

1980

# Wesley Mulherin v. Ingersoll-Rand Co. : Brief of Appellant in Reply to Respondent's Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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WESLEY MULHERIN, )  
 )  
Plaintiff-Appellant, )  
 )  
vs. )  
 )  
INGERSOLL-RAND COMPANY, )  
 )  
Defendant-Respondent. )

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Case No. 17027

APPELLANT'S BRIEF IN REPLY  
TO RESPONDENT'S PETITION  
FOR REHEARING

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STATEMENT OF KIND OF CASE

This is a strict liability action instituted by Wesley Mulherin for damages caused by accidental activation of an air winch manufactured by Ingersoll-Rand Company.

DISPOSITION ON APPEAL

This Court by opinion dated May 4, 1981, reversed and remanded to the trial court, holding that the defense of misuse in a product liability action is to be compared by the trier of fact to the product defect and plaintiff's recovery diminished by the degree in which his own fault contributed as a proximate cause of his injury.

STATEMENT OF FACTS

The pertinent facts are fully rehearsed in appellant's original brief on appeal.

## ISSUES PRESENTED

1. Should the 50 percent cut-off imposed upon a plaintiff's recovery by the Utah Comparative Negligence Act, § 78-27-37, Utah Code Ann., (as amended), require that this Court impose a similar limitation upon plaintiff's recovery in this action, should plaintiff's contributory fault (constituting the available defenses of misuse or assumption of risk) be found by the trier of fact to equal or exceed the actionable conduct of defendant?

## ARGUMENT

### POINT I

#### MANUFACTURERS OF DEFECTIVE PRODUCTS ARE NOT AND SHOULD NOT BE SUBJECT TO THE SAME STANDARDS AS NEGLIGENT TORTFEASORS

Respondent's brief argues that manufacturers of defective products should not be treated differently from other parties to tortfeasors. A brief examination of current law and the underlying social policies involved reveals that such a contention is totally without merit.

It is axiomatic that the public policy which resulted in judicial adoption of strict liability for defective products was one of practicality. (Restatement of Torts 2d, § 402A). It was recognized that manufacturers and distributors were profiting from the sale of both defective and nondefective products. At common law, absent a showing of negligence, a manufacturer could continue to profit from the sale of its unreasonably dangerous products. That situation differs radically from that of a negligent driver who has nothing to gain by causing or allowing his negligence to injure another. This Court and others adopting strict liability, therefore, held that a showing a product was unreasonably dangerous and caused harm while being used in a normal manner was sufficient to support recovery.

Hahn v. Armco Steel Co., 601 P.2d 152 (Utah 1979), expressly adopted these doctrines in Utah.

A problem common to all tort actions is that of achieving inherent fairness in the allocation of fault. The Utah legislature addressed this problem in negligence actions by its adoption of the Utah Comparative Negligence Act, § 78-27-37, Utah Code Ann. (as amended). While this provision bars plaintiff's recovery where his own negligence is equal to or greater than the defendants, it must be remembered that in the vast majority of ordinary negligence cases the plaintiff has suffered damages as well as the defendant. In a products liability case it is difficult to conceive of a manufacturer ever being injured. The manufacturer not only has no exposure to harm, but it has benefited from the sale of the product. By adopting a pure comparative standard in the apportionment of fault in a products liability action, this Court recognizes the motivating principle behind adoption of the strict liability doctrine, which is that one who benefits from the sale of the defective product is in the best position to prevent or explain the defect and to pay for damages resulting from the defect.

Respondent argues that by adoption of the Utah Product Liability Act, § 78-15-1, et seq., Utah Code Ann. (as amended), the legislature demonstrated its intention to treat manufacturers like "everyone else". Even a cursory examination of these statutes exhibit a disparity in treatment of a manufacturer and "everyone



else". The Product Liability Act, in § 78-15-13, provides a limitation period of from six to ten years. Any first year law student would recognize the difference between this provision and limitation periods provided for negligence related actions; i.e., one year for actions against governmental entities, two years for actions for wrongful death, one to two years for medical malpractice and four years for most other negligence actions. To argue, as does respondent, that the Product Liability Act equalizes technical application of the law of torts among manufacturers of defective products and "everyone else" is to ignore reality.

