TORT LIABILITY OF A MANUFACTURER FOR DEFECTIVE COMPONENTS

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Few manufacturers produce every part of their product. Almost all incorporate one or more components purchased from independent suppliers. Many "manufacturers" are, in truth, little more than assemblers of components that they themselves do not make. This raises the following issue: where there is no contractual relationship with the claimant and no actual or constructive knowledge of any defect on the part of the manufacturer, should the manufacturer be liable for injury arising from a defective component purchased from a reputable supplier? Is a manufacturer, in other words, to be held vicariously liable for the negligence of the component maker? One would think that this issue would arise with some frequency, but in fact there are remarkably few decisions in which the matter has been considered.

1. The Liability of a Manufacturer is Founded in Negligence

There is no shortage of case law authority for the proposition that the standard of care demanded of a manufacturer is the ordinary negligence standard, applicable both to the design and manufacture of its product. In an oft-quoted remark, Schroeder J.A. said: "The standard of care expected of [manufacturers] under our law is the duty to use reasonable care in the circumstances and nothing more."[1] Other similar statements are:

> It was argued that strict liability does not attach to the actions of a manufacturer. Clearly it does not.[2]
>
> As for the responsibility of the defendants Coca-Cola and Domglas in tort, it must be recognized that liability is not absolute; it is still based in negligence . . .[3]

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1. *Phillips v. Ford Motor Co. of Canada Ltd.*, [1971] 2 O.R. 637 at p. 653, 18 D.L.R. (3d) 641 (C.A.).
2. *Nicholson v. John Deere Ltd.* (1986), 58 O.R. (2d) 53 at para. 19, 34 D.L.R. (4th) 542, I.L.R. ¶92-646 (H.C.), affd 68 O.R. (2d) 191*n*, 57 D.L.R. (4th) 639*n* (C.A.).
3. *Brunski v. Dominion Stores Ltd.* (1981), 20 C.C.L.T. 14 at para. 25 (Ont. H.C.).

> The burden of proof in product liability cases still rests with the plaintiff to establish negligence on the balance of probabilities. The law does not impose strict liability.[4]
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> While academics and the Law Reform Commission have long argued that strict liability ought to be part of the tort law of Canada, their recommendations have neither been enacted in Ontario nor adopted by the courts. In fact, in four decisions since 1971, the Ontario Court of Appeal has declined to do so, but rather has preferred to subsume product liability under traditional negligence principles, requiring proof of negligence.[5]
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> Products liability law in the United States incorporates a strict liability principle. But under the products liability law of Canada the plaintiff must prove negligence, as in any other negligence claim.[6]

A manufacturer is in no different position than such other defendants as, for example, a municipality: "The city's duty, after all, is only to exercise reasonable care."[7] That is hardly surprising, given that the modern law of negligence flows from the seminal decision in *M'Alister (Donoghue) v. Stevenson*,[8] which was itself a product liability case. "The *Donoghue* case recognized the right of an ultimate consumer, apart from contract or warranty, to recover for damage sustained to his person or property by reason of the negligence of a manufacturer in marketing a defective article"[9] and "The responsibility of [a manufacturer] in selling a product to reach an unknown ultimate consumer is that expressed in *Donoghue v Stevenson*".[10] While some members of the academic community support the imposition of strict liability,[11] they agree that the liability of manufacturers under current law is based on the ordinary principles of negligence.[12]

4. *Hunt v. Federal Pioneer Ltd.* [1993] O.J. No. 2455 (QL) at para. 10, 43 A.C.W.S. (3d) 494 (Gen. Div.).
5. *Andersen v. St. Jude Medical Inc.,* [2002] O.T.C. 53 at para. 28 (Ont. S.C.).
6. *Viridian Inc. v. Dresser Canada Inc.* (2000), 274 A.R. 28 at para. 275 (Q.B.), affd 216 D.L.R. (4th) 122, [2002] 10 W.W.R. 37, 281 W.A.C. 93 (C.A.).
7. *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259 at para. 17, 63 D.L.R. (4th) 449, [1990] 1 W.W.R. 408.
8. [1932] A.C. 562 (H.L.).
9. *Rivtow Marine Ltd. v. Washington Iron Works,* [1974] S.C.R. 1189 at para. 40, 40 D.L.R. (3d) 530, [1973] 6 W.W.R. 692. See also *Rae v. T. Eaton Co. (Maritimes) Ltd.* (1960), 28 D.L.R. (2d) 522 at para. 44 (N.S.S.C.).
10. *LeBlanc v. Oland Breweries Ltd.* (1994), 142 N.B.R. (2d) 287 at para. 12 (C.A.).
11. Waddams, *Products Liability,* 4th ed. (Toronto: Carswell, 2002), pp. 230-31; Linden and Feldthusen, *Canadian Tort Law,* 8th ed. (Markham: Butterworths, 2006), p. 657; Dean F. Edgell, *Product Liability Law in Canada,* (Markham: Butterworths, 2000), pp. 16 and 61.

2. The Importance of Fault

Liability for loss is generally based on wrongdoing, whether that be in the form of a tort or a breach of contract or otherwise.

