Torts--The Accidental Trespass

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TORTS—THE ACCIDENTAL TRESPASS

An interesting result involving trespass was reached in the recent case of United Electric Company v. Deliso Construction Company.¹ The defendant was constructing a sewer and in doing so, it was necessary to build a tunnel below the surface of the street. The plaintiff owned and maintained electric conduits below the surface of the street several feet above the top of the defendant’s tunnel. Thus, the defendant placed sheet metal near the top and forced cement through holes in the metal to support the roof. In carrying out this operation the cement was non-negligently forced up without the plaintiff’s knowledge through crevices in the earth causing damage to the conduits. In an action by the plaintiff for the damage, the view of the court was that if the injury was the immediate and direct, rather than the remote and consequential, result of the act of forcing the cement through holes in the sheet metal, the plaintiff could recover. Thus the court recognized the distinction between trespass and case, and the action was remanded to the lower court for a hearing on the question of directness.

Trespass is an invasion of the person or the property of another which is the direct result of force applied by the wrongdoer. Trespass differs from negligence in that trespass requires an affirmative act on the part of the wrongdoer² while in negligence an omission is sufficient to cast liability on the actor where there is a duty to act.³ Force is an essential element of trespass⁴ and the injury must be the direct result of the unjustified force.⁵

With respect to the element of intention, it would seem that unprivileged invasions of property may be placed in five classes: (1) specific intention on the part of the actor to invade the property of another; (2) intention to do the act which causes

¹ 315 Mass. 313, 52 N. E. (2d) 553 (1943).
³ Prosser, TORTS (1941) p. 190.
⁵ Norwood v. Eastern Oregon Land Co., 139 Ore. 25, 5 P. (2d) at 1057 (1931); Prosser, TORTS (1941) p. 80.
the invasion, but because of a mistake of either fact or law, the actor does not know that he is invading the property of another; (3) intention to invade because of an emergency; (4) intention to do the act which causes the invasion due to the negligence of the actor; and (5) an unintentional act which is not accompanied by negligence (liability for the latter is in dispute).

In order to better understand the problem presented by the principal case, it is necessary to discuss the above classes and the liability therefor. There can be no question but that there is liability for an infringement with intention to invade except in certain emergency cases. The law places full responsibility on a person who intends to interfere with the property of another. Thus, if A hunts on B's land with knowledge of B's ownership, A is liable. Where both intent and knowledge are present, the trespass is actionable and nominal damages may be recovered where no actual damage is present.6

A mistaken invasion (or innocent trespass as it is often called) arises where one interferes with the right of possession of another acting under a mistake of either fact or law. Thus, if A enters the land of B believing that it is his land, he becomes an innocent trespasser. Although the innocent trespass is actionable, the courts tend to hold the actor liable only for nominal damages or for actual damages if such occur.7 However, the burden of proving innocence is on the trespasser.8 A recovery beyond actual damages depends on the degree of the actor's fault. In the principal case the actor clearly intended to do the act which constituted the trespass. In applying the test of fault, we see that as between the entirely innocent party who was damaged, and the actor who, although innocent, actually injured another, the former should prevail.

Liability for the negligent invasion is clear where actual damages are alleged and proven. Thus, if A negligently runs his

6 Fletcher v. Howard, 226 Ky. 258, 10 S. W. (2d) 825 (1928); Sine v. Jensen, 213 Minn. 476, 7 N. W. (2d) 325 (1943); Forest City Cotton Co. v. Mills, 218 N. C. 294, 10 S. E. (2d) 806 (1940); RESTATEMENT, TORTS (1934) Secs. 158 and 163.
7 Ohio Oil Co. v. Sharp, 135 F. (2d) 303 (C. C. A. 10th, 1943); Teasley v. Robinson, 149 Miss. 188, 115 So. 211 (1928); Elk Garden Mining Co. v. Gerstall, 100 W. Va. 472, 131 S. E. 152 (1926); RESTATEMENT, TORTS (1934) Sec. 164.
automobile upon the land of B causing substantial damage, B may recover. Even though the actor intended to do the act which due to his negligence caused the invasion, yet it may not have been willed in the sense of knowing that the act was a trespass. However, due to his negligent conduct, the defendant should be held responsible for all damage caused by the trespass. In the early common law, any wrongful invasion was actionable. However, with the development of trespass on the case, actual damage became necessary for any recovery where the injury was caused by negligence.\(^9\)

There should be no liability for an involuntary invasion. Thus, if A slips and falls onto the land of B, there can be no recovery. This is the weight of authority in trespass to personality\(^10\) and the trend seems to be toward this view in trespass to realty both in this country and in England.\(^11\) The proper criterion for determining liability is applied by inquiring whether the actor intentionally did the final act which constituted the trespass. A striking example of this view may be found in the case of *Smith v. Stone*\(^12\) where A was forcibly carried onto the land of B. No recovery was allowed. The same principle was illustrated by a case where a locomotive frightened horses causing them to damage plaintiff's stonepost,\(^13\) and also on the occasion of an explosion of a boiler injuring another's property.\(^14\) In a case where a boy accidentally fell and his arm was forced through the defendant's picket fence and against a high voltage wire by the fall, the court did not hold the infringement to be a trespass and thereby deny him recovery for the injuries sustained.\(^15\) One notes that in each of these cases the actor did not intentionally do the final act which constituted the trespass. A contrary result was reached.

\(^9\) Sullivan v. Old Colony Street Ry., 200 Mass. 303, 86 N. E. 511 (1908); Restatement, Torts (1934) Sec. 165, comment b., see Prosser, Torts (1941) pp. 81-82.

\(^10\) Prosser, Torts (1941) p. 94.

\(^11\) Prosser, Torts (1941) p. 78; Restatement, Torts (1934) Sec. 166. Winfield and Goodhart, *Trespass and Negligence* (1933) 49 L. Q. Rev. 359, 375.

\(^12\) Style 65, 82 Eng. Rep. 533 (1647).


in a case where a streetcar jumped the tracks and hit a telephone pole which fell on the plaintiff's property injuring the plaintiff.\textsuperscript{16} This view is well illustrated by an early North Carolina\textsuperscript{17} case where a tree fell onto another's land. There the plaintiff was allowed to recover in trespass even though neither intention nor negligence was present. Although this theory, which approaches strict liability, has considerable support,\textsuperscript{18} it seems wrong in the light of previous discussion. The final acts which constituted the trespasses were not shown to result from intentional acts of the defendants and the acts of force which caused the trespasses were certainly not those of the defendants. It was force directed at the plaintiff as a result of an unavoidable accident which caused the harm. The proper rule here is that where both parties are equally innocent, the loss lies where it falls.

The principal case seems therefore to be correctly decided. When the defendant forced the cement through the holes in the metal and into the plaintiff's conduit, it became a mistaken trespass. It is no defense that one does not know he is interfering with another's possession. That the actor does the final act which causes the invasion is sufficient to create liability. The plaintiff should recover for the damage sustained.

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\textsuperscript{16} Louisville Ry. v. Sweeney, 157 Ky. 620, 163 S. W. 739 (1914).
\textsuperscript{18} Happy Coal Co. v. Smith, 229 Ky. 716, 17 S. W. (2d) 1008 694, 194 S. W. 1048 (1917); West Virginia Central and Pittsburgh Ry. v. State, 96 Md. 642, 54 Atl. 669, L. R. A. 574 (1903); cf. Vincent v. Lake Erie Trans. Co., 109 Minn. 456, 124 N. W. 221 (1910).