

"Attractive Nuisance" Doctrine in Wisconsin - Infant Trespassers

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NOTES AND COMMENT

"ATTRACTIVE NUISANCE" DOCTRINE IN WISCONSIN—INFANT TRESPASSERS—It is a general rule that a trespasser takes his chances and must look out for himself, and that no duty rests upon the owner of property to keep his property in such condition or so guarded that a wrongful intermeddler shall not be exposed to danger.¹ But inasmuch as children of tender years are less able to foresee and appreciate danger than are persons of mature years and intelligence it is generally recognized that they are entitled to a greater degree of care than adults.² Such recognition of the consideration due infant trespassers has led to the development in recent years³ of the so-called "attractive nuisance" doctrine, the viewpoint, not endorsed in all jurisdictions,⁴ that one who maintains upon his property or in a public place a dangerous instrumentality or dangerous condition, of a character likely to attract children, with the knowledge that children, motivated by childish impulses of curiosity and playfulness, are in the habit of resorting thereto, is liable to a child who is injured thereby. It is an analysis of the application of this doctrine in the state of Wisconsin that this summary is dedicated.

Wisconsin courts, it is submitted, in determining the extent of and limitations upon the "attractive nuisance" theory have placed considerable emphasis upon the location of the structure complained of, possibly agreeing that "a thing which might otherwise not attract may become the source of injury when so situated as to imply to the childish mind the right to make free use of it."⁵ Thus, in cases where the condition or structure resulting in injury to one of tender years was located in a public highway, while the injured infant's status might,

¹ 20 R.C.L. 70

² Judge Cooley: "Children wherever they go must be expected to act upon childish instincts and impulses and others who are chargeable with a duty of care and caution toward them must calculate upon this and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them and which they in their immature judgment might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken." in *Powers v. Harlow*, 53 Mich. 507, 19 N.W. 257

³ *Lynch v. Nurdin*, 1 Q.B. 29, 113 Eng. Reprint 1041; *Sioux City & P. R. Co. v. Stout*, 17 Wall 657, 21 U.S. (L.Ed.) 745; *Union P. R. Co. v. MacDonald*, 152 U.S. 262; 38 U.S. (L.Ed.) 434

⁴ Eastern industrial commonwealths, such as Maine, Connecticut, Vermont, Massachusetts, New Hampshire, Rhode Island, New Jersey, among others, seem to quite uniformly reject the "attractive nuisance" doctrine

⁵ 20 R.C.L. 84

at least technically, be that of a trespasser,⁶ the courts recognize that although such public streets are primarily dedicated to the purposes of public travel, children are accustomed to use them for the purposes of play.⁷

Possibly upon this theory recovery has been granted where an infant was injured by the collapse of an unshored ditch located in a public street where small children had been seen playing about the ditch. *Ptak v. Kuetemeyer*, 182 Wis. 357, 196 N.W. 855; or where a nine year old girl was killed by falling into an unguarded posthole located in a street where children were likely to be passing. *Secard v. Rhineland Light Co.* 147 Wis. 624, 133 N.W. 45. Recovery was also granted to an eight year old plaintiff for an injury resulting from playing about a rope and tackle being used to raise sacks of oats from a wagon standing in an alleyway. *Webster v. Corcoran Bros. Co.* 156 Wis. 576, 146 N.W. 815; while in an action against a street railway company for injury to a child alleged to have been caused by failure to guard against children playing with a rope and pulley by which a feed wire was being strung in a highway, it was held not to be a sufficient defense that the work was being done in the usual way, that due care was exercised to avoid interfering with public travel, and that no accident had previously occurred. *Kelly v. Southern Railway Co.* 152 Wis. 328, 140 N.W. 60.⁸

Chief Justice Winslow, in the case of *Harris v. Eastern Wisconsin Railway & Light Co.* 152 Wis. 627, 140 N.W. 288, remarked, "It is settled in this jurisdiction that one who maintains in the public street an unguarded object of condition likely to attract children to meddle or play therewith, with the probable result that of causing injuries to themselves or others lawfully using the street, is guilty of actionable negligence, providing such person knows or is chargeable with knowledge of the attractiveness of the object or condition and the conse-

⁶ *Rose v. Habenstreit*, 9 Ohio App. 23, 27 Ohio C.A. 564; *Wilde v. Ohio Knife Co.*, 18 Ohio 373; but see *Reynolds v. Iowa Southern Utilities Co.* 21 F. (2nd) 958

