Michigan Law Review

Volume 45 | Issue 4

1947

# TORTS-LIABILITY OF LAND AND CHATTEL OWNER TO THIRD PARTY FOR ACTS OF INFANT TRESPASSER

T. L. Tolan
*University of Michigan Law School*

Follow this and additional works at: https://repository.law.umich.edu/mlr

 Part of the Torts Commons

## Recommended Citation

T. L. Tolan, *TORTS-LIABILITY OF LAND AND CHATTEL OWNER TO THIRD PARTY FOR ACTS OF INFANT TRESPASSER*, 45 MICH. L. REV. (1947).
Available at: https://repository.law.umich.edu/mlr/vol45/iss4/12

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

TORTS—LIABILITY OF LAND AND CHATTEL OWNER TO THIRD PARTY FOR ACTS OF INFANT TRESPASSER—Defendant left on his land tractors which could easily be started by children in the neighborhood who, defendant knew, frequently trespassed and played on the machines. A boy of ten inadvertently started one of the machines and then jumped to safety, but the tractor proceeded through a building on defendant's land, down a hill, across a street, and into and through the plaintiff's house a block away, causing the damage for which she sues. The trial court charged that to justify recovery for the plaintiff the jury must find not only that defendant was negligent, and that his negligence was the proximate cause of the harm, but also that the tractor was an "attractive nuisance." Defendant appeals from a judgment on the verdict for plaintiff. *Held*, affirmed, for while the attractive nuisance doctrine did not

apply to the facts of this case, the error was not prejudicial. *Bronk v. Davenny*, (Wash. 1946) 171 P. (2d) 237.

The trial court's attempted extension of the benefits of the attractive nuisance doctrine to third persons is unique.[1] The appellate court grounds recovery on simple negligence; but the case is susceptible of several analyses. The action is unusual: one outside the premises suing a land and chattel owner for damage caused by admitted trespassers on defendant's land and chattel. Should the basis of recovery be the breach of a duty to control the activities of known trespassers? [2] Would such a duty be analogous to that of controlling invitees [3] and licensees? [4] Another question is suggested when the trespasser approach is used. Some notice of the likelihood of the trespasser's presence seems necessary to make the defendant negligent; [5] but, generally, it is said that a landowner is not bound to anticipate trespassers.[6] Following this rule, liability could be denied although the presence of the trespasser was to be expected, in fact. But if the mischievous tractor enthusiast in the principal case is labelled a licensee by virtue of the attractive nuisance doctrine,[7] that label may suggest the duty; yet the

[1] The general rule is that a landowner is not liable to trespassers injured by the condition or use of his land. PROSSER, TORTS, § 77 (1941); 2 TORTS RESTATEMENT, § 333 (1934); Preston v. Austin, 206 Mich. 194, 172 N.W. 377 (1919). In many jurisdictions, however, infant trespassers may recover in certain situations under the attractive nuisance doctrine. Railroad Co. v. Stout, 17 Wall. (84 U. S.) 657 (1873). Limitations, literature and decisions on the theory are myriad. Cases are collected in 36 A.L.R. 34 (1925); 39 A.L.R. 486 (1925); 45 A.L.R. 982 (1926); 53 A.L.R. 1344 (1928); 60 A.L.R. 1444 (1929); and 145 A.L.R. 322 (1943). See also Smith, "Liability of Landowners to Children Entering Without Permission," 11 HARV. L. REV. 349 (1898); Hudson, "The Turntable Cases in the Federal Courts," 36 HARV. L. REV. 826 (1923); 34 COL. L. REV. 782 (1934); 40 MICH. L. REV. 322 (1941). The reason for the exception is said to be that society abhors maimed children more than partially restricted landowners. Hudson, ibid.; Green, "Landowner v. Intruder; Intruder v. Landowner," 21 MICH. L. REV. 495 (1923); Bohlen, "The Duty of a Landowner Towards Those Entering His Premises of Their Own Right," 69 UNIV. PA. L. REV. 142, 237, 340 (1921); BOHLEN, STUDIES IN TORTS, c. 3, pp. 190-194 (1926); 2 TORTS RESTATEMENT, § 339 (1934).

[2] See PROSSER, TORTS, § 76 at p. 609 (1941).

[3] Greenley v. Miller's, Inc., 111 Conn. 584, 150 A. 500 (1930).

