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No. 94732-5

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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MARGARET RUBLEE, Individually and as Personal Representative of  
the Estate of VERNON D. RUBLEE,

Plaintiff-Petitioner,

vs.

PFIZER, INC.,

Defendant-Respondent.

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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On Behalf of  
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for Justice Foundation

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the proper interpretation and application of Washington common law strict product liability.

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

The facts are drawn from the briefs of the parties and the Court of Appeals decision. *See Rublee v. Carrier Corp.*, 199 Wn. App. 364, 398 P.3d 1247, *review granted*, 189 Wn.2d 1023 (2017); Rublee's Pet. for Rev. at 2-7; Pfizer's Ans. to Pet. for Rev. at 4-11; Rublee's Supp. Br. at 2-7; Pfizer's Supp. Br. at 3-5.

Vernon Rublee died of mesothelioma in 2015. Rublee had been a machinist at Puget Sound Naval Shipyard (PSNS) from 1965 to 1980, which required him to work around equipment coated with refractories (insulation cement containing asbestos). When refractories were reapplied, insulation cement was poured into containers and mixed, creating a dust that lingered and exposed workers to asbestos. PSNS workers used two refractory products, both manufactured by Quigley Company Inc. (Quigley). These products contained asbestos until the early 1970s when they were replaced with asbestos-free products.

Pfizer acquired Quigley as a wholly owned subsidiary in 1968. Quigley filed for bankruptcy in 2004, after more than 160,000 workers sued for injuries caused by asbestos. In 2013, a federal bankruptcy court approved a reorganization plan that created an asbestos injury trust to compensate claimants. The court enjoined all parties from suing Quigley for asbestos-related injuries, and from bringing asbestos-related claims against Pfizer based on its ownership, management, or control of Quigley. The injunction does not bar claimants from bringing claims based on the theory that Pfizer is liable as an “apparent manufacturer” under *Restatement (Second)* § 400 (1965). *See In re Quigley Co., Inc.*, 676 F.3d 45, 62 (2d Cir. 2012).

Rublee brought suit against Pfizer as an “apparent manufacturer” under *Restatement (Second)* § 400. Pfizer moved for summary judgment. Pfizer submitted evidence that it claimed shows that Pfizer had nothing to do with the manufacture of the refractories, and that the product purchasers knew that Quigley was the sole manufacturer. Rublee countered with evidence that the estate claimed shows Pfizer’s involvement in the manufacture and marketing of the refractories and the PSNS workers’ belief that Pfizer was involved in the product’s manufacture. The trial court granted summary judgment, and the Court of Appeals granted discretionary review on the issue of apparent manufacturer liability.

The Court of Appeals assumed the Washington Supreme Court would apply § 400. 199 Wn. App. at 371. The appellate court considered what test should be applied for apparent manufacturer liability, observing

that other jurisdictions have applied three tests: objective reliance, actual reliance, and “enterprise liability.” The Court of Appeals did not choose which test to apply, however, finding that the plaintiff could not create a genuine issue of material fact as to whether Pfizer was an “apparent manufacturer” of the refractories under any of the three liability tests. *Id.*

The court found that while the evidence showed that Pfizer and Quigley had a corporate relationship, no reasonable purchaser would infer that Pfizer was an actual manufacturer. *See id.* at 375. As to the workers’ statements, the court stated workers’ testimony has no relevance to determining what a reasonable purchaser would understand, and, in any event, none of the workers said that they took any particular action based on seeing Pfizer’s name on the products. *See id.* The court held that the plaintiff’s evidence did not create a fact question about objective reliance. *See id.* at 377. Regarding the subjective reliance test, the court held that the plaintiff’s evidence did not create a fact question, because no testimony showed that a purchaser actually relied on Pfizer’s name when the products were purchased, or showed that a worker relied on Pfizer’s name in deciding whether to use or work around the products. *See id.* at 378. Finally, the court held that under the “enterprise liability” test the evidence did not create an issue of fact as to whether Pfizer participated substantially in the design, manufacture or distribution of Quigley’s products. *See id.* at 381. The Court of Appeals summarized: “On this record, any liability Pfizer incurred would stem not from representing itself as the dangerous products’ manufacturer

but from owning the company that did manufacture and sell the products.”  
*Id.* at 382. The court affirmed the summary judgment dismissal of Rublee’s  
claim. *See id.* at 383.

Rublee’s petition for review was granted by this Court.

### III. ISSUES PRESENTED

1. Whether the “apparent manufacturer” doctrine set forth in *Restatement (Second) of Torts* § 400 (1965) applies to a product liability claim that arose before the 1981 effective date of the Washington Product Liability Act?
2. If § 400 is applicable, whether consumer reliance is a required element for apparent manufacturer liability of an entity that affixes its trademark to a product manufactured by another?
3. If § 400 is applicable and reliance by a consumer is a required element, whether the Court should apply the “objective reliance” test from the viewpoint of an ordinary product user?
4. Whether § 400 apparent manufacturer liability is limited to sellers and others in the chain of distribution?

### IV. SUMMARY OF ARGUMENT

Prior to the enactment of the Washington Product Liability Act (WPLA) in 1981, this Court adopted *Restatement (Second) of Torts* § 402A (1965), applying strict product liability to manufacturers and others in the chain of distribution of unreasonably unsafe products. The adoption of strict product liability reflects public policy principles that include placing the burden of injuries caused by unsafe products upon those who market them and providing the maximum of protection for the ultimate user of the product. These principles support the adoption of apparent manufacturer liability under *Restatement (Second) of Torts* § 400.

Section 400 provides that an entity that affixes its trade name or trademark to a product manufactured by another “puts out” that product as its own and has the same liability as the manufacturer. The entity can avoid liability by clearly indicating on the product that it has nothing to do with the manufacture of the product. While an entity that places its trademark on a product may cause a product user to rely upon the reputation of that entity, neither the text of § 400 nor the principles underlying Washington common law strict product liability support a requirement that a plaintiff prove reliance in order to establish apparent manufacturer liability.

