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TORTS - EFFECT OF ATTRACTIVE NUISANCE DOCTRINE ON MUNICIPAL LIABILITY TO CHILDREN ON THE STREETS

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TORTS — EFFECT OF ATTRACTIVE NUISANCE DOCTRINE ON MUNICIPAL LIABILITY TO CHILDREN ON THE STREETS — Plaintiff, an eight year old girl, stopped on the way home with a playmate to play around a newspaper stand located on the edge of the sidewalk. The stand was maintained by a vendor who was licensed by the city. While the plaintiff was standing beside the stand, her playmate swung from the top, causing it to topple over on the plaintiff and gash her forehead. Despite medical care infection set in and a disfiguring scar resulted. There was evidence that the stand had fallen over previously for various reasons. *Held,* that the defendant city was negligent in not using reasonable care to protect children from a dangerous agency which it should have known would attract children from a place where they had a right to be. The city had also breached its duty to keep the street free from obstructions. *Harrison v. City of Chicago,* 308 Ill. App. 263, 31 N. E. (2d) 359 (1941).

Generally, a landowner owes no duty to a trespasser except to avoid wilfully harming him.[1] However, concern for the welfare and safety of children has led to development of the attractive nuisance doctrine, which makes a landowner liable for the injuries of a child who is actually a trespasser when the circumstances are such that the landowner can reasonably expect children to be on his

[1] 20 R. C. L. 79 (1918).

land and playing with a dangerous object which he has placed there.[2] Numerous theories and fictions have been presented to justify raising a duty to a child where none would exist if the trespasser were an adult.[3] From the early cases involving railroads,[4] the doctrine has been extended to impose liability on other private landowners,[5] and the doctrine has been used to permit recovery by children who are injured while in a place where they have a full right to be, as in the principal case.[6] In these latter cases, a common-law duty to protect the child exists independent of the attractive nuisance doctrine, and the doctrine is used not to create the duty, but apparently to prove the breach of duty. The question naturally arises whether the application of the attractive nuisance doctrine to this class of cases in any way enlarges the liability of the landowner as to infant invitees. At common law, municipalities have a duty to use reasonable care to make highways safe for ordinary use.[7] Children at play, certainly when the play is merely incidental to travel, are making a proper use of the highway.[8] To fulfill this duty to the child the city must exercise greater care than is necessary to protect an adult.[9] The fundamental duty, however, lies toward the individual regardless of his age, and only the degree of care that must be exercised to fulfill the duty, not the raising of the duty itself, is dependent upon the

[2] 36 A. L. R. 37 at 38 (1925); 39 A. L. R. 486 (1925); 45 A. L. R. 982 (1926). Numerous citations show the status of the doctrine in the various states.

[3] Some of the explanations are: natural consequences are intended; failure to take precaution is equivalent to wanton injury; attractive dangerous object constitutes a trap; "sic utere tuo ut alienum non laedas"; attraction amounts to an invitation; a child of tender years cannot be a trespasser; or one must take reasonable precautions to avoid reasonably anticipated injury. 36 A. L. R. 37 at 109 (1925).

[4] Railroad Co. v. Stout, 17 Wall. (84 U. S.) 657 (1873); Union Pacific R. R. v. McDonald, 152 U. S. 262, 14 S. Ct. 619 (1894).

[5] Edwards v. Negley, 193 Ill. App. 426 (1914); Brinkley Car Co. v. Cooper, 60 Ark. 545, 31 S. W. 154 (1895); Bransom's Admr. v. Labrot, 81 Ky. 638 (1884).

[6] Schmidt v. Cook, 12 Misc. 449, 33 N. Y. S. 624 (1895). Also, it should be noted that other jurisdictions get results consistent with this theory, but on somewhat different reasoning. In Michigan, for instance, while the true attactive nuisance doctrine is not accepted in full, a modification of the doctrine has been used which would apparently allow recovery on facts similar to those of the principal case. See LeDuc v. Detroit Edison Co., 254 Mich. 86 at 91, 235 N. W. 832 (1931), where the court reviewed the cases and laid down this rule: "Where the child is where he has a right to be, as in the street or as a licensee on private premises, and his trespass is technical rather than wilful, *i.e.*, consists of playing with or taking the property of another as the spontaneous and natural act of an irresponsible child immediately attracted to the object, recovery is not barred by the trespass."

