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Kentucky Law Survey: Torts

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Torts
BY RICHARD C. AUSNESS*

INTRODUCTION

During the past term the Kentucky Court of Appeals was quite active in the area of torts. The Court considered cases involving battery,¹ nuisance,² products liability and negligence. The negligence decisions dealt with a defendant’s standard of care,³ contributory negligence⁴ and last clear chance.⁵ Four of these cases have been selected for examination in this article.

I. NEGLIGENCE

A. Proximate Cause

In House v. Kellerman⁶ the plaintiff’s wife was killed when an automobile in which she was a passenger went out of control and was struck by the defendant’s vehicle. The car began to skid while proceeding southward along an interstate highway, and the decedent, who had been asleep, awoke and grabbed the driver’s right arm, causing him to lose control of the automobile. While out of control, the automobile was struck by the defendant’s car which was traveling in the same direction.

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² See Taylor v. Carrico, 528 S.W.2d 694 (Ky. 1975).
⁴ See Daniels v. Kerschner, 519 S.W.2d 386 (Ky. 1975); Allen v. Arnett, 525 S.W.2d 748 (Ky. 1975); Boss v. Pierce, No. F-32-72 (Ky., Feb. 7, 1975).
⁵ See Gaddie, Inc., v. Price, 528 S.W.2d 703 (Ky. 1975); Smith v. Wright, 512 S.W.2d 943 (Ky. 1974).
⁶ 519 S.W.2d 380 (Ky. 1975).
⁷ The decedent’s unborn child was also killed. The husband, acting as administrator of their estate and suing in his own right, brought this action against both drivers, as well as against his own insurance company, under the uninsured motorist provisions applicable to Mrs. Hill. After the trial the claims against Mrs. Hill and the plaintiff’s insurance company were settled, and the appeal was taken only against Kellerman. Id. at 381.
At trial the jury was instructed to find for the defendant if it believed that the accident "was caused and brought about solely by the decedent, Janice House, grabbing the arm of her driver . . . and thereby causing said automobile to go out of control . . . ." The theory of this instruction apparently was that although the decedent's action may not have been negligent, it could have been an intervening cause, superseding the negligence of the defendants. Relying on this instruction, the jury returned a verdict in favor of both defendants.

The Court of Appeals reversed, holding that the jury instruction was erroneous and prejudicial to the plaintiff. According to the Court:

An instruction telling the jury that if the accident resulted from a cause for which a party was not responsible it shall find for the defendant is needless, because it has been instructed elsewhere that it shall find against him only if it believes from the evidence that the cause was one for which he was responsible. And it is prejudicial because it gives undue emphasis to the evidence on which the defendant relies in contending that his fault, if any, was not a legal cause.

The Court also pointed out that any instruction on superseding cause was inappropriate in this case because the decedent's action occurred before the defendant's negligent act, and, therefore, could not be an intervening force.

The most significant aspect of House v. Kellerman, however, was the Court's ruling that questions of superseding cause should be treated as legal issues for the court instead of questions of fact for the jury. As the Court acknowledged, this position is contrary to prior Kentucky decisions and the weight of

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8 Id.
9 An intervening cause is one which actively operates to produce the plaintiff's injury after the defendant's negligent act or omission has occurred. Restatement (Second) of Torts § 441 (1965) [hereinafter cited as Restatement].
10 A superseding cause is an act of a third person or other force which by its intervention prevents the defendant from being liable for the harm caused by his antecedent negligence. Restatement § 440.
11 See also Wooten v. Legate, 519 S.W.2d 385 (Ky. 1975), in which the court held that an instruction on the theory of unavoidable accident was improper and prejudicial to the plaintiff.
12 519 S.W.2d at 382.
13 See State Contracting & Stone Co. v. Fulkerson, 288 S.W.2d 43 (Ky. 1956);
authority nationally. Consequently, the decision raises a serious question about the respective roles of judge and jury in the trial of a negligence case and suggests the need for a re-examination of the theory of proximate cause in Kentucky.

Proximate cause has been described as one of the most imprecise and confusing concepts in the law of torts. This is due in part to a fusion of two distinct issues in the traditional proximate cause formula: (1) The factual question of whether the defendant's conduct was sufficiently connected with the plaintiff's injury to be regarded as an actual cause of it; and (2) the liability question of whether, under the circumstances, the defendant should be held liable for the injury caused by a breach of his duty of care.

Let us first consider cause-in-fact. In Mahan v. Able the Court declared: "To constitute proximate cause, an act must be such that it induces an accident and without which the accident would not have occurred." This language is a version of the "but for" or "sine qua non" test of cause-in-fact. Under

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Clardy v. Robinson, 284 S.W.2d 651 (Ky. 1955); Routzahn v. Bronen Hotel, 211 S.W.2d 848 (Ky. 1948).

14 See Green, Jury Trial and Proximate Cause, 35 Tex. L. Rev. 357, 358 (1957).


16 251 S.W.2d 994 (Ky. 1952). See also Gerebenics v. Gaillard, 338 S.W.2d 216 (Ky. 1960); Berry v. Jorris, 199 S.W.2d 616 (Ky. 1947).

17 251 S.W.2d at 997.

18 The "but for" or "sine qua non" rule is the most common test of cause-in-fact. Under this approach the defendant's conduct is not considered a cause of the plaintiff's injury if the harm would have occurred anyway. See Gerebenics v. Gaillard, 338 S.W.2d 216 (Ky. 1960); Mahan v. Able, 251 S.W.2d 994 (Ky. 1952). The "but for" test, however, has been criticized, particularly where the defendant's conduct involved an omission rather than an affirmative act. See Green, The Causal Relation Issue in Negligence Law, 60 Mich. L. Rev. 543, 556 (1962); Thode, The Indefensible Use of the Hypothetical Case to Determine Cause-in-Fact, 46 Tex. L. Rev. 423, 431-33 (1968). See, e.g., Ford v. Trident Fisheries Co., 122 N.E. 399 (Mass. 1919)(failure to provide lifeboat); Weeks v. McNulty, 48 S.W. 809 (Tenn. 1898)(failure to provide fire escape); Stacy v. Knickerbocker Ice Co., 54 N.W. 1091 (Wis. 1893)(failure to place fence around hole in ice). In such cases, the jury is forced to speculate about what might have happened rather than what in fact did happen. This situation arose in Texas & Pa. Ry. v. McCleary, 418 S.W.2d 494 (Tex. 1967) and provoked a series of articles on the hypothetical case aspects of the "but for" test. See Henderson, A Defense to the Use of The Hypothetical Case to Resolve the Causation Issue — The Need for an Expanded, Rather Than a Contracted Analysis, 47 Tex. L. Rev. 183 (1969); Thode, A Reply to the Defense of the Use of the Hypothetical Case to Resolve the Causation Issue, 47 Tex. L. Rev. 1344 (1969); Thode, The Indefensible Use of the Hypothetical
this rule, or the somewhat broader "substantial factor" test, the existence of a causal relationship between the defendant's negligence and the plaintiff's injury is largely, although not entirely, a question of fact and may properly be submitted to the jury.

The liability aspect of proximate cause has proven to be more troublesome than cause-in-fact. Over the years, the Kentucky Court has used a variety of tests more or less interchangeably in dealing with the liability question. Each of these approaches represents a different theory about the way in which liability for negligent acts should be determined.

