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Torts—Negligence—Liability of Storekeeper to Infant Invitee, Hammontree v. Edison Bros. Stores, 270 S.W.2d 117 (Mo. App. 1954)

MISSOURI SECTION

COMMENTS

TORTS—NEGLIGENCE—LIABILITY OF STOREKEEPER TO INFANT INVITEE

Hammontree v. Edison Bros. Stores, 270 S.W.2d 117 (Mo. App. 1954)

Plaintiff, an eighteen-month-old boy, accompanied his mother into defendant's shoe store. While his mother went to the back of the store to examine shoes, plaintiff stood unattended near the doorway. The entrance doors and adjacent panels were constructed of thick plate glass, and appeared to be a continuous sheet of glass. When one of the doors was opened, a space of about an inch was created between the hinged edge of the door and its adjacent panel.[1] Plaintiff apparently thrust his hand into the space created when the door was opened by someone entering or leaving the store; when the door swung shut it crushed plaintiff's hand. The trial court gave judgment for defendant notwithstanding a jury verdict for plaintiff. The Kansas City Court of Appeals, reinstating the verdict for the plaintiff, found that the child was an invitee and held that, although there was no evidence of any defect in the condition or construction of the door, there was sufficient evidence for a jury to find that in the exercise of ordinary care defendant should have foreseen that the door was dangerous to a child of the plaintiff's age, and that failure to take remedial measures or to warn the plaintiff of this danger was actionable negligence.[2]

Persons who are expressly or impliedly invited to enter the premises of another for the transaction of business or for some other purpose which concerns the proprietor are considered invitees.[3] The owner of a place of business owes a duty to an invitee to exercise reasonable care to discover dangerous conditions on his premises, and either to make them safe or to warn the invitee of their existence.[4] Virtually all courts which have considered the question hold that a child accompanying an adult into a commercial establishment has the status of an invitee, although the child himself has no business dealings with the owner.[5] Missouri is in accord with the great majority of states

1. Photographs of the defendant's doorway are to be found in Hammontree v. Edison Bros. Stores, 270 S.W.2d 117, 120-21 (Mo. App. 1954).
2. Hammontree v. Edison Bros. Stores, 270 S.W.2d 117 (Mo. App. 1954).
3. PROSSER, TORTS § 79 (1941); RESTATEMENT, TORTS § 332 (1934); Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942).
4. PROSSER, TORTS § 79 (1941); RESTATEMENT, TORTS § 343 (1934); Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942).
5. Crane v. Smith, 23 Cal. 2d 288, 144 P.2d 356 (1943); Weinberg v. Hartman, 45 Del. 9, 65 A.2d 805 (Super. Ct. 1949); Wheaton v. Goldblatt Bros., 295 Ill. App. 618, 15 N.E.2d 64 (1938); Howlett v. Dorchester Trust Co., 256 Mass. 544, 152 N.E. 895 (1926); Miller v. Peck Dry Goods Co., 104 Mo. App. 609, 78 S.W.

in this regard,[6] and the plaintiff's status as an invitee was not contested in the principal case.[7]

Where a child-invitee has not achieved the "age of discretion"—generally considered to be reached somewhere above the age of three[8]—the business-owner owes him a much greater duty in regard to his safety than is owed an adult invitee.[9] The business-owner is required to anticipate the childish impulses of very young children, and to take reasonable measures to avoid injury to the child-invitee which could foreseeably result from such impulses.[10] Nor is the defense of contributory negligence available to the business-owner as against such children, since, due to their extreme youth, they are generally held incapable of contributory negligence.[11] Therefore, business-owners have been repeatedly held liable to child-invitees of the age of the plaintiff in the principal case for injuries received through instrumentalities such as coffee-grinders,[12] escalators,[13] and swinging doors,[14] which are customarily harmless to a non-negligent adult.

Although no court is willing to hold that the business-owner is an insurer of the safety of child-invitees on his premises,[15] the principal case, in which the business-owner is held liable for failing to guard against injuries received from a properly-maintained, commonplace instrumentality, has virtually the same effect. If the business-owner is to be declared liable for failing to warn or to take precautions against remote and relatively unforeseeable dangers to small children which necessarily accompany the use of such essential instrumentalities as doors, radiators, and escalators, he might as well resign himself to the position of insurer. This is true because very young children are impervious to warnings,[16] and precautions—which in many instances

682 (1904); Walec v. Jersey State Electric Co., 125 N.J.L. 90, 13 A.2d 301 (Sup. Ct. 1940); Carlisle v. Weingarten, 137 Tex. 220, 152 S.W.2d 1073 (1941). *Contra*, Petree v. Davison-Paxon-Stokes Co., 30 Ga. App. 490, 118 S.E. 697 (1923), where the child was held to be only a licensee.

