Kentucky Law Survey: Torts

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Torts

BY STEVEN CONNELLY*

INTRODUCTION

Kentucky's two appellate courts considered a wide variety of tort issues during the survey year. Four such issues provide the focus for this article. Part I examines recent developments in the application of Kentucky's injury "discovery" rule to the statute of limitations. Tort liability of an agent for acts which could render his principal liable is discussed in Part II. Part III considers the current state of municipal liability, and Part IV reanalyzes the Parker v. Redden rule of contributory negligence in light of recent decisions.

I. THE "DISCOVERY" RULE IN KENTUCKY

Statutes of limitations for personal injury actions traditionally begin to run when the cause of action accrues, i.e.,

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* J.D. 1979, University of Kentucky.

1 July 1, 1978 through June 30, 1979. Other interesting cases decided in the past year but not discussed in this article are: Holdaway Drugs, Inc. v. Braden, 582 S.W.2d 646 (Ky. 1979) (in a defamation action it is a prejudicial error not to inform the jury that a conditional privilege exists and that actual malice is necessary to overcome it); Joyce v. Downs, 573 S.W.2d 338 (Ky. 1978) (a bicyclist has the same duty as a driver of a car to keep a lookout to the rear even though a rearview mirror not required by law); City of Murray v. Commonwealth, 584 S.W.2d 403 (Ky. Ct. App. 1979) (Ky. Rev. Stat. § 150.460 (Supp. 1978) [hereinafter cited as KRS] imposes strict liability on a city for discharging raw sewage into stream); Browning v. Browning, 584 S.W.2d 406 (Ky. Ct. App. 1979) (no cause of action against a spouse who intentionally causes emotional distress of the other spouse by "openly consorting with another party"); Commonwealth v. Burger, 578 S.W.2d 897 (Ky. Ct. App. 1979) (the Board of Claims has no authority under KRS § 44.070 (Supp. 1978) to make awards based on strict liability); University of Louisville v. Martin, 574 S.W.2d 676 (Ky. Ct. App. 1978) (KRS § 273.171(2) (1970) does not permit a breach of contract action to be maintained against the University of Louisville since sovereign immunity extends to contract actions; proper remedy lies under KRS § 44.260); Rooks v. University of Louisville, 574 S.W.2d 923 (Ky. Ct. App. 1978) (KRS § 273.171(2) does not allow a negligence suit to be brought against the University of Louisville other than through the Board of Claims).

2 421 S.W.2d 556 (Ky. 1967).

3 E.g., KRS § 413.140(1)(Supp. 1978)(actions with one year limitation). "Statutes of limitation are based on the accrual of a right of action and, therefore, begin to run from the time the cause or the foundation of the right came into existence . . . ."
when the wrongful act produces injury.\textsuperscript{4} When the existence of the injury is inherently unknowable, however, a number of jurisdictions postpone the running of the statute until the plaintiff discovers the injury or should have discovered it through the use of reasonable diligence.\textsuperscript{5} Kentucky first adopted this "discovery" rule in 1970 in Tomlinson v. Siehl.\textsuperscript{6}

In April, 1979, the Kentucky Supreme Court radically revised the Tomlinson discovery rule in Louisville Trust Co. v. Johns-Manville Products Corp.\textsuperscript{7} The scope of the revised rule is unclear but the Johns-Manville Court arguably contemplated a comprehensive expansion of the Tomlinson rule.

A. \textit{The Tomlinson Rule}

The discovery rule was adopted in Kentucky in two wrongful birth cases. In Tomlinson v. Siehl,\textsuperscript{8} the Tomlinsons instituted an action against their physician for alleged negligence in performing a sterilization operation. The trial court dismissed the suit because it had been filed more than one year after the operation. The Court of Appeals reversed, overruling previous cases which had held "that causes of action such as the present one 'accrue' on the date of operation."\textsuperscript{9} The Court decreed that "the statute of limitations should not begin to run until the discovery of the cause of action."\textsuperscript{10} Applying a policy balancing analysis, the Court concluded that the possible hardship in defending a "stale" claim, such as lost evidence, faded memories, missing witnesses, or a chance of fraud, was outweighed by the certain hardship the total loss

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\textsuperscript{4} E.g., Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973) "A cause of action does not exist until the conduct causes injury that produces loss or damage." \textit{Id.} at 225.

\textsuperscript{5} According to Dean Prosser, the discovery rule is a judicial or legislative decision that a statute of limitations "will not be construed as intended to run until the plaintiff has in fact discovered that he has suffered injury, or by the exercise of reasonable diligence should have discovered it." W. PROSSER, \textit{HANDBOOK OF THE LAW OF TORTS} § 30 (4th ed. 1971).

\textsuperscript{6} 459 S.W.2d 166 (Ky. 1970).

\textsuperscript{7} 580 S.W.2d 497 (Ky. 1979).

\textsuperscript{8} 459 S.W.2d at 166.

\textsuperscript{9} \textit{Id.} at 167.

\textsuperscript{10} \textit{Id.} (emphasis added).
of a cause of action would work on the plaintiff. Thus the new discovery rule would produce less injustice.\(^{11}\)

A year later, the Court refined the *Tomlinson* rule in a second wrongful birth decision. In *Hackworth v. Hart*,\(^{12}\) the plaintiffs sued the husband’s physician, alleging negligent performance of a vasectomy. Again the issue centered on accrual of the cause of action for malpractice. Narrowing the *Tomlinson* rule, the Court held “that the statute begins to run on the date of the discovery of the injury, or from the date it should, in the exercise of ordinary care and diligence, have been discovered.”\(^{13}\)

### B. Limits on the Tomlinson Rule

By 1972 several limits had been placed on the *Tomlinson* rule. First, the Kentucky General Assembly codified the discovery rule in Kentucky Revised Statutes (KRS) § 413.140(2). The statute, while incorporating the *Tomlinson* rule that the cause of action accrues on the date the injury is discovered or in the exercise of ordinary care and diligence should have been discovered, limited the rule's scope to actions commenced “within five years from the date on which the alleged negligent act or omission is said to have occurred.”\(^{14}\) Secondly, in *Caudill v. Arnett*,\(^{15}\) the Court itself constricted the discovery rule by narrowly defining the elements of the discovery of an injury.

