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get specific decisions on all the points that may arise under the statutes of the traditional type; that process may take many years.

ROBERT J. HOLLAND

ATTRACTIVE NUISANCE IN MONTANA

The *Restatement of the Law of Torts*¹ provides that:

“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.”

Students of tort law will note with satisfaction that the Montana Supreme Court evidenced awareness of the implications of this statement in its recent decision of January 16, 1952, *Nichols v. Consolidated Dairies of Lake County*.²

The attractive nuisance doctrine traces its origin to an English case decided in 1841, wherein a defendant who left a horse and cart unattended on the street was held liable after a child climbed on the cart and was then thrown off and injured when the horse started suddenly at the urging of another child.³

Sioux City and Pacific R. R. Co. v. Stout,⁴ decided by the United States Supreme Court in 1873, is generally considered the leading American case on the doctrine,⁵ though there appear to

¹§ 339.

².....Mont., 239 P. (2d) 740 (1952).

³*Lynch v. Nurdin*, 1 Q.B. 29, 113 Eng. Rep. 1041 (1841).

⁴17 Wall. (U.S.) 657 (1873).

⁵*Hudson, The Turntable Cases in the Federal Courts*, 36 HARV. L. REV. 826 (1922-23).

have been earlier ones decided in a few state courts.⁶ It was in the *Stout* case that the doctrine received its popular name "turntable doctrine," since the railroad company was held liable when plaintiff, a child 6 years old, received a crushed foot while playing around a turntable on its property where it knew children were in the habit of playing. Liability was predicated on negligence in failing to repair a broken lock on the turntable, it being considered that the defendant owed this duty to children whom it knew were apt to trespass, play on the turntable, and be injured. It was also thought that defendant was negligent in not making more effort to keep the children away.

Following the decision in the *Stout* case, which has been followed quite generally in the federal courts,⁷ the state courts seem to have taken three positions on the doctrine. Manley O. Hudson,⁸ writing in 36 Harv. L. Rev. in 1922-23, pointed out that a majority of the states, 23 in number, approved the doctrine and allowed recovery even though the child was a trespasser. Some 13 states denied any recovery under the doctrine, and 7 states, including Montana, distinguished the turntable cases⁹ and allowed recovery only if it were shown that the nuisance was so especially and unusually alluring to children of tender years as to constitute an implied invitation,¹⁰ or that the landowner had neglected some usual and customary precaution,¹¹ or that the child was in fact tempted onto the land by the thing occasioning the injury,¹² etc.¹³ Of the five states not covered by Hudson's survey,

⁶*Supra*, note 5, see p. 826 and note 3.

⁷*Supra*, note 5, p. 831.

⁸Professor of Law, Harvard, 1919-23, and at present. He has been very active in international law, the League of Nations, etc.

⁹*Supra*, note 5, (see note 103 p. 854 for a listing of the states in the various categories).

¹⁰*Driscoll v. Clark*, 32 Mont. 172, 80 P. 373 (1905); *Gates v. Nor. Pac. R.R. Co.*, 37 Mont. 103, 94 P. 751 (1908); *Martin v. Nor. Pac. R.R. Co.*, 51 Mont. 31, 149 P. 89 (1915); *Bicandi v. Boise Payette Lbr. Co.*, 55 Idaho 543, 44 P. (2d) 1103 (1935); *Wheeler v. City of St. Helens*, 153 Or. 610, 58 P. (2d) 501 (1936), to cite a few.

¹¹*Salladay v. Old Dominion Copper Mining and Smelting Co.*, 12 Ariz. 348, 100 P. 441 (1909).

¹²*Fusselman v. Yellowstone Valley Land and Irrigation Co.*, 53 Mont. 254, 163 P. 473 (1917); *Salt River Valley Water Users' Association v. Compton*, 40 Ariz. 282, 11 P. (2d) 839 (1932), wherein plaintiff was denied recovery after being injured while climbing a pole on defendant's land, because it was not the pole but a bird's nest on top of the pole which had attracted him onto the land.

¹³*Supra*, note 5, see note 103 p. 854 for a list showing the position of 43 of the 48 states on the doctrine. A check of the General and American Digests through March, 1952, indicates that substantially the same classification, with only a few changes, would apply today. For instance, Maryland, listed as a state which distinguishes the turntable cases, held in *State, to Use of Lorenze v. Machen*, 164 Md. 579, 164 A.

one, Florida, has definitely adopted the doctrine,¹⁴ while another, Wyoming, has refused to apply it in at least two cases¹⁵ and apparently disapproves of it. Nevada, New Mexico, and North Dakota have evidently had no cases rendering a decision as to whether the doctrine applies. On the whole it is the opinion of this author that the attractive nuisance doctrine has held its own in the last quarter century and has probably gained in breadth of application.

