Washington and Lee Law Review

Volume 25 | Issue 1 Article 9

Spring 3-1-1968

Children Trespassing On Chattels In The Public Domain

other common grounds of exclusion. Specific acts are widely rejected due to their collateral and misleading nature.[29] This is the usual basis for excluding them under the aggressor theory.[30] If the courts are to remain consistent, it would seem that this basis of exclusion also should be applied to the state-of-mind theory. The fact that specific acts are being used to show state of mind does not cure their objectionability, as the acts are still collateral and potentially misleading to the jury.

In addition to the possible confusion specific acts may present under the state-of-mind theory, there is a greater danger in allowing them to be shown. This is due to the fact that they are generally admissible under one theory and inadmissible under the other. As a result, the possibility of the misuse of specific acts is compounded. Not only may they be collateral as to the issue of the defendant's state of mind, but also they may be misapplied by the jury to the question of who was the aggressor. This situation presents a problem, frequently encountered in the law of evidence, as to how the evidence will be handled by the court. It is generally accepted that evidence admissible under one theory and inadmissible under another should be admitted with appropriate instructions to the jury.[31] However, the crux of the problem is whether instructions can cure the inherently objectionable nature of the evidence. The obvious solution is to give the trial judge discretion to exclude specific acts when he feels that instructions cannot cure their potential harm.[32] In any event, the use of specific acts under either theory is to be viewed with caution and their application re-examined.

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CHILDREN TRESPASSING ON CHATTELS IN THE PUBLIC DOMAIN

When a child is injured by the personal property of another located in the public domain, determination of the property owner's liability has presented a peculiar problem: the child and the property

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[29]1 J. WIGMORE, EVIDENCE §§ 192, 193 (3d ed. 1940).

[30]Cases cited note 27 *supra*.

[31]Sprinkle v. Davis, 111 F.2d 925 (4th Cir. 1940); Skinner v. State, 36 Ala. App. 434, 60 So. 2d 363 (1952); People v. Burton, 11 Cal. Rptr. 65, 359 P.2d 433 (1961); State v. Jones, 229 N.C. 276, 49 S.E.2d 463 (1948); 1 J. WIGMORE, EVIDENCE § 13 (3d ed. 1940).

[32]*See* Adkins v. Brett, 184 Cal. 252, 193 P. 251, 254 (1920).

owner have an equal right to use the public domain but the child has committed a technical trespass on the personal property. Traditionally, the duty owed by a property owner to a trespasser has been to refrain only from wanton, willful, or reckless conduct.[1] Consequently, in the absence of such conduct, the technical trespass would effectively bar recovery by the child. However, as long ago as 1841 in *Lynch v. Nurdin*,[2] the child was allowed to recover. The court held that the defendant had failed to exercise ordinary care in foreseeing the consequences of leaving a tempting and dangerous instrumentality in the public street. In de-emphasizing the trespass the court said that the misconduct involved in such a trespass "bears no proportion to that of the defendant which produced it."[3]

The recent decision of the Supreme Court of Maine in *Cogswell*

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[1]Holberg v. Collins, Lavery & Co., 80 N.J. 425, 78 A. 166 (1910); Magar v. Hammond, 183 N.Y. 387, 76 N.E. 474 (1960); *see* Nashville, C. & St. L. Ry. v. Priest, 117 Ga. 767, 45 S.E. 35 (1903); O'Brien v. Union Freight R.R., 209 Mass. 449, 95 N.E. 861 (1911); Schiffer v. W.N. Sauer, 238 Pa. 550, 86 A. 479 (1913).

[2]1 Q.B. 30, 133 Eng. Rep. 1041 (1841). This case foreshadowed the American cases which established the turntable or attractive nuisance doctrine, which essentially is an exception to the general trespass rule. It was first applied to children trespassing on railroad turntables. The reasoning behind the doctrine was that the child had been lured onto the land by the instrumentality and the defendant was responsible for the trespass and therefore could not raise it against the child. The doctrine gradually was expanded to cover other dangerous instrumentalities. Support was given to the doctrine in 1934 in the *Restatement of Torts*. The *Restatement* dropped the idea of allurement to trespass and treated the concept as one of ordinary negligence liability. The *Restatement* was revised in 1964 and section 339 now provides:

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
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> (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
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> (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
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> (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
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> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
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> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

RESTATEMENT (SECOND) OF TORTS § 339 (1964). Thus a defendant is to be held liable only for negligence, that is, failure to exercise ordinary care. This section is followed by a great majority of the states and purports to deal solely with children trespassing on private land.

