Comments

The Restatement's Attractive Nuisance Doctrine: An Attractive Alternative for Ohio

I. INTRODUCTION

Under traditional tort doctrine, the extent of the duty that an owner or occupier of land owes to an entrant upon the land has depended on the entrant's status as a trespasser, licensee, or invitee.[1] The law has required the least duty of care toward trespassers. The owner or occupier has had to refrain only from willful or wanton injury to trespassers.[2] An exception to this harsh rule has developed, however, with respect to child trespassers. This special duty is known as the attractive nuisance doctrine[3] and has been adopted in some form by the vast majority of American jurisdictions, most of which have adopted the Second Restatement of Torts section 339[4] version of the special rule.[5]

Ohio, however, has steadfastly refused to adopt any version of the attractive nuisance doctrine. In Ohio, a trespassing child is afforded no greater protection than that afforded a trespassing adult.[6] This outdated and harsh position fails to take into account the societal value of protecting children from serious injury.

Ohio's current position is based upon *Railroad Co. v. Harvey*,[7] a decision handed down over seventy-five years ago. Since the *Harvey* decision, a vast majority of jurisdictions have adopted the Restatement Rule in an effort to balance equitably the interests of landowners with those of children who may not appreciate the gravity of danger they are likely to encounter on the land.

Although the Ohio court has continually rejected any form of the attractive nuisance doctrine, it has reevaluated outdated concepts in other areas of tort law. Justice Sweeney, writing for a 6–1 majority of the Supreme Court of Ohio in the recent decision of *Paugh v. Hanks*,[8] emphasized the court's desire to establish new standards in the area of tort law to reflect corresponding changes in modern society.[9] In *Paugh*, the court reaffirmed its bold recognition of a cause of action for the negligent infliction of serious emotional distress even when there has been no physical contact with the plaintiff nor physical manifestation of injury.[10] This decision

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1. W. PROSSER & W. KEETON, THE LAW OF TORTS § 58 (5th ed. 1984).

2. *See, e.g.*, Cole v. New York Cent. R.R., 150 Ohio St. 175, 80 N.E.2d 854 (1948).

3. W. PROSSER & W. KEETON, *supra* note 1, § 59.

4. RESTATEMENT (SECOND) OF TORTS § 339 (1965) [hereinafter referred to in text and notes as the Restatement Rule or Rule].

5. *See infra* note 46.

6. *See, e.g.*, Sharp Realty Co. v. Forsha, 122 Ohio St. 368, 171 N.E. 598 (1930).

7. 77 Ohio St. 235, 83 N.E. 66 (1907).

8. 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983). The court in *Paugh* was explaining its earlier opinion in the case of Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983), in which the court eliminated the requirement of physical manifestation of injury or physical contact as a prerequisite for bringing an action for negligent infliction of serious emotional distress.

9. 6 Ohio St. 3d 72, 74, 451 N.E.2d 759, 762 (1983).

10. *See* Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983).

places Ohio among the most progressive American jurisdictions with regard to the recognition of that particular tort cause of action.

Another major step was taken by the same court just three weeks after the *Paugh* decision. In *Anderson v. Ceccardi*[11] the court eliminated the longstanding distinction between contributory negligence and assumption of risk. It held that assumption of risk would no longer act as a complete bar to recovery, but would be apportioned along with any contributory negligence in light of the Ohio comparative negligence statute.[12]

The purpose of this Comment is to encourage the Supreme Court of Ohio to reevaluate its harsh and outdated view of the duty owed to trespassing children, specifically where highly dangerous conditions on the land pose a threat to their safety. The Ohio courts have continued to rely on *Harvey*[13] as the basis for denying recovery to injured minor trespassers. Although the underlying rationale of *Harvey* was the subject of considerable criticism after the Supreme Court of Ohio handed down the decision,[14] it has not been reevaluated in light of the many changes that have occurred in American society since that time.

This Comment will demonstrate that the Restatement Rule would provide a workable standard for the Ohio courts to apply.[15] It is a much more flexible approach than the earlier version of the attractive nuisance doctrine rejected in *Harvey*. The Restatement Rule is based on foreseeability and will not unduly burden landowners. Rather, ordinary negligence standards are embodied in the Restatement Rule and, more importantly, it reflects the important value of protecting children who are unable to protect themselves.

If the Supreme Court of Ohio truly desires to be in the forefront of American tort law it should, at the very least, reevaluate its past position and examine the merits of the Restatement Rule. This Comment will outline the development of the Restatement Rule and explain its components. Also, it will trace the law in Ohio and the split that has developed between it and the other jurisdictions in the United States. Finally, this Comment will show that the adoption of a slightly modified version of the Restatement Rule would be beneficial for Ohio.

II. THE HISTORY AND DEVELOPMENT OF THE ATTRACTIVE NUISANCE DOCTRINE

The Restatement's attractive nuisance doctrine, which this Comment proposes Ohio adopt, differs from the original common law attractive nuisance doctrine. That doctrine was based on the concept of allurement,[16] a basis that both the original Restatement and the Second Restatement have since rejected.[17] Nonetheless, an

11. 6 Ohio St. 3d 110, 451 N.E.2d 780 (1983).

12. *Id.* at 113, 451 N.E. 2d at 783; *see* OHIO REV. CODE ANN. § 2315.19 (Page Supp. 1982).

13. Railroad Co. v. Harvey, 77 Ohio St. 235, 83 N.E. 66 (1907).

14. *See, e.g.*, Ziehm v. Vale, 98 Ohio St. 306, 120 N.E. 702 (1918) (Wanamaker, J., concurring).

15. *See infra* text accompanying notes 31–37.

16. The "allurement" rationale, which was based on the judicial fiction of the child's enticement to the dangerous object, was first espoused by the Supreme Court of Minnesota in Keffe v. Milwaukee & St. P. Ry. Co., 21 Minn. 207 (1875).

17. *See infra* text accompanying notes 31–44.

examination of the doctrine as it originally developed is useful. It is important to note that the original doctrine was adopted by a vast majority of the jurisdictions in the United States and rejected by a few, including Ohio.[18] Equally significant is the fact that the vast majority of jurisdictions that followed the traditional doctrine as it originally developed, as well as several jurisdictions that flatly rejected the original statement of the doctrine, have accepted the modified Restatement view, Second Restatement section 339.[19]

Traditionally, courts have distinguished the duties owed to an entrant upon one's land on the basis of the entrant's status as a trespasser, licensee, or invitee.[20] Under the traditional rule a trespasser, defined as "a person who enters or remains upon land in the possession of another without a privilege to do so, created by the possessor's consent or otherwise,"[21] has been afforded only a limited amount of protection. The owner or occupier of the land has only owed a trespasser the duty not to inflict harm willfully or wantonly nor trap the entrant once his presence has become known.[22]

An exception to this rule with respect to trespassing children was first enunciated by the United States Supreme Court in *Sioux City & Pacific Railroad v. Stout*.[23] In

18. Hannon v. Ehrlich, 102 Ohio St. 176, 131 N.E. 504 (1921); Railroad Co. v. Harvey, 77 Ohio St. 235, 83 N.E. 66 (1907).

19. *See infra* note 46.

20. W. PROSSER & W. KEETON, *supra* note 1, § 58. *But see* Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). In *Rowland*, the California Supreme Court discarded the categories of trespasser, licensee, and invitee as they relate to landowner liability. Instead, the court established the single landowner duty of ordinary care and management of property, and the duty to conduct oneself as a reasonable person would in view of the probability of injury to others. *Id.* The court indicated, however, that the plaintiff's status as trespasser, licensee, or invitee may, in light of the facts giving rise to such status, have some bearing on the question of liability. *Id.* Nonetheless, the status itself is no longer determinative of liability in California and in most states that have adopted the *Rowland* view. It should be noted also, however, that not all of those states which have adopted *Rowland* have included trespassers within the new rule. *See infra* note 102. Notwithstanding these exceptions, pure application of *Rowland* encompasses trespassers.

The Supreme Court of Ohio in DiGildo v. Caponi, 18 Ohio St. 2d 125, 247 N.E.2d 732 (1969), mentioned the *Rowland* approach in a case that involved injury to an infant social guest, but decided the case on other grounds. The court, however, did not explicitly reject the *Rowland* approach. Rather, it deferred the question until a later date. *Id.* at 131, 247 N.E.2d at 736. As of this writing, the Supreme Court of Ohio has not ruled on this issue.

This Comment focuses on the current need for increased protection of child trespassers who are unaware of dangerous conditions upon land. Adoption of the Restatement Rule would sufficiently address this problem. While the *Rowland v. Christian* approach, when applied to encompass a duty to trespassers, *see infra* note 102, would remedy this problem, its effects would be much farther reaching than those of the Restatement Rule. Indeed, while *Rowland* offers a meritorious approach to premises liability law, the approach would be a drastic change in Ohio law. Although one effect of that rule would be the protection of children in attractive nuisance types of situations, it would also extend a similar duty even to adult trespassers.

