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Torts--Negligence--Duty to Warn in Product Liability Cases

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is opportunity to cross-examine these statements, there is simply no purpose in excluding them as substantive proof provided they meet the other criteria for admissibility.

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TORTS—NEGLIGENCE—DUTY TO WARN IN PRODUCT LIABILITY CASES—Wilbur Post was injured when the fan of an industrial vacuum cleaner, designed for 115 AC voltage, disintegrated as the result of his plugging it into an outlet supplying 220 DC voltage. The equipment was furnished to Post's employer by an out of state corporation[1] through a local distributor. Written instructions accompanying the machine warned the user that serious damage to both machine and operator might result from use of the wrong voltage. The manufacturer had included a 2½" x 1½" decal bearing the inscription "ONLY USE ON 115 VOLTS AC OR DC" for attachment to the equipment. In addition, it had affixed a metal plate to the vacuum bearing the serial number of the machine and the words "VOLTS 115." The plate had been mentioned in the written instructions.

Under an instruction which made no reference to a duty to warn and contained no definition of an adequate warning, the jury found in favor of the manufacturer. Post appealed. *Held:* Reversed. The judge should have instructed the jury that there was a duty to give an adequate warning to all foreseeable users. *Post v. American Cleaning Equipment Corporation,* 437 S.W.2d 516 (Ky. 1968).

Manufacturer's liability for product-caused injuries may be based on contract or tort law. In the latter, actions are predicated on either negligence or strict liability. Within specific areas of product liability such as product design and the duty to warn, negligence still remains the prevalent theory of liability.[2] Recently, however, there have been a few cases applying strict liability for a failure to provide an adequate warning to the user.[3]

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[1] The Court discusses the jurisdiction question and Kentucky's "doing business" statute, KY. REV. STAT. § 271.610(2) (1946), and rules that the concept of "doing business," as discussed in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), is no longer applicable in product liability cases where the doctrine of strict liability has been adopted. The Court cites Annot., 19 A.L.R. 3d 13 as authority. Note that the Court is implying that *Post* is a strict liability case.

[2] Note, *Foreseeability in Product Design & Duty to Warn Cases—Distinctions & Misconceptions,* 68 WIS. L. REV. 228 (1968).

[3] *See e.g.,* Canifax v. Hercules Power Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).

The concept of product liability has evolved from the early English case of *Winterbottom v. Wright*[4] to the modern view of *MacPherson v. Buick Motor Company*[5] and *Greeman v. Yuba Power Products.*[6] Since the 1906 case of *Heindirk v. Louisville Elevator Company,*[7] tort authorities in Kentucky have agreed that when a manufacturer markets a defective article which is "imminently" or "inherently" dangerous, he will be liable for any resultant injury, unless notice of the inherently dangerous quality is given.[8] The Kentucky Court, in an attempt to escape the confines of the privity doctrine established in *Winterbottom,* later implied that deceit had to be shown before recovery could be allowed.[9] In so doing, the Kentucky Court recognized an exception to the "general rule" set forth in *Winterbottom*[10] which had held that the original manufacturer or vendor of goods was not liable for injury caused by his negligence to anyone except the original vendee. The Kentucky Court's exception to this rule held the seller liable to any person who suffers an injury which might have been reasonably anticipated by the seller, unless notice had been given of the "imminently" dangerous qualities of the product.[11]

Subsequently, the scope of liability was expanded by charging the manufacturer with implied notice of the quality of the article he had produced.[12] The Court also distinguished between "imminently" and "inherently" dangerous articles; the dicta limited

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[4] 152 Eng. Rep. 402 (Ex. 1842). This case stood for the "general rule" that the original maker or seller of goods was not liable for injury caused by his negligence to anyone except the original buyer.

[5] 217 N.Y. 382, 111 N.E. 1050 (1916). Judge Cardozo stated the modern rule which is adopted by the *Restatement of Torts* § 395, that the manufacturer is liable for harm caused by lawful use of a product which was not carefully made, thus creating an unreasonable risk of harm to those lawfully using it for the purpose for which it was manufactured.

[6] 59 Cal. 2d 63, 377 P.2d 897 (1963). A manufacturer is strictly liable in tort when an article he places on the market contains a defect that causes injury to a human being.

[7] 122 Ky. 675, 92 S.W. 608 (1906).

[8] *See also* Pullman Co. v. Ward, 143 Ky. 727, 137 S.W. 233 (1911); Berger v. Standard Oil Co., 126 Ky. 155, 103 S.W. 245 (1907).

