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NEGLIGENCE - ATTRACTIVE NUISANCE DOCTRINE - LIABILITY TO INFANT TRESPASSERS

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NEGLIGENCE — ATTRACTIVE NUISANCE DOCTRINE — LIABILITY TO INFANT TRESPASSERS — A thirteen-year-old boy was killed while standing under a defective hoist in defendant's ice plant. There was evidence that for three or four years children had been accustomed to frequent the plant and play there without apparent objection from the defendant. *Held*, the defendant was liable for breach of a duty to use due care in mainaining a dangerous hoist accessible to children who were so frequently present in the plant as to imply a tacit assent to their presence. *Weimer v. Westmoreland Water Co.*, 127 Pa. Super. 201, 193 A. 665 (1937).

A five-year-old boy was buried under a pile of refuse from a coal mine dumped from an overhead cable car while he and several companions were playing on the dump. There was evidence that miners and their families were accustomed to walk across an adjoining field but little or no evidence that any one was accustomed to venture onto the dump. *Held*, insufficient evidence to show such use of that portion of the premises where the accident occurred as to impose on the defendant a duty to use due care. *Maksimshuk v. Union Collieries Co.*, 128 Pa. Super. 86, 193 A. 669 (1937).

A two-year-and-ten months old infant was crushed by timber falling from a lumber pile on defendant's land. The defendant had been engaged in constructing a house on his lot which adjoined the plaintiff's premises and the lumber had been piled there for some two months. There was evidence that the deceased and his young sister had been accustomed to play on defendant's property and that defendant had told plaintiff that he would "keep an eye" on them. *Held*, the defendant was liable for maintaining on a portion of his land, on which he knew, or should have known that children were likely to trespass, a condition likely to be dangerous to them. *Wolfe v. Rehbein*, 123 Conn. 110, 193 A. 608 (1937).

Although under ordinary conditions trespassing children occupy the same position as trespassing adults [1] and the tender age of a child does not raise a duty where none otherwise exists,[2] the development of the "attractive nuisance" doctrine has considerably broadened the duty of the landowner to trespassing children.[3] The principal cases are illustrative of the liberal protection given to infant trespassers in two jurisdictions which have refused to apply the "attractive nuisance" doctrine.[4] Paralleling the modern tendency to require land-

[1] This is true in jurisdictions which adopt, as well as in those which reject, the "attractive nuisance" doctrine. United Zinc & Chemical Co. v. Britt, 258 U. S. 268, 42 S. Ct. 299 (1922); Pastorello v. Stone, 89 Conn. 286, 93 A. 529 (1915); Fitzpatrick v. Penfield, 267 Pa. 564, 109 A. 653 (1920).

[2] Nolan v. N. Y., N. H. & H. R. R., 53 Conn. 461, 4 A. 106 (1885); United Zinc & Chemical Co. v. Britt, 258 U. S. 268, 42 S. Ct. 299 (1922).

[3] Exhaustive note in 36 A. L. R. 34 (1925), supplemented in 39 A. L. R. 486 (1925); 45 A. L. R. 982 (1926); 53 A. L. R. 1344 (1928); 60 A. L. R. 1444 (1929).

[4] Wilmot v. McPadden, 79 Conn. 367, 65 A. 157 (1906); Pastorello v. Stone, 89 Conn. 286, 93 A. 529 (1915); Thompson v. B. & O. R. R., 218 Pa. 444, 67 A. 768 (1907). It was thought at one time that Hydraulic Works Co. v. Orr, 83 Pa. 332 (1877), was authority for the doctrine in Pennsylvania, but it has been explained on other grounds and is taken as authority only for its own facts. Schilling v. Aber-

owners to consider the safety of tolerated intruders,[5] the Pennsylvania courts place on the landowner who permits his premises to be used as a playground the duty of using reasonable care to keep the premises safe and to avoid injury to children by active operations conducted thereon.[6] Pennsylvania landowners are held to owe a similar duty to children injured while on a particular portion of premises over which the public has been accustomed to travel without objection from the owner.[7] This latter theory was the basis on which the *Maksimshuk* case was argued and decided. The *Weimer* case is typical of a number of Pennsylvania cases in which the facts do not fit either of the above-mentioned theories and in which the actual basis of the decision is uncertain.[8] The tendency in such cases is to go back to the broad premise on which both the "playground rule" and the "permissive user" doctrine have been established.[9]

nethy, 112 Pa. 437, 7 A. 792 (1886); Gillespie v. McGowan, 100 Pa. 144 (1882).

