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Torts—Duty to Act

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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.

of the complaint,[48] *held* that unless the plaintiff could show that some peculiar danger existed on the path, the defendant was under no duty to illuminate it.[49]

In the absence of a statute imposing such a duty upon an owner of a camp, resort must be had to the common law. At common law, however, no duty exists to provide artificial lighting for stairways, halls, or other ways used in common apartment buildings, in the absence of a defective condition or unusual hazards to be exposed by such light.[50] This applies not only as between visitors and landlords, but also as between tenants and landlords.[51] A paying camper is not unlike a tenant, nor the commonly used path unlike a hallway in an apartment building.

In addition to the absence of a duty and the resultant absence of its breach, the Court pointed out that one who camps in the woods assumes the incidental risks thereof.[52] Floodlights illuminating the whole area would destroy the very reason for camping in the woods, namely the desire to live primitively and close to nature. Although plaintiff's contributory negligence was not considered, the Court could have easily found him contributorily negligent as a matter of law.[53]

Instructions to Jury

Plaintiff, an employee of a subcontractor, fell from a scaffolding while attempting to help two other workmen to adjust the planks. At the time of the accident the scaffolding had been partially dismantled, and was only two boards wide. The plaintiff in his own testimony admitted that he noticed the condition of the scaffolding before going up. He brought an action both against the general contractor and the City of Rochester which employed it. The Court of Appeals, reversing the Appellate Division,[54] *held* that an instruction to the jury which in effect was a direction to bring in a verdict for the plaintiff unless the general contractor had "warned the plaintiff that the scaffolding was being taken down and must not be used" was erroneous, and that the jury should also have been

48. *Kimbar v. Estis*, 1 App. Div. 2d 151, 148 N. Y. S. 2d 569 (1st Dep't 1956).
49. *Kimbar v. Estis*, 1 N. Y. 2d 399, 135 N. E. 2d 708 (1956).
50. *Landes v. Barone*, 307 N. Y. 867, 122 N. E. 2d 750 (1954); *Boyce v. 228th & Carpenter Ave. Holding Co.*, 295 N. Y. 575, 64 N. E. 2d 282 (1945).
51. *Hirschler v. Briacliff Management Corp.*, 300 N. Y. 680, 91 N. E. 2d 331 (1950).
52. *Cf. Murphy v. Steeplechase Amusement Co.*, 250 N. Y. 479, 166 N. E. 173 (1929); *Lobsenz v. Rubinstein*, 258 App. Div. 164, 15 N. Y. S. 2d 848 (2d Dep't 1939), *aff'd*, 283 N. Y. 600, 28 N. E. 2d 22 (1940).
53. Tacitly there seemed to be a finding of contributory negligence; the plaintiff had spent three successive summers at this camp and was undoubtedly familiar with its surroundings; also, the impact if he were walking would not probably be enough to break his nose. See *Kimbar v. Estis*, 1 App. Div. 2d 151 at 152, 148 N. Y. S. 2d 569 at 570 (1st Dep't 1956).
54. *Cosby v. City of Rochester*, 286 App. Div. 1063, 146 N. Y. S. 2d 112 (4th Dep't 1956).