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Torts: Performer of Gratuitous Services on Private Premises: Invitee or Licensee?

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sumer from harm if possible. So too the courts have held the vendor of food liable to the ultimate consumer for his negligence and to his immediate purchaser for a breach of warranty. Now the Montana court is extending the dealer's liability on a warranty to those out of privity of contract; by a sale of food unwholesome from any cause the dealer is made, as the court says, "the insurer of the purity of the food products." Surely the liability of the dealer who usually has little opportunity to inspect the food, especially packaged or canned food, should not be so broad as that of the manufacturer who in preparing the product had ample opportunity for inspection. The principal justification for such broad liability of the dealer who is without fault is that he is in a better position to pass the liability on to the party who should bear the loss.[84] But as Williston says, " . . . where personal injury is caused by the defect in the warranted article to a third person, and the buyer (here the dealer) is compelled to pay damages to the person injured, it is disputed whether the buyer can recover these damages from the seller.'"[85] So long as such a doubt exists, the better rule would seem to be to impose on the dealer a civil liability under the pure food act that is no broader than his criminal liability.

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TORTS: PERFORMER OF GRATUITOUS SERVICES ON PRIVATE PREMISES: INVITEE OR LICENSEE?

In *McCulloch v. Horton,*[1] plaintiff stopped in at the farm home of defendant to pay for his board and was offered a ride home, defendant stating that he was "going that way anyway." While plaintiff held open the garage door at the request of defendant so that it wouldn't sway with the wind, defendant backed his truck out swiftly and at an angle, so that the side of the truck hit against the door frame, and the resulting jar caused an upright wing on the truck to fall upon plaintiff as the truck cleared the garage. Defendant knew that the wing was then in an upright position and was unfastened. The court conceded that if plaintiff was only a li-

[84]Vold, Sales (1931) §146, pp. 454-5, and §149, pp. 466-7.
[85]2 WILLISTON SALES (2d ed. 1924) §614a, p. 1545.

[1] (1936) 102 Mont. 135, 56 P. (2d) 1344. A comment by the writer on the question of whether the Montana Court in the second appeal of this case, (1937) 105 Mont. 531, 74 P. (2d) 1, adopted the doctrine of comparative negligence appears in 1 MONT. L. REV. 97 (1940).

censee, defendant's only duty was to refrain from wanton or wilful acts which might occasion injury, but held that "plaintiff was an invitee, if not a gratuitous employee," and that, therefore, defendant owed plaintiff the duty of exercising ordinary care, and that the lower court erred in granting a nonsuit against the plaintiff.

In *Hatcher v. Cantrell*[2] the facts were somewhat similar to those found in the principal case. There the plaintiff, a neighbor of defendant, went over to defendant's premises to suggest moving defendant's car out of the garage to protect it from a nearby fire. Plaintiff stood inside the garage giving directions on how to start the car, and while so standing just to the left of the driver, was injured when the driver started the car suddenly while the front wheels were cramped to the right. The court approached the question, as did the Montana court, without regard to the theory of "active negligence," discussed *infra,* and held that it was a question for the jury whether or not plaintiff was a volunteer. It would thus seem that the Montana decision in the principal case is comparable, for clearly plaintiff could not be considered a volunteer, as he was expressly asked to hold open the garage door.

A preferable theory upon which to have tried and decided the case would have been to ascertain whether there was a failure to exercise ordinary care to avoid injuring plaintiff, after defendant knew of plaintiff's presence; knowing of plaintiff's presence, the duty to exercise such care follows regardless of plaintiff's technical status. Plaintiff's injuries were not due to a defective condition on the premises, but were caused by the overt act of defendant in backing the truck carelessly when it was foreseeable a jar might cause the wing to fall. The causal connection surely is complete.[3] A majority of courts and text-writers give lip service to the timeworn formula that the only duty to licensees and trespassers is to refrain from wanton or wilful acts which might occasion

[2] (1933) 16 Tenn. App. 544, 65 S. W. (2d) 247. See also Smith v. Pickwick Stages System (1931) 113 Cal. App. 118, 297 P. 940; Ohm v. Miller (1928) 31 Ohio App. 446, 167 N. E. 482. *Cf.* Nevada Transfer & Warehouse Co. v. Peterson (1940)——Nev.——, 99 P. (2d) 633.

