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Torts--Landowner's Liability to Trespassing Children

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> deceased. In one case he was shot and in the other improperly treated. The case under consideration is analogous to neither. Here the wrongful act complained of was the violation of the liquor law. It was not the commission of any wrongful act *toward* the person of the deceased, or the neglect or failure to discharge any duty which the defendant owed him. (Italics supplied)[19]

It would seem that the same could be said of the defendants act in the present case since in both cases the act was an illegal sale of whiskey. In the absence of an allegation of some act which could be said to be directed against the person of the deceased or that the defendant used duress, deception, or arts of persuasion to induce the drinking of the liquor the complaint did not state a claim upon which relief could be granted by previously existing standards.

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TORTS—LANDOWNER'S LIABILITY TO TRESPASSING CHILDREN—Plaintiff, a two and one-half year old boy, sustained injuries when he was run over by a tank car after he had followed his dog into defendant railroad's switchyard. Plaintiff lived adjacent to the switchyard on a street which dead-ended at the yard. Approximately thirty-five to forty children lived on this street. There was no fence or barrier of any kind between it and the switchyard, but defendant had erected a no-trespassing sign at the end of the street and had three patrolmen on duty at all times who inspected the cars and chased children from the property when they saw them. Defendant had knowledge of both child and adult trespassers, but denied that these trespassers crossed the tracks. Plaintiff's evidence showed that in order to avoid going several blocks around the yard, pedestrians often used a path across the yards as a shortcut. The Circuit Court gave a directed verdict for the defendant. *Held:* Reversed. The court said that the case should have been submitted to the jury with an instruction which regarded the switchyard as an inherent peril to the young child, as a matter of law, and which allowed the jury to determine the issues of (1) whether the child's presence could have been anticipated, (2) whether defendant was negligent in failing to take reasonable precautions to prevent the child's entry, and (3) whether this negligence was the cause of the injury. *Mann* v. *Kentucky & Indiana Railroad Company,* 290 S.W. 2d 820 (Ky. 1955).[1]

[19] Supra note 5 at 132, 136 S.W. at 144.

[1] At the subsequent trial in Jefferson Circuit Court in November, 1956, the plaintiff was awarded $175,000 damages for the loss of his leg at the hip and arm at the shoulder.

Generally a possessor of land owes no duty to trespassers to keep his land in a reasonably safe condition. His duty to trespassing children under the "attractive nuisance" doctrine is an exception to this rule. This limitation required that the injury be caused by an instrumentality that was *attractive* to children and had allured them onto the land. The United States Supreme Court in an opinion,[2] written by Justice Holmes, applied this limitation and denied recovery for the death of a trespassing child as a result of swimming in a poisoned pool, because the pool had not attracted the child onto the land but was discovered after he was already a trespasser. This limitation was followed in numerous jurisdictions but was widely criticized. The Supreme Court soon rejected it in *Best* v. *District of Columbia*,[3] and the element of allurement was replaced by a "foreseeability" test.

The *Restatement of Torts* adopts this test, abandons the antiquated term "attractive nuisance", and does not require that the child trespasser must have been attracted onto the property.[4] It imposes liability on the possessor of land for injuries to young trespassers when: (1) he should foresee child trespassers, (2) he should foresee an unreasonable risk to these children, (3) he should foresee that the child will not realize or discover the danger, and (4) the utility of maintaining the condition is slight compared to the risk.

The majority opinion of the Kentucky Court of Appeals in the *Mann* case was undoubtedly correct in concluding that the young boy might recover, even though the injuring instrumentality had not attracted him onto the property. However, a large portion of the reasoning of the court seems to be somewhat antiquated and is not supported by the court's previous decisions.

The majority opinion states that landowners' nonliability to trespassers is generally applicable to infants,[5] but that there are two exceptions to this rule: (1) liability under the "attractive nuisance" doctrine and (2) liability where a dangerous instrumentality is so maintained that there is the likelihood of a child's being injured by it. The court then classifies this second exception as an extension of the

[2] United Zinc & Chemical Co. v. Britt, 258 U.S. 268 (1922).

[3] The opinion in this case, written by Chief Justice Hughes, stated, "The duty must find its source in special circumstances in which, by reason of the inducement and of the fact that visits of children to the place would naturally be anticipated and because of the character of the danger to which they would unwittingly be exposed, reasonable prudence would require that precautions be taken for their protection." 291 U.S. 411 (1934).