[9] *Id.*

[10] *See* J. I. Case Threshing Machine Co. v. Huset, 120 F. 865 (8th Cir. 1903), summarizing the exceptions to the "general rule" of the *Winterbottom* case. Kentucky seemed to follow the third exception: where one sells or delivers an article which he knows to be imminently dangerous, because defective, without giving notice of its qualities, he is responsible to any person who suffers an injury therefrom which might have been reasonably anticipated. (It must be noted that the Court confuses terms and uses "imminently" meaning "inherently.")

[11] *See* Pennington, *Manufacturers' Liability in Kentucky,* 42 KY. L.J. 273, 274-75 (1954).

[12] Old's Motor Works v. Shaffer, 145 Ky. 616, 140 S.W. 1047 (1911). Kentucky seemed to have been anticipating the *MacPherson* case. *See also* Rankin v. Harlan Retreading Co., 298 Ky. 461, 183 S.W.2d 40 (1944).

"inherently" dangerous articles to poisons, explosives and drugs while implying that "imminently" dangerous products were those which were dangerous due to defects in manufacture.[13] In later developments, the Court indicated that a manufacturer who places either an "inherently" or "imminently" dangerous product in commerce will be liable to *any* injured party who had no warning of the defect.[14] These later results manifested the Court's development of negligence as the basis for liability.[15]

In 1925, the Court held for the first time that the duty to warn extended to persons not in privity with the manufacturer.[16] In other words, if the manufacturer could forsee that one with knowledge of the danger might permit others to use the defective product, this intervening act or omission would not necessarily relieve the manufacturer of liability to a third party.[17] Thus, the warning to the purchaser was not enough; the Court declared that it had to be extended to all foreseeable users.

Concern with the foreseeability of the manufacturer eventually led the Kentucky Court to extend the *MacPherson* rule to allow recovery by a pedestrian who was injured as a result of a defective automobile.[18] Finally, in 1956, the Court apparently discarded its preoccupation with exceptions to the privity doctrine and applied straight negligence concepts to product liability cases.[19] Prior to 1966, in order to recover for product-caused injuries, a plaintiff had to have expert knowledge of production techniques in order to demon-

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[13] Old's Motor Works v. Shaffer, 145 Ky. 616, 624, 140 S.W. 1047, 1051 (1911).

[14] Peaslee-Gaulbert Co. v. McMath's Admr., 148 Ky. 265, 146 S.W. 770 (1912). This case involved a seller, not a manufacturer; however, different rules were indicated for each. Here, as in the *Old's Motor* case, it seems that the Court was anticipating the decision in *MacPherson v. Buick Motor Co.*

[15] Pennington, *supra* note 11, at 276.

[16] Kentucky Independent Oil Co. v. Schnitzler, 208 Ky. 507, 271 S.W. 570 (1925). The Court held the defendant liable for the death of the consumer caused by an explosive mixture of gasoline and kerosene sold as kerosene, although the retailer had been warned that the container contained the mixture. It must be noted that this case was also decided without a showing of deceit. *Compare with* Ford Motor Co. v. Atcher, 310 S.W.2d 510 (Ky. 1957) where the Court limited the manufacturer's liability to a duty to warn the purchaser. *See also* 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1542-44. Professor James acclaims the *Kentucky Independent Oil* case and states that the rule limiting the duty of the manufacturer is "a vestigial carry-over from pre-*MacPherson* days when deceit was needed for recovery." *Id.*

[17] 208 Ky. at 517, 271 S.W. at 573.

[18] Gaidry Motors v. Brannon, 268 S.W.2d 627 (Ky. 1954). It is interesting to note that Kentucky extended the *MacPherson* rule before fully accepting it.

[19] C. D. Herme, Inc. v. R. C. Tway Co., 294 S.W.2d 534 (Ky. 1956). For a more exhaustive discussion of the case, *see* Oberst, *Recent Developments in Torts: Decisions of The Court of Appeals at The 1956-57 Terms.* 46 KY. L.J. 194, 202 (1958).

strate the manufacturer's negligence.[20] However, the Court in *Dealers Transport Company v. Battery Distributing Company*[21] reduced this burden considerably by abolishing the privity requirement between the ultimate consumer and the manufacturer. The consumer was thus able to sue the manufacturer for negligent construction and breach of implied warranty. Of even greater consequence was the Court's adoption of the modern doctrine of strict liability as a basis for recovery in cases involving dangerously defective products.[22]

Until *Post*, however, the Kentucky Court had not decided a case involving the duty to warn and the foreseeable misuse of *non-defective* products.[23] In most jurisdictions, a manufacturer may be held liable for negligent failure to give adequate warning to the user,[24] not only for dangerous design, but also for dangers inseparable from a normally non-defective product.[25] The manufacturer is also

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[20] Davis Red Rock Bottling Co. v. Alsip, 287 S.W.2d 594, 595 (Ky. 1956); Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S.W.2d 701 (1931).

