§ A. The Nature of Tort Law

Tort law is basically about collisions. Often the collision is literal, as where two cars collide in an intersection,\(^1\) or a defective Coke bottle explodes in the hand of a waitress,\(^2\) but even where the collision is less literal it is no less real. For example, in defamation (libel and slander) cases,\(^3\) plaintiffs sue to recover for injury to their reputations. Tort law must resolve the conflict between competing claims of the individual's interest in his reputation and the public's interest in free expression. Just as cars on the highway usually pass one another without incident, so newspapers and individuals can—usually—carry on their respective activities in harmony. Occasionally, however, collisions occur and someone is hurt. When that happens we turn to tort law to decide who must pay for the injury: is the injured party entitled to have the party that caused his injury compensate him, or should the loss "lie where it falls"?\(^4\)

What makes tort law so interesting (and at the same time so difficult) is that there are no absolute formulas by which such questions are resolved. The rules of tort law are rough approximations of the balance our society wants to strike between competing values, and the "correct" decision frequently depends upon the facts of the particular case. For example, we make automobile drivers liable for the injuries they cause, but only when they are "at fault," or negligent. Manufacturers, by contrast, are liable for the injuries caused by a defective product, even if they have exercised all reasonable care. A newspaper, to take yet another example, is not liable for injuries to the reputation of a "public figure," even when the newspaper acts negligently, so long as it does not exhibit "reckless disregard" for the probable falsity of what it publishes.

The primary dilemma in striking the proper balance between these competing interests lies in determining the standard for imposing liability. Should the defendant be liable irrespective of negligence (strict liability); liable only if "at fault" (negligent); or liable only the defendant's behavior is even more culpable than mere negligence (e.g., actual malice)? Again, this issue of where to draw the line for liability purposes is the most significant of the questions of tort law, but there are others. For example, even if the defendant’s behavior crosses the line we have set for acceptable behavior, under what circumstances can we say that the defendant’s actions caused the plaintiff’s injury? And even if we have decided to impose liability, how do we identify the types of damages that are recoverable, or calculate the proper amount of such damages?

Beyond these questions, what about the availability of special immunities or defenses to avoid liability, such as negligence or other fault on the part of the plaintiff, or the running of the statute of limitations? I have tried to structure this book to correspond to these major categories of issues.

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\(^1\) Li v. Yellow Cab, infra Chapter Five.

\(^2\) Escola v. Coca Cola Bottling Co., infra Chapter Eight.

\(^3\) This subject is covered in Chapter Twelve.

\(^4\) "The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune," Oliver Wendell Holmes, The Common Law 88 (1881).
§ B. The Structure of this Book

This book is divided into six parts, each of which covers a distinct set of issues that are raised in the administration of tort law.

**Part I, Personal Injury: The Prima Facie Case**, discusses what is usually thought of as the plaintiff’s "prima facie" case in a typical tort suit: what must the plaintiff prove in order to recover? Just a moment ago I said that the question of whether to impose liability on the defendant depends upon whether the injured party was "[1] entitled to have the party that [2] caused his injury [3] compensate him." These three elements make up the building blocks of what a plaintiff must prove in a typical tort case, and they are discussed in Chapters One, Two and Three respectively.5

- **Chapter 1, Establishing a Breach of Duty**, examines what the plaintiff must prove about the defendant’s conduct to entitle him to be compensated. As noted above, the most common standard is that of reasonable care, or to put it in the negative mode, whether or not the defendant was negligent. However, in certain kinds of cases liability can be imposed on a "no-fault" or "strict liability" basis.

- **Chapter 2, Causation**, considers a separate problem: if we have decided that the defendant breached a duty he owed, and thus should in fairness pay for the injuries that his conduct causes the plaintiff, how do we know that the defendant’s breach of duty (rather than some other force(s)) caused the injury? In the vast majority of cases causation is obvious, but where it is in doubt the analysis is complex indeed.

- **Chapter 3, Damages**, examines what kinds of damages can be recovered, who can recover them, and how a dollar value is assigned to the plaintiff’s loss.

