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CURRENT ATTRACTIVE NUISANCE CASES IN WISCONSIN AND OTHER JURISDICTIONS

I. INTRODUCTION

Litigation involving injuries to trespassing children of tender years evokes troublesome problems of substantive law. At common law the occupier of land owed only the most restricted duty to trespassers upon his property, and such duty was not enlarged by foreseeable likelihood that children would trespass. This meant that a landowner might with impunity leave dangerous machinery or other hazardous conditions unguarded on his own land, even adjoining a children's playground. The harshness of such a result inevitably led to a series of departures from this strict rule. Where the trespasser is a child, the courts today often circumvent the rule of non-liability of the landowner by applying what is commonly called the "attractive nuisance doctrine." The majority of courts feel that, because of the immaturity of young children, they are incapable of understanding and appreciating all the dangers they may encounter while trespassing. Furthermore, parents cannot keep them under continual observation or follow them everywhere; consequently, the occupier of land should be held liable for conditions which are highly dangerous to trespassing children. Among the theories advanced by the American courts in support of this doctrine are: 1) implied invitation theory, 2) the reasonable anticipation theory, 3) the trap or pitfall theory, and 4) humanitarian principles. Better authorities, however, now agree that there are two chief theories on which the doctrine is founded: 1) liability based on general negligence, or 2) liability based on implied invitation to enter.

These dissimilar theories, applied differently throughout the United States, make the doctrine of attractive nuisance an extremely confusing and controversial one. Moreover, the cases are far from uniform with respect to what things or conditions are attractive and dangerous to children, so as to impose a duty on the owner or occupier of land. The line is not an easy one to draw, and elements other than the actual nature of the thing or condition in question must frequently be taken into consideration; so that the same thing may be an attractive nuisance under some circumstances, but not under others. It is the purpose of this comment to trace the historical development of the doctrine and to analyze certain recurring fact situations and instrumentalities as they have been treated by the courts in the recent cases. Special emphasis

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1 Bottum's Adm'r v. Hawks, 84 Vt. 370, 79 Atl. 858 (1911).
2 James, Tort Liability of Occupiers of Land: Duties Owed to Trespassers, 63 Yale L.J. 144 (1953).
3 PROSSER, TORTS §76 (2d ed. 1955).
4 1 DePaul L. Rev. 263 (1952).
5 Ibid at 264.
6 2 HARPER & JAMES, TORTS §27.5 (1956).
II. History

The attractive nuisance doctrine appears to have had its origin in English common law in the case of *Lynch v. Nurdin.* In that case a seven year old child fell from an unattended cart left in the street by the employee of the defendant. The court allowed recovery, pointing out that the child, acting under natural impulse, in obedience to his instinctive nature, was enticed to meddle with the cart; and that the danger of the situation was created by the defendant in failing to observe the tendency of children to play around unprotected vehicles. It was not until 1873 that the doctrine took root in this country. The United States Supreme Court, in the landmark case of *Sioux City & Pac. R.R. Co. v. Stout* was faced with the question of whether the owner of an unlocked railway turntable was actionably negligent toward a child of six years who was injured while playing on the turntable. The court ruled that the temptation to the child constituted an implied invitation to come on the premises. Having raised the child to the level of invitee, the landowner was under a duty to exercise ordinary care not to injure the child.

At the time of this decision, the occupier of land owed no duty to a trespasser, except not to injure him intentionally, maliciously or wilfully. To the licensee, however, all duty was fulfilled if he was warned of concealed dangers actually known to the occupier. Regarding an invitee or business invitee, the occupier had to make reasonable inspection to discover dangers, but he was thought to fulfill all further duty if he then made complete disclosure of the defect, even though he did not remedy it at all.

In 1922, however, in the case of *United Zinc and Chemical Co. v. Britt,* Justice Holmes emphasized that under the attractive nuisance doctrine, the landowner is not liable to a child trespasser who entered upon his land without being attracted thereto. This special requirement of “bait” or “allurement” was to be short-lived. Mr. Chief Justice Hughes, in *Best v. District of Columbia,* giving reasons for disregarding the element of attraction as a necessary condition to the application of the doctrine, states:

“The duty must find its source in special circumstances in which, by reason of the inducement and of the fact the visits of

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9 84 U.S. 657 (1873).
11 2 HARPER & JAMES, op. cit. supra note 6, §27.5.
12 Ibid §27.9.
13 Ibid §27.12.
14 258 U.S. 268 (1922).
15 291 U.S. 411 (1934).
children to the place would naturally be anticipated, and because of the character of the danger to which they would unwittingly be exposed, reasonable prudence would require that precautions be taken for their protection."

Here it would seem that the court found a duty, based on anticipation of the trespass, to take reasonable precautions to prevent injury. The Best case was interpreted in Eastburn v. Levin, as establishing the rule that the visible attraction need not be the immediate cause of the injury; however, none of the cases of the period settled the question whether there need be a visible attraction before the doctrine applies.

In regard to the element of allurement or enticement, many cases have followed the Best case. Perhaps the most clear cut on this point is the leading case in Minnesota, Grimmelstad v. Rose Bros. Co., where the court remarked:

"We conclude that the idea of invitation, express or implied, actual or factual, as condition precedent to liability in the case of young children, injured as was the plaintiff here, should be finally and emphatically discarded. They are not trespassers, but, because of their tender years, and the consequent lack of perception and responsibility, liability results notwithstanding the trespass."

