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Recent Case

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ARTIFICIAL CONDITIONS HIGHLY DANGEROUS TO TRESPASSING CHILDREN—RESTATEMENT OF TORTS, § 339

In the recent decision of *Bartleson*, et. al., *v. Glen Alden Coal Co.*, et. al.,[1] the Pennsylvania Supreme Court emphatically adopted section 339 of the Restatement of the Law of Torts. "To the extent that past cases are in conflict with the view of section 339 of the Restatement of the Law of Torts, which we have adopted, they are no longer authority."[2] As a consequence the "invitation by allurement"[3] idea has been expressly discarded. And we can also conclude that the "playground doctrine"[4] has been discarded as well.

In this case a boy of 11 years climbed defendant's tower which carried electric wires into his mine. A new fence around the tower had been completed four days previous and the contractor had turned it over to the defendant ready for locking. The contractor's foreman had secured the gate with wire strands and defendant's foreman, inspecting the job, noticed these wire strands securing the gate but did nothing further. The day before the accident the plaintiff and his companions visited the adjacent land to pick apples. They noticed that the gate to the fence around the tower was open, a condition which they had never seen occur before. They played around the tower and climbed upon it, using the iron studs which formed a ladder effect from top to bottom. The next day plaintiff and other friends again visited the land to pick apples and play. Plaintiff entered the open tower enclosure, climbed the tower and thus came in contact with uninsulated wires with the resulting injuries. There were three well worn paths passing close to the tower which people used as shortcuts going to and from work and school.

The majority opinion by Mr. Justice Linn held that the four factors set forth by section 339 of the Restatement were satisfied. Section 339 of the Restatement is as follows:

> "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if,
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> (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
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> (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an

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1 361 Pa. 519, 64 A.2d 846 (1949).

2 Ibid, at page 529.

3 United Zinc & Chemical Co. v. Britt, 258 US 268, 36 A.L.R. 28; Rapczynski v. W. T. Cowan, Inc. 138 Pa. Super. 392, 10 A.2d 810 (1939).

4 Fitzpatrick v. Penfield, 267 Pa. 564, 109 A.653; see also 36 A.L.R. 96 for ful discussion of doctrine in Pa.

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."

However, Mr. Justice Drew in his dissent contended that the third factor, whereby "the children because of their youth did not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it", was not fulfilled by the facts in the case. It is not our purpose to discuss the aspect of the case presented by the dissenting opinion, but suffice it to say that the very fact that there are so many similar accidents under similar circumstances tends to show that the danger, as above presented to a child, was far from obvious. And the comment on clause (b) to section 339 states that "the lack of experience and judgment normal to young children may prevent them from realizing that a condition observed by them is dangerous or, although they realize that it is dangerous, may prevent them from appreciating the full extent of the risk." This, taken in conjunction with the fact that clause (c) is designed to protect the landowner from children who, in the words of the Restatement, "nonetheless choose to encounter it out of recklessness or bravado," seem to discredit the view of the dissent, which, it must be remembered, is overruling the voice of the jury on a question of fact.

However the court is as one regarding the law applicable to the case. No longer is the allurement contention[5] applicable to those cases falling within the principles announced in section 339. Allurement is important only insofar as determining the foreseeability of the risk of injury. Thus such statements as "there must be an allurement before there is liability to an infant trespasser for mere negligence even though a danger exists",[6] can no longer be used for a basis of argument. As Professor Eldredge says "the true basis of the duty is the value of child life to the community. The danger arises out of the likelihood of children trespassing, and the element of 'enticement' or 'allurement' is merely a subsidiary element, important only insofar as it bears upon the likelihood of trespassing."[7]

We can also observe from the *Bartleson* case that the "playground doctrine"[8] in Pennsylvania has in all probability been laid to rest. By this doctrine the general

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[5] Supra, note 3. Justice Holmes' contention in the Britt case was that the object which lured the children on the premises must be the object which caused the injury. Applying this to the Bartleson case, the defendant argues that since the plaintiff was attracted to the land by the apples, then no liability attaches to them for the injury caused by the plaintiff falling from the tower.

[6] Rapczynski v. W. T. Cowan, Inc. Supra, note 3.

[7] ELDREDGE, MODERN TORT PROBLEMS (1941) 163, 191.

[8] Supra, note 4.

rule that the landowner was only liable to trespassing children for the results of wilful and wanton misconduct was mitigated, so that if the landowner permitted his premises to be used as a playground for such length of time as to raise forth an invitation or permission to use the premises as such, and the place was generally known in the vicinity as a playground, then the landowner was liable for the results flowing from the lack of ordinary care on his part. It can surely be seen that with the complete Restatement view any need for the continued existence of that doctrine is eliminated. This case could well have been decided by the use of this doctrine, but is significant to note that no mention was made of the doctrine in the decision.[9]

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[9] Thompson, et al., v. Reading Co., 343 Pa. 584, 23 A.2d 729; where "playground doctrine" could well have decided the case.