Marquette Law Review

Volume 21
Issue 3 *April 1937*

Article 2

The Attractive Nuisance Doctrine with Emphasis Upon Its Application in Wisconsin

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THE ATTRACTIVE NUISANCE DOCTRINE WITH EMPHASIS UPON ITS APPLICATION IN WISCONSIN

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THE attractive nuisance theory appears to have originated about a century ago when legal recognition was accorded to the natural proclivities of children of tender years to become attracted to dangerous instrumentalities. This led to the formation of the attractive nuisance doctrine. Emphasis was placed upon the degree of care to be exercised by the owner controlling the dangerous instrumentality. In *Lynch* v. *Nurdin*,[1] a seven year old child trespassed upon an unattended cart left in the street by the employee of the defendant. Children had mounted the cart in pursuit of play. Lord Denman, in speaking of the child's right in maintaining the action for injury resulting from his fall from the wagon, pointed out that the child acting under natural impulse, in obedience to his instinctive nature, was enticed to meddle with the attractive cart, and that the danger of the situation was created by the defendant in failing to observe the tendency of children to play about unprotected vehicles.

Similar in character to the enticement of a child of tender years directed by its propensity to an unguarded contrivance is the entrapment of a dog which in obedience to its instinct is lured by a trap baited with flesh.[2] In the early decision of *Townsend* v. *Wather*[3] motivation of instinct is considered. In this case judgment was given to the owner of a dog which became injured when drawn to a trap by the savor of meat on a neighbor's premises.[4] It has been emphasized and reiterated by judical opinion upholding the attractive nuisance doctrine that it is the duty incumbent upon a proprietor of an alluring instrumentality to take cognizance of the child's irresistible instinctive

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[1] 1 Q.B. 30, 113 Eng. Rep. 1041 (1841).

[2] Union Pac. Ry. Co. v. McDonald, 152 U.S. 262, 14 Sup. Ct. 619, 38 L.ed. 745 (1893); Justice Crownhart, dissenting opinion, Lewko v. Chas. Krause Milling Co., 179 Wis. 83, 190 N.W. 924 (1922); 1 THOMPSON, NEGLIGENCE 305.

[3] 9 East 277, 103 Eng. Rep. 579 (1808).

[4] Lord Ellenborough, C. J.: "The traps were placed so near to the plaintiff's court yard where his dogs were kept that they might scent the bait, without committing any trespass on the defendant's wood. Every man must be taken to contemplate the probable consequences of the act he does. And therefore when the defendant caused traps scented with the strongest meats to be placed so near to the plaintiff's house as to influence the instinct of those animals and draw them irresistibly to their destruction, he must be considered as contemplating this probable consequence of his act." Townsend v. Wather, 9 East 277, 279, 103 Eng. Rep. 579 (1808).

nature to come within the zone of the allurement transforming it into an entrapment which may result in injury or death to the child.[5]

In cognizance of the child's impulsive conduct, the Supreme Court of the United States in 1872 made a distinction between the degree of care necessary to be exercised by an adult and the care required of a child of tender years under the same or similar circumstances.[6] Justice Hunt said: "The rule of law in regard to the negligence of an adult, and the rule in regard to that of an infant of tender years is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge."[7]

In 1873 the attractive nuisance doctrine took root in this country. It was then that the United States Supreme Court in *Sioux City & Pac. R. R. Co.* v. *Stout*[8] examined the question of whether a proprietor of a turntable left unlocked was negligent in failing to exercise an alleged duty to a child of six years who was injured while playing on the turntable. The decision of this question depended upon the condition, situation, and place of the turntable. In the early turntables cases, liability was incurred by the railroad company operating the turntable when the company failed to observe the required care and duty to the child in protecting it from injury, the company knowing that an unguarded or unlocked turntable was attractive and dangerous to children; children had previously played on the turntable giving the company sufficient ground to anticipate that they would resort to it again; the particular unprotected turntable lured the child in question into a trap.[9]

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[5] In Powers v. Harlow, 53 Mich. 507, 515, 19 N.W. 257 (1875), Judge Cooley said, "Children, wherever they go must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this and take precaution accordingly." See also Sioux City & Pac. R. R. Co. v. Stout, 84 U.S. 657, 21 L.ed. 745 (1873); Meibus v. Dodge, 38 Wis. 300 (1875); Dublin Cotton Oil Co. v. Jarrard (Tex. 1897), 40 S.W. 531; Drew v. Lett, 95 Ind. App. 89, 182 N.E. 547 (1932); Bicandi v. Boise Payette Lumber Co., 55 Idaho 543, 44 P. (2d) 1103 (1935); Meredith v. Fehr, 262 Ky. 648, 90 S.W. (2d) 1021 (1936).

[6] Washington etc. R. R. Co. v. Gladmon, 82 U.S. 401, 21 L.ed. 114 (1872).

[7] Washington etc. R. R. Co v. Gladmon, 82 U.S. 401, 408, 21 L.ed. 114 (1872).

[8] Sioux City & Pac. R. R. Co. v. Stout, 84 U.S. 657, 21 L.ed. 745 (1873).

[9] In Sioux City & Pac. R. R. Co. v. Stout, 84 U.S. 657, 659, 21 L.ed. 745 (1873), the United States Supreme Court affirmed the judgment of the lower court, and approved the instructions of that court in which it was stated that "to maintain the action it must appear by the evidence that the turn-table, in the condition, situation and place where it then was, was a dangerous machine, one which, if unguarded or unlocked, would be likely to cause injury to children." See also Keffe v. Milwaukee & St. P. Ry. Co., 21 Minn. 207 (1875).