Of course the greatest stumbling block to the courts in applying the doctrine has been the general rule that a landowner owes no duty to those who trespass on his land other than to refrain from wilfully or wantonly injuring them. Many courts, including Montana's, have attempted to compromise the trespasser status of the child by implying from the attractive nature of the nuisance an invitation to him to come onto the land. This makes the child an invitee and casts a duty on the landowner to exercise ordinary care to make the premises reasonably safe for him, taking into consideration the propensities of children. Another view taken is that the landowner has set up something in the nature of a trap for children who are too young to appreciate the danger. This puts the case within a well recognized exception to

695 (1933), that the attractive nuisance doctrine does not obtain in Maryland. However, the general tenor of that opinion seems to indicate that they would still distinguish the cases where an invitation could be implied. Pennsylvania, listed as denying liability, adopted the restatement view in *Thompson v. Reading Co.*, 343 Pa. 585, 23 A. (2d) 729 (1942), and has since consistently followed it. See also *Bartleson et al. v. Glen Alden Coal Co. et al.*, 361 Pa. 519, 64 A. (2d) 846 (1949). Michigan will now apply the doctrine where what is termed a "technical trespass" is found, i.e. where the child is rightfully on the land as a licensee but trespasses by playing with or taking the instrumentality as the spontaneous and natural act of an irresponsible child immediately attracted to the object. See *Petrak v. Cooke Contracting Co.*, 329 Mich. 564, 46 N.W. (2d) 574, 576 (1951); *Butrick v. Snyder*, 236 Mich. 300, 210 N.W. 311 (1926). New York is listed as denying liability. However, in *Clifton v. Patroon Operating Corp.*, 63 N.Y.S. (2d) 597, 271 App. Div. 122 (1946), a lower New York court (Supr. Ct., App. Div., 3rd Dept.) applied the restatement view. Subsequently, in *Eason v. State*, 104 N.Y.S. (2d) 683 (1951), another lower court (Court of Claims) held, without mentioning the Clifton case, that the attractive nuisance doctrine, when applied in New York, is applied almost exclusively to dangerous attractions in the highway, and that the same attraction off the highway, even though in close proximity thereto, does not impose liability. Vermont, while still denying liability generally, has applied the doctrine by statute to dilapidated buildings. See *Trudo v. Lazarus*, 116 Vt. 221, 73 A. (2d) 306 (1950); also V.S. § 10.361.

¹⁴*Johnson v. Wood*, 155 Fla. 753, 21 So. (2d) 353 (1945); also *Allen v. William P. McDonald Corp.*,Fla....., 42 So. (2d) 706 (1949), which applied the doctrine to an artificial pond on the theory that it was so constructed as to be a trap.

¹⁵*Wilson v. City of Laramie*, 65 Wyo. 234, 199 P. (2d) 119 (1949); *Maher v. City of Casper*, 67 Wyo. 268, 219 P. (2d) 125 (1950).

the rule of non-liability for injury to trespassers.¹⁶ However these theories are pure fiction, since obviously the landowner has not intended to invite children onto his premises when he sets up an attractive instrumentality thereon, nor has he any intent of trapping them. It seems to this author that it is far better for the courts to recognize that the child is a trespasser and that the doctrine of attractive nuisance is another exception to the general rule of non-liability to trespassers. Taking into account the known propensities of children, the supposedly enlightened position of the human race as compared with the days when much of the common law was formulated, and the interests of society in the securing of the young from needless injury, the general rule should be capable of being modified in this wise. Hudson was also of this opinion when he wrote on the subject over 25 years ago.¹⁷

As Hudson points out, there are several interests which compete for protection in the ordinary attractive nuisance case.¹⁸ There is the interest of the child in being, in some measure, protected prior to injury as well as in being adequately compensated for an injury which is really the fault of the landowner who has failed to take into account the natural instincts of children. It is well known that those instincts lead them to investigate and play about unusual instrumentalities, oblivious of the danger that may be involved and, as often as not, completely unmindful of any trespass. While many courts have been influenced by the fact that a recovery would merely redound to the benefit of the child's parents,¹⁹ this seems a poor argument for refusing to allow a recovery by the child, since it is the child who has endured the pain and suffering and who will often suffer more in the future from any resulting handicap or from the possible inability of the parents to provide the funds necessary for proper care and treatment. It seems to this author that, except where the parent is clearly able to bear the burden, no court is justified in denying the child recovery because the parent may have been negligent, even though the parent benefits from the recovery through the fact that the landowner pays for the treatment of the child. In any event the child should recover for pain, suffering, and future handicap. Of course if the child is killed it is inescapable that any recovery must directly benefit the parent, and it would seem reasonable to allow the parent's negligence to defeat the recovery.

