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## Negligence--Infant Trespassers--Attractive Nuisance Doctrine

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NEGLIGENCE—INFANT TRESPASSERS—ATTRACTIVE NUISANCE DOCTRINE.—

The plaintiff brought this action against the defendant to recover damages for the death of his infant son eleven years old. It appeared from the plaintiff's complaint that the defendant was the owner of twenty acres of land, on which there was an abandoned mine. The entrance to the mine shaft was covered by a shed, which with a number of other abandoned buildings made an inviting place for children to play; and children did come on the premises and played about the buildings, frequently, with the knowledge of the defendant. Gasses ("damps") of a poisonous character formed in the shaft and the shed. Their presence could not be seen or ascertained, and they were highly dangerous. The defendant knew of the location of the shaft, and open door, the "damps," and the frequency of the presence of children; or by the exercise of a reasonable care could have known of their presence. Defendant negligently left the door open. The plaintiff child, through no negligence of the plaintiff, entered the shed and was suffocated by the gases. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and the plaintiff appeals. Held, the complaint stated facts sufficient to constitute a cause of action under the attractive nuisance doctrine.<sup>1</sup>

The Supreme Court of the United States decided that a railway company was liable in an action by a child six years of age when he hurt himself upon a turntable notwithstanding the contention that the child was a trespasser to whom the company owed no duty to make its premises safe.<sup>2</sup> This decision created a particular exception to the general rule that there is no affirmative duty on the part of the landowner to make his land safe for trespassers but only the duty to refrain from intentionally or wantonly injuring them.<sup>3</sup> Since that case the majority of the juris-

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<sup>15</sup> *Indiana Natural Gas & Oil Co. v. O'Brien* (1903), 160 Ind. 266, 65 N. E. 918, 66 N. E. 782.

<sup>16</sup> *Montieth v. Kokomo Enameling Co.* (1902), 159 Ind. 149, 64 N. E. 610.

<sup>17</sup> *Malloy v. Starin* (1906), 113 App. Div. 852, 99 N. Y. Supp. 603.

<sup>1</sup> *Drew v. Lett*, Appellate Court of Indiana, October 6, 1932.

<sup>2</sup> *Sioux City & Pacific R. R. Co. v. Stout* (1873), 17 Wall. 657, 21 L. Ed. 745.

<sup>3</sup> Thompson, *Law of Negligence*, 871, 874; *Penx v. McCormick* (1890), 125 Ind. 116, 25 N. E. 156, 21 A. L. R. 271, 9 L. R. A. 313; *Indianapolis, Peru & Chicago*

dictions in the United States have come to recognize this exception frequently referred to as the doctrine of the turntable cases or the "attractive nuisance" doctrine.<sup>4</sup>

This general rule as to trespassers embodies the concept that the landowner is sovereign within the boundaries of his own land. But it may be said that this concept has yielded to social necessity. The immunity of the occupier of land from responsibility for acts upon it has been greatly diminished by making him answerable in certain instances for injuries to trespassers caused by the dangerous condition of the land.<sup>5</sup> The problem involved here is to give the proper weight to two social interests; first, the social interest in freedom of young children from serious bodily injury resulting from dangerous conditions on the land; second, the social interest in the unfettered use of the land by the occupiers thereof.<sup>6</sup> If the greater weight is placed on the first, the attractive nuisance doctrine is applied; if the weight is placed upon the second, the doctrine will not be applied.<sup>7</sup>

The so-called attractive nuisance doctrine may be stated as follows.<sup>8</sup> An occupier of land is subject to liability for bodily harm to young children trespassing on his land caused by a structure or other artificial condition<sup>9</sup> which he maintains upon the land; if the place where the condition is maintained is one upon which the occupier knows or as a reasonable man would know that such children are likely to trespass;<sup>10</sup> if the condition is one which he realizes or should realize involves unreasonable risk of death or serious bodily harm to such children;<sup>11</sup> and the children because of their tender years do not discover the condition or realize the risk involved in intermeddling or in coming within the area made dangerous

*R. Co. v. Pitzer* (1886), 109 Ind. 179, 6 N. E. 310; *Knapp v. Dall* (1913), 180 Ind. 526, 103 N. E. 385. American Law Institute, Restatement of the Law of Torts, Tentative Draft No. 4, Sec. 203, p. 136.

