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Kentucky Law Survey: Torts

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Torts

BY RICHARD AUSNESS*

INTRODUCTION

This issue of the Survey includes recent decisions on false imprisonment, intentional infliction of emotional distress, and products liability. The first case, *Consolidated Sales Co. v. Malone*,¹ held that Kentucky's shoplifter detention statute authorized a personal search of suspected shoplifters by store personnel. In the second case, *Eigelbach v. Watts*,² the Kentucky Supreme Court adhered to its longstanding rule that physical impact was essential to an action for intentional infliction of emotional distress. Finally, in the third decision, *McMichael v. American Red Cross*,³ the Court, utilizing the Restatement's "unavoidably unsafe"⁴ rationale, refused to impose strict liability in tort on a noncommercial blood bank which supplied contaminated blood to a transfusion patient.

I. FALSE IMPRISONMENT

Consolidated Sales Co. v. Malone,⁵ was an action for false imprisonment which arose after the plaintiff's detention and search as a suspected shoplifter by employees of the Consolidated Sales Company. The trial court granted a directed verdict for the plaintiff on liability and authorized the jury to award punitive damages if it found that the action and attitude of Consolidated's employees "indicated a wanton and wilful disregard of the rights of others, including the plaintiff. . . ."⁶ The jury awarded Mrs. Malone \$1,000 in compensatory damages and \$2,500 in punitive damages. The Kentucky Supreme Court reversed. In holding that the search was reasonable, the

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¹ 530 S.W.2d 680 (Ky. 1975).

² No. 74-336 (Ky., Feb. 20, 1976) (per curiam).

³ 532 S.W.2d 7 (Ky. 1975).

⁴ RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as RESTATEMENT].

⁵ 530 S.W.2d 680 (Ky. 1975).

⁶ *Id.*

Court relied on Kentucky Revised Statutes [hereinafter cited as KRS] § 433.236(1), which declares:

A peace officer, security agent of a merchantile establishment, merchant or merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person, and that he can recover same by taking the person into custody, may, for the purpose of attempting to effect recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time.

This statute, like those of other states,⁷ was designed to protect merchants against tort liability arising out of their efforts to recover property from suspected shoplifters.

A. *Common-Law Liability Rules*

At common law the merchant who unlawfully detained a suspected shoplifter could be held liable for false imprisonment or false arrest. False imprisonment is the unlawful restraint of another's physical liberty by means of force or the threat of force.⁸ One who accomplishes this restraint through the improper assertion of legal authority, on the other hand, is guilty of false arrest.⁹ Many states do not distinguish between false arrest and false imprisonment, or use the terms interchangeably.¹⁰ In either case, the victim can recover damages for loss of time, physical discomfort or injury, emotional distress, humiliation, and injury to reputation.¹¹ Nominal damages may be recovered if the plaintiff has suffered no actual damages,¹² and

⁷ See *infra* note 41.

⁸ Great Atl. & Pac. Tea Co. v. Billyps, 69 S.W.2d 5 (Ky. 1934); Gust v. Montgomery Ward & Co., 136 S.W.2d 94 (Mo. App. 1939); 32 Am. Jur. 2d *False Imprisonment* § 58 (1967). However, there is no false imprisonment when the plaintiff voluntarily submits to the restraint. White v. Levy Bros., 306 S.W.2d 829 (Ky. 1957). Moreover, the restraint must be total, with no reasonable means of escape available. Crew-Beggs Dry Goods Co. v. Bayle, 51 P.2d 1026 (Colo. 1935); Halliburton-Abbott Co. v. Hodge, 44 P.2d 122 (Okla. 1935).

⁹ Annot., 21 A.L.R.2d 643, 649 (1952).

¹⁰ Hammargren v. Montgomery Ward & Co., 241 P.2d 1192 (Kan. 1952); Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387 (Va. 1948).

¹¹ S.H. Kress & Co. v. Powell, 180 So. 757 (Fla. 1938); Great Atl. & Pac. Tea Co. v. Smith, 136 S.W.2d 759 (Ky. 1940); W.T. Grant Co. v. Owens, 141 S.E. 860 (Va. 1928).

¹² See Comment, 17 S.C.L. REV. 729, 730 (1965).

in aggravated cases, the jury may impose punitive damages.¹³

Formerly, to avoid liability for detaining a suspected shoplifter, a merchant either had to claim defense or recapture of property, or assert that he had made a valid arrest. Defense of property was the broadest of these privileges. One in possession of real or personal property could defend it by the use of such force as reasonably appeared necessary to prevent a threatened interference with possession.¹⁴ Although a reasonable mistake as to the necessity for asserting the defense was permitted,¹⁵ the possessor could not use force to defend the property against one who had a better right to it, and a mistake as to the privilege of the intruder was no defense if the possessor resisted with force,¹⁶ except where the intruder was intentionally or negligently responsible for the mistake.¹⁷

Defense of property was seldom appropriate when goods were displayed so that customers could freely examine them. Having voluntarily surrendered possession of an article, the merchant was forced to rely on the recovery of property privilege when the customer kept the merchandise without paying for it.¹⁸ Recovery of property was a more limited privilege than that of defending possession:¹⁹ the rightful owner had to be in possession; the property must have been taken either forcibly, fraudulently, or without claim of right; the rightful owner had to be entitled to immediate possession; the rightful owner had to make a request for return of the goods unless it would be useless or dangerous to do so; and the force used could not be excessive.²⁰ In addition, the privilege was limited to situations where the owner promptly discovered the loss and made prompt and persistent efforts to recover the goods.²¹ In the absence of such "fresh pursuit" the owner was limited to a

¹³ *Parrott v. Bank of America Nat. Trust & Sav. Ass'n*, 217 P.2d 89 (Cal. App. 1950); *Sternberg v. Hogg*, 72 S.W.2d 421 (Ky. 1934).

¹⁴ RESTATEMENT § 377.

¹⁵ *Smith v. Delery*, 114 So. 2d 857 (La. 1959).

¹⁶ *Arlowski v. Foglio*, 135 A. 397 (Conn. 1926).

¹⁷ *Leach v. Francis*, 41 Vt. 670 (1868).

¹⁸ Comment, *Shoplifting: Protection for Merchants in Wisconsin*, 57 MARQ. L. REV. 141, 142-43 (1973).

¹⁹ RESTATEMENT § 101.

²⁰ Note, *The Right of Recaption of Chattels by Force*, 34 KY. L.J. 65, 66 (1945).

²¹ RESTATEMENT § 103.

remedy at law.²² Moreover, one who used force to recover property acted at his peril and was liable for any mistake;²³ therefore, a merchant who detained a suspected shoplifter was not privileged if the customer had not actually taken something.²⁴

As a practical matter courts often ignored defense or recovery of property considerations and applied the rules of arrest where a merchant detained a suspect.²⁵ Because there was seldom time to obtain a warrant in such cases, however, it was difficult for a merchant to make a valid arrest.²⁶ In most states a private citizen could make an arrest for a felony only if the arrested person had actually committed a serious crime and could make an arrest for a misdemeanor only if the crime was committed in his presence and constituted a breach of the peace.²⁷ Since most shoplifting was neither a felony²⁸ nor a breach of the peace,²⁹ a merchant often could not validly arrest a suspected shoplifter at all.³⁰ Moreover, if the shoplifter returned the stolen merchandise, the recovery of property privilege was no longer applicable, and the merchant was liable for false arrest or false imprisonment if he continued to detain the suspect. In addition, the burden of proof was upon the merchant to show that the arrest was valid,³¹ and probable cause alone would not justify an arrest.³² Police officers had somewhat broader powers to arrest without a warrant,³³ but a pri-

²² *Bobb v. Bosworth*, 16 Ky. 81 (1808).

²³ Comment, "*Shoplifters*" Beware? *Detention of Suspected Shoplifters*, 11 *DRAKE L. REV.* 31, 34 (1961).

²⁴ Comment, *The Protection and Recapture of Merchandise from Shoplifters*, 46 *ILL. L. REV.* 887, 892 (1952).

²⁵ Note, *Shoplifting—An Analysis of Legal Controls*, 32 *IND. L.J.* 20, 24 (1956).

²⁶ *Id.* at 26.

²⁷ *RESTATEMENT* § 119; see generally *Perkins, The Law of Arrest*, 25 *IOWA L. REV.* 201 (1940); *Waite, The Law of Arrest*, 24 *TEX. L. REV.* 279 (1946); Note, *The Law of Citizens's Arrest*, 65 *COLUM. L. REV.* 502 (1965).

²⁸ *M. FRANKLIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 389 (1971).

²⁹ *Radloff v. Nat'l Food Stores, Inc.*, 121 N.W.2d 865 (Wis. 1963). The *RESTATEMENT* § 116 defines breach of the peace as "a public offense done by violence, or one causing or likely to cause an immediate disturbance of public order." But see *Branston, The Forcible Recaption of Chattels*, 28 *L.Q. REV.* 262 (1912).

³⁰ See Note, *Shoplifting and the Law of Arrest: The Merchant's Dilemma*, 62 *YALE L.J.* 788, 799 (1953).

³¹ Comment, *supra* note 23, at 35.

³² Comment, 50 *N.C.L. REV.* 188, 189 (1971).

³³ At common law an officer may arrest without warrant for a felony committed in his presence or when a felony has in fact been committed and he has reasonable

vate person who directed an officer to make an arrest could be held liable for false arrest if he were mistaken, even though the officer was protected.³⁴ Consequently, merchants often allowed a suspected shoplifter to leave with stolen goods rather than risk a suit for false arrest or false imprisonment that might result if they attempted to recover their property.³⁵

Eventually, the courts and legislatures of many states modified the common law rules to provide greater protection for merchants in these circumstances. *Collyer v. S.H. Kress Co.*,³⁶ decided in 1936, first recognized a shopkeeper's privilege to detain a suspected shoplifter. The plaintiff in *Collyer* was suspected of stealing after several store employees saw him put articles in his pocket. Although he was detained by store personnel for about 20 minutes until the police arrived and arrested him, the California Supreme Court held that this detention was not false imprisonment because the store had probable cause for believing that the plaintiff had unlawfully taken its property.³⁷

The *Collyer* approach was later approved by the Restatement (Second) of Torts,³⁸ under which the merchant may temporarily detain in order to investigate the possibility of shoplifting.³⁹ The drafters of the Restatement expressed no opinion as to whether the shopkeeper's privilege would extend to detention outside the store but case law has recognized the privilege

grounds to believe that it was committed by the person arrested. He may also arrest for a misdemeanor committed in his presence. Comment, *Shoplifting and the Law of Arrest: A Problem in Effective Social Legislation*, 19 MD. L. REV. 28, 31 (1959).

³⁴ Note, *supra* note 25, at 25. There is no liability, however, if one merely gives the officer the information and leaves it up to him whether to make the arrest. In addition, probable cause will prevent liability for malicious prosecution. Comment, *supra* note 12, at 730.

³⁵ Comment, *supra* note 23, at 31.

³⁶ 54 P.2d 20 (Cal. 1936).