¹⁶65 C.J.S. *Negligence* § 29(2).

¹⁷*Supra*, note 5, p. 828.

¹⁸*Supra*, note 5, pp. 839 and following.

¹⁹*Supra*, note 5, p. 839.

The interest of the bereaved parent must be considered where the child has been killed and, to a lesser extent, the expectancy of a dependent parent on a child's future earnings. As Hudson points out, these interests are very difficult to value. However, while damages are seldom allowed for the mental anguish occasioned by the child's death,²⁰ the weight of authority seems to permit the parent to recover for the loss of the child's society and companionship,²¹ and the latter interest should be taken into consideration by the courts in jurisdictions allowing such recovery. The interest in future earnings seems much more doubtful. Where the child has been injured the parent has a great interest in receiving compensation for the added burdens which are thrust upon him in seeing that the child is treated, as well as in caring for a child who may have been handicapped.

Opposing these interests is that of the landowner in the free and uninhibited development of his land. Where the development and use made of the land is of great benefit to the community it may well tilt the scales in favor of the landowner, even though he would otherwise be liable. Hudson pointed this out as does *Restatement, Torts, Section 339, Comment F*. However, the restatement would hold him liable regardless of the usefulness of the instrumentality if it is practicable to safeguard the thing at a reasonable cost. It will be remembered that this was the basis of liability in the *Stout* case. Judge Lewis, in *United Zinc and Chemical Co. v. Britt*,²² pointed out that he had less hesitation in applying the doctrine where the instrumentality complained of was, as in that case, put to no useful, ornamental or other purpose of enjoyment.

Finally there are to be considered the social interests in-

²⁰See 67 C.J.S. *Parent and Child* § 55, and the General and Decennial Digests, *Death* § 89.

²¹67 C.J.S. *Parent and Child* § 55 intimates that the weight of authority denies recovery for loss of society and companionship. However a check of the General and Decennial Digests, *Death*, § 88 seems to indicate that the majority of jurisdictions allow such recovery.

²²264 F. 785 (1920), wherein defendants had allowed to stand on their premises an abandoned chemical plant. Water gathering in the basement was contaminated with sulphuric acid and zinc sulphate which poisoned plaintiff's sons when they came onto the land, found the pool, and went in swimming. Defendant was held liable below for their deaths even though the pool was not shown to have been, in fact, the thing that attracted the boys onto the land. Also the court imputed to defendant knowledge of the trespass or the likelihood thereof and consent thereto from the fact that the public habitually crossed the premises at will. This judgment was later reversed by the U. S. Supreme Court which granted certiorari. On review, Mr. Justice Holmes pointed out that the pool could not be seen from the highway and that there was no evidence that it was what attracted the boys onto the land. See *infra*, note 35.

volved. Society has interests both in the security of child life and in the freedom of land development and enterprise. Hudson points this out and also states: "The social interest in keeping the earth's surface free from menaces to small children is all but paramount." He also indicates that this interest is accentuated by the fact that "so many other menaces to child life *now* exist."²³ The word "now" refers to the year 1923 when the article was written. It is the belief of this author that, as of the present time, the social interest in keeping the earth's surface free from menaces to small children is definitely paramount and if it was accentuated by "other menaces" existing in 1923, consider for a moment how much more this is a factor in 1952. It would seem that society would be justified in restricting the landowner's free use of his land even to the point of requiring quite sizable expenditures for safety devices where it is well known that children are apt to trespass and, due to their childish propensities, be injured by dangerous instrumentalities. What seems an excellent example of the present-day tendency to subordinate the interests of property owners in the unrestricted use of their property to the interests of public safety is found in the advent in comparatively recent years of municipal zoning laws.²⁴ In the light of this development alone it seems reasonable to this author that there is much justification in expecting the further extension, also, of the attractive nuisance doctrine and the imposition on landowners of a greater burden of care in the protection of the public interest in child welfare and safety.

Hudson points out that it is debatable whether extension of the doctrine would promote child safety,²⁵ but it would certainly promote the general welfare of injured children and their parents and it seems highly arguable that it would promote child safety generally, since corporate landowners are apt to exercise greater care in protecting trespassing children from dangerous instrumentalities on their land when they find that they will be liable if they do not, even though individual landowners may be slower to learn of the state of the law. It would seem also that what constitutes a reasonable expenditure for safety devices or an unreasonable hindrance of the landowner in the use of his

²³*Supra*, note 5, p. 840 and note 50.

