South Carolina Law Review

Volume 23 | Issue 5 Article 5

1971

Human Torch--An Exegesis about the Clothes We Wear

David D. Armstrong

THE HUMAN TORCH—AN EXEGESIS ABOUT THE CLOTHES WE WEAR

I. INTRODUCTION

I wish to apoligize to my reader for not following the usual aloof, esoteric and sententious style which is most often employed in legal writing. Indeed, I gladly plead guilty to employing a genre which is often thought better suited to sensational fiction. But is not a guilty plea justified? Take the case of Philip,[1] aged four. This lad had been dressed in cotton trousers which "ignited and burst into violent flames while [he] was standing near a fire. . . . [That] Philip suffered severe burns which resulted in a permanent physical injury"[2] is a mere understatement. Therefore, the court, in addition to granting recovery, held that the "trousers were inherently dangerous"[3] because they burned like a torch.

Just imagine this four-year old. Hear his cries. Smell his burning flesh and singed hair. View his atrocious scars. See his face racked with pain and think of the numerous operations and months in the hospital. Sickening isn't it? Yes, especially when this tragedy could have been readily averted by effective legislation. However, since no legislation was in effect to protect Philip, he was forced to seek redress in the courts. This opens the door to consumer protection, flammable fabrics, implied warranties, products liability, negligence, and a host of other concepts—all unnecessarily complicated and often quite baffling. So, perhaps my guilty plea, if not entirely justified, is at least based on sound law and human compassion. Hopefully, Mr. Reader, you will be incensed at the inadequacy of the law in the area of flammable fabrics. Furthermore, it is hoped you will support any and all efforts to ensure that effective legislation is enacted to protect us all.

II. HISTORICAL AND MEDICAL BACKGROUND

One of the earlier authors to write about this type of tragedy was Plutarch. In the biography of Alexander, Plutarch tells the story of the

1. Knab v. Alden's Irving Park, Inc., 49 Ill. App. 2d 371, 199 N.E.2d 815 (1964).
2. *Id.* at 373, 199 N.E.2d at 817.
3. *Id.* at 380, 199 N.E.2d at 820.

ugly faced Stephanus who willingly subjected himself to an experiment with naptha.

> [A]s soon as he was anointed and rubbed with it, his whole body broke out into such a flame, and was so seized by the fire, that Alexander was in the greatest perplexity and alarm for him, and not without reason; for nothing could have prevented his being consumed by it, if by good chance there had not been people at hand with a great many vessels of water for the service of the bath, with all which they had much ado to extinguish the fire; and his body was so burned all over, that he was not cured of it a good while after.[4]

The Bible also speaks of human burning and sacrifice. Abraham was instructed by God to offer his only son, Isaac, as a burnt offering. Abraham proceeded as directed by God. But as Abraham was about to slay Isaac prior to firing the kindling, God intervened in Isaac's behalf by placing a ram in the thicket. Then at God's direction Abraham offered the ram instead of his son.[5]

Unfortunately, most potential burn victims have little hope of divine intervention and no statutory protection. So, with no protective shields operating in his favor, the victim gets burned. What is a burn? "A burn is a bodily injury or lesion caused by contact with, or exposure to, heat, caustic chemicals, electricity, or radiation."[6] Burns are classified by degree. First-degree burns, e.g. sunburn, are the least severe. They show a reddening (erythema) and slight swelling (edema). Second-degree burns involve skin blistering and some swelling. A distinction is made between superficial and deep second-degree burns. The primary distinction is that a superficial second-degree burn destroys the epidermis and the upper layers of the dermis, whereas a deep second-degree burn destroys all but the deepest layers of the dermis. These burns, often moist with weeping, uncover nerve endings and are very painful. Third-degree burns are those where the epidermis and the entire dermis are destroyed. They appear either brown or dead white (the color of subcutaneous fat). Since hair follicles, sweat glands and nerve endings are destroyed, they are usually less painful than second-degree

4. PLUTARCH (*c.* 100 A.D.), LIVES 265 (The Cuneo Press, Inc., 1936).

5. *Genesis* 22.

6. 1A L. J. GORDY & R.N. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 20.01 (1965).

burns. Fourth-degree burns are those where tissue beneath the skin, such as fat, muscle and bone has been destroyed. Lastly, a char burn destroys one complete area of the body.[7]

Treatment of burns is painful, slow, and dangerous because the victim is so susceptable to infection. Furthermore, dehydration presents a serious problem. Children and the aged present special problems. Both have difficulty weathering the initial stress. Children have difficulty coping with the physiological concomitants of a serious burn and the aged often have little desire to recuperate. The methods of treatment are constantly being improved due to dedicated personnel within the medical community, but the underlying fact is that a great percentage of these tragedies could be prevented were there effective legislation to require clothing manufacturers to fireproof all articles. As will be seen, judicial law can only provide a monetary "cure".

