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Kentucky Law Survey: Torts

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Torts
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INTRODUCTION

This issue of the Survey includes recent decisions on false imprisonment, intentional infliction of emotional distress, and products liability. The first case, Consolidated Sales Co. v. Malone,\(^1\) held that Kentucky's shoplifter detention statute authorized a personal search of suspected shoplifters by store personnel. In the second case, Eigelbach v. Watts,\(^2\) the Kentucky Supreme Court adhered to its longstanding rule that physical impact was essential to an action for intentional infliction of emotional distress. Finally, in the third decision, McMichael v. American Red Cross,\(^3\) the Court, utilizing the Restatement's "unavoidably unsafe"\(^4\) rationale, refused to impose strict liability in tort on a noncommercial blood bank which supplied contaminated blood to a transfusion patient.

I. FALSE IMPRISONMENT

Consolidated Sales Co. v. Malone,\(^5\) was an action for false imprisonment which arose after the plaintiff's detention and search as a suspected shoplifter by employees of the Consolidated Sales Company. The trial court granted a directed verdict for the plaintiff on liability and authorized the jury to award punitive damages if it found that the action and attitude of Consolidated's employees "indicated a wanton and wilful disregard of the rights of others, including the plaintiff. . . . .\(^6\) The jury awarded Mrs. Malone $1,000 in compensatory damages and $2,500 in punitive damages. The Kentucky Supreme Court reversed. In holding that the search was reasonable, the

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\(^1\) 530 S.W.2d 680 (Ky. 1975).

\(^2\) No. 74-336 (Ky., Feb. 20, 1976) (per curiam).

\(^3\) 532 S.W.2d 7 (Ky. 1976).

\(^4\) RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as RESTATEMENT].

\(^5\) 530 S.W.2d 680 (Ky. 1975).

\(^6\) Id.
Court relied on Kentucky Revised Statutes [hereinafter cited as KRS] § 433.236(1), which declares:

A peace officer, security agent of a merchantile establishment, merchant or merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person, and that he can recover same by taking the person into custody, may, for the purpose of attempting to effect recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time.

This statute, like those of other states, was designed to protect merchants against tort liability arising out of their efforts to recover property from suspected shoplifters.

A. Common-Law Liability Rules

At common law the merchant who unlawfully detained a suspected shoplifter could be held liable for false imprisonment or false arrest. False imprisonment is the unlawful restraint of another's physical liberty by means of force or the threat of force. One who accomplishes this restraint through the improper assertion of legal authority, on the other hand, is guilty of false arrest. Many states do not distinguish between false arrest and false imprisonment, or use the terms interchangeably. In either case, the victim can recover damages for loss of time, physical discomfort or injury, emotional distress, humiliation, and injury to reputation. Nominal damages may be recovered if the plaintiff has suffered no actual damages, and

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7 See infra note 41.
8 Great Atl. & Pac. Tea Co. v. Billyps, 69 S.W.2d 5 (Ky. 1934); Gust v. Montgomery Ward & Co., 136 S.W.2d 94 (Mo. App. 1939); 32 Am. Jur. 2d False Imprisonment § 58 (1967). However, there is no false imprisonment when the plaintiff voluntarily submits to the restraint. White v. Levy Bros., 306 S.W.2d 829 (Ky. 1957). Moreover, the restraint must be total, with no reasonable means of escape available. Crew-Beggs Dry Goods Co. v. Bayle, 51 P.2d 1026 (Colo. 1935); Halliburton-Abbott Co. v. Hodge, 44 P.2d 122 (Okla. 1935).
9 See infra note 41.
11 S.H. Kress & Co. v. Powell, 180 So. 757 (Fla. 1938); Great Atl. & Pac. Tea Co. v. Smith, 136 S.W.2d 759 (Ky. 1940); W.T. Grant Co. v. Owens, 141 S.E. 860 (Va. 1928).
in aggravated cases, the jury may impose punitive damages.\textsuperscript{13}

Formerly, to avoid liability for detaining a suspected shoplifter, a merchant either had to claim defense or recapture of property, or assert that he had made a valid arrest. Defense of property was the broadest of these privileges. One in possession of real or personal property could defend it by the use of such force as reasonably appeared necessary to prevent a threatened interference with possession.\textsuperscript{14} Although a reasonable mistake as to the necessity for asserting the defense was permitted,\textsuperscript{15} the possessor could not use force to defend the property against one who had a better right to it, and a mistake as to the privilege of the intruder was no defense if the possessor resisted with force,\textsuperscript{16} except where the intruder was intentionally or negligently responsible for the mistake.\textsuperscript{17}

Defense of property was seldom appropriate when goods were displayed so that customers could freely examine them. Having voluntarily surrendered possession of an article, the merchant was forced to rely on the recovery of property privilege when the customer kept the merchandise without paying for it.\textsuperscript{18} Recovery of property was a more limited privilege than that of defending possession: the rightful owner had to be in possession; the property must have been taken either forcibly, fraudulently, or without claim of right; the rightful owner had to be entitled to immediate possession; the rightful owner had to make a request for return of the goods unless it would be useless or dangerous to do so; and the force used could not be excessive.\textsuperscript{20} In addition, the privilege was limited to situations where the owner promptly discovered the loss and made prompt and persistent efforts to recover the goods.\textsuperscript{21} In the absence of such "fresh pursuit" the owner was limited to a

\begin{enumerate}
\item Restatement § 377.
\item Smith v. Delery, 114 So. 2d 857 (La. 1959).
\item Arowlowski v. Foglio, 135 A. 397 (Conn. 1926).
\item Leach v. Francis, 41 Vt. 670 (1868).
\item Comment, Shoplifting: Protection for Merchants in Wisconsin, 57 Marq. L. Rev. 141, 142-43 (1973).
\item Restatement § 101.
\item Note, The Right of Recaption of Chattels by Force, 34 Ky. L.J. 65, 66 (1945).
\item Restatement § 103.
\end{enumerate}
remedy at law. Moreover, one who used force to recover property acted at his peril and was liable for any mistake; therefore, a merchant who detained a suspected shoplifter was not privileged if the customer had not actually taken something.

As a practical matter courts often ignored defense or recovery of property considerations and applied the rules of arrest where a merchant detained a suspect. Because there was seldom time to obtain a warrant in such cases, however, it was difficult for a merchant to make a valid arrest. In most states a private citizen could make an arrest for a felony only if the arrested person had actually committed a serious crime and could make an arrest for a misdemeanor only if the crime was committed in his presence and constituted a breach of the peace. Since most shoplifting was neither a felony nor a breach of the peace, a merchant often could not validly arrest a suspected shoplifter at all. Moreover, if the shoplifter returned the stolen merchandise, the recovery of property privilege was no longer applicable, and the merchant was liable for false arrest or false imprisonment if he continued to detain the suspect. In addition, the burden of proof was upon the merchant to show that the arrest was valid, and probable cause alone would not justify an arrest. Police officers had somewhat broader powers to arrest without a warrant, but a pri-

22 Bobb v. Bosworth, 16 Ky. 81 (1808).
24 Comment, The Protection and Recapture of Merchandise from Shoplifters, 46 Ill. L. Rev. 887, 892 (1952).
26 Id. at 26.
29 Radloff v. Nat'l Food Stores, Inc., 121 N.W.2d 865 (Wis. 1963). The Restatement § 116 defines breach of the peace as "a public offense done by violence, or one causing or likely to cause an immediate disturbance of public order." But see Branston, The Forcible Recaption of Chattels, 28 L.Q. Rev. 262 (1912).
31 Comment, supra note 23, at 35.
32 Comment, 50 N.C.L. Rev. 188, 189 (1971).
33 At common law an officer may arrest without warrant for a felony committed in his presence or when a felony has in fact been committed and he has reasonable
vate person who directed an officer to make an arrest could be held liable for false arrest if he were mistaken, even though the officer was protected. Consequently, merchants often allowed a suspected shoplifter to leave with stolen goods rather than risk a suit for false arrest or false imprisonment that might result if they attempted to recover their property.

Eventually, the courts and legislatures of many states modified the common law rules to provide greater protection for merchants in these circumstances. Collyer v. S.H. Kress Co., decided in 1936, first recognized a shopkeeper's privilege to detain a suspected shoplifter. The plaintiff in Collyer was suspected of stealing after several store employees saw him put articles in his pocket. Although he was detained by store personnel for about 20 minutes until the police arrived and arrested him, the California Supreme Court held that this detention was not false imprisonment because the store had probable cause for believing that the plaintiff had unlawfully taken its property.

