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Kentucky Law Survey: Torts

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TORTS

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During the past survey year[1] the Kentucky judiciary rendered a number of decisions relating to tort law.[2] The primary subject of this survey is major developments in product liability theory, with emphasis on design defects and manufacturers' duty to warn. Additionally, two significant cases concerning contributory negligence are discussed.

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[1] The survey year commenced on July 1, 1979, and extended through June 3, 1980.

[2] Other cases of interest decided this survey year but not considered in the text are: Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980)(voluntary abortion did not break causal link for negligence that caused injury to fetus)(exposure of pregnant women to x-rays was sufficient contact on which to base damages for mental anguish); Gussler v. Damron, 599 S.W.2d 775 (Ky. Ct. App. 1980)(failure to obtain security as required by no-fault act does not bar action in tort if such action could be brought by a secured person); Bonnie Braes Farms, Inc. v. Robinson, 598 S.W.2d 765 (Ky. Ct. App. 1980)(filing of lis pendens is not a judicial proceeding within the meaning of the tort of abuse of process)(special damage is an essential element of slander of title); Stinnett v. Buchele, 598 S.W.2d 469 (Ky. Ct. App. 1980)(a violation of Occupational Health and Safety Act does not create a civil cause of action); Helton v. Montgomery, 595 S.W.2d 257 (Ky. Ct. App. 1980)(jury should determine whether driver of pick-up truck was liable for death of child who fell out of back, where driver did not know of child's presence in truck but was aware of children in vicinity of truck prior to embarking); Riney v. Wray, 594 S.W.2d 905 (Ky. Ct. App. 1980)(person who voluntarily assumed duty of holding ladder was not liable for ceasing to hold it where there was sufficient time before fall for painter to realize no one was holding ladder); Williams v. Central Concrete Inc., 599 S.W.2d 460 (Ky. Ct. App. 1979)(malice is not an essential element of abuse of process); Everman v. Miller, 597 S.W.2d 153 (Ky. Ct. App. 1979)(no-fault statute applies only to accidents occurring after effective date of act); Hargett v. Dodson, 597 S.W.2d 151 (Ky. Ct. App. 1979)(insured has no cause of action to extent that basic reparation benefits are paid or payable); Johnson v. Cormney, 596 S.W.2d 23 (Ky. Ct. App. 1979)(action for deceit may be based on a failure to disclose known material facts where the circumstances surrounding a transaction give rise to such an obligation); Helton v. Forest Park Baptist Church, 589 S.W.2d 217 (Ky. Ct. App. 1979)(the doctrine of res ipsa loquitur cannot be invoked until it is shown that a particular instrumentality caused the injury); Browning v. Browning, 584 S.W.2d 406 (Ky. Ct. App. 1979)(infidelity of spouse failed to support claim for intentional infliction of emotional distress).

I. RECENT PRODUCT LIABILITY CASES

The theory of manufacturers' liability for design defects has been the subject of considerable interest and confusion.[3] Various approaches exist throughout the country for determining the manufacturers' liability, and these differences in analysis mainly arise from misconstructions of the term "strict liability."[4]

In *Nichols v. Union Underwear Co.*,[5] the Kentucky Supreme Court became embroiled in this confusion. In defining "unreasonably dangerous,"[6] the Court abandoned the applica-

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[3] Much has been written in the last year concerning design defect. *See generally Symposium—Current Developments in the Law of Torts*, 33 VAND. L. REV. 549 (1980); Note, *Products Liability: Motorcycle Design—The Outer Limits of Crashworthiness*, 9 STETSON L. REV. 406 (1980); Note, *Seller's Liability for Defective Design—The Measure of Responsibility*, 37 WASH. & LEE L. REV. 237 (1980); Comment, *Determining Liability for Design Defects: Arizona's Dichotomized Approach*, 22 ARIZ. L. REV. 339 (1980); Comment, *The Failure to Warn Defect After* Barker v. Lull Engineering Co.: *Preservation of the Limited Duty and Demise of the Knowledge Requirement Defense*, 14 U.S.F. L. REV. 309 (1980).

[4] "The liability stated in this Section [strict liability] does not rest upon negligence." RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1965). This statement has led a number of courts to take the term "strict liability" literally, thereby discounting principles of risk allocation generally associated with negligence. For example, some courts have refused to use the term "unreasonably dangerous" because it "rings of negligence." Cronin v. J.B.T. Olson Corp., 501 P.2d 1153 (Cal. 1972). *But see* Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973).

Unfortunately, space does not permit an extensive discussion of this serious problem. However, until all courts recognize that a manufacturer's liability in most respects is based upon negligence principles, it will continue to be true that the "orderly flow of development has turned into a swampy quagmire and threatens to split into several different streams with diverse destinations." Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 557 (1980).

[5] 602 S.W.2d 429 (Ky. 1980). For another discussion of the *Nichols* case, see Comment, Nichols v. Union Underwear, Inc. *and the Meaning of "Unreasonably Dangerous": A Call for a More Precise Standard*, 69 KY. L.J. 409 (1981).

[6] In 1965 the Kentucky Court adopted what has inappropriately been called strict liability in Dealers Transport Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1965). Therein the Court adopted the position taken by the American Law Institute in RESTATEMENT (SECOND) OF TORTS § 402A (1965), which provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without sub-

tion of warranty theory to manufacturers' liability for design defects.[7] In *McCabe Powers Body Co. v. Sharp*,[8] the Court considered the question of a manufacturer's liability where the buyer had designed the product, and held that except in extraordinary situations, imposition of such liability would be unfair. In *Sturm, Ruger & Co. v. Bloyd*,[9] the Court discussed the manufacturer's "duty to warn" and considered the effect of the user's negligence on a bystander's cause of action.

