

CHAPTER 15 TORTS, NEGLIGENCE, AND STRICT LIABILITY

15.1 INTRODUCTION

A tort (from the French - meaning personal injury, and Medieval Latin - wrong, injustice) is a private or civil wrong against a person or persons and/or their property that results in a liability for which compensation is justified. The basis of tort liability is that a legal duty is owed by one party to another, that the duty is breached, and that the breach of duty results in a harm that is legally recognizable.

The injured party (plaintiff) files a civil suit against the injuring party (defendant) for actual damages to compensate for the injury. Damages can include the expenses related to direct and material damage (physical injuries, medical costs, lost pay, etc.) and intangible losses (such as emotional distress, pain and suffering, injury to reputation etc.). In some torts, punitive damages can be awarded. As the name suggests, punitive damages are intended as punishment and are awarded as a result of reprehensible behavior by the defendant and to deter future behavior. It should be noted that some injuries may have both criminal and civil liabilities (e.g. rape, battery, intentional infliction of mental distress, among others). At times, the injured party may file a tort claim in a civil proceeding to recover compensation for the injury, or because the criminal courts will not support a guilty finding based on the evidence. In the latter case, it is important to note that the degree of "proof" required is different for criminal and civil cases. In a criminal case, the plaintiff must prove beyond a reasonable doubt, while in a civil tort, the plaintiff needs to prove the facts at a lower standard; the preponderance of the evidence.

15.2 INTENTIONAL TORTS

Battery.

There exists a fundamental right for individuals to be free of bodily contacts that are harmful or offensive. Battery occurs when one party intentionally touches another party without his/her consent in a way that is harmful or offensive. While a harmful contact is defined as one in which injury results, a contact that is nonharmful can still be considered battery. Further, direct physical contact is not required. For example, touching anything that is connected with a person's body may constitute grounds for battery (e.g. kicking a dog on a leash that is being walked or placing offensive material in someone's food). It is not necessary for the defendant to intend to harm the injured party; under the doctrine of transferred intent it is only necessary to show that the defendant intended to injure someone.

One defense to a claim of battery is that of consent. Consent must be given freely and intelligently and may be inferred from the behavior of a person, such as voluntary participation in an activity. In this case, consent is limited to contacts which would be a normal consequence of the activity.

Assault.

Assault is an intentional tort that arises from an individual's right to be free from the apprehension of battery. Thus, an assault occurs if there is a "well-grounded apprehension of imminent (immediate) battery in the mind of the person threatened with contact." It is irrelevant whether the threatened contact occurs. Assault applies only to imminent threats - not to future threats. Merely using threatening words does not in itself create an assault unless they are accompanied by other acts or circumstances that reveal an intent.

False Imprisonment.

False imprisonment occurs as a result of the intentional confinement of an individual against his/her consent. While

confinement must occur for an appreciable period, in fact a few minutes may be enough. Further, confinement can result from physical barriers (locking a person in a room); the use of, or the threat of physical force; the assertion of legal authority; the detention of property (holding valuables as security); or even the threat to harm another party, if such action operates to prevent the movement of the plaintiff. Confinement must be complete and not partial; for example, simply blocking one route of escape while other reasonable means of escape remain open does not constitute false imprisonment, but such alternatives must reasonably be known to the plaintiff and within access (that is, without an unreasonable risk of harm).

Liability for false imprisonment will not arise when the person has freely consented to confinement, that is, without actual or implied threat of force or assertion of legal authority. A conditional privilege (i.e. not liable for the tort of false imprisonment) exists for store owners to detain persons that are reasonably believed to be shoplifters, if the store owner or his/her agent acts in a reasonable manner.

Defamation

An individual's reputation is protected against defamation: the "unprivileged publication of false and defamatory statements concerning another." A statement is considered to be defamatory when it harms the reputation of a person by adversely affecting the opinion of the community or other people in their dealings with the individual. A crucial element in a defamation suit is that the defamation must be "of and concerning" the plaintiff and must cause damage or harm to his/her reputation. Even if the individual is not identified directly but his/her identity can be inferred reasonably, then defamation will exist. Humorous or satirical statements are not defamatory unless a reasonable person would believe that the statements purport to describe real acts. Similarly, personal opinion generally will not be held to be defamatory since it is not a statement of fact but opinion. However, a statement that implies the existence of undisclosed facts is defamatory.

If a defamatory statement is made about a specific group of people then a member of that group can only recover damages to his/her reputation if the group is so small, or the circumstances are such as to make a reasonable conclusion about the identity of the particular member of the group. For example, the statement that all Australians are convicts would not be defamatory unless there was one Australian in the group and character/criminal record was an issue. There are some exceptions for defamation; including dead people and some statements made about corporations. Corporations have a limited right to reputation and can only sue to protect the conduct of their businesses. Defamatory statements regarding the officers, employees, or shareholders is not defamation of the corporation unless the statements relate to the manner of conducting the business of the corporation. Statements regarding the products/services of the company may provide the basis for a disparagement suit.

A defamation suit requires "publication" of the defamatory statement before liability arises, but in fact communication of the statement to another person other than the defamed party is sufficient. Further, any person who repeats a defamatory statement is similarly liable for defamation.

There are two types of defamation: libel (written, printed, or conveyed in other physical manifestation) and slander (oral defamation - except broadcast defamation, which is libel). Libel usually is more serious because it is both more permanent and greater importance is attached to "printed" media. Slander generally is not actionable unless there is proof of special damage or the nature of the slanderous statements is so serious that injury to the reputation can be presumed (slander per se). Types of defamatory statements qualifying for slander per se are those involving criminal involvement (with the potential for imprisonment or involving moral turpitude), a "loathsome" disease, professional incompetence or misconduct, or serious sexual misconduct.

Defamation suits frequently can involve rights under the First Amendment to the Constitution (freedom of speech and freedom of the press). A series of U.S. Supreme Court decisions have established some limitations including recovery by public officials (and people in the public eye) for statements concerning their official duties but plaintiffs must prove actual malice (the defendant must have actual knowledge of the falsity or make statements with a reckless disregard for the truth).

For a successful defamation suit, the statement must be false. Therefore, the truth is an absolute defense. In some cases, the statements may be false but a defense of privilege may prevent liability. In these situations, other social interests may prevail over an individual's right to repudiate the statements. For example, absolute privilege exists for legislators, participants in legal proceedings, and for conversations between spouses in private. Conditional privilege exists when a party makes a defamatory statement to protect his/her own legitimate interest or that of a third party, or when the media reports defamatory statements that are reported in the proceedings of court, public meetings, or official action.

Invasion of Privacy.

One (relatively) recent development in intentional tort law is an invasion of an individual's right to privacy. Behavior or actions that may constitute the basis for a suit include the disclosure of private facts about a person, intrusion upon an individual's seclusion, placing a person in a false light through publicity, or appropriating an individual's name or likeness for commercial purposes without permission.

The invasion upon an individual's seclusion must be such that a reasonable person would find intrusion offensive and includes physical intrusion, opening mail, tapping a telephone, making harassing phone calls etc. Photographing or observing a person in a public place is not an invasion of privacy. Similarly, publicizing¹ private facts regarding a person is judged by a "reasonable person" standard. For example, facts concerning an individual's failure to pay debts, certain illnesses, or details pertaining to sexuality are an invasion of privacy and the truth is NOT a defense. Like defamation, there is the potential for conflict with First Amendment rights of freedom of speech and freedom of the press, and the details must be of public record or of legitimate interest to the public for an invasion of privacy not to be found.

For invasion of privacy by placing a person in a false light, it is not necessary for the person to be defamed. It is only necessary that the defendant publicizes unreasonable and objectionable personal characteristics and beliefs that are not possessed by the individual. The appropriation of a person's name or likeness for commercial purpose can occur when the person's name or likeness is used in an advertisement implying the endorsement of the product/service. Limitations occur for public figures (for example, a book about a movie star) and vary on a state-by-state basis. Since the right of privacy is purely a personal right, only living persons can bring suit for invasion of privacy.

The Misuse Of Legal Proceedings.

There are three intentional torts that may arise from the misuse of legal proceedings. For example, if criminal proceedings are wrongly brought and damages the individual's reputation or emotional/financial health, the injured party may bring a suit for malicious prosecution. The plaintiff must prove that the defendant acted without probable cause (i.e. maliciously) and the criminal proceeding was terminated in the plaintiff's favor. A suit for the wrongful use of civil proceedings can be brought under conditions that are similar for criminal proceedings. Abuse of process occurs when a party initiates legal proceedings whose major purpose is other than that for which the proceedings are intended; for example, if the legal proceedings are initiated in an effort to get the defendant to take a particular action on another (unrelated) matter.

Wrongful Discharge.

Wrongful discharge is a relatively new area of tort law that recognizes the right of a fired employee to recover against his/her previous employer. In some states, such as Ohio, wrongful discharge is not recognized by itself and must be accompanied by another claim based on tort law (defamation, emotional distress etc.) or statute violation.

PROPERTY RIGHTS.

The rights associated with the ownership and use of property also can be the source of tortious liability when one party interferes with the rights to possession of the property of another. For example, a tenant has the right of possession and

1. In this context publicizing means the widespread dissemination of private details

generally has the right to bring suit. However, if lasting damage has occurred, the owner of the property also may have the right to recover for damage to the property.

Trespass occurs when one party intentionally and unlawfully enters land possessed by another, remains on the land unlawfully after entering lawfully, unlawfully causes anything to enter the land, or fails to remove something from the land for which he/she was responsible.¹ It is important to note that actual damage to the land is not required for intentional trespass but is required for negligent (reckless) trespass. Trespass can be applied to personal property and occurs when one party intentionally meddles with the personal property in the possession of another party in such a way as to cause actual damage or deprive the party of its use for an appreciable period of time. For example, Smith throws black paint on Brown's white dog or hides the dog for several hours in his garage.

Conversion.

If one party intentionally exercises control over another's property in such a way as to seriously interfere with that party's rights to control the property, then a suit for the tort of conversion may be brought. The degree of interference is a function of the harm done to the property and the duration/extent of the interference.

15.3 NEGLIGENCE.

Many injuries are not the result of intentional or willful actions against the injured party but may be the unavoidable results of an advanced society and complex technology. However, in some situations, while the injuries are unintended they are caused by a standard of conduct that is less than that which is necessary to protect people from an unreasonable risk of harm. There are four elements that must be proved by the plaintiff for a successful negligence suit:

- a. The defendant owed a duty of care to the plaintiff.
- b. The duty of care was breached by the defendant.
- c. The plaintiff suffered injuries.
- d. The breach of duty was the actual and legal (proximate) cause of the injuries suffered by the plaintiff.

Defenses to a negligence suit include the standard of care that is owed between defendant and plaintiff and the degree to which the plaintiff contributed to his/her injury (by his/her own negligence).