> One of the main reasons for shifting a loss to a defendant is that he has been at fault, that he has done some act which should be discouraged. There is then good reason for taking money from the defendant as well as reason for giving it to the plaintiff who has suffered from the fault of the defendant . . . ''[S]ound policy lets losses lie where they fall except where a special reason can be shown for interference'' . . . The imposition of heavy financial burden . . . without fault . . . does not incline one to interfere. It is better that the loss lies where it falls.[13]

A person should be liable "only for his own wrongful acts save in certain exceptional circumstances".[14] "[J]ustice demands liability when someone conducts themselves negligently and another person suffers thereby"[15] and the courts "must not attempt to make our tort law system into a no-fault system".[16]

3. The Normal Standard of Care

The ordinary standard of care required by the law of negligence is summarized in the following statement:[17]

> Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external

12. Waddams, *ibid.,* at pp. 67, 68 and 71; Linden and Feldthusen, *ibid.,* at pp. 600 and 639; Edgell, *ibid.,* at p. 18; Klar, *Tort Law,* 3rd ed. (Toronto: Thomson Carswell, 2003), p. 333; *Winfield and Jolowicz on Tort*, 17th ed. (London: Sweet & Maxwell, 2006), s. 10-6.
13. *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at paras. 34 and 36, 143 D.L.R. (3d) 9, [1983] 3 W.W.R. 97.
14. *Vermont Construction Inc. v. Beatson*, [1977] 1 S.C.R. 758 at para. 22, 67 D.L.R. (3d) 95, 8 N.R. 519. The comment was made in the context of vicarious liability.
15. *University of Regina v. Pettick* (1991), 77 D.L.R. (4th) 615 at para. 62, 90 Sask. R. 241, 6 C.C.L.T. (2d) 1 (Sask. C.A.).
16. *Schulz v. Leeside Developments Ltd.* (1978), 90 D.L.R. (3d) 98 at para. 3, [1978] 5 W.W.R. 620, 6 C.C.L.T. 248 (B.C.C.A.), leave to appeal to S.C.C. refused 90 D.L.R. (3d) 98.
17. *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 28, 168 D.L.R. (4th) 513, [1999] 6 W.W.R. 61.

> indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

It is trite to say that perfection is not the standard,[18] that "no one is bound to act so as to rule out any possibility of an accident",[19] that the standard must be "realistic and reasonable" and the defendant "should not be made an insurer".[20] It is "axiomatic that the question whether there has been negligence in any given case must depend on the particular circumstances of that case"[21] and, as indicated in the passage reproduced above, the factors to be considered include the likelihood and gravity of the foreseeable harm.[22] "[T]he law in all cases exacts a degree of care commensurate with the risk created."[23] That general principle applies equally to manufacturers: "The burden of taking precautions increases as the probability of harm and the severity of the damage threatened increase."[24]

The term "ensure" has, at times, crept into the lexicon of negligence law, as in the statement "[A] person who manufactures goods which he intends to be used or consumed by others, is under a duty to exercise such reasonable care in their manufacture as to ensure that they can be used or consumed in the manner intended without causing physical damage to persons or their property."[25] What is meant, of course, is that the purpose or goal is the avoidance of harm, not that there is an absolute obligation to achieve that goal. The law requires

18. *Pete v. Axworthy* (2005), 258 D.L.R. (4th) 675 at para. 30, [2006] 5 W.W.R. 581, 356 W.A.C. 217 (B.C.C.A.), leave to appeal to S.C.C. refused 260 D.L.R. (4th) vii.
19. *Swift v. MacDougall*, [1976] 1 S.C.R. 240 at para. 12, 10 N.R. 445.
20. *Tacknyk v. Lake of the Woods Clinic*, [1982] O.J. No. 170 (QL) at para. 29 (C.A.).
21. *Smith v. Littlewoods Organisation Ltd.*, [1987] A.C. 241 at p. 249.
22. *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298 at para. 40, 183 D.L.R. (4th) 193, 130 O.A.C. 201; *Crocker v Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186 at para. 24, 51 D.L.R. (4th) 321, 29 O.A.C. 1; *Gramak Ltd. v. O'Connor* (1973), 1 O.R. (2d) 505 at paras. 20-21, 41 D.L.R. (3d) 14 (C.A.).
23. *Dziwenka v. Alberta* , [1972] S.C.R. 419 at para. 36, 25 D.L.R. (3d) 12, [1972] 1 W.W.R. 350, quoting from *Read v. J. Lyons & Co. Ltd.,* [1947] A.C. 156 (H.L.).
24. Linden and Feldthusen, *supra,* footnote 11, at p. 653. See also Edgell, *supra,* footnote 11, at p. 18.
25. *D & F Estates Ltd. v. Church Commissioners for England*, [1989] A.C. 177 at p. 202 (H.L.), quoting from *Junior Books Ltd. v. Veitchi Co. Ltd.*, [1983] 1 A.C. 520 (H.L.). See also *Pacific Lumber & Shipping Co. v. Western Stevedoring Co.*, [1995] B.C.J. No. 866 at para. 29, 55 A.C.W.S. (3d) 221 (S.C.); *Forsyth v. Sikorsky Aircraft Corp.*, [2000] B.C.J. No. 813 at para. 41, 96 A.C.W.S. (3d) 392, 2000 BCSC 642 (S.C.); *Smith v. Littlewoods Organisation*, *supra,* footnote 21, at p. 250.

only that reasonable care be exercised for the attainment of that goal. Subject to certain exceptions discussed below, a manufacturer is no more an insurer of the safety and well-being of the ultimate consumer than is, for example, a common carrier of passengers.[26] To do otherwise would be to impose an "unreasonable burden" on the manufacturer.[27] The standard of care is aptly described in the following remark: "There is a duty, in the absence of any contractual obligation, to take reasonable care not to manufacture and distribute a product that is dangerous. Breach of such a duty can be pursued in negligence . . . by persons who are not in contract."[28]

