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Products Liability

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Determining that liability for harm caused by defective products should be resolved without reference to outmoded rules of negligence and attracted by the apparent simplicity of the rule set forth in the Restatement of Torts,[1] the New Mexico Supreme Court in 1972 adopted Section 402A as the rule of strict tort liability to be applied in New Mexico.[2] Presented with the issue of whether plaintiff's negligent conduct could serve as a defense to a products liability action, the Court of Appeals in *Bendorf v. Volkswagenwerk Aktiengesellschaft*[3] has demonstrated that at least on some occasions, fault principles are relevant and that Section 402A's treatment of the issues is incomplete, if not misleading.

Bendorf was injured in a two car collision when his vehicle entered an intersection in violation of the controlling traffic signal. Bendorf filed suit against the manufacturer of the vehicle he was driving, alleging that the cause of the accident was a defective seat mechanism which caused the front seat to jump forward, preventing him from successfully applying the brakes. The manufacturer denied that a defect existed and asserted alternatively that if a defect did exist, it was not causally related to the accident. In addition, defendant alleged that the plaintiff was not exercising reasonable care in the general operation of the car at the time of the accident.

The trial court properly charged the jury that the absence of a defect or of any causal relationship between the defect and the accident or harm would preclude recovery.[4] At the request of the defendant, the court also instructed the jury that if the defendant had proven that the plaintiff was negligent in failing to exercise rea-

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1. Restatement (Second) of Torts § 402A (1965).

2. Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972). The New Mexico Court of Appeals had earlier cited Section 402A with apparent approval in Schrib v. Seidenberg, 80 N.M. 573, 458 P.2d 825 (Ct. App. 1969), and in 1970 the Tenth Circuit affirmed the decision of a Federal District Court judge who concluded that New Mexico would adopt Section 402A. Moomey v. Massey Ferguson, Inc., 429 F.2d 1184 (10th Cir. 1970).

3. Bendorf v. Volkswagenwerk Aktiengesellschaft, 88 N.M. 355, 540 P.2d 835 (Ct. App. 1975), *cert. denied,* 88 N.M. 319, 540 P.2d 249 (1975).

4. "One who sells any product in a *defective condition* unreasonably dangerous . . . is subject to liability for physical harm thereby *caused*. . . ." Restatement (Second) of Torts § 402A (1965) (emphasis added).

sonable care in operating the vehicle at the time of the accident, the jury was to find for the defendant. The jury returned a general verdict for the defendant, and judgment was entered accordingly. The Court of Appeals reversed, all judges agreeing that the trial judge erred in not informing the jury that plaintiff's negligent failure to exercise reasonable care in driving was not a defense unless a causal relationship between the negligence and the accident was established. Because additional issues concerning the scope of defenses to a products liability action would arise at the required new trial, the majority of the Court of Appeals discussed in detail the circumstances under which the plaintiff's negligent conduct could bar his recovery in a products liability action and the formulae under which the jury should be instructed to consider such conduct. Finding "grievous error in analysis of law"[5] in a portion of the majority opinion, Judge Sutin concurred in a separate opinion.

While the text of Section 402A does not address the issue of the extent to which plaintiff's negligent conduct may bar his recovery, accompanying Comment n does provide that:

> 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. . . .[6]

The majority[7] and concurring opinions[8] agreed that Comment n correctly states the law to be applied, thus rejecting one form of contributory negligence as a defense[9] while reintroducing assump-

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5. 88 N.M. at , 540 P.2d at 843 (concurring opinion). Whether Judge Sutin's characterization of the majority opinion is correct is discussed *infra* at note 17.

6. Restatement (Second) of Torts § 402A comment *n*, at 356 (1965).

7. 88 N.M. at , 540 P.2d at 838-839.

8. 88 N.M. at , 540 P.2d at 845.

9. Because there had been no allegation in the pleadings or at the trial that Bendorf had negligently failed to discover the defect, the majority opinion was careful to note the tentative nature of its conclusion: "unless some future fact pattern should demonstrate a contrary necessity, we are inclined to adopt that view set forth in Comment (n). . . ." 88 N.M. at , 540 P.2d at 838. Judge Sutin expressed no reservation at all. 88 N.M. at , 540 P.2d at 845. Given the widespread support for this position found in other jurisdictions, e.g., Ford Motor Co. v. Henderson, 500 S.W.2d 709 (Tex. Civ. App. 1973), *see* Annot., 46 A.L.R.3d 240 (1972), and the Supreme Court's statement that in the field of products liability there is nothing wrong with " 'following the leader' . . . if the leader is going in the right direction," Stang v. Hertz Corp., 83 N.M. 730, 735, 497 P.2d 732, 737 (1972), it seems unlikely that a different result will be found necessary in the future.

tion of risk to New Mexico.[10] Difficulty arose not from the rules expressed in the Comment for the conduct there described but from the fact that as to other forms of misconduct by the plaintiff the Comment is silent. Lacking specific guidance in the Restatement, the court unanimously concluded that additional defenses were available to the defendant who established that plaintiff's misconduct caused the accident or enhanced the injuries he suffered.

