Washington Law Review

Volume 22 | Number 1

2-1-1947

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THE ATTRACTIVE NUISANCE DOCTRINE IN WASHINGTON

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The recent Washington case of *Bronk v. Davenny*[1] presented a most interesting and unusual factual situation; the plaintiff's house was damaged by a "caterpillar type" tractor belonging to the defendant, which had been left unlocked and in gear upon defendant's unguarded premises, and inadvertantly set in operation by a small boy However, there is more than the factual situation in the case to make it of interest, for it is an illustration of what is either a widespread misconception of the applicability of that rule of law known as the attractive nuisance doctrine,[2] or a persistent attempt to extend this doctrine to new situations, an extension which the Washington court has consistently resisted. As will be shown hereafter, the doctrine was developed to give compensation for the personal injuries of young children who were trespassers (or licensees), yet in the *Bronk* case, which involved *property* damage of an *adult* plaintiff, on the plaintiff's own premises, the trial court gave an instruction setting out in full the rules for the application of the attractive nuisance doctrine. The Supreme Court of Washington denied that this doctrine would apply in such a situation, but held that the instruction would stand as informing the jury of the duty of the defendant to foresee the risk of this injury to the plaintiff, in effect holding that the instruction was in error but not prejudicial to the defendant.

It is here proposed to examine the cases in Washington wherein "attractive nuisance" has been discussed, for the purpose of determining the scope of the doctrine as it has been accepted in this state, and to point out the types of situations in which an unsuccessful attempt has been made to apply this rule, for the appellate court in this state has dealt with the doctrine primarily in a negative manner, *i.e.* has denied its applicability to most of the factual situations in cases where the issue has been raised on appeal, which in itself illustrates that the bar of this state has been confused as to the scope or limits of the doctrine. No attempt will be made to discuss extensively the merits of the doctrine, for it will become apparent that it has become an accepted rule of law in this state; nor will anything more than a brief statement of the historical development and theory be given, for there is a wealth of material available on this subject.[3]

[1] Bronk v. Davenny, 125 Wash. Dec. 415, 171 P.(2d) 237 (1946)

[2] Also called the "Turntable Doctrine" because several early cases in which the theory was presented involved railway turntables.

[3] 38 AM. JUR., *Negligence*, 802-809, §§ 142-144; Smith, *Liability of Landowners to Children Entering Without Permission* (1898) 11 HARV. L. REV. 349; Hudson,

The Anglo-American law has been very harsh with one who comes upon the property of another in the capacity of a trespasser[4] or licensee.[5] It is generally stated that the owner of property owes no duty toward a trespasser except to refrain from willfully or wantonly injuring him.[6] The duty owing a licensee varies in the different states,[7] but in Washington it is the same as that for a trespasser.[8] To avoid the hardships of this rule an English court[9] nearly a hundred years ago announced an exception in the case of trespassing children too young to appreciate the risks of injury attendant upon their trespass. In the United States, the first cases making a breach in the general rule of landowners' non-liability to trespassers involved injuries sustained by young children while playing upon unlocked railway turntables —hence the often applied term of the doctrine of the "Turntable Cases."[10] In a few states the doctrine has been flatly rejected, the court holding to the strict rule of liability to trespassers only for willful or wanton injury.[11] However, the large majority of states have accepted in one form or another what has come to be called the "attractive nuisance" doctrine, (a misnomer, for the thing causing the injury need be neither attractive, nor a nuisance as that term is generally used) making the landowner responsible for the injuries sustained by children of tender years who come upon his property as trespassers or licensees, when he knows or should have known that children are likely to trespass, and when he knows or should know of a condition upon his land which involves an unreasonable risk of harm to such children. It is apparent that this is nothing more than a part of the general problem of

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The Turntable Cases in the Federal Courts (1923) 36 HARV. L. REV. 826; Wilson, *Limitations on the Attractive Nuisance Doctrine* (1923) 1 N. C. L. REV. 162 (1923)

[4] "A trespasser is one who enters the premises of another without invitation or permission, express or implied, but goes, rather, for his own purposes or convenience and not in the performance of a duty to the owner or one in possession of the premises." Schock v. Ringling Bros., 5 Wn.(2d) 599, 605, 105 P.(2d) 838, 841 (1940)

[5] "A licensee occupies an intermediate position between that of an invitee and that of a trespasser. He is one who goes upon the premises of another, either without any invitation, express or implied, or else for some purpose not connected with the business conducted on the land, but goes, nevertheless, with the permission or at the toleration of the owner." Schock v. Ringling Bros., *supra* note 4.

