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"TO GUARD AGAINST THE UNFOUNDED ACTIONS . . . ."—THE ISSUE BEHIND THE MENDEL LABELS

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The holding in *Mendel v. Pittsburgh Plate Glass Co.*[1] is that a person injured by a product cannot sue the product manufacturer under "strict liability in tort" if the accident occurred after the expiration of the statute of limitations governing the right of the original buyer to sue the manufacturer for breach of contract. The result in *Mendel* was that the plaintiff was "time-barred from prosecuting a cause of action before he ever had one," a result that the dissent viewed as "all but unthinkable."[2]

Mendel is directly contrary to the decision of the New Jersey Supreme Court in *Rosenau v. New Brunswick*,[3] which held that a strict liability claim accrued at the time when the damage occurred, notwithstanding the lapse of 22 years between the time the product left the manufacturer's hands and the time of the damage.

Although *Mendel* appears to turn on the issue of whether a strict liability claim should be labelled a contract or tort action, the root causes of the split among the members of the New York Court of Appeals extend well beyond the mere labelling of a cause of action.

The majority and minority both characterized the cause of action as "strict liability in tort," but had widely disparate views concerning the nature of such an action. Thus, the majority stated that

> strict liability in tort and implied warranty in the absence of privity are merely different ways of describing the very same cause of action.[4]

Additionally, it indicated that the Uniform Commercial Code (UCC) would govern a products liability case involving facts occurring after the Code's effective date of September 27, 1964.[5]

On the other hand, the minority stated that

> strict liability in tort is itself a new doctrine although it has swept the nation in extraordinarily rapid fashion.[6]

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* A.B., Columbia University, 1951; LL.B., Columbia University, 1954.

1 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

2 *Id.* at 346, 253 N.E.2d at 211, 305 N.Y.S.2d at 495 (dissenting opinion).

3 51 N.J. 130, 238 A.2d 169 (1968).

4 25 N.Y.2d at 345, 253 N.E.2d at 210, 305 N.Y.S.2d at 494.

5 *Id.* at 342 n.1, 253 N.E.2d at 208 n.1, 305 N.Y.S.2d at 492 n.1.

6 *Id.* at 348, 253 N.E.2d at 212, 305 N.Y.S.2d at 497 (dissenting opinion).

> As for the Uniform Commercial Code, it is all but irrelevant to the problem at hand. . . . In short, the code does not purport to provide an exclusive remedy but is confined to that in warranty in the correct sense of that term.[7]

It is submitted that the minority is correct in recognizing strict liability in tort as a "new doctrine." Writing in 1965 about New Jersey's landmark strict liability cases,[8] this author stated:

> These two products liability cases were decided on the basis of the new common-law principle of strict liability in tort instead of the traditional theory of implied warranty. The doctrine of strict liability in tort as enunciated in *Santor* and *Schipper* has added to the law of products liability new concepts that in many respects render outmoded the warranty aspects of products liability law as governed by the Uniform Commercial Code. At the very least, it can be said that the strict liability in tort principle gives New Jersey an independent body of products liability law paralleling article 2 of the Uniform Commercial Code in some respects, but in other respects forging ahead, free and clear of the code. The purpose of this article is to point out some of the similarities and contrasts between this new tort doctrine and the Uniform Commercial Code and to suggest some of the serious questions raised by the interplay of the two bodies of law.[9]

The existence of two parallel bodies of products liability law is fundamentally undesirable. Philosophically, there is the jurisprudential question of whether courts should create a new common-law doctrine when the legislature has only recently spoken on the same subject.[10] In actual practice, as exemplified by *Mendel*, there is unwarranted confusion and lack of certainty in an area of law that is becoming increasingly important as society focuses more and more attention on the problems of the consumer.[11]

As might be expected with any new common-law doctrine, there is no certainty as to its scope. Courts are handling the problems on a case-by-case basis, with the result that there is little uniformity among the decisions as to whether and to what extent a products liability case

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7 *Id.* at 341, 253 N.E.2d at 214, 305 N.Y.S.2d at 500 (dissenting opinion).

8 Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

9 Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between The Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692, 693 (1965).

10 *Id.* at 712-13.

11 The American consumer, once docile and understanding, is on the rampage. . . . One of the growing problems in industry (and, consequently, for the insurance business) is, . . . a growing awareness on the part of the consumer that he has a right to expect the American manufacturer to turn out safe products.

