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Torts -- Negligence -- Injuries to Elevator Passengers

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senses.[18] In an early Massachusetts decision, the court said that "if the plaintiff was a person of poor sight, common prudence required of her greater care in walking upon the streets, and avoiding obstructions, than is required of persons of good sight."[19]

The North Carolina court in the principal case, following *Foy v. Winston*,[20] seemed to agree with this theory. It is clear that the word "care" as used by the Massachusetts and North Carolina courts refers to the particular plaintiff's effort or diligence or care and not to the standard of care. In the *Cook* case the court avoids any possible confusion by using the word "effort" as follows: "Plaintiff's evidence compels the conclusion that he, a blind man, failed to put forth a greater degree of effort than one not acting under any disabilities to attain due care for his own safety: that standard of care which the law has established for everybody. . . . Such a failure to use due care for his own safety was a proximate contributing cause of his injuries."[21]

It is submitted that this statement of the North Carolina Supreme Court leads to a clearer understanding of the standard of care required of persons under physical disability and, if followed generally, would remove much of the existing confusion.

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Torts—Negligence—Injuries to Elevator Passengers

In a recent case the Supreme Court of North Carolina upheld a nonsuit on the ground that the plaintiff, an elevator passenger, was guilty of contributory negligence.[1] In this case the court, by implication, followed the rulings of previous North Carolina decisions that the owner of an elevator owes a passenger riding thereon that degree of care exercised by the ordinary prudent man under the circumstances.[2] Various jurisdictions have used different approaches in determining the protection to be afforded passengers on elevators in terms of the duties owed by manufacturers and those under contracts to maintain, as well as owners.

[18] Hill v. City of Glenwood, 14 Iowa 479, 100 N. W. 522 (1904); Winn v. Lowell, 1 Allen 177 (Mass., 1861); Fann v. North Carolina R. R., 155 N. C. 136, 71 S. E. 81 (1911).
[19] Winn v. Lowell, 1 Allen 177, 180 (Mass., 1861).
[20] 126 N. C. 381, 35 S. E. 609 (1900).
[21] Cook v. Winston-Salem, 241 N. C. 422, 431, 85 S. E. 2d 696, 702 (1954).

[1] Waldrup v. Garver, 240 N. C. 649, 83 S. E. 2d 663 (1954). The North Carolina court held that where the plaintiff's evidence showed that the tenant of a building failed to use lighting facilities provided by the owner of the building, opened an elevator, and stepped into an open shaft, a nonsuit was proper as contributory negligence was shown in the plaintiff's evidence. The court implied, however, that the defendant building owner owed his tenant the ordinary degree of care.
[2] Ramsey v. Nash Furniture Co., 209 N. C. 165, 183 S. E. 536 (1936); Hood v. Mitchell, 206 N. C. 156, 173 S. E. 61 (1934); Scott v. Western Union Telegraph Co., 198 N. C. 795, 153 S. E. 413 (1930).

Some courts have ruled with North Carolina in refusing to afford special protection to elevator passengers with respect to the duty owed by elevator owners.[3] On the other hand, others have felt that passengers on elevators should be afforded special protection in terms of the liability of owners and have held owners to the highest degree of care.[4] Those jurisdictions, including North Carolina, which hold the duty of owners to be that of ordinary care, base their decisions on the propositions that (1) elevator owners are not servants of the public[5] and (2) they are not under enforceable obligations to receive passengers.[6] As practical matters, these reasons are not too cogent, for elevator owners, especially department stores and hotels, do offer their facili-