In Louisville & Nashville Railroad v. Stevens, the Court held: "Proximate cause may be defined as that which, in a natural and continuous sequence, unbroken by any new cause, produces an event." This is an example of the direct causation test, which was once very popular and which is still followed

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Citation: Case to Determine Cause-in-Fact, 46 Tex. L. Rev. 423 (1968).

Dissatisfaction with this approach has led Professor Leon Green to conclude that the test of cause in fact should be simply whether the defendant's negligence "contributed to" the plaintiff's injuries. See also Annot., 100 A.L.R.2d 942, 958 (1965).

The "but for" test is completely unsatisfactory when two independent forces combine to produce a result which either alone would have produced. In such cases most courts employ the substantial factor test, which provides that the defendant's conduct will be regarded as a cause of the event if it was a material element and a substantial factor in bringing it about. See Anderson v. Minneapolis, 179 N.W. 45 (Minn. 1920); Carney v. Goodman, 270 S.W.2d 572 (Tenn. Ct. App. 1954); Walton v. Blavert, 40 N.W.2d 545 (Wis. 1949); James & Perry, Legal Cause, 60 Yale L.J. 761, 762-63 (1951); Smith, Legal Cause of Actions of Tort, 25 Harv. L. Rev. 103, 223, 229 (1911). Although originally intended as a test for both cause-in-fact and proximate cause, the substantial factor test is now largely confined to the cause-in-fact issue. See 2 F. Harper & F. James, The Law of Torts, § 20.6(6) (1956). The substantial factor test has been criticized as vague. See H. Hart & A. Honore, Causation in the Law 216-18, 263-66 (1959). However, one commentator has suggested that it is less mechanical than the "but for" test and should be used in place of it more often. See Malone, Ruminations on Cause-in-Fact, 9 Stan. L. Rev. 50, 91, 96-97 (1956). The Restatement § 432(2) restricts the substantial factor test to situations where the force set in motion by the defendant would alone have been sufficient to produce the damage.

See Green, The Causal Relation Issue in Negligence Law, 60 Mich. L. Rev. 543, 549 (1962). However, the significance of this distinction has been questioned. See Malone, Ruminations on Cause-in-Fact, 9 Stan. L. Rev. 50, 97 (1956); Probert, Causation in the Negligence Jargon: A Plea for Balanced "Realism," 18 U. Fla. L. Rev. 369, 377 (1966).

See also Morris v. Combs' Adm'r, 200 S.W.2d 281 (Ky. 1947); Paducah Traction Co. v. Weitlauf, 195 S.W. 99 (Ky. 1917); City of Louisville v. Hart's Adm'r, 136 S.W. 212 (Ky. 1911).
in a number of states.\textsuperscript{23} It resolves the liability issue by imposing liability on the defendant for any injury that was a direct consequence of his negligent act, regardless of the foreseeability of the nature or extent of the injury.\textsuperscript{24} At first blush, the direct causation rule appears easy to apply, but as its critics point out, this rather mechanical approach deprives the court of its legitimate role in determining liability.\textsuperscript{25}

Another approach was utilized in \textit{Hewitt's Administrator v. Central Truckaway System},\textsuperscript{26} where the Court stated: “To constitute ‘proximate cause’ creating liability for negligence, the injury must have been a natural and probable consequence of the negligent act.”\textsuperscript{27} To this definition \textit{Eaton v. Louisville & Nashville Railroad Co.}\textsuperscript{28} added: “For negligence to constitute the ‘proximate cause’ of an injury, the injury must be . . . of such a character as an ordinarily prudent person should have foreseen might probably occur as a result of negligence, but the negligent person need not have foreseen the precise form of the injury.”\textsuperscript{29}

The \textit{Hewitt} decision attempts to limit the defendant’s liability to the “natural and probable consequences” of his act.\textsuperscript{30} Although this test is somewhat mechanical, the vagueness of such terms as “natural” and “probable” provides considerable latitude to the decision-maker. The natural and probable consequences test also contains a hint of the foreseeability standard and is often regarded as a variant of the “foreseeable

\begin{thebibliography}{99}
\item[23] See, e.g., Chenoweth v. Flynn, 99 N.W.2d 310 (Iowa 1959); Dellwo v. Pearson, 107 N.W.2d 859 (Minn. 1961); Thompson v. Green Mountain Power Corp., 144 A.2d 786 (Vt. 1958); Strahlendorf v. Walgreen Co., 114 N.W.2d 823 (Wis. 1962).
\item[24] See R. KEETON, LEGAL CAUSE IN THE LAW OF TORTS 28-36 (1963); Myers, \textit{Causation and Common Sense}, 5 MIAMI L.Q. 238, 242-45 (1951). However, when there are intervening forces the defendant is liable only for that harm which occurs within the risk that his conduct created. See Nunan v. Bennett, 212 S.W. 570 (Ky. 1919); 57 AM. Jur. 2d, Negligence § 203 (1971).
\item[26] 194 S.W.2d 999 (Ky. 1946). \textit{See also} Ohio Cas. Ins. Co. v. Dep’t of Highways, 479 S.W.2d 603 (Ky. 1972); Dick v. Higgason, 322 S.W.2d 92 (Ky. 1959).
\item[27] 194 S.W.2d at 1001.
\item[28] 259 S.W.2d 29 (Ky. 1953).
\item[29] \textit{Id.} at 31.
\end{thebibliography}
consequences” test.\textsuperscript{31} The language in Eaton is more typical of the foreseeable consequences rule. This approach, which is followed in many states,\textsuperscript{32} purports to limit the defendant’s liability to those consequences which were reasonably foreseeable at the time of the negligent act. This would appear to expose a negligent defendant to less liability than the direct causation rule exemplified by the Stevens case. However, such a conclusion must be qualified, since, as the court in Eaton observed, the precise injury need not be foreseen in order to hold the defendant liable.\textsuperscript{33} This, of course, gives the decision-maker a great deal of leeway, for resolution of the liability issue depends on the degree of particularity with which the judge or jury defines the reasonably foreseeable consequences.\textsuperscript{34}

Foreseeability, at least in theory, is especially important where the defendant's negligent act only indirectly causes or contributes to the plaintiff's injury. As the Court in Hines v. Westerfield\textsuperscript{35} declared:

If the original negligent act set in force a chain of events which the original negligent actor might have reasonably foreseen would, according to the experience of mankind, lead to the event which happened, the original actor is not relieved of liability by the intervening act. If, however, the ultimate injury is brought about by an intervening act or force so unusual as not to have been reasonably foreseeable, the intervening act is considered as the superseding cause and the original actor is not liable.\textsuperscript{36}

In fact, the Kentucky Court of Appeals has held the original actor liable when such intervening forces as lightning,\textsuperscript{37} dis-

\textsuperscript{31} See Annot., 100 A.L.R.2d 942, 974-81 (1965). The natural and probable consequences test, however, can also be interpreted as a hindsight test. See R. Keeton, Legal Cause in the Law of Torts 27 (1963).


\textsuperscript{33} See also Rich v. Finley, 89 N.E.2d 213 (Mass. 1949); Mrazek v. Terminal Ry. Ass'n, 111 S.W.2d 26 (Mo. 1937).


\textsuperscript{35} 254 S.W.2d 728 (Ky. 1953).

\textsuperscript{36} Id. at 729.

