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7 is the answer. The main purpose of the section 7 is to stop this growth towards bigness in its incipiency and to foster competition. Congress does not want to "wait and see" what the effects of the merger may be before they find a violation of section 7, Clayton Act. If they were to allow mergers of this kind, and not find a violation until the merger showed the anticompetitive effects or until the company did use its power to stifle competition, the entire purpose of the Act would be frustrated.

Thus, the Court has failed to distinguish between the various types of mergers when applying section 7. It may be a bit inflexible to use one test for all mergers, but it appears to be the best approach because the aim of section 7 is to stop anticompetitive effects—the end results of many mergers. In other words, if the proposed merger will substantially lessen competition or tend to create a monopoly, it should be stopped regardless of the name accorded to it.

MICHAEL J. O'MELIA

Products Liability: Adoption of Section 402A of the Restatement of Torts (Second) in Wisconsin.

> For products-liability cases we adopt the rule of strict liability in tort as set forth in sec. 402A of Restatement, 2 Torts(2d),[1] pp. 347, 348.[2]

The Wisconsin Supreme Court, in *Dippel v. Sciano*,[3] used these words in adopting the rule of strict liability in product liability cases. However, it is questionable if the doctrine of "strict liability," as that term is used in the *Restatement*[4] and elsewhere, was in fact adopted.

The plaintiff in *Dippel* sought to recover damages for personal injuries sustained when the front leg assembly of a large coin-operated pool table collapsed, traumatically amputating two of his toes. Plaintiff and two other men, allegedly at the request of and with the consent of the defendant tavern owner, were moving the pool table to a position

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[1] Sec. 402 A. Special Liability of Seller of Product for Physical Harm to User or Consumer
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[2] 37 Wis.2d 443, 459, 155 N.W.2d 55, 63; See also, Monograph, *Brief Opposing Strict Liability In Tort*, DEFENSE RESEARCH INSTITUTE (1966).

[3] 37 Wis.2d 443, 155 N.W.2d 55 (1967).

[4] RESTATEMENT (SECOND), TORTS §402A (1965).

where it could be used. The plaintiff alleged three causes of action: (1) negligence against the manufacturer of the pool table, the sales distributor, the amusement company that placed the table in the tavern and the tavern owner; (2) an action against the tavern owner sounding in negligence calling for the application of the res ipsa loquitur doctrine; (3) a cause of action against the manufacturer and the sales distributor alleging breach of expressed and implied warranties of merchantability and fitness for purpose. The defendant's demurrer to the third cause of action was sustained because of lack of privity of contract between the plaintiff user and the seller. On appeal, the Wisconsin Supreme Court affirmed, with leave to the plaintiff to plead over.

The court stated the issue as follows: "Is the lack of privity of contract between the seller of the offending product and its ultimate user or consumer fatal to the injured user's claim of strict liability in tort against the seller?"[5] It was conceded that the law of Wisconsin required privity of contract in an action for breach of implied warranty at the time of this appeal.[6] The trend, however, has been away from such requirement and the Wisconsin court has recognized it. In *Smith v. Atco Co.*[7] the court said:

> We deem that the time has come for this court to flatly declare that in a tort action for negligence against a manufacturer, or supplier, whether or not privity exists is wholly immaterial. The question of liability should be approached from the standpoint of the standard of care to be exercised by the reasonably prudent person in the shoes of the defendant manufacturer or supplier. Such an approach will eliminate any necessity of determining whether a particular product is "inherently dangerous." If a manufacturer or supplier is hereafter to be relieved from liability as a matter of law by the courts, such result should be reached on the basis that there was no casual negligence established against the defendant rather than that the product was not inherently dangerous.[8]

It should be noted that this statement applied to a tort action for negligence against a manufacturer and did nothing to the privity requirement in breach of implied warranty actions. However, the trend in Wisconsin was established and the last brick in the foundation of the privity requirement in implied warranty cases was removed in *Strahlendorf v. Walgreen Co.*[9]

> When this court declared by footnote in *Smith v. Atco Co.*[10] that Wisconsin requires privity in breach-of-implied-warranty cases, it was merely stating the present status of our law. This

