Michigan Law Review

Volume 38 | Issue 5

1940

TORTS - DUTY - LIABILITY OF ABUTTING PROPERTY OWNER TO ONE WHO FALLS ON ICE

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TORTS — DUTY — LIABILITY OF ABUTTING PROPERTY OWNER TO ONE WHO FALLS ON ICE — After having made some purchases in defendant's store, plaintiff fell on the ice and snow covering the walk in front. Alleging that the defendant had negligently cleaned the walk by leaving ridges of snow which melted and froze, forming an uneven surface, the plaintiff and her husband brought actions against the defendant store owner to recover for the injuries

sustained. The lower court directed a verdict for the defendant. *Held*, the plaintiff could not recover because the defendant did not owe a duty to her. *Therrien v. First Nat. Stores, Inc.*, (R. I. 1939) 6 A. (2d) 731.

Today it is almost axiomatic that the first requisite of any negligence action is proof of the existence of a duty owed to the plaintiff by the defendant.[1] The general rule is that the owner or occupant of abutting property does not owe a duty to the general public to remove snow and ice from the walk.[2] An ordinance requiring the property owner or occupant to remove the snow and ice will not raise a duty towards the general public.[3] The reason for this view is that such an ordinance is not designed to protect the general public; it merely shifts the expense of keeping the walks free from snow and ice to the abutting owners.[4] However, it seems to be well understood that an abutting owner may, by his own actions in respect to the snow, create an artificial condition which amounts to a public nuisance,[5] and if a member of the general public suffers injuries the defendant will be liable.[6] The decision of the principal case was not based upon the theory of nuisance, but rather upon common-law doctrines of negligence. The court explicitly held that there was no affirmative duty to clear the walks of the snow. The most interesting point was its refusal to raise a duty when the abutting owner voluntarily assumed the task of removing the snow unless the removal was pursuant to a special agreement entered into with the plaintiff.[7] The requirement of privity of contract as a condition precedent to the existence of a duty seems strangely out of place when the action is founded in tort.[8] Although apparently some courts talk in terms of contractual duties,[9] which is reminiscent of the historical foundation of tort liability, it is believed that the question of the existence of a tort duty should not be based upon the presence or absence of a special agreement, but rather upon whether it can be

[1] Palsgraf v. Long Island R. R., 248 N. Y. 339, 162 N. E. 99 (1928).

[2] 43 C. J. 1106 (1927); ANGELL and DURFEE, HIGHWAYS, 3d ed., §§ 264-265 (1886). The municipality owes a duty to the citizens to use reasonable care in keeping the sidewalks free from snow and ice. The difficulty in action against the municipality is not in finding the duty but in determining what amounts to a breach of the duty.

[3] The latest case upon this point is Western Auto Supply Agency of Los Angeles v. Phelan, (C. C. A. 9th, 1939) 104 F. (2d) 85.

[4] The courts often say that the abutting property owner is the agent of the municipality.

[5] 7 McQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., § 2978 (1928).

[6] Thus where an owner swept snow from his lot upon the walk he was held liable in tort to injured party. Rohling v. Eich, 23 App. Div. 179, 48 N. Y. S. 892 (1897). See also Tremblay v. Harmony Mills, 171 N. Y. 598, 64 N. E. 501 (1902).

[7] For authority it cited Gill v. Middleton, 105 Mass. 477 (1870), where a tort recovery was allowed for injuries arising out of negligent performance by a landlord of a promise to repair.

[8] BOHLEN, STUDIES IN THE LAW OF TORTS 86-88 (1926).

[9] See WHARTON, NEGLIGENCE, 2d ed., § 435 (1878), for interesting discussion on the relation between contractual duties and tort duties. Aspects of this doctrine still exist in cases where a third party seeks to recover in tort from a manufacturer or vendor of chattels. See in this connection MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1915).

said that the failure on the part of the owner to act reasonably, once he assumes the task of removing the snow, will create an unreasonable risk of harm to a class of which this plaintiff is a member.[10] Applying this test the court could have denied the duty upon logical principles of tort law.[11] In the latter part of its decision the court rejects plaintiff's claim of duty based upon the doctrine laid down in *Moch Co. v. Rensselaer Water Co.*[12] This result is proper. This doctrine of this case is appropriately applied only in a situation where the harm arises because of the failure to complete an act voluntarily assumed; it is inapplicable in the case of a failure properly to perform an act which by hypothesis has been completed.[13] At least one court has held that where the defendant by a long course of conduct, assumes the duty of keeping the walks free from snow and ice and such a course of conduct has come to be relied upon by the plaintiff, a duty arises to perform the act and to exercise due care in the performance of the act.[14] No reliance upon such a course of conduct was shown in the principal case. There is still another possible theory by which a person in the position of the plaintiff in the principal case might establish a duty. Although there are no decisions in point,[15] one who has just made purchases in the store might still be considered a business invitee while on the walk in front. This relation would establish an affirmative duty and the breach of this duty would give rise to liability whether the defendant had acted or not. Unless such a duty is invoked, the result in the principal case seems sound, for it would be unwise to allow one who did not remove any snow to escape liability, but to hold liable one who defectively removed snow.[16]

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[10] This is the foreseeability test. It is most effectively set forth in Palsgraf v. Long Island R. R., 248 N. Y. 339, 163 N. E. 99 (1928).

[11] It would seem difficult to say that the situation was unreasonably dangerous.

[12] 247 N. Y. 160, 159 N. E. 896 (1928).

[13] The distinction between misfeasance and nonfeasance is difficult to ascertain, but the doctrine has no application in the present case.

[14] Stewart v. Standard Publishing Co., 102 Mont. 43, 55 P. (2d) 694 (1936).

[15] HARPER, TORTS, § 97 (1933). It may be possible that the business invitee relation terminates when the customer leaves the store, but there has been a considerable enlargement of the doctrine in the past, and this tendency would support its application in this case.

[16] Of course, if the defendant's action created an artificial hazard, the result would be different. See note 5, supra.