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Negligence - Care as to Trespassers - Liability of Land-owner for Mere Passive Negligence

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security given for an antecedent debt requiring no concessions from the holder [18]

North Dakota, although having no case law on similar factual situations, appears to follow the majority view that conditional credit alone is insufficient for value.[19] "The law should be progressive; it should advance with changing conditions. It should also correct trends proceeding from unsound results."[20] By accepting the view of the principle case North Dakota courts would be providing justice to those persons who deal with checks daily and apply them as payments and credits.

HARLAN K. HOLLY

NEGLIGENCE—CARE AS TO TRESPASSERS—LIABILITY OF LANDOWNER FOR MERE PASSIVE NEGLIGENCE—The two and one-half year old plaintiff was severely injured in a fall from an apartment window enclosed by a defective screen. When injured he was living with the tenant contrary to the terms of the tenant's lease with the defendants. This arrangement was neither known to the defendants, nor in any way consented to by them. The lease required the defendants to make all repairs except those necessitated by damage caused by the tenants. The United States Court of Appeals, D.C. Cir., *held*, one judge dissenting, that although the plaintiff was a trespasser as a matter of law, and the defective screen was a static condition, the plaintiff was well within the range of foreseeability in terms of those persons to whom injury might result from an unsafe screen. The terms of the lease were not the outer limits of the defendants' vision. The dissenting judge held that under the circumstances, the defendants owed the plaintiff no duty with respect to the screens since he was plainly a trespasser *Gould v DeBeve*, 330 F.2d 826 (D C. Cir 1964)

This case represents a trend toward increasing a land-

18. UNIFORM COMMERCIAL CODE § 3-408.

19. See Dakota Transfer & Storage Co. v. Merchants Nat'l Bank & Trust Co., 86 N.W.2d 639 (N.D. 1957).

20. Phillips v. Foster, 252 Iowa 1076, 109 N.W.2d 604 (1961).

owner's liability and duty of care to trespassers.[1] In the late nineteenth century a landowner owed a duty to trespassers only to refrain from willful and wanton misconduct.[2] The courts reasoned that if an injured party had no right to be on the property where the injury occurred, he was a trespasser to whom, as a matter of law, the landowner owed no duty [3] A landowner had a right to use his property in any lawful manner he desired as long as he did not create a nuisance.[4]

One of the first departures from the strict common law doctrine of "no liability to trespassers" occurred in the field of trespassing children. By the early twentieth century the status of child trespassers had changed considerably, mostly by extending the application of the attractive nuisance doctrine.[5] Even though this doctrine has been widely accepted, the mere fact that the trespasser is a child does not impose any duty upon the landowner to keep his premises safe where the condition of the premises does not attract children.[6] A second departure from the common law doctrine occurred when cases began holding that a landowner owed a reasonable duty of care to trespassers for "active negligence" [7] However, when a trespasser's injuries arise from static conditions of the premises, courts have been more reluctant to impose liability upon the landowner [8] Some cases have also held a

1. See *e.g.*, Krieger v. Ownership Corp., 270 F.2d 265 (3rd Cir. 1959) Imre v. Riegal Paper Corp., 43 N.J. Super. 289, 128 A.2d 498 (1957).

2. *E.g.*, O'Leary v. Brooks Elevator Co., 7 N.D. 554, 75 N.W 919 (1898). See also, Hutson v. King, 95 Ga. 271, 22 S.E. 615 (1895) Union Stockyard & Transit Co. v. Rourke 10 Ill. App. 474 (1882) Hargreaves v. Deacon, 25 Mich. 1 (1872).

3. *E.g.*, O'Leary v. Brooks Elevator Co., *supra* note 2.

4. Trask v. Shotwell, 41 Minn. 66, 42 N.W 699 (1899) Hutson v. King, *supra* note 2.

5. "Where an owner permits anything dangerous which is attractive to children, and from which injury may be anticipated, to remain unguarded on his premises, he will be liable if a child attracted to it is injured thereby." Foster v. Lusk, 129 Ark. 1, 194 S.W 855 (1917).

6. Louisville & N.R. Co. v. Spence's Adm'r, 282 S.W.2d 826 (Ky. 1955), Lewis v. Mains, 150 Me. 75, 104 A.2d 432 (1954).

7. "Generally speaking, the term 'passive negligence' denotes negligence which permits defects, obstacles or pitfalls to exist upon the premises, in other words, negligence which causes dangers arising from the physical condition of the land itself. Active Negligence' on the other hand, is negligence occurring in connection with activities conducted on the premises, as for example, negligence in the operation of machinery or of moving vehicles whereby a person lawfully upon the premises is injured." Potter Title & Trust Co. v. Young, 367 Pa. 239, 80 A.2d 76 (1951) Boucher v. American Bridge Co., 95 Cal. App. 2d 659, 213 P.2d 537 (1950).