[5] 37 Wis.2d 443, 459, 155 N.W.2d 55, 57.
[6] Cohan v. Associated Fur Farms, 261 Wis. 584, 53 N.W.2d 788 (1952); Kennedy-Ingalls Corp. v. Meissner, 5 Wis.2d 100, 92 N.W.2d 247 (1958).
[7] 6 Wis.2d 371, 94 N.W.2d 697 (1959).
[8] *Id.* at 383, 94 N.W.2d at 704.
[9] 16 Wis.2d 421, 114 N.W.2d 823 (1962).
[10] 6 Wis.2d 371, 383, 94 N.W.2d 697, 704.

> does not mean that this court will adhere to this rule forever, regardless of the persuasiveness of the arguments made, or authorities cited, in favor of changing it. However, we do not deem the instant case a proper one in which to give consideration to this question.[11]

Thus, all that remained was the formal announcement of the collapse. The reasons given by the court for not making the announcement in the *Strahlendorf* case were given in the instant case.

> Our reluctance to take the step in *Strahlendorf* has not proved a mistake. Treading lightly, this court was slowly moving in the direction of implied warranty without privity while others, in our opinion, were doing so without due consideration of the legal fictions they were creating.[12]

Warranty law had been so closely connected to contract and sales law as set out in the Uniform Commercial Code that any "warranty not arising out of or dependent upon any contract, but imposed by law, in tort, as a matter of policy"[13] was difficult to rationalize. What this "tort" warranty does is to remove the defenses of notice of breach, disclaimer, and lack of privity along with the necessity of proving specific acts of negligence and reliance on any expressed assertions. With the problem now in perspective the court stated:

> Whether or not this court waits for a case to arise under the Code, the basic decision must still be made, viz: should products-liability cases be treated as matters of implied warranty exclusively, or is it properly a matter of tort liability.[14]

The court used the words of Dean Prosser to provide the answer.

> Why not, then, talk of the strict liability in tort, a thing familiar enough in the law of animals, abnormally dangerous activities, nuisance, workman's compensation, libel, misrepresentation, and respondeat superior, and discard the word "warranty" with all its contract implications?[15]

Thus, section 402A of the *Restatement of Torts (Second)* becomes the legal basis for actions based on a claim of a defective product unreasonably dangerous to a user. It should be noted that the court neither accepted nor rejected any of the comments to section 402A because of the narrow fact situation presented by the demurrer.

What then is the status of Wisconsin law under the principles set down by the court in the instant case? It relieves the plaintiff from proving specific acts of negligence and protects him from the defenses of notice of breach, disclaimer and lack of privity. However, the plaintiff must meet the following requirements of proof:

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[11] 16 Wis.2d 421, 435, 114 N.W.2d 823, 830.
[12] 37 Wis.2d 443, 453, 155 N.W.2d 55, 59.
[13] Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 801 (1966).
[14] 37 Wis.2d 443, 455, 155 N.W.2d 55, 61.
[15] *Supra* note 13.

(1) that the product was in defective condition when it left the possession and control of the seller,
(2) that it was unreasonably dangerous to the user or consumer,
(3) that the defect was a cause (substantial factor) of the plaintiff's injuries or damages,
(4) that the seller engaged in the business of selling the product or, put negatively, that this is not an isolated or infrequent transaction not related to the principal business of the seller, and
(5) that the product was one which the seller expected to and did reach the user or consumer without substantial change in the condition it was when he sold it.[16]

As a comparison, an action based on strict liability in warranty would require the following as elements of plaintiff's proof:

(1) facts upon which warranty is based: manufacture, distribution, sale, bailment, or other transaction which give rise to the warranty,
(2) identification of the type of warranty, expressed or implied,
(3) reliance where action is brought upon an expressed warranty or implied warranty for a particular purpose,
(4) the facts and circumstances surrounding the breach of the warranty, such as a defect in the product or lack of fitness for the ordinary purposes for which such product was used,
(5) defendant's breach of warranty as the proximate cause of plaintiff's injury,
(6) notice to the defendant of the breach of warranty,
(7) injuries or damages.[17]

