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Kentucky Law Survey: Torts

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Torts

By Richard C. Ausness*

I. NEGLIGENCE

A. Negligence Per Se

The concept of negligence presupposes a uniform standard of human behavior by which a defendant's action can be measured. The familiar "reasonable man" test embodies this principle.1 Because a community standard is involved, evidence of usual and customary conduct sometimes may be relevant to the issue of due care. In Kentucky, however, a custom must be "certain, definite, uniform and notorious" to establish a standard of due care.2 Legislation, which requires or prohibits a particular act, may also establish the standard of care. Accordingly, the unexcused violation3 of a statute or ordinance4 designed to protect the class of persons in which the plaintiff is included5 against a risk of harm which has in fact occurred6 is negligence per se.7 As the Court of Appeals declared recently

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2 Louisville Trust Co. v. Nutting, 437 S.W.2d 484 (Ky. 1968); Illinois Cent. R.R. v. Maxwell, 167 S.W.2d 841 (Ky. 1943).

3 Normally, the defendant is required to make a reasonable effort to obey the statute in question. Restatement (Second) of Torts § 288A (1965); Satterlee v. Orange Glenn School Dist., 177 P.2d 279 (Cal. 1947).

4 See Blackwell's Adm'r v. Union Light, Heat & Power Co., 265 S.W.2d 462 (Ky. 1954); Greyhound Terminal v. Thomas, 209 S.W.2d 478 (Ky. 1947); Kepner, Violation of a Municipal Ordinance as Negligence Per Se in Kentucky, 37 Ky. L.J. 358 (1949).

5 Buren v. Midwest Indus., Inc., 380 S.W.2d 96 (Ky. 1964); Cooper v. Louisville & N.R.R., 321 S.W.2d 53 (Ky. 1959); Vissman v. Koby, 309 S.W.2d 345 (Ky. 1958); Restatement (Second) of Torts § 288 (1965).

6 Wagers v. Frantz, Inc., 445 S.W.2d 453 (Ky. 1969); Brown Hotel v. Levitt, 209 S.W.2d 70 (Ky. 1948); Louisville & N.R.R. v. Sloan, 155 S.W.2d 23 (Ky. 1941); Restatement (Second) of Torts § 286 (1965).

7 The standard of conduct is fixed by the legislature and the jury is not permitted to substitute its own judgment in this respect. See Restatement (Second) of Torts § 288B (1965). However, it is often a jury question as to whether the defendant's violation of the statute was a proximate cause of the plaintiff's injury. Higgins Inv., v. Sturgill, 509 S.W.2d 266 (Ky. 1974). Unless the statute violated imposes strict liability, the
in Blakeman v. Joyce, customary conduct which constitutes a violation of a statute will still be deemed negligent.

In the Blakeman case a motorcyclist brought an action for injuries suffered in a collision with an automobile. The plaintiff was preparing to make a right turn into a driveway when he was struck by the defendant’s automobile, while the defendant was attempting to pass on the right shoulder of the road. The Court held that the defendant had violated Kentucky Revised Statutes § 189.340(1) [hereinafter cited as KRS], which requires vehicles to pass on the left, and rejected the argument that usage and custom on that particular road allowed the defendant to pass on the right. Applying the doctrine of negligence per se, the Court held that the defendant was negligent as a matter of law and affirmed judgment for the plaintiff. This decision is consistent with the weight of authority which holds that customary conduct will not override the effect of a statute.

B. Res Ipsi Loquitur

The doctrine of res ipsa loquitur is applicable when the defendant has full control over the instrumentality which caused the injury, and the accident, according to the common knowledge and experience of mankind, could not have happened if those having control and management had not been

defendant is merely required to exercise due care. In such cases, he may raise the defense of contributory negligence if the plaintiff fails to exercise due care on his own behalf. Thus, the statute sets the standard of care required of the defendant, but does not lower the degree of care required by the plaintiff. Bennett v. Parkway Professional Center, Inc., 507 S.W.2d 694 (Ky. 1974).

511 S.W.2d 112 (Ky. 1974).

Id. at 113. See also Barrett v. Stephany, 510 S.W.2d 524 (Ky. 1974), in which the Court examined the relationship between Ky. Rev. Stat. § 189.340(1) (1970) [hereinafter cited as KRS], which also provides that the operator of an overtaking vehicle sound his horn before passing, and KRS § 189.340(2) which allows vehicles on a four-lane highway to pass on the right. Overruling Fuson v. Van Bebber, 454 S.W.2d 111 (Ky. 1970) and Deason v. Odem, 453 S.W.2d 588 (Ky. 1970), the Court held that the hornsounding requirements of KRS § 189.340(1) were inapplicable to vehicles passing on the right pursuant to the provisions of KRS § 189.340(2). The Court, therefore, held that the plaintiff was not contributorily negligent as a matter of law for failing to sound his horn under these circumstances.

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negligent. Although proof by the defendant of proper care will not usually destroy the inference of negligence raised by the circumstances of the case, sometimes it may be so overwhelming that a directed verdict or a judgment notwithstanding the verdict for the defendant is justified. Such a case, Embry v. Henderson, came before the Court of Appeals last year.

In Embry the plaintiff, who was struck by a screwdriver thrown from a rotary-type power lawnmower, sued the lawnmower operator, the owner of the property involved and his tenant. The plaintiff attempted to rely on res ipsa loquitur, but the defendant testified that he had inspected the yard prior to mowing it and had picked up all visible debris. The Court held that the uncontested evidence of defendant’s careful inspection of the yard prior to mowing was sufficient to establish the exercise of reasonable care and to rebut any inference of negligence arising from the nature of the accident.

