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NEGLIGENCE-"COAL HOLE" CASES-CONSTRUCTIVE NOTICE ARISING FROM CONDITION OF THE PREMISES-FAILURE TO LOCK AS EVIDENCE OF NEGLIGENCE

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NEGLIGENCE—"COAL HOLE" CASES—CONSTRUCTIVE NOTICE ARISING FROM CONDITION OF THE PREMISES—FAILURE TO LOCK AS EVIDENCE OF NEGLIGENCE—While on the way to a bowling alley at 7:15 p.m., plaintiff fell through an open coal hole in the private sidewalk which ran along the rear of defendant's business building. The public used the sidewalk to enter the building and to reach the rear of other stores in the block. There was no evidence as to how the door of the coal hole, which had been closed at 5:30 p.m., was opened. *Held,* judgment for plaintiffs reversed and judgment entered for defendant, two justices dissenting. Plaintiff failed to prove that the door in question was open a sufficient length of time before the accident to charge defendant with knowledge that the door was open. *Moore v. Traverse City Masonic Building Association,* 324 Mich. 507, 37 N.W. (2d) 457 (1949).

The decision seems to be in accord with the authorities in this general type of "coal hole" case, where the cover is completely displaced,[1] as distinguished from those in which the cover is defective or loose.[2] It would also seem to agree with the *Restatement of Torts*[3] which requires actual or constructive notice of the defect to render the landowner liable. The courts will not apply the doctrine of res ipsa loquitur to this situation,[4] though they may apply the doctrine if the cover was defective or loose.[5] Because of the frequency of these accidents it would seem that the courts might do well to consider as evidence of negligence the failure to lock the covers from the inside so that they could not be removed by malicious or negligent third parties, as was evidently the situation in this case.[6] This point appears to have been raised by counsel in this case, but the majority evidently passed over it.[7] A few courts, however, have recognized that a failure to fasten and lock the cover could be considered by the jury as evidence of negligence, even though there was neither actual nor constructive notice of the defect. In a recent North Dakota case it was held that, considering the location of the coal hole and the ability to open it from the outside, it could not be said as a matter of law that reasonable care was used in its maintenance.[8] The Iowa court similarly held that the jury could have found that it was negligent to

[1] Gunning v. King, 229 Mass. 177, 118 N.E. 233 (1918); Cleveland v. Amato, 123 Ohio St. 575, 176 N.E. 227 (1931); Copeland v. Junkin, 198 Iowa 530, 199 N.W. 363 (1924); Fandel v. Parish of St. John the Evangelist, 225 Minn. 77, 29 N.W. (2d) 817 (1947).

[2] In the latter type of case, the courts seem to allow recovery more frequently, either on the ground that constructive notice will be more readily found, or that the doctrine of res ipsa loquitur will be applied.

[3] 2 TORTS RESTATEMENT §§342, 343 (1934).

[4] Gunning v. King, supra, note 1; Cleveland v. Amato, supra, note 1. See 174 A.L.R. 607 (1948). Michigan purports not to recognize the doctrine of res ipsa loquitur. Principal case at 521.

[5] Brown Hotel Co. v. Sizemore, 303 Ky. 431, 197 S.W. (2d) 911 (1946); Moser v. Legniti, 76 Misc. 216, 134 N.Y.S. 606 (1912).

[6] Principal case at 520.

[7] But see principal case at 516, where that fact was considered as relevant in the dissenting opinion.

[8] State v. Columbus Hall Assn., (N.D. 1947) 27 N.W. (2d) 664.

leave the covering without lock: "the care required by the law, for the safety of those who frequented the street, demanded that such a trap should not be arranged for them in the side-walk, which could be readily set by the mischievous and malicious, and would be set by the negligent, who would fail properly to replace the cover after using it."[9] Other courts would do well to consider more fully this latter aspect of the "coal hole" cases, thus permitting liability to be based on negligence in the maintenance of the coal hole rather than hinging liability on actual or constructive notice of the defect.[10]

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[9] Calder v. Smalley, 66 Iowa 219 at 223, 23 N.W. 638 (1885).

[10] For a comprehensive study of this type of accident in New York State, see JACOBS, SIDEWALK ACCIDENTS IN NEW YORK (1948). See also annotations in 70 A.L.R. 1358 (1931); 6 N.C.C.A. 455 (1915); 13 N.C.C.A. 505 (1917); 14 N.C.C.A. 583 (1917); 37 N.C.C.A. 439 (1935).