COMMENTS

THE DUTY PROBLEM AND CAUSE PROBLEM IN NEGLIGENT CASES

(*Indian Refining Co. v. Summerland,* 172 N. E. 129.)

In the November issue of the Indiana Law Journal, a case comment approved the disposition made by the Appellate Court of the case of *Indian Refining Co. v. Summerland.*[1] Since the publication of that comment, the Appellate Court has granted a rehearing in the case and reversed its former position. Since the present writer is responsible in part for the approval of the former opinion,[2] it might be justifiable for him to appraise the opinion on rehearing, in which the opposite result was reached by the court. Fortunately, the writer feels that he is well within the limits of logic and sound tort law to also approve of the second opinion. To rationalize a position apparently so odd, a consideration of the fundamental problem involved in the case is necessary.

The facts of the case are simple. Plaintiff, a child of five, was sent to defendant's filling station with a glass jar to obtain gasoline. Defendant filled the jar with gasoline and the child started to return. While climbing some cement steps, the plaintiff fell, broke the jar and cut its wrist. It was claimed that the gasoline burned the wound, causing sloughing of the flesh. The plaintiff alleged negligence on the part of the defendant. The trial court passed the case to the jury which found for the plaintiff in the sum of $2,000. In the first opinion, the Appellate court reversed on the ground that there was no evidence of defendant's negligence. In the second opinion, the verdict was upheld and judgment below affirmed.

Plaintiff, to substantiate his allegation of negligence, offered the testimony of one physician who declared that gasoline would cause a cauterizing of an open wound and result in sloughing of flesh. Defendant offered the testimony of five physicians who declared that gasoline did not have such effect, but, on the contrary is often employed with good results for antiseptic purposes on open wounds. This, together with the statement of

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1 *Indiana Law Journal,* November, 1930, p. 126.

2 The comment was written by a student editor and "approved" for publication in the Journal by the writer, as instructor in torts.

facts set out above constitute all the material evidence of the case.

In the first opinion the court apparently took the position that the question of negligence was the only one involved, and, there being no evidence of negligence, the verdict could not be upheld. In the second opinion, the ground thereof is not so clear. The court attacks the negligence issue by saying "whether the act of placing a glass jar of the size alleged in the complaint *filled with any kind of liquid,* which the servant and agent knew was to be carried by the child up a flight of stone steps was an act of negligence, was one of fact for the jury to determine." This is an intelligible way of putting the problem, and while the evidence of negligence is slight (i. e., it is a very close case), a finding of a breach of duty might well be within the limits of a reasonable judgment.

The court apparently injects another issue, however, by observing that "it is certain that the condition in which the child's wrist was left was the direct result of the breaking of the jar. The jury believed that the placing of the jar filled with the liquid in the arms of so young a child was negligence and but for that negligence, the accident would not have occurred. It is certain that the cut was the proximate and efficient cause of the injury." Is there a casual problem in this case? If so, the court seems to have met the problem with directness. It conceives that the only problem is is one of cause in fact, i. e. a problem to be answered by the "but for" test. If the fall would probably not have happened but for defendant's acts of filling the jar with *any kind of liquid,* those acts substantially contribute to the injury, and casual relation is clear. This is perfectly sound.[3]

In every negligence case there are four problems, one of which may be difficult but usually not more than one. These problems may be described and have been analyzed as follows:

[3] By designating a result as "sound" or "unsound," the writer is necessarily giving his own opinion. But he does not offer his opinion as an arbitrary appraisal of the point in question. What he means is to submit that, from the point of view of the cases that have received the respect of the profession, i. e. "authority;" from the point of view of legal logic, i. e. the kind of logic lawyers and judges use when they indulge in what they call "legal reasoning;" and from the point of view of common sense, the proposition in question is satisfactory. This is what is intended by designating a result as "sound."

(1) the problem of duty; (2) the problem of violation thereof; (3) the problem of causation; and (4) the problem of damage.[4] Let us consider the aspects of these various problems insofar as they concern the present case.