4. A Higher Standard of Care

Just as a higher standard of care is imposed with respect to a dangerous operation,[29] special care, in some instances almost attaining the level of absolute liability, is required for products that are inherently dangerous,[30] such as the chemical malathion.[31] Whether a product is inherently dangerous is sometimes not an easy question to answer.[32] A rifle, for example, was held to be inherently dangerous not so much because it was a firearm but because the user was not properly instructed regarding the assembly of the locking device.[33] Doubt has been raised whether this special category of products should be maintained when general tort rules are adequate to cope with the fluid nature of the standard of care, and particularly when account is taken of the view that a product not dangerous in itself, but rendered dangerous by negligent construction, is "a wolf in sheep's clothing instead of an obvious wolf" and, if anything, seems the more dangerous of the two.[34]

26. *Webb v. Cassidy* (1907), 27 N.Z.L.R. 489 (S.C.), passenger injured because of accident caused by defective axle purchased from a reputable supplier.
27. *Rothfield v. Manolakos*, *supra,* footnote 7, at para. 16.
28. *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.* (2004), 245 D.L.R. (4th) 650 at para. 90, [2005] 7 W.W.R. 419, 334 W.A.C. 139 (Alta. C.A.), leave to appeal to S.C.C. refused 250 D.L.R. (4th) vii.
29. *Gramak Ltd. v. O'Connor, supra,* footnote 22, at para. 21.
30. *Andersen v. St. Jude Medical Inc., supra,* footnote 5, at para. 24; *Heimler v. Calvert Caterers Ltd.*(1975), 8 O.R. (2d) 1 at para. 4, 56 D.L.R. (3d) 643 (C.A.); *Shandloff v. City Dairy Ltd.*, [1936] O.R. 579 at para. 27 (C.A.); Edgell, *supra,* footnote 11, at p. 17.
31. *Pack v. Warner #5 (County)*(1964), 44 D.L.R. (2d) 215 at para. 24, 46 W.W.R. 422 (Alta. C.A.). Lists of such products are provided by Linden and Feldthusen, *supra,* footnote 11, at pp. 652-53.
32. See *Rae v. T. Eaton Co., supra,* footnote 9, at paras. 20-23.
33. *Ross v. Dunstall* (1921), 62 S.C.R. 393.
34. Linden and Feldthusen, *supra,* footnote 11, at p. 653. See also *Rivtow Marine, supra,* footnote 9, at para. 42.

An "extremely high" standard of care has been imposed for the special category of food products and the food-handling business in general.[35] Given that food is ingested, this might be explained as an example of an inherently dangerous product.

5. Inference, Presumption and Reverse Onus

As in any negligence claim, the facts and circumstances may permit the drawing of an inference of negligence on the part of a manufacturer.[36] The inference "is readily made if the nature of the defect prevents it being disclosed by reasonable examination by the buyer",[37] and where the defect arises in the manufacturing process controlled by the defendant manufacturer, the inference is practically irresistible.[38]

The inference of negligence has also been described as, or perhaps, stated more accurately, has been elevated to,[39] a presumption of negligence resulting in a reversal of the onus of proof.[40] Some authorities refer only to a shift in the onus of proof.[41] The issue then becomes whether a manufacturer's reliance on a reputable

35. *Heimler v. Calvert Caterers, supra,* footnote 30, at para. 4; *Brunski v. Dominion Stores Ltd, supra,* footnote 3, at para. 26; Linden and Feldthusen, *supra,* footnote 11, at pp. 640-41; Edgell, *supra,* footnote 11, at p. 17.
36. *Farro v. Nutone Electrical Ltd.*(1990), 72 O.R. (2d) 637 at paras. 16-20, 68 D.L.R. (4th) 268, 40 O.A.C. 233 (C.A.); *Cohen v. Coca-Cola Ltd.*, [1967] S.C.R. 469 at para. 10, 62 D.L.R. (2d) 285; *LeBlanc v. Oland Breweries Ltd., supra,* footnote 10, at para. 15; Winfield and Jolowicz, *supra,* footnote 12, at s. 10-6.
37. *Smith v. Inglis Ltd.* (1978), 83 D.L.R. (3d) 215 at para. 15, 25 N.B.R. (2d) 38, 3 B.L.R. 153 (C.A.).
38. Waddams, *supra,* footnote 11, at p. 67; *Pacific Lumber & Shipping Co. v. Western Stevedoring Co., supra,* footnote 25, at para. 27; Linden and Feldthusen, *supra,* footnote 11, at p. 640; Klar, *supra,* footnote 12, at p. 336; Edgell, *supra,* footnote 11, at p. 49.
39. In *Viridian Inc. v. Dresser Canada Inc., supra,* footnote 6, the following comment was made at para. 278: "The cases indicate that the trier of fact may draw an inference that the manufacturer was negligent from the fact that a defect exists in the product. It is not put as anything higher than an inference. It is not a presumption of negligence, it does not shift the burden to the defendant to prove no negligence. It is merely an inference which the trier of fact may rely on to reach the conclusion that negligence has been proved." The cases referred to below, however, suggest otherwise.
40. *Zeppa v. Coca-Cola Limited*, [1955] O.R. 855 at pp. 864-65 (C.A.); *Cohen v. Coca-Cola Ltd., supra,* footnote 36, at para. 12; Linden and Feldthusen, *supra,* footnote 11, at pp. 666-67; Edgell, *supra,* footnote 11, at p. 49.
41. *Arendale v. Canada Bread Co.*, [1941] O.W.N. 69 (C.A.); *Farro v. Nutone Electrical Ltd., supra,* footnote 36, at para. 24; *Brunski v. Dominion Stores Ltd. , supra,* footnote 3, at para. 27; Waddams, *supra,* footnote 11, at p. 68.

component supplier is sufficient to rebut the inference or presumption of negligence. For the reasons given hereafter, the answer in most circumstances in our view is "Yes."

