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anon

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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.¹ Defendant did not inspect the truck.² 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 to³ a duty to warn

¹ *Fleming v. Stoddard Wendle Motor Co.*, 70 Wash. Dec. 2d 443, 445, 423 P.2d 926, 927 (1967):

[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).

² *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.

Fleming v. Stoddard Wendle Motor Co., 70 Wash. Dec. 2d 443, 446, 423 P.2d 926, 928 (1967) (emphasis added).

³ 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

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* vendor⁴ 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.⁵ 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.⁶ 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;⁷ 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* § 338⁸ without discussion.⁹ After finding *T* to be

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).

⁴The 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.*

⁵*Butler v. L. Sonneborn Sons, Inc.*, 296 F.2d 623 (2d Cir. 1961); *Walker v. National Gun Traders, Inc.*, 116 So.2d 792 (Fla. 1960); *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64 (1870); *Golden Gate Hop Ranch, Inc. v. Velsicol Chemical Corp.*, 66 Wn. 2d 469, 403 P.2d 351 (1965), *cert. denied*, 382 U.S. 1025 (1966).

⁶*Eldredge, Vendor's Tort Liability*, 89 U. PA. L. REV. 306, 310-13 (1941).

⁷As 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*.

⁸2 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,¹⁰ the court held that the undisputed facts would allow reasonable minds to conclude that *T* was negligent.¹¹ Although the court recognized that parties may "bargain for exemption from liability for the consequences of negligence"¹² if they clearly express an intention to do so,¹³ 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."¹⁴ 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.

⁹ *Fleming v. Stoddard Wendle Motor Co.*, 70 Wash. Dec. 2d 443, 445, 423 P.2d 926, 928 (1967).

¹⁰ 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.

¹¹ 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.

Fleming v. Stoddard Wendle Motor Co., 70 Wash. Dec. 2d 443, 444, 446, 423 P.2d 926, 927, 928 (1967).

¹² *Fleming v. Stoddard Wendle Motor Co.*, 70 Wash. Dec. 2d 443, 447, 423 P.2d 926, 928 (1967). *Broderson v. Rainier Nat'l Park Co.*, 187 Wash. 399, 60 P.2d 234 (1936) states the general rule. For discussion of restrictions on contracting away liability for negligence, see Comment, *Contractual Exemption from Liability for Negligence*, 44 CALIF. L. REV. 120 (1956); Comment, *Contracting Against Liability for Negligent Conduct*, 4 Mo. L. Rev. 55 (1939).

¹³ *Luedeke v. Chicago & N.W. Ry. Co.*, 120 Neb. 124, 231 N.W. 695 (1930).

¹⁴ *T* based his argument on *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,¹⁵ the court concluded that "the term 'as is' by itself amounts solely to a disclaimer of warranty."¹⁶ Absence of warranties does not preclude liability for negligence.¹⁷ 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.¹⁸ 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 used¹⁹ or dangerous if used in a particular way.²⁰ However, the vendor does not have to warn of danger which he reasonably believes to be known to the vendee.²¹

tinguished *Pokrajac* for that reason. *Fleming v. Stoddard Wendle Motor Co.*, 70 Wash. Dec. 2d 443, 445, 448, 423 P.2d 926, 927, 929 (1967). *Thrash* was distinguished on the ground that the injury there occurred after the vendee had resold the vehicle as a *reconditioned* used vehicle without replacing a mismatched lock ring on a wheel. *Thrash v. U-Drive-It Co.*, 158 Ohio St. 465, 110 N.E.2d 419 (1953), discussed in note 41 *infra*; *Fleming v. Stoddard Wendle Motor Co.*, 70 Wash. Dec. 2d 443, 448, 423 P.2d 926, 929 (1967). Thus, because the *facts* of both *Thrash* and *Pokrajac* precluded finding the vendor liable, there was no negligence liability for an "as is" sale to disclaim. Therefore, in neither *Thrash* nor *Pokrajac* was the fact of a sale "as is" of itself held to be an express assumption of risk by the vendee.

