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Torts -- Independent Contractors -- Duty of Care

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covers "scalping,"[30] the nearly unanimous approval by the Supreme Court of the liberal interpretation of the provisions in this case should certainly have an impact upon securities regulation in the future. It should facilitate regulation of the industry, since broad legislation—intended to be interpreted broadly—can be enacted with reasonable assurance that its effect will not be unduly restricted by narrow interpretation.

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Torts—Independent Contractors—Duty of Care

In *Heldenfels v. Hernandez*[1] an employee of the owner of property on which construction work was being done brought action against a paving subcontractor for injuries sustained by the employee when struck by a backing truck. The jury found that the subcontractor failed to provide a flagman to warn the employee of the backing truck but found no affirmative negligence. The Texas court held that the plaintiff was merely a licensee as to the subcontractor and that it had breached no duty owed to the landowner's employee by its failure to provide a flagman. Even though the subcontractor owned no interest in the land, the court reasoned that it became an occupant of the private premises for the purpose of the construction work, and that although an occupier or owner of land may owe to a licensee the duty to warn him of *concealed* hazardous conditions, there is no duty to warn him of dangers on the land which are not concealed.

Owners and occupiers of land have been given immunities concerning the exercise of care which are not, as a general rule, available to others. It may be broadly stated that an owner or occupier has no duty of care toward a trespasser except the duty not to wilfully injure him.[2] He has a duty toward licensees which includes a duty to warn of concealed dangerous conditions of the premises of which

[30] Investment Advisers Act of 1940, § 206(4), added by § 9, 74 Stat. 887 (1960), 15 U.S.C. § 80b-6(4) (Supp. IV 1963).

[1] 366 S.W.2d 641 (Tex. Civ. App. 1963).

[2] Peters v. Bowman, 115 Cal. 345, 47 Pac. 113 (1896); Hooker v. Routt Realty Co., 102 Colo. 8, 76 P.2d 431 (1938); Previte v. Wanskuck Co., 80 R.I. 1, 90 A.2d 769 (1952). See generally 2 HARPER & JAMES, TORTS § 27.1 (1956) [hereinafter cited as HARPER & JAMES].

he has knowledge.[3] He has no duty to use care to inspect his premises or take precautions for the safety of a licensee.[4] The principal case raises the question who, if anyone, should be permitted to take advantage of the limited duties of the owner or occupier of land. On this question there is a solid division of authority in this country. Generally all courts agree that these immunities of the owner or occupier extend to the members of his household and to his servants during the course of their employment.[5] The *Restatement of Torts* adds independent contractors to the list of those who may derive the benefit of these exemptions,[6] and several jurisdictions, including the Texas court in the principal case, have adopted this view.[7] Other courts have limited the exemptions to those designated either as "owner," "possessor" or "occupant." These courts have taken the view that on strictly technical and historical grounds the exemptions should apply only to those who have a proprietary interest in the land.[8] The term "possession" in this context is held to mean under one's control and the right to exclude every other person from dealing with it.[9] The term "occupant" ordinarily implies a person having possessory rights who can control any activity on the premises.[10]

There are reasonable grounds for extending a landowner's exemptions to the members of his family for a verdict against a mem-

[3] See, *e.g.*, Straight v. B. F. Goodrich Co., 354 Pa. 391, 47 A.2d 605 (1946). See generally 2 HARPER & JAMES § 27.1 (1956).

[4] Rosenberger v. Consolidated Coal Co., 318 Ill. App. 8, 47 N.E.2d 491 (1943); Brauner v. Leutz, 293 Ky. 406, 169 S.W.2d 4 (1943); Myszkiewicz v. Lord Baltimore Filling Stations, Inc., 168 Md. 642, 178 Atl. 856 (1935).

