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Tort--Negligence--Manufacturer's Liability--Termination of Risk

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Conclusion

It seems very probable that the taxpayer had a sound basis for claiming a deduction for his loss in *Whitaker*. It is submitted, however, that there are more reasonable theories than the accelerated depreciation argument upon which he proceeded. The loss would seem to be fully deductible either as a casualty loss or as a section 117(j)[30] loss, except for the possibility, not discernible from the statement of facts in the particular case, that taxpayer may have had gains from similar involuntary conversion transactions against which he would have been required to offset the loss.

Thomas L. Jones

TORT—NEGLIGENCE-MANUFACTURER'S LIABILITY—TERMINATION OF RISK—The plaintiff, a four-year old boy, fell from a moving automobile when the door came open. The plaintiff's mother had recently purchased the automobile new from defendant dealer. The door from which the plaintiff fell was known to have a tendency to "bind" and it was often necessary to slam it several times to latch it. Two other doors had previously come open and the purchaser had taken the automobile to the dealer for repair, but on neither occasion did she mention the "bind" in the door from which the plaintiff fell. An action was brought against the manufacturer and dealer alleging that the automobile was defective and that the defendants were negligent in its manufacture and sale. Evidence proved the automobile had been constructed with a warped frame and defective locks. The jury returned a verdict for the plaintiff and from judgment entered thereon the defendants appealed on grounds that they were entitled to a directed verdict. *Held:* reversed. The purchaser, in continuing to operate the automobile daily with knowledge that the doors could not be depended upon to function properly, was negligent as a matter of law. This was an intervening cause of the accident which relieved the defendants from liability. *Ford Motor Company v. Atcher*, 310 S.W.2d 510 (Ky. 1957).

The Court of Appeals was faced with a problem of risk termination. Risk termination is the extent to which the risk of harm caused by the actor's negligence will render him liable for injuries caused thereby. Specifically, the question before the court was whether the duty owed to the plaintiff by the defendants was terminated by the negligence of the purchaser in continuing to operate the automobile with knowledge

[30] Now Int. Rev. Code of 1954, § 1231.

of defective doors.[1] In holding for the manufacturer, the court adopted what may be considered the majority view.[2] In support of its holding the court cites four products liability cases: two Kentucky decisions, *Olds Motor Works v. Shaffer*[3] and *Pullman Company v. Ward;*[4] a Tennessee case, *Ford Motor Co. v. Wagoner;*[5] and a California decision, *Stultz v. Benson.*[6]

The *Olds Motor* case restated the abandoned "general rule" that the manufacturer was liable only if he had practiced deceit and concealed a known defect. The Court allowed recovery to a plaintiff who had fallen from a defective seat, because there was no evidence that the purchaser had knowledge of the defects. But the Court emphasized, "[w]here the purchaser of an article knows that it is unsafe or dangerous, and with knowledge of this fact invites or permits a third party to use it and the third party is injured, he cannot maintain an action for tort against the maker."[7] In *Pullman Company v. Ward,*[8] the Court allowed recovery where an employee was injured when a defective weld on the brakerod of a gondola car manufactured by the defendant snapped, throwing the employee under the wheels of the car. The weld had been painted so that it could not be detected. In a dictum the court suggested that the manufacturer would not be liable if the employer had knowledge of the defect. In both cases the dicta employed was appropriate to reasoning under the "general rule" where deceit was necessary for recovery,[9] although in the *Olds Motor* case the court applied proximate cause theory as a second explanation for this limitation.[10]

The court also found support for its holding in cases from Tennessee and California. In the Tennessee case, *Ford Motor Co. v. Wagon-*

[1] Whether the purchaser was actually negligent may be seriously questioned. Obviously she did not appreciate the danger involved. It is doubtful whether the conduct of a reasonable and prudent person would have differed substantially from that of the purchaser. Assuming that the court did have reason for holding the purchaser negligent as a matter of law, it was necessary to find the means with which it could deny recovery to the innocent plaintiff. The negligence of the mother could not be imputed to the child. Allegheny Coke Co. v. Massey, 163 Ky. 792, 174 S.W. 499 (1915); State Ry. Co. v. Herlotz, 104 Ky. 400, 47 S.W. 265 (1898).

