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## Torts - Landlord's Liability - Liability of Landlord to Trespassing Child for Failure to Repair. *Gould v. DeBeve*, 330 F.2d 826 (D . C. Cir. 1964)

D. Barry Hill

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## CURRENT DECISIONS

**Torts—LANDLORD'S LIABILITY—LIABILITY OF LANDLORD TO TRESPASSING CHILD FOR FAILURE TO REPAIR.**—Does a landlord owe a duty to an infant trespasser to keep screens in repair so that the child will not fall out? A recent Federal decision, *Gould v. DeBeve*,<sup>1</sup> says "yes."

In this case, the defendant landlord had rented an apartment to the tenant, Mrs. Dodd, and her two children. Mrs. DeBeve and her son Jacques came for a visit, then decided to stay permanently. The two women agreed to split the rent payments, violating the provisions of the written lease restricting tenancy to Mrs. Dodd and her family alone.

There was a lease provision obligating the landlord to make repairs, and on several occasions Mrs. Dodd had complained to the defendant that there was a defective screen in the bedroom. Although he had promised to repair the screen, the defendant had not done so. On a warm summer night Jacques DeBeve, 2½ years old, fell through the screen and was severely injured.

The lower court found that Jacques was a trespasser (because of the lease restriction), and that the landlord, in failing to repair the screen, was guilty of wilful, wanton misconduct which proximately caused the injuries to the child. The appellate court, in affirming the decision, declared also that the duty of the landlord toward such a child is to provide screens which not only keep flies out, but young children in.<sup>2</sup>

Many cases have considered the use of screens for keeping children from falling out and only a few have stated that this is the proper use of them. One must use landlord-tenant relationships to determine the position of *Gould v. DeBeve* with other cases on the question of use of screens, because a trespasser's rights can rise no higher than those of a tenant, and more practically, because one cannot envision a case holding that a landlord's failure to repair a screen amounts to wilful, wanton misconduct toward a trespasser. As defendant contended in the instant case, the failure to repair a screen does not seem to warrant that denotation.

One of the leading cases on the use of screens is *Egan v. Krueger*.<sup>3</sup>

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1. 330 F.2d 826 (D.C. Cir. 1964).

2. *Id.* at 829.

3. 103 N.J.L. 474, 135 Atl. 811 (1927).

There, a 2½ year-old girl fell out a screen that fitted the window only loosely. The court said, "a screen in a window obviously and of common knowledge, is not placed there for the purpose of keeping persons from falling out a window any more than the glass in the window itself is placed there for that purpose, and a landlord is under no duty, when such a screen is used for a purpose other than intended."<sup>4</sup> *Chelefou v. Springfield Institute for Savings*<sup>5</sup> agrees with that viewpoint. In this case, the landlord had promised to fix the screens, but had not done so up to the time the tenant's 3 year-old daughter fell out. The court, denying recovery, said that keeping children from falling out was not an ordinary purpose of screens. *Potter v. Southwestern Telephone Co.*,<sup>6</sup> a Texas case, agrees. This was an action by an infant against a defendant lessor resulting from plaintiff's fall out a screened window from quarters provided by defendant for his employees. By the employment contract, lessor was to make repairs. The Court says, "it is a matter of common knowledge that a screen is not placed in a window for the purpose of keeping persons from falling out."<sup>7</sup>

In *Gascoigne v. Bornstein*,<sup>8</sup> the tenant's child (17 months old), fell through a screen, but here there was no agreement to repair. The court quoted with approval *Egan v. Krueger*, that the purpose of screens was not to keep people from falling out. In *Crawford v. Ormer and Shayne*,<sup>9</sup> an Illinois case, the defendant lessor installed a defective screen. The plaintiff's parents notified the defendant that the screen was loose, and that plaintiff (3½ years old) might fall out of the window if she leaned on it. The defendants agreed to repair, but this was held nudum pactum for no consideration. The court also said that there was no duty imposed on the defendant lessor to maintain a screen in the dining room window sufficient to support plaintiff when she leaned on it. In *Schlemmer v. Stokes*,<sup>10</sup> the mother of plaintiff specifically asked the owner for screens, "on account of the baby." The owner installed defective screens and the baby fell through. The court said, "it is a matter of common knowledge that a screen is not placed in a window for the purpose of keeping persons from falling out."<sup>11</sup>

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4. *Id.* at 812.

5. 927 Mass. 236, 8 N.E.2d 769 (1937).

6. 248 S.W.2d 286 (Tex. Civ. App. 1952).

7. *Id.* at 290.

8. 10 Ill. App.2d 423, 135 N.E.2d 121 (1956).

9. 331 Ill. App. 568, 73 N.E.2d 615 (1947).

10. 117 P.2d 396 (Cal. 1941).

11. *Id.* at 398.

Against this authority is *Shaw v. Butterworth*,<sup>12</sup> a Missouri case. There, the woman notified defendant's janitor that the screens were out and that she desired them so that the children would not fall out. A defective screen was subsequently installed. The court, distinguishing *Egan v. Krueger*, said that here the landlord had undertaken repairs and had done so negligently and thus was liable for personal injury, but the court also took this opportunity to state that although the primary purpose of screens is to admit light and air and to keep out insects, a secondary purpose involved "ordinary protection against persons falling from the window."<sup>13</sup> A Texas case, *Ross v. Hamer*,<sup>14</sup> agrees with *Shaw*. In *Ross*, the mother specifically asked for a defective catch on a screen to be replaced for the safety of her child.

