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Torts--Trespass--Kentucky Eliminates a Strict Liability Rule

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it did arrive at a correct and just conclusion. Perhaps in future cases this point can be clarified and reduced to the basic principles of landowners' liability to trespassing children, without being tied to the use of the antiquated term, "attractive nuisance", and to so-called "extensions" of this doctrine. The court very capably dealt with the fence law statute in deciding it did not govern in a situation where it was not strictly applicable and other circumstances dictated the necessity for a fence. Although the dissenting opinion finds the majority opinion to be ". . . divergent from my idea of the law . . ." it is the rule supported by numerous jurisdictions and one which is being increasingly followed. The necessity for this rule of landowners' liability to trespassing children, without the attractiveness limitations, is very aptly stated by Prosser, when, speaking of trespassing children he states:

If he is to be protected the person who may do it with the least inconvenience is the one upon whose land he strays, and the interest in unrestricted freedom to make use of the land may be required, within reasonable limits, to give way to the greater social interest in the safety of the child.¹⁶

Fred F. Bradley

TORTS—TRESPASS—KENTUCKY ELIMINATES A STRICT LIABILITY RULE—The plaintiff, a child, lived in a house near the highway. While returning to her home from across the road, she was struck by a rock thrown from the wheels of a passing truck. According to her testimony, after she had entered her yard the truck passed and, as she stated, "It threw a rock out and hit me and broke my leg." It was not shown conclusively at the trial whether the rock had come from between the dual wheels of the truck or was lying in the highway when it was thrown onto plaintiff's land. The evidence presented was not sufficient to show that the operator of the truck was negligent. *Held*: judgment for the plaintiff in the trial court reversed. Defendant is not liable for a personal injury inflicted upon another by an unintentional, non-negligent act, although the injury was preceded by an unprivileged intrusion upon land occupied by the injured party. *Randall v. Shelton*, 293 S.W. 2d 559 (Ky. 1956).

In its earlier stages trespass was identified with the view that any forcible or direct invasion of the person or property of another was an actionable trespass, even if the injury was a pure accident.¹ The em-

¹⁶ Prosser, Torts, Sec. 76 at 438 (2nd ed. 1955).

¹ Restatement, Torts, Sec. 166 (1934).

phasis was upon the causal sequence involved in the injury, and the question of whether the injury was the result of unintentional and non-negligent conduct was of no importance.² Later, trespass on the case was designed to afford a remedy in those cases in which one of the elements of trespass was missing. This action on the case came to be used more frequently in actions involving negligence, while trespass became the remedy most often used for intentional wrongs.³ This change was accompanied by a growing recognition that, under either action, there should be no liability for injuries arising out of pure accident.⁴ With few exceptions,⁵ it is now very generally required that the injury must result from either intentional or negligent conduct before liability will be imposed.⁶

The Kentucky court has required that either negligence or intent exist in cases of actionable trespass to the person since at least as early as 1892.⁷ However, just at the time when other jurisdictions were discarding the strict liability rule, Kentucky courts embraced it⁸ and began imposing liability for unintentional, non-negligent entries upon land with accompanying personal injury. The leading decision in a series granting relief in such cases is *Louisville Railway Co. v. Sweeney*.⁹ In that case a street car left its tracks and struck a utility pole. The pole fell against a gate fronting the property of the plaintiff, causing it to swing back violently and injure the plaintiff who was standing on her own property. The entry was not shown to have been occasioned by any negligent act or omission by the defendant. The court placed considerable emphasis upon the directness of the causal sequence, resorting to the analogy of the lighted squib case. In rendering a verdict for the plaintiff, the court said,

The plaintiff as the owner of her property was entitled to the undisputed possession of it. The entry of the defendant upon it . . . was a trespass.¹⁰

It is obvious that under such a rule the present case would have resulted in a recovery by the plaintiff since the only thing necessary

² For a conflicting view see Holmes, *The Common Law* 4 (1881).

³ Prosser, *Torts* 27 (2nd ed. 1955).

⁴ *Id.* at 28.

⁵ For a thorough treatment of these exceptions such as blasting, collecting and storing water, liability of owners of animals, etc., see Smith, *Tort and Absolute Liability—Suggested Changes in Classification*, 30 *Harv. L. Rev.* 319 at 329-334 (1916).

⁶ *Restatement, Torts*, Sec. 166 (1934).

⁷ *Belt Electric Line Co. v. Creason*, 14 *Ky. L. Rep.* 203 (1892).

⁸ Oddly enough, a diligent search of Kentucky law revealed no case prior to 1914 which imposed strict liability in cases of trespass to land, since all the cases uncovered were cases of negligent or intentional trespass.

⁹ 157 *Ky.* 620, 163 *S.W.* 739 (1914).

¹⁰ *Id.* at 622, 163 *S.W.* 740 (1914).

to prove would have been that the truck in fact caused the rock to go upon the land and strike the child.

