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COMMENTS

ELEMENTS OF ATTRACTIVE NUISANCE

The attractive nuisance doctrine, so called, presents an interesting example of the conflict between age-old principles of the common law and modern humanitarian concepts. One of the fundamental rules governing the liability of the possessor of land for injuries caused to persons entering his land is the maxim that the possessor is not liable for harm to trespassers caused by his failures to safely provide for their reception.¹ The sound foundation and justice of the rule that a trespasser, entering without right or privilege, has assumed the risk is readily apparent, at least where the trespass is an intentional violation of the right of the owner occupier of land to exclusive possession. Even where the trespass is unintentional, a consideration of the rule in the light of the burden that a contrary rule would place upon possessors of land justifies the proposition that, as between possessor and trespasser, the latter must bear the loss. Property rights are of great importance in our law, and, in the case of a trespasser, we do not hesitate to affirm the precedence of the property right of exclusive possession over the personal rights of those who come upon the land without license or invitation.² We do not cast upon the possessor of land the burden of watching for and protecting trespassers.³

A trespasser is one who is upon the land of another without right or privilege. The definition carries no exception as to the age of such a person. *Age is immaterial as bearing upon his status as a trespasser.*⁴ A child wrongfully upon another's land is as much a trespasser as an adult in the same situation and is subject to the same general rule of non-liability for injuries to trespassers as is applicable to adults.⁵

However, the propensities of children to trespass are obvious. A child at play knows no boundary lines beyond which he may not go, especially when there is an instrumentality on or condition of the land beyond the boundary to which he is attracted. Realizing these facts, and recognizing the inability of children of tender years to appreciate the dangers of trespassing, the courts have developed what is commonly called the attractive nuisance doctrine. Despite the attempts of some of the courts to fit the doctrine into existing rules of law so as not to create an exception to the general rule of non-liability,⁶ the fact remains that under the doctrine an infant trespasser can recover for injuries sustained while trespassing upon another's land.

¹ 65 C.J.S., Negligence §24; Prosser on Torts, sec. 77.

² Prosser on Torts, *supra*, note 1.

³ Prosser on Torts, *supra*, note 1.

⁴ 65 C.J.S., Negligence §27.

⁵ *Supra*, note 4.

⁶ 38 Am. Jur., Negligence §144.

The basic problem encountered in any consideration of the attractive nuisance doctrine is the question: *What is an "attractive nuisance?"* The question is vital because, as has been pointed out, the mere fact of childhood does not remove a trespasser from that class and give him any preferred status.⁷ And the cases show that the attractive nuisance doctrine does not operate to remove a child trespasser from that class and hence from the operation of the non-liability rule, *but rather it operates through the instrumentality which caused the child's injury and allows recovery despite the fact that the child was and remained a trespasser.*⁸ Or, under another view, it at least operates through the instrumentality to remove the child from the trespasser class because of the character of the instrumentality.⁹ It becomes obvious that the core of the problem is to know exactly what constitutes an attractive nuisance. The present inquiry will view the doctrine in that light in an attempt to arrive at some aids to solution of the problem.

The attractive nuisance doctrine received its first wide recognition in this country following the first decision on the subject by the United States Supreme Court in *Sioux City & Pacific Railroad Co. v. Stout*,¹⁰ though the doctrine had been developed earlier in England.¹¹ In the *Stout* case, decided in 1873, the plaintiff, a child of six, was injured when playing with other boys upon an unguarded and unlocked turntable on the property of the defendant railroad. The Supreme Court affirmed a judgment for the plaintiff despite the fact that the child was a trespasser, holding the defendant guilty of negligence in not properly guarding or fastening the turntable.

Under this and other early cases liability was placed upon the occupier of land where he maintained upon his premises in instrumentality inherently dangerous and attractive to children of tender years, when he knew or should have known that it was dangerous and attractive to children and that children would be likely to trespass upon the land because of the "attractive nuisance," and where the utility of maintaining the object was slight as compared to the risk to children.¹²

⁷ *Supra*, note 4.

