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## MUST A VENDOR INSPECT CHATTELS BEFORE THEIR SALE? AN ANSWER

D. J. FARAGE\*

Professor Laurence H. Eldredge recently published a very stimulating paper<sup>1</sup> devoted to a consideration of the liability imposed under tort law upon a vendor of a chattel for harm resulting from its dangerous condition. While excluding discussion of problems involving those vendors who "manufacture, compound, pack, or otherwise create the finished product," Mr. Eldredge, in his usual, admirably thorough way, considers virtually every phase of the liability of retailers and wholesalers and has sought to collect all available case authority pertinent thereto.

With his analysis of and conclusions about all phases of the subject but one, I find myself in such substantial accord that any animadversion concerning these would be hypercriticism. Thus, I have no fault to find with his summary concerning liability for personal injuries based on breach of warranty theories, nor with the views he expounds under his subheadings entitled "Chattels Known to be Dangerous," "Conscious Misrepresentation of Source," "Reckless Misrepresentation of Chattel's Safety," and "Honest Misrepresentation of Chattel's Safety." On only one basic point which Mr. Eldredge makes do I feel doubt, but that point is of such major importance that, notwithstanding my reluctance to question his generally sound judgment, I feel impelled to pause, if not to cross lances on the matter.

If I rightly understand the position argued for by Mr. Eldredge, it is that a vendor of a chattel, if free from "active" negligence, is not liable to a purchaser or third party for personal injuries resulting from the fact that the chattel was in a dangerous condition, even if the vendor could have discovered the danger through a "reasonable" or even " cursory" examination of the article. In other words, the suggestion seems to be that unless the vendor has himself produced the dangerous condition, or is guilty of misrepresentation, he is not liable for personal injuries unless he actually *knew* of facts indicating the danger and failed to warn the buyer. To put the matter still differently, a vendor is not liable for harm suffered by ven-

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<sup>1</sup>Eldredge, *Vendor's Tort Liability* (1941) 89 U. OF PA. L. REV. 306.

dees or third persons merely because he could have discovered the danger by making an inspection previous to sale, *no matter how little the burden of such inspection, nor how great the danger* threatened by the condition of the chattel. "The test," says Mr. Eldredge, "should be the vendor's actual knowledge of the defect or of facts pointing to it, while the degree of observableness of the defect should be merely evidence bearing upon the existence or non-existence of that controlling fact."<sup>2</sup> In sum, the contention seems to be that a vendor owes, or at least should owe, *no* duty to inspect a chattel before selling it.

The reasoning advanced to support this proposition invites examination. Says Mr. Eldredge:

"Ordinarily, if a vendor is held liable for selling a chattel without inspection, liability is being imposed not because he did a foreseeably dangerous act, but because he omitted to do something. In other words an affirmative duty to act is being imposed. Generally, affirmative obligations are imposed only as the price of a benefit. (*Eg.*, the possessor of land owes a duty to a business visitor to inspect, but only owes to other licensees a duty to warn of known defects: RESTATEMENT, TORTS (1934) §§ 342, comment *c*, and 343, comment *a*.)<sup>3</sup> If it be said that the vendor benefits from the sale of a chattel, it may also be said that the primary benefit of using the chattel accrues to the purchaser."<sup>4</sup>

The effort in the last sentence to minimize the economic benefit accruing to a vendor in carrying on his trade leaves me unimpressed. The vendee's interest in acquiring and using a chattel cannot gainsay the vendor's interest in making the sale. By and large, vendors are not in business because they are charitably disposed. The one benefiting the most is perhaps he striking the best bargain. Both, however, are economically interested in the sale. In any event, I find difficulty in understanding why, although the vendor is conceded by Mr. Eldredge to have sufficient economic interest in his trade to justify the imposition of a duty to make a "reasonable" inspection of the *premises* for the protection of customers, the same vendor is deemed not to have a sufficient economic interest in the same trade which may justify the imposition of a duty to "reasonably" inspect stock for the benefit of the same customers. There may be other reasons, perhaps, for imposing the duty in the one case and denying it in the other, but the absence of benefit to the vendor seems a doubtful basis for distinction.

