A DAY AT THE BEACH©

It was one of those "dog days" of the summer of 2009 in the Buena Bella Valley. Temperatures had been in the low 100 degrees Fahrenheit for the last two weeks. Jitsy Jetson was at the end of her rope coping with the heat. Over the hill at the local Gould State Beaches, the daily temperatures for the last two weeks had been at least 20 degrees cooler than in the Valley. Jetson decided to spend the day at Veronica Beach to enjoy the cooler weather and impress other beachgoers with her new slim figure. For the last several months Jetson had been eating healthy and exercising daily. In addition, she was eager to show off a stunning yellow polka dot bikini by Aquacleara and a new pair of Sandpiper designer flip-flops that she had just purchased from the Sandpiper Footwear outlet store during a recent visit to the local mall.

The weather at the beach was just as expected. The skies were a fantastic shade of periwinkle blue. There was not a trace of pollution in the air; the beach was free of debris; and the coli form content of the ocean water was within acceptable levels. As she lay on the sand, absorbing the warmth of the sun, she could smell the wonderful aromas of freshly made buttered popcorn and cotton candy wafting from the nearby concessions on Veronica Pier. Jetson could not help but think that life was good here in paradise.

At day's end Jetson was on an emotional high. She was feeling as good as she had felt in months. She decided to head for home. Jetson had driven to the beach in her new Nimbus 2009 WMB-X4 convertible sports car. Now, with the top down, Jetson drove along the coast highway on her way to the canyon road that would take her over the hills and back into the Valley. While waiting at a stoplight, Jetson was conscious of the stares from occupants of the other vehicles also waiting at the stoplight. Flattered by the stares and hoping to impress all who could see, she stepped on the accelerator and started to drive through the intersection at normal speed. However, as she stepped on the gas pedal, one of the flip-flops Jetson was wearing slipped off her foot and became lodged under the pedal. The automobile continued to accelerate but at a very rapid rate. Within moments, Jetson lost control of the vehicle. In the process the X4 crossed the double yellow line and into oncoming traffic colliding head-on into a car driven by Patrick McDuff.

As a consequence of the accident McDuff suffered a spinal cord injury resulting in his becoming a quadriplegic. McDuff's medical condition is such that he is unable to ever work again. At the time of his injury: McDuff was 53 years of age; his life expectancy was 77 years of age; he would have been expected to retire at the age of 65; he was an employee of the United States Postal Service covered by a union contract projecting his wages to rise by 3% per year in real terms plus an annual Cost of Living Adjustment (COLA) equal to the rate of inflation; and his then current annual gross salary was $48,000.

McDuff and Jetson have each retained legal counsel to represent them in resolving liability issues that have arisen as a result of the unfortunate circumstances in this case. McDuff has retained Ms. Nicole Hahn and Jetson has retained Mr. Ed Loafer.

Required

In preparing for a meeting with McDuff, Ms. Hahn has asked your group to evaluate McDuff's case. She is particularly interested in the strengths and weaknesses that exist in any lawsuit(s) that might be filed on behalf of McDuff. Ms. Hahn is also interested in the relevance of the information contained in Table 1 and Table 2 below.

Also, in preparing for the meeting with McDuff and Ms. Hahn, your team may want to review the following: the Viewspeak article and the Fogel, Wayans and O'Hare cases contained in the "A Day at the Beach - Case Library;" business law LDC concepts 2, 4, and 9; financial accounting LDC concept 7, macroeconomics LDC concept 1; statistics LDC concepts 1, 4, and 7.

Table 1: Government Survey Data

Year	Difference in Accident Rates = Flip Flops – Other Footwear
1	4%
2	5%
3	3%
4	4%
5	6%
6	5%
7	7%
8	8%
9	7%
10	9%

Table 2: Year End Consumer Price Index (CPI) for the Years 1999 to 2008

Year	Year End CPI Value
1999	148.2
2000	152.4
2001	156.6
2002	162.5
2003	166.2
2004	169.8
2005	176.0
2006	183.1
2007	192.6
2008	199.0

A DAY AT THE BEACH LIBRARY

MAGAZINE ARTICLE

FASHION

The Flip-Flop Craze

Viewspeak
January 2009

Today, it seems that everyone is wearing flip-flops. Once consigned to the beach or the locker room, in the last few years flip-flops seem to have become the footwear of choice for an entire generation. Flip-flops have moved from merely being comfortable footwear for the beach during the summer months to everyday wear. They have evolved from simple $5 dime and drugstore apparel to $500 designer "knock-ups;" from no-name to big name designers, including: Havaianas, Beverly Feldman, Prada, Sandpiper, Ferragamo, and Fontz de Leon; and from strictly apparel for play to being acceptable at work and formal social settings. "There's a real craze for flip-flops right now," says Ron Walko, vice president of marketing at Sandpiper Footwear, "our sales have tripled in the last two years."

