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Kentucky Law Survey: Torts

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Torts

BY RONALD L. GREEN*

I. INTRODUCTION

It has been some time since the last Torts Survey appeared on these pages, and much has changed in the law of torts. Three trends are evident. The first is that the Supreme Court of Kentucky continues to be active in its willingness to expand tort liability. The second is that the court frequently has been willing to reverse itself in a short amount of time, as will be documented below. The absence of deference to the principle of *stare decisis* has resulted in a lack of certainty in the law, making it impossible for practitioners to advise clients with any certainty, which in turn affects the decision whether to settle or litigate. Whether the redistribution of wealth is worth the increased cost of the system is, however, a largely political issue that will be left for another time. Third is a tendency to confuse issues of duty and liability with comparative fault; the latter, of course, presupposes a finding of fault and relates solely to the effect of any negligence by the plaintiff.

II. WRONGFUL DEATH

While there was no cause of action for death at common law,¹ and early attempts by the legislature to define such a cause of action were awk-

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¹ At common law claims for wrongful death were governed by the maxim *actio personalis moritur cum persona* (a personal right of action dies with the person) and accordingly an action in tort abated if the injured person or the tortfeasor died. See *Covington St.-Ry. Co. v. Packer*, 72 Ky. 455, 457 (1873). The death of a human being could not be complained of as an injury in civil court except as prescribed by statute. See *Harris v. Kentucky Timber & Lumber Co.*, 43 S.W. 462, 463 (Ky. 1897) (finding that a father did not qualify under the statutes to recover for the death of his son).

ward,² the foundation for the present cause of action for wrongful death was laid with the constitutional convention in 1891.³ Beginning with its incorporation into the state Constitution and until 1981, the nature and scope of the cause of action was well settled. Since then, however, it has undergone significant expansion by judicial fiat notwithstanding the fact that the constitution places responsibility for the cause of action in the hands of the legislature. The effect has been to increase the amount of compensation payable in wrongful death cases.

A. Expansion of the Measure of Damages

In 1981, the court of appeals rendered its opinion in *Charlton v. Jacobs*,⁴ which has been applied so many times through the years without

² The original statutes allowing recovery for wrongful death were derived from Lord Campbell's Act of 1854, *see Sturgeon v Baker*, 227 S.W.2d 202, 203 (Ky. 1950) (holding for the defendant because the widow and minor child did not prove the homicide was committed maliciously and in self-defense), and were narrow in scope. There were two primary statutes. General Statutes of Kentucky [hereinafter GEN. ST.] 57 § 1 allowed recovery for the death of anyone who was not an employee of the railroad against the proprietor of a railroad upon a showing of negligence, punitive damages not being recoverable. Section 3 provided for recovery of damages for death against any person upon a showing of willful neglect, and upon such a showing punitive damages could be recovered. *Cincinnati, N.O. & T.P. Ry. Co. v Prewitt's Adm'r*, 17 S.W. 484 (Ky. 1891). The latter statute was narrowly construed, such that recovery could only be had in the event the decedent was survived by a widow or child. *See Hackett v. Louisville, St. L. & T.P. Ry. Co.*, 24 S.W. 871 (Ky. 1894) (concluding that a father could not recover damages for the death of his seven-year-old child). The unconstitutionality of section 1 and dissatisfaction with section 3 led to the incorporation of the cause of action for wrongful death into the Constitution. *See Passamaneck v. Louisville Ry. Co.*, 32 S.W. 620, 621-22 (Ky. 1895).

³ Section 241 of the Kentucky Constitution provides as follows:

Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and such persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person.

KY CONST. § 241.

⁴ *Charlton v Jacobs*, 619 S.W.2d 498 (Ky Ct. App. 1981).

review that it is commonly thought to be the law in Kentucky. However, the opinion is not authoritative in Kentucky and was wrongly decided.

The *Charlton* case arose out of an automobile accident in which Ricky Charlton was killed. A jury awarded the sum of \$50,000.00 and both parties appealed.⁵ The court of appeals held that the trial court erred in allowing evidence concerning the amount of the decedent's lost future earnings that would have been consumed if he had lived, and that "consumed" portions should not offset an award to the estate.⁶ The court presented two bases for its opinion. First, the court relied on Professor Dobbs, whose view is based on the fact that consumption is not mentioned in the jury instructions used in a 1915 Kentucky case.⁷ In addition to Dobbs, the court cited *West Kentucky Coal Co. v. Shoulder's Adm'r*,⁸ where the court also addressed the requisites of jury instructions.⁹ The second basis for the court's opinion

⁵ See *id.* at 499.

⁶ See *id.* at 500-01. While most states base recovery for wrongful death on the loss sustained by the survivors, Kentucky has consistently construed its statute to be a "true" wrongful death statute in that recovery is based on the loss to the decedent's estate. See, e.g., *Empire Metal Corp. v. Wohlwender*, 445 S.W.2d 685, 687 (Ky. 1969) (finding that the measure of damages should be calculated by looking at "the destruction of the decedent's power to earn money," rather than looking at whether a pecuniary loss was suffered).

⁷ Professor Dobbs states in DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 556 n.3 (1973), that Kentucky is in the minority of jurisdictions in not allowing a set-off for personal consumption. He cites the case of *Lexington Utility Co. v. Parker's Administrator*, 178 S.W. 1173 (Ky. 1915), which pertains only to the form of the jury instruction. This view was picked up in STUART M. SPIESER, RECOVERY FOR WRONGFUL DEATH § 3.2 (2d ed. 1975). This misstatement of Kentucky law likely originated with a student work, which Professor Dobbs cites as a complete survey. See Note, *Wrongful Death Damages in North Carolina*, 44 N.C.L. REV. 402, 405 n.17 (1966). Each of these authors either did not account for or ignored the fact that Kentucky utilizes a "bare bones" approach to jury instructions, see *Nichols v. Union Underwear Co., Inc.*, 602 S.W.2d 429, 433 (Ky. 1980), and thus the instruction does not set forth all relevant factors. See *Cuniffe's Ex'x v. Johnson*, 132 S.W.2d 47 (1939). Therefore, the mere fact that the approved jury instruction makes no reference to consumption is not determinative of whether it is relevant. It should be noted that there is no mention of the so-called minority rule in W PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 950 (5th ed. 1984).

⁸ *West Ky. Coal Co. v. Shoulders' Adm'r*, 234 Ky. 427, 28 S.W.2d 479 (1930) (finding that the jury instructions in an action for the wrongful death of a coal miner were not prejudicial to employer).

⁹ See *Charlton*, 619 S.W.2d at 500.

was *Louisville & N.R.R. Co. v. Morris' Adm'x*.¹⁰ However, the court failed to recognize that *Morris* dealt with the wrongful death statute in effect before 1891¹¹ and that the court had declined to follow that statute when the new (and present) cause of action for wrongful death was incorporated into the Constitution.

A mere five years after the decision in *Morris*, but in the context of the new Constitution, the court struggled with this very issue. Initially, the court reaffirmed the *Morris* rule in *Chesapeake & O. Ry. Co. v. Lang's Adm'r*¹² and *Louisville & N.R.R. Co. v. Kelly's Adm'x*.¹³ However, instead of establishing the so-called minority view described by Professor Dobbs, these cases commenced a flurry of judicial debate. On May 1, 1897, the court rendered opinions overruling petitions for rehearing in *Lang's Adm'r*¹⁴ and *Kelly's Adm'x*¹⁵ that retracted portions of the original opinions, and specifically held that the jury was authorized by the instruction to consider personal consumption even though such was not set forth in the jury's instruction.¹⁶

¹⁰ *Louisville & N.R.R. Co. v. Morris' Adm'x*, 20 S.W. 539, 540 (Ky. 1892) (indicating that consideration of consumption was speculative, but holding only that it should not be included in the jury instructions).

¹¹ *See id.*

¹² *Chesapeake & O. Ry. Co. v. Lang's Adm'r*, 38 S.W. 503, 504 (Ky. 1896) (following the rule established in *Morris* to not consider deduction of future living expenses (consumption) when calculating damages).

¹³ *Louisville & N.R.R. Co. v. Kelly's Adm'x*, 38 S.W. 852, 855 (Ky. 1897) (following *Morris* and *Lang's Adm'r*).

¹⁴ *Chesapeake & O. Ry. Co. v. Lang's Adm'r*, 40 S.W. 451, 452 (Ky. 1897) (modifying the portion of the lower court's opinion that declared that "it is the earning power of the deceased, extended to the probable duration of his life, that is the measure of damages").

¹⁵ *Louisville & N.R.R. Co. v. Kelly's Adm'x*, 40 S.W. 452, 453 (Ky. 1897) (holding that the jury should not be instructed to consider decedent's life expectancy, ability to earn money, and the duration of that ability).

