

TORTS — ATTRACTIVE NUISANCE DOCTRINE
— ATTRACTION AS ELEMENT OF

MacNeil v. Perkins,¹ involved the taking of dynamite caps from the mining property of defendants by the plaintiffs, three boys ranging in age from eleven to sixteen years. The children were severely injured by the explosion of the caps after their removal from the property of defendants. The boys had gone onto the property to hunt, and while thereon, decided to take the caps which were kept in a small powder magazine. The door of the storage facility was allowed to remain ajar. It was not contended by plaintiffs that they were attracted onto defendants' property by the magazine or its contents but they admitted that the thought of taking the caps was conceived some time after the original entry. The Court held, in an unanimous opinion, that recovery by plaintiffs was sustainable under the attractive nuisance doctrine.

Although the case presents several interesting facets of the law relative to attractive nuisance, this note will be restricted to a consideration of that part of the holding dealing with whether the dangerous instrumentality need attract the child on defendant's land at the first moment of trespass to give rise to the application of the doctrine. Special attention will be given the antecedent pronouncements by the Arizona Supreme Court on this phase of attractive nuisance law.

In the first dynamite blasting cap case in Arizona,² it was held that a child on the premises of defendant by the latter's permission could recover for injuries sustained from the explosion of a blasting cap found on such premises. There was no requirement enunciated requiring the dangerous agency or condition to be the initial attracting force. To the contrary, the child found the cap perchance while gathering wood.

It was in *Salt River Valley Water Users' Ass'n v. Compton*³ that the following was said in denying application of the doctrine:

Regardless of what the respective decisions may hold as to what does or does not constitute an attractive nuisance, there is practical unanimity in them that no matter how attractive an object may be, unless it was the attraction of that particular object which lured

¹ 84 Ariz. 74, 324 P.2d 211 (1958). See also TORTS, *supra*.

² *Southwest Cotton Co. v. Clements*, 25 Ariz. 124, 213 Pac. 1005 reh. den., 25 Ariz. 169, 215 Pac. 156 (1923).

³ 39 Ariz. 491, 8 P.2d 249 reh. 39 Ariz. 282, 11 P.2d 839 (1942).

the child to its injury, the doctrine can have no application, and even though an attractive nuisance may exist on the premises of a landowner, if the real lure was not such nuisance, but something else, there can be no recovery in case of injury.

It is difficult to know precisely what the Court meant in that case. The opinion is susceptible of two interpretations. First, it may have meant that the dangerous instrumentality must itself have been the original attraction onto the premises, or secondly, it perhaps was intended that the dangerous instrumentality must have been the attraction without regard to the original purpose of the child in going on defendant's land. In other words, under the first interpretation, the child could not have discovered the alluring device after having trespassed but the original trespass would have to be occasioned by an attraction to the dangerous object. Under the second interpretation, it would be unimportant what caused the initial trespass, so long as there was an enticement to the hazardous object or condition at some time before injury.

But in the *Compton* case, *supra*, the attraction was a bird's nest atop an electrical power line pole. Such object was naturally created and in itself harmless. The danger lay in the electrical power line attached to the pole on which the nest rested. Thus, in this bird's nest case, the ultimate cause of the injury was not the attracting device. From a technical point of view it could not be said that the power line attracted the child. Recovery could be denied the injured child in applying either of the two interpretations.

Subsequent to the *Compton* case, the issue herein discussed did not receive comment specifically until the *MacNeil* case. But in a 1935 case,⁴ Section 339 of the RESTATEMENT, TORTS, was cited with approval. As will subsequently appear, this section does not require the original trespass to have occurred as a result of an attraction for the dangerous object. In 1956⁵ the doctrine was held applicable to a child who had come on defendant's property to meet his father who was employed on the premises. While there he was attracted to a dangerous electrical device. Again, there was no explicit discussion of the reason for original presence on the property.

Thus the cases subsequent to the *Compton* case suggested which interpretation was correct. The *MacNeil* case settled the law relative to this point. As therein articulated it is unimportant why the child originally entered the premises so long as there was an attraction to

⁴ *Buckeye Irr. Co. v. Askren*, 45 Ariz. 566, 46 P.2d 1068 (1935).

⁵ *Downs v. Sulphur Springs Valley Electric Coop.*, 80 Ariz. 286, 297 P.2d 339 (1956).

the perilous device some time prior to injury. In arriving at this conclusion the Court had merely to cite the Comment on Clause (a) of Section 339, RESTATEMENT, TORTS:

It is sufficient to satisfy the conditions stated in Clause (a) that the possessor knows or should know that children are likely to trespass upon a part of the land upon which he maintains a condition which is likely to be dangerous to them because of their childish propensities to intermeddle or otherwise. Therefore, the possessor is subject to liability to children who after entering the land are attracted into dangerous intermeddling by such a condition maintained by him although they were ignorant of its existence until after they had entered the land, if he knows or should know that the place is one upon which children are likely to trespass and that the condition is one with which they are likely to meddle.

