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Negligence - Dry Ice Held Not Inherently Dangerous Substance in Hands of Child - Scott v. Ewing Dairy, 317 S.W. 2d 477 (Ky., 1958)

DePaul College of Law

are not liable for negligent omissions respecting governmental functions in New York, remains to be seen.

NEGLIGENCE–DRY ICE HELD NOT INHERENTLY DANGEROUS SUBSTANCE IN HANDS OF A CHILD

In an action for damages, it was shown that defendant's truck driver, while in the process of removing dry ice[1] from defendant's truck which was parked near a vacant lot in which children were playing, offered some of the ice to several young boys who had approached his vehicle. One boy accepted. This lad and two of his companions each took some and carried it, in a cardboard carton, to the area of plaintiff's residence. Upon seeing the plaintiff the boys offered him some of the dry ice; he, in turn, accepted. Taking particles of the substance, he broke them into small pieces and inserted them in a bottle which he had already partially filled with water. Another young boy who was with the plaintiff capped the bottle and threw it into some grass nearby. The boys had expected that the action of the water on the ice would cause the top of the bottle to pop off. When the desired result did not occur, plaintiff went over to the bottle and picked it up; at this time it exploded in his face. Result–loss of the right eye of plaintiff, a boy of twelve years of age. At the conclusion of the plaintiff's opening statement to the jury, the trial court directed a verdict for the defendant. On appeal the decision of the lower court was affirmed. *Scott v. Ewing Dairy*, 317 S.W. 2d 477 (Ky., 1958).

The reviewing court based its decision on the idea that dry ice is not an inherently dangerous substance to children; that the use plaintiff put the product to was unusual;[2] and, that plaintiff did not offer proof of any custom of children to use dry ice for explosive purposes.[3] Therefore, the

[1] "Dry ice is Carbon Dioxide, or CO_2 in solid form. At ordinary temperature it is in a gaseous state. By applying pressure, it may be liquified and, in turn, solidified, whence comes the product known by the trade name 'Dry Ice.' It has a temperature of 110 degrees Fahrenheit, below zero. At normal temperatures dry ice changes from a solid to a gas rapidly and, increasingly so when placed in water and agitated. In the transition from solid to gas, its volume increases *500 times*, and, when confined, as in a bottle, the pressure exerted naturally increases, and, if the container cannot withstand the expansion, it must burst. Because of its low temperature dry ice will cause frostbite if part of the body is exposed to it for any length of time." New York Eskimo Pie Corp. v. Rataj, 73 F.2d 184, 185, C.A.3rd, (1934) (emphasis added).

[2] Cf., that dry ice is used commercially for an explosive in blasting operations, New York Eskimo Pie Corp. v. Rataj, and Tidwell v. Kay's of Nashville, Inc., cited in the instant case and in the text following.

[3] Cf., on customs of children, Powers v. Harlow, 53 Mich. 507, 19 N.W. 257, (1884), which has been cited as controlling in the substantial majority of states, and has never been overruled. This case held, at page 508, "Children, wherever they go, must be expected to act on childish instincts and impulses; and others who are chargeable with a duty of care and caution toward them must calculate upon this and take precautions accordingly."

defendant dairy company was not charged with foreseeability that children playing with the dry ice might be injured by an explosion. Further, the court stated that it would not take judicial notice of the fact that children know of and are attracted by the explosive qualities of dry ice.[4]

The decision in the instant case stands in direct opposition to two prior decisions involving injuries to children caused by an explosion resulting from dry ice being confined in a bottle, partially filled with liquid. In *New York Eskimo Pie Corp. v. Rataj*,[5] an employee of the defendant, in the course of delivering defendant's ice cream products, threw a bag containing dry ice into a street where children were playing nearby. On seeing the bag and noticing the vapor, one of the children picked up the bag and removed the ice. Plaintiff's sister put the ice into a citrate of magnesia bottle which had water in it, put the top on the bottle and began to shake it. Plaintiff, Josephine Rataj, told her sister to throw the bottle away. This the child would not do. Consequently Josephine forcibly took the bottle away from her sister, which exploded while in her hands causing substantial and serious injury. In deciding for plaintiff, the circuit court charged the defendant with knowledge of the explosive character of dry ice, as well as a knowledge that its extremely low temperature will cause frostbite. Since defendant knew of the dangerous qualities of dry ice, and that it could cause harm, the injury was such that the defendant should have foreseen it as the natural and probable consequences of its acts. The *Rataj* case was cited as direct authority by the court in deciding *Tidwell v. Kay's of Nashville, Inc.*[6]

In the *Tidwell* case, an employee of the defendant corporation gave dry ice to two ten year old boys who wanted to play with it. As in the *Rataj* and *Scott* cases, the boys put the ice in a bottle, poured in water, capped the bottle and an explosion occurred causing severe injury to the plaintiff. The court said that giving the ice to the boys was a negligent act; that dry ice was a dangerous product; and that the resultant injury was a probability and not a chance possibility.

In the words of Judge Davis in the *Rataj* case, on foreseeability, the court said:

[4] Cf., on judicial notice, Alldread v. Mills, 211 Ark. 99, 199 S.W.2d 571, (1947), which held that judicial notice should be taken of the unquestioned laws of nature, mathematics, mechanics and physics; Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 203 P.2d 522, (1949), and Roper v. Dad's Root Beer Co., 336 Ill. App. 91, 82 N.E.2d 815, (1948), where judicial notice was taken that a glass bottle filled with liquid under extreme pressure will explode; and Evinger v. Thompson, 364 Mo. 658, 265 S.W.2d 726, (1954), holding that judicial notice would be taken that contact with many chemicals can produce harmful results to persons.

