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DEMISE OF THE "ATTRACTIVE NUISANCE" CONCEPT

One of the most provocative areas of tort litigation appears in cases involving the query of the attractive nuisance doctrine. When a possessor of land maintains a condition upon his land which is likely to cause bodily harm to children and there is reasonable cause to anticipate the uninvited presence of children, should the landowner be held accountable for the death or injury of a trespassing child? Should the landholder be under a legal duty to make compensation for the child's injuries or death?

These questions have proved anything but simple to answer. On the one hand is the recurring instinct that tells us that a man's home is his castle, and that a landowner's rights and privileges are sacrosanct and need no justification.[1] On the other hand is a humanitarian conscience which reminds us of an instinctive obligation nature has placed on every adult for the care and protection of the community's young.[2]

It is the purpose of this article to first analyze the law in Mississippi as it relates to landholders and child trespassers, and secondly to compare Mississippi's law in this area with that of other states. Finally it is the author's intention to illustrate and hopefully justify Mississippi's need for a rational modification in this area of law to meet contemporary standards.

THE LAW IN MISSISSIPPI

General Rule: Definitions and Duties of Care

Mississippi has embraced the traditional or common law definitions of persons coming onto the premises of another.[3] These definitions were stated succinctly by the court in *Hoffman v. Planter's Gin Co., Inc.*[4] Therein the distinctions were noted and it was stated that an *invitee* is one who enters the premises of another with an expressed or implied invitation.[5] Under Mississippi law a landholder owes one who is an invitee the duty to use reasonable care in all circumstances.[6]

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[1]"A man's home has always been considered his castle—a domain where secure from intrusion he might lawfully do as he would, so long as he did not interfere with the legal rights of others." Ryan v. Towers, 128 Mich. 463, 479, 87 N.W. 644, 649 (1901).

[2]"[W]e are clothed with a trusteeship as to the care for those of tender years." Johnson v. Wood, 155 Fla. 753, 756, 21 So. 2d 353, 355 (1945).

[3]*See* Allen v. Yazoo & M.V.R.R. Co., 111 Miss. 267, 71 So. 386 (1916); Ingram-Day Lumber Co. v. Harvey, 98 Miss. 11, 53 So. 347 (1910); Illinois Central R.R. Co. v. Arnola, 78 Miss. 787, 29 So. 768 (1901).

[4]358 So. 2d 1008 (Miss. 1978).

[5]*Id.* at 1011. *See* Langford v. Mercurio, 183 So. 2d 150, 154 (Miss. 1966); Wright v. Caffey, 239 Miss. 470, 474, 123 So. 2d 841, 842 (1960); Kelly v. Sportsman's Speedway, Inc., 224 Miss. 632, 643, 80 So. 2d 785, 790 (1955).

[6]Braswell v. Economy Supply Co., 281 So. 2d 669, 677 (Miss. 1973); Strand Enterprises v. Turner, 223 Miss. 588, 603, 78 So. 2d 769, 773 (1955).

A *licensee* is one who enters the premises of another pursuant to a license or with the implied permission of the owner.[7] Mississippi law is that a landholder owes the licensee the duty of refraining from willfully or wantonly injuring the entrant,[8] and the duty to abstain from setting traps or pitfalls which expose the licensee to harm.[9] The duty owed to a licensee was expanded in 1978, when in *Hoffman* the court stated that a standard of ordinary or reasonable care was due the licensee when the injury complained of was proximately caused by the landholder's affirmative or active negligence.[10]

A *trespasser* is one who enters without a license or an invitation.[11] Mississippi law requires that a landholder owes a trespasser the duty to refrain from willfully and wantonly injuring him.[12] The classification of trespasser embodies a broad spectrum, from the felon, intent on criminal harm, to the inquisitive child who seeks only to gratify his curiosity.[13]

Exception to the General Rule concerning Children Trespassers: The Attractive Nuisance Doctrine

Strict adherence to the traditional standards of care based upon status and duties owed produced shocking results in cases involving trespassing children. Under the traditional rules no consideration was to be given to a child's age or his ability to recognize or comprehend dangers. Recovery was denied even in those instances where the landholder with comparative ease could have eradicated the menace without interfering with his own unrestricted use of the property. This was also true where the probability of harm to the child was great.

In the latter part of the nineteenth century a rebellion against the application of the traditional rules regarding trespassing children be-

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[7]358 So. 2d at 1011.

[8]Astleford v. Milner Enterprises, 233 So. 2d 524, 526 (Miss. 1970); Marlon Investment Co. v. Conner, 246 Miss. 343, 351, 149 So. 2d 312, 315 (1963); Dry v. Ford, 238 Miss. 98, 102, 117 So. 2d 456, 458 (1960).

[9]Marlon Investment Co. v. Conner, 246 Miss. 343, 351, 149 So. 2d 312, 316 (1963).

[10]358 So. 2d at 1013.