If the Court concludes § 400 requires proof of reliance, it should hold that requirement is met when either a reasonable product purchaser or user would have relied upon the reputation or assurances of quality of the trademarking entity in purchasing or using the product. Reliance by a product user is consistent with the text of § 400 and the principle that the end user of a product is the consumer, who is to be accorded maximum protection under Washington common law strict product liability.

Finally, § 400 and its comments do not limit apparent manufacturer liability to entities in the chain of product distribution, and limiting its liability to those in the chain of distribution is unwarranted by the principles underlying Washington common law strict product liability. Similar to entities in the chain of distribution, licensors that trademark products play an important role in bringing products to the market, for which they derive economic benefit, and they should bear the burden of injuries caused by

unreasonably unsafe trademarked products.

## V. ARGUMENT

### A. Brief Overview Of The Policies Underlying Washington Common Law Strict Product Liability.

Because Rublee was exposed to asbestos before the 1981 effective date of the Washington Product Liability Act, Ch. 7.72 RCW (WPLA), strict liability under the common law applies. *See Simonetta v Viad Corp.*, 165 Wn.2d 341, 348, 197 P.3d 127 (2008). This Court adopted § 402A of the *Restatement (Second) of Torts* applying strict product liability as to manufacturers in *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 531-32, 452 P.2d 729 (1969). The Court extended strict liability beyond manufacturers to all others in the chain of distribution in *Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 149, 542 P.2d 774 (1975). The Court has since recognized that *Tabert* reflected a “broad interpretation of section 402A.” *See Zamora v. Mobil Oil*, 104 Wn.2d 199, 206, 704 P.2d 584 (1985). Strict product liability is retroactively applied in asbestos litigation where exposure occurred prior to this Court’s adoption of § 402A. *See Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 284 n.20, 208 P.3d 1292 (2009).

In *Ulmer*, the Court recounted earlier Washington product liability cases which were based upon a “common law implied warranty” grounded in tort, rather than contract. *See Ulmer*, 75 Wn.2d at 525-28. This court-created warranty did not require privity between the parties or reliance by the consumer. *See id.* at 529. The Court concluded that § 402A was in accord with these implied warranty cases, and adopted it as the law in Washington.

*See id.* at 531-32. The Court quoted from comment m of § 402A:

The rule stated in this Section does not require any reliance on the part of the consumer upon the reputation, skill, or judgment of the seller who is to be held liable, nor any representation or undertaking on the part of that seller. The seller is strictly liable although, as is frequently the case, the consumer does not even know who he is at the time of consumption.

*Id.* at 531.

In *Tabert*, the Court held that § 402A liability is imposed if a product is “unsafe to an extent beyond that which would be reasonably contemplated by the ordinary consumer.” 86 Wn.2d at 154. Extending liability to distributors and wholesale or retail dealers, the Court noted that the reasons supporting strict product liability for manufacturers have equal force in the case of dealers in the chain of distribution, which are “to justify giving the consumer the maximum of protection, and requiring the dealer to argue out with the manufacturer any questions as to their respective liability.” *Id.* at 149 (quoting W. Prosser, *Law of Torts* § 100, at 665 (4<sup>th</sup> ed. 1971)).<sup>1</sup>

This Court has quoted § 402A comment c as setting forth the policies underlying the imposition of strict liability:

[T]he seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it ... the public has the right to and does expect ... that reputable sellers will stand behind their goods ... public policy demands that the burden of

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<sup>1</sup> The Court also cited *Torts – Strict Products Liability For Retailers? – Ulmer v. Ford Motor Company*, 45 Wash. L. Rev. 431 (1970), as setting forth and analyzing policy considerations that support extending § 402A liability to distributors and sellers. 86 Wn.2d at 148. In that article, the author noted that “[t]he ultimate purpose of strict products liability is to relieve consumers of the burden of losses resulting from defective products.” 45 Wash. L. Rev. at 439 (brackets added).

accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and ... the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

*Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 392, 198 P.3d 493 (2008); *Simonetta*, 165 Wn.2d at 363 n.8 (brackets added). *See also Martin v. Abbott Laboratories*, 102 Wn.2d 581, 604, 689 P.2d 368 (1984) (it is better to have manufacturers and distributors share the cost of injuries than “to place the burden solely on the innocent plaintiff”); *Bombardi v. Pochel’s Appliance*, 9 Wn. App. 797, 806, 515 P.2d 540 (1973), *review denied*, 83 Wn.2d 1009 (1974) (“the purpose of such liability is to ensure that the costs of injuries resulting from defective products are borne by the makers of the products who put them in the channels of trade ... rather than by the injured persons who ordinarily are powerless to protect themselves”).

In *Zamora v. Mobil Oil*, *supra*, this Court again reviewed the development and policies underlying Washington’s adoption of § 402A:

The primary policy justification recognized by this court for the extension of strict liability to all sellers in the chain of distribution is provision of the “maximum of protection” to the consumer. The sellers are then required to argue among themselves any questions as to their respective liability.... That policy rationale is as applicable to sellers who never handle or control the product as it is to those sellers who do possess or control the product. In either case, consumer protection is the ultimate factor considered by this court.... [T]he *degree* of a seller’s participation in the marketing process is less important to our decision than the public protection consideration where, as here, a seller has had *some* identifiable role in placing a defective product on the market.

104 Wn.2d at 206-07 (brackets added).

The end user of a product is the consumer who is accorded “maximum protection” under Washington’s common law strict product liability. *See Seay v. Chrysler Corp.*, 93 Wn.2d 319, 324, 609 P.2d 1382 (1980) (the “ultimate user” of a defective product is the “appropriate beneficiary of the doctrine of strict liability”); *see also Spellmeyer v. Weyerhaeuser Corp.*, 14 Wn. App. 642, 646, 544 P.2d 107 (1975), *review denied*, 87 Wn.2d 1003 (1976) (“[t]he thrust of section 402A is... to protect the ‘ultimate user or consumer’ of the product[;] [i]mplicit recognition of this principle runs throughout the *Tabert* opinion, where ... the Supreme Court returned again and again to ‘the reasonable expectations of *the ordinary consumer*’”) (brackets added; citation omitted).

