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Torts - Negligence - Liability to Trespassing Children

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'There is nothing in this section which would prevent any court from treating the rule stated as a matter of "warranty" to the user or consumer'

But in the next sentence it points out that,

'if this is done, it should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods and that it is not subject to the various contract rules which have grown up to surround such sales.'³²

Because of the two earlier decisions, North Dakota appears to be confronted with the same alternatives as was Pennsylvania prior to their most recent decision.³³ Earlier state cases, public policy, and the latest trend indicate that future litigation in North Dakota is likely to adopt the Restatement view as did Pennsylvania.

A possible criticism of the Restatement approach is that such a holding places an unfair burden upon the manufacturer. This approach does not place liability without fault since the plaintiff is still required to prove a defect in the product as well as to show a causal connection between the defect and the injury³⁴ Placing a consumer, who has no adequate means of protecting himself, in a position of uncertain recovery for injuries resulting from defective products is a more dangerous proposition. A supplier should not be permitted to avoid responsibility by saying that he has made no contract with the consumer. Liability ought to be placed at the source of the defect. That end can best be accomplished through the adoption of the view recommended by the Restatement of Torts (Second)

RONALD K. CARPENTER

TORTS—NEGLIGENCE—LIABILITY TO TRESPASSING CHILDREN—The plaintiff, a twelve-year-old boy, suffered personal injuries while climbing on and jumping from a scaffold erected by the defendants in connection with the construction of a new home. The district court denied defendants' motion for a judgment notwithstanding verdict. The Supreme Court of North Dakota *held* that under the

32. *Stromsodt v. Parke-Davis & Co.*, *supra* note 28 at 997, quoted from 2 FRUMER-FRIEDMAN, *PRODUCTS LIABILITY*, Chap. 3, § 16A (4).

33. *Webb v. Zern*, 220 A.2d 853 (Pa. 1966).

34. *RESTATEMENT (SECOND), TORTS*, § 402A (1964).

facts of the case, considered in the light of the principles of the *Restatement (Second) of Torts*, there were no factual questions for the jury to determine and reversed the order denying defendants' motion for judgment notwithstanding verdict. *Mikkelson v Risovi*, 141 N.W.2d 150 (N.D. 1966)

This case is one of first impression in this jurisdiction. It marks the acceptance of the principles set forth in Section 339, *Restatement (Second) of the Law, Torts*,¹ as the determinants in establishing whether or not a possessor of land is liable for physical harm to children trespassing thereon.

The earliest acknowledgment of the special status of the child trespasser is found in the *Sioux City & P.R.R. v Stout*² and has since been variously recognized³ as the "turntable doctrine," "infant trespasser doctrine," "attractive nuisance doctrine," and "playground doctrine." Each characterization carried its own unique criteria for establishing the landowner's or possessor's duty and liability toward the trespassing child.⁴

While the North Dakota Supreme Court in the instant case expressed the opinion that previous North Dakota cases were in no way contrary to its present position, Dean Prosser saw in one of those prior cases, *O'Leary v Brooks Elevator Co.*,⁵ the apparent requirement that the child be induced to trespass.⁶ If, then, there ever was any need for allurements or attractions in order to find liability in this jurisdiction, such is clearly no longer the case.

It should be noted that this particular section of the *Restatement (Second)* is not concerned with the activities of the possessor;⁷ is not limited to "young children" or those of "tender years;"⁸ does not impose a duty upon the possessor to investigate or inspect his land to discover a condition which may be harmful; and, unless

1. RESTATEMENT (SECOND), TORTS, § 339 (1965) "A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger is slight as compared with the risk to children involved, and (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children."

2. 84 U.S. (17 Wall.) 657 (1873).

3. See Generally, Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427 (1959), 20 VAND. L. REV. 139 (1966).

4. *Ibid.*

5. 7 N.D. 554, 75 N.W. 919 (1898).

6. Prosser, *supra* note 3, at 448.

7. As to liability to children for such activities see RESTATEMENT (SECOND), TORTS, §§ 333, 334, 336 (1965).

8. *E.g.*, *Boyer v. Guidicy*, 246 S.W.2d 742 (Mo. 1952) (seventeen-year-old boy injured by dynamite cap).

he knows of the condition, imposes no liability.⁹ It does impose liability even though the structure or artificial condition was created and maintained by some third person so long as the possessor has knowledge of it.¹⁰

Whether the child appreciates the risk or hazard involved is generally considered to be a subjective matter. The question is not what the possessor may expect of the child trespasser, but what the child in fact understands.¹¹ This being the case, it follows that once the child's ignorance of the risk is established any issue of contributory negligence is irrelevant.¹²

Liability ordinarily will not attach to conditions of height, fire and water in the absence of some other factor creating a special hazard not readily apparent to the child trespasser. Among the special factors that may cause liability to be incurred, even as to these common hazards, are such things as a hidden condition, a distracting influence, or the extreme youth of known trespassers.¹³ The court may hold the child to knowledge and appreciation of an obvious risk even though the complaint alleged lack of such knowledge.¹⁴

Attractive nuisance cases undoubtedly require the exercise of extreme discretion on the part of the judge as to whether or not the allegations and facts are sufficient to take the case into the province of the jury. The sympathy provoking nature of an injured child is no minor factor.¹⁵ Courts which follow the functional delineation¹⁶ suggested by the *Restatement (Second)* achieve results more in keeping with the purposes of section 339 of *Restatement (Second)*.¹⁷ It must be remembered that under section 339 five facts must be found before the possessor incurs a duty toward the trespassing child. If reasonable minds might not differ on any one

9. Prosser, *supra* note 3, at 451.

10. *Smith v. Otto Henderson Post 212*, American Legion, 241 Minn. 46, 62 N.W.2d 354 (1934).

11. Prosser, *supra* note 3, at 461.

12. *Larnel Builders, Inc. v. Martin*, 110 So.2d 649 (Fla. App. 1959).

13. Prosser, *supra* note 3, at 456-61.

14. *Schilz v. Walter Kassuba, Inc.*, 27 Wis.2d 390, 134 N.W.2d 453, 457 (1965).

15. See *Johnson v. Clement F. Scully Construction Co.*, 255 Minn. 41, 95 N.W.2d 409 (1959).

16. RESTATEMENT (SECOND), TORTS, § 328B (1965) "In an action for negligence the court determines (a) whether the evidence as to the facts makes an issue upon which the jury may reasonably find the existence or non-existence of such facts; (b) whether such facts give rise to any legal duty on the part of the defendant; (c) the standard of conduct required of the defendant by his legal duty; (d) whether the defendant has conformed to that standard, in any case in which the jury may not reasonably come to a different conclusion; (e) the applicability of any rules of law determining whether the defendant's conduct is a legal cause of harm to the plaintiff; and (f) whether the harm claimed to be suffered by the plaintiff is legally compensable."

17. See *O'Keefe v. South End Rowing Club*, 51 Cal.Rptr. 534, 414 P.2d. 830 (1966); *Walker v. Sprinkle*, 267 N.C. 626, 148 S.E.2d 631 (1966); *Jesko v. Turk*, 421 Pa. 434, 219 A.2d. 591 (1966).

of the five facts and such is adduced in favor of the defendant, a directed verdict for the defendant should follow irrespective of any other consideration.¹⁸

The supreme court in the instant case has applied the *Restatement (Second)* as the better reasoned cases would have it applied; under this application, the resulting liability is only negligence liability; the defendant is not liable if he has used all reasonable care under the circumstances.

PATRICK W FISHER

18. Klaus v. Eden, 70 N.M. 371, 374 P.2d. 129, 132 (1962).