III. JUDICIAL TREATMENT OF FLAMMABLE FABRICS

The factual accounts of many of the most horrible burn cases are barely believable. In *Noone v. Fred Perlberg, Inc.*,[8] the attractive plaintiff purchased an evening gown with a double-netted skirt. Unknown to her, the netting had been sized with pyroxylin—a nitrocellulose material which is the chemical basis of *gunpowder*. When the "dress . . . came in contact with a lighted cigarette, [it] exploded and was consumed in a blinding flash of fire . . ."[9] Taking the basic premise that "[c]lothing is worn to cover, adorn and protect the human body,"[10] one cannot help but wonder why a manufacturer of dresses would size them with pyroxylin. But one's imagination is staggered when one learns that a manufacturer of welding aprons treated them

7. *Id.* at ¶ 20.21. One of the best works concerning burns is: C.P. ARTZ & E. REISS, THE TREATMENT OF BURNS, W.B. Saunders Co., Philadelphia, 1957. *Cf.* Larson and Gaston, *Current Trends in the Care of Burned Patients*, 67 AM. J. NURSING 319 (1967) and Swartz, *Product Liability: The Torch Cases*, 76 CASE & COMMENT 3 (1971). The last article cited contains an excellent account of a burn victim's life from a psychological viewpoint. Perhaps the best summary of the victim's plight was stated by Mr. Swartz when he said: "The severely burned will live forever in a hell not of his own making." *Id.* at 9.

8. 49 N.Y.S.2d 460 (1944), *aff'd*, 60 N.E.2d 839 (1945). *Cf.* Dayton v. Harlene Frocks, Inc., 86 N.Y.S.2d 614 (1948), *aff'd*, 86 N.E.2d 176 (1949).

9. Moss v. Fred Perlbrg, Inc., 29 N.Y.S.2d 922, 923 (1941). The language quoted here equally applies to the first case cited in note 8, *supra*.

10. Noone v. Fred Perlberg, Inc., 49 N.Y.S.2d 461, 463 (1944).

with pyroxylin. Such was the case in *Ingalls v. Meissner*[11] where the plaintiff employer recovered from the defendant apron material seller for monies paid to the plaintiff's disabled employee who was injured by the defendant's apron.

The courts have generally had difficulty in pinpointing the exact legal theory which they wished to employ to justify recovery for the non-negligent plaintiff. Perhaps one of the better statements was made in *Deffebach v. Lansburgh & Bro.*,[12] where the plaintiff's chenille lounging robe caught fire as she waved a match after lighting a cigarette. The court, after interpreting the District of Columbia Code and determining that the plaintiff relied on the seller's judgment stated:

> Since outer garments intended for domestic wear are not unlikely to come into momentary contact with lighted matches, tobacco, or stoves, it seems to us clear that a robe which, when this contact occurs, instantly bursts into flame and inflicts severe injury is unreasonably dangerous and unfit for use.[13]

A Washington state court cited *Deffebach* with approval when another plaintiff was burned by a summer cocktail robe. After citing the aforementioned excerpt, it continued that "it might be expected that a lounging robe or cocktail robe would be subjected to flame and heat hazards that come from cigarette lighting and smoking . . ."[14] Both *Deffebach* and the summer cocktail robe case were based on an implied warranty, however, many of the earlier cases were based solely on negligence. In *Blessington v. McCrory Stores Corp.*,[15] the plaintiff's attorney sought to use negligence and an implied warranty as a basis of recovery for the estate of a seven-year old who died about three months after his "Gene Autry" suit caught fire. However, the three year Statute of Limitations had run, so the plaintiff attempted to recovery on the theory of nuisance. Unfortunately this theory failed to bring the plaintiff recovery.

There are four legal theories which can be employed by the plaintiff in an attempt to recovery for flammable clothing injuries. Today,

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11. 11 Wis.2d 371, 105 N.W.2d 748 (1960).

12. 150 F.2d 591 (D.C. Cir. 1945), *cert. denied*, 326 U.S. 772 (1945).

13. *Id.*

14. Ringstad v. I. Magnin & Co., 39 Wash. 2d 923, ____, 239 P.2d 848, 851 (1952).

15. 95 N.Y.S.2d 414 (1950), *aff'd*, 110 N.Y.S.2d 456 (1952), *aff'd*, 111 N.E.2d 421 (1953).

the implied warranty in the UNIFORM COMMERCIAL CODE §§ 2-315 and 2-318 is a very powerful tool. It behooves the plaintiff to employ it. Negligence actions still have their place, but it is extremely difficult for a plaintiff to prove how the defendant was negligent and then how this allegedly negligent act was causal in injuring the plaintiff. On the other hand, under the concept of implied warranty one need only prove that the goods were unfit for their designed purpose. An even more powerful tool is contained in RESTATEMENT (SECOND) OF TORTS § 402A (1965). More will be mentioned about this theory later in this article.[16] Lastly, if none of the other theories can be employed, one might try nuisance. However one's prospects of recovery are very poor, because nuisance suits have been historically limited to facts based on land use interference.

