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Negligence—Attractive Nuisance—Child Trespassers: Klaus v. Eden, 70 N.M. 371, 374 P.2d 129 (1962);McFall v. Shelley, 70 N.M. 390, 374 P.2d 799 (1962)

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NEGLIGENCE—ATTRACTIVE NUISANCE—CHILD TRESPASSERS*—Ever since the little Stout boy recovered for injuries received while playing on a railroad turntable,[1] there has been a conflict as to whether, and on what legal basis, recoveries should be allowed to injured child trespassers. On the one hand, society has realized that a child's natural inquisitiveness coupled with his lack of experience may often place him in a hazardous situation which will lead to his injury.[2] Therefore, courts have tended to require that a higher degree of care be exercised toward child trespassers. But on the other hand, there has been considerable resistance to any abandonment of the "no duty to trespassers" rule which has been an expression of the individualism so characteristic in our society.[3] The decisions reflect a balancing of these two forces.[4]

Two early child trespasser cases were decided on a general negligence

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* Klaus v. Eden, 70 N.M. 371, 374 P.2d 129 (1962); McFall v. Shelley, 70 N.M. 390, 374 P.2d 141 (1962).

1. Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall.) 657 (1873). Plaintiff, a six year old, and some other youngsters had trespassed to play on an unlocked railroad turntable located on defendant railroad's property. The evidence showed (1) that there were provisions to latch the turntable to keep it from moving, but that the latch had been broken off and never replaced, and (2) that a railroad employee had seen the children playing on the turntable before and had warned them to keep off. The trial judge sent the question of the railroad's negligence to the jury with an instruction based on the foreseeability of the child's trespass and the resultant injury.

Affirming the trial court and jury verdict for plaintiff Stout, the United States Supreme Court quoted the rule from Washington & Georgetown Ry. v. Gladmon, 82 U.S. (15 Wall.) 401, 408 (1872), that because of their immaturity, children may contribute to their own injury, but this should not be an absolute bar to their recovery as it would be in the case of an adult. The care and caution required of a child should be according to his maturity and capacity only, and this should be determined by the circumstances of each case.

2. Prosser, Torts 438 (2d ed. 1955).

3. It is generally said the possessor of land is not liable for harm to trespassers caused by his failure to put the land in a reasonably safe condition for their reception, or to carry on his activities so as not to endanger them. Prosser, Torts 432 (2d ed. 1955). The landowner owes the trespasser only the duty not to wilfully or wantonly injure him and to warn him of dangers known by the landowner to exist after he has knowledge of the trespasser's presence on the land. James, *Tort Liability to Occupiers of Land: Duties Owed Trespassers,* 63 Yale L.J. 144, 145 (1953).

4. "The decisions show an effort to hammer out a compromise between the interest of society in preserving the safety of its children and the legitimate interest of landowners to use their land for their own purposes with reasonable freedom, and so are naturally in a state of flux and motion." Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right,* 69 U. Pa. L. Rev. 340, 348 (1921).

The following materials will provide the reader with additional information on the child trespasser problem: 2 Harper & James, Torts 1435, 1447-61 (1956); Prosser, Torts 438-45 (2d ed. 1955); Green, *Landowner v. Intruder; Intruder v. Landowner: The Basis of Responsibility in Tort,* 21 Mich. L. Rev. 495 (1923); James, *supra* note 3; Prosser, *Trespassing Children,* 47 Calif. L. Rev. 427 (1959).

theory.[5] However, this approach was later rejected because of the inroads it made on the "no duty" rule.[6] Since those early decisions, three approaches to the problem have developed: (1) a strict adherance to the "no duty" rule, very much in the minority today;[7] (2) the technical attractive nuisance doc-

5. Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall.) 657 (1873); Lynch v. Nurdin, 1 Q.B. 29, 113 Eng. Rep. 1041 (1841). The latter was probably one of the first cases to deal specifically with an injured child trespasser. Defendant had left his horse and cart standing unattended in the street. Plaintiff, a seven year old, climbed up on the cart to play and another child led the horse ahead. Plaintiff slipped off a shaft and fell under a wheel, suffering a broken leg. The court held that defendant would be liable in an action on the case if he was found negligent, even though plaintiff was a trespasser and contributorily negligent. The question whether defendant's conduct was negligent and whether the negligence caused the injury was left to the jury.