C. Legal Duty of Occupant of Land to Licensee

The concept of “duty” serves as a limitation on the liability of owners and occupiers of land. The traditional approach categorizes persons entering land as trespassers, licensees, or invitees and graduates accordingly the legal duty owed by the possessor of the land. During 1974 the Court of Appeals an-

12 Vernon’s Adm’r v. Gentry, 334 S.W.2d 266 (Ky. 1960); Lewis v. Wolk, 228 S.W.2d 492 (Ky. 1950).
14 511 S.W.2d 218 (Ky. 1974).
15 A recent Indiana decision, Stayton v. Funkhouser, 263 N.E.2d 764 (Ind. App. 1970), resembles Embry. In Stayton, the plaintiff was injured by an object thrown from a rotary lawnmower. The appellate court upheld a directed verdict for the defendant because he had no knowledge of any objects in his yard that might be propelled by the mower.
16 A trespasser is one who comes upon the land without any legal right to do so. As noted in the text, a licensee is one who enters upon the land with the consent of the occupant. An invitee is one who comes upon the land because of business which concerns the occupier. Bowers v. Schenley Distillers, Inc., 469 S.W.2d 566 (Ky. 1971).
nounced in *Hardin v. Harris,* a new approach to the legal duty owed to licensees.

A licensee is one who enters upon land with the consent of the occupant. Originally, the possessor of land owed no duty to a licensee other than to refrain from exposing the licensee to wanton or willful injury and to warn him of known defects. The Kentucky Court first departed from this traditional and somewhat harsh rule of limited duty to licensees by distinguishing between “active” and “passive” negligence. In *Sage's Administrator v. Creech Coal Co.* the Court equated “active” negligence with “willful and wanton” conduct, a well established exception to the rule of limited liability. However, the terms “active” and “passive” were soon used to distinguish injuries which resulted from negligence in conducting business activity upon the premises from those which occurred because the defendant failed to warn of latent defects on the property.

In *Hardin v. Harris* the Court of Appeals expressly adopted the “modern view” enunciated by the Restatement of *Torts* that the duty of landowners to licensees is that of due care with respect to business activities conducted on their property. The plaintiff in the *Hardin* case, a 9-year-old child, was injured on a dairy farm when a feed grinder was accidentally backed over him by a farm employee. The boy’s father was also a farm employee and the child was considered to be a licensee by the Court. The trial court dismissed a suit against

The possessor of land owes no duty to a trespasser other than to exercise ordinary care to avoid injury to the trespasser after his position of peril is discovered and to refrain from exposing him to wanton or willful injury. *Louisville & N.R.R. v. Vanderpool*, 496 S.W.2d 349 (Ky. 1973); *Dykes v. Alexander*, 411 S.W.2d 47 (Ky. 1967). The possessor of land owes a duty of ordinary care to invitees which may require him to inspect the premises in order to discover latent dangerous conditions. *Creech v. Heaven Hill Distilleries, Inc.*, 497 S.W.2d 934 (Ky. 1973); *Lloyd v. Lloyd*, 479 S.W.2d 623 (Ky. 1972); *Ferrell v. Hellem*, 408 S.W.2d 459 (Ky. 1966). *See generally James, Tort Liability of Occupiers of Land: Duties Owed to Trespassers, 63 Yale L.J. 144 (1953).*

507 S.W.2d 172 (Ky. 1974).

Chesser v. Louisville Country Club, 339 S.W.2d 194 (Ky. 1960).


240 S.W. 42 (Ky. 1922).


507 S.W.2d 172 (Ky. 1974).

RESTATEMENT (SECOND) OF TORTS § 341 (1965).
the owner and manager of the farm, but the Court of Appeals reversed, holding that the defendants had a duty to conduct their farming activities with reasonable care for the safety of the child.

The Hardin decision does not change the actual duty of care imposed on a possessor of land; it merely adopts the more straightforward approach of the Restatement, thereby eliminating the distinction between "active" and "passive" negligence. Nevertheless, the case does point out the need for a reexamination of this problem. Beginning with Rowland v. Christian, a 1968 California case, a number of jurisdictions have abolished the distinctions between trespasser, licensee and invitee insofar as they affect the landowner's duty of care. The increasing strength of this trend indicates that the policies upon which the rule of limited liability was predicated in the nineteenth century are no longer in accord with modern social and economic realities.

D. Parental Liability for Acts of Children

The Restatement of Torts declares that it is negligence to permit a third person to use a thing which is under the control of the defendant if he knows or should know that such person is likely to use the thing in such a manner as to create an unreasonable risk of harm to others. Furthermore, it is negligent to place loaded firearms within the reach of young children. Spivey v. Sheeler involved a 12-year-old boy who was shot by an 11-year-old companion. A negligence action was brought against the parents of the companion on the theory that the parents had been negligent in failing to secure the gun.

24 70 Cal. Rptr. 97, 443 P.2d 561 (1968).
26 James, Tort Liability of Occupiers of Land: Duties Owed to Trespassers, 63 Yale L.J. 144, 146 (1953); Comment, Land Occupant's Liability to Invitees, Licensees and Trespassers, 31 Tenn. L. Rev. 485 (1964).
27 RESTATEMENT (SECOND) OF TORTS § 308 (1965).
29 514 S.W.2d 667 (Ky. 1974).
The evidence showed that the children had obtained the pistol from the defendants' locked gun case by using a key found on top of the cabinet. The Court of Appeals reversed a directed verdict for the defendants, holding that one who possesses an extremely dangerous instrumentality must take exceptional precautions to prevent injury and that children are entitled to a degree of care proportional to their ability to foresee and avoid the perils that may be encountered.