Two other street car cases¹¹ with facts very similar to those in the *Sweeney* decision followed. The court in dealing with those cases cited *Sweeney*, as authority for holding that a showing of negligence was not necessary for recovery. The same rule was applied in *Consolidated Fuel Co. v. Stevens*.¹² In *Happy Coal Co. v. Smith*,¹³ a spool of wire under the control of the defendant's employee rolled down a hill and crashed into a dwelling, injuring one of the occupants. The court allowed the injured plaintiff to recover saying, "The facts show an actual trespass for which a recovery may be had with or without negligence."¹⁴

At the time these cases were being decided there were numerous personal injury cases, not involving trespass to land, in which the court very definitely required either negligent or intentional conduct on the part of the actor before liability was imposed.¹⁵ Thus, we see two lines of cases involving personal injuries. In one line of cases the injury was preceded by a trespass to land, as in the *Sweeney* case and the instant case, while in the other there was a personal injury existing alone. In the former, the courts imposed absolute liability; in the latter, either negligence or intent had to be shown. Such a situation presents an unfortunate anomaly.¹⁶ If the instant case had been decided upon the principle of the *Sweeney* decision, recovery would have depended upon whether the child was in her yard at the time when the rock struck her. Certainly, in this modern day personal safety is held in greater esteem than any property right; yet it would seem that

¹¹ *Kentucky Traction and Terminal Co. v. Bain*, 174 Ky. 679, 192 S.W. 656, L.R.A. 1917D, 813 (1917); *Kentucky Traction and Terminal Co. v. Grimes*, 175 Ky. 694, 194 S.W. 1048 (1917).

¹² 223 Ky. 192, 3 S.W. 2d 203 (1928).

¹³ 229 Ky. 716, 17 S.W. 2d 1008 (1929).

¹⁴ *Id.* at 717, 17 S.W. 2d 1009 (1929). Speaking of the above cited cases, the court in *Randall v. Shelton* at 561, said, "We are of the opinion that in the cases last above cited the same result would have been reached had the doctrine of *Res Ipsa Loquitur* been applied which, of course involves the issue of negligence." In *Armstrong v. New Orleans Public Service Inc.*, 188 So. 189 (La. 1939), another street car involving trespass to land with resulting personal injury, the doctrine of *Res Ipsa Loquitur* was applied which raised a rebuttable presumption of negligence.

¹⁵ *Louisville Railway Co. v. Edelen's Adm'x*, 123 Ky. 629, 29 Ky. L. Rep. 1125, 96 S.W. 901 (1906); *Lexington Railway Co. v. Vanladen's Adm'r*, 32 Ky. L. Rep. 1047, 107 S.W. 740 (1908); *Ham v. Hord*, 189 Ky. 317, 224 S.W. 868 (1920).

¹⁶ Judge Clay in *Randall v. Shelton* at 562, recognized the anomaly when he said in the opinion, "To point up the absurdity of the situation, suppose the plaintiff had been in her front yard talking to a neighbor and the stone had struck both. Assuming no negligence, would there be any logic in ruling that the plaintiff could recover and the neighbor could not?"

the court in the *Sweeney* case and the ones following it envisioned the property right as being more inviolable than the right to personal safety. This is certainly the inference to be drawn from the two lines of decisions because, if the plaintiff expected to recover for an unintentional, non-negligent act resulting in injury to himself, he was required to show that the injury was preceded by a trespass to land in the usual case. In such a case it would seem that the trespass to the land was the real wrong. The subsequent personal injury was merely an aggravation of that wrong.

A rule so obviously fallacious could not persist forever. The first signs of a break from the rule of the *Sweeney* case occurred in *Jewell v. Dell*.¹⁷ In that case a heavily loaded truck left the highway and struck a building, substantially demolishing it and injuring one of the occupants. However, the court was not required to face the problem of whether to again impose strict liability without fault since the injury was attributable to the negligence of the truck driver who operated the truck knowing it had a defective brake. Nevertheless, the court recognized that the trend of modern authority was that a defendant is "not subject to liability for an entry that was non-negligent or was unintentional." In the principal case the court was required to face squarely the question of whether to continue the principle of strict liability as laid down in the *Sweeney* case. The court, in an excellent opinion, reviewed the state of trespass law in Kentucky and, recognizing the absurdities in the old rule, expressly overruled it.

The *Randall* decision leaves Kentucky law, in regard to trespass, in a position consistent with majority law. It removed an anachronism which decided cases, not upon considerations of public policy and fundamental reason, but upon a strict mechanical formula of direct causation. It removed an anomaly which was inconsistent with American concepts of the worth of the individual and brought Kentucky law to the point where it is no longer inferable that Kentucky courts think more of property rights than they do of personal rights. That is as it should be.¹⁸

Charles E. Goss

¹⁷ 284 S.W. 2d 92 (Ky. 1955).

¹⁸ The line of cases imposing strict liability which started with *Louisville Railway Co. v. Sweeney*, supra note 9, was the subject of a note by Glenn W. Denham in 35 Ky. Law Journal 164 (1942). The note concluded by saying at 166, "In regard to liability for unintentional and non-negligent entries on land, Kentucky might well adopt the rational and common sense view which would restrict the doctrine of absolute liability to those cases where the actor is engaged in an extra-hazardous activity."