¹⁵ *Champlin v. Oklahoma Furniture Mfg. Co.*, 269 F.2d 918 (10th Cir. 1959); *Robinson v. Carter*, 77 A.2d 174, 177 (D.C. Mun. Ct. App. 1950) (dictum); *First Nat'l Bank of Elgin v. Husted*, 57 Ill. App. 2d 227, 205 N.E.2d 780 (1965) (alternative holding); WASH. REV. CODE ANN. § 62A.2-316(3) (a) (1966); 23 MINN. L. REV. 784, 793 (1939).

¹⁶ *Fleming v. Stoddard Wendle Motor Co.*, 70 Wash. Dec. 2d 443, 447, 423 P.2d 926, 928 (1967). See discussion in note 54 *infra*.

¹⁷ 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY 547 n.6 (1966); W. PROSSER, TORTS 491 (2d ed. 1955).

¹⁸ *E.g.*, *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64 (1870). See *Eldredge, Vendor's Tort Liability*, 89 U. PA. L. REV. 306, 310-13 (1941).

¹⁹ *E.g.*, *Roberts v. United States*, 316 F.2d 489 (3d Cir. 1963) (toxic chemical).

²⁰ *E.g.*, *Hopkins v. E.I. duPont de Nemours & Co.*, 199 F.2d 930 (3d Cir. 1952) (although a construction worker can be expected to know about the general danger of working with dynamite, the manufacturer may have a duty to warn of the specific danger created by loading dynamite into a freshly drilled hole in hard rock while other holes are being drilled close by); *cf. Hopkins v. E.I. duPont de Nemours & Co.*, 212 F.2d 623 (1954), *cert. denied*, 384 U.S. 872 (1954) (same case as above; on appeal after retrial held that manufacturer did not have a duty to warn, because additional facts produced at the new trial showed that the vendee knew about the specific danger); *Foster v. Ford Motor Co.*, 139 Wash. 341, 246 P. 945 (1926) (held that manufacturer gave sufficient warning that its tractor might flip over backwards if power was suddenly applied to the rear wheels when mired in mud).

Instructions for use are not necessarily sufficient to discharge the duty to warn of danger created by improper use. 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 8.05 [1] (1966); *Dillard & Hart, Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145 (1955).

²¹ *Bradshaw v. Blystone Equip. Co.*, 79 Nev. 441, 386 P.2d 396 (1963) (dangerous condition apparent to casual observer); *Dalton v. Pioneer Sand & Gravel Co.*, 37 Wn.2d 946, 227 P.2d 173 (1951) (danger of exposing skin to wet cement is within common knowledge).

Although the commercial vendor's duty to warn was established at an early date,²² 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.²³ 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.²⁴ 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.²⁵ 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.²⁶

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.²⁷ Nevertheless an individual, like a commercial vendor, is generally required to avoid exposing others to unreasonable risks of bodily harm.²⁸ For that reason the individual who sells a chattel should

Although the general danger of using a chattel is apparent, the vendor may be required to warn of a specific danger that is not apparent. *E.g.*, *Hopkins v. E.I. duPont de Nemours & Co.*, 199 F.2d 930 (3d Cir. 1952), discussed briefly in note 20 *supra*.

²² See note 18 *supra*.

²³ See the cases discussed in *Huset v. J. I. Case Threshing Machine Co.*, 120 F. 865, 868 (8th Cir. 1903). The rule was justified as a necessary limit to a vendor's liability. *Id.* at 867, 869.

