

1945

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Recommended Citation

L. Paul Jewell, *The "Attractive Nuisance Doctrine" in Montana*, 6 Mont. L. Rev. (1945).

Available at: <https://scholarship.law.umt.edu/mlr/vol6/iss1/4>

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lies upon continued performance and fails to do what he otherwise would have done to protect himself, it is submitted that the decision in the principal case is open to serious question since the court does not go into the question of reliance and it is not probable that reliance could be shown in this type of case were the court to consider it from that standpoint.

R. Bruce Gilbert.

THE "ATTRACTIVE NUISANCE DOCTRINE" IN MONTANA

It is not the writer's purpose to attempt to cover the vast materials and cases on the "turntable" or "attractive nuisance" doctrines in its entirety. But a short discussion of its treatment in the courts of Montana and the merits of the doctrine will be attempted.

As to the liability of land occupiers for injuries to small children who have come upon their land to play, *Sioux City & Pacific R. R. Co. v. Stout*¹ has been the leading case. This is the first "turntable" case in the United States. There was an earlier case imposing similar liability,² but there it was not decided whether plaintiff was a trespasser.

In the case of *Sioux City & Pacific R. R. Co. v. Stout* the defendant railway company maintained, unlocked, a turntable on which it knew that children trespassed to play. Plaintiff, a child of tender years, was injured when a companion turned the table as he was getting on to ride. The Supreme Court held not error a charge that defendant was liable if the jury found that the unlocked turntable was a danger to children, and that the defendant could reasonably expect children to play on it.

From this decision the growth of the doctrine in the United States was quite rapid. At this writing, twenty-three states impose liability; seven, including Montana, distinguish, and thirteen deny liability in the turntable cases.³ But the extent to which it has been allowed to be applied under the various factual situations has caused the courts no end of difficulty. It seems that after its first flourish in this country the trend in the United States Courts seems to be to limit rather than

¹17 Wall (U. S.) 657 (1873), 21 L. Ed. 745.

²*Birge v. Gardiner* 19 Conn. 507 (1849), 50 Am. Dec. 413.

³For list of states and cases applying, not applying, and distinguishing the "turntable cases" see 36 Harvard Law Review 826.

extend the doctrine.⁴ Even in those states giving recognition to the "attractive nuisance" doctrine there has been much bickering and disagreement as to the requisite facts that must be present, as well as innumerable and variant theories upon which the courts attempt to justify their application of the doctrine to the particular factual situation at hand.

However, out of the vast amount of litigation it is generally held that in order to make out a case against the person responsible for the danger it must appear that (1) the injured child was too young to understand and avoid the danger; (2) there was reason to anticipate the presence of such children, either because of some attraction on the premises, or because the danger was in some place where children had the right to be; (3) there was a strong likelihood of accident; (4) the danger was one other than those ordinarily encountered; and (5) the precautions not taken were such as a reasonably prudent person would have taken under the circumstances.⁵

Various grounds have been suggested for the "attractive nuisance" doctrine and they all represent efforts to bring the doctrine into harmony with the rule that there is no liability to trespassers other than for wilful or wanton injuries.⁶ Sometimes the attempt is to demonstrate that injuries to children attracted to meddle with a dangerous instrumentality, or brought by attraction into proximity with a dangerous instrumentality, are wilful, or that they are wanton. And sometimes the effort at harmony takes the form of an attempt to demonstrate that under the circumstances children of tender

⁴United Zinc and Chemical Co. v. Britt 258 U. S. 268 (1922) and N. Y. N. H. & H. R. Co. v. Fruchter. 260 U. S. 141, 43 Sup. Ct. Rep. 38 (1922).

⁵In substantial accord is §339, Vol. 2 of Am. Law Inst. Restatement of the Law of Torts, which declares: "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 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 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."

⁶Shawnee v. Clark (1913) 41 Okla. 227, 51 L. R. A. (N. S.) 672, 137 Pac. 724. "A principle deductible from much of the case law on the subject allowing recovery is that it is not only the duty of a landowner to a trespasser not to injure him intentionally or wantonly, but that an act or omission involving a reckless indifference to the safety of reasonably anticipated technical trespassers, such as children of tender years, although, without intent to injure, may be wanton."

years are not trespassers, or that they are implied invitees. And, although, there has never been a recovery by plaintiff under the doctrine in Montana,⁷ for various reasons the majority of the court in *Driscoll v. Clark*⁸ gave tacit recognition to the doctrine, despite the statement in the majority opinion by Mr. Commissioner Clayberg that in his opinion the "turntable cases" were not the weight of authority.

It has been held in some cases that the attraction must be so situated as to lure or attract children from a place where they have a right or are likely to be.⁹ Another form of the rule that the attraction must be so located as to lure children from a place where they have a right, or are likely to be, is that where the attraction is discovered only after the child has become a trespasser, there is no liability.¹⁰ It would seem, how-

⁷*Driscoll v. Clark*, 32 Montana 172, 80 Pac. 373. "In an action for injuries to a child received while playing around machinery operated by defendant, the complaint must allege either that there was an actual invitation to children to play about the machinery, or that it was so especially and unusually attractive to children that it constituted an implied invitation; and an allegation that defendant knew that the machinery did attract children is insufficient."

States v. N. P. Ry. Co., 37 Montana 103, 94 Pac. 751. "Employees of a railroad company deposited a worn-out car bottom side up on the sloping side of the track embankment, within the company's yard limits, in such a way as to fall upon and cause the death of a child eleven years old, attracted thereto by its peculiar appearance. In an action against the company for damages plaintiff relied chiefly upon the doctrine of the "Turntable Case." (*Stout v. Sioux City & Pac. R. R. Co.* Fed. Case No. 13,504, 2 Dill. 294). Held, that in order to bring the action within the principles of that case it was necessary for plaintiff to allege and prove not only that the car was especially attractive to children, but also that the child was too young to appreciate the danger and that defendant knew or in the exercise of ordinary care ought to have known, of its unusually attractive character."

Martin v. Northern Pac. Ry. Co. 51 Montana 31, 149 Pac. 89. "In an action for the death of a seven-year old boy on a railroad to which he was attracted to play, an instruction that if an owner of property maintains exposed thereon something which is peculiarly and unusually attractive to children of youth and inexperience, and such children are attracted by such thing, they are not trespassers, is erroneous as omitting the element of knowledge by the owner that the device was dangerous and alluring to children."

Fusselman v. Yellowstone Valley Land & Irrigation Co. 53 Montana 254, 163 Pac. 473. In an action for the drowning of a child in the canal of an irrigation company. Held to state a cause of action under the doctrine of the "turntable cases," it is not enough for the complaint to show that the premises were attractive to children or that children generally were attracted thereto, but it must show that the attraction lured the injured child there with the result complained of, the facts pleaded disclosing the causal connection between the negligent act and the injury.

⁸32 Montana 172, 80 Pac. 373.

⁹*McDermott v. Burke* (1912) 256 Ill. 401, 100 N. E. 168.

¹⁰*United Zinc and Chemical Co. v. Britt* 258 U. S. 268.

NOTE AND COMMENT

ever, that this is an unreasonable restriction upon the "turntable doctrine," as the fact that an attraction is not visible from any place where child has a right to be, should not automatically exempt the landowner from the duty to take precautions, but should be treated as only a circumstance from which the question of the presence of children may be reasonably anticipated, is to be determined.

The fact that the thing is attractive to children is not of itself sufficient ground for applying the doctrine¹¹ that is, "temptation is not always invitation."¹² Therefore we have the requirement by the majority of the courts that the attraction must be especially and unusually attractive.¹³

In order to get away from the difficulty that is ever present in the "attractive nuisance" doctrine because of the rule that a landowner owes no duty to trespassers other than to refrain from wilful or wanton injury, it has been held by numerous cases that the attractiveness of the premises is to be considered as an implied invitation, thereby taking the children out of the category of trespassers and putting them in the category of invitees, giving rise to a duty of ordinary care.¹⁴

There have been two criticisms of the implied invitation theory. The first is, that its logical effect is to extend the "attractive nuisance" doctrine to all cases where one is attracted by something upon the premises of another as, by the tree which may be climbed so that the fruit may be eaten, thereby ignoring the distinction between temptation and invitation. The second is, that the implication is usually at variance with the owner's actual intent.¹⁵

This line of reasoning has unnecessarily caused many of the thirteen states that reject the "turntable" doctrine to do so. But it would seem that careful application of the requirement that the condition be unusually attractive rather than merely attractive would give the court a sufficient basis upon which to distinguish between mere temptation and invitation.

Nor should the fact that the implication is at a variance with the owner's actual intent prevent the court from applying the "attractive nuisance" doctrine, as the courts have found intent by implication throughout all of the fields of law where wilfulness and wantonness are present and it would certainly

¹¹Loftus v. Dehail 133 Cal. 217, 65 Pac. 379.

¹²Erie R. Co. v. Hilt 247 U. S. 97, 38 Sup. Ct. Rep. 435.

¹³San Antonio & A. P. R. Co. v. Morgan 92 Tex. 98, 46 S. W. 28.

¹⁴Davis v. Malvein Light & P. C. 186 Iowa 884, 173 N. W. 262.

¹⁵Gay v. Essex Electric Street R. Co. 159 Mass. 238, 21 L. R. A. 428, 34 N. E. 186.

seem that where a landowner is aware or should be aware that children are likely to be hurt on his premises that this would be sufficient ground to find wilfulness by implication.

It seems clear that Montana has been very strict in its decisions on those cases attempted to be brought under the "turntable doctrine" and this, in the writer's opinion, is as it should be. But the requisites for application of the doctrine as have been brought out by the numerous decisions giving recognition to the "attractive nuisance" cases which properly allege all the requirements in a proper case should allow the plaintiff to recover. It is clear that to loosely apply the "doctrine" would be to place too great a burden on the landowner. The proprietor's development of his land needs to be encouraged. Burdens must not be heaped upon various activities which will discourage his undertaking them, nor must the possession of land be rendered "something rather to be avoided than desired."¹⁶ If every occupier were required to maintain his land in such condition that no intruder might suffer injury a great clog would be put on his activities. Those intruders who are able to look out for themselves do not need a protection which would be so onerous; and the amount of burden which a precaution would involve must always be a factor to consider.

The question then arises as to how we are going to balance the interests between the landowner and the intruding child. In answer to this it is quite clear that there can be no precise method of applying the doctrine but it must be left up to the courts who must be guided by their own sense of social justice. To attempt to set up rigid rules would be wholly inadequate as the child's age and mentality varies,¹⁷ the usefulness of the condition varies, etc.

But where the doctrine is carefully and strictly applied with a sense of social justice on the part of the courts it is the writer's opinion that the doctrine will not place too great a burden on the landowner, or condition maintainer. And it is to be hoped that Montana in a proper case will see fit to apply the doctrine and allow the plaintiff to recover.

L. Paul Jewell.

¹⁶Hall, J., in *Keffe v. M. & St. P. Ry. Co.* 21 Minn. 207 (1875), 2 Cent. L. J. 172.

¹⁷Blair J., in *Shaw v. C. & A. Ry. Co.* 184 S. W. 1151,Mo..... (1916) "It would be a very exceptional state of facts which would render the attractive nuisance doctrine applicable to a strong, healthy and intelligent girl 15½ years old."