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<sup>2</sup>*id.* at 329.

<sup>3</sup>*id.* at 321, footnote 76.

<sup>4</sup>*id.* at 321.

The article continues:

"If that use benefit<sup>5</sup> is not strong enough to raise a duty of inspection by the purchaser, why should the sale benefit be sufficient to raise a duty of inspection by the vendor? If the purchaser's belief that the chattel is free from defects is reasonable, so that his use without inspection is not negligent as to a third person or contributory negligence as to himself, how can it be said that the vendor's equally reasonable belief and sale without inspection is negligence? After all, the risk of harm is to the purchaser, not to the vendor."<sup>6</sup>

To begin with, this statement suggests that the vendee of a dangerous chattel is under no obligation to make any reasonable examination for himself before using the chattel. No cases, however, are cited in support, and the point is not conceded. It would seem that a vendee injured while using a chattel because of a defect therein is guilty of contributory negligence if he omits a reasonable inspection which would have disclosed the danger.<sup>7</sup> On the other hand, it may well be that to be "reasonable" the vendor's inspection must be more thorough than that which the vendee must reasonably make to avoid the charge of contributory negligence. A difference in the degree of thoroughness in the inspection required of vendor and vendee respectively of itself does not establish unfair discrimination. Equitable considerations may justify greater demands upon one than upon the other. It is not unreasonable to suppose that one in the business of constantly handling and selling specified chattels should be able to discover defects of more varieties, more easily and quickly than a vendee making only occasional purchases of such chattels and lacking the ready ability to spot defects which comes from long experience.

To say, therefore, that if a vendee is not guilty of contributory negligence in failing to discover defects, the vendor is entitled to like exoneration for failing to discover the same defects, begs the issue. If for reasons of economic or social policy, a duty is imposed upon a vendor to do more than is required of the vendee, conformance by the former with the standards set up for the latter will not suffice. The real question is whether fairness requires the imposition of identical standards on both. It is not uncommon to demand more rigorous precautions from one pursuing a business calling than from his patrons. This principle is recognized by the RESTATEMENT<sup>8</sup> when it states:

<sup>5</sup>*i.e.*, the vendee's.

<sup>6</sup>Eldredge, *supra* note 1, at 321.

<sup>7</sup>*See* Berger v. Standard Oil Co., 126 Ky. 155, 103 S.W. 245 (1907); *cf.* VanLien v. Scoville Mfg. Co., 14 Abb. Prac. (N.S.) 74 (N.Y. 1873); BOHLEN, STUDIES IN THE LAW OF TORTS, (1926) 118 (intimation). As to duty of vendee to inspect for the benefit of third persons, compare RESTATEMENT, TORTS, §307, comment b, quoted *infra*, note 9.

<sup>8</sup>RESTATEMENT, TORTS (1934) §343, comment f.

"A person who holds his land open to others for his own business purposes must possess and exercise a knowledge of the dangerous qualities of the place itself and the appliances provided therein, which is not required of his patrons. Thus, the keeper of a boarding house is negligent in providing a gas stove to be used in an unventilated bathroom, although the boarder, who is made ill by the fumes, uses the bathroom with knowledge of all the circumstances, except the risk of so doing. *This is so because the boarding house keeper, even though a man of the same class as his boarders, is required to have a superior knowledge of the dangers incident to the facilities which he furnishes to them.*"<sup>9</sup>

Accordingly, the mere fact that a vendee may be entitled to ignore certain risks in using a chattel does not and should not necessarily absolve the vendor from a duty to inspect the chattel before sale, if by hypothesis, it is deemed equitable to require *superior* knowledge on his part. To be sure, the boarding house case put by the RESTATEMENT concerns the duty to inspect business premises, not chattels. Mr. Eldredge, however, has sought to distinguish the chattel cases by minimizing the benefit accruing therein to the vendor. If, as I have contended, the vendor's benefit is the same in the two situations, there appears to be no further argument advanced by Mr. Eldredge against applying the reasoning of the boarding house case to situations involving sales of chattels, unless it be his suggestion that "it is doubtful"<sup>10</sup> whether a vendee relies on the vendor's having made an inspection of the purchased chattel. This point raises a question of fact which perhaps can never be definitely settled.