The decision of the *Stout* case led to the adoption of three different rules pertaining to the attractive nuisance doctrine, namely: The proprietor is subject to liability to a child trespasser only if under the same circumstances he would be answerable to an adult trespasser.[10] The proprietor is liable to an infant trespasser who being attracted to a dangerous instrumentality on his premises prior to his instrusion resorted to it and was injured or killed as a result of his contact with the dangerous structure.[11] The proprietor is liable to an infant trespasser injured or killed while playing near an instrumentality on his premises, although the child failed to notice the instrumentality before entering the premises.[12]

Courts repudiating the attractive nuisance doctrine make no distinction between a child and an adult trespasser, refusing to impose extra care on the occupant in case of the child intruder, contending that: The owner has no intention to invite or entrap the child. The possessor's profitable use of the instrumentality must not be limited or diminished. The structure being harmless in and of itself must remain intact for the owner's intended use.[13] Apparently, the latest case in England on the doctrine of attractive nuisance is *Addie* v. *Dumbreck*,[14] in which case, contrary to the warnings of the defendants, the land had been used by young children as a playground. Among other children attracted to play with an unprotected terminal wheel located on the field of the defendant was a boy under five years of age who was crushed to death by the wheel. Because the boy was declared a trespasser by the court, the defendants were not responsible for his death. Lord Buckmaster asserted: "The conclusion to my mind is irresistible, that the child, who could know nothing of the law of trespass or licence, was in fact a trespasser . . . . If it once be held that the child was a trespasser, innocent as the trespass was, there was no legal duty cast upon the appellants (the defendants) to afford protection against the danger which they must have known use of the land by the children almost necessarily involved."[15]

During the period following the *Stout* case, a tendency was manifested by some courts to differentiate between two kinds of duties of an occupant to a child intruder. The proprietor's only duty to a child trespassing upon his premises without express or implied permission

[10] Daniels v. New York & New England Railroad Co., 154 Mass. 349, 28 N.E. 283 (1891); Thompson v. Baltimore & O. R. Co., 218 Pa. 444, 67 Atl. 768 (1907); Smith, *Liability of Landowners to Children Entering Without Permission* (1898) 11 HARV. L. REV. 349.

[11] McDermott v. Burke, 256 Ill. 401, 100 N.E. 168 (1912); Drew v. Lett, 95 Ind. App. 89, 182 N.E. 547 (1932).

[12] Best v. District of Columbia, 291 U.S. 411, 54 Sup. Ct. 487, 78 L.ed. 882 (1934).

[13] Thompson v. Baltimore & O. R. Co., 218 Pa. 444, 67 Atl. 768 (1907).

[14] [1929] A.C. 358.

[15] Addie v. Dumbreck [1929] A.C. 358.

is to prevent an unintentional injury to it. The possessor of a dangerous unprotected structure is obligated to prevent injury to a child who is allured by the instrumentality on his premises; the child, although technically termed a trespasser, accepted an implied invitation to play with the instrumentality by virtue of the attraction.[16]

Twenty years after the *Stout* case, the United States Supreme Court declared that a railroad company violated its duty to a twelve year old boy who fell into a burning slack pit maintained by the company. Acting on impulse to see the coal mine in a vicinity where he was visiting for the first time, the child suddenly frightened by boys, sought escape by way of a nearby path when he was precipitated into an unguarded pit. The duty was principally imposed upon the railroad company, because children to the knowledge of the company had played near the dangerous pit prior to the plaintiff's injury.[18] This same court, however, in *United Zinc and Chemical Co.* v. *Britt*,[19] emphasized that under the attractive nuisance doctrine, the landowner is not liable to a child trespasser who entered upon his land without being baited thereto by a potentially dangerous object, such as a pond.[20]

The courts that take full cognizance of the natural inclinations of children to play or to come in contact with a dangerous structure do not draw a line of demarcation as to the causation of the trespass. In other words, it is immaterial whether the trespass was committed by the child as a result of the attraction or whether the intrusion preceded the arrestation of the child's attention to the dangerous object. Mr.

[16] "Infants have no greater right to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon landowners to expect them and to prepare for their safety. On the other hand, the duty of one who invites another upon his land, not to lead him into a trap, is well settled, and while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them, although not to an adult." United Zinc & Chemical Co. v. Britt, 258 U.S. 268, 275, 42 Sup. Ct. 299, 66 L.ed. 615 (1921).

[17] Union Pac. Ry. Co. v. McDonald, 152 U.S. 262, 14 Sup. Ct. 619, 38 L.ed. 434 (1893).

[18] Justice Harlan: "Under all of these circumstances, the railroad company ought not to be heard to say that the plaintiff, a mere lad, moved by curiosity to see the mine, in the vicinity of the slack pit, was a trespasser to whom it owed no duty or for whose protection it was under no obligation to make provision." Union Pac. Co. v. McDonald, 152 U.S. 262, 279, 14 Sup. Ct. 619, 38 L.ed. 745 (1893).

[19] 258 U.S. 268, 42 Sup. Ct. 299, 66 L.ed. 615 (1921).