In *Caudill* the plaintiff, who had been injured while riding a school bus, sued the county school system more than six years after his injury. He argued that the *Tomlinson* rule controlled and that although he had suffered continuous pain since the accident in 1963, he did not discover his chronic pancreatitis until undergoing exploratory surgery in August, 1969. Since suit was filed in November, 1969, he contended

\(^{11}\) Id. at 168. See Comment, *Medical Malpractice Statute of Limitations—Adoption of the Discovery Rule*, 59 Ky. L.J. 990 (1970) for a more detailed analysis of *Tomlinson*.

\(^{12}\) 474 S.W.2d 377 (Ky. 1971).

\(^{13}\) Id. at 379 (emphasis in original).

\(^{14}\) KRS § 413.140(2) (Supp. 1978).

\(^{15}\) 481 S.W.2d 668 (Ky. 1972).
that the action was timely. The trial court disagreed, ruling that the action was barred by the statute of limitations.

The Court of Appeals affirmed, stating that the exploratory operation in 1969 did not reveal the injury, "but rather [revealed] ... the extent of a previously recognized injury." The Court determined that the cause of action accrued and the statute of limitations began to run on the day Caudill was injured because he had been aware of the injury at that time. Although he was unaware of the full extent of the injury until several years later, that impediment did not toll the statute. The Court, in dicta, added that "[t]he rule of Tomlinson is an exception to the general rule with its application being limited to malpractice cases."

C. Louisville Trust Co. v. Johns-Manville Products Corp.

The Kentucky Supreme Court's decision in Louisville Trust Co. v. Johns-Manville Products Corp. shattered the convenient pigeonhole that the Tomlinson rule had occupied since 1970. The rule was no longer limited to malpractice ac-

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16 Id. at 668-69.
17 Id. at 669.
18 Id. at 670. The Sixth Circuit, in Hall v. Musgrave, 517 F.2d 1163 (6th Cir. 1975), also narrowly construed Kentucky's discovery rule. In Hall, although the plaintiff discovered that her bladder was leaking ten days after giving birth, it was more than a year until she learned that her injury had been caused by the defendant physician's negligence rather than the natural problems of childbirth. The plaintiff brought a negligence action against her physician ten months after discovering the connection but the United States District Court for the Eastern District of Kentucky dismissed the case, ruling that the action had not been filed within the one year limitation period. The Sixth Circuit affirmed, holding that Kentucky's "discovery" rule was intended to apply only until the discovery of the harmful effects of an inherently unknowable injury and not until the discovery of a causal connection between the injury and the defendant's negligence. Since the plaintiff had learned of her problem ten days after the delivery, her action had been barred more than a year before she filed suit. 517 F.2d at 1167-68. Judge Celebrezze's dissent focused on the difference between the discovery of harm and the discovery of an injury which gives rise to a concomitant cause of action. Under Kentucky law, he argued, the statute of limitations does not begin running in malpractice actions until the plaintiff knows or should have known that a cause of action existed against the defendant. Thus "[t]he majority's test [violated] the basic principle of the discovery rule—that a plaintiff be aware of the right to bring an action before that right is taken away." 517 F.2d at 1172. See RESTATEMENT (SECOND) OF TORTS § 7, and comments (1965).
19 580 S.W.2d 497 (Ky. 1979).
tions, nor was it subject to the inference that the statute of limitations period begins to run with discovery of harmful effects and not with the discovery of a cause of action.

*Johns-Manville* concerned a wrongful death action prosecuted by the administrator of William Sampson’s estate against Johns-Manville for failure to warn Sampson adequately of known dangers associated with breathing asbestos dust. Sampson was exposed to the asbestos dust for five years while employed by the defendant. He left that position in 1967 and discovered he had lung cancer in 1971. Sampson died the following year.

The jury awarded the plaintiff $90,000. The Kentucky Court of Appeals reversed, relying on *Columbus Mining Company v. Walke* and held that the cause of action accrued on the date Sampson was last exposed. Therefore, the one year statute of limitations had run before the action was instituted. The plaintiff appealed and the Kentucky Supreme Court reversed the court of appeals.

The Supreme Court discarded the language in *Caudill* which limited the *Tomlinson* rule to malpractice actions. The Court carefully noted that the holding in *Caudill* was that the plaintiff had discovered his injury at the time of the accident and only discovered the extent of his injury later. Characterizing its statement in *Caudill* as “gratuitous, obiter dictum”, the Court stated that “the application of *Tomlinson* was irrelevant to the decision,” and overruled *Columbus Mining*, thus extending the *Tomlinson* rule to latent disease injuries arising from exposure to harmful substances. Thus in *Johns-Manville*, the action accrued when the lung cancer was discovered and not at the time of the last exposure to the dust. The Court found no compelling policy justification for distinguishing a latent disease injury from a medical malpractice injury. In both instances, because the injury was inherently unknowable, the injured plaintiff could lose his cause of action before he became aware of his right to sue.