6. Strict Liability

Where an injured consumer has purchased the product containing the defective component directly from the manufacturer, the relationship invokes the express or implied warranties under the contract of sale, thereby creating a form of strict liability.[42] Even in the absence of a contractual relationship, strict liability in tort has been adopted in many, if not most, jurisdictions in the United States,[43] but Linden and Feldthusen say that the doctrine "has not so much as tiptoed across the Canadian border".[44]

Consistent with that comment, apart from the special category of food products, there is only one Canadian decision in which strict liability in tort has been expressly adopted, and even there only through an incidental comment.[45] While there have been isolated statements that might be taken as amounting to the imposition of strict liability, when considered in context they are seen to be expressions of the normal rules of negligence including the higher standard of care applicable in certain situations.[46] Examples are:

> The bottler of carbonated beverages owes a duty to furnish containers of sufficient strength to withstand normal distribution and consumer handling.[47]

42. Linden and Feldthusen, *supra,* footnote 11, at pp. 599-600.
43. *Andersen v. St. Jude Medical, supra,* footnote 5, at paras. 20 and 38; *Viridian Inc. v. Dresser Canada, supra,* footnote 6, at para. 275; *Phillips v. Ford Motor Co. , supra,* footnote 1, at p. 653; Waddams, *supra,* footnote 11, at pp. 213-14.
44. *Supra,* footnote 11, at p. 622. At p. 657, they similarly state "this American strict tort liability 'explosion' has not caused so much as a ripple on our placid Canadian waters".
45. *Murphy v. St. Catharines General Hospital*, [1964] 1 O.R. 239 at para. 42, 41 D.L.R. (2d) 697 (H.C.): "I agree that, if there was any negligence on the part of Deseret as to the design or manufacture of this particular needle and catheter — and in this respect, of course, Deseret is responsible for any defect introduced by the producers of the component parts of the instrument — it would probably be liable to the plaintiff."
46. See the comments by Linden and Feldthusen, *supra,* footnote 11, at p. 655 regarding the unique views of Riddell J.A. advocating implied warranties in non-contractual situations.
47. *Cohen v. Coca-Cola Ltd., supra,* footnote 36, at para. 10. The same paragraph ends with the following: "Each case turns upon whether the evidence in that particular case excludes any probable cause of injury except the permissible inference of the defendant's negligence." See also *Hart v.*

> As a manufacturer, Sikorsky owes a duty to consumers of its products to ensure that there are no defects in the manufacture of the product likely to cause injury when used . . .[48]

The justifications for the imposition of strict liability in tort include the reliance by consumers on manufacturers based on the inability of consumers "to bring to bear the volume of information and expertise necessary for them to assess the wide variety of products they must face",[49] "loss distribution and enterprise liability, the basis of liability being that an enterprise involving risk of injury to others ought to pay for their injuries in order to bear its true cost and in order to distribute that cost among all its customers",[50] the views that "the injured consumer, who is protected inadequately by the negligence theory, should be assured compensation by no-fault liability",[51] that manufacturers are better able to spread accident costs either through insurance or through price increases for their products,[52] and that "strict tort liability may deter slipshod working practices which cause accidents".[53] Policy justifications for strict liability can, however, be found for virtually any type of tort claim and there are competing policy justifications for protecting defendants from tort liability in the absence of negligence. Why should claims against manufacturers be different than claims against other alleged wrongdoers whose liability requires proof of negligence? Canadian courts have, in our opinion, sensibly declined to throw overboard the tried and tested rules of negligence law for claims made against manufacturers merely because there are some policy reasons for doing so. Making manufacturers insurers can have far-reaching economic and other consequences that judges are ill equipped to consider.[54] As indicated below, this is a matter for legislation, not for judicial innovation.

Dominion Stores Ltd., [1968] 1 O.R. 775 at paras. 18-19, 67 D.L.R. (2d) 675 (H.C.).

48. *Forsyth v. Sikorsky Aircraft Corp., supra,* footnote 25, at para. 13. At para. 14(d), however, was reference to the need to show that Sikorsky was aware, or reasonably should have been aware, of the defective parts in the helicopter, and at para. 40 it was said that the plaintiffs were required to establish negligence in distributing the failed component.
49. Edgell, *supra,* footnote 11, at p. 16.
50. Waddams, *supra,* footnote 11, at p. 228.
51. Linden and Feldthusen, *supra,* footnote 11, at p. 656.
52. *Ibid.*
53. *Ibid.*
54. For example, there may be products for which manufacturers would be unable to obtain liability insurance coverage, leading to the refusal by the manufacturer to produce and market those products.

