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Torts: Attractive Nuisance

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TORTS: "ATTRACTIVE NUISANCE."—Once again, a California court operating under a notably cautious application of the attractive nuisance doctrine, has denied relief to a trespassing child. In *Puchta v. Rothman*,¹ which involved an action for damages for injuries sustained by a minor as a result of a fall from a building under construction, the First District Court of Appeal, Division 2, California, affirmed a judgment rendered by the Superior Court in and for the county of San Mateo holding that the defendants were not liable under the attractive nuisance doctrine. The facts were as follows: Defendants were engaged in the construction of a building—(partially complete at the time of injury)—the second floor of which was overlaid with sheets of tar-paper completely concealing a hole in the floor for a proposed ventilator or skylight. The stairway to the second floor was completed and its use was exceedingly convenient. The defendants, obviously cognizant of the use of the building as a playing place by the neighboring children, erected a barricade at the foot of the stairway in an effort to make the second floor inaccessible. Subsequently defendants removed the barricade and plaintiff while playing on the second floor fell through the tar-paper covered hole, thereby sustaining injury.

The application of the attractive nuisance doctrine has been, since its inception, a subject of great controversy. In a minority of a dozen or less jurisdictions the courts have completely rejected the doctrine as "sentimental humanitarianism." It will be noted that these jurisdictions are chiefly comprised of industrial states. The majority of the states, however, accept the doctrine with a reservation of cautious application, allowing recovery only in a limited group of cases.²

The best statement of the rule, and of the requisites necessary to bring a given fact situation under its operation, can be found in the Restatement of Torts, paragraph 339.^{2a}

"A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a *structure* (emphasis added) or other artificial condition which he maintains upon the land if,

- "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
- "c. 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, and
- "d. the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

The doctrine was first applied in California in *Barret v. Southern Pacific Co.*³ which involved a typical turntable situation. At that stage the doctrine in California was relevant only in relation to machinery under certain conditions.⁴ However the

¹99 A. C. A., Vol. 4 at 328 (Aug. 31, 1950), 221 P.2d 744.

²Prosser on Torts, par. 77.

^{2a}The necessity of fulfilling these requisites therefore does not make "the owner of a thing dangerous and attractive to children always and universally liable for an injury to a child tempted by the attraction." (*Peters v. Bowman*, 115 Cal. (345) 349.)

³91 Cal. 296, 27 P. 666.

⁴*Hernandez v. Santiago Orange Growers*, 110 C. A. 229, 293 P. 875.

cases have progressed past that point and have extended the doctrines' operation over various appliances and contrivances.⁵ It may be seen that these cases involve a common element of artificial condition as opposed to a natural one. It is now generally agreed that California is essentially in accord with Restatement 339⁶, but has in some instances varied in the application of the rules and also in the basis of recovery.⁷

Generally the doctrine serves as an exception to the oft-expressed rule that a landowner is under no duty to keep his premises safe for the benefit of trespassers.⁸ Other courts have based the doctrine on the maxim that "one must so use and enjoy his property as to interfere with the safety of others as little as possible consistently with its proper use."⁹ A unique conception of the basis of the doctrine has been advanced by a few courts to the effect that the attractiveness of the nuisance raises an implied invitation and the owner owes to the accepting children the duty owed to an invitee.

In the principal case a California court has refused to extend the operation of the attractive nuisance doctrine to a building under construction. The court advanced two lines of argument in support of their conclusion which the writer would like to deal with in sequence: Following the line of thought as expressed in *Peters v. Bowman*, *supra*, where it was stated that the doctrine "should not be carried beyond the class of cases to which it has been applied," the court also adopted this mechanical rigidity of application.^{9a} This is clearly evidenced in the course of the opinion where the court states that "an unfinished building has none of the characteristics of turn-tables, moving cars or wagons, live wires or dangerous and attractive machinery," and, therefore, seemingly concludes that a building under construction is not a proper situation to which the doctrine can be applied.¹⁰ But it is the contention of the writer (in this regard he is in accord with Dooling, J., dissenting), that the facts alleged fulfill the requisites of liability of the "concealed peril or trap" phase of the attractive nuisance

⁵Cahill v. E. B. & A. L. Stone Co., 153 Cal. 571, 96 P. 84.

⁶California Annotations on the Restatement on Torts, Vol. 1 and 2, par. 339.

⁷Similarity in fact situations that have arisen in California where the doctrine has been involved can be conveniently grouped as follows: Turntables, ponds or reservoirs, siphons, electric shocks and, street and railroad cases. California courts have refused successful application of the doctrine in the following specific cases: *Loftus v. Dehail* (1901), 133 Cal. 214, 65 P. 379 (open cellar where house has been removed); *Doyle v. Pacific Electric R. Co.* (1936), 6 Cal. 2d 550, 59 P. 2d 93 (attic of a ballroom, a finished building, with canvas ceiling over ballroom); *Solomon v. Red River Lumber Co.* (1922), 56 C. A. 742, 206 P. 498 (swing on school grounds); *Hernandez v. Santiago Orange Growers Assn.*, *supra* (loading ice into cars and a block falls on a boy below).

