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The attractive nuisance doctrine in California education

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THE ATTRACTIVE NUISANCE DOCTRINE IN CALIFORNIA EDUCATION

A Thesis
Presented to
College of the Pacific

In Partial Fulfillment
of the Requirements for the Degree
Master of Arts

by
Leon Rovetta
June 1957

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CHAPTER I

INTRODUCTION

Increasingly important to school districts are the aspects of liability under the attractive nuisance doctrine.

Since school business has become "big business," and since laws and judicial opinions on attractive nuisance have multiplied rapidly, an attempt will be made in this thesis to present the sundry aspects of the attractive nuisance doctrine in such a manner as to be of practical knowledge and use to the schoolman.

Under the law, school districts either own or lease the premises which they occupy.¹ Pupils come upon the school premises not only to attend school but also for many other reasons. In any action at law in order to create a liability by law, there must be parties. This thesis will clarify the responsibility of the school district in exercising proper care to those who come upon the school property.

An analysis of the relationships between the school district and the pupil should aid the schoolman in judging whether he is in danger of a lawsuit.

¹ B. E. Witkin, Summary of California Law (6th ed., Vol. I; San Francisco: The Borden Printing Company, 1946), p. 748.

I. THE PROBLEM

Statement of the problem. The problem is to determine the circumstances and conditions prerequisite to liability under attractive nuisance as it applies to public schools in the State of California.

In answering this problem an attempt will be made to clarify for the school administrator sundry areas in attractive nuisance, as follows:

1. What constitutes the action of negligence?
2. What is the history of the attractive nuisance doctrine in England where it originated, and in the United States?
3. What is the attractive nuisance doctrine as recognized in the State of California?
4. What distinction does California make between negligence and attractive nuisance as they apply to school districts?
5. What are possible situations under which lawsuits in attractive nuisance may culminate into judgments against school districts?
6. Why have California courts to date rendered no decision on attractive nuisance against a school district?

Importance and need for the study. A review of the attractive nuisance area indicates that "things" and

"conditions" held to be attractive nuisances have increased in number in the past eighty years.² Since many of these "things" and "conditions" may apply to a school district, it may be of practical value to indicate the scope of these dangerous instrumentalities and conditions to the schoolman. Also, further study dealing with attractive nuisance in the field of education may be suggested.

To show the importance of this problem and the need for the study, an attempt will be made to indicate the areas of potential liability, and to establish an awareness of these areas on the part of the school administrator, as follows:

1. Insight into the liability in attractive nuisance and negligence against school boards, districts, personnel, and administrators.
2. Broad knowledge of state laws in order to protect school districts and taxpayers.
3. Particular knowledge to the schoolman of California school laws.
4. Provide educational background to forestall injuries to person or property.
5. Foresight into what constitutes standard ordinary care; a safety factor to children.
6. A breakdown of statutes and court decisions.

²American Law Reports. Vol. XXXI of Attractive Nuisance (San Francisco: The Bancroft Whitney Company, 1947), pp. 155-291.

Procedures. The material, sources, and data for this thesis were obtained through reviewing selected court cases and all pertinent California codes and statutes. Visits were made to both education and law libraries of cities, counties, and universities. Interviews were granted by professors of education and of law, as well as many lawyers and judges.

Research and interviews were obtained at the following Schools of Education: College of the Pacific, Sacramento State College, University of California, and Stanford University.

Research was done in the following law libraries: San Joaquin County Law Library, California State Law Library at Sacramento, the Library of Boalt Hall of Law, University of California at Berkeley, and the Library of the Stanford School of Law, Stanford University.

Interviews were granted by the following jurists: county counsels of several counties, district attorneys, attorneys at law, and superior court judges.

II. DEFINITIONS OF TERMS USED

Three terms which will be used repeatedly in this thesis need defining, as follows:

Tort. A tort, is that legal wrong, or breach of duty, which is capable of being redressed in a civil action for damages. Other definitions which have been given are as follows:

A tort is an act or omission to act giving rise to a civil remedy which is not under contract. A tort may be said to be a breach of duty fixed by municipal law, or statute, for which a suit in damages can be maintained. The essence of a tort is that it arose from neither the commission of a crime nor the breach of a contract.³

Contributory negligence. The doctrine of contributory negligence is that one cannot recover compensation for an injury from any negligence into which negligence of his own has to a greater or less degree entered into the cause of the injury, contributing as a proximate cause to the complained result.⁴

Infant. Under the common law every person is a minor (or infant) until he or she has attained the age of twenty-one years. In more than half of the states of this country at the present time, by statutory provisions, women become of age upon completing their eighteenth birthday. This also is the statutory rule in California.⁵

The common law made distinctions for minors who were not sui juris. Sui juris applies to those who were not able to distinguish between right and wrong. The common law courts fixed the age at which a minor was sui juris at fourteen years of age. The courts of California have adopted

³California Jurisprudence. Vol. XIX of Contributory Negligence. Edited by William McKinney. (San Francisco: The Bancroft Whitney Company, 1925), p. 625.

⁴Ibid., p. 630.

⁵Hamilton Law Library. Vol. III of Minors. (Chicago: Cree Publishing Company, 1912), pp. 17-21.

this common law ruling. However, in California a fourteen year old minor is, in the absence of proof to the contrary, held to be capable of distinguishing right from wrong in the common everyday matters of life.

CHAPTER II

THE LAW OF NEGLIGENCE AS A BASIS FOR AN ATTRACTIVE NUISANCE ACTION

In order to understand attractive nuisance, it is necessary to know the elements of negligence and to understand the legal duties owed to a person. These legal duties owed involve due care. Whether due care--or ordinary care--was exercised or not, depends upon the relationship between the parties to an action. This relationship will always fall into one of three legal categories: either that of a trespasser, of a licensee, or of an invitee.¹

The basic element of attractive nuisance is that the child who enters upon the school property must be a trespasser.

I. THE ELEMENTS OF NEGLIGENCE

Negligence is not the act itself, but the absence of care in the performance of an act.²

Witkin states that negligence is either the omission of a person to do something which an ordinary prudent person would have done under a given circumstance, or the doing of

¹William L. Prosser, The Law of Torts. Sec. 339 of Restatement of the Law of Attractive Nuisance (St. Paul, Minnesota: West Publishing Company, 1955), p. 432.

²Stephenson v. Southern Pacific Company, 102 Cal. 143, 34 Pac. 618 (1894).

something which an ordinary prudent person would not have done under the circumstances.³

The elements of actionable negligence involve the following:

1. Legal duty to use care
2. Breach of such legal duty
3. Breach as to the proximate cause or legal cause of the injury.⁴

The legal duty of care may be of two types:

1. The duty of a person to use ordinary care in activities from which harm might reasonably be anticipated
2. An affirmative duty where a person occupies a particular relationship to others.

The rules governing negligence to property are the same as those which apply to personal injury.⁵ The duty is that of ordinary care under all circumstances and it varies with changing circumstances. The standard is that of the ordinary prudent person.⁶ The amount of care must be in

³B. E. Witkin, Summary of California Law (San Francisco: The Borden Printing Company, 1941), p. 752.

⁴Means v. Southern Pacific Company, 144 Cal. 473, 77 Pac. 1001 (1904).

⁵Royal Insurance Company v. Mazzei, 50 Cal. App. 2d, 549, 123 Pac. 2d, 586 (1942).

⁶Fouch v. Werner, 99 Cal. App. 557, 279 Pac. 193 (1929).

proportion to the danger to be avoided and the consequences reasonably to be anticipated.

The general test of negligence is foreseeability; that is, conduct is negligence where some unreasonable risk of danger to others would have been foreseen by a reasonable person.⁷

The proper and reasonable conduct for a prudent person to follow under particular circumstances may become established by long approved practice. When one does what the great body of other prudent men do in the same situation, he cannot be considered negligent.⁸

The duty owed to a child. The question of a duty of care owed to a child usually depends upon the child's age, mental capacity, and experience.

A child of immature years is not held to the same standard of conduct as an adult, but only to the degree of care exercised by children of like age, mental capacity, and experience. There are no particular ages at which he is deemed wholly without capacity or fully accountable, and the question of capacity is usually for the jury to decide.⁹

⁷Schwerin v. Capwell, 140 Cal. App. 1, 34 Pac. 2d, 1050 (1934).

⁸Denman v. Pasadena, 101 Cal. App. 769, 282 Pac. 820 (1929).

⁹Todd v. Orcutt, 42 Cal. App. 687, 183 Pac. 963 (1919).

The same underlying consideration, namely, the child's lack of capacity to appreciate risks and avoid danger, leads to the imposition of a greater degree of care on the part of others toward children. Thus, childish curiosity and propensity must be taken into consideration.¹⁰

Failure to give warning before doing certain acts may be negligence: a motorist not sounding a horn, backing a street car without sounding a bell, or throwing heavy objects without warning, others being present.¹¹

II. THE LEGAL RELATIONSHIP BETWEEN PARTIES IN AN ATTRACTIVE NUISANCE ACTION

The rights and liabilities of landowners and occupiers.

In general the landowner owes certain affirmative duties of care with respect to activities or conditions on the land to persons who come upon the land.¹²

Normally the duties do not extend to a person outside the land, for example, on adjacent land or on the highway. But the owner of the land is under the usual liability to any persons, including those outside the land, where his dangerous

¹⁰ Kataoka v. May Department Stores, 60 Cal. 2d, 288, 144 Pac. 2d, 356 (1943).

¹¹ Adamson v. San Francisco, 66 Cal. App. 256, 225 Pac. 875 (1924).

¹² Oettinger v. Stewart, 24 Cal. 2d, 133, 148 Pac. 2d, 19 (1944).

conditions cause harm, such as creating artificial conditions.¹³

Persons who come upon the land are legally classified as either trespassers, licensees, or invitees. These are the relationships, the legal names, for those persons who come upon land with or without the landowner's consent.

It is important that the school administrator become aware of and understand these classifications of persons who come upon the land of another. This is the crux of whether or not there is a liability, the extent of the liability, and in essence for the purpose of this thesis, if there be a negligence or an attractive nuisance case. Regarding a person who comes upon the school property, the administrator must always ask and then analyze this question: Does that person come upon the school property with or without consent of the occupant of the land, or does the person who enters have a right to be on the land?

Trespasser. This type of person is not given the landowner's consent to enter his premises. In general 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. It has been said that as to a trespasser, the owner only owes him a duty to refrain from

¹³Gerberich v. Southern California Edison Company, 5 Cal. 2d, 46; 53 Pac. 2d, 948 (1936).

wilful or malicious harm or injury.¹⁴ An increasing regard for human safety has led to the development of certain exceptions to this general rule of no duty owed to a trespasser, and these exceptions are directly quoted from Prosser on The Law of Torts:

a. If the presence of trespassers is discovered, the possessor is commonly required to exercise reasonable care for his safety as to any active operations the possessor may carry on, and possibly as to any highly dangerous condition on the land.

b. If the landowner knows that trespassers frequently intrude upon a particular place or limited area, he is required to exercise reasonable care as to any activities carried on, and probably as to any highly dangerous conditions.

c. As to trespassing children, the greater number of courts impose a duty to exercise reasonable care where the trespass is foreseeable. The condition of the premises should be recognized as involving unreasonable risk of harm to the child. The child because of his immaturity does not discover or appreciate the danger, and the utility of maintaining the condition is slight compared to the risk.¹⁵

Section c. of Prosser's statement above, is called the exception to the general rule against trespassers. Children of tender years (infants or minors) come within the exception under the attractive nuisance doctrine. As it has been put by the courts, the attractive nuisance

¹⁴ Gianni v. Campodonico, 176 Cal. 548, 169 Pac. 80 (1917); Langozo v. San Joaquin Light and Power Company, 32 Cal. App. 2d, 678, 90 Pac. 2d, 825 (1939).

¹⁵ William L. Prosser, The Law of Torts. Sec. 339 of Restatement of the Law of Attractive Nuisance (St. Paul, Minnesota: West Publishing Company, 1955), p. 432.

doctrine is the exception to the general rule that a landowner owes no duty of care toward a trespasser.

Licensee. This person generally comes upon the land with the bare consent of the landowner and for his own purpose. The landowner owes the licensee no duty except to refrain from wilful harm or injury from concealed dangers and traps.¹⁶

Prosser states: A licensee is a person who is privileged to enter the land by virtue of the possessor's consent, and this consent may be actual or it may be implied. The possessor is under no care to make the premises safe for the licensee, and is under no duty to him, except:

- a. To use reasonable care to discover him and to avoid injury to him in carrying out activities upon the land.
- b. To use reasonable care to warn him of any concealed dangerous conditions or activities which are known to the possessor, or of any change in the condition of the premises which may be dangerous to him, and which the licensee may be reasonably expected not to discover. Once the licensee discovers the danger he may not in fact complain about it.