7. Defective Components Purchased from Reputable Suppliers

All of the above is prologue to the main focus of this article, namely, whether a manufacturer is liable in tort for injury caused by the failure of its product where that failure was, in turn, due to a defective component purchased from a reputable supplier. There is, of course, no difficulty answering that question when the manufacturer has actual or constructive knowledge of the defective nature of the component — the manufacturer will be found liable under the ordinary principles of negligence law. What if, however, the defect is hidden or otherwise latent?

As liability in negligence requires careless conduct, one of the necessary ingredients for liability is actual or constructive knowledge of the dangerous condition. "One may say in general terms that the existence of a duty must be based upon knowledge of the hazard."[55] The potential for harm can neither be known nor reasonably foreseeable, except as a remote or speculative possibility, where there is no actual or constructive knowledge of danger. A contractor is not liable for injury caused by a latent defect not discoverable by reasonable care;[56] a municipal inspector is not required to discover every latent defect, only those ascertainable through reasonable inspection;[57] a taxi company is liable only for harm caused by defects in the vehicle that should have been discovered by reasonable inspection.[58] Just as the buyer or user of a defective product cannot be blamed for failing to observe a hidden defect,[59] neither should the manufacturer, as a general rule, be blamed for failing to discover it in a purchased component.[60]

On the other hand, merely because the dangerous condition is hidden or otherwise latent does not necessarily insulate the defendant from liability. It is only where the condition would not have been discovered by such inspection as would be reasonable in the circumstances that liability is avoided.[61] Two pertinent comments are:

55. *Smith v. Littlewoods Organisation, supra,* footnote 21, at p. 269, quoting from *Goldman v. Hargrave*, [1967] 1 A.C. 645 (P.C.).
56. *Dominion Chain Co. v. Eastern Construction Co.* (1976), 12 O.R. (2d) 201 at para. 27 (C.A.).
57. *Ingles v. Tutkaluk Construction, supra,* footnote 22, at para. 40.
58. *Fraser v. U-Need-A-Cab Ltd.*(1983), 43 O.R. (2d) 389 at paras. 32-36, 1 D.L.R. (4th) 268, 26 C.C.L.T. 309 (H.C.), affd 50 O.R. (2d) 281, 17 D.L.R. (4th) 574 (C.A.).
59. *Smith v. Inglis Ltd., supra,* footnote 37, at paras. 15-17.
60. In *Brunski v. Dominion Stores, supra,* footnote 3, at para. 28, the manufacturer was held liable when it was aware of the danger inherent in the product.

> A passage has been cited from Charlesworth on Negligence . . .
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> > A manufacturer's duty is not limited to those parts of his product which he makes himself. It extends to component parts, supplied by his sub-manufacturers or others, which he uses in the manufacture of his own products. He must take reasonable care, by inspection or otherwise, to see that those parts can properly be used to put his products in a condition in which it can be safely used or consumed in the contemplated manner by the ultimate user or consumer.
>
> I see no reason to disagree in any way with that statement of the law. The important passage is "He must take reasonable care, by inspection or otherwise, to see that those parts can properly be used."
> But what is reasonable care?[62]
>
> [R]easonable care demands from those handling or distributing goods some measure of inspection to detect defects in the creation of which they may not have had a hand at all. The maker of a beverage, for instance, owes a duty to inspect the bottles he uses, even if this need not be nearly as exacting as the tests for flaws required from the bottle manufacturer, since to demand more would be needlessly wasteful and often impractical.[63]

From an engineering standpoint, a manufacturer has an obligation to see that the various components work together to produce a functioning and apparently safe product.[64] The same obligation is equally valid from a legal standpoint. That does not, however, mean that each and every component purchased from a reputable supplier must be inspected and tested by the manufacturer. A fault in the manufacture of one particular component unit that has not been inspected or tested by the manufacturer will not be negligence on its part unless the circumstances call for secondary testing. The imposition of liability in those circumstances would be tantamount

61. *Farro v. Nutone Electrical, supra,* footnote 36, at para. 13; *Hart v. Dominion Stores, supra,* footnote 47, at para. 19; *Rothfield v. Manolakos, supra,* footnote 7, at para. 17; *Webb v. Cassidy, supra,* footnote 26, at pp. 492 and 494 (a contract case where the contract called for the exercise of reasonable care).
62. *Taylor v. Rover Company Ltd.*, [1966] 1 W.L.R. 1491 at p. 1499 (Q.B.). In *Farro v. Nutone, ibid.*, it was said (at para. 14) that there have been no Canadian cases that have relied on *Taylor*. That, however, is not a disavowal of the *Taylor* decision, which is uncritically cited as authoritative in several texts: Fleming, *The Law of Torts,* 9th ed. (Sydney: LBC Information Services, 1998), p. 547, note 144; *Clerk and Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006), s. 11-17, note 82; *Winfield and Jolowicz*, *supra,* footnote 12, at s. 10-6, note 59.
63. Fleming, *ibid.*, at pp. 564-47.
64. Robert J. David, Ph.D., Mech. Eng. (a son of one of the authors — thanks, Rob!).

to the imposition of contractual warranties in circumstances where there is no contractual relationship and would create the anomalous result of strict liability for injuries caused by the failure of purchased defective components while liability for parts produced by the manufacturer would be based on the ordinary principles of negligence.