In concluding that the case should have been submitted to the jury, the Court distinguished *Dick v. Higgason*, a case in which the operator of a salvage yard was sued when the child of an employee shot a bystander. An unloaded rifle was stored in the defendant's private office behind a desk, and cartridges were kept in an unlocked desk drawer. In the defendant's absence, the child entered the office, discovered the rifle and cartridges, and engaged in target practice, wounding a person in an adjacent lot. The Court held for the defendant, noting that the child was under the control of his father, not the defendant, and was not expected to enter the office. In contrast, the defendant in *Spivey* had a duty to supervise the child; he knew that the child had access to the house; and the gun was left loaded and in full view of the child and his friends. The risk of harm was thus far greater in *Spivey* than it was in the *Dick* case.

The reasoning in *Spivey v. Sheeler* appears sound. The law of torts has a deterrent as well as a compensatory function. Society can encourage the prevention of accidents by placing liability on the person who is best able to modify his behavior in order to reduce accident costs. Clearly, the parents who displayed the loaded guns were better able to prevent the accident than the child who actually did the shooting.

E. Last Clear Chance

There are four distinct situations in which the last clear chance doctrine might be utilized: (1) where the plaintiff is helpless, but the defendant is aware of the danger; (2) where

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30 322 S.W.2d 92 (Ky. 1959).
the plaintiff is helpless, and the defendant is unaware of the
danger; (3) where the plaintiff in inattentive, but the defen-
dant is aware of the danger; and (4) where the plaintiff is
inattentive and the defendant is also unaware of the danger.32

The first category is known as “conscious last clear
chance,” or the “doctrine of discovered peril.” The plaintiff’s
prior negligence has placed him in a position from which he is
powerless to extricate himself, and the defendant discovers his
danger while there is still time to avoid it, but fails to take any
action on the plaintiff’s behalf. There must be proof that the
defendant actually discovered the plaintiff’s condition, and
had sufficient time to take effective action to save him.33

The second situation is an example of “unconscious last
clear chance.” The plaintiff is again helpless, but the defen-
dant does not discover his danger in time to avoid the injury,
although with proper care he could have done so.

In the third situation the plaintiff is able to escape, but
due to negligence has failed to discover his peril. Nevertheless,
most courts will hold the defendant liable, notwithstanding the
plaintiff’s continuing contributory negligence, if the defendant
discovers the plaintiff’s danger, and negligently fails to save
him.

The final situation is one in which neither party discovers
the plaintiff’s peril, although either could have done so by the
exercise of care. Only Missouri, in what is called the “humanit-
arian doctrine,” utilizes last clear chance to permit the plain-
tiff to recover in this situation.34

Kentucky has allowed the use of the last clear chance doc-
trine in the first three situations,35 but, as illustrated by the
recent case of Beasley v. Standard Paving & Engineering Co.,36
the Court of Appeals refuses to allow use of the doctrine in the

33 Feistritzer v. Lister, 401 S.W.2d 49 (Ky. 1966); Skees v. Whitaker, 398 S.W.2d
715 (Ky. 1966). See also Cincinnati, N.O. & Tex. Pac. Ry. v. Wood, 392 S.W.2d 437
(Ky. 1965).
34 McCall v. Thompson, 155 S.W.2d 161 (Mo. 1941); Womack v. Missouri Pac.
R.R., 88 S.W.2d 388 (Mo. 1935). See Gaines, The Humanitarian Doctrine in Missouri,
20 St. Louis L. Rev. 113 (1935).
35 Wheeler v. Creekmore, 469 S.W.2d 559 (Ky. 1971); French v. Mozzali, 433
S.W.2d 122 (Ky. 1968); Saddler v. Parham, 249 S.W.2d 945 (Ky. 1952).
36 511 S.W.2d 667 (Ky. 1974). See also General Tel. Co. v. Yount, 482 S.W.2d 567
(Ky. 1972).
fourth situation. In *Beasley*, an inspector for the State Department of Highways sought to recover from a contractor for injuries sustained when the plaintiff’s hand was crushed by construction machinery. The defendant was using a mobile crane to lay concrete sewer pipe. Four retractable hydraulic outriggers or stabilizers were used to stabilize the crane during this operation. When retracted, the two front outriggers came to rest against a large bumper which ran across the front of the crane. As the outrigger was being retracted, the plaintiff’s hand was caught between the bumper and outrigger. There was no evidence that the operator of the crane actually knew that Beasley had his hand on the bumper in the place of danger.

The trial court directed a verdict for the defendant on the ground that the plaintiff was contributorily negligent as a matter of law and refused to allow submission of the case to the jury on a theory of last clear chance. This decision was affirmed on appeal. Assuming that the plaintiff was contributorily negligent in standing with his back to the crane and resting his hand on the bumper, the facts of the case seem to fall within the fourth category discussed above. The plaintiff negligently placed himself in a position of danger which neither he nor the defendant discovered, because both failed to exercise due care.

Although the Court’s decision in *Beasley* is doctrinally sound, it illustrates the harshness of the contributory negligence defense. Both the plaintiff and the defendant contributed to the accident, but the loss was placed entirely on the victim. Perhaps a comparative negligence approach would better satisfy the compensation function of tort law as well as encourage the defendant to operate his machinery with greater care.37

II. PRODUCTS LIABILITY

The law of products liability is concerned with the alloca-

tion of losses resulting from injuries caused by the use or consumption of manufactured products. Despite its obvious deficiencies, for many years negligence provided plaintiffs with their only basis for recovery against the sellers of defective products. Later, express and implied warranty theories were also utilized for this purpose. Today, these approaches have been largely superceded by strict liability in tort.

Section 402A of the Restatement of Torts is the source of the strict liability theory. It imposes strict liability on one who sells goods which are defective or unreasonably dangerous due to either improper manufacture or improper design. The Kentucky Court of Appeals first recognized the strict liability approach in Dealers Transport Co. v. Battery Distributing Co. and has since applied the theory in a number of products liability cases.

The public policy consideration most widely accepted as the primary justification for strict liability is “cost spreading.” According to this rationale, the manufacturer can

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38 See James, Products Liability, 34 TEXAS L. REV. 192 (1955); Keeton, Products Liability—Problems Pertaining to Proof of Negligence, 19 SW. L.J. 26 (1965); Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1069 (1960).


