Torts -- Nuisance -- Wild Animals

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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).

that the complaint alleged that the defendant knew that it was the nature of wild geese to collect during the winter season at such favorable havens as the defendant's pond, to feed on the surrounding countryside, and to return to the same location in succeeding years accompanied by their offspring and other geese so long as the shelter and lame decoys were maintained by the defendant.

The court had difficulty finding North Carolina precedent, or for that matter any cases in point, and relied on garden-variety nuisance decisions grounded on facts showing interference with the enjoyment of land by neighboring commercial or industrial enterprises.[2] In this connection, the court noted that negligence was not an indispensable element of nuisance, and recited the often repeated Latin maxim which seems to lurk in the background of nuisance actions: *"Sic utere tuo ut alienum non laedas* (to use your own so that you do not injure another)."[3]

The majority opinion, written by Justice Higgins, characterized the plaintiff's cause of action as a private nuisance *per accidens* (depending on the circumstances of the interference in relation to the surrounding conditions) as distinguished from a private nuisance *per se* (unlawful interference regardless of location or surroundings). The court evidently found the circumstances of the interference sufficiently compelling to warrant plaintiff's cause of action, even without clear legal precedent to guide it. Noting the perilous position of the plaintiff, they suggested that, "at the same rate of increase 7,500 will be there this year and 20,000 next. If there is no relief for the plaintiff as of the date suit was brought, there will be none next year. Surely the arm of the law is neither too short nor too weak to reach out to the pond and take away the wild geese maintained as prisoners there to attract their kind in ever increasing numbers."[4]

Justice Parker, in a dissenting opinion, concurred completely with defendant's contention that there can be no liability for the trespass of wild geese which are not owned or reduced to possession by the defendant. On this point the dissent cited a Federal Tort Claims action by private landowners against the United States for the negligence of its employees in the operation of its game reserve for migratory waterfowl, Canadian geese. The court there denied recovery, holding that a person cannot be held liable on a theory of negligence for the trespasses of animals *ferae naturae* which exist free in nature.[5]

[2] Morgan v. High Penn Oil Co., 238 N. C. 185, 77 S. E. 2d 682 (1953); Holton v. Northwestern Oil Co., 201 N. C. 744, 161 S. E. 391 (1931).
[3] Andrews v. Andrews, 242 N. C. 382, 389, 88 S. E. 2d 88, 92 (1955).
[4] *Id.* at 388, 88 S. E. 2d at 92.
[5] Sickman v. United States, 184 F. 2d 616 (1950), *cert. denied* 341 U. S. 939 (1951).

The purpose here is to determine the legal rationale on which the majority of the court based its conclusion in support of the plaintiff's cause, apart from the general maxims of tort liability in nuisance, and to explain, if possible, the diametrically opposed theory of the dissent. Without a case in point, law by analogy is particularly difficult in the area of private nuisance for the reason suggested by Professor Prosser that "there is no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'. . . . [It] is incapable of any exact or comprehensive definition."[6] He attributes the causes for the uncertainty and confusion to the fact that "nuisance is a field of tortious conduct. It has reference to the interests invaded, and not to any particular kind of conduct which has led to the invasion. The attempt frequently made to distinguish between nuisance and negligence, for example, is based on a mistaken emphasis upon what the defendant has done rather than the result which has followed, and overlooks the well established fact that negligence is merely one type of conduct which may give rise to a nuisance. The same is true as to the attempted distinction between nuisance and strict liability for abnormal activities, which has plagued the English as well as the American courts."[7] Caught in the very middle of the "muddied waters" of the law of nuisance is the question of liability that might be imposed on landowners for the damage caused by wild animals naturally found on the land or introduced and nurtured there by the owner.

Since there seems to be little American case authority on this problem, reference must necessarily be made to the reported English decisions and the editorial comments thereon. In the very early case of *Boulston v. Hardy*,[8] the defendant made coney-boroughs (rabbit nests or pens) on his land to protect the conies which he placed in the boroughs. They increased bountifully under the landowner's care and then devastated his neighbor's crops. The court held that the neighbors could not have an action on the case against him because as soon as the conies came on the plaintiff's land he might kill them, for they were *ferae naturae* since merely placing the conies in boroughs did not bring them into possession, so to create a property right. "This cause is not like to the cases put, on the other side, of erecting a lime-kiln, dye-house, or the like; for there the annoyance is by the act of the parties who make them; but it is not so here, for the conies of themselves went into the plaintiff's land, and he might take them when they came upon his land, and make profit of them."[9] The court was

[6] PROSSER, TORTS § 70, p. 389 (2d ed. 1955).
[7] *Id.* at § 70 at p. 391.
[8] 5 Co. Rep. 104 b. Also reported as Bowlston v. Hardy, Cro. Eliz. 547, 78 Eng. Rep. 794 (Q. B. 1597).
[9] *Ibid.*

clearly grappling with the very issues discussed in the majority and dissenting opinions of our present case.