Despite the increased popularity and apparent widespread acceptance of this foot fashion, some are expressing health and safety concerns stemming from wearing this type of footwear. From a health perspective, podiatrists are concerned because of the lack of support to the bottom of the feet when wearing flip-flops. Because of the absence of support the foot lacks stability, leading to sprains, breaks and falls. In addition, the thin soles provide no shock-absorbing qualities to feet and legs placing strain on the arch, ankle, hips and lower back. Podiatrists suggest that flip-flops should be worn only for short periods of time and not as primary footwear.

In a recent study presented at the annual meeting of the American College of Sports Medicine, researchers at Auburn University found that flip-flops actually alter the way wearers walk. That change in gait can cause persistent foot and ankle pain. Researchers also found that flip-flop wearers take shorter steps, resulting in more stress on the body because you have to move more to go the same distance as people wearing other kinds of shoes. According to Dr. Anthony Sanchez of the University of Texas, "that leads to a higher risk of muscle and joint pain in the legs, along with tenderness in your toes due to the constant pressure due to "scrunching" your toes tightly to keep the flip-flop on your foot."

Flip-flops may also not be the best choice for safety reasons. Regular wearers of flip-flops often find that they are awkward footwear for climbing steps, running, or doing anything else in which the use of one's feet are involved. Last summer, a woman wearing flip-flops while shopping at the Mall of America in Minneapolis single-handedly shut down an escalator when one of her flip-flops became lodged in a moving step. A man in Atlanta crashed into a storefront window when he lost control of his bicycle while wearing flip-flops. One of the flip-flops he was wearing had slipped off his foot and jammed up the bike chain.

Automobile safety experts warn that driving in loose-fitting footwear is dangerous because the sole can easily get caught under the brake, clutch or accelerator pedal resulting in a fatal accident. A poll by the insurer Eastwich Union appears to confirm these warnings. The survey of 1000 drivers found that a quarter of the drivers indicated that they regularly drive wearing flip-flops. In addition, nearly three quarters of the motorists surveyed admitted that they found it difficult to drive when wearing flip-flops. "Being in control of your car when driving is essential. However, many of us are ignoring safety advice when it comes to the shoes we wear when driving," said Richard Ponce, motor marketing manager at Eastwich Union. He added that "footwear such as flip-flops are dangerous as the sole can get caught under a pedal during a simple gear change, when applying the brake or accelerator, or even when simply moving the foot from a pedal to another. The absence of ankle support can lead to the foot slipping off the pedal altogether." Wearing shoes suitable for driving, without question, is an important part of safe driving.

Flip-flops may be the signature statement of a new generation, but they may not be sensible shoes for all occasions. Dr. Sanchez summed it up best when he added: "Just because something's fashionable doesn't mean it's practical or safe for that matter.

FERN A. FOGEL, Appellee-Plaintiff, vs. GET 'N GO MARKETS, INC., Appellant-Defendant

COURT OF APPEALS OF GOULD, FIRST DISTRICT70 Gou.App.3d 1048, 23 P.3d 1480
July 4, 2006, Decided

PRIOR HISTORY: APPEAL FROM THE VANDENBURGH SUPERIOR COURT. The Honorable Minerva McGonagal, Judge.

DISPOSITION: Affirmed.

JUDGES: RAVENCLAW, Judge. HUFFLEPUFF, J., and SLYTHERIN, J., concur.

OPINION BY: RAVENCLAW

OPINION:

Get 'n Go Markets, Inc. appeals the trial court judge's denial of its motion for a directed verdict and motion for judgment n.o.v. We affirm.

Issues

The dispositive issue to our review of this appeal is whether Get 'n Go Markets, Inc. owed a duty to Fogel and if so, whether that duty was breached.

Facts

On the morning of April 1, 2000, Fern A. Fogel received extensive lacerations as the result of walking into and through a large glass panel which formed the front of the building in which Get 'n Go Markets, Inc., operated a supermarket. Fogel sued Get 'n Go Markets for damages in the Gould state court where the cause was tried and a jury verdict rendered in favor of plaintiff. Defendant filed a motion for a directed verdict at the close of all the evidence, and also filed a motion for judgment n.o.v.

