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TORTS IN MISSOURI*

GLENN A. MCCLEARY**

I. PRODUCTS LIABILITY

The spectacular development in the tort liability of manufacturers of products, beginning with the industrial revolution in England and extending over the following one hundred and twenty-five years, continued apace in one of the landmark decisions in Missouri law in the case of *Morrow v. Caloric Appliances Corp.*[1]

Prior to the rise of manufacturing in the early part of the nineteenth century the theory of tort law was strict liability for injuries to persons and property. The social viewpoint following the industrial revolution recognized the importance of manufacturing to the economy and strength of England. The entrepreneur group was making England a world power in trade and the implements of warfare. It was a time when men worked long hours in factories without the protection of safety devices. In this crude state of manufacturing, injuries to workmen from the tools and machines and from the unskilfulness of their fellow workmen took a heavy toll. Had the theory of strict liability continued for these injuries, the enterprises would have suffered judgments which they could not endure if they were to continue to contribute to the expanding economy. It was not that human suffering was entirely ignored, but rather a feeling that these claims could not be recognized on a basis of absolute liability. In an attempt to harmonize these social interests the theory of liability for negligence began to supplant strict liability in the field of personal injuries. In addition the defenses of assumption of risk and contributory negligence further protected the manufacturing group.

The same social viewpoint of this period considered the burden on manufacturers too great if the law held them liable for injuries resulting from negligence in the manufacturing process sustained by persons other than those directly supplied. Hence the courts, in attempting to achieve

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*This article contains a discussion of selected decisions of the Missouri Supreme Court which appear in Volumes 371 to 381 (or 382), inclusive of the South Western Reporter, Second Series.

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1. 372 S.W.2d 41 (Mo. 1963); See Smith, *Product Liability—Missouri—Implied Warranty—The End of Privity*, 29 MO. L. REV. 217 (1964).

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the social goals of that society, limited liability by adopting into negligence law a principle from the law of contracts, namely, that there was no legal relationship and no liability except between those who were in privity of contract, thus insulating the manufacturer from the consumer and user of the product where the goods passed through a dealer.

The action of the courts first in achieving this protection for the entrepreneur group, and later in providing greater protection for consumers by finding liability for personal injuries from foreseeable risks to foreseeable consumers, rather than continuing to limit liability by the contract theory of privity, is an inspiring example of common law courts being able to adapt the principles found in the body of the law to meet changing social needs and social goals. These changes took the form of exceptions to the requirement of privity beginning about the opening of the present century. The first exception applied to a manufacturer of an article intended to preserve, destroy, or affect human life where there was negligence in the making of the product. Food and drugs for human consumption were first brought under the exception, but soon it was applied to injuries from harmful substances in animal food and to other forms of personal injuries caused by various agents from weapons to automobiles. These exceptions were expanded to achieve the same protection for consumers that liability based on straight negligence principles achieved, where there was a foreseeable of risk of injury, if reasonable care was not employed in the making of the product. It was not until 1916 that the older theory, together with the exceptions, were swept away and replaced by our modern principles of negligence. Until 1940, Missouri lawyers continued to plead under the exceptions with an additional count on straight negligence, before it became clear that the negligence count was adequate. The new theory of liability was extended beyond physical injuries to the user to anyone who could reasonably be foreseen to be in the vicinity of its probable use and be endangered if the chattel was defective. It has also been extended to foreseeable risks to property.

Among the reasons for this extension of liability on manufacturers of products was a re-evaluation of the social interests. The entrepreneur group in this field, by the opening of the twentieth century, was more stable as a result of technical, industrial advances and developed means of transportation and distribution of goods, so that the burden of judgments could be absorbed by a slight increase in the cost of the product. Furthermore, protection became more readily available through liability insurance, the cost of which could be distributed to the consumer in the price of the product. By these means the manufacturer was able to distribute losses to

the general public. Thus the social interest in protecting consumers from negligently made products received an increased evaluation in balancing this interest with the social interest in business enterprise.

