SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 18 | Issue 5

1967

Negligence--Products Liability--Extent of a Manufacturer's Duty [*Simpson Timber Co. v. Parks*, 369 F.2d 324 (9th Cir. 1966)]

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Recent Decisions

NEGLIGENCE — PRODUCTS LIABILITY — EXTENT OF A MANUFACTURER'S DUTY

Simpson Timber Co. v. Parks, 369 F.2d 324 (9th Cir. 1966).

In the fifty years since the renowned decision of *MacPherson v. Buick Motor Co.*,[1] the scope of a manufacturer's duty to compensate negligently injured consumers has expanded dramatically.[2] According to leading contemporary scholars, the *MacPherson* negligence principle has been developed to hold manufacturers to a duty of reasonable care to see that "intended users" of a manufactured product will not be injured when making an "intended use" thereof.[3] Just as the concrete attributes of that abstract personage, the "intended user," can be understood only by reference to post-1916 decisions,[4] the breadth of the concept of "intended use" can be comprehended only by a similar study of academic and case authority. The weight of contemporary authority unmistakably holds that the class of intended uses of a manufactured product includes those uses that are reasonably foreseeable to the manufacturer.[5] The Ninth Circuit Court of Appeals has, however, in its recent decision of *Simpson Timber Co. v. Parks*,[6] apparently restricted the scope of

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[1] 217 N.Y. 382, 111 N.E. 1050 (1916).

[2] Prior to the *MacPherson* case, a consumer could not recover for the negligence of a manufacturer unless he could show that he stood in contractual privity with the manufacturer or that the product of the manufacturer was imminently or inherently dangerous. 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY §§ 5.01-.02 (1966); PROSSER, TORTS § 96, at 658-60 (3d ed. 1964). In holding that any product "reasonably certain to place life and limb in peril when negligently made" was sufficiently dangerous to fall within the imminently or inherently dangerous classification, *MacPherson* eliminated the requirement of contractual privity as a precondition to recovery. 217 N.Y. at 389, 111 N.E. at 1053. For a discussion of the development of a manufacturer's liability for negligence since *MacPherson*, see 1 FRUMER & FRIEDMAN, *op. cit. supra* §§ 5.03-.03[1]; PROSSER, *op. cit. supra* at 661-72; James, *Products Liability* (pts. 1-2), 34 TEXAS L. REV. 44, 49-77, 192-218 (1955).

[3] See 1 FRUMER & FRIEDMAN, *op. cit. supra* note 2, § 5.03[1], at 23; RESTATEMENT (SECOND), TORTS § 395 (1965).

[4] "The MacPherson decision did not go beyond liability to the ultimate purchaser himself. Later cases have extended it to the purchaser's employees and other users of the chattel, to members of his family, to subsequent purchasers, and to casual bystanders." PROSSER, *op. cit. supra* note 2, § 96, at 662-63. (Footnotes omitted.)

[5] *E.g.*, Mazzi v. Greenlee Tool Co., 320 F.2d 821 (2d Cir. 1963); Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962); 1 FRUMER & FRIEDMAN, *op. cit. supra* note 2, § 11.02, at 210.7; PROSSER, *op. cit. supra* note 2, § 96, at 667-68.

[6] 369 F.2d 324 (9th Cir. 1966).

"intended use" to those uses of a product that are actually known by the manufacturer. The language of the *Simpson* court is rather ambiguous, to the extent that any conclusions as to the significance of the case must be postponed until after close analysis of the court's opinion.

The plaintiff in *Simpson*, a longshoreman, injured himself when he fell through the cardboard wrapping of a bundle of doors that had been packaged and manufactured by the defendant Simpson Timber Company. The longshoreman at the time of the injury was walking upon a "floor" of bundles that had been set in place within the hold of a cargo ship.[7] He sought to recover damages in federal district court for personal injuries caused by the company's alleged negligence. On the defendant's appeal to the Ninth Circuit from a jury verdict for the plaintiff, an issue concerning the propriety of the trial court's instructions to the jury was raised.[8] The contraverted instruction directed the jury to find the manufacturer negligent if it were found that the defendant knew " '*or in the exercise of reasonable care should have known*' "[9] of the stevedoring practice of walking upon cargo already set into place, and under those circumstances, if the failure of the company to warn of the weakness of the bundles created an unreasonable risk of harm to the plaintiff.[10]