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20 271 S.W.2d 276 (Ky. 1954).
22 580 S.W.2d at 500.
Finally, the Supreme Court rephrased the *Tomlinson* rule, and adopted the New Hampshire approach, quoting from *Raymond v. Eli Lilly & Co.*: 23

In a case, such as the one before us, in which the injury and the discovery of the causal relationship do not occur simultaneously, it is important to articulate exactly what the discovery rule means. We believe that the proper formulation of the rule and the one that will cause the least confusion is the one adopted by the majority of courts: A cause of action will not accrue under the discovery rule until the plaintiff discovers or, in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct. 24

The newly adopted rule is the same as the rule pronounced in *Tomlinson* and *Hackworth*, except that the cause of action accrues with the discovery of a causal connection between the plaintiff's injury and the defendant's conduct. 25

1. **Scope After Johns-Manville**

*Johns-Manville* invites the inference that the *Tomlinson* rule is not limited simply to medical malpractice or latent disease injuries. The Court specifically noted that the discovery rule also was applicable to fraud and workmen's compensation actions. 26 Given the Court's language and that the discovery rule clearly is applicable to these four separate causes of action, it is arguable that the scope of the *Tomlinson* rule now includes all actions where the injury and a causal connection between the injury and a defendant's conduct is inherently unknowable to the plaintiff when the tort is committed.

*Lashlee v. Sumner*, 27 a Sixth Circuit decision, provides an

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24 580 S.W.2d at 501 (emphasis in original).
25 *Cf.* Hall v. Musgrave, 517 F.2d 1163 (6th Cir. 1975) (federal rule requires some indication to plaintiff that injury resulted from malpractice before cause of action accrues) (dissenting opinion).
26 580 S.W.2d at 500 (citing Cooper, *Civil Procedure*, 66 Ky. L.J. 531, 534-35 (1978)); See KRS § 413.139(3) (1972) (fraud); KRS § 342.316(3) (1977) (workmen's compensation).
27 570 F.2d 107 (6th Cir. 1978).
example of this argument. In Sumner, an action for libel was brought against a psychologist who had interviewed the plaintiff-employee and later sent an allegedly libelous report to the plaintiff’s employer. A federal district court applying Kentucky law dismissed the action for, among other reasons, failure to comply with the applicable statute of limitations. On appeal the plaintiff argued that:

his cause of action for libel did not accrue until he learned or should have learned of its existence . . . [and that] the injury to his relationship with his employer which resulted from the report was inherently unknowable until its contents were revealed to him and that he was blamelessly ignorant of the wrong which had been inflicted.\(^2\)

The Sixth Circuit rejected the argument because of the express statement in Caudill limiting Tomlinson to malpractice actions. The court noted, however, that “[i]f the highest court of Kentucky had not limited the application of the discovery rule plaintiff’s argument might be persuasive.”\(^3\) Under the rule as framed in Johns-Manville, such a libel action might qualify for the Tomlinson treatment.

2. Limits

Although the Tomlinson rule is broad, it does have limitations. The Hackworth requirement\(^4\) that the statute of limitations will not begin to run until the plaintiff in the exercise of ordinary care and diligence should have discovered the injury is still applicable. In addition, the Johns-Manville Court did not overrule that portion of the Caudill decision holding the Tomlinson rule inapplicable to toll the running of the statute of limitations when only the extent of an injury remains undiscovered. Furthermore, there is a maximum time limit for the Tomlinson rule in medical malpractice,\(^5\) products liability,\(^6\) workmen’s compensation,\(^7\) and fraud\(^8\) actions

\(^{28}\) Id. at 109.
\(^{29}\) Id. at 110.
\(^{30}\) See text accompanying notes 12-13 supra for a more detailed discussion of the Hackworth limitation.
\(^{31}\) KRS § 413.140(2) (Supp. 1978).
\(^{32}\) KRS § 411.320(3) (Supp. 1978).
by virtue of statute.

II. AGENCY CONCEPTS IN TORT LIABILITY

During the survey year, the Kentucky Court of Appeals considered tort liability in an agency context in *Carr v. Barnett*, which presented the issue of an agent’s personal liability to a third party. In *Carr*, Carr Co., allegedly owned by Jacob Carr, contracted with Rockcastle Villa Partnership to build a housing project. C & C Contracting Company was selected as the subcontractor for the grading and drainage work on the project. During construction, as C & C needed additional fill dirt, Jacob Carr directed C & C’s foremen to remove dirt from the plaintiffs’ adjoining land.

The plaintiffs sued Jacob Carr and C & C for, among other things, the value of the fill dirt. The circuit court granted judgment against C & C and against Jacob Carr personally. On appeal, Carr argued that he should not have been personally liable since he was merely acting as an agent for Carr Co., and no judgment had been entered against it. The court of appeals rejected his argument, concluding that Jacob Carr had been aware of the boundary line marking the plaintiffs’ property, that he had not been authorized to take the fill dirt, and that the order to remove the dirt was tortious.38

The court based its decision on the *Restatement (Second) of Agency* and Kentucky precedent. The court noted

35 KRS § 342.316(3) (1977).
36 KRS § 413.130(3) (1972).
38 580 S.W.2d at 239.

The court quoted the *Restatement (Second) of Agency* § 343 (1958):

An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal, except where he is exercising a privilege of the principal, or a privilege held by him for the protection of the principal’s interest, or where the principal owes no duty or less than the normal duty of care to the person harmed.

580 S.W.2d at 239-40.

The court also noted the comments accompanying section 343 of the Restatement:

An agent who directs or permits conduct of another under such circumstances that he should realize that there is an unreasonable risk of harm to
that "an agent is personally liable for his own tortuous [sic] acts even though performed within the scope of his employment and under conditions which impose liability upon the principal also"\(^3\) and that "it has long been the law of this jurisdiction that the party harmed can look for reparation from the agent only without the necessity of proceeding against the principal."\(^3\)

Both the law and policy behind the *Carr* decision are well founded. The personal liability of an agent to a third party has long been settled.\(^4\) Few cases, however, have dealt with

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others or to their belongings is subject to liability for harm resulting from a risk which his directions or permission creates.

580 S.W.2d at 240. *See Restatement (Second) of Agency* § 343, comment b ("agent who enters the land of another . . . is not excused by the mere fact that he is acting as an agent"); *Id.* comment d ("agent who assists another agent or the principal to commit a tort is normally himself liable as a joint tortfeasor for the entire damage"); *Id.* § 344 ("agent is subject to liability, as he would be for his own personal conduct, for the consequences of another's conduct which results from his directions . . . ."); *Id.* comment a, illustration 1 ("A, foreman of a gang of track workers, directs some of the workers to obtain wood from a specified field which belongs to T. A is subject to liability to T for the trespass.").