In a subsequent personal injury action, based on breach of contract, the court held that since the primary purpose of the repair was to prevent children from falling out, the parties must have contemplated this would be the result of the breach of contract. Two other decisions follow this viewpoint, *Crosswhite v. Shelby Operating Corporation*,<sup>15</sup> a Virginia case, and *Baker v. Dallas Hotel Co.*,<sup>16</sup> a Texas case. In *Crosswhite*, a child whose mother had just registered at defendant's hotel was killed when she fell through a defective screen. The court, allowing recovery, said, "while screens are installed to keep bugs out, they do afford some protection to little children; and its presence here lulled the mother into a false sense of security."<sup>17</sup> In *Baker*, another hotel case, the court allowed recovery, when a 2½ year-old infant fell through a screen. The court said that the false sense of security provided by a screen might mislead the parent or inspire confidence in the child to lean against it, reasoning analogous to the *Crosswhite* case. These latter two cases are based on a higher duty of care, because innkeepers are involved, but are interesting on the use of screens question.

A case considering *Egan* and *Shaw* is *Rogers v. Sims*.<sup>18</sup> The plaintiff, denied recovery, tried to distinguish his case, which involved a common hallway under control of the lessor, from *Egan* and *Shaw*, in that they were cases concerning the leased premises. The court says "we have

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12. 327 Mo. 622, 38 S.W.2d 57 (1931).

13. *Id.* at 61.

14. 58 S.W. 1036 (Tex. 1924).

15. 182 Va. 713, 30 S.E.2d 673 (1944).

16. 73 F.2d 825 (5th Cir. 1934).

17. *Id.* at 718.

18. 349 Ill. App. 353, 110 N.E.2d 643 (1953).

examined both cases and find no such distinction made. They were predicated upon the purpose of screens, and that they were not guards. It may be that screens have some restrictive effect, if the child is not too aggressive, but they are not customarily designed to withstand all tampering, leaning or falling against them."<sup>19</sup> If this were so, as the court points out, owners would be well advised to put thick iron bars on the windows to restrain falling children.

The factor that seems to differentiate *Sharw* and *Egan* is that in *Sharw*, the mother specifically requested the screens for protection of her child, while in *Egan*, the mother only asked for repairs. The court in *Gould v. DeBeve* seems to adopt the *Sharw* reasoning (although no authority is cited on this point), saying that "when the tenant here repeatedly complained about the dangerous condition of the screen, she was not talking about the dangers of infection from flies, nor do we believe she was so understood."<sup>20</sup> But the fact remains that she did not expressly state that protection of the children was the purpose of the repairs and the court is only inferring that she was so understood. It is reasonably certain that she did not ask for protection for Jacques, which would have disclosed to the landlord her violation of the lease. If this danger were so predominant in their thinking, why did the two mothers go out of the bedroom for a long period of time, leaving the children playing on a bed near a window with a screen they knew to be defective?

The District of Columbia, where this case arose, allows recovery to a tenant for personal injuries suffered because of the landlord's failure to repair, where it is a provision of the written lease,<sup>21</sup> but extending this recovery to a trespasser seems ill-considered. A landlord, typically, has only owed a trespasser the duty of not wilfully or wantonly injuring him, because the trespasser is not rightfully on the land, and also because he is beyond the area of foreseeable harm by the owner of the property.<sup>22</sup>

In the majority of jurisdictions, a tenant, under the same situation as this case, could not have recovered,<sup>23</sup> much less a trespasser. Dean Prosser states, "the effect of an agreement on the part of the lessor to keep the premises in repair is a subject of considerable dispute. The majority of courts have held that when a landlord's contract to repair

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19. *Id.* at 645.

20. *Supra*, note 2 at 828.

21. *Walker & Dunlop v. Gladden*, 47 A.2d 510 (D.C. Ct. App. 1956).

22. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, 433 (2d ed. 1955).

23. *Id.* at 474.

is broken, the only remedy of the tenant is a contract action for the breach.”<sup>24</sup> Virginia follows this majority, allowing only a breach of contract action, with damages being limited to the cost of repairs.<sup>25</sup>

The fact that the tenant asked for the repairs and the landlord agreed to furnish them should not make the landlord liable, any more than if she had asked a carpenter to make the repairs and he had failed to do so. There is no consideration for this promise and the landlord does not stand in a fiduciary relationship with the tenant, nor is he an insurer.

The court cleverly draws a distinction between the “poachers upon the manorial estate of 18th Century England,”<sup>26</sup> about whom the law of landowner liability developed and the young child of this case, saying there are trespassers and then there are trespassers. But the difficulty of identifying the two trespassers under one appellation should not justify a different application of the rule, once the determination of their status is made. The apartment owner’s property interest in this case is no less dear than that of the lord of the eighteenth-century manor. While technicalities should not control, if the name fits, the rule should apply.

It does not seem that there is any mutuality of being bound by the contract here, when the landlord, who has breached his contract by failing to repair, is liable to one who has no right to be on the land, but who is, in fact, breaching the contract (the lease restriction) himself by being there. One must pay for his breach and its results, while the other may recover for his breach and its results.

The result is that landlords, under the ruling of this case, must put bars on their windows to protect infant trespassers.

This surely widens the duty of a landowner toward a trespasser (whether infant or otherwise), in that mere nonfeasance may now make him liable as if he had actively and intentionally injured the trespasser. One might wonder, as the dissent of Wilbur K. Miller says, if the decision were based on sympathy, instead of legal liability.<sup>27</sup>

*D. Barry Hill*

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24. *Ibid.*

25. *Caudill v. Gibson Fuel Co.*, 185 Va. 233, 38 S.E.2d 465 (1946).

26. *Supra*, note 2 at 830.

27. *Ibid.*