The majority opinion in *Simpson* held the trial court's instruction erroneous on the ground that it imposed too broad a scope of duty upon the defendant.[11] According to the court, the instruction

[7] *Id.* at 326. The longshoreman was employed by a stevedore company which had contracted to stow cargo for a shipping company which in turn had agreed with the defendant to ship the bundles of doors. The defendant, in bundling the doors, wrapped them with cardboard in such a manner that the finished bundles contained concealed "wells," formed by holes cut in the door frames for the later insertion of glass panes. Also, there was no warning of the dangerous condition printed on the bundles. *Ibid.*

[8] *Id.* at 327. At trial the plaintiff offered evidence tending to prove that it was a common stevedoring practice to stow cargo in layers and that previously stowed layers were used as "floors" upon which workmen would walk while placing additional cargo within the ship's hold. *Id.* at 327-28. A jury verdict was returned against the defendant company. After a panel of the Ninth Circuit affirmed the district court judgment, a petition for rehearing by the Ninth Circuit en banc was granted. For an excellent discussion and analysis of the panel's decision in *Simpson*, see 54 GEO. L.J. 1439 (1966). The plaintiff also sued the shipper, but that cause of action is beyond the scope of this discussion.

[9] 369 F.2d at 327.

[10] *Ibid.*

[11] *Id.* at 328. The *Simpson* court evidently considered the problem of the defendant's knowledge, whether foreseeable or actual, as a factor in determining the scope of the defendant's duty rather than as a determinant of proximate causation. See 54 GEO. L.J. 1439, 1441 n.8 (1966). Commentators are in agreement that the scope of a defendant's knowledge is critical in the determination of his duty. See, *e.g.*, PROSSER,

would cause a packager to be burdened "with a legal duty to ascertain the customary working practices of stevedores in *any* port which the purchaser, a shipper or transporter might select for loading and embarkation."[12] The majority reasoned that since no difficulty would be encountered in ascertaining customary stevedoring practices in any port, the effect of the instruction would be to preclude a packager from claiming that he had satisfied his duty of reasonable care unless he had undertaken to universally learn of such practices.[13]

The court placed primary reliance on the authority of *McCready v. United Iron & Steel Co.*[14] in which the plaintiff's decedent was using the horizontal cross-bars of a casement window frame as a ladder to facilitate the installation of glass panes. The decedent fell to his death because the cross-bars were not welded to the vertical frame of the casement firmly enough to support his weight.[15] The majority emphasized the *McCready* holding that it was not a normal or intended that a casement frame should be used as a lad-

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op. cit. supra note 2, § 50, at 294-97; Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961).

However, the commentators point out that social policy considerations, such as the ability of large corporations to bear negligence losses, will often determine the presence of a duty apart from foreseeability or knowledge of a risk. The scope of knowledge is not an automatic equivalent to duty. See PROSSER, *op. cit. supra* note 2, § 50, at 296-97. The *Simpson* court also considered finding a duty for the manufacturer on the basis of social policy but subsequently rejected such a thesis. 369 F.2d at 330 n.7.

[12] *Id.* at 328. (Emphasis added.)

[13] The objection in the majority opinion to the trial court's instructions went merely to the usage of the words "'*in the exercise of reasonable care* [the defendant] *should have known.*'" *Id.* at 327. The segment of the instruction calling for the imposition of liability on the defendant if it were found that the manufacturer had actual knowledge of the stevedoring practice of walking on already-stowed cargo was approved by the majority. On this basis the case was remanded to the trial court in order that the jury might consider the circumstances of the case "with reasonable inferences" to determine the presence or absence of actual knowledge. *Id.* at 328. For a discussion of the significance of the Ninth Circuit's instructions to the trial court on remanding the case, see text accompanying notes 34-38 *infra.*

The court's opinion indicated that a jury question of actual knowledge lay in the fact that the defendant had a warehouse on the waterfront in Portland, Oregon, that the manufacturer's plant manager was an inquisitive frequenter of the dock area, and that the defendant shipped 16,000 to 18,000 doors overseas annually. 369 F.2d at 328. The majority did not purport to state as an absolute rule that the defendant must have actual knowledge of a hazardous use before a legal duty will be imposed. The court pointed out that when "a hazard is so obvious as to permit of no doubt that one could have anticipated it, then he may be held to the same responsibility that rests upon one to whom the hazard is 'known.'" *Id.* at 328 n.5. Also, the *Simpson* court indicated in dictum that an extended duty could be imposed upon a defendant if his product was "inherently dangerous or harmful." *Id.* at 328-29.