\(^3\) 580 S.W.2d at 240 (citing Kentucky-Tennessee Light and Power Co. v. Nashville Coal Co., 37 F. Supp. 728 (W.D. Ky. 1941)).

In *Nashville Coal*, one defendant, an officer of the company, made commission payments forbidden by anti-trust laws. The defendant contended that even if a cause of action existed against the company, none existed against him personally because he was merely an agent.

The federal court rejected his argument, stating that well-settled principles of agency law allowed the agent to be held personally liable along with the principal. No Kentucky case was cited as authority, but *Waller* v. Martin, 56 Ky. (17 B. Mon.) 181 (1856) and cases from jurisdictions cited in Annot., 20 A.L.R. 97, 109 (1922) and Annot., 99 A.L.R. 408 (1935) could have been used.

In *Waller*, the officers, engineers, and laborers of a railroad were sued for trespass. The Kentucky Court held that if the company had no authority to be on the land, the officers were individually liable. The Court said that it "is a well-settled principle that an agent who does or causes the illegal act can not justify [the act] by the command or authority of another who had no right to do or authorize it." 56 Ky. at 192.

\(^2\) 580 S.W.2d at 240; *see* Pool v. Adkisson, 31 Ky. (1 Dana) 110, 112 (1833):

The injured party has a right to look for reparation to him who was actually and immediately employed in the act from which the injury resulted. He may sue either the principal or accessory, the employer or employed, the constituent or his agent; and may (generally) sue either one separately.


"When joinder is permitted, it is not compelled . . . ." *Id.*

\(^4\) *See* notes 37 and 38 *supra*, for a more complete discussion of the authorities.
the sole liability of an agent. Normally, the plaintiff sues the principal for his deep pocket. However, when a corporation is under-capitalized and the agent, often the sole shareholder, has a deep pocket, a plaintiff can prosecute an action against the agent alone.

The modern policy of proper loss allocation\textsuperscript{41} justifies the personal liability of the agent in this situation since the agent can best bear the loss and distribute the cost. In the words of the Kentucky Court in the early case of \textit{Waller v. Martin},\textsuperscript{42} "as to the remedy against the corporation may be fruitless, and against its agents or officers the only available one, it would be an inadmissible conclusion to say that . . . there is no remedy against individuals who have occasioned the injury."\textsuperscript{43}

\section{III. Municipal Liability}

Since Kentucky abrogated municipal immunity sixteen years ago in \textit{Haney v. City of Lexington},\textsuperscript{44} Kentucky's high court has searched for a proper theory to measure that liability. Two recent decisions, \textit{Grogan v. Commonwealth}\textsuperscript{45} and \textit{Brown v. City of Louisville},\textsuperscript{46} indicate that the issue has yet to be resolved.

\subsection{A. The Developing Theory}

Over the past sixteen years, the Court has fashioned three theories of municipal liability. Under the \textit{Haney} formulation, no distinction was drawn between individuals and municipal corporations. Cities were to be held liable in any instance where individuals would be liable.\textsuperscript{47} \textit{Haney} did not, however, "'broaden the government's obligation so as to make it responsible for all harms to others; it is only as to those harms

\begin{itemize}
\item See W. Prosser, \textsc{Handbook of the Law of Torts} § 69, at 459 (4th ed. 1971) for a thorough discussion of loss allocation.
\item 56 Ky. (17 B. Mon.) 181 (1856).
\item Id. at 192.
\item 386 S.W.2d 738 (Ky. 1964).
\item 577 S.W.2d 4 (Ky. 1979).
\item 585 S.W.2d 428 (Ky. Ct. App. 1979).
\item 386 S.W.2d at 742.
\end{itemize}
which are torts that governmental bodies are to be liable by reason of this decision.'

The Court in *City of Louisville v. Louisville Seed Co.* retreated from the broad liability imposed by *Haney*, holding that cities were not liable "[w]here the acts affects all members of the general public alike . . . ." Thus a city would not be held liable "for a risk which is inherently part of the carrying on of the function of government, such as its failure to provide fire protection, police protection or, as here, flood protection." Only where "the city, by its dealings or activities, seeks out or separates the individual from the general public and deals with him on an individual basis, as any other person might do . . . [or where] the negligent act of the city per chance falls upon the isolated citizen" would a municipality be subjected to the same rules as are individuals.

In *City of Russellville v. Greer*, the Court limited the *Louisville Seed Co.* "singled out" theory, reshaping it to fit tort concepts. Using traditional tort analysis, a city would be liable only if it owed a duty to the plaintiff as an individual and not as a member of the public. Because municipalities do not owe a legal duty to individual members of the public to provide fire protection, traffic regulation or perform other government functions, they would not be liable for failure to provide these services.

Eight years later, in *Frankfort Variety, Inc. v. City of Frankfort*, the Court reaffirmed its adherence to the duty

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48 Id. (quoting Holytz v. City of Milwaukee, 115 N.W.2d 618, 625 (Wis. 1962). The Court also applied the *Haney* rule in *City of Louisville v. Chapman*, 413 S.W.2d 74 (Ky. 1967), which involved a wrongful death action arising out of a collision between a police cruiser and the decedent's car. Refusing to hold the city immune from liability, the Court suggested that the city obtain liability insurance. *Id.* at 77.

49 433 S.W.2d 638 (Ky. 1968).

50 433 S.W.2d at 643.

51 *Id.*

52 *Id.* The Court also applied the *Louisville Seed* "singled out" theory of liability in *City of Lexington v. Yank*, 431 S.W.2d 892 (Ky. 1968), where the city was held liable for a police officer's excessive use of force in making an arrest, and in *Fryar v. Stovall*, 504 S.W.2d 701 (Ky. 1974), where the city was held liable for an accident resulting from a police officer's negligent directing of traffic.

