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Trespassing Children in Kentucky--Limitations on the Attractive Nuisance Doctrine

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TRESPASSING CHILDREN IN KENTUCKY – LIMITATIONS ON THE ATTRACTIVE NUISANCE DOCTRINE

The attractive nuisance doctrine, that exception to the general lack of duty owing from land-owners to trespassers, which has been created for the protection of the very young in order that the child of the Industrial Age may find his world as safe a playground as did his ancestors, has reached its broadest application in Kentucky in the past fifty years and has begun to undergo a series of limitations.

The attractive nuisance doctrine has been defined by the Kentucky Court as the doctrine that "one who maintains upon his premises a condition, instrumentality, machine or other agency which is dangerous to children of tender years by reason of their inability to appreciate the peril therein, and which may reasonably be expected to attract children of tender years to premises, is under a duty to exercise reasonable care to protect them against the dangers of the attraction."[1]

While the court has shown no inclination to abandon the doctrine, or to make any fundamental changes in it, there appears to be a definite tendency on the part of Kentucky decisions to limit its application.[2] This has been effected by imposing various limitations upon the duty of the owner of premises to the infant trespasser.

The Condition

One of these limitations pertains to the condition itself – its inherently dangerous qualities and its attractiveness to children of tender years. The court stated its policy quite frankly in a recent case: "The tendency of courts is to restrict rather than to enlarge the attractive nuisance doctrine and to exclude from its application things not in their very nature dangerous or peculiarly alluring to children, such as walls, fences, simple tools and appliances and conditions arising from the ordinary conduct of business."[3]

One of the best examples of such conditions so excluded is the standing railroad car upon which children often receive injuries. Recovery for such injuries has repeatedly been denied by the court,[4] upon the theory that no person in the exercise of reasonable care could or

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[1] Latta v. Brooks, 293 Ky. 346, 348, 169 S.W 2d 7, 8 (1943).

Jarvis v. Howard, 310 Ky. 38, 219 S.W 2d 958 (1949); Ice Delivery Co. v. Thomas, 290 Ky. 230, 160 S.W 2d 605 (1942).

[3] Jarvis v. Howard, 310 Ky. 38, 42, 219 S.W 2d 958, 960 (1949).

[4] Durbin v. Louisville & N. Ry., 310 Ky. 144, 220 S.W 2d 1011 (1949); Teagarden v. Russell's Adm x, 306 Ky. 528, 207 S.W 2d 18 (1947); Jones v. Louisville & N. Ry., 297 Ky. 197, 179 S.W 2d 874 (1944); Smith v. Hines, 212 Ky. 30, 278 S.W 142 (1925). See also, Barnhill's Adm r v. Mt. Morgan Coal Co., 215 Fed. 608 (C.C.A. 1910).

would be held to anticipate that a child would be attracted by a standing railroad car,[5] and that is is not an instrumentality inherently dangerous to children.[6] In a 1910 case, a four year old boy, in attempting to climb a telephone pole, caught his finger in an angle between the projecting prong and the guy wire thus tearing the finger off. The court, in refusing recovery stated that no person in the exercise of reasonable care would anticipate that the structure was attractive to children or dangerous to them.[7] In 1915 the court found that a wall forming one side of a viaduct maintained by a railroad company was not an attractive nuisance because even though children found it attractive, it was not of an inherently dangerous nature.[8]

More recent decisions have applied this limitation to include an unrailed ramp used for dumping coal from trucks to adjacent railroad cars,[9] a wheelbarrow containing lime left in an unlocked garage,[10] and an ice truck left parked by the ice company s ice house.[11]

Evidence of the tendency to limit the application of the doctrine is found by comparing these comparatively recent decisions with earlier ones, such as a 1901 case, which allowed recovery for injuries to a nine year old boy received while playing on a railroad handcar,[12] and a case which gave recovery for a child's injuries received while playing on lumber which had been irregularly stacked in defendant's lumber yard.[13]

