

2011

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Recommended Citation

Christie, George C. (2011) "A Comment on Restatement Third of Torts' Proposed Treatment of the Liability of Possessors of Land," *William Mitchell Law Review*: Vol. 37: Iss. 3, Article 5.

Available at: <http://open.mitchellhamline.edu/wmlr/vol37/iss3/5>

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A COMMENT ON RESTATEMENT THIRD OF TORTS' PROPOSED TREATMENT OF THE LIABILITY OF POSSESSORS OF LAND

George C. Christie[†]

In Tentative Draft Number 6 of Restatement (Third) of Torts: Liability for Physical and Emotional Harm (Third Restatement), the reporters have tried to recognize and accommodate the important developments in the law governing the liability of possessors of land since the publication of the Restatement (Second) of Torts (1965) (Second Restatement).¹ The major development has been the movement to eliminate the rigid common law distinctions among invitees, licensees, and trespassers and to substitute in their place a general duty of reasonable care under the circumstances. Nearly half of American jurisdictions have done just that regarding the distinction between invitees and licensees, of whom social guests are the largest class.² At least nine of these jurisdictions have gone one step further and done away with the separate standards governing trespassers in favor of a general duty of reasonable care under the circumstances.³

At common law, until the latter part of the nineteenth century, the only duty a possessor of land had to trespassers was to not intentionally or recklessly injure them.⁴ Over time, this harsh

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1. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 49–54 (Tentative Draft No. 6, 2009).

2. *Id.* § 51 cmt. a reporters' note. For a breakdown of the law in the various states regarding duty of care that indicates which states follow the traditional common law distinction and which follow a more modern general duty of care, see the table accompanying the reporters' notes to comment a.

3. *Id.*

4. For cases noting this feature of the common law and continuing to adhere to it, see *Osterman v. Peters*, 272 A.2d 21, 22–23 (Md. 1971) (explaining that filling a pool with water was not an act of willful or wanton misconduct resulting in liability) and *Earnest v. Regent Pool, Inc.*, 257 So. 2d 313, 315 (Ala. 1972) (explaining that the general rule is that the only duty owed to a trespasser is not to

treatment of trespassers was subjected to some amelioration. For example, the doctrine of attractive nuisance was developed in the nineteenth century to impose on possessors of land a duty to exercise reasonable care to trespassing children in some circumstances.⁵ Both the Restatement (First) of Torts (1934) (First Restatement) and the Second Restatement reflected not only this development,⁶ but also the development of the category of known trespassers who might be injured by the possessor's failure to carry on his activities with reasonable care⁷ as well as an additional category of constant trespassers within a limited area who might be injured by highly dangerous artificial conditions in the absence of reasonable care on the part of the possessor.⁸ In the proposed sections 51 and 52 of the Third Restatement's treatment of the liability of possessors of land, the reporters try to accommodate these legal developments by abolishing all the common law distinctions with the exception of one residual category of trespassers labeled "flagrant trespassers."⁹ As to such trespassers, the only duties of the possessor are not "to act in an intentional, willful, or wanton manner" and to exercise reasonable care for them should they become "imperiled" and "helpless" or "unable to protect themselves."¹⁰

There is much to be said for this attempt to accommodate recent legal and social developments—even though, as the reporters recognize, one effect of extending the general duty of reasonable care under the circumstances will be to make many, if not most, controversies that could have been decided as a matter of law by the judge subject to jury determination after a more

willfully, wantonly, or negligently injure him).

5. See, e.g., *R.R. Co. v. Stout*, 84 U.S. 657 (1874) (allowing a child to recover from a railroad company for damages caused while the child was trespassing on railroad property).

6. RESTATEMENT (SECOND) OF TORTS § 339 (1965); RESTATEMENT (FIRST) OF TORTS § 339 (1934).

7. RESTATEMENT (SECOND) OF TORTS §§ 336–38 (1965); RESTATEMENT (FIRST) OF TORTS §§ 336–38 (1934).

8. RESTATEMENT (SECOND) OF TORTS §§ 334–35 (1965); RESTATEMENT (FIRST) OF TORTS §§ 334–35 (1934).

9. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 51–52 (Tentative Draft No. 6, 2009). A possessor owes a duty of reasonable care under the circumstances to all entrants except for "flagrant trespassers." *Id.* § 52. The reporters hope that by incorporating foreseeability of harm into the rule, the result will achieve the same goal as the traditional rule but without the rigidity of defined classes. See *id.* § 51 cmt. 1.

10. *Id.* § 52.

extended factual inquiry.¹¹ There are, however, other difficulties presented by the reporters' suggested new scheme which, though not unrecognized, are not adequately dealt with in their draft. In extending the duty of reasonable care under the circumstances to known and, in some circumstances, to constant trespassers, the First Restatement and Second Restatement focused on the possessor's knowledge of the presence or, in the case of constant trespassers, likelihood of presence, as a reason for imposing on the possessor the obligation to take reasonable care.¹² Moreover, in totally abolishing the common law distinctions and extending the duty of reasonable care to all trespassers, the courts that did so expressly recognized that the fact the injured person would have been a trespasser under the common law was a factor to be taken into consideration in determining the likelihood of that person being present on the possessor's land—the less likely the presence, the lesser the duty of reasonable care.¹³ The presumption was that the presence of trespassers would normally be less foreseeable than the presence of invitees or licensees.