At present, the Best case seems to be the majority view, and is followed by the Restatement of Torts Section 339. Arizona and Colorado still require the invitation fiction of allurement to be present as a condition precedent to the trespass, whereas Maine, Massachusetts, New York, Ohio, Rhode Island, Vermont and Michigan refuse to embrace the doctrine as such, allowing limited recovery on a different theory.

III. PRESENT LAW AND ITS TREND

A study of the recent cases reveals that section 339 of the Restatement is becoming a common denominator for the different states in applying the attractive nuisance doctrine. Dean Prosser has said that section 339 is a signal achievement for the Restatement because of the

16 Ibid at 419.
17 113 F. 2d 176 (D.C. Cir. 1940).
18 194 Minn. 531, 261 N.W. 194 (1935).
19 Ibid at 537, 261 N.W. at 196.
20 RESTATEMENT, TORTS §339 (1934).
21 Salt River Valley Water Users Ass'n v. Compton, 39 Ariz. 491, 8 P. 2d 249 (1932).
23 Lewis v. Mains, 150 Me. 75, 104 A. 2d 432 (1954).
26 Hannan v. Ehrlich, 102 Ohio St. 176, 131 N.E. 504 (1921).
30 PROSSER, op. cit. supra note 3, at 440.
general acceptance it has received. Section 339 of the Restatement of Torts provides:

**Artificial Conditions Highly Dangerous to Trespassing Children**

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

(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 is slight as compared to the risk to the young children involved therein.\(^{31}\)

When these conditions are satisfied, an owner or occupier of land can be found liable for injuries suffered by children while upon his land. This seems to be the proper theory.\(^{32}\) Dean Prosser has explained the rationale for such liability by stating:

"The majority of courts agree that the true justification for the liability is nothing more than the foreseeability of harm to the child, and the considerations of common humanity and social policy which, as in other negligence cases, operate to bring about a compromise between conflicting interests, and to curtail to some reasonable extent the defendant's privilege to act as he sees fit without care for the protection of others."\(^{33}\)

The attractive nuisance doctrine has been adopted by Wisconsin. The leading case in Wisconsin is *Angelier v. Red Star Yeast Products Co.*\(^{34}\) wherein a young child, playing in the company's yard, fell into a trough of boiling refuse. There was no apparent element of attraction in the case. The court held that the liability was a policy extension of the landowner's duty of care, so as to include the child trespasser.\(^{35}\) The court substantially adopted the rule of section 339 of the Restatement of Torts as to the nature and extent of the duty. It is interesting to compare the elements necessary for the operation of the doctrine in Wisconsin, as announced in *Angelier*, with those of Section 339. The *Angelier* case laid down the following elements:

\(^{31}\) Restatement, op. cit. supra note 20, §339.

\(^{32}\) Prosser, op. cit. supra note 3, at 440.

\(^{33}\) Ibid.

\(^{34}\) 215 Wis. 47, 254 N.W. 351 (1934).

\(^{35}\) Ibid at 53, 254 N.W. at 353.
"It is our opinion that a possessor of real estate should be subjected to liability to a young child who is injured upon his premises if it be found that the former maintained or allowed to exist, upon his land,

(1) an artificial condition which was inherently dangerous to children being upon his premises;
(2) that he knew or should have known that children trespassed or were likely to trespass upon his premises;
(3) that he realized or should have realized that the structure erected or the artificial condition maintained by him was inherently dangerous to children and involved an unreasonable risk of serious bodily injury or death to them;
(4) that the injured child, because of his youth or tender age, did not discover the condition or realize the risk involved in going within the area, or in playing in close proximity to the inherently dangerous condition;
(5) and that safeguards could reasonably have obviated the inherent danger without materially interfering with the purpose for which the artificial condition was maintained.\[emphasis supplied.\]

An apparent dissimilarity in the two tests is that of Angelier's incorporation of the words "inherently dangerous". Until recently, there seems to have been some question as to whether or not the words "inherently dangerous" meant the same thing as those stated in section 339, part (b), that is: "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.\[37\] The Supreme Court of Wisconsin in Massino v. Smaglick has recently ruled on this precise point and held:

"Some authorities interpret this language [2 Restatement, Torts p. 920, sec. 339, part (b)] to mean that the condition or instrumentality must in and of itself be 'highly dangerous' or 'per se dangerous'. Wisconsin, like many other states, uses the term 'inherently dangerous.' We think they all mean the same thing."\[38\]

One would be prompted to ask what will be considered "highly dangerous" or "per se dangerous." A Missouri decision seems to be helpful in this regard. Missouri, like Wisconsin, is a state which has incorporated the language "inherently dangerous" in its doctrine, and in a recent case,\[39\] interpreting these words, the Supreme Court of Missouri held:

"Inherently dangerous means that danger inheres in the instrumentality or condition itself at all times, so as to require special precautions to be taken with regard to it to prevent injury; instead of danger arising from mere casual or collateral negli-

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\[36\] Ibid.
\[37\] RESTATEMENT, op. cit. supra note 20, §339.
\[38\] 3 Wis. (2d) 607, 89 N.W. 2d 223 (1958).
gence of others with respect to it under particular circumstances.\footnote{40}

In the Massino case,\footnote{41} however, the court went further and indicated that there has been no change in the rule set out in Angelier; consequently, that doctrine is still the law to be applied in Wisconsin.