[7] WHITE, NEGLIGENCE OF MUNICIPAL CORPORATIONS, § 243 (1920); Smith v. Davis, 22 App. D. C. 298 (1903); Board of Councilmen of City of Frankfort v. Allen, 26 Ky. L. R. 581, 82 S. W. 292 (1904).

[8] WHITE, NEGLIGENCE OF MUNICIPAL CORPORATIONS, § 292 (1920); Gulline v. Lowell, 144 Mass. 491, 11 N. E. 723 (1887); Irvine v. Town of Greenwood, 89 S. C. 511, 72 S. E. 228 (1911). Statutes raising a duty only to travellers are sometimes held not to protect children using highways solely as a playground. 22 L. R. A. 561 (1894).

[9] 20 R. C. L. 79 (1918); Lynch v. Smith, 104 Mass. 52 (1870); Gnau v. Ackerman, 166 Ky. 258, 179 S. W. 217 (1915).

plaintiff's age.[10] Of course in these cases the degree of care imposed upon the municipality as to travellers is of necessity limited to some extent by virtue of the coexisting duty in the municipality to furnish adequate transportation facilities.[11] Under the attractive nuisance doctrine, the right of the plaintiff to be on the premises is assumed because of an artificial structure which the jury finds to be so tempting to children that their presence there may be reasonably anticipated.[12] If the jury finds such a structure, it then decides whether reasonable care has been used in view of the fact that children were expected or invited to play there.[13] The logical difference between the two approaches in these cases is that the attractive nuisance doctrine uses a fiction to create a duty which already exists. However, the application of the two doctrines would not seem always to impose the same burden upon the municipality. Under the ordinary duty theory, the question placed before the jury is whether the city exercised reasonable care in the maintenance of its roads to protect the children; in the attractive nuisance cases, whether the city used reasonable care to protect children after it had invited or tempted them to the scene of the attraction. As the principal case demonstrates, the use of hindsight or a res ipsa loquitur test by the jury is likely to result in a holding that the object was attrative and not reasonably guarded whenever it has attracted and injured a child. Thus, although authoritative statements of the doctrine categorically deny that a landowner is liable as an insurer,[14] such liability is frequently the result.[15] It seems questionable whether such a heavy responsibility should be placed upon the city rather than upon the parents of the child.

Donald H. Treadwell

[10] The immaturity of the plaintiff would also lessen his responsibility for contributing negligent acts. Lynch v. Smith, 104 Mass. 52 (1870); Reed v. City of Madison, 83 Wis. 171, 53 N. W. 547 (1892).

[11] Irvine v. Town of Greenwood, 89 S. C. 511, 72 S. E. 228 (1911).

[12] Peters v. Bowman, 115 Cal. 345, 47 P. 113, 598 (1896); Gandy v. Copeland, 204 Ala. 366, 86 So. 3 (1920). In Louisville & Nashville R. R. v. Ray, 124 Tenn. 16, 134 S. W. 858 (1910), the court said that in the Tennessee cases the courts had in some way controlled the cases in which the doctrine was applied.

[13] Peters v. Bowman, 115 Cal. 345, 47 P. 113, 598 (1896); McMillin's Admr. v. Bourbon Stock Yards Co., 179 Ky. 140, 200 S. W. 328 (1918). In Union Light, Heat & Power Co. v. Lunsford, 189 Ky. 785, 225 S. W. 741 (1920), it was said that care commensurate with the danger involved must be used.

[14] 22 L. R. A. 561 (1894); 36 A. L. R. 37 at 123 (1925).

[15] Smith, "Liability of Landowners to Children Entering without Permission," 11 HARV. L. REV. 349 (1898).