[20] Two children, eight and eleven years of age, crossed the unfenced land of the defendant while their parents were camping nearby. The pool on this land containing sulphuric acid and zinc sulphate appeared to children as an ideal swimming pool. No danger sign indicating the poisonous character of the water was given. The children went into the water and succumbed to the poison. Justice Holmes: "In the case at bar it is at least doubtful whether the water could be seen from any place where the children lawfully were, and there is no evidence that it was what led them to enter the land. But that is necessary to start the supposed duty."

Chief Justice Hughes, in *Best* v. *Dist. of Columbia,*[21] giving the reasons for disregarding the element of attraction as a necessary condition precedent to the trespass, stated: "The duty must find its source in special circumstances in which, by reason of the inducement and of the fact the visits of children to the place would naturally be anticipated, and because of the character of the danger to which they would unwittingly be exposed, reasonable prudence would require that precautions be taken for their protection."

In a recent decision,[22] the attractive nuisance doctrine was applied in accordance with the principle adopted by *Best* v. *Dist. of Columbia.* While playing with other children on a pile of lumber on an unfenced private lot where wrecking materials were sorted, a boy of five years of age was injured. Although the defendant had previously warned children to stay off the premises, and even employed a watchman to guard the area, he was nevertheless liable for the child's injury, as the court expressly declared. "It (the attractive nuisance doctrine) is but a convenient phrase to designate one sort of case within the ordinary rule, that one is liable for injury resulting to another from failure to exercise, for the protection of the injured child, the degree of care commensurate with and therefore demanded by the circumstances. The greater the hazard, the greater the care required."

At the present time, the jurisdictions opposed to limited liability by the proprietor to a child trespasser tend to adopt the following as constituting the attractive nuisance doctrine:[23] A person is liable to a child trespasser of tender years for injury caused by an artificial condition upon the premises of that person if:

1. "The place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass."
2. "The condition is one of which the possessor knows or should know . . . . involving an unreasonable risk of death, or serious bodily harm to such children."
3. "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."
4. "The utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."[23a]

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[21] 291 U.S. 411, 419, 78 L.ed. 882 (1934).
[22] Gimmestad v. Rose Co., 194 Minn. 531, 261 N.W. 194 (1935).
[23] Angelier v. Red Star Yeast & Products Co., 215 Wis. 47, 254 N.W. 351 (1933); Jackson v. Robert L. Reisinger & Co., 219 Wis. 535, 263 N.W. 641 (1935); Prather v. Union Nat. Bank, (N.C. 1937) 189 S.E. 182; Gimmestad v. Rose Bros. Co., 194 Minn. 531, 261 N.W. 194 (1935).
[23a] See RESTATEMENT, TORTS (1934) § 339.

General Application of the Attractive Nuisance Doctrine in Wisconsin

Although the courts of Wisconsin have never had the occasion to apply directly the *Stout* case rule,[24] involving injury to a child playing on an unprotected turntable, they have nevertheless explicitly formulated and defined the duty of a proprietor of a dangerous contrivance in protecting children from harm. As early as 1875, judicial opinion in Wisconsin manifested recognition of instinct as a decisive factor in the child's conduct,[25] and in accordance with this concept, imposed upon the child the degree of care to be exercised by it when near the dangerous object.

The attractive nuisance doctrine has been adopted in Wisconsin.[26] The extent of its application in this state, however, involves consideration of the location of the instrumentality, the status of the child, the risk the child takes in playing upon or near the contrivance, — all viewed in the light of the circumstances of each particular case.[27] The location of the structure perilous to the safety of children is instrumental in determining the proprietor's liability to the child under the doctrine.[28] The Supreme Court of Wisconsin has employed the attractive nuisance theory in legal controversies where the unsafe structure or condition was kept on private property. For some time, the tendency was to disregard the attractive nuisance doctrine in decisions where the alluring structure was located on private property, on the ground that the owner in the lawful use of the instrumentality was not legally bound to protect children from incurring injury through contact with the object.[29] It was inferred from these determinations that liability would nevertheless be imposed upon the possessor in favor of the child when the dangerous object was so near to the highway that it was a public nuisance to those using the highway,[30] or when the acts of the proprietor at the time of the injury constituted either gross negligence or active negligence.[31]

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[24] Note (1920) 1 Wis. L. Rev. 189.

[25] Meibus v. Dodge, 38 Wis. 300 (1875).

[26] Angelier v. Red Star Yeast & Products Co., 215 Wis. 47, 254 N.W. 351 (1933); Matson v. Dane County, 177 Wis. 649, 189 N.W. 154 (1922); Kelly v. Southern Wisconsin R. Co., 152 Wis. 328, 140 N.W. 60 (1913).

[27] Note (1932) 17 Marq. L. Rev. 67.

[28] Emond v. Kimberly-Clark Co., 159 Wis. 83, 149 N.W. 760 (1914); Kelly v. Southern Wisconsin R. Co., 152 Wis. 328, 140 N.W. 60 (1913).

[29] "Our court has held that a person may be liable for the maintenance of a dangerous object upon or over private property where such object is deadly in its effect and the danger of coming in contact with it not obvious to every one, but it has not gone to the extent of holding a person liable to trespassers for mere ordinary passive negligence in the usual conduct of a lawful and customary business upon his own premises." Zartner v. George, 156 Wis. 131, 137, 145 N.W. 971 (1914).

[30] Klix v. Nieman, 68 Wis. 271, 32 N.W. 223 (1887).

