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Negligence - Proving Inviter's Breach of Duty by Circumstantial Evidence

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NEGLIGENCE — PROVING INVITOR'S BREACH OF DUTY BY CIRCUMSTANTIAL EVIDENCE—Plaintiff brought a negligence action for personal injuries suffered when she slipped on a spot of grease in the driveway of defendant's railroad station. The evidence showed that the spot was at least one foot square and was covered with dust and dirt so that it resembled in color and texture the rest of the pavement. The evidence also indicated that vehicles often drove through and parked in the drive, and that there were no marks on the spot other than a deep skid mark left by plaintiff's heel. The trial court allowed the jury to determine from this evidence that the spot had existed long enough for the defendant, in the exercise of due care, to find and remove it. The defendant's motion for a judgment *n.o.v.* was overruled. The intermediate appellate court unanimously affirmed.[1] On appeal, *held,* reversed. "It is clear . . . that it could not be determined from any or all of the circumstances and at best it would only be a guess whether the grease spot was on the driveway 10 minutes, 10 hours or 10 days prior to the plaintiff's accident." Two judges dissented. *Lanni v. Pennsylvania R. Co.,* (Pa. 1952) 88 A. (2d) 887 at 889.

"A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he . . . knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them. . . ."[2] It was conceded in the principal case that the plaintiff was a business visitor

[1] 170 Pa. Super. 81, 84 A. (2d) 242 (1951).
[2] 2 TORTS RESTATEMENT §343 (1934).

upon the property of the defendant, that the spot constituted an unreasonable risk, and that the defendant had no actual knowledge of the existence of the spot. The only issue was whether the evidence supported the jury's finding that the defendant was negligent in failing to discover the spot. Since breach of duty is ordinarily a jury question,[3] the trial court was correct in sending the case to the jury unless the evidence was so slight that it would be unreasonable to infer that the spot had been on the driveway long enough for the defendant to have discovered it. The issue arose upon the denial of the defendant's motion for a judgment *n.o.v.*, which in Pennsylvania basically raises the question of whether the trial court should have directed a verdict for the defendant.[4] In considering either type of motion the court must view the evidence in a light most favorable to the party against whom the motion is directed.[5] Admittedly the plaintiff submitted no direct evidence as to how long the grease had been on the drive.[6] However, it is clear that breach of duty may be inferred by the jury from circumstantial evidence, provided the inference is reasonable and logical.[7] The evidence showed that the grease was located on the usual exit from the depot where it could easily have been discovered. The spot had been there long enough to become covered with dust and dirt. The grease was thick and was spread over a substantial area, which would logically indicate that, since cars used the drive, it had accumulated over a period of time. Of the fourteen judges who considered the case in three courts, nine judges thought that it was reasonable to conclude from this evidence that the grease had been on the drive long enough to charge the defendant with constructive notice. On second appeal, a five-judge majority thought otherwise. As in all cases involving a question of fact, other precedents are not very persuasive since the controlling circumstances vary in nearly every case.[8] The situation poses a difficult if not

[3] PROSSER, TORTS 280-281 (1941).

[4] For discussion of the motion for judgment *n.o.v.*, as utilized in Pennsylvania, see 6 STANDARD PENNSYLVANIA PRACTICE 386-412 (1936).

[5] See 6 STANDARD PENNSYLVANIA PRACTICE 75-76 and 407-410 (1936) for discussion and citations.

[6] For discussion of probative value of evidence and logical inferences see 1 WIGMORE, EVIDENCE, 3d ed., §26 et seq. (1940).

[7] When there is direct evidence as to the length of time that the condition has existed, the courts appear to be more willing to submit the issue to the jury, although there is still the question of fact as to whether the time was long enough to charge the defendant with constructive notice. In Van Wye v. Robbins, 48 Cal. App. 660, 120 P. (2d) 507 (1941), where the plaintiff proved that the grease spot upon which he fell had been on the parking lot for twenty minutes, the court held that constructive notice was a jury question. In Langley v. F. W. Woolworth Co., 46 R.I. 394, 131 A. 194 (1925), the court held that it was a jury question where peanuts had been upon the store floor for one hour and ten minutes prior to the time that the plaintiff slipped on them. Compare Burke v. National India Rubber Co., 21 R.I. 446, 44 A. 307 (1899), where the court held that three hours was an insufficient length of time to charge an employer with constructive notice of grease upon a factory floor.

[8] Compare the following cases: Kroger Grocery & Baking Co. v. Dempsey, 201 Ark. 71, 143 S.W. (2d) 564 (1940) (court reversed jury verdict for the plaintiff, who had slipped on banana peel in defendant's grocery store, on the ground that there was not enough evidence to show that the peel had been on the floor long enough to charge defendant with constructive notice); Smith v. Manning's, Inc., 13 Wash. (2d) 573, 126

impossible problem for plaintiffs in similar cases who have no way of proving how long a dangerous condition has existed if the jury is not allowed to draw reasonable inferences from evidence relating to the appearance, location and size of the hazard. What type of circumstantial evidence could a plaintiff in this position submit in order to assure a jury determination in Pennsylvania?[9] The court in the principal case indicated that if there had been evidence that there were other footprints on the spot the case could have gone to the jury.[10] It is suggested that the evidence presented was sufficient to support a reasonable inference that the grease had been on the drive for some time, and that the court, in reversing the jury finding on this point, extended its appellate authority further than was justified by the facts of the case.[11]

Charles E. Oldfather, S.Ed.

P. (2d) 44 (1942) (court allowed jury to find for the plaintiff, who had slipped on a pickle in defendant's restaurant, where evidence showed that bus boys were on duty to keep the floor clean and there was evidence that the floor probably had not been swept that day); Bremer v. W. W. Smith, Inc., 126 Pa. Super. 408, 191 A. 395 (1937) (court sustained defendant's motion for a judgment *n.o.v.* in action for injuries sustained by plaintiff when he fell into a hole in a parking lot and the evidence showed that many cars had run over the hole, and the size of the hole); O'Leary v. Smith, 255 Mass. 121, 150 N.E. 878 (1926) (court directed a verdict for the defendant in case where plaintiff fell on a piece of pie in defendant's restaurant, although the defendant admitted that the floor had not been swept that morning or the night before).

[9] For an enumeration of relevant circumstances which the jury could consider in a case where plaintiff slipped on a bag of peanuts in a store, see Langley v. F. W. Woolworth Co., note 7 supra. Many of these circumstances would appear to be applicable to the accident in the principal case.

[10] See Mack v. Pittsburgh Railways Co., 247 Pa. 598, 93 A. 618 (1915).

[11] The dissenting judge cited Hagen v. Standard Oil Co. of Pennsylvania, 119 Pa. Super. 337, 181 A. 458 (1935), as being precisely in point with the principal case. In that case there was no direct evidence as to how long the grease upon which the plaintiff fell had been on the driveway. The court held that the issue of constructive notice was a question of fact for the jury.