A. Nichols v. Union Underwear Co.:[10] *Defective and Unreasonably Dangerous*

Nichols held that a plaintiff in Kentucky must continue to prove that a product is unreasonably dangerous, a requirement that at least two jurisdictions have abandoned.[11] Consequently, the Court addressed the meaning of "unreasonably dangerous" and determined how that meaning should be conveyed to the jury.

1. *The Concept of "Unreasonably Dangerous"*

In *Nichols* the trial judge had included in his instructions to the jury a definition of "unreasonably dangerous." If the product was "dangerous to an extent beyond that which would be contemplated by an ordinary adult purchaser . . .

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stantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[7] See text accompanying notes 19-20 & 76-89 *infra* for a discussion of the role of contract law in the product liability area.

[8] 594 S.W.2d 595 (Ky. 1980).

[9] 586 S.W.2d 19 (Ky. 1979). This case was decided prior to the survey period but was not treated in the last survey issue.

[10] 602 S.W.2d 429 (Ky. 1980).

[11] Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Cronin v. J.B.E. Olson Corp., 501 P.2d 1153 (Cal. 1972). Despite California's abandonment of the "unreasonably dangerous" requirement in *Cronin*, a recent decision indicates that the basis for liability remains the same. Barker v. Lull Eng'r Co., 573 P.2d 443 (Cal. 1978).

with ordinary knowledge as to its inherent characteristics,"[12] the jury was instructed to find for the plaintiff. The product at issue was a four-year-old child's T-shirt that caught fire while the child was playing with matches. The jury returned a verdict for the manufacturer; the plaintiff appealed, attacking the trial court's definition of "unreasonably dangerous."[13] Since there clearly was sufficient evidence to support the jury's finding under the instruction,[14] the Supreme Court of Kentucky found it necessary to review the meaning of "unreasonably dangerous."

In reaching its decision, the Kentucky Court had to decide whether a product's "patent danger" necessarily insulated a manufacturer from liability.[15] If a product is "no more dangerous than would be anticipated by the ordinary person,"[16] should a jury nonetheless be allowed to consider the reasonableness of the risk the product creates? While numer-

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[12] 602 S.W.2d at 432.

[13] The trial court's instruction was based upon a definition offered by the Restatement: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." RESTATEMENT (SECOND) OF TORTS § 402A, Comment i (1965).

[14] 602 S.W.2d at 430.

[15] The Court also struggled with the distinction between strict liability and negligence in the design defect context. Justice Stephens stated: "In every case, however, the golden thread that holds the rule together is [402A]," 602 S.W.2d at 431, but said "that this 'knowledge' [the seller is presumed to have knowledge of the condition of the product when it leaves his hands] characteristic is not as significant in *design* defect cases as in *manufacturing* defect cases." *Id.* at 433. In contrast consider the following:

> The fact that this bears a remarkable resemblance to negligence suggests only that perhaps principles of strict tort liability, which are suitable for defining the liability of a manufacturer in the production phase of his operations, may not be suitable for defining the defendant's duties in the design and marketing operations. This may also suggest that traditional concepts of negligence may be the proper measure of a manufacturer's responsibility in those areas, and that § 402A of the Restatement, Second, Torts was not intended to supersede § 398, "Chattel Made Under Dangerous Plan or Design."

W. KIMBLE & R. LESHER, PRODUCTS LIABILITY 83-84 (1979). This confusion has not been confined to Kentucky. *See* Birnbaum, *Unmasking the Test for Design Defect: From Negligence to Strict Liability to Negligence,* 33 VAND. L. REV. 593 (1980).

[16] 602 S.W.2d at 432.

ous states say no,[17] the *Nichols* Court noted a strong movement to a tort-oriented approach.[18] While consumer expectation, *i.e.*, whether the consumer received the benefit of his bargain, is the prime consideration in a contract action,[19] tort law is premised on the allocation of responsibility for risk.[20] Consumer expectation therefore cannot serve as an absolute defense. For a manufacturer to be liable for personal injury or property loss under tort theory, however, the logical basis for that liability must be the creation of an unreasonable risk. The *Nichols* Court accepted this logic and held that for liability to be imposed upon a manufacturer, the plaintiff must establish that the product posed an unreasonable risk.

2. *Factors to be Considered*

The *Nichols* Court did not enumerate all factors that might be significant in determining whether an unreasonable risk exists. The Court noted, however, that such factors might include knowledge of the ordinary consumer, obviousness of the danger and the presence or absence of a warning.[21]

Justice Lukowsky, concurring,[22] agreed fully with the analysis of Justice Stephens, writing for the majority. He stated, however, that the opinion should "identify the gut issue:"

> The bottom line is that the trier of fact is required to balance two pairs of factors existing at the time of manufacture: (1) the likelihood that the product would cause the claimants harm or similar harms, and the seriousness of those harms; against (2) the manufacturer's burden of designing a product that would have prevented those harms,

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[17] The Court said 17 states follow this rule. *Id.*

[18] *Id.*

[19] *See* Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 829 (1973). *See also* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 206 (1970).

[20] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 145 (4th ed. 1971).

[21] 602 S.W.2d at 433. The Court also referred the reader to Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339 (1974); Phillips, *The Standard for Determining Defectiveness in Products Liability*, 46 U. CIN. L. REV. 101 (1977); and Wade, *supra* note 19, at 825, for further factors that might be considered.

[22] 602 S.W.2d at 434 (Lukowsky, J., concurring).

> and the adverse effect that alternative design would have on the usefulness of the product. That is to say that the manufacturer is not liable unless at the time of manufacture the magnitude of the danger to the claimant outweighed the utility of the product to the public. . . . The ultimate inquiry is risk versus benefit.[23]

Both opinions reach the same conclusion, but the majority position requires the consideration of several factors, while the concurring position isolates only two. Closer inspection, however, reveals that each of the factors referred to by the majority would be considered in a weighing of the two factors isolated by the concurring position, because each has some bearing on either risk or benefit.[24]

3. *Instructing the Jury*

The primary distinction between the majority and concurring opinions in *Nichols* is in the language suggested to guide the jury in making the correct decision. Justice Stephens proposed:

> You will find for the plaintiff only if you are satisfied from

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[23] *Id.*

[24] Wade, *supra* note 19, at 837-38, lists the following factors as significant:

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
> (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Factors (1) through (6) clearly have a bearing on either risk or benefit. Factor (7) reflects the view that the risk should be transferred to the party most able to bear the loss.