\textsuperscript{37} See Clark's Adm'r v. Kentucky Util. Co., 158 S.W.2d 134 (Ky. 1942).
ease,\textsuperscript{33} or the innocent acts of the victim\textsuperscript{30} or a third person\textsuperscript{39} contributed to the plaintiff’s injury on the theory that such forces were foreseeable.\textsuperscript{41} Even intervening negligent conduct, when reasonably foreseeable, will not relieve the first tortfeasor from liability. Thus, in \textit{Miles v. Southeastern Motor Truck Lines}\textsuperscript{42} the defendant, whose negligent driving caused a truck to overturn, was held liable for an explosion caused by the negligence of a bystander who was smoking within 20 feet of the overturned truck’s fuel tank. In \textit{Roberts v. Taylor}\textsuperscript{43} the defendant motorist negligently struck a child; while the victim was lying unconscious in the street, she was run over by a second driver. This intervening act was considered foreseeable, and the original defendant was held liable for all of the plaintiff’s injuries. The Court has also regarded subsequent improper medical treatment\textsuperscript{44} and a second accident\textsuperscript{45} as sufficiently foreseeable to hold the original tort-feasor liable for injuries caused by such intervening forces. On the other hand, in \textit{Dixon v. Kentucky Utilities Co.}\textsuperscript{46} the intervening negligence of a motorist who struck the defendant’s utility pole, which in turn electrocuted a small child, was treated as a superseding force.

Since intervening criminal or intentionally tortious acts are seldom foreseeable, the Kentucky Court has usually treated them as superseding causes.\textsuperscript{47} Nevertheless, in \textit{University of Louisville v. Hammock}\textsuperscript{48} the Court allowed the plaintiff, a patient at the defendant’s infirmary, to recover for injuries received when she was attacked by a patient who was afflicted with delirium tremens. In \textit{Miller v. Mills},\textsuperscript{49} the plaintiff, a pas-

\textsuperscript{33} See Hazelwood v. Hodge, 357 S.W.2d 711 (Ky. 1961). But see Bush v. Commonwealth, 78 Ky. 268 (1880).
\textsuperscript{34} See, e.g., Mackey v. Spradlin, 397 S.W.2d 33 (Ky. 1965); Louisville & Nashville R.R. v. Stevens, 182 S.W. 2d 447 (Ky. 1944); Newton v. Wetherby’s Adm’x, 153 S.W.2d 947 (Ky. 1941).
\textsuperscript{35} See Lexington Country Club v. Stevenson, 390 S.W.2d 137 (Ky. 1965).
\textsuperscript{36} But see Newton v. Wetherby’s Adm’x, 153 S.W.2d 947 (Ky. 1941).
\textsuperscript{37} 173 S.W.2d 990 (Ky. 1943).
\textsuperscript{38} 339 S.W.2d 653 (Ky. 1960).
\textsuperscript{39} See City of Covington v. Keal, 133 S.W.2d 49 (Ky. 1939).
\textsuperscript{40} See Eichstadt v. Underwood, 337 S.W.2d 684 (Ky. 1960).
\textsuperscript{41} 174 S.W.2d 19 (Ky. 1943).
\textsuperscript{42} See Watson v. Kentucky & Ind. Bridge & R.R. Co., 126 S.W. 146 (Ky. 1910).
\textsuperscript{43} 106 S.W. 219 (Ky. 1907).
\textsuperscript{44} 257 S.W.2d 520 (Ky. 1953).
senger on the defendant's bus, got out of the bus to watch a fight between the bus driver and two intoxicated non-passengers and was struck in the head by a whiskey bottle thrown by one of the driver's adversaries. The Court held for the plaintiff against the bus company, after declaring that harm to the passengers resulting from the fight was foreseeable.

As these cases show, a foreseeability rule, if not taken too literally, will usually work relatively well in practice, even though rather unlikely events are occasionally characterized as "foreseeable." The liability issue, however, may often require a court to consider factors other than foreseeability. The foreseeable consequences rule is analytically deficient because it may prevent a court from explicitly considering other relevant policy matters in deciding the liability issue. It also confused the role of judge and jury when it transforms questions of law (liability) into questions of fact (foreseeability).

Dissatisfaction with these and other aspects of the proximate cause analysis has led some commentators to advocate the "risk theory," a new approach to the liability issue which separates causation and liability. Under the risk theory, causation is limited to cause-in-fact, while the liability issue is treated as a duty problem. This theory is based on the notion that duty and negligence are relational, and that the plaintiff may recover only if the defendant breached a duty which was owed to him. Most proponents of the risk theory argue that the scope of liability should be coterminous with the hazard created, that the injury should be within the risk, and that the defendant should be held liable only if his negligence created an unreasonable risk with respect to the plaintiff. While this theory appears to be analytically superior to the traditional concept of proximate cause, it still subjects the liability issue to a foreseeability standard.

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The approach advocated by Leon Green and his followers also assumes that the liability issue in a negligence case is best decided as a scope of duty question.\textsuperscript{53} According to Green, the plaintiff should recover only if four criteria are met: (1) The plaintiff must show a causal relationship between the defendant's conduct and his injury (the causation issue); (2) he must also prove the injuries that he has suffered (the damages issue); (3) there must be a duty owed to the plaintiff by the defendant concerning the risk involved (the duty issue); and (4) the defendant must have violated his duty (the negligence issue).\textsuperscript{54}

Causation, negligence and damages are jury issues,\textsuperscript{55} and since foreseeability is treated as part of the negligence issue, it too remains within the purview of the jury. According to Green, breach of duty involves subjecting the plaintiff to an unreasonable risk, an issue which requires evaluation of the defendant's conduct in light of \textit{foreseeable} harm to the plaintiff or others in the same class.

Duty, on the other hand, involves policy considerations and is a question of law.\textsuperscript{56} In many cases the scope of the defendant's duty will already be known from former decisions or statutes, but where there is no controlling legal rule the court must make new law. This involves not the foresight of the defendant, but the hindsight of the court—hindsight that may involve policy considerations extending beyond the interests of the immediate litigants.\textsuperscript{57} When an intervening force is involved, the court must determine whether the defendant owed the plaintiff a duty to protect him from the intervening cause of his injuries.\textsuperscript{58}

Although \textit{House v. Kellerman} did not depart from the traditional proximate cause analysis, the Court's holding is not


inconsistent with the Green approach. If the issue of superseding cause is taken away from the jury, a duty-oriented hindsight approach may be better suited to the court's role in the litigation process than the foreseeability-oriented approach that is presently utilized. Liability will remain a difficult issue, whether viewed from a proximate cause or a duty perspective. The approach suggested here will not perform miracles, but it may clarify matters by isolating the liability issue from the other constituents of a negligence cause of action and delineating the respective functions of judge and jury.

B. The Family Purpose Doctrine

In *Keeney v. Smith* the Court of Appeals recently reexamined the family purpose doctrine, under which the owner of a motor vehicle maintained for family use is liable for injuries caused by its negligent operation when it is driven by a family member for a family purpose. The doctrine requires: (1) ownership of the automobile by the defendant against whom vicarious liability is sought; (2) designation of the automobile as a family vehicle; (3) status of the driver as a family member; (4) use of the automobile for a family purpose; and (5) use of

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521 S.W.2d 242 (Ky. 1975).


See Elliott v. Killian, 87 S.E.2d 903 (N.C. 1955); Jerdal v. Sinclair, 342 P.2d 585 (Wash. 1959). Actual or constructive ownership of the vehicle has been considered unnecessary in some cases when the parent had control over the use of the car. See, e.g., Chappell v. Dean, 128 S.E.2d 830 (N.C. 1963).


