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Negligence - Duty of Care - Manufacturer's Duty to Warn of Obvious Dangers

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NEGLIGENCE—DUTY OF CARE—MANUFACTURER'S DUTY TO WARN OF OBVIOUS DANGERS—Plaintiff purchased a "Lithe-Line" exerciser, a rubber rope forty inches long with a loop on each end, manufactured by defendant Helena Rubenstein, Inc. With the exerciser plaintiff received a leaflet of instructions stating that "anybody" could reduce with it, and containing sketches and descriptions of eight exercises. While plaintiff was lying on the floor with the rope under her feet doing one of the exercises, the rope slipped off her feet and snapped back, hitting her in the eye and causing partial loss of vision. She sued the manufacturer for negligence,¹ alleging that the exerciser was inherently dangerous when used as directed, and that defendant had a duty to warn her of such danger. The district court granted defendant's motion for summary judgment. On appeal, *held*, affirmed, four judges dissenting. A manufacturer has no duty to warn of an obvious danger. That the impact and extent of recoil of a rubber rope are proportional to the tension placed

¹ Plaintiff also unsuccessfully sued the retailer.

upon it, and that the rope might slip, are dangers so obvious as to warrant summary judgment without submission of the case to the jury. *Jamieson v. Woodward & Lothrop*, (D.C. Cir. 1957) 247 F. (2d) 23.

If a manufacturer, supplying an article inherently dangerous for use in its existing state, realizes or should realize that the article is dangerous, and the ultimate purchaser cannot justifiably be expected to recognize the danger, the manufacturer has a duty to warn the purchaser of the dangerous condition.² When the article is of simple construction, and its properties are a matter of common knowledge so that the dangers are obvious to the uneducated purchaser as well as to the manufacturer, a duty to warn becomes superfluous and unnecessary as a matter of law.³ Thus there is no duty to warn that a knife or axe will cut, a match will take fire, dynamite will explode, or a hammer will mash a finger.⁴ Likewise, since the dangers arising from the explosive nature of phosphorous⁵ and the highly inflammable quality of a "Fuzzy-Wuzzy" lounging robe⁶ are commonly apparent, it has been held that there is no duty to warn of these dangers as a matter of law. Also kept from the jury have been actions in which personal injuries resulted from splashing a cleansing agent into the eye,⁷ pulling a starting rope on a gasoline motor,⁸ and

² See 2 TORTS RESTATEMENT §§388, 392 (1934); James, "Products Liability," 34 TEX. L. REV. 44 (1955); Dillard and Hart, "Product Liability: Directions for Use and the Duty To Warn," 41 VA. L. REV. 145 (1955). The situation should also be considered where injury results, not to the purchaser or user as in the principal case, but to a casual bystander. 2 TORTS RESTATEMENT §388, comment *d* (1934) states that the manufacturer's liability for failure to warn of the dangerous condition of the chattel extends ". . . to third persons in whose vicinity the supplier intends or should expect it to be used." To the effect that knowledge by the purchaser of the danger may be an intervening cause insulating the manufacturer from liability, see *Farley v. Edward E. Tower Co.*, 271 Mass. 230, 171 N.E. 639 (1930).

³ Some courts have considered the question of apparentness of danger as pertinent to the issue of contributory negligence or assumption of the risk by plaintiff. See *De Eugenio v. Allis-Chalmers Mfg. Co.*, (3d Cir. 1954) 210 F. (2d) 409; *Karstead v. Phillip Gross H. & S. Co.*, 179 Wis. 110, 190 N.W. 844 (1922). But see Dillard and Hart, "Product Liability: Directions for Use and the Duty To Warn," 41 VA. L. REV. 145 at 163 (1955), stating that ". . . they are theoretically inapplicable when the defendant's breach of duty is based on a failure to warn. To allow these defenses is to indulge in circular reasoning, since usually the plaintiff cannot be said to have assumed a risk of which he was ignorant or to have contributed to his own injury when he had no way of reasonably ascertaining that the danger of injury existed." This language was cited with approval in *Wright v. Carter Products, Inc.*, (2d Cir. 1957) 244 F. (2d) 53.

⁴ Principal case at 26; *Dempsey v. Virginia Dare Stores, Inc.*, 239 Mo. App. 355, 186 S.W. (2d) 217 (1945). See also James, "Products Liability," 34 TEX. L. REV. 44 at 51 (1955).

⁵ *Gibson v. Torbert*, 115 Iowa 163, 88 N.W. 443 (1901). But cf. *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64 (1870), holding that whether people knew dangerous qualities of naphtha is a jury question.