<sup>4</sup> 36 A. L. R. 66; 45 A. L. R. 983; 45 C. J. 753.

<sup>5</sup> F. Bohlen, 69 U. of Pa. L. R. 347, Studies in Torts, p. 190.

<sup>6</sup> See *Chicago, etc. R. Co. v. Fox* (1906), 38 Ind. App. 268, 70 N. E. 81; *Holstein v. Director General of Railroads* (1921), 77 Ind. App. 582, 139 N. E. 303, where this interplay of social interests seems to have been recognized by the courts. See 36 Harv. L. Rev. 843.

<sup>7</sup> *Ryan v. Tower* (1901), 128 Mich. 463, 87 N. W. 644, 92 Am. St. Rep. 412.

<sup>8</sup> This statement is substantially that found in American Law Institute, Restatement of the Law of Torts, Tentative Draft No. 4, p. 152, Sec. 209.

<sup>9</sup> See to the effect that it is almost impossible to draw the line between what is artificial and natural, 36 Harv. L. Rev. 852.

<sup>10</sup> *Chicago, etc. R. Co. v. Fox* (1906), 38 Ind. App. 268, 70 N. E. 81; *Lewis v. Cleveland, etc., R. Co.* (1908), 42 Ind. App. 337, 84 N. E. 23; *Fretz Maurice v. Conn. R. & Lighting Co.* (1905), 78 Conn. 406, 62 Atl. 620, 3 L. R. A. (n. s.) 449, 112 A. S. R. 159; *Atlantic & W. P. E. Co. v. Green* (1917), 246 Fed. 676; *Hardy v. Mo. Pac. Rd. Co.* (1920), 266 Fed. 860. It seems that the courts mean that the presence of children must be reasonably anticipated, when they say the child must be "allured," "attracted," or "tempted" to come on the premises. *McDermott v. Burke* (1912), 256 Ill. 401, 100 N. E. 168; *Fitzgerald v. Rogers* (1901), 58 App. Div. 298, 68 N. Y. Sup. 946.

<sup>11</sup> *Lewis v. Cleveland, etc. R. Co.* (1908), 42 Ind. App. 337, 84 N. E. 23; *McKiddy v. Des Moines Electric Co.* (1926), 202 Ia. 225, 206 N. W. 815; *Carr v. Oregon-Washington R. & Nav. Co.* (1927), 123 Ore. 359, 261 Pac. 899.

by it;<sup>12</sup> and the utility of maintaining the condition is slight as compared with the risk to young children involved.<sup>13</sup>

The Supreme Court of the United States has recently added a restriction to the doctrine as stated above by requiring that the child must be attracted on to the premises by the condition maintained upon them.<sup>14</sup> Where the dangerous potentialities of the condition are obvious to children and the risk is appreciated by them, there is no liability on the occupier.<sup>15</sup> This limitation prevents liability attaching to maintaining on the premises many necessary and usual implements which are essential to the normal use of the land, but which children may use to their injury.<sup>16</sup> Where the child realizes the danger of the condition or structure, and yet through bravado or an immature recklessness plays with it and is injured, there is no recovery. The rule is to protect children from danger they are not likely to appreciate.

The doctrine imposes an affirmative duty to use due care in guarding against injury to the trespassing children.<sup>17</sup> The occupier must make the land reasonably safe for the children coming on to the premises.<sup>18</sup> What is due care in the particular case is a question of fact which varies; it may require guarding the dangerous condition,<sup>19</sup> or

<sup>12</sup> *City of Indianapolis v. Emmelman* (1886), 108 Ind. 530, 9 N. E. 155, 58 A. L. R. 65; *Indianapolis Water Co. v. Harold* (1907), 170 Ind. 170, 83 N. E. 993; *Lewis v. Cleveland, etc. R. Co.* (1908), 42 Ind. App. 337, 84 N. E. 23.

