Marquette Law Review

Volume 38
Issue 3 *Winter 1954-1955*

Article 5

Duty of Conduct Owed by Property Owner to Trespasser

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COMMENTS

DUTY OF CONDUCT OWED BY PROPERTY OWNER TO TRESPASSER

I. INTRODUCTION

This comment proposes to analyze the duty of care which a property owner must observe with respect to trespassers on his property. Although the rules relating to this subject are usually announced in cases having to do with acts of trespass upon land, they are equally applicable where the trespass is upon personal property. In the main, the scope of this inquiry is limited to the *conduct* of all property owners and does not extend to *conditions* existing on land, the maintenance of which may impose liability on a landowner. The rules of law applicable to cases of trespasses upon land were formulated by a civilization dedicated to the idea of private ownership and to a social policy which held that it was just and wise that landowners should have the right to enjoy their land without the burden of watching for and protecting those who enter there without a claim of right.[1]

The common law writ of trespass, which included within its scope offenses committed by a landowner upon his own premises, was originally a criminal writ.[2] For a trespasser to have a cause of action in the royal courts of England it was necessary that the act of the landowner be accompanied by such a degree of culpability that it also amounted to an offense against the Crown. Unless the injured trespasser could show that the landowner's act involved criminality, he was denied relief. The fact that trespass had its origin in criminal law has a dual significance. First, it demonstrates the extent to which the law of feudal England favored the landowner;[3] second, it explains why, after the criminal character of the writ of trespass disappeared, the landowner's civil liability continued to be stated in terms which demanded the existence of a substantially criminal state of mind.[4]

The duty which a property owner owes to a trespasser under modern law becomes intelligible only when we understand that the modern law evolved largely from cases involving a trespass upon land in a society that stressed the landowner's right of use short of criminal conduct.

II. LIABILITY FOR INTENTIONAL ACTS

While their phraseology differs, most courts hold that no duty exists toward a trespasser except that of refraining from injuring him either

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[1] PROSSER, TORTS §77 (1941).
[2] Bohlen, *The Duty of a Landowner Toward Those Entering His Premises of Their Own Right*, 69 U. OF PA. L. REV. 237 (1921).
[3] Eldredge, *Tort Liability to Trespassers*, 12 L.Q. 32 (1937).
[4] Bohlen, *supra* note 2, at 238.

wilfully, wantonly or intentionally.[5] The Wisconsin court has repeatedly stated that "it has long been the established law of this state that a person owes no duty to a trespasser except that of refraining from wilful and intentional injury."[6]

> To warrant a finding of a *willingness* to inflict an injury:
> "the danger of inflicting a personal injury upon a person by the conduct of another must be such as to reasonably permit of a belief that such other either contemplated producing it, or, being conscious of the danger that it would occur, imposed that danger upon such person in utter disregard of the consequences."[7]

In Wisconsin, conduct which manifests a *willingness* to inflict injury is equivalent to gross negligence.[8] The term "gross negligence," as it is used in Wisconsin, is misleading because it has no reference to negligent conduct at all. While negligent conduct is characterized by inadvertence, gross negligence is characterized by the absence of inadvertence.

> "Ordinary negligence and gross negligence are not the same. The former lies in the field of inadvertence; the latter in the field of an actual or constructive intent to injure."[9]

So far as its legal consequences are concerned, it is equivalent to conduct that is "reckless, wilful, wanton and intentional."[10]

Although a landowner is entitled to the exclusive possession of his land and may remove, with force if necessary, a trespasser, he will be liable by virtue of the general rule in assault and battery if, in ejecting a trespasser, he uses more than reasonable force.[11] In *Palmer v. Smith*[12] the question of whether or not a newly-wedded landowner was priviledged to shoot bullets at a group of trespassers who were conducting a charivari party on his premises was before the court. In affirming a judgment for the plaintiff who was a member of the charivari and who was struck by a bullet fired by the defendant, the court approved the following instruction:

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[5] See, *e.g.*, Magar v. Hammond, 183 N.Y. 387, 390, 76 N.E. 474, 475 (1906) ("The only obligation resting upon the defendants was to abstain from wilfully, wantonly or recklessly injuring them."); O'Brien v. Union Freight Railroad Co., 209 Mass. 449, 453, 95 N.E. 861, 862 (1911) ("As to trespassers and licensees the well settled rule is that the only duty of the owners or occupiers of the land is to abstain from inflicting intentional or wanton or wilful injuries."); Hobert v. Collins, Lavery & Co., 80 N.J. Law 425, 78 Atl. 166 (1910); Nashville, C. & St. L. Ry. Co. v. Priest, 117 Ga. 767, 45 S.E. 35 (1903).

