Manufacturers' Liability in Kentucky

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NOTES AND COMMENTS

of the right to give or withhold consent to the adoption of his child. Statutes should be carefully worded to insure the right of the natural parent, with or without present custody, not to have the permanent parent-child relationship terminated by adoption by another without his consent, unless that parent's neglect of duty to the child has been flagrant.

P. Joan Skaggs

MANUFACTURERS' LIABILITY IN KENTUCKY

The law of manufacturers' liability in America has evolved a long way from the 1842 English case of Winterbottom v. Wright1 to the so-called "modern view" of the 1916 American case of MacPherson v. Buick Motor Co.2 In order to attempt to classify Kentucky's present position in such cases, a brief summary of this evolution would appear to be in order. Winterbottom v. Wright is one of the most discussed, but unfortunately oft-misunderstood cases in the law. In this case the court held that one who had contracted with a buyer to keep a mail coach in repair was not liable on the contract to a third party for injuries caused by disrepair. Certain dicta of the judges were so grossly misunderstood, however, that a "general rule" of tort evolved from the case that the original maker or seller of goods was not liable for the damages caused by his negligence in manufacture, or failure to inspect, to anyone except his immediate buyer.

As is usual, exceptions were made to the "general rule." Probably the most significant of these were summarized in the 1903 case of Huset v. J. I. Case Threshing Machine Co.3 as follows: 1) Where a manufacturer does a negligent act, imminently dangerous to human life in preparation of articles intended to preserve, destroy or effect human life he is liable to third parties injured by his negligence. 2) Where an owner invites one to come onto land and use defective instruments, he is liable for an injury caused by the defective condition of the instruments. 3) Where one sells or delivers an article which he knows to be "imminently" dangerous, because defective, without giving notice of its qualities, he is responsible to any person who suffers an injury therefrom which might have been reasonably anticipated. Later cases condensed the rule into liability for the negligent manufacture of articles "inherently" dangerous, in describing the first ex-

2217 N.Y. 882, 111 N.E. 1050 (1916).
3120 F. 865 (1903).
ception, and liability for manufacture of articles “imminently” dangerous, in describing the third exception, based on knowledge of the defect. There was much confusion as to what articles should be classified as “inherently” dangerous and what articles were merely “imminently” dangerous. Usually, such articles as poisons, food, drugs, explosives and firearms were designated “inherently”; others “imminently” dangerous.

In the case of MacPherson v. Buick Motor Co., involving a defect in the wheel of an automobile, Judge Cardozo refused to limit liability of manufacturers for negligence to cases involving such articles as deadly weapons, explosives, poisons, and other articles generally deemed to be “inherently” dangerous. In deciding the case on the basis of foreseeability of harm in the absence of care, and establishing the “modern view”, Judge Cardozo said:

Subtle distinctions are drawn by the defendant between things inherently dangerous and things imminently dangerous, but the case does not turn upon these verbal niceties. If the danger was to be expected as reasonably certain, there was a duty of vigilance, and this whether you call the danger inherent or imminent.

The first Kentucky case found involving manufacturers’ liability was the 1906 case of Heindirk v. Louisville Elevator Co. Here, the court conditioned liability for negligently injuring a third party on whether or not the article by which the party was injured was an article “imminently” dangerous. The case involved a machine consisting of a ball and socket joint on a piece of heavy machinery. In sustaining a demurrer to the petition the court laid down the rule that a manufacturer is not liable to a third party for negligence unless the article is “imminently” (“inherently”?) dangerous to human life. The court implied that for recovery to be allowed for injuries sustained by defects in ordinary articles, fraudulent concealment had to be shown. It would therefore appear that the court took the same approach presented in J. I. Case, supra and limited liability for negligence to a small class of articles which the Kentucky court called “imminently” dangerous, but which the other courts called “inherently” dangerous.

The court soon reiterated the dictum in the Heindirk case that

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1 Supra, note 2.
2 Italics throughout the article are the writer’s.
3 Supra, note 2 at —, 111 N.E. 1050, 1054-1055. Restatement Torts, section 395, codifies this rule.
4 122 Ky. 675, 92 S.W. 608 (1906).
5 It is submitted that the court confused the terms “inherently” and “imminently” dangerous as understood in the J. I. Case case.
6 Chief Justice Hobson, in quoting Judge Freeman, also used the term “intrinsically” dangerous.
fraudulent concealment had to be shown to allow recovery for injuries sustained from defects in ordinary articles. In a 1907 case,\textsuperscript{10} the court announced the rule in such cases to be that the seller is not liable unless either the article is an "imminently" ("inherently"?)\textsuperscript{11} dangerous article or the seller has knowledge of its defects, and they are such as to endanger life or property of one who has no notice of the defects. Thus, Kentucky again recognized the third "exception" of the J. I. Case case to its rule, by annexing the fraud or deceit addition. The court refused recovery in this case where a defendant sold oil as a lubricant to plaintiff and a glass tube on his stationary steam engine exploded, injuring plaintiff's eye. Plaintiff alleged the oil caused the explosion, but the court refused to classify the oil as "intrinsically" ("inherently"?) dangerous and found no deceit or scienter.

