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# Negligence--Attractive Nuisance (Tierny v. New York Dugan Bros., Inc., 288 N.Y. 16 (1942))

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The Supreme Court of the United States recognized the entity status of a labor organization [7] as an artificial person who had the right to sue for torts committed upon it during strikes. Labor unions are permitted to bring suits in equity in order to enforce the terms of collective bargaining agreements.[8] It has also been held by the courts, that unions could hold funds of another union in trust.[9] In New York State, as in other jurisdictions, the problem as to whether or not a labor union can bring an action at law, and who in the labor union could bring the action, was solved by statute.[10]

G. N.

NEGLIGENCE—ATTRACTIVE NUISANCE.—Defendant used an electric truck to make deliveries. There was no driver's seat in the truck, and the platform upon which the driver stood was nine inches above the level of the sidewalk. This platform could be entered upon from either side of the truck. Each side had a sliding door which was usually kept open in the warm weather, and closed and locked in the cold weather. In order to make a delivery, the driver pulled alongside the curb and parked the truck in a street where three children, including the five-year-old infant plaintiff, were playing. He turned off the safety switch, but had no key with which to lock it, and he pulled up the emergency brake. Knowing that these children generally had played on the truck on previous occasions, the driver sharply warned them to stay away. While he was making his delivery, the children got on the truck, turned on the safety switch, and set the truck in motion. It moved diagonally across the street with its full power, but so slowed by the brakes that its speed was only two miles per hour. Warning the children not to jump off, the driver ran to catch the truck. The infant plaintiff either fell or jumped before the driver reached the truck, and he brings this action through his guardian *ad litem* to recover for the damages he sustained. From a judgment

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[7] Mine Workers v. Corando Coal Co., 259 U. S. 344, 42 Sup. Ct. 570 (1921).

[8] Schlesinger v. Quinto, 201 App. Div. 487, 194 N. Y. Supp. 401 (1st Dep't 1922); Weber v. Nasser, 61 Cal. App. Dec. 1259 (1930).

[9] Furniture Workers' Union Local 1007 v. United Brotherhood of Carpenters and Joiners of America, 6 Wash. (2d) 654, 108 P. (2d) 651 (1940).

[10] N. Y. GEN. ASS'N L. § 12.—*Actions or proceedings by unincorporated associations.* An action or special proceeding may be maintained, by the president or the treasurer of an unincorporated association to recover any property, or upon any cause of action, for or upon which all the associates may maintain an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. An action may likewise be maintained by such president or treasurer to recover from one or more members of such association his or their proportionate share of any moneys lawfully expended by such association for the benefit of such associates, or to enforce any lawful claim of such association against such member or members. (L. 1932, c. 609.)

entered on an order of the Appellate Division reversing a judgment on a verdict in favor of plaintiff and dismissing the complaint on the facts and on the law, plaintiff appeals. *Held,* judgment reversed and new trial granted. The question as to whether the driver was negligent in leaving his truck unattended under these circumstances was for a jury. *Tierny v. New York Dugan Bros., Inc.,* 288 N. Y. 16, 41 N. E. (2d) 161 (1942).

The doctrine of attractive nuisance is not applicable in New York.[1] However, following the English decision of *Lynch v. Nurdin,*[2] the New York courts do require a greater standard of care from those who use the public ways, than they do from those who are using private real property.[3] Even in those jurisdictions where the "doctrine" has been favorably received, an automobile is not an attractive nuisance.[4] The use of the phrases "dangerous attraction" and "attractive nuisance" are misleading in decisions based on negligence. In a case decided in 1920 on all fours with the principal case, these phrases were not used, but the decision was the same.[5] The doctrine of attractive nuisance is inapplicable where one who uses the public highway has knowledge, express or implied, that children are likely to congregate about the automobile.[6] This knowledge takes the case out of the narrow question of whether the defendant was maintaining an attractive nuisance, and places it within the much broader question of whether, with the knowledge that children were likely to congregate, the defendant was negligent. Where no such knowledge has been shown, it has been held that the act of the driver in leaving the truck unattended was not the proximate cause of the accident.[7] The decision in the principal case is not an extension of the attractive nuisance doctrine, but is founded upon settled law of negligence.

R. S.

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[1] Hockstein v. Congregation Talmud Torah Sons of Israel, 144 Misc. 207, 258 N. Y. Supp. 479 (1932).

[2] Lynch v. Nurdin, 1 Q. B. 29, 113 Eng. Repr. 1041 (1841). Here the court held that the question of whether a driver was negligent in leaving his horse and cart on a public street unattended for one-half hour, so that children were hurt while playing thereon, was for a jury.

[3] *See* Robertson v. Rockland Light & Power Co., 187 App. Div. 720, 729, 176 N. Y. Supp. 281, 287 (1st Dep't 1919), where the court recognizes the increased duty of care of one using the public street for business.

[4] Campbell v. Model Steam Laundry, 190 N. C. 649, 654, 130 S. E. 638, 640 (1925); Garis v. Eberling, 18 Tenn. App. 1, —, 71 S. W. (2d) 215, 223 (1934).

[5] Lee v. Van Buren & N. Y. Bill Posting Co., 190 App. Div. 742, 180 N. Y. Supp. 295 (1920).

[6] Dabrowski v. Ill. Cent. R. R., 303 Ill. App. 31, 24 N. E. (2d) 382 (1939).

[7] Jackson v. Mills-Fox Baking Co., 221 Mich. 64, 190 N. W. 740 (1922). Here the infant plaintiff fell from defendant baker's electric truck in the same circumstances as the principal case. The only element of distinction between the two cases is that here the driver did not have knowledge that children would be likely to play on the truck. *Accord,* Mann v. Parshall, 229 App. Div. 366, 241 N. Y. Supp. 673 (4th Dep't 1930); Vincent v. Crandall and Godley Co., 131 App. Div. 200, 115 N. Y. Supp. 600 (2d Dep't 1909); *cf.* Maloney v. Kaplan 233 N. Y. 426, 428, 135 N. E. 838, 839 (1922).