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## Torts—Duty of Employer to Provide Safe Premises for Employees

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question of defendant's negligence.<sup>54</sup> (Violation of a statute, however, may in itself give rise to liability, either "a liability created by a statute or a liability for negligence for which the statute creates a new standard or norm", the latter known as negligence per se.<sup>55</sup>) The Court stated this rule but also spoke of the ordinance as imposing an "absolute duty", and its refusal to allow the defendant any notice of the defective lighting seems inconsistent with a mere evidence-of-negligence effect of the ordinance. Previous decisions have considered notice, actual or constructive, essential to liability in cases involving violation of an ordinance<sup>56</sup> and even a statute.<sup>57</sup> Thus the present case seems to involve a departure from the New York rule that violation of an ordinance may be only evidence of negligence.

### Duty of Property Owner to Licensee

A social guest, who is on another's premises pursuant to an invitation, is not in law an invitee but rather a licensee to whom the possessor owes no duty of inspection and affirmative care to make the premises safe for his visit.<sup>58</sup> The same rule applies where the social guest is an infant.<sup>59</sup> There is an obligation, however, on the part of the possessor, to disclose to the licensee any concealed dangerous defects.<sup>60</sup>

The above principles were again approved by the Court of Appeals in *Krause v. Alper*,<sup>61</sup> which was a suit by the father of a boy who was injured while playing basketball with the defendants' son on the defendants' premises. Since the wooden doorstep, over which the infant had tripped, was in plain sight, there was no "hidden pitfall" which could have imposed the duty of disclosure on the defendants.

### Duty of Employer to Provide Safe Premises for Employees

In *Zucchelli v. City Construction Co.*<sup>62</sup> thirteen injured employees of the R. E. Carrick Co. (subcontractor) brought an action against the 981 Madison

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54. *Teller v. Prospect Heights Hospital*, 280 N.Y. 456, 21 N.E.2d 504 (1939); *Carlock v. Westchester Lighting Co.*, 268 N.Y. 345, 197 N.E. 306 (1935); *Fluker v. Ziegele Brewing Co.*, 201 N.Y. 40, 93 N.E. 1112 (1911). *But see Silverman v. Konig*, 170 N.Y. Supp. 368 (Sup.Ct. 1918).

55. *Schmidt v. Merchant's Despatch Trans. Co.*, 270 N.Y. 287, 303, 200 N.E. 804, 829 (1936). See also *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814 (1920).

56. *Carlock v. Westchester Lighting Co.*, *supra* note 54; cf. 1 SHEARMAN AND REDFIELD, NEGLIGENCE §21 (rev. ed. 1941).

57. *Altz v. Leiberson*, 233 N.Y. 16, 134 N.E. 703 (1922); *Schaeffer v. Caldwell*, 273 App. Div. 263, 78 N.Y.S.2d 652 (4th Dep't 1948).

58. *Wilder v. Ayers*, 2 A.D.2d 354, 156 N.Y.S.2d 85 (1st Dep't 1956), *aff'd* 3 N.Y.2d 725, 163 N.Y.S.2d 966 (1957); PROSSER, TORTS §77 (2d ed., 1955).

59. *Droge v. Czarniechi*, 285 App. Div. 1052, 139 N.Y.S.2d 314 (2d Dep't 1955), *aff'd* 2 N.Y.2d 897, 161 N.Y.S.2d 149 (1957).

60. *Bernal v. Baptist Fresh Air Home Society*, 275 App. Div. 88, 96, 87 N.Y.S.2d 458, 465 (1st Dep't 1949), *aff'd* 300 N.Y. 486, 88 N.E. 2d 720 (1949).

61. 4 N.Y.2d 518, 176 N.Y.S.2d 349 (1958).

62. 4 N.Y.2d 52, 172 N.Y.S.2d 139 (1958).

Ave. Corp. (owner) and the City Construction Co. (supervising agent) for not providing a safe place to work.<sup>63</sup> At the trial, the owner and agent conceded their liability to the plaintiffs, but were successful in obtaining a judgment over against the impleaded subcontractor as the primary wrongdoer. The Appellate Division<sup>64</sup> reversed the judgment as it pertained to the subcontractor, holding that no liability of the owner-agent had been established and their concession could not be binding upon the subcontractor.

The Court's sole inquiry, therefore, was whether the owner-agent actually failed to provide the subcontractor's men with a safe place to work.