¹⁶ *See Lang's Adm'r*, 40 S.W. at 451; *Kelly's Adm'x*, 40 S.W. at 453. In revising its opinions, the court, at this early stage, clearly recognized that the "loss to the estate" which formed the measure of damages included the concept of personal consumption. Justice Du Relle wrote:

While we are of the opinion that the instruction "to find for the plaintiff in such sum as you may believe from the evidence will reasonably and fairly compensate the estate of James Kelly for the destruction of the power to earn money" authorized the jury to consider all the evidence in the case, and, if they were of the opinion that he would have no greater earning capacity during the remainder of his life than at the time of his death, to deduct from his gross earnings during his life expectancy such reasonable

These opinions refute the “authorities” which base their view on the jury instruction.¹⁷

To place this issue in context, it should be noted that the effect of the *Charlton* opinion, which disallowed offsetting awards with “consumed” portions, would be that the measure of damages for death would involve no more than a computation, that being the annual earnings of the decedent multiplied by the life expectancy of the decedent. However, in *Louisville & N.R.R. Co. v. Eakins’ Adm’r*,¹⁸ the court specifically rejected a jury instruction that embodied this concept because “all that it was necessary for the jury to do to arrive at a verdict was to determine how much [the] deceased was capable of earning in a year, and multiply that amount by his expectation of life.”¹⁹ The court explained its rejection of such an instruction as follows:

expenses as might be necessary, we do not think that this should have been embodied in the instruction.

Kelly’s Adm’r, 40 S.W. at 452-53 (emphasis added). Any doubt concerning the court’s intent in this regard was removed in a second modification of the opinion in *Lang’s Adm’r*, wherein the court stated:

The petition for modification of the opinion suggests that there is some doubt as to the meaning of the court in its statement of the measure of recovery in an action for damages for death caused by negligence, the doubt being as to whether the measure of recovery was the gross earnings of the deceased or the net earnings continued for the probable duration of his life. *Our opinion was that the measure of recovery was such sum as would fairly compensate the estate of the deceased for the destruction of his earning power*. Had the question of the sufficiency of the instruction been a new one, we should have held that the jury ought to have been specifically instructed in estimating the loss to the estate to take into consideration what would have been the necessary and economical living expenses of the deceased had he not been killed.

Chesapeake & O. Ry. Co. v. Lang’s Adm’r, 41 S.W. 271, 271-72 (Ky. 1897) (emphasis added). The court went on to say that the instruction as given, even though it did not mention consumption, authorized the jury to take into account all the facts and circumstances.

¹⁷ See *supra* notes 7-9 and accompanying text.

¹⁸ *Louisville & N.R.R. Co. v. Eakins’ Adm’r*, 45 S.W. 529 (Ky. 1898) (holding that the jury should take into account the decedent’s cost of living when calculating damages).

¹⁹ *Id.* at 532. The offending instruction stated that: “If the jury find for the plaintiff, the measure of damages will be the capacity of deceased to earn money, coupled with his expectation of life.” *Id.*

This entirely leaves out of view the fact that deceased necessarily applied a certain proportion of the money earned by him to his own support. The true measure of damages is not the capacity of the deceased to earn money, but is such a sum as will reasonably compensate his estate for the destruction of his power to earn money; and, in arriving at the amount of this sum, the jury are authorized to consider all the testimony in the case bearing on this question.²⁰

Finally, the court confronted the issue head-on in *Stewart's Adm'x v. Louisville & N.R.R. Co.*,²¹ in the context of a claim that an award was inadequate, when it stated:

The value of a piece of machinery is not to be determined by multiplying its present earning power by the length of its probable use, but the cost of maintenance must be subtracted. The value of the human machine to his estate must be determined in like manner. It must be maintained – that is, it must be fed, clothed, and supplied with other necessities. *What the estate would lose would be the net gain.*²²

In *Cincinnati, N.O. & T.P. Ry. Co. v. Lovell's Adm'r*,²³ the rule was phrased

²⁰ *Id.* Any remaining doubt concerning the meaning of the holding in *Eakins' Adm'r* should be resolved by reference to its two dissenting opinions by Justice Guffy. See *Louisville & N.R. Co. v. Eakins' Adm'r*, 46 S.W 496 (Ky. 1898); *Louisville & N.R. Co. v. Eakins' Adm'r*, 47 S.W 872 (Ky 1898). In the first, Justice Guffy wrote:

The rule announced in the majority opinion in this case would always prevent the recovery for any damages where the power of the decedent to earn money was not greater than the amount necessary to defray his expenses of living, or, in other words, to furnish him with food, raiment, and shelter, and pay his taxes

Eakins' Adm'r, 46 S.W at 496. Justice Guffy continued to argue against the majority view and advocate the holding in *Charlton* through the turn of the century. See *Louisville & N.R.R. Co. v. Creighton*, 50 S.W 227, 229 (Ky 1899). Finally, in *Southern Ry. Co. v. Evans' Adm'r*, 63 S.W 445 (Ky 1901), Justice Guffy reluctantly accepted the view of the majority, stating, “This court has held that a jury might, if they see proper, take such things into consideration, but it has never held that they ought to be instructed to consider such personal expense.” *Id.* at 446. Thus, 80 years before the decision in *Charlton*, there was consensus that the jury could consider personal consumption in determining the estate’s loss, and the only argument was whether such consideration should be required by the instruction.

²¹ *Stewart's Adm'x v. Louisville & N.R.R. Co.*, 125 S.W 154 (Ky. 1910).

²² *Id.* at 157 (emphasis added).

²³ *Cincinnati, N.O. & T.P. Ry. Co. v. Lovell's Adm'r*, 132 S.W 569 (Ky. 1910) (affirming the jury’s award for damages even though unusually large because the

as: "The loss to his estate is the amount that he will probably make *and save* if he should live the full limit of his expectancy of life."²⁴

Thus, it is clear that the holding of the court of appeals in *Charlton* is contrary to the established holdings of the high court in Kentucky. As an intermediate appellate court, the court of appeals simply does not have the power to overrule this line of cases.²⁵ While it is true that discretionary review by the supreme court was sought and denied, this does not indicate approval,²⁶ particularly in a case such as this where the key cases were not brought to the attention of either court.

B. Present Value

In *Paducah Area Public Library v. Terry*,²⁷ the court of appeals recognized that awards for future loss must be reduced to present value.²⁸ The court then held that the parties can be precluded, at the trial court's

jury was allowed to consider decedent's personality and physical traits).

²⁴ *Id.* at 574 (emphasis added).

²⁵ Since the adoption of section 114 of the Kentucky Constitution, which became effective in 1976, Kentucky has utilized a two-tiered appellate structure, the highest court being the Supreme Court of Kentucky. Earlier, the high court was known as the Court of Appeals of Kentucky. Under the current system, the court of appeals is without authority to effect a change in Kentucky law. The rules of the supreme court provide: "The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court." KY. SUP. CT. R. 1.030(8)(a). This principle is likewise well-settled in the decisional law. *See Louisville Trust Co. v. Johns-Manville Prod. Corp.*, 580 S.W.2d 497 (Ky. 1979) (noting that the court of appeals had to follow case precedent until it was overruled by the supreme court); *Borden v. Litchford*, 619 S.W.2d 715 (Ky. Ct. App. 1981) (holding that the court of appeals was bound by the supreme court's decision concerning implied warranties); *Thurman v. Commonwealth*, 611 S.W.2d 803 (Ky. Ct. App. 1980) (recognizing that the court of appeals is bound by the state supreme court); *Mackey v. Greenview Hosp., Inc.*, 587 S.W.2d 249 (Ky. Ct. App. 1979) (declaring that the decision to overrule the common law defense of contributory negligence would have to originate in the state supreme court).

²⁶ A Kentucky court rule provides that "[t]he denial of a motion for discretionary review does not indicate approval of the opinion or order sought to be reviewed and shall not be cited as connoting such approval." KY. SUP. CT. R. 76.20(9)(2).

²⁷ *Paducah Area Pub. Library v. Terry*, 655 S.W.2d 19 (Ky. Ct. App. 1983).

²⁸ *See id.* at 24. While the case involved damages for personal injury rather than death, the role of present value is the same.

discretion, from offering evidence concerning present value. Although the court's rule is pragmatic, it is not economically sound.²⁹ The court reasoned that because inflation and interest rates "offset" each other, a rule excluding present value testimony would prevent battles of experts regarding interest rates and future inflation. The court is only partially correct. It is true that interest rates and inflation offset each other because interest rates encompass expected price rises in the future. However, interest rates and general price inflation are not the same thing. To say that inflation and interest rates offset each other is to say that foregone consumption (i.e., saving) has no present value or that money has no value over time, a fact that any lender or borrower knows to be false. Further, if there were no difference between inflation and interest rates, there would be no need for a rule reducing awards to present value since present value in all cases, by definition, present value would equal future value. The opinion indicated that this holding was in part fueled by concern about battles of experts regarding interest rates and future inflation.