40 See Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791 (1966); Wade, Strict Tort Liability of Manufacturers, 19 SW. L.J. 5 (1965).


42 402 S.W.2d 441 (Ky. 1965).

43 E.g., Post v. American Cleaning Equip. Corp., 437 S.W.2d 516 (Ky. 1968); Kroger Co. v. Bowman, 411 S.W.2d 339 (Ky. 1967).

44 Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 YALE L.J. 499, 517-27 (1961); Note, Strict Products Liability to the Bystander: A Study in Common Law Determinism, 38 U. CHI. L. REV. 625, 635-36 (1971). Another concept is "enterprise liability." Under this theory, it is argued that an industry or activity should pay for injuries that it causes. See James, Social Insurance and Tort Liability, 27 N.Y.U.L. REV. 537 (1952); Morris, Hazardous Enterprises and Risk Bearing Capacity,
spread accident costs to consumers by means of higher prices. However, arguments based on considerations of efficiency have also been offered in support of the imposition of losses on manufacturers by means of strict liability. Proponents of the strict liability doctrine contend that losses caused by defective products should be placed upon the party who, by changing his behavior, can most easily reduce the costs of accidents and of accident prevention. The cases discussed below will touch upon these considerations in discussing three aspects in products liability law: (1) the burden of proof, (2) misuse and alteration of the product, and (3) the applicability of strict liability principles to bystander injuries.

A. The Burden of Proof

In every products liability case the plaintiff must prove the existence of a defect in the product, that the product was defective when it left the hands of the defendant, and finally, that this defect caused the injuries involved. Proof of these basic elements has presented plaintiffs with their most difficult problems in strict liability cases. It is probable that more cases are lost by plaintiffs because the existence of the defect has not been proved, or has not been connected with the eventual injury, than for any other reason.

In Midwestern V.W. Corp. v. Ringley, the purchaser of a new automobile brought suit against the manufacturer and the dealer for damages sustained when the vehicle skidded and struck a telephone pole. Based on evidence that the right-front
brake drum was "out of round" as a result of defective manufacture, the trial court submitted the case to the jury on a strict liability theory and a verdict for the plaintiff was given. The Court of Appeals reversed, however, because it found no evidence that the defect was the probable cause of the accident. The Court declared that, even under the strict liability theory, the plaintiff must submit proof of causation in order to recover. Although the jury can draw inferences from the existence of the defect itself, the plaintiff is required to introduce evidence sufficient to support a reasonable inference that the defect was the probable cause of the accident, and not merely a possible cause.

Kentucky, like most jurisdictions, has required the plaintiff to establish each element of his case, including that of causation, by a preponderance of the evidence. For example, in *Briner v. General Motors Corp.*, where the plaintiff was injured in an automobile accident caused by a defective steering mechanism, it was unclear whether the condition was the result of a manufacturing defect or subsequent negligent repair. The accident occurred almost two years after the date of purchase. The Court concluded that the evidence must indicate a probable cause, as distinguished from a possible cause, and ruled for the defendant.

In deciding *Ringley* the Court distinguished *Gairdy Motors, Inc. v. Brannon*, a case in which the plaintiff was able to satisfy his burden of proof on the issue of causation. In *Gairdy Motors* the plaintiff was injured by an automobile recently sold by the defendant to a third party. The plaintiff introduced evidence showing that there was grease on the brake drum which was sufficient to cause the brake failure. Because the buyer had just purchased the vehicle and had driven it only a few blocks, the jury was permitted to find that the defendant had failed to use reasonable care to discover and repair the defective brakes, and that this had contributed to the accident. Thus, the Court was able to distinguish *Gairdy Motors* based on the brief interval of time between the purchase of the car

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52 See Huffman v. SS. Mary & Elizabeth Hosp., 475 S.W.2d 631 (Ky. 1972); Holbrook v. Rose, 458 S.W.2d 155 (Ky. 1970).
53 461 S.W.2d 99 (Ky. 1971).
54 268 S.W.2d 627 (Ky. 1954).
and the accident and on the absence of any explanation for the mechanical failure.

Allocation of the burden of proof in products liability cases has significant policy aspects with respect to the efficient allocation of resources.\(^{55}\) The manufacturer should be held liable only when he has placed a defective product on the market.\(^{56}\) However, if plaintiffs are required to sustain a heavy burden of proof in order to recover, many legitimate claims will be defeated, manufacturers’ failure costs will be deceptively low, and consumer protection will not be maximized.\(^{57}\) If loss-spreading is more important, public policy would dictate that the loss be placed on the best loss-spreader, which is usually the manufacturer rather than an individual consumer.\(^{58}\)

In some states, the burden of proof is shifted to the defendant once the plaintiff has proven the existence of a defect.\(^{59}\) Although this approach is perhaps too favorable to the plaintiff, the present Kentucky position on the burden of proof, as manifested by the *Ringley* case, may be unnecessarily severe. An approach which allows a plaintiff to meet his burden of proof on the issue of causation by relatively weak or indirect evidence is justified by the realities of products liability litigation. Normally, the manufacturer knows considerably more about the nature and manufacturing history of the product than the plaintiff. From its testing and market experience the manufacturer is better able to determine what is likely to go wrong with his product. In addition, experts are often more accessible to the defendant than to the plaintiff.\(^{60}\)

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\(^{56}\) Id. at 1779.

\(^{57}\) Id. at 1781.


B. Misuse and Alteration of the Product

A manufacturer is generally not liable for injuries caused by the plaintiff's abnormal use of a product. This rule, which has its basis in proximate cause concepts, assumes that the seller is entitled to expect a normal use of his product. Likewise, unauthorized alteration of a product may absolve the manufacturer of liability. Section 402A of the Restatement imposes strict liability only if the product "is expected to and does reach the user or consumer without substantial change in the condition in which it is sold." Furthermore, the plaintiff has the burden of proving that the product was in a defective condition at the time it left the control of the seller.