While the elimination of the privity requirement in the negligence field was coming to full fruition, another attack on the privity requirement in products cases was being approached from the theory of implied warranty. Although warranty was originally a tort theory, it had become imbedded in the law of contracts as a theory requiring privity between the consumer and the manufacturer of the product. However, within the past thirty years, a development is to be found, parallel to that in the negligence field, in which a kind of warranty different from that usually found in the sale of goods cases and which is not governed by the contract rules which have surrounded it has arisen. Although it may be called implied warranty, it is actually strict liability in a pure tort action giving protection to the consumer of the product as a matter of policy, and courts in these cases are already discarding further talk of warranty, in favor of strict liability.

As in negligence, the first cases holding the manufacturer strictly liable to a consumer on the warranty theory involved bodily harm from the defective condition of sealed foods and beverages, even though the producer had exercised all possible care in the preparation and sale of the food and beverage, and although there was no privity between them. These products were intended for human consumption, and the justification for strict liability was that the social policy demanded protection of the consuming public. Thus the consumer may have acquired the product through one or more intermediate dealers, or he may have been a member of the family of the purchaser, a guest at his home, or a mere donee but the manufacturer is still liable. The concept of food includes all products which are intended to be taken internally, such as drugs, candy, beverages and similar products.

As recently as 1961, the American Law Institute recognized that some courts were extending strict liability to products beyond those intended for internal consumption and that the limits could not be stated at that time. But three years later, in 1964, the Institute was aware that this is the law of the immediate future as to other products generally and approved the wider application:

> § 402A. Special Liability of Seller of Product to User or Consumer.
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to this property,

is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to this property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to reach the user or consumer in the condition in which it is sold.

(2) The rule stated in subsection (1) applied although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[2]

Among the products to which strict liability has been extended are automobiles, tires, airplanes, grinding wheels, children's playground equipment, chairs, water heaters, and the gas range in the *Morrow* case. In that case a gas range caught on fire as a result of defective valves which were an integral part of the stove, completely destroying the plaintiff's house. The gas range was manufactured by defendant and purchased by plaintiffs through a dealer. Thus, the case is one of the more advanced extensions of strict liability to products other than those intended for human consumption and to nonpersonal injuries.

An interesting feature of this case was the use by counsel for the plaintiffs, in his oral presentation to the Missouri Supreme Court, of an excellent article recently published in the *Missouri Law Review* by Ross T. Roberts on "Implied Warranties—The Privity Rule and Strict Liability—The Non-Food Cases."[3] Counsel pointed out to the court that, due to the careful and exhaustive research published in this article, greater help could be obtained there than in any attempt he might make in his oral argument. In the opinion the court cites this article as "well-documented," and concludes:

> Careful consideration of the recent decisions of the courts of other states to the same effect, the inclination of the courts of this state to modify the harsh results flowing from a rule of *caveat emptor* in analogous situations, the logic of the reasoning upon which these cases (and numerous other cases therein cited) are ruled in an effort to afford justice to the vast majority of the "consumer" citizenry, whose well-being, health and very lives are dependent in great degree upon processed food and manufactured

2. RESTATEMENT (SECOND), TORTS (Tent. Draft No. 10, 1964).
3. 27 Mo. L. REV. 194 (1962).

> articles and facilities, the fitness or safe use of which the ordinary "consumer" can know little or nothing other than the fact that the processor or manufacturer holds them out to the public as fit and reasonably safe for use by the "consumer" when used in the manner and for the purpose for which they are manufactured and sold, leads inevitably to the conclusion that under the facts as found by the jury the appellant is to be held liable as an implied warrantor of the fitness and reasonable safety of the gas cooking range here involved, despite lack of privity of contract.[4]

Yet to be determined by the Missouri courts will be injuries resulting from the defective product sustained by non-users and non-consumers. Will strict liability be applied to injuries to members of the family or employees of the consumer? To a guest injured while riding in a defective automobile? To passengers riding in an airplane? To a pedestrian injured as a result of a blow-out of a defective tire on a passing automobile? Some courts have found liability in these instances. Since strict liability based on implied warranty in the products cases is now clearly an action in tort, may we not expect that the tort concept of foreseeability will be employed in determining those who come within the area of the risk from a defective product, in the same manner that foreseeability has been developed in negligence cases? Furthermore, due to the uncertainty and difficulty of proof of negligence in establishing liability, is it not already quite clear that future cases arising from injuries from defective products will be brought on strict liability, and the negligence theory left to wither on the vine? The plaintiff will only need to allege and prove that he suffered an injury caused by a defect in the product, and that the defect existed when the product was shipped by the manufacturer.[5]

However, the manufacturer is not an insurer that his product is accident proof or foolproof. His strict liability is limited to injuries resulting from latent or concealed defects. Where the danger is observable or the user has knowledge of the defect or danger, the manufacturer is not responsible. His obligation is satisfied if the product is free of latent and concealed dangers. In *Stevens v. Durbin-Durco, Inc.*,[6] a truck driver re-

4. 372 S.W.2d 41, 55.

