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Kentucky Law Survey: Torts

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INTRODUCTION

The Kentucky courts have recently decided several significant cases in the area of torts. This Survey will address decisions involving comparative negligence, strict products liability, apparent authority in medical malpractice, damages for future mental suffering, and the applicability of the fireman’s rule to police officers.

I. COMPARATIVE NEGLIGENCE

With the decision in Hilen v. Hayes, Kentucky became the forty-second state in the nation to abandon the contributory negligence defense and adopt comparative negligence. Comparative negligence is the concept that in any negligence action liability should be imposed in direct relation to fault. The doctrine, which is often said to be based on fundamental fairness, has replaced contributory negligence as the majority rule in the United States.

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* J.D. Candidate, University of Kentucky, 1985. The author expresses her appreciation to Richard C. Ausness, Professor of Law, for his assistance in the preparation of this survey.

1 Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984).
4 Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984).
6 673 S.W.2d 713 (Ky. 1984).
7 See notes 36–41 infra and accompanying text.
8 E.g., V. Schwartz, Comparative Negligence § 2.1 (1974). The concept of comparative negligence predates the concept of contributory negligence. Comparative negligence was part of Roman law by 533 A.D., and some legal scholars believe the concept has a much earlier origin. See H. Woods, Comparative Fault § 1:9 (1978); Mole & Wilson, A Study of Comparative Negligence, 17 CORNELL L.Q. 333, 337 (1931-32). But see Turk, Comparative Negligence on the March, 28 CHI.-KENT L. REV. 189, 216-18 (1949-50).
10 See notes 36–41 infra. For recent Kentucky articles on comparative negligence, see Bagby, Contributory Negligence on the Decline, 46 KY. BENCH & B. 8 (1982); Rogers & Shaw, A Comparative Negligence Checklist to Avoid Future Unnecessary Litigation, 72 KY. L.J. 25 (1983-84); White, The Doctrine of Comparative Negligence Should Be Adopted in Kentucky, 11 N. KY. L. REV. 37 (1984).
A. The History of Contributory Negligence

Contributory negligence itself is a fairly recent development in tort law. Its beginnings are generally traced\(^\text{11}\) to an 1809 English case, *Butterfield v. Forrester.*\(^\text{12}\) In *Butterfield,* the court stated that the plaintiff could recover from the defendant only if there were "no want of ordinary care to avoid [being harmed by defendant's negligence] on the part of the plaintiff."\(^\text{13}\)

The first American application of contributory negligence was not until 1824,\(^\text{14}\) when the Massachusetts Supreme Judicial Court held that a plaintiff could not recover unless he could show that he had used ordinary care.\(^\text{15}\) Kentucky first\(^\text{16}\) applied the doctrine of contributory negligence in the 1892 case, *Newport News & M.V.R. Co. v. Dauser.*\(^\text{17}\) The Kentucky court held: "[I]f the plaintiff so far contributed to the injury that but for his contributory negligence the injury would not have been received, he cannot recover. . . ."\(^\text{18}\)

Contributory negligence has been harshly criticized as an "all or nothing" proposition that unfairly denies recovery to the plaintiff.\(^\text{19}\) It has also been suggested that jurors ignore or deliberately violate the rule in order to allow a slightly negligent

\(^\text{11}\) See, e.g., H. Woods, *supra* note 8, at § 1:3. One reason given for the adoption of the doctrine of contributory negligence in England and America was to protect the fledgling industrial revolution by imposing a duty of self protection on individuals. See *id.* at § 1:4.

\(^\text{12}\) 103 Eng. Rep. 926 (1809). In *Butterfield,* the plaintiff had been riding his horse at a hard pace when he struck a pole the defendant had placed across part of a public road. The jury was instructed to find for the defendant that the plaintiff could have discovered the obstacle by use of ordinary care. The jury found for the defendant, and that decision was affirmed on appeal. *Id.* at 927.

\(^\text{13}\) *Id.* at 927.

\(^\text{14}\) See H. Woods, *supra* note 8, at § 1:3.

\(^\text{15}\) See Smith v. Smith, 19 Mass. (2 Pick.) 621, 624 (1824).

\(^\text{16}\) See Hilen v. Hays, 673 S.W.2d 713, 714 (Ky. 1984).


\(^\text{18}\) *Id.*

\(^\text{19}\) The United States Supreme Court has stated:

The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and procedure. . . . Petitioner presents no persuasive arguments that admiralty should now adopt a discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight.

plaintiff to recover.\textsuperscript{20} Attempting to avoid the harshness of contributory negligence, courts have fashioned several exceptions to the doctrine,\textsuperscript{21} including the doctrine of "last clear chance," the irrelevance of contributory negligence where the defendant's acts were deliberate, wanton or willful, and the rule that young children are incapable of contributory negligence.\textsuperscript{22} Although limiting the reach of contributory negligence, these makeshift remedies failed to overcome the doctrine's fundamental unfairness.\textsuperscript{23}

\begin{center}
B. Development of Comparative Negligence
\end{center}

Following English precedent, American courts have long applied comparative negligence in admiralty cases.\textsuperscript{24} However, comparative negligence made little advancement into other areas of law in this country until Congress passed the Federal Employee's Liability Act (FELA) in 1908.\textsuperscript{25} The FELA provided for application of comparative negligence in actions brought by injured railway employees.\textsuperscript{26} With this Congressional lead, some thirty states subsequently adopted comparative negligence statutes that were limited to railroad accidents.\textsuperscript{27} These statutes were enacted in reaction to the harsh treatment accorded injured railroad

\begin{footnotesize}\footnoteskip
\footnote{\textsuperscript{20} See W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 67, at 469 (5th ed. 1984) ("[J]uries are notoriously inclined to find that there has been no such negligence or to make some more or less haphazard reduction of the plaintiff's damages in proportion to his fault.").}
\footnote{\textsuperscript{21} See id. at 460; V. SCHWARTZ, supra note 8, at §§ 5.3, 7.1.}
\footnote{\textsuperscript{22} E.g., V. SCHWARTZ, supra note 8, at §§ 5.3, 7.1. Each of these exceptions is recognized in Kentucky. See, e.g., General Tel. Co. of Ky. v. Yount, 482 S.W.2d 567, 568 (Ky. 1972) (last clear chance doctrine is designed to soften the harsh effects of contributory negligence and allow helpless plaintiffs to recover); Wheeler v. Creekmore, 469 S.W.2d 559, 561 (Ky. 1971) (contributory negligence not available as a defense if defendant guilty of wanton negligence); Basham v. White, 298 S.W.2d 316, 317 (Ky. 1957) (contributory negligence not available to defendant who intentionally causes harm); Dykes v. Alexander, 411 S.W.2d 47, 49 (Ky. 1967) (child under the age of seven incapable of contributory negligence).}
\footnote{\textsuperscript{23} "The attack upon contributory negligence has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone. . . ." Hilen v. Hays, 673 S.W.2d at 717 (citing Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 469 (1953)).}
\footnote{\textsuperscript{24} Turk, supra note 8, at 231.}
\footnote{\textsuperscript{25} V. SCHWARTZ, supra note 8, at § 1.4.}
\footnote{\textsuperscript{26} Federal Employer's Liability Act, ch. 149, § 3, 35 Stat. 65, 66 (1908) (current version at 45 U.S.C. § 53 (1976)).}
\footnote{\textsuperscript{27} V. SCHWARTZ, supra note 8, at § 1.4.}
\end{footnotesize}
workers, and out of a desire to afford the workers greater protection.28

In 1910, the Mississippi legislature enacted the first true comparative negligence statute29 applicable to all suits for personal injury.30 Nebraska followed with a statute in 1913.31 Also in 1913, the Georgia Supreme Court, in what has been termed "a rather remarkable tour de force,"32 held that a statute applicable to railroad accidents would be given general application.33 The next statutory adoption was not until 1931, when Wisconsin adopted34 comparative negligence.35 Eventually, thirty-two states had statutorily adopted some form of comparative negligence.36

In 1973, Florida became the first state to judicially adopt comparative negligence37 in Hoffman v. Jones.38 The Florida

28 Turk, supra note 8, at 334.
29 1910 Miss. Laws 135 (current version at Miss. Code Ann. § 11-7-15 (1972)).
30 Turk, supra note 8, at 334.
32 W. Keeton, supra note 20, § 67, at 471.
33 Elk Cotton Mills v. Grant, 79 S.E. 836 (Ga. 1913).
35 V. Schwartz, supra note 8, at § 1.4.
37 An Illinois appellate court had attempted a judicial adoption six years earlier
court reasoned that legislative inaction did not preclude the judiciary from changing a common law rule where changed conditions and social and economic needs dictated. The California Supreme Court followed two years later in *Li v. Yellow Cab Co.* The trend continued and, by the early part of 1984, nine states had judicially adopted some form of comparative negligence.

