

Winter 1951

Landowner's Liability for Infant Drowning in Artificial Pond

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Property Law and Real Estate Commons](#), and the [Torts Commons](#)

Recommended Citation

(1951) "Landowner's Liability for Infant Drowning in Artificial Pond," *Indiana Law Journal*: Vol. 26 : Iss. 2 , Article 7.

Available at: <http://www.repository.law.indiana.edu/ilj/vol26/iss2/7>

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

LANDOWNER'S LIABILITY FOR INFANT DROWNING IN ARTIFICIAL POND

Since its introduction some seventy years ago, the proposition that a landowner may be liable to trespassing children who are injured by dangerous artificial conditions on the land, under circumstances where an adult could not recover, has had an interesting history. A recent Indiana Supreme Court decision on one of the specific applications of this "attractive nuisance" doctrine—the liability for the drowning of a child trespasser in an artificial body of water—was *Plotzki v. Standard Oil Co. of Indiana*.¹ The complaint for wrongful death alleged that the defendant left unguarded on its land an artificial pond in view of the street in a residential section of Hammond, Indiana. Although the bottom was littered with debris and broken by abrupt drop-offs which were invisible through the murky water, the defendant took no steps to warn the large groups of children known to be attracted there frequently to

27. See note 1 *supra*.

28. In *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938), it was pointed out that the presumption of validity may have a narrower scope in regard to statutes regulating non-economic rights embraced within the first ten amendments and the Fourteenth Amendment. See also *Schneider v. State*, 308 U.S. 147, 161 (1939). *Mac Dougall v. Green*, 335 U.S. 281 (1948) would seem to give this presumption a broader scope where the regulation of non-economic rights embodies the principle that government is not purely a matter of majority rule. See note 5 *supra*. This is understandable and defensible because that principle is embodied in the Federal Constitution, which awards each state equal representation in the Senate regardless of population. U.S. CONST. XVIII, § 1; ART. I, §§ 2, 3. However, the analogy is incomplete when it is applied to political subdivisions within the state, because it presupposes the relation between county and state to be similar to that between state and federal government. See note 9 *supra*. It forgets that the Federal Constitution was created to perfect a union of thirteen separate, distinct, and independent sovereignties while the Georgia counties are mere divisions for the more efficient operation of a single state government. GA. CONST. ART. XI, § 1. *South v. Peters*, 339 U.S. 276 (1950), goes to an extreme in that it does not give effect to the policy of *Mac Dougall v. Green*, *supra*, nor does it pass upon the constitutionality of the statute in question, but renders it unassailable regardless of its constitutionality.

1. 92 N.E.2d 632 (Ind. 1950); *petition for rehearing denied*, Oct. 4, 1950.

swim. Among those attracted was the plaintiff's eleven-year-old son, who went swimming without his mother's knowledge. He was drowned when he stepped into a drop-off of which he was unaware. A demurrer for want of facts sufficient to state a cause of action was sustained and a judgment for the defendant affirmed, two judges dissenting. Starr, J., for the majority, held that a body of water was not an attractive nuisance because children are presumed to know the dangers of water.²

In 1873, in *Sioux City & Pac. R.R. v. Stout*,³ the United States Supreme Court, disregarding the old rule that a landowner owes no duty to trespassers in regard to risks arising from the condition of the premises,⁴ imposed responsibility upon a railroad for negligently exposing a dangerous artificial condition (an unlocked turntable) to the curiosity of a trespassing child.⁵ Indiana readily accepted this inroad upon the landowner's "immunity"⁶ and for twenty years ruled broadly that he could not with impunity create a dangerous condition which made injury to children probable.⁷

The obvious conflict between the extension and the general rule induced courts to seek an adequate doctrinal rationale. Instead of positing liability on foreseeability of the risk and acknowledging the conflict, they resorted to a fiction—an invitation implied in law from an unnecessary exposure of some dangerous and alluring artificial condition with which children were prompted to meddle. This has become the traditional statement of the "attractive nuisance" doctrine.⁸

The new theoretical basis of liability was first asserted in Indiana in two railroad turntable cases,⁹ which aptly fitted the "invitation" formula since the

2. *Id.* at 634.

3. 17 Wall. 657 (1873).