³⁷ See also *Kroger Grocery & Baking Co. v. Waller*, 189 S.W.2d 361 (Ark. 1945); *Sima v. Skaggs Payless Drug Center, Inc.* 353 P.2d 1085 (Idaho 1960); *Durand v. United Dollar Store, Inc.*, 242 So. 2d 635 (La. App. 1970); *Teel v. May Dep't Stores Co.*, 155 S.W. 2d 74 (Mo. 1941); *Swafford v. Vermillion*, 261 P.2d 187 (Okla. 1953); *Cohen v. Lit Bros.*, 70 A.2d 419 (Pa. Super. 1950).

³⁸ RESTATEMENT § 120A.

³⁹ The privilege authorizes detention for investigation only; the law of arrest will apply if the merchant takes the suspect into custody for the purpose of instituting criminal proceedings against him. Comment, *Survey and Analysis of Criminal and Tort Aspects of Shoplifting Statutes*, 58 MICH. L. REV. 429, 432 (1960).

in such circumstances.⁴⁰ Other states attempt to resolve the problem by legislation.⁴¹ Typically these statutes permit merchants or their employees to detain a suspect upon probable cause for a reasonable time and in a reasonable manner,⁴² although some also allow the merchant to make an arrest if probable cause exists.⁴³

B. *Probable Cause*

In *Malone* the Court declared that Kentucky's detention statute, KRS § 433.236(1) makes probable cause a justification in the case of suspected shoplifting. This justification is in the nature of a confession and avoidance defense, which ordinarily must be pleaded and proved.⁴⁴ Once the plaintiff shows that the detention has occurred, the burden of proof shifts to the defendant who must then prove the existence of probable cause.⁴⁵

Probable cause exists when there are circumstances that would lead a reasonable person to entertain an honest and strong belief that the person detained is guilty of shoplifting.⁴⁶

⁴⁰ J.C. Penney Co. v. O'Daniell, 263 F.2d 849 (10th Cir. 1959); Bonkowski v. Arlan's Dep't Store, 162 N.W.2d 347 (Mich. App. 1969), *rev'd on other grounds*, 174 N.W.2d 765 (Mich. 1970).

⁴¹ ALA. CODE, tit. 14 § 334(1) (1959); 11 DEL. C. § 647 (1970); GA. CODE ANN. § 105-1005 (1968); HAWAII REV. LAWS § 663-2 (1967); IND. ANN. STAT. § 10-3044 (1972); IOWA CODE ANN. 709.24 (1972); KY. REV. STA. § 433.236 (1969) [hereinafter cited as KRS]; MD. ANN. CODE art. 27, § 551A (1971); M.G.L.A. c. 231, § 94B (1971); MICH. STAT. ANN. § 27A.2917 (1962); M.S.A. § 629.366 (1972); MISS. CODE ANN. § 2374-04 (1971); V.A.M.S. § 537.125 (1972); NEV. REV. STAT. § 29-402.01 (1964); N.J.S.A. 2A:170-100 (1971); N.M. STAT. ANN. § 40A-16-22 (1964); N.Y. GENERAL BUSINESS LAW § 218 (1968); N.C. GEN. STATS. § 14-72.1 (1971); N.D. GEN. CODE § 29-060-27 (1960); OHIO REV. CODE § 29 35.041 (1971); 22 OKL. ST. ANN. § 1343 (1972); O.R.S. § 164.392 (1969); S.C. CODE ANN. § 16-359.4 (1971); TENN. CODE ANN. § 40-824 (1972); UTAH CODE ANN. § 77-13-32 (1971); R.C.W.A. 9.01.116 (1972); W. VA. CODE ANN. § 61-3A (1972); W.S.A. § 943.50 (1971); WYO. STAT. ANN. § 6-146.3 (1971).

⁴² See generally Annot., 47 A.L.R.3d 998 (1973).

⁴³ GA. CODE ANN. § 105-1005 (1968); TEX. PEN. CODE, art. 1436e (2) (1972); W. VA. CODE ANN. § 61-3A-4 (1972).

⁴⁴ 32 AM. JUR. 2d *False Imprisonment* § 99 (1967).

⁴⁵ J.C. Penney Co. v. Cox, 148 So. 2d 679 (Miss. 1963); *Isaiah v. Great Atl. & Pac. Tea Co.*, 174 N.E.2d 128 (Ohio App. 1959); Comment, *supra* note 32, at 197; Comment, *supra* note 12, at 737.

⁴⁶ *Gibson v. J.C. Penney Co.*, 331 P.2d 1057 (Cal. App. 1958); Annot., 47 A.L.R.3d 998, 1006 (1973).

Mere suspicion is not enough,⁴⁷ but a series of minor incidents when taken together may give rise to probable cause, as in the *Malone* case.⁴⁸ In *Malone*, an employee of the defendant, stationed in a concealed position above the security office, observed the plaintiff in the baby department apparently carrying some items of baby clothing under her arm. Later, the same employee saw Mrs. Malone walk over to the shoe department several times to talk to her mother-in-law. During this period the baby clothing seen earlier in the plaintiff's possession disappeared. As the plaintiff was heading toward the check-out counter, the store employee made a quick inspection trip through the areas where the plaintiff had been seen to determine if she had left the articles there. Not finding them, the store employee went to the area near the check-out counter and accosted the plaintiff, who was waiting by the door while her companions went through a check-out lane.

Arguably, there was probable cause to believe that the plaintiff was guilty of shoplifting even though the defendant's employee did not actually see her conceal the baby clothes. The plaintiff's frequent trips back and forth from the baby department to the shoe department, the gradual disappearance of the baby clothing during these trips, and the failure to find any of the missing items where the plaintiff had been, taken together, provided the defendant's employee with sufficient evidence to suspect that the plaintiff was a shoplifter. Therefore, the Court's finding that probable cause might exist seems correct.⁴⁹

C. Reasonableness of the Detention and Search

A second issue in *Malone* was the reasonableness of the detention and the propriety of the search of Mrs. Malone. In most states a merchant is allowed to detain a suspected shoplifter only for a reasonable time and in a reasonable manner. This

⁴⁷ *Butler v. Walker Stores, Inc.*, 222 So. 2d 128 (Miss. 1969).

⁴⁸ Comment, *supra* note 32, at 197.

⁴⁹ It is important to remember, however, that probable cause is treated as a question of law in most states and only if the facts are in dispute should it be left to the jury. See *supra* note 18, at 157; Comment, 3 U.C.L.A.L. REV. 269, 270 (1956).

In *Malone* the testimony of the defendant's employee apparently was not in dispute, so the Court could have held as a matter of law that the probable cause requirement was satisfied.

is generally a jury question.⁵⁰

A reasonable length of time is usually that required to conduct an investigation and perhaps to summon a supervisor with decision-making authority. Some statutes provide explicit guidelines on the length of time that a suspected shoplifter may be held.⁵¹ In Kentucky, the merchant may detain a suspect only long enough to ascertain that his property was in fact taken and to regain possession of it.⁵²

The detention must also be made in a reasonable manner.⁵³ Abusive remarks or accusations are not privileged under most detention statutes.⁵⁴ According to an opinion of the Attorney General, under the Kentucky statute a merchant must inform the suspect of the reason for the detention and request the return of the merchandise.⁵⁵ If the suspect resists, reasonable force may be used to restrain him,⁵⁶ but the statutory privilege will be lost if excessive force is used.⁵⁷

Finally, the detention must be made for an authorized purpose.⁵⁸ A number of states allow the merchant to detain only for purposes of investigation,⁵⁹ but others, including Kentucky, permit detention in order to recover stolen goods.⁶⁰ A few allow detention only for the purpose of summoning the police,⁶¹ and

⁵⁰ *Delp v. Zapp's Drug & Variety Stores*, 395 P.2d 137 (Ore. 1964); Comment, *supra* note 12, at 738.

⁵¹ HAWAII REV. LAWS § 663-2 (1967); LA. C. CR. P. art. 215 (1967) (one hour); S.D.C.L. § 22-37-24 (1967) (time to summon police); WASH. STAT. ANN. § 9.01.116 (1971) (time to examine records); W. VA. CODE ANN. § 61-3A-4; WIS. STAT. ANN. § 943.50 (1971).

⁵² KY. ATTORNEY GENERAL'S OPINION 69-64 [hereinafter cited as OAG].

⁵³ Comment, *supra* note 39, at 443-44.

⁵⁴ *Little Stores v. Isenberg*, 172 S.W.2d 13 (Tenn. App. 1943); Annot., 29 A.L.R.3d 961 (1970).

⁵⁵ OAG 69-64.

⁵⁶ *Collyer v. S.H. Kress Co.*, 54 P.2d 20 (Cal. 1936). The rule is similar to general tort doctrine regarding the use of force in the recovery of property. Comment, 24 TENN. L. REV. 1177, 1182-83 (1957).

⁵⁷ *Jefferson Stores Inc. v. Caudell*, 228 So. 2d 99 (Fla. App. 1969); *J.C. Penney Co. v. Cox*, 148 So. 2d 679 (Miss. 1963); *Peak v. W.T. Grant Co.*, 386 S.W.2d 685 (Mo. 1964); *Lukas v. J.C. Penney Co.*, 378 P.2d 717 (Ore. 1963).

⁵⁸ Comment, *The Protection and Recapture of Merchandise from Shoplifters*, 47 NW. U.L. REV. 82, 85 (1952).

⁵⁹ Colorado, Hawaii, Illinois, Indiana, Kansas, Louisiana, Missouri, New York, Oregon, South Carolina, Utah, Washington, West Virginia, and Wyoming.

⁶⁰ Alabama, Arkansas, Florida, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Tennessee, and Utah.

⁶¹ Delaware, Minnesota, South Dakota, Wisconsin.

four states place no limits on the purposes for which a suspect may be detained.⁶²

In *Malone*, the plaintiff was detained for about 15 minutes, a period which seems reasonable. The defendant's employees were not rude or abusive, nor did they use excessive force. The defendant's liability, therefore, must be based on its physical search of the plaintiff. Accompanied by a uniformed guard, the plaintiff was escorted to a small closet-like office, where her handbag was searched by a plainclothes security agent. The female employee who had observed the plaintiff earlier in the baby department, was also present. After completing this task, the man in the plain clothes left the room, and the search was continued by the female employee. During the course of this search, the plaintiff was "patted down" and eventually forced to take off all of her clothes. Since the search failed to uncover any stolen property, Mrs. Malone was then permitted to leave. The Kentucky Supreme Court stated that "we see nothing in this account to support a finding that the manner in which [the plaintiff] was treated and in which the search was conducted was unreasonable."⁶³

Malone indicates that KRS § 433.236 authorizes not only personal searches, but also "strip searches" by store employees, at least in some cases. The statute says nothing about a personal search being authorized, but merely states that a merchant may take a suspected shoplifter "into custody and detain him in a reasonable manner . . ."⁶⁴ At least one state statute expressly prohibits personal searches,⁶⁵ while a few others seem to permit them.⁶⁶ Most statutes, however, are silent on the subject.

The "plain language" of the Kentucky statute provides no interpretive guidance. The word "detain" means "to restrain from proceeding" and does not carry with it the notion of a search, but the phrase "take into custody" does suggest a broader privilege than mere detention.⁶⁷ Nor does a look at the

⁶² Maryland, Massachusetts, Michigan, and North Carolina.

