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Torts: The Attractive Nuisance Doctrine

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In the present case the complaint failed to allege that the deceased was engaged in diving at the time of his death. As a result the complainant has been deprived of his trial on the merits. It is certainly questionable whether the pleadings, in this instance, have been "construed so as to do substantial justice."[19]

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TORTS: THE ATTRACTIVE NUISANCE DOCTRINE

Crutchfield v. Adams, 152 So. 2d 808 (1st D.C.A. Fla. 1963)

Plaintiffs, father and son, brought suit for injuries sustained by the three-year-old son whose hand was caught in an unguarded revolving fan belt of pump machinery located on defendants' residential premises. The trial court granted defendants' motion to dismiss. On appeal, HELD, the allegations of the plaintiffs were sufficient to state a cause of action under the attractive nuisance doctrine. Judgment reversed and remanded, one judge dissenting. Certiorari was denied by the Florida Supreme Court without opinion.[1]

It was a fundamental principle of the common law that, unless there was some special circumstance or condition, the owner or possessor of land owed no duty to a trespasser to maintain his property in a safe condition.[2] The one special circumstance that came to be recognized was the duty owed by the possessor to trespassing children. The realization that a child is incapable of understanding and appreciating all the possible dangers that he may encounter in trespassing led to the formulation of the "attractive nuisance" doctrine.[3]

19. FLA. R. CIV. P. 1.8(g).

1. Adams v. Crutchfield, 155 So. 2d 693 (Fla. 1963).
2. See Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427 (1959).
3. PROSSER, TORTS §76, at 438-45 (2d ed. 1955).

In 1873, in *Sioux City & Pacific R.R. v. Stout*,[4] a railroad was held liable for injuries received by trespassing children while playing on a turntable on defendant's premises. This Supreme Court decision marked the initial appearance of the attractive nuisance doctrine in this country. The reception accorded the doctrine by the courts of the several states has varied.[5] Some accepted it wholeheartedly,[6] others grudgingly and within narrow limitations, and a few totally rejected it.

The best available statement of the doctrine, as it stands today, is found in the *Restatement of Torts*.[7] Section 339 of the *Restatement* declares essentially that a possessor of land is liable for injury to trespassing children caused by a structure or other artificial condition on the land, if the possessor knows or should know that:

(1) children are likely to trespass on the land;

(2) such condition creates an unreasonable risk of death or serious injury to children;

(3) the children because of their youth do not realize the risk involved; and

(4) the utility to the possessor of maintaining the condition is slight as compared to the risk.

The doctrine has generally been applied to such instrumentalities as electricity,[8] dynamite caps,[9] and turntables.[10] It has also been applied to other conditions such as burning rubbish,[11] artificial bodies of water,[12] and sand bins.[13] In *Clover Creamery Co. v. Diehl*,[14] pump machinery similar to that in *Crutchfield v. Adams* was held to be an attractive nuisance.

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4. 84 U.S. (17 Wall.) 657 (1873).

5. See 2 HARPER & JAMES, TORTS §27.5, at 1448 (1956); PROSSER, TORTS §76, at 439 (2d ed. 1955).

6. Florida has accepted the doctrine. See, *e.g.*, May v. Simmons, 104 Fla. 707, 140 So. 780 (1932); Stark v. Holtzclaw, 90 Fla. 207, 105 So. 330 (1925).

7. RESTATEMENT, TORTS §339 (1934). Florida courts have cited this section of the *Restatement* with approval in numerous cases. See, *e.g.*, Cockerham v. R. E. Vaughan, Inc., 82 So. 2d 890 (Fla. 1955); Banks v. Mason, 132 So. 2d 219 (2d D.C.A. Fla. 1961); Fouraker v. Mullis, 120 So. 2d 808 (1st D.C.A. Fla. 1960).

8. Stark v. Holtzclaw, 90 Fla. 207, 105 So. 330 (1925).

9. Verran v. Town of Greeneville, 4 Tenn. App. 422 (1927).

10. Thompson v. Reading Co., 343 Pa. 585, 23 A.2d 729 (1942); Louisville & N.R.R. v. Vaughn, 292 Ky. 120, 166 S.W.2d 43 (1942).

11. Tucker Bros., Inc. v. Menard, 90 So. 2d 908 (Fla. 1956).

12. Banker v. McLaughlin, 146 Tex. 434, 208 S.W.2d 843 (1948); Franks v. Southern Cotton Oil Co., 78 S.C. 10, 58 S.E. 960 (1907).

13. Ramsay v. Tuthill Bldg. Material Co., 295 Ill. 395, 129 N.E. 127 (1920).

14. 183 Ala. 429, 63 So. 196 (1913).

The principal significance of the *Crutchfield* case is the willingness of the court to allow a homeowner to be held liable on the basis of the attractive nuisance doctrine for injuries suffered by a young child who has intruded on his residential premises. Although the Florida courts have never expressly exempted homeowners from liability under the doctrine, there has been no reported Florida case holding an owner or possessor of land liable, on the basis of this doctrine, when the child has trespassed on residential premises.

Many defendants in attractive nuisance suits have been business entities engaged in construction work. This is easily understandable since construction sites are areas into which young children are likely to intrude.[15] Municipal corporations and various business organizations have also been held liable for harm to trespassing children on the basis of this doctrine. In *Adler v. Copeland*[16] and *Banks v. Mason*,[17] children drowned while trespassing on the residential premises of the defendants. The defendant homeowners were excused from liability on the basis that normal swimming pools are not attractive nuisances; the court did not discuss the homeowner status of the defendants. The effect of these decisions has been to deny recovery under the attractive nuisance doctrine except in situations involving either "government" or "business."