4. *Knapp v. Doll*, 180 Ind. 526, 103 N.E. 385 (1913); *Evansville & T. H. R.R. v. Griffin*, 100 Ind. 221 (1884); *Lary v. Cleveland, C. C. & I. R.R.*, 78 Ind. 323 (1881). See also *Indianapolis v. Emmelman*, 108 Ind. 530, 533, 9 N.E. 155, 156 (1886); *City of Elwood v. Addison*, 26 Ind. App. 28, 31, 59 N.E. 47, 48 (1901).

5. See Townes, *Is a Restatement of the Law as to Liability Arising from Dangerous Premises Desirable and Practicable?*, 1 TEX. L. REV. 1, 3 (1922). In blandly disregarding the old rule, the Court did not view the decision "as a great innovation." Hudson, *The Turntable Cases in the Federal Courts*, 36 HARV. L. REV. 826, 829 (1923).

6. *Binford v. Johnston*, 82 Ind. 426, 430 (1882). Two earlier cases, *Young v. Harvey*, 16 Ind. 314 (1861) and *Durham v. Musselman*, 2 Blackf. 96 (Ind. 1827), indicated that Indiana courts might be receptive to such a rule in regard to children.

7. *Cincinnati & Hammond Spring Co. v. Brown*, 32 Ind. App. 58, 69 N.E. 197 (1903); *accord*, *Penso v. McCormick*, 125 Ind. 116, 25 N.E. 156 (1890). Cf. *South Bend v. Turner*, 156 Ind. 418, 60 N.E. 271 (1900) (reversed on other grounds). See also *Indianapolis, P. & C. R.R. v. Pitzer*, 109 Ind. 179, 182, 6 N.E. 310, 311 (1886); *Binford v. Johnston*, 82 Ind. 426, 430 (1882). But cf. *Indianapolis v. Emmelman*, 108 Ind. 530, 533-534, 9 N.E. 155, 156-157 (1886); *City of Elwood v. Addison*, 26 Ind. App. 28, 31, 59 N.E. 47, 48 (1901).

8. See, e.g., *Cleveland, C. C. & St. L. Ry. v. Means*, 59 Ind. App. 383, 399, 104 N.E. 785, 790 (1915). The rationalization was probably first asserted in *Keefe v. Milwaukee & St. P. Ry.*, 21 Minn. 207 (1875).

9. *Chicago & E. R.R. v. Fox*, 38 Ind. App. 268, 70 N.E. 81 (1904); *Lewis v. Cleveland, C. C. & St. L. Ry.*, 42 Ind. App. 337, 84 N.E. 23 (1908).

children had actually been attracted by the prospect of a merry-go-round ride. But the logical implications of the rule restricted the possibility of recovery within a narrow factual compass: the child could recover only if he had been both induced to trespass and injured by a condition determined to be peculiarly alluring to children.¹⁰ Although the theory favored in Indiana today is not clear,¹¹ the many cases in which a child has successfully sued for injuries suffered while trespassing indicates that the courts of the state have been unwilling to adhere to the implications of the attractive nuisance theory where their effect is to limit too narrowly the rights of the child.

Thus the 1915 case of *Cleveland, C. C. & St. L. Ry. v. Means*¹² presented a situation not literally within the doctrinal terms since the injury was not caused by the condition which enticed the child to trespass, but resulted from the defendant's separate "affirmative" conduct. A child gathering wheat from beneath railroad cars on a siding where children had been known to play was killed when, in coupling operations, the defendant's trainmen suddenly and without warning or investigation moved the cars. Hottel, J., noting the confusion as to the landowner's duty toward intruders, decided that recovery could be based on traditional principles of negligence.¹³ Later cases have imposed liability for injuries from an unreasonable risk to foreseeable trespassing children, whether created by affirmative conduct or by a dangerous condition, even if it "may not be what is termed an attractive nuisance."¹⁴ The

