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## Products Liability--Delegation of Duties by Manufactures for Inherently Dangerous Products

Paul R. Rice  
*West Virginia University College of Law*

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to insist on such a clause,<sup>56</sup> the management lawyer should bargain for as broad a prerogative clause as possible.

*Louis Sweetland Southworth, II*

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**Products Liability—Delegation of Duties by Manufacturers of  
Inherently Dangerous Products**

*P*, the purchaser and user of a hot water heater, manufactured by *D<sub>1</sub>*, instituted an action against *D<sub>1</sub>* and *D<sub>2</sub>*, the contractor who installed the hot water heater, for the damages arising from its explosion. When sold, the water heater was accompanied by installation instructions which specified that a combination temperature and pressure valve must be used on the hot water line. These instructions were not followed. The contractor instead followed the common practice of the plumbing industry and installed only pressure valves, resulting in the explosion. The lower court dismissed the suit as to *D<sub>2</sub>* and found against *D<sub>1</sub>* and then both *P* and *D<sub>1</sub>* appealed. *Held*, judgment against *D<sub>1</sub>* reversed. The water heater was not in a defective condition or unreasonably dangerous to the user when it left the manufacturer, and, in addition, the water heater was substantially changed when used by *P* from the condition in which it was sold. Because *D<sub>2</sub>* failed to install the correct temperature relief valve he was negligent and this negligence became the sole proximate cause of the explosion. *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966).

This case raises a vital problem existing today in the field of product liability, i.e., to what extent can a manufacturer delegate his duty to preserve the safety of the consuming public through (1) inspecting his product, (2) warning as to the safe use of his product or (3) installing additional and necessary safety devices, and by delegating this responsibility be relieved of liability, when the product itself is inherently or imminently dangerous?<sup>1</sup>

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<sup>56</sup> *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

<sup>1</sup> For the purposes of this article it is assumed that privity of contract is not a requirement for the manufacturer to be held liable. However, West Virginia would still recognize the manufacturer's liability since it supports the exception of imminently dangerous products to the privity rule. *General Motors Corp. v. Johnson*, 137 F.2d 320 (4th Cir. 1943) and *Peters v. Johnson, Jackson & Co.*, 50 W. Va. 644, 41 S.E. 190 (1901).

The first type of case involving the delegation of the duty to inspect the product, for the most part, arises in the appliance and automobile industries.<sup>2</sup> These cases have consistently held that this duty is non-delegable.<sup>3</sup> The Restatement of Torts provides that one's failure to inspect, which if done could have prevented the injury, "does not however, relieve from liability the manufacturer to whose negligence the dangerous condition is due."<sup>4</sup>

A leading example is *Vandermark v. Ford Motor Co.*<sup>5</sup> in which the manufacturer had delegated the final steps in checking the products to its authorized dealer who neglected to adjust the brakes, resulting in the injury to the purchaser. The court said, "since Ford, as the manufacturer of the completed product, cannot delegate its duty to have its cars delivered to the ultimate purchaser free from dangerous defects, it cannot escape liability on the ground that the defect in Vandermark's car may have been caused by something one of its authorized dealers did or failed to do."<sup>6</sup> This case was cited by the dissenting opinion in the principal case, (after the dissenting judge found that the water heater was not reasonably safe for the intended use), to support the contention that the manufacturer had a duty to install the safety device and that this duty as non-delegable.

Two approaches have been suggested in determining the automobile manufacturer's liability: (1) the manufacturer warrants that the inherently dangerous products is reasonably safe for use when it leaves the dealer's service department, or (2) it warrants that the automobile was reasonably suitable for delivery to the dealer under the accepted standards of the industry.<sup>7</sup>

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<sup>2</sup> The automobile has generally been held to be imminently dangerous, i.e., a product not dangerous in itself but dangerous if negligently made. *Elliott v. General Motors Corp.*, 296 F.2d 125 (7th Cir. 1961) and *Griffith v. Chevrolet Motor Div.*, 105 Ga. App. 588, 125 S.E.2d 525 (1962), as opposed to inherently dangerous, i.e., dangerous by its very nature, *General Bronze Corp. v. Kostopulos*, 203 Va. 66, 122 S.E.2d 548 (1961).