[11]*Id.* at 1011; Kelly v. Sportsman's Speedway, Inc., 224 Miss. 632, 643, 80 So. 2d 785, 790 (1955).

[12]*See* McGee v. Smith & Sons, Inc., 357 So. 2d 930, 931 (Miss. 1978); Ausmer v. Sliman, 336 So. 2d 730, 731 (Miss. 1976); Langford v. Mercurio, 183 So. 2d 150, 157 (Miss. 1966); Kelly v. Sportsman's Speedway, Inc., 224 Miss. 632, 648, 80 So. 2d 785, 793 (1955). "Where the misconduct is wilful, there is an intentional injury. If it is wanton, there is an intentional and wrongful act or admission whose resultant harm is consciously previsioned and recklessly ignored or disregarded." Covington v. Carley, 197 Miss. 535, 542, 19 So. 2d 812, 818 (1944).

[13]"Infants have no greater rights to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon landowners to expect and to prepare for their safety." United Zinc & Chemical Co. v. Britt, 258 U.S. 268, 278 (1922).

gan in the United States. Mississippi's first breach with the traditional duties of care owed the trespassing child occurred in 1887 in the case of *Mackey v. City of Vicksburg*.[14] The six-year old child in that case was allowed to recover damages for injuries received on the property of another, despite the fact that there was no breach of the traditional duty owed him.[15] The basis for allowing recovery in this traditional nonliability situation was the principle established in 1873 in the landmark United States Supreme Court decision of *Sioux City Railroad Co. v. Stout*.[16] It was in this case that the special rule or exception to the general rule concerning trespassing children first appeared in America.

In *Stout* a six-year old child was injured while playing on an unguarded unlocked railroad turntable which was located entirely upon the railroad company's property. The child was a trespasser, yet the Court rejected the traditional concept of duty owed the child as such and found the railroad company liable for the child's injuries caused by the turntable.[17] The Court stated that though the railroad company did not owe strangers the same degree of care it owed its customers, this did not exempt the railroad from liability caused by the company's negligence.[18]

The Supreme Court's decision in *Stout* caused major problems in its application to later cases because the Court in ignoring the traditional rules governing child trespassers and determining liability failed, in the alternative, to find a legal duty which the landowner would be held to owe the child.[19] Notwithstanding this, the Mississippi Supreme Court embraced the special rule concerning child trespassers enunciated by *Stout*, and in the early cases of *Mackey, Spengler v. Williams*,[20] and *City of Vicksburg v. McLain*,[21] granted the trespassing child relief.

The difference between the rationale of *Stout* and that of the subsequent Mississippi cases was that the Mississippi cases found liability based on the foreseeability of injury and not merely on the rights and obligations of property ownership.[22] In *Mackey* the court stated that if a landholder could have anticipated the probability of a child's actions

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[14]64 Miss. 777, 2 So. 178 (1887).

[15]*Id.* at 783, 2 So. at 180.

[16]84 U.S. 657 (1873).

[17]*Id.*

[18]*Id.* at 661. *See* Union Pacific R.R. Co. v. McDonald, 152 U.S. 262 (1894); Lynch v. Nurdin, 113 Eng. Rep. 1041 (1841).

[19]"[I]t seemed to have been assumed without much discussion that the railroad owed a duty to the boy." United Zinc Co. v. Britt, 258 U.S. 268, 275 (1922) (criticizing *Stout*).

[20]67 Miss. 1, 6 So. 613 (1889).

[21]67 Miss. 4, 6 So. 774 (1889).

[22]*See* Temple v. McComb City Elec. Light & Power Co., 89 Miss. 1, 8, 42 So. 874, 875 (1906); Spengler v. Williams, 67 Miss. at 4, 6 So. at 613; City of Vicksburg v. McLain, 67 Miss. at 11, 6 So. at 775; Mackey v. City of Vicksburg, 64 Miss. at 783, 2 So. at 180.

by the exercise of reasonable forethought, it is the landholder's duty to guard against the danger. Failure to do so would be a failure of duty from which the landholder would not be relieved even though the child was a trespasser.[23]

The special rule concerning trespassing children which began with *Stout* and was carried on in Mississippi by *Mackey* and other cases was given many names: the *Stout* doctrine,[24] the turntable doctrine,[25] and the attraction or allurement theory.[26] The term "attraction" or "allurement theory" was contrived by legal scholars early in the twentieth century. The theory was based upon a rationale laid down by an old English case, *Townsend v. Walten*.[27] In *Townsend* a landholder was found liable for baiting traps to lure a neighbor's dog.[28] Applying the rationale of *Townsend* it was reasoned that if a landholder maintained on his land a condition which was instinctively alluring or attractive to children, the landholder was in fact some sort of Pied Piper whose maintenance implied an invitation for the child to enter. This concept of liability based upon attraction or allurement became known as the attractive nuisance doctrine.[29]

The Mississippi Supreme Court enunciated Mississippi's first expressed "attractive nuisance" doctrine in 1928 in the case of *Lucas v. Hammond*.[30] Basically the court stated that anyone maintaining a dangerous instrumentality on their premises which was easily accessible and attractive to children, and who permitted the condition to exist with the knowledge that young children were in the habit of frequenting the area, and yet failed to use ordinary care in preventing injury, would be liable for any resulting injury to such a child.[31]

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[23]64 Miss. at 783, 2 So. at 180.