**B. Policies Underlying Washington Common Law Strict Product Liability Support The Adoption Of *Restatement (Second) of Torts* § 400.**

*Restatement (Second) of Torts* § 400 states:

Selling as Own Product Chattel Made by Another

One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.

This case presents an issue of first impression regarding the adoption of § 400 apparent manufacturer liability in Washington.<sup>2</sup> *See Rublee*, 199 Wn. App. at 371. The Court of Appeals noted that the majority of

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<sup>2</sup> The WPLA incorporated apparent manufacturer liability by defining "manufacturer" to include "a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer." RCW 7.72.010(2).

jurisdictions that have considered § 400 have adopted it, and that the United States District Court for the Western District of Washington has twice concluded that the Washington Supreme Court would adopt § 400. *See id.* (citing *Sprague v. Pfizer, Inc.*, 2015 WL 144330 (W.D. Wash. Jan. 12, 2015) and *Turner v. Lockheed Shipbuilding Co.*, 2013 WL 7144096 (W.D. Wash. Dec. 13, 2013)). The Court of Appeals noted that the Supreme Court has adopted other sections of the *Restatement (Second)*, and assumed, “[f]or purposes of this appeal,” the Supreme Court would adopt § 400. 199 Wn. App. at 371 (brackets added).

Earlier Washington cases have discussed apparent manufacturer liability. In *Seattle-First Nat’l Bank v. Volkswagen of America, Inc.*, 11 Wn. App. 929, 525 P.2d 286 (1974), *aff’d sub nom. Seattle-First Nat’l Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975), the court quoted Prosser: “There is no dispute that the strict liability applies to the manufacturer of the product... as well as one who vouches for manufacturer [sic] by another by selling the product as his own.” 11 Wn. App. at 933 (citing W. Prosser, *Law of Torts* § 100, at 664-65 (4th ed. 1971)). In *Kasey v. Suburban Gas Heat of Kennewick, Inc.*, 60 Wn.2d 468, 374 P.2d 549 (1962), a gas explosion case decided before § 402A was adopted in *Ulmer*, this Court held that a dealer that sold under its own name propane gas manufactured by others became legally responsible as a manufacturer. 60 Wn.2d at 471-72.

In *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 237 A.2d 593 (1968), the Supreme Court of Pennsylvania identified the reasons for extending liability

to an apparent manufacturer under § 400: “(a) the name and the trademark of the sponsor, plus the reputation of the sponsor, constitute ‘an assurance to the user of the quality of the product’ (Comment d, Section 400) and (b) ‘reliance (by the user) upon a belief that (the sponsor) has required (the product) to be made properly for him’ (Comment d, Section 400).” 237 A.2d at 599. *See also Brandimarti v. Caterpillar Tractor Co.*, 364 Pa. Super. 26, 527 A.2d 134, 140 (1987), *allocatur denied*, 539 A.2d 810 (1988) (“[t]he Restatement (Second) of Torts § 400 was drafted in recognition of the fact that where one’s name appears on a product ‘the actor’s reputation is an assurance to the user of the quality of the product’” (quoting § 400 comment d; brackets added)).

In *Connelly v. Uniroyal, Inc.*, 75 Ill. 2d 393, 389 N.E.2d 155 (1979), *cert. denied*, 444 U.S. 1060 (1980), the Illinois Supreme Court explained its reason for imposing § 400 liability: “[a] licensor is an integral part of the marketing enterprise, and its participation in the profits reaped by placing a defective product in the stream of commerce... presents the same public policy reasons for the applicability of strict liability which supported the imposition of such liability on wholesalers, retailers and lessors.” 389 N.E.2d at 163 (brackets added).

In Washington, the primary policy justification for the extension of strict liability to distributors and wholesale and retail sellers is the provision of “maximum of protection” to the ultimate user of the product. *See Zamora*, 104 Wn.2d at 206. That same policy reason supports the extension of § 402A

strict product liability to an “apparent manufacturer” under *Restatement (Second)* § 400.

**C. This Court Should Not Construe § 400 Apparent Manufacturer Liability To Require Proof Of Reliance Because Such A Requirement Is Unsupported By The Text Of The Restatement And Is Inconsistent With The Principles Underlying Washington Common Law Strict Product Liability.**

*Restatement (Second)* § 400 states, “[o]ne who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer” (brackets added). Examination of § 400 and its comments demonstrate that while reliance by a product user appears to be the *rationale* for the doctrine, nothing in that Section suggests that a plaintiff is required to prove reliance in order to show that an entity “put out” as its own product a chattel manufactured by another. Comment d to § 400 is the section that examines when an entity “puts out” as its own product a chattel manufactured by another. The first section of comment d describes two different conclusions that product users may be likely to draw when an entity affixes its trademark to a product, but does not purport to determine *how* a plaintiff must prove what constitutes “putting out” a product:

The actor puts out a chattel as his own product in two types of cases. The first is where the actor appears to be the manufacturer of the chattel. The second is where the chattel appears to have been made particularly for the actor. In the first type of case the actor frequently causes the chattel to be used in reliance upon his care in making it; in the second, he frequently causes the chattel to be used in reliance upon a belief that he has required it to be made properly for him and that the actor’s reputation is an assurance to the user of the quality of the product.

Comment d then goes on to explain that an entity “puts out a chattel

as his own product” by affixing a trademark to a product:

Thus, one puts out a chattel as his own product when he puts it out under his name or affixes to it his trade name or trademark. When such identification is referred to on the label as an indication of the quality or wholesomeness of the chattel, there is an added emphasis that the user can rely upon the reputation of the person so identified.