Some cases have held the family purpose doctrine to be applicable even though the driver at the time of the accident was a third party and not a family member. See, e.g., Myrick v. Alexander, 112 S.E.2d 697 (Ga. 1960); Driver v. Smitt, 339 S.W.2d 135 (Tenn. Ct. App. 1959). This appears to be the rule in Kentucky. See Daniel v. Patrick, 333 S.W.2d 504 (Ky. 1960).

About half of the family purpose jurisdictions hold that a child who drives for his own pleasure is not furthering a "family" purpose and is, therefore, not within the scope of the doctrine. See, e.g., Hildock v. Grosso, 5 A.2d 555 (Pa. 1939); Sare v. Stetz, 214 P.2d 486 (Wyo. 1950). The remainder take the opposite view. See, e.g., Boyd v. Close, 287 P. 1079 (Colo. 1927); Stevens v. Van Deusen, 241 P.2d 331 (N.M. 1951); Reid v. Swindler, 154 S.E.2d 910 (S.C. 1967). Kentucky adheres to the latter position. See Stowe v. Morris, 144 S.W. 52 (Ky. 1912).
the automobile with the owner's permission. The family purpose doctrine is followed in 14 states but has been rejected in 32 jurisdictions.

The family purpose doctrine is grounded in the agency principle that one who furnishes a car for the use of his family may be held liable as a "master," under the theory of respondeat superior, when a family member causes injury while using the automobile for "family business." This conceptualization has been often criticized, however, because a family member's negligent use of the car for his own benefit or pleasure can constitute the requisite "family business," rendering the owner liable. This result is incompatible with the agency law principle that an agent must act for his principal's benefit in order for the principal to be held vicariously liable.


See Griffin v. Russell, 87 S.E. 10 (Ga. 1915); Davis v. Littlefield, 81 S.E. 487 (S.C. 1914); Birch v. Abercrombie, 133 P. 1020 (Wash. 1913).

Consequently, many states which adhere to the family purpose doctrine have abandoned the agency rationale and frankly acknowledge that the doctrine is merely an instrument of policy intended to place liability upon the party most easily held responsible. In terms of social policy, the doctrine has been justified as a means of encouraging owners to exercise greater care in allowing family members to use their cars, and as a method for fixing responsibility upon the one who is best able to compensate a victim, either directly or through liability insurance.

Kentucky first recognized the family purpose doctrine more than 60 years ago in *Stowe v. Morris*. Although liability was originally predicated on an agency theory, policy justifications for the doctrine have also received judicial recognition. For example, in *Turner v. Hall's Administratrix* the Court declared:

The Family Purpose Doctrine is a humanitarian one designed for the protection of the public generally, and resulted from recognition of the fact that in the vast majority of instances an infant has not sufficient property in his own right to indemnify one who may suffer from his negligent act.

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70 See Note, *The Family Purpose Doctrine*, 18 S.C.L. Rev. 638, 639 (1966). "There is obviously an element of unblushing fiction in this manufactured agency; and it has quite often been recognized, without apology, that the doctrine is an instrument of policy, a transparent device intended to place the liability upon the party most easily held responsible." W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 73 at 483 (4th ed. 1971).

71 See King v. Smythe, 204 S.W. 296 (Tenn. 1918).


73 See Note, *Liability of the Owner of an Automobile for Its Negligent Use by a Member of His Family*, 20 COLUM. L. REV. 213, 215 (1920).

74 144 S.W. 52 (Ky. 1912). Lashbrook v. Patten, 62 Ky. (1 Duv.) 317 (1864) is sometimes cited as the origin of the family purpose doctrine in America. In that case the Court held a father liable for the negligence of his minor son in connection with transporting his sisters to a picnic.

75 See, e.g., Steel v. Age's Adm'x, 26 S.W.2d 563, 564 (Ky. 1930); Sole v. Atkins, 276 S.W. 223 (Ky. 1924). The agency theory was criticized in Sampson, *Liability of the Owner of an Automobile for the Negligence of His Chauffeur and of His Family in His Car*, 14 Ky. L.J. 201, 212 (1926).

76 252 S.W.2d 30 (Ky. 1952). See also Richardson v. True, 259 S.W.2d 70, 71 (Ky. 1953); 48 KY. L.J. 169, 171-72 (1959).

77 252 S.W.2d at 32.
Keeney v. Smith was an appeal from a judgment which awarded damages to the plaintiff for injuries sustained in an automobile collision. Liability had been imposed not only upon the driver, but also upon the owner of the car, the driver's father. At the time of the collision the negligent driver was almost 19 years old, resided at home with his parents and attended a local community college. Although he earned some money by working on his father's farm, the younger Keeney was not entirely self-supporting. The motor vehicle, a van registered in the father's name, was used primarily by the son for transporting his horses to various horse shows.

The defendant-owner contended that the family purpose doctrine should be restricted to situations in which the owner has a legal duty to support the driver. The Court of Appeals agreed and reversed the lower court's judgment. In effect, the Court held that the doctrine was inapplicable to an adult child, even when he resides with his parents and is dependent upon them for support.

Many states apply the family purpose doctrine to adult as well as minor children, under certain circumstances. In such states the controlling test is not whether the child is an adult or a minor, or whether he is self-supporting, but whether he was using the automobile for a family purpose with the consent of the owner. This view, however, has been rejected in a few states which have limited the family purpose doctrine to minor or dependent children.

Until the Keeney decision, the status of the adult child was uncertain in Kentucky. In Ludwig v. Johnson the Court had held that the family purpose doctrine was applicable only where the owner was under a legal or moral obligation to sup-

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80 See, e.g., Adkins v. Nanney, 82 S.W.2d 867 (Tenn. 1935); Foran v. Kallio, 355 P.2d 544 (Wash. 1960).


82 49 S.W.2d 347 (Ky. 1932).
port the driver of the vehicle or where the driver was a minor child of the owner. The Court did not indicate, however, whether the age and obligation elements were both necessary. Although in some Kentucky cases automobile owners have been held liable for the negligence of their adult children, liability was not based on the family purpose doctrine, but upon conventional agency principles, since the child was clearly acting for the benefit of the parent and not on his own behalf. In no case prior to Keeney had the doctrine's applicability depended solely upon the age of the driver.

The Court in Keeney noted that the General Assembly had reduced the age of majority in Kentucky to 18 years and concluded that the father had no legal obligation to support his 19-year-old son. Moreover, the Court rejected the plaintiff's contention that the family purpose doctrine could be based on a moral as well as a legal obligation, although there had been dicta to that effect in earlier cases. In the Court's words:

No standards have ever been established for determining what constitutes a moral obligation to support, and in our view the term is so vague and indefinite as to defy any precise application to the family purpose doctrine.

As a result of the Keeney decision, application of the family purpose doctrine in the future will be limited to situations in which the driver of the vehicle is a minor to whom the owner owes a legal obligation of support. A statute already provides that the negligence of a driver under 18 years of age will be imputed to the person who signs his application for an operator's license, to any motor vehicle owner who permits a child under 18 to drive his automobile or to any one who gives or

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83 The Court's language was taken from dictum in an earlier family purpose case, Bradley v. Schmidt, 4 S.W.2d 703, 705 (Ky. 1928). See also Walker v. Farley, 213 S.W.2d 1016, 1017 (Ky. 1948).

84 See Wireman v. Salyer, 336 S.W.2d 349 (Ky. 1960).

85 The adult child rule has often been confused with pure agency principles. This may be due to the Court's tendency to employ agency language in family purpose cases. See 55 Ky. L.J. 502, 505 (1968).

