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TORTS-DUTY TO CUT WEEDS AROUND OIL WAREHOUSE-INJURY CAUSED BY OCCURRENCE OTHER THAN THAT FOR WHICH DUTY WAS RAISED

TORTS — DUTY TO CUT WEEDS AROUND OIL WAREHOUSE — INJURY CAUSED BY OCCURRENCE OTHER THAN THAT FOR WHICH DUTY WAS RAISED — Plaintiff's house was located some 400 feet northeast of a wooden warehouse used by defendant for the storage of oils and grease. South and west of the warehouse lay a peet bog, and, between the bog and the defendant's warehouse and entirely on defendant's property was a 25-foot stretch of grass which defendant had neglected to cut down. A smouldering fire in the peet bog flared up under the influence of a strong wind, swept across the land of defendant, set fire to the warehouse and, eventually, crossed a full-width paved street and destroyed plaintiff's house. *Held*, though the use of the warehouse for the storage of oils and grease created the duty to use due care (as to spading the ground and cutting the grass in the vicinity), plaintiff's recovery was not dependent upon proof that the fire which was communicated to his house had actually ignited the

oil and grease in the warehouse. *Riley v. Standard Oil Co. of Indiana*, (Wis. 1934) 252 N. W. 183.

The court in this most interesting case had little difficulty in deciding that the storage of the inflammable materials raised a duty to cut the weeds around the warehouse. There must be, it is said, an undue probability of harm to that very plaintiff for the creation of a duty to use due care.[1] Merely because the plaintiff's house was 400 feet away from the warehouse would not necessarily mean that it was outside the zone of apprehended danger. "If conditions warrant the reasonable anticipation of a spread of fire over a large area . . . such conditions determine the distance for which the defendant will be liable for a spread of a fire." [2] Under some circumstances it has been held that owners of property several miles distant could recover.[3] It has been held that one in possession of land has the duty toward surrounding landowners not to let rubbish accumulate on the premises,[4] not to allow a grain elevator to become filled with inflammable dust,[5] and not to allow the ground around where petroleum is stored to become saturated with oil [6] where there is a reasonable probability that it may be set on fire. Due to the possible danger of fire from the peet bog, the instant court was probably correct in deciding that the storage of oil raised a duty to cut the weeds around the warehouse. But by far the most important contention of the defendant was based on the argument that, as the risk involved became unreasonable by reason of the use to which the warehouse was put (the storage of highly inflammable material), the plaintiff could not recover unless the evidence permitted the inference that the oil and grease caught fire and, subsequently, this fire was communicated to the property of the plaintiff. "If," argued the defendant, "the plaintiff's house caught fire before our oils had ignited, it cannot be said that 'but for' the oil storage plaintiff would not have suffered loss." The argument, as outlined by Justice Rosenberry (who wrote the opinion, in which the entire court concurred), was couched in the familiar language of causation, but would seem to illustrate, in perfect fashion, the intertwining of the

[1] See the opinion of Justice Cardozo in Palsgraf v. Long Island R. R., 248 N. Y. 339, 162 N. E. 99 (1928), where he says that negligence is not a wrong to third persons but to a particular individual and therefore third persons cannot recover even though they have been injured by the act. Compare the dissenting opinion of Justice Andrews to the effect that negligence is not only a wrong to the particular individual foreseeably endangered by the act, but also to any one who may be injured by it. See Goodhart, "The Unforeseeable Consequences of a Negligent Act," 39 YALE L. J. 449 (1930); Green, "The Palsgraf Case," 30 COL. L. REV. 789 (1930); Smith v. The London & South Western Ry., L. R. 6 C. P. 14 (1870).

[2] HARPER, TORTS, sec. 197 (1933).

[3] Atchison, T. & S. F. R. R. v. Stanford, 12 Kan. 354, 15 Am. Rep. 362 (1874), 3 or 4 miles; Poeppers v. Missouri, K. & T. Ry., 67 Mo. 715 (1878), 8 miles; East Tenn., V. & G. Ry. v. Hesters, 90 Ga. 11, 15 S. E. 828 (1892), 2 miles.

[4] Eisenkramer v. Eck, 162 Ark. 501, 258 S. W. 368 (1924). See 5 A. L. R. 1378 (1920).

[5] Quaker Oats Co. v. Grice, (C. C. A. 2d, 1912) 195 Fed. 441.

[6] Texas & N. O. Ry. v. Bellar, 51 Tex. Civ. App. 154, 112 S. W. 323 (1908); Wright v. Chicago & N. W. Ry., 27 Ill. App. 200 (1888). But see Beckham v. Seaboard Air-Line Ry., 127 Ga. 550, 56 S. E. 638, 12 L. R. A. (N. S.) 476 (1907).

duty, breach, and causal elements in a negligence action. Justice Rosenberry points out, as suggested above, that "while the presence of oil and grease imposed the duty," breach of the duty would permit recovery if failure to perform was "a substantial factor in the destruction of the plaintiff's property." Reading between the lines of defendant's argument, one suspects that he is arguing that (1) as he was charged with a *failure* to act, the "but for" [7] rather than the "substantial factor" [8] test of causation should apply, and (2) that "certain forms of conduct are negligent because they tend to subject certain interests of another to a particular hazard or type of hazard," in which case it is said that "If so, the actor's negligence lies in his subjecting the other to the particular hazard and he is liable only for such harm as results from the other's exposure thereto." [9] Properly applied, both these contentions are valid. But it would seem clear that, as Justice Rosenberry points out, there is no room for their application here. Defendant's use of his warehouse created the duty to use due care, with respect to cutting his grass, so that the fire hazard might be reduced. But with such a duty so created, and admitting the contention that defendant is charged with inaction, the "but for" test will be properly applied by relating it, not to the oils and greases, but to the failure to cut the grass. And, though it may be that one who hands a loaded revolver to a boy of eleven is not liable to a person on whose toe the loaded revolver is dropped, because liability exists only for such harm as results from a failure to take precautions made necessary by the undue risks involved in the handling of loaded revolvers, still, once the duty to use care exists in favor of a plaintiff who is subjected to unreasonable risk from the spread of fire, its measure would not seem to be restricted to cases in which the fire is communicated through the hazard which created the duty — here, the oil and grease.

J. W. C.

[7] See HARPER, TORTS, sec. 109 (1933). When the defendant's wrong is a failure to act, causation in fact exists only where doing the act would have prevented the consequence. Sowles v. Moore, 65 Vt. 322, 26 Atl. 629 (1893); Stacy v. Knickerbocker Ice Co., 84 Wis. 614, 54 N. W. 1091 (1893); Browne v. Seigel, Cooper & Co., 90 Ill. App. 49 (1899).

For an excellent discussion of proximate cause principles, see Carpenter, "Workable Rules for Determining Proximate Cause," 20 CAL. L. REV. 229, 396 (1932).

[8] Defendant's tort must have been a substantial factor in producing the damage complained of. Smith, "Legal Cause in Actions of Tort," 25 HARV. L. REV. 303 at 309 (1912). And also see Edgerton, "Legal Cause," 72 UNIV. PA. L. REV. 211, 343 (1924).

[9] AM. L. INST. RESTATEMENT OF TORTS, Tentative Draft No. 4, sec. 165e (1929).