[6] 38 AM. JUR., Negligence, 772, § 109.

[7] 38 AM. JUR., Negligence, 765, § 104.

[8] Schock v. Ringling Bros., *supra* note 4; Garner v. Pacific Coast Coal Co., 3 Wn.(2d) 143, 100 P (2d) 32 (1940), and cases cited therein.

[9] Lynch v. Nurdin, 1 Q. B. 29, 10 L. J. Q. B. 73 (1841)

[10] Hudson, *op. cit.*

[11] Those rejecting the doctrine are mostly eastern states having a large industrial development. *See* 36 A. L. R. 34.

negligence, with the test of that elusive gentleman often appearing in the law—the reasonable man—being applied to a specialized situation where it has been thought socially desirable to protect one class of persons at the expense of another. In a sense it is judicial legislation, for what a "reasonable" man would do in one jurisdiction should be just as "reasonable" in those states denying the existence of the doctrine. However, the majority of states follow the doctrine as to its fundamental principles, but there is much confusion among the different courts as to its application to particular fact situations, and modifications and qualifications have been put upon the rule in different jurisdictions.[12]

It is interesting to note that the first case in which the doctrine was presented by the Washington court involved an injury sustained upon a turntable, making for an easy transfer of the rule of the "turntable cases" from other states. In *Ilwaco, etc., Nav. Co. v. Hedrick*[13] a child of five was killed while playing upon an unlocked turntable upon defendant's premises, near a public street. It was undisputed that the defendant's employees knew that children were in the habit of playing upon the turntable, and that the defendant had attempted to secure the turntable only with a rope. The court noted that it had been shown that such a device could easily be securely locked, and that it was the duty of the defendant to so secure the turntable as to prevent injury to those who, by reason of their youth, were incapable of comprehending its dangerous character.

However, a few years after the *Ilwaco* case, the court was faced with a claim that the rule announced in that case was applicable to a child of twelve who was killed while crossing railroad tracks to go to a circus;[14] the court denied the plaintiff's contentions, stating that a circus was not a dangerous attraction, and that the rule of the *Ilwaco* case would not be extended as one of general application to other conditions. And shortly thereafter, in the case of *Harris v. Cowles*[15] the court approached the problem in the same manner in denying the application of the rule to a child injured in a revolving door. In fact, the court definitely stated that it would not extend the "turntable" doctrine to cases other than those involving turntables, and that in this instance it was not possible to guard or protect a revolving door and still have it usable. The court stated that " it would be productive of litigation to

[12] An exhaustive state-by-state analysis of the rules in the different jurisdictions has been made in 36 A. L. R. 34, and supplemented in 39 A. L. R. 487, 45 A. L. R. 982, 53 A. L. R. 1344, and 60 A. L. R. 1444.

[13] Ilwaco Etc. Nav. Co. v. Hedrick, 1 Wash. 446, 25 Pac. 335 (1890).

[14] Clark v. Northern Pacific Ry., 29 Wash. 139, 69 Pac. 636 (1902)

[15] Harris v. Cowles, 36 Wash. 331, 336, 80 Pac. 537, 538, 539 (1905)

such an extent as would greatly endanger the security of property interests" if the doctrine were extended, and went on to point out that "Swings, teeter boards, lumber piles, fences, gates, walls, buildings, trees, hanging on vehicles are attractive to children."

Thus it can be seen that in these early cases where the attractive nuisance doctrine was first raised in this state, the court took a very critical view of making inroads upon the comparative freedom of a landowner from liability for injury to trespassers. But only a year later the court found itself more concerned with giving protection or compensation to the injured child. In *McAllister v. Seattle Brewing and Malting Co.*[16] the court announced, "Where dangerous machinery of a character likely to excite the curiosity of children and allure them into danger, has been left unguarded in exposed places close to the highways, or playgrounds of children, even though on the premises of the owner, and children have been attracted to them and met with injury, the owner is liable for such injury." Here a nine-year-old child was injured by a pulley placed by the defendant between railroad tracks (which were twenty-five feet from a public path), the pulley being used to pull cars up the tracks to the defendant's brewery. The court held that the case should have gone to a jury for a determination of whether the pulley was a dangerous machine, whether it was alluring to young children, and whether, because of the location of the pulley, the defendant should have known children would be attracted to it. These were the only limitations that the court put upon the attractive nuisance doctrine at that time—the limited rule of the *Ilwaco* case had been widely extended, but where its outside limits were the court had not stated.