[6] See, *e.g.*, Routt v. Look, 180 Wis. 1, 191 N.W. 557 (1923); Frederick v. Great Northern Ry. Co., 207 Wis. 234, 241 N.W. 363 (1932); Hartman v. Badger Tobacco Co., 210 Wis. 519, 246 N.W. 577 (1933); Nalepinski v. Durner, 259 Wis. 583, 49 N.W. 2d 601 (1951).

[7] Bolin v. Chicago, St. P., M. & O. Ry. Co., 108 Wis. 333, 84 N.W. 446 (1900).

[8] Fox. v. Chicago, St. P., M. & O. Ry. Co., 147 Wis. 310, 133 N.W. 19 (1911).

[9] Bentson v. Brown, 191 Wis. 460, 211 N.W. 132 (1926).

[10] Austin v. Chicago, M. & St. P. Ry. Co., 143 Wis. 477, 484, 128 N.W. 265 (1910).

[11] See 2. R.C.L. 557, 558.

[12] 147 Wis. 70, 132 N.W. 614 (1911).

> "A man may use reasonable and necessary force to eject a trespasser who intrudes upon his premises against his known commands but he cannot use wanton or unnecessary violence in so doing or he becomes liable to respond in damages for any injury which he may thereby inflict."[13]

The general rule, requiring a property owner to refrain from wilfully or intentionally injuring a trespasser, has been invoked to restrict the means available to a property owner for the protection of his property. It is firmly established that a person cannot protect his property by means which are intended or calculated to destroy human life or inflict serious or grievous bodily harm.[14] *Meibus v. Dodge*[15] involved a trespass on personal property. In that case, the plaintiff, while trespassing on the defendant's sleigh, was bitten by a ferocious dog who was left to guard the sleigh. In holding the defendant liable for the injuries sustained by the plaintiff, the court stated that an owner may not protect his property by "means endangering the life or safety of a human being."[16] The cases, however, in which this rule has been most frequently enunciated are the so-called "Spring gun" cases. These concern trespassers who have been shot by a spring gun or who have fallen into a mantrap which the landowner had set on his premises to protect his property. In jurisdictions which have decided such cases the landowner has been held to be liable.[17] His liability is said to "arise from the fact that the defendant . . . has expected the trespasser and prepared an injury that is no more justified than if he had held the gun and fired it"[18] and is based "upon the limitation which the law imposes upon the right of the owner of property in rendering it protection."[19] His liability, in other words, is predicated upon the ground that his very act in setting a spring gun or a mantrap indicates that he is expecting a trespasser and intends to injure him.

While no spring gun case, as such, has arisen in Wisconsin, it would be safe to conclude, in view of *Meibus v. Dodge,* that Wisconsin would impose liability on the landowner in such a situation. The fact that a ferocious dog was involved in that case would appear to be immaterial since the basis of the plaintiff's cause of action is the defendant's *intention to inflict injury* and not the *instrument* by which his will is executed.[20] The owner's intent to inflict serious injury is manifested

[13] *Ibid.* at 75, 132 N.W. at 617.
[14] Bohlen and Burns, *The Privilege To Protect Property By Dangerous Barriers and Mechanical Devices,* 35 YALE L. J. 525, 539 (1926). See also 29 L.R.A. 154; 24 L.R.A. (N.S.) 369.
[15] 38 Wis. 300 (1875).
[16] *Ibid.* at 308.
[17] Hooker v. Miller, 37 Iowa 613, 18 Am.Rep. 18 (1873); Riedel v. West Jersey & S.R. Co., 177 F. 374, 28 L.R.A. (N.S.) 98, 21 Ann. Cas. 746 (1910); See also note 14 supra.
[18] United Zinc & Chemical Co. v. Britt, 258 U.S. 268, 275, 42 S.Ct. 299 (1921).
[19] Hooker v. Miller, *supra* note 17.
[20] Zink v. Foss, 221 Mass. 73, 108 N.E. 906 (1915).

whether he leaves a savage dog, a spring gun or a mantrap to protect his property.[21]

III. Liability for Negligent Acts

As the social value of human life came to be stressed by the courts, dissatisfaction with the general rule, requiring property owners to refrain only from injuring trespassers wilfully or intentionally, became apparent. The growing law of negligence urged that the property owner be required to exercise ordinary care to protect trespassers; on the other hand the landowners, pointing to their traditional immunities, insisted that the imposition of such a duty would be unreasonable.[22] Most courts tried to please all parties concerned by attempting to effect a compromise. In dealing with the problem, they have distinguished situations in which the property owner is *unaware* of the trespasser's presence from situations in which he has *discovered* the trespasser.