To understand the implications of the rule from defendant's viewpoint it is necessary to establish on what theory of tort law the rule of *Dippel* is based. The concurring opinion of Chief Justice Hallows clearly sets out that the negligence doctrine is to be used and that the court has *not* adopted "strict liability," "absolute liability," or any meaning which these terms commonly connote. Justice Beilfuss, the author of the opinion, uses the *Osborne*[18] opinion to reach the negligence *per se* foundation of the rule. He states that negligence *per se* can be founded upon violation of statute or, via *Osborne,* upon violation of judicial law as set forth by prior decisions of the Supreme Court. The instant case, therefore, will be used as the origin for the determination of negligence *per se.* Once plaintiff proves the elements necessary under the rule, negligence as a matter of law follows. At this point all the rules and theories of defense to a negligence action become available. Theses would specifically include contributory negligence and its function within the Wisconsin comparative negligence statute. The plaintiff has the duty to act as a reasonably prudent man in connection with the use of the

[16] 37 Wis.2d 443, 460, 155 N.W.2d 55, 63.
[17] Emroch, *Pleading and Proof in a Strict Products Liability Case,* PRACTICING LAW INSTITUTE LITIGATION SERIES §§10:5, 10:12 (1967).
[18] Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931).

product. He must "use ordinary care to protect himself from known or readily apparent dangers."[19] If he does not, and such conduct proximately contributes to his injury, his negligence must be compared to the sellers and used to reduce or bar recovery. Assumption of risk would be included in contributory negligence under the above definition.[20] The court specifically listed other defenses available to the defendant.

> Defenses among others that suggest themselves are that the product must be reasonably used for the purpose for which it was intended; abuse or alteration of the product may relieve or limit liability, some products just naturally wear out in such a manner as to render them unsafe and as to others, the intended use can be coupled with inherent danger. . . .[21]

Therefore, it can be said that Wisconsin has adopted section 402A of the *Restatement of Torts (Second)*. However, as Chief Justice Hallows pointed out,[22] it must be understood that the words of the *Restatement* section must be changed to fit the mold of Wisconsin law and the intreptation intended by the court in its adoption. The words in subsection 1 of section 402A would therefore read, "is negligent as a matter of law" rather than "is subject to liability for." This change eliminates any hint of "strict liability" in Wisconsin as that is not what the court adopted. The Wisconsin comparative negligence doctrine requires negligence and therefore bars any rule of strict liability in torts. Chief Justice Hallows emphasized this in the conclusion to his concurring opinion.

> While the Restatement, 2 Torts 2d, sec. 402A, imposes a strict or absolute liability regardless of the negligence of the seller, we do not. This same approach and reasoning of providing a solution by favoring our comparative-negligence doctrine by adopting negligence as a matter of law rather than strict liability was used in the dog-bite cases.[23]

This implementation of section 402A will, under the court's definition and present Wisconsin law, provide a workable solution to the confusion that has existed in products-liability cases. Hopefully, courts in other jurisdictions may use the *Dippel* case as the basis for establishing a solid tort basis for so-called breach of warranty cases. In fact, this case may well become the forerunner for the eventual removal of all products liability cases from the provisions of the Uniform Commercial Code.

THOMAS A. ERDMANN

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[19] 37 Wis.2d 443, 460, 155 N.W.2d 55, 63.
[20] McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis.2d 374, 113 N.W.2d 14 (1962).
[21] *Supra* note 19.
[22] 37 Wis.2d 443, 464, 155 N.W.2d 55, 65.
[23] *Id.* at 464, 155 N.W.2d at 66; For a discussion of the differences between absolute and strict liability see, Monograph, *Products Liability—Implied Warranties*, DEFENSE RESEARCH INSTITUTE at 13,21 (1964); See also Nelson v. Hansen, 10 Wis.2d 107, 102 N.W.2d 251 (1960); Wurtzler v. Miller, 31 Wis.2d 310, 143 N.W.2d 27 (1966).