The Collyer approach was later approved by the Restatement (Second) of Torts, under which the merchant may temporarily detain in order to investigate the possibility of shoplifting. The drafters of the Restatement expressed no opinion as to whether the shopkeeper's privilege would extend to detention outside the store but case law has recognized the privilege grounds to believe that it was committed by the person arrested. He may also arrest for a misdemeanor committed in his presence. Comment, Shoplifting and the Law of Arrest: A Problem in Effective Social Legislation, 19 Md. L. Rev. 28, 31 (1959).

Note, supra note 25, at 25. There is no liability, however, if one merely gives the officer the information and leaves it up to him whether to make the arrest. In addition, probable cause will prevent liability for malicious prosecution. Comment, supra note 12, at 730.

Comment, supra note 23, at 31.

54 P.2d 20 (Cal. 1936).


RESTATEMENT § 120A.

The privilege authorizes detention for investigation only; the law of arrest will apply if the merchant takes the suspect into custody for the purpose of instituting criminal proceedings against him. Comment, Survey and Analysis of Criminal and Tort Aspects of Shoplifting Statutes, 58 Mich. L. Rev. 429, 432 (1960).
in such circumstances. Typically these statutes permit merchants or their employees to detain a suspect upon probable cause for a reasonable time and in a reasonable manner, although some also allow the merchant to make an arrest if probable cause exists.

B. Probable Cause

In Malone the Court declared that Kentucky's detention statute, KRS § 433.236(1) makes probable cause a justification in the case of suspected shoplifting. This justification is in the nature of a confession and avoidance defense, which ordinarily must be pleaded and proved. Once the plaintiff shows that the detention has occurred, the burden of proof shifts to the defendant who must then prove the existence of probable cause.

Probable cause exists when there are circumstances that would lead a reasonable person to entertain an honest and strong belief that the person detained is guilty of shoplifting.
Mere suspicion is not enough, but a series of minor incidents when taken together may give rise to probable cause, as in the *Malone* case. In *Malone*, an employee of the defendant, stationed in a concealed position above the security office, observed the plaintiff in the baby department apparently carrying some items of baby clothing under her arm. Later, the same employee saw Mrs. Malone walk over to the shoe department several times to talk to her mother-in-law. During this period the baby clothing seen earlier in the plaintiff's possession disappeared. As the plaintiff was heading toward the check-out counter, the store employee made a quick inspection trip through the areas where the plaintiff had been seen to determine if she had left the articles there. Not finding them, the store employee went to the area near the check-out counter and accosted the plaintiff, who was waiting by the door while her companions went through a check-out lane.

Arguably, there was probable cause to believe that the plaintiff was guilty of shoplifting even though the defendant's employee did not actually see her conceal the baby clothes. The plaintiff's frequent trips back and forth from the baby department to the shoe department, the gradual disappearance of the baby clothing during these trips, and the failure to find any of the missing items where the plaintiff had been, taken together, provided the defendant's employee with sufficient evidence to suspect that the plaintiff was a shoplifter. Therefore, the Court's finding that probable cause might exist seems correct.

C. *Reasonableness of the Detention and Search*

A second issue in *Malone* was the reasonableness of the detention and the propriety of the search of Mrs. Malone. In most states a merchant is allowed to detain a suspected shoplifter only for a reasonable time and in a reasonable manner. This

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"Butler v. Walker Stores, Inc., 222 So. 2d 128 (Miss. 1969)."

"Comment, supra note 32, at 197."

"It is important to remember, however, that probable cause is treated as a question of law in most states and only if the facts are in dispute should it be left to the jury. See supra note 18, at 157; Comment, 3 U.C.L.A.L. Rev. 269, 270 (1956). In *Malone* the testimony of the defendant's employee apparently was not in dispute, so the Court could have held as a matter of law that the probable cause requirement was satisfied."
is generally a jury question.\textsuperscript{50}

A reasonable length of time is usually that required to conduct an investigation and perhaps to summon a supervisor with decision-making authority. Some statutes provide explicit guidelines on the length of time that a suspected shoplifter may be held.\textsuperscript{61} In Kentucky, the merchant may detain a suspect only long enough to ascertain that his property was in fact taken and to regain possession of it.\textsuperscript{52}

The detention must also be made in a reasonable manner.\textsuperscript{53} Abusive remarks or accusations are not privileged under most detention statutes.\textsuperscript{54} According to an opinion of the Attorney General, under the Kentucky statute a merchant must inform the suspect of the reason for the detention and request the return of the merchandise.\textsuperscript{55} If the suspect resists, reasonable force may be used to restrain him,\textsuperscript{56} but the statutory privilege will be lost if excessive force is used.\textsuperscript{57}

Finally, the detention must be made for an authorized purpose.\textsuperscript{58} A number of states allow the merchant to detain only for purposes of investigation,\textsuperscript{69} but others, including Kentucky, permit detention in order to recover stolen goods.\textsuperscript{60} A few allow detention only for the purpose of summoning the police,\textsuperscript{61} and

\textsuperscript{50} Delp v. Zepp's Drug & Variety Stores, 395 P.2d 137 ( Ore. 1964); Comment, supra note 12, at 738.

\textsuperscript{51} HAWAI'I REV. LAWS § 663-2 (1967); LA. C. CR. P. art. 215 (1967) (one hour); S.D.C.L. § 22-37-24 (1967) (time to summon police); WASH. STAT. ANN. § 9.01.116 (1971) (time to examine records); W. VA. CODE ANN. § 61-3A-4; WIS. STAT. ANN. § 943.50 (1971).

\textsuperscript{52} KY. ATTORNEY GENERAL'S OPINION 69-64 [hereinafter cited as OAG].

\textsuperscript{53} Comment, supra note 39, at 443-44.

\textsuperscript{54} Little Stores v. Isenberg, 172 S.W.2d 13 (Tenn. App. 1943); Annot., 29 A.L.R.3d 961 (1970).

\textsuperscript{55} OAG 69-64.

\textsuperscript{56} Collyer v. S.H. Kress Co., 54 P.2d 20 (Cal. 1936). The rule is similar to general tort doctrine regarding the use of force in the recovery of property. Comment, 24 TENN. L. REV. 1177, 1182-83 (1957).

\textsuperscript{57} Jefferson Stores Inc. v. Caudell, 228 So. 2d 99 (Fla. App. 1969); J.C. Penney Co. v. Cox, 148 So. 2d 679 (Miss. 1963); Peak v. W.T. Grant Co., 386 S.W.2d 685 (Mo. 1964); Lukas v. J.C. Penney Co., 378 P.2d 717 (Ore. 1963).

\textsuperscript{58} Comment, The Protection and Recapture of Merchandise from Shoplifters, 47 NW. U.L. REV. 82, 85 (1952).

\textsuperscript{59} Colorado, Hawaii, Illinois, Indiana, Kansas, Louisiana, Missouri, New York, Oregon, South Carolina, Utah, Washington, West Virginia, and Wyoming.

\textsuperscript{60} Alabama, Arkansas, Florida, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Tennessee, and Utah.

\textsuperscript{61} Delaware, Minnesota, South Dakota, Wisconsin.
four states place no limits on the purposes for which a suspect may be detained.\(^6\)

In *Malone*, the plaintiff was detained for about 15 minutes, a period which seems reasonable. The defendant’s employees were not rude or abusive, nor did they use excessive force. The defendant’s liability, therefore, must be based on its physical search of the plaintiff. Accompanied by a uniformed guard, the plaintiff was escorted to a small closet-like office, where her handbag was searched by a plainclothes security agent. The female employee who had observed the plaintiff earlier in the baby department, was also present. After completing this task, the man in the plain clothes left the room, and the search was continued by the female employee. During the course of this search, the plaintiff was “patted down” and eventually forced to take off all of her clothes. Since the search failed to uncover any stolen property, Mrs. Malone was then permitted to leave. The Kentucky Supreme Court stated that “we see nothing in this account to support a finding that the manner in which [the plaintiff] was treated and in which the search was conducted was unreasonable.”\(^3\)

*Malone* indicates that KRS § 433.236 authorizes not only personal searches, but also “strip searches” by store employees, at least in some cases. The statute says nothing about a personal search being authorized, but merely states that a merchant may take a suspected shoplifter “into custody and detain him in a reasonable manner . . . .”\(^8\) At least one state statute expressly prohibits personal searches,\(^5\) while a few others seem to permit them.\(^6\) Most statutes, however, are silent on the subject.