[24]W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 59 at 364 (4th ed. 1971).

[25]*See, e.g.*, Salter v. Deweese-Gammill Lumber Co., 137 Miss. 229, 238, 102 So. 268, 270 (1924); Dampf v. Yazoo & M.V.R.R., 95 Miss. 85, 48 So. 612 (1909); Temple v. McComb City Elec. Light & Power Co., 89 Miss. 1, 42 So. 874 (1906).

[26]*See, e.g.*, Temple v. McComb City Elec. Light & Power Co., 89 Miss. 1, 7, 42 So. 874, 875 (1906); Spengler v. Williams, 67 Miss. 1, 2, 6 So. 613, 613 (1889); Mackey v. City of Vicksburg, 64 Miss. 777, 783, 2 So. 178, 180 (1887).

[27]103 Eng. Rep. 578 (1808).

[28]*Id.*

[29]*See, e.g.*, Lucas v. Hammond, 150 Miss. 369, 381, 116 So. 536-37 (1928); Salter v. Deweese-Gammill Lumber Co., 137 Miss. 229, 238, 102 So. 268, 270 (1924); Temple v. McComb City Elec. Light & Power Co., 89 Miss. 1, 7, 42 So. 874, 875 (1906).

[30]150 Miss. 369, 116 So. 536 (1928).

[31]*Id.* at 381, 116 So. at 536-37.

> One who maintains dangerous instrumentalities or appliances on his premises easily accessible to children and of a character likely to attract them in play, or permits dangerous conditions to remain thereon with the knowledge that children are in the habit of resorting thereto for amusement, and who failed to exercise ordinary care to prevent children playing thereto, is liable to a child *non sui juris* who is injured thereby, and who did not know and appreciate the danger incurred by him in playing with the instrumentality or in the vicinity of the dangerous condition, or was too young to be charged with such knowledge. *Id.*

Limitations on the Application of the Attractive Nuisance Doctrine

The special rule as applied to trespassing children espoused by cases such as *Stout* and *Mackey* appeared to be unrestricted as to its applicability. But for anyone who regarded this new theory as a panacea, disappointment was in store. The early 1920's evidenced a nationwide trend in restricting the application of this special doctrine.

In Mississippi the move to restrict the new doctrine's applicability was immediate. The very case which first expressly verbalized a solution to the difficult question concerning children trespassers, and labeled it Mississippi's "Attractive Nuisance Doctrine," *Lucas v. Hammond,* placed limitations on its use. *Lucas* stated that before the doctrine could be applicable the instrumentality which caused the injury must have been in a location easily accessible to children.[32] Because of this restriction the very case which enunciated Mississippi's doctrine denied recovery for the child.[33]

The move to restrict the doctrine's applicability was not limited to Mississippi. The United States Supreme Court which started the whole attractive nuisance doctrine concept in 1873 with *Stout,* some fifty years later in the case of *United Zinc & Chemical Co. v. Britt,*[34] stated that the doctrine should be very cautiously applied.[35]

Cases subsequent to *Lucas* manifested a further circumvention of the doctrine's usefulness. The Mississippi Supreme Court in *McComb v. Hagman*[36] stated that the doctrine would not be applicable unless the instrument of danger was of artificial construction.[37] In *Salter v. Deweese-Gammill Lumber Co.*[38] the court further held that the instrumentality must possess characteristics that are *both* attractive and alluring,[39] and according to *Zinc* it was necessary that the allurement or attractiveness of the instrumentality induced the child to enter the property. The child's discovery of the instrumentality's presence after the entry would be insufficient.[40]

In the Mississippi case of *Gordon v. C.H.C. Corp.*,[41] the court stated that in order to invoke the doctrine, the danger must have been hid-

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[32]150 Miss. at 381, 116 So. at 537.

[33]*Id.*

[34]258 U.S. 268 (1922).

[35]*Id.* at 275."[I]t may be held that knowingly to establish and expose, unfenced, to children . . . something that is certain to attract them, has the legal effect of an invitation . . . . But the principle, if accepted must be very cautiously applied." *Id. See, e.g.,* Gordon v. C.H.C. Corp., 236 So. 2d 733, 735 (Miss. 1975).

[36]124 Miss. 525, 87 So. 11 (1920).

[37]*Id.* at 536, 87 So. at 12.

[38]137 Miss. 229, 102 So. 268 (1924).

[39]*Id.* at 240, 102 So. at 270.

