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Torts - Wyoming Finds an Appropriate Case to Adopt Strict Products Liability - Ogle v. Caterpillar Tractor Co.

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TORTS—Wyoming Finds an Appropriate Case to Adopt Strict Products Liability. *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334 (Wyo. 1986).

On January 9, 1980, Timothy Ogle was operating a Caterpillar scraper at a uranium mine in Carbon County.[1] He climbed onto the hood of the scraper to inspect a malfunction.[2] While attempting to climb down, Ogle slipped and fell, injuring his hip.[3] Exactly four years later, he filed suit against Caterpillar Tractor Co., the manufacturer of the scraper, and Wyoming Machinery Co., who sold the scraper to Ogle's employer.[4] The complaint stated three claims for relief. The first claim was based on negligence and the second on breach of express and implied warranties.[5] The basis for the third claim was later alleged to be strict liability, but the complaint did not clearly state this.

The district court granted summary judgment to the defendants on the grounds that the statute of limitations for warranty actions[6] had expired, that Ogle had failed to show that the statute of limitations for negligence[7] had not run, and that the product had been materially altered.[8] Ogle appealed.

The Wyoming Supreme Court, in an opinion by Justice Cardine, affirmed the ruling that the warranty claim was barred but reversed on the negligence claim.[9] The court also concluded that the complaint contained the elements of a strict liability claim and formally adopted strict liabilty as expressed by section 402A, Restatement, Second, Torts (1965).[10]

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1. Ogle v. Caterpillar Tractor Co., 716 P.2d 334, 336 (Wyo. 1986).
2. Brief for Appellee Caterpillar Tractor Co. at 1, *Ogle* (No. 85-154).
3. Brief for Appellant at 2, *Ogle* (No. 85-154).
4. *Ogle*, 716 P.2d at 336.
5. *Id.*
6. WYO. STAT. § 34-21-299.5 (1977). This statute is identical to U.C.C. § 2-725 (1976).
7. WYO. STAT. § 1-3-105 (1977).
8. *Ogle*, 716 P.2d at 337.
9. *Id.* at 346. The statutory period for both causes of action is four years. The difference is when the statute begins to run. For warranty actions, the statute begins to run when tender of delivery is made. *Id.* at 339. For a negligence action, the statute begins to run when the injured party knows or should have known that damage has resulted. *Id.* at 337. For a discussion of these two statutes in the context of a personal injury action, see *id.* at 337-40. The court held that the statute of limitations for strict liability is the same as for negligence. *Id.* at 345.
10. *Id.* at 341-42. The language of the Restatement quoted by the court is as follows:
    402A. *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 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.
The court also refers to the official comments, and it seems safe to assume they intend to

Despite several prior cases involving the issue, the court had never explicitly adopted strict liability. This casenote will examine why the court chose this case to adopt the doctrine and explore the decision's impact on Wyoming products liability litigation.

BACKGROUND

A review of Wyoming products liability cases decided after the advent of section 402A[11] shows that the court has considered strict liability several times but has been reluctant to address the question of its status under Wyoming law. In *Maxted v. Pacific Car & Foundry Co.*,[12] the plaintiff asserted a claim of "negligent design" based on strict liability. The case was tried under the standards of section 402A,[13] but the appeal was decided solely on negligence grounds. The court confused strict liability and negligence. It treated liability under section 402A as an alternate form of negligence, rather than an independent cause of action. This confusion is apparent in the court's use of the definition of a defective product given in section 402A, which was misinterpreted as a definition of a manufacturer's legal duty in a negligence action.[14]

In *O'Donnell v. City of Casper*,[15] the plaintiff sued on both negligence and strict liability grounds. The district court granted defendants' summary judgment motion on the negligence issue.[16] On appeal, the plaintiff contended that the district court erred "in failing to apply the strict products liability standard set forth in section 402A."[17] The court, however, declined to address the issue. It said the applicability of strict liability was not properly raised because the summary judgment was granted only on the negligence claim.[18]

The court has also faced a situation where the trial court submitted the case to the jury solely upon a theory of strict liability under section 402A. Therefore, strict liability became the law of the case in *Caldwell v. Yamaha Motor Co., Ltd.*[19] Neither party contested the legitimacy of strict liability on appeal. The court was thus in the awkward position of deciding whether an exclusionary rule of evidence applied in a strict liability action, even though "the question of whether or not strict liability

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rely on them as well as the definition quoted above. *See also* RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter RESTATEMENT].

