The Tale of Two Lakes—A New Chapter in Washington Water Law

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RECENT DEVELOPMENTS

THE TALE OF TWO LAKES—A NEW CHAPTER IN WASHINGTON WATER LAW

The State of Washington, through its Department of Game, purchased waterfront lots on Phantom and Ames Lakes and developed both properties into public fishing access areas. Large numbers of the public took advantage of these facilities, fishing from boats and the lake-shore. The two lakes, however, were not the kind found in true fishermen’s dreams, isolated from civilization and surrounded by forests primeval. Both Phantom and Ames Lakes were surrounded by numerous residences, whose owners brought separate actions to enjoin the State from maintaining the public access areas, alleging nuisance and abuse of the lakes by the State’s licensees. The trial courts found


2 These lakes, though some miles distant from one another, are situated in the northern portion of King County, Washington. Under the present law of Washington, both lakes are non-navigable bodies of water. See Proctor v. Sim, 134 Wash. 606, 236 P. 114 (1925).

3 These access areas generally included a large parking area and facilities for launching small boats. There was no attempt by the State to develop the access areas into public parks or similar recreation grounds.

4 Interviews with residents on Phantom and Ames Lakes, and persons who had utilized the access areas during fishing season, confirmed that the lakes were extremely popular fishing waters. The largest crowds were to be found at the lakes on “opening day” and on the weekends.

5 Residents and witnesses agree that the greatest evidence of the lakes’ popularity was the first day of every fishing season. Fishermen would begin arriving well before dawn and, after either placing their boats in the water or finding an attractive place on the lake-shore, a veritable celebration would ensue until first-light. A person, viewing the lakes at dawn, would behold scores of boats on all parts of the lakes and fishermen every few yards along the lake-shore.

6 The plaintiffs alleged, and the trial courts found as fact, that the State’s licensees had, by their conduct and numbers, caused the following results: (1) The market value of the plaintiffs’ property had been decreased; (2) Thievery had substantially increased, including the theft of boats, boating equipment, furniture, and other personal property; (3) Persons had relieved themselves in the lake and on the plaintiffs’ property, causing plaintiffs, their families and guests annoyance and embarrassment; (4) Various items of garbage had been deposited in the lake and upon plaintiffs’ property; (5) Plaintiffs suffered frequent trespasses on their yards, docks, beaches, and other property; (6) Plaintiffs and their families had suffered personal injuries from broken bottles and other debris deposited on their property; (7) Fishermen, trespassing on plaintiffs’ beaches and docks, often harassed members of plaintiffs’ families; (8) Although hunting and shooting on the lakes were
as fact that such abuses had occurred and persisted, and concluded that
the State's maintenance of such facilities unreasonably interfered with
the property owners' rights, constituting a taking and damaging of
property without compensation in violation of the Washington State
Constitution. Based on these facts and conclusions, the trial courts
permanently enjoined the State of Washington from maintaining and
operating the public fishing access areas. Upon appeal by the State,
the lower courts' injunctions were modified to provide that the State
would be enjoined only until it obtained the trial courts' approval of
comprehensive plans for regulating public use of the lakes. With this
modification, the judgments of the trial courts were affirmed. Held:
The State, where it enjoys riparian rights, need not acquire by con-
demnation the rights of other riparians before its licensees may use the
water in reasonable numbers, but it has the obligation to regulate the
number and conduct of its licensees so as to prevent undue inter-
ference with the rights of other riparians. Botton v. State, 69 Wn. 2d
751, 420 P.2d 352 (1966); Ames Lake Community Club v. State, 69
The majority of the court, though without expressly so holding,
accepted the State's contention that it enjoyed riparian status. From
this premise, the court concluded that such status created an inherent
obligation to police and control State licensees in order to prevent
injury to the rights of other riparians. After adverting to, and incor-

illegal, persons came onto the lakes and engaged in such activities; (9) Uncontrolled
speed boating endangered plaintiffs and their families while swimming in the
lakes; (10) The noise level on and around the lake had greatly increased.
WASH. CONST. amend. IX provides: "No private property shall be taken or
damaged for public or private use without just compensation having been first
made. . . ."

Only four judges joined in the court's opinion. With an equal number joining
dissent, it was left to Judge Finley, concurring specially, to cast the decisive
vote. This close division of the court reflects the difficult and evenly balanced
policy considerations involved in the instant cases.

In the instant cases the State had acquired fee title to the riparian property.
The law is long-established in Washington that riparian rights are "inextricably
annexed" to fee-ownership of riparian property. See Hayward v. Mason, 54 Wash.
653, 104 P. 141 (1909); Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 P. 147
(1894). Therefore, the court's premise that the State, by acquisition of fee title to
the two riparian properties, enjoyed riparian status was entirely correct.

Whether the State would enjoy riparian status by acquisition of a lake-front
easement has yet to be determined by the court. This determination may well rest
upon the court's classification of the property interests encompassed by an easement.
Notwithstanding the result of that classification, it would appear that the purpose
of the easement may be dispositive. If the easement were acquired for the purpose of
providing public access to a watercourse or lake, there would be greater reason to
conclude that the easement carried with it those riparian rights necessary to fulfill
its purpose.
porating by reference, an addendum surveying prior decisions involving riparian rights in Washington, the court stated that it considered the recent decision in *Snively v. Jaber* to be controlling, thereafter relying on the language of that opinion to support its decision.

In his concurring opinion, Judge Finley characterized the problem before the court as one of “balancing of interests and rights.” Stating that there were a number of factors to be considered, he reasoned that what was needed, rather than a strict riparian rights analysis, was a practical common-sense approach, balancing the need to protect private rights against the need to provide for maximum public use of Washington’s lakes.

