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Negligent Failure to Stop Escalator

TORTS

NEGLIGLENT FAILURE TO STOP ESCALATOR

Action for the injuries sustained by a six year old boy who lost his balance and fell to the bottom of escalator in defendant's store. *Held*: defendant's failure to stop escalator with reasonable promptness constituted negligence.[1]

There is no general duty to aid a person who is in peril.[2] A relationship between the parties, however, may impose a duty[3] The relation may be created by an economic advantage to the defendant.[4] Thus a carrier must give reasonable assistance to a passenger in peril,[5] an employer must aid an employee injured in the course of employment,[6] and a ship must help a seaman who has fallen overboard.[7] Similarly, there is a duty to assist an invitee or business guest in time of peril, even though the initial injury was not caused by defendant's negligence.[8] In the instant case, the store had the exclusive means of stopping the escalator and extricating the plaintiff.[9]

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[1] L. S. Ayres & Co. v. Hicks, 34 N.E. (2d) 177 (Ind. App. 1941).

[2] Allen v. Hixon, 111 Ga. 460, 36 S.E. 810 (1900); Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058 (1901); Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1938); Bohlen, *Moral Duty to Aid Others as a Basis of Tort Liability* (1908) 56 U. OF PA. L. REV. 217, 316 *passim*.

[3] HARPER, TORTS (1933) 199.

[4] Bohlen, *The Basis of Affirmative Obligations in the Law of Torts* (1905) 44 A.M. L. REG. (N.S.) 209, 273, 337. *Cf.* Davis v. Keller, 85 Ind. App. 9, 150 N.E. 70 (1928) (sudden emergency may give rise to duty to aid); Whiteside v. Southern R.R., 128 N.C. 229, 38 S.E. 878 (1901) (knowledge of serious peril creates a sufficient relation).

[5] Tippecanoe Loan & Trust Co., Adm'r v. Cleveland R.R., 57 Ind. App. 644, 106 N.E. 739 (1914); Layne v. Chicago & Alton R.R., 175 Mo. App. 34, 157 S.W. 850 (1913), Yazoo & M.V. R.R. v. Byrd, 89 Miss. 308, 42 So. 286 (1906). See Warner, *Duty of a Railway Company to Care for a Person it has Without Fault Rendered Helpless* (1919) 7 CALIF. L. REV. 312.

[6] Cushman v. Cloverland Coal & Mining Co., 170 Ind. 402, 84 N.E. 759 (1908); Hunicke v. Meramec Quarry Co., 262 Mo. 560, 172 S.W. 43 (1914).

[7] Cortes v. Baltimore Insular Lines, 287 U.S. 367 (1932); Harris v. Penn. R.R., 50 F. (2d) 866 (C.C.A. 4th, 1931), (1932) 17 CORN. L. Q. 505.

[8] Katakoa v. May Dep't Stores Co., 28 F. Supp. 3, 8 (D. C. Calif. 1939) (by implication); Wolff v. Weymire, 52 Iowa 533, 3 N.W. 541 (1879); Depue v. Flatau, 100 Minn. 299, 11 N.W. 1 (1907). See PROSSER, TORTS (1941) 635 (definition of business visitor). *Cf.* Grogan v. O'Keefe's Inc., 267 Mass. 189, 166 N.E. 721 (1929) (child accompanying parents held to be business visitor).

[9] "A passenger by placing himself in charge of company is confined by very necessity to the confines of the conveyance, being in effect imprisoned there, and he must look to the carrier to aid him when he is in peril. This duty exists irrespective of whether conveyance is a common carrier or not." Bohlen, *Moral Duty to Aid Others as a Basis of Tort Liability* (1908) 56 U. OF PA. L. REV. 219, 229. Cases holding escalators common carriers: Heffernon v. Mandel Bros., 297 Ill. App. 272, 17 N.E. (2d) 528 (1938), Mc-

The court's meticulous determination of the exact moment at which the defendant's negligence began, creates the difficult problem of measuring the damages. The court predicated liability solely upon the aggravation of the injury. Failure to instruct jury as to severability of damages forms the basis of the dissent.[10]

The question of apportionment is primarily one of feasibility and practical convenience in splitting the total harm into separate parts.[11] Apportionment is usually permitted where part of the damage is attributable to an innocent cause.[12] A distinction is made between injury resulting from defendant's reasonable conduct, and injuries aggravated by the defendant's negligence.[13]

Similar to the principal case are those where plaintiff's negligence played no part in bringing about an impact or accident, but aggravated the ensuing injury.[14] In Connecticut, the court refused to make any division, and awarded the plaintiff the entire amount.[15] In Iowa[16] and Kansas,[17] damages were apportioned. The better view

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Bride v. May Dep't Stores Co., 390 Ohio App. 420, 177 N.E. 773 (1931), *aff'd*, 124 Ohio St. 264, 178 N.E. 12 (1931). *Contra*: Stratton v. J. J. Newberry Co., 117 Conn. 522, 169 Atl., 56 (1933). The courts emphasis that an escalator was a common carrier in the instant case, seems unnecessary. De Bois v. Boston El. Ry. Co., 276 Mass. 98, 176 N.E. 920 (1931) (whether court technically correct in classifying escalator a common carrier immaterial; in either event the passenger is in the same helpless condition).

