St. John's Law Review

Volume 51
Number 1 *Volume 51, Fall 1976, Number 1*

Article 13

Patent Danger Rule in Negligent Design Actions Abandoned

St. John's Law Review

signal an end to its use as "'a trap to catch the unwary or the ignorant.'"[129]

DEVELOPMENTS IN NEW YORK PRACTICE

Patent danger rule in negligent design actions abandoned.

The patent danger rule, propounded more than 25 years ago in *Campo v. Schofield*,[130] has prevented many a potential plaintiff from maintaining an action against a manufacturer for injuries sustained in the use of a negligently designed product. Under the *Campo* doctrine, a manufacturer had no duty to warn or protect a user from conspicuous defects in the design or operation of the product.[131] Consequently, the injured user had no right of redress in negligence against a manufacturer who sold a "patently" dangerous product, even if minimal safety features were completely lacking.[132] In accord with the current trend towards imposing greater potential liability on those who place dangerous or defective products into the stream of commerce,[133] the Court of Appeals, in *Micallef v. Miehle Co.*,[134] has overruled *Campo* and held that a manufacturer must exercise that degree of care in the design of his product which is necessary to prevent an unreasonable risk of harm to anyone exposed to dangers created by any intended or foreseeable use of the product.[135]

---

ground that it was made after commencement of an action against the public corporation." N.Y. GEN. MUN. LAW § 50-e(5) (McKinney Supp. 1976).

[129] 38 N.Y.2d at 668, 345 N.E.2d at 564, 382 N.Y.S.2d at 21, *quoting* Sweeney v. City of New York, 225 N.Y. 271, 273, 122 N.E. 243, 244 (1919).

[130] 301 N.Y. 468, 95 N.E.2d 802 (1950).

[131] In *Campo*, the Court held that a manufacturer "is under no duty to guard against injury from a patent peril or from a source manifestly dangerous." *Id.* at 472, 95 N.E.2d at 804.

[132] *See, e.g.*, Sarnoff v. Charles Schad, Inc., 22 N.Y.2d 180, 239 N.E.2d 194, 292 N.Y.S.2d 93 (1968) (supplier not liable for injury caused by obviously defective scaffolding); Inman v. Binghamton Hous. Auth., 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957) (builder not liable for child's fall from porch with no guard rail); Edgar v. Nachman, 37 App. Div. 2d 86, 323 N.Y.S.2d 53 (3d Dep't), *motion for leave to appeal denied*, 29 N.Y.2d 483, 274 N.E.2d 312, 324 N.Y.S.2d 1029 (1971) (allegations of improperly designed gas tank and cap insufficient to state claim); Tatik v. Miehle-Goss-Dexter, Inc., 28 App. Div. 2d 1111, 284 N.Y.S.2d 597 (1st Dep't 1967) (mem.), *aff'd mem.*, 23 N.Y.2d 828, 245 N.E.2d 231, 297 N.Y.S.2d 586 (1969) (absence of automatic shutoff device on offset press not evidence of defective design).

[133] *See, e.g.*, Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975), *discussed in The Survey*, 50 ST. JOHN'S L. REV. 179, 181 (1975).

[134] 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976), *rev'g* 46 App. Div. 2d 790, 361 N.Y.S.2d 25 (2d Dep't 1974) (mem.). For another discussion of *Micallef*, see 1 L. FRUMER & M. FREIDMAN, PRODUCTS LIABILITY § 7.02 (1976) [hereinafter cited as FRUMER & FRIEDMAN].

[135] 39 N.Y.2d at 385, 348 N.E.2d at 577, 384 N.Y.S.2d at 121.