The “plain language” of the Kentucky statute provides no interpretive guidance. The word “detain” means “to restrain from proceeding” and does not carry with it the notion of a search, but the phrase “take into custody” does suggest a broader privilege than mere detention.\(^7\) Nor does a look at the

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\(^6\) Maryland, Massachusetts, Michigan, and North Carolina.

\(^5\) 530 S.W.2d 680, 683 (Ky. 1975).

\(^4\) KRS § 433.236(1) (1958).

\(^3\) Wis. STAT. ANN. § 943.50(3) (1971).

\(^2\) See, e.g., IOWA CODE ANN. § 709.22-23 (1972).

\(^1\) But see OAG 74-94, which states that detention under KRS § 433.236(1) is not considered an arrest.
statutory purpose help very much. The statute authorizes detention for the purpose of recovering stolen merchandise, an objective that could be accomplished by allowing store personnel to detain the suspect long enough to determine whether any merchandise is missing, to seek an explanation from the customer, to demand the return of the property, and perhaps to summon a police officer. On the other hand, while a personal search is seldom necessary to accomplish the statutory purpose, it is not inconsistent with this objective either.

Even if KRS § 433.236(1) does sanction a personal search under some circumstances, the strip search conducted in the Malone case was unreasonable and therefore exceeded the statutory privilege. The search, made under an implied threat of force and against the plaintiff's will, was a substantial and intentional invasion of her person. While the defendant is entitled to take reasonable measures to protect its property, the value of the goods involved here was not sufficient to justify so serious an invasion of the plaintiff's dignitary interests. At the very least the issue of reasonableness in this case should have been regarded as a jury question.48

D. Conclusion

Shoplifting is unquestionably a serious social and economic problem.69 Although shoplifting is a crime,70 the criminal process alone cannot deal with it,71 and merchants must rely on a variety of measures to deter thefts and recover their property.72 Clearly a return to the common-law rules discussed earlier would substantially impair the effectiveness of these efforts. On the other hand, the economic interests of the retail sales industry must be balanced against the rights of individu-

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48 The Kentucky Court also overturned the jury's verdict of $2,500 in punitive damages against the defendant.
49 Losses from shoplifting amount to about $5 billion annually in the United States. Shoplifting losses are equal to about 2 percent of overall sales volume for the average store, and the average value of a stolen article is about $28. 57 STORES, Oct. 11, 1975, at 25.
50 See KRS § 433.234(1) (1958).
51 The crime of shoplifting is often difficult to prove, and sometimes merchants are reluctant to prosecute because it results in poor public relations for the store. Comment, supra note 18, at 142.
52 Comment, supra note 39, at 429-30.
als mistakenly accused of shoplifting. The detention of suspected shoplifters represents a substantial, though acceptable, invasion of this right, but the authorization of personal searches under a detention statute goes too far. If individuals must be searched without their consent, it should be done by police officers under conditions where the suspect is protected by the criminal process.

We suggest, therefore, that KRS § 433.236(1) should be amended to provide that a merchant or his employee may detain a suspected shoplifter only to determine whether property has been taken by the suspect, to recover the property, or to summon the police for investigation or arrest. The legislature should limit the detention period to a maximum of 1 hour. The probable cause requirement should be retained, but the merchant's right to search should be restricted to handbags and outer garments such as overcoats. Personal searches beyond this, by private individuals without the consent of the suspect, should be specifically prohibited.

Although some increased losses from shoplifting might occur, it is doubtful, that the statutory revision suggested above would seriously harm retail merchants. Merchants might simply absorb these additional costs, but hopefully they will hire additional sales personnel, display their merchandise in a different manner, or take other measures to reduce the incidence of shoplifting. Whichever alternative is chosen, its economic costs will be spread among the consuming public. The strip search of a suspected shoplifter by store personnel is an intolerable affront to human dignity. The approach suggested above provides an acceptable level of protection for the retail merchant without imposing an unfair burden on innocent customers who are wrongfully suspected of shoplifting.

II. INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS

In Eigelbach v. Watts the Kentucky Supreme Court refused to permit the plaintiff to recover for intentional infliction of emotional distress. The defendant, Watts, engaged in a heated argument with Mrs. Eigelbach in the early part of the afternoon and threatened to return that night and kill the

72 No. 74-336 (Ky., Feb. 20, 1976) (per curiam).
plaintiff and her son. Mrs. Eigelbach was apprehensive during the remainder of the day and died that night after she had gone to bed, about 10 hours after the argument. Although Watts did not touch her, it was claimed that his threats and language severely disturbed her and contributed to her death. In a brief memorandum opinion affirming the judgment below, the Court declared that, "[t]here is no showing of any physical contact between Watts and Ada Eigelbach. In the absence of such contact, no recovery may be had for language used at any time which may have produced fright or shock or injuries resulting from such fright or shock unaccompanied by such physical contact."74

A. Development of an Independent Action for Intentional Infliction of Emotional Distress

In most states, intentional infliction of emotional distress is an independent cause of action to recover damages not only for intentionally-caused mental or psychic injuries but also for any physical harm produced as a direct consequence of such emotional disturbance. Both English and American courts generally refused to entertain such actions until the present century.75 In the words of one 19th century English jurist, "[m]ental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes

74 Id.

75 Smith, Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli, 30 VA. L. Rev. 193, 193-212 (1944). Roman law, however, under the concept of injuria gave relief against insults and abusive language. Digest 47.10.1, 47.10.15; Institutes 4.4.1. This action was based on outrage to feelings as well as loss to reputation. De Villiers, The Roman Law of Defamation, 34 L.Q. Rev. 412, 417 (1918). Influenced by Roman civil law, the English ecclesiastical courts during the middle ages punished insults as contumelia. T. Plucknett, Concise History of the Common Law 484 n.2 (5th ed. 1956). In addition, the local courts of medieval England often allowed civil as well as criminal actions for insults. Wade, Tort Liability for Abusive and Insulting Language, 4 Vand. L. Rev. 63, 64-65 (1950). Later, the action of libel as it developed in the Court of Star Chamber provided relief against insults, while the action of slander as it developed in the Court of King's Bench concerned itself with damage to reputation. Holdsworth, Defamation in the Sixteenth and Seventeenth Century, 40 L.Q. Rev. 302, 304 (1924); Ausness, Libel Per Quod in Florida, 23 U. FLA. L. Rev. 51, 53 (1970). The availability both of criminal penalties and civil damages for insult in Star Chamber proceedings was intended to discourage duels. Modern statutes in some American jurisdictions were originally designed to serve the same purpose. Miss. Code Ann. § 95-1-1 (1972); W. Va. Code Ann. § 55-7-2 (1966).
that alone." However, the courts often mitigated the harshness of this rule by allowing recovery for emotional distress under the guises of assault, battery, false imprisonment, invasion of privacy, and even trespass to land. Damages for emotional distress were characterized as "parasitic" in such cases because they were supported by the underlying "technical" tort.