[5] Authority cited supra, note 1.

[6] 194 Tenn. 205, 250 S.W.2d 75 (1952).

That does not mean that in this case it [defendant] must have been able to anticipate the exact details from the time of its negligent act to the injury of the child by the explosion.[7]

Other courts, in dealing with dangerous instrumentalities, have held that danger involves a risk of harm due to the nature of the instrumentality and the fact that there is a probability that some damage will result from the handling of, or exposure to the substance. If there is probability of serious harm such that ordinary, reasonable men would take precautions to avoid injury, failure to take the precautionary measures is negligence.[8] A tortfeasor is liable for harm inflicted on another person within the "zone of danger," resulting from an act which a reasonably prudent man under the circumstances could foresee as the cause of some harm, and which act is in fact a definite and causative factor of the harm.[9] In the *Rataj* and Tidwell cases it was found that a reasonably prudent man should have anticipated harm resulting from the handling of dry ice by a child, thus, liability was imposed for the resultant damage. The *Scott* case, though admitting that there was great possibility that the children would suffer severe burns from handling the dry ice, would not hold that the children's act of bottling the substance was foreseeable. Since the defendant has a duty of care to prevent persons from being burned by dry ice, it would seem to follow that the duty of care should be extended to cover damage resulting from the explosive qualities of the material, even if the actual injury was held to be unforeseeable. The test of foreseeability, as part of the basis for tort liability, ceases to be applicable where there has been a finding that a duty of care was violated.[10] The act of the children in bottling the ice cannot be said to be an intervening act that would break the chain of causation.[11] If the defendant alleged a lack of knowledge that

[7] Cf., that forseeable harm need not be the same as the actual injury, the following cases, all of which involved situations where some defect or default of the defendant led to rather surprising consequences. Payne v. City of New York, 277 N.Y. 393, 14 N.E.2d 449 (1938); Smith v. Peerless Glass Co., 259 N.Y. 292, 181 N.E. 576 (1932); Parnell v. Holland Furnace Co., 260 N.Y. 604, 184 N.E. 112 (1932); Rosebrock v. General Electric Co., 236 N.Y. 227, 140 N.E. 571 (1923); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Hill v. Windsor, 118 Mass. 251 (1875).

[8] Cf., Tullgren v. Amoskeag Mfg. Co., 82 N.H. 268, 133 A. 4 (1926).

[9] Mahoney v. Beatman, 110 Conn. 184, 147 A. 762 (1929); Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928); Ferril v. Ellis, 120 Iowa 614, 105 N.W. 614 (1906); Williams v. North Wisconsin Lumber Co., 124 Wis. 328, 102 N.W. 589, (1905); Wood v. Pennsylvania R.R., 177 Pa. 306, 35 A. 699 (1896); Bunting v. Hogsett, 139 Pa. 363, 21 A. 31 (1891); Hoag and Alger v. Lake Shore R.R., 85 Pa. 293 (1877).

[10] Smith v. Peerless Glass Co., and Hill v. Windsor, supra note 7.

[11] Cf., Marthis v. Granger Brick and Tile Co., 85 Wash. 634, 149 P. 3 (1915); Bunyan v. American Glycerin Co., 230 Ill. App. 351 (1923); Tulsa v. McIntosh, 90 Okla. 50, 215 P. 624 (1923), where the courts have inferred that in cases of dangerous instrumentalities they will not look too closely for intervening causes.

dry ice would explode, the lack of such knowledge will not preclude a finding of negligence.[12] The *Rataj* and *Tidwell* cases, in holding that dry ice is a dangerous substance, appear to follow more closely the standards of tort liability and negligence evidenced by numerous American decisions.

[12] LeJeune v. General Petroleum Co., 13 P.2d 1057 (1932); Easler v. Downie Amusement Co., 125 Me. 334, 133 Atl. 905 (1926).

REAL PROPERTY—WIDOW NOT ENTITLED TO CONTRIBUTION FOR MORTGAGE OF PROPERTY HELD BY THE ENTIRETIES

Aaron Keil and his wife Ada Keil acquired property as tenants by the entirety in 1954. In April 1956 Aaron and his wife borrowed $8,000 to be used to improve the land. This debt was evidenced by a joint bond payable in five years and secured by a mortgage on the property. Aaron died in August 1956 and at the time of his death nothing had been paid on the debt. The estate proceedings took place in the Orphan's Court of New Castle County, Delaware. The widow contended that (1) the will evidenced an intention to exonerate her from all liability on the debt; and (2) if not entitled to be fully exonerated, she had a right to contribution for one half the debt. The widow was denied relief on both grounds, and appealed to the Supreme Court of Delaware, renewing both contentions. The Supreme Court also denied the first contention but affirmed the right of the widow to contribution for one half of the $8,000 debt. *In re Keil's Estate*, 145 A 2d 563 (Del., 1958).

The question before the court was: If a husband and wife jointly incur a debt which is secured by a mortgage on property held by them as tenants by the entirety, and one spouse dies, does the surviving spouse have a right of contribution of one half the common debt from the estate of the decedent?

The Supreme Court of Delaware, in settling this issue for the first time in its history, passed upon a question of which there is much disagreement in the various courts of this country. The basis for reversing the lower court's decision was that the right of contribution exists independently of the interest each tenant has in the property. Therefore the survivorship feature of tenancy by the entirety in no way affects the right of contribution of one half the common debt claimed by the surviving spouse. The leading case in support of this position is *Cunningham v. Cunningham*,[1] which involved the right of contribution by the widow out of the deceased husband's estate for a proportionate share of a purchase money mortgage indebtedness. The court upheld the widow's claim, saying that

[1] 158 Md. 372, 148 Atl. 444 (1930).