⁶³ 530 S.W.2d 680, 683 (Ky. 1975).

⁶⁴ KRS § 433.236(1) (1958).

⁶⁵ Wis. STAT. ANN. § 943.50(3) (1971).

⁶⁶ See, e.g., IOWA CODE ANN. § 709.22-23 (1972).

⁶⁷ But see OAG 74-94, which states that detention under KRS § 433.236(1) is not considered an arrest.

statutory purpose help very much. The statute authorizes detention for the purpose of recovering stolen merchandise, an objective that could be accomplished by allowing store personnel to detain the suspect long enough to determine whether any merchandise is missing, to seek an explanation from the customer, to demand the return of the property, and perhaps to summon a police officer. On the other hand, while a personal search is seldom necessary to accomplish the statutory purpose, it is not inconsistent with this objective either.

Even if KRS § 433.236(1) does sanction a personal search under some circumstances, the strip search conducted in the *Malone* case was unreasonable and therefore exceeded the statutory privilege. The search, made under an implied threat of force and against the plaintiff's will, was a substantial and intentional invasion of her person. While the defendant is entitled to take reasonable measures to protect its property, the value of the goods involved here was not sufficient to justify so serious an invasion of the plaintiff's dignitary interests. At the very least the issue of reasonableness in this case should have been regarded as a jury question.⁶⁸

D. Conclusion

Shoplifting is unquestionably a serious social and economic problem.⁶⁹ Although shoplifting is a crime,⁷⁰ the criminal process alone cannot deal with it,⁷¹ and merchants must rely on a variety of measures to deter thefts and recover their property.⁷² Clearly a return to the common-law rules discussed earlier would substantially impair the effectiveness of these efforts. On the other hand, the economic interests of the retail sales industry must be balanced against the rights of individu-

⁶⁸ The Kentucky Court also overturned the jury's verdict of \$2,500 in punitive damages against the defendant.

⁶⁹ Losses from shoplifting amount to about \$5 billion annually in the United States. Shoplifting losses are equal to about 2 percent of overall sales volume for the average store, and the average value of a stolen article is about \$28. 57 STORES, Oct. 11, 1975, at 25.

⁷⁰ See KRS § 433.234(1) (1958).

⁷¹ The crime of shoplifting is often difficult to prove, and sometimes merchants are reluctant to prosecute because it results in poor public relations for the store. Comment, *supra* note 18, at 142.

⁷² Comment, *supra* note 39, at 429-30.

als mistakenly accused of shoplifting. The detention of suspected shoplifters represents a substantial, though acceptable, invasion of this right, but the authorization of personal searches under a detention statute goes too far. If individuals must be searched without their consent, it should be done by police officers under conditions where the suspect is protected by the criminal process.

We suggest, therefore, that KRS § 433.236(1) should be amended to provide that a merchant or his employee may detain a suspected shoplifter only to determine whether property has been taken by the suspect, to recover the property, or to summon the police for investigation or arrest. The legislature should limit the detention period to a maximum of 1 hour. The probable cause requirement should be retained, but the merchant's right to search should be restricted to handbags and outer garments such as overcoats. Personal searches beyond this, by private individuals without the consent of the suspect, should be specifically prohibited.

Although some increased losses from shoplifting might occur, it is doubtful, that the statutory revision suggested above would seriously harm retail merchants. Merchants might simply absorb these additional costs, but hopefully they will hire additional sales personnel, display their merchandise in a different manner, or take other measures to reduce the incidence of shoplifting. Whichever alternative is chosen, its economic costs will be spread among the consuming public. The strip search of a suspected shoplifter by store personnel is an intolerable affront to human dignity. The approach suggested above provides an acceptable level of protection for the retail merchant without imposing an unfair burden on innocent customers who are wrongfully suspected of shoplifting.

II. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In *Eigelbach v. Watts*⁷³ the Kentucky Supreme Court refused to permit the plaintiff to recover for intentional infliction of emotional distress. The defendant, Watts, engaged in a heated argument with Mrs. Eigelbach in the early part of the afternoon and threatened to return that night and kill the

⁷³ No. 74-336 (Ky., Feb. 20, 1976) (per curiam).

plaintiff and her son. Mrs. Eigelbach was apprehensive during the remainder of the day and died that night after she had gone to bed, about 10 hours after the argument. Although Watts did not touch her, it was claimed that his threats and language severely disturbed her and contributed to her death. In a brief memorandum opinion affirming the judgment below, the Court declared that, "[t]here is no showing of any physical contact between Watts and Ada Eigelbach. In the absence of such contact, no recovery may be had for language used at any time which may have produced fright or shock or injuries resulting from such fright or shock unaccompanied by such physical contact."⁷⁴

A. *Development of an Independent Action for Intentional Infliction of Emotional Distress*

In most states, intentional infliction of emotional distress is an independent cause of action to recover damages not only for intentionally-caused mental or psychic injuries but also for any physical harm produced as a direct consequence of such emotional disturbance. Both English and American courts generally refused to entertain such actions until the present century.⁷⁵ In the words of one 19th century English jurist, "[m]ental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes

⁷⁴ *Id.*

⁷⁵ Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 193-212 (1944). Roman law, however, under the concept of *injuria* gave relief against insults and abusive language. DIGEST 47.10.1, 47.10.15; INSTITUTES 4.4.1. This action was based on outrage to feelings as well as loss to reputation. De Villiers, *The Roman Law of Defamation*, 34 L.Q. REV. 412, 417 (1918). Influenced by Roman civil law, the English ecclesiastical courts during the middle ages punished insults as *contumelia*. T. PLUCKNETT, *CONCISE HISTORY OF THE COMMON LAW* 484 n.2 (5th ed. 1956). In addition, the local courts of medieval England often allowed civil as well as criminal actions for insults. Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63, 64-65 (1950). Later, the action of libel as it developed in the Court of Star Chamber provided relief against insults, while the action of slander as it developed in the Court of King's Bench concerned itself with damage to reputation. Holdsworth, *Defamation in the Sixteenth and Seventeenth Century*, 40 L.Q. REV. 302, 304 (1924); Ausness, *Libel Per Quod in Florida*, 23 U. FLA. L. REV. 51, 53 (1970). The availability both of criminal penalties and civil damages for insult in Star Chamber proceedings was intended to discourage duels. Modern statutes in some American jurisdictions were originally designed to serve the same purpose. MISS. CODE ANN. § 95-1-1 (1972); W. VA. CODE ANN. § 55-7-2 (1966).

that alone."⁷⁶ However, the courts often mitigated the harshness of this rule by allowing recovery for emotional distress under the guises of assault,⁷⁷ battery,⁷⁸ false imprisonment,⁷⁹ invasion of privacy,⁸⁰ and even trespass to land.⁸¹ Damages for emotional distress were characterized as "parasitic" in such cases because they were supported by the underlying "technical" tort.⁸²

In addition, the courts recognized a number of exceptions to the general rule against recovery. For example, a long line of cases held that a common carrier must provide its passengers with courteous treatment.⁸³ This duty originally rested on a contractual basis,⁸⁴ but later cases also allowed nonpassengers

⁷⁶ Lynch v. Knight, 11 Eng. Rep. 854, 863 (H.L. 1861)(Lord Wensleydale).

⁷⁷ Erwin v. Milligan, 67 S.W.2d 592, 593 (Ark. 1934); Atlanta Hub Co. v. Jones, 171 S.E. 470, 472 (Ga. 1933); Johnson v. Hahn, 150 N.W. 6 (Iowa 1914); Kurpgeweit v. Kirby, 129 N.W. 177 (Neb. 1910).

⁷⁸ Interstate Life & Accident Co. v. Brewer, 193 S.E. 458, 462 (Ga. 1937); Draper v. Baker, 21 N.W. 527, 528 (Wis. 1884).

⁷⁹ Godsden Gen. Hosp. v. Hamilton, 103 So. 553, 554 (Ala. 1925); Fisher v. Rumber, 214 N.W. 310, 311 (Mich. 1927); Salisbury v. Poulson, 172 P. 315, 316 (Utah 1918).

⁸⁰ Brents v. Morgan, 299 S.W. 967, 971 (Ky. 1927); Barber v. Time, Inc., 159 S.W.2d 291, 293-94 (Mo. 1942).

⁸¹ Am. Security Co. v. Cook, 176 S.E. 798, 800 (Ga. App. 1934); Continental Cas. Co. v. Garrett, 161 So. 753, 755 (Miss. 1935).

⁸² RESTATEMENT § 47, comment b at 80-81; Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 42-43 (1956); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 880-81 (1939). The case of Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967), provides a good illustration of this principle. The plaintiff in *Fisher*, a black scientist employed by NASA, was attending a conference at the defendant's hotel with a group of about 25 or 30 colleagues. As the plaintiff stood in line at a buffet style luncheon, one of the defendant's employees snatched the plate from his hand and shouted that he, a Negro, could not be served. The plaintiff was consequently embarrassed and humiliated. On appeal, the Texas Supreme Court held that the defendant's employee had committed a battery by snatching the plate from the man's hand, although the refusal to serve, not the snatching of the plate, was the real cause of the injury. The damages for emotional distress were thus "parasitic" to the technical battery committed against the plaintiff.

⁸³ Berger v. Southern Pac. Co., 300 P.2d 170, 173 (Cal. App. 1956); Gebhardt v. Public Serv. Coordinated Transp., 137 A.2d 48 (N.J. Super. 1957); Brown v. Fifth Ave. Coach Lines, 185 N.Y.S.2d 923 (N.Y. App. 1959). RESTATEMENT OF TORTS § 48 (1934); Annot., 60 A.L.R.2d 1104 (1958); Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63, 66-71 (1950). There is no liability, however, for mere discourtesy; the defendant's words or actions must actually be insulting or abusive. New York, L.E. & W.R. Co. v. Bennett, 50 F. 496, 501 (6th Cir. 1892); Crutcher v. Cleveland, C.C. & St. L.R.R., 111 S.W. 891, 893 (Mo. App. 1908).

⁸⁴ Bleecker v. Colorado & S. Ry., 114 P. 481 (Colo. 1911); Frewen v. Page, 131 N.E. 475 (Mass. 1921).

to recover for offensive behavior by employees of a common carrier.⁸⁵ Similar liability was imposed upon innkeepers in a number of jurisdictions,⁸⁶ although recovery was usually limited to hotel guests.⁸⁷ On occasion, liability for gross insult was extended to telegraph companies,⁸⁸ although not to retail merchants generally.⁸⁹

Some courts also awarded damages for mental distress arising from the mishandling of a dead body,⁹⁰ and wrongful withholding of the body.⁹⁴ Although recovery was usually predicated upon wrongful interference with a property interest in the corpse,⁹⁵ the concern for the emotional well-being of the survivors seems to have been the actual basis for the tort.⁹⁶

Eventually, the exceptions swallowed up the rule as the American courts began to recognize a separate and independent cause of action for intentional infliction of emotional distress. The new tort was approved by the American Law Institute in 1947 and duly incorporated into the Restatement of Torts. The great majority of jurisdictions now allow the plaintiff to recover for intentional infliction of emotional distress and most follow the Restatement's formulation.⁹⁷ According to the Restatement, "[o]ne who by extreme and outrageous con-

⁸⁵ *St. Louis-San Francisco R.R. v. Clark*, 229 P. 779 (Okla. 1924); *Jones v. Atlantic Coast Line R.R.*, 94 S.E. 490 (S.C. 1917).