> the evidence that the material of which the T-shirt was made created such a risk of its being accidentally set on fire by a child wearing it that an ordinarily prudent company engaged in the manufacture of clothing, being fully aware of the risk, would not have put it on the market; otherwise you will find for the defendant.[25]

Justice Lukowsky offered the following alternative:

> You will find for the plaintiff if you are satisfied from the evidence that at the time of the manufacture of the cotton and polyester T-shirt the risk of harm from its being accidentally set on fire while being worn by a child outweighed the benefit to the public from its availability in the marketplace. Otherwise you will find for the defendant.[26]

The majority instruction reflects to some extent one offered by Dean Wade.[27] Under Stephens' instruction, the jury would be told that the manufacturer is presumed to be "fully aware of the risk." The manufacturer, under that rule, would be nothing less than an insurer. The law does not hold the manufacturer to full knowledge of all risks, but rather imputes to him knowledge of the condition of his product.[28] This is why the rule is "not as significant in *design* defect cases as in *manufacturing* defect cases."[29] It should be noted that Dean Wade's suggestion read "had actual knowledge of its harmful character."[30] In short, there is no support in the law for holding a manufacturer to the knowledge of all risks which may attend themselves to use of the product.

Both instructions refer ultimately to the same test but

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[25] 602 S.W.2d at 433.

[26] *Id.* at 434 (Lukowsky, J., concurring).

[27] Wade, *supra* note 19, at 839-40.

[28] Ulrich v. Kasco Abrasives Co., 532 S.W.2d 197, 200 (Ky. 1976). *See also* Poland v. Beaird-Poulan, 483 F. Supp. 1256 (W.D. La. 1980); Wilson v. Piper Aircraft Corp., 577 P.2d 1322 (Or. 1978); Reiger v. Toby Enterprises, 609 P.2d 402 (Or. Ct. App. 1980).

[29] 602 S.W.2d at 433. In the design defect case, the manufacturer has generally chosen the characteristic that is alleged to be defective and thus has *actual* knowledge. A manufacturing defect, on the other hand, often cannot be discovered even with reasonable inspection and thus recovery often hinges on this presumption of knowledge. In both cases a plaintiff must show that an ordinarily prudent manufacturer would have appreciated the risk created by the condition of the product.

[30] Wade, *supra* note 19, at 840.

differ in orientation. The majority instruction fails to convey to the jury the ultimate determination that it is asked to make—that of risk versus benefit.[31] Assuming the jury to know what an "ordinarily prudent company" is, the instruction only impliedly asks the jury to weigh risk against benefit.[32]

In contrast, the instruction offered by Justice Lukowsky focuses the jury's attention on the risk versus benefit issue. The instruction clearly outlines the jury's task, which is to weigh the factors germane to risk and benefit based on evidence introduced at trial.[33]

4. *Effect of Federal Standards*

The T-shirt in *Nichols* apparently complied with federal

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[31] To the extent that the instruction suggested by the majority in *Nichols* will likely be changed by the Court in the future, a trial judge presented with a similar case is in an obvious dilemma. The giving of a different instruction may result in a retrial, because it might be improper to give an instruction that conflicts with a Supreme Court opinion. The resolution of this problem is suggested by Penker Constr. Co. v. Finley, 485 S.W.2d 244, 250 (Ky. 1972), in which the Court stated that the failure to define unreasonably dangerous is not reversible error. Until the Court has a chance to review the *Nichols* instruction, the best course may be to avoid the issue.

[32] In the typical negligence case the jury would be instructed as to the defendant's duty to exercise ordinary care. *See, e.g.*, J. PALMORE, INSTRUCTIONS TO JURIES § 23.01 (1977). Ordinary care is then separately defined to mean "such care as an ordinarily prudent person would exercise under similar circumstances." *Id.* at 30. Implicit in the definition is the risk versus benefit analysis. W. PROSSER, *supra* note 20, at 145-49.

[33] Dean Wade made clear that the factors were not to be given to the jury. Wade, *supra* note 19, at 840. This discussion, of course, assumes that it is feasible for the jury to make the risk versus benefit determination. The jury sees only two parties, the manufacturer and the injured plaintiff, yet the public as a collective whole has a tremendous interest in the outcome of the case. The decision may affect the choices available to the public in the marketplace, product costs, and other considerations. The Kentucky Court has on other occasions concluded that the role of the jury should be to decide controverted factual theories while the role of the court is to weigh the various policy considerations relevant to the question of whether to impose liability. Manchester Ins. & Indem. Co. v. Grundy, 531 S.W.2d 493 (Ky. 1975); House v. Kellerman, 519 S.W.2d 380 (Ky. 1974). *See also* Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980). If an instance ever exists in which a jury is not suited to applying the facts to the law, the issue of whether a product is unreasonably dangerous seems to be it, as is evidenced by the call to handle the problem administratively. *See* Model Uniform Product Liability Act, *reprinted in* 44 Fed. Reg. 62714 (1979) [hereinafter cited as UPLA].

safety standards.[34] While the majority and concurring opinions did not address the issue at all, Justice Stephenson's dissent argued that the manufacturer was entitled to a directed verdict because of compliance.[35] Should the case come before the Court on appeal from a second trial, it will likely be called upon to decide the effect of such compliance.[36]

