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Intended Use In Products Liability - Parks v. Simpson Timber Co.

Intended Use In Products Liability

Parks v. Simpson Timber Co.[1]

Plaintiff was a longshoreman employed by an independent stevedore to load cargo in the hold of a vessel owned by the defendant carrier. As cargo was loaded through the hatch, plaintiff moved it away from the hatch to other parts of the hold, using cargo previously loaded as a floor on which to walk. Plaintiff had loaded a bundle of doors being shipped by defendant manufacturer into the hold, and had moved them away from the hatch. Each door in the package had a large aperture into which glass could later be inserted. When the doors were stacked on top of each other, the aligned apertures formed a well 42 inches high. Around the center of the bundle of doors, the manufacturer had wrapped corrugated cardboard; and, although it left both ends of the package exposed, the cardboard effectively covered the entire well created by the empty window frames in the doors. After plaintiff had loaded this package in the hold, he took from the hatch a heavy sack of flour, shouldered it, and began to move across the floor created by the previously loaded cargo. When he stepped on the corrugated cardboard covering the package of doors, he broke through the cardboard, fell into the well created by the window frames, and sustained serious injuries.

Plaintiff sued both the carrier and manufacturer of the doors. The jury returned a verdict against both defendants, and the verdict was initially affirmed on appeal by the United States Court of Appeals for the Ninth Circuit in a 2–1 decision.[2] However, the court granted a petition for rehearing en banc; and, on November 9, 1966, the full court reversed the three-judge panel, with four judges dissenting.[3]

1. 369 F.2d 324 (9th Cir. 1966).

2. Parks v. Simpson Timber Co., No. 19,673, 9th Cir., Dec. 3, 1965.

3. 369 F.2d 324 (9th Cir. 1966). This case was removed from a state court of Oregon to the United States District Court where jurisdiction rested on diversity of

The plaintiff based his action against the manufacturer on a theory of negligence, rather than on warranty or strict liability. The trial judge had given an instruction which permitted the jury to find that the manufacturer was negligent if it found that the manufacturer either knew *"or in the exercise of reasonable care should have known"* that longshoremen, such as the plaintiff, might walk on the packaged doors.[4] The Court of Appeals agreed that, if the manufacturer in fact knew of a practice among longshoremen of walking upon cargo, it would be liable for negligence in breaching a duty to the longshoremen.[5] But an instruction that the manufacturer would be liable if he reasonably should have known of the longshoremen's practice would impose upon the manufacturer "the legal duty to make inquiry as to the working practice of those who might handle its product."[6] The court refused to create such a duty on the ground that it would not be "fair" to require the manufacturer "to anticipate every course which the product is to follow and to acquire knowledge, in advance, as to the uses to which his product will be subjected by reason of working practices, perhaps unique, or even strange, of those who are to handle it."[7] The dissent reasoned, first, that it is not necessary to require the manufacturer to foresee "every" use to which his product will be put, but only those which the manufacturer, in the exercise of reasonable care, should have anticipated;[8] and, second, that the manufacturer, under the facts of the case, could have reasonably anticipated that the bundle of doors would be walked on by longshoremen in the course of shipment.[9]

Originally, negligence liability was extended only to persons in privity with the manufacturer.[10] Later, the requirement of privity was overlooked in cases such as poisons and other "inherently dangerous" or "imminently dangerous" products.[11] Today, liability has been imposed upon the manufacturer where the injured party was not in privity with the manufacturer in a wide variety of situations.[12] The general rule, however, is that recovery is denied unless the injured party was using the product or was in the vicinity of someone using the product in the manner for which it was designed and manufactured.[13] Such use has become known as the "intended use" of the product,[14] a notion which would seem to be a necessary corollary of the concept of negligence as doing something which will foreseeably cause harm.

On the facts of the instant case, determining whether a manufacturer will be liable to an employee of a carrier for injuries sustained

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citizenship and the necessary amount in controversy. In neither of its opinions, however, did the United States Court of Appeals purport to be applying the substantive state law of Oregon.