⁸⁶ *Wiggs v. Courshon*, 355 F. Supp. 206 (S.D. Fla.), *appeal dismissed*, 485 F.2d 1281 (5th Cir. 1973); *Milner Hotels v. Dougherty*, 15 So. 2d 358 (Miss. 1943).

⁸⁷ *Wallace v. Shoreham Hotel Corp.*, 49 A.2d 81 (Mun. App. D.C. 1946); *Jenkins v. Kentucky Hotel, Inc.*, 87 S.W.2d 951 (Ky. 1935).

⁸⁸ *Dunn v. Western Union Tel. Co.*, 59 S.E.2d 189 (Ga. App. 1970); *Buchanan v. Western Union Tel. Co.*, 106 S.E. 159 (S.C. 1920).

⁸⁹ *Slocum v. Food Fair Stores of Fla.*, 100 So. 2d 396 (Fla. 1958); *Miller v. Friedman's Jewelers, Inc.*, 131 S.E.2d 663 (Ga. App. 1963).

⁹⁰ *Magruder, Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1064-67 (1936).

⁹¹ *Kirsev v. Jernigan*, 45 So. 2d 188 (Fla. 1950).

⁹² *Papieves v. Kelley*, 263 A.2d 118 (Pa. 1970); Comment, 10 DUQUESNE L. REV. 296 (1971).

⁹³ *Gostkowski v. Roman Catholic Church of the Sacred Hearts of Jesus and Mary*, 186 N.E. 798 (N.Y. 1933).

⁹⁴ *Alcorn v. Adams Express Co.*, 146 S.W. 747 (Ky. 1912); *Gadbury v. Bleitz*, 233 P. 299 (Wash. 1925).

⁹⁵ 22 AM. JUR. 2d *Dead Bodies* § 4 (1965); Note, *Nature of the Rights in a Dead Body*, 18 MINN. L. REV. 204 (1934).

⁹⁶ *Badbury v. Bleitz*, 233 P. 299 (Wash. 1925); RESTATEMENT OF TORTS § 868 (1939).

⁹⁷ W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 12 (4th ed. 1971).

duct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."⁹⁸ Thus, two elements are necessary in an action for intentional infliction of emotional distress: the defendant must be guilty of extreme and outrageous conduct; and his actions must cause the plaintiff severe emotional distress. These requirements restrict the scope of the tort considerably.

Outrageous conduct involves more than a mere intent to cause emotional distress. In the words of one commentator, "[l]iability has been imposed only in cases where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."⁹⁹ Conduct of this sort is genuinely uncommon although some of the more outrageous tactics of bill collectors,¹⁰⁰ insurance claims adjusters,¹⁰¹ and landlords¹⁰² have met the test. Abuse of authority has also given rise to liability in this area.¹⁰³ Normally, the standard is an objective one and the conduct must be such that it would cause severe emotional distress in a person of ordinary sensibilities,¹⁰⁴ but recovery has been allowed for less offensive conduct in the case of small children¹⁰⁵ and weak or unusually susceptible persons where the defendant had knowledge of their condition.¹⁰⁶

Not only must the defendant's conduct be outrageous, but

⁹⁸ RESTATEMENT § 46(1).

⁹⁹ Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 44 (1956).

¹⁰⁰ Annot., 46 A.L.R.3d 773 (1972); Berger, *The Bill Collector and the Law*, 17 DE PAUL L. REV. 327 (1968); Note, *Intentional Infliction of Mental Distress in the Debtor-Creditor Relationship*, 37 ALB. L. REV. 797 (1973); Note, *Mental Distress from Collection Activities*, 17 HAST. L.J. 369 (1965).

¹⁰¹ Frishett v. State Farm Mut. Auto. Insur. Co., 143 N.W.2d 612 (Mich. App. 1966); Fletcher v. Western Nat. Life Insur. Co., 89 Cal. Rptr. 78 (1970); Annot. 39 A.L.R.3d 739 (1971).

¹⁰² Kaufman v. Abramson, 363 F.2d 865 (4th Cir. 1966).

¹⁰³ Johnson v. Sampson, 208 N.W. 814 (Minn. 1926).

¹⁰⁴ Prosser, *Insult and Outrage*, 44 CALF. L. REV. 40, 53 (1956).

¹⁰⁵ Korbin v. Berlin, 177 So. 2d 551 (Fla. App. 1965); Delta Fin. Co. v. Ganakas, 91 S.E.2d 383 (Ga. 1956).

¹⁰⁶ Clark v. Associated Retail Credit Men of Washington D.C., 105 F.2d 62 (D.C. Cir. 1932); Nickerson v. Hodges, 84 So. 37 (La. 1920); Continental Cas. Co. v. Garrett, 161 So. 753 (Miss. 1935).

it must also cause severe emotional distress.¹⁰⁷ Normally, it is up to the jury to determine whether there has been the requisite degree of emotional disturbance.¹⁰⁸ Although most states do not require that the plaintiff's emotional distress manifest itself by physical symptoms,¹⁰⁹ in the great majority of cases the plaintiff has suffered a physical illness of a serious character.

Applying these criteria to the *Eigelbach* case, it is by no means certain that the plaintiff would have been able to recover. Looking first at the defendant's conduct, it is debatable whether the defendant's action met the "outrageous conduct" standard. Mere threats alone would probably not be enough, although an explicit threat to kill the plaintiff and her child at a particular time and place, if part of a pattern of harassment, might be sufficient.¹¹⁰

In order to determine whether the defendant's threat could be expected to cause severe emotional distress, it must be ascertained whether the plaintiff was likely to take the threat seriously. Apparently, she and her child were living alone and were therefore vulnerable to a physical attack. If the defendant had a history of violence, his threat to kill might have been sufficient to cause severe emotional distress. Since the plaintiff died of a heart attack, it is possible that she was weak and unusually susceptible to emotional trauma; if the defendant knew of her susceptibility, he might be held liable even though his actions would not be expected to cause serious harm if directed at an ordinary person.

Finally, there is no direct proof that the defendant's conduct caused or contributed to the plaintiff's heart attack, although the temporal proximity of the two events suggests a causal relationship. No doubt the cause-in-fact issue would have posed a serious problem for the plaintiff and the causal connection could only have been established by expert medical testimony.

¹⁰⁷ *Slocum v. Food Fair Stores of Fla.*, 100 So. 2d 396 (Fla. 1958).

¹⁰⁸ *Savage v. Boies*, 272 P.2d 349 (Ariz. 1954); 38 AM. JUR. 2d *Fright, Shock & Mental Disturbance* § 7 (1968).

¹⁰⁹ *E.g.*, *Samms v. Eccles*, 358 P.2d 344 (Utah 1961).

¹¹⁰ *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282 (Cal. 1952).

B. *Recovery for Emotional Distress in Kentucky*

Eigelbach is consistent with prior Kentucky decisions on this issue. Except in cases of gross insult by employees of a common carrier,¹¹¹ mishandling of dead bodies,¹¹² and negligent transmission or misdelivery of death messages,¹¹³ the Kentucky courts have refused to allow recovery for emotional distress unless accompanied by a direct, contemporaneous physical contact or injury.¹¹⁴ This requirement, known as the "impact rule," is almost universally rejected in America where the defendant's conduct is intentional,¹¹⁵ and survives in only a few states in cases of negligently caused emotional distress.¹¹⁶ The rule as it is employed in Kentucky is similar to the "parasitic damages" approach discussed earlier, and over the years has produced some absurd results. For example, damages for emotional distress were allowed in *Ragsdale v. Ezell*,¹¹⁷ where the defendant kissed the plaintiff, but denied in *Morgan v. High-*

¹¹¹ *Chesapeake & O. Ry. v. Francisco*, 148 S.W. 46 (Ky. 1912); *Quinn v. Louisville & N. Ry.*, 32 S.W. 742 (Ky. 1895). A common carrier may also be held liable for failure to prevent abuse of a customer by another passenger. *Louisville & N. Ry. v. Bell*, 179 S.W. 400 (Ky. 1915).

¹¹² *North East Coal Co. v. Pickelsimer*, 68 S.W.2d 760 (Ky. 1934); *Streipe v. Liberty Mut. Ins. Co.*, 47 S.W.2d 1004 (Ky. 1932); *Douglas v. Stokes*, 149 S.W. 849 (Ky. 1912); *Alcorn v. Adams Express Co.*, 146 S.W. 747 (Ky. 1912).

¹¹³ *Smith v. Cowdy*, 244 S.W. 678 (Ky. 1922); *Hockenhammer v. Lexington & E.R.R.*, 74 S.W. 222 (Ky. 1903); *Western Union Tel. Co. v. Van Cleave*, 54 S.W. 827 (Ky. 1900); *Chapman v. Western Union Tel. Co.*, 13 S.W. 880 (Ky. 1890); Comment, 19 Ky. L.J. 259, 260 (1931).

¹¹⁴ *Weber-Stair Co. v. Fisher*, 119 S.W. 195 (Ky. 1909), seems to be the only departure from this pattern. The plaintiff in that case recovered for emotional distress caused by the defendant's employees who wrongfully ejected him from a theater and threatened to have him arrested. *But see Capital Theatre Co. v. Compton*, 54 S.W.2d 620 (Ky. 1932).

¹¹⁵ *George v. Jordan Marsh Co.*, 268 N.E.2d 915 (Mass. 1971); *Monteleone v. Co-Operative Transit Co.*, 36 S.E.2d 475 (W. Va. 1945); 38 AM. JUR.2d *Fright, Shock & Mental Disturbance* § 14 (1968); Comment, 6 SUFFOLK L. REV. 140 (1971). *But see Bartow v. Smith*, 78 N.E.2d 735 (Ohio 1948).

¹¹⁶ *St. Louis, I.M. & S.R.R. v. Bragg*, 64 S.W. 226 (Ark. 1901); *Gilliam v. Stewart*, 291 So. 2d 593 (Fla. 1974); *Braun v. Craven*, 51 N.E. 657 (Ill. 1898); *Boston v. Chesapeake & O. Ry.*, 61 N.E.2d 326 (Ind. 1945); *Kentucky Traction & Terminal Co. v. Roman's Guardian*, 23 S.W.2d 272 (Ky. 1929); *Sullivan v. H.P. Hood & Sons, Inc.*, 168 N.E.2d 80 (Mass. 1960); *Gambill v. White*, 303 S.W.2d 41 (Mo. 1957); *Miller v. Baltimore & S.W.R.R.*, 85 N.E. 499 (Ohio 1908); Annot., 64 A.L.R.2d 100 (1959).

¹¹⁷ 49 S.W. 775 (Ky. 1899). On the other hand, recovery was denied in *Reed v. Maley*, 74 S.W. 1079 (Ky. 1903), where the amorous defendant made an indecent proposal to an unresponsive plaintiff.

tower's Administrator,¹¹⁸ where the defendant shot and killed himself in the plaintiff's presence, even though the plaintiff was shocked by this bloody and wholly unexpected suicide and required medical attention.