[4] Restatement, Torts, Sec. 339, comment to clause (a): "It is not necessary that the defendant should know that the condition which he maintains upon his land is likely to attract the trespasses of children or that the children's trespasses shall be due to the attractiveness of the condition."

[5] Gray v. Golden, 301 Ky. 477, 192 S.W. 2d 371 (1945).

"attractive nuisance" doctrine relying on the 1915 case of *Lyttle* v. *Harlan Town Coal Co.*[6]

The court has perhaps extended its "attractive nuisance" doctrine in a few cases,[7] but not to the extent that is done in the principal case. Even in the "extension" cases where the court allowed recovery the children had been attracted by something about the premises, although they were injured by an instrumentality other than the thing that attracted them onto the premises. The principal case can be distinguished from these cases since here the plaintiff was actually attracted by his dog, not by any attraction of, or in, the switchyard.

In most of the Kentucky cases the notion that the child must be attracted by the injuring instrumentality itself is emphasized in the opinions of the court.[8] The court has allowed recovery on the grounds

[6] 167 Ky. 345 at 350, 180 S.W. 519 (1915). In this case children, with the defendant's knowledge were in the habit of playing underneath some shade trees at the base of a hill on defendant's property. One of the children was killed when an employee of defendant, while clearing a road, rolled a rock down the hill. The court stated in its decision:

> "The property owner may not be obliged to keep his eyes open to discover the presence of children on his premises, but, when he does discover them habitually intruding at a place that is unsafe for children, the plainest dictates of humanity require that he should do something or say something to save them from probable injury or death.
>
> "This is not a modification of the general rule announced in the cases cited that trespassing children and trespassing adults are to be treated alike, but is merely a new application of what is known as the 'attractive nuisance' doctrine, which we think may well be extended to embrace the case we have."

[7] Lyttle v. Harlan Town Coal Co., supra note 6; Bransom's Administrator v. Labrot & Graham, 5 Ky. L. Rep. 827 (1884). Children were attracted to and often played on defendant's vacant lot. Defendant, although aware of this custom, had a lumber pile on the lot which was stacked in a dangerous manner. A child was killed when a piece of this lumber fell on him while he was playing in the lot and defendant was held liable. Union Light, Heat and Power Company v. Lunsford, 189 Ky. 785, 225 S.W. 741 (1920) Children were attracted to defendant's lot because of a pond located in it. The children often played on this lot with defendant's knowledge. One of the boys was severely burned when, while chasing a frog, he stuck his arm through a fence, which was in disrepair, and came into contact with defendant's high voltage line, which ran from a transformer on the lot to a building adjacent to the lot. Defendant was held liable although the child was attracted by the pond and not the electric line.

[8] Meredith v. Fehr, 262 Ky. 648 at 653, 90 S.W. 2d 1021 (1936). The court defined attractive nuisances as, " 'attractive places' which are calculated to attract and lure infants of tender years, ignorant of their dangerous nature and proper use, as to 'a trap' set for their ensnarement and hurt."; Louisville & N. Ry. v. Vaughn, 292 Ky. 120 at 124, 166 S.W. 2d 43 at 45 (1942). The court in this case used the definition found in 38 Am. Jur. 803:

> "That one who maintains upon his premises a condition, instrumentality, machine, or other agency which is dangerous to children of tender years by reason of their inability to appreciate the peril therein, and which may reasonably be expected to attract children of tender years to the premises, is under a duty to exercise reasonable care to protect them against the dangers of the attraction."

that the injuring instrumentality was alluring or attractive,[9] and recovery has been denied when the court did not consider the instrumentality to be *attractive.*[10] The injuring instrumentality has been found to be attractive, but not dangerous,[11] and to be attractive, but sufficiently guarded.[12] Recovery has been denied when the injuring instrumentality did not attract children onto the property.[13]

The import of all these decisions is that the Kentucky Court of Appeals has constantly stressed the necessity that the injuring instrumentality be attractive, or that the child be attracted onto the premises. In the principal case the court developed a so-called "extension" of the doctrine and no longer requires that the child be attracted to the property, but places liability upon the concept that liability ". . . rests upon reasonable anticipation that children might be exposed to danger, and the duty to take precautions against their going on the premises. . . ." It is not too surprising that three judges dissented vigorously from a holding that was not in accord with past decisions of the court. It is more unusual that the majority seemed to be so bound by the generally repudiated "attractiveness" element of the "attractive nuisance" label that it classified this case as an "extension" of the doctrine. Would it not be much simpler for the court to clarify its newly imposed liability upon landowners to child trespassers by doing away with the misnomer "attractive" and to align itself forthrightly with the position taken by a majority of jurisdictions and the *Restatement of*

