Buffalo Law Review

Volume 2 | Number 1 Article 42

12-1-1952

Torts—Negligence—Duty

Ralph Halpern

Sheldon Hurwitz

cation, that no record was kept of the people who came in or went out, that ordinarily only one employee was present to care for over 1900 boxes in the vault, and reasoned that from this evidence fair minded men could draw more than one inference. Consequently, the question of negligence should have been left to the jury.

Judge Desmond for the dissent stated that the relation between the safe deposit company and its depositor is not that of bailor-bailee, because the safe deposit company did not have exclusive possession over the contents of the box. Consequently, the plaintiff was not entitled to the presumption of negligence. Without the presumption, plaintiff had failed to state a cause of action, because she had failed to show any causal connection between defendant's alleged negligence and the disappearance. Hence, the defendant was entitled to a directed verdict.

It is submitted that the characterization of Judge Desmond, theoretically speaking, is true. But in the light of practical results, characterizing the relation as one of bailment achieves a just and fair solution of a unique problem. It shifts the burden of producing evidence to the defendant. Any other characterization would compel the depositor to sue on general negligence principles, and since there is no available legal device to permit the shifting of the burden to the defendant the result would ordinarily be to deny recovery.

The opinion of the majority, by declaring that the question of negligence was for the jury, has established a precedent for similar fact situations, and to that extent defined the standard of care for safe deposit companies.[46]

IX. Torts

The law of torts must effect a reasonable compromise between conflicting interests, marking out the limits of permissible invasion of one man's interests by another. The courts in the development of the common law have been guided by and have often expressly referred to, "public policy" as the final standard of justice.[1] Tort law being primarily non-statutory, its growth and development depend on the temperament of any given court. The exigency of adhering to past rules or precedents may conflict with a just disposition of the case before the court. The 1951-1952 term of the New York Court of Appeals illustrates the successful adjusting of

46. See Prosser, *supra* n. 37, § 41.

1. Pound, *Interests in Personality*, 28 Harv. L. Rev. 343 (1915).

the current ideas of what is "public policy," on the one hand, and the antecedent rules and precedents on the other.

A. Negligence

Duty

The philosophy of a progressive court of last instance is demonstrated in *Woods v. Lancet.*[2] Rather than take the path so often followed by referring any advance in the law to the legislature, the Court, in the interest of justice, created a new duty. The breach of this duty will be recognized at law as actionable negligence.

An infant plaintiff, in an action brought by his guardian ad litem, sued for injuries sustained while plaintiff was *en ventre sa mere*[3] in the ninth month of pregnancy. The Court of Appeals held that the complaint, alleging prenatal injuries tortiously inflicted on a ninth month fetus actually born later, stated a cause of action.[4]

The only legal precedent in the court's way was *Drobner v. Peters,*[5] which denied recovery in a similar instance. In implicitly overruling this case the court cited *Rumsey v. New York & N. E. R.,*[6] where the Court of Appeals said that it had not only the right, but the duty to re-examine a question where justice demands it. The court also cited *Frank v. United States,*[7] to the effect that while legislative bodies have the power to change old rules of law, nevertheless, when they fail to act, it is the duty of the courts to bring the law into accord with present day standards of wisdom and justice, rather than with outworn and antiquated rules of the past. The Court might well have quoted from the dissenting opinion in the *Lancet* case in the Appellate Division: "The law would be an absurd science were it founded on precedents only. The law is presumed to keep pace with present day concepts."[8]

Recovery was denied in the *Drobner* case[9] on three grounds: (1) lack of precedent, (2) the difficulty of proof, and (3) refusal of

---

2. 303 N. Y. 349, 102 N. E. 2d 691 (1951), *rev'g* 278 App. Div. 913, 105 N. Y. S. 2d 417 (1st Dep't 1951).

3. Unborn child *in utero.*

4. *Woods v. Lancet, supra* n. 2.

5. 232 N. Y. 220, 133 N. E. 567 (1921).

6. 133 N. Y. 79, 85, 30 N. E. 654, 655 (1892).

7. 290 U. S. 371, 382 (1933).

8. 278 App. Div. 913, 914, 105 N. Y. S. 2d 417, 418 (1st Dep't 1951).

9. *Supra* n. 2.

the law to recognize the unborn child as separate from its mother. The New York courts have felt bound by the decision and its reasoning until the principal case.[10]

Obviously, the least substantial argument is the lack of precedent. The common law does not go on the theory that a case of first impression presents a legislative rather than a judicial problem.[11] "(I)f that were a valid objection, the common law would now be in the Plantagenet period."[12] At any rate there is ample precedent in other jurisdictions today where recovery has been recognized.[13]

Similarly, the objection that proof is difficult is weak. The proof should have no effect on the pleadings[14] and indeed, it is no different than proof required in any other cause of action.

