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AN INSURER'S LIABILITY TO THIRD PARTIES FOR NEGLIGENT INSPECTION

INTRODUCTION

Although liability arising from mutual promises is governed by the law of contracts,¹ a different situation is presented when one unilaterally decides to act. Because such a unilateral undertaking is not supported by consideration, it was early recognized that such promises were unenforceable under general contract principles.² However, tort law might provide a basis for liability "if a man takes upon himself expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage."³ Tort law will not hold an individual responsible for failing to do that which he was not required to do; however, once a person does act he may be held liable for performing his task poorly.⁴ Liability is most likely to be imposed when another party relies on the actor's promises and is injured because of that reliance.⁵ A more difficult case is presented when the damage suffered is due to something other than reliance.⁶

These concepts are especially relevant to insurance law.⁷ An insurer may decide to inspect its insured's premises and equipment even though it has no obligation to do so. If the inspection fails to disclose a dangerous or unsafe condition and a patron or employee is injured as a result of that condition, the courts must decide how the theory of gratuitous assumption of performance will be applied.⁸

This comment will focus upon the liability of an insurer for negligent inspection of an injury-causing instrumentality.

¹ RESTATEMENT (SECOND) OF CONTRACTS § 1 (1973).

² *Coggs v. Bernard*, 2 Lord Raymond 909, 92 Eng. Rep. 107 (Q.B. 1703).

³ *Id.* at 107. Judge Cardozo updated the principle: "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *Glanzer v. Shepard*, 135 N.E. 275, 276 (N.Y. 1922).

⁴ *Seavey, Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 914-15 (1951).

⁵ *Id.* at 928.

⁶ The most relevant example is when a *third* party is injured because of an actor's negligent performance of an activity undertaken for the benefit of the actor and a second party.

⁷ 16 J. APPLEMAN & J. APPLEMAN, *INSURANCE LAW AND PRACTICE* 641 § 8883 (1968).

⁸ *Id.*

More specifically, examination will be directed toward cases where the injured party alleges: (1) that the defendant insurance company gratuitously undertook the responsibility of inspecting the property of its insured; (2) that the insurer failed to inspect properly; and (3) that the injury could have been avoided by proper inspection.⁹

I. NEGLIGENT INSPECTION IN KENTUCKY

The Kentucky courts have not expressly found an insurer liable for negligent inspection. However, several cases suggest that, in the proper circumstances, such a holding would be possible.

In *Ward v. Pullman Car Corp.*,¹⁰ the Kentucky Court of Appeals held that an injured railroad brakeman had a cause of action against other employees who had negligently inspected a railroad car. The Court stated, "It is not a case of mere failure to act, but it is a case of one who was charged with the duty of seeing that the car was safe. . . . If they had not inspected the car at all . . . a different question would be presented."¹¹

In *Murray v. Cowherd*,¹² the president of a telephone company was held personally liable for negligently inspecting a telephone pole that subsequently fell and injured the plaintiff. The Court indicated that "[t]here is no reason for making a distinction between acts of commission and omission when each involves a breach of duty."¹³ Once a duty of inspection is established, a breach of the duty results in liability to those to whom the duty runs—in this case, to third persons.

The Restatement (Second) of Torts provides for liability to third persons for gratuitous endeavors in section 324A.¹⁴ Kentucky has not expressly followed this provision; however, Judge Scott Reed argued for its application in a case in which it was alleged that a design engineer had been negligent.¹⁵ Sec-

⁹ This focus is necessary since "[n]egligence in the air, so to speak, will not do." F. POLLACK, *LAW OF TORTS* 345 (15th ed. 1951).

¹⁰ 114 S.W. 754 (Ky. 1908).

¹¹ *Id.* at 756.

¹² 147 S.W. 6 (Ky. 1912).

¹³ *Id.* at 9 (quoting *Haynes' Adm'rs v. Cincinnati, N.O. & T. P. R. Co.*, 140 S.W. 176 (Ky. 1911)).

¹⁴ For the text of § 324A, see text at note 22 *infra*.