For a general reference work see W. KEETON, PROSSER AND KEETON ON TORTS (5th ed. 1984). Dean Prosser was one of the leading proponents of strict products liability. *See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). The landmark cases in the development of the doctrine are noted in Annotation, *Products Liability: Strict Liability in Tort*, 13 A.L.R.3D 1057 (1967).

11. Section 402A was published in 1965.
12. 527 P.2d 832 (Wyo. 1974).
13. *Id.* at 837.
14. *Id.* at 835-36.
15. 696 P.2d 1278 (Wyo. 1985).
16. *Id.* at 1280.
17. *Id.*
18. *Id.* at 1288.
19. 648 P.2d 519 (Wyo. 1982).

under section 402A is the law of the state"[20] was not before it for decision. While it may not have been the law of the state, it certainly seems to have been the law in some of the district courts.[21]

The last decision to consider strict products liability prior to *Ogle* was *Buckley v. Bell.*[22] Buckley ordered some gasoline from Bell, who delivered diesel fuel by mistake. Buckley unknowingly filled the gas tank of his hay baler with the diesel fuel. Buckley was attempting to purge the diesel from the fuel system when the engine backfired, starting a fire which destroyed the hay baler.[23]

Buckley sued on strict liability, warranty, and negligence theories.[24] The trial court found Buckley's actions were an intervening cause which precluded the warranty and negligence claims. It also held that the strict liability claim failed for lack of proof of a defective product.[25]

On appeal, the Wyoming Supreme Court affirmed, holding that Buckley's intervening acts broke the chain of causation.[26] The strict liability issue raised on appeal was whether the trial court correctly held that diesel fuel delivered in place of gasoline could not be a "defective product" under section 402A.[27] Chief Justice Thomas responded that the court had not adopted the rule of section 402A and that it was "foreclosed" from doing so in the case for three reasons.[28] First, the determination that Bell's actions were not the proximate cause of the damages prevented application of the strict liability concept.[29] Second, the court rejected Buckley's argument that misidentified diesel fuel was defective as a totally adulterated product.[30] The court primarily relied on a New Jersey decision[31] involving blood transfusions to posit a rule that "a wrong product is not a defective product" in strict liability actions.[32] Third, the court stated

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20. *Id.* at 521. The court decided that the exclusionary provisions of Rule 407, WYO. R. EVID., were not applicable to strict liability actions. Therefore, evidence of post-accident remedial measures was admissible. *Id.* at 523.

21. Based on a review of cases appealed to the Wyoming Supreme Court, it is apparent that some of the district courts were allowing strict liability claims, while others were not. For instance, *Caldwell* was tried solely on a § 402A basis. Compare this with *O'Donnell*, where the court did not apply § 402A.

22. 703 P.2d 1089 (Wyo. 1985).

23. *Id.* at 1090-91.

24. *Id.* at 1091.

25. *Id.*

26. *Id.* at 1090-91.

27. *Id.* at 1091.

28. *Id.* at 1094.

29. *Id. See generally* Keeton, *Products Liability and Defenses—Intervening Misconduct*, 15 FORUM 109 (1979) (arguing that defenses based on a plaintiff's behavior should be treated the same in strict liability and negligence actions).

30. *Buckley*, 703 P.2d at 1095. Plaintiff's argument might better have been based on Restatement § 402A comment g. Comment g deals with the definition of a product in a defective condition. It says in pertinent part: "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Related to the facts in *Buckley*, the argument could be made that diesel fuel, while not defective of itself, is placed in a defective *condition* when incorrectly poured into a gasoline tank.

