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TORTS

EFFECT OF THE BLACKOUT ON TORT LIABILITY

Comparatively few tort cases arising as a result of the blackout have reached the higher English courts. Already, however, considerable confusion has been caused by the application of old concepts to the new situations.¹ With the spread of the blackout to this country, it is anticipated that similar confusion may arise. For this reason, a review of the recent English decisions on this subject seems desirable.²

The very existence of tort liability presupposes that there is a legal duty owed to the injured person.³ Since the English blackout regulations are held to temporarily supersede all legal obligations in conflict or variance therewith,⁴ it is clear that a statutory duty to provide street lighting is abrogated.⁵ Therefore, it is necessary to determine the effect of the blackout on the common law duty of reasonable care under the circumstances.

Much of the confusion surrounding the recent English cases has been caused by an attempt to follow a World War I case, *Great Central Rwy. v. Hewlett*.⁶ In that case, Parliament had authorized the maintenance of an obstruction which had formerly been a nuisance.⁷ In denying relief to a plaintiff injured in a collision therewith,⁸ the

1. A Note (1943) 59 L.Q.Rev. 13 doubts whether the English cases are reconcilable.
2. Several of the cases commented on herein are considered in Note (1942) 136 A.L.R. 1327. A number of articles and notes on tort liability during blackout have been published in law journals. Those especially pertinent are: Cass, "The Blackout and Its Relation to Civil Liabilities" (1942) 22 B.U.L.Rev. 287; Ollerenshaw, "Highway Duties in Blackouts" (1941) 15 Aust. L.J. 79; Sawyer, "Blackout Cases and Their Relation to Administrative Law" (1941) 15 Aust. L.J. 103; Notes (1941) 15 Aust. L.J. 146, (1941) 19 Can. B. Rev. 384, (1942) 8 Irish Jur. 16, (1940) 52 Jurid. Rev. 333, (1941) 91 L.J. 198, (1943) 59 L.Q. Rev. 13, (1941) 57 L.Q. Rev. 160, (1940) 7 Sol. 15, (1941) 85 Sol. J. 87; and the following Notes on the blackout regulations: (1940) 84 Sol. J. 123, (1940) 84 Sol. J. 87.
3. Street, "Foundations of Legal Liability" (1906) 91.
4. *Wodehouse v. Levy*, [1940] 2 K.B. 561; *Greenwood v. Central Service Co., Ltd.*, [1940] 2 K.B. 447.
5. The English blackout regulations prohibit the displaying of lights during the hours of darkness. However, there are certain exceptions in that lights of a specified type must be used on vehicles. In addition, it is permissible, but not mandatory, to use ". . . lamps indicating obstructions on or near the carriageway of any road providing that they are of a candle power not exceeding 1.0, and so screened as to prevent light being thrown upwards and any appreciable glow being produced on the road surface." See 136 A.L.R. at 1321.
6. [1916] 2 A.C. 511 (House of Lords).
7. "The company may maintain [sic] the gate posts and gates erected by them . . ." *Great Central Railway Act, 1902*, 2 Edw. VII, C. cxxxv., §31.
8. Plaintiff cab driver was moving at 6 or 7 miles per hour on a dark, rainy night. Owing to the diminution of the street illum-

House of Lords held that the mere power to "maintain" the post as it then was, imposed no obligation on the defendant to warn the public of its existence. Since the legislature had authorized the continuance of a particular post—which it knew was not separately guarded—it must have been of the opinion that the defendant should not be under a duty to guard it.⁹ Parliament had simply said, "It's a nuisance, but we authorize you to maintain it henceforth without doing more."¹⁰ There had been a duty on the local authorities to light the street, but the mere fact that this duty had ceased due to blackout regulations did not impose a new duty on the defendant.¹¹

In one of the first World War II cases, *Wodehouse v. Levy*,¹² a cab had hit an unlighted refuge, or safety-island, in the middle of the road. Purporting to follow the *Great Central* case, the Court of Appeals found that, inasmuch as the local authorities had been given the right to erect the refuge, there was no obligation to light it other than the general obligation to provide an adequate system of street lighting; since that obligation had been abrogated by the blackout regulations, there was no statutory or common law duty to light the refuge.¹³ In *Greenwood v. Central Service Co.*,¹⁴ involving substantially the same facts, the court again found that since the obstruction had been erected under statutory authorization, there was no duty to light it.¹⁵

In *Lytus v. Stepney Borough Council*,¹⁶ a city had been authorized to "provide and maintain" sandbins on the streets. The Court of Appeals said that the only duty on the local authority was to exercise reasonable care in erecting the sandbins. Thereafter, its only

ination because of blackout regulations, the post, although visible on a clear night, could not be seen by the plaintiff.