[2] See notes 12-15 infra.

[3] 145 Ky. 616, 140 S.W. 1047 (1911).

[4] 143 Ky. 727, 137 S.W. 233 (1911).

[5] 183 Tenn. 392, 192 S.W.2d 840 (1946).

[6] 6 Cal.2d 688, 59 P.2d 100 (1936).

[7] Olds Motor Works v. Shaffer, 145 Ky. 616, 621, 140 S.W. 1047, 1052. This same language was used in the principal case. See Ford Motor Co. v. Atcher, 310 S.W.2d 510, 512 (Ky. 1958).

[8] 143 Ky. 727, 137 S.W. 233 (1910).

[9] Since the purchaser had knowledge of the danger or defects concealed from him at purchase, the deceit was not the proximate cause of the injury.

[10] Olds Motor Works v. Shaffer, 145 Ky. 616, 622, 140 S.W. 1047, 1053 (1911).

er,[11] the plaintiff, owner of an automobile, was denied recovery for injuries sustained in an accident caused as a result of the hood flying open. The manufacturer had warned the original purchaser of the defect and offered to correct it, but the automobile was sold to the plaintiff uncorrected. The defendant's warning was not passed on to the plaintiff. The court held that the negligence of the original purchaser in selling the automobile without passing on the warning constituted an intervening cause which could neither have been anticipated nor foreseen, and which broke the causal connection between the original wrong and the plaintiff's injury. In *Stulz v. Benson*,[12] the California court denied recovery to an injured workman who fell from a scaffold which had been constructed with defective wood. The purchaser of the lumber knew it was defective and constructing the scaffold with such knowledge constituted an efficient cause of the injury.

The majority of cases from other jurisdictions are in line with the principal case. Recent manufacturer cases following this view have involved products of beverages,[13] poisonous insecticides,[14] poisonous cattle feed,[15] and metal gas containers.[16] Generally the explanation of these cases is similar to that of a recent federal court decision:

> One who acts negligently is not bound necessarily to anticipate that another person will be negligent after the latter has discovered the danger arising from the former's negligence. . . . When the second actor has knowledge and thereby brings about an accident, the first actor is relieved of liability because the condition created by him was merely a circumstance and not the proximate cause.[17]

Other jurisdictions following the majority view hold that any conscious intervening act will be an efficient cause relieving the negligent manufacturer from liability.[18]

Another line of products liability cases has developed a minority view more consonant with the general principles of negligence. The feature distinguishing the minority view is that where the manufacturer or supplier can foresee that one with knowledge of the danger or defects will permit others to use the defective article, the intervening

[11] 183 Tenn. 392, 192 S.W.2d 840 (1936).

[12] 6 Cal.2d 688, 59 P.2d 100 (1936).

[13] Jones v. Hartman Beverage Co., 29 Tenn. App. 265, 203 S.W.2d 166 (1946). If there intervenes a conscious agency, which might or should have averted mischief, the original wrongdoer ceases to be liable. Ibid.

[14] Walton v. Sherwin-Williams Co., 191 F.2d 277 (8th Cir. 1951) (court merely held that evidence was sufficient for the jury).

[15] Nishida v. E. I. DuPont DeNemours Co., 245 F.2d 768 (5th Cir. 1957) (court affirmed jury verdict for manufacturer).

[16] Parkinson v. California Co., 255 F.2d 265 (10th Cir. 1958) (directly in line with the Wagoner case although involves peculiar propensities of product).

[17] Nishida v. E. I. DuPont DeNemours Co. 245 F.2d 768, 773 (5th Cir. 1957).