²⁴At the time Hudson wrote the zoning law was in its infancy. Justice Adams in *State v. Roberson*, 198 N.C. 70, 150 S.E. 674 (1929), points out that only a few years previous to that time zoning laws would have been invalid. Compare, also, the multitude of cases on zoning laws in the 4th and 5th Decennial Digests with the comparatively few in the 3rd Decennial. See *Municipal Corps.* §§ 600, 601, 3rd, 4th, and 5th Decennial Digests.

²⁵*Supra*, note 5, p. 841.

instrumentality would have to be decided in the light of the apparent modern tendency to further subordinate proprietary interests to the public interests.

As Hudson indicates, in balancing up these interests it is undesirable to use a set of rigid rules, but rather the application of the doctrine should depend on the variables arising in the cases.²⁶ He states that a standard of judgment is at hand in the general legal standard of social conduct, i.e. our requirement that one who acts in society, whether it be merely to maintain land, to conduct operations upon it or to place its product upon the market, must use due care under the circumstances.²⁷ Modern conditions and tendencies seem, to this writer, to justify weighing the interests more heavily against the landowner. However, the restatement appears to be a reasonable compromise between a view which would exonerate the landowner and one which would impose a very strict liability with little regard for attendant circumstances.

The first decision on the attractive nuisance doctrine by the Montana Supreme Court appears to have been rendered in 1905 when that Court refused to find liability under it in *Driscoll v. Clark*.²⁸ In that case defendant was operating an unguarded conveyor chain within ten feet of a main street. Plaintiff, a child of 5 years, was in the habit of playing around the machine as were other children to defendant's knowledge. Plaintiff became entangled in the chain and was badly injured. The court, speaking through Chief Justice Brantly in an opinion prepared by Commissioner Clayberg, seemed to apply the same rule to trespassing children as would be applicable to trespassing adults and held that there was no duty to warn the trespassing child of open and apparent dangers even though the child was unable to appreciate them and that there was no duty to keep a lookout for children and warn them off the premises even though it was well known that they were in the habit of playing there. The case turned primarily on the facts that the child was a trespasser and that the complaint did not allege facts from which an implied invitation to come onto the premises could be worked out. The court held that before such an invitation could be implied the complaint must allege that the machinery was so *especially* and *unusually* attractive to children as to extend an implied invitation to them to come onto the premises. The mere fact that the machinery did attract children to defendant's knowledge was held insufficient. The court considered an implied invitation a neces-

²⁶*Supra*, note 5, p. 844.

²⁷*Supra*, note 5, pp. 844, 845.

²⁸32 Mont. 172, 80 P. 373 (1905).

sary prerequisite to liability and then seemingly made it as difficult as possible to find such invitation.

Three years later the court decided *Gates v. Northern Pacific Railway Co.*²⁹⁷ wherein defendant had placed an old railroad car body in a precarious position on an embankment on its right-of-way in Missoula. Deceased, a child of 11 years, while traversing a path across defendant's property which had long been used by the public generally, deviated from the path to investigate the car in its curious position. It rolled over crushing him. The supreme court reversed and remanded the case, after a decision below for plaintiff, on the grounds that it had not been alleged and proved either that the defendant had *knowledge* of the attractive character of the car or *should have foreseen* that it was especially and unusually attractive to children, or that deceased was so young as not to appreciate the danger or that his trespass was excusable. In this opinion Justice Holloway, concurring, stated that the attractive nuisance doctrine should apply to make a landowner liable to trespassing children only if the following facts exist:

- “1. A child too young to appreciate the danger or be contributorily negligent.
2. An injury caused by an unguarded, dangerous machine or other dangerous thing peculiarly attractive to children of the class to which the injured child belongs.
3. An implied invitation to come on the premises. This may be implied from the fact that the landowner *knew* or *in the exercise of ordinary care ought to have known* that such children were in the habit of coming on his premises to play or to gratify their childish curiosity.”²⁹⁸

This agreed substantially with a statement by Mr. Justice Smith, who pointed out in the majority opinion that the special attractiveness of the nuisance might be shown by the very nature of the thing and the fact that children were attracted to it. Justice Brantly, strongly opposed to the turntable doctrine, was of the opinion that the *Driscoll* case was applicable here and that the child was a mere trespasser to whom the defendant owed no duty other than to refrain from wantonly or wilfully injuring him.