In *Nichols,* Justice Stephens called to the legislature's attention the existence of the Draft Uniform Product Liability Law[37] (UPLA), with an attendant urging of its adoption.[38] The UPLA provides for a rebuttable presumption against defectiveness if the federal standard complied with meets four criteria: 1) that the standard is the result of thorough testing and evaluation; 2) that consumer interests were considered; 3) that it is considered to be more than a minimum safety standard; and 4) that the standard is technologically and scientifically "up-to-date."[39] The approach taken by the UPLA provides for the various interests at stake and reflects the position of a majority of jurisdictions.[40]

B. Sturm, Ruger & Co. v. Bloyd:[41] *Failure to Warn*

It is well settled that a manufacturer is liable for failure to adequately warn of a product's dangers.[42] In *Bloyd* the manufacturer had produced a handgun resembling old western revolvers. When the fully-loaded weapon was dropped from a height of eight to fifteen inches, it had a propensity to fire. Alternative safety measures that would have rendered the weapon safe when dropped from a height of twelve inches were available to the manufacturer at a nominal cost. The

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[34] 602 S.W.2d at 434 (Stephenson, J., dissenting).

[35] *Id.*

[36] For a discussion of the effect of statutes and trade standards upon the manufacturers' liability, see R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2D § 9:11 (2d ed. 1975).

[37] UPLA, *supra* note 33.

[38] 602 S.W.2d at 432 n.1.

[39] UPLA, *supra* note 33, § 107.

[40] *See* analysis accompanying UPLA, *supra* note 33, § 107.

[41] 586 S.W.2d 19 (Ky. 1979).

[42] R. HURSH & H. BAILEY, *supra* note 36, § 8:1; W. KIMBLE & R. LESHER, *supra* note 15, at 192-94.

manufacturer justified the absence of these measures on the grounds of style and marketability,[43] and the handgun was accompanied by instructions which, if followed, would prevent the weapon from firing when dropped. The co-defendant purchaser kept the fully-loaded weapon on the floor of his automobile. Plaintiff was shot in the ankle when, in the process of washing the automobile, the gun fell to the concrete floor and fired.

1. *Theory Underlying the Failure to Warn Concept*

For purposes of analysis, failure to warn[44] cases may be divided into three categories. The first category consists of cases in which the design chosen is clearly deficient under the risk versus benefit analysis, but the danger is converted to a reasonable one by virtue of a warning.[45] In these cases the focus is not solely upon the duty to warn; rather the existence of a warning is one factor to be considered in determining whether the design is unreasonably dangerous.[46] The second group consists of cases in which there is nothing "wrong" with the product, but the product has particular characteristics that when coupled with specific conduct of the user may create an unreasonable risk or injury.[47] Finally are the cases that involve a design with a large degree of risk combined with an overriding degree of social utility and are thus unavoidably

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[43] 586 S.W.2d at 20.

[44] Of course a manufacturer has no duty to warn of dangers not created or enhanced by the product. That the product is to be used in a dangerous activity does not make the product unsafe.

[45] This category contemplates a situation in which the manufacturer has a choice between two designs, chooses the design that creates the greater risk, and because of the absence of a corresponding increase in utility, the product is unreasonably dangerous. Therefore, an adequate warning may have the effect of reducing the risk so that in the final analysis, risk is outweighed by benefit.

[46] See text accompanying note 21 *supra* for a discussion of a warning in this context.

[47] This category contemplates a situation in which the product is not unreasonably dangerous, either because of low amount of risk or because of the lack of a safer alternative. In such a case the risk is created by the coupling of some characteristic of the product with some course of conduct, usually a misuse. If the conduct should have been reasonably anticipated, then the manufacturer may have a duty to warn of the increased risk incurred by such conduct. A classic example is Post v. American Cleaning Equip. Corp., 437 S.W.2d 516 (1968).

unsafe. While the design is not in any way defective, the manufacturer has breached an independent duty by failing to warn of the risk inherent in the product.[48]

The second category, consisting of cases where specific conduct of the user renders an otherwise safe product unreasonably dangerous, is the most frequently encountered.[49] It is into this second group that *Bloyd* falls. The Court appeared to distinguish between the design defect and manufacturer's duty to warn concepts and applied a negligence standard for measuring the manufacturer's liability.[50] In design defect cases, a manufacturer's knowledge of the product's characteristics is presumed,[51] but this presumption is not generally extended to failure to warn cases.[52] A significant difference exists between requiring a manufacturer to be aware of the characteristics of his chosen design and requiring him to anticipate all possible conduct of the user. Thus, courts have limited this duty to warn to conduct that is foreseeable[53] at

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[48] This situation is specifically treated in RESTATEMENT (SECOND) OF TORTS § 402A, Comment k (1965). While liability is not imposed on a manufacturer for producing such a product, the law does impose on him the duty to warn. The risk being unavoidable, the warning in these cases does little more than allow a consumer to make an informed choice.

[49] For a listing of the advantages of basing a claim on this type theory, see W. KIMBLE & R. LESHER, *supra* note 15, at 193-94.

[50] The criteria of liability by which the duty of a manufacturer is measured are whether it knew, or by the exercise of ordinary care ought to have known, that the equipment was limited in its safety design and that it should foresee a substantial likelihood that a user, exercising ordinary care for his own safety, might be injured by it. If so, the manufacturer is under a duty either to use reasonable care to remedy the design before selling it so that it is reasonably safe for its intended use and other uses which are reasonably foreseeable or to provide such warning as would be reasonably sufficient to bring the danger to an expectable user's attention and be understood by him.

Id. at 21.

[51] See text accompanying notes 29-30 *supra* for a discussion of this point.

[52] W. KIMBLE & R. LESHER, *supra* note 15, at 198.

