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Negligence--Foreseeability of Result--Proximate Cause--Attractive Nuisance (Morse et al. v. Buffalo Tank Corporation, 280 N.Y. 110 (1939))

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The determination of these qualities for which no objective standard or measure are available, rests in the discretion of the Municipal Civil Service Commission, subject to review by the courts in case of abuse.[26]

The provisions of the Commission in this particular instance, however, do not detract from the competitive examination form, because the list is made up of those whose merit and fitness has been duly ascertained, and only then are those who have the relative training in athletic or educational fields given the extra credit [27] (and this credit, too, on a competitive basis).[28] The test of fitness comes after and not before all applicants have had a fair opportunity to compete in an open competitive examination held pursuant to the rules of the Civil Service.[29]

It is apparent that the court saw in the refusal of the applications of the petitioners an opportunity to extend to the Police Department a personnel as able as is possible to obtain for "a person who has had such training, will for that reason, make a more useful policeman * * * in order to maintain law, order, and adequate protection for society against modern, organized criminals." [30]

H. L.

NEGLIGENCE—FORESEEABILITY OF RESULT—PROXIMATE CAUSE —ATTRACTIVE NUISANCE.—The infant plaintiff brought an action for personal injuries sustained when he, while lawfully on a public street, tripped and fell into a bonfire that had been built in the street by several other boys with gasoline they had stolen from a drip can on the unfenced premises of the defendant corporation. Plaintiff had not trespassed on the premises of defendant and had not aided in the

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[26] Fink v. Finegan, 270 N. Y. 356, 363, 1 N. E. (2d) 462, 465 (1936). Here the court held that the examiner's use of a non-competitive test to determine whether the applicant for medical examiner had force and executive ability was an abuse of discretion on the part of the committee. CIVIL SERVICE LAW §§ 9, 12.

[27] *In re* Keymer, 148 N. Y. 219, 42 N. E. 667 (1896).

[28] Instant case at 243. It appears in the record that educational training has always been used as a test of merit and fitness. In examinations for x-ray technicians, education and experience receive a weight of 4; junior and civil service examiner, a weight of 3 for education and experience; a credit of not more than five per cent was given to successful candidates in the last examination for firemen F. D., who had relevant engineering degrees from an accredited institution. Provisions for extra credit were incorporated into the HENDEL ACT, N. Y. Laws 1931, c. 798, § 19, as amended by N. Y. Laws 1936, c. 822, UNCONSOL. LAWS § 2471, which provides in part that "in the grading of eligible lists established as a result of civil service competitive examinations, a due credit shall be given for experience. * * *."

[29] Sheridan v. Kern, 255 App. Div. 57, 5 N. Y. S. (2d) 336, 341 (1st Dept. 1938); People v. Lyman, 157 N. Y. 368, 52 N. E. 132 (1898).

[30] Instant case at 241.

theft of the gasoline. The defendant was engaged in the manufacture of steel tanks and in the conduct of its business kept, without the required permit from the city of New York for the storage of gasoline, a drum of gasoline having a spigot. A drip can was kept under the spigot to prevent the ground from becoming saturated. From this can trespassing boys had stolen the gasoline to replenish the bonfire into which the plaintiff fell. The theory of the action was twofold: first, negligence which the plaintiff apparently attempted to base on the doctrine of attractive nuisance and, second, nuisance based on the failure of the defendant to obtain the permit required by city ordinance for the storage of gasoline. Upon appeal, judgment entered upon a verdict found for plaintiff on both counts and affirmed by the Appellate Division,[1] *held,* reversed, complaint dismissed. Plaintiff failed to prove that defendant was guilty of negligence in the conduct of its business. *Morse et al.* v. *Buffalo Tank Corporation,* 280 N. Y. 110, 19 N. E. (2d) 981 (1939).