31. Baptista v. St. Barnabas Medical Center, 109 N.J. Super. 217, 262 A.2d 902 (1970), *aff'd*, 57 N.J. 167, 270 A.2d 409 (1970).

32. *Buckley*, 703 P.2d at 1095.

that strict liability was not an appropriate vehicle for recovery of purely economic losses.[33] It concluded that these reasons made strict liability inapplicable to the case.[34]

Prior to the *Ogle* decision, the Wyoming Supreme Court had yet to clearly rule on the status of strict products liability in Wyoming. It had ruled on several issues involving strict liability under section 402A, but was waiting for an "appropriate" case to address the status of the doctrine in Wyoming.

THE PRINCIPAL CASE

The question of the status of strict products liability in Wyoming was not directly raised in *Ogle*. The interpretation of the third claim was the real issue. Ogle argued that the district court erred in dismissing his "strict liability claim."[35] Appellees countered that the complaint did not state a strict liability claim. They asserted that it merely restated the warranty claim.[36]

Ogle's third claim did not use the words "strict liability" or refer to section 402A. He alleged only that the scraper was "unsafe for its intended use" and that he was "injured as a direct result of the defects herein alleged."[37] Appellees contended this language did not give them notice of a strict liability claim.[38] In response, the court ruled that no particular words were required; a plaintiff must only plead sufficient facts to support a legal claim for relief.[39] It listed the facts that Ogle had to allege to support a strict liability claim under section 402A.[40] The court then concluded that Ogle had alleged facts sufficient to satisfy these criteria.[41]

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33. *Id.* The case cited by the court to support this proposition, Hart Eng'g Co. v. FMC Corp., 593 F. Supp. 1471 (D.R.I. 1984), held that strict liabilty is not appropriate when the only damages are commercial losses. It favored remedies based on contract law when the harm is a failure to meet commercial expectations. It is not clear why the Wyoming court decided that this barred strict liability in *Buckley*, where there was property damage as well as purely economic damages.

34. *Buckley*, 703 P.2d at 1095.

35. Brief for Appellant at 3.

36. Brief for Appellee Wyoming Machinery Co. at 17-18, *Ogle* (No. 85-154); Brief for Appellee Caterpillar Tractor Co. at 2.

37. *Ogle*, 716 P.2d at 336.

38. *Id.* at 341.

39. *Id.* at 344. *See also* Johnson v. Aetna Casualty & Sur. Co., 608 P.2d 1299 (Wyo. 1980), *appeal dismissed and cert. denied*, 454 U.S. 1118 (1980).

40. 716 P.2d at 344. This list was derived from § 402A with reference to the facts involved in *Ogle*. For example, the court referred to physical harm only, while the Restatement provides for physical harm to the user or his property. Interestingly, the court splits the litany of "in a defective condition unreasonably dangerous" contained in § 402A into two separate requirements: that the product was defective, and that the product was unreasonably dangerous. In the latter formulation, it is not clear that the defective condition must cause the product to be unreasonably dangerous. For a discussion of the Restatement terms, see Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 828-38 (1973). For analysis of what constitutes a defect, see Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973).

41. *Ogle*, 716 P.2d at 344. The grounds for this ruling are tenuous. The court stated that the requisite allegations could be "implied" from the pleadings. Allegations of fact that must be derived by implication would not seem to comply with the requirement that

The court noted that appellees raised the defense of alteration of product in their responsive pleadings[42] and acknowledged that substantial change may be a defense to a strict liability claim.[43] It ruled, however, that the question of causation was not adequately determined in the summary judgment proceeding,[44] and indicated that such questions were better left to a jury.[45]

Justice Brown dissented. He asserted that *Ogle* was not an appropriate case to adopt strict liability for two reasons. First, Brown agreed with the appellees' contention that the third claim was merely a restatement of the warranty claim, which did not give notice to the opposing party of a strict liability claim.[46] Second, he argued that Ogle could not recover under a section 402A strict liability theory because the scraper had been substantially modified after it was sold.[47]

The court, however, used the case as a vehicle to adopt section 402A. It realized that effective resolution of the case required a definition of strict liability in Wyoming.