A. The Implied Warranty

An implied warranty has been described as "a freak hybrid born of the illicit intercourse of tort and contract."[17] Actually it wasn't born, it was haphazardly created.

South Carolina is unique because it recognized not only *caveat venditor*, instead of the typical *caveat emptor*, but also implied warranties as early as 1793.[18] However, prior to the 1968 adoption of the Uniform Commercial Code, a "warranty of a chattel [did] not run with the property but [was] personal to the purchaser to whom the warranty [was] made . . ."[19]

The Commonwealth countries early recognized the implied warranty. In *Grant v. Australian Knitting Mills, Ltd.*,[20] the plaintiff recovered from the defendant because he contacted dermatitis from free

16. *See* Part III, Sec. D., *infra* at 796.

17. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1126 (1960).

18. Timrod v. Shoolbred, 1 Bay 324 (S.C. 1793). Here the plaintiff purchased a slave ploughman from the defendant. One day after the sale was consummated, the slave broke out with smallpox and died. The court, in granting recovery to the plaintiff said: "[S]elling for a sound price, raises, in law, a warranty of the soundness of the thing sold; . . . this warranty extends to all faults, known and unknown to the seller . . ."

19. Odom v. Ford Motor Co., 230 S.C. 320, 326, 95 S.E.2d 601, 604 (1956).

20. [1936] A.C. 85.

sulphite left in his "Golden Fleece" woolen underwear. The Privy Council said:

> [T]he buyer [is entitled] to the benefit of an implied condition that the goods are reasonably fit for the purpose for which the goods are supplied, but only if that purpose is made known to the seller "so as to show that the buyer relies on the seller's skill or judgment."[21]

Most jurisdictions, however, failed to recognize the implied warranty. In denying the plaintiff recovery for acute dermatitis from dye in a cotton dress, a Pennsylvania court in a 1941 case said: "It can hardly be said that a vendor thereof would be liable for a breach of an implied warranty solely because of the harmful effect due to a buyers individual idiosyncrasy."[22] Such a statement generally encompasses the pre-Code public policy.

In a later Washington case, the dissenting judge said: "The oldest and most extensively used fabric known to man is cotton. Men have burned themselves with it from time immemorial and probably always will. . . ."[23] [Furthermore since the r]espondent failed to prove what

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21. *Id.* at 99.

22. Barrett v. S.S. Kresge Co., 144 Pa. Sup. 516, ____, 19 A.2d 502, 503 (1941).

23. According to unpublished material supplied to the author by Mr. Robert L. Innes, Administrator of the Shriners Hospital for Crippled Children, Galveston, Texas, the Judge's statement is accurate. 72.7% of all fabrics which burned and caused injuries were 100% cotton. 7.1% were a cotton blend and 12.4% were made of various synthetics.

As far as the frequency of specific garments which ignited involving boys' clothing: 30.4% were shirts, 24.6% trousers, 10.0% undershorts, 9.2% undershirts and T-shirts, 6.2% socks, 4.6% tennis shoes, 6.2% pajamas or robes, and 8.8% miscellaneous. As to girls' clothing: 27.9% dresses, 21.5% nightgowns, pajamas or robes, 2.9% skirts, 8.6% blouses, 6.8% slips, 18.3% panties, and 14.0% miscellaneous.

Of the admitted cases, 49.9% involved 0-30% of the total body surface burned, 33.9% involved 30-60% total body surface, and 16.2% involved +60% total body surface. (For an explanation on how to determine the extent of injury by the "Rule of Nines," *see* 1A L. J. GORDY & R.N. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 20.22 (1965)).

Although the greatest frequency of acute admissions from clothing ignition at the Shriners Burns Institute is for children between 5 and 6 years old, the greatest death rate is for children 2 to 3 years old. It should be noted that this hospital has been in existence since 1966 and it only treats acutely burned children up to the age of 16. Sources of ignition were heaters and fire places (28.0%), matches (23.8%), outdoor fire (21.3%), other (8.4%), kitchen range (7.3%), hot water heater (5.9%) and unknown (5.3%).

Dr. Philip R. Lee, Assistant Secretary for Health and Scientific Affairs, Department of Health, Education and Welfare, for the Flammable Fabrics Act and Product Safety Commission testified to a House Committee (90th Cong., 1st Sess., Serial No. 90-2 (1967) at 57) that there are approximately 150,000 burn cases per year involving

caused the explosion, . . . recovery must be [denied under the theory of implied warranty.]"[24] Fortunately, the minor plaintiff, whose shirt caught fire, prevailed under the theory of implied warranty. But statements similar to those of the dissenting judge are not atypical in the decisions which immediately preceeded the adoption of the Uniform Commercial Code's version of implied warranty.