[40]United Zinc & Chemical Co. v. Britt, 258 U.S. 268, 276 (1922).

[41]236 So. 2d 733 (Miss. 1970).

den or concealed.[42] In *Thomas v. Magnolia Tree Service Co.*,[43] the court stated that the instrumentality must have been the proximate cause of the injury.[44] In *Thomas* a ten-year old child was struck by an automobile while observing the operation of machinery near a city street. It was claimed that the machinery constituted an attractive nuisance. Recovery was denied on the basis that the automobile and not the machinery was the proximate cause of the injury.[45]

Other cases held that the doctrine would not be applicable in those situations where the danger was obvious and known.[46] Concerning the issue of knowledge, it was stated that the evidence had to show that the child was accustomed to entering the sphere of danger and the owner must have had knowledge of the child's repeated entries.[47] Further it was required that the child be of such a tender age and so inexperienced as to be unable to fully comprehend the danger.[48]

In *Harkins v. City of Carthage*,[49] the court stated that the doctrine could only be applied to trespassers.[50] If a youngster was fortunate enough to avoid all the other restrictions placed on the doctrine, but was held to be a licensee, the attractive nuisance doctrine would offer no relief.

Finally, the Mississippi Supreme Court in *Jackson v. City of Biloxi*,[51] stated that an instrumentality must be more than just dangerous; it must be inherently dangerous.[52] This had the effect of limiting the doctrine's applicability to railroad turntables,[53] explosive materials,[54] and electrical conduits.[55] Other Mississippi cases excluded as a

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[42]*Id.* at 736.

[43]247 Miss. 357, 154 So. 2d 282 (1963).

[44]*Id.* at 363, 154 So. 2d at 284.

[45]*Id.* at 364, 154 So. 2d at 284.

[46]Salter v. Lumber Co., 137 Miss. at 239, 102 So. at 270.

[47]Lucas v. Hammond, 150 Miss. at 381, 116 So. at 537.

[48]McComb v. Hagman, 137 Miss. at 239, 102 So. at 270.

[49]284 So. 2d 530 (Miss. 1973).

[50]*Id.* at 531.

[51]272 So. 2d 654 (Miss. 1973).

[52]*Id.* at 658. *Contra*, Haddad v. First Nat'l Stores, Inc., 109 R.I. 59, 63, 280 A.2d 93, 97 (1971).

> [T]he liability under the rule should not be predicated upon the inherent danger of the condition or object. Such an inflexible guide ignores the reason for the rule. The more rational and realistic approach is to consider the injuring mechanism or condition together with the age and sophistication of the child. *Id.*

[53]Dampf v. Yazoo & M.V.R.R., 95 Miss. 85, 48 So. 612 (1909).

[54]Shemper v. Cleveland, 212 Miss. 113, 54 So. 2d 215 (1957); Hercules Powder Co. v. Wolf, 145 Miss. 388, 110 So. 842 (1927); McTighe v. Johnson, 114 Miss. 862, 75 So. 600 (1917).

[55]272 So. 2d at 658.

matter of law water hazards,[56] both natural and artificial, fire,[57] and embankments[58] from the doctrine's operation.

Circumscription became proscription and except for the irreconcilable conclusion of a few early cases where liability was imposed, it has become virtually impossible to find a case that can hurdle all the obstacles. Considering the fact that the Mississippi Supreme Court has not ruled favorably for the child in a child trespasser case since the early 1920's, the question should be raised whether Mississippi has the right to even call itself an attractive nuisance state.

THE PRESENT STATUS OF THE ATTRACTIVE NUISANCE DOCTRINE IN MISSISSIPPI

The latest Mississippi case concerning the attractive nuisance doctrine was decided by the state supreme court in January of 1980. *Hughes v. Star Homes, Inc.*,[59] involved a ten-year old boy who was killed by a falling two-hundred pound concrete slab that had been placed upright along the side of a newly dug septic tank. The septic tank was located on the lot adjoining the child's home where a new house was under construction. The slab had been placed in the upright position to facilitate an inspection of the septic tank by the county health department. Soon after the inspection was completed the child evidently climbed into the septic tank and in his attempt to climb out caused the slab to fall. The builders and developers of the subdivision were able to avoid liability by claiming that the injured child was a trespasser. The court dismissed the applicability of the attractive nuisance doctrine by simply stating, "a septic tank is not inherently dangerous."[60] It was of no consequence that an agent of Star Homes admitted that the slabs positioned as they were constituted a highly dangerous condition.[61] Star Homes' agent also admitted that it was common knowledge that the area was frequented by minor children. In fact the agent testified that he not only saw the child, but actually spoke to him only ten minutes before the child's death.[62]

One cannot help but question how draconian the Mississippi rule is that in effect exacts the cost from one whose only wrong is nature's immaturity, and excuses the adult who had reason to expect the harm and cites as his only defense that he has no duty to pay for his carelessness, since he owns the land.