[53] The UPLA replaces the term "foreseeable" with the term "reasonably anticipated conduct," which is defined in § 102(6) to be "conduct which would be expected of an ordinary prudent person who is likely to use the product." The analysis to that section explains the difference as follows:

The meaning of "reasonably anticipated" should be contrasted with "foreseeable." Almost any kind of misconduct with regard to products can be foreseeable—especially if the trier of fact is permitted to use hindsight, *e.g.*,

the time of manufacture,[54] but the manufacturer is required to exercise ordinary care in anticipating uses that may render the product unreasonably dangerous.

2. *To Whom Warning Must be Given*

Generally, if a duty to warn exists, it must be extended to all foreseeable[55] users and consumers.[56] This rule is subject to exceptions, however, and the most prevalent ones are where the employer buys a product for his employee's use[57] and where a physician prescribes drugs for his patients.[58] These exceptions are based upon the premise that the product will be used in a supervised context,[59] with the buyer being in the best position to give a warning.

Embs v. Pepsi-Cola Bottling Co.,[60] in 1975, settled the issue of whether a manufacturer's liability for a *defect* extends to injuries sustained by a bystander; in *Embs*, the Court allowed the bystander to recover. No reference was made in *Bloyd* to any duty to warn a bystander,[61] and under the facts

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that a soda bottle will be used for a hammer, that someone will attempt to drive a land vehicle on water, that perfume will be poured on a candle in order to scent it.

[54] *See* W. KIMBLE & R. LESHER, *supra* note 15, at 208-09. The Kentucky Court has consistently used the language "reasonably anticipated" in this context. Ulrich v. Kasco Abrasives Co., 532 S.W.2d 197, 200 (Ky. 1976).

[55] See note 53 *supra* for a discussion of the problem with the term "foreseeable."

[56] *See* R. HURSH & H. BAILEY, *supra* note 36, at 167-74.

[57] This exception was recognized in Bohnert Equip. Co. v. Kendall, 569 S.W.2d 161 (Ky. 1978):

> Under the evidence in this case, we think the warning given to Kittel discharged the manufacturer's and seller's responsibility if it was adequate under the circumstances. The warning duty has been deemed satisfied where warning was given to supervising engineers or technicians though not to one who was injured while simply following the directions of such skilled individuals.

Id. at 166. *See, e.g.*, Wilhelm v. Globe Solvent Co., 373 A.2d 218 (Del. 1977); Reed v. Pennwalt Corp., 591 P.2d 478 (Wash. Ct. App. 1979).

[58] *See, e.g.*, Haste v. American Home Products Corp., 577 F.2d 1122 (10th Cir. 1978); Hawkins v. Richardson-Merrill, Inc., 249 S.E.2d 286 (Ga. Ct. App. 1978). *Cf.* Torsiello v. Whitehall Labs., 398 A.2d 132 (N.J. Super. 1979)(rule does not apply where sold without prescription).

[59] *Compare* Bohnert Equip. Co. v. Kendall, 569 S.W.2d 161 (Ky. 1978) *with* Post v. American Cleaning Equip. Corp., 437 S.W.2d 516 (Ky. 1970).

[60] 528 S.W.2d 703 (Ky. 1975).

[61] The majority in *Bloyd* did not treat the issue. Chief Justice Palmore raised the

therein,[62] it is difficult to conceive how the manufacturer could have warned the plaintiff.

3. *Effect of User's Failure to Heed Warning on Bystander's Cause of Action*

The central issue in *Bloyd* was the effect of the user's failure to follow the manufacturer's instructions on a bystander's right to recovery.[63] While the Court found such failure to be negligent, it based its decision absolving the manufacturer of liability upon the premise that the user's failure to follow the instructions was conduct that could not reasonably be anticipated.[64] The concurrence agreed, stating that there was no duty to foresee the negligence of another.[65] The dissent argued that it was entirely foreseeable that instructions would be ignored by the consumer and, additionally, that liability need not be based on a finding of foreseeability.[66] The three opinions differ primarily on what is foreseeable. The majority and concurring opinions viewed the user's conduct as an insulating event and thus never reached the question of whether the product was unreasonably dangerous, while the dissent argued that the manufacturer's reliance on the user to follow the instructions was unreasonable and that the manufacturer should be held liable for choosing an unsafe design.

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issue in his concurring opinion.

[62] See text accompanying notes 45-48 *supra* for a discussion of the role of a warning in such a case. The duty to warn in these situations seems to run only to users, and in *Bloyd* a user warning had been given by the manufacturer.

[63] The effect of a user's failure to follow instructions where the *user* seeks recovery was settled in Post v. American Cleaning Equip. Corp., 437 S.W.2d 516, 520 (Ky. 1970)(the user's "contributory negligence must be read in the light of the sufficiency of the warning to apprise him of the severity, gravity and extent of the danger").

[64] In the present case, there is no basis to conclude that the manufacturer could reasonably be expected to anticipate that the revolver would be carried loaded, stashed away under the floor mat of a car, and above all, when the car was to be washed and cleaned that the person who owned the revolver would not tell the person doing the cleaning of the revolver's presence and dangerous propensity.

586 S.W.2d at 23.

[65] *Id.* (Palmore, C.J., concurring).

[66] *Id.* at 24 (Reed, J., dissenting).

a. *Buyer's Failure to Heed Warning as a Superseding Event*

In Kentucky, determination of foreseeability is a question of law.[67] Furthermore, another's negligence is superseding only if "unforeseeable" and only if it is not the result of normal incidents of the risk.[68] The majority in *Bloyd* concluded that a manufacturer who has given an adequate warning of a product's dangers has the right to rely on the user to follow those directions. The dissent, however, pointed out that instructions are often ignored and that the risk was created by the design choice. Thus, the dissent reasoned that a warning cannot insulate a manufacturer from liability to a bystander where an unsafe design was chosen.[69]

b. *To Whom Manufacturer's Duty Runs*

The basis for a manufacturer's possible liability to a bystander in a failure to warn case has never been specified by the Kentucky Court. In design defect cases, liability is clearly based on the creation of an unreasonable risk,[70] with the bystander being within the scope of that risk. Where a warning is given to render a defective design reasonably safe, an implicit determination exists that the increased risk associated with the chosen design outweighed its utility to society and that there was a safer choice. The risk is decreased by the issuance of a warning, but in the absence of a warning the product is unreasonably dangerous.

