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MEDIEVAL THEORY AND PRODUCTS LIABILITY

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For some time scholars have speculated as to the relevance of medieval life to the problems of the present century. Tawney, in his classic *Religion and the Rise of Capitalism*, wrote of the attempt being made:

> . . . to restate the practical implications of social ethics of the Christian faith, in a form sufficiently comprehensive to provide a standard by which to judge the collective actions . . . of mankind . . .[1]

More recently, Christopher Dawson has written of the need for higher spiritual principles of coordination to overcome "the conflict between self interest and the common good."[2] A comparable movement on a secular plane is the quest of contemporary legal scholars, such as Jerome Hall, for an integrative jurisprudence, one which seeks a comprehensive, interrelated fusion between Jurisprudence, Legal Theory and Positive Law.[3] The need for such fusion—for an integral approach to law—is perhaps triggered by the presence of many legal problems, the solution of which is not to be found in the traditional procedures of judicial method, nor by the application of traditional legal concepts. Reasoning by analogy breaks down when the underlying assumptions no longer exist.[4] Time-honored notions of "fault" based upon a failure to observe the "reasonable man" standard lose their value in the face of scientific discovery that no fault, in the negligent sense, was involved in the action in question.[5] One difficult issue in this area is that of products liability—the liability of a producer or manufacturer to the ultimate user of his product, for injuries resulting from a latent defect, in the absence of privity of contract between the parties and any provable negligence in the manufacturing processes. This is an area in which considerable disagreement exists as to the desirability of imposing legal liability upon the remote vendor. After analyzing the problem, an attempt will be made to show the relevance of some medieval

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1 Tawney, Religion and the Rise of Capitalism 4 (1948).

2 Dawson, Schism in Education, The Commonweal Vol. LXXIV, No. 2 (April 7, 1961), excerpt from a forthcoming book, Crisis of Western Education (Sheed & Ward 1961).

3 J. Hall, Studies in Jurisprudence and Criminal Theory (1958); J. Hall, The Present Position of Jurisprudence in the United States, 44 Va. L. Rev. 321 (1958).

4 Pound, Law Finding Through Reason and Experience (1960).

5 See Pound, An Introduction to the Philosophy of Law (1954); and Pound, The Problem of the Exploding Bottle, 40 B.U.L. Rev. 167 (1960).

ideas to it, and the way in which such ideas can assist in solution of the difficulty.

It is well, before proceeding, to define what is meant by medieval theory. Medieval society was conceived by its members to be an organic whole. Within it were two principal spheres of influence: the Church and the State. Because of the overriding concept of unity, the Spiritual and Temporal orders were seen as two sides or aspects of the single Christian Commonwealth. Mutual cooperation between the two was encouraged, with a view towards achieving a full and harmonious life for medieval man.[6] One aspect of that cooperation, which shall be examined here, was the attempt by the civil society to realize in its positive law the spiritual and moral teachings of the Church. The means employed was also significant, for it was to a large degree the *collective* activity of the group exercising regulatory power which was the most important means of insuring good order. It is, then, these two aspects of medieval life, the attempted realization of spiritual and moral teaching in the temporal sphere, and the collective activity of the people or their leaders seeking the realization of these ideals, with which we shall be concerned.

Before examining medieval society further, one should first, in a general way, explore the attitude taken by the American judiciary towards the liability of a seller for injuries caused by his defective products. *Seixas v. Woods*,[7] decided in 1804, established the rule of *caveat emptor* with respect to latent defects. In announcing the majority decision, Chancellor Kent was reflecting the prevailing economic view of the day, that social well-being was best achieved by not shackling the enterprising spirit with an excess of legal regulation. With the exception of food cases,[8] it was not until the adoption of the Uniform Sales Act that warranty responsibility was extended to general sales of merchandise. Yet these warranties were developed upon principles of contract law, and were not designed to cover the situation of a middleman market without privity between the vendor and the ultimate consumer or user of the product. Some courts have attempted to extend the scope of the warranties to cover the economic realities. In so doing, they have strained the limits of judicial ingenuity while achieving only limited success. A parallel development has been the attempt by the judiciary to hold the remote vendor[9] liable in negligence. Al-

[6] Gierke, Political Theories of the Middle Ages 1-17 (1927).

