Indiana Law Journal

Volume 10 | Issue 6 Article 9

3-1935

Negligence-As a Matter of Law or a Question of Fact-Contributory Negligence of Customers

Negligence—As a Matter of Law or a Question of Fact—Contributory Negligence of Customers. Appellant sued appellee to recover damages for injuries alleged to have been sustained as a result of falling over weighing scales negligently placed in the aisle near the entrance of appellee's store. Appellant alleged that on December 23, 1930 she was trading in said store; that appellee had placed the said scales near the entrance of said store in such a manner that a portion of the platform thereof extended into the aisle "where customers walked and passed, thereby obstructing the passageway"; that as she started to leave the store she could not and did not see the scales because of the crowded condition of the aisles, and as she was walking along the aisle she caught her foot under the said platform and fell, thereby sustaining the injuries for which she seeks to recover damages. Appellee's demurrer was overruled and verdict was rendered for appellant for $2000. Upon appellee's request, the court submitted sixteen interrogatories to the jury, and upon appellee's motion rendered judgment for appellee upon the answers notwithstanding the verdict. The interrogatories brought forth the following facts:

1. Appellant on entering the store walked past the scales.

2. Appellant on entering the store could have seen the scales had she looked along the aisle where she was walking.

3. Appellant as she was leaving the store could have seen the scales just prior to her injury had she looked along the aisle where she was walking.

4. Appellant was not carrying her baby in such a position as to prevent her from seeing the aisle where she was walking.

5. Appellant, prior to December 23, 1930, had frequently been along the aisle in question.

6. There was no one between appellant and the scales as she was walking along the aisle prior to the accident.

7. There was no evidence that appellant looked along the aisle where she was walking prior to the accident.

Appellant appealed, assigning the rendition of judgment on the answers to the interrogatories as error. Held, the failure to observe the condition of an aisle in a store does not constitute contributory negligence as a matter of law on the part of a customer who falls over an obstruction negligently placed in said aisle.[1]

Two important phases of the law of negligence form the basis of the above decision; namely, negligence as a matter of law, as distinguished from negligence as a question for the jury, and contributory negligence on the part of customers in stores. The fundamental factor in each is, of course, negligence. The former involves only the problem of determining whether

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12 Baldwin's Ind. Stat. (1934), sec. 903.

13 Weidlich, Rationale of Restraint Upon Remarriage After Divorce (1933), 19 Am. Bar Assoc. J. 529.

1 Thompson v. F. W. Woolworth Co. (1934), 192 N. E. 893 (Ind.).

or not certain conduct comes within the definition of negligence;[2] the latter involves the relative duties of store-keepers and invitees as determined by social policy.[3]

Negligence is the creation of an unreasonable risk, or conversely it is the failure to act as a reasonably prudent person would act in the same or similar circumstances. The standard by which to determine whether a person has been guilty of negligence is the conduct of the prudent or careful or diligent man.[4] In most instances it is a question of fact whether or not there is negligence; that is, whether or not there was conformity with the standards of the reasonable man. However, there are some instances wherein is involved "a rule of substantive law prescribing in terms of actual conduct what the minimum precautions shall be to satisfy the standard of the reasonable man."[5] Failure to conform with these minimum precautions is termed negligence per se and is a matter of law.[6]

An essential factor in the application of the law of negligence and one which, although basically it is pure negligence, requires further definition, is that of contributory negligence. The law contemplates that every person having the capacity to exercise ordinary care for his own protection will do so, and if he fails to exercise such care and such failure, concurring with and cooperating with the actionable negligence of the defendant, contributes to the injury complained of as a proximate cause, he is guilty of contributory negligence.[7] This duty to exercise ordinary care to avoid injury includes the duty to exercise ordinary care to observe and appreciate danger. A person is required to make reasonable use of his faculties of sight, hearing, and intelligence to discover dangers and conditions of danger, to which he is or might become exposed.[8] However, there must be a knowledge[9] or reason to know[10] of danger on the part of the plaintiff before he can be held to have been contributorily negligent.

Whether or not certain conduct constitutes negligence is determined either by the jury or by the court. Generally negligence and contributory negligence are questions for the jury,[11] for the question is one of judgment to be predicated on circumstances upon which more than one opinion can be reasonably

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2 Chambers v. Princeton Power Co. (1923), 93 W. Va. 598, 117 S. E. 480; City of Decatur v. Eady (1917), 186 Ind. 205, 115 N. E. 577; Fagan v. Central Ry. Co. of N. J. (1920), 94 N. J. Law 454, 111 A. 32.