4. *Id.* at 327.
5. *Ibid.*
6. *Id.* at 328.
7. *Id.* at 330.
8. *Id.* at 333.
9. *Id.* at 336.
10. Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842).
11. See, *e.g.*, Wellington v. Downer Kerosene Oil Co., 104 Mass. 64 (1870) (explosives); Thomas v. Winchester, 6 N.Y. 397 (1852) (poison).
12. See generally PROSSER, TORTS § 96, at 662–63 (3d ed. 1964).
13. *Id.* at 667–68.
14. See Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 83 (4th Cir. 1962).

by the employee while handling the manufacturer's product involves essentially two questions: First, does a manufacturer owe a duty to a plaintiff who has assisted in the movement through commerce of the manufacturer's product? This is the "remote plaintiff" problem. Second, can a plaintiff recover for injuries from the manufacturer of a product which the plaintiff was using for a purpose accepted as customary in the plaintiff's trade or business, but which was not the purpose for which the product was manufactured? This is the "intended use" problem.

I. THE REMOTE PLAINTIFF

The problem of the "remote plaintiff," or the plaintiff who is not in privity with the manufacturer of the product, has been in large measure resolved in this country. Its evolution since *MacPherson v. Buick Motor Co.*[15] is well known, and ably recounted elsewhere.[16] Essentially, the *MacPherson* case held that a manufacturer is liable for injuries caused by a product whose "nature . . . is such that it is reasonably certain to place life and limb in peril when negligently made. . . ."[17] Courts throughout the United States have accepted the *MacPherson* decision as establishing a manufacturer's liability for negligently producing an item which causes injury to a person, or to someone in the vicinity of a person, lawfully using the product for a purpose for which it was manufactured.[18] In Maryland, although the status of the *MacPherson* rule was unclear for many years,[19] it now appears to have been accepted.[20]

Having abandoned the requirement of "imminent" or "inherent" danger, the courts since *MacPherson* have held manufacturers liable for injuries arising from such ostensibly inert and innocuous products as a hair comb,[21] an evening dress,[22] twine,[23] a sofa bed[24] (but not a

15. 217 N.Y. 382, 111 N.E. 1050 (1916).

16. PROSSER, TORTS § 96 (3d ed. 1964); Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

17. 111 N.E. at 1053.

18. See, *e.g.*, Kalash v. Los Angeles Ladder Co., 1 Cal. 2d 229, 34 P.2d 481 (1934); Rotche v. Buick Motor Co., 358 Ill. 507, 193 N.E. 529 (1934); Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693, 164 A.L.R. 559 (1946); Sicard v. Kremer, 133 Ohio St. 291, 13 N.E.2d 250 (1938); Liggett & Meyers Tobacco Co. v. Wallace, 69 S.W.2d 857 (Tex. Civ. App. 1934). Each of these cases is believed to be the earliest decision to accept the *MacPherson* holding in its jurisdiction. For decisions, not necessarily the earliest, in other jurisdictions, see 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 5.03[1], 17 (1960).

19. See Walker v. Vail, 203 Md. 321, 101 A.2d 201 (1953) ("qualified recognition"); Otis Elevator Co. v. Embert, 198 Md. 585, 84 A.2d 876 (1951) ("never . . . expressly approved or disapproved").

20. See Woodzell v. Garzell Plastics Industries, Inc., 152 F. Supp. 483 (E.D. Mich. 1957) (applying Maryland law); Katz v. Arundel-Brooks Concrete Corp., 220 Md. 200, 203, 151 A.2d 731, 733 (1959) (however, no liability imposed in this case because the caustic qualities of concrete are "obvious" to a reasonable man); Babylon v. Scruton, 215 Md. 299, 303, 138 A.2d 375, 377 (1958) (liability imposed upon manufacturer of a concrete slab which broke when plaintiff stepped on it).

21. Smith v. S. S. Kresge Co., 79 F.2d 361 (8th Cir. 1935).

22. Noone v. Fred Perlberg, Inc., 268 App. Div. 149, 49 N.Y.S.2d 460 (1944), *aff'd*, 294 N.Y. 680, 60 N.E.2d 839 (1945).

23. Schuylerville Wall Paper Co. v. American Mfg. Co., 272 App. Div. 856, 70 N.Y.S.2d 166 (1947), *appeal denied*, 272 App. Div. 980, 73 N.Y.S.2d 830 (1947).