5. Articles on this development in tort liability which should prove most helpful to members of the bar with cases in this area, in addition to the article by Ross Roberts, cited above: Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) (citing extensive bibliography); PROSSER, TORTS 658-88 (3d ed. 1964). Also see RESTATEMENT (SECOND), TORTS, § 402A, in Tentative Drafts No. 6, 1961; No. 7, 1962; No. 10, 1964.

6. 377 S.W.2d 343 (Mo. 1964).

ceived injuries when an extension pipe being used with a load binder kicked back. The trucker had used load binders for years and knew of their danger when used with an extension pipe. He alleged negligence in that this load binder was not equipped with a safety ratchet device, which would have prevented the pipe from being released suddenly through the entire arc, when force was no longer applied to the end of the handle-lever. In this case the load binder was structurally sound. The lack of a safety ratchet was obvious to plaintiff and the danger created was known to him because of his experience with such equipment. He was injured in a normal use of the load binder which reacted in the normal manner anticipated by the user. The court held that plaintiff failed to show the existence, or the breach, of any duty.

Where the product was natural gas supplied through gas distributing systems not owned by the supplier or under its control, it was held in *Fields v. Missouri Power & Light Co.*[7] that the supplier is not an insurer as to injuries resulting from leaks in the distributing system. To establish negligence, the injured plaintiff would have to establish that the supplier had notice,

> and having such notice (a) negligently inspects or negligently repairs; (b) agrees and assumes to inspect or repair, and then fails to do so; (c) refuses to inspect and repair knowing a dangerous condition exists, and with such knowledge fails to shut off its gas until the owner can have his defective pipes or appliance properly repaired.[8]

However, a supplier of electricity through its own power lines may be found negligent where it permitted the insulation on the 7200 volt line to rot so that there was very little insulation left, and plaintiff, a bystander on the street, received injuries when a limb of a tree which was being trimmed by the owner fell on a street light wire attached to one of the poles of the power company. When the limb struck the street light wire it came in contact with the 7200 volt line. An arc occurred and both lines were severed, causing the volt line to fall to the ground where it struck plaintiff, causing serious burns. A submissible case of negligence was also made against the city for maintaining its uninsulated street light wire in close proximity to an inadequately insulated high voltage line. A directed verdict for the power company and the city was set aside on appeal in *Goddard v. St. Joseph Light & Power Co.*[9] and the case remanded for a new trial.

7. 374 S.W.2d 17 (Mo. 1963).
8. *Id.* at 22.
9. 379 S.W.2d 565 (Mo. 1964).

The fact that the thing supplied was in accordance with plans and specifications of the contract of installation with the city was no defense to contractors in *Arnold v. Edelman.*[10] This was an action for injuries incurred by a city employee while using revolving doors in the city hall which had been installed by the contractors. Although they were required under the contract with the city to service and adjust the panic-exit device for normal and emergency usage to the satisfaction of the city, they were also under a common-law duty to the general public using the revolving doors to make such adjustments of the panic-exit device which were reasonably calculated to protect the public in the normal use of the doors.

II. Defenses in Negligence Cases

For some time the defense of assumption of risk in the negligence area of tort liability has needed clarification in the Missouri decisions.[11] Because the legal effect is similar, the distinction between the defenses of contributory negligence and assumption of risk is not infrequently lost sight of. Originating in the master-servant cases arising out of the industrial revolution in England, the assumption of risk defense seemed to be limited for many years to a contractual relationship. In legal theory the two defenses are quite different and depend on different sets of facts. In contributory negligence, the plaintiff has fallen short of the standard to which a reasonable man should conform for his own safety; on the other hand, if he deliberately, with full knowledge, and without any reasonable necessity for doing so, chooses to encounter a danger, his misconduct is akin to consent and amounts to an assumption of risk. In strict legal theory, the defense of contributory negligence must be pleaded affirmatively; if he deliberately assumed a known risk, the theory of the defense is that the plaintiff hurt himself and a denial of any liability is pleaded under the general denial, although the defendant may have committed an act for which he would otherwise have been liable. Under Rule 55.10 of the Missouri Rules of Civil Procedure, however, both defenses must be affirmatively pleaded, which tends to make their differences less distinct.

