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Products Liability - Physical Injury to Property and Consequent Economic Loss: Strict Liability in Tort. Seely v. White Motor Co. (Cal. 1965)

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PRODUCTS LIABILITY—PHYSICAL INJURY TO PROPERTY AND CONSEQUENT ECONOMIC LOSS; STRICT LIABILITY IN TORT. *Seely v. White Motor Co.* (Cal. 1965).

In October 1959 plaintiff purchased from a dealer a new truck manufactured by defendant. Defendant's express warranty stated that the vehicle was "free from defects in material and workmanship under normal use and service." This warranty was exclusive of all other warranties and was limited to "making good" at defendant's factory any parts which proved defective in material or workmanship. Plaintiff soon discovered that the truck bounced violently, a condition known as "galloping." Repeated attempts by the manufacturer and the dealer failed to correct the defect. In July 1960 the brakes failed and the truck overturned. Although no personal injury to plaintiff resulted, it cost him $5,466.09 to have the truck repaired. Plaintiff brought suit against both the manufacturer and the dealer, later dismissing the action against the dealer without prejudice. The trial court refused to allow any recovery for damages resulting from the accident because plaintiff had failed to establish any causal connection between the "galloping" defect and the accident. However, on the basis of a breach of the express warranty, the court allowed recovery for plaintiff's payments on the truck and for business losses which resulted from the "galloping" defect. On appeal, the Supreme Court of California affirmed and allowed recovery for the damages awarded by the trial court based on defendant's breach of the express warranty, but rejected the contention that plaintiff could recover for all economic loss based on strict liability in tort. However, the court stated in dicta that if the defect in the truck had been proven to be the cause of the accident, recovery would have been allowed based on strict liability in tort, as that doctrine governs physical injury to plaintiff's property as well as personal injury. *Seely v. White Motor Co.*, 63 Adv. Cal. 1, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

Recently, there have been two major developments in the California law of products liability. The Uniform Commercial Code, which became effective in California on January 1, 1965, revised in certain instances the statutory law of breach of warranties.[1] In addition, contemporary judicial decisions have formulated the doctrine of strict liability in tort.[2] The function of the former is to replace the

[1] *Compare* CAL. COMM'L CODE §§ 2311-17, 2607, 2714-15 *with* Cal. Stat. 1931, ch. 1070, §§ 1731-35, at 2238-39, § 1749, at 2249, §§ 1789-90, at 2255-56.

[2] See Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr.

Uniform Sales Act[3] in governing commercial transactions; that of the latter is to protect the consumer from injuries caused by defectively manufactured products by allowing recovery for such injuries against both the manufacturer and the retailer.[4]

The first California cases which enunciated the doctrine of strict liability in tort were limited by the facts of each case to personal injuries.[5] Accordingly, questions regarding the limitations on the doctrine were not considered by the court. Nevertheless, the extension of strict liability in tort to physical injury to property was not unforeseeable.[6]

The defendant in *Seely* contended that its obligation to replace or repair defective parts was expressly in lieu of all other warranties and thus was an effective disclaimer of all liability for damages for breach of warranty. The court held, however, that by failing to correct the defect as promised, the defendant incurred liability for the breach of its promise as a breach of warranty and that recovery properly included lost profits as well as the amount paid on the purchase price.[7]

It was also contended that the doctrine of strict liability in tort superseded the statutory provisions relative to liability based on breach of warranty. Chief Justice Traynor, speaking for six members of the court, rejected this contention. He stated that the statutory provisions relative to breach of warranty frustrate rational compensation for physical injuries and that for this reason the doctrine of strict liability was designed specifically to govern the problem of physical injuries. However, the opinion asserts that actions for breach of warranty do serve a distinct function in the commercial world and that the rules regarding breach of warranties do provide specific criteria for determining the liability which arises as a result of the

896 (1964); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[3] Cal. Stat. 1931, ch. 1070 (now CAL. COMM'L CODE).

[4] See Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); *cf.* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (concurring opinion); Prosser, *Strict Liability To The Consumer*, 69 YALE L.J. 1099, 1122 (1960).

[5] Vandermark v. Ford Motor Co., *supra* note 4; Greenman v. Yuba Power Prods., Inc., *supra* note 4.

[6] See Lascher, *Strict Liability in Tort for Defective Products: The Road To and Past Vandermark*, 38 So. CAL. L. REV. 30, 59 (1965); Prosser, *supra* note 4, at 1143.