Thereafter, from 1906 (the date of the *McAllister* case) until 1940, the Supreme Court of Washington concerned itself in some twenty or more cases while slowly evolving the limits of the attractive nuisance doctrine as it would be applied in this state. In 1940 the case of *Schock v. Ringling Bros. etc.*[17] was presented for the consideration of the court, whereupon the court undertook at some length to give a complete and definitive explanation of the doctrine. After defining a trespasser and a licensee, and setting forth the usual duty of the owner of land to such persons, the court proceeded to state the following five elements necessary in order to hold the landowner liable to such persons:

1. "The instrumentality or condition must be dangerous in itself.
2. "It must be attractive and alluring, or enticing to young children.

[16] McAllister v. Seattle Brewing & Malting Co., 44 Wash. 179, 183, 87 Pac. 68, 69 (1906).

[17] Schock v. Ringling Bros., *supra* note 4.

3. "The children must have been incapable, by reason of their youth, of comprehending the danger involved.
4. "The instrumentality or condition must have been left unguarded and exposed at a place where children of tender years are accustomed to resort, or where it is reasonably to be expected that they will resort, for play or amusement, or for the gratification of youthful curiosity.
5. "It must have been reasonably practicable and feasible either to prevent access to the instrumentality or condition, or else to render it innocuous, without obstructing any reasonable purpose or use for which it was intended."

These rules, although phrased in different language, are substantially the same as those prescribed by the Restatement of Torts.[18] However, a closer examination of the rules in the *Schock* case discloses that some of them are so ambiguous as to be practically meaningless. For example, "The instrumentality must be dangerous in itself." When is a thing dangerous? Only when it is improperly used—even dynamite is not dangerous if sitting by itself in the middle of a desert. It is doubtful that the court meant to say that the doctrine should be applied only to such things as are usually classified in the law as "inherently dangerous" (firearms, dynamite caps, electric power), for previous Washington cases had made no such restriction. It is more likely that the court intended by this requirement to put outside the scope of the doctrine such articles as "swings, teeter boards, lumber piles, fences, gates, walls, buildings, trees "[19] but if such be the meaning, the phraseology of the rule leaves much to be desired.

And again, the second requirement that "It must be attractive and alluring, or enticing to young children" cannot have been meant by the court to be literally applied, for it is inconceivable that recovery is to be denied to a child injured by a condition of whose existence the child is entirely unaware—*e.g.* an electric wire posted with a danger sign. And yet, such a condition cannot be said to be attractive to the child. Perhaps the court meant this as

[18] "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."

RESTATEMENT OF TORTS, Negligence, § 339.

[19] *Supra* note 15.

an element to be considered in determining whether the landowner should anticipate the presence of trespassing children, but this concept is adequately covered by the fourth requirement of the *Schock* case. However, it is not absolutely necessary for an instrument to be attractive in order that a landowner recognize that it presents a danger to children, and to apply literally the requirement that the thing be attractive, alluring or enticing to children puts a restriction upon the attractive nuisance doctrine far beyond what was probably intended by the Washington court, which has generally been quite solicitous of the welfare of young children. It is submitted that the court will at some time in the future, when faced with a hard case, have to say either that this requirement of the *Schock* case was ill advised, or give it such a construction as has been suggested here.

The *Schock* case involved injuries to three children of the ages of ten, eleven and twelve years, who had come down to the railroad yards to watch the defendant's circus unload its equipment. A circus wagon was being lowered from a railroad car by means of a rope, which broke and allowed the wagon to come down unchecked, striking the plaintiff's children. Although the court found that the children were mere licensees upon the property, they denied the applicability of the attractive nuisance doctrine (under the rules set forth above) to this situation, stating that the evidence showed that the defendant had done all that he could to make this necessary operation safe, and that the children had been warned to stay back. As to this question of warning being given, while the court didn't make particular mention of the fact, it should be noted that the children were accompanied by and in the charge of several adults, who would, of course, be capable of recognizing the risk involved in the unloading operations.