⁷ *Indianapolis v. Emmelman*, 108 Ind. 530, 9 N.E. 155; *Kreiner v. Straubmuller*, 30 Pa. Super. Ct. 609; *Znidarsnich v. Minnesota Utilities Co.*, 155 Minn. 293, 193 N.W. 449

⁸ But municipal corporation is not liable for injury to child who caught hold of the chains of a wagon used for street cleaning purposes, since automobiles, carriages, or dumping wagons while each attractive and dangerous to children, and often dangerous to adults, are not nuisances when in legitimate use in public street. *Bruhnke v. LaCrosse*, 155 Wis. 485, 50 L.R.A. 1147, 144 N.W. 1100. Attractive nuisances theory held not applicable to moving truck. *Rouff v. Look*, 180 Wis. 1, 191 N.W. 55; *Gamble v. Uncle Sam Oil Co.*, 100 Kan. 74, 163 Pac. 627

quent probability of such meddling and resulting injuries."⁹ citing in the opinion the case of *Busse v. Rogers*, 120 Wis. 443, 98 N.W. 219, in which recovery was had in the case of a five year old plaintiff injured by falling lumber pile located within the limits of the street and upon which the plaintiff had been playing. However, although the courts have held that a street railway company which left a street car standing in a public street is chargeable with knowledge that it is an alluring object to children and is therefore required to render it innocuous to probable childish incursion, such company is not bound to anticipate extraordinary conduct or precocious ingenuity. *Kressine v. Janesville Traction Co.* 175 Wis. 192, 184 N.W. 777.

Somewhat greater reluctance to apply the "attractive nuisance" theory appears where the alluring or attractive object complained of is maintained upon private property, despite the fact that it may substantially adjoin a public way. Thus in *Zartner v. George*, 156 Wis. 131, 145 N.W. 971, where the plaintiff was injured by jumping into a mortar box containing lime¹⁰ and water covered by two inches of sand, recovery was denied although the mortar box was but four or five feet from the sidewalk. The court, speaking through Justice Vinje, refused to apply the doctrine of "attractive nuisances" to what it termed the conduct of ordinary business¹¹ carried on in a customary manner upon private property. The validity of applying the doctrine to injuries resulting from electricity the court conceded,¹² thus distinguishing the

⁹ Where company constructed a plank-covered breakwater, access to which from the street was unobstructed, and where to the knowledge of company's agents such planked surface was used as a pathway, company was held liable for the death of boy who while walking along the breakwater fell through a not readily observable hole in the planking into a steam and hot water pit. *Brinilson v. Chicago & Northwestern Railway Co.*, 144 Wis. 614, 129 N.W. 664; *Jackson v. Texas Co.*, 143 La. 21, 78 So. 137.

¹⁰ "Slacked lime is common article of building material in general use among building contractors. It is frequently left exposed on lots and in public thoroughfares at places convenient to building operations. It may be handled without harm. It is only dangerous when put in the eye or in contact with some tender member." *Fitzpatrick v. Donahue Realty Co.*, 151 Minn. 128, 186 N.W. 141, 36 A.L.R. 21.

¹¹ *Chicago & E. R. Co. v. Fox*, 38 Ind. App. 268, 70 N.E. 81; *Nixon v. Montana W. & S. W. R. Co.*, 50 Mont. 9, 145 Pac. 8; *Stamford Oil Mill Co. v. Barnes*, 103 Tex. 409, 128 S. W. 375; *Smalley v. Rio Grande Western R. Co.*, 34 Utah 423, 98 Pac. 311.

¹² Justice Vinje, "The dangers from electrical currents are so great, so obvious to those familiar with the effects of electricity, that more strict and stringent rules and broader test of liability should be applied to the safeguarding of persons from dangers resulting from coming in contact with such currents than should be applied to better understood and less hazardous risks resulting from the usual conduct of ordinary business on private premises." Judicial stringency in regard to deaths resulting to children from leaving within reach

case from that of *Meyer v. Menominee & Marinette Light and Traction Co.* 151 Wis. 279, 138 N.W. 1008, where recovery was granted for the death of a fourteen year old boy who climbed a twenty-four foot lumber pile adjacent to a well travelled road and who was killed when he grasped a sagging electric lighting wire which was poorly insulated.

