



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 26 | Number 2

Article 15

2-1-1948

Torts -- Injury to Trespassing Child -- Attractive Nuisance Doctrine

Lennox P. McLendon Jr.

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Lennox P. McLendon Jr., *Torts -- Injury to Trespassing Child -- Attractive Nuisance Doctrine*, 26 N.C. L. REV. 227 (1948).

Available at: <http://scholarship.law.unc.edu/nclr/vol26/iss2/15>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Torts—Injury to Trespassing Child—Attractive Nuisance Doctrine

Plaintiff, a six-year-old boy, while playing on a pile of timbers placed on defendant's railroad platform was injured when one of the timbers fell. Defendant had knowledge of the fact that children resorted to the platform and pile to play. *Held*: nonsuit affirmed. The evidence does not disclose that the pile of timbers was inherently dangerous, or so attractive or alluring as to impose upon the defendant the duty to anticipate and guard against the efforts of children to play there.¹

Until a comparatively recent date,² the common law refused to recognize liability of a landowner to trespassers injured by dangerous conditions on the land. But it is now established in many states that a trespassing child of tender years may recover for injuries sustained as a result of dangerous conditions of the land.³

Some courts have based this newly recognized duty to keep one's premises safe for anticipated child-trespassers on the fiction that a child is attracted or allured by the dangerous object or condition and thereby enters by implied invitation as an invitee, to whom the landowner owes a duty of ordinary care.⁴ Others have sustained the doctrine on the maxim that one must so use his property as not to harm others;⁵ others, that a child of tender years is not a trespasser, or at best, only a technical trespasser;⁶ still others, that an attraction of

¹ *Boyette v. Atlantic Coast Line R. R.*, 227 N. C. 406 42 S. E. 2d 462 (1947).

² *Lynch v. Nurdin*, 1 Q. B. 29, 113 Eng. Reprint 1041 (1841), is advanced as original authority for the attractive nuisance doctrine. There a child was injured when he climbed upon defendant's horse cart left standing untied in the highway. *Sioux City S. Pac. R. R. v. Stout*, 17 Wall. 657 (U. S. 1874) is the leading "turntable" case. See 38 AM. JUR., NEGLIGENCE §143.

³ For a list of states see: Note, 36 A. L. R. 34 (1925); Hudson, *The Turntable Cases in the Federal Courts*, 36 HARV. L. REV. 826, 854, n. 103 (1922-1923); 22 WASH. U. L. Q. 141, n. 2 (1936); 45 C. J. 785, n. 9.

For coverage of the general doctrine see: Jeremiah Smith, *Liability of Landowners to Children Entering Without Permission*, 11 HARV. L. REV. 349, 434 (1897-98); Hudson, *The Turntable Cases in the Federal Courts*, 36 HARV. L. REV. 826 (1922-23); Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility in Tort*, 21 MICH. L. REV. 495 (1922-23). Townes, *Is a Restatement of the Law as to the Liability Arising from Dangerous Premises Desirable and Practical*, 1 TEX. L. REV. 1, 388 (1922-23). For emphasis on the North Carolina situation see: Wilson, *Limitations on the Attractive Nuisance Doctrine*, 1 N. C. L. REV. 162 (1922); Note, 13 N. C. L. REV. 340 (1934).

⁴ *Wilmes v. Chicago G. W. R. Co.*, 175 Iowa 101, 116, 156 N. W. 877, 883 (1916) ("He [defendant] is charged with liability because of the imputed knowledge of the habits of children to use a thing so temptingly presented as a plaything, and he is liable because he has invited the child. . ."). *Keffe v. Milwaukee and S. P. Ry.*, 21 Minn. 207, 18 Am. St. Rep. 393 (1875); *United Zinc & Chemical Co. v. Van Britt*, 258 U. S. 268 (1922).

⁵ *Sic utere tuo ut alienum non laedas* "teaches nothing but a benevolent yearning." Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 3 (1894-95). See *Chesko v. Delaware & H. Co.*, 218 Fed. 804 (C. C. A. 3rd 1914); *Alabama G. S. R. Co. v. Crocker*, 131 Ala. 584, 31 So. 561 (1901).

