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Torts—Pleading Elements of Negligence

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doned today. As to the second, he raised the question whether it reasonably could be applied any longer to professionals who are full-time hospital staff members, as opposed to outsiders called in to treat an individual patient.

He pictured the present-day hospital as the employer of countless professional persons, who live permanently in its walls — a purveyor of "medical services" to paying patients. The hospital staff controls the care of its patients to a great degree and generally renders the services exclusively.

In holding this case as outside the rule, he concluded by questioning, "What reason compels us to say that of all employees working in their employers' businesses . . . the only ones for whom the employers can escape liability are the employees of hospitals?"

It would seem that the Court's holding points to at least a partial overthrow of the old rule. When the proper case comes before the Court, its holding at that time may well result in the loss of hospital's immunity from acts of permanently-employed professional personnel. Most probably, the result of its holding will be the application of traditional Agency principles of derivative liability to nonproprietary hospitals.

Pleading Elements of Negligence

Negligence is the failure to exercise the care required by law.[36] No action will lie in negligence unless there is a duty on defendant's part as to plaintiff, and there is a breach of this duty with resultant injury to him.[37] There must be a foreseeable plaintiff,[38] and the negligence charged must be the proximate cause of the injury received.[39] All these points must be alleged and proved in order for the plaintiff to recover.[40]

In *Howard Stores Corp. v. Pope*[41] the plaintiffs, tenant and owners of a Manhattan building damaged by fire caused by inflammable materials used on the floor, brought an action against three defendants — the manufacturer, the seller, and the contractor who applied the materials to the plaintiff's floor. The seller moved to dismiss the complaint as to him. Special Term denied the motion and stated that sufficient causal connection had been alleged and that the complaint was good. The Court of Appeals, reversing the Appellate Division,[42] held the complaint sufficient.

36. *Tedla v. Ellman,* 280 N. Y. 124, 130, 19 N. E. 2d 787 (1939).
37. *Kimbar v. Estis,* 1 N. Y. 2d 399, 135 N. E. 2d 708 (1956).
38. *Palsgraf v. Long Island R.R. Co.,* 248 N. Y. 339, 162 N. E. 99 (1928).
39. *Williams v. State,* 308 N. Y. 548, 127 N. E. 2d 545 (1955).
40. RESTATEMENT, TORTS §281 (1934).
41. 1 N. Y. 2d 110, 134 N. E. 2d 63 (1956).
42. 1 A. D. 2d 659, 146 N. Y. S. 2d 363 (1st Dep't 1955).

All sellers owe buyers a duty that the goods sold will be safe to use, or if dangerous, as inflammable materials are, that the proper warning is given concerning the dangerous nature of the article provided the seller has no reason to expect the buyer or user will realize the danger involved.[43] The complaint alleged that failure to give this warning was an act of negligence which resulted in the fire damage. The New York City Administrative Code required that there be affixed to containers of dangerous and inflammatory materials a notice as to their nature and instructions as to their use and storage.[44]

Plaintiffs alleged in their complaint that users of dangerous articles who do not have knowledge of the danger are foreseeable plaintiffs. The last point in the complaint that must be alleged is that the negligent act is the proximate cause of the injury received. The plaintiffs in their allegation said that the contractor would have used greater care but for his lack of knowledge of the nature of the material.[45] The contractor did not take proper safety measures and when a lighted match was dropped a fire resulted and consequently the damage.

In holding that the allegations stated a cause of action known to law, the Court pointed out that the pleading, as liberally construed,[46] and considered as a whole, is deemed to allege whatever can be implied from its statments by fair intendment.[47] Whether or not the plaintiff will be able to prove his allegations at the trial, it is clear that all of the necessary elements have been alleged and a cause of action in negligence has been stated.

Duty to Act

Plaintiff, a fourteen year old paying camper at defendant's summer camp, strayed off a commonly used "beaten path" at night, and broke his nose on a tree. The path was not lighted; however, there was evidence that the tree was only ten to fifteen feet away from a brightly illuminated building with two large windows facing the path. The Court of Appeals, affirming the Appellate Division's dismissal

43. *Campo v. Scofield,* 301 N. Y. 468, 95 N. E. 2d 802 (1950).

44. ADMINISTRATIVE CODE OF CITY OF NEW YORK §§C19-53.0, subd. c, C19-59.0, subd. c, C19-62.0. The Court tok judicial notice of these sections of the Code.

45. "11. Because . . . the contents of the cans were negligently used . . . by the defendant, Pope in that he did not possess proper . . . warning needed and necesary in using . . . said cans, and . . . that had defendant Pope been given sufficient warning . . . which defendants Prospect and Lacquer possessed, he would have applied . . . the contents carefully . . . rather than in the negligent manner he did."

46. N. Y. CIV. PRAC. ACT §275: Pleadings must be liberally construed with a view to substantial justice between the parties.

47. *Condon v. Associated Hosp. Services,* 287 N. Y. 411, 40 N. E. 2d 230 (1942), *Dulberg v. Mock,* 1 N. Y. 2d 54, 134 N. E. 2d 691 (1956); N. Y. CIV. PRAC. ACT §241.