10. See, e.g., *United Zinc & Chemical Co. v. Van Britt*, 258 U.S. 268 (1922).

11. There is language in a few Indiana attractive nuisance cases which supports the narrower limitations. See, e.g., *Indianapolis Water Co. v. Harold*, 170 Ind. 170, 176, 83 N.E. 993, 995 (1908) (the child was not lured by the condition until after trespassing); *Indianapolis Motor Speedway Co. v. Shoup*, 88 Ind. App. 572, 577-578, 165 N.E. 246, 248 (1928) (the child did not discover the condition until after trespassing); *Davis, Director v. Keller*, 85 Ind. App. 9, 17, 150 N.E. 70, 72 (1926) (a railroad right of way was thought not peculiarly alluring to children); *Holstine v. Director*, 77 Ind. App. 582, 591, 134 N.E. 303, 306 (1922) (the child was not killed by the devices which lured him to trespass). In each of these cases, however, the court seemed to posit its decision of no liability on other grounds. Furthermore, the early Indiana cases applying the doctrine of negligence (cases in note 7 *supra*) are still cited with approval, although they conflict with the narrower limitations implicit in the literal doctrinal terms. It is doubtful whether such limitations would be employed today where the facts of a case call strongly for liability. For example, in *Drew v. Lett*, 95 Ind. App. 89, 182 N.E. 547 (1932), the defendant was held liable when a child was killed by poison gas which had collected at the mouth of a shaft on the defendant's abandoned mine works although no particular condition could be pointed to as having lured the child to trespass. For a discussion of that case as well as the attractive nuisance doctrine in general, see 8 IND. L. J. 508 (1933).

12. 59 Ind. App. 383, 104 N.E. 785 (1915), *petition for rehearing denied*, 59 Ind. App. 412, 108 N.E. 375 (1915).

13. *Id.* at 411, 104 N.E. at 795. In support of the proposition that the landowner's liability to children originated under the traditional doctrine of negligence see Green, *Landowner's Responsibility to Children*, 27 TEX. L. REV. 1 (1948); Wilson, *Limitations on the Attractive Nuisance Doctrine*, 1 N.C.L. REV. 162, 169 (1923).

14. 1 THOMPSON, NEGLIGENCE 945 (1901). In *Indiana Harbor Belt R.R. v. Jones*, 220 Ind. 139, 41 N.E.2d 361 (1942), Richman, J., excellently pointed out the proposition of the *Means* case. See Harper, *Development in the Law of Torts in Indiana 1940-*

consistently satisfactory results of the decisions indicate that the Indiana courts have in each made a practical compromise between the interest in the protection of children and the interest in maximizing the free use of land.¹⁵

The Indiana cases, regardless of whether the rule applied can properly be termed attractive nuisance, reveal that the elements of liability for injuries caused children by artificial conditions on land are four: (1) The landowner should have known that children were likely to trespass; (2) he should have known that the condition involved serious risk of harm to children; (3) the injured child because of its tender years did not realize the risk; (4) the utility to the landowner of maintaining the dangerous condition was slight compared with the risk to the child.¹⁶ It is of course impossible to state with precision the comparative weight which Indiana courts have given each element.¹⁷ There is an inverse relationship between the first two, so that as the likelihood of a child's presence at the place of danger increases, it becomes correspondingly easier to impose liability for injury from a condition which is of comparatively minor danger.¹⁸ The utility and degree of necessity of main-

1945, 21 IND. L.J. 447, 467-469 (1946). This rule has been termed variously as the intermediate rule, *Holstine v. Director*, 77 Ind. App. 582, 597, 134 N.E. 303, 308 (1922), and the habitual trespasser rule, 14 IND. L.J. 376 (1939). It has been applied chiefly against railroads and power companies. The rule applied in the *Means* case has been recognized and followed: *Harris v. Indiana G. S. Co.*, 206 Ind. 351, 189 N. E. 410 (1933); *Wise v. Southern I.G. & E. Co.*, 109 Ind. App. 681, 34 N.E.2d 975 (1941); *Terre Haute, I. & E. T. Co. v. Sanders*, 80 Ind. App. 16, 136 N.E. 54 (1923); *Fort Wayne & N.I.T. Co. v. Stark*, 74 Ind. App. 669, 127 N.E. 460 (1920); it has also been recognized and distinguished: *McClelland v. Baltimore & O. C. T. R.R.*, 123 F.2d 734 (7th Cir. 1941); *Brush v. Public Serv. Co.*, 106 Ind. App. 554, 21 N.E.2d 83 (1939); *Dickerson v. Ewin*, 105 Ind. App. 694, 17 N.E.2d 496 (1938); *Snyder v. New York C. R.R.*, 101 Ind. App. 258, 194 N.E. 796 (1935); *Davis v. Keller*, 85 Ind. App. 9, 150 N.E. 70 (1926). *But see Kent v. Interstate P.S. Co.*, 97 Ind. App. 13, 19, 168 N.E. 465, 467 (1929) (disapproved in part by the *Wise* case *supra*).