²⁴ *Huset v. J. I. Case Threshing Machine Co.*, 120 F. 865 (8th Cir. 1903); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

Huset is a classic example of how the privity requirement was gradually undermined by the exceptions that were made to mitigate the harshness of the general rule. Recovery was allowed against the manufacturer of a threshing machine found to have been imminently dangerous to life and limb, by one not in privity of contract with him. The exception was made on the basis of

... the underlying principle of the law of negligence, that it is the duty of every one to so act himself as to so use his property as to do no unnecessary damage to his neighbors....

Id. at 866. For further discussion of how privity was eventually removed from negligence actions, see Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134, 136-39 (1937); 21 MINN. L. REV. 315, 315-21 (1937).

²⁵ *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N.E.2d 693 (1946); *Freeman v. Navarre*, 47 Wn.2d 760, 289 P.2d 1015 (1955).

²⁶ Discussed at notes 18, 24 *supra*.

²⁷ This is a reason usually given to justify imposing the implied warranty of merchantability on merchants. See Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 118-22 (1942). This warranty is an alternative to negligence as a basis for recovery. See Prosser, *supra*, at 117. It is advantageous to the vendee because he does not have to prove that the vendor was negligent. *E.g.*, 11 KAN. L. REV. 168 (1962). Warranty liability is beyond the scope of this Note.

²⁸ James, *Products Liability*, 34 TEXAS L. REV. 44 (1955).

be subject to the duty to give his vendee a reasonable warning.²⁹ This conclusion, reached in the principal case, is merely an application of the general principle underlying the commercial vendor cases.³⁰

The court resolved the negligence issue by adopting 2 *Restatement (Second) of Torts* § 338.³¹ This rule was properly applied in the principal case to an individual who *knew* of the condition that created the danger.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.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.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.³⁵ A review of past cases suggests that a manufacturer, and occasionally a distributor,³⁶ of chattels has a duty to acquire knowledge about the

²⁹ 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 (SECOND) OF TORTS § 388, comment *b* (1965). Although subject to liability to subsequent users of the chattel, 2 RESTATEMENT (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 (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.

³⁰ Discussed at p. 485 *supra*.

³¹ 2 RESTATEMENT (SECOND) OF TORTS § 388 (1965), quoted in note 8 *supra*.

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."

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).

³⁴ 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.*

³⁵ 2 RESTATEMENT (SECOND) OF TORTS § 289(b) (1965).

³⁶ This manufacturers' 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 (SECOND) OF TORTS § 400 (1965).

chattels he places on the market³⁷ in addition to a duty to warn.³⁸ 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.³⁹

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,⁴⁰ 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.⁴¹ This element is incorporated into the *Restatement*

³⁷ *Roberts v. United States*, 316 F.2d 489, 494 (3d Cir. 1963) (manufacturer of chemical should know its toxicity); *Mealey v. Super Curline Hair Wave Corp.*, 342 Mass. 303, 173 N.E.2d 84 (1961) (manufacturer of hairdressing lotion should know that it might cause scalp burns); *Bock v. Truck & Tractor, Inc.*, 18 Wn.2d 458, 139 P.2d 706 (1943) (duty applied to dealer who sold second hand car as a *reconditioned* used car). There is language suggesting this duty in *Golden Gate Hop Ranch, Inc. v. Velsicol Chemical Corp.*, 66 Wn.2d 469, 474, 403 P.2d 351, 355 (1965), *cert. denied*, 382 U.S. 1025 (1966); *cf. Kasey v. Suburban Gas Heat, Inc.*, 60 Wn.2d 468, 374 P.2d 549 (1962).

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); *Ringsstad 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.⁴² The reasonableness of the vendor's belief is controlling; actual failure of the vendee to realize the danger is unimportant.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,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.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.⁴⁶ In the principal case the vendor did neither.

failing to warn. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY 466 (1966). This interpretation of the holding is too broad.

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*, *n* (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.

⁴² 2 RESTATEMENT (SECOND) OF TORTS § 388(b) and comment *k* (1965).

⁴³ 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*.

⁴⁴ See discussion at pp. 492-93 *infra*.