It is to be noted that both section 339 and Angelier require the dangerous condition to be artificial before liability will be imposed upon the land owner. In the application of the doctrine, the courts have always made a distinction between artificial conditions upon property and those which are considered to be natural. The distinction rests upon the principle that natural conditions such as ponds, pools, lakes, streams and fires are perils which are deemed to be obvious to children of tender years; and, as a general proposition, no liability attaches to the proprietor by reason of death or injury resulting to children who have come upon the land.\footnote{42} It is obvious that if the children should have realized the risk involved in being on the property there can be no recovery under the doctrine. Some cases, however, are discarding this distinction; and, in the view of some modern writers, it is an arbitrary one. Dean Prosser feels that the distinction is not a proper one; and, even when the condition is natural, liability should be directed at nothing more than the existence of a recognizable and unreasonable risk of harm to the child.\footnote{43}

Before a landowner can be found liable he must be found negligent as measured by the standards set out by the elements of the attractive nuisance doctrine. Professor Campbell,\footnote{44} in commenting on this subject remarked, "It would seem that the attractive nuisance blanket should never be allowed to obscure the fault requirement."\footnote{45} This position was sustained in Wisconsin, through Justice Currie concurring in Flamingo v. Waukesha\footnote{46} wherein he stated, "It therefore seems clear that liability for an attractive nuisance is but a phase of the liability for negligence."\footnote{47} It would seem that the element of foreseeability characteristic of negligence is incorporated in the doctrine by language of Angelier requiring that the landowner know or should know that the place where the condition is maintained is one where children have trespassed or are likely to trespass, and that he realizes or should realize that the structure erected or artificial condition maintained by him is inherently dangerous to children and involves an unreasonable

\footnotesize{\begin{itemize}
  \item \footnote{40} Ibid at 855.
  \item \footnote{41} See note 38 supra at 611.
  \item \footnote{42} James, op. cit. supra note 2, at 165.
  \item \footnote{43} PROSSER, op. cit. supra note 3, at 440.
  \item \footnote{44} Campbell, Recent Developments of the Law of Negligence in Wisconsin, 1956 Wis. L. Rev. 4.
  \item \footnote{45} Ibid. at 13.
  \item \footnote{46} 262 Wis. 219, 55 N.W. 2d 24 (1952).
  \item \footnote{47} Ibid at 228, 55 N.W. 2d at 29.
\end{itemize}}
risk of serious bodily injury or death to them. This is substantially the same language as that presented by Section 339.

This bird's-eye view of the doctrine illustrates that the position of Wisconsin is seemingly en rapport with the majority view as promulgated in the Restatement of Torts, section 339. It is noted, however, that both the test of Section 339 and that announced in the Angelier case are extremely subjective. They are broad standards and are composed of no real objective factual content. It seems clear to the writer that, this being so, the modern attorney is faced with the problem of extensive search for exact fact situations where recovery has been allowed or disallowed. Some of the more common fact situations will be reviewed.

IV. SOME CLASSIC SITUATIONS IN THE LAW OF ATTRACTIVE NUISANCE

A. BUILDING UNDER CONSTRUCTION

Careful consideration should be given to the cases involving home building and general heavy construction because of the boom in such activity since the termination of World War II. Some of the more recent cases will be analyzed.

A cautious California court\(^4\) denied recovery to a trespassing child injured in a fall from a building under construction. The defendants were engaged in the construction of the building, partially completed at the time of injury, the second floor of which was overlaid with sheets of tar paper completely concealing a hole in the floor for a proposed ventilator or skylight. The stairway to the second floor was completed and its use was very convenient. The defendants erected a barricade at the foot of the stairs to make the second floor inaccessible to children; however, they later removed the barricade, and a child fell through the concealed hole while trespassing on the second floor. The court held that an unfinished building has none of the characteristics of turn tables, moving cars or wagons, live wires or dangerous and attractive machinery, and concluded that a building under construction is not a proper situation to which the doctrine can be applied.

Since this decision, the California court, in 1956, has applied a broader view and allowed recovery in Gardner v. The Stonestown Corp.\(^5\) In that case the plaintiff, nine years old, lived with her mother in an apartment. One defendant was a plaster contractor doing work on a house adjacent to plaintiff's apartment building. A lawn and concrete ramp led from the adjoining property to the back door of the apartment building. This ramp or apron was commonly used by the children in play. Planks were placed over a wall separating the proper-


ties leading down to the ramp. The plaintiff was walking on these planks when her foot slipped between them and she fell, knocking out six permanent teeth and sustaining body bruises. The court held that this was a proper case for the jury, because here the defendant owner's employee's saw the children playing on the ramp and had permitted them to continue playing. It is difficult to reconcile these cases on the facts, because it seems the defendants had notice or should have had notice of the presence of the children in both cases. It may be that California is adopting a more liberal view. California appears to rest foreseeability of harm on notice; and it would seem that, if there is notice, liability will follow.

New Jersey is one of the most liberal jurisdictions in applying the doctrine. In a case involving a contractor excavating with a bulldozer on property adjacent to the Echo Lake Public School, a child of six years was injured when he fell into a furrow three or four feet below the grade of the property line. The facts in this case were particularly favorable to the plaintiff. Here the court could consider the propinquity of the school, the fact that children frequently used the area, and the fact that their presence on the premises was known to the operator of the bulldozer. The court held: "The basis of liability is the foreseeability of harm, and the measure of duty is care in proportion to the foreseeable risk. An act in disregard of this obligation was a remediable misfeasance." It was felt that habitual acquiescence in trespass on the part of the landowner or his agent may well constitute a license; and, even granting that the plaintiff was not an invitee on the property, but a licensee, the rule still prevails.