While the court essentially held that such evidence is within the common knowledge of a jury, it is also true that the jury has the ability, without the aid of an economist, to determine life expectancy and multiply that number by the earnings shown in the proof. Therefore, it would seem logical that if a trial court wished to exclude evidence of present value, it should exclude other economic testimony as well.

The trial court in *Terry* precluded not only cross-examination of the defendant's expert economist as to present value, but also any other demonstration by the defendant to the jury that the award should be reduced to its present value.³⁰ The opinion does not indicate whether the defendant was allowed to argue present value to the jury, but many practitioners read the case to foreclose such argument. No matter what the ruling of a trial court is concerning the introduction of evidence, counsel must be allowed to address the issue in opening and closing if it is an issue in the case.³¹

²⁹ See *id.* at 25.

³⁰ See *id.* at 24.

³¹ In Kentucky, counsel is given wide latitude in summation. See *Collins v. Galbraith*, 494 S.W.2d 527 (Ky 1973) (finding that counsel can guard against incorrect inferences through closing argument); *Commonwealth v. Reppert*, 421 S.W.2d 575, 576 (Ky 1967) (holding that "[g]reat latitude is allowed in closing arguments"); *Humana, Inc. v. Fairchild*, 603 S.W.2d 918 (Ky. Ct. App. 1980) (stating that it is counsel's responsibility to clarify jury instructions). In *Kentucky & I.T.R.R. Co. v. Becker's Adm'r*, 214 S.W. 900 (Ky 1919), the court stated:

It is true, of course, counsel must confine their arguments to the jury to the

C. *Loss of Consortium for Children*

In *Giuliani v. Guiler*,³² the Kentucky Supreme Court, in a four-to-three decision,³³ adopted a new cause of action – loss of parental consortium on behalf of children whose parent is deceased (despite having declined to do so less than two years earlier in *Adams v. Miller*³⁴). In *Giuliani*, the dissent argued vigorously³⁵ that the court does not have the constitutional power to create such a cause of action, a technical point that was simply ignored by the majority.³⁶ As the composition of the court changes, this issue may be revisited.

In *Giuliani*, Kentucky's supreme court took the position that loss of consortium is a common law doctrine.³⁷ While this is true in the context of personal injury, for obvious reasons the doctrine has never been extended to death cases.³⁸ In 1968, Kentucky's legislature enacted a statute providing

evidence, but this does not mean that they may not make calculations and deductions to illustrate the result of an application of the facts as proven to the court's instructions and the law of the case, and thus to assist the jury in making a verdict, for such is the province and should be the purpose of every argument to the jury.

Id. at 902. Since reduction to present value is the law of the case, counsel must be allowed to discuss it in summation whether or not the trial court allowed expert testimony on the issue.

³² *Giuliani v. Guiler*, 951 S.W.2d 318 (Ky. 1997).

³³ Interestingly, one member of the majority was a special justice, a practicing attorney who represents plaintiffs in tort litigation. The political viability of allowing practicing attorneys to sit on the court is beyond the scope of this writing. However, in the opinion of this author, such a practice should not occur where the case involves the creation or definition of causes of action.

³⁴ *Adams v. Miller*, 908 S.W.2d 112 (Ky. 1995) (holding that the administrator for the estates of tenants who died or were injured in a fire could not recover damages for loss of parental consortium).

³⁵ By way of disclaimer it should be noted that the author represented one of the respondents in the case on appeal.

³⁶ The majority treats this as an issue of legislative prerogative rather than constitutional power. See *Giuliani*, 951 S.W.2d at 321.

³⁷ See *id.* at 320.

³⁸ The common law cause of action for loss of consortium of a spouse ceases upon the death of the spouse. *McGuire v. East Ky. Beverage Co.*, 238 S.W.2d 1020 (Ky. 1951). There never has been a common law action in the context of personal injury available to parents or children. See *supra* note 3 for the text of section 241 of Kentucky's Constitution, the constitutional provision vesting the legislature with the power to define actions for death.

for recovery of damages by a parent for loss of affection and companionship of a minor that would have been derived during the child's minority³⁹ Until the *Giuliani* decision, there was no common law cause of action for loss of consortium. The *Giuliani* opinion, which allows children to recover for the loss of affection and companionship of a parent, leaves many questions unanswered. These questions are discussed below

1. *To Whom Does the Cause of Action Belong?*

While the *Giuliani* opinion does not specifically address the issue of to whom the new cause of action belongs, it does point out that a loss of consortium claim is separate from the claim for wrongful death and belongs to separate legal entities.⁴⁰ Thus, it would appear that the loss of consortium claim belongs to the minor, and if there are multiple children, each would have his or her own claim.

2. *Who May Bring the Cause of Action?*

While the opinion speaks frequently in terms of "children," it seems clear that the intent was to limit recovery to minor children. The court used the term "minor" twice in the opinion, once when it framed the issue on appeal and again when it announced the adoption of the new rule. There is a reference in the opinion to the need to "provide for the complete development of that child,"⁴¹ and it is clear that the court considered its new creation to be the reciprocal of the statutory cause of action for parents.⁴² Thus, the opinion suggests that the court intended a cause of action by and for minors.

3. *What is the Measure of Damages?*

The opinion states that the measure of damages is to be the same measure set forth in the statute creating a claim on the part of parents.⁴³ Thus, the measure of damages is the loss of affection and companionship.⁴⁴

³⁹ See KY REV STAT. ANN. [hereinafter K.R.S.] § 411.135 (Michie 1992).

⁴⁰ See *Giuliani*, 951 S.W.2d at 322 (citing *Department of Educ. v. Blevins*, 707 S.W.2d 782 (Ky 1986)).

⁴¹ *Id.* at 320.

⁴² See *id.* at 321.

⁴³ See *id.*

⁴⁴ See K.R.S. § 411.135.

However, this issue is clouded by a statement in the opinion that “[t]he proof of such loss and the necessary proof of monetary loss resulting therefrom are factors to be considered by the trier of fact separate from any wrongful death claim.”⁴⁵ It is likely that the reference to monetary loss simply refers to the translation of an emotional loss into an economic value. However, it also could be interpreted to mean that the child can assert a claim for the cost of day care and other expenses, which would clearly be duplicative of the damages awarded in the death action since they would have been paid for by the parent had he or she lived. Finally, the court was silent on the time frame for recovery of damages. For the reasons set forth above, the likely intent was to limit recovery to the duration of the minority just as is the case with the parental claim.

4. *How Are Evidentiary Issues to Be Handled?*

There is no way to predict all, or perhaps even most, of the evidentiary issues that will arise in connection with these claims. Obviously, this ruling is a bonanza for psychologists and psychiatrists, and surely some will become specialists in assessing this type of loss and serve as professional witnesses. Perhaps the most significant issue, however, will involve the introduction of proof concerning the decedent that would not otherwise be admissible in the wrongful death case. Because one cannot assess the loss of affection and companionship without looking at the relationship, evidence concerning the decedent’s past, such as prior abuse of the children, abuse of alcohol and other drugs, the amount of time spent with the children, etc., should be competent. By the same token, the plaintiff in the death case will have the benefit of using the party-children to invoke sympathy in the death case, testifying at length concerning how much they miss their parent, etc. The best rule probably would be to not allow any of this proof and just assume the jury understands that children will miss their parent.

5. *What is the Effect of the Statute of Limitations?*

The statute of limitations is problematic because the cause of action involves minors. Wrongful death cases that were settled, or tried and satisfied, years ago often involved children of the decedent who were minors at the time. These children will now try to assert a loss of consortium claim. Just as with any other consortium claim, the statute of

⁴⁵ *Giuliani*, 951 S.W.2d at 323.

limitations is one year,⁴⁶ but by virtue of infancy, the statute is suspended until the age of majority is reached.⁴⁷ Thus, parties who long ago "bought their peace" or took repose through *res judicata* now are faced with a brand new claim. In addition, there is no requirement that the minor bring his or her action at the same time as the wrongful death action is prosecuted, or, in the case of multiple minors, there is no reason why they would need to be brought together, raising the possibility of two or more trials per wrongful death. Either the court or the legislature must fashion a remedy to this problem.⁴⁸

III. PRODUCT LIABILITY

Most of the recent decisions concerning product liability law have related to the Product Liability Act⁴⁹ ("PLA"), which was enacted in 1978.⁵⁰ This legislation was the original "tort reform" enacted by the

⁴⁶ See *Floyd v Gray*, 657 S.W.2d 936, 938 (Ky. 1983).