[3] *District of Columbia:* Woodward and Lothrop v. Lineberry, 60 App. D. C. 164, 50 Fed. 2d 314 (1913); *Iowa:* Johnson v. Lincoln Hotel Co., 189 Iowa 29, 177 N. W. 550 (1920); *Massachusetts:* Seaver v. Bradley, 179 Mass. 39, 60 N. E. 795 (1901); *Michigan:* Burgess v. Stowe, 134 Mich. 204, 96 N. W. 29 (1903); *Missouri:* Phegley v. Graham, 358 Mo. 551, 215 S. W. 2d 499 (1948). In this case the court stated that the defendant building owner owed the ordinary degree of care, and that he could not delegate this duty. Kennedy v. Phillips, 319 Mo. 573, 5 S. W. 2d 33 (1928); Cox v. Bondurant, 220 Mo. App. 948, 7 S. W. 2d 403 (1925); *Montana:* Chicas v. Foley Bros. Grocery Co., 73 Mont. 575, 236 Pac. 361 (1925); *New Jersey:* McCracken v. Myers, 75 N. J. L. 935, 68 Atl. 805 (1908); *New York:* Cohen v. Sun Ins. Office, 198 N. Y. 177, 91 N. E. 263 (1910). The court in this case stated that a landlord cannot delegate his duty to use reasonable care in the operation of his elevator so as to relieve himself of liability. *Rhode Island:* Edward v. Manufacturer's Building Co., 27 R. I. 428, 61 Atl. 646 (1905); *Texas:* Martin Inc. Co. v. Trevey, 8 S. W. 2d 527 (Tex. Civ. App. 1928); *Washington:* Myers v. Little Church by the Side of the Road, 37 Wash. 2d 897, 227 P. 2d 165 (1951). Here the court ruled that a master owes his servant the duty of supplying a reasonably safe place of work, and that this duty is non-delegable. *West Virginia:* Brown v. De Marie, 131 W. Va. 264, 46 S. E. 2d 797 (1948).

[4] *Alabama:* Ensley Holding Co. v. Kelly, 229 Ala. 650, 158 So. 896 (1934); Morgan v. Saks, 43 Ala. 139, 38 So. 848 (1905). In this case the court held that the defendant was bound to use the highest degree of care while the plaintiff was entering the elevator as well as while he was in it. *California:* Champagne v. A. Hamburger and Sons, Inc., 169 Cal. 683, 147 Pac. 954 (1915); Treadwell v. Whitier, 80 Cal. 574, 22 Pac. 266 (1889); *Illinois:* Carson v. Weston Hotel Corp., 351 Ill. App. 53, 115 N. E. 2d 800 (1953). Here the court stated the rule as requiring extraordinary care and diligence on the part of the owner. Hefferman v. Mandel Bros., 297 Ill. App. 272, 17 N. E. 2d 523 (1938); *Indiana:* Tippecanoe Loan and Trust Co. v. Jester, 180 Ind. 357, 101 N. E. 915 (1913); *Kentucky:* Kentucky Hotel Corp. v. Camp, 97 Ky. 424, 30 S. W. 1010 (1895); *Minnesota:* Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873 (1889); *Missouri:* Hensler v. Stix, 113 Mo. App. 566, 88 S. W. 108 (1905); *Nebraska:* Grimmel v. Boyd, 94 Neb. 240, 142 N. W. 893 (1913); *Nevada:* Smith v. Odd Fellows Bldg. Ass'n, 46 Nev. 48, 205 Pac. 796 (1922); *Pennsylvania:* McKnight v. S. S. Kresge Co., 285 Pa. 489, 135 Atl. 575 (1926); Fox v. Philadelphia, 208 Pa. 127, 57 Atl. 356 (1904); *Virginia:* Murphy's Hotel, Inc. v. Cuddy's Adm'r, 124 Va. 207, 97 S. E. 794 (1919); *Wisconsin:* Dibbert v. Metropolitan Inv. Co., 158 Wis. 69, 147 N. W. 3 (1914). In all of the above cases the owners of elevators were characterized as common carriers. *Oregon:* Kelly v. Lewis Inv. Co., 66 Ore 1, 133 Pac. 826 (1913). In this case elevator owners were classified as carriers for hire rather than common carriers. *Texas:* O'Connor v. Dallas Cotton Exchange, 153 S. W. 2d 266 (Tex. Civ. App. 1941). Here the defendant was held to the highest degree of care, even though the court refused to hold that he was a common carrier.

[5] Edwards v. Manufacturers Bldg. Co., 27 R. I. 248, 61 Atl. 646 (1905).

