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ceased the moment the threshold of the wrong room was crossed.\textsuperscript{28} This confusion and uncertainty has been remedied in England, where the courts have discarded the nebulous distinctions between administrative and professional acts and have ruled that the negligence of a physician\textsuperscript{29} or nurse\textsuperscript{30} is imputed to the employing hospital. In this country, hospital immunity has been strongly condemned in text and treatise.\textsuperscript{31} Perhaps in response to this criticism, the recent trend throughout the nation has been to reduce or eliminate immunity. Thirteen years ago but three states permitted no immunity,\textsuperscript{32} whereas today at least seventeen jurisdictions have explicitly or impliedly adopted a complete liability rule.\textsuperscript{33} It is to be hoped that New York, experiencing the difficulties that plagued other American jurisdictions and England, will respond by doing away with hospital immunity.

\textbf{TORTS — LIABILITY FOR MAINTENANCE OF A DANGEROUS INSTRUMENTALITY ON PREMISES.}—Plaintiff brought suit for the wrongful death of his twelve-year-old son who plunged through a hoistway opening on defendants' platform. The platform was located midway in an alley which, although fenced off, was frequently entered by school children through a space beneath the fence. The Court held that by placing an insecure and deceptive covering over the opening, the defendants created an inherently "dangerous instrumentality" for which they are liable. \textit{Mayer v. Temple Properties, Inc.}, 307 N.Y. 559, 122 N.E.2d 909 (1954).

Generally, a possessor of land is not subject to liability for bodily harm caused to trespassers as a result of his failure either to keep his land in a safe condition or to carry on activities so as not to endanger them.\textsuperscript{1} An increasing regard for human safety has led to the development of certain exceptions to this rule of non-liability.\textsuperscript{2} One such

\textsuperscript{31} See 2A BOGERT, TRUSTS AND TRUSTEES § 401 (1953); PROSSER, TORTS 1079 (1941); 3 SCOTT, TRUSTS § 402 (1939).
\textsuperscript{32} See President and Directors of Georgetown College v. Hughes, 130 F.2d 810, 819 (D.C. Cir. 1942).
\textsuperscript{33} See Note, 25 A.L.R.2d 29, 142 (1953), which lists fifteen jurisdictions as imposing, or tending to impose, complete liability. Since the publication of that volume, Kansas and Washington have adopted this rule. See Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934 (1954); Pierce v. Yakima Valley Memorial Hosp. Ass'n, 43 Wash.2d 162, 260 P.2d 765 (1953).
\textsuperscript{1} See RESTATEMENT, TORTS § 333 (1934).
\textsuperscript{2} See PROSSER, TORTS 609 (1941).
exception is popularly alluded to as the theory of "attractive nuisance." This doctrine is a peculiar creation of the courts, founded on the reasoning that children, because of their tender years, need to be protected from their own lack of discretion. The theory had its origin in the English case of Lynch v. Nurdin, decided in 1841. Thirty-two years later, this view was approved by the United States Supreme Court in Railroad Co. v. Stout. In that case an infant was injured while unlawfully playing on defendant's unlocked turntable. In allowing recovery, the Court held that an owner of land is not exempt from liability for negligence even though the child might be a trespasser.

Although approximately two-thirds of the American jurisdictions developed an attractive nuisance doctrine, the adopting courts realized that the theory might logically be extended to the point of absurdity. Consequently, they soon imposed their own distinctive limitations, with the result that today there is no uniform application of the rule. However, the attractive nuisance doctrine as propounded in the Restatement substantially reflects the rule as it is applied in the various jurisdictions.

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3 "'Nuisance' because of a supposed analogy to conditions dangerous to children in the highway; 'attractive' because it was thought essential that the child be allured onto the land." Id. at 618 n.14.
4 See SEALY, TORTS § 394 (1939).
6 17 Wall. 657 (U.S. 1873).
7 Id. at 661.
8 See PROSSER, TORTS 618 (1941).
9 "Once it [attractive nuisance] is adopted, there is no logical stopping place this side of practical insurance of children; for no one can say what will not prove an attraction to the restless and inventive mind of an active child, or where a sympathetic jury will say the duty ends." Bottum's Adm'r v. Hawks, 84 Vt. 370, 79 Atl. 858, 865 (1911).
10 "In some jurisdictions it is repudiated altogether; in others applied strictly; in others adopted in a more or less modified form; while in others it has been extended to such a variety of cases that it has lost its original identity and has become a new rule of the substantive law of negligence." Fusselman v. Yellowstone Valley Land & Irr. Co., 53 Mont. 254, 163 Pac. 473, 474 (1917).
11 The American Law Institute predicates liability under the attractive nuisance theory if:

(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and
(b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and
(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and
(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein." RESTATEMENT, TORTS § 339 (1934).
12 See PROSSER, TORTS 620-625 (1941).
New York has refused to approve the attractive nuisance theory. The case cited most frequently to sustain this proposition is *Walsh v. Fitchburg R.R.*, in which an infant was injured while unlawfully playing on defendant's turntable. The court, after reviewing the authorities, including the *Stout* case, held that the facts of the case at bar did not bring it "... within any such principle." The application of the *Walsh* decision was soon limited. In the case of *Johnson v. City of New York*, it was conceded that the ruling in the *Walsh* case had no application where the danger was located on the public way. Under such circumstances, it was indicated that a trespasser might recover. Since the *Johnson* case, it has been held that infant trespassers might recover for injuries received while playing on an electric wire pole, piled steel beams, and a truck, all of which were located on a public way.