The dissent concurred with the court’s refusal to adopt the trial court’s permanent injunction, but vigorously objected to the decree of a temporary injunction until implementation of an approved plan of lake regulation. Finding “no authority in law or in equity to enjoin all members of the public for the misconduct of a few,” the dissent argued that only those abusing the lakes and riparian property should be enjoined. The core of the dissent’s reasoning was that maintenance of the access facilities was within State police power, and to enjoin operation of the facilities not only would be contrary to statutory com-

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*In the court’s addendum, following discussion of Proctor v. Sim, 134 Wash. 606, 236 P. 114 (1925), a comment of potential significance in the future development of Washington water law is made, 69 Wn. 2d at 758:

It must be noted that this very broad statement [referring to the preceding quotation from Proctor v. Sim] may be limited to the arid portions of this state; and that, in subsequent cases in the western part of the state, a lowering of a lake or an interference with its riparian uses creates liabilities and, on occasion, a necessity for condemnation.

With this comment, the court suggests for the first time that the scope of, and protection afforded, riparian rights may vary between western and eastern Washington. A prominent authority on Washington water law has suggested that in evaluating methods of water control and use it is necessary to consider the different climatological conditions prevailing in eastern and western Washington. Johnson, *Riparian and Public Rights to Lakes and Streams*, 35 WASH. L. REV. 580, 583 (1960). Although consideration of differing climatological conditions may be proper in determining “reasonableness” or assessing the most “beneficial use” of lakes, it is submitted that allowing geography to per se vary established legal rights within the same state is highly questionable.

*69 Wn. 2d at 757, 420 P.2d at 356.

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12 48 Wn. 2d 815, 296 P.2d 1015 (1956).

13 69 Wn. 2d at 762, 420 P.2d at 360.

14 These factors were: (1) The increasing interest and recreational needs of the public in fishing in the non-navigable lakes of the state; (2) The establishment of state fish hatcheries for propagation of game fish, coupled with the acquisition of lakefront, public-access areas to waters stocked by the state; (3) The fact that the state had not acquired complete ownership of all the water-front property on lakes having public-access areas; (4) The fact that much of the water-front property, on such lakes as Phantom and Ames Lakes, is held in private ownership by numerous individuals.

16 69 Wn. 2d at 766, 420 P.2d at 362.
mand, but also would re-establish private fishing lakes. Also discernible in the dissenting opinion was the thought that a State program, properly within the police power, should not be subject to judicial approval as a condition precedent to its operation. Finally, the dissent stated that one who resides on a lake, such as Phantom or Ames Lake, must take his property with the benefits of its location, and the correlative burdens of public use of the water for recreation.

The premise that the State enjoys the status of a riparian by acquiring property abutting non-navigable lakes should not have led the court to conclude summarily that the determination of rights in the instant cases was controlled by *Snively v. Jaber*. That case involved a contest between two private riparians wherein the plaintiff, a land developer, obtained an injunction against his neighbor's allowing customers of his small resort to boat on the lake, because such persons had littered and abused property that the plaintiff had been attempting to develop and market. Although analogous, significant distinctions exist between this decision and the principal cases. First, the State, when holding property for use by the public, is a unique riparian whose powers and number of potential licensees clearly differentiate it from private riparians. The law of eminent domain is illustrative of the disparity between the powers of the State and those of the citizen.

Once the State has acquired riparian status, by eminent domain or otherwise, and developed access facilities for use by the public without charge or limitation, it becomes self-evident that the number of its licensees far exceeds the number gaining access to the lake from the property of a private riparian. Second, the law of riparian rights has developed in contests between private persons, such as occurred in *Snively v. Jaber*. It is ill-suited for application to a dispute between a

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15 WASH. REV. CODE § 90.03.010. The language upon which the dissent particularly relied was: "Subject to existing rights all waters within the state belong to the public...."

16 The State enjoys the power of eminent domain by which it may acquire riparian land or condemn the riparian rights of private property. WASH. REV. CODE § 90.03.040. The private riparian does not ordinarily possess this power, nor can he usually successfully resist the State's exercise of this power for a proper objective pursuant to the required procedures. The Washington Water Code does provide that "[A]ny person may exercise the right of eminent domain to acquire any property or rights... for the storage or application of water for the greatest public benefit." WASH. REV. CODE § 90.03.040. However, before a private person may exercise this right, he must prove not only that his use would be more beneficial, but also that such use would be of public benefit.

17 Although the right of use of the lake by the licensees of one of the litigants was involved in that case, the heart of the controversy was the conflicting interests of two riparians in the use of the lake surface.
private riparian, or class of such riparians, and the State acting as representative of the general public's competing interest. ¹⁸

Finally, *Snively v. Jaber* primarily involved the conflict of two private persons in the use of a single lake. Only secondarily involving the interests and property rights ¹⁹ of individuals in particular lakes, the primary conflict in the instant cases was between "private rights" and "public rights." This conflict is best characterized as a confrontation of the competing socio-legal policies of protection of private property rights and provision for public recreational development of Washington's lakes.

The court's decisions may be interpreted as an extension of the reasonable-use-in-common principle of *Snively v. Jaber* to such controversies as existed in the principal cases. Although this principle may be utilitarian in litigation between parties of relatively equal interests, it is of questionable value when parties represent greatly unequal and dissimilar interests. Reasonableness is but the foundation from which the court, with appreciation of the unique nature of the controversies created by the State's involvement, should have fashioned a more comprehensive analysis.

It is significant that the court was careful to state that it was not necessary to condemn the riparian rights of private riparians on the lakes in order to maintain and operate the public access facilities. However, the court did not foreclose the alternative of such condemnation by proceedings in eminent domain. Therefore, the State may

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¹⁸ In *Snively v. Jaber*, the licensees' right to use the lake depended upon the riparian rights of the private riparian licensors. The licensees in the instant cases sought to come upon the lakes in their own right as members of the public. In these cases the State only acted as the public's representative in the adjudication of the extent of permissible public use of the lakes.