It is fundamental in the law of torts that for liability to attach it must be reasonably foreseeable that injury will result from the act or omission. The injuries to the plaintiff did not arise out of any inherently dangerous characteristic of gasoline, but merely out of its combustibility. If one is expected to foresee that gasoline may be stolen and so used to the injury of another, then by the same reasoning he can be required to foresee that ordinary wood may be stolen from his premises with the same result.[2] A person does not have to anticipate the mischievous or criminal acts of others which may inflict damage. This is true even though the acts are those of children.[3] "Passive negligence may constitute proximate cause if it is the direct cause of the injury, but where the negligence of one person is merely passive and potential while the negligence of another is the moving and effective cause of the injury, the latter is the proximate cause and fixes the liability." [4]

One who stores explosives and inflammables without a permit and in violation of an ordinance becomes a wrongdoer and is answerable for the proximate consequences of the wrong, that is, the consequences that ought to have been foreseen by a reasonably prudent man.[5] But in order for the violation of an ordinance to impose

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[1] 255 App. Div. 712, 6 N. Y. S. (2d) 645 (2d Dept. 1938). The Appellate Division affirmed the judgment for the plaintiff on the authority of Parnell v. Holland Furnace Co., 234 App. Div. 567, 256 N. Y. Supp. 323 (4th Dept. 1932), *aff'd,* 260 N. Y. 604, 184 N. E. 112 (1932), but the court distinguishes that case by the fact that the plaintiff was not a trespasser or a bare licensee, but was rightfully upon the land at the invitation of one of the other tenants. The land on which the automobile had been abandoned, the open tank of which exploded when the plaintiff knocked two rocks together causing a spark, was not only a private driveway, but was a portion of the yard used in common by the defendants and other tenants of the common landlord.

[2] Instant case.

[3] Frashella v. Taylor, 157 N. Y. Supp. 881 (1916).

[4] 45 C. J. (1928) 910, § 481.

[5] Perry v. Rochester Lime Co., 219 N. Y. 60, 113 N. E. 529 (1916).

liability it must appear that the injury would have been prevented if there had been compliance with the ordinance or statute.[6] In the instant case, the failure of the defendant to obtain the permit required by the ordinance was not the proximate cause of the accident.

Although the court in the course of its opinion calls attention to the *Walsh* case [7] holding the doctrine of attractive nuisance inapplicable in New York, the facts in this case would render that doctrine inapplicable even in jurisdictions which embrace it inasmuch as the plaintiff was not trespassing upon defendant's premises when injured. If relief based on the doctrine of attractive nuisance were granted to the plaintiff it would be an extension of the recognized limits of the doctrine. As a general rule the owner or occupier of land owes no further or greater duty to a trespasser than merely to refrain from the infliction of wanton or wilful injuries upon him. Traps such as spring guns may not be set for a trespasser without incurring liability if the trespasser is thereby injured.[8] And it is generally recognized that no different or greater duty is owed to an infant trespasser than to an adult trespasser.[9] This, however, is subject to one well-known exception, generally termed the doctrine of the attractive nuisance. If the owner or occupier of land maintains on his premises a condition, instrumentality or device that is alluring or particularly attractive to young children and they are thereby injured, the owner is liable even though the child was trespassing when it was injured. However, everything that is attractive to children, and at the same time dangerous, cannot be characterized as an attractive nuisance. Almost anything may attract a child.[10] The doctrine is based on the theory that the condition or instrumentality, being particularly attractive to children, is an implied invitation to them to trespass.[11] But temptation is not always an invitation [12] and the theory of implied invitation is considered fallacious by some.[13] This doctrine of attractive nuisance originated in England.[14] It is accepted by a number of Ameri-

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[6] Chrystal v. Troy and Boston R. R., 124 N. Y. 519, 26 N. E. 1103 (1891).

[7] Walsh v. Fitchburg Ry., 145 N. Y. 301, 39 N. E. 1068 (1895).

[8] Bird v. Holbrook, 4 Bing. 628, 130 Eng. Rep. 911 (1828).

[9] Helles v. N. Y. N. H. & H. R. R., 265 Fed. 192 (C. C. A. 2d, 1920); McCarthy v. N. Y. N. H. & H. R. R., 240 Fed. 602 (C. C. A. 2d, 1917).

[10] Hayko v. Colorado and Utah Coal Co., 77 Colo. 143, 235 Pac. 373 (1925).

[11] Smalley v. Rio Grande Western R. R., 34 Utah 423, 98 Pac. 311 (1908).

[12] Erie R. R. v. Hilt, 247 U. S. 97, 38 Sup. Ct. 435 (1918).