The fundamental proposition of both the attractive nuisance cases and those following *Cleveland C. C. & St. L. Ry. v. Means* is that if the possibility of intruding children at a place of danger is foreseeable, due care is required. Both lines of cases can be traced back to the early Indiana decisions cited in note 7 *supra*.

15. The competition of these interests is the crux of the problem. See Bohlen, *The Duty of a Landlord Toward Those Entering His Premises of Their Own Right*, 69 U. OF PA. L. REV. 340, 348 (1921); Smith, *Liability of Landowners to Children Entering Without Permission*, 11 HARV. L. REV. 349, 369 (1898).

16. This classification is a rough paraphrase of RESTATEMENT, TORTS § 339 (1934).

17. See Bauer, *The Degree of Danger and the Degree of Difficulty of Removal of the Danger as Factors in the "Attractive Nuisance" Cases*, 18 MINN. L. REV. 523 (1934) and cases cited.

18. See *Cincinnati & Hammond Spring Co. v. Brown*, 32 Ind. App. 58, 69 N.E. 197 (1903), where a landowner who had left parts of an unkept barbed wire fence to remain among the underbrush of his abandoned city lot was held liable for injuries to a child who ran against the wire during a game. The danger was not required to be great since children had been known to use the defendant's land as a playground. See also *Penso v. McCormick*, 125 Ind. 116, 25 N.E. 156 (1890) (pile of hot ashes on a lot used by the public); *Borinstein v. Hansbrough*, 119 Ind. App. 134, 82 N.E. 2d 266 (1948) (pile of heavy junk on a city lot where children played); *Indianapolis v. Williams*, 58 Ind. App. 447, 108 N.E. 387 (1915) (sewer hole in a stream bed on a playground). On the other hand, the likelihood of the child's presence at the dangerous place has been substantially

taining the particular condition is also a variable factor which affects the ultimate decision as to the reasonableness of the landowner's conduct.¹⁹ The courts have not viewed the third element—inadvertence to the danger—as involving considerations any different from the doctrine of contributory negligence as familiarly applied to children.²⁰ Consequently, determination of whether the child exercised “diligence” has been left largely to the trier of fact,²¹ except when the evidence showed that the child was aware of the danger.²²

Measured against the foregoing four-part formula for determining liability, it seems erroneous to say that the complaint in the *Plotzki* case failed to state a cause of action. There was no dispute that the defendant should have known that children were likely to come to its dangerous pond. The issue was whether the child knew or should have known of the danger, and it is on this point that the court denied recovery. Instead of leaving the question to the trier of fact, it ruled as a matter of law that all trespassing children understand the dangers of water.²³ Authority for the ruling was found in an often quoted dictum in *Indianapolis Water Co. v. Harold*,²⁴ although that case and another,²⁵ the only two Indiana precedents in point, allowed a suit for the drowning of an

less and liability still resulted where the danger was extreme to anyone contacting the condition. *Harris v. Indiana G. S. Co.*, 206 Ind. 351, 189 N.E. 410 (1933) (high tension tower with defective wiring causing a short circuit); *Fort Wayne & N. I. T. Co. v. Stark*, 74 Ind. App. 669, 127 N.E. 460 (1920) (uninsulated wires running through a tree top).

19. See *Indianapolis Water Co. v. Harold*, 170 Ind. 170, 83 N.E. 993 (1908).

20. See, e.g., *Drew v. Lett*, 95 Ind. App. 89, 95, 182 N.E. 547, 549 (1932).

21. “Contributory negligence is a defense and unless it affirmatively appears the complaint is good. . . . These were questions of fact not apparent on the face of the complaint and therefore subject to proof and for the jury.” *Indiana H. B. R.R. v. Jones*, 220 Ind. 139, 146-147, 41 N.E.2d 361, 364 (1942). See *South Bend v. Turner*, 156 Ind. 418, 423-424, 60 N.E. 271, 273-274 (1901); *Wise v. Southern I. G. & E. Co.*, 109 Ind. App. 681, 693, 34 N.E.2d 975, 979 (1941). *Contra*: *Anderson v. Reith-Riley Construction Co.*, 112 Ind. App. 170, 44 N.E.2d 184 (1942).

22. See, e.g., *Dickerson v. Ewin*, 105 Ind. App. 694, 17 N.E.2d 496 (1938); *Kent v. Interstate P.S. Co.*, 97 Ind. App. 13, 168 N.E. 465 (1929).