[10] L. S. Ayres Co. v. Hicks, 34 N.E. (2d) 177, 188 (Ind. App. 1941) (trial court instructions, "In determining the amount of damages which you award plaintiff, it is proper to consider every phase of his injuries...").

[11] Prosser, *Joint Torts & Several Liability* (1937) 25 CALIF. L. REV. 413; See Jackson, *Joint Torts & Several Liability* (1939) 17 TEX. L. REV. 399. An analogy may be suggested in problem of splitting a cause of action against a single defendant in the pleading cases. Gavit, *The Code Cause of Action* (1930) 30 COL. L. REV. 802.

[12] McAdams v. Chicago R.I. & P. R. Co., 200 Iowa 732, 205 N.W. 310 (1925); Rex v. Town of Alamagordo, 42 N.M. 325, 77 P. (2d) 765 (1938). *Contra*: Willie v. Minn. Power & Light Co., 190 Minn. 95, 250 N.W. 809 (1928); Note (1928) MINN. L. REV. 91.

[13] Jenkins v. Pa. R.R., 67 N.J.L. 331, 51 Atl. 704 (1902) (smoke nuisance).

[14] Mahoney v. Beatman, 110 Conn. 184, 147 Atl. 762 (1929); Green, *Mahoney v. Beatman: A Study in Proximate Cause* (1930) 39 YALE L.J. 532.

[15] Mahoney v. Beatman, 110 Conn. 184, 147 Atl. 762 (1929) (plaintiff's excessive speed in driving was not responsible for the collision, but greatly increased damages resulting from it). But see HARPER, TORTS (1933) 299-300; Note (1938) 22 MINN. L. REV. 410.

[16] Wright v. Ill. & Miss. Tel. Co., 20 Iowa 195, (1866) (plaintiff's damages from a runaway enhanced by negligent failure to have more than one helper).

[17] O'Keefe v. Kansas City Western R.R., 87 Kan. 322, 124 Pac. 416 (1912) (plaintiff's injuries from fall increased by prior intoxication, which did not contribute to fall). See Smithwich v. Hall & Upson Co., 59 Conn. 261, 263, 21 Atl. 24, 25 (1890) (act or omission that merely increased extent of loss may affect amount of damages in a given case).

reduces the plaintiff's recovery to the extent his injuries have been aggravated by his own antecedent negligence.[18]

In the principal case, there are obvious difficulties in apportioning physical and mental suffering and medical expense. Such difficulties are not insuperable. They are no greater than apportionment upon the basis of potential damage from one cause, which reduces the loss inflicted by another.[19] Each apportionment case, however, must turn on its own particular facts.

Logic and consistency in the principal case demand an apportionment of damages. A correct instruction as to damages might have resulted in a smaller verdict. A retrial should have been granted on the issue of damages.[20]

TRADE REGULATION

GENERAL MOTORS ACCEPTANCE CORPORATION AND THE SHERMAN ACT

Four affiliated General Motors Corporations and seventeen individuals were prosecuted, under Section 1 of the Sherman Anti-Trust Act, for conspiring to restrain interstate trade and commerce in General Motors automobiles. The alleged purpose of the conspiracy was to compel General Motors dealers to use General Motors Acceptance Corporation financing in their purchases and sales of automobiles. The purpose was stated to have been accomplished by cancelling the franchises of dealers who refused to use the financing, by favoring dealers who used the finance service, in the matter of deliveries of automobiles and other appropriate means. A jury in the District Court acquitted the individual defendants and found the four corporate defendants guilty. Judgment entered upon verdict fining each corporate defendant $5000. Held, affirmed on appeal.[1]

The defendants contended that, since they were affiliated noncompeting corporations, any restraint by them of the interstate commerce in their own automobiles was not prohibited by the Sherman Act.[2] The title to the automobiles usually passes to the dealers before shipment and the commerce which was restrained was the commerce

[18] Notes (1938) 22 MINN. L. REV. 410, (1930) 66 A.L.R. 1121, 1135, (1930) 30 COL. L. REV. 268.

[19] Dillon v. Twin State Gas & Electric Co., 85 N.H. 449, 216 Atl. 111 (1932); See Peaslee, *Multiple Causation & Damage* (1934) 47 HARV. L. REV. 1127. See also, Felter v. Delaware & Hudson R.R., 19 F. Supp. 825 (1937), *aff'd* 98 F. (2d) 868 (C.C.A. 3d, 1938) (damage for only portion of total value), (1937) 12 TEMPLE L.Q. 132.

[20] Kummer Motor Bus & Taxi Co. v. Mech. Lumber Co., 175 Ark. 750, 300 S.W. 399; May Dep't Stores Co. v. Bell, 61 F. (2d) 83 (C.C.A. 8th, 1932) (issues of retrial limited to damages).

[1] United States v. General Motors Corp., 121 F. (2d) 376 (C.C.A. 7th, 1941), *cert. denied*, 10 U.S.L. WEEK 3113.

[2] 26 STAT. 209 (1890), 15 U.S.C. §1 (1934).