An examination of cases in other jurisdictions shows that imposition of liability on homeowners on the basis of the doctrine is rare. In *King v. Lennen*,[18] the California Supreme Court held the defendant homeowner liable for the drowning of a small child in a swimming pool on the defendant's residential premises. The swimming pool was held to be an attractive nuisance, but the California court, like the Florida courts, did not discuss the homeowner status of the defendant.

A possible explanation of the lack of cases holding homeowners liable is that most children injured on residential premises enjoy the status of a licensee. The reluctance of the courts to impose liability in these cases could also be founded on the feeling that the property rights and privacy of the homeowner must be accorded the greatest protection. The *Restatement* makes no distinction between a homeowner and other landowners; the duty imposed by the doctrine is on the "possessor" of the land.

Factors that would tend toward imposition of liability include the advent of homeowner insurance, crowded suburban living, and the

15. Carter v. Livesay Window Co., 73 So. 2d 411, 414 (Fla. 1954). "[I]t is common knowledge that children are as prone to play around houses under construction as monkeys are prone to climb trees."

16. 105 So. 2d 594 (3d D.C.A. Fla. 1958).

17. 132 So. 2d 219 (2d D.C.A. Fla. 1961).

18. 53 Cal. 2d 340, 348 P.2d 98 (1959).

de-emphasis of land as the indicia of wealth. Also, technical advances and a high standard of living have made available to the homeowner many new instrumentalities that are potentially dangerous to children. These factors probably played a part in the court's adoption in *Crutchfield* of Prosser's view that the person who may protect the child with the least inconvenience is the one upon whose land he strays.[19]

The courts attempt to strike a balance between the interests of the landowner and the child, but the greater social interest in the safety of young children is coming to be recognized. The decision in this case is consistent with the *Restatement* view that the doctrine is an independent rule of negligence liability that raises the question of what a reasonably prudent man would do to protect trespassing children.[20]

The dissenting opinion in the *Crutchfield* case illustrates the difficulties caused by the perplexing manner in which the Florida courts have applied the attractive nuisance doctrine to artificial bodies of water. The Florida Supreme Court, in *Allen v. William P. McDonald Corp.*,[21] while holding that the attractive nuisance doctrine applied to an artificial pond with sloping banks of white sand, laid down the general proposition that the doctrine was inapplicable to artificial bodies of water unless they presented a concealed danger in the nature of a "trap" uncommon to natural ponds and streams. The *Allen* case was later cited by the Third District Court of Appeal in *Adler v. Copeland*[22] as authority for its holding that the attractive nuisance doctrine, as a matter of law, does not apply to a normal swimming pool. The distinction between a normal swimming pool and an artificial pond with white sand banks is not realistic when applied to a young child who does not realize the danger involved. The fact that a condition giving rise to injury is common in character should not necessarily exclude liability. The ability to appreciate danger varies with the age and mental capacity of the child. A normal swimming pool may be an attractive nuisance to a child of two or three but not to a child of ten or twelve. The important point is not whether the condition is common in character, but whether its dangers are fully understood by the child.

The pool cases typify the practice that has evolved of categorizing conditions as attractive nuisances on the basis of whether they are "in-

19. PROSSER, TORTS §76, at 438 (2d ed. 1955).

20. Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427, 466 (1959).

21. 42 So. 2d 706 (Fla. 1949).

22. 105 So. 2d 594 (3d D.C.A. Fla. 1958). See also Banks v. Mason, 132 So. 2d 219 (2d D.C.A. Fla. 1961) in which a swimming pool without a fence, guard, rail, or safety device was held not to be an attractive nuisance.

herently dangerous" in the judgment of the court.[23] The court in the present case did not make this determination, and perhaps this marks a desirable trend away from the classification approach. These cases should not, and need not, be resolved by adherence to an inflexible rule of law. *Cockerham v. R. E. Vaughan, Inc.*,[24] decided by the Florida Supreme Court in 1955, provides ample authority for allowing a jury to decide whether the condition created a probable risk of serious harm not obvious or apparent to the young child. The flexibility inherent in the jury approach should be utilized in all attractive nuisance cases including those involving artificial bodies of water.[25] Only by considering all the circumstances such as the age of the child, the location and nature of the structure or condition, the utility of maintaining the condition, and the precautions taken by the defendant, can a just result be reached in these cases.

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23. *E.g.*, May v. Simmons, 104 Fla. 707, 140 So. 780 (1932), holding an endless belt used to convey sawdust from railway cars to defendant's ice plant was an "inherently dangerous instrumentality"; Stark v. Holtzclaw, 90 Fla. 207, 105 So. 330 (1925), holding electricity to be an invisible force "highly dangerous to life and property"; Edwards v. Maule Indus., Inc., 147 So. 2d 5 (3d D.C.A. Fla. 1962), holding that a sand pile did not present an inherent danger; Miller v. Guernsey Constr. Co., 112 So. 2d 55 (3d D.C.A. Fla. 1959), holding that an unfinished building in the orderly process of construction was not inherently dangerous per se.

24. 82 So. 2d 890 (Fla. 1955).

25. King v. Lennen, 53 Cal. 2d 340, 348 P.2d 98 (1959), held that whether a normal swimming pool constituted an attractive nuisance was a question for the jury.