The third ground for denying recovery—that of refusal to characterize the unborn child as an entity separate from its mother has been disproved by medical science.[15] Moreover, the law has recognized property[16] and personal[17] rights of an unborn child. Once the embryo, *a fortiori* the fetus, is deemed a person, the duty of care follows as a conclusion.

Thus with all three arguments properly disposed of, the court was not bound by stare decisis and took the proper course of overruling *Drobner v. Peters*.[18] Although the decision was carefully limited to the fact of a viable, nine months fetus later born, the Court may well in the future allow an action for injury to a shorter

---

10. *Matter of Roberts*, 158 Misc, 286 N. Y. Supp. 476 (Surr. Ct. 1936).

11. 1935 Report, N. Y. LAW REVISION COMMISSION 449, 465.

12. 4 U. of Toronto L. J. 285 (1941).

13. *Bonbrest v. Kotz*, 65 F. Supp. 138 (D. D. C. 1946); *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P. 2d 678 (1939); *Tucker v. Carmichael & Sons*, 208 Ga. 201, 65 S. E. 2d 909 (1951); *Cooper v. Blanck*, 39 So. 2d 352 (La. App. 1923); *Damasiewicz v. Gorsuch*,—Md.—, 79 A. 2d 550 (1951); *Verkennes v. Corniea*, 229 Minn. 365, 38 N. W. 2d 838 (1949); *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N. E. 2d 334 (1949); *Montreal Tramways v. Leveille*, [1933] Can. S. C. 456, [1933] 4 D. L. R. 337.

14. See C. P. A. §241.

15. "An embryo's life as a new individual must be regarded as commencing at the moment of fertilization." Patten, HUMAN EMBRYOLOGY 181 (1946). The embryo, and *a fortiori* the fetus, has its own nervous and circulatory system separate from its mother. Arey, DEVELOPMENTAL ANATOMY 90-91 (4th rev. ed. 1940).

16. For cases see note, 1 BFLO. L. REV. 194, 195 (1952).

17. N. Y. PENAL LAW §1050 imposes penalty of first degree manslaughter for wilfully killing the child after it is able to stir in the womb. §1052 imposes penalty on mother for causing the death of "the quick child whereof she is pregnant."

18. *Supra* n. 5.

term fetus and finally to an embryo, and also a wrongful death action[19] for such injury.

Standard of Care

A landowner owes a duty of reasonable care to protect invitiees, not only against risks incident to the former's activities, but against hazards incident to the *condition* of the premises.[20] The one in possession of land owes the affirmative duty to inspect his premises and either make them safe or give adequate warning, so that an invitee may judge and see if he wishes to assume the risk.[21]

Although there is a conflict[22] among the states on the question whether a municipal corporation in the maintenance of parks as places of recreation is discharging a governmental duty or a quasi-corporate one, it is settled in New York that it is the latter.[23]

With these rules in mind, we should conclude that a municipality stands on the same basis as a private land owner in regard to the duty of care required in the operation of a park. Moreover, there should be no need to categorize a situation as involving a special relationship. The normal rules of negligence should apply, and the duty should arise, not out of any anachronistic relationship, but out of defendant's conduct likely to affect the interests of the plaintiff.

In *Caldwell v. Village of Island Park,*[24] the plaintiff sued the village for negligence in permitting fireworks on a city owned owned and operated beach after the hour when admission ceased to be charged and supervision provided. Admission was charged from 9:00 A. M. to 6:00 P. M., and from 6:00 P.M. to 11:00 P. M. the public is admitted free, but lifeguards were not provided. Plaintiff was injured by fireworks set off by some third person after 6:00 P. M. There was evidence that on the two previous days people had complained of fireworks to the lifeguards. The court held (4-3) that the village owed a duty to the plaintiff and was negligent in so far as the plaintiff was injured by the third person's setting off fireworks.

---

19. DECEDENT ESTATE LAW § 130.

20. *Mapp v. Saenger Theaters, Inc.,* 40 F. 2d 19 (5th Cir. 1930).

21. *Haefeli v. Woodrich Engineering Co.,* 255 N. Y. 442, 175 N. E. 123 (1931).

22. See *Augustine v. Town of Brant,* 249 N. Y. 198, 163 N. E. 732 (1928).

23. *Collentine v. City of New York,* 279 N. Y. 119, 17 N. E. 2d 792 (1938); *Ehrgott v. New York,* 96 N. Y. 264 (1884).

24. 304 N. Y. 268, 107 N. E. 2d 441 (1952), *rev'g* 279 App. Div. 746, 108 N. Y. S. 2d 334 (2d Dep't 1951).