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Manufacturers' Liability to Remote Users of Obviously Dangerous Instrumentalities

MANUFACTURERS' LIABILITY TO REMOTE USERS OF OBVIOUSLY DANGEROUS INSTRUMENTALITIES

A recent New York Supreme Court ruling[1] dismissed a complaint alleging negligence on the part of a manufacturer of a storm door which resulted in injury to an infant. The court found that "the instant complaint fails to allege that the defective condition of the storm door was latent or that it created a danger that was hidden from the infant plaintiff. Such omission renders the pleading legally insufficient."[2] The federal courts have enunciated a similar rule.[3]

Liability of manufacturers or suppliers to ultimate and remote users of their products has been a source of controversy since *Winterbottom v. Wright*.[4] The English court in that case invoked the privity doctrine, and held that the plaintiff, not being in privity with the defendant, could not maintain a cause of action in negligence for an injury sustained as a result of a product failure. After a series of New York decisions which gradually eroded the force of the *Winterbottom* case,[5] Judge Cardozo, in *MacPherson v. Buick Motor Co.*,[6] discarded the doctrine of privity in actions involving inherently dangerous instrumentalities or products which become dangerous if negligently made. The *MacPherson* decision has been construed by the New York Court of Appeals to limit liability of the manufacturer to instances where the defect which causes the injury is hidden.[7] From this interpretation of the *MacPherson* rule has developed the strict pleading requirement first announced by the court of appeals in 1957.[8]

1. Eilenberg v. O & M Storm Window Co., 17 Misc. 2d 799, 187 N.Y.S.2d 922 (Sup. Ct. 1959). The complaint was dismissed pursuant to Rule 106 of the Rules of Civil Practice.

2. Id. at 800, 187 N.Y.S.2d at 924.

3. See, e.g., Messina v. Clark Equip. Co., 263 F.2d 291 (2d Cir.), cert. denied, 359 U.S. 1013 (1959). Chief Judge Charles E. Clark wrote a vigorous dissent in which he renounced the practice of applying a formal pleading rule to the facts before the court instead of applying principles of negligence law in determining duty.

4. 4 M. & W. 109, 152 Eng. Rep. 409 (Ex. 1842). The action here was brought by a person injured in a stagecoach which had been repaired by the defendant. There was no contractual relationship between the parties.

5. See Statler v. George A. Ray Mfg. Co., 195 N.Y. 478, 88 N.E. 1063 (1909) (defectively made coffee urn); Torgesen v. Schultz, 192 N.Y. 156, 84 N.E. 956 (1908) (defective aerated water bottle); Devlin v. Smith, 89 N.Y. 470 (1882) (imperfectly constructed scaffold); Thomas v. Winchester, 6 N.Y. 397 (1852) (mislabeled poison).

6. 217 N.Y. 382, 111 N.E. 1050 (1916).

7. See, e.g., Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950). See also Patrons Fire Relief Ass'n v. L. Sonneborn Sons, 263 N.Y. 463, 189 N.E. 551 (1934), where the court of appeals, in a dictum, first recognized the latent-patent distinction by conditioning application of MacPherson v. Buick Motor Co., supra note 6, on the existence of a hidden defect or latent danger.

8. Inman v. Binghamton Housing Authority, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S. 2d 699 (1957). For lower court cases following this decision see Eilenberg v. O & M Storm Window Co., 17 Misc. 2d 799, 187 N.Y.S.2d 922 (Sup. Ct. 1959); Thomas v. Jerominek, 8 Misc. 2d 517, 170 N.Y.S.2d 388 (Sup. Ct. 1957).

The purpose of this comment is to examine the rationale of the decisions which have established the requirement of a hidden danger or defect in the manufacturer-liability cases.