[7] 2 Cai. R. 48, 2 Am. Dec. 215 (N.Y. Sup. Ct. 1804).

[8] Strict liability of a warranty nature for defective food was established early in New York. Van Bracklin v. Fonda, 12 Johns. R. 468 (N.Y. 1815).

[9] The term "remote vendor" is used to designate those who, by reasonable classification, can be held responsible for latent defects because of their control over the product.

though originally limited to matters which were considered "inherently dangerous,"[10] the liability now extends, generally, to the sellers of any chattel.[11]

A new dimension has been added to this problem in recent years. A tendency has developed which seeks to hold the seller liable to an ultimate consumer for injuries resulting from the use of the product, although the seller had exercised all possible care in making the product, and the user had not entered into any contractual relationship with him.[12] The emergence of such demands is not traceable to any single cause. It is, no doubt, due in some measure to the extreme emphasis upon security which characterizes our age. A good deal of it is traceable to a dissatisfaction with the capacity of the judicial process to meet the demands arising from our complex market structure. Some of the proponents of absolute liability argue that the seller should be liable because he is in a better financial position to bear the loss, and can pass the expense on to the general public through the medium of higher prices.[13] Yet it has been pointed out that many sellers, because of the intensity of the competition in their particular markets, are not in a position to make the necessary price adjustments.[14] If the matter is approached from the viewpoint of reasonable expectation—i.e., is it reasonable for those injured by defective products to assume that the seller should make good their loss?[15]—we are then at the threshold of responsibility, even though no fault is involved, at least in the traditional negligence sense. Those who would impose liability argue that, in certain commercial activities, some damage can be forseen as a consequence of conducting the particular business, and since it is forseeable, those conducting that business should be responsible for it. Thus, anticipation of harm at the start of the business, rather than at the time of the specific act of production which led to injury, would be the basis of liability. As developed by Ehrenzweig, liability is then the

10 Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852); Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865 (8th Cir. 1903).

11 The development of legal theory in this area has been extensively traced by various authors. See, e.g., Prosser, Assault upon the Citadel, 69 Yale L. J. 1099 (1960); Ehrenzweig, Negligence Without Fault (1951).

12 See Prosser and Ehrenzweig, supra note 11, and Pound, op. cit. supra note 5, esp. at 72 et. seq. Such cases include: Spence v. Three Rivers Builders & Masonry Supply Inc., 353 Mich. 120, 90 N.W.2d 873 (1958) and Continental Copper and Steel Industries v. E. C. "Red" Cornelius, 104 So.2d 40 (Fla. 1958).

13 See Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (concurring opinion).

14 Plant, Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View, 24 Tenn. L. Rev. 938 (1957); Peairs, The God in the Machine, 29 B.U.L. Rev. 37 (1949).

15 See Pound, op. cit. supra note 5, at 105-06.

price which must be paid to society for permission to conduct an "ultrahazardous" activity, on an analogy to cases in which contractors agree with municipalities to assume responsibility for all damage caused by some ultrahazardous activity such as blasting. Thus:

> . . . the contemplated test may be related to a hypothetical agreement between the entrepreneur and the state, under which the enterprise is permitted or licensed in spite of its known dangerous nature, in consideration of the assumption of full liability for those, and only those, damages which may reasonably be supposed to have been in the contemplation of both parties at the time they made the "contract," that is, when the "license" was granted. Causation of such (typical) harm could be considered as bringing the "contractual" liability into operation, whether or not the harmful event was was preceded by "fault."[16]

