

1945

Recent Cases

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Recent Cases

TORTS—LIABILITY OF SUPPLIER FOR INJURIES SUSTAINED FROM UNUSUAL USE OF THING SUPPLIED

*Lawson v. Benjamin Ansehl Co.*¹

In an action against a supplier² by the parents for the death of a child caused when the child splashed the inflammable contents of a bottle of finger nail polish remover on himself and lighted a match thereto, plaintiffs seek to establish liability on the theory that the bottle of finger nail polish remover contained an element which was imminently dangerous when exposed to fire and was not so labeled, although perfectly harmless when used as a finger nail polish remover. The plaintiffs recovered a judgment in the trial court after it had denied defendant's instruction in the nature of a demurrer to the evidence at the close of all the evidence produced in the trial of the case. The appellate court denied recovery on the grounds that the finger nail polish remover was not used in the manner for which and by a person for whose use it was supplied.

This presents the unusual situation, for ordinarily the injuries resulting from the normal use to which a chattel is put are to be anticipated, and where the chattel supplied is inherently dangerous it can be made to carry its own warning to insure its safe use. In such fact situations the supplier (whether direct or through a third person) is fully cognizant of the fact that the chattel will be unsafe for its intended use unless warning is communicated to the person supplied. The Missouri Supreme Court³ has adopted the view of the Restatement of Torts⁴ to the effect that unless proper warning is given a supplier is liable if injury results when the chattel is used in the intended manner. This case, however, presents the converse, where the chattel is absolutely safe if used in the intended manner and the person supplied need not be notified of the chemical analysis of the contents nor is warning necessary to insure safe use.

In *Schfranek v. Benjamin Moore & Co.*,⁵ the person supplied purchased wall

1. 180 S. W. (2d) 751 (Mo. App. 1944).

2. The case does not state whether the chattel was supplied direct or through a retailer, or whether the defendant was a manufacturer or distributor.

3. *Orr v. Shell Oil Company*, 177 S. W. (2d) 608 (Mo. 1943).

4. RESTATEMENT, MO. ANNOT. (1936) §§ 388-408.

5. 54 F. (2d) 76 (S. D. N. Y. 1931); cf. *Robbins v. Georgia Power Co.*, 47 Ga. App. 517, 171 S. E. 218 (1933). There the plaintiff who had recently undergone an operation, purchased an electric-vibrating machine for reducing purposes. She ran the machine at full speed, resulting in a displaced kidney. The defendant was held not responsible, even though it had told the plaintiff she could safely run the machine at a high speed, for the machine was not a "dangerous instrumentality" and the degree of vibration was completely under the control of the operator.

decorating material which he poured into water and mixed with his hands, sustaining severe cuts from particles of glass which were in the powder by mistake. Recovery was denied on the basis that the manufacturer could not have foreseen anyone's mixing this powder in such a manner, the court pointing out in summarizing the cases "that what I may properly call their lowest common denominator is found by asking the question whether the probable normal and appropriate use to which the thing in question is intended by the manufacturer to be put would involve injury to its user, if it is wrongfully compounded or negligently inspected."⁶ In enlarging upon the scope of "probable" the court said, "The zone of the possible in casualties is practically limitless . . . The zone of the probable, however, is very much narrower, and that is the zone with which tort liability is concerned, and a survey of it involves the exercise of reasonable foresight only."⁷

Similar reasoning appears in a suit against a meat packer for death resulting from eating raw pork which contained trichina.⁸ Recovery was denied on negligence principles and the court further held that there was no implied warranty as to the fitness of raw pork as food in an uncooked condition, saying that "The warranty should be applied only to food used in the usual, rather than in the unusual and improper manner."⁹

A case comparable to these cases occurred when an automobile owner drained his gas tank, splashing ethyl gas on his clothing and suffering burns and blisters which resulted in a streptococcus infection.¹⁰ The supplier of the gasoline was exonerated for ". . . there was no evidence to charge the defendants with knowledge that the ethyl gasoline from which the plaintiff's injury is claimed to have resulted, was likely to be dangerous to life or limb when used for the purpose for which it was supplied."¹¹

Compared to these cases are those where the chattel possesses inherently dangerous qualities when used in the manner and for the purpose intended. A paint manufacturer supplied oil stain of a highly volatile nature without a warning of its composition. While using the stain, a consumer struck a match to light a chandelier and an explosion followed for which the supplier was held responsible for failing to warn of the inherent dangers accompanying the ordinary use of the

6. *Schfrank v. Benjamin Moore & Co.*, 54 F. (2d) 76, 77 (S. D. N. Y. 1931).

7. *Ibid.*; PROSSER, *TORTS* (1941), at 679; "The manufacturer is at least entitled to assume that the chattel will be put to a normal use by a normal user, and is not subject to liability where it would ordinarily be safe, but injury results from some unusual use, or some personal idiosyncrasy of the consumer."