[9] Illinois Central Railway Co. v. Wilson, 23 Ky. L. Rep. 684, 63 S.W. 608 (1901) (handcar); Gnau v. Ackerman, 166 Ky. 258, 179 S.W. 217 (1915) (limebed in street); Cumberland River Co. v. Dicken, 279 Ky. 700, 131 S.W. 2d 927 (1939) (gas pumps and intake pipe); Louisville & N. Ry. v. Vaughn, 292 Ky. 120, 166 S.W. 2d 43 (1942) (railroad turntable); Kentucky Utilities Co. v. Garland, 314 Ky. 252, 234 S.W. 2d 753 (1950) (uninsulated wire running through a tree, with the wire being the nuisance and the tree the attraction).

[10] Mayfield Water & Light Co. v. Webb's Adm'r, 129 Ky. 395, 111 S.W. 712 (1908) (electric wire eighteen feet above the ground); Thompson v. Cumberland Telephone & Telegraph Co., 138 Ky. 109, 127 S.W. 531 (1910) (telephone pole); Dennis' Adm'r v. Ky. & W. Va. Power Co., 258 Ky. 106, 79 S.W. 2d 377 (1935) (steel transmission tower); Fain v. Standard Oil Co. of Kentucky Inc., 284 Ky. 561, 145 S.W. 2d 39 (1940) (hole in ground); Ice Delivery Co. v. Thomas, 290 Ky. 230, 160 S.W. 2d 605 (1943) (ice truck); Burkett v. Southern Belle Dairy Company, 272 S.W. 2d 661 (Ky. 1954) (milk vending truck).

[11] Coon v. Ky. & Ind. Ry., 163 Ky. 223, 173 S.W. 325 (1915) (viaduct wall); Jarvis v. Howard, 310 Ky. 38, 219 S.W. 2d 958 (1949) (coal ramp).

[12] McMillin's Adm'r v. Bourbon Stock Yards Co., 179 Ky. 140, 200 S.W. 328 (1918).

[13] Latta v. Brooks, 293 Ky. 346, 169 S.W. 2d 7 (1943); Recovery denied for injuries to eyes from unslacked lime, since it was not the lime which attracted the children to the premises and it was not inherently dangerous; Jones v. Louisville & N. Ry., 297 Ky. 197, 179 S.W. 2d 874 (1944): A seven and one-half year old boy released brake on a coal car and fell or jumped from the car and was crushed to death. Recovery denied since the boy and his sister were not attracted to the premises by the coal car but by a sandpile, and the brake could not be considered an attractive nuisance.

Torts? The significance of "attractiveness" should be eliminated as a controlling factor and given its proper weight as one of the factors bearing on the point of whether the presence of children could be reasonably anticipated.

The majority opinion seemed to use this approach in holding that it was the function of the jury to determine whether the child's presence could have been anticipated, whether defendant was negligent in failing to take reasonable precautions to prevent the child's entry, and whether this negligence was the proximate cause of the injury. The dictum of the court actually went much further than its holding, however. In its opinion it characterized the switchyard as an "inherent peril" and thus answered all of these questions of fact in the affirmative. It thus ruled as a matter of law that defendant had breached its duty to plaintiff and that it was negligent in the performance of this duty, thus causing plaintiff's injury.

The court was faced with little difficulty in finding that the defendant should have anticipated the presence of children since the evidence showed the large number of children living in close proximity to the unfenced switchyard and the previous trespasses both by adults and children. Nor could there be any question that railroad cars, moving swiftly, silently, and unattended, create an unreasonable risk to children. A two and one-half year old child could certainly not be expected to discover or realize the danger. Therefore, the main question confronting the court was whether defendant had a duty to erect some form of barrier between the child-crowded dead-end street and its switchyard. This is a question of utility in the light of obvious risk.

This question was complicated by a Kentucky statute[14] which does not require a railroad to fence its property in any town or city. The court rightly relegated this statute to a position of covering only the railroad's general duty and imposed liability upon the premise that the statute does not relieve the railroad from liability for omitting to perform an act founded upon the common law principle of a duty to exercise diligence and care commensurate with the circumstances of the particular case.