[31] Zartner v. George, 156 Wis. 131, 145 N.W. 971 (1914); Lewko v. Chas. Krause Milling Co., 179 Wis. 83, 190 N.W. 924 (1922).

With the singular exception of cases dealing with accidents to children playing in ponds,[32] the Wisconsin court has shown a pre-disposition to grant recovery for the injury or death to a child resulting from meddling with the instrumentality on private premises upon proof that:[33]

1. The structure or artificial condition "which was inherently dangerous to children" was suffered by the proprietor to exist upon his premises.
2. The proprietor "should have realized" that: a. The structure or artificial condition was inherently dangerous to children. b. The structure or artificial condition involved an unreasonable risk of serious bodily injury or death to children. c. " . . children . . . . were likely to trespass upon his premises."
3. The injured child because of his youth or tender age, did not discover the condition or realize the risk involved in . . . . playing in close proximity to the inherently dangerous condition."
4. "Safeguards could reasonably have been provided which would have obviated the inherent danger without materially interfering with the purpose for which the artificial condition was maintained."[33a]

When a child is injured by a dangerous instrumentality on the street, it is free of negligence, provided it has exercised such care as is "ordinarily exercised by children of the same age, capacity, discretion, knowledge and experience under the same or similar circumstances."[34] It is judicially noticed that children play upon the street, and in recognition of the child's inclination to use the street, the courts have declared that children have a legal right to play thereon.[35] To protect this right, the possessor of the dangerous instrumentality is required to exercise ordinary care in preventing injury to the child.

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[32] Fiel v. City of Racine, 203 Wis. 149, 233 N.W. 611 (1930).

[33] Angelier v. Red Star Yeast & Products Co., 215 Wis. 47, 53, 254 N.W. 351 (1933); to the same effect see Jackson v. Robert L. Reisinger & Co., 219 Wis. 535, 538, 263 N.W. 641 (1935); Brinilson v. Chicago & N. W. R. Co., 144 Wis. 614, 129 N.W. 664 (1911); Meyer v. Menominee & Marinette Light & Traction Co., 151 Wis. 279, 138 N.W. 1008 (1912); Herrem v. Konz, 165 Wis. 574, 162 N.W. 654 (1917).

[33a] Angelier v. Red Star Yeast & Products Co., 215 Wis. 47, 53, 254 N.W. 351 (1933).

[34] Goldberg v. Berkowitz, 173 Wis. 603, 606, 181 N.W. 216 (1921).

[35] In Ptak v. Kuetemeyer, 182 Wis. 357, 363, 196 N.W. 855 (1924), the court said, "While streets are dedicated primarily for the purpose of public travel, nevertheless it must be realized and recognized that children are accustomed to use highways for the purposes of play." Justice Marshall in Kelly v. Southern Wisconsin R. Co., 152 Wis. 328, 338, 140 N.W. 60 (1913) said: "Children have, as it is said, a subservient right to play in the street and their safety in doing so must not be imperiled by any act of a person which he has reasonable ground to expect may probably do so, even though the danger be only rendered active through infantile curiosity or instinct for play."

What has been established in this state is that "children are liable always to be upon the public streets * * * and play or meddle with attractive things left thereon; that a reasonable man must bear this fact in mind, and hence may not negligently or willfully place upon the street a dangerous animal or trap well calculated to arouse the admiration or curiosity of a child, and when it has accomplished the natural result, which might reasonably be expected, escape the consequences by saying that the injured child should not have yielded to his curiosity."[36]

It appears that the courts have not always applied the attractive nuisance doctrine to cases where the injury to the child occurred on the street as a result of the child's playing with the dangerous instrumentality. Under circumstances, where the attractive nuisance doctrine apparently could be applied, some courts impose liability, on the principle that the alluring instrumentality is a public nuisance.[37] In *Busse* v. *Rogers*[38] Justice Winslow refused to recognize the principle of the attractive nuisance in the case of a young child who was hurt while playing on a lumber pile in the street. The timber carelessly laid on the lumber pile by the defendant rolled to the street causing the accident. Justice Winslow, in rendering the decision in this case stated, "It is the case of an owner placing an unlawful nuisance on the highway and leaving it unguarded."[38a] The law of nuisance was again applied in the case of *Bruhnke* v. *La Crosse*[39] where a child was injured in the street. A distinction was observed between the attractive nuisance doctrine and the principle of liability arising from a public nuisance. In reference to this distinction, the court asserted, "An automobile, a carriage, or a dumping wagon is each attractive and dangerous to children. . . . But that does not make either, when in legitimate use, a nuisance in the public street."[39a] The attractive nuisance doctrine was applied in *Kelly* v. *Southern Wis. R. R. Co.*[40] in which case a child suffered injury through contact with an electric wire in the street. Justice Marshall approving the adoption of the doctrine in Wisconsin stated, "Conservation of child life and safety as to artificial perils, is one of such importance that ordinary care may well hold everyone responsible for creating or maintaining a condition involving any such, with reasonable ground for apprehending that children of tender years may probably be allured thereinto. In many

