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# Negligence-Duty to Trespassers--Duty to Warn Known Trespasser

NEGLIGENCE—DUTY TO TRESPASSERS—DUTY TO WARN KNOWN TRESPASSER—The defendant, a nursery contractor, was on the land of Farris removing a large elm tree. Several children observed the contractor's work and were warned that they must stay away and were driven away by defendant and his assistants several times. When the tree was about to fall, the defendant cut the last root off and, without a warning, the tree fell upon plaintiff, a child, who was severely injured. Plaintiff alleges negligence for failure to warn that the tree was about to fall. The defendant defends saying plaintiff was a trespasser and was contributorily negligent. Lower court gave verdict for defendant on ground that plaintiff was a trespasser, but admitted defendant's negligence. Defendant released from damages on theory that defendant owed no duty to the plaintiff because he was a trespasser. Plaintiff appeals. *Held*, for plaintiff on grounds that defendant owed duty to warn even a trespasser of any acts of defendant which would increase his peril. *Mourton v. Poulter* (1930), 2 K. B. 183, 99 L. J. K. 289.

One who is upon the land of another by express or implied invitation to do work which will benefit both the land owner and the party doing the work is as a matter of law an invitee. *Thistlewaite v. Heck*, 75 Ind. App. 359, 128 N. E. 611; *Bennett v. The R. R.*, 102 U. S. 577; 1 Thompson on Negligence, 968 et seq. To the invitee the land owner owes a duty of protection and he is in charge of the invitee's safety while on the premises. *Indiana, Bloomington and Western Railroad Co. v. Barnhart*, 115 Ind. 393, 16 N. E. 121.

The invitee who is on the land of another by his express permission in the form of an invitation and on which invitee is maintaining instrumentalities, owes no greater duty of due care to one upon the land, whether rightfully or wrongfully, than the owner of the land. The one using the land of X owes no more duty to a wrongdoer on the land than the owner of the lot would owe so long as the users' use is rightful. *Cumberland Telegraph and Telephone Co. v. Martin*, 116 Ky. 554, 76 S. W. 394. But see *Quinn v. Telephone Co.*, 72 N. J. Law 276, 62 A 412.

In the principle case the facts as interpreted show that the infants were trespassers upon the land of the owner and the nurseryman was an invitee upon the land, which interpretation of the facts is logically correct, but from these facts the court reaches a decision which at first appears to be contrary to the American majority view of *Cumberland Telegraph and Telephone Co. v. Martin, supra.*

One exception to the general rule that a land owner owes no duty to keep his premises safe for trespassers is the "probable trespasser" and "infant" rule. Wherever the land owner (or his invitee) has reason to believe that trespassers are present or may be present, and wherever children frequently trespass, or will be liable to trespass when land owner (or his invitee) maintains something very dangerous in nature and in which case the children will not realize the danger involved, the land owner (or his invitee) owes a duty to use reasonable care and diligence to prevent any bodily harm or injury to come to the trespassing infants. Restatement of Law of Torts, Tentative Draft 4, Sections 203-209; *Knapp v. Doll,* 180 Ind. 526, 103 N. E. 385; *Cleveland, C. C. and St. L. Ry. Co. v. Means,* 59 Ind. App. 383, 104 N. E. 785.

Then by analogy, and by authority also, an invitee upon the land of a third party should be liable whenever an infant trespasser's presence could be anticipated or is known or whenever a dangerous instrument or structure is maintained upon the land which would be injurious to infants and of such a nature as to be accessible to them if they should trespass. *Godfery v. Kansas City Light and Power Co.,* 253 S. W. 233; *O'Gare v. Philadelphia Electric Co.,* 244 Pa. 156, 90 A. 529.

A note in *The Law Quarterly Review,* v, 46, 393 states: "It is now clear (since decision of *Mourton v. Poulter*) that whoever is about to do, himself or by his servants, something involving risk of injury to persons on the scene of action, and has reasonable grounds to expect that some one may be there, is bound to give sufficient warning and, what is more, to give it at the last decisive moment. Moreover, the parties respective interests, or want of interest, in the land on which the event happens are immaterial. The actor may be an occupying owner, a tenant, or a mere licensee. The sufferer may be a licensee by acquiescence or a mere trespasser. This doctrine has nothing to do with the duties of occupiers as such and does not lend any countenance to the discredited position that a man is in some manner bound to make his land safe for trespassers.

"The duty to warn a licensee or trespasser at the last moment possible to avoid injury is the predominating end reached by these cases . . . . "

A similar duty is owed to children by one who maintains an attractive nuisance, *Lumberg v. City of Rock Island,* 136 Ill. App. 495; although the present case is to be understood as prescribing a duty not to increase the risks to a probable or known trespasser while the attractive nuisance cases go to the question of taking affirmative action to prevent injury to probable trespassers. cf. *Restatement,* sec. 206 with sec. 209. J. B. E.