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[56]*See* Ausmer v. Slimen, 336 So. 2d 730, 731 (Miss. 1970); McGill v. City of Laurel, 252 Miss. 740, 746-47, 173 So. 2d 892, 894-95 (1965); Vincent v. Barnhill, 203 Miss. 740, 751, 34 So. 2d 363, 365 (1948).

[57]272 So. 2d at 658.

[58]Coleman v. Associated Pipeline Contractors, Inc., 444 F.2d 737, 741 (5th Cir. 1971).

[59]379 So. 2d 301 (Miss. 1980).

[60]*Id.* at 305.

[61]Hughes v. Star Homes, 379 So. 2d 301, 307 (Miss. 1980) (Sugg, J., dissenting).

[62] 379 So. 2d at 303.

THE MODERN TREND IN THE UNITED STATES

The law as it relates to the trespassing child has indeed progressed through several substantial changes in the last one hundred years. First came the turntable cases such as *Stout* which changed the traditional concept that a landholder owed no duty to the trespassing child, and which later gave rise to the attractive nuisance doctrine. Then came the many restrictions and qualifications that have destroyed the doctrine's usefulness. The Mississippi Supreme Court's latest word on the status of the doctrine would lead one to believe that the entire nation has totally rejected the theory of liability expounded by *Stout*. In 1928 in *Lucas v. Hammond*,[63] the Mississippi court, quoting from the United States Supreme Court's decision in *United Zinc Co. v. Britt*,[64] stated that the attractive nuisance doctrine should be limited in its application.[65] Also in *Hammond* it was noted that a majority of the states had rejected the doctrine.[66] In 1980, in *Hughes v. Star Homes*,[67] the Mississippi court quoted both of these 1928 statements.[68]

It would seem that the Mississippi Supreme Court has been oblivious to the dramatic changes in the laws concerning the trespassing child in America in the last fifty years. During these years, there has been in other jurisdictions, a dramatic reaction against the limitations and qualifications placed on the doctrine. This reaction has led to the revival of the straight negligence approach of the turntable cases, but with a declaration that the landholder owes trespassing children a duty to exercise *reasonable care* for their protection. This duty derives from the apparent likelihood of the presence of the children and the harm *reasonably* to be anticipated.[69]

This reaction has taken various forms in different states. The most liberal reaction has been in California, Colorado, Hawaii, and New Hampshire. In these jurisdictions the courts have completely abolished the distinctions between the status of invitee, licensee, and trespasser,[70]

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[63]150 Miss. 369, 116 So. 536 (1928).

[64]258 U.S. 268 (1922).

[65]150 Miss. at 381, 116 So. at 536; 258 U.S. at 275.

[66]150 Miss. at 381, 116 So. at 536.

[67]379 So. 2d 301 (Miss. 1980).

[68]*Id.* at 304.

[69]"Any discussion of the categories of invitee, licensee and trespasser would be quite inadequate without the observation that these distinctions have been more and more obscured during the last century as courts have moved toward imposing on owners and occupiers a single duty of reasonable care." Kermarec v. Compagnie Generale Transatlantique, 245 F.2d 175, 180 (2nd Cir. 1957) (Clark, C.J., dissenting), *rev'd*, 358 U.S. 625 (by a unanimous Supreme Court, adopting Chief Justice Clark's view).

[70]Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971); Pickard v. City and County of Honolulu, 51 Haw. 134, 452 P.2d 445 (1969); Ouellette v. Blanchard, 116 N.H. 552, 364 A.2d 631 (1976).

and have stated that the classification of one who enters the property of another is no longer to be the determinative factor. The new test in these states is whether or not the landholder managed his property as a reasonable and prudent man would in view of the probability or foreseeability of harm to others.[71]

Several other states have expanded the duty owed trespassers to a similar reasonable care standard by legislating "expected" trespasser statutes.[72] Basically such statutes provide that a landholder can incur liability for injury to a trespasser if the trespasser is one whose presence is known or reasonably should have been known.[73]

The third and most widely accepted approach is that formulated in the *Restatement (Second) of Torts*, section 339.[74] This section entitled "Artificial Conditions Highly Dangerous to Trespassing Children,"[75] raises the duty owed the trespassing child, by stating that a possessor of land is subject to liability for bodily harm to trespassing children caused by a structure or artificial condition he maintains, if the possessor had or should have had knowledge of the child's presence. Other factors to be considered under section 339 are the child's age and maturity, the possessor's knowledge of the risk of harm, and the burden or cost to the possessor to eliminate the risk.[76] Missing from the *Restatement* section is the element of attractiveness or allurement essen-

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[71]*See, e.g.*, 69 Cal. 2d at 115, 443 P.2d at 568, 70 Cal. Rptr. at 104; 175 Colo. at 548, 489 P.2d at 314; 51 Haw. at 136, 452 P.2d at 446; 116 N.H. at 555, 364 A.2d at 634.

