

1986

Wagoner v. Waterslide Incorporated : Brief of Appellant

Utah Supreme Court

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BRIEF

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DOCKET NO. 860092-CA

IN THE SUPREME COURT OF THE
STATE OF UTAH

WALTER WAGONER,	:	
Plaintiff/Appellant,	:	860092-CA Case No. 20410
vs.	:	
WATERSLIDE INCORPORATED dba	:	
BURCHCREEK WATERSLIDE,	:	
Defendant/Respondent.	:	
vs.	:	
GREAT BASIN ENGINEERING,	:	
Third-Party Defendant.	:	

BRIEF OF APPELLANT

Appeal from the Second Judicial District Court of
Weber County, State of Utah, the Honorable John F.
Wahlquist, District Judge.

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FILED

APR 18 1985

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the trial court fail to properly instruct the jury on the legal duty owed by a possessor of land to a business invitee to warn the invitee about hazardous conditions to be encountered on the land?

2. Did the court fail to instruct the jury about the legal definition of "unreasonable risk" as stated in Section 343, Restatement of Torts, Second?

STATEMENT OF THE CASE

Statement of the Nature of the Case

Plaintiff appeals from a jury verdict of no cause of action against the defendant and from a denial of plaintiff's motion for a new trial.

Disposition of Case in Lower Court

A jury trial was held in this case on October 2 and 3 1984, the Honorable John F. Wahlquist presiding. The jury was given instructions prepared by the Court asking whether the defendant was negligent in his operation of a waterslide on which plaintiff was injured. Based on the instruction given it, the jury concluded that the defendant was not negligent. Judgment was entered in favor of the defendant. Plaintiff requested a new trial in the case which was denied. An order to that effect was entered on December 14, 1984. An appeal was filed on January 7, 1985.

Statement of Facts

On June 21, 1982 plaintiff Walter Wagoner, family members and some friends went to the Burchcreek Waterslide in Ogden, to use the waterslide facilities. Mr. Wagoner had never before ridden a waterslide. Shortly after arriving at the facility he cut the tendon of his right great toe when his foot went out over the top of the waterslide as he came out of a turn and contacted an unfinished roughened, outer edge of the fiberglass waterslide. At the time of his

injury he was using the waterslide in a proper recommended fashion by sliding on his chest on a rubbermat provided by the facility for that purpose.

The waterslide itself was of fiberglass construction. The top of the waterslide was open. It had been manufactured and installed in 1979 and in operation each summer thereafter.

When the waterslide components were originally manufactured there was a rounded edge at the top of the waterslide which flared out into an unfinished edge of rough fiberglass on each outer edge of the fiberglass sections. (R.29, Exhibits 2P, 3P, 4P and 5P) When the components were assembled into the complete waterslide the rough, unfinished edge of fiberglass extended the entire length of the waterslide along both outer edges of the slide.

At the top of the waterslide is an entry pool from which access is gained to the slide itself. There is a splash pool at the bottom of the waterslide. (R.440) Water flowing down the interior of the waterslide has two functions. First it moistens the fiberglass so a person can slide; secondly it acts to slow a person down by creating a wave of water in front of the slide user which acts as a brake. (R. 440) If the water is prevented from flowing down the slide, leaving only the moist fiberglass, a rider will reach a higher speed. (R.441) Also, a smaller person will

not generally go down the slide as fast as a larger person (R.442) and if several riders join together to form a train they will likewise increase their speed down the waterslide. (R.443) In this case, plaintiff Walter Wagoner was 6'3 $\frac{1}{2}$ " tall and weighed 250 lbs. when injured so he would automatically have gone down the waterslide faster than a normal sized man. (R.443-444)

As a person goes through the curves of a waterslide their momentum propels them upward on the outer edge of the slide as they go through a turn. (R.444-445) In fact, if their speed becomes too great through the curves they can literally pop right out of the top of this kind of waterslide. This had occurred once previously at the Burchcreek Waterslide. (R.447) As a person goes through a turn his arms or legs automatically come in closer proximity to the exposed, unfinished edge of the waterslide with a greater potential for getting cut if an arm or leg extends over the top curved edge of the slide.

The exposed edge of this waterslide, on which plaintiff was cut, is about four inches from the curved top of the waterslide. (R.432 and 437) It was not uncommon for riders to grab the upper, curved edge to slow down (R.437) So it was clearly known and expected that riders arms or legs would routinely be within four inches of the exposed outer edge of rough fiberglass. (R. 437).

The trial testimony of defendant Neal Citte concerning the danger presented by the outer edge of the waterslide is important for purposes of this appeal.

Q. But that edge, if a person were sliding down the waterslide and in motion and a portion of their body--arm, fingers, feet, whatever--came in contact with that unfinished edge, it has the capacity to cut them?

A. Yes. (R. 432)

Mr. Hasenyager: Q. All right. So at least with hands, it is foreseeable that someone would have fingers within four inches of this unfinished edge that Mr. Wagoner was cut on?

A. I've already answered that, yes.

Q. All right. I think then you would agree Mr. Citte, would you not, that that roughened edge is dangerous if a person comes in contact with it?

A. Yes.

Q. And its dangerous of course because a person could get cut?

A. Yes. (R. 439-440)

Q. All right. Now, the answer that you gave me of bordering up the sides too far and actually making it so your body might protrude out of the slide, its a hazard that was known in the use of the waterslide if a person got going fast enough?

A. When you say it was a hazard that was known, I rode the slide before and you know, on anything there's limitations and there's a point you don't feel safe, but when. . . . I rode the slide, I felt there was a point of being safe and unsafe.

Q. All right. Let's talk about the point where a person becomes unsafe riding the slide. Where a person becomes unsafe is when the speed builds up far enough that they rise up to the wall and they are put in close proximity to this roughened edge where they can become cut, isn't that true?

A. That's true.

Q. So one of the dangers of this slide, which is known to you as the owner, was that the roughened edge. The outside edge posed a danger to sliders who come in proximity with it?

A. That's why we told them not to hold the water back. (R.448-449)

Q. All right. But as a parallel to that, you've already told us that edge was roughened, that it was dangerous, you considered it so, and that is a hazard of the slide, right?

A. Yes. (R.450)

Q. Now Mr. Citte, when a person is riding the waterslide--you've seen a lot of people go down that slide, haven't you?

A. Fair share.

Q. Okay. There are times when an inexperienced person could lose control of their arms or legs as they go through the curves, aren't there? Is it fair to say that could happen?

A. It would be fair to say an inexperienced person could lose control. When you say their arms or legs would protrude like you're trying to infer--

Q. Well, I haven't said that. My question is only that they could lose control of where their arms or legs are, isn't that true?

A. I guess it's possible, sure.

Q. And in fact, that's not an uncommon thing either is it? People hit those curves and they'll--their arms will go one direction and/or their feet or another arm may go up over that edge. That's not uncommon?

A. No, I wouldn't --when you say it's not uncommon, I've seen it happen, sure.

Q. You've seen it happen, you knew it does happen from time to time.

A. Sure.

Q. It's an expected occurrence, right?

A. It can happen, sure.

Q. Okay. In those circumstances where somebody loses their control of their arms, their arms could go all different directions and the same with their legs, isn't that true?

A. I imagine.

Q. Okay. That is a known and expected circumstance in riding the waterslide, isn't it?

A. It's happened.

Q. Okay. And that can happen when a person is riding the slide correctly without holding the water back, can't it?

A. I think it could happen (R.458-459)

Q. All right. And the third question is that you never warned any of the users of the waterslide about a risk or hazard of getting cut if their arms or legs protruded out over that edge?

A. No. (R.460)

Q. So you're not meaning to imply that the average rider or the first-time rider, like Mr. Wagoner was, would look at that edge and a light would go on in his head and he'd say you know, better keep my arms and legs in because I could get cut; you're not implying that, are?

A. No, I have not implied that. (R. 495)

From the excerpts of Mr. Citte's testimony cited above it is clear that Mr. Wagoner was injured in a foreseeable manner when his foot came into contact with a dangerous condition of the waterslide, known to exist by the slide owner, who had not warned slide users about the hazard.

It was the defendant's contention at trial that because no one had been previously injured in a similar fashion the risk of injury was not unreasonable and he therefore had no legal duty to warn users about the hazard, nor any responsibility to guard the hazard or remove it.

The trial court then prepared its own special verdict jury instructions which contained the following interrogatory number 1:

Do you find it proven by a preponderance of the evidence that the defendant was negligent in the manner in which he used the slides with the edge as it was and did he expose the plaintiff to an unreasonable risk of injury?
(R.351)

The interrogatory was followed by an explanation prepared by the trial judge. (R. 351-352)

Plaintiff's Objections were taken to the courts proposed instruction (R. 498-503) and in partinent part were made primarily because the explanations given in conjunction with the first interrogatory did not inform the jury that the defendant had an affirmative duty to, at a minimum, warn slide users of known hazards they would encounter in using the waterslide. Also, the jury was given no guidance as to the legal definition of "unreasonable risk" nor the factors to be considered in determining whether or not a risk was unreasonable.

Summary of Argument

The jury was improperly insturcted on the law concerning the duty of a possessor of land to a business invi-tee because they were not informed that the possessor of land has an affirmative duty to warn invitees about hazar-dous conditions they will encounter on the land in cir-cumstances where the hazard it not obvious and the jury was not instructed about the nature of an unreasonable risk.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT CORRECTLY INSTRUCT THE JURY ON THE DUTY OWED BY THE POSSESSOR OF LAND TO A BUSINESS INVITEE TO WARN THE INVITEE ABOUT HAZARDOUS CONDITIONS TO BE ENCOUNTERED ON THE LAND.

Section 343, Restatement of Torts, Second States:

§ 343. Dangerous Conditions Known to or Discoverable by Possessor.

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- a) Knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- c) fails to exercise reasonable care to protect them against the danger.

The comment notes to Section 343 in pertinent part say that the invitee on land

. . . He is entitled to expect such care not only in the original construction of the premises, and any activities of the possessor or his employees which may affect their condition, but also in inspection to discover their actual condition and any latent defects, followed by such repair, safeguards, or warning as may be reasonably necessary for his protection under the circumstances. (emphasis added)

. . . To the invitee the possessor owes not only this duty, but also the additional duty to exercise reasonable affirmative care to see that the premises are safe for the reception of the visitor, or at least to ascertain the condition of the land and to give such warning that the visitor may decide intelligently whether or not to accept the invitation, or may protect himself against the danger if he does accept it. (emphasis added)

It is clear from the language of the Restatement Comments that once a possessor of land knows of a dangerous condition on the land he must, at a minimum, give the invitee a warning about the hazard if he chooses not to remove or guard against the hazard.

This was the precise holding in Odell v. Cook's

Market, Inc., 432 S.W. 2d 382 (Mo. App. 1968). The plaintiff fell in a store when she slipped on a mixture of water and lettuce or cabbage leaves. The Court cited Section 343 of the Restatement and said that the defendant had "the alternate duty either to remove the wet leaves that created the dangerous condition or warn Mrs. O'Dell of the dangerous condition that existed on the floor."

This case is significant for two reasons. First, dangerous condition is used synonymously with unreasonable risk of harm, the specific language of Section 343. i.e. a dangerous condition creates an unreasonable risk of harm unless corrected or warned about. Secondly, it recognizes the affirmative nature of the duty to remove the dangerous condition or warn about it. Either conduct fulfills the affirmative duty of care. Ignoring the dangerous condition does not.

In the instruction given by the trial court in this case, the affirmative duty to warn slide users about a known dangerous condition was ignored by the court. Also, the court simply asked the two part question was the defendant negligent in his use of the slide with the edge as it was and did the defendant expose plaintiff to an unreasonable risk of injury.

If there does actually exist an affirmative duty under Section 343 to warn slide users about a known

dangerous condition then the defendant was negligent as a matter of law in this instance because he clearly knew of the hazard and failed to warn plaintiff or anyone else about the hazard.

If the issue of negligence must be analyzed from the standpoint of whether the risk was unreasonable before the minimum duty to warn about a known dangerous condition arises then the instruction given by the court was still inadequate because it did not define unreasonable risk.

POINT II

THE TRIAL COURT FAILED TO INSTRUCT THE JURY ABOUT THE LEGAL DEFINITION OF UNREASONABLE RISK OR THE FACTORS TO BE CONSIDERED IN DECIDING WHETHER OR NOT A RISK IS UNREASONABLE.

Under Section 291, Restatement of Torts, Second a risk is unreasonable and the act (or here omission) negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done. In determining the utility of the act under Section 292, Restatement of Torts, Second there must be some social value advanced or protected by leaving an unfinished, roughened fiberglass edge on the waterslide when that edge had the recognized capacity to cause injury if contacted. Or, some particular social value in failing or justifying the failure to warn slide users about the edge so they could take reasonable steps to pro-

tect themselves from contracting the edge if they chose to use the waterslide.

It is difficult to see any utility or social value of any kind that would justify or excuse the failure to warn in this instance. The defendant attempted at trial to excuse his failure to warn patrons about the edge by testifying that over a million rides had taken place down the waterslide without anyone previously being cut like plaintiff. That, of course, is not a complete test of utility or social value in this case. The test is whether the defendant had any public or private interest that was advanced or protected by failing to warn about the hazardous condition. It includes the magnitude of the risk, the possible extent of harm or injury that might result to a user and a consideration of individual and societal rights and obligations. i.e. is there any social utility or value in exposing slide users to the risk of injury by being cut on a known, dangerous, unfinished, outer edge of the waterslide. Matthews v. Ashland Chemical, Inc., 703 F. 2d 921, 924 (1983). Moning v. Alfono, 254 N.W. 2d 759, 770 (1977). When a known hazard is present that could be easily warned about there is no possible public or private interest belonging to the defendant which was greater than the general public interest in having waterslide users ride the waterslide free of injury or at a minimum with full disclo-

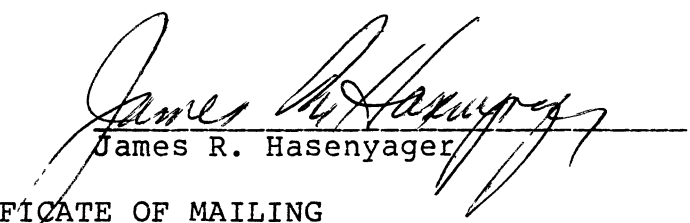
sure of the risks involved in use of the waterslide so they could intelligently decide whether or not to accept the risk and use the waterslide anyway.

Conclusion

For the reasons stated above plaintiff request that the court order a new trial in this case.

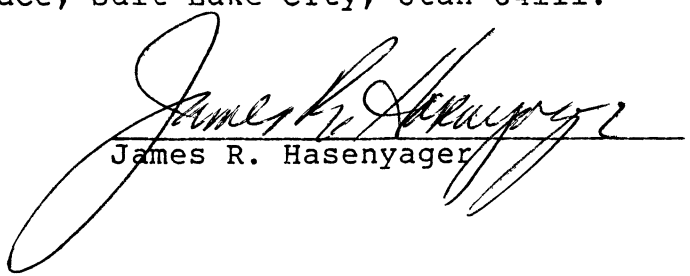
DATED this 16 day of April, 1985.

MARQUARDT, HASENYAGER & CUSTEN


James R. Hasenyager

CERTIFICATE OF MAILING

I hereby certify that on this 16 day of April, 1985, I mailed 4 true and correct copy of the foregoing Brief of Appellant, postage prepaid, to Roger H. Bullock, Attorney for Respondent, Sixth Floor Boston Building, 9 Exchange Place, Salt Lake City, Utah 84111.


James R. Hasenyager

k. Where warning inadequate. There will, however, be special situations in which the possessor has knowledge of facts from which he should realize that an ordinary warning will not be sufficient to notify the licensee of the danger, or to enable him to protect himself against it. Thus where the possessor knows that the licensee is blind, illiterate, or a foreigner, or a child too young to be able to read, it is not enough to rely upon a posted notice to give warning of the danger, and the possessor may still be required to exercise reasonable care to give adequate warning in some other way. In extreme cases, as in the case of the blind man, he may even be required to give physical assistance to enable the licensee to avoid the danger.

l. Dangers known to licensee. The licensee, who enters land with no more than bare permission, is entitled to nothing more than knowledge of the conditions and dangers which he will encounter if he comes. If he is warned of the actual conditions, and the dangers involved, or if he discovers them for himself without such warning, and fully understands and appreciates the risk, he is in a position to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining. Therefore, even though a dangerous condition is concealed and not obvious, and the possessor has given the licensee no warning, if the licensee is in fact fully aware of the condition and the risk, there is no liability to him.

TITLE E. SPECIAL LIABILITY OF POSSESSORS OF LAND TO INVITEES

§ 343. Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

See Appendix for Reporter's Notes, Court Citations, and Cross References

(c) fails to exercise reasonable care to protect them against the danger.

See Reporter's Notes.

Comment:

a. This Section should be read together with § 343 A, which deals with the effect of the fact that the condition is known to the invitee, or is obvious to him, as well as the fact that the invitee is a patron of a public utility. That Section limits the liability here stated. In the interest of brevity, the limitation is not repeated in this Section.

b. *Distinction between duties to licensee and invitee.* One who holds his land open for the reception of invitees is under a greater duty in respect to its physical condition than one who permits the visit of a mere licensee. The licensee enters with the understanding that he will take the land as the possessor himself uses it. Therefore such a licensee is entitled to expect only that he will be placed upon an equal footing with the possessor himself by an adequate disclosure of any dangerous conditions that are known to the possessor. On the other hand an invitee enters upon an implied representation or assurance that the land has been prepared and made ready and safe for his reception. He is therefore entitled to expect that the possessor will exercise reasonable care to make the land safe for his entry, or for his use for the purposes of the invitation. He is entitled to expect such care not only in the original construction of the premises, and any activities of the possessor or his employees which may affect their condition, but also in inspection to discover their actual condition and any latent defects, followed by such repair, safeguards, or warning as may be reasonably necessary for his protection under the circumstances.

As stated in § 342, the possessor owes to a licensee only the duty to exercise reasonable care to disclose to him dangerous conditions which are known to the possessor, and are likely not to be discovered by the licensee. To the invitee the possessor owes not only this duty, but also the additional duty to exercise reasonable affirmative care to see that the premises are safe for the reception of the visitor, or at least to ascertain the condition of the land, and to give such warning that the visitor may decide intelligently whether or not to accept the invitation, or may protect himself against the danger if he does accept it.