The MacPherson Doctrine

In *MacPherson,* Judge Cardozo found that the test of a manufacturer's duty was not based on any contractual relationship between the parties but rather on the foreseeable risk that would result if the manufacturer were negligent. Concerning the manufacturer's duty the court said: "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."[9] Several courts and text writers,[10] however, treated the *MacPherson* rule as an *exception* to the general rule of nonliability in manufacturer-remote user cases. A recent decision indicates New York courts are still in this company.[11]

Although in *MacPherson* the defect, a rotted spoke in a wooden wheel, was in fact a hidden one, Judge Cardozo did not anywhere in his opinion condition recovery upon that fact. The courts, nevertheless, have effectively restricted *MacPherson* to its facts; that is to say, if a remote user is to have a cause of action he must be injured by a hidden defect.

The Campo Rule

The leading manufacturer-remote user case requiring an allegation of a hidden defect is *Campo v. Scofield.*[12] While feeding onions into a topping machine, the plaintiff caught his hands in its exposed blades. The negligence charged to the manufacturer was twofold: (1) a failure to employ safety devices; and (2) a failure to provide a rapid means to turn off the machine in an emergency. The court of appeals sustained the dismissal of the complaint since the plaintiff failed to "allege and prove the existence of a latent defect or a danger not known to the plaintiff or other users."[13]

The obviousness of the danger, therefore, relieved the defendant of liability in the *Campo* case. It might well be argued that in such a case there should

9. MacPherson v. Buick Motor Co., 217 N.Y. 382, 390, 111 N.E. 1050, 1053 (1916).

10. See, e.g., 3 Cooley, Torts § 498, at 463 (4th ed. 1932), where it is stated that "the general rule is that a contractor, manufacturer, vendor, or furnisher of an article is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture or sale of such article." See also Courteen Seed Co. v. Hong Kong & Shanghai Banking Corp., 245 N.Y. 377, 157 N.E. 272 (1927); International Prod. Co. v. Erie R.R., 244 N.Y. 331, 155 N.E. 662 (1927).

11. A recent supreme court decision premised its discussion of a case with these words: "The plaintiff not in privity with the defendant manufacturer . . . sues in . . . negligence. . . ." Thomas v. Jerominek, 8 Misc. 2d 517, 518, 170 N.Y.S.2d 388, 389 (Sup. Ct. 1957). See also Inman v. Binghamton Housing Authority, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

12. 301 N.Y. 468, 95 N.E.2d 802 (1950).

13. Id. at 471, 95 N.E.2d at 803.

be no recovery because the plaintiff was obviously either contributorily negligent or had assumed the risk. The *Campo* court, however, discussed neither contributory negligence nor assumption of risk. It based its decision on the lack of foreseeability. In effect, the court held that once the defect is obvious no further duty is owed because it is not reasonably foreseeable that any *rational person in good physical condition* could be injured if he used reasonable care.[14]

This objective view of foreseeability, which is not endorsed by the more liberal scholars,[15] is classically illustrated in *Inman v. Binghamton Housing Authority*.[16] A two-year-old child, incapable of being contributorily negligent,[17] fell from an unguarded terrace in an apartment house. The court dismissed the complaint against the architect and builder since it lacked the allegation of a hidden defect. Clearly the builder knew, when he built a terrace without a railing, that a person using it would be exposed to injury. The court apparently reasoned, however, that because the lack of a railing was apparent the builder could not foresee injury since prudent men would have avoided the danger. How much more objective a standard of foreseeability could be applied? The two-year-old child was not reasonably prudent, nor would have been a blind man, though both could reasonably be expected to be found in an apartment house, along with idiots, epileptics and persons under other assorted disabilities. Even a prudent man who had been swept away by a windstorm or who had slipped on ice, both of which are foreseeable, and who might have been saved by a guard rail, would have no cause of action because objectively no duty was imposed on the builder to guard the terrace so long as the lack of a guard was apparent. The lower courts in New York have followed this rule.[18]

Another test of foreseeability, one apparently applied in most tort actions other than manufacturer-remote user situations, is that the defendant should

