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Torts—Negligence—Standard of Care

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term fetus and finally to an embryo, and also a wrongful death action[19] for such injury.

Standard of Care

A landowner owes a duty of reasonable care to protect invitiees, not only against risks incident to the former's activities, but against hazards incident to the *condition* of the premises.[20] The one in possession of land owes the affirmative duty to inspect his premises and either make them safe or give adequate warning, so that an invitee may judge and see if he wishes to assume the risk.[21]

Although there is a conflict[22] among the states on the question whether a municipal corporation in the maintenance of parks as places of recreation is discharging a governmental duty or a quasi-corporate one, it is settled in New York that it is the latter.[23]

With these rules in mind, we should conclude that a municipality stands on the same basis as a private land owner in regard to the duty of care required in the operation of a park. Moreover, there should be no need to categorize a situation as involving a special relationship. The normal rules of negligence should apply, and the duty should arise, not out of any anachronistic relationship, but out of defendant's conduct likely to affect the interests of the plaintiff.

In *Caldwell v. Village of Island Park*,[24] the plaintiff sued the village for negligence in permitting fireworks on a city owned owned and operated beach after the hour when admission ceased to be charged and supervision provided. Admission was charged from 9:00 A. M. to 6:00 P. M., and from 6:00 P.M. to 11:00 P. M. the public is admitted free, but lifeguards were not provided. Plaintiff was injured by fireworks set off by some third person after 6:00 P. M. There was evidence that on the two previous days people had complained of fireworks to the lifeguards. The court held (4-3) that the village owed a duty to the plaintiff and was negligent in so far as the plaintiff was injured by the third person's setting off fireworks.

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19. DECEDENT ESTATE LAW § 130.

20. *Mapp v. Saenger Theaters, Inc.,* 40 F. 2d 19 (5th Cir. 1930).

21. *Haefeli v. Woodrich Engineering Co.,* 255 N. Y. 442, 175 N. E. 123 (1931).

22. See *Augustine v. Town of Brant,* 249 N. Y. 198, 163 N. E. 732 (1928).

23. *Collentine v. City of New York,* 279 N. Y. 119, 17 N. E. 2d 792 (1938); *Ehrgott v. New York,* 96 N. Y. 264 (1884).

24. 304 N. Y. 268, 107 N. E. 2d 441 (1952), *rev'g* 279 App. Div. 746, 108 N. Y. S. 2d 334 (2d Dep't 1951).

The majority assumed that the plaintiff was an invitee even though no admission was charged, citing *Fritz v. City of Buffalo*[25] and *Collentine v. City of New York*.[26] This characterization of the plaintiff is justified on two bases. First, in the operation of a public park by a municipality there is some element of invitation in the common meaning of that word: "To induce or tempt by encouraging."[27] Second, the fact that a fee was charged until 6:00 P. M. tends to make plaintiff at least a quasi-invitee. Thus as an invitee, plaintiff was owed the duty to be warned of dangerous *activities* or unsafe *conditions*.[28] The dangerous activities referred to are those of the defendant.[29] It was unnecessary for the Court to say that a municipality owes a greater duty to invitees of public parks than a private land owner does to a trespasser or licensee. If the plaintiff is an *invitee*, then it follows, both by normal rules of negligence and by special rules applicable to land owners, that a higher duty will be owed than if plaintiff were a trespasser or licensee.

The dissenters were troubled by the fact that the municipality was being held liable for the acts of a third person. Actually, it was not being held liable for the third person's acts, but rather for its own failure to provide a warning or supervision after it learned that dangerous and illegal[30] acts were being conducted on its land.

The Court, of course, spoke in traditional terms. Although a city is not an insurer of the safety of persons who make use of its park facilities, it is required to exercise reasonable care in the maintenance of its parks and in the supervision of their use by the public.[31] Here, no supervision at all was provided after 6:00 P. M., when the "accident" occurred. *Ergo,* reasonable care was not exercised. This, it is clear, is not different from the normal rule of reasonable care under the circumstances. The Court further spoke in terms of the *condition* of the park. It declared that the mere setting off of fireworks was sufficient to create an unsafe condition of the premises, thus creating liability for failure to warn when the defendant had knowledge.[32]

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25. 277 N. Y. 710, 14 N. E. 2d 815 (1938).

26. *Supra* n. 23; see also, 22 A. L. R. 629.

27. WEBSTER'S NEW INTERNATIONAL DICTIONARY, (2d ed. 1950).

28. *Supra* n. 21.

29. *Ibid.*

30. N. Y. PENAL LAW § 1894 (a).

31. *Clark v. City of Buffalo,* 288 N. Y. 62, 41 N. E. 2d 459 (1942).

32. *Supra* n. 5.

The court leaned toward the modern tendency to abolish rules of special relationship and instead to apply the general rules of negligence.

Causation

An essential element of an actionable tort is causation in fact; it must appear that the defendant's acts were the actual cause of the harm in question.[33] The historical test for causation has been the "but for" or *sine qua non* rule. By this test consequences are in fact caused by defendant's conduct if they would not have happened *but for* such conduct.[34] The "but for" test works affirmatively to establish cause in fact, but not always does it disestablish the causal relation. The rule fails where two causes could have brought about the event, each without the other. In such a case, some different rule must be used: The defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about.[35] This is a question of fact, and one on which any layman is quite as competent to sit in judgment as the most experienced court. If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from responsibility merely because other causes contributed to the result.[36] If, as a matter of ordinary experience, a particular act or omission might be expected under the circumstances to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the casual relation exists. It is enough that the plaintiff introduces evidence from which reasonable men may conclude that it is more probable than not that the event was caused by the defendant.

The Court of Appeals in *Dunham v. Village of Canisteo*[37] used the "substantial factor" analysis in finding that it was a question for the jury "whether or not defendant's negligence was a competent producing cause of . . . the death . . ."[38]

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33. Causation in fact, or cause and effect, is not to be confused with proximate or legal cause, which is the limitation courts have been compelled to place, as practical necessity, upon the actor's responsibility for the consequences of his act. *Comstock v. Wilson,* 257 N. Y. 231, 177 N. E. 431 (1931). Before any question of proximate or legal cause may arise, there must be cause and effect.

34. See Smith, *Legal Cause in Actions of Tort,* 25 HARV. L. REV. 103, 106, 109 (1911).

35. RESTATEMENT, TORTS § 431.

36. This is not what *might* have caused the plaintiff's harm, but what did in *fact* cause it. Beale, *The Proximate Consequences of an Act,* 33 HARV. L. REV. 633, 638 (1920).

37. 303 N. Y. 498, 104 N. E. 2d 872 (1952), *rev'g* 278 App. Div. 743, 103 N. Y. S. 2d 519 (4th Dep't 1951).

38. 303 N. Y. 498, 506, 104 N. E. 2d 872, 877 (1952).