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## SUPPLIERS' LIABILITY FOR SALE OF HIGHLY INFLAMMABLE LIQUIDS TO CHILDREN

The common law principle is well established that it is negligent to sell a dangerous article or substance to a child who because of his youth and inexperience is likely to misuse it to his injury.<sup>1</sup> This principle is easily applied to find negligence and liability when the article supplied to the child is extremely dangerous in nature, requiring a high degree of skill for its safe handling (explosives),<sup>2</sup> or when the article is capable of safe handling without undue caution, but is particularly attractive to children and likely to be misused by them (firearms).<sup>3</sup> These articles are often referred to by courts as being "inherently dangerous" in nature.<sup>4</sup> Thus, it is the common law duty of the dealer in dangerous articles to refuse such sales to children when he knows, or should know, that the youth is unfit to be trusted with them.

A more difficult problem arises, however, where the article or substance sold is potentially quite dangerous if misused, but is nevertheless commonly utilized in a non-dangerous manner. Typical examples of such substances are gasoline and lighter fluids. When faced with a determination of negligence for the sale of such inflammables, the courts have often refused to recognize them as dangerous to a child or to allow recovery for injury received after the sale of

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1. Annot., 20 A.L.R.2d 119, 124 (1951). The Restatement of Torts formulates the rule in the following terms: "One who supplies . . . a chattel for the use of another whom the supplier knows or from facts known to him should know to be likely because of his youth, inexperience or otherwise, to use it in a manner involving unreasonable risk of bodily harm to himself and others whom the supplier should expect to share in, or be in the vicinity of its use, is subject to liability for bodily harm caused thereby to them." Restatement, Torts § 390 (1934).

2. See, e.g., *Burbee v. McFarland*, 114 Conn. 56, 157 Atl. 538 (1931); *Binford v. Johnston*, 82 Ind. 426 (1882); *McEldon v. Drew*, 138 Iowa 390, 116 N.W. 147 (1908); *Carter v. Towne*, 98 Mass. 567 (1868); *Bosserman v. Smith*, 205 Mo. App. 657, 226 S.W. 608 (1920); *Pierson v. London*, 102 Pa. Super. 176, 156 Atl. 719 (1931).

3. See, e.g., *Spires v. Goldberg*, 26 Ga. App. 530, 106 S.E. 585 (1921); *Henningson v. Markowitz*, 132 Misc. 547, 230 N.Y. Supp. 313 (Sup. Ct. 1928); *Poe v. Canton-Mansfield Dry Goods Co.*, 36 Ohio App. 395, 173 N.E. 318 (1929); *Wassel v. Ludwig*, 92 Pa. Super. 341 (1928); *Bernard v. Smith*, 36 R.I. 377, 90 Atl. 657 (1914).

4. E.g., *Burbee v. McFarland*, 114 Conn. 56, 157 Atl. 538 (1931); *Bosserman v. Smith*, 205 Mo. App. 657, 226 S.W. 608 (1920). An "inherently dangerous" article is one, which if put to the use intended is likely to cause injury.

such a substance.<sup>5</sup> Because of the established principle outlined above, and the apparent incongruity of the courts' holdings in the "inflammable" cases with those previously noted, these latter cases invite analysis. The subject matter to be considered, therefore, is the common law liability<sup>6</sup> of suppliers of highly inflammable liquids to children. The decisions are far from harmonious.