In *Farrer v. Nelson,*[10] the defendants were lessees of the shooting rights over the estate of which the plaintiff's farm formed a part. Plaintiff sued for damages to his crops by wild pheasants, 450 of which the defendant had placed as game stock in a thicket adjoining the plaintiff's farm. The defendant answered that he was a reasonable user of the land, and since the birds lived and propagated naturally on the land, being *ferae naturae,* their trespass could not be imputed to the defendant, citing to the court *Boulston v. Hardy.* Pollack B. chose not to follow the *Boulston* case, holding that, "It is not merely the case of a man collecting noxious animals upon his land so as to injure his neighbor, but the case of a man entitled to keep game upon the land, and the tenant complaining of injury to his crops from this game being unduly multiplied. . . . [The] moment he brings on game to an unreasonable amount or causes it to increase to an unreasonable extent, he is doing that which is unlawful. . . ."[11]

The English court in *Bland v. Yates,*[12] allowed an injunction to the plaintiff who occupied a dwelling house next to the defendant's market garden, an enterprise common to the community but where was heaped a large amount of manure which attracted flies to the annoyance of the plaintiff. The court restrained the defendant from maintaining the supply of manure which it found he was keeping in amounts excess for that locality.

A different result was reached in the relatively recent case of *Stearn v. Prentice Bros., Ltd.,*[13] where the plaintiff was suing for damages to his crops from rats which passed back and forth between his fields and a fertilizer factory where the defendant stored large heaps of animal bones. The court distinguished the *Bland* case on the theory that the lower court had not found that the amount of bones stored had been excessive. It denied recovery to the plaintiff holding that the *Boulston* case was controlling on the point, and by way of analysis of the equities involved, stated that, "Bone manure manufactories have existed for a very great number of years. Bones are a natural and valuable waste product. . . . Rats have been the enemies of farmers ever since land was cultivated. If proper measures are not taken by occupiers of land to destroy them they quickly increase. They are *ferae naturae.*"[14] The industry-minded court was evidently impressed by the plaintiff's failure to prove that the rats were increasing

[10] 15 Q. B. D. 258 (1885).
[11] *Id.* at 260.
[12] 58 Sol. J. 612 (1914).
[13] [1919] 1 K. B. 394.
[14] *Id.* at 396.

because of anything done on the defendant's premises since his pile of bones was no larger then than it had been for the past thirty years.

If there exists a definite field of liability for the depredations of animals naturally on the land, some commentators[15] on the subject tend to imply that the rationale used in the few decisions available lies somewhere between the traditional law of nuisance and the doctrine of *Rylands v. Fletcher*.[16] Under either theory of recovery liability attaches to certain conduct on the actor's own premises which results in harm to the property rights of an adjoining landowner. The *Rylands* case could not be decided on the grounds of ordinary trespass since the damage to the plaintiff's land was neither intentional nor direct. It didn't seem to fit the orthodox pattern of private nuisance since it was more than a mere noxious interference with the enjoyment of land, but yet was not continuous nor recurring so that the defendant was put on notice.[17] The *Restatement of Torts* limits the *Rylands* doctrine to ultrahazardous activity and allowing liability without consideration of fault for the "non-natural" use of land which "necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care."[18] A kindred type of liability without regard to the degree of care used applies to the keeping of wild and ferocious animals.[19]

Private nuisance, on the other hand, had been defined merely as the "unreasonable interference with the interest of an individual in the use or enjoyment of land. Such a nuisance requires substantial harm, as distinguished from a trespass, which may consist of a mere technical invasion."[20]

Professor Prosser in discussing the apparent blending of the two theories comes up with a solution which seems to fit our present case: "There are relatively few situations in which it makes very much difference which basis of liability is to be relied on. For this reason, and because the action on the case for nuisance was adequate to cover any of three [i. e. theories of recovery based on intentional invasion, negligence, and strict liability], the courts seldom have made the distinction, and have been content to say merely that a nuisance exists. Another reason for this has been the fact that the great majority of nuisance suits have been in equity, and concerned primarily with the prevention of future damages. Under such circumstances the original nature of

[15] Noel, *Nuisance From Land in Its Natural Condition*, 56 HARV. L. REV. 772 (1943). Notes, 19 COLUM. L. REV. 251 (1919); 18 MICH. L. REV. 70 (1919); *cf.* 23 CALIF. L. REV. 427, 433 (1935).
[16] L. R. 1 Ex. 265 (1866), *aff'd* 3 H. L. 330 (1868).
[17] PROSSER, TORTS § 59 (2d ed. 1955).
[18] RESTATEMENT, TORTS § 519 (1938).
[19] PROSSER, TORTS § 57 (2d ed. 1955).
[20] *Id.* § 70 at p. 389.

the defendant's conduct frequently loses its importance, since his persistence, over the plaintiff's protest, in continuing conduct which may have been merely negligent or abnormal in its inception, is sufficient to establish its character as an intentional wrong."[21]

Breaking down the elements involved in the present North Carolina decision, it would be fair to conclude that by a general application of facts to theory, the defendant's conduct, as alleged by the plaintiff, in unreasonably using a pond on his own land, has interfered with the plaintiff's enjoyment of the plaintiff's land. Defendant's purposes evidence no great social or economic utility which would outweigh the value of plaintiff's farming enterprise, and he had been placed on notice of the damage caused by his conduct but yet refused to abate the nuisance even though the expense or effort required on his part would be nominal. The remaining question, however, is whether as a matter of law holding the defendant liable for the trespasses of wild geese, living free from the control, possession or restraint of the defendant, is so fundamentally a violation of personal freedom to enjoy one's own land as in all justice to require a finding for the defendant.