¹⁵ *Rigsby v. Brighton Engineering Co.*, 464 S.W.2d 279 (Ky. 1970)(concurring opinion by Reed, J., in which two judges joined).

tion 324A provides three bases for placing liability on gratuitous actions and its adoption could certainly result in liability for insurers in a large number of cases.

The issue of an insurer's liability arises often in workmen's compensation cases.¹⁶ In most cases, the injured employee sues the insurance company pursuant to a provision in the state's workmen's compensation law allowing suit against a third party, other than the employer, who has caused the injury through negligence.¹⁷

*Bryant v. Old Republic Insurance Co.*¹⁸ is the only case in which a court has considered Kentucky's workmen's compensation law in regard to the issue of negligent inspection by an insurance company. In *Bryant*, miners employed by the Peabody Coal Company alleged that negligent inspection by the company's compensation insurer resulted in their injury.¹⁹ Reversing the district court, the Sixth Circuit held that a compen-

¹⁶ Larson, *Workmen's Compensation Insurer As Suable Third Party*, 1969 DUKE L. J. 1117.

¹⁷ *Id.* at 1118. Several states specifically exclude the insurer from liability. See, e.g., ILL. ANN. STAT. ch. 48, § 138.5(a) (Smith-Hurd Supp. 1977); IOWA CODE ANN. § 88A.14 (West 1972) (repealed by 1972 Iowa Acts, ch. 1028, § 1); KY. REV. STAT. § 342.690(1) (1977) [hereinafter cited as KRS]; MO. ANN. STAT. § 287.030.2 (Vernon Supp. 1976); NEB. REV. STAT. § 48-112 (1974); N.H. REV. STAT. ANN. § 281.14 (1966); N.M. STAT. ANN. § 59-10-4(D) (Supp. 1975); OR. REV. STAT. § 656.018(3) (1975); PA. STAT. ANN. tit. 77, § 501 (Purdon Supp. 1977); TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967); WIS. STAT. ANN. § 102.03(2) (West Supp. 1977). These statutes are very specific in terms of granting insurer immunity. For a list of statutes that contain language which, in all likelihood, grants immunity, see Larson, *supra* note 16, at 1123-26. *But see* Beasley v. MacDonald Eng'r Co., 249 So.2d 844 (Ala. 1971) (despite the persuasive language of the statute, the insurer does not share the employer's immunity).

Other states find no immunity for the insurance carrier. See, e.g., Stacy v. Aetna Cas. & Sur. Co., 334 F. Supp. 1216 (N.D. Miss. 1971); Mays v. Liberty Mut. Ins. Co., 211 F. Supp. 541 (E.D. Pa. 1962), *rev'd on other grounds*, 323 F.2d 174 (3d Cir. 1963) (both decisions superseded by PA. STAT. ANN. tit. 77, § 501 (Purdon Supp. 1977)); Beasley v. MacDonald Eng'r Co., 249 So.2d 844 (Ala. 1971); Nelson v. Union Wire Rope Corp., 199 N.E.2d 769 (Ill. 1964) (applying Florida law); Fabricius v. Montgomery Elevator Co., 121 N.W.2d 361 (Iowa 1963); Megge v. Lumberman's Mut. Cas. Co., 206 N.W.2d 245 (Mich. Ct. App. 1973).

However, even if immunity exists, at least one court has held that a negligent third party may obtain contribution from a compensation insurer. If a duty to inspect properly is breached, the insurer would be considered a joint tortfeasor. See, e.g., Mays v. Liberty Mut. Ins. Co., 211 F. Supp. 541 (E.D. Pa. 1962), *rev'd on other grounds*, 323 F.2d 174 (3d Cir. 1963).

¹⁸ 431 F.2d 1385 (6th Cir. 1970).

¹⁹ *Id.*

sation insurer did not share the employer's immunity²⁰ and remanded the case to the district court.²¹ Unfortunately, there is no record of the case after remand, so *Bryant* gives no real indication of how Kentucky law on negligent inspection will be resolved.

Thus, although the Kentucky courts have not yet expressly found liability for an insurer's negligent inspection, such a holding is not implausible. Because such a case would be one of first impression in Kentucky, a detailed examination of other jurisdictions may be instructive.

