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NEGLIGENCE - DUTY OF A LANDOWNER TOWARD A USER OF THE HIGHWAY

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NEGLIGENCE — DUTY OF A LANDOWNER TOWARD A USER OF THE HIGHWAY — The plaintiffs were walking along the highway when one of them became exhausted. They both sat down for about five minutes on the doorsill of the defendant's factory which was within four inches of the street. No mark indicated the line dividing the street from the defendant's premises. The plaintiffs were about to continue on their way when a sign, fastened over the door of the factory, fell without warning and injured both plaintiffs. The defendant did not know the sign was in danger of falling, but had not inspected it for several years. *Held*, the plaintiffs cannot recover as they were not users of the highway at the time of the injury. *Foley v. Farnham Co.*, (Me. 1936) 188 A. 708.

A landowner owes a duty of due care toward a user of the highway.[1] The courts have preserved the status of a user of the highway to persons who have departed from the highway by the implied invitation of the landowner [2] and to those who have strayed from the highway onto the property of the abutting landowner.[3] Neither of these theories appears to have been considered by the court or presented to it in the principal case. The plaintiffs might have been classified as users of the highway according to the first theory on the ground that the implied invitation held out by the landowner in paving up to the doorsill extended to the doorsill itself.[4] However, it would seem logical for the invita-

[1] "The general rule is that it is the duty of an abutting owner, maintaining structures along and adjacent to a highway, to use reasonable care to see that they are kept in such a condition as not to endanger the safety of persons engaged in the . . . lawful use of the highway." Pindell v. Rubenstein, 139 Md. 567 at 580, 115 A. 859 (1921); Davis v. Pennsylvania R. R., 218 Pa. 463, 67 A. 777 (1907); Railroad v. Hopkins, 54 Ark. 209, 12 L. R. A. 189 (1891).

[2] Crogan v. Schiele, 53 Conn. 186, 1 A. 899 (1885); Sedita v. Steinberg, 105 Conn. 1, 134 A. 243 (1926).

[3] Durst v. Wareham, 132 Kan. 785, 297 P. 675 (1931); Norwich v. Breed, 30 Conn. 535 (1862); Bennett v. Bank, 100 Kan. 90, 163 P. 625 (1917).

[4] In Crogan v. Schiele, 53 Conn. 186, 1 A. 899 (1885), the plaintiff had crossed a ten-foot space belonging to the defendant but paved like the street. She had ascended the porch of the defendant's factory from which she fell into an unguarded excavation and was injured. The first count of the declaration alleged the plaintiff was a traveller; the second that she was lawfully on the defendant's premises. Both counts were held good.

tion to extend to the paved portion of the defendant's premises that could be used as a highway, but not to a doorsill.[5] The cases decided according to the second theory usually emphasize the inadvertence of the deviation from the highway,[6] but in a few cases the deviation has been intentional.[7] A few courts have retained to one intentionally on the defendant's property his status as a user of the highway without mentioning either of these theories. In a Maryland case [8] the plaintiff sat down on the defendant's doorsill to fix his shoe. A brick from the wall of the house fell and injured him. The court in holding that the plaintiff was a user of the highway said, "Travelers on the street have not only the right to pass, but to stop and rest on necessary and reasonable occasions." This is compared by that court to the right to go *extra viam* if a road becomes impassable.[9] The test of reasonable foreseeability was used by an English court in holding a child, who was standing on the defendant's fence when it gave way, a user of the highway.[10] Since this is the usual test for negligence in the field of torts, it would seem that it should be used in this type of case unless its application will place too great burden on the landowner. Where the invasion is intentional and without an implied invitation, the distance of the cause of the injury from the highway is taken into account.[11] Another element that might be considered is the dangerousness of the condition of the premises.[12]

[5] In Paget v. Girard Trust Co., 44 Pa. Super. Ct. 596 (1910), the plaintiff stepped from the sidewalk on to a raised cellar door. The court in holding the plaintiff a trespasser said that the construction of the door indicated it was not to be walked upon and that the plaintiff did not claim that she was "in any manner deceived into the belief that the door was a part of the walk."

[6] "The jury . . . found that Durst was on Wareham's land, not of his own volition but on account of having lost control of his machine. . . ." Durst v. Wareham, 132 Kan. 785 at 789, 297 P. 675 (1931). "The landowner can not escape liability . . . because the traveller inadvertently left the highway." Bennett v. Bank, 100 Kan. 90 at 92, 163 P. 625 (1917). "Nor does she [the plaintiff] claim that by reason of it [the door] being close to the walk she inadvertently stepped upon it." Paget v. Girard Trust Co., 44 Pa. Super Ct. 596 at 602 (1910).

[7] Ruocco v. United Advertising Corp., 98 Conn. 241, 119 A. 48, 30 A. L. R. 1237 (1922); Healy v. Vorndran, 65 App. Div. 353, 72 N. Y. S. 877 (1901); Goodwin v. Columbia Telephone Co., 157 Mo. App. 596, 138 S. W. 940 (1911).

[8] Murray v. McShane, 52 Md. 217 at 226 (1879).

[9] This principle prevents the intruder from being a trespasser, Campbell v. Race, 61 Mass. 408 (1851), but it seems doubtful whether it should preserve to him his status as a user of the highway.

[10] The court in Harrold v. Watney, 2 Q. B. 320 at 325 (1898), said that the true test was: "Ought what the child did to have been present to the mind of the person who created the nuisance as a probable result of his act?"

[11] "The excavation was distant from the sidewalk some three or five feet . . . and, while it may be that a pedestrian who had unintentionally deviated from the sidewalk . . . could have recovered . . . the plaintiff . . . left it [the highway] deliberately. . . ." Crimmens v. United Engineering & Contracting Co., 49 Misc. 622 at 623, 96 N. Y. S. 1032 (1905).

[12] In the cases holding the traveller who intentionally deviated a user of the highway on the straying theory, the cause of the injury has been patently dangerous, electrically charged wires in Ruocco v. United Advertising Corp., 98 Conn. 241, 119 A.

The placing of liability on a landowner for his failure to protect those who come on his property intentionally against a dangerous condition does not seem unreasonable. Such liability placed on the owner of a structure apparently in safe condition,[13] when the person injured has encroached to any considerable extent intentionally and without an implied invitation into the property of the landowner, might be placing too great a burden on the landowner. It is suggested that since the plaintiffs were very near the street in the principal case, they could have been classified as users of the highway without placing too great a burden on the defendant.

48, 30 A. L. R. 1237 (1922); and Goodwin v. Columbia Telephone Co., 157 Mo. App. 596 at 607, 138 S. W. 940 (1911), and an unguarded excavation in Healy v. Vorndran, 65 App. Div. 353, 72 N. Y. S. 877 (1901). In the Goodwin case the court said, "The defendant brought death and kept it where the innocent wayfarer had but to extend his hand to receive its sting."

[13] Railroad Co. v. Hopkins, 54 Ark. 209, 12 L. R. A. 189 (1891), and Roberts v. Mitchell, 21 Ont. App. 433 (1894), hold that it is the duty of the owner of a building adjoining a highway to inspect it at reasonable intervals to see that it is in such condition as not to injure users of the highway.