The court also faced the contention that even if there had been a barrier at the end of the street, children could have gone around it. It is not clear what decision would have been reached had there been a barrier, but in this case the court emphasized the fact that there was

[14] Ky. Rev. Stat. Sec. 256.160 (3) (1953): the railroad shall not be required to ". . . build any fence along the line through any town or city or across any public or private passway"; see also KRS Sec. 256.100 (1953): "A railroad shall be on equal terms and obligations with other landowners adjoining lands in this state."

no barrier and cited *McMillins' Adm'r* v. *Bourbon Stockyards Co.*,[15] where the defendant had fenced its premises, but a six year old boy had gone a round-about-way and entered through an open gate and was killed when he fell into poisonous cattle dip. It was there held that the Company was not liable since it had met its duty of exercising reasonable care by fencing the premises. Perhaps if there had been a barrier in the principal case defendant would have been absolved from liability, but it is probable that the court, touched by the horrible injury to the plaintiff, would have found that the defendant should have constructed a fence sufficient to prevent child trespassers from entering its property. The expense of erecting a fence would be greater than the cost of the lock in the turntable cases, but here the risk of serious injury or death is greater, too.

The dissenting opinion in the principal case assumes that the switchyard was not an "attractive nuisance" and argues that the railroad was under no duty to fence its switchyard either by statutes or because of the foreseeable danger. The dissent offers two other reasons why there was no breach of duty which were not discussed in the majority opinion. It is contended that the defendant satisfied any duty he might have had to prevent the entry of trespassing children by having three watchmen constantly on duty. However, it is to be noted that these watchmen were hired primarily to check the cars and protect them from thieves, and that keeping children off the premises was merely an incidental duty which evidently was not performed in a manner designed to keep the switchyard free from trespassers.

The dissent also takes the view that the presence of a two and one-half year old child could not be reasonably anticipated, since children of this age are usually kept in some form of captivity. This seems to be a very weak point and would especially be so to harassed parents who realize the difficulty of keeping a two and one-half year old boy under constant rein. Add to this a wandering puppy, which was perhaps the child's most prized possession, and you have a combination that can escape even from the most attentive parent. In fact, it seems that the converse of the dissent's view is the more apt statement, for an older child is often much easier to control than a child the age of the plaintiff.

The decision reached in this case seems very just under the circumstances. The court's method of reasoning in taking the attractiveness out of the "attractive nuisance" doctrine was rather strained, but

[15] 179 Ky. 140, 200 S.W. 328 (1918).

it did arrive at a correct and just conclusion. Perhaps in future cases this point can be clarified and reduced to the basic principles of landowners' liability to trespassing children, without being tied to the use of the antiquated term, "attractive nuisance", and to so-called "extensions" of this doctrine. The court very capably dealt with the fence law statute in deciding it did not govern in a situation where it was not strictly applicable and other circumstances dictated the necessity for a fence. Although the dissenting opinion finds the majority opinion to be ". . . divergent from my idea of the law . . ." it is the rule supported by numerous jurisdictions and one which is being increasingly followed. The necessity for this rule of landowners' liability to trespassing children, without the attractiveness limitations, is very aptly stated by Prosser, when, speaking of trespassing children he states:

> If he is to be protected the person who may do it with the least inconvenience is the one upon whose land he strays, and the interest in unrestricted freedom to make use of the land may be required, within reasonable limits, to give way to the greater social interest in the safety of the child.[16]

Fred F. Bradley

TORTS—TRESPASS—KENTUCKY ELIMINATES A STRICT LIABILITY RULE—The plaintiff, a child, lived in a house near the highway. While returning to her home from across the road, she was struck by a rock thrown from the wheels of a passing truck. According to her testimony, after she had entered her yard the truck passed and, as she stated, "It throwed a rock out and hit me and broke my leg." It was not shown conclusively at the trial whether the rock had come from between the dual wheels of the truck or was lying in the highway when it was thrown onto plaintiff's land. The evidence presented was not sufficient to show that the operator of the truck was negligent. *Held:* judgment for the plaintiff in the trial court reversed. Defendant is not liable for a personal injury inflicted upon another by an unintentional, nonnegligent act, although the injury was preceeded by an unprivileged intrusion upon land occupied by the injured party. *Randall* v. *Shelton,* 293 S.W. 2d 559 (Ky. 1956).

In its earlier stages trespass was identified with the view that any forcible or direct invasion of the person or property of another was an actionable trespass, even if the injury was a pure accident.[1] The em-

[16] Prosser, Torts, Sec. 76 at 438 (2nd ed. 1955).

[1] Restatement, Torts, Sec. 166 (1934).