C. Hilen v. Hays

The Kentucky Supreme Court addressed the issue of whether Kentucky would join the majority of states and adopt comparative negligence in *Hilen v. Hays.* Margie Hilen and Keith Hays were returning from a party where both had been drinking beer. Each had also consumed a Quaalude. Neither Hilen nor Hays believed that Hays was intoxicated or doubted his judgment. No one at the party had attempted to prevent Hays from driving. On the way home, Hays drove his vehicle into the back of another vehicle. As a result of the accident, Margie lost fifty percent of the movement in her neck.

In the subsequent lawsuit which Hilen brought against Hays, the trial "judge directed a verdict as to [Hays'] negligence and submitted the case to the jury solely on the issue of [Hilen's]
A unanimous jury found Hilen had been contributorily negligent by getting into an automobile with a driver she knew or should have known was intoxicated. With her damages award barred by the jury's finding, Hilen appealed, urging that the jury should have been instructed to apply comparative negligence. The Kentucky Court of Appeals affirmed the trial court's decision and stated that it believed any adoption of comparative negligence was a matter for the Supreme Court. The Kentucky Supreme Court granted discretionary review to decide whether the Commonwealth should adopt comparative negligence.

D. Judicial Creation: The Court Has the Power

The initial issue before the Court was whether the judiciary had the power to adopt comparative negligence. Nine state courts that had faced the issue had declared that the change could be made judicially. Although other state courts had held that they would defer to their state legislatures, most of these courts had merely stated that such an adoption was more appropriately a legislative function, not that courts lacked the power to judicially adopt comparative negligence.

Legal scholars have uniformly asserted that comparative negligence could and should be adopted judicially. In support of its own assumption of the power to act, the Kentucky Supreme Court quoted from Dean Prosser: "There never has been any

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48 673 S.W.2d at 714.
49 Brief for Appellant Margie Hilen at 1, 673 S.W.2d 713.
50 No. 82-CA-2566-MR, slip op. at 2.
51 Id., slip op. at 2-3.
52 See 673 S.W.2d at 714. The Court had last considered this issue in 1970 and had simply stated, "We have not adopted the comparative negligence doctrine in Kentucky." Houchin v. Willow Ave. Realty Co., 453 S.W.2d 560, 563 (Ky. 1970).
53 See note 41 supra.
55 See, e.g., 392 So. 2d at 817. But see 303 A.2d at 644 (change can come only from the legislature).
56 See, e.g., W. Keeton, supra note 20, at § 67.
essential reason why the change could not be made without a statute by the courts which made the contributory negligence rule in the first place."

The Court noted that neither was contributory negligence a part of the laws of Virginia adopted by the Kentucky Constitution in 1792, nor had the Kentucky General Assembly chosen to preempt the field by enacting specific legislation. Although some form of general comparative negligence legislation had been frequently introduced since 1968, the legislature had not acted.

After reviewing the histories of contributory negligence and comparative negligence and the lack of legislative preemption, the Court concluded that it had the power to judicially adopt comparative negligence.

E. Fundamental Fairness

Having determined that it had the authority to act, the Court went on to address the issue of fundamental fairness. The
Court stated that "[a]bove all else, court-made law must be just," and that "the fundamental fairness of comparative negligence . . . weighs overwhelmingly in favor of the appellant." The fairness in issue was that it appears inherently wrong to deny recovery to a plaintiff who may have been only slightly negligent. Allowing an injured party to recover an award reduced by that party's percentage of fault seems vastly preferable to denying recovery altogether. As a result of its analysis, the Court held: "Henceforth, where contributory negligence has previously been a complete defense, it is supplanted by the doctrine of comparative negligence."

F. Form and Application

The next issue before the court was which form of comparative negligence to adopt. Pure comparative negligence allows a plaintiff to recover the portion of his or her damages caused by the defendant's fault. In theory, a plaintiff who is ninety-nine percent at fault may still recover one percent of his or her damages. Modified comparative negligence allows the plaintiff to recover damages if his fault is found to be equal to or not greater than that of the defendant. Thus, if a jury found the plaintiff to be fifty-one percent at fault, the plaintiff would be denied recovery.

1982) ("[T]he main reason for changing . . . is fairness."); Scott v. Rizzo, 634 P.2d 1234, 1236 (N.M. 1981) (New Mexico adopts comparative negligence "in the interest of fundamental justice"). As the California Supreme Court stated:

We are . . . persuaded that logic, practical experience, and fundamental justice counsel against the retention of the doctrine of rendering contributory negligence a complete bar to recovery—and that it should be replaced in this state by a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault.

Li v. Yellow Cab Co., 532 P.2d 1226, 1232 (Cal. 1975) (emphasis added).

64 673 S.W.2d at 718.
65 Id. at 719.
66 Id. at 720.
67 E.g., V. Schwartz, supra note 8, at § 3.2.
68 See V. Schwartz, supra note 8, at § 3.2; H. Woods, supra note 8, at § 4:1.
69 Prosser has pointed out that in states that have the pure system, the 99% situation does not occur. See Prosser, supra note 23, at 494.
70 E.g., V. Schwartz, supra note 8, § 3.5(B).
71 The slight-gross system, which allows the plaintiff to recover if plaintiff's negligence was slight and the defendant's negligence was gross, is considered to be a form of comparative negligence. See V. Schwartz, supra note 8, at §§ 3.4, 3.5; H. Woods, supra note 8, at § 4:3.
Pure comparative negligence is almost universally favored by legal scholars and the judiciary. Pure comparative negligence is applied in England, Scotland, Northern Ireland, Australia, New Zealand, and the Canadian provinces and is embodied in the Uniform Comparative Fault Act.

Critics of the pure version of comparative negligence contend that it favors the party with the greater amount of damages, regardless of fault. This contention led the high court of West Virginia to adopt a modified form of comparative negligence. Other critics have contended that comparative negligence leads to no fault liability which increases the cost of insurance.