Thus the case modifies the harsh doctrine of the *Driscoll* case in that it imposes on a landowner, who is maintaining on his

²⁹⁷37 Mont. 103, 94 P. 751 (1908).

²⁹⁸See 37 Mont. 103, p. 118; 94 P. 751, p. 755.

premises a dangerous instrumentality which, from its nature, he should know to be peculiarly attractive to children, some duty to look out for trespassing children whom he knows or ought to know are in the habit of coming to play or to gratify curiosity.

In 1914 the court decided the case of *Nixon v. Montana, Wyoming, and S. W. Ry.*⁵¹ wherein plaintiff's daughter, 8 years old, was killed while trespassing on defendant's property. The child had tried to board the rear car of a slow moving freight train which was so made up that two cars were behind the caboose. The defendant had failed to comply with a statutory duty to fence its right-of-way at the point of the accident and knew that children were accustomed to walk along the track in the vicinity. The court declined to hold defendant liable because the failure to fence was a breach of a duty owed to stockmen rather than to children, there was no showing that a train made up with cars behind the caboose was more attractive to children than other trains, and because, even though the habitual use of the track as a highway by children imposed a duty on defendant to look out for them, an implied license to so use the track was not a license to board trains traveling thereon. The court pointed out that an invitation may be implied from especially or unusually attractive instrumentalities, but said also that a landowner might conduct his business on his premises with such machinery operated in such manner as might be necessary and convenient to make his business successful; and where it did not appear but that the machinery or the use thereof was proper, necessary and convenient, and that it was especially and unusually attractive to children, and that its unusual attractiveness to children was known or should have been known to the owner, no cause of action under the turntable doctrine was held to be stated. Justice Sanner went on to indicate that the *Driscoll* case had adopted the idea that the attractive nuisance doctrine would not be applied to things ordinarily in existence and use such as "rivers, creeks, ponds, wagons, axes, plows, woodpiles, haystacks," etc., which are both attractive and dangerous, since the result would be to impose a crippling duty on landowners. Then the court stated that trains, while attractive, are familiar objects necessary to the conduct of the railroad business. The case is in accord generally with the modern idea that the doctrine will not be extended so as to deprive a landowner of the use of his property because it is dangerous to children who may come uninvited onto his premises,⁵² but

⁵¹50 Mont. 95, 145 P. 8 (1914).

⁵²65 C.J.S. *Negligence*, § 29 (6).

the court fails to consider the possibility of safeguarding the premises other than to hold that the statutory duty to fence the right-of-way was not owed to children. No mention is made of the failure to take affirmative steps to warn children off the property where defendant knew they were in the habit of trespassing. It seems rather ironic that defendant would have been liable if a cow had been killed but was not liable where a child too young to thoroughly appreciate the dangers involved was killed. However, one should not lose sight of the fact that the child was attempting to board the train.

The following year, in 1915, in *Martin v. Northern Pacific Ry Co.*,⁸³ a decision for plaintiff below was reversed and the case remanded on the ground that the lower court's instruction to the jury was erroneous in omitting the element of knowledge on the part of the defendant that the instrumentality, a damaged railway car, was inherently dangerous, that it was unusually alluring to children of tender years, and that such children were or were likely to be attracted by it as it stood in defendant's yards. Holloway points out that there are three theories advanced by the courts to avoid the fact that the child was a trespasser. Some treat him as a trespasser but excuse the trespass due to the landowner's wrongful act in tempting him by maintaining the attractive nuisance. Others imply an invitation, while others say that he who maintains an instrumentality such as an unlocked turntable on his premises with knowledge of its attractiveness to children, of its potentiality for harm, and of the probability that such children will be attracted to it, will not be heard to say that such children were wrongfully where their childish instincts naturally led them. However knowledge was held to be an essential element under either theory.⁸⁴ The court also held in this case that the attractiveness of the instrumentality causing the injury must have been the proximate cause of the injury, and that it was therefore insufficient to allege that other objects attracted the child onto the land. This is the same position that the United States Supreme Court, in an opinion given by Mr. Justice Holmes, took six years later in *United Zinc and Chemical Co. v.*

⁸³51 Mont. 31, 149 P. 89 (1915), wherein a boy of 7 was killed while playing about a damaged railroad car standing in defendant's yards. Death was caused by a door falling on the boy because the catch that held it was defective.

⁸⁴The court then quotes from 29 Cyc. 448 which stated that one of the grounds for liability is that the owner knew or *should have known*. Thus it would probably have been sufficient had it been stated that defendant should have known. Previous cases indicate that such was the rule.

