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Torts--Attractive Nuisance Doctrine (Jarvis et al. v. Howard et al., 219 S.W.2d 958 (Ky. 1949))

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tibility to potential local bias, and not to give him another body of law under which he might gain a greater right than in the court of the state itself.

J. J. G.

TORTS—ATTRACTIVE NUISANCE DOCTRINE.—Plaintiff, a boy of seven years, brought an action for injuries sustained when he fell from a long raised runway maintained by the defendant for the purpose of unloading trucks into railroad coal cars. Plaintiff claimed that a duty of care arose under the attractive nuisance doctrine in favor of children who habitually frolicked in the vicinity of the ramp. It was established that defendant's watchman had consistently attempted to prevent the plaintiff from trespassing on the ramp. *Held,* directed verdict for defendant affirmed. Notwithstanding proof of the attractiveness of the instrumentality, liability will not be imposed unless plaintiff shows that the instrumentality possessed dangerous qualities and that defendant negligently failed to avert the injury. *Jarvis* et al. *v. Howard* et al., — Ky. —, 219 S. W. 2d 958 (1949).

The "attractive nuisance" doctrine applies in those cases where a defendant maintains upon his premises a condition, instrumentality, machine or other agency which is attractive to children of tender years by reason of their inability to appreciate the peril thereof.[1] In such cases the owner is under a duty to exercise reasonable care to protect children against the dangers of the attraction.

The doctrine creates a problem of reconciling two conflicting interests, namely, the owner's interest in the unrestricted use of his property [2] as opposed to society's interest in the protection of chil-

[1] United Zinc v. Britt, 258 U. S. 268 (1922). Mr. Justice Holmes formulated the rule that one of the essentials of this definition is that the child has been enticed to enter the land by some alluring condition which he sees while off the land. About two-thirds of the states follow this rule in an attempt to limit the landowner's liability. But since it is contrary to the theory of the doctrine, *i.e.,* the prevention of a foreseeable harm to a child, it has been rejected by the RESTATEMENT OF TORTS § 339 (1934). This view has been followed by: *Arizona,* Buckeye Irr. Co. v. Askren, 45 Ariz. 566, 46 P. 2d 1068 (1935); *Minnesota,* Gimmestad v. Rose Bros., 194 Minn. 531, 261 N. W. 194 (1935); *South Dakota,* Morris v. City of Britton, 66 S. D. 121, 279 N. W. 531 (1938); and either quoted or cited in support by: *California,* Melendez v. City of Los Angeles, 8 Cal. 2d 741, 68 P. 2d 971 (1937); *Colorado,* Phipps v. Mitze, 116 Colo. 288, 180 P. 2d 233 (1947); *Pennsylvania,* Altenbach v. Lehigh Valley Ry., 349 Pa. 272, 37 A. 2d 429 (1944); *Wisconsin,* Angelier v. Red Star Yeast & Products Co., 215 Wis. 47, 254 N. W. 351 (1934); *Wyoming,* Afton Elect. Co. v. Harrison, 49 Wyo. 367, 54 P. 2d 540 (1936).

[2] In New York, the only duty owed to a trespasser, whether child or adult, is to refrain from wilful and wanton injuries. The attractive nuisance doctrine is expressly rejected in Morse v. Buffalo Tank Corp., 280 N. Y. 110, 19 N. E. 2d 981 (1939); Walsh v. Fitchburg Ry., 145 N. Y. 301, 39 N. E. 1068 (1895). However, since a child has a *right* to be on a public highway, it has been held

dren. Since it is common knowledge that children are not inclined to respect a landowner's boundaries and are apt to be injured wherever they might stray, courts are inclined to restrict the doctrine rather than extend it.[3]

Difficulty is experienced in drawing the line of liability because the same condition may be an attractive nuisance under some circumstances but not under others.[4] In determining the applicability of the doctrine to a particular fact situation courts will first ascertain whether the condition or instrumentality is inherently dangerous. Once this is established it must further be shown that it would not arise within the ordinary course of the defendant's business,[5] and/or that the owner failed to take reasonable precautions to prevent injury.[6]

In applying this test courts have found the doctrine applied: where dynamite was left under ties on a railroad right of way;[7] where uninsulated electric wires were left sagging over a lumber pile;[8] where a mortar bed was left open in a street;[9] where a large stone was rolled downhill while children were playing;[10] where a coal mine air shaft was covered by a small house in which deadly gases accumulated;[11] where dynamite caps were left in a box near a sidewalk along which children were accustomed to pass;[12] where a stop-cock was left unlocked on a gasoline drip;[13] and where a manhole was left open and unguarded.[14]

On the other hand, although the condition or instrumentality was attractive and dangerous, the courts have held that the doctrine did not apply, either because the condition arose within the ordinary course of business or because reasonable protection was afforded, where injuries were sustained: on a moving ice truck in a public

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that a dangerous attraction in that place may impose a duty of care for a child, although there would be none had the very same attraction been left upon private premises. Tierney v. N. Y. Dugan Bros., 288 N. Y. 16, 41 N. E. 2d 161 (1942).