**Part II, Defenses to a Personal Injury Case**, looks at the tort case from the defendant’s point of view. Even if the plaintiff has met each of the three elements of the prima facie case, other policy considerations may intervene to allow the defendant to avoid liability or reduce the amount of liability.

- **Chapter 4, Immunity**, looks at doctrines that exempt certain classes of defendants from liability. It also looks at the modification or abandonment of such doctrines through statutory waiver and caselaw restriction.

- **Chapter 5, Contributory Fault**, considers the principles that allow a defendant to escape or reduce his liability because the plaintiff was at least in part responsible for his own injury.

- **Chapter 6, Multiple Tortfeasors**, is concerned with cases where the plaintiff’s injury was caused by more than one defendant. In such cases the court must decide how the responsibility for the injury is to be allocated, and in particular whether to make one defendant responsible for other defendants who may or may not be able to pay their fair share. In addition, courts must decide how to handle cases where one party settles for only part of the liability and the plaintiff pursues his claim against another defendant.

- **Chapter 7, Statutes of Limitation**, deals with a familiar problem: what happens when the plaintiff waits too long to file his

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5 A tort case is typically described as consisting of an analysis of four elements: duty, breach, cause, and damages. Harbeson v. Parke-Davis, infra Chapter Three. This text follows this general approach with one major exception: Duty and breach are classed together as essentially a single question. Part III discusses in greater detail the question of how to determine what kind of duty the defendant owes to the plaintiff. Because the "duty" question has confused generations of lawyers, not to mention law students (and rarely helps to solve a problem to boot), this text starts from the facts of a situation and asks the question "Does the defendant’s conduct in this case constitute a breach of duty?" It might seem easier to start with the question, "What duty(ies) did the defendant owe the plaintiff?" and then proceed to determine whether that duty is breached. But you will find that we can often conclude that a duty has been breached even where we have difficulty defining "duty" in the abstract.
claim? How does the court measure the amount of time that the plaintiff is given to file a claim, and what circumstances will allow an exception to the rule?

Part III, Modification of Duty by Status and Relationships, returns to examine the origin and limiting principles that accompany the basis for imposing liability. In particular, it considers the numerous cases in which the standard of liability (or to put it another way, the nature of the duty that the defendant owes the plaintiff) is affected by a contractual relationship between them. Courts must decide how much significance to attribute to the fact that in many cases the parties have the opportunity to shape the transaction — to allocate their duty(ies) of care to one another — before the risk of injury is created.

- Chapter 8, Premises Liability, concerns a common transaction: where the defendant has permitted the plaintiff to use his land for some purpose. Most courts make the defendant's duty (and subsequent tort liability) depend upon the nature of the relationship between them: whether it is business, social, or nonconsensual.

- Chapter 9, Product Liability, considers an analogous problem: where the plaintiff has agreed to buy the defendant's product, and defendant has agreed to sell it, what duties has the seller accepted with respect to the safety of the product? What obligations has the buyer accepted?

- Chapter 10, Professional Negligence, deals with yet another set of related parties: the provider and the consumer of professional services, such as medicine, law, accounting, etc. While the standard of reasonable care works as a good baseline for predicting liability, there are peculiarities in the professional context that require special attention. While most of this chapter focuses on the medical context, since the injuries there are most spectacular, tort remedies are pursued in an increasing number of professional specialties.

- Chapter 11, Rescuers, Justifiable Reliance, and the Extension of Duty to Remote Plaintiffs, deals with one of the law's most difficult subjects: when to impose upon someone a duty to use reasonable care. This chapter starts with the premise that, ordinarily, tort liability can only be predicated upon the defendant having acted in a way that caused the plaintiff's injury. In other words, the failure to act ordinarily creates no liability. However, in some cases the defendant may have assumed a duty to protect the plaintiff from harm caused from some external source (e.g. a caseworker who intervenes in a child abuse situation, or an ambulance service responding to an emergency call). There are particularly difficult questions about how far liability should be extended.

Part IV, Intentional Torts, considers those cases — relatively rare in terms of the everyday practice of law, but fundamental to an understanding of the history of tort law — where the defendant intentionally causes injury to the plaintiff.