An interesting case, previously alluded to, has been decided by the Supreme Court of Missouri. The facts of the case involved a child four and one-half years old who lived with parents in an apartment across the street from a lot where a church was being constructed. The excavation had been made, concrete foundation poured, and the joists completed. A trench ran around the foundation three feet wide and twelve feet deep. Children had played in the area since construction began. The workmen had never disturbed or warned them, and trespassing signs were not erected until after the accident occurred. The plaintiff fell into the trench when walking across some boards placed there for wheelbarrows. The trial court directed a verdict for the defendant, and the Supreme Court affirmed, holding that the boards could not be considered an inherently dangerous instrumentality. This case demonstrates that, even though the landowner had notice or should have had notice of the children's presence, the doctrine apparently will

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51 Ibid at 389.
52 See note 39 supra.
not apply if the condition upon the property is not inherently dangerous.

The question, what is an inherently dangerous artificial condition, will often become the pivotal point of an attractive nuisance case. This is especially true in Wisconsin, since *Angelier* employs this express language. A late Wisconsin case dealing with this question, *Nechodomu v. Lindstrom*, is pertinent. The defendant had allowed the children to play near a mortar mixer; and, while defendant was carrying mud to the other side of the building, he had left the mixer unattended. The plaintiff was injured in trying to retrieve a can which his playmate had dropped into the mixer. In sustaining a recovery for the plaintiff, the court said that, in its opinion, the evidence presented a question of fact for the jury whether, under all the circumstances existing, the machine was inherently dangerous to children and constituted an attractive nuisance. The court approved the instruction of the trial court with respect to a machine inherently dangerous to children. The trial court had instructed:

"An artificial condition may be peculiarly dangerous to children because of their tendency to intermeddle with things which are notoriously attractive to them, but this is not the only childish characteristic which may make an artificial condition which involves no serious risk to an adult highly dangerous to children. The lack of experience and judgment normal to young children may prevent them from realizing that a condition observed by them is dangerous or, although they realize that it is dangerous, may prevent them from appreciating the full extent of the risk."

In analysis of the facts presented in this case, it appears that a mud mixer under these circumstances may be considered "inherently dangerous" within the terms of the doctrine. Furthermore, the defendant had actual notice of the presence of the children, so the requisite elements to establish liability were fulfilled.

In a manner of comparison, it is material to consider the recent case of *Massino v. Smaglick*. In that case the plaintiff was a nine year old boy who sustained injuries as a result of being struck in the left eye by a piece of asphalt shingle. Because of the injuries, the plaintiff's left eye had to be removed and replaced with an artificial eye. The defendant was having a house built, and the carpenter work was being managed by his brother as the foreman. The plaintiff was attracted to the property by two boys who were upon the roof throwing loose shingles. One of the boys on the roof threw a piece of shingle which

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53 273 Wis. 313, 78 N.W. 2d 417 (1956).
55 See note 53 *supra* at 325.
56 See note 38 *supra*. 
struck the plaintiff. The trial court granted a directed verdict for the defendant. In sustaining the trial court, the Wisconsin Supreme Court held that the piece of shingle was not inherently dangerous. The court said:

"His injury was caused by a distinct and unrelated cause, which was the throwing of an object by an older boy, something that the defendants could not anticipate. The defendants had been engaged in building houses for many years and each of them testified that he had never known of boys climbing upon roofs of houses under construction and throwing pieces of shingle or other building materials there found at other children."

These cases indicate the importance of the notice feature. In Nechodomu, the defendant had actual notice of the presence of the children; whereas in Massino there was direct testimony to the contrary. It would seem that in cases of this category, proof of notice should receive careful circumspection, in that such notice bears directly on the foreseeability of harm to trespassing children. Moreover, concerning the element of "inherently dangerous" condition, the two cases are ostensibly harmonious. It is reasonable to conclude that an active mud-mixer, under the circumstances presented in Nechodomu, is an inherently dangerous condition; however, the unused cut shingles, in Massino, are not in themselves dangerous. They needed outside propulsion by an independent force to make them "inherently dangerous"; and, under the evidence presented in the case, it was reasonable to find that the defendants could not anticipate such a force.

**B. FIRE AS AN ATTRACTIVE NUISANCE**

As pointed out earlier, a landowner is liable only for artificial conditions maintained on his premises which are inherently dangerous to children of tender years. The law requires that the dangerous condition of the premises must be produced or created by man, or maintained by the occupier, in order to find the occupier liable. This is because children are likely to appreciate the risks of natural dangers, such as water, fire, or high places, so that these conditions are not highly dangerous to them. This is the majority view and was exemplified in Botticelli v. Winters. In that case the Connecticut court held no liability on the part of the defendant landowner for injuries suffered by a child of six years when he was seriously burned by an unguarded and unattended incinerator. The landowner knew of the children's presence and he never ordered them away; nevertheless the court refused to impose liability because fire itself is a natural hazard, and not one of an artificial nature. In a parallel case, decided by the Supreme Court of Connecticut, no liability was found even though the incinerator was placed near the children's play area.