Duty of Care.

Each member of our society has a duty to act in a manner that avoids an unreasonable risk of harm to others. The standard that determines the nature of the duty of care is both objective and flexible and depends on the specific circumstances surrounding the injury. For example, the standard of care in most situations is that of a "reasonable person (man) of ordinary prudence in similar circumstances." That is, a thoughtful, cautious and risk averse individual who avoids placing others in unreasonable danger. From this definition it can be observed that the nature of the circumstances can affect the standard of care; an emergency situation will be considered differently to another where there is sufficient time for reflection and thoughtful action. In addition, the personal characteristics of the defendant are an issue and his/her behavior is considered with respect to a reasonable person of similar age, intelligence, and experience. Physical disabilities also are considered but mental deficiencies do not relieve a person from the "reasonable man" standard.

Under certain conditions, a special duty may arise for the defendant to protect the plaintiff from harm. Such duties can originate from many sources; including contractual relationships and professional duties. For example, a contract can establish a higher standard and both clients and third parties can sue a professional for the incompetent performance of professional work that was the proximate cause of their injuries. Recent court decisions also have established that an affirmative duty exists to protect passengers and guests from the foreseeable and wrongful acts of third parties, greatly extending the general duty to aid and protect others from third parties.

1. Trespass also can occur when the entry was mistakenly believed to be legally justified.

A special duty can be created by the relationship between the parties (e.g. a family) and special duties also can result for a party in possession of land with respect to other persons entering the land. For people who are lawfully on the property (invitees) because it is a public place or engaged in a purpose that is related to the business of the possessor (customers, deliveries, meter readers etc.) the possessor has a duty to exercise reasonable care by keeping the land in a reasonably safe condition, and protecting the invitee against known dangerous conditions (or conditions that he/she reasonably should have known about). For licensees (whose right to enter the land depends upon the possessor's consent), including guests, family, people soliciting money etc., the possessor has a duty to warn them of dangerous conditions. For trespassers (who enter or remain upon the land without a legal right to do so) the possessor traditionally has a duty not to willfully injure them. Increasingly, the distinction between licensees and invitees are being eroded and a higher standard of care is expected for trespassers, particularly children and habitual trespassers.

In some situations, a statute can establish the standard of care (for example, a building code). If the statute is violated, then the doctrine of negligence per se can be applied if the statute was intended to protect the injured party.

Breach of Duty.

The duty of care is breached if a person exposes another to an unreasonable, foreseeable risk of harm." Negligence occurs when a person does something that a reasonable person would not do under the same circumstances, or does not do something when a reasonable person would. Thus, if the party responsible for the injury does what a reasonable person would do under same conditions and guards against foreseeable risks by exercising reasonable caution, then liability will not result.

The reasonableness of the risk depends on a weighing of the social utility of the person's conduct, the ability and relative ease of avoiding (or minimizing) the risk, the probability that harm will result and the likely seriousness of that harm. "As the risk of serious harm to others increases, so does the duty to take steps to avoid that harm." Business Law and the Regulatory Environment p. 103.

Causation.

The breach of duty must be the actual cause of the plaintiff's injuries. That is, a "but for" test is employed: the injury would not have occurred but for the breach of duty by the defendant. It is not required that the breach of duty be the only cause of the injury, but it must be a substantial factor.

Proximate Cause.

A defendant is liable only if his/her conduct was the proximate cause of the injuries of the plaintiff. Proximate cause is a question of social policy and involves weighing the potential for defendants to be exposed to catastrophic liability against preventing some plaintiffs from recovering compensation for their injuries. Thus, some courts have established that liability extends only to the consequences that are natural and probable results of the defendant's actions, while other courts have referred to consequences that are within the "scope of the foreseeable risk." Under the latter interpretation, if some injury cannot be reasonably foreseen, then no liability exists for any injury that results from negligence.

According to the Restatement (Second) of Torts of 1965 [R(2)T], liability does not occur if, "looking back after the harm, it appears highly extraordinary to the court that the defendant's negligence should have brought about the plaintiff's injury."

Supervening or Intervening Causes.

If an intervening force occurs after a negligent act in such a way as to play a significant role in the harm, it may relieve the defendant of liability. This will occur if the intervening force is not foreseeable (supervening cause), though one exception occurs when the harm would be the same without the intervening force. For example, a concert hall is constructed without sufficient fire exits. A negligently operated aircraft crashes and patrons are burned in the ensuing fire

as they try to reach the exits. In this case, the owners (and architect) of the concert hall are liable.

The Injuries of the Plaintiff.

Defendants (if guilty) "take their victims as they find them." That is, the defendant is liable for the full extent of the plaintiff's injuries even if the injuries were aggravated by prior (physical) conditions. Further, liability includes the additional injuries that might be induced as a result of the plaintiff's weakened condition and the defendant may be jointly liable with the physician for negligent medical care. A defendant also may be liable for injuries suffered by people who were trying to avoid being injured by the plaintiff¹ and third parties may be able to recover against the defendant for injuries received during efforts to help or rescue the victims of negligence.

The plaintiff must prove that an injury was of a type that tort law is intended to protect against. While physical injuries are covered, claims of emotional distress are less clear, a situation that is due in part to the potential for spurious claims and problems inherent in valuing such injuries. Accordingly, the court is reluctant to grant damages for emotional harm. Until recently, emotional injuries of the plaintiff were required to be associated with a physical contact with the defendant (the impact rule) but this requirement largely has been abandoned (although many courts still require physical symptoms of emotional harm).

There also has been a growing trend in third party claims of emotional distress. Such claims arise as a result of negligently caused injuries to another person (e.g. a loved one) and are facilitated by the gradual abandonment of the impact rule in favor of a "zone of danger." Under this approach, the third party must be within the "zone of danger" that results from the defendant's negligence but courts applying this approach usually require a physical manifestation of the emotional harm.²

Res Ipsa Loquitur.

The doctrine of *res ipsa loquitur* (the thing speaks for itself) is introduced when the defendant has superior knowledge regarding the conditions relating to the injury and the defendant's best interests would not be met by disclosing the circumstances of the injury to the plaintiff. In some courts, *res ipsa* is used to create a presumption of negligence, requiring a directed verdict for the plaintiff unless the defendant provides proof that refutes the presumption. In other courts, an inference is made that the defendant was negligent and such negligence was the cause of the injury. This also places responsibility on the defendant for refuting the inference of responsibility for the injury.

For *res ipsa* to be applied, the defendant must have "exclusive control of the instrumentality of harm (and therefore probable knowledge of responsibility for the cause of harm)". Further, the harm would not have occurred if negligence had not occurred.

DEFENSES TO NEGLIGENCE.

There are two defenses that often are used in a negligence suit: contributory negligence and assumption of risk. These traditional common law defenses are based on the theory that the behavior of the plaintiff played a role in the injury (contributory fault). In recent times, this theory has become less successful as a defense.

Contributory Negligence.

If the plaintiff's own negligent behavior (as a failure to exercise reasonable care) is a substantial factor in the injuries suffered by the plaintiff, then under the doctrine of contributory negligence, recovery is prevented. For example, if Brown steps in front of Smith's speeding car without looking, then under contributory negligence, Brown would be

1. For example, Brown swerves to miss Smith's negligently driven car and crashes.

2. Some courts have abandoned the "zone of danger" concept but attempt to limit recovery by requiring a close personal relationship between the third party and the victim of the defendant's negligence. Generally, the courts are becoming more liberal and some courts even allow recovery if the emotional distress is induced by seeing the victim shortly after the injury.

unable to recover.

A plaintiff who contributes to the injury by his/her own negligence, may be able to overcome the defendant's contributory negligence defense by arguing that there was a last clear chance for the defendant to avoid harm. Under the doctrine of the "last clear chance", the court focuses on "who was last at fault in time?" Thus, even though the defendant may have initiated a chain of events, the plaintiff may have had a superior opportunity to avoid the injury.

Comparative Negligence.

Most states have adopted a system of comparative negligence in lieu of contributory negligence. Under this approach, the court endeavors to ascertain the relative fault of the two parties and awards damages in proportion to relative fault. In some states, partial recovery will be allowed only if the plaintiff was responsible for less than 50 percent of the injury.

Assumption of Risk.

If a plaintiff has assumed the risk of injury by voluntarily placing himself/herself in a known danger that is created by the negligent actions of the defendant, then under most conditions, no recovery is possible. For assumption of risk to be a valid defense, the plaintiff must fully understand both the nature and extent of the risk involved.¹

Recklessness.

Recklessness occurs when the behavior of the defendant reflects a "conscious disregard for a known high risk" that is likely to cause injury to others. In this case, the degree of risk of harm considerably exceeds that of negligence and represents a moral culpability that is closer to an intentional tort or willful action. The "reasonable person" test is applied to the defendant by examining whether a reasonable person would have seen the increased chance of harming others through his/her conduct. If reckless behavior is proved, then contributory negligence on the part of the plaintiff will not restrict recovery unless the plaintiff also acted in reckless disregard for his/her safety, or assumed the increased risk. In addition, the potential for punitive damages (as well as compensatory damages) is significantly higher for recklessness than negligence (where courts are reluctant to grant punitive damages).

15.4 PRODUCT LIABILITY AND STRICT LIABILITY.

The doctrine of strict liability is the third primary component of tort liability. Strict liability arises for a defendant that engages in particular types of activities that are potentially harm-producing, and despite the fact that the person did not intend harm and took every measure within his/her power to prevent injury to the plaintiff. The application of strict liability is a relatively new theory of law and reflects an emerging social policy that the risks associated with a particular activity should be carried by those parties who "pursue it", instead of by people who are merely exposed to the risk. Although the previously discussed defense of contributory negligence is generally held NOT to be a valid defense for strict liability, assumption of risk by the plaintiff may be accepted by the court and prevent recovery.

Strict liability applies to two types of activity: abnormally dangerous (ultrahazardous) activities and the manufacture/sale of defective or unreasonably dangerous goods/products.

Abnormally Dangerous Activities.

Activities that involve a considerable potential for injury that cannot be eliminated by taking reasonable care (such as the demolition of buildings, stunt flying, crop dusting etc.) may constitute a basis for strict liability if the following conditions are met with respect to an activity:

- a. the existence of a high degree of risk of some harm to the person, land or chattels of another.
- b. the likelihood that the harm that results from it will be great

1. Some states that apply a comparative negligence approach will not allow an assumption of risk defense.

- c. inability to eliminate the risk by the exercise of reasonable care
- d. extent to which the activity is (is not) a matter of common usage.
- e. appropriateness of the activity to the place where it is carried on.
- f. extent to which its value to the community is outweighed by its dangerous attributes.

From the Restatement (Second) of Torts, Section 519.