86 Dicta in several cases, however, suggested that the family purpose doctrine would not apply to an adult. See Abell v. Whitehead, 99 S.W.2d 770 (Ky. 1936); Miracle v. Cavins, 72 S.W.2d 25 (Ky. 1934).


88 521 S.W.2d at 243.
furnishes a motor vehicle to such a child. However, now that the age of majority has been lowered to 18, accident victims will be unable to recover against car owners for the negligence of college students and other adult dependents. This leaves a significant gap in the protection formerly afforded to accident victims in this state.

The problem created by Keeney emphasizes the inadequacy of basing the family purpose doctrine on the driver's status as a minor child. The legal obligation test, despite its long acceptance in this state, should be rejected in favor of a broader standard. Not only is the legal obligation test too narrow, but it seems to confuse the requirement of a family relationship with the requirement that the automobile be driven for a family purpose. A family relationship is, of course, necessary to sustain the concept of a family purpose and to establish the agency status upon which the doctrine is based. However, this requirement is satisfied if the driver lives with the family and actually functions as a member of the household. Once the family relationship is established, the existence of vicarious liability should depend upon whether the parent has provided a vehicle for the benefit of the family, and whether he has retained control over its use by family members, including adult children. In other words, the legal obligation test implies that the parent's vicarious liability is based on his general ability to control the child's conduct, whereas it should depend on his power to control the child's use of the motor vehicle in question.

Despite its limitations, the family purpose doctrine represents a policy of placing the risk of injury by a financially irresponsible driver on the owner of the automobile, rather than on the injured victim. This choice is due primarily to a belief that the owner is in a better position than the victim to spread the loss through insurance. The effect of the Keeney decision

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100 Those victims who drive can spread the risk by means of uninsured motorist coverage under their own automobile liability insurance policies. 2 R. Long, The
is to shift the risk back to the victim in some situations. Although victims as a class have some capacity to spread the risk, automobile owners can usually do so less expensively and more effectively.

As was mentioned earlier, the family purpose doctrine is primarily concerned with distributional goals. Its raison d'être is to compensate accident victims who are injured by financially irresponsible drivers. There are, however, other judicial and legislative devices to achieve this objective.92

For example, many states have enacted financial responsibility laws and compulsory insurance provisions on the assumption that drivers are the better loss-spreaders. Such laws require drivers to carry liability insurance or otherwise demonstrate a capacity to respond in damages if they cause an accident.93 This approach is not entirely satisfactory because the negligent driver is usually allowed one accident before he must obtain the necessary insurance.94 A few states, however, require each driver to carry specified amounts of liability insurance as a condition precedent to obtaining an operator's license or registering a motor vehicle.95 Although Kentucky enacted a compulsory liability insurance provision as part of its recent no-fault automobile insurance legislation,96 the act does not include an effective enforcement mechanism.97

Other states place some of the risk on the owner as well as the driver. For example, in some states automobile liability

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[96] KRS § 304.39-090, 304.39-110 (Supp. 1974). It appears that owners and operators of motor vehicles must also purchase no-fault benefits, even if they decline to limit their tort rights in return for no-fault coverage. See OFFICE OF CONTINUING LEGAL EDUCATION, REPORT OF THE SEMINAR ON NO FAULT INSURANCE 100-02 (1974).
[97] One who fails to obtain the necessary liability insurance is subject to a fine of $50 to $500. KRS § 304.39-050 (Supp. 1974). This appears to be the only means of enforcement.
insurance policies must include an omnibus clause of a specified scope. This provision insures not only against the negligence of the owner of the car, but also against that of any person who has an accident while driving the automobile with the owner's consent. Finally, legislation in a number of states imposes liability on the owner for the negligence of the driver where the vehicle is operated with the owner's consent. The Florida courts have reached the same result by characterizing the automobile as a "dangerous instrumentality" and thereby holding the owner vicariously liable for the negligent acts of the driver.

Having restricted the scope of the family purpose doctrine, Kentucky should adopt one of the alternatives discussed above in order to more fairly distribute accident losses. Although each of these proposals has strengths, as well as weaknesses, this writer believes the last approach—a broad rule of vicarious liability for automobile owners—would provide the greatest protection for accident victims.

II. PRODUCTS LIABILITY

*Embs v. Pepsi-Cola Bottling Co.* involved the question of whether manufacturers and sellers are strictly liable to "non-users" for injuries caused by their defective products. Over the years, liability for the manufacture and sale of defective products has rested on negligence, warranty and strict liability principles. Originally, a defendant's tort liability was limited

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98 See R. Keeton, Basic Text on Insurance Law § 4.7(a) (1971).
102 528 S.W.2d 703 (Ky. 1975).
to those in privity with him,\textsuperscript{105} but since \textit{MacPherson v. Buick Motor Co.}\textsuperscript{106} all states have abandoned this requirement in negligence actions.\textsuperscript{107} A second form of products liability, based on implied warranty, arises by operation of law, regardless of the seller's intention.\textsuperscript{108} Strict liability in tort, which was first proposed in \textit{Greenman v. Yuba Power Products, Inc.}\textsuperscript{109} and which has been incorporated into the Restatement of Torts,\textsuperscript{110} is now accepted in most states,\textsuperscript{111} largely displacing the other theories where personal injuries to users or consumers are involved.\textsuperscript{112}

Although strict liability on behalf of users and consumers is now well established, similar protection for nonusers has developed more slowly. Part of the problem is conceptual. The nonuser is outside the chain of distribution of the goods: "He is not the man the supplier has sought to reach, and no implied representation has been made to him that the product is safe for use; nor has he relied upon any assurance of safety whatever."\textsuperscript{113} Nevertheless, nonusers may recover in negligence actions against the manufacturers, distributors and sellers of defective products in cases where lack of due care can be shown.\textsuperscript{114} Liability to nonusers has also been allowed in some jurisdictions under an implied warranty theory.\textsuperscript{115} However, the

\textsuperscript{106} 111 N.E. 1050 (N.Y. 1916).
\textsuperscript{109} 377 P.2d 897, 27 Cal. Rptr. 697 (1962).
\textsuperscript{111} See Prosser, \textit{The Fall of the Citadel (Strict Liability to the Consumer)}, 50 Minn. L. Rev. 791 (1966); Annot., 13 A.L.R.3d 1057 (1967).
\textsuperscript{114} See Gall v. Union Ice Co., 239 P.2d 48 (Cal. App. 1951); Gaidry Motors, Inc. v. Brannon, 268 S.W.2d 627 (Ky. 1953); McLeod v. Line Air Prods. Co., 1 S.W.2d 122 (Mo. 1927); See also Restatement § 395 (1965).
\textsuperscript{115} See Comment, \textit{Cave Adstantem: Bystander Recovery in Products Liability
rights of nonusers under the doctrine of strict liability are still somewhat unclear.

Section 402A of the Restatement (Second) of Torts expressly includes only "users" and "consumers" within its protective ambit. In a caveat the drafters express no opinion "as to whether the rules stated in this Section may not apply . . . to harm to persons other than users or consumers . . . ."\(^{116}\) The "user or consumer" limitation, a vestige of the old privity requirement,\(^ {117}\) has been criticized by some commentators,\(^ {118}\) and despite the Restatement's lack of encouragement, most cases decided in the past decade have favored extending the scope of strict liability to nonusers.\(^ {119}\) Today, at least 11 states permit nonusers to recover under the strict liability doctrine.\(^ {120}\)

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\(^{116}\) Casual bystanders and others who may come in contact with the product, as in the case of employees of the retailer, a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery. There may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded, other than that they do not have the same reasons for expecting such protection as the consumer who buys a marketed product; but the social pressure which has been largely responsible for the development of the rule stated has been a consumers' pressure, and there is not the same demand for the protection of casual strangers.