⁴⁵ References cited notes 12, 13 *supra*.

⁴⁶ 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., 266 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 vendee'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

when the trailer was destroyed by a fire caused by loose fuel line fittings. The court said, at 105:

[The vendors] may not escape their warranty of merchantable quality on the ground that [the vendee] had inspected the trailer, for the reason that the defect was a hidden mechanical deficiency which would not be discernible by the ordinary person using reasonable care while looking over a trailer with a view toward purchasing it as a family home.

⁴⁷ See 2 RESTATEMENT (SECOND) OF TORTS § 388, comment *g* (1965).

⁴⁸ The implied warranty of merchantability applies only to sales by merchants. WASH. REV. CODE ANN. § 62A.2-314(1) (1966) (effective midnight, June 30, 1967); Cosway, *Sales—A Comparison of the Law in Washington and the Uniform Commercial Code*, 35 WASH. L. REV. 617, 626 (1960); see WASH. REV. CODE § 63.04.160(2) (1925) (applicable to the principal case; superseded by WASH. REV. CODE ANN. § 62A.2-314(1) (1966)).

⁴⁹ Cf. 39 VA. L. REV. 387 (1953). This argument was not presented to the court in the principal case. Brief of Respondent, *Fleming v. Stoddard Wendle Motor Co.*, 70 Wash. Dec. 2d 443, 423 P.2d 926 (1967).

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.⁵¹ When used to avoid tort liability, the term "as is" ordinarily is intended to be a disclaimer of implied warranties.⁵² 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.⁵³ For this reason, a sale "as is," without more, does not exempt from negligence liability an individual who sells a chattel.⁵⁴ It is submitted that the same rule should apply to sales by commercial vendors.⁵⁵

The *Restatement* imposes the duty required by § 388 on any person who supplies a chattel for another to use.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,⁵⁷ without regard to economic benefit, the rule should also apply to donors,⁵⁸ lessors,⁵⁹ and all kinds of bailors⁶⁰ of chattels.

(dictum); *cf.* *Draisner v. Schlosberg*, 57 A.2d 202 (D.C. Mun. Ct. App. 1948).

⁵¹ *E.g.*, *Leudeke v. Chicago & N.W.Ry. Co.*, 120 Neb. 124, 231 N.W. 695 (1930); 6A A. CORBIN, *CONTRACTS* § 1472, at 602-04 (1962); *see* 6 S. WILLISTON, *CONTRACTS* § 1825, at 5169-70 (1938).

⁵² Cases cited note 15 *supra*; *cf.* *Stalik v. United States*, 247 F.2d 136 (10th Cir. 1957).

⁵³ 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. Waisman 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, Products Liability*, 34 TEXAS L. REV. 192, 210-11 (1956); *see also* *Stalik v. United States*, 247 F.2d 136 (10th Cir. 1957).

⁵⁴ 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." *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, *supra*, for a possible example (vendee's agreement that he had examined the chattel and knew what he was buying).

⁵⁵ 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. *See* notes 15, 53 *supra*, and authorities cited.

⁵⁶ 2 RESTATEMENT (SECOND) OF TORTS § 388, comment *c* (1965), quoted in note 10, *supra*.

⁵⁷ *Id.* *See* *James, Products Liability*, 34 TEXAS L. REV. 44, 45-47 (1955).

⁵⁸ *Guinan v. Famous Players-Lasky Corp.*, 267 Mass. 501, 167 N.E. 235 (1929); 2 RESTATEMENT (SECOND) OF TORTS § 388, comment *c* (1965), quoted in note 10, *supra*; *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).

⁵⁹ *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 RESTATEMENT (SECOND) OF TORTS § 388, comment *c* (1965), quoted in note 10, *supra*.

⁶⁰ *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.⁶¹ 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.⁶² 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).

⁶¹ James, *Products Liability*, 34 TEXAS L. REV. 44, 44-47 (1955).

⁶² 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.