

ATTRACTIVE NUISANCE: A MORE FLEXIBLE APPROACH

SUBJECT to certain important exceptions,¹ a land occupier is not liable for harm to trespassers caused by his failure to put the land in a reasonably safe condition for their entry or to carry on his activities so as not to endanger them.² Among these exceptions is the attractive nuisance doctrine.³

In those jurisdictions which accept the attractive nuisance doctrine,⁴

¹ RESTATEMENT, TORTS §§ 334-339 (1934).

² *Id.* § 333.

³ *Sioux City & Pac. R.R. v. Stout*, 84 U.S. (17 Wall.) 657 (1873), was the first case to articulate the doctrine in this country, although the Court cited two Connecticut cases, *Birge v. Gardiner*, 19 Conn. 507 (1849) and *Daley v. Norwich & W.R.R.*, 26 Conn. 591 (1858), and *Lynch v. Nurdin*, 1 Q.B. 29, 113 Eng. Rep. 1041 (1841), as "authorities" for its decision.

The term attractive nuisance belies the true nature of the doctrine in that it is not necessary for liability that the instrumentality or condition be a nuisance in the legal sense or that the trespass be induced by its attractiveness. The term arose as a result of the now discarded "invitation" or "allurement" requirement. See note 23 *infra*.

See RESTATEMENT, TORTS § 339 (1934).

See generally 65 C.J.S. *Negligence* § 29 (1950); 38 Am. Jur. *Negligence* §§ 142-157 (1941); Annot., 36 A.L.R. 1, 34 (1925); Annot., 39 A.L.R. 482, 486 (1925); Annot., 45 A.L.R. 982 (1926); Annot., 53 A.L.R. 1328, 1344 (1928); Annot., 60 A.L.R. 1424, 1444 (1929). See also PROSSER, TORTS § 76, at 438-445 (2d ed. 1955); 2 HARPER & JAMES, TORTS § 27.5 (1956); Eldredge, *Tort Liability to Trespassers*, 12 TEMP. L.Q. 32 (1937); Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility In Tort*, 21 MICH. L. REV. 495 (1923); Green, *Landowners' Responsibility to Children*, 27 TEXAS L. REV. 1 (1948); Hudson, *The Turntable Cases In the Federal Courts*, 36 HARV. L. REV. 826 (1923); James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 144 (1953); Smith, *Liability of Landowners to Children Entering Without Permission*, 11 HARV. L. REV. 349, 434 (1898).

⁴ The doctrine is still rejected by eight states. See PROSSER, TORTS § 76 at 439, n.22 (2d ed. 1955).

Various reasons have been asserted for rejecting the doctrine. It is argued that, carried to an extreme, it would amount to insurance on children, *Bottum's Adm'r v. Hawks*, 84 Vt. 370, 79 Atl. 858 (1911); that it shifts the duty of caring for children from the parents to the public, *Hannan v. Ehrlich*, 102 Ohio St. 176, 131 N.E. 504 (1921); that it impairs property rights, *Uthermohlen v. Bogg's Run Mining & Mfg. Co.*, 50 W.Va. 457, 40 S.E. 410 (1901); *Nelson v. Burnham & Morrill Co.*, 114 Me. 213, 95 Atl. 1029 (1915); and that the entire concept is founded on sympathy rather than sound legal principles, *Nelson v. Burnham & Morrill Co.*, *supra*; *Thompson v. Baltimore & O.R.R.*, 218 Pa. 444, 67 Atl. 768 (1907); *Bottum's Adm'r v. Hawks*, *supra*.

it is traditionally restricted⁵ in application to those artificial⁶ instrumentalities and conditions which present latent or hidden danger.⁷ There is substantial agreement that the doctrine does not apply to such "common and obvious" dangers as fires,⁸ bodies of water,⁹ and high

⁵ The courts of virtually all jurisdictions apply the doctrine cautiously, fearful of unrestricted imposition upon the rights of the land occupier. See *United Zinc & Chem. Co. v. Britt*, 258 U.S. 268 (1922); *Alligator Co. v. Dutton*, 109 F.2d 900 (8th Cir. 1940); *Lake v. Ferrer*, 139 Cal. App.2d 114, 293 P.2d 104 (1956); *Burns v. Chicago*, 338 Ill. 89, 169 N.E. 811 (1929).

⁶ It is generally held that the doctrine applies only to artificial conditions and instrumentalities because it would place too great a burden upon the land occupier to require him to guard against all natural conditions on his premises that offer a threat of harm to trespassing children. *Hunsche v. Southern Pac. R.R.*, 62 F. Supp. 634 (N.D. Cal. 1945); *Salt River Valley Water Users' Ass'n v. Compton*, 40 Ariz. 282, 11 P.2d 839 (1932); *Baugh v. Beatty*, 91 Cal. App.2d 786, 205 P.2d 671