9. Sawyer, "Blackout Cases and Their Relation to Administrative Law" (1941) 15 *Aust. L.J.* 103, 104.
10. See *du Pareq, L.J.*, dissenting in *Fox v. Newcastle-upon-Tyne Corp.*, [1941] 2 *K.B.* 120, 129.
11. [1916] 2 *A.C.* 511; see also Note (1941) 57 *L.Q. Rev.* 160.
12. [1940] 2 *K.B.* 561. The lower court found ([1940] 2 *K.B.* 298) that the blackout regulations did not entirely abrogate the statute requiring a town to light obstructions on a highway, and that such duty remained to the extent permitted by the regulations.
13. [1940] 2 *K.B.* 561, 569.
14. [1940] 2 *K.B.* 447.
15. *McKinnon, L.J.*, said in 56 *T.L.R.* 944, 945 that there still remained a common law duty to use due care to prevent the obstruction from being a danger to highway users. However, in *Wodehouse v. Levy*, [1940] 2 *K.B.* 561, 564, 565, the Lord Justice corrected his earlier statement, explaining that what he meant was that even if a common law duty had existed, there still was no negligence on the part of the local authority.
16. [1941] 1 *K.B.* 134, 136 *A.L.R.* 1317 (1942). The act authorizing the erection and maintenance of the sandbins provided that they were not to hinder the reasonable use of the street. The lower court held that although there was no duty upon the local authority to light the street, there was a duty to see that the sandbin did not become a danger to the public.

duty was the statutory one of providing lights, and this duty had been suspended. The court held that the question of hindrance to use was to be considered as of the time of erection since the power to maintain did not involve active operation.¹⁷

Again, in *Jelley v. Ilford Borough Council*,¹⁸ the same court said that a city owes no continuing common law duty to take reasonable care to guard against collisions with authorized obstructions.

In the reported cases decided thus far, then, it appears that the ratio decidendi of the English courts is: (1) that the common law duty of due care applies only to the doing of positive acts, and that erecting and maintaining an authorized obstruction is not a positive act, and (2) that the only duties which the local authorities can owe with respect to authorized obstructions are those imposed by statute.¹⁹

This reasoning is based on a broad interpretation of the rule of the Great Central case,²⁰ and has been criticized.²¹ A proper interpretation of the Great Central case calls for a suspension of the common law duty of due care only where a statute authorizes the continuance of a specific obstruction.²² If by a reasonable exercise of powers, either given by statute or existing at common law, the damage could be avoided, it is negligence not to make a reasonable exer-

17. "In our judgment the question whether the erection of this sandbin will hinder the reasonable user of the street by the public . . . is one to be considered at the time when the sandbin was erected, and if at that time there was no such hindrance it is difficult to see how at some later date it can be said that the sandbin has become a hindrance to the user of the street." [1941] 1 K.B. at 146, 136 A.L.R. at 1323.
18. [1941] 2 All Eng. Rep. 468 (Court of Appeal). Plaintiff walked into an unlighted sandbag shelter erected without full compliance with the statute authorizing such shelters. He was denied recovery on the grounds of contributory negligence in that he was walking too fast.
19. See Sawyer, "Blackout Cases and Their Relation to Administrative Law" (1941) 15 Aust. L.J. 103.
20. In all the cases mentioned above, the Court of Appeal reviewed the Great Central case and found the rule of that case to be applicable. E.g., Luxmoore, L.J., in *Lysus v. Stepney Borough Council*, [1941] 1 K.B. 134, 146, 136 A.L.R. at 1325, "After it [the sandbin] had been erected, it became an authorized obstruction . . . which the council were empowered to maintain. The power to maintain is distinct and separate from the power to provide and, as pointed out . . . in *Great Central Railway v. Hewlett*, does not involve any active operation on the part of the council." Being "bound" by the Great Central case, the court held as stated earlier.
21. Sawyer, "Blackout Cases and Their Relation to Administrative Law" (1941) 15 Aust. L.J. 103; Note (1943) 59 L. Q. Rev. 13.
22. The real difficulty appears to arise through the use of the word "maintain." In the Great Central case, "the authority was not an authority to do anything actively . . ., but a mere authority to leave things alone." *Wrenbury, L.J.*, [1916] 2 A.C. at 524. In the recent cases, the authority has been to erect and then maintain the obstruction, being quite different from the Great Central case.

cise of such powers.²³ The local authorities are under a common law duty to use due care and such duty should be unaffected, in the absence of express or implied statutory provisions to the contrary, by any express statutory duty to provide a general lighting system.²⁴ It is to be noted that, in all the cases mentioned above, a small light of the candle power permitted would probably have prevented the accident.²⁵ If any power to light is allowed under the regulations, it should be exercised.²⁶ The most recent of the English cases hint that the rule of the Great Central case may be interpreted as suggested above.²⁷ It would seem to be a better view that "there is no reason why local authorities should not be under a duty to take ordinary precautions to make air-raid shelters and other obstructions

23. See the opinion of Lord Blackburn in *Geddes v. Proprietors of Bann Reservoir*, 3 App. Cas. 430, 455 (1878), quoted with approval by du Parcq, L.J., dissenting in *Fox v. Newcastle-upon-Tyne Corp.*, [1941] 2 K.B. 120, 127, 128.