Section 466 of the *Restatement of the Law of Torts* also tended to eliminate the essential differences between these two defenses by including each defense as a different form of contributory negligence, where the the-

10. 375 S.W.2d 167 (Mo. 1964).
11. See earlier study made of this problem in the Missouri decisions, Eblen, *Defense of Voluntary Assumption of Risk Dependent upon a Contractual Relationship,* 42 U. Mo. Bull. L. Ser. 34 (1930).

ory of liability is negligence. Merging of these into two types of contributory negligence created much confusion in cases where the theory of liability was based upon non-negligent conduct for which there may be liability; *e.g.* absolute liability, intentional misconduct, wanton and reckless misconduct, certain types of nuisance, where contributory negligence is not, but assumption of risk is, a defense. Recognizing the confusion created by Section 466 of the first *Restatement*, Tentative Draft No. 9 of the *Restatement of the Law of Torts* (*Second*) (1963) has gone to great length in revising this area. The result is a clear and comprehensive recognition that the defense of assumption of risk is an entirely different defense from that of contributory negligence, although recognizing that the same conduct on the part of the plaintiff may, in certain situations, subject him to both defenses. Sections 496A to 496G, inclusive, of this revision gives the most complete and authoritative treatment of the defense of assumption of risk, and its distinction from the defense of contributory negligence, to be found anywhere.

Occasionally a Missouri decision has broken away from the earlier restriction of the defense of assumption of risk to the master-servant relationship and recognized this as a proper defense by a negligent defendant. However, this form, where there was no contractual relationship, has usually been called contributory negligence. This problem was before the court in *Terry v. Boss Hotels, Inc.*,[12] in an action against the owner and operator of a hotel for personal injuries sustained by a patron in a fall on a slippery dance floor. An instruction directed a verdict for defendant if plaintiff knew the floor was slippery, knew that there was danger of falling while dancing thereon, and thereafter voluntarily chose to continue to dance on the floor, even though the jury should find that defendant was negligent and that plaintiff was exercising care for his own safety at the time and place in question. No error was found in submitting the issue of assumption of risk in this case, as there was evidence that plaintiff knew there was too much wax on the floor when he commenced the fourth dance; that he discussed, while dancing with his partner, the condition of the floor; that he knew the floor was too slick to dance; and that the danger was so evident that they decided to dance over to their table and sit down, but nevertheless plaintiff continued dancing until the time he fell. The court held that the doctrine of assumed risk is not limtied to contractual

12. 376 S.W.2d 239 (Mo. 1964).

relationships or master-servant cases. However, the opinion seems to discourage its use in other negligence cases:

> Our limited ruling is not intended to encourage the submission on instructions on assumption of risk in the average negligence case. The circumstances in which reliance on the doctrine of assumed or incurred risk will be approved are exceptional.[13]

It is the belief of the writer that the court, in speaking of the "exceptional" circumstances in which an instruction on assumed risk will be approved, meant only that a defendant in using the defense should be careful that his evidence supports the requirements for showing a voluntary assumption of a known danger. However, this is true whether the theory of defendant's liability be based on negligence or any other theory, and surely it was not intended to restrict this defense in any other way or to confuse it further with contributory negligence. When the question is well presented in a later case, it is to be hoped that the court will seize the opportunity to clarify further these two defenses.