Often very slight and unrelated physical conduct has been sufficient to satisfy the impact requirement. In *Chesapeake & Ohio Ry. v. Robinett*,¹¹⁹ a train conductor committed a battery upon the plaintiff's father in her presence and the plaintiff, a young girl, was upset by the incident. Ordinarily, no recovery would be allowed in these circumstances,¹²⁰ but during the course of the fight the defendant shoved the plaintiff's father against her. The court held that this contact, though incidental and slight, was enough to satisfy the impact requirement, and permitted the young girl to recover for the emotional distress she suffered as a result of seeing her father struck by the train conductor.

*McGee v. Vanover*¹²¹ provides another illustration of the capriciousness of the impact rule. In that case the two defendants beat up the plaintiff's husband while she was present. She became frightened and consequently suffered a miscarriage. During the altercation, one of the defendants, Evans, pushed the plaintiff aside in order to reach her husband, but McGee, the other defendant, did not touch her. As a result, the plaintiff was permitted to recover against Evans, but not against McGee.

C. Conclusion

In the past the courts have given a variety of reasons for refusing to allow an independent action for intentional infliction of emotional distress. Recovery has been denied because damages for psychic injury were deemed insubstantial and impossible to measure. The courts also complained that such damages were difficult to prove and expressed fears of being inundated by a flood of trivial or fraudulent claims.¹²² However,

¹¹⁸ 163 S.W.2d 21 (Ky. 1942).

¹¹⁹ 152 S.W. 976 (Ky. 1913).

¹²⁰ *Reed v. Ford*, 112 S.W. 600 (Ky. 1908).

¹²¹ 147 S.W. 742 (Ky. 1912).

¹²² *Reed v. Maley*, 74 S.W. 1079, 1080 (Ky. 1903). This language is taken almost verbatim from *Wadsworth v. Western Union Tel. Co.*, 8 S.W. 574, 582-83 (Tenn. 1888).

in our opinion none of these contentions is serious enough to justify Kentucky's continuing refusal to provide a remedy for the victims of intentionally-caused mental distress.

There is no longer any doubt that damages from severe emotional disturbances are real and not merely "metaphysical" and insubstantial. The science of psychiatry recognizes that such emotional or mental conditions as anxiety and depression have objective characteristics and can be treated by means of psychotherapeutic methods.¹²³ In addition, emotional trauma may also produce physical consequences such as gastrointestinal and cardiovascular symptoms, genitourinary problems, along with headaches, backaches, and a variety of other lesser ailments.¹²⁴ These injuries are clearly no less substantial when induced by psychic stimuli than when they are caused by physical contact.

"Nonphysical" damages caused by emotional distress are admittedly difficult to measure;¹²⁵ however, problems of this sort have not deterred Kentucky courts from allowing plaintiffs to recover for such damages in cases involving common carriers, telegraph companies, or the mishandling of dead bodies. Courts have also overcome such difficulties in numerous assault and battery and false imprisonment cases where psychic harm was the primary element of damage. In addition, as mentioned earlier, mental distress cases often involve physical as well as emotional injuries. It is hard to see that the difficulty of measurement rationale has any validity at all when the intentional infliction of emotional distress causes physical harm. In *Eigelbach*, for example, the jury would not have been required to measure a purely psychic injury. Since the plaintiff allegedly died as the result of defendant's tortious conduct, damages would be measured according to the provisions of the state wrongful death statute.

Emotional distress cases unquestionably present more difficult causation problems than other types of personal injury

¹²³ See generally AYD, *RECOGNIZING THE DEPRESSED PATIENT* (1961); Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922).

¹²⁴ Note, *Expanding the Concept of Recovery for Mental and Emotional Injury*, 76 W. VA. L. REV. 176, 192 (1974).

¹²⁵ Dearman, *The Psychiatric Examination of the Client*, 32 TENN. L. REV. 592 (1965).

litigation, but these difficulties should not induce the courts to deny recovery across the board. After all, the burden of proof is on the plaintiff, and in most instances he will be required to establish causation by means of expert medical testimony.¹²⁶ Perhaps this is why no proliferation of fraudulent claims has materialized in those states which have permitted actions for intentional infliction of emotional distress.¹²⁷

Furthermore, even if a case could be made for limiting recovery for intentional infliction of emotional distress, the impact requirement in Kentucky can no longer be justified. At one time medical scholars apparently believed that all mental and emotional ills were traceable to physical problems, and the impact rule was a reflection of this thinking.¹²⁸ With the advent of Freudian psychology the older theory was abandoned and consequently there is no longer any scientific justification for the impact requirement.¹²⁹

The impact requirement is also unsound from a policy perspective. It is a mechanical approach to the liability issue, which concentrates on the presence or absence of physical contact and for the most part ignores both the character of the defendant's conduct and the nature of the plaintiff's injuries. This approach often leads to absurd and unjust results. The time has come for Kentucky to reject the impact test. As one commentator remarked, "If 'impact' is no criterion for distinguishing good from bad claims it requires but little courage to renounce it as a fit test of liability."¹³⁰

The Kentucky Supreme Court should have adopted the language of the Restatement of Torts and recognized an independent action for intentional infliction of emotional distress. The Restatement's requirement of "outrageous conduct" and "severe emotional distress," along with its use of a "person of

¹²⁶ Smith, *Problems of Proof in Psychic Injury Cases*, 14 SYRACUSE L. REV. 586 (1963).

¹²⁷ Note, *Torts—Damages for Fright*, 24 KY. L.J. 69 (1935).

¹²⁸ TRAUMATIC MEDICINE & SURGERY FOR THE ATTORNEY 87 (P. Cantor ed. 1962); Note, *Expanding the Concept of Recovery for Mental and Emotional Injury*, 76 W. VA. L. REV. 176, 191 (1974).

¹²⁹ Robitscher, *Mental Suffering and Traumatic Neurosis*, in COMPENSATION IN PSYCHIATRIC DISABILITY AND REHABILITATION 218, 220-223 (J. Leedy, ed. 1971).

¹³⁰ Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 301 (1944).

ordinary sensibilities" standard, insures that plaintiffs will not be allowed to recover for minor insults, rudeness, or other breaches of social decorum, and that defendants will not be held liable for bizarre and wholly unforeseeable consequences when their conduct is only mildly culpable. In short, the Restatement represents a more intelligent approach to the issue of liability for intentionally caused emotional distress than Kentucky's impact rule.

Therefore, despite the lack of impact, the *Eigelbach* case should not have been dismissed. Since the plaintiff died, it can be assumed that her injury was not fraudulent or trivial, nor were her damages "speculative," "metaphysical," or impossible to determine. Based on the available facts, it cannot be said whether the defendant's conduct was outrageous or likely to have caused severe emotional distress. Accordingly, these issues should have been left for the jury to determine, along with the question of whether there was any causal connection between the defendant's arguably tortious conduct and the plaintiff's undeniably substantial injury.

III. PRODUCTS LIABILITY

The plaintiff in *McMichael v. American Red Cross*¹³¹ contracted serum hepatitis from transfusions of whole blood and plasma supplied by the American Red Cross and brought suit under alternative theories of breach of implied warranty and strict liability in tort. Holding that a sale was essential to a cause of action under either theory, the lower court characterized the transaction as a service and directed a verdict for the defendant. On appeal, the Kentucky Supreme Court did not reach this issue, but instead determined that the product was unavoidable unsafe, not unmerchantable or unreasonably dangerous, and affirmed the lower court's decision. Kentucky thus joins most other jurisdictions in refusing to impose strict liability upon hospitals or blood banks who transmit hepatitis through the transfusion of contaminated blood.¹³²

¹³¹ 532 S.W.2d 7 (Ky. 1975).

¹³² See generally Butterich & Wilson, *Serum Hepatitis—A Historical Perspective and Current Progress*, 36 U. MICH. MED. CENTER J. 67 (1970). Hepatitis is an inflammation of the liver and can be caused by viruses, bacteria, drugs, toxic chemicals and

A. *Medical Aspects*

Serum hepatitis¹³³ is a disease of the liver which can cause illness, permanent disability,¹³⁴ or even death.¹³⁵ Approximately 30,000 Americans a year,¹³⁶ or 1 percent of those who receive blood transfusions, become infected with serum hepatitis.¹³⁷ Although 2 to 3 percent of the adult American population are carriers of serum hepatitis,¹³⁸ a carrier may never show symptoms of the disease, and may pass it on to many others if he donates blood.¹³⁹ A number of tests have been developed to detect serum hepatitis virus in the blood, including simple liver function tests,¹⁴⁰ the serum immunoglobulin test,¹⁴¹ and the Aus-

other noxious agents. Infectious hepatitis and serum hepatitis are the major types of viral hepatitis. Infectious hepatitis virus, or virus A, enters the body either through the gastrointestinal tract or through parenteral introduction. (Parenteral means that the virus is introduced directly into the tissues.) Van Wormer, *Transfusion Associated Hepatitis*, 12 CALIF. W.L. REV. 389 (1976). Serum hepatitis virus, or virus B, enters the body only through the parenteral route. Dunn, *Blood Transfusions and Serum Hepatitis*, 15 CLEV.-MAR. L. REV. 497, 498 (1966).

¹³³ See generally Annot., 45 A.L.R.3d 1364 (1972).

¹³⁴ Symptoms include tiredness, depression, severe headaches, loss of appetite, weight loss, chills, fever, acute nausea, enlarged and tender liver or spleen, as well as jaundice. Severe cases may also involve insomnia, excessive irritability, confusion, asterexis, drowsiness, convulsions, and coma. 2 R. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE ¶ 38.30-38.37 (3d ed. 1970). Treatment consists primarily of adequate rest and good diet. There is no drug which can speed the healing process, although cortisone and similar drugs sometimes give beneficial results. Holder, *Serum Hepatitis*, 6 LAWYERS MED. J. 79, 83 (1970).

¹³⁵ Note, *Hospital's Liability for Transfusing Serum Hepatitis, Contaminated Blood*, 44 TEMP. L.Q. 575, 575 (1971). It is believed that approximately 3,000 persons annually die of the disease as a result of blood transfusions. Comment, 16 VILL. L. REV. 983, 986 (1971). Estimates of the death rate vary from 3.5 to 12 percent. Chalmers, Koff & Grady, *A Note on Fatality in Serum Hepatitis*, 49 GASTROENTEROLOGY 23 (1965); Weiner, *Medicolegal Aspects of Blood Transfusions*, 151 J.A.M.A. 1435, 1437 (1953). However, the risk associated with hepatitis rises monotonically with age, and about 20 percent of those over age of 40 who contract the disease die as a result. Kessel, *Transfused Blood, Serum Hepatitis and the Coase Theorem*, 17 J. LAW & ECON. 265, 268 (1974).

¹³⁶ Ward, *Detecting Viral Hepatitis in Blood Transfusions: Recent Developments*, 12 CALIF. W.L. REV. 380, 381 (1976).

¹³⁷ Trout, *Blood Transfusions*, 73 DICK. L. REV. 201, 212 (1969). Estimates of the infection rate, however, vary from .2 percent to 3 percent for whole blood. Comment, 69 MICH. L. REV. 1172, 1174 n.12 (1971).