Types of licensee are: a parent entering a lot or building or yard to locate a lost child, one seeking a shortcut across land, lounging loafers, spectators not invited to enter a building, those who enter land for a social visit, tourists who visit a commercial plant at their own request, gratuitous riders on an automobile. However, paid riders are invitees and as such are owed the highest duty of care by the car owner, for they come with his consent and for his or their mutual purpose. Thus we see that the licensee comes for a purpose of his own, and which has no relation to the business of the owner.

¹⁶Frates v. Keeling, 20 Cal. App. 2d, 490, 67 Pac. 2d, 118 (1937); Lucas v. Walker, 22 Cal. App. 296, 134 Pac. 374 (1913).

Invitee. An invitee is a person who enters or is permitted to enter upon land for the purpose of the occupier. Some courts require that the business upon which he comes be pecuniary in nature, or of some economic benefit to the possessor, other courts require only that it be such purpose that there is an implied representation that care has been exercised to make the land safe for the visitor.

The owner must make the place safe for the invitee, for it is he who gets the economic benefit. The occupier encourages others to enter for purposes of his own, and it is implied that he must use reasonable care to make the premises safe for those who come for that purpose.¹⁷

What relationship exists by law, the school administrator will ask, between the pupil who enters the land and the school district? Is the pupil a trespasser, a licensee, or an invitee? A number of possible situations clarifying these relationships will be discussed in Chapter V, Sections V and VI.

Is the pupil a licensee? As we shall later see, the general weight of authority in the United States holds that a pupil is either a licensee or an invitee. When the pupil comes upon the school property for school business and instruction, he comes with a mutual-purpose interest, and therefore the school district and its employees at all times owe the pupil a high standard of care.¹⁸ In California the courts

¹⁷William L. Prosser, The Law of Torts. Sec. 78, et seq, of Trespassers, Licensees, Invitees. (St. Paul, Minnesota: West Publishing Company, 1955), p. 452.

¹⁸McDonald v. Standard Gas Engine Company, 8 Cal. App. 2d, 464, 47 Pac. 2d, 77 (1935); student on a field trip; vide, Lorenzo v. Santa Monica City High School District, 51 Cal. App. 2d, 393, 124 Pac. 2d, 846 (1951).

have declared pupils and students at all levels to have the right of an invitee.¹⁹

The invitee has an express or an implied invitation of the owner or occupier to come upon the land, and that consent is for a purpose of common or mutual interest. Whenever a child of tender years enters land, the courts will seek their utmost to protect him under the shield of being either a licensee or an invitee. In the field of attractive nuisance in California, one of the main theories under which recovery can be had is that although the child is a trespasser upon the land, the contrivance that allured him was an implied invitation to come and play with the contrivance. This fiction is based upon the child's immaturity, instincts, and natural propensities.

Since children by nature are known "to go where angels fear to tread," there is no known formula that will keep a child from being a trespasser. An administrator's best safeguard and assurance against a trespassing child who may involve the school in an attractive nuisance lawsuit, is to see that all "contrivances" and "conditions" are as carefully operated as they would be operated by the ordinary prudent man under similar circumstances.

¹⁹Stockwell v. Board of Trustees, 64 Cal. App. 2d, 393, 124 Pac. 2d, 405 (1944).

CHAPTER III

HISTORY OF THE ATTRACTIVE NUISANCE DOCTRINE

All our early American colonies, with the exception of Louisiana, adopted in toto the English common law. Louisiana, however, adopted the laws of France, which were in effect the Roman Law, the Codes of Justinian. Later, our states, one by one as they were formed--and expressly by legislative enactments--adopted the English common law rules to govern local peace, person, and property. As time passed, local needs and customs were enacted into state statutes and codes, thus modeling the states' adopted body of common law to current needs of the people. Until the year 1841 in England the common law tort of trespass guarded and protected the owner of land with an iron-clad rule of law. Under that old English common law the owner of land owed no duty of care to a trespasser, except to refrain from wilfully or maliciously harming the trespasser when he came upon the owner's land. This was also the rule in the United States until 1871.

I. THE PIONEER ATTRACTIVE NUISANCE CASE IN ENGLAND

In 1841 the case of Lynch v. Nurdin gave notice to all landowners that from now on the courts of England would take a more humanitarian view toward trespassing children of tender years.

The facts and the decision in the case of Lynch v. Nurdin are as follows:

On a summer evening just after sundown the defendant had left his horse and wine cart standing unattended on a sloping street in front of a wine shop. The plaintiff, a child of 7 years of age, was playing in the street with other boys. It was while the plaintiff was getting on the cart that another boy made the horse move on. The plaintiff was thrown to the ground, the wheel of the cart rolled over his leg and fractured it.

LORD DENMAN: If one has on his premises something that is dangerous to children of tender years, of such character that children themselves can create danger out of it, and it is attractive and alluring or enticing to them, the landowner owes the duty as a matter of common humanity to protect that thing and guard it from danger to children.¹

II. THE PIONEER ATTRACTIVE NUISANCE CASE IN THE UNITED STATES

With the early expansion of the railroads came a new and dangerous device, a man-made piece of machinery called a turntable. Wherever there were turntables, there also were boys where they were not supposed to be. The boys played upon the turntables. Consequently they were trespassers. Although up to 1871 many boys had been injured while playing on such railroad turntables, no legal recovery had been allowed the trespassing children for these injuries. However, in 1871, in Nebraska, a turntable lawsuit was brought by a boy's parents. Although the Nebraska courts refused a judgment for the plaintiff, yet when the case, Sioux City and Pacific Railroad v. Stout, was brought before the Supreme Court of the United States, it was held that a

¹Lynch v. Nurdin, 1 Queens Bench Div. 28, 113 English Reports 1041 (1841).

railroad turntable was an attractive nuisance. The Nebraska judgment was reversed in favor of the plaintiff, thus giving America its first case under the attractive nuisance doctrine.

The facts and the law of Sioux City and Pacific Railroad v. Stout are as follows:

Henry Stout, a six year old boy, living with his parents, sues the Sioux City and Pacific Railroad to recover damages for injuries sustained while playing on a turntable owned by the defendant railroad company.

The court held for the child, Henry Stout, on the attractive nuisance theory, on the precedent set by Lynch v. Nurdin.

The turntable was a dangerous machine which would be likely to cause injury to children who resorted to it, and this may be inferred from the injury which actually did occur to the plaintiff.²

III. EXTENSION OF THE ATTRACTIVE NUISANCE DOCTRINE TO OTHER THINGS AND CONDITIONS

An expanding economy, scientific discoveries, growth in population, and the second industrial revolution with its innumerable new man-made devices multiplied the turntable doctrine of attractive nuisance into hundreds of court judgments. "The difficulty," opined the court in Oglesby v. Metropolitan Railroad Company, "of determining the kinds of things to which the attractive nuisance doctrine is properly applicable has been frequently remarked upon by the courts,

²Sioux City and Pacific Railroad v. Stout, 17 Wall. (U. S.) (1873).

and in some, has been regarded as a reason for rejecting the doctrine altogether."³

As listed in American Law Reports,⁴ the doctrine has been held to apply to the following places or things in one court or another of the United States:

Abutments	Barb wire
Advertising board	Barrel
Arcade	Basket
Ashes	Block and tackle
Ash dump	Buildings, under construction
Airport	Car truck
Auto	Land cave-in
Cement piping	Moving vehicle
Charged wires	Oil can
Chemicals	Scaffolds
Crate	Phosphorus
Demolition of building	Pipes
Dynamite caps	Pistol
Drainage ditch	Pit
Dynamite	Platform
Elevator	Quicklime
Excavation	Revolving door
Fireworks	Mill race
Footbridge	Raft
Furnace	Railing
Gas leak	Refuse conveyor
Gate	Reservoir
Guy wires	Retaining wall
Hot water	Rivers
Ice	Road
Ladder	Rock pile
Lime (slack)	Roof
Lumber pile	Rope
Machines.	Rowboat sand pit
Manhole	Sand bin
Moving cable	Sand pile

³Oglesby v. Metropolitan Railroad Company, 219 Ill. App. 321 (1920).

⁴American Law Reports. Vol. XXXI of Attractive Nuisance (San Francisco: The Bancroft Whitney Company, 1947), pp. 155-291.

Sawdust pile	Telephone wire
Sewer	Tractor
Sewage tank	Trees
Shelves	Train
Shrub	Trench
Sidewalk covering	Trestle
Poles	Truck
Ponds	Tunnel
Pools	Turntable (playground)
Portable furnace	Vat
Post holes	Vault
Power house	Vacant house
Pickup	Velocipede
Putting shot	Ventilating fan
Smoke	Wagon
Stairway	Washing machine
Steam roller	Water tank
Street cars	Wells and cisterns
Swing	Wheelbarrow
Tank	Wire fence
Tar	Wires
Telephone post	Woodpile

This imposing list of conditions and things is not generally accepted by the California courts. As will be seen later, the California courts narrow the number of things to which the doctrine may apply.

IV. HOW THE ATTRACTIVE NUISANCE DOCTRINE IS ACCEPTED OR REJECTED AMONG THE SEVERAL STATES

As has been previously indicated, in the years following the case of Sioux City and Pacific Railroad v. Stout, hundreds of modern "things" and "conditions" became accepted as attractive nuisances. Most of the state courts were hopelessly confused as to when to apply the doctrine. Several states have refused to lend any recognition, while others gave it credence under one or more judicial theories. Some states refused to recognize the doctrine on the grounds that

if negligence was an available remedy, there was no need to recognize attractive nuisance as a remedy. Some states enacted "Safe Place Statutes": the owner must provide a safe place for children regardless of negligence or trespass. Other states said through their court decisions or by way of legislative enactments that even if the school district did maintain an attractive nuisance, education is a quasi-governmental function, and one cannot sue the government unless it consents to be sued. States that refuse to give consent to being sued on any grounds are called "governmental immunity" states. As will be seen later, California is not a governmental immunity state. California, through a number of statutes which have been embodied in several codes, has given consent to be sued for negligence. This not only means that cities and counties may be sued for negligence, but school districts, school boards, and school employees may also be sued.

Before submitting a summary of the states accepting or rejecting the attractive nuisance doctrine, it will prove fruitful to consider a digest of the doctrine from American Law Reports,⁵ as follows:

Attractive nuisance is a subject on which there is no wider diversity of judicial opinion. In some jurisdictions it is repudiated altogether. In others, applied

⁵ American Law Reports. Vol. XXXVI of Attractive Nuisance (San Francisco: The Bancroft Whitney Company, 1941) p. 37.

strictly, in others adopted in a more or less modified form, while in others it has been extended to such a variety of forms and cases that it has lost its original identity. The courts which give recognition to the doctrine are not agreed upon the principle which underlies it and encounter difficulty in defining the doctrine itself.

There has been a difference of opinion not only as to whether the doctrine should be recognized or not, but also in jurisdictions where it has been accepted as to the condition under which it is acceptable.

Ordinarily, when people come on lands of others for their own purposes, without right or invitation, they must take the lands as they find them, and if exposed to unseen dangers they must take care of themselves, and cannot throw responsibility upon the person whose lands they have trespassed.⁶

But in Hannah v. Erlich⁷ in a jurisdiction which follows the attractive nuisance doctrine, a duty is owed to children of tender years, who are permitted frequently to inhabit premises, on the ground that they are implied licensees, whom it is a duty of the property owner to protect against dangers which, to their childish understandings, are latent and in the nature of a trap. If there is no duty owed by the landowner, there can be no culpable negligence. There cannot be such a thing as a negligent performance of a non-existing duty if the owner might reasonably anticipate that children of tender age be incapable of exercising proper care for their own safety.

Where a person maintains upon his premises anything dangerous to life or limb and of a nature to invite the intrusion of children, he owes them a duty of precaution against harm, and is liable to them for injury even if their own acts put in operation its hurtful agency.⁸

One who leaves exposed in a public place a dangerous machine likely to attract children, excite their curiosity, and lead to injury while they are pursuing their childish instincts, is liable for an injury sustained.⁹

⁶Peters v. Bowman, 115 Cal. 41, 41 A. L. R. 831 (1896).

⁷Hannah v. Erlich, 102 Ohio State 176 (1921).

⁸Price v. Atchison Water Company, 58 Kan. 551 (1897).

⁹Westerfield v. Levis Bros., 43 La. Ann. 63 (1891).

One who maintains dangerous instrumentalities or appliances on his premises of a character likely to attract children in playing, or permits dangerous conditions to remain thereon with knowledge that children are in the habit of resorting thereto for amusement, is liable for injury therefrom to children of tender years who, from immaturity, cannot exercise the proper degree of care for their own protection.¹⁰

One who leaves an instrumentality on premises where children have a right to be (as a school), or where children by reason of instinct are likely for some apparent reason to be attracted, must exercise ordinary¹¹ care under all circumstances to prevent injury to them.

