been applied to newspaper publications[4] and in two or three instances, to cases of radio defamation.[5] In these instances the court has predicated its decision upon the analogy between newspaper publication and publication by radio broadcasting. This analogy has been subjected to considerable discussion.[6] The present case seems to be the first in which an appellate court has formally rejected the analogy and consequently refused to extend the doctrine of absolute liability to radio defamation. The court here said, "But where the circumstances like these now presented are such that the defamation occurs beyond the control of the broadcaster, it is perfectly clear that the analogy between newspapers and broadcasting companies collapses completely * * * "[7] The holding of the present case seems to be in line with numerous prior decisions in Pennsylvania restricting the doctrine of absolute liability.[8] It is also in harmony with the trend of modern authority that no man should be held liable for an unintentional injury resulting from the performance of a lawful act without negligence or wilful misconduct.[9]

D. L.

TORTS—NEGLIGENCE—LIABILITY OF SUPPLIER OF CHATTELS—DANGEROUS SUBSTANCE—[Federal].—Defendant sent plaintiff, a chemistry teacher, on the latter's request, a free set of oil samples showing various forms of oil products. To insure safe shipment, defendant had substituted water for kerosene. Although it labelled the vial "kerosene", it in no way informed plaintiff of the substitution. After displaying the exhibit to the class, plaintiff poured the contents of this vial over some metallic sodium. This is the usual laboratory method for preserving the metal. Water, unlike kerosene, reacts violently with sodium. The explosion which resulted destroyed plaintiff's eye. Plaintiff brought suit for the injury and recovered

4. Peck v. Tribune Co. (1909) 214 U. S. 185; Oklahoma Pub. Co. v. Givens (C. C. A. 10, 1933) 67 F. (2d) 62; Thorley v. Lord Kerry (1812) 4 Taunt. 355.

5. Coffey v. Midland Broadcasting Co. (D. C. W. D. Mo. 1934) 8 F. Supp. 889; Sorenson v. Wood (1932) 123 Neb. 348, 243 N. W. 82; Irwin v. Ashurst (1938) 158 Ore. 61, 74 P. (2d) 1127; Miles v. Wasmer (1933) 172 Wash. 466, 20 P. (2d) 847.

6. Opposing the analogy: Guider, Liability for Defamation in Political Broadcasts (1932) 2 J. Radio L. 708, 713; Bohlen, Fifty Years of Torts (1937) 50 Harv. L. Rev. 725, 731; Farnum, Radio Defamation and the American Law Institute (1936) 16 Boston U. L. Rev. 1, 6; Nash, The Application of the Law of Libel and Slander to Radio Brodacasting (1938) 17 Ore. L. Rev. 307, 309. But cf.: Vold, The Basis for Liability for Defamation by Radio (1935) 19 Minn. L. Rev. 612, 644; Keller, Federal Control of Defamation by Radio (1936) 12 Notre Dame Lawyer 134, 154.

7. Summit Hotel Co. v. National Broadcasting Co. (Pa. 1939) 8 A (2d) 302, 309.

8. Pennsylvania Coal Co. v. Sanderson (1886) 113 Pa. St. 126, 6 Atl. 453; Malone v. Pierce (1911) 231 Pa. 534, 80 Atl. 979; Teller v. Hood (1923) 81 Pa. Super. 443; Fredericks v. Atlantic Refining Co. (1925) 282 Pa. 8, 127 Atl. 615.

9. See Holmes, *The Common Law* (1881) 108; Ames, Law and Morals (1908) 22 Harv. L. Rev. 97, 99.

in the court below. Defendant, contending that these facts show no negligence on its part, appealed. *Held*, that there was sufficient evidence to carry the case to the jury.[1]

The court, in its application of the law of negligence and proximate cause, employs what is, in effect, the well-known approach of the *Polemis* case[2]. In confronting the problem, the court says: "The real question is whether the defendant's act, in substituting water for kerosene without any warning of the substitution, is sufficiently *unnatural* to make an issue properly to be submitted to the jury on the question of reasonableness of its conduct."[3] The court upholds the right of the jury to find the mislabelling unreasonable even though its particular consequences are surprising, citing a number of cases in which damages were awarded where the precise injury which resulted was just as surprising.

Each of these cases cited by the court as illustrating situations in which the injury was surprising involves an act with regard to some article, substance, or condition which is usually accepted as actually or potentially dangerous in itself: dry ice,[4] gasoline,[5] street pavement,[6] electric transformer,[7] soda water bottle,[8] and auto wheel.[9]. The two sections of the America Law Institute's *Restatement of the Law of Torts* cited by the court[10] likewise seem to contemplate action with regard to such an article, substance, or condition. To have brought the instant case under the rule of "dangerous article—surprising consequence" which these authorities illustrate, the court must have found most unusual circumstances to establish that conduct here in relation to water was dangerous. The factual set-up—the mislabelling water for kerosene, the possibility of laboratory use, the chance of some harm through such use, et cetera—under which the conduct thus becomes dangerous, even as under more usual circumstances conduct with regard to gasoline and the like becomes dangerous, makes this case virtually unique.

The line which divides the facts of the instant case from one in which the defendant's acts violate no duty and create no unreasonable risk is a fine one at best. This is illustrated by the distinction which the court seems

1. Pease v. Sinclair Refining Co. (C. C. A. 2, 1939) 104 F. (2d) 183. Contributory negligence, the second point on which appeal was made, also failed.

2. In re Polemis and Furness, Withy & Co., Ltd. [1921] 3 K. B. 560.

3. Pease v. Sinclair Refining Co. (C. C. A. 2, 1939) 104 F. (2d) 183 186. Italics supplied.

4. New York Eskimo Pie Corp. v. Rataj (C. C. A. 3, 1934) 73 F. (2d) 184.

5. Parnell v. Holland Furnace Co. (1932) 260 N. Y. 604, 184 N. E. 112 aff'g 234 App. Div. 567, 256, N. Y. S. 323.

6. Payne v. City of New York (1938) 277 N. Y. 393, 14 N. E. (2d) 449, 115 A. L. R. 1495.

7. Rosebrock v. General Electric Co. (1923) 236 N. Y. 227, 140 N. E. 571.

8. Smith v. Peerless Glass Co. (1932) 259 N. Y. 292, 181 N. E. 576.

9. MacPherson v. Buick Motor Co. (1916) 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916C 440, L. R. A. 1916F 696.

10. Restatement, *Torts* (1934) sec. 310 and sec. 388.

to draw between the word "unnatural" as used in the passage quoted above and the word "unusual" as employed by the court when it says, "This, therefore, is one of those cases where not *unusual* human conduct produces results so unexpected and tragic as to startle and amaze."[11] Is the substition of water under the circumstances "not unusual," but, nevertheless "unnatural"?

The opinion is of added interest because it is one of the first by Judge Charles E. Clark, lately Dean of the Yale School of Law. It is characterized by a clear style, analytical approach, a refreshing frankness, and by the absence of the dogmatic formulae to which courts sometimes resort when confronted by problems in this field. Judge Clark's use of law review literature,[12] treatise material,[13] and, particularly, of the American Law Institute's restatement of the law,[14] is worthy of passing comment.

W. G. P.

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11. Pease v. Sinclair Refining Co. (C. C. A. 2, 1939) 104 F. (2d) 183, 185. Italics supplied.
12. Gregory, Proximate Cause in Negligence—A Retreat from "Rationalization" (1938) 6 U. of Chi. L. Rev. 36.
13. Street, *The Foundations of Legal Liability* (1906).
14. Restatement, *Torts*, (1934).