¹³⁸ Comment, *Liability for Transfusions of Hepatitis Infected Blood*, 5 U. RICH. L. REV. 364, at 364 (1971).

¹³⁹ Mosley & Galambos, *Viral Hepatitis*, in DISEASES OF THE LIVER 410, 420 (L. Schiff ed. 1969).

¹⁴⁰ These include thymol turbidity tests, urine bilirubin tests and tests of elevated

tralian antigen test.¹⁴² Unfortunately, none of these tests is entirely satisfactory, nor can the virus be destroyed or removed from whole blood once it is drawn.¹⁴³ Consequently, until better tests are developed, careful screening of donors is perhaps the most effective way to reduce the risk of infection.¹⁴⁴

B. *Implied Warranty*

The plaintiff in *McMichael* alleged a breach of implied warranty,¹⁴⁵ arguing that the blood in question was neither merchantable,¹⁴⁶ nor fit for its intended purpose.¹⁴⁷ Although some of the Uniform Commercial Code's provisions apply only to merchants, the expansive definition of "merchant" found in §

serum glutamic oxalactic transaminase activity. Garibaldi, *A New Look at Hospitals' Liability for Hepatitis Contaminated Blood on Principles of Strict Tort Liability*, 48 CHI. BAR REC. 204, 206 (1967). While these tests would not eliminate all carriers of serum hepatitis as blood donors, they would result in the rejection of about 40 percent of all potential donors, though only a small number of these rejects would be carriers of the serum hepatitis virus. Note, *Medical Judgment v. Legal Doctrine in the Matter of Hepatitis Contaminated Blood*, 49 CHI. BAR. REC. 22, 23 (1967).

¹⁴¹ Testing the level of serum immunoglobulin in the donor's blood, sometimes known as the "HIM" test, does not also eliminate large number of noncarriers as do liver function tests. Bevan, Taswell & Gleich, *Serum Immunoglobulin Levels in Blood Donors Implicated in the Transmission of Hepatitis*, 203 J.A.M.A. 38 (1968). However, this test apparently can only detect 50 to 60 percent of the hepatitis carriers. Trout, *Blood Transfusions*, 73 DICK. L. REV. 201, 219 (1969). See also Weaver, King & Brown, *A Clinical Evaluation of the "HIM" Test*, 49 AM. J. CLIN. PATH. 647 (1968).

¹⁴² It is believed that Australian antigen and serum hepatitis virus are closely related. A test for the presence of "Australian antigen" has been developed. Prince, *Relation of Australian and SH Antigens*, 2 THE LANCET 462 (1965). This test, known as the hepatitis-associated antigen or HAA test, when put into general use, will identify about 25 percent of the hepatitis carriers. Blumberg, Sutnick, London & Millman, *Australian Antigen and Hepatitis*, 283 NEW ENG. J. MED. 349 (1970).

¹⁴³ The only blood products which can be prepared completely free of serum hepatitis virus are albumin and gamma globulin since these substances can be heated during manufacture without destroying their biologic properties. Holder, *Serum Hepatitis*, 6 LAWYERS MED. J. 79, 80 (1970). There are also methods available to treat plasma in order to destroy any virus present. Allen, Enerson, Barron & Skyes, *Pooled Plasma with Little or No Risk of Homologous Serum Jaundice*, 154 J.A.M.A. 103 (1954). Note, *Liability for Serum Hepatitis in Blood Transfusions*, 32 OHIO ST. L.J. 585, 585 (1971).

¹⁴⁴ Note, *Strict Liability—The Medical Service Immunity and Blood Transfusions in California*, 7 U.C.D.L. REV. 196, 196 n.1 (1974).

¹⁴⁵ Breach of express warranty is rare in this area. Note, *Blood Transfusions and Human Transplants: A Problem of Proof and Causation*, 4 IND. LEGAL F. 518, 528 (1971); but see *Napoli v. St. Peter's Hosp. of Brooklyn*, 213 N.Y.S.2d 6 (1961).

¹⁴⁶ UNIFORM COMMERCIAL CODE § 2-314.

¹⁴⁷ UNIFORM COMMERCIAL CODE § 2-315.

2-104(1) could probably include hospitals and blood banks.¹⁴⁸ However, according to § 2-102, the Code's warranty provisions apply only to sales involving "transactions in goods," and do not cover service transactions.¹⁴⁹ Section 2-106(1) of the UCC declares that "[a] sale [of goods] consists in the passing of title from a seller to the buyer for a price. . . ." The sale of blood from a commercial blood bank to a hospital would clearly fit this definition and thus fall within the scope of the Code's merchantability and fitness warranties. The case of the non-commercial blood bank is more difficult, although the Red Cross and other community blood banks usually charge hospitals a fee for processing the blood,¹⁵⁰ a practice that would seemingly meet the literal requirements of § 2-106(1). In addition, a sale would perhaps occur when the hospital charges a patient for each unit of blood transfused, even though the transaction is billed as a service.¹⁵¹

Nevertheless, the trial court in *McMichael* determined that the transaction between the blood bank and the patient was a service rather than a sale, basing its conclusion on KRS § 139.125, which states that "the procurement, processing, distribution or use of whole blood, plasma, blood products, blood derivatives and other human tissue . . . is declared not to be a sale. . . ." On appeal, the plaintiff argued that the statute dealt with the applicability of the state sales tax and had no bearing on the defendant's liability under tort or implied warranty principles. Although the Kentucky Supreme Court avoided the sale-versus-service problem by reaching its decision on other grounds, the issue nevertheless deserves some discussion here.

Until recently, most courts, relying on *Perlmutter v. Beth David Hospital*,¹⁵² denied relief by characterizing the supplying of blood to a patient as a service rather than a sale. The court

¹⁴⁸ Note, *Hospital's Liability*, *supra* note 135, at 581.

¹⁴⁹ Note, *Blood Transfusions and Human Transplants*, *supra* note 145, at 530.

¹⁵⁰ Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal*, 24 STAN. L. REV. 439, 441 (1972). A fee of \$9.95 per unit was charged in *McMichael*. 533 S.W.2d at 8.

¹⁵¹ Uniform Commercial Code Commentary, *Blood Transfusions and Warranty Provisions of the Uniform Commercial Code*, 9 B.C. IND. & COM. L. REV. 943, 946-47 (1968).

¹⁵² 123 N.E.2d 792 (N.Y. 1954).

in *Perlmutter* found that the predominant aspect of the parties' relationship was the rendering of medical care and that the furnishing of blood was only an "incidental and very secondary adjunct"¹⁵³ to the performance of that service and thus outside the scope of the implied warranty provisions of the state sales act. In the words of the *Perlmutter* court, "it was not for blood—or iodine or bandages—for which plaintiff bargained, but the wherewithal of the hospital facilities to provide whatever medical treatment was considered admissible."¹⁵⁴ The court in *Perlmutter* relied on a long line of cases holding that the transfer of property was not a sale when it was merely "accessory" to a service contract.¹⁵⁵ This reasoning is still followed in many states,¹⁵⁶ and has been extended to blood banks in some cases.¹⁵⁷ In addition, many states have enacted statutes like KRS § 139.125, which declare that the supplying of blood for purposes of a transfusion is a service rather than a sale.¹⁵⁸ Nevertheless *Perlmutter* has been criticized because the court used a technical aspect of contract law to avoid a discussion of the underlying policy considerations.¹⁵⁹

¹⁵³ *Id.* at 795.

¹⁵⁴ *Id.*

¹⁵⁵ Comment, 71 COLUM. L. REV. 487, 488 (1971). Thus, a contract to paint a picture would not be regarded as a sale of the canvas. The New York court applied the so-called "essence" test of *Clay v. Yates*, 156 Eng. Rep. 1125 (Ex. 1856). Comment, 2 LOY. CHI. L.J. 217, 218 (1971). For a discussion of the various tests employed to distinguish sales from service contracts see Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 663 (1957); Note, *Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction*, 24 HAST. L.J. 111, 113-15 (1972).

¹⁵⁶ *Sloneker v. St. Joseph's Hosp.*, 233 F. Supp. 105 (D. Colo. 1964); *Epstein v. Giannattasio*, 197 A.2d 342 (Conn. Super. 1963); *Lovett v. Emory Univ., Inc.*, 156 S.E.2d 923 (Ga. App. 1967); *Gile v. Kennewick Pub. Hosp. Dist.*, 296 P.2d 662 (Wash. 1956).

¹⁵⁷ *Whitehurst v. American Nat'l Red Cross*, 402 P.2d 584 (Ariz. 1965); *Balkowitsch v. Minneapolis War Memorial Blood Bank Inc.*, 132 N.W.2d 805, (Minn. 1965); *Goelz v. J.K. & Susie L. Wadley Research Inst.*, 350 S.W.2d 573 (Tex. Civ. App. 1961); but see *Carter v. Inter-Faith Hosp.*, 304 N.Y.S.2d 97 (1969).

¹⁵⁸ At the present time all states except New Jersey, New York, Rhode Island, and Vermont have enacted legislation to relieve hospitals and blood banks of strict liability for the transfusion of blood contaminated with serum hepatitis virus. Of these, all but nine define the procurement, processing, and distribution of blood and blood products as a service. Comment, 3 FLA. ST. U.L. REV. 483, at 483 n.4 (1975).

¹⁵⁹ See generally Comment, 69 HARV. L. REV. 391 (1955); Comment, 33 MISS. L.J. 253 (1962); Comment, 37 NOTRE DAME LAW. 565 (1962); Comment, 29 ST. JOHNS L. REV. 305 (1955). The sale-service distinction stems from the English Statute of Frauds

Russell v. Community Blood Bank, Inc.,¹⁶⁰ decided in 1966, was the first case to depart from the *Perlmutter* approach. The plaintiff, in a suit against a blood bank, alleged that the blood was sold by the blood bank as a separate transaction "complete in itself and entirely apart from any services rendered"¹⁶¹ to her by the hospital. The Florida court agreed that the transaction was a sale and remarked that "[i]t seems to us a distortion to take what is, at least arguably, a sale, twist it into the shape of a service, and then employ this transformed material in erecting the framework of a major policy decision."¹⁶²

The *Perlmutter* rationale was also rejected in *Jackson v. Muhlenberg Hospital*,¹⁶³ which declared that "[t]he transfer of human blood for a consideration is a sale. So is its transfusion into the body of a patient when a charge is made for the blood."¹⁶⁴ In that case the hospital purchased the blood from a commercial blood bank for \$18 per unit and charged the patient \$25 per unit plus an additional \$20 per unit for the transfusion.

In *Hoffman v. Misericordia Hospital*¹⁶⁵ the Pennsylvania court reversed the lower court's judgment for the defendant, a hospital and community blood bank. The court rejected the sales-versus-service analysis of *Perlmutter* and declared that it was not required to determine the case on the technical existence of a sale. The court held that the complaint stated a valid cause of action where it alleged that the hospital sold blood to the plaintiff for a consideration and that he subsequently died as a result of contracting serum hepatitis from the blood.