11. See *id.* § 51 cmt. i reporters' note. While judges could hold that no reasonable jury could find the defendant negligent, the threshold for a defendant to avoid a jury trial will be higher than if a judicial finding that the plaintiff was a trespasser resulted in the defendant's owing him no duty of care. Even if the new system produces the same outcomes with regards to liability, the costs to possessors of land will rise due to the increased costs and risks of going to trial more often.

12. See *Wood v. Camp*, 284 So. 2d 691, 693 (Fla. 1973) (rejecting the application of a duty of reasonable care to trespassers because “[trespassers’] presence cannot be charged to the unknowing owner” and holding that it would be “unreasonable to subject an owner to a ‘reasonable care’ test against someone who isn’t supposed to be there and about whom he does not know”); 1 THOMAS ATKINS STREET, FOUNDATIONS OF LEGAL LIABILITY 155 n.8 (1906) (“Injury to trespassers is not reasonably foreseeable as a natural consequence of the owner’s lack of care. The law justly assumes in favor of the owner that the trespasser will not ordinarily be there.”). But see W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 58, at 394–95 (5th ed. 1984) (rejecting foreseeability as the explanation for the immunity from liability to trespassers and citing the basis as the rights of a landowner to use his own land without an additional burden of protecting trespassers).

13. See, e.g., *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968) (stating the proper test to determine liability is “whether in the management of his property [the possessor] has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff’s status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative”); *Scurti v. City of New York*, 354 N.E.2d 794, 798 (N.Y. 1976) (noting property owners “must take reasonable measures to prevent injury to those whose presence on the property can reasonably be foreseen” when dangerous conditions exist on the land).

By stressing the attribution of something akin to moral fault to the flagrant trespassers, which the reporters of the Third Restatement recognize could include the quality of being “so antithetical to the rights of the land possessor to exclusive use and possession of the land that the possessor should not be subject to liability for failing to exercise the ordinary duty of reasonable care,”¹⁴ the frequency of the trespass could now become a reason to deny the trespasser the benefit of reasonable care under the circumstances rather than a reason to afford him that benefit.¹⁵ Some of the difficulty is, of course, occasioned by the fact that the notion of “intention” has a number of meanings in the modern law of trespass to land. There is first the intention of the alleged trespasser to enter the land in question, but there is no requirement that the trespasser should know that he is entering the land of another.¹⁶ This restricted type of intention is required in all actions for trespass to land and, on its face, is a morally neutral requirement. There is then the intention to enter land that the trespasser knows or should know is not land which he is entitled to enter, a category that could include land known to be the plaintiff’s or that of some other possessor. Finally, there is the intent behind the trespasser’s entry onto the land.

The comments to the proposed Third Restatement declare that intent to commit a “crime of personal security” on the property or a crime that could infringe on the possessor’s exclusive control of the property is a relevant factor for determining that he is a flagrant trespasser.¹⁷ This injects a moral dimension into the characterization of the trespasser’s conduct that is not present when the focus is on whether a possessor of land has negligently injured a person whom he knows is on his land or whether a person who has been injured by a highly dangerous artificial condition of land is a constant trespasser. One wonders what might be an adequate justification to avoid being labeled a flagrant trespasser. Would often running across another person’s property when one is afraid of missing his commuter train make a person a flagrant trespasser if he has been told by the possessor of the land

14. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 cmt. a (Tentative Draft No. 6, 2009).

15. *See id.* at cmt. a, illus. 6. In this illustration, the repeated trespassing is relevant to the determination that the trespass is flagrant.

16. *See* RESTATEMENT (SECOND) OF TORTS §§ 158, 164 (1965).

17. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 cmt. a, illus. 3 (Tentative Draft No. 6, 2009).

not to do so? Would the possessor have the ability to place all trespassers in that category by placing a sufficiently dramatic no trespassing notice on his property? However innocent or trivial the trespasser may believe his conduct is, from the point of view of the possessor, the frequency of the trespass would certainly be a relevant consideration in how he evaluates the possible flagrancy of the trespass. In many instances, that might well be more important to the possessor than the motive of the trespasser. None of the illustrations provided by the drafters involve these sorts of repeated trivial trespasses.

