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Torts--Liability of Owner and Lessor for Injuries Suffered by Lessee's Employee (La Rocca v. Farrington, 301 N.Y. 247 (1950))

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in this article. There are factors,[14] however, which possibly might have diminished the number of these claims to the extent that it would have presented no problem. They are: the short time within which the action must be commenced;[15] the common law defenses[16] available to the government; the settlement or compromise of certain valid claims;[17] and finally, the hesitancy of servicemen to wade through tedious court procedure with its attendant court costs and attorney's fees in an effort to supplement substantial compensation to which they are already entitled.

Whether these factors would eliminate the problem is conjectural. If, however, in the words of the Court, ". . . we misinterpret the Act, at least Congress possesses a ready remedy."[18]

TORTS—LIABILITY OF OWNER AND LESSOR FOR INJURIES SUFFERED BY LESSEE'S EMPLOYEE.—Plaintiff, a shipyard employee, sustained injuries when a link of chain on a tractor crane broke as he was assisting those who were operating the crane. The crane was the property of the defendant Turner who had rented it to the defendant Farrington, who, within two days of receipt, had sublet it to plaintiff's employer. The evidence showed that the link had been defectively manufactured, and that the defect (but not its extent) had been detectable for more than two years before the accident. Further, there existed several well-known methods of testing the link. *Held,* where the nature and use of a chattel are such that it is reasonably certain to place life and limb in peril when defectively made or repaired, and it is probable that it will be used without inspection by persons other than those who could claim the benefit of implied warranty, the supplier thereof has a duty to use reasonable care to see that the chattel is reasonably safe for use, even when there is no actual knowledge of a defect or of facts which indicate a defect. The fact that plaintiff's employer, as lessee of the crane, had an equal opportunity to discover the defect does not serve to relieve the owner of liability. *La Rocca v. Farrington,* 301 N. Y. 247, 93 N. E. 2d 829 (1950).

The conclusion reached by the court finds its genesis in the holding of *Thomas v. Winchester.*[1] The essence of that case was that the finished article must be imminently dangerous to human life

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[14] Note, 58 YALE L. J. 615, 625, n. 44 (1949). These factors were forwarded in reference to the *Brooks* case but they are applicable here.

[15] 28 U. S. C. A. § 2401(b) (1948).

[16] Contributory negligence, assumption of risk and fellow servant theory.

[17] 28 U. S. C. A. § 2677 (1948).

[18] Feres v. United States, 71 Sup. Ct. 153, 155 (1950).

[1] 6 N. Y. 381 (1852).

and that the danger must be caused by the negligence of the manufacturer. The liability was said to rest not upon any contract or direct privity between the manufacturer and the party injured, but upon the duty which the law imposes on everyone to avoid acts which endanger the lives of others.[2]

For a time it was thought that application of the rule should be limited to the manufacture of those articles which normally function as instruments of destruction.[3] But this belief was shattered by the clear-cut ruling in *Mac Pherson v. Buick Motor Co.*[4] wherein it was declared, ". . . the principle . . . is not limited . . . to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. . . ." [5]

Following the rule as enunciated by Judge Cardozo, liability has been imposed upon a manufacturer for the injuries proximately caused from the use by third persons of the following defective articles: electric transformers,[6] furnaces and boilers,[7] coffee urns,[8] sanitary napkin,[9] ladder,[10] chain,[11] oxygen tank,[12] sparklers,[13] and eyebrow and eyelash dye.[14]

However, some products such as defective slats on a wooden bed,[15] heel of a shoe,[16] collapsible beach chair [17] and voting machines,[18] have been considered harmless even though negligently produced because injury from such defectiveness was not foreseeable.

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[2] *Id.* at 410.

[3] For example, drugs, firearms and explosives. See PROSSER, TORTS 676 (1941).

[4] 217 N. Y. 382, 111 N. E. 1050 (1916).

[5] *Id.* at 389, 111 N. E. at 1053.

[6] Rosebrock v. General Electric Co., 236 N. Y. 227, 140 N. E. 571 (1923).