- Chapter 12, Intentional Torts: The Prima Facie Case, analyzes the burden of proof for the plaintiff in much the same way that we did in the negligence cases. However, because the requirements are different, and more technical in nature, close attention is paid to the criteria established in the principal authority for such cases, the Restatement of Torts.

- Chapter 13, Defenses to Intentional Torts, looks at affirmative defenses that can shield a defendant from liability. Just as in Part 2 (concerning defenses to negligence cases), a plaintiff may be able to prove that the defendant committed an act constituting the prima facie case for recovery, but still lose the case because of the application of a principle denying recovery.

Part V, Harm to Non-Physical Interests, treats those cases where the plaintiff sustains an injury to an interest other than physical well-being. For example, the plaintiff may have suffered injury to reputation.

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6 I should note that when I teach Torts as a 5-credit course, I am not able to cover Parts V or VI.
Chapter 14, Defamation, discusses the cases where the plaintiff’s right to his reputation is injured by the defendant’s use (or abuse) of the first amendment right to speak one’s mind.

Chapter 15, Privacy, is a topic related to defamation; but it involves an injury to a different interest — the right to be let alone, usually by some type of media exposure, but occasionally by other intrusions.

Chapter 16, Damage to Business Interests, addresses situations where the defendant caused a business or property loss, for example, by misappropriating property, misrepresentation, interference with contractual relations, etc.

Chapter 17, Misuse of the Legal Process, covers two distinct but related torts: abuse of process (where the defendant uses the legal process for some ulterior purpose), and malicious prosecution (where the defendant wrongfully causes the legal system to prosecute the plaintiff).

Part VI, Tort Reform and the Future of the Tort System, tries to put into perspective the larger theoretical questions about the function the tort system ought to perform in our society, and whether it is performing that function satisfactorily.

§ C. The Selection of Case Materials

The cases and materials selected for this book reflect a variety of different teaching goals. My primary goal in teaching Torts is to help you become good lawyers. At Gonzaga Law School we have identified three basic types of expectations for our students. First, we expect our students to acquire knowledge of a variety of different doctrines, rules, legal history, etc. Second, we want our students to acquire skills of legal analysis, oral presentation, negotiation, etc. Third, we have identified certain values that we believe are conducive to successful lawyering, such as integrity, compassion, etc. The classroom is the primary vehicle by which these expectations are communicated. And the review of the written materials (the textbook) is the primary activity in the classroom. As I have composed this set of materials, I have chosen a sequence of materials with the complex set of expectations in mind that I have just described.

At one time I labeled the introduction to my textbook “The Macrocsm and the Microcosm.” This figure of speech was an attempt to communicate the fact that we study Law (with a capital “L”) by studying law (with a small “l”). We learn about general principles by looking at specific cases, and drawing from those specific cases principles of general application. When a student reads a case, and summarizes the case for himself or herself (“briefing” the case), and then prepares to be called on in class, the student is expected to begin the process of sifting through the case to discover what is significant about the case: what are the general principles that have been articulated by the case that seem likely to prove influential in the future. In the beginning, of course, the student has difficulty “seeing around the corner” — discerning what in the court’s opinion is “for the ages” and what is either specific to the case or so lacking in persuasive value that it ought to be abandoned.

My selection of cases is designed in large part to help you get better at the legal analysis that will make you a successful lawyer. You not only will learn how to read a case (in the beginning, it will be a slow and frustrating process, but after time you will get good at it), but also how to think about it—to learn what a persuasive line of reasoning sounds like, and by contrast how a court can say something that is superficially appealing, but on further reflection is an inferior approach compared to alternatives that could be proposed.