The Restatement Rule proposed herein would allow the Supreme Court of Ohio to avoid drastically changing premises liability laws relating to all classes of entrants, while allowing increased protection to child trespassers. For this reason, this Comment only suggests the adoption of the Restatement Rule approach, and does not address the merits of the *Rowland v. Christian* approach. For a more detailed analysis of *Rowland v. Christian*, see Case Comment, *Duty of Reasonable Care to Third Persons on the Premises*, 26 WASH. & LEE L. REV. 128 (1969). For an extensive survey of the current state of the *Rowland v. Christian* doctrine, see Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Function*, 1981 UTAH L. REV. 15; see also Ouellette v. Blanchard, 116 N.H. 552, 558–59, 364 A.2d 631, 635 (1976) (Duncan, J. concurring), where the adoption of the *Rowland* approach in New Hampshire was criticized. Justice Duncan stated that the court should have based its decision on the Restatement Rule rather than abandon the traditional distinctions between trespassers, licensees, and invitees.

> There is too much of value in the restatement of the law with respect to trespassing children [Restatement (Second) of Torts §339 (1965)], and owners of land in general to warrant its abandonment particularly in instructing juries. [citations omitted]. The considerations set forth in the Restatement [Rule] must be imparted to the jury if it is to be placed in a position to decide whether reasonable care was exercised by the landowner.

Id.

21. W. PROSSER & W. KEETON, *supra* note 1, § 58.

22. *Id.* at 397.

23. 84 U.S. (17 Wall.) 657 (1873).

Stout a trespassing child was injured while playing with a railroad turntable. For this reason the doctrine originally was known as the "turntable doctrine."[24] Under this doctrine, an owner or occupier of land was liable for injuries to trespassing children caused by conditions or objects on the premises if the occupier knew or should have known that the condition or object was in a place where children were likely to trespass, and the occupier failed to exercise reasonable care to protect against the threatened injury.[25] The *Stout* decision was based on the foreseeability of injury to a minor, rather than the minor's status as either trespasser, licensee, or invitee. The *Stout* rationale remains the basis of most actions of this type today.[26]

Two years after *Stout* was decided the Minnesota Supreme Court, in *Keffe v. Milwaukee & St. Paul Railway Co.*,[27] first used the terminology "attractive nuisance" and enunciated a modified theory based on allurement or attraction. The theory was based on the judicial fiction that the enticement (*i.e.*, the turntable or other similarly hazardous condition that attracted the young child) substituted for an invitation and imposed upon the landowner the duties and obligations owed to an invitee.[28] The United States Supreme Court adopted this "implied invitation" version of the doctrine in 1922 in *United Zinc & Chemical Co. v. Britt*,[29] stating: "[I]t may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult."[30]

III. The Restatement's Rejection of the Allurement Requirement: Section 339

In 1934, the American Law Institute (A.L.I.) promulgated the Restatement of Torts.[31] In an effort to avoid the judicial fiction of the attractive nuisance doctrine that originated in *Keffe*, the A.L.I. in section 339 of the Restatement[32] devised a rule which forthrightly recognized the child's status as a trespasser, but nevertheless imposed a carefully limited duty of reasonable care upon the landowner toward the child. That section of the Restatement, entitled "Artificial Conditions Highly Dangerous to Trespassing Children," grew out of widespread resistance to the allurement theory upon which *Keffe* had been based. It has been adopted by the vast majority of American jurisdictions.[33] Thus, the term "attractive nuisance" came to be and remains a misnomer. For this reason, this Comment will refer to the Restatement approach simply as the Restatement Rule. The Restatement Rule replaced the allurement theory with a rationale based on foreseeability.[34]

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24. W. Prosser & W. Keeton, *supra* note 1, § 59.
25. 84 U.S. (17 Wall.) 657 (1873).
26. J. Dooley, Modern Tort Law § 12.02 (1982).
27. 21 Minn. 207 (1875).
28. *Id.* at 211.
29. 258 U.S. 268 (1922). The *Britt* case was implicitly overruled 12 years later, after it had been the subject of much criticism, in Best v. District of Columbia, 291 U.S. 411 (1934).
30. 258 U.S. 268, 275 (1922).
31. Restatement of Torts (1934).
32. *Id.* § 339.
33. W. Prosser & W. Keeton, *supra* note 1, § 59.
34. *Id.*

Dean Prosser stated that under the Restatement's approach, trespassing children should be treated under the general principles of negligence and "the fact the child [is] a trespasser is merely one fact to be taken into account, with others, in determining the defendant's duty, and the care required of him."[35] Whereas the "allurement" rule often led to results not truly based on foreseeability, but rather on legal fiction, and accordingly was criticized by several jurisdictions including Ohio,[36] the Restatement Rule was drafted to balance the rights of trespassing minors who were injured with the rights of the landowner who had created a dangerous artificial condition.[37]

This section of the Restatement was modified slightly[38] in 1965 in the Second Restatement of Torts section 339, which states:

> *Artificial Conditions Highly Dangerous to Trespassing Children*
> A possessor of land is subject to liability for physical harm[39] to children[40] trespassing thereon caused by an artificial condition[41] upon the land[42] if
> (a) the place 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[43] 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.[44]

This section provides that a possessor of land is subject to liability for physical harm to trespassing children as a result of an artificial condition[45] upon the land, provided that the five elements are met. The Restatement Rule is now accepted by the

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35. *Id.*

36. Hannon v. Ehrlich, 102 Ohio St. 176, 131 N.E. 504 (1921); Railroad Co. v. Harvey, 77 Ohio St. 235, 83 N.E. 66 (1907).

37. Banker v. McLaughlin, 146 Tex. 434, 208 S.W.2d 843 (1948).

38. The modifications in the RESTATEMENT (SECOND) OF TORTS § 339 were largely a result of Dean Prosser's article *Trespassing Children*, 47 CALIF. L. REV. 427 (1959).

39. In the original Restatement rule, the phrase was "bodily harm." This is a wider rule than that encompassed by the first Restatement. *See* Prosser, *supra* note 38.

40. In the original Restatement rule, the phrase was "young children." RESTATEMENT OF TORTS § 339 (1934). *See infra* text accompanying notes 69–71.

41. In the original Restatement rule, the phrase was "structure or other artificial condition." RESTATEMENT OF TORTS § 339 (1934).

42. In the original Restatement rule, the phrase was "which he maintains upon the land." *Id.*

43. The original Restatement rule did not contain the phrase "the burden of eliminating the danger." *Id.* § 339(d).

44. Clause (e) was not a part of the original Restatement rule. *Id.* § 339.

45. The Restatement Rule does not apply to activities upon the land, but instead is limited to artificial conditions present upon the land. Children receive no greater protection than adults in carrying out activities on the land unless the children fall within one of the other exceptions to the general rule of nonliability towards any trespasser. Those exceptions include those in RESTATEMENT (SECOND) OF TORTS § 334 (1965) (Artificial Conditions Highly Dangerous to Constant Trespassers on Limited Area) and *id.* § 336 (Activities Dangerous to Known Trespassers).

great majority of American courts,[46] some of which had not previously recognized the attractive nuisance doctrine.[47]

The official comments to the Restatement Rule help to explain the reason for the Rule's widespread acceptance.

> It is now recognized by most [jurisdictions] that the basis of the rule is . . . the ordinary negligence basis of a duty of reasonable care not to inflict foreseeable harm on another, and that the fact that the child is a trespasser is merely one of the facts to be taken into consideration. The result is a limited obligation to the child, falling short of a duty to prevent all foreseeable harm to him, but requiring reasonable care as to those conditions against which he may be expected to be unable to protect himself.[48]

The Restatement Rule as stated applies only to artificial conditions or structures. It specifically states that the A.L.I. expresses no position whether the Rule applies to natural conditions or conditions closely approximating nature.[49] The reason for this caveat was the diversity of judicial opinion on the subject.[50] For example, there are a few decisions, including ones involving natural waters,[51] a rock cliff in a park,[52] and a gully near a street,[53] which have held that the doctrine does not apply to natural conditions. Additionally, in many cases concerning artificial ponds and other artificial conditions, liability has been denied because the conditions duplicate nature.[54]

Dean Prosser, the Reporter for the Second Restatement of Torts, noted that the true reason for denying recovery in the case of a natural condition was not simply because the condition was a natural one, but rather because these conditions were ones which the child would usually be able to understand and appreciate.[55] Thus, even if the Restatement explicitly applied to natural conditions, recovery would not necessarily follow in a case involving a natural condition, because the requirement of section 339(c)[56] would not have been met. Prosser concluded that the caveat regard-