In Hilen, the Kentucky Supreme Court noted that the modified system of comparative negligence generates a large number of appeals on the "narrow question of whether plaintiff's negligence amounted to 50% or less of the aggregate." The Court also recognized the criticism that modified comparative negligence "does not abrogate contributory negligence but..."
ply shifts the lottery aspects of the rule to a different ground."\textsuperscript{81} This review of the experiences of other states "[compelled the Court] to conclude that the pure form of comparative negligence is preferable over any of the variety of modified forms that have been suggested."\textsuperscript{82}

To implement pure comparative negligence in Kentucky, the Court specifically adopted a portion of section two of the Uniform Comparative Fault Act,\textsuperscript{83} but "[expressed] no opinion as to future application of any [other] portion of the Act."\textsuperscript{84} The Court then held "as did the Missouri court . . . and the Iowa court . . . that the comparative negligence shall apply to: (1) The present case; (2) All cases tried or retried after the date of filing of this opinion; and (3) All cases pending, including appeals, in which the issue has been preserved."\textsuperscript{85}

\textbf{G. Conclusion}

The adoption of comparative negligence is a desirable change. Comparative negligence is consistent with current trends\textsuperscript{86} in tort law to abolish absolute bars to plaintiff's recovery\textsuperscript{87} and to focus on the injured plaintiff's rights. Whether this emphasis on plaintiff's rights is, as some commentators have suggested, due to the

\textsuperscript{81} Id. (quoting Li v. Yellow Cab Co., 532 P.2d 1226, 1242 (Cal. 1975)).
\textsuperscript{82} 673 S.W.2d at 719.
\textsuperscript{83} In applying comparative negligence in \textit{Hilen}, the Court stated:
\begin{quote}
[W]e extract the following instructions from the Uniform Comparative Fault Act, § 2 . . . for the jury to use in the event it finds both parties at fault:
\begin{itemize}
\item[(a)] . . . the court . . . shall instruct the jury to answer special interrogatories . . . indicating:
\begin{itemize}
\item[(1)] the [total] amount of damages [the] claimant would be entitled to recover if contributory fault is disregarded; and
\item[(2)] the percentage of the total fault . . . that is allocated to [the] claimant [and] defendant, [the total being 100%].
\end{itemize}
\item[(b)] In determining the percentages of fault, the [jury] shall consider both the nature of the conduct of each party at fault and the extent of the causal relationship between the conduct and damages claimed."
\end{itemize}
We adopt only this part of the Uniform Comparative Fault Act. . . .
\end{quote}
\textit{Id.} at 720. See note 94 \textit{infra} for a discussion of the Act.
\textsuperscript{84} 673 S.W.2d at 720.
\textsuperscript{85} Id. \textit{See also} Goetzman v. Wichern, 327 N.W.2d 742, 754 (Iowa 1982); Gustafson v. Benda, 661 S.W.2d 11, 15-16 (Mo. 1983).
\textsuperscript{86} \textit{See W. KEETON, supra} note 20, § 67, at 471.
\textsuperscript{87} Perhaps the most important development was the abolition of the privity requirement in MacPherson v. Buick Motor Co., 111 N.E. 1030 (N.Y. 1916).
increased availability of insurance, or is due to other factors such as a change in society's expectations, is beyond the scope of this Survey.

While this adoption is extremely desirable, numerous collateral issues remain undetermined. One unresolved issue is whether to allocate a percentage of fault to an absent tortfeasor (which would not be res judicata in subsequent proceedings) or to compare the percentage of total fault only of those parties who are in court. A second question of great importance for plaintiffs is whether the courts will continue to follow the common law rule of joint and several liability, or whether each defendant will be liable only for his allocated percentage of fault. If the courts do allow joint and several liability, the next question is whether comparative contribution is to be applied. Other unresolved issues are what effect, if any, the adoption of comparative negligence will have on products liability, and whether other doctrines such as last clear chance will be retained.

Resolution of these and other issues remains to be accomplished in Kentucky. Either the courts will have to resolve the issues as they arise, or a comprehensive solution such as the

88 See W. Keeton, supra note 20, § 82, at 589. For cases that cite the existence of liability insurance as a factor in abolishing a bar to recovery, see Gibson v. Gibson, 479 P.2d 648, 653 (Cal. 1971) (parent-child immunity); Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599, 603 (Mo. 1969) (charitable immunity); Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 323 (N.J. 1965) (home builders immunity).


90 California, for example, has retained joint and severable liability, while Kansas has statutorily limited liability to the defendant's equitable share. See W. Keeton, supra note 20, § 67, at 475; Humphrey, Haas & Gritzner, supra note 76, at 812. See also V. Schwartz, supra note 8, at § 16.7; H. Woods, supra note 8, at § 13:4.

91 See H. Woods, supra note 8, at § 13:5--:10.

92 The courts that have considered the issue have been split, with some courts concluding that comparative negligence is incompatible with strict liability principles, and other courts finding comparative negligence applicable. See V. Schwartz, supra note 8, at § 12.1-:7; H. Woods, supra note 8, at § 14:49--:50. Compare Lewis v. Timco, Inc., 697 F.2d 1252, 1254 (5th Cir. 1983) (not applicable) with Kaneko v. Hilo Coast Processing, 654 P.2d 343, 352 (Hawaii 1982) (fairness more important, comparative negligence is applicable).

93 See V. Schwartz, supra note 8, at § 7.2--:3; H. Woods, supra note 8, at § 8:1--:7. Compare Alvis v. Ribar, 421 N.E.2d 886, 898 (Ill. 1981) (last clear chance abolished) with Conner v. Mangum, 207 S.E.2d 604, 609 (Ga. Ct. App. 1974) (last clear chance doctrine could have been applied if applicable to the facts of the case).
Uniform Comparative Fault Act\textsuperscript{94} could be judicially adopted or legislatively enacted. It now appears that any adoption of a comprehensive solution will occur legislatively rather than judicially.\textsuperscript{95}

II. PRODUCTS LIABILITY

A. \textit{Montgomery Elevator Co. v. McCullough}\textsuperscript{96}

In \textit{Montgomery Elevator Co. v. McCullough}, the Kentucky Supreme Court was afforded an opportunity to examine several issues related to strict products liability: the scope of a manufacturer's duty to warn, inaction by the purchaser of the product as a superseding cause, and the standard for determining defective condition unreasonably dangerous.\textsuperscript{97} Ten-year old Kevin McCullough was injured in a Shillito's Department Store when the tennis shoe on his right foot was caught between the treads and side skirt of an escalator.\textsuperscript{98} He suffered a crushing, tearing injury which resulted in the amputation of his right large toe.\textsuperscript{99}

McCullough claimed that the escalator was defectively designed when manufactured,\textsuperscript{100} and sought damages from both Shillito's and the escalator manufacturer.\textsuperscript{101} Although the manufacturer had previously notified the store of the escalator's propensity for causing this type of injury and had offered to sell the store additional safety equipment, the store had not

\textsuperscript{94} The Act was approved by the National Conference of Commissioners on Uniform State Laws in 1977. The Act applies the pure form of comparative negligence, adheres to the concept of joint and severable liability and provides for contribution on the basis of proportionate fault. Liability is apportioned only to those parties in court, and should any one share of the obligation be uncollectible, the amount is redistributed among the remainder. Wade, \textit{Uniform Comparative Fault Act}, 14 \textit{Forum} 379 (1978-79). The Missouri court judicially adopted the Act. Gustafson v. Benda, 661 S.W.2d at 17-27 (text and comments of the Act).

\textsuperscript{95} Justice Leibson, in a concurring opinion to his own majority opinion, stated that he would have had the Court adopt the UCFA. 673 S.W.2d at 717 (Leibson, J., concurring). The General Assembly has had a Uniform Comparative Fault Act before it in the last three General Assemblies.

\textsuperscript{96} 676 S.W.2d 776 (Ky. 1984).

\textsuperscript{97} \textit{Id.} at 779-82.

\textsuperscript{98} \textit{Id.} at 778.

\textsuperscript{99} \textit{Id.}

\textsuperscript{100} The manufacturer had labeled the accidents the "tennis shoe" phenomenon. \textit{Id.}

\textsuperscript{101} \textit{Id.}
purchased any of the additional equipment. The escalator manufacturer argued that the store's failure to add the suggested safety equipment after notification of the danger was a superseding or intervening cause of the plaintiff's injuries, which relieved the manufacturer of liability even though the escalator was defective when sold.

At trial, the jury found that the manufacturer and Shillito's were each fifty percent responsible, and entered judgment against the manufacturer for $25,755.87. Shillito's had previously settled with McCullough.

The defendant appealed, claiming entitlement to a directed verdict, as well as alleging trial errors. The Kentucky Court of Appeals held the manufacturer was not entitled to a directed verdict, but sustained its claim of trial errors. Both parties appealed.