In *Indianapolis Water Co. v. Harold*, 170 Ind. 170, 83 N.E. 993 (1908), the landowner was held not liable when the evidence showed among other things that a child who drowned in the defendant's canal had been warned by adults and had discussed with a playmate before his ill-fated venture the danger of walking on a log lying across the water. The evidence also showed that the log was serving a beneficial purpose to the defendant.

23. *Plotzki v. Standard Oil Co. of Ind.*, 92 N.E.2d 632, 734 (Ind. 1950).

24. 170 Ind. 170, 177, 83 N.E. 993, 995 (1908). Two other Indiana cases have since quoted the dictum: *Evansville v. Blue*, 212 Ind. 130, 140, 8 N.E.2d 224, 229 (1937); *Anderson v. Reith-Riley Construction Co.*, 112 Ind. App. 170, 172, 44 N. E.2d 184, 185 (1942). The unrealistic presumption that the danger of drowning is appreciated by all children was probably first made as dicta in *Peters v. Bowman*, 115 Cal. 345, 350, 47 Pac. 113, 114 (1896) *rehearing denied*, 115 Cal. 355, 47 Pac. 598 (1897). That unsupported remark was unnecessary for the decision of the case. At 20 R.C.L. 96 (1918) the dictum is stated as the general rule throughout the nation, although most of the cases cited there as authority do not support it. Since that time, however, an imposing body of case law indulging in the presumption has accumulated.

25. *Indianapolis v. Williams*, 58 Ind. App. 447, 108 N.E. 387 (1915) (overruled in the *Plotzki* case, 92 N.E.2d 632, 634 (Ind. 1950)).

infant trespasser. The express *Indianapolis Water Co.* holding was that recovery for the drowning of an infant trespasser was possible unless the evidence showed that the child *actually recognized* the peril.²⁶

Entirely apart from the questionability of the authority for the *Plotzki* holding, it is unsound for other more cogent reasons. In the first place an application of the premise that all children appreciate the perils of water would necessarily preclude liability in every case of drowning where the child had seen and voluntarily entered or played near water, even if he were rightfully at the place where the drowning occurred, since contributory negligence would be established as a matter of law. This, of course, has not been the law of Indiana.²⁷ A far more important objection lies in the undeniable facts of life: if automobile accidents are excluded, drowning is perhaps the largest single cause of accidental death to children between the ages of one and fourteen in the United States.²⁸ The inference is that children do *not* appreciate the dangers of water.²⁹

The last element of the formula under discussion, embodying the economic aspect of the rule, requires that the utility to the landowner of maintaining the dangerous condition be slight compared with the risk to the child. Thus, in the railroad turntable cases³⁰ where the danger could readily and inexpen-

26. There plaintiff alleged that defendant negligently exposed an alluring slippery log across the canal, that the child did not realize the danger and was drowned. A demurrer for failure to allege a cause of action was overruled. The subsequent trial resulted in a verdict and judgment for the plaintiff. On appeal, two questions were presented: first, whether the demurrer was properly overruled; secondly, whether the evidence supported the allegations. The court held on the second question that the evidence failed to support the allegations and reversed in favor of the defendant. See note 22 *supra*. However, the reversal came only after the court expressly held that the allegations were sufficient and therefore the demurrer had been properly overruled. *Indianapolis Water Co. v. Harold*, 170 Ind. 170, 83 N.E. 993 (1908).

27. See, *e.g.*, *Indianapolis v. Emmelman*, 108 Ind. 530, 9 N.E. 155 (1886). There the pool in which the child drowned was in a public highway. The court pointed out that an adult likewise, if free from fault, could recover under the same facts, implying that the child had been free from fault. In *Mayhew v. Burns*, 103 Ind. 328, 2 N.E. 793 (1885), the defendant had excavated up to the plaintiff's property line so that a pool was formed into which the child fell and was drowned; a judgment for the plaintiff was reversed on other grounds. And in *City of Elwood v. Addison*, 26 Ind. App. 28, 59 N.E. 47 (1901), recovery was allowed for the drowning of a child in water collected in a pool adjacent to the sidewalk due to a defective culvert. Other jurisdictions are in accord: *Heitmann v. Lake City*, 225 Minn. 117, 30 N.W.2d 18 (1947); *Mussolino v. Coxe Bros. & Co.*, 357 Pa. 10, 53 A.2d 93 (1947). See 20 TENN. L. REV. 765, 767 (1949). An additional argument against the holding of the *Plotzki* case is that the concealed drop-offs in the bottom of the pond added to the gravity of the danger in swimming there.