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[36] Busse v. Rogers, 120 Wis. 443, 455, 98 N.W. 219 (1904).
[37] Busse v. Rogers, 120 Wis. 443, 98 N.W. 219 (1904); Bruhnke v. La Crosse, 155 Wis. 485, 144 N.W. 1100 (1914).
[38] 120 Wis. 443, 98 N.W. 219 (1904).
[38a] See case cited in note 38 at p. 453.
[39] 155 Wis. 485, 144 N.W. 1100 (1914).
[39a] See case cited in note 39 at p. 488.
[40] 152 Wis. 328, 140 N.W. 60 (1913).

courts that has been applied generally,—to private premises where children have no right to be, and to public places and those visited by license as well,—while other courts restrict it to the rightful visitations. This court, perhaps, has not taken a decided stand on the broad lines indicated, though the writer is of the opinion that it has, in logical effect, and would assert it and defend it as sound doctrine, demanded by precedent, principle, and humanity."[41]

Judicial authority in Wisconsin does not adopt the attractive nuisance doctrine in cases involving injury to a child from an appliance located on public ground used for governmental functions. In *Bernstein* v. *Milwaukee*,[42] the defendant city maintained in a portion of a public playground certain devices for the use of children over twelve years of age. A nine-year-old child who was permitted by the defendant to play on one of these appliances was seriously hurt. The supreme court affirmed the order sustaining a demurrer to the complaint on the ground that "negligence in the performance of a governmental function by the officers or agents of a municipality does not give a right of action."[43] The application of this rule resulted in a denial of recovery in *Gensch* v. *City of Milwaukee*,[44] in which case a five-year-old boy was killed when he fell from a wooden locker while playing with other children in a public bathhouse.

A line of demarcation is drawn between the duty of a proprietor of an attractive instrumentality on private premises as distinguished from an alluring structure located on public property. In the former instance, the attractive nuisance doctrine is applicable, because there the instrument is primarily maintained for use by others than children, obligating the proprietor to obviate danger to children enticed to the structure. The same doctrine, on the other hand, cannot be applied to an instrumentality on governmental premises operated for a public function, because the instrument on a public playground is placed chiefly for the purpose of attracting children to play thereon, and for this reason the instrumentality may be left unlocked without creating a duty of care to the child.[45]

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[41] Kelly v. Southern Wisconsin R. Co., 152 Wis. 328, 337, 140 N.W. 60 (1913).
[42] 158 Wis. 576, 149 N.W. 382 (1914).
[43] Bernstein v. Milwaukee, 158 Wis. 576, 578, 149 N.W. 382 (1914). Since the decision of Higgins v. Superior, 134 Wis. 264, 114 N.W. 490 (1908), a governmental agency is not responsible in damages for the negligence of its employees while rendering a governmental service. *Cf.* Skiris v. City of Port Washington (Wis. 1936), 269 N.W. 556; Virovatz v. City of Cudahy, 211 Wis. 357, 247 N.W. 341 (1933); Erickson v. Village of West Salem, 205 Wis. 107, 236 N.W. 579 (1931); De Baere v. Town of Oconto, 208 Wis. 377, 243 N.W. 221 (1932).
[44] 179 Wis. 95, 190 N.W. 843 (1922).
[45] Solomon v. Red River Lumber Co., 56 Cal. App. 742, 206 Pac. 498 (1922); Smith v. Iowa City, 213 Iowa 391, 239 N.W. 29 (1931); Royston's Estate v. City of Charlotte (Mich. 1936), 270 N.W. 288.

THE DOCTRINE AS APPLIED TO VARIOUS CAUSES OF INJURIES IN WISCONSIN

In Wisconsin the attractive nuisance doctrine has been applied in cases where children were injured while playing on lumber piles.[46] In *Meyer* v. *Menominee & Marinette Light & Traction Co.*[47] the defendant placed a lumber pile on his property near a road used by people for travel. The lumber pile by virtue of its being accessible to children attracted their attention to play thereon. A young boy while playing on the top of the lumber pile took hold of highly charged sagging wires that were within his reach and was electrocuted. In declaring the defendant negligent, the court governed impliedly by the attractive nuisance principle, stated, "In the case at bar the evidence was ample to warrant the jury in finding that for a long time before the accident, the defendant knew or ought to have known, that children were likely to be upon the lumber pile and be injured by contact with the wires, and that defendant was guilty of negligence in the use of its wires at the time and place of the death of the deceased."[47a]

In the *Meyer* case emphasis was placed on the importance of having the proprietor of a dangerous instrumentality exercise due care in obviating danger to children, who to his knowledge played or were likely to play in the proximity of the dangerous location. This principle determined the decision of *Jackson* v. *Robert L. Reisinger & Co.*[48] Here the court decided that the defendant was not guilty of negligence under the attractive nuisance doctrine, because to his knowledge children had not played upon the dangerous lumber pile, located in the center of his unfenced premises, prior to the accident in question. Justice Fowler, pointing out the decisive factor in this decision stated, "The place where the condition existed seems to be the point to which the inquiry should be directed."[48a] The defendant was not held liable for the death of the child who was killed in falling from the lumber pile on which he played, although children had trespassed upon the defendant's premises, playing on sand piles and places where men were working at a distance from the particular dangerous condition.