[5] See, *e.g.*, Hamakawa v. Crescent Wharf & Warehouse Co., 4 Cal. 2d 499, 50 P.2d 803 (1935); Mikaelian v. Palaza, 300 Mass. 354, 15 N.E.2d 480 (1938); Sohn v. Katz, 112 N.J.L. 106, 169 Atl. 838 (Ct. Err. & App. 1934). See also RESTATEMENT, TORTS § 382 (1938).

[6] RESTATEMENT, TORTS § 383 (1938).

[7] McIntyre v. Converse, 238 Mass. 592, 131 N.E. 198 (1921); Waller v. Smith, 116 Wash. 645, 200 Pac. 95 (1921). Annot., 90 A.L.R. 886 (1934). It is now probably the majority opinion that one who maintains wires over another's land cannot take advantage of the landowner's exemptions. Annot., 56 A.L.R. 1021 (1928).

[8] Fort Wayne & N. I. Traction Co. v. Stark, 74 Ind. App. 669, 127 N.E. 460 (1920); Godfrey v. Kansas City Light & Power Co., 299 Mo. 472, 253 S.W. 233 (1923); Cooper v. North Coast Power Co., 117 Ore. 652, 244 Pac. 665 (1926).

[9] Green v. Menveg Properties, Inc., 126 Cal. 2d 1, 271 P.2d 544 (1954). It is that condition of facts under which one can exercise his power over a corporeal thing to the exclusion of all other persons. Starits v. Avery, 204 Iowa 401, 213 N.W. 769 (1927).

[10] United States v. Fox, 60 F.2d 685 (2d Cir. 1932); Lechler v. Chapin, 12 Nev. 65 (1877); Wittkop v. Garner, 4 N.J. Misc. 234, 132 Atl. 339 (Sup. Ct. 1926).

ber of the family will in all probability ultimately fall on the shoulders of the landowner. The extension of these exemptions to his servants during the course of their employment may also be justified, for if the servant is held liable, the master may also be liable under the doctrine of *respondeat superior*. To deny the servant the exemption would deprive the landowner of that to which the law says he is entitled. No such result would follow in refusing to extend the exemptions to an independent contractor. The *Restatement of Torts* recognizes a distinction between one who is on the land "on behalf of" the landowner, such as an independent contractor, and one on the land in some other capacity, such as an easement owner.[11] The former but not the latter, according to the *Restatement*, gets the landowner's immunity. Dean Prosser says that this distinction reconciles most of the cases.[12]

Dean Prosser's observation may well explain the North Carolina court's refusal to extend the exemptions in some early cases, but one who looks at the cases with the cynic's eye might well wonder if the results might not be explained by something other than the "on behalf of" theory. In most of the cases in which the court has specifically refused to extend the exemptions to the holder of an easement, the defendant was an electric power company.[13] Since the exemptions stem from land ownership, it would appear that the easement owner would be more entitled to the exemptions than would a defendant who has no interest in the land of any kind. The inclusion of the independent contractor stands on a different footing than the inclusion of members of the landowner's family or his servants. Upon analysis it would seem to be unjustified upon any sound grounds. His exclusion from the requirement of using due care does not spring from the land, for he has no interest in the land. He is not an "occupant," "owner" or "possessor" as these terms are used in designating an estate in land.[14]

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[11] RESTATEMENT, TORTS §§ 383-86 (1938).

[12] PROSSER, TORTS § 76 (2d ed. 1955). According to Dean Prosser the "in behalf of" theory extends the landowner immunities to independent contractors who are acting in behalf of the landowner and denies the immunities to those, such as electric power companies, who have an easement across the lands of another in order to further their own interest.

[13] Ferrell v. Durham Traction Co., 172 N.C. 682, 90 S.E. 893 (1916); Benton v. North Carolina Pub. Serv. Corp., 165 N.C. 354, 81 S.E. 448 (1914).

[14] For a discussion of these terms see Garver v. Hawkeye Ins. Co., 69 Iowa 202, 28 N.W. 555 (1886); Nevin v. Louisville Trust Co., 258 Ky. 187, 79 S.W.2d 688 (1935).