[18] See Jones v. Hartman Beverage Co., 29 Tenn. App. 265, 203 S.W.2d 166 (1946).

act is not necessarily an efficient cause relieving the defendant of liability.[19] A Kentucky decision, *Kentucky Independent Oil v. Schnitzler*,[20] is one of the leading authorities for the rule. There the court held the supplier liable for the death of the consumer of an explosive mixture of gasoline and kerosene sold to the decendent as kerosene, even though the retailer had been warned that the container contained the mixture. The Court said, "[b]y the decided weight of authority the first will be liable if he foresaw or ought to have foreseen the commission of the second's tort . . . "[21] The Court also said that the "mere omission of a third person to interrupt the result of the defendant's act will not amount to an efficient intervening cause so as to relieve defendant from liability."[22] This line of decisions follows more closely the general principles of negligence which allow recovery for foreseeable consequences resulting from foreseeable intervening causes.[23] Recent cases supporting the minority view have involved products such as a house trailer hitch,[24] special cartridges used in shooting galleries,[25] and aircraft.[26]

Under the old "general rule," from which both views have evolved, there was a distinction between products imminently dangerous and those that were inherently dangerous.[27] The *Olds Motor* case involved a product thought to be "imminently" dangerous and therefore it was necessary to find deceit as grounds for third parties to recover. If the purchaser discovered the defect, there was no longer any concealment. The *Kentucky Independent Oil* case involved an explosive mixture, considered "inherently" dangerous and therefore recovery was permitted on the basis of negligence, without a showing of deceit. It is no longer necessary to make this distinction concerning the character of the product.[28] Under the modern rule all products liability cases are governed by the general principles of negligence.[29] Thus, the existence of two different views is merely the result of the variations and manner

[19] Warner v. Santa Catalina Island Co., 44 Cal.2d 310, 282 P.2d 12 (1955).
[20] 208 Ky. 507, 271 S.W. 570 (1925).
[21] Id. at 514, 271 S.W. at 573.
[22] Id at 517, 271 S.W. at 575.
[23] Prosser, Torts § 49, at 266 (2d ed. 1955).
[24] Kothe v. Tysdale, 233 Minn. 163, 46 N.W.2d 233 (1951).
[25] Warner v. Santa Catalina Island Co., supra note 17.
[26] Vrooman v. Beach Aircraft Corporation, 183 F.2d 479 (10th Cir. 1950).
[27] Olds Motor Works v. Shaffer, 145 Ky. 616, 140 S.W. 1047 (1911).
[28] See Annot. 164 A.L.R. 371, 372 (1946).
[29] The modern rule as found in the Restatement of Torts is "A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in the manner and for a purpose for which it is manufactured." Restatement, Torts § 395 (1934).

in which the several jurisdictions apply negligence and proximate cause theory. Ironically the minority view, having its early development in negligence, is more in accord with the majority of jurisdictions's application of negligence and proximate cause theory.

The general rules governing "proximate cause" and "risk termination" are well defined in Kentucky. One of the early decisions, *Watson v. Kentucky Indiana Bridge & R. Co.*[30] set a precedent which has been followed with but slight variation. There the court said the mere fact that the intervention was unforeseen will not relieve from liability one guilty of primary negligence; but, if it is something so unexpected or extraordinary that he could not or ought not to have anticipated it, he will not be liable.[31] The rule as stated in a recent case is, "[i]f . . . the ultimate injury is brought about by an intervening act or force so unusual as not to have been reasonably foreseeable, the intervening act is considered as the superseding cause and the original actor is not liable."[32] Thus the determining factor in deciding whether an intervening cause is efficient is whether it is reasonably foreseeable. Determination of "proximate cause" is generally a question for the jury. Only when reasonable men can reach but one logical determination of such question, may the court decide the question as a matter of law.[33] The court in our principal case may have thought that under the facts only one reasonable determination was possible; but apparently other jurisdictions applying the same general principles of negligence have found that in similar situations it is a question on which reasonable men may differ.[34]

