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Torts - Doctrine of Attractive Nuisance - Damages Recoverable by Trespassing Child in Absence of Entrapment or Allurement. *Taylor v. Alaska Rivers Nav. Corp.*, 391 P.2d 15 (Alaska 1964)

Gus James II

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passing of our federal system,¹⁹ yet for others it represents another step implementing the true intent of the Fourteenth Amendment.²⁰

Alan MacDonald

Torts—DOCTRINE OF ATTRACTIVE NUISANCE—DAMAGES RECOVERABLE BY TRESPASSING CHILD IN ABSENCE OF ENTICEMENT OR ALLUREMENT.—On April 8, 1964 the Supreme Court of Alaska¹ reversed a superior court decision and held that the element of enticement or allurement need not exist before there can be liability to a child trespasser under the Doctrine of Attractive Nuisance.²

Five-year-old Gerald Vaska boarded the defendant's barge by way of a plank which extended to shore and was killed on deck when a heavy wooden cargo pallet fell on him. His administrator brought suit to recover damages for the death of the child. The case was tried by the Superior Court of the Fourth Judicial District and at the end of the plaintiff's case, the defendant moved for dismissal. The motion was granted on the ground that under the evidence and the law, the child's death was not a result of any negligence on the part of the defendant. The court further stated that the Attractive Nuisance Doctrine would not be applicable in this case because there was nothing about the barge and the cargo pallet that was particularly attractive or inherently dangerous to young children.

The Doctrine of Attractive Nuisance, as originally formulated, was in a state of confusion. The Supreme Court of the United States, in a much criticized opinion by Mr. Justice Holmes,³ held that an occupier or possessor of land was liable for conditions which were highly dangerous to a trespassing child, only where there was something about the land or some object on it that enticed or allured the child into exposing himself to the dangerous condition.⁴

19. *Supra*, note 2, a dissent by Justice Harlan, joined by Justice Clark.

20. *Adamson v. California*, 332 U.S. 46, 68 (1946).

1. *Taylor v. Alaska Rivers Nav. Corp.*, 391 P.2d 15 (Alaska 1964).

2. The Doctrine of Attractive Nuisance was developed by courts making the occupier or possessor of land liable for conditions which are highly dangerous to trespassing children. It was considered that because of a child's immaturity and lack of judgment, he was incapable of understanding and appreciating all of the possible dangers which he may encounter in trespassing.

3. *United Zinc and Chemical Co. v. Butt*, 258 U.S. 268, 275 (1921). "A child was not allowed to recover when he was not induced to trespass by the presence of a pool of poisoned water that killed him, but discovered it after he had come upon the land."

4. *Keefe v. Milwaukee and St. Paul R.R.*, 21 Minn., 207, 18 Am. Rep. 393 (1875);

Years later, however, this decision was overruled by the Supreme Court of the United States in *Best v. District of Columbia*.⁵ The great majority of courts now agree with the *Best* case, that the element of enticement or allurement need not exist before there can be liability. The element is significant only in so far as it bears upon the likelihood that a child would place himself in a position where injury would be likely to occur.⁶

The Supreme Court of Alaska adopted the latter view and the rule formulated in 1934 in section 339 of the Restatement of Torts⁷ with the revisions recommended by Dean Prosser which states certain requirements for the application of the Attractive Nuisance Principle.⁸ Applying these rules to the evidence presented by the plaintiff, the court stated that a prima facie case of liability was shown and that the trial judge erred in dismissing the action before he had heard both sides of the case.⁹

While some jurisdictions still adhere to the old rule,¹⁰ the great majority of the courts now agree that enticement or allurement is

Daniels v. New York and N.E.R. Co., 154 Mass. 349, 28 N.E. 283 (1891); PROSSER, TORTS § 76 (1955).

5. *Best v. District of Columbia*, 291 U.S. 411, 419 (1934) "The visible attraction need not be the immediate cause of the injury."