28. See REPORT OF THE NATIONAL SAFETY COUNCIL (STATISTICAL DIVISION), ACCIDENT FACTS, 6-7, 16 (1950).

29. In Indiana today a landowner owes no duty of due care to infant trespassers when he creates a pond on his land but does owe the duty when he piles junk thereon, since the law is that a child does not necessarily appreciate the danger of being crushed by heavy metal pieces. Compare *Plotzki v. Standard Oil Co. of Indiana*, 92 N.E.2d 632 (Ind. 1950) with *Borinstein v. Hansbrough*, 119 Ind. App. 134, 82 N.E.2d 266 (1948).

30. See note 9 *supra*.

sively have been eliminated by a lock when the device was not in use, railroads have not escaped liability.³¹ *Holstine v. Director General of Railroads*³² illustrates how a consideration of this element will prevent recovery in a proper case. There a child was attracted by a pile of sawdust beside a regular right of way and was struck by a moving train after wandering on the tracks. The defendant was held not liable because the court felt that to grant recovery would be an unreasonable restriction on the beneficial use of property.³³ In contrast is the case already mentioned where the child was killed while collecting grain on a siding where children played.³⁴ An inspection at that spot would not have been too costly a burden on the railroad.

It is on this economic element that the *Plotzki* case should have been considered and decided.³⁵ Probably most artificial ponds where the expense of child-proofing would be impractical serve a purpose so highly beneficial to the landowner as to render the risk not unreasonable.³⁶ However, the *Plotzki* complaint showed that the pond there was not serving any evident useful purpose to the defendant. It could have been made unattractive by pouring oil into it. It could have been fenced at no great expense; a requirement of fencing around small areas has been applied in other Indiana cases where the danger was no greater.³⁷

31. In *Indiana H. B. R.R. v. Jones*, 220 Ind. 139, 41 N.E.2d 361 (1941), a complaint was held to state a cause of action in alleging that a child was crushed by a falling door with a faulty lock while he was playing in a sided railroad car. And in cases not involving railroads the landowner's neglect to keep up his premises has been an important factor in establishing liability. See *Harris v. Indiana G. S. Co.*, 206 Ind. 351, 189 N.E. 410 (1931) (a short-circuit on a high tension tower); *Drew v. Lett*, 95 Ind. App. 89, 182 N.E. 547 (1932) (poison gas allowed to collect in an abandoned mine shaft); *Indianapolis v. Williams*, 58 Ind. App. 447, 108 N.E. 387 (1915) (hole in stream bed washed out by the drainage from a sewer outlet above); *Cincinnati & H.S. Co. v. Brown*, 32 Ind. App. 58, 69 N.E. 197 (1903) (strands of barbed wire among underbrush on abandoned lot). The existence of a dangerous condition which does not serve any beneficial purpose tends toward liability. See, e.g., *Drew v. Lett*, *supra*; *Cincinnati & H.S. Co. v. Brown*, *supra*.

32. 77 Ind. App. 582, 134 N.E. 303 (1922).

33. *Id.* at 593, 134 N.E. at 307. Cf., *Indianapolis Motor Speedway v. Shoup*, 88 Ind. App. 572, 165 N.E. 246 (1928).

34. *Cleveland, C. C. & St. L. Ry v. Means*, 59 Ind. App. 383, 104 N.E. 785 (1915), *petition for rehearing denied*, 59 Ind. App. 412, 108 N.E. 375 (1915).

35. The two dissenters in the *Plotzki* case, Emmert, C. J., and Gilkinson, J., directed a large part of their argument toward this element. *Plotzki v. Standard Oil Co. of Ind.*, 92 N.E.2d 632, 634-645 (Ind. 1950) *passim*.

36. Courts in other jurisdictions have expressly pointed this out in denying liability for the drowning of an infant trespasser. See, e.g., *Sullivan v. Huiidekoper*, 27 App. D. C. 154, 159-164 (1906); *Bass v. Quinn-Robbins Co.*, 216 P.2d 944, 948 (Idaho, 1950); *Stendal v. Boyd*, 73 Minn. 53, 56-57, 75 N.W. 735, 736 (1898); *Thompson v. Illinois C. R.R.*, 105 Miss. 636, 650-652, 63 So. 185, 186-187 (1913).