[3]113 Eng. Rep. at 1044.

v. Warren Brothers Road Company[4] involved a five-year old girl who was injured when the rear of a single-axle flatbed trailer came down across her thighs. The trailer was parked on a street in a residential area and left unattended. The defendant had not taken the precautions necessary to prevent the trailer from rotating on its axle. Witnesses had seen children playing on the trailer and had observed them causing it to act as a seesaw.[5] The trial court finding that the plaintiff was a trespasser directed a verdict for the defendant, and the supreme court affirmed. The court refused to apply an ordinary care standard, holding that the only duty owed to the plaintiff was to refrain from wanton, willful, or reckless conduct. Recognizing its earlier refusal to adopt the attractive nuisance doctrine with respect to children trespassing on private land, the court refused to apply the doctrine "to trespassers to personal property in public domain."[6] The court found no distinction between the duty owed to a child injured while trespassing on private land and that owed to a child injured while trespassing on personal property located in the public domain.

The dissent in *Cogswell* criticized the majority's preoccupation with Maine's rejection of the attractive nuisance doctrine, stating that the issues should be resolved by application of ordinary principles of tort law and not on the basis that all trespassing children should be penalized for their indiscretions. The defendant should have anticipated children playing on the seesaw trailer and foreseen the possibility of injury.

A majority of courts which have considered this problem have allowed the injured child to recover.[7] In order to reach this result courts must somehow avoid the wanton-willful-reckless standard of conduct applied when a trespasser is involved, in favor of an ordinary care standard. Where the trespass is on private land the attractive nuisance doctrine has been used to effect the avoidance. When

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[4]229 A.2d 215 (Me. 1967).

[5]There was no eyewitness to the accident, only to the events preceding the accident.

[6]229 A.2d at 219.

[7]*E.g.*, Snare & Triest Co. v. Friedman, 169 F. 1 (3d Cir. 1909); Morse v. Douglas, 107 Cal. 196, 290 P. 465 (Ct. App. 1930); Edwards v. Kansas City, 104 Kan. 684, 180 P. 271 (1919); Westerfield v. Levis, 43 La. Ann. 63, 9 So. 52 (1891); Znidersich v. Minnesota Util. Co., 155 Minn. 293, 193 N.W. 449 (1923); Rotenberger v. Powers Fuel, Feed, Transfer & Storage Co., 148 Minn. 209, 181 N.W. 641 (1921); Boylhart v. Di Marco & Reimann, Inc., 270 N.Y. 217, 200 N.E. 793 (1936); Busse v. Rogers, 120 Wis. 443, 98 N.W. 219 (1904). A few courts, however, have denied recovery to a trespassing child, using reasoning similar to that of the majority in *Cogswell*. Gay v. Essex Elec. St. Ry., 159 Mass. 242, 34 N.E. 258 (1893); Fitzgerald v. Rodgers, 58 App. Div. 298, 68 N.Y.S. 946 (1901).

the trespass is on personal property situated in the public domain, the majority of courts reach the same result, but their rationale is far from uniform. Thus, in order to avoid the lesser duty owed to trespassers, a number of courts, which recognize the attractive nuisance doctrine, have applied the same or a similar doctrine to children in the public domain.[8] Other courts, as the court in *Lynch,* have reached this result by merely emphasizing the duty of ordinary care owed to children in the public domain, thus avoiding the problems presented by attractive nuisance concepts.[9]

Of the courts which apply attractive nuisance or a similar doctrine, many apply it to both the public and private land situations.[10] Some of these apply it equally to both,[11] while others imply that it is more applicable in the public land situation.[12] The latter courts recognize the propensity of children to play in the street and point out that there are many objects which would be attractive and dangerous to children when situated on a highway but would be looked upon as entirely innocuous if located on private land.[13] Using this rationale courts have employed attractive nuisance concepts to arrive at an ordinary care standard. In *Kelly v. Southern Wisconsin Railway Company*[14] a child was injured while playing with a pulley which was lawfully in the street. The court said that neither the fact that the child was using the street as a playground nor the fact that the

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[8]*E.g.,* Snare & Triest Co. v. Friedman, 169 F. 1 (3d Cir. 1909); Morse v. Douglas, 107 Cal. 196, 290 P. 465 (Ct. App. 1930); Znidersich v. Minnesota Util. Co., 155 Minn. 293, 193 N.W. 449 (1923).

