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Torts--Conclusive Presumption that Attractive Nuisance Doctrine Is of No Benefit at Age Fourteen

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Recent Cases

TORTS—CONCLUSIVE PRESUMPTION THAT ATTRACTIVE NUISANCE DOCTRINE IS OF NO BENEFIT AT AGE FOURTEEN—Plaintiff, who was ten days from his fifteenth birthday, was severely burned when he entered an enclosure containing electrical transformers on defendant's property. The enclosure was between seventy-five and one hundred feet from the defendant's office. Plaintiff testified that the gate to the enclosure had been unlocked for "maybe six months" before the injury. When questioned whether he believed that the electricity was off because the gate was ajar, the plaintiff replied, "Yes, I did. What child wouldn't?", but admitted that he knew the meaning of a danger sign posted on the enclosure. Psychiatric testimony was introduced to show that the plaintiff was not of normal mentality for a child of his age. He had repeated three grades, and was only in the eighth grade at age sixteen on the date of the trial. The trial court entered judgment on a directed verdict for the defendant. *Held:* Affirmed. There is a conclusive presumption that a child ten days from his fifteenth birthday is not within the class protected by the attractive nuisance doctrine. The court reasoned that to hold otherwise would impose a duty upon landowners to protect older children, as well as adults, if it could be shown that they are mentally subnormal. *Bentley v. South-East Coal Co.*, 334 S.W.2d 349 (Ky. 1960).

The *Bentley* decision extends to minors of age fourteen the holding of *Columbus Mining Co. v. Napier's Adm'r*,[1] which established a conclusive presumption of a child's capacity to appreciate dangers or assume risks at age *fifteen.* Despite the *Napier* rule, the court did not apply it in subsequent decisions,[2] but indicated that an occupier of land would be liable to children over fifteen years of age if it could

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[1] 239 Ky. 642, 40 S.W.2d 285 (1931).

[2] *E.g.*, Dennis' Adm'r v. Kentucky & W. Va. Power Co., 258 Ky. 106, 79 S.W.2d 377 (1935). A similar disregard of the conclusive presumption at *age fourteen* propounded in the *Bentley* decision is evidenced by dictum in the subsequent decision of Chesser v. Louisville Country Club, 339 S.W.2d 194 (Ky. 1960). In this case the court, without mention of the *Bentley* case, refused to apply the attractive nuisance doctrine to a sixteen-year-old boy, and stated at page 196 as follows:

> When a youth has grown beyond the protection humanely afforded a child of tender years from his indiscretion and lack of capacity to appreciate a peril, he is not entitled to the benefit of the doctrine any more than is a normal adult, qualified however in an occasional case of undeveloped mentality. We so held in relation to a fourteen year old boy in Louisville & N. R. Co. v. Hutton, 220 Ky. 277, 295 S.W. 175, 53 A.L.R. 1328. That age has since been regarded as a normal dividing line.

be shown that the child was of such *subnormal mentality* as to be classed with those for whom the protecting rule was created. Although recovery had seldom been granted to children of age fourteen[3] under the attractive nuisance doctrine, the court had been unwilling to create a conclusive presumption that the doctrine offered no protection to minors of that age after the *Napier* decision. To be accorded the protection of the attractive nuisance doctrine prior to the *Bentley* case, a child between the ages of fourteen and fifteen was required to prove that he was of subnormal mentality. However, the notable implication of the Bentley case is that *no considerations* or *circumstances* will bring a child within the protection of the attractive nuisance doctrine after his fourteenth birthday.

The "age fourteen rule" of the attractive nuisance doctrine in Kentucky is apparently an analogy drawn from the rules of contributory negligence[4] in which a rebuttable presumption of capacity begins at age fourteen,[5] and the burden is on the child to show his incapacity. This rule recognizes that under some circumstances a child beyond the age of fourteen may not in fact have sufficient capacity for contributory negligence. Age alone is not the test for applying the principle as it would be under a conclusive presumption in attractive nuisance. The first question in the application of the attractive nuisance doctrine in Kentucky involves only the age of the child, and no further consideration need be made of the wrong of either party if he is *fourteen.* In contrast to the rebuttable presumption in determining capacity for contributory negligence, the conclusive presumption at age fourteen in the application of the attractive nuisance doctrine has no flexibility.

Two recent Kentucky decisions demonstrate the flexible approach taken by the Court of Appeals in cases involving standards of conduct for children. In a 1960 case,[6] the standard of care required of a fifteen-year-old who was electrocuted while climbing a bridge was not that of an adult, but of a person of *like age,* and *capacity under the circumstances.* A 1959 decision[7] held that it was error to instruct on the contributory negligence of an eight-year-old who had violated a safety statute in the absence of evidence bearing upon his capacity for con-

[3] E.g., Union Light, Heat & Power Co. v. Lunsford, 189 Ky. 785, 225 S.W. 741 (1920) (youth between fourteen and fifteen-entitled to recovery for injury received by contact with defendant's electric wire); see also Kentucky Cent. R.R. v. Gastineau's Adm'r, 83 Ky. 119, 7 Ky. L. Rep. 3 (1885) (youth between fourteen and fifteen-entitled to a jury determination of his discretion based upon age and experience).