As stated in § 342, the possessor is under no duty to protect the licensee against dangers of which the licensee knows or has reason to know. On the other hand, as stated in § 343 A, there are some situations in which there is a duty to protect an invitee against even known dangers, where the possessor should anticipate harm to the invitee notwithstanding such knowledge.

c. As to invitees who go beyond the scope of the invitation, as to either time or place, see § 332, Comment l.

d. *What invitee entitled to expect.* An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein. Therefore an invitee is not required to be on the alert to discover defects which, if he were a mere licensee, entitled to expect nothing but notice of known defects, he might be negligent in not discovering. This is of importance in determining whether the visitor is or is not guilty of contributory negligence in failing to discover a defect, as well as in determining whether the defect is one which the possessor should believe that his visitor would not discover, and as to which, therefore, he must use reasonable care to warn the visitor.

e. *Preparation required for invitee.* In determining the extent of preparation which an invitee is entitled to expect to be made for his protection, the nature of the land and the purposes for which it is used are of great importance. One who enters a private residence even for purposes connected with the owner's business, is entitled to expect only such preparation as a reasonably prudent householder makes for the reception of such visitors. On the other hand, one entering a store, theatre, office building, or hotel, is entitled to expect that his host will make far greater preparations to secure the safety of his patrons than a householder will make for his social or even his business visitors. So too, one who goes on business to the executive offices in a factory, is entitled to expect that the possessor will exercise reasonable care to secure his visitor's safety. If, however, on some particular occasion, he is invited to go on business into the factory itself, he is not entitled to expect that special preparation will be made for his safety, but is entitled to expect only such safety as he would find in a properly conducted factory.

f. *Appliances used on land.* A possessor who holds his land open to others must possess and exercise a knowledge of the

dangerous qualities of the place itself and the appliances provided therein, which is not required of his patrons. Thus, the keeper of a boardinghouse is negligent in providing a gas stove to be used in an unventilated bathroom, although the boarder who is made ill by the fumes uses the bathroom with knowledge of all the circumstances, except the risk of so doing. This is true because the boardinghouse keeper, even though a man of the same class as his boarders, is required to have a superior knowledge of the dangers incident to the facilities which he furnishes to them.

g. As to the duty of a possessor of business premises to protect his invitees from harm threatened thereon by third persons, see § 344.

§ 343 A. Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

See Reporter's Notes.

Comment on Subsection (1):

a. The rule stated in this Subsection applies to all persons who enter or remain on land in the capacity of invitees, as defined in § 332. It includes in particular the patrons of a public utility who enter land in its possession seeking its services, to which as members of the public they are entitled; and it includes members of the public making use of the land of the government or a government agency which is held open for the use of the public. As is stated in Subsection (2), such a public utility, government, or government agency may have special reason to anticipate that one who so enters will proceed to encounter known or obvious dangers; and such a defendant may therefore be subject to liability in some cases where the ordinary possessor of land would not.

prior positions and courses of movement of the injured pedestrian and the defendant motorist. Those crucial factors distinguish the cited cases from ours. Here, the evidence is more akin to the cases of *Davis v. St. Louis Public Service Co., Mo.*, 316 S.W.2d 494 [8, 9]; *Wapelhorst v. Lindner, Mo.*, 269 S.W.2d 865 [7, 8]; *Hartlage v. Halloran, Mo.App.*, 331 S.W.2d 197 [3]. In each, plaintiff lost by failing to show the relative prior positions and courses of travel of the plaintiff pedestrian and the defendant motorist. We reach the same result here.

We hold that the plaintiff failed to make a submissible humanitarian case. The trial court correctly set aside plaintiff's verdict and judgment and entered judgment for the defendants. That judgment should be affirmed.

PER CURIAM:

The foregoing opinion of CLEMENS, C., is adopted as the opinion of this court. Accordingly, the judgment for defendants is affirmed.

ANDERSON, P. J., RUDDY, J., and P. F. PALUMBO, Special Judge, concur.



**Audrey Ann O'DELL and Paul O'Dell,
Plaintiffs, Appellants,**

v.

**COOK'S MARKET, INC., Defendant,
Respondent.**

No. 32914.

St. Louis Court of Appeals.

Missouri.

Sept. 17, 1968.

Action by invitee and her husband to recover for invitee's injuries and husband's medical expenses and loss of consortium

resulting when invitee slipped on wet cabbage or lettuce leaves in defendant's store. The Circuit Court, City of St. Louis, J. Casey Walsh, J., sustained defendant's motion for judgment in accordance with his motion for directed verdict and appeal was taken. The Court of Appeals, Ruddy, J., held that since invitee was aware of the dangerous condition defendant was not liable for failure to warn invitee of condition, and invitee, who had observed and been warned by mother of condition 30 minutes prior to fall, was not distracted and was not prevented from seeing condition at time of fall in well-lighted store, was contributorily negligent.

Affirmed.

1. Negligence ⇨48, 52

A landowner is liable for bodily harm caused an invitee by a natural or artificial condition on the land if landowner knows, or with use of reasonable care should know, of condition which, if known, would cause landowner to realize it involves an unreasonable risk of harm to invitees, landowner has no reason to believe invitees will discover condition or realize risk, and landowner invites or permits invitees to remain without exercising reasonable care to remedy the condition or warn invitees.

2. Negligence ⇨48

Basis of landowner's liability to invitee is superior knowledge of an unreasonable risk of harm of which the invitee, in exercise of ordinary care, does not or should not know of.

3. Negligence ⇨52

Landowner must warn invitee of existing conditions on the land which involve an unreasonable risk of harm, but he need not make repeated warnings.

4. Negligence ⇨50, 52

Storekeeper had duty either to remove wet leaves that created dangerous condi-

tion or to warn invitee of dangerous condition, but not both.

5. Negligence ⇐48

Only when a dangerous condition on the premises is known to the landowner and not known to invitee who is injured, is a recovery permitted.

6. Negligence ⇐66(1)

There is no liability of landowner for injuries from dangers that are obvious, or as well known to person injured as to landowner.

7. Negligence ⇐66(1)

Invitee, who slipped on wet cabbage or lettuce leaves in store where lighting was good, she was not distracted, she had seen the condition and been warned by her mother that it was dangerous 30 minutes previous to fall and she was not prevented from seeing the dangerous condition at time of fall, was contributorily negligent.

8. Negligence ⇐69

Forgetfulness, when nothing has occurred to distract the mind, does not excuse negligence based on knowledge of dangerous condition.

9. Negligence ⇐69

Assuming invitee who fell on wet cabbage or lettuce leaves in store forgot that she had observed and been warned by her mother of the condition 30 minutes previous to fall, forgetfulness was not excused where nothing occurred to distract in-

RUDDY, Judge.

Audrey Ann O'Dell, wife of Paul O'Dell was injured when she slipped and fell in defendant's store on either lettuce or cabbage leaves mixed with water. She and her husband jointly brought this action. She to recover damages for her injuries and he to recover for medical expenses and loss of consortium. A jury trial resulted in a verdict in favor of the wife in the sum of \$1500 and in favor of the husband in the sum of \$500. The trial court sustained defendant's motion for judgment in accordance with its motions for a directed verdict filed by it at the close of all of the evidence and entered a judgment in favor of defendant against plaintiffs. Plaintiffs appeal.

Mrs. O'Dell went to the store of the defendant in an automobile driven by her husband. Mr. O'Dell remained in the automobile and Mrs. O'Dell, her young son and her mother entered the store about 8:00 P.M. on June 16, 1965. It was the intention of Mrs. O'Dell and her mother to shop for their respective needs. Each procured a cart in which to put her purchases. There were not many customers in the store that evening. Mrs. O'Dell and her mother shopped through the various meat and grocery departments of the store as well as at the vegetable counter. Mrs. O'Dell did not believe that she purchased any of the vegetables. There were no customers in the vegetable department when they passed through. As they got to the vegetable counter in the course of their shopping tour Mrs. O'Dell noticed that the floor was wet in spots and that it had debris which she described as either lettuce or cabbage leaves. It covered an area of one square foot. At that time she saw the manager of the store and a clerk in the vegetable department. The mother of Mrs. O'Dell testified that she told her daughter to "be careful" * * * "it looks kind of messy in there." Her daughter did not respond to this admonition or say anything to her. Mrs. O'Dell testified that she did not remember her mother saying anything

Ray B. Marglous, Clayton, for plaintiffs-appellants.

Moser, Marsalek, Carpenter, Cleary & Schel, St. Louis, for defendant-respond-

to her and that she said nothing to her mother about the presence of the leaves and water on the floor at the time they first went through the vegetable department. Mrs. O'Dell was wearing a pair of low flat heeled shoes. She testified that the lighting was adequate and that she had no trouble seeing where she was going. About thirty minutes after she and her mother left the vegetable area they arrived at the checkout counter of the store where a clerk would compute the sum owed for the purchases made. While her mother's purchases were being computed Mrs. O'Dell remembered that she wanted to purchase an avocado for salad. She gave her mother her purse and told her to set it on the mother's cart while she went back to get the avocado. As she was going through the vegetable department on her way to get the avocado she slipped and fell. She testified, "I slid and I fell." Her leg folded under her and she fell in a sitting position. She testified that she knew she had fallen on something because she went down "too fast." After she had fallen she looked back from her sitting position to see what she had fallen on and she noticed a skid mark "that was either lettuce, or cabbage, mixed with water," and noticed some of the mixture on her left shoe. She described it as a green, slimy substance. She said it was all over the bottom of the sole of her left shoe. While she was sitting on the floor she saw a boy picking up leaves from the floor. He was about twelve to eighteen feet in front of her. When Mrs. O'Dell failed to return to the checkout counter her mother told Mrs. O'Dell's son to go back and see what happened to the mother. Upon learning from the boy of her daughter's fall she went to her daughter's assistance. She described the area at the time as "sort of damp, and a few little greens on the floor." The mother thought the condition of the floor was about the same as the first time she and her daughter went through the vegetable department. She saw what she described as lettuce on her daughter's left foot and that her daughter's slim jims were all green and wet.

~~Thereafter~~ Mrs. O'Dell's husband who had been ~~also~~ into the store picked up Mrs. O'Dell and carried her out to the automobile. ~~She~~ ~~in~~ O'Dell testified that when he looked ~~on~~ the floor he noticed it was wet and saw a lettuce leaf clinging to the sole of his ~~left~~ shoe. He noticed one of the young grocery clerks picking vegetable leaves ~~on~~ the floor. He said the lighting ~~conditions~~ in the store were adequate at the time and he had no difficulty seeing where ~~he~~ was going. He said the store was well lighted. Mrs. O'Dell testified that ~~when~~ she returned to the vegetable department to obtain the avocado she observed ~~no~~ employees or customers in the vegetable department and when asked if there was anything to distract her she answered "No." When asked if there was anything to prevent her from seeing the lettuce leaves on the floor if she had looked ~~on~~ he answered that she was not looking ~~on~~ the floor at the time but said there was nothing to prevent her from seeing the lettuce leaves on the floor had she looked. The manager of the store testified that between fifteen and thirty minutes before he learned of Mrs. O'Dell's fall he was in the vegetable area for the purpose of helping customers and checking supplies. He said he ~~will~~ have checked to see whether or not there was any debris on the floor. It was ~~one~~ of his responsibilities to look after the area. He was told by one of the clerks that Mrs. O'Dell had fallen and he went ~~to~~ where she had fallen and said he looked ~~on~~ the floor and saw nothing.

The case was submitted to the jury on the ~~stated~~ ground that defendant failed to use ordinary care to remove the wet lettuce and cabbage leaves on the floor after it knew ~~it~~ could have known of the unsafe condition and that Mrs. O'Dell did not know ~~and~~ could not have known of the unsafe condition of the floor.

Plaintiffs contend that the trial court erred in setting aside the jury verdict in favor of the plaintiffs and entering a judgment in favor of the defendant because the evidence shows that defendant had either

actual or constructive notice of the condition of the floor and was negligent in permitting the wet leaves to remain on the floor for a period of thirty minutes and further contends that Mrs O'Dell was not contributorily negligent as a matter of law in failing to remember the presence of the leaves on the floor, which she had previously observed thirty minutes prior thereto. Defendant contends that her knowledge of the condition of the floor and her conduct in failing to avoid it constitutes contributory negligence as a matter of law

[1-3] Defendant admits that Mrs O'Dell was an invitee who was injured on its premises. The Supreme Court in the case of *Harbourn v Katz Drug Company, Mo.*, 318 S W 2d 226, 74 A L R 2d 938 has given the applicable rule governing liability to an invitee. It said (1 c 228, 229)

"* * * the rule as to defendants' duty and liability to one in such status (invitee), as stated in 2 Restatement, Law of Torts, § 343, is as follows 'A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he (a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and (b) has no reason to believe that they will discover the condition or realize the risk involved therein, and (c) invites or permits them to remain upon the land without exercising reasonable care (i) to make the condition reasonably safe, or (ii) to give a warning adequate to enable them to avoid the harm * * *'"

The basis of defendant's liability is its superior knowledge of an unreasonable risk of harm of which the invitee, in the exercise of ordinary care, does not or should not know. *Harbourn v Katz Drug Company*, supra, 1 c 229. However, in order for defendant to fulfill its duty to plaintiff invitee it need not make repeated

warnings. *Harbourn v Katz Drug Company*, supra, 1 c 231

[4-6] Also, defendant had only the alternate duty either to remove the wet leaves that created the dangerous condition or to warn Mrs O'Dell of the dangerous condition that existed on the floor. Defendant did not have the duty to both remove the leaves from the floor and to warn plaintiff of the dangerous condition. If defendant warned plaintiff of the condition or if plaintiff had the same knowledge of the condition as defendant there would be no liability on the part of defendant. Liability of an owner or occupant of premises is predicated on the owner or proprietor's superior knowledge of the dangerous condition and the danger therefrom to persons going upon the premises. It is only when the dangerous condition is known to the owner or occupant of the premises and not known to the person injured, that a recovery is permitted. It follows therefore that there is no liability by the owner or occupier of the premises for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant. *Lamberton v Fish, Mo.*, 148 S W. 2d 544, 1 c 546

[7] In the instant case Mrs O'Dell on her first trip past the vegetable counter thirty minutes before she fell saw that the floor was wet and that it had debris which she described as either lettuce or cabbage leaves on it. She said it covered an area of one square foot, her mother warned her to "be careful," telling her, "it looks kind of messy in there." Mrs O'Dell did not deny that her mother warned her, she merely testified that she did not remember her mother saying anything to her. State ex rel and to Use of *Williams v Feld Chevrolet, Inc.*, Mo App, 403 S W 2d 672, 683. The fact is that Mrs O'Dell did admit that she saw the wet leaves on the floor and was fully aware of the dangerous condition of the floor at that time. While the evidence in this case does not show that defendant warned Mrs. O'Dell

to her and that she said nothing to her mother about the presence of the leaves and water on the floor at the time they first went through the vegetable department. Mrs. O'Dell was wearing a pair of low flat heeled shoes. She testified that the lighting was adequate and that she had no trouble seeing where she was going. About thirty minutes after she and her mother left the vegetable area they arrived at the checkout counter of the store where a clerk would compute the sum owed for the purchases made. While her mother's purchases were being computed Mrs. O'Dell remembered that she wanted to purchase an avocado for salad. She gave her mother her purse and told her to set it on the mother's cart while she went back to get the avocado. As she was going through the vegetable department on her way to get the avocado she slipped and fell. She testified, "I slid and I fell." Her leg folded under her and she fell in a sitting position. She testified that she knew she had fallen on something because she went down "too fast." After she had fallen she looked back from her sitting position to see what she had fallen on and she noticed a skid mark "that was either lettuce, or cabbage, mixed with water," and noticed some of the mixture on her left shoe. She described it as a green, slimy substance. She said it was all over the bottom of the sole of her left shoe. While she was sitting on the floor she saw a boy picking up leaves from the floor. He was about twelve to eighteen feet in front of her. When Mrs. O'Dell failed to return to the checkout counter her mother told Mrs. O'Dell's son to go back and see what happened to the mother. Upon learning from the boy of her daughter's fall she went to her daughter's assistance. She described the area at the time as "sort of damp, and a few little greens on the floor." The mother thought the condition of the floor was about the same as the first time she and her daughter went through the vegetable department. She saw what she described as lettuce on her daughter's left foot and that her daughter's slim jims were all green and wet.

Thereafter, Mrs. O'Dell's husband who had been called into the store picked up Mrs. O'Dell and carried her out to the automobile. Mr. O'Dell testified that when he looked at the floor he noticed it was wet and saw a lettuce leaf clinging to the sole of his wife's shoe. He noticed one of the young grocery clerks picking vegetable leaves off of the floor. He said the lighting conditions in the store were adequate at the time and he had no difficulty seeing where he was going. He said the store was well lighted. Mrs. O'Dell testified that when she returned to the vegetable department to obtain the avocado she observed no employees or customers in the vegetable department and when asked if there was anything to distract her she answered "No." When asked if there was anything to prevent her from seeing the lettuce leaves on the floor if she had looked she answered that she was not looking on the floor at the time but said there was nothing to prevent her from seeing the lettuce leaves on the floor had she looked. The manager of the store testified that between fifteen and thirty minutes before he learned of Mrs. O'Dell's fall he was in the vegetable area for the purpose of helping customers and checking supplies. He said he would have checked to see whether or not there was any debris on the floor. It was one of his responsibilities to look after the aisles. He was told by one of the clerks that Mrs. O'Dell had fallen and he went to where she had fallen and said he looked at the floor and saw nothing.

The cause was submitted to the jury on the alleged ground that defendant failed to use ordinary care to remove the wet lettuce or cabbage leaves on the floor after it knew or could have known of the unsafe condition and that Mrs. O'Dell did not know and could not have known of the unsafe condition of the floor.