[4] 2 TORTS RESTATEMENT, §§ 318, 497 (1934); Harper and Kime, "The Duty to Control the Conduct of Another," 43 YALE L. J. 886 (1934). Authority in decisions is limited to the owner's duty to control a licensee driving his automobile; there are no other cases in point. For the duty to control licensees creating a nuisance, see Grant v. Louisville & Nashville Ry. Co., 129 Tenn. 398, 165 S.W. 963 (1913).

[5] See the opinion of Lehman, J., for the New York Court of Appeals in Ford v. Grand Union Co., 268 N.Y. 243, 197 N.E. 266 (1935).

[6] PROSSER, TORTS, § 77 (1941); 2 TORTS RESTATEMENT, § 333 (1934).

[7] Railroad Co. v. Stout, 17 Wall. (84 U. S.) 657 (1873); Union Pac. Ry. Co. v. McDonald, 152 U.S. 262, 14 S. Ct. 619 (1894). The theory is that the "attractive nuisance" "lured" the child onto the land; ergo, he came with the landowner's permission.

social interest creating the doctrine is most apparent when the plaintiff is the injured child.[8] Cases in point illustrate the willingness of our courts to use legal labels and concomitant theories in one situation and to ignore them when there are different parties to the action. Liability in the instant case is not based on the trespasser relationship; nor is the "duty to control another" analysis employed. Instead, the duty is imposed because the owner knew or should have known that trespassers were likely,[9] and did not take reasonable precautions to keep dangerous instrumentalities out of their hands.[10] It is submitted that the rule is sound; that the relationship of the intervenor is relatively unimportant; and that the duty-to-control-another theory need not be employed when a clearer ground for recovery is possible.[11] However, in the light of Cardozo's

[8] See note 1, supra.

[9] The principal case is the first one reported allowing recovery in a negligence action under the above rule, but the three other report decisions in point recognize it, denying recovery since the plaintiff could not make out a case under the rule. Strasburger v. Vogel, 103 Md. 85, 63 A. 202 (1906) (bricks fell from *D*'s building injuring *P*, lawful traveller on the highway; there was evidence that the bricks had been dislodged by trespassers on the roof; since trespassers were there without *D*'s knowledge or consent, liability denied); McDowall v. Great Western Ry. Co., [1903] 2 K.B. 331, (trespassing boys released brakes on *D* railroad's cars, sending them downhill and across a highway where they struck *P*; no recovery since no evidence that reasonable precautions were not taken, nor that the acts of the trespassers should have been anticipated); Wheeler v. Morris, 84 L.J.(K.B.) 1435 (1915) (trespassers pulled *D*'s awning down on top of *P*, lawful highway traveller; liability denied since this action was unforeseeable). Analogous cases include Atty. Gen. v. Heatley [1897] 1 Ch. 560 (injunction against nuisance); Rickards v. Lothian, [1913] A.C. 263; dictum by Bramwell, B., in Nichols v. Marsland, L.R. 10 Ex. 255 (1875); Barker v. Herbert, [1911] 2 K.B. 633. But see Spiker v. Eikenberry, 135 Iowa 79, 110 N.W. 457 (1907) (injunction denied although *D* knew trespassers were creating nuisance).

[10] The duty here is one step removed from the duty not to put a dangerous instrumentality into the hands of one unable to appreciate its danger, Dixon v. Bell, 5 M. & S. 198, 105 Eng. Rep. 1023 (1816); Meers v. McDowell, 110 Ky. 926, 62 S.W. 1013 (1901); and is unlike the duty to control another's activity. Note that the affirmative obligation to control another has narrow bounds; its existence is based on a "peculiar relationship" between the controller and controlled. Harper and Kime, "The Duty to Control Another," 43 YALE L. J. 886 (1934); 2 TORTS RESTATEMENT, §§ 318, 497 (1934).

[11] In the principal case the emphasis is on cause—the foreseeability of the child's intervening act. In other cases stress is placed on the duty problem—to guard against dangerous activity by expected trespassers. Is this an illustration of the idea that duty and proximate cause are essentially the same problem—"whether the interest which is sought to be vindicated is within the protection of the law"? See GREEN, RATIONALE OF PROXIMATE CAUSE 122ff. (1927); Seavey, "Mr. Justice Cardozo and the Law of Torts," 52 HARV. L. REV. 372 (1939); Bingham, "Legal Cause at Common Law," 9 COL. L. REV. 16, 136 at 154 (1909).

[12] Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928). See 4 MONT. L. REV. 97 (1943).

analysis in the *Palsgraf* case,[12] one may inquire whether there was foreseeable risk to the present plaintiff in the defendant's acts.

*T. L. Tolan*