At this point and before proceeding to consideration of the issues presented by this appeal, we indulge in a resume of the pertinent facts. Get 'n Go Market is a self-service grocery store in Johnson County, Gould. The building faces east, and the front or east portion thereof is constructed of four transparent plate glass panels, each about ten feet square. The two center panels were in fact sliding doors but were no different in appearance from the two stationary panels. The sliding doors were closed on the morning in question. The only other front entrance to the store was through a door located in the north portion of the front of the building. This door was perpendicular to the glass front and was behind a brick wall which ran parallel to the front of the store and extended out in front of the door approximately one foot. A soft drink vending machine was also in front of the north door, and the wall and vending machine caused the north door to be hidden from the view of a person approaching the front of the building, until the person was approximately six feet from the glass front. There were no signs or markings of any kind on the glass panels on the morning of the litigated occurrence and the glass was spotlessly clean. Plaintiff stopped her automobile with the front facing the vending machine. She got out of the automobile eighteen or twenty feet from the front of the store and proceeded toward the building intending to enter the store not to make a purchase but to use its restroom facilities. From the testimony, the jury was warranted in finding that as plaintiff approached the store she was walking at a normal gait and with her head up; that although she was looking ahead, she did not see the glass or its bordering metal frame and saw no reflections from lights or identifying marks of any kind on the glass. She did not realize until she crashed through the glass, that what she thought was the entrance to the store was in fact a solid plate glass panel. Defendant assets that plaintiff failed to make a submissible case and that the court erred in failing to grant its motion for a directed verdict and motion for judgment n.o.v.

In order to prevail in a claim for negligence, the plaintiff must establish several points, referred to in the law as a prima facie case. The prima facie case for negligence requires that the plaintiff prove: (1) that a duty was owed to the plaintiff; (2) that defendant breached that duty; (3) that the breach actually (in fact) and legally (proximately) caused; (4) plaintiff to suffer damage.

Defendant contends that under all of the evidence favorable to plaintiff and giving to plaintiff the benefit of all reasonable inferences, it conclusively appears that defendant did not owe a duty to plaintiff since the evidence is clear that the plaintiff was merely on the premises for the sole purpose of using the defendant's restroom facilities and not to purchase any item(s) from the store. In addition, defendant contends that a sign was posted on the door of both the men's and women's restroom conspicuously stating "RESTROOM FACILITIES RESTRICTED TO USE BY PATRONS ONLY." The defendant further contends that if a duty was owed, defendant did not breach that duty; that defendant was not guilty of any actionable negligence, and the issue of liability should not have been presented to the jury.

A. DUTY

We first address the argument that no duty was owed to the plaintiff. In our state the question of the existence of a duty is one for the court to determine. In making that determination Gould courts analyze three factors in determining whether to impose a duty at common law: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns. The existence of any one of these factors is sufficient for a court to impose a duty. Northern Gould Public Service Co. v. Patil, 1 Gou.3d 462, 466 (Gou. 2000). We consider each of these factors in turn.

1. THE RELATIONSHIP BETWEEN THE PLAINTIFF AND DEFENDANT

The defendant contends that there was no relationship between it and the plaintiff in as much as the plaintiff was not a customer nor prospective customer but was a trespasser. The evidence is undisputed that the sole purpose for plaintiff's intent to enter upon defendant's premises was to use the restroom facilities.

A duty of reasonable care is "not, of course, owed to the world at large," but generally arises out of a relationship between the parties." Seamus v. Lavender, 104 Gou.2d 929, 931 (Gou. 1991). Fogel was not a customer of Get 'n Go and there is no direct contractual relationship between Fogel and Get 'n Go. However, the absence of a direct contractual relationship does not mean that no duty exists.

2. THE REASONABLE FORESEEABILITY OF HARM TO THE PLAINTIFF

The most important of these considerations in establishing duty is foreseeability of harm to the plaintiff. As a general principal, a "defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." (citation omitted). In the instant case patrons of the store are clearly foreseeable. In addition, defendants posting of the sign on the restroom doors restricting use to "PATRONS ONLY" clearly demonstrates that plaintiff's presence on the property was foreseeable. Otherwise, what purpose of the defendant is to be served by the posting of such a notice?

The designation of an individual as a business "invitee" or "licensee" or "trespasser" was abolished by our Supreme Court in the case of Rowling v. Christianson, 120 Gou. 2d 180 (1998). Thus, the existence or non-existence of the duty imposed on the proprietor of a business establishment toward individuals who may come upon his premises is not contingent on whether the individual is classified as an invitee, licensee or trespasser. Following *Rowling*, a business proprietor is under a duty to use due care to keep in a reasonably safe condition the premises where individuals may be expected to come and go; if there is a dangerous place on the premises, the business owner must safeguard those who come thereon by

warning them of the condition and risk involved. "The true ground of liability is the proprietor's superior knowledge of the dangerous condition over individuals who may come upon the property and his failure to give warning of the risk." Id. at 187.

3. PUBLIC POLICY CONCERNS

There are numerous points that are considered in the area of public policy concerns. Among the points are: the moral blame attached to the defendant's conduct; the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, the policy of preventing future harm; and the availability, cost and prevalence of insurance for the risk involved.