⁶ *Dempsey v. Virginia Dare Stores, Inc.*, note 4 supra. Cf. *Noone v. Fred Perlberg, Inc.*, 268 App. Div. 149, 49 N.Y.S. (2d) 460 (1944), affd. 294 N.Y. 680, 60 N.E. (2d) 839 (1945), reinstating a jury verdict for plaintiff holding defendant liable for failure to warn that the netting of a dress treated with nitro-cellulose sizing was highly inflammable.

⁷ *Sawyer v. Pine Oil Sales Co.*, (5th Cir. 1946) 155 F. (2d) 855.

⁸ *Pontifex v. Sears, Roebuck & Co.*, (4th Cir. 1955) 226 F. (2d) 909.

bringing one's hands into contact with caustic ready-mix concrete.⁹ When, however, the article or process involved is less common or more complicated, so that the manufacturer because of superior technical knowledge should realize the danger, whereas the less experienced user might not, the issue becomes a jury question.¹⁰ Whether a worker should realize that dynamite will prematurely explode from heat in the borehole or vibrations from nearby drilling has therefore been held a matter for the jury to determine.¹¹ So also the possible dangers inherent in too short a boom cable on a crane¹² or a drum of sulphuric acid left to heat in the sun¹³ were sufficiently obscure to warrant submitting the question to the jury. A third group of cases, in which the manufacturer by representing that his product is "harmless" lulls the user into a false sense of security, indicates an even greater hesitance on the part of judges to find for the manufacturer as a matter of law.¹⁴ Thus the manufacturer who advertised that sparks from a sparkler¹⁵ or a toy gun¹⁶ were "harmless" faced a jury determination of whether the user was aware of the danger when injury in fact resulted. Summary judgment in the principal case can therefore be justified only if the rubber exerciser falls within the first class of articles whose dangerous qualities are equally apparent to the user and the manufacturer. The dissenting judges argued that defendant's representation that "anybody" could reduce with the exerciser might well have induced false security in the plaintiff, and thus the case was for the jury under a theory similar to that of the "harmless sparkler" decision.¹⁷ Including the exerciser in the first group, however, is a logical extension of that category to include somewhat less common, but simple non-mechanical devices, which are based on universally known principles and which possess physical attributes identical with everyday articles of familiar character. Here the exerciser was merely a forty-inch rubber rope having no mechanical parts or latent defects. It was designed on the same principle and presented similar inherent dangers as a rubber band or sling-shot. It is a matter of common knowledge, obvious to the user as well as to

⁹ *Dalton v. Pioneer Sand & Gravel Co.*, 37 Wash. (2d) 946, 227 P. (2d) 173 (1951).

¹⁰ See 2 TORTS RESTATEMENT §388, comment *i* (1934).

¹¹ *Hopkins v. E. I. DuPont de Nemours & Co.*, (3d Cir. 1952) 199 F. (2d) 930. Cf. *Hopkins v. E. I. DuPont de Nemours & Co.*, (3d Cir. 1954) 212 F. (2d) 623, cert. den. sub nom. *Hopkins Admx. v. E. I. DuPont de Nemours & Co.*, 348 U.S. 872 (1954), reversing a jury verdict for plaintiff, holding as a matter of law that since the blasting foreman had knowledge of the danger, the manufacturer was not negligent in failing to warn.

¹² *Lambert v. Richards-Kelly Constr. Co.*, 348 Pa. 407, 35 A. (2d) 76 (1944).

¹³ *Gall v. Union Ice Co.*, 108 Cal. App. (2d) 303, 239 P. (2d) 48 (1951).

¹⁴ See 2 TORTS RESTATEMENT §388, comment *b* (1934).

¹⁵ *Henry v. Crook*, 202 App. Div. 19, 195 N.Y.S. 642 (1922).

¹⁶ *Crist v. Art Metal Works*, 230 App. Div. 114, 243 N.Y.S. 496 (1930), affd. 255 N.Y. 624, 175 N.E. 341 (1931). But note dissent arguing toy was of simple construction, that it was a matter of common knowledge that sparks applied to inflammable material will start a fire, and that the toy gun was not inherently dangerous.

¹⁷ Principal case at 37 et seq.

the manufacturer, that when these articles are stretched, they may slip, and if they slip, they will snap back with a force proportional to the amount of tension placed upon them. Representing that "anybody" could reduce by using the exerciser would not make these dangers less apparent to the adult user in the principal case, as the representation that something was "harmless" might make an otherwise obvious danger less apparent to a child. Therefore, no jury question was presented. To hold otherwise, and permit the jury to determine whether these dangers were obvious to the plaintiff, would place an unjustifiable burden on the manufacturer in the present atmosphere of recognized jury leniency toward the personal injury plaintiff.

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