6. Two years after the *Stout* decision, the Minnesota Supreme Court, in Keffe v. Milwaukee & St. P. Ry., 21 Minn. 207, 18 Am. Rep. 393 (1875), recognized this problem and found a means of allowing recovery to a child injured on a railroad turntable without having to use the general negligence approach. The court circumvented both the general negligence and "no duty" theories and analogized the early English "stinking bait" case of Townsend v. Wathen, 9 East. 277, 103 Eng. Rep. 579 (1808), wherein the defendant placed baited traps near plaintiff's land to entice plaintiff's dogs to their injury or destruction. *Held,* that if defendant's traps were so placed as to attract his neighbor's dogs and they were injured thereby, an action on the case would lie. By this analogy, the Minnesota court found an invitor-invitee situation in which a duty of care was owed the child invitee. The theory being that if the child came onto the land because of an artificial, highly dangerous unguarded thing, certain to attract children, and the child was of an age when he failed to appreciate the danger, then the possessor's act of creating or maintaining such a condition was equivalent to an invitation. The *Keffe* case thus established the technical attractive nuisance rule, that the possessor of land became liable if the plaintiff could show both *allurement* and *negligence.*

However, the allurement requirement soon proved too restrictive. Probably the most extreme example of the difficulty the courts were having with the application of the requirement may be found in United Zinc & Chemical Co. v. Britt, 258 U.S. 268 (1921), where a child, already trespassing on the land of the chemical company, was killed when he attempted to swim in what appeared to be a pool of clear water, but was actually a poisonous chemical solution. Mr. Justice Holmes held that since the child was not allured onto the premises by the instrumentality which ultimately caused the harm, the requirements of the attractive niusance doctrine were not met and there could be no recovery. The United States Supreme Court appears to have since rejected the requirement. In Best v. District of Columbia, 291 U.S. 411 (1933), the Court cited the *Britt* case with apparent approval, but in Eastburn v. Levin, 113 F.2d 176 (D.C.Cir. 1940), the *Best* case was taken to have overruled *Britt* and to have established the rule that "the visible attraction need not be the cause of the injury."

7. In the seven states of Maine, Maryland, Massachusetts, New Hampshire, Ohio, Rhode Island and Vermont any attempts to allow recovery for injuries to child trespassers have been rejected on the ground that an undue burden would be placed on the landowner. See Labore v. Davison Construction Co., 101 N.H. 123, 135 A.2d 591 (1957); Frost v. Eastern R.R., 64 N.H. 220, 9 Atl. 790 (1887); Paolino v. McKendall, 24 R.I. 432, 53 Atl. 268 (1902); Bottum's Adm'r v. Hawks, 84 Vt. 370, 79 Atl. 858 (1911); Prosser, Torts 439 (2d ed. 1955).

It has been suggested, however, that the reason these few states still do not recognize a rule for child trespassers is that in all but a very few cases in which they have rejected any rule for recovery, the fact situation is one to which other jurisdictions would not have applied their child trespasser rule either. It is conceivable that these

trine;[8] and (3) the most widely accepted approach today, the rule as expressed by the *Restatement of the Law of Torts,* section 339 (1934):

> A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if:
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> (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
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> (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and
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> (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.

Section 339 is almost a return to the earlier general negligence approach as may be seen by comparing it with the trial court's instruction in the *Stout* case.[9] The tenor of section 339 is that a duty of care is owed child trespassers. Sub-section (a) includes the element of foreseeability of the child's trespass; sub-section (b) speaks in terms of the foreseeability of harm to the child trespasser; sub-section (c) makes it clear that the child does not have to be attracted by the instrumentality which causes the injury; and sub-section (d) states the well recognized test of negligence liability, that the utility to the possessor of maintaining the condition should be weighed against the risk to young children involved therein. To put it another way, the basic theory of

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jurisdictions also will find a rule allowing recovery when the proper set of facts is presented. See Prosser, *Trespassing Children,* 47 Calif. L. Rev. 427, 435 (1959).

