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Definitions and History

THE "ATTRACTIVE NUISANCE" DOCTRINE which has evolved from the so-called turntable cases, holds that one who maintains instrumentalities or appliances on his premises of a character likely to attract children in play, is liable to such children when they are injured therefrom.

The doctrine was formulated in *Sioux City and Pacific Railroad Co. v. Stout* in 1873[1] although the ground had been prepared by the decision in *Lynch v. Nurdin* in 1841[2] and *Washington and Georgetown Railroad Co. v. Gladman* in 1872.[3]

In the *Stout* case, *supra,* the defendant maintained a railroad turntable on which children had previously been seen to play. The facts showed that the defendant had forbidden children to play on the premises. A latch used for locking the turntable was broken and therefore inoperative. The plaintiff was playing on the turntable when he was injured.

In the first trial of this case, which ended in a jury disagreement, there was no question of the defendant maintaining an "attractive nuisance." The issue was whether or not the defendant was negligent in not safeguarding the turntable. The defendant alleged contributory negligence.

The second trial, in which the defendant did not bring up the issue of plaintiff's contributory negligence, resulted in a verdict for the plaintiff. The issue in the second trial was the liability of a landowner to an infant trespasser for injuries resulting from defendant's unsafe turntable. In this second trial, Judge Dillon charged that the defendant would be liable if he knew or had good reason to believe that children would play upon the turntable and if they possibly might be injured because it was left in an unlocked condition.

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1 17 Wall. (U. S.) 657; L. Ed. 745 (1873).

2 1 Q. B. 29 (1841).

3 15 Wall. (U. S.) 401 (1872).

This case did not create any immediate stir in the courts, but the number of cases using it as a basis for finding liability against landowners in favor of trespassing children increased tremendously in succeeding years. Although the courts relied on the *Stout* case for precedent, the issue of defendant's maintaining a "trap" or "allurement" for children actually became the basis for most of these later decisions.

Many jurists became alarmed at the number of cases being decided in favor of the trespassing children and being justified by such phrases as "the defendant had invited, allured, or enticed" the children to come upon his premises and therefore subjected them to the perils of the property.

In *Townsend v. Wathen* in 1808,[4] the defendant laid out traps with decayed meat for the purpose of attracting and capturing neighbor's dogs.

Many courts applied this case to the "attractive nuisance" doctrine, saying that the child has been "allured or enticed" upon the premises "as a bait attracts a fish or a piece of stinking meat draws a dog." [5]

Around the turn of the century, Jeremiah Smith in his article, "Liability of Landowners to Children Entering Without Permission" [6] wrote with alarm that "the natural meaning of these strong expressions is that the landowner actually intended and desired that the children should come upon his land, and that the changes on his premises were made by him for the express purpose of attracting children to encounter peril . . . But no sane man believes that people who are making beneficial use of their own land do in fact entertain the intention of thereby alluring children to their destruction."

It was thought that judicial opinion was gradually beginning to set against *R. R. Co. v. Stout* as a result of two cases: *United Zinc and Chemical Co. v. Britt*[7] and *N. Y. N. H. and H. R. R. Co. v. Fruchter*.[8]

In the *Zinc Co. v. Britt* case, the plaintiff's two sons lost their lives while swimming in an abandoned pool owned by defendants,

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[4] 9 East 277, 9 R. R. 553 (1808).

[5] 1 Thompson, Negligence (1st ed. 1886), 305; Buckeye Cotton Oil Co. v. Horton, 117 Ark. 1, 173 S. W. 423 (1915); Williams Estate Co. v. Nevada Wonder Mining Co., 192, 45 Nev. 25, 196 P. 844 (1921).

[6] 11 Harv. L. Rev., 349 (1897-8).

[7] 258 U. S. 268 (1922).

[8] 260 U. S. 141, 43 Sup. Ct. Rep. 38 (1922).

which had become poisoned. In this case Justice Holmes said that "if the children had been adults, they would have had no case," and that "infants have no greater rights upon other people's land than adults." Justice Holmes also brought out the point that the decedents had entered the premises without knowing that the pool of water was there and therefore could not have been "allured" to it.

In the *N. Y. N. H. and H. R. R. Co. v. Fruchter* case, the plaintiff climbed to the top girder of a city-owned bridge and touched the defendant's wire, thereby injuring himself. Justice McReynolds in the Supreme Court held for the defendant because "if the plaintiff had been an adult, he could not recover."

However, these two decisions were much criticized and the courts continued to hold with *R. R. Co. v. Stout* until at the present time, a minority of only seven jurisdictions, including some of the leading industrial states of the country, still refuse to accept the "attractive nuisance" doctrine. These jurisdictions are Maryland, Massachusetts, Michigan, New York, Ohio, Vermont and Virginia.

Modern Trends

Professor William L. Prosser wrote in 1941[9] that although the landowner had no liability towards an adult trespasser, there was an important reason why this was not so when the trespasser was a child: The child is incapable of understanding and appreciating all the possible dangers resulting from his trespass.