[4] See Louisville & N.R.R. v. Hutton, 220 Ky. 277, 295 S.W. 175 (1927); 25 Ky. L.J. 277 (1937).

[5] 48 Ky. L.J. 601, 603 (1960).

[6] Jones v. Kentucky Util. Co., 334 S.W.2d 263 (Ky. 1960).

[7] Baldwin v. Holsey, 328 S.W.2d 426 (Ky. 1959).

tributory negligence. The court in its opinion stated that there should be "no sudden leap at any particular age"[8] in measuring a child's standard of conduct.

In view of these decisions should there be a more flexible application of the attractive nuisance doctrine after the fourteenth birthday? Most recoveries in other jurisdictions have been by children under fourteen years of age,[9] but this is not to say that age should be the only measurement of the ability to discover dangerous conditions or recognize a given risk. Other jurisdictions have granted recovery or placed the question before the jury under the attractive nuisance doctrine for youths of ages fourteen,[10] fifteen,[11] sixteen[12] and eighteen.[13] Some commentators have stated that a limitation at any particular age is not desirable.[14]

The section of the *Restatement of Torts*[15] dealing with trespassing children mentions no specific age limitation. However, there is a clause relating to youthful trespassers which imposes liability upon a possessor of land for bodily harm to these children caused by

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[8] *Id.* at 430.

[9] Annots., 36 A.L.R. 34, 140 (1925); 39 A.L.R. 486, 489 (1925); 45 A.L.R. 982, 988 (1926); 53 A.L.R. 1344, 1351 (1928); 60 A.L.R. 1444, 1450 (1929); 8 A.L.R.2d 1254, 1299 (1949). *E.g.*, Robinson v. St. Louis S.F.R.R., 172 Ark. 494, 289 S.W. 465 (1926); Ramirez v. Chicago, B. & Q. R.R., 116 Neb. 740, 219 N.W. 1 (1928); Rognow V. Zanesville, 24 Ohio App. 536, 157 N.E. 299 (1926); Shaw v. Stevenson, 119 Okla. 182, 249 Pac. 306 (1926).

[10] Cicero State Bank v. Dolese & Shepard Co., 298 Ill. App. 290, 18 N.E.2d 574 (1939) (fourteen-year-old girl drowned in pool); McKiddy v. Des Moines Elec. Co., 202 Iowa 225, 206 N.W. 815 (1926) (determination of protection for youth between twelve and fourteen-years-of-age—jury question); Biggs v. Consol. Barb-Wire Co., 60 Kan. 217, 56 Pac. 4 (1899) (fourteen-year-old killed by dangerous machinery on landowner's property).

[11] Ekdahl v. Minnesota Util. Co., 203 Minn. 374, 281 N.W. 517 (1938), granted recovery where a fifteen-year-old was electrocuted when raising a mast on a pole which came in contact with defendant's exposed electric wire. In Johns v. Fort Worth Power & Light Co., 30 S.W.2d 549 (Tex. Civ. App. 1930), it was a question for the jury as to the benefit of attractive nuisance doctrine for a fifteen-year-old who was electrocuted while extricating a kite from the defendant's electric tower.

[12] Skaggs v. Junis, 27 Ill.App.2d 251, 169 N.E.2d 684 (1960), held that a sixteen-year-old boy would not be denied benefit of the attractive nuisance doctrine just because over age fourteen. The same accident involved in the *Ekdahl* case, *supra* note 11, was an issue in Schoor v. Minnesota Util. Co., 203 Minn. 384, 281 N.W. 523 (1938), where a sixteen-year-old was burned by electricity when defendant's exposed wire came in contact with a mast handled by the two children. Recovery was granted under the attractive nuisance doctrine.

[13] Harris v. Indiana Gen. Serv. Co., 206 Ind. 351, 189 N.E. 410 (1934) (eighteen-year-old deaf mute with mentality of a six-year-old burned by electricity while climbing on electric tower).

[14] Prosser, Torts § 76(3), at 444 (2d ed. 1955); Green, *Landowner's Responsibility to Children*, 27 Texas L. Rev. 1 (1948); James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 Yale L.J. 144, 167 (1953).