The *Micallef* plaintiff, an offset printing press operator, was injured while attempting to remove a foreign object from the printing plate. Due to the absence of safety guards near the press rollers, a clear and obvious danger,[136] plaintiff's hand was drawn into the machine and injured. Plaintiff brought an action against the manufacturer of the press, alleging both negligent design and breach of an implied warranty of merchantability, but was unsuccessful on the negligence claim in both the supreme court and on appeal to the appellate division.[137]

Addressing the negligent design claim, Judge Cooke, writing for a unanimous Court of Appeals, observed that the Court's past reluctance to extend the manufacturer's duty to guard against injuries arising from patent defects in the design of its products was due to the belief that a manufacturer was under no duty to make an accident-proof product.[138] According to the *Micallef* Court, *Campo* and its progeny adhered to the belief that only legislative action was appropriate to force manufacturers to install safety devices and eliminate patently defective designs.[139] While this deference to the legislature may have been commendable, its effect often was to foreclose judicial relief to parties injured in accidents where there were "open and obvious" risks involved in the use of a piece of machinery.[140] Although agreeing that the manufacturer is not under

---

[136] *See id.* at 379-80, 348 N.E.2d at 573-74, 384 N.Y.S.2d at 117.

[137] The jury had returned a verdict in favor of defendant on the negligence cause of action and a verdict in plaintiff's favor on the implied warranty action. Both verdicts apparently were due in part to an erroneous charge to the jury. *Id.* at 381, 348 N.E.2d at 573, 384 N.Y.S.2d at 118. While the trial judge felt that these errors justified a new trial, the appellate division did not agree, and reinstated the verdict in favor of defendant on the negligence cause and directed judgment for defendant on the warranty claim. 46 App. Div. 2d at 791, 361 N.Y.S.2d at 27. After examining the record, the Court of Appeals found that the original order of a new trial was justified. 39 N.Y.2d at 382, 348 N.E.2d at 575, 384 N.Y.S.2d at 118-19.

[138] 39 N.Y.2d at 383, 348 N.E.2d at 576, 384 N.Y.S.2d at 119, *discussing* Campo v. Scofield, 301 N.Y. 468, 472, 95 N.E.2d 802, 804 (1950). *See also* R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2d § 9:4, at 258 (1974). In support of this view, the *Campo* Court indicated that where the danger is patent, the user's own conduct rather than the design of the instrumentality is the proximate cause of the injury. *See* 301 N.Y. at 473, 95 N.E.2d at 804-05. The Court also noted that where the danger is open and obvious to all, a manufacturer has the right to expect the user to take all precautions necessary to avoid injury. *Id.* at 472, 95 N.E.2d at 804.

[139] 39 N.Y.2d at 383, 348 N.E.2d at 576, 384 N.Y.S.2d at 119-20.

[140] Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521, 541 (1974). Concern over the judiciary's inability to deal with highly technical product safety issues has given rise to calls for legislative action. One commentator has remarked: "At the present time, almost any ill-trained and scientifically ignorant judge is at liberty to determine the efficacy of a manufacturer's design . . . no matter how complex . . . ." Pawlak, *Manufacturer's Design Liability: The Expanding Frontiers of the Law*, 19 DEFENSE L.J. 143, 170 (1970).

a duty to guard against all risk of accident, the *Micallef* Court noted that some expansion of liability was warranted, primarily because the manufacturer is in the best position to recognize and cure dangerous designs.[141]

In altering the degree of care owed by the manufacturer, the Court carefully noted that its holding does not require "a manufacturer to clothe himself in the garb of an insurer . . . ."[142] Unlike a strict products liability action, in which no showing of fault is required,[143] a manufacturer in a negligent design action cannot be held liable if he has exercised reasonable care in the design of his product.[144] A plaintiff must establish all the elements of a negligence cause of action, including fault.

In reaching its conclusion, the *Micallef* Court drew upon both similar decisions in other jurisdictions[145] and scholarly criticism of the *Campo* doctrine.[146] Noting the inconsistency inherent in the patent danger rule, Judge Cooke declared that

> on the one hand, it places a duty on the manufacturer to develop a reasonably safe product yet eliminates this duty . . . if the dangerous character of the product can be readily seen, irrespective of whether the injured user or consumer actually perceived the danger.[147]

---

[141] 39 N.Y.2d at 386, 348 N.E.2d at 578, 384 N.Y.S.2d at 121-22.