Under these conditions, the greater the social utility of the activity and the higher the costs of reducing the risk associated with it, the less likely the activity will be considered by the court to be abnormally dangerous.

Product Liability.

Traditionally, claims for product liability involved express or implied warranties that were part of the contract for the sale of the product and negligence arose from the breach of contract with respect to the warranty. Increasingly, theories of negligence under tort law are being applied to products. There are six categories of negligence that can involve products:

- a. defective design
- b. negligence per se based on the violation of a statute regarding product safety or quality
- c. improper manufacturing of goods and/or selection of materials
- d. improper packaging
- e. improper inspection
- f. failure to provide adequate warnings regarding product usage, hazards and defects.

Design Defects.

A manufacturer is negligent if an injury results when the design of a product does not attain a standard of design that the court determines is reasonable. The standard of reasonableness is determined by an examination of the reasonable foreseeability of injury resulting from the design, including:

- a. the magnitude of the foreseeable harm.
- b. the standard of the industry practices that were in effect at the time of production.
- c. the state of the art of scientific and technical knowledge at the time of production.
- d. compliance with government standards.
- e. the social utility of the product.

Many courts may seek to integrate these factors in a risk-return framework. Defenses (and underlying considerations) include the prohibitive cost of designing the product differently (or the fact that there is no better way of designing it) and the existing design already has considerable value to society.

Strict Liability.

In the 1960's there was a growing desire of courts (and others) to award damages to people injured by defective products and to impose liability on the manufacturers and sellers of such products. However, under the theories of product liability that existed at that time, there were significant problems. For example, many products were sold by the manufacturer to one or more dealers/resellers and the delivery process often involved several sales before it was finally sold to the ultimate buyer/consumer. At that point, the doctrine of privity of contract (with respect to the express or implied warranty) prevented the injured consumer (plaintiff) from suing parties other than the dealer at the point of final sale. In addition, it was exceedingly difficult for the plaintiff to prove a breach of duty by the defendant in a negligence suit because of such factors as the high level of technology involved in the product.

The doctrine of strict liability that began to emerge at this time represented a socialization of risk and in 1965 the doctrine was accepted and incorporated into the Restatement (second) of Torts in Section 402A. This section has been adopted by most states and represents the initiation of a virtual explosion of product liability cases.

Section 402A provides that sellers of products are liable for any damages (as physical injury or damage to property) that are suffered by the end user/consumer if the product was "in a defective condition unreasonably dangerous to the user or consumer or to his property". Under Section 402A, the plaintiff does not need to establish that the defendant breached his/her duty of care because the defendant is liable even though "the seller has exercised all possible care in the preparation and sale of his product." However, the type of damages applicable and the circumstances in which strict liability applies are limited. For example, Section 402A applies to sellers that resemble the merchant of goods as defined in the Uniform Commercial Code and does not apply to sellers of individual items or occasional sellers (such as the farmer who sells homemade bread). Another limitation is that if the product is substantially modified after its sale and the modification contributes to the injury, then liability may be avoided. Section 402 A also requires that the product be in a defective condition (and be unreasonably dangerous as a result) at the time it leaves the seller's hands. The defective condition is defined as the product's failure to satisfy the average consumer's reasonable expectations and that condition is considered to be unreasonably dangerous when it is dangerous beyond the reasonable contemplation of the consumer. These limitations restrict the range of product defects to less than what probably would be covered by an implied warranty of merchantability (the product is sold as being fit for its ordinary intended use).¹

Suits for both design defects and failure to warn can be brought under Section 402A. The standards that apply in such cases are the same as those under a theory of negligence (product liability). Under S 402A, and in product liability/negligence suits, damages generally cover only the personal injury and property damage suffered by the plaintiff. Consequential damages (indirect damages such as lost profits or damage to reputation) and punitive damages are seldom awarded, although the latter may be available if the defendant acted with a "conscious or reckless disregard" by concealing or failing to correct known defects, knowingly violating standards of product safety, or employing grossly inadequate testing or quality control.

Defenses to strict liability suits include product misuse and assumption of risk by the consumer and some states have allowed comparative negligence as a defense.² The statute of limitations for Section 402 A employs the times set forth in the state's statute of limitations for torts, usually a period of two years or less. However, in most states the time begins to run once the defect was discovered (usually at the time of injury). Because this may be overly advantageous to the plaintiff, some states have introduced statutes of repose that establish time periods from five to twelve years from the time of final sale, after which time no recovery is possible (even though the statute of limitations is still valid).

Section 402 B Liability

Section 402 B of the Restatement (Second) of Torts deals with consumer injuries that arise because of misrepresentations about products. Such misrepresentations must be made by a defendant engaged in the business of selling products of that type and communicated to the public by advertising or labelling or similar means. Further, the misrepresentation must concern a material fact of the product and be actually and justifiably relied on by the consumer in making the decision to purchase the product.

1. The implied warranty of merchantability can be disclosed by making a conspicuous disclaimer that uses the word merchantability. There is also an implied warranty of fitness (which also can be disclaimed) that product is fit for the buyer's particular purpose. It arises when the seller has reason to know of the use to which the buyer will put the product and the buyer relies on the seller's skill and judgment in the purchase decision.

2. It is important to note that for ordinary consumers, it is virtually impossible to disclaim strict liability (per Section 402A) but disclaimers may be effective for commercial transactions when the parties have equal bargaining power.

SAMUELSON v. LORD, AECK & SERGEANT, INC. et al.

Court of Appeals of Georgia

205 Ga. App. 568; 423 S.E.2d 268; 1992

September 8, 1992, Decided

JUDGES: Pope, Judge. Carley, P. J., and Johnson, J., concur in Divisions 1, 2, 3, and in judgment.

Plaintiff Kyle Joan Samuelson brought this action against defendants LRE Engineering, Inc. (hereinafter "engineers"), and Lord, Aeck & Sergeant, Inc. (hereinafter "architects"), as well as several other defendants, claiming defendants are liable for the injuries she received when she was struck by an automobile while jogging. Both defendants moved for dismissal of the complaint for failure to state a claim. Additionally, defendant architects moved, in the alternative, for judgment on the pleadings. The trial court granted the motions and plaintiff appeals.

Plaintiff alleges in the complaint that she was jogging on the grassy shoulder of Spalding Drive in Gwinnett County headed east on the south side of the road. When she reached the post office property at 5600 Spalding Drive the shoulder was replaced by an unmarked paved turn lane. She continued jogging in the turn lane and was struck from behind by an automobile also travelling east in the turn lane and sustained severe and disabling injuries. Plaintiff alleges defendants engineers and architects were responsible for the site design of the post office which eliminated the shoulder adjacent to the road and created in its place a sloping bank with an above-ground manhole which could not be used by pedestrians. Plaintiff alleges defendants were negligent in designing the site, that the design constitutes negligence per se because it does not conform to applicable Gwinnett County roadway development standards and that the design constitutes a nuisance. Defendants argue the complaint was rightly dismissed because the complaint alleges they committed professional malpractice but the expert affidavits filed in support of the complaint fail to meet the minimum requirements of OCGA @ 9-11-9.1 and also because the complaint fails to state a claim upon which relief can be granted. Defendant architects further argue that the pleadings and admissions in judicio demonstrate that plaintiff is not entitled to recover

1.

First we address the sufficiency of the expert affidavits. The affidavit of a licensed engineer was filed in regard to the complaint against defendant engineers and the affidavit of a licensed architect was filed in regard to the complaint against defendant architects. The affidavit of the engineer recited that the affiant had reviewed certain documents concerning the design of the site and contained the opinion that in the execution and construction of the project, defendant engineers "failed to follow generally accepted and customary engineering practices and principles and failed to exercise that degree of care generally employed by engineering professionals in the field of civil engineering under similar conditions and like surrounding circumstances...." The expert went on to opine that defendant engineers "among other things, might have recommended that a retaining wall be constructed along the frontage of the... property in such a way as to permit continuous pedestrian traffic along Spalding Drive...; and further that [defendant engineers] failed to design such a wall or other appropriate safe alternative." The affiant also asserted he had reviewed the facts alleged in the complaint and, in his opinion, "such facts, if true, constitute professional malpractice." The affidavit of the architect was virtually identical except it referred to the standards and practices of architects.

Citing *Cheeley v. Henderson*, 261 Ga. 498 (405 SE2d 865) (1991), defendants argue the affidavits were insufficient. In *Cheeley*, the Georgia Supreme Court held that because the expert affidavit stated merely that the errors and omissions set forth in the complaint constitute malpractice, without setting forth in the affidavit itself "at least one negligent act or omission claimed to exist and the factual basis for each such claim," as required by OCGA 9-11-9.1, then the affidavit was insufficient. Defendants argue that the affidavits in this case do not assert they were negligent in failing to provide a sidewalk or traversable shoulder and that the assertion that the facts alleged in the complaint constitute malpractice is insufficient to meet the requirements of OCGA 9-11-9.1.

The affidavits in this case offer a suggestion of what the defendants "might" have designed under the circumstances. Reading each affidavit in its entirety, however, it is obviously the affiant's opinion that the failure to provide the retaining wall they might have designed "or other appropriate safe alternative" to permit continuous pedestrian traffic along the road in front of the premises constitutes negligence and a failure to meet the appropriate standard of care. When the sufficiency of an expert affidavit is questioned by a motion to dismiss, the affidavit, like a complaint, should "be construed in the light most favorable to the plaintiff with all doubts resolved in [her] favor even though unfavorable constructions are possible." *Bowen v. Adams*, 203 Ga. App. 123 (416 SE2d 102) (1992). Accordingly, in *Bowen*, this court held the affidavit sufficient even though it did not specifically opine that the procedures employed by the defendant doctor were negligent because it did contain the opinion that other medical procedures are "ordinarily" preferred and that the surgical procedure employed by the defendant was "premature" and caused injury to the plaintiff. Likewise, in this case the opinion that another specified design "might" have been used and that the failure to use such a design or another appropriate alternative constituted malpractice is sufficient to set forth a negligent act or omission as required by the affidavit statute. Thus the trial court erred in granting defendants' motions to dismiss on the ground that the expert affidavit was insufficient.

2.

Having determined that the affidavit is sufficient to withstand defendants' motion to dismiss, we next address whether the complaint itself states a cause of action against these defendants.