In the 1911 case, The Pullman Co. v. Ward,\textsuperscript{12} the court laid down the rule that the manufacturer is liable if he knows the article to be defective and thus "imminently"\textsuperscript{13} dangerous and fails to give notice of its dangerous qualities or conditions to any person injured therefrom whom it might reasonably be anticipated would be injured, and is in fact injured. Here we see again the appearance of the third "exception" of J. I. Case, placing liability on the manufacturer in cases involving noninherently dangerous articles for something like fraud.

In 1911, with Olds Motor Works v. Shaffer,\textsuperscript{14} the Kentucky court approached the "modern view". It is interesting to note that in deciding the 1916 case of MacPherson v. Buick Motor Co., it would appear Judge Cardozo relied somewhat on this Kentucky case.\textsuperscript{15} In the Kentucky case, recovery was granted to one injured by a defective rumble seat in an automobile. The Kentucky court held that the fact that the manufacturer may not have had actual notice of the defect does not relieve him of liability, for the defects, being apparent, constituted notice, and representations that the article was safe were said to be sufficient concealment. In this case, Judge Carroll's dictum limited "inherently" dangerous articles to poisons and drugs and clearly indicated that the manufacturer is liable for his negligence in manu-

\textsuperscript{10} Berger v. Standard Oil Co., 126 Ky. 155, 103 S.W. 245 (1907).
\textsuperscript{11} Again, it is submitted, the court has confused the terms "inherently" and "imminently" dangerous as understood in the J. I. Case case.
\textsuperscript{12} 145 Ky. 727, 137 S.W. 233 (1911).
\textsuperscript{13} Here the manufacturer concealed a defective brake rod on a railroad car with paint and the court would appear to define "imminently" dangerous as it was defined in the third "exception" of the J. I. Case case. The court apparently refused to classify a railroad car with a defective brake rod as an "inherently" dangerous article.
\textsuperscript{14} 145 Ky. 616, 140 S.W. 1047 (1911).
\textsuperscript{15} Supra, note 2.
facturing other articles even though he has no actual knowledge of the defects. It is concluded, therefore, that while the case was purportedly decided on the basis of fraud because of the duty, springing from constructive notice, to disclose defects, it actually predicated liability on negligence, and it would appear reasonable to assume that Judge Cardozo in deciding MacPherson v. Buick Motor Co. harbored this view also.

It is also noteworthy that Judge Carroll in the Olds case said that many articles were "imminently" dangerous—"in fact a great many articles, in common use, unless they are safely and properly constructed." We see then for the first time that the Kentucky court appeared to have broadened the J. I. Case third "exception", and paved the way for the "modern view" of basing liability on negligence.

The next year, 1912, in the case of Peaslee-Gaulbert Co. v. Math's Admr., the court indicated that a manufacturer who puts a defective "inherently" or "imminently" dangerous article on the market will be liable to any injured person who had no notice of the defect. The instant case involved a seller, not a manufacturer, however, and different rules were indicated for each. Kentucky then, it would appear, again anticipated the "modern view" to be laid down in the MacPherson v. Buick Motor Co. case as it had previously done in the Olds case. As the article involved was paint dryer and not an explosive per se, and hence probably not an "inherently" dangerous article, we see liability based on negligence where a mere "imminently" dangerous article is involved. Thus, it would appear, the distinction of J. I. Case is abolished here unless the court used the terms "inherently" and "imminently" as synonymous—which the writer submits they did not. It is noteworthy that Judge Carroll also decided this case, lending more credence to the contention that the terms were not confused.

Unfortunately the supposed approach to the "modern view" suffered a retrograde movement in the 1913 Stone v. Van Noy Railroad News Co. case. This was the first of Kentucky's "soft-drink bottle cases." In this case the court said that liability was imposed on manufacturers in two different classes of case: 1) For negligence in the manufacturer of "intrinsically" and "inherently" dangerous articles, and 2) For knowingly concealing or misrepresenting soundness in articles known to be unsound. The first class was said to include poisons and dangerous drugs and the court stated that it was held in the Olds case that the maker of an automobile could be held liable

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148 Ky. 265, 146 S.W. 770, 435 (1912).
153 Ky. 240, 154 S.W. 1092 (1913).
only for concealing known defects! Applying the rule to the defective bottle in this case, the court found that the bottle was not "intrinsically" or "inherently" dangerous. Further, since there was no evidence that the manufacturer knew the bottle was defective there could be no liability for concealment of defects. The court then added that there was no evidence for finding the defendant was even negligent since the evidence produced was equally consistent with no negligence so the writer must admit the case is somewhat inconclusive as to establishing any general rule.