[3] "We think it may be said to be the general rule, sustained by the great weight of authority, that 'where the primary cause of an injury is a pure accident, occasioned without fault of the injured party, if the negligent act of the defendant is a cooperating or culminating cause of the injury, or if the accident would not have resulted in the injury excepting for the negligent act, the negligence is the proximate cause of the injury, for which damages may be recovered. . . .'" Davis v. Freisheimer (1923) 68 Mont. 322, 333, 219 P. 236, 240.

injury,[4] but require a landowner to use reasonable care for the safety of trespassers, licensees, and invitees, as far as his affirmative conduct is concerned, after he knows of their presence.[5] In *Egan v. Montana Central Railway Co.*[6] the court said: "The defendants owed to the plaintiff as they did to any other trespasser, the duty to refrain from any wilful or wanton act occasioning injury, *and the duty of exercising reasonable care to avoid injuring him after becoming aware of his presence on the right of way . . .* " In many later Montana cases, the court has failed to state the rule with this qualification and has thus left it uncertain whether this exception to the general rule will be applied in this state. It has been said that this affirmative duty is based upon knowledge of the presence of the trespasser as a man and not as a trespasser.[7] In *Babcock & Wilcox Co. v. Nolton et ux,*[8] defendant's employee negligently backed a truck against a car in which a licensee was sitting. The court said: "There is no evidence of willful or wanton negligence on the part of appellant's employee in backing the truck against respondent's car, but the evidence sustains lack of due care on his part, resulting in active negligence, for which appellant is liable. The great weight of authority is to the effect that a person guilty of active negligence, as distinguished from passive negligence, is liable for resulting injury to a licensee . . ."

The Montana *Guest Statute*[9] limiting recovery unless the injury is caused by grossly negligent and reckless operation of a vehicle would seem inapplicable to the principal case,

[4] This phrase has been designated as a barbaric formula which has survived the past, and the possible historical background has been said to be the fact that the early judges in England were drawn from the landowning classes and that for generations large tracts of land were held by feudal lords having their own courts for the regulation of disputes arising within their boundaries. Slowly the King's courts assumed jurisdiction, but unless the offense was heinous, the King's law stopped at the boundaries of these local dominions. If, however, the landowner held open his land to strangers, the Kings court gave protection, but some act of the owner by which the stranger was admitted was necessary. Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 735 (1937).

[5] Herold v. P. H. Mathews Paint House (1919) 39 Cal. App. 489, 179 P. 414; Palmer v. Gordon (1899) 173 Mass. 410, 53 N. E. 909; Herrick v. Wixom (1899) 121 Mich. 384, 80 N. W. 117, on rehearing, 81 N. W. 333; *Negligence*, 45 C. J. p. 804; RESTATEMENT, TORTS, §§336, 341; ANNOTATION: 49 A. L. R. 778.

[6] (1901) 24 Mont. 569, 573, 63 P. 831.

[7] RESTATEMENT, TORTS, §336, comment *c*.

[8] (1937)——Nev.——, 71 P. (2d) 1051, 1054. See also Brigman v. Fiske-Carter Const. Co. (1926) 192 N. C. 791, 136 S. E. 125, 49 A. L. R. 773.

[9] R. C. M. 1935, §1741.1.

since the plaintiff was not at the time of his injuries riding in the vehicle.[10]

The inference that plaintiff under the facts of the principal case is an invitee to whom the defendant would owe the duty of prior inspection of the premises is doubtful, though probably correct. It is going a little far to suggest that plaintiff was a gratuitous employee, however, since to establish the relation of employer and employee, not only must there be a contractual relation between the parties, but one party must have the right of control over the other.[11] It has been said that there is a dearth of authority on the question of liability for injury to a guest on private premises,[12] although it has been held that social guests expressly invited are only licensees, to whom no duty of prior inspection is owed.[13] The Montana court in the principal case decided these cases were not controlling because at the time of the injury plaintiff was performing a service for the defendant. There seems to be a distinction, for in those cases the plaintiff at the time of the injury was merely accepting the hospitality of the defendant, and was not asked to go to a particular portion of the premises to aid defendant on a matter apparently to his interest and benefit. Plaintiff's assistance was certainly of some benefit, since it facilitated the work of getting the truck out of the garage. Defendant was taking the truck out not merely

[10]Under a similar statute in Iowa containing the words "riding in said motor vehicle" as does the Montana statute, the Iowa court held that before the statute applied the guest must be riding in the car. Puckett v. Pailthorpe (1929) 207 Iowa 613, 223 N. W. 254. A similar decision was reached in California under a statute where the words were "and while so riding." Moreas v. Ferry (1933) 135 Cal. App. 202, 26 P. (2d) 886.