[6] Seaver v. Bradley, 179 Mass. 329, 60 N. E. 795 (1901).

ties for use by the general public. On the other hand, courts affording passengers special protection put forward excellent reasons for their decisions. They point to the fact that an elevator passenger is in a completely helpless condition—moving either up or down in a machine over which he has no control, and in which he is unable to protect himself from serious injury or death.[7] Other factors alluded to as good reasons for affording passengers special protection are the owner's knowledge that his facilities will be used by the public, and his derivation of profit from the maintenance of elevators.[8]

Although North Carolina has refused to grant passengers special protection in terms of owners' liability, it has afforded them some aid in suits against one under a contract to maintain the elevators in a safe condition by labeling elevators "dangerous instrumentalities."[9] This label enables persons injured in elevator accidents to recover in actions against persons contracting to maintain elevators, even though plaintiffs in such actions are not parties to the contracts. Several other jurisdictions are in accord with North Carolina on this point.[10] Still others have reached the same result without describing elevators as "dangerous instrumentalities."[11] Those courts finding such a duty point out that where elevators are defective, serious injuries or death is likely to result, and that such results are traceable to failures on the part of the contractor to fulfill his contractual obligation to keep in repair. A few jurisdictions have held that one under a contract to maintain owes no duty to passengers because they are not parties to the contract. However, these cases are either old ones,[12] or ones in which the defect is chargeable to someone other than the contractor.[13]

The Supreme Court of North Carolina has not directly passed upon the protection to be afforded passengers in terms of the duty owed by

[7] Treadwell v. Whitier, 80 Cal. 574, 22 Pac. 66 (1889).

[8] Champagne v. A. Hamburger and Sons, Inc., 169 Cal. 683, 147 Pac. 954 (1915); Hefferman v. Mandel Bros., 297 Ill. App. 272, 17 N. E. 2d 523 (1938). In these cases the courts pointed out that elevator owners, especially department stores and hotels, provide their facilities in order to increase patronage.

[9] Jones v. Otis Elevator Co., 231 N. C. 285, 56 S. E. 2d 684 (1949). Here the court was applying Virginia substantive law. Actually the court stated that an elevator is not an inherently dangerous instrumentality, but that it may become one by the defendant's work on it.

[10] Dahms v. General Elevator Co., 214 Cal. 733, 7 P. 2d 1013 (1932); Berg v. Otis Elevator Co., 64 Utah 318, 231 Pac. 832 (1924).

[11] Carson v. Weston Hotel Corp., 342 Ill. App. 602, 97 N. E. 2d 620 (1951); Dobson v. Otis Elevator Co., 324 Mo. 1147, 26 S. W. 2d 942 (1930). In these cases the courts held the defendants liable on the ground that one who supplies a thing for such use by others where it is obvious that any defect will be likely to result in injury to those so using it, is liable to any person who, using it properly for the purpose for which it was intended, is injured by its defective condition.

[12] Simmons v. Gregory, 27 Ky. L. Rep. 509, 85 S. E. 751 (1905).

[13] McDonald v. Haughton Elevator and Machine Co., 60 Ohio App. 185, 20 N. E. 2d 253 (1938).

elevator manufacturers. In most cases the manufacturers contract with the owners to maintain the elevator in a safe condition, and suits are brought against manufacturers for failure to maintain and not on the grounds of negligent manufacturing. Most jurisdictions that have determined the duty of manufacturers have preferred to protect the passenger by finding a duty of ordinary care owed to members of the public although there is no privity of contract between the defendant manufacturer and the complaining passenger.[14] Only one case has flatly refused to find such an obligation,[15] and the court deciding it failed to give any reasons for so holding.

Regardless of their approach with regard to the duty owed, whether by manufacturers, contractors to maintain or owners, a number of the courts have enabled complaining passengers to withstand nonsuits, even though they fail to prove any specific negligence on the part of the defendants, by the use of the res ipsa loquitur doctrine.[16] One court has disagreed with this view for technical reasons,[17] but policy, at least, seems to be on the side of the courts accepting this view. As a practical matter, it is almost impossible to prove what specific negligence was the cause of an elevator accident, even though such accidents are not likely to occur without negligence on someone's part.

Some courts have further aided injured elevator passengers by stating that passengers can rely on the safety devices with which elevators are equipped,[18] thus limiting the availability of the defense of contributory negligence as a bar to their action.