8. See note 6 *supra.*

9. In *Stout* the trial court instructed:

> That to maintain the action it must appear by the evidence that the turntable, 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; that if in its construction and the manner in which it was left it was not dangerous in its nature, the defendants were not liable for negligence; that [you are] further to consider whether, situated as it was as the defendant's property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence. Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall.) 657, 659 (1873).

section 339 is that liability should depend upon the probability of harm to the child trespasser.[10]

Although New Mexico purports to follow section 339 generally,[11] there is some judicial language which could lead to the conclusion that the rationale of the attractive nuisance decisions is one of general negligence.[12] The following discussion is intended to show that the general negligence approach underlies the New Mexico attractive nuisance decisions; that attempting to decide on the basis of section 339 forces the court to develop fictions and make exceptions; and to suggest that there is no precedent which absolutely binds New Mexico to the section 339 rule.

In *Klaus v. Eden*,[13] recovery was sought for the death of one minor child and injury to another caused by closeness and heat in the cabin of defendant's private airplane in which the children had been confined all one summer day. Defendant had flown into Alamogordo, New Mexico, on business over a hundred times in the past several years. It was his custom to land at defendant Harrington's airstrip on the north edge of town. This was a "week-end" airstrip, unattended during the week. Immediately adjacent to the airstrip was the Otero County Fairground which was used as a public recreational area. Rides, games and food concessions were open daily during the summer months. The recreational area was not separated from the airstrip by any fence or

10. As Dean Prosser stated, "The rule as to trespassing children is simply swallowed up in the sea of ordinary negligence liability, and the essential question is merely one of whether there is an unreasonable risk of harm to the child." Prosser, *Trespassing Children*, 47 Calif. L. Rev. 427, 448 (1959).

Some of the jurisdictions accepting section 339 have expressed their approval in the following manner:

> Minnesota: There is no longer a distinction between attractive nuisance cases and other negligence cases. Doren v. Northwestern Baptist Hospital Ass'n, 240 Minn. 181, 60 N.W.2d 361 (1953).
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> Illinois: The core and crux of liability is the foreseeability of harm to the straying child. Kahn v. James Burton Co., 5 Ill.2d 614, 126 N.E.2d 836 (1955).
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> New Jersey, Texas: Attractiveness is important only in determining the foreseeability of harm to the child and the question of liability is for the jury under ordinary negligence principles. Strang v. South Jersey Broadcasting Co., 9 N.J. 38, 86 A.2d 777 (1952); Eaton v. R.B. George Investments, Inc., 152 Tex. 523, 260 S.W.2d 587 (1953).

11. In Klaus v. Eden, 70 N.M. 371, 374, 374 P.2d 129, 130 (1962), the supreme court referred to Selby v. Tolbert, 56 N.M. 718, 249 P.2d 498 (1952), and stated that the court in that case, "indicated its acceptance and approval of the Restatement of Torts, § 339, which it described as an 'attempt to clarify the rules.'"

12. The supreme court stated in McFall v. Shelley, 70 N.M. 390, 392, 374 P.2d 141, 143 (1962):

> There is no question but that this court is committed to the doctrine that a rule of negligence liability should be more strictly applied to the case of young children than other trespassers. This is the miscalled attractive nuisance doctrine . . . By implication . . . we have generally accepted the doctrine as set out in § 339 of Restatment of Law of Torts . . . .