[7] Citing Rose v. Chrysler Motors Corp., 212 Cal. App. 2d 755, 28 Cal. Rptr. 185 (1963); Allen v. Brown, 181 Kan. 301, 310 P.2d 923 (1957); see Cal. Stat. 1931, ch. 1070 §§ 1789-90, at 2255-56 (now CAL. COMM'L CODE §§ 2714-15). See generally Annot., 99 A.L.R.2d 1419 (1965).

economic relationship between suppliers and consumers. The Code[8] therefore allows a manufacturer or supplier to disclaim or limit warranties,[9] and in addition it prescribes certain requirements of privity[10] and of seasonable notice of breach.[11] If strict liability were to supersede this area of sales law, unmerchantability[12] alone would make applicable the doctrine of strict liability in tort and the manufacturer could be held liable for damages of an unknown and unlimited scope. For example, truckers such as the plaintiff in *Seely* could recover business losses resulting from the improper operation of their trucks even though the manufacturer disclaimed all warranties and even though there was no physical damage to either person or property. The rules of warranty in such a case give a certain deserved protection to the manufacturer, for he cannot fairly be charged with the risk that the product will in all cases meet each consumer's individual needs.

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8 CAL. COMM'L CODE.

9 CAL. COMM'L CODE §§ 2316.

10 Traditionaly an action for breach of warranty has required privity of contract. But over the years the courts have developed many exceptions to this requirement. See Prosser, *supra* note 4. Section 2-318 of the Uniform Commercial Code attempted to give limited effect to these exceptions in personal injury cases. However, when adopting the Uniform Commercial Code, California omitted § 2-318, for at that time California had already gone beyond the limitations of that section in a number of cases involving personal injury. Marsh & Warren, *Report on Proposed Amendments To The Uniform Commercial Code*, SENATE FACT FINDING COMM. ON JUDICIARY, SIXTH PROGRESS REPORT TO THE LEGISLATURE, PART 1—THE UNIFORM COMMERCIAL CODE, ch. VII 436, 457-58 (1961); see Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960); Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960). These cases were the springboard for the California Supreme Court to make the leap to strict liability in tort which completely eliminated the privity requirement in cases involving personal injury. Now that strict liability in tort has become a separate cause of action, the question arises whether the previous exceptions to the privity requirement are still alive in California breach of warranty law. Apparently not. The exceptions to the privity requirement were created to meet the exigencies of personal injury litigation. Since strict liability in tort seems to have replaced breach of warranty in California personal injury ltigation, the previous exceptions to the privity requirement would no longer seem to be applicable in breach of warranty actions. See 2 SAN DIEGO L. REV. 165 (1965).

Moreover, the privity requirement is implicit in the California Commercial Code. Under § 2313 express warranties are created when made "by the seller to the buyer" or when "made a part of the basis of the bargain." Under § 2314 the implied warranty of merchantability is implied *in the contract* for their sale. Under § 2315 the implied warranty of fitness for particular purpose is also a part of the contract of sale. Thus any liability for breach of warranty would not seem to extend beyond the provisions of the contract of sale, whether these provisions be express or implied. This limitation is in effect a requirement of privity of contract.

11 CAL. COMM'L CODE § 2607(3).

12 See generally CAL. COMM'L CODE § 2314; UNIFORM COMM'L CODE § 2-314; Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943). In general, "unmerchantable" may be thought of as meaning defective.

The reason given in the *Seely* dicta for extending the doctrine of strict liability in tort to cases of physical injury to plaintiff's property is: "Physical injury to property is so akin to personal injury that there is no reason for distinguishing them."[13] However, the opinion does not expressly state the extent of recovery which will be allowed for such damage. Viewing the court's opinion narrowly, one could conclude that recovery will be limited to personal injury losses and to the cost of repairing physical damage to plaintiff's property. Conceivably, however, the court would, if the case arose, extend strict liability in tort to allow recovery also for economic[14] losses which proximately[15] flow from physical injury to property as well as to person. This argument is supported by the rationale of the doctrine, by an analogy to actions based on negligence, and by an analysis of the *Seely* opinion.

The primary purpose of the doctrine of strict liability in tort is to provide an effective remedy against the manufacturer or supplier of a defective product to consumers who are injured because of the defect.[16] Since economic losses, such as lost profits and earnings, can be as pecuniarily injurious as medical expenses or repair bills, including the former in the scheme of recovery would comport with the rationale of the theory.