\(^{118}\) See Comment, Misuse as a Bar to Bystander Recovery Under Strict Products Liability, 10 Houston L. Rev. 1106, 1115 (1973).

\(^{119}\) Although Greenman v. Yuba Power Prods., Inc. did not involve injury to a nonuser, the California Supreme Court anticipated this trend by setting forth a broad rule of liability: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963) (emphasis added).

\(^{120}\) Cases, 2 Creighton L. Rev. 295, 296-305 (1969). Section 2-318, as first drafted in 1951, provided that the seller's warranty extended to "any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such a person may use, consume, or be affected by the goods." In 1956 the drafters proposed two additional alternatives. Alternative B expanded protection to any "natural person," and alternative C extended coverage to injuries beyond those to the person that might result from the seller's breach of warranty. See Jentz, Extension of Strict Liability to All Third Persons, 12 Am. Bus. L.J. 231, 242 (1975). Kentucky has retained the original version, alternative A. KRS § 355.2-318. Therefore, a suit for damages by a non-user under a theory of implied warranty might fail for lack of privity with the seller.
Strict liability was first applied to a nonuser in the 1965 Michigan case, *Piercefield v. Remington Arms Co.*,¹²¹ in which the plaintiff was injured when a defective shell caused his brother's shotgun barrel to explode. Although the court spoke in terms of warranty, its rationale was based more on strict liability principles.¹²² A similar result was reached that same year by a Connecticut court in *Mitchell v. Miller.*¹²³ The leading case, however, is *Elmore v. American Motors Corp.*,¹²⁴ a 1969 California decision involving a plaintiff who was injured when his vehicle was struck by an automobile manufactured and sold by the defendants. The collision occurred when the other vehicle went out of control because of a defectively connected drive shaft. The lower court nonsuited the plaintiffs, but the California Supreme Court reversed, holding that a nonuser could bring an action based on strict liability in tort against both the manufacturer and the seller of a defective automobile:

An automobile with a defectively connected drive shaft constituted a substantial hazard on the highway not only to the driver and passenger of the car but also to pedestrians and other drivers. The public policy which protects the driver and passenger of the car should also protect the bystander, and where a driver or passenger of another car is injured due to defects in the manufacture of an automobile and without any fault of their own, they may recover from the manufacturer of the defective automobile.¹²⁵

The Kentucky Court of Appeals first allowed recovery under a theory of strict tort liability in *Dealers Transport Co. v. Battery Distributing Co.*¹²⁶ and has since applied strict liability in a number of products liability cases.¹²⁷ Prior to *Embs*,

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¹²⁵ 451 P.2d at 89, 75 Cal. Rptr. at 657.

¹²⁶ 402 S.W.2d 441 (Ky. 1965). This case is discussed in Kentucky Court of Appeals Review: Torts, 55 Ky. L.J. 453, 472-73 (1967).

however, the issue of a manufacturer's liability to nonusers had arisen only twice in this state. The first case, *Davidson v. Leadingham*, was decided by a federal district court in 1968. *Davidson* arose out of an automobile accident caused by a defect in a truck manufactured by one of the defendants. The federal court, applying Kentucky law in a diversity action, refused to allow the suit to proceed on a strict liability basis because it was unwilling to extend the scope of strict liability beyond that which had been established by existing Kentucky decisions.\(^\text{129}\)

The second case was *Ford Motor Co. v. Zipper*, a 1973 decision in which 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 vehicle. At trial it was established that the accident had occurred when the brakes on the defendant's car failed as the result of a manufacturing defect. Although judgment for the plaintiff was affirmed on appeal, the Court did not discuss the victim's nonuser status.\(^\text{131}\)

Nevertheless, the result in *Zipper* suggested that the Court of Appeals would permit nonusers to recover on a strict liability theory.

The Court permitted just such a recovery in *Embs v. Pepsi-Cola Bottling Co.* In *Embs* the plaintiff was injured by flying glass when a soft-drink exploded near her while she was shopping in a self-service retail store. She brought suit under strict liability, but the trial court directed a verdict for the defendants. The Court of Appeals reversed, holding that manufacturers and sellers of defective products are strictly liable in tort for injuries caused by such products, even though the victim may be a "nonuser." Thus, Kentucky has joined the growing number of jurisdictions which permit nonusers to recover

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\(^{129}\) A similar result was reached by a federal district court in New York. See Mull v. Colt Co., 31 F.R.D. 154 (S.D.N.Y. 1962), aff'd, Mull v. Ford Motor Co., 368 F.2d 713 (2d Cir. 1966). The *Mull* case was cited with approval by the federal court in *Davidson*, 294 F. Supp. at 157.

\(^{131}\) The *Zipper* case was discussed in Ausness, *Kentucky Law Survey: Torts*, 63 Ky. L.J. 766-67 (1975).
against manufacturers under strict liability for injuries caused by defective products.

The imposition of strict liability for injuries caused by defective products is usually justified by a concept known as "enterprise liability," which provides that a product's social costs, including personal injuries, should be treated as a cost of production and placed on the manufacturer or seller rather than on the victim.\(^{12}\) Enterprise liability is premised on the dual considerations of loss spreading and efficiency.\(^{13}\) Although criticized by some commentators,\(^{14}\) the loss spreading rationale is the most popular justification for the imposition of strict liability.\(^{15}\) Losses caused by defective products are shifted to the manufacturer, because he can minimize their economic impact by spreading them over a large number of persons.\(^{16}\) The manufacturer may either absorb the loss directly or insure against it; in either event the additional cost can be spread among the purchasers of the product through higher prices.\(^{17}\)


\(^{17}\) The manufacturer may also pass part of the cost back to production factors, such as labor or the suppliers of raw materials. See Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499, 519-27 (1961).
Considerations of efficiency may also support a strict liability rule which places liability on manufacturers.\(^\text{138}\) According to this theory, losses caused by defective products should be placed upon the party who can most easily reduce or prevent them.\(^\text{139}\) This is usually the manufacturer or seller, rather than the user or victim.\(^\text{140}\)

Both loss spreading and economic efficiency objectives appear to favor an extension of manufacturer liability to non-users. To the extent that loss spreading arguments support strict liability for users, they apply with equal force to non-users.\(^\text{141}\) As the federal court in Sills v. Massey-Ferguson, Inc.\(^\text{142}\) declared: "[B]ystanders as a class would not generally be better able to bear the loss than users or consumers."\(^\text{143}\) Moreover, nonusers are less likely than consumers to insure against injury on a first party basis.\(^\text{144}\)

The protection of nonusers is also consistent with cost avoidance and efficiency goals. Clearly, the nonuser is no better able than the consumer to avoid injury from product defects. As the Elmore court noted, since a bystander is not a purchaser or user, he cannot exercise care in the selection or use of the product.\(^\text{145}\) Therefore, if the imposition of strict liability upon manufacturers is justifiable on the ground that producers can reduce accident costs from defective products less expensively or more efficiently than can consumers, this same principle will support a liability rule that also protects nonusers.


\(^\text{142}\) 296 F. Supp. 776 (N.D. Ind. 1969).

\(^\text{143}\) Id. at 781.

\(^\text{144}\) See Note, \textit{Strict Products Liability and the Bystander}, 64 Colum. L. Rev. 916, 935 (1964).

