Michigan Law Review

Volume 38 | Issue 7

1940

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TORTS — LIABILITY OF MANUFACTURER OF CHATTEL — DANGEROUS NON-DEFECTIVE ARTICLES — The defendant manufacturer sold a storekeeper, as a protective weapon, a tear gas gun made to resemble a fountain pen, recommending to the storekeeper that the gun lie open and exposed in his shop and representing that tear gas was a harmless irritant and would not injure permanently. The plaintiff, a customer in the store, idly picked up the gun-pen from beside the cash register, and while examining it, ignorant of its nature, accidentally discharged it into his face. Permanent injuries resulted for which plaintiff sued defendant, claiming negligence. *Held,* two justices dissenting, that no act of negligence was alleged. *Scurfield v. Federal Laboratories Inc.,* 335 Pa. 145, 6 A. (2d) 559 (1939).

The liability of a manufacturer for injuries sustained through the use of his dangerous, non-defective articles by persons outside the original contract of sale must be grounded on one of two theories, negligence or conscious misrepresentation.[1] A recovery for negligence depends on a breach of a duty of the

[1] Pate Auto Co. v. W. J. Westbrook Elevator Co., 142 Miss. 419, 107 So. 552 (1926). *Negligence:* Du Pont de Nemours Powder Co. v. Duboise, (C. C. A. 5th, 1916) 236 F. 690; Peterson v. Standard Oil Co., 55 Ore. 511, 106 P. 337 (1910); Kentucky Oil Co. v. Schnitzler, 208 Ky. 507, 271 S. W. 570 (1925); Thornhill v. Carpenter-Morton Co., 220 Mass. 593, 108 N. E. 474 (1915); Farley v. Edward E. Tower Co., 271 Mass. 230, 171 N. E. 639 (1930); Rosebrock v. General Electric Co., 236 N. Y. 227, 140 N. E. 571 (1923); Spry v. Kiser, 179 N. C. 417, 102 S. E. 708 (1920); Employers' Liability Assur. Corp. v. Columbus McKinnon Chain Co., (D. C. N. Y. 1926) 13 F. (2d) 128; Kalash v. Los Angeles Ladder Co., 1 Cal. (2d) 229, 34 P. (2d) 481 (1934); 86 A. L. R. 947 (1933). *Conscious misrepresentation:* Marsh v. Usk Hardware Co., 73 Wash. 543, 132 P. 241 (1913); Cunningham v. Pease House Furnishing Co., 74 N. H. 435, 69 A. 120 (1908); Cahill v. Inecto, 208 App. Div. 191, 203 N. Y. S. 1 (1924); Woodward v. Miller, 119 Ga. 618, 46

manufacturer, a duty owed to such third persons to take some steps which would warn them of dangers resulting from the use of the article.[2] The circumstances vary under which different courts will find this duty to exist.[3] The better rule is that when the manufacturer knows, or in the exercise of reasonable care ought to know, that the article is dangerous under certain conditions of reasonably expected use, there arises a duty to use due care, owed to the remote vendee and others thereby placed in unreasonable risk of injury.[4] Usually, such due care requires that a warning of those dangers not likely to be discovered be given to persons to whom the duty is owed. In the principal case, the article—a weapon—may be called dangerous. There was a duty to warn victims of foreseeable injuries of any danger. However, the court found that the representation of harmlessness, which, plaintiff alleged, led the storekeeper to leave the gun exposed, did not make plaintiff's injury foreseeable, since defendant was justified in believing that the gun would be kept by the storekeeper for his own purposes and not placed where it would attract others. The extent of the defendant's duty, then, was to warn the storekeeper of the nature of the gun in its expected use, and the decision held that this was done.[5] Had it been said

S. E. 847 (1904); Lewis v. Terry, 111 Cal. 39, 43 P. 398 (1896); 17 A. L. R. 707 (1922); 111 A. L. R. 1250 (1937).

[2] See citations in note 1 under "negligence."

[3] Some courts hold that if there is no privity of contract between the manufacturer and the injured person, there is no liability, unless the case comes under one of the exceptions to that rule. These courts are at variance in defining the exceptions, but all find that the manufacturer has a duty to use due care in dealing with an article inherently dangerous—in nature, or because of known hidden defects, or because of intended use. 17 A. L. R. 683 (1922); 111 A. L. R. 1240 (1937).

[4] MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916); Smith v. Peerless Glass Co., 259 N. Y. 292, 181 N. E. 576 (1932); Lenz v. Standard Oil Co. of New York, 88 N. H. 212, 186 A. 329 (1936); HARPER, TORTS, § 106 (1933); 2 TORTS RESTATEMENT, § 388 (1934).

[5] One who supplies a chattel for another's use is not subject to liability for bodily harm caused by its use by a third person without the consent of the one for whose use it is supplied, and if used with consent of the suppliee, not liable if the supplier has no reason to expect that the third person will be permitted to use it. 2 TORTS RESTATEMENT, § 388, comment e (1934).

"If the actor's conduct creates a recognizable risk of harm only to a particular class of persons, the fact that it causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not render the actor liable to the persons so injured." 2 TORTS RESTATEMENT, § 281, comment c (1934). In Wissman v. General Tire Co. of Philadelphia, 327 Pa. 215, 192 A. 633 (1937), the court held that if defendant company, which noticed (but did not create) a dangerous condition of a wheel when equipping *X's* truck with tires, had a duty, it was only a duty to notify the customer and did not extend to plaintiff, a workman of a motor company to whom the customer took the truck. Rowan v. Prettyman, 194 Pa. 443, 45 A. 380 (1900), held that defendant, the general building contractor, was not liable for the death of an employee of subcontractor *A* caused when the allegedly defective scaffold on which deceased was standing collapsed; subcontractor *A* had been engaged by defendant to do slag roofing and tin work on the premises, and the scaffold had been erected by defendant as part of a contract with subcontractor *B*, engaged to do the cornice work; the reasons for non-liability were: that deceased was not an

that the representation of harmlessness was a negligent misstatement or a negligently insufficient statement, still there would be no duty to warn the plaintiff, in view of the finding that the representation did not make plaintiff's injury foreseeable. The same can be said for the theory that the representation of harmlessness was a conscious misrepresentation: plaintiff did not allege that, in making the conscious misrepresentation, defendant intended to cause bodily harm; that being so, defendant's liability for bodily harm resulting from action induced by his conscious misrepresentation must be based on the existence of an unreasonable risk to the general class of which plaintiff is a member; plaintiff's injury not being foreseeable, there was no unreasonable risk to plaintiff involved in the conscious misrepresentation.[6] It is submitted that, since foreseeability is oftentimes merely a question of policy or expediency,[7] it is sound to hold that the placing of a protective weapon in such a position as to be readily accessible to a customer of the storekeeper was so unlikely that defendant manufacturer's conduct created no unreasonable risk of bodily harm to one in the plaintiff's class.

employee of defendant; that he was not ordered on the scaffold by subcontractor *A*; and that he was not engaged in work requiring the use of the scaffold—the last because no provision was made in the contract with subcontractor *A* for erection or use of a scaffold. Also see Eason v. Kelly Pipe Co., 16 Cal. App. (2d) 88, 60 P. (2d) 488 (1936); Robbins v. Georgia Power Co., 47 Ga. App. 517, 171 S. E. 218 (1933).

[6] 2 TORTS RESTATEMENT, § 310, comments a and c (1934); HARPER, TORTS 18 (1933), stating "there is probably no civil liability to one who, at the time the actor attempts an intended invasion of a third person's interests, is not within the zone of apprehended peril."

[7] 2 TORTS RESTATEMENT, § 292 (1934).