⁶ *Hardy v. Missouri P. R. Co.*, 266 Fed. 860 (C. C. A. 8th 1920).

children by a dangerous instrumentality amounts to an intention to injure,⁷ or a reckless disregard of safety,⁸ or a trap.⁹

Cases emphasizing attraction and allurements, as opposed to danger and foreseeability, especially in those jurisdictions that adopt the fiction of implied invitation, have tended to limit the principle of recovery "to the point of absurdity."¹⁰ Not infrequently recovery has been limited to the case where the child was shown to have trespassed only because of the attraction.¹¹ The result has been doctrinaire rules of liability, undesirable and unwieldy in the field of negligence.¹²

The most satisfactory theory adopted seems to be that the landowner's liability rests upon "the general legal standard of social conduct," *i.e.*, due care under the circumstances.¹³ As so recognized the rule reads as follows: "An owner or occupier of land must use such care as a man of ordinary prudence would use under the circumstances to prevent serious hurt to others because of the dangerous condition of his premises when such condition is known, or should have been known, to him and may be remedied or guarded against readily with reasonable cost, when the presence of other persons and their exposure to such hurt may reasonably be anticipated."¹⁴

Some twenty-seven cases involving the "attractive nuisance" doctrine have arisen in North Carolina.¹⁵ The general attitude of the court

⁷ Jeremiah Smith, *supra* note 3 at 355, criticizes as grossly erroneous the finding of an intent to injure.

⁸ *Altus v. Millikin*, 98 Okla. 1, 223 Pac. 851 (1924); *Shawnee v. Cheek*, 41 Okla. 227, 137 Pac. 724 (1913).

⁹ *Keffe v. Milwaukee and S. P. Ry.*, 21 Minn. 207, 18 Am. St. Rep. 393 (1875).

¹⁰ *Wilson*, *supra* note 3 at 166. One need only refer to the annotation in 36 A. L. R. 34 (1925) to verify this conclusion.

¹¹ *United Zinc & Chemical Co. v. Van Brittt*, 258 U. S. 268 (1922) is the leading case.

¹² ". . . it is not fashionable to speak of the landowner's duty to use care in maintaining his land, and many courts have attempted instead to make a set of fixed rules built on categories to do the work of a standard. . . . The result is that inclusions in the categories are varied to suit the cases. . . ." *Hudson*, *supra* note 3 at 847.

¹³ *Hudson*, *supra* note 3 at 840-845, argues for the theory in this vein: The social interest in the general security and the social interest in the development of land and freedom of enterprise are to be balanced. These competing forces are best reconciled by a standard of judgment, its application dependent upon the variables of each case, *i.e.*, the general legal standard of social conduct—that one act with due care under the circumstances to avoid injury to others. *See Gimmetstad v. Rose Bros. Co.*, 194 Minn. 531, 534, 261 N. W. 194, 195 (1935) where it is said: "Here the duty of defendants must necessarily find its source in special circumstances in which, by reason of the inducement and of the fact that visits of children to the place would naturally be anticipated, and because of the character of the danger to which they would unwittingly be exposed, reasonable prudence would require that precautions be taken for their protection." *Best Adm'r v. District of Columbia*, 291 U. S. 411, 419 (1933)."

¹⁴ *See Townes*, *supra* note 3. RESTATEMENT OF TORTS, §339 (1934).

¹⁵ *Nichols v. Atlantic C. L. R. R.*, 228 N. C. 222, 44 S. E. 2d 879, 1947; *Boyette v. Atlantic C. L. R. R.*, 227 N. C. 406, 42 S. E. 2d 462 (1947); *Barlowe v. Gurney*, 224 N. C. 223, 29 S. E. 2d 681 (1944); *Hedgepath v. Durham*, 223 N. C. 822, 28 S. E. 2d 503 (1943); *Luttrell v. Carolina Mineral Co.*, 220 N. C.