Lawsuits by Consumers Put Pressure on Insurers in Product-Liability Area, N.Y. Times, Mar. 5, 1970, at 55, col. 2.

is governed by the UCC. Furthermore, there are fundamental inconsistencies even among those courts which unhesitatingly recognize that they are espousing a new common-law doctrine.[12] As a consequence, there are great variations in the manner in which courts apply the doctrine to routine types of products liability cases.

Given this confusion and uncertainty surrounding the doctrine, the endeavor of the majority in *Mendel* to "contain" strict liability in tort within the statutory strictures of the UCC is understandable. But this approach merely postpones resolution of the problems.

The major area of confusion and uncertainty surrounding the doctrine involves the nature, both quantitatively and qualitatively, of the proof required to sustain a strict liability in tort claim.

What is the burden of proof? A classic definition was given by the New Jersey Supreme Court in *Santor v. A & M Karagheusian, Inc.*:[13]

> Under the strict liability in tort doctrine, as in the case of express or implied warranty of fitness or merchantability, proof of the manufacturer's negligence in the making or handling of the article is not required. If the article is defective, i.e., not reasonably fit for the ordinary purposes for which such articles are sold and used, and the defect arose out of the design or manufacture or while the article was in the control of the manufacturer, and it proximately causes injury or damage to the ultimate purchaser or reasonably expected consumer, liability exists.[14]

The majority in *Mendel* would probably agree with this definition. There is general agreement that the claimant is not required to prove negligence, but must prove that the product had a defect attributable to the manufacturer, which defect proximately caused the injury. There is also general agreement that the product is not required to be "perfect,"[15] and that "strict liability is not absolute liability."[16]

Thus, the burden of proof is less than that in a negligence case, but more than that required under an absolute liability doctrine. The crucial question still remains: How "heavy" is this burden in actual practice?

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12 Note the conflict between the Supreme Courts of California and New Jersey as to whether the doctrine should be applied to a situation where the plaintiff suffered only economic loss or loss of bargain as distinguished from physical injury. *Compare* Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) *with* Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). Note the New Jersey Supreme Court's reaction in Rosenau v. New Brunswick, 51 N.J. 130, 134, 238 A.2d 169, 175 (1968).

13 44 N.J. 52, 207 A.2d 305 (1965).

14 *Id.* at 66-67, 207 A.2d at 313.

15 Schipper v. Levitt & Sons, 44 N.J. at 92, 207 A.2d at 326.

16 Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d at 351, 253 N.E.2d at 214, 305 N.Y.S.2d at 499 (dissenting opinion).

The minority in *Mendel* contended that the burden of proof is "heavy rather than light," especially where "the passage of time has the effect of making quite difficult the proof that the defect was due to the manufacturer rather than to circumstances, passage of time, users, and repairers of the product since sale and delivery."[17] Is this contention correct as a practical matter? The majority was not convinced, and indicated that it was quite uneasy about this question when it concluded its opinion as follows:

> We are willing to sacrifice the small percentage of meritorious claims that might arise after the statutory period has run in order to prevent the many *unfounded suits that would be brought and sustained against manufacturers* ad infinitum. Surely an injury resulting from a defective product many years after it has been manufactured, presumptively at least, is due to operation and maintenance. It is our opinion that to *guard against the unfounded actions that would be brought many years after a product is manufactured,* we must make that presumption conclusive by holding the contract Statute of Limitations applicable to the instant action and limit appellants to their action in negligence.[18]

The majority was well aware that negligence actions have been, and will continue to be, brought against manufacturers for injuries resulting from a defective product many years after it has been manufactured. In fact, in *Mendel* itself, the first two causes of action sounded in negligence and were not involved in the decision, with the result that the plaintiffs remained free to pursue their negligence claims.

Why then was the majority so disturbed with strict liability in tort actions that it felt compelled to "guard" against "many unfounded suits that would be brought and sustained against manufacturers . . . many years after a product is manufactured"?[19] One suspects that the majority may have been manifesting an uneasy concern that the burden of proof in strict liability in tort cases was not really "heavy," but was actually much lighter than that in a negligence case—too much lighter for its own liking.[20]

Is it easy or difficult to establish liability in a strict liability in tort case? Initially, it is essential to note that unlike the typical tort case, the product manufacturer is usually not present when the accident occurs

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17 *Id.*

18 *Id.* at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495 (emphasis added).

