

## NEGLIGENCE IN LAW\*

### II.

#### RESPONSIBILITY.

To be able to exercise "care according to the circumstances" there must be capacity to form a judgment as to what the circumstances require and act accordingly. One who has no such capacity is not responsible for his actions. Thus idiots who never had, or have completely lost, mental intelligence, and young children whose faculties have not matured sufficiently to enable them to act with intelligence are free from responsibility. In regard to weak-minded persons not so defective as to be styled idiots capacity or non-capacity must be proved, as it must in the case of lunatics or maniacs. A lunatic is not always insane and may not be insane in every respect.

Mr. Beven discusses this question in the third chapter of his treatise entitled "Limits of Liability." He there says (writing twenty years ago) that opinion in the United States as to it was divided, Dr. Wharton declaring against responsibility and Sherman & Redfield contra, with judicial opinions pro. and con. There may still be division, but in 1925 the State Court of Oregon decided, *Fisher v. Burrell*,<sup>1</sup> according to Wharton's view and cited decisions of several other State Courts to the same effect. In England, says Beven, the law is the same though no case actually decides the question, and it must still be regarded as a matter of principle only. However, Farwell, J., says in *Latham v. Johnson*,<sup>2</sup> that "a child may be too young to be guilty of contributory negligence." In Canada judicial opinion is against responsibility.<sup>3</sup>

Then there is the responsibility of a person who sets his motion a dangerous element; he is, subject to the intervention of third parties, responsible for all the consequences that result from his action. An example of this is the leading case of *Scott v. Shepherd*.<sup>4</sup> The defendant threw a lighted squib in a market and it fell upon

\*This is the second of a series of articles on Negligence in Law, by Mr. Masters, the first will be found on p. 181, *ante*.

<sup>1</sup> 241 Pac. R. 40.

<sup>2</sup> [1913] 1 K.B. 398 at p. 407.

<sup>3</sup> See *Acadia Coal Co. v. MacNeil*, [1927] S.C.R. 497.

<sup>4</sup> 3 Wils. 403; 1 Smith L.C. (11th ed.) 454.

the standing of one Y. A bystander, to protect himself and the goods of Y, picked it up and threw it on to another standing, whose owner threw it to another part of the market-house and in so throwing it struck the plaintiff and the combustible matter then bursting, put out one of his eyes. The defendant was held liable for this injury.

This case is an example of what is styled "unconscious agencies" in said third chapter of Beven. He defines the term as meaning agencies intervening between the original wrongdoer and the victim or between him and a conscious agent. A case which he cites from the United States, *Thomas v. Winchester*<sup>5</sup> makes this clear.

Plaintiff purchased from a druggist what he believed to be medicine prescribed for his sick wife; the druggist had purchased it from a dealer in New York who had bought it from defendant. What was supplied plaintiff, though labelled as such, was not the medicine prescribed but a dangerous ingredient which seriously injured the sick wife. The defendant was held liable, the jury finding that neither of the intermediate druggists was guilty of negligence. If it was their duty or the duty of either of them to test the article purchased the defendant was not responsible; if no such duty existed but they were mere conduit pipes he was. So in the Squib case, if the squib when first thrown had landed in a place where it could do no harm and a bystander had picked it up and thrown it from him the original owner would have been exonerated.

This raises a subsidiary question, namely, the right of one who buys goods to rely on the reputation and good faith of the seller. Beven states, as a principle judicially recognized, that every person pursuing his lawful affairs in a lawful way has a right to act on the assumption that every other person will do the same thing. He gives as an example the case of Bass's bottled ale being ordered from a dealer who obtains properly labelled bottles from the proper source which proved to contain vitriol from tasting which the purchaser is injured. The dealer is not responsible for two reasons. First, he did all that he could, and what any dealer would have done, to obtain the article ordered; secondly, not only was no duty cast upon him to examine the contents of the bottles but doing so would be a breach of duty as breaking the label and unsealing the bottles would destroy the value of what he agreed to supply. This, apparently, was only a supposed case but the reasoning cannot be controverted. A Scotch case, which Beven cites, entirely supports it. The Court there says: "A grocer who gets a quantity of tins of preserved food and sells them to the public as he got them cannot

<sup>5</sup>6 N.Y. 107.

be liable for the condition of the contents of the tins if he buys from a dealer of repute."