[14] 272 F.2d 700 (10th Cir. 1959).

[15] *Id.* at 702-03.

der and that a defendant manufacturer could properly "'assume that his product . . . [would] be devoted to its normal use.'"[16]

In applying the *MacPherson* negligence principle,[17] the *Simpson* court clearly indicated that a lack of contractual privity between the defendant company and the plaintiff was not the basis for the court's decision. The judgment for the plaintiff was reversed not because he was an "unintended user," but because he was making an "unintended use" of the product.[18]

The dissenting opinion construed the rule of law contained in the trial court's instruction as *not* obligating the defendant either to learn of possible longshoremen's practices or to insure that its product would be fit for all uses incident to the process of loading.[19] Rather, the minority construed the jury instruction to impose only a duty of reasonable care under the circumstances to learn the practices of stevedores.

It was reasoned that the restriction of the defendant's duty to those potentially harmful uses that were actually known rewarded the defendant's ignorance:[20] "The majority holds that a manufacturer is required to guard against only those risks which it actually knows. The more limited the manufacturer's knowledge, the less onerous its duty. Ignorance, no matter how unjustified, affords a complete defense to a charge of negligence . . . ."[21] Implicit in the dissenting opinion is the criticism that the majority did not recognize the imposition of a "moderate" duty upon the manufacturer. Seemingly, under the *Simpson* rationale, the manufacturer could have either an absolute duty to learn of all stevedoring practices or no duty of self-information. The minority rejected both extreme

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16 Simpson Timber Co. v. Parks, 369 F.2d 324, 329 (9th Cir. 1966), citing McCready v. United Iron & Steel Co., 272 F.2d 700, 703 (10th Cir. 1959).

17 For a discussion of the *MacPherson* negligence rule, see note 2 *supra* and text accompanying note 3 *supra.*

18 369 F.2d at 330-31. That an intermediate handler of a product, such as the longshoreman in *Simpson,* may be an "intended user" and not subject to a privity defense has been established in several other cases. *E.g.,* Land O'Lakes Creameries, Inc. v. Hungerholt, 319 F.2d 352 (8th Cir. 1963) (trucker); Central Steel Tub Co. v. Herzog, 203 F.2d 544 (8th Cir. 1953) (employee of supplier); McFall v. Compagnie Maritime Belge (Lloyd Royal) S.A., 304 N.Y. 314, 107 N.E.2d 463 (1952) (longshoreman). The *Simpson* court recognized and apparently approved the holdings in *Hungerholt* and *Herzog* but found them inapplicable. 369 F.2d at 330-31 n.8.

19 *Id.* at 332.

20 *Id.* at 331. For a discussion of the relationship of a defendant's knowledge and duty, see note 11 *supra.*

21 369 F.2d at 331 (dissenting opinion).

positions, asserting that the concept incorporated in the trial court's instruction was "a more sensible middle ground."[22]

The dissenters also indicated[23] that the court had misread the *McCready* case[24] which, while holding for the defendant, did not adopt a test of duty which limited a manufacturer's liability to only those uses of its product of which the manufacturer had actual knowledge. Rather, *McCready* held against the plaintiff on the ground that the decedent's use of the product was "not *reasonably* anticipated."[25]

The *Simpson* holding may be understood in two ways. First, and perhaps more justifiably, it may be viewed as setting forth a narrow test of "actual knowledge" upon which the duty of a manufacturer toward users of its products may be based.[26] However, such a view is contrary to the vast weight of both academic and case authority[27] which, in discussing the breadth of the "intended use" doctrine, appears to define its scope in terms of reasonable foreseeability. *Spruill v. Boyle-Midway, Inc.*[28] held that the "intended use" rule is merely a shorthand method for expressing a test of knowledge properly based upon reasonable foreseeability:

> "Intended use" is but a convenient adaptation of the basic test of "reasonable foreseeability" framed to more specifically fit the factual situations out of which arise questions of a manufacturer's liability for negligence. "Intended use" is not an inflexible formula to be apodictally applied to every case.[29]

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[22] *Id.* at 332.

[23] *Id.* at 335.