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46. The following jurisdictions have adopted in some form the Restatement of Torts § 339 or Restatement (Second) of Torts § 339: Taylor v. Alaska Rivers Nav. Co., 391 P.2d 15 (Alaska 1964); MacNeil v. Perkins, 84 Ariz. 74, 324 P.2d 211 (1958); Wolfe v. Rehbein, 123 Conn. 110, 193 A. 608 (1937); Beaston v. James Julian, Inc., 49 Del. 521, 120 A.2d 317 (1956); Cockerham v. R.E. Vaughan, Inc., 82 So. 2d 890 (Fla. 1955); Wagner v. Kepler, 411 Ill. 368, 104 N.E.2d 231 (1951); Brittain v. Cubbon, 190 Kan. 641, 378 P.2d 141 (1963); Kentucky & Indiana Terminal R. v. Mann, 312 S.W.2d 451 (Ky. 1958); Jones v. Billings, 289 A.2d 39 (Me. 1972); Slinker v. Wallner, 258 Minn. 243, 103 N.W.2d 377 (1960); Nichols v. Consolidated Dairies of Lake County, 125 Mont. 460, 239 P.2d 740 (1952); Arbogast v. Terminal R.R. Ass'n of St. Louis, 452 S.W.2d 81 (Mo. 1970) (the Supreme Court of Missouri, Division No. 1, refusing to follow Thieret v. Hoel, 412 S.W.2d 127 (Mo. 1967) decided by the Supreme Court of Missouri, Division No. 2. That decision had rejected the doctrine.); Saul v. Roman Catholic Church of Santa Fe, 75 N.M. 160, 402 P.2d 48 (1965); Dean v. Wilson Constr. Co., 251 N.C. 581, 111 S.E.2d 827 (1960) (To invoke the attractive nuisance doctrine, "the facts [must be] such as to impose the duty of anticipation or prevision." [Citations omitted]); Mikkelson v. Risovi, 141 N.W.2d 150 (N.D. 1966); Pocholec v. Giustina, 224 Or. 245, 355 P.2d 1104 (1960); Jesko v. Turk, 421 Pa. 434, 219 A.2d 591 (1966); Morris v. City of Britton, 66 S.D. 121, 279 N.W. 531 (1938); Massie v. Copeland, 149 Tex. 319, 233 S.W.2d 449 (1950); Davis v. Provo City Corp., 1 Utah 2d 244, 265 P.2d 415 (1953); Massino v. Smaglick, 3 Wis. 2d 607, 89 N.W.2d 223 (1958); Afton Elec. Co. v. Harrison, 49 Wyo. 367, 54 P.2d 540 (1936).

47. *See infra* note 112.

48. RESTATEMENT (SECOND) OF TORTS § 339 comment b (1965).

49. *Id.* § 339 comment p (1965). For an excellent discussion of this caveat see Prosser, *supra* note 38, § 2.2(e).

50. Prosser, *supra* note 38.

51. Gandy v. Copeland, 204 Ala. 366, 86 So. 3 (1920) (spring); Fitch v. Selwyn Village, 234 N.C. 632, 68 S.E.2d 255 (1951) (stream).

52. Bagby v. Kansas City, 338 Mo. 771, 92 S.W.2d 142 (1936).

53. McComb City v. Hayman, 124 Miss. 525, 87 So. 11 (1920).

54. Prosser, *supra* note 38, at 446.

55. *Id.*

56. RESTATEMENT (SECOND) OF TORTS § 339(c) (1965).

ing natural conditions in section 339 was added because the case of the natural condition that the child would not appreciate had not yet arisen.[57] Should that case arise, this Comment proposes that the Restatement guidelines, if strictly applied, should also encompass purely natural conditions. There is no compelling justification to deny recovery solely because of the origin of the condition.

Although other jurisdictions may have limited the Restatement Rule to artificial conditions, that position is unduly restrictive. Because the Restatement Rule is a rule of foreseeability, landowners will be liable only for foreseeable injuries caused by a natural condition, the danger of which the landowner could expect a child to be unaware. To impose liability under the Rule it must be established also that the utility of maintaining the condition and the burden of eliminating the risk of danger are slight compared with the danger. Even assuming that both are substantially outweighed by the risk of danger to those trespassing children,[58] the owner of the land will still not have to take drastic means to protect them. Rather, he will simply be subject to the reasonable care requirement of the Restatement Rule,[59] which is not unduly burdensome. "The basis of liability is the foreseeability of harm, and the measure of duty is care in proportion to the foreseeable risk."[60]

A. *The Elements of the Restatement Rule*

The Restatement Rule contains flexible language. This flexibility is useful because it gives triers of fact greater leeway in deciding premises liability cases, and avoids the problem of per se denial of recovery (and per se imposition of liability) by allowing the trier of fact to analyze the facts of each case thoroughly.

Various jurisdictions have interpreted the Rule in many different ways as a result of the Rule's flexibility.[61] Because the Restatement is not statutory in nature, but rather a model approach, no specific interpretation of the Rule is compelled. Therefore, Ohio should not limit its application of the Rule to certain enumerated factual situations as such a limitation would destroy one of the great attributes of the Restatement Rule—its inherent flexibility. Indeed, this Comment does not urge a restrictive approach to the Rule, but argues for a flexible interpretation. Further, this Comment encourages Ohio not to restrict application of the Rule to artificial conditions.[62]

The drafters formulated the Rule with the intent that it be strictly applied.[63] Therefore, in order to establish liability under the Rule all five of the elements of section 339 must be satisfied.[64] This strict requirement is a guarantee that the interests of both the landowner and the child will be examined in each case. Superficially, the Rule appears inflexible, since every one of its elements must be fulfilled before

57. Prosser, *supra* note 38.

58. *See* RESTATEMENT (SECOND) OF TORTS § 339(d).

59. *Id.* § 339(e).

60. Strang v. New Jersey Broadcasting Co., 9 N.J. 38, 45, 86 A.2d 777, 780 (1951).

61. For an examination of the different applications of the Restatement Rule see 62 AM. JUR. 2d §§ 146–68 (1972 & Supp. 1984).

62. *See supra* text accompanying notes 54–60.

63. Martinelli v. Peters, 413 Pa. 472, 198 A.2d 530 (1964).

64. Taylor v. Alaska Rivers Navigation Co., 391 P.2d 15 (Alaska 1964); Fourseam Corp. v. Greer, 282 S.W.2d 129 (Ky. 1955); Hocking v. Duluth, Missabe & Iron Range Ry., 263 Minn. 483, 117 N.W.2d 304 (1962); Martinelli v. Peters, 413 Pa. 472, 198 A.2d 530 (1964).

liability can be imposed. Nevertheless, the Rule is flexible, since each of the elements can be applied flexibly. This flexibility is illustrated by the varied interpretations accorded to each of the five elements of the Rule by the jurisdictions that have adopted it.[65]

In addition to the varied interpretations accorded each element of the Rule, jurisdictions differ whether the fulfillment of each of the five conditions should be decided as a matter of law or a question of fact. Several jurisdictions hold that whether the special Rule applies is a question of law.[66] The prevalent view, however, is whether the conditions of the Restatement Rule have been met is a question of fact for the jury.[67]

This Comment suggests that the latter view is more appropriate and should be adopted by Ohio. The flexibility of the Rule depends upon a careful factual analysis by the fact finder in each case. Were the court to apply it solely as a question of law, the overall utility of the Restatement Rule could be diminished severely. While a jury given broad discretion might tend to sympathize with and therefore find in favor of child plaintiffs, a safeguard is available to a defendant that would be unavailable if the applicability of the Restatement Rule were decided as a matter of law by the court—defense counsel could submit jury interrogatories. By submitting interrogatories, counsel would be able to ascertain whether all five elements have been met. Should the answers to those interrogatories indicate that all five conditions have not been satisfied, the court should set aside the verdict as a matter of law.[68] This same safeguard would not exist if courts were free to apply the Rule solely as a matter of law. This is not meant to imply that judges will not attempt to separate the factual findings from the issues at law. Nonetheless, human nature and human frailties do suggest that the division between judge and jury would be more efficient and appropriate. The following discussion will highlight the components of the Restatement Rule.

1. *Age of the Child*

The Second Restatement modified the original version of section 339 by replacing the words "young children trespassing" with the more flexible "children trespassing."[69] Thus, while early cases rarely applied the attractive nuisance doctrine to children over the age of twelve,[70] the standard under the Second Restatement appears to be less rigid and would allow recovery even in the case of a considerably older child, if the danger is one that a child of similar age would not be expected to appreciate.[71] This change takes into account the increasingly complex technological nature of modern society. For example, a condition may be so complex and latently

65. *See infra* text accompanying notes 72–98; *see also supra* note 61.

66. *See, e.g.*, Bloodworth v. Stuart, 221 Tenn. 567, 428 S.W.2d 786 (1968); Massie v. Copeland, 149 Tex. 319, 233 S.W.2d 449 (1950).