The case of *Knab v. Alden's Irving Park, Inc.*,[25] demonstrates a typical court's reaction to implied warranties while the Uniform Commercial Code was under consideration in the state's legislature. Although the Code was not yet law, the court felt justified in finding a common law implied warranty.

The Supreme Court of South Carolina also took a similar approach to the Code in *Springfield v. Williams Plumbing Supply Co.*,[26] but the law of implied warranty did not reach its maturity until S.C. CODE ANN. §§ 10.2-315 and 10.2-318 went into effect on January 1, 1968. In particular, § 10.2-318 is an extremely powerful section because it extends an implied warranty "to any natural person" whose "person or property is damaged." Thus, with this enactment, the Legislature codified and expanded a 130 year South Carolina precedent that "a retailer . . . 'is bound . . . to make good the damages which the buyers shall have suffered.' "[27]

B. Contributory Negligence—No Defense to an Implied Warranty

The jurisdictions are fairly evenly split as to whether or not contributory negligence is a defense to an implied warranty. One of the better

clothing ignition. Burn victims occupy 2 million hospital bed-days per year and approximately 3,000 victims die as a result of their injuries. One of the more tragic aspects of these clothing burns is that the victims are most often children, the aged, the disabled and the poor.

Later estimates are that the 1967 statistics of Dr. Lee are still accurate. Wallace, *Fabric Fires Continuing To Cause Anguish, Agony*, The State (Columbia, S.C.), July 25, 1971, at 8-A, col. 1.

24. Martin v. J.C. Penney Co., 50 Wash.2d 560, 565, 313 P.2d 689, 693 (1957) (dissent).

25. 49 Ill. App.2d 371, 199 N.E.2d 815 (1964). *See* text at note 1, *supra*.

26. 249 S.C. 130, 153 S.E.2d 184 (1967).

27. Smith v. Regina Mfg. Corp., 396 F.2d 826, 828 (4th Cir. 1968). Further information on implied warranties may be found in Ray, *Products Liability—A Symposium*, 19 S.W.L.J. 1 et seq. (1965), and McNeal, *Flammable Fabrics, Detergents, Farm Machinery and Equipment*, 24 OHIO ST. L.J. 450 (1963).

cases was brought by a disenchanted plaintiff whose cattle failed to gain weight as normally expected when they were fed food manufactured by the defendant. The plaintiff pleaded that the defendant's cattle food did not meet certain standards, so he sought recovery under an implied warranty. The defendant answered and pleaded contributory negligence because the plaintiff allegedly failed to follow the package directions. The court, in rejecting the defense and summarily dismissing the case, said:

> [T]his Court [Texas] . . . does not recognize . . . general . . . contributory negligence (by whatever name it may be known) as a bar to recovery under either the theory of product liability or implied warranty.[28]

One of the most delightful cases where the defense of contributory negligence was denied occurred in California. The plaintiff, while reading a newspaper, began to eat a chocolate bar. After consuming approximately one-third of it, "she bit into a mushy worm,"[29] and suffered injuries which resulted in her being awarded damages.

A typical case involving a flammable garment is *Nave v. Hixenbaugh*.[30] The plaintiff, a business invitee, went into a filling station to warm herself in front of a stove. Because the stove was defective, the plaintiff's corduroy skirt caught fire. It was held that under the circumstances the plaintiff was not contributorially negligent, so she recovered for her injuries.

Many ladies have had their skirts catch fire,[31] but the most famous case is where the plaintiff's hula skirt was ignited from a glowing cigarette butt on the floor.[32] She borrowed the skirt from one who had purchased it from a shop owned by the defendants. She wore the skirt to a masquerade party in British Columbia. As a result of the fire the plaintiff suffered burns over 75 percent of her body. The issue was whether or not the plaintiff could recover without being in privity with

28. Texsun Feedyards, Inc. v. Ralston Purina Co., 311 F. Supp. 644, 647 (N.D. Tex. 1970).

29. Kassouf v. Lee Bros. Inc., 209 Cal. App.2d 568, ___, 26 Cal. Rptr. 276, 277 (1962).

30. 180 Kan. 370, 304 P.2d 482 (1956).

31. *See* cases and text at notes 8 and 9, *supra*.

32. Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962).

the seller. The court in divining the Hawaii law decided the plaintiff need not be in privity. It also denied the defense of contributory negligence.