Those who oppose the tendency point out, as stated above, the fallacy of the "ability to pass" argument, the great difficulty in tracing causation, the non-ultrahazardous nature, in the traditional *Rylands v. Fletcher*[17] sense, of most business activity and the absence of intentional wrongdoing or carelessness on the part of the seller.[18] It is also argued, with much force, that absolute liability would run against accepted ideas of justice:

> . . . For more than 150 years the accepted legal basis of tort liability in Anglo-American law has been the general philosophy that, except for intentional wrongdoing, a person should be accorded freedom of action, subject only to the limitation that in exercising this freedom he must use the care which can be expected of a reasonably prudent man. He must meet this social standard; if he does not he will be held liable for the injuries he causes. Whereas primitive law stressed security, modern law stresses freedom of action . . . this philosophy has contributed to the enormous economic and social progress of this country. . . . It has enhanced the atmosphere of encouragement to the man who generates new ideas and has a venturesome temperament.[19]

It is clear that a resolution of the difficulty will turn, in some degree, upon ethical notions indicating proper allocation of responsibility in

[16] Ehrenzweig, supra note 11, at 54.
[17] L.R. 3 H.L. 330 (1868).
[18] See Peairs, supra note 14.
[19] Plant, supra note 14, at 940.

order to justify the imposition of liability. Insurance schemes may help to distribute expense, but do not decide ultimate questions. It is also clear that we do not have readily at hand any legal principle which can be applied to the problem with much probability of reaching a successful solution. It is at this point then that we can, with some justification, return to medieval theory in quest of some helpful principles.

In medieval society the regulation of trade and commerce was characterized by a strong preference for the rights of the consumer. Extensive regulation sought to insure that all products were the result of good workmanship and proper measure, and that they were sold for a fair price. The community at large was also given preference.[20] This reflected a political outlook very different from that of the eighteenth and nineteenth century both in England and in this country. In medieval times the burden of proof was upon those who would deny the state's right of regulation; the later view was to shift the burden to those who would interfere.[21] What was important was the sense of community; the seller who violated the regulation injured the community even more than he injured the consumer:

> The records attest the dominance of the idea of solidarity. The welfare of the collect is always given first position. . . . In the prevailing legal theory it was not so much the buyer who was injured as the commune.[22]

This dual concern for the consumer and the general public placed responsibility upon the seller not only for fraudulent concealment of defects, but also for latent defects of which he had no knowledge. On the continent, this resulted in civil liability.[23] In England, the existence of civil responsibility is disputed;[24] however, some responsibility of a criminal or quasi-criminal character fell upon the innocent seller. In all of this the society was attempting to realize the ethical teachings of the Church as a means of insuring a well ordered community. St. Thomas Aquinas had provided the moral framework. He had taught that the seller's responsibility for a latent defect included those of which he had no knowledge.[25] When the defect was brought to his

20 2 Holdsworth, A History of English Law (1923); Hamilton, The Ancient Maxim Caveat Emptor, 40 Yale L. J. 1133 (1931).

21 2 Holdsworth, op. cit. supra note 20, at 468.

22 Hamilton, supra note 20, at 1152.

23 See Morrow, Warranty of Quality: A Comparative Survey, 14 Tul. L. Rev. 327, 529 (1940).

24 Compare Hamilton, The Ancient Maxim Caveat Emptor, 40 Yale L. J. 1133 (1931) with Perkins, Unwholesome Food as a Source of Liability, 5 Iowa L. Bul. 6 (1919).

25 Summa Theologica II II, Q. 77, A.2.

attention the seller was bound to make restitution, for it was always unlawful:

> . . . to give anyone an occasion of danger or loss . . . the seller who offers goods for sale gives the buyer an occasion for loss or danger by the very fact that he offers him defective goods if such defect may occasion loss or danger to the buyer.[26]

Much of this regulation of trade, requiring the seller to account for latent defects, continued in Continental Europe following the decline of the Middle Ages.[27] Such was not the case in England, however, where societal control of economic activity broke down in the seventeenth and eighteenth centuries. The disintegration was due to many causes, political, economic and religious; yet all had the common thread of individual activity asserting itself against all forms of regulation. It meant *caveat emptor*, consecrated by the court of Exchequer as early as 1603 in *Chandelor v. Lopus*[28] with its famous bezar-stone. The remote user found himself without recovery because of the "outrageous consequences that would follow" in *Winterbottom v. Wright*,[29] and it was not illogical that pioneering America, which had inherited the philosophy of economic liberalism, should echo these sentiments.