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57 Ibid.
58 Ibid at 612.
59 Botticelli v. Winters, 7 A. 2d 443, 125 Conn. 537 (1939).
60 Ibid.
Court of Pennsylvania, the court refuses to allow recovery to a two year and eleven month old boy who was burned on defendant's lot by a bonfire started on a Sunday afternoon by his playmates. The rationale of the decision was:

"But, the rule was not intended to impose upon an owner of land the duty of policing the conduct of trespassing young children against dangers of their own creation and not related to or inhering in the artificial conditions which the owner maintains upon his land."62

Under a recent New Jersey decision, Simmel v. New Jersey Coop Co.,63 (November, 1957), the majority view is rejected. The Simmel case arose under these facts. Twenty days before the accident the defendant acquired title to a number of lots, all fronting on a street in Hoboken. These lots were located across the street from a large housing project containing over 700 families, including plaintiffs and perhaps 1000 children. Refuse trucks of the Department of Public Works of Hoboken dumped rubbish and junk on the vacant lots both before acquisition of title and thereafter. This rubbish was set on fire daily either by the truckdrivers or by children, and the fires were then left to burn and smolder, with no one to tend them. The defendant denied knowledge of the fires and of the dumping on the lots. Nevertheless the court held that the jury could have found that one of the defendant's officers had seen the property a few months before the acquisition of title, because the defendant's place of business was only ten blocks away. The court stated that it was not necessary to decide the question whether or not there is an affirmative obligation upon the occupier to inspect his premises so as to ascertain whether children are likely to trespass thereon. The defendant argued that no land owner should be charged with liability to trespassing children because of fires on his land, unless, by his own act, he authorized the fires or permitted their continuance; and that there can be no liability when the condition is natural, as is a fire. In striking down these contentions, the court said:

"For we think that under the law of New Jersey the land occupier may be held liable for injuries to trespassing children resulting from an artificial condition of which he is aware, whether or not, by his own act, he caused or continued the condition or acquiesced therein. The duty which all land owners owe to the children or society, while at play on their lands, extends at least this far."64

This case reflects the extent to which New Jersey is expanding the doctrine of attractive nuisance. An occupier of land can now be held

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62 Ibid at 429.
64 Ibid at 304.
liable for maintaining a hazardous natural condition upon his premises. It seems immaterial whether the land owner created the condition or whether it was created by some third party. This case would seem almost to impose the burden of inspection upon the land owner to ascertain that his property is free from hazardous conditions attractive to children. Wisconsin has no cases on this precise point.

C. WATER FILLED PITS, PONDS AND SWIMMING POOLS

Cases involving the deaths of young children by drowning have frequently appeared at the appellate level. There have been many such cases in the United States; and a study of the law in this field discloses some possible expansion, rather than limitation, of the doctrine. The prevailing view is expressed in *Phipps v. Mitze* where the court denied recovery to a parent of a nine year old boy who drowned while swimming in the defendant's artificially created pond. The court felt that the plaintiff had not supported an allegation that the children had waded there previously; and directed a verdict for defendant, notwithstanding the fact that the fence around the property was in disrepair and the only signs forbidding trespass were one mile away. This, of course, is parallel to the view of the majority concerning fire. Another case following this general principle was *Jennings v. Glen Alden Coal Co.* Under facts substantially similar to those of *Phipps v. Mitze*, the Pennsylvania court held, in denying recovery:

"... it cannot be said that a normal boy 13½ years of age who has been in and around water does not realize the risk of swimming in deep water. We have repeatedly held that the perils contained in a body of water are obvious to children at an early age."

Two cases decided in 1957 fortify the majority view. In the first case, *Jewell Carmichael v. Little Rock Housing Authority*, a seven year-eleven month old child was denied recovery when he was attracted across the street from his home to a pond in a sunken area lined with sweet gum trees. Children congregated there frequently to throw stones at the fish. The pond was enclosed, and the parents had difficulty keeping their children away. This court exhibited a disinclination to shift the duty of care to the owners of such hazards. The reason given was the impracticality of making the hazard childproof by guards or fences. Also relied upon was the fact that the weight of authority classifies ponds outside the scope of attractive nuisance, in the absence of any unusual element of danger. The second case, involved a child, two years-ten months old, in the company of three children seven

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67 Ibid at 208 of the Atlantic Reports.
68 --- --- --- Ark., 299 S.W. 2d 198 (1957).
69 Ibid at 200.
years old, who was drowned in a sewage disposal plant operated by the
city across from a city-maintained housing project. The court held the
doctrine would not apply under the facts because the element of implied
invitation was absent. The child had to walk 850 feet to the plant, and
then, down a forty-five to sixty degree incline, eighty feet to the pool.
The child was found to be a trespasser, or at best a licensee; hence,
no recovery was allowed. The court cited Lake v. Ferrer,\textsuperscript{71}
probably California's leading case on swimming pools. The Lake case is worthy
of comment because of its recency, and because it is primary precedent
denying recovery for drownings in private swimming pools.

In that case, the plaintiff's two and one-half year old son was
drowned in an artificial swimming pool maintained by the defendant
at his home in a thickly populated residential area of Los Angeles.
While playing in his yard, the child wandered through a hedge which
separated the adjoining land of the defendant, and followed a dirt path
to the pool, where he fell or climbed to his death. There was no fence
around the pool. The court sustained the defendant's demurrer to
the complaint, holding that, in the absence of facts warranting the in-
vocation of the attractive nuisance doctrine, the defendant owed no
duty of care to trespassing children. Furthermore, it was felt that the
doctrine was an exceptionally harsh rule of liability imposed on land
owners, and should not be extended any further than absolutely neces-
sary.