The above doctrine as to intermediate agents is applicable also to the case of a person who knowingly sells goods of a dangerous character. If the purchaser is one who is not or may not be aware of their nature the seller's duty is to warn him; but if he sells to one who knows the danger and passes it on to a third person without warning, the original seller is not responsible if injury results.

Next is responsibility for injury done under compulsion. It is difficult to conceive a case of injury to person or property under physical compulsion. One is suggested in *Weaver v. Ward*,<sup>6</sup> which is: If a man by force take my hand and strike another I am not liable. That must mean, of course, a man of muscular power against which I am helpless. If I am strong enough to prevent the injurious act and do not do so I would be liable.

But the compulsion may be other than physical. It may be exercised through terror or, as in the *Squib* case, from the instinct of self-preservation. Another example is that of a man riding on a coach and being placed in a perilous position by the breaking of a coupling rein jumps off and breaks his leg. *Jones v. Boyce*.<sup>7</sup> The legal position is that if the man was, by the negligence of the coach owner, placed in a situation which compelled him either to take a dangerous leap or remain at certain peril, the owner is responsible, but if he acted rashly and imprudently under an apprehension of danger which did not exist he has no remedy. This is only a decision at *nisi prius* but has been approved in later cases.

Compulsion by terror is well exemplified by an American case cited by Beven. A woman walking along the street was frightened by the attempt of a man to molest her and in her effort to escape fell into a hole negligently left on the side of the way. As she was well aware of the existence of this hole it would have been negligence on her part to fall into it had she been going past in the ordinary way, but under the circumstances contributory negligence was negatived. The Court said that fright would justify a momentary forgetfulness of the condition of the way. And Lord Blackburn said in *The Khedive*<sup>8</sup> that "when a man is suddenly and without warning thrown into a critical position, due allowance should be made for this."

<sup>6</sup> Hob. 134.

<sup>7</sup> 1 Stark. N.P. 493.

<sup>8</sup> (1879-80) 5 A.C. 891.

Lastly is the application of the maxim *volenti non fit injuria*. One who voluntarily incurs a risk must himself bear the consequences. He must know what the risk is but given that knowledge the injuring party, though negligent, is not responsible.

This principle is best expressed by the case of one who accepts employment in a dangerous place such as a factory for making explosives or one with defective machinery. If he is made aware of the dangers which will confront him and how to avoid them he is without remedy if injured thereby. But this is subject to the qualification that the conditions existing at the making of his contract shall continue. If, for instance, during his employment in the factory making explosives the making of other and more dangerous explosives is introduced without his knowledge he has a remedy if injured thereby. So, also, as to defective machinery. If machinery represented at the outset as in proper condition becomes defective, of which he is not informed, and causes him injury again he has his remedy.

The maxim explains itself. The one who meets danger of his own will must be capable of realizing the risk; therefore it will not be applicable to young children and persons mentally defective. And even where danger from a moving vehicle is encountered by a man in a state of great mental abstraction when his condition is evident to the driver the latter may be liable.<sup>9</sup> But a normal person running into danger of his own free will must bear the consequences.

A late case as to this is *Sigerseth v. Pederson*,<sup>10</sup> which is not entirely satisfactory. The respondent Pederson was employed on a farm and lived in a shack with the farmer. In the shack kitchen was a stove which smoked badly. It had a pipe carried from the stove through the roof with a roof-jack for a chimney to carry off the smoke. Towards winter the two men cleaned the stove and pipes and set them up again. One night Pederson not feeling well went to bed in a room adjoining the kitchen with an opening in the wall. The farmer agreed to sit up and look after the stove as it was very cold weather. Two days later Pederson awoke with both feet frozen. He went into the kitchen and found his employer dead on the floor and his body frozen.