The contrary holdings under these two sets of facts might be interpreted as aligning Wisconsin with jurisdictions holding that "liability bears relation to the character of the thing, whether natural and common or artificial and uncommon, to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing¹³ and in short to the reasonableness and propriety of the defendant's conduct in view of all surrounding circumstances and conditions."¹⁴ For, although when we go to say what is attractive to some child, or even to children generally, we enter upon a wide uncertain field,¹⁵ it seems that the courts are more likely to hold the owner of premises liable in cases involving dynamite,¹⁶ dynamite caps,¹⁷ or electricity,¹⁸ than they are to find liability in cases involving

of such a child heavily charged electrical wires possibly illustrated by *Lomoe v. Superior Light & Power Co.* 147 Wis. 5, 132 N.W. 623; also, *Nagle v. Hake*, 123 Wis. 256.

¹³ *Loftus v. Dehail*, 133 Cal. 217, 65 Pac. 379; *Lewis v. Cleveland C. C. & St. L. R. C.*, 42 Ind. App. 337, 84 N.E. 23; *Bown v. Salt Lake City*, 33 Utah 222, 93 Pac. 570; *Wilson v. Atchison T. & S. F. R. Co.*, 66 Kan. 183, 71 Pac. 282; *Grube v. Baltimore*, 132 d. 355, 103 Atl. 948; *McLendon v. Hampton Cotton Mills*, 109 S. C. 238, 95 S.E. 781; *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74.

¹⁴ *Peters v. Bowman*, 115 Cal. 349, 47 Pac. 598.

¹⁵ *U'thermohlen v. Bogg's Run Min. Co.*, 50 W.Va. 467, 40 S.E. 410.

¹⁶ *Mattson v. Minn. & N. W. R. Co.*, 95 Minn. 477, 104 N.W. 443; *Nelson v. McLellan*, 31 Wash. 208, 71 Pac. 747; *Olson v. Gill Home Investment Co.* 58 Wash. 151, 108 Pac. 140; *Depew v. Kilgore*, 117 Okla. 263, 246 Pac. 606.

¹⁷ *Sandeen v. Tschider* 123 C.C.A. 456, 205 Fed. 252; *Vills v. City of Cloquet*, 119 Minn. 277, 138 N.W. 33; *Krachanake v. Acme Mfr. Co.*, 175 N.C. 435, 95 S.E. 851; *Butrick v. Snyder*, 236 Mich. 300, 210 N.W. 311.

¹⁸ *Meyer v. Menominee & Marinette L. & T. Co.*, supra; *Sheffield Co. v. Morton*, 161 Ala. 153, 49 So. 772; *Hayes v. Southern P. Co.*, 95 S.C. 230; 78 S.E. 956; *Hurd v. Phoenix Co.*, 7 Boyce (Del.) 332, 106 Atl. 286; *Stedwell v. Chicago*, 297 Ill. 486, 130 N.E. 729; *Graves v. Interstate Power Co.*, 189 Iowa 227, 178 N.W. 376; *Temple v. McComb City E. L. & P. Co.*, 89 Miss. 1, 42 So. 874; *Consolidated Electric Co. v. Healy*, 65 Kan. 748, 70 Pac. 884.

ponds,¹⁹ canals,²⁰ coffee grinders,²¹ piles of railroad ties,²² buildings under construction,²³ revolving doors,²⁴ or standing freight cars.²⁵ While no classification could cover the innumerable types of risk which might cause injury to an infant trespasser nor indicate other factors which might cause the court to permit a recovery,²⁶ it might be safe to conclude that both the character of the instrumentality²⁷ and its location are material considerations in determining whether the "attractive nuisance" doctrine applies.²⁸

However, the landowner need take only reasonable precautions;²⁹ and even a company engaged in transmitting electrical power need not foresee and provide against injury to an individual climbing a tower to the height of thirty feet where no one had ever attempted the feat be-

¹⁹ *Fiel v. City of Racine*, 203 Wis. 149, 233 N. W. 611. (at least in absence of something extraordinary or exceptional in the circumstances to render the place peculiarly attractive, more so than the mere pond itself); *Emond v. Kimberly-Clark Co.*, 159 Wis. 63, 149 N.W. 760; *Klix v. Nieman*, 68 Wis. 271, 32 N.W. 223; *Thompson v. Ill. C. R. Co.*, 105 Miss. 636, 63 So. 185; *Blough v. Chicago G. W. R. Co.*, 189 Iowa 1256, 179 N.W. 840.