53 440 S.W.2d 269 (Ky. 1969).

54 *Id.* at 271.

55 552 S.W.2d 653 (Ky. 1977).
The nonliability of a city does not rest on the doctrine of governmental immunity. As in the instance of a private individual, a city is answerable for a breach of duty. However, a city's relationship to individuals and to the public is not the same as if the city were a private individual or corporation, and its duties are not the same. When it undertakes measures for the protection of its citizens, it is not to be held to the same standards of performance. . . . If it were, it very well might hesitate to undertake them.

The following year, in *Richmond v. Louisville and Jefferson County Metropolitan Sewer District*, the court of appeals apparently retreated from the duty theory. In that case, a fourteen year old boy drowned in an allegedly defectively designed and constructed drainage culvert. In affirming a summary judgment in favor of the sewer district, the court first noted that: "[t]he law concerning municipal immunity is influx [sic], and recent opinions have not been totally consistent." The court mentioned the duty theory espoused in *Greer and Frankfort Variety*, but chose instead to apply the *Louisville Seed Co.* doctrine. Thus, because it had not singled out the boy from the general public and dealt with him on a personal basis, the sewer district was not liable for his death.

B. Recent Cases

In the aftermath of the Beverly Hills Supper Club fire the Kentucky Supreme Court again confronted the problem of municipal liability. In *Grogan v. Commonwealth* the city of Southgate was sued for alleged negligence in failure to enforce a local building code ordinance. The Supreme Court forcefully asserted that, as it had explained in *Frankfort Variety*, a city is totally different from an individual or private corporation.

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56 Id. at 655.
58 Id. at 603.
59 Id. at 604. See notes 49-52 *supra* and accompanying text for discussion of the *Louisville Seed Co.* doctrine.
60 577 S.W.2d 4 (Ky. 1979).
and should not be held to a normal duty standard for tort liability. The Court relied on Greer for authority that the failure of a city employee to perform a governmental function, such as enforcing a city ordinance, did not breach a duty owed to any individual. After emphasizing that Haney, in abolishing municipal immunity, had created no “new” torts, the Court explained that the existence of sovereign immunity had “served to prevent a normal development of common-law tort principles in the field of municipal liability . . . [and that] a ready-made suit of clothes borrowed from the law of torts as it applies to individuals and private corporations [would not fit]. They simply are not the same animals.”

Despite its willingness to embrace the “duty” approach to municipal liability, the Court based its decision on a public policy analysis since “a legal problem of this magnitude should not be resolved by the tricks of mechanical logic. The answer must find its source in conscious public policy . . . .”

The fundamental policy-viewpoint . . . since Haney v. City of Lexington . . . is that a government ought to be free to enact laws for the public protection without thereby exposing its supporting taxpayers . . . to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all.

The Court’s refusal to resolve the case by mouthing the magic words “the city has no duty” is a step in the proper direction. As Dean Prosser stated:

[T]he statement that there is or is not a duty begs the essential question—whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct. It is therefore not surprising to find that the problem of duty is as broad as the whole law of negligence, and that no universal test for it ever has been formulated. It is a shorthand statement of a conclusion, rather than an aid to analysis in itself . . . . But it should be recognized that “duty” is not sacrosanct in itself, but only an expression of the sum total

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61 Id. at 5.
62 Id. at 6.
63 Id.
of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.\textsuperscript{64}

Such an approach, however, would necessitate frequent decisions by the Kentucky Supreme Court since new questions of policy cannot be determined conclusively by the lower courts.

The most recent appellate court excursion into municipal liability was \textit{Brown v. City of Louisville}.\textsuperscript{65} In \textit{Brown}, the city was sued for negligence when its police set fire to a tavern while using tear gas to flush out a gunman who was barricaded in the tavern. The majority of the court used the \textit{Louisville Seed Co.} "singled out" theory to determine whether the city owed the tavern owner a duty to protect his property on a personal basis. Since the police officer's actions in attempting to subdue the gunman affected the general public and not simply the tavern owner, the city as a matter of law was not liable for the damages to the tavern.\textsuperscript{66} In his dissent, Judge Wilhoit advocated a nonfeasance/misfeasance test. Under this theory the "singled out" theory would apply only where the harm was caused by the city's failure to act. When the city was actively negligent, as Judge Wilhoit argued was the case in \textit{Brown}, the city would be liable as would an individual under the \textit{Haney} theory.\textsuperscript{67}

Given the Supreme Court's strong adherence to the duty theory in \textit{Frankfort Variety} and \textit{Grogan}, one may question the court of appeals' failure to apply the theory in \textit{Brown} and \textit{Richmond}. Possibly the court believed that the duty theory did not provide a sufficiently precise standard with which to evaluate municipal liability. The \textit{Louisville Seed Co.} "singled out" theory has the advantage of providing a factual standard against which liability can be measured. In light of \textit{Grogan} and \textit{Frankfort Variety}, however, it seems clear that the Supreme Court will not hold a municipality, even in a misfeasance case, to the private individual or corporation standard.

At the present time, the state of municipal liability is "in


\textsuperscript{65} 585 S.W.2d 428 (Ky. Ct. App. 1979).

\textsuperscript{66} Id. at 430.

\textsuperscript{67} Id. at 430-31. (Wilhoit, J., dissenting).
When the Supreme Court stated in *Grogan* that sovereign immunity had prevented the normal development of the common law in this area, it signaled that such development would continue. In future years, or until the General Assembly acts to clarify the area, changes will continue to evolve in a case-by-case manner.