The Supreme Court affirmed in part, holding that the manufacturer was not entitled to a directed verdict, and reversed in part, holding that any error at trial level was harmless. The Court dealt at length with the issue of whether Shillito's inaction, after being specifically advised of the risk of harm and the corrective measures needed, could be a superseding cause of the accident. The Court stated that such warnings "are not a defense in the circumstances of this case where the person injured is a member of the public, a bystander or a user without notice of the dangerous propensities of the product."

1. Policy Behind Strict Products Liability

The Restatement (Second) of Torts [hereinafter referred to as Restatement] states: "[P]ublic policy demands that the burden of accidental injuries caused by products intended for consump-

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102 Id.
103 Id. at 779.
104 Id. at 778.
105 See id. Shillito's had paid McCullough $30,000. Id.
106 See id.
107 Id.
108 Id.
109 Id.
110 Id.
111 Id. at 779-80.
112 Id. at 779.
tion be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained.\textsuperscript{113} Manufacturers are not, however, absolute insurers of public safety. The mere fact that a plaintiff was injured by a manufacturer's product will not automatically result in liability.\textsuperscript{114} The plaintiff must show that the product was "in a defective condition unreasonably dangerous to the user"\textsuperscript{115} and that the defect caused the injury.\textsuperscript{116}

Most commentators agree that products liability actions can be grouped into three categories: manufacturing defects, design defects, and defective or inadequate warnings.\textsuperscript{117} Manufacturing defects occur where one unit or product does not conform to the manufacturer's design.\textsuperscript{118} An example would be a bottle of cola that contained a rodent or other foreign matter.\textsuperscript{119} A design defect occurs when, although the product conforms to the manufacturer's design, the design itself is defective.\textsuperscript{120} Perhaps the best known example is the design defect that frequently caused Ford Pintos to explode in rear-end collisions.\textsuperscript{121} Finally, the product, while flawlessly designed and produced, may be found

\textsuperscript{113} \textit{Restatement (Second) of Torts} § 402A comment c (1965).
\textsuperscript{114} See Cox v. General Motors Corp., 514 S.W.2d 197 (Ky. 1974). Before plaintiff can recover in a products liability action, the plaintiff must show that the defect was the cause of harm. \textit{Id.} at 200.
\textsuperscript{115} \textit{Restatement (Second) of Torts} § 402A (1965). Throughout this Survey, the term "defect" will be used as a synonym for "defective condition unreasonably dangerous."
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} See W. Keeton, \textit{supra} note 20, at § 99. See also Birnbaum, \textit{Unmasking the Test for Design Defect: From Negligence (to Warranty) to Strict Liability to Negligence}, 33 \textit{Vand. L. Rev.} 593, 599 (1980) (defect is used to apply to product flaws that result from unintentional mishaps in manufacturing as well as to flaws that arise from intentional design decisions); Keeton, \textit{The Meaning of Defect in Products Liability Law - A Review of Basic Principles}, 45 Mo. L. Rev. 579, 585-88 (1980) (construction flaws, failure to adequately warn, and defective design as bases for products liability) [hereinafter cited as Keeton, \textit{The Meaning of Defect}].
\textsuperscript{119} See Coca-Cola Bottling Works v. Lyons, 111 So. 305 (Miss. 1927) (broken glass in bottle).
to be defective if the manufacturer fails to warn the consumer of dangers associated with the product’s use.\textsuperscript{122} For example a medicine which, although manufactured as intended in a pure form, is defective if the manufacturer fails to warn of the risks or side effects associated with the drug’s use.\textsuperscript{123}

\section*{2. Defective or Inadequate Warning as a Product Defect}

In \textit{Montgomery} the Court addressed the manufacturer’s duty to provide users with an adequate warning of risks associated with its product. While the absence or presence of a warning is usually an evidentiary consideration in determining whether the product was defective,\textsuperscript{124} the Court noted that it had previously held: “[T]he product was unreasonably unsafe if there was failure to provide \textit{adequate} warning to the \textit{ultimate} user.”\textsuperscript{125} Although some courts have held that warning an industrial purchaser of the dangers associated with the product fulfills the manufacturer’s duties towards the purchaser’s employees,\textsuperscript{126} other courts have held that the manufacturer has a nondelegable duty to warn the actual user.\textsuperscript{127} In \textit{Montgomery},\textsuperscript{128} the Court adhered to the latter approach.


\textsuperscript{124} 676 S.W.2d at 781.

\textsuperscript{125} \textit{Id.} (citing Post v. American Cleaning Equip. Corp., 437 S.W.2d 516, 520 (Ky. 1968)) (emphasis in original).

\textsuperscript{126} See, \textit{e.g.}, Reed v. Pennwalt Corp., 591 P.2d 478 (Wash. Ct. App. 1979) (manufacturer’s warning to industrial purchaser sufficient, especially since product did not reach employee in original container), \textit{aff’d}, 604 P.2d 164 (Wash. 1979).

\textsuperscript{127} See Hopkins v. Chip-In-Saw, Inc., 630 F.2d 616, 619 (8th Cir. 1980) (warnings only given to immediate purchaser do not insulate manufacturer from liability to foreseeable user); Pan-Alaska Fisheries v. Marine Constr. & Design Co., 565 F.2d 1129, 1137 (9th Cir. 1977) (manufacturer has a nondelegable duty to warn); Garrison v. Rohm & Haas Co., 492 F.2d 346, 352 (6th Cir. 1974) (“under Kentucky law there is a general duty on the part of a manufacturer to warn’’ user); Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 366 (E.D. Pa. 1982) (supplier had duty to warn ultimate users of asbestos exposure hazards); Post v. American Cleaning Equip. Corp., 437 S.W.2d
This appears to be the better view. Having designed and marketed the product, the manufacturer should not be allowed to automatically shift its duty to warn to initial purchasers. As one court stated:

To allow a manufacturer to insulate itself from liability for harm caused by a defective product (which it built, designed and placed into the stream of commerce) by merely sending a single warning notice to its dealer would defeat the policy and purpose of strict products liability which is to protect the consumer, who is oftentimes unwaried or unable to protect himself and to place the liability on those who are responsible for the harm and best able to absorb the loss.\footnote{676 S.W.2d at 782.}

A question left unanswered by the Kentucky Court is whether an adequate warning which reaches the ultimate user necessarily relieves the manufacturer of liability. The Court observed that the warning given would be considered—along with the relative costs of design alternatives, the feasibility of the design alternatives, and the product's inherent damages—in determining whether the product is in the safest possible form.\footnote{676 S.W.2d at 780-81.} The impli-
cation is that merely giving an adequate warning will not always avoid liability.\footnote{131}

3. Defective Design

The trial court found for McCullough based on his claim of defective design of the escalator.\footnote{132} McCullough introduced evidence tending to prove that a safer escalator was being produced at the same time as the defective one\footnote{133} and evidence of numerous similar accidents involving tennis shoes.\footnote{134} Additionally, the manufacturer had failed to warn McCullough and other users of the escalator's risks.\footnote{135}

The Supreme Court reviewed the present state of the law and stated: "The shift is from the conduct of the actor, which is the problem in negligence cases, to the condition of the product."\footnote{136} The Court reiterated that in determining whether a product is defective, Kentucky applies the formula contained in the Restatement.\footnote{137} This is the "defective condition unreasonably dangerous"\footnote{138} standard which is accepted in the majority of

\footnote{131} The absence or presence of a warning is an evidentiary consideration in determining whether or not the product is defective. \textit{See id.} at 781. However, when a safer feasible product is available, permitting a manufacturer to limit or terminate liability merely by giving notice seems to defeat the principle of products liability by allowing the manufacturer either to define the scope of its liability or to escape liability altogether. The Supreme Court of California discussed this refusal to allow a manufacturer to define its own liability in Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1962): "[T]he refusal to permit the manufacturer to define the scope of its own responsibility for defective products . . . make[s] clear that the liability is not one governed by the law of contract but by the law of strict liability in tort." \textit{Id.} at 901 (citations omitted). \textit{See also} \textit{L. FRUMER \\& M. FRIEDMAN, PRODUCTS LIABILITY} § 5A.04(1) (1960).