ANALYSIS

Ogle did not differ markedly from previous cases in which the court avoided a decision on the status of strict liability. The stated issues in *Ogle* were primarily procedural. The court could have followed the approach taken in *Buckley* and decided the case without adopting strict liability. But the court did not. Instead, it adopted strict liability as a prerequisite to its evaluation of Ogle's pleadings. The question was whether Ogle sufficiently pleaded strict liability. In order to determine the sufficiency of the pleading, the court needed a standard against which to measure. The standard the court chose was section 402A. Of course, the court could have articulated the standard of section 402A and declined to consider adoption of section 402A. This would appear to comply with the principle that decisions should be strictly limited to the issues before the court. That result, however, would have been unfortunate.

Such a course of action would have raised more questions than it answered. Underlying a complaint is the requirement that it state a claim for which legal relief can be granted.[48] If the court had decided that Ogle pled a strict liability claim without adopting strict liability, it could be argued that the court had implicitly recognized strict liability as a legal

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"averments . . . be simple, concise, and direct." WYO. R. CIV. P. 8(e)(1). The court, however, believed that Ogle intended to plead strict liability and that his claim should be allowed to stand in the interests of "substantial justice." *Ogle*, 716 P.2d at 344.

42. *Ogle*, 716 P.2d at 344.

43. *Id.* at 345. That defendants raised this defense is not conclusive proof that they were notified of a strict liability claim. Material alteration is also a defense to negligent design claims. *Id.*

44. *Id.*

45. *Id.* at 346.

46. *Id.*

47. *Id.*

48. *See* WYO. R. CIV. P. 12(b).

basis for relief. The counterargument would be that the court had consistently declined to consider adoption of strict liability; if it had intended to change its policy, presumably it would have said so. The net effect would be to allow Ogle to proceed on his strict liability claim, while confusion over the status of strict liability would have increased.

The Wyoming Supreme Court has another important function besides resolving differences between parties. Through its reported decisions, the court must guide and direct the lower courts and the bar. A decision that unnecessarily increases confusion and uncertainty in Wyoming law helps no one. Prior decisions of the court had forced litigants to operate in a twilight zone of the law, uncertain of the legal status of their claims. The *Ogle* decision eliminated this uncertainty and provides a clear exposition of the doctrine. It also provided a rational basis for resolution of the issue before the court.

Impact of Ogle

The court has put Wyoming in the mainstream of products liability law in the United States. The majority of other jurisdictions have adopted strict liability in some form.[49] By adopting section 402A, the court has provided a solid foundation for future strict liability actions. Case law from the numerous jurisdictions that have adopted section 402A is available as persuasive authority.[50] If the court had chosen to formulate a novel theory of strict liability, it would necessarily develop very slowly due to the relative paucity of appellate decisions in Wyoming. Under section

49. Wyoming is the 46th state to adopt strict product liability in some form. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY 3-8 to -24 (1985). For a thorough analysis of the major elements of § 402A, see Davis, *Product Liability Under Section 402A of the Restatement (Second) of Torts and the Model Uniform Product Liability Act,* 16 WAKE FOREST L. REV. 513 (1980).