Finally, respondent suggests a hypothetical "chamber of horrors" situation to support its contention that "pure" comparative principles should not apply in strict product liability actions. A plaintiff who is 40 percent at fault for his injuries suffered from an exploding fire hydrant is able, under this Court's decision in the instant case, to recover against a defendant manufacturer who along with two other defendants is each 20 percent at fault in causing plaintiff's injuries. It is difficult to imagine such a result from a jury verdict in any context other than counsel's imagination. For the sake of argument, however, that possibility should be considered. The inequitable nature of a result where such a plaintiff, who is only 40 percent responsible for his injury, yet who is unable to recover 60 percent of

his damages because he had the misfortune to look to three defendants rather than one is obvious. Who among the defendants in such an action is in the best position to prevent and/or assume responsibility for that portion of plaintiff's injuries? The governmental entity supported by involuntary tax dollars? The contractor who may do only a handful of such installations, and relies upon the product to hold together? It appears obvious that the manufacturer who makes and markets thousands of such hydrants yearly, reaps profits thereby, and controls the design and quality of its product, is in the best position to prevent or explain such accidents, and to respond in damages when a dangerous defect and proximate cause have been established; even though the plaintiff's own conduct may have contributed in some degree to his injury.

The plain fact is that an astute plaintiff will include as parties defendant everyone whose negligence or other liability-producing conduct (including strict product liability) could conceivably be found by a jury to have contributed to his injury. To penalize such a plaintiff by arbitrarily applying a 50 percent no-recovery rule when his fault equals or exceeds that of any strict liability defendant regardless of findings against other defendants would require him to leave out of the action potential defendants whose negligent conduct may have contributed to the injury, and make an "all-or-nothing" attack on a single product

liability defendant. In that case, the remaining defendant would quite naturally point to the missing defendants, and juries are notoriously ready to blame those not present.

By far, the more fair and practical approach is to apportion fault among the parties to such a product liability action as this on the basis of pure comparative principles as to the defective product, as this Court has chosen to do by its opinion. Any ordinary negligence claims against other defendants may be handled according to the statute. The alternative course urged upon the court by respondent would produce both uncertainty, unnecessary risk-taking in the selection of defendants, and inequitable outcomes based upon numbers imposed by the jury upon the respective parties' fault. The latter, and most serious problem with that approach, is aggravated by Utah's current law preventing the jury's being advised of the ultimate effect of its apportionment of fault, McGinn v. Utah Power & Light Co., 529 P.2d 423 (1975).

Respondent's plea for judicial recognition of a claimed similarity between manufacturers of defective products and "everyone else" whose fault causes injury disregards the fact that current product liability law was created to benefit the injured plaintiff who could not recover because at the time such manufacturers were considered and treated like "everyone else". Both the court and legislature determined that there is a differ-

ence and that such manufacturing of defective products causing injury should not be treated like "everyone else."

There is indeed a "double standard" which does and should apply in such situations. The manufacturer or seller is properly liable when its product is proven to be dangerously defective, and to have caused injury while being used in a normal manner, regardless of negligence. Anyone else must be proven to be guilty of negligence. Those two theories of liability are poles apart, and different or "double" standards obviously apply to the plaintiff's burden of proving fault. Since a "double" standard already exists in the nature of proof required to support a cause of action, how can respondent be heard to complain that the application of pure comparative principles results in a double standard?


It should be noted that the legal doctrine of strict liability for defective products in Utah, the available defenses, and manner of application of those defenses are all judicially-created law covering matters to which the legislature has never addressed itself. Had the legislature chosen to speak out in this field, it should, of course, be heard. Since it has not, this Court is entirely free to create the law to apply and direct the manner in which it will apply. The legislative action (and inaction) in the field of negligence should in no way be considered as limiting this Court in its judicial development of strict liability.

## CONCLUSION

Strict product liability and negligence actions are entirely different creatures, to which different burdens of proof and defenses apply. Distinctions between the two are obvious, and application of available defenses in different ways arises from rational distinction between them. There are substantial underlying social, economic and legal justifications for the deferences involved, and such distinctions may by no means be considered as denials of equal protection.


This Court's decision stands at the forefront of the developing body, of strict liability law, not only in Utah but nation-wide. Respondent's attempt to dilute the effect of that decision by persuading the Court it really meant something other than what it said should not be given serious consideration.

RESPECTFULLY SUBMITTED this 10th day of August, 1981.



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This is to certify that two copies of the foregoing Appellant's Brief in Reply to Respondent's Petition for Rehearing were hand delivered and served upon Richard H. Moffat and John L. Young of MOFFAT, WELLING & PAULSEN, Attorneys for Defendant Respondent, 261 East Broadway, Suite 300, Salt Lake City, UT 84111 this 11th day of August, 1981.



ANTHONY M. THURBER