The text authorites are not in complete agreement, but they appear to support the minority view. Professor James strongly acclaims the *Kentucky Independent Oil* case,[35] and says that the rule limiting the manufacturer's liability to a duty to warn is "a vestigial carryover from pre-*Macpherson* days when deceit was needed for recovery."[36] Dean Prosser acknowledges the rule of the principle case to be the majority law, and says it is in line with the older rules concerning manufacturer's liability.[37] However, he would qualify his opinion depending upon the

[30] 137 Ky. 619, 126 S.W. 146 (1910).
[31] Id. at 633, 126 S.W. at 151.
[32] Carr v. Kentucky Utilities Co., 301 S.W.2d 894, 899 (Ky. 1957). See Hines v. Westerfield, 254 S.W.2d 728 (Ky. 1953); Louisville & N. R.R. v. Stevens, 298 Ky. 328, 182 S.W.2d 447 (1944); Kentucky Independent Oil v. Schnitzler, 208 Ky. 507, 271 S.W. 507 (1925).
[33] State Contracting & Stone Co. v. Fulkerson, 288 S.W.2d 43 (Ky. 1956); Clardy v. Robinson, 284 S.W.2d 651 (Ky. 1955); Routzahn v. Brown Hotel, 307 Ky. 548, 211 S.W. 2d 848 (1948); Berry v. Jorris, 303 Ky. 799, 199, S.W.2d 616 (1947).
[34] See Vrooman v. Beach Aircraft Corp., 183 F.2d 479 (10th Cir. 1950).
[35] 2 Harper & James, Torts § 28.5, at 1542 (1956).
[36] Id. § 28.5, at 1544.
[37] Prosser, Torts § 84, at 504 (2d ed. 1955).

degree of danger and the risk of harm.[38] Professor Seavey takes a third view. Considering proximate cause theory as a mere legalism to indicate the presence or absence of liability,[39] he advocates the "risk theory" of negligence. Under this theory the sole question is whether the injury is within the risk,[40] meaning a foreseeable injury to a foreseeable plaintiff. If the court had applied the "risk theory" to the fact situation in the principal case, it probably would have permitted the plaintiff to recover.[41]

The rule adopted by the court in essence limits the manufacturer's liability to a duty to warn of defects, and if the purchaser or user has knowledge of these defects, the manufacturer's duty is terminated. If the court intends to use "proximate cause" in such a manner as to protect industry as a special class, it is not in line with present trends. Though knowledge of the danger or defect is an important factor in determining whether the manufacturer's negligence is the proximate cause of the injury, it should not be sufficient in itself under all situations to relieve the manufacturer from liability. Other factors also warrant the jury's consideration, such as: distance in space and time, foreseeableness of harm and intervening causes, the use to which the product is intended, the relationship of the user, the change in condition of the product since its purchase, and the utility of the product versus the burden of making it safe. The present case carries things too far, if the general law of negligence is to be applied. Under negligence principles the jury question should still be whether an unreasonable hazard is to be anticipated from use of the article, even though its dangerous condition has been drawn to the attention of the purchaser.[42]

K. Sidney Neuman

TORT—AUTOMOBILES—RECOVERY BY WIFE-PASSENGER AGAINST HUSBAND-DRIVER—Shortly after the defendant-husband picked up his wife to take her home after work one evening, a freezing rain fell and the roads became slick. At approximately 2 a.m. on a "well shaded curve" the car slid off the highway and turned over. The plaintiff-wife testified that although the roads were hazardous, her husband, over her protests, drove at the rate of 50-55 m.p.h. After her repeated requests for him to

[38] Id. § 49, at 268.
[39] Seavy, Cogitations on Torts 32 (1954).
[40] Ibid.
[41] This is clearly a foreseeable injury to a foreseeable plaintiff. Thus, the plaintiff could recover notwithstanding any possible intervening negligence of the owner of the automobile.
[42] 2 Harper & James, Torts § 28.5, at 1542 (1956).