IV. The *Parker v. Redden* Rule of Contributory Negligence

In 1967, *Parker v. Redden* split the defense of assumption of the risk into two parts, which were labelled "pure" and "qualified." The Court abolished the pure form as a defense and incorporated the qualified form into an enlarged doctrine of contributory negligence. In two recent cases,*9* the Kentucky Court of Appeals expanded the application of the *Parker* rule and attempted to reanalyze it in an effort to eliminate the confusion encountered in its application. This section will reexamine the *Parker* rule and explore its recent judicial transformation.

A. Parker v. Redden

*Parker* evolved from a three-car collision. After Redden had stopped his car to assist Melton with a flat tire, a third car, owned by Parker, rammed Melton’s vehicle, driving it into Redden’s car and injuring Redden when he was caught between his car and Melton’s car. One issue before the Court was whether Redden had assumed the risk of injury when he stopped to help Melton fix the flat and saw that she was not attempting to "flag" on-coming traffic.*70*

The Court analyzed assumption of the risk, concluding that the doctrine consisted of two parts, pure and qualified.*71* Pure assumption of the risk operated to bar “recovery by the plaintiff who, aware of a risk already created by the negli-

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*68 421 S.W.2d 586 (Ky. 1967).*  
*70 421 S.W.2d at 588-90.*  
*71 421 S.W.2d at 591. See W. Prosser, Handbook of the Law of Torts § 67 (4th ed. 1971); Restatement (Second) of Torts §§ 466, 496A-G (1965).*
gence of the defendant, [proceeds] voluntarily to encounter it” regardless of whether his conduct was reasonable. Qualified assumption of the risk, on the other hand, bars recovery by the plaintiff only if his exposure of himself to the risk created by the defendant’s prior negligence was unreasonable.

The Court also compared qualified assumption of the risk with ordinary contributory negligence, noting that both were based on a "reasonable person" standard but that qualified assumption of the risk would bar a plaintiff in some instances where contributory negligence would not. For example, while contributory negligence would not bar a negligent plaintiff from a recovery when the defendant was grossly negligent, qualified assumption of the risk would bar recovery. After drawing these distinctions, the Court abolished pure assumption of the risk as a defense "because reasonableness of conduct should be the basic consideration in all negligence cases."

Having eliminated one half of the doctrine, the Court broadened contributory negligence by incorporating in its scope the qualified assumption of the risk doctrine. Contributory negligence in Kentucky thus became bifurcated: one half consisting of unreasonable conduct in any situation; the other of an unreasonable voluntary exposure to a known risk created by another’s negligence. The first part was purely objective; the second was subjective to the extent it depended on a plaintiff’s awareness of the risk. The barring effect of contributory negligence was also expanded. For example, it now barred recovery by a plaintiff who negligently exposed himself to a risk created by a grossly negligent defendant.

The Court, however, fearing that the abolition of pure assumption of the risk would allow "a plaintiff to recover where no concept of fault would warrant his recovery," limited the treatment of traditional assumption of the risk situations in

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72 421 S.W.2d at 591 (emphasis in original); see also Restatement (Second) of Torts § 496 (1965).
73 421 S.W.2d at 591. Cf. Restatement (Second) of Torts § 466 (1965)(contributory negligence).
74 421 S.W.2d at 592.
75 This duality is illustrated by Restatement (Second) of Torts § 466 (1965).
76 421 S.W.2d at 592.
contributory negligence contexts. Under this limitation, a plaintiff would be found contributorily negligent as a matter of law if "there was no substantial necessity or urgency for the plaintiff's subjecting himself to the risk, or if the risk was one that easily could have been eliminated before the plaintiff took action . . . ." Conversely, "if there was an urgent necessity for the plaintiff to incur the risk, such as to save a life, and if the risk could not easily have been eliminated, there is no reason why the damage suffered by the plaintiff should be borne by him rather than the defendant who negligently created the risk." This is the necessity-ease of elimination standard that will be discussed subsequently.

In applying its new rule of contributory negligence to Parker, the Court stated that Redden had a "justifiable reason" for confronting the risk since "[h]e was a Good Samaritan aiding a lady in distress . . . ." The Court concluded that Redden had not confronted unreasonably the known risk created by Melton's prior negligent acts and was not, as a matter of law, contributorily negligent. Therefore, the question of whether Redden had acted reasonably in stopping to assist Melton in fixing a flat tire on a country road at night and in confronting the risk she created by not flagging approaching cars, was a question of fact for the jury.

B. The Rule and its Application

1. Threshold Requirements

Although the Parker Court incorporated qualified assumption of the risk into contributory negligence, it did not abolish the traditional requirements for presentation of an assumption of the risk defense. Before the Parker rule can be applied, therefore, two threshold elements must exist. First, the risk confronted by the plaintiff must be created prior to the plaintiff's action. In Haert v. Stanberg, for example,

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77 Id. at 593 (emphasis added).
78 Id. (emphasis added).
79 Id.
80 Haert v. Stanberg, 479 S.W.2d 588 (Ky. 1972).
81 Id. at 590.
the Court reversed the trial court's finding that the plaintiff was contributorily negligent as a matter of law under *Parker*, where the defendant's negligence in creating the risk occurred *after* the plaintiff had begun to act. Secondly, the plaintiff must be aware of the risk before acting. For example, in *Bryant v. Conrad* the Court held that the *Parker* rule of contributory negligence would not bar the plaintiff's suit where the plaintiff was unaware that the defendant's employee had removed the "chock blocks" holding logs on a truck and was thus unaware of the risk in walking behind the truck.

The two threshold elements of the *Parker* rule serve as signposts for the trial judge, directing him toward application of the correct element of the contributory negligence duality. Where the defendant's negligence did not create a prior risk or where a plaintiff was unaware of the risk, the trial judge should evaluate the plaintiff's conduct in light of the usual reasonable person contributory negligence standard; this reasonableness will usually be a question of fact. Where, on the other hand, the defendant created a prior risk of which the plaintiff was aware, the trial judge should apply the *Parker* rule.