Although a business owner is not an insurer against all accidents that may befall him upon the premises, in the instant case we believe that the burden placed upon the defendant by imposing a duty to exercise care is slight. In addition, we believe that the policy of preventing future harm and the availability of insurance to cover the risk involved in this case require a finding that Get 'n Go owed a duty to Fogel. The trial court was not in error in instructing the jury as to that point.

B. BREACH OF DUTY

Defendant argues that even if this court were to find that defendant owed a duty to Fogel it nevertheless is not liable for Fogel's injuries because it did not breach that duty.

Courts approach the question of breach of duty in several ways. However, these various approaches generally attempt to measure three things: (1) the probability of the accident's occurring; (2) the magnitude or gravity of the injury suffered by the plaintiff if an accident occurs; and (3) the burden placed on the defendant to take adequate precautions to avert the accident. Judge Learned Hand, in the case of United States v. Carroll Towing Co., 159 F.2d 169 (Second Circuit, 1947), attempted to give content to a relatively simple concept of determining whether a defendant had breach a duty - failed to exercise ordinary care- owed to the plaintiff. Hand's attempt to explain the notion of ordinary care using these three criteria was stated "in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL." In economic terms multiplying the cost of an accident if it occurs by the probability of its occurrence provides a measure of the benefit than can be anticipated from incurring the costs necessary to prevent the accident (the benefit of not having to pay out tort damages outweigh the costs incurred to prevent the accident from occurring). The cost of prevention is what Hand meant by the "burden of adequate precautions" against the accident. It may be the cost of making the activity safer, or the benefit forgone by curtailing or eliminating the activity. If the cost of safety measures or curtailment - whichever cost is lower - exceeds the benefit in accident avoidance to be gained by incurring that cost, an enterprise would be better off, in economic terms, to forgo accident prevention. A rule making the enterprise liable for the accidents that occur in such cases cannot be justified on the ground that it will induce the enterprise to increase the safety of its operations. When the cost of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability. If, on the other hand, the benefits in accident avoidance exceed the costs of prevention, the enterprise is better off if those costs are incurred and the accident averted, and thus the enterprise is made liable, in the expectation that self-interest will lead it to adopt the precautions in order to avoid a greater cost in tort judgments.

It is important to note that Hand's evaluation of the breach of duty in algebraic terms was not intended to convey the notion that the three factors are easily quantifiable and produce precise results. What can be said about the process is this: as the probability for injury and or the severity of the injury increases, the burden imposed or the cost that must be incurred by the defendant, to avoid being deemed as having breached a duty owed to the plaintiff, also increases.

1. PROBABILITY OF THE ACCIDENT OCCURRING

Apparently, the Gould Supreme Court has not had occasion to deal with a plate glass case, but other jurisdictions have. Cases where plaintiff recovered for injuries resulting from contact with plate glass walls or doors are numerous (citations omitted). In addition, the question of liability for injuries resulting from contact with plate glass walls or doors is the subject of an Annotation in the American Law Reports (citation omitted).

Here, plaintiff, a citizen of our neighboring state of Grace returning home from a vacation, was a complete stranger to the defendant's premises and had never seen the market before. The invisibility of transparent glass, by its very nature, is likely to deceive the most prudent person, particularly where, as here, the construction was designed to give the market an open front appearance. Furthermore, as noted the north entrance door was obscured from view by the wall and vending machine and was not readily discernible until one approaching the glass front was within six feet thereof. The jury was not required to speculate as to the dangerous and unsafe condition created by the glass front. There was evidence to that effect. A former employee of defendant testified that during a period of eight months he observed four or five persons come in contact with the glass front and 'bounce off'. A safety engineer testified it was a hazardous arrangement, and detailed the methods that could have been employed to correct the lack of visibility of the glass.

2. THE MAGNITUDE OF INJURY

There is little doubt that one may suffer injury from accidental contact with a plate glass wall or door. The extent of that injury may certainly vary in range from no injury at all to slight to moderate to severe life threatening injury and even death. Our prior reference to cases where plaintiff recovered for injuries resulting from contact with plate glass walls or doors cases or recovery and the American Law Reports on the subject confirm this belief.

3. THE BURDEN OF ADEQUATE PRECAUTIONS

To be sure, transparent plate glass is recognized as a suitable and safe material for use in construction of buildings, indeed, it is common knowledge that such glass is used rather extensively in commercial buildings. However, it seems to us that the number of reported cases, some of which are cited infra, involving personal injuries from bodily contact with transparent glass doors and walls is some indication that with the advantages that may be derived from such construction are concomitant risks which the proprietor must assume. However, in the present case, the danger incident to the use of transparent plate glass may be significantly lessened by the placement of a sticker on the glass that would alert individuals to the presence of the glass. Interference with the architectural aesthetics of construction using transparent plate glass is so slight that it is outweighed by the danger to be anticipated from a failure to use it.