50. Section 402A has been cited in over 4,100 cases. Other than Wyoming, 26 states have adopted § 402A: *Alabama* (Atkins v. American Motors Corp., 335 So. 2d 134 (Ala. 1976)); *Arizona* (O.S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968)); *Colorado* (Brandford v. Bendix-Westinghouse Auto. Air Brake Co., 33 Colo. App. 225, 517 P.2d 406 (1973)); *Connecticut* (Garthwait v. Burgio, 153 Conn. 284, 216 A.2d 189 (1965)); *Florida* (West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976)); *Hawaii* (Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 470 P.2d 240 (1970)); *Idaho* (Shields v. Morton Chem. Co., 95 Idaho 674, 518 P.2d 857 (1974)); *Indiana* (Cornette v. Searjeant Metal Prod., Inc., 147 Ind. App. 46, 258 N.E.2d 652 (1970)); *Iowa* (Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970)); *Kansas* (Brooks v. Dietz, 218 Kan. 698, 545 P.2d 1104 (1976)); *Kentucky* (Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1966)); *Maryland* (Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976)); *Mississippi* (State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966)); *Missouri* (Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969)); *Montana* (Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 513 P.2d 268 (1973)); *New Hampshire* (Buttrick v. Arthur Lessad & Sons, Inc., 110 N.H. 336, 260 A.2d 111 (1969)); *New Mexico* (Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972)); *North Dakota* (Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974)); *Oklahoma* (Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974)); *Oregon* (Heaton v. Ford Motor Co., 248 Or. 467, 435 P.2d 806 (1967)); *Pennsylvania* (Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966)); *Rhode Island* (Ritter v. Narragansett Elec. Co., 109 R.I. 176, 283 A.2d 255 (1971)); *Texas* (Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969)); *Vermont* (Zaleskie v. Joyce, 133 Vt. 150, 333 A.2d 110 (1975)); *Washington* (Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P.2d 729 (1969)); *Wisconsin* (Dipple v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967)).

402A many of the major issues have been litigated elsewhere, providing guidance for Wyoming litigants.

The adoption of section 402A is merely the starting point. Wyoming must now build its own body of strict liability law as future cases come before the court. However, some indications of where the court will go in developing the doctrine are available.

First, the court will not apply strict liability to cases of purely economic damage. This view was originally stated in *Buckley* and was reiterated in *Ogle*.[51] The court views warranty as the proper basis for claims of commercial loss, while strict liability is appropriate for personal injury and property damage.[52] This distinction may be explained by a simple example. Consider a common household toaster. If the toaster refuses to toast a slice of bread, the consumer has sustained an economic loss. He has not received the function sought in return for the purchase price. His remedy would be a warranty action. Conversely, the toaster might function perfectly in turning bread into toast, but in doing so the toaster catches fire. If the fire is due to a defect in the toaster, the appropriate remedy is a strict liability action.

Of course, a plaintiff in the latter circumstance could sue on both strict liability and warranty, but little would be gained by the warranty theory. The plaintiff has a lesser burden of proof in a strict liability action. He does not have to consider the problems of privity of contract and disclaimer of warranties. Also, the court adopted a statute of limitations for strict liability that is more favorable to the plaintiff than that for warranty.[53] In fact, the court hinted that the legislature might want to consider amending warranty law to limit it to commercial applications.[54]

The court also recognized that material alteration of the product may be a defense.[55] This is not an affirmative defense. Rather, it is a refutation of an element of the plaintiff's prima facie case. Section 402A(1)(b) requires that the product reach the user "without substantial change in the condition in which it is sold."[56] The actual inquiry here is one of causation. Even if the product is defective, the defect must be the proximate cause of the injury. When material alteration is raised as a defense, the defendant must show that the alterations, not the defect, were the proximate cause. Appellees raised this defense in *Ogle*, but the court ruled that a question of fact existed in regard to causation. It indicated that the question of proximate cause in strict liability actions, like negligence, were better determined by a jury.[57]

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51. *Ogle*, 716 P.2d at 343; Buckley v. Bell, 703 P.2d 1089, 1095 (Wyo. 1985).
52. *Ogle*, 716 P.2d at 341 n.7.
53. Since the statute of limitations for warranty begins to run on tender of delivery, it could expire before a plaintiff is injured.
54. *Ogle*, 716 P.2d at 341 n.7.
55. *Id.* at 345.
56. RESTATEMENT § 402A(1)(b).
57. *Ogle*, 716 P.2d at 346.