To understand the limitation placed by some courts on the application of the doctrine solely to those cases where the attraction initially caused the child's presence on defendant's land, it is important to survey the bases for the doctrine. There are essentially seven underlying theories:

1. One is held to have intended the harm to the trespassing child because he is presumed to have intended the proximate consequences of his act.⁶

2. Failure to take reasonable precautions for the safety of children whose presence may be anticipated amounts to wantonness for which one is liable even to a trespasser.⁷

3. A danger which children of tender years are incapable of comprehending is, as to them, a trap or hidden danger.⁸

4. *Sic Utere tuo ut alienum non laedas*—one must use his property so as not to harm others.⁹

5. One who has reason to anticipate injury to another from conditions for which he is responsible, and which he can readily avert, is under a duty, based upon considerations of humanity, to take reasonable precautions against such injury.¹⁰

⁶ 36 A.L.R. 110, 111.

⁷ *Altus v. Millikin*, 98 Okla. 1, 223 Pac. 851 (1924).

⁸ *Faylor v. Great Eastern Quick-Silver Min. Co.*, 45 Cal. App. 194, 184 Pac. 104 (1919).

⁹ *Bjock v. Tacoma*, 76 Wash. 225, 135 Pac. 1005 (1913).

¹⁰ 36 A.L.R. 119; also *Berry v. St. Louis M. & S.E.R. Co.*, 214 Mo. 593, 114 S.W. 27 (1908); RESTATEMENT, TORTS, § 339 (1939).

6. The attractive condition constitutes an implied invitation to infants.¹¹ This theory has received considerable criticism because it clearly is a fiction.¹²

7. A child of tender years is not regarded as a trespasser when his presence could be reasonably anticipated.¹³ This is an inadequate ground in that it does not really explain the basis for liability.

Apparently the limitation of allurements being required at the outset of the trespass is a dryly logical outgrowth of the implied-invitation theory (number 6 above).¹⁴ This is unjustifiable since the implied-invitation theory is a mere rationalization to attach liability where justice demands but where the court doesn't wish to be accused of making law.

Under what appears to be a better basis for the attractive nuisance doctrine, namely, that the owner or occupant owes the duty to use ordinary care for the safety of children whose presence he might reasonably anticipate, the reason for the injured child's presence upon the premises is unimportant so long as it appears that the owner or occupant had reason to anticipate the presence of children.¹⁵

Thus, the cause of the child's presence is material only as it bears on whether his presence could be reasonably anticipated.¹⁶

Still, a number of courts tenaciously cling to the restrictive view that attraction following a trespass does not invoke application of the doctrine.¹⁷ Even very recent cases voice this condition.¹⁸

The courts in the United States repeatedly state that the doctrine is burdensome to land possessors and should be limited in its application.¹⁹ Yet, twentieth century ideals of humanity and awareness of social problems occasioned by increasing density of population, gainful em-

¹¹ See 36 A.L.R. 114 for cases.

¹² *Shawnee v. Cheek*, 41 Okla. 227, 137 Pac. 724 (1913); also 1 STREET, FOUNDATIONS OF LEGAL LIABILITY at 160, 161.

¹³ *Hardy v. Missouri & P.R. Co.*, 266 Fed. 860 (8th Cir. 1920).

¹⁴ 10 A.L.R. 2d, 22, 45; *Hayko v. Colorado & U. Coal Co.*, 77 Colo. 153, 235 Pac. 373 (1925).

¹⁵ 38 AM. JUR., *Negligence*, § 146 at 812; this quotation is really an epitomized version of the RESTATEMENT, TORTS, § 339 (1939). Of this section Prosser has the following to say: "The Restatement of Torts has dealt with the problem in a section which is perhaps its most successful single achievement, and which has received such general acceptance that it may be regarded as a new point of departure for the modern law." PROSSER, TORTS (2d. Ed. 1955), § 76 at 440.

¹⁶ *Eaton v. R. B. George Investments, Inc.*, 260 S.W. 2d 587 (Tex. 1953).

¹⁷ *Matijevich v. Dolese & S. Co.*, 261 Ill. App. 498 (1931); *LeDuc v. Detroit Edison Co.*, 254 Mich. 86, 235 N.W. 832 (1931); *Smith v. Smith-Peterson Co.*, 56 Nev. 79, 45 P.2d 785, 48 P.2d 760 (1935).

¹⁸ *Beaston v. James Julian, Inc.*, 120 A.2d 317 (Del. 1956); *Shemper v. Cleveland*, 212 Miss. 113, 51 So.2d 770, 54 So.2d 215 (1951); *Goiger v. T.V.A.*, 168 Tenn. 96, 216 S.W.2d 739 (1949).

¹⁹ *Salt River Valley Water Users' Ass'n. v. Compton*, *supra*, note 3; *United Zinc & Chemical Co. v. Britt*, 258 U.S. 268 (1921).

ployment of mothers, and an increasingly greater number of dangerous artificial objects on populated land would seem to promote an extension of the doctrine. While articulating this caveat of limitation, the courts will probably impose liability for maintenance of an even greater variety of objects and conditions. Arizona, in the *MacNeil* case, has shown its proclivity to do just that.

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