EXTENSION OF ATTRACTIVE NUISANCE DOCTRINE TO REASONABLY FORESEEABLE DANGEROUS CONDITIONS

Menneti v. Evans Construction Co.,
259 F.2d 367 (3d Cir. 1958)

A seven year old boy was drowned in a rain filled ditch while trespassing on the defendant's land. The ditch, located in a low spot, had been excavated for the defendant five days prior to the fatal accident and was in the process of being refilled when heavy rains halted the project. Without the knowledge of the defendant or its employees, the ditch filled with water less than thirty hours before the drowning. Defendant was held liable under the theory set forth in the *Restatement of Torts*[1] for maintaining a ditch which it should have foreseen would fill with rain water as it ran off from higher surrounding land.

The early common law treated a trespassing child as if he were an adult, allowing recovery only when the landowner would be liable to an adult trespasser.[2] The first recognition of any liability of the possessor of the land came in 1873 when the United States Supreme Court held a railroad liable for the injury which a six year old child sustained while playing on an unguarded turntable left unlocked on the railroad's land.[3] The name "attractive nuisance" came from another turntable case in which the court drew an analogy of children being attracted to the turntable as a piece of stinking meat draws a dog.[4]

The *Restatement* devoted a section[5] to this development in the common law in an effort to bring some uniformity into the many

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[1] RESTATEMENT, TORTS § 339 (1934). "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."

[2] HARPER & JAMES, TORTS: § 27.5, at 1447 (1956); PROSSER, TORTS § 76, at 438 (2d ed. 1955); Green, *Landowner v. Intruder; Intruder v. Landowner,* 21 MICH. L. REV. 495 (1923); James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers,* 63 YALE L.J. 144 (1953).

[3] Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657 (1873).

[4] Keffe v. Milwaukee & St. P. Ry., 21 Minn. 207 (1875).

[5] *Supra* note 1.

conflicts among, and at times within, the states.[6] The *Restatement* theory of liability has received general acceptance throughout the country[7] and has been adopted by eight states in cases concerning the drowning of child trespassers.[8] Pennsylvania, the jurisdiction wherein this case arose, has adopted the *Restatement* theory as its law pertaining to the liability of possessors of land for injury to child trespassers.[9]

While the decisions have been extending liability to new situations, the courts have consistently required that the possessor of the land *maintain* the *condition* which caused the death or injury before liability will be imposed.[10] Consequently, the decisive issues become first, whether or not the possessor can be said to have *maintained* the condition, and second, whether or not the possessor can be said to have had sufficient *knowledge* that the *condition* was *dangerous.*

As to the first issue, possessors of land have been held to have maintained a condition even when it was created by another trespasser if the possessor, with knowledge of such acts, acquiesces in them.[11] The Federal District Court's definition of "maintain" in the noted case[12] seemingly states the existing law as to whether or not the possessor can be said to have maintained the condition.[13]

It is on the second issue, "knowledge," that the Court of Appeals extends the possessor's liability.[14] In 1952 the Pennsylvania Supreme Court refused to allow recovery when the possessor had no actual knowledge of the dangerous condition, stating that without such

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[6] For an excellent discussion of the effect of the RESTATEMENT on the "attractive nuisance" doctrine see, James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers,* 63 YALE L.J. 144, 164 (1953).

[7] PROSSER, TORTS § 76, at 440 (2d ed. 1955).

[8] Annot., 8 A.L.R.2d 1254 (1949). Those states are California, Minnesota, Oregon, Pennsylvania, South Dakota, Texas, and Wisconsin.

[9] Dugan v. Pennsylvania R.R., 387 Pa. 25, 127 A.2d 343 (1956); Thompson v. Reading Co., 343 Pa. 585, 23 A.2d 729 (1942); Eldredge, *Tort Liability to Trespassers,* 12 TEMP. L.Q. 32 (1937).

[10] Cooper v. City of Reading, 392 Pa. 452, 140 A.2d 792 (1958); Bartelson v. Glen Alden Coal Co., 361 Pa. 519, 64 A.2d 846 (1949); Weimer v. Westmoreland Water Co., 127 Pa. Super. 201, 193 Atl. 665 (1937).

[11] Simmel v. New Jersey Coop. Co., 28 N.J. 1, 143 A.2d 521 (1958); Lorusso v. DeCarlo, 48 N.J. Super. 112, 136 A.2d 900 (1957).

[12] 160 F. Supp. 372, 378 (E.D. Penn. 1958). "As employed in § 339 . . . 'maintain' must be construed to mean an intentional retention of an artificial condition . . . after the possessor had actual knowledge or constructive knowledge of its existence. Absent any expression of such intent by the possessor, there must at least be evidence of acts or conduct of the possessor from which such an intent may be inferred. If the only conduct relied on to support such an inference is the possessor's inaction, then such inaction must continue for a sufficient period of time after the possessor acquired actual or constructive knowledge of the existence of the artificial condition to permit that inference reasonably to be drawn."