Prosser goes on to say that the parent or guardian cannot be expected to look out for the child at all times, and this duty should naturally fall on "the one upon whose land he strays, and the interest in unrestricted freedom to make use of the land may be required, within reasonable limits, to give way to the greater social interest in the safety of the child."

The Restatement of Torts, #339, requires that four conditions be satisfied before there can be any liability:

1. The owner must have reason to believe that the children are likely to trespass, either because they have done so before or the danger is located in a place easily accessible to children.

2. The owner should know and recognize that the condition involves an unreasonable risk to children.

[9] Handbook of the Law of Torts, p. 617 (1941).

3. It must be shown that the child was incapable of appreciating the risk involved.

4. The risk to the child must be overwhelming compared to the benefit the owner derives from the condition.

Not all of the jurisdictions which rule in favor of the plaintiff have used the "attractive nuisance" doctrine as a basis for finding liability. A typical example was *Bicandi et ux v. Boise Payette Lumber Co.*[10] In this case, the plaintiff's decedent entered upon defendant's premises to play on logs floating in the mill pond there, and while so engaged, he slipped off and was drowned. The facts showed that defendant's watchman knew of the boy's presence. The court held that since this was the case, the decedent was no longer a trespasser and the "attractive nuisance" doctrine therefore did not apply. However, the defendant was negligent in not using the reasonable care due an invitee. (The lack of reasonable care was in permitting the boy to play on the dangerous logs.)

The tendency in the majority of jurisdictions is to find liability even when, by any stretch of the imagination, it is impossible to find any "attraction." In *Foster v. Lusk*[11] and *City of South Bend v. Turner*,[12] the child never even discovered the thing that injured him.

The jurisdictions still holding out against the "attractive nuisance" doctrine have used various reasons for reaching their decisions.

In *Urban v. Central Massachusetts Electric Co.*[13] the court held that there was an obvious trespass and there could be no liability since the entire "attractive nuisance doctrine was nothing but a piece of sentimental humanitarianism which was founded on sympathy rather than law and logic."

Ohio Doctrine

The Ohio courts have been almost unanimous in repudiating this doctrine although there are a few cases which lean the other way:

In *Harriman v. Pittsburgh, C. and St. L. R. Co.*[14] the court

[10] 55 Idaho 543, 44 P. 2d 1103 (1935).
[11] 129 Ark. 1, 194 S. W. 855 (1917).
[12] 156 Ind. 418, 60 N. E. 271 (1901).
[13] 301 Mass. 519, 17 N. E. 2d 718 (1938).
[14] 45 O. S. 11, 12 N. E. 451, 4 Am. St. Rep. 507 (1887).

held that it was negligence on the part of the defendant to allow an apparently harmless, but in reality dangerous object, such as a signal torpedo, to be placed in a locality where it was easily picked up and handled by children and where children were likely to be *attracted* (italics ours) to it.

In *Ann Arbor R. Co. v. Kinz*[15] the court said, in referring to the *Harriman* case, "we think the better and more reasonable proposition is that the owner of property owes no general duty to keep it in condition which will insure the safety of persons who go upon it without invitation or license; yet if he keeps upon his premises dangerous machinery, or other things *likely to attract* (italics ours) children, and does not guard them to prevent injuries to them, he is liable for injuries resulting from his neglect to provide such guards."

In *Scherman v. Allard*[16] the court held that it was not necessary to determine whether or not the steps and porch where the plaintiff fell were within the law of an attractive nuisance, "although the facts do suggest the rule."

The Court held in *Rognon v. Zanesville*[17] that where a child was hurt while playing on a road-grader the real issue was whether or not the road-grader was an attractive nuisance and not whether the plaintiff was a trespasser.

In *Cleveland Electric Illuminating v. Van Benshoten*[18] the Court commented in favor of the "attractive nuisance" doctrine. The plaintiff was an adult who had used a toilet erected by the defendant in a public street for the use of its workmen. The building was placed over an open sewer, and escaping sewer gas exploded when the plaintiff lit a match in the building. The court said, "Had the case been one where children of tender years had been attracted to the building and become injured in the same manner, the principle of attractive nuisance might apply . . ."

Most Ohio courts hold, however, that a trespassing child is no different than a trespassing adult in ordinary cases.[19] In *Han-*

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[15] 68 O. S. 210, 67 N. E. 479 (1903).

[16] 19 O. App. 374 (1923).

[17] 24 O. App. 536, 157 N. E. 299 (1926).

[18] 120 O. S. 438, 442 (1929).