[11]Schmueser v. Copelin (1934) 99 Ind. App. 209, 192 N. E. 123; Ledoux v. Joncas (1925) 163 Minn. 498, 204 N. W. 635; Hinds v. Department of Labor and Industries of the State of Washington (1928) 150 Wash. 230, 272 P. 734, 62 A. L. R. 225; 18 R. C. L., *Master & Servant*, §3, p. 493 (contractual relation necessary). Pace v. Appanoose County (1918) 184 Iowa 498, 168 N. W. 916; Khoury v. Edison Electric Illuminating Company (1928) 265 Mass. 236, 164 N. E. 77, 60 A. L. R. 1159; Security Union Ins. Co. v. McLeod (1931)——Tex. Com. App. ——, 36 S. W. (2d) 449; 18 R. C. L., *Master & Servant*, §5, p. 495 (one party must have the right of control over the other).

[12]ANNOTATION: 12 A. L. R. 987.

[13]Southcote v. Stanley (1856) 1 Hurlst. & N. 247, 156 Eng. Reprint 1195, 25 L. J. Exch. N. S. 339, 19 Eng. Rul. Cas. 60, 38 Eng. L. & Eq. Rep. 295; Comeau v. Comeau (1934) 285 Mass. 578, 189 N. E. 588, 92 A. L. R. 1002; Page v. Murphy (1935) 194 Minn. 607, 261 N. W. 443; Morril v. Morril (1928) 104 N. J. L. 557, 142 A. 337, 60 A. L. R. 102; Greenfield v. Miller (1921) 173 Wis. 184, 180 N. W. 834, 12 A. L. R. 982; RESTATEMENT, TORTS, §331; ANNOTATIONS: 12 A. L. R. 987, 92 A. L. R. 1005. The Montana court in the principal case indicated approval of the rule announced in these authorities.

to take the plaintiff home, but on a matter of his own as well. None of the cases or text-books attempt to say how much benefit to the defendant is necessary to give one the status of an invitee. It is frequently stated that "An invitation is inferred where there is a common interest or mutual advantage, while a license is implied where the object is the mere pleasure, convenience or benefit of the person enjoying the privilege.'"[14] Another definition is that "A business visitor is a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them.'"[15] It might be argued that plaintiff was an invitee coming by implied invitation, since he came to pay his board bill.[16] To retain this status, after leaving the house, it would be necessary to show that defendant asked plaintiff to go to the garage on a matter of benefit to defendant, and any possible benefit or interest other than social would appear to be shadowy until the time plaintiff was asked to hold open the door.[17]

Even though the status of invitee be extended to the situation where one performs some trifling service at the request of the defendant, it must be remembered that the duties owed to an invitee vary with the circumstances.

> "One who enters a private residence even for purposes connected with the owner's business, is entitled to expect only such preparation as a reasonably prudent householder makes for the reception of such visitors. On the other hand, one entering a store, theatre, office building or hotel, is entitled to expect that his host will make far greater preparations to secure the safety of his patrons than a householder will make for his social or even his business visitors. So too, one who goes on business to the executive offices in a factory, is entitled to expect that the possessor will exercise reasonable care to secure his visitor's

[14] Jonosky v. Northern Pac. Ry. Co. (1920) 57 Mont. 63, 187 P. 1014. See also Chicas v. Foley Bros. Grocery Co. (1925) 73 Mont. 575, 236 P. 361 where it was said: " . . . A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby'."

[15] RESTATEMENT, TORTS, §332.

[16] Vairo v. Vairo (1936)——Mo. App.——, 99 S. W. (2d) 113.