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82 McCormick v. Gullett, 460 S.W.2d 813 (Ky. 1970) (plaintiff did not know of the risk created by over-stacking hay on a truck); Cassidy v. Fertig, 438 S.W.2d 346 (Ky. 1969) (plaintiff was not aware that the defendant was on top of unsupported "floating wall"); Bryant v. Conrad, 420 S.W.2d 666 (Ky. 1967) (plaintiff was not aware that defendant's employee had removed "chock blocks" holding logs on truck); Adams v. Crandall, 418 S.W.2d 730 (Ky. 1967) (plaintiff was not aware that a usually docile cow was agitated by attempts to rope her).

83 420 S.W.2d 666 (Ky. 1967).

84 In two cases involving hay-hauling accidents, Roberts v. Davis, 422 S.W.2d 890 (Ky. 1967) and Gullett v. McCormick, 421 S.W.2d 352 (Ky. 1967), the Court did not seem to require that the threshold elements be present before it applied the *Parker* rule. This deviation is due, perhaps, in part to the newness of the *Parker* rule when the cases were decided. Subsequent cases have tried to harmonize *Roberts* and *Gullett* with the requirements of the *Parker* rule. In Barnett v. Hendrix, 442 S.W.2d 312 (Ky. 1969), the Court distinguished *Roberts*, noting that the plaintiff was not aware of the defendant's negligence. The Court in McCormick v. Gullett, 460 S.W.2d 813, 815 (Ky. 1970), explained the earlier *Gullett* decision, stating that the plaintiff in the case was unaware of the danger.

85 Cassidy v. Fertig, 438 S.W.2d 346 (Ky. 1969); Bryant v. Conrad, 420 S.W.2d 666 (Ky. 1967); Adams v. Crandall, 418 S.W.2d 730 (Ky. 1967).
2. The Parker Rule in Application

As explained above, the Parker rule provides that when a plaintiff voluntarily confronts a known risk created by the defendant's prior negligence, the plaintiff may recover from the defendant for an injury only if the plaintiff acted reasonably in facing that risk. Cases that have applied the rule give some indication of the operation of the necessity-ease of elimination standard. In Parker, the plaintiff was acting as a "good samaritan" when he stopped to help a lone woman fix a flat tire at night on a country road. The Court held this act was sufficiently "necessary" to not be determined unreasonable as a matter of law. In Armes v. Armes, the Court found that two women were not acting unreasonably as a matter of law when they were injured while helping to start a stalled truck on a country road, since the two were "marooned . . . miles from home on a winter night with a two month old child, with no other means at hand or easily obtainable to return them to their homes." These two cases depict a "substantial" degree of necessity.

Conversely, other cases have demonstrated a degree of necessity below that standard. In Crush v. Kaelin, the plaintiff, a carpenter by trade, was injured while working on a scaffold which he knew was constructed improperly. The Court found the plaintiff contributorily negligent as a matter of law under the Parker rule, when he failed to demonstrate a substantial necessity for proceeding in face of the risk. In Houchin v. Willow Avenue Realty Co., the Court held that the plaintiff, who had known for two weeks that a stairway light was burned out, was contributorily negligent as a matter of law when she fell down the stairway in a descent to do her laundry. The Court noted that the necessity to wash was minimal and the ease of getting a flashlight to eliminate the risk

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86 Parker v. Redden, 421 S.W.2d 586, 592-93 (Ky. 1967).
87 424 S.W.2d 137 (Ky. 1967).
88 424 S.W.2d at 140. See Restatement (Second) of Torts § 466 (1965) (example given concerns the saving of lives).
89 419 S.W.2d 142 (Ky. 1967).
90 453 S.W.2d 560 (Ky. 1970).
was obvious.\footnote{Id. at 563.}

Two recent court of appeals cases also have been instructive. In \textit{Dade Park Jockey Club v. Minton},\footnote{550 S.W.2d 188 (Ky. Ct. App. 1977).} the court held the plaintiff contributorily negligent as a matter of law when she fell on a sand-covered ramp at a race track, because having previously slipped, she knew it was slippery and could have easily used other ramps. Mere inconvenience was not a sufficient "necessity". In the second case, \textit{Fuhs v. Ryan},\footnote{571 S.W.2d 627 (Ky. Ct. App. 1978).} the plaintiff was stranded in her apartment by the ice covered stairway between her apartment and the parking lot. When ordered to report to work she chanced utilization of the stairway and fell. In a split decision, the court of appeals held that the plaintiff was not, as a matter of law, contributorily negligent since it was unclear whether the necessity prompting her to face the risk was "substantial".

The \textit{Fuhs} court's decision that contributory negligence was a question of fact when the sufficiency of the necessity to face the risk was unclear was foreshadowed by both \textit{Crush} and \textit{Houchin}. In \textit{Crush} the Court implied that proof of economic necessity might be sufficient to avoid a directed verdict on the necessity issue,\footnote{419 S.W.2d at 143.} while the \textit{Houchin} Court stated that the issue of contributory negligence should go to the trier of the fact if the existence of necessity was unclear.\footnote{453 S.W.2d at 563.}

Kentucky case law since \textit{Parker} has established a continuum for the application of \textit{Parker}'s necessity-ease of elimination standard. At one pole lies a real risk of serious physical harm; at the other lies mere inconvenience or commonplace activities. In the middle, yet to be precisely placed, is economic compulsion. Whatever the standard, the \textit{Parker} rule of contributory negligence requires a plaintiff to satisfy the necessity-ease of elimination standard to avert a summary judgment or directed verdict.\footnote{Even if the necessity-ease of elimination hurdle is surmounted by a plaintiff and a directed verdict avoided, an instruction that the reasonableness of plaintiff's conduct must be measured in light of necessity and ease of risk elimination would be}
C. Recent Developments

1. Rueff v. Investor Associates Inc.—A Misstep?

In recent decisions, the Kentucky Court of Appeals has taken the opportunity to attempt clarification of the Parker rule and to expand its application. In Rueff v. Investor Associates, Inc.\(^7\), Rueff brought an action against the owner of an apartment complex where he fell and broke his ankle while attempting to descend a stairway. The defendant asserted that the plaintiff was contributorily negligent in utilizing the stairway. The trial court granted summary judgment for the defendant.

