Torts - Occupier's Liability To Trespassing Children

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Plaintiff, a thirteen-year-old boy, sued for personal injuries sustained when he was struck by a train traveling adjacent to the defendant's property. As on previous occasions, the plaintiff had gone on defendant's property to play upon a sandpile situated there. The sole exit from the sandpile was by way of the railroad tracks. On this particular occasion two of the plaintiff's infant friends were leaving the sandpile and plaintiff was hit on the tracks about thirty feet from the sandpile while urging the children to return. The trial court entered summary judgment for the defendant, and on appeal to the Illinois Court of Appeal, held, reversed and remanded. An occupier of land has a duty to anticipate and take reasonable care to guard against injuries occurring to trespassing children on dangerous premises immediately adjacent to his own. This duty arises when the occupier knows or should have known that there is a likelihood children will be attracted to the dangerous environment by an attractive object maintained on his premises and that there is an unreasonable likelihood of bodily harm. *Halloran v. Belt Ry. Chicago*, 25 Ill. App.2d 114, 166 N.E.2d 98 (1960).

The recognition by American courts that a landowner may come under a duty to guard against injuries to trespassing infants occasioned by highly dangerous objects is generally conceded to have originated in *Sioux City & Pac. R.R. v. Stout*. A young child was there attracted and injured by a railroad turntable. The court, speaking in broad terms of negligence, allowed recovery despite the fact that the infant was a trespasser. A Minnesota court, seeking some justification other than neglig-

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3. *Sioux City & Pac. R.R. v. Stout*, 84 U.S. (17 Wall.) 657, 661 (1873): "But we conceive the rule to be this: that while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts."
gence for holding a landowner liable to a child trespasser, originated the "implied invitation" theory, that a landowner impliedly invites an infant onto his premises by the maintenance of an object which would naturally lure children onto the land. Under these circumstances the child trespasser is converted into an invitee.\(^5\) This qualification and others resulted in the formulation of the "turntable" or "attractive nuisance" doctrine. Broadly stated, the doctrine imposed liability on a landowner for children injured on his property if he maintained an object thereon which attracted and injured the children. The next important element added to the doctrine was the requirement that an infant trespasser, in order to recover, must have been lured onto the property by the attracting object.\(^7\) Thus recovery was not allowed where children were injured by an object which they discovered on the defendant's property after becoming trespassers.\(^8\) Other restrictions were added to the doctrine that further limited the scope of its applicability.\(^9\) Although Louisiana began its history of attractive nuisance with language which laid a rather broad platform for landowner's liability to children,\(^0\) the Louisiana courts soon reverted to the qualifications used in other American jurisdictions to limit the doctrine.\(^11\) Louisiana courts

\(^5\) Green, Landowners' Responsibility to Children, 27 Texas L. Rev. 1, 7 (1948).

\(^6\) Ibid.

\(^7\) United Zinc & Chemical Co. v. Britt, 258 U.S. 268 (1922). Contrary to the rule announced in the Britt case, "the great majority of the courts now agree that the element of allurement, enticement, or attraction onto the land in the first place is not essential, and is important only in so far as it may mean that the trespass is to be anticipated. They agree that the true justification for the liability is nothing more than the foreseeability of harm to the child, and the consideration of common humanity and social policy." Prosser, Torts 440 (2d ed. 1955).

See Green, Landowners' Responsibility to Children, 27 Texas L. Rev. 1, 9 (1948) : "[I]t [the notion that what injures must attract] had been seized upon in many cases to limit the doctrine in other jurisdictions with the result that numerous insupportable decisions have been rendered, in cases which called for different disposition."

Apparently, the following jurisdictions still adhere to the Britt case: Arizona, Mississippi, Colorado, Missouri, and Tennessee. Prosser, Torts 440, n. 32 (2d ed. 1955).

\(^8\) United Zinc & Chemical Co. v. Britt, 258 U.S. 268 (1922).


\(^10\) In Reary v. Louisville & New Orleans Ry., 40 La. Ann. 32, 3 So. 390 (1888), the Louisiana Supreme Court approved the negligence approach of the Stout case.

\(^11\) For a comprehensive treatment of the attractive nuisance doctrine in Louisiana, see Comment, 10 Louisiana Law Review 469 (1950).
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still require for recovery that the object which injures must attract," and that the injuring object be "peculiarly alluring."13

Present day application of the attractive nuisance doctrine illustrates the extent to which the doctrine has been broadened to impose a greater duty on the landowner to trespassing infants. In a recent Texas case recovery was allowed to infants for injuries sustained by an explosion of dynamite caps which they had found on and removed from defendant's premises prior to the explosion.14 Under a strict application of attractive nuisance, the infants would not have recovered since they were not injured on the defendant's premises. At least one jurisdiction has allowed recovery for injuries to infants lured onto the landowner's premises to play with an object which was inherently safe, but which was in such close proximity to a dangerous condition that the infant was injured by that condition.15 Had the doctrine been strictly applied, the infants would not have recovered because they were not injured by the attracting object.