\footnote{132} 676 S.W.2d at 778.

\footnote{133} \textit{Id.}

\footnote{134} \textit{Id.} at 783. On appeal, the manufacturer claimed that introduction of this evidence, concerning many occurrences throughout the United States, constituted an error. The Court stated that "evidence of similar product failures under similar conditions is relevant and admissible." \textit{Id.} The evidentiary implications of \textit{Montgomery Elevator} are discussed more fully in Fowler, \textit{Kentucky Law Survey—Evidence}, 73 Ky. L.J. 407, 407-11 (1984-85).

\footnote{135} 676 S.W.2d at 779.

\footnote{136} \textit{Id.} at 780.

\footnote{137} \textit{Id.} (citing \textit{RESTATEMENT (SECOND) OF TORTS} § 402A (1965)).

\footnote{138} Section 402A of the \textit{RESTATEMENT (SECOND) OF TORTS} (1965) states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his
jurisdictions. The term "defective condition unreasonably dangerous" has been criticized as placing too great a burden on the plaintiff, and has been replaced in several jurisdictions with the "not reasonably safe test" or simply the "defective condition" standard. However, the Montgomery Court reaffirmed that "[t]he four key words are 'defective condition unreasonably dangerous.'" 

a. Determination of Defective Condition Unreasonably Dangerous

The standard for determining whether or not a product is in a defective condition unreasonably dangerous was set out by the Supreme Court of Kentucky in Nichols v. Union Underwear Co., Inc. In Nichols, the Court rejected the consumer expectation test, which focuses on whether the product is more

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.

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.


See, e.g., Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1162 (Cal. 1972) ("We think that a requirement that a plaintiff also prove that the defect made the product 'unreasonably dangerous' places upon him a significantly increased burden and represents a step backward in the area pioneered by this court.").


See 676 S.W.2d at 780.

602 S.W.2d 429 (Ky. 1980).

See id. at 432.
dangerous than the consumer expected. The Court instead adopted the prudent manufacturer test, which focuses on whether a prudent manufacturer, aware of the qualities, characteristics, and actual condition of the product would place the product on the market. However, in Montgomery, the Court declared that the trier of fact could also consider such factors as "feasibility of making a safer product, patency of the danger, warnings and instructions, subsequent maintenance and repair, misuse, and the products' inherently unsafe characteristics."

These factors are associated with the risk-utility test. The risk-utility test asks the fact finder to determine whether the risks the product poses outweigh the benefits it provides. Although these factors are similar to a negligence test, it is important to keep in mind that the Court's emphasis is on the condition of the product as opposed to the culpability of the manufacturer.

b. Was the Escalator Defective?

The dissent in Montgomery protested that there had been no showing that the escalator was defective: "In normal use, the equipment is not dangerous at all." This statement could have been made about many products liability cases in which the plaintiff eventually recovered. The dissent failed to appreciate

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146 See W. Keeton, supra note 20, § 99, at 698; Birnbaum, supra note 117, at 611-18.
147 See 602 S.W.2d at 433.
149 676 S.W.2d at 780.
150 See W. Keeton, supra note 20, § 99, at 699; Birnbaum, supra note 117, at 631-35.
151 Vandall, supra note 120, at 74.
152 See 676 S.W.2d at 780.
153 See Montgomery Elevator Co. v. McCullough, 676 S.W.2d at 784 (Stephenson, J., dissenting).
154 Id.
155 See, e.g., LeBouef v. Goodyear Tire & Rubber Co., 623 F.2d 985 (5th Cir. 1980) (manufacturer liable for tire blowouts caused by speeds in excess of 100 m.p.h. where speeding foreseeable); Steinmetz v. Bradbury Co., 618 F.2d 21 (8th Cir. 1980) (manufacturer liable where foreseeable that operator's hands would be placed on moving rollers).
that a manufacturer is also liable for foreseeable misuse of its product.

The Kentucky Supreme Court had previously held that a manufacturer is responsible for the accidents that occur both from normal use and from foreseeable misuse, as the manufacturer may reasonably anticipate that its product will be used in certain ways. In Montgomery, the Court held that a manufacturer "is presumed to know the qualities and characteristics, and the actual condition, of his product at the time he sells it... ." The question for the finder of fact is: Would a prudent manufacturer, knowing that there will be a certain number of similar accidents, nevertheless place this type of product on the market?

In Montgomery, the manufacturer knew of previous tennis shoes accidents and was presumed to know the condition of its escalator and that other accidents would likely occur. Considering that a safer escalator was being manufactured at the same time and that the manufacturer failed to warn Kevin McCullough, it would appear that there was ample evidence to support the trial court's finding that the escalator was defective when sold.

4. Superseding Cause

In Montgomery, the manufacturer asserted that Shillito's failure to act after it had warned Shillito's of the danger constituted a superseding cause of the accident which would relieve it of all liability. Generally, if the purchaser of a product, or other intermediary, has altered the manufacturer's product, or committed certain actions or inactions, those actions may constitute a superseding cause that relieves the manufacturer of liability. The Montgomery Court reiterated that the basic law

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157 676 S.W.2d at 780.
158 See id. The finder of fact may consider the feasibility of making a safer product, the obviousness of the danger, the warnings that were or could have been placed on the product, and the product's inherent dangers. See id. The fact finder may also look at whether a safer product is being manufactured at the same time. See id. at 778.
159 676 S.W.2d at 779.
160 See 1A L. Frumer & M. Friedman, supra note 131, at § 11.04[1].
on superseding cause in Kentucky is found in the Restatement:161 "A superseding cause is an act of a third person or other force which by its intervention prevents the action from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about."162

The Court quoted the section of the Restatement dealing with a third party's inaction: "[T]he failure of a third person to act to prevent harm to another threatened by the actor's negligent conduct is not a superseding cause of such harm with rare exceptions."163 To constitute a superseding cause, the action or inaction must be "extraordinary rather than normal"164 or "highly extraordinary"165 in nature.

In Montgomery, the manufacturer relied on Bohnert Equipment Co., Inc. v. Kendall,166 which had held that the purchaser's inaction could be an intervening cause.167 In Bohnert, the manufacturer alleged that, after it had warned the purchaser's plant engineer of the problem and the steps needed to correct the problem, the engineer had assured the manufacturer the problem would be corrected.168 The Montgomery Court stated that the issue in Bohnert was whether the purchaser had assumed responsibility for the repair.169 The Court added: "So much of the Bohnert opinion as is subject to broader interpretation, is in conflict with this underlying principle [of strict liability] and is overruled."170

5. Conclusion

The Court's holding in Montgomery Elevator Co. v. McCullough that a manufacturer is not relieved of liability when it warns the intermediary purchaser, rather than the ultimate user,

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161 See 676 S.W.2d at 779-80.
162 Restatement (Second) of Torts § 440 (1965).
163 See 676 S.W.2d at 780 (quoting Restatement (Second) of Torts § 452(1) (1965)).
164 Id. (quoting House v. Kellerman, 519 S.W.2d 380, 382 (Ky. 1974)).
165 Id.
166 569 S.W.2d 161 (Ky. 1978) (overruled by Montgomery Elevator Co. v. McCullough, 672 S.W.2d 776 (Ky. 1984)).
167 676 S.W.2d at 779.
168 569 S.W.2d at 166.
169 676 S.W.2d at 781-82.
170 Id. at 782.
is a sound decision. The case is consistent with the stated policy of products liability and with the case law of Kentucky and other jurisdictions. Although the case does not appear to break any new ground, the decision is valuable for its discussion and clarification of the issues of superseding cause, a manufacturer's duty to warn the ultimate consumer, and for its review and affirmation of the standard for determining when a product is in a defective condition unreasonably dangerous.