24. Simmons v. Hardin, 75 Ga. App. 420, 43 S.E.2d 553 (1947).

fixed-position bed[25]), and a bottle of perfume.[26] Thus, the courts have almost completely eliminated privity of contract as a necessary element in establishing negligence liability.[27] The plaintiff in *MacPherson,* although not in privity with the manufacturer, was at least a purchaser. Successful plaintiffs in cases subsequent to *MacPherson* have included employees of the purchaser,[28] members of his family,[29] a donee of the purchaser,[30] a prospective purchaser,[31] and an independent contractor of a subsequent purchaser.[32] Products liability has even been extended to non-users, such as casual bystanders,[33] who have been in the vicinity of the user.[34] It is entirely logical to apply this doctrine so as to recognize a duty owed by the manufacturer of a product to those handling it during shipment.

Instead of focusing on the contractual ties, if any, between the parties, courts today frequently seem to speak in terms of social and economic relations, and especially of the benefit which a manufacturer may derive from the plaintiff's contact with the product.[35] Often, the purchaser of a product will intend that it be used by someone else. For instance, an employer may buy a product for use by an employee;[36] a parent for a child;[37] or, a purchaser for resale to another, as in those everyday situations where the original purchaser is a wholesaler dealer, who is less likely than anyone to use the product himself.[38] In such cases, the manufacturer clearly benefits from the ultimate user's contact with the product, since the original purchaser would not have bought the product except for the existence of the ultimate user. At the essence of the benefit theory, therefore, are the utility and marketability of the product, which outweigh the risk of injury resulting from its use. The benefit theory has even been extended, quite reasonably, to a teacher who was a donee from the manufacturer of laboratory materials for classroom use.[39] If the ultimate user, even though he is not the immediate purchaser, benefits the manufacturer, so also does a longshoreman who assists in moving a product through commerce toward the manufacturer's vendee. Without such assistance, the manufacturer would be compelled to devise his own network of transportation or to require his purchasers to accept delivery only at his plant. Therefore, the assistance of persons such as the plaintiff in the instant

25. Jaroniec v. C. O. Hasselbarth, Inc., 223 App. Div. 182, 228 N.Y.S. 302 (1928).
26. Carter v. Yardley & Co., 319 Mass. 92, 67 N.E.2d 693 (1946).
27. Green v. Equitable Powder Mfg. Co., 94 F. Supp. 126, 129 (D. Ark. 1950); Howell v. Betts, 211 Tenn. 134, 362 S.W.2d 924, 925 (1962) (dicta).
28. See Sylvania Electric Products, Inc. v. Barker, 228 F.2d 842 (1st Cir. 1955), *cert. denied,* 350 U.S. 988 (1956); Lovejoy v. Minneapolis-Moline Power Implement Co., 248 Minn. 319, 79 N.W.2d 688 (1956); Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932).
29. See, *e.g.,* Baker v. Sears Roebuck & Co., 16 F. Supp. 925 (S.D. Cal. 1936).
30. See Liggett & Meyers Tobacco Co. v. De Lape, 109 F.2d 598 (9th Cir. 1940).
31. See Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956).
32. See Hoenig v. Central Stamping Co., 273 N.Y. 485, 6 N.E.2d 415 (1936).
33. See, *e.g.,* McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S.W.2d 122 (1927).
34. RESTATEMENT (SECOND), TORTS § 395, comment *i* (1965).
35. See Pease v. Sinclair Refining Co., 104 F.2d 183, 186 (2d Cir. 1939).
36. See note 21 *supra.*
37. See note 22 *supra.*
38. Beadles v. Servel, Inc., 344 Ill. App. 133, 100 N.E.2d 405 (1951).
39. Pease v. Sinclair Refining Co., 104 F.2d 183 (2d Cir. 1939).

case enables manufacturers to carry on business throughout far greater areas than would otherwise be possible.

A manufacturer owes his own employees a duty to avoid negligence in manufacturing the product. He owes the same duty of care, as we have seen, not only to persons with whom he is in privity, but also "to remote and unknown persons,"[40] as long as they are reasonably foreseeable. There is, therefore, no reason why a manufacturer's duty to those who handle or use his product should be suspended from the time when the product leaves his factory until it reaches the first purchaser.