may be said to favor a guarded application of the doctrine.¹⁶ Recovery has been allowed the trespassing child in but three situations: where the instrumentality was (a) a charged electric wire,¹⁷ or (b) dynamite caps,¹⁸ or (c) an artificial pool of water.¹⁹ The following observations can be made: (1) Conditions where recovery was allowed have all been artificial and obviously of extreme danger.²⁰ (2) Plaintiff must gen-

782, 18 S. E. 2d 412 (1941); *Harris v. Winston-Salem Ry.*, 220 N. C. 689, 18 S. E. 2d 204 (1941); *Prather v. Bank*, 211 N. C. 98, 189 S. E. 182 (1936); *Cummings v. Dunning*, 210 N. C. 156, 185 S. E. 653 (1936); *Jackson v. Standard Oil Co.*, 208 N. C. 766, 182 S. E. 490 (1935); *Brannon v. Sprinkle*, 207 N. C. 398, 177 S. E. 114 (1934); *Boyd v. Atlanta & C. R. R.*, 207 N. C. 390, 177 S. E. 1 (1934); *Campbell v. Model Steam Laundry*, 190 N. C. 649, 130 S. E. 638 (1925); *Graham v. Sandhill Power Co.*, 189 N. C. 381, 127 S. E. 429 (1925); *Richardson v. Libes*, 188 N. C. 112, 123 S. E. 306 (1924); *Lineberry v. North Carolina Ry.*, 187 N. C. 786, 123 S. E. 1 (1924); *Comer v. Winston-Salem*, 178 N. C. 383, 100 S. E. 619 (1919); *Krachanake v. Acme Mfg. Co.*, 175 N. C. 435, 95 S. E. 851 (1918); *Gurley v. Power Co.*, 172 N. C. 690, 90 S. E. 943 (1916); *Ragan v. Traction Co.*, 170 N. C. 92, 86 S. E. 1001 (1915); *Parker v. Charlotte Electric Ry.*, 169 N. C. 68, 85 S. E. 33 (1915); *Starling v. Selma Cotton Mills*, 168 N. C. 229, 84 S. E. 388 (1915); *Barnett v. Cliffside Mills*, 167 N. C. 576, 83 S. E. 826 (1914); *Benton v. Public Service Co.*, 165 N. C. 354, 81 S. E. 448 (1914); *Greer v. Damascus Lumber Co.*, 161 N. C. 116, 76 S. E. 731 (1912); *Ferrell v. Dixie Cotton Mills*, 157 N. C. 528, 73 S. E. 142 (1911); *Briscoe v. Henderson Lighting and Power Co.*, 148 N. C. 396, 62 S. E. 600 (1908); *Kramer v. Southern Ry.*, 127 N. C. 328, 37 S. E. 468 (1900).

Ten of these cases are not strictly under the attractive nuisance doctrine either because the child was on public property, or the ownership of the property was in a third party or not shown on the record, or the child was an invitee or licensee. But the cases are pertinent and important for their discussions and references to the doctrine. See *supra* this note: the *Cummings* case, the *Campbell* case, the *Graham* case, the *Comer* case, the *Gurley* case, the *Ragan* case, the *Parker* case, the *Benton* case, the *Greer* case, and the *Kramer* case.

¹⁶ *Campbell v. Model Steam Laundry*, 190 N. C. 649, 130 S. E. 638 (1925), "We are not disposed to extend the so-called attractive nuisance doctrine."

¹⁷ *Graham v. Sandhill Power Co.*, 189 N. C. 381, 127 S. E. 429 (1925) (whether defendant owned the land not on the record); *Ferrell v. Dixie Cotton Mills*, 157 N. C. 528, 73 S. E. 142 (1911) (plaintiff's intestate trespassed and swung on charged wire).

¹⁸ *Richardson v. Libes*, 188 N. C. 112, 123 S. E. 306 (1924); *Krachanake v. Acme Mfg. Co.*, 175 N. C. 435, 95 S. E. 851 (1918) (Brown, J., dissented saying that there was no evidence that plaintiff knew caps were on the premises); *Barnett v. Cliffside Mills*, 167 N. C. 576, 83 S. E. 826 (1914). *But cf. Luttrell v. Carolina Mineral Co.*, 220 N. C. 782, 18 S. E. 2d 412 (1941) (*held*, as matter of law, evidence insufficient to charge defendant with knowledge that children played on the premises).