Both of these factors were involved in Cox v. General Motors Corp. The plaintiffs in the Cox case were injured when the automobile in which they were riding was struck by a wheel which had broken off another automobile. The plaintiff brought suit against the manufacturer of the automobile on a theory of strict liability. It appeared that a previous owner had made substantial modifications on the automobile in question, including the substitution of 15-inch wheels for 14-inch wheels, and that some of the equipment, including the wheels, had not been designed by the manufacturer for this particular model.

The Court of Appeals affirmed a directed verdict for the defendant, declaring:

The evidence conclusively shows that the automobile being driven by Brown had been badly mishandled, as well as modified. It was necessary for the parties to introduce evidence that the wheel came off the automobile as a proximate result.

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41 See Restatement (Second) of Torts § 402A, comment h (1965); Epstein, Products Liability: Defenses Based on Plaintiff's Conduct, 1968 Utah L. Rev. 267; Levine, Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty, 52 Minn. L. Rev. 627 (1968); Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 Vand. L. Rev. 93, 95 (1972).


43 Restatement (Second) of Torts § 402A(1)(b) (1965).

44 Id. at comment g.

45 514 S.W.2d 197 (Ky. 1974).

46 Id. at 200.
of a design defect and not as a result of the subsequent mishandling and modification.\(^6\)

Cox is in accord with the weight of authority, although the comments made earlier concerning the plaintiff's burden of proof apply with equal force to situations such as this, where alteration or misuse of the product is involved.

C. Liability to Bystanders

The issue of whether the manufacturer or seller is liable to a nonuser—who is injured by a defective product—is still very much an open question in this country.\(^6\) Section 402A of the Restatement of Torts, which expressly applies only to "users" or "consumers," includes a caveat stating that the Institute "expresses no opinion as to whether the rules stated in this Section may not apply . . . to harm to persons other than users or consumers . . . ." \(^6\)

The Kentucky Court has not yet expressly ruled on the application of the strict liability concept to bystander situations,\(^6\) although a federal court construing Kentucky law in a diversity case refused to allow a bystander to recover.\(^6\) However, a recent case, Ford Motor Co. v. Zipper,\(^7\) suggests that bystanders may recover under a strict liability theory. In that case, the plaintiff was struck from behind by an automobile driven by one of the defendants. The plaintiff brought suit on a strict liability theory against the driver, the retail seller and the manufacturer of the automobile. At trial, the jury found that the accident was caused solely by brake failure due to a manufacturing defect in the automobile. Judgment for the plaintiff was affirmed on appeal. Most of the issues discussed in the case dealt with matters of evidence, and the defendant

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\(^{6}\) Restatement (Second) of Torts § 402A, caveat (1965).

\(^{6}\) Editor's note. Since this article was written, the Court decided Embs v. Pepsi-Cola Bottling Co., C.A. No. 12,263 (May 23, 1975) which extended the protections of § 402A to bystanders.


\(^{7}\) 502 S.W.2d 74 (Ky. 1973).
did not argue that strict liability under Section 402A could not extend to bystanders.

Beginning with Piercefield v. Remington Arms Co.,\textsuperscript{71} decided in 1965, a substantial number of jurisdictions have extended strict liability to bystanders.\textsuperscript{72} The leading case, Elmore v. American Motors Corp.,\textsuperscript{73} a 1969 California decision, justified its holding on the ground that the manufacturer was a better cost-spreader than the victim.\textsuperscript{74} However, the imposition of strict liability on manufacturers for injuries to bystanders can also be supported on the basis of the efficiency considerations discussed above.\textsuperscript{75}

III. NUISANCE

A. Public Nuisance

The Court of Appeals recently examined the criminal and civil aspects of public nuisances in Hancock v. Terry Elkhorn Mining Co.\textsuperscript{76} In that case residents of Johnson County sought to enjoin the use of overweight coal trucks on state roads. The defendant, Terry Elkhorn Mining Company, operated a surface mine in the area and transported its coal over public highways to nearby tipples. The loaded coal trucks sometimes exceeded the highway load limits by almost 50,000 pounds.\textsuperscript{77} Consequently, sections of the blacktop surface of several highways were completely destroyed.\textsuperscript{78} Furthermore, the trucks were overloaded to the extent that coal spilled off the beds of the

\textsuperscript{71} 133 N.W.2d 129 (Mich. 1965).
\textsuperscript{72} See Comment, Misuse as a Bar to Bystander Recovery Under Strict Products Liability, 10 Houston L. Rev. 1106, 1115 (1973).
\textsuperscript{74} 75 Cal. Rptr. at 657, 451 P.2d at 89. See Note, Strict Products Liability and the Bystander, 64 Colum. L. Rev. 916, 935 (1964).
\textsuperscript{76} 503 S.W.2d 710 (Ky. 1973).
\textsuperscript{77} Employees of the Department of Motor Transportation testified that they have never weighed a truck on either of these highways which was not overweight. On some occasions the trucks were so heavily overloaded that the scales being used sank into the asphalt pavement. Id. at 714.
\textsuperscript{78} Portions of state highways 302 and 1107 at the time of the trial consisted mostly of "red dog," a byproduct of surface mining. Id.
trucks and onto the highways and shoulders of the roads.\textsuperscript{79} Although many of the truckers were indicted for operating overweight vehicles, none had ever been convicted of that offense in Johnson County.

The plaintiffs brought suit on the theory that continued operation of overweight coal trucks constituted a public nuisance.\textsuperscript{80} The landowners alleged that the destruction of the highways posed a continuing threat to public safety, and also contended that they had suffered special injuries because their homes were damaged by vibrations and dust from the trucks.

