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Torts—Attractive Nuisance Doctrine as a Basis for Damages Caused to Third Persons by Trespassing Child

A subrogee insurer sued for damages to a building resulting from acts of children trespassing on adjacent land. Three children, at night, observed a tractor standing unguarded on a job site in a slum district, and began playing. They inadvertently started the tractor, which ran into and damaged the building. *Held,* recovery against the tractor owner affirmed on the basis of the attractive nuisance doctrine.[1] Following the usual application of this doctrine, there would seem to be no question of liability to the children had they been injured while so trespassing and playing on the tractor. However, as the children were not injured, but caused injury to the property of another, this is an unusual application.

The attractive nuisance doctrine in the United States is generally stated as an exception to the usual non-liability of a property owner for injury to a trespasser resulting from a negligently maintained condition on the property owner's land.[2] The doctrine is based on several theories, viz., that there is an implied invitation to the child, that the damage is within the reasonable anticipation of the owner, or that the instrumentality or condition constitutes a trap or pitfall.[3] Four points are generally considered to bring a case within the doctrine and to allow recovery from the landowner for injury to a trespassing child. These are: (1) that the place where the condition is maintained is one upon which the possessor knows

[1] Commonwealth Union Fire Ins. Co. v. Blocker, 86 So.2d 760 (La. App. 1956).

[2] Louisville & N. R. Co. v. Vaughn, 292 Ky. 120, 166 S.W.2d 43 (1942); Sioux City & Pac. Ry. Co. v. Stout, 84 U.S. 657 (1874).

[3] Best v. District of Columbia, 291 U.S. 411 (1934); United Zinc Co. v. Britt, 258 U.S. 268 (1922); Hardy v. Missouri Pac. Ry. Co., 266 Fed. 860 (8th Cir. 1920); Harriman v. Town of Afton, 225 Iowa 659, 281 N.W. 183 (1938); Schultz v. Kinabrew, 177 So. 450 (La. App., 1937); Peters v. Town of Tuston, 167 So. 491 (La. App. 1936); Batten v. Cornwall, 218 Iowa 42, 253 N.W. 842 (1934).

or should know that children are likely to trespass; (2) that the condition is one which the possessor recognizes or should recognize as involving an unreasonable risk of death or serious bodily harm to the children; (3) that the children, because of their youth, do not discover the condition or realize the risk involved; (4) that the utility of the condition to the possessor is slight as compared to the risk to young children involved therein.[4] Although the tractor owner is not a landowner, he is acting on behalf of the landowner, which brings to him the same liabilities and immunities.[5]

The attractive nuisance doctrine in its traditional form was recognized in Louisiana, situs of the instant case, as early as 1891.[6] It has been the subject of at least one questionable application previous to the instant case.[7] The objection to the instant case is however that it determines the question of a landowner's liability to adjacent property owners on a theory of a landowner's liability to persons on his land. The status of the intermediate party (be he adult or child trespasser, licensee, or whatever) vis-a-vis the landowner is irrelevant to the rights of a third party against the landowner, except insofar as the status of the intermediate party bears upon the foreseeability of the harm caused to the third party.

Basing liability upon the attractive nuisance doctrine in cases such as the present one involves the undesirable consequence of depriving the landowner of the opportunity of persuading the jury that the harm caused to the third party was not forseeable. In the instant case, however, such harm probably was foreseeable as a matter of law and this would seem to be true whether the children be regarded as accidentally or intentionally starting the tractor. If the ultimate harm is foreseeable, the intermediate act, even if

[4] See Restatement, Torts § 339 (1938).

[5] See McPheters v. Loomis, 125 Conn. 526, 7 A.2d 437 (1939); Humphrey v. Twin State Gas and Elec. Co., 100 Vt. 414, 139 Atl. 440 (1927); Guinn v. Delaware and Atl. T. & T., 72 N.J.L. 276, 62 Atl. 412 (1905).

[6] Westerfield v. Levis, 43 La. Ann. 63, 9 So. 52 (1891).