[13] (1898) 11 HARV. L. REV. 349.

[14] 45 C. J. (1928) 758, § 155; Lynch v. Nurdin, 1 Q. B. 29, 113 Eng. Rep. 1041 (1841). In this case the plaintiff, a child of seven, climbed upon a cart that the defendant had left unattended on the street. Another child led the horse and the plaintiff fell and was hurt. The court held the defendant liable even though the infant was wrongfully on the cart and contributed to his injuries by his own mischief.

can jurisdictions,[15] by the United States Supreme Court,[16] and with modifications it is embraced by the Restatement.[17] But New York

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[15] The following jurisdictions follow the doctrine of attractive nuisance: ALA.—Alabama G. S. R. R. v. Crocker, 131 Ala. 584, 31 So. 561 (1901); ARIZ.—Salladay v. Old Dominion Copper Mining Co., 12 Ariz. 124, 100 Pac. 441 (1909); ARK.—See Valley Planing Mill Co. v. McDaniel, 119 Ark. 139, 170 S. W. 994 (1914); CAL.—Faylor v. Great Eastern Quicksilver Mining Co., 45 Cal. App. 194, 187 Pac. 101 (1919); COLO.—Denver City Tramway Co. v. Nicholas, 35 Colo. 462, 84 Pac. 813 (1906); WASH., D. C.—Best v. Dist. of Col., 291 U. S. 411, 54 Sup. Ct. 487 (1934); DEL.—Hurd v. Phoenix Co., 30 Del. 332, 106 Atl. 286 (1918); FLA.—Stark v. Holtzclaw, 90 Fla. 207, 105 So. 330 (1925); IDAHO—York v. Pacific and I. N. R. R., 8 Idaho 574, 69 Pac. 1042 (1902); ILL.—City of Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484 (1895); IND.—Chicago and E. R. R. v. Fox, 38 Ind. App. 268, 70 N. E. 81 (1904); IOWA—Edgington v. Burlington C. R. & N. Ry., 116 Iowa 410, 90 N. W. 95 (1902); KAN.—Osborn v. Atchison T. & S. F. R. R., 86 Kan. 440, 121 Pac. 364 (1912); KY.—Louisville Ry. v. Esselman, 29 Ky. 333, 93 S. W. 50 (1906); LA.—Westerfield v. Levis, 43 La. Ann. 63, 9 So. 52 (1891); MINN.—Berg. v. B & B Fuel Co., 122 Minn. 323, 142 N. W. 321 (1913); MISS.—Temple v. McComb City Elec. Light & Power Co., 89 Miss. 1, 42 So. 874 (1907); MO.—Berry v. St. Louis M. & S. E. R. R., 214 Mo. 593, 114 S. W. 27 (1908); MONT.—Fusselman v. Yellowstone Valley Land Co., 53 Mont. 254, 163 Pac. 473 (1917); NEB.—Tucker v. Draper, 62 Neb. 66, 86 N. W. 917 (1901); NEV.—Perry v. Tonopah Mining Co. of Nevada, 13 F. (2d) 865 (1915); N. C.—Briscoe v. Henderson Lighting & Power Co., 148 N. C. 396, 62 S. E. 600 (1908); N. D.—O'Leary v. Brooks Elevator Co., 7 N. D. 554, 75 N. W. 919 (1898); OKLA.—Ramage Mining Co. v. Thomas, 172 Okla. 24, 44 P. (2d) 19 (1935); ORE.—See Slattery v. Drake, 130 Ore. 693, 281 Pac. 846 (1929); S. C.—Renno v. Seaboard Air Line Ry., 120 S. C. 7, 112 S. E. 439 (1922); S. D.—Baxter v. Park, 44 S. D. 360, 184 N. W. 198 (1921); TENN.—East Tennessee & W. N. C. R. R. v. Cargille, 105 Tenn. 628, 59 S. W. 141 (1900); TEXAS—Dennison & P. & S. Ry. v. Harlan, 39 Tex. Civ. App. 427, 87 S. W. 732 (1905); UTAH—Brown v. Salt Lake City, 33 Utah 222, 93 Pac. 570 (1908); WASH.—McAllister v. Seattle Brewing & Malting Co., 44 Wash. 179, 87 Pac. 68 (1906); WIS.—Kelly v. Southern Wisconsin Ry., 152 Wis. 328, 140 N. W. 60 (1913).