Plaintiffs contend that the trial court erred in setting aside the jury verdict in favor of the plaintiffs and entering a judgment in favor of the defendant because the evidence shows that defendant had either

actual or constructive notice of the condition of the floor and was negligent in permitting the wet leaves to remain on the floor for a period of thirty minutes and further contends that Mrs. O'Dell was not contributorily negligent as a matter of law in failing to remember the presence of the leaves on the floor, which she had previously observed thirty minutes prior thereto. Defendant contends that her knowledge of the condition of the floor and her conduct in failing to avoid it constitutes contributory negligence as a matter of law.

[1-3] Defendant admits that Mrs. O'Dell was an invitee who was injured on its premises. The Supreme Court in the case of *Harbourn v. Katz Drug Company*, Mo., 318 S.W.2d 226, 74 A.L.R.2d 938 has given the applicable rule governing liability to an invitee. It said (l.c. 228, 229):

"* * * the rule as to defendants' duty and liability to one in such status (invitee), as stated in 2 Restatement, Law of Torts, § 343, is as follows: 'A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he (a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and (b) has no reason to believe that they will discover the condition or realize the risk involved therein, and (c) invites or permits them to remain upon the land without exercising reasonable care (i) to make the condition reasonably safe, or (ii) to give a warning adequate to enable them to avoid the harm * * *.'"

The basis of defendant's liability is its superior knowledge of an unreasonable risk of harm of which the invitee, in the exercise of ordinary care, does not or should not know. *Harbourn v. Katz Drug Company*, supra, l.c. 229. However, in order for defendant to fulfill its duty to plaintiff an invitee it need not make repeated

warnings. *Harbourn v. Katz Drug Company*, supra, l.c. 231.

[4-6] Also, defendant had only the alternate duty either to remove the wet leaves that created the dangerous condition or to warn Mrs. O'Dell of the dangerous condition that existed on the floor. Defendant did not have the duty to both remove the leaves from the floor and to warn plaintiff of the dangerous condition. If defendant warned plaintiff of the condition or if plaintiff had the same knowledge of the condition as defendant there would be no liability on the part of defendant. Liability of an owner or occupant of premises is predicated on the owner or proprietor's superior knowledge of the dangerous condition and the danger therefrom to persons going upon the premises. It is only when the dangerous condition is known to the owner or occupant of the premises and not known to the person injured, that a recovery is permitted. It follows therefore that there is no liability by the owner or occupier of the premises for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant. *Lamberton v. Fish*, Mo., 148 S.W.2d 544, l.c. 546.

[7] In the instant case Mrs. O'Dell on her first trip past the vegetable counter thirty minutes before she fell saw that the floor was wet and that it had debris which she described as either lettuce or cabbage leaves on it. She said it covered an area of one square foot; her mother warned her to "be careful," telling her, "it looks kind of messy in there." Mrs. O'Dell did not deny that her mother warned her, she merely testified that she did not remember her mother saying anything to her. State ex rel. and to Use of *Williams v. Feld Chevrolet, Inc.*, Mo.App., 403 S.W.2d 672, 683. The fact is that Mrs. O'Dell did admit that she saw the wet leaves on the floor and was fully aware of the dangerous condition of the floor at that time. While the evidence in this case does not show that defendant warned Mrs. O'Dell

of the condition of the floor, nevertheless, defendant is not liable for failure to warn Mrs. O'Dell because it was shown that Mrs. O'Dell had knowledge of the dangerous condition of the floor. She saw its dangerous condition thirty minutes before she fell. The source of the knowledge of Mrs. O'Dell is immaterial. The important fact is that she had as much knowledge of the condition as defendant had or was charged with. *Trautloff v. Dannen Mills, Inc.*, Mo.App., 316 S.W.2d 866, 871. The lighting conditions were good; there were no customers in the vegetable department at the time Mrs. O'Dell fell and there was nothing to prevent her from seeing an obviously dangerous condition which she had observed thirty minutes earlier. Mrs. O'Dell was contributorily negligent as a matter of law.

However, Mrs. O'Dell seeks to escape the accusatory nature and effect of this knowledge by stating in her brief that she failed to remember the presence of the leaves on the floor when she returned to get the avocado thirty minutes later.

[8,9] The fact is that Mrs. O'Dell never did testify that she failed to remember or forgot about the presence of the leaves on the floor. No such testimony was ever given by her; but assuming, without so stating, that Mrs. O'Dell did forget, the rule of law in this state is that forgetfulness, when nothing has occurred to distract the mind, does not excuse. *Clark v. Missouri Natural Gas Co.*, Mo., 251 S.W.2d 27, 1.c. 30. In the case of *Harbourn v. Katz Drug Co.*, supra, at page 231, the Supreme Court said: "It is unquestionably correct, and properly so, that generally an invitee who is aware of a dangerous condition cannot impose liability on the possessor of property because he momentarily forgot about it and was injured. *Lamberton v. Fish*, supra; 38 Am.Jur., Negligence, § 187; Annotation, 39 L.R.A.,N.S., 896." The court further said: "'Circumstances may exist under which forgetfulness or inattention to a known danger may be con-

sistent with the exercise of due care, as where the situation requires one to give undivided attention to other matters, or is such as to produce hurry or confusion, or where conditions arise suddenly which are calculated to divert one's attention momentarily from the danger.'" 65 C.J.S. Negligence § 120, pp. 726-727."

Were the circumstances in this case sufficient to excuse Mrs. O'Dell's forgetfulness, if in fact she did forget? She did not testify that she was in a hurry, nor was there anything to show that a condition arose suddenly which was calculated to divert her attention. She did not say that she was unaware of the location of the avocados. She did not say that she was focusing her attention on the vegetable stand. She did testify that there were no customers in the vegetable department at that time and that there was nothing to distract her and that she could have seen this condition on the floor, which was one foot square in area, had she looked. We find nothing in the evidence that was calculated to divert Mrs. O'Dell's attention from the obviously dangerous condition of the floor. No circumstances were shown to exist which would excuse her forgetfulness or inattention to the danger confronting her. Plaintiffs cite the case of *Stocker v. J. C. Penney Co.*, Mo.App., 338 S.W.2d 339 in support of their position. The facts in that case may be distinguished from the facts of the instant case. In that case plaintiff saw a small dark object about the size of a plum as she was descending the steps of the store on the first trip down the steps and after a considerable shopping tour of the store that lasted approximately one hour and a half, she again descended the same steps and stepped in and was caused to fall by the deposit of gum on the stairway which had been on said step for at least one hour and a half. In the *Stocker* case plaintiff testified that she was not thinking of the spot as she descended the steps, stating that it had, "just slipped my mind." We upheld the judgment in favor of plaintiff pointing out that the defect or condition was not of such

striking nature as would likely produce a lasting effect upon the mind of one observing it. In the instant case the condition that caused Mrs O'Dell's fall was a glaringly dangerous condition. A much shorter period of time elapsed between the time Mrs O'Dell saw it and the time of her fall than existed in the Stocker case. Also Mrs O'Dell testified that she was not distracted.

We rule the trial court was correct in directing a judgment for the defendant. The judgment of the trial court is affirmed

ANDERSON, P J, and JAMES H. KEET, Jr, Special Judge, concur.



BURGDORFER ELECTRIC COMPANY,
Plaintiff-Respondent-Appellant,

v.

VOYLES CONSTRUCTION COMPANY,
Defendant-Appellant-Respondent,

and

Henry B. Classe and Helma Classe,
Defendants-Respondents.

Nos. 32844, 32845.

St. Louis Court of Appeals.

Missouri

Sept 17, 1968

Action for mechanic's lien. The Circuit Court, City of St. Louis County, William E. Buder, J., entered judgment for plaintiff and defendant appealed. The Court of Appeals, Clemens, C., held that contractor could rely on builder's testimony that builder agreed to pay contractor \$7,525 to wire 14 apartment units to establish contract price although that price differed from contractor's testimony that original

agreement was for 12 units for \$6,500 with tentative plans for two additional units where contractor's petition was based on contract and sought money judgment and mechanic's lien of \$8,003.09 for work and materials furnished at builder's request, without specifying any number of units.

Reversed and remanded.

1. Evidence ⇨592

Rule that a party is entitled to all evidence in case favorable to his position is subject to qualification that evidence introduced by other party cannot be used if it contradicts party's own evidence or is contrary to his theory.

2. Mechanics' Liens ⇨281(1)

Contractor could rely on builder's testimony that builder agreed to pay contractor \$7,525 to wire 14 apartment units to establish contract price although that price differed from contractor's testimony that original agreement was for 12 units for \$6,500 with tentative plans for two additional units where contractor's petition was based on contract and sought money judgment and mechanic's lien of \$8,003.09 for work and materials furnished at builder's request, without specifying any number of units.

3. Mechanics' Liens ⇨288(1)

Evidence, in mechanic's lien action, was sufficient for jury, on basis of builder's testimony, to find that builder had promised to pay contractor \$7,525 to wire 14 apartment units even though contractor testified that original agreement was for 12 units for \$6,550 with tentative plans for two additional units.

4. Trial ⇨109

Verdict should be directed against plaintiff when his opening statement contains admissions precluding his recovery.

5. Evidence ⇨207(2)

Plaintiff's opening statement that he had a different recollection about initial

the enactment, no matter how actually excusable, does not protect him from liability for any harm caused by its violation to an interest which the enactment is designed to protect. This is true although the enactment establishes a standard of conduct which is in direct contradiction to that customarily regarded as necessary. The same is true when a course of judicial decision has fixed a standard different from that which had been previously regarded as sufficient. Not only must the actor know the statutory and common law, in so far as it establishes a standard of obligatory behavior, at the risk of incurring liability if he falls below it, but he must also know such law in so far as obedience to it is likely to determine the conduct of others. In the absence of some reason to know that others habitually violate such standards, or that a particular person is about to do so, he should expect them to be obeyed and regulate his conduct accordingly.

Illustration:

7. An ordinance of the city of X requires trolley cars to stop at the near side of every boulevard crossing. A is driving an automobile along an intersecting street. He is about to pass between a trolley car and the curb. The car is approaching a boulevard crossing but gives no evidence of its purpose to stop. A speeds up to pass. The car stops and a passenger, B, alights. A's automobile is then going so fast that when he sees the car about to stop he is unable to stop his automobile in time to avoid running over B. Irrespective of whether A knows of the ordinance or resides in X, he is negligent, since he is charged with knowledge of the ordinance and should expect the car to stop, unless there is some particular reason to believe that the motorman does not intend to obey the ordinance.

§ 291. Unreasonableness; How Determined; Magnitude of Risk and Utility of Conduct

Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

See Reporter's Notes.

See Appendix for Reporter's Notes, Court Citations, and Cross References

Comment:

a. The problem involved may be expressed in homely terms by asking whether "the game is worth the candle."

b. *Burden of proof.* Conduct is not negligent unless the magnitude of the risk involved therein so outweighs its utility as to make the risk unreasonable. Therefore, one relying upon negligence as a cause of action or defense must convince the court and jury that this is the case.

c. *Standardized judgment.* In determining whether the actor should realize the unreasonable character of a known or recognizable risk, the judgment of the actor, unless he be a child, must conform to the standard of a reasonable man, neither more nor less. He is not excused because he is peculiarly inconsiderate of others or reckless of his own safety, nor is he negligent if his moral or social conscience is so sensitive that he regards as improper conduct which a reasonable man would regard as proper. In this respect the problem differs somewhat from that of determining whether the actor should recognize the risk which his conduct involves and its magnitude, in which allowance is made for certain physical infirmities and in which the actor is required to utilize such superior qualities as he may possess. As to the standard to which the judgment of a child must conform, see § 283 A.

d. *Weighing risk against utility of conduct which creates it.* The magnitude of the risk is to be compared with what the law regards as the utility of the act. If legal and popular opinion differ, it is the legal opinion which prevails. The point upon which there is likely to be such divergence between the two is usually in respect to the social value of the respective interests concerned. If the legal valuation differs from that attached to the respective interests by a persistent and long-continued course of public conviction, as distinguished from a novel and possibly ephemeral opinion, courts should and often do re-examine their valuation and make it conform to the settled popular opinion. In so far as the legal valuation depends upon the settled public conviction at the time and place, there is often a necessary difference of decision on a particular question, not only between England and America, but even between different States of the United States.

e. The law attaches utility to general types or classes of acts as appropriate to the advancement of certain interests rather than to the purpose for which a particular act is done, except in the

case in which the purpose is of itself of such public utility as to justify an otherwise impermissible risk. Thus, the law regards the free use of the highway for travel as of sufficient utility to outweigh the risk of carefully conducted traffic, and does not ordinarily concern itself with the good, bad, or indifferent purpose of a particular journey. It may, however, permit a particular method of travel which is normally not permitted if it is necessary to protect some interest to which the law attaches a pre-eminent value, as where the legal rate of speed is exceeded in the pursuit of a felon or in conveying a desperately wounded patient to a hospital.

f. Misfeasance and non-feasance. An act is negligent if the risk involved in it outweighs its utility. On the other hand, it is not enough to create a duty to take positive action for the protection of another that the burden of giving the protection is out of all proportion small as compared to other's need thereof. (See § 314, Comment c.) Some relationship between the parties or some precedent action is necessary to create such a duty, and duties of positive action are not imposed except under circumstances in which normally the benefit to the other outweighs the burden to the actor. (See §§ 314-324 A.) Even where the relationship or precedent act is one which usually creates a duty of protective action, no such duty exists if the benefit to the other is less than, or merely equal to, the utility of action or inaction to the actor.

g. There is rarely an absolute duty to secure the other's protection. The duty is usually to take reasonable care to give protection. As in all cases where reasonable conduct is involved, the reasonable character of the care depends upon whether the interference with the actor's own affairs is warranted by the other's danger.

§ 292. Factors Considered in Determining Utility of Actor's Conduct

In determining what the law regards as the utility of the actor's conduct for the purpose of determining whether the actor is negligent, the following factors are important:

- (a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct;

(b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct;

(c) the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct.

See Reporter's Notes.

Comment on Clause (a):

a. Legal valuation of actor's interests. The most important factor in determining the utility of the actor's conduct is the value which the law attaches to the interest which the conduct is intended and appropriate to advance or protect. The interest may be exclusively public, as in the case of the apprehension of an actual or reasonably supposed criminal. It may be a purely private interest of the actor or a third person. It may be an interest which is primarily of private advantage, but the public may nonetheless be interested, not merely as the protector of the private interest, but also because the general public good is advanced by the protection and advancement of such private interests. Thus, the idea that the interest of the public as a group can best be served by permitting the utmost freedom of individual initiative is inherent in both legal and popular thought. The irreducible minimum of risk both to employees and outsiders which is inherent in manufacture is not regarded as unreasonable, not so much because manufacture is profitable to those who carry it on, but because it is believed that the whole community benefits by it. The operation of railways and other public utilities, no matter how carefully carried on, produces accidents which kill or harm many people but the risk involved in the operation is more than counterbalanced by the service which they render the public.

b. Deviation from popular valuation of interests. It is the value which the law attaches to the interest which is decisive of the utility of conduct which serves it. The value attached by the law to the great majority of interests is identical with the value which popular opinion attaches to them. There are, however, interests to which a persistent course of decisions has, expressly or by implication, attached a value different from that which the jury would ordinarily attach thereto. In such case, it is the legal and not the popular valuation which is controlling.

See Appendix for Reporter's Notes, Court Citations, and Cross References

Comment on Clause (c):

c. Alternative opportunity for actor to advance his interest. If the actor can advance or protect his interest as adequately by other conduct which involves less risk of harm to others, the risk contained in his conduct is clearly unreasonable. If any other practicable course of conduct is clearly likely to give his interest a less adequate advancement or protection the question whether the risk is or is not unreasonable depends upon whether the additional risk involved in the particular course of conduct outweighs the additional advancement or protection which it is likely to secure. In determining whether an actor has acted reasonably in pursuing a particular course of conduct rather than another and less dangerous course, account is also taken of the fact that he was acting in an emergency which required him to make an immediate decision (see § 296).

§ 293. Factors Considered in Determining Magnitude of Risk

In determining the magnitude of the risk for the purpose of determining whether the actor is negligent, the following factors are important:

(a) the social value which the law attaches to the interests which are imperiled;

(b) the extent of the chance that the actor's conduct will cause an invasion of any interest of the other or of one of a class of which the other is a member;

(c) the extent of the harm likely to be caused to the interests imperiled;

(d) the number of persons whose interests are likely to be invaded if the risk takes effect in harm.

See Reporter's Notes.

Comment on Clause (a):

a. As the social value of the interest imperiled increases, the magnitude of the risk which is justified diminishes. Conduct which would be unreasonable if it created a risk of harm to life or limb might be justified if it should imperil only some property interest of merely dignitary or slight tangible value.

Henry MATTHEWS, Plaintiff-Appellant,
v.

ASHLAND CHEMICAL, INC.,
Defendant-Appellee.

Henry MATTHEWS, Plaintiff-Appellant,
v.

ASHLAND CHEMICAL, INC., et
al., Defendants,
and

Ozone Waters, Inc. and Ebco Manufac-
turing Co., Defendants-Appellee.

Nos. 82-3303, 82-3521, 82-3531
and 82-3598

Summary Calendar

United States Court of Appeals,
Fifth Circuit.

April 25, 1983.

In a Louisiana diversity action, plaintiff sought damages from several defendants for personal injuries sustained in a propane gas explosion on premises of one of the defendants. Appeals brought by plaintiff from dismissal of his claims against some of the defendants by the United States District Court for the Eastern District of Louisiana at New Orleans, Adrian G. Duplantier, J., were consolidated. The Court of Appeals, Tate, Circuit Judge, held that: (1) it could not be said as matter of law, under Louisiana law, that defendant did not create unreasonable risk of injury to plaintiff worker by placing its gas containers to be filled by him adjacent to water cooler that would emit sparks when motor clicked on as plaintiff filled container with flammable gas, and issue as to whether defendant knew or should have known that its conduct created such risk and whether risk so created was unreasonable were issues for trier of fact, but (2) as matter of law, under Louisiana law, such alleged defect in water cooler did not constitute defect or create unreasonable risk of injury to others.

Ⓢ Affirmed in part, reversed and remanded in part, and dismissed in part.

1. Federal Courts ⇌600

Where although fewer than all claims were decided in federal district court the judgment dismissing plaintiff's claim against one defendant was not entered with certification required, dismissal of appeal without prejudice, as premature, was required. Fed.Rules Civ.Proc. Rule 54(b), 28 U.S.C.A.