[9]*E.g.,* Edwards v. Kansas City, 104 Kan. 684, 180 P. 271 (1919); Rotenberger v. Powers Fuel, Feed, Transfer & Storage Co., 148 Minn. 209, 181 N.W. 641 (1921); Busse v. Rogers, 120 Wis. 443, 98 N.W. 219 (1904).

[10]*E.g.,* Cahill v. E.B.&A.L. Stone Co., 153 Cal. 571, 96 P. 84 (1908); Brownell v. Village of Antioch, 215 Ill. App. 404 (1919); Shapiro v. City of Chicago, 308 Ill. App. 613, 32 N.E.2d 338 (1941); Znidersich v. Minnesota Util. Co., 155 Minn. 293, 193 N.W. 449 (1923); Rognow v. City of Zanesville, 24 Ohio App. 536, 157 N.E. 299 (1926); Kelly v. Southern Wis. Ry., 152 Wis. 328, 140 N.W. 60 (1913). Courts often do not state specifically that they are applying the attractive nuisance doctrine but base their decisions on the principles embodied in the doctrine. *See* Hurd v. Phoenix Co., 7 Boyce 332, 106 A. 286 (Del. 1918); Jackson v. Texas Co., 143 La. 21, 78 So. 137 (1918); Westerfield v. Levis, 43 La. Ann. 63, 9 So. 52 (1891); Harris v. Eastern Wis. Ry. & Light Co., 152 Wis. 627, 140 N.W. 288 (1913).

[11]*E.g.,* Snare & Triest Co. v. Friedman, 169 F. 1 (3d Cir. 1909); Morse v. Douglas, 107 Cal. 196, 290 P. 465 (Ct. App. 1930); O'Bier v. Manufacturers Cas. Co., 70 So. 2d 220 (La. App. 1954).

[12]*E.g.,* Flis v. City of Chicago, 247 Ill. App. 128 (1927); O'Leary v. Michigan State Tel. Co., 146 Mich. 243, 109 N.W. 434 (1906); Doyle v. City of Chattanooga, 128 Tenn. 433, 161 S.W. 997 (1913); *see* Spengler v. Williams, 67 Miss. 1, 6 So. 613 (1889).

[13]Holmberg v. City of Chicago, 244 Ill. App. 505 (1927).

[14]152 Wis. 328, 140 N.W. 60 (1913).

child was a trespasser in meddling with the instrumentality absolved the owner from his duty of ordinary care. In *Snare & Triest Company v. Friedman*[15] a child was injured when she sat on girders located partially on the sidewalk. The court stated that the doctrine relating to dangerous and attractive structures maintained on a defendant's land is necessarily applicable to cases where the dangerous attraction is maintained on a public street or highway.[16] Whoever does anything in or immediately adjacent to a public street which could foreseeably attract children of the vicinity into danger owes a duty of protection to them.[17]

Two jurisdictions which purport to reject the attractive nuisance doctrine with regard to private land apply it when the trespass occurs on an instrumentality located in a public street or sidewalk.[18] Although New York purports to disclaim the doctrine, "the doctrine, when applied, is applied almost exclusively to dangerous attractions in the highway; the same attraction off the highway does not impose liability."[19] In *Tierney v. New York Dugan Brothers, Incorporated*,[20] where defendant had failed to lock the doors of his parked truck, the court said that a dangerous attraction in a public highway may impose liability on one responsible because of failure to exercise due care, although there would be no liability if the attraction were upon private premises where a child had no right to go.

Many courts apply a standard of ordinary care initially and avoid the problems raised in applying the attractive nuisance doctrine to public land situations.[21] Behind these decisions seems to

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[15]169 F. 1 (3d Cir. 1909).

[16]*Id.* at 10.

[17]Smith v. City of Baton Rouge, 166 La. 472, 117 So. 559 (1928).