14. For a case strikingly similar in facts and result see Tyson v. Long Mfg. Co., 249 N.C. 557, 107 S.E.2d 170 (1959). See also Jamieson v. Woodward & Lothrop, 247 F.2d 23 (D.C. Cir.), cert. denied, 355 U.S. 855 (1957); Stevens v. Allis-Chalmers Mfg. Co., 151 Kan. 638, 100 P.2d 723 (1940); Yaun v. Allis-Chalmers Mfg. Co., 253 Wis. 558, 34 N.W.2d 853 (1948). Here the courts, while holding that the plaintiff was precluded from recovering for the injury because of the obviousness of the danger, seemed to view the question of liability more from the point of view of the plaintiff's contributory negligence than from the lack of duty on the part of the defendant. As we shall see, this fundamental difference in approach could have a far-reaching effect. See Comment, 26 Fordham L. Rev. 689, 692 (1958) (problem in such a test of foreseeability).

15. See 2 Harper & James, Torts § 28.5 (1956); Keeton, Personal Injuries Resulting from Open and Obvious Conditions, 100 U. Pa. L. Rev. 629 (1952).

16. 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

17. See Verni v. Johnson, 295 N.Y. 436, 68 N.E.2d 431 (1946) (three-year-old child); Day v. Johnson, 265 App. Div. 383, 39 N.Y.S.2d 203 (4th Dep't 1943) (four-year-old child, question of capacity is for jury); Prosser, Torts § 31, at 129 (2d ed. 1955).

18. See, e.g., Eilenberg v. O & M Storm Window Co., 17 Misc. 2d 799, 187 N.Y.S.2d 922 (Sup. Ct. 1959). For a case decided prior to Inman v. Binghamton Housing Authority, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957), see Noone v. Fred Perlberg, Inc., 268 App. Div. 149, 49 N.Y.S.2d 460 (1st Dep't 1944), aff'd, 294 N.Y. 680, 60 N.E.2d 839 (1945).

foresee that among a large group of people some will be careless and some will be acting under disabilities.[19] Here the ultimate question is whether, all factors considered, the defendant could have taken reasonable steps to prevent the injury in the first instance. Under this approach, any intervening factors would not necessarily relieve the defendant of responsibility, though they may bar the plaintiff's recovery.[20]

In negligence cases not involving manufacturers and remote users, the mere fact that a party is injured by an obvious danger or defect does not automatically relieve the defendant of liability. Thus, it has been held in New York that a person who falls on an icy sidewalk has a valid cause of action, and possible contributory negligence is a question for the jury.[21] In another New York action,[22] a visitor in the defendant's shop was injured by chips flying from a lathe. Though the danger was obvious, the court did not deny plaintiff a cause of action. Negligence was again a question for the jury.

In other jurisdictions the same test is applied. Thus, where injury resulted from a fall into an obvious hole in a floor,[23] coming into contact with exposed electrical wires,[24] a fall into an open elevator shaft[25] or burns resulting from ignition of an obviously highly inflammable robe,[26] the courts held in each case that the obviousness of the danger did not of itself preclude the plaintiff from a cause of action, and the question of contributory negligence was one for the jury.

It is one thing to say that because a *particular* plaintiff is aware of the existence of an obvious defect he cannot recover against the defendant. It is quite another matter to hold that in order for *any* plaintiff to recover he must be injured by a hidden danger.

The first rule would take into account the contributory negligence of the plaintiff and, possibly, assumption of risk. It would base lack of liability not on the absence of a duty but rather on the intervening behavior of the plaintiff. The majority of jurisdictions which considered the manufacturers' liability problem, in most instances where the danger was obvious, found for the defendant, but the cases were decided after a full trial of the issues.[27] This

19. See Prosser, Torts § 49, at 269 (2d ed. 1955). Cf. Perry & James, Legal Cause, 60 Yale L.J. 761, 792 (1951).

20. Prosser, op. cit. supra note 19, at 268.

21. Matthiesen v. Adrian, 110 N.Y.S.2d 830 (Sup. Ct.), aff'd mem., 281 App. Div. 715, 118 N.Y.S.2d 560 (2d Dep't 1952), aff'd mem., 306 N.Y. 694, 117 N.E.2d 639 (1954).

