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TORTS - LIABILITY OF LANDOWNER TO PEDESTRIAN FOR ACTS OF THIRD PERSONS

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TORTS — LIABILITY OF LANDOWNER TO PEDESTRIAN FOR ACTS OF THIRD PERSONS — Children built a fire in the street outside defendant's premises after business hours. They went on defendant's premises and took gasoline which defendant had allowed to collect in a drip can under a spigot. When they threw the gas toward the fire it splashed on plaintiff, an infant standing nearby; his clothing caught fire when he tripped and fell toward the fire. There was evidence that defendant knew the children had been playing on his premises. *Held*, that plaintiff has failed to show that defendant was negligent in the conduct of his business, and that the doctrine of attractive nuisance has no application, Judges Lehman and Loughran dissenting. *Morse v. Buffalo Tank Corp.*, 280 N. Y. 110, 19 N. E. (2d) 981 (1939).[1]

The extent of the duty to control action of others is difficult to predict,[2] and its determination is complicated by the traditional reluctance of courts to impose affirmative duties to act for the safety of others.[3] But in certain cases where, as a matter of fact, defendant is in position to control actions of others, courts have required him to use reasonable care to prevent them from injuring third persons.[4] Common examples are where another uses defendant's chattels

[1] The court held that plaintiff added nothing to his case by showing that defendant had breached a municipal ordinance requiring permits to store gasoline, since the ordinance was not for plaintiff's benefit. See Flaherty v. Metro Stations, Inc., 235 N. Y. 605, 139 N. E. 753 (1923).

[2] See Harper and Kime, "The Duty to Control the Conduct of Another," 43 YALE L. J. 886 (1934).

[3] BOHLEN, STUDIES IN THE LAW OF TORTS 33-67 (1932); HARPER, TORTS, §§ 79-82 (1933); Harper and Kime, "The Duty to Control the Conduct of Another," 43 YALE L. J. 886 (1934).

[4] It should be noted that this is not an instance of vicarious liability. Defendant owes a duty to prevent the actions of others, not to compensate for their injurious consequences. See Harper and Kime, "The Duty to Control the Conduct of Another," 43 YALE L. J. 886 (1934), and the careful language of Judge Lehman in Ford v.

in his presence,[5] where defendant stands in locis parentis to another,[6] or where a master-servant relationship exists.[7] Apparently the instant case is the first one involving a landowner's duty to third persons outside the premises to control the actions of licensees.[8] And the reasoning of the majority, in denying the existence of such a duty, seems unsatisfactory.[9] The fact that New York does not recognize the attractive nuisance doctrine [10] or that defendant was not negligent toward the other children [11] does not determine that defendant owes no duty to plaintiff.[12] Generally speaking, a landowner must use reasonable care in his activities on the premises not to injure persons using adjoining public ways.[13] Where he can control actions of others on his premises [14] and reasonably can foresee harm to those using the adjoining public way,[15] it would seem that he

Grand Union Co., 268 N. Y. 243, 197 N. E. 266 (1935), noted in 30 ILL. L. REV. 677 (1936), 84 UNIV. PA. L. REV. 264 (1935); Norton v. Payne, 154 Wash. 241, 281 P. 991 (1929).

[5] Sampson v. Atchison, [1912] A. C. 844; Bell v. Jacobs, 261 Pa. 204, 104 A. 587 (1917); Wheeler v. Darmochwat, 280 Mass. 553, 183 N. E. 55 (1932).

[6] Hoverson v. Noker, 60 Wis. 511, 19 N. W. 382 (1884); Daggy v. Miller, 180 Iowa 1146, 162 N. W. 854 (1917); Norton v. Payne, 154 Wash. 241, 281 P. 991 (1929).

[7] Fletcher v. Baltimore & Potomac Ry., 168 U. S. 135, 18 S. Ct. 35 (1896); Hogle v. Franklin Mfg. Co., 199 N. Y. 388, 92 N. E. 794 (1910). Harper and Kime, "The Duty to Control the Conduct of Another," 43 YALE L. J. 886 at 895-903 (1936), point out several other cases not material here.