Finally, comment d describes how an entity may remove itself from the reach of § 400 by clearly indicating to prospective consumers that it has nothing to do with manufacturing or other oversight to ensure quality:

On the other hand, where it is clear that the actor’s only connection with the chattel is that of a distributor of it (for example, as a wholesale or retail seller), he does not put it out as his own product and the rule stated in this section is inapplicable... The mere fact that the goods are marked with such additional words as “made for” the seller, or describe him as a distributor, particularly in the absence of a clear and distinctive designation of the real manufacturer or packer, is not sufficient to make inapplicable the rule stated in this Section... However, where the real manufacturer or packer is clearly and accurately identified on the label or other markings on the goods, and it is also clearly stated that another who is also named has nothing to do with the goods except to distribute or sell them, the latter does not put out such goods as his own. That the goods are not the product of him who puts them out may also be indicated clearly in other ways.

In sum, the language of comment d speaks in terms of how an entity that puts a trade name or trademark on a product manufactured by another “puts out” that product as its own, and how the entity can avoid apparent manufacturer liability by clearly marking its lack of involvement with the product and identifying the real manufacturer. Section 400 and its comments do not state or imply that a plaintiff is required to prove reliance in order to show that an entity “puts out” as his own a product manufactured by

another.<sup>3</sup> There is no binding Washington precedent for the application of § 400, and the Supreme Court can follow the language of comment d to hold that a product user is not required to prove reliance to show apparent manufacturer liability. *See Taylor v. Intuitive Surgical, Inc.*, 187 Wn.2d 743, 764, 389 P.3d 517 (2017).

The apparent manufacturer derives economic benefit from the product bearing its trade name or trademark being placed in the stream of commerce, and putting its trade name or trademark on the product is a part of the marketing of that product, whether or not the apparent manufacturer is a distributor or seller. *See Connelly*, 389 N.E.2d at 163. These reasons, combined with Washington's paramount policy to provide the "maximum of protection" to the consumer, justify following the language of § 400 comment d to extend strict product liability to an apparent manufacturer without requiring the product user to prove reliance.<sup>4</sup>

**D. If The Court Requires Proof Of Reliance Under § 400, The Objective Reliance Test From The Viewpoint Of The End User Of The Defective Product Comports With Policies Underlying Washington Common Law Strict Product Liability.**

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<sup>3</sup> In *Forry v. Gulf Oil Corp.*, *supra*, the "dissenting" opinion agreed with the "majority" that Restatement (Second) § 400 should be adopted as the law of Pennsylvania, but stated that neither § 400 nor the comments permit a defense of non-reliance. 237 A.2d at 601-02 (Roberts, J. dissenting). The opinion denominated as the majority did not, in fact, represent the views of a majority of the Pennsylvania Supreme Court. *See id.* at 601 n.1. The "majority" opinion included one Justice concurring and one Justice concurring in the result. *See id.* at 593. The dissenting opinion included three Justices. *See id.* at 601-02.

<sup>4</sup> In *Kasey v. Suburban Gas Heat of Kennewick, Inc.*, *supra*, a dealer that sold under its own name propane gas manufactured by others argued that a warranty action should have been dismissed because the plaintiff never relied on the dealer's skill and judgment in making the purchase. The Court held "[t]he act of purchase and use of a product manufactured for that use is evidence of reliance on the skill and judgment of the manufacturer; and, in the absence of evidence to the contrary, meets the requirement of reliance." 60 Wn.2d at 472 (brackets added).

In the event the Supreme Court holds reliance is a necessary element of § 400 apparent manufacturer liability, the Court should adopt an objective reliance test, *i.e.*, a plaintiff must show that a reasonable product consumer would have relied upon the alleged apparent manufacturer’s reputation or assurances of quality in purchasing or using the product. Of the three tests used to determine “apparent manufacturer” liability – objective reliance, actual reliance, and enterprise liability – objective reliance has been adopted by the majority of other jurisdictions. *See Rublee*, 199 Wn. App. at 371 (citing *Stein v Pfizer, Inc.*, 228 Md. App. 72, 137 A.3d 279, *cert. denied*, 146 A.3d 476 (2016)).<sup>5</sup>

Washington’s pre-WPLA law focused upon the expectations and understandings of the “ordinary consumer,” and this focus is consistent with adopting an objective reliance test for apparent manufacturer liability. *See, e.g., Tabert*, 86 Wn.2d at 154 (liability is imposed under *Restatement (Second)* § 402A if a product is unsafe to an extent beyond that which would be reasonably contemplated by the ordinary consumer). Pfizer does not appear to contest the application of the objective reliance test. *See Pfizer Supp. Br.* at 9.

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<sup>5</sup> The “enterprise liability” test does not focus upon consumer reliance, but instead requires that the defendant applied its trademark on a product and participated in the design, manufacture or distribution of the product. *Rublee*, 199 Wn. App. at 378-79. While liability under § 400 certainly may apply to an entity participating in the design, manufacture or distribution of the product, nothing in the language of § 400 requires that level of involvement. Since § 402A already provides for strict liability of entities participating in the design, manufacture or distribution of product, this test for apparent manufacturer liability would appear to add nothing to existing product liability law. The “enterprise liability” test is not an appropriate test to determine the applicability of apparent manufacturer liability, but rather is a limitation on the apparent manufacturer liability that is not warranted by § 400 and should not be applied.

The Court of Appeals held that the objective reliance test should be applied from the viewpoint of the purchaser. *See Rublee*, 199 Wn. App. at 372. The court held that the test is whether a sophisticated industrial entity, such as PSNS, would have relied upon a label or advertising materials to conclude that Pfizer manufactured the refractories and to purchase the products based on that reliance. *See id.* at 372, 376-77.