The trial court upheld the validity of special overweight truck permits obtained by the defendant from the Highway Department and refused to enjoin further violations of load limit regulations. The lower court also denied a motion by the state Attorney General to intervene in the proceeding. The Court of Appeals, however, reversed, holding that a public nuisance existed and that the landowners were entitled to injunctive relief. The Court further concluded that the issuance of the overweight truck permits was invalid\textsuperscript{81} and upheld the Attorney General's right to intervene.

Public or common nuisances are a diverse group of minor

\textsuperscript{79} This spillage violates KRS § 189.150.

\textsuperscript{80} The plaintiffs also contended, and the Court of Appeals agreed, that they were entitled to injunctive relief under KRS § 281.790. 503 S.W.2d at 720. KRS § 281.790 provides:

At the instance of motor transportation or of any person having an interest in the subject matter, the courts of this state may enjoin any person from violating any of the provisions of this chapter or other chapters relating to the operation or taxation of motor vehicles, or any order, rule, regulation, or requirement of the department relating to such vehicles.

\textsuperscript{81} Pursuant to its authority under KRS § 189.222, the Highway Department had imposed a weight limit of 24,000 pounds on the roads in question. After this case was filed the defendant obtained a series of special overweight permits which could be issued "for stated periods, special purposes and unusual conditions, and upon such terms in the interest of public safety and the preservation of highways as the department may, in its discretion, require." KRS § 189.270(2). The Court concluded that this statute was designed to take care of emergency or unusual situations only, and could not be used by a person in the day-to-day operation of a business. 503 S.W.2d at 718. See also Ashland Transfer Co. v. State Tax Comm'n, 56 S.W.2d 691 (Ky. 1932). The Court also found that the Highway Department had failed to observe its own regulations when it issued the overweight permits to Terry Elkhorn. See Regulation HIWA-TC-P1(2). It is noteworthy that the Department's power to issue overweight permits has been altered and, in general, constricted by the enactment of KRS § 189.271 by the 1974 General Assembly.
criminal offenses which involve some interference with the interests of the community or the comfort and safety of the general public.\textsuperscript{82} The entire community need not be actually affected, however, as long as the condition interferes with the exercise of a public right. Although a public nuisance is normally treated as a criminal offense, the government may also pursue a civil remedy. Moreover, since the sixteenth century,\textsuperscript{83} private individuals have been allowed to maintain tort actions when they suffer damage from a public nuisance which differs from that suffered by the general public.\textsuperscript{84}

In the \textit{Hancock} case it was undisputed that portions of the highway were virtually destroyed, making travel by the public both hazardous and inconvenient.\textsuperscript{85} The allegations of the landowners with respect to interference with the use and enjoyment of their property met the requirements of the special damages rule. The only question was whether the issuance of overweight truck permits by the Highway Department legitimized what would otherwise be a public nuisance under the theory that, generally, no act carried on in a customary manner may be deemed a public nuisance if it is legislatively authorized.\textsuperscript{86} In this case, however, the Court found that because the overweight permits issued by the Highway Department were invalid, they would not immunize the defendant from liability.

The Court in \textit{Hancock} also recognized the Attorney General's right to intervene. KRS § 15.020, which designates the Attorney General as the chief law officer of the Commonwealth and enumerates the powers and duties of that office, also provides that the Attorney General may exercise "all common law

\begin{footnotesize}
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\item \textsuperscript{82} Maum v. Commonwealth, 490 S.W.2d 748 (Ky. 1973); W. Prosser, \textit{Law of Torts} § 88, at 583 (4th ed. 1971).
\item \textsuperscript{83} Fowler v. Sanders, 79 Eng. Rep. 382 (K.B. 1618); Williams' Case, 77 Eng. Rep. 163, 164-65 (K.B. 1592). The first reported case, Southall v. Dagger, appeared in Y.B. Mich. 27 Hen. 8, pl. 10 (1535); a translation can be found in Smith, \textit{Private Action for Obstruction to Public Right of Passage}, 15 \textit{Columbia L. Rev.} 142 n.65 (1915).
\item \textsuperscript{85} Obstruction of a public highway has traditionally been considered a public nuisance. The King v. Jones, 170 Eng. Rep. 1364 (N.P. 1812); The King v. Cross, 170 Eng. Rep. 1362 (N.P. 1812); The King v. Russell, 102 Eng. Rep. 1350 (K.B. 1805); \textit{Bacon's Abridgment}, Highways 875.
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duties and authority pertaining to the office of the Attorney General under the common law, except when modified by statutory enactment." At common law, the Attorney General was the chief legal advisor of the Crown, responsible for the management of all legal affairs and for the prosecution of all suits, civil and criminal, in which the government was concerned. It appears that in England the Attorney General could seek injunctive relief against the maintenance of a public nuisance, although criminal proceedings were more common. There is ample precedent for this in Kentucky as well. Having concluded that the Attorney General could have brought a civil action on behalf of the state against Terry Elkhorn, the Court of Appeals held that the Rules of Civil Procedure would permit him to intervene in the landowners' suit.

