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Torts—Flimsy Cover Over Hole Constitutes Negligence

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TORTS

Flimsy Covering Over Hole Constitutes Negligence

In an action by a father as administrator for a twelve year old youth who fell to his death, allegedly as the result of the defendant's affirmative act of negligence in placing an insecure covering over a deep opening on the property adjacent to school grounds, the Court affirmed the Appellate Division's judgment for the plaintiff;[1] children were known to have played in the area and to have passed through defendant's premises.[2]

Since 1895 the courts of New York have refused to apply the "attractive nuisance" doctrine[3] to situations of this nature. No duty of care is imposed upon an owner of property to protect a trespasser or mere licensee from unreasonable risk;[4] liability for personal injury can only be justified where the property owner commits affirmative acts of negligence, or creates an unreasonable risk, or intentionally injures such persons.[5] In determining what constitutes unreasonable risk "the jury is entitled to take into consideration the well-known propensities of children to climb about and play."[6]

The dissenting judges, with an ease perhaps born of over-simplification, stated in three lines that defendant was not shown to have violated a duty owing to a trespasser.[7] The majority distinguished the cases cited by the dissenters on the theory that the defective conditions in those cases were the result of failure to repair the effects of decay (non-feasance, or non affirmative acts of negligence) which is in contradistinction to the instant case, where the defendant placed "flimsy" pieces of wood over the hole fifty-five feet deep, thereby creating a risk tantamount to a deceptive trap for the unwary. We may conclude that although the "attractive nuisance" doctrine has not been followed in New York, the same result may be arrived at by the conventional tests of negligence: proximate cause, foreseeability and standard of care, which may seem legally tenuous when applied to these types of situations but which may be justified through a supervening public policy of risk distribution.[8]

1. *Mayer v. Temple Properties,* 307 N. Y. 559, 122 N. E. 2d 909 (1954).
2. 283 App. Div. 786, 129 N. Y. S. 2d 228 (1st Dep't 1954).
3. *Walsh v. Fitchburg R. R. Co.,* 145 N. Y. 301, 39 N. E. 1068 (1895).
4. *Carbone v. Mackchil Realty Corp.,* 296 N. Y. 154, 71 N. E. 2d 447 (1947); *Mendelowitz v. Neisner,* 258 N. Y. 181, 179 N. E. 378 (1932); *Basmajian v. Board of Education,* 211 App. Div. 347, 207 N. Y. Supp. 298 (1st Dep't 1925).
5. Note 3, *supra.*
6. *Parnell v. Holland Furnace Co.,* 234 App. Div. 567, 256 N. Y. Supp. 323 (4th Dep't); *aff'd,* 260 N. Y. 604, 184 N. E. 112 (1932).
7. See note 4, *supra.*
8. Douglas, *Vicarious Liability and Administration of Risk,* 38 YALE L. J. 584, 720 (1929); Laski, *The Basis of Vicarious Liability,* 26 YALE L. J. 106 (1916).