In denying liability to the injured child in these cases, the courts appear to use three basic approaches, often in combination. The first is to say that the substance is not dangerous enough in small quantities to require one to foresee that a child will be injured by it, the theory being that the substance is one in common, non-dangerous use.<sup>7</sup> The second approach is to admit that inflammables are dangerous, but to hold that since the substance is in common use, even children must know of its dangerous nature.<sup>8</sup> The result of either of these findings is to hold that there was no foreseeability of harm and that, therefore, the defendant vendor is not negligent as a matter of law. The third approach is used when the court is willing to admit negligence on the part of the seller as to the original child purchaser, but, when the injuries are inflicted by or to others than the original purchaser, to hold that these actions are intervening forces and to deny liability because of lack of proximate cause.<sup>9</sup>

#### *Inflammables Not Inherently Dangerous Prevent Liability*

The first approach is illustrated by the 1948 New York case of *Traynor v. United Cigar—Whelan Stores Corp.*,<sup>10</sup> in which the defendant sold the eleven-year-old plaintiff a bottle of cigarette lighter fluid. The boy subsequently uncorked the bottle, applied a match and was severely burned. The court held that "as a matter of law, the cigarette-lighter fluid was not a dangerous substance within the doctrine that one who puts a dangerous implement in the hands of a person incompetent to use it is chargeable with knowledge of the consequences."<sup>11</sup> The court stated that the fluid was an article in

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5. *Mondt v. Ehrenwerth*, 251 Ill. App. 226 (1929); *Greiving v. LaPlante*, 156 Kan. 196, 131 P.2d 898 (1942); *Tharp v. Monsees*, 327 S.W.2d 889 (Mo. 1959); *Traynor v. United Cigar-Whelan Stores Corp.*, 274 App. Div. 800, 79 N.Y.S.2d 329 (1948).

6. With the exception of *Mondt v. Ehrenwerth*, supra note 5, there seem to be no judicial decisions involving the sale of inflammables in violation of a statute.

7. *Traynor v. United Cigar-Whelan Stores Corp.*, 274 App. Div. 800, 79 N.Y.S.2d 329 (1948).

8. *Tharp v. Monsees*, 327 S.W.2d 889 (Mo. 1959).

9. *Greiving v. LaPlante*, 156 Kan. 196, 131 P.2d 898 (1942).

10. 274 App. Div. 800, 79 N.Y.S.2d 329 (1948).

11. *Id.* at 800, 79 N.Y.S.2d at 330.

common use and was not inherently dangerous. Reasoning that since the occurrence was not one that a reasonable, prudent man would foresee, the court found no proximate cause.

This same rationale was applied in *Mondt v. Ehrenwerth*.<sup>12</sup> This case involved a thirteen-year-old boy who was sent by his parents to defendant's store to purchase benzine. Previously the boy had run similar errands without mishap. On the occasion complained of, the clerk had filled an empty paint can with benzine, the child paid ten cents and left. The evidence indicated that the boy knew the character and qualities of benzine. The court held that under these circumstances and in view of the small quantity purchased, the benzine was not so inherently dangerous as to constitute a violation of a statute.<sup>13</sup>

#### *Children's Knowledge of Dangerous Characteristics Negates Liability*

Most courts are willing to recognize that these substances are, even in small quantities, potentially quite dangerous. Although these substances are dangerous, it is reasoned, their properties are "well known to young and old alike"<sup>14</sup> and, therefore, the child can reasonably be expected to use inflammables safely. This is the second method used to prevent recovery from the supplier and was the basis of the court's decision in the case of *Tharp v. Monsees*,<sup>15</sup> decided by the Missouri Supreme Court in September of 1959. The evidence showed that defendant service station operator had sold a twelve-year-old boy three cents worth of gasoline in a jar with a lid on it. Defendant did not ask the boy why he wanted it, nor did the boy tell him. After a small amount of the liquid was used to clean paint brushes, the purchaser and another youngster of eleven decided to see how the rest would burn. While the latter was pouring the gasoline on a small fire, the flame backed up into the jar and in the excitement the contents were spilled on the plaintiff, a boy of four watching nearby, causing him to be badly burned. Other evidence showed that the purchaser and his eleven-year-old friend both knew that the substance would burn and "that people said it was dangerous,"<sup>16</sup> but neither knew how dangerous or was aware that the flame would "backlash" up a poured stream to the container and set the liquid

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12. 251 Ill. App. 226 (1929).