This, however, is not the state of the law throughout all American
jurisdictions. In Davies v. Land O'Lakes Racing Association,\textsuperscript{72}
the Supreme Court of Minnesota allowed a recovery to the parents of a
six year old child, drowned in a catch basin used to facilitate drainage
at the defendant's race track. The defendant left these basins or pits,
which were about ten feet square and six feet deep, entirely unguarded
and uncovered. The court held that the evidence was sufficient to
sustain the jury's verdict under Section 339 of the Restatement of
Torts because:

(a) the unbarricaded and concealed pit, a virtual trap for un-
wary children, was located in a place where the defendant
knew or had reason to know children were likely to tresp-
ss;
(b) the unguarded pit, concealed by shallow water on its ap-
proaches, involved a hazardous condition which defendant
had reason to recognize as constituting an unreasonable risk
to children;
(c) the drowned child, because of his immaturity, was unable
to appreciate his danger or discover the danger involved;
(d) the utility to defendant of maintaining the catch basins in

\textsuperscript{71} 139 Cal. App. 2d 114, 293 P. 2d 104 (1956); 9 Stan. L. Rev. 204 (1956).
\textsuperscript{72} 244 Minn. 248, 69 N.W. 2d 642 (1955); 16 NACCA L.J. 327 (1955).
their unguarded condition was comparatively slight, in relation to the serious risks threatening foreseeable infant trespassers.

The Court indicated in this case that, while some courts refuse to hold the occupier liable to a child trespasser for harm caused by ponds, pools and other bodies of water, this immunity does not apply where, as in the present case, the body of water, concealing a hidden pit, involves extra danger and lurking peril to infant intruders.

Texas, too, has shown more liberality in applying the doctrine to water hazards. Recovery has been allowed to a plaintiff whose three year old step-daughter was drowned in the defendant's cattle-dipping vat, enclosed by a chute which the jury found not "unusually" attractive to children. At trial judgment was rendered for the defendant; but the Supreme Court reversed. In a very clearly written opinion, the Court embraced Section 339 of the Restatement of Torts; and, moreover, provided a guide for framing and submitting the jury issues. The court said that the principal jury issue is one of foreseeability, whether the child's presence on the premises reasonably should have been anticipated. Such issue should be submitted separately, since the remaining issues are contingent upon an affirmative finding on the question. The submissible issues, framed in keeping with the facts involved, should include:

1. whether, in view of the child's anticipated presence, the defendant was negligent in maintaining the premises, considering both the utility of any structure or condition, and the cost of protection or removal;
2. whether this negligence was the proximate cause of the child's injuries or death;
3. whether the child was negligent in going upon the premises;
4. whether the child's negligence was a proximate cause of his injury or death.

It should be noted that, in the Minnesota case, the court alluded to the concealed pit as a virtual trap for unwary children. This might suggest an additional factor for consideration in applying the doctrine. It might be argued that, if the pond or pool is concealed, or its danger undetectable by young children, the circumstances would give rise to an element of entrapment; and, as such, liability should be placed upon the land owner, even as against a technical trespasser.

Louisiana has decided a case that is germane to this view, wherein the court held that, under certain conditions, a pond may be considered

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74 Copeland v. Massie, 228 S.W. 2d 960 (Texas, 1950), reversed 233 S.W. 2d 449 (1950), the court holding as a matter of law that a 14 year old plaintiff is deemed to have appreciated the risk.
an attractive nuisance. The court looked to the unusual attractiveness of a natural collection of sticks, timber, small logs, and sea gulls in granting recovery.\textsuperscript{75} This was also the procedure followed in \textit{Saxton v. Plum Orchards Inc.}\textsuperscript{76}

It is more realistic to conclude however, that the courts are merely giving special attention to all the facts and circumstances which set the scene for the accident, rather than adding an element of entrapment to the doctrine. It is submitted that the position presented by these cases is the better view. Water hazards should be within the attractive nuisance doctrine when some artificial conditions exists which is unusually attractive to children.

\textbf{D. Towers and Trestles}

Towers and trestles stand out in the law as structures which have frequently been argued to be attractive nuisances. Wisconsin has two relatively recent cases on the point; and there has been an abundance of contemporary litigation in the field. Here, again, the question has been, "Can the structures, under all the circumstances, be considered to be an attractive nuisance?" As in most of the cases, the age of the child will bear on the problem. In \textit{Garrett v. Arkansas Power and Light Company},\textsuperscript{77} the court decided that a seventeen year old boy who had climbed an electric light pole, and then slid down the wires, being burned by a live wire in his descent, would have no relief under the doctrine. The Court considered the boy a mere licensee; and, as such, he was entitled to no affirmative protection from the owner who granted the license. A seventeen year old boy in a junior high school should have received some rudimentary training in electricity and should have realized the risk. Of course, the particular facts will determine whether or not the child's age is determinative.\textsuperscript{78}