It may be true that "in this age of national advertising and familiar trademarks, the purchaser is *equally* likely to rely on the manufacturer."<sup>11</sup> This would not prove, however, that there is not at least a partial reliance upon the retailer. While, perhaps, a prospective purchaser of an automobile may be more likely to concern himself with the identity of the manufacturer than of the retailer, it is significant that the prospective purchaser is usually moved to deal with one particular retailer out of a group selling the same manufacturer's products. I know

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<sup>9</sup>Italics added. This illustration is based no doubt on *Gobrecht v. Beckwith*, 82 N.H. 415, 135 Atl. 20 (1926). Compare also RESTATEMENT, TORTS (1934) §307, comment b: "If a third person has turned over the thing to the actor for the purpose of his using it for the particular work or similar work, the actor is usually entitled to assume that the thing is in normally fit condition unless there is some reason to suspect the contrary. On the other hand, there are certain relations, of which that of Master and Servant is an instance, in which the actor is required to take reasonable care to ascertain by inspection the actual character of a thing turned over to him by even a careful person or bought of a reputable manufacturer. Even in the absence of such a special relation, there is a similar duty of inspection where the work in hand threatens serious danger unless the instrumentalities used are appropriate and in good condition."

<sup>10</sup>Eldredge, *supra* note 1, at 321.

<sup>11</sup>*ibid.* Italics added.

many people who insist on dealing with a particular individual retailer even when buying trademarked products which this retailer sells at prices slightly above those elsewhere, because he has established a reputation for fastidious care that even such products must be completely free of imperfections when he sells them.

Perhaps no generalization that vendees always do or do not rely on the vendor can be validly made. In certain specific cases, such reliance is undoubtedly present. In others a purchaser may ask for a trademarked product without even a thought as to whom he is relying upon for inspection of the chattel, just as a purchaser often enters business premises without any expectation that dangers lurk therein, and so without any conscious reliance upon the possessor or anyone else for antecedent inspections. In such cases, the only intelligible inquiry which might be pursued is not upon whom *did* the vendee rely, but upon whom *would* he have relied had he thought about the matter? It is submitted that a rule of law absolving vendors from any duty to inspect chattels is unjustified insofar as it rests on the doubtful, debatable, and undemonstrable factual basis that vendees do not rely on the vendor.

#### THE AUTHORITIES

After advancing the arguments already considered, Mr. Eldredge states:

"Because of these reasons and until quite recently, it has generally been thought that a vendor had no duty of inspection; and that he was not liable (in the absence of a warranty) for harm caused by a defect which should have made him suspicious."<sup>12</sup>

Making an endeavor to "cite and analyze every case relating to a vendor's purely tort duty which could be found in the reports"<sup>13</sup> and reviewing the RESTATEMENT, he concludes that:

". . . it is difficult to see why the public welfare requires the imposition upon vendors of this *new* duty of inspection. On the contrary it requires continued adherence to the present weight of authority."<sup>14</sup>

Conceding the claimed thorough scope of Mr. Eldredge's research, I nevertheless wish to dispute the conclusions he draws therefrom as to the effect of the decisions and the "weight of authority." The cases he relies upon are collected on pages 322 and 323 of his article. There it is alleged that "there is a considerable body of case law in which vendors who did not inspect chattels, which by reason of hidden defects caused harm, have been absolved from liability." *No*

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<sup>12</sup>*id.* at 322.

<sup>13</sup>*id.* at 334.

<sup>14</sup>*ibid.* Italics added.

