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Negligence - Duty of Care - Liability for Injury Caused by Obvious Defect Where Lessor Contracted to Repair

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NEGLIGENCE—DUTY OF CARE—LIABILITY FOR INJURY CAUSED BY OBVIOUS DEFECT WHERE LESSOR CONTRACTED TO REPAIR—Defendant, lessor of a delivery truck, agreed with the lessee to maintain the vehicle in good condition and make regular inspections. The lessee's driver was not to make any repairs or adjustments but was to deliver the truck to the lessor as it needed repairs or as requested for inspection. Two years after the lease was made, plaintiff-driver made a written request to the lessor for repairs to the floor in the driver's compartment. Although plaintiff left the truck overnight with the lessor and made several further requests, the floor was not repaired. One month after notifying the lessor, plaintiff slipped on a small spot where the metal was exposed and sustained severe injuries. In an action against the lessor for negligence, the jury returned a verdict for plaintiff. The trial court, however, granted the lessor's motion for judgment notwithstanding the verdict on the theory that there could be no liability since the defect was obvious, and not concealed. On appeal, *held,* reversed. Where by agreement a lessor has reserved control of the property through the exclusive right and duty to repair, tort liability for injuries incurred due to failure to repair may be imposed even though the defect was apparent. *Campbell v. Siever,* (Minn. 1958) 91 N.W. (2d) 474.

The question of a lessor's liability for injuries caused by his failure to repair as agreed usually is resolved in terms of "control." If the lessor had

control over the subject-matter, there is basis for liability for injury resulting from a defective condition;[1] without control there is no liability.[2] Developed in landlord-tenant situations, the original reason for this principle was that one who is not able both to enter in order to repair[3] and to exclude people until the danger is abated should not be liable.[4] The same reasoning was applied in bailment cases.[5] While most later decisions retain the "control" requirement, often the kind of control actually present is not that which was originally said to be necessary. It is not at all settled that a contract to repair confers control sufficient to impose liability. Many states declare that a mere agreement to repair confers no control.[6] Others hold that although a lessor may acquire control in the sense of a privilege of entry, this is not sufficient. For instance, the New York court stated that the landlord must have the "power and right to admit people to the premises and to exclude people from them."[7] "Exclusive control" is required in Ohio.[8] But other states, while agreeing that control is essential for liability, define it so that the type acquired by a lessor through an agreement to repair is sufficient.[9] Minnesota has long held that an agreement to repair made by a landlord gives him implied authority to enter the premises and that this is control upon which may be predicated duty and liability.[10] But the trial court in the principal case felt compelled to apply the rule that it is also essential that the defect constitute a concealed danger; hence, there was no liability since the defect was obvious.[11] The court in the principal case agreed that such is the usual rule but held it inapplicable where the defendant not only reserved control of the truck for the purpose of keeping it in repair but also provided that plaintiff and other drivers of the lessee were not to make any repairs whatsoever.[12] This decision gives a new meaning and

[1] See Johnson v. Prange-Geussenhainer Co., 240 Wis. 363, 2 N.W. (2d) 723 (1942).

[2] See Soulia v. Noyes, 111 Vt. 323, 16 A. (2d) 173 (1940); Huey v. Barton, 328 Mich. 584, 44 N.W. (2d) 132 (1950), noted 49 MICH. L. REV. 1080 (1951).

[3] See Appel v. Muller, 262 N.Y. 278, 186 N.E. 785 (1933).

[4] Cullings v. Goetz, 256 N.Y. 287, 176 N.E. 397 (1931).

[5] Missouri, Kansas, and Texas Ry. Co. v. Merrill, 65 Kan. 436, 70 P. 358 (1902).

[6] E.g., Caudill v. Gibson Fuel Co., 185 Va. 233, 38 S.E. (2d) 465 (1946); Berkowitz v. Winston, 128 Ohio St. 611, 193 N.E. 343 (1934). See generally PROSSER, TORTS, 2d ed., 473-475 (1955).

[7] Cullings v. Goetz, note 4 supra, at 290. But see Noble v. Marx, 298 N.Y. 106, 81 N.E. (2d) 40 (1948). Comment, 48 MICH. L. REV. 689 (1950).

[8] Ripple v. Mahoning Nat. Bank, 143 Ohio St. 614, 56 N.E. (2d) 289 (1944).