<sup>3</sup> *Alexander v. Nash-Kelvinator Corp.*, 261 F.2d 187 (2d Cir. 1958), *Pierce v. Ford Motor Co.*, 190 F.2d 910 (4th Cir. 1951) and *Birdsong v. General Motors Corp.*, 99 F.Supp. 163 (E.D. Pa. 1951).

<sup>4</sup> RESTATEMENT (SECOND), TORTS § 396, comment b (1965).

<sup>5</sup> 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896, (1964).

<sup>6</sup> *Id.* at 261. For a further discussion with citations to cases involving other products see 1 FRUMER & FRIEDMAN, PRODUCT LIABILITY § 11.04 (2) (1966).

<sup>7</sup> *Miller, Henningsen and the Pre-Delivery Inspection and Conditioning Schedule*, 16 RUTGERS L. REV. 559, 564-565 (1962). This article discusses the case of *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1961), the successor to the celebrated case of *MacPherson v. Buick Motor*

The first approach is justifiable on either of two grounds. First, the court might consider the delegation of this duty to inspect as analogous to a subcontract for a part of the completed product and apply the general rule set forth in *Ford Motor Co. v. Mathis*<sup>8</sup> and *Boeing Airplane Co. v. Brown*.<sup>9</sup> This rule is that the negligence of the supplier of component parts imposes liability on the manufacturer as if the manufacturer had produced the part himself. Secondly, the court might consider this delegation as it would the delegation of any work which, without special precautions, is certain to be attended with injurious consequences. The rule of law in this situation is set forth in the case of *Law v. Phillips*<sup>10</sup> which involved the problem of subcontracting a dangerous excavating job. The court held that an employer who orders work to be performed which is intrinsically dangerous in character or which is likely to cause injury if proper care is not taken must see that necessary precautions are taken to prevent injury, and liability cannot be escaped for the negligent performance of such work by delegating it to an independent contractor.

The second type of cases deal with the delegability of the manufacturer's duty to warn as to the safe use of his product.<sup>11</sup> This

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Co., 217 N.Y. 382, 111 N.E. 1050 (1916), and applies the rule of liability laid down in the former case, that privity of contract is not necessary for warranty liability (because it is imposed by law, not assumed by agreement), to a hypothetical situation similar to our first line of cases. For a thorough discussion of the topic of strict liability see Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

<sup>8</sup> 322 F.2d 267 (5th Cir. 1963).

<sup>9</sup> 291 F.2d 310 (9th Cir. 1961).

<sup>10</sup> 136 W. Va. 761, 68 S.E.2d 452 (1951).

<sup>11</sup> It must be noted that when one produces an inherently dangerous product, *i.e.*, a product dangerous in itself, which requires instructions as to its use, either because of danger which is latent or because of its very nature, *Tomae v. A. P. DeSanno & Son, Inc.*, 209 F.2d 544 (3d Cir. 1954); *Martin v. Bengue Inc.*, 25 N.J. 359, 136 A.2d 626 (1957), mere instructions as to use are likely to be insufficient to relieve the manufacturer's duty to the public. Instructions for use, which merely tell how to use the product, saying nothing about the danger of foreseeable misuses do not necessarily satisfy the duty to warn, *McLaughlin v. Mine Safety Appliances Co.*, 11 N.Y.2d 62, 226 N.Y.S.2d 407, 181 N.E.2d 430 (1962) and *McClanahan v. California Spray-Chemical Corp.*, 194 Va. 842, 75 S.E.2d 712 (1953). For a discussion of the duty to warn "in use" as well as giving directions "for use" see Dillard and Hart, *Product Liability: Directions for Use and the Duty to Warn*, 4 VA. L. REV. 145 (1955). The extent to which this rule is applied was expressed in *Tampa Drug Co. v. Wait*, 103 So. 2d 603 (Fla. 1958), where the court said, "implicit in the duty to warn is the duty to warn with a degree of intensity that would cause a reasonable man to exercise for his own safety the caution commensurate with the potential danger." *Id.* at 609.