(1) Undiscovered Trespassers

The rule is well settled that a person has no duty to anticipate the presence of trespassers.[23] An owner of property is entitled to assume that persons will obey the law and not trespass upon his property.[24] Because he is under no duty to anticipate trespassers, a property owner is not bound to provide for their safety[25] and a person who wrongfully enters upon the land of another "takes his chances and must look out for himself."[26] Thus, a driver of a truck has no duty to provide for the safety of persons who trespass on the truck without his knowledge and is not liable for injuries sustained by such persons should they lose their grip and fall under the wheels of the truck.[27] Similarily, a railroad company is not bound to exercise any care or diligence to discover trespassers on its tracks or to do any act or service in anticipation of trespassers.[28] In *Nalepinski v. Durner*,[29] the plaintiff, standing on a ladder in a driveway between the defendant's residence and an adjoining residence, fell when the defendant, unaware of his presence, backed

[21] Woolf v. Chalker, 31 Conn. 121, 131, 81 Am. Dec. 175, 181 (1862) ("A man may not, in this country, use dangerous or unnecessary instruments for the protection of his property against trespassers . . . A dog is an instrument for protection. A ferocious one is a dangerous instrument, and the keeping him on the premises to protect them against trespassers is unlawful, upon the same principle that setting spring guns, or concealed spears, or placing poisonous food is unlawful.")

[22] Bohlen, *supra* note 2, at 237.

[23] Erie R.R. Co. v. Hilt, 247 U.S. 97, 38 S.Ct. 435 (1918); Upp v. Darner, 150 Iowa 403, 130 N.W. 409 (1911).

[24] *Supra*, note 18.

[25] Erie R.R. Co. v. Hilt, *supra* note 23.

[26] Dahl v. Valley Dredging Co., 125 Minn. 90, 145 N.W. 796 (1914).

[27] Routt v. Look, *supra* note 6.

[28] Schug v. The Chicago, Milw. & St. P. R. Co., 102 Wis. 515, 78 N.W. 1090 (1899); Anderson v. C., St. P., M. & O. R. Co., 87 Wis. 195, 58 N.W. 79 (1894); Sorenson v. Chicago, M. & St. P. R. Co., 192 Wis. 231, 212 N.W. 273 (1927).

[29] 259 Wis. 583, 49 N.W. 2d 601 (1951).

her automobile into the driveway and struck the ladder. It was held that the allegation that the plaintiff was a trespasser on the defendant's private property without the defendant's knowledge or consent constituted a good defense to a charge of negligence.

There is one recognized exception to the rule that a property owner has no duty to anticipate trespassers. This exception applies where the injured trespasser is a child who has been injured by instrumentalities or artificial conditions which the property owner, in the exercise of ordinary judgment and prudence, should know would naturally attract children into unsuspected danger.[30] Before a duty to anticipate trespassing children and to exercise reasonable care for their safety arises, the following factors must be present:[31]

(a) the instrumentality or artificial condition maintained or allowed to exist by the property owner must be inherently dangerous to children;

(b) the property owner knew or should have known that children trespassed or were likely to trespass;

(c) the property owner realized or should have realized that the instrumentality or artificial condition was inherently dangerous to children and involved an unreasonable risk of serious bodily injury or death to them;

(d) the injured child, because of his youth or tender age, did not discover the instrumentality or artificial condition or realize the risk involved in going within the area or in playing in close proximity to the inherently dangerous instrumentality or artificial condition;

(e) the property owner could reasonably have provided safeguards which would have obviated the inherent danger without materially interfering with the purpose for which the instrumentality or artificial condition was maintained.

In situations involving undiscovered trespassers, except in cases where the "attractive nuisance" doctrine applies, the traditional immunity of property owners has been preserved because the only duty that a property owner owes to them is merely to refrain from wilfully or intentionally injuring them.

(2) Discovered Trespassers

While all courts are agreed that there is no duty to exercise ordinary care to protect undiscovered trespassers, such unanimous accord has not been reached in the case of discovered trespassers. The majority

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[30] This exception is commonly referred to as the "attractive nuisance" doctrine. The phrase is misleading because liability is based on the rules relating to negligence and not on those relating to the maintenance of a nuisance. See Flamingo v. City of Waukesha, 262 Wis. 219, 55 N.W. 2d 24 (1952) (concurring opinion).