67. *See, e.g.*, MacNeil v. Perkins, 84 Ariz. 74, 324 P.2d 211 (1958); Nechodomu v. Lindstrom, 273 Wis. 313, 77 N.W.2d 707 (1956).

68. OHIO R. CIV. P. 49(b).

69. RESTATEMENT (SECOND) OF TORTS § 339 (1965).

70. W. PROSSER & W. KEETON, *supra* note 1, § 59.

71. RESTATEMENT (SECOND) OF TORTS § 339 comment c (1965).

dangerous that even a child of sixteen would not appreciate its danger. Conversely, a condition may be so common and obviously dangerous that even a very young child would be able to understand its inherent danger. The Restatement's drafters recognized this when eliminating the word "young" from the language of the Rule. A plaintiff's age is considered in view of the prevailing foreseeability requirement of the Rule.

2. *Knowledge of Children's Presence*

The Second Restatement requires the possessor of land to know, or have reason to know, that children likely will trespass on the place where the condition exists, before liability will be imposed for an injury caused by the condition.[72] The official comments to the Restatement indicate that the drafters' intent behind this requirement was to define "has reason to know" as having information that would lead a person of reasonable intelligence, or of the superior intelligence of the possessor, to infer that children are trespassing, or to govern her conduct upon the assumption that they are doing so.[73] To impose liability on the possessor

> it is not enough that the possessor "should know" of trespasses, in the sense that a reasonable man in his position would investigate to discover the fact. The possessor is under no duty to make any investigation or inquiry as to whether children are trespassing, or are likely to trespass, until he is notified or otherwise receives information which would lead a reasonable man to that conclusion.[74]

Accordingly, the Restatement Rule does not require that landowners guard their property as fortresses as some of the jurisdictions that had rejected the attractive nuisance doctrine had feared.[75] The duty to investigate arises only when the landowner has actual or constructive knowledge of the child's presence.

3. *Dangerousness of the Condition*

The second precondition to liability under the Restatement Rule is that the possessor know or have reason to know of the condition, and realize or should realize that an unreasonable risk of death or serious bodily harm to the trespassing children is created by the condition.[76] The same definition of "has reason to know" applies both to the possessor's knowledge or reason to know the condition exists upon his land, and to the likelihood of its causing danger to trespassing children.[77] The possessor is under no duty to inspect or police his land to discover whether such conditions exist. Rather, he becomes liable only when he knows or has reason to know that such dangerous conditions do indeed exist.[78]

The drafters of the Restatement noted that to impose a higher standard would unduly burden landowners. In light of the drafters' desire to balance the interests of

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72. *Id.* § 339(a).
73. *Id.* § 339 comment g.
74. *Id.*
75. *See, e.g.*, Ryan v. Tower, 128 Mich. 463, 87 N.W. 644 (1901).
76. RESTATEMENT (SECOND) OF TORTS § 339(b) (1965).
77. *Id.* § 339 comment h.
78. *Id.*

both landowner and child the fear that the Restatement Rule will unduly burden landowners by forcing them to become absolute insurers of the safety of trespassing children[79] is without merit. Landowners under the Restatement Rule will not be unduly burdened, since the Rule does not impose any duty to police one's land.[80] Rather, the Rule requires only that landowners take responsibility for those conditions of which the reasonable person in the landowner's situation would know. Thus, what some jurisdictions have rejected as unreasonably burdensome is simply a rule that proscribes ordinary negligence.

4. *The Child's Knowledge of the Danger*

The third element of the Restatement Rule states that the Rule applies only if the children entering upon the land, because of their youth, do not discover the condition nor realize the risk of danger of either meddling with it or coming into the area made dangerous by it.[81] The third element of the Rule is similar to the type of assumption of risk in which a plaintiff is aware of a risk that has been created by the negligence of the defendant, yet chooses voluntarily to encounter it.[82] It is this type of assumption of risk that most closely resembles contributory negligence.[83] The Supreme Court of Ohio in *Anderson v. Ceccardi*[84] recently held that the doctrines of contributory negligence and assumption of risk have been merged under Ohio's comparative negligence statute.[85] Therefore, most forms of assumption of risk that had acted as a complete bar to recovery prior to *Anderson*, will no longer act as a bar.[86]

The *Anderson* decision raises an interesting question regarding the third element of the Restatement Rule: to what extent does an injured child have to satisfy that element in order for the Rule to apply? Two opposing positions can be taken. The first position is since *Anderson* makes clear assumption of risk will no longer act as an automatic bar to recovery—as long as the defendant's negligence was at least a fifty-one percent cause of the plaintiff's injury[87]—it should not act as a bar to recovery for child plaintiffs under the Restatement Rule. Rather, the court should weigh the child's own "contribution" to his injuries against the negligence of the

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79. This fear was one of the original reasons for rejection of the attractive nuisance doctrine by Ohio and some other jurisdictions. *See* Railroad Co. v. Harvey, 77 Ohio St. 235, 83 N.E. 66 (1907); *see, e.g.*, Ryan v. Tower, 128 Mich. 463, 87 N.W. 644 (1901).

80. Simmel v. New Jersey Coop. Co., 28 N.J. 1, 143 A.2d 521 (1958).

81. RESTATEMENT (SECOND) OF TORTS § 339(c) (1965).

82. W. PROSSER & W. KEETON, *supra* note 1, § 68.

83. *Id.*

84. 6 Ohio St. 3d 110, 451 N.E.2d 780 (1983).

85. *Id.* at 113, 451 N.E.2d at 783; *see* OHIO REV. CODE ANN. § 2315.19 (Page Supp. 1982).

86. For a detailed analysis of the current state of the assumption of risk doctrine in Ohio following the decision in *Anderson v. Ceccardi*, see Note, *Assumption of Risk Merged with Contributory Negligence*, 45 OHIO ST. L.J. 1059 (1985).

87. OHIO REV. CODE ANN. § 2315.19 (Page Supp. 1982).That section states in pertinent part:

> (A)(1) In negligence actions, the contributory negligence of a person does not bar the person or his legal representative from recovering damages that have directly and proximately resulted from the negligence of one or more other persons, *if the contributory negligence of the person bringing the action was no greater than the combined negligence of all other persons from whom recovery is sought.* However, any damages recoverable by the person bringing the action shall be diminished by an amount that is proportionately equal to his percentage of negligence. . . .

Id. (emphasis added).

landowner. Therefore, the first position leads to the conclusion that, as a matter of law, the third element would be satisfied so long as the trier of fact finds that the child's assumption of the risk was a lesser cause of his injuries than was the negligence of the landowner.

The second and opposing position is based on a more technical argument. According to this argument, the third element of the Restatement Rule, although sounding much like assumption of risk, is not to be equated with that doctrine because it is an affirmative element of the child plaintiff's cause of action under the Rule, and is not a defense. Under this view, since the requirement operates as an element of the cause of action, the requirement must be completely satisfied before recovery can occur. This position does not violate *Anderson v. Ceccardi* since *Anderson* relates only to assumption of risk as a defense.

The first position would lead to more recoveries for plaintiffs than the second position, since the first position permits recovery even when the plaintiff bears forty-nine percent of the fault for his injury. Still, although these two positions are inconsistent with each other, they both are analytically correct. The precise application of this element of the Restatement Rule is a matter of policy and since the Rule is only a model approach, it may be interpreted and applied in the manner that is most appropriate for Ohio. Neither interpretation would be totally inconsistent with approaches utilized in the other jurisdictions that have adopted and applied the Restatement Rule.[88]

This element, regardless of the specific manner in which it is applied, operates as an important limitation on a landowner's liability under the Rule.[89] This limitation should alleviate the concern of those who feel that the ability to make free use of one's land is severely restricted by the Restatement Rule. The landowner's duty under the Rule is to exercise reasonable care to keep the part of the land upon which the landowner should realize the likelihood of children's trespassing free from those conditions that, though observable by adults, are not likely to be observed by children, or that contain risks which are beyond the imperfect understanding of children.[90] Again, it must be noted that the term "children" is defined loosely under the Rule.[91] The trier of fact should look at whether the risk likely would have been perceived by a child of the same age and mentality as that of the trespasser. This analysis should turn on the type of condition that is maintained and the obviousness of the danger it presents.

5. *Utility of the Condition*

The fourth condition which must exist in order to impose liability under the Rule is that the utility to the possessor of maintaining the condition and the burden of

88. *See supra* notes 61–62 and accompanying text.

89. The view that landowners should be able to make free use of their own land was one of the primary reasons for rejection of the doctrine in Ohio. Hannon v. Ehrlich, 102 Ohio St. 176, 131 N.E. 504 (1921); Railroad Co. v. Harvey, 77 Ohio St. 235, 83 N.E. 66 (1907).