The *Perlmutter* rationale should be rejected in Kentucky insofar as the application of implied warranty liability is concerned.¹⁶⁶ However, this would not necessarily settle the liabil-

which applied only to sales of goods worth 10 pounds or more. Note, *Liability of a Hospital for Supplying Impure Blood*, 1965 Wis. L. REV. 374, 375.

¹⁶⁰ 185 So. 2d 749 (Fla. 1966), *aff'd per curiam*, 196 So. 2d 115 (Fla. 1967).

¹⁶¹ 185 So. 2d at 750.

¹⁶² *Id.* at 752.

¹⁶³ 232 A.2d 879 (N.J. Super 1967).

¹⁶⁴ 232 A.2d at 884.

¹⁶⁵ 267 A.2d 867 (Pa. 1970).

¹⁶⁶ Even though KRS § 139.125 characterized the furnishing of blood for transfusion as a service rather than a sale, the Court might still determine that an implied warranty existed. Although statutory implied warranties are limited to sales transactions, the Code is "not designed in any way to disturb those lines of case growth which

ity question. While a consumer would hardly consider blood containing serum hepatitis virus either merchantable or fit for the purpose sold,¹⁶⁷ several recent cases appear to hold that suppliers of contaminated blood will not be held strictly liable for breach of warranty if they can show that there was no way to detect serum hepatitis virus in the blood.¹⁶⁸ Some commentators maintain that this is inappropriate in a warranty action¹⁶⁹ since sellers have been held liable in nontransfusion cases for undiscoverable defects.¹⁷⁰ The Kentucky Supreme Court nevertheless took this position in the *McMichael* case, declaring that strict liability in tort and liability for breach of warranty were "expressions of a single basic policy as to liability for defective products."¹⁷¹

C. *Strict Liability in Tort*

The plaintiff in *McMichael* also based his action on a theory of strict liability in tort. According to section 402A of the Restatement (Second) of Torts, the seller of a product that is defective, and thereby unreasonably dangerous, will be held strictly liable to the consumer who is injured as a conse-

have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract." UNIFORM COMMERCIAL CODE § 2-313 Comment 2. See also Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort*, 1974 UTAH L. REV. 661.

Courts have permitted recovery under an implied warranty theory in such hybrid transactions as restaurant meals and beauty treatments. *Kenower v. Hotel Statler C.*, 124 F.2d 658 (6th Cir. 1942); *Goetten v. Owl Drug Co.*, 59 P.2d 142 (Cal. 1936) (food in restaurant); *Newmark v. Gimbel's Inc.*, 258 A.2d 697 (N.J. 1969) (permanent wave treatment); *Yochem v. Gloria, Inc.*, 17 N.E.2d 731 (Ohio 1938). The UNIFORM COMMERCIAL CODE § 2-314(1) now imposes liability under implied warranty for the serving of contaminated or unwholesome food in restaurants. An extension of this principle to blood transfusions seems reasonable. See generally Van Meveren, *The Extension of Liability to Service Contracts—Emphasizing the Furnishing of Unfit Blood for Transfusion*, 6 AM. BUS. L.J. 517 (1968).

¹⁶⁷ Note, *Hospital's Liability*, *supra* note 135, at 578.

¹⁶⁸ *Williamson v. Memorial Hosp.*, 307 So. 2d 199 (Fla. App. 1975); *Jackson v. Muhlenberg Hosp.*, 232 A.2d 879 (N.H. Super 1967).

¹⁶⁹ Uniform Commercial Code Commentary, *supra* note 151, at 952-53.

¹⁷⁰ *Veases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. 1967); *cf.* *Speed Fasteners, Inc. v. Newsom*, 382 F.2d 395 (10th Cir. 1967); *Gottsdanker v. Cutter Laboratories*, 6 Cal. Rptr. 320 (1960); *Marathon Battery v. Kilpatrick*, 418 P.2d 900 (Okla. 1965).

¹⁷¹ 532 S.W.2d at 11.

quence.¹⁷² Blood is a "product" within the meaning of § 402A because it is intended for human consumption,¹⁷³ and both hospitals and blood banks, whether nonprofit organizations or commercial enterprises, should be considered sellers for purposes of liability since they are part of the distributive process that transmits blood from the donor to the patient.¹⁷⁴

Section 402A requires that the product be sold "in a defective condition unreasonably dangerous to the user or consumer." Arguably, blood infected with hepatitis virus satisfies this test.¹⁷⁵ However, "unavoidably unsafe" products are not treated as unreasonably dangerous and are thus outside the scope of the strict liability doctrine.¹⁷⁶ Section 402A, comment k, characterizes as unavoidably unsafe those products which "in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use." The Kentucky Court based its decision in *McMichael* almost entirely on this concept. In the Court's words: "[W]e have concluded that under the stipulated facts of the instant case the blood in question, in respect to the presence of hepatitis virus, was unavoidably unsafe and thus was not unreasonably dangerous nor unfit."¹⁷⁷

In reaching this conclusion the Court relied on *Jackson v. Muhlenberg Hospital*,¹⁷⁸ a 1967 New Jersey case, which denied

¹⁷² See generally Annot., 13 A.L.R.3d 1057 (1967); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965).

¹⁷³ RESTATEMENT § 402A, comment e (1965). *Cunningham v. MacNeal Memorial Hosp.* 266 N.E.2d 897, 899 (Ill. 1970).

¹⁷⁴ RESTATEMENT § 402A, comment f (1965); Comment, *Products Liability—Hospitals Held Strictly Liable in Tort for the Transfusion of Hepatitis Infected Blood*, 2 LOY. CHI. L.J. 217, 223 (1971); Comment, 25 U. MIAMI L. REV. 349, 351-52 (1971); Comment, *supra* note 135, at 995-96. The Court refused to distinguish between a blood bank and a hospital in this respect, holding that strict liability would apply to anyone within the product's chain of distribution regardless of whether selling or supplying that product was the defendant's principal business. Note, *Strict Liability for Disease Contracted from Blood Transfusion*, 66 NW. U.L. REV. 80, 82 (1971).

¹⁷⁵ Boland, *Strict Liability in Tort for Transfusing Contaminated Blood*, 23 ARK. L. REV. 236, 243-45 (1969).

¹⁷⁶ Comment, *Serum Hepatitis Through Blood Transfusions: A Wrong Without a Remedy?*, 24 Sw. L.J. 305, 323 (1970).

¹⁷⁷ 532 S.W.2d at 11.

¹⁷⁸ 232 A.2d 879 (N.J. Super. 1967), *rev'd on other grounds*, 249 A.2d 65 (N.J. 1969).

recovery under both implied warranty and strict liability theories. The court assumed that serum hepatitis virus was undetectable and therefore considered the product unavoidably unsafe. The Kentucky Court also discussed *Brody v. Overlook Hospital*,¹⁷⁹ another New Jersey case, which held that contaminated blood could be considered unavoidably unsafe and therefore not unreasonably dangerous.

McMichael, however, is contrary to *Cunningham v. MacNeal Memorial Hospital*,¹⁸⁰ which declared that blood containing serum hepatitis virus was unreasonably dangerous to the user because of its impurity and did not fall within the unavoidably unsafe product exception.¹⁸¹ According to the *Cunningham* court, the mere fact that there was no reliable means to detect serum hepatitis virus in the blood was not enough to characterize the product as unavoidably unsafe:

[W]hether or not defendant can, even theoretically, ascertain the existence of serum hepatitis virus in whole blood employed by it for transfusion purposes is of absolutely no moment. Any other ruling would be entirely inconsistent with the concept of strict tort liability.¹⁸²

While many commentators assert that blood contaminated with serum hepatitis virus falls within the comment k exception,¹⁸³ the *Cunningham* court was correct in deciding that reliance on comment k in blood transfusion cases is improper. Three elements should exist before a product is exempted

¹⁷⁹ 317 A.2d 392 (N.J. Super 1974).

¹⁸⁰ 266 N.E.2d 897 (Ill. 1970).

¹⁸¹ Comment, *supra* note 155, at 492-93. *Cunningham* also held that comment k was only applicable to products that were pure. Comment, 4 AKRON L. REV. 225, 228 (1971), but this interpretation seems to be too narrow. Comment, 69 MICH. L. REV. 1172, 1182 (1971).

¹⁸² 266 N.E.2d at 903.

¹⁸³ The following agree that comment k should apply: Haut & Alter, *Blood Transfusions—Strict Liability?*, 43 ST. JOHNS L. REV. 557, 571 (1969); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 32 AM. TRIAL LAWYERS J. 1, 10 (1968); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367 (1965); Note, *Homologous Serum Hepatitis—Products Liability in a Quandary*, 10 WASHBURN L.J. 77, 91 (1970); Note, *Liability of a Hospital for Supplying Impure Blood*, 1965 WIS. L. REV. 374, 387; Comment, *supra* note 181, at 1181-83; Comment, 24 VAND. L. REV. 645, 653 (1971). The following believe that comment k should not apply: Boland, *supra* note 175, at 241-42; Note, *supra* note 144, at 216-17; Comment, 16 N.Y.L.F. 957, 966 (1970).

under comment k from § 402A's strict liability: (1) The product at the time of sale must be incapable of being made safe for its intended use; (2) the potential societal benefit must outweigh its possible harm; and (3) the product must be one that would not have been marketed (or would have been delayed in marketing) due to a fear of catastrophic damages under a strict liability theory.¹⁸⁴ Although contaminated blood might meet the second of these three requirements, it does not meet the first and third.

In the first place, with the development of the Australian antigen test, it is doubtful that blood is presently incapable of being made safe for its intended use.¹⁸⁵ Furthermore, even if serum hepatitis virus cannot be eliminated from blood with absolute certainty, the risk of contamination can be dramatically reduced if prospective donors are properly screened. Thus, if adequate testing and screening procedures are utilized, blood can be made reasonably, if not absolutely, safe.

Moreover, even if serum hepatitis virus cannot be detected in the blood, it is unlikely that the imposition of strict liability would seriously deter the suppliers of blood from marketing their product. Blood is not like a new drug for which it may be difficult to obtain insurance or to self-insure because the risk of loss cannot be calculated accurately, thus discouraging its development and marketing.¹⁸⁶

D. Conclusion

As the Kentucky Supreme Court pointed out last year in *Embs v. Pepsi-Cola Bottling Company*,¹⁸⁷ the Restatement's imposition of strict liability upon the manufacturers and sellers of defective products is based on the concept of enterprise liability.¹⁸⁸ According to the proponents of this principle, a product's social costs, including those associated with personal injuries, should be treated as a cost of production and placed on those in the chain of distribution instead of being left to fall

¹⁸⁴ Note, *supra* note 144 at 215-16.

¹⁸⁵ Boland, *supra* note 175, at 241-42.

¹⁸⁶ Comment, 46 N.Y.U.L. Rev. 403 414-15 (1971).

¹⁸⁷ 528 S.W.2d 703, 705 (Ky. 1975). See also Ausness, *Kentucky Law Survey—Torts*, 64 Ky. L.J. 201, 222-24 (1975).