13. 70 N.M. 371, 374 P.2d 129 (1962).

other obstruction. It was approximately one-fourth mile from the area to the place where defendant parked his plane. On the week-day morning in question defendant landed and parked his plane but did not lock the cabin door. Subsequently, decedent and his sister wandered onto the airstrip from the nearby recreational area. They managed to get into the unlocked plane through the cabin door, but were unable to get out again. When defendant Eden returned at 4:30 p.m. that afternoon he found one child dead and the other nearly so from the closeness and heat inside the cabin. The children's father brought action against defendants Eden and Harrington on the theory that they were liable under the attractive nuisance doctrine. The trial court sustained defendant's motion for summary judgment. On appeal to the Supreme Court of New Mexico, *held,* Affirmed.

Defendants Eden and Harrington had testified that they had never seen any children on the airstrip around the planes. Also, there was testimony that the seven year old decedant and his six year old sister had never before wandered away to the recreational area or the airstrip. The supreme court cited *Selby v. Tolbert*[14] as the first New Mexico case in which the attractive nuisance doctrine was reviewed. The court credited that case as the one in which section 339 was approved and accepted as the law of attractive nuisance in New Mexico. In deciding *Klaus* on the basis of section 339 the court applied the language of sub-section (a) which states:

> the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass. . . .

The court concluded that there was insufficient evidence to establish that any children had ever been seen by defendants around the airstrip or that any children were *ever* around the airstrip. Therefore, the requirements of subsection (a) were not met. Stating that there must be a concurrence of all four section 339 conditions before the rule will apply, the court denied recovery.

In *McFall v. Shelley,*[15] plaintiff McFall sought damages for injuries received in a fall from defendant's cement block wall. Plaintiff, a five year old boy, had climbed up on the wall in front of the house next door to his house. These houses were rental properties owned by defendant. The property was located in the near downtown area of Albuquerque and the wall thereon was

14. 56 N.M. 718, 249 P.2d 498 (1952), where an eight year old boy recovered for injuries received while playing around a burned out semi-trailer which had been placed upon a dolly, propped up with beams and left by defendants on a vacant lot situated across the street from a church where plaintiff and his family attended services. In spite of his father's instructions to keep away from the trailer, plaintiff crossed the street to investigate, was attracted by the melted remnants of the red tail light and when he reached out to touch the tail light the trailer tipped over on him, breaking a leg.

15. 70 N.M. 390, 374 P.2d 141 (1962).

adjacent to a public sidewalk. Plaintiff climbed up on the wall to reach a cat which he had seen on the roof of the neighbor's house. When he realized he could not reach the cat he started to let himself down off the wall. While hanging by his hands from the top of the wall some blocks came loose and he fell. One of the blocks fell on his leg causing serious and permanent injuries. His father brought suit on the grounds that the wall was an attractive nuisance. At the conclusion of all the evidence the trial court, sitting without a jury, entered judgment for defendant. On appeal to the Supreme Court of New Mexico, *held* Affirmed.

At the trial no evidence was introduced that plaintiff himself, or any other children, had ever climbed or played on the wall. The trial court found that defendant had no actual knowledge that small children were playing about or climbing upon the wall, nor had she received any information to that effect. The supreme court agreed with this finding in spite of plaintiff's contention that it is well known that children climb upon walls and that such knowledge could be imputed to defendant in this case. The trial court further found that defendant had no actual knowledge that the wall was defective or in a state of disrepair, nor had she received any information to that effect. Plaintiff attacked this finding on the theory that if part of the wall fell down, knowledge that it was defective could be imputed to defendant; whether or not defendant had actual knowledge was immaterial. In effect, plaintiff's contention was that defendant landowner owed a duty to inspect her premises in order to discover whether there was any condition that would be likely to harm trespassing children. The supreme court did not accept this argument, stating, "it is too much to expect that every person owning a structure must anticipate and protect himself against every conceivable form of infant's play or exploration."[16]

The trial court found that the block wall, as such, could not be considered an attractive nuisance. The supreme court agreed with this finding and stated, "just because the accident occurred does not make the defendant responsible, nor does it make the wall, as such, an attractive nuisance."[17] The decision is significant in that it was handled on general negligence principles. By concluding that the circumstances of the case did not involve the attractive nuisance doctrine the court avoided having to wrestle with section 339 and its limitations. For example, the following are questions that arise when applying section 339 to the *Klaus* and *McFall* facts: [Taking the sub-sections of section 339 in order.[18]]

16. *Id.* at 394, 374 P.2d at 144.