In *Standard Oil Co. v. Tierney*,[41] defendant shipped a quantity of naptha, negligently labelled as carbon oil, by railroad. Plaintiff, an employee of the railroad, was injured when naptha which had leaked from its container exploded. The court found that the manufacturer owed a duty to those employees of the railroad who handled the product in transit.

As suggested above, a purchaser of a product often buys it having in mind an ultimate user other than himself. In such a situation, the user, because of his need for and contact with the product, confers an economic benefit upon the manufacturer. This benefit is less clear, however, when the ultimate user is someone whom the purchaser probably did not have in mind when he bought the product, such as an innocent bystander[42] or a donee of the purchaser.[43] Cases allowing recovery to remote plaintiffs of this ilk usually rationalize their holdings on special grounds, such as a high duty of care owed to the particular plaintiff,[44] or, especially in earlier cases, an "imminently" or "inherently" dangerous product.[45]

The courts have also, in cases involving plaintiffs of varying degrees of remoteness, imposed liability on the basis of "a duty imposed by the law upon one who may foresee that his actions or failure to act may result in an injury to others."[46] In other words, negligence liability to the remote plaintiff has been based on the element of foreseeability. Since the *Palsgraf* case,[47] a debate has raged in judicial and academic circles as to whether foreseeability of injury to the particular plaintiff (Judge Cardozo's position[48]) or mere foreseeability of injury to anyone (Judge Andrews' position[49]) is necessary to support recovery. Even under the more limited Cardozo view, a manufacturer who ships substantial quantities of his product by vessel should reasonably foresee that longshoremen will necessarily come into contact

40. Nelson v. Union Wire Rope Corp., 31 Ill. 2d 69, 199 N.E.2d 769, 779 (1964) (employee of defendant's purchaser); Garrett v. S. N. Nielsen Co., 49 Ill. App. 2d 422, 200 N.E.2d 81, 86 (1964) (employee of defendant's subcontractor).

41. 92 Ky. 367, 17 S.W. 1025 (1891).

42. See McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S.W.2d 122 (1927).

43. See Liggett & Meyers Tobacco Co. v. De Lape, 109 F.2d 598 (9th Cir. 1940).

44. See, *e.g.*, Carpini v. Pittsburgh and Weirton Bus Co., 216 F.2d 404, 405 (3d Cir. 1954).

45. See, *e.g.*, Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855, 857 (1928).

46. Gaidry Motors v. Brannon, 268 S.W.2d 627, 629 (Ky. 1953). See also Ford Motor Co. v. Zahn, 265 F.2d 729, 734 (8th Cir. 1959); Nelson v. Union Wire Rope Corp., 31 Ill. 2d 69, 199 N.E.2d 769, 779 (1964).

47. Palsgraf v. Long Island Railroad, Inc., 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928).

48. 162 N.E. at 100.

49. *Id.* at 102.

with his product. The manufacturer may never see the purchaser or subsequent users; but where, as in the instant case, he delivers his goods directly to the dock, he may well confront the carrier, the stevedore, and their employees personally.

II. INTENDED USE

The idea that a manufacturer is liable for an injury caused by his product when it is being put to a use for which it was manufactured is no more than an attempt to define the usual situation in which courts will impose liability. In such cases, liability is based on the ground that the manufacturer should have reasonably been able to foresee an injury caused by a product with which he is expected to be familiar. Thus, the intended use doctrine is merely a refinement of the reasonable foreseeability test which more precisely describes a frequently recurring factual situation.[50]

