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Torts-Duty Owed by Railroad to Habitual Trespassers

TORTS—DUTY OWED BY RAILROAD TO HABITUAL TRESPASSERS.—In a suit against the engineer of a train, the railroad company, and its receiver, appellant sought damages for personal injuries received when, through the alleged negligent operation of the train, appellant, a boy of twelve, riding between two cars, lost his balance, and caught his foot in the coupling. Appellant had climbed on the train during switching operations, when it stopped on a track which lay within one-hundred feet of a public playground. Evidence was introduced that children long had been accustomed to leave the playground and ride on trains switching on the nearby tracks without serious objection from railroad employees, but with their knowledge. It was shown that those in charge of the train had not seen the boy get on, and that they could not have seen him after he had taken his position between the cars. The parties stipulated that appellant was a trespasser. Held: affirmed for defendants. Assuming that appellees were burdened with constructive knowledge of the appellant's presence on the train, appellees owed

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[13] Martin's Admr. v. Fielder (1887), 82 Va. 455, 4 S. E. 602.

[14] Parmentier v. Phillips (1816), 4 N. C. (2 Car. Law Reps.) 294; Chaney v. Smallwood (1843), 1 Gill (Md.) 367.

[15] Grimes et. al. v. Wilson et. ux., (1837), 4 Blackf. 332; Breeding v. Shinn (1856), 8 Ind. 125.

[16] Van Epps v. Van Deusen (1833), 4 Paige (N. Y.) 64, 25 Am. Dec. 516, (money and profits of services of a slave); Chaney v. Smallwood (1843), 1 Gill (Md.) 367, (profits from services of slaves).

[17] McCord v. Bright (1909), 44 Ind. App. 275.

[18] Note, however, that the statute involved in this case was amended as part of the Financial Institutions Act of 1933. The present applicable provision precludes the result of the instant case by providing for the conveyance to a new trustee or guardian of property held by the bank in any fiduciary capacity *under the appointment of any court.* Burns' Ind. Stat. (1933), § 18-321.

him no duty except to refrain from willfully injuring him after they became burdened with such constructive knowledge. *Dickerson v. Ewin* (Ind. 1938), 17 N. E. (2d) 496.

By "constructive knowledge" the court can mean only that the facts disclosed reason to know of the presence of trespassers, or reason to expect them.[1] Whether or not such facts existed is a jury matter.[2] However, it is submitted the court is in error as to the duty owed by a property owner, in this case the railroad, to those persons we may call "habitual" or "constant" trespassers.[3]

The court purports to distinguish the case on its facts from *Cleveland etc. R. Co. v. Means*[4] (largely on the grounds that the child injured in that case was very young—in the words of the court, *non sui juris*), and overlooks the real basis upon which the child was there permitted recovery, i.e., that the probable presence of children upon property where a dangerous activity is being carried on, imposes a duty of ordinary care upon the owner of such property to anticipate their presence by keeping a look-out for them.[5] A few courts have said that persons engaging in dangerous activities upon their property ordinarily owe no duty to trespassing persons, whether children or adults, other than to refrain from "willfully and wantonly" injuring them;[6] nevertheless, when reasonable grounds for anticipating or expecting trespassers exists, particularly if no effort has been made to warn the trespassers or prevent the trespassing,[7] whether the issue is one of condition of the

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[1] It is not contended that this is a correct definition of "constructive knowledge." But that the court's meaning is as indicated, is clearly shown in the case of Cleveland etc. R. Co. v. Means (1915), 59 Ind. App. 383, 108 N. E. 375, from which the phrase is taken, as well as in the present case.

[2] Counizzari v. Philadelphia & R. R. Co. (1915), 248 Pa. 474, 94 A. 134. That the determination of such facts is for the jury seems patent, and no extensive documentation of authority is attempted.

[3] Trespassers whose presence is to be anticipated, i.e., expectable or probable, may be designated by these terms. Although perhaps not extensively employed they are particularly useful in distinguishing this type of intruder upon property from the "known" or "discovered" trespasser.

[4] (1915), 59 Ind. App. 383, 108 N. E. 375.