You will notice that the cases vary considerably in age and in reliability. Sometimes
an older case is presented in order to show the origin of a particular doctrine. Sometimes an older case is followed by a more modern case that modifies the rule announced in the first case. Sometimes a case from one jurisdiction is followed by a case from another jurisdiction that takes a different approach to the same issue. Part of your task is to fit the cases together yourself. You will first have to figure out what it is the court is saying in an individual case. You will then have to figure out how the cases in a section fit together. You will need to be alert to the potential for subtle shifts in doctrine. Ask yourself whether the rule(s) of law announced in the case make sense; that is, do they provide a sensible balance between the conflicting social goals reflected in the case? You may often be convinced by a court’s reasoning, but at other times you will not be. The continuing dialogue about relating tort law to your sense of justice and to the needs of a complex society is one of the major goals of this course. As you engage in that dialogue, the "rules" of tort law should emerge in clearer focus.

As I stated earlier, my goal of this course is for you to become successful lawyers by learning how to analyze torts problems. While this text includes a variety of issues that arise in tort law, it is not comprehensive. No single course can hope to cover all the topics that you are likely to encounter in practice, or even on the bar exam. Moreover, torts is a rapidly changing body of law. Vast areas of law will arise (and others will disappear) depending upon societal and statutory changes. My goal is that through mastery of the materials covered in this course — and the skills that are required to analyze cases — you will be able to tackle the tort law of the future.

By way of introduction, I present you with a problem that reflects the kind of question you are likely to be asked once you become a lawyer. As it happens, it was a question asked of me when I first returned to Spokane to begin teaching law at Gonzaga.

Problem

Suppose you are a lawyer practicing in Spokane, Washington. Your neighbor Jean has asked you for some legal advice about a neighborhood association to which she belongs. The Walnut Creek Homeowner’s Association (“WCHA”) was formed when the Walnut Creek Subdivision was built. WCHA owns a piece of property upon which it plans to build a swimming pool is to be built. But before construction commences, WCHA’s officers want to know about what WCHA’s potential tort liability would be in the event that somebody gets injured on the property. Specifically, Jean wants to know the answers to the following questions:

(1) What would be their legal liability if a child should get into the pool area when no one is there, and hurt himself?

(2) What would you recommend to minimize the risk that the WCHA runs by building a pool?

To prepare yourself to answer Jean’s questions, read the following two cases. Pretend for a moment that they represent everything you know about tort law. By trying to answer Jean’s questions, we will learn a great deal about how to study Law.

**RAILROAD CO. v. STOUT**

84 U.S. (17 Wall.) 657 (1873)

ERROR to the Circuit Court for the District of Nebraska.

Henry Stout, a child six years of age and living with his parents, sued, by his next friend, the Sioux City and Pacific Railroad Company, in the court below, to recover damages for an injury sustained upon a turntable belonging to the said company. The turntable was in an open space, about eighty rods from the company’s depot, in a hamlet or settlement of one hundred to one hundred and fifty persons. Near the turntable was a travelled road passing through the depot grounds, and another travelled road near by. On the railroad
ground, which was not inclosed or visibly separated from the adjoining property, was situated the company’s station-house, and about a quarter of a mile distant from this was the turntable on which the plaintiff was injured. There were but few houses in the neighborhood of the turntable, and the child’s parents lived in another part of the town, and about three-fourths of a mile distant. The child, without the knowledge of his parents, set off with two other boys, the one nine and the other ten years of age, to go to the depot, with no definite purpose in view. When the boys arrived there, it was proposed by some of them to go to the turntable to play. The turntable was not attended or guarded by any servant of the company, was not fastened or locked, and revolved easily on its axis. Two of the boys began to turn it, and in attempting to get upon it, the foot of the child (he being at the time upon the railroad track) was caught between the end of the rail on the turntable as it was revolving, and the end of the iron rail on the main track of the road, and was crushed.

One witness, then a servant of the company, testified that he had previously seen boys playing at the turntable, and had forbidden them from playing there. But the witness had no charge of the table, and did not communicate the fact of having seen boys playing there, to any of the officers or servants of the company having the table in charge.

One of the boys, who was with the child when injured, had previously played upon the turntable when the railroad men were working on the track, in sight, and not far distant.

It appeared from the testimony that the child had not, before the day on which he was now injured, played at the turntable, or had, indeed, ever been there.

