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NEGLIGENCE-PROXIMATE CAUSE-INTERVENING ACT OF CHILD

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NEGLIGENCE—PROXIMATE CAUSE—INTERVENING ACT OF CHILD—In the race track arena of defendant's fairground there were nightly fireworks displays. Three bombs, similar in appearance to ordinary firecrackers, but containing explosives more powerful than gunpowder, had failed to explode on the previous night. They had been wrapped in paper, placed in open wooden crates alongside three exposed bombs, and left unguarded in the arena firing area which was accessible to and traversed by the general public. The plaintiff's older brother, aged thirteen, together with other children between twelve and fifteen years old, had climbed over a fence into the fairgrounds. In compassing the fairgrounds

he discovered the bombs, took the defective ones, gave two to his friends and carried one to his home two miles away. The next morning while being handled by the infant plaintiff, who was seven years of age, the bomb exploded injuring him seriously. The jury returned a verdict for the plaintiff, and judgment was entered thereon. On appeal, *held*, affirmed. The intervening acts of the plaintiff's brother did not as a matter of law break the causal chain. Two judges dissented. *Kingsland v. Erie County Agr. Soc.*, 298 N.Y. 409, 84 N.E. (2d) 38 (1949).

In a series of cases involving the taking of inherently dangerous objects[1] by children with resulting injuries to third persons, the New York courts have ruled that failure to exercise the degree of care commensurate with the dangerous nature of the object[2] makes the possessor liable for those consequences that ought to have been foreseen by a reasonably prudent man.[3] In establishing standards to measure foreseeability, they have relied on the factors of (1) whether the objects are left accessible under circumstances where children would feel tempted or at liberty to handle them, or whether they would be conscious of a moral wrong in taking them;[4] (2) the children's appreciation of the risk involved;[5] and (3) the proximity in time and place of the taking and resulting injury.[6] In *Perry v. Rochester Lime Co.*[7] the defendant's employees left nitroglycerine caps stored where children were known to play. They were packed in tin boxes, marked "Blasting Caps, Handle With Care," enclosed within wooden boxes, in turn stored in an unlocked wooden chest. Boys discovered the open chest, appropriated a wooden box full of caps, carried it a half mile, and in handling them the next day an explosion occurred killing the plaintiff's intestate, eight years old. In holding as a matter of law that the injury was unforeseeable, the court emphasized that

[1] Held inherently dangerous—caked gunpowder: Travell v. Bannerman, 71 App. Div. 439, 75 N.Y.S. 866 (1902), revd on other grounds, 174 N.Y. 47, 66 N.E. 583 (1903); nitroglycerine caps: Perry v. Rochester Lime Co., 219 N.Y. 60, 113 N.E. 529 (1916); blasting caps: Babcock v. Fitzpatrick, 221 App. Div. 638, 225 N.Y.S. 30 (1927), affd. 248 N.Y. 608, 162 N.E. 543 (1928); Hallenbeck v. Lone Star Cement Corp., 273 App. Div. 327, 77 N.Y.S. (2d) 807 (1948). See Eastern Carbon Black Co. v. Stephens' Administrator, 216 Ky. 85, 287 S.W. 215 (1926) and Babcock v. Fitzpatrick, supra, suggesting distinction that inherently dangerous articles may be exploded by jar or concussion while those that may be handled safely, provided they do not come in contact with fire, are not within the category.

[2] Travell v. Bannerman, supra, note 1; Beickert v. G.M. Laboratories, 242 N.Y. 168, 151 N.E. 195 (1926).

[3] Perry v. Rochester Lime Co., supra, note 1.

[4] Ibid.; Babcock v. Fitzpatrick, supra, note 1; Hallenbeck v. Lone Star Cement Corp., supra, note 1.

[5] Babcock v. Fitzpatrick, supra, note 1; Hallenbeck v. Lone Star Cement Corp., supra, note 1.

[6] PROSSER, TORTS 349 (1941); Perry v. Rochester Lime Co., supra, note 1. Cf. Travell v. Bannerman, supra, note 1. See Bird v. St. Paul Fire and Marine Ins. Co., 224 N.Y. 47, 120 N.E. 86 (1918) for evaluation of remoteness in place as factor in causation in different type case.

[7] Perry v. Rochester Lime Co., supra, note 1.

a twelve-year-old discovering the unexposed caps and taking them in quantity, far from feeling invited to take them, must have appreciated the moral wrong involved. The court also weighed the intervention of a day and of a half mile between the theft and the explosion as breaking the "unity of the transaction." In noting the tins were plainly marked as dangerous, the court undoubtedly assumed without specific mention that the takers appreciated that risk was involved. Conceding the *Perry* case to establish that an uninvited taking by an infant cognizant of the risk involved breaks the chain of causation,[8] the problem remains of determining how culpable the taking must be and to what degree the infant must be cognizant of the risk involved before reasonable minds would agree his acts are foreseeable, independent, supervening forces. Greatest contention in the principal case centered on the state in which the bombs were discovered, the majority emphasizing that they were wrapped in old papers, within tumbled, empty crates, and could be anticipated to appeal to children as valueless cast-offs which they would be at liberty to take as souvenirs; while the dissenting minority emphasized that they were not exposed, but wrapped, and their discovery involved motivated search which the defendants should not have been required to anticipate. In taking the defective bombs, which looked like ordinary firecrackers, the children undoubtedly anticipated some danger, yet testimony shows they did not suspect their extra-hazardous nature. Measured in terms of moral wrong and appreciation of risk, the actions of the taker in the *Perry* case are clearly more independent and consequently less foreseeable than those in the principal case. This difference in degree might well warrant the submission of foreseeability to the jury in the principal case while still accepting the *Perry* case as controlling. This leaves unanswered the question of the vitality left in the proximity in time and place test as an added factor in causation. Standing alone it is certainly not determinative,[9] although in adopting the *Perry* case it might be concluded that the dissenters still sanction it as a contributing factor.

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[8] Hallenbeck v. Lone Star Cement Corp., supra, note 1, relying on the Perry case.

[9] The injury was even farther removed from the taking in the principal case than in the Perry case. Note the court fails to mention the doctrine specifically in Hallenbeck v. Lone Star Cement Corp., supra, note 1.