A thorough examination of all the cases wherein the attractive nuisance doctrine has been in issue since the *McAllister* case[20] in 1906 discloses but a few instances in which a factual situation has been presented to the appellate court in which the court would apply the doctrine—this is not to say that the existence of the doctrine has been denied, but merely that it was not applicable to the situations presented. In the limited field of injuries sustained from dynamite caps[21] and electrical wires[22] the court has applied the

[20] *Supra* note 16.

[21] Akin v. Bradley Engineering & Machinery Co., 48 Wash. 97, 92 Pac. 903 (1907); Olson v. Gill Home Investment Co., 58 Wash. 151, 108 Pac. 140 (1910); Mathis v. Granger Brick & Tile Co., 85 Wash. 634, 149 Pac. 3 (1915), Crabb v. Wilkins, 59 Wash. 302, 109 Pac. 807 (1910), Davis v. Wenatchee, 86 Wash. 13, 149 Pac. 337 (1915)

[22] Talkington v. Washington Water Power Co., 96 Wash. 386, 165 Pac. 87 (1917); Clark v. Longview Public Service Co., 143 Wash. 319, 255 Pac. 380 (1927)

doctrine without hesitation, and has imposed upon one maintaining such instruments the duty of utmost care, in effect treating these cases as in a class by themselves.

Looking at this record of such a consistent denial of the applicability of the doctrine to the cases presented to the court, it seems that there has been an apparent misconception of the use to which it should be put, by parties plaintiff and at times by trial courts in this state. Perhaps the opinion in the case of *Bjork v. Tacoma*[23] in 1913 has been partly responsible for this situation. There a three-year-old child had been drowned in a flume in which an opening had been left uncovered, the flume being in an open, unfenced lot where children were accustomed to play The court held the attractive nuisance doctrine applicable to this situation and stressed the *humanitarian* aspect of the doctrine, thus perhaps leading to the erroneous belief that the doctrine was to be applied to every situation in which a child has been injured. In the *Bjork* case the court cited a textbook on negligence as follows: "The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in safe condition, for they, being without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers and mere licensees."[24] Notice that this statement does not stress any of the limitations upon the rule as have been pointed in the *Schock* case.

The Washington court has refused to apply the doctrine where a trespassing child was injured when his foot slipped through a hole in the floor of a power house and was caught in the wheels of the machinery[25] The court stated that there was nothing alluring or enticing to children about these premises or machinery Again the court refused to extend the doctrine to cover a child injured while climbing a bridge pier, when he came in contact with electric wires, which were insulated in an approved manner.[26] The court pointed out that in this instance the electric company maintaining the wires could not have anticipated the presence of children on this pier, which was practically inaccessible except to an active boy It should be noted that the court did not discuss the fact that the boy here was fifteen years old, which would appear to be an age at which a child should be able to understand the danger involved in his actions.

Hanson v. Washington Water Power Co., 165 Wash. 497, 5 P (2d) 1025 (1931)

[23] Bjork v. Tacoma, 76 Wash. 225, 135 Pac. 1005 (1913)

[24] 3 SHEARMAN AND REDFIELD, NEGLIGENCE (6th Ed.) § 705.

[25] Curtis v. Tenino Stone Quarries, 37 Wash. 355, 79 Pac. 955 (1905)

[26] Graves v. Washington Water Power Co., 44 Wash. 675, 87 Pac. 956 (1906)

In the case of *Gordon v. Snoqualmie Lumber & Shingle Co.*[27] the plaintiff's ten-year-old child was injured by boiling water from a barrel on the defendant's premises. The barrel was used to collect the exhaust from a steam line, and the child was shown to be only a licensee upon the premises. The court held the attractive nuisance doctrine not applicable here, finding that the barrel was substantially and securely placed, and was covered, and that its use was necessary in the defendant's business. In commenting upon the element of attraction, the court quoted from a case from West Virginia[28] as follows: "Almost everything will attract some child. The pretty horse or the bright red mowing machine, or the pond in the farmer's field, the millpond, canal, the railroad cars, the moving carriage in the street, electric works, and infinite other things attract a child as well as the city's reservoir. To what things is the rule to be limited? And where will not the curiosity, the thoughtlessness and the agile feet of the truant boy carry him? He climbs into the high barn and the high cherry tree. Are they, too, to be watched and guarded against him? As was well said in *Gillespie v. McGowan,* 100 Pa. St. 144, this rule 'would charge the duty of the protection of children upon every member of the community except their parents.' A very onerous duty!"