*cases are cited at this point.* The next sentence continues, "In a number of cases the defect was not detectable by an ocular inspection and could have been disclosed only by thorough testing." In support of this statement seventeen cases are cited. These, however, obviously do not support the view that a vendor owes no duty to inspect chattels. At best they hold that the duty to inspect must not be "unreasonably" onerous. Indeed, the next sentence of the article concedes this to be so by saying, "As to these cases it may be said that the vendor could not have discovered the defect even if he had used 'reasonable care' in inspecting them." Up to this point, therefore, Mr. Eldredge fails to cite any *holding* in support of his view. He does thereafter refer to *dicta* in seven cases<sup>15</sup> upholding his position, at the same time conceding, however, that other cases use language which might be construed against his position. The *dicta* are therefore not persuasive either way.

Finally, Mr. Eldredge states<sup>16</sup> flatly that "In two cases involving observable defects but in which the vendor did not inspect and learn of them, he was held not to have any such duty." These cases, *Longmeid v. Holliday*<sup>17</sup> and *Moore v. Jefferson D. & D. Co.*,<sup>18</sup> it is respectfully submitted, do not support the text.

In *Longmeid v. Holliday*, defendant vendor sold a defective lamp to A, whose wife, B, suffered harm because of the defect. There is no statement in the report that the defect was reasonably observable. Recovery against the vendor was denied to B in an action alleging deceit (*i. e.*, "intentional fraud") because no fraud was proved. Any language in the opinion bearing on the point for which Mr. Eldredge cites the case must therefore be regarded as *dictum*. It is noteworthy, however, that in denying recovery, the court stressed that the plaintiff was not a party to the contract. Parke, B., states, "There are other cases besides those of fraud in which a third person, though not a party to the contract, may sue for the damage sustained if it be broken. These cases occur where there has been a wrong done to that person for which he would have had a right of action, though no such contract had been made," but he states further that there is no actionable wrong in the absence of contractual privity, where the transfer involves "*an article not in its nature dangerous*, but which might become so by a latent defect entirely unknown, though discoverable by the exercise of ordinary care even by the person who manufactured it."<sup>19</sup> There is much in this language which points, not so much to the idea that a vendee owes no duty to inspect, as to the policy later announced by the now discredited case of *Huset v. Case Threshing Machine Co.*<sup>20</sup> to the effect that a transferor of a chattel is liable for personal injuries suffered by one not in con-

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<sup>15</sup>*id.* at 322, footnote 81.

<sup>16</sup>*id.* at 323.

<sup>17</sup>6 Ex. 761 (1851).

<sup>18</sup>169 La. 1156, 126 So. 691 (1930).

<sup>19</sup>Italics added.

<sup>20</sup>120 Fed. 865 (C.C.A. Mo., 1903).

tractual privity, only if the case falls within the three classic exemptions announced by Judge Sanborn, one being the case of a chattel which is "imminently dangerous to life or limb." Indeed, in the *Huset* case Judge Sanborn specifically cites and relies upon *Longmeid v. Holliday*. That case lends but doubtful support, therefore, to Mr. Eldredge's contention.

The second case he cites as definitely denying the vendor's duty to discover observable defects, *Moore v. Jefferson*, involved a sale by A to B of steel drums. B had previously contracted to procure and to sell them to C. While C was inspecting one of the drums, B "negligently" brought a lighted match near the bunghole, causing an explosion which killed C. In a suit against A on the theory that A failed to make an inspection of the drums before the sale to B, which would have disclosed the presence of inflammatory gases, recovery was denied. But the decision does *not* turn on the theory that a vendor owes no duty to inspect chattels. The court emphasizes that "There was, in fact, no contractual relationship of any kind existing between defendant and decedent. . . . We are dealing here with a case in which privity of contract is absent."<sup>21</sup> Quoting from an earlier case, the court continues:

*"The duty owing to the public for breach of which one injured may recover, has respect to and is limited to instruments and articles in their nature calculated to do injury, such as are essentially and in their elements instruments of danger, and to acts that are ordinarily dangerous to life and property. If the wrongful act be not imminently dangerous to life or property, the negligent vendor is liable only to the party with whom he contracted."*<sup>22</sup>

Again, the theory is simply that of the *Huset* case. Moreover, the court holds that B's striking of the match was a superseding cause of the injury. In short, *Moore v. Jefferson* does not in the least hold that a vendor is under no duty to inspect chattels he sells.