[31] Angelier v. Red Star Yeast & Products Co., 215 Wis. 47, 254 N.W. 351 (1934); RESTATEMENT, TORTS §339.

rule, often called the Michigan rule, holds property owners liable for injuries negligently inflicted upon discovered trespassers. "Where a trespasser is discovered upon the premises by the owner or occupant, he is not beyond the pale of the law, and any negligence resulting in injury will render the person guilty of negligence liable to respond in damages."[32] Once the trespasser is discovered, the property owner must exercise ordinary care for his safety. The minority rule, called the Massachusetts rule, states that the only duty of the owner is to refrain from wilfully or intentionally injuring the seen trespasser.[33]

Wisconsin has followed the Michigan rule in setting forth the duty of care which a railroad owes to trespassers on its tracks:

> "The use of a railroad is exclusively for its owner or those acting under its authority, and the company is not bound to the exercise of any active duty of care or diligence towards mere trespassers on its track, to keep a look-out to discover or protect them from injury, except, that, when discovered in a position of danger or peril, it is its duty to use all reasonable and proper effort to save and protect them from the probable consequences of their indiscretion or negligence."[34]

The court later remarks:

> "But after discovery that a party is on its track and in a position of danger, it is bound to the exercise of reasonable and appropriate care to prevent his injury, even though wrongfully on its track."[35]

Another situation in which Wisconsin has applied the Michigan rule is where the trespass is upon vehicles. In this situation, the plaintiff is generally a child who has climbed onto a railroad car[36] or a truck[37] and loses his grip when the vehicle is set into motion. If the presence of the trespassers was unknown to the defendant the plaintiff is denied recovery because the only duty owed to him is that "of refraining from wilful and intentional injury." If, on the other hand, the defendant had knowledge of his presence, he is under a duty to protect him from injury.[38]

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[32] Herrick v. Wixom, 121 Mich. 384, 81 N.W. 333 (1899). For an exhaustive collection of authorities see 45 C.J. 749 note 34. See also, RESTATEMENT, TORTS §336 (adopts the Michigan rule).

[33] See, Peaslee, *Duty to Seen Trespassers,* 27 HARV. L. REV. 403 (The author presents compelling arguments in favor of the Michigan rule).

[34] Anderson v. C., St. P., M. & O. R. Co., *supra* note 28 at 204, 58 N.W. at 82.

[35] *Ibid.;* See also Sorenson v. C. M. & St. P. R. Co., *supra* note 28; Sheehan v. St. P. & D. Ry. Co., 76 Fed. 201 (1896), in which the court said that "an obligation to exercise reasonable effort to avert injury to trespassers arises at the moment of discovery."

[36] Wendorf v. Director General of Railroads, 173 Wis. 53, 180 N.W. 128 (1920).

[37] Routt v. Look, *supra* note 6.

[38] Wendorf v. Director General of Railroads, *supra* note 36 at 55, 180 N.W. at 129 ("The railroad company owed them no active duty to protect them unless its agents and servants had knowledge of their presence on the train and of their perilous position"); Routt v. Look, *supra* note 6 at 11, 191 N.W. at 561

In other situations the Wisconsin court has vacillated between the Michigan and the Massachusetts rule. It has failed to draw the distinction between seen and unseen trespassers and at times has said that no duty exists toward a trespasser except to refrain from wilfully or intentionally injuring him,[39] while at other times it has said that the property owner is under an additional duty to refrain from "active negligence committed at the time of injury."[40] The latest pronouncement on this subject is the case of *Deaton v. Unit Crane & Shovel Corp.*[41] In that case, the plaintiff was an employee of an independent contractor who was hired by the defendant to lay sewer pipes on the defendant's property in trenches to be dug by the defendant with one of its own power shovels. The plaintiff, his own work being slack, went over to the power shovel and by means of his hands guided the bucket as it was lowered into the trench and was injured when the bucket struck him. The crane operator and works manager testified that the plaintiff had been warned to stay away from the power shovel and not to put his hands on the bucket. The plaintiff denied that he had received such warning. No question was submitted in the special verdict as to whether plaintiff was a trespasser as to the power shovel at the time he placed his hands on the bucket. In remanding the case for a new trial the court said:

> "If the plaintiff should be determined to have been a trespasser at the time and place of the accident, then he cannot recover, because the only duty defendant's crane operator would have owed to plaintiff would have been to have refrained from wilfully or wantonly injuring him."[42]

The only authority cited by the court in support of this statement is *Nalepinski v. Durner.* That case, however, is plainly distinguishable on its facts in that it involved an injury to an unseen trespasser.