It has been suggested that *Snively v. Jaber* has analogous application to the instant cases because in both instances the licensees' rights were derived from the riparian status of the licensor. Such analogical reasoning fails to appreciate the nature and source of the licensees' rights in each case. The licensees' rights in *Snively v. Jaber* were wholly derivative, Mr. Jaber's rights determining the extent of use which his licensees could make of the lake. The licensees in the instant cases, although coming upon the lakes over State-owned riparian property, claimed a right of use in their own right as members of the public. The basis of this claimed right was the statutory dedication of such waters to the public. See WASH. REV. CODE § 90.03.010. With assertion of this direct right of use, the controversies concerning Phantom and Ames Lakes became conflicts between relatively small groups of riparian landowners and the public.

Although recognizing the language of the statute, the court dealt with the State as if it were a riparian landowner. It is submitted that the possible dangers of this approach, in terms of restrictive definition of reasonable use, are as great as those inherent to the private riparian in adoption of any "public trust" approach.

operate access facilities pursuant to a comprehensive regulatory plan, as directed by the court, or it may condemn the riparian rights of all private property on the lakes and operate access facilities without a regulatory plan. The latter alternative, however, would be one of last resort because of the substantial expense of the condemnation awards.\(^{20}\)

It is also significant that the court did not proceed under any theory of "public trust," nor did it construe the Washington Water Code\(^{21}\) as granting the State pre-emptive rights in non-navigable lakes. These theories, though available to the court, have as yet to find favor in any Washington decision. The Washington Water Code does declare that "[A]ll waters within the state belong to the public."\(^{22}\) However, this phrase is qualified by the introductory words, "Subject to existing rights..."\(^{23}\) The court's failure to adopt either a public-trust or pre-emption theory would seem to indicate the validity of two conclusions. First, public ownership and any trustee-power of the State are limited to those waters not already appropriated or subject to existing riparian rights. Second, the language, "Subject to existing rights," qualifies the extent of State control of lakes, and inhibits pre-emptive rights being exercised by the State in such waters.

The court wisely rejected the two solutions to the controversies urged by the dissent. The first solution was that protection of private rights and full recreational use of the lakes would be served best by individual civil and criminal actions against persons committing the alleged abuses. The dissent's second solution was that persons owning lake-front property should be required to enjoy the benefits of such location along with the abuses and wrongdoing by certain members of the public. Implementation of the dissent's first solution would place responsibility for control and regulation of lake use upon the private

\(^{20}\) In addition to the acquisition of footage on the immediate periphery of the lakes, the State would properly be required to compensate owners of lake-front property for the other recognized riparian rights. Perhaps the most important compensable right involved would be the use of the lake for recreation. See Snively v. Jaber, 48 Wn. 2d 815, 296 P.2d 1015 (1956). In Washington, a riparian also has an established right to have a lake remain at such a level, and in such a condition, as to not detract from the scenic or aesthetic value of the riparian property. Cf. In re Martha Lake Water Co., 152 Wash. 53, 277 P. 382 (1929). There is also a recognized riparian right to use the lake for irrigation or drainage. See In re Clinton Water Dist., 36 Wn. 2d 264, 218 P.2d 309 (1950). These rights, as well as the appraised value of the actual property condemned by the state, are property interests protected by the Washington State Constitution. See In re Clinton Water Dist., supra; Litka v. Anacortes, 167 Wash. 259, 9 P.2d 88 (1932); In re Martha Lake Water Co., supra.

\(^{21}\) WASH. REV. CODE § 90.03.010.

\(^{22}\) Id.

\(^{23}\) Id.
property owners. It is doubtful that this responsibility could be effectively discharged without these persons retaining a small "police force" to determine the identity of persons committing trespass and to apprehend those committing criminal acts. Rather than placing the burden of regulation, and its inherent costs, upon the State as the court required, the dissent effectively would have placed it on the lake residents. Because the State was responsible for bringing the public upon the lake, as part of a comprehensive plan for increasing recreational opportunities for its citizens, the dissent's determination of regulatory responsibility would appear unjust and inequitable. The second solution advanced by the dissent is no less troublesome than the first. A property owner may reasonably be expected and required to take his property subject to municipal or State easements for subterranean or surface utilities. Residents on the shore of a navigable body of water, such as Lake Washington or Puget Sound, may fairly be called upon to endure occasional raucous speed-boats or to evict waterfront hikers who may stray onto their property. However, the resident on the shore of a relatively small non-navigable lake, having paid a premium for privacy and accessibility to water recreation, cannot reasonably be said to take his property subject to the abuses and depredations proven to have taken place on and about Phantom and Ames Lakes.

In his concurring opinion, Judge Finley employed the proper analysis in resolving the controversy, the basis of which he defined as "the uncontrolled, indiscriminate public use, and, more importantly, the destructive abuse" of the lakes. He concluded that "a common sense" balancing of the private property interests of the lakeside residents and the interests of the public in the fullest development of recreational resources was required. Regulation of State licensees, as a solution to such controversies as those in the instant cases, is properly supported by such "balancing of interests," and reflects that the overriding issue is one of competing social policies rather than mere adjudication of conflicting property rights.

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24 69 Wn. 2d at 761, 420 P.2d at 359.
25 Id. at 762, 420 P.2d at 360.
26 Although in concurring Judge Finley commended the majority opinion, it would appear the commendation was directed to its result rather than its reasoning since he criticized resolution of the controversy by application of the doctrine of riparian rights as being too restrictive and limited.
27 Cardozo writes: "Finally, when the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends." B. CARDozo, THE NATURE OF THE JUDICIAL PROCESS, 65 (1922).
Despite the significant social aspects adhering in controversies typified by the principal cases, a more precise and utilitarian "balancing of interests" analysis should be employed. The basic principle of such an analysis should be: Whether the use, or abuse, of a lake by State licensees constitutes an actionable wrong depends upon, and is measured by, the residential and commercial development of the riparian property. Such measurement goes, primarily, to the quantum of proof required of riparian property owners to show unreasonable interference with their property interests, and thereby compel State regulation of its licensees using the lake. If the riparian property is minimally developed, the property owners would be required to show gross abuse or permanent damage in order to compel regulation. By contrast, if the lake is bordered by substantially developed property, owners of that property would be required to prove only minor abuse and continuing misconduct by the State's licensees in order to compel regulation. In sum, whether State regulation would be decreed would depend primarily upon the kind and extent of damage to the lake and riparian property, as measured against the overall existing development of the riparian property. This analysis must, in all cases, incorporate the general test of reasonableness, allowing the court to consider additional factors when necessary.