In addition, the courts recognized a number of exceptions to the general rule against recovery. For example, a long line of cases held that a common carrier must provide its passengers with courteous treatment. This duty originally rested on a contractual basis, but later cases also allowed nonpassengers

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77 Erwin v. Milligan, 67 S.W.2d 592, 593 (Ark. 1934); Atlanta Hub Co. v. Jones, 171 S.E. 470, 472 (Ga. 1933); Johnson v. Hahn, 150 N.W. 6 (Iowa 1914); Kurpgeweit v. Kirby, 129 N.W. 177 (Neb. 1910).
79 Interstate Life & Accident Co. v. Brewer, 193 S.W. 458, 462 (Ga. 1937); Draper v. Baker, 21 N.W. 527, 528 (Wis. 1884).
81 Berens v. Morgan, 299 S.W. 967, 971 (Ky. 1927); Barber v. Time, Inc., 159 S.W.2d 291, 293-94 (Mo. 1942).
to recover for offensive behavior by employees of a common carrier.\textsuperscript{65} Similar liability was imposed upon innkeepers in a number of jurisdictions,\textsuperscript{66} although recovery was usually limited to hotel guests.\textsuperscript{67} On occasion, liability for gross insult was extended to telegraph companies,\textsuperscript{68} although not to retail merchants generally.\textsuperscript{69}

Some courts also awarded damages for mental distress arising from the mishandling of a dead body,\textsuperscript{70} and wrongful withholding of the body.\textsuperscript{71} Although recovery was usually predicated upon wrongful interference with a property interest in the corpse,\textsuperscript{72} the concern for the emotional well-being of the survivors seems to have been the actual basis for the tort.\textsuperscript{73}

Eventually, the exceptions swallowed up the rule as the American courts began to recognize a separate and independent cause of action for intentional infliction of emotional distress. The new tort was approved by the American Law Institute in 1947 and duly incorporated into the Restatement of Torts. The great majority of jurisdictions now allow the plaintiff to recover for intentional infliction of emotional distress and most follow the Restatement’s formulation.\textsuperscript{74} According to the Restatement, “[o]ne who by extreme and outrageous con-

\begin{footnotes}
\item St. Louis-San Francisco R.R. v. Clark, 229 P. 779 (Okla. 1924); Jones v. Atlantic Coast Line R.R., 94 S.E. 490 (S.C. 1917).
\item Wiggs v. Courshon, 355 F. Supp. 206 (S.D. Fla.), appeal dismissed, 485 F.2d 1281 (5th Cir. 1973); Milner Hotels v. Dougherty, 15 So. 2d 358 (Miss. 1943).
\item Slocum v. Food Fair Stores of Fla., 100 So. 2d 396 (Fla. 1958); Miller v. Friedman's Jewelers, Inc., 131 S.E.2d 663 (Ga. App. 1963).
\item Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033, 1064-67 (1936).
\item Kirsye v. Jernigan, 45 So. 2d 188 (Fla. 1950).
\item Gostkowski v. Roman Catholic Church of the Sacred Hearts of Jesus and Mary, 186 N.E. 798 (N.Y. 1933).
\item Alcorn v. Adams Express Co., 146 S.W. 747 (Ky. 1912); Gadbury v. Bleitz, 233 P. 299 (Wash. 1925).
\item 22 Am. Jur. 2d Dead Bodies § 4 (1965); Note, Nature of the Rights in a Dead Body, 18 Minn. L. Rev. 204 (1934).
\item Badbury v. Bleitz, 233 P. 299 (Wash. 1925); Restatement of Torts § 868 (1939).
\end{footnotes}
duct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Thus, two elements are necessary in an action for intentional infliction of emotional distress: the defendant must be guilty of extreme and outrageous conduct; and his actions must cause the plaintiff severe emotional distress. These requirements restrict the scope of the tort considerably.

Outrageous conduct involves more than a mere intent to cause emotional distress. In the words of one commentator, "[l]iability has been imposed only in cases where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Conduct of this sort is genuinely uncommon although some of the more outrageous tactics of bill collectors, insurance claims adjusters, and landlords have met the test. Abuse of authority has also given rise to liability in this area. Normally, the standard is an objective one and the conduct must be such that it would cause severe emotional distress in a person of ordinary sensibilities, but recovery has been allowed for less offensive conduct in the case of small children and weak or unusually susceptible persons where the defendant had knowledge of their condition.

Not only must the defendant's conduct be outrageous, but

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83 Restatement § 46(1).
89 Prosser, Insult and Outrage, 44 Cal. L. Rev. 40, 44 (1956).
102 Kaufman v. Abramson, 363 F.2d 865 (4th Cir. 1966).
103 Johnson v. Sampson, 208 N.W. 814 (Minn. 1926).
106 Clark v. Associated Retail Credit Men of Washington D.C., 105 F.2d 62 (D.C. Cir. 1932); Nickerson v. Hodges, 84 So. 37 (La. 1920); Continental Cas. Co. v. Garrett, 161 So. 753 (Miss. 1935).
it must also cause severe emotional distress.\textsuperscript{107} Normally, it is up to the jury to determine whether there has been the requisite degree of emotional disturbance.\textsuperscript{108} Although most states do not require that the plaintiff’s emotional distress manifest itself by physical symptoms,\textsuperscript{109} in the great majority of cases the plaintiff has suffered a physical illness of a serious character.

Applying these criteria to the \textit{Eigelbach} case, it is by no means certain that the plaintiff would have been able to recover. Looking first at the defendant’s conduct, it is debatable whether the defendant’s action met the “outrageous conduct” standard. Mere threats alone would probably not be enough, although an explicit threat to kill the plaintiff and her child at a particular time and place, if part of a pattern of harassment, might be sufficient.\textsuperscript{110}

In order to determine whether the defendant’s threat could be expected to cause severe emotional distress, it must be ascertained whether the plaintiff was likely to take the threat seriously. Apparently, she and her child were living alone and were therefore vulnerable to a physical attack. If the defendant had a history of violence, his threat to kill might have been sufficient to cause severe emotional distress. Since the plaintiff died of a heart attack, it is possible that she was weak and unusually susceptible to emotional trauma; if the defendant knew of her susceptibility, he might be held liable even though his actions would not be expected to cause serious harm if directed at an ordinary person.

Finally, there is no direct proof that the defendant’s conduct caused or contributed to the plaintiff’s heart attack, although the temporal proximity of the two events suggests a causal relationship. No doubt the cause-in-fact issue would have posed a serious problem for the plaintiff and the causal connection could only have been established by expert medical testimony.

\textsuperscript{107} Slocum v. Food Fair Stores of Fla., 100 So. 2d 396 (Fla. 1958).
\textsuperscript{109} E.g., Samms v. Eccles, 358 P.2d 344 (Utah 1961).
\textsuperscript{110} State Rubbish Collectors Ass’n v. Siliznoff, 240 P.2d 282 (Cal. 1952).
B. Recovery for Emotional Distress in Kentucky

Eigelbach is consistent with prior Kentucky decisions on this issue. Except in cases of gross insult by employees of a common carrier,\textsuperscript{111} mishandling of dead bodies,\textsuperscript{112} and negligent transmission or misdelivery of death messages,\textsuperscript{113} the Kentucky courts have refused to allow recovery for emotional distress unless accompanied by a direct, contemporaneous physical contact or injury.\textsuperscript{114} This requirement, known as the "impact rule," is almost universally rejected in America where the defendant’s conduct is intentional,\textsuperscript{115} and survives in only a few states in cases of negligently caused emotional distress.\textsuperscript{116} The rule as it is employed in Kentucky is similar to the "parasitic damages" approach discussed earlier, and over the years has produced some absurd results. For example, damages for emotional distress were allowed in \textit{Ragsdale v. Ezell},\textsuperscript{117} where the defendant kissed the plaintiff, but denied in \textit{Morgan v. High-}

\textsuperscript{111} Chesapeake & O. Ry. v. Francisco, 148 S.W. 46 (Ky. 1912); Quinn v. Louisville & N. Ry., 32 S.W. 742 (Ky. 1895). A common carrier may also be held liable for failure to prevent abuse of a customer by another passenger. Louisville & N. Ry. v. Bell, 179 S.W. 400 (Ky. 1915).

\textsuperscript{112} North East Coal Co. v. Pickelsimer, 68 S.W.2d 760 (Ky. 1934); Streipe v. Liberty Mut. Ins. Co., 47 S.W.2d 1004 (Ky. 1932); Douglas v. Stokes, 149 S.W. 849 (Ky. 1912); Alcorn v. Adams Express Co., 146 S.W. 747 (Ky. 1912).

\textsuperscript{113} Smith v. Cowdy, 244 S.W. 678 (Ky. 1922); Hockenhammer v. Lexington & E.R.R., 74 S.W. 222 (Ky. 1903); Western Union Tel. Co. v. Van Cleave, 54 S.W. 827 (Ky. 1900); Chapman v. Western Union Tel. Co., 13 S.W. 880 (Ky. 1890); Comment, 19 Ky. L.J. 259, 260 (1931).

\textsuperscript{114} Weber-Stair Co. v. Fisher, 119 S.W. 195 (Ky. 1909), seems to be the only departure from this pattern. The plaintiff in that case recovered for emotional distress caused by the defendant’s employees who wrongfully ejected him from a theater and threatened to have him arrested. \textit{But see} Capital Theatre Co. v. Compton, 54 S.W.2d 620 (Ky. 1932).