3 Reed v. Hammel Dry Goods Co. (1927), 215 Ala. 494, 111 So. 237; Downing v. Merchants Natl. Bank (1921), 192 Iowa 1250, 184 N. W. 722, 20 A. L. R. 1138; Larned v. Vanderlinde (1911), 165 Mich. 464, 131 N. W. 165; Williams v. Liberty Stores (1921), 148 La. 450, 87 So. 233; Gallagher v. Kroger Groc. & Baking Co. (1925), 272 S. W. 1005 (Mo.); Langley v. F. W. Woolworth Co. (1925), 131 A. 194 (R. I.); Well v. F. W. Woolworth Co. (1925), 209 Ky. 258, 272 S. W. 730; William Laurie Co. v. McCullough (1910), 174 Ind. 477, 90 N. E. 1014; Howe v. Ohmart (1893), 7 Ind. App. 32, 33 N. E. 466; Clark Fruit Co. v. Stephan (1930), 91 Ind. App. 152, 170 N. E. 558.

4 Henderson Chevrolet Co. v. Ingle (1932), 202 N. C. 158, 162 N. E. 219.

5 Harper, Law of Tort (1933), sec. 78; 45 C. J. 633, "Negligence per se is a term frequently employed to designate an act or omission which is contrary to positive law, or so opposed to common prudence that it can be said without hesitation or doubt that no careful person would have been guilty thereof. Negligence per se has not acquired that precise and definite meaning which is essential for the prevention of ambiguity."

6 Platt v. Southern Photo Material Co. (1908), 4 Ga. App. 159, 163, 60 S. E. 1068.

7 45 C. J. 944; Ackerman v. Pere Marquette Ry. (1915), 58 Ind. App. 212, 108 N. E. 144.

8 45 C. J. 947; De Honney v. Harding (1924), 300 F. 696 (N. D.).

9 Southwest Cotton Co. v. Clements (1923), 25 Ariz. 169, 215 P. 156.

10 Seabridge v. Poli (1922), 98 Conn. 297, 119 A. 214; Johnson v. Washington Route (1922), 121 Wash. 608, 209 P. 1100.

11 Chambers v. Princeton Power Co. (1923), 93 W. Va. 598, 117 S. E. 480; Butler v. McMinnville (1928), 268 P. 760 (Ore.).

based.[12] Where, however, the facts of the case are undisputed and but one inference can reasonably be drawn therefrom, negligence or contributory negligence is a matter of law to be determined by the court.[13] Thus, the facts of each case are the determining factor as to whether negligence or contributory negligence is a question of law for the court or a question of fact for the jury.[14]

The principal case concerns a very distinct factual situation which involves primarily the relative duties of storekeepers and customers. The general rule holds the proprietor of a store or other place of business to the duty of using reasonable care to keep his premises in a reasonably safe condition; he must guard against dangers and defects and must use reasonable care to prevent accidents resulting therefrom.[15] A storekeeper is not an insurer of the safety of the customer, however, but is liable only for injuries resulting from negligence on his part.[16] This duty of a proprietor to use reasonable care to maintain his premises in a safe condition is subject to at least two limitations: 1. The duty extends only to those parts of the premises to which the customer is invited,[17] and, 2. The premises must be reasonably safe only for the purposes of the invitation, that is, the business to be transacted.[18]

Not only is the storekeeper bound to exercise reasonable care, but the customer is also so bound. However, the customer is an invitee and not a licensee.[19] Therefore, he is entitled to assume that the premises have been made reasonably safe by the storekeeper.[20] Where the relation of the storekeeper and the customer exists there is an implied invitation on the part of the former held out to the latter to enter the store and look at the merchandise. Together with this invitation and as a part thereof there is an implied assurance that the premises are in a condition that is safe for the purposes of the invitation.[21] The proprietor is bound to make that assurance truthful and the customer is entitled to rely thereon. But the customer is not altogether relieved of his duty to use care; he cannot depend on the assurance of safety after he discovers or should as a reasonably prudent person have discovered the presence of danger; and he is not entitled to act otherwise than a reasonably prudent person would act under the same or similar circumstances.[22] The customer, because of the relation, and the purpose and

12 Fagan v. Central Ry. Co. of N. J. (1920), 94 N. J. Law 454, 111 A. 32; Baltimore & O. & C. Ry. v. Walborn (1891), 127 Ind. 142, 26 N. E. 207; Indianapolis Traction & Terminal Co. v. Miller (1913), 179 Ind. 182, 100 N. E. 449.

13 Lyman v. Putnam Coal and Ice Co. (1918), 169 N. Y. S. 984, 182 App. Div. 105; Hicks v. Southern Ry. Co. (1920), 23 Ga. App. 594, 99 S. E. 218, aff. 149 Ga. 713, 101 S. E. 798; Beaumont S. L. & W. Ry. v. Sterling (1924), 260 S. W. 320 (Tex.); Butler v. McMinnville (1928), 268 P. 760 (Ore.); Chambers v. Princeton Power Co. (1923), 117 S. E. 480 (W. Va.); Brady v. Lumber Co. (1926), 243 P. 96 (Ore.); Indianapolis and St. L. Ry. Co. v. Watson (1887), 114 Ind. 20, 14 N. E. 721; Dowling v. Merchants Natl. Bank of Green, Iowa (1921), 192 Iowa 1250, 184 N. W. 722; Louisville Gas and Elec. Co. v. Beaucond (1920), 188 Ky. 725, 224 S. W. 179.