⁴⁷ See K.R.S. § 413.170.

⁴⁸ This exemplifies one of the reasons courts should leave legislating to the legislature, since the court is not in a position to fully examine the ramifications of a change in public policy

⁴⁹ K.R.S. § 411.300-.350. The statute places a number of limitations on expansion of product liability law. It excuses the seller from liability where the defect is created by the alteration or modification of a product. See *id.* § 411.320(1). The statute requires a hearing on relevance before the admission of evidence concerning subsequent remedial measures. See *id.* § 411.330. Finally, a middleman who was not negligent and did not breach an express warranty is absolved from liability where the manufacturer is identified and subject to the jurisdiction of the court. See *id.* § 411.340.

The statute creates two presumptions of non-defectiveness. The first presumes that a product is not defective if the injury occurred more than five years after the first sale of the product or more than eight years after the date of manufacture. See *id.* § 411.310(1). The second presumes that a product is not defective if prevailing standards or the state of the art at the time of manufacture were met. See *id.* § 411.310(2). While both of these sections are effective statements of policy, the creation of a presumption seems meaningless, as a practical matter, since the burden of proof inherent in the bringing of such a claim has the same effect without regard to the application of the statute.

⁵⁰ Worth considering, however, is the decision in *Niehoff v. Surgidev Corp.*, 950 S.W.2d 816 (Ky. 1997), in which the court held that state claims for negligence or special liability against the manufacturer of intraocular lens implants were not preempted by the Medical Device Amendments to the Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301 - 393 (1982). See *Niehoff*, 950 S.W.2d at 818. While an

General Assembly Notwithstanding the length of time that has elapsed since its enactment, the significance and validity of many sections of the PLA remain in doubt.

A. *Constitutionality of the PLA*

The Kentucky Supreme Court has finally been presented with the issue of whether the PLA violates the Kentucky Constitution, particularly section 54.⁵¹ In *Monsanto Co. v. Reed*,⁵² the statute passed constitutional muster on the ground that it was not reform at all, but was instead a codification of existing Kentucky law.⁵³ The case, however, involved those sections of the

extensive analysis of preemption is beyond the scope of this Article, the subject does give rise to concern about conflict between state tort law and public policy as determined by Congress. The court noted that the purpose of the investigational device exemption under which the implants were being used was to "encourage research and development." *Id.* The effect of a finding of defect in design is that the product should not have been placed on the market. *See Nichols v. Union Underwear Co., Inc.*, 602 S.W.2d 429 (Ky. 1980). Thus, while the federal government has established a policy to encourage experimentation, the state is imposing liability on the theory that the manufacturer is presumed to know the likely results of the experimentation. Under such circumstances, even if preemption technically is not involved, the state should seriously consider comity.

⁵¹ This section provides as follows: "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death or for injuries to person or property." KY. CONST. § 54.

⁵² *Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky. 1997).

⁵³ *See id.* at 815. The construction given to section 54 has varied through the years. In *Ludwig v. Johnson*, 49 S.W.2d 347 (Ky. 1932), the court developed the concept of "jural rights," holding that it was the purpose of section 54 to preserve the common law right of a citizen harmed by the negligence of another to sue and recover for the injury. *See id.* at 349. The court held that the enactment of a "guest statute" was unconstitutional on that ground. In *Happy v. Erwin*, 330 S.W.2d 412 (Ky. 1959), the court struck down a statute granting city employees immunity from personal liability. *See id.* at 414. The court noted that there was an immunity in favor of charitable institutions, but that such liability did not exist before 1891 and therefore section 54 had no application. *See id.* In *Fireman's Fund Ins. v. Government Emp. Ins. Co.*, 635 S.W.2d 475 (Ky. 1982), *overruled by Perkins v. Northeastern Log Homes*, 808 S.W.2d 809 (Ky. 1991), the court observed:

Assuming, however, but without so deciding, that the general theory of indemnity as grounds for a cause of action cannot be legislated away, still the specific issue in any case is whether the facts of the case would have established a cause of action under that theory at that time. Today, for example, we behold the theory of negligence having burgeoned into

PLA that preclude recovery where the product was modified or altered,⁵⁴ and was decided in the context of an action for negligence, rather than warranty or special liability. Accordingly, there remains room for challenges to other provisions of the PLA.

B. *Scope of the PLA*

Notwithstanding the fact that the language of the PLA is clear,⁵⁵ the court in *Monsanto* found it necessary to affirm that the PLA applies to all product liability actions without regard to the legal theory asserted.⁵⁶ In that case, the plaintiffs alleged negligence in the supplying of a chattel.⁵⁷ Thus,

liability without fault in products liability cases, but it would be absurd to contend that such liability would have been countenanced in 1891.

Id. at 477. Thus, a statute would only be unconstitutional to the extent that it limited or abolished a cause of action based on facts that were actionable in 1891. To confuse the issue, however, the court in *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973), held that the question was not whether the facts stated a claim in 1891, but rather whether they stated a claim at the time of the enactment of the statute. *See id.* at 224. Then, ten years later, the court reviewed the same statute in *Carney v. Moody*, 646 S.W.2d 40 (Ky. 1983), *overruled by* *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809 (Ky. 1991), and, without overruling *Saylor*, held that the key time is 1891. *See id.* at 41. Finally, in *Tabler v. Wallace*, 704 S.W.2d 179 (Ky. 1986), the court once again reviewed the same statute, striking it down on other grounds, *see id.* at 187, and in so doing declined to expound on the conflict between *Saylor* and *Carney*. The latter appears to express the current state of the law on this issue. A remaining issue to be determined is whether the existence of a pre-1891 cause of action based on a particular state of facts necessarily invalidates the statute in its entirety, or whether the statute is invalid only as applied to those causes of action.

⁵⁴ *See* K.R.S. § 411.320(1), (2) (Michie 1982).

⁵⁵ Section 411.300(1) states:

As used in KRS 411.310 to 411.340, a "product liability action" shall include any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, advertising, packaging or labeling of any product.

Id. § 411.300(1) (Michie/Bobbs-Merrill 1992).

⁵⁶ *See Monsanto*, 950 S.W.2d at 814.

⁵⁷ *See id.* at 812. The plaintiffs' theory of recovery was based on section 388 of the Restatement (Second) of Torts, which provides as follows:

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

whether the plaintiff alleges an injury caused by negligence, breach of warranty, or special liability, the provisions of the PLA and the defenses included therein are applicable.

C. *Alterations and Modifications of the Product*

In one more example of the volatility of tort law in recent years, Kentucky courts cannot seem to come to a consensus on the provisions in the PLA that preclude recovery where the user has altered or modified the product.⁵⁸ In *Caterpillar, Inc. v. Brock*,⁵⁹ the Kentucky Supreme Court

the 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.

RESTATEMENT (SECOND) OF TORTS § 388 (1965). While this section's scope is broader than special liability under section 402A of the Restatement (Second) of Torts, warranty under section 355.2, and the PLA, all of which apply only to sellers, *Monsanto* did involve a seller, and given the court's ruling that the PLA was merely a codification of prior law, the same rules should apply to a non-seller.

⁵⁸ Section 411.320(1) provides as follows: "In any products liability action, a manufacturer shall be liable only for the personal injury, death or property damage that would have occurred if the product had been used in its original, unaltered and unmodified condition." K.R.S. § 411.320(1).

Section 411.320(2) provides as follows:

In any products liability action, if the plaintiff performed an unauthorized alteration or an unauthorized modification, and such alteration or modification was a substantial cause of the occurrence that caused injury or damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective.

Id. § 411.320(2).

For purposes of this discussion, the important distinction between these two subsections is that subsection (1) governs the liability of a seller regardless of who made the alteration or modification, whereas subsection (2) relates to unauthorized alterations or modifications made by the plaintiff. The legislature should share in any blame for any misconstruction of these statutes since on the surface, subsection (2) is redundant. There is no need for an affirmative defense of alteration or modification by the plaintiff if there is no liability in the first instance under subsection (1).