⁸ 65 C.J.S., Negligence §29(1).

⁹ *Wheeler v. City of St. Helens*, 153 Or. 610, 58 P.(2d) 501 (1936): "The attractive nuisance doctrine in no way alters or expands the principle of negligence. It concerns itself with the status of the child. If he, without express invitation, was lured upon the land of another by the display of an attractive object which was kept there, the attractive nuisance doctrine changes his status from trespasser to invitee." The holding is typical of those jurisdictions supporting this view. *Contra: Gimmestad v. Rose Bros. Co.*, 194 Minn. 531, 261 N.W. 194 (1935) (where the court vigorously denounces the theory).

¹⁰ 17 Wall. 657, 21 L.Ed. 745 (1873).

¹¹ *Lynch v. Nurdin*, 1 Q.B. 30, 113 Eng. Rep. 1041 (1841) (This case, though it involved trespass to personalty, a cart left in the city street, is generally regarded as the beginning of the attractive nuisance doctrine.)

¹² *Sioux City & Pac. R. Co. v. Stout*, *supra*, note 10; *Keefe v. Milwaukee & St. P. Ry. Co.*, 21 Minn. 207 (1875); *O'Malley v. St. Paul, M. & M. Ry. Co.*, 43 Minn. 289, 45 N.W. 440 (1890).

The dangerous instrumentality in the *Stout* case, and in many of the early cases, was a railroad turntable, and from this fact the doctrine is sometimes called the "turntable doctrine."

In these early cases much emphasis was placed upon the fact that the turntable or other instrumentality was in such a position as naturally to attract children to trespass, because from such fact the defendant could be expected to anticipate a trespass and know of the danger to children.¹³ Furthermore, it was necessary for an application of the doctrine that the child be induced to trespass by reason of the attractive instrumentality.¹⁴ It was insufficient that the child first trespass and, once upon the land, be attracted to the object causing injury; or that the injury be caused to the trespassing child by some dangerous object without any element of attraction.¹⁵ In *O'Malley v. St. Paul, M. & M. Ry. Co.*¹⁶ the court said:

"To impose the duty of care, the machine must be such that it is dangerous for every young child to play with or about it, it must be of such a character that such children would naturally be attracted to play with or about it, and it must be where they are likely to come for that purpose, so that an ordinarily prudent person would anticipate that they might come for that purpose."

The effect of such a rule is well demonstrated by the case of *United Zinc and Chemical Co. v. Britt*.¹⁷ In that case children were trespassing upon defendant's land and, after they were on the land, were attracted to a pool of water apparently pure but actually poisoned by chemicals. The children attempted to swim in the pool and were killed by the effects of the poison. While it would seem that recovery should have been available on the theory that the pool was a trap, another exception to the rule of non-liability of landowner to trespassers, the plaintiff based his case upon the attractive nuisance doctrine. Recovery was denied, and Mr. Justice Holmes gave as the reason that the attractive nuisance doctrine was inapplicable where the children were not induced to trespass by the object causing injury. He said:

"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."

The rule that the attractive nuisance doctrine is inapplicable where the object causing injury did not induce trespass is a distinct limitation

¹³ *O'Malley v. St. Paul, M. & M. Ry. Co.*, *supra*, note 12.

¹⁴ *Keefe v. Milwaukee & St. P. Ry. Co.*, *supra*, note 12; *O'Malley v. St. Paul, M. & M. Ry. Co.*, *supra*, note 12; *United Zinc and Chemical Co. v. Britt*, 258 U.S. 268, 42 S.Ct. 299, 66 L.Ed. 615 (1921); *Battin v. Cornwall*, 218 Iowa 42, 253 N.W. 842 (1935).

¹⁵ *United Zinc and Chemical Co. v. Britt*, *supra*, note 14.

¹⁶ *Supra*, note 12.

¹⁷ *Supra*, note 14.

upon the doctrine. It excludes from classification as attractive nuisances all objects, however attractive and dangerous to children, which are not in such a position as to be seen from without the land and induce the trespass upon the land culminating in injury.