It should be noted that this limitation has not been imposed upon a class of conditions which might be classified on the surface with those of an apparently static and harmless nature, but which have a hidden element of unperceivable danger. Perhaps the very best example to be included in this class is the railroad turntable, from which the doctrine derived its popular name of the "turntable doctrine." Ken-

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[5] Jones v. Louisville & N. Ry., 297 Ky. 197, 179 S.W 2d 874 (1944). In United Zinc & Chemical Co. v. Britt, 258 U.S. 268, 42 S. Ct. 299 (1922), the view that the condition actually causing the injury must be the actual allurement to the premises was followed. Two children died from injuries received in a pool containing sulfuric acid, but it was shown that they were not allured on the premises by the pool, thus recovery was denied. Kentucky s view has not been clearly decided.

[6] Smith v. Hines, Director General of Railroads, 212 Ky. 30, 278 S.W 142 (1925).

[7] Thompson v. Cumberland Telephone & Telegraph Co., 138 Ky. 109, 127 S.W 531 (1910).

Coon v. Ky. & Ind. Ry., 163 Ky. 223, 173 S.W 325 (1915).

[8] Jarvis v. Howard, 310 Ky. 38, 219 S.W 2d 958 (1949).

[9] Latta v. Brooks, 293 Ky. 346, 169 S.W 2d 7 (1943).

[10] Ice Delivery Co. v. Thomas, 290 Ky. 230, 160 S.W 2d 605 (1943).

[11] Illinois Central Railway Co. v. Wilson, 23 Ky. L. Rep. 684, 63 S.W 608 (1901).

[12] Bronson s Adm r v. Labrot, 81 Ky. 638 (1884).

tucky courts have held that turntables are inherently dangerous and attractive to children.[14]

A sand pile containing lime also furnishes an excellent example of a non-mechanical object which may contain a hidden element of danger and thus be brought within the doctrine,[15] as does a tree through which live electric wires are strung,[16] and dynamite caps left unguarded in a school building.[17]

Into which class the electric transmission tower falls has not been so clearly decided. The court held that such a tower was not an attractive nuisance in a 1935 case even when located near an athletic field and used as an observation tower to view a football game.[18] (Another ground of this decision, however, was the age of the plaintiff — sixteen years.) Seven years later recovery was allowed for the death of a small boy who climbed such a tower, which was located near a public pathway, on the theory that the evidence that the tower was attractive and alluring to children and that the company was negligent in not taking precautions to prevent children from climbing thereon required submission to the jury under the attractive nuisance doctrine.[19]

The question of water as an attractive nuisance was somewhat settled in Kentucky in *Von Almens Adm r* v *Louisville*[20] which held that neither a small pond nor the wall partially surrounding it was an attractive nuisance.

It is submitted that application of the attractive nuisance doctrine in Kentucky has been limited to those objects and conditions which are alluring to children of tender years and are inherently dangerous either because of their mechanical nature or because of the existence in them of elements of unperceivable danger.

Age of Plaintiff

Another limitation which has been imposed upon the attractive nuisance doctrine by Kentucky decisions arises out of the application of a rigid age standard. Consistently it has been held that the doctrine

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[14] Louisville & N. Ry. v. Vaughn, 292 Ky. 120, 166 S.W 2d 43 (1942); Brown v. Chespakeake & O. Ry., 135 Ky. 798, 123 S.W 298 (1909).

[15] Gnau v. Ackerman, 166 Ky. 258, 179 S.W 217 (1915).

[16] Kentucky Utilities Co. v. Garland, 314 Ky. 252, 234 S.W 2d 753 (1950).

[17] Jones Savage Lumber Co. v. Thompson, 233 Ky. 198, 25 S.W 2d 373 (1930).

[18] Dennis Adm r v. Ky. & W Va. Power Co., 258 Ky. 106, 79 S.W 2d 377 (1935).

[19] Deaton s Adm r v. Ky. & W Va. Power Co., 291 Ky. 304, 164 S.W 2d 468 (1942).