¹⁸⁸ RESTATEMENT § 402A, comment c (1965).

upon the victims.¹⁸⁹ The primary justification of enterprise liability from the perspective of welfare economics is that it encourages a more efficient allocation of resources in the society.¹⁹⁰

Loss spreading is another justification for enterprise liability. According to this rationale, losses caused by defective products should be shifted to the manufacturer or supplier because he can best minimize their economic impact by spreading them among a large number of consumers.¹⁹¹ Both loss spreading and resource allocation principles support the imposition of strict liability in blood transfusion cases such as *McMichael*.

Let us consider the loss-spreading issue first. As was mentioned earlier, the effects of serum hepatitis can be catastrophic. In addition to its painful symptoms, the disease frequently causes substantial economic loss to its victims.¹⁹² In the *McMichael* case, for example, the victim sustained more than \$7,000 in out-of-pocket expenses from the disease.¹⁹³ Admit-

¹⁸⁹ 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 13.1 (1956); James, *An Evaluation of the Fault Concept*, 32 TENN. L. REV. 394, 399-400 (1965); Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 158-59 (1976).

¹⁹⁰ The enterprise liability theory assumes that the market is generally the best institutional device for allocating the resources of society. For the pricing mechanism of the market to achieve the most efficient allocation of the community's total resources, however, the market price of goods and services must reflect the full cost of making them available. Therefore failure to internalize social costs such as personal injuries caused by a product will distort consumer demand and induce society to produce more of the product than necessary. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500-06 (1961).

¹⁹¹ Note, *Strict Products Liability to the Bystander: A Study in Common Law Determinism*, 38 U. CHI. L. REV. 625, 636 (1971). The case for loss-spreading rests on the assumption that the imposition of a substantial cost on relatively few people is more likely to cause greater social and economic dislocation (secondary losses) than an equivalent cost imposed by taking a series of small sums for many people. G. CALABRESI, *THE COSTS OF ACCIDENTS* 39-40 (1970); Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. PA. L. REV. 805, 809-10 (1930).

¹⁹² One study estimated the average loss from serum hepatitis at (1) \$1875 for hospital and in-patient treatment costs; (2) \$425 for home nursing; (3) \$675 absence from the labor market; and (4) \$250 for out-patient medical treatment. The loss to the victim or his family will average more than \$20,000, however, in cases where the disease results in death or permanent disability. Kessel, *Transfused Blood*, *supra* note 135, at 269.

¹⁹³ Appellant's Brief at 8, *McMichael v. American Red Cross*, 532 S.W.2d 7 (Ky. 1975).

tedly, victims may shift some of these costs on a first party basis through hospitalization and disability insurance programs.¹⁹⁴ Nevertheless, many "costs," such as pain and suffering, will not be spread if the victim is initially forced to bear the consequences of serum hepatitis. In most cases hospitals and blood banks are better loss-spreaders. Because the statistical risk of serum hepatitis contamination is known,¹⁹⁵ the suppliers of blood should be able to obtain liability insurance (or self-insure) and adjust the cost of the product accordingly.¹⁹⁶ Perhaps this will cause an increase in the cost of blood¹⁹⁷ or contribute to the general rise of medical costs.¹⁹⁸ However, the cost to society from serum hepatitis remains the same, and is merely shifted from a small class (victims) to a larger one (consumers). Those who receive blood transfusions as a class are better able to bear the social costs of serum hepatitis infection than the actual victims.¹⁹⁹

In addition, the imposition of strict liability in blood transfusion cases may also lead to a more efficient allocation of resources.²⁰⁰ Considerations of economic efficiency support the notion that losses caused by defective products should be placed on the cheapest cost avoider—the party who can most cheaply reduce or prevent them.²⁰¹ In most instances the supplier, rather than the victim, will be the cheapest cost avoider.²⁰² This seems to be the case with blood suppliers. Shifting

¹⁹⁴ Note, *Liability for Serum Hepatitis in Blood Transfusions*, *supra* note 143, at 598.

¹⁹⁵ Calabresi & Bass, *Right Approach, Wrong Implications: A critique of McKean on Products Liability*, 38 U. CHI. L. REV. 74, 83 (1970).

¹⁹⁶ Comment, *supra* note 155, at 494. This is questioned, however, in Comment, 24 VAND. L. REV. 645, 654 (1971).

¹⁹⁷ Note, *supra* note 143, at 596.

¹⁹⁸ Comment, *supra* note 138, at 372.

¹⁹⁹ Note, *supra* note 144, at 212. If, as is later suggested, imposition of strict liability on the suppliers of blood will significantly reduce the incidence of serum hepatitis infection, the total amount of costs that must be spread will also be reduced, and therefore the pro rata cost that each consumer must bear will be correspondingly reduced. For this reason, a shift to strict liability will not necessarily lead to a dramatic increase in the price of blood or in the general cost of medical services.

²⁰⁰ Calabresi & Bass, *supra* note 195, at 84.

²⁰¹ *Id.* at 76-89.

²⁰² See Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1071-72 (1972); but see Buchanan, *In Defense of Caveat Emptor*, 38 U. CHI. L. REV. 64, 67-70 (1970).

the costs of contaminated blood from the victim to the supplier would discourage unnecessary blood transfusions and would provide a financial incentive to develop a more effective method of detecting serum hepatitis virus in the blood.²⁰³ The strict liability approach might also lead to the creation of blood substitutes for clinical use.²⁰⁴ More importantly, the imposition of strict liability on hospitals and blood banks would have a beneficial effect on donor selection and blood collection practices. An English commentator recently compared America's system of blood collection and allocation with that of Great Britain, which relies entirely on noncommercial donors, and concluded that the commercial sector is largely responsible for the existence of the hepatitis problem in the United States.²⁰⁵

It is well known that the rate of serum hepatitis contamination from commercial sources is about 10 times greater than that of blood from volunteer donors,²⁰⁶ a condition largely due to the poor screening methods of commercial blood banks which locate in central cities and attract drug users, alcoholics, and others with much higher hepatitis infection rates than the general population.²⁰⁷ Unquestionably, better screening of donors could substantially reduce the incidence of serum hepatitis contamination in blood²⁰⁸ and hospitals and blood banks are in a better position than victims to see that this is done.²⁰⁹ The

²⁰³ *Brody v. Oberlook Hosp.*, 296 A.2d 668 (N.J. Super. 1972); Comment, 4 *SETON HALL L. REV.* 730, 742 (1973).

²⁰⁴ Comment, *supra* note 135, at 1010; see Sloviter, *Erythrocyte Substitutes*, 54 *MED. CLIN. N.A.* 787 (May, 1970).

²⁰⁵ See generally R. TITMUS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971); but see Solow, Book Review, 80 *YALE L.J.* 1696, 1705 (1971).

²⁰⁶ Note, *supra* note 144 at 196 n.1.

²⁰⁷ Allen, *Volunteer Blood for Everyone*, 9 *STAN. M.D.* 2 (1970); Holder, *Serum Hepatitis*, 6 *LAWYERS MED. J.* 79, 87 (1970).

²⁰⁸ Note, *Liability for Blood Transfusion Injuries*, 42 *MINN. L. REV.* 640, 655 (1958); Comment, *supra* note 186, at 415.

²⁰⁹ Legislative action is also possible. The state could prohibit commercial blood banks entirely as was done recently in Wisconsin. *WIS. STAT. ANN.* § 146.31(1) (Supp. 1971). However, not all paid donors are dangerous. Jennings, *Not all Paid Donors Pose Hepatitis Risks*, 2 *LAB. MEDICINE* 8 (July, 1971). Many European countries rely heavily on commercial blood donors without experiencing a high incidence of serum hepatitis contamination. R. TITMUS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* 174-75 (1971). Therefore the legislature should concentrate its attention on high-risk categories of commercial donors. For example the use of prisoners, a high-risk group, as blood donors might be banned or at least discouraged. Franklin, *Hepatitis, Blood Transfusions, and Public Action*, 21 *CATH. U.L. REV.* 683, 698 (1972).

imposition of strict liability would encourage hospitals to obtain blood from low-risk sources and give a competitive advantage to those commercial suppliers who employ the most effective screening procedures.²¹⁰

The prospect of strict liability might also encourage hospitals to obtain more blood from volunteer sources.²¹¹ At the present time, about 4.3 million units of blood annually are provided from volunteer sources such as the Red Cross,²¹² while commercial donors provide an additional 1.3 million units.²¹³ While there are an estimated 100 million eligible donors in the United States, only about 3 percent give blood each year.²¹⁴ Hospitals could attract more volunteer donors by advertising, by promoting the formation of group blood plans, and by encouraging patients to secure replacement donors instead of relying on blood from commercial sources.²¹⁵

So far in presenting the case for strict liability there has been no distinction made between commercial and noncommercial suppliers of blood. The defendant in the *McMichael* case, the American Red Cross, was a noncommercial supplier. Do the principles of enterprise liability discussed above also support the imposition of strict liability on noncommercial blood banks? The "efficiency" or "resource allocation" argu-

Legislation might discourage skid row derelicts from donating blood by prohibiting the payment except in the form of a check mailed to the donor not less than 15 days after the donation. See TEX. REV. CIV. STAT. ANN. art. 4590-3 § 3(6) (Vern. Supp. 1972) (since repealed). Finally, blood donations by individuals might be induced by the use of federal tax incentive devices. Franklin, *supra*.

²¹⁰ Comment, 48 CHI.-KENT L. REV. 292, 297 (1971); Comment, 25 U. MIAMI L. REV. 349, 353 (1971).

²¹¹ Volunteer donors include "altruistic" donors, assurance donors, and replacement donors. Assurance donors contribute annually to a blood bank, often under a group blood plan, in return for the right to draw blood if needed for themselves or their families during the following year. The replacement donor donates blood on behalf of someone, usually a friend or relative, who has already received a transfusion. Franklin, *supra* note 209.

²¹² NAT'L ACAD. OF SCIENCE, NAT'L RES. COUNCIL, AN EVALUATION OF THE UTILIZATION OF HUMAN BLOOD RESOURCES IN THE UNITED STATES 21 (1970). The Red Cross provides about three million units of this blood. It should be noted, however, that the Red Cross sometimes uses paid donors. NAT'L HEART & LUNG INST., BLOOD RESOURCES STUDIES SUMMARY REPORT 134 (H.E.W., NIH 73-416, June 30, 1972).

²¹³ Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal*, 24 STAN. L. REV. 439, 441 (1972).

²¹⁴ Note, *Strict Liability*, *supra* note 174, at 80.

²¹⁵ Comment, *supra* note 155, at 494-95.

ment is admittedly weak insofar as noncommercial blood banks are concerned. The prospect of strict liability might encourage these institutions to support more research into serum hepatitis detection methods, but it will have little impact on donor selection practices since most noncommercial blood banks already use low-risk volunteers. However, the noncommercial status of the supplier does not make much difference as far as the risk-spreading rationale is concerned. Noncommercial blood banks are still better loss-spreaders than individual hepatitis victims. Because of their low-risk status they should be able to spread the costs of serum hepatitis infection, either directly or by means of insurance, among all their blood transfusion recipients.

Accordingly, the Kentucky Supreme Court in *McMichael* should have determined that the transaction in question gave rise to an implied warranty of merchantability and also fell within the scope of § 402A even though serum hepatitis virus could not be detected in the blood.