Under the suggested analysis the State would be free, initially, to create and operate fishing and recreation access facilities without regulation. Should the riparian property owners object to the conduct or number of the State's licensees, their proper course would be an action to enjoin unregulated use of the lake by the State's licensees. At trial the court would employ the suggested analysis to determine whether the riparians should obtain relief. Should the court determine that the State's operation of the facilities, absent regulation, constitutes unreasonable interference with the plaintiff's rights, regulation would properly be decreed. Should the riparian property owners fail to prove that the alleged abuses, measured against riparian property

Typical factors that may assume importance in particular cases are the size of the lake, the configuration of the lake, and the population density in the general locality. The court should be free to consider any other factors relevant to the question of general "reasonableness."

Implicit in this analysis is the requirement that riparians, acquiring residences on the lake subsequent to establishment of conditions alleged to constitute unreasonable interference with their interests, would not be estopped to compel State regulation of the lake.

The court should have broad discretion in framing the decree in this type of controversy. The decree should be tailored to the particular conditions and abuses in each case, and should have reference to seasonal patterns of abuse where they exist.
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development and other relevant factors, entitle them to relief, regulation would not be decreed and the State would be free to continue its access facility operations as before.

Resolution of such controversies by the suggested analysis has several practical and beneficial results. First, a "balancing of interests" is achieved by an analysis affording guidance to both attorney and judge. Second, should the State desire to develop access areas, or similar facilities, without assuming the financial burdens of regulation, such development could be accomplished on those lakes not surrounded by substantial residential or commercial development. Finally, should the State undertake creation of access facilities on lakes with substantially developed riparian property, it would be required to assume the legitimate responsibility of regulation. It is submitted that such results are equitable and advantageous to both the interests of private property owners and the interests of the State in maximizing the fishing and recreational development of Washington's lakes.

Although the court's reasoning may be subjected to criticism, and alternative analyses may be suggested, its decisions in the principal cases are commendable. State regulation of the lakes which it opens for public use is not only equitable, but also preserves established legal rights while furthering a sound social policy. The Washington Court has again distinguished itself as a leader in the continuing development of water law.

There is little question that the expansion of sports and recreational opportunities for the general public constitutes sound public policy. The only question that may yet remain is the specific remedy which the court fashioned to achieve this policy. The State was required, prior to further operation of its access facilities, to submit a regulatory plan to the trial court for approval. There are no expressions in any of the opinions of the majority or dissent questioning that the State is within its police power in operating the lake access facilities. It might be suggested, therefore, that the decree required the State, in the performance of a program within its police powers, to obtain judicial approval as a condition precedent to its implementation. This poses interesting questions of the constitutionality, or at least propriety, of the court's decree, particularly in regard to the very basic doctrine of separation of powers.
DUTY TO WARN EXTENDED TO NON-COMMERCIAL VENDOR SELLING CHATTEL "AS IS"

The ignition system of T's pickup truck had a safety switch to prevent the engine from being started when the automatic transmission was in gear. When T accidentally broke the safety switch, the ignition system became inoperable. To remedy that situation, T joined the wires of the ignition system so as to bypass the broken safety switch. He knew this modification made it possible to start the truck even when the transmission was in gear. Later the motor broke down, and T had the truck towed to defendant's dealership, where he sold it "as is" to defendant. T did not tell defendant about his modification of the ignition system. Defendant did not inspect the truck. Two weeks later defendant's mechanic, while repairing the truck, started the engine; the truck suddenly moved forward and struck plaintiff. In plaintiff's action for personal injuries, defendant impleaded T as third party defendant. The trial court granted T's motion for summary judgment and dismissed him from the suit. On appeal, the Washington Supreme Court reversed and remanded. Held:

An individual selling his chattel to another is subject to a duty to warn. See 2 RESTATEMENT (SECOND) OF TORTS §388, comment g (1965). T sold his truck to defendant as part of a trade-in transaction. At the time of the sale, the truck was seven years old. The motor was inoperable and the drive shaft had been removed. Thus it was not necessary for defendant to inspect the truck in order to place a value on it and complete the transaction.

Even though T did not see defendant inspect the truck, he was not required to give a warning if he reasonably believed that defendant would realize the dangerous condition of the ignition system. 2 RESTATEMENT (SECOND) OF TORTS §388 (b) (1965). However, because the truck could not be operated at the time of the transaction, a trier of fact could find that T, the vendor,

...had no reason to believe that [the vendee] would realize the dangerous condition of the pickup, at least until repairs had been made to the motor so that the truck could be operated again.


The vendor has a duty to warn only if the circumstances of the sale are found to satisfy the requirements illustrated in note 11, infra. Because the principal case was an appeal from summary judgment, the court remanded the case so that the trier of fact could consider the negligence issue. On the other hand, the effect of a

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[T] did not disclose to [defendant] that he had modified the safety mechanism in the ignition system, but he did say that the motor was inoperable and that the drive shaft was not in place.

The court did not attach any significance to T's disclosure of his truck's other mechanical difficulties. The important fact was that he said nothing about the dangerous condition created by his modification of the ignition system. See 2 RESTATEMENT (SECOND) OF TORTS §388, comment g (1965).

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the vendee of a condition, known to the vendor, which makes the chattel dangerous for its intended use, even though the sale is made "as is." *Fleming v. Stoddard Wendle Motor Co.*, 70 Wash. Dec. 2d 443, 423 P.2d 926 (1967).