[7] Marsh Wood Products Co. v. Babcock and Wilcox Co., 207 Wis. 209, 240 N. W. 392 (1932).

[8] Hoenig v. Central Stamping Co., 273 N. Y. 485, 6 N. E. 2d 415 (1936).

[9] La Frumento v. Kotex Co., 131 Misc. 314, 226 N. Y. Supp. 750 (N. Y. City Ct. 1928).

[10] Kalash v. Los Angeles Ladder Co., 1 Cal. 2d 229, 34 P. 2d 481 (1934).

[11] Employers' Liability Assur. Corp. v. Columbus McKinnon Chain Co., 13 F. 2d 128 (W. D. N. Y. 1926).

[12] McLeod v. Linde Air. Prod. Co., 318 Mo. 397, 1 S. W. 2d 122 (1927).

[13] Henry v. Crook, 202 App. Div. 19, 195 N. Y. Supp. 642 (3d Dep't 1922).

[14] *Accord,* Bundy v. Ey-Tee, Inc., 160 Misc. 325, 289 N. Y. Supp. 905 (N. Y. City Ct. 1935), *motion for leave to appeal denied,* 248 App. Div. 596, 288 N. Y. Supp. 1078 (2d Dep't 1936).

[15] Field v. Empire Case Goods Co., 179 App. Div. 253, 166 N. Y. Supp. 509 (2d Dep't 1917).

[16] Sherwood v. Lax and Abowitz, 145 Misc. 578, 259 N. Y. Supp. 948 (Sup. Ct. 1932).

[17] Liedeker v. Sears, Roebuck and Co., 249 App. Div. 835, 292 N. Y. Supp. 541 (2d Dep't), *aff'd without opinion,* 274 N. Y. 631, 10 N. E. 2d 586 (1937).

[18] *Cf.* Creedon v. Automatic Voting Machine Corp., 243 App. Div. 339, 276 N. Y. Supp. 609 (4th Dep't), *aff'd without opinion,* 268 N. Y. 583, 198 N. E. 415 (1935).

But the decision in the *Mac Pherson* case went no further than to define the doctrine and fix the class of physical objects to which it has application. It did not purport to determine—indeed, it carefully avoided doing so—the persons against whom it can be employed.[19]

In the instant case, the defendant contended that the rule was intended to apply only to manufacturers and thus it has no application where the defendant is a mere supplier. This was rejected. It is submitted such rejection is sound. If such a restriction ever existed the underlying currents of legal reasoning in tort law has effected a drifting away from it. The present tendency is to impose liability whenever the defendant's affirmative action in pursuit of pecuniary profit adversely affects the interests of a third person. It is apparent that this monetary benefit derived from the defendant's activity constitutes a sufficient basis for his obligation to use due care to protect third persons from harm. Moreover, the imposition of such a legal duty produces a desirable social result. "The 'prophylactic' factor of preventing future harm has been quite important in the field of torts . . . . When the decisions of the courts become known, and the defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm . . . ." [20]

The extension of the doctrine to include suppliers has a basis from the reasoning advanced by the *Restatement* [21] and the courts of other jurisdictions.[22] New York, however, is not devoid of analogous authority. As early as 1892, such a holding was prophesied.[23]

In support of the liability found in the instant case it may be said in conclusion that the supplier to secure pecuniary interest has embarked in a business, that is, undertaken a positive course of conduct, which may injuriously affect the rights of others, and thus should use due care; that life and limb will be imperiled is foreseeable if the supplied chattel is defective; that the supplied party's reliance

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[19] 217 N. Y. 382, 389, 111 N. E. 1050, 1053 (1916).

[20] PROSSER, TORTS 27, 28 (1941).

[21] RESTATEMENT, TORTS § 388 (1934).

[22] Milestone System v. Gasior, 160 Md. 131, 152 Atl. 810 (1931); Trusty v. Patterson, 299 Pa. 469, 149 Atl. 717 (1930); see Note, *Liability of Bailors and Other Suppliers of Personal Property for Injuries Due to Defects*, 78 U. PA. L. REV. 413 (1930).