22. Klimaszewski v. Herrick, 263 App. Div. 235, 32 N.Y.S.2d 441 (4th Dep't 1942). See also Pelligrino v. Seventh Chelsea Corp., 20 N.Y.S.2d 947 (N.Y. City Ct. 1940) (action against contractor by employee of subcontractor for fall down stair well opening).

23. Eggen v. Hickman, 274 Ky. 550, 119 S.W.2d 633 (1938). See also Magay v. Claflin-Sumner Coal Co., 257 Mass. 244, 153 N.E. 534 (1926) (coal hole in sidewalk).

24. Davidson v. Otter Tail Power Co., 150 Minn. 446, 185 N.W. 644 (1921); Asher v. City of Independence, 177 Mo. App. 1, 163 S.W. 574 (1914).

25. Landy v. Olson & Serley Co., 171 Minn. 440, 214 N.W. 659 (1927).

26. Dempsey v. Virginia Dare Stores, 239 Mo. App. 355, 186 S.W.2d 217 (1945).

27. See, e.g., Jamieson v. Woodward & Lothrop, 247 F.2d 23 (D.C. Cir.), cert. denied, 355 U.S. 855 (1957); Allis Chalmers Mfg. Co. v. Wichman, 220 F.2d 426 (8th Cir. 1955); Stevens v. Allis-Chalmers Mfg. Co., 151 Kan. 638, 100 P.2d 723 (1940).

is as it should be, because contributory negligence and assumption of risk are usually questions of fact for a jury to determine.

Why is this more logical rule not applied in manufacturer-remote user cases in New York? The answer is probably that the courts consider the manufacturer to require special protection where liability to remote users is concerned.[28] Privity protection still survives in negligence cases. The fact that the manufacturer has no personal relationship with the ultimate user and does not know the propensities of each of thousands of ultimate users, imposes on him only a minimum duty. Indeed, the *Campo* case has been styled a carry-over of the privity doctrine,[29] for while the court of appeals in both the *Campo* and *Inman* cases avoided any open subscription to the privity doctrine, it is clear that the court was greatly concerned with protection of the manufacturer.[30]

Increased Liability Within the Common Law Framework

Some courts in refusing to impose a duty upon manufacturers to guard remote users against obvious dangers, have commented upon the absence of proof that protective devices, as a practical matter, could have been installed by the manufacturer.[31] If an adequate showing were made that a machine

28. Nelson v. Wm. H. Ziegler Co., 190 Minn. 313, 251 N.W. 534 (1933), in which a recovery was permitted a user in privity with the manufacturer of an obviously dangerous machine.

29. 2 Harper & James, Torts § 28.5, at 1544 (1956); Note, 1 Buffalo L. Rev. 169 (1951); Note, 35 Minn. L. Rev. 608 (1951). For support of the New York position see Note, 17 Brooklyn L. Rev. 349 (1951).

30. In Campo v. Scofield, 301 N.Y. 468, 475, 95 N.E.2d 802, 805 (1950), Judge Fuld said: "If, however, the manufacturer's liability is to be so extended, if so fundamental a change is to be effected, we deem it the function of the legislature rather than of the courts to achieve that change." The court in Jamieson v. Woodward & Lothrop, 247 F.2d 23, 33 (D.C. Cir.), cert. denied, 355 U.S. 855 (1957), said: "There is in some sociological circles a philosophy that the burden of damages suffered in accidents with manufactured articles ought to be widely spread. . . . But such a plan ought to be adopted, if it is to be adopted, by the voice of the people generally, expressed by the legislative branch. . . . It ought not be imposed by the judicial branch." It would seem the federal court here was concerned primarily with the fear of absolute liability.

