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TORTS-ATTRACTIVE NUISANCE-PONDS

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TORTS — ATTRACTIVE NUISANCE — PONDS — Plaintiff's four-year-old daughter drowned in a pond on defendant's land. The pond was from six to ten feet deep, with extremely steep banks, and contained various forms of marine life and debris. The pond was useless and was eliminated by the defendant soon after the drowning. The defendant knew that at least twenty small children resided in the immediate area and the pond was visible and accessible to them. In a damage action for the death, *held,* the defendant was liable under the attractive nuisance doctrine. *Saxton v. Plum Orchards, Inc.,* (La. 1949) 40 S. (2d) 791 (1949).

While most of the American courts have accepted the attractive nuisance doctrine to a greater or less degree,[1] they have refused to apply it to moving machinery, fire, excavations or water.[2] It is reasoned that everyone (including children)

[1] Generally, the modern courts accept the TORTS RESTATEMENT §339 (1934) as defining the attractive nuisance doctrine. In essence, it holds that the landowner is liable for injury to children where a condition was maintained involving unreasonable risk to them, where the presence of children might reasonably be anticipated, where the child because of tender years would not be able to realize the risk involved, and the magnitude of the risk exceeds the utility of maintaining the conditions. See Green, "Landowners' Responsibility to Children," 27 TEX. L. REV. 1 (1948); 36 HARV. L. REV. 854 (1923).

[2] 20 R.C.L., Negligence, §§ 82-86 (1918); 36 A.L.R. 192 (1925) (fire); 36 A.L.R. 189 (1925) (excavations); 60 A.L.R. 1453 (1929); 36 A.L.R. 224 (1925) (ponds). Peters v. Bowman [115 Cal. 345, 47 P. 113 (1896) rehearing den. 47 P. 598 (1897)] is the case most often quoted as defining the exception of ponds from the attractive nuisance doctrine.

knows that these are dangerous,[3] that it would be an impossible burden upon the property owner to require him to make these hazards "child-proof,"[4] and that the expense to the owner and the consequent disruption of commerce would be disproportionate to the social gain.[5] Despite this general approach, a pond may be treated as an attractive nuisance if, in addition to the ordinary alluring characteristics common to all ponds, it has some unusually attractive feature[6] or some concealed danger.[7] The court in the principal case considered the pond to be unusually dangerous and to possess unusually attractive features. The danger lay in the steep banks with immediately adjoining deep water; the unusual attractions were marine life and floating short boards, sticks and small timbers, coupled with the fact that the pond was visible from the street and accessible.[8] It may be questioned whether other courts would have reached this conclusion, for these are conditions common to a great many ponds.[9] In most cases where liability as an attractive nuisance has been found, there have been hazards of much greater degree than were present in the instant case.[10] Perhaps the court was influenced more than the opinion indicates by the facts that the pond served no useful purpose to its owner and could easily have been removed or safeguarded at a small cost. If the decision were based upon these facts, it would be a frank recognition that liability for injury arising from an ordinary pond may be imposed where there would not be an unreasonable expense in guarding the land, nor any utilization to safeguard;[11] that the interest of society in protecting small children from alluring dangers out-

[3] Peters v. Bowman, note 2, supra; McCall v. McCallie, (Ga. 1933) 171 S.E. 843; Morris v. City of Britton, 66 S.D. 121, 279 N.W. 531 (1938); Polk v. Laurel Hill Cemetery Assn., 37 Cal. App. 624, 174 P. 414 (1918).

[4] Williams v. Kansas City, C.C. & St. J. Ry. Co., 222 Mo. App. 865, 6 S.W. (2d) 48 (1928); Emond v. Kimberly-Clark Co., 159 Wis. 83, 149 N.W. 760 (1914).

[5] TORTS RESTATEMENT §339, comment *f* (1934); McCall v. McCallie, note 3, supra; Thompson v. Illinois Central R. Co., 105 Miss. 636, 63 S. 185 (1913); Richards v. Connell, 45 Neb. 467, 63 N.W. 915 (1895); Bicandi v. Boise Payette Lumber Co., 55 Idaho 543, 44 P. (2d) 1103 (1935).

[6] Allen v. William P. McDonald Corp., (Fla. 1949) 42 S. (2d) 706 (white sand banks); City of Pekin v. McMahon, 154 Ill. 141, 39 N.E. 484 (1895) (floating timber); Price v. Atchison Water Co., 58 Kan. 551, 50 P. 450 (1897) (wooden apron); Kansas City v. Siese, 71 Kan. 283, 80 P. 626 (1905) (sewer pipe).

[7] Sanchez v. East Contra Costa Irrigation Co., 205 Cal. 515, 271 P. 1060 (1928) (concealed outlet); 36 A.L.R. 231 (1925); 40 A.L.R. 488 (1926).

[8] Principal case at 796.

[9] A few recent cases denying relief are Vincent v. Barnhill, 203 Miss. 740, 34 S. (2d) 363 (1948); Wood v. Consumers Co., 334 Ill. App. 530, 79 N.E. (2d) 826 (1948); Peers v. Pierre, 336 Ill. App. 134, 83 N.E. (2d) 20 (1948); King v. Simons Brick Co., 52 Cal. App. (2d) 586, 126 P. (2d) 627 (1942).

[10] See notes 6 and 7, supra. But, in a few cases, a pond has been held an attractive nuisance without reference to the general exception for ponds. In Banker v. McLaughlin, 146 Tex. 434, 208 S.W. (2d) 843 (1948), under circumstances very similar to those in the principal case, the pond was brought within the general doctrine of attractive nuisance. A similar result was reached in Renno v. Seaboard Air Line Ry., 120 S.C. 7, 112 S.E. 439 (1922) where a pond was formed when a culvert was too small to handle surface drainage.

[11] BOHLEN, TORTS 191 (1926); Smith, "Liability of Landowners to Children Entering Without Permission," 11 HARV. L. REV. 349 at 360, 369 (1898); Green, "Landowners' Responsibility to Children," 27 TEX. L. REV. 1 at 12 (1948).

weighs the interest of the landowner in these circumstances. The advantage of such an approach, in focusing attention upon the policy considerations involved in this class of cases, would be to relieve the courts of the necessity of resorting to the uncertain and confusing fictions of unusual conditions to find a pond to be an attractive nuisance.

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