\textsuperscript{75} Burris v. City of New Orleans, 86 So. 2d 549 (Louisiana, 1956).
\textsuperscript{76} 215 La. 378, 40 So. 2d 791 (1949).
\textsuperscript{77} 218 Ark. 575, 237 S.W. 2d 895 (1951).
Issue for jury, 15 years old: Ekdahl v. Minnesota Utilities Co., 203 Minn. 374, 281 N.W. 517 (1938); Johns v. Fort Worth Power & Light Co., 30 S.W. 2d 549 (1930).
In *James v. Wisconsin Power and Light Company* the Wisconsin Court refused to allow recovery to a fifteen year, eight month old Boy Scout (who averred he was mentally retarded two or three years), when he was electrically shocked on defendant's electric transmission line tower. The tower was located 1200 feet from a Scout Camp and consisted of four corner posts supported by diagonal and cross braces. A sign in two-inch letters, reading “DANGER — HIGH VOLTAGE”, was attached at the first cross bar. The plaintiff entered defendant's property with a fellow-scout and climbed the pole. The companion would not climb the pole even though he was called “chicken” by the plaintiff just before the latter received the shock. The jury returned a verdict for the plaintiff, finding him forty-five percent and the defendant fifty-five percent negligent. In reversing, the Supreme Court noted the plaintiff's testimony that he did not touch the pole because of his fear of possible shock. This evidence demonstrated his appreciation of risk, and that he chose to encounter it with reckless bravado; consequently the defendant could not be held liable. The Court said:

"The doctrine is intended for the protection of children of tender years, not to require the owner of a structure built in the free use of his own land and doing that which is necessary in carrying on his business properly, to so guard and secure it as to prevent its use by children who are brought to it in a spirit of recklessness or bravado." [79]

The Court also noted that the defendant had no knowledge of the Scouts having previously been on the pole; and, ruled that the defendant could not assume that a boy would attempt so perilous a trip because of the construction of the pole. Evidently, only a very wiry boy could have made this climb; therefore, the type of construction and facility with which a pole may be climbed is an important element in the case. This point has been clearly demonstrated in *Bartleson v. Glen Alden Coal Company* in which the Pennsylvania Court abandoned the invitation by allurement theory and adopted Restatement Section 339. In that case an eleven year old boy climbed the defendant's forty-five foot high tension transmission tower which carried electric wires into a mine. A new fence around the tower had been completed four days previously and the contractor had turned it over to the defendant, ready for locking. The gate was secured with wire strands; this fact was observed by the defendant's inspection foreman, who did nothing further about the matter. The day before the accident, plaintiff and other children entered the gate and climbed the tower. On the day of the accident, the plaintiff entered the en-

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[79] 266 Wis. 290, 63 N.W. 2d 116 (1954).

[80] Ibid at 299, 63 N.W. 2d at 120.

[81] 361 Pa. 519, 64 A. 2d 846 (1949); 54 Dickinson L. Rev. 102 (1949).
closure and again climbed the tower, using iron studs which formed a ladder effect from top to bottom. He came in contact with uninsulated wires; and, as a result, he eventually suffered the amputation of his right arm. There were three well-worn paths passing close to the tower which people had used as short cuts going to and from work and school. The Court held that whether or not the attractive nuisance doctrine should apply was a question for the jury, and that the case was squarely governed by the principles of Section 339. In discarding the allurement theory, the court said:

"...the true basis of the duty is the value of child life to the community. The danger arises out of likelihood of children trespassing, and the element of 'enticement' or 'allurement' is merely a subsidiary element, important only insofar as it bears upon the likelihood of trespassing."\(^{82}\)

The court held that as long as the defendant can be charged with the duty to anticipate trespassing children, and that children will accept the invitation to enter the inclosure and climb the tower, the defendant can not remain passive. It seems that the absence of affirmative notice of the open gate to the defendant was immaterial, and that the negligent act on the part of the defendant was one of omission, that is, failing to so secure the gate that it would not be opened. The relative ease with which a child could climb the tower by going up the studs, however, seems to be of additional materiality. The James Case in Wisconsin and the Bartleson decision in Pennsylvania are good comparative studies of facts under which recovery was respectively refused and allowed in cases involving high tension towers. The Circuit Court of Appeals of the Third Circuit allowed recovery under the Federal Tort Claims Act in 1953 for a seven year old plaintiff who fell from an abandoned Coast Guard Tower; and, in applying the law of New Jersey, further reinforced a very liberal New Jersey application of the doctrine.\(^{83}\)

A case involving a railroad bridge or trestle as an attractive nuisance in Wisconsin was Brady v. Chicago and Northwestern Railway Company.\(^{84}\) Three boys, of ages nine, thirteen, and thirteen left DePere, Wisconsin on the east side of the Fox River and walked across the defendant’s railroad bridge to the west short of the River where they went to play. Upon hearing the noon whistles, they started for home across the railroad bridge, walking on a catwalk outside the car rails. The catwalk did not run the full length of the bridge; and, at its end, it projected over the river without any guard or barrier. One of the boys, attempting to cross from catwalk to track, fell into the river and drowned, and one companion drowned in an attempt to rescue him.

\(^{82}\) Ibid at 851 of the Atlantic Reports.
\(^{83}\) McGill v. U.S., 200 F. 2d 873 (3rd Cir. 1953).
\(^{84}\) 265 Wis. 618, 62 N.W. 2d 415 (1954).
The plaintiffs urged that such a bridge was an attractive nuisance. The evidence adduced showed that the bridge was frequently used by members of the public of all ages as a place to fish or loaf, and as a passage across the river more convenient than the regularly used highway bridge. The defendant acquiesced in and tolerated such use and made no effort to prevent it. It would seem that, in this case, the court might have extended the application of the doctrine in Wisconsin; however, it did not choose to do so. The case illustrates the Wisconsin Court's reluctance to broaden the scope of the doctrine. The court felt that the missing element under the rule of *Angelier* was the failure of the child, because of its youth, to discover the condition or realize the risk involved.