8. Is the Duty Delegable?

The supplier of a component is essentially in the same relationship to a manufacturer as an independent contractor is to a person who has retained him. Subject to certain exceptions, "It is trite law that the employer of an independent contractor is, in general, not liable for the negligence or other torts committed by the contractor in the course of the execution of the work."[65] The exceptions are listed in the *Lewis* decision, one being negligence in the selection of the contractor (although that should not be classified as an exception because it involves the negligence of the employer himself in the selection of the contractor).[66] More recently, however, greater emphasis has been placed on the question whether the duty of care is delegable to an independent contractor.[67] "In essence, a non-delegable duty is a duty not only to take care, but to ensure that care is taken. It is not strict liability, since it requires someone (the independent contractor) to have been negligent."[68]

This is an issue of long standing[69] and usually has been held to apply where the work is inherently dangerous or fraught with risk.[70] In England, another historical exception is the non-delegability of an

65. *D & F Estates Ltd., supra,* footnote 25, at p. 208. See also *B. (K.L.) v. British Columbia*, [2003] 2 S.C.R. 403 at para. 20, 230 D.L.R. (4th) 513, [2003] 11 W.W.R. 203.
66. *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145 at para. 49, 153 D.L.R. (4th) 594, [1998] 5 W.W.R. 732.
67. *Ibid; D & F Estates*, *supra,* footnote 25, at p. 208.
68. *Lewis, ibid.,* at para. 50 (note again the use of the term "ensure").
69. For example, *St. John (City) v. Donald*, [1926] S.C.R. 371, [1926] 2 D.L.R. 185.
70. *Savage v. Wilby*, [1954] S.C.R. 376 at paras. 1, 2, 5, 12, 19 and 23, [1954] 3 D.L.R. 204; *Janzen v. Kovachik Aircraft Services Ltd.*, [1999] O.J. No. 334 (QL) at para. 32, 118 O.A.C. 91 (C.A.); *Sin v. Mascioli* (1999), 43 O.R. (3d) 1 at paras. 14-15, 118 O.A.C. 99, 8 C.C.L.I. (3d) 39 (C.A.); *Fraser v. U-Need-A-Cab, supra,* footnote 58, at para. 31; *Craven v. Strand Holidays (Canada) Ltd.* (1982), 40 O.R. (2d) 186 at para. 19, 142 D.L.R. (3d) 31 (C.A.), leave to appeal to S.C.C. refused 48 N.R. 320; *Creasy v. Sudbury (Regional Municipality)*, [1999] O.J. No. 4843 at paras. 32-33 (C.A.); *Gramak Ltd. v. O'Connor, supra,* footnote 22, at paras. 19-21; *Salsbury v. Woodland*, [1970] 1 Q.B. 324 at pp. 337, 338 and 345 (C.A.).

employer's duty to provide to its workers a "safe system of work".[71]

The test is now expressed in the following terms:[72]

> Whether the duty of care owed by a defendant may be discharged by exercising reasonable care in the selection of an independent contractor will depend upon the nature and the extent of the duty owed by the defendant to the plaintiff.

That test is couched in such general terms that it may be difficult to assess whether a particular duty is delegable. Some assistance is provided by: (a) the fact that *Lewis* involved an affirmative statutory duty to maintain roads, described as an "absolute statutory duty",[73] (b) the reference to the importance of the complete control of the road maintenance work that remained with the Ministry despite the delegation of the work to an independent contractor,[74] and (c) the comment: "On the other hand, a common law duty does not usually demand compliance with a specific obligation. It is only when an act is undertaken by a party that a general duty arises to perform the act with reasonable care."[75]

These factors suggest that the delegation of a common law duty of care to an independent contractor will generally trigger the rule of non-liability, subject to the established exception regarding work or a product that is inherently dangerous or fraught with risk, unless the defendant has retained complete control of the matter delegated or has performed some positive act in a careless manner.

Policy considerations were also factors referred to in *Lewis*: the reasonable expectations of users of the highways, the particular vulnerability of the travelling public, their reliance on the Ministry to provide safe roads, the impracticality of identifying the negligent contractor, the uncertainty of the financial means of the contractor, and the ability of the Ministry to stipulate for indemnity from the contractor.[76] It should be mentioned that *Lewis* has been viewed as a decision relating to non-delegable duties arising from statute,[77] and

71. *McDermid v. Nash Dredging & Reclamation Co. Ltd.,* [1987] A.C. 906 at p. 910 (H.L.).
72. *Lewis v. British Columbia, supra,* footnote 66, at paras. 17 and 52.
73. *Ibid.,* at para. 17.
74. *Ibid.,* at paras. 36 and 53.
75. *Ibid.,* at para. 18.
76. *Ibid.,* at paras. 32-37 and 53.
77. *B. (K.L.) v British Columbia*, *supra*, footnote 65, at para. 32; *G. (E.D.) v Hammer*, [2003] 2 S.C.R. 459 at para. 16, 230 D.L.R. (4th) 554, [2003] 11 W.W.R. 244; *Blackwater v. Plint*, [2005] 3 S.C.R. 3 at para. 50, 258 D.L.R. (4th) 275, [2006] 3 W.W.R. 401; *Creasy v. Sudbury, supra,* footnote 70, at para. 37.

therefore is of limited assistance in the consideration of common law duties that may or may not be delegable.