¹⁹ *Barlowe v. Gurney*, 224 N. C. 223, 29 S. E. 2d 681 (1944); *Brannon v. Sprinkle*, 207 N. C. 398, 177 S. E. 114 (1934); *Starling v. Selma Cotton Mills*, 168 N. C. 229, 84 S. E. 388 (1915). Recovery denied in these cases: *Hedgepath v. Durham*, 223 N. C. 822, 28 S. E. 2d 503 (1943) (defendant had no notice children swam in pool, nor was pool so attractive as to charge him with notice.); *Gurley v. Power Co.*, 172 N. C. 690, 90 S. E. 943 (1916) (defendant company had no notice that its servant was allowing children to swim in its tank; servant beyond scope of his employment).

In *Campbell v. Model Steam Laundry*, 190 N. C. 649, 130 S. E. 638 (1925), recovery was allowed where four-year-old started and fell from negligently parked electric truck, but the court emphasized the fact that the truck was parked on a public street and that the intestate child was a member of the public.

²⁰ *Boyette v. Atlantic C. L. R. R.*, 227 N. C. 406, 408, 42 S. E. 2d 462, 463 (1947) ("... doctrine of the turntable cases should be applied to all things that are uncommon and are artificially produced . . . and are attractive and are inherently dangerous. . . . *Brown v. Salt Lake City*, 33 Utah 222."). *Cf. Hudson*,

erally be not over twelve years of age to escape the defense of contributory negligence.²¹ This is a jury question.²² (3) Failure of the parents to prevent the injury is generally not a bar to recovery.²³ (4) Whether defendant owes a duty to plaintiff depends on (a) maintenance of an "attractive nuisance" or dangerous instrumentality or condition,²⁴ and (b) reasonable foreseeability that children are likely to come upon the land and be hurt by contact with the object.²⁵ The court would seem to say that both "a" and "b" are questions of law.²⁶ It is intimated that extreme attractiveness alone will charge defendant with notice.²⁷ (5) Even if "a" and "b" of "4," *supra*, are established, it

supra note 3 at 852, where it is said: "It seems quite impossible to draw a satisfactory line between 'artificial and natural' uses, or normal and abnormal." No North Carolina cases on the natural condition of land seem to have arisen. *Query*: Would the court deny recovery where a small, useless quicksand bog, natural but easily protected was frequented by children to the knowledge of the defendant?

²¹ *Graham v. Sandhill Power Co.*, 189 N. C. 381, 127 S. E. 429 (1925) (a boy of fourteen is presumed to be able to sense and avoid danger, but proof of lack of intelligence is admissible; attention commensurate with child's mental age is required); *Briscoe v. Henderson Power Co.*, 148 N. C. 396, 62 S. E. 600 (1908) (court could find no cases where boy of thirteen could rely on "attractive allurements of machinery"); *Barnett v. Cliffside Mills*, 167 N. C. 576, 83 S. E. 826 (1914) (recovery allowed where trespassing child of eleven exploded dynamite caps).

²² *Graham v. Sandhill Power Co.*, 189 N. C. 381, 127 S. E. 429 (1925).

²³ *Ferrell v. Dixie Cotton Mills*, 157 N. C. 528, 73 S. E. 142 (1911); *Comer v. Winston-Salem*, 178 N. C. 383, 100 S. E. 619 (1919).

²⁴ See note 20 *supra*.

²⁵ *Briscoe v. Henderson Lighting and Power Co.*, 148 N. C. 396, 62 S. E. 600 (1908) is the leading North Carolina case on this point. At page 411 it is said: ". . . liability for injuries to children sustained by dangerous conditions on one's premises is recognized . . . provided the facts are such as to impose the duty of anticipation or prevision; that is, whether under all the circumstances he should have anticipated that children would be attracted or allured to go upon his premises and sustain injury." A dictum to the effect that the owner may be charged with notice by the very nature of the object is found in *Barlowe v. Gurney*, 224 N. C. 223, 29 S. E. 2d 681 (1944). See RESTATEMENT, TORTS §339 comment a; 38 AM. JUR., NEGLIGENCE §145.