Thus, given the relatively high probability of injury and the significant severity of that injury when compared to the nominal cost to the defendant of adequate precautions to prevent the injury, we find no error in the jury's conclusion that Get 'n Go breached the duty it owed to Fogel.

Without further discussion, we conclude and hold that there was substantial evidence from which the jury could find: (1) that the glass front constituted a dangerous and unsafe condition; (2) that plaintiff was exercising ordinary care for his own safety; (3) that there was a duty on the part of defendant to warn its patrons of the condition and (4) that defendant breached its duty.

The judgment is affirmed.

GLENN WAYANS, Plaintiff/Appellee v. ALBERT LANDON, Defendant, and BLACK & DECKER CORPORATION, Defendant/Appellant

Supreme Court of the State of Gould
35 Gou.3d. 1492, 895 P.2d 718 (1995)

May 1, 1995, Decided.

HUNTLEY, Associate Justice.

This is an appeal from the Order of the Superior Court of Cronkite County of October 10, 1994 denying the defendant Black & Decker Corporation's motions for judgment notwithstanding the verdict and for a new trial.

I. Facts

The critical facts are not in dispute. On March 15, 1994, Albert Landon purchased a new Lawn Wizard lawn mower from Sears, Roebuck & Co. Sears, Roebuck is not a party to this dispute. The mower was manufactured by Black & Decker Corporation, a manufacturer of consumer power tools, hardware, and home improvement products. On the morning of March 21, 1995, Landon was using the mower to mow the front lawn of his home as Wayans was walking on the sidewalk abutting Landon's front lawn. Suddenly, while he was passing approximately 15 feet from Wayans, Landon heard a "click" sound and turned to see Wayans cry out and put his hand over his eye. Landon immediately called for emergency medical assistance. Subsequently, Landon and the emergency personnel discovered that Wayans had been struck in the eye by a small plastic toy soldier that belonged to Landon's son. Apparently, the toy had been left on the lawn by Landon's son and had not been removed before Landon began mowing the lawn. When the mower passed over the toy, it was picked up and ejected it at high velocity, blinding Wayans' right eye. The parties have stipulated that there was no warning as to the risk of such an injury included in the owner's manual.

Wayans filed suit against Landon and Black & Decker, asserting a claim for negligence against Landon and a claim in strict tort liability against Black & Decker, asserting that the mower was unreasonably dangerous on the basis that Black & Decker failed to provide warnings to purchasers as to the risk of injury from small objects that might be ejected from under the mower. Following trial, the jury returned a verdict in favor of Wayans and against Landon and Black & Decker. Defendant Black & Decker filed motions for judgment notwithstanding the verdict and for a new trial. Judge Edward Murrow issued an order denying those motion and defendant appealed. The Court of Appeals affirmed and we granted review upon defendant's petition.

As to Black & Decker, at trial plaintiff asserted that the mower was unreasonably dangerous on the grounds that defendant failed to warn that it was capable of randomly discharging foreign objects. The defendant responded by presenting evidence, and arguing, that the conduct of co-defendant Adam Landon constituted the sole cause of plaintiff's injury. The defendant also presented expert opinion evidence that the failure to warn of a readily observable danger was not unreasonably dangerous. The jury entered a verdict in favor the plaintiff in the amount of $1.1 million. Both defendants filed motions for a judgment notwithstanding the verdict and for a new trial. Judge Murrow issued orders denying the motions of both defendants. Defendant Black & Decker appealed to the Court of Appeals, which affirmed, and we granted review upon petition.

II. Applicable Law

Plaintiff's claim is grounded in strict tort liability. As distinguished from negligence, which involves a failure to exercise reasonable care, strict liability does not require proof of intent, carelessness, recklessness, or any other fault. In the context of strict liability claims involving injuries from defective products, we have adopted section 402A of the Restatement (Second) of Torts, which states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby

caused to the ultimate user or consumer, or to his property, if

> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The unreasonable dangerous condition must have caused the plaintiff's injury or damage. A seller's liability for personal injury or property damage caused by defective products extends not only to the "ultimate user or consumer," but also to bystanders and others who are injured by the product. *See* William L. Prosser, *The Fall of the Citadel,* 50 MINN. L. REV. 791 (1966).

