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# Negligence—MacPherson v. Buick Held Inapplicable Where Alleged Defect Is Obvious to User

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state could protect his good will, usually built up at great expense, by enforcement of his prices against all retailers selling his products, whether or not they had so contracted, he can now only enforce such contracts against the signatories. Contracting with every outlet is obviously impossible in most cases, and to require such a contract as a basis for enjoining price cutters, cripples the whole resale price maintenance program. It is for this very reason that all of the State Fair Trade Acts include non-signer provisions. See 24 Calif. L. Rev. 640 (1949). It is believed that the present interpretation of the Miller-Tydings Act which disrupts long established business practices and reduces the intent of Congress to a legislative anachronism will soon be met by remedial legislation.

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## NEGLIGENCE—MacPHERSON v. BUICK HELD INAPPLICABLE WHERE ALLEGED DEFECT IS OBVIOUS TO USER

Plaintiff was injured when he caught his fingers in an onion topping machine manufactured by defendant. Plaintiff, a remote user, (not in privity of contract with defendant), claimed that the defendant was negligent in manufacturing a dangerous machine in that: (1) the cutters were not guarded and (2) the operator had no means of stopping the machine from where he stood. The trial court denied a motion by defendant to dismiss the complaint and the Appellate Division reversed. The Court of Appeals in affirming the Appellate Division held: the complaint does not state a cause of action in negligence; there is no duty owed by a manufacturer to a remote user when the alleged defects are obvious. *Campo* v. *Scofield,* 301 N. Y. 468, 95 N. E. 2d 802 (1950).

It was the "general rule" at common law that manufacturers and suppliers were not liable for injuries caused by their negligence to anyone except those with whom they had privity of contract. *Winterbottom* v. *Wright,* 10 M. & W. 109, 152 Eng. Rep. 402 (1842). Reasons advanced in support of this rule were that the manufacturer could not foresee injury to persons other than the purchaser, *Huset* v. *J. I. Case Threshing Machine Co.,* 120 F. 865 (8th Cir. 1903), and that industry could not bear the onus of responsibilty to so large a class of people. *Longmeid* v. *Holliday,* 6 Ex. 761, 155 Eng. Rep. 752 (1851). See 164 A.L.R. 569, Manufacturers Liability For Negligence . . . There were several exceptions to this general rule. A duty was owed to the one injured: (1) where the article was imminently dangerous to life or health, (2) where there was an invitation to use a defective product on the owner's premises, and (3) where the defendant knew the article to be dangerous and failed to give notice. *Huset* v. *J. I. Case Threshing Machine Co.,* supra at 870.

Early New York cases recognized similar exceptions and a duty was held

owing to third persons by the manufacturer where poison was falsely labeled, *Thomas v. Winchester,* 6 N. Y. 397, 57 Am. Dec. 455 (1852); a scaffold was defective, *Devlin v. Smith,* 89 N. Y. 470, 42 Am. Rep. 311 (1882); a bottle of aerated water exploded, *Torgesen v. Schultz,* 192 N. Y. 470, 84 N. E. 956 (1908); a coffee urn exploded, *Statler v. Ray Manufacturing Co.,* 195 N. Y. 478, 88 N. E. 1063 (1909). Finally in *Mac Pherson v. Buick Motor Co.,* 217 N. Y. 382, 111 N. E. 1050 (1916), an ultimate purchaser was allowed recovery when injured by the collapse of a defective automobile wheel. Ostensibly the decision extended the class of inherently dangerous articles to include anything which foreseeably would be dangerous if negligently made. Subsequent New York cases have held manufacturers liable for personal injuries to those who were not purchasers but were merely users of the chattel. *Rosebrock v. General Electric Co.,* 236 N. Y. 227, 140 N. E. 571 (1923); *Hoenig v. Central Stamping Co.,* 273 N. Y. 485, 6 N. E. 2d 415 (1936). As to liability for property damage, see *Genesee County Patrons Fire Relief Ass'n.* v. *Sonneborn,* 263 N. Y. 463, 189 N. E. 551 (1934).

