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NEGLIGENCE — THE "SAME HAZARD" PRINCIPLE — NONLIABILITY IN EVENT OF INJURY FROM A HAZARD OF DIFFERENT TYPE FROM THAT WHICH JUSTIFIED IMPOSITION OF DUTY TO USE DUE CARE — In a previous suit by plaintiff against a policy holder, defendant, who was the insurer and conducted the defense for the insured, rejected an offer made by plaintiff to settle the claim for less than the policy limit, which was $5,000. There was thereafter a verdict for plaintiff for $7,500, which was satisfied to the amount of $5,000. Plaintiff then brought an action against the defendant insurance company in the name of the policy holder to recover the remainder of the judgment on the ground that defendant was negligent in rejecting the plaintiff's settlement offer. *Held*, plaintiff stated no cause of action against the defendant because the hazard from which injury resulted was not the same hazard which justified the imposition on the defendant of the duty to use due care. *Duncan v. Lumbermen's Mutual Casualty Co.*, (N. H. 1941) 23 A. (2d) 325.

This unusual case is of interest because it is one of the few cases, other than those involving statutes and ordinances,[1] in which a court of last resort has given explicit recognition to a rather modern tort theory, viz., that not only must there be a duty owing to the plaintiff himself, but the injury must result from the same hazard which prompted the imposition of the duty to use due care.[2] While this theory has been adopted by the *Torts Restatment*,[3] courts have been very reluctant to apply it in cases where no statute or ordinance is involved.[4] The instant case appears to be one of the first in which the court explicitly uses this "same hazard" principle to determine whether there is a duty owed by the defendant.[5] However, the principle is not an entirely new one, for use of the

[1] The principle is used in these cases on the theory that the legislature intended protection only from certain types of risks. Gorris v. Scott, 9 Exch. 125 (1874); Lang v. New York Central R. R., 255 U. S. 455, 41 S. Ct. 381 (1921); Ingalsbe v. St. Louis-San Francisco R. R., 295 Mo. 177, 243 S. W. 323 (1922); Robertson v. Yazoo & M. V. R. R., 154 Miss. 182, 122 So. 371 (1929); Richards v. Waltz, 153 Mich. 416, 117 N. W. 193 (1908).

[2] "But 'liability for negligence is imposed only for injuries resulting from the particular hazard against which the duty of due care required protection to be given.'" Principal case, 23 A. (2d) 325 at 326, quoting Flynn v. Gordon, 86 N. H. 198 at 202, 165 A. 715 (1933).

[3] 2 TORTS RESTATEMENT, § 281, p. 734 et seq. (1934).

[4] In re Polemis, [1921] 3 K. B. 560; Riley v. Standard Oil Co. of Indiana, 214 Wis. 15, 252 N. W. 183 (1934); Walmsley v. Rural Telephone Assn. of Delphos, 102 Kan. 139, 169 P. 197 (1917).

[5] This "hazard" problem is also explicitly recognized in McFadden v. Pennzoil Co., 341 Pa. 433, 19 A. (2d) 370 (1941), but this case involved a determination whether the plaintiff's recovery would be barred because of his own contributory negligence. The court held his negligence did not bar recovery, because "The fact that the plaintiff has failed to exercise reasonable care for his own safety does not bar recovery unless the plaintiff's harm results from a hazard because of which his conduct was negligent." 341 Pa. at 436, quoting Hull v. Bowers, 273 Pa. 429 at 433, 117 A. 189 (1922). This is the same language used in 2 TORTS RESTATEMENT, § 468, p. 1237 (1934).

doctrine has been urged in many cases,[6] and frequently courts have used its basic logic, in effect if not expressly in just that form.[7] A good deal of confusion on this subject arises from the fact that most courts treat it as exclusively a causation problem,[8] and so even if they do agree on the principle to be applied, they express themselves only in terms of causal relation. Much of the opposition to treating the problem as one of duty seems to be based on the belief that it would not be much of an improvement over the commonly accepted causation formulas.[9] This attitude seems particularly unfortunate because, as one writer has pointed out,[10] recognition of the fact that it is actually a test for the existence of a duty owed by the defendant in regard to the injury involved, rather than merely a formula for determining proximate cause, would enable the courts to remove a good deal of clutter from the general causation problem.[11] Moreover, since the principle limits the duty owed to the plaintiff to those hazards from which the plaintiff was entitled to be protected, liability under it is more nearly based on the wrongfulness of the defendant's act than it is under the proximate cause concept; and so, being more deeply rooted in morality, is preferable. In view of these considerations the pioneer action of the Supreme Court of New Hampshire in taking full advantage of this opportunity to apply the "same hazard" principle seems commendable.[12]

[6] See cases cited in note 4, supra. It is true that the argument urged in those cases was not phrased in terms of the "hazard problem," but it is submitted that there is very little difference in substance between saying, "My client was negligent, but is not liable because he could not as a reasonably prudent man foresee harm from a risk of that kind" (which in general was the argument used), and saying "My client was not liable for the injury resulting from this hazard because it would not be reasonable to impose a duty on him in regard to that risk."

[7] The basic logic of the principle was seemingly employed in the following cases: Smithwick v. Hall & Upson Co., 59 Conn. 261, 21 A. 924 (1890); Gray v. Scott, 66 Pa. 345 (1870); Bellows v. Worcester Storage Co., 297 Mass. 188, 7 N. E. (2d) 588 (1937); New York, L. E. & W. R. R. v. Ball, 53 N. J. L. 283, 21 A. 1052 (1891).

[8] See cases cited in notes 4 and 7, supra, with the exception of Smithwick v. Hall & Upson Co., 59 Conn. 261, 21 A. 924 (1890), and Gray v. Scott, 66 Pa. 345 (1870).

[9] See cases cited in note 4, supra. To the effect that this principle is less satisfactory in testing proximate cause than the usual direct result theory, see PROSSER, TORTS 350 (1941).

[10] ELDREDGE, MODERN TORT PROBLEMS 17-25 (1941).

[11] Id. Professor Eldredge also discusses the theory of Judge Cardozo as to duty, and is likewise of the opinion that a proper use of this doctrine would decide many cases on that theory rather than as a causation problem. Id., 15-17.

[12] While congratulating the court for its unequivocal statement of the "same hazard" principle, it is submitted that it might be argued that the case could have been decided without ever getting to a consideration of negligence. Since if defendant insurance company had accepted the settlement, plaintiff would have received less than the $5,000 she did get, it is hard to see any injury "in fact" to her.

Again it might well have been argued that the court went out of its way to employ the "same hazard" principle because it could have dismissed the plaintiff's case on yet another ground. Since defendant's duty to use due care in accepting or rejecting plaintiff's settlement offer would, under the doctrine of Palsgraf v. Long Island R. R., 248 N. Y. 339, 162 N. E. 99 (1928), extend only to those reasonably

likely to be hurt from that negligence, it does seem that plaintiff could clearly be held to be outside the "orbit of the danger." If, then, defendant owed no duty to the plaintiff, it is readily apparent that the court could logically have held that the plaintiff stated no cause of action, and so could have reached the same result without ever getting to consideration of the "same hazard."