Unlike negligence, strict liability does not require proof of a breach of the duty of care. Among the justifications for imposing strict liability without proof of negligence on the manufacturers and sellers of products is that consumers are less able to inspect products and determine their safety. Thus, "public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained ... ." Restatement (Second) of Torts § 402A, cmt. c (1965). The cost of injuries caused by defective products is imposed on manufacturers and sellers since they can spread the cost of insurance on to all consumers in the prices charged for their products. Therefore, strict liability for defective products may result even though the seller has exercised all possible care in the preparation and sale of his product ... ." Restatement (Second) of Torts § 402(A)(2)(a) (1965).

For an injured plaintiff to recover in strict liability, the injury must result from a defective condition of the product, the condition must be unreasonably dangerous, and the condition must have existed at the time the product left the manufacturer's control. A product is defective if it contains some flaw or deficiency that renders it unreasonably dangerous. The defect may arise from faulty manufacturing or design of the product, or through a failure to warn of a potential danger associated with the product.

A manufacturing defect occurs when a product is imperfectly built or assembled. Examples include a bottle of soda pop containing a shard of glass or an electrical saw with missing bolts. A design defect results when an entire product line contains some harmful imperfection or shortcoming making those products hazardous in their normal use. For instance, an automobile that is prone to catch fire on impact or a farm tractor that easily tips over on uneven ground.

Finally, a failure to warn defect arises where the manufacturer has failed to alert the user of a risk of potential harm in using the product where the danger is not reasonably observable by the user. For example, a failure to warn of the potential side effects of a drug or a failure to warn that a cleaning product might cause severe skin irritation.

The purpose of a warning is to draw a reasonably prudent person's attention to a danger in using a product and how to avoid it. Strict liability attaches "only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Restatement (Second) of Torts § 402A, cmt. g (1965). Whether a failure to warn amounts to an unreasonably dangerous defect turns on whether the product is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Restatement (Second) of Torts § 402A, cmt. i (1965). Accordingly, we must consider the reasonable expectations of the ordinary consumer as to the danger involved in using the product in the absence of adequate

warnings for safe use. With these principles in mind, we turn to the case at hand.

III. Analysis

The defendant contends that it was not obligated to furnish a warning to the plaintiff of the hazard to himself or others from passing the mower over small foreign objects while in use. In support of this assertion, the defendant argues that it offered for sale an attachable refuse bag to collect grass cuttings during operation of the mower, and that this, combined with the easily observable fact that grass is cut by a high speed rotary blade and that the cuttings are discharged from side of the mower was sufficient to warn of the danger. We note that the bag was not sold together with the mower and plaintiff did not purchase it as a separate item.

In making this argument, defendant seeks to subtly shift the blame to the plaintiff for failure to observe the obvious and reduce the risk by purchasing and using the refuse bag. We disagree. As the manufacturer, Black & Decker was in the best position to test and ascertain the various hazards posed in using its product. Indeed, its own witnesses at trial admitted that they were aware that the mower could pick up and expel stones, twigs, or other small objects, at high velocity while in operation. Additional evidence demonstrated that the attachment of a refuse bag to the mower served the dual purposes of collecting grass cuttings and preventing grass and other matter from being discharged from under the mower.

Black & Decker should have alerted the users of its product of the danger of which it was aware. Its failure to do so was a defect that made use of the product potentially dangerous to the user as well as bystanders. The purpose of strict liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. The plaintiff, a passer-by innocent to the risk of severe harm, is such a person.

IV. Conclusion

We find no error in the trial court's denial of defendant's motions. Accordingly, the judgment is affirmed.

Dissenting Opinion

BRINKLEY, Chief Justice, dissenting.

Failure to warn of known or knowable dangers in a product renders it unreasonably dangerous. *See* Restatement (Second) of Torts 402A cmt. j (duty to warn where the seller "has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the ... danger"). Nevertheless, strict liability is not absolute liability, and a manufacturer is not an absolute insurer who is responsible for all harm that may occur in using the product. The more difficult issue is where to draw line between compensating injured consumers and users of defective products and saddling manufacturers and sellers with the costly burden of being absolute insurers of the safety of their products. This is where the manufacturer's knowledge of the danger comes into play. Holding a manufacturer liable for failure to warn of a danger of which it was impossible to know or detect would transform the manufacturer into an insurer of the product, and impose absolute rather than strict liability. As such, we must determine whether the manufacturer had actual or constructive knowledge of the danger, in light of product testing and scientific, technological, and other information available when the product was placed on the market. A manufacturer need not provide a warning if the state of the art or knowledge at the time the product was distributed did not indicate that a warning was necessary.

On the other hand, a manufacturer is under no responsibility to warn of dangers that are generally known or obvious. A manufacturer cannot be held liable for a failure to warn of dangers that are of common knowledge to the general public. In other words, there is no liability for failure to warn when the user of the product is or should already be aware of the danger.