The majority concluded that misuse of the product by the plaintiff, though not mentioned in Comment n, may be available as a defense to a strict tort liability action.[11] The court noted that evidence of misuse was admissible to negate the plaintiff's required allegation that a causal relationship existed between the defect and the injury.[12] Thus, while product misuse is not one of the affirmative defenses mentioned in Comment n, it may be raised in the defendant's pleadings by denial of the plaintiff's allegation that a defect existed which caused the complained of injury.[13]

10. In Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971), the Supreme Court eliminated the separate defense of assumption of risk and held that the doctrine should be merged with contributory negligence. The court concluded that while assumption of risk was no longer to have independent existence, conduct which had supported the defense "will be as efficacious as formerly" although "[i]t will . . . henceforth be regarded as contributory negligence and governed by the principles pertaining to that doctrine." *Id.* at , 491 P.2d at 1152. Because Comment n preserves as a defense "the form of contributory negligence which . . . commonly passes under the name of assumption of risk," Restatement (Second) of Torts § 402A Comment *n*, at 356 (1965), Judge Sutin correctly noted that "[a]vailability of this defense does not conflict with New Mexico's abandonment of assumption of risk as a defense apart from contributory negligence," Bendorf v. Volkswagenwerk Aktiengesellschaft, 88 N.M., , 540 P.2d 835, 844 (1975) (concurring opinion).

11. 88 N.M. at , 540 P.2d at 839.

12. *Id.* In his concurring opinion Judge Sutin agreed that "[t]his defense would be proper if it claimed that the defect did not cause the plaintiff to lose control of his vehicle; that the defect was not the proximate cause of the accident; that the sole proximate cause of the collision was the negligent operation of the vehicle." 88 N.M. at , 540 P.2d at 844.

Neither the majority nor the concurring opinions alluded to the fact that the Comments to 402A would permit evidence of plaintiff's misuse of the product to be admitted not only to negate causation, but also to establish that the product was not defective. Comment g defines defective condition as one "not contemplated by the ultimate consumer, which will be unreasonably dangerous to him" and then states that "[t]he 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." Restatement (Second) of Torts, § 402A Comment *g*, at 351 (1965). The following comment states that "a product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling . . . the seller is not liable." Restatement (Second) of Torts § 402A Comment *h* (1965). Thus, evidence that the harm was caused by misuse tends to negate the allegation that the product was in a defective condition, a separate though related position, from that which the majority pursued.

13. 88 N.M. , 540 P.2d at 839-840. Judge Sutin agreed that when misuse is asserted as it was by the defendant in *Bendorf*, "[p]laintiff's misuse, rather than a product defect, becomes the proximate cause of plaintiff's injuries or damages. Thus, defendant can assert

The majority opinion in *Bendorf* equated the allegations that plaintiff failed to keep a proper lookout, to yield the right of way, and to keep his vehicle under proper control with conduct amounting to misuse, and therefore agreed that it was proper to instruct the jury that such misconduct may bar the plaintiff from recovery. However, the trial judge failed to instruct the jury that it was necessary that such misconduct be the cause of the accident. A new trial was ordered because "defendant's defense should only have prevailed if plaintiff's negligent driving had caused the accident and the court's instruction allowed it to prevail regardless of the cause of the accident. . . ."[14] Because the defendant had limited his claim that evidence of misuse was relevant to the assertion that it tended to negage causation, the court declined to consider "one of the most hotly debated issues in products liability litigation today,"[15] whether misuse may bar recovery where the defect and the misuse are concurrent causes of the accident or the harm.

Judge Sutin agreed that misuse of the product by the plaintiff should sometimes bar recovery but because he feared that a general rule recognizing such a defense "would destroy the doctrine of special products liability under Section 402A"[16] he attempted to

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plaintiff's misuse to disprove causation. Strictly speaking, this is part of the denial of plaintiff's case, rather than an affirmative defense." 88 N.M. , 540 P.2d at 845 (concurring opinion).