*Campo* v. *Scofield,* the principal case, holds that "the duty owed by a manufacturer to remote users does not require him to guard against hazards apparent." Therefore, where a manufacturer would normally be liable following *Mac Pherson* v. *Buick,* supra, he will be relieved of liability where the dangers from an unsafely designed machine are obvious. Should the manufacturer's duty to the user be precluded because of the patency of the danger in the machine which he constructed?

The court, without violating precedent, might have found that a duty existed between the manufacturer and the remote user even though the alleged defect was obvious. True there were cases that in dicta declared that a duty is owed only if the defect or danger be not "known" or "patent" or discoverable "by reasonable inspection." See *Genesee Co. Patrons Fire Relief Ass'n.* v. *Sonneborn,* supra at 468, 189 N. E. at 552; *Noone* v. *Perlberg, Inc.,* 268 App. Div. 149, 152, 49 N. Y. S. 2d 460, 462, (1st Dept. 1944), aff'd, 294 N. Y. 680, 60 N. E. 2d 839 (1945). But in these cases the defects were *latent.* The New York courts have allowed children to recover against manufacturers of dangerous toys for not giving adequate warning of the risk, although some danger was obvious. *Henry* v. *Crook,* 202 App. Div. 19, 195 N. Y. S. 624 (3rd Dept. 1922); *Christ* v. *Art Metal Works,* 230 App. Div. 114, 243 N. Y. S. 496 (1st Dept. 1930). A duty to a remote user was recognized where a manufacturer failed to guard an X-Ray machine, *O'Connell* v. *Westinghouse X-Ray Co.* 288 N. Y. 486, 41 N. E. 2d 177 (1942) and also where there was a failure to place a safe-guard on a washing machine. *De War* v. *Sears Roebuck & Co.,* 49 N. Y. S. 2d 654 (Sup. Ct. 1944).

The court might have chosen in this case to apply the ordinary rules of neg-

ligence: a duty arising not by any anachronistic relationship, but by defendant's affirmative conduct likely to affect the interests of the plaintiff. From Cardozo's opinion in the *Mac Pherson* case emerges the fundamental principle that the duty to use care arises not by contract but when the manufacturer's conduct creates a foreseeable danger to the plaintiff. In Massachusetts, where the court in *Davidson* v. *Nichols*, 11 Allen 514 (Mass. 1866) held a manufacturer owes no duty to a remote vendee, the court now has declared the general rule to be abolished, stating "the *Mac Pherson* case caused the exception to swallow the asserted general rule of nonliability." *Carter* v. *Yardley*, 319 Mass. 92, 64 N. E. 2d 693, 700 (1946). See Peairs, *The God in the Machine*, 29 B. U. L. Rev. 37 (1949).

The Restatement, Torts Sec. 398 (1934) recognizes a duty to use care in the adoption of a safe plan or design in the manufacture of a chattel. Cf. *Davlin* v. *Ford, Inc.*, 20 F. 2d 317, 319 (6th Cir. 1927); *United States Radiator Corp.* v. *Henderson*, 68 F. 2d 87, 91 (10th Cir. 1933), cert. denied, 292 U. S. 650 (1934); *Reusch v. Ford Motor Co.*, 196 Wis. 213, 82 P. 2nd 556, 559 (1938); *Johnson v. Murray Co.*, 90 S. W. 2d 920, 925 (Texas 1936). Recovery was denied where the negligence alleged was the dangerous construction of an unguarded hay baler. *Yaun* v. *Allis-Chalmers Mfg. Co.*, 253 Wis. 558, 34 N. W. 2d 853 (1948).