\textsuperscript{117} 49 S.W. 775 (Ky. 1899). On the other hand, recovery was denied in Reed v. Maley, 74 S.W. 1079 (Ky. 1903), where the amorous defendant made an indecent proposal to an unresponsive plaintiff.
tower's Administrator, where the defendant shot and killed himself in the plaintiff's presence, even though the plaintiff was shocked by this bloody and wholly unexpected suicide and required medical attention.

Often very slight and unrelated physical conduct has been sufficient to satisfy the impact requirement. In *Chesapeake & Ohio Ry. v. Robinett*, a train conductor committed a battery upon the plaintiff's father in her presence and the plaintiff, a young girl, was upset by the incident. Ordinarily, no recovery would be allowed in these circumstances, but during the course of the fight the defendant shoved the plaintiff's father against her. The court held that this contact, though incidental and slight, was enough to satisfy the impact requirement, and permitted the young girl to recover for the emotional distress she suffered as a result of seeing her father struck by the train conductor.

*McGee v. Vanover* provides another illustration of the capriciousness of the impact rule. In that case the two defendants beat up the plaintiff's husband while she was present. She became frightened and consequently suffered a miscarriage. During the altercation, one of the defendants, Evans, pushed the plaintiff aside in order to reach her husband, but McGee, the other defendant, did not touch her. As a result, the plaintiff was permitted to recover against Evans, but not against McGee.

C. Conclusion

In the past the courts have given a variety of reasons for refusing to allow an independent action for intentional infliction of emotional distress. Recovery has been denied because damages for psychic injury were deemed insubstantial and impossible to measure. The courts also complained that such damages were difficult to prove and expressed fears of being inundated by a flood of trivial or fraudulent claims. However,

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118 163 S.W.2d 21 (Ky. 1942).
119 152 S.W. 976 (Ky. 1913).
120 Reed v. Ford, 112 S.W. 600 (Ky. 1908).
121 147 S.W. 742 (Ky. 1912).
122 Reed v. Maley, 74 S.W. 1079, 1080 (Ky. 1903). This language is taken almost verbatim from Wadsworth v. Western Union Tel. Co., 8 S.W. 574, 582-83 (Tenn. 1888).
in our opinion none of these contentions is serious enough to justify Kentucky's continuing refusal to provide a remedy for the victims of intentionally-caused mental distress.

There is no longer any doubt that damages from severe emotional disturbances are real and not merely "metaphysical" and insubstantial. The science of psychiatry recognizes that such emotional or mental conditions as anxiety and depression have objective characteristics and can be treated by means of psychotherapeutic methods. In addition, emotional trauma may also produce physical consequences such as gastrointestinal and cardiovascular symptoms, genitourinary problems, along with headaches, backaches, and a variety of other lesser ailments. These injuries are clearly no less substantial when induced by psychic stimuli than when they are caused by physical contact.

"Nonphysical" damages caused by emotional distress are admittedly difficult to measure; however, problems of this sort have not deterred Kentucky courts from allowing plaintiffs to recover for such damages in cases involving common carriers, telegraph companies, or the mishandling of dead bodies. Courts have also overcome such difficulties in numerous assault and battery and false imprisonment cases where psychic harm was the primary element of damage. In addition, as mentioned earlier, mental distress cases often involve physical as well as emotional injuries. It is hard to see that the difficulty of measurement rationale has any validity at all when the intentional infliction of emotional distress causes physical harm. In Eigelbach, for example, the jury would not have been required to measure a purely psychic injury. Since the plaintiff allegedly died as the result of defendant's tortious conduct, damages would be measured according to the provisions of the state wrongful death statute.

Emotional distress cases unquestionably present more difficult causation problems than other types of personal injury

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litigation, but these difficulties should not induce the courts to deny recovery across the board. After all, the burden of proof is on the plaintiff, and in most instances he will be required to establish causation by means of expert medical testimony. Perhaps this is why no proliferation of fraudulent claims has materialized in those states which have permitted actions for intentional infliction of emotional distress.

Furthermore, even if a case could be made for limiting recovery for intentional infliction of emotional distress, the impact requirement in Kentucky can no longer be justified. At one time medical scholars apparently believed that all mental and emotional ills were traceable to physical problems, and the impact rule was a reflection of this thinking. With the advent of Freudian psychology the older theory was abandoned and consequently there is no longer any scientific justification for the impact requirement.

The impact requirement is also unsound from a policy perspective. It is a mechanical approach to the liability issue, which concentrates on the presence or absence of physical contact and for the most part ignores both the character of the defendant's conduct and the nature of the plaintiff's injuries. This approach often leads to absurd and unjust results. The time has come for Kentucky to reject the impact test. As one commentator remarked, "If 'impact' is no criterion for distinguishing good from bad claims it requires but little courage to renounce it as a fit test of liability."

The Kentucky Supreme Court should have adopted the language of the Restatement of Torts and recognized an independent action for intentional infliction of emotional distress. The Restatement's requirement of "outrageous conduct" and "severe emotional distress," along with its use of a "person of


Robitscher, Mental Suffering and Traumatic Neurosis, in COMPENSATION IN PSYCHIATRIC DISABILITY AND REHABILITATION 218, 220-223 (J. Leedy, ed. 1971).

Smith, Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli, 30 VA. L. REV. 183, 301 (1944).
ordinary sensibilities” standard, insures that plaintiffs will not be allowed to recover for minor insults, rudeness, or other breaches of social decorum, and that defendants will not be held liable for bizarre and wholly unforeseeable consequences when their conduct is only mildly culpable. In short, the Restatement represents a more intelligent approach to the issue of liability for intentionally caused emotional distress than Kentucky’s impact rule.

Therefore, despite the lack of impact, the *Eigelbach* case should not have been dismissed. Since the plaintiff died, it can be assumed that her injury was not fraudulent or trivial, nor were her damages “speculative,” “metaphysical,” or impossible to determine. Based on the available facts, it cannot be said whether the defendant’s conduct was outrageous or likely to have caused severe emotional distress. Accordingly, these issues should have been left for the jury to determine, along with the question of whether there was any causal connection between the defendant’s arguably tortious conduct and the plaintiff’s undeniably substantial injury.

III. PRODUCTS LIABILITY

The plaintiff in *McMichael v. American Red Cross*\(^3\) contracted serum hepatitis from transfusions of whole blood and plasma supplied by the American Red Cross and brought suit under alternative theories of breach of implied warranty and strict liability in tort. Holding that a sale was essential to a cause of action under either theory, the lower court characterized the transaction as a service and directed a verdict for the defendant. On appeal, the Kentucky Supreme Court did not reach this issue, but instead determined that the product was unavoidable unsafe, not unmerchantable or unreasonably dangerous, and affirmed the lower court’s decision. Kentucky thus joins most other jurisdictions in refusing to impose strict liability upon hospitals or blood banks who transmit hepatitis through the transfusion of contaminated blood.\(^2\)

\(^{131}\) 532 S.W.2d 7 (Ky. 1975).

\(^{132}\) See generally Butterich & Wilson, *Serum Hepatitis—A Historical Perspective and Current Progress*, 36 U. Mich. Med. Center J. 67 (1970). Hepatitis is an inflammation of the liver and can be caused by viruses, bacteria, drugs, toxic chemicals and
A. Medical Aspects

Serum hepatitis is a disease of the liver which can cause illness, permanent disability, or even death. Approximately 30,000 Americans a year, or 1 percent of those who receive blood transfusions, become infected with serum hepatitis. Although 2 to 3 percent of the adult American population are carriers of serum hepatitis, a carrier may never show symptoms of the disease, and may pass it on to many others if he donates blood. A number of tests have been developed to detect serum hepatitis virus in the blood, including simple liver function tests, the serum immunoglobulin test, and the Aus-

other noxious agents. Infectious hepatitis and serum hepatitis are the major types of viral hepatitis. Infectious hepatitis virus, or virus A, enters the body either through the gastrointestinal tract or through parenteral introduction. (Parenteral means that the virus in introduced directly into the tissues.) Van Wormer, Transfusion Associated Hepatitis, 12 CALIF. W.L. REV. 389 (1976). Serum hepatitis virus, or virus B, enters the body only through the parenteral route. Dunn, Blood Transfusions and Serum Hepatitis, 15 CLEV.-MAR. L. REV. 497, 498 (1966).