The State of Washington has definitely accepted the attractive nuisance doctrine in general, and in particular it imposes liability on school districts for maintaining attractive nuisances.

The judgment in the case of Hutchins v. School District No. 81 of Spokane County, Washington, 1921, held that a pit dug on the school grounds constituted an attractive nuisance to children of tender years. Since the hole was an alluring temptation to a nine year old boy to play there, the school district was liable for maintaining this dangerous condition.¹²

The State of Kentucky will also hold a school district liable for attractive nuisance. In the case of Jones Savage Lumber Company, et al v. Thompson, it was held that dynamite

¹⁰Mattson v. Minneapolis & Northwest Railway Company, 95 Minn. 477 (1905).

¹¹Routt v. Look, 180 Wis. 121 (1914).

¹²Hutchins v. School District No. 81 of Spokane County, 140 Wash. 548, 195 Pac. 1020 (1921).

caps found left in the basement of the school building constituted an attractive nuisance.¹³

But California would not allow recovery in attractive nuisance under the facts in the Kentucky case, unless it could be proved that the child was a trespasser. However, California courts would hold a school district liable in general negligence for leaving dynamite caps scattered in a school basement.

A tabulation of the forty-eight states shows that 22 states have accepted the doctrine in whole or in part, that 20 states have completely rejected the doctrine, and that five states as yet have not had any necessity for passing upon the doctrine. Only one state, Texas, has court decisions both accepting and rejecting the attractive nuisance doctrine.

Appendix A indicates a state by state point of view on the attractive nuisance doctrine, together with supporting case citations.

V. STATES RENDERING JUDGMENTS AGAINST SCHOOL DISTRICTS FOR MAINTAINING ATTRACTIVE NUISANCES

Two states, Washington and Kentucky, have issued judgments against school districts, holding that the school districts were maintaining an attractive nuisance.

¹³ Jones Savage Lumber Company, et al v. Thompson, 233 Ky. 198, 23 S. W. 2d, 373 (1930).

The State of California has had many cases in attractive nuisance filed against school districts, but none of them has ended in judgments against the school district. According to Judge Woodward of the San Joaquin Bar Association, "Since California has adopted the doctrine, a situation could arise at any moment in California, given the proper facts, where a plaintiff could be successful against a school district in an action based upon attractive nuisance."¹⁴

At first glance it may seem nominal to the California educator that to date only two states in the Union have rendered attractive nuisance judgments against a school district. It must be borne in mind that once a novel form of legal remedy is initiated in a given state in the United States, the use of the new remedy spreads rapidly into the sister states. At first it is accepted or rejected by the local courts. If after a few years the case of novel impression is found to be sound upon principal and authority, and fulfills a need of protecting person and property, it is universally accepted, first, by the courts, where it becomes a rule of law and secondly, by the local legislature, where it becomes a statute or a section of the local state code law.

To illustrate the point that legal remedies, once initiated, spread rapidly into a wave of legal reform,

¹⁴Judge M. G. Woodward, Superior Court, San Joaquin County. Opinion given in a personal interview, January 16, 1956. Permission to quote secured.

reference is made to the law school dissertation written in 1924 by Judge Raymond Dunne, Superior Court, San Joaquin County. The hypothesis of that dissertation was based upon "Theories as to the Survival of Tort Actions."¹⁵ It dealt with the effect of death upon the jural relations between the parties to a tort, where the one committing the tort died before the plaintiff recovered damages. The problem in the paper raised the question as to what rights the injured survivor might have. In 1924, except for four states, the survivor had no right of action surviving against the estate of the deceased wrongdoer. This line of judicial reasoning was based upon the common law ruling that a personal right of action died with the person. Such ruling holds true today unless the right of action has been kept alive by a statute. In 1956, thirty-two years later, almost all of the forty-eight states had provided by statute for recovery against the estate of the deceased wrongdoer.

More than a hundred years have passed since the courts ruled on the case of Lynch v. Nurdin in 1841. When Prosser wrote his Restatement, Section 339, in 1955, he standardized the fundamental elements of attractive nuisance. This provided the courts of the United States with an accepted outline of rules as to what constitutes attractive nuisance.

¹⁵Raymond M. Dunne, "Theories as to the Survival of Tort Actions." (Unpublished Juris Doctor dissertation, University of California, Berkeley, 1924), p. 70.

The gap between the ancient common law rule of no duty owed to a trespasser and the attractive nuisance doctrine has narrowed greatly.

CHAPTER IV

THE ATTRACTIVE NUISANCE DOCTRINE IN CALIFORNIA

In order to understand the doctrine of attractive nuisance in California, it might be well to include pertinent sections of Witkin's Summary of California Law.¹

Witkin has stressed four elements of the doctrine: the character of the dangerous instrumentality, its attractiveness to children, the knowledge by the owner of the danger involved to a child, how the acts of a third party might affect such a case, and what bearing does knowledge of the danger by the injured child have upon the case.

These elements affect recovery on the doctrine in California, which follows three distinct theories outlined in this chapter.

I. GENERAL STATEMENT OF THE ATTRACTIVE NUISANCE DOCTRINE

A child of immature years is expected to exercise only such care and restraint as pertains to childhood.² A reasonable person is expected to know this and to govern his actions

¹B. E. Witkin, Summary of California Law (6th ed., Vol. I; San Francisco: The Borden Printing Company, 1946), p. 748.

²Bowdoin v. Southern Pacific Railroad Company, 178 Cal. 634, 174 Pac. 664 (1918).

accordingly.³ A child likely to be injured cannot be expected to exercise the usual quantum of care, so a greater amount of caution is necessary upon the part of one whose act might cause the injury.⁴

Witkin's Summary of California Law on Attractive Nuisance. The attractive nuisance doctrine or "the rule of the turntable cases" grew up as an exception to the general rule that the landowner owes no affirmative duty of care to trespassers.⁵ It has been stated as follows:

One who places an attractive but dangerous contrivance in a place frequented by children, and knowing or having reason to believe, that children will be attracted to it and subject to injury thereby, owes a duty of exercising ordinary care to prevent the injury to them, and this because he is charged with the knowledge that children are likely to be attracted thereto and are usually unable to foresee, comprehend, and avoid the dangers into which he thus knowingly allures them.⁶

The doctrine involves the "balancing of opposing conveniences." In other words the duty is to use "ordinary prudence and foresight to prevent injury to children which might be expected where it can be guarded against, without placing undue burden upon the owner of land and his right to make beneficial use of it."⁷

In other words, it must be possible and practicable to install safeguards or otherwise prevent the danger

³Cahill v. Stone, 153 Cal. 571 (1908), 19 L. R. A. (N. S.) 1094.

⁴Foley v. California Horseshoe Company, 115 Cal. 184, 47 Pac. 42 (1896); Barrett v. Southern Pacific Company, 91 Cal. 296, 27 Pac. 666 (1891); Lompton v. Standard Bread Company, 48 Cal. App. 116, 191 Pac. 710 (1917); Waterman v. Visalia Electric Company, 23 Cal. App. 350, 137 Pac. 1096 (1913).

⁵Morse v. Douglas, 107 Cal. App. 196 (1930).

⁶Kataoka v. May Department Stores, 60 Cal. App. 177 (1943).

⁷Melendez v. City of Los Angeles, 8 Cal. 274 (1943).

without impairing the usefulness of necessary appliances. Thus, a turntable may be rendered safe by locking it, but a pond or reservoir cannot ordinarily be rendered inaccessible.⁸

Elements of the attractive nuisance doctrine:

1. The attraction must be such that children do not appreciate the danger
2. The attraction must be an artificial contrivance, in a place where the landowner should know that children are likely to trespass
3. Some courts say that the entry must have been caused by the very contrivance itself, the novelty of the thing.⁹

The character of the instrumentality. An owner of a thing dangerous and attractive to children is not always and universally liable for injury to a child tempted by the attraction. His liability is said to bear a relation to the character of the thing, whether common or natural, or artificial and uncommon, and to the comparative ease or difficulty of preventing danger without destroying the usefulness of the thing.¹⁰

Liability attaches only when the thing is novel in character, and is of such a nature as to virtually constitute a trap for children because of their ignorance and inexperience.

⁸Peters v. Bowman, 115 Cal. 345 (1896).

⁹B. E. Witkin, Summary of California Law (6th ed., Vol. I; San Francisco: The Borden Printing Company, 1946), p. 748; Hernandez v. Santiago O. G. Assn., 110 Cal. App. 229 (1930).

¹⁰Cahill v. Stone, 153 Cal. 571 (1908); Peters v. Bowman, 115 Cal. 345, 47 Pac. 113 (1896).

It has been said that the basis of the rule is that one person may have a dangerous contrivance which, if not properly guarded, will cause injury to others, but that the rule does not apply where the apparatus, not naturally dangerous to children, is designed for the express purpose of having children play thereon. School playground equipment, playground equipment on public or private property does not, then, come within the operation of the attractive nuisance doctrine.¹¹

The attractiveness to children. It is an essential ingredient in an action based upon the attractive nuisance doctrine that a child should be attracted to the premises by a natural curiosity and desire to play upon or with the contrivance.¹²

The doctrine has no application where the reason for a child's presence upon premises is a request of an employee of the owner.¹³ Such would be the case, for example, where a school principal permitted a teacher to take pupils to a factory, and while on the factory premises and at the

¹¹Solomon v. Red River Lumber Company, 56 Cal. App. 742, 206 Pac. 498 (1922).

¹²Skinner v. Knickerohn, 10 Cal. App. 596, 102 Pac. 947 (1900).

¹³Gianinni v. Campodonico, 176 Cal. 548, 169 Pac. 80 (1917).

invitation of the factory owner, the child was injured through the factory owner's lack of due care of some instrumentality or condition. The child could not recover for attractive nuisance because he was an invitee and not a trespasser. However, California decisions and codes provide the child under these facts adequate remedy against the factory for any negligence involved concerning the instrumentality or condition.

A contrivance must be more than merely attractive to the child. It must be novel in character, dangerous, and easily guarded. The one having control of the apparatus must be under positive duty to prevent children from playing thereon.¹⁴

The knowledge by the owner of the danger--the acts of a third party. In order that an owner of an attractive and dangerous instrumentality be held liable it must be shown that he knows, as a reasonably prudent man ought to have known, of the dangerous character of the contrivance. Liability does not attach where the defect was latent.¹⁵ The test then of whether the school district or its employees will be held liable is found in the answer to the following question: Did the school district or its employees know or

¹⁴Solomon v. Red River Lumber Company, 56 Cal. App. 742 (1922).

¹⁵Marsiglia v. Dozier, 161 Cal. 403, 19 L. R. A. (N. S.) 1094 (1911).

should have known or foreseen the danger regarding a particular instrumentality or condition on school property?

The weighing of the question of what constitutes ordinary care necessitates constant alertness. Common everyday matters call for the reasonable prudence of the common man. In technical matters, technically trained individuals are used to testify when, in their particular field, a reasonably prudent man is exercising ordinary care. There is a wide difference of the quantum of care required to operate a wheelbarrow, a steam locomotive engine, or an atomic reactor.

Likewise, the owner of an instrumentality is not liable where the dangerous condition is created by the intervening act of a third party, or where the injury does not occur in the natural course of the play of the children, but results from the malicious acts of another child. If a pupil is sitting on a school window ledge during recess or lunch time, and is pushed off and is injured by another pupil, the school district is not liable for the wanton or careless act of intervention. If a high school student steals chemicals from a school store room, takes them home, and an innocent neighborhood boy plays with these chemicals and is injured, the school district is not liable for an intervening act based upon larceny.

However, an owner of a dangerous instrumentality is not excused because of the fact that the contrivance is set

in motion by the act of other children, and that one of them who was injured had been attracted by the fact that such children are playing thereon.¹⁶ It may necessitate many children to start the momentum of a turntable, but that does not lessen the liability of the owner of the turntable for maintaining an attractive nuisance, merely because only one child was injured. As in the case of Solomon v. Red River Lumber Company, thirty children may be playing with a piece of playground equipment on a school ground. When the school board had first purchased the play apparatus it had been alluring and attractive to children. As the years rolled by a defect in the equipment occurred, and some well-meaning teacher without informing his immediate administrator, took it upon himself to change the nature of the equipment. It now was not only an alluring but also a dangerous contrivance. Here a teacher changed the nature of the playground equipment so that it became an attractive nuisance. The school in such a case would be held liable in attractive nuisance if the child were an after-school-hour trespasser--and in any event--for general negligence.¹⁷

The knowledge of the injured child. The attractive nuisance doctrine applies only where the instrumentality

¹⁶Barrett v. Southern Pacific Company, 91 Cal. 296 (1891).