Finally, the defendant argued that the issuance of the injunction against continued violations of the load limit laws was improper. As a general rule, courts will not enjoin the future commission of a crime, because the criminal statute itself constitutes an injunction. However, public nuisance is a civil wrong as well as a crime, and equitable relief traditionally was available at common law. In America, many courts have al-

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90 See, e.g., Respass v. Commonwealth, 115 S.W. 1131 (Ky. 1909); Bollinger v. Commonwealth, 35 S.W. 553 (Ky. 1896).
91 Ky. R. Civ. P. 24.01.
92 Commonwealth v. Ruh, 191 S.W. 498 (Ky. 1917).
93 Shabez, The Historical Development of The Power of Equity Courts To Enjoin Nuisances, 11 Marq. L. Rev. 32 (1926). At common law an indictment for public nuisance was tried at the assizes or in the Court of King's Bench. Upon conviction, the court would order the nuisance abated. Hall's Case, 86 Eng. Rep. 744 (K.B. 1671). Suit for injunctive relief on the other hand was brought in Chancery. Only once prior to the late eighteenth century did the Attorney General seek this remedy. Bonds Case, 72 Eng. Rep. 553 (K.B. 1587); Schofield, Equity Jurisdiction to Abate and Enjoin Illegal Saloons as Public Nuisances, 8 Ill. L. Rev. 19, 20-21 (1913). It was doubted as late as the early nineteenth century whether a court of equity had this power. Attorney General v. Cleaver, 34 Eng. Rep. 297 (Ch. 1811); Mayor of London v. Bolt, 31 Eng. Rep. 507 (Ch. 1799); Mack, The Revival of Criminal Equity, 16 Harv. L. Rev. 389, 395-
allowed an Attorney General to institute proceedings to enjoin the maintenance of a public nuisance even though the criminal process may also be utilized.\textsuperscript{94}

This rule has often been recognized in Kentucky, at least where the use of real property was concerned.\textsuperscript{95} One of the leading cases is \textit{Respass v. Commonwealth}.\textsuperscript{96} After a series of criminal convictions failed to remedy the condition, the state sought to prevent the continued use of the defendant's property for illegal betting on horse races on the theory that it constituted a public nuisance. The Court distinguished between prohibiting the defendant from gambling and restraining the unlawful use of the property in question. The Court made this same distinction in \textit{Goose v. Commonwealth ex rel. Dummit}.\textsuperscript{97} another case involving the use of property for illegal gambling. The Court held that there was a clear difference between enjoining an individual from committing a crime and enjoining him from using his property so as to create a nuisance.

In the \textit{Hancock} case, the conduct at issue involved the manner of transporting coal and not, strictly speaking, the use of the defendant's land. It would seem, therefore, that \textit{Hancock} may represent a slight expansion of prior Kentucky law. It should be noted that the defendants had not been convicted of either maintaining a public nuisance or of violating the overweight truck law. While the equitable remedy sought here was distinct from the relief commonly provided as part of the criminal process, it is interesting that in most of the earlier cases, the defendants involved had previously been convicted in criminal proceedings.

\textsuperscript{96} (1903); Note, \textit{The Criminal Jurisdiction of Equity—Purprestures and Other Public Nuisances Affecting Health and Safety}, 20 Ky. L.J. 163 (1931).


\textsuperscript{95} Goose v. Commonwealth \textit{ex rel. Dummit}, 205 S.W.2d 326 (Ky. 1947) (gambling); Kentucky State Bd. of Dental Examiners v. Payne, 281 S.W. 186 (Ky. 1926) (unlicensed dentist); Respass v. Commonwealth, 115 S.W. 1131 (Ky. 1909) (gambling); Ehrlik v. Commonwealth, 102 S.W. 289 (Ky. 1907) (gambling); Commonwealth v. McGovern, 75 S.W. 261 (Ky. 1903) (illegal prize fight); Bollinger v. Commonwealth, 35 S.W. 553 (Ky. 1896) (gambling house); Ashbrook v. Commonwealth, 64 Ky. (1 Bush) 139 (1866) (animal pen).

\textsuperscript{97} 115 S.W. 1131 (Ky. 1909).

\textsuperscript{98} 205 S.W.2d 326 (Ky. 1947).

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B. Private Nuisance

The interaction between exploitation of mineral rights and the law of private nuisance was explored in *Kentland-Elkhorn Coal Co. v. Charles,* a case in which a landowner brought a private nuisance action for damages resulting from the operation of a coal preparation plant on an adjacent tract of land. The defendant had acquired the mineral rights to both tracts through a "broad form" deed.

A private nuisance is anything which annoys or disturbs the free use of one's property or which renders ordinary use or physical occupation of the property uncomfortable. The existence of a nuisance must be ascertained by examining the reasonableness of the defendant's use of his property and the gravity of the harm to the landowner. This involves a balancing of the social utility of the defendant's conduct against the harm to the plaintiff's land.

In Kentucky, however, the owner of mineral rights under the broad form deed is liable only for surface damages caused by oppressive, arbitrary, wanton or malicious action. Furthermore, the fact that an operation would otherwise constitute a private nuisance will not impose liability on the mineral owner if a broad form deed is involved. With this in mind, the Court of Appeals first considered whether the defendant's

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98 514 S.W.2d 659 (Ky. 1974).
100 Adams v. Hamilton Carhartt Overall Co., 169 S.W.2d 294 (Ky. 1943); Kentucky-Ohio Gas Co. v. Bowling, 95 S.W.2d 1 (Ky. 1936).
101 Curry v. Farmers Livestock Mkt., 343 S.W.2d 134 (Ky. 1961); Louisville Ref. Co. v. Mudd, 339 S.W.2d 181 (Ky. 1960).
102 *Restatement of Torts* §§ 826, 827, 828 (1939). In George v. Standard Slag Co., 431 S.W.2d 711 (Ky. 1968), the Court listed the following factors as relevant to the question of whether a private nuisance existed: (1) the lawful nature and location of the defendant's facility; (2) the manner of its operations; (3) its importance and influence on the growth and prosperity of the community; (4) the kind, volume and duration of the annoyance; (5) the respective relations of the parties; and (6) the character and development of the neighborhood and the locality in which the properties are located.
103 Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395 (Ky. 1968); Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956).
104 Tolliver v. Pittsburgh-Consolidation Coal Co., 290 S.W.2d 471 (Ky. 1956); Consolidation Coal Co. v. Mann, 181 S.W.2d 394 (Ky. 1944).
conduct was "oppressive, arbitrary, wanton or malicious." The Court distinguished between acts which were "necessary" to remove the coal, and those which merely made its removal more "convenient." Insofar as the defendant's acts are necessary, in the sense that there is no other way in which to remove the mineral, the mineral owner's right to perform those acts is unqualified. However, in the case of acts done under a claim of convenience, the conduct will be deemed "arbitrary, wanton or malicious" if the mineral owner has chosen a harmful procedure when one less harmful is equally available.