The trial Judge held that negligence by deceased was not proved and dismissed the action. The Court of Appeal gave judgment

<sup>9</sup> *Long v. Toronto Ry. Co.*, 50 S.C.R. 224. See also *Ottawa Elec. Ry. Co. v. Booth*, 63 S.C.R. 444

<sup>10</sup> [1927] S.C.R. 342.

for Pederson. The Supreme Court of Canada reversed the judgment of the Court of Appeal, agreeing with the trial Judge as to negligence of deceased and also holding that in the words of the written opinion "it is not merely a case of knowledge by the respondent of a possible danger but of free acceptance by him of any risk there might have been in the existing conditions."

I have said that this decision is not entirely satisfactory. The *volens* of Pederson is based upon the fact that he elected to live in the shack knowing the conditions there. There are several considerations to be noted with respect to that. First, he evidently had to live there or give up his employment; secondly, it is fairly well proved that both Pederson and the deceased were Norwegians, which would be a reason for the former to want to live there. Then as to the conditions; there is nothing inherently dangerous in smoke from a stove, at all events not to a young foreigner who had had no experience of stoves of the kind and knew that his employer had. Then stress is laid on the belief of both that the emission of smoke was caused by a defect in the stove itself and that neither imagined it was due to the pipe or chimney. But Pederson knew nothing about it. He, no doubt, merely accepted the statement of deceased as a much older man who had been using this stove for some time and would be supposed to know. Further it appears from the position of the body of deceased that he was overcome when trying to get to the door and open it to let the smoke out. Had he succeeded in doing so the injury to Pederson would not have happened. But can it be said that the death of his employer at this precise time was a risk that Pederson knew he was taking when he agreed to live in the shack? I would say it certainly was not. And finally the cause of the farmer's death can only be conjectured. A physician at the trial said he died from suffocation by coal gas, but all he knew was that coal gas may have come out of the stove, and that coal gas in a closely shut room can kill a man. But while I cannot speak of it from the medical standpoint, I consider it strange that coal gas in sufficient quantity to kill one man would leave another only a few feet away suffering no ill effects from it. It is quite as reasonable to suppose that the deceased had some inherent weakness which succumbed to the conditions in which he found himself. If that were so it was again not a risk which Pederson undertook. In fact in view of his youth and nationality, I doubt that death from coal gas was such a risk.

A decision of the Judicial Committee of the Privy Council expresses the principle of the maxim very concisely and clearly. In

*Letang v. Ottawa Electric Ry. Co.*,<sup>11</sup> it is said that if the defendant wishes to rely on the maxim *volenti non fit injuria* there must be a finding of the fact that the plaintiff freely and voluntarily agreed by implication to run the risk with *full knowledge* of its nature and extent. The maxim does not, as a rule, apply when danger is incurred in an effort to save human life.<sup>12</sup>

Though it is not relevant to the question of *volens* which is being considered nor to the subject of responsibility with which this instalment deals, I think it well to add a word as to the negligence of the deceased in the case of *Sigerseth v. Pederson*. He owed a duty to Pederson, his lodger, not only to provide him with food and warmth but to protect him from harm in the shack as far as was in his power. Was that duty fulfilled by his assumption, in good faith no doubt, that the emission of smoke resulted from a defect in the stove and not from the appliance erected for the express purpose of carrying the smoke away? And especially when he found that the mischief increased with the low temperature was he justified in adhering to his theory of the cause with no regard to this appliance which was directly exposed to the atmosphere? The opinion of the Supreme Court says that there was no proof as to when the condition of the roof-jack which so intensified the trouble from the stove began or that it existed prior to the 16th of December, when Pederson last saw his employer alive. No direct proof it is true. But the report in 20 Sask. tells us that the severe weather began on the 14th. If the deceased who knew that matters were becoming worse had examined it on the 16th it is quite probable that he would then have discovered the cause even though the roof-jack was not so badly choked up as it was when examined on the 19th. On the whole I am more inclined to the view of the Saskatchewan Court of Appeal than to that of the Supreme Court.

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<sup>11</sup> [1926] A.C. 725.

<sup>12</sup> See Beven, vol. I, p. 632.