(a) Defendants first argue the complaint was rightly dismissed because the complaint shows no privity existed between the plaintiff and defendants. The general rule applied by the Georgia courts is that one cannot be held liable for professional negligence to a party not in privity with the professional. See, e.g., *Howard v. Dun & Bradstreet*, 136 Ga. App. 221 (220 SE2d 702) (1975). "[T]he trend in Georgia[, however,] has been to relax the rule of strict contractual privity in malpractice actions, recognizing that under certain circumstances, professionals owe a duty of reasonable care to parties who are not their clients." *Driebe v. Cox*, 203 Ga. App. 8, 9 (1) (416 SE2d 314) (1992). Exceptions to the privity rule have been carved out where injury to third parties is foreseeable. For example, in cases involving negligent misrepresentation of facts, liability extends "to a foreseeable person or limited class of persons for whom the information was intended, either directly or indirectly.... [Otherwise] there will be no liability in the absence of privity, wilfulness or physical harm or property damage." *Robert & Co. Assoc. v. Rhodes-Haverty Partnership*, 250 Ga. 680, 682 (300 SE2d 503) (1983).¹

In cases alleging negligent design by an architect, an exception to the rule against liability to third parties is recognized when the complaint alleges a defect which is imminently dangerous to third persons. "There are... well recognized exceptions to [the] general rule [that an independent contractor is not liable to third persons for injury suffered as a result of the work once it is turned over to the owner]. One such exception is that the contractor is liable where the work is a nuisance per se, or inherently or intrinsically dangerous. Another is that the contractor is liable where the work done and turned over by him is so negligently defective as to be imminently dangerous to third persons." *Cox v. Ray M. Lee Co.*, 100 Ga. App. 333, 335 (111 SE2d 246) (1959). In *Cox*, this court reversed the trial court's dismissal of the complaint against a contractor and architect for bodily injuries allegedly sustained as a result of the dangerous design and construction of steps to a church building. Likewise, in *Hunt v. Star Photo Finishing Co.*, 115 Ga. App. 1 (1) (153 SE2d 602) (1967), a case brought for property damage due to the collapse of a roof, we recognized an exception to the general rule where the design of the roof was alleged to be so negligently defective as to be dangerous to third parties.

The exception to the privity rule for architectural defects which are imminently dangerous to third parties is consistent with the general law of torts in this state whereby "no privity is necessary to support a tort action; but, if the tort results from the violation of a duty which is itself the consequence of a contract, the right of action is confined to the parties and those in privity to that contract, except in cases where the party would have a right of action for the injury done

1. We note the case at hand involves a claim for personal injury which, the *Rhodes-Haverty* opinion implies, would not require privity in any event.

independently of the contract...." OCGA @ 51-1-11 (a). The legal duty owed by a professional need not arise out of a professional-client relationship but may arise "out of the general duty one owes to all the world not to subject them to an unreasonable risk of harm." *Bradley Center v. Wessner*, 250 Ga. 199, 201 (296 SE2d 693) (1982). "[I]n appropriate circumstances, a duty of care may be called for by contract and may be required by tort law at the same time, and where this is true plaintiff requires no privity to maintain a tort action." *Sims v. American Cas. Co.*, 131 Ga. App. 461, 479-480 (206SE2d 121), *aff'd*, 232 Ga. 787 (209 SE2d 61) (1974). Independently of the contract to design a building or premises, an architect or engineer owes a general duty to use reasonable care not to harm third persons who, it is reasonably foreseeable, might be harmed by a negligent architectural design.

In this case the plaintiff alleges the site design was dangerous to pedestrians. We reject defendants' argument that plaintiff's complaint is barred because of an absence of privity between the parties. This case presents a factual situation which is an exception to the general rule requiring privity in order to impose liability for negligent performance of a contract because if plaintiff's allegations of negligence are true, injury to a third party pedestrian, such as plaintiff, is reasonably foreseeable. Thus, the trial court erred in granting defendants' motions to dismiss on the ground of lack of privity. This result is consistent with the general trend in other states toward abolishing the privity requirement for negligence actions against architects involving personal injury and replacing it with the rule of foreseeability. See, e.g., *Karna v. Byron Reed Syndicate*, #4, 374 F Supp. 687 (D. Neb. 1974); *Mallow v. Tucker, Sadler &c.*, 54 Cal. Rptr. 174 (Ca. Ct. App. 1966); *Montijo v. Swift*, 33 Cal. Rptr. 133 (Cal. Ct. App. 1963); *Parliament Towers Condominium v. Parliament House Realty, Inc.*, 377 S2d 976 (Fla. Dist. Ct. App. 1979); *Laukkanen v. Jewel Tea Co.*, 222 NE2d 584 (Ill. App. Ct. 1966); *Totten v. Gruzen*, 245 A2d 1 (N. J. 1968). See also W. Page Keeton, *Prosser and Keeton on The Law of Torts*, @ 104A, pp. 722-724 (5th ed. 1984); Note, *The Crumbling Tower of Architectural Immunity: Evolution and Expansion of the Liability to Third Parties*, 45 Ohio St. L.J. 217 (1984).

(b) Defendants next argue the complaint was rightly dismissed because the complaint fails to state a claim upon which judgment can be granted. "To state a cause of action for negligence in Georgia, it is necessary to establish the essential elements of duty, breach of that duty, and proximate causation, as well as damages, as a basis for liability for the injuries of another. It is well established that 'the occurrence of an unfortunate event is not sufficient to authorize an inference of negligence.' *Robertson v. MARTA*, 199 Ga. App. 681, 682 (405 SE2d 745) (1991). We agree with defendants that no general duty exists at law to design a roadway (or in this case, the premises adjacent to the roadway) with a sidewalk or traversable shoulder. See *Hamza v. Bourgeois*, 493 S2d 112 (La. Ct. App. 1986). But see *Berglund v. Spokane County*, 103 P2d 355 (Wash. 1940). We take notice, as did the trial judge upon the hearing of the motions, that many roads and highways in this state make no specific provision for pedestrians. Instead, a statute exists to govern the acts of pedestrians walking on or along a roadway. OCGA @ 40-6-96. In fact, that statute addresses the circumstance of pedestrians walking along roadways "[w]here neither a sidewalk nor a shoulder is available...." *Id.* at subsection (c).

A duty to create a walkway for pedestrians may be created, however, by ordinance or by an accepted industry standard for a particular type of development. In fact, we decided in Division 1 of this opinion that the plaintiff's expert affidavits alleged the defendants' failure to provide a way to permit continuous pedestrian traffic in front of the premises was a failure to follow generally accepted practices of the architectural and engineering professions. Upon a motion for summary judgment defendants may be able to establish that the applicable ordinances and industry standards for the premises at issue in this case do not require a way for pedestrian traffic across the property. At this point in the proceedings of this case, however, it was premature to dismiss the complaint or to grant judgment to the defendants on the pleadings.

3.

Plaintiff's complaint also alleges negligence per se for the alleged violation of applicable county roadway and development standards. At the request of the trial court, at the hearing on defendants' motions plaintiff submitted into the record a copy of the county ordinances she alleges were applicable to the design of the site at issue in this case. Defendants argue those ordinances show on their face that they apply only to subdivisions and thus are not applicable to the case at hand. However, the record is insufficient at this point to determine as a matter of law whether they are applica-

ble. Pursuant to OCGA @ 9-11-12 (c), when matters outside the pleadings are presented in a motion on the pleadings, the motion may be turned into a motion for summary judgment. However, this requires the motion to be treated by the court as one for summary judgment, with "all parties... given reasonable opportunity to present all material made pertinent to such a motion by Code Section 9-11-56." The transcript of the motions hearing shows the parties and the trial court did not treat the motion as one for summary judgment and the trial court did not grant summary judgment but judgment on the pleadings, as requested by defendants. Again, at this point in the proceedings it was premature to grant judgment to defendants. Whether defendants are entitled to judgment on the claim of negligence per se may be determined only after the parties have had the opportunity to present additional evidence on the claim.

4.

Finally, defendants argue they are entitled to judgment on the pleadings because the facts alleged in the complaint show plaintiff is barred from recovering by the open and obvious rule, the doctrine of assumption of the risk, the equal knowledge rule, the doctrine of avoidance, the doctrine of remote and unforeseeable consequences and because the facts alleged in the complaint show defendants cannot be found to be the proximate cause of plaintiff's injuries. It is our opinion that issues of fact remain at this point in the proceedings which preclude the grant of judgment on these defenses.

Judgment reversed.

Sedar v. Knowlton Construction Co.

Supreme Court of Ohio

49 Ohio St. 3d 193; 551 N.E.2d 938; 1990

PRIOR HISTORY: APPEAL from the Court of Appeals for Cuyahoga County,

JUDGES: Holmes, J. Moyer, C.J., Wright and H. Brown, JJ., concur. Resnick, J., concurs in the syllabus [***4] and judgment only. Sweeney and Douglas, JJ., dissent.

Douglas J., dissenting.

OPINIONBY: HOLMES

OPINION: We are asked in this case to decide whether R.C.2305.131 may constitutionally prevent the accrual of actions sounding in tort against architects, construction contractors and others who perform services related to the design and construction of improvements to real property, where such action arises more than ten years following the completion of such services. For the reasons which follow, and as applied to bar the claims of appellant herein, we answer such query in the affirmative. 49 Ohio St. 3d 193, R.C. 2305.131 provides:

"No action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property nor any action for contribution or indemnity for damages sustained as a result of said injury, shall be brought against any person performing services for or furnishing the [**941] design, planning, supervision of construction, or construction of such improvement to real property, more than ten years after the performance or furnishing of such services and construction. This limitation does not apply to actions against any person in actual possession and control as owner, tenant, or otherwise of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought."

This ten-year statute of repose applies to architects, construction contractors and others who supply services in the design, planning, supervision of construction or construction of buildings and other improvements to real property. Unlike a true statute of limitations, which limits the time in which a plaintiff may bring suit after the cause of action accrues, a statute of repose, such as R.C. 2305.131, potentially bars a plaintiff's suit before the cause of action arises. Comment, *The Constitutionality of Statutes of Repose: Federalism Reigns* (1985), 38 Vand. L. Rev. 627, 629; *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy* (C.A. 6, 1984), 740 F. 2d 1362, 1367; *Hardy v. Ver-Meulen* (1987), 32 Ohio St. 3d 45, 46, 512 N.E. 2d 626, 627, fn. 2.

Construction statutes of repose, such as R.C. 2305.131, were enacted by several states in the late 1950s and early 1960s in response to the expansion of common-law liability of architects and builders to third parties who lacked "privity of contract." *Hartford Fire Ins. Co.*, supra, at 1368; *Kocisko v. Charles Shutrump & Sons Co.* (1986), 21 Ohio St. 3d 98, 101, 21 OBR 392, 394, 488 N.E. 2d 171, 174 (Wright, J., dissenting). n1 Generally, the only contracts involved in this context are the ones between the architect and the owner and between the contractor and the owner. n2 At early common law, courts strictly applied the doctrine of privity of contract and denied recovery to a third party who, after a structure had been completed and accepted by an owner, sought recovery from the architect or builder involved for injuries allegedly sustained as a result of a defective or unsafe condition of such structure. Annotation (1979), 93 A.L.R. 3d 1242, 1245-1246; *Winterbottom v. Wright* (1842), 10 M & W 109, 152 Eng. Reprint 402. 49 Ohio St. 3d 193,

"The general rule of law, subject to certain exceptions not now material to note, is that, after the contractor has turned over the work and it has [*196] been accepted by the owner, the contractor incurs no further liability to third persons

by reason of the condition of the work, but the responsibility for maintaining it and protecting third persons against danger therefrom, or the use of it in a defective condition, or failing to give notice or warning of dangers to be apprehended from its existence, is then shifted to the owner. This rule of law does not seem to be disputed; in fact, counsel for both parties cite and rely in part on the same cases." *Williams v. Edward Gillen Dock, Dredge & Constr. Co.* (C.A. 6, 1919), 258 F. 591,594.