[5] See also; Counizzari v. Philadelphia & R. R. Co. (1915), 248 Pa. 474, 94 A. 134; Ollis v. Houston, E. W. & T. Ry. Co. (1903), 31 Tex. Civ. App. 601, 73 S. W. 30; Texas & P. Ry. Co. v. Watkins (1895), 29 S. W. 232. The Texas cases are exceptional in that they impose upon the railroad a duty to keep a look-out for all trespassers upon their property and require a very high degree of care where trespassers are known to be expectable. The duty owed to children may go considerably beyond the mere keeping of a look-out. See; Devereaux v. Thornton (1879), 4 Ohio Dec. Rep. 449; Harris v. Indiana General Service Co. (1934), 206 Ind. 351, 189 N. E. 410; Excelsior Wire Rope Co. Ltd. v. Callan (1930), A. C. 404; also 79 U. of Pa. L. Rev. 370.

[6] Salt River Valley Water Users Assn. v. Compton (1932), 39 Ariz. 491, 8 P. (2d) 249; Hamakawa v. Crescent Wharf & Warehouse Co. (1935), 4 Cal. (2d) 499, 50 P. (2d) 803; Makimshuk v. Union Collieries Co. (1937), 128 Pa. Super. 86, 193 A. 669; Cleveland & Means (1915), 59 Ind. App. 383, 108 N. E. 375. See also: Green, Basis of Responsibility in Tort (1922-23), 21 Mich. L. Rev. 495.

[7] The effect of warning is too large a subject matter to analyze in this note. The problem of warning arises as one of the elements that may be involved in a duty of reasonable care, once that duty has been found to exist.

premises or of activities upon the land, a duty of reasonable care arises.[8] The duty to maintain a look-out for habitually trespassing children is strongly analogous to the duty imposed under the so-called "attractive nuisance" doctrine, where the expectability of the presence of children in certain places gives rise to a duty in the property owner to exercise due car for thir safety with respect to artificial conditions on his land.[9] Railroad cars, of course, are not ordinarily considered "attractive nuisances",[10] the analogy being useful only in emphasizing the fact that the "expectability" of trespassing children raises a duty of reasonable care.

The duty owed to known or discovered trespassers, whether children or adults, is well settled as one of ordinary care.[11] This duty extends to those trespassers whose presence, though not actually known, is expectable.[12] Habitual trespass has been recognized as imposing a duty of ordinary care in Indiana,[13] as well as in other jurisdictions.[14] Although the actual result

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[8] Wolfe v. Rehbein (1937), 123 Conn. 110, 193 A. 608; Harris v. Indiana General Service Co. (1934), 206 Ind. 351, 189 N. E. 410; Fort Wayne & Northern Indiana Traction Co. v. Stark (1920), 74 Ind. App. 669, 127 N. E. 460; Cleveland etc. R. Co. v. Means (1915), 59 Ind. App. 383, 108 N. E. 375; Hogan v. Etna Concrete Block Co. (1936), 325 Pa. 49, 188 A. 763; Ollis v. Houston, E. W. & T. Ry. Co. (1903), 31 Tex. Civ. App. 601, 73 S. W. 30; Christiansen v. Los Angeles & S. L R Co (1930), 77 Utah 85, 291 P. 926, noted in 79 U. of Pa. L. Rev. 370; Excelsior Wire Rope Co. Ltd. v. Callan (1930), A. C. 404. See also: Harper, A Treatise on the Law of Torts; Green, Basis of Responsibility in Tort (1923), 21 Mich. L. Rev. 495; Bohlen, Duty of a Landowner Towards Those Entering His Premises of Their Own Right (1920), 69 U. of Pa. L. Rev. 142, 237, 340, at p. 251; Restatement, Torts, §§ 334, 338.

[9] Barrett v. Southern Pac. Co. (1891), 91 Cal. 296, 27 P. 666, 25 Am. St. 186; Chicago, etc. R. Co. v. Fox (1906), 38 Ind App. 268, 70 N. E. 81; Christiansen v. Los Angeles & S. L. Ry. Co. (1930), 77 Utah 85, 291 p. 926; Restatement, Torts, § 339; 36 A. L. R. 34, 39 A. L. R. 486, 45 A. L. R. 982, 53 A. L. R. 1344, 60 A. L. R. 1444.

[10] Cleveland etc. R. Co. v. Means (1915), 59 Ind. App. 383, 108 N. E. 375 (the court discussed the "attractive nuisance" doctrine, but did not place the cars within its scope); Smith v. Hines (1925), 212 Ky. 30, 278 S. W. 142; Christiansen v. Los Angeles (1930), 77 Utah 85, 291 p. 926; 36 A. L. R. 217.