The other "sociological circles" buttress their argument supporting extended liability on the fact that a new relationship has grown up between manufacturer and ultimate user. While these authorities themselves decry any attempt to create an absolute liability in the manufacturer which would make him an insurer, they argue that the existing rule does not conform to the law as it should be. See 2 Harper & James, Torts § 28.5 (1956). This authority, citing James & Dickinson, Accident Proneness and Accident Law, 63 Harv. L. Rev. 769 (1950), points out that the best way of preventing industrial accidents is by introducing safety devices on dangerous machinery. Further, it might well be argued that because of mass advertising media used today which brings the manufacturers' product directly before the eyes of the buying public, the rule that an absence of privity of contract between parties prevents recovery by a remote user has become sterile.

31. See, e.g., Jamieson v. Woodward & Lothrop, 247 F.2d 23 (D.C. Cir.), cert. denied, 355 U.S. 855 (1957). Cf. Yaun v. Allis-Chalmers Mfg. Co., 253 Wis. 558, 34 N.W.2d 853 (1948). In Jamieson v. Woodward & Lothrop, supra, the court said: "Appellant makes

could reasonably be provided with safety guards, it is predictable that these courts might find in the manufacturer a duty to install them.[32] It is reasonable to predict, however, that New York will be slow to increase manufacturers' liability for any reason.

A possibility remains, nevertheless, that a skillful use of a pleading of customary usage might overcome even the inflexibility of the *Campo* rule.[33] It is reasonable enough to assume that if all manufacturers who produce machines of the same type made by the defendant manufacturer use safety guards, the defendant should reasonably be expected to see the purpose for such use. It might also be argued that a manufacturer should foresee that people who use particular types of machines which are customarily or almost universally equipped with safety guards will naturally come to rely on the presence of the guards in their operation of the machines. Failure of a small group of manufacturers to comply with an industry policy with knowledge of the general attitude of operators toward the machine or device might well be a violation of a duty owing to operators in general and the injured operator in particular.

CONCLUSION

The pleading rule enunciated in New York is far more restrictive than the general rule elsewhere applied in negligence cases. The *Campo* decision finds some justification in the fact that the machine which caused the injury was one which was normally used only by adults without disabilities, and that the duty of care based on reasonable foreseeability was fulfilled. Nevertheless, there are times "when an actor has reason to know that he is dealing with persons whose characteristics make it especially likely that they will do unreasonable things."[34] Thus, in *Inman* the duty of care might be far different than it was in *Campo*. If a manufacturer knows his product is likely to be brought into contact with infants or others under disability and reasonable steps may be taken to prevent injury then, in logic and justice, a duty should arise in the manufacturer to take such steps. The extension of the ordinary and generally accepted rule of negligence to manufacturer-remote user cases would have the beneficial effect not only of preserving otherwise

reference to the possibility of safeguards. The District Court referred to this possibility but pointed out, correctly, that nothing whatever was offered as a fact or as an issue of fact to indicate the desirability or feasibility of additional accessories. . . . Plaintiff tendered no issue of fact on this topic. . . ." 247 F.2d at 32-33.

32. Allis-Chalmers Mfg. Co. v. Wichman, 220 F.2d 426 (8th Cir. 1955). Cf. Karsteadt v. Phillip Gross Hardware & Supply Co., 179 Wis. 110, 190 N.W. 844 (1922). In the Allis Chalmers case, supra, the court said: "[W]e conclude that the trial court cannot be said to have erred in holding that a question of negligence was properly presented by the evidence for the trier of the facts to determine . . . whether the defendant . . . ought reasonably to have equipped the rollers with some shield or guard. . . ." 220 F.2d at 428-29.

33. Messina v. Clark Equip. Co., 263 F.2d 291 (2d Cir.), cert. denied, 359 U.S. 1013 (1959) (attempt to plead customary usage failed).

34. Prosser, Torts § 32, at 140 (2d ed. 1955).