Washington product liability cases, however, focus concern on liability for injury to the *end user* of a product, rather than solely considering the expectations or reliance of a purchaser. *See, e.g., Mazetti v. Armour & Co.*, 75 Wash. 622, 629-30, 135 P. 633 (1913) (manufacturer of food products is liable to any person injured by the consumption of contaminated products); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 462-63, 12 P.2d 409 (1932) (manufacturer who made express representations in its advertising was liable to the injured consumer although there was no privity); *Bock v. Truck & Tractor, Inc.*, 18 Wn.2d 458, 467, 139 P.2d 706 (1943) (“a manufacturer may be held liable, not only to his immediate vendee, but also to third persons, for damages resulting from noxious, dangerous, or defective articles of merchandise which are unsafe for the purposes to which they ordinarily would be put by the consumer or user of them, or by the person who expectantly would come in contact with them”); *Brewer v. Oriard Powder Co.*, 66 Wn.2d 187, 190-91, 401 P.2d 844 (1965) (manufacturer of dynamite impliedly warranted to the employee of the purchaser that the product was fit for its intended use); *Terhune v. A. H. Robins Co.*, 90 Wn.2d

9, 12, 577 P.2d 975 (1978) (a product may be considered unreasonably dangerous if it is placed in the hands of the ultimate consumer unaccompanied by adequate warnings); *Seay*, 93 Wn.2d at 324 (the “ultimate user” of a defective product is the “appropriate beneficiary of the doctrine of strict liability”); *Baughn v. Honda Motor Co.*, 107 Wn.2d 127, 139-40, 727 P.2d 655 (1986) (a product warning must be sufficient to catch the attention of persons expected to use the product).

Similarly, if a consumer is required to prove reliance to establish § 400 apparent manufacturer liability, this requirement should be deemed met when reliance by the end user is established. Comment d sets forth the reasons for extending § 400 liability to an apparent manufacturer: the name or trademark causes the product “to be *used* in reliance upon his care in making it”; or, the name or trademark causes the product “to be *used* in reliance upon a belief that he has required it to be made properly for him” (italics added). In either case, the apparent manufacturer’s reputation “is an assurance to the *user* of the quality of the product.” *See* § 400 comment d (italics added). The Section extends liability based upon the effect of the conduct of the apparent manufacturer upon a product user, rather than a purchaser.<sup>6</sup>

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<sup>6</sup> The inadequacy of focusing solely on the reliance of a product purchaser is illustrated by the discussion regarding the “learned intermediary” rule in *Ruiz-Guzman v. Amvac Chem. Corp.*, 141 Wn.2d 493, 508-09, 7 P.3d 795 (2000). The Court noted that in *Terhune v. A.H. Robins Co.*, *supra*, it approved the rule that a manufacturer satisfies its duty to warn of dangers involved in the use of unavoidably unsafe medical products by providing adequate warning to a prescribing physician. The manufacturer may assume the physician will exercise informed judgment in the best interest of his or her patient. In contrast, in *Ruiz-Guzman*, the Court noted it may not be safe to assume that a commercial grower purchasing a pesticide will independently evaluate the risk to farmworkers using the product. 141

**E. § 400 Apparent Manufacturer Liability Is Not Limited To Sellers And Others “In The Chain Of Distribution.”**

Pfizer argues that the apparent manufacturer doctrine applies only to entities in the chain of distribution. Pfizer Supp. Br. at 18-20.<sup>7</sup> Pfizer states that § 400 applies only to one who “puts out” a product, which means “anyone who supplies it to others.” Pfizer Supp. Br. at 19 (citing § 400 comment a). More complete quotes from the Section and comment provide that it applies to “[o]ne who puts out as his own product a chattel manufactured by another,” and “[t]he words ‘one who puts out a chattel’ *include* anyone who supplies it to others” (emphasis added; brackets added). Comment d clarifies that “one puts out a chattel as his own product when he puts it out under his name or affixes to it his trade name or trademark.”

Similar arguments were proposed by the defendants who placed their trade names on products manufactured by another in *Connelly v. Uniroyal Inc.*, *supra*, and *Brandimarti v. Caterpillar Tractor Co.*, *supra*. In *Connelly*, the Illinois Supreme Court held “[t]he fact that the defendant may not have been a link in the chain of distribution is wholly irrelevant, for as the court, referring to a seller, contractor or supplier, said... ‘Lack of privity of contract not being a defense in a tort action against the manufacturer, it is not a defense in an action against any of these parties.’” 389 N.E.2d at 163 (citation omitted; brackets added). In *Brandimarti*, the Court found that

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Wn.2d at 508-09. Similarly, it should not be assumed that a purchaser such as PSNS, with knowledge that Pfizer was not the manufacturer of products containing asbestos, would pass that knowledge onto its workers, who were induced by a trademark to believe Pfizer manufactured the product.

<sup>7</sup> The Court of Appeals did not decide this issue. *Rublee*, 199 Wn. App. at 382.

although Caterpillar was not in the chain of distribution of the product, it allowed the use of its name on the product, and could expect purchasers to rely on the reputation associated with its name, and held § 400 applied. *See* 527 A.2d at 139-40.<sup>8</sup>

The “general rule” in Washington is that a person or entity must be in “the chain of distribution” for common law strict product liability and § 402A to apply. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 410-11, 282 P.3d 1069 (2012); *Braaten*, 165 Wn.2d at 385. However, this is a *general* rule, and has not always been applied. For instance, the rule is not applied to a manufacturer who incorporates a defective component into its finished product (referred to as “assembler liability”). *Macias*, 175 Wn.2d at 411; *Braaten*, 165 Wn.2d at 385 n.7. The Court explained the reason for excepting assembler liability from the “general rule”:

[T]he justification for assembler’s liability “is that the assembler derives an economic benefit from the sale of the product incorporating the defective component and has the ability to test and inspect the component when it is within the assembler’s possession, and by including the component in its finished product represents to the consumer and ultimate user that the component is safe.”

*Macias*, 175 Wn.2d at 411 (quoting *Braaten*, 165 Wn.2d at 385 n.7).