> [T]he court holds that contributory negligence, under the generally accepted rule is not a bar to a suit based on implied warranty . . . [T]he doctrine of contributory negligence, which takes no account of the comparative negligence of the parties, often produces results far from equitable . . .[33]

The Ninth Circuit Court of Appeals further supported the District Court's position by stating:

> Anticipating that one may, negligently, drop tobacco ash upon one's clothing, one may well rely upon a warranty that such clothing is made from suitable fabric which does not possess extraordinary characteristics of flammability and, accordingly, which will not burst into flame as the result of such an act of carelessness.[34]

These decisions, which are annotated,[35] indicate that the trend is away from allowing contributory negligence as a defense.

C. *Contributory Negligence—A Defense to an Implied Warranty*

The courts which have allowed this defense to an implied warranty action usually were faced with facts which were overwhelmingly against the plaintiff. Consider *Barefield v. La Salle Coca-Cola Bottling Co.*[36] Here the plaintiff, after having good reason to know the beverage was adulterated with broken glass, continued to quench her insatisable thirst. Such action by the plaintiff allowed the defendant bottler to successfully employ the defense of contributory negligence.

A retail clothing store was also able to employ this defense in a pre-Code *negligence* action.[37] The plaintiff had purchased a "fuzzy wuzzy" bathrobe. She was smoking and wearing the robe over a gown. When she noticed smoke, she made little attempt to extinguish the fire, but finally arose, strolled into the bathroom and removed the burning

33. 198 F. Supp. at 86.
34. 304 F.2d at 153.
35. Annot., 4 A.L.R. 3d 490 (1965).
36. 370 Mich. 1, 120 N.W.2d 786 (1963).
37. Dempsey v. Virginia Dare Stores, Inc., 239 Mo. App. 355, 186 S.W.2d 217 (1945).

robe which had only scorched her gown. The court in taking cognizance of the plaintiff's lethargic actions also noted that the seller needn't give warning to prospective purchasers because "[p]ersons of ordinary intelligence also know that openly woven fluffy and 'fuzzy wuzzy' materials will ignite and burn more readily than ordinary cloth."[38]

Later decisions have, on occasion, allowed the defendant to employ the defense of contributory negligence to an implied warranty action. In *Dallison v. Sears, Roebuck and Co.*,[39] the court noted that "[t]he weight of authority . . . appears to be that contributory negligence on the part of the buyer of a product sold under a warranty of fitness is *not* a defense in an action against the manufacturer or seller of the product for breach of that warranty."[40] Nevertheless, the court found for the defendant. The plaintiff was severely burned when the head of a match she was using to light a cigarette ignited her 100 percent cotton nightgown while she was lying in bed. She had taken a "heavy dosage"[41] of a "rapidly acting barbiturate"[42] a few moments prior to lying down flat and lighting the cigarette. In this case, as well as those previously mentioned within this subsection, the plaintiff clearly was at fault. However, the decisions appear to be uniform in holding for the plaintiff where there is no clear-cut evidence that the plaintiff was negligent.[43]

D. Strict Liability

> Strict liability evolved from the action for breach of warranty, . . . but shorn of the verbiage and complications of warranty law; strict liability reduces the difficulty of injured victims in proving negligence of sellers of products and shifts the risk of loss for defective products from the ultimate user to those who put such products on the market. Strict liability is a vehicle of social policy.[44]

Indeed, strict liability is a relatively new concept in the law, but

38. *Id.* at 359, 186 S.W.2d at 220.
39. 313 F.2d 343 (10th Cir. 1962).
40. *Id.* at 346 (emphasis added).
41. *Id.* at 345.
42. *Id.* at 344.
43. For an excellent discussion of products liability and its defenses, *see* Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, UTAH L. REV. 267 (1968).
44. LaGorga v. Kroger Co., 275 F. Supp. 373, 375-76 (W.D. Pa. 1967).

since the American Law Institute promulgated the concept in 1965,[45] several jurisdictions have seen fit to adopt it.

Pennsylvania adopted § 402A in 1966[46] when the plaintiff was injured by an exploding beer keg which was purchased from the defendant. Subsequently, the Federal District Court for the Western District of Pennsylvania deftly applied it in *LaGorga v. Kroger Co.*[47] The minor plaintiff was playing near a metal barrel in which refuse was burning. He was wearing a jacket with an outer cotton shell and an interlining composed of mill waste which was comprised of 50 percent unknown material and 50 percent acrylic fiber. A spark landed on the jacket and burned a nickel-sized hole. One of his friends tried to extinguish the fabric but could not. He also tried to take the jacket off but the zipper jammed. In panic, the child ran. Testimony proved that flames several feet long shot out from the child's body. He was tackled and rolled in blankets, but the material persisted in burning.[48] Finally the fabrics were extinguished leaving the child with burns over 80 percent of his

45. RESTATEMENT (SECOND) OF TORTS § 402A (1965)—Special Liability of Seller of Product for Physicial Harm to User or Consumer.

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

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

46. Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966).

