Let the Maker Beware

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LET THE MAKER BEWARE

ONE of the most interesting illustrations of the effects of economic and social developments on the course of the common law is the trend in our court decisions toward imposing an absolute liability upon manufacturers of dangerous articles—regardless of contract relations between the manufacturer and the person injured. Public interest has been stirred by a number of recent occurrences and decisions. Congress gave consideration during the month of April, 1945, to the problem of dealing with boys' play suits composed of materials said to be easily inflammable.1 "The Greatest Show on Earth" is still involved in dealing with the claims arising out of the frightful catastrophe in Hartford, Connecticut, last year, which resulted from a carelessly thrown cigarette igniting the "big top", the canvas of which had been treated with a mixture which proved to be highly inflammable. The Pennsylvania Supreme Court has just held that a cleaning fluid, which, when uncorked, gave off deadly gases which caused the death of a woman who was using the fluid—even though there was a warning of the danger on the label of the can containing the fluid—was such a dangerous instrumentality as rendered the manufacturer liable to the user.2

A case in which the Court of Appeals of New York unanimously affirmed a unanimous decision of the Appellate Division, First Department,3 holding a manufacturer liable

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1 1945, CONGRESSIONAL RECORD (H. R.) p. 3280 (April 9, 1945).
for damages suffered by a young woman when her dress, coming into contact with a lighted cigarette, burst into an explosive flame the first time it was worn, was deemed of sufficient public interest by a New York newspaper to lead it to publish a half-column editorial comment on the shift from "caveat emptor" to "Let the Seller Beware". When such a transition calls forth popular discussion of the change in basic legal theories, it would seem to justify a survey of the field involved.

So far as research has revealed, this case is the first in which a court of last resort has decided that a woman's dress is a "dangerous instrumentality", within the general principles of law laid down in *MacPherson v. Buick Motor Company*. The Court of Appeals in *Noone v. Perlberg*, by its unanimous affirmation of the unanimous decision of the Appellate Division reinstating a unanimous verdict which had been set aside by the trial justice held, in substance and effect, that it was a question for the jury whether, as expert testimony indicated, the net overskirt of an evening gown had been "sized" with a solution of nitro-cellulose and, if so, whether it had become an instrumentality dangerous to life and limb. In short, whether the fact that, the first time it was worn, it burst into an explosive flame which seriously injured the wearer, rendered the manufacturer of the gown liable in damages was a question for the jury.

This particular field of the law is intriguing because it shows a marked variation in the development of the theories involved, over thousands of years. It is a striking illustration of the impact of developments in the social and economic world upon the course of judicial decisions.

In the early days of Roman civilization, the process of buying and selling related almost exclusively to objects not manufactured, such as farm animals and slaves, which were bought and sold in the market-place. Where the object of

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4 The New York Sun, July 15, 1944, p. 6.
the sale was affected by a hidden defect, the question arose as to whether the seller or the buyer should bear the loss and, apparently, where the defect was hidden or concealed, Roman jurisprudence gradually developed a responsibility on the part of the seller.\(^7\) The parties involved were, of course, only the seller and the buyer.

In the early days of the English common law, some five hundred years ago, the sale of manufactured goods became the subject of court consideration as to liabilities as between buyer and seller. Bread and drink, when sold by a purveyor—for the most part the maker—if possessing defects which caused physical injury to the buyer, were held to render the seller liable to the buyer who had suffered physical injury as a result. Even where there was no evidence to support a claim that the seller had, in substance or effect, stated to the buyer, “I guarantee (or warrant) that this food or drink is fit for human consumption,” the courts, apparently expressing community opinion, held the maker or purveyor liable for the injury suffered. Possibly the influence of guild organizations had a material part in bringing about this development. This liability was enforced on a tort basis, in an action on the case.\(^8\)

Then, over the years, the development of the individualistic theory of the Yankee trader, as applied to such sales, brought about the gradual adoption of the rule embodied in the maxim, “caveat emptor”—on the basis that, in dealings in the market-place, the buyer was under a responsibility to determine for himself and at his own risk whether the article sold was what it purported to be. The courts, departing from the early theory of an implied representation by the seller as to the quality of the product—which they deemed brought it within one of their tort forms of action—apparently became confused by the theory that a warranty was involved and that that had to be brought within the form of a contract action and there seemed no satisfactory evidence to indicate any such meeting of the minds of the seller and

\(^7\) Hunter, Roman Law (4th ed. 1903) 492-502.
\(^8\) Ames, History of Assumpsit (1888) 2 Harv. L. Rev. 1, 53; Williston, Sales (2d ed. 1924) §§ 195, 196.
the ultimate user as would justify holding the seller liable.\(^9\)
Here, also, only the immediate parties to the sale were involved.