In *Campo v. Scofield*, supra, if a duty to the plaintiff can be found by approaching the facts with the basic principles of negligence, there will not necessarily be liability. Liability will depend on a finding as to whether there was failure to use reasonable care under the circumstances, i. e. negligence, or whether there was such contributory fault as to deny recovery. If reasonable men can differ, these are questions of fact for the jury. *O'Connell* v. *Westinghouse X-Ray Co.*, supra at 487, 41 N. E. 2d at 178. The fact that a defect is obvious should not vitiate a duty otherwise owing to the plaintiff; the obviousness of the danger should rather raise the question of plaintiff's contributory fault and such a question is properly for a jury. *Person* v. *Cauldwell-Wingate Co.*, 187 F. 2d 832, 837 (1951). See accord, Restatement, Torts Sec. 398 (1934), comment b.

The fact that onion toppers are commonly manufactured without guards or accessible stopping devices is not conclusive that the manufacturer has used reasonable care in construction. Common prudence is not always the measure of reasonable prudence. *T. J. Hooper*, 60 F. 2d. 737, 740 (2d. Cir. 1932). If the cost for such improvement is small compared to the foreseeable risk without it, then care is required to avoid the risk. See L. Hand, J. in *United States v. Carroll Towing Co.*, 159 F. 2d 169, 173 (2d Cir. 1947).

Why is the manufacturer's duty to use reasonable care obviated when the danger he creates is patent? The duty should arise by the foreseeability that the

one injured would fall within the risk created by his conduct. *Palsgraf v. Long Island R.R. Co.,* 248 N. Y. 339, 162 N. E. 99 (1928); *Mac Pherson* v. *Buick Motor Co.,* supra at 390, 111 N. E. at 1053. Social conditions that once demanded temporary protective judicial legislation for manufacturers no longer exist. See Seavey, *Cardozo and the Law of Torts,* 52 Harv. L. Rev. 372, 379 (1939).

There are no legal or social barriers that now prevent approaching the manufacturer liability cases from the standpoint of the general principles of negligence. It is submitted that the complaint in *Campo* v. *Scofield* stated a cause of action in negligence; a preclusion of a manufacturer's responsibility should not rest on the patency or obviousness of the danger he creates.

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## CIVIL PRACTICE—PREFERENCE IN DOCKETING DENIED THOUGH PARTY AGED, INFIRM, AND DESTITUTE

Plaintiff, over 72 years of age, received injuries in an accident allegedly due to the negligence of the Defendant and moves for preference in docketing this action for trial. In support of this contention, the following facts are alleged. Plaintiff received a fractured femur necessitating a metal pin in the hip, but is too old for a cast. According to physician's affidavit, Plaintiff is "totally and completely disabled," and according to physician's testimony under oath, Plaintiff's injury is permanent. Further, due to the effects of the injury and Plaintiff's age, it is extremely likely that he may not survive to trial in the regular order. The doctor bill is unpaid. Neither Plaintiff nor his wife, who is 70, has a bank account. There is no insurance except a $500.00 life policy to cover burial expenses. Plaintiff's income, received as Social Security benefits, is $35.00 a month; that of his wife, $19.00 a month. They must pay $34.00 a month rent, exclusive of gas and electricity. Only occasionally do various members of the family contribute to their aid. Held (3-2): Motion for preference properly denied under Rule 151 of Rules of Civil Practice. *Bitterman* v. *2007 Davidson Avenue, Inc.,* 278 A. D. 759, 104 N. Y. S. 2d 81. (1st Dept. 1951).

Subsection (3) of Rule 151 states that preference may be granted in "an action or special proceeding in which it is shown to the court or a judge thereof that the interest of justice will be served by an early trial or hearing thereof." This section was proposed by the Judicial Council to "simplify and consolidate for the entire State the procedure to be followed in obtaining a preference." It was designed to replace certain subdivisions of Section 138 of the Civil Practice Act which were in a state of cumbersome confusion. Rule 151 was needed to alleviate the technical procedure by which preference was being granted in nearly all cases, and to return the exercise of discretion to a consideration of the facts