Maryland Law Review

Volume 8 | Issue 2 Article 5

Degree of Care Owed by Shopkeeper to Business Invitee - Biggs v. Hutzler Brothers Co.

DEGREE OF CARE OWED BY SHOPKEEPER TO BUSINESS INVITEE

Biggs v. Hutzler Brothers Co.[1]

Plaintiff, a customer, was walking east in a twelve-foot aisle of defendant's department store. A female employee of the store, walking south along a cross aisle, collided with plaintiff and caused her to fall, breaking her wrist. Merchandise displayed in the aisles appears to have obstructed the view of both parties so that neither saw the other advancing; but plaintiff testified that she was aware, out of the corner of her left eye, of an approaching figure just before the impact. Suit for damages was decided in favor of defendant, and affirmed.

The questions of law presented are as to what rule of negligence governs under the circumstances and what precedents may properly be applied to the facts. A business invitee, using reasonable care on his own part for his own safety, is entitled to expect that the occupier of the premises will exercise, on his part, reasonable care to prevent damage from unusual danger of which he knows or ought to know;[2] and where there is evidence of neglect, the questions as to whether or not reasonable care has been taken, and whether there was contributory negligence must be determined by the jury.[3] Counsel for the plaintiff cited *Moore v. American Stores Co.*[4] to show that a higher degree of care and diligence is required by one who invites the public to his premises; but, in that case, the facts were that a greasy substance was left on the floor, which substance caused the customer to slip and fall. The Court held that the rule was inapplicable to the case at hand because this accident was not due to any foreign substance on the floor nor to boxes or obstructions placed in the aisle, as in *Chalmers v. Tea Co.*,[5] but resulted from normal use of the two aisles intersecting at right angles, one being used by the patron of the store and the other by an employee. The question is, then, whether either party was negligent; and if so, which one, or both. That issue was fairly submitted

[1] 181 Md. 50, 28 A. (2d) 609 (1942). For the trial court opinion denying the plaintiff's motion for a new trial, see Baltimore Daily Record, February 10, 1942.

[2] Indermaur v. Dames, L. R. 2 C. P. 311 (1867). See also PROSSER, TORTS (1941) 642.

[3] *Ibid.*

[4] 169 Md. 541, 182 A. 436 (1936).

[5] 172 Md. 552, 192 A. 419 (1937).

to the jury on the facts as a question for them to determine. The verdict does not disclose whether there was found no negligence on either side or whether both were negligent in not seeing each other, for in either case the verdict should be for defendant.

The most generally accepted theory for the basis of the special obligation placed on an occupier of land who invites the public to his premises is based on the economic benefit to him from the presence of the visitor. On this basis, there must be at least a potential profit to the shopkeeper in the business of the invitee. A second theory is that the occupier impliedly represents that reasonable care has been exercised to make the premises safe for those who come on the property for the purpose intended by the occupier. Historically, the former theory carries the greater weight, but more recent trends indicate that the second is gaining favor.

As pointed out by the Court, this case is the first of its kind known in this jurisdiction; and there are only two other known cases dealing with like or similar circumstances in the country, one in Connecticut, the other in California.[6] In the Connecticut case, plaintiff contended that he, as an invited guest, was entitled to a higher degree of care on the part of defendant than would be required in the pursuance of ordinary business operations; but the Court, referring to its refusal to apply the doctrine of a higher and different standard of care than in ordinary business to the conduct of places of public amusement, said:

> "Due care in such a case is care proportional to the nature of instrumentalities involved and the circumstances ordinarily attendant. Due care may in any given case mean great care; the care is always to be proportionate to attendant requirements and hazard".

In *Schell v. United Rys. & Electric Co.*,[7] the Maryland Court said, similarly:

> "Negligence is essentially relative and comparative and dependent on circumstances, and its existence is therefore to be determined from the facts and surroundings of each case".

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[6] Geoghegan v. G. Fox & Co., Inc., 104 Conn. 129, 132 A. 408 (1926); and Brisbin v. Wise Co., 6 Cal. Ap. (2d) 441, 44 P. (2d) 622 (1935).

[7] 144 Md. 527, 125 A. 158 (1924).

This "due care" is what is required of a department store. It must not by its own "active negligence" injure the invitee.

In the California case,[8] it was held that the plaintiff was under a duty to keep a lookout for clerks and other persons using the aisleways; and it was just as much her duty to exercise the care of an ordinarily prudent person for her own safety as it was the duty of defendant to exercise such case, each owing the same degree of care to avoid injury to the other.

Objectively, this case serves to determine whether the rule of "greater degree of care", as applied by the courts with respect to a shopkeeper's premises, would be applied also to his duty respecting the conduct of his employees. The duty as to premises has been summarized:

> "Thus, while a merchant who invites the public on his premises to inspect and purchase goods is held to a higher or greater degree of care and diligence than otherwise, yet he is not an insurer of the safety of his patrons, and is therefore not liable for injuries caused by some defect in the premises, in the absence of any evidence tending to show that he or his agents knew or should have known, by the exercise of reasonable diligence, of this defect".[9]

In *Moore v. American Stores Co.*,[10] the Court of Appeals of Maryland criticizes this statement as not entirely accurate, saying:

> "The inviter, under such circumstances, is under no duty to exercise any higher or greater degree of care than any other inviter would be; but, to discharge the duty imposed on him of exercising ordinary care for the safety of business visitors to his premises, he may be required to take different measures or precautions than would one who invited others to his private residence for purposes of social intercourse or even business."

It is evident that plaintiff sought this additional protection to his interests. But, of course, the rule of shopkeeper's liability includes only injuries arising *"on ac-*

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[8] *Supra*, n. 6.
[9] Note (1924) 33 A. L. R. 176, 186.
[10] 169 Md. 541, 546, 182 A. 436 (1936).

count of conditions of the premises",[11] and *Moore v. American Stores Co.* also dealt with such a situation. However, in the case of *Brisbin v. Wise Co.*,[12] the question of the duty of the shopkeeper to keep premises and passageways in safe condition, and use ordinary care to avoid injuring his patrons and invitees is entirely beside the issues in the case, and the Supreme Court held that the trial court properly declined to instruct on that subject.

The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against defendant's conduct.[13] The conduct complained of is the act of walking without observing the progress of others who may be moving so as to intersect the path, with attendant risk of collision.

Unless the progress of the injuring party be so swift or unpredictable as to prevent the one injured from avoiding contact, there seems to be no reason why the accident should occur; for if the path be straight and the speed moderate, an ordinarily prudent person could contrive to be out of danger's way, or if the traveler should come upon a "blind" intersection, knowing it to be there or having reason to believe that it might be there, he should prepare himself for the contingency of meeting someone at the crossing of the ways. It therefore follows, that unless some recklessness in defendant be shown, plaintiff will be faced with the difficult problem of explaining why he did not avoid the collision; for it is not a foregone conclusion that the party injured may obtain for his interests protection at the hands of the courts when he has failed to use care and diligence to protect them for himself.

Certainly the plaintiff received full protection when in the instant case the jury was allowed to pass on such matters when nothing more than the fact of injury was shown to indicate the defendant's negligence.

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[11] Note (1924) 33 A. L. R. 176, 181 (italics supplied).
[12] *Supra*, n. 6.
[13] PROSSER, TORTS (1941) 180.