When a manufacturer places a product on the market, he will usually have in mind at least one purpose for it. It is only logical to charge the manufacturer with liability for a negligent act or omission by him which causes injury while the product is being used for this purpose.[51] Over the course of time, however, users of a product may discover uses for it which the manufacturer did not originally have in mind and never intended. The "ordinary" use of a product,[52] or the use which the manufacturer intended for it, may not be the only purpose for which the product may be employed. The manufacturer benefits from these additional uses since they enhance the utility of the product and, thus, its value to at least some purchasers. Therefore, as the majority in the instant case recognizes, if the manufacturer becomes aware that his product is being used for a new or additional purpose, he should be liable for negligent acts or omissions on his part which cause injury while the product is being used in this additional capacity.[53] Likewise, even where the manufacturer does not in fact know of the new use, if from the surrounding circumstances he reasonably should have known of it, he should still be charged with liability.[54] For example, in *Phillips v. Ogle Aluminum Furniture, Inc.*,[55] the plaintiff was injured when she fell from an aluminum chair on which she had been standing. The court acknowledged that the "ordinary use" of a chair is for sitting, but held that the manufacturer could have "reasonably anticipated that the described chairs would be used for

50. Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 83 (4th Cir. 1962).

51. RESTATEMENT (SECOND), TORTS § 395 (1965); HARPER & JAMES, THE LAW OF TORTS § 28.6 (1956).

52. Phillips v. Ogle Aluminum Furniture, Inc., 106 Cal. App. 2d 650, 235 P.2d 857, 859 (1951).

53. Parks v. Simpson Timber Co., 369 F.2d 324, 327-28 (9th Cir. 1966).

54. *Cf.* 66 COLUM. L. REV. 1190, 1193 (1966). Requiring the manufacturer to know the nature of his product induces him to make it safe. If a manufacturer's liability were based only on what he actually knew, he would be encouraged to avoid liability by remaining ignorant. Thus, in Gobrecht v. Beckwith, 82 N.H. 415, 135 Atl. 20 (1926), the court stated that "where a duty to use care is imposed and knowledge is necessary to careful conduct, voluntary ignorance is equivalent to negligence." 135 Atl. at 22.

55. 106 Cal. App. 2d 650, 235 P.2d 857 (1951).

the purpose of standing upon them."[56] Thus, a manufacturer should be liable for injury arising from an unintended use if it is reasonably foreseeable.[57]

"Intended use" is, therefore, as the dissent in the instant case suggests, only " 'a convenient adaptation of the basic test of "reasonably foreseeability" . . . .' "[58] Whatever appellation is used — intended use, reasonable anticipation,[59] or foreseeability[60] — the basic question presented in the context of the *Simpson* case is whether a jury could rationally conclude that the manufacturer should have foreseen that persons engaged in moving his product through commerce would use it for a purpose other than that for which a purchaser would buy it but entirely in accordance with the trade customs of shipping goods. The answer should be an unequivocal "Yes." The law imposes a duty upon a manufacturer who knows that his "affirmative conduct" in producing and distributing a product will necessarily affect the interests of other persons.[61]

The manufacturer's purchaser and those taking subsequent to him will generally purchase or use the product for the same purpose, whereas those who come into contact with the product prior to the purchaser — that is, while the product is still in transit — may use or handle it in a different manner. The most important question, however, is not whether the injured party is prior or subsequent to the first purchaser, but whether the use from which the injury arose was foreseeable to the manufacturer. Therefore, if the manufacturer should be liable to the purchaser, or to someone taking the product *after* the purchaser, for a use other than that for which the product is usually sold, but one which the manufacturer should have foreseen,[62] then he should also be liable for an unintended but foreseeable use by an injured party who comes into contact with the product *before* the purchaser.

Common practice among those who the manufacturer knows will come into contact with the product will assist in establishing what uses should be reasonably foreseeable to the manufacturer.[63] Thus, custom in the trade is evidence of a "proper" use.[64] A manufacturer is not, however, expected to know of every trade custom among persons who will come into contact with his product, but only those which are sufficiently "general" in the trade.[65] It was established in the instant case that using previously loaded cargo as a floor was a custom of the

56. 235 P.2d at 859–60. See also Maddox Coffee Co. v. Collins, 46 Ga. App. 220, 167 S.E. 306, 308 (1932).

57. RESTATEMENT (SECOND), TORTS § 395, comment *k* (1965).

58. Parks v. Simpson Timber Co., 369 F.2d 324, 334 (9th Cir. 1966). See also Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 83 (4th Cir. 1962).

59. See McCready v. United Iron and Steel Co., 272 F.2d 700, 703 (10th Cir. 1959); Pierce v. C. H. Bidwell Thresher Co., 153 Mich. 323, 116 N.W. 1104, 1105 (1908).

