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-

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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, Angeler 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
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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).


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).


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

13 Shaffer Oil Co. v. Thomas, 120 Okla. 235, 252 Pac. 41 (1926).

street;\textsuperscript{15} on a trailer attached to a truck;\textsuperscript{16} on a standing freight car;\textsuperscript{17} on a freight car although the brake might be released with a slight touch;\textsuperscript{18} by a revolving shaft not readily accessible to a child;\textsuperscript{19} in an artificial lake used to provide water for boilers and engines;\textsuperscript{20} in an electric transformer station guarded by a high fence;\textsuperscript{21} by an electric fan installed in an open duct used to blow air into a theater;\textsuperscript{22} by a large cylindrical gasoline tank stored in an open lot without being fastened to the ground;\textsuperscript{23} by an escalator in a department store.\textsuperscript{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.\textsuperscript{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.\textsuperscript{26}

\textit{W. M. M.}

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\item[15] Ice Delivery Co. v. Thomas, 290 Ky. 230, 160 S. W. 2d 605 (1942).
\item[18] Contra: Kressine v. Janesville Traction Co., 175 Wis. 192, 184 N. W. 777 (1921).
\item[19] Jones v. Louisville & N. R. R., 297 Ky. 197, 179 S. W. 2d 874 (1944).
\item[20] Lucas v. Hammond, 150 Miss. 369, 116 So. 536 (1928).
\item[23] McCulley v. Cherokee Amusement Co., 182 Tenn. 68, 184 S. W. 2d 170 (1944).
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