8. *Cheli v. Cudahy Bros. Co.*, 267 Mich. 690, 255 N. W. 414 (1934).

9. *Id.* at 697, 255 N. W. at 416 (1934).

10. *Lenz v. Standard Oil Co. of New York*, 88 N. H. 212, 186 Atl. 329 (1936); *cf. Walstrom Optical Co. v. Miller*, (Tex. Civ. App.), 59 S. W. (2d) 895 (1933) (optical company held not liable for failing to foresee that purchaser of frames for glasses would be allergic to the dye used in the frames).

11. *Lenz v. Standard Oil Co. of New York*, 88 N. H. 212, 215, 186 Atl. 329, 331 (1936).

stain, the court commenting that one should anticipate that a consumer might use stain under artificial light and would thus be called upon to strike a match.¹²

Similar to this was the supplying of a fluid used to clean ship condensers, the fluid reacting with cast iron to give off hydrogen which exploded upon the approach of a workman with a lighted candle. Recovery was granted on the ground that this cleaning fluid was dangerous when used for its intended purpose and the chemical analysis was not disclosed nor was warning given of dangers inherent in its normal use.¹³ A supplier was likewise held responsible for failure to warn of the nature of chemicals furnished to one who was to combine them as directed by the supplier to form an insect spray, when an employee of the processor immersed the crystals in oil and squeezed the sack out with his hands, the toxic chemicals causing permanent injuries to the employee's kidneys.¹⁴

Falling somewhere in between these two groups of cases is the case of *Pease v. Sinclair Refining Co.*¹⁵ There the Sinclair petroleum company supplied a bottled display of petroleum products for use in schools, a high school instructor acquiring one of these exhibits. To avoid possible dangers from shipping highly inflammable gasoline and kerosene, the company substituted water in those bottles. The instructor, thinking the bottle contained kerosene, poured the contents over sodium metal—which is the accepted method of preserving sodium. The result was an explosion, which is the natural reaction to the combination of water and sodium. This is one of the very few instances in which water would be more dangerous than kerosene, yet the company was held liable for it should have foreseen the possible uses to which water labeled "kerosene" might be put.

The decision of such cases depends upon one's notion of the foreseeable when applied to possible uses to which a chattel might be put and which the supplier

12. *Thornhill v. Carpenter-Morton Co.*, 220 Mass. 593, 108 N. E. 474 (1915); *Genesee County Patrons Fire Relief Ass'n v. L. Sonneborn Sons*, 263 N. Y. 463, 189 N. E. 551 (1934) (waterproofing material of a highly inflammable nature was supplied without warning and the supplier was held liable for the fire which resulted when the vapors were ignited by an oil lamp); *Genack v. Gorman*, 224 Mich. 79, 194 N. W. 575 (1923); *Wolcho v. Rosenbluth*, 81 Conn. 358, 71 Atl. 566 (1908) (cases wherein stove polish ignited on being applied to a hot stove).

13. *Anglo-Celtic Shipping Co., Ltd. v. Elliott and Jeffery et al.*, 42 T. L. R. 297 (K. B. 1926); cf. *Bosserman v. Smith*, 205 Mo. App. 657, 226 S. W. 608 (1920) (merchant sold small boy a "mine" which exploded, but told him it was a "red fire" which burned); *Harmon v. Plapao Laboratories*, 218 S. W. 701 (Mo. App. 1920) *Weller v. Plapao Laboratories*, 197 Mo. App. 47, 191 S. W. 1056 (1917).

14. *Orr v. Shell Oil Company*, 177 S. W. (2d) 608 (Mo. 1943); cf. *Guinan v. Famous Players-Lasky Corp.*, 267 Mass. 501, 167 N. E. 235 (1929), where defendant film processing company supplied scraps of film to an employee of X Co. to be used in making cement for brushes. The employee placed film scraps in a sack, boarded a street car, sat by a heater, the films exploded, and defendant was liable for injuries to passengers because it supplied an inherently dangerous chattel without warning. The court, however, seemed to rely upon a local ordinance requiring safe disposal of film scraps.

15. 104 F. (2d) 183 (C.C.A. 2nd, 1939); See cases collected in: Notes (1925) 39 A. L. R. 992; (1936) 105 A. L. R. 1502; (1937) 111 A. L. R. 1239.

reasonably may be said to anticipate where he supplies the thing, as in this case, through the usual marketing channels. On comparing the instant case with the other cases cited the decision seems properly based, for use by the boy of the nail polish remover falls completely outside those uses which one could reasonably anticipate. Query, suppose while using the polish remover the user had been smoking a cigarette and the liquid had ignited?

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