[11] Leach v. St. Louis-San Francisco Ry. Co. (1931), 48 F. (2d) 722; Hamakawa v. Crescent Wharf & Warehouse Co. (1935), 4 Cal. (2d) 499, 50 P. (2d) 803. See dicta in: Dillon v. Twin State Gas & Electric Co. (1932), 85 N. H. 499, 163 A. 111; Osalek v. Baltimore & O. Ry. Co. (1929), 295 Pa. 553, 145 A. 582, 72 A. L. R. 526; Green, Basis of Responsibility in Tort (1923), 21 Mich. L. Rev. 495.

[12] Dillon v. Twin State Gas & Electric Co. (1932), 85 N. H. 499, 163 A. 111; and note language in Restatement, Torts, §§ 336, 338.

[13] The Indiana cases are: Harris v. Indiana General Service Co. (1934), 206 Ind. 351, 189 N. E. 410; Fort Wayne & Northern Indiana Traction Co. v. Stark (1920), 74 Ind. App. 669, 127 N. E. 460 (a particularly strong case in that it denies that the only basis for holding a property owner who maintains dangerous conditions on his premises to a duty of care is that of the "attractive nuisance" doctrine, and holds that reasonable care must be exercised whenever the presence of children reasonably may be anticipated); Cleveland etc. Ry. Co. v. Means (1915), 59 Ind. App. 383, 108 N. E. 375.

[14] The foundation of this principle is the famous English case of Lowery v. Walker (1911) A. C. 10. The cases following this precedent in jurisdictions other than Indiana may be found in footnote 8, *supra.*

in the present case, even when judged by a standard of reasonable care, is probably correct,[15] it is submitted that the liability formula of the court is unfortunate, and not in accordance with authority. The only conceivable basis upon which the liability formula of the court can be justified, is to make the failure of the railroad to take account of the habitual trespassers strong evidence of willful and wanton misconduct,[16] and this the court showed no inclination to do. C. B. D.

TORTS—PROXIMATE CAUSE—INTERVENING CAUSE.—In violation of a city ordinance a construction company obstructed the street and sidewalk in front of property upon which it was building a garage. While plantiff's intestate was walking into the street to get around the obstruction, she was struck by an automobile. Plaintiff, as administratrix, sues the city, the construction company, and the property owner alleging negligence in allowing the obstructing of the public way. Held: The negligence of the defendants was not the proximate cause of the injury. *City of Gary et al v. Struble* (Ind. App. 1939), 18 N. E. (2d) 465.

Negligence is the creation of an unreasonable risk toward a particular class of persons in respect to certain types of harm.[1] Such a tortious act may bring many harmful consequences, but the law as a matter of policy holds the actor accountable for only a few; the rest of the harms, being too remote, are said not to be the proximate result of the act. In drawing the line between proximate and remote consequences, one must scrutinize not only the consequences themselves, but also the character of the conduct to determine toward whom the defendant is negligent. There is a clash of opinion as to whether attention should be focused primarily on the extent of the risk created or on the nature of the resulting harms, but it is to be noted that the difference is only one of analysis.[2]

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[15] The appellant admitted making sure that he was unobserved before mounting the cars. The train was moved only at a slow rate of speed, and it is difficult to see how merely bringing the train to a halt could amount to negligent operation, or failure to exercise due care. To impose a duty of giving warning before stopping the train under such circumstances would seem clearly unreasonable.

[16] The results obtained by such a rule would be more harsh than under a standard of reasonable care. At least one Indiana case has apparently reached its result in this manner. The facts are not analagous to the present case, and the court was dealing with what might have been an "attractive nuisance" situation. Penso v. McCormick (1890), 125 Ind. 116, 25 N. E. 156, 9 L. R. A. 313, 21 Am. St. 211.

[1] Restatement, Torts (1934), §§ 281-2.

[2] Those emphasizing the character of the conduct to see the scope of the risk created leave only the question of cause in fact to be determined by looking to the consequences. Advocates of this view include Leon Green, Rationale of Proximate Cause, (1927); and Cardozo, J. in Palsgraf v. Long Island R. Co. (1928), 248 N. Y. 339, 162 N. E. 99.

Proponents of the consequences test look to the conduct only to see if there is any unreasonable risk created toward anyone without regard to the class of persons or type of harm. This "negligence in the air" view was advocated by Andrews, J. dissenting in Palsgraf v. Long Island R. Co. (1928), 248 N. Y. 339, 162 N. E. 99. Ths test throws more of a load on the