<sup>13</sup> *Chicago, etc., R. Co. v. Fox*, 38 Ind. App. 268, 70 N. E. 81; *Cincinnati Spring Co. v. Brown* (1903), 32 Ind. App. 58, 69 N. E. 198; *Lewis v. Cleveland, etc. R. Co.* (1908), 42 Ind. App. 268, 84 N. E. 23; *Erickson v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1925), 165 Minn. 106, 205 N. W. 889, 24 A. L. R. 973; *Carr v. Oregon-Washington E. & Nav. Co.* (1927), 123 Ore. 259, 261 Pac. 899.

<sup>14</sup> *United Zinc & Chemical Co. v. Van Brett* (1922), 258 U. S. 268, 66 L. Ed. 615, 42 Sup. Ct. Rep. 299, 36 A. L. R. 28. This decision has been criticized as making the rule too rigid, and has been approved of as tempering the doctrine and therefore making sure it will continue to exist in the law. See 36 Harv. L. Rev. 113. Indiana cases contain language that would seem to be in accord with this limitation: *City of Indianapolis v. Emmelman* (1886), 108 Ind. 530, 9 N. E. 155, 58 A. L. R. 65; *Holstein v. Director General of Railroads* (1921), 77 Ind. App. 582, 134 N. E. 303; *Indianapolis Motor Speedway Co. v. Shoup* (1929), 88 Ind. App. 572, 165 N. E. 246. But see *Fort Wayne, etc. Traction Co. v. Stark* (1920), 74 Ind. App. 669, 127 N. E. 460. The American Law Institute in its Restatement of the Law of Torts has expressly repudiated this limitation. See Restatement of the Law of Torts, Tentative Draft No. 4, Sec. 209.

<sup>15</sup> *City of Indianapolis v. Emmelman* (1886), 108 Ind. 530, 9 N. E. 155, 58 A. L. R. 65; *Indianapolis Water Co. v. Harold* (1907), 170 Ind. 170, 83 N. E. 993; *Lewis v. Cleveland, etc. R. Co.* (1908), 42 Ind. App. 337, 84 N. E. 23; *Kent v. Interstate Public Service Com.* (1929), 168 N. E. 465.

<sup>16</sup> American Law Institute, Restatement of the Law of Torts, Tentative Draft No. 4, Sec. 209, p. 152.

<sup>17</sup> *Cleveland, etc. R. Co. v. Means* (1915), 59 Ind. App. 383, 108 N. E. 375; *Holstein v. Directors of Railroads* (1921), 77 Ind. App. 582, 134 N. E. 303.

<sup>18</sup> *City of Indianapolis v. Emmelman* (1886), 108 Ind. 530, 9 N. E. 155, 58 A. L. R. 65; *Cincinnati, etc. Spring Co. v. Brown* (1903), 32 Ind. 58, 69 N. E. 198; *Chicago, etc. R. Co. v. Fox* (1906), 38 Ind. App. 268, 70 N. E. 81; *Lewis v. Cleveland, etc. R. Co.* (1908) 42 Ind. App. 337, 84 N. E. 23; *Ann Arbor R. Co. v. King* (1903), 68 Ohio St. 210, 67 N. E. 479; *Chicago, E. & Q. R. Co. v. Krayenbuhl* (1902), 65 Neb. 889, 91 N. W. 880, 59 L. R. A. 920, 12 Am. Rep. 300.

<sup>19</sup> *City of Indianapolis v. Emmelman* (1886), 108 Ind. 530, 9 N. E. 155; *City of South Bend v. Turner* (1901), 156 Ind. 418, 60 N. E. 271.

eliminating it altogether.<sup>20</sup> The mere injury does not show a departure from due care, and the plaintiff has the burden of proving that the defendant was negligent.<sup>21</sup> In determining what is due care, the degree of danger connected with the condition, as well as the nature of the use to which the land is put and the nature of the condition or structure in question should be taken into account.<sup>22</sup> In most cases due care will require that the children be kept off the premises, if it is possible to keep them off by fences or watchmen.<sup>23</sup>