[20] 180 Ky. 441, 202 S.W 880 (1918).

is applicable to persons under the age of fourteen years. Beyond that age there is a presumption that the child is of sufficient intelligence to appreciate the danger of his act and thus he becomes a trespasser beyond the application of the doctrine.[21] The court has repeatedly stated that this presumption may be rebutted by sufficient evidence establishing that the child is of such inferior intelligence as to be classed with those for whom the protecting rule is created.[22] However, one case held that the presumption that a child of fifteen years is outside the protected class is conclusive.[23]

The sort of evidence sufficient to bring the child of fourteen or over into the protected class does not appear to have been settled. A recent case held that a child may have had below normal school grades and yet not be established as a member of the group to be protected by the doctrine.[24] It may be assumed that the evidence must be such as to discredit the child's general reasoning ability as to the danger of the article to which he was attracted.

A 1927 case bases this prima facie presumption that a child of fourteen years is aware of the consequences of trespass on the property of another upon the following sections of the KENTUCKY REVISED STATUTES: section 339.100 which restricts the employment of children under fourteen years and has now been repealed, section 387.050 which states that a fourteen-year-old minor may appoint his own guardian, and section 402.020 which allows a female of fourteen to enter into a valid marriage contract.[25] Although these statutes may create a presumption that a child of the age of fourteen has reached an age to be capable of assuming such responsibilities, it seems a poor basis for creating such a presumption as to trespass. Another basis for this presumption which is often mentioned is an analogy to the presumption that a child of fourteen has the same status as an adult in regard to contributory negligence, as recognized by the Kentucky Court.[26] This seems little more logical since this presumption too probably received its foundation from these or similar statutes.

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[21] Kentucky Utilities Co. v. Earles Adm r, 311 Ky. 5, 222 S.W 2d 929 (1949); Dennis Adm r v. Ky. & W Va. Power Co., 258 Ky. 106, 79 S.W 2d 377 (1935); Commonwealth v. Hender s Guardian, 245 Ky. 328, 53 S.W 2d 694 (1932); Louisville & N. Ry. v. Hutton, 220 Ky. 277, 295 S.W 175 (1927).

[22] Louisville & N. Ry. v. Hutton, 220 Ky. 277, 295 S.W 175 (1927). See also Commonwealth v. Henderson s Guardian, 245 Ky. 328, 333, 53 S.W 2d 694 (1932).

[23] Columbus Mining Co. v. Napier s Adm r, 239 Ky. 642, 40 S.W 2d 285 (1931).

[24] Kentucky Utilities Co. v. Earles Adm r, 311 Ky. 5, 222 S.W 2d 929 (1949).

[25] Louisville & N. Ry. v. Hutton, 220 Ky. 277, 295 S.W 175 (1927).

[26] Dixon v. Stringer, 277 Ky. 237, 126 S.W 2d 448 (1939).

The Location

Another method of limiting application of the doctrine is the insistence by the courts that the condition be located in a place where children may reasonably be expected to trespass. The possessor of land is not required to take precautions if he has no reason to believe that children will come upon his premises.[27] The court held in *Dominion Construction Co.* v *Williamson,*[28] that a mere allegation that child was killed when he entered a train car to which he was attracted stated no cause of action, there being no averment that the owner knew or should have known that children played around the train. The court said that this was not a repudiation of the attractive nuisance doctrine, but merely a qualification.

Where the location is so removed from places where children could likely be expected to be that the infant trespasser is compelled to hunt for or seek it out, then the owner or maintainer of the premises is not liable.[29] An excellent example of a condition which may, in the minds of reasonable men, be unaccessible to very young children, but from which injury to them has occurred, is an electric wire strung eighteen feet above the ground at the top of a telephone pole. A 1908 case denied recovery for the death of an eleven year old boy who climbed such a pole and was electrocuted by the wire. The court said that it could not reasonably be expected that a child would reach the dangerous wire.[30]

In the case of *Kentucky Utilities* v *Garland,*[31] 1950, the court allowed recovery for injuries to a small boy who climbed a tree in which were hidden live electric wires. However, in holding the company liable, the court made careful note of the location of the tree which was near children s homes on a path which led to a stream where they often played, and not on an isolated hill where children could not be expected to be.