The court followed the same line of thought in another case where an eight-year-old child was drowned in a pond caused by water backed up behind a railway grade. The child had been playing upon a raft and the court said, "That a pond of water is attractive to boys for the purposes of play, swimming and fishing, no one will deny But its being an attractive agency is not sufficient to subject the owner to liability It must be an agency such as is likely, or will probably, result in injury to those attracted to it."[29]

In the case of *Barnes v. J C. Penney Co.*[30] is another good illustration of the tendency of plaintiffs to bring up the question of attractive nuisance whenever a child and some instrument attractive to a child happen to be involved in an injury of any sort. Here an *adult* was injured by a tricycle being ridden by a child in the defendant's store; our court flatly stated that the attractive nuisance doctrine (which had been presented by the adult plaintiff) had no application to a situation such as this. It is obvious that the doctrine, having

[27] Gordon v. Snoqualmie Lumber & Shingle Co., 59 Wash. 272, 109 Pac. 1044 (1910)

[28] Ritz v. Wheeling, 45 W Va. 262, 31 S. E. 993, 45 L. R. A. 148.

[29] Barnhart v. Chicago, M. & St. P Ry., 89 Wash. 304, 307, 154 Pac. 441, 442 (1916), where the doctrine was held not applicable. *Accord:* Smith v. McGoldrick Lbr. Co., 124 Wash. 363, 214 Pac. 819 (1923) where the use of a pond was held to be necessary to the operation of a mill.

[30] Barnes v. J. C. Penney Co., 190 Wash. 633, 70 P (2d) 311 (1937)

been developed solely for the protection of trespassing children, it should never have been mentioned in connection with an adult who has been injured —it should not be used as a general test of negligence in failing to foresee the actions of children.[31]

There have also been times when the Washington Supreme Court itself seems to have forgotten the purpose for which the doctrine has been developed. In two cases involving injuries to children taking place upon school grounds,[32] where the issue of attractive nuisance was raised upon appeal, the court fails to mention that the children involved were neither trespassers nor licensees (but were invitees or there as a matter of right) and hence there is no need for applying these rules, which were developed only for the protection of children who were trespassers or licensees.[33] And further, in a case where a child was injured while on a public street,[34] while the court doesn't speak of the attractive nuisance doctrine by name, it does cite a number of Washington cases wherein the doctrine was discussed. The comment on the school-ground cases above applies here as well—the child is neither a trespasser nor a licensee.[35] Again, when an eighteen-year-old boy was injured when a bleacher railing gave way,[36] the court ruled out the attractive nuisance doctrine only on the basis that the boy was too old, not mentioning at all that this boy was an *invitee* upon the premises, and that the owner had the duty of due care for his safety, thus making unnecessary any discussion of the attractive nuisance doctrine.

In conclusion it is submitted that there is a place in the law of this state for the attractive nuisance doctrine, but the issue should be raised only when the factual situation is one which will come within the rules as laid down by the court in the *Schock* case, and set forth in full herein, with the exception already noted that the requirement that the instrumentality be attractive to children probably should not be taken too seriously Additional limitations were implied in the *Schock* case, but perhaps should have been expressly stated, in the light of the confusion in the cases heretofore noted—the doctrine should be applied only to children who are trespassers or licensees, and only when it is the trespassing child who has been injured. "Attractive nuisance" is a term of art, having a definite and restricted meaning, and should not be

[31] *Cf.* Bronk v. Davenny, *supra* note 1.

[32] Heva v. School Dist. No. 1, 110 Wash. 668, 188 Pac. 776 (1920); Hutchins v. School Dist. No. 81, 114 Wash. 548, 195 Pac. 1020 (1921)

[33] The court refused to apply the doctrine upon other grounds.

[34] Jorgenson v. Crane, 86 Wash. 273, 150 Pac. 419 (1915)

[35] *See also* Clark v. Bremerton, 1 Wn.(2d) 689, 97 P.(2d) 112 (1939)

[36] Juntila v. Everett School Dist. No. 24, 183 Wash. 357, 48 P (2d) 613 (1935)

used in connection with other matters such as an instruction upon the question of foreseeable risk of injury to property where the actions of children are involved, as was most recently done in the *Bronk* case.[87]

(EDITOR'S NOTE: See also a recent case, *Defland v. Spokane Portland Cement Co.*, 26 Wash. Dec. 840 (1947).)

[87] Bronk v. Davenny *supra* note 1; Helland v. Arland, 14 Wn.(2d) 32, 126 P (2d) 594 (1942)