12. See Beasley v. Guerriero, 123 So.2d 774 (La. App. 1960), where the parents sued to recover damages for the death of their three-year-old daughter, and for the serious injury to a six-year-old daughter, resulting from suffocation in a refrigerator located in a house owned by the defendant. The girls were attracted to the unlocked house by tall clover growing in the defendant's yard. After going onto the premises, the children entered the defendant's house; they found an empty refrigerator with the shelves removed, got in, and were suffocated. The court held that a landowner is under no duty to take precautions to prevent injury to trespassing children if there is no foreseeability of unreasonable risk of harm. In dictum the court said that the injuring instrumentality must lure the child from a place where he had a lawful right to be. This case would seem to support the idea that Louisiana still follows the Britt theory. The holding for the defendant could have been abundantly supported by a finding of no negligence on the part of the defendant. See also Fincher v. Chicago, R.I. & P. Ry., 143 La. 164, 78 So. 433 (1918); Fuscia v. Central Light & Power Co., 2 La. App. 195 (1925). See also Browne v. Rosenfield's, 42 So.2d 885, 887 (La. App. 1949).

13. Browne v. Rosenfield's, 42 So.2d 885 (La. App. 1949). Of. Saxton v. Plum Orchards, 215 La. 378, 40 So.2d 791 (1949). This case is discussed in Comment, 10 LOUISIANA LAW REVIEW 468, 472 (1950) and The Work of the Louisiana Supreme Court for the 1948-1949 Term—Torts, 10 LOUISIANA LAW REVIEW 188 (1949), to the effect that Louisiana may be becoming more liberal in its approach to attractive nuisance. The court there dispelled a Louisiana rule-of-thumb that if a child were drowned in a pool of water there would be no recovery. Also, in Morton v. Rome, 110 So.2d 192, 196 (La. App. 1959), the court said, in dictum, that the proper theory for recovery might have been negligence rather than attractive nuisance.


15. Thus, an Illinois court allowed recovery to a child who was attracted to play on the defendant's premises when the child in the course of play tripped and fell into immediately adjacent water and was drowned. Rost v. Parker Washington Co., 170 Ill. App. 245 (1919).
In some jurisdictions, the courts have even avoided the terminology of attractive nuisance and relied on negligence language.\textsuperscript{16} The Restatement of Torts measures landowners' liability to trespassing infants by four criteria: (1) the landowner must have reason to know that children are likely to trespass, (2) the risk must be one of death or serious bodily harm, (3) the children must be too young to realize the dangers, and (4) the utility of the object to the landowner must be slight as compared with the risk to the children.\textsuperscript{17}

The instant case is significant in that it takes cognizance of the notion that in certain circumstances a landowner may owe a duty to take reasonable care to prevent injury to infants who are not on his premises at the instant of the injury. The court seemed to give greater weight to the fact that a dangerous environment had been created and that the plaintiff was injured while within the sphere of that environment than to the fact that the child was not on the defendant's premises at the time of the injury.\textsuperscript{18} Also, the decision is couched in terms of negligence, rather than attractive nuisance. The court quoted with approval the rather broad negligence rule that, "the creator of conditions, dangerous and hazardous to children because of their immature appreciation of such dangers and hazards, must be held to a standard of conduct for the protection of such children, in accordance with the attendant circumstances and condi-


\textsuperscript{17} RESTATEMENT, TORTS § 339 (1934).

\textsuperscript{18} Halloran v. Belt Ry. of Chicago, 25 Ill. App.2d 114, 120, 166 N.E.2d 98, 101 (1960) : "In the instant case, it is true that plaintiff, after leaving the sand pile, started to walk west on the tracks, following his companions, and was 30 feet from the sand pile. However, he was still in the same dangerous environment into which he had been attracted and allured by the sand pile." In the instant case, the court also said: "A duty arose to exercise due care for their safety, if they were exposed to danger in the immediate approach to its premises." Id. at 119, 166 N.E.2d at 101. This would appear to be so only if all factors mentioned in RESTATEMENT, TORTS § 339 (1934) were present. The requirement that the landowner's maintenance of the attractive object be of high utility in comparison with the risk to children would be of singular importance here. It appears that special attention should be given to the burden placed on the landowner, because it would seem that burdening a landowner with the responsibility of guarding children merely approaching or leaving the property would be to place him in a virtually impossible position. Presented with a case of that nature, the court would want to be especially mindful of the requirement of reasonable anticipation. That a court would hold a landowner for injury to a child merely entering or leaving the landowner's premises, without strong proof of the landowner's anticipation of trespassing infants, seems unlikely.
Although the court made no direct mention of the utility of the object to the defendant, this may have been contemplated in the language of the test quoted: "in accordance with the attendant circumstances and conditions." Because utility of conduct is an important factor to consider when determining the reasonableness of the defendant's actions, it appears that the court might have considered this facet more fully. A landowner is not negligent unless his maintenance of the dangerous condition is slight as compared with the risk to children.