Reasonable foreseeability that children may enter and be injured is established only by showing that children often played on the premises and that defendant knew or could reasonably have known of their habit to play on or near the instrumentality. *Barlowe v. Gurney*, 224 N. C. 223, 29 S. E. 2d 681 (1944) (recovery allowed where children commonly played around and in pool, as defendant knew); *Hedgepath v. Durham*, 223 N. C. 822, 28 S. E. 2d 503 (1943) (nonsuit aff'd, no evidence that children ever swam in the pool); *Luttrell v. Carolina Mineral Co.*, 220 N. C. 782, 18 S. E. 2d 412 (1941) (evidence must show that children habitually played on the premises and that defendant knew this or should have known it).

²⁶ *Luttrell v. Carolina Mineral Co.*, 220 N. C. 782, 789, 18 S. E. 2d 412, 416 (1941) (" . . . what is negligence is a question of law [in North Carolina] and when the facts are admitted or established the court must say whether it does or does not exist. 'This rule extends to the question of negligent breach of duty and also to the feature of proximate cause.' Hoke, J., in *Hicks v. Mfg. Co.*, 138 N. C. 319, 50 S. E. 703 [1905]."). It is clear that most North Carolina cases on the trespassing child situation are dismissed because the court finds no duty owed under the circumstances. *Boyette v. Atlantic C. L. R. R.*, 227 N. C. 406, 42 S. E. 2d 462 (1947); *Hedgepath v. Durham*, 223 N. C. 822, 28 S. E. 2d 503 (1943).

²⁷ See note 25 *supra*.

would appear that the court must find that the utility of maintaining the condition is slight as compared to the risk to young children involved therein.²⁸ (6) Defendant's breach of duty by failure to exercise the care reasonably demanded under the circumstances must be the proximate cause of the injury.²⁹ This, too, is a question of law if only one inference can be drawn from the facts.³⁰ (7) The duty to the plaintiff established, failure of the defendant to exercise due care under the circumstances is a question of fact for the jury.³¹

North Carolina, though apparently adopting the general negligence rule,³² frequently complicates the theory upon which recovery is based by (a) citation of cases from jurisdictions using the theory of allurement as invitation,³³ (b) by distinguishing cases which are brought before it "bottomed" on negligence from those "bottomed" on the principle of "attractive nuisance as elucidated in *Sioux City S. P. R. R. v. Stout*," and apparently applying different rules of recovery,³⁴ and (c) by categorizing certain objects as attractive nuisances as opposed to those which are not.³⁵ The court often speaks of attraction and allurement as if they were a *sine qua non* of liability.³⁶ It is submitted

²⁸ Note, 13 N. C. L. REV. 340 (1934). RESTATEMENT, TORTS §339(d) (1934).

²⁹ Prather v. Bank, 211 N. C. 98, 189 S. E. 182 (1936).

³⁰ Luttrell v. Carolina Mineral Co., 220 N. C. 782, 18 S. E. 2d 412 (1941).

³¹ Luttrell v. Carolina Mineral Co., *supra* note 30. Brannon v. Sprinkle, 207 N. C. 398, 177 S. E. 114 (1934).

³² Note, 13 N. C. L. REV. 340 (1934).

³³ Brannon v. Sprinkle, 207 N. C. 398, 177 S. E. 114 (1934); Ferrell v. Dixie Cotton Mills, 157 N. C. 528, 73 S. E. 142 (1911).