Recovery based on strict liability is a tort action, and as in an action in tort based on negligence it must be proved that the damages were caused by the defective product. Likewise, it would appear that the scope of recoverable damages would also be the same. In negligence cases economic losses are compensable when they flow from an accident or physical injury to person or property.[17] Accordingly, recovery

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[13] 63 Adv. Cal. at 11, 403 P.2d at 152, 45 Cal. Rptr. at 24.

[14] The term economic loss is meant to include pecuniary damages resulting from loss of use, loss of earnings, loss of profits, and loss of value.

[15] See CAL. CIV. CODE § 3333 which states: "For the breach of an obligation not arising from contract, the measure of damages except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

[16] See Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (concurring opinion); Prosser, *supra* note 4, at 1122.

[17] See Guido v. Hudson Transit Lines, 178 F.2d 740 (3d Cir. 1949) (special damages for loss of use of truck and bulldozer); Reynolds v. Bank of America, 53 Cal. 2d 49, 345 P.2d 926 (1959) (special damages for loss of rental value of airplane); Caso v. Heboin, 55 Cal. App. 601, 203 Pac. 1025 (3d Dist. 1921) (special damages for loss of use of truck); Paguio v. Evening Journal Ass'n, 127 N.J.L. 144, 21 A.2d 667 (Sup. Ct. 1941) (special damages for loss of dog trained for vaudeville); *cf.* International Harvester Co. v. Sharoff, 202 F.2d 52 (10th Cir. 1953); Fentress v. Van Etta

based on strict liability in tort should also include the same items of damage.

Significantly, the court relied on cases involving negligence[18] in determining that the doctrine of strict liability in tort did not allow for recovery of solely economic losses. Thus, following the negligence rule, the court held that strict liability is limited to damages for physical injuries and that there is no liability for economic loss alone.[19] However, the opinion did not state that there is to be no recovery for those economic losses which are caused by physical injuries to property. Moreover, in saying "physical injury to property is so akin to personal injury that there is no reason for distinguishing them,"[20] the language intimates that since one may recover for economic losses which stem from personal injury,[21] so too may one recover in strict liability in tort for economic loss caused by physical injury to property.

Conspicuously absent from the opinion is any explanation of the phrases "physical injury to property" and "economic loss alone." However, the court provides some clarification by citing two cases in which liability for negligence was denied. In *Wyatt v. Cadillac Motor Car Div.*[22] an automobile manufacturer negligently sealed some wrapping paper in the "breather pipe" of an automobile engine. This eventually caused the car to be completely ruined. The court held that a manufacturer is not liable for negligence unless there is bodily injury or damage to other property.[23] In *Trans World Airlines v. Curtiss-Wright Corp.*[24] a defect in some airplane engines rendered the engines worthless. There was no accident. It was held that there is no liability for negligence unless there is a resulting accident.[25]

Motors, 157 Cal. App. 2d 863, 323 P.2d 227 (Super. Ct., App. Dept. 1958); Quackenbush v. Ford Motor Co., 167 App. Div. 433, 153 N.Y. Supp. 131 (1915).

18 Wyatt v. Cadillac Motor Car Div., 145 Cal. App. 2d 423, 302 P.2d 665 (1956); Trans World Airlines v. Curtiss-Wright Corp., 148 N.Y.S.2d 284 (Sup. Ct. 1955), *aff'd mem.*, 153 N.Y.S.2d 550 (App. Div. 1956).

19 63 Adv. Cal. at 10, 403 P.2d at 151, 45 Cal. Rptr. at 23.

20 *Id.* at 11, 403 P.2d at 151, 45 Cal. Rptr. at 23.

21 In his dissenting opinion Justice Peters says that strict liability in tort allows personal injury damages and that "such an award may include compensation for past loss of time and earnings due to the injury (Storrs v. Los Angeles Traction Co., 134 Cal. 91, 93, 66 P. 72) for loss of future earning capacity (Bonneau v. North Shore R.R. Co., 152 Cal. 406, 414, 93 P. 106), and for increased living expenses caused by the injury (Kline v. Santa Barbara etc. Ry. Co., 150 Cal. 741, 748-49, 90 P. 125)."

22 145 Cal. App. 2d 423, 302 P.2d 665 (1956).

23 *Id.* at 426, 302 P.2d at 667.

24 148 N.Y.S.2d 284 (Sup. Ct. 1955), *aff'd mem.*, 153 N.Y.S.2d 550 (App. Div. 1956).

25 *Id.* at 290.