If the issue is one of "oppressive" conduct, however, the concept of reasonableness becomes relevant. In *Kentland-Elkhorn*, the plaintiff claimed that the coal preparation plant was operated or maintained in an oppressive manner. The Court invoked the concept of unreasonable harm developed in the law of nuisance as a standard for determining whether the defendant's conduct was "oppressive." The landowners showed that the coal preparation plant cast dust over their residences in such quantities that the property was rendered almost uninhabitable. In addition, it appeared that on occasion the defendant not only failed to operate the plant in a customary or prudent manner, but also failed to make a reasonable effort to minimize the harm. Accordingly, the Court held that it was proper to submit the case to the jury on the unreasonable harm theory.

The Court reversed, however, because of errors in the jury instructions. One of these errors involved the issue of damages. Damages for private nuisance can be either temporary or permanent. Temporary damages are based on the reduction in the value of the use of the property during the continuance of the nuisance (or in the case of rental property, the reduction in rental value during that period). If a permanent nuisance is involved, the measure of damages is the amount by which the nuisance reduces the market value of the property.

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105 Blue Diamond Coal Co. v. Neace, 337 S.W.2d 725 (Ky. 1960).

106 The Court also discussed the use of this concept in water right cases. See Commonwealth, Dep't of Highways v. Baird, 444 S.W.2d 541 (Ky. 1969); Klutney v. Commonwealth, Dep't of Highways, 428 S.W.2d 766 (Ky. 1967).

107 Adams Constr. Co. v. Bentley, 335 S.W.2d 912 (Ky. 1960); Fidelity Trust Co. v. Shelbyville Water and Light Co., 110 S.W. 239 (Ky. 1908).
The Court of Appeals employed two tests to determine whether the private nuisance was temporary or permanent. Under one approach a nuisance is permanent if it cannot be readily corrected or abated at reasonable expense,\textsuperscript{108} while under the other test a nuisance may be regarded as permanent if the offending structure will be relatively enduring and is not likely to be abated, either voluntarily or by court order.\textsuperscript{109}

The offending structure met the test of a permanent nuisance under the first criterion because it was not economically feasible to eliminate the excessive emission of dust by modifying the coal preparation plant. However, under the second approach, the nuisance was considered temporary because the plant was scheduled to close within a year and a half after the case went to trial. Thus, the Court of Appeals determined that the nuisance was temporary and reversed the trial court, which had found the nuisance to be permanent. The Court also reversed on the ground that damages for personal annoyance, discomfort or sickness on the part of the landowners were not recoverable as a separate element of damages, but were necessarily included in the damages for diminution in the value of the use of the property, unless a specific claim of damages for personal injury was made.\textsuperscript{110}

In a concurring opinion, Justice Stephenson rejected the dual test of the majority and urged that “the rights of the parties should be resolved under the law of minerals with respect to the rights of the surface owner whose improvements are damaged by the conduct of the mining operation.”\textsuperscript{111} According to Justice Stephenson, early cases in Kentucky distinguished between damage to improved, as opposed to unimproved property, insofar as liability of the owner of the mineral estate was concerned.\textsuperscript{112} The present rule, enunciated by the Court in Buchanan v. Watson\textsuperscript{113} in 1956, was not applied to

\textsuperscript{108} City of Ashland v. Kittle, 305 S.W.2d 788 (Ky. 1957).

\textsuperscript{109} Kentucky-Ohio Gas Co. v. Bowling, 95 S.W.2d 1 (Ky. 1936).

\textsuperscript{110} City of Hazard v. Eversole, 133 S.W.2d 906 (Ky. 1939); Gay v. Perry, 265 S.W. 437 (Ky. 1924).

\textsuperscript{111} 514 S.W.2d at 665.

\textsuperscript{112} Kentucky-W. Va. Gas Co. v. Crum, 80 S.W.2d 537 (Ky. 1935); McIntire v. Marian Coal Co., 227 S.W. 298 (Ky. 1921).

\textsuperscript{113} 290 S.W.2d 40 (Ky. 1956).
improved property until Blue Diamond Coal Co. v. Neace in 1960. Justice Stephenson regarded the Buchanan requirement of oppressive, arbitrary, wanton or malicious conduct as too narrow a test for liability to the surface estate where improvements to the land were involved. Instead, he suggested that the Court "impose strict liability for damages to the surface owners' improvements, improved property and merchantable timber occasioned by the conduct of a mining operation."

Despite various efforts at governmental regulation, the institutional framework has not induced the coal industry to minimize its social and environmental costs. Consequently, externalities have occurred which are borne, not by the consumers of coal, but largely by residents of the mining regions. Hancock v. Terry Elkhorn Mining Co. and Kentland-Elkhorn Coal Co. v. Charles provide examples of this situation. The law of nuisance could be used to correct such externalities by requiring coal producers to compensate those who are damaged as a result of their mining activities. Moreover, it would seem that coal producers could easily spread these costs to the general public in the form of higher prices for their product. Thus, both the resource allocation and the cost-spreading objectives appear to support a rule which would place the initial entitlement in the surface owner rather than the mineral owner. Decisions such as Buchanan v. Watson, which limit the liability of coal producers whose activities give rise to nuisance conditions, cannot be justified in terms of sound public policy. The approach advocated by Justice Stephenson in his concurring opinions seems more promising.

114 337 S.W.2d 725 (Ky. 1960). See also Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395 (Ky. 1968).
115 514 S.W.2d at 667.