A century or more ago, only a few years after the new republic had begun to make its own law, the Empire State
developed a new theory, as volume manufacturing became
more general, that the manufacturer who endangered the life
or limb of one who purchased his product from an intermedi-
deate dealer and suffered injury as a result of the negligent
composition of a drug, which was represented to be harmless
but contained active poison, was responsible for the damage
which had been suffered by an ultimate purchaser with whom
he had no contractual relations.\(^10\)

This necessitated some ingenious intellectual gymnastics
which transferred such a case from the old contract pigeon-
hole into the tort pigeonhole on a basis of misrepresentation.
The warranty, whether express or implied, which had re-
sulted in cataloguing the liability as contractual, was
changed to place it, more or less on the original basis, in
the field of negligence. *Thomas v. Winchester*\(^10\) caused the
common law courts in many states to adopt a similar re-
adjustment of the theory of liability.

Even in the days of comparatively simple living, in the
eighties, when a contracting painter, whose employees were
painting a building, hired another contractor to build a
scaffold, and the scaffold was constructed of defective wood,
which defect caused it to break when in use by the painter's
employee, the fall resulting in his suffering severe physical
injuries, the court found a way to hold the maker liable.
Obviously, there was no contractual relationship between
the maker of the scaffold and the employee of the contract-
ing painter, who was injured by its defective structure.\(^11\)
The basis for this decision, as later interpreted by Judge
Cardozo, was that the contractor knew that the scaffold
would be a most dangerous trap if improperly constructed

\(^9\) Wright v. Hart, 18 Wend. 449 (N. Y. 1837); Sweet v. Colgate, 20 Johns.
196 (N. Y. 1822); Seixas v. Woods, 2 Caines 48 (N. Y. Sup. Ct. 1804); Stuart
v. Wilkins, 1 Doug. 18 (K. B. 1778).
\(^10\) Thomas v. Winchester, 6 N. Y. 397 (2 Seld. 1852).
\(^10a\) Ibid.
and also knew that workmen were to use it. This was held to create in him a duty, regardless of contract, to build it with care.\textsuperscript{12}

Then came the machinery age, mass production, and numerous intervening transactions between the manufacturer and the ultimate user of the product. Restaurants, instead of making their coffee in coffee pots, bought great urns, for quantity production, and these urns when in use developed heavy pressure strains. When such a coffee urn exploded under the strain because of a defect in its construction and inflicted severe physical injury upon an employee of the purchaser from the manufacturer, the New York court again found that the principle originally proclaimed in \textit{Thonus v. Winchester} \textsuperscript{12a} applied, because of the inherently dangerous qualities of the urn and the likelihood of exactly such an accident as happened. In that case, the manufacturer had sold the urn to a jobber who sold it to a corporation which employed the plaintiff, and there was obviously no contractual relation between the parties—yet, because of the inherently dangerous character, the injured person was held entitled to recover for his injuries.\textsuperscript{13}

As Judge Cardozo almost naively suggests, in discussing this case some years later, "it may be that \textit{Devlin v. Smith} and \textit{Statler v. Ray Mfg. Co.} have extended the rule of \textit{Thonus v. Winchester}! He continues, "If so, this court is committed to the extension." Not only was the court committed to the earlier extension, but it thereupon committed itself to an "all-out" extension, in addition!\textsuperscript{14}

Then, too, came new customs and new inventions. Speeding through the country-side, the death-dealing automobile, composed of parts made by scores of different manufacturers and assembled by the maker of the finished product into a complete machine, produced a situation which obviously caused imminent danger to life and limb—not only of the purchaser or owner but of the guest or of the member of the general public who was unfortunate enough to feel the

\textsuperscript{12} MacPherson v. Buick Motor Co., \textit{supra} note 5, at 386.