The table was constructed on the railroad company’s own land, and, the testimony tended to show, in the ordinary way. It was a skeleton turntable, that is to say, it was not planked between the rails, though it had one or two loose boards upon the ties. There was an iron latch fastened to it which turned on a hinge, and, when in order, dropped into an iron socket on the track, and held the table in position while using. The catch of this latch was broken at the time of the accident. The latch, which weighed eight or ten pounds, could be easily lifted out of the catch and thrown back on the table, and the table was allowed to be moved about. This latch was not locked, or in any way fastened down before it was broken, and all the testimony on that subject tended to show that it was not usual for railroad companies to lock or guard turntables, but that it was usual to have a latch with a catch, or a draw-bolt, to keep them in position when used.

The record stated that "the counsel for the defendant disclaimed resting their defence on the ground that the plaintiff’s parents were negligent, or that the plaintiff (considering his tender age) was negligent, but rested their defence on the ground that the company was not negligent, and asserted that the injury to the plaintiff was accidental or brought upon himself."

On the question whether there was negligence on the part of the railway company in the management or condition of its turntable, the judge charged the jury —

That to maintain the action it must appear by the evidence that the turntable, in the condition, situation, and place where it then was, was a dangerous machine, one which, if unguarded or unlocked, would be likely to cause injury to children; that if in its construction and the manner in which it was left it was not dangerous in its nature, the defendants were not liable for negligence; that they were further to consider whether, situated as it was as the defendants’ property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence.

The jury found a verdict of $7500 for the plaintiff, from the judgment upon which this writ of error was brought.

Mr. Isaac Cook, for the plaintiff in error, insisted —

1st. That the party injured was himself in fault, that his own negligence produced the result, and that upon well-settled principles, a party thus situated is not entitled to recover.

2d. That there was no negligence proved on the part of the defendant in the condition or
management of the table.

3d. That the facts being undisputed, the question of negligence was one of law, to be passed upon by the court, and should not have been submitted to the jury.

Mr. S.A. Strickland, contra.

1. While it is the general rule in regard to an adult, that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case.

2. While a railway company is not bound to the same degree of care in regard to mere strangers who are even unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts.

3. Though it is true, in many cases, that where the facts of a case are undisputed the effect of them is for the judgment of the court and not for the decision of the jury, this is true in that class of cases where the existence of such facts come in question, rather than where deductions or inferences are to be made from them. And whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case is properly left to the jury.

Mr. Justice HUNT delivered the opinion of the court.

1st. It is well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. While it is the general rule in regard to an adult, that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case.

But it is not necessary to pursue this subject. The record expressly states that "the counsel for the defendant disclaim resting their defence on the ground that the plaintiff's parents were negligent, or that the plaintiff (considering his tender age) was negligent, but rest their defence on the ground that the company was not negligent, and claim that the injury to the plaintiff was accidental or brought upon himself."

This disclaimer ought to dispose of the question of the plaintiff's negligence, whether made in a direct form, or indirectly under the allegation that the plaintiff was a trespasser upon the railroad premises, and therefore cannot recover.

A reference to some of the authorities on the last suggestion may, however, be useful.

In the well-known case of Lynch v. Nurdin, the child was clearly a trespasser in climbing upon the cart, but was allowed to recover.

In Birge v. Gardner, the same judgment was given and the same principle was laid down. In most of the actions, indeed, brought to recover for injuries to children, the position of the child was that of a technical trespasser.

In Daly v. Norwich and Worcester Railroad Company, it is said the fact that the person was trespassing at the time is no excuse, unless he thereby invited the act or his negligent conduct contributed to it.

In Bird v. Hoebrook, the plaintiff was injured by the spring guns set in the defendant's grounds, and although the plaintiff was a trespasser the defendant was held liable.

There are no doubt cases in which the contrary rule is laid down. But we conceive the rule to be this: that while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts.

2d. Was there negligence on the part of the railway company in the management or condition of its turntable?