In Ohio, the law of privity was even more stringent, limiting liability to those in actual control or possession of premises, be they owners or lessees of the owner. See *Burdick v. Cheadle* (1875), 26 Ohio St. 393; *Berkowitz v. Winston* (1934), 128 Ohio St. 611, 1 O.O. 269, 193 N.E. 343, paragraph two of the syllabus ("[I]iability in tort is an incident to occupation or control.").

Nationally, the fall of the privity doctrine began generally with the landmark decision in *MacPherson v. Buick Motor Co.* (1916), 217 N.Y. 382, 111 N.E. 1050, and specifically with respect to the construction industry in *Inman v. Binghamton Housing Auth.* (1957), 3 N.Y. 2d 137, 164 N.Y. Supp. 2d 699, 143 N.E. 2d 895, which held that privity of contract was no longer required for an injured party to recover for negligent architectural design. *Id.* at 144, 164 N.Y. Supp. 2d at 703-704, 143 N.E. 2d at 899. Although many jurisdictions which had judicially considered the issue abolished the privity doctrine in negligence actions against an architect, this court has not had occasion to consider the continued validity of the privity doctrine with respect to third persons who are injured due to an allegedly defective or unsafe-building design or construction. Indeed, when R.C. 2305.131 was enacted in 1963, the strict privity doctrine remained intact in Ohio. Accordingly, in *Insurance Co. of North America v. Bonnie Built Homes* (1980), 64 Ohio St. 2d 269, 18 O.O. 3d 458, 416 N.E. 2d 623, this court held as syllabus law that "[p]rivacy of contract is a necessary element of an action brought by an owner of a real-property structure against the builder-vendor of the structure for damages proximately caused by unworkmanlike construction." See, also, *Velotta v. Leo Petronzio Landscaping, Inc.* (1982), 69 Ohio St. 2d 376, 23 O.O. 3d 346, 433 N.E. 2d 147.

It was not until 1983 that this court, in *McMillan v. Brune-Harpenau-Torbeck Builders, Inc.* (1983), 8 Ohio St. 3d 3, 8 OBR 73, 455 N.E. 2d 1276, at syllabus, overruled *Bonnie Built Homes*, supra, holding: "Privity of contract is not a necessary element of an action in negligence brought by a vendee of real property against the builder-vendor." However, as stated, this court has not had occasion to recognize a similar cause of action against builders or architects brought by third parties other than vendees. Although R.C. 2305.131, as enacted, does encompass such actions, we express no specific opinion concerning such issue, as the sole question before us here is the constitutionality of the provision for repose contained in such section of law.

R.C. 2305.131, by its express terms, does not apply to persons in actual possession and control of premises at the time the unsafe and defective condition proximately causes the injury or damage complained of, and appears to recognize the common-law liability of such persons. Impliedly, the statute also does not apply to any person who supplies materials, rather than services, to be used in the construction of an improvement to real property, as they may be liable for damages caused by defects in the materials under Section 402A of the Restatement of the Law 2d, Torts (1965). *Lonzrick v. Republic Steel Corp.* (1966), 6 Ohio St. 2d 227, 35 O.O. 2d 404, 218 N.E. 2d 185. In addition, R.C. 2305.131 applies only to actions sounding in tort, as actions on the contract between an owner and the architect or builder continue to be governed by the fifteen-year statute of limitations found in R.C. 2305.06.

Finally, unlike the four-year statute of repose for medical malpractice actions, R.C. 2305.11(B),¹ which begins to run from the date of malpractice (the date of "the act or omission constituting the alleged basis of the claim"), the ten-year repose period of R.C. 2305.131 begins to run upon the completion of performance of the construction-related services.

1. R.C. 2305.11(B) has been held unconstitutional on various grounds and as applied to various factual circumstances: *Schwan v. Riverside Methodist Hosp.* (1983), 6 Ohio St. 3d 300, 6 OBR 361, 452 N.E. 2d 1337 (statute violates equal protection with respect to minors); *Mominee v. Scherbarth* (1986), 28 Ohio St. 3d 270, 28 OBR 346, 503 N.E. 2d 717 (statute violates due course of law provision of Ohio Constitution with respect to minors); *Hardy*, supra (statute violates right-to-a-remedy provision of Ohio Constitution with respect to plaintiffs who did not know or could not reasonably have known of their injuries); *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St. 3d 54, 514 N.E. 2d 709 (statute unconstitutional with respect to plaintiffs who, following discovery, do not have the time provided by R.C. 2305.11[A] in which to file their actions).

The designation of this triggering event is consonant with the common-law rule shifting liability towards third persons to the owner of a building upon acceptance of the design and construction of such building. The completion of performance of the services of both appellees in this case, the architect and builder, occurred no later than December 31, 1966. Appellant's injuries occurred on September 11, 1985, over eighteen and one-half years after the repose period began to run. Appellant now challenges the constitutionality of R.C. 2305.131, which clearly bars his action in negligence for personal injuries against these appellees.

As a prelude to his constitutional challenges, appellant asserts, without argument, that a sort of "discovery rule" of accrual, analogous to the medical malpractice discovery rule,¹ n4 applies to him and other third persons who assert that their injuries are caused by a "static condition" (the existence of door glass which is "defective" in the sense that it is not safety glass). He cites our decision in *Velotta*, supra, in support of this assertion.

Appellant has misconstrued our statements in *Velotta*, and the nature of his cause of action. The medical malpractice cases are wholly distinguishable. In order to establish actionable negligence, three essential elements must be shown: (1) a duty to protect another from foreseeable injury; (2) a breach of or failure to discharge such duty; and (3) an injury to such other proximately resulting from that failure or breach. *Wellman v. East Ohio Gas Co.* (1953), 160 Ohio St. 103, 51 O.O. 27, 113 N.E. 2d. A cause of action generally accrues immediately upon the occurrence of all these elements. In the medical malpractice cases, the latter elements, i.e., breach of duty and injury proximately resulting therefrom, occur simultaneously, or nearly so. However, such negligence often remains undiscovered, and we have held that the running of the statute of limitations is tolled until the patient discovers, or should have discovered, the negligent act (*Melnyk v. Cleveland Clinic* [1972], 32 Ohio St. 2d 198, 61 O.O. 2d 430, 290 N.E. 2d 916, syllabus ["foreign object" cases]) or the resulting injury (*Oliver v. Kaiser Community Health Found.* [1983], 5 Ohio St. 3d 111, 5 OBR 247, 449 N.E. 2d 438, syllabus).

In the construction cases, however, breach of duty and injury may often be separated by several years. Thus, in *Velotta*, supra, although the vendee alleged that the builder-vendor had negligently installed the tile around his residence, purchased in December 1970, the vendee did not experience any damaging water drainage problems until "sometime in 1975." It is axiomatic that "[n]egligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. 'Proof of negligence in the air, so to speak, will not do.'" *Palsgraf v. Long Island RR. Co.* (1928), 248 N.Y. 339, 341, 162 N.E. 99. Thus in *Velotta*, we simply held that for purposes of the four-year statute of limitations set forth in R.C. 2305.09(D), "where the wrongful conduct complained of is not presently harmful, the cause of action does not accrue until actual damage occurs." The *Velotta* holding is not a "discovery rule." The construction cases deal with the delayed occurrence of damages, not with the "discovery" of injury. The *Velotta* decision is concerned solely with accrual of a cause of action for purposes of a statute of limitations, not with discovery of injury or damages which have already occurred. Our decision in *Velotta* did not discuss or even mention the ten-year statute of repose, R.C. 2305.131.

Nor is "discovery" an issue in the present case. Although faulty design or construction of a building by an architect or builder may constitute a breach of duty of care owed to all foreseeable occupants of such building, like appellee here, see *Prosser & Keeton on Torts* (5 Ed. 1984) 723, Section 104A, no such foreseeable plaintiffs have an actionable claim in negligence until they are individually, and proximately, damaged by the breach of duty.

Moreover, although the presence of a defect in the design or construction of a structure may cause such immediate damage as a reduction of the structure's economic value, which economic damage the owner may not discover until long after completion of the construction-related services, a third-party occupant, like appellant here, has no damage to discover until he is physically injured by the defect. The existence of an actionable claim in the owner of a structure does not portend a contemporaneous claim in all foreseeable occupants of the structure -- as a construction-related defect may never physically injure anyone. "The plaintiff sues in [his] own right for a wrong personal to [him], and not

1. Ostensibly, the "discovery rule" cited by appellant is found in *Melnyk v. Cleveland Clinic* (1972), 32 Ohio St. 2d 198, 61 O.O. 2d 430, 290 N.E. 2d 916, wherein we held, at syllabus: "Where a metallic forceps and a nonabsorbent sponge are negligently left inside a patient's body during surgery, the running of the statute of limitation governing a claim therefor is tolled until the patient discovers, or by the exercise of reasonable diligence should have discovered, the negligent act."

as the vicarious beneficiary of a breach of duty to another." *Palsgraf*, supra, at 342, 162 N.E. at 100. Appellant's assertion of a "discovery rule" in this context is just not applicable.

All legislative enactments enjoy a presumption of constitutionality. *Hardy*, supra, at 48, 512 N.E. 2d at 629; *State v. Dorso* (1983), 4 Ohio St. 3d 60, 61, 4 OBR 150, 151, 446 N.E. 2d 449, 450; *State, ex rel. Dickman, v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E. 2d 59, paragraph one of the syllabus. When a statute is challenged as unconstitutional, "courts must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible," such statute. *Dorso*, supra, at 61, 4 OBR at 151, 446 N.E. 2d at 450. Appellant here assails R.C. 2305.131, as it applies to bar his cause of action against appellees, contending it violates the due process and right-to-a-remedy provisions of Section 16, Article I of the Ohio Constitution as well as the equal protection guarantees of Section 2, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

Section 16, Article I of the Ohio Constitution provides in part:

"All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

The decisions of this court have interpreted this provision of the Bill of Rights to Ohio's Constitution as providing two distinct guarantees: (1) that legislative enactments may abridge individual rights only "by due course of law," *Mominee v. Scherbarth* (1986), 28 Ohio St. 3d 270, 274-276, 28 OBR 346, 349-351, 503 N.E. 2d 717, 720-722; *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St. 3d 54, 59, 514 N.E. 2d 709, 715, a guarantee which is equivalent to that of the Due Process Clause of the Fourteenth Amendment, *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 544, 21 O.O. 422, 424, 38 N.E. 2d 70, 72; accord *Hartford Fire Ins. Co.*, supra, at 1367; and (2) that all courts shall be open to every person with a right to a remedy for injury to his person, property or reputation, with the opportunity for such remedy being granted at a meaningful time and in a meaningful manner. Appellant challenges R.C. 2305.131 on both grounds.