Britt.⁸⁵ Holmes based the doctrine on implied invitation and stated that it must be very cautiously applied. In that case 3 justices⁸⁶ dissented strongly, pointing out that the attractive nuisance doctrine would make men more considerate of the safety of their neighbors' children than would the harsh rule which made trespassers out of little children unless they were actually attracted onto the land by the thing that caused their injury or death, in this case a poisoned pool of water which defendant had no use for. Holmes stated that to imply an invitation, it must appear that defendant knowingly established and exposed, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them.

*Fusselman v. Yellowstone Valley Land and Irrigation Co.*⁸⁷ was a Montana case wherein an infant 3 years old was drowned in an irrigation canal running on land owned by defendant. The court, speaking through Holloway, reiterated that the attractive nuisance doctrine in Montana was based on implied invitation and that the instrumentality causing the injury must have been, in fact, the attraction that lured the injured child onto the land, it being insufficient to allege that the premises were attractive to children or that children generally were attracted thereto. Liability was held to attach only when a dangerous instrumentality peculiarly attractive to children was maintained and "which did lure or attract the child to her death."⁸⁸

Following the decision in the *Fusselman* case the attractive nuisance doctrine appears to have slumbered in Montana for almost 30 years. Then in 1945 *Gilligan v. City of Butte*⁸⁹ was decided. This was a case wherein a 5 year old child was severely burned when her dress caught fire after coming in contact with a lighted signal flare being used by defendant in connection with street repair work. The flare was located in the public street where children commonly played to defendant's knowledge and was lighted in the middle of a bright day when there was no reason for it to be lighted save defendant's negligence in failing to extinguish it as was usually done. It was held that plaintiff could recover. The case was not a good one for the application of the attractive nuisance doctrine since the street was public and the child was, therefore, not a trespasser. However, the court does quote with approval from cases in other jurisdictions, some of

⁸⁵258 U.S. 268, 42 S. Ct. 299, 66 L.Ed. 615, 36 A.L.R. 28 (1922).

⁸⁶Mr. Justice Clark, Mr. Justice Day, and Chief Justice Taft.

⁸⁷53 Mont. 254, 163 P. 473 (1917).

⁸⁸*Supra*, note 37, 53 Mont. 254, 264.

⁸⁹118 Mont. 350, 166 P. (2d) 797 (1945).

which applied the doctrine more liberally than Montana had. The court quoted from *Barrett v. Southern Co.*⁴⁰ to the general effect that a reasonable man is presumed to know that a child of tender years will exercise only the care and self-restraint belonging to childhood, and will govern himself accordingly, taking into account childish instincts and lack of discretion and appreciation of danger; and that it has been held to be an act of negligence to leave, unguarded and exposed to the observation of little children, dangerous and attractive machinery which they would naturally be attracted to without appreciation of the danger. The general tenor of the decision seems to be to rely more heavily on what the defendant knew or should have known about the propensities of children and less on any finding of implied invitation from the especially or unusually attractive character of the instrumentality. However, the Montana court also mentions implied invitation in a quotation from the *Fusselman* case. The court in both the *Fusselman* case and the *Gilligan* case quotes from *Thompson on Negligence* to the effect that: "It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed; and which would exempt from liability for the consequence of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed or maimed for life."⁴¹

Finally, in 1952, the Montana Supreme Court apparently took a great step forward in its application of the doctrine of attractive nuisance when it decided *Nichols v. Consolidated Dairies of Lake County*.⁴² In this case the plaintiff, a boy of 12, was playing about a grain elevator owned by defendant, and inside of which was a manually operated passenger elevator, consisting of a platform suspended by ropes and operated by arranging counterbalances so as to approximately equal the combined weight of a passenger and the elevator platform, after which a man could

⁴⁰91 Calif. 296, 27 Pac. 666 (1891), wherein defendant was held liable when a child of 8 was injured while playing on a turntable which defendant kept latched in the usual way, when defendant knew or in the exercise of common sense should have known that children might be attracted to it and injured. Defendant was held liable even though it chased the children off whenever it found them on the premises. There was no mention of implied invitation and no mention of the rule that the instrumentality must, in fact, have lured the child onto the land.

⁴¹1 THOMPSON, NEGLIGENCE (1st Ed. 1880), p. 305.

⁴².....Mont....., 239 P. (2d) 740 (1952).

pull himself up by means of a rope and pulley arrangement. Plaintiff was attracted to this while playing in defendant's building and stepped onto the platform after which it evidently was loosed in some manner, and, since the counterbalances outweighed the boy and the platform, the elevator was pulled to the top of the building where the rope broke causing the platform to fall about 50 feet and resulting in injury to plaintiff.