17. *Id.* at 395, 374 P.2d at 145.

18. Sub-section (d), that the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein, poses no serious problem of interpretation and is not included in the following discussion. It is a statement that the well recognized "utility v. risk" test should be applied to child trespasser cases; another indication that the general negligence theory is the basis for section 339.

> A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land. . . .

Several difficulties are posed by this opening paragraph of section 339 as applied to the *Klaus* facts. The rule limits itself to the possessor of land. Defendant Harrington was a possessor of land but it was not a condition which *he* maintained that injured plaintiff. It was defendant Eden's airplane. How does section 339 cover the liability of invitees on the premises, as Eden was in the instant case? How does it cover the possessor of chattels, as Eden was here? It doesn't. In both *Klaus* and *McFall* the supreme court stated that New Mexico has recognized an expansion of section 339 in that the doctrine is not limited to cases of landowner liability, but applies equally to dangerous items of personal property whether on public or private property.[19]

Section 339 is limited to a structure or artificial condition on the land. Both *Klaus* and *McFall* involve artificial conditions, an airplane, and a wall; however, the next New Mexico attractive nuisance case may involve a natural pond or lake used by children as a swimming hole with the owner's knowledge[20] but which might contain a hidden deep hole into which an unknowing swimmer could step. Would section 339 cover this situation?[21]

> (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. . . .

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19. The question arises as to *whose* personal property is intended to be included in this expansion of section 339—that of the landowner or possessor of land, or that of the invitee on the land, or both? Probably, the New Mexico Supreme Court would accept the reasoning of the Illinois court in Kahn v. James Burton Co., 5 Ill.2d 614, 126 N.E.2d 836 (1955), and hold both possessor and invitee liable for injuries caused by their personal property. The *Kahn* case allowed recovery to plaintiff where a dealer delivered a load of lumber to a construction site, left it carelessly stacked and plaintiff, thinking it "looked like a boat" climbed upon the pile and it toppled, injuring him.

20. As in Mellas v. Lowdermilk, 58 N.M. 363, 271 P.2d 399 (1954), where plaintiff's decedent a nine year old boy, swimming with some other friends in a pond on defendant's premises, jumped off a raft against his friends' advice and drowned. Although defendant had allowed swimming in the pond under the supervision of the local high school coach, he did have the premises posted against unauthorized entry and swimming, and decedent and his friends were aware of this. Recovery was denied in this case on the ground that decedent was contributorily negligent.

21. Section 339 speaks in terms of an artificial condition of the land or structure on the land, so if a case arose involving a natural condition with a hidden danger, the court might find it necessary to expand section 339 again. A typical example of this artificial v. natural problem is found in a California case, King v. Lennen, 1 Cal. Rptr. 665, 348 P.2d 98 (1959), which reviews the difficulty the California courts have had in this area and settles the problem by holding the landowner liable whether or not the contrivance causing the injury to the child trespasser was a common contrivance, an artificial condition or land in its natural state. In its opinion, the court stated, "what is important is not whether conditions are common in character but whether their dangers are fully understood by children."

In *Klaus* some difficulty arises in the court's interpretation of sub-section (a) and its application to the facts therein. The court stated, "As we read § 339(a), for appellees to be held liable they must have appreciated as reasonable men that it was 'likely' that children would venture to the airport."[22] Then the court went on to relate the facts that defendant Eden had made some one hundred landings at the airstrip and there was no evidence he ever saw a child there; that there was even a total absence of proof that any children had been around the airstrip at any time; and that the two children here had never before undertaken a venturesome trek to the airstrip or the recreational area nearby.

The supreme court seems to require actual knowledge of the previous presence of children around the airstrip. In view of the facts that the recreational area was immediately adjacent to the airstrip and defendant Eden was aware of this from having flown in there before, could it not be argued that it was foreseeable that children might wander over to the airstrip from the recreational area, without having to prove this had actually happened? Wouldn't this satisfy the "should know" element of sub-section (a)?