13. "That it shall be unlawful for any person, firm, association or corporation to keep, store, transport, sell or use any crude petroleum, benzine, benzol, gasoline, naphtha, ether or other like volatile combustibles, or other compounds, in such manner or under such circumstances as will jeopardize life or property." Ill. Rev. Stat. c. 38 § 326 (1927).

14. *Tharp v. Monsees*, 327 S.W.2d 889, 897 (Mo. 1959).

15. 327 S.W.2d 889 (Mo. 1959).

16. *Id.* at 892.

in it on fire. The verdict and judgment of \$48,000 for plaintiff was reversed on appeal and the supreme court found "nothing in this record to support a finding that defendant had any reasonable cause to anticipate that Jerry Teson [the purchaser] would make any dangerous or improper use of the small quantity of gasoline sold . . . ." <sup>17</sup> The court noted that it would be "hard to conceive of a normal twelve-year-old boy (ready to enter high school) and living in a town or in the country or particularly in the vicinity of a great city with its many gasoline filling stations and its thousands of gasoline operated motors, gasoline powered machines, . . . that did not know the general properties of gasoline and the ease with which it takes fire or can be ignited." <sup>18</sup> The court expressly ruled that section 390 of the Restatement of Torts <sup>19</sup> was inapplicable upon the facts of the case, since a twelve-year-old boy *must* know the dangerous nature of the substance. <sup>20</sup> Therefore, reasonable men could only conclude that the defendant had acted with due care in making the sale.

Knowledge of the characteristics of benzine by the child purchaser was a basis of decision in the *Mondt* case also. <sup>21</sup> Proof that the boy knew the qualities of benzine was one of the reasons why the appellate court approved a directed verdict for defendant.

#### *Sale Not Proximate Cause of Injury to Third Person*

Even when the defendant is found negligent, courts sometimes limit his liability. Under such a circumstance it is said that there is no proximate cause since the acts of others have intervened and contributed to the plaintiff's injury. <sup>22</sup> In *Greiving v. LaPlante*, <sup>23</sup> an employee of the defendant service station operator sold two cents worth of gasoline in an open can to a nine-year-old boy. This boy and the ten-year-old plaintiff were playing in a lot near the plaintiff's home where they had a fire going in a small can. They had previously put coal oil on the fire to increase the flame, and when it was consumed, plaintiff told his friend to go across the street to defendant's service station and buy some gasoline on the premise that his father wanted it to clean out spots on a hat. The boy purchased gasoline and gave it to plaintiff who poured it on the fire and was badly burnt. Verdict for plaintiff was reversed by the Supreme

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17. *Id.* at 898.

18. *Id.* at 897.

19. Note 1 *supra*.

20. 327 S.W.2d 889, 897 (Mo. 1959).

21. *Mondt v. Ehrenwerth*, 251 Ill. App. 226 (1929).

22. The difference between physical causation and limitation of liability must be recognized. See Prosser, Torts § 47 (2d ed. 1955).

23. 156 Kan. 196, 131 P.2d 898 (1942).

Court of Kansas which held that the plaintiff's injury was so remote that it "was not within the probabilities, the natural sequence, which the appellant is chargeable with foreseeing."<sup>24</sup> Plaintiff's act was an intervening event and the sale was not held to be the proximate cause of the particular injury complained of. A dissent by Justice Harvey pointed out that the defendant's negligence was such that injury to someone could certainly have been reasonably anticipated, and that, therefore, the judgment of the lower court should have been affirmed.<sup>25</sup> Implicit in this statement is the realization that the dangerous situation which the supplier has created is not limited to the child purchaser, but extends also to other children likely to be playing near him.

This principle was applied in *Clark v. Ticehurst*,<sup>26</sup> decided by the same court twelve years later. The defendant's employee sold approximately three pints, ten cents worth, of gasoline in an open can, to an eleven-year-old boy. At the time of the purchase, the boy told the employee that he was going to use the gasoline to set fire to a toy airplane. The flame ignited the remainder of the gasoline, whereupon the boy instinctively threw the can away, burning the four-year-old plaintiff who was standing nearby. On appeal from the overruling of defendant's demurrer to plaintiff's petition, the court limited the rule of the *Greiving* case to its particular facts, and held the petition sufficient.