Similar in character to the lumber pile cases are those involving injury or death to children as a result of their meddling with electric current wires. In either case the proprietor is exempt from liability, provided he had no knowledge or had no reason to know that the

[46] Busse v. Rogers, 120 Wis. 443, 98 N.W. 219 (1904), refused to decide that the attractive nuisance doctrine is applicable to a case where the lumber pile was on the street, manifesting the limitation that the doctrine is applicable only where the structure attractive to children is on private property.
[47] 151 Wis. 279, 138 N.W. 1008 (1912).
[47a] See case cited in note 47 at p. 285.
[48] 219 Wis. 535, 263 N.W. 641 (1935).
[48a] See case cited in note 48 at p. 538.

place of injury was previously frequented by children.[49] The Wisconsin court recognizing that children of tender years, guided by instinct, are incapable of forseeing and appreciating the potential danger involved in playing with electric current tends to impose on the person handling the wires a duty to exercise, "a high degree of watchfulness for the prevention of accidents" to children coming in contact with the wires. The duty, however, placed upon the owner of the wires extends only to the risks he reasonably anticipated by a prudent person under the circumstances. The court has held that "whether deceased in the instant case was a bare licensee or invitee when upon the lumber pile, if defendant knew or ought to have known that boys of his age were accustomed to be there, it was chargeable with due care in the management of its poles, wires, and current so as to protect children and others who might be expected to be there from injury, and was bound to anticipate that some injury might result to someone in consequence of the location and condition of the wires."[50] In *Haselmeyer* v. *The Milwaukee E. R. & L. Co.*[51] the infant plaintiff while playing pull-away with other children touched a live power wire in the street. For the resulting injury to his hand, he recovered judgment, because "he had no comprehension of the deadly quality of the current with which he toyed."[51a] A similar case is *Bonniwell* v. *Milwaukee Light, Heat & Traction Co.*,[52] where a boy, in a farming district, climbed one of three towers carrying wires with thousands of volts, a feat never before attempted by any child. Touching the wire, the boy received severe burns causing his death. Because the fatal injury of the child could not have been foreseen and obviated by the exercise of reasonable care on the part of the defendant owner, he, consequently, was not liable under the attractive nuisance doctrine.

It is a well known fact that children will play about excavations and ditches in the street necessitating an exercise of care on the part of the building contractors to prevent the excavations from becoming death traps to infant intruders. *Secard* v. *Rhinelander Lighting Co.*[53] concerns a nine-year-old girl who met death in an unguarded ditch. Disregarding the warning of her older sister, the little girl continued to play in the zone of danger and when about ready to jump across the hole, she fell headlong into it, and was buried by a cave-in causing

[49] Bonniwell v. Milwaukee Light, Heat & Traction Co., 174 Wis. 1, 182 N.W. 468 (1921); Jackson v. Robert L. Reisinger & Co., 219 Wis. 535, 263 N.W. 641 (1935).
[50] Meyer v. Menominee & Marinette Light & Traction Co., 151 Wis. 279, 285, 138 N.W. 1008 (1912).
[51] 185 Wis. 210, 201 N.W. 257 (1924).
[51a] See case cited in note 51 at p. 214.
[52] 174 Wis. 1, 182 N.W. 468 (1921).
[53] 147 Wis. 614, 133 N.W. 45 (1912).

her death. In allowing recovery for the death of the child, the court observed that the defendant contractor, because of his failure to warn the children of the risk of a possible cave-in, "created a serious danger by which children, lawfully in the street, were liable to be injured."[53a] The same observation was made in *Ptak* v. *Kuetemeyer*,[54] in which case the plaintiff recovered damages for the death of his six-year-old son who was killed by a cave-in while playing in a ditch under construction. To the knowledge of the defendant, a plumber-contractor, children, attracted by the ditch located on the street in a city residential section, resorted to play about it prior to the accident. The court declaring the defendant guilty of negligence, gave implied affirmation to the attractive nuisance doctrine, when it stated, "From evidence in the case and from the knowledge which the average adult normal human being is presumed to possess with respect to activities of children, it must be assumed that the defendant knew or should have known that children would be liable to enter this ditch at a time when construction work for the day had ceased."[54a]

Two interesting cases testing the extent of the application of the attractive nuisance doctrine in Wisconsin are *Kelly* v. *Southern Wisconsin R. R. Co.*[55] and *Webster* v. *Corcoran Brothers Co.*[56] Both of these decisions have arisen out of injuries to children occasioned by a rope which the defendant used in lawful work. The absence of ordinary care required in guarding children lawfully on the street against meddling with a dangerous instrumentality located thereon constituted negligence on the part of a defendant company. In *Kelly* v. *Southern Wisconsin R. R. Co.* the defendant used a rope and pulley to string an electric feed wire on the street. A six-year-old boy attracted by the rope began to play with it and hurt his hand as it was drawn into the pulley put in movement by the defendant. In the subsequent case of *Webster* v. *Corcoran Brothers Co.* a rope and a pulley were used to unload oats into a barn. A boy, who with other children was watching the operation of the pulley, was asked by one of the employees of the defendant to remove a kink formed in the rope. As the boy took hold of the rope his hand was caught in the pulley. Here, too, the defendant was guilty of negligence for the injury to the child. The distinction observed between the two cases was that in the latter instance the child was expressly asked by the defendant to handle the rope. In the *Webster* decision the court pointing out its similarity to *Kelly* v. *Southern R. R. Co.* stated, "It was competent for appellant (defendant) to

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[53a] See case cited in note 53 at p. 618.
[54] 182 Wis. 357, 196 N.W. 855 (1924).
[54a] See case cited in note 54 at p. 364.
[55] 152 Wis. 328, 140 N.W. 60 (1913).
[56] 156 Wis. 576, 146 N.W. 815 (1914).