The Doctrine is not followed in the following jurisdictions: CONN.—Skaling v. Sheedy, 101 Conn. 545, 126 Atl. 721 (1924); GA.—See Southern Cotton Oil Co. v. Pierce, 145 Ga. 130, 88 S. E. 672 (1916) (has refused to extend the doctrine beyond the case of a turntable); ME.—Nelson v. Burnham & Morrill Co., 114 Me. 213, 95 Atl. 1029 (1915); MD.—State, to Use of Lorenz v. Machen, 164 Md. 579, 165 Atl. 695 (1933); MASS.—Daniels v. New York & N. E. R. R., 154 Mass. 349, 28 N. E. 283 (1891); MICH.—Ryan v. Towar, 128 Mich. 463, 87 N. W. 644 (1901); N. H.—Devost v. Twin State Gas & E. Co., 79 N. H. 411, 109 Atl. 839 (1920); N. J.—Turess v. New York, S. & W. R. R., 61 N. J. Law 314, 40 Atl. 614 (1898); N. Y.—Walsh v. Fitchburg Ry., 145 N. Y. 301, 39 N. E. 1068 (1895); OHIO—Wheeling & L. E. R. R. v. Harvey, 77 Ohio St. 235, 83 N. E. 66 (1907); PA.—Thompson v. Baltimore & Ohio R. R., 218 Pa. 444, 67 Atl. 768 (1907); R. I.—Paolina v. McKendall, 24 R. I. 432, 53 Atl. 268 (1902); VT.—Bottum's Adm'r v. Hawks, 84 Vt. 370, 79 Atl. 858 (1911); VA.—Walker's Adm'r v. Potomac F. & P. R. R., 105 Va. 226, 53 S. E. 113 (1906); W. VA.—Martino v. Rotondi, 91 W. Va. 482, 113 S. E. 760 (1922).

In New Mexico and Wyoming the question apparently has not been adjudicated.

[16] Sioux City and Pacific R. R. v. Harry G. Stout, 17 Wall. 657 (U. S. 1874).

[17] RESTATEMENT, TORTS (1934) § 339. "A possessor of land is subject to

has never accepted the doctrine [18] although many concluded that it had done so in the *Parnell* case [19] and its adoption was advocated in the *Flaherty* case.[20]

The trend is toward limiting the application of the doctrine of attractive nuisance and this extends to the United States Supreme Court which has led the jurisdictions following the doctrine.[21] It is submitted that the doctrine should be limited since its unlimited application would impose a crushing burden of care on property owners. However, the law has always recognized the need to protect minors against their lack of discretion and judgment, both in contracts and in crimes committed against them and involving their consent. It would seem equally logical to afford a modicum of protection to children trespassers where the danger and attractiveness of the instrumentality is obvious to adults and the instrument is easily accessible to children who may reach it despite the care of reasonably watchful parents, and when the danger could, without undue hardship or inconvenience, be eliminated by the owner.

L. D. B.

SUCCESSION TAXES—SITUS OF INTANGIBLES—DOUBLE TAXATION (TWO CASES).—(First Case) Decedent, while a resident of Colorado, created a trust of securities which she delivered to a Colorado trustee, the settlor of the trust retaining the power of revocation. After becoming a resident of New York, she died without exercising

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liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, 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 unusual 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."

Paragraph (d) would appear to be a modification of the general rule of the turntable cases. It would probably be difficult to say that a turntable, for example, is of slight utility to a railroad company as compared with the risk it creates to young children.

[18] 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).

[19] Parnell v. Holland Furnace Co., 260 N. Y. 604, 184 N. E. 112 (1932).

[20] Flaherty v. Metro Stations, Inc., 202 App. Div. 583, 196 N. Y. Supp. 2 (4th Dept. 1922), *aff'd*, 235 N. Y. 605, 139 N. E. 753 (1923).

[21] Compare Sioux City and Pacific R. R. v. Harry G. Stout, 17 Wall. 657 (U. S. 1874), with United Zinc and Chem. Co. v. Britt, 258 U. S. 268, 42 Sup. Ct. 299 (1921).