2. Negligence ⇌121.1(6)

Under law of Louisiana, whether liability is sought to be imposed on defendant by reason either of negligence or of strict liability under statute, injured plaintiff is required to prove that risk from which his damage resulted was an unreasonable risk of harm. LSA-C.C. arts. 2316, 2317, 2322.

3. Negligence ⇌22

Under Louisiana law, determination whether defendant has created or maintained unreasonable risk of harm to another involves balancing whether risk is of such magnitude as to outweigh what law regards as social utility of defendant's conduct, premises or thing or manner in which defendant's conduct is done or his premises maintained or his thing manufactured, whether defendant is sought to be held liable for his negligence under Louisiana strict liability theories. LSA-C.C. arts. 2316, 2317, 2322.

4. Negligence ⇌22

Under Louisiana law, in determining whether defendant has created or maintained unreasonable risk of harm to another, ease of association of plaintiff's injury with rule relied upon, upon which defendant's liability is sought to be based, is always proper consideration. LSA-C.C. arts. 2316, 2317, 2322.

5. Federal Civil Procedure ⇌2515

Issues that require determination of reasonableness of acts and conduct of parties under all facts and circumstances of case cannot ordinarily be disposed of by summary judgment. LSA-C.C. arts. 2316, 2317, 2322.

6. Negligence ⇐ 136(18)

It could not be said as matter of law, under Louisiana law, that defendant did not create unreasonable risk of injury to plaintiff worker by placing propane gas containers to be filled by him adjacent to water cooler that would emit sparks when motor clicked on, thus creating foreseeable hazard of gas explosion injuring plaintiff while, as expected, he filled container with flammable gas, and issues as to whether defendant knew or should have known that its conduct created such risk and whether risk so created was unreasonable were issues for trier of fact. LSA-C.C. arts. 2316, 2317, 2322.

7. Negligence ⇐ 20

As matter of law, under Louisiana law, alleged defect in defendant's water cooler in that it emitted electric sparks when motor clicked on did not constitute defect or create unreasonable risk of injury to others, there being no permissible inference that defendant water cooler manufacturer, distinguishable from plaintiff's actual or presumed knowledge, should reasonably have anticipated foreseeable use of water cooler in dangerous proximity to flammable gas. LSA-C.C. arts. 2316, 2317, 2322.

Russ Herman, New Orleans, La., Philip A. Gattuso, Gretna, La., for plaintiff-appellant.

Jones, Walker, Waechter, Poitevent, Carrere & Dengre, John J. Weigel, New Orleans, La., for defendants-appellees.

John H. Musser, IV, New Orleans, La., for Ozone Waters.

Camp, Carmouche, Palmer, Barsh & Hunter, Donald A. Hoffman, New Orleans, La., for Ebco Mfg. Co.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GEE, RANDALL and TATE, Circuit Judges.

TATE, Circuit Judge:

In this Louisiana diversity action, the plaintiff Matthews seeks damages from

several defendants for personal injuries he sustained in a propane gas explosion on the premises of Ashland Chemical, one of the defendants. These four consolidated appeals are brought by Matthews from the dismissal of his claims against some of the defendants. His claims against other defendants are still pending below.

Matthews, a propane gas deliveryman, was filling a gas cylinder left out for him on the loading dock of the defendant Ashland, a customer. For purposes of summary judgment, the explosion occurred because of an electrical spark emitted from the motor of a water cooler near the cylinder. Ashland was the custodian or owner of the premises and of both water cooler and cylinder and had placed the latter in proximity to one another. The water cooler had been manufactured by the defendant-appellee Ebco and had been leased to Ashland by the defendant-appellee Ozone.

[1] Initially, we note that, although claims are still pending below, the judgment dismissing the plaintiff Matthews' claim against Ozone (Supp.Rec., document 132) was not entered with the certification required by Fed.R.Civ.P. 54(b) when fewer than all claims are decided, so this appeal (our appeal No. 82-3521) must be dismissed without prejudice as premature. The appeals as to the dismissals against Ashland and Ebco are, however, properly before us, since so certified and directed for entry.

For reasons more fully set forth below, we find that a disputed factual issue is presented as to whether Ashland had created an unreasonable risk of harm to others, so as to be liable under Louisiana negligence or strict liability theories, and that therefore summary judgment was improvidently granted in favor of this defendant (our appeals No. 82-3303 and No. 82-3598). However, we also find that the district court did not err as a matter of law in holding that, under the facts presented, there was no defect in the spark-causing water cooler that would subject its manufacturer Ebco (our appeal No. 82-3521) to Louisiana negligence or products liability

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recovery, and we therefore affirm the summary judgments dismissing Matthews' claim as against this defendant.

I.

Resolving all factual inferences in favor of Matthews, and construing the facts shown most favorably to him as the non-moving party in a summary judgment determination, *Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982), the accident occurred when Matthews, a propane gas route delivery salesman for Amoco Oil Company, was filling a propane gas cylinder (used to power forklifts) in a warehouse leased and operated by Ashland. The empty cylinder (one of three) had been left by Ashland for filling at a place within the warehouse immediately adjacent to a water cooler (manufactured by Ebco and leased to Ashland by Ozone, a supplier of spring water). After properly connecting the hose to the first cylinder, Matthews got a drink of water from the water cooler. A moment later, the water cooler made a clicking sound which was immediately followed by the explosion which caused the plaintiff's injuries.¹

At least for summary judgment purposes, it must be accepted that the probable cause of the explosion was a spark generated by the electrical motor of the water cooler when it kicked on. Although the district court made no express finding to this effect or against it, deposition testimony in the record supports this causation. In dismissing Matthews' claims against the water cooler defendants (Ebco and Ozone), the district court itself noted that "all motors throw sparks" but that nevertheless the

water cooler motor was not defective "by virtue of [its] emitting sparks."

In granting summary judgment to Ashland, the district court found that the above undisputed facts presented no factual issue and indisputably showed that Ashland had not failed to use reasonable care in placing the empty gas cylinder next to the water cooler; and it further found no basis for Louisiana strict liability as custodian or premise-owner in Ashland's placing non-defective empty propane cylinders near a non-defective electric water cooler with the expectation that Matthews would fill them with explosive propane gas. In granting summary judgment to the water cooler defendants (Ebco and Ozone), the district court found that the water cooler "was not defective by virtue of emitting sparks or an arc" and that these defendants "had no duty to warn Matthews that the compressor may emit sparks and should not be used around flammable gases."

It should be noted that the narrow issue presented by these appeals concerns only whether the district court erred in holding that the defendants' conduct or equipment did not subject them to liability under Louisiana negligence or strict liability theories. The district court did not reach the issue of whether the plaintiff Matthews himself might be barred from recovery by his contributory negligence or assumption of the risk, and we do not reach that issue for that reason. (Further conflicting factual showings in the record before us make summary judgment inappropriate for resolution of that issue by us on appeal.) Thus, in a sense, the issue before us on appeal for summary judgment purposes concerns the defendants' liability independent of Mat-

1. We note that certain facts, potentially material in a trial on the merits, are in controversy; for example, the defendant contends (1) that the cylinders weighed, at most, seventy pounds when filled, and could have been easily moved to be safely filled outside the warehouse (this is denied by the plaintiff), (2) that the gas escaped because of a faulty nozzle connection or the carelessness of the plaintiff (denied by the plaintiff), (3) that the water cooler functioned normally before and after the accident and was free of all defects (denied by the plaintiff who

now argues that the accident occurred when an unsealed thermostatic switch within the water cooler generated a spark, in turning its compressor off or on, which ignited the propane gas), and (4) that filling the cylinder within an enclosed space or near a motor was contrary to safety practices of the plaintiff's employer, Amoco Oil Company (denied by the plaintiff); and, finally, (5) the parties also differ in their estimates of the distances separating the water cooler from the propane cylinder.

thews' individual conduct or expertise, somewhat as if an innocent bystander instead of the experienced Matthews had been injured by the explosion. *Cf., Brownlee v. Louisville Varnish Company*, 641 F.2d 397, 401 (5th Cir.1981).

II.

The issues thus posed by these appeals may be stated as follows: *As to Ashland*: Is this defendant at actionable fault, either because negligent, La.Civ.C. art. 2316, or by virtue of its strict liability as the custodian of things, La.Civ.C. art. 2317, or owner of premises, La.Civ.C. art. 2322, because it placed gas cylinders for filling next to a water cooler that emitted sparks when the motor clicked on, because of actual or presumed knowledge of that latter fact and of the further circumstance that Matthews would fill those cylinders as placed by Ashland² with flammable propane gas that would explode if a spark emitted during the filling? *As to Ebco*: Did the characteristics of the water cooler of emitting electrical sparks when its motor kicked on constitute a defect so as to implicate liability under Louisiana negligence or products strict liability theories?

[2] Central in law and fact to the decision of these issues is whether, as to each defendant, its conduct or equipment created an unreasonable risk of harm to others. In its recent decision in *Entrevia v. Hood*, 427 So.2d 1146 (La.1983), the Supreme Court of Louisiana made plain that, whether liability

is sought to be imposed on a defendant by reason *either* of negligence *or* of its strict liability under La.Civ.C. arts. 2317, 2322,³ an injured plaintiff is required to prove that "the risk from which his damage resulted posed an unreasonable risk of harm." 427 So.2d at 1149.

[3] *Entrevia* notes that the determination of whether the defendant has created or maintained an unreasonable risk of harm is determined on the basis of "a balancing of claims and interests, a weighing of the risk and the gravity of harm, and a consideration of individual and societal rights and obligations," 427 So.2d at 1149, weighing the "magnitude of the risk and the gravity of the harm threatened", 427 So.2d at 1149, a weighing that calls upon the judge "to decide questions of social utility that require him to consider the particular case in terms of moral, social and economic considerations", 427 So.2d at 1149. As *Entrevia* indicates, the judge's duty in determining whether the defendant has created an unreasonable risk of harm in part partakes of a determination of law ("it is necessary for the judge, in shaping his decision about how the law applies to the facts, to consider the particular situation from the same standpoint as would a legislator regulating the matter", 427 So.2d at 1149,⁴ as well as a determination of fact as to whether the defendant's conduct or thing created an unreasonable risk of harm in the particularized situation presented for decision. See *Andrus v. Trailers Unlimited*, 647 F.2d 556

2. The plaintiff Matthews' discovery deposition indicates that an Ashland employee would place the cylinders on Ashland's loading platform and await Matthews' arrival and that he always filled them as placed. Dep., pp. 50-53, 56-57. This is a controverted issue, however.

3. The court noted that a chief difference is that in strict liability, unlike in negligence, the defendant may be liable whether or not he knew of the unreasonable risk of harm (his "inability to know or prevent the risk is not a defense"), but that the considerations in determining whether the risk of harm was undue should not differ for negligence or strict liability. 427 So.2d at 1150. To same effect, see *Hunt v. City Stores, Inc.*, 387 So.2d 585 (La.1980).

4. In *Andrus v. Trailers Unlimited*, 647 F.2d 556, 559 (5th Cir.1981), in analyzing the Louisiana jurisprudence with regard to the determination of whether a risk of injury falls within the ambit of the duty owned by the defendant, we noted that "[i]t is, therefore, an inherently judicial function to say whether there is any legal principle to cover the risk of injury sustained by the plaintiff." The *Andrus* court ultimately held that an issue of fact precluding a directed verdict was presented as to whether the defendant breached its duty under the particularized facts presented, having noted that the court determines whether the risks should fall within the scope of the defendant's duty, but that the trier of fact (the jury, there) determines whether the defendant's conduct foreseeably had violated such duty. 647 F.2d at 559.

(5th Cir.1981), for analysis of prior Louisiana jurisprudence to the same effect.

[4] In accord with prior Louisiana jurisprudence, *Entrevia* thus illustrates that the determination of whether the defendant has created or maintained an unreasonable risk of harm to another involves a balancing of whether the risk is of such magnitude⁵ as to outweigh what the law regards as the social utility⁶ of the defendant's conduct, premises, or thing or the manner in which the defendant's conduct is done or his premises maintained or his thing manufactured, whether the defendant is sought to be held liable for his negligence, *Hebert v. Gulf States Utilities Company*, 426 So.2d 111 (La. 1983); *Hill v. Lundin & Associates, Inc.*, 260 La. 542, 256 So.2d 620 (1972), or under Louisiana strict liability theories, *Olsen v. Shell Oil Co.*, 365 So.2d 1285 (La.1978); *Loescher v. Parr*, 324 So.2d 441 (La.1975); *Weber v. Fidelity & Casualty Ins. Co.*, 259 La. 599, 250 So.2d 754 (1971). Further, "the ease of association of the [plaintiff's] injury with the rule relied upon [upon which the defendant's liability is sought to be based] . . . is always a proper consideration." *Hill v. Lundin & Associates, supra*, 260 La. at 549, 256 So.2d at 622; *Andrus v. Trailers Unlimited, supra*, 647 F.2d at 560.

to

III.

Tested in the light of these principles, we find for reasons to be stated that the district court's grant of summary judgment dismissing the plaintiff Matthews' claim

5. Cf. Restatement 2d of Torts § 293 (1965):
12d Factors Considered in Determining Magnitude of Risk

13c In determining the magnitude of the risk for the purpose of determining whether the actor is negligent, the following factors are important:

- 14a (a) the social value which the law attaches to the interests which are imperiled;
- 15b (b) the extent of the chance that the actor's conduct will cause an invasion of any interest of the other or of one of a class of which the other is a member;
- 16c (c) the extent of the harm likely to be caused to the interests imperiled;
- 17d (d) the number of persons whose interests are likely to be invaded if the risk takes effect in harm.

against Ebco, the manufacturer of the water cooler, should be affirmed, but that disputed issues or inferences of fact precluded the entry of summary judgment dismissing Matthews' claim against Ashland.

[5] Summary judgment may be granted only where—after considering all factual showings and inferences in the light most favorable to the opposing party—there is "no genuine issue as to any material fact and the opposing party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(3); *Williams v. Shell Oil Company*, 677 F.2d 506, 509 (5th Cir.1982). "A court must not decide any factual issues it finds in the record, but if such are present, the courts must deny the motion and proceed to trial. . . . [Even] [i]f reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment." *Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, supra*, 669 F.2d at 1031. Summary judgment is ordinarily (but not always) inappropriate when the issue involves negligence or contributory negligence, 10 Wright, Miller, and Kane, Federal Practice and Procedure, § 2729 (2d ed. 1983), since "even where there is no dispute as to the facts, it is usually for the jury to decide whether the conduct in question meets the reasonable man standard." *Id.*, at p. 217. Issues that require "the determination of the reasonableness of the acts and conduct of the parties under all the facts and circumstances of the case, cannot ordi-

6. Cf. Restatement 2d of Torts § 292 (1965):
Factors Considered in Determining Utility of Actor's Conduct

In determining what the law regards as the utility of the actor's conduct for the purpose of determining whether the actor is negligent, the following factors are important:

- (a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct;
- (b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct;
- (c) the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct.

narily be disposed of by summary judgment." *Gross v. Southern Railway Company*, 414 F.2d 292, 296 (5th Cir.1969).

A. *Matthews' Claim Against Ashland*

[6] Construing the disputed facts most favorably to Matthews for purposes of summary judgment, we cannot say that Ashland did not as a matter of law create an unreasonable risk of injury to him by placing its containers to be filled by him adjacent to its water cooler that would emit sparks when the motor clicked on and thus creating a foreseeable hazard of gas explosion injuring Matthews while, as expected, he filled the container with flammable gas.

The magnitude of the risk thus created is not clearly outweighed by utility factors, and the injury received is closely associated with the risk thus created. Whether the defendant Ashland knew or should have known that its conduct created such risk, and whether the risk so created was unreasonable under the particularized facts before us, are issues that cannot, in our opinion, be decided as a matter of law but must be relegated to the trier of fact. As we recently stated in *Owen v. Kerr-McGee Corporation*, 698 F.2d 236, 239 (5th Cir.1983), in affirming the defendant's denial of a motion for judgment notwithstanding the verdict in favor of a plaintiff injured by the defendant's buried gas pipeline:

Under Louisiana law, the owner and operator of a facility must exercise reasonable care for the safety of persons on or around his property. *Walker v. Union Oil Mill, Inc.*, 369 So.2d 1043, 1047 (La. 1979); *Dyson v. Gulf Modular Corp.*, 338 So.2d 1385, 1390-91 (La.1976); *Williams v. City of Alexandria*, 376 So.2d 367, 370 (La.App.1979). In determining a particular defendant's duty, consideration should be given to the nature of the facility and the dangers presented by it. *Walker, supra* [369 So.2d] at 1047; *Shelton v. Aetna Casualty & Surety Co.*, 334 So.2d 406, 410 (La.1976). *Whether or not the defendant conformed to the standard of care that would be exercised by a reasonable person in his position is a factual question.*

Lacombe v. Greathouse, 407 So.2d 1346, 1349 (La.App.1981).

(Emphasis added.)

B. *Matthews' Claim Against Ebco*

[7] Matthews' claim against Ebco, the manufacturer of the water cooler, is based on the machine's alleged defect in that it emitted electrical sparks when the motor clicked on. We find no error in the district court's concluding as a matter of law that this characteristic of the machine did not constitute a defect or create an unreasonable risk of injury to others.

In dismissing the claim, the district court noted, a permissible inference from the factual showings, that "all motors throw sparks", and found that Ebco's motor in the water cooler previously sold by it to Ozone and installed by Ozone on Ashland's premises was not defective simply because it emitted electrical sparks. Implicit in the district court's finding was its conclusion that the social utility of producing water coolers for use in the offices and plants throughout the United States—which could not feasibly be produced without motors emitting sparks—far outweighed any slight risk that might result from the not closely associated risk and not readily foreseeable use of the water cooler in the immediate vicinity of flammable gas.