duty, like the duty to inspect, is probably not delegable because of the nature of the product. The Restatement of Torts supports this contention by providing that:

The manufacturer of a chattel which he knows or has reason to know to be, or to be likely to be dangerous, for use is subject to the liability of a supplier of chattels with such knowledge.<sup>12</sup>

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier would expect to use the chattel . . . if the supplier . . . (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.<sup>13</sup>

The comment following the latter section points out that when the degree of danger is great the manufacturer or supplier cannot rely on a third person to give the necessary warnings. If the third person fails to give to those whom the supplier would expect to use the product the warnings requested, the manufacturer or supplier will be liable, since the degree of caution taken would not be commensurate with the magnitude of the risk involved.

The case of *Clement v. Crosby & Co.*<sup>14</sup> applied this rule where the retailer, having full knowledge of the product's dangerous propensities, sold stove polish manufactured by the defendant but did not warn the customer. The court, in holding that the manufacturer was liable for injuries resulting from the combustion of the polish, said, "it would be no defense to the manufacturer, even if the retailer had full knowledge of the dangerous nature of the article, and sold it without warning."<sup>15</sup> More recent cases in accord with this holding are *Farley v. Standard Pyroxoloid Corp.*<sup>16</sup> and *Martin v. Bengue, Inc.*<sup>17</sup> both of which held that the manufacturer of inherently dangerous products should foresee that their dealer might fail to disclose the dangerous characteristics of the product and so must be liable in event of such happening.

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<sup>12</sup> RESTATEMENT (SECOND), TORTS § 394 (1965).

<sup>13</sup> *Id.* at § 388.

<sup>14</sup> 148 Mich. 293, 111 N.W. 745 (1907).

<sup>15</sup> *Id.* at 295.

<sup>16</sup> 271 Mass. 230, 171 N.E. 639 (1930).

<sup>17</sup> 25 N.J. 359, 136 A.2d 626 (1957).

In conjunction with a discussion of this problem of the manufacturer delegating his duty to warn to the dealer, it is necessary to mention the additional problem of the necessity of warnings to remote users by a manufacturer. The authors of one article<sup>18</sup> suggest that if a supplier or manufacturer to a remote user gives an adequate warning to his immediate vendee, he should be relieved of liability unless he knows: (a) that the vendee will probably not pass on the warning, (b) the probability of harm is extra-ordinary, and (c) the actual user would not appreciate a usual warning whether given by the manufacturer or the supplier.

In the case of *Foster v. Ford Motor Co.*<sup>19</sup> a tractor which was manufactured by the defendant and driven by the owner's employee tipped over backwards when attempts were made to extricate it after becoming mired. The court held that the manufacturer was not liable for failing to give the employee notice of the danger since adequate instructions had been given previously to the employer. The court stated that "the manufacturer who puts out an article with notice to the purchaser of its limitations, restrictions, or defects is not liable to third persons injured thereby . . . ."<sup>20</sup>

In the third type of case, involving the delegation of the duty to install additional devices to preserve the safety of the consuming public, some trouble might arise in initially establishing a duty owed by the manufacturer. Obviously, without a duty owed there is no problem of delegation. So, this necessitates an initial determination of what the product in question is conceived to be. A product can be defined either as an article which is able to achieve an end result, i.e., a hot water heater which will heat water, or an article which, in light of its function, is immediately ready to safely perform that function. If the former definition is adopted there would be no duty imposed on the manufacturer in this third type of case, whereas, if the latter definition is adopted, a duty to install the safety device would arise. In the principal case, if we consider the combination temperature and pressure valve as part of the product, due to its absolute necessity, then the duty to install the valve arises, for without it the product would obviously be

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<sup>18</sup> Baylor & Gruit, *Liability for Negligent Design of Inert Products: The Duty to Warn*, A.B.A. SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW 222 (1965).

<sup>19</sup> 139 Wash. 341, 246 Pac. 945 (1926).