Because a warning cannot generally be given to a bystander, the product could be found to be unreasonably dangerous as to the bystander. Thus, the real issue is who a manufacturer must consider when choosing a design. A tendency in the law exists, based on contract principles, to treat a bystander differently than a user or consumer.[71] Under tort theory, however, a bystander's recovery should be premised on a finding that the product was unreasonably dangerous as to

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[67] House v. Kellerman, 519 S.W.2d 380 (Ky. 1974).

[68] W. PROSSER, *supra* note 20, at 281-86.

[69] See note 45 *supra* for a discussion of this kind of warning.

[70] Wade, *supra* note 4, at 557.

[71] Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1125-26 (1960).

him, just as a user must prove unreasonable danger to himself in order to recover. If the choice of design was not unreasonably dangerous, no basis exists for holding the manufacturer liable to a bystander.

Under this analysis, the holding in *Bloyd* could have better rested on whether the choice of design was unreasonably dangerous in the first instance. While the manufacturer chose the more dangerous of available designs, the choice was not unreasoned. The weapon "was emblematic of the western guns and was highly successful on the market."[72] The Court stated that a manufacturer "is not required to design the best possible product or one as good as others make or a better product than the one he has, so long as it is reasonably safe."[73] Thus, in order to find a product unreasonably dangerous, it would have to appear that the *risk of injury to a bystander* is greater than the utility of the design choice. Under this analysis, it was inadvisable for the Court to consider the question of superseding cause without first determining whether the product was unreasonably dangerous. If the design choice was not unreasonable, no basis exists for liability to the bystander, regardless of any breach of duty to warn the user. As urged by the dissent, the likelihood of the user's failure to follow instructions should be but one factor in determining the likelihood of bystander injury.[74] The dissent's position, however, that a warning cannot insulate a manufacturer from liability to a bystander where an unsafe but not unreasonably dangerous design was chosen should not be adopted. To do so would make a manufacturer an insurer of bystanders' safety.

C. McCabe Powers Body Co. v. Sharp:[75] *Manufacturer's Liability for the Design of Another*

In *McCabe Powers Body Co.*, the manufacturer had not chosen the design but had assembled the product in accor-

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[72] 586 S.W.2d at 20.
[73] *Id.* at 21-22.
[74] *Id.* at 24 (Reed, J., dissenting).
[75] 594 S.W.2d 592 (Ky. 1980).

dance with the buyer's specifications. McCabe received a bid from the state to construct an aerial boom, with the provision that any deviation from specifications would be grounds for rejection. The aerial boom was open on one side. In the course of his employment with the Department of Highways, Sharp lost consciousness and fell from the boom, sustaining permanent injury.

The court of appeals reversed the trial court's holding that compliance with specifications absolved the manufacturer of any liability for defective design. The Supreme Court reinstated the trial court's ruling, quoting from a Sixth Circuit opinion:[76] "To hold [the manufacturer] liable for defective design would amount to holding a nondesigner liable for design defect."[77]

The Court stated that an exception to this rule would be where the supplied plans "could contain design defects so extraordinarily dangerous that a product manufacturer should decline to produce or, if appropriate, issue warnings as to the use of the product."[78] This exception merely states the obvious, that a manufacturer may be held liable for negligence, independent of product liability theory. The Court further limited the rule to nonliability for defects obvious to the user, reserving ruling on concealed defects.[79]

D. *Viability of Implied Warranty*

The decision in *Nichols v. Union Underwear, Inc.*[80] was clearly based upon tort principles. The question then arises whether in Kentucky a consumer has a cause of action in con-

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[76] Garrison v. Rohm & Haas Co., 492 F.2d 346 (6th Cir. 1974) (applying Kentucky law).

[77] 594 S.W.2d at 595. Does not this rationale apply with equal force to a retailer or wholesaler? *See* KY. REV. STAT. § 411.340 (Cum. Supp. 1980) [hereinafter cited as KRS].

[78] 594 S.W.2d at 595.

[79] *Id.* There is no reason for not extending the rule to concealed defects, as the manufacturer's duty would remain the same. That the defect is concealed would, however, have significant impact on the scope of the exception. The nature of the defect has a direct bearing on the degree of danger, as well as on the duty to warn, and thus should be a factor to consider in deciding whether to issue a warning or decline to manufacture the product.

[80] 602 S.W.2d 429 (Ky. 1980).

tract as well.[81] Sixteen years ago, in *Dealer's Transport Co. v. Battery Distributing Co.*,[82] the Court noted that contract law was not an appropriate theory for product liability: "[T]he pragmatic view impels us to recognize that recovery against a remote vendor in this type of case, even when based on implied warranty, truly sounds more in tort than in contract."[83]

In *McMichael v. American Red Cross*,[84] the plaintiff brought an action for damages arising from the sale of blood containing hepatitis virus; the trial judge directed a verdict for the defendant on the ground that there was no sale of goods involved. The Court of Appeals affirmed but on the ground that the product was unavoidably unsafe and therefore not unreasonably dangerous. This finding was held to bar a claim under both tort and contract theories. The Court stated:

> We recognize that the concept of unavoidable unsafeness was developed only as an exception to strict tort liability under Section 402A as an interpretation of the term "unreasonably dangerous" as used in that section, and has not in terms been utilized by any court as a basis for an exception to liability under the implied warranty of fitness provided for in the Uniform Commercial Code. Nevertheless, *we view strict liability under Section 402A and implied warranty liability under the Uniform Commercial Code as being expressions of a single basic public policy as to liability for defective products.* If the policy as to Section 402A is that unavoidable unsafeness of the character involved in the blood in the instant case is a basis for denying strict liability, it would seem that the same policy should prevail with respect to liability under implied warranty.[85]

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[81] No case has been decided on warranty theory since Dealers Transport Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1965). The Kentucky Court has declined comment on the distinction between tort and implied warranty theory in a number of cases brought on both theories. Huffman v. S.S. Mary & Elizabeth Hosp., 475 S.W.2d 631, 633 (Ky. 1972); Briner v. General Motors Corp., 461 S.W.2d 99, 103 (Ky. 1970); Holbrook v. Rose, 458 S.W.2d 155, 157 (Ky. 1970).