²⁰ *McCabe v. American W. Co.* 65 C.C.A. 59, 132 Fed. 1006; *Athey v. Tenn. Coal & R. Co.*, 191 Ala. 646, 68 So. 154; *National Metal Edge Box Co. v. Agostini*, 169 C.C.A. 195, 258 Fed. 109; *Somerfield v. Land & Power Co.*, 93 Kan. 762, 145 Pac. 893.

²¹ *Holbrook v. Aldrich*, 168 Mass. 16, 46 N.E. 115; *Connelly v. Carrig*, 244 N. Y. 81, 154 N. E. 828.

²² *Great N. R. Co. v. Willard*, 171 C.C.A. 564, 258 Fed. 714; *Miss. K. & T. R. Co. v. Edwards*, 90 Tex. 55, 36 S.W. 430; *Jenkins v. Great W. R. Co.*, 1 K.B. 525.

²³ *Witte v. Stifel*, 126 Mo. 295, 28 S.W. 891; *O'Callaghan v. Commonwealth Engineering Co.*, 247 N. Y. 127, 159 N.E. 884.

²⁴ *Harris v. Cowles*, 38 Wash. 331, 80 Pac. 537.

²⁵ *Wendorf v. Director General of R. R.'s*, 173 Wis. 53, 180 N.W. 128; *Smith v. Hines*, 212 Ky. 30, 278 S.W. 142.

²⁶ As in *Flood v. Pabst Brewing Co.* 158 Wis. 626, 149 N.W. 489 where plaintiff who fell into opening above cellarway recovered because protection neither proper, adequate, or safe.

²⁷ "For extremely detailed classification on basis of type of machinery, structure, etc., creating risk-see annotation 36 A.L.R. 34. An understanding of the decisions is more nearly to be derived from a study of the risks and factors present in the particular case than on any other basis. The attempts at broad doctrinal generalizations both for and against responsibility in these cases have produced many doubtful decisions." Leon Green, "The Judicial Process in Tort Cases," p. 503.

²⁸ *Pennington v. Little Pirate Oil & Gas Co.*, 106 Kan. 569, 189 Pac. 137; *Arkansas Valley Trust Co. v. McIlroy*, 133 S.W. 816; see *Thompson on Negligence*, ¶ 1030.

²⁹ *Thompson v. Alexander City Cotton Mills Co.*, 190 Ala. 184, 67 So. 407; *McMillan v. Bourbon Stock Yards*, 179 Ky. 140, 200 S.W. 328; *Keffe v. Milwaukee St. P. R. Co.*, 21 Minn. 207, 18 Am. Rep. 393; *Sexton v. Construction Co.*, 108 S. C. 238, 95 S.E. 781.

fore, although had such injury occurred near the foot of the tower, the court might have clothed the child at least with the rights of a licensee and might then have granted recovery. *Bonniwell v. Milwaukee Light, Heat & Traction Co.* 174 Wis. 1, 182 N.W. 468.

Finally, as to alleged alluring conditions located wholly upon private property, so that when the child encounters the thing or enters the structure he is not where he has a right to be,³⁰ it would seem that the "attractive nuisance" viewpoint has, at least in Wisconsin, been received with rather definite judicial frigidity. In the case of *Lewko v. Chas. A. Krause Milling Co.* 179 Wis. 83, 190 N.W. 924, a child who fell into an open steam pit located upon defendant's premises was denied recovery despite allegation that children were in the habit or playing on defendant's land to its knowledge. The court, rather completely ignoring the habitual use of the premises as a playground, in other jurisdictions held to be controlling,³¹ ruled such a child to be at most a mere licensee to whom the owner owed at most no duty save to refrain from active negligence rendering the premises dangerous,³² a conclusion to which Justice Crownhart respectfully dissented.³³

³⁰ In accord see *United Zinc & Chemical Co. v. Van Britt*, 258 U.S. 268, 66 U.S. (L.Ed.) 615, 42 S. C. Rep. 299, holding no liability for death of child in pool of poisonous water where there was nothing to show that pool was what led children to the place and where it did not appear children were in habit of going to place; *Rost v. Parker Washington Co.*, 176 Ill. App. 245; *Fincher v. Chicago R. I. & P. R. Co.* 143 La. 164, 78 So. 433. Viuepoint sharply criticized by Francis H. Bohlen, American Law Institute, Explanatory Notes Torts, T. No. 4, p. 23; also see *Central Coal & Coke Co. v. Porter*, 170 Ark. 498, 280 S. W. 12.