Like the assembler, the entity that affixes its trademark to a product manufactured by another derives an economic benefit from the sale of the product, should be able to exert pressure on the manufacturer to ensure the product is safe, and by including its trademark or trade name on the finished

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<sup>8</sup> Pfizer cites authorities holding that § 400 is only applicable to entities in the chain of distribution. *See* Pfizer Supp. Br. at 18-20; Pfizer App. Br. at 40-46.

product suggests a level of quality to the consumer and ultimate user. *See Restatement (Second) § 400, comment d; Connelly, supra*, 389 N.E.2d at 411. As one scholar has noted:

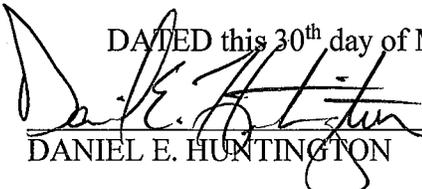
[I]t is almost anachronistic to require a trademark licensor to be an actual participant in the chain of commerce in order to allocate the costs of injury to the licensor... Strict liability is not attached to the manufacturer because it caused the defect, and the seller is strictly liable despite the fact that it could not have caused the defect; liability attaches to these entities due to the role they play in bringing the product to the market. It would be entirely consistent with these considerations to hold a pure trademark licensor to that same standard of liability.

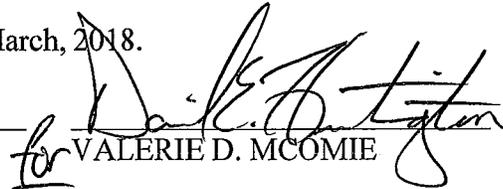
Stephen C. Jarvis, *Pure Confusion: Should Pure Licensors Share the Products Liability of Manufacturers and Sellers of Dangerously Defective Products?* 61 DePaul L. Rev. 697, 715-16 (2012). Participation in the chain of distribution is irrelevant to the application of § 400.<sup>9</sup>

## VI. CONCLUSION

The Court should adopt the analysis advanced in this brief in the course of resolving the issues on review.

DATED this 30<sup>th</sup> day of March, 2018.

  
DANIEL E. HUNTINGTON

  
for VALERIE D. MCOMIE

On Behalf of WSAJ Foundation

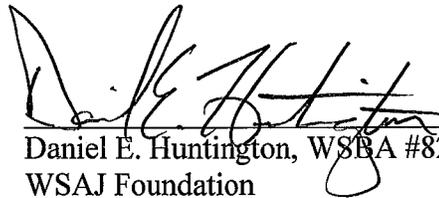
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<sup>9</sup> *Restatement (Third) of Torts: Products Liability* § 14 (1998) does not apply apparent manufacturer liability to trademark licensors. *See* § 14 comment d. Section 14 purports to be "derived" from § 400 of the *Restatement (Second)*. *See* § 14 comment a. A legal commentator discussed § 14: "It is doubtful whether this view accurately restates existing law, given the substantial number of courts that have applied the apparent manufacturer doctrine to non-selling, non-distributing trademark licensors. Indeed, it would be more accurate to say there is a split of authority as to whether the apparent manufacturer doctrine applies to non-selling trademark licensors, and that the new Restatement has chosen to follow a particular line of cases." David J. Franklyn, *The Apparent Manufacturer Doctrine, Trademark Licensors and the Third Restatement of Torts*, 49 Cas. W. Res. L. Rev. 671, 675 & n.15 (1999).

## CERTIFICATE OF SERVICE

I hereby certify that on the 30<sup>th</sup> day of March, 2018, I electronically filed the foregoing document with the Clerk of the Court using the Washington State Appellate Courts Portal which will send notification of such filing to all counsel of record herein.

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# APPENDIX

**Restatement (Second) of Torts § 400 (1965)**

Restatement of the Law - Torts    March 2018 Update  
Restatement (Second) of Torts  
Division Two. Negligence  
Chapter 14. Liability of Persons Supplying Chattels for the Use of Others  
Topic 4. Sellers of Chattels Manufactured  
by Third Persons

§ 400 Selling as Own Product Chattel Made by Another

Comment:

Reporter's Notes

Case Citations - by Jurisdiction

**One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.**

**See Reporter's Notes.**

**Comment:**

*a.* The words "one who puts out a chattel" include anyone who supplies it to others for their own use or for the use of third persons, either by sale or lease or by gift or loan.

*b.* The rules which determine the liability of a manufacturer of a chattel are stated in §§ 394- 398.

*c.* One who puts out as his own product chattels made by others is under a duty to exercise care, proportionate to the danger involved in the use of the chattels if improperly made, to secure the adoption of a proper formula or plan and the use of safe materials and to inspect the chattel when made. But he does not escape liability by so doing. He is liable if, because of some negligence in its fabrication or through lack of proper inspection during the process of manufacture, the article is in a dangerously defective condition which the seller could not discover after it was delivered to him.

*d.* The rule stated in this Section applies only where the actor puts out the chattel as his own product. The actor puts out a chattel as his own product in two types of cases. The first is where the actor appears to be the manufacturer of the chattel. The second is where the chattel appears to have been made particularly for the actor. In the first type of case the actor frequently causes the chattel to be used in reliance upon his care in making it; in the second, he frequently causes the chattel to be used in reliance upon a belief that he has required it to be made properly for him and that the actor's reputation is an assurance to the user of the quality of the product. On the other hand, where it is clear that the actor's only connection with the chattel is that of a distributor of it (for example, as a wholesale or retail seller), he does not put it out as his own product and the rule stated in this section is inapplicable. Thus, one puts out a chattel as his own product when he puts it out under his name or affixes to it his trade name or trademark. When such identification is referred to on the label as an indication of the quality or wholesomeness of the chattel, there is an added emphasis that the user can rely upon the reputation of the person so identified. The mere fact that the goods are marked with such additional words as "made for" the seller, or describe him as a distributor, particularly in the absence of a clear and distinctive designation of the real manufacturer or packer, is not sufficient to make inapplicable the rule stated in this Section. The casual reader of a label is likely to rely upon the featured name, trade name, or trademark, and overlook the qualification of the description of source. So too, the fact that the seller is known to carry on only a retail business

does not prevent him from putting out as his own product a chattel which is marked in such a way as to indicate clearly it is put out as his product. However, where the real manufacturer or packer is clearly and accurately identified on the label or other markings on the goods, and it is also clearly stated that another who is also named has nothing to do with the goods except to distribute or sell them, the latter does not put out such goods as his own. That the goods are not the product of him who puts them out may also be indicated clearly in other ways.