The children were therefore classified as gratuitous licensees. Since danger arose solely from the manner in which the defendant constructed and maintained its premises, and was open and apparent, mere passive negligence, such as it was, would not sustain a cause of action in favor either of an adult licensee or in favor of a child having adequate knowledge and appreciation, as found by the jury. The opinion in this case is consonant with that of *Antonas v. Lyford,* involving similar facts, wherein the court held that the railroad's duty under Pennsylvania law did not extend to protection of trespassing children from risks so obvious as the danger of falling from a trestle.

E. MISCELLANEOUS

Three cases recently decided may be harbingers of a further extension of the doctrine. An already famous case, *Kahn v. James Burton Company,* decided that a supplier of lumber, who was not in possession of the land upon which the injury took place, could be found liable within the scope of the doctrine. The supplier's employee had negligently piled lumber upon the premises for the use of an independent contractor. The court seemed to consider irrelevant the contentions of the lumber supplier that it was not in control of the premises and that its contract obligations for defects in the lumber pile ran only to the contractor. The court held that the jury could properly find that the lumber supplier was negligent in piling the lumber, and also that the contractor was negligent in maintaining the carelessly piled lumber on the premises.

*Mann v. Kentucky and Indiana Railway Company* has announced the more liberal Restatement Section 339 to be the Kentucky view, eliminating the requirement of allurement. In that case, a two and

86 5 Ill. 2d 614, 126 N.E. 2d 836 (1955); 34 Texas L. Rev. 667 (1956).
87 ________ Ky. ________, 290 S.W. 2d 820 (Ky., 1955). At the subsequent trial in Jefferson Circuit Court in Nov., 1956, the plaintiff was awarded $175,000 damages for loss of his leg at the hip and arm at the shoulder. 46 Ky. L.J. 181 (1957).
one-half year old boy sustained injuries when he was run over by a tank car after he had followed his dog into the defendant’s railroad switch yard. The boy lived adjacent to the switch yard on a street which came to a dead end at the yard. Approximately thirty-five to forty children lived on this street. There was no fence or barrier of any kind between the street and the switch yard; but the defendant had erected a no-trespassing sign and had on duty at all times three patrolmen, who inspected trespassing cars and chased children from the property when they saw them. The defendant had knowledge of children and adult trespassers, but denied that these trespassers had ever crossed the tracks; however, the plaintiff’s evidence showed that, in order to avoid going several blocks around the yard, pedestrians often used the path across the yard as a shortcut.

In reversing the trial court’s ruling that the facts presented no jury issue, the court stated that the case should have been submitted with an instruction which regarded the switch yard as an inherent peril to the young child as a matter of law. The jury should have been allowed to determine the issues of:

1. whether the child’s presence could have been anticipated;
2. whether the defendant was negligent in failing to take reasonable precautions to prevent the child’s entry, and
3. whether this negligence was the cause of the injury.

By this decision, railroad cars moving unattended, create an unreasonable risk to children; and are dangerous, per se.

New Jersey’s broad application of the doctrine is further evidenced by a recovery allowed a thirteen and one-half year old child who was injured as a result of a cave-in while playing on a refuse hill in Jersey City.88 Sometimes as many as fifteen boys played on the hill. The hill had foot holes already in it. It was not surrounded by a fence, nor were there any warning signs or verbal warnings from anyone. The plaintiff and his friend were on the hill; and, when his friend descended the hill first, the hill suddenly collapsed and the plaintiff fell to the ground, suffering a broken leg. Inasmuch as the plaintiff testified at the trial that he knew that the hill was made up of loose material and that he was an average student in grammar school, his realization of the risk would seem to have been established; and the trial court so ruled. However, the New Jersey Court disagreed, pointing out that children will accept a situational invitation to climb where foot holes are already present, citing Bartelson v. Glen Alden Coal Company.89

California, under facts substantially similar, refused recovery when a sand pile collapsed on a child, with resultant asphyxiation.90 The

89 See note 81 supra.
rationale of the case was that there could be no application of the doctrine when the object was natural, and that there could be no significant difference between a body of water and a sand pile. It was felt that the dangers connected with and inherent in a sand pile are obvious to everyone, even to a child old enough to be permitted by its parents to play unattended. However, it is the opinion of the writer that Justice Traynor’s dissent in the case was more cogent and justly realistic. He held that the court could not hold that every sand pile duplicates the work of nature, or hold, as a matter of law, that no defendant should reasonably foresee that dangers connected with and inherent in it will be unappreciated by children who play unattended.91

V. CONCLUSION

The collection of cases reviewed and categorized is expository of the checkered fact situations which arise and are urged as being within the purview of the attractive nuisance doctrine. The tests being employed today are too subjective to offer any stable precedents for legal predictability; consequently, each case must stand or fall on its own unique facts. As has been shown, some jurisdictions, like New Jersey, are refusing narrowly to delimit the doctrine; whereas others, less liberal, are at least abrogating the requirement of allurement or enticement. These jurisdictions are basing the liability of the occupier of land upon his ability to anticipate young children trespassing upon his land, and then judging his conduct by the standards of ordinary negligence. The majority of jurisdictions, however, are clinging to a conservative and strict interpretation of the doctrine.

The doctrine is in a state of inevitable confusion. Where recovery has been refused, either the child was found to be a trespasser or the property owner was found non-negligent. These two legal principles operate independently of one another; and as such, have been applied throughout the cases discussed in this article.

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91 Ibid at 1096 of the Pacific Reports.