II. LIABILITY TO PATRONS AND EMPLOYEES FOR NEGLIGENT INSPECTION

Most case law in this area may be analyzed in terms of section 324A of the Restatement (Second) of Torts. This method will provide an indication of judicial acceptance and application of the section. Although the opinions range from literal acceptance to constructive rejection, some consensus is evident. Section 324A provides for liability to third persons for gratuitous services as follows:

One who undertakes, gratuitously or for consideration to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.²²

These three elements will be discussed as they have been applied in other jurisdictions.

²⁰ *Id.* at 1388.

²¹ Whatever effect this case may have had on Kentucky law was abrogated by KRS § 342.690(1) (1977) which provides, in part, that "[t]he exemption from liability given an employer by this section shall also extend to such employer's carrier."

²² Compare § 324A with § 323, which provides liability when one attempts, gratuitously, to render services to *another*, and does so negligently, but only if the actor has (a) increased the risk of harm, or (b) induced the other to rely on the undertaking.

A. *The Undertaking of a Duty*

Section 324A(b) provides for liability when one party has "undertaken to perform a duty owed by the other to the third person." The "other" is usually the insured, so a key issue is the extent of the insured's duty. In the compensation cases, the duty of the employer is that of a master, i.e., he must furnish a place of employment which is free from recognizable hazards.²³ This duty is imposed under Kentucky law.²⁴ The duty that an owner or possessor owes to invitees is to keep areas the invitee is likely to visit in a condition safe enough to "use in a manner consistent with the purpose of the invitation."²⁵

A distinct minority has made it virtually impossible for the insurer to be considered to have assumed the insured's duty. In deciding *Gerace v. Liberty Mutual Insurance Co.*,²⁶ the court felt that there should be no liability by the insurer in *any* circumstance, regardless of whether there was an inspection. A similar view is that a disclaimer in the policy²⁷ is sufficient to bar any claim based on negligent inspection.²⁸

One of the main issues in the assumption of duty cases is how much of the insured's duty must be assumed by the insurer before a court will find an insurer liable for breach of the duty. In *Van Winkle v. American Steam-Boiler Insurance Co.*,²⁹ the first case to hold an insurer liable for negligent inspection,³⁰ the insurer was found to have assumed the insured's duty to keep a boiler in safe operating condition. The insurer not only conducted continuous safety inspections, but

²³ RESTATEMENT (SECOND) OF AGENCY § 503 (1957).

²⁴ KRS § 338.031 (1977).

²⁵ *City of Madisonville v. Poole*, 249 S.W.2d 133, 135 (Ky. 1952).

²⁶ 264 F. Supp. 95 (D.D.C. 1966).

²⁷ See note 50 *infra* for a sample disclaimer.

²⁸ In *Kennard v. Liberty Mut. Ins. Co.*, 277 So.2d 170 (La. Ct. of App. 1973) (on rehearing), the court noted:

From the foregoing [disclaimer in the policy] it is clear that *any* inspections made by the insurer are made only in connection with the contract between the insurer and its insured. Accordingly, we fail to comprehend how the insurer's obligation by virtue of any inspection it may make is greater to the plaintiff, with whom it has no contract, than it is to its insured.

Id. at 174 (emphasis added). One response to this argument is that the plaintiff had no opportunity to contract away any obligations.

²⁹ 19 A. 472 (N.J. 1890).

³⁰ Comment, *Insurer's Liability for Negligent Performance of Voluntary Safety Inspection*, 3 CUM.-SAM. L. REV. 118 (1972).

also took the responsibility of repairing and maintaining the boiler.

A similar analysis was made in *Sheridan v. Aetna Casualty & Surety Co.*³¹ The city of Seattle required inspection reports by all owners of elevators. The insurer voluntarily conducted quarterly inspections and also took upon itself the job of sending the required reports to the city. The injured plaintiff was permitted to recover from the insurer because the court held that the insurer had assumed the owner's duty.³² In another case, when the insurer made repeated inspections and, in addition, kept prodding the insured until its safety recommendations were followed, the court found an assumption of the insured's duty to maintain a safe place for the employees to work.³³ Thus, it appears that a duty may be imposed on the insurer when the insurer both thoroughly inspects and makes provision for correcting defects.