unload its grain where it did. It was charged with knowledge that young children,—too young, without efficient warning and considerable oversight, to be free from peril of personal injury in case of being allowed to be near the rope,—were liable to be rightfully in the vicinity. In such circumstances it owed such children the duty of ordinary care to keep them without the zone of danger. In that respect the situation was quite similar to *Kelly* v. *Southern Wisconsin R. R. Co.*"[56a]

Zartner v. *George*[57] and *Lewko* v. *Chas. Krause Milling Co.*[58] constitute two interesting Wisconsin cases, because of their rejection of the attractive nuisance doctrine, which doctrine at a later date was resumed and affirmed in a case similar in circumstances. In the *Zartner* case, a child trespassed upon a private lot where a building was being erected. He stepped into a box of hot lime screened by a thin coat of sand and suffered severe burns. Although to the knowledge of the defendant contractor, children were attracted to the lot and played thereon, the court in its decision disregarded the doctrine by denying recovery to the child, on the ground that he was a trespasser. Now in the *Lewko* case, the same court denied recovery to a child under five years of age, who, encroaching upon the defendant's premises, fell into an open pit containing hot water and steam and was injured. The determination in this case was based on the rule, that "a mere licensee on private property takes the premises as he finds them. The owner owes him no duty, save to refrain from active negligence rendering the premises dangerous."[58a]

This tendency of the court to base its decision primarily on the status of the child in utter disregard of the child's instinctive conduct, was completely annulled in *Angelier* v. *Red Star Yeast & Products Co.*,[59] a case similar in facts to that of *Lewko* v. *Chas. Krause Milling Co.* The present attitude as expressly defined in the words of the court reads, "Whether the technical legal status of a young child who enters upon the premises of another for purposes of play is a trespasser, a licensee, or an invitee by implication is, in our opinion, quite immaterial, in a case like this where the circumstances and conditions shown or alleged bring the case within 'the attractive nuisance doctrine'."[59a] The principle just elucidated found expression in cases preceding the *Angelier* decision.[60] In *Herrem* v. *Konz*,[61] the court

[56a] See case cited in note 56 at p. 579.
[57] 156 Wis. 131, 145 N.W. 971 (1914).
[58] 179 Wis. 83, 190 N.W. 924 (1922).
[58a] See case cited in note 58 at p. 85.
[59] 215 Wis. 47, 254 N.W. 351 (1933).
[59a] See case cited in note 59 at p. 53.
[60] O'Brien v. Fred Kroner Hardware Co., 175 Wis. 238, 185 N.W. 205 (1921); Brinilson v. Chicago & N. W. R. Co., 144 Wis. 614, 129 N.W. 664 (1911).
[61] 165 Wis. 574, 578, 162 N.W. 654 (1917).

rendering its decision in favor of the plaintiff made no attempt to determine the status of the child, although the case was impliedly governed by the attractive nuisance doctrine. This controversy was based upon injury to a nine-year-old child who was trapped by an unguarded revolving shaft located underneath the mill of the defendant. Children, to the knowledge and consent of the defendant, played in close proximity to the inherently dangerous structure. In view of these facts, the court decided, "Under these circumstances the defendant was bound to anticipate that an injury might result to some child by coming in contact" with the instrumentality.

Wisconsin courts have persistently refused to apply the attractive nuisance doctrine in cases where children were injured while playing on lawfully used moving or standing vehicles. The doctrine is repudiated in cases dealing with vehicles when the defendant could not, prior to the injury, reasonably or possibly anticipate the extraordinary conduct of the child under the circumstances of the case.[62] In *Routt* v. *Look*[63] the supreme court reversed a judgment in favor of a trespassing child under four years of age who was injured as he fell from the side of a moving truck which he climbed as the vehicle passed through a public alley. The court affirmed the rule that the driver of a moving truck "is not required to look out for children who may attempt to climb onto the sides or the rear of his vehicle." Justice Rosenberry maintained that, "In cases where the attractive nuisance theory is not applicable the duty of a driver to look out for the safety of a child does not arise unless and until he is advised or knows that the child is in a perilous position."[63a] The view expressed in the *Routt* case was formerly declared in *Bruhnke* v. *La Crosse*,[64] where a child followed and clung to the chains of a dump wagon lawfully moving upon the highway, and was hurt when the person in charge of the wagon released the dumping device.

In each case, the test is whether the owner of the vehicle exercised reasonable care to avoid injury to children. The owner is not required to take cognizance of the unusual indulgence of children on or about the vehicle. An interesting case illustrating the degree of care expected of the owner operating the vehicle, in avoiding injury to children is

[62] Gamble v. Uncle Sam Oil Co. of Kansas, 100 Kan. 74, 163 Pac. 627 (1917); Michalek v. City of Chicago (Ill. 1936), 4 N.E. (2d) 256; Routt v. Look, 180 Wis. 1, 191 N.W. 557 (1923); Kressine v. Janesville Traction Co., 175 Wis. 192, 184 N.W. 777 (1921); Kollentz v. Chicago & N. W. R. Co., 170 Wis. 454, 175 N.W. 929 (1920); Bauer, *The Degree of Danger and the Degree of Difficulty of Removal of the Danger as Factors in Attractive Nuisance Cases* (1933) 18 MINN. L. REV. 523, 535.

[63] 180 Wis. 1, 10, 191 N.W. 557 (1923).