[72]*See, e.g.*, Daugherty v. Hippchen, 175 Va. 62, 7 S.E.2d 119 (1940); Adams v. Virginian Gasoline & Oil Co., 109 W. Va. 631, 156 S.E. 63 (1930). *See also* British Ry. Bd. v. Herrington, [1972] 1 All E. R. 749.

> Where an occupier knew that there were trespassers on his land . . . and also knew of the physical facts in relation to the state of the land that would constitute a serious danger to persons on the land . . . the occupier was under a duty to take reasonable steps to enable the trespasser to avoid the danger. *Id.* at 750.

[73]*See, e.g.*, 175 Va. at 67, 7 S.E.2d at 121; 109 W. Va. at 637, 156 S.E. at 65.

[74]RESTATEMENT (SECOND) OF TORTS § 339 (1965).

[75]*Id.*

[76]*Id.* This section provides:

> A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition he maintains upon the land, if:
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> (a) the place where the condition is maintained is one the possessor knows or should know that such children are likely to trespass, and
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> (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and
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> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
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> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to the children involved, and
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> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the child. *Id.*

tial to the attractive nuisance doctrine.[77] More importantly, section 339 is not a "restatement" of the attractive nuisance doctrine. Therefore considerations based on this section are not hampered by the string of legal decisions that has in the past fifty years destroyed the effectiveness of that doctrine.

At present thirty-five states have adopted section 339 as the operative law in child trespasser cases.[78] In light of the fact that Mississippi's attractive nuisance doctrine, which at one time purported to do justice and equity in such cases, is now nonfunctional, it would seem reasonable to suggest that Mississippi join the majority of states and adopt section 339 of the *Restatement* as its law in child trespasser cases.

The Cost of Adopting Section 339

The adoption of section 339 in Mississippi would raise the duty owed by a landholder to a trespassing child from the present standard

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[77]"The better authorities now agree that the element of 'attraction' is important only in so far as it may mean that the trespass is to be anticipated, and the basis of liability is merely the foreseeability of harm to the child . . . ." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 77 at 619 (1941).

[78]Tolbert v. Gulsby, 333 So. 2d 129, 135 (1976); Taylor v. Alaska Rivers Nav. Co., 391 P.2d 15, 17 (Alas. 1964); Giacona v. Tapley, 5 Ariz. App. 494, 498, 428 P.2d 439, 443 (1967); Wolfe v. Rehbein, 123 Conn. 110, 113-14, 193 A. 608, 609-10 (1937); Beaston v. James Julian, Inc., 49 Del. 521, 526-27, 120 A.2d 317, 320 (1956); Cockoman v. R. E. Vaughan, Inc., 82 So. 2d 890, 892 (Fla. 1955); Davis v. McDougall, 94 Idaho 61, 63, 480 P.2d 907, 909 (1971); Hendricks v. Peabody Coal Co., 115 Ill. App. 2d 35, 43-46, 253 N.E.2d 56, 60-61 (1969); Wozniczka v. McKean, 144 Ind. App. 471, 487-88, 247 N.E.2d 215, 223-24 (1969); Rosenau v. City of Esterville, 199 N.W.2d 125, 136 (1972); Brittain v. Cubbon, 190 Kan. 641, 646, 378 P.2d 141, 145-46 (1963); Louisville & N. Ry. Co. v. Vaughn, 292 Ky. 120, 127, 166 S.W.2d 43, 47 (1942); Jones v. Billings, 289 A.2d 39, 42-43 (1972); Soule v. Massachusetts' Elec. Co., 390 N.E.2d 716, 720 (1979); Taylor v. Matthews, 40 Mich. App. 74, 81, 198 N.W.2d 843, 846 (1972); Gimmestad v. Rose Brothers Co., 194 Minn. 531, 536, 261 N.W. 194, 196 (1935); Arbogast v. Terminal R.R. Ass'n, 452 S.W.2d 81, 84-85 (Mo. 1970); Nichals v. Consolidated Dairies of Lake County, Inc., 125 Mont. 460, 463-64, 239 P.2d 740, 742 (1952); Gubalke v. Anthes, 189 Neb. 385, 390-91, 202 N.W.2d 836, 840 (1972); Strange v. South Jersey Broadcasting Co., 9 N.J. 38, 45-46, 86 A.2d 771, 780 (1952); Shelby v. Tolbert, 56 N.M. 718, 721, 249 P.2d 498, 500 (1952); Barker v. Parnossa, Inc., 39 N.Y.2d 926, 928-29, 352 N.E.2d 880, 882 (1976); Dean v. Wilson Const. Co., 251 N.C. 581, 588, 111 S.E.2d 827, 830 (1960); Arron v. Plummer, 132 N.W.2d 198, 201 (N.D. 1964); Stevens v. Ohio Fuel Gas Co., 175 Ohio 257, 261, 193 N.E.2d 517, 520 (1960); Pocholec v. Giustina, 224 Ore. 245, 252, 355 P.2d 1104, 1107-08 (1960); Martinelli v. Peters, 413 Pa. 472, 473, 198 A.2d 530, 531 (1964); Haddad v. First Nat. Stores, Inc., 109 R.I. 59, 64, 280 A.2d 93, 96 (1971); Everett v. White, 245 S.C. 331, 338, 140 S.E.2d 582, 584 (1965); Morris v. City of Britton, 66 S.D. 121, 124, 279 N.W. 531, 532 (1938); Bloodworth v. Stuart, 221 Tenn. 567, 572, 428 S.W.2d 786, 789 (1968); Massier v. Copland, 149 Tex. 319, 324, 233 S.W.2d 449, 451-52 (1950); Eaton v. Savage, 28 Utah 2d 353, 354, 502 P.2d 564, 565 (1972); Mazurkiewicz v. Pawinski, 32 Wis. 211, 215-16, 145 N.W.2d 186, 191 (1966); Afton Elec. Co. v. Harrison, 49 Wy. 367, 377, 54 P.2d 540, 542 (1936).