This critical point, I believe, is what the jury and the majority overlooked. The plaintiff in

this case knew or should have known that passing a motorized lawn mower over a stone or other small foreign object would be likely to propel it at high velocity from under the mower. This is particularly important where, as in this case, the plaintiff was operating the mower without a bag attached to collect grass cuttings. No specialized scientific or technical knowledge is required to understand this; it is a matter of common sense and is readily observable while operating a motorized lawn mower. The hazard was not hidden.

When a danger is obvious and known to the user of the product, the failure to warn of such a danger is not a defect that renders the product unreasonably dangerous. That is precisely the reason why the defendant should not be held strictly liable for the unfortunate injuries suffered by the plaintiff. In its understandable desire to compensate the plaintiff for a terrible injury, the jury reached into the deep pockets of Black & Decker. However, the plaintiff should be limited to a recovery on his negligence claim against the co-defendant operator of the mower. For these reasons, I respectfully dissent.

SCARLETT O'HARE, Plaintiff and Respondent v. WILKES EXCURSION LINES, INC., Defendant and Appellant

Supreme Court of Gould
83 Gou.2d 131 (1985)

OPINION

HOFF, Associate Justice

The Delta Queen, a one-time riverboat, was converted to a Hotel and Casino and is permanently moored at a dock on the Sacrilege River. The Delta Queen is owned and operated by Wilkes Excursion Lines, Inc. (Wilkes). On March 17, 1980, Scarlett O'Hare was coming off duty as a waitress on the Delta Queen when, in getting off the boat, she fell and sustained disabling injuries. O'Hare sued Wilkes for negligence in failing to properly maintain the disembarking ramp. Wilkes was found to be negligent and O'Hare free from contributory negligence. As part of her total damage recovery, O'Hare was awarded $48,000 for loss of future wages. Wilkes appealed the trial court decision contesting only that portion of the damages awarded for loss of future wages. On appeal to the Court of Appeal, the decision of the trial court was affirmed. We grant review to resolve matters of confusion regarding the estimation of lost future wages.

The facts relevant to the determination of the loss of future wages are not in dispute. At the time of her injury, O'Hare was 58 years of age and had been in the employ of Wilkes for three years and expected to retire at age 65. Her salary, including tips, during the time she was employed by Wilkes was $4,000 per year. She received no health or retirement benefits from Wilkes. Her life expectancy is 75 years of age. At the time of the trial, O'Hare was 60 years old. Lastly, as a result of her injuries, O'Hare has been deemed to be permanently disabled and unable to work in the future.

According to the trial record, the calculation of lost future earnings was based upon several factors. First, at the time of trial O'Hare was 60 years of age and was expected to live until the age of 75. The trial court judge determined, therefore that she was entitled to 15 years of lost wages or $60,000 (based on her $4,000 per year salary at the time of her injury). The $60,000 figure was reduced to a present value of $48,000 using a discount rate of 3%.

There appears to be some confusion at the trial court level relating to the calculation of lost future earnings. We take this opportunity to discuss this matter in an attempt to provide some guidelines to be followed by the courts in the future.

In a personal injury action the plaintiff is entitled to be compensated for monetary losses and expenses which the plaintiff has incurred and is likely to incur in the future as a result of the defendant's negligence. Included in the recovery would be harm to the plaintiff's earning capacity. However, recovery requires that the plaintiff establish that the defendant caused the loss. In addition, damages for harm to one's earning capacity will not be awarded in the absence of evidence in support of the claim. See Restatement (Second) of Torts § 906 (1979). The evidence presented in support of the claim must be sufficient to establish the extent of the damages suffered and the amount of money required to adequately compensate the plaintiff. See Restatement (Second) of Torts § 912 (1979). The proof presented must establish the loss with "as much certainty as the nature of the tort and the circumstances permit." Id.

Establishing lost earnings from the time of the accrual of the cause of action to the time of judgment is generally easy. A reasonable estimation of the loss is based upon information and "historical" data that is known and requires little speculation. For example: the length of time the plaintiff has been unable to work is definite; the amount of earnings lost can be easily determined; and increases in pay that would have occurred had the plaintiff been able to work are also easy to establish.

A more difficult task is encountered when the plaintiff attempts to prove the loss of income that would have been earned in the future. Establishing a loss of future earnings

raises questions that are not easily answered. How long will it be before the plaintiff is able to return to work? If the plaintiff is totally disabled and will be unable to return to work, at what age would the plaintiff have retired had he or she been able to work? Is the plaintiff's annual wage at the time of injury the starting figure in calculating the lost stream of future income? Will this figure be increased to include other factors that might contribute to a real growth in future wages? Are factors such as the plaintiff's education, experience and background relevant? Should employer contributions to medical insurance and an annuity or pension plan be considered? Should inflation be taken into account in determining lost future earnings? If so, what is the projected rate of inflation? Should income taxes that the plaintiff would have had to pay on the future earnings had they been actually earned be subtracted from the gross amount of projected future earnings? Will the lost earnings be paid periodically or in a lump sum? If a lump-sum, should the award for future loss of earnings be reduced to the present value of the entire amount of the loss that would have been received in the future?