19 *Id.*

20 *But see* Leach v. Wiles, 429 S.W.2d 823 (1968), which inexplicably states that strict liability in tort "of course, places a much heavier burden of proof upon the purchaser than does the rule which allows recovery by the purchaser from his immediate seller under the Uniform Commercial Code." *Id.* at 832.

in a products liability case. Hence, when a Mrs. Mendel claims that she was struck by a glass door installed by Pittsburgh Plate Glass Company, or a Mrs. Henningsen claims that the steering wheel of her new Plymouth spun in her hands just before her car veered off the highway and crashed,[21] or a Mrs. Newmark claims that the hair wave solution applied to her head by the beauty parlor operator gave her dermatitis and caused her hair to fall out,[22] the manufacturer is not usually in a position to prove that the accident *did not* happen.

In such cases, the most the manufacturer can say is that the accident *could not have happened in the manner claimed.* This then creates an issue of fact to be decided by the jury—usually a panel of consumers. In this consumer-oriented society, a jury is not likely to be sympathetic to a target defendant in the form of a large corporate manufacturer, especially when it is obvious that the plaintiff has in fact suffered some injury after using a product.

If the plaintiff testifies that the glass door struck her, or that the steering wheel spun in her hands, or that her scalp became red and blistered and her hair fell out, and the treating physician confirms the injuries and testifies that the injuries proximately resulted from the product, the defendant product manufacturer will be hard pressed to convince the jury that the accident did not happen *that way.*

Must the plaintiff prove anything more? The cases hold that the plaintiff has the burden of proving that the product was "defective."[23] How is this proven as a practical matter? What is a "defective" product?

The *Mendel* majority held that "strict liability in tort and implied warranty in the absence of privity are merely different ways of describing the very same cause of action."[24] Under this concept, a product that is unmerchantable under section 2-314(2) of the UCC is "defective." Goods not "fit for the ordinary purposes for which such goods are used" are unmerchantable,[25] *i.e.*, defective. Thus, the New York Court of Appeals is in apparent agreement with the New Jersey Supreme Court's statement in *Santor,* that a defective article is one "not reasonably fit for the purposes for which such articles are sold."[26]

There is no requirement that "defect" be established by expert testimony. Rather, the cases appear to say that the jury is permitted to find that a product is "defective" when, based upon common knowledge

21 Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).
22 Newmark v. Gimbels, Inc., 54 N.J. 585, 258 A.2d 697 (1969).
23 *See* 44 N.J. 52, 207 A.2d 305 (1965).
24 *See* 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).
25 UNIFORM COMMERCIAL CODE § 2-314(2)(c).
26 *See* 44 N.J. at 66-67, 207 A.2d at 313.

and the overall circumstances, there is sufficient evidence demonstrating that an average user's reasonable expectations about the product's performance have been disappointed.[27] In *Newmark v. Gimbels, Inc.*,[28] it was held that the jury could infer that a hair-wave solution was defective from the fact that the product was accompanied by an instruction in the form of a warning which indicated that the product's use could adversely affect an appreciable number of persons.

Defining "defective" products is the pivotal and crucial problem in the law of products liability.[29] Former Chief Justice Traynor of the California Supreme Court, a creator of the strict liability in tort doctrine, has stated that "no single definition of defect has proved adequate to define the scope of the manufacturer's strict liability in tort for physical injuries."[30]

The nation's courts are just beginning to explore the problems raised by the fluidity of this new criterion of "defect." An important case worth noting on this vital question of what is a "defective product" is *Jackson v. Muhlenberg Hospital*.[31] There, the issue was whether a commercial blood bank and a hospital may be held accountable on the basis of strict liability in tort where they furnished blood containing viral hepatitis which resulted in injury to the plaintiff. The lower court held that the blood was not "defective" under strict liability in tort because the defendants were scientifically unable to prevent the presence of the harmful agent in the blood. However, the New Jersey Supreme Court reversed and remanded the case for a complete evidential record which was to include

> not only detailed testimony as to the nature of the defendants' operations, but also expert testimony as to the availability of any test to ascertain the presence of viral hepatitis in blood, the respective incidences of hepatitis in blood received from commercial blood banks and other sources. . . .[32]

The significance of the remand in *Jackson* may lie in the fact that the defendants were, in effect, required to come forth with evidence

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27 1 R. HURSH, AMERICAN LAW OF PRODUCTS LIABILITY § 5A:6 (Supp. 1961).