"A legislative enactment will be deemed valid on due process grounds ' [1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary.'" *Mominee*, supra, at 274, 28 OBR at 349-350, 503 N.E. 2d at 720-721, quoting *Benjamin v. Columbus* (1957), 167 Ohio St. 103, 4 O.O. 2d 113, 146 N.E. 2d 854, at paragraph five of the syllabus. R.C. 2305.131 does bear a real and substantial relation to the general welfare of the public. Although specific legislative history is unavailable for enactments of the Ohio General Assembly, it is apparent, as discussed above, that R.C. 2305.131 was enacted in response to the general demise of the privity requirement and the extension of the liability of an architect or builder to third parties injured by design and construction defects with whom the architects or builders have no contractual relationship. See, e.g., *Yarbro v. Hilton Hotels Corp.* (Colo. 1983), 655 P. 2d 822, 825, and cases cited therein; *Hartford Fire Ins. Co.*, supra, at 1368, and cases cited therein; accord *Elizabeth Gamble Deaconess Home Assn. v. Turner Constr. Co.* (1984), 14 Ohio App. 3d 281, 287, 14 OBR 337, 344, 470 N.E. 2d 950, 958.

"... Given this expanded group of potential claimants and the lengthy anticipated useful life of an improvement to real property, designers and builders were confronted with the threat of defending claims when evidence was no longer available.... [R.C. 2305.131] attempt[s] to mitigate this situation by limiting the duration of liability and the attendant risks of stale litigation, a public purpose recognized as permissible under due process analysis...." (Citations omitted.) *Hartford Fire Ins. Co.*, supra, at 1368. Because extended liability engenders faded memories, lost evidence, the disappearance of witnesses, and the [***20] increased likelihood of intervening negligence, see *Yarbro*, supra, at 825 and *Kocisko*, supra, at 101, 21 OBR at 394, 488 N.E. 2d at 174 (*Wright, J.*, dissenting), the General Assembly, as a matter of policy, limited architects' and builders' exposure to liability by barring suits brought more than ten years after the performance of their services in the design or construction of improvements to real property.

The legislature's choice of ten years to achieve its valid goal of limiting liability here was neither unreasonable nor arbitrary. An often quoted study presented to a committee of the United States House of Representatives studying a similar statute of repose for the District of Columbia revealed that 89.7 percent of all claims against architects were brought within five years of completion of the building, 99.6 percent of all such claims were brought within ten years,

and 100 percent of all such claims were brought within fourteen years. See Comment, Limitation of Action Statutes for Architects and Builders, *supra*, at 367. Indeed, a substantial majority of states have found no due process violations in similar statutes,¹ some of which afford periods as brief as four years. See, e.g., *Harmon v. Angus R. Jessup Assoc., Inc.* (Tenn. 1981), 619 S.W. 2d 522. See, also, *Klein v. Catalano*(1982), 386 Mass. 701, 437 N.E. 2d 514 (upholding a six-year statute of repose barring a college student's action against an architect for lacerations to his hand resulting from the shattering of a plate-glass door in the student center).

We realize that faded memories, lost evidence, unavailable witnesses and intervening negligence hinders plaintiffs, who bear the burden of proving negligence, as well as defendants. We also recognize that R.C. 2305.131 bars all claims after ten years, whether meritorious or frivolous. However, we do not sit in judgment of the wisdom of legislative enactments. "... [A] court has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislative branch of the government. When the validity of a statute is challenged on constitutional grounds, the sole function of the court is to determine whether it transcends the limits of legislative power." *State, ex rel. Bishop, v. Bd. of Edn.* (1942), 139 Ohio St. 427, 438, 22 O.O. 494, 498, 40 N.E. 2d 913, 919. We agree that "[t]he Legislature could reasonably conclude that the statistical improbability of meritorious claims after a certain length of time,... and the inability of the courts to adjudicate stale claims weigh more heavily than allowing the adjudication of a few meritorious claims...." *Klein, supra*, at 710, 437 N.E. 2d at 521, fn. 11. Thus, we hold that R.C. 2305.131 does not violate the due course of law provision of Section 16, Article I of the Ohio Constitution.

Appellant also contends that R.C. 2305.131 violates the "open court" or "right to a remedy" provision of Section 16, Article I, seizing upon our recent analysis of that constitutional provision in the context of the four-year repose statute for medical malpractice actions, R.C. 2305.11(B). As discussed previously, however, the situation presented in the medical malpractice cases, particularly in *Hardy*,⁷ is clearly distinguishable from the situation presented by the operation of R.C. 2305.131. Operation of the medical malpractice repose statute takes away an existing, actionable negligence claim before the injured person discovers it. Thus, "it denies legal remedy to one who has suffered bodily injury,..." in violation of the right-to-a-remedy guarantee. We are not presented in this case with the circumstances which faced us in *Gaines, supra*. There, a medical malpractice plaintiff discovered her claims within the four-year repose period, but at such a time that less than a year (provided by the statute of limitations, R.C. 2305.11[A]) remained for pursuit of such claim. Because the plaintiff was denied a meaningful time in which to pursue her remedy, the author of the majority opinion invalidated the application of the repose statute to her.

In contrast, R.C. 2305.131 does not take away an existing cause of action, as applied in this case. "... [I]ts effect, rather, is to prevent what might otherwise be a cause of action, from ever arising. Thus injury occurring more than ten years after the negligent act allegedly responsible for the harm, forms no basis for recovering. The injured party literally has no cause of action...." *Rosenberg v. North Bergen* (1972), 61 N.J. 190, 199, 293 A. 2d 662, 667. A majority of state constitutions contain a "right-to-a-remedy" provision, which are traceable to the common-law precept *ubi jus ibi remedium* -- there is no wrong without a remedy. Comment, *State Constitutions' Remedy Guarantee Provisions Provide more than Mere "Lip Service" to Rendering Justice* (1985), 16 *Tol. L. Rev.* 585, 588. Originating in the Magna Carta (1225), 9 *Hen. 3, c. 29*, this maxim was incorporated into Ohio's original Constitution of 1802, at Section 7, Article VIII, and was melded into the federal common law by the decision in *Marbury v. Madison* (1803), 5 U.S. (1 Cranch)

1. Forty-six states and the District of Columbia have enacted construction statutes of repose (the exception being Arizona, Kansas, New York and Vermont). Thirty of these jurisdictions, now including Ohio, have upheld the constitutionality of such statutes under various theories. Five have held their versions to be unconstitutional (Alabama, Alaska, Hawaii, New Hampshire and Wisconsin) and the remaining twelve have not ruled on the constitutionality of their current statutes, as passed or amended (Illinois, Iowa, Kentucky, Maine, Missouri, New Mexico, Oklahoma, South Carolina, South Dakota, Virginia, West Virginia and Wyoming). The following courts have upheld their state's statutes against due process challenges: *Carter v. Hartenstein* (Ark. 1970), 455 S.W. 2d 918, appeal dismissed (1971), 401 U.S. 901; *Barnhouse v. Pinole* (1982), 133 Cal. App. 3d 171, 183 Cal. Rptr. 881; *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.* (Del. 1984), 489 A. 2d 413; *Beecher v. White* (Ind. App. 1983), 447 N.E. 2d 622; *Burmester v. Gravity Drainage Dist. No. 2* (La. 1978), 366 So. 2d 1381; *Klein v. Catalano* (1982), 386 Mass. 701, 437 N.E. 2d 514; *O'Brien v. Hazelet & Erdal* (1980), 410 Mich. 1, 299 N.W. 2d 336; *Calder v. Crystal* (Minn. 1982), 318 N.W. 2d 838; *Reeves v. Ille Elec. Co.* (Mont. 1976), 551 P. 2d 647; *Williams v. Kingery Constr. Co.* (1987), 225 Neb. 235, 404 N.W. 2d 33; *Rosenberg v. North Bergen* (1972), 61 N.J. 190, 293 A. 2d 662; *Suburban Homes v. Austin-Northwest Dev. Co.* (Tex. App. 1987), 734 S.W. 2d 89.

137, 163:

"The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

This court has similarly recognized the proper scope of Ohio's right-to-a-remedy provision. As recently stated in the Hardy decision, this court has never taken the position "that causes of action as they existed at common law or the rules that govern such causes are immune from legislative attention. As this court said in *Fassig v. State*, "No one has a vested right in rules of the common law. Rights of property vested under the common law cannot be taken away without due process, but the law itself as a rule of conduct may be changed at the will of the legislature unless prevented by constitutional limitations. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to new circumstances...." *Hardy, supra*, at 49, 512 N.E. 2d at 630. Indeed, several state courts construing similar right-to-a-remedy provisions concur in this view:

"Societal conditions occasionally require the law to change in a way that denies a plaintiff a cause of action available in an earlier day...." This Court would encroach upon the Legislature's ability to guide the development of the law if we invalidated legislation simply because the rule enacted by the Legislature rejects some cause of action currently preferred by the courts. To do so would be to place certain rules of the "common law" and certain non-constitutional decisions of courts above all change except by constitutional amendment. Such a result would offend our notion of the checks and balances between the various branches of government, and the flexibility required for the healthy growth of the law." *Klein, supra*, at 712-713, 437 N.E. 2d at 522, quoting *Freezer Storage, Inc. v. Armstrong Cork Co.* (1978), 476 Pa. 270, 280-281, 382 A. 2d 715, 721. The right-to-a-remedy provision of Section 16, Article I applies only to existing, vested rights, and it is state law which determines what injuries are recognized and what remedies are available. R.C. 2305.131, as applied to bar the claims of appellant here, whose injury occurred over eight years after the expiration of the statute of repose, does not violate Section 16, Article I of the Ohio Constitution.

Appellant lastly argues that R.C. 2305.131, which cuts off the tort liability of architects and builders after expiration of ten years -- but does not so limit the liability of owners and materialmen -- violates the equal protection guarantees of the Ohio and federal Constitutions. We do not agree.