B. American Motors Corp. v. Addington

American Motors Corp. (AMC) v. Addington was a products liability action concerning both a failure to warn consumers of the Jeep CF-5's propensity to roll over and false advertising of the Jeep's capabilities.

Induced by television ads that showed a Jeep "being operated in rough terrain, jumping in the air and landing on all four wheels," Mr. and Mrs. Addington purchased an AMC Jeep CJ-5. Mrs. Addington was subsequently injured when the Jeep wrecked while heading into a curve on an icy road. Although there was a factual dispute as to the manner in which the accident had occurred, it was clear that the Jeep did end up on its side, severely injuring Mrs. Addington.

The court held that AMC's failure to warn consumers about the Jeep's propensity to roll over constituted a defect. According

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172 See id. slip op. at 5.
173 See id. slip op. at 10-11.
174 Id. slip op. at 2. Other courts have dealt differently with consumer reliance on the manufacturer's advertising. Compare Haynes v. American Motors Corp., 691 F.2d 1268, 1271 (8th Cir. 1982) (plaintiff not allowed to testify that commercials influenced him to buy a Jeep CJ-5), with Leichtamer v. American Motors Corp., 424 N.E.2d 568, 579-80 (Ohio 1981) (court relied on manufacturer's willfully suggestive campaign and on manufacturer's knowledge of test results to affirm an award of $1.1 million in punitive damages). 175 No. 82-CA-2624-MR, slip op. at 3.
176 See id., slip op. at 9.
177 See id., slip op. at 5.
178 See id., slip op. at 10. The Jeep is constructed with a high ground clearance, a high center of gravity, a short base and a narrow track width. Although apparently appropriate for an off-road vehicle, these characteristics do create a propensity to roll over. Only the manufacturer, not the consumer, would be likely to have knowledge of this type of nonobvious defect. See id.
to the court, "[t]he law's purpose in imposing a duty to warn users of a product is that with the advances of technology the ordinary person is not aware of potential harm unless specifically advised about it. This potential harm can result even if the product is flawlessly made."\(^{179}\)

Additionally, the court held that Mrs. Addington could recover for her bodily injuries under Kentucky's Consumer Protection Act if the jury believed the Jeep advertisement was misleading or deceptive.\(^{180}\)

The court specifically adopted the language of Restatement section 388 comment b\(^{181}\) which states:

This Section states that one who supplies a chattel for another to use for any purpose is subject to liability for physical harm caused by his failure to exercise reasonable care to give to those whom he may expect to use the chattel any information as to the character and condition of the chattel which he possesses, and which he should recognize as necessary to enable them to realize the danger of using it. A fortiori, one so supplying a chattel is subject to liability if by word or deed he leads those who are to use the chattel to believe it to be of a character or in a condition safer for use than he knows it to be or to be likely to be.\(^{182}\)

The court then remanded the case for retrial with proper consideration in the jury instructions of both section 388 comment b and the defendant's theory of the cause of the accident.\(^{183}\)

\(^{179}\) Id.

\(^{180}\) See id., slip op. at 13-14. The Consumer Protection Act is codified at KRS § 367.170. The relevant portion of the Act provides: "Unlawful Acts. (1) Unfair, false, misleading or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. (2) For the purposes of this section, unfair shall be construed to mean unconscionable," KRS § 367.170 (Cum. Supp. 1984).

\(^{181}\) See No. 82-CA-2624-MR, slip op. at 18.

\(^{182}\) RESTATEMENT (SECOND) OF TORTS § 388 comment b (1965). This holding is also consistent with § 402B which states:

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though (a) it is not made fraudulently or negligently, and (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.


\(^{183}\) See No. 82-CA-2624-MR, slip op. at 18.
III. MEDICAL MALPRACTICE AND APPARENT AUTHORITY

A. The Doctrine of Apparent Authority

Historically, a hospital could only be held liable for the negligent acts of employees or agents under the theory of respondeat superior. This form of vicarious liability could be imposed only if the employee or agent was in fact employed by the hospital and was acting within the scope of the employee’s duties. This limited theory of liability effectively insulated hospitals from liability for a private physician’s or independent contractor’s negligent acts, no matter how gross the negligence. Dissatisfaction with this lack of responsibility on a hospital’s part led courts to develop new theories of hospital liability, such as the doctrines of apparent authority and corporate liability. In *Williams v. St. Claire Medical Center*, the Kentucky Court of Appeals adopted the doctrine of apparent authority.

1. Williams v. St. Claire Medical Center

In *Williams*, the plaintiff Delbert Williams entered St. Claire Medical Center (St. Claire) for knee surgery. The day prior to his surgery Ed Johnson, a nurse anesthetist, met with Williams to determine what anesthetic to use in his surgery. Williams did not know Johnson was employed by a local medical clinic rather than by St. Claire. Johnson, a recent graduate of a nurse anesthetist program, had not yet obtained

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185 *Restatement (Second) of Agency* § 219 (1957).


187 See notes 204-17 *infra* and accompanying text.

188 See notes 218-25 *infra* and accompanying text.

189 657 S.W.2d 590 (Ky. Ct. App. 1983). *See also* Paintsville Hospital v. Rose, 84-SC-14-DG, 32 KLS 1, at 19 (Ky. Jan. 17, 1985) (ostensible agency applied where physician who was not employed by the hospital furnished treatment in the emergency room, which was open to the public).

190 657 S.W.2d at 591.

191 Id. at 592.

192 See id. at 591.
certification as a nurse anesthetist.\textsuperscript{193} The morning Johnson anesthetized Williams, neither Johnson's supervisor nor a physician were in the room as required by St. Claire's published procedures.\textsuperscript{194} Williams was noted to be in distress about twenty minutes after the anesthesia was begun. Despite resuscitation measures, Williams remained in a coma for ten to twelve days and suffered massive brain damage.\textsuperscript{195}

2. \textit{Hospital's Liability Under the Rule of Respondeat Superior}

Under the doctrine of respondeat superior, St. Claire could probably not be held liable for the negligence of an independent contractor such as Johnson.\textsuperscript{196} To impose liability under this theory, there must be a master-servant relationship, and the servant must be acting within the scope of the servant's duties.\textsuperscript{197}

Under this rationale, a hospital would seldom be held liable for the negligent acts of medical personnel not directly employed by it.\textsuperscript{198} As an additional bar, for many years courts held that a physician's "professional skills" precluded the finding that the physician was a servant of the hospital, because the hospital did not intrude on the doctor's skill and judgment.\textsuperscript{199} This theory was first rejected in 1957.\textsuperscript{200} Gradually a two-pronged test developed for determining whether the hospital controlled the

\begin{itemize}
  \item \textsuperscript{193} \textit{Id.}
  \item \textsuperscript{194} \textit{Id. at 592.}
  \item \textsuperscript{195} \textit{Id. at 591-92.}
  \item \textsuperscript{196} Under a strict application of respondeat superior, Johnson was not a servant of St. Claire. To be a servant, one's conduct and actions must be controlled or subject to the control of the master. \textit{Restatement (Second) of Agency} § 220 (1957).
  \item \textsuperscript{197} \textit{Black's Law Dictionary} 1179 (5th ed. 1979). Perhaps the most well-known example of a servant not within the scope of duties is the "frolic and detour" exception, where the servant has strayed from assigned business to pursue activities on the servant's own behalf. The master is then typically not liable. \textit{See} W. Keeton, \textit{supra} note 20, § 70, at 503-05.
  \item \textsuperscript{198} \textit{See Comment, The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Physicians, 50 Wash. L. Rev.} 385, 396-97 (1975).
  \item \textsuperscript{199} \textit{See, e.g., Schloendorff v. Society of N.Y. Hosp., 105 N.E. 92 (N.Y. 1914). In Schloendorff, the court held the hospital could not be liable where physicians are independent contractors merely using the hospital as a facility. Id. at 93.}
  \item \textsuperscript{200} \textit{See Bing v. Thunig, 143 N.E.2d 3, 9 (N.Y. 1957). In Bing a nurse negligently failed to remove an operating linen saturated with flammable antiseptic. An electric cautery used during the surgery caught the linen on fire, burning the plaintiff. Id. at 3-4.}
\end{itemize}
physician or other medical personnel.\textsuperscript{201} If (1) the patient sought treatment from the hospital rather than from the physician, and (2) the physician was a salaried employee of the hospital, the hospital could be found to be the employer and thus liable.\textsuperscript{202} Several courts extended this test to cover medical personnel who, though generally viewed as independent contractors, receive a percentage of the hospital's profits for the services they provide.\textsuperscript{203}

