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Torts

Wex S. Malone

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*Wex S. Malone**

LIABILITY TO TRESPASSERS

Under ordinary circumstances trespassers and gratuitious licensees upon private property are entitled to very little by way of a duty of care owed them by the owner or occupier. The adult trespasser or tolerated intruder takes the property as he finds it, and he can recover only where some new danger has been interjected on the land with knowledge of the imminent likelihood of his presence and the new peril is one that even an alert trespasser could not discover for himself.[1] The gratuitous licensee who is permitted to come upon the property for his own purposes can expect very little more than the trespasser. Since he has permission to enter, his presence cannot be wholly ignored, and he should be warned of special dangers of which the occupier has actual knowledge and which he realizes that even an alert licensee could not discover for himself.[2] But apart from this situation (commonly called a "trap") the licensee fares no better than the trespasser or tolerated intruder insofar as the condition of the land is concerned.

In view of the above, it is surprising that the legislature should have felt it necessary to enact a special statute in order to protect landowners and occupiers against claims by licensees or intruders who enter their property for "hunting, fishing, camping, hiking, sightseeing or boating."[3] The statute is ex-

*Professor of Law, Louisiana State University.

1. See generally, PROSSER, TORTS § 58 (3d ed. 1964). The Louisiana position, which is basically in accord with other jurisdictions, is discussed in Comment, 18 LA. L. REV. 716, 723 (1958).

2. PROSSER, TORTS § 60 (3d ed. 1964); Taylor v. Baton Rouge Sash and Door Works, 68 So. 2d 159 (La. App. 1st Cir. 1953); Vargas v. Blue Seal Bottling Works, 12 La. App. 652, 126 So. 707 (Orl. Cir. 1930).

3. La. Acts 1964, No. 248, LA. R.S. 9:2791 (Supp. 1964). The entire text is as follows:

"A. An owner, lessee, or occupant of premises owes no duty of care to keep such premises safe for entry or use by others for hunting, fishing, camping, hiking, sightseeing or boating or to give warning of any hazardous conditions, use of, structure or activities on such premises to persons entering for such purposes. If such an owner, lessee or occupant give permission to another to enter the premises for such recreational purposes he does not thereby extend any assurance that the premises are safe for such purposes or constitute the person to whom permission is granted one to whom a duty of care is owed, or assume responsibil-

plicit in stating that the landowner does not extend any assurance to such entrants that the premises are safe for them. In answer, it can be said that at no time did he ever do so, even before the enactment of the statute. The statute again provides that the landowner owes no "duty of care" to such persons. Again, it can be replied that at no time has he ever owed any duty, except as suggested in the preceding paragraph. If the landowner should set traps for the trespasser or if, acting in conscious indifference toward his safety, he should put some new and hidden peril in the trespasser's way, the statute contemplates that the landowner should be liable as before, for it expressly preserves liability for "deliberate, wilful and malicious injury."[4] Thus the statute seems to offer little, if any, additional protection even for the class of landowners in whose favor it was enacted.

The statute, however, can be a source of considerable confusion. It appears to make the purpose for which the licensee or trespasser entered a matter of importance and suggests that campers, hunters, fishermen, and the like are to be treated differently in some way from other intruders and bare permittees. Yet, we do not know how, or why.

Again, the statute introduces confusion by specifying "hiking and sightseeing" as activities within its special coverage, and, most important, it draws no distinction between adult and infant trespassers. Is a child who wanders into the property of an industrial establishment to satisfy his curiosity or his instinct for play to be regarded as a "sightseer" or "hiker," and does the legislature intend thus to abolish or modify the widely accepted Attractive Nuisance Doctrine? No one can seriously believe that the legislature had any such intention, but the statute invites the argument and faces the courts with the necessity of drawing more specious distinctions in an area of law that is just emerging from a state of confusion in Louisiana.

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ity for or incur liability for any injury to persons or property caused by any act of person to whom permission is granted.

"B. This Section does not exclude any liability which would otherwise exist for deliberate and willful or malicious injury to persons or property, nor does it create any liability where such liability does not now exist. Furthermore the provisions of this Section shall not apply when the premises are used principally for a commercial, recreational enterprise for profit; existing law governing such use is not changed by this Section.

"C. The word 'premises' as used in this Section includes lands, roads, waters, water courses, private ways and buildings, structures, machinery or equipment thereon."

4. *Id.* at subsection B.

The statute refers broadly to an absence of a "duty of care to keep the premises safe for entry." Presumably the measure refers only to the physical condition of the land and does not purport to grant any immunity to the landowner with reference to the activities in which he may engage in the presence of trespassers or licensees. But again, the act invites the argument that a carelessly conducted activity is merely one aspect of the maintenance of unsafe premises, and that the legislature intended an immunity here also. If so, the jurisprudence of Louisiana will have received a serious setback.