Symptoms include tiredness, depression, severe headaches, loss of appetite, weight loss, chills, fever, acute nausea, enlarged and tender liver or spleen, as well as jaundice. Severe cases may also involve insomnia, excessive irritability, confusion, asterixis, drowsiness, convulsions, and coma. 2 R. Gray, ATTORNEY'S TEXTBOOK OF MEDICINE § 38.30-38.37 (3d ed. 1970). Treatment consists primarily of adequate rest and good diet. There is no drug which can speed the healing process, although cortisone and similar drugs sometimes give beneficial results. Holder, Serum Hepatitis, 6 LAWYERS MED. J. 79, 83 (1970).

Note, Hospital's Liability for Transfusing Serum Hepatitis, Contaminated Blood, 44 TEMP. L.Q. 575, 576 (1971). It is believed that approximately 3,000 persons annually die of the disease as a result of blood transfusions. Comment, 16 VILL. L. REV. 983, 986 (1971). Estimates of the death rate vary from 3.5 to 12 percent. Chalmers, Koff & Grady, A Note on Fatality in Serum Hepatitis, 49 GASTROENTEROLOGY 23 (1965); Weiner, Medicolegal Aspects of Blood Transfusions, 151 J.A.M.A. 1435, 1437 (1953). However, the risk associated with hepatitis rises monotonically with age, and about 20 percent of those over age of 40 who contract the disease die as a result. Kessel, Transfused Blood, Serum Hepatitis and the Coase Theorem, 17 J. LAW & ECON. 265, 268 (1974).


These include thymol turbidity tests, urine bilirubin tests and tests of elevated
Unfortunately, none of these tests is entirely satisfactory, nor can the virus be destroyed or removed from whole blood once it is drawn. Consequently, until better tests are developed, careful screening of donors is perhaps the most effective way to reduce the risk of infection.

B. Implied Warranty

The plaintiff in McMichael alleged a breach of implied warranty, arguing that the blood in question was neither merchantable, nor fit for its intended purpose. Although some of the Uniform Commercial Code's provisions apply only to merchants, the expansive definition of "merchant" found in §

serum glutamic oxalacetic transaminase activity. Garibaldi, A New Look at Hospitals' Liability for Hepatitis Contaminated Blood on Principles of Strict Tort Liability, 48 CHI. BAR REC. 204, 206 (1967). While these tests would not eliminate all carriers of serum hepatitis as blood donors, they would result in the rejection of about 40 percent of all potential donors, though only a small number of these rejects would be carriers of the serum hepatitis virus. Note, Medical Judgment v. Legal Doctrine in the Matter of Hepatitis Contaminated Blood, 49 CHI. BAR. REC. 22, 23 (1967).

Testing the level of serum immunoglobulin in the donor's blood, sometimes known as the "HIM" test, does not also eliminate large number of noncarriers as do liver function tests. Bevan, Taswell & Gleich, Serum Immunoglobulin Levels in Blood Donors Implicated in the Transmission of Hepatitis, 203 J.A.M.A. 38 (1968). However, this test apparently can only detect 50 to 60 percent of the hepatitis carriers. Trout, Blood Transfusions, 73 DICK. L. REV. 201, 219 (1969). See also Weaver, King & Brown, A Clinical Evaluation of the "HIM" Test, 49 AM. J. CLIN. PATH. 647 (1968).

It is believed that Australian antigen and serum hepatitis virus are closely related. A test for the presence of "Australian antigen" has been developed. Prince, Relation of Australian and SH Antigens, 2 THE LANCET 462 (1965). This test, known as the hepatitis-associated antigen or HAA test, when put into general use, will identify about 25 percent of the hepatitis carriers. Blumberg, Sutnich, London & Millman, Australian Antigen and Hepatitis, 283 NEW ENG. J. MED. 349 (1970).

The only blood products which can be prepared completely free of serum hepatitis virus are albumin and gamma globulin since these substances can be heated during manufacture without destroying their biologic properties. Holder, Serum Hepatitis, 6 LAWYERS MED. J. 79, 80 (1970). There are also methods available to treat plasma in order to destroy any virus present. Allen, Enerson, Barron & Skyes, Pooled Plasma with Little or No Risk of Homologous Serum Jaundice, 154 J.A.M.A. 103 (1954). Note, Liability for Serum Hepatitis in Blood Transfusions, 32 OHIO ST. L.J. 555, 585 (1971).


UNIFORM COMMERCIAL CODE § 2-314.

UNIFORM COMMERCIAL CODE § 2-315.
2-104(1) could probably include hospitals and blood banks. However, according to § 2-102, the Code's warranty provisions apply only to sales involving "transactions in goods," and do not cover service transactions. Section 2-106(1) of the UCC declares that "[a] sale [of goods] consists in the passing of title from a seller to the buyer for a price. . . ." The sale of blood from a commercial blood bank to a hospital would clearly fit this definition and thus fall within the scope of the Code's merchantability and fitness warranties. The case of the non-commercial blood bank is more difficult, although the Red Cross and other community blood banks usually charge hospitals a fee for processing the blood, a practice that would seemingly meet the literal requirements of § 2-106(1). In addition, a sale would perhaps occur when the hospital charges a patient for each unit of blood transfused, even though the transaction is billed as a service.

Nevertheless, the trial court in McMichael determined that the transaction between the blood bank and the patient was a service rather than a sale, basing its conclusion on KRS § 139.125, which states that "the procurement, processing, distribution or use of whole blood, plasma, blood products, blood derivatives and other human tissue . . . is declared not to be a sale. . . ." On appeal, the plaintiff argued that the statute dealt with the applicability of the state sales tax and had no bearing on the defendant's liability under tort or implied warranty principles. Although the Kentucky Supreme Court avoided the sale-versus-service problem by reaching its decision on other grounds, the issue nevertheless deserves some discussion here.

Until recently, most courts, relying on Perlmutter v. Beth David Hospital, denied relief by characterizing the supplying of blood to a patient as a service rather than a sale. The court

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148 Note, Hospital's Liability, supra note 135, at 581.
149 Note, Blood Transfusions and Human Transplants, supra note 145, at 530.
150 Franklin, Tort Liability for Hepatitis: An Analysis and a Proposal, 24 STAN. L. REV. 439, 441 (1972). A fee of $9.95 per unit was charged in McMichael. 533 S.W.2d at 8.
in *Perlmutter* found that the predominant aspect of the parties' relationship was the rendering of medical care and that the furnishing of blood was only an "incidental and very secondary adjunct"\(^5\) to the performance of that service and thus outside the scope of the implied warranty provisions of the state sales act. In the words of the *Perlmutter* court, "it was not for blood—or iodine or bandages—for which plaintiff bargained, but the wherewithal of the hospital facilities to provide whatever medical treatment was considered admissible."\(^6\) The court in *Perlmutter* relied on a long line of cases holding that the transfer of property was not a sale when it was merely "accessory" to a service contract.\(^5\) This reasoning is still followed in many states,\(^5\) and has been extended to blood banks in some cases.\(^5\) In addition, many states have enacted statutes like KRS § 139.125, which declare that the supplying of blood for purposes of a transfusion is a service rather than a sale.\(^5\)

Nevertheless *Perlmutter* has been criticized because the court used a technical aspect of contract law to avoid a discussion of the underlying policy considerations.\(^5\)

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\(^5\) Id. at 795.

\(^4\) Id.


\(^6\) At the present time all states except New Jersey, New York, Rhode Island, and Vermont have enacted legislation to relieve hospitals and blood banks of strict liability for the transfusion of blood contaminated with serum hepatitis virus. Of these, all but nine define the procurement, processing, and distribution of blood and blood products as a service. Comment, 3 FLA. ST. U.L. REV. 483, at 483 n.4 (1975).