Some courts attempt to bring this doctrine into conformity with the general rule by calling the dangerous condition or structure a "trap"<sup>24</sup> or an "allurement,"<sup>25</sup> or by treating it as an invitation to enter.<sup>26</sup> As has been said, however, the word "trap" is a figure of speech and not a formula.<sup>27</sup> Even if the condition is a trap in the sense in which the term is used to denote a danger known to the occupier and unknown to a visitor, there still remains the necessity of proving that infants may come within its reach.<sup>28</sup> The mere fact that the trespasser is ignorant of pitfalls on the land is not enough to make the occupier liable if the trespasser falls into it.<sup>29</sup> A child of tender years may be a trespasser.<sup>30</sup> The word allurement implies in every other connection a thing done with the purpose of alluring.<sup>31</sup> In cases that come before the courts under this doctrine, the occupier desires the children to stay off his land. The word invitation also implies an act done or condition created which is at least capable of being construed into a desire to receive the person invited.<sup>32</sup> Temptation is not an invitation.<sup>33</sup> It is submitted that these phrases are a perversion of language and the underlying idea is that the occupier, as a reasonably prudent man, should have anticipated that the children would be attracted by the condition or structure on the land, and that the court should accept the doctrine as a desirable exception to the general rule based upon the social interests involved.<sup>34</sup>

<sup>20</sup> See *Chicago, B. & Q. R. Co. v. Krayenbuhl* (1902), 65 Neb. 889, 91 N. W. 880.

<sup>21</sup> *Indianapolis Water Co. v. Harold* (1907), 170 Ind. 170, 83 N. E. 993.

<sup>22</sup> *C. B. & Q. R. Co. v. Krayenbuhl* (1902), 65 Neb. 889, 909, 91 N. W. 880.

<sup>23</sup> *Carr v. Oregon-Washington R. & Nav. Co.* (1927), 123 Ore. 259, 261 Pac. 399, 904; *Taylor v. Minneapolis & St. L. R. R. Co.* (1927), 180 Ia. 702, 163 N. W. 406. But see *Price v. Atchison Water Co.* (1897), 158 Kans. 551, 50 Pac. 450.

<sup>24</sup> *City of Indianapolis v. Emmelman* (1886), 108 Ind. 530, 9 N. E. 155.

<sup>25</sup> *Chicago, etc., R. Co. v. Fox* (1906), 38 Ind. App. 263, 70 N. E. 81; *Lewis v. Cleveland, etc. R. Co.* (1908), 42 Ind. App. 337, 84 N. E. 23; *Fort Wayne, etc. Traction Co. v. Stark* (1920), 74 Ind. App. 669, 127 N. E. 460.

<sup>26</sup> *City of Indianapolis v. Emmelman* (1886), 108 Ind. 530, 9 N. E. 155; *Chicago, etc. R. Co. v. Fox* (1906), 38 Ind. App. 263, 40 N. E. 81; *Lewis v. Cleveland, etc. R. Co.* (1908) 42 Ind. App. 337, 84 N. E. 26; *Wilmen v. Chicago & W. R. Co.* (1916), 175 Ia. 101, 156 N. W. 877.

<sup>27</sup> *Lathan v. R. Johnson & Nephew* (1913), 1 K. B. 398.

<sup>28</sup> Bohlen, 69 U. of Pa. L. R. 142, 347; *Studies in Torts*, 190.

<sup>29</sup> 36 Harv. L. Rev. 850, see also II Harv. L. Rev. 440.

<sup>30</sup> *B. & O. S. W. R. Co. v. Bradford* (1895), 20 Ind. App. 348, 49 N. E. 388.

<sup>31</sup> Bohlen, 69 U. of Pa. L. Rev. 142, 347; *Studies in Torts*, 190; *Ryan v. Tower* (1901), 128 Mich. 463, 87 N. W. 644; *Bottum v. Hawks* (1911), 84 Vt. 370, 79 Atl. 858, Ann Cas. 1913 A, 1025.

<sup>32</sup> Bohlen, 69 U. of Pa. L. Rev. 142, 347; *Studies in Torts*, 190; 36 Harv. L. Rev. 850.

<sup>33</sup> John C. Townes, 1 Tex. L. R. 1, 8.

<sup>34</sup> Jeremiah Smith, 11 Harv. L. Rev. 439; Manely O. Hudson, 36 Harv. L. Rev. 849; Bohlen, 69 U. of Pa. L. R. 142, 347; *Studies in Torts*, 190.