[142] *Id.*

[143] *See, e.g.*, Velez v. Craine & Clark Lumber Corp., 33 N.Y.2d 117, 121-22, 305 N.E.2d 750, 752, 350 N.Y.S.2d 617, 620 (1973).

[144] 39 N.Y.2d at 384-85, 348 N.E.2d at 577, 384 N.Y.S.2d at 121.

[145] Judge Cooke commented favorably on the approach taken in Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972), and Palmer v. Massey Ferguson, Inc., 3 Wash. App. 508, 476 P.2d 713 (1970). In all three cases, the patent danger rule was criticized for allowing the manufacturer of a dangerously designed product to escape liability simply because the defect satisfies an objective standard of "obviousness." These courts found that permitting manufacturers to sell patently dangerous products without fear of liability affords no protection to a user who, for some reason, fails to perceive the danger.

[146] *See, e.g.*, 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.5 (1956); FRUMER & FRIEDMAN, *supra* note 134, § 7.02; Marschall, *An Obvious Wrong Does Not Make A Right: Manufacturer's Liability for Patently Dangerous Products*, 48 N.Y.U. L. Rev. 1065 (1973). It has been suggested that a less restrictive interpretation of *Campo* was entirely feasible. Professor Noel, for example, has argued that *Campo* did no more than make the obviousness of the defect *one* of the significant factors to be considered on the question of liability. Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 837 (1962) [hereinafter cited as Noel].

[147] 39 N.Y.2d at 384, 348 N.E.2d at 576, 384 N.Y.S.2d at 120. Obviously, the Court was fearful that the patent danger rule would encourage negligent product design. Encouraging manufacturers to make safer products is one of the themes often evinced in cases expanding the scope of products liability. *See, e.g.*, Codling v. Paglia, 32 N.Y.2d 330, 341, 298 N.E.2d 622, 628, 345 N.Y.S.2d 461, 468-69 (1973). As the *Micallef* Court indicated, this policy is

Moreover, the Court found the rigidity of the rule inequitable in that it failed to take into account the difficulties present in discovering "patent" defects in highly technical products whose operation is often " 'far beyond the ken of the average consumer.' "[148]

In place of the *Campo* rule, the Court propounded a balancing approach for determining whether a manufacturer has satisfied his duty of reasonable care. Under this approach, the trier of fact must weigh the seriousness and probability of foreseeable harm which a patently dangerous product might cause against the burden which would be imposed on the manufacturer were he to take steps to avoid that danger.[149] The obviousness of the danger is no longer an absolute bar to maintenance of an action, although it remains a factor in determining the plaintiff's responsibility for the accident and in allocating damages.[150]

---

frustrated when liability cannot be imposed on a manufacturer who constructs an obviously dangerous product. 39 N.Y.2d at 384, 348 N.E.2d at 576, 384 N.Y.S.2d at 120.

[148] 39 N.Y.2d at 385, 348 N.E.2d at 577, 384 N.Y.S.2d at 121, *quoting* Codling v. Paglia, 32 N.Y.2d 330, 340, 298 N.E.2d 622, 627, 345 N.Y.S.2d 461, 468 (1973). In the past, courts consistently refused to undertake an inquiry into whether a plaintiff actually perceived the danger; rather, they applied an objective test to determine whether the danger was patent or latent. *E.g.*, Meyer v. Gehl. Co., 42 App. Div. 2d 461, 348 N.Y.S.2d 801 (3d Dep't 1973) (not relevant that "patent" defect might not be recognizable to child-plaintiff); *see* Inman v. Binghamton Hous. Auth., 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957) (Court did not discuss fact that at the time of accident the injured child was only two years old). Moreover, where the product's design was so simple as to be readily observable, courts frequently found defects to be patent even though they were not apparent upon initial inspection. *See, e.g.*, Lewis v. John Royle & Sons, 46 App. Div. 2d 304, 362 N.Y.S.2d 262 (3d Dep't 1974); Edgar v. Nachman, 37 App. Div. 2d 86, 323 N.Y.S.2d 53 (3d Dep't), *motion for leave to appeal denied*, 29 N.Y.2d 483, 274 N.E.2d 312, 324 N.Y.S.2d 1029 (1971); Noel, *supra* note 146, at 838. *But see* Bolm v. Triumph Corp., 33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973).