The owner is not obliged to protect a subcontractor's employee against the negligence of a fellow worker,<sup>65</sup> nor does the "place" which he must make safe include the subcontractor's own plant,<sup>66</sup> equipment,<sup>67</sup> tools,<sup>68</sup> details of work,<sup>69</sup> or the very work he is doing.<sup>70</sup> Generally, it can be said that the owner's liability does not include a subcontractor's "work in progress," which is solely within his control.

In this case the accident occurred when some vertical wooden shoring shifted and buckled, causing the floor on which the plaintiffs were working to collapse. This was caused by the subcontractor's employees who negligently removed, a few days prior, a wooden form encasing a beam which indirectly supported the floor. The entire "structure" involved in this accident was part of the subcontractor's contractual obligation and all the persons involved were his employees. The majority concluded from these facts that the accident arose out of the subcontractor's work in progress, stemming from their own negligence and rendered the owner-agent immune from liability.

It was the dissent's contention, however, that the structure itself had been completed, thereby becoming a place of employment, and the subcontractor's men were, therefore, working on a new and different "work in progress." Certainly, the fact that the structure was originally created by a plaintiff's employer does not automatically insulate the owner against liability for accidents arising in connection with the structure.

63. N. Y. LABOR LAW §200.

64. *Zucchelli v. City Construction Co.*, 286 App.Div. 842, 142 N.Y.S. 2d 303 (1st Dep't 1955).

65. *Broderick v. Cauldwell-Wingate Co.*, 301 N.Y. 182, 93 N.E.2d 629 (1950).

66. *Iacono v. Frank & Frank Construction Co.*, 259 N.Y. 377, 182 N.E. 23 (1932).

67. *Ibid.*

68. *Ibid.*

69. *Wohlfron v. Brooklyn Edison Co.*, 238 App.Div. 463, 463, 235 N.Y.Supp. 18, 21 (2d Dep't 1933), *aff'd* 263 N.Y. 547, 189 N.E. 691 (1933).

70. *Hess v. Bernheimer & Schwartz Pilsener Brewing Co.*, 219 N.Y. 415, 114 N.E. 808 (1916).

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The structure has to be deemed completed at some point, and it is feasible that this so-called "completed structure" could then be utilized by the same workmen as a place of employment. It is the writer's opinion, however, that the change from a work in progress to a place of employment must be clearly manifested by a lapse of time, a definite change in purpose, or a remote change in location in order to avoid obligating the owner to supervise, in reality, a sub-contractor's methods or details of work.

### Loss of Consortium as Element of Damages

In New York, it has been the established rule that a wife does not have a right of action for damages for loss of consortium and other marital rights resulting from injuries to her husband caused by the negligence of a third person.<sup>71</sup> However, in *Kronenbitter v. Washburn Wire Co.*,<sup>72</sup> an attempt was made to persuade the Court of Appeals to abandon this rule.

The plaintiff in this case based her claim for loss of consortium on two grounds: that the marital relation creates rights in both the husband and wife and that therefore the wife as well as the husband has a cause of action for damages to the marital relation resulting from injuries to the husband caused by negligence of a third person,<sup>73</sup> and that the trend of legal opinion is toward recognition of such a right in the wife.<sup>74</sup>

The Court affirmed the judgment dismissing plaintiff's complaint on motion for legal insufficiency.

The argument that equality of the sexes calls for a change overlooks that the husband's right to damages for loss of consortium is based on outworn theory. It derives from the time when the wife was regarded in law in some respects as her husband's chattel.<sup>75</sup>

This language seems to indicate that the inconsistency between the allowance of consortium to husbands but not to wives will in a short time be terminated—not by extending the damages but rather by taking away the rights now enjoyed by husbands.

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71. *Don v. Benjamin M. Knapp, Inc.*, 306 N.Y. 675, 117 N.E.2d 128 (1954).

72. *Kronenbitter v. Washburn Wire Co.*, 4 N.Y.2d 524, 176 N.Y.S.2d 354 (1953).

73. *Oppenheim v. Kridel*, 236 N.Y. 156, 140 N.E. 227 (1923).

74. *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C.Cir. 1950); *Acuff v. Schmit*, 248 Ia. 272, 78 N.W. 2d 480 (1956).

75. *Kronenbitter v. Washburn Wire Co.*, *supra* note 72, at 527, 176 N.Y.S.2d at 355.