90. RESTATEMENT (SECOND) OF TORTS § 339 comment i (1965).

91. *See supra* text accompanying notes 69–71.

eliminating the danger must be slight compared to the risk to the children involved.[92] This is a balancing test that, if applied in accordance with the comments to section 339, will tend to limit rather than extend liability. Comment n states that the public interest in the possessors' free use of the land for their own purposes is of great significance.[93] A particular condition, therefore, is regarded as not involving an unreasonable risk to trespassing children unless it involves a grave risk that could be avoided without any serious interference with the possessor's legitimate use of the land. The standard is reasonableness in the use of one's land in light of the type of condition, the value of the condition, and the cost to make it safe.[94] It is a balancing of costs and benefits test, similar to the famous test adopted by Judge Learned Hand in *United States v. Carroll Towing Co.*[95]

The requirement that the burden of eliminating the condition be slight weighs favorably toward applying the Restatement Rule to all conditions, natural and artificial. If a useful natural condition would be very burdensome to eliminate as compared with the risk of harm to children it may pose, the Restatement Rule would not impose any duty on the landowner. This requirement prevents landowners from becoming absolute insurers of children's safety. The Rule thus imposes only a slight burden on landowners' use of their land, while affording protection to children from dangerous conditions. This result is especially desirable in view of the high value society places on the safety of children.

6. *The Exercise of Reasonable Care by the Possessor*

The final precondition for liability under the Rule is that the possessor must have failed to exercise reasonable care to eliminate the danger (defined in subsections (b) and (c)) or otherwise must have failed to reasonably protect the trespassing children.[96] Thus, even though the possessor knows that children are likely to trespass, that the condition on the land involves an unreasonable risk of harm to them, and that they are neither likely to discover nor appreciate the risk, no liability will be imposed unless the possessor has failed to take steps that a reasonable person would take under similar circumstances.[97] This requirement does not impose a duty upon the possessor to make the premises "childproof." Indeed, in many instances the reasonable care requirement can be satisfied by merely warning the child of the danger, provided the warning can reasonably be expected to be appreciated and followed by the child. Therefore, one of the traditional criticisms of the attractive nuisance doctrine, that it would amount practically to insurance of all children by landowners,[98] is without merit under the Restatement Rule, if the Rule is applied as intended by its drafters.

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92. *Id.* § 339(d).

93. *Id.* § 339 comment n.

94. *Id.*

95. 159 F.2d 169 (2d Cir. 1947). The Hand test was formulated in the context of determining whether a defendant's conduct posed an unreasonable risk of harm. The test states that an unreasonable risk of harm has occurred if B is less than the product of L times P ($B < L \times P$), where B is the burden which the defendant would have had to bear to avoid the risk, L is the gravity of the potential injury, and P is the probability that harm will occur from the defendant's conduct.

96. RESTATEMENT (SECOND) OF TORTS § 339(e) (1965).

97. *Id.* § 339 comment o.

98. Bottum's Adm'r v. Hawks, 84 Vt. 370, 79 A. 858 (1911).

As a close analysis of its requirements demonstrates, the Restatement Rule balances the interests of the child trespasser and the landowner. Because all five conditions need to be satisfied for the possessor to be liable, the Rule provides an adequate opportunity for the trier of fact to analyze carefully all of the attendant circumstances of each case, rather than simply categorize the condition involved as being an attractive nuisance *vel non*. The result of the Rule is the imposition of ordinary negligence liability based on foreseeability and reasonable care.

IV. Rejection of the Rule: A Shrinking Minority

Although the Restatement Rule has gained widespread adoption, Ohio has decided not to take a modern approach to the attractive nuisance problem. In failing to adopt a version of the attractive nuisance doctrine,[99] Ohio remains one of only three jurisdictions that have neither created a special duty towards trespassing children in the form of the attractive nuisance doctrine or the Restatement Rule,[100] nor adopted the *Rowland v. Christian*[101] approach by abrogating the distinctions of duty based on status as either a trespasser, licensee, or invitee. The jurisdictions following the *Rowland* approach have replaced those distinctions with a standard of reasonable care under the circumstances.[102]

In the three jurisdictions that still reject some form of greater protection for trespassing minors,[103] a number of justifications for rejection have been given, none of which are compelling today. These justifications include: (1) the attractive nuisance doctrine has its foundation on sympathy rather than on any sound principle of law;[104] (2) the doctrine impairs property rights;[105] (3) the doctrine imposes on every member of the community a higher duty for the protection of children than is imposed

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99. The doctrine has been flatly rejected in Ohio. Hannon v. Ehrlich, 102 Ohio St. 176, 131 N.E. 504 (1921); Railroad Co. v. Harvey, 77 Ohio St. 235, 83 N.E. 66 (1907); Swarts v. Akron Water Works Co., 77 Ohio St. 235, 83 N.E. 66 (1907). It should be noted that these decisions rejected the attractive nuisance doctrine that was based on allurement or implied invitation and not the Restatement Rule. In fact, all were decided prior to the promulgation of the Restatement of Torts in 1934.

100. Other than Ohio, only Vermont, Hillier v. Noble, 142 Vt. 552, 458 A.2d 1101 (1983); and Maryland, Murphy v. Baltimore Gas & Elec. Co., 290 Md. 186, 428 A.2d 459 (1981), have retained the traditional distinctions between trespassers, licensees, and invitees without providing for a special duty of care towards trespassing children, injured as a result of highly dangerous artificial conditions present on the land.

101. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

102. This *Rowland* rationale has been adopted by the following jurisdictions: Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972); Webb v. City of Sitka, 561 P.2d 731 (Alaska 1977); Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971); Pickard v. City of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969); Cates v. Beauregard Elec. Coop., 328 So. 2d 367 (La. 1976); Ouellette v. Blanchard, 116 N.H. 552, 364 A.2d 631 (1976); Basso v. Miller, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976); Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127 (R.I. 1975).

Several other states have repudiated the licensee–invitee distinction but have retained more limited duty rules for trespassers. Poulin v. Colby College, 402 A.2d 846 (Me. 1979); Mounsey v. Ellard, 363 Mass. 693, 297 N.E.2d 43 (1973); Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639 (1972); O'Leary v. Coenen, 251 N.W.2d 746 (N.D. 1977); Antoniewicz v. Reszcynski, 70 Wis. 2d 836, 236 N.W.2d 1 (1975).

Even though Massachusetts did not eliminate the category of trespasser in adopting *Rowland*, the Massachusetts legislature passed a nearly verbatim version of the Restatement Rule in 1977. *See infra* note 113.

103. *See supra* note 100.

104. Bottum's Adm'r. v. Hawks, 84 Vt. 370, 79 A. 858 (1911).

105. Railroad Co. v. Harvey, 77 Ohio St. 235, 83 N.E. 66 (1907).

on their parents;[106] and (4) if the doctrine is carried to its logical conclusion, it would be tantamount to insurance of all children.[107]

These so-called justifications, viewed in light of modern society's values favoring the protection of children[108] and the intent of the Restatement Rule, are no longer valid. They were espoused many years prior to the Restatement's promulgation. Indeed, the rejection of the attractive nuisance doctrine in Ohio came at a time when the doctrine was based on an allurement theory.[109] Nonetheless, a few jurisdictions, including Ohio, have not re-examined the law since the issuance of the Restatement of Torts.[110] Even if Ohio's rejection at that time were proper, it does not remain proper today. The Restatement Rule differs significantly from the old, and widely rejected, theory based on an allurement or an implied invitation.[111]

Several jurisdictions that, along with Ohio, had rejected the attractive nuisance doctrine have reexamined their law, and have adopted the Restatement Rule.[112] Massachusetts, a jurisdiction that, until as late as 1977, had purported to reject the attractive nuisance doctrine, took a major step forward when it statutorily enacted a nearly verbatim version of the Restatement Rule as the new law in that state.[113]

Maine, a jurisdiction that, until 1972, espoused the view that trespassing children were to be afforded no greater protection than that afforded trespassing adults,[114] joined the vast majority of jurisdictions and adopted the Restatement Rule in *Jones v. Billings*.[115] In *Jones* a three year old child fell into a cesspool that negligently had been left open and unprotected on the defendant's property. The child subsequently died as a result of the fall.[116] In what the Supreme Judicial Court of Maine characterized as a "radical departure from our prior case law,"[117] the court explained in great detail the merits of the Restatement Rule. The court stated that the Restatement Rule was carefully drafted to limit the duty owed to trespassing children by the possessor of property to specific and well defined situations. Furthermore, the Restatement Rule does not impose an obligation "to exercise ordinary care to keep

106. Hannon v. Ehrlich, 102 Ohio St. 176, 131 N.E. 504 (1921).

107. *See* Bottum's Adm'r v. Hawks, 84 Vt. 370, 79 A. 858 (1911).

108. *See infra* text accompanying notes 182–83.