⁵⁹ *Caterpillar, Inc. v. Brock*, 915 S.W.2d 751 (Ky 1996), *cert. denied*, 117 S. Ct. 1428 (1997).

considered the relationship between section 411.320(1) (no liability if product was altered) and K.R.S. § 411.182(1) (several liability applies to product liability cases)⁶⁰ in the context of a certified question received from the United States Court of Appeals for the Sixth Circuit.⁶¹ In that case the plaintiff was an employee of Great Western Coal Company and was injured when the brakes failed on a bulldozer manufactured by Caterpillar.⁶² Caterpillar had filed a third-party complaint against Great Western alleging failure to observe routine maintenance and care, which if true would constitute an alteration or modification.⁶³ Great Western was dismissed from the case,⁶⁴ but the parties agreed that, assuming there was sufficient evidence, Great Western would be included in the instructions for purposes of apportionment,⁶⁵ and the jury did in fact apportion some fault against Great Western.⁶⁶ The court held that the enactment of section 411.182,

⁶⁰ This statute establishes several liability in tort cases including product liability cases. *See* K.R.S. § 411.182(1).

⁶¹ *See Brock*, 915 S.W.2d at 751.

⁶² *See id.* at 751-52.

⁶³ *See id.* at 752.

⁶⁴ Great Western had filed bankruptcy. *See id.*

⁶⁵ *See id.* The application of several liability has been permitted in Kentucky since 1839, *Central Passenger Ry. Co. v. Kuhn*, 6 S.W. 441, 446-47 (Ky. 1888), when section 454.040 was enacted. At that time, the statute applied only to party defendants, *Nix v. Jordan*, 532 S.W.2d 762, 763 (Ky. 1975), *overruled by Dix & Assoc. Pipeline Contractors, Inc. v. Key*, 799 S.W.2d 24 (Ky. 1990), but it was subsequently extended to defendants who had settled, *Orr v. Coleman*, 455 S.W.2d 59, 61 (Ky. 1970), and to defendants who had been dismissed from the suit for any other reason, *Daulton v. Reed*, 538 S.W.2d 306, 308 (Ky. 1976). With the adoption of comparative fault in *Hilen v. Hays*, 673 S.W.2d 713, 719 (Ky. 1984), the court worked to merge the two concepts, and by the time section 411.182 was effective, the court had fashioned a common law rule regarding several liability independent of section 454.040. *See Floyd v. Carlisle Constr. Co.*, 758 S.W.2d 430, 432 (Ky. 1988). *See generally* John M. Rogers, *Apportionment in Kentucky After Comparative Negligence*, 75 KY. L.J. 102 (1986-87). The only difference between the common law rule and section 411.182 is the application of comparative negligence to product liability cases and other torts.

⁶⁶ *See Brock*, 915 S.W.2d at 752. Further clouding the opinion is the fact that Caterpillar sought an instruction advising the jury that there could be no liability on the part of Caterpillar if any person performed an unauthorized alteration, which would include the failure to observe routine maintenance and care of the bulldozer. *See id.* The trial court declined to give the instruction on the ground that there was insufficient evidence that Great Western altered or modified the bulldozer by failing to observe routine maintenance and care. The trial court did, however, give

which calls for apportionment among tortfeasors who are parties or have been released, repealed section 411.320(1) by implication.⁶⁷

Historically, negligence on the part of a plaintiff was a complete defense to recovery.⁶⁸ By the same token, Kentucky recognized several liability among tortfeasor parties and tortfeasors who had been dismissed from the case.⁶⁹ Kentucky first recognized the special liability imposed on a seller of a product for physical harm to the consumer, as set forth in section 402A of the Restatement (Second) of Torts, in *Dealers Transport Co. v. Battery Distributing Co.*⁷⁰ While Kentucky never adopted such a position, there was a trend in other jurisdictions allowing recovery for "foreseeable misuse,"⁷¹ which had the effect of eliminating contributory negligence as a defense in product liability cases. One of the purposes of the PLA was to ensure that this trend was not followed in Kentucky.⁷² In 1984, the Kentucky Supreme Court in *Hilen v. Hays*⁷³ adopted comparative fault, but because the PLA specifically referred to "contributory negligence" as a defense, the court held in 1986 that *Hilen* did not apply to product liability cases.⁷⁴ In 1988 the legislature enacted section 411.182,⁷⁵ which specifically applied apportionment of fault to product liability cases.⁷⁶ Thus, there can be no doubt that the enactment of section 411.182

an instruction allowing the jury to find that Great Western failed to exercise ordinary care in the inspection, maintenance, and service of the bulldozer, and the jury found against Great Western in this respect. *See id.* The opinion gives no clue as to what evidence, if any, on which this instruction was based. The trial court apparently found that there was evidence of a failure to observe routine maintenance and care on the part of Great Western (or no instruction would have been given), but that such failure on a qualitative basis did not arise to the level of an alteration or modification. *See id.* The fact is, however, that the statute does not require any such analysis and is absolute in its terms. *See Ingersoll-Rand Co. v Rice*, 775 S.W.2d 924 (Ky Ct. App. 1988).

⁶⁷ *See Brock*, 915 S.W.2d at 753.

⁶⁸ *See Hilen*, 673 S.W.2d at 714.

⁶⁹ *See Daulton*, 538 S.W.2d at 308.

⁷⁰ *Dealers Transp. Co. v Battery Distr. Co.*, 402 S.W.2d 441, 446-47 (Ky 1965).

⁷¹ *See Frederick E. Felder, Annotation, Products Liability: Alteration of Product After it Leaves Hands of Manufacturer or Seller as Affecting Liability for Product-Caused Harm*, 41 A.L.R.3d 1251 (1972).

⁷² *See K.R.S. § 411.320(2), (3)* (Michie/Bobbs-Merrill 1992).

⁷³ *Hilen v Hays*, 673 S.W.2d 713 (Ky. 1984).

⁷⁴ *See Reda Pump Co. v Finck*, 713 S.W.2d 818, 821 (Ky 1986).

⁷⁵ K.R.S. § 411.182.

⁷⁶ While the obvious purpose of section 411.182's emphasis on product liability actions was to place the effect of negligence on the part of the plaintiff on an equal

(which calls for apportionment of fault among tortfeasors) did in fact repeal or at least modify section 411.320(3) (which releases a defendant from liability if the plaintiff's failure to exercise ordinary care was a substantial cause of the injury) and section 411.320(2) (which releases a defendant from liability if the plaintiff has altered or modified the product and such alteration or modification was a substantial cause of the injury). However, there is no rational basis for concluding that the enactment of section 411.182 had any effect on section 411.320(1), since it has nothing to do with the conduct of the plaintiff, but rather defines the circumstances under which the seller is liable in the first instance.

A mere fourteen months after deciding *Brock*, the Kentucky Supreme Court implied with its *Monsanto* decision,⁷⁷ the converse conclusion of *Brock* by holding that alteration or mutilation of the chattel precluded recovery for the plaintiff.⁷⁸ In *Monsanto* the defendant had manufactured and sold electrical transformers that contained polychlorinated biphenyls ("PCB"). After the manufacture of the transformers, the use of PCBs was banned by Congress.⁷⁹ After the useful life of the transformers was exhausted, they were sold for salvage, and in the course of the salvage operations, which involved removal of copper coils within the transformers, the plaintiffs allegedly were exposed to PCBs.⁸⁰ Of the thirty-seven plaintiffs, five proceeded presumably alleging special liability under section 402A. Summary judgment was granted based on the PLA, and the judgment became final without an appeal.⁸¹ The remaining plaintiffs proceeded under a negligence theory, arguing that the PLA did not apply. In affirming the summary judgment against those plaintiffs, the court observed that it has long been the law in Kentucky that a manufacturer is

footing with its effect in other cases sounding in tort, the statute is significant in a couple of additional respects. First, its enactment served as a ratification of the adoption of comparative negligence in *Hilen*. Second, it complemented section 411.340 and formally ended the inefficient result typified by *Embs v. Pepsi-Cola Bottling Co.*, 528 S.W.2d 703 (Ky 1975), wherein a retailer was held strictly liable but was allowed to seek indemnification from the entity that sold the product to him, even though there was no showing of fault.

⁷⁷ See *Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky 1997). The *Monsanto* Court found section 411.320(1), (2) to be constitutional, which would have been unnecessary had the provisions been repealed.

⁷⁸ See *id.* at 814.

⁷⁹ See *id.* at 812.

⁸⁰ See *id.*

⁸¹ See *id.*

not liable for injuries resulting from mutilation or alteration of a chattel,⁸² and that the PLA codifies this longstanding principle.⁸³ The *Monsanto* court affirmed the summary judgment without suggesting that there was any question as to the validity of the PLA as it relates to alteration or modification of the product.

Given the conflicting opinions from the Kentucky Supreme Court on the role of alterations and modifications of products, the question arises as to just what is the liability of a seller of goods in this context. There was not a significant change in the composition of the court in the fourteen months separating the two opinions,⁸⁴ and thus the question remains as to the status of section 411.320(1). The language of the statutes involved makes the correct result obvious. Section 411.320(1) simply has nothing to do with the conduct of the plaintiff and therefore nothing to do with the plaintiff's comparative negligence. Rather, it defines the circumstances under which the seller is liable and stands for the proposition that where a product has been altered or modified, whether by the plaintiff or a third person, there is no defect for which the seller can be held liable.