14. 88 N.M. at , 540 P.2d at 840. Judge Hendley noted that once the trial court erroneously concluded that misuse should be considered as an affirmative defense, it was quite natural, though erroneous, to fail to instruct the jury that the misuse and not the defect must have been the cause of the accident. Since the very nature of an affirmative defense is that "it will bar plaintiff's recovery once plaintiff's right to recover is otherwise established," 88 N.M. at , 540 P.2d at 838, positing misuse as an affirmative defense permits it to serve as a bar to plaintiff's recovery even when the misuse does not negate plaintiff's allegation of causation. 88 N.M. , 540 P.2d at 840. The court suggested that when the case was retried, the trial judge should explain to the jury the necessary relationship of plaintiff's allegation of causation and defendant's assertion of misuse "immediately after the trial court instructs that defendant denies all the plaintiff's claims and before it instructs as to affirmative defenses, if any." *Id.*

15. 88 N.M. at , 540 P.2d at 839. Asserting that the debate was largely confined to "crashworthiness," *e.g.*, Evans v. General Motors Corp., 359 F.2d 822 (7th Cir.), *cert. denied* 385 U.S. 836 (1966), or "second collision" cases, *e.g.*, Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968) (accidents caused by plaintiff's negligence but injuries enhanced by defect), and to cases in which the defect and the plaintiff's misuse concur to cause the harm, *e.g.*, Culpepper v. Volkswagen of America, Inc., 33 Cal. App.3d 510, 109 Cal. Rptr. 110 (Ct. App. 4th Dist. 1973), the court expressed its pleasure that given the facts and the defendant's allegations "in this case we need not enter the quagmire." 88 N.M. at , 540 P.2d at 839.

While Judge Sutin conceded that the majority did not address the issue, he claimed that it should have been considered because it was one of the defendant's theories of the case. 88 N.M. at , 540 P.2d at 843. *See* note 17 *infra.*

16. 88 N.M. at , 540 P.2d at 844 (concurring opinion).

limit the circumstances under which the defense of misuse would be permitted.[17]

When the plaintiff's misconduct is the *sole* proximate cause of the accident, Judge Sutin, in agreement with the majority, would permit the defense of misuse[18] to act as a bar to recovery. Thus, where a defect exists but plays no part in causing the accident or enhancing the injury because the plaintiff's misconduct alone has caused the harm, the defense of misconduct is applicable as a bar to recovery.

When the accident or harm is caused by the concurrence of plaintiff's misconduct and a product defect Judge Sutin would severely limit the availability of the misconduct defense. In such situations plaintiff would normally be precluded from recovery because his negligent conduct is a significant contributing factor in the events leading to his injury, even though the harm was caused in part by the defective product.[19] But to permit the defense of misuse as a matter of course in such cases might well frustrate the policy underlying Section 402A "that the burden of accidental injuries caused by products . . . be placed on those who market them . . . and that the consumer of such products is entitled to the maximum of protection at the hands of . . . those who market the products."[20] Particularly

17. Throughout his opinion, Judge Sutin assumes that the defendant claimed that misuse was always available as a defense even if the misuse did not negate the defect as the cause of the accident: "If we adopted defendant's contention, the jury could believe that [the defect] was a proximate cause of the collision and yet deny plaintiff recovery because he failed to keep a proper lookout." 88 N.M. at , 540 P.2d at 844.

In light of the majority's frequent characterization of the defendant's position in more narrow terms, as where it stated, "We stress that, in the case at bar, defendant's theory of the cases should be stated in terms of causation and not in terms of negligence or contributory negligence," 88 N.M. at , 540 P.2d at 840, it is reasonably certain that Judge Sutin's concurring opinion, whether correct or incorrect, addressed issues the majority declined to discuss, and thus added to, but in no way contradicted the substantive positions taken by the majority.

In view of the defendant-appellee's statement in the introduction of its brief that "in this case, the cause of the accident is a basic contested issue. The defendant's theory of the case is that the accident was caused by the driving conduct of the plaintiff," Brief for the appellee at VI, it would seem that the majority correctly formulated the defendant's position.

18. 88 N.M. at , 540 P.2d at 846.

19. *E.g.*, Johnson v. Primm, 74 N.M. 597, 396 P.2d 426 (1964); *see* Restatement (Second) of Torts, § § 467, 465 (1965).