The factual showing negatives and does not permit an inference that Ebco, distinguishably from Ashland's actual or presumed knowledge, should reasonably have anticipated a foreseeable use, *Branch v. Chevron International Oil Company*, 681 F.2d 426, 428 (5th Cir.1982) (Louisiana products liability law), of its water cooler in dangerous proximity to flammable gas, so as to constitute either a defect in the machine (as unreasonably dangerous to normal use), *Id.*, or to require Ebco to place a warning on its machines cautioning against such use. As stated by the Supreme Court of Louisiana in holding that under the circumstances shown a premise defect was not actionable, "the magnitude of the risk posed and the gravity of the harm threatened were small in comparison with that of other

risks presented by things in our society." *Entrevia, supra*, 427 So.2d at 1150.

Conclusion

Accordingly, for the reasons stated:

(1) The appeal of the plaintiff Matthews from the dismissal of his claim against Ozone, our appeal No. 82-3521, is DISMISSED without prejudice as premature;

(2) In appeal Nos. 82-3303 and 82-3598, the district court's grant of summary judgment dismissing Matthews' claims against Ashland is REVERSED, and these claims are remanded for further proceedings consistent with our opinion; and

(3) We AFFIRM the grant of summary judgment in favor of Ebco in appeal No. 82-3531, dismissing Matthews' claim as against that defendant.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART, AND DISMISSED IN PART.



STEERE TANK LINES, INC., Petitioner,
v.

INTERSTATE COMMERCE COMMISSION and United States of America, Respondents.

No. 82-4309

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

April 25, 1983.

Petitioner, joined by intervening petitioner, sought review of Interstate Commerce Commission order granting intervenor certificate of public convenience and necessity to operate as common carrier over irregular routes between points in several states. The Court of Appeals, Tate, Circuit Judge, held that: (1) carefully drawn four-

state-nonradial/two-state-radial authority granted to intervenor was not arbitrary or capricious and was supported by substantial evidence, and (2) intervenor made showing adequate to sustain finding of financial fitness.

Affirmed.

1. Commerce ⇐169, 174

Review by Court of Appeals of Interstate Commerce Commission order granting certificate of public convenience and necessity to operate as common carrier is limited to determining whether Commission's conclusions were arbitrary, capricious, abuse of discretion, not in accordance with law or unsupported by substantial evidence; if Commission's findings are grounded on such relevant evidence as reasonable mind might accept as adequate to support conclusion, they must be upheld. 5 U.S.C.A. § 706(2).

2. Commerce ⇐108

Review of supporting shipper affidavits submitted by petitioner for certificate of public convenience and necessity to operate as motor common carrier transporting petroleum and petroleum products supported conclusion of Interstate Commerce Commission that petitioner had demonstrated need for service throughout substantial portions of territory sought, and, when viewed as a whole, carefully drawn four-state-nonradial/two-state-radial authority granted was not arbitrary or capricious and was supported by substantial evidence. Revised Interstate Commerce Act, 49 U.S.C.A. §§ 10101 et seq., 10922(b)(1).

3. Administrative Law and Procedure ⇐791

Fact that two different conclusions could be drawn from evidence does not prevent agency's finding from being supported by substantial evidence.

4. Commerce ⇐169

As long as Interstate Commerce Commission considers relevant factors and articulates rational connection between facts found and choice made, decision is not "arbitrary or capricious."

See publication Words and Phrases for other judicial constructions and definitions.

400 Mich. 425

Royal MONING, by his next friend,
Ronald Moning, and Ronald Moning,
Individually, Plaintiffs-Appellants,

v.

Joseph ALFONO, a minor, Yvonne Alfono,
and Vincent Alfono, and Georgette
Campbell, d/b/a Campbell Discount Jew-
elry, King Tobacco and Grocery Co., a
Michigan Corporation, and Chemtoy Cor-
poration (formerly Chemical Sundries,
Inc.), a Foreign Corporation, jointly and
severally, Defendants-Appellees.

No. 55669.

Supreme Court of Michigan.

June 15, 1977.

Twelve-year-old boy brought negli-
gence action against manufacturer, whole-
saler and retailer of 10 ¢ slingshot seeking
recovery for loss of sight of an eye which
was struck by a pellet fired from a sling-
shot being used by his 11-year-old playmate.
The Circuit Court, Wayne County, directed
verdict for defendants, and plaintiffs ap-
pealed. The Court of Appeals, Division I,
affirmed, and plaintiff appealed. The Su-
preme Court, Levin, J., held that whether
manufacturer, wholesaler and retailer, in
violation of obligation of due care to by-
stander affected by use of product, created
unreasonable risk of harm in marketing
slingshots directly to children was a jury
question.

Reversed and remanded.

Fitzgerald, J., dissented with opinion in
which Coleman, J., joined.

1. Products Liability ⇐ 22

Manufacturers, wholesalers and retail-
ers of manufactured products owe a legal
obligation of due care to bystanders affect-
ed by use of the products.

2. Products Liability ⇐ 88

Whether manufacturer, wholesaler and
retailer of 10 ¢ slingshot were in violation
of obligation of due care to bystander by

creation of an unreasonable risk of harm in
marketing slingshot directly to children was
question for jury.

3. Negligence ⇐ 119(1)

It obscures the separate issues in negli-
gence case to combine and state them to-
gether in terms of whether there is a duty
to refrain from particular conduct.

4. Negligence ⇐ 1

"Negligence" is conduct involving an
unreasonable risk of harm.

See publication Words and Phrases
for other judicial constructions and
definitions.

5. Negligence ⇐ 4

Reasonableness of risk of harm, wheth-
er analyzed or expressed in terms of duty,
proximate cause or the specific standard of
care, and whether regarded as issue of law
or fact or for the court or the jury to
decide, turns on how the utility of the de-
fendants' conduct is viewed in relation to
the magnitude of the risk.

6. Negligence ⇐ 136(14)

Preference for jury resolution of issue
of negligence is not simply an expedient
reflecting the difficulty of stating a rule
that will readily resolve all cases; rather, it
is rooted in the belief that the jury's judg-
ment of what is reasonable under the cir-
cumstances of a particular case is more
likely than the judicial judgment to rep-
resent the community's judgment of how
reasonable persons would conduct them-
selves.

7. Negligence ⇐ 136(14)

If experience should be that juries in-
variably reach one result in determining
standard of care, that may suggest specific
standard of care upon which all reasonable
persons would agree; however, until com-
munity judgment is made to appear, the
principle that doubtful questions regarding
application of standard of care should be
decided by reference to community judg-
ment requires jury submission of question
so in doubt.

8. Negligence ⇨1

Law of negligence was created by common-law judges and, therefore, it is the court's responsibility to continue to develop or limit the development of that body of law absent legislative directive.

9. Negligence ⇨1

Elements of an action for negligence are duty, general standard of care, specific standard of care, cause in fact, legal or proximate cause, and damage.

10. Negligence ⇨2

"Duty" comprehends whether defendant is under any obligation to the plaintiff to avoid negligent conduct; it does not include where there is an obligation, the nature of the obligation, the general standard of care and the specific standard of care.

See publication Words and Phrases for other judicial constructions and definitions.

11. Negligence ⇨136(14, 25)

While court in negligence action decides questions of duty, general standard of care and proximate cause, jury decides whether there is cause in fact in the specific standard of care and whether defendants' conduct in particular case is below general standard of care, including, unless court is of opinion that all reasonable persons would agree or there is an overriding legislatively or judicially declared public policy, whether in the particular case the risk of harm created by the defendants' conduct is or is not reasonable.

12. Negligence ⇨2, 56(1.4)

"Duty" is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person; while proximate cause encompasses a number of distinct problems including the limits of liability for foreseeable consequences.

See publication Words and Phrases for other judicial constructions and definitions.

13. Products Liability ⇨6

A manufacturer owes consumer an obligation to avoid negligent conduct and the

obligation extends to persons within foreseeable scope of the risk.

14. Products Liability ⇨88

Eleven-year-old's shooting pellets toward tree with a slingshot and ricochet in 12-year-old playmate's eye was within "recognizable risk of harm" created by marketing slingshot directly to children and ricochet was "a normal consequence of situation" created by manufacturers, retailers and wholesalers' conduct, thus, creating jury question on liability of manufacturer, retailer, and wholesaler.

15. Negligence ⇨4

In a negligence case, standard of conduct is reasonable or due care.

16. Products Liability ⇨23

A person who supplies an article to child which may pose a reasonable risk of harm in the hands of an adult but which poses an unreasonable risk of harm in the hands of the child is subject to liability for resulting harm under doctrine of negligence entrustment.

17. Products Liability ⇨23

Doctrine of negligent entrustment not limited to plaintiffs whose "individual propensities are known to the supplier; doctrine also applies to classes of persons.

18. Negligence ⇨26**Parent and Child** ⇨13(1)

A parent or other responsible adult who entrusts a potentially dangerous instrumentality to a child may be subject to liability.

19. Products Liability ⇨23

Liability under doctrine of negligent entrustment arises from the defendant's act of misconduct; he has actually created an unreasonable risk to others by placing chattel in the hands of a person whose use thereof is likely to create a recognizable risk to third persons.

20. Negligence ⇨7

The obligation to guard or secure objects which are dangerous to children arises because of the likelihood of their own

ermeddling; persons dealing with children must take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that comes in their way.

1. Negligence ⇐ 39

The attractive nuisance doctrine, an exception to the general rule limiting liability of landowners for injuries to trespassers, is based on child's inability to appreciate danger and his inclination to explore without regard to the risk.

2. Negligence ⇐ 39

Doctrine of attractive nuisance does not depend on the landowner's knowledge that the individual child is incompetent.

3. Negligence ⇐ 14

Doctrine of negligent entrustment is not peculiar to automobiles but, rather, an ordinary application of general principles for determining whether a person's conduct was reasonable in light of the apparent risk.

4. Negligence ⇐ 14

Doctrine of negligent entrustment is grounded in general principle that a reasonable person will have in mind the immaturity, inexperience and carelessness of children.

5. Products Liability ⇐ 88

Issue of whether manufacturer, retailer and wholesaler of slingshot were subject to liability for 12-year-old's loss of sight of one eye which was struck by a pellet fired from a slingshot being used by his 11-year-old playmate could not be taken from jury on supposition that an 11-year-old boy knows how slingshot operates and, therefore, appreciates the risk.

6. Products Liability ⇐ 12

Just as the driver of an automobile is expected to take precautions for the safety of children playing near a highway even though children can be expected to appreciate the risk and the driver does not know that the individual children are incompetent to look after themselves, so too a supplier can be expected in marketing a product to take precautions for the safety of children

and others even if the child may be expected to appreciate the risk and individual children may thus appreciate it and be skilled in using the product.

27. Negligence ⇐ 4

Even if a person recognizes that his conduct involves a risk of invading another person's interest, he may nevertheless engage in such conduct unless the risk created by his conduct is unreasonable.

28. Negligence ⇐ 136(14)

Balancing of magnitude of the risk and utility of the actor's conduct in determining whether risk created by conduct is unreasonable requires a consideration by the court and the jury of the societal interests involved; the issue of negligence may be removed from jury consideration if the court concludes that overriding considerations of public policy require that a particular view be adopted and applied in all cases.

29. Common Law ⇐ 2

Statutes and other legislative judgments may themselves be a source of common law.

30. Products Liability ⇐ 88

Balancing the magnitude of risk and utility of conduct consisting of manufacture and sale of slingshots to children, there is not sufficient basis for concluding as matter of law that utility of conduct outweighs risk of harm thereby created, and sharp difference of opinion regarding balancing of utility and risk of harm would require submission of questions for jury assessment as part of its consideration of reasonableness of risk of harm and of manufacturers', retailers' and wholesalers' conduct in sale of slingshots.

31. Common Law ⇐ 1

The common law is not immutable, unable to respond to change in society and technology.

Milan & Miller, Zeff & Zeff, Detroit, for plaintiffs and appellants; Edward Grebs, Detroit, of counsel.

Robert E. Fox, Detroit, for defendant-appellee, cross-appellant and cross-appellee Chemtoy Corp., formerly Chemical Sundries Co., appearing specially.

Richard B. Kramer, Southfield, for defendant-appellee, cross-appellant and cross-appellee King Tobacco.

Garan, Lucow, Miller, Lehman, Seward & Copper, by Albert A. Miller, Detroit, for cross-appellees Joseph Alfono, a minor, Yvonne Alfono and Vincent Alfono.

LEVIN, Justice.

Royal Moning, when he was 12 years old, lost the sight of an eye which was struck by a pellet fired from a slingshot being used by his 11 year old playmate, Joseph Alfono.

There was evidence that Alfono purchased two 10¢-slingshots from defendant Campbell Discount Jewelry and had given one to Moning, and that the slingshots had been manufactured by defendant Chemtoy Corporation and distributed by defendant King Tobacco and Grocery Company.

Moning claims that it is negligence to market slingshots directly to children, and that the manufacturer, wholesaler and retailer are subject to liability.

The claim against the Alfonos was settled. Upon completion of Moning's proofs, the trial judge directed a verdict for the remaining defendants. The Court of Appeals affirmed.

[1,2] We remand for a new trial because a manufacturer, wholesaler and retailer of a manufactured product owe a legal obligation of due care to a bystander affected by use of the product, and whether defendants in violation of that obligation created an unreasonable risk of harm in marketing slingshots directly to children is for a jury to decide, reasonable persons being of different minds.

My colleague declares that there is no legal duty to refrain from manufacturing slingshots for and marketing them directly to children.

[3] It obscures the separate issue negligence case (duty, proximate cause, general and specific standard of care) combine and state them together in terms of whether there is a duty to refrain from particular conduct.

It is now established that the manufacturer and wholesaler of a product, by marketing it, owe a legal duty to those affected by its use. The duty of a retailer to a customer with whom he directly deals is well established long before the manufacturer and wholesaler were held to be obligated. The scope of their duty now extends to a bystander. All the defendants were, therefore, under an "obligation of the safety"¹ of Moning; they owed a duty to avoid conduct that was negligent.

Whether it would be a violation of the obligation to market slingshots directly to children is not a question of duty, but of a specific standard of care: the reasonableness of the risk of harm thereby created.

[4] Negligence is conduct involving an unreasonable risk of harm.

Slingshots pose a risk of harm. In manufacturing and marketing slingshots the defendants necessarily created such a risk.

The meritorious issues are whether the risk so created was unreasonable because the slingshots were marketed directly to children, and whether this should be decided by the court or by the jury.

[5] The reasonableness of the risk of harm, whether analyzed or expressed in terms of duty, proximate cause or the specific standard of care, and whether regarded as one of law or fact or for the court or the jury to decide, turns on how the view of the defendants' conduct is viewed in relation to the magnitude of the risk.

If a court is of the opinion that marketing slingshots directly to children is of no utility that it should be fully protected by a court in effect determines as a matter of law that the risk of harm so created is unreasonable and, therefore, such conduct is not negligent.

1. See Prosser, Torts (4th ed.), § 37, p. 206, quoted in my colleague's opinion.

The resolution of the balance between the utility of children having ready-market access to slingshots and the risk of harm hereby created is an aspect of the determination of the reasonableness of that risk and of the defendants' conduct, and should be decided by a jury:

—Reasonable persons can differ on the balance of utility and risk, and whether marketing slingshots directly to children creates an unreasonable risk of harm;

—The interest of children in ready-market access to slingshots is not so clearly entitled to absolute protection in comparison with the interest of persons who face the risk thereby created as to warrant the Court in declaring, as a rule of common law, that the risk will be deemed to be reasonable.

The statement that "we are being asked to perform a legislative task" because a holding for Moning "would in effect be making a value judgment and saying * * * that slingshots] should not be *manufactured or marketed*" (emphasis supplied) to children assumes that allowing juries to decide the reasonableness of the risk of harm created by *marketing* slingshots directly to children will so burden the manufacture and marketing of slingshots that all manufacturing and marketing would cease, rather than merely affect the manner and cost of marketing slingshots, and does not take account that however the Court decides the case it in effect makes a value judgment.

—Affirming a directed verdict for the defendants in effect expresses a value judgment that the interest of the child in ready-market access to slingshots is of such societal importance that as a matter of law it takes precedence over the interest in protecting persons exposed to the risk of harm so created, or that all reasonable persons would agree that the risk so created is not unreasonable.

"The reasonable man represents the general level of community intelligence and perception and the jury, being a cross-section of the community, should best be able to tell what that general level is." 2 Harper & James, *The Law of Torts*, § 16.10, p. 936.

—Reversing the directed verdict and holding that the issue should be decided by a jury is not an expression of a value judgment that slingshots should not be manufactured and marketed, but rather expresses a value judgment that all reasonable persons do not agree concerning the reasonableness of the risk so created and that the interest of the child in ready-market access is not of such overriding importance as to be entitled to absolute protection as a matter of law, and therefore a jury, applying the community's judgment of how reasonable persons would conduct themselves, should make the ultimate value judgment of the risks and the societal importance of the interests involved in marketing slingshots directly to children.

However the Court decides this case, it necessarily makes a choice, even if the Legislature may later make a different choice.

[6] If the issue is left to juries to decide, different juries will, indeed, reach different results, sometimes in cases appearing to be factually indistinguishable. The variant results may be more perceptible in this kind of case than in one where it may appear there are more variables. The preference for jury resolution of the issue of negligence is not, however, simply an expedient reflecting the difficulty of stating a rule that will readily resolve all cases; rather, it is rooted in the belief that the jury's judgment of what is reasonable under the circumstances of a particular case is more likely than the judicial judgment to represent the community's judgment of how reasonable persons would conduct themselves.²

[7] If the experience should be that juries invariably reach one result, that may suggest the specific standard of care upon which "all" reasonable persons would

Similarly see, Prosser, *supra*, § 37, p. 207; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99, 120 (1868).

agree.³ Until the *community* judgment is made so to appear, the principle that doubtful questions regarding the application of the standard of care should be decided by reference to the community judgment requires jury submission of the question so in doubt.

[8] The law of negligence was created by common law judges and, therefore, it is unavoidably the Court's responsibility to continue to develop or limit the development of that body of law *absent* legislative directive. The Legislature has not approved or disapproved the manufacture of slingshots and their marketing directly to children; the Court perforce must decide what the common law rule shall be.

I

Duty and Proximate Cause

While we all agree that the duty question is solely for the court to decide,⁴ the specific standard of care is not part of that question.

[9] The elements of an action for negligence are (i) duty, (ii) general standard of care, (iii) specific standard of care, (iv) cause in fact, (v) legal or proximate cause, and (vi) damage.