On the other hand, some jurisdictions have indicated that numerous inspections alone are insufficient for a finding of liability. One United States district court³⁴ held that an insurer owed no duty to an injured employee where the insurer lacked the authority to compel repairs.³⁵

Several courts are in agreement upon the scope of inspection required for liability. In one of the most widely discussed cases in the area of negligent inspection, *Nelson v. Union Wire Rope Corp.*,³⁶ the Illinois Supreme Court required evidence that the insurer inspected the exact machine which caused the injury. This concept has been used to bar recovery where the insurer made spot inspections of the employer's plant, but never examined the particular machinery involved.³⁷ Another

³¹ 100 P.2d 1024 (Wash. 1940).

³² *Id.* at 1031. See also *Smith v. American Employers' Ins. Co.*, 163 A.2d 564 (N.H. 1960), in which the insurer assumed the insured's duty by making monthly inspections of the entire plant. Compare *Vidulich v. Greater New York Mut. Ins. Co.*, 192 A.2d 596 (N.J. Super. Ct. 1963), in which an assumption of duty was found to be lacking since the insurer had made no effort to report any findings to the insured. However, the insurer only made one inspection, so emphasis on the insurer's not reporting its findings would probably change if more inspections were made.

³³ *Andrews v. Insurance Co.*, 230 N.W.2d 371 (Mich. Ct. App. 1975). See also *Tillman v. Travelers Indem. Co.*, 506 F.2d 917 (5th Cir. 1975).

³⁴ *Clark v. Employers Mut.*, 297 F. Supp. 286 (E.D. Pa. 1969).

³⁵ *Id.* at 290.

³⁶ 199 N.E.2d 769 (Ill. 1964).

³⁷ *Evans v. Liberty Mut. Ins. Co.*, 398 F.2d 665 (3d Cir. 1968).

court barred recovery under this principle when the insurer inspected a water heater which exploded, but did not inspect the pipe and bushing which led to the explosion.³⁸

Still another element of assumption of the insured's duty is that the person injured must be one of a class which the inspection was intended to protect. *Johnson v. Aetna Casualty & Surety Co.*³⁹ indicated that this requirement might have real impact when the court held that a fireman, injured while fighting a fire which was arguably the product of a negligent inspection, was not a party that the inspection was aimed at protecting. However, when the district court reconsidered its opinion it held that injury to a fireman was reasonably foreseeable and that the inspection was thus intended to protect him as well.⁴⁰

The final factor in deciding whether the insurer has assumed its insured's duty to third parties involves the purpose of the inspection.⁴¹ In *Ulwelling v. Crown Coach Corp.*,⁴² several children were injured when the drive shaft on a school bus broke. The insurer of the bus owner had inspected some of the buses; however, the court held that the insurer made only one initial inspection for the sole purpose of underwriting. The insurance company's internal purpose for inspecting was evidenced by the fact that the inspector had no special mechanical training. The court held that since the inspections were superficial in both scope and purpose they could not be the basis for liability.⁴³

It must be noted that section 324A deals with rendering services to *another*.⁴⁴ Arguably, when an insurer inspects for the purpose of internal use (risk analysis), or even for the purpose of increasing safety in order to reduce its possibility of loss, the insurer is rendering services for its own benefit.⁴⁵ Others con-

³⁸ *Ruddy v. United States Fidelity & Guar. Co.*, 288 F. Supp. 315 (M.D. Pa. 1968).

³⁹ 339 F. Supp. 1178 (M.D. Fla.), *rev'd on rehearing*, 348 F. Supp. 627 (M.D. Fla. 1972).

⁴⁰ *Johnson v. Aetna Cas. & Sur. Co.*, 348 F. Supp. 627 (M.D. Fla. 1972).

⁴¹ *See Sims v. American Cas. Co.*, 206 S.E.2d 121 (Ga. Ct. App.), *aff'd per curiam*, 209 S.E.2d 61 (Ga. 1974).

⁴² 23 Cal. Rptr. 631 (Dist. Ct. App. 1962).