[7] In Friedman's Estate v. Texas & Pac. Ry. Co., 209 La. 540, 25 So.2d 88 (1945) the owner of five horses was allowed recovery from the railroad when the horses were killed while trespassing on a railroad trestle. In this case the court analogized that both horses and children are unable to realize the dangers possibly resulting from the trespass. For other applications of the attractive nuisance doctrine in Louisiana, see Saxton v. Plum Orchards Inc., 34 So.2d 423 (La. App. 1948) *rev'd on other grounds*, 215 La. 378, 40 So.2d 791 (1949); and Peters v. Town of Ruston, 167 So. 491 (La. App. 1936).

intentional, does not break the chain of causation.[8] The foreseeability of the ultimate harm here seems obvious. The tractor was parked unguarded only twenty-five feet from the sidewalk in a slum area abounding with small children and no precautions were taken to render the starting of the tractor difficult. However, cases could arise in which, though a child injured on the land would be entitled to recover against the landowner under the attractive nuisance doctrine, reasonable men could differ on whether the ultimate harm to a third party was foreseeable. The landowner in such cases should be allowed the opportunity of persuading a jury that it was not foreseeable.

There is a similarity between the instant case and the cases involving the liability of a car owner to a third party injured by the negligent driving of a thief where the car owner had left keys in the ignition. Where the car thief is a child and the presence of children in the area was reasonably to be anticipated, most courts have held the owner liable on the theory that the harm could be foreseen and that the negligent driving of the child was not an intervening cause.[9] Louisiana has indicated it might follow this view in *Castay v. Katz & Besthoff, Ltd.*[10] If the tractor in the present case had been parked in the street, liability could have attached

[8] See generally, Restatement, Torts, §§ 333-39 and especially §§ 448-49 (1938). Whether the act was intentional or negligent has a bearing only in determining the foreseeability of the act. If foreseeable, an intentional act, even a criminal act, will not be an intervening cause to terminate the liability of the original negligent party.

[9] 1951 Wisc. L. Rev. 740. In cases involving adult thieves, the majority view is that the owner is not liable to third persons, even though keys were left in the car. See Richards v. Stanley, 43 Cal.2d 60, 271 P.2d 23 (1954); Lustbader v. Traders Delivery Co., 193 Md. 233, 67 A.2d 237 (1949); Galbraith v. Levin, 323 Mass. 255, 81 N.E.2d 560 (1948); Sullivan v. Griffin, 318 Mass. 359, 61 N.E.2d 330 (1945); Walter v. Bond, 267 App. Div. 779, 45 N.Y.S.2d 378 (1943); Roberts v. Lundy, 301 Mich. 726, 4 N.W.2d 74 (1942); Rapczynski v. Cowan, 138 Pa. Super. 392, 10 A.2d 810 (1940); Emmler v. Kline, 6 N.J.Misc. 56, 139 Atl. 899 (1928); Slater v. T. C. Baker Co., 261 Mass. 424, 158 N.E. 778 (1927). Cases holding for liability by the owner under statutes requiring unattended vehicles to be locked include Ney v. Yellow Cab Co., 2 Ill.2d 74, 117 N.E.2d 74 (1954) (involving Uniform Traffic Act); and Shaff v. Claxton, 144 F.2d 532 (D.C.Cir. 1944). See 43 Calif. L. Rev. 140 (1955); 6 Hastings L.J. 94 (1955); 8 Okla. L. Rev. 371 (1955); and 35 Minn. L. Rev. 175 (1949).

[10] 148 So. 76 (La. App. 1933). Cited as a leading case for the proposition that theft is an intervening cause cutting off the automobile owner's negligence of leaving keys in an unattended vehicle (see 8 Okla. L. Rev.

under the *Castay* case. It has been held in other jurisdictions that the fact that the vehicle was taken from the property of the owner was immaterial to the matter of the owner's liability to a third person for negligent operation.[11]

On the basis of foreseeability, the result of the instant case is justifiable. However, basing the result upon the attractive nuisance doctrine is unnecessary and fraught with misleading implications.

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371 (1955)), the court indicated that a different result might flow if the vehicle were set in motion by a child. The court said, id. at 78:

> . . . The situation would be different if the accident had been caused by a child attracted by the running motor of defendant's truck for the reason that children—boys particularly—may reasonably be expected to experiment with machinery or other mechanism which can be set in motion.

[11] Sullivan v. Griffin, 318 Mass. 359, 61 N.E.2d (1945). This case, involving an adult thief, followed Slater v. T. C. Baker Co., 261 Mass. 424, 158 N.E. 778 (1927) which held the theft served as an intervening cause, shielding the owner from liability.