PHYSICIANS AND SURGEONS

The so-called "Good Samaritan Law" recently enacted by the legislature provides in substance that a licensed physician, surgeon, or nurse who "in good faith gratuitously renders emergency care or services at the scene of an emergency" shall not be held liable for civil damages "as a result of any act or omission in rendering such services."[5] It is difficult to understand why such legislation was needed. Present tort law, without the aid of the statute, makes abundant provision for the protection of the physician who undertakes to render medical assistance to an unconscious patient in an emergency. Under such circumstances the physician or surgeon need only exercise his best judgment and show that he was medically qualified.[6] The circumstance that he was called upon to act in an emergency is taken abundantly into consideration in determining the reasonableness of his conduct. Certainly this is true with respect to the professional judgment that he is called upon to exercise. As to matters of mechanical skill the emergency character of his conduct is still a factor to be heavily weighed in his favor. The speed with which he must act, the possible unavailability of proper materials and equipment are all matters entitled to serious consideration. But should he still not be required to exercise average professional care and competence within these limitations? The statute seems to confer a broadside immunity upon the physician acting in an emergency, and it is submitted that it goes too far. The statute purports to shield only the physician who renders emergency services "gratuitously," suggesting that the lucky patient who gets services free of charge should grate-

5. La. Acts 1964, No. 46.

6. See, for example, Luka v. Lowrie, 171 Mich. 122, 136 N.W. 1106 (1912); Wheeler v. Barker, 92 Cal. App. 2d 776, 208 P.2d 68 (1949).

fully accept whatever is dished out to him. This, of course, does not accord with general principles of law.

Where the patient is conscious or his parents are present or readily available so that consent can be secured, a physician who arbitrarily relies upon the existence of an emergency situation and ignores the wishes of the patient or parent has always been, and should be, subject to liability for arrogantly insisting that "doctor knows best" in the face of his patient's protest or the protest of the family.[7] It is difficult to justify a statute that would sanction conduct of this kind and it is to be hoped that the Louisiana courts will not so interpret it.

NUISANCE

The creation of the Louisiana Air Control Commission[8] marks a step forward in the protection of the health of Louisiana citizens against pollution. It is enough to observe here that the statute vests the commission with power to make findings of fact with reference to air pollution and, within prescribed limitations, to issue orders and to enforce the same through the application for an injunction to be brought by the Attorney General.

We are concerned here solely with the possible effect of the existence and activities of the commission upon presently existing rights of individuals to seek relief by way of injunction for air pollution as a nuisance. At this point, two principles may be borne in mind: first, that a public nuisance may ordinarily be made the subject of an injunction by a private individual provided that he can show special damage to himself, distinct from the invasion of the public interest generally; second, there is a principle which, although perhaps less securely settled elsewhere, seems to prevail in Louisiana, that an operation prohibited by positive law is to be regarded arbitrarily as a nuisance to be abated by a private individual who suffers special injury therefrom.[9] Indeed, the Louisiana Supreme Court has gone so far as to observe in *State* ex rel. *Dema Realty Co. v. McDonald*:

> "The Legislature was not competent to take away from an individual the constitutional right of action for an injury

7. RESTATEMENT, TORTS § 62 (1934).
8. La. Acts 1964, No. 259, LA. R.S. 40:2201-2215 (Supp. 1964).
9. An excellent discussion will be found in Comment, 54 MICH. L. REV. 266 (1955).

suffered in his person or property by reason of the violation of a zoning ordinance and confer such right of action exclusively upon the municipal authorities."[10]

The statute under consideration anticipates this type of problem by providing that nothing in the act "shall be construed to prevent private actions to abate nuisances under existing laws."[11] Furthermore, since many actionable nuisances involve only serious inconveniences, rather than appreciable injury to human life, and are thus beyond the scope of the statute,[12] no conflict between the statute and the law of nuisance would exist where nothing more than inconvenience is involved. When the alleged nuisance of air pollution threatens human health or materially interferes with the use of property (and thus comes within the purview of the commission), the legislature does make clear that the right to institute a suit for private nuisance still exists. But, the question remains: where the defendant is charged with the maintenance of a private nuisance, what effect should be given the fact that the same conduct is also a violation of a commission order or finding? The statute contains this pertinent provision: "The basis for proceedings or other actions that shall result from violations of any rule or regulation which shall be promulgated by the commission shall inure solely to and shall be for the benefit of the people of the state generally and it is not intended to create in any way new rights or to enlarge eixsting rights or to abrogate existing rights."[13]

Despite the broad *dictum* quoted above from the *Dema Realty Co.* case, it would appear that the legislature can empower a commission to make determinations and orders concerning the general health without conferring private rights upon individuals who, it is conceded, would have no claim to an injunction apart from the conduct condemned by the commission.

The problem still remains as to what use, if any, an individual seeking an injunction for nuisance can place the findings of the commission concerning the conduct of the defendant. The statute provides that the conditions found by the commission "shall not create by reason thereof any presumption

10. 168 La. 172, 179, 121 So. 613, 616 (1929), *cert. den.*, 280 U.S. 556 (1929).
11. LA. R.S. 40:2216 (Supp. 1964).
12. *Id.* 40:2202(c).
13. *Id.* 40:2215.

of law *or finding of fact* which shall inure to or be for the benefit of any person other than the state."[14] (Emphasis added.)

Although one can readily agree that the commission's conclusions should not create any presumption of law that a nuisance exists, yet it is difficult to understand why its findings should not be admissible in evidence in a suit by an individual for an injunction, subject to explanation and qualification, just like any other body of scientific facts and data, to be available to the court in exercising its judgment that a nuisance in fact does, or does not, exist.

14. *Ibid.*