The limitations placed upon the legislature by the state and federal equal protection provisions "are essentially identical," *Beatty v. Akron City Hosp.* (1981), 67 Ohio St. 2d 483, 491, 21 O.O. 3d 302, 307, 424 N.E. 2d 586, 591-592, and "require the existence of reasonable grounds for making a distinction between those within and those outside a designated class...." *Id.* 491. Where, as here, the legislative distinctions do not affect a "suspect class" or infringe upon a fundamental right, and impinge on mere economic interests, courts apply a rational basis test: "[U]nequal treatment of classes of persons by a state is valid only if the state can show that a rational basis exists for the inequality...." *Id.* at 492.

The United States Supreme Court has dismissed appeals from at least two state court decisions upholding similar architect-builder statutes of repose, on the grounds that no substantial federal question was presented. A dismissal for lack of a substantial federal question is a decision on the merits, *Hicks v. Miranda* (1975), 422 U.S. 332, 344, and is at least some authority that these statutes do not violate the federal Constitution. Moreover, the vast majority of states have upheld similar architect-builder statutes of repose, holding the legislative classifications therein were based on valid distinctions.¹

We find such authority persuasive. Owners, tenants and others actually in possession of improvements to real property, who are expressly excluded from operation of the statute, have continuing control of the premises and are responsible for their repair and maintenance. In contrast, architects and builders have no control over the premises once they are turned over to the owner after which time "... there exists the possibility of neglect, abuse, poor maintenance, mishandling, improper modification, or unskilled repair of an improvement...." *Burmaster v. Gravity Drainage Dist. No. 2* (La. 1978), 366 So. 2d 1381, 1385. "The owner or tenant may... use the premises for a purpose for which it was not designed, or make defective alterations which may appear to be a part of the original construction...." *Howell v. Burk* (1977), 90 N.M. 688, 694, 568 P. 2d 214, 220. The legislation could reasonably and logically distinguish between these

roles, and conclude that architects and builders should thus not be held liable indefinitely, as discussed above. Accord Harmon, *supra*, at 525.

Similarly, the differences in work conditions provides a rational basis for limiting the liability of architects and builders, but not materialmen:

"... Suppliers and manufacturers, who typically supply and produce components in large quantities, make standard goods and develop standard processes. They can thus maintain high quality control standards in the controlled environment of the factory. On the other hand, the architect or contractor can pre-test and standardize construction designs and plans only in a limited fashion. In addition, the inspection, supervision and observation of construction by architects and contractors involv[e] individual expertise not susceptible of the quality control standards of the factory...." Burmaster, *supra*, at 1386.

Moreover, some courts have upheld these distinctions as "necessary to encourage... [architects and builders] to experiment with new designs and materials...." Klein, *supra*, at 717, 437 N.E. 2d at 524. "... Design creativity might be stifled if architects and engineers labored under the fear that every untried configuration might have unsuspected flaws that could lead to liability decades later." O'Brien v. Hazelet & Erdal(1980), 410 Mich. 1, 18, 299 N.W. 2d 336, 342.

Appellant argues, however, that none of these justifications applies here, where a "static condition" is involved. This argument is meritless, however, as equal protection does not require perfection in making classifications. Massachusetts Bd. of Retirement v. Murgia (1976), 427 U.S. 307, 314. "[W]hen legislative authority is exerted within a proper area, it need not embrace every conceivable problem within that field. The Legislature may proceed one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind...." Jewel Cos., Inc. v. Burlington (1974), 365 Mass. 274, 279, 311 N.E. 2d 539, 542, quoting Mobil Oil Corp. v. Atty. Gen. (1972), 361 Mass. 401, 417, 280 N.E. 2d 406, 417. The General Assembly is not required, under the rubric of equal protection, to choose between dealing with all aspects of a problem or not dealing with it at all. Dandridge v. Williams (1970), 397 U.S. 471, 486-487. Where, as here, the classifications made by the General Assembly are rational and not arbitrary, the requirements of equal protection are satisfied. Here, as in the area of due process, this court "may not sit as a superlegislature to judge the wisdom or desirability [*205] of legislative policy determinations...; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment...."

We hold that R.C. 2305.131 does not violate the equal protection guarantees of the Ohio and United States Constitutions by limiting the liability of architects and builders without corresponding limits on the liability of occupiers of improvements to real property and materialmen supplying materials used in the construction of such improvements. Because we also have held that the statute does not violate either the due process or right-to-a-remedy provisions of Section 16, Article I of the Ohio Constitution, we thus affirm the court of appeals.

DISSENT: DOUGLAS, J., dissenting.

Section 16, Article I of the Ohio Constitution provides in relevant part:

"All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." (Emphasis added.)

1. The following jurisdictions have upheld their construction statutes of repose against equal protection challenges: Carter v. Hartenstein (Ark.), *supra*; Barnhouse v. Pinole (Cal.), *supra*; Yarbrow v. Hilton Hotels Corp. (Colo.), *supra*; Zapata v. Burns (Conn. 1988), 542 A. 2d 700; Cheswold Volunteer Fire Co. (Del.), *supra*; Britt v. Schindler Elevator Corp. (D.D.C. 1986), 637 F. Supp. 734; Mullis v. Southern Company Services, Inc. (Ga. 1982), 296 S.E. 2d 579; Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill (Idaho 1982), 644 P. 2d 341; Beecher v. White (Ind.), *supra*; Burmaster v. Gravity Drainage Dist. No. 2 (La.), *supra*; Whiting-Turner Contracting Co. v. Coupard (Md. 1985), 499 A. 2d 178; Klein v. Catalano (Mass.), *supra*; O'Brien v. Hazelet & Erdal (Mich.), *supra*; Reich v. Jesco, Inc. (Miss. 1988), 526 So. 2d 550; Reeves v. Ille Elec. Co. (Mont.), *supra*; Williams v. Kingery Constr. Co. (Neb.), *supra*; Wise v. Bechtel Corp. (Nev. 1988), 766 P. 2d 1317; Rosenberg v. North Bergen (N.J.), *supra*; Lamb v. Wedgewood South Corp. (N.C. 1983), 302 S.E. 2d 868; Bellemare v. Gateway Builders, Inc. (N.D. 1988), 420 N.W. 2d 733; Harmon v. Angus R. Jessup Assoc., Inc. (Tenn. 1981), 619 S.W. 2d 522; Suburban Homes (Tex. App.), *supra*; Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co. (Wash. 1972), 503 P. 2d 108.

Section 16, Article I of the Ohio Constitution is clear and unambiguous. The courthouse doors are to be open to an individual who suffers an injury to his person. The individual has a right to a remedy for his injuries and to have justice administered without denial.

In the case at bar, Sedar suffered severe injuries to his person. However, Sedar was denied a remedy for his injuries because R.C. 2305.131, a statute of repose, effectively barred his pursuit of a remedy before his injuries even occurred.

The majority attempts to distinguish the present case from our recent analysis of Section 16, Article I in the context of the four-year repose statute for medical malpractice actions, R.C. 2305.11(B). In doing so, the majority states that the medical-repose statute takes away an existing actionable claim before the injured party discovered his claim and, therefore, denies a legal remedy to one who has suffered injury to his person, thereby violating Section 16, Article I. In contrast, says the majority, R.C. 2305.131 does not take away an existing cause of action from Sedar but, rather, prevents the cause of action from ever arising. Hence, reasons the majority, denial of a future legal remedy to one who has not yet suffered bodily injury does not violate Section 16, Article I when the injury actually occurs. I fail to see Section 16, Article I should not be read so as to discriminate between how a violation of its protections occurs. R.C. 2305.131 effectively closes the courthouse to Sedar and individuals like him in contravention of the express language of Section 16, Article I, thereby violating constitutionally protected rights. Therefore, in my judgment, R.C. 2305.131 is unconstitutional. Accordingly, I dissent.

**Gerard J. KRANTZ, Plaintiff-Appellant, v. The GEHL COMPANY,
Defendant-Respondent**

Court of Appeals of Wisconsin

146 Wis. 2d 398; 431 N.W.2d 675; 1988 Wisc. App.

Submitted on briefs September 1, 1988, Decided

OPINION BY: DYKMAN

OPINION: Gerard Krantz appeals from a judgment dismissing his complaint. Krantz was injured while cleaning Gehl-manufactured farm machinery and sued Gehl for damages. The trial court granted Gehl's motion for a directed verdict. The issue is whether Krantz's negligence exceeded that of Gehl as a matter of law. We conclude that it did, and affirm.

1; CCH Prod. Liab. Rep. P11,990 In 1984, Krantz was injured while unloading haylage¹ from a Gehl forage box.² The forage box, while self-unloading, has no power of its own. The self-unloading features are powered by connecting the forage box to a power take-off on a tractor. Conveyors (feeder aprons) move the haylage to the front end of the forage box where it passes through a set of three "beaters," positioned one above the other. The beaters are large steel cylinders from which steel blades protrude. The beaters are controlled by beater clutch levers which are located at the front side corners of the forage box. Pulling the beater clutch lever out and down activates the beaters while pushing the lever up and in disengages the beater drive. The beaters shred the haylage and deposit it onto a cross-conveyor. The cross-conveyor carries the haylage through the cross-conveyor discharge opening to a blower unit located next to the forage box, which blows the haylage into the silo for storage.

Nothing in the forage box operates unless its "telescoping drive connection" is connected to a tractor's power take-off shaft. Engaging the power take-off automatically engages the cross-conveyor. The feeder aprons are only engaged when the beaters are "on." A separate control regulates the speed of the feeder aprons, which may be operated at one of three speeds: "low," "high," or "sweep." "Sweep" speed is used to clean out the forage box after it has been emptied. Just above the cross-conveyor discharge opening, at roughly eye level, is a decal that says:

DANGER

KEEP HANDS OUT.

ROTATING COMPONENTS CAN CATCH HANDS.

SERIOUS INJURY.

On July 18, 1984 at about 5 p.m., after Krantz had unloaded the last load of the day, he set the feeder apron control at "sweep" speed to clean the box so there would be no hay remaining to rot the box. He let the beaters and conveyors run at "sweep" speed for "at least five minutes." At the end of the process there was still some material left near the cross-conveyor by the discharge opening. The material was approximately seven inches deep and extended three to five feet back into the box from the cross-conveyor.

Intending to remove the remaining material manually, Krantz reached into the cross-conveyor discharge opening as far as he could with his right arm to sweep the material out. While he reached under the beater blades, his left arm accidentally turned on the beater control lever and the beater blades injured his right arm. Krantz used his left hand to shut the beaters off with the beater control lever. While struggling to free his right arm he kept his left hand on the beater

1. Haylage is chopped hay which is stored in a silo.

2. A forage box is approximately sixteen feet long, nine feet wide and nine and one-half feet high. In the field, a chopper connected to a tractor chops hay and blows it into the forage box.

control lever and accidentally turned it back on. Hearing the commotion from the barn, Krantz's brother came and shut the forage box off.