The starting point in the determination of the amount of future earnings that will be lost by the plaintiff is the establishment of the length of time the plaintiff will be disabled. If the plaintiff is totally disabled, the age at which the plaintiff would have retired must be determined. The next step in the process is to establish the initial amount of the plaintiff's annual salary followed by a determination as to how the annual salary is likely to change in the future. The last step is to discount the estimate to present value.

There is no dispute in the record as to O'Hare's permanent disability. Also, there is no dispute that O'Hare would have continued to work until she retired at the age of 65. At the time of trial O'Hare was 60 years old. Thus the determination of lost future earnings should have been based on a loss of future earnings for five years not 15 years. The trail court judge based the loss of future earnings on O'Hare's life expectancy of 75 years of age rather than her retirement age. This was error. The starting figure in determining the loss of future earnings is the plaintiff's annual salary at the time of injury. That figure, however, may be increased to reflect real wage growth, benefits, education, experience, collective bargaining agreements and societal forces "such as foreseeable productivity growth within the worker's industry." See, Parker v. Wheeling Steel Co., 522 F.2d 13 (1975). At trial, the plaintiff only presented evidence to establish that at the time of her injury her annual salary was $4,000. This evidence was not contested by the defendant. No other evidence was presented by the plaintiff regarding other factors that might impact her future earnings.

Once the beginning figure is established the issue that must be addressed is whether that figure will be increased based upon expected inflation. Closely tied to resolving this issue is the requirement that any estimate of lost future wages must be discounted to present value. There are at least two ways to deal with inflation in estimating lost future wages. One way is to eliminate any consideration of inflation when determining the amount of lost future wages and the discount rate that will be applied to reduce the final lump sum payment to its present value. The other approach includes expected inflation in estimating the amount of lost future wages but applies a higher discount rate (which includes an anticipated inflation rate) when reducing the lump sum payment to its present value. Both approaches will essentially yield the same result. For a more thorough discussion of the two alternatives, see Alexon v. Tritt River Towing Co., 549 F.2d 63 (1977). In prior decision we have ruled that expected inflation is to be considered in estimating the amount of lost future wages with a resulting application of a higher discount rate when reducing the lump sum payment to its present value. See, Bakkee v. Tolentino Construction Co., 73 Gou.2d 1944 (1979); Carter v. Suresh, 51 Gou.2d 273 (1970). Decisions that have been rendered at the Court of Appeals have not been consistent and have not provided clear guidance for judges presiding over cases at the trial court level. [Citations omitted]. Because of that confusion the trial court judge did not consider inflation when estimating the amount of O'Hare's lost future wages.

Following our decision in the present case, there should be no confusion as to how this matter is to be resolved in the future.

When expected inflation is used in estimating the amount of lost future wages, the question that is presented is what inflation rate will be used in the estimation? One method that can be applied to estimate the long-term inflation rate is to use interest rates on long-term riskless financial instruments like U.S. government bonds. Another method would be to use the year-to-year percentage change in the consumer price index as calculated by the Bureau of Labor Statistics. Either method is acceptable.

Had the plaintiff not been injured and continued to work, her wages would have been diminished by state and federal income taxes. Since the damages award is tax free, the estimated lost stream of income consists "ideally of after-tax wages and benefits." Coutee v. Shaygangfard Imports, 423 U.S. 1045 (1975). In determining O'Hare's lost future wages, the trial court did not reduce the gross annual salary to a net amount after deducting taxes that would have been paid on the income. This should have been done.

The last step in determining the lump-sum payment is the discounting of the lost stream of future income to present value. Acres v. Lenroot Development, Inc., 443 U.S. 526 (1979). The preferred method of compensating the plaintiff for loss of future income is a lump-sum payment rather than periodic payments (weekly, bi-weekly, or monthly) during the time of the disability. The lump sum payment is computed to equal the present value of the lost earnings. The concept of present value is based on the time value of money. In its simplest terms, money received today is worth more than money to be received at any time in the future. The reason for this is because money received today can be used in such a manner as to increase in value.

We conclude that calculation of the damages award for lost future income was in error and must be set aside.

The judgment is reversed and remanded to the trial court to resolve the issue of the lump sum payment for lost future income consistent with the directions provided in this case.

DaKroob, J., Gregoria, J., Huang, J., Mora, J., Paria, J., and Thomas, C.J., concurred.