<sup>20</sup> *Id.* at 348.

defective. Even if the safety device is considered a part of the installation process and not part of the product per se, a duty arises to install the safety device when it is foreseeable that the exact accessory might not be installed (possibly because the common installation practice is otherwise) and the dangerousness of the consequences in such case is excessive.

It is suggested that the duty in this third type of case can be delegated but only when the consumer is adequately warned concerning the consequences in case of faulty installation and is adequately instructed as to the proper method of installation or use. This view is supported by the principal case and a case quite similar to it, *Schipper v. Levitt & Sons, Inc.*<sup>21</sup> In that case the manufacturer of a hot water heater was not liable to a third person who suffered injuries because of the faulty installation of the water heater since the contractor who purchased it did not follow the accompanying directions. The court said:

[T]he defect alleged by the plaintiffs arose not from the heating unit as such but from the later installation which did not include any mixing valve or other tempering device at the boiler. [The manufacturer] had furnished suitable installation instructions which 'strongly recommended that a mixing valve be installed between the hot and cold domestic water lines.' [The contractor] deliberately disregarded [the manufacturer's] recommendation and decided upon its own design and installation . . . . It is evident . . . that neither Levitt nor anyone else placed any reliance on [the manufacturer's] judgment or skill . . .; that being so there would appear to be no sound bases for invoking principles of implied warranty or strict liability against [the manufacturer].<sup>22</sup>

Other than the fact that the manufacturer in the *Schipper* case more strongly recommended the installation of the safety device (which could have some bearing on whether adequate warning was given) the cases seem to stand for the proposition that a manufacturer's duty to the consuming public to make his product additionally safe for use by the installation of safety devices can be delegated to another if adequate warnings to the consumer are given.

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<sup>21</sup> 44 N.J. 70, 207 A.2d 314 (1965).

<sup>22</sup> *Id.* at 97.

It appears that the manufacturer of inherently dangerous products has a duty to protect the public from foreseeable injuries due to the very nature of the product, the purposes for which the product will be used or the necessity of additional safety devices upon installation. This duty to warn, instruct or inspect is not delegable to an intermediary party, but apparently the duty to make one's product more safe by the installation of safety devices is delegable through proper warnings and instructions to the consumer.

*Paul R. Rice*

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### Torts—Discarding the Rule of Imputed Negligence in Automobile Cases

*P*, while riding in an automobile driven by his servant within the scope of employment, was injured when his automobile was struck by another vehicle driven by *D*'s servant. *P*'s servant was contributorily negligent. *D* contended that the negligence of *P*'s servant should be imputed to *P*. Judgment in the lower court was in favor of *D*. *Held*, reversed. The negligence of a servant involved in an automobile accident in the scope of his employment should not be imputed to his master, who was riding with him at the time, so as to bar the master's right of recovery against a negligent third party. *Weber v. Stokley Van Camp, Inc.*, 144 N.W.2d 540 (Minn. 1966).

This Minnesota decision represents a rejection of a widely, if not universally, accepted principle that the negligence of a servant will be imputed to his master in automobile cases when the master would be vicariously liable.<sup>1</sup> The theory of imputed negligence is said to have its origin<sup>2</sup> in an old English case<sup>3</sup> in which the negligence of an omnibus driver was imputed to a passenger who was struck and injured by another vehicle upon alighting from the omnibus. The omnibus driver was negligent in permitting the passenger to disembark in the middle of the street instead of at the curb as was proper. In imputing his negligence to the passenger, the court reasoned that the passenger was so *identified* with the driver that she must be precluded from recovering against the negligent driver of the other vehicle.

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<sup>1</sup> *E.g.*, *Hightower v. Landrum*, 109 Ga. App. 510, 136 S.E.2d 425 (1964); *Divita v. Atlantic Trucking Co.*, 129 W. Va. 264, 40 S.E. 324 (1946).

<sup>2</sup> Lessler, *THE PROPOSED DISCARD OF THE DOCTRINE OF IMPUTED CONTRIBUTORY NEGLIGENCE*, 20 *Fordham L. Rev.* 156 (1951).

<sup>3</sup> *Thorogood v. Bryan*, 8 C.B. 115 Eng. Rep. 452 (1849).