47. 275 F. Supp. 373 (W.D. Pa. 1967).

48. LaGorga v. Kroger Co., 275 F. Supp. at 378.

"It was stipulated by all parties that the jacket conformed to or was not in violation of the Federal Flammable Fabrics Act, 15 U.S.C.A. §§ 1191 et seq., which stipulation was some evidence that the design was not unreasonably dangerous. See: Commentary on Flammable Fabrics Act by Maurine B. Neuberger, Consumer Consultant, Department of Labor, Trial, April—May 1967, p. 44."

See also, text at note 62, *infra*.

body. In rendering judgment for the minor plaintiff under the theory of strict liability, the court said:

> To an ever-increasing extent in this day of synthetic living, the population is dependent on mass producers for its wearing apparel. The composition and qualities of combined fabrics are not generally known. Greater care and integrity is required by society from sellers, as well as increased caution for the safety and well-being of all users, especially the child consumer. Where experiment or research is necessary to determine the presence or the degree of unusual danger in a child's jacket, the product should not be tried out on those who wear it. The public cannot be expected to possess the facilities or technical knowledge to apprehend inherent or latent dangers. The decisive factor is the condition of the product which a jury might find to be defective and unreasonably dangerous in foreseeable circumstances. Sellers do have duties to the public. They have no greater right to place on the market a product which may foreseeably cause harm than does a drunken driver to operate an automobile.[49]

Additional advantages of strict liability are that the theory is one of pure tort and not of negligence. Furthermore, it does not have the theoretical difficulties which are inherent in a contractural express or implied warranty.[50] Contributory negligence is *not* a defense to a strict liability claim; however, assumption of the risk is.[51]

The South Carolina Supreme Court has considered adopting § 402A, but as yet it has not been presented with a factual situation where it could readily be applied. The plaintiff in *Springfield v. Williams Plumbing Supply Co.*[52] brought an action against the defendant for damages caused by a water heater which exploded. The court ordered a trial on the merits because it did not want to decide such important points as strict liability or pre-Code implied warranty on a demurrer.

It is interesting to note that in a subsequent federal court case, based on *Springfield* and the action taken by the South Carolina Legislature in adopting a very liberal implied warranty provision,[53] United States District Judge Martin divined the South Carolina law to include

49. *Id.* at 379.
50. RESTATEMENT (SECOND) OF TORTS § 402A, comment *m* (1965).
51. *Id.*, comment *n*.
52. 249 S.C. 130, 153 S.E.2d 184 (1967).
53. S.C. CODE ANN. § 10.2-318 (1966).

strict liability.[54] The South Carolina plaintiff alleged three causes of action: (1) negligence, (2) breach of warranty, and (3) strict liability. The defendants contended, *inter alia*, that South Carolina did not recognize strict liability in tort. In citing *Springfield*, the court said "that if and when the question is properly presented on appeal to the South Carolina Supreme Court, it would most likely follow the direction of the modern trend of authority in products liability cases by adopting the strict liability rule set forth in Restatement of Torts (2d), Sec. 402A."[55] The court found itself confronted with the same type of problem that faced the United States District Court for the District of Vermont.[56] The District Judge, after careful consideration of Vermont law and in particular 9A V.S.A. § 2-318,[57] concluded that strict liability applied in Vermont.

Strict liability is an extremely strong legal weapon, but in our corporate-industrial economy, the older theories of recovery are often prohibitively difficult and expensive for the plaintiff to utilize. Industry should take warning and institute quality control programs so their goods are safe. If they cannot make them safe, they must warn the consumer.[58] If they fail to warn the consumer of unsafe conditions or goods, then they should suffer the consequences.

E. Third and Fourth Party Liability

Although most flammable fabric suits are directed at the seller, there are often numerous possible defendants. Whereas many commodities are manufactured by only one company, textiles go through many different manufacturing operations. First, there is the fiber producer, either the farmer or a synthetic yarn manufacturer. Then comes the spinner, followed by the weaver whose product is known as a greige good. These goods then go to dyers and finishers and on to converters and cut-and-sew plants. Once the material is made into a garmet, it will go to various wholesalers, jobbers, and/or retailers. This chain is extremely flexible and varies for different textile goods, but it should be clear that the sued textile seller usually attempts to join these processors

54. Starnes v. Keller Industries, Inc., Civil No. 70-204 (D.S.C., filed June 10, 1970).
55. *Id.* at 3.
56. Wasik v. Borg, 423 F.2d 44 (2d Cir. 1970).
57. *See* S.C. CODE ANN. § 10.2-318 (Supp. 1966) for similar statutory treatment.
58. RESTATEMENT (SECOND) OF TORTS § 402A, comment *j* (1965).

as co-defendants. Usually, the number of defendants is limited because it is virtually impossible to prove that a particular defendant made the cloth or grew the cotton. Such was the case in *LaGorga v. Kroger Co.*,[59] where the defendant was unable to prove that the third-party defendant had made the jacket.[60] The defendant's failure also released Lowenstein & Sons as a fourth party defendant (the third-party defendant's manufacturer).