It is well established that a commercial vendor can be held liable for negligently failing to warn his vendee of a condition, known to the vendor, that makes the chattel sold dangerous for its intended use. This duty to warn has been justified as an application of the general principle that one has a duty to avoid exposing others to unreasonable risks of bodily harm. In the principal case the Washington Court was faced with two questions of first impression: whether an individual making an occasional sale is subject to the duty to warn; and if he is, whether the individual can affect his negligence liability merely by selling the chattel "as is." A related issue to be discussed is the effect an "as is" sale would have on the negligence liability of a commercial vendor under similar circumstances.

With respect to the duty of the supplier of a chattel to disclose conditions, known to him, that make the chattel dangerous for its intended use, the court in the principal case adopted 2 *Restatement (Second) of Torts* § 338 without discussion. After finding T to be

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sale "as is" was decided as a matter of law. *Fleming v. Stoddard Wendle Motor Co.*, 70 Wash. Dec. 2d 443, 448, 423 P.2d 926, 929 (1967).

4 The term "commercial vendor" is used in this note to refer to producers or distributors of chattels who are in the business of selling those chattels. A commercial vendor is thus distinguished from an individual who occasionally sells a chattel that he owns. The reason for the distinction is that a commercial vendor develops a level of expertise on which his vendees rely. See *State v. Barnes*, 126 N.C. 1063, 35 S.E. 605 (1900).

A special situation should be noted. For example, a retailer of shoes who sells his neon advertising sign to another party would be considered an individual making an occasional sale with respect to that sign. He is a commercial vendor of shoes but not of neon signs. See id.


7 As recently as 1941, Dean Prosser noted that the liability of an individual selling a chattel for negligent failure to warn had apparently not been considered by any court. W. Prosser, *Torts* 682 (1st ed. 1941). Apparently, as of 1965 the duty to warn, as formulated in the *Restatement*, had not yet been imposed on an individual making an occasional sale. *Restatement in the Courts, Torts* § 388 (1945, Supp. 1954, Supp. 1965). However, the duty has been imposed on an individual who is bailor of a chattel. Cases cited in note 60 infra.

8 2 *Restatement (Second) of Torts* § 388 (1965):

Chattel Known to be Dangerous for Intended Use

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the
within the ambit of that section, the court held that the undisputed facts would allow reasonable minds to conclude that T was negligent.

Although the court recognized that parties may "bargain for exemption from liability for the consequences of negligence" if they clearly express an intention to do so, the court rejected T's contention that as a matter of law he could not be held liable for negligence because he sold his truck to defendant "as is." After noting that

chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.


2 RESTATEMENT (SECOND) OF TORTS § 388, comment c (1965) (emphasis added): Persons included as "suppliers." The rules stated in this Section... apply to determine the liability of any person who for any purpose or in any manner gives possession of a chattel for another's use, or who permits another to use or occupy it while it is in his own possession or control, without disclosing his knowledge that the chattel is dangerous for the use for which it is supplied.... These rules, therefore, apply to sellers, lessors, donors, or lenders, irrespective of whether the chattel is made by them or by a third person.

Given T's knowledge of the effect of his modification of the ignition system and his undisputed failure to warn defendant, his vendee, of that modification, T would be liable to defendant under the rule of 2 RESTATEMENT (SECOND) OF TORTS § 388 (1965) if the trier of fact found that T:

1. supplied his truck to defendant for the purpose of repair and resale, and

2. had reason to know that the truck was likely to be dangerous when used for that purpose, and

3. had reason to expect that third parties would be endangered by this use, at least while the truck remained in defendant's possession, and

4. had no reason to believe that defendant would realize the dangerous condition of the truck, at least until the motor was repaired.


Pokrajac v. Wade Motors, Inc., 266 Wis. 398, 63 N.W.2d 720 (1954), and Thrash v. U-Drive-It Co., 158 Ohio St. 465, 110 N.E.2d 419 (1953). However, in both those cases the sale "as is" was made in a context that precluded finding the vendor liable for negligent failure to warn. In Pokrajac, supra, the purchaser expressly agreed that he had examined the vehicle and knew what he was buying. The contract of sale provided, in part:

In case the car covered by this order is a used car, the undersigned purchaser states that he has examined it, is familiar with its condition, is buying it as a used car, as is, and with no guaranty as to condition....

Pokrajac v. Wade Motors, Inc., 266 Wis. 398, 399, 63 N.W.2d 720, 721 (1954). The vendor in the principal case made no inspection of the truck, and the court dis-
an "as is" sale normally excludes warranties, the court concluded that "the term 'as is' by itself amounts solely to a disclaimer of warranty." Absence of warranties does not preclude liability for negligence. Therefore, T could be held liable for a negligent failure to warn even though he sold his truck "as is."

A vendor's duty to warn was recognized at an early date as a particularization of one's general duty to avoid exposing others to unreasonable risks of bodily harm. Recent cases have imposed this duty on the commercial vendor under varying circumstances. He must warn his vendee of a condition which he has reason to know makes the chattel dangerous when used or dangerous if used in a particular way. However, the vendor does not have to warn of danger which he reasonably believes to be known to the vendee.

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15 RECENT DEVELOPMENTS
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Although the commercial vendor's duty to warn was established at an early date, he was initially liable for negligence only to a relatively small class of persons. Early cases barred recovery by one not in privity of contract with the vendor. As courts began to accept the proposition that injury to a subvendee is a foreseeable consequence of the negligence of a commercial vendor, the privity requirement was gradually eliminated. It is now generally accepted that a commercial vendor's liability for negligence with respect to chattels he sells extends to third parties not in privity of contract with him. The development of this area of negligence law has been primarily concerned with deciding to whom a commercial vendor owes a duty of reasonable care rather than with establishing his duty to warn.