These features highlight an inherent contradiction in the law governing the law of trespass. Everyone agrees that one cannot intentionally injure a human trespasser without some important justification. The flagrancy of the trespass does not immunize the possessor from such liability unless the possessor is trying to protect himself or others from physical harm or is defending the integrity of a dwelling.¹⁸ The extension of a duty of care to known and constant trespassers again recognizes that however annoying or “flagrant” one might consider constant trespassers, one has a legal obligation to look out for them. The proposed Third Restatement provisions likewise expressly recognizes a duty not to injure a flagrant trespasser in an “intentional, willful, or wanton manner.”¹⁹ Unless the terms “willful” and “wanton” are to be considered merely rhetorical and in no way expand the scope of the possessor’s liability beyond the duty to refrain from intentionally injuring a flagrant trespasser, then the more frequent the trespass, however flagrant it might be, the greater the likelihood that the possessor might be found to have recklessly endangered the trespasser for failing to remedy hidden dangers on his property. Indeed, in jurisdictions in which possessors are only under the additional duty to refrain from willfully or wantonly injuring them, this has been the case.²⁰ Accordingly, a situation would exist in

18. See RESTATEMENT (SECOND) OF TORTS §§ 63–99 (1965).

19. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 (Tentative Draft No. 6, 2009).

20. See *Harris v. Buckeye Irrigation Co.*, 642 P.2d 885, 890 (Ariz. Ct. App. 1982) (equating wanton or willful with “reckless indifference to the safety of [the trespasser]”); *Trammell v. Baird*, 413 S.E.2d 445, 447 (Ga. 1992) (“[I]t is considered wilful [sic] or wanton not to exercise ordinary care to protect anticipated trespassers from dangerous activities or hidden perils on the premises.”); *Mech v. Hearst Corp.*, 496 A.2d 1099, 1102 (Md. Ct. Spec. App. 1984) (“‘Willful or wanton’ generally denotes conduct that is extreme and outrageous, in reckless disregard for the rights of others.”). The Restatement (Third) of Torts

which, up to a certain point, the more frequent the trespass, the greater the likelihood that it might be found to be flagrant, and thus prevent the trespasser from recovering. But once the trespass becomes too frequent, it would be the possessor of the land who bears the risk of liability because all that is then relevant is the foreseeability of injury to the trespasser as it bears on the recklessness of the possessor's conduct that injured the trespasser. As long as the trespasser is not threatening the physical safety of the possessor or the integrity of his dwelling or is tortuous in some other way, the motive of the trespasser has now become irrelevant.

Sorting out these matters case-by-case so as to give some relatively clear indication of when the possessor of land might or might not be liable will not be an easy matter. From the perspective of a restatement of American law, a last and very serious difficulty with the flagrant trespasser concept, as it has been presented in the draft, is the open invitation to courts to adapt that concept to their "different values" and procedural preferences.²¹ The restatement project was not merely undertaken to produce something like an encyclopedia of American law, but also, as the Third Restatement does, to channel and even direct its progress. If the restatement project is to have any continuing viability, it must be seen as providing some continuing future uniformity and consistency of application of law among the various jurisdictions. In other words, the belief that "there will not be one law in Rome and another in Athens,"²² seems to have been an original assumption of the American Law Institute and certainly underlies the rise of the so-called national law school. Given that objective, this is yet another reason for attempting to spell out in greater detail what is meant by a "flagrant trespasser."

That some courts may not accept the restatement's position is inevitable. Even one of the American Law Institute's most successful achievements in uniformity, section 402A of the Second

even describes the terminology "willful or wanton" as frequently used to mean recklessness. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 2 cmt. a (2010).

21. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 cmt. a (Tentative Draft No. 6, 2009).

22. CICERO, *The Republic, Book III*, in THE REPUBLIC AND THE LAWS 69 (Niall Rudd trans., Oxford World's Classics ed., 1998). The most famous American case in which that maxim was quoted is *Swift v. Tyson*, 41 U.S. 1, 19 (1842) (quoting the Latin).

Restatement, never received universal acceptance.²³ Nevertheless, to create a restatement where important concepts are just placeholders for a broad range of different and sometimes even conflicting results among the various states on similar fact patterns, is not an approach that should be pursued. Indeed, if the various jurisdictions do not soon establish some relatively bright-line criteria with some clear indication of priority, it will lead to the covert reintroduction of the excessive resort to factor analysis that was rejected in the Restatement (Third) of Torts: Product Liability and in the proposed Third Restatement's treatment of liability for the miscarriage of abnormally dangerous activities.²⁴ In short, I think that the motive underlying the proposed section 52 of the Third Restatement is an admirable one. I have doubts, however, as to whether the solution chosen will fulfill the expectations of its drafters.

23. See N.C. GEN. STAT. ANN. § 99B-1.1 (West 2009) (declaring that “[t]here shall be no strict liability in tort in product liability actions”); see also DAVID OWENS, PRODUCTS LIABILITY LAW 31 (2005) (noting that “several states (notably Delaware, Massachusetts, Michigan and Virginia)” never adopted strict liability in tort for the sale of defective products, relying “largely upon an implied warranty of quality”).

24. The author has explored elsewhere the serious inadequacies of past attempts to introduce factor analysis into tort law as well as any other area of law. See GEORGE C. CHRISTIE, THE NOTION OF AN IDEAL AUDIENCE IN LEGAL ARGUMENT 166–79 (2000).