Third and fourth party defendant fights are by no means uncommon, especially where the plaintiff has settled with the primary defendant for injuries caused by a garmet fire.[61]

IV. LEGISLATION CONCERNING FLAMMABLE FABRICS

A. United States

The United States Congress modified the Flammable Fabrics Act[62] in 1967, but despite excellent intentions,[63] the Act does not prevent

59. 275 F. Supp. 373 (W.D. Pa. 1967). *See* text at note 44, *supra*.

60. *Cf.* Timberlake v. M.A. Henry Co., 104 N.Y.S.2d 284, *aff'd*, 103 N.Y.S.2d 452 (1951).

61. *See, e.g.*, McDonald v. Blue Jeans Corp., 183 F. Supp. 149 (S.D. N.Y. 1960) (Fringe on cowboy suit).

62. 15 U.S.C.A. §§ 1191, *et seq.* (1967) *amending* 15 U.S.C.A. § 1191, *et seq.* (1953).

63. H.R. REP. No. 972, 90th Cong., 1st Sess. 617, *passim* (1967).

> "This legislation would protect the public against risk of fire leading to death, injury, or property damage arising out of ignition of articles of wearing apparel and interior household furnishings. It would also make the Flammable Fabrics Act more flexible by permitting flammability standards and other regulations to be issued under rulemaking procedures rather than having them fixed by law as is now the case. The need for such standards and regulations would be based on a continuing study and investigation and research provided for in the bill which would be carried out by the Secretary of Health, Education, and Welfare and the Secretary of Commerce . . .
>
> "Although precise statistics are lacking, the available evidence makes it abundantly clear that the toll in terms of death, injury, and disfigurement from fires involving wearing apparel and interior furnishings is far greater than need be. For example Public Health Service estimates that at least 150,000 persons annually are burned seriously enough to receive a doctor's care, or to restrict their activities for at least a day as a result of ignition of clothing alone. Unfortunately, the victims of burns, particularly of clothings fire burns, are very largely concentrated among the very young and the aged. The former often have not learned the significance of what

flammable clothing from being marketed. It merely establishes a few standards and it only provides for government[64] and *not* private enforcement.

Consider how ineffectual the Act was in *LaGorga*[65] where a child sustained burns over 80 percent of his body—yet it was stipulated by the parties that the Act's provisions had been met! The New York courts also have recognized the uselessness of the Act as it now stands. In *Sherman v. M. Lowenstein & Sons, Inc.*,[66] the plaintiff's pajamas caught fire while she was in close proximity to a gas range. The court, in ordering a new trial, rejected Lowenstein's argument that it could not "be held liable because, in manufacturing the fabrics used in making the pajamas, it complied with the flammability-testing method prescribed by [The Flammable Fabrics Act]. While a defendant's compliance with a statute 'is some evidence of the exercise of due care,' [Citations omitted.] it does not preclude a conclusion that he was negligent . . ." Such judicial language should awaken our legislators. But until they do respond adequately, the Federal Trade Commission can only prescribe rules and regulations and prohibit shipment or importation of products in violation of the Act.[67] Those who violate the

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is happening to them; the later often suffer from disabilities and cannot protect themselves rapidly enough. Many of these individuals suffer months of pain, require extensive and expensive medical care, and incur permanent physical disfiguration. Burns are therefore among the most serious of human injuries in terms of long-term effects and costs.

"For these reasons the committee proposed amendments to the act which would permit increased safeguards in the form of flammability standards and regulations to better protect the public against unreasonable risks of fire due to the flammability of wearing apparel and interior furnishings. The legislation would also authorize the Secretary of Commerce to continually update flammability standards to keep pace with new technological processes developed by industry."

64. Act of Dec. 14, 1967, Pub. L. 90-189, §§ 3-5, 81 Stat. 569-71, *amending* 15 U.S.C.A. §§ 1193-95 (1953) (codified at 15 U.S.C.A. §§ 1193-95 (1967)).

65. *See* note 48, *supra*.

66. 28 A.D.2d 922, 282 N.Y.S.2d 142 (1967).

67. 15 U.S.C.A. § 1194 (1967). 15 CFR 7 (1971) contains Flammable Fabrics Act Procedures, 16 CFR 302 (1971) contains the Federal Trade Commission Rules and Regulations under the Flammable Fabrics Act.