In addition to the conflicting English decisions on point, and one American case following the *Farrer* lead,[22] there have been a number of cases holding liability for private nuisance against landowners for maintaining stagnant ponds which breed malarial mosquitoes.[23] This would certainly seem to demonstrate that no ironclad rule governs liability for animals *ferae naturae*.[24]

The dissenting opinion of the principal case in citing *Sickman v. United States*[25] is weakened by the fact that that case was brought under the Federal Tort Claims Act on the theory that the United States had ownership rights in the wild geese and was negligent, through its employees and agents, in allowing its animals to trespass on the plaintiffs' land, destroying their crops. It is doubtful whether either the American or English authorities would find an employer liable for injuries by a wild animal on a theory that his employees were negligent in allowing wildbirds to fly on plaintiffs' land, when the birds had never been reduced to possession or control in the defendant's game preserve,

[21] PROSSER, TORTS § 70, p. 393 (2d ed. 1955).

[22] Taylor v. Granger, 19 R. I. 410, 34 Atl. 153 (1896), where the court said of an action for negligently permitting pigeons to disturb the plaintiff's premises, that though the cause of action on the case was the proper remedy, the principle really embodied in the facts was based on nuisance; *Sic utere tuo ut alienum non laedus.*

[23] Yaffe v. City of Fort Smith, 178 Ark. 406, 10 S. W. 886, 61 A. L. R. 1138 (1928); Towaliga Falls Power Co. v. Sims, 6 Ga. App. 649, 65 S. E. 844 (1909); Mills v. Hall, 9 Wend. 315, 24 Am. Dec. 160 (N. Y. 1832).

[24] For a general criticism of the judicial use of the term *ferae naturae*, see Beven, *The Responsibility at Common Law for the Keeping of Animals*, 22 HARV. L. REV. 465 (1909).

[25] 184 F. 2d 616 (1950), *cert. denied* 341 U. S. 939 (1951).

established pursuant to statute. A possible alternative theory might have been based on a taking or partial confiscation of the plaintiffs' property without just compensation with suit brought instead in the U. S. Court of Claims.[26]

The North Carolina decision can be supported as a proper and just one in view of both the historical development of the rights of landowners and the current interpretations and conclusions reached by students of that "impenetrable jungle" of the law called nuisance.

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Wills and Contracts—Degree of Mental Capacity Requisite for Each

The problem of whether the degree of mental capacity necessary for making a valid will is in any way related to or measurable by that degree of mental capacity requisite to entering into a valid contractual obligation has been the source of frequent disagreement among courts. In North Carolina, as in most jurisdictions, a person is in law deemed to have sufficient mental capacity to make a will when he has a clear understanding of the nature and extent of his act, the kind and value of the property devised, the persons who are the natural objects of his bounty, and the manner in which he desires to dispose of it.[1] The problem is in determining when these requirements are met. Courts have repeatedly attempted to compare contractual capacity with testamentary capacity, and for the most part the result has been unsatisfactory.

It has been said that a lesser degree of mental capacity is required for a will than for the execution of a valid contract or the transaction of ordinary business.[2] In an Illinois case,[3] the testatrix had been adjudged incapable of managing her business affairs and a conservator was appointed one month before the execution of her will. The court held that this was not enough to invalidate a will,[4] stating:

> "Mental strength to compete with an antagonist and understanding to protect his own interest are essential in the transaction of ordinary business, while it is sufficient for the making of a will that the testator understands the business in which he is engaged, his property, the natural objects of his bounty, and the disposition he desires to make of his property."[5]

[26] See, *e.g.*, United States v. Causby, 328 U. S. 256 (1946); U. S. CONST. amend. V.

[1] *In re* Will of Brown, 194 N. C. 583, 140 S. E. 192 (1927).

[2] Converse v. Converse, 2 Vt. 168 (1849).

[3] *In re* Weedman's Estate, 254 Ill. 504, 98 N. E. 956 (1912).

[4] 86 Ill. Rev. Stat. 14 (1874) provides that an inquest of lunacy once proven will void subsequent contracts. It is significant that no such declaration is made in regard to wills.

[5] *In re* Weedman's Estate, 254 Ill. 504, 508, 98 N. E. 956, 957 (1912). See also: