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THE PASSING OF THE DOCTRINES OF "ATTRACTIVE NUISANCE" AND "PLAYGROUND RULE" IN PENNSYLVANIA

BY GLENN A. TROUTMAN *

THE doctrines of "attractive nuisance" and the "playground rule" are essentially separate doctrines,[1] but are frequently treated as involving the same principles of tort law. They have a number of common factors. In each instance children under the age of fourteen are involved; the children are trespassers; and the liability and responsibility of a possessor or occupier of land is at issue.

The doctrine of "attractive nuisance" grew out of situations on property which were said to be fraught with potential enticement or allurement to children. It was in the nature of a legal excuse for the admitted trespass of the child, so as to enable a recovery to be had from the property owner for damages arising out of injury to the trespasser. "The playground rule" is predicated on the frequent and notorious uses of the premises for play and the tolerant or passive attitude of the property owner. It has been said that there arises an implied permission or a privilege.[2]

The Supreme Court of Pennsylvania, in effect, superseded or supplanted the doctrine of "attractive nuisance" by its decision in *Thompson, et al. v. Reading Company.*[3] It did not specifically and categorically so state until its decision in *Verrichia v. Society Di. M. S. Del Lazio,*[4] although inferentially so doing in *Bartleson et al. v. Glen Alden Coal Co.*[5]

The opinion in the *Verrichia* case leaves no doubt that the doctrine of "attractive nuisance" is no longer in itself a basis for recovery. Mr. Chief Justice Drew in the opinion stated: "Prior to *Thompson v. Reading Co.,* 343 Pa. 585, 23 A. 2d 729, the element of allurement was often considered essential to recovery under the attractive nuisance doctrine. However, in that case we adopted § 339 of the *Restatement of Torts* which eliminates the necessity of enticement onto the premises by the object causing the injury. Since

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[1] Prokop v. Becker, 345 Pa. 607, 29 A. 2d 23 (1942).
[2] Hogan v. Etna Concrete Block Company, 325 Pa. 49, 188 Atl. 763 (1936).
[3] 343 Pa. 585, 23 A. 2d 729 (1942).
[4] 366 Pa. 629, 79 A. 2d 237 (1951).
[5] 361 Pa. 519, 64 A. 2d 846 (1949).

that time we have consistently followed the rule of the Restatement and in *Bartleson v. Glen Alden Coal Co.,* 361 Pa. 519, 64 A. 2d 846, we expressly overruled all cases contrary to it."

The Supreme Court did not couple the doctrine of the "playground rule" with that of "attractive nuisance" and expressly overrule both doctrines until the recent case of *Dugan v. Pennsylvania Railroad.*[6] The language of the majority opinion is clear and definite. Mr. Justice Chidsey states: "This section of the Restatement [Section 339 Torts] supersedes and supplants the doctrine of 'attractive nuisance' and the 'playground rule'."

It may now be conclusively stated that recovery for injuries to a trespassing child under the age of fourteen is predicated on a fulfillment of the four conditions of Section 339 of the *Restatement of Torts.*[7]

The earlier cases, in which enticement, allurement and attraction seemed to be necessary for a recovery from a land owner or occupant, generally made a distinction between artificial and natural conditions on the premises of the defendant. For example, a water course,[8] a pond,[9] or a vault filled with water [10] were held not to be so attractive or enticing as to permit of a recovery under the attractive nuisance doctrine.

Injury as the result of artificial conditions present greater difficulty in distinguishing between cases of liability and non-liability. A stone wall,[11] an open sewer ditch,[12] a water tank,[13] a fence,[14] a telephone wire,[15] a gate,[16] or a reservoir [17] were not considered so attractive or alluring as to fall within the doctrine of attractive nuisance.

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[6] 387 Pa. 25, 127 A. 2d 343 (1956).

[7] The provisions of section 339 of the RESTATEMENT are 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 (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."

[8] Simon, Admrx. v. Hudson Coal Co., 350 Pa. 82, 38 A. 2d 259 (1944).

[9] Irwin S. & T. Co. v. Pa. R.R. Co., 349 Pa. 278, 37 A. 2d 432 (1944); Ansell v. Phila., 276 Pa. 370, 120 Atl. 277 (1923); Murdock v. Pa. R.R. Co., 150 Pa. Super. 156, 27 A. 2d 405 (1942); LaGrande v. Wilkes-Barre Traction Co., 10 Pa. Super. 12 (1899).

[10] Selve v. Pilosi, 253 Pa. 571, 98 Atl. 723 (1916).

[11] McHugh v. Reading R.R., 346 Pa. 266, 30 A. 2d 122 (1943).

[12] Powell v. Ligon, 334 Pa. 250, 5 A. 2d 373 (1939).

[13] Dolena v. Pittsburgh Terminal Coal Co., 324 Pa. 228, 188 Atl. 112 (1936).

[14] Brown v. Scranton, 313 Pa. 230, 169 Atl. 435 (1933).

[15] Nichol v. Bell Telephone Co., 266 Pa. 463, 109 Atl. 649 (1920).

[16] Guilmartin v. Phila., 201 Pa. 518, 51 Atl. 312 (1902).

[17] Dornick v. Wierton Coal Co., 109 Pa. Super. 400, 167 Atl. 617 (1933).

In the "turntable cases", the Supreme Court of Pennsylvania reached opposite conclusions in the two leading cases. In *Thompson v. B. & O. R. R. Co.*,[18] a turntable was considered not to be an attractive nuisance. In *Thompson v. Reading Company (supra)* an opposite conclusion was reached by first employing the provisions of Section 339 of the *Restatement of Torts*. The earlier case is clearly overruled and does not now represent the law of the State.

A considerable number of the cases before the adoption of the *Restatement* doctrine held that unattached or loosely affixed objects constitute attractive nuisances. For example, a park bench,[19] a car of a narrow gauge railroad,[20] a high voltage wire,[21] slabs of slate,[22] a road scraper,[23] water pipes,[24] unattached radiators[25] and beer barrels [26] were held so enticing and alluring as to fall within the attractive nuisance doctrine and recovery was allowed. In practically every instance above cited, the location, manner of storing and ready accessibility to children was stressed as constituting the chief ground for holding the objects attractive rather than the intrinsic nature of the objects involved.

The cases since the adoption of the Restatement would seem to fall within the same general pattern.[27] The recent case of *Gallagher v. Frederick* [28] illustrates the limits to which the new doctrine will be extended. In that case a bonfire was built by infant trespassers on vacant land owned by the defendants. The minor plaintiff was badly burned. The Supreme Court in its opinion denying recovery stated: "But, the rule was not intended to impose upon an owner of land the duty of policing the conduct of trespassing young children against dangers of their own creation and not related to or inhering in the artificial conditions which the owner maintains upon his land."

Since both the doctrine of "attractive nuisance" and the "playground rule" no longer apply in the reasoning of the courts in determining the liability of the possessors of land to infant trespassers, a brief examination of the provisions of Section 339 would seem merited.

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[18] 218 Pa. 444, 67 Atl. 768 (1907).
[19] Bonczek v. Phila., 338 Pa. 484, 13 A. 2d 414 (1940).
[20] Hogan v. Etna Concrete Block Co., 325 Pa. 49, 188 Atl. 763 (1936).
[21] Novak v. Ford City Borough, 292 Pa. 537, 141 Atl. 496 (1928).
[22] Rachmel v. Clark, 205 Pa. 314, 54 Atl. 1027 (1903).
[23] Reichvalder v. Taylor Borough, 322 Pa. 72, 185 Atl. 270 (1936).
[24] Chambers v. Ellis, Inc., 104 Pa. Super. 41, 158 Atl. 583 (1931).
[25] Farbarik v. Jones, 67 Pa. Super. 517 (1917).
[26] Kreiner v. Straubmüller, 30 Pa. Super. 609 (1906).
[27] Allen, Admr. v. Silverman, 355 Pa. 471, 50 A. 2d 275 (1947).
[28] 366 Pa. 450, 77 A. 2d 427 (1951).

It will be observed that the section refers to the maintenance of "a structure or other artificial condition" on the land. It would seem to carry out the theory of the cases decided prior to the Restatement that the existence of natural conditions which may cause harm to trespassing children do not constitute grounds for the application of the section. It would appear that this position must be further modified to require the natural conditions to follow the ordinary contour of the land as natural ponds, springs or streams. This was indicated in the recent case of *McGuire v. Carey,* [29] where a child was drowned while walking on thin ice formed on a natural stream on defendant's property. The court rejected a contention that the condition might be considered artificially created.

If the condition be "man made", it would appear that the courts will construe it to be an "artificial" condition. This is illustrated in two recent cases where in one instance [30] a pond created or formed on land which had been strip-mined was held to constitute such a condition as to permit of recovery for the drowning of a trespassing child, and in the other [31] a reservoir for water storage was held such an artificial condition as warranted recovery for a similar accident.

The chief criticism of the *Restatement of Torts* has been centered around the application of its general language to the facts of the particular case. It is doubtful whether such a factual subject as tort law can be molded into a statement of principles which will be helpful. In such an attempt the average trial judge and practitioner have been puzzled and confused by the general language of many portions of the *Restatement of Torts.* Such phrases as "substantial factor" or "unreasonable risk" are so general and relative in their nature as to furnish little aid or assistance to either the lawyer or the court. It has been said that the *Restatement* is like the Scriptures. It can be quoted for many purposes.

Subdivision (a), in general, is an attempted application of the "playground rule." Places where children will trespass are legion. The phrase "likely to trespass" is so general in scope as to permit of wide application. Barriers and safeguards are of little moment. Trespassing children tread "where angels fear to tread." The use of the phrases "child proof" and "fool proof" crop up in the decisions. They illustrate the tremendous burden imposed on the property owner. He must determine what situations will fall in the class "likely to trespass" and then guard against the contingency. The situa-

[29] 366 Pa. 627, 79 A. 2d 237 (1951).
[30] Mussolino v. Coxe Bros. & Co., Inc., 357 Pa. 10, 53 A. 2d 93 (1947).
[31] Altenbach v. Lehigh Valley R.R., Co., 349 Pa. 272, 37 A. 2d 429 (1944).

tion no longer needs to be attractive, enticing or alluring, nor need the intrusion be for the purpose of play. Any venturesome exploration suggested by the infant mind seems comprehended by the general language of subsection (a).

Subdivision (b) places the burden on the property owner of realizing those situations which involve "an unreasonable risk". As previously adverted to, the word "unreasonable" is a relative one. A child will risk anything. It presents the possessor of land with a very difficult determination.

Subdivision (c) seems to make the child's mind the criterion of reasoning. The child must not discover the condition nor realize the risk involved. This would imply that the property owner must analyze the minds of prospective infant trespassers. Realization of risk by the average adventurous boy is an unknown quantity. A property owner is not a mind reader, yet the *Restatement* requires his analysis of the minds of all the young uninvited guests on his premises. Again it seems to be imposing too great a burden on the possessor of land.

The earlier cases seemed to indicate that certain conditions presented hazards cognizable by the infant mind. For example, the cases suggest that all children have a knowledge of the danger of falling. Recovery has been denied in certain instances where the injuries were as a result of the fall.[32] However, if the injury resulted, after the venturesome lad had climbed up the inviting wall, column, or other structure, by some other instrumentality as an electrical current, recovery will be allowed.[33] Drowning seemed another danger which some of the earlier cases considered to be a realizable risk in the child's mind. Whether the courts will continue arbitrarily to classify certain risks as appreciable to the infant mind in construing the wording of subsection (c) remains to be seen.

Subsection (d) appears more sensible and reasonable. It sets up as a requirement the utility of establishing safeguards as compared to the risk. It seems a belated realization of the burden placed on the possessor of land and holds out to him some measure of relief. There must have appeared in the minds of the framers of the *Restatement* that certain situations would seem so burdensome to make "child proof" as to call for some limitation of the burden previously imposed. A railroad right of way is such a situation in the minds of the Supreme Court as evidenced by certain of its recent decisions.[34] To enclose and barricade a right of way of a railroad involves such

[32] Malloy v. Pa. R.R., 387 Pa. 408, 128 A. 2d 40 (1956); McHugh v. Reading R.R., 346 Pa. 266, 30 A. 2d 122 (1943); Roche v. Pa. R.R., 169 Pa. Super. 48, 82 A. 2d 332 (1951).

[33] Bartleson v. Glen Alden Coal Co., 361 Pa. 519, 64 A. 2d 846 (1949).

[34] Dugan v. Pa. R.R. Co., 387 Pa. 25, 127 A. 2d 343 (1956); Scibelli v. Pa. R.R. Co., 379 Pa. 282, 108 A. 2d 348 (1954); Shaw v. Pa. R.R. Co., 374 Pa. 8, 96 A. 2d 923 (1953).

a monumental expenditure of money as to balance the scale of justice against the trespassing boys, although it must be conceded that there exists no condition more conducive to trespass by venturesome boys than a railroad car or a freight train. It will be interesting to see how far the courts will extend the "utility" doctrine.

At least one textwriter and the Supreme Court have termed the provisions of Section 339 as "the best statement yet made" of the principles of liability of property owners for injuries sustained by trespassing children. It may be that the situation defies more definite statement. It would seem that when the compilers of the *Restatement* undertook to define rules of conduct in tort actions, they took unto themselves an impossible task. While contract law and property rights may well lend themselves to a general statement of principles, rules and doctrines, the law of torts, and particularly negligence, is so factual as to defy such generalization.

Where children of tender years are involved, tort law is given a severe test. The "reasonably prudent person doctrine" certainly cannot be applied to children. Reason and prudence are not sufficiently developed traits in a child to determine and evaluate his conduct by that rule.

Various doctrines having to do with a child's conduct have arisen, aside from the "attractive nuisance" and "playground rule." For example, the "darting out rule," the "responsibility rule" (taken by analogy from the criminal law) to determine a child's possible contributory negligence, the "school zone" doctrine, the "coasting cases," and a number of other doctrines have arisen as the result of frequent accidents under a generally similar state of circumstances.

It would seem better to make some arbitrary rules of conduct with respect to trespassing children. Obviously, the mind of the child represents too uncertain a quantity to predicate any course of conduct. One child may be venturesome, another cautious, a third awkward and clumsy. The mere matter of age does not furnish a stable basis. Children have varying degrees of mentality and appreciation of danger.

The property owner is certainly entitled to some consideration in framing rules of conduct. It would seem proper to protect him by establishing certain accepted standards of preventive care. Certain of the provisions of Section 339 are too burdensome. They leave him to the mercy of almost every conceivable type of conduct by venturesome and mischievous children. He should be protected upon the adoption of certain measures of prevention. It is suggested that reasonable precautions to prevent trespass by children

should exonerate him from responsibility. It would seem that his responsibility should be satisfied by the erection of any type of fence or barrier that would require a conscious effort to surmount or scale. Most of the criminal tendencies of our youth are traceable to poor home training and surroundings. The rights of property are not inculcated into the mind of the child. It should be just as important to train a child not to trespass on a neighbor's real estate as not to steal his personal property. A fence should be deemed a moat to protect one's property, and a child should be trained to respect it. An owner who provides a fence or barrier which must be scaled to gain access to his property should be relieved of legal responsibility upon uncontested proof of its existence.

Upon the same parity of reasoning, a building or structure of any kind should be inviolate. A child should be trained to respect all buildings on land. An owner is not required to make his building "burglar proof" and should not be required to make it "child proof." Home training should again be such that a proper respect for a neighbor's property would cause children not to invade it without express invitation. The excuse that parents cannot be responsible for the venturesome and exploratory disposition of their youngsters should not avail them in a suit for damages resulting from the disregard by their child of a neighbor's close.

Again, some protection should be afforded the property owner from the effects of proof of continued trespasses by children on his property. It would be a hardship in many instances to have him employ watchmen around the clock. Frequent arrests of trespassers would not seem to be the solution. Proof of proper barricades and notification to the responsible municipal authorities should be all that should be required of a land owner. If the municipal authorities cannot adequately protect his property from the inroads of adventurous children, the consequence of their visitation should not be placed upon him.

In conclusion, it is submitted that the framers of the *Restatement,* if they concluded to place so heavy a burden on the possessor of land, should likewise have provided rules of conduct which would exculpate him. In the absence of such protection, the courts should not wholeheartedly adopt the provisions of Section 339 without affording the land owner some measure of protection from its harsh provisions.