\(^7\) See generally Comment, 69 HARV. L. REV. 391 (1955); Comment, 33 MISS. L.J. 253 (1962); Comment, 37 NOTRE DAME LAW. 565 (1962); Comment, 29 ST. JOHNS L. REV. 305 (1955). The sale-service distinction stems from the English Statute of Frauds

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Russell v. Community Blood Bank, Inc., decided in 1966, was the first case to depart from the Perlmutter approach. The plaintiff, in a suit against a blood bank, alleged that the blood was sold by the blood bank as a separate transaction “complete in itself and entirely apart from any services rendered” to her by the hospital. The Florida court agreed that the transaction was a sale and remarked that “[i]t seems to us a distortion to take what is, at least arguably, a sale, twist it into the shape of a service, and then employ this transformed material in erecting the framework of a major policy decision.”

The Perlmutter rationale was also rejected in Jackson v. Muhlenberg Hospital, which declared that “[t]he transfer of human blood for a consideration is a sale. So is its transfusion into the body of a patient when a charge is made for the blood.” In that case the hospital purchased the blood from a commercial blood bank for $18 per unit and charged the patient $25 per unit plus an additional $20 per unit for the transfusion.

In Hoffman v. Misericordia Hospital the Pennsylvania court reversed the lower court’s judgment for the defendant, a hospital and community blood bank. The court rejected the sales-versus-service analysis of Perlmutter and declared that it was not required to determine the case on the technical existence of a sale. The court held that the complaint stated a valid cause of action where it alleged that the hospital sold blood to the plaintiff for a consideration and that he subsequently died as a result of contracting serum hepatitis from the blood.

The Perlmutter rationale should be rejected in Kentucky insofar as the application of implied warranty liability is concerned. However, this would not necessarily settle the liabil-
ity question. While a consumer would hardly consider blood containing serum hepatitis virus either merchantable or fit for the purpose sold, several recent cases appear to hold that suppliers of contaminated blood will not be held strictly liable for breach of warranty if they can show that there was no way to detect serum hepatitis virus in the blood. Some commentators maintain that this is inappropriate in a warranty action since sellers have been held liable in nontransfusion cases for undiscoverable defects. The Kentucky Supreme Court nevertheless took this position in the McMichael case, declaring that strict liability in tort and liability for breach of warranty were "expressions of a single basic policy as to liability for defective products."

C. Strict Liability in Tort

The plaintiff in McMichael also based his action on a theory of strict liability in tort. According to section 402A of the Restatement (Second) of Torts, the seller of a product that is defective, and thereby unreasonably dangerous, will be held strictly liable to the consumer who is injured as a conse-

have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract." Uniform Commercial Code § 2-313 Comment 2. See also Greenfield, Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort, 1974 Utah L. Rev. 661.


167 Note, Hospital's Liability, supra note 135, at 578.
169 Uniform Commercial Code Commentary, supra note 151, at 952-53.
171 532 S.W.2d at 11.
quence. Blood is a "product" within the meaning of § 402A because it is intended for human consumption, and both hospitals and blood banks, whether nonprofit organizations or commercial enterprises, should be considered sellers for purposes of liability since they are part of the distributive process that transmits blood from the donor to the patient.

Section 402A requires that the product be sold "in a defective condition unreasonably dangerous to the user or consumer." Arguably, blood infected with hepatitis virus satisfies this test. However, "unavoidably unsafe" products are not treated as unreasonably dangerous and are thus outside the scope of the strict liability doctrine. Section 402A, comment k, characterizes as unavoidably unsafe those products which "in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use." The Kentucky Court based its decision in McMichael almost entirely on this concept. In the Court's words: "[W]e have concluded that under the stipulated facts of the instant case the blood in question, in respect to the presence of hepatitis virus, was unavoidably unsafe and thus was not unreasonably dangerous nor unfit."

In reaching this conclusion the Court relied on Jackson v. Muhlenberg Hospital, a 1967 New Jersey case, which denied

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174 RESTATEMENT § 402A, comment f (1965); Comment, Products Liability—Hospitals Held Strictly Liable in Tort for the Transfusion of Hepatitis Infected Blood, 2 LOY. CHI. L.J. 217, 223 (1971); Comment, 25 U. MIAMI L. REV. 349, 351-52 (1971); Comment, supra note 135, at 995-96. The Court refused to distinguish between a blood bank and a hospital in this respect, holding that strict liability would apply to anyone within the product's chain of distribution regardless of whether selling or supplying that product was the defendant's principal business. Note, Strict Liability for Disease Contracted from Blood Transfusion, 66 NW. U.L. REV. 80, 82 (1971).


177 532 S.W.2d at 11.


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recovery under both implied warranty and strict liability theories. The court assumed that serum hepatitis virus was undetectable and therefore considered the product unavoidably unsafe. The Kentucky Court also discussed Brody v. Overlook Hospital, another New Jersey case, which held that contaminated blood could be considered unavoidably unsafe and therefore not unreasonably dangerous.

McMichael, however, is contrary to Cunningham v. MacNeal Memorial Hospital, which declared that blood containing serum hepatitis virus was unreasonably dangerous to the user because of its impurity and did not fall within the unavoidably unsafe product exception. According to the Cunningham court, the mere fact that there was no reliable means to detect serum hepatitis virus in the blood was not enough to characterize the product as unavoidably unsafe:

[Whether or not defendant can, even theoretically, ascertain the existence of serum hepatitis virus in whole blood employed by it for transfusion purposes is of absolutely no moment. Any other ruling would be entirely inconsistent with the concept of strict tort liability.]

While many commentators assert that blood contaminated with serum hepatitis virus falls within the comment k exception, the Cunningham court was correct in deciding that reliance on comment k in blood transfusion cases is improper. Three elements should exist before a product is exempted

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180 266 N.E.2d 897 (Ill. 1970).
181 Comment, supra note 155, at 492-93. Cunningham also held that comment k was only applicable to products that were pure. Comment, 4 Akron L. Rev. 225, 228 (1971), but this interpretation seems to be too narrow. Comment, 69 Mich. L. Rev. 1172, 1182 (1971).
182 266 N.E.2d at 903.
183 The following agree that comment k should apply: Haut & Alter, Blood Transfusions—Strict Liability?, 43 St. Johns L. Rev. 557, 571 (1969); Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 32 Am. Trial Lawyers J. 1, 10 (1968); Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363, 367 (1965); Note, Homologous Serum Hepatitis—Products Liability in a Quandary, 10 Washburn L.J. 77, 91 (1970); Note, Liability of a Hospital for Supplying Impure Blood, 1965 Wis. L. Rev. 374, 387; Comment, supra note 181, at 1181-83; Comment, 24 Vand. L. Rev. 645, 653 (1971). The following believe that comment k should not apply: Boland, supra note 175, at 241-42; Note, supra note 144, at 216-17; Comment, 16 N.Y.L.F. 957, 966 (1970).
under comment k from § 402A's strict liability: (1) The product at the time of sale must be incapable of being made safe for its intended use; (2) the potential societal benefit must outweigh its possible harm; and (3) the product must be one that would not have been marketed (or would have been delayed in marketing) due to a fear of catastrophic damages under a strict liability theory. Although contaminated blood might meet the second of these three requirements, it does not meet the first and third.

In the first place, with the development of the Australian antigen test, it is doubtful that blood is presently incapable of being made safe for its intended use. Furthermore, even if serum hepatitis virus cannot be eliminated from blood with absolute certainty, the risk of contamination can be dramatically reduced if prospective donors are properly screened. Thus, if adequate testing and screening procedures are utilized, blood can be made reasonably, if not absolutely, safe.

Moreover, even if serum hepatitis virus cannot be detected in the blood, it is unlikely that the imposition of strict liability would seriously deter the suppliers of blood from marketing their product. Blood is not like a new drug for which it may be difficult to obtain insurance or to self-insure because the risk of loss cannot be calculated accurately, thus discouraging its development and marketing.

D. Conclusion

As the Kentucky Supreme Court pointed out last year in Embs v. Pepsi-Cola Bottling Company, the Restatement's imposition of strict liability upon the manufacturers and sellers of defective products is based on the concept of enterprise liability. According to the proponents of this principle, a product's social costs, including those associated with personal injuries, should be treated as a cost of production and placed on those in the chain of distribution instead of being left to fall

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184 Note, supra note 144 at 215-16.
185 Boland, supra note 175, at 241-42.
187 528 S.W.2d 703, 705 (Ky. 1975). See also Ausness, Kentucky Law Survey—Torts, 64 Ky. L.J. 201, 222-24 (1975).
188 RESTATEMENT § 402A, comment c (1965).
upon the victims.\textsuperscript{189} The primary justification of enterprise liability from the perspective of welfare economics is that it encourages a more efficient allocation of resources in the society.\textsuperscript{190}

Loss spreading is another justification for enterprise liability. According to this rationale, losses caused by defective products should be shifted to the manufacturer or supplier because he can best minimize their economic impact by spreading them among a large number of consumers.\textsuperscript{191} Both loss spreading and resource allocation principles support the imposition of strict liability in blood transfusion cases such as McMichael.