It would appear that the court did not interpret the Olds case as the writer believes Judge Cardozo did and did not follow the "modern view" which appeared in the case. Rather, it is submitted, the court clearly returned to the old J. I. Case doctrine and its first and third "exceptions."

Continuing in retrograde, or at least making no forward movement, the 1924 case of Osheroff v. Rhodes-Burford Co.,[18] refused to recognize the principle laid down in the Olds case. Here, a porch swing broke after seven months suspension because of crystallization of its metal hook. A woman seated in the swing suffered a fractured ankle. The court's dictum indicated that the manufacturer was not liable to third person who had no contractual relations with him for negligence in construction, manufacture or sale unless the article is "inherently" or "imminently" dangerous. Although this case has been approved as an instance in which an article involves no risk of serious harm,[16] it is submitted that in fact there is such a risk involved and that the court was in reality making the old distinction between articles "inherently" and "imminently" dangerous. The court emphasized that the seven month's use possibly caused the crystallization of the hook. It is submitted that this argument is rather weak when we think of many porch swings that have swung for generations without this type of mishap.

The more recent cases are inconclusive as determinants in establishing a firm rule in Kentucky's law of manufacturers' liability. For purposes of discussion, we shall classify two of these cases as "explosives" cases.

In Kentucky Independent Oil Company v. Schnitzler, Administrator,[20] a 1925 case, a person was injured by the explosion of a mixture of gasoline and kerosene which he believed to be only kerosene and used to kindle his fire. The court allowed recovery on a negligence theory. The opinion clearly indicates that the court classified the

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18 203 Ky. 408, 262 S.W. 583 (1924).
16 PROSSER, TORTS, 679 (1941).
20 208 Ky. 507, 271 S.W. 570 (1925).
mixture as an "explosive" and decided the case squarely on the "inherently" dangerous article theory.\textsuperscript{21}

In the 1944 case of Rankin v. Harlan Retreading Co.,\textsuperscript{22} the court, by implication, seems to have extended the scope of the J. I. Case exception one. Suit was brought by one who was injured when tire re-pairing material he was using exploded. The injured party sued the vendor, not the manufacturer. The court held that a seller is not liable unless he knew the article was an explosive, and hence "inherently" dangerous, and failed to give warning of this fact. The court added, however, that a manufacturer's duty as to the giving of notice is different; that a manufacturer is required to warn of the danger whether he has actual knowledge of the explosive nature of the article or not. It is submitted that if this dictum is followed negligence in the manufacture of the article is immaterial. The highest degree of care may have been exercised in the preparation of the article, yet the manufacturer will still be liable if he fails to give notice to consumers that the article is explosive. Thus, when "inherently" dangerous articles are involved, the manufacturer has not only the duty to exercise care in preparation but also a duty to warn that the article is inherently dangerous though carefully made.

The next two "recent" cases, are so-called "soft-drink bottle cases". In the first of these, the 1926 Coca-Cola Bottling Works v. Shelton\textsuperscript{23} case, twenty-seven bottles exploded. The court followed the Olds case and placed the bottles in exception three of the J. I. Case decision—that is, the manufacturer who knows of defects which make an article "imminently" dangerous will be liable to consumers if he fails to give notice thereof. On the basis of the fact that so many bottles exploded, the court said, in effect, that the defendant \textit{must have known} of the defect, thus presuming the element of knowledge as was done in the Olds case. It is thought that this case does not indicate any new philosophy but simply represents an isolated situation where the facts were such that the Olds case could be followed.

The second, and more recent "soft-drink bottle case", Nehi Bottling Company v. Thomas,\textsuperscript{24} demonstrates that in 1930 the court had not abandoned the general rationalization of the old J. I. Case "exception" one. This case was not an "explosive" situation but one of foreign matter in the drink itself. This of course allowed an easy path to follow

\textsuperscript{21} It is interesting to note that even the vendor's "gross negligence" would not absolve the manufacturer from liability, since the manufacturer could foresee the vendor would sell the article.

\textsuperscript{22} 298 Ky. 461, 183 S.W. 2d 40 (1944).

\textsuperscript{23} 214 Ky. 118, 282 S.W. 778 (1926).

