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Article 13

Negligence--Manufacturer's Liability for Injury from Inherently Dangerous Article (Elizabeth Noone v. Fred Perlberg, Inc., 268 App. Div. 149 (1944))

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abled person is the same as the duty to an intoxicated person.

The appellant also made out a case grounded on the doctrine of last clear chance. The learned judge in the Trial Term should have charged as Chief Justice Pound suggested in the case of *Storr v. N. Y. Central R. R. Co.*,[4] that the doctrine is never wakened into action unless and until there is brought home to the defendant to be charged with liability, knowledge that another or his property is in a state of present peril, in which event there must be a reasonable effort to counteract the peril and avert its consequences.[5] If one by a negligent act places himself or his property in a position of danger, his negligence does not contribute to defeat his recovery if the situation was known to the defendant in time to avert the consequence of the plaintiff's own negligence. In such a case the defendant's negligence is the sole cause of the injury. It must not run on "inert and callous" and cause an accident which proper care might have avoided. Knowledge may be established by circumstantial evidence, in the face even of professions of ignorance,[6] but knowledge there must be, or negligence so reckless as to betoken indifference to knowledge. This doctrine of last clear chance, as set forth in many states, really means that even though a person's own acts may have placed him in a position of peril, yet if another acts or omits to act with knowledge of the peril and an injury results, the injured person is entitled to recover.[7]

M. A. H.

NEGLIGENCE—MANUFACTURER'S LIABILITY FOR INJURY FROM INHERENTLY DANGEROUS ARTICLE.—While wearing an evening gown with a glazed double-netted skirt manufactured by the defendant, the plaintiff was seriously injured when the netting of her dress ignited, instantly enveloping her in flames. The plaintiff's proof tended to show that the netting was treated with an explosive substance (nitrocellulose sizing) that rendered it inherently dangerous for the purpose for which it was intended. From a judgment of the trial court granting the defendant's motion to set aside a plaintiff's verdict and for a directed verdict on the ground that there was a deficiency in the proof that the dress as manufactured and delivered was inherently dangerous, the plaintiff appeals. *Held,* judgment reversed. The defendant manufacturer did not adduce any evidence to show the nature of the sizing used in the dress. The jury could properly take most

[4] 261 N. Y. 348, 185 N. E. 407 (1933).

[5] Panarese v. Union Ry. Co., 261 N. Y. 233, 185 N. E. 84 (1933); Woloszynowski v. N. Y. Central R. R. Co., 254 N. Y. 206, 172 N. E. 471 (1930).

[6] Bragg v. Central New England Ry. Co., 228 N. Y. 54, 126 N. E. 253 (1920).

[7] Chunn v. Washington City & Suburban Ry., 207 U. S. 302, 28 Sup. Ct. 63 (1907); Green v. Los Angeles Terminal R. R. Co., 143 Cal. 31, 76 Pac. 719 (1903).

strongly evidence presented in the plaintiff's case and find that her injuries were proximately caused by the inherently dangerous substance used by the defendant in the manufacture of the gown. A manufacturer is legally liable for personal injuries received by one who uses the manufactured article in the ordinary and expected manner when the manufacturer sells the inherently dangerous article for use in its existing state, the danger not being known to the purchaser and not patent, and notice is not given of the danger or it cannot be discovered by reasonable inspection. *Elizabeth Noone v. Fred Perlberg, Inc.*, 268 App. Div. 149, 49 N. Y. S. (2d) 460 (1944).

This decision is in keeping with the trend and strengthens the manufacturer's liability for injury from inherently dangerous articles. The rule has been extended from drugs to motor vehicles, toys, cosmetics, lotions, household appliances, exploding container cases, food cases, beverage cases and to wearing apparel. A dealer in drugs and medicines who carelessly labels a deadly poison as a harmless medicine, and sends it, so labelled, into the market, is liable to any person who without fault on his part, is injured thereby, though it may have passed through other hands, by intermediate sales, before it reached the person injured.[1] This principle is not limited to poisons, explosives, and things of light nature, or 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. Its nature gives warning of consequences to be expected. If to the element of probable danger is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. If he is negligent where danger is to be foreseen, a liability will follow.[2] In a case where the defendant manufactured toy revolvers for use by children and the plaintiff was injured when flames from such a toy ignited the costume which the plaintiff was wearing, the court held the manufacturer liable on grounds that he knew or should have known that such an article would be used at gatherings where persons would probably be garbed in inflammable material and damage might result.[3] Underlying the manufacturer's liability is the danger reasonably to be foreseen from the intended use of the article.[4]

M. D.

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[1] Thomas v. Winchester, 6 N. Y. 397 (1852).

[2] MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916).

[3] Crist v. Art Metal Works, 230 App. Div. 114, 243 N. Y. Supp. 496, *aff'd*, 255 N. Y. 624, 175 N. E. 341 (1930).

[4] Liedeker v. Sears, Roebuck and Co., Inc., 249 App. Div. 835, *aff'd*, 274 N. Y. 631, 10 N. E. (2d) 586 (1937).