[149] 39 N.Y.2d at 386, 348 N.E.2d at 577-78, 384 N.Y.S.2d at 121. Some of the factors to be considered in resolving the issue include: cost of manufacturing a safer product; industry custom and practice as to inclusion of a safety device; effect of inclusion of the device on marketability of the product; whether the manufacturer kept abreast of scientific discoveries affecting the product; and, whether safety tests of the product had been conducted. *Id.* Such an approach has previously been suggested by several commentators. *E.g.*, 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.4 (1956); Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521 (1974).

[150] Prior decisions treated the nature of the defect as bearing upon the existence of the manufacturer's duty of care. *See, e.g.*, Bolm v. Triumph Corp., 33 N.Y.2d 151, 156, 305 N.E.2d 769, 772, 350 N.Y.S.2d 644, 648 (1973); Sarnoff v. Charles Schad, Inc., 22 N.Y.2d 180, 186, 239 N.E.2d 194, 197, 292 N.Y.S.2d 93, 98 (1968). *Micallef* is a significant departure from that approach in that now the obviousness of the danger will be considered only in assessing the plaintiff's conduct and in ascertaining damages, and will not be a factor in determining the existence of the manufacturer's duty to provide a reasonably safe product. Prior to enactment of the comparative negligence statute, CPLR art. 14-A, the obviousness of a defect might have completely barred recovery even absent application of the *Campo* rule since plaintiff's use of a patently dangerous machine might be deemed to amount to contributory

It is submitted that *Micallef* is consonant with both the legislative intent underlying enactment of the comparative negligence statutes[151] and recent developments in the field of products liability that have expanded the enterprise liability of manufacturers.[152] The *Campo* rule was inconsistent with the modern tendency to place liability for injuries caused by defective products on manufacturers under the theory that they are best able to correct defects and can allocate the additional cost to the consumers, who will thus benefit from a safer product.[153]

The Court's adoption of a balancing test brings the negligent design area into conformity with traditional tort principles which provide that one who has exercised reasonable care in choosing or acting upon a course of conduct cannot be held liable in negligence to one who is unintentionally injured by such conduct.[154] Basically, the test adopted by the *Micallef* Court is also one of reasonableness, focusing upon whether the design is unreasonably dangerous in light of the steps which could be taken by the manufacturer to produce a safer product.[155] By enunciating the factors and circumstances to be considered on the issue of reasonableness,[156] the Court has laid down practical guidelines which ensure that future negligent design

negligence or assumption of the risk. In either a negligence or strict products liability action, if the plaintiff could have perceived the danger by exercising reasonable care, the defendant would not be liable, even though the instrumentality was unreasonably dangerous. This barrier will be much less significant in the future since in causes of action accruing on or after September 1, 1975 a plaintiff's unreasonable failure to perceive the danger will affect the amount of damages recoverable, but will not be determinative insofar as the existence of liability is concerned. *See* CPLR 1411-13, *discussed in The Survey,* 50 ST. JOHN'S L. REV. 179, 196 (1975); note 157 *infra.*

The Court of Appeals did not address the issue of whether plaintiff could have been found contributorily negligent if he was acting under the directions of his employer. There is some authority to the effect that in such a case, the plaintiff, as a matter of law, cannot be held contributorily negligent, even in a suit against the manufacturer rather than the employer. *See* Boerio v. Haiss Motor Trucking Co., 7 App. Div. 2d 228, 181 N.Y.S.2d 823 (1st Dep't 1959). The significance of *Boerio* is questionable in light of the adoption of comparative negligence in New York.