The charge on this point was an impartial and intelligent one. Unless the defendant was entitled to an order that the plaintiff be nonsuited, or, as it is expressed in the practice of the United States courts, to an order directing a verdict in its favor, the submission was right. If, upon any construction which the jury was authorized to put upon the
evidence, or by any inferences they were authorized to draw from it, the conclusion of negligence can be justified, the defendant was not entitled to this order, and the judgment cannot be disturbed. To express it affirmatively, if from the evidence given it might justly be inferred by the jury that the defendant, in the construction, location, management, or condition of its machine had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, the jury was at liberty to find for the plaintiff.

That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injury to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury, by his foot being caught between the fixed rail of the road-bed and the turning rail of the table they were justified in believing that there was a probability of the occurrence of such accidents.

So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turntable on other occasions, and within the observation and to the knowledge of the employes of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case.

As it was in fact, on this occasion, so it was to be expected that the amusement of the boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. This was a heavy catch which, by dropping into a socket, prevented the revolution of the table. There had been one on this table weighing some eight or ten pounds, but it had been broken off and had not been replaced. It was proved to have been usual with railroad companies to have upon their turntables a latch or bolt, or some similar instrument. The jury may well have believed that if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given, that it was negligent, and that its negligence caused the injury to the plaintiff. The evidence is not strong and the negligence is slight, but we are not able to say that there is not evidence sufficient to justify the verdict. We are not called upon to weigh, to measure, to balance the evidence, or to ascertain how we should have decided if acting as jurors. The charge was in all respects sound and judicious, and there being sufficient evidence to justify the finding, we are not authorized to disturb it.

3d. It is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contract with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coachdriver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the
deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence.

In REDFIELD ON THE LAW OF RAILWAYS, it is said: "And what is proper care will be often a question of law, where there is no controversy about the facts. But ordinarily, we apprehend, where there is any testimony tending to show negligence, it is a question for the jury.

In Patterson v. Wallace, there was no controversy about the facts, but only a question whether certain facts proved established negligence on the one side, or rashness on the other. The judge at the trial withdrew the case from the jury, but it was held in the House of Lords to be a pure question of fact for the jury, and the judgment was reversed.

In Mangam v. Brooklyn Railroad, the facts in relation to the conduct of the child injured, the manner in which it was guarded, and how it escaped from those having it in charge, were undisputed. The judge at the trial ordered a nonsuit, holding that these facts established negligence in those having the custody of the child. The Court of Appeals of the State of New York held that the case should have been submitted to the jury, and set aside the nonsuit.

In Detroit and W.R.R. Co. v. Van Steinberg, the cases are largely examined, and the rule laid down, that when the facts are disputed, or when they are not disputed, but different minds might honestly draw different conclusions from them, the case must be left to the jury for their determination.

It has been already shown that the facts proved justified the jury in finding that the defendant was guilty of negligence, and we are of the opinion that it was properly left to the jury to determine that point.

Upon the whole case, the judgment must be AFFIRMED.

UNITED ZINC & CHEMICAL CO. v. BRITT
258 U.S. 268 (1921)

Mr. Justice HOLMES delivered the opinion of the Court

This is a suit brought by the respondents against the petitioner to recover for the death of two children, sons of the respondents. The facts that for the purposes of decision we shall assume to have been proved are these. The petitioner owned a tract of about twenty acres in the outskirts of the town of Iola, Kansas. Formerly it had there a plant for the making of sulphuric acid and zinc spelter. In 1910 it tore the buildings down but left a basement and cellar, in which in July, 1916, water was accumulated, clear in appearance but in fact dangerously poisoned by sulphuric acid and zinc sulphate that had come in one way or another from the petitioner’s works, as the petitioner knew. The respondents had been travelling and encamped at some distance from this place. A travelled way passed within 120 or 100 feet of it. On July 27, 1916, the children, who were eight and eleven years old, came upon the petitioner’s land, went into the water, were poisoned and died. The petitioner saved the question whether it could be held liable. At the trial the Judge instructed the jury that if the water looked clear but in fact was poisonous and thus the children were allured to it
the petitioner was liable. The respondents got a verdict and judgment, which was affirmed by the Circuit Court of Appeals, 264 Fed. 785.