6. *Verriclia v. Society Dis M. and S. Del Lazio*, 366 pa. 629, 79 A.2d 237 (1951); *Moore v. North Chicago Refiners and Smelters*, 346 Ill. App. 530, 105 N.E.2d 553 (1952); *Lone Star Gas Co. v. Parsons*, 159 Okl. 52, 14 P.2d 369 (1932); *Banker v. McLaughlin* 146 Tex. 434, 208 S.W.2d 843 (1948).

7. RESTATEMENT, TORTS § 339 (1934). "A possessor of land or chattel is subject to liability for physical harm to children trespassing thereon, caused by a condition of the land or chattel 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 conditions or realize the risk involved in intermeddling in it or coming within the area made dangerous by it, and

"(d) the ability of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

"(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children."

8. Prosser, *Trespassing Children*, 47 CAL. L. REV. 427 (1959).

9. *Trusty v. Jones*, 369 P.2d 420 (Alaska 1962); *Pogge v. Weaver*, 368 P.2d 810 (Alaska 1962).

10. States which follow the old rule are: Colorado, Indiana, Louisiana, Mississippi, Missouri, South Carolina, Tennessee. PROSSER AND SMITH, TORTS 491 (3rd Ed. 1962).

not essential in finding liability.¹¹ It appears that the reasoning behind the majority is to curtail to the same reasonable extent the defendant's privilege to act as he sees fit without care for the protection of others.¹²

Gus James II

TORTS—DAMAGES—NEGLIGENT INJURY TO HUSBAND DOES NOT GIVE WIFE ACTION FOR LOSS OF CONSORTIUM.—In *Rush v. Great American Ins. Co.*¹ the plaintiff sued to recover damages for loss of consortium resulting from injuries negligently inflicted upon her husband by the defendant. The defendant demurred, alleging that no such action could be maintained by the wife under common law and that there was no state statute permitting such an action. The trial court sustained the demurrer and dismissed the case. Affirming, the Supreme Court of Tennessee ruled that the common law was, and continues to be, in full force and effect,² except, of course, where expressly changed by statute.³ In its strict adherence to a common law rule which was originally based upon the inequality of the sexes, this decision stands in direct opposition to modern social pressures which demand complete legal equality for the married woman. It is obviously of great importance to understand why, in the face of desirable reform, this court has decided to support that ancient common law principle.

Although there is no universally accepted definition of the word "consortium,"⁴ it generally refers to "conjugal fellowship; and the term embraces love, companionship, affection, society, comfort, sexual

11. With the exception of Virginia, West Virginia, PROSSER AND SMITH, *TORTS* 492 (3rd Ed. 1962) and New York, Weisbein, *The Attractive Nuisance Doctrine and Its Status in New York*, 8 N.Y.U. INTRAMURAL L. REV. 224 (1953), who purport to reject the whole theory of attractive nuisance and find liability under certain exceptions, the remaining states follow the *Best* case, *supra*, note 5, and the RESTATEMENT, *TORTS*, § 339 (1934) and hold that enticement and allurement are not necessary before liability.

12. Wilson, *Limitations on the Attractive Nuisance Doctrine*, 1 N.C.L. REV. 162 (1923); James, *Tort Liability of Occupiers of Land*, 63 YALE L.J. 144 (1953).

1. 376 S.W.2d 454 (Tenn. 1964).

2. *Accord*, *Cogburn v. State*, 198 Tenn. 431, 281 S.W.2d 38 (1955).

3. TENN. CONST. ART. XI, § 1; *accord*, *Henley v. State*, 98 Tenn. 665, 41 S.W. 352, 39 L.R.A. 126 (1897).

4. *E.g.*, *Igneri v. Cie de Transports Oceaniques*, 323 F.2d 257, 260 (2d Cir. 1963); *Hitaffer v. Argonne Co.*, 183 F.2d 811, 23 A.L.R. 1366 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852, (1950); *Acuff v. Schmit*, 248 Iowa 272, 78 N.W.2d 480, 481 (1956); *Roseberry v. Starkovich*, 387 P.2d 321, 322 (N.M. 1963); *Hinnant v. Tide Water Power Co.*, 187 N.C. 120, 126 S.E. 307, 37 A.L.R. 889 (1929). See generally BLACK, *LAW DICTIONARY* 382 (4th ed. 1957).