3. \textit{The Doctrine of Apparent Authority}

Today, more and more hospital services are being performed by various nonemployee contractors.\textsuperscript{204} The typical hospital patient requires a wide range of hospital services from a variety of personnel. The patient expects these services to be performed competently. To the patient, an independent contractor is usually indistinguishable from a hospital employee.\textsuperscript{205} The \textit{Williams} court recognized the inequity of insulating the hospital from liability in this situation, and held the hospital could be liable under the doctrine of apparent authority or ostensible agency.\textsuperscript{206}

Apparent authority originated in the 1955 California case, \textit{Seneris v. Haas},\textsuperscript{207} and has been applied in numerous jurisdic-

\textsuperscript{201} The first case to elucidate the two-pronged test appears to have been \textit{Brown v. La Societe Francaise de Bienfaisance Mutuelle}, 71 P. 516 (Cal. 1903).

\textsuperscript{202} Comment, supra note 198, at 393, 401. Typically, under this test, if the patient enters the hospital's emergency room and is seen by a physician who is employed on any type basis by the hospital, then the hospital can be held liable. \textit{See Schagrin v. Wilmington Medical Center, Inc.}, 304 A.2d 61, 64-65 (Del. Super. Ct. 1973).

\textsuperscript{203} \textit{See, e.g.}, \textit{Newton County Hospital v. Nickolson}, 207 S.E.2d 659 (Ga. Ct. App. 1974).

\textsuperscript{204} \textit{See Southwick, Hospital Liability: Two Theories Have Been Merged}, 4 J. LEGAL MED. 1, 9 (1983).

\textsuperscript{205} \textit{See id.} at 10.


\textsuperscript{207} 291 P.2d 915 (Cal. 1955). \textit{Seneris} also dealt with an allegation of negligently administered anesthesia where the anesthesiologist was not a hospital employee. \textit{See id.} at 926-27.
tions since then. Under this doctrine, having "held out" to the patient that the contractor was a hospital employee, the hospital is now liable for the contractor's negligence. Courts applying the doctrine of apparent authority frequently inquire into whether the patient justifiably relied upon the representation that the contractor was a hospital employee. The California court in Seneris reasoned that the plaintiff could not be required to determine whether each person who attended her was a hospital employee or an independent contractor. It was enough that she reasonably believed she was being treated by hospital employees, that such belief was generated by the act or neglect of the hospital, and that she was in no way negligent. Once it has been determined that the doctrine of apparent authority applies, then the hospital may be liable for any tortious act committed within the scope of the independent contractor's duties, just as if the contractor were truly an employee.

The Williams case presented very sympathetic facts for the adoption of the doctrine of apparent authority. Mr. Williams had every reason to believe that his anesthetist was a hospital employee and under the supervision and control of the hospital. Because Mr. Williams had no reason to suspect Johnson was an independent contractor, the hospital should have been estopped from asserting otherwise.

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208 See, e.g., Grewe v. Mt. Clemens Gen. Hosp., 273 N.W.2d 429, 433-35 (Mich. 1978) (hospital may be liable under theory of agency by estoppel); Lundberg v. Bay View Hosp., 191 N.E.2d 821, 823 (Ohio 1963) (hospital represented and induced belief that physician was an employee, allowing jury to find physician to be an agent by estoppel). See also Southwick, supra note 204, at 10.

209 See, e.g., Seneris v. Haas, 291 P.2d 915. The California court defined apparent authority (or ostensible agency—the terms are used interchangeably) as where "the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Id. at 927 (quoting Stanhope v. Los Angeles College of Chiropractic, 128 P.2d 705, 706 (Cal. Dist. Ct. App. 1942)). See also Williams v. St. Claire Medical Center, 657 S.W.2d at 596.

210 See, e.g., Vanaman v. Milford Memorial Hosp., 272 A.2d 718 (Del. 1970) (hospital is liable if it caused the plaintiff to justifiably rely on the representation that the defendant physician was employed by it).

211 291 P.2d at 927.

212 See RESTATEMENT (SECOND) OF AGENCY § 267 (1957). If the hospital's liability is based on agency by estoppel, then the hospital's liability can be neither more nor less broad than its liability for an actual employee.
4. **Hospital's Duty To Enforce Its Own Policies for the Benefit of All Patients**

Additionally, the court held that the hospital could be liable for failing to enforce its own policies for Williams' benefit.\(^{213}\) This appears to be an entirely reasonable duty. The court held that both staff employees and independent contractors must exercise appropriate care for a patient whether that patient is classified as a private patient\(^{214}\) or a hospital patient.\(^{215}\) This exercise of appropriate care includes enforcing the hospital's own policies.\(^{216}\) The court stated: "A breach of this duty may expose the hospital to liability in tort. Any lesser rule would be insensible to the true role of a hospital as an institution in present day society."\(^{217}\)

5. **Corporate Liability**

A related issue not addressed by the *Williams* court is whether a hospital can be held liable for the negligent acts of medical personnel who are clearly not hospital employees. Here, the doctrine of apparent authority would not apply. An example would be the hospital's referral of the patient to a private physician who has staff privileges at the hospital. Numerous jurisdictions have held the hospital can be liable under the theory of corporate liability,\(^{218}\) if the hospital has failed to exercise adequate care in selecton, retention, or supervision of a physician.

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\(^{213}\) See *Williams v. St. Claire Medical Center*, 657 S.W.2d 590, 592-95 (Ky. Ct. App. 1983).

\(^{214}\) The hospital had argued not only that it had no duty to supervise Johnson, but also that it had no duties to Williams who was a private patient rather than a patient of the hospital. See id. at 592-95.

\(^{215}\) See id. at 597.

\(^{216}\) Id. at 594.

\(^{217}\) Id. at 597.

or other independent contractor. Corporate liability is premised on the independent duty a hospital owes a patient to provide competent medical care.

The jurisdictions that apply corporate liability recognize that hospitals do control areas such as granting of staff privileges, enforcement of hospital procedures, and review of medical procedures. While the doctrine of corporate liability may appear to apply to a broader range of cases than the doctrine of apparent authority, its application is limited by the requirement that the hospital either know or have reason to know of the contractor's incompetence.

6. Conclusion

The adoption of the doctrine of apparent authority was a positive and needed step. The doctrine is more compatible with the needs and expectations of a hospital patient than is an unbending rule of nonliability. Additionally, in *Williams* the court may have indicated a willingness to consider corporate liability in the proper factual situation. The court noted that a hospital does owe a duty to exercise appropriate care for a patient's well-being. This duty could be extended to require appropriate care in hiring and supervision of medical personnel. The court did hold that a hospital may breach a duty to a patient by failing to enforce its own rules and regulations, but specifically noted that the issue in the case was "not the duty to supervise or review the medical treatment given [the patient]." Apparently the adoption or rejection of corporate liability must await a ripe factual situation.

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221 Note, *supra* note 219, at 317.