\textsuperscript{12a} \textit{Supra} note 10.


\textsuperscript{14} \textit{Supra} note 5.
impact of some portion of the destructive machine which, because of some defect in manufacture, shot off from the completed mechanism while it was in motion and caused serious physical injury to the innocent by-stander.15

Again, the court had to find a basis for the liability of the original assembler of the parts, manufactured by others, including a wheel which contained dangerous defects which the assembler might and therefore should have discovered, to the car owner, who was injured by its collapse. Clearly, no contract liability could cover this case, and yet, equally obviously, it was unfair to the general public, including the purchaser of the completed machine, that such dangerous defects could be permitted to cause injury to innocent purchasers, guests, or by-standers without creating a liability, and the adroit mind of Cardozo furnished the solution in the trail-blazing opinion of the *MacPherson* case.

This rule has been applied in cases involving an almost countless variety of products which have been held to render manufacturers liable to those ultimately injured—persons who may never have heard of the original manufacturer. Numerous collections of authorities in the case books16 have attempted rough classifications and have listed scores—nay, hundreds—of cases including those in which foreign particles have mysteriously intruded themselves in the process of manufacture of bread, cake, and especially soft drinks. Law Review articles covering different aspects of these developments would fill a bulky volume—or two!17

15 Supra note 5.
Still, in the absence of any clearly controlling authority, one could not well be surprised that a justice at trial term would find it difficult to declare an evening gown a "dangerous instrumentality". Nevertheless, only a few years before, in a case which apparently attracted little notice, the Court of Appeals had held by a bare majority that a child's shoe, with a defect in the lining which caused a chafing which broke the skin on the child's toe and started an infection which killed the child, constituted an imminently dangerous instrumentality. As an aside, it may be noted as an unusual feature in the presentation of plaintiffs' cases that in this development of the "plaintiff's law", which, in the last quarter century, has taken the place of the "defendant's law", which had long governed such matters, the insurance companies, usually defendants, have been responsible in a number of cases for the establishment of claims against defendants in favor of plaintiffs, to whose rights the insurance companies have become subrogated. Two unusual cases which have, apparently, extended the doctrine of MacPherson against Buick Motor Company, were prosecuted by insurance companies. In one, the claim for damage was not for personal injuries to the individual who suffered burns as a result of an explosion, but a claim for the damage to a building, which was consumed by a fire which resulted from the explosion. The insurance company, which paid the loss on the burning of a


19 As significant evidence of this development see The Insurance Response to a Shifting Caveat by Mary Coate Houtz in the Report of Proceedings of the American Bar Ass'n, Section of Insurance Law, Sept., 1944, pp. 296-308.
barn and silo, succeeded in holding liable for the amount of the loss the manufacturer of a paint solution which was being used to cover the inner walls of the silo, when the fumes from the paint came into contact with the open flame of an ordinary lantern and a fire resulted which caused the loss which the insurance company paid.\textsuperscript{20}

Similarly, although the loss in this case resulted from an eye injury to an individual, the insurer, in \textit{Commissioners v. City Chemical Co.},\textsuperscript{21} obtained a decision in support of its claim against the manufacturer of a chemical, which, apparently, was mislabeled; the bottle containing the fluid, which could not be identified because it was consumed in the flash, exploded when tapped by a worker.

Perhaps the most unusual application of this expanding theory was that which held a railroad company liable for having blocked a road-crossing over railroad tracks, on which a farmer was driving a pair of horses pulling an iron roller, which, being forced off from the roadway, came into contact with the rails, causing such a clanking, as the roller scraped against the rails, that it startled the horses and caused them to run away, throwing off the driver and inflicting severe damage to him. In other words, the action of the railroad company in permitting its freight-train to partially block the crossing made the road-crossing a "dangerous instrumentality"!\textsuperscript{22}