¹⁷Solomon v. Red River Lumber Company, 56 Cal. App. 742 (1922).

which causes the injury is a novel and dangerous appliance, the consequences of which are not fully comprehended by the infant mind. It does not apply where the instrumentality is of such a nature that all persons--even children--are presumed to have knowledge of the danger attending its use, or where the circumstances of the case show that the infant had knowledge of the danger.¹⁸

Matters of common knowledge are not considered as instrumentalities or conditions within the purview of the attractive nuisance doctrine. California will not recognize such common dangers as ponds, pools, playground equipment, automobiles, stoves, fires, ladders, sidewalks, streets, buildings, trees, bridges, and a host of other common things, places, or objects, as instrumentally attractive nuisances. California considers that parents of ordinary prudence and care have raised their children with reasonable care and a full appreciation of the facts of the common dangers of life. It is the uncommon, the man-made artificial contrivances and conditions only, that will sustain the doctrine.

If a child knows the danger, how then can he be a child of "innocent and tender age" that was allured to his peril, innocently? The novelty of the danger, in California, must be such that no reasonable man could presume that a

¹⁸Barrett v. Southern Pacific Company, 91 Cal. 296, 27 Pac. 666 (1891).

child of tender years would have knowledge of its inherently dangerous qualities.

II. THE THREE THEORIES OF RECOVERY ON ATTRACTIVE NUISANCE IN CALIFORNIA

California court judgments on the attractive nuisance doctrine have been based upon three theories and two limitations on those theories, as follows:

1. The original theory supporting the attractive nuisance doctrine in California is that the owner or possessor of a dangerous contrivance is under a duty of anticipating that children of tender years will be attracted to it, get upon, use or play with it, and because he is under a duty of anticipating that result, he is charged with the further duty of guarding against the danger which children thus encounter.
2. The next theory that the California courts developed is that the appliance or condition which is dangerous but attractive to children too young to appreciate the danger, is in the nature of a trap for them. This is an exception to the well-recognized common law rule that no duty exists toward a trespasser except to refrain from willfully or wantonly injuring them. However, if anything which may properly be regarded as a trap is maintained on the premises under such circumstances as to indicate a reckless disregard for the safety of children whose presence may be reasonably anticipated, although they may be trespassers, there is liability for resultant injury.
3. The last theory developed was that the attractiveness of the dangerous contrivance acts as an implied invitation to children to approach and use or play with it. Under this theory the children are not considered as trespassers but as invitees, and entitled to the protection afforded by law to invitees. An owner or possessor of premises owes invitees the duty of

maintaining his premises in a safe condition and of exercising reasonable care to protect them from injury. Reasonable care, as applied to attractive nuisance, can be exercised by taking into consideration the propensities of children to play or meddle with a dangerous contrivance, the ability of such children to appreciate the danger, and their power to avoid.¹⁹

In Chapter V the court rulings from several selected cases will be analyzed in an attempt to reconcile the use of these three theories by the California courts.

¹⁹California Jurisprudence. Vol. XIX of Attractive Nuisance and Negligence (San Francisco: The Bancroft Whitney Company, 1925), pp. 625 et seq.

CHAPTER V

INTERPRETATION OF CALIFORNIA CODES ON ATTRACTIVE NUISANCE AS APPLIED TO SCHOOLS

As previously stated, the attractive nuisance doctrine is included within the field of negligence. This field, in California, is interpreted in three distinct codes: the Government Code, the Motor Vehicle Code, and the Education Code.

A short historical legislative review will show how amendments to these codes have broadened the liability for negligence against school districts, their officers, and employees.

I. IN GENERAL

The doctrine of non-liability for tort. The rule is well-established throughout the United States that school districts are not liable for the negligence of its officers, agents, or employees while acting in a governmental capacity, in absence of a statute expressly imposing such liability. Immunity from liability is based on the theory that the state is sovereign and cannot be sued without its consent.¹

¹Edwin M. Borchard, "Governmental Liability in Tort,"
34 Yale L. Rev. 1 (1924).

The California rule on school tort liability. According to Dr. Rolla Hamilton, Dean of the University of Wyoming Law School, California is the only state in which liability is imposed on school districts by express statutory provisions. Three statutes in this state relate to the question of liability. First, Government Code sections impose liability caused by defective or dangerous conditions of buildings, grounds, works or property of the school district if the condition is not remedied after a reasonable notice; second, a section of the Motor Vehicle Code which makes a school district liable for injuries or damage caused through the negligent operation of a motor vehicle owned by the district; and third, a provision in the Education Code to the effect that a school district shall be liable on account of injury to person or property arising because of the negligence of the district, its officers or employees. Taking these sections together they amount to a complete repudiation of the general rule of governmental immunity, and place school districts in California on the same basis of liability as individuals or corporations.²

The liability of teachers in tort. The general immunity from liability of districts in tort--if such exists--does

²Robert R. Hamilton, and Paul R. Mort, The Law and Public Education (Chicago: The Foundation Press, 1941), pp. 269-270.

not extend to employees of the district. Everyone, regardless of his position, is liable for his own torts. While teachers enjoy a measure of immunity from liability for reasonable punishment of pupils, that immunity does not extend to injury which is caused through wilful acts of negligence.³

The possibility of negligent action by teachers is very great due to the number of activities in which pupils engage as part of the school work and extra-curricula programs.⁴ Injuries resulting from manual training, laboratory work, and physical training have been the sources of a great number of negligence suits against both the district and teacher.⁵ In other words, a very high degree of care in supervision is necessary if the district or the teacher is to escape the charge of negligence.

II. STATUTES IMPOSING LIABILITY ON SCHOOL DISTRICTS FOR NEGLIGENCE

A review of pertinent code sections dealing with school district liability will specifically show that all

³ Robert R. Hamilton, and Paul R. Mort, The Law and Public Education (Chicago: The Foundation Press, 1941), pp. 273-275.

⁴ Ibid., p. 273.

⁵ Mastrangelo v. West Side Union High School District, 2 Cal. 2d, 540, 42 Pac. 2d, 634 (1935).

school districts, their officers, and employees may be liable for negligence.

Legislative history of statutory liability for negligence against school districts. Up to 1873 California had made no provision for a school district or its employees to be sued for negligence. Neither the early State Constitution nor the statutes provided for redress of any type against a school district. However, in the 1873-1874 Amendments to the Codes, a statutory provision was first legislated to this effect:

....school boards, trustees....are liable for any judgment against a school district for any salary due any teacher....on contract.⁶

In 1923, California by statute permitted a school district to be sued for negligence:

....school board....is liable for salary due any teacher on contract....and for any judgment against the district on account of any injury to any pupil because of the negligence of the district, its officers or employees.⁷

In 1931 the School Code, section 2.801, was amended broadening school district liability for negligence, thus:

⁶ Amendments to the Codes, 1873-1874 (Sacramento: G. H. Springer, State Printer, 1874), p. 96.

⁷ Statutes and Amendments to Codes of California, 1923 (San Francisco: The Bancroft Whitney Company, 1923), p. 298.

School trustees...are liable as such in the name of the district for any judgment against the district on account of any injury to person or property because of the negligence of the district, or its officers, or employees.⁸

In 1943 the School Code was again revised. The title of the code was changed from School Code to Education Code. Section 2.801 of the School Code became section 1007 of the present Education Code, affirming school district liability for negligence as first codified in 1923.⁹

Government Code, 53050, definitions. As used in this article:

1. "Person" or "public" includes a pupil attending public schools or any school or high school district.
2. "Public building" means any public street, highway, building, park, grounds, works, or property.
3. "Local agency" means any city, county, or school district.¹⁰

⁸ School Code, section 2.801, amended by Statutes, 1937, p. 414. Statutes and Amendments to the Codes (Sacramento: State Printing Office, Harry Hammand, State Printer, 1931).

⁹ Education Code, section 1007, enacted 1943, based on former School Code, section 2.801, as amended by Statutes of 1931. Political Code, section 1623, as amended by Code Amendments, 1873-1874 (San Francisco: The Bancroft Whitney Company, 1943).

¹⁰ West's Annotated California Codes, Government Code 53050 (St. Paul, Minnesota: West Publishing Company, 1955).

Government Code, 53051. Injuries from dangerous or defective condition of public property, basis of liability.

A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, person authorized to remedy the condition:

1. Had knowledge or notice of the defective condition
2. Failed for a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or take action reasonably necessary to protect the public against the condition.¹¹

Under these two Government Code sections a wealth of cases exist in California holding a political subdivision and its officers liable for tort.¹² California law school reviews amply illustrate carefully selected cases distinguishing between negligence and nuisance as these doctrines apply in practice in cases of municipal tort liability.¹³ The cases are legion under these statutes where school districts have been held liable in negligence for maintaining dangerous conditions.¹⁴

¹¹Ibid., 53051.

¹²Barton L. Gorman v. County of Sacramento, 92 Cal. App. 656 (1928); Schmidt v. City of Vallejo, 122 Cal. App. 5, 10 Pac. 2d, 107 (1932).

¹³Leon Thomas David, "Municipal Liability in Tort in California," 7 So. Cal. L. Rev. 214 (1933); vide, 6 So. Cal. L. Rev. 255 (1932); 12 So. Cal. L. Rev. 127 (1939); 26 Cal. L. Rev. 135 (1937).

¹⁴Whiteford v. Yuba City Union High School, 117 Cal. App. 462 (1897); Woodman v. Hemet Union High School District of Riverside, 136 Cal. App. 544 (1933); Castro v. Sutter Creek Union High School District, 25 Cal. App. 2d, 372, 77 Pac. 2d, 509 (1937); Boyce v. San Diego Union High School of San Diego County, 215 Cal. 293, 3 Pac. 2d, 30 (1931).

It might be well to add a word concerning school board members liability under the Government Code.

Government Code, 2000. Whenever a suit for damages resulting from:

1. Injuries caused by or due to the inefficiency or incompetency of any appointee or employee or any board or any member thereof, or:
2. Negligence in failing or neglecting to remedy the dangerous or defective condition of any public property, or take such action as is reasonably necessary to protect the public against the condition is brought against any board member, the cost of defending the suit, including attorneys fees, actually expended in the suit, is charged against the county, city, or school district of which the member was an officer, if the member had neither knowledge nor notice of:
 - (a) The inefficiency or incompetency of the appointee or employee at the time of the injury, or:
 - (b) The dangerous or defective condition.¹⁵

Motor Vehicle Code, 400. Liability of governmental agencies.

The State and every county, city and county, municipal corporation, the State Insurance Fund Districts, irrigation districts, school districts owning any motor vehicle is responsible to every person who sustains any damage by reason of death, or injury to person or property as a result of the negligent operation of any said motor vehicle by any officer, agent, or employee acting within the scope of his office, agency or employment.... and as such....any person so injured....may sue in any

¹⁵West's Annotated California Codes, Government Code 2000 (St. Paul, Minnesota: West Publishing Company, 1955).

court of competent jurisdiction in this State in the manner directed by law.¹⁶

Motor Vehicle Code section 400 also provides that the person or school district who may potentially be defendants in such a negligent action may protect themselves under this section with liability insurance.¹⁷

Education Code, 1007. Liability for personal injury and property damages, claim for damages, time for filing.

The governing board of any school district is liable as such in the name of the school district for any judgment against the school district on account of any injury to person or property arising because of the negligence of the district, or its officers, or employees in any case where a verified claim for damages has been presented in writing and filed with the secretary or clerk of the school district within...days after it has occurred. The claim shall specify the names, addresses of the claimant, the date and place of the accident, and the extent of the injuries or damage received.¹⁸

As stated by Hamilton¹⁹ this California statute Education Code, 1007, places a direct responsibility upon school districts, their officers, and employees, for the tort of negligence committed within the scope of the business

¹⁶West's Annotated California Codes, Vehicle Code 400 (St. Paul, Minnesota: West Publishing Company, 1955).

¹⁷Bates v. Escondido Union High School District, 133 Cal. App. 725 (1933); Meyers v. Hopland Elementary School District, 6 Cal. App. 2d, 590 (1935).

¹⁸West's Annotated California Codes, Education Code 1007 (St. Paul, Minnesota: West Publishing Company, 1955).

¹⁹Robert R. Hamilton, and Paul R. Mort, The Law and Public Education (Chicago: The Foundation Press, 1941), p. 269.

conducted.²⁰ There is no doubt that under the statute schools and school personnel are liable for their negligent acts.²¹ One who supervises, as in the case of a teacher, owes a duty of care,²² but the quantum of care is not that of the teacher being bound to such a degree of care as to anticipate negligence.²³

Two other Education Code sections are of importance to educators and administrators:

Education Code, 1026.

No member of the governing board of any school district shall be liable for accidents to children going to or returning from school, or on the playgrounds, or in connection with school work.²⁴

Education Code 1026 is to be construed that the board member had no knowledge either of the negligence or of the maintenance of an attractive nuisance, nor had the board taken any official cognizance of it--assuming that negligence did exist. Nothing in this section can be construed to mean

²⁰Woodman v. Hemet Union High School District of Riverside, 13 Cal. App. 544 (1934).