Unlike a commercial vendor, an individual who makes an occasional sale does not have a business reputation at stake, and consequently his vendee is less likely to expect him to stand behind his product. Nevertheless an individual, like a commercial vendor, is generally required to avoid exposing others to unreasonable risks of bodily harm. For that reason the individual who sells a chattel should
be subject to the duty to give his vendee a reasonable warning.\textsuperscript{28} This conclusion, reached in the principal case, is merely an application of the general principle underlying the commercial vendor cases.\textsuperscript{30}

The court resolved the negligence issue by adopting 2 Restatement \textit{(Second) of Torts} § 338.\textsuperscript{31} This rule was properly applied in the principal case to an individual who knew of the condition that created the danger.\textsuperscript{32} Given a vendor’s knowledge of the chattel’s condition, it is for the trier of fact to decide whether from that knowledge he had reason to know that the chattel was dangerous for its intended use.\textsuperscript{33} This requires an inference from condition to danger. The Restatement rule also applies to a vendor who has reason to know, from facts generally within his knowledge, of a condition that is likely to render the chattel dangerous.\textsuperscript{34} This requires an inference from known facts to condition to danger. It is for the trier of fact to determine whether the vendor knew or had reason to know of the condition and whether he knew or had reason to know of the danger. Any expertise the vendor may have will influence the determinations.\textsuperscript{35} A review of past cases suggests that a manufacturer, and occasionally a distributor,\textsuperscript{36} of chattels has a duty to acquire knowledge about the

\textsuperscript{28}In each case, it must first be determined whether the vendor does have a duty to warn. See, e.g., note 11 supra. If he does have the duty, then he must exercise reasonable care to communicate his knowledge of the danger in order to make safe use of the chattel likely. 2 Restatement \textit{(Second) of Torts} § 388, comment b (1965). Although subject to liability to subsequent users of the chattel, 2 Restatement \textit{(Second) of Torts} § 388, comment a (1965), a vendor is not necessarily required to warn the users. A vendor can discharge the duty by warning his vendee, if it is reasonable for him to rely on his vendee to eliminate the danger of which he has been made aware or to pass the warning on to subsequent vendees. 2 Restatement \textit{(Second) of Torts} § 388, comment n (1965). Thus in the principal case, although plaintiff could have sued T directly, T would have satisfied the duty to warn by telling defendant about his modification of the ignition system of his truck.

\textsuperscript{30}Discussed at p. 485 supra.

\textsuperscript{31}2 Restatement \textit{(Second) of Torts} § 388 (1965), quoted in note 8 supra.

\textsuperscript{32}Fleming v. Stoddard Wendle Motor Co., 70 Wash. Dec. 2d 443, 444, 423 P.2d 926, 927: “[T] was well aware of the effect of the modification he made.”

\textsuperscript{33}Butler v. L. Sonneborn Sons, Inc., 296 F.2d 623 (2d Cir. 1961) (manufacturer knew that corrosion of steel containers by its product would produce explosive hydrogen gas; from this knowledge it should have inferred that containers filled with its product were dangerous in the absence of a warning to call attention to the importance of handling the containers carefully and keeping them away from excessive heat).

\textsuperscript{35}James, Products Liability, 34 Texas L. Rev. 44, 48 (1955). Professor James notes the distinction between “dangers known to the supplier” (see notes 32 and 33 and accompanying text, supra) and “conditions known to [the supplier], the danger of which a reasonable man in his place would recognize.” Id.

\textsuperscript{36}2 Restatement \textit{(Second) of Torts} § 289(b) (1965).

\textsuperscript{35}This manufacturer’s duty is also imposed on one who supplies a chattel as his own product. Kasey v. Suburban Gas Heat of Kennewick, Inc., 60 Wn.2d 468, 374 P.2d 549 (1962); 2 Restatement \textit{(Second) of Torts} § 400 (1965).
chattels he places on the market in addition to a duty to warn. These cases require him to supplement his existing knowledge with additional facts so that he can make an inference, reasonable in light of his position as manufacturer, from those additional facts to condition to danger. This additional duty should not be placed on the individual, because he lacks the manufacturer’s special knowledge and opportunity to make the chattels safe.

The expertise of the vendee will affect the existence of the vendor’s duty to warn. If a chattel is sold to a vendee who deals in goods of that kind as part of his business, one might expect that, because of his experience, he would be more likely than an individual to realize a chattel’s dangerous condition, and hence be less apt to need a warning. This element is incorporated into the Restatement

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A retailer who does not sell a chattel as his own product does not have this duty with respect to that chattel. Simmons v. Richardson Variety Stores, 52 Del. 80, 137 A.2d 747 (Super. Ct. 1957); Ringstad v. I. Magnin Co., 39 Wn.2d 923, 239 P.2d 848 (1952).

The rule of Restatement § 388 does not itself require a vendor to make any inspection, “no matter how cursory.” 2 RESTATEMENT (SECOND) OF TORTS § 388, comment m (1965).

38 The manufacturer’s duty to acquire additional knowledge about his product complements his duty to warn. See cases cited in note 37 supra. On the other hand, a duty to make reasonable inspections is separate from the duty to warn, and provides an alternative basis for recovery. E.g., MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

The distinction between the duty to inspect and the duty to acquire additional knowledge is illustrated by the somewhat extreme case of Hopkins v. E. I. duPont de Nemours & Co., 199 F.2d 930 (3d Cir. 1952). A construction worker was killed while loading a drill hole with dynamite manufactured by defendant. The dynamite exploded prematurely because of the unusually high temperature and vibration created by drilling in hard rock. Defendant was held subject to liability for negligently failing to warn of the specific danger created by loading the dynamite into a hole freshly drilled in hard rock while other holes were being drilled close by, even though defendant had no actual knowledge of his specific danger. See id. at 933 n.3. The court held that defendant was required to have this knowledge. The result was reached on the basis of defendant’s failure to warn; there was no claim the defendant negligently failed to inspect the dynamite. Id. at 932.