Let us consider the loss-spreading issue first. As was mentioned earlier, the effects of serum hepatitis can be catastrophic. In addition to its painful symptoms, the disease frequently causes substantial economic loss to its victims.\textsuperscript{192} In the McMichael case, for example, the victim sustained more than $7,000 in out-of-pocket expenses from the disease.\textsuperscript{193} Admit-


\textsuperscript{190} The enterprise liability theory assumes that the market is generally the best institutional device for allocating the resources of society. For the pricing mechanism of the market to achieve the most efficient allocation of the community's total resources, however, the market price of goods and services must reflect the full cost of making them available. Therefore failure to internalize social costs such as personal injuries caused by a product will distort consumer demand and induce society to produce more of the product than necessary. Calabresi, \textit{Some Thoughts on Risk Distribution and the Law of Torts}, 70 Yale L.J. 499, 500-06 (1961).


\textsuperscript{192} One study estimated the average loss from serum hepatitis at (1) $1875 for hospital and in-patient treatment costs; (2) $425 for home nursing; (3) $675 absence from the labor market; and (4) $250 for out-patient medical treatment. The loss to the victim or his family will average more than $20,000, however, in cases where the disease results in death or permanent disability. Kessel, \textit{Transfused Blood, supra} note 135, at 269.

\textsuperscript{193} Appellant's Brief at 8, McMichael v. American Red Cross, 532 S.W.2d 7 (Ky. 1975).
tedly, victims may shift some of these costs on a first party basis through hospitalization and disability insurance programs. Nevertheless, many "costs," such as pain and suffering, will not be spread if the victim is initially forced to bear the consequences of serum hepatitis. In most cases hospitals and blood banks are better loss-spreaders. Because the statistical risk of serum hepatitis contamination is known, the suppliers of blood should be able to obtain liability insurance (or self-insure) and adjust the cost of the product accordingly. Perhaps this will cause an increase in the cost of blood or contribute to the general rise of medical costs. However, the cost to society from serum hepatitis remains the same, and is merely shifted from a small class (victims) to a larger one (consumers). Those who receive blood transfusions as a class are better able to bear the social costs of serum hepatitis infection than the actual victims.

In addition, the imposition of strict liability in blood transfusion cases may also lead to a more efficient allocation of resources. Considerations of economic efficiency support the notion that losses caused by defective products should be placed on the cheapest cost avoider—the party who can most cheaply reduce or prevent them. In most instances the supplier, rather than the victim, will be the cheapest cost avoider. This seems to be the case with blood suppliers. Shifting

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194 Note, Liability for Serum Hepatitis in Blood Transfusions, supra note 143, at 598.
196 Comment, *supra* note 155, at 494. This is questioned, however, in Comment, 24 VAND. L. Rev. 645, 654 (1971).
197 Note, *supra* note 143, at 596.
199 Note, *supra* note 144, at 212. If, as is later suggested, imposition of strict liability on the suppliers of blood will significantly reduce the incidence of serum hepatitis infection, the total amount of costs that must be spread will also be reduced, and therefore the pro rata cost that each consumer must bear will be correspondingly reduced. For this reason, a shift to strict liability will not necessarily lead to a dramatic increase in the price of blood or in the general cost of medical services.
201 *Id.* at 76-89.
the costs of contaminated blood from the victim to the supplier would discourage unnecessary blood transfusions and would provide a financial incentive to develop a more effective method of detecting serum hepatitis virus in the blood. The strict liability approach might also lead to the creation of blood substitutes for clinical use. More importantly, the imposition of strict liability on hospitals and blood banks would have a beneficial effect on donor selection and blood collection practices. An English commentator recently compared America's system of blood collection and allocation with that of Great Britain, which relies entirely on noncommercial donors, and concluded that the commercial sector is largely responsible for the existence of the hepatitis problem in the United States.

It is well known that the rate of serum hepatitis contamination from commercial sources is about 10 times greater than that of blood from volunteer donors, a condition largely due to the poor screening methods of commercial blood banks which locate in central cities and attract drug users, alcoholics, and others with much higher hepatitis infection rates than the general population. Unquestionably, better screening of donors could substantially reduce the incidence of serum hepatitis contamination in blood and hospitals and blood banks are in a better position than victims to see that this is done. The

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264 Comment, supra note 135, at 1010; see Sloviter, Erythrocyte Substitutes, 54 MED. CLIN. N.A. 787 (May, 1970).
266 Note, supra note 144 at 196 n.1.
268 Note, Liability for Blood Transfusion Injuries, 42 MINN. L. REV. 640, 655 (1958); Comment, supra note 186, at 415.
269 Legislative action is also possible. The state could prohibit commercial blood banks entirely as was done recently in Wisconsin. Wis. STAT. ANN. § 146.31(1) (Supp. 1971). However, not all paid donors are dangerous. Jennings, Not all Paid Donors Pose Hepatitis Risks, 2 LAB. MEDICINE 8 (July, 1971). Many European countries rely heavily on commercial blood donors without experiencing a high incidence of serum hepatitis contamination. R. TTMUSS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY 174-75 (1971). Therefore the legislature should concentrate its attention on high-risk categories of commercial donors. For example the use of prisoners, a high-risk group, as blood donors might be banned or at least discouraged. Franklin, Hepatitis, Blood Transfusions, and Public Action, 21 CATH. U.L. REV. 683, 698 (1972).
imposition of strict liability would encourage hospitals to obtain blood from low-risk sources and give a competitive advantage to those commercial suppliers who employ the most effective screening procedures.

The prospect of strict liability might also encourage hospitals to obtain more blood from volunteer sources. At the present time, about 4.3 million units of blood annually are provided from volunteer sources such as the Red Cross, while commercial donors provide an additional 1.3 million units. While there are an estimated 100 million eligible donors in the United States, only about 3 percent give blood each year. Hospitals could attract more volunteer donors by advertising, by promoting the formation of group blood plans, and by encouraging patients to secure replacement donors instead of relying on blood from commercial sources.

So far in presenting the case for strict liability there has been no distinction made between commercial and noncommercial suppliers of blood. The defendant in the McMichael case, the American Red Cross, was a noncommercial supplier. Do the principles of enterprise liability discussed above also support the imposition of strict liability on noncommercial blood banks? The "efficiency" or "resource allocation" argu-

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Legislation might discourage skid row derelicts from donating blood by prohibiting the payment except in the form of a check mailed to the donor not less than 15 days after the donation. See Tex. Rev. Civ. Stat. Ann. art. 4590-3 § 3(6) (Vern. Supp. 1972) (since repealed). Finally, blood donations by individuals might be induced by the use of federal tax incentive devices. Franklin, supra.


Volunteer donors include "altruistic" donors, assurance donors, and replacement donors. Assurance donors contribute annually to a blood bank, often under a group blood plan, in return for the right to draw blood if needed for themselves or their families during the following year. The replacement donor donates blood on behalf of someone, usually a friend or relative, who has already received a transfusion. Franklin, supra note 209.


Note, Strict Liability, supra note 174, at 80.

Comment, supra note 155, at 494-95.
ment is admittedly weak insofar as noncommercial blood banks are concerned. The prospect of strict liability might encourage these institutions to support more research into serum hepatitis detection methods, but it will have little impact on donor selection practices since most noncommercial blood banks already use low-risk volunteers. However, the noncommercial status of the supplier does not make much difference as far as the risk-spreading rationale is concerned. Noncommercial blood banks are still better loss-spreaders than individual hepatitis victims. Because of their low-risk status they should be able to spread the costs of serum hepatitis infection, either directly or by means of insurance, among all their blood transfusion recipients.

Accordingly, the Kentucky Supreme Court in McMichael should have determined that the transaction in question gave rise to an implied warranty of merchantability and also fell within the scope of § 402A even though serum hepatitis virus could not be detected in the blood.