The duty problem is often (as in this case) the difficult one. Does the law protect the plaintiff's interest that has been invaded? What rule or principle of law protects this interest? Does it protect the interest invaded against the particular risk to which that interest has been subjected?[5] All these questions must be answered in the affirmative by the court, as a question of law, before there is any further problem raised. Unless there is a duty imposed by law, there can be no violation thereof, i. e., no negligence (where the case is tried on the theory of negligence). In the present case the interest of the plaintiff that has been invaded is his interest in his bodily or personal security. It is such an interest that the policy of the law protects against both intended and unintended invasion. The rule or principle of law upon which plaintiff relies for protection of this interest is that principle which imposes upon one the duty of operating his business with proper regard for the safety of others when an ordinary reasonable man would forsee that there was a probability of harm involved. Now the final question, in determining whether there is a duty involved which may have been violated, is the hard one, viz., does the rule relied upon comprehend the peril which the plaintiff experienced? What was that hazard? The risk of falling with the glass jar and suffering a cut to which the gasoline became an added source of injury. If this question can be answered in the affirmative, there is a duty imposed toward the particular plaintiff with respect to the particular risk, and unless the question is answered in the affirmative, the case is ended. There being no duty imposed by law to cover the facts of the situation, there is no issue of violation for the jury. On the other hand, if the court can say that there is a duty imposed by law to cover such a situation, there is a case for the jury. In other words, this all means merely that the court is willing to hold the defendant liable if the jury is willing to do so.[6] In such a situation, there is "evidence" of negligence and it is a jury case. If, by chance, the court should feel positive and have no doubt whatever that the particular plain-

[4] See Leon Green, *Judge and Jury*, Ch. 2 (1930).

[5] See Leon Green, *Rationale of Proximate Cause*, sec. 1 (1927).

[6] Cf. Green, The Palsgraph Case, *Judge and Jury*, Ch. 8.

tiff's particular interest was protected by a rule of law against the particular risk suffered, it could direct a verdict for plaintiff. But not being willing to go so far, there is merely "evidence of negligence" and the jury can determine who must bear the loss. The determination of this question by the jury is the "violation of duty" problem. In other words, if the court is certain one way or the other, the case may be disposed of as a problem of "duty." If it is doubtful, then the jury is entitled to its judgment on the matter under some approved instruction.

Applied to the facts of the case under discussion, what results are in accord with common sense? Is the rule of law that requires defendant to operate his filling station with a due regard to the safety of others to be regarded as covering a case of a child of five bringing a glass jar to procure gasoline? Common sense demands several factors to be considered. Would a reasonable man forsee that if the child fell and cut itself, the gasoline would increase its injury? This goes to the effects of gasoline upon an open wound and how general such information is held. The testimony of six doctors differed, one stating that it would increase the injury; five stating that it would not. At best, this testimony is conflicting. In case the jury believed the one rather than the five, what is established? Merely the scientific fact that gasoline does have such an effect. Should the defendant be charged with that knowledge? Under the forseeability test, which is most important, he is to be so charged only if he actually knew or should have known of it. There was no evidence whatever that defendant actually knew of such effect of gasoline upon an open wound and no evidence that such knowledge was common or general or that an ordinary reasonable man should have known thereof. Consequently, under the forseeability formula or test, we are forced to the conclusion that so far as the additional risk due to the gasoline burning an open cut, the risk is not within the rule which plaintiff must rely upon.

There is another aspect to this problem, however. It may be argued with force that the mere fact that the defendant filled the glass with a liquid so greatly multiplied the chances that the child would fall and cut itself that such an event might have been forseen by defendant and thus should have been avoided. This properly ignores the fact that the liquid was gasoline. A like result would be demanded had the defendant filled the glass with milk, vinegar, or some other liquid. A glass jar full of

any liquid is heavier and harder to carry than an empty one, and consequently might be said to *increase the chances of a fall.* There are several analogues situations where one increasing the hazard is regarded as negligent, although most of the cases are analyzed improperly, as "proximate cause" cases. To mention two examples, where a carrier by negligent delay increases the opportunity for destruction of goods by storm or flood, it is liable.[7] The risk comes within the rule forbidding unjustifiable delay. Where, under Workmens' Compensation Acts, risks of injury is increased by the work, defendant is liable.[8] The risk comes within the rule requiring compensation.

But even if the particular risk to which plaintiff has been exposed does not come within the contemplation of the rule relied upon as disclosed by the test of forseeability, which is not a final test, it may be included as within the protection of the rule for other reasons if the reasons are compelling, that is if the court is strongly of opinion that defendant ought to bear the loss anyway. These reasons are too numerous and complex to even attempt to consider.[9] They do exist and in many cases will bring a risk within the protection of a rule of law even though the risk were unforseeable if the jury find that *some* risks were forseeable.[10] Would common sense uphold the recovery of plaintiff in the present case on exceptional grounds, for it must be an exceptional càse for an unforseeable risk to be within a rule of law.