Up to this point, therefore, Mr. Eldredge still fails to cite a single case *holding* for his proposition. The only other case he cites anywhere in his article, so far as I have been able to discover, which might be construed to support him is *Miller v. Svenson*.<sup>23</sup> There a vendor of a fur coat admittedly inspected it, but failed to discover a furrier's knife which was concealed in the lining and later hurt the vendee. Recovery was denied because:

"The evidence does not show that the failure . . . to discover that there was a knife concealed in the coat was caused by any failure on

<sup>21</sup>126 So. 691, 693 (1930).

<sup>22</sup>*Ibid.* Italics the court's.

<sup>23</sup>189 Ill. App. 355 (1914).

the part of the defendants to use reasonable and ordinary care. . . . The defendants were not bound to anticipate and search for that which was unusual and unforeseen."<sup>24</sup>

In short, this case, like the seventeen previously referred to, does not deny the existence of a duty to make a "reasonable" inspection, but goes on the ground that the duty was fulfilled.

Beginning on page 330 of his article, Mr. Eldredge discusses three cases<sup>25</sup> which, he concedes, *hold* that the vendor *is* under a duty to inspect chattels he sells. Since Mr. Eldredge fails to cite a single case flatly holding for his views, it is difficult to understand his suggestion that the requirement of inspection would be a "new" duty<sup>26</sup> and "contrary . . . to the present weight of authority."<sup>27</sup> His criticism of the first two of these cases, on the ground that the particular inspection required in the specific instances was "unreasonably" onerous, may be conceded to be sound. That criticism in itself, however, does not invalidate the argument for imposing at least a "reasonable" duty. Similarly, the contention that all three cases requiring inspection rest upon dubious precedents may be accepted without reflecting upon the wisdom behind the requirement. After all, since there appear to be relatively few decisions which squarely raise the question, the courts could hardly be expected to cite other than more or less analogous cases.

Other authorities cited by Professor Eldredge as denying the existence of any duty on the vendor to inspect are statements in *Ruling Case Law* and *Corpus Juris*.<sup>28</sup> Neither of these, however, cites any cases not already considered by Mr. Eldredge himself, and since neither of these books purports in itself to be an exegesis on a sacred text, it would seem that the contention is not thereby furthered.

The views of the RESTATEMENT remain for consideration. After a minute examination of §§ 401 and 402, Mr. Eldredge concludes that a number of sentences and phrases, especially when viewed in the light of their context, must be regarded as "misleading" and "unfortunate" expressions which were not intended to be made, and which presumably were the result of faulty draftsmanship. Referring to a comment under § 401, which states that "the retailer is not subject to liability for bodily harm caused by their defective condition, unless the condition is such that even the cursory inspection *which a dealer should make of any article*

<sup>24</sup>*Id.* at 356.

<sup>25</sup>*Garvey v. Namm*, 136 App. Div. 815, 121 N.Y.S. 442 (1910); *Santise v. Martins, Inc.*, 258 App. Div. 663, 17 N.Y.S. (2d) 741 (1940); *Ebbert v. Phila. Elec. Co.*, 126 Pa. Super. Ct. 351, 191 Atl. 384 (1937), *aff'd* 330 Pa. 257, 198 Atl. 323 (1938).

<sup>26</sup>Eldredge, *supra* note 1, at 334.