³¹ *Union L. H. & P. Co. v. Lunsford*, 189 Ky. 785, 22 S.W. 741; *Lyttle v. Harlan Town Coal Co.*, 167 Ky. 345, 180 S.W. 519; *Chicago B. & O. R. Co. v. Krayenbuhl*, 65 Neb. 889, 91 N.W. 880; *Atlanta & W. P. R. Co. v. Green*, 158 C.C. A. 632, 246 Fed. 767; *Millum v. Lehigh & W. B. Coal Co.*, 225 Pa. 214, 73 Atl. 1106; *Fitzpatrick v. Penfield*, 267 Pa. 564, 109 Atl. 656; *Nashville Lumber Co. v. Busbee*, 100 Ark. 76 139 S.W. 301; *Perry v. Tonapah Min. Co.* 13 F. (2nd) 865; *Dalton v. Phil & R. R. Co.*, 285 Pa. 209; 131 Atl. 724.

³² *Brinilson v. C. & N. W. R. Co.*, supra; *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800; *Cahill v. Layton*, 57 Wis. 600, 16 N. W. 1.

³³ Justice Crownhart, dissenting, "Children of four and one-half are incapable of discretion. Theirs is 'the law of perfect liberty.' They wander at will on vacant property for play. Every open place in a populous district is an invitation to the children for childish games. They cannot understand the invisible line of private property, the crossing of which we are asked to hold makes them outlaws subject to all the pitfalls that a careless and reckless owner may dig for their undoing. We are asked to carry the principles established by the feudal barons to protect game from peasant poachers too far. Humanity recoils from such a doctrine—a doctrine that legalizes injury and death to helpless children through the negligence of grown people, with full understanding of the consequences of their acts . . . For my part I feel impelled to follow

The effect of the decision is to render the landowner liable to infant trespasser only for acts of active negligence or deliberate entrapment.

To this extent the case seems directly contrary to a somewhat earlier ruling in *Herrem v. Konz*, 165 Wis. 574, 162 N.W. 654, where the defendant was held bound to anticipate injury might result to some child by coming into contact with a rapidly revolving shaft where he knew children of tender age were in the habit of playing in open spaces underneath the ground floor of a lumber mill in close proximity to the revolving shaft. Why one mill owner should be bound to anticipate injury from children playing near a revolving shaft, and another mill owner should not be bound to anticipate injury to children playing about a pit into which scalding steam was piped is a question referred to intellects more penetrating than that of the writer's. At any rate, insofar as the Lewko decision is followed and to the extent that the solicitude for the rights of landowners shown in a recent case involving adult trespassers³⁴ is continued it would seem that the Wisconsin courts, following the tendency in other jurisdictions to limit the scope of the doctrine,³⁵ have denied the application of the "attractive nuisance" doctrine to conditions or structures situated upon private property and not adjoining a public way.

ROBERT W. HANSEN

BANKS AND BANKING—INSOLVENCY—RECEIVING DEPOSITS. The case of *Schroeder v. State of Wisconsin*, 244 N.W. 599, is of especial importance at this time in view of current deflated values and the numerous bank failures which have occurred. Schroeder was convicted in the Circuit Court for having accepted deposits in the Franklin State Bank of Milwaukee in violation of Section 348.19 of the Statutes. This Statute makes it a criminal offense for an officer of a bank to receive deposits when he knows or has good reason to know that the bank is unsafe or insolvent.

When is a bank insolvent? This question is bound to be the primary issue in any case of this kind. It was answered in *Ellis v. State*, 138 Wis. 513, 119 U.W. 1110, as follows:

"A bank is insolvent when the cash value of its assets realizable in a reasonable time, in case of liquidation by the proprietors, as ordinarily

the reasonable doctrine that a person shall take reasonable care to protect little children anywhere and everywhere."

³⁴ *Frederick v. Great Northern Ry. Co.* —Wis.—, 241 N.W. 363.

³⁵ *Kelly v. Benas*, 217 Mo. 1, 116 S.W. 557; *Louisville & N. R. Co. v. Ray*, 124 Tenn. 16, 134 S.W. 858; *Barnhardt v. Chicago M. & St. P. R. Co.*, 89 Wash. 304, 154 Pac. 441; *Carr v. Oregon W. R. & N. Co.*, 123 Ore. 259, 261 Pac. 899; *Lucas v. Hammond*, 150 Miss. 369, 116 So. 536.