In this case the plaintiff filed a complaint containing three counts which was demurred to generally and the demurrer sustained in the district court. The first count alleged that plaintiff was a boy of tender years; that the injury was caused by a passenger elevator which was a "dangerous and unsafe" instrumentality; that the defendant knew the grain elevator premises were "peculiarly alluring and attractive to children of tender years"; and that prior to the date of the accident the defendant knew or in the exercise of reasonable care and diligence should have known that children were on the premises and playing on or about the passenger elevator; and further that defendant permitted them to play there, failed to secure the instrumentality so as to prevent children from operating it, and had negligently allowed the safety catch and brakes to get out of repair. The second count was like the first except that it alleged that defendant "knew or should have known" that the condition existed, and that children were attracted to the (grain) elevator and were playing in and around the premises. In considering whether these counts stated causes of action the court went back to the *Gates* case⁴⁸ and quoted with approval the statement made therein by Justice Smith to the effect that when one brings or artificially creates something on his land especially attractive to children, as shown by the nature of the thing itself and the fact that children were attracted to it, leaving it exposed where they are likely to come in contact with it, either as a plaything or through curiosity, and such contact is obviously dangerous to them, the person so exposing the thing is bound to reasonably anticipate the injury and use ordinary care to guard it and prevent the injury. The court also quotes from the same case the conditions outlined by Holloway as being necessary for the application of the doctrine, to-wit: A child too young to appreciate the danger, injury caused by an unguarded dangerous thing peculiarly attractive to the class of children to which the injured child belongs, and an implied invitation to come on the premises, such to be implied from the fact that the landowner in exercising ordinary care knew

⁴⁸*Supra*, note 29.

or ought to have known that children were in the habit of coming there to play or gratify curiosity. The court then quotes *Restatement, Torts, Section 339*, which is set out at the beginning of this article and which does not require an implied invitation nor that the thing be especially or unusually attractive to children, but only knowledge or reason for knowledge by the landowner of the likelihood of a trespass by children and that the condition involves an unreasonable risk of death or serious bodily harm to children, that the children do not discover the risk because of their youth, and that the utility to the possessor is slight compared to the risk to children involved. The court then points out that a cause of action is stated by the first two counts under both the restatement view and the view expressed by Holloway in the *Gates* case. Thus, while the court does not expressly adopt the restatement view, the conclusion seems inescapable that it considers that view a satisfactory expression of the doctrine, and that a cause of action was stated thereunder, even though the facts may have been such as to justify an implied invitation also.

The court then takes another great step forward and, completely ignoring the *Martin* and *Fusselman* cases, states that "when it is alleged that the person maintaining the artificial conditions *knows* that children of tender years are *on the premises and in the building* it is not necessary that the instrumentality be the one that attracted them into the building. This is not exactly the restatement view since it appears that the landowner here has to *know* that children are, in fact, on the land before it becomes immaterial whether the instrumentality lured them thereon, whereas the restatement, in comment a, makes the landowner liable regardless of whether the instrumentality attracted the children to the land if he knew or should have known that they were likely to trespass, find it after trespassing, and intermeddle with it. However, the court, in connection with the second count wherein it was alleged that defendant knew or should have known that the condition existed and that children were attracted to the (grain) elevator" and were playing in and around the premises, says there is a sufficient allegation of negligence under the torts restatement rule. This seems almost tantamount to a statement to the effect that defendant would be liable if he knew or should have known that children were likely to trespass and thereafter come in contact with and be injured by the instrumentality, since it was apparently not alleged that the passenger elevator at-

"There is some ambiguity in the second count at this point as to whether the grain elevator or the passenger elevator is meant.

tracted the boy onto the land. In view of the court's apparent approval of the restatement position, it seems not unreasonable to suppose that the rule in Montana now is that a defendant will be liable in any event if he knew or should have known that children were likely to trespass, intermeddle, and be injured, regardless of whether the instrumentality in fact attracted the child onto the land.

In the course of this decision the court also adopts the view of *Restatement, Torts, Section 339, Comment F*, and holds that even though an instrumentality is a necessary device and has great utility to the landowner, he will nevertheless be liable for a failure to install or keep in repair safety devices which it may be practicable to install without burdensome cost or serious interference.