In the attempt to reach a practicable compromise between the interests of landowners on one hand and infants on the other, the adoption of rules of negligence and the elimination of the attractive nuisance concepts would seem to provide a more logical and understandable approach, for the latter tends to develop into stereotyped concepts which may tie the court's hands and lead to undesirable and illogical results. The Restatement

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20. Restatement, Torts § 339 (1934): "(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein." (Emphasis added.) The requirement of Subsection (d) appears to be specifically noted in Kahn v. James BurtonCo., 5 Ill.2d 614, 625, 126 N.E.2d 836, 842 (1955): "We believe the rule [Kahn] may be reasonably applied so as to render . . . [the defendant] liable for injuries to children, where it is responsible for the creation of the attraction, notwithstanding . . . [defendant] does not own or control the premises on which plaintiff was injured."

21. Bauer, The Degree of Danger and the Degree of Difficulty of Removal of the Danger as Factors in "Attractive Nuisance Cases," 18 Minn. L. Rev. 523, 531 (1933): "Usually, in cases in which the defendants have been liable for injury to a child by an 'attractive nuisance,' the removal of the danger could have been easily and cheaply accomplished, with no serious interference with the operation of the business of the defendant."

22. Sioux City & P.R.R. v. Stout, 84 U.S. (17 Wall.) 657, 662 (1873); Restatement, Torts § 339, comment f (1934).


24. Thayer, Liability Without Fault, 29 Harv. L. Rev. 801, 814 (1916): "The subject is one where too much weight should not be given to history, for the law of negligence in its present development is a very modern affair, rendering obsolete much that went before it."

25. See note 9 supra.

26. Botum's Adm'r v. Hawks, 84 Vt. 370, 35 L.R.A. (N.S.) 440, Ann. Cas. 1913A, 1025, 79 Atl. 858 (1911). Consider a hypothetical situation where two young boys trespass on another's land and find a pool filled with a clear liquid, which they assume to be water, but which is in reality a deadly poison. One of the boys leaves and returns in his bathing suit, the other preferring to swim in his natural state. Upon entering the pool, they are seriously injured. Under a strict application of the attractive nuisance doctrine, the boy who stayed on the premises and swam in his natural state could not collect because he was not attracted to the land by the injuring object. If this case were decided on the basis of negligence, both boys might collect.
of Torts indicates that a landowner's liability to trespassing children is not measured entirely by the doctrine of ordinary negligence, since the judge retains control over issues which normally would be allocated to the jury in an ordinary negligence case. Thus, in cases of injury to infant trespassers, the judge is free to find no cause of action when it is found that (1) likelihood that children will trespass is slight; or (2) there is no unreasonable risk of death or serious bodily harm; or (3) the child may have been of sufficient age to appreciate the danger. In determining the risks against which infant trespassers are protected, the language of negligence appears to offer a more flexible medium than does attractive nuisance. For these reasons it appears that Louisiana courts might well consider replacing attractive nuisance with a modified form of negligence.

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TORTS — RECOVERY FOR EMOTIONALLY PRODUCED PHYSICAL DISTRESS

Plaintiff brought suit for personal physical injuries arising out of her fright caused by a traffic accident. The accident occurred when defendant negligently drove her small foreign car from her driveway and struck plaintiff's car. Plaintiff immediately feared that she had struck and killed a child, and upon learning the truth was relieved and stated to defendant that she was unharmed. Plaintiff went home and later in the day became nervous and upset. This nervousness grew steadily worse until she developed physical damage in the form of a conversion reaction. Approximately a month prior to the accident a small child had driven her bicycle into the side of a car being driven by plaintiff's brother-in-law, and was killed. Expert testimony in the present case was to the effect that this incident in plaintiff's family made her more susceptible to the fright caused by her accident with defendant. In the lower court, plaintiff was allowed recovery for her injuries. On appeal to the

27. RESTATEMENT, TORTS § 339 (1934).
1. Plaintiff also sued for damages for her automobile and was awarded $200 by the trial court. This part of the trial court's decision was affirmed by the North Carolina Supreme Court.
2. Gould, MEDICAL DICTIONARY 242 (Blakiston ed. 1949): "Conversion — In psychiatry, a mental defense mechanism whereby unconscious emotional conflict is transformed into physical disability."