When one assesses the value of traditional moral principles in resolving contemporary problems, it is important that the relevance be not oversimplified. A coincidence of ethical teaching and civil law was possible in medieval society for reasons which are no longer existent. Medieval society was characterized by a religious unity which made the identity of law and morality a relatively easy matter. The Spiritual and the Temporal orders were seen as two sides of a single Christian Commonwealth. Matters of trade were, by and large, immediate and intra-personal, and, therefore, the application of personal morality to personal activity was fairly easy.[30] This primitive market structure has changed considerably with the rise of the complexity of the middleman. Where the immediacy remains, such as in the simple seller-buyer situation, one has no difficulty (where the production is under full control of the seller) in imposing warranty liability. The problem of the remote vendor, with the presence of so many additional factors, such as dubious causation, gives one pause.[31]

[26] Id. at II II, Q. 77, A.2. Liability had been imposed upon the seller for damages occasioned by unknown defects under the Roman Edictal system. Buckland, A Textbook of Roman Law 488, 489 (1921).

[27] For analysis of this development, see Morrow, supra note 23.

[28] Cro. Jac. 4, 79 Eng. Rep. 3 (1603).

[29] 10 M. & W. 109, 114; 152 Eng. Rep. 402, 405 (Exch. 1842).

[30] See Cunningham, Industry and Commerce 466.

[31] The provisions of the French Code have been used to impose liability on the

Yet if the determination of the problem is to be made in the context of whether or not the expectation of recovering by consumers is a reasonable one, the ethical teaching of responsibility for latent defects regardless of the seller's knowledge is relevant, for it provides a rational framework within which the difficulties can be resolved. Once its value is accepted, it is possible to make some defensible allocations of responsibility. It would be reasonable, for example, to limit liability to those injuries which may reasonably be foreseen as typically occurring as a consequence of conducting the enterprise;[32] to impose, in the case of branded canned goods, responsibility upon the manufacturer who takes credit for his product, rather than upon an innocent retailer;[33] to impose liability upon a distributor who markets the goods of many small producers.[34] Where the middleman is no more than a conduit, the application of the medieval rule is evident, for the remote vendor is then truly the "seller" in the ethical sense. It is clear that some hardship will necessarily result in making classifications, but such is inevitable in a field as complex as this. In view of the availability of insurance, it does not seem that any hardship will be unduly burdensome.

The medieval ethic is not without value for correcting excessive humanitarianism. Medieval society was not the prototype of a welfare state; the consumer could not act irrationally and expect its protection. If the defects were manifest, the buyer was on notice; he was not to be afforded any greater protection than he needed.[35] Again, the reasonableness of the expectations can be examined with reference to this ethical ideal to form the basis of a reasonable solution.

There is another aspect of medievalism that is pertinent. The history of products liability records the valiant but unsuccessful attempts by many courts to extend warranties to remote vendors, either by stretching the warranty by use of various fictions[36] or by the imposition of traditional ideas of "negligence."[37] It is becoming increasingly evident that the judicial process has all but exhausted the possibilities of making common law notions achieve the necessary equilibrium. Here also medieval theory can be helpful. In the middle

remote vendor for latent defects of which he had no knowledge. See Morrow, supra note 23, at 550.

32 This is Ehrenzweig's theory. Op. cit. supra note 11.

33 Ehrenzweig, op. cit. supra note 11, at 80.

34 Id. at 81.

35 See Morrow, supra note 23. This is Aquinas's view. Summa Theologica II II, Q. 77 A.3. For a discussion of patent and latent defects, see Report of the New York Law Revision Commission, Leg. Doc. 65, p. 460 (1943).