When the seller sold the gasoline to the boy it was with knowledge the boy was going to burn the gasoline and he was bound to know that in the performance of that burning harm was a likely and not improbable result, and the mere fact the harm occurred to another boy instead of to the boy making the purchase cannot avail the appellant.<sup>27</sup>

Thus the court was willing to adopt, in essence, the principle embodied in section 390 of the Restatement of Torts, i. e. that the defendant's responsibility should extend to the purchaser or anyone whom the defendant should expect to share in or be in the vicinity of its use. It is felt that this decision is at least moving in the right direction.

However, the holdings in the *Traynor*, *Tharp* and *Mondt* cases are hard to justify. In ruling that lighter fluid is not inherently dangerous, these cases merely beg the question. Common usage of an article by no means determines that it is not dangerous; for example the ordinary automobile is in common use, yet it would doubtlessly

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24. Id. at 204, 131 P.2d at 903.

25. Ibid.

26. 176 Kan. 544, 271 P.2d 295 (1954).

27. Id. at 547, 271 P.2d at 297.

be negligent to put a child behind the wheel of one. Although lighter fluid and gasoline are commonly used everyday by persons who are aware of the dangerous uses of the liquids, children are not apt to realize the risks. Their inquisitive minds, inventive imaginations and lack of training are factors that make it more reasonable to expect that children will use these inflammables in dangerous experimentation, rather than in the common manner.

One of the opinions states that twelve-year-old boys must know of the general properties of gasoline and the ease with which it is ignited.<sup>28</sup> No doubt children are aware of the fact that gasoline runs motors and many machines; but it cannot be said that they know of the propensity of gasoline, when poured on a fire, to "backlash" or leap up the stream to the source. But more important, if it must be granted that young boys know what the courts state that every boy knows,<sup>29</sup> is it not more reasonable to believe that this very knowledge might lead to their setting fires and experimenting, rather than to safe and cautious conduct? The small amount sold and the delivery of the liquid in a closed container, are facts which do not substantially diminish the risk of serious injury. On the basis of these considerations, reasonable men might well disagree on the issue of the defendant's negligence, and as a matter of fact, might readily find such negligence.

#### *A Suggested Approach*

The attractive nuisance doctrine and the doctrine here under discussion are closely related by their common origins in the early case of *Lynch v. Nurdin*.<sup>30</sup> In that case, the defendant's servant left a horse and cart unattended and untied in the street. While the seven-year-old plaintiff was climbing into the cart, another child carelessly caused the horse to move and plaintiff was thrown down and injured. The court held defendant liable although plaintiff was a trespasser and had been injured because of his own act and the act of another child. The court stated that an important factor in finding a case of negligence sufficient to reach the jury was whether children might reasonably be attracted to the spot (or come in proximity to the dangerous instrumentality). "If this . . . fact were probable, it would be hard to say that a case of gross negligence was not fully established."<sup>31</sup> If the jury found that the plaintiff contributed to the accident, but that in doing so "he merely indulged the natural instinct of a child in amusing himself with the

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28. *Tharp v. Monsees*, 327 S.W.2d 889, 897 (Mo. 1959).

29. *Ibid.*

30. [1841] 1 Q.B. 29, 113 Eng. Rep. 1041.

31. *Id.* at 38, 113 Eng. Rep. at 1044.

empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact."<sup>32</sup> The court concluded by saying that if the act of the servant resulted in tempting the child then "he ought not to reproach the child with yielding to that temptation."<sup>33</sup>

The court recognized the fact that young children are easily tempted to meddle. Surely this suggests that, as a matter of policy, people should be held responsible for creating or allowing a situation in which children are likely to meddle, and in their play, seriously injure themselves. The result of this philosophy, in the attractive nuisance cases against landowners, has been to hold the landowner liable where he has done no positive act, but has only allowed a potentially dangerous situation to exist on his land. Certainly, then, when the supplier does an affirmative act that actually brings the child and the dangerous substance together, liability ought to be readily found.