There are policy considerations in the case of a manufacturer incorporating in its product a defective component purchased from a reputable supplier that are not present in the case of a statutory duty imposed upon a Ministry. The supplier will have, in the great majority of cases, more expertise regarding the component, and more and better facilities and ability to inspect and test it. As stated by Professor Fleming,[78] it would be impractical and economically inefficient to require the manufacturer to conduct any detailed inspection and testing of a component already inspected and tested by the supplier. That is not to say that the manufacturer has no obligation or liability in the matter: where the defect is readily apparent, or where the circumstances call for secondary inspection and/or testing, the manufacturer should be liable for injury when it has failed to discover a defect that would have been apparent upon reasonable inspection/testing.

The nature of the inspection/testing by the manufacturer, if any, that would be reasonable will depend on the circumstances of each case, the factors being the usual negligence factors of the knowledge of a risk, the likelihood of the materialization of that risk, the severity of the foreseeable harm, and the cost of such inspection/testing. In most instances, the manufacturer should be entitled to rely on the fact that the product was obtained from a reputable supplier and the onus should rest with the plaintiff to show why that general rule ought not to apply in the circumstances of the particular case.

Analogous common law duties have been held delegable:

> I take the view that employers, if they buy reputable tools from reputable people who make them, are not bound to set up examinations, either before issuing a tool or after it has been in use for days or weeks or even months, unless there is something which calls their attention to the suggestion that there is something wrong. Employers have to act as reasonable people, they have to take reasonable care; but if they buy their tools from well-known makers, such as the second defendants are, they are entitled to assume that the tools will be proper for the purposes for which both sides intended them to be used, and not require daily, weekly or monthly inspection to see if in fact all is well.[79]

78. *Supra,* footnote 62.
79. *Mason v. Williams,* [1955] 1 W.L.R. 549 at pp. 550-51 (Q.B.). Note, however, that these comments appear to conflict with a specific exception to the general rule, that being the non-delegability of an employer's duty to provide to its workers a "safe system of work": see footnote 71 above.

> In so far as the former decision relied on any general principle of law that a main contractor is liable to a third party who suffers damage from the negligently defective work done by his subcontractor, I can only say, as already indicated, that I can find no basis in law to support any such principle.[80]

9. The Farro Decision

It has been suggested that the decision in *Farro v. Nutone Electrical Ltd.*[81] imposes on a manufacturer strict liability in tort for injuries caused by a defective component purchased by the manufacturer from an independent supplier.[82] Citing *Farro* and another decision,[83] Professor Klar states "Case law has held that a manufacturer of a product which uses a component part supplied by a third party remains responsible for a defect in that component."[84] Professor Fleming uses the term *semble* when indicating that *Farro* stands for that proposition.[85] Other decisions that cite *Farro* refer to negligence[86] or the negligence standard.[87] In the second decision cited by Professor Klar, the confusing term "reasonable care . . . to ensure" was utilized.[88]

A subsequent decision of the Ontario Court of Appeal, which also cites *Farro*, clearly indicates in the following statement that the negligence standard applies with respect to components: "The [manufacturer] had a duty *to take reasonable care* in the manufacture of its product including its component parts and it is clear that it did not do so." (emphasis added)[89] In another decision,

80. *D & F Estates, supra,* footnote 25, at p. 209.
81. *Farro v. Nutone Electrical Ltd., supra,* footnote 36.
82. *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 at para. 50, 127 D.L.R. (4th) 552, 40 C.P.C. (3d) 245 (Gen. Div.), leave to appeal to Div. Ct. refused 129 D.L.R. (4th) 110, 25 O.R. (3d) 331 at p. 347, 40 C.P.C. (3d) 263, leave to appeal to C.A. refused 7 C.P.C. (4th) 206; *Pacific Lumber & Shipping Co. v. Western Stevedoring Co., supra,* footnote 25, at para. 21(d) — note this was merely the submission by plaintiff's counsel; Edgell, *supra,* footnote 11, at pp. 50 and 59-60, where Mr. Edgell indicates that a manufacturer is, or should be, vicariously liable for the negligence of the component supplier.
83. *Pacific Lumber & Shipping*, *ibid.*, as to which see below.
84. *Supra,* footnote 12, at p. 336.
85. *Supra,* footnote 62, at p. 547, note 145.
86. *Viridian Inc. v. Dresser Canada Inc., supra,* footnote 6, at paras. 275-76 and 280.
87. *Hunt v. Federal Pioneer Ltd., supra,* footnote 4, at paras. 10-11.
88. *Pacific Lumber & Shipping Co., supra,* footnote 25, at para. 29. See footnote 25 above regarding that term.
89. *Mississauga (City) v. Keiper Recaro Seating Inc.*, 2001 CarswellOnt 1725,

the comment was made that the court in *Farro* "described as 'appropriate' the distinction made between the negligence standard . . . and the standard of strict liability".[90] *Farro* itself used the normal language of negligence law (emphasis added): "A manufacturer has a duty *to take reasonable care* in the manufacture of his product, including all its component parts, and *failure to take such reasonable care* can result in liability to the ultimate user or consumer" and "[T]he manufacturer owes a duty to the ultimate user of the product *to take care* that the appliance is free from defects when it leaves the manufacturing plant."[91]

A further matter of note regarding *Farro* is the fact that the manufacturer in that case conceded liability in the event of a finding that the component had been negligently manufactured by the supplier. The importance of this concession is made clear in the following statement (emphasis added): "*First and foremost*, as determined by the learned trial judge, [the manufacturer] accepted responsibility for the damage in the event that there was negligence in the manufacture of the fan motor."[92] Ultimately it was held that the supplier of the component had been negligent.[93] Given the concession it had made, the manufacturer was therefore held liable.