**Illustrations:**

1. A puts out under his own name a floor stain which is manufactured under a secret formula by B, to whom A entrusts the selection of the formula. The stain made under this formula is inflammable, as a competent maker of such articles would have known. Of this both A and B are ignorant, and neither the advertisements nor the directions contain any warning against using it near unguarded lights. C purchases from a retail dealer a supply of this stain and while D, C's wife, is applying it to the floor of the kitchen, C strikes a match to light the gas. An explosion follows, causing harm to D and to E, a friend who is watching D stain the floor. A is subject to liability to D and E.

2. A, a wholesale distributor, sells canned corned beef labeled with A's widely known trademark and also labeled "Packed for A" and "A, distributor". The beef was negligently packed by B and is unwholesome. C buys a can of it from D, a retail grocer, and serves it to her guest, E, who is made ill. A is liable to E.

**Restatement (Second) of Torts § 402A (1965)**

Restatement of the Law - Torts March 2018 Update  
Restatement (Second) of Torts  
Division Two. Negligence  
Chapter 14. Liability of Persons Supplying Chattels for the Use of Others  
Topic 5. Strict Liability

§ 402A Special Liability of Seller of Product for Physical Harm to User or Consumer

Comment:

- (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 thereby caused 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.**

See Reporter's Notes.

**Caveat:**

The Institute expresses no opinion as to whether the rules stated in this Section may not apply

- (1) to harm to persons other than users or consumers;
- (2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or
- (3) to the seller of a component part of a product to be assembled.

**Comment:**

*a.* This Section states a special rule applicable to sellers of products. The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product. The Section is inserted in the Chapter dealing with the negligence liability of suppliers of chattels, for convenience of reference and comparison with other Sections dealing with negligence. The rule stated here is not exclusive, and does not preclude liability based upon the alternative ground of negligence of the seller, where such negligence can be proved.

*b. History.* Since the early days of the common law those engaged in the business of selling food intended for human consumption have been held to a high degree of responsibility for their products. As long ago as 1266 there were enacted special criminal statutes imposing penalties upon victualers, vintners, brewers, butchers, cooks, and other persons who supplied "corrupt" food and drink. In the earlier part of this century this ancient attitude was reflected in a series of decisions in which the courts of a number of states sought to find some method of holding the seller of food liable to the

ultimate consumer even though there was no showing of negligence on the part of the seller. These decisions represented a departure from, and an exception to, the general rule that a supplier of chattels was not liable to third persons in the absence of negligence or privity of contract. In the beginning, these decisions displayed considerable ingenuity in evolving more or less fictitious theories of liability to fit the case. The various devices included an agency of the intermediate dealer or another to purchase for the consumer, or to sell for the seller; a theoretical assignment of the seller's warranty to the intermediate dealer; a third party beneficiary contract; and an implied representation that the food was fit for consumption because it was placed on the market, as well as numerous others. In later years the courts have become more or less agreed upon the theory of a "warranty" from the seller to the consumer, either "running with the goods" by analogy to a covenant running with the land, or made directly to the consumer. Other decisions have indicated that the basis is merely one of strict liability in tort, which is not dependent upon either contract or negligence.

Recent decisions, since 1950, have extended this special rule of strict liability beyond the seller of food for human consumption. The first extension was into the closely analogous cases of other products intended for intimate bodily use, where, for example, as in the case of cosmetics, the application to the body of the consumer is external rather than internal. Beginning in 1958 with a Michigan case involving cinder building blocks, a number of recent decisions have discarded any limitation to intimate association with the body, and have extended the rule of strict liability to cover the sale of any product which, if it should prove to be defective, may be expected to cause physical harm to the consumer or his property.

*c.* On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

*d.* The rule stated in this Section is not limited to the sale of food for human consumption, or other products for intimate bodily use, although it will obviously include them. It extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer. Thus the rule stated applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair, and an insecticide. It applies also to products which, if they are defective, may be expected to and do cause only "physical harm" in the form of damage to the user's land or chattels, as in the case of animal food or a herbicide.

*e.* Normally the rule stated in this Section will be applied to articles which already have undergone some processing before sale, since there is today little in the way of consumer products which will reach the consumer without such processing. The rule is not, however, so limited, and the supplier of poisonous mushrooms which are neither cooked, canned, packaged, nor otherwise treated is subject to the liability here stated.

*f. Business of selling.* The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. Thus the rule applies to the owner of a motion picture theatre who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home.

The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor,

or even sells it to a dealer in used cars, and this even though he is fully aware that the dealer plans to resell it. The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods. This basis is lacking in the case of the ordinary individual who makes the isolated sale, and he is not liable to a third person, or even to his buyer, in the absence of his negligence. An analogy may be found in the provision of the Uniform Sales Act, § 15, which limits the implied warranty of merchantable quality to sellers who deal in such goods; and in the similar limitation of the Uniform Commercial Code, § 2-314, to a seller who is a merchant. This Section is also not intended to apply to sales of the stock of merchants out of the usual course of business, such as execution sales, bankruptcy sales, bulk sales, and the like.

*g. Defective condition.* The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

Safe condition at the time of delivery by the seller will, however, include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner.

*h.* A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger (see Comment *f*), and a product sold without such warning is in a defective condition.