A survey of the hundreds of cases in the highest courts and intermediate appellate courts throughout the country reveals scores of unique applications of this newly developed doctrine. Possibly the most striking of all was the decision by the U. S. Circuit Court of Appeals in the Second Circuit in a case in which a bottle filled with water was held to be a dangerous instrumentality, when it was—no doubt innocently enough—mislabeled "kerosene". The contents of the bottle were used—as the court found had been the intention of the donor thereof—in the conduct of some chemical experiments. The water in the bottle was poured upon a substance

\textsuperscript{20} \textit{Genesee, etc. Ass'n v. Sonneborn}, 263 N. Y. 463, 189 N. E. 551 (1934).
\textsuperscript{21} \textit{Commissioners of Ins. v. City Chemical Co.}, 290 N. Y. 64, 48 N. E. (2d) 262 (1943).
\textsuperscript{22} \textit{Dandino v. N. Y. Central}, 273 N. Y. 111, 6 N. E. (2d) 397 (1937).
which, when mixed with kerosene, formed a harmless combination but which exploded when water was applied to it. Therefore, the water, harmless in itself, became a "dangerous instrumentality" when used as kerosene, as might have been foreseen.\textsuperscript{23}

Out of all of this welter of authorities, what basic principle can be derived to become the foundation of a rationalized theory to be applied to such situations as may hereafter develop? Must we be confronted by the artificial intellectual creation of an implied obligation creating a contractual right, the benefit of which can be claimed by one suffering injury under a wide application of Lawrence against Fox?\textsuperscript{24} Must we create an imaginary agreement on the part of the manufacturer to pay to one injured by the manufactured product who uses it as it had been intended it should be used and suffers damage as a result, the contractual right being transferred from person to person until the injured party was the final recipient thereof? Or shall we hark back to the condition in the early stages of tort law, which many of us studied in the kindergarten grade at law school, the old squib case?\textsuperscript{25} The law laid down there held that where one started in motion a dangerous instrumentality which, when passed from hand to hand, finally reached an innocent by-stander who was injured thereby, the one who set the dangerous instrumentality in motion became liable to anyone, no matter how far down the line, who was injured as a result of the passing on of the dangerous instrumentality.

Isn't it time that the courts simplified their intellectual processes in dealing with such situations and clearly stated as the basis for holding the creator of the danger liable the mere fact that he had launched into the world a dangerous instrument which finally caused damage, whether to life, limb, or property?\textsuperscript{26}

Take, for instance, the case at bar. A manufacturer of

\textsuperscript{23}Pease v. Sinclair Oil Co., 104 F. (2d) 183 (C. C. A. 2d, 1939).
\textsuperscript{24}Lawrence v. Fox, 20 N. Y. 268 (1859).
evening gowns buys, presumably, thousands of yards of glazed net—"sized" with some substance of which he is, presumably, entirely ignorant. It proves to have been, as a result of the sizing, an explosive substance which, when touched by the lighted coal of a cigar or cigarette or the flame of a match, would ignite in a blinding flash of flame. In order to hold him liable, must we say that he knew or "should have known" of the dangerous qualities of the substance? Should we not rather come down to first principles and say the manufacturer launched upon the public, as did the man who threw the squib, a dangerous instrumentality, which, whether he realized it or not, when it followed a reasonably forseeable course, resulted in cruel injuries to the innocent purchaser or wearer of the gown or equally innocent bystanders? Must we say that this is not a situation in which res ipsa loquitur is applicable and then apply the basic principle of res ipsa loquitur, concealed under a mass of verbiage—wrapped up in presumptions, expressed in obligations of implied contracts which no one ever conceived existed? May we not hope that when opportunity is afforded, our courts will firmly grasp a machete or a pruning-knife and clear away the undergrowth or cut down the bramble-bushes and leave the view clear and the explanation of the liability simple and straightforward?

Meanwhile, we shall have to do our best, in the application and, when necessary, expansion of the doctrine that a maker is liable when he launches upon an unsuspecting public an instrumentality which, when used in such a manner as was either intended or might normally have been foreseen, develops into something inherently dangerous to human life and limb and, incidentally, in many cases to property, if the manufacturer knew that the article was capable of becoming under such circumstances "inherently dangerous"—or "should have known", however ignorantly and bona fide he may have acted.

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