20. Restatement (Second) of Torts § 402A Comment *c*, at 349-50 (1965). The authors of the most recent work on products liability conclude that there is a general trend in the cases toward narrowing the availability of contributory negligence as a defense "so that, in all situations where the defendant is at least partly responsible for the harm, he will bear the cost as the party best able to do so." Noel and Phillips, Products Liability Cases and Materials 608 (1976). Perhaps the most concise statement of the argument comes from Professor Morris: "consumers can be taught to be more careful if the law penalizes them for imprudence. Fostering careful manufacture is, however, more important than discouraging incautious consumption. Pernicious products should be scrapped in the factory rather than dodged in the home." Morris, Negligence in Tort Law, 53 Va. L. Rev. 899, 909 (1967).

concerned that automobile drivers injured by the combination of a defective product and their own failure to drive in a reasonable manner might be unable to recover because their negligence would be labeled misuse and treated as a defense under the majority's reasoning,[21] Judge Sutin declared that in such cases of concurring causation, only when the misuse was not foreseeable by the defendant-manufacturer should it be a defense.[22] While the issue of whether a particular use is foreseeable is normally to be determined by a jury,[23] Judge Sutin would rule as a matter of law that negligent driving is a foreseeable misuse of a motor vehicle and thus cannot be interposed as a defense to a product liability action even when the negligent driving combines with the product defect to cause the accident.[24]

Judge Sutin's conclusion that misuse of the product is a defense only when it was not foreseeable to the defendant represents a position midway between extremes reached in other jurisdictions. The New York Court of Appeals recently concluded that where plaintiff's negligent misuse of an automobile combined with the existence of a defect in the vehicle to cause the accident, plaintiff could not recover under a theory of strict liability.[25] The New York court did not limit the availability of the defense to cases in which the misuse of the product was not foreseeable to the defendant, but would permit the defense of misuse to bar recovery whenever plaintiff's misconduct was a concurring cause of the accident.[26] In contrast, the Supreme

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21. *But see* note 15 *supra.*

22. 88 N.M. at , 540 P.2d at 845. Judge Sutin cites several cases which support this position. *E.g.*, General Motors Corp. v. Walden, 406 F.2d 606 (10th Cir. 1969) (Arizona law). The distinction between foreseeable and unforeseeable misuse is also made in the Restatement, Restatement (Second) of Torts § 402A Comment *h*, at 351-52 (1965), though the Restatement would merely impose a duty upon the manufacturer to warn of the dangers resulting from foreseeable misuse. The concurring opinion does not consider whether an adequate warning against foreseeable forms of misuse will protect the manufacturer from liability, though at least where such a warning is read and understood by the consumer, presumably there should be no liability because the consumer would be guilty of "that form of contributory negligence [which] commonly passes under the name of assumption of risk," Restatement (Second) of Torts § 402A Comment *n*, at 356 (1965), a defense which Judge Sutin would recognize. 88 N.M. at , 540 P.2d at 845.

23. 88 N.M. at , 540 P.2d at 845. *See, e.g.*, Olsen v. Royal Metals Corp., 392 F.2d 116 (5th Cir. 1968).

24. 88 N.M. at , 540 P.2d at 843. Judge Sutin would thereby favor the plaintiff in "second collision" and "crashworthiness" cases, an issue the majority declined to discuss. Note 15 *supra.*

25. Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622 (1973). New York has not adopted the Restatement formulation of strict tort liability. However, other states which have adopted § 402A have reached the same result. *E.g.*, Enberg v. Ford Motor Co., 205 N.W.2d 104 (So. Dak. 1973). *See generally* Annot., 46 A.L.R.3d 240 (1972).

26. Codling v. Paglia, 32 N.Y.2d 330, , 298 N.E.2d 622, 628-29 (1973).

Court of Alaska[27] has concluded that misuse of a product by the plaintiff which concurs with the existence of a defect to cause harm is never a defense to a strict tort liability action:

> If a product is defective, if the plaintiff is unaware of that defect, and if that defect is the proximate cause of the plaintiff's injury, then the fact the plaintiff's negligent conduct may have concurred with the defect to cause his injury should have no bearing . . . [on liability].[28]

The *Bendorf* case offers only limited guidance to lawyers and judges now attempting to formulate jury instructions in pending cases. Yet, it is a necessary and valuable step in the process by which New Mexico courts will determine the role that plaintiff's negligence is to play in an action brought under Section 402A. The Court of Appeals unanimously adopted the rules set forth in Comment n of the Restatement, and there is no reason to doubt that when the occasion presents itself, the Supreme Court will concur in that determination. On the more difficult issue of the significance of plaintiff's negligent misuse of the product, the Court of Appeals demonstrated the inadequacy of the Restatement and Comment n as a source for a controlling rule. The separate opinions of Judge Hendley and Judge Sutin set forth tentative solutions for consideration. Whether New Mexico ultimately adopts the approach taken in New York, that of the Alaska Supreme Court or the compromise proposed by Judge Sutin will of course only be resolved by the Supreme Court in a decision which will certainly be enriched by this initial attempt of the Court of Appeals to resolve the issue.

27. Bachner v. Pearson, 479 P.2d 319 (Alaska 1970).
28. *Id.* at 329.