D. Multiple Theories and Jury Instructions

The *Monsanto* holding that the PLA applies to all theories of recovery must, however, be viewed in light of the holding in *Clark v. Hauck Manufacturing Co.*⁸⁵ In *Clark*, the plaintiff was killed while using an oil-fired, hand-held torch. The estate claimed that the flame went out, causing a mist of oil to spew from the torch onto the decedent, and then reignited, causing severe burns.⁸⁶ The torch came with a nose cone that could be removed easily, as it was held in place by three screws. The nose cone had been removed on the date in question. Engineers for the manufacturer knew that, without the nose cone, a strong wind could blow out the flame.⁸⁷ The estate's claim was that the decedent should have been warned of a foreseeable misuse.⁸⁸

⁸² See *id.* at 814 (citing *Collins Co. v. Rowe*, 428 S.W.2d 194, 198 (Ky. 1968)).

⁸³ See *id.*

⁸⁴ The only difference was that the author of *Brock* had died before *Monsanto* was decided. Both opinions were unanimous.

⁸⁵ *Clark v. Hauck Mfg. Co.*, 910 S.W.2d 247 (Ky. 1995).

⁸⁶ See *id.* at 250.

⁸⁷ See *id.* at 250-51.

⁸⁸ See *id.* at 251. It is this type of case that has caused the clamor for federal tort reform in the country. In the sense that the term "foreseeable" is used in this case, all misuses are foreseeable. The issue should instead be whether the misuse is in the

The opinion does not set forth the actual instruction given by the trial court, but it appears that the jury was instructed that the plaintiff was required to prove a defective design and a failure to warn. The court held that the plaintiff was required only to prove one or the other, and that the instruction "improperly linked two distinct theories of recovery"⁸⁹ The net effect of the ruling, however, is to require that a theory of recovery be submitted to the jury twice. If the issue is submitted to the jury under a defective design theory using an instruction such as that authorized in *Nichols v. Union Underwear*,⁹⁰ then the jury has already been instructed on the warning issue. The decision to include or exclude a warning is part and parcel of the design process, and whether an adequate warning is given is a factor to be considered by the jury in determining whether the product is unreasonably dangerous.⁹¹ Thus, to give both the *Nichols* instruction and a warning instruction such as that approved in *Post v. American Cleaning Equipment Corp.*⁹² violates the well-settled rule that instructions should not emphasize one theory of the case. Only where the sole issue for the jury's determination is the adequacy of a warning should the *Post* instruction be given.

IV DRAM SHOP LIABILITY

Until recently, the Kentucky Supreme Court consistently rejected attempts to impose liability on anyone for the furnishing of liquor. In the context of a man who literally drank himself to death, the court held that such an injury was not a foreseeable result of furnishing liquor.⁹³ In 1968,

scope of uses for which the manufacturer should, as a matter of policy, be held responsible. For some reason, when the otherwise sober and prudent "reasonable man" finds himself in the proximity of a product, he becomes an idiot, and the courts have charged manufacturers and sellers with the duty of protecting him from himself. This is the very reason the legislature established a contrary policy by enacting section 411.320(1), which was largely ignored in this case.

⁸⁹ *Id.*

⁹⁰ *Nichols v Union Underwear Co., Inc.*, 602 S.W.2d 429, 433 (Ky 1980).

⁹¹ *See id.*

⁹² *Post v American Cleaning Equip. Corp.*, 437 S.W.2d 516, 522 (Ky 1968).

⁹³ *See Britton's Adm'r v Samuels*, 136 S.W 143, 144 (Ky. 1911), where it was alleged that liquor was furnished to a person known to be intoxicated and an inebriate, therefore violating a statute which specifically provided for a civil action when notice had been given to the tavern keeper. *See id.* at 143. The court held that the death was caused not by the sale of the liquor but by the drinking of it. *See id.*

the first reported attempt was made to impose on the seller of liquor liability for an automobile accident. In *Pike v. George*,⁹⁴ this issue was before the court in the context of a motion to dismiss.⁹⁵ There is nothing in the *Pike* opinion that could justify a determination that the *Pike* court authorized an action for negligence or in any way modified prior law⁹⁶

The Kentucky Supreme Court recognized such liability in *Grayson Fraternal Order of Eagles v. Claywell*.⁹⁷ Under the holding of that case, to recover, a plaintiff must show that (1) the tavern keeper knew or should have known "that he is serving 'a person actually or apparently under the influence of alcoholic beverages'" and (2) "that there is a reasonable likelihood that upon leaving the tavern that person will operate a motor

at 144. In order to be actionable, the court required some basis for concluding that: [t]he sale was made for the purpose of injuring [the decedent], or with the knowledge that [the decedent] intended to drink of it to such an extent as to produce injury or death, or that [the tavern keeper] had reasonable grounds to believe that deceased could not be safely trusted with the whiskey.

Id. In *Nally v. Blandford*, 291 S.W.2d 832 (Ky. 1956), the court allowed a complaint to stand where it was specifically alleged that the furnisher knew that the patron was intoxicated and knew that the patron intended to continue to drink. The court made a point of characterizing the tort as an intentional one. The same rationale was applied where the patron, after the sale of the liquor, shot a third person. *See Waller's Adm'r v. Collinworth*, 137 S.W. 766 (Ky. 1911). The court again found difficulty with causation, holding that an intentional battery was not a reasonably foreseeable result of serving alcohol. *See id.* at 767

⁹⁴ *Pike v. George*, 434 S.W.2d 626 (Ky. 1968).

⁹⁵ The complaint alleged it was a willful and malicious violation of section 244.080 to sell alcohol to a minor. *See id.* at 626-27. Emphasizing that malice was alleged, and that the facts and circumstances were not known, the court held that it could not say that there were no circumstances under which the seller could be liable, and accordingly found that the complaint stated a claim. *See id.* at 629. This result is consistent with the holding in *Nally*, which required intentional conduct. *See Nally*, 291 S.W.2d at 835.

⁹⁶ *See Pike*, 434 S.W.2d at 629

⁹⁷ *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328 (Ky. 1987). *Grayson* involved an unlicensed vendor of liquor situated in a dry county. There was proof that the patron, Horton, came into the bar "a little tight" and was served four or five double shots of whiskey in about an hour-and-a-half. Horton left at closing time, very drunk, when the bartender forced him out of the bar and into his car. While driving intoxicated, Horton collided with a police car, causing the death of the driving police officer and serious injuries to the passenger. *See id.* at 329.

vehicle."⁹⁸ The opinion is not clear at all as to the role to be played by statutes regulating the sale of alcohol.⁹⁹

In 1988, the legislature enacted section 413.241 in direct response to the *Grayson* opinion.¹⁰⁰ This statute deals with four issues. In the first paragraph, the statute makes a legislative finding that the consumption of alcohol, rather than the furnishing of alcohol, is *the proximate cause* of any

⁹⁸ *Id.* at 334 (quoting K.R.S. § 244.080(2)). While the opinion dealt factually with furnishing liquor to an intoxicated person, presumably it also would apply to the furnishing of liquor to a minor so long as the second element were present. *See infra* note 99.

⁹⁹ Section 244.080 proscribes the selling of alcohol to four categories of purchasers: (1) a minor; (2) a person actually or apparently intoxicated; (3) a habitual drunkard; and (4) a person known to have been convicted of a felony or of a misdemeanor attributable to the use of alcohol. *See* K.R.S. § 244.080 (Michie 1994). This is a penal statute regulating persons holding licenses to sell alcohol; it is silent as to whether it gives rise to a civil cause of action. *See id.* It also should be noted that intent and knowledge are not elements required by the statute. *See* *Duncan v Commonwealth*, 179 S.W.2d 899, 899 (Ky 1944) (interpreting the predecessor to K.R.S. § 244.080).

In one part of the *Grayson* opinion, the court noted that section 244.080 reflects a standard of care, while a few paragraphs further on, the court indicated that where the vendor is licensed, a violation of the statute would be negligence per se. *See Grayson*, 736 S.W.2d at 333. The court went on to rely on section 286 of the Restatement (Second) of Torts, which sets forth the circumstances under which the court may adopt a statute as a definition of the standard of conduct. *See id.* at 334; RESTATEMENT (SECOND) OF TORTS § 286 (1965). It is doubtful that section 286 has any true application to section 244.080 of the Kentucky Revised Statutes. The Restatement provision requires a relationship between the purpose of the statute and the harm in question. *See id.* This statute has been in existence much longer than the current concern about drunk driving. While it seems clear that the statute may now have the effect of protecting the public from injury, it seems equally clear that the intent of the statute was to protect the morals, not the persons, of the public. In short, while the statute may be helpful in articulating a standard, it does not appear that a violation of the statute can properly be deemed negligence per se. The *Grayson* opinion supports this view. For example, since the statute does not require notice or knowledge, it may be violated if a person who is actually intoxicated is served, even if he does not appear to be intoxicated; conversely, it may also be violated if the person appears to be intoxicated but actually is not. According to the *Grayson* opinion, however, either circumstance would not be sufficient to find negligence since it must also be shown that the tavern keeper knew or should have known of the patron's state of intoxication. *See Grayson*, 736 S.W.2d at 334.