[19] Wheeling R. Co. v. Hawey, 77 O. S. 235, 250; 83 N. E. 66, 19 L. R. A. (N. S.) 1136, 122 Am. St. 503, 11 Ann. Cas. 1981 (1907); Baker-Evans Ice Cream Co. v. Tedesco, 114 O. S. 170, 150 N. E. 745, 44 A. L. R. 430 (1926); Wabash R. Co. v. Norway, 7 C. C. 449; 4 C. D. 674 (1893); Steele v. Pittsburgh, C., C. etc. R. Co., 4 O. D. 350 (1895); Sharp Realty Co. v. Forsha, 122 O. S. 368, 171 N. E. 598 (1930).

nan v. Ehrlich[20] plaintiff's decedent was a boy eight years of age. The defendant owned and operated a sand pit which had been excavated to a great depth. In places, the banks of the pit were almost vertical due to the constant excavation. The defendant was aware that children used the premises and played in the excavation. The child was killed when the sides of the pit collapsed and fell.

The court held that since the plaintiff's decedent was a trespasser, the defendant owed him no duty except to refrain from wilful wrongdoing. The court went on to say that the "attractive nuisance" doctrine had no application in Ohio, and the most favorable construction of the allegation that the defendant allowed the children to play on the premises would be that the boy was a licensee. The court said that if this were so, the licensor still owes no duty to the licensee except to refrain from wantonly or wilfully injuring him.

However, the court made the point in this case that greater care and caution would have to be exercised to prevent injuries to children upon premises where dangerous active operations are carried on than upon premises containing a visibly dangerous statical condition.

In Ohio the law is fairly well laid down that although the "attractive nuisance" doctrine does not apply when an infant comes upon the premises without invitation, the owner does become liable if the condition of the premises is made perilous "by the active and negligent operation thereof by the owner."[21]

In *Ziehm v. Vale*[22] the defendant was aware that the plaintiff, an infant, four and a half years old, was in the proximity of his car since he had tried to drive the plaintiff away from it several times. The court held that under such circumstances the condition had become an active perilous one when the defendant drove the car away, and he was required to use ordinary care to avoid injuring the child.

Another exception to the rule in Ohio is where the dangerous condition exists in a public place.[23]

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[20] 102 O. S. 176, 131 N. E. 504 (1921).

[21] 29 O. Jur. 58, p. 460.

[22] 98 O. S. 306, 120 N. E. 702, 1 A. L. R. 1381 (1918).

[23] Zimanski v. Curro etc. Co., 6 O. L. A. 117 (1928). (Rule that defendant owes no duty to child who comes upon premises without invitation is held not to apply to machinery left in public street.)

In *Isaac Leisy Brewing Co. v. Kapl*[24] the defendant had temporarily placed a bar fixture on the sidewalk and the plaintiff was injured when it fell on him while he was playing with it. The court said that the defendant was liable "because this was a public street, where the child had a right to be, and where it was to be expected that small children would exercise their childish instincts."

Conclusions

The history of the "attractive nuisance" rule shows that it stemmed from the turntable cases because the courts felt that an owner of a contrivance of this nature was negligent in not keeping it locked when he realized that small children would play on it.

From this shaky proposition of law was built the even shakier structure of the "attractive nuisance." There was no longer any question of the owner failing to repair a lock on a turntable, but the mere fact that the instrumentality or appliance was *there* became enough to find the owner liable towards trespassing children.

The place that this concept of the law has in modern times is certainly questionable. In this day of Nike sites, subways with their platforms and stairways, coal-conveyor systems, helioports and other mechanical devices located in and near residential areas, it is humanly impossible to guard against every trespassing child. To make such locations completely child-proof would negative any benefit the owner or the public might derive from it because the costs of operation would become prohibitive.

Certainly it is not being anti-social to submit that the parent or guardian should be the primary source of guidance in instructing and teaching children which areas are safe and which are unsafe for play. The responsibility should be on them to know where the child is playing or going to play and the negligence or lack of care or neglect of duty should be charged against the parent or guardian when they allow their ward to play in an unsafe area.

Perhaps when the turntable cases originated, parents and children both may have been ignorant of the possible dangers inherent in some of the new mechanical devices just then beginning to be used. This cannot be presented as an excuse now be-

[24] 22 O. C. C. N. S. 309 (1908).

cause of the wide dissemination of information through radio, television, books and newspapers and especially because of our modern compulsory public school programs. Every parent or guardian at least, is fully cognizant of the dangers involved in any modern contrivance, and it is incumbent upon him not to permit his ward to play where the danger is present.

There is no reason to believe that any landowner would ever completely ignore the fact that children may come upon his land, either as licensees or as trespassers. He would naturally take reasonable precautions to protect them as well as any similar adults who may be there. But the "attractive nuisance" doctrine which makes the fact that the child was injured practically prima facie evidence of the landowner's liability certainly has no place in this modern world.

The Ohio law, whereby the landowner is required to use care when active operations are in progress or when the contrivance is in a public place, is the better and more reasonable law. It not only protects the child from reckless landowners but also gives some thought to the owner who is trying to derive some benefit from his property.

The "attractive nuisance" doctrine as such should be discarded and each case decided on its own merits with due regard given to whether or not the child was or was not a trespasser.