Other cases have allowed recovery for damage to the defective product itself when there has been an accompanying accident.[26] The language of the cases also indicates that recovery is allowed when a defective product causes damage to other property even though there has been no accident.[27] In the light of these cases the phrase "physical injury to property" seems to limit liability to cases in which there is an accident or physical damage to property other than the defective product itself. Pecuniary losses resulting from the defectiveness itself,[28] or from mere deterioration,[29] or even from complete ruin brought about by internal defect[30] seem to be considered "solely economic" and therefore not recoverable in tort.

Justice Peters, in a well-reasoned dissenting opinion, contended that the line which the majority was drawing between physical injury and economic loss was an arbitrary one. He maintained that strict liability in tort should be extended to allow recovery to the ordinary consumer for all pecuniary losses caused by a defective product. In effect, unmerchantability[31] alone would make applicable the doctrine of strict liability in tort and the only restriction on recovery other than the requirement of causation would be the requirement that the consumer be "ordinary."[32] It cannot be denied that this theory comports with the purpose of the strict liability theory, as strict liability was designed to shield the otherwise poorly protected consumer from

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26 International Harvester Co. v. Sharoff, 202 F.2d 52 (10th Cir. 1953); Fentress v. Van Etta Motors, 157 Cal. App. 2d 863, 323 P.2d 227 (Super. Ct., App. Dept. 1958); Quackenbush v. Ford Motor Co., 167 App. Div. 433, 153 N.Y. Supp. 131 (1915).

27 The *Wyatt* case stated that negligence required either bodily injury or damage to other property. 145 Cal. App. 2d at 426, 302 P.2d at 667. This requirement of damage to other property would seem to be met by the facts of Gladiola Biscuit Co. v. Southern Ice Co., 267 F.2d 138 (5th Cir. 1959). In *Gladiola* snow ice was used to reduce the temperature of dough in the manufacture of frozen biscuits. The ice contained glass which became mixed with the dough. Although it could be said that there was no accident involved, "other property" was completely ruined and under the *Wyatt* rule an action for negligence would seem to lie.

28 Seely v. White Motor Co., 63 Adv. Cal. 1, 10, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 27 (1965). *Contra*, Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

29 Fentress v. Van Etta Motors, 157 Cal. App. 2d 863, 866, 323 P.2d 227, 229 (Super. Ct., App. Dept. 1958) (dictum); Trans World Airlines v. Curtiss-Wright Corp., 148 N.Y.S.2d 284 (Sup. Ct. 1955), *aff'd mem.*, 153 N.Y.S.2d 550 (App. Div. 1956) (by implication).

30 Wyatt v. Cadillac Motor Car Div., 145 Cal. App. 2d 423, 302 P.2d 665 (1956); Fentress v. Van Etta Motors, 157 Cal. App. 2d 863, 866, 323 P.2d 227, 229 (Super. Ct., App. Dept. 1958) (dictum).

31 See generally authorities cited note 12 *supra*.

32 Justice Peters says that judicial definition of the term "ordinary consumer" should be done on a case-by-case basis, as is customarily done with any new doctrine. 63 Adv. Cal. at 20, 403 P.2d at 158, 45 Cal. Rptr. at 30 (dissenting opinion).

the strict requirements of the world of commerce. To be consistent with its purpose, argues the dissenting opinion, the strict liability rule should allow the "ordinary" consumer recovery for all economic losses, for in a given case such losses can indeed be an overwhelming misfortune.

The *Seely* court, although leaving the door open to economic losses resulting from physical injury to property as well as to person, refused to extend strict liability in tort to include solely economic loss because the manufacturer would then be liable for damages of unknown and unlimited scope. But Justice Peters' plan would limit the scope by restricting recovery based on strict liability to the "ordinary" consumer. Another reason for the majority's refusal to extend the doctrine further seems to have been its unwillingness to exceed the recovery limitations of negligence actions. As indicated previously, negligence and strict liability in tort are closely related. There is no reason for them to have different rules as to either causation or damages. Justice Peters made out a good case for extending strict liability to cover solely economic losses. Others have set forth strong arguments for a similar extension of recoverable damages in negligence actions.[33] In time further extensions will probably be made, but when they are, strict liability in tort and negligence should advance together. Not only would such a coincident development be logical but it would also be a help towards clarification of a confusing area of tort law.

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[33] See Note, *Negligent Interference With Economic Expectancy: The Case for Recovery*, 16 STAN. L. REV. 664 (1964).