⁴³ *Id.* at 655.

⁴⁴ *See text accompanying note 22 supra* for the complete wording of § 324A.

⁴⁵ *American Mut. Liab. Ins. Co. v. St. Paul Fire and Marine Ins. Co.*, 179 N.W.2d 864, 871 (Wis. 1970) (Hallows, C.J., dissenting). *See generally* *Hartford Steam-Boiler Inspection & Ins. Co. v. Cooper*, 341 So. 2d 665 (Miss. 1977).

tend that any improvement of safety which lowers the insurer's possibility of loss also benefits the employee or patron. So, they argue, it is impossible to speak of inspections which benefit only the insurer.⁴⁶

In *Nelson v. Union Wire Rope Corp.*,⁴⁷ the insurer's inspection was not merely for internal purposes. The insurance company conducted a national advertising campaign claiming that its safety programs and experts would save money for its clients.⁴⁸ The sales department followed up all safety recommendations of the company to make certain that suggestions were being implemented. The court noted that "it appears beyond a shadow of a doubt that the services gratuitously given by the engineers were not solely for the defendant's own purpose,"⁴⁹ and found that the insurer had assumed the insured's duty.

Thus, factors to consider when determining whether an insurer has assumed the duty of an insured are: 1) The amount of "inspecting" done. Did the insurer make repairs, report its findings, make recommendations? 2) The scope of the inspection. Did the insurer inspect the exact cause of the injury? 3) The class of persons to which the injured person belongs. Would proper inspection have protected this plaintiff? 4) The purpose of the inspection. Was the insurer's purpose to prevent this particular sort of injury?

Insurance companies often reserve the right to inspect in a permissive inspection clause. The clauses generally provide for a permissive right of inspection without obligation to do so and without any warranty of safety.⁵⁰ No court has allowed a

⁴⁶ *Sims v. American Cas. Co.*, 206 S.E.2d 121 (Ga. Ct. App. 1974). Cf. *Hartford Steam-Boiler Inspection & Ins. Co. v. Pabst Brewing Co.*, 201 F. 617 (7th Cir. 1912); *Kotarski v. Aetna Cas. and Sur. Co.*, 244 F. Supp. 547 (E.D. Mich. 1965), *aff'd per curiam*, 372 F.2d 95 (6th Cir. 1967).

⁴⁷ 199 N.E.2d 768,776 (Ill. 1964).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ A sample clause provides:

The Company shall be permitted but not obligated to inspect the named insured's property and operations at any time. Neither the Company's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the named insured or others, to determine or warrant that such property or operation are safe.

Hassan v. Hartford Ins. Group, 373 F. Supp. 1385, 1390 (D. Del. 1974).

finding of liability when an insurer who had such a right failed to inspect;⁵¹ some type of inspection is required to convert the right to a duty.

B. *Increasing the Risk of Harm*

Of all the elements of section 324A, the least used for imposing liability is that which holds the insurer responsible if, by failing to exercise due care, the risk of harm to a third person is increased.⁵² The illustration to this section involves an employee of an electric company called to fix a defective light in a store. After repairing the light, the worker leaves it insecurely attached. Later, the light falls on one of the store's customers. The section seems to apply only when the actor has made it *more* likely that some sort of harm will result. Seldom in the area of safety inspection does an insurer make the situation more dangerous. Some writers contend that when the insured foregoes inspections because the insurer has undertaken them, then the repairs the insured would have made are not made and the situation, in reality, is worse.⁵³ However, this reasoning does not seem to be applicable to the risk of harm concept, but is more appropriate to the reliance theory.⁵⁴

*Hassan v. Hartford Insurance Group*⁵⁵ illustrates the difficulty of holding insurers liable on the theory that they increased the risk of harm by conducting inspections. The decedent in this action was the victim of a fire in a motel where fire safety code violations allegedly existed. One theory advanced by the plaintiff was that the hotel's insurer, through negligent inspection of the premises, increased the risk of harm to the decedent. The court rejected the contention, noting:

⁵¹ *E.g.*, *Mann v. Highland Ins. Co.*, 461 F.2d 541 (5th Cir. 1972); *Hassan v. Hartford Ins. Group*, 373 F. Supp. 1385 (D. Del. 1974); *Clark v. Employers Mut.*, 297 F. Supp. 286 (E.D. Pa. 1969); *Bartolotta v. United States*, 276 F. Supp. 74 (D. Conn. 1967); *Thompson v. National Press Corp.*, 264 F. Supp. 668 (D.D.C. 1966); *Kennard v. Liberty Mut. Ins. Co.*, 277 So. 2d 170 (La. Ct. App. 1973); *American Mut. Liabl. Ins. Co. v. St. Paul Fire and Marine Ins. Co.*, 179 N.W.2d 864 (Wis. 1970); *Van Winkle v. American Steam-Boiler Ins. Co.*, 19 A. 472 (N.J. 1890).

⁵² See text accompanying note 22 *supra* for the actual wording of § 324A(a).

⁵³ J. APPLEMAN & J. APPLEMAN, *supra* note 7, at 641.

⁵⁴ See text accompanying notes 57-77 *infra* for a discussion of the reliance theory.

⁵⁵ 373 F. Supp. 1385 (D. Del. 1974).

There is no fact alleged or even a remote suggestion that [the insurer] *directed* or *altered* the operation of the motel in any manner so as to make the motel *more* hazardous to the decedent. If any risk existed it existed independently of any undertaking by [the insurer].⁵⁶

Following this reasoning, few courts could be faced with situations where liability could be based on increasing the risk of harm through negligent inspection.

C. *Liability Based on Reliance*

The third principle embodied in section 324A is that liability can be based upon reliance on the actions of the insurer.⁵⁷ The main questions which must be answered before reliance can be found are: First, is reliance a necessary finding in inspection cases, and, next, who must rely on the insurer's activities?

While refusing to take a position itself, the court in *Winslett v. Twin City Fire Insurance Co.*⁵⁸ noted that the federal courts seem to require reliance on the insurer's inspections by the plaintiff or the insured before liability can be found. However, this statement does not appear to be supported by the case law. Although the court in *Viducich v. Greater New York Mutual Insurance Co.*⁵⁹ stated that reliance was "essential," that term appeared to mean something less than mandatory.⁶⁰ One court did require an instruction on reliance to be submitted to the jury even though the plaintiff based his claim on the theory that the insurer had assumed the duty of the insured.⁶¹ However, that same court thereafter reversed its position and held that, when one of the other two theories in section 324A is urged, an instruction on reliance is not necessary.⁶²

⁵⁶ *Id.* at 1391 (emphasis added).

⁵⁷ See text accompanying note 22 *supra* where § 324A (c), the reliance section, is set out.

⁵⁸ 232 S.E.2d 638 (Ga. Ct. App. 1977).

⁵⁹ 192 A.2d 596 (N.J. Super. Ct. 1963). For the argument that reliance is a necessity, see Comment, *The Workmen's Compensation Insurance Carrier As a Third Party Tort-Feasor*, 1 CONN. L. REV. 183 (1968).

⁶⁰ 192 A.2d at 601.

⁶¹ *Ray v. Transamerica Ins. Co.*, 208 N.W.2d 610 (Mich. Ct. App. 1973), *overruled* by *Olkowski v. Aetna Cas. & Sur. Co.*, 220 N.W.2d 97 (Mich. Ct. App. 1974).

⁶² *Olkowski v. Aetna Cas. & Sur. Co.*, 220 N.W.2d 97 (Mich. Ct. App. 1974).

The cases which hold that reliance is unnecessary are more numerous and enjoy a more logical footing. It must be noted that section 324A is phrased in the *disjunctive*,⁶³ any one of the three theories or any combination will be sufficient to state a claim.⁶⁴ In *Nelson v. Union Wire Rope Corp.*,⁶⁵ recovery was based on the insurer's assumption of the insured's duty to keep a reasonably safe workplace. Reliance was held to be unnecessary.⁶⁶

As a practical matter, reliance may be an absolute necessity. Given the scrutiny which some courts use in determining whether the insurer has assumed all of the insured's duty,⁶⁷ and realizing the difficulty of showing an increase in the risk of harm,⁶⁸ reliance may be the only theory left for the plaintiff to use.