[23] Davies v. The Pelham Hod Elevating Co., 65 Hun 573, 578 (App. Div. 1st Dep't N. Y. 1892), *aff'd without opinion*, 146 N. Y. 363, 41 N. E. 88 (1895). "We are of the opinion that the substitution by plaintiff's intestate of his own judgment for that of the defendant, in respect to the kind of rope that should be used, is a complete answer to the claim made of negligence as against defendant in having supplied him with the very thing ordered, and from the use of which his injuries were received." See also MacKibbin v. Wilson and English Construction Co., 263 App. Div. 1014, 33 N. Y. S. 2d 974 (2d Dep't), *leave to appeal denied*, 288 N. Y. 738 (1942) (supplier had actual knowledge of defect); Richards v. Texas Co., 245 App. Div. 797, 280 N. Y. Supp. 950 (3d Dep't), *leave to appeal denied*, 268 N. Y. 728 (1935).

on the supplier to inspect the chattel may be anticipated by the supplier so that he knows the supplied party will not normally inspect so as to protect those third persons who come in contact with it. The last argument is especially applicable here because the chattel was leased for immediate use; therefore, it was not reasonable for the lessor to expect that the lessee would make a thorough inspection. The lessor should have realized that safe use of the chattel can be secured only by taking precautions before turning the chattel over to the lessee.[24]

TORTS—LOSS OF CONSORTIUM—WIFE MAY RECOVER FOR NEGLIGENT INJURY TO HUSBAND.—The plaintiff brought this action for the loss of her consortium caused by the negligence of the defendant in injuring her husband. The District Court for the District of Columbia found for the defendant. *Held,* reversed and a new trial granted. The wife may maintain an action for the loss of her consortium caused by the negligence of a third party. *Hitaffer v. Argonne Co.,* 183 F. 2d 811 (D. C. Cir.), *cert. denied,* 340 U. S. 852 (1950).

Consortium has been defined in many ways; substantially it includes the right of a husband or a wife to the material and sentimental services [1] of the other. At common law prior to the Emancipation Acts for women, a husband could recover for his loss of consortium whether the injury to his wife was negligent [2] or intentional; [3] whether the damage was to the material services [4] or to the companionship, love and conjugal relation.[5] The wife, on the other hand, could not maintain an action in her own name, whether for assault

[24] "One who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be in the vicinity of its probable use, for bodily harm caused by its use in a manner for which . . . it is leased, if the lessor fails to exercise reasonable care. . . ." RESTATEMENT, TORTS § 408 (1934).

[1] Pratt v. Daly, 55 Ariz. 535, 104 P. 2d 147 (1940); Ramsey v. Ramsey, 4 W. W. Harr. 576, 156 Atl. 354 (Super. Ct. Del. 1931); Feneff v. N. Y. Central and Hudson River R. R., 203 Mass. 278, 89 N. E. 436 (1909); see COOLEY, TORTS 266, 267 (2d ed. 1888).

[2] Little Rock Gas & Fuel Co. v. Coopedge *et ux.,* 116 Ark. 334, 172 S. W. 885 (1915); Commercial Carriers, Inc. v. Small, 277 Ky. 189, 126 S. W. 2d 143 (1939); Kelly v. N. Y., N. H. & Hartford R. R., 168 Mass. 308, 38 L. R. A. 631 (1897); Guevin v. Manchester St. Ry., 78 N. H. 289, 99 Atl. 298 (1916).

[3] McMillan v. Smith, 47 Ga. App. 646, 171 S. E. 169 (1933); Clouser v. Clapper, 59 Ind. 548 (1877).

[4] See Lippman, *The Breakdown of Consortium,* 30 COL. L. REV. 651 (1930).

[5] Clouser v. Clapper, 59 Ind. 548 (1877); Pierce v. Crisp, 260 Ky. 519, 86 S. W. 2d 293 (1935); Root v. Goehring, 33 N. D. 413, 157 N. W. 293 (1916); Smith v. Hochenberry, 138 Mich. 129, 101 N. W. 207 (1904).