[21] 402 S.W.2d 441 (Ky. 1966). This case was cited in *Post* as authority concerning the jurisdiction question. For a more lengthy discussion of this case, *see Torts, 1967 Court of Appeals Review*, 55 KY. L.J. 453, 472 (1967).

[22] 402 S.W.2d 441 (Ky. 1966). Adopting § 402A of the REVISED RESTATEMENT OF THE LAW OF TORTS, the Court stated that a manufacturer who:

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

[23] *See* E. I. DuPont de Nemours v. Wright, 146 F.2d 765 (6th Cir. 1944). Interpreting Kentucky Law, the Federal Court implied a concern for protection arising from the foreseeable misuse of a non-defective product. The Court still adhered to the "deceit" exception due to a change in the type of container which was unknown to the plaintiff. However, they were primarily concerned with the failure to warn of the danger of mishandling the product in its new container. The Court stated:

> Our conclusion is that the danger inherent in subjecting the appellant's black container to the customary handling of drums of nitro-cellulose by lacquer manufacturers in the Louisville district, including their liability to spark when skidded, was foreseeable by the appellant, and so a direct casual relation existed between the failure to warn the consignee of such danger and the injury which followed unbroken by any fault of the consignee in handling because that, too, was foreseeable in the light of attendant circumstances. *Id.* at 768.

[24] *See* Tampa Drug Co. v. Wait, 103 So.2d 603 (Fla. 1958). A warning may be inadequate if it is not sufficiently emphatic. For a more comprehensive discussion of the duty to warn and the adequacy of warning, *see* Dillard & Hart, *Product Liability: Directions for Use and Duty to Warn*, 41 VA. L. REV. 145 (1955).

[25] Tamao v. A. P. DeSanno & Son, 209 F.2d 544 (3rd Cir. 1954); Lovejoy v. Minneapolis Moline Power Implement Co., 248 Minn. 319, 79 N.W.2d 688 (1956); McClanahan v. California Spray-Chemical Corp., 194 Va. 842, 75 S.E.2d 712 (1953). The Court in *Post* relied on these negligence cases in making its decision.

required to give adequate directions for use whenever reasonable care calls for them.[26] However, it must also be pointed out that some authorities would hold the manufacturer strictly liable for failure to give adequate warning.[27] But all of these authorities agree that in order to impose strict liability there must be a defect in the manufacturer's product.[28] The term defect has "no single definition,"[29] but comment h to section 402A of the *Restatement of Torts (Second)* states if the manufacturer "has reason to anticipate that danger may result" from a particular use of the product, ". . . he may be required to give adequate warning of the danger, and a product sold without such warning is in a defective condition."[30] Therefore, strict liability can be applied to a failure to give an adequate warning.

The Kentucky Court of Appeals in *Post* apparently chose the negligence concept as the basis for the defendant's liability. The Court declared that there is a duty to give a warning *proportionate to the danger* of which the manufacturer is aware.[31] It further stated that this duty extends beyond the scope of *intended* use, and reaches into the field of *foreseeable* uses.[32]

Although directions to the consumer accompanied the machine, the Court stated this was not enough: the manufacturer should have given adequate warning as well as directions for use.[33] In cases of this type, the misuse or failure to follow directions may be foreseeable, and the issue of adequacy of warning still exists even if the directions contain an admonition.

The Court further stated that an adequate warning, for purposes of contributory negligence standards, is one which is calculated to attract the user's attention because of its "size, position, and color."[34]

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[26] For a more exhaustive discussion of the requirement of adequate directions, *see* Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962).

[27] *See* Annot., 13 A.L.R.3d 1057, 1078-81 (1967).

[28] *Id.*

[29] Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 373 (1965).

[30] RESTATEMENT OF TORTS (SECOND) § 402A, Comment h (1965). *See also* Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965), where it is suggested that the test for invoking strict liability can be stated in terms of whether or not a product is reasonably safe. The determination of this question involves the balancing of the utility of the risk and the magnitude of the risk. It is suggested that the avoidability of injury through care by the user (including the effect of instructions or warnings) is a factor.

[31] 437 S.W.2d at 520.

[32] *Id.* at 522.

[33] *Id.* at 520. *See also* 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 8.05 (1967) wherein the authors distinguish between directions whose purpose is to insure *effective* use, and warnings whose purpose is to assure *safe* use.