<sup>27</sup>*Ibid.*

<sup>28</sup>24 R.C.L. 509, 510; 45 C.J. 893.

which he puts in stock and sells, would disclose some indication that the goods had deteriorated to a dangerous extent,"<sup>29</sup> Mr. Eldredge says:

"If this means no more than that the vendor of canned goods, for example, is liable when the defect has swollen the can to produce an obvious bulge, there can be no real objection because it is *practically* certain the bulge will be seen and that fact is a danger signal to the vendor."<sup>30</sup>

Similarly, with regard to the comment under § 402 that "the rule stated . . . requires the wholesale and retail dealer to utilize . . . the special opportunities which he has to observe the condition of the goods . . .," he comments:

"It can be argued that this requires the dealer to search for 'observable' defects. Taking the sentence in its context does not warrant such a broad interpretation; nor does the rationale of a vendor's liability. If the evidence of the defect is plain on the outer face of the chattel it is *practically* certain the vendor did know of it. His denial will generally be met with incredulity by the jury just as the jury views with incredulity the defendant's protestations of ignorance of the falsity of his statements in a deceit action where the evidence makes such ignorance highly improbable. But so far as the rule of law is concerned the test should be the vendor's actual knowledge of the defect or of facts pointing to it, while the degree of observability of the defect should be merely evidence bearing upon the existence or non-existence of that controlling fact . . ."<sup>31</sup>

The word "practically" in each of these quotations carries an implicit admission that there may be occasions when the vendor, though he might ascertain the facts at a glance, actually has not done so. Thus, a merchant, while engrossed in conversation with his customer, might pick a can of food from a recently delivered and still unpacked carton and put it in a bag for the customer without giving the particular can a glance. Likewise the case might be put of a sale from such a carton by an inexperienced helper of the merchant. To say that the jury will not believe the vendor's claim of ignorance when the defect is "observable," and that in such case the merchant should or will be treated as though he had knowledge, whether he did or not, is in effect to concede that at least in those cases the vendor must make a reasonable inspection if he wishes to avoid liability.

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<sup>29</sup>RESTATEMENT, TORTS (1934) §401, comment *a*.

<sup>30</sup>Eldredge, *supra* note 1, at 324. Italics added.

<sup>31</sup>*id.* at 329. Italics added.

Section 402 states in blackletter:

"A vendor of a chattel manufactured by a third person is subject to liability as stated in § 399,<sup>82</sup> if, although he is ignorant of the dangerous character or condition of the chattel, he could have discovered it by exercising reasonable care to utilize the peculiar opportunity and competence which as a dealer in such chattels he has or should have."<sup>83</sup>

To explain away the *prima facie* implication of this section, Mr. Eldredge refers to a statement made by Professor Bohlen when the latter presented the draft<sup>84</sup> of the pertinent sections to the American Law Institute. Mr. Bohlen said:

"I don't think there is any doubt about it that if I buy a chattel from a reputable manufacturer I may sell without subjecting it to any *extended* investigation unless there is some reason to suppose it is defective. I do not know whether there may or may not be chattels so dangerous that even a retailer would be under a duty of carefully checking up."<sup>85</sup>

The presence of the word "extended" would seem to be significant in suggesting that Mr. Bohlen believed that there was a duty to make *some* inspection. Likewise the word "carefully" in his second sentence suggests that he was concerned, perhaps, not so much with the existence of the duty as with its extent. In any event, his profession of uncertainty is double-edged; he was not certain one way or the other.<sup>86</sup> Though it be of no moment, the impression I received from him, first as a student and then as his assistant for three years, are that he believed that a vendor does owe a duty to make a "reasonable" inspection of chattels offered for sale. In the light of the doubt expressed by Mr. Bohlen in 1930, it would seem strange that the blackletter provision of § 402 did not make actual knowledge a prerequisite for liability if such a rule had been intended. Assuredly Mr. Bohlen keenly perceived the distinction between liability based upon actual knowledge and liability predicated upon the failure to make a "reasonable" inspection.