North Carolina seems to have agreed with the absurdity of allowing one to defend on the grounds that the plaintiff was a trespasser as to a third party, although it should be kept in mind the considerations as to whether or not the defendant was on the land in his own behalf rather than "on behalf of" the landowner. In *Ferrell v. Durham Traction Co.*[15] the court aptly stated the basis of the exemption from the duty of reasonable care as being "a principle growing out of and dependent upon the rights of ownership and considered essential to their proper enjoyment.... [R]ecovery is not... denied merely because... the injured party is himself a trespasser"[16] (to a third party). In *Benton v. North Carolina Pub. Serv. Corp.*[17] a child was killed while climbing a tree growing on land over which defendant held an easement when the child came in contact with defendant's poorly insulated wires. It was held that "it is immaterial to consider whether the boy killed was a trespasser. He certainly was not trespassing upon any property of the defendant."[18] Although the defendant's easement merely contemplated

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Denial of recovery can be best explained by the fact that there was no negligence. In Ellis v. Orkin Exterminating Co., 24 Tenn. App. 279, 143 S.W.2d 108 (1939), the defendant was employed to fumigate the residence of the plaintiff. To effectuate this purpose it was necessary that the plaintiff and his family vacate the residence for twenty-four hours. The plaintiff's intestate, a child of tender years, entered the house and was asphyxiated. The evidence disclosed that the defendant had warned the family of the extreme danger involved and of the imperative necessity of remaining out of the house for twenty-four hours; in addition the defendant had locked the house from the inside, placed two substantial padlocks on the two outside doors, and placed large red-lettered warning signs around the premises. The court found no liability on the basis that the deceased child was a trespasser.

In Hamakawa v. Crescent Wharf & Warehouse Co., 4 Cal. 2d 499, 50 P.2d 803 (1935), General Steamship Company had general control of the dock where the defendant was engaged in loading a ship. The steamship company required persons to obtain from them a permit to go upon the dock. Plaintiff, without permission, went on the dock and in so doing went upon a portion which he would have been guided around had he obtained permission. While on this portion of the dock he was struck by a bale of paper which the defendant knocked off the balcony of the warehouse. It was held that since plaintiff was present without permission of defendant and that as he had no business with either defendant or the ship he was a trespasser and defendant only owed a duty to refrain from wilful injury. The court could have better supported a decision of no liability on the basis of no duty because of the unforeseeability of someone being in the restricted area without permission.

[15] 172 N.C. 682, 90 S.E. 893 (1916).

[16] *Id.* at 684, 90 S.E. at 893-94.

[17] 165 N.C. 354, 81 S.E. 448 (1914).

[18] *Id.* at 357, 81 S.E. at 449.

transmission lines, he obviously had more of an interest in the land than would a mere independent contractor.

In 1937 Mr. Pafford[19] seemed to have brought North Carolina in line with the *Restatement*,[20] and those jurisdictions which have adopted its view,[21] by falling down an elevator shaft maintained by an independent contractor on the property of another. The court in denying recovery designated Mr. Pafford a licensee. The court seems to have given no thought to the possibility that in relieving the defendant from the exercise of due care while on the premises of another, it was relieving defendant from such duty altogether, as it may reasonably be assumed that its business will always be carried out on the property of another. It is not disclosed whether or not Mr. Pafford was left with the ability to ponder this question. The court made no reference to its earlier decisions and in designating the defendant as one in possession there is no indication that serious consideration was given to the question.

A defendant who was engaged in activity similar to the defendant in the *Pafford* case was held to the duty of exercising due care in *Bemont v. Isenhour*,[22] but on the theory that the plaintiff's position with respect to the defendant was "at least that of an invitee." The court seems to imply that recovery would have been denied otherwise, and yet the proper test would seem to be whether or not the plaintiff's presence and resulting injury could have been reasonably foreseen by the defendant.