39 Cf. cases cited in note 37, supra.

40 See the definition of “commercial vendor,” note 4 supra.

41 In Thrash v. U-Drive-It Co., 158 Ohio St. 465, 110 N.E.2d 419 (1953), the defendant sold his used vehicle “as is” to an automobile dealer. After resale, the dealer’s vendee was injured when an insecure lock ring on a wheel caused the vehicle to go out of control. In refusing to hold defendant liable for failing to warn of this dangerous condition, the Ohio Court relied on the dealer’s duty to inspect the vehicle before selling it as a reconditioned used vehicle. Id. Messrs. Frumer and Friedman seem to interpret Thrash as holding that an individual who sells his used car to an automobile dealer cannot be held liable to a vendee of the dealer for.
rule, which considers the vendor’s reasonable belief that the vendee will realize the danger in determining whether or not the vendor has a duty to warn in a particular case.\textsuperscript{42} The reasonableness of the vendor’s belief is controlling; actual failure of the vendee to realize the danger is unimportant.\textsuperscript{43}

Once the possibility of a vendor’s liability for negligent failure to warn is acknowledged, it must be decided whether selling a chattel "as is" is sufficient to vitiate that liability. At the outset a distinction, implicit in the result of the principal case,\textsuperscript{44} should be noted between the two alternatives available to the vendor who desires to avoid the risk of liability. He can preclude liability by insisting on a provision in the contract of sale whereby the vendee agrees to assume the risk of the vendor’s negligence.\textsuperscript{45} Or, he can bring to the attention of the vendee facts which constitute a warning of danger sufficient under the circumstances to preclude a finding of negligence.\textsuperscript{46} In the principal case the vendor did neither.

\begin{itemize}
\item The Restatement rule adequately covers the resale situation. An owner who sells his vehicle to a dealer without warning of a dangerous condition, but who reasonably believes that the dealer will realize the danger, would not be found negligent. 2 Restatement (Second) of Torts § 388 (b) (1965). If the owner does warn the dealer, he probably would not be found negligent. See 2 Restatement (Second) of Torts § 388, comments g, h (1965). In these two instances, the Ohio Court’s reluctance to impose too heavy a burden on the owner should be vindicated. If, however, the owner gives no warning, and cannot reasonably believe that the dealer will discover the particular dangerous condition that later causes injury, then he should be subject to liability for negligence under the Restatement rule. See 2 Restatement (Second) of Torts § 388, comment b (1965); cf. id., comment e. The view of Frumer and Friedman is too broad because it does not account for the latter possibility.

\item Thus, in the principal case the vendee did fail to realize, until after the time of plaintiff’s injury, that the truck could be started when the transmission was in gear. However, the court left it to the trier of fact to determine whether T had reason to believe that defendant would realize the dangerous condition. Fleming v. Stoddard Wendle Motor Co., 70 Wash. Dec. 2d 443, 446, 423 P.2d 926, 928 (1967), quoted in note 2 supra.

\item The vendor can preclude a finding of negligence against him by giving his vendee an adequate warning. 2 Restatement (Second) of Torts § 388, comment g (1965); Dillard & Hart, Product Liability: Directions for Use and the Duty to Warn, 41 Va. L. Rev. 145 (1955). He may accomplish the same objective indirectly by requiring his vendee to inspect the chattel and purchase it in reliance solely on his inspection. See the treatment of Pokrajac v. Wade Motors, Inc., 265 Wis. 398, 63 N.W.2d 720 (1954), by the court in the principal case. Fleming v. Stoddard Wendle Motor Co., 70 Wash. Dec. 2d 443, 448, 423 P.2d 926, 929 (1967), discussed in note 14 supra. However, the vendor’s inspection will insulate the vendor from a finding of negligence only if the vendor can reasonably believe that the inspection as made by the vendee will reveal the dangerous condition of the chattel to the vendee. See 2 Restatement (Second) of Torts § 388 (b) (1965) and comment k; cf. George v. Willman, 379 P.2d 103 (Alas. 1963). In George the vendor of a trailer was held liable to the vendee for breach of the implied warranty of merchantability
Selling a chattel "as is" cannot by itself be sufficient to discharge a vendor's duty to warn. The purpose of a warning, if one is required, is to eliminate danger by providing the vendee with the vendor's knowledge of the chattel's dangerous condition.\(^{47}\) The term "as is" does not communicate that knowledge. Nor, in the principal case, would the vendor have sold his chattel "as is" in order to disclaim the implied warranty of merchantability. That warranty does not arise when an individual makes an occasional sale.\(^{48}\) Therefore, it could be argued that in a sale by an individual without warranties, a purchase "as is" constitutes as a matter of law an express assumption by the vendee of the risk of the vendor's negligence.\(^{49}\) Otherwise, the argument proceeds, the term "as is," intended by the parties to mean something, is rendered meaningless. The difficulty with that argument is its assumption that the term "as is" is always intended to limit the vendor's liability for physical harm. That assumption is inaccurate. Parties to a sale could very well intend the term "as is" to be an expression of their agreement that the vendor is not required to restore the chattel to a particular state of repair.\(^{50}\) So used, "as is" would not be intended as an assumption of the risk of physical harm.

Underlying the court's disposition of the principal case is the premise that a sale "as is," without more, can vitiate a vendor's liability for negligence only if the term is interpreted as an express assumption of risk by the vendee. There is a heavy burden of proof on a party who asserts that someone else has agreed to assume

\(^{47}\) See 2 Restatement (Second) of Torts § 388, comment g (1965).