Union Pacific Ry. Co. v. McDonald, 152 U.S. 262, 14 S. Ct. 619, 38 L. Ed. 434, and kindred cases were relied upon as leading to the result, and perhaps there is language in that and in Sioux City & Pacific Ry. Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745, that might seem to justify it; but the doctrine needs very careful statement not to make an unjust and impracticable requirement. If the children had been adults they would have had no case. They would have been trespassers and the owner of the land would have owed no duty to remove even hidden danger; it would have been entitled to assume that they would obey the law and not trespass. The liability for spring guns and mantraps arises from the fact that the defendant has not rested on that assumption, but on the contrary has expected the trespasser and prepared an injury that is no more justified than if he had held the gun and fired it. Chenery v. Fitchburg R. R. Co., 160 Mass. 211, 213, 35 N.E. 554, 22 L.R.A. 575. Infants have no greater right to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon landowners to expect them and to prepare for their safety. On the other hand the duty of one who invites another upon his land not to lead him into a trap is well settled, and while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult. But the principle if accepted must be very cautiously applied.

In Railroad Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745, the well-known case of a boy injured on a turntable, it appeared that children had played there before to the knowledge of employees of the railroad, and in view of that fact and the situation of the turntable near a road without visible separation, it seems to have been assumed without much discussion that the railroad owed a duty to the boy. Perhaps this was as strong a case as would be likely to occur of maintaining a known temptation, where temptation takes the place of invitation. A license was implied and liability for a danger not manifest to a child was declared in the very similar case of Cooke v. Midland Great Western Ry. of Ireland (1909), A.C. 229.

In the case at bar it is at least doubtful whether the water could be seen from any place where the children lawfully were and there is no evidence that it was what led them to enter the land. But that is necessary to start the supposed duty. There can be no general duty on the part of a land-owner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there. The difficulties in the way of implying a license are adverted to in Chenery v. Fitchburg R. R. Co., 160 Mass. 211, 212, 35 N.E. 554, 22 L.R.A. 575, but need not be considered here. It does not appear that children were in the habit of going to the place; so that foundation also fails.

Union Pacific Ry. Co. v. McDonald, 152 U.S. 262, 14 S. Ct. 619, 38 L. Ed. 434, is less in point. There a boy was burned by falling into burning coal slack close by the side of a path on which he was running homeward from other boys who had frightened him. It hardly appears that he was a trespasser and the path suggests an invitation; at all events boys habitually resorted to the place where he was. Also the defendant was under a statutory duty to fence the place sufficiently to keep out cattle. The decision is very far from establishing that the petitioner is liable for poisoned water not bordering a road, not shown to have been the inducement that led the children to trespass, if in any event the law would deem it sufficient to excuse their going there, and not shown to have been the indirect inducement because known to the children to be frequented by others. It is suggested that the roads across the place were invitations. A road is not an invitation to leave it elsewhere than at its end.

Judgment reversed.

Mr. Justice CLARKE, dissenting

The courts of our country have sharply divided as to the principles of law applicable to "attractive nuisance" cases, of which this one is typical.

At the head of one group, from 1873 until the decision of to-day, has stood the Supreme Court of the United States, applying what has been designated as the "humane" doctrine. Quite distinctly the courts of Massachusetts have stood at the head of the other group, applying what has been designated as a "hard doctrine" — the

In 1873, in Railroad Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745, this court, in a turntable case, in a unanimous decision, strongly approved the doctrine that he who places upon his land, where children of tender years are likely to go, a construction or agency, in its nature attractive, and therefore a temptation, to such children, is culpably negligent if he does not take reasonable care to keep them away, or to see that such dangerous thing is so guarded that they will not be injured by it when following the instincts and impulses of childhood, of which all mankind has notice. The court also held that where the facts are such that different minds may honestly draw different conclusions from them, the case should go to the jury.