See also Cooper v. Diesel Serv., Inc., 254 Ark. 743, 750, 496 S.W.2d 383, 387 (1972) (Fogleman, J., dissenting); Kimberlin v. Lear, 88 Nev. 492, 496, 500 P.2d 1022, 1024

of refraining from *willfully* and *wantonly* injuring the child, to that of using *reasonable care,* but only in those instances where *all* the elements of section 339 are present. This change would not serve to make the landholder the insurer of trespassing children.[79] The test is one of reasonable care, and where all that a reasonable man would do to assure against harm is done and injury still occurs, then no liability would attach.[80]

If section 339 were to be adopted the issue of whether the landholder acted in a reasonable and prudent manner, would be decided by a jury. This in itself would be a drastic change in Mississippi because it has been the rule rather than the exception for the court to take from the jury those cases concerning child trespassers.[81] This stems perhaps in part from the fear that a jury's sympathy for an injured or deceased child will too often result in verdicts that are contrary to the court's charge. If in reality this is a flaw, it is one attributable to the jury system generally. It should be remedied by devising a better system for resolving issues of liability—one that is free from the influence of human sympathies and persuasions, which have no place in the deliberations by which legal obligations are determined. Furthermore the Mississippi Supreme Court is no stranger to the laws concerning remittiturs or the granting of new trials. These laws should provide no less adequate remedies in child trespasser cases than in other cases where liability is based on the conception of human fault.

Any monetary burden placed on the landholder due to an adoption of section 339, and a resulting change to the duty of reasonable care and tespassing children, would seem to be slight. Only in circumstances where an injury occurs and a landholder is found guilty of not using reasonable care would the monetary risk be great.

Initially, the adoption of section 339 would require very little of the landholder. In railroad turntable cases such as *Stout,* a duty of reasonable care would have required only that the turntable be locked. In a case such as *Spengler v. Williams,*[82] which involved falling building and industrial materials, a duty of reasonable care would have re-

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(1972) (Zenoff, C.J., dissenting). "[W]e should adopt the doctrine as stated in the Restatement [§ 339] and join the majority of the states." *Id.* at 497, 500 P.2d at 1024.

[79]*See, e.g.,* Ryan v. Tower, 128 Mich. 463, 87 N.W. 644 (1901), *overruled* by Lyshak v. City of Detroit, 351 Mich. 230, 80 N.W.2d 596 (1958).

[80]"[T]he city was not required to build its fence so that no person could climb over it, but merely to exercise reasonable care to prevent trespassing children from being hurt by the dangerous condition,—to erect a reasonable barrier, to take reasonable precaution, to keep trespassing children out of the dangerous area." Wytupeck v. Camden, 25 N.J. 450, 458, 136 A.2d 887, 892 (1957).

[81]*See, e.g.,* Hughes v. Star Homes, Inc., 379 So. 2d 301 (Miss. 1980); Jackson v. City of Biloxi, 272 So. 2d 654 (1973); Gordon v. C.H.C. Corp., 236 So. 2d 733 (1970); Gill v. City of Laurel, 252 Miss. 740, 168 So. 2d 50 (1965).

[82]67 Miss. 1, 6 So. 613 (1889).

quired only that the materials not be stacked quite so high. In a case such as *Standard Oil & Gas Co. v. Franklin*,[83] which involved the storage of dangerous tools and equipment in an unlocked shed, a simple lock on the door would have satisfied the duty of reasonable care. Open wells would need only to be covered, and deep holes would need only be filled in. In cases involving older children, a sign of warning might be sufficient. In *Hughes*,[84] the duty of reasonable care would have required only that the slabs be laid flat or braced. Can it be said that such safeguards are unreasonably burdensome or ruinous, especially in light of the fact that each of these precautions could have served to protect a small child from serious injury or death?

