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NEGLIGENCE-DUTY OF CARE-DUTY OF POSSESSOR OF LAND CONDUCTING ACTIVITIES THEREON TO KEEP A LOOKOUT FOR LICENSEES

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NEGLIGENCE—DUTY OF CARE—DUTY OF POSSESSOR OF LAND CONDUCTING ACTIVITIES THEREON TO KEEP A LOOKOUT FOR LICENSEES—Plaintiff, seeking employment, came onto the site of a road construction project under defendant's control as general contractor and posted by him with notices of construction and against trespassing. Plaintiff was struck by a materials truck backing, without lookout or warning, over the completed half of the road. On these facts the jury found that the truck was negligently operated and plaintiff prevailed. On appeal, *held,* affirmed. A contractor owes a duty of ordinary care to licensees in a case of "active," as distinguished from "passive" negligence. Evidence as to the mode of operating the truck and "likelihood" of plaintiff's presence in the position of peril was found sufficient to support the jury's findings. One judge dissented, on grounds, inter alia, that the truck driver "had no reason to anticipate" a licensee's presence in the path on the facts presented (notably the posted notices), and that the burden of warning thus imposed was "unreasonable." *Potter Title and Trust Co. v. Young,* 367 Pa. 239, 80 A. (2d) 76 (1951).

In the following case in the same court, on strikingly similar facts, the plaintiff had been struck by a materials truck, backing without lookout or warning, while he was on a road construction site seeking employment. *Held,* defendant contractor was liable. The decision was rested squarely, and exclusively, on the decision of the *Potter* case above. The court merely reiterated that defendant owed a duty of ordinary care with respect to affirmative, or "active" conduct. *Bennett v. Boney,* 367 Pa. 249, 80 A. (2d) 81 (1951).

Following the general distinction between "active" and "passive" negligence, most courts find a duty of ordinary care owed to licensees by the owner or occupier of land in the manner of conducting activities thereon.[1] This duty cannot arise until the licensee's presence, in a position of peril,[2] is known, or under the circumstances reasonably should be known, to the possessor.[3] This means that the possessor of land does owe some duty to look out for a licensee when conducting possibly dangerous activities on the premises.[4] This doctrine is not new, dating back to well before the turn of the century;[5] but its wide acceptance in the past half century is probably a reflection of the general trend to increase the protection of rights of personality at the expense of rights of

[1] 156 A.L.R. 1226 et seq. (1945).

[2] Georgia Power Co. v. Deese, 78 Ga. App. 704, 51 S.E. (2d) 724 at 727 (1949).

[3] Georgia Power Co. v. Deese, supra note 2. Babcock and Wilcox Co. v. Nolton, 58 Nev. 133, 71 P. (2d) 1051 (1937); Yamauchi v. O'Neill, 38 Cal. App. (2d) 703, 102 P. (2d) 365 (1940); Wieghmink v. Harrington, 274 Mich. 409, 264 N.W. 845 (1936); Polston v. S. S. Kresge Co., 324 Mich. 575, 37 N.W. (2d) 638 (1949); PROSSER, TORTS 630 (1941); 65 C.J.S., Negligence §36 (1950).

[4] In Illinois at least, this duty to lookout has been expressly refuted. See Cox v. Terminal R. Assn. of St. Louis, 331 Mo. 910, 55 S.W. (2d) 685 (1932), and cases cited therein. Apparently this rule still stands in Illinois. See Cox case and Georgia Power Co. v. Deese, supra note 2, for evasion of "willful and wanton" doctrine in Missouri and Georgia by giving these words definition of ordinary negligence. Apparently Maryland also is plagued by this doctrine, Duff v. United States, (4th Cir. 1949) 171 F. (2d) 846.

[5] 21 A. and E. ENCYC. OF LAW, 2d ed., 473 (1902) and cases cited.

owners of property.[6] Some courts, such as the Pennsylvania court in the cases here noted, have been content merely to state the definition of duty in terms of ordinary care, after making the simple distinction between "active" and "passive" negligence. This means that the jury is left to consider the probability of the licensee's presence as a question of breach of duty and as a mere incident to the general reasonableness of the possessor's conduct.[7] It is believed that not all courts would take this view and that the better considered cases would not impose a duty of ordinary care without first finding a specific duty to look out for the licensee.[8] Logically it would seem that the duty to lookout is prerequisite to the duty to exercise care to avoid injury, assuming that the licensee remains undiscovered. At least this approach would seem within the "eye of ordinary vigilance" test of duty as laid down by Justice Cardozo.[9] Apart from any logical difficulties, the writer's principal objection to the approach used by the Pennsylvania court in the cases here noted is the ease with which a jury could infuse an emotional response to activities having a high degree of danger or potential of serious injury into a finding that there were sufficient facts reasonably apprising the defendant of the likelihood of the licensee's presence to raise a duty to lookout for him.[10] Further, the court's anaylsis of these cases suggests that, had it directed itself to the problem, a valid test of the duty to lookout could be based on the ease of maintaining such a lookout, relative to both the potentiality of serious injury from the activity and the degree of probability of the licensee's presence.[11] Perhaps there is no insurmountable logical difficulty in letting the

[6] See 22 So. CAL. L. REV. 318 (1949), noting Newman v. Fox West Coast Theatres, 86 Cal. App. (2d) 428, 194 P. (2d) 706 (1948), for discussion of this trend and also of the anomalous case of a dangerous "condition" of premises arising subsequent to probability of licensee's presence. For a similar case and similar treatment, see Olderman v. Bridgeport-City Trust Co., 125 Conn. 177, 4 A. (2d) 646 (1939).