But the attractive nuisance doctrine has been liberalized to a great extent by many of the courts, and this liberal view is most ably stated by the *Restatement of Torts*:¹⁸

"A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land if

- a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and
- b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and
- c) the children, because of their youth, do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and
- d) the utility to the possessor of maintaining the condition slight as compared to the risk to young children involved therein."

In commenting upon the rule the *Restatement* says:

"Therefore, the possessor is subject to liability to children who after entering the land are attracted into dangerous intermeddling by such a condition maintained by him although they were ignorant of its existence until after they had entered the land, if he knows or should know that the place is one upon which children are likely to trespass and that the condition is one with which they are likely to meddle."¹⁹

This view removes the limitation discussed above. The *Restatement* view has been adopted verbatim by some courts,²⁰ and others, before and after the promulgation of the *Restatement*, have adopted it in effect,²¹ Wisconsin being in the latter class, except as qualified, *infra*.²²

The case of *Nelson v. McLellan*²³ is precisely in point. In that case plaintiff and another, both young boys, were trespassing upon a lot owned by the defendant upon which he had kept a box of dynamite

¹⁸ Restatement, Torts, §339.

¹⁹ *Supra*, note 18.

²⁰ *Louisville & N.R.Co. v. Vaughn*, 292 Ky. 120, 166 S.W. 43 (1942); *Gimmestad v. Rose Bros. Co.*, *supra*, note 9.

²¹ *Nelson v. McLellan*, 31 Wash. 208, 71 P. 747 (1903); *Krachanake v. Acme Mfg. Co.*, 175 N.C. 435, 95 S.E. 851 (1918); *Angelier v. Red Star Yeast Co.*, 215 Wis. 47, 254 N.W. 351 (1934).

²² *Angelier v. Red Star Yeast Co.*, *supra*, note 21.

²³ *Supra*, note 21.

used for construction purposes, the lot being located where trespass by children at play was to be anticipated. After they had entered the lot, the boys found the box of dynamite sticks and, thinking them to be firecrackers, exploded one, causing severe injury to the plaintiff. Recovery under the attractive nuisance doctrine was allowed, despite the fact that inducement followed trespass and was not the cause of it. A comparison of the fact situation in this case with that of the *Britt* case, *supra*, where recovery was denied, indicates that they are almost identical.

This extension of the doctrine seems logical, for it is actually unimportant that the attraction occurred before or after the trespass as long as the possessor had real or constructive knowledge that the children would be likely to trespass upon that part of the land where the condition was maintained, and that the condition created an unreasonable risk to them. This becomes obvious when it is considered that *the attractive nuisance doctrine renders the fact of trespass immaterial*.

But the courts have not stopped at this extension of the doctrine. In several jurisdictions, including Wisconsin,²⁴ the cause of injury need not attract the child at any time in order to allow a recovery under the attractive nuisance doctrine.²⁵ In the Wisconsin case of *Angelier v. Red Star Yeast Co.*²⁶ the plaintiff, a boy of thirteen, was injured while playing upon the defendant's land with the defendant's knowledge. He fell into an open trough of boiling refuse which he failed to see because absorbed in play. The Wisconsin court allowed recovery under the attractive nuisance doctrine (and it appears that the label here is a misnomer), adopting in effect the Restatement rule, and expressly overruling two earlier Wisconsin cases which had rejected the doctrine entirely.²⁷

The United States Supreme Court, on a fact situation almost identical to that in the *Angelier* case, held as early as 1893 that a child trespasser could recover under the doctrine where the object causing the injury contained no element of attraction, but was actually more in the nature of a trap.²⁸ In that case the child was running along a narrow path bordering a pile of refuse from a coal mine which, though unnoticeable from the outside, was burning underneath. The child fell into the fire and was severely burned. There is some dispute as to whether the later case of *United Zinc and Chemical Co. v. Britt*,²⁹

²⁴ *Angelier v. Red Star Yeast Co.*, *supra*, note 21.