²¹Reithardt v. Board of Education of Yuba City, 43 Cal. App. 2d, 629 (1941).

²²Charonnat v. San Francisco Unified School District, 56 Cal. App. 2d, 840, 133 Pac. 2d, 643 (1943).

²³Frace v. Long Beach City High School District, 58 Cal. App. 2d, 566, 133 Pac. 2d, 260 (1943).

²⁴West's Annotated California Codes, Education Code 1026 (St. Paul, Minnesota: West Publishing Company, 1955).

that if in his official capacity a board member was aware of negligence, he would not be open to liability.²⁵

Education Code 1027 clarifies and sustains the position taken in Education Code 1026:

No member of the governing board of any school district shall be held personally liable for the death or injury to any pupil resulting from the participation in any classroom or other activity to which the pupil has been lawfully assigned unless negligence on the part of the member of the governing board is the proximate cause of the injury or death.²⁶

Section 1027 merely restates the general rule that everyone is liable for his torts. No one has immunity for his wrongful act if he be the proximate cause of the injury.

Since liability for negligence is imposed by statutes upon school districts, and since a cause of action under the attractive nuisance theory is based on general negligence, a cause of action under the attractive nuisance doctrine could be maintained against a school district by virtue of these consent-to-be-sued statutes.²⁷

²⁵Judge M. G. Woodward, Superior Court, San Joaquin County, in a personal interview, January 10, 1955. Permission to quote secured.

²⁶West's Annotated California Codes, Education Code 1027 (St. Paul, Minnesota: West Publishing Company, 1955).

²⁷J. Frank Coakley, District Attorney, Alameda County, in a letter dated, August 24, 1956. Permission to quote secured.

III. SELECTED ATTRACTIVE NUISANCE CASES
ON OFF-SCHOOL PROPERTY

Although the California cases on the doctrine follow three clearly defined theories as given below, university law reviews illustrate two supplementary theories. Broadly speaking, the two supplementary theories are in the nature of limitations. They are elemental requirements, a sine qua non, to bringing an action in attractive nuisance.

The three basic theories are:

1. The owner of the contrivance is bound to anticipate that children will enter and be harmed
2. The appliance or condition is in the nature of a trap, the peril of which immature children do not appreciate
3. The attraction acts as an implied invitation.

The two supplementary theories are:

1. The attractive nuisance must be artificial and man-made
2. The owner must not be burdened with costs which would destroy the use of the thing.²⁸

²⁸Eugene Garfinkle, "Torts; Children: Attractive Nuisance in California: Trap Doctrine Applied to Children: Restatement of the Law of Torts, Section 339," 41 Cal. L. Rev. 138 (1953), pp. 138-142; vide, 24 So. Cal. L. Rev. 504 (1951).

The cases where the owner is bound to anticipate that children will enter and be harmed.

Joseph Coil Barrett, by his guardian, etc. v. Southern Pacific Railroad Company, 91 Cal. 296 (1891). An eight year old boy played upon the railroad company's turntable, which was not protected by an enclosure. The boy injured his leg which had to be amputated. The railroad company was held liable for maintaining an attractive nuisance. The court held that the railroad should have reasonably anticipated that children would play upon the turntable when it was unguarded. This case, Barrett v. Southern Pacific Railroad Company, 1891, was the first California case on attractive nuisance.²⁹

The cases where the appliance or condition is in the nature of a trap.

Long v. Standard Oil Company, 92 Cal. App. 455 (1949). The Standard Oil Company excavated a pipe line ditch near a

²⁹Joseph Coil Barrett, by his guardian, etc. v. Southern Pacific Railroad Company, 91 Cal. 296 (1891). Other cases holding that the owner must reasonably anticipate that the thing is dangerous to children: Brown v. Southern California Edison Company, 120 Cal. App. 107 (1932); Pierce v. United Gas & Electric Company, 161 Cal. 176 (1911); Cahill v. Stone, 153 Cal. 571 (1908); Lambert v. Western Pacific Railroad Company, 135 Cal. App. 81 (1933); Clark v. Pacific Gas and Electric Company, 118 Cal. App. 344 (1931); also see for a good review on the Attractive Nuisance Doctrine, 19 California Jurisprudence 625, et seq., and Norse v. Douglas, 107 Cal. App. 196 (1930).

city residential area. Rain water and mud filled this ditch. A four year old wandered away from its home and was drowned in the water-filled excavation. The court held that this accumulation of water could be classified as a trap for children of young and tender years.³⁰

The California cases where the attraction acts as an implied invitation.

Faylor v. Great Eastern Quartz Mining Company, 45 Cal. App. 194 (1919). The Great Eastern Quartz Mining Company owned an abandoned old mine twenty-five feet off of a highway upon which school children passed daily. Passing school children often entered the mine, and played on the ore cars in the many tunnels. Due to winter rains, one tunnel caved into a stope. An eleven year old boy entered this tunnel and disappeared. Later, his body was found in the stope.

The court held as follows:

1. One theory upon which the attractive nuisance rests is that the attractiveness of the dangerous contrivance or machinery raised an implied invitation to children to go upon the property.

If, therefore, the owner places something which is easily accessible to children, and which is alluring and attractive to their childish propensities, and excites their curiosity to

³⁰Long v. Standard Oil Company, 92 Cal. App. 455 (1949). Other California cases that follow the trap theory on Attractive Nuisance are Loftus v. Dehail, 133 Cal. 214 (1941); Crane v. Smith, 23 Cal. App. 288, 144 Pac. 2d, 356 (1943); and King v. Simmons Brick Company, 52 Cal. App. 2d, 586 (1942).

play, it in effect amounts to an implied invitation to come upon the land and play.

2. By reason of this implied invitation such cases are sometimes said to be within the general and well-settled rule of law that the owner or occupant of land and buildings, who by invitation express or implied, induces persons to come upon his premises, is under a duty to exercise ordinary care to render the premises reasonably safe for them.³¹

Cases holding that the attractive nuisance must be artificial and man-made.

Beeson v. City of Los Angeles, 115 Cal. App. 122 (1931).

Facts:

A ten year old boy was playing in the city streets after a strong rain; the gutters and sewers were flooded. The boy, while playing, fell into a storm drain that had been left open by the city employees in order to permit the street and gutter flood to subside. The boy was drowned.

Held:

In order to constitute an attractive nuisance there must be an appliance or contrivance that is artificial, uncommon, dangerous and constituting a trap for a young child, the which can be made safe without destroying its usefulness.

Judgment for the Plaintiff.³²

³¹Faylor v. Great Eastern Quartz Mining Company, 45 Cal. App. 194, 187 Pac. 101 (1919); also on implied invitation, Bradley v. Thompson, 65 Cal. App. 226 (1924). The cases quoted within the courts opinion in the above case of Faylor v. Great Eastern Quartz Mining Company are leading cases in both Utah and California on the attractive nuisance being an implied invitation to the child to enter the land.

³²Beeson v. City of Los Angeles, 115 Cal. App. 122 (1931).

A California Law Review commentary on artificial waters within the attractive nuisance doctrine, states:

In California the application of the doctrine to artificial waters is in confusion. In the leading case, Peters v. Bowman, the Supreme Court of the State held that the theory could not be applied to natural waters. This was held inapplicable in Polk v. Laurel Hill Cemetery Association, wherein the court said that this was an obvious danger, but added, that it was settled in Peters v. Bowman case that a pond of water, whether natural or artificial, is not to be included in the same class with turntables and other complicated machinery.

But the attractive nuisance doctrine was applied to a body of artificial water in the Sanchez v. East Contra Costa Irrigation Company: in which case the court said that a body of water, an irrigation ditch in which a child was drowned because of a siphon hidden in the ditch, "it was a concealed contrivance which no one would suspect." But to show the inconsistency in these cases, in Hernandez v. Santiago Association, recovery was allowed for a drowning in an artificial body of water, "because," as the court opined, "there were unusual hidden hazards therein."³³

The stand taken in Peters v. Bowman on natural waters is supported by strong law review articles of the University of Pennsylvania and the University of Illinois:

Most courts refuse to apply the doctrine to water courses and pools, for the danger therein is apparent even to children of tender years. They know that water is dangerous in large bodies. The danger is

³³A. H. B., "Torts, Negligence: Attractive Nuisance: Bodies of Water," 26 Cal. L. Rev. 159 (1937). In connection with artificial waters and attractive nuisance vide leading California cases: Polk v. Laurel Hill Cemetery Association, 32 Cal. App. 624, 174 Pac. 418 (1922); Sanchez v. East Contra Costa Irrigation Company, 205 Cal. 515, 271 Pac. 1060 (1928); Hernandez v. Santiago Association, 110 Cal. App. 229, 293 Pac. 875 (1930); Melendez v. City of Los Angeles, 8 Cal. 2d, 741, 68 Pac. 2d, 971 (1937); Peters v. Bowman, 115 Cal. 345 (1896).

clearly apparent to children because water is typed as common to nature and hence known to all.³⁴

The cases where the owner is burdened with costs which destroy the use of the thing.

Henry Peters v. C. E. Bowman, 113 Cal. 345 (1896).

An eleven-year-old boy was drowned in a pond formed on a low lot by the natural run-off of rain water from high ground. The court held that there is no just rule to compel property owners to surround a natural body of water with an impenetrable wall. To safeguard all such natural waters from trespassers would burden adjacent landowners with excessive costs.³⁵

Margaret Jane Puchta v. N. Rothman, 99 Cal. App. 2d, 290 (1950). While a new building was partially constructed, the contractor ordered the removal of a protective barricade around a second floor ventilation shaft. This shaft was completely concealed by tar paper. Access to the second floor was easy for many children who played on the second floor, as the stairway was complete. A ten-year-old girl, while playing with companions, stepped on the tar paper concealing ventilation shaft. Although she suffered permanent injury, the court refused to grant her the judgment.

³⁴Illinois Law Rev. 67 (1935); and see 82 Univ. of Penn. L. Rev. 67 (1934).

³⁵Henry Peters v. C. E. Bowman, 115 Cal. 345 (1896).

The court held that an unfinished building has none of the characteristics of turntables, moving cars, etc. If the owner of a building became responsible merely because children were attracted, it would burden the ownership of property with a most preposterous and unbearable weight. It is evident that any barricade at the foot of the stairway of the building, of sufficient size and strength to keep children from going upstairs, would destroy the very purpose for which stairs were being built and retard the completion of the building.

Even under the attractive nuisance doctrine the owner is not expected to destroy or impair the usefulness of the property in order to safeguard trespassing children. This being so, then he surely cannot be held to such an onerous duty where the property is not an attractive nuisance, the rule being that an owner is under no duty to keep his property safe for trespassers.³⁶

However, one judge dissented and gave his reasons, as follows:

The complaint states a cause of action under the attractive nuisance doctrine. The defendant knew that the plaintiff played inside the building, and that the tar paper concealed a hole, nor did the plaintiff have knowledge of this concealment. This concealed peril was a trap. The removal of a piece of tar paper would not burden the owner with a preposterous and unbearable weight or any appreciable weight at all, particularly when measured against the lives and safety of little children known to play in the building.

With knowledge that little children played in the building, the defendant covered the entire floor with tar paper, including the ventilator opening, thus giving the deceptive appearance of a safe flooring to the ventilator opening, and the minor plaintiff deceived by this appearance, fell through the opening, thus springing the trap.

I would reverse the judgment.³⁷

³⁶Margaret Jane Puchta v. N. Rothman, 99 Cal. App. 2d, 290 (1950).

³⁷Ibid., p. 78.

IV. UNSUCCESSFUL ATTRACTIVE NUISANCE ACTIONS AGAINST
CALIFORNIA SCHOOL DISTRICTS

The fact that we do not have a California decision in attractive nuisance favoring a plaintiff against a school district means that the attorney for the plaintiff child failed to allege and prove one or more of the essential elements required to sustain an action under the doctrine.³⁸

A few of the unsuccessful attractive nuisance cases tried in the California courts are reviewed as follows:

Frace v. Long Beach City High School District, 58 Cal. App. 2d, 566 (1943). Two high school boys over fourteen years of age pilfered chemicals from a high school supply room. The two boys experimented with the stolen chemicals in a garage at the home of one of the boys. A young boy, eleven years of age, requested to experiment with these chemicals. He received severe injuries from a resulting explosion. When he sought recovery, claiming that the chemicals were an attractive nuisance, the court held as follows:

1. These chemicals were not in the open or exposed, the chain of causation was broken by the two thieving high school boys. They were the proximate cause of the injury, not the school. Hence the school is not liable for negligence, for those boys were unauthorized to take out the chemicals. Since they stole the chemicals, the rule applies that no responsibility attaches to the owner whose property is wrongfully taken.