Doubt as to the meaning of the RESTATEMENT arises only because some of the illustrations given under the pertinent sections involve vendors having knowledge of the facts which would make them suspect the existence of defects in the chattels. Nevertheless it is significant that nowhere does the RESTATEMENT specifically deny the existence of the vendor's duty to make a reasonable inspection, although it would have been a simple matter to frame a rule requiring actual

<sup>82</sup>Section 399 states the liability for selling a chattel known to be dangerous.

<sup>83</sup>RESTATEMENT, TORTS (1934) §402.

<sup>84</sup>*id.* (Tent. Draft No. 5, 1930).

<sup>85</sup>(1930) 8 PROC. A.L.I. 239. Italics added.

<sup>86</sup>Whatever Mr. Bohlen's views when he wrote in 1905 (see BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 67, 105), it would seem that at the time of his statement before the American Law Institute in 1930 he was at least in doubt.

knowledge. Moreover, § 399 clearly provides that "a vendor of a chattel manufactured by a third person, who sells it knowing that it is, or is likely to be dangerous, is subject to liability. . . ." If, as Mr. Eldredge suggests, § 402 should be construed to impose liability only when the vendor has such actual knowledge, § 402 is obviously redundant. It is hardly conceivable that Mr. Bohlen or his advisers intended to repeat the identical rule in two different sections.

One more argument, which Mr. Eldredge advances in favor of a rule requiring the vendor to have "actual knowledge" as a condition to liability, must be considered. He says:

"Further, the issue of the vendor's knowledge is easily understandable while a rule of law requiring inspection for observable defects but not for unobservable defects draws a line very difficult of application. Does observable mean visible to the eye from the outside? Does it mean observable only if you look for it seeking danger, or observable by the casual glance given in the usual unpacking and handling? Does it require the removal of easily removable parts to see what is visible underneath? Does it mean visible as you view the chattel from a normal standing or sitting posture or visible as you get down and look all over it? Does it mean detectable by the sense of feel, or smell, or hearing, or taste as well as sight? Must the vendor look at, handle, smell, taste and listen to the chattel? Must he palpate the chattel inside to feel the defect? Must he tap it with a handy hammer to hear the defect? If an equally simple and not inconvenient test, such as using litmus paper, will make the defect observable by sight, as palpation makes it observable by feeling, is this required?"<sup>87</sup>

The difficulties posed by these questions seem awe-inspiring until it is recalled that by far the greatest part of the law of negligence rests upon the conveniently vague formula that the conduct required of members of society must conform to the "standard of the reasonable man." In advance it is usually impossible to give legal advice as to the precise forms of conduct required in order to avoid tort liability. Cases in which the courts have prescribed specific standards for observance (like those involving the "stop, look, and listen" rule) are comparatively rare. That this is so is perhaps fortunate, for it permits a consideration of special facts and conditions in particular cases which might otherwise be impossible.

It is not intended to suggest that burdens out of all proportion to possible risks should be imposed upon vendors of chattels. It may be conceded that in

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<sup>87</sup>Eldredge, *supra* note 1, at 329, 330.

many, if not most, cases the vendor, to use the language of the RESTATEMENT, need not subject goods to "rigid inspection"<sup>38</sup> but to one that is merely "cursory."<sup>39</sup> But why foreclose all possibility of imposing liability for failure to inspect, if the equities in future cases so demand, by adopting an absolute, arbitrary rule that there never need be *any* inspection? In view of the paucity of authority squarely in point, may it not be wise to permit juries under the supervision of courts to set up standards, from case to case, by which to gauge the "reasonableness" of the vendor's inspection as fairness requires?

What has been said here may not be conclusive as to whether a duty should be imposed to make any inspection. It is submitted, however, that neither the cases to date nor the RESTATEMENT rule out such a duty, and that the arguments advanced thus far against its imposition rest upon at least debatable grounds.

CARLISLE, PA., MARCH 15, 1941

D. J. FARAGE

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<sup>38</sup>RESTATEMENT, TORTS (1934) §402, comment *a*.

<sup>39</sup>*ibid.*