³⁴ Boyette v. Atlantic C. L. R. R., 227 N. C. 406, 407, 42 S. E. 2d 462, 463 (1947) ("Plaintiff's action is not bottomed on the principle of attractive nuisance . . . but on negligence. . . ." The court then points out that the plaintiff cannot recover on negligence, nor can he recover on the attractive nuisance doctrine). In Campbell v. Model Steam Laundry, 190 N. C. 649, 130 S. E. 638 (1925), the court evidently could not find that an electric truck was an "attractive nuisance" but managed to grant recovery without trouble since plaintiff's complaint was based on negligence. See note 16 *supra*.

³⁵ Brannon v. Sprinkle, 207 N. C. 398, 177 S. E. 114 (1934) (Connor, J., dissenting on grounds evidence does not show that well was an attractive nuisance); Campbell v. Model Steam Laundry, 190 N. C. 649, 130 S. E. 638 (1925) (electric truck is not an attractive nuisance, but recovery allowed on negligence principles); Comer v. Winston-Salem, 178 N. C. 383, 100 S. E. 619 (1919) (bridge not an attractive nuisance but recovery allowed on negligence principles); Gurley v. Power Co., 172 N. C. 690, 90 S. E. 943 (1916) (dictum that attractive nuisance doctrine not applicable to pools or reservoirs).

³⁶ Thus in Briscoe v. Henderson Lighting and Power Co., 148 N. C. 396, 62 S. E. 600 (1908) the court sustained a demurrer to the complaint saying that plaintiff failed to allege that children had been allured or attracted to the premises, or that plaintiff had in fact been attracted thereon. Again in Ferrell v. Dixie Cotton Mills, 157 N. C. 528, 73 S. E. 142 (1911) the court cites with equal facility and approval cases which follow the implied invitation doctrine (often requiring that the plaintiff be lured) and cases which require due care under the circumstances. The dissent in Krachanake v. Acme Mfg. Co., 175 N. C. 435, 95 S. E. 851 (1918) would deny recovery on the basis that children were not attracted by the instrumentality.

The tendency of the court to circumscribe the principle of recovery with legal definitions of what is or is not an attractive nuisance may possibly be attributed to a desire to keep the issue out of jury hands.

that the attractiveness of the object is an element only to the extent that it helps answer this question: "Did the landowner know or by reasonable care could he have known that children were likely to trespass on a part of the land upon which he maintained a condition likely to be dangerous to them because of their childish propensities to intermeddle or otherwise?"³⁷

The principal case, while in harmony with the reasoning of past decisions and while the result seems equitable, continues what is submitted as an undesirable precedent by classifying certain instrumentalities as attractive or dangerous instead of clearly recognizing that liability should rest primarily upon foreseeability of injury to a child whose presence should have been anticipated. "The greater the hazard, the greater the care required."³⁸ The court should repudiate all reference to the fiction of implied invitation and "attractive nuisance" and affirm the principle that recovery be based entirely on general principles of negligence.

LENNOX P. McLENDON, JR.

Trusts—Inheritance by Murderer—The Constructive Trust and a Statutory Solution*

In a recent case,¹ the Georgia Supreme Court decided that a husband inherited his wife's estate under the statute of descent and distribution in spite of the fact that he had murdered her, holding that it was not justified in reading into a clear and unconditional statute an exception denying the right of a murderer to inherit from his victim.

Statutes of descent and distribution and the Statute of Wills generally contain no such exception, and in the absence of other specific

³⁷ RESTATEMENT, TORTS §339, comment *a* (1934). *Gimmestad v. Rose Bros. Co.*, 194 Minn. 531, 261 N. W. 194 (1935).

³⁸ *Gimmestad v. Rose Bros. Co.*, 194 Minn. 531, 536, 261 N. W. 194, 196 (1935). At page 536, 261 N. W. 194, 196, the court continues: "Nothing more is needed to support the proposition that one who maintains on his premises an artificial condition is liable for resulting injury to young children trespassing thereon 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 injury 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.' RESTATEMENT, TORTS (Tentative Draft No. 4) §209 [RESTATEMENT, TORTS §339 (1934)]."

* The closely related problems arising in the fields of insurance, bank deposits, and other property relationships are outside the scope of this note.

¹ *Crumley v. Hall*, 43 S. E. 2d 646 (Ga. 1947).