[82] 402 S.W.2d 441 (Ky. 1965).

[83] *Id.* at 446-47.

[84] 532 S.W.2d 7 (Ky. 1975).

[85] *Id.* at 15 (emphasis added).

McCabe Powers Body Co. v. Sharp[86] is the only case in which implied warranty has been given any attention. The Court stated that "[t]he Court of Appeals pointed out that there was no contention that the aerial boom failed to operate in the intended manner and properly rejected Sharp's assertion of breach of implied warranty."[87] Thus, in Kentucky, even if implied warranty theory has been retained, it has not been applied in the contexts of failure to warn and absence of safety devices.[88]

It is submitted that the Kentucky Court should express what it has often implied—product liability should be grounded in tort, not contract.[89] Engrafting warranty theory onto product liability only results in confusion.[90] The General

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[86] 594 S.W.2d 592 (Ky. 1980). See text accompanying notes 75-76 *supra* for a discussion of this case.

[87] *Id.* at 593.

[88] *See* R. HURSH & H. BAILEY, *supra* note 36, § 8:29; W. KIMBLE & R. LESHER, *supra* note 15, at 203-04. It should be noted that in *McCabe* the plaintiff's contract cause of action would have been barred by the horizontal privity requirement in KRS § 355.2-318 (1971).

[89] "The time has now come to be forthright in using a tort way of thinking and tort terminology." Wade, *supra* note 19, at 834.

[90] The master in this area, the late Dean Prosser, defined this problem years ago with great specificity and insight. He noted the courts had indulged in no less than 29 legal fictions to determine manufacturer's liability, and that:

> [O]ut of this welter, the theory which finally emerged . . . was that of an implied "warranty". . . .
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> The adoption of this particular device was facilitated by the peculiar and uncertain nature and character of warranty, a freak hybrid born of the illicit intercourse of tort and contract. "A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty. Originally sounding in tort, yet arising out of the warrantor's consent to be bound, it later ceased necessarily to be consensual, and at the same time came to lie mainly in contract."

Prosser, *supra* note 71, at 1125-26. After noting several disadvantages of contract theory in this context, Dean Prosser continued:

> What all of this adds up to is that "warranty," as a device for the justification of strict liability to the consumer, carries for too much luggage in the way of undesirable complications, and is leading us down a very thorny path. . . . There is no need to borrow a concept from the contract law of sales; and it is "only by some violent pounding and twisting" that "warranty" can be made to serve the purpose at all. Why talk of it?

Id. at 1133. Some six years later, commenting on the impact of his astute observations, he wrote:

> The effect of this decision [Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963)] was immediate. Other courts at once agreed that the

Assembly, in enacting the Product Liability Act of Kentucky,[91] did not distinguish between tort and contract theories in a product liability action.[92] The drafters of the UPLA have also seen the wisdom of such an approach.[93]

II. CONTRIBUTORY NEGLIGENCE

In Kentucky a plaintiff may be denied recovery if his own negligence contributed to his injury, even though he has proven each element in his negligence cause of action.[94] The Kentucky courts have recently decided several cases involving contributory negligence, two of which are treated herein.

A. *Safety Regulation as Basis for Liability*

Breach of the standard of care imposed upon a defendant[95] may often be proved by showing a violation of a safety-oriented statute or regulation.[96] In *Lomayestewa v. Our Lady of Mercy Hospital*,[97] the plaintiff was being treated in the defendant hospital for grand mal epilepsy and emotional derangement. The hospital staff knew plaintiff to be in a violent state and placed her in a "restraint-type vest."[98] While unat-

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> proper theory was not one of warranty at all, but simply of strict liability in tort divorced from any contract rules. . . . There are still courts which have continued to talk the language of "warranty"; but the forty-year reign of the word is ending, and it is passing quietly down the drain.

Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 804 (1966).

[91] KRS § 411.300 (Cum. Supp. 1980).

[92] KRS § 411.300(1) (Cum. Supp. 1980) provides: "[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."

[93] UPLA, *supra* note 33, § 103(a).

[94] *See generally* Parker v. Redden, 421 S.W.2d 586 (Ky. 1967).

[95] The standard is that degree of care that would have been exercised by a reasonably prudent person under the circumstances. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 150 (4th ed. 1971).

[96] *See* Wagers v. Frantz, 445 S.W.2d 453 (Ky. 1969); *see also* Bennett v. Parkway Professional Ctr., Inc., 507 S.W.2d 694 (Ky. 1974) (building code set higher standard of care than common law).

[97] 589 S.W.2d 885 (Ky. 1979).

[98] *Id.* at 886.

tended, she released herself from the restraint and either fell or jumped from the second floor of the hospital, sustaining serious injuries. The defendant had failed to provide a detention screen over the window, as required by administrative regulation. The trial judge submitted both the plaintiff's and defendant's negligence to the jury, which returned a general verdict for the defendant. The Court of Appeals affirmed, but the Supreme Court reversed, finding the hospital liable as a matter of law.