In reversing, the court of appeals noted that the defendants had relied on Parker for the proposition that a plaintiff is contributorily negligent as a matter of law unless there is substantial necessity or urgency for confronting a known risk created by the defendant. The court disagreed and held that under Parker, necessity and urgency “are not the controlling elements in determining contributory negligence; they are merely factors to be considered in ascertaining the reasonableness of plaintiff’s conduct, which is the ultimate question.”\(^8\) Since it was unable to conclude that Rueff’s attempt to descend the stairway in the dark was, as a matter of law, unreasonable, the court held that the issue should have gone to the jury.

Although the Rueff court discussed the Parker rule, it failed to apply the rule correctly. Instead, the court merely concluded that, “unless reasonable minds could not differ,” the issue of contributory negligence was for the jury.\(^9\) There was no discussion of weighing the necessity or urgency for descending the stairway or mention of the feasibility of elimination of the risk. Were there other stairs the plaintiff could have used? Could he have gotten a flashlight? The Rueff court failed to indicate whether any such evidence had been produced.

\(^7\) 571 S.W.2d 93 (Ky. Ct. App. 1978).
\(^8\) Id. at 95.
\(^9\) Id.
The Rueff court's failure to require the plaintiff to produce evidence of the necessity to confront the risk and inability to easily eliminate it undercut a policy objective of the Parker rule. The necessity-ease of elimination standard pronounced in Parker was intended to screen out unwarranted plaintiffs by requiring the plaintiff to produce such evidence or suffer a directed verdict. Implicit in the Rueff court's failure to demand this production is the requirement that the defendant produce evidence to indicate either a lack of necessity for the plaintiff's conduct or ease of risk elimination before obtaining a directed verdict. Thus, the court undercut the policy of preventing unwarranted recovery as adopted in Parker.

2. Application of the Parker Rule in Products Liability Cases

The court of appeals, in Sharp v. McCabe Powers Body Co., recently extended the application of the Parker rule. Although the court merely utilized the necessity-ease of elimination standard mandated by Parker, the decision is significant as the first Kentucky case to apply the Parker rule of contributory negligence in a products liability context.

In Sharp, the plaintiff, an electrician for the Kentucky Department of Highways, was injured when he fell from an aerial boom which was not equipped with a safety belt. In his action against McCabe Powers Body Co., the manufacturer of

101 The court stated:
There was evidence that safety belts were not readily available for purchase and that appellant was aware of a request for one from his employer with no results. We feel reasonable minds could differ as to appellant's actions—whether to risk the danger of operating an aerial boom without a belt or perhaps risk losing his job if he failed to operate the machinery when belts were not issued by the state or used by other workers operating similar equipment.

Id. at 4.
102 This absence of precedent was noted in Wooten v. White Trucks, 514 F.2d 634 (5th Cir. 1975). There the Fifth Circuit, applying Kentucky law, assumed that Kentucky would not "discriminate as to defenses according to theories of defendant's liability . . . ." Id. at 639. The court of appeals decision in Sharp confirms the Fifth Circuit's assumption.
the boom, the plaintiff alleged negligence, strict liability for
defective design, and breach of implied warranty. McCabe
Powers contended that Sharp had been aware of the need for
a safety belt and was, therefore, contributorily negligent as a
matter of law. The trial court accepted the defendant's conten-
tions and directed a verdict for McCabe Powers. The court
of appeals reversed. In its analysis the court examined the is-
suit of reasonableness in light of the Parker rule, but refused
to find for the defendant as a matter of law. Instead, the court
ruled that the plaintiff had presented enough evidence to cre-
ate a jury question.

In discussing the plaintiff's strict liability claim for defec-
tive design, the court explained its application of the Parker
rule to the case by noting that Kentucky had adopted § 402A
of the Restatement (Second) of Torts as its standard in defec-
tive design cases and that comment n to § 402A made “the
form of contributory negligence which consists in voluntarily
and unreasonably proceeding to encounter a known danger
. . . a defense under [that] section . . . .” The Court held
“the same principles applicable” to contributory negligence
under strict liability as stated in the court's analysis of “ordi-
nary negligence.”

The application of the Parker rule was not surprising be-
cause most jurisdictions recognize some similar defense in
product liability actions. Since Kentucky has recently in-
cluded “failure to exercise ordinary care” as a defense to
product liability actions in its new products liability legisla-
tion, Sharp would seem to add the Parker rule to that de-
fense, even though the statutory language does not expressly
embrace the old assumption of the risk situation.

On February 12, 1980 the Kentucky Supreme Court re-

103 No. 76-441, slip op. at 1-3.
104 Id. at 4.
105 No. 76-441, slip op. at 5-6 (quoting RESTATEMENT (SECOND) OF TORTS § 402A, comment n (1965)).
106 Id. at 6.
versed the court of appeals decision in Sharp,\textsuperscript{109} holding that "where a product is manufactured according to plans and specifications furnished by the buyer and the alleged defect is open and obvious, the manufacturer is protected from liability for injuries occasioned by use of the product."\textsuperscript{110} In reaching its decision the Court did not consider the application of the Parker rule in products liability cases, rather it concluded that "this case is entirely different from the classic products liability case due to the added factor of design according to the buyer's specifications."\textsuperscript{111} Thus it is unclear how the Kentucky Court will apply the Parker rule in products liability cases not involving a design specification, although the Court should adopt the position taken by the court of appeals in Sharp.

\textsuperscript{109} No. 78-SC-599-DG (Ky. Feb. 12, 1980).
\textsuperscript{110} Id. at 6.
\textsuperscript{111} Id. at 5.