[7] Petree v. Davison-Paxon-Stokes Co., 30 Ga. App. 490, 118 S.E. 697 (1923); Banks v. Watts, 75 Ga. App. 769, 44 S.E. (2d) 510 (1947); Brown v. Boston & Maine R.R. Co., 73 N.H. 568, 64 A. 194 (1906); Wieghmink v. Harrington, supra note 3; but note in Wieghmink case, 274 Mich. 409 at 413, the quotation from Schmidt v. Mich. Coal and Mining Co., 159 Mich. 308, 123 N.W. 1122 (1909), which sets up the duty of care to avoid injury to licensee "after" his presence is or should be known; to the same effect see Rawlins v. Pickren, 45 Ga. App. 261, 164 S.E. 223 at 224 (1932), and Georgia Power Co. v. Deese, supra note 2.

[8] See in particular Babcock and Wilcox Co. v. Nolton, supra note 3; also Demmon v. Smith, 58 Cal. App. (2d) 425, 136 P. (2d) 660 (1943); and, obiter dictum, John P. Pettyjohn and Sons v. Basham, 126 Va. 72, 100 S.E. 813 at 815 (1919); see also note 7 supra. As early as 1870 the Pennsylvania court had declared, "Precaution is a duty only so far as there is reason for apprehension," Kay v. Penn. R.R., 65 Pa. 269 at 275 (1870). What constitutes such "reason" in 1951 may well be different from the view taken in 1870, but why should there be a change in the logic?

[9] Palsgraff v. Long Island R.R. Co., 248 N.Y. 339 at 342, 162 N.E. 99 (1928).

[10] It must be admitted, of course, that judges are not above this emotional response, as witness the lengthy and general indictment of backing "blind" in the Potter case, principal case at 245.

[11] The "burden" element of this problem was specifically noted as early as 1868 in Driscoll v. Newark and Rosendale Lime and Cement Co., 37 N.Y. 637 (1868). This being a case of blasting near a footpath, the "danger" element also seems prominent in the court's decision to sustain the duty to lookout.

jury apply this or any other test of the duty to maintain a lookout, if some assurance is available that it will be considered as a question predeterminative of the duty of ordinary care to avoid injury.[12] The historical emphasis has been on the element of probability of the licensee's presence arising from habitual use of the premises,[13] or the concurrent presence of a group or crowd, known to the possessor, of which the licensee is an incidental member.[14] It is believed the two cases here noted go as far as any in sustaining the duty to lookout with only a slight factual probability of the licensee's presence. Faced with such a case of slight probability, the courts have been prone to label the intruder a "trespasser," and thus avoid the duty of due care entirely.[15] In line with this reasoning, some expression has been given to the idea that, because of the license, the licensee's presence is at all time probable and "some" care must be taken to anticipate his presence.[16] This appears to be reasoning by definition. A more accurate concept of the problem would seem to result from resting the duty to lookout on the facts of each case and then setting a fairly high standard for the execution of this duty. Where the duty to lookout has been properly discharged it seems unlikely that the licensee could reach the position of peril without actually being discovered. What steps are necessary to guard him once discovery is made is another question.

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[12] This precise approach is advocated in Smith v. Bassett, 159 Kan. 128, 152 P. (2d) 794 (1944).

[13] Northern Pac. Ry. Co. v. Curtz, (9th Cir. 1912) 196 F. 367; Babcock and Wilcox Co. v. Nolton, supra note 3; Brown v. R.R. Co., supra note 7; and particularly compare Yamauchi v. O'Neill, supra note 3, with facts of the principal cases here noted.

[14] Herrick v. Wixom, 121 Mich. 384, 80 N.W. 117 (1899); Barnett v. La Mesa Post No. 282, American Legion Department of California, 15 Cal. (2d) 191, 99 P. (2d) 650 (1940); Colgrove v. Lompoc Model "T" Club, 51 Cal. App. (2d) 18, 124 P. (2d) 128 (1942).

[15] Compare treatment on strikingly similar facts leading to similar decisions in Lindholm v. Northwestern Pac. R.R. Co., 79 Cal. App. 34, 248 P. 1033 (1926) (a "bare licensee"); and Hamakawa v. Crescent Wharf & Warehouse Co., 4 Cal. (2d) 499, 50 P. (2d) 803 (1935) (a "trespasser").

[16] Leach v. Inman, 63 Ga. App. 790, 12 S.E. (2d) 103 (1940); Georgia Power Co. v. Deese, supra note 2.