Prospects for Change in Mississippi

Section 339 has been brought to the attention of the Mississippi Supreme Court on at least two occasions,[85] but each time the court stated that the facts of those cases fell outside the scope of the section.[86] For this reason the court determined that there was no need to rule on the question of its applicability in Mississippi child trespasser cases. Yet when *Hughes* was brought before the court in January of 1980, although the case seemed to clearly fall within the framework of section 339, the court never mentioned the section.

However, there is one heartening aspect of *Hughes*. It represents the first time a strong dissent was voiced in a child trespasser case.[87] Justice Sugg's dissent, which was joined by Chief Justice Patterson and Justice Bowling,[88] did not call for an adoption of section 339. Instead, the dissenting justices sought to predicate liability on one of the pre-attractive nuisance doctrine cases, *Spengler*.[89] In *Spengler* a seven-year old child was killed when a stack of lumber fell upon him. The lumber had been placed by the defendant in an area where children were known to play. The court in holding the defendant liable, stated that all adults are imputed with the knowledge of the curiosity of children.[90] Justice Sugg stated that *Spengler* had never been expressly overruled and should therefore still be considered good law.[91] The fault with this argument is that in the past sixty years the Mississippi Supreme Court had repeatedly denied recovery in similar cases concern-

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[83]193 F.2d 561 (5th Cir. 1951).

[84]379 So. 2d 301 (Miss. 1980).

[85]Jackson v. City of Biloxi, 272 So. 2d 654 (Miss. 1973); Gordon v. C.H.C. Corp., 236 So. 2d 733 (Miss. 1970).

[86]272 So. 2d at 658; 236 So. 2d at 736.

[87]Hughes v. Star Homes, 379 So. 2d 301, 308 (Cofer, J., dissenting).

[88]*Id.*

[89]67 Miss. 1, 6 So. 613 (1889).

[90]*Id.* at 4, 6 So. at 614.

[91]379 So. 2d at 308 (Cofer, J., dissenting).

ing trespassing children based on the defunct attractive nuisance doctrine, a doctrine that developed from cases such as *Spengler*.

Rather than try to leap-frog over sixty years of adverse law, it would seem more reasonable to adopt the modern approach espoused by section 339 to correct the injustices perpetuated by cases such as *Hughes*. A close look at Justice Sugg's dissent reveals a discussion of all the elements contained in section 339. Therein it was stated that Star Homes had *knowledge of the child's presence*[92] and *of the dangerous condition it had created*.[93] The dissent also noted that the *dangerous condition could have been eradicated with extreme ease*.[94] In his final assessment Justice Sugg, speaking for the minority, concluded that Star Homes owed the child *"at least ordinary care."*[95]

It would seem based on the dissenting opinion, that the seeds of change have been sown. The adoption of section 339 would allow a determination of liability in child trespasser cases predicated on a straight negligence approach of foreseeability and knowledge, without the restraints of adverse attractive nuisance doctrine cases.

CONCLUSION

It is basic to our law that every man is responsible for his carelessness which results in foreseeable harm to others. For this reason it is obvious that Mississippi law concerning the child trespasser should stand condemned because it callously requires the owner to exert no effort whatsoever to avoid the harm which he as a reasonable man should expect. In fact, by shielding him with immunity for his indifference, Mississippi's maligned attractive nuisance doctrine actually encourages the landholder in his irresponsibility.

The failure of the Mississippi Supreme Court to grapple with this issue and to address the problem in light of the mores of our contemporary society, is a burden that innocent young children of this state must bear. It is hoped that the court will redirect its thinking in this area and in the future harvest the seed begun by Justice Sugg's dissent

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[92]*Compare* 379 So. 2d at 306 (Cofer, J., dissenting) *with* RESTATEMENT (SECOND) OF TORTS § 339 (1965) subsection (a).

[93]*Compare* 379 So. 2d at 307 (Cofer, J., dissenting) *with* RESTATEMENT (SECOND) OF TORTS § 339 (1965) subsection (b).

[94]*Compare* 379 So. 2d at 308 (Cofer, J., dissenting) *with* RESTATEMENT (SECOND) OF TORTS § 339 (1965) subsection (d).

[95]Compare 379 So. 2d at 308 (Cofer, J., dissenting) *with* RESTATEMENT (SECOND) OF TORTS § 339 (1965) subsection (e).

in *Hughes*. The lives of many of Mississippi's young children may be at stake.[96]

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[96] A young child cannot, because of his immaturity and lack of judgment, be deemed to be able to perceive all the dangers he might encounter as he trespasses on the land of others. There must and should be an accommodation between the landowner's unrestricted right to use his land and society's interest in the protection of the life and limb of its young. When these respective social-economic interests are placed on the scale, the public's concern for a youth's safety far outweighs the owner's desire to utilize his land as he sees fit. The Restatement rule [§ 339] is a reasonable compromise between the two.

Haddad v. First National Stores, Inc., 109 R.I. 59, 64, 280 A.2d 93, 96 (1971).