Although section 324A(c) mentions "reliance of the other or third person,"⁶⁹ a few courts require a showing of reliance by a particular party. The Supreme Court of Vermont rejected liability when there was no evidence that the *plaintiff* had relied on the insurer's inspections.⁷⁰ Another court made reliance on the undertaking by the policy holder the *sine qua non*.⁷¹ The better and more accepted view is that liability can be based on reliance by either the insured or the plaintiff. Since the theory behind reliance is that someone relied upon the insurer's actions and representations, and that an injury occurred as a result thereof, it should make no difference who acted in reliance.⁷²

⁶³ See text accompanying note 22 *supra* where § 324A is set out.

⁶⁴ *Corson v. Liberty Mut. Ins. Co.*, 265 A.2d 315 (N.H. 1970).

⁶⁵ 199 N.E.2d 769 (Ill. 1964).

⁶⁶ *Id.* at 778. See also *Sims v. American Cas. Co.*, 206 S.E.2d 121 (Ga. Ct. App. 1974), *aff'd per curiam*, 209 S.E.2d 61 (Ga. 1974), where reliance was simply a factor in finding negligence.

⁶⁷ See text accompanying notes 23-49 *supra* for a discussion of the "assumption of duty" cases.

⁶⁸ See text accompanying notes 52-56 *supra* in which this difficulty is examined.

⁶⁹ Emphasis is added. As pointed out in the text accompanying note 22 *supra*, the Restatement does not mandate one particular selection.

⁷⁰ *Steele v. Eaton*, 285 A.2d 749 (Vt. 1971). See also *Evans v. Liberty Mut. Ins. Co.*, 288 F. Supp. 393 (W.D. Pa. 1967), *aff'd*, 398 F.2d 665 (3d Cir. 1968).

⁷¹ *Clark v. Employers Mut.*, 297 F. Supp. 286, 289 (E.D. Pa. 1969).

⁷² *Hill v. United States Fidelity and Guar. Co.*, 428 F.2d 112 (5th Cir. 1970), *cert. denied*, 400 U.S. 1008 (1971). What the court gave with one hand, *i.e.*, allowing either

The injured party has a difficult time showing his reliance.⁷³ Because the third-party employee or patron rarely knows the insurer is inspecting, there are few cases where the plaintiff can show that he relied upon inspections for his safety. It is also more convenient to focus on the insured's reliance because such reliance can be evidenced by the insured's actions. Logically, in situations where the insured's property has been totally destroyed, the insured is less reluctant to agree that he did, in fact, rely on the insurer's inspections.

Prima facie evidence that the insured has relied on the insurer's inspections has been found when the insured lessened its own safety program once the insurer started inspecting.⁷⁴ This evidence can be countered by showing that, despite the fact the insured changed its safety patterns, there was no actual reliance. For example, when the insurer inspects and makes recommendations for improving safety standards, and the insured continually rejects such suggestions, then it can hardly be said that the insured relied on the insurance company's inspections.⁷⁵ In addition, those courts which accept the "internal purpose" concept⁷⁶ are willing to find that there can be no reliance when the inspections are for such purposes.⁷⁷

CONCLUSION

Theoretically, in a suit to determine the liability of an insurance company for conducting negligent inspections, the jury has no part to play in deciding whether the defendant was

party to rely, it took away with the other. Taking a distinctively minority position, the court held:

If reliance is a prerequisite to liability, the insurer may substantially protect itself in its safety undertakings, and at the same time protect users of the premises who may be the victims of lack of performances, by making unambiguously clear to the insured either that it can rely or that it must not rely.

Id. at 120.

⁷³ *Contra*, Comment, *supra* note 59.

⁷⁴ *Tillman v. Travelers Indem. Co.*, 506 F.2d 917 (5th Cir. 1975); *Stacy v. Aetna Cas. & Sur. Co.*, 484 F.2d 289 (5th Cir. 1973).

⁷⁵ *Watson v. Employers Ins. Co.*, 213 N.W.2d 765 (Mich. Ct. App. 1973).