109. Railroad Co. v. Harvey, 77 Ohio St. 235, 83 N.E. 66 (1907) was decided when the allurement version of the attractive nuisance doctrine based on Keffe v. Milwaukee & St. Paul Ry. Co., 21 Minn. 207 (1875) was widely accepted.

110. *See supra* note 100.

111. *See supra* text accompanying notes 27–30.

112. It is especially interesting to note that two jurisdictions which until very recently had rejected the attractive nuisance doctrine have opted to take the more liberal *Rowland* approach of eliminating the traditional distinctions based on status and replacing them with the standard of reasonable care under the circumstances. *See supra* notes 20 & 102.

Rhode Island, which adopted the Second Restatement § 339 in Haddad v. First Nat'l. Stores, Inc., 109 R.I. 59, 280 A.2d 93 (1971) after having rejected the doctrine for many years, later adopted the *Rowland* view and abolished the traditional distinctions. Although the two views would appear to be inconsistent with each other, the court nonetheless held the two to be harmonious in Bernhart v. Nine, 120 R.I. 692, 700, 391 A.2d 75, 79 (1978).

Another state that has long rejected the attractive nuisance doctrine, New Hampshire, abandoned its harsh view towards trespassing children and adopted the *Rowland* approach in Ouelette v. Blanchard, 116 N.H. 552, 557, 364 A.2d 631, 634 (1976).

113. The Massachusetts statute, MASS. ANN. LAWS ch. 231 § 85Q (Michie/Law. Co-op. Supp. 1983), is discussed in Soule v. Mass. Elec. Co., 378 Mass. 177, 390 N.E.2d 716 (1979). The court termed the statutory enactment a softening of a "Draconian doctrine." *Id.* at 180, 390 N.E.2d at 718.

114. Cogswell v. Warren Bros. Road Co., 229 A.2d 215 (Me. 1967).

115. Jones v. Billings, 289 A.2d 39, 43 (Me. 1972).

116. *Id.* at 40.

117. *Id.* at 43.

the premises reasonably safe" since it applies only to conditions "which involve an unreasonable risk of death or serious bodily harm."[118]

In *Jones* the Maine court explained the reason for its former reluctance to adopt the Rule. In large part the court had refused to adopt the Rule because many jurisdictions had been applying it loosely, without requiring clear proof of all five of the Restatement's requirements. The court felt that this misapplication of the Rule had resulted in some cases of imposing on defendants a duty of being absolute insurers of the safety of trespassing children and a duty to "childproof" the premises.[119] This "insurance" rationale had been one of the traditional reasons for rejecting the doctrine in the past, even among jurisdictions that have since accepted the Restatement Rule.[120] The *Jones* court noted, however, that this result was not contemplated by the Restatement Rule itself. Indeed, the court stated:

> [W]e have become satisfied from a reading of the cases that when courts have vigilantly respected the limits of liability contemplated by the Rule and clearly stated therein, the burden imposed upon the possessor of property has not been intolerable or unjust. When the Rule is properly understood and applied, liability will attach only with respect to conditions involving an "unreasonable risk of death or serious bodily harm" and not to those innocuous conditions which are normally considered perfectly safe but which the ingenuity of the childish mind can sometimes convert to an instrument of harm.[121]

Rhode Island is another jurisdiction that, after years of rejecting the attractive nuisance doctrine,[122] has recently adopted the Restatement Rule. In *Haddad v. First National Stores, Inc.*,[123] plaintiff, a five year old child, was injured when she fell from a shopping cart which was being pushed by another child in defendant supermarket's parking lot after business hours. Several carts had been left in the parking lot after the store's closing.[124] The Supreme Court of Rhode Island, after a careful examination of the development of the attractive nuisance doctrine and of the current state of the doctrine, overruled prior case law and adopted the Restatement Rule.[125] In adopting the Restatement's version of the attractive nuisance doctrine, the court emphasized that in order to apply the Rule properly all five elements of the Rule must first be met.[126]

The court rejected the outdated "allurement theory," and succinctly stated the compelling reasons for following the Restatement Rule. Speaking for the court, Justice Kelleher wrote:

> A young child cannot, because of his immaturity and lack of judgment, be deemed to be able to perceive all the dangers he might encounter as he trespasses on the land of others. There must and should be an accomodation between the landowner's unrestricted right to

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118. *Id.* at 42.
119. *Id.*
120. W. PROSSER & W. KEETON, *supra* note 1, § 59.
121. Jones v. Billings, 289 A.2d 39, 43 (Me. 1972).
122. *See, e.g.*, Houle v. Carr-Consolidated Biscuit Co., 85 R.I. 1, 125 A.2d 143 (1956), *overruled by* Haddad v. First Nat'l Stores, Inc., 109 R.I. 59, 280 A.2d 93 (1971).
123. Haddad v. First Nat'l Stores, Inc., 109 R.I. 59, 280 A.2d 93 (1971).
124. *Id.* at 60–61, 280 A.2d at 94–95.
125. *Id.* at 64, 280 A.2d at 96.
126. *Id.*

> use of his land and society's interest in the protection of the life and limb of its young. When these respective social-economic interests are placed on the scale, the public's concern for a youth's safety far outweighs the owner's desire to utilize the land as he sees fit. . . . The Restatement [R]ule is a reasonable compromise between the conflicting interests.[127]

The court also stated that by adopting the Restatement Rule, possessors of land would not become insurers of the safety of young trespassers.[128] The strict requirements of the Restatement Rule prevent this overapplication of the doctrine to situations which do not meet each of the Rule's five criteria. It is only when all five criteria have been met that liability can be imposed.[129]

V. OHIO'S FAILURE TO ADOPT THE DOCTRINE

Although several jurisdictions have reexamined their prior stance on the attractive nuisance doctrine,[130] Ohio has consistently failed to reexamine its own position on the doctrine. Instead, the Ohio courts have continued to rely on the seventy-five year old case of *Railroad Co. v. Harvey*[131] in stating that the attractive nuisance doctrine does not apply in Ohio. In *Harvey* the Supreme Court of Ohio held that "[i]t is not the duty of an occupier of land to exercise care to make it safe for infant children who come upon it without invitation but merely by sufferance. . . . The doctrine of the turntable cases is disapproved."[132] Although the Supreme Court of Ohio has heard other cases involving attractive nuisance issues, it has summarily dismissed those cases by simply citing *Harvey*.[133] The more recent Ohio decisions have not even questioned the basis of the *Harvey* decision.[134] Instead, that decision has been blindly followed for nearly three quarters of a century.

Because the courts in Ohio have relied so heavily on the *Harvey* decision, an analysis of that case is necessary. *Harvey* was the classic "turntable" case in which a child trespasser was injured while playing on an unlocked railroad turntable.[135] The case was brought as a typical "allurement" or "implied invitation"[136] cause of action, the rationale of which has since been rejected by the Restatement Rule.[137]

The court in its lengthy opinion canvassed many jurisdictions regarding the applicability of the attractive nuisance doctrine as it existed in 1907.[138] Though the

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127. *Id.* (citation omitted).

128. *Id.*

129. RESTATEMENT (SECOND) OF TORTS § 339 (1965). The Restatement Rule is quite explicit in stating that all five elements must exist before any liability can be imposed under the section. This is apparent from the Rule's use of the word "and" preceeding clauses (b), (c), (d), and (e). *See supra* text accompanying notes 38–44.

130. *See supra* notes 112–13, 115 & 123 and accompanying text.

131. 77 Ohio St. 235, 83 N.E. 66 (1907).

132. *Id.* at syllabus, paras. 1–2.

133. *See, e.g.*, Morgenstern v. Austin, 170 Ohio St. 113, 115, 162 N.E.2d 849, 851 (1959); Sharp Realty Co. v. Forsha, 122 Ohio St. 368, 371, 171 N.E. 598, 600 (1930).

134. *See, e.g.*, McKenzie v. Fairmont Food Co., 305 F. Supp. 163 (N.D. Ohio 1969); Steven v. Ohio Fuel Gas Co., 26 Ohio Op. 2d 345, 346, 193 N.E.2d 317, 318 (C.P. Pickaway Cty. 1960) (citing *Harvey* with approval but deciding the case as an exception to that rule).

135. Railroad Co. v. Harvey, 77 Ohio St. 235, 236–37, 83 N.E. 66, 67 (1907).

136. *See supra* note 16.

137. *See supra* text accompanying note 34.