³⁸Opinion of Lawrence Drivon, Chief Deputy District Attorney, San Joaquin County, Stockton, California, in a personal interview, August 19, 1956. Permission to quote secured.

2. The boys who stole the chemicals were over fourteen years old, and as high school students they were in the eyes of the law capable of committing crime.

In order to recover in attractive nuisance, the plaintiff would have had to prove that the defendant school district could anticipate that children would steal these dangerous chemicals. Having failed to prove this important element, plus the fact that there was a third party intervening factor breaking the chain of causation, there can be no liability in negligence for the defendant school district.³⁹

In Camp v. Peel, 1939, an eight year old girl seeks to collect damages for injury received while playing in a school auditorium under construction. The defendant, a plastering sub-contractor, had left some plaster on a scaffold in the uncompleted building. The school district was joined as a party defendant with Peel. The court said:

Neither the defendant Peel, nor the school district was liable either in attractive nuisance or negligence. In the first place, lime is common matter and not an attractive nuisance; and in the second instance, the injury was the result of acts over which neither Peel nor the school district had control, for the lime was thrown by other children than the plaintiff. This brings the case within the rule of no liability for a third party intervening cause; that is, the chain of causation was broken. There is nothing inherently dangerous in putty.⁴⁰

The Solomon v. Red River Lumber Company case in 1922 is the only California case wherein all the elements of attractive nuisance were found. However, the plaintiff's

³⁹Trace v. Long Beach City High School, 58 Cal. App. 2d, 566 (1943).

⁴⁰Camp v. Peel, et al., 53 Cal. App. 2d, 612 (1939).

attorney sued the wrong defendant. If the plaintiff had sued the school district instead of the contractor who made the playground apparatus, the court indicated that there may have been a recovery against the school district in attractive nuisance. Playground apparatus and equipment is not per se an attractive nuisance. If subsequent to the manufacture and use of the contrivance in its original state, some change is made in the nature of the thing so as to make it defective or dangerous, then attractive nuisance could very well lie against the employee or the school district who proximately caused the injury.

Solomon v. Red River Lumber Company, 56 Cal. App. 742 (1922). The Red River Lumber Company built and installed a playground apparatus on the grounds of the Westwood Public School. A heavy dump wagon wheel was attached to the top of a fourteen foot tree stump. Ropes were attached to the wheel rim, thus creating a May-pole type swing. This swing became defective after many years of use. Later, a teacher attached teeter boards at the end of the ropes to prevent children from playing with the swing. About twenty-five children played with this defective apparatus. The stump broke causing the massive wagon wheel to fall. It struck a nine year old boy, causing his death. The boy's father now seeks to sue the lumber company for building an attractive nuisance.

The court held that no negligence can be imputed, because the swing was constructed for the use of children. The apparatus was originally constructed for the very purpose for which the plaintiff was using it, that is, a plaything.

The element of trespassing is not involved, and it was entirely proper for the defendant to make the swing as attractive as possible to promote the purpose had in view. Playground equipment does not involve the novel and hidden danger that is regarded as so important in the turntable cases.

It was not the act of the defendant lumber company in building the swing for the playground that caused the injury, but rather the change made by a third party, the teacher, that was the cause of the boy's death.⁴¹

In Reithardt v. Board of Education, 1941, a fifteen year old Marysville High School girl suffered an injury when she was pushed off a window ledge by another girl during the lunch hour. The court said that the window ledge was not of a dangerous character, nor was the school district liable for the wilful misconduct of another student. The girl had charged in her complaint that a window ledge was an attractive nuisance, and that the inherent danger should have been foreseen as a perilous condition.⁴²

⁴¹Solomon v. Red River Lumber Company, 56 Cal. App. 742 (1922); vide, 8 Cal. L. Rev. 266 (1920); 19 Cal. L. Rev. 86 (1930); 26 Cal. L. Rev. 402 (1937); 38 Cal. L. Rev. 402 (); Hale v. Pacific Telephone and Telegraph Company, 42 Cal. App. 55, 183 Pac. 280 (1929) is worth examining for an exposition by the court that the entire attractive nuisance doctrine has nothing to do with proximate cause; Walker v. Pacific Electric Railroad Company, 66 Cal. App. 2d, 290 (1944), holds that a train is not an attractive nuisance, and that a 14 year old boy is sui juris, capable of knowing right from wrong and cannot plead innocent infancy.

⁴²Reithardt v. Board of Education, 43 Cal. App. 2d, 629, 111 Pac. 2d, 440 (1941); Ellis v. Burns Valley School District, 128 Cal. App. 550 (1933), a game of tag on a school ground is not inherently dangerous and a nuisance.

Many law suits on attractive nuisance have been filed in California against school districts which never culminated into final court judgments. It would take a life time to go through all the California County Clerk files of all the counties of the State to locate such actions.⁴³ One such case, Robert Vosburg v. College of the Pacific, Western Pacific Railroad, and Pacific Riding Academy, Doe One, Doe Two, was filed in the Superior Court of San Joaquin County in 1950.⁴⁴

In the Vosberg v. College of the Pacific case, a young child had been playing on the college lawns. Upon suffering burns caused from rubbish fire embers, he sought to recover on the ground that fire and ashes came within the doctrine: obviously fire and ashes are not novel dangers.

Although the many cases quoted in this chapter were unsuccessful, it is the opinion of Judge M. G. Woodward of San Joaquin County that at any moment now an action could arise that would make a California school district liable for attractive nuisance.⁴⁵

⁴³Judge George F. Buck, Superior Court, San Joaquin County, August 20, 1956. Permission to quote secured.

⁴⁴Vosberg v. College of the Pacific, et al., filed in the Superior Court, San Joaquin County, California, December 20, 1950. On file with the County Clerk, San Joaquin County.

⁴⁵Opinion of Judge M. G. Woodward, Superior Court, San Joaquin County, Stockton, California, in a personal interview, January 12, 1956. Permission to quote secured.

V. THE FACTORS WHICH TO DATE HAVE PREVENTED AN ATTRACTIVE
NUISANCE JUDGMENT AGAINST A CALIFORNIA SCHOOL DISTRICT

By now it should be apparent that rarely do California Courts agree on any one of the three California theories of recovery under the doctrine. Therefore, in order that the school administrator may improve his over-all picture of the doctrine, a concise summary is submitted of the reasons for California Courts denying the child an attractive nuisance judgment against a school district, as follows:

1. Where the child is under 14 years of age:
 - (a) The thing was a common contrivance, not novel.
 - (b) The child had knowledge of the danger; i.e., was not innocent.
 - (c) The owner owed no duty to anticipate that a child would suffer injury.
 - (d) The character of the thing held not that type of potential danger that the owner was under an affirmative duty to foresee the peril to a child.
 - (e) The child was an invitee, not a trespasser.
 - (f) The owner could not protect the child unless prohibitive costs destroyed the use of the thing--or--it would be too costly to properly guard the thing against peril to children.
 - (g) A third party intervening act was the proximate cause of the injury.

- (h) Owner of land not guilty of culpable negligence, as proximate cause of the injury.
 - (i) The thing was not a concealed danger or trap.
 - (j) The thing was not alluring.
2. Where the child is over 14 years of age:
- (a) The child is old enough at 14 years of age, in the eyes of the law, to appreciate the danger of the thing.
 - (b) The child stole the thing, hence the owner is not liable for the acts of a wrongdoer.
 - (c) The child was an invitee, and although the owner was guilty of culpable negligence for maintaining a dangerous condition, the child was not a trespasser.

These, then, comprise the judicial reasons for denying the child a judgment in attractive nuisance against a defendant either off school property or on school property.

VI. THE POSSIBLE SITUATIONS UNDER WHICH AN ACTION OF ATTRACTIVE NUISANCE MAY LIE AGAINST A SCHOOL DISTRICT

The implications of liability against a school district as the refined quantum of care under a multitude of possible circumstances in equally possible potential negligence actions are many. Several hypotheses are hereinafter presented, illustrating the potential liability of school administrators and school districts:

Where the pupil is of pre-school age. If the child is not enrolled in the school, he has no right to be there. Hence he is to be treated as a trespasser until evidence proves his relationship to the owner of the land is that of an invitee. As a trespasser, the child may recover under any one of the three California theories of attractive nuisance, if culpable negligence be proven against the school district.

Where the pupil has been expelled from the school. If the child has been expelled from the school, he has no right to be on school premises, unless the school authorities waived such right by requesting the child to enter the school premises on official school business. In oral waivers the schoolman should protect himself either with witnesses or by a written note or statement. If the child has been expelled, he comes upon the premises without the consent of the authorities.

Where the pupil is an unlicensed, uninvited visitor. If the child is an out-of-town pupil who enters the school land without authoritative permission--or not for school business purposes, the child is a trespasser, and as such the district is open to liability.

If the pupil lives in the town, but in a school district remote from the school district premises which he enters without right--and is a truant--he enters the premises

other than his own district presumably without a right to be there. Hence he is a trespasser, and may recover under the doctrine.

When school is not in regular session, as prescribed by the California Education Code. Let us assume that the pupil has had his day at school within the daily time limit prescribed by the Education Code, and that the child has been delivered to his mother's doorstep. Suddenly the child recalls some novel contrivance that he had seen on the school grounds and thereupon returns on his own to the school grounds to play upon this dangerous novelty. Technically, he is where he has no right to be, is a trespasser, and is able to hold the district potentially liable.

This situation could also happen on a weekend, a school or other legal holiday, or when regular school business has ceased to function. Here again the child would be where he was not supposed to be, hence a trespasser and the school district is open to a tort action under the doctrine.

Where the pupil is on other than his own campus property, nevertheless school district property. A school district may own one school building, or if a district is large it may own several hundred buildings or parcels of real estate. All of these buildings may not house classes; some may be warehouses, paint shops, tin shops, glazier shops, bus terminals, repair sheds, and other types of buildings or

parcels of land for maintenance, storage, and sundry educational needs. Within the meaning of "local agency" and "school district buildings" subject to actions of negligence, as mentioned in Government Code, 53050, 53051, Education Code, 1007, and Motor Vehicle Code 400, all real estate and personal property owned by a California school district is subject to the laws of general negligence in the State of California. It may be here again observed that under the statutes in California a pupil has an imposing array of legal weapons to use for any injury suffered while on school property.

If the pupil is not on his own school plant property, but due to his childish propensities and instincts seeks to play upon the greener pastures of "other school property," he is where he has no right to be, hence a trespasser, hence could sue the district if it maintained an attractive nuisance.

Where the pupil is on a field trip. Assume that the field trip has been properly cleared by the schoolman, thus bringing the pupil under school supervision and sanction by law. Technically, the child in this situation is an invitee for he has a right to be on the field trip. The bus-load of children arrives at the commercial plant, public institution, or venture other than school district property. The child breaks away from the supervision while on the field-trip-property, and is allured and injured by an attractive nuisance. Liabilities on such a case would be resolved as follows: The

school district owed the child a high degree of supervisory care which no court will refute. The school district--for its negligent supervision--could be joined as a party defendant in an action brought by the child. Since the commercial plant maintained the attractive nuisance, it was the proximate cause of the injury. However, if the child brought action on general negligence instead of attractive nuisance, the district could be liable for negligent supervision.

Assume that the field trip was over. The children had all been duly returned to their parental hearths. Then the child remembers the novel "plaything" seen during the afternoon field trip, wanders off and makes contact with it, sustaining injury thereby. There would be no school liability, for the owner of the thing that allured the child was not the school district.

The schoolman should be broadly aware that if the attractive nuisance theory applies to children of tender years, the doctrine applies primarily to elementary children and not to secondary students. Whether a child is sui juris or not is a question of fact for the court and the jury to decide. This distinction may raise a moot point or two as to how a jury might decide on an attractive nuisance case where a plaintiff was a fifteen year old mentally retarded child, or a sixteen year old moron, or a seventeen year old mongoloid. Would the landowner owe a duty to anticipate entry by such classes of persons? Are such persons properly

public institutional cases, and hence the district would owe no duty to anticipate their entry on the land? These are moot points, to which California Courts as yet offer no answer.

It is now clearly established that in order to sustain an action in attractive nuisance the key element is that the child must be one of tender years and a trespasser. A school district could be held in general negligence or the attractive nuisance doctrine if a breach of duty were owed by the district to the child who entered the land.

CHAPTER VI

ANALYSIS OF THE CALIFORNIA COURT DECISIONS ON ATTRACTIVE NUISANCE

The early California court decisions cited in this study have illustrated that the thing or condition that constituted attractive nuisance was in the nature of a "trap." The courts have construed that a trap exists when danger to life or limb is latent.¹

A review of legal commentaries will illustrate that false distinctions and fictional degrees of moral turpitude have been resorted to by the California courts in arriving at decisions in attractive nuisance cases. This has lead to confusions when applying the doctrine.²

I. THE HISTORICAL AND LEGAL ANALYSIS OF THE DOCTRINE IN CALIFORNIA

The early California courts very rarely allowed the "no liability to trespassers" rule to be circumvented. When concealed dangerous instrumentalities injured trespassers, the early courts allowed recovery under the "trap rule" on the fiction that an intentional battery had been committed. The "trap rule" holds that a landowner may

¹ Hannah v. Erlich, 102 Ohio State 176 (1921).