²⁵ *Union Pac. Ry. Co. v. McDonald*, 152 U.S. 262, 14 S.Ct. 619, 38 L.Ed. 434 (1893); *Angelier v. Red Star Yeast Co.*, *supra*, note 21.

²⁶ *Supra*, note 21.

²⁷ *Zartner v. George*, 156 Wis. 131, 145 N.W. 971 (1914); *Lewko v. Chas. A. Krause Milling Co.*, 179 Wis. 83, 190 N.W. 924 (1922).

²⁸ *Union Pac. Ry. Co. v. McDonald*, *supra*, note 25.

²⁹ *Supra*, note 14.

supra, overrules this case,³⁰ but the majority opinion in the *Britt* case and a later attractive nuisance case³¹ hold that it does not.

It has been seen that the attractiveness of the object causing the injury is of less importance under more liberal interpretations of the doctrine and, in fact, altogether immaterial under a class of cases typified by the *Angelier* case in Wisconsin. But while certain of the courts will extend the doctrine on the question of attractiveness, the universal tendency is to limit it with regard to other characteristics of the object causing the injury.³²

One of the important considerations in any application of the doctrine is the rule that a possessor of land will not be liable for injuries caused by the maintenance of an object dangerous to children where the utility of maintaining the object is great as compared to the risk involved to trespassing children.³³ The Wisconsin court draws the distinction between lawful attractive objects and attractive nuisances.³⁴ Thus where the utility to the possessor of maintaining the dangerous and attractive object, or of maintaining it in its dangerous and attractive state unguarded or unsecured, is greater than the risk to trespassing children, the object is not an attractive nuisance at all, but a lawful object, and it is without the operation of the doctrine. The point is well put by *Corpus Juris Secundum*:³⁵

"Not every instrumentality attractive to children constitutes an attractive nuisance under the attractive nuisance doctrine. A statement that any agency which is dangerous and attractive to children may constitute an attractive nuisance is entirely too broad, and leads to absurdities, since there is practically no limit to what may attract children. It is manifest that many things ordinarily in existence and use throughout the country are both attractive and dangerous to children, and to hold that such things amount to an implied invitation to enter would be contrary to reason, would lead to vexatious and oppressive litigation, and impose upon property owners such a burden of vigilance and care as would materially impair the value of property and seriously cripple the business of the country."

Accordingly, the courts have set very definite limitations upon what can amount to an attractive nuisance. A vast number of potential attractive nuisances are excluded by the rule that the doctrine applies only to artificial conditions and is inapplicable to natural conditions.³⁶ The courts consider as excessive the burden which might be imposed

³⁰ See *United Zinc & Chemical Co. v. Britt*, supra, note 14 (dissenting opinion).

³¹ *Best v. District of Columbia*, 291 U.S. 411, 54 S.Ct. 487, 78 L.Ed. 635 (1933).

³² 65 C.J.S. Negligence §29(3), (4) and (7).

³³ 65 C.J.S. Negligence §29(8); supra, note 18.

³⁴ *Emond v. Kimberly-Clark Co.*, 159 Wis. 83, 149 N.W. 760 (1914).

³⁵ 65 C.J.S. Negligence §29(4).

³⁶ 65 C.J.S. Negligence §29(7); *Fiel v. City of Racine*, 203 Wis. 149, 233 N.W. 611 (1930).

upon landowners if every pond, lake, tree, etc., upon which children might be expected to trespass had to be fenced or otherwise guarded in order that the landowner be free from liability.³⁷

The doctrine is further limited by the requirements that the object labelled "attractive nuisance" must be inherently dangerous to children,³⁸ and, in jurisdictions where attraction is an element, it must be unusually attractive and alluring.³⁹ Above and beyond this the courts have enumerated various specific objects which are or are not attractive nuisances.⁴⁰ For example, a turntable is almost always an attractive nuisance,⁴¹ while a building, even under construction, usually is not.⁴²

From the foregoing it will be appreciated that the courts are by no means in agreement as to what constitutes an "attractive nuisance." Inasmuch as the determination of a particular object as an attractive nuisance controls the application of a doctrine which will nullify a property right and give effect to personal rights which, without the doctrine, would not exist, it would seem that the problems of attractive nuisance can be reduced to this common denominator: *the conflict between the property right of the occupier of land to exclusive possession and the personal right of the child to be free from subjection to unreasonable risks of harm.* It is probably not oversimplifying the problem to state that the courts will label particular instrumentalities "attractive nuisances" and apply the doctrine in direct proportion to the extent to which those courts are willing to give precedence to the personal rights of the child over the property rights of the occupier of land.