[17] "'Where a person has entered on the premises of another under invitation, express or implied, he is bound by that invitation, and becomes a bare licensee if he goes, for purposes of his own, to some part of the premises other than that to which he was invited . . . " *Negligence*, 45 C. J. p. 794.

safety. If, however, on some particular occasion, he is invited to go on business into the factory itself, he is not entitled to expect that special preparation will be made for his safety, but is entitled to expect only such safety as he would find in a properly conducted factory.'"[18]

It could hardly be said to be a failure to exercise reasonable care to fail to make an inspection of the premises in the short interim before a licensee goes to the spot directed to aid the defendant. In most cases it would seem that defendant would be entitled to a directed verdict.[19]

The difficulty encountered in attempting to classify persons coming on the premises of another, as well as the difficulty of adapting the traditional classifications to new situations, as is illustrated by the case of firemen and others who come by virtue of a public duty irrespective of the landowner's consent,[20] suggest that the method is unsatisfactory and is apt to lead to arbitrary results. The question, though, arises whether anything better can be substituted. The present method has been subjected to much criticism recently, and one suggestion is that perhaps the matter could be handled by basing liability on the standard announced by Brett, M. R., in *Heaven v. Pender*,[21] that: "Whenever one person is by circumstances placed

[18] RESTATEMENT, TORTS, §343, comment *e*.

[19] In Leonard v. Enterprise Realty Co. (1920) 187 Ky. 578, 219 S. W. 1066, 10 A. L. R. 238, plaintiff went to defendant's apartment house and was granted permission to inspect an apartment just vacated by a tenant. A portion of the premises being dark, he lit a match to see his way, and as he did so an explosion took place. The court assumed plaintiff was an invitee, but affirmed the lower court's action in directing a verdict for the defendant, saying: "The negligent act giving rise to the explosion was that of an intruder or of the man in charge of removing the contents from the house . . . The landlord had no knowledge of the condition in which the man had left the apartment, nor did appellee, in the short space of time between 5 P. M. and 6:30 P. M., have an opportunity to discover it . . . . The unfortunate accident was from a cause that could not have reasonably been in the contemplation of the parties or forseen by them. . . . Imposing liability here would be equivalent to holding that it was the duty of a landlord to maintain almost a continuous inspection of his premises . . . "

[20] ". . . A distinction suggests itself, however, between officers who go upon property in the regular course of the business conducted thereon—and whose presence may be deemed to be contemplated and known to the owner or occupant—and those public officers who enter not under any prearranged scheme but as the result of extraordinary and unforseen circumstances. Officials of the former class may well be deemed to come on the premises by invitation, whereas those of the latter description properly may be considered no more than licensees. The owner's knowledge of the presence of the former charges him with a duty that cannot exist in the case of officers of the latter sort . . . " 20 R. C. L., *Negligence*, §54, p. 62. See also ANNOTATION: 13 A. L. R. 637.

[21] (1883) 11 Q. B. D. 509.

in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." Whether defendant's negligence is grounded in active misconduct after discovery of plaintiff on the premises or is based on the existing condition of the premises regardless of knowledge of plaintiff's presence, it is believed that wider recognition of this fundamental principle, rather than emphasis on plaintiff's technical status, would result in fewer arbitrary decisions in this important branch of the law.[22]

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[22] "The adoption of such a standard as that of Brett, M. R., would not therefore make so radical a change in this branch of the law as is sometimes supposed. . . If such a standard were adopted it would not carry with it the overthrow of all our law on this subject. Much of it indeed could and should be retained. We should still have to consider whether the visitor's presence was lawful or unlawful, known or unknown, anticipated or unanticipated, whether he came on business concerning the occupier or on a social visit, or in the discharge of some public duty. The degree of care required of the possessor may vary with each of these circumstances and where the law has already fixed the duty owing in one of these circumstances, and where such duty is generally recognized and accepted, it would undoubtedly continue to be recognized even under a general formula. It is not the idea of having different categories of liability that is mainly objected to. The writer's main objection is to the idea that placing a person in a category is the chief purpose of the law, whereas in fact that should only be a factor in the determination of the prime question, viz: what from all viewpoints, ought to be done in this particular case. Furthermore, the attempt to cover the whole field by a closed and sealed group of categories takes no account of new situations which may arise. . . If the duties attaching to a possessor in respect of the various groups were to be occasionally revised, and extended to meet changing conditions and demands, or if courts were free to create new groups when occasion required, the system of classifying visitors to premises into various groups could undoubtedly be made to suffice." A. L. MacDonald, *Invitees*, 8 CAN. BAR REV. 344 (1930). Further criticism of the classification of persons coming on land is contained in 13 CALIF. L. REV. 72 (1924); Hudson, *The Turntable Cases in the Federal Courts*, 36 HARV. L. REV. 826 (1923); Bohlen, *The Duty of a Landowner Toward Those Entering His Premises of Their Own Right*, 69 UNIV. PA. L. REV. pp. 142, 237, 340 (1921).