The future of strict liability will be shaped by the way the court treats two major elements: the definition of a defective product and the effect of the plaintiff's behavior. These two areas were not directly addressed in *Ogle,* but they depend heavily on how closely the court chooses to adhere to section 402A. These are essentially policy questions because they directly affect the scope of liability. To analyze the probable direction of the court, the reasons it gave for adoption of strict liability must first be discussed.

The court relied on the theory of enterprise liability[58] as justification for imposing strict liability.[59] This theory is derived from a policy judgment that those engaged in a business enterprise should bear the risk resulting from defective products. More specifically, the risk of loss is more appropriately borne by those who put a defective product in the stream of commerce than by an innocent victim.

Enterprise liability is based on two premises. First, the manufacturer and dealer are in a better financial position to spread the social costs resulting from damage caused by defective products.[60] Second, it provides an economic incentive for manufacturers to improve the quality and safety of products on the market.[61] If a manufacturer has to distribute the costs of defective products through price increases, the manufacturer of defective products is placed at a competitive disadvantage in relation to other manufacturers. The court stated that negligence and warranty actions were inadequate to accomplish these objectives in personal injury cases.[62] Strict liability is a better legal mechanism to allocate risk.

Strict liability, however, does not make a manufacturer an absolute insurer of his products. It is based on a concept of liability for defective products. It is not liability for all injuries resulting from the use of a product. A product cannot be considered defective merely because injury resulted from its use. To do so would impose absolute liability and destroy the economic incentives for the manufacturer to improve his products. It would substitute an incentive to withhold products from the market which could not be made perfectly safe. Alternatively, a manufacturer might have to raise prices to a point where his profit is sufficient to cover all conceivable liability. These are powerful disincentives, for the possibility of manufacturing an absolutely "idiot proof" product is infinitely small. The manufacturer would have to anticipate every possible way that notoriously inventive consumers might be harmed by using a product.

The difference between absolute liability and liability for defective products can be illustrated by a simple example. Every time a hammer is

58. For a succinct discussion of the enterprise liability theory, see Wights v. Staff Jennings, Inc., 241 Or. 301, 405 P.2d 624 (1965).

59. *Ogle,* 716 P.2d at 342.

60. *See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 YALE L.J. 1099, 1119-24 (1960). This text is illustrative of the view prevailing immediately prior to the adoption of § 402A.

61. *Id.*

62. *Ogle,* 716 P.2d at 344.

used to drive a nail, there is a risk that the user will smash his finger. If the manufacturer is absolutely liable, he must account for this risk. If he chooses to do so by including the potential liability cost in the price, the cost of a hammer might well rise to several hundred dollars. If hammers cannot be sold at a profit at that price, the manufacturer will cease to sell hammers. While the goal of a risk-free environment might be desirable to some, one that is achieved by undue restriction of affordable consumer goods is too extreme. In contrast, strict liability imposes liability when the hammer is defective, for example when the head of the hammer flies off, causing injury, while pounding nails. The manufacturer can account for this risk by improving the quality of his products.

Realistically, some risk is inherent in life itself. The policy question is how much of the risk should be shouldered by the manufacturer. Section 402A allocates to the manufacturer the risk of loss for all products in a defective condition which are unreasonably dangerous. Therefore, the characterization of the product condition is of critical importance in the allocation of risk. This in turn directly affects the economic incentives of the enterprise liability scheme.