This proposition finds support in the Canadian case of *Yachuk v. Oliver Blais Co.*<sup>34</sup> In that case, the nine-year-old plaintiff bought approximately a pint of gasoline at the defendant's service station, falsely stating, upon inquiry by the attendant, that he wanted the gas for his mother's car which was stalled down the street. In fact he intended to and did use the gasoline for torches in a game of "Indians." While he was lighting a bulrush dipped in the pail of gasoline, the pail caught fire and the young plaintiff, one of several boys present, was severely burned. On appeal to the Privy Council of the House of Lords, the judgment of the Supreme Court of Canada was reversed and the defendant was held liable on the ground that "to put a highly inflammable substance into the hands of a small boy is to subject him to temptation and the risk of injury, and this is no less true if the boy has resorted to deceit in order to overcome the suppliers' scruples."<sup>35</sup> The court, citing the "principle stated by Lord Denman C. J. in *Lynch v. Nurdin*,"<sup>36</sup> also held that the plaintiff could not be found contributorily negligent and quoted approvingly from the opinion of the Court of Appeals for Ontario:

If one gives to a child an explosive substance, and the child, with a limited knowledge in respect to the likely effect of the explosion, is tempted to meddle with it to his injury, it cannot

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32. *Ibid.*

33. *Id.* at 39, 113 Eng. Rep. at 1044.

34. [1949] A.C. 386 (P.C.) (Can.). For a discussion of this case see 27 Can. B. Rev. 845 (1949).

35. [1949] A.C. 386, 394-95 (P.C.) (Can.).

36. *Id.* at 395.

be said in answer to a claim on behalf of the child that he did meddle to his own injury, or that he was tempted to do that which a child of his years might reasonably be expected to do.<sup>37</sup>

It is submitted that this case has reached the proper result. It has adopted the realistic approach outlined in the *Lynch* case—that is, that children are easily tempted to meddle and thus subject themselves to injury. Further, this case recognizes that children have a limited knowledge of inflammable substances, and that although they may know that these liquids burn, they are not aware that injurious explosions may occur.

### *Conclusion*

The distinction between cases finding the defendant liable and those absolving him from responsibility may have a basis not explicitly set out in the decisions. Part of the answer may lie in the differing views the courts have on the propensity of children to meddle, investigate, experiment and get into mischief, and consequently to use these inflammables in such a way that injury to someone is likely. If this propensity is slight, there is, perhaps, only a slight probability of harm resulting from the sale; on the other hand if it is felt that the propensity is great, the result would be to say that there is a foreseeable risk and a high probability that harm will occur. The courts in the *Traynor*, *Tharp* and *Mondt* cases, in absolving the defendant of negligence, apparently felt that the risk of harm was slight, or at least justified in the interest of commerce so as not to “render retail trade and business of vendors extremely hazardous and to place upon them a burden greater than can be borne.”<sup>38</sup>

In the final analysis, the problem is one of balancing society's interest in encouraging commerce against that in protecting the safety of children. If there were only a slight risk of injury to children in selling them inflammable substances, then such sales would be justified in the eyes of reasonable men. However, it is submitted that the sounder view is that implicit in the *Yachuk* and *Clark* cases. In those decisions it is recognized that inflammable liquids have dangerous properties and even if children are somewhat cognizant of the danger, they are given to playful experimentation which often leads to injury. In view of these considerations and the fact that the sales have little utility to the seller when compared to the total business volume, it is hoped that the courts will adjust their views accordingly.

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37. *Id.* at 397.

38. *Mondt v. Ehrenwerth*, 251 Ill. App. 226, 233 (1929).