Throughout the cases affording passengers protection runs a cogent line of reasoning, as follows:

1. Elevator passengers are in a completely helpless position.

[14] Buteman v. Doughnut Corp., 63 Cal. App. 2d 711, 147 P. 2d 404 (1944). In this case the court ruled that, as the defendant was the manufacturer of an inherently dangerous instrumentality, he owed a duty to the plaintiff even though there was no privity of contract between the defendant and the plaintiff. Dahms v. General Elevator Co., 214 Cal. 733, 7 P. 2d 1013 (1932).

[15] McDonald v. Haughton Elevator and Machine Co., 60 Ohio App. 185, 20 N. E. 2d 253 (1938).

[16] *Illinois:* Carson v. Weston Hotel Corp., 351 Ill. App. 523, 115 N. E. 2d 800 (1953); Hefferman v. Mandel Bros., Inc., 297 Ill. App. 272, 17 N. E. 2d 523 (1938); *North Carolina:* McIntyre v. Monarch Elevator and Machine Co., 230 N. C. 539, 53 S. E. 2d 528 (1949); Stewart v. Carpet Co., 138 N. C. 60, 50 S. E. 562 (1905); *Pennsylvania:* McKnight v. S. S. Kresge Co., 285 Pa. 489, 132 Atl. 575 (1926); Fox v. Philadelphia, 208 Pa. 127, 57 Atl. 356 (1904); *Wisconsin:* Dibbert v. Metropolitan Inv. Co., 158 Wis. 69, 147 N. W. 3 (1914).

[17] Feinberg v. Hotel Olmsted Co., 152 Ohio St. 417, 89 N. E. 2d 569 (1949). The court here refused to apply the res ipsa loquitur doctrine to an elevator injury where the machine was a self-service elevator on the grounds that it was not within the exclusive control of the defendant.

[18] Morgan v. Saks, 43 Ala. 139, 38 So. 848 (1905); Hood v. Mitchell, 206 N. C. 156, 173 S. E. 61 (1934); Garret v. Eugene Medical Center, 190 Ore. 117, 224 P. 2d 563 (1950).

2. Owners, contractors to maintain, and manufacturers provide their services for profit.

3. The defects which result in injury are traceable to some dereliction in duty on the part of either the owner, the one under a contract to maintain or the manufacturer.

4. The specific negligence causing the accident is hard to determine and prove.

5. Where one of two parties has to suffer, the law will cast liability on the one who made the injury possible who, in these cases, happens to be either the owner, the contractor, or the manufacturer.

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Torts—Nuisance—Wild Animals

The North Carolina Supreme Court was recently faced with a most interesting and unique case arising out of a dispute between adjoining landowners culminating in an action founded on a theory of nuisance.[1] The defendant in this case constructed on his farm in Richmond County an artificial pond of about three and one half acres at a point within 400 feet of the neighboring plaintiff's farm. During the winter of 1951-52 the defendant placed lame wild geese on his pond and baited the surrounding area of the pond with food, thus attracting large numbers of migrating geese, southward bound in search of comfortable winter quarters. Between the months of October 1951 and June 1952 approximately 200 wild geese nestled by the defendant's pond and from there foraged on the plaintiff's corn field destroying about one and one half acres of corn with a market value of $48.00. The next winter the migrating flock returned, but increased in numbers, and 1200 geese fed on $105.00 worth of the plaintiff's corn. During the winter of 1953-54 the geese returned for the third time, 3000 strong, and consumed 400 bushels of the plaintiff's wheat ($1,036), seven acres of pasture grass ($100), 140 bushels of barley ($154), and 75 bushels of oats ($52), causing the plaintiff damages totalling some $1,343.00 for the year.

The defendant, demurring, answered that the complaint failed to allege any duty owed the plaintiff to protect his property from wild geese, or that the defendant was negligent in this respect, or in any respect proximately causing the plaintiff's injury; and that since plaintiff failed to allege that the defendant in any way owned, possessed or controlled the wild geese, he could not be liable for the trespasses of animals which are *ferae naturae*.

The supreme court, overruling the trial court, held that the plaintiff had stated a good cause of action. The court pointed to the fact

[1] Andrews v. Andrews, 242 N. C. 382, 88 S. E. 2d 88, (1955).