\(^{50}\) For example, suppose A offers to buy B's pickup truck for $500, if B will repair the tailgate and fix a tear in the seat. B rejects that offer. After a period of bargaining, A says, "O.K., I'll pay $450 for your truck, as is, and fix the seat and tailgate myself." B accepts. It is doubtful that A, by using the term "as is," intended to assume all risk of hidden mechanical dangers about which B remained silent. See Swisher v. Miami Motors, 81 Ohio App. 97, 72 N.E.2d 682, 684 (1947).
the risk of his negligence.\textsuperscript{51} When used to avoid tort liability, the term "as is" ordinarily is intended to be a disclaimer of implied warranties.\textsuperscript{62} This meaning does not communicate to a vendee that he has assumed all risk of the vendor's negligence with respect to the chattel sold.\textsuperscript{53} For this reason, a sale "as is," without more, does not exempt from negligence liability an individual who sells a chattel.\textsuperscript{54} It is submitted that the same rule should apply to sales by commercial vendors.\textsuperscript{55}

The \textit{Restatement} imposes the duty required by § 388 on any person who supplies a chattel for another to use.\textsuperscript{56} Because the court adopted § 388 without discussion, it is not entirely clear that the rule will be broadly applied in the future. However, because the significant act is the supplying of a chattel for another's use,\textsuperscript{57} without regard to economic benefit, the rule should also apply to donors,\textsuperscript{58} lessors,\textsuperscript{69} and all kinds of bailors\textsuperscript{60} of chattels.

\footnotesize{(dictum); cf. Draisner v. Schlosberg, 57 A.2d 202 (D.C. Mun. Ct. App. 1948).\textsuperscript{61} E.g., Leudeke v. Chicago & N.W.Ry. Co., 120 Neb. 124, 231 N.W. 695 (1930); 6A. A. Corbin, \textit{Contracts} § 1472, at 602-04 (1962); see 6 S. Williston, \textit{Contracts} § 1825, at 5169-70 (1938).\textsuperscript{62} Cases cited note 15 \textit{supra}; cf. Stalik v. United States, 247 F.2d 136 (10th Cir. 1957).\textsuperscript{52} By purchasing a chattel "as is," the vendee is willing to take the risk of an unprofitable bargain, generally in consideration of a reduced price. See Findley v. Downing Motors, Inc., 79 Ga. App. 682, 54 S.E.2d 716 (1949); Johnson v. Waismann Bros., 93 N.H. 716, 36 A.2d 634 (1944); Swisher v. Miami Motors, 81 Ohio App. 97, 72 N.E.2d 682, 684 (1947) (dictum). This does not mean that he intends to take the risk of personal injuries caused by hidden danger. See James, \textit{Products Liability}, 34 Texas L. Rev. 192, 210-11 (1956); see also Stalik v. United States, 247 F.2d 136 (10th Cir. 1957).\textsuperscript{53} This proposition is established as a matter of law by the principal case. Fleming v. Stoddard Wendle Motor Co., 70 Wash. Dec. 2d 443, 448, 423 P.2d 926, 929 (1967). The court states that "the term as is by itself amounts solely to a disclaimer of warranty." \textit{Id.} at 447, 423 P.2d at 928 (1967) (emphasis added). By distinguishing Pokrajac v. Wade Motors, 226 Wis. 398, 63 N.W.2d 720 (1954), rather than rejecting it, the court appears to have left open the possibility that a sale "as is," together with additional evidence, may preclude a vendor's liability for negligent failure to warn. See the discussion in note 14, \textit{supra}, for a possible example (vendor's agreement that he had examined the chattel and knew what he was buying).\textsuperscript{54} The failure of a sale "as is" to communicate to a vendee that he has assumed all risk of the vendor's negligence does not depend on the identity of the vendor. \textit{See} notes 15, 53 \textit{supra}, and authorities cited.\textsuperscript{55} 2 \textit{Restatement (Second) of Torts} § 388, comment c (1965), quoted in note 10, \textit{supra}.\textsuperscript{56} Id. \textit{See} James, \textit{Products Liability}, 34 Texas L. Rev. 44, 45-47 (1955).\textsuperscript{57} Guinan v. Famous Players-Lasky Corp., 257 Mass. 501, 167 N.E. 235 (1929); 2 \textit{Restatement (Second) of Torts} § 388, comment c (1965), quoted in note 10, \textit{supra}; \textit{cf.} Ruth v. Hutchinson Gas Co., 209 Minn. 248, 296 N.W. 136 (1941) (duty to warn did not arise because donor of gas had no actual knowledge of the dangerous condition).\textsuperscript{58} Monroe v. East Bay Rental Service, 111 Cal. App. 2d 574, 245 P.2d 9 (1952); La Rocca v. Farrington, 301 N.Y. 247, 93 N.E.2d 829 (1952); 2 \textit{Restatement (Second) of Torts} § 388, comment c (1965), quoted in note 10, \textit{supra}.\textsuperscript{59} Mikel v. Aaker, 256 Minn. 500, 99 N.W.2d 76 (1959) ( gratuitous bailor); 2
The court reached a correct result in the principal case. Imposing the duty to warn on an individual, in appropriate circumstances, is consistent with the general principle of negligence law that an individual should not expose others to unreasonable risks of physical harm. No one should have the privilege to foist on someone else machinery that he knows to be dangerous. If a vendor wants to avoid the risk of liability, he can try to obtain an express assumption of risk from the vendee. In practice, this may not be feasible. His alternative is to give his vendee adequate warning. An advantage of this alternative is that dangerous conditions are more likely to be made safe if the vendee is put on notice that they exist. It is also the safest course for the vendor to follow, and demands no more than reasonable attention to the safety of others.

Restatement (Second) of Torts § 388, comment c (1965), quoted in note 10, supra; Thomas v. Ribble, 404 Pa. 296, 172 A.2d 280 (1961) (owner brought car to garage to have it repaired).

In a sale by an individual to a dealer, the vendor may lack bargaining power sufficient to obtain such an agreement. In a sale to an individual, if the vendee is asked to sign a contract whereby he agrees to assume all risks of harm caused by the chattel, he may begin to wonder what is wrong with the chattel and decide to buy elsewhere.