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Montana's Law of Attractive Nuisance

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NOTES

MONTANA'S LAW OF ATTRACTIVE NUISANCE

Traditionally, a landowner owes no duty to a trespasser except to refrain from wilfully or wantonly injuring him.[1] Once this general rule of nonliability is stated, the rest of the law of trespassers is but a list of exceptions.[2] The attractive nuisance doctrine is one of these exceptions and where there exists certain circumstances, it may be invoked to impose a duty or reasonable care on a landowner where none previously existed.[3] The purpose of the doctrine is to protect trespassing children from physical harm caused by a dangerous artificial condition, the risk of which they cannot appreciate, due to their age and inexperience.[4]

The attractive nuisance doctrine first appeared in the United States in the case of Sioux City and Pac. RR. v. Stout[5] with the announcement of the "turntable doctrine." The trial court[6] instructed the jury that in order to maintain the action the evidence would have to show:

> "That the turntable, in the condition, situation and place where it then was, was a dangerous machine, one which if unguarded or unlocked, would be likely to cause injury to children; that if in its construction and the manner in which it was left it was not dangerous in its nature, the defendant was not liable for negligence; that it was further to consider, whether, situated as was defendant's property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if it did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured by it if they did resort to it, then there was no negligence."[7]

The jury found for the plaintiff and the Supreme Court of the United States affirmed, finding the charge an "impartial and intelligent one."[8]

Historically, the courts have strongly enforced the right of the landowner to use his land in an uninhibited manner. However it has also been recognized that the privileges of a landowner may be limited when the use of his land adversely affects others.[9] The attractive nuisance

[1]Driscoll v. Clark, 32 Mont. 172, 80 P. 1 (1905), *aff'd on rehearing*, 32 Mont. 192, 80 P. 373 (1905); Conway v. Monidah Trust Co., 47 Mont. 269, 132 P. 27 (1913); Egan v. Montana C. Ry., 24 Mont. 569, 63 P.831 (1901); Beinhorn v. Griswold, 27 Mont. 79, 69 P. 557 (1902); Thompson v. Matusek, 134 Mont. 500, 333 P.2d 1022 (1959); RESTATEMENT (SECOND) OF TORTS Section 333 at 183 (1965) states the rule in a slightly different form: "A possessor of land is not liable to trespassers for physical harm caused by his failure to exercise reasonable care."

[2]W. Prosser, HANDBOOK OF THE LAW OF TORTS Section 58 at 368 (3rd. ed. 1964).

[3]*Id.*

[4]PROSSER, *supra* note 2, Section 59 at 372.

[5]17 Wall. 657, 21 L.Ed. 745 (1873).

[6]23 Fed. Cases 183 (1872).

[7]*Sioux City and Pac. RR. v. Stout, supra* note 5.

[8]*Id.*

[9]*Prosser, supra* note 4, "the interest in unrestricted freedom to make use of the land may be required, within reasonable limits, to give way to the greater social interest in the safety of the child. . . ."

doctrine is, then, an attempt to balance two interests: The traditional interest in the safety and welfare of children and the burden a landowner incurs in making his premises safe to avoid harming a trespassing child. If the landowner's burden is so slight as to not be unreasonable, and the risk to trespassing children is high, there would seem to be good reason to hold a landowner liable for injuries inflicted on trespassing children.[10] This balancing process employed in the attractive nuisance doctrine has yielded a morass of inconsistent decisions[11] in the United States. The case law among jurisdictions in nearly impossible to reconcile. In any particular case, only those principles and applications of the doctrine which have been approved by a particular jurisdiction should be relied on.

The attractive nuisance doctrine first appeared in Montana in 1905.[12] Recovery will be permitted under the doctrine in Montana when a defendant breaches the duty to act in a reasonable manner under the circumstances. This is not a general duty to prevent all forseeable harm, but arises as an exception to the traditional rule regarding trespassers when there exists special circumstances which justify imposing a duty despite the trespasser status of the plaintiff. The special circumstances which are a prerequisite to recovery in Montana are contained in Section 399 of the Second Restatement of Torts which provides:

> "A posessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
>
> (a) the land where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve 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 with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children."[13]

A failure of a plaintiff in a Montana court to plead and prove "each and every element" of Section 339 will preclude recovery.[14]

[10] *See supra* note 2.

[11] This state of the law prompted one judge to state: "To review the decisions is useless and to reconcile them is impossible." Fussleman v. Yellowstone Valley Land and Irrigation Co., 53 Mont. 254, 163 P. 475 (1917).

[12] *Driscoll v. Clark*, *supra* note 1.

[13] Section 339 also contained the following caveat: "The Institute expresses no opinion as to whether the rule stated in this Section may not apply to natural conditions of the land."

[14] Gagnier v. Curran Construction Co., ..., 433 P.2d 894, 900 (1968).

However Section 339 is not the entirety of attractive nuisance law in Montana as is evidenced by a statement of the Montana court in Gagnier v. Curran Construction Co.[15]

> "This court adopted *as part* of the doctrine the Rest. Of Law, Torts 2d, Section 339."[16]

As an additional barrier to recovery, the plaintiff in a Montana court must be aware of the strong reluctance of the Montana Supreme Court to impose a duty of reasonable care on a landowner to prevent injuries to a trespassing child. This reluctance can be seen to operate independently of the quite adequate protection afforded the landowner by Section 339.[17] As a result, the landowner has seemingly been released from the duty to act reasonably under the circumstances in many Montana cases.

A plaintiff in Montana is required then to plead and prove that a landowner defendant knew or had reason to know both that children were li. ' to trespass[18] and that they were likely to be harmed by an artificial condition which gave rise to an unreasonable risk.[19] The Montana Supreme Court, in the most recent attractive nuisance case,[20] has affirmed the *Second Restatement* meaning of the words "has reason to know." Section 12 of the *Second Restatement* provides:

> "The words are used to denote the fact that the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists."

In contrast to the meaning of the words "should know",[21] Section 339 imposes no affirmative duty on a landowner to search his land either for trespassing children or for the existence of an unreasonable risk. The duty to act reasonably arises only after the landowner actually has such information.[22]

A plaintiff in the Montana courts must also plead and prove that

[15] *Gagnier v. Curran Construction, supra* note 14.

[16] *Id.* at 900.

[17] Apparently no such reluctance is manifested by the Montana Court when the landowner is a public entity. *See* Gilligan v. City of Butte, 118 Mont. 350, 166 P.2d 797 (1946). Attractive Nuisance was discussed in the *Gilligan* case, but the decision seems to be a trap for the unwary. The plaintiff in the case was not a trespasser, the city was found to have an affirmative duty to "keep in touch" with conditions in its streets and in *Gagnier v. Curran Construction Co., supra note 15*, the court found the case "inapplicable unless all elements of Section 339 of the *Second Restatement* were pleaded by the plaintiff." *But see* Knox v. City of Granite Falls, Minn., 72 N.W.2d 67 (1955).

[18] RESTATEMENT (SECOND) OF TORTS Section 339 clause (a).

[19] *Id.* clause (b).

[20] *Gagnier v. Curran Construction Co., supra* note 14.

[21] RESTATEMENT (SECOND) OF TORTS Section 12 (1965).

[22] *Supra* note 18 comment h.

the risk arising from an artificial condition was such that the trespassing child could not appreciate the danger.[23] This element of the attractive nuisance doctrine is the most difficult to assess. The determination of whether the child in a particular case realized the danger is not made by comparisons with the average child. Rather the factual determination is whether the particular child realized or should have realized the danger of trespassing or intermeddling with the condition.[24] In Montana, this question is for the jury[25] but such a determination should not increase landowner liability beyond what would be reasonable under the circumstances. If there is a risk which a trespassing child appreciates but nevertheless chooses to encounter, the landowner is not liable for physical harm caused by the condition of the land.[26] It would also be doubtful that a Montana landowner could be held liable if a child, because of mental defect or other infirmity, could not realize risks which would have been obvious to the average child. A landowner defendant in such a case would be required to act affirmatively only if he had reason to know both that such a child was likely to trespass and that the child could not appreciate normal risks because of his infirmity.[27]

The majority of the attractive nuisance cases in Montana have been decided on the issue of whether the plaintiff has pleaded and proved the existence of an unreasonable risk to a trespasssing child. In the deciding of this issue, the Montana Supreme Court has displayed its strong reluctance to impose a duty or reasonable care on the landowner when the plaintiff is a trespasser. Montana case law removes entire classes of conditions from the operation of the attractive nuisance rule without regard to either the reasonableness of the landowner's conduct or the high degree of risk to trespassing children. This approach has been manifested by three rulings of the Montana court: (1) the "allurement" rule, (2) the "Unusually attractive" rule, and (3) the rule of the Gagnier case.

The "allurement" rule was made a prerequisite to recovery in Driscoll v. Clark,[28] the first Montana attractive nuisance case. In *Driscoll,* a trespassing child was denied recovery for injuries sustained when he was caught up in an endless chain which transported lumber to the defendant's mill. The court ruled that in order to recover, the plaintiff was bound to plead and prove an implied invitation thereby obviating the trespasser status. The basis for the implied invitation was the alluring and attractive nature of the dangerous condition causing the child's presence on the

[23] *Supra* note 18 clause (c).
[24] *Gagnier v. Curran Construction Co., supra* note 14 at 900.
[25] *Id.*
[26] *Supra* note 14 comment i.; *see also* Callahan v. Buttrey Inc. 300 F.2d 901 (1962).
[27] *See* O'Keefe v. South End Rowing Club, 64 Cal.2d 729, 744, 414 P.2d 830, 839 (1966).
[28] *Supra* note 1.

land. This rule continued to be applied in later cases.[29] In one case, for example, a child was denied recovery for injuries sustained in a fall into an obscured mine shaft, because there was no evidence that the child was aware of its existence.[30] However, in at least one of the early cases,[31] the arbitrary nature of this rule was recognized and it was implicitly overruled in Nichols v. Consolidated Daries of Lake County[32] when the court stated:

> "It is not necessary that the instrumentality be the one attracting them into the building."[33]

This question was ultimately settled in a later Montana case [34] which held that a child trespasser may recover even though he never discovers the dangerous condition which injures him. Montana law now agrees with Section 339 of the *Second Restatement of Torts* on this subject and in fairness, the Montana court should not be unduly criticized for utilizing such a rule. Allurement was originally the crucial element of the attractive nuisance doctrine. Now, however, the words "Attractive Nuisance" are regarded as a misnomer.

The "unusually attractive" rule was also laid down in the *Driscoll* case when the Montana court adopted the reasoning contained in an opinion of a foreign court.[36] That court held that the attraction of a child by a dangerous condition could not be made the basis of an implied invitation if such a condition amounted to a use of the land "As others normally do throughout the country."[37] This process of exclusion removes from the operation of the attractive nuisance doctrine, all conditions except those which amounted to an extraordinary use of the land. Only those conditions of the land, which were "unusually calculated to attract",[38] could be made the basis of an implied invitation and hence the basis for recovery. In later cases, an overturned railway car,[39] a slow moving train,[40] and a railway terminal and yard[41] were deemed as not being "unusually calculated to attract." This ruling applied solely to to the nature of condition without regard to the actual attraction of

[29]Nixon v. Montana W. and S. Ry., 50 Mont. 95, 145 P. 8 (1914): Martin v. Northern Pac. Ry., 51 Mont. 31, 149 P. 91 (1915); *Fussleman v. Yellowstone Valley Land and Irrigation Co., supra* note 11; *Conway v. Monidah Trust Co., supra* note 1.

[30]*Conway v. Monidah Trust Co., supra* note 1.

[31]*See* Gates v. Northern Pac. Ry., 37 Mont. 103, 94 P. 751 (1908).

[32]125 Mont. 460, 239 P.2d 740, 28 A.L.R. 2d 1216 (1952).

[33]*Id.* at 742.

[34]*Gagnier v. Curran Construction Co., supra* note 14 at 900.

[35]*Supra* note 18 comment b.

[36]San Antonio Ry. v. Morgan, 92 Tex. 98, 46 S.W. 28 (1898).

[37]*Driscoll v. Clark, supra* note 1 at 3.

[38]*Id.*

[39]*Gates v. Northern Pac. Ry., supra* note 31.

[40]*Nixon v. Montana S. and W. Ry., supra* note 29.

[41]*Marin v. Northern Pac. Ry., supra* note 29.

children by such a condition. As a result, in the *Gates* case,[42] the court decided that even if children were in fact attracted by the overturned railway car, it was not conclusive that it was an "unusually attractive" condition."

The "unusually attractive" rule was also overturned by the Montana court in the *Nichols* case.[43] In that case, a child who had been playing in and about a grain storage elevator was injured while operating an unlocked service elevator within the building. The service elevator was alleged to have been maintained in a defective condition which caused the supporting rope to break and the rapid descent of the elevator to ground level. The court ruled the defendant's answer, that the service elevator was an instrumentality normally used in the grain elevator business, was not an effective defense. The court reasoned that the installation of a locking device was only a slight burden to the landowner in relation to the risk to trespassing children. Insofar as mechanical instrumentalities on the land are concerned, the Montana law now agrees with the *Second Restatement of Torts'* determination of what constitutes an unreasonable risk. In order to qualify a condition as one giving rise to such risk, two factors are necessary. First, the risk must be such that it cannot be understood by a trespassing child.[44] Secondly, the risk to children must be preventable in a manner amounting to slight burden to the landowner, in relation to the high degree of risk.[45] In explaining this element of unreasonable risk, the *Second Restatement* provides:

> "The public interest in the possessor's free use of his land for his own purposes, is of great significance. A particular condition is therefore regarded as not involving an unreasonable risk to trespassing children unless it involves a grave risk to them which could be obviated without any serious interference with the possessor's legitimate use of the land."[46]

Thus if measures taken to safeguard children would materially interfere with the use of the land or its utility to the landowner, the risk to children will not be considered unreasonable. Quite properly then, the *Nichols* court refused to exclude the service elevator from the operation of the attractive nuisance rule. Because of the absence of any knowledge of the risk by the child, the court concerned itself with only the burden the landowner would have incurred in installing a locking device. Upon finding that this burden was slight in relation to the high degree of risk to trespassing children, the court concluded that the plaintiff had alleged facts which amounted to a maintenance of an unreasonable risk by the defendant.

The rule announced in Ganier v. Curran Construction Co.[47] mani-

[42] *Supra* note 31.
[43] *Supra* note 32.
[44] RESTATEMENT (SECOND) OF TORTS, *supra* note 18 comment m.
[45] *Id.* comment n.
[46] Id.
[47] *Supra* note 14.

fests the continuing reluctance of the Montana court to impose on the landowner the duty of reasonable care under the circumstances. The defendant in the *Gagnier* case was engaged in the housebuilding trade in a populated area. Two children were asphyxiated when the earthen wall of a waterline trench caved in and buried them. The waterline trench had been partially refilled but the portion near the foundation of the house had been left open to facilitate the completion of the foundation. At the time of the accident, the foundation work had been completed for several days. Although the Montana court had not previously faced the problem of an excavation, with regard to the attractive nuisance doctrine, it elected to rule that:

> "Certain instrumentalities in or about buildings under construction are not the type of conditions which can be classified attractive nuisances."[48]

This ruling was made after consideration of the case law of several foreign jurisdictions which have held that artificial conditions which duplicate natural conditions, familiar to the average child, do not amount to an unreasonable risk within the law of attractive nuisance. To hold otherwise, in the view of the Montana court, would impose an unreasonable duty on a private landowner to guard against harm to trespassing children.[49] Thus it would seem that this reasoning is an attempt by the Montana court to recognize both the knowledge of the child and degree of burden to the landowner as element of an unreasonable risk in conformity with Section 339 of the *Second Restatement of Torts.*

The *Gagnier* rule however is not consistent with the *Restatement* reasoning. As previously noted,[50] the *Gagnier* court recognized that the appreciation of the risk by the child is the most difficult condition to assess. The question of whether the particular child should have realized the risk is, in the words of the court, "for the jury to decide."[51] The court's concern for the rights of landowner and the recognition of the burdens imposed by a duty to act reasonably probably explain the *Gagnier* ruling. This reasoning is an unwarranted extension of the same reasoning which caused a caveat to be inserted in Section 339 of the *Second Restatement of Torts.* That caveat stated that no opinion was expressed as to whether the section should not also apply to natural conditions of the land. In explaining the reason for the caveat, the *Second Restatement* provides:

> "In most instances the burden of improving the land in a state of nature in order to make is safe for trespassing children would be disapportionately heavy, and for that reason alone there would be no liability."[52]

[48] *Supra* note 14 at 899 *but see instant case* at 901.
[49] *Id.*
[50] *See* text accompanying notes 24 and 25.
[51] Id.
[52] RESTATEMENT (SECOND) OF TORTS, *supra* note 18 comment p.

In the *Gagnier* case, the preventative measures required to protect children would have imposed no such heavy burden. Since the excavation was a temporary, not permanent condition of the land, and since nothing remained which would prevent completely refilling the waterline trench, the preventative measure of filling that trench represented nothing more that that which the defendant could have and would have performed as a matter of course. The result of the *Gagnier* ruling is to again remove an entire class of conditions from the operation of the attractive nuisance rule without regard to either the degree of risk to children or the reasonableness of the landowner's conduct.

There is a more reasonable alternative. California has recently decided a case [53] which reflects the trend in the law of negligence to determine liability as far as possible on the reasonableness of the defendant's actions without resort to such arbitrary labelizing as "trespasser." In Crain v. Sestak,[54] the particular facts and circumstances closely approximated those found in the *Gagnier* case. A fifteen year old boy fell from a defective scaffolding which was being used in construction of a house. The California court affirmed a prior decision[55] in which it was held that a landowner should be held to a standard of reasonable care as to those conditions from which a child could not be reasonably expected to protect himself. In the *Crain* case, the court emphasized,

> "Whether or not such an obligation or duty should be imposed on the possessor depends on the number of variable factors and the question of liability must be decided in the light of the circumstances and not by arbitrarily placing cases in rigid categories on the basis of the type of condition involved."[56]

The California approach represents the more enlightened view in which the burden of preventative measures is a circumstance considered in determining the landowner's liability on the basis of the reasonableness of his actions. This approach should not increase landowner liability beyond that which would be reasonable under the circumstances. Thus, the circumstances in the *Crain* case were resolved in favor of the defendant landowner.

In view of past decisions, Montana attractive nuisance law reflects little of the recent trend in the law of negligence. In Montana, the courts continue to recognize the interests of landowners independently of the safeguards contained in Section 339 of the *Second Restatement of Torts.* Consequently, the landowner has been relieved of the duty to act in a reasonable manner in attractive nuisance cases involving certain classes of conditions. Two such classes are: (1) artificial conditions which duplicate natural conditions in and about buildings under construction,

[53]Crain v. Cestak, 68 Cal. Rptr. 849, 262 A.C.A. 175 (1968).
[54]Id.
[55]*O'Keefe v. South End Rowing Club, supra* note 27.
[56]*Crain v. Sestak, supra* note 53 at 853.

and (2) by implication, natural conditions would also be excluded. If the *Gagnier* court[57] ruled against recovery, the ruling should have been clearly based on the theory that the danger created by the condition was obvious and appreciated by the child rather than an arbitrary and somewhat inflexible ruling based on the nature of the condition. If the *Gagnier* rule should be applied in a future Montana case involving a condition of the land which duplicates a natural condition, the risk of which a child cannot appreciate, the necessary result would be a denial of recovery even if the preventive measures represent only slight burden to a landowner who fails to act reasonably.

The future of the attractive nuisance doctrine as an action for recovery based on the breach of the duty to act in a reasonable manner appears dim in view of the continued reluctance by the Montana court to impose such a duty on the landowner when the plaintiff is a trespasser. In future Montana cases involving the attractive nuisance doctrine, the Montana court should abandon inflexible approaches which unduly favor the landowner. The burden that a landowner might incur in making his premises safe to avoid harming a trespassing child should be considered as one of the circumstances determinative of the reasonableness of his actions, not as a social evil justifying the complete release of the landowner from the duty to act reasonably.

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[57] *Gagnier v. Curran Construction Co., supra note 14.*