60. See Mazzi v. Greenlee Tool Co., 320 F.2d 821, 823 (2d Cir. 1963); Noel, *Manufacturer's Negligence in Design or Directions for Use of Product*, 71 YALE L.J. 816, 856 (1962).

61. PROSSER, TORTS § 96 (3d ed. 1964).

62. See, *e.g.*, Mazzi v. Greenlee Tool Co., 320 F.2d 821 (2d Cir. 1963); Phillips v. Ogle Aluminum Furniture, Inc., 106 Cal. App. 2d 650, 235 P.2d 857, 859 (1951).

63. See McCready v. United Iron and Steel Co., 272 F.2d 700, 703 (10th Cir. 1959).

64. See Cohagan v. Laclede Steel Co., 317 S.W.2d 452, 454 (Mo. 1958).

65. McCready v. United Iron and Steel Co., 272 F.2d 700, 703 (10th Cir. 1959).

longshoring trade. Moreover, the "practice was not unusual or peculiar, but was pervasive and long continued,"[66] and known by other manufacturers exporting from the same port.[67] Even if the manufacturer was unaware of this custom, he should have been able to anticipate the use. While the "zone" of possible injuries from any product is "practically limitless," the "zone of the probable . . . is very much narrower . . . and a survey of it involves the exercise of reasonable foresight."[68] Here, the manufacturer shipped 16,000 to 18,000 doors each year by cargo vessels. The doors were delivered directly to the dock for loading. Unlike some cases in which recovery has been denied,[69] the manufacturer came into direct contact with the stevedore and with the stevedore's employees. A single inspection of one of the cargo vessels would have provided the manufacturer with useful information about the manner in which his product was shipped and handled during an ocean voyage, about which a jury might rationally conclude that the manufacturer should have been curious as a matter of course.

The manufacturer could also have protected himself from liability by warning of the trap disguised by the cardboard covering. Where a manufacturer can easily and inexpensively warn of a latent danger, it is unreasonable for him not to do so.[70] It is for the jury to decide whether a plaintiff's use of the product is reasonably foreseeable and whether the defendant's failure to warn of the danger in such use constitutes negligence.[71] However, even if there is no negligence in the manufacture of the product, the jury may find that it was negligent not to warn a prospective user — not in privity with the manufacturer — of a potential danger of which the manufacturer was cognizant.[72] There was sufficient evidence presented that manufacturers of fragile or breakable products marked them as such, and that the longshoremen took the necessary precautions in accordance with products so marked.

It is entirely natural from a business viewpoint that a manufacturer should want to inform himself about the handling of his product during shipment to his purchasers; and a jury could fairly conclude that a manufacturer should have reasonably anticipated or foreseen actions of others which natural business curiosity would have apprised him of immediately. Where these actions, when performed in relation to a manufacturer's product, would possibly cause serious injury, yet would probably not be performed if the actor were cognizant of the danger, it is not an inordinate onus to require the manufacturer to underscore and probably eliminate this danger with a simple warning affixed to the product.

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66. Parks v. Simpson Timber Co., 369 F.2d 324, 332 (9th Cir. 1966). See also Reddick v. McAllister Lighterage Line, Inc., 258 F.2d 297 (2d Cir. 1958).
67. Parks v. Simpson Timber Co., 369 F.2d 324, 333 (1966).
68. Schfranek v. Benjamin Moore & Co., 54 F.2d 76, 77 (S.D.N.Y. 1931).
69. McCready v. United Iron and Steel Co., 272 F.2d 700 (10th Cir. 1959); Cohagan v. Laclede Steel Co., 317 S.W.2d 452 (Mo. 1958).
70. Pease v. Sinclair Refining Co., 104 F.2d 183, 186 (2d Cir. 1939).
71. Mazzi v. Greenlee Tool Co., 320 F.2d 821, 823 (2d Cir. 1963). See also Ringstad v. I. Magnin & Co., 39 Wash. 2d 923, 239 P.2d 848, 853 (1952).
72. Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp., 66 Wash. 2d 469, 403 P.2d 351, 355 (1965).