[151] *See* CPLR 1411-13, *discussed in The Survey,* 50 ST. JOHN'S L. REV. 179, 196 (1975); note 157 *infra.*

[152] *See* Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 662, 345 N.Y.S.2d 461 (1973), *discussed in The Survey,* 48 ST. JOHN'S L. REV. 611, 616 (1974) (strict products liability cause of action recognized in New York); Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975), *discussed in The Survey,* 50 ST. JOHN'S L. REV. 179, 181 (1975) (tort statute of limitations adopted for strict products liability action).

[153] *See* Codling v. Paglia, 32 N.Y.2d 330, 341, 298 N.E.2d 622, 628, 345 N.Y.S.2d 461, 468 (1973).

[154] *See* Palsgraf v. Long Island R.R., 248 N.Y. 339, 341, 162 N.E. 99, 99 (1928).

[155] *See* 39 N.Y.2d at 385-86, 348 N.E.2d at 577, 384 N.Y.S.2d at 121.

[156] *See* note 149 *supra.*

litigation will involve realistic inquiry into the merits of individual claims, rather than mechanical application of a dogmatic formulation.

Furthermore, the *Micallef* decision is in conformity with the view, recently expressed by both the legislative[157] and judicial[158] branches in New York, that rigid, absolute rules of liability which prevent the assertion of meritorious claims should be replaced with flexible rules allowing inquiry into the individual merits of each case. Continued judicial refusal to reexamine a rule that was established a quarter-century ago and has since been the subject of much criticism would have been unjustified, for, as one court stated in a different context, courts "act in the finest common-law tradition when [they] adapt and alter decisional law to produce commonsense justice."[159]

Use of term "issue" in a will presumed to encompass illegitimates.

An examination of recent judicial decisions on both the federal and state levels evinces an increased concern for the rights of illegitimates.[160] The extent to which children born out of wedlock enjoy the same rights as legitimates is far from settled, however, inasmuch as conflicting decisions continue to appear.[161] One troublesome ques-

---

[157] *See* ch. 69, § 1, [1975] N.Y. Laws 95 (McKinney) (codified at CPLR 1411-13)(comparative negligence statute). It is interesting to note that the legislature's enactment of this chapter was viewed by some commentators as a legislative overruling of *Campo*. *See* FRUMER & FRIEDMAN, *supra* note 134, § 7.02, wherein the authors note that in recommending the statute to the legislature, the Judicial Conference specifically stated that under the new statute the patent danger rule should only be a factor in diminishing damages. The *Micallef* Court, however, based its decision on other grounds, since the cause of action accrued prior to the effective date of the comparative negligence law. *See* CPLR 1413.

[158] *See, e.g.*, Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

[159] Woods v. Lancet, 303 N.Y. 349, 355, 102 N.E.2d 691, 694 (1951) (Desmond, J.).

[160] *See, e.g.*, New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (illegitimates have right to receive welfare benefits); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (illegitimates have right to receive workmen's compensation death benefits upon death of father); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimates have standing to sue for wrongful death of mother); *cf.* Stanley v. Illinois, 405 U.S. 645 (1972) (father entitled to hearing on his fitness to retain custody of his illegitimate child); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (mother has standing to sue for wrongful death of illegitimate child). Decisions on the state level have had a similar effect. *See, e.g., In re* Johnson, 75 Misc. 2d 502, 348 N.Y.S.2d 315 (Sur. Ct. Bronx County 1973) (illegitimates have standing to sue for wrongful death of father); Prudential Ins. Co. of America v. Hernandez, 63 Misc. 2d 1058, 314 N.Y.S.2d 188 (Sup. Ct. N.Y. County 1970) (illegitimates entitled to proceeds of father's life insurance policy); *cf.* Holden v. Alexander, 39 App. Div. 2d 476, 336 N.Y.S.2d 649 (2d Dep't 1972) (father has standing to sue for wrongful death of illegitimate child).

[161] While the Supreme Court has struck down as violative of the equal protection clause several statutory schemes which distinguished between legitimates and illegitimates, *see*