222 See *id.* at 320-21.


224 See *id.* at 594-95.

225 *Id.* at 594.
B. Compensation for Future Mental Suffering

In *Davis v. Graviss*, the Supreme Court of Kentucky dealt with the issue of whether a plaintiff could recover for "future harm and for mental suffering and impairment of earning power resulting from the fear caused by the increased risk of future harm."  

Sandra Davis Litten was injured in an auto collision. She suffered various injuries, including a basilar skull fracture which was termed "potentially devastating." One physician had advised her to have corrective surgery. A second physician had cautioned that the surgery was too perilous to attempt. At trial, Litten's experts testified she would probably experience episodes "of cerebral spinal fluid leakage . . . [and possibly] meningitis, brain abscess or other neurological problems."

The trial court awarded Litten $390,000.00 for present and future mental and physical suffering and for permanent impairment of earning power. The court of appeals reversed, holding that a plaintiff could not be compensated for future complications that are "speculative." The Kentucky Supreme Court reversed and reinstated the trial court decision.

The Court cited existing Kentucky case law that had allowed damages where the mental suffering was not related to physical pain, where the injury was a phobic reaction of the mind, and where fear of future consequences caused a woman to

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226 672 S.W.2d 928 (Ky. 1984).
228 *See* Davis v. Graviss, 672 S.W.2d at 929.
229 *Id.*
230 *Id.*
231 *Id.* at 930.
232 *Id.* at 929-30.
233 *See id.* at 933.
234 *See id.* at 930 (citing Wilson v. Redken Laboratories, Inc., 562 S.W.2d 633 (Ky. 1978) (plaintiff suffered mental anguish from permanent damage to hair)).
235 *See 672 S.W.2d* at 930 (citing Murray v. Lawson, 441 S.W.2d 136 (Ky. 1969) (plaintiff had physically recovered from injury but suffered a disabling phobic reaction)).
undergo a therapeutic abortion.\textsuperscript{236} The Court noted: "Thus, we have previously recognized the right to substantial damages for mental suffering not directly related to physical pain. . . ."\textsuperscript{237} The Court then addressed whether "enhanced or created susceptibility" of developing a future condition or disease was compensable.\textsuperscript{238} An example would be where a blow to the head creates an increased risk of future epilepsy.\textsuperscript{239} The Court held "where there is substantial evidence of probative value to support it, the jury may consider and compensate for the increased likelihood of future complications. Where, as here, that likelihood initiates serious mental distress, this also is compensable."\textsuperscript{240}

In specifically recognizing future mental distress, the Court made what appears to be a conceptually sound decision. Mental suffering is as real to the victim as physical suffering. With the requirement of substantial evidence of probative value, plaintiffs do not receive a windfall but instead are more fully compensated for actual damages.

IV. Fireman's Rule

In \textit{Fletcher v. Illinois Central Gulf Railroad Co.}\textsuperscript{241} the Kentucky Court of Appeals held the fireman's rule\textsuperscript{242} applicable to police officers acting in the line of duty: \textsuperscript{243} "[P]olicemen, as well as firemen, must be deemed to assume all normal risks inherent in their employment."\textsuperscript{244}

\textsuperscript{236} See 672 S.W.2d at 931 (citing Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980) (physician negligently x-rayed pregnant woman, causing her to seek a therapeutic abortion out of fear of harm to fetus)).

\textsuperscript{237} 672 S.W.2d at 931.

\textsuperscript{238} See id.

\textsuperscript{239} See id. (citing McCall v. United States, 206 F. Supp. 421 (E.D. Va. 1962); Schwegel v. Goldberg, 228 A.2d 405 (Pa. 1967)).

\textsuperscript{240} 672 S.W.2d at 932.

\textsuperscript{241} 679 S.W.2d 240 (Ky. Ct. App. 1984).


\textsuperscript{243} See 679 S.W.2d at 241.

\textsuperscript{244} Id. at 243.
Kentucky adopted the fireman's rule in 1964 in *Buren v. Midwest Industries, Inc.* The Court stated:

[As] a general rule the owner or occupant [of land] is not liable for having negligently created the condition necessitating the fireman's presence (that is, the fire itself), but may be liable for failure to warn of unusual or hidden hazards, for actively negligent conduct and, in some jurisdictions, for statutory violations [creating extraordinary risks].

The fireman's rule is applied in the majority of states, regardless of whether the fireman is considered an invitee or licensee. Kentucky ignores these classifications of entrants onto land, and, instead, holds that the fireman is sui generis. However, it is the principle of assumed risk and not the classification of the fireman that mandates the rule of nonliability. An additional justification is that once the officer arrives on the scene, the landowner has very little control over the officer's actions.

A. Application in Fletcher

In *Fletcher*, the plaintiff was a state trooper called to the scene of a train derailment. Vinyl chloride fumes escaping from punctured tank cars caused Trooper Fletcher "serious...

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245 380 S.W.2d 96 (Ky. 1964).
246 Id. at 97.
247 *See* J. Dooley, *supra* note 242 at § 19.07.
248 *See*, e.g., Strong v. Seattle Stevedore Co., 466 P.2d 545, 549 (Wash. Ct. App. 1970) (fireman was an invitee under the economic benefit test).
249 *See*, e.g., Pallikan v. Mark, 322 N.E.2d 398, 399 (Ind. Ct. App. 1975) (fireman was a licensee and took all risks of the premises).
250 *See* Buren v. Midwest Indus., Inc., 380 S.W.2d at 98. Sui generis is defined as being "%[o]f its own kind or class; i.e., the only one of its own kind; peculiar." *Black's Law Dictionary* 1286 (5th ed. 1979).
251 679 S.W.2d at 242-43. Note, however, that Kentucky expressly abolished the assumption of risk defense in Parker v. Redden, 421 S.W.2d 586, 592 (Ky. 1967). KRS § 61.315 (Cum. Supp. 1984) provides that the spouse of a police officer or fireman killed in the line of duty is entitled to death benefits of $25,000.00. Two questions are raised: (1) Should all taxpayers be liable (through the use of their tax money) when a single landowner's negligence kills a fireman or police officer? (2) In light of an officer's assumedly regular pay, can the officer truly be said to have assumed the risk of death or maiming?
252 380 S.W.2d at 99.
253 *See* 679 S.W.2d at 241-42.
personal injuries." The train derailment was allegedly due to the railroad’s negligence.

In the resulting negligence action, the trial court granted the defendant railroad company’s motion for summary judgment, based on the application of the fireman’s rule. The Court of Appeals affirmed the decision and the Kentucky Supreme Court denied discretionary review.

**B. Discussion**

Although public policy is cited as the basis for the fireman’s rule, there appears to be little justification for denying recovery in the face of violation of safety statutes. Public policy would seem to urge the enforcement of safety statutes for the benefit of all persons. Anomalous results would occur where an officer and a utilities meter-reader were both injured by a landowner’s violation of safety statute. Although the officer would not have a cause of action, the utilities employee would be able to prove negligence per se and readily recover.

It is true that firemen and police officers are paid for the work they do. However, the policy behind denying these public servants recovery in the face of a landowner’s negligence, especially where a safety statute has been violated, appears suspect. The Kentucky courts or legislature should reexamine the fireman’s rule and determine if this rule of nonliability is justifiable.

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254 Id. at 242.
255 Id. at 241-42.
256 Id. at 242.
257 Id. at 241.
258 See id. at 240.
259 See Clark v. Corby, 249 N.W.2d 567, 571-72 (Wis. 1977) (land owner may be held liable for injury to fireman when injury caused by violation of safety statutes intended to protect firemen).
260 See Note, supra note 242, at 148-49.
261 Buren expressly held that a fireman could not recover on the facts of the case where a landowner had violated a safety statute. See Buren v. Midwest Indus., Inc., 380 S.W.2d at 98-99.
262 The rule in Kentucky is that a safety statute violation resulting in an injury of the type the statute was meant to prevent is negligence per se. See Blue Grass Restaurant Co. v. Franklin, 424 S.W.2d 594, 597 (Ky. 1968).