Krantz sued Gehl for damages, alleging that Gehl had negligently designed the forage box, and that such negligence directly caused Krantz's injuries. At the conclusion of Krantz's case, Gehl moved for a directed verdict, asserting that Krantz was negligent as a matter of law and that his negligence exceeded that of Gehl as a matter of law. Basing its decision on the reasoning in *Schuh v. Fox River Tractor Co.*, 63 Wis. 2d 728, 743-45, 218 N.W.2d 279, 287-88 (1974),¹ the trial court granted Gehl's motion for a directed verdict, concluding that Krantz was negligent and that his negligence exceeded Gehl's. The court entered judgment against Krantz.

STANDARD OF REVIEW

In determining whether a directed verdict should be granted, the evidence is viewed most favorably to the party against whom the verdict is sought to be directed. The test is whether there is any credible evidence which under a reasonable view would support a verdict contrary to that which is sought. A trial judge should, except in the clearest of cases, withhold ruling on a directed verdict and ordinarily permit the question to go to the jury. The test on appeal is whether the trial court was clearly wrong. This test requires us to give deference to a trial court's decision. "Where the causal negligence of the plaintiff is greater than that of the defendant the trial court has a duty to so hold as a matter of law." *Stewart v. Wulf*, 85 Wis. 2d 461, 471, 271 N.W.2d 79, 84 (1978).

Krantz testified to the following: that he had operated forage boxes on a continuous basis as needed for six or seven years before the accident and knew all about the safety devices, safety decals and warnings on the Gehl forage box; that before his accident, he knew he needed to follow a mandatory safety shutdown procedure every time before manually cleaning the forage box; that he knew that the parts of the procedure included shutting off the power take-off, shutting off the tractor engine, and then disconnecting the power take-off from its mating part; that had he followed this procedure, or any one part of it, his accident would not have happened; that he followed no part of this procedure; that he knew that the beaters in the forage box were potentially dangerous even if they were not moving because unless the power take-off was disengaged there was a "minute possibility that the beaters might start up when you don't want them to"; that he knew he was supposed to keep his hands out of the discharge opening.

Krantz concedes he could have prevented the accident if he had followed the mandatory shutdown procedure. However, he argues that his behavior and actions were "undoubtedly foreseeable by the manufacturer and arguably reasonable under the circumstances" because the machine wasn't unloading itself, he was enticed by the placement and location of the beater clutch lever near the discharge opening, he was under time pressure and the environmental conditions were less than ideal.

Even if we assume that Gehl was negligent as a matter of law because of the design and location of the beater clutch control lever,² n4 we agree with the trial court that Krantz's negligence exceeded Gehl's as a matter of law. Krantz admitted that if he had followed the mandatory shutdown procedure his accident would not have happened.³ n5 Krantz admitted that if he had kept his hand out of the discharge opening, as he knew he should have, the accident would not

1. In *Schuh v. Fox River Tractor Co.*, 63 Wis. 2d 728, 218 N.W.2d 279 (1974), the trial court had directed a verdict dismissing the plaintiff's action after a jury had returned a verdict for the plaintiff. The plaintiff had fallen into a crop blower fan which injured his leg. The plaintiff had put himself in a "precarious position with his feet on the narrow rim of the crop blower, while the tractor which powered it was running." *Id.* at 745, 218 N.W.2d at 288. On review, the court found the following facts significant: that plaintiff was a farmer who had lived on a farm all his life; that he was familiar with farm machinery; and that he was experienced with the crop blower. *Id.* at 744, 218 N.W.2d at 287. The court noted that the defendant in *Schuh* may have been negligent because of the unusual and misleading position of the crop blower's clutch lever, inadequate warnings, and the foreseeability of the misuse. Nevertheless, the court concluded that the plaintiff's negligence equalled or exceeded any negligence of the defendant as a matter of law.

2. Krantz claimed the beater clutch control lever design demonstrated Gehl's negligence as a matter of law because: (1) it was defective because of the clutch's direction of travel (down for "on"), the small amount of travel, the ease of engagement, and its lack of detent; (2) the clutch was in the defective condition when it left the manufacturer; (3) the clutch was unreasonably dangerous to the user; (4) the clutch was a substantial cause of plaintiff's injury; (5) the clutch reached Krantz without substantial change from when sold and Gehl was in the business of selling such product. Krantz claimed these factors fulfilled the test for strict liability laid out in *Dippel v. Sciano*, 37 Wis. 2d 443, 460, 155 N.W.2d 55, 63 (1967), and that therefore Gehl was negligent as a matter of law.

have happened. Although Krantz alleges that he was under time pressure and that there were less than ideal environmental conditions, he submitted no evidence on these factors.¹

Krantz also claims that the warning decal over the discharge opening which warns "keep hands out, rotating components can catch hands," actually invited Krantz to put his hands near the beaters once they had stopped rotating. Krantz claims that, once the rotation had stopped, a reasonable operator would believe that the danger had also stopped. However, Krantz conceded that he knew there was still a danger even when the beaters weren't rotating because "they might start up even when you don't want them to." In addition, the trial court specifically noted that it was not deciding the directed verdict motion on the basis of the warnings' sufficiency, but on the basis of Krantz's contributory negligence.

Furthermore, looking at the testimony in the light most beneficial to Krantz regarding the position of his left hand just before the accident, Krantz testified that it was on the safety bar, approximately eight inches above the beater bar clutch. Krantz then leaned over to sweep out the box with his right arm, even though he knew that if he accidentally hit the beater bar clutch, he could turn on the beater bars. This is further support for concluding that, as a matter of law, Krantz was more negligent than Gehl.

The dissent attempts to distinguish *Schuh*, supra, because comparative negligence law at the time of *Schuh* barred recovery if a plaintiff was fifty percent or more negligent, and now recovery is barred if plaintiffs are fifty-one percent or more negligent. A one percent difference cannot be the basis for rejecting *Schuh*. No appellate court can cut that finely. The dissent's suggestion that dissimilar kinds of negligence somehow cannot be compared is really an assertion that *Schuh* was wrongly decided. However, we are bound by supreme court opinions. *State v. Lossman*, 118 Wis. 2d 526. In *Schuh*, the tractor company's negligence was improperly placing a clutch lever, while the plaintiff's negligence was proceeding in the face of a known danger. *Schuh*, 63 Wis. 2d at 737 and 744, 218 N.W.2d at 284 and 287. The dissent does not explain how that differs from the situation here.

Krantz violated every safety rule he claimed he knew. As the trial court aptly noted, "whether it was through over-familiarity and the false sense of security that comes with it, whether it was just because it was the end of a long, hot day, he was in a hurry, or for whatever reason," the degree of Krantz's negligence is as a matter of law greater than any negligence Gehl may have had in the design and positioning of the beater bar clutch lever.

By the Court. -- Judgment affirmed.

DISSENT: GARTZKE, P.J. (dissenting.)

The trial court based its decision largely on *Schuh v. Fox River Tractor Co.*, 63 Wis. 2d 728, 743-45, 218 N.W.2d 279, 287-88 (1974). When *Schuh* was decided, the comparative negligence statute provided that a plaintiff could not recover if the plaintiff's negligence was equal to or greater than that of the defendant. The law is now that contributory negligence does not bar recovery unless the plaintiff's negligence was greater than that of the defendant. Sec. 895.045, Stats. The *Schuh* court did not hold that the negligence of the plaintiff in that case was greater than that of the defendant farm machinery manufacturer. The court held only that the trial court was correct in determining that the negligence of the

3. Krantz asserts that he "reasonably complied with defendant's clean-out procedure" by sweeping out under the beater with his arm. However, Krantz's actions are contrary to a safety instruction in the operator's manual: "DO NOT attempt to hand-feed any crop or material into the area of the Unloading Mechanism!" Krantz claimed he was familiar with the operator's manual's safety instructions. Nevertheless, he disregarded them.

1. Krantz claims that "a reasonable jury could properly have found that the sweltering temperature, exhaustive workday, equipment design, machinery placement and general urgency made plaintiff's actions 'reasonable under the circumstances.'" Although Krantz submitted evidence regarding allegedly negligent equipment design and machinery placement, Krantz has not indicated where there is evidence in the record on these other factors. Gehl claims Krantz submitted no such evidence. In his reply brief, Krantz makes a record reference in which he described the day the accident occurred: "It was in July. It was like with regular July weather. It was hot and dry and some dust flying around, things like that, 'cause it was during a dry spell." From this testimony, Krantz claims that "reasonable jurors could easily find that such undesirable environmental conditions adversely affect the safe use of such a machine." We do not agree. For a jury to reach the conclusions Krantz proposes from the evidence submitted, it would have to speculate, which it may not do. See *Milonig v. Bakken*, 112 Wis. 2d 445, 458 n. 2, 334 N.W.2d 80, 87 (1983) (Wis J I -- Civil 220, Jury not to speculate, held to be correct statement of the law.) We therefore need not consider whether the working conditions were relevant to the negligence issue.

plaintiff equaled or exceeded that of the defendant. Schuh is not persuasive.

I accept the trial court's conclusions that Krantz was negligent, and that credible evidence supports a finding that the forage box was defectively designed so as to render the defendant liable under a strict liability theory. No one would suggest, however, that the negligence of Krantz and the negligence of the manufacturer had anything in common. They are necessarily dissimilar and of different kinds.

The apportionment of negligence is ordinarily for the trier of fact. *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis. 2d 723, 732, 275 N.W.2d 660, 665 (1979). The instances in which a court may rule that, as a matter of law, the plaintiff's negligence exceeds or equals that of the defendant are extremely rare. And those instances in which the court may make such a ruling are ordinarily limited to cases where the negligence is of a similar kind or character. *Id.* For this reason, it is only in an unusual case that a court will upset a jury's apportionment, particularly where the negligence of each party is not of the same kind and character. *Jagmin v. Simonds Abrasive Co.*, 61 Wis. 2d 60, 83-84, 211 N.W.2d 810, 822 (1973), *Williams v. Milwaukee & Suburban Transport Co.*, 37 Wis. 2d 402, 408, 155 N.W.2d 100, 103 (1967), and *Mix v. Farmers Mutual Automobile Ins. Co.*, 6 Wis. 2d 38, 43, 93 N.W.2d 869, 873 (1959), are to the same effect.

In an unusual case, perhaps a court can conclude that where the acts of negligence by the plaintiff and the defendant differ in kind and quality, the negligence of each at least equals that of the other. But in my view, it is the extraordinary case in which a court may hold as a matter of law that the negligence of one party exceeds that of the other where the acts of negligence have nothing in common, as in a product liability case. This is particularly true in a products liability case involving a design defect. This is not an extraordinary case.

Accordingly, in my view, the trial court erred when it concluded that the negligence of Krantz exceeded that of the farm machinery manufacturer.