138. Railroad Co. v. Harvey, 77 Ohio St. 235, 243–45, 83 N.E. 66, 69–70 (1907).

court cited cases as standing for the attractive nuisance doctrine, these cases actually were decided on the implied invitation theory,[139] and as a result were later repudiated by most of those jurisdictions that had previously accepted the implied invitation theory,[140] choosing in its stead the position of the Restatement Rule. The *Harvey* decision was a clear rejection of the allurement or implied invitation theory, but not necessarily a rejection of the modern Restatement Rule as well. The *Harvey* court wrote, "[t]he real reason for *implying invitation*, or declaring a turntable to be a *lure*, is to escape the imputation of making the law, rather than declaring it."[141]

The *Harvey* court rejected the attractive nuisance doctrine in Ohio based upon the following beliefs: 1) the doctrine would impair property rights, 2) the doctrine would charge the duty of protection of children upon every member of a community except their parents, and 3) the doctrine had no true legal basis.[142] It is clear from a careful reading of the opinion that in 1907 the Supreme Court of Ohio placed a greater value on the free use of land than it did on the protection of society's youth. The court also hinted in dictum, that it wanted to leave the issue of adoption of the doctrine to the legislature, rather than to judicially create a duty.[143]

In support of the proposition that a child trespasser is owed no duty greater than that owed an adult trespasser, the court cited many cases from other jurisdictions which have since been overruled either judicially[144] or statutorily.[145] Even though there has been a general reversal in the law relied upon by the *Harvey* court to reach its decision, Ohio courts still view *Harvey* as the controlling authority on the issue.[146]

In a companion case to *Harvey*, the court in *Swarts v. Akron Water Works Co.*[147] was confronted with a case in which the attractive nuisance doctrine arguably applied to a non-turntable case. The court flatly rejected this application[148] and held that abrogating the general rule of nonliability to trespassers in the case of child trespassers would force every owner of property to make his premises childproof.[149] The court even stated that the logical extension of this exception of nonliability would extend the doctrine to apply to purely natural conditions.[150]

The *Harvey* and *Swarts* decisions were followed in several later cases.[151] The opinions in those later cases fail, however, to explain the basis for this continued reliance. Indeed, the rationale of *Harvey* has rarely been questioned. Although the *Harvey* decision was severely criticized by one justice of the Supreme Court of Ohio

139. *See supra* text accompanying notes 16–30.

140. *See supra* note 33 and accompanying text.

141. Railroad Co. v. Harvey, 77 Ohio St. 235, 255, 83 N.E. 66, 72 (1907) (emphasis added).

142. *Id.* at 250, 83 N.E. at 70.

143. *Id.* at 255–56, 83 N.E. at 72. Although the Ohio General Assembly could adopt the Restatement Rule statutorily, as did Massachusetts, *see supra* note 113, it would be more effective to adopt the Rule judicially. In that way, the Restatement Rule's flexibility would be better maintained.

144. *See supra* notes 46, 115 & 123.

145. *See supra* note 113 and accompanying text.

146. Hannon v. Ehrlich, 102 Ohio St. 176, 131 N.E. 504 (1921); Cleveland v. Parschen, 9 Ohio L. Abs. 694 (Ohio Ct. App. 1931); Minick v. Windsor Brick Co., 30 Ohio App. 232, 164 N.E. 769 (1929).

147. 77 Ohio St. 235, 262, 83 N.E. 66, 74 (1907).

148. *Id.* at 269, 83 N.E. at 76.

149. *Id.* at 264, 83 N.E. at 75.

150. *Id.*; see *supra* text accompanying notes 58–60 for an explanation of why an extention of the Rule to natural conditions is perfectly logical.

151. *See supra* note 133 and accompanying text.

a few years after it was decided,[152] it is well settled today that the attractive nuisance doctrine, rejected in *Harvey*, has no application in Ohio.[153]

In *Hannon v. Ehrlich*,[154] decided 14 years after *Harvey*, the Supreme Court of Ohio rejected once again the theory that trespassing children should be afforded a greater duty of care than that afforded trespassing adults.[155] *Hannon* involved the death of an eight year old child who was killed while playing in defendant's sand pit.[156] Although the court was not entirely clear whether the boy was a trespasser or a licensee, it proceeded to hold that no greater duty existed towards the boy because of his youth.[157]

The *Hannon* court quoted extensively from *Harvey* and further explained the basis for the rejection of the attractive nuisance doctrine in Ohio:

> Any other rule than [rejection of the attractive nuisance doctrine] would impose a much greater burden and a higher duty for the protection of children upon every member of the community than is imposed upon the child's parents. . . . The contrary rule as stated in many cases produced the effect of making persons owning dangerous premises insurers of the lives and limbs of the children of the neighborhood.[158]

In *Signs v. Signs*[159] the Supreme Court of Ohio appeared to be critical of the decisions in *Harvey* and *Hannon* but failed, nonetheless, to overrule them. *Signs* involved an injury to a six year old who was burned while playing with a gasoline pump on the defendant's property.[160] The court denied recovery based upon the prior *Harvey* and *Hannon* decisions, stating that the "infancy of the child is not a factor, under the decisions of [the Supreme Court of Ohio], in conferring upon the child any greater rights than those of a trespasser."[161] Although it followed the rule established by *Harvey* and *Hannon*, the *Signs* court implied that it was not entirely comfortable with *Harvey* and its progeny. The court noted, however, that it was not within the

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152. In Ziehm v. Vale, 98 Ohio St. 306, 120 N.E. 702 (1918) (Wanamaker, J., concurring) decided eleven years after *Harvey*, Justice Wanamaker, in a harsh concurrence stated:

> I desire here and now to register my protest against the judgment of [*Railroad Co. v. Harvey*]. It was an astonisher to the profession and the public at the time it was rendered, in 1907, and indicates the high-water mark of the supreme court of that time in its effort to magnify property right and minimize personal right—the right to life, limb, health and safety—especially when applied to a child four and a half years of age.
>
> The [*Harvey*] opinion notes more than a hundred cases pro and con, and reviews many of them touching the subject-matter of that case. . . .
>
> The [S]upreme [C]ourt of the United States in *Sioux City & Pac. Rd. Co. v. Stout*, [citation omitted] laid down the doctrine that entitled Harvey to a verdict in that case.
>
> The opinion in the *Harvey* [case] laments the fact that "[T]he multitude of circumstances under which the owner of property would be liable for injuries to children, and the very serious burden that was, in consequence, being placed upon the owners of property, were very probably not foreseen in the [*Stout*] case."
>
> Throughout the [*Harvey*] opinion much consideration is given to the conservation of property, but substantially no regard to the conservation of child life, limb and safety. Many cases no doubt sustain the *Harvey* [case], but an equal number of cases may be found in the books sustaining witchcraft, slavery, and other inhumanities and infamies, in the light of present-day civilization and jurisprudence.

Id. at 314–15, 120 N.E. at 704.

153. *See supra* note 146 and accompanying text.

154. 102 Ohio St. 176, 131 N.E. 504 (1921).

155. *Id.* at 184, 131 N.E. at 507.

156. *Id.* at 177, 131 N.E. at 505.

157. *Id.* at 185–86, 131 N.E. at 507.

158. *Id.* at 187, 131 N.E. at 508.

159. 161 Ohio St. 241, 118 N.E.2d 411 (1954).

160. *Id.* at 242, 118 N.E.2d at 411.

161. *Id.* at 243, 118 N.E.2d at 412.

court's province to create any special duty: "Although the law, as long established in this state by [*Harvey* and *Hannon*], may seem to be harsh, there has been no *legislative* change therein."[162] Why the court preferred to let the legislature change the law is not entirely clear. Simply altering a judicially created law is well within the province of the very courts which created those laws.[163]

Although the Supreme Court of Ohio has consistently refused to apply the attractive nuisance doctrine in Ohio,[164] there are certain situations in which the court has held that a greater degree of care is owed to trespassing children.[165] In regard to liability for injuries to children, the view has been taken that there is a material difference between trespassing upon private premises and using private property left unguarded or unlocked in a public place.[166] The rationale given for this distinction is that "while the presence of children on private property cannot always be reasonably anticipated, their presence upon public streets and alleys is to be invariably expected. . . ."[167]

Dean Prosser stated that the public-private distinction is based on the naive ground that the child injured while climbing on a chattel left in the street is then "where he has a right to be." In fact, however, the child "has no more right to be upon the truck, the power line pole, or the lumber pile than upon [one's] land."[168] Prosser concluded by characterizing the public-private distinction as a "half-hearted acceptance of the [attractive nuisance] principle, which may in time lead to full recognition."[169] From Prosser's astute observation it is clear that there is no material difference between a dangerous private and a dangerous public condition. Applying a special duty in one situation and not in the other is unjustifiable. The duty afforded in cases of injury on public land caused by private chattels should likewise extend to those situations covered by the Restatement Rule on private land.[170]

Another exception to the general rule established in Ohio by *Harvey* and *Hannon* is that "[o]ne who keeps or uses explosives owes a duty to young children, who may have access to or come in contact with them and who cannot be expected to know and appreciate the danger incident thereto, to exercise care commensurate with the danger in order to avoid injury to such children."[171] The Restatement position on artificial

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162. *Id.* (emphasis added).