[13] O'Connell v. Kansas City, 208 Mo. App. 174, 231 S.W. 1040 (1921); Morris v. American Liability & Surety Co., 322 Pa. 91, 185 Atl. 201 (1936).

[14] *Supra* notes 2, 10, 11, 12; 2 HARPER & JAMES, TORTS § 27.5 (1956).

knowledge he could not have maintained the condition.[15] However, the decision in *Menneti* apparently holds the possessor of the land liable when he maintains a condition on the land which a reasonably prudent man under like circumstances should foresee *may* become an unreasonable risk to trespassing children at some future time. Thus, although the water actually caused the death of the child, the ditch, so situated that reasonable men could have foreseen that it would fill with water, constituted the dangerous condition for the maintainance of which the defendant was held liable.

This extension is in accord with the exact wording employed in the *Restatement.* Section 339, clause (b), uses "should know" as the test for whether or not the possessor has knowledge that the condition being maintained is dangerous. Sections 12 and 334 of the *Restatement* discuss the meaning of "should know" as used therein and impose a duty of inspection on the possessor of the land to discover any changes in the condition.[16]

While the court does not cite any authority for this extension and a diligent search has failed to disclose any precedent in the United States, it is a logical continuation of the adoption of the established law of negligence into the area of attractive nuisance; in this case, foreseeability.

Despite the fact that practically every American jurisdiction imposes some duty on the possessor of land to keep his land reasonably safe for trespassing children,[17] Ohio courts have steadfastly refused to recognize any phase of the attractive nuisance doctrine. In the latest case urging the Ohio Supreme Court to overrule its prior decisions and adopt the attractive nuisance doctrine the Court said, ". . . the infancy of a child is not a factor . . . in conferring upon the child any greater rights than those of a trespasser."[18] Ohio does, however, distinguish between "statical" and "active" operations, placing some burden of care on the possessor to watch for trespassing children when an active operation is being employed upon the land.[19] Also, the owner of a dangerous instrumentality loses his immunity from liability when a trespassing child is injured on such an instrumentality left unguarded

[15] Rush v. Plains Township, 371 Pa. 117, 89 A.2d 200 (1952).

[16] RESTATEMENT, TORTS §§ 12(2), 334(b) (1934).

[17] PROSSER, TORTS § 76, at 438-9 (2d ed. 1955).

[18] Signs v. Signs, 161 Ohio St. 241, 243, 118 N.E.2d 411, 412 (1954).

[19] Hannan v. Ehrlich, 102 Ohio St. 176, 131 N.E. 504 (1921) (Recognized the distinction in a dictum). Examples of "statical" conditions are *turntables,* Wheeling & L. E. R.R. v. Harvey, 77 Ohio St. 235, 83 N.E. 66 (1907); and *reservoirs,* Swarts v. Akron Water Works Co., 77 Ohio St. 235, 83 N.E. 66 (1907) (Companion case to Harvey). For an example of an "active" operation see, Ziehm v. Vale, 98 Ohio St. 306, 120 N.E. 702 (1918) (Operating an automobile); also see, Case v. Miami Chevrolet Co., 38 Ohio App. 41, 175 N.E. 224 (1930) (obiter dictum). For a more detailed review of the Ohio law in this area see, 29 OHIO JUR. *Negligence* §§ 55-9 (1933).

and unlocked in a public place.[20] An 1887 case seemingly applied the doctrine,[21] but it was subsequently distinguished as being based upon the children being licensees rather than trespassers.[22] Thus, only in these limited circumstances will Ohio allow recovery by a trespassing child. Perhaps the Ohio Supreme Court should re-examine its original basis for repudiating the attractive nuisance doctrine, especially in view of the acceptance of the doctrine by a vast majority of American jurisdictions which apparently have decided that the protection of children is of sufficient significance to override the desire for the unqualified use of one's land. Certainly the Ohio Supreme Court has not felt constrained in other instances to adhere to precedent when it appeared that the basis for such precedent could no longer sustain it.[23]

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[20] The owner of a high voltage tower located on a playground was held liable for the injury to a child who climbed to the top. Klingensmith v. Scioto Valley Traction Co., 18 Ohio App. 290 (1924).

[21] Harriman v. Pittsburgh, C. & St. L. R.R., 45 Ohio St. 11, 12 N.E. 451 (1887).

[22] Wheeling & L. E. R.R. v. Harvey, 77 Ohio St. 235, 83 N.E. 66 (1907).

[23] Avellone v. St. John's Hospital, 165 Ohio St. 467, 135 N.E.2d 410 (1956) (overruled exemption from liability for negligence of charitable hospitals); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949) (cause of action for injury in the womb to a viable foetus).