One of the basic considerations in classifying an object as an "attractive nuisance" is the determination as to whether "the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."⁴³ The determination that utility is slight as compared to risk is nothing more than an application to the question of attractive nuisance of the fundamental rule of the law of negligence that the standard of conduct below which specific acts are negligent is arrived at by weighing the utility of the actor's conduct against the magnitude of the risk of harm to others arising from such conduct.⁴⁴ If it is ascertained that utility is slight as compared to risk, negligence is established *if a duty exists on the part of*

³⁷ Emond v. Kimberly-Clark Co., *supra*, note 34.

³⁸ 65 C.J.S. Negligence §29(3); Schulte v. Willow River Powder Co., 234 Wis. 188, 290 N.W. 629 (1940); Lentz v. Schuerman Bldg. & Realty Co., 359 Mo. 103, 220 S.W. (2d) 58 (1949).

³⁹ *Supra*, note 35.

⁴⁰ 65 C.J.S. Negligence §29(12).

⁴¹ *Supra*, notes 12 and 40; Louisville & N.R.Co. v. Vaughn, *supra*, note 20.

⁴² *Supra*, note 40; Puchta v. Rothman, 221 P.(2d) 744 (Cal. App., 1950).

⁴³ *Supra*, note 18.

⁴⁴ Prosser on Torts, sec. 35.

the occupier, and that duty is supplied by giving effect to the trespassing child's personal rights in the face of the occupier's property rights.

Some of the more specific limitations upon what can come under the heading of "attractive nuisances" are merely expansions of this general proposition. The courts consider that where the condition of the land is natural,⁴⁵ where it is not inherently dangerous,⁴⁶ where, in some jurisdictions, it is not unusually attractive to children,⁴⁷ or where the occupier is not chargeable with real or constructive knowledge of the danger and the likelihood of trespass⁴⁸ he should not be burdened with a duty toward trespassing children. The personal rights of the children will not be given effect to the point of undue interference with the possessory rights of the occupier.

On the question of attractiveness the courts differ and have developed three views. The first of these would limit attractive nuisances to those objects in such a position as to naturally attract children from the outside and thereby induce the trespass;⁴⁹ the second would include objects to which children were attracted after they had become trespassers;⁵⁰ the third would abolish the requirement of attractiveness.⁵¹

Taken as rules of law these three views appear contradictory. However, if they are considered merely as degrees to which the courts will go in enforcing the child trespasser's rights over those of the landowner, they become much less so, and they fall exactly into line with the general proposition above developed that the solution to the attractive nuisance problem lies in the answer to the question as to how far the courts will go in recognizing the rights of a trespassing child.

The attractive nuisance doctrine has been, from its inception, very controversial in the law. It has been condemned as pure sentiment unfounded in law or logic. It has been lauded as a triumph of humane principles over harsh common law rules. It has been the subject of a great multitude of judicial opinions and numerous treatises. However, if the problem is approached as part of the conflict of property and personal rights, and as arising from a desire by the courts, based upon humanitarian considerations, to extend personal rights at the expense of property rights to a point determined by sound public policy, which necessarily will differ with the various jurisdictions, the fact that the line is drawn at different points and that different reasons are given therefor should not affect a basic understanding of it.

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⁴⁵ *Supra*, notes 34 and 36.

⁴⁶ *Supra*, note 38.

⁴⁷ *Supra*, note 35.

⁴⁸ *Supra*, notes 12 and 18.

⁴⁹ *Supra*, notes 12-17.

⁵⁰ *Supra*, notes 18-23.

⁵¹ *Supra*, notes 24-31.