28 54 N.J. 585, 258 A.2d 697 (1969).

29 The Restatement of Torts, one of the prime sources of law for the strict liability doctrine, defines it as applying to the sale of "any product in a defective condition *unreasonably dangerous* to the user or consumer or to his property." The comments thereto offer helpful guidelines. According to comment *i*, the words "unreasonably dangerous" are designed to limit "defect" by recognizing that "many products cannot possibly be made safe for all consumption." RESTATEMENT (SECOND) OF TORTS § 402A & comment *i* (1965).

30 Traynor, *Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 373 (1965).

31 96 N.J. Super. 314, 232 A.2d 879 (1967), *rev'd*, 53 N.J. 137, 249 A.2d 65 (1969).

32 53 N.J. at 138, 249 A.2d at 67-68.

that the blood was not "defective." Does this shift the burden of proof? Does this portend a rule that once the claimant establishes an unintended or unexpected result from the product, the manufacturer then has the burden to prove that the product is not defective?

Courts accepting strict liability in tort as a socially desirable doctrine designed to compensate innocent consumers unexpectedly injured by the use of "defective" products, may be heading toward such a rule. A possible formulation is:

> A consumer or ordinary user suffering unanticipated or unexpected injury from the intended and proper use of a product is entitled to be compensated for his damages, unless the manufacturer affirmatively establishes that there was no way it could have foreseen or avoided the possible injury. If the manufacturer could have foreseen the possibility of injury, it must then establish that it has furnished adequate means for notifying and warning potential users of this possibility and furnished adequate directions concerning the use of the product in view of such possibility.

Under this standard, a plaintiff who establishes that he used a product in an intended and proper manner, but suffered an unanticipated and unexpected injury from such use, has made out a prima facie case under strict liability in tort, and stands an excellent chance of obtaining a verdict from a jury of consumers.

If this standard represents the direction in which courts are headed in the application of the strict liability in tort doctrine, it is fair to conclude that as a practical matter, the burden of proof is really quite "light." The majority in *Mendel* may well have sensed this direction with apprehension. Accordingly, it enunciated a restrictive rule, even though it conceded that such a rule would "sacrifice" meritorious claims.[33]

The vital question is whether such a "sacrifice" is justified. The majority's stated fear of, and need to "guard" against, "the many unfounded suits that would be brought and sustained against manufacturers . . . many years after a product is manufactured"[34] seems to reflect a mistrust of society's ability, in the form of the jury, to arrive at an objective and reliable determination that a plaintiff is or is not entitled to recover under the strict liability in tort doctrine.

The majority was "willing to sacrifice a small percentage of meritorious claims that might arise."[35] What is the justification for sacrificing

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33 25 N.Y.2d at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495.
34 *Id.*
35 *Id.*

any percentage of meritorious claims? The repose of a statute of limitations against lawsuits is not a consideration because the manufacturer still remains subject to negligence suits.

The foregoing analysis suggests that the major issue emerging from *Mendel* is whether it is *too easy*, in this consumer-minded society, to persuade a jury to render a strict liability in tort verdict against a product manufacturer. Is this why the majority was willing "to sacrifice the small percentage of meritorious claims" in order to "guard against" the "many unfounded suits that would be brought and sustained against manufacturers ad infinitum"?[36]

A jury trial may not be the best forum for resolving a products liability claim. But a rule that arbitrarily deprives innocent and injured consumers of a right to be compensated for damages is not the solution.

One way or another, the needs of our consumer-oriented society require some means of compensating innocent persons for avoidable injuries resulting from products.[37] If a jury trial is not the best forum to award compensation, the system must be modified to provide a better forum. It is no answer to say that the person has no remedy. Law must serve society, and a rule of law that denies proper compensation does not so serve, and cannot long stand.

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[36] *Id.*

[37] This need is being recognized by some lower courts. *See, e.g.*, Jefferson Credit Corp. v. Marcano, 60 Misc. 2d 168, 302 N.Y.S.2d 390 (N.Y.C. Civ. Ct., N.Y. County 1969) where the court, in holding a retail installment sales contract unconscionable and unenforceable, stated:

> The establishment of the many departments of consumer affairs and consumer protection bureaus as official agencies of our City, State and Federal government and the enactment of truth in lending and truth in advertising legislation is proof, if there need be any, of the recognition of the need to protect consumers, even against their own improvidence.

Id. at 171, 302 N.Y.S.2d at 394.