It has been suggested that a distinction should be drawn as to the status of the person against whom liability is asserted.[43] In the *Deaton*

("The duty of a driver to look out for the safety of a child does not arise unless and until he is advised or knows or ought to know that the child is in a perilous position.").

[39] Bolin v. Chicago, St. P., M. & O. Ry. Co., *supra* note 7; Nalepinski v. Durner, *supra* note 6.

[40] Frederick v. Great Northern Ry Co., *supra* note 6; Zartner v. George, 156 Wis. 131, 145 N.W. 129 (1914) (overruled in Angelier v. Red Star Yeast & Products Co., *supra* note 31 on other grounds).

[41] 265 Wis. 349, 61 N.W. 2d 552 (1953).

[42] *Ibid.* at 353, 61 N.W. 2d at 554; *Compare* the Deaton case with Walsh v. Pittsburgh Ry. Co., 221 Pa. 463, 70 Atl. 826 (1908), in which the court said, "If the man who started the motor . . . from his knowledge of the circumstances was conscious that she would be exposed to danger if the machinery was put in motion, a duty of care arose, as it would in the case of an engineer who sees a child on the track in front of his engine."

[43] See Stefan v. New Process Laundry, 323 Pa. 373, 377, 185 Atl. 734, 736 (1936), where the distinction as to the status of the person sought to be held liable was expressly recognized.

case, the plaintiff was attempting to hold liable not the person whose negligence caused its injury but his employer. The problem of the extent to which vicarious liability should be imposed upon an absent master for the negligence of his servant was, therefore, involved.[44] As to the employer, the plaintiff was, in fact, an unseen trespasser. If the plaintiff had attempted to hold the crane operator liable, perhaps the court would have been inclined to have followed the rule enunciated in *Zartner v. George*[45] which would impose liability on the defendant for active negligence committed at the time of the injury.

Until the time arrives that Wisconsin sees fit to adopt the modern view (IV, *infra*), it is suggested that the distinction between seen and unseen trespassers which the Wisconsin court has drawn in the railroad cases be applied in all cases wherein a trespasser seeks recovery against a property owner. If this distinction were applied the present uncertainty in this area of the law would be eliminated and a property owner would owe to a discovered trespasser only that duty which he already owes to every other human being. At the same time, Wisconsin law would be brought into harmony with that of the overwhelming majority of the states.

IV. A Modern View

The compromise of the majority of the courts which holds that a property owner's liability for negligently injuring a trespasser depends on whether or not the trespasser was discovered by him is certainly a laudable one in that it attempts to mitigate the harshness of the general rule which holds that a property owner is liable to trespassers only for wilful and intentional injury.

A modern view, however, has questioned the validity of making a property owner's liability depend upon whether the trespasser is seen or unseen.[46] It points out that the basis of a defendant's liability should be his conduct and not the status of the person injured. The reason that is given for denying relief to an unseen trespasser is not that a trespass is a wrongful act but that his presence is not to be *anticipated* and therefore no duty rests upon the property owner to provide for his safety. This is purely a legal fiction because, in fact, his presence can be, and often is, anticipated. Take the case of an unseen trespasser who has been injured by a spring gun or a mantrap set by the landowner. The reason why the landowner has been held liable is because

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[44] The same problem was present in Hartmann v. Badger Tobacco Co., *supra* note 6. (Defendant's employee, in disregard of the defendant's directions not to permit other persons to ride on the truck, took his sister for a ride. She was killed when the truck capsized. In an action by the deceased's parents the court refused to impose liability on the defendant-employer.)

[45] *Supra*, note 40.

[46] Hamakawa v. Crescent Wharf & W. Co., 4 Cal. 2d 499, 501, 502, 503, 50 P. 2d 803 (1935); Restatement, Torts §336.

he has, in fact, anticipated the "unseen" trespasser.[47] His liability is predicated on his conduct and not on the status of the trespasser.

The modern view simply broadens the rationale of the "Spring gun" cases by applying it to all cases where a trespasser can, in fact, be anticipated. It has the effect of expanding the "attractive nuisance" doctrine to include adults as well as children. It submits that, in all cases, the true test of a property owner's liability is whether he has acted as a reasonably prudent man would act in view of the probability that his conduct may result in injuries to others.[48] It should be noted that this doctrine would almost entirely deprive a landowner of his traditional immunities since he would be liable to even unseen trespassers if, at the time he acted, he had reason to expect that trespassers would be present within the range of his negligent acts.

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[47] United Zinc & Chemical Co. v. Britt, *supra* note 18.
[48] *Supra,* note 46.