Here, it seems to this writer, there is room for a difference of reasonable opinion. It may well be that defendant's capacity to bear and distribute the loss is so great, as compared with plaintiff's that the result is justifiable. It may be that the protection which the law should throw around children of tender years should go to such length for the general welfare of society. Many other considerations make the case a very close one. Consequently, in view of the many considerations of policy, of desirability and of practical convenience, it is impossible to say that the passing of judgment either way is "true" or "false."

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[7] *Bibb Broom Corn Co. v. Atchinson etc. R. R.*, 94 Minn. 269, 102 N. W. 709 (1905).

[8] *Deckard v. Indiana University*, 172 N. E. 547 (Ind., 1930) Commented on in 6 Ind. L. J. 194 (December, 1930).

[9] See Green, *The Duty Problem*, 28 Col. L. Rev., 1014 (1928), 29 Col. L. Rev. 255 (1929).

[10] *Re Polemis & Furness Etc. Co.*, (1921) 3 K. B. 560.

Either way, the court is articulating its judgment upon the "oughtness" of the situation and throwing the loss where it believes it should be placed. Both opinions are honest and intelligent attempts to grasp a difficult problem and answer it as soundly as the judges could. Both are entitled to the profession's sincere respect and honest commendation.

Just a word should be said as to the other problems involved, viz., the casual problem and the damage problem. The latter is not in issue. The jury found, and properly, so far as is disclosed by the record, the damages to which plaintiff was entitled if he was entitled to any. The casual relation problem is no more difficult. If so, if could be passed to the jury in an easy and appropriate manner. If defendant's act in filling the jar with gasoline was a material or substantial factor in the fall, cutting or subsequent sloughing of flesh, it is a cause of such injury. This is all that is necessary. All questions of the "proximateness" of the cause, once cause in fact is established, are taken care of in the foregoing analysis of the duty problem. The jury might well find that, even though the child might (or would) have fallen if defendant had put no gasoline in the jar, yet, the filling of the jar contributed substantially to the fall and subsequent injury, and was therefore the actual cause of the damage.[11] The two opinions in this case represent a rational and able treatment of one of the most difficult problems of the law, and both are clearly sound.

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[11] The question is not what would or might have caused the injury if defendant's acts had not, but what in fact *did* cause it.

EXPLANATION OF TWO RECENT CASE COMMENTS

(*Rainy v. Lafayette Loan Co.*, 172 N. E. 128, and *Indiana Refining Co. v. Summerland*, 172 N. E. 129.)

In the November issue of the Indiana Law Journal, there appeared two recent Case Comments upon the above decisions of the Appellate Court. The writer of the comment on the Rainy case criticised the result and reasoning of the court while the writer of the comment on the Summerland case approved the decision. Both cases were reversed on rehearing. (*Rainy v. Lafayette Loan Co.*, rehearing September 24; *Indiana Refining Co. v. Summerland*, 173 N. E. 269.) The Summerland case is discussed at length elsewhere in this issue of the Journal. The Rainy case, as it was finally disposed of, accords with the criticism on the original opinion. It is to be observed, however, that the Rainy case, as to which Judge Remy delivered both opinions of the court, was finally disposed of some six or seven weeks *before* the comment appeared in the Indiana Law Journal. A word of explanation of this situation is in order.

The Indiana Law Journal desires to give to the profession critical comments and commentaries upon Indiana cases as soon as possible after they are released to the public. In this way, there is available a cumulative and up-to-date literature on current Indiana law that is presumably of value to Indiana lawyers. This, however, involves some difficulties. One difficulty is that a rehearing may be granted or a writ of transfer issued and the case reversed. The assignment of cases to student editors takes place very soon after an opinion is handed down. This, together with the fact that copy for the Journal is sent to the printer from four to eight weeks or more before date of publication, accounts for the circumstance that after a case has been selected for comment but before it has appeared in the Journal, the case may have been disposed of in a different manner upon a rehearing. This was precisely what happened in the two cases mentioned. In the case of *Rainy v. Lafayette Loan Co.*, it is a source of regret that Judge Remy's first opinion was subjected to adverse comment when he had withdrawn the same and submitted a most excellent and able analysis of the case before the comment on the first opinion had been published.

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