8. See Hume v. Hart, 109 Cal. App. 2d 614, 241 P.2d 25 (1952), Levine v.

landowner liable for damage resulting from highly dangerous activity on land, which threatened the personal safety of others, regardless of their status as invitees, licensees, or trespassers.[9]

One court has said in criticism of the common law invitee, licensee, trespasser trichotomy:

> Such an approach requires a court to first determine the precise status of the visitor which is sometimes a most difficult task, and then to determine from the cases whether the owner has violated any duty owed to a member of such a class. Such an approach is unrealistic, arbitrary, and inelastic. The point where the duties towards members of each of the classes begins or ends or where it should begin or end, or becomes supplemented by the duty to act is almost impossible of perception.[10]

The jurisdictions which have discarded the common law distinctions now apply a general negligence doctrine making the landowner's duty of care dependent on the totality of the circumstances.[11] But, unlike the principle case, they are still unwilling to apply a general negligence doctrine to cases involving static conditions.[12] The prevailing view in cases involving injury resulting from active conduct, as distinguished from a static condition, is that the landowner may be liable for failure to exercise ordinary care toward a trespasser whose presence on the land is known or should reasonably be known to him.[13]

It is the opinion of this writer that a departure from the strict common law doctrine is warranted; however, extending a landowner's duty of care to trespassers to include liability for static conditions of the premises will put unreasonable

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Miller, 218 Md. 74, 145 A.2d 418 (1958), Richardson v. Whittier, 265 Mass. 478, 164 N.E. 384 (1929).

9. *E.g.*, Wytupeck v. Camden, 25 N.J. 450, 136 A.2d 887 (1957), Fernandez v. American Bridge Co., 104 Cal. App. 2d 340, 231 P.2d 548 (1951).

10. Fernandez v. Consolidated Fisheries, 98 Cal. App. 2d 91, 219 P.2d 73, 76 (1950).

11. See *e.g.*, Taylor v. Baton Rouge Sash & Door, Inc., 68 So. 2d 159 (La. 1953) Fernandez v. Consolidated Fisheries, *supra* note 10.

12. *E.g.*, Boucher v. American Bridge Co., *supra* note 7.

13. Oettinger v. Stewart, 24 Cal. 2d 133, 148 P.2d 19 (1944).

restrictions on the landowner's use of his property Therefore, this extension should not be followed by this state.

EDWIN ODLAND

LIBEL AND SLANDER—EXEMPLARY DAMAGES—THE REQUIREMENT OF ACTUAL DAMAGES—In a libel action the trial Court of Ramsey County ruled that the publication in issue was libel per se. The jury returned a verdict for the plaintiff assessing actual damages at $0 and punitive damages at $5,000. Defendant's motion for judgment notwithstanding the verdict was granted, and on appeal the Minnesota Supreme Court *held:* punitive damages in a libel per se action are recoverable in the absence of actual damages. *Loftsgaarden v Reiling,* 126 N.W.2d 154 (Minn. 1964)

Generally, punitive damages are awarded where factors aggravating the plaintiff's injury are present; those usually considered are fraud, willfullness or wantonness, oppression, malice, or violence.[1]

The great weight of authority requires actual or compensatory damages as a prerequisite to the recovery of punitive or exemplary damages,[2] since the defendant may not be punished for his wrongful conduct alone.[3] Therefore, there must be a separate cause of action for compensatory damages, exemplary damages being mere incidents to that cause of action.[4] More often than not, under this theory, there must be an actual award of compensatory damages.[5] North Dakota, along with the great weight of authority, deems

1. OLECK, DAMAGES TO PERSONS AND PROPERTY § 29 (rev. ed. 1961).

2. See *e.g.,* Manhatten Credit Co. v. Skirvin, 228 Ark. 913, 311 S.W.2d 168 (1958) Barber v. Hohl, 40 N.J. Super, 526, 123 A.2d 785 (App. Div. 1956) Haydel v. Morton, 8 Cal. App. 2d 730, 48 P.2d 709 (1935).

3. OLECK, *op. cit. supra* note 1, § 275D.

4. Tyra v. Board of Police & Fire Pension Comm'rs., 32 Cal. 2d 666, 197 P.2d 710 (1948).

5. Manhatten Credit Co. v. Skirvin, *supra* note 2 (distinguishing between actual and nominal damages and holding that the latter will not support an award of punitive damages).