It is rather difficult to tell whether or not the court, in this decision, intended to cast out completely the theory of implied invitation since it quotes, with apparent approval, Holloway's position which required an implied invitation as well as the restatement view which does not. However, it seems very reasonable to suppose that the court has, in effect, taken a more realistic position and no longer considers an implied invitation a necessary prerequisite, though if one can be implied it will be permissible to do so. It is said in this case that "when children were permitted to play in and about the grain elevator premises without objection on the part of the defendant, it is implied that they are there with defendant's consent and that defendant knew or should have known that they would be attracted to and likely come into contact with such an instrumentality as a self-operated elevator."⁴⁵ This is not an unreasonable implication and is not, in the least, inconsistent with the idea of eliminating the necessity of an implied invitation as a prerequisite to liability. Also, under the holding in the *Nixon* case⁴⁶ an invitation to play on the premises would not be construed as an invitation to use the passenger elevator. The court concluded by ordering that the demurrer be overruled as to counts one and two, sustaining it only as to the third count which was not based on attractive nuisance and which will not be discussed here.

Thus it would appear to this author that the Montana Supreme Court has finally adopted the view of *Restatement, Torts, Section 339* in applying the attractive nuisance doctrine, which is a far more liberal view than that previously taken. The

⁴⁵*Supra*, note 42, p. 742.

⁴⁶*Supra*, note 31.

restatement position seems to be a very desirable one from the standpoint of all the parties involved. Full recognition is given to the natural propensities of children and the fact that they are often found trespassing on land whereon they may afterwards discover some attractive and dangerous artificial condition and be injured by it. The holding that a thing must be so especially and unusually alluring to young children as to constitute an implied invitation is quite indefinite, and it does not seem to this writer that the Montana Supreme Court ever got around to saying just where the line indicating the degree of attractiveness would be drawn. Certain it is that it believed a thing could be attractive to children and still not be attractive enough to give grounds for implying an invitation. It seems better to meet the problem squarely for what it is rather than to avoid it by the use of a fiction. The children involved are trespassers and it is far better to recognize them as such and to recognize also that in our modern society we are capable of making needed exceptions to the old established doctrines concerning trespassers when justified by modern circumstances.

The restatement view gives recognition to the right of the landowner to develop his land, and only when the utility to the possessor in maintaining the condition is slight as compared to the risk to young children involved will it hold him liable, subject to the qualification that he must take whatever reasonable safety measures he can to protect children when he knows or should know that they may be trespassing and so may come in contact with and be injured by the instrumentality.

The restatement protects the landowner where it is proved that the children appreciated the risk prior to intermeddling. It would seem very doubtful whether it could often be proved that the child recognized the *full* risk involved, but comment *b* indicates that he must have been *fully* cognizant of it. It is a well known fact that children quite often realize that a considerable risk is involved in an undertaking but will go ahead in a spirit of childish bravado and incur that risk, not realizing until too late that they are more incapable of coping with it than they had at first thought. In such a case can it fairly be said that they recognized fully the risk involved? This author believes not and believes that great caution should be used in deciding whether there was full realization of the risk.

Finally the restatement will not hold the landowner liable unless he was or should have been aware of the likelihood of tres-

passes by children and the dangerous propensities of his instrumentality.

From the plaintiff's viewpoint, the adoption of the restatement position will greatly facilitate the recovery of damages in cases where all the dictates of human decency require that damages be awarded. Lawyers will no longer be hampered by the necessity of proving that an instrumentality was so especially and unusually attractive to children as to constitute an implied invitation to them, nor will they be confronted with the often impossible task of proving that the dangerous instrumentality was the thing that actually lured the child onto the land in the first place. From the landowner's standpoint, the restatement position will cast upon him somewhat greater burdens in that he will have to make more effort to inform himself as to whether children will be likely to trespass, and whether they will be apt to discover the dangerous condition after they get on the land; he will also have to take into consideration ways and means of protecting such children from injury which is unreasonably threatened by dangerous instrumentalities which perchance they may not discover before trespassing.

To sum up, adoption of the restatement view on attractive nuisance should promote a much more equitable disposition of the cases than has heretofore been had in Montana.

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PRENATAL INJURY: RECOVERY OR ANOMALY?

En ventre sa mere is a term descriptive of an unborn child. According to Black's Law Dictionary,¹ for some purposes the law regards an infant *en ventre* as in being. The examples given are: it may take a legacy, have a guardian, and an estate may be limited to its use. The common law, while it recognized and protected the rights and interests of an unborn child in some respects; flatly denied them in others, most obviously where a tort was concerned. The rationale most relied upon seemed to be that an unborn child was but a part of the mother, and had no existence or being which could be subject to injury. This view in the field of torts was flatly contradictory of recognition given the rights of an infant *en ventre sa mere* in other branches of the law.

¹BLACK'S LAW DICTIONARY (4th ed. 1951) p. 619.