[9] Saturnini v. Rosenblum, 217 Minn. 147, 14 N.W. (2d) 108 (1944); Hodges v. Hilton, 173 Miss. 343, 161 S. 686 (1935).

[10] Barron v. Liedloff, 95 Minn. 474, 104 N.W. 289 (1905); Saturnini v. Rosenblum, note 9 supra.

[11] The court cited O'Brien v. American Bridge Co., 110 Minn. 364, 125 N.W. 1012 (1910); 13 DUN. DIG., 3d ed., §6995a (1954); and 2 TORTS RESTATEMENT §§388 and 405 (1934). The *Restatement* is somewhat ambiguous on this point.

[12] Principal case at 478. No supporting authority was cited.

a new consequence to control. Where the control retained includes the ability to exclude all others from repairing the vehicle, the consequence is liability even for obvious defects. The decision does not, however, deviate significantly from results reached through other approaches in analogous situations. That neither a landlord nor a bailor is liable when the harmful defect was obvious is supported by ample authority.[13] But in the special situation where the lessor has covenanted to repair the subject-matter, courts allowing liability usually rule that when notified of the defect a lessor who fails to repair within a reasonable time is negligent,[14] and the apparentness of the defect bears only on the question whether the injured person had assumed the risk or was guilty of contributory negligence.[15] Further, this conduct could be found only where the plaintiff was aware of the specific defect causing the injury, fully comprehended the danger it presented, and failed to exercise reasonable care in the face of the danger.[16] It often is said that once the lessee has given notice of the need for repair, the lessor assumes the risk of injury to others and only after an unreasonable time has passed does the lessee again assume the risk.[17] He does so then only because it is unreasonable to rely any longer on performance by the lessor and to protect himself he ought to make the repairs.[18] Thus recovery often is allowed even though the defect was apparent. Such an approach seems preferable to dealing with the problem in terms of "control." It is suggested that the law should impose a duty of care with regard to any defects where there is an agreement to repair plus an additional relationship such as lessor-lessee or bailor-bailee,[19] since there is a strong probability of reliance by the lessee or bailee that the lessor or bailor will repair.[20] This would provide a justifiable basis for tort liability which enables the uncertain and unhelpful concept of "control" to be discarded.

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[13] E.g., Spinks v. Asp, 192 Ky. 550, 234 S.W. 14 (1921) (landlord); Blankenship v. St. Joseph Fuel Oil Co., 360 Mo. 1171, 232 S.W. (2d) 954 (1950) (bailor).

[14] Hudson v. Moonier, (8th Cir. 1939) 102 F. (2d) 96.

[15] Runnels v. Dixie Drive-It-Yourself System, 220 Miss. 678, 71 S. (2d) 453 (1954); Witte v. Whitney, 37 Wash. (2d) 865, 226 P. (2d) 900 (1951); Ashmun v. Nichols, 92 Ore. 223, 178 P. 234 (1919).

[16] Dean v. Hershowitz, 119 Conn. 398, 177 A. 262 (1935).

[17] Peterson v. Zaremba, 110 N.J. L. 529, 166 A. 527 (1933); Bland v. Gross, 10 N.J. Misc. 446, 159 A. 392 (1932), affd. 110 N.J. L. 26, 163 A. 891 (1933).

[18] Lebovics v. Howie, 307 Mich. 326, 11 N.W. (2d) 906 (1943); Busick v. Home Owners Loan Corp., 91 N.H. 257, 18 A. (2d) 190 (1941); Stoops v. Carlisle-Pennell Lumber Co., 127 Wash. 82, 219 P. 876 (1923).

[19] Note, 83 UNIV. PA. L. REV. 1035 (1935).

[20] Merchants' Cotton Press and Storage Co. v. Miller, 135 Tenn. 187, 186 S.W. 87 (1916); Scholey v. Steele, 59 Cal. App. (2d) 402, 138 P. (2d) 733 (1943); Anglen v. Braniff Airways, (8th Cir. 1956) 237 F. (2d) 736. See 2 TORTS RESTATEMENT §357 (1934). On the general subject, see 163 A.L.R. 300 (1946) (landlord-tenant); 46 A.L.R. (2d) 404 (1956) (automobile bailor-bailee).