36 Gillam, Products Liability in a Nutshell, 37 Ore. L. Rev. 119, 153 (1957).

37 See Prosser, supra note 11, at 1100-01.

ages the power of the community was brought to bear upon the problems of trade through the use of legislative processes. The local boroughs, through their boards of Aldermen, regulated commercial matters within their jurisdiction when the welfare of the community so demanded. These functions were later assumed by the Parliament. The legislative power was the most effective way of achieving community rule.[38] We have seen a similar movement in this century in the increasing awareness of the power inherent in the legislative process for achieving social justice.[39] But most of this has been on a national or federal level. What exists on a local or state level is principally legislation imposing criminal penalties for violation of community standards, or the use of the administrative process for realizing desirable social goals. What is yet to be fully explored is the immense potential of the state legislature for achieving social justice by creating direct civil remedies.[40] The instant problem is one in which effective reform can only come through the legislative process. It is certainly not found in the existing Uniform Commercial Code.[41] To work for imposition of liability upon the remote vendor does no disservice to the tremendous economic and social advantages which have accrued to us as a result of the free enterprise system. If those who have an underlying responsibility have the means of fulfilling it, either directly, or through the use of the insurance mechanism, there is no good reason for not imposing the rule. To those who would immunize the remote vendor because the common law had given him a preferential position, the short answer is that the periodic demands for social justice, which have asserted themselves with continual vigor in this century, are

[38] See 2 Holdsworth, op. cit. supra note 20, and Hamilton, supra note 20.

[39] The development is traced in Morganthau, The Purpose of American Politics 79 et seq. (1960). See also Commager, The American Mind (1950).

[40] Georgia has passed a statute which provides:

> The manufacturer of any personal property sold as new property, either directly or through wholesale or retail dealers or any other person, shall warrant the following to the ultimate consumer, who, however, must exercise caution when purchasing to detect defects, and provided there is no express covenant of warranty and no agreement to the contrary:
>
> 1. The article sold is merchantable and reasonably suited to the uses intended.
>
> 2. The manufacturer knows of no latent defects undisclosed. Ga. Code § 96-307 (1933).

The statute has been held constitutional. Bookhalt v. General Motors Corp., 215 Ga. 391, 110 S.E.2d 642 (1959). See also L. Patterson, Manufacturer's Statutory Warranty: Tort or Contract?, 10 Mercer L. Rev. 272 (1959). As for the potential use of Codes in this country, see The Code Napolean and the Common Law World (1960).

[41] The Code warranty provisions run beyond the immediate vendor only in cases involving food or other articles for human consumption, where other members of a household and guests are also protected. UCC § 2-318. See Kaczmarkiewicz v. J. A. Williams Co., 13 Pa. D. & C. 2d 14 (C. P., Allegheny Cty. 1957).

voicing their preference for values which are truly human. Granting that the ethical ideal and the legal rule are not always identical, neither should the wisdom of medieval Christendom be denied to those who desire its use in eradicating injustice. To those who insist upon the supremacy of economic considerations over human welfare, the words of Tawney are still worth thoughtful consideration:

> The most obvious facts are the most easily forgotten. Both the existing economic order, and too many of the projects advanced for reconstructing it break down through their neglect of the truism that, since even quite common men have souls, no increase in material wealth will compensate them for arrangements which insult their self-respect and impair their freedom. A reasonable estimate of economic organization must allow for the fact that, unless industry is to be paralyzed by recurrent revolts on the part of outraged human nature, it must satisfy criteria which are not purely economic . . . the medieval insistence that riches exist for man, not man for riches . . . emphasizes the instrumental character of economic activities, by reference to an ideal which is held to express the true nature of man.[42]

[42] Tawney, op. cit. supra note 1, at 284-85.