The ASTM (American Society for Testing Materials) Standards (D1230-61, Part 24, Oct. 1969, p. 253) which are a commercial offshoot of the government standards indicate that "no guarantee can be given and none is implied that a fabric or product [which meets these standards] will or will not burn with disasterous results under some

rules and regulations are maily subject to a Federal Trade Commission cease and desist order.[68]

Much public pressure is being exerted upon the legislative bodies to enact preventive legislation. Various estimates have been made that if the law required: (1) flame retardant chemicals on clothing, (2) control of the misuse of flammable liquids, and (3) fireguards for open heaters, between 50 and 75 percent of *all* tragic and needless burn injuries could be eliminated.[69]

Our legislators are beginning to respond to these pressures. An excellent example is the Child Protection and Toy Safety Act of 1969,[70] but this Act does not include wearing apparel. Many other Bills are in both houses of Congress, but most of them specifically exclude flammable fabrics.[71] Hopefully effective legislation will soon be forthcoming.

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condition of use." *Id.* at 255.

S. 3765, 91st Cong., 2d Sess. (1970), entitled the Flammable Fabrics Act Amendments, would greatly improve the Flammable Fabrics Act as it currently stands. *See* S. REP. No. 1093, 91st Cong., 2d Sess. (1970). The amendments would require the manufacturer to certify that a fabric offered for sale meets a certain regulation or standard. The testing would be conducted by the manufacturers and approved by the Federal Trade Commission. Failure to follow this mandate would be considered as unfair competition and a deceptive act in commerce under the Federal Trade Commission Act.

Enforcement provisions would also be strengthened in that a knowing violator would be guilty of a felony subject to a $10,000 fine or 3 years imprisonment, or both. One who violates the act without knowledge would be guilty of a misdemeanor and subject to a $1,000 fine or 1 year in prison, or both. Lastly, the bill imposes civil penalties not to exceed $10,000 for each violation. One bad provision in the opinion of the author, is that the civil and criminal penalties in the bill are cumulative. To the best knowledge of the author, this bill (S.3765) had not been enacted as of June 1, 1971. However, during the week of July 26, 1971, the Commerce Department overrode the objections of manufacturers, and said that beginning in July 1973, it will ban the sale of children's sleepwear that has not been flameproofed. TIME, Aug. 9, 1971, at 60. Apparently, the dyke is beginning to leak.

68. *See, In the Matter of*: Watumull Bros., Ltd., 66 F.T.C. 1323 (1964), where the defendant was ordered to stop importing flammable saris. *Cf., In the Matter of:* New York Sankyo Seiko Co., 64 F.T.C. 342 (1964) and *In the Matter of:* The Schwarzenbach Huber Co., 64 F.T.C. 345 (1964).

69. Unpublished material supplied courtesy of the Shriners Burns Institute, Galveston, Texas.

70. Pub. L. 91-113, Nov. 6, 1969, 83 Stat. 187, 15 U.S.C.A. §§ 401n, 1261, 1262, 1274 (Supp. 1969).

71. *E.g.*, S. 4054, 91st Cong., 2d Sess. § 33b (1970). *See* note 67, *supra.*

B. England

The English experienced a burn epidemic in the early part of the 1950's. Statistical studies indicated that most of the fires were caused by flammable nightclothing and defectively designed open space heaters. Parliament, taking cognizance of these statistics, responded with The Heating Appliances (Fireguards) Act of 1952[72] and The Consumer Protection Act of 1961.[73] They have also promulgated Oil Heaters Regulations[74] and Children's Nightdress Regulations.[75] According to later statistical studies, the death rate has decreased by approximately 50 percent since the passage of the aforementioned legislation.[76]

V. CONCLUSION

Having become familiar with the law of flammable fabrics, one cannot help but draw a parallel between the plight of the American consumer and Harry Graham's Billy.[77] Our concern is for the victim, not the potential victim. We react in the courts, rather than act in the legislature.

Until legislation is enacted, our only redress is in the courts. But until the time of legislative protection, remember that all of the plaintiffs written about were at one time potential victims. You and I are potential victims. Will our status change?

DAVID D. ARMSTRONG

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72. 15 & 16 Geo. 6 & 1 Eliz. 2, c. 42.

73. 9 & 10 Eliz. 2, c. 40, s.6.

74. S.I. (Statutory Instrument) 1962 No. 884; 1965 No. 588.

75. S.I. 1964 No. 1153. *See also* Heating Appliances (Fireguards) (Scotland) Regulations (S.I. 1953 No. 524); Heating Appliances (Fireguards) Regulations (S.I. 1953 No. 526); and Stands for Carry-cots (Safety) Regulations (S.I. 1966 No. 610).

76. *See* note 69, *supra*.

77. Billy, in one of his nice new sashes,
Fell in the fire and was burnt to ashes;
Now, although the room grows chilly,
I haven't the heart to poke poor Billy.
Harry Graham (1874-1936)
From: *Ruthless Rhymes for Heartless Homes* [1899]
Tenderness