Necessary Precautions

In the definition of the doctrine laid down by the court, it is said that one maintaining on his premises a condition which is dangerous and attractive to young children must exercise *reasonable care* to pro-

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[27] PROSSER, TORTS, 621, citing Dominion Construction Company v. Williamson, 217 Ky. 62, 288 S.W 1018 (1926).

[28] 217 Ky. 62, 288 S.W 1018 (1926).

[29] Puckett v. Louisville, 273 Ky. 349, 116 S.W 2d 627 (1938).

[30] Mayfield Water & Light Co. v. Webb s Admr, 129 Ky. 395, 111 S.W 712 (1908).

[31] 234 S.W 2d 753 (Ky. 1950).

tect them against dangers of such attraction.[32] This does not mean that the owner of the premises is an insurer against accident to trespassing children produced by the maintenance of the attractive nuisance, but only that he must use the care of a reasonably prudent man in avoiding such injury.[33]

If the utility of maintaining the condition which becomes an attractive nuisance to the child of tender years greatly outweighs the risk of injury to such children, it may be said that the owner generally is not liable,[34] unless he can by some comparatively inexpensive means render the object less dangerous (as in the case of the railroad turntable which can be made harmless by the means of an inexpensive lock or fastening),[35] or unless he has failed to make any reasonable effort to warn children of the danger or prevent their playing thereon.[36] However, there is no duty to maintain precautions which are impossible or even greatly expensive. In *McMillin's Adm'r* v *Bourbon Stock Yards Co.*,[37] two young children went into the defendant's stock yard to play ball. One of them fell into the cattle dip and died soon thereafter from the effects of the poisonous water. Recovery was denied, the court saying that the owner was under a duty to take reasonable precautions for the safety of trespassing children, but he was not required to keep gates that are on his enclosed premises continually locked, or to build his fences so high that no person can climb over them, or to have his servants continually on the lookout for trespassing children.

A specific warning of the danger of the premises made to the child is generally held to be insufficient care to absolve liability unless it can be shown that the child was able to appreciate the warning and proceeded at his own peril.[38]

Conclusion

Kentucky, in so carefully limiting its application of the attractive nuisance doctrine, is in line with the general trend followed by the majority of jurisdictions which recognize the doctrine. The ultimate effect of this trend is that a middle-ground for the application of the

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[32] Latta v. Brooks 293 Ky. 346, 169 S.W 2d 7 (1943). See also Jarvis v. Howard, 310 Ky. 38, 41, 219 S.W 2d 958, 959 (1949).

[33] Puckett v. Louisville, 273 Ky. 349, 116 S.W 2d 627 (1938).

[34] Jarvis v. Howard, 310 Ky. 230, 219 S.W 2d 948 (1949).

[35] Brown v. Chesapeake & O. Ry. 135 Ky. 798, 123 S.W 298 (1909).

[36] McMillin's Adm'r v. Bourbon Stock Yards Co., 179 Ky. 140, 200 S.W 328 (1918).

[37] 179 Ky. 140, 200 S.W 328 (1918).

[38] Cumberland River Co. v. Dicken, 279 Ky. 700, 131 S.W 2d 927 (1939). See also Jones Savage Lumber Co. v. Thompson, 233 Ky. 198, 25 S.W 2d 373 (1930).

doctrine has been reached, thereby making the doctrine more acceptable to all jurisdictions. Consequently, those dozen or so jurisdictions, which formerly refused to accept the doctrine on the ground that it was only a bit of sentimental humanitarianism, are willing, in extreme cases, to find some excuse for liability.[39]

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[39] See PROSSER, TORTS, 618, 619.