When Justice Baldridge in the Weimer case said (193 A. at 666): "The so-called playground or attractive nuisance doctrine has been firmly established in our jurisprudence," he was referring to the case of Hogan v. Etna Concrete Block Co., 325 Pa. 49, 188 A. 763 (1936), wherein the decision rested on the playground theory and a misapplication was made of the rule spoken of in Reichvalder v. Borough of Taylor, 322 Pa. 72, 185 A. 270 (1936). There the doctrine that a third person who places a machine attractive to children on the property of another, in a place where children are accustomed to play, must act with due care was called the "attractive nuisance" doctrine. This, however, was not a case in which it was applied to a landowner.

[5] BOHLEN, STUDIES IN THE LAW OF TORTS 179 (1926).

[6] Millum v. Lehigh & W. B. Coal Co., 225 Pa. 214, 73 A. 1106 (1909); Henderson v. Continental Ref. Co., 219 Pa. 384, 68 A. 968 (1908); Counizzarri v. Phila. & Reading R. R., 248 Pa. 474, 94 A. 134 (1915); Carr v. So. Penn. Traction Co., 253 Pa. 274, 98 A 554 (1916); Balser v. Young, 72 Pa. Super. 502 (1919). The extent of the use required to bring the facts within the rule varies with each case. In Fitzpatrick v. Penfield, 267 Pa. 564 at 572, 109 A. 653 (1920), the court said: "The amount of use that will bring otherwise private ground within the playground rule must depend to a large extent on the circumstances of each case. It may be said that the use contemplated is such as to cause the place to be generally known in the immediate vicinity as a recreation center, and its occupancy should be shown to be of such frequency as to impress it with the obligation of ordinary care on the part of the owner." See also O'Leary v. Pittsburgh & L. E. R. R., 248 Pa. 4 at 10, 93 A. 771 (1915), where the court said: "those who used the property as a playground with the company's permission cannot be regarded as trespassers."

[7] Counizzarri v. Phila. & Reading R. R., 248 Pa. 474, 94 A. 134 (1915); Kremposky v. Mt. Jessup Coal Co., 266 Pa. 573, 109 A. 766 (1920).

[8] Cosgrave v. Hay, 54 Pa. Super. 175 (1913); Kierkowsky v. Connell, 253 Pa. 566, 98 A. 766 (1916). In the Weimer case the difficulty in applying the playground rule arose from the fact that to date it has never been applied to the interior of buildings. Rahe v. Fidelity-Phila. Trust Co., 318 Pa. 376, 178 A. 467 (1935).

[9] The origin of both of these doctrines can be traced back to the language of Justice Agnew in Kay v. Pennsylvania R. R., 65 Pa. 269 at 273, 3 Am. Rep. 628 (1870). "Duties grow out of circumstances, the authorities tell us, and that which in one case would be an ordinary and proper use of one's rights may, by a change of circumstances, become negligence and a want of due care. . . . If, therefore, an owner of property has become accustomed to allow others a permissive use of it, such as

In Connecticut, cases of recovery by infant trespassers have been less frequent than in Pennsylvania and, while the *Wolfe* case indicates a tendency to allow recovery in some situations, a survey of previous decisions in that jurisdiction would indicate a reluctance to extend the basis of recovery.[10]

tends to produce a confident belief that the use will not be objected to, and therefore to act on the belief accordingly, he must be held to exercise his rights in view of the circumstances so as not to mislead others to their injury without a proper warning of his intention to recall his permission."

[10] Pastorello v. Stone, 89 Conn. 286, 93 A. 529 (1915). Cf. Skladzien v. Sutherland Bldg. & Const. Co., 101 Conn. 340, 125 A. 614 (1924); Spagnolo v. Lanza, 110 Conn. 178, 147 A. 594 (1930); Sklaling v. Sheedy, 101 Conn. 545, 126 A. 721 (1924).