[63a] 180 Wis. 1, 11, 191 N.W. 557 (1923).

[64] 155 Wis. 485, 144 N.W. 1100 (1914).

Kressine v. *Janesville Traction Co.*[65] In this case, the plaintiff infant was playing with other children on a street car standing at the end of a city line. The children placed the trolley pole in contact with the electric wire and started the car with an instrument never before used as a controller. This caused the street car to collide with another trolley, which collision resulted in injury to the plaintiff child. In refusing to permit recovery, the court said, "The dangers which it was the duty of the company to guard against were such as reasonably might have been anticipated. * * * It was not the duty of the company to so dismantle or disempower the car as to render it harmless under every conceivable circumstance. * * * It was not bound to anticipate consequences resulting from the unusual or extraordinary conduct or the precocious ingenuity displayed by this particular crowd of boys."[65a] The court decided not to adapt the doctrine to an instance in which a freight train standing on a track constitutes the alluring instrumentality.[66]

Another group of cases to which the courts have refused to extend the attractive nuisance doctrine are those arising from injury or death to children who played in and about ponds and other natural or artificial bodies of water.[67] Once established that the owner, as a reasonable, prudent person, used the pond in a lawful, necessary and useful way, he is not legally bound to guard it against trespassing children. In view of the fact, that fencing the pond would render it impracticable and disadvantageous to the owner, the court had not imposed this type of restriction upon him, although it has conceded that an unguarded pond is both attractive and dangerous to children. In the words of the court, "all bodies of water deep enough to drown a child and situated within roving distance of children present a danger from which an injury to some person or death may reasonably be anticipated. But it does not follow from such fact that there is a duty on the part of the owner to fence or guard springs therefrom."[68] Kindred cases illustrating the Wisconsin view are *Klix* v. *Nieman*[69] and *Emond* v. *Kimberly Clark Co.*[70] In the former instance, a nine-year-old boy,

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[65] 175 Wis. 192, 184 N.W. 777 (1921).

[65a] See case cited in note 65 at p. 198.

[66] "We do not consider that a train of railroad cars on a track can be classed with turntables and like machinery as alluring and attractive to children, so as to put the burden on railroad companies to carefully guard them against danger to small children." Wendorf v. Director General of Railroads, 173 Wis. 53, 56, 180 N.W. 128 (1920).

[67] Emond v. Kimberly-Clark Co., 159 Wis. 83, 149 N.W. 760 (1914); United Zinc & Chemical Co. v. Britt, 258 U.S. 268, 42 Sup. Ct. 299, 66 L.ed. 615 (1921); Bicandi v. Boise Payette Lumber Co., 55 Idaho 543, 44 P. (2d) 1103 (1935).

[68] 159 Wis. 83, 87, 149 N.W. 760 (1914).

[69] 68 Wis. 271, 32 N.W. 223 (1887).

[70] 159 Wis. 83, 149 N.W. 760 (1914).

who played about an unfenced pond, fell into it and was drowned; while in the latter case, a boy met the same fate, when he fell into the pond adjacent to the spillway at which he played. In both of these cases, the court aiming to protect the owner's unhindered lawful use of the pond, deemed it just to release him from an alleged duty to the child. This tendency, favoring the owner's interest, led to an express distinction between an attractive nuisance and an "attractive lawful object;" the pond in and of itself belong to the latter category.[71]

The principles evolved from the *Klix* and *Emond* cases were followed in *Fiel* v. *Racine*[72] where the court, in discussing the applicability of the doctrine, further asserted that a body of water does not in and of itself constitute a condition subjecting the owner to liability. It was manifested in *Fiel* v. *Racine* that only when "there was something exceptional or extraordinary in the circumstances to render the place peculiarly attractive, more so than the mere pond itself" would the owner of the pond be charged with negligence under the doctrine.[72a] Peculiar circumstances demonstrating the exception referred to in the *Fiel* case formed the basis of the decision in *Brinilson* v. *Chicago & N. W. R. R. Co.*[73] In this instance the defendant railroad company built a breakwater to protect its land from the actions of the adjacent lake. The breakwater was covered by a planking which served as a path to the street. A hole in the planking not easily discernible, because steam was constantly rising up through it from a pit underneath, transformed the planking into a trap. On the day of the accident, a six-year-old boy on crossing the planking came upon the invisible hole, fell into the pit containing steam and hot water, and was fatally scalded. This condition created by the company itself "made the pit a dangerous trap or pitfall to persons on the premises."[73a]

The Conclusion

The foregoing attempt to analyze the development of the attractive nuisance doctrine from its origin to its present state shows the conflict of the courts in deciding the adaptability of the doctrine in cases of injury to young children attracted to a dangerous structure or condition. Wisconsin's limited application of the theory of attractive nuisance, as appears from the analysis of the cases, does not make the possessor of the instrumentality an insurer of the safety of children. At most, the Wisconsin court gives due recognition to the child's instinctive conduct, simultaneously protecting the possessor in his lawful and necessary use of the instrumentality.

[71] Emond v. Kimberly-Clark Co., 159 Wis. 83, 149 N.W. 760 (1914).
[72] 203 Wis. 149, 157, 233 N.W. 611 (1930).
[72a] See case cited in note 72.
[73] 144 Wis. 614, 129 N.W. 664 (1911).
[73a] See case cited in case 73 at p. 619.