[24] McCready v. United Iron & Steel Co., 272 F.2d 700 (10th Cir. 1959). For a discussion of the *McCready* case, see text accompanying notes 14-16 *supra.*

[25] 272 F.2d at 703. (Emphasis added.) The *Simpson* minority rejected the distinction drawn by the majority in dictum that manufacturers may properly be charged with an extended duty if their products are inherently dangerous. 369 F.2d at 334-35. It should be remembered that the *MacPherson* holding abrogated such a distinction. For a discussion of the *MacPherson* case, see note 2 *supra.* Contemporary scholars likewise reject the "inherently dangerous" distinction. *E.g.*, 1 FRUMER & FRIEDMAN, *op. cit. supra* note 2, § 5.03[1], at 29-30.2; PROSSER, *op. cit. supra* note 2, § 96, at 661.

[26] For a discussion of the relationship between a defendant's knowledge and his duty, see note 11 *supra.*

[27] The following cases either expressly or impliedly recognize that the scope of "intended use" is determined by a test of reasonable foreseeability: Mazzi v. Greenlee Tool Co., 320 F.2d 821 (2d Cir. 1963); Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962); Marker v. Universal Oil Prods. Co., 250 F.2d 603 (10th Cir. 1957); Boyl v. California Chem. Co., 221 F. Supp. 669 (D. Ore. 1963). See treatises cited note 5 *supra.* This writer has not discovered a case, other than *Simpson*, which expressly restricts a defendant's duty to those instances in which he has actual knowledge of his product's use.

[28] 308 F.2d 79 (4th Cir. 1962).

[29] *Id.* at 83.

Neither *McCready* nor *Cohagan v. Laclede Steel Co.*,[30] also cited in the majority opinion, specifically limited the duty of the respective defendant-manufacturers to instances where the "unintended use" was actually known. Rather, both cases held that the factual situations present did not warrant charging the defendants with "reasonable" knowledge of the hazardous use.[31] If it is concluded that the *Simpson* court posited a new test of knowledge, it must be conceded that such a test is without precedent.[32] Evidence of the novel character of the Ninth Circuit's holding may be seen in the plaintiff's claim that the defendant never did object to the trial court instruction, but rather that the appellate court struck down the instruction on its own volition.[33]

A second view, namely, that the majority misinterpreted the nature of the trial court's instruction but still applied a test of similar substantive content, is tenable and would fit comfortably within the context of prior decisions. The *Simpson* court did remand the case to the trial court so that the jury might consider whether the officers of the defendant company had actual knowledge of the stevedoring practice of walking upon previously stowed cargo.[34] In considering the remanded issue, the jury was to be permitted to consider the factual circumstances of the case in conjunction with "reasonable inferences" drawn from those facts.[35] Whether this "reasonable inference" test for knowledge can be effectively distinguished from the traditional rule,[36] which presumes that knowledge could have been attained had the defendant exercised reasonable care under the circumstances, is questionable. Such a distinction

30 317 S.W.2d 452 (Mo. 1958).

31 In *Cohagan*, the plaintiff was struck by heavy steel wiring that had become disengaged from the bundle of steel it was securing. The wiring was loosened when the bundle was picked up by a crane hook, the hook being attached to the wiring. The court held that the plaintiff did not offer sufficient evidence to show a custom in the plaintiff's trade of hooking wrapping wires in order to transport bundles. *Id.* at 454. There is no language in *Cohagan* that would support the narrow test of knowledge seemingly posed by the *Simpson* court. For a discussion of the *McCready* case, see text accompanying notes 14-16 *supra.*

32 See authorities cited note 27 *supra.*

33 Brief for Appellee on Petition for Rehearing, pp. 2-3, Simpson Timber Co. v. Parks, 369 F.2d 324 (9th Cir. 1966). Despite the consistent application of the "reasonable knowledge" test by the courts, the results have not been particularly consistent. *Compare* McCready v. United Iron & Steel Co., 272 F.2d 700 (10th Cir. 1959), *with* Mazzi v. Greenlee Tool Co., 320 F.2d 821 (2d Cir. 1963). See generally Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 856-62 (1962).

34 369 F.2d at 328, 331.

35 *Id.* at 328.

36 For a discussion of the traditional rule, see text accompanying notes 28-29 *supra.*

appears, at first blush, to be a tenuous basis for distinguishing rules of knowledge.