Where the condition is located on private property, an infant, to recover in New York, must prove that the condition was inherently dangerous. This principle may be traced to the case of *Travell v. Bannerman*. There the infant, though not a trespasser, was injured by the explosion of a mass of gunpowder which his playmates had taken from the defendant's land. In allowing recovery, the court distinguished the *Walsh* case by holding that explosives, unlike turntables, were inherently dangerous and accordingly required a higher degree of care. The court pointed out that the defendant should have foreseen that trespassing children might take the explosives and thereby injure others. Decisions subsequent to the *Bannerman* case have held denatured alcohol, film, and gasoline not to be inher-
ently dangerous and injury therefrom not foreseeable. In the recent case of *Kingsland v. Erie County Agricultural Soc’y*, explosives were again held to be inherently dangerous. As in the *Bannerman* case, the injured infant was not a trespasser, but had been injured by an exploding bomb which his brother had taken from the defendant’s fairground. In imposing liability, the court held that the trespass by the brother and the resulting injury were foreseeable.

In the aforementioned cases, where the condition was located on private property, no recovery was permitted where the infant himself had been a trespasser. Recent decisions, however, have shown a strong tendency toward allowing the infant to recover even where his injury was the result of his own trespass. Thus in *French v. Central New York Power Corp.*, the Appellate Division ruled that since electricity may be inherently dangerous, recovery might be had for the wrongful death of a child, even if the infant had been a trespasser. The Appellate Division reiterated this position in the case of *Runkel v. City of New York*, which involved an infant who was injured when a condemned building, located along the public way, collapsed. The court stated the rule to be that an "[i]njury sustained by any person, even though he be a trespasser, due to such an inherently dangerous instrumentality, may be said to have been caused by the wanton or intentional or inhuman act of the one responsible for its existence or its removal and will cast him in liability, provided: (a) that care 'commensurate with the risk involved' has not been taken to guard against the injury; and (b) that the accident was 'foreseeable'...."  

The rule, as propounded in the *French* and *Runkel* cases, was invoked by the Court of Appeals in the instant decision, where the dangerous instrumentality was situated approximately one hundred feet off the public way and fenced in at both ends. The Court pointed out that liability might attach even though the child might be a trespasser. Thus it appears that New York requires a possessor of land to exercise reasonable care to protect trespassing children from injury. The point of distinction between the New York view toward infant trespassers and that of other jurisdictions is the requirement that the condition be inherently dangerous. However, it may be noted

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see Flaherty v. Metro Stations, Inc., 202 App. Div. 583, 588, 196 N.Y. Supp. 2, 6-7 (4th Dep’t 1922) (concurring opinion), aff’d mem., 235 N.Y. 605, 139 N.E. 753 (1923). But see Parnell v. Holland Furnace Co., 234 App. Div. 567, 256 N.Y. Supp. 323 (4th Dep’t), aff’d mem., 260 N.Y. 604, 184 N.E. 112 (1932) (In this case the infant was rightfully on the land. The gasoline was in the tank of an abandoned “pick-up” truck. The court held that the defendant should have foreseen the propensities of children to climb about abandoned vehicles.).

26 298 N.Y. 409, 84 N.E. 2d 38 (1949).
29 Id. at 176, 123 N.Y.S. 2d at 488-489.
that whereas an explosive was sufficient to confer a cause of action on an infant some fifty years ago, today there need only be a defectively-covered platform opening. The instant decision indicates that while New York formally rejects the attractive nuisance doctrine, it will, in effect, apply its equitable results when the circumstances of the case require it.

TORTS — VETERANS COMPENSATION — CONCURRENT REMEDY UNDER TORT CLAIMS ACT ALLOWED.—Plaintiff, a veteran, sought recovery under the Federal Tort Claims Act for injuries sustained during an operation performed at a Veterans Administration hospital. An allegedly defective tourniquet, applied by an attendant, had aggravated a knee injury which the plaintiff incurred during World War II. Subsequent to the operation, but prior to this action, a veterans compensation award for the original injury was increased. The Court held that the action was maintainable since the injury had not been sustained "incident to service," and that the plaintiff was not precluded from recovery by the receipt of disability payments under the Veterans Act. United States v. Brown, 75 Sup. Ct. 141 (1954).

Although the Federal Tort Claims Act1 contains twelve exceptions to governmental liability,2 it does not deny military personnel the right to sue. Because of the compensation benefits available under the various veterans acts,3 the unique relationship that exists between the serviceman and the Government,4 and the possible adverse effects on military discipline,5 the courts have found the problem of suits by the military a vexatious one. The Supreme Court first dealt with the question in Brooks v. United States.6 In that case, the Court reasoned that since the accident had occurred while the servicemen were on leave, there was no connection between the tort and the military status of the petitioners. Consequently, the cause of action was not barred by the Government-serviceman relationship. In addition, the Court, in permitting recovery, held that the receipt of veterans compensation for the injuries did not constitute an election of rem-

2 Id. § 2680.
3 See Title 38 of the United States Code.
6 337 U.S. 49 (1949).