[10] "Duty" comprehends whether the defendant is under any obligation to the plaintiff to avoid negligent conduct; it does not include—where there is an obligation—the nature of the obligation: the general standard of care and the specific standard of care.

Dean Prosser observed:

"It is quite possible, and not at all uncommon, to deal with most of the questions which arise in a negligence case in terms of 'duty.' Thus the standard of conduct required of the individual may be expressed by saying that the driver of an automobile approaching an intersection is

under a duty to moderate his speed, to keep a proper lookout, or to blow his horn, but that he is not under a duty to take precautions against the unexpected explosion of a manhole cover in the street. But the problems of 'duty' are sufficiently complex without subdividing it in this manner to cover an endless series of details of conduct. It is better to reserve 'duty' for the problem of the relation between individuals which arises upon one a legal obligation for the benefit of the other, and to deal with particular conduct in terms of a standard of what is required to meet the obligation. In other words, 'duty' is the question of whether the defendant is under any obligation for the benefit of a particular plaintiff; and in negligence cases, the duty is always the same: to conform to the legal standard of reasonable conduct in the light of the apparent risk. *What the defendant must do, and what he must not do, is a question of the standard of conduct required to satisfy the duty.*" (Prosser, Torts (4th ed.), § 53, p. 324 (emphasis supplied)).

The statement in my colleague's opinion that the "defendants did not owe plaintiffs the asserted duty not to manufacture, distribute and sell slingshots" combines the separate questions of duty, general and specific standard of care and proximate cause: whether in marketing a product a manufacturer, wholesaler and retailer are under any legal obligation to a bystander (duty); the nature of that obligation (general standard of care: reasonable conduct "in the light of the apparent risk"); whether marketing slingshots directly to children is reasonable conduct (specific standard of care); whether marketing slingshots directly to children is "so significant and important a cause [of loss resulting from such marketing] that the defendant should be legally responsible"⁵ (proximate cause, a policy question often indistinguishable from the duty question).

3. See Prosser, *supra*, § 35, p. 188; 2 Harper & James, *supra*, § 17.2, p. 971.

4. See Prosser, *supra*, § 37, p. 206. See, also, *Elbert v. Saginaw*, 363 Mich. 463, 476, 109 N.W.2d 879 (1961).

5. Prosser, *supra*, § 42, p. 244.

[11] Combining in one statement these different questions obscures the functions of the court and jury. While the court decides questions of duty, general standard of care and proximate cause, the jury decides whether there is cause in fact and the specific standard of care:⁶ whether defendants' conduct in the particular case is below the general standard of care, including—unless the court is of the opinion that all reasonable persons would agree or there is an overriding legislatively or judicially declared public policy—whether in the particular case the risk of harm created by the defendants' conduct is or is not reasonable.

[12] Duty is essentially a question of whether the relationship⁷ between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. Proximate cause encompasses a number of distinct problems including the limits of liability for foreseeable consequences.⁸ In the *Palsgraf*⁹ case, the New York Court of Appeals, combining the questions of duty and proximate cause,¹⁰ concluded that no duty is owed to an unforeseeable plaintiff.

The questions of duty and proximate cause are interrelated because the question whether there is the requisite relationship, giving rise to a duty, and the question whether the cause is so significant and important to be regarded a proximate cause both depend in part on foreseeability—whether it is foreseeable that the actor's

conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable.

[13] It is well established that placing a product on the market creates the requisite relationship between a manufacturer, wholesaler and retailer and persons affected by use of the product giving rise to a legal obligation or duty to the persons so affected. A manufacturer owes the consumer an obligation to avoid negligent conduct.¹¹ The obligation extends to persons within the foreseeable scope of the risk. In *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965), a bystander, injured when his brother's shotgun barrel exploded, was permitted to maintain an action against the manufacturer, wholesaler and retailer of allegedly defective shotgun shells.¹²

A manufacturer, wholesaler and retailer of slingshots can be expected to foresee that they will be used to propel pellets and that a person within range may be struck. Moning, as a playmate of a child who purchased a slingshot marketed by the defendants, was within the foreseeable scope of the risk created by their conduct in marketing slingshots directly to children. Moning was a foreseeable plaintiff. The defendant manufacturer, wholesaler and retailer were under an obligation for the safety of Moning.

6. *Id.*, § 45, pp. 289–290; § 37, pp. 205–208.

7. *Id.*, § 42, p. 244; *Clark v. Dalman*, 379 Mich. 251, 260, 150 N.W.2d 755 (1967).

8. See generally, H. L. A. Hart and A. M. Honore, *Causation in the Law* (Oxford, Clarendon Press, 1973), ch. IX.

9. *Palsgraf v. Long I. R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

10. Prosser, *supra*, § 43, p. 254.

11. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

12. "Agreeing as all of our recent decisions do with the developing weight of authority, the essence of which is that the manufacturer is

best able to control dangers arising from defects of manufacture, I would say definitely that *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873; *Manzoni v. Detroit Coca-Cola Bottling Co.*, 363 Mich. 235, 109 N.W.2d 918; *Barefield v. LaSalle Coca-Cola Bottling Co.*, 370 Mich. 1, 120 N.W.2d 786, and *Hill v. Harbor Steel & Supply Corp.*, 374 Mich. 194, 132 N.W.2d 54, have put an end in Michigan to the defense of no privity, certainly so far as concerns an innocent bystander injured as this plaintiff pleads, and that a person thus injured should have a right of action against the manufacturer on the theory of breach of warranty as well as upon the theory of negligence." *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 97–98, 133 N.W.2d 129, 135 (1965) (emphasis supplied).

The question of proximate cause, like the question of duty, is "essentially a problem of law."¹³ Most proximate cause problems are not involved in this case.¹⁴

Alfano's conduct in using the slingshot to propel pellets was to be anticipated. "If the intervening cause is one which in ordinary human experience is reasonably to be anticipated, or one which the defendant has reason to anticipate under the particular circumstances, he may be negligent, among other reasons, because he has failed to guard against it; or he may be negligent only for that reason." Prosser, *supra*, § 44, p. 272.

[14] By marketing slingshots directly to children, the defendants effectively created the risk that Alfano would use the slingshot. “Obviously the defendant cannot be

13. Prosser, *supra*, § 42, p 244

"[I]t is possible to approach 'proximate cause' as a series of distinct problems, more or less unrelated, to be determined upon different considerations. The list, which is not necessarily exclusive, would include at least the following problems.

"1. The problem of causation in fact
* * *

"2. The problem of apportionment of damages among causes. * * *

"3. The problem of liability for unforeseeable consequences * * *

"4. The problem of intervening causes
* * *

* * * "5. The problem of shifting responsibility
* * * " *Id.*, pp 249-250.

14. See fn 13, *supra*; there is no issue of apportionment of damages, or of shifting responsibility to another person except insofar as defendants similarly situated might be free to leave the duty of protecting a person affected by a child's use of a slingshot to adults were they to market slingshots in a manner designed to reach adults and not children, the issue of causation in fact is for a jury to resolve

15. The Restatement illustrates the scope of the responsibility for delivering a potentially dangerous chattel to a child

“A gives a loaded pistol to B, a boy of eight, to carry to C. In handing the pistol to C the boy drops it, injuring the bare foot of D, his comrade. The fall discharges the pistol, wounding C. A is subject to liability to C, but not to D.” Restatement 2d, Torts, § 281, Illustration to Comment f on Clause (b).

“If a gun is entrusted to a child, it suggests at once to anyone with imagination at all that someone, the child or another, is likely to be shot.” Prosser, *supra*, § 44, p 273

relieved from liability by the fact that risk, or a substantial and important part of the risk, to which he has subjected plaintiff has indeed come to pass. Foreseeable intervening forces are within the scope of the original risk, and hence of the defendant's negligence. The courts are quite generally agreed that intervening causes which fall fairly in this category will supersede the defendant's responsibility. *Id.*, p. 273.¹⁵

Alfano's shooting pellets toward a target and a ricochet into Moning's eye was with the "recognizable risk of harm" created by marketing slingshots directly to children.

The ricochet was “a normal consequence of the situation” created by the defendant’s conduct.¹⁷

16. Restatement, *supra*, § 281, Comment 1
Clause (b)

"So far as scope of duty (or, as courts put it, the relation of proximate cause) is concerned, it should make no difference whether the intervening actor is negligent intentional or criminal. Even criminal conduct by others is often reasonably to be anticipated. After all, if I leave a borrowed car on the streets of New York or Chicago, doors unlocked and key in ignition, I am negligent (at least towards the owner) because of the very likelihood of theft. And I am equally careless if I am negligent precisely because of the likelihood of his negligent operation of the car. Again the importance of the factor of foreseeability is not altered if the intervening act is that of plaintiff himself, nor is that act a negligent one. When I lent my car to the careless driver, one of the chances that made me negligent was surely the chance that he might hurt himself. If I am barred from recovery for such hurt it is because of his contributory fault, not for want of a causal connection or because he is beyond the scope of my duty." 2 Harper & James, *supra*, § 20.5, pp. 1144-1146.

Similarly, see *Comstock v General Motors Corp.*, 358 Mich. 163, 179, 99 N.W.2d 627, 41 A.L.R.2d 449 (1959); *Berry v Visser*, 354 N.W.2d 38, 47, 92 N.W.2d 1 (1958).

17. "The intervention of a force which normal consequence of a situation creates the actor's negligent conduct is not a supervening cause of harm which such conduct has been a substantial factor in bringing about." Restatement, *supra*, § 443

"The word 'normal' is not used in Section in the sense of what is usual, cus

II

*General Standard of Care Specific
Standard of Care*

Turning to a consideration of the nature of the obligation owed by a manufacturer, wholesaler or retailer, we note that this is not an ordinary products liability case where the plaintiff seeks to recover by proving a defect in the product without carrying the burden of proving fault or negligence. Moning's claim is grounded in negligence. He asserts that his damage was caused by the fault of the defendants.

[15] In a negligence case, the standard of conduct is reasonable or due care. The Restatement 2d, Torts, § 283, provides: "The standard of conduct to which [the actor] must conform to avoid being negligent is that of a reasonable man under like circumstances." "[I]n negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in the light of the apparent risk." Prosser, Torts, *supra*, § 53, p. 324.

It is the application of that general standard of conduct to the marketing of slingshots to children, the specific standard of care—not whether there is a duty of due care in such marketing—that is the primary area of disagreement in this case.

Manufacturing and marketing slingshots necessarily creates a risk of harm. Moning does not, however, contend that manufacturing and marketing slingshots is negligence *per se*. His contention, rather, is that marketing them *directly to children* creates an unreasonable risk of harm.

ary, foreseeable, or to be expected. It denotes rather the antithesis of abnormal, of extraordinary. It means that the court or jury, looking at the matter after the event, and therefore knowing the situation which existed when the new force intervened, does not regard its intervention as so extraordinary as to fall outside of the class of normal events." *Id.*, comment b.

18. The doctrine is not limited to plaintiffs whose "individual" propensities are known to the supplier. The comments following Restatement, *supra*, § 390, show that the doctrine of negligent entrustment also applies to classes of persons. Restatement, *supra*, § 390, Comment (b).

[16, 17] Moning relies on the doctrine of negligent entrustment, one of the many specific rules concerning particular conduct that have evolved in the application of the general standard of care. A person who supplies an article to a child which may pose a reasonable risk of harm in the hands of an adult but which poses an unreasonable risk of harm in the hands of a child is subject to liability for resulting harm:

"One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them." Restatement 2d, Torts, § 390.¹⁸

[18, 19] The common law has long recognized that a parent or other responsible adult who entrusts a potentially dangerous instrumentality to a child may be subject to liability.¹⁹ Liability "arises from [the defendant's] active misconduct; he has actually created an unreasonable risk to others by placing a chattel in the hands of a person whose use thereof is likely to create a recognizable risk to third persons."²⁰

[20] The obligation "to guard or secure objects which are dangerous to children" arises "because of the likelihood of their own intermeddling."²¹ Persons dealing

19. See, Harper & Kime, *The Duty To Control the Conduct of Another*, 43 Yale L.J. 886, 894 (1934).

20. *Id.*

21. James, *Scope of Duty in Negligence Cases*, 47 N.W.U.L.Rev. 778, 782 (1953). See *Terranella v. Union Building & Construction Co.*, 3 N.J. 443, 70 A.2d 753 (1950).

"A product designed to be used by adults who may be expected to exercise care may not be dangerous, but when intended to be placed in the hands of inexperienced children who may seek to enlarge their knowledge by experimentation of various and sometimes

with children must "take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that came in their way."²²

[21, 22] Special rules for children are not unusual. The attractive nuisance doctrine, an exception to the general rule limiting the liability of landowners for injuries to trespassers,²³ is based on the child's inability to appreciate danger and his inclina-

unsuspected character, it may be a source of peril * * *." *Crist v Art Metal Works*, 230 App.Div. 114, 117, 243 N.Y.S. 496, 499 (1930), *aff'd* 255 N.Y. 624, 175 N.E. 341 (1931).

22. Note, *Dangerous Toys*, 64 Irish L.Times 223, 224 (1930); 38 Am.Jur., Negligence, § 40, pp. 685-686.

23. See generally, Prosser, *supra*, § 59, p. 364.

24. While the Restatement's illustrations and the case law applying the doctrine of negligent entrustment largely concern suppliers of automobiles (see, e. g., *Johnson v Cassetta*, 197 Cal.App.2d 272, 17 Cal.Rptr. 81 [1961]), it does not depend on the nature of the chattel. *Fredericks v. General Motors Corp.*, 48 Mich.App. 580, 585, 211 N.W.2d 44 (1973) (supply of dies to plaintiff's employer). See also *Dee v. Parrish*, 160 Tex. 171, 327 S.W.2d 449, 452 (1959); 65 C.J.S. Negligence § 69, pp. 949-950; cf. Woods, *Negligent Entrustment: Evaluation of a Frequently Overlooked Source of Additional Liability*, 20 Ark.L.Rev. 101, 107-108 (1966), Littlejohn, *Torts*, 21 Wayne L.Rev. 665, 681 (1975). Nor is the doctrine restricted to chattels classified as latently defective or inherently dangerous. *Fredericks, supra*, 48 Mich.App. p. 584, 211 N.W.2d 44.

The Restatement sets forth a rule crystallized by the development of the common law concerning the liability of one who sells or entrusts devices to children who, because of their youth and inexperience, cannot be relied on to use them prudently, or because of their immaturity may not appreciate the risk of injury or have the skill to use such devices safely:

"At common law the legal principle is established that if one sells a dangerous article or instrumentality such as firearms or explosives to a child whom he knows or ought to know to be, by reason of youth and inexperience, unfit to be trusted with it, and who might innocently and ignorantly play with or use it to his injury, and injury does in fact result, he may be found guilty of negligence and consequently liable in damages." Anno., *Liability of Seller of Firearm, Explosive, or Highly Inflammable Substance to Child*, 20 A.L.R.2d 119, 124.

tion to explore without regard to the owner's knowledge that the "individual child is "incompetent."

[23, 24] The doctrine of negligent entrustment is not peculiar to automobiles; rather an ordinary application of general principles for determining whether a person's conduct was reasonable in light of apparent risk.²⁴ It is grounded in the general principle that a reasonable person

See also 79 Am Jur 2d, Weapons and Fire § 43, p. 48

"The common law imposes upon every person the duty of so using and disposing of his property as not to injure the person or property of another, and if one sells a dangerous article to a child whom he knows to be of the age of his youth and inexperience, who is to be trusted with it, and who probably will innocently and ignorantly play with it to his own injury, and injury does in fact result, he is liable in damages therefor." *McEldon v. Drew*, 138 Iowa 390, 392, 116 N.W. 14 (1908).

In *McEldon*, the court held that the seller of gun powder to a 12 year old child was liable for the injury to one of the child's eyes caused by an inadvertent explosion. See also *Carter v. Towne*, 98 Mass. 567, 96 A. 682 (1868).

Entrusting other devices used by children may also give rise to liability. *Schmidt v. Capital Candy Co.*, 139 Minn. 166 N.W. 502 (1918) (sparkler) (*dictum*); *Serman v. Smith*, 205 Mo App 657, 22 Mo App 608 (1920) (fireworks); *Gerbino v. Grisebach*, 165 App.Div. 76 N.Y.S. 502 (1915) (airgun used on residential premises); *Semeniuk v. Chentis*, 1 Ill. App. 508, 117 N.E.2d 883 (1954) (airgun; parents, retailer knew that 7 year old child used it); *Krueger v. Knutson*, 261 Minn. 1 N.W.2d 526 (1961) (potassium chlorate); *Faso v. La Faso*, 126 Vt. 90, 223 A.2d 1 (1966) (cigarette lighter without fluid).

supra, 64 Irish L.Times 223 (citing case). The only basis for distinguishing the instant case would be to conclude that there is a qualitative difference between the risk of entrusting such instrumentalities to children and the risk posed by marketable toys directly to children. In light of the frequency and severity of injuries to children attributable to slingshots, and the wide view, expressed in statutes and other authorities, that children should not be entrusted with slingshots, there is no sound basis for distinguishing, as a matter of law, such a distinction.

have in mind the immaturity, inexperience and carelessness of children. If, taking those traits into account, a reasonable person would recognize that his conduct involves a risk of creating an invasion of the child's or some other person's interest, he is required to recognize that his conduct does involve such a risk. "He should realize that the inexperience and immaturity of young children may lead them to act innocently in a way which an adult would recognize as culpably careless, and that older children are peculiarly prone to conduct which they themselves recognize as careless or even reckless." Restatement, *supra*, § 290, comment k.²⁵

[25] The issue whether the defendants are subject to liability cannot properly be taken from the jury on the supposition that an 11 year old boy knows how a slingshot operates and, therefore, appreciates the risk.²⁶ Even if it is thought, without supporting evidence and as a matter of law, that children should be deemed to appreciate the risk, there still may be an unreasonable risk of physical harm to the child and others in marketing slingshots directly to them.

Entrusting potentially dangerous articles to a child may pose an unreasonable risk of harm not only because the child may not appreciate the risk or may not have the skill

to use the article safely but—even if he does appreciate the risk and does have the requisite skill—because he may recklessly ignore the risk and use the article frivolously due to immaturity of judgment, exuberance of spirit, or sheer bravado.