14 City of Decatur v. Eady (1917), 186 Ind. 205, 115 N. E. 577; Crowley v. Chicago, Burlington and Quincy Ry. Co. (1927), 213 N. W. 403 (Iowa).

15 William Laurie Co. v. McCullough (1910), 174 Ind. 477, 90 N. E. 1014; Howe v. Ohmart (1893), 7 Ind. App. 32, 33 N. E. 466; Washington Market Co. v. Clagett (1901), 19 App. D. C. 12.

16 33 A. L. R. 181; Clark Fruit Co. v. Stephan (1930), 91 Ind. App. 152, 170 N. E. 558.

17 Well v. F. W. Woolworth Co. (1925), 209 Ky. 258, 272 S. W. 730.

18 Gallagher v. Kroger Groc. & Baking Co. (1925), 272 S. W. 1005 (Mo.); Langley v. F. W. Woolworth Co. (1925), 131 A. 194 (R. I.).

19 Dowling v. McLean Drug Co. (1928), 248 Ill. App. 270.

20 Bloomer v. Snellenburg (1908), 221 Pa. 25, 69 A. 1124.

21 Washington Market Co. v. Clagett (1901), 19 App. D. C. 12.

22 Williams v. Liberty Stores (1921), 148 La. 450, 87 So. 233.

object thereof, is entitled to look at and examine the merchandise, and, in so doing, devote his attention primarily thereto. He is not required, therefore, to exercise those precautions to observe and avoid danger which he would exercise in the absence of the said relation.[23]

There are many cases which involve the same or similar factual situation as the principal case.[24] The same general principles discussed above govern them and most, if not all of them may be rationalized thereon. In Dowling v. McLean Drug Co., where the plaintiff entered a drug store to make a telephone call and tripped over a weighing machine, the court held that he was an invitee and not guilty of contributory negligence as a matter of law. Since more than one conclusion might reasonably be drawn from the attendant circumstances, contributory negligence was held to be a question for the jury.[25] In a similar case, Reed v. Hammel Dry Goods Co., where the weighing machine had been in the same position for two years, it was held that the defendant was not negligent as a matter of law since a reasonably prudent and careful management might not anticipate that injury would result from the obstruction.[26] In Brinkworth v. Sam Seelig Co., where the proprietor of a vegetable market having a center stand around which were counters for the delivery and display of goods, and the space between constituted an aisle for the use of customers, the defendant was held liable for injuries to a customer who, in leaving, stepped backward and fell over boxes placed in the aisle three hours before, contrary to the custom of the defendant.[27] But, while it is negligence for a proprietor to leave a box in an aisle through which customers have to pass, no recovery was allowed in Williams v. Liberty Stores for injuries to a customer from falling over a box which was in plain view for twenty-seven feet when he was hurrying down the wrong side of the aisle, after traversing the full length of the aisle previously without seeing the box, since in the exercise of reasonable care he must have seen it.[28] A customer was held contributorily negligent in Mullen v. Sensenbrenner Mercantile Co., where she noticed a defect in the store entrance upon entering and fell over it upon leaving, because she had knowledge of the danger and therefore the duty to avoid it.[29] However, in Downing v. Merchants National Bank it was held that a person about to enter a business building where the public is invited to enter, is not guilty of negligence as a matter of law in failing to look at the floor of the vestibule or corridor before crossing the threshold of an open door.[30]

In the principal case, there was no evidence of unreasonable conduct on the part of the plaintiff. The interrogatory merely brought forth facts from which an inference of contributory negligence might or might not be drawn. No inference was drawn by the jury and since there was no unequivocal conclusion to be reached the court could not decide that the plaintiff was contributorily negligent as a matter of law.

H. P. C.

Workmen's Compensation—Refusal by an Employee to Accept Proffered Medical Services. Witte, employee of J. Winkler and Sons, prosecutes this appeal from a decision of the Industrial Board which adhered to demands of

23 Bloomer v. Snelling (1908), 221 Pa. 25, 69 A. 1124.
24 33 A. L. R. 181; 33 A. L. R. 218.
25 (1928), 248 Ill. App. 270.
26 (1927), 215 Ala. 494, 111 So. 237.
27 (1921), 51 Cal. App. 668, 197 P. 427.
28 (1921), 148 La. 450, 87 So. 233.
29 (1924), 260 S. W. 982 (Mo.).
30 (1921), 192 Iowa 1250, 184 N. W. 722, 20 A. L. R. 1138.