² 41 Cal. L. Rev. 138, 142 (1953).

not injure a trespasser intentionally or recklessly, by conscious disregard for his safety.³ The trap doctrine applies in favor of adults as well as children, while the attractive nuisance doctrine only protects children.⁴

The attractive nuisance doctrine being an extension of the trap doctrine, embodied the basic rules in its creation.⁵ As the theory enlarged, a new set of requirements for recovery soon evolved. The attractive nuisance doctrine the latter part of the nineteenth century could be summarized as follows:

One who owns an attractive but dangerous contrivance in a place frequented by children, and knowing, or having reason to believe, that children will be attracted to it and subject to injury thereby, owes the duty of exercising ordinary care to prevent such injury to them, and this because he is charged with knowledge that children are likely to be attracted thereto and are usually unable to foresee, comprehend, and avoid the dangers into which he is thus knowingly allured into.⁶

This is a restatement of the California theory that the landowner must foresee that his contrivance allures an innocent child to his peril.

Since the advent of attractive nuisance, the "trap" doctrine has been rarely used as a means of recovery for

³Long v. Standard Oil Company, 92 Cal. App. 455, 65 Pac. 2d, 837 (1949).

⁴Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379 (1941).

⁵Crane v. Smith, 23 Cal. App. 288, 144 Pac. 356 (1943).

⁶41 Cal. L. Rev. 138-142 (1953).

injuries to children. It is easier to gain recovery, under the attractive nuisance doctrine, which requires that the landowner exercise a greater degree of care than does the trap doctrine. Today the scope of attractive nuisance has so expanded in California that there is no situation where recovery for injuries to children should properly be allowed under the trap doctrine and not attractive nuisance. With regard to children, the trap doctrine has outlived its usefulness and should be eliminated by incorporation into the attractive nuisance doctrine.⁷ This has virtually been accomplished in Prosser's section 339, Restatement of the Law of Attractive Nuisance, wherein Prosser standardizes on a national basis some uniform rules on what constitutes an attractive nuisance.⁸

II. THE CURIOUS DISTINCTIONS IN CALIFORNIA DECISIONS THAT LEAD TO CONFUSION WHEN APPLYING THE DOCTRINE

One of the main reasons for existing judicial confusion is the name "attractive nuisance".⁹

⁷41 Cal. L. Rev. 138, 142 (1953).

⁸William L. Prosser, The Law of Torts. Sec. 339 of Restatement of the Law of Attractive Nuisance (St. Paul, Minnesota: West Publishing Company, 1955), p.

⁹41 Cal. L. Rev. 138, 141 (1953).

A further difficulty arises because the word "trap" is often used in attractive nuisance cases, but is rarely defined clearly. Sometimes the court uses the term "trap" to show wanton misconduct, and at other times--the word refers to enticement of the child to the land, as in the original attractive nuisance cases. On the other hand, other courts speak of "trap" as a part of the modern doctrine of attractive nuisance.¹⁰

Some California cases have been decided on the basis of the Public Liability Act of 1923, and other cases rely on both the attractive nuisance doctrine and the Public Liability Act of 1923.¹¹

Apparently the Act is relied on by courts only in cases where it is absolutely necessary to render justice. In Magnuson v. City of Stockton recovery was allowed on a section of the Act, where a child was drowned in a lake maintained by the city, and no witnesses being present, a district court allowed recovery by using the statutory presumption that one acts for his own safety.¹² That presumption is found in the California Code of Civil Procedure, Section 1963 (4), and reads as follows:

¹⁰41 Cal. L. Rev. 138, 141 (1953).

¹¹Public Liability Act of 1923, California Statutes, 1943, p. 134. California General Law, Act 5619 (Deering, 1949).

¹²Magnuson v. City of Stockton, 116 Cal. App. 532, 3 Pac. 2d, 30 (1931).

All presumptions are satisfactory, if uncontradicted. These are denominated disputable presumptions, and may be controverted by other evidence.¹³

Another curious distinction is found in cases which involve the storage of dangerous items. When a landowner has made an attempt to care for such items, such as dynamite caps, he is not liable for injury to a child who takes the caps from their place of storage. The child is said to be an actual trespasser. However, when the dangerous items are left scattered on the ground, the landowner is liable. The reasoning used is that the child--in the latter case--is held to be only a technical trespasser, having an implied invitation to come upon the land.¹⁴ The California Law Review in commenting on such cases had this to say:

Why cases and decisions are based on fictional degrees of moral turpitude is hard to see. It could be that the facts of the case in which safe storage had been attempted still did not indicate the use of ordinary care, or perhaps when those cases were decided, the courts did not wish to extend the landowner's liability.¹⁵

In the same California Law Review article the editor offers further commentary on California court decisions:

California courts have added to the obscurity by employing fictions and false distinctions when allowing recovery under attractive nuisance. This may be partly explained by a desire to allow recovery, caused by the

¹³California Code of Civil Procedure, Sec. 1963 (4). (San Francisco: The Bancroft Whitney Company, 1949).

¹⁴Bradley v. Thompson, 65 Cal. App. 226, 2 Pac. 572 (1924).

¹⁵41 Cal. L. Rev. 138, 143 (1953).

great emotional sympathy at play in cases involving injury to children, and also by an attempt on the part of the courts to fit the facts into the strict attractive nuisance rules.

Strange theories have persisted as a basis for denying recovery. California courts observing the general rule that water is not an attractive nuisance have held that there is no recovery for an injury resulting from natural, concealed holes in pools of water. But recovery has been allowed in cases involving artificially created holes. The rationale is that a child should know of natural holes concealed in a pool of water, but concealed artificial holes need not be foreseen. To heighten absurdity, holes formed by cracking cement to form a crevice have been held to be natural.¹⁶

The California Law Review editorial digest adds further commentary on judicial confusion in California concerning the interpretation and application of Prosser's Restatement of the Law of Attractive Nuisance, section 339, as follows:

Confusion is particularly great in cases which a municipality is the defendant. The Public Liability Act of 1923 sets up standards for recovery under California Government Code, 53051. It will be noted that this section subjects the landowner to liability only for injuries caused by artificial conditions on the land. The meaning of artificial conditions was thought to have been settled in California when in Long v. Standard Oil Company, section 339 of Prosser's Restatement of the Law of Attractive Nuisance was applied to camouflage a pool of water. In Blaylock v. Coates, the Long case was relied on, section 339 was not cited, but very similar tests were used by the court to allow recovery for injuries sustained from a concealed oil sump. "Artificial condition" as applied by the Long case, clearly was not used in the sense of a mechanical contrivance, but in the broader meaning of any condition not found naturally on the land.

¹⁶ Ibid., 143 (1953); vide Sanchez v. East Contra Costa Irrigation Company, 205 Cal. 515, 271 Pac. 1060 (1928), recovery allowed for an artificially created water hole; but in Melendez v. Los Angeles, 8 Cal. 2d, 741 (1937) holes formed by cement cracking in an artificial water course held to be natural.

However, in Fuchta v. Rothman, 1950, a California Court of Appeal asserted this state draws a distinction not found in section 339. The court intimated that generally speaking, the California rule on attractive nuisance is substantially in accord with Prosser's Restatement of the Law of Attractive Nuisance, section 339, but the cases which we have cited show lines of distinction which the California courts have drawn. A building under construction for one thing, being immobile, is readily distinguishable from an attractive movable vehicle or piece of machinery. In applying the rule our courts draw the line at a situation where the protective measure would destroy or impair the usefulness of the property itself. Thus California limits recovery to certain specific situations. If the strict limitation imposed by the Fuchta case, 1950, is followed, the growth of attractive nuisance during the last sixty years is discarded. It is important to keep the burden of landowners to a minimum in imposing liability under the attractive nuisance doctrine, but to restrict the doctrine so completely that only injuries from one class of conditions fall under it, not only imposes great hardship, but refuses to acknowledge the truth of the doctrine. The Restatement of the Law of Attractive Nuisance has recognized the conflict between society's duty to protect children and the burden which must be imposed on the landowner if this objective is to be carried out.

Section 339 of the Restatement of the Law of Attractive Nuisance limits the application of the attractive nuisance doctrine specifically to three requirements:

1. The trespasser must be foreseeable
2. Use of the land must not be impaired
3. The condition must not be such that the trespasser does or should realize the danger.

California courts have imposed these limitations, but in view of the Fuchta case, an additional limitation of a specific type of condition has been imposed.¹⁷

¹⁷24 So. Cal. L. Rev. 504 (1951); vide 41 Cal. L. Rev. 138, 144 (1953); and also Fuchta v. Rothman, 99 Cal. App. 2d, 285, 221 Pac. 2d, 744 (1950); William L. Prosser, The Law of Torts, §339 of Restatement of the Law of Attractive Nuisance (St. Paul, Minnesota: West Publishing Company, 1955), p.

Admitting that these editorial comments have in a measure analyzed the confusions and conflicts regarding the application of the attractive nuisance doctrine in California, the writer of these editorials does not take into consideration the rapid encroachments of science, the increasing population problems, nor the fact that judges are human beings subject to many disconcerting social pressures.

Regarding the law review commentaries on the natural and artificial water cases involving the attractive nuisance doctrine, the editor pointedly indicates that a river or other natural stream or body of water should be as much within the doctrine, as is an artificial body of water which conceals a dangerous instrumentality. Such a view would deny one of the elemental premises upon which the attractive nuisance doctrine was founded; i.e., that the thing must be an artificial man-made thing.

In the matter of the law review editor's commentary on the court's application of section 339 of the Restatement of the Law of Attractive Nuisance--if under the Restatement--the elements of an attractive nuisance action are too broad or too narrow, then either the doctrine or the Restatement are inadequate for relief in all cases. If the doctrine is to be retained as a remedy, it should be modified.¹⁸

¹⁸₂₄ So. Cal. L. Rev. 504 (1951).

CHAPTER VII

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Summary. The purpose of this study was to determine the circumstances and conditions prerequisite to liability under attractive nuisance as it applies to public schools in the State of California.

The material, sources, and data for this thesis were obtained through reviewing selected court cases and all pertinent California codes and statutes. Research was done in both education and law libraries. Interviews were had with county defense counsels, district attorneys, superior court judges, law school professors, and professors of education.

The law of negligence was clarified as a basis for a lawsuit under the attractive nuisance doctrine. The elements of negligence were defined, and the legal relationship between the parties was shown.

An historical review of the doctrine was made of all cases, from the pioneer cases in England (1841) and the United States (1873), to Prosser's Restatement of the Law of Attractive Nuisance, published in 1955. An extension of the doctrine to many things and conditions was pointed out. A study was made of the acceptance or rejection of the doctrine in the several states. Special note was made of the states which rendered judgments against school districts for maintaining attractive nuisances.

Witkin has defined the four principal elements of the doctrine in his Summary of California Law. These are stated together with the three theories of recovery on attractive nuisance acceptable to the California courts.

The California codes, namely, the Government Code, the Motor Vehicle Code, and the Education Code, implant broad liability against school districts for negligence. A review was made of the legislative history of statutory liability for negligence against school districts.

The factors which to date have prevented an attractive nuisance judgment against a California school district depends upon two age groups, as follows: (1) where the child is under fourteen years of age

- (a) The thing was a common not a novel contrivance.
- (b) The child knew of the danger.
- (c) The owner owed no duty to anticipate that a child would be injured.
- (d) The child was an invitee, not a trespasser.
- (e) The owner could not protect the child unless prohibitive costs destroyed the use of the thing.
- (f) A third party intervening act was the cause of the injury.
- (g) The owner was not guilty of negligence.
- (h) The thing was not a concealed danger or trap.
- (i) The thing was not alluring.

- (2) where the child is over fourteen years of age
- (a) The child is old enough to appreciate the danger of the thing.
 - (b) The child stole the thing.
 - (c) The child was an invitee.

There are many possible situations under which an action of attractive nuisance may lie against a school district.

The following situations may be noted:

1. Where the pupil is of pre-school age.
2. Where the pupil has been expelled from school.
3. Where the pupil is an unlicensed, uninvited visitor.
4. When school is not in regular session, as prescribed by the California Education Code.
5. Where the pupil is on other than his own campus property, nevertheless school district property.
6. Where the pupil is on a field trip.