It is submitted that the same result in *Klaus* might have been reached more easily by applying sub-section (b) which deals with the foreseeability of harm resulting from the child's trespass. It would seem reasonable to argue on this basis, that it would be unlikely that a child would die or suffer permanent injuries merely because he had climbed into the cabin of a parked airplane.

> (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children . . . .

There is a danger of misinterpretation on the "should know" language in sub-section (b). For example, plaintiff in *McFall* argued that defendant should have been held to have knowledge of the defective condition of the wall and that it was immaterial whether or not defendant had actual knowledge of the condition. In effect, plaintiff was contending that it was defendant's duty to inspect her property in order to determine whether there was any condition which would be likely to harm trespassing children. The supreme court held to the contrary.[23]

> (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 . . . .

The wording "because of their youth" is liable to cause some difficulty. What is "youth"? At what age should the section 339 rule cease to apply to child trespassers? Prosser says the maximum age to which the attractive nuisance

22. Klaus v. Eden, 70 N.M. 371, 376, 374 P.2d 129, 132 (1962).
23. McFall v. Shelley, 70 N.M. 390, 393, 374 P.2d 141, 144 (1962).

doctrine should apply is twelve years.[24] James says fourteen years.[25] Others say that due to the great variance in experience and mental capacity which will affect the child's ability to recognize dangerous situations, no certain age should determine the cut-off point, but that the question should be left up to the jury on an individual basis.[26] The latter seems to be the more sensible view and is now followed in most jurisdictions.[27]

How much difference is there between a block wall adjacent to a public sidewalk and an airplane next to a public recreational area? Neither seems inherently dangerous. It is likely that children might trespass on either, and that the possessor of land or chattel might reasonably foresee such a trespass. But it would also seem that harm to the child would not be a reasonably foreseeable result of that trespass. Why then, apply the cumbersome section 339 rule to one set of facts and a general negligence rule to the other?

Despite the language in *Selby v. Tolbert* and *Klaus v. Eden* that New Mexico recognizes and accepts the attractive nuisance doctrine and section 339 rule,[28] a close examination of both these cases indicates that section 339 has not been expressly accepted. Indeed, the so-called cornerstone case for attractive nuisance in New Mexico, a 1943 decision, *Barker v. City of Santa Fe*,[29] did not expressly adopt the doctrine, let alone the section 339 rule. The case was primarily concerned with whether a municipality could be held liable for the drowning death of a girl under ten years of age who had wandered onto defendant city's premises (a sewage disposal plant) wherein were located open tanks of sewage. Sludge and filth about two feet thick floated on top of these tanks, giving the appearance of solid ground. Decedent's hat blew onto this covering and she stepped out onto it to recover the hat and fell through, drowning in the liquid beneath. Evidence indicated that the gates and fences surrounding the plant were in disrepair, allowing easy access, and that defendant had not posted the premises against trespassers. The New Mexico Supreme Court held defendant city liable for the child's death. The opinion of the court stated that the allegations of the complaint, taken together, sufficiently alleged a "condition amounting to the maintainence of a dangerous and attractive nuisance."[30] The court further held that the allegations were sufficient to establish negligent conduct by defendant city. None of the elements of the attractive nuisance doctrine or of section 339 were discussed in the opinion. It might be

24. Prosser, Torts 444 (2d ed. 1955).

25. James, *supra* note 3, at 166-69.

26. Harris v. Indiana Gen. Serv. Co., 206 Ind. 351, 189 N.E. 410 (1934); Hoff v. Natural Ref. Products Co., 38 N.J. Super. 222, 118 A.2d 714 (1955).

27. Prosser, Torts 444 (2d ed. 1955).

28. *Supra* note 11.

29. 47 N.M. 85, 136 P.2d 480 (1943).