III. Governmental Immunity

To those concerned with the expansion in all directions of governmental agencies and their immunity from damages resulting from persons carrying on the activities of these agencies, the decision in *Rector v. Tobin Const. Co.*[14] will strengthen further their conviction that this archaic doctrine of governmental immunity has no rightful place in modern day society. The action was to recover double damages under section 236.270, RSMo 1959, for the trespass of backing up water and overflowing lands resulting in damage to plaintiff's growing crops, caused by the construction by the contractor of an earthen fill across a non-navigable, natural watercourse, in order to move fill materials and heavy machinery across the stream in connection with construction of a highway bridge for the State Highway Commission. The contract made no specific reference to a dam or fill across the creek, but did require "any incidental work necessary to complete" the project contracted. The question was whether defendant-contractor was entitled to share the immunity from liability enjoyed by the state authority with which it contracted, where the injuries growing out of the work were incidental to the performance of the contract. There was no claim that the contractor was negligent. A metal drain three feet

13. *Id.* at 248.
14. 377 S.W.2d 409 (Mo. En Banc 1964).

in diameter ran through the fill which permitted the normal flow of the stream, but this drain was insufficient to carry the water resulting from heavy rains while the work was in progress.

The trial court made specific findings that the earthen fill was not specifically directed by the plans and specifications; that the construction of the fill was incidental to the performance by the contractor of its contract; that the fill was reasonably necessary for the purpose for which it was intended and was a reasonable, customary and approved method of moving machinery and fill materials across a watercourse; and that any method which the contractor could have employed would have resulted in some obstruction to the flow of water.

On appeal, the St. Louis Court of Appeals held that the flooding of another's land by blocking a stream constituted a trespass, and that the contractor was liable for damages regardless of the fact that the trespass was committed while engaged in public work.[15] That court was not impressed by the contention that the fill was essential to the work being done under the contract for it appeared, from the photographs and the plat of the right of way, that a passage could have been cut through the banks within the right of way to afford the machines of the defendant a low level crossing with sufficient drainage. It found that defendant had trespassed to the extent that the fill caused the water to flood and stand upon plaintiff's land, resulting in the damages alleged.

The Missouri Supreme Court, on appeal, could not agree with the findings of the court of appeals on either ground. Since there was no practical way under the evidence for moving the fill material and heavy machinery except by the means used, and the fill or dam was a reasonable, customary and approved method, the construction of the fill was "sufficient to equate in legal contemplation, the construction of the fill with doing the work in strict accordance with the contract and plans and specifications." It also held that this was not a trespass by the contractor because it was not willful:

> "While the non-negligent intentional construction by the defendant resulted in harm to the plaintiff in a way sufficient to support a charge of trespass q.c.f., it cannot be contended that the defendant intended to invade the interests of the plaintiff when it intentionally constructed the fill. Hence there was no wilful tort."[16]

15. Rector v. Tobin Const. Co., 351 S.W.2d 816 (St. L. Mo. App. 1961).
16. 377 S.W.2d 409, 414, quoting *Valley Forge Gardens, Inc. v. James D. Morrissey, Inc.*, 385 Pa. 477, 483, 123 A.2d 888, 891 (1956).

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In so holding the court was following a Pennsylvania decision where a recovery was sought on the theory that the contractor was guilty of a willful tort because of its trespass q.c.f. Trespass to land is actionable even though the entry was made under mistake. It must be a volitional act but it need not be with the intention to do wrong. Under older forms of action the invasion must have been the direct result of a voluntary act. (Perhaps the time lapse in the instant case prevented the backing up of the water from being sufficiently direct for the action of trespass.) On this point the writer believes that the court of appeals was on firmer ground, supported by Missouri Supreme Court decisions cited in the intermediate court's opinion.

The supreme court's opinion concludes with an interesting observation on the doctrine of soverign immunity:

> As defendant has been guilty of neither negligence nor wilful tort, it is not liable to plaintiffs for the damages to their crops resulting from the performance of the state's contract. We quite agree with much of the argument in the able brief of amici curiae inveighing against the principle of soverign immunity from tort liability as not embodying sound social policy in accordance with present-day political ethics. We do not explore that field, inviting as the opportunity may seem to be. The amici brief conceded "the principle is so thoroughly established in our law that it cannot now be abrogated by judicial decision" (citing Hinds v. City of Hannibal, Mo., 212 S.W.2d 401 [Mo. 1948]), and, accordingly, directs its fire against extending the principle. But the holding just announced does not run counter to any of our cases, nor, in our opinion, does it extend the principle beyond pre-existing limits.[17]

17. 377 S.W.2d 409, 414. For other aspects of the problem of the abolition of the doctrine of governmental immunity, see McCleary, *Torts in Missouri,* 28 Mo. L. Rev. 617, 627 (1963).