¹⁰⁰ *See* K.R.S. § 413.241 (Michie 1992).

injury to the drinker or a third person.¹⁰¹ The second paragraph sets forth the circumstances under which one may be liable for furnishing alcohol to an intoxicated adult. In order for liability to be imposed there must be a showing that "a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving."¹⁰² This section does not address service to minors and specifies only licensed vendors of liquors.¹⁰³ The statute's third paragraph states that the intoxicated person is primarily liable for injuries suffered by third persons.¹⁰⁴ In the fourth paragraph, the statute provides that the limitation of liability does not apply to any person who contributes to intoxication by force or misrepresentation.¹⁰⁵

On its face, the statute makes no sense. In paragraph four, the statute is described as a limitation of liability, but if furnishing alcohol is not a proximate cause, as stated in paragraph one, then no cause of action for negligence can exist.¹⁰⁶ Yet, in paragraph two, circumstances are described under which liability can be imposed.¹⁰⁷ If the statute is to be read as a whole, one must conclude that the legislature has repealed *Grayson*, replacing it with a modified dram shop statute. Under this statute, if that be the case, it is not necessary to show that the furnishing of liquor was a cause, but only that the intoxication was a cause.¹⁰⁸

¹⁰¹ See *id.* § 413.241(1).

¹⁰² *Id.* § 413.241(2).

¹⁰³ See *id.*

¹⁰⁴ See *id.* § 413.241(3).

¹⁰⁵ See *id.* § 413.241(4).

¹⁰⁶ See *id.* § 413.241(1), (4).

¹⁰⁷ See *id.* § 413.241(2).

¹⁰⁸ This construction would, in some respects, expand potential liability. For example, consider the case where a person enters an establishment and is already intoxicated. Suppose he is served one beer, leaves the premises, and is involved in an accident. He is found to have a blood alcohol level of 0.20. Under the common law rule of *Grayson*, the furnisher would have a strong argument that the one additional drink was not a cause of the accident because even without that drink, the patron would still have been substantially impaired, and may very well have been involved in the accident in any event. Under section 413.241 this argument would not appear to be viable, since the issue under the statute is whether the intoxication was a cause of the accident.

Assuming that the intention of the legislature was as described above, the question remains as to whether a cause of action continues to exist regarding furnishing alcohol to a minor. Since section 413.241 provides no such cause of action, and since the furnishing of liquor is not a proximate cause of a subsequent

Recently, in *Watts v. K, S & H*,¹⁰⁹ Kentucky's supreme court applied *Grayson* to the sale of alcohol to a minor.¹¹⁰ No mention is made of the dram shop statute, possibly due to the fact that the cause of action accrued long before the enactment of that statute.¹¹¹ The case is most significant for its extension of the element requiring foreseeable use of an automobile.¹¹²

The plaintiff received serious injuries in an automobile accident involving an intoxicated teenage driver, Neal. Neal and three friends had skipped school the day of the accident, and one of the friends purchased a case of beer and a pint of rum from the defendant. They spent the rest of the day visiting with friends and playing pool, and it was unclear how much alcohol each teen consumed. At first, Neal was not driving. The boys returned to school at dismissal time and then Neal left the school in his own car. The accident occurred while Neal was driving his own car.¹¹³ The court simply held that reasonable minds could differ as to whether the scenario was "clearly unforeseeable."¹¹⁴ Unfortunately, the burden is not on the defendant to show that the conduct could not have been foreseen. The test, rather, is whether the defendant had reason to believe the purchaser would be driving an automobile while intoxicated.¹¹⁵ There are no facts revealed in the opinion that would have put the defendant on notice that Neal would be driving. The net result of the opinion is that one can infer the second and key element in *Grayson* from the mere fact that liquor was purchased. In other words, if left to stand, *Watts* stands for strict liability in the sale of liquor, which clearly was not the intent of the court in *Grayson*. It remains to be seen what the Kentucky Supreme Court will make of the statute.

injury, *see id.*, it would appear that this cause of action has been abrogated. The statute also appears to retain the no-liability rule for social hosts and in fact extends the no-liability rule to business events held by a non-licensed entity. *See id.* Furthermore, under *Grayson*, it must be shown that the furnisher had reason to believe that the drinker would drive an automobile, *see Grayson*, 736 S.W.2d at 334, but the statute includes no such requirement. The statute, by its terms, applies to all injuries, not just those suffered in an automobile accident. *See* K.R.S. § 413.241.

¹⁰⁹ *Watts v. K, S & H*, 44 Ky. L. Summary No. 11, at 37 (1997).

¹¹⁰ *See id.* at 39.

¹¹¹ *See id.*

¹¹² *See id.*

¹¹³ *See id.* at 38.

¹¹⁴ *See id.* at 39.

¹¹⁵ *See id.*

V DUTY

Kentucky appellate courts have recently had several occasions to consider the concept of duty, and while a detailed discussion of that concept is beyond the scope of this work, those cases set the backdrop for a brief discussion of a key component of duty which is often misstated in practice.

In *Sheehan v. United Services Automobile Association*,¹¹⁶ the plaintiff's decedent placed a handgun to his head and accidentally pulled the trigger. The gun was supplied by a friend who had removed it from his father's home. The plaintiff argued that the father's homeowner insurer had a duty to screen applicants and educate them as to safe gun use.¹¹⁷ The *Sheehan* court quoted the sophistry from the *Grayson* opinion, "liability for negligence expresses a universal duty by all to all."¹¹⁸ The court observed that duty is not as universal as the saying may imply, stating "[h]owever, and this is a point frequently overlooked by some, the duty to exercise ordinary care is commensurate with the circumstances."¹¹⁹ The circumstance most relevant to the nature of the duty owed is whether the risk was created by the conduct of the defendant or by another, and the issue in the latter instance is whether the defendant should have protected the plaintiff from that risk.

Even in the context of risk created by the defendant, the *Grayson* statement is not entirely correct, since the duty to exercise ordinary care extends only to those within the foreseeable scope of the risk created.¹²⁰ Furthermore, it has no application where the risk was created by one other than the defendant. In fact, the general rule is that there is no duty to protect others,¹²¹ with the exception being where a duty to protect arises out of the

¹¹⁶ *Sheehan v. United Services Auto. Ass'n*, 913 S.W.2d 4 (Ky. Ct. App. 1996).

¹¹⁷ *See id.* at 6.

¹¹⁸ *Id.* (quoting *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328, 330 (Ky. 1987)).

¹¹⁹ *Id.* The *Sheehan* court further stated:

The statement of whether or not a duty exists is but a conclusion of whether a plaintiff's interests are entitled to legal protection against the defendant's conduct. The existence of a duty is an issue of law, and a court, when making the determination of such existence, engages in what is essentially a policy determination.

Id. (citations omitted).

¹²⁰ *See Parker v. Redden*, 421 S.W.2d 586, 595 (Ky. 1967).

¹²¹ *See Grimes v. Hettinger*, 566 S.W.2d 769, 775 (Ky. Ct. App. 1978).

special relationship between the defendant and the plaintiff,¹²² and the extent of that duty depends in turn on the nature of the relationship.¹²³ The nature of the relationship is critical to any analysis of duty but is increasingly ignored or misunderstood.¹²⁴

In the context of the duty to protect, the Kentucky Court of Appeals reaffirmed on at least two occasions that a licensee is owed no duty as to dangers that are open and obvious.¹²⁵ In *Scifres v. Kraft*, a social guest dived into a swimming pool and struck his head on the other side, causing quadriplegia.¹²⁶ The court held that there was no duty to warn a guest of a condition that was readily apparent.¹²⁷ This should apply to most other cases involving depth, particularly those involving above-ground pools.