If it may be assumed that inferential knowledge must depend ultimately upon actual knowledge, then a distinction between the appellate court's instruction on remand and the traditional test may be drawn.[37] Under such an assumption, the scope of reasonable inferences would merely be a variable dependent upon what is actually known by the defendant, thus ultimately retaining the subjective nature of the test. The traditional test, in contrast, considers matters other than what the defendant actually knew in determining whether a defendant should have known of a potentially harmful use.[38]

If one were to conclude that the "reasonable inferences" test is merely the traditional "reasonable knowledge" test under another guise, then the *Simpson* case could not be understood to have changed the law. This proposition is dubious at best.[39] Properly viewed, *Simpson* appears to stand for the general rule that a manufacturer's duty to a consumer arises only when the manufacturer has actual knowledge of a harmful use.[40] The unfortunate consequences of this change in the law are manifold. First, it encourages manufacturers to remain ignorant of uses involving unreasonable risks. As a corollary, the rule discourages manufacturers, the parties in the best position to remedy manufacturing defects, from exercising vigilance in production — a patently erroneous policy.

Second, the increasing complexity of commercial practices warrants an extension, rather than a contraction, of a manufacturer's

[37] Some justification for such an assumption may be found in the principal holding of the *Simpson* court. The tenor of the majority's argument went to a rejection of a test of knowledge based upon what the defendant should have known and approval of a test that charged the defendant with responsibility for only that which the company's officers actually knew. It would seem incorrect to consider that the court's instructions on remand incorporated a legal test inconsistent with the basic holding, as would be the result under the reasonable knowledge test. For a discussion of the *Simpson* court's basic holding, see notes 10-13 *supra* and accompanying text.

[38] Cases which apply the traditional test often look to the presence of a custom in a trade or business to employ a seemingly unintended use in determining whether the use is foreseeable by the defendant. *E.g.*, McCready v. United Iron & Steel Co., 272 F.2d 700, 703 (10th Cir. 1959); Cohagan v. Laclede Steel Co., 317 S.W.2d 452, 454 (Mo. 1958). In its instructions on remanding the *Simpson* case, the Ninth Circuit did not include the fact that walking on previously stowed cargo might have been a trade custom as a factor for jury consideration. Instead, the factors presenting a jury question of actual knowledge were all matters of which the defendant had actual knowledge. For a delineation of the factors to be considered by the trial court on remand, see note 13 *supra.*

[39] See notes 37-38 *supra.*

[40] The statement is only a general proposition; several exceptions were suggested by the court's opinion. For a delineation of the exceptions, see note 13 *supra.*

responsibility.[41] As the number of possible users such as shippers, wholesalers, and retailers increases, so does the number of possible uses. It is highly improbable that a manufacturer could have actual knowledge of commercial practices in cities distant from the manufacturer's plant. Yet, because a responsible manufacturer is often fully able to prevent harm from the use of its product and because the manufacturer is able to spread the risk of harm to the public by charging higher prices, there is little reason to hold the manufacturer to only those risks of which he has actual knowledge.[42]

Finally, the rule and the exceptions seemingly generated by *Simpson* will not simplify the task of the trial judge. A trial court will not only have to determine whether a manufacturer had actual knowledge of an "unintended use," but, even in the absence of such knowledge, the trial court will also be obliged to determine whether the product was inherently or imminently dangerous, whether the hazard was so obvious that the manufacturer could not avoid notice thereof, or whether reasonable inferences from the circumstances of the case could show that the defendant had knowledge of the use before a products liability case, under the Ninth Circuit test, could be disposed of.[43] In contrast to the relatively simple traditional test,[44] the process advocated by *Simpson* is tortuously cumbersome. It is hoped that the rationale of the Ninth Circuit will be given little credence in the future.

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41 In the early 1900's, when manufactured products often passed directly from the manufacturer to the consumer, a restriction of liability to those uses of which the manufacturer had actual knowledge may have been justified. The number of "uses" of a product in the hands of one party was limited, and it would be more likely that a manufacturer would have had actual knowledge of a foreseeable misuse of a product than under today's complex commercial practices through which a product may be subjected to a multiplicity of "unintended uses" by a half-dozen or more intermediate handlers before reaching the ultimate consumer.

42 See PROSSER, *op. cit. supra* note 2, § 50, at 296-97.

43 For a discussion of the exceptions to the rule posed by *Simpson*, see note 13 *supra*.

44 For a discussion of the traditional test, see text accompanying notes 28-29 *supra*. The traditional test appears to involve only two steps. First, it must be determined whether the plaintiff's use of the defendant's product is reasonably foreseeable and whether the defendant is under a duty to the plaintiff. Second, if it is found that the defendant did owe a duty to the plaintiff, it must then be determined whether the defendant fulfilled or breached his duty. *Ibid.*