Twenty years later the principle of this Stout Case was elaborately re-examined and unreservedly affirmed, again in a unanimous decision in Union Pacific Railway Co. v. McDonald, 152 U.S. 262, 14 S. Ct. 619, 38 L. Ed. 434. In each of these cases the contention that a child of tender years must be held to the same understanding of the law with respect to property rights as an adult and that therefore, under the circumstances of each, the child injured was a trespasser, was considered and emphatically rejected. The attractiveness of the unguarded construction or agency — the temptation of it to children — is an invitation to enter the premises that purges their technical trespass. These have been regarded as leading cases on the subject for now almost fifty years and have been widely followed by state and federal courts — by the latter so recently as Heller v. New York, N.H. & H.R. Co. (C.C.A.) 265 Fed. 192, and American Ry. Express Co. v. Crabtree (C.C.A.) 271 Fed. 287.

The dimensions of the pool of poisoned water were about 20x45 feet. It was 2½ to 3 feet deep in part and in part 10 or more feet deep. A photograph in the record gives it the appearance of an attractive swimming pool, with brick sides and the water coming nearly to the top of the wall. The water is described by the witnesses as appearing to be clear and pure, and, on the hot summer day on which the children perished, attractively cool.

This pool is indefinitely located within a tract of land about 1,000 feet wide by 1,200 feet long, about which there had not been any fence whatever for many years, and there was no sign or warning of any kind indicating the dangerous character of the water in the pool. There were several paths across the lot, a highway ran within 100 to 120 feet of the pool, and a railway track was not far away. The land was immediately adjacent to a city of about 10,000 inhabitants, with dwelling houses not far distant from it. The testimony shows that not only the two boys who perished had been attracted to the pool at the time, but that there were two or three other children with them, whose cries attracted men who were passing near by, who, by getting into the water, succeeded in recovering the dead body of one child and in rescuing the other in such condition that, after lingering for a day or a two, he died. The evidence shows that the water in the pool was highly impregnated with sulphuric acid and zinc sulphate, which certainly caused the death of the children, and that the men who rescued the boys suffered seriously, one of them for as much as two weeks, from the effects of the poisoned water.

The case was given to the jury in a clear and comprehensive charge, and the judgment of the District Court upon the verdict was affirmed by the Circuit Court of Appeals. The court charged the jury that if the water in the pool was not poisonous and if the boys were simply drowned there could be no recovery, but that if it was found, that the defendant knew or in the exercise of ordinary care should have known that the water was impregnated with poison, that children were likely to go to its vicinity, that it was in appearance clear and pure and attractive to young children as a place for bathing, and that the death of the children was caused by its alluring appearance and by its poisonous character, and because no protection or warning was given against it, the case came within the principle of the 'attractive nuisance' or 'turntable' cases and recovery would be allowed.

This was as favorable a view of the federal law, as it has been until to-day, as the petitioner deserved. The Supreme Court of Illinois, on the authority of the Stout Case, held a city liable for the death of a child drowned in a similar pool of water not poisoned. City of Pekin v. McMahon, 151 Ill. 141, 39 N.E. 484, 27 L.R.A. 206, 45 Am. St. Rep. 114.

The facts, as stated, make it very clear that in
the view most unfavorable to the plaintiffs below there might be a difference of opinion between candid men as to whether the pool was so located that the owners of the land should have anticipated that children might frequent its vicinity, whether its appearance and character rendered it attractive to childish instincts so as to make it a temptation to children of tender years, and whether, therefore, it was culpable negligence to maintain it in that location, unprotected and without warning as to its poisonous condition. This being true, the case would seem to be one clearly for a jury, under the ruling in the Stout Case, supra.

Believing as I do that the doctrine of the Stout and McDonald Cases, giving weight to, and making allowance, as they do, for, the instincts and habitual conduct of children of tender years, is a sound doctrine, calculated to make men more reasonably considerate of the safely of the children of their neighbors, than will the harsh rule which makes trespassers of little children which the court is now substituting for it, I cannot share in setting aside the verdict of the jury in this case, approved by the judgments of two courts, upon what is plainly a disputed question of fact and in thereby overruling two decisions which have been accepted as leading authorities for half a century, and I therefore dissent from the judgment and opinion of the court.

The CHIEF JUSTICE and Mr. Justice DAY concur in this opinion.

Questions and Notes

1. The specific issue raised in this case, usually referred to as the "attractive nuisance" doctrine, is treated in greater depth in Chapter Eight, § A(3).