[15] Restatement, Torts § 339 (1934). Kentucky has adopted this section without qualification in Fourseam Coal Corp. v. Greer, 282 S.W.2d 129 (Ky. 1955).

structural or artificial conditions if, in addition to three other requisites,[16] ". . . the children because of their *youth* do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it. . . ."[17] Although the word "youth" as used in the *Restatement* provision has not been specifically interpreted by the Kentucky court, recent cases in Minnesota[18] and New Jersey[19] reflect the view that there is no sharp dividing line at which minors cease to be "young children." Nevertheless, the Kentucky court has only considered the application of this section to children under fourteen years of age.[20] Therefore, under the facts of the *Bentley* case, the same result could have been grounded upon Kentucky's previous restrictive interpretation of the *Restatement* provision.

Therefore, it was not necessary to limit the attractive nuisance doctrine to children under fourteen by a conclusive presumption of no benefit at the age. Indeed, the same result could have also been reached by employing the rebuttable presumption of capacity between the ages of fourteen and fifteen as had been followed in applying the attractive nuisance doctrine previously in Kentucky. Support for such a view is bolstered by the trial judge's peremptory instruction:

> I will be frank in saying this boy is a smart boy; every question that his lawyer asked him was answered logically, reasonably and clearly. I was much impressed with the boy's mentality as a boy of fourteen.

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[16] Restatement, Torts § 339 (a), (b) and (d) (1934). These requisites are:
(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and
(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
• • •
(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.

[17] *Id.* at clause (c). (Emphasis added.)

[18] Johnson v. Clement F. Sculley Constr. Co., 255 Minn. 41, 95 N.W.2d 409 (1959).

[19] Hoff v. Natural Ref. Prods. Co., 38 N.J. Super. 222, 118 A.2d 714 (1955). This decision provides a thorough discussion of the age problem found in the cases.

[20] Clover Fork Coal Co. v. Daniels, 340 S.W.2d 210 (Ky. 1960) (seven-year-old—Restatement § 339 applicable for injuries in coal hopper insufficiently safeguarded); Hanners v. City of Ashland, 331 S.W.2d 729 (Ky. 1960) (eight-year-old—Restatement § 339 not applicable in a public pool drowning); Lynch v. Kentucky Util. Co., 328 S.W.2d 520 (Ky. 1959) (eight-year-old—Restatement § 339 not applicable for injury by impalement of hand on defendant's guy wire); Kentucky & Ind. Terminal R.R. v. Mann, 312 S.W.2d 451 (Ky. 1958) (two-year-old—Restatement § 339 applicable for injuries in a switch yard); Bates v. Caudill, 255 S.W.2d 487 (Ky. 1953) (ten and eight-year-olds—Restatement § 339 not applicable to dynamite cap injuries where caps were taken without defendant's knowledge by a third party).

> He is a bright boy and being such he cannot recover from the company because his mind is not shown to be a child under fourteen.[21]

The capacity of the boy is further indicated by the fact that he knew the meaning of the danger sign upon the enclosure and when questioned whether he believed that the electricity was off because the gate was ajar, he replied, "Yes, I did. *What child wouldn't?*"[22] In summary, the court selected the least flexible approach to reach its result.

Age can be no more than an indication of ability to appreciate a given risk. A conclusive presumption does not alter the minor's misjudgment or his immaturity. Either the rebuttable presumption of no benefit at age fourteen or the *Restatement* view, if applied after age fourteen, would permit the child to present his case. Mentally subnormal children, because of their deficiencies, have a particular need of at least introducing evidence of their failure to comprehend a risk. The *Bentley* rule prevents the jury's inquiry into the negligence of the land possessor, the nature of the condition on the land or any other facts upon which reasonable men might differ. In a society increasingly more industrialized and mechanized such an inquiry would seem critical in many factual situations. The likelihood that negligent acts by land possessors today would not be appreciated even by normal children over age fourteen increases with the complexity of conditions continually being added to land areas.

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TORTS—NUISANCE—REASONABLE USE—Plaintiff brought an action for damages for diminution of the market value of her home as the result of an alleged nuisance created by the defendant, an oil refining company. Since 1928, defendant had been in operation at this location, which was zoned for heavy industrial use. Technilogical developments in the industry dictated the defendant's installation of a "platformer-unifying" unit in 1957. No evidence was produced that the placement and use of the unit were not accomplished with ordinary prudence and discretion; however, the unit necessarily produced a composite noise. Plaintiff's home, in which she had lived since 1950, was in a residential district across the street from defendant's plant; it was separated by a distance of 420 feet from the "platformer-unifying" unit. The trial court entered judgment on a verdict for the plaintiff. *Held:* Reversed and a

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[21] Brief for Appellee, p. 6, Bentley v. South-East Coal Co., 334 S.W.2d 349 (Ky. 1960).

[22] 334 S.W.2d 349 (Ky. 1960). (Emphasis added.) It appears that this phrase by the child is awkward and unnatural.