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Attractive Nuisance Doctrine

TORTS

ATTRACTIVE NUISANCE DOCTRINE

Plaintiff's intestate was killed while climbing an unguarded high tension electrical tower located 1000 feet from a traveled road. Children were accustomed to playing in that vicinity, and the jury found that the child had been actually attracted to the tower. *Held,* for plaintiff. Electrical tower was an attractive nuisance. *Gillespie v. Sanitary Dist. of Chicago,* 43 N.E. (2d) 141 (Ill. 1942).

The court in the instant case applied the rule of *United Zink Co., v. Britt,* 258 U.S. 268 (1922), which held that for recovery the instrumentality must *in fact* attract the victim on to the premises.

Some authorities have criticised this rule, contending that if for any reason the occupier of the land knew that children were likely to trespass and become exposed to a dangerous and attractive device, then the duty to protect the children arises. Recovery should be allowed even though the children were not *in fact* attracted on to the

premises by the "nuisance." *See*, HARPER, LAW OF TORTS (1933) §93; at 220; RESTATEMENT, TORTS (1934) §339.

Indiana courts have followed the stricter rule and have insisted that the plaintiff be *in fact* attracted on to the premises by the instrumentality. The "nuisance" is said to create "an implied invitation by leaving a thing exposed and unguarded which is of such a nature as to tempt and allure young children." *Chicago and Erie R.R. v. Fox*, 38 Ind. App. 268, 275, 70 N.E. 81, 84 (1906).

See also *Drew v. Lett*, 95 Ind. App. 89, 182 N.E. 547 (1932); Note (1933) 8 IND. L. J. 508; (1925) 36 A.L.R. 28, at 77, 78.

The Indiana courts have found the doctrine inapplicable where the plaintiff was not in fact attracted by the injurious instrument; see *Holstine v. Director General of R.R.*, 77 Ind. App. 582, 134 N.E. 303 (1922); (1925) 36 A.L.R. 28, at 78; as the injured "did not discover such place until after they had themselves become trespassers." *Indianapolis Motor Speedway Co. v. Shoup*, 88 Ind. App. 572, 578, 165 N.E. 246, 248 (1929).

However, Indiana by statute has excepted cases involving electricity from the general rule, and has stipulated "that in the transmission and use of electricity of a dangerous voltage, full and complete insulation shall be provided at all points where the public . . . are liable to come into contact with the wires." IND. STAT. ANN. (Burns, 1933) § 20-304. In these cases anticipation of the danger, rather than the *fact* of attraction seems to be the important element. *Ft. Wayne and No. Ind. Traction Co. v. Stark*, 74 Ind. App 669, 127 N.E. 460 (1920); *Harris v. Indiana Gen'l Service*, 206 Ind. 351, 189 N.E. 410 (1934) (but neither case mentioned the statute).