The defective condition may arise not only from harmful ingredients, not characteristic of the product itself either as to presence or quantity, but also from foreign objects contained in the product, from decay or deterioration before sale, or from the way in which the product is prepared or packed. No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole. Where the container is itself dangerous, the product is sold in a defective condition. Thus a carbonated beverage in a bottle which is so weak, or cracked, or jagged at the edges, or bottled under such excessive pressure that it may explode or otherwise cause harm to the person who handles it, is in a defective and dangerous condition. The container cannot logically be separated from the contents when the two are sold as a unit, and the liability stated in this Section arises not only when the consumer drinks the beverage and is poisoned by it, but also when he is injured by the bottle while he is handling it preparatory to consumption.

*i. Unreasonably dangerous.* The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not

unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

*j. Directions or warning.* In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.

Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

*k. Unavoidably unsafe products.* There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

*l. User or consumer.* In order for the rule stated in this Section to apply, it is not necessary that the ultimate user or consumer have acquired the product directly from the seller, although the rule applies equally if he does so. He may have acquired it through one or more intermediate dealers. It is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser. The liability stated is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant.

“Consumers” include not only those who in fact consume the product, but also those who prepare it for consumption; and the housewife who contracts tularemia while cooking rabbits for her husband is included within the rule stated in this Section, as is also the husband who is opening a bottle of beer for his wife to drink. Consumption includes all ultimate uses for which the product is intended, and the customer in a beauty shop to whose hair a permanent wave solution is applied by the shop is a consumer. “User” includes those who are passively enjoying the benefit of the product, as in the

case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.

**Illustration:**

1. A manufactures and packs a can of beans, which he sells to B, a wholesaler. B sells the beans to C, a jobber, who resells it to D, a retail grocer. E buys the can of beans from D, and gives it to F. F serves the beans at lunch to G, his guest. While eating the beans, G breaks a tooth, on a pebble of the size, shape, and color of a bean, which no reasonable inspection could possibly have discovered. There is satisfactory evidence that the pebble was in the can of beans when it was opened. Although there is no negligence on the part of A, B, C, or D, each of them is subject to liability to G. On the other hand E and F, who have not sold the beans, are not liable to G in the absence of some negligence on their part.

*m. "Warranty."* The liability stated in this Section does not rest upon negligence. It is strict liability, similar in its nature to that covered by Chapters 20 and 21. The basis of liability is purely one of tort.

A number of courts, seeking a theoretical basis for the liability, have resorted to a "warranty," either running with the goods sold, by analogy to covenants running with the land, or made directly to the consumer without contract. In some instances this theory has proved to be an unfortunate one. Although warranty was in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach, it has become so identified in practice with a contract of sale between the plaintiff and the defendant that the warranty theory has become something of an obstacle to the recognition of the strict liability where there is no such contract. There is nothing in this Section which would prevent any court from treating the rule stated as a matter of "warranty" to the user or consumer. But if this is done, it should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.

The rule stated in this Section does not require any reliance on the part of the consumer upon the reputation, skill, or judgment of the seller who is to be held liable, nor any representation or undertaking on the part of that seller. The seller is strictly liable although, as is frequently the case, the consumer does not even know who he is at the time of consumption. The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to "buyer" and "seller" in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands. In short, "warranty" must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort.

*n. Contributory negligence.* Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

**Comment on Caveat:**

*o. Injuries to non-users and non-consumers.* Thus far the courts, in applying the rule stated in this Section, have not gone beyond allowing recovery to users and consumers, as those terms are defined in Comment *l*. Casual bystanders, and others who may come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery. There may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded, other than that they do not have the same reasons for expecting such protection as the consumer who buys a marketed product; but the social pressure which has been largely responsible for the development of the rule stated has been a consumers' pressure, and there is not the same demand for the protection of casual strangers. The Institute expresses neither approval nor disapproval of expansion of the rule to permit recovery by such persons.

*p. Further processing or substantial change.* Thus far the decisions applying the rule stated have not gone beyond products which are sold in the condition, or in substantially the same condition, in which they are expected to reach the hands of the ultimate user or consumer. In the absence of decisions providing a clue to the rules which are likely to develop, the Institute has refrained from taking any position as to the possible liability of the seller where the product is expected to, and does, undergo further processing or other substantial change after it leaves his hands and before it reaches those of the ultimate user or consumer.

It seems reasonably clear that the mere fact that the product is to undergo processing, or other substantial change, will not in all cases relieve the seller of liability under the rule stated in this Section. If, for example, raw coffee beans are sold to a buyer who roasts and packs them for sale to the ultimate consumer, it cannot be supposed that the seller will be relieved of all liability when the raw beans are contaminated with arsenic, or some other poison. Likewise the seller of an automobile with a defective steering gear which breaks and injures the driver, can scarcely expect to be relieved of the responsibility by reason of the fact that the car is sold to a dealer who is expected to "service" it, adjust the brakes, mount and inflate the tires, and the like, before it is ready for use. On the other hand, the manufacturer of pig iron, which is capable of a wide variety of uses, is not so likely to be held to strict liability when it turns out to be unsuitable for the child's tricycle into which it is finally made by a remote buyer. The question is essentially one of whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes. No doubt there will be some situations, and some defects, as to which the responsibility will be shifted, and others in which it will not. The existing decisions as yet throw no light upon the questions, and the Institute therefore expresses neither approval nor disapproval of the seller's strict liability in such a case.

*q. Component parts.* The same problem arises in cases of the sale of a component part of a product to be assembled by another, as for example a tire to be placed on a new automobile, a brake cylinder for the same purpose, or an instrument for the panel of an airplane. Again the question arises, whether the responsibility is not shifted to the assembler. It is no doubt to be expected that where there is no change in the component part itself, but it is merely incorporated into something larger, the strict liability will be found to carry through to the ultimate user or consumer. But in the absence of a sufficient number of decisions on the matter to justify a conclusion, the Institute expresses no opinion on the matter.

**RICHTER-WIMBERLEY, P.S.**

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