[8] Apparently there is no other case directly in point. Somewhat in point are: Pease v. Parsons, 273 Mass. 111, 173 N. E. 406 (1930) (owner of land liable to pedestrian for injuries from baseball batted by licensee on owner's property); Honaman v. Philadelphia, 322 Pa. 535, 185 A. 750 (1936) (city liable to pedestrian for injuries from baseball fouled by licensee on city park); Grogan v. Pennsylvania Ry., 213 Pa. 340, 62 A. 924 (1905) (owner not liable to pedestrian injured when trespassers knocked weak fence over on her). It should be noted that in all of these cases the act was consummated on defendant's premises.

[9] The court says, 19 N. E. (2d) at 984: "If defendant . . . is not guilty of any negligence to a child who, as a trespasser or bare licensee, is injured in coming upon the private premises of defendant . . . then it is difficult to see how this defendant becomes liable to plaintiff."

[10] Walsh v. Fitchburg Ry., 145 N. Y. 301, 39 N. E. 1068 (1895). The attractive nuisance doctrine would afford redress only to the children who took the gasoline.

[11] Apparently New York protects licensees and trespassers only against the landowner's active negligence and intentional wrongs. Vaughan v. Transit Dev. Co., 222 N. Y. 79, 118 N. E. 219 (1918).

[12] Plaintiff never went on the premises. He stands, as to defendant, in the same relation as any other passerby would. See infra, note 13.

[13] Fort Wayne Cooperage Co. v. Page, 170 Ind. 585, 84 N. E. 145 (1908); Wolf v. Des Moines Elevator Co., 126 Iowa 659, 98 N. W. 301, 102 N. W. 517 (1905); HARPER, TORTS, § 86 (1933).

[14] The landowner could exclude them, order them to leave the gasoline alone, or make it inaccessible. That he was not there at the time of the injury seem immaterial if he knew of their previous conduct. See infra, note 19.

[15] This is a very difficult question. See Dean Green's analysis of Palsgraf v. Long Island Ry., 248 N. Y. 339, 162 N. E. 99 (1928), in 30 COL. L. REV. 789 (1930).

should take reasonable steps to prevent injury to such users.[16] This would involve merely bringing the relation of landowner-licensee within the principle of cases placing an affirmative duty on one to control the actions of another.[17] Moreover, it would be possible to sustain a recovery for plaintiff on the theory that defendant created a condition which was unreasonably dangerous because of the likelihood of action by third parties.[18] The intervention of third persons frequently can be anticipated, and this appears to be true in the instant case.[19] Recovery on this theory rests not on any peculiar relation of the parties[20] but upon ordinary negligence principles.[21] While the case is a hard one, the resemblance to cases where an affirmative duty to control the action of others has been imposed is close,[22] and the reasoning of the minority seems more convincing.[23] Moreover, it is in accord with the best modern authority.[24]

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[16] This seems to be dissenting Judge Lehman's view. See Fletcher v. Baltimore & Potomac Ry., 168 U. S. 135, 18 S. Ct. 35 (1896), and Hogle v. Franklin Mfg. Co., 199 N. Y. 388, 92 N. E. 794 (1910).

[17] See cases cited in notes 5-7, supra.

[18] Sullivan v. Creed, [1904] 2 Ir. Rep. 317; Lane v. Atlantic Works, 111 Mass. 136 (1872); Kliebenstein v. Iowa Ry. & Light Co., 193 Iowa 892, 188 N. W. 129 (1922).

[19] The majority say no, 19 N. E. (2d) at 984, but see cases cited in note 18, supra. Judge Finch and Judge Lehman seem to disagree as to whether defendant knew the children had built fires previously and used gasoline similarly acquired. At least defendant knew they overran the premises and had taken gasoline. If he did not, then the result the majority reached is sound. See Ford v. Grand Union Co., 268 N. Y. 243, 197 N. E. 266 (1935). If he did, the result seems at least doubtful.

[20] That is, landowner-licensee, etc.

[21] See cases in note 18, supra.

[22] See cases in notes 5-7, supra.

[23] See note 19, supra. One difficulty with plaintiff's recovery is that he seems to be guilty of contributory negligence. But that is a jury question.

[24] 2 TORTS RESTATEMENT, § 318 (1934).