The *Scifres* court also affirmed the right of a landowner to allow his guests to enjoy themselves at a party. The plaintiff argued that the owner failed to supervise and control the conduct of his guests. The party was attended by about forty friends and coworkers, who brought their own alcohol. Some of the guests mixed a concoction called "jungle juice" in a plastic garbage can, which was observed by the owner. The plaintiff consumed two glasses of the "jungle juice" and three or four beers while at the party, and had imbibed several beers at a local bar before coming to the party. Two men were swimming in the pool, properly attired, when a

¹²² *See id.*

¹²³ For example, the existence of an economic relationship, such as in the case of a business visitor or public invitee, supports a greater duty to protect than does the relationship between the possessor of land and a mere licensee. *See Bowers v. Schenley Distillers, Inc.*, 469 S.W.2d 565, 567 (Ky. 1971).

¹²⁴ In fact, *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328 (Ky. 1987), provides a perfect example of this. In order to reach its conclusion, the *Grayson* court necessarily must have determined that the risk was created by the tavern keeper who furnished the alcohol to the one who intended to drive. Yet, in the same opinion, the court stated that its holding would not extend to social guests, who are licensees. *See id.* at 335. Furthermore, many would argue that the risk was actually created by the person who drank and drove, and under that analysis there would be no duty to third persons on the highway who have no relationship with the tavern keeper. This nature-of-relationship analysis only applies when the issue is a duty to protect from a risk created by a third person. *See Scifres v. Kraft*, 916 S.W.2d 779, 782 n.1 (Ky. Ct. App. 1996). Thus, by failing to address the key issue underlying any analysis of duty, the result turns out to be internally inconsistent.

¹²⁵ *See Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. Ct. App. 1996); *see also Collins v. Rocky Knob Assoc.*, 911 S.W.2d 608, 611-12 (Ky. Ct. App. 1996).

¹²⁶ *See Scifres*, 916 S.W.2d at 780.

¹²⁷ *See id.* at 781.

third jumped into the pool naked. Someone teased the plaintiff about being afraid to get his hair wet, and it was at that point that he dived into the pool and sustained his injury.¹²⁸ The court noted that the duty to control the behavior of guests is premised on knowledge of the ability to control the guests and knowledge of the need and opportunity to do so.¹²⁹ The court held, however, that the guests' behavior was not the type of behavior that gives rise to a duty.¹³⁰ Rather, the behavior must pose a physical risk to the involuntary or unsuspecting victim or innocent bystander.¹³¹

The Kentucky Supreme Court likewise reviewed the standard of liability for injuries among participants in a sporting event in *Hoke v. Cullinan*.¹³² The plaintiff was a player in a tennis match and was struck in the eye by a tennis ball that was being returned to the server.¹³³ The court held that the failure to plead recklessness, even though play was stopped at the time, was fatal to his claim.¹³⁴ The court held that the standard of care remains the same throughout the game even though play frequently is temporarily stopped as a routine part of the game.¹³⁵

VI. SUDDEN EMERGENCY

The Kentucky Court of Appeals rendered an opinion in *Bass v. Williams*,¹³⁶ which, although not particularly recent, deserves discussion and review. The *Bass* court held that a sudden-emergency instruction was no longer appropriate since Kentucky's adoption of comparative negligence.¹³⁷ What should be obvious is that the sudden-emergency instruction relates to the imposition of liability on the tortfeasor, and has nothing whatsoever to do with the liability accorded to the negligence of the plaintiff. In fact, a sudden-emergency instruction also applies to the conduct of the plaintiff, and its application does not require that the plaintiff be negligent at all.¹³⁸

¹²⁸ See *id.* at 780.

¹²⁹ See *id.* at 782.

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² *Hoke v. Cullinan*, 914 S.W.2d 335 (Ky. 1996).

¹³³ See *id.* at 336.

¹³⁴ See *id.* at 339 (following the view set forth in section 500 of the Restatement (Second) of Torts, see RESTATEMENT (SECOND) OF TORTS § 500 (1965)).

¹³⁵ See *id.*

¹³⁶ *Bass v. Williams*, 839 S.W.2d 559 (Ky. Ct. App. 1992).

¹³⁷ See *id.* at 563.

¹³⁸ See *Bowers v. Schenley Distillers, Inc.*, 469 S.W.2d 565, 570 (Ky. 1971).

The court did not suggest that the sudden-emergency doctrine¹³⁹ was no longer part of the law of negligence. Rather, it has the effect of excusing what would otherwise be a breach of duty.¹⁴⁰ The rule advocated by the *Bass* court would, in some cases, amount to the direction of a verdict against a party who was not even at fault. Such a holding obviously cannot be allowed to stand.

VII. SPOILIATION OF EVIDENCE

The Kentucky Supreme Court in *Monsanto Co. v. Reed*¹⁴¹ declined to adopt a cause of action for spoliation.¹⁴² The court held that where a party has deliberately destroyed evidence, the remedy is to be found in evidentiary rules and missing-evidence instructions to the jury.¹⁴³ In most cases, this remedy seems complete, but offers no relief in the event of destruction of evidence, with knowledge of the claim or defense to which the evidence may be relevant, by a third person. For example, if documents that may have supported a defense have been destroyed, it would hardly be just to instruct the jury as to any presumption since the plaintiff had no part in the destruction, and absent that defense, the defendant may find himself subject to a judgment without liability. In such a case, it seems that there needs to be some additional remedy for the plaintiff who loses a cause of action or

¹³⁹ The sudden-emergency doctrine serves to define the standard of care where a party is confronted with an emergency situation not of his creation. *See, e.g.,* Weichhand v Garlinger, 447 S.W.2d 606 (Ky 1969). The doctrine recognizes that “[a]n ordinarily reasonable and prudent man is not prone to remain calm, cool and collected in an emergency, and one so imperiled is not required to make the decision which seems soundest in light of subsequent circumstances.” *Smith v Roberts*, 268 S.W.2d 635, 638 (Ky 1953).

¹⁴⁰ For example, it is a violation of a statute for an automobile driver to leave the right lane where there is an obstruction ahead, and thus to do so is negligence per se. *See* K.R.S. § 189.300(1) (Michie 1997). Absent a sudden-emergency instruction, it matters not why this violation occurred. The existence of an emergency excuses the operator from compliance with the statute.

¹⁴¹ *Monsanto Co. v Reed*, 950 S.W.2d 811 (Ky 1997).

¹⁴² *See id.* at 815.

¹⁴³ *See id.*, *see also* *Tinsley v Jackson*, 771 S.W.2d 331, 332 (Ky 1989) (discussing use of missing-evidence instruction where evidence has been lost by Commonwealth); *Sanborn v Commonwealth*, 754 S.W.2d 534, 539-40 (Ky. 1988) (approving instruction that allowed jury to draw inference favorable to defendant from destruction of evidence by prosecutor).

a defendant who loses a valid defense by reason of the intentional destruction of evidence by a third person.

VIII. ROLE OF OSHA REGULATIONS

The Kentucky Supreme Court has once again had the opportunity to address the role that OSHA regulations play in civil litigation, even though the enabling statutes at both the federal¹⁴⁴ and state¹⁴⁵ levels specifically state that OSHA regulations are not designed to change the common law¹⁴⁶. In *Carman v. Dunaway Timber Co.*,¹⁴⁷ an independent logger was injured on the defendant's premises when logs rolled off a truck.¹⁴⁸ The jury found against the plaintiff, who argued on appeal that the violation of an OSHA regulation concerning the release of binders constituted negligence per se.¹⁴⁹ The court rejected this contention on the ground that the plaintiff was not an employee and therefore was not within the class of persons for whose benefit the regulation was promulgated.¹⁵⁰ However, the court did express approval of the introduction of the regulations into the record as evidence of the standard of care.¹⁵¹ Obviously, the mere introduction of such evidence affects the common law contrary to the specific provisions of the enabling statute, and the court at no time addressed this conflict.

¹⁴⁴ See 29 U.S.C. § 653(b)(4) (1994).

¹⁴⁵ K.R.S. § 338.021(2) (Miche 1995).

¹⁴⁶ See 29 U.S.C. § 653(b)(4) (1994); K.R.S. § 338.021(2). Kentucky's statute provides as follows:

Nothing in this chapter shall be construed to supersede or in any manner affect any worker's compensation law or to enlarge or diminish or *affect in any manner the common-law or statutory rights, duties, or liabilities of employers* or employees, under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of employment.

Id. (emphasis added).

¹⁴⁷ *Carman v. Dunaway Timber Co.*, 949 S.W.2d 569 (Ky 1997).

¹⁴⁸ See *id.*

¹⁴⁹ See *id.* at 569-70.

¹⁵⁰ See *id.* at 570.

¹⁵¹ See *id.* at 571. Actually, the *Carman* court stated that proof concerning OSHA regulations was admissible to controvert evidence the defendant had introduced concerning custom. It remains open whether OSHA regulations are admissible where there is no proof offered concerning custom. In any event, the court did not explain how the regulations could be introduced for any purpose and not "affect" the common law.