[3] Ice Delivery Co. v. Thomas, 290 Ky. 230, 160 S. W. 2d 605 (1942). *But cf.* Friedman's Estate v. Texas P. R. R., 209 La. 540, 25 So. 2d 88 (1945) (a novel extension bringing trespassing animals within the coverage of the doctrine).

[4] Ramsay v. Tuthill Bldg. Material Co., 295 Ill. 395, 129 N. E. 127 (1920). See notes 17 and 18 *infra.*

[5] Holstine v. Director General, 77 Ind. App. 582, 134 N. E. 303 (1922).

[6] Kressine v. Janesville Traction Co., 175 Wis. 192, 184 N. W. 777 (1921).

[7] Sandeen v. Tschider, 205 Fed. 252 (C. C. A. 8th 1913); Mattson v. Minnesota & N. W. R. R., 95 Minn. 477, 104 N. W. 443 (1905).

[8] Meyer v. Menominee & M. Light & Traction Co., 151 Wis. 279, 138 N. W. 1008 (1912).

[9] Gnau v. Ackerman, 166 Ky. 258, 179 S. W. 217 (1915).

[10] Lyttle v. Harlan Town Coal Co., 167 Ky. 345, 180 S. W. 519 (1915).

[11] Central Coal & Coke Co. v. Porter, 170 Ark. 498, 280 S. W. 12 (1926).

[12] Depew v. Kilgore, 117 Okla. 263, 246 Pac. 606 (1926).

[13] Shaffer Oil Co. v. Thomas, 120 Okla. 253, 252 Pac. 41 (1926).

[14] Ramirez v. Chicago, B. & Q. Ry., 116 Neb. 740, 219 N. W. 1 (1928).

street;[15] on a trailer attached to a truck;[16] on a standing freight car;[17] on a freight car although the brake might be released with a slight touch;[18] by a revolving shaft not readily accessible to a child;[19] in an artificial lake used to provide water for boilers and engines;[20] in an electric transformer station guarded by a high fence;[21] by an electric fan installed in an open duct used to blow air into a theater;[22] by a large cylindrical gasoline tank stored in an open lot without being fastened to the ground;[23] by an escalator in a department store.[24]

It is readily apparent that the ramp in the instant case, was an instrumentality arising within the usual conduct of the defendant's business for which adequate protection had been afforded. It would therefore fall into the second category and the doctrine should not apply.

In New York the rule is different for the courts have expressly rejected the doctrine and will only impose a duty upon a landowner to refrain from wilful and wanton injuries to trespassers no matter what their age.[25] However, since a child has a *right* to be upon a public highway, it has been held in New York that a dangerous attraction on a public way may impose an affirmative duty of care for the child, although there would be no such duty had the very same attraction been left upon private premises.[26]

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[15] Ice Delivery Co. v. Thomas, 290 Ky. 230, 160 S. W. 2d 605 (1942).

[16] Michalik v. City of Chicago, 286 Ill. App. 617, 4 N. E. 2d 256 (1936).

[17] Barnhill's Adm'r v. Mt. Morgan Coal Co., 215 Fed. 608 (E. D. Ky. 1910). *Contra:* Kressine v. Janesville Traction Co., 175 Wis. 192, 184 N. W. 777 (1921).

[18] Jones v. Louisville & N. R. R., 297 Ky. 197, 179 S. W. 2d 874 (1944).

[19] Lucas v. Hammond, 150 Miss. 369, 116 So. 536 (1928).

[20] Maruska v. Missouri, K. & T. Ry., 10 S. W. 2d 211 (Tex. Civ. App. 1928).

[21] Colligen v. Phila. Elect. Co., 301 Pa. 87, 151 Atl. 699 (1930).

[22] McCulley v. Cherokee Amusement Co., 182 Tenn. 68, 184 S. W. 2d 170 (1944).

[23] Patton v. Standard Oil Co., 67 N. E. 2d 71 (Ohio App. 1946).

[24] Kataoka v. May Dep't Stores Co., 28 F. Supp. 3 (S. D. Cal. 1939), *rev'd on other grounds,* 115 F. 2d 521 (C. C. A. 9th 1940).

[25] Morse v. Buffalo Tank Corp., 280 N. Y. 110, 19 N. E. 2d 981 (1939); Walsh v. Fitchburg R. R., 145 N. Y. 301, 39 N. E. 1068 (1895).

[26] Tierney v. N. Y. Dugan Bros., 288 N. Y. 16, 41 N. E. 2d 161 (1942). *But cf.* Parnell v. Holland Furnace Co., 234 App. Div. 567, 256 N. Y. Supp. 323 (4th Dep't 1932), *aff'd,* 260 N. Y. 604, 184 N. E. 112 (1932) (a duty of care arose under attractive nuisance doctrine where injuries were sustained upon private premises; this case is not a contradiction of the New York rule because the child was *rightfully* on the premises as a guest).