⁸*Peters v. Bowman*, 115 Cal. (345) 349; *Cahill v. E. B. & A. L. Stone Co.*, *supra*. It is therefore incumbent upon the plaintiff "to obviate the legal consequences of the trespass by alleging and proving all the facts which are necessary to remove the effect of the trespass as an objection to recovery." (*Bradley v. Thompson*, 65 C. A. 226, 223 P. 572.)

⁹*Polk v. Laurel Hill Cemetery Assn.*, 37 Cal. App. 624, 174 P. 414.

^{9a}The disabling effect of this rigid view in handling new fact situations in the light of the courts avowed caution in application of the doctrine poses an interesting problem which cannot be adequately dealt with in the scope of this note.

¹⁰Under the Restatement on Torts, paragraph 339, the operation of the rule has not been so thoroughly restricted. The Restatement allows application of the doctrine on "structures and artificial conditions" in general. To emphasize the broadness of the Restatement view in contrast with the California view "structure" has been defined by a California court in *Barr Lumber Co. v. Perkins*, 295 P. 552, 555, as "something composed of parts or portions which have been put together by human exertion." This indeed allows a wider range of operation than the California courts have granted.

doctrine, and thus places the case within that class of cases in which California courts have applied the doctrine.

The rule of non-liability to trespassers is not to be applied in "instances where the owner maintains on his land something in the nature of a trap or other concealed danger known to him and as to which no warning is given to others."¹¹ The courts of this state have securely settled that an open body of water on a defendant's land is not within the scope of the attractive nuisance doctrine's application¹² (on the basis of the majority holding that an unfinished building is also not within the doctrine's scope a substitution of "unfinished building" for "open body of water" can easily be made) and yet in *Sanchez v. East Contra Costa Irr. Co.*,¹³ when a concealed trap was found to exist in such waters the court without any apparent difficulty found that the "trap" even though found in a situation where the doctrine does not apply, will on the pure basis of the existence of the trap create liability under the doctrine. Also, Beasley, J., speaking in *Faylor v. Great Eastern Q. Mining Co.*, *supra*, said of the decision in *Polk v. Laurel Hill Cem. Assn.*, *supra*, "The rule of the turntable cases was applied to a reservoir of water (not proper grounds for invoking the doctrine, *supra*) in which a child was drowned, apparently because the reservoir was so *concealed* (emphasis added) as to be dangerous to persons passing near it."¹⁴ It is a matter of common knowledge that children are irresistibly tempted to play about in buildings under construction. Such a structure is then something in the nature of bait for the extraordinary, concealed and unguarded hole beneath the tar-paper which might be said to be the trap.

While it is true that the trespassing children assume the risk of the open, ordinary, obvious dangers of the reservoir, unfinished building or what have you, such is not the case in reference to the unknown, concealed, unguarded dangers present and thus assumption of the risk cannot be employed to defeat recovery by the injured child if the other requisites of liability are complied with.¹⁵ It is the contention of the writer that the cases roughly similar in fact situations where relief under the doctrine has been denied can be in the main explained by the fact that "the danger was either so open that the injured child was held to have been able to see it, or so obvious that the particular child was held accountable for understanding the danger."¹⁶

The court dealt rather extensively with the principle that the attractive nuisance doctrine does not require an owner to destroy or impair usefulness of his property in order to safeguard trespassing children, concluding that a protective measure, namely a barricade at the foot of the stair, "would destroy the very purpose for which the stairs were built and retard the completion of the building" and thus impose upon the ownership a "preposterous and unbearable weight." It is submitted that while the principle is correct in theory the conclusion of the court in this instance is not supported by the facts. Under the facts, the erection of a barricade is not the only possible means of guarding the danger of the concealed hole as the court seemingly

¹¹*Faylor v. Great Eastern Q. Mining Co.*, 45 Cal. App. 194, 187 P. 101.

¹²*Peters v. Bowman*, *supra*; see 26 Cal. L. R. 159.

¹³205 Cal. 515, 271 P. 1060.

¹⁴A general discussion of the problem can also be found in the following cases: *Peters v. Bowman*, *supra*; *Loftus v. Dehail*, *supra*; *Loveland v. Gardner*, 79 Cal. 317, 21 P. 766; *Malloy v. Hibernia Sav. & Loan Soc.*, 3 Cal. Unrep. 76, 21 P. 525.

¹⁵*Hernandez v. Santiago Orange Growers Assn.*, *supra*.

¹⁶*Faylor v. Great Eastern Q. Mining Co.*, *supra*.

assumes. It is further submitted that the removal of the tar-paper from the hole or the placing of boards over the hole would not burden the ownership with any "preposterous and unbearable weight" but would to the contrary involve very little effort and would not impair the usefulness of the second floor to any great extent, nor would it retard completion in the least. The veracity and weight given the above statements are indeed emphasized when one measures the amount of effort the defendants must expend against the "lives and safety of little children known to have played in the building."

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