⁷⁶ See text accompanying notes 41-49 *supra* for a discussion of the "internal purpose" concept. Internal purposes include an initial inspection for the purpose of determining whether to insure the client; inspections designed to reduce the risk of loss by the insurer; and inspections to provide underwriting information.

⁷⁷ *Hartford Steam-Boiler Inspection & Ins. Co. v. Cooper*, 341 So. 2d 665 (Miss. 1977).

legally bound to protect some interest or right of the plaintiff.⁷⁸ When a judge submits to the jury the issue of negligence simply because he feels that the resolution of the duty issue is not clear, the jury may assume that there was a duty or else the judge would never have submitted the negligence issue at all.⁷⁹ Given the recognized bias of juries against insurance companies and large corporations,⁸⁰ the case may be decided simply by submitting the issue of duty to the jury. Therefore, it is incumbent upon the court to consider the issue of duty carefully and come to a conclusion prior to submission of the negligence issue to the jury.

The Wisconsin legislature decided that the public could best be served by granting insurers immunity from liability for negligent inspection.⁸¹ However, this type of "legislative attention"⁸² is probably constitutionally impermissible in Kentucky.⁸³ Since the legislature is constitutionally prevented from implementing an arguably valid public policy, i.e., encouraging insurers to inspect by limiting their liability, there is even more reason for a court to examine the facts closely before finding a duty on the part of the insurer to the injured person. The courts are the only means of instituting this policy, if it is desirable at all.

This comment has briefly discussed the complexities necessarily faced in deciding whether a duty was owed by the inspector to a third party. Several key factors emerge from the existing case law.

Focusing first on the reaction of the insured to the inspection, reliance and duty are more likely to be found when the

⁷⁸ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 37 (4th ed. 1971).

⁷⁹ Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928).

⁸⁰ *Finch v. Conley*, 422 S.W.2d 128 (Ky. 1967).

⁸¹ WIS. STAT. ANN. § 895.44 (West 1966). It is questionable whether this statute is constitutional under Wisconsin law. The Wisconsin Constitution guarantees:

Every person has [the right] to a certain remedy in the laws for all injuries, or wrongs which he may receive to his person, property, or character; he ought to obtain justice freely, and without denial, promptly and without delay, conformably to the laws.

WIS. CONST. art. 1, § 9. For a discussion of constitutionality, see Comment, *Wisconsin's "Good Samaritan" Statute*, 48 MARQ. L. REV. 80 (1964).

⁸² Larson, *supra* note 16, at 1143.

⁸³ KY. CONST. § 54 provides:

The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.

insured discontinued his safety program after the insurer began inspecting. The same result is probable if the insured did not completely discontinue his program but simply reduced it by a sufficient degree. The reaction of the insured is the most important factor in determining the applicability of the reliance theory.

Receiving equal attention will be the conduct of the insurer. An initial factor will be the purpose of the inspection. If the inspection is solely for internal purposes and on a limited basis, a duty is less likely to be found. Another important element will be whether open and obvious conditions were inspected. If so, a court might restrict liability to harm following from those conditions.

A final and perhaps most important consideration deals with the character of the inspection. If the insurer makes representations as to the efficiency of its program, coupled with high safety credentials of its inspectors, liability will be more likely. The authority to enforce recommendations will also help establish the existence of a duty. By the same token, the absence of these considerations will also lead to a finding of no duty.

While no rigid formula can be utilized, the analysis of the above factors should present the court with a fairly good indication of the insurer's duty, if any, to the plaintiff. The jury, on the other hand, should focus on questions of fact. Were there any inspections? What would a reasonable inspection have discovered? Did the defect which led to the accident occur between the last inspection and the injury?⁸⁴

As a basis for liability, the concept of negligent inspection is gaining momentum. While no one supports a wrongdoer escaping liability, it is necessary for the court to consider carefully whether a wrongdoer is before the court at all. Kentucky law is in a virginal state regarding the theory of negligent inspections. The courts should use the opportunity to balance public policy with the rights of injured parties.

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⁸⁴ See, e.g., *Winslett v. Twin City Fire Ins. Co.*, 232 S.E.2d 638 (Ga. Ct. App. 1977).