6. Graves v. May Dep't Stores Co., 153 S.W.2d 778 (Mo. App. 1941); Miller v. Peck Dry Goods Co., 104 Mo. App. 609, 78 S.W. 682 (1904).

7. Hammontree v. Edison Bros. Stores, 270 S.W.2d 117, 125, 128 (Mo. App. 1954).

8. See PROSSER, TORTS § 36 (1941).

9. Crane v. Smith, 23 Cal. 2d 288, 144 P.2d 356 (1943); Burdine's, Inc. v. McConnell, 146 Fla. 512, 1 So. 2d 462 (1941); Hillerbrand v. May Mercantile Co., 141 Mo. App. 122, 121 S.W. 326 (1909); Bowers v. City Bank Farmers Trust Co., 282 N.Y. 442, 26 N.E.2d 970 (1940).

10. Hillerbrand v. May Mercantile Co., 141 Mo. App. 122, 133, 121 S.W. 326, 328 (1909).

11. See PROSSER, TORTS § 36 (1941).

12. Crane v. Smith, 23 Cal. 2d 288, 144 P.2d 356 (1943).

13. Burdine's, Inc. v. McConnell, 146 Fla. 512, 1 So. 2d 462 (1941); Graves v. May Dep't Stores Co., 153 S.W.2d 778 (Mo. App. 1941).

14. Young v. Bank of America, 95 Cal. App. 2d 725, 214 P.2d 106 (1950).

15. PROSSER, TORTS 642 (1941).

16. The child himself will probably not understand the warning, and the only efficient means of communication would be to warn the accompanying parent. But this would not protect the business-owner, since if the parent negligently failed

would require the placing of an employee to guard against the danger—may well be economically prohibitive.

A surprising number of cases, however, have in effect taken this view by allowing the jury to decide, upon the slightest evidence, whether a reasonable man would have foreseen the danger and would have taken steps to avert injury.[17] The jury, whose sympathies are invariably aroused in favor of the injured child, is prone to disregard both the impossibility of warning young children and the economic prohibition against guarding young child-invitees from all of the remote dangers to be encountered in a place of business, and declare that since the injury was foreseeable, the business-owner should have taken steps to prevent it.

The groundwork for the holding in the principal case was apparently laid in the 1941 St. Louis Court of Appeals decision of *Graves v. May Dep't Stores Co.*,[18] in which a two-and-a-half-year-old plaintiff was injured by defendant's escalator when he stuck his fingers between the moving stair-treads and the "comb-plate" under which the treads passed at a landing. Although the escalator was the latest and safest model available, and there was no evidence of any defect in its construction or maintenance, the jury was allowed to find the defendant negligent for failing to foresee the injury and to take proper measures to safeguard the plaintiff from the danger.

The principal case, however, would seem to go a step beyond the *Graves* decision in holding the business-owner liable without appreciable fault. For while the department store owner could have prevailed upon escalator manufacturers to use known principles to produce child-proof escalators,[19] the business-owner in the principal case had little opportunity to improve his glass doors, since the basic principles of doors are such that a determined infant can always manage to crush a finger in them.

Surely, no court is willing to suggest that the use of common instrumentalities such as plate-glass doors or escalators should be dis-

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to protect the child, this negligence could not be imputed to the child, and the child could recover from the business-owner in spite of the warning. Cases holding that the negligence of the parent cannot be imputed to the child include: Jacksonville Electric Co. v. Adams, 50 Fla. 429, 39 So. 183 (1905); Petree v. Davison-Paxon-Stokes Co., 30 Ga. App. 490, 118 S.E. 697 (1923); Neff v. City of Cameron, 213 Mo. 350, 111 S.W. 1139 (1908).

17. See, *e.g.*, Takashi Kataoka v. May Dep't Stores Co., 60 Cal. App. 2d 177, 140 P.2d 467 (1943); Burdine's, Inc. v. McConnell, 146 Fla. 512, 1 So. 2d 462 (1941); Howlett v. Dorchester Trust Co., 256 Mass. 544, 152 N.E. 895 (1926); Jablonski v. May Dep't Stores Co., 153 S.W.2d 786 (Mo. App. 1941); Graves v. May Dep't Stores Co., 153 S.W.2d 778 (Mo. App. 1941).

18. 153 S.W.2d 778 (Mo. App. 1941).

19. In the *Graves* case, the court agreed that from the evidence presented, it could be inferred that escalator manufacturers knew means of making escalators completely safe. Graves v. May Dep't Stores Co., 153 S.W.2d 778, 785 (Mo. App. 1941).

continued. Rather, it would seem that, in spite of their language disclaiming the imposition of strict liability, the courts are willing to make damages for injuries to very young child-invitees a part of the cost of doing business. All the business-owner can do is hope that such occurrences are infrequent, yet make necessary provision, such as the purchase of insurance, for ultimate possibilities.