\textsuperscript{24} 236 Ky. 684, 33 S.W. 2d 701 (1930).
by basing recovery on the "inherently" dangerous classification of food as provided in the first "exception" of *J. I. Case* to the 1842 Winterbottom "rule". The case further indicated that the doctrine of *res ipsa loquitur* may apply when the manufacture of food is involved. Later "bottle" cases involved the applicability of the *res ipsa loquitur* doctrine and it is apparently assumed in all these cases that a manufacturer is liable on proof of negligence. This might indicate that the court does consider, as Prosser flatly stated, that all "soft-drink bottle cases" deal with food, whether there is foreign matter in the drink, an explosion of the bottle, or other defect. It is submitted, however, that if this be true it is a recent innovation and it would be as easy and more realistic merely to place these cases along with other manufacturing cases, allowing recovery for negligence on the basis of foreseeability of harm in the absence of care.

There are only two recent manufacturers' liability cases not involving "bottles" and "explosives"; the court treated them very differently. In 1929, in the case of *Payton's Administrator v. Childers Electric Co.*, the court presented the rule that a manufacturer of an article not "inherently" dangerous but "manifestly" dangerous because of negligent construction, is liable for injury reasonably to be anticipated. The court cited both *J. I. Case* and *MacPherson*. The court said,

> The early cases limited this exception (*J. I. Case*) to things in their nature destructive, such as poisons, explosives, and deadly weapons, but the tendency recently has been to extend this exception to include any article imminently dangerous, whether inherently so or not, and we think the exception as extended is sound in principle.

The court then held that the manufacturer of an electrically operated crane was liable for his negligence where a third party was injured thereby. Again then, the Kentucky Court upholds the "modern view," this time placing itself on a middle ground between the *MacPherson* and *Olds* cases. It is significant that constructive notice of the defect, an element thought necessary in the *Olds* case, did not receive such attention in the instant case. Although there is an indication of re-

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25. Of course it is clear that foreign matter in the drink itself is a matter concerned with food and that these cases decided on the food—"inherently" dangerous articles basis are not nearly so remote as would be a decision based on this fact in the other "soft-drink bottle cases" as discussed in this note and as commented on by Prosser, *Torts* 676-677 (1941).


27. 228 Ky. 44, 14 S.W. 2d 208 (1929).

28. Id. at 48, 14 S.W. 2d at 209.
luctance to release the antiquated J. I. Case terminology, the court clearly has at this point refused to limit liability to any set group of articles when negligence is evidenced.

Undoubtedly the most disturbing indication that Kentucky has never fully departed from the antiquated approach in manufacturers’ liability cases is the 1944 case of Davis v. Glass Coffee Brewing Co. Here, a defective handle on a glass coffee brewer broke when the brewer was being lifted from the stove. The person lifting the hot brewer was scalded. The court refused recovery because the plaintiff failed to allege the article was “imminently” dangerous. Surely the scalded arm was mute evidence that even a coffee brewer, harmless enough in itself, is such an article that if negligently made may foreseeably inflict injury. This case demonstrated a direct return to the superannuated and unrealistic approach of the J. I. Case case unless the theory could be advanced that the court refused to recognize that it was foreseeable that a coffee brewer with its scalding contents, if defectively made, might inflict injury.

In summary, it is submitted that Kentucky has developed a rule for manufacturers’ liability which is a cross between the Case rule and McPherson rule. The court has never accepted fully the view of liability that it helped pioneer and has not completely abandoned the obsolete J. I. Case view. Would it not be more realistic and practical to establish the rule in Kentucky in these cases based on the “modern view” of foreseeability of harm in the absence of care without resort to J. I. Case case terminology and without resort to fictional constructive notice in order to bring a case within the Case rule? It is believed by the writer that if this approach were adopted Kentucky would be more likely to render substantial justice in each case than it would by engaging in fruitless attempts to classify articles by inconsistent and inefficient terms. It is further submitted that if Kentucky adopted this rule it would turn to the very rule it helped initiate and on which the majority of courts in the country base liability in manufacturers’ liability cases.

HENRY V. PENNINGTON II

296 Ky. 706, 178 S.W. 2d 407 (1944).

See: Prosser, TORTS 678 (1941); Russell, Manufacturers’ Liability to the Ultimate Consumer, 21 Ky. L. J. 399, (1933). Jeanblanc, Manufacturers’ Liability to Persons Other Than Their Immediate Vendees 24 Va. L. R. 139; Harper, A TREATISE ON THE LAW OF TORTS, p. 243 (1933) and RESTATEMENT, TORTS, sec. 395. It is readily apparent that there is not a wealth of material available in Kentucky law on the subject of manufacturers’ liability. The last case found was the Davis case—decided almost a decade ago! Realizing that Kentucky is not an industrial state as such, nevertheless, it is indeed strange that such a long period has evidenced lack of these cases.