[34] 434 S.W.2d at 521. Commingled with the Court's holding is the issue of contributory negligence. The Court held the appellant not guilty of contributory

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Furthermore, the warning must adequately convey the true nature of the danger.[35]

Asserting that the majority opinion results from the application of the doctrine of strict liability without regard to negligence, the dissent in *Post* stated that the majority sought to conceal this fact with the use of "legal jargon in a pretense of applying legal principles."[36]

Judicial phraseology has tended to emphasize the element of foreseeability as the most significant factor upon which liability turns.[37] The instant case is no different. In determining the limits of foreseeability, many authorities agree that carelessness and ignorance can be foreseen in some circumstances.[38] Therefore, the courts and the jury have taken into consideration the character, knowledge, and special qualities of a product user.[39] In so doing, there is a tendency to hold manufacturers to a higher duty to foresee an ignorant and careless plaintiff than to anticipate one who has some degree of skill.[40] Moreover, the manufacturer is required to have special knowledge of his product in cases involving a failure to adequately warn about its misuse.[41] Similarly, in order to be able to foresee the user's behavior, he is required to comprehend and anticipate the nature and habits of men.[42] The extent of the manufacturer's foreseeability reaches only to the point, however, where he can reasonably foresee the unintended use of the product.[43] This standard of reasonableness is based upon community customs and usages.[44]

In *Post*, the manufacturer was well aware of the dangerous quality of the product, and by its own admission had been trying to perfect a safety device to prevent such injuries. Thus, it is obvious that the

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negligence as a matter of law stating that the "gauge" for contributory negligence must be considered in light of whether the warning was sufficient to give him notice of the degree of danger. The Court stated: ". . . . [A] reasonable person might hazard violation of an innocuous warning when he would have acted otherwise if the true danger were made known." *Id.* at 520.

[35] *Id.*

[36] *Id.* at 523.

[37] 68 WIS. L. REV., *supra* note 2 ,at 229.

[38] *See* Dillard & Hart, *supra* note 24, at 147.

[39] 68 WIS. L. REV., *supra* note 2, at 236.

[40] Noel, *supra* note 26; *see also* Keeton, *Products Liability—Problems Pertaining to Proof of Negligence*, 19 Sw L.J. 26 (1965). The manufacturer is required to keep reasonably abreast of the relevant scientific and technical knowledge of his industry. *Id.* at 27.

[41] Noel, *supra* note 26, at 847.

[42] 68 WIS. L. REV., *supra* note 2, at 240.

[43] RESTATEMENT OF TORTS (SECOND) §§ 290, 390 (1965).

[44] 68 WIS. L. REV., *supra* note 2, at 232.

possibility of an injury had been foreseen and adequate warning should have been provided to the user.

It seems apparent that the Court's opinion in *Post* rests upon negligence concepts because it incorporates negligence terms and cites precedent based upon the concept of negligence. But *Post* could also be interpreted as an outgrowth of the theory of strict liability. Whether strict liability or negligence is the basis does not alter the outcome: in either case, liability is imposed upon the jury's determination of inadequate warning.

Underlying the theory of negligence is the fault concept, *i.e.*, to the more careless should fall the burden.[45] Such a rule requires the parties to be on an equal basis, but in *Post*, the user and the manufacturer are being held to different standards. The manufacturer is charged with a higher degree of care—not to actually foresee possible harm, but to bear a larger proportion of the risk. This is the same policy which underlies the concept of strict liability, that is, the manufacturer is best able to distribute the inevitable losses to the general public.[46] Therefore, the Court seems to be stretching the concept of negligence in order to apply the policy behind strict liability.

The dissent's assertion that the Court is attempting to conceal its application of strict liability through the use of "legal jargon" would thus seem to be apt. Similarly appropriate is the dissent's characterization of this case and strict liability as "another step down the path of socializing losses."[47] But this danger is not nearly so alarming as the dissent believes it to be. Tort law has been and will continue to be largely concerned with the prevention and distribution of losses in a complex and dangerous society.[48] The distribution of such losses in a socially acceptable or manageable fashion is scarcely a legal taboo. A more sophisticated and articulate analysis of judicial decisions in this area will lead to a more enlightened, and therefore, a more equitable distribution of those losses which are for the most part unavoidable.[49]

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[45] *See* Isaacs, *Fault and Liability*, 31 HARV. L. REV. 954 (1918).

[46] *See* W. PROSSER, THE LAW OF TORTS 673 (3rd ed. 1964). *See also* Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952).

[47] 437 S.W.2d at 523. *See also* Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1957).

[48] *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1337-41 (1956).

[49] For an exhaustive discussion on "risk distribution" *See* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).