An analysis of the doctrine in California shows that the early California cases regarded the thing or condition that constituted an attractive nuisance in the nature of a trap. The curious distinctions in California decisions led to confusion when the courts sought to apply the doctrine by using any one of the three acceptable theories of recovery. However, the modern view is that where a proper type of danger

exists, the trespassing of a child must merely be foreseeable by the owner of the land.

Conclusions. While this study has been neither intensive nor extensive enough to warrant any definite conclusions on both the nature and extent of the attractive nuisance doctrine, certain general conclusions may be drawn, as follows:

1. The California codes--Government Code, Motor Vehicle Code, and the Education Code--through sundry sections allow redress for negligence against school districts, their officers, and employees.
2. The attractive nuisance doctrine is a tort within the field of negligence.
3. The elements constituting attractive nuisance, as well as the three California theories allowing recovery under the doctrine, are technical, confusing, and often misleading. This, to date, has prevented a successful judgment under the doctrine.
4. Since the California courts are in conflict when applying both the elements and the theories on the attractive nuisance doctrine, this thesis concludes that an injured child should seek legal redress under the general negligence laws imposed by statutes against school districts.

Recommendations. As a result of analyzing the historical and legal aspects of the doctrine in California, the following recommendations are made:

1. That a statistical study of California school tort cases be made in order to disclose the extent to which insurance covering school tort liability is a protection to the school district.
2. That the school administrator be thoroughly acquainted with the factors causing negligence. The purpose of this endeavor would be to aid the administrator in reducing both insurance costs and claims for negligence.
3. That a comprehensive study be made of potential situations under which an action for attractive nuisance may be brought against a school district.
4. That greater emphasis should be placed upon the study of negligence in the various schools of education so that classroom teachers may assist the school administrators wisely in avoiding negligence actions against the schools where they are employed.

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APPENDIX A

A SUMMARY ON HOW THE ATTRACTIVE NUISANCE DOCTRINE IS ACCEPTED OR REJECTED AMONG THE SEVERAL STATES

A brief summary, state by state, illustrates the lack of accord among the several states of a standard or uniform formula on the doctrine:

Alabama. Accepts the doctrine,¹ stating that attractive nuisance is common prudence.

Arizona. Rejects the doctrine on the grounds that the defendant landowner is entitled to assume that the plaintiff's natural guardians (parents) will protect him from danger.²

Arkansas. Accepts the doctrine; the turntable theory not only applies to turntables, but to machinery, instrumentalities, appliances, or conditions of any kind that are dangerous, and yet calculated to attract children who may be too young to know of their dangerous character.³

California. Accepts the doctrine; the duty is owed by the owner not to maintain a trap or concealed danger and to refrain from wanton injury. The thing must be novel and artificial or man-made, and its utility not impaired by protective guards. It is a dangerous condition which the ordinary man would foresee where children are concerned. This is the only state consenting by statute, suits in negligence against school districts.

¹Gandy v. Copeland, 204 Ala. 366 (1920).

²Salladay v. Old Dominion Copper Mining Co., 12 Ariz. 124 (1909).

³Nashville Lumber Company v. Bushel, 96 Ark. 469 (1910).

⁴Barrett v. Southern Pacific Railroad Company, 91 Cal. 296 (1891). This is the original attractive nuisance case in the State of California, and involved a railroad turntable.

Colorado. Accepts the doctrine; anything that is on a street or on land, that attracts and allures a child, is an attractive nuisance.⁵

Connecticut. No duty is owed to an infant trespasser or licensee, negligence is an adequate remedy.⁶

Delaware. Accepts the doctrine.⁷

Georgia. Rejects the doctrine, this is a government immunity state, hence the state or its political subdivisions are not liable in negligence.⁸

Idaho. Accepts the doctrine.⁹

Illinois. Accepts the doctrine, the attraction amounts to an implied invitation to come upon the premises.¹⁰

Indiana. Rejects the doctrine, if there is no reason to anticipate that a child will come upon the land, there is no duty owing; if there is an injury to person or property the Indiana courts apply the general rules of negligence.¹¹

Iowa. Accepts the doctrine, if it attracts and allures and the child is injured, the landowner is liable.¹²

⁵Denver City Tramway v. Nicholas, 35 Colo. 462 (1906).

⁶Wilmot v. McPadden, 79 Conn. 367 (1906).

⁷Hurd v. Phoenix Company, 7 Boyce (Del.) 332 (1918).

⁸Ferguson v. Columbus Railroad Company, 75 Ga. 637 (1885).

⁹York v. Pacific and Northern Railroad Company, 8 Idaho 574 (1902).

¹⁰Stollery v. Cicero and P. Street Railroad Company, 243 Ill. 290 (1909).

¹¹Indianapolis v. Immelman, 168 Ind. 530 (1886).

¹²Davis v. Malvern Light & Power Company, 186 Iowa 884 (1919).

Kansas. Accepts the doctrine, and applies it to both public and private corporations or municipalities.¹³

Kentucky. Accepts the doctrine, if an injury from a dangerous device can be reasonably anticipated by the landowner.¹⁴

Louisiana. Rejects the doctrine, but as in Indiana will hold the defendant landowner on negligence.¹⁵

Maine. Rejects the doctrine, the court refused on the ground that the doctrine changed a sentimental obligation into a legal duty.¹⁶

Maryland. Rejects the doctrine, on the grounds that the presence of the child upon the land is not to be reasonably anticipated.¹⁷

Massachusetts. Rejects the doctrine, because of the fact that a child is a trespasser, does not create a duty where none otherwise existed.¹⁸ This is strictly a Common Law state.

Michigan. Rejects the doctrine, holding that the duty toward a trespassing child is the same as toward an adult.¹⁹

Minnesota. Rejects the doctrine, the innocence of a trespasser does not vicariously establish a legal duty against the landowner to protect the child from injury.²⁰

¹³Schaubel v. Manhattan, 102 Kan. 430 (1918).

¹⁴Gnau v. Ackerman, 166 Ky. 258 (1915).

¹⁵Palermo v. New Orleans Ice Mfg. Co., 130 La. 833 (1912).

¹⁶McMenn v. New England Telephone and Telegraph Company, 113 Maine 519 (1915).

¹⁷Merganthau v. Kirby, 79 Md. 182 (1894).

¹⁸Morrissey v. Eastern Railroad Company, 126 Mass. 377 (1879).

¹⁹Jawarski v. Detroit Edison Company, 210 Mich. 317 (1920).

²⁰Erickson v. Great Northern Railroad Company, 82 Minn. 60 (1900).

At an earlier date the Minnesota courts had adopted the doctrine, "what an express invitation would be to an adult, the temptations of an attractive (nuisance) plaything is to a child of tender years."²¹

Mississippi. Accepts the doctrine if the thing is artificially created.²²

Missouri. Accepts the doctrine, in this state an attractive nuisance is the equivalent of an invitation to enter the land, and if the thing attracts the child, no actual knowledge on the part of the owner that it does, need be put in evidence.²³

Montana. Accepts the doctrine, in this state the child is--as in one of the five California theories of attractive nuisance--an implied invitee.²⁴

Nebraska. Accepts the doctrine, for a condition on a highway for which a municipality was held liable.²⁵

New Hampshire. Rejects the doctrine, there is no duty owed to a trespasser, even if an infant.²⁶

New Jersey. Rejects the doctrine, and severely criticizes the attractive nuisance doctrine.²⁷

²¹Keefe v. Milwaukee and St. Paul Railroad Company, 21 Minn. 207 (1875).

²²McComb City v. Hayman, 124 Miss. 525 (1924).

²³Morrisson v. Phelps Stone Company, 203 Mo. App. 142

²⁴Driscoll v. Clarke, 32 Mont. 172 (1905).

²⁵Omaha v. Richards, 49 Neb. 244 (1896).

²⁶Clark v. Manchester, 62 N. H. 577 (1883).

²⁷Turies v. N. Y. S. and W. R. Co., 61 N. J. L. (N. J.) 314 (1891).

New York. Rejects the doctrine; only if the child has a right to be on the land, or the thing is alluring, inherently dangerous, and then recovery will only be allowed under general negligence.²⁸

North Carolina. Accepts the doctrine, the attraction must be the proximate cause of the injury.²⁹ California rejects the proximate cause theory where attractive nuisance is concerned; the California court stated, "the entire doctrine of attractive nuisance has nothing to do with proximate cause."³⁰

North Dakota. Rejects the doctrine even though as yet local state courts have never had occasion to apply the doctrine; rejection is on grounds the adequate remedy is provided by general negligence.³¹

Ohio. Rejects the doctrine, holding that it is not the duty of the landowner to make land safe for infant children to come upon it without invitation.³²

Oklahoma. Accepts the doctrine, "the conditions with respect to which property owners owe such a duty are obviously dangerous, artificial, and attractive conditions which can be made safe without appreciable impairment of the beneficial use of the land."³³

²⁸Parkes v. New York Telephone Company, 120 Misc. (N. Y.) 459, 198 N. Y. S. 698 (1923).

²⁹Lineberry v. North Carolina Railroad Company, 187 N. C. 786 (1924).

³⁰Hale v. Pacific Telephone and Telegraph Company, 42 Cal. App. 55, 183 Pac. 280 (1919).

³¹American Law Reports. Vol. XXXVI, of Attractive Nuisance. (San Francisco: The Bancroft Whitney Company, 1941), p. 37.

³²Wheeling & L. E. Railroad Company v. Harvey, 77 Ohio St. 235 (1907).

³³Shawnee v. Cheek, 41 Okla. 227 (1913).

Oregon. The necessity for adopting or rejecting the attractive nuisance doctrine has not as yet arisen.

Pennsylvania. Rejects the doctrine, on common law grounds of no duty owed to a trespasser except to refrain from wilful or wanton injury, the court explicitly said, "there is no duty owed where none otherwise exists."³⁴

Rhode Island. Rejects the doctrine, holding that there is no duty toward an infant trespasser, nor any reason to anticipate that a child would come upon the defendant's property.³⁵

South Carolina. Accepts the doctrine; court declares itself bound by broad humanitarian views, quoting the ancient common law maxim, "sic utero tuo et alienum non laedas," (one must so use their land as to not injure another).³⁶

South Dakota. Accepts the doctrine, the landowner owes a duty to protect the child of tender years from an attractive nuisance.³⁷

Tennessee. Accepts the doctrine, recovery can be had if the plaintiff can prove that the landowner had actual knowledge of the danger.³⁸

Texas. Both accepts and rejects the doctrine in a long line of cases, attractive nuisance has had a very checkered career in Texas. The doctrine is accepted if the attraction was especially attractive.³⁹ But there is no liability if the landowner's negligence was not the proximate cause of the injury.⁴⁰

³⁴McMullen v. Pennsylvania Railway Co., 132 Pa. 107 (1890).

³⁵Bishop v. Union Railroad Co., 14 R. I. 314 (1884).

³⁶Frank v. Southern Cotton Oil Co., 78 S. C. 10 (1907).

³⁷Baxter v. Park, 44 S. D. 360 (1921).

³⁸Cooper v. Overton, 102 Tenn. 222 (1899).

³⁹San Antonio Light & Power Co. v. Morgan, 92 Tex. 98 (1898).

⁴⁰Evansich v. Gulf Coast & Southern Railroad Co., 71 Tex. 24 (1884).

Utah. Accepts the doctrine, because an attractive nuisance is in effect an invitation to children of tender years to come upon the premises and play.⁴¹

Vermont. Rejects the doctrine, outright repudiation.⁴²

Virginia. Rejects the doctrine, for there is no duty on the part of the landowner for active diligence to a trespassing child attracted upon the premises.⁴³

Washington. Accepts the doctrine, for where there is dangerous machinery likely to allure children into danger, and which is close to highway or playgrounds, the landowner is liable.⁴⁴ Several judgments have been rendered against school districts under the attractive nuisance doctrine.

West Virginia. Rejects the doctrine, here again the old common law speaks, "the fact of infancy raises no duty on the part of the landowner, where none otherwise existed as against a trespasser."⁴⁵

But where an invitation to use the landowner's premises (school) can be implied, the landowner (school) is under a duty to use ordinary and reasonable care to prevent injury to children coming thereon.⁴⁶

Wisconsin. Accepts the doctrine, for the owner owes a duty of ordinary care to protect children from peril.⁴⁷

⁴¹Charvoz v. Salt Lake City, 42 Utah 455 (1913).

⁴²Bottom v. Hawkes, 84 Vt. 370 (1911).

⁴³Walker v. Potomac Railroad Company, 105 Va. 226 (1906).

⁴⁴Ritz v. Wheeling, 45 W. Va. 267 (1898).

⁴⁵McAllister v. Seattle Brewing and Malt Company, 44 Wash. 179 (1906); Heva v. Seattle School Dist., 110 Wash. 668 (1920).

⁴⁶Diottiallavi v. United Pochantas Coal Co., 95 W. Va. 692 (1924).

⁴⁷Webster v. Corcoran Brothers, 156 Wis. 576 (1914).