37. Indiana courts have not felt that a requirement of fencing was an unreasonable burden on land ownership in the following cases: *South Bend v. Turner*, 156 Ind. 418, 60 N.E. 271 (1900) (open manhole); *Penso v. McCormick*, 125 Ind. 116, 25 N.E. 156 (1890) (pile of hot ashes); *Borinstein v. Hansbrough*, 119 Ind. App. 134, 82 N.E.2d 266 (1948) (junk yard). But if the danger is slight and only temporary, there is no duty to fence it. *Anderson v. Reith-Riley Construction Co.*, 112 Ind. App. 170, 44 N.E.2d 184

The *Plotzki* case illustrates a weakness in the traditional statement of the attractive nuisance doctrine. The propensity of courts to attempt abstractly to rule that particular conditions may and others may not be "attractive nuisances,"³⁸ coupled with a fear that to once allow recovery for an infant drowning is to impose liability in every such instance, perhaps even where a natural pond is involved, has led to a questionable crystallization in the tort law of Indiana.³⁹ But the fear of strict liability—advanced by some as a reason for repudiating the attractive nuisance doctrine⁴⁰—is justified only so long as the mistaken idea of "nuisance" (which implies strict liability) pervades the opinions.⁴¹ The attractive nuisance cases, regardless of labels, are properly in the area of "negligence," where liability flows only from unreasonable conduct depending on the circumstances of each case.⁴²

TAXATION OF ROYALTIES RECEIVED BY THE EMPLOYED INVENTOR

When the owner of patents or inventions transfers them in exchange for royalties, the return in excess of basis is considered for tax purposes a capital gain rather than ordinary income.¹ However, certain qualifications to this rule stand ready to frustrate the quest for favorable capital rates. There must

(1942). Insulation of electric wiring at certain places is required by statute in Indiana although it involves some expense. IND. STAT. ANN. § 20-304, (Burns 1950 Repl.).

38. See 9 ORE. L. REV. 190, 191-192 (1930).

39. The *Plotzki* case should be compared with the following recent cases in other jurisdictions in which a landowner was held liable for an infant drowning: *Saxton v. Plum Orchards*, 215 La. 378, 40 So.2d 791 (1949); *Gimmstead v. Rose Bros. Co.*, 194 Minn. 531, 261 N.W. 194 (1935); *Williams v. Morristown*, 222 S.W.2d 607 (Tenn. App. 1946) (on demurrer), modified 189 Tenn. 124, 222 S.W.2d 615 (1946); *Angelier v. Red Star Y. & P. Co.*, 215 Wis. 47, 254 N.W. 351 (1934) (on demurrer); *Altenback v. Lehigh V. R.R.*, 339 Pa. 272, 37 A.2d 429 (1944).

40. See Smith, *Liability of Landowners to Children Entering Without Permission*, 11 HARV. L. REV. 434, 435-439 (1898).

41. See *Coffey v. Oscar Mayer & Co.*, 252 Wis. 473, 479, 32 N.W.2d 235, 238 (1948), [1949] WIS. L. REV. 598.

42. See *Gimmstead v. Rose Bros. Co.*, 194 Minn. 531, 536, 261 N.W. 194, 196 (1935); *Banker v. McLaughlin*, 146 Tex. 434, 208 S.W.2d 843 (1948) *passim*. See also Hudson, *The Turntable Cases in the Federal Courts*, 36 HARV. L. REV. 826, 844-853 (1923); Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility in Tort*, 21 MICH. L. REV. 495, 522 (1923).

A court may be reluctant to leave the fate of the landowner—always favored in the law—to the jury which may not fully appreciate his position. Yet, this does not excuse casting a decision in a particular case as a rule of law which, by stare decisis, will prevent a practical judgment of the rights of parties in subsequent litigation. See Bohlen, *Mixed Questions of Law and Fact*, 72 U. OF PA. L. REV. 111, 119-122 (1924).

1. *Burnett v. Logan*, 283 U.S. 404 (1931); *Hofferbert v. Briggs*, 178 F.2d 743 (4th Cir. 1949); *Commissioner v. Carter*, 170 F.2d 911 (2d Cir. 1948); *United States v. Adamson*, 161 F.2d 942 (9th Cir. 1947); *Commissioner v. Hopkinson*, 126 F.2d 406 (2d Cir. 1942); See *Commissioner v. Celanese Corp.*, 140 F.2d 339, 341 (D.C. Cir. 1944). See also Greenlee and Kramer, *Capital Gains on Sales of Patents*, 26 TAXES 779 (1948).