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Torts—Negligence—Liability to Trespassing Children

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TORTS—NEGLIGENCE—LIABILITY TO TRESPASSING CHILDREN

Plaintiff, an eleven year old boy, was injured when a lumber pile on which he was playing collapsed. The lumber had been ordered by a contractor and had been piled on the building site by a lumber dealer. The lumber, which allegedly resembled a boat to the plaintiff, was near two public alleys which bordered the building site. The plaintiff brought an action for injuries under the attractive nuisance doctrine against both the contractor and the lumber dealer. *Held*: Even though the lumber dealer had neither possession or control of the premises, he owed a duty to trespassing children not to create an attractive, dangerous situation; and liability should be determined by the jury under the ordinary rules of negligence.[1]

The instant case is the first in which liability has been imposed upon a lumber dealer under this type of factual situation.[2] However, the opinion of the court is not too clear as to the principles upon which liability was predicated. A plaintiff in another case was denied recovery against a lumber dealer under an almost identical factual situation because the dealer was allowed to take advantage of the fact of the trespass for relief from liability.[3] In the instant case the court rejected the contention

[1] Kahn v. James Burton Co., 5 Ill.2d 614, 126 N.E.2d 836 (1955), reversing, 1 Ill. App.2d 370, 117 N.E.2d 670 (1954) which is noted in 32 Chi.-Kent L. Rev. 348 (1954). It should be noted that the court stated by dictum that the attractive nuisance doctrine and its requirement that the child be lured onto the land by the attractive object was no longer applicable to the contractor as a possessor of the land. Attractiveness was important only in determining foreseeability, and liability was to be determined by the jury by the ordinary rules of negligence. This view is in conformity with the more modern view adopted by the Restatement. Torts § 339 (1934). The gradual acceptance of this position has tended to clarify the basis for imposing liability for injuries sustained by trespassing children. Grimmestad v. Rose Brothers, Inc., 194 Minn. 531, 261 N.W. 194 (1935); Strang v. South Jersey Broadcasting Co., 10 N.J. Super. 486, 77 A.2d 502 (1950); Eaton v. R.B. George Investments, Inc., 152 Tex. 523, 260 S.W.2d 587 (1953). See Fleming, Tort Liability of Occupiers of Land: Duties Owed to Trespassers, 63 Yale L.J. 144, 161 (1953); Prosser, Torts §§ 77, 620 (1st ed. 1941).

[2] "No cases have been cited, nor have I found any, wherein the standard of conduct binding a supplier of lumber has been held to impose upon him an obligation to any more than was done by the lumber company in this case." Kahn v. James Burton Co., 5 Ill.2d 614, 126 N.E.2d 836, 843 (1955) (dissenting opinion). Research by the author has also failed to produce any such case.

[3] Morris v. Lewis Mfg. Co., 331 Mich. 252, 49 N.W.2d 164. 28 A.L.R.2d 214 (1951).

that since the dealer was neither in control nor possession of the premises, he owed no duty to anyone other than the owner or the contractor. The court, citing *Stedwell v. Chicago*,[4] said that as to the dealer, the child is not a trespasser. Coinciding with the weight of authority, the *Stedwell* case is one in which persons maintaining electrical lines over property have not been allowed to take advantage of the defense of the injured child's trespass. In those cases the duties of the possessor of land and the negligent party have been decided independently. The duty of the possessor of land is decided according to the attractive nuisance rule of the jurisdiction, and the duty of the negligent party is decided according to whether or not it was foreseeable that harm would come to the injured child.[5] The test as to negligence is merely whether or not the party was negligent in stringing its wires where it had reason to believe it would imperil the lives of children.[6]

The failure to decide the duties of the possessor of the land and the negligent party independently has led to criticism of the contrary result.[7] Although the instant case lacked the highly dangerous nature of electricity and the element of control found in the electrical cases, the court applied the same test:

> . . . whether the lumber company in the exercise of ordinary care could reasonably have anticipated the likelihood that children would climb onto the lumber and would be injured if it were not securely piled.[8]

Thus it is the foreseeability of harm which serves as the basis for the imposition of a duty of ordinary care.

The absence of control or possession is not a defense when liability is sought to be imposed upon the breach of a common law duty which a seller owes to anyone whom he has reason to believe will come into contact with the article sold, where he knows, or by the exercise of ordinary diligence should know, that the article he is delivering is in an imminently dangerous or defective condition.[9] In such case he is liable to any person, or

[4] 297 Ill. 486, 130 N.E. 729, 17 A.L.R. 829 (1921).

[5] See cases collected, Annot., 56 A.L.R. 1021, 1030 (1928).

[6] Edwards v. Kansas City, 104 Kan. 684, 180 Pac. 271 (1919); see Annot., 17 A.L.R. 833, 849 (1922).

[7] McCaffrey v. Concord Electric Co., 80 N.H. 45, 114 Atl. 395 (1921); see Annot., 17 A.L.R. 833, 849 (1922).

[8] Kahn v. James Burton Co., 5 Ill.2d 614, 126 N.E.2d 836, 840 (1955).

[9] See Annot., 42 A.L.R. 1243, 1244. (1926) for distinction between inherently and imminently dangerous. Cf. MacPherson v. Buick Motor Co., 217 N.Y. 382. 111 N.E. 1050, 1916F L.R.A. 696.

class of persons, who, he has reason to believe, will come into contact with the articles and who suffers injury because of its defective and dangerous condition.[10]

Similarly, a like result would be attained by the adoption of the Restatement rule that:

> . . . one who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability . . . for bodily harm . . . after his work has been accepted . . . under the same rules as those . . . determining liability of one who as manufacturer . . . makes a chattel. . . .[11]

The adoption of the Restatement rule would lead to the same test as applied by the court in the instant case.

Denying the pleas of the defendant lumber company that its conduct was in conformity with the customs of the trade of the area, the court stated that there was sufficient evidence for the jury to find such conduct unreasonable. Customs and usages of the trade under the better view should always be required to meet the test of "learned reason."[12] When a whole industry adopts careless methods in order to save time, effort, or expense, the standard is not conclusive, and conformity thereto is a circumstance to be weighed and considered with other circumstances in determining whether or not ordinary care has been exercised.[13] The determination of reasonableness is therefore left to the jury.

The test as applied by the court was the proper one and there is sufficient basis for its application to future cases of a similar nature.

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