"One has no right to demand of a child, or of any other person known to be wanting in ordinary judgment or discretion, a prudence beyond his years or capacity, and therefore in his own conduct, where it may possibly result in injury, a degree of care is required commensurate to the apparent immaturity or imbecility that exposes the other to peril. Thus, a person driving rapidly along a highway where he sees boys engaged in sports, is not at liberty to assume that they will exercise the same discretion in keeping out of his way that would be exercised by others; and ordinary care demands of him that he shall take notice of their immaturity and govern his action accordingly." 3 Cooley, *Law of Torts* (4th ed.), § 490, pp. 433-434.

[26] Just as the driver of an automobile is expected to take precautions for the safety of children playing near a highway even though children can be expected to appreciate the risk and the driver does not know that the individual children are incompetent to look after themselves,²⁷ so too a supplier

25. An actor "is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising (a) such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have; * * * Restatement, *supra*, § 289.

"For the purpose of determining whether the actor should recognize that his conduct involves a risk, he is required to know (a) the qualities and habits of human beings and animals and the qualities, characteristics, and capacities of things and forces in so far as they are matters of common knowledge at the time and in the community." *Id.*, § 290.

26. There is some evidence that one of the reasons slingshot injuries are experienced by children between the ages of 5 and 14 in disproportionate to the populace generally is that the risk is not appreciated. See, Johnston, *Perforating Eye Injuries: A Five Year Survey*, 91 *Transactions*

of the Ophthalmological Soc'y U.K. 895, 897 (1971); Kerby, *Eye Accidents to School Children*, 20 *Sight-Saving Rev.* 2 (1950).

27. Reasonable precautions must be taken even though the actor does not know that an individual child is not competent and the child may appreciate the risk:

"And when children are in the vicinity, much is necessarily to be expected of them which would not be looked for on the part of an adult. It may be anticipated that a child will dash into the street in the path of a car, or meddle with a turntable. It may be clear negligence to entrust him with a gun, or to allow him to drive an automobile, or to throw candy where a crowd of boys will scramble for it. There have been a number of 'ped piper' cases, in which street vendors of ice cream, and the like, which attract children into the street, have been held liable for failure to protect them against traffic. It may

can be expected in marketing a product to take precautions for the safety of children and others even if the child may be expected to appreciate the risk and individual children may both appreciate it and be skilled in using the product. It is for a jury to decide whether any negligence in marketing slingshots directly to children is a cause in fact of plaintiff's loss.²⁸

III

Reasonableness of the Risk of Harm

[27] Even if a person recognizes that his conduct involves a risk of invading another person's interest, he may nevertheless engage in such conduct unless the risk created by his conduct is unreasonable.

The reasonableness of the risk depends on whether its magnitude is outweighed by its

be quite as negligent to leave the gun, or to leave dynamite caps, where children are likely to come, and can easily find them. In all such cases, the question comes down essentially to one of whether the risk outweighs the utility of the actor's conduct. He may be required to guard a power line pole located in a public park, but not one in the open country; and whether he must take steps to prevent children from interfering with such an object as a stationary vehicle is entirely a matter of the circumstances of the particular case." Prosser, *supra*, § 33, pp. 172-173.

"In addition, people who have an ordinary amount of exposure to the facts of modern life in America will be treated as though they know many other things. The normal adult is held to have knowledge of the characteristics of animals common to his community, such as the proneness of mules to kick, the viciousness of bulls, and the propensity of mad dogs to bite. He is also required to be acquainted with the natural propensities of children,³⁵ the dangers incident to com-

³⁵ Such as their heedlessness—*Femling v. Star Publication Co.*, 195 Wash. 395, 81 P.2d 293 (1938); the attractiveness of ponds of water—*Davoren v. Kansas City*, 308 Mo. 513, 273 S.W. 401, 40 A.L.R. 473 (1925), the attractiveness of dangerous objects such as explosives—*Wellman v. Fordson Coal Co.*, 105 W.Va. 463, 143 S.E. 160 (1928), childish impulses—*Louisville & N. R. Co. v. Vaughn*, 292 Ky. 120, 166 S.W.2d 43 (1943), climbing propensity—*Deaton's Administrator v. Kentucky & West Virginia Power Co.*, 291 Ky. 304, 164 S.W.2d 468 (1942); propensity of small children to wander into streets—*Agdeppa v. Glougie*, 71 Cal.App.2d 463, 162

utility. The Restatement provides: "Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done." 1 statement, *supra*, § 291.

[28] The balancing of the magnitude of the risk and the utility of the actor's conduct requires a consideration by the court and jury of the societal interests involved. The issue of negligence may be removed from jury consideration if the court concludes that overriding considerations of public policy require that a particular rule be adopted and applied in all cases.

²⁸ P.2d 944 (1945). Compare § 27.5 *infra*. Harper & James, *supra*, § 16.5, pp. 912-913, on sports, and the elements of the weapon to which he is accustomed.

The trier of fact decides whether reasonable precautions have been taken and thereby establishes the specific standard of care.

"The common formula for the negligence standard is the conduct of a reasonable person under like circumstances. In applying this standard under the instructions of the court, the jury normally is expected to determine what the general standard of conduct requires in the particular case, and so to apply that particular standard of its own within the general one. This function is commonly said to be one of the determination of a question of fact, and not of law. It differs from the function of the court, however, only in that it is not reduced to any definite rules, so that the same conclusion will not necessarily be reached in two identical cases, and that its secondary function, performed only after the court has reached its initial conclusion on the issue is for the jury." Restatement (Second) § 328 C, Comment on Clause (b).

28. A jury might conclude that because the plaintiff was skilled in the use of a slingshot and used it frivolously, the manner of market sale of slingshots was not the cause in fact of plaintiff's injury.

29. "Conduct is not negligent unless the magnitude of the risk involved therein so outweighs its utility as to make the risk unreasonable. Therefore, one relying upon negligence as a cause of action or defense must convince the court and jury that this is the case." Restatement (Second) § 291, Comment b, p. 55 (this is supplied).

A court would thus refuse to allow a jury to consider whether an automobile manufacturer should be liable for all injuries resulting from manufacturing automobiles on the theory that it is foreseeable that some 50,000 persons may be killed and hundreds of thousands injured every year as a result of manufacturing automobiles. The utility of providing automobile transportation is deemed by society to override the magnitude of the risk created by their manufacture. Similarly, a court might conclude that it would be violative of public policy to hold a manufacturer of slingshots liable for all injuries resulting from their use. The interest of mature persons who wish to purchase and use slingshots might be deemed to supersede the interest of those who may be harmed by their careless or improper use.

The issue in the instant case is not whether slingshots should be manufactured, but the narrower question of whether marketing slingshots directly to children creates an unreasonable risk of harm. In determining that question, the Court must first ask whether the utility of marketing slingshots directly to children so overrides the risk hereby created as to justify the Court in refusing to permit juries to subject persons who engage in such conduct to liability for the resulting harm. If it concludes that the utility does not, as a matter of law, override the risk, then the question of balancing utility and risk is for the jury to decide, again, as part of its consideration of the reasonableness of defendants' conduct, unless the Court concludes that all reasonable

persons would be of one mind on that question.

The Restatement suggests a number of factors that should be considered in balancing the utility of the actor's conduct and the magnitude of the risk. First, the magnitude of the risk:

"In determining the magnitude of the risk for the purpose of determining whether the actor is negligent, the following factors are important:

"(a) the social value which the law attaches to the interests which are imperiled;

"(b) the extent of the chance that the actor's conduct will cause an invasion of any interest of the other or of one of a class of which the other is a member;

"(c) the extent of the harm likely to be caused to the interests imperiled;

"(d) the number of persons whose interests are likely to be invaded if the risk takes effect in harm." Restatement, *supra*, § 293.

a) The law attaches a high social value to the interest of persons in unimpaired eyesight.

b) Slingshots are potentially dangerous. An expert witness, called by Moning, testified that the slingshots Alfono purchased were capable of launching projectiles at speeds exceeding 350 miles per hour. Slingshots cause hundreds of serious injuries each year to school age children. Almost all these injuries are head or eye injuries and occur to children 5 to 14.³⁰ Experience

1. Projections from one study indicate that nearly 66,000 school children in the United States during any 9-month school year suffer injuries to the eye. Over 4% of the reported injuries in a study carried out in Louisville were caused by slingshots and other weapons. Such instrumentalities were responsible for 17% of the more serious injuries. Kerby, *supra*, 20 Sight Saving Rev., pp. 3-4, 11.

Another study shows that "[t]here were an estimated 471 injuries related to slingshots and sling propelled toys during the period July 1, 1974-July 30, 1975, treated in United States hospital emergency rooms, all but 2 of which were head or eye injuries to victims under 15 years of age." U. S. Consumer Product Safety Commission, Bureau of Epidemiology, *Special*

Report: Injuries Associated with Products Which Have Projectiles (Draft, October 23, 1975), p. 15. During the same time period, 2,120 injuries reported to hospital emergency rooms involved projectile products. *Id.*, p. 17.

The U. S. Consumer Product Safety Commission states that since "[s]lingshots range from toys to hunting models capable of killing small game * * * it is recommended that high powered slingshots be sold only to persons over 20 years of age." *Id.*, p. 23. The Commission concluded that "[o]verall, projectile products include a diverse array of products which while they share a common hazard are very different in age of users, intended use, and likelihood and consequences of misuse," and that therefore "Commission action would be

therefore shows that marketing slingshots to children may with substantial frequency cause an invasion of the interest in unimpaired eyesight of a substantial number of persons.

c) The extent of the harm likely to be caused to the interest so imperiled may be of a most serious nature.

d) The number of persons whose interests are likely to be invaded is difficult to estimate, but it appears that hundreds of injuries, many resulting in serious impairment of vision, occur every year as a result of the use of slingshots by children.³¹

Turning to utility:

"In determining what the law regards as the utility of the actor's conduct for the purpose of determining whether the actor is negligent, the following factors are important:

"(a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct;

"(b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct;

"(c) the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct." Restatement 2d, Torts, § 292.

most effective" "in the area of toy guns and other toy weapons with projectiles and slingshots." *Id.*

31. See fn. 30, *supra*, and accompanying text.

32. The United States Supreme Court, relying on state statutes providing for wrongful death actions and overruling cases to the contrary, held that under general maritime law there was a cause of action for wrongful death.

State courts created an action for wrongful death in admiralty cases, based on statutes not, by their terms, applicable to maritime cases. In that context, judges were "awake to the purport of this legislative movement, eagerly seized upon principles derivable from 'natural equity' and 'consonant * * * with the benign spirit of English and American legislation on the subject' to mould admiralty law to conform with the trend of civilized thought." Landis, *Statutes and the Sources of Law*, Harv. Legal Essays 213, 226 (1934). Several state courts have relied on statutes in other jurisdic-

a) There is a sharp difference of opinion concerning the social value of the child's interest in having direct-market access to slingshots. The view that slingshots should not be sold or used by children is widely held and is reflected in statutes and ordinances prohibiting the sale of slingshots to or their use by minors.

[29] Statutes and other legislative judgments may themselves be a source of common law. "This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction *but also in those of decisional law.*" *Moragne v. States Marine Lines*, 398 U.S. 375, 390-391, 90 S.Ct. 1772, 1782, 26 L.Ed.2d 339 (1970).³² Similarly, see *Williams v. Polgar*, 391 Mich. 6, 14, 26-28, 215 N.W.2d 149 (1974).³³

North Carolina and Mississippi prohibit sale of a slingshot to a minor.³⁴ Idaho prohibits sale to a minor under 16 without parental consent.³⁵ Mississippi holds a father liable for allowing a son under 16 to have, own or carry concealed a slingshot. Pennsylvania prohibits sale to and carrying by persons under 18 of an implement "which impels a pellet of any kind with force that can reasonably be expected to

infringe on the rights of others." Pennsylvania's rule is "the wiser and safer rule," notwithstanding local common law to the contrary, holding that a general devise operates to execute a power of appointment vested in the testator. *Id.*, p. 231.

Legislative judgments or trends and statutory changes may be relevant in assessing the "rational conscience" in common law and constitutional adjudication. See *Furman v. Georgia*, 408 U.S. 238, 298-299, 92 S.Ct. 2726, 2746, 34 L.Ed.2d 346 (1972) (Brennan, J., concurring).

33. In extending the obligation of an abstract to persons not in privity of contract, this Court relied in part on statutes of other jurisdictions so providing.

34. N.C.Gen.Stat. § 14-315; Miss.Code Ann. § 97-37-13.

35. Idaho Code § 18-3302.

36. Miss.Code Ann. § 97-37-15.

cause bodily harm".³⁷ Nine states prohibit any person from carrying a concealed slingshot.³⁸ A number of states consider slingshots to be deadly weapons and treat them under statutes prohibiting carrying concealed weapons.³⁹ Many cities regulate the sale and possession of slingshots.⁴⁰

Michigan empowers fourth class cities to "prohibit and punish the use of toy pistols, *slingshots and other dangerous toys* or implements within the city" (emphasis supplied).⁴¹ Nine cities in this state prohibit persons from possessing slingshots,⁴² five others prohibit possession by or sale to minors.⁴³ Those ordinances generally classify slingshots as "dangerous weapons."⁴⁴

It is apparent from the legislation in other states and innumerable municipalities that all reasonable persons do not agree that marketing slingshots directly to children does not involve an unreasonable risk of harm. The failure of other states and cities to enact like statutes and ordinances, and of the Legislature either to authorize or prohibit the marketing of slingshots direct-

ly to children, indicates a variety of opinion, but not a consensus regarding the reasonableness of marketing slingshots directly to children.

b) Children are more likely to obtain slingshots if they are marketed directly to them.

c) Slingshots could be marketed in a manner designed to confine sale to adults and to exclude purchases by children. Instead of manufacturers, wholesalers and retailers effectively determining whether children shall have slingshots, an adult who generally would know the child would decide whether he is of sufficient maturity to have one; the adult would, under the common law, assume responsibility for any negligence on his part in entrusting a slingshot to the child.

Having in mind the parent's interest in protecting the child from potentially dangerous instrumentalities⁴⁵ and in avoiding exposure to litigation such as befell the Alfonsos, the child's interest in an opportuni-

³⁷ Pa.Stat. Ann., title 18, § 6304 (Purdon).

³⁸ Alas. Stat. Ann. § 11.55.010; Idaho Code § 18-3302; Miss. Code Ann. § 97-37-1; Mont. Rev. Codes Ann. § 94-3525; Tenn. Code Ann. § 39-4901; Utah Code Ann. § 76-23-4; N.C. Gen. Stat. § 14-269; S.C. Code § 16-23-460; R.I. Gen. Laws § 11-47-42.

³⁹ Alas. Stat. Ann. § 11.55.010 (treated, along with pistols, firearms and daggers, under carrying concealed weapons statute); Del. Code Ann., title 11, § 222(5) (defined to be a "deadly weapon"); D.C. Code Ann. § 22-3217 ("dangerous article"); Idaho Code § 18-3302 (treated with "concealed and dangerous weapons"); Ind. Code Ann. § 35-1-79-1 (Burns) ("dangerous weapon"); Mass. Laws Ann., ch. 269, § 12 (sale prohibited, along with switch knife, sword cane, bludgeon and blackjack); Miss. Code Ann. § 97-37-1 ("deadly weapon"); Mont. Rev. Codes Ann. § 94-3525 ("deadly weapon"); N.J. Stat. Ann. §§ 2A:151-2, 2A:151-5 (West) ("weapon," "dangerous instrument"); N.C. Gen. Stat. § 14-269 ("deadly weapon"); S.C. Code § 16-23-460 ("deadly weapon"); Tenn. Code Ann. § 39-4901 ("dangerous weapon"); Utah Code Ann. § 76-23-4 ("deadly weapon"); Va. Code Ann. § 26-2901, committee notes, 201.

³⁹ Fed. Reg. 16707-16710 (1974).

M.C.L.A. § 91.1; M.S.A. § 5.1740.

Home-rule cities possess the police power and thus there is no need for specific enabling legislation. M.C.L.A. § 117.3; M.S.A. § 5.2073.

⁴² Belding ordinances, § 12.11; Buchanan ordinances, § 11.4; Center Line ordinances, § 8-108; Escanaba ordinances, § (D); Grand Haven ordinances, § 8-209; Hazel Park ordinances, § 15; Sterling Heights ordinances, § 7.(1); Trenton ordinances, § 9.171, and Warren ordinances, § 8-210. See 39 Fed. Reg. 16708-16710 (1974).

⁴³ Gladstone ordinances, § 504.06 (prohibits possession, sale, or gift to persons younger than 18); Lake Orion ordinances, § 9 (prohibits sale, offer to sale, give away or distribute to persons under the age of 21); Port Huron ordinances, § 9.117 (prohibits parents to knowingly permit child under 18 to use or possess except under adult supervision); Waterford ordinances, § 61-IX (prohibits possession, sale or gift to persons younger than 21); Royal Oak ordinances, § 276.1(c) (prohibits selling or giving to persons under 16). See 39 Fed. Reg. 16707-16710 (1974).

⁴⁴ See 39 Fed. Reg., *supra*.

⁴⁵ See generally 59 Am. Jur.2d, Parent and Child, § 106, p. 205 *et seq.*; Prosser, *supra*, § 125, p. 888 *et seq.*

ty to use slingshots cannot be said as a matter of law to be inadequately advanced or protected by allowing a jury to decide that a manufacturer, wholesaler or retailer is negligent in marketing them directly to children.

[30] Balancing the magnitude of the risk and the utility of the conduct in the application of the factors suggested by the Restatement, there is not a sufficient basis for concluding as a matter of law that the utility of the defendants' conduct outweighs the risk of harm thereby created. The sharp difference of opinion regarding the balancing of utility and risk of harm requires submission of these questions for jury assessment as part of its consideration of the reasonableness of the risk of harm and of defendants' conduct.

[31] While "slingshots have a long history of association with the human race" and have been used for hundreds of years by both adults and children, the common law is not immutable, unable to respond to changes in society and technology.