[18]*See* Boylhart v. Di Marco & Reimann, Inc., 270 N.Y. 217, 200 N.E. 793 (1936); Keenan v. Lawyers Mortgage Co., 254 App. Div. 348, 5 N.Y.S.2d 18 (1938); Rine v. Morris, 99 W. Va. 52, 127 S.E. 908 (1925).

[19]Eason v. State, 201 Misc. 336, 104 N.Y.S.2d 683, 687 (Ct. Cl. 1951). A child was injured when he rode his bicycle into a pile of smoldering leaves. The court, however, refused to impose liability as the pile was some distance off the highway.

[20]288 N.Y. 16, 41 N.E.2d 161 (1942).

[21]Rotenberger v. Powers Fuel, Feed, Transfer & Storage Co., 148 Minn. 209, 181 N.W. 641 (1921); Rachmel v. Clark, 205 Pa. 314, 54 A. 1027 (1903); Kressine v. Janesville Traction Co., 175 Wis. 192, 184 N.W. 777 (1921) (although defendant is required to exercise ordinary care, he is not an insurer of the safety of children); Secard v. Rhinelander Lighting Co., 147 Wis. 614, 133 N.W. 45 (1911); *see* Valley Planing Mill Co. v. McDaniel, 119 Ark. 139, 170 S.W. 994 (1914); Edwards v. Kansas City, 104 Kan. 684, 180 P. 271 (1919); Harper v. Kopp, 24 Ky. L. Rptr. 2342, 73 S.W. 1127 (Ct. App. 1903); Lynchburg Tel. Co. v. Bokker, 103 Va. 594, 50 S.E. 148 (1905); Busse v. Rogers, 120 Wis. 443, 98 N.W. 219 (1904); *cf.* Kessler v. Berger, 205 Pa. 289, 54 A. 887 (1903); Coffey v. Oscar Mayer & Co., 252 Wis. 473, 32 N.W.2d 235 (1948).

be a recognition that children have a right to be on the highway and will play there if the opportunity arises.[22] Although it is not correct to say that streets are playgrounds for children, it would be equally incorrect to say that one can totally disregard the fact that children always have and probably always will play there. A child might realize that he should not go onto another man's private property, but the same child might feel completely unrestrained playing upon property located on a public street or sidewalk.

In *Campbell v. Model Steam Laundry*[23] a child jumped onto the defendant's parked truck and was killed when he subsequently set the truck in motion. The court said that one is held responsible for all the consequences of his acts which ought to have been foreseen by a reasonably prudent man. If the defendant fails to exercise ordinary care, then he is liable for any injury resulting from his negligence. In *Ashbach v. Iowa Telegraph Company*[24] a child was injured while playing with the defendant's machinery in the street. As neither had exclusive right to use of the street, it was the duty of each to exercise ordinary care. Although the court recognized the possible application of attractive nuisance concepts, it viewed the case as much stronger than an attractive nuisance case, since the machinery was not on the defendant's private premises but on the street where the child had an equal right to be. The plaintiff does not have the burden of proving willful or wanton conduct but is required only to show a lack of ordinary care.[25]

Although they approach the problem differently most courts do find liability. In the *Restatement (Second) of Torts* § 339 the general treatment of trespassing children is based on a standard of ordinary care. Since the language refers only to possessors of land, the *Restatement* is not expressly applicable where a child is trespassing on private property located in the public domain. Nevertheless, it appears that the majority of jurisdictions apply it anyway. Dean Prosser, Reporter for the *Restatement (Second) of Torts* suggested making section 339

[22]When a child is injured on another's property in the street, some courts do not consider the child a trespasser. *See* Kelley v. Parker-Washington Co., 107 Mo. App. 490, 81 S.W. 631 (Ct. App. 1904); Harkins v. East N.Y. Sav. Bank, 260 App. Div. 394, 22 N.Y.S.2d 905 (1940); Pate v. Parker, 180 Ore. 330, 177 P.2d 250 (1947). In *Harkins*, a child was injured while playing on the defendant's fire escape which had inadvertently become lowered and was resting on the sidewalk. The court held that the child could not be regarded as a trespasser since the fire escape was on the sidewalk where children had a right to play.

[23]190 N.C. 649, 130 S.E. 638 (1925).

[24]165 Iowa 473, 146 N.W. 441 (1914).

[25]De Francisco v. La Face, 128 Pa. Super. 538, 194 A. 511 (1937).