30. *Id.* at 87, 136 P.2d at 481.

suggested that the court was more interested in establishing negligent conduct on the part of the municipality in the maintainence of a public nuisance than it was in expressly establishing the attractive nuisance doctrine in New Mexico.

In fact, the general negligence rationale runs through New Mexico's other child trespasser cases. For example, in *Selby v. Tolbert*,[31] the court quoted from section 1030 of *Thompson on Negligence* that, although the dangerous thing might not "attract" children, where it is so left exposed that children are likely to encounter it and be injured, the person so exposing it should reasonably anticipate the injury likely to occur and should be bound to take reasonable pains to guard against such injury.

Cotter v. Novak,[32] held that the owner or operator of premises should exercise a higher degree of care toward children who are invitees to protect them from dangers which might be obvious to an adult, and that there was no difference between the duty of care of a landowner maintaining an "attractive nuisance" on his property and the duty he would owe to children lawfully on his premises as invitees. However, the violation of this duty could only be established by a showing the condition complained of was dangerous to children and the landowner as a reasonable man should have foreseen the risk of injury.[33]

The New Mexico Supreme Court, in *Mellas v. Lowdermilk*,[34] gave further strength to the general negligence argument by imposing plaintiff's contributory negligence as a bar to recovery.

And finally, there is a recognition of the general negligence approach in both cases being considered in this comment. In *Klaus v. Eden*,[35] the court stated,

> As a matter of fact, we see nothing different in the so-called law of attractive nuisance and the general law of negligence, except that involved is a recognition of the habits and characteristics of very young children.

In *McFall v. Shelley*,[36] it was stated that the New Mexico Supreme Court is committed to the doctrine that a rule of negligence liability should be more strictly applied to the case of young children than other trespassers.[37]

In view of the supreme court's language in the foregoing cases, it is submitted that New Mexico is in the fortunate position of not yet having tied

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31. 56 N.M. 718, 249 P.2d 498 (1952).

32. 57 N.M. 639, 261 P.2d 827 (1953). A six year old girl, staying at defendant's trailer park, was hit in the eye with a nail shot from a playmate's dart gun. Evidence was introduced to show that defendant had been tearing down a tool shed and had left a can of nails near the piled up lumber. Recovery was denied on the ground that nails were such a common and inherently harmless item that such an injury as occurred was not reasonably foreseeable.

33. *Id.* at 641, 261 P.2d at 828.

34. 58 N.M. 363, 271 P.2d 399 (1954).

35. 70 N.M. 371, 375, 374 P.2d 129, 131 (1962).

36. 70 N.M. 390, 374 P.2d 141 (1962).

37. *Supra* note 12.

itself to any of the three principal doctrines applicable in the child trespasser area. Although the court has recognized the section 339 rule, there is no indication of an express acceptance. There is no reason to expressly adopt an attractive nuisance rule. Child trespasser cases should be decided on an individual basis under a general negligence theory, recognizing that a higher degree of care is owed the young trespasser. In the interest of simplicity and ease of application it is hoped the New Mexico Supreme Court will by-pass the special and mechanical attractive nuisance rules in favor of the general negligence approach which it appears to have followed to date.[38]

FORREST S. SMITH

38. But if a complete break with the attractive nuisance doctrine and the section 339 rule meets too much resistance from the supporters of the "no duty to trespassers" theory, a compromise approach might be found in Dean Prosser's modified section 339 rule, introduced in his article, *Trespassing Children,* 47 Calif. L. Rev. 427, at 469 (1959). For purposes of comparison to the original section 339 rule, the modified rule is set out below:

> A possessor of land or a chattel is subject to liability for physical harm to children trespassing thereon, caused by a condition of the land or chattel, if
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know, and which he realizes or should realize will involve an unreasonable 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 of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Oregon has expressly adopted the modified 339 rule in Pocholec v. Giustina, 224 Ore. 245, 355 P.2d 1104 (1960). For a discussion of the experiences Oregon has had with the attractive nuisance doctrine and the application of the modified 339 rule to the *Pocholec* case, see Note, 1 Willamette L.J. 379 (1960).