24. Sawyer, "Blackout Cases and Their Relation to Administrative Law" (1941) 15 Aust. L.J. 103; and see *Morrison v. Sheffield Corp.*, [1917] 2 K.B. 866. In the latter case, a statute authorized cities to plant trees in the highways and guards could be erected for the protection of the trees. However, this power was not to be exercised nor were the trees to be planted so as to become nuisances or hinder the reasonable use of the highways. The defendant city contended that, having erected a guard around the tree at a time when such guard was reasonably safe, there was no further duty on it after the blackout came into effect. Nevertheless, the Court of Appeals said, ". . . the obligation on the defendants continues as long as the trees and guards are maintained in the highway. . . . It is their duty to take reasonable care . . . and this duty is continuing The degree of care required was not exhausted by erecting the guards so as to be reasonably safe for the protection of the public at the time of their erection." [1917] 2 K.B. 866, 870, 871 (per Viscount Reading, C.J.).

25. See note 5 supra.

26. See the dissenting opinion of du Parcq in *Fox v. Newcastle-upon-Tyne Corp.*, [1941] 2 K.B. 120, 134.

27. du Parcq, L.J. urges (*Fox v. Newcastle etc.*, cited supra note 26) that the rule of the Great Central case is not being properly limited. In *Foster v. Gillingham Corp.*, [1942] 1 All Eng. Rep. 304, the court pointed out that the earlier cases need reconsidering. In the latter case, the city had been under a duty to enclose any road obstructions. A barrier was erected around a bomb crater and hurricane lights placed thereon. The local authority was found to be negligent in not keeping the lamps lighted. The Court of Appeal distinguished the "specific authority to maintain" in the Great Central case, and found that, if whatever means the city used to protect the public did form an obstruction, the city had to light it insofar as permitted under the blackout regulations. Again, in the most recent case, *Knight v. Sheffield Corp.*, [1942] 2 All Eng. Rep. 411, the court distinguished the Great Central case. The court said that in constructing a shelter under statutory powers, the city was under a duty not to create a thing which by its nature was dangerous. It must be admitted, however, that, in this case the obstruction had been built AFTER the blackout regulations had gone into effect. Nevertheless, this argument was presented in *Fox v. Newcastle etc.*, supra, at page 124, and the court said that there was no basis for such a distinction.

as safe as circumstances, including the blackout, will permit."²⁸ A statute ought not to be interpreted as being in conflict with this ordinary rule of law unless its words lead to no other possible conclusion.²⁹

In marked contrast to the confusion found in the above cases, the English courts have had little trouble in defining "reasonable care under the circumstances." They have said that to drive any vehicle during a blackout is an operation which must involve a considerable degree of danger to other road-users, but, since it is permitted by law, it is not a tort in itself.³⁰ However, the difficulty of sight is greatly increased and so there is a duty on all road-users to minimize the attendant danger.³¹ If, through the failure to take some such precaution, the driver's difficulty is increased, that breach of duty is the proximate cause of the injury.³² It is apparent, then, that as to this particular problem, there is no change in the standard of care required; it is merely a question of emphasizing the word "reasonable" as applied to a particular situation.³³

Although no cases arising because of the blackout have been found in the American reports, at least one state has already considered legislation which marks the beginning of the approach to this problem.³⁴ When such cases are brought before the courts in this country, it is believed that the more desirable solution will be found along the lines suggested above. The result reached by such reasoning will prevent an unwarranted extension of municipal liability and will give nevertheless reasonable protection to the public.

28. See Note (1943) 59 L.Q. Rev. 13.

29. *Id.*

30. *Franklin v. Bristol Tramways & Carriage, Ltd.*, [1941] 1 All Eng. Rep. 188.

31. The duty is higher because it is almost impossible for a driver to see a pedestrian whereas the use of dimmed lights makes the presence of a vehicle ascertainable if the pedestrian keeps a sharp lookout. *Franklin v. Bristol Tramways and Carriage Co., Ltd.*, cited *supra* note 30; *Miller v. Liverpool Cooperative Society, Ltd.*, [1940] 4 All Eng. Rep. 367, *aff'd*, [1941] 1 All Eng. Rep. 379; accord, *MacDonald v. Star Cabs, Ltd. et al.*, [1943] 1 Dom. L. Rep. 420 (Sup. Ct. Br. Col.). Similarly, vehicles must be driven slower and greater care will be required on the part of drivers, both as to other drivers, *Miller v. Liverpool Cooperative, Ltd. et al.*, *supra*, and as to pedestrians, *MacDonald v. Star Cabs, Ltd.*, *et al.*, *supra*.

32. *Franklin v. Bristol Tramways and Carriage Co., Ltd.*, *supra*, note 30.

33. Notes (1941) 19 Can. B. J. 384, 15 Aust. L.J. 79.

34. Mass. Laws 1942, c. 13. See Cass, "The Blackout and Its Relation to Civil Liabilities" (1942) 22 B.U.L. Rev. 287, at 288, note 5.