\(^\text{145}\) "[Consumers] have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities." Elmore v. American Motors Corp., 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657 (1969).
It is clear that both loss spreading and economic efficiency goals influenced the Court's decision in the *Embs* case. After noting that "public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained," the Court described how these considerations affected a manufacturer's liability to nonusers:

> Our expressed public policy will be furthered if we minimize the risk of personal injury and property damage by charging the cost of injuries against the manufacturer who can procure liability insurance and distribute its expense among the public as a cost of doing business; and since the risk of harm from defective products exists for mere bystanders and passersby as well as for the purchaser or user, there is no substantial reason for protecting one class of persons and not the other.  

The Court of Appeals also discussed the issue of retailer liability in *Embs*. California, which decided the landmark *Greenman* and *Elmore* cases, was likewise the first state to extend strict liability to retailers; most strict liability jurisdictions, including Kentucky, immediately followed. *Caruth v. Marini,* a 1970 Arizona case, was perhaps the earliest decision to impose strict liability upon retailers for injuries to nonusers. In *Embs* the Kentucky Court, relying upon *Caruth*, held that strict liability would extend to retail sellers as well as manufacturers, a decision which it justified with the risk spreading rationale discussed earlier:

> As a matter of public policy the retailer or middleman as well as the manufacturer should be liable since the loss for injuries resulting from defective products should be placed on those

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146 528 S.W.2d at 705. See also Restatement § 402A, comment c (1965).
147 528 S.W.2d at 705.
members of the marketing chain best able to pay the loss, who can then distribute such a risk among themselves by means of insurance and indemnity agreements.\textsuperscript{152}

Finally, the Court in \textit{Embs} imposed a “reasonably foreseeable” limitation on the strict liability doctrine, declaring: “Public policy is adequately served if parameters are placed upon the extension of the rule so that it is limited to bystanders whose injury from the defect is reasonably foreseeable.”\textsuperscript{153} Strict liability, of course, has never meant that the manufacturer is regarded as a general insurer for the victim no matter how or where he comes to grief,\textsuperscript{154} and the Restatement’s “user or consumer” limitation was probably intended to delimit the class of persons to whom the manufacturer would be liable.\textsuperscript{155} Once manufacturers’ liability for defective products was extended to include nonusers, however, the problem of limiting liability became more significant. Presently, two approaches are in general use: the “any person” test and the “foreseeability” standard. Although the foreseeability criterion appears to be the prevailing rule,\textsuperscript{156} it has been criticized as less consistent with the loss spreading objectives of enterprise liability than the broader “any person” approach.\textsuperscript{157}

The application of strict liability in tort to manufacturers and retailers on behalf of nonusers is consistent with the prevailing trend in American products liability law. Moreover, this extension of liability appears fully justified by the public policy considerations discussed earlier. Therefore, the Court in

\textsuperscript{152} 528 S.W.2d at 706.

\textsuperscript{153} Id.

\textsuperscript{154} See Calabresi & Hirschoff, \textit{Toward a Test for Strict Liability in Torts}, 81 \textsc{Yale} L.J. 1055, 1056 (1972).


\textsuperscript{157} See Howes v. Hansen, 201 N.W.2d 825, 831 (Wis. 1972); Jentz, \textit{Extension of Strict Liability to All Third Persons}, 12 \textsc{Am. Bus. L.J.} 231, 243-45 (1975).
Embs v. Pepsi-Cola Bottling Co. reached the correct decision and did so for the right reasons.

III. NUISANCE

The difference between a public and private nuisance does not lie in the nature of the nuisance itself, but rather in the scope of its injurious effect. A public nuisance affects the public at large, or those members of the public who come into contact with it, while a private nuisance affects only a limited number of individuals. A nuisance may be characterized as both public and private, when public as well as individual interests are wrongfully invaded.

In City of Monticello v. Rankin, a number of property owners sought injunctive relief against the continued operation of a nearby sewage disposal plant owned by the city. The plaintiffs alleged that the operation of the plant constituted a nuisance because it emitted offensive odors and interfered with the use and enjoyment of their homes and adjacent premises. The trial court found that a properly constructed and maintained sewage disposal plant would not create unpleasant odors, and that the city had made no attempt to alleviate the problem. Consequently, the lower court held in favor of the plaintiffs, ruling that unless the nuisance was abated within seven months, further operation of the sewage disposal plant would be enjoined. On appeal, the defendant argued that the plaintiffs lacked standing to bring abatement proceedings.

A common or public nuisance is an act or omission that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience or injury to the public. The maintenance of a public nuisance is a crimi-

158 See W. G. Duncan Coal Co. v. Jones, 254 S.W.2d 720 (Ky. 1953).
160 521 S.W.2d 79 (Ky. 1975).
161 It is a generally recognized exception to the rule of sovereign immunity that an injunction will lie against a governmental body for creating or maintaining a nuisance. See 58 Am. Jur.2d Nuisances § 55 (1971). Moreover, the doctrine of sovereign immunity has been abrogated in Kentucky with respect to municipalities.
nal offense. In addition, the state, through its attorney general or other authorized official, can maintain a suit in equity to abate a public nuisance. Although the power to sue for abatement of a public nuisance is sometimes conferred on individuals by statute, normally, a private individual may maintain a civil action in tort only when he suffers special damage, different in kind from that suffered by the general public. The special damage, however, need not be peculiar, exclusive or unique to the plaintiff, and the fact that other individuals suffer the same kind of damage does not prevent any of them from recovering under a public nuisance theory.

The special damage rule is satisfied if a public nuisance affects the use and enjoyment of an individual's land. The property owner's damages are "special" because each tract of land is considered unique in the eyes of the law. Furthermore, in most cases only a limited number of landowners will be affected by the nuisance, and their interest will be different from that of the general public. Accordingly, in City of Monticello v. Rankin the Court of Appeals allowed the plaintiffs to

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163 See Kentucky Glycerine Co. v. Commonwealth, 224 S.W. 360 (Ky. 1920); Commonwealth v. Beals, 119 S.W. 813 (Ky. 1909); 58 Am. Jur.2d Nuisance § 186 (1971).
164 See Hancock v. Terry Elkhorn Mining Co., 503 S.W.2d 710 (Ky. 1973); Austin, Kentucky Law Survey: Torts, 63 Ky. L.J. 753, 767-71 (1975).
165 See Pompano Horse Club v. State, 111 So. 801 (Fla. 1927); 58 Am. Jur.2d Nuisance § 112 (1971).
166 See Embry-Bosse Funeral Home, Inc. v. Webster, 261 S.W.2d 682 (Ky. 1953); Polk v. Axton, 208 S.W.2d 497 (Ky. 1948); York v. Chesapeake & Ohio Ry. Co., 41 S.W.2d 668 (Ky. 1931); Alsip v. Hodge, 283 S.W. 392 (Ky. 1926). The historical development of the special damages rule is discussed in Newark, The Boundaries of Nuisance, 65 L.Q. Rev. 480 (1949). The special damages limitation is based on a policy of preventing a multiplicity of suits. See William's Case, 77 Eng. Rep. 163 (K.B. 1592); Comment, Public Nuisance Standing to Sue without Showing "Special Inquiry," 26 U. Fla. L. Rev. 360, 361 (1974). But this construction has been criticized: Jurgensmeyer, Control of Air Pollution Through the Assertion of Private Rights, 1967 DUKE L.J. 2126, 2234-35; Smith, Private Action for Obstruction of Public Right of Passage, 15 COLUM. L. REV. 1, 15-23 (1915). But see Save Sand Key, Inc. v. United States Steel Corp., 281 So.2d 572 (Fla. Ct. App. 1973); RESTATEMENT § 821C(2) (c) (Tent. Draft No. 16, 1970). Moreover, the special damages requirement is not confined to actions for damages, but is also applied to cases where a private individual seeks an injunction, Prosser, Private Action for Public Nuisance, 52 VA. L. REV. 997, 1006 (1966), or even abatement of a nuisance by self-help. See Ehrlick v. Commonwealth, 102 S.W. 289 (Ky. 1907); RESTATEMENT § 203(2).
maintain an action in public nuisance against the city. The Court further declared that the defendant's operation of its sewage disposal plant constituted a private nuisance:

It is also generally recognized, however, that where there is any substantial interference with the plaintiff's use and enjoyment of his own land, this makes the nuisance a private as well as a public one, and since the plaintiff does not lose his rights as a land owner merely because others suffer damage of the same kind, or even of the same degree, there is general agreement that he may proceed upon either theory, or upon both.168

Liability is imposed for a private nuisance if one party unreasonably interferes with the property rights of another.169 This usually involves two aspects: (1) Defining the nature of the protected property interest, and (2) determining the reasonableness of the defendant's conduct.170 The interest protected is the right to reasonable comfort and convenience in the occupation of one's land.171 Once an invasion is established,172 the defendant will be held liable if his conduct is deemed unreasonable. According to the Restatement of Torts, any intentional invasion is considered unreasonable, "unless the utility of the actor's conduct outweighs the gravity of the harm."173 Factors that affect the gravity of the harm are its extent and character, the suitability of the invaded interest and the burden on the injured party to avoid harm.174 These factors must be balanced against the social value of the invading conduct, its suitability to the locality and the ease by which it may be modified to prevent the harm.175 The Restatement's balancing

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168 521 S.W.2d at 80-81.
169 See 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); Petroleum Ref. Co. v. Commonwealth, 232 S.W. 421 (Ky. 1921).
172 The plaintiff must suffer "substantial harm" to be entitled to relief. See id. at § 87; RESTATEMENT § 821F (Tent. Draft No. 16, 1970).
173 Id. at § 825.
175 Id. at § 828.
approach is now the law in Kentucky, having been adopted and endorsed by the Court of Appeals in *Louisville Refining Co. v. Mudd*:

> [T]he existence of a nuisance must be ascertained on the basis of two broad factors, neither of which may in any case be the sole test to the exclusion of the other; (1) the reasonableness of the defendant's use of his property, and (2) the gravity of harm to the complainant. Both are to be considered in light of all the circumstances of the case, including the lawful nature and location of the defendant's business, the manner of its operation, and such importance to the community as it may have; the kind, volume, time and duration of the particular annoyance; the respective situations of the parties; and the character (including applicable zoning) of the locality.

In weighing the utility of the defendant's conduct against the gravity of the harm, the Court in *Rankin* undoubtedly thought that the odor problem could have been largely prevented by proper operation of the plant. Citing *Louisville & Jefferson County Air Board v. Porter*, the city argued that an activity which would constitute a nuisance if conducted for private gain might not necessarily be considered a nuisance when conducted for an important public purpose. The Court admitted the general validity of this proposition, but denied its applicability to the facts in the *Rankin* case. Although the public benefits of a sewage disposal plant might in some instances outweigh unavoidable harm to nearby landowners, the adverse effects in this case were avoidable and unnecessary.

The choice, therefore, was not between a plant or no plant, but between a properly operated plant and an improperly operated facility. An improperly operated sewage disposal plant has no particular social utility, regardless of whether it is publicly or privately owned, and the Court quite properly refused to allow the city to rely on the public character of the operation as a

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176 For a discussion of the two conflicting lines of nuisance cases in Kentucky prior to 1960, see note, 50 Ky. L.J. 104 (1961).
177 339 S.W.2d 181 (Ky. 1960).
178 Id. at 186-87.
179 397 S.W.2d 146, 150 (Ky. 1965).
180 See *Restatement of Torts* § 830 (1939).
means of avoiding liability.

Another issue in the Rankin case was the nature of the relief granted to the plaintiffs. The lower court allowed the city approximately seven months to abate the nuisance and directed that the plant be closed if the harmful conditions were not remedied by that time. On appeal, the city urged the Court to apply the balance of convenience doctrine\textsuperscript{181} and limit the plaintiff's relief to an award of damages. However, denial of injunctive relief under the balance of convenience doctrine is appropriate only where the total damage to the plaintiff's property is small in comparison with the harm to the defendant if an injunction is granted.\textsuperscript{182} This was not the case in Rankin, for the injunction merely required the city to operate the plant properly, a comparatively light burden in relation to the harm that would otherwise result. Therefore, the Court rejected the city's argument.

The decision in Rankin seems doctrinally sound. The defendant's conduct was certainly tortious under the balancing test of Louisville Refining Co. v. Mudd. Moreover, the plaintiffs were entitled to an injunction, since the continuing unreasonable interference with the use and enjoyment of their land could not be adequately compensated by damages at law,\textsuperscript{183} and the balance of convenience doctrine was inapplicable.

Economic analysis adds an interesting dimension to the Rankin case.\textsuperscript{184} If we accept the proposition that the law of nuisance should promote an efficient allocation of resources, we may ask whether Rankin achieved this objective. In economic terms the objectionable odors may be characterized as a negative externality. If we assume that the benefits of having a


sewage disposal plant in this particular location outweigh the harm to nearby property owners, a decision to close the plant in order to protect the property owners would be inappropriate. However, if liability is placed on the city, it should be able, theoretically, to internalize the costs of compensating the property owners for their losses, while still continuing to operate. An award of permanent damages would be sufficient to accomplish this, and injunctive relief would not be necessary.

However, Rankin did not involve an "either-or" situation. The trial court concluded that the city could eliminate, or at least greatly reduce, the harm it caused the plaintiffs by modifying the manner in which the plant was operated. If the costs of modifying its behavior are demonstrably less than the plaintiff's damages, then the defendant should be compelled to modify its behavior accordingly. The form of relief decreed was calculated to do just that, and the most efficient resolution of the conflict was thereby achieved. Thus, Rankin seems correctly decided on both doctrinal and policy grounds.

Professor Coase has argued that an efficient result would occur regardless of where the liability was initially imposed, provided that there are no significant transaction costs. Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960). See also Calabresi, Transaction Costs, Resource Allocation and Liability Rules—A Comment, 11 J. Law & Econ. 67 (1968); Nutter, The Coase Theorem on Social Cost: A Footnote, 11 J. Law & Econ. 504 (1968). After a decade and a half, the Coase Theorem remains controversial and was recently the subject of a two-issue symposium in the Natural Resources Journal. See Symposium, 13 Nat. Res. J. 557-716 (1973); 14 Nat. Res. J. 1-86 (1974). This implies that when there are significant bargaining and administrative costs, as in the case of multiple parties, it does make a difference on whom the liability is placed. See Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1084-98 (1972). If the Court had placed the liability on the landowners, i.e., if it had found that there was no nuisance, it is doubtful that the landowners could have "bribed" the city to operate the disposal plant properly, even though this was clearly the most efficient course of action from a societal point of view.

Once its liability was established, the city might have been willing to abate the nuisance in order to avoid paying damages to the plaintiffs, since by hypothesis this would be the less expensive course of action. However, since governmental institutions are not always responsive to economic pressures, the more direct approach seems preferable under the circumstances.