In *McIntyre v. Monarch Elevator Co.*[23] an independent contractor was repairing an elevator located in a medical clinic. The plaintiff was on her way to see one of the doctors when she fell down the shaft as a result of the defendant having left the elevator door open. The court held that the defendant was chargeable with the duty of exercising reasonable care for the safety of *those who rightfull use* or attempt to use the elevator. No mention was made in the opinion as to plaintiff's position as either invitee or licensee, and except for the qualifying clause emphasized it would appear that the court was reaffirming its earlier decisions not to consider

[19] Pafford v. J. A. Jones Constr. Co., 217 N.C. 730, 9 S.E.2d 408 (1940).
[20] RESTATEMENT, TORTS § 382 (1938).
[21] Key West Elec. Co. v. Roberts, 81 Fla. 743, 89 So. 122 (1921); Hafey v. Turners Falls Power & Elec. Co., 240 Mass. 155, 133 N.E. 107 (1921); Parshall v. Lapeer Gas-Elec. Co., 228 Mich. 80, 199 N.W. 599 (1924).
[22] 249 N.C. 106, 105 S.E.2d 431 (1958).
[23] 230 N.C. 539, 54 S.E.2d 45 (1949).

the limitations of a landowner's duty except in cases involving a landowner, members of his household or his servants. Again whether or not the defendant could reasonably foresee harm resulting to someone would seem to be the proper test as to whether the defendant be chargeable with the duty to exercise reasonable care for their safety, rather than any label which might be attached to the body liying at the bottom of the shaft. The exemptions traditionally extended to a landowner require these labels, but there seems to be no good reason to extend such exemptions further.

It is difficult to determine with any degree of certainty what position the North Carolina court would take if called upon to decide head-on whether an independent contractor was entitled to the exemptions allowed the landowner or possessor on whose premises he was conducting his activity. In the cases noted here the defendants were held to have a duty of due care with the exception of the *Pafford* case. *Quaere* if the court there did not inadvertently give to the words "one in possession" a wider scope than they would have been willing to give after deliberate consideration of the possible effect of such extension. It is conceivable that a building contractor might lease the premises upon which he had contracted to construct a building in order to acquire the immunities granted to such proprietary interest. Were this the purpose it would seem to be an attempt to contract away his liability. The courts have consistently held such contracts void as being detrimental to the public good.[24] It is inconceivable that the court would consciously do for the independent contractor that which they would not tolerate his doing for himself. It would also seem that the court would be very reluctant to deliberately overrule the sound logic of the earlier cases which held that a trespass was immaterial if only an infringement upon the rights of a third party.[25]

The landowner has been a favorite of the law. According to Blackstone the right of private ownership of property was one of the three absolute rights of English law. The law's regard for this right was so great that it would "not authorize the least violation of it . . . even for the general good of the whole community."[26]

[24] Brown v. Postal Tel. Co., 111 N.C. 187, 16 S.E. 179 (1892); Jankele v. Texas Co., 88 Utah 325, 54 P.2d 425 (1936).

[25] Ferrell v. Durham Traction Co. 172 N.C. 682, 90 S.E. 893 (1916); Benton v. North Carolina Pub. Serv. Corp., 165 N.C. 354, 81 S.E. 448 (1914).

[26] 2 BLACKSTONE, COMMENTARIES *138.

The exemption was applied with harshness and inflexability. From this strict observance of the sanctity of property, courts have attempted to restrict the application of the exemptions in particular instances through classification of plaintiffs into categories such as "trespasser," "licensee" or "invitee." The landowner's freedom from a duty was in this manner modified. Even as to the trespasser most courts have discarded the "wilful or wanton" formula and have stated that a duty of due care is owed to preceived trespassers.[27] The many decisions creating exceptions to the limitations of a landowner's duty would seem to illustrate an attempt to confine the exemptions allowed within narrow limits. The principal case would appear to be a marked reversal of this trend and should merit close examination and critical appraisal.

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[27] See generally 2 HARPER & JAMES § 27.1.