163. The classic denunciation of the attractive nuisance doctrine had been voiced in Ryan v. Tower, 128 Mich. 463, 87 N.W. 644 (1901), a case heavily relied on by the Supreme Court of Ohio in *Harvey*. Nonetheless, the Supreme Court of Michigan, later seeing the Restatement Rule's merits, adopted the Rule as the law in that state. *See* Lyshak v. City of Detroit, 351 Mich. 230, 249, 88 N.W.2d 596, 606 (1958).

164. *See supra* note 133 and accompanying text.

165. *See infra* notes 166 & 171 and accompanying text.

166. Klingensmith v. Scioto Valley Traction Co., 18 Ohio App. 290 (1924).

167. Collins v. Sutter, 18 Ohio L. Abs. 27, 29 (Ohio Ct. App. 1934).

168. W. PROSSER & W. KEETON, *supra* note 1, § 59.

169. *Id.*

170. This conclusion was also reached by Dean Prosser in his article concerning trespassing children. Prosser, *supra* note 38.

171. Vaughan v. Industrial Silica Corp., 140 Ohio St. 17, 17, 42 N.E.2d 156, 156 (1942); *see* Harriman v. Pittsburgh, C. & St. L. Ry. Co. v. Shields, 47 Ohio St. 387, 24 N.E. 658 (1890); *see also DiGildo v. Caponi*, 18 Ohio St. 2d 125, 247 N.E.2d 732 (1969), in which the Supreme Court of Ohio stated that "[t]he amount of care required to discharge a duty owing to a child of tender years exposed to danger is necessarily greater than that required to discharge a duty to an adult exposed to the same danger." *Id.* at syllabus, para. 1. The *DiGildo* decision cannot be said to have created a special duty towards child trespassers, as it only dealt with a child social guest. Nonetheless, it is a clear indication of the

conditions that are highly dangerous to trespassing children,[172] although clearly not limited to explosives, is basically the same. Why the court has chosen to single out explosives as opposed to all highly dangerous instrumentalities is not clear and indeed is not justifiable. Adopting the Restatement Rule would simply and logically extend the explosives rationale to all dangerous conditions which are sufficiently dangerous to meet the second of the Rule's requirements. Additionally, the Rule would take into account the value of maintaining such a condition.

As a practical matter, Ohio attorneys faced with the case of the injured child under circumstances that would be encompassed by the Restatement Rule, have had to base their case on a violation of the duty of care to any trespasser. Thus, attorneys have tried often to characterize a particular condition as a trap or a hidden danger.[173] The obvious problem with this approach is that it is only in extreme cases that the facts will warrant a finding that the owner or occupant intended to injure the child, or that he expected a trespass and set a trap for the trespasser.[174]

VI. THE SECOND RESTATEMENT SECTION 339 IN OHIO

The Ohio courts' uncritical reliance on the rule of law espoused in *Harvey* and *Hannon*[175] has had an important ramification—the courts have never evaluated the modern attractive nuisance doctrine as it has been set forth in the Restatement Rule[176] and widely adopted by other jurisdictions.[177] In fact, no reported decision of the Supreme Court of Ohio or the Ohio Courts of Appeals has ever made any mention of

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Supreme Court of Ohio's recognition of the societal value of protecting children from dangerous conditions of which those children may be unaware, at least under certain circumstances.

172. RESTATEMENT (SECOND) OF TORTS § 339 (1965).

173. *See, e.g.*, Brockmeyer v. Deuer, No. 81AP-537, at 3727 (Franklin Cty., Ohio Ct. App. Nov. 19, 1981); In *Brockmeyer*, the plaintiffs filed a wrongful death action against defendants to recover damages for the death of their eight year old son who drowned in an unused swimming pool located on defendants' property. The child, at the very most, was a licensee at the time of his death.

Both parties agreed that the attractive nuisance doctrine did not apply in Ohio. The plaintiffs, however, alleged in their complaint that "said pool being unfenced, half-filled and slime covered, in effect, amounted to a trap, defendant having knowledge, or being charged with knowledge that said property was frequented by adults and children." *Id.* at 3727–28.

The court sustained the trial court's grant of summary judgment in favor of defendants. It held that "[t]he condition of the swimming pool and its potential perils were open and obvious and, as a matter of law, [fell] short of being hidden perils or traps." *Id.* at 3729.

Further language in that opinion is especially indicative of the Ohio courts' continued reliance on *Harvey* and its progeny, and particularly, of the courts' reluctance to award damages based on any theory of attractive nuisance.

"Such dangerous conditions as open excavations, . . . railroad turntables, . . . open elevator shafts . . . abandoned automobiles with gasoline in their fuel tanks . . . and unguarded and unmarked holes . . . all have been held as a matter of law to fall short of being hidden perils or traps." *Id.* at 3729–30 [citations omitted]. *Cf. Euclid—105th St. Properties Co. v. Beckman*, 36 Ohio L. Abs. 164, 42 N.E.2d 789 (Cuyahoga Cty. Ct. App. 1931) (skylight in a roof which had been covered up with tar paper and gravel so as to look like the rest of the roof, held to have been a trap or hidden danger and caused the property owner who had created or tolerated the situation to become liable to the licensee who had been injured as the result of the situation).

174. *See* Cox v. Alabama Water Co., 216 Ala. 35, 112 So. 352 (1927); *see also* United Zinc & Chem. Co. v. Britt, 258 U.S. 268 (1921).

175. *See supra* note 133 and accompanying text.

176. RESTATEMENT (SECOND) OF TORTS § 339 (1965).

177. *See supra* note 46.

section 339 of the Second Restatement of Torts.[178] Whether the courts are unaware of the existence of section 339 or whether they simply are rejecting it as inconsistent with *Harvey* and *Hannon* remains a mystery.

Harvey and its early progeny[179] were clearly based on the "allurement" or "implied invitation" theory of the attractive nuisance doctrine; the Restatement Rule has rejected these theories.[180] The Ohio courts have failed to distinguish the new rule from the old, and one can only infer that the courts in Ohio have equated the Restatement Rule with the doctrine that was rejected in *Harvey*. The Supreme Court of Ohio needs to reassess its earlier position and should adopt the Restatement Rule as the law in Ohio.

VII. CONCLUSION

Much has evolved in the area of tort law since 1907, including the abandonment of the "allurement" or "implied invitation" theory of the attractive nuisance doctrine.[181] In its place, the version espoused by the Restatement Rule has been adopted by the vast majority of jurisdictions.[182] Society also has become more complex and threatening to children. Likewise, children often are less supervised today as increasing numbers of households have two parents who work outside the home. Thus, modern society requires that everyone exercise greater care for the protection of children who might not realize the dangers they may encounter.

Ohio should adopt the Restatement Rule of the attractive nuisance doctrine. As the Supreme Court of Rhode Island aptly stated when that court recently adopted the Restatement Rule:[183]

> There must and should be an accommodation between the landowner's right to use of his land and society's interest in the protection of the life and limb of its young. When these respective social-economic interests are placed on the scale, the public's concern for a

178. Stevens v. Ohio Fuel Gas Co., 26 Ohio Op. 2d 345, 193 N.E.2d 317 (C.P. Pickaway Cty. 1960) is the only reported decision in Ohio that has mentioned the Restatement of Torts section 339 or the Second Restatement of Torts section 339. *Stevens* was a wrongful death action where plaintiff's decedent was an infant who died when he fell from a pipeline maintained by the defendant on a public bridge. Thus, the *Stevens* case fit into the "private condition on public roads" exception to the general rule of no special duty to trespassing children because the injury occurred on a public bridge. In dicta, the Pickaway County Court of Common Pleas did quote in its entirety the Second Restatement section 339. However, the court relied on existing precedent to reach its holding.

179. Hannon v. Ehrlich, 102 Ohio St. 176, 131 N.E. 504 (1921).

180. *See supra* text accompanying notes 16–34.

181. *See supra* note 16.

182. *See supra* note 46.

183. Rhode Island had been a jurisdiction that, along with Ohio, had long rejected the attractive nuisance doctrine in any form. Rhode Island subsequently adopted the Restatement Rule in 1971. *See* Haddad v. First Nat'l Stores, Inc., 109 R.I. 59, 280 A.2d 93 (1971).

> youth's safety far outweighs the owner's desire to utilize his land as he sees fit. . . . The Restatement [R]ule is a reasonable compromise between the conflicting interests.[184]

In light of the foregoing analysis and the desire of the Supreme Court of Ohio to be in the forefront of modern tort law, the court should reevaluate the basis for its failure to take affirmative steps in this area of the law. Adoption of the Restatement Rule would be a long-awaited step in the right direction.

David A. Gurwin

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184. *Id.* at 64, 280 A.2d at 96 (citing Strang v. South Jersey Broadcasting Co., 9 N.J. 38, 45, 86 A.2d 777, 780 (1951)).