As the Court had little difficulty finding the defendant negligent based upon the violation of the safety regulation, its decision focused on the contributory negligence of the plaintiff.[99] Generally, the fact that the defendant's negligence is premised on the violation of a statute or regulation does not negate the availability of the defense of contributory negligence.[100] It has long been recognized, however, that a specific class of these protective measures could not be effective if contributory negligence were a bar to recovery.[101] Whether a statute or regulation falls within this class is "a matter of the legislative purpose which the Court finds in the statute."[102]

In *Lomayestewa* the regulation imposed upon the defendant the duty to protect the plaintiff from her own infirmity. It is this aspect of the regulation that is crucial to a holding that contributory negligence is not a bar to recovery.[103]

B. *Medical History and Malpractice*

In *Mackey v. Greenview Hospital, Inc.*,[104] the plaintiff was admitted to the defendant hospital for a breast biopsy, a procedure requiring anesthetization. During surgery the plaintiff went into cardiac arrest. The physicians were unable to restore normal heart function promptly, which resulted in

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[99] *Id.* at 887.

[100] Bennett v. Parkway Professional Ctr., Inc., 507 S.W.2d 694 (Ky. 1974).

[101] 589 S.W.2d at 887.

[102] *Id.*

[103] The same theme may be found in the Child Labor cases referred to by the Court, in that the purpose of a child labor statute is to protect children, whose age and lack of appreciation of danger renders them unable to protect themselves from occupational hazards. Louisville & St. L. Ry. Co. v. Lyons, 159 S.W. 971 (Ky. 1913).

[104] 587 S.W.2d 249 (Ky. Ct. App. 1979).

massive brain damage. The plaintiff had a pre-existing heart condition and had been taking the drugs Lasix and nitroglycerin. The physicians' failure to know of these facts (and to thus postpone surgery) was clearly the cause of the plaintiff's brain damage.[105] Plaintiff contended that the defendant was negligent in not learning of her medical history; defendant contended that plaintiff was contributorily negligent in not relaying it. The jury found for the defendant, and the plaintiff appealed.

A physician is negligent if he fails to "use that degree of care and skill that is expected of a reasonably competent practitioner in the same class to which he belongs, acting in the same or similar circumstances."[106] When the physician is charged with making an improper judgment, however, the reasonableness of the decision must be viewed in light of facts known to him at the time he made the decision.[107] Nothing in the *Mackey* opinion indicates that the surgery or acts after cardiac arrest were improvidently performed; therefore, any dereliction would be in the physicians' not learning of the plaintiff's medical history.

The court first noted that "the question of negligence of the treating physicians and the hospital is closely related to the question of contributory negligence of Mrs. Clark in giving an incomplete or inaccurate history."[108] If the physician's elicitation of medical history does not comport to the standard of ordinary care, the patient is contributorily negligent if he knows the physician is unaware of a condition or of prior treatment that poses a risk of danger to the patient and if his failure to so inform the physician is unreasonable under the circumstances.[109] The patient, however, has no duty to be aware that some historical fact might subject him to risk; the patient is allowed to rely on the physician to inquire as to material facts.[110] Then if the physician, in taking the medical

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[105] *Id.* at 252.

[106] Blair v. Eblen, 461 S.W.2d 370, 373 (Ky. 1970).

[107] 587 S.W.2d at 254.

[108] *Id.*

[109] *Id.* at 255-56.

[110] *Id.*

history, comports with standard medical practice, there is no basis for liability.

In dicta, the court explored circumstances under which failure to relay medical history may not bar recovery. The court was particularly concerned with situations in which the physician had actual knowledge of the facts not disclosed or should have discovered the facts independent of the medical history.[111]It should be recognized that if the physician was negligent in not discovering historical facts, he will be charged with knowledge of the same constructively, and the question thus becomes whether a reasonably prudent physician could have come to the same conclusion as did the defendant.

If the physician has actual knowledge of the crucial fact, the plaintiff's conduct is immaterial because no causal connection between plaintiff's negligence and the physician's conduct exists. Where the physician should have discovered the fact through independent means, however, the plaintiff's negligence can be material, although a causal connection between the plaintiff's negligence and the injury must be shown. Thus, if causation is the dispositive issue, the question is whether the patient's negligence was a substantial factor in bringing about the harm.[112] In the situation here, the patient's negligence clearly appears to have been a direct cause of the harm, concurring with any independent negligence of the physician. The court thus upheld a verdict for the defendants.

The fact that the patient's negligence is a substantial factor in causing the harm, however, does not require a finding that the negligence is the legal cause of the harm if there is a "rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm."[113] Thus, if a court desires to relieve a patient of his negligence, it can be done under such a rule. On this issue the *Mackey* court referred to *Southeastern Kentucky Baptist Hospital, Inc. v. Bruce,*[114] stating that *Bruce* "suggests that a patient's contributory negligence in giving a history may not be a bar to recov-

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[111] *Id.* at 256.

[112] RESTATEMENT (SECOND) OF TORTS § 465 (1965).

[113] *Id.* at § 431(b).

[114] 539 S.W.2d 286 (Ky. 1976).

ery in all cases."[115] Unfortunately, the case does not suggest such a rule.

In *Bruce*, a thyroidectomy was performed on the wrong patient. Apparently the patient had answered to the wrong name, and the medical staff did not check the identification bracelet on the patient's wrist or make any effort to otherwise ascertain the patient's identity. The fallacy in the court's analogy of the two situations is that the patient in *Bruce* was not negligent.[116] Thus *Bruce* provides no support for the rule suggested by the *Mackey* court, and if such a rule is to be adopted in some future case the court will have to create it therein.

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[115] 587 S.W.2d at 256.

[116] The *Bruce* Court made this point clear when it stated: The appellants insist that Gladys was remiss in her duties, in that for some unaccountable reason she answered to the name of Smith. However, this Court does not consider this to be the neglect of a duty required of Gladys. *After all, she was being removed to the operating room for surgery and at the best would have been in a somewhat confused condition.* An even more critical duty was placed upon the doctor, Bryant, and Wyatt in establishing with absolute certainty the identity of a surgical patient.
539 S.W.2d at 287 (emphasis added).