Close adherence to section 402A would restrict the number of products that are considered defective. The Restatement uses the "consumer contemplation" test to determine whether a defective product is in an unreasonably dangerous condition.[63] Briefly, the plaintiff must show that the product was in an unreasonably dangerous condition which was outside the contemplation of the ultimate consumer.[64] In essence, the reasonable expectations of the consumer set the standard of quality for the manufacturer and seller. By contrast, some jurisdictions use alternative tests which allow a greater number of products to be found defective. California has chosen a bifurcated approach which allows a plaintiff to show defect by either the "consumer expectation" test or by a "risk/utility" test.[65] Using the latter test, the burden is on the defendant to show that the benefits to society outweigh the risks of the product. This greatly expands the number of products that are found defective.[66]

The approach used to determine defect is important to strict liability actions because existence of a defect is a threshold question. In *Ogle* the court stated that section 402A would be the starting point for the strict liability doctrine.[67] If it chooses to closely follow the Restatement test for defective product the court will limit the scope of strict liability, perhaps preventing a "deserving" plaintiff from recovery. Conversely, if the court broadens the scope, it risks destroying the underlying justification for strict liability. When the definiton of a defective product becomes so broad

63. RESTATEMENT § 402A, comment g.

64. *Id.*

65. *See, e.g.*, Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

66. For a general discussion of the various theories of defect, see W. KEETON, PROSSER AND KEETON ON TORTS, § 99 (5th ed. 1984).

67. *Ogle*, 716 P.2d at 341.

as to include virtually all products, the enterprise liability theory disappears. It is replaced by the theory that a maufacturer is an insurer of his products. There is an important difference between the adoption of strict liability and the adoption of absolute liability. The court should carefully consider any expansion of the defective condition test to ensure that it does not cross the line from strict to absolute liability.

Another important issue is how to treat the plaintiff's behavior. Strict liability focuses on the condition of the product rather than the behavior of the parties. However, comment n to section 402A expressly states that assumption of risk may be a complete defense.[68] The Wyoming court has abolished this defense in negligence actions[69] and relies instead on statutory comparative negligence provisions.[70] The Restatement was written before the general acceptance of comparative negligence. Several jurisdictions have applied comparative fault principles to strict liability actions to weigh the effects of plaintiff's behavior.[71] Whether the Wyoming court will do so depends on how closely the court follows section 402A. At least one member of the present court has said that defenses based on contributory negligence are outmoded.[72]

The comparative fault approach is easier to reconcile with the objectives of strict liability. The enterprise liability theory used by the court to justify strict liability rewards an innocent victim at the expense of the manufacturer. This is a reasonable policy decision. But it is questionable whether the not-so-innocent victim should be entitled to the same recovery. The social policy underlying enterprise liability might be served equally well, if not better, by a legal theory that closely ties liability to the harm caused by the defective product. Enterprise liability provides incentives for the manufacturer to improve the quality of his products. The manufacturer, however, has no means to improve consumers' behavior. Imposition of liability for damages due to the consumers' behavior provides no incentive for the manufacturer. The comparative fault approach allows liability to be limited to damages resulting from the defective product itself, rather than the "all-or-nothing" consequences of the assumption of risk defense.

CONCLUSION

The *Ogle* decision is a victory of substance over form. The court did not reach out and render an advisory opinion. The court adopted section 402A to provide a rational, principled basis for decision of a substantive

68. RESTATEMENT § 402A, comment n.

69. Brittain v. Booth, 601 P.2d 532 (Wyo. 1979).

70. Wyoming adopted comparative negligence by statute in 1977. WYO. STAT. § 1-1-109 (1977 & Cum. supp. 1986).

71. Vaninsi, *Merging Comparative Fault with Strict Liability in North Dakota: In Search of a New Day*, 61 N.D.L. REV. 7, 8-9 (1985). For an article advocating the adoption of this principle in Wyoming, see Greenlee & Rochelle, *Comparative Negligence and Strict Tort Liability - A Marriage of Necessity*, XVIII LAND & WATER L. REV. 643 (1983).

72. Buckley v. Bell, 703 P.2d 1089, 1095-96 (Wyo. 1985) (Cardine, J., dissenting).

issue in the case. By doing so, the court also clarified the status of strict liability in Wyoming, and indicated the future direction of the doctrine. The quest for the elusive "appropriate" case is at an end; the court has found one.

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