"The customary usage and practice of the industry is relevant evidence to be used in determining whether or not this standard [of reasonably prudent conduct] has been met. Such usage cannot, however, be determinative of the standard. As stated by Justice Holmes:

"What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." *Texas and Pacific R. Co. v. Behymer* (1903), 189 U.S. 468, 470, 23 S.Ct. 622, 47 L.Ed. 905." *Marietta v. Cliffs Ridge, Inc.*, 385 Mich. 364, 369-370, 189 N.W.2d 208, 209 (1971).

46. A slingshot is no more a toy than a sparkler, fireworks, an air gun or an empty cigarette lighter, yet courts have sustained liability for the entrustment of such articles to children. See fn. 24, *supra*. Books prepared for parents speak of the dangers of such "toys." See, e. g., Swartz, *Toys That Don't Care* (Gambit, Inc., 1971), p. 251. The toy industry has acknowledged its awareness of the risks; the industry's proposed draft of Voluntary Product Standards for Toy Safety (May, 1972), while excluding slingshots from coverage, states that there are

As society becomes increasingly urbanized and access to open space decreases, the law responds and develops.

Modern technology may have magnified the risk of ricochet and of injury to persons not in the immediate range or direction in which the slingshot is aimed. Slingshots capable of firing projectiles at 350 miles per hour may be a far cry from those historically made by children from rubber bands and household paraphernalia.

Nor does calling a slingshot a "toy" make it any less dangerous nor immunize its marketing directly to children from the general rules of negligence liability.⁴⁶

There is a qualitative difference between slingshots and other projectile "toys" on the one hand, and baseball equipment and bicycles on the other. The latter are viewed by society essentially as are automobiles in that although children are injured and killed riding bicycles and playing baseball the utility of such activity is regarded by society and all reasonable persons as outweighing the risk of harm created by the manufacture for and marketing to children. Statutes and ordinances do not prohibit the purchase or use of bicycles or baseball equipment by children. There is no ongoing debate, as there is about slingshots, whether children should have direct market access to bicycles or baseball equipment.

In sum, it cannot be said that there was no "obligation of reasonable conduct for the benefit of the plaintiff,"⁴⁷ or that all reasonable men would agree that defendant's conduct was not "a substantial factor producing the result"⁴⁸ or regarding "the foreseeability of [the] particular risk"⁴⁹ regarding "the reasonableness of the

"[c]ertain well-recognized hazards inherent in such traditional toys as bows and arrows, slingshots and darts," quoted in Swartz, *Business in the Toy Box*, 43 *Sight Saving Rev* 97 (1973).

47. Prosser, *supra*, § 45, pp. 289-290.

48. *Id.*

49. *Id.*

fendants' conduct with respect to it, or the normal character of [Alfono's conduct]"⁵⁰ as an intervening cause.

Since reasonable persons can differ regarding the balance of risk and utility (the reasonableness of the risk of harm) and since there is no overriding policy based on social utility of maintaining absolute access to slingshots by children, we reverse and remand for a new trial.

KAVANAGH, C. J., and WILLIAMS, J., concur.

RYAN and MOODY, JJ., not participating.

FITZGERALD, Justice.

This appeal concerns the propriety of a trial court's grant of directed verdict in favor of defendants, the manufacturer, wholesaler, and retailers of a slingshot, in an action brought by plaintiff to recover for injuries sustained as a result of use of the slingshot.

Evidence introduced at trial indicated that on August 17, 1967, Joseph Alfono, age 11, purchased two ten-cent slingshots from defendant Campbell Discount Jewelry. He gave one of the slingshots to plaintiff, age 12, and the boys rode their bicycles to a nearby park. At the park plaintiff and Joseph Alfono employed their slingshots to shoot projectiles at frogs which they found in the vicinity of a pond. The incident of injury occurred when plaintiff was standing near the small pond and Joseph was on the side of a nearby hill. Joseph called to plaintiff to look up and watch as Joseph shot at a bird. When plaintiff looked up, he was struck in the left eye by a projectile from Joseph's slingshot. Evidence introduced at trial indicated that the injuring slingshot was manufactured by Chemical Sundries, Inc.,¹ and distributed by King Tobacco and Grocery Co.

50. *Id.*

1. After commencement of this litigation the name of defendant was changed to Chemtoy Corporation.
2. The Alfonos are party to a cross-appeal concerning their respective rights against the other

Settlement was agreed upon between plaintiff and defendant Alfonos with the result that the Alfonos were only nominal parties to the litigation.² The trial court, upon motion of the remaining defendants after presentation of plaintiff's proofs, granted directed verdict in favor of defendants, opining that defendants owed plaintiff no legal duty upon which recovery could be premised and that defendants' conduct was not the proximate cause of plaintiff's injury.³ The Court of Appeals affirmed in an unpublished per curiam opinion. We granted leave to appeal.

We would affirm the trial court and the Court of Appeals, concluding defendants did not owe plaintiff minor the asserted duty not to manufacture, distribute and sell slingshots.

I

Prosser, in his treatise on the law of torts, offers the following analysis of the role of the court and jury respecting the question of whether a legal duty is owed by one party to another:

"3. The existence of a duty. In other words, whether, upon the facts in evidence, such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other—or, more simply, whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant. This is entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law; and it must be determined only by the court. *It is no part of the province of a jury to decide whether a manufacturer of goods is under any obligation for the safety of the*

defendants in the event this Court were to set aside the directed verdict entered by the trial court.

3. The trial court's extensive opinion was issued from the bench and evidences thorough consideration of the case before that court.

ultimate consumer, * * *. A decision by the court that, upon any version of the facts, there is no duty, must necessarily result in judgment for the defendant." (Emphasis supplied.) Prosser, Torts (4th Ed.), § 37, p. 206.

Decisions of this Court have in similar fashion recognized that the question of duty is to be resolved by the court rather than the jury. See *Fisher v. Johnson Milk Co., Inc.*, 383 Mich. 158, 162, 174 N.W.2d 752, 754 (1970), in which the Court viewed summary judgment for defendant manufacturer of a wire milk bottle carrier proper after determination that there was "no legal duty to supply a carrier so designed as to prevent bottles placed therein from breaking when dropped to a hard surface". Also, see *Bonin v. Gralewicz*, 378 Mich. 521, 527, 146 N.W.2d 647 (1966).

The trial court in this case found no legal duty owed plaintiff by defendants. We now review—as a question of law—that determination.

II

During the course of proceedings below plaintiff has alleged that the defendants violated numerous duties⁴ which attached liability. Through the sifting and winnowing action of the trial and appellate process these allegations have been refined so that we have presently before us only the following contention as stated at page 11 of plaintiff's brief:

"Plaintiff's position [is] that the defendants had a duty as reasonably prudent manufacturers, distributors and retail merchants not to manufacture, market and sell these slingshots to young children."

It is asserted that two factors give rise to this duty:

4. Among these duties was the duty to warn plaintiff purchaser of the dangerous propensities of a slingshot either by personal notification as in the case of a retailer or by printed notice as in the case of the wholesaler and manufacturer. Other courts have uniformly rejected a duty to warn when confronted with products, like the slingshot, the dangerous propensities of which are well known. See, e. g., *Pitts v. Basile*, 35 Ill.2d 49, 219 N.E.2d 472 (1966), and *Morris v. Toy Box*, 204 Cal.App.2d

"(1) the inherently dangerous nature of the slingshot, and (2) the youthful age and lack of discretion of the purchaser."

The question before us is not settled by Michigan case law precedent. A relevant question was considered by this Court, however, in *Chaddock v. Plummer*, 88 Mich. 50 N.W. 135 (1891). In *Chaddock*, a gun case, this Court affirmed a directed verdict in favor of the father-purchaser of an air gun used by a neighbor boy in a negligent fashion. Evidence indicated that the father, rather than the father, was in "control of the premises at the time the gun was loaned to and used by the visiting child." Negligence of the mother was not asserted. The court concluded:

"It was not negligence *per se* for the defendant to buy this toy gun, and it was in the hands of the boy nine years of age; and there were too many intervening causes without the act or knowledge of the defendant, between the buying of the gun and the injury to hold the defendant liable for its use in this case. His own son had in any manner contributed to the accident, a different question would arise, upon which I express no opinion." *supra*, 230, 50 N.W. 13.

Whalen v. Bennett, 4 Mich.App. 1 N.W.2d 797 (1966), involved the question of injury which occurred while the defendant's son shot an air gun while playing with friends and injured one of his children. The Court of Appeals⁵, concluding that the trial court's grant of summary judgment was improper, there being evidence indicating that a duty on the part of the parent, to supervise the use of the instrumentality as dangerous as an air gun had been breached.⁶ Neither *Chaddock*

468, 22 Cal.Rptr. 572 (1962). See, also, Prosser, Torts (4th Ed.), § 96, p. 649.

5. Justice Fitzgerald authored the opinion sitting as a judge of the Court of Appeals.

6. See for an analogous holding, which also discusses application of Restatement Torts Second, § 390, discussed in *Fredericks v. General Motors Corp.*, 580, 211 N.W.2d 44 (1973).

Whalen dealt with the liability of retailers, wholesalers, or manufacturers.⁷

Cases from other jurisdictions offer instruction not afforded by Michigan precedent. In *Pitts v. Basile*, 35 Ill.2d 49, 219 N.E.2d 472 (1966), a child struck by a dart thrown by another child brought suit against the wholesaler of the dart and the retailer from whom the darts had been purchased. The appeal considered only the question of the wholesaler's liability. The Illinois Supreme Court concluded that there was insufficient causal connection between alleged negligence on the part of the wholesaler and resulting injury, finding that there was no relation between the marketing of the darts and subsequent injury. In addition, the Court commented:

"We are not concerned in this case with the liability of the proprietors of the grocery store who sold the darts to the eight-year-old boy, but with the liability of the defendant [wholesaler], who sold the darts to the proprietors of the grocery store. There was no contention or proof that the darts were in any way defective, and the appellate court emphasized that it was not characterizing them as 'inherently dangerous.' In this court, however, the plaintiff urges that the defendant's "non-defective" dart manifestly was not safe when used by small children for the purpose for which it was intended. The dart in question was intended to be thrown at various objects * * *. Its propensity to cause serious injury, particularly to the eyes, was demonstrated by the very injury suffered by the infant plaintiff in the instant case.'

"There are many things used by children that may be said to be unsafe when

used for the purpose for which they are intended. A baseball, a baseball bat, a penknife, a Boy Scout hatchet, a bicycle, all have the capacity to injure the user or others in the course of their normal use. They are not, however, to be categorized as 'dangerous instrumentalities.' As was said by the Tennessee court in *Highsaw v. Creech*, 17 Tenn.App. 573, 69 S.W.2d 249, 252 [1934], 'an air gun is not a dangerous instrumentality of itself, but is in fact a toy. * * * The fact alone that an injury may be inflicted by such a toy does not make of it a dangerous instrumentality in the sense that the term is generally used.' In *Morris v. Toy Box* (1962), 204 Cal.App.2d 468, 22 Cal.Rptr. 572, 574-575, a complaint brought by a minor against a retailer alleging that the retailer knew that the intended user of a bow and arrow was the purchaser's ten-year-old boy was dismissed, the court saying, 'the bow and arrow has been in use by young and old alike for thousands of years. * * * To us it is simply inconceivable that a 10-year-old boy, much less his mother, would be unacquainted with the use of so common an article as the one here in question.' See also, *White v. Page* (Ohio App 1950), 105 N.E.2d 652." supra, 35 Ill.2d 49, 51-52; 219 N.E.2d 472, 473, 474.

The Supreme Court of Oklahoma in *Atkins v. Arlan's Department Store of Norman*, 522 P.2d 1020 (Okla.1974), quoted the above from *Pitts v. Basile* in concluding that there was no cause of action for plaintiff against the manufacturer and retailer of a lawn dart game for injury caused when a lawn dart struck the eye of a child. That court concluded:

sniffing was, at this time, sufficiently notorious that defendant knew or should have known this was an alternative use for its product "

In *Crowther*, however, summary judgment on the pleadings alone was involved. Here we have a directed verdict granted after plaintiff has presented all his proofs. The thrust of decision in *Crowther* was that plaintiff be given an opportunity to present proofs. In the present case plaintiff enjoyed such opportunity. *Crowther* is therefore not of decisional significance to the case before us.

7. Plaintiff also asserts that *Crowther v. Ross Chemical & Manufacturing Co.*, 42 Mich App 426, 202 N.W.2d 577 (1972), is a case in point. This action was brought to recover for the wrongful death of two young girls who were killed by a man who had allegedly been sniffing glue manufactured by defendant. The Court of Appeals concluded that the trial court's grant of summary judgment was inappropriate because

"It is an issue of fact whether, as plaintiff alleges in his complaint, the practice of glue

"There are many toys and playthings, perfectly harmless and inoffensive in themselves, but whose common use can be perverted into a dangerous use and design, and there are very few of the most harmless toys which cannot be used to injure another. The dart's propensities to cause injury is demonstrated by the injury sustained but the fact that an injury was sustained does not necessarily mean that the manufacturer or retailer are liable for those injuries.

* * * * *

The dart in question was not designed or manufactured to be thrown at an individual but at a plastic ring or another target." *supra*, 1022.

In *Morris v. Toy Box*, 204 Cal.App.2d 468, 22 Cal.Rptr. 572 (1962), the Second District Court of Appeals of California faced the allegation of plaintiff that the retailer of a bow and arrow was liable for injuries sustained by a child who had been struck by an arrow shot by the son of the buyer of the bow and arrow. The California court rejected the notion that a bow and arrow were "inherently dangerous",⁸ and commented:

"As in the case of a slingshot,⁹ the bow and arrow has been in use by young and old alike for thousands of years; its method of operation, therefore, is a matter so notorious to all that production of evidence relative thereto would be unnecessary * * *." (Emphasis supplied.) *supra*, 472, 22 Cal.Rptr. 574.

The court concluded there was no duty on the part of the retailer to warn of the dangers incident to the bow and arrows' use and found no cause of action.¹⁰

8. The talismanic label "inherently dangerous" attained significance because a finding of "inherent dangerousness" avoided the privity requirement of contract law subjecting the wholesaler, manufacturer or retailer to liability in tort. Plaintiff's complaint is framed in terms of negligence. The doctrine of "inherent dangerousness" is not of decisional significance to the case at hand.

9. The California court at this point footnotes the following:

Plaintiff refers us to § 390 of the Restatement of Torts, 2d, indicating that that section affords a basis for liability. That section states:

"One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them."

A similar contention was rejected by the California Court of Appeals in *Bojorquez v. House of Toys, Inc.*, 62 Cal.App.3d 980, 133 Cal.Rptr. 483, 484 (1976), with the following remarks.

"A ten cent slingshot is a toy although its use, like the use of other toys, such as baseball bats and bows and arrows, may cause injury to others. The cases we have found under section 390 and the illustrations provided in the Restatement all involve the sale or entrustment of chattel to a particular individual who allegedly was known to the seller to be young, inexperienced or incompetent to use the item properly.

"Here [plaintiff] wants us to hold the retailer and distributor negligent for selling toy slingshots to the class of people for whom they were intended; in effect, she asks us to bar the sale of toy slingshots by judicial fiat. Such a limitation is within the purview of the Legislature, not the judiciary."

The illustrations to the Restatement indicate that that section was intended to apply when knowledge of an individual's character

"And David prevailed over the Philistines with a sling and a stone, and he struck the king and slew the Philistine." (1 Kings 17:50)"

10. The New Jersey Superior Court similarly commented that a plastic slingshot was not a dangerous instrumentality in *Levis v. Z. Z. Z.*, 72 N.J.Super. 168, 178 A.2d 44 (1962), involving injury sustained as a result of a defective slingshot.

stances indicates to the supplier reasonable likelihood that the individual supplied is incompetent to use the chattel supplied and may therefore cause harm to himself and others. Plaintiff in this case seeks an extension of the Restatement doctrine to recognize the status of children, rather than circumstances concerning an individual child, and in relation thereto to circumscribe with duty the distribution of toys, the misuse of which involves a likelihood of injury—i. e., here, slingshots.

III

In our view we are being asked to perform a legislative task. If we were to find a duty on the part of defendants not to supply slingshots to children, we would in effect be making a value judgment and saying to defendants and their counterparts that such—in this instance—toys should not be manufactured or marketed.

As has been noted, slingshots have a long history of association with the human race. Indeed, anyone can make one from a tree branch and a piece of inner tube. We acknowledge that there are dangers incident to their use and that such dangers are magnified when slingshots are used by minors. In the case of use by a minor, the law recognizes that parents have some responsibility of supervision. See, e. g., *Whalen v. Bennett*, *supra*. Cf. *Chaddock v. Plummer*, *supra*.

In the absence of legislative prescription circumscribing the manufacture, distribution, or sale of slingshots or providing that defendants insure against the misuse of their products, we are unable to find a duty upon which the liability of defendants may be premised.

We would affirm.

COLEMAN, J., concurs.



74 Mich App 540

Saud BARBAT, Plaintiff-Cross
Defendant-Appellant,

v.

M. E. ARDEN COMPANY, a Michigan
Corporation, Defendant-Cross
Plaintiff-Appellee.

Docket No. 27267.

Court of Appeals of Michigan.

March 30, 1977.

Released for Publication June 21, 1977.

Action was brought against realty company by prospective purchaser for return of deposit made to company toward purchase of real estate, and realty company counterclaimed for its full commission plus \$10,200. The Macomb County Circuit Court, George R. Deneweth, J., granted realty company summary judgment for full amount of its counterclaim, and appeal was taken. The Court of Appeals, R. B. Burns, J., held that: (1) realty company was bound by its obligations to vendor to submit any offers it received to vendor irrespective of irrevocability clause in its contract with prospective purchaser, and (2) realty company's promise to exert effort to obtain vendor's approval of prospective purchaser's offer was an unenforceable promise and did not constitute, consideration to support irrevocability clause by which prospective purchaser's offer was purportedly made irrevocable for 15-day period.

Reversed and remanded.

1. Brokers ⇐ 32

Realty company was bound by its obligations to vendor to submit any offers it received to vendor irrespective of irrevocability clause in realty company's contract with prospective purchaser, by which prospective purchaser's offer was purportedly made irrevocable for 15-day period in exchange for realty company's promise to exert effort to obtain vendor's approval of such offer, and it would have been breach