Once it is shown that the particular occupier has failed to use due care, the contributory negligence of the child may bar recovery in most jurisdictions.<sup>35</sup> The child, of course, must be of such an age as to be capable of being negligent,<sup>36</sup> and the mere fact of trespass is not itself negligence.<sup>37</sup>

Under the facts alleged in the principal case, it seems clear that it was properly decided. The defendant could have anticipated the presence of children, and it was foreseeable that the "damps" involved an unreasonable risk of bodily harm to them. The children could not discover the existence or extent of the risk, and, at a small cost, the defendant could have protected them from it.

R. S. M.

**GIFTS—CORPORATE STOCK—DELIVERY.**—On June 8, 1924, John G. Kratli, being the owner of a certificate of shares of corporate stock, caused to be written upon the back of said certificate an indorsement transferring it to Frank W. Kratli, his son. The indorsement was dated, witnessed, and signed by the indorser. From the time of the indorsement to the death of the indorser in January, 1929, the certificate was kept in his safety deposit box, to which he held the only key except the one kept by the bank. All dividends paid on the stock during this time were paid to John G. Kratli. The son, indorsee of the certificate, claimed a gift *inter vivos* of the certificate. Frequently, during the summer of 1928, the son accompanied his father, the decedent, to the bank. *Held*, there was not a gift *inter vivos*. Judgment for claimant, reversed.<sup>1</sup>

While the law requires delivery of the gift to be made and many cases state the rule to be that there must be an absolute transfer of the property from the donor to the donee,<sup>2</sup> several cases modify this rule by holding that it is not to be enforced arbitrarily<sup>3</sup> and it should be the object of the court not to defeat, but rather to carry into effect, the intention of the intestate, if it is able to do so without violation of some controlling

<sup>35</sup> *Kent v. Interstate Public Service Co.* (1929), 168 N. E. 465; *Indianapolis Water Co. v. Harold* (1907), 170 Ind. 170, 83 N. E. 993.

<sup>36</sup> *The Louisville, N. A. etc. R. Co. v. Leass* (1894), 11 Ind. App. 654, 38 N. E. 774.

<sup>37</sup> *Union Pacific Ry. Co. v. Dundem* (1887), 37 Kans. 1, 14 Pac. 501.

<sup>1</sup> *Kratli v. Starke County Trust & Savings Bank*, Appellate Court of Indiana, December 23, 1932, 183 N. E. 696.

<sup>2</sup> *Hayes v. McKinney* (1919), 73 Ind. App. 105, 126 N. E. 497; *Tenbrook v. Brown* (1861), 17 Ind. 410; *Smith v. Dorsey* (1872), 38 Ind. 451; 10 Am. Rep. 216; *Daubenspect v. Biggs*, 71 Ind. 255; *Buschian v. Hughart*, 28 Ind. 449; *Smith v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216; *Pruitt v. Pruitt*, 91 Ind. 595; *Bingham v. Stage*, 123 Ind. 281; *Richard v. Reeves*, 149 Ind. 427; *Martin v. McCullough, Adm.* (1893), 136 Ind. 331, 34 N. E. 819; *Crawfordsville Trust Co. v. Ramsey* (1913), 55 Ind. App. 40, 100 N. E. 1049, 102 N. E. 282; *Reasoner, Adm. v. Bohne* (1921), 76 Ind. App. 114, 129 N. E. 490; *Ogdon, Adm. v. Washington Natl. Bank* (1924), 82 Ind. App. 187, 145 N. E. 514; *Snyder v. Frank* (1912), 53 Ind. App. 301, 101 N. E. 684; *Dewey v. Barnhouse* (1910), 83 Kans. 12, 109 Pac. 1081, 29 L. R. A. (N. S.) 166; *Miller v. Williams* (1923), 195 Iowa 1305, 192 N. W. 798; *Jones v. Jones* (1918, Mo.), 201 S. W. 557; *Edson v. Lucas* (1931), 40 Fed. (2) 398; *Copland v. Commissioner* (1931), 41 Fed. (2) 501.

<sup>3</sup> *Teague v. Abbott* (1912), 51 Ind. App. 604, 100 N. E. 27; *Ross, Exr. v. Watkins* (1923), 80 Ind. App. 487, 141 N. E. 477; *Stephenson's Adm. v. King, etc.* (1883), 81 Ky. 425, 50 Am. Rep. 173.