10. Additional Considerations

Consumers often rely on the reputation of the manufacturer when purchasing a product and are unaware that some or even all of the component parts of the product were in fact produced and sold by an independent supplier to the presumed manufacturer of those parts. Where the manufacturer provides a warranty to the ultimate user, there may be reliance not only on the warranty itself but also on the reputation of the manufacturer in responding to complaints. Some consumers may even rely on the financial soundness of the manufacturer if considering the possibility of a claim arising from a defect in the product.[94]

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105 A.C.W.S. (3d) 983 (C.A.), May 22, 2001: A heating pad that caused a fire in a bus was an inappropriate component for the type of driver's seat into which the manufacturer chose to incorporate it. The manufacturer was negligent in its choice of that component.

90. *Andersen v. St. Jude Medical Inc., supra,* footnote 5, at para. 31.
91. *Supra,* footnote 36, at paras. 11 and 18 respectively.
92. *Ibid.*, at para. 15.
93. *Ibid.,* at para. 20.
94. The uncertainty of financial means of a defendant was one of the factors considered in *Lewis* in the context of the issue of delegability of a duty of care: see footnote 76 above.

However, reliance on reputation cannot be a sufficient basis for liability in the absence of negligence. To impose liability on that basis would have the perverse effect of penalizing those who have made the greatest effort to act carefully and responsibly. Is an occupier to be held liable in the absence of negligence because his premises are known to be generally neat, clean and tidy? Is a professional person to be found liable in the absence of fault because of her reputation for excellence? Furthermore, it would merely be a disguised manner of imposing strict liability.

What about, however, reliance by consumers on promotional claims made by a manufacturer who does not sell directly to the end user seeking indirectly to enlarge the market for its product? Should that lead to no-fault liability in the event of loss or injury caused by a defective component? Our response is that liability should be imposed only if a claim for misrepresentation or breach of a collateral contract can be made out — in other words, where some form of fault on the part of the manufacturer can be demonstrated. Pure no-fault liability should not be imposed.

As for reliance on the matter of response to complaints, that involves a contractual relationship. The remedy for breach of a warranty lies in contract. Liability in tort in the absence of fault or negligence cannot be based on the manufacturer's reputation in regard to response to consumer complaints.

Finally, with regard to the financial solvency of the manufacturer, liability coverage for commercial entities is widespread. It is unlikely that a negligent component maker would be uninsured and unable to satisfy a judgment.[95] If this were a matter of serious concern, the proper response would be legislation mandating minimum limits of product liability insurance, as in the case of automobile insurance. Furthermore, a manufacturer should not be penalized for being large and successful. Discarding the law of negligence to deal with the relatively few instances where a negligent component supplier would be unable to satisfy a judgment is a bad trade-off. The concept of liability based on fault or wrongdoing should not be abandoned on such slim grounds. As indicated below, the decision whether and in what circumstances to impose a no-fault system of liability should be left to the legislature.

95. More likely is the possibility of inadequate insurance coverage coupled with financial inability to pay a judgment in full.

11. The Role of the Legislature

Dramatic, as opposed to incremental, changes in the law should be accomplished through legislation. It is "a dangerous course for the common law to embark upon the adoption of novel policies which it sees as instruments of social justice but to which, unlike the legislature, it is unable to set carefully defined limitations".[96] The imposition of what effectively amounts to strict liability on manufacturers for purchased components is just such a matter that should be left for the legislature, regardless of the desire by some members of the academic community for the imposition of strict liability.[97] As it presently stands, it is "plain and obvious" that the common law does not impose strict liability on manufacturers for defective components purchased from reputable suppliers.[98]

12. Conclusion

In the absence of a contractual relationship, a manufacturer provides no contract-like warranties and is not vicariously liable for the negligence of a component supplier unless the product is inherently dangerous or fraught with risk. As a general rule, a manufacturer should be entitled to rely on its selection of a reputable and apparently competent supplier, unless the defect in the component is readily apparent. The normal rules of negligence law should apply. As stated by Baker J.: "The important passage is 'He must take reasonable care, by inspection or otherwise, to see that those parts can properly be used.' But what is reasonable care?"[99] Each case depends on its own facts and circumstances, and the answer to that question will turn on the usual factors of knowledge of a risk, the likelihood of materialization of that risk, the magnitude of the foreseeable harm, and the cost of inspection/testing by the manufacturer. The imposition either of a non-delegable duty of care or of strict liability would be a significant departure from the existing rules (other than with respect to the special category of food products) and should be a matter left for the legislature.

A no-fault regime should not be imposed by the courts. In most circumstances, reliance by a manufacturer on a reputable component supplier should rebut any inference or presumption of negligence

96. *D & F Estates, supra,* footnote 25, at p. 210. See also *Schulz v. Leeside Developments Ltd., supra,* footnote 16, at para. 3.
97. *Andersen v. St. Jude Medical Inc, supra,* footnote 5, at paras. 18-22 and 35-39.
98. *Ibid.,* at para. 40.
99. *Supra,* footnote 62.

and, in the absence of negligence, the injured person's remedy would lie against the seller (unless the injured person is a third party who did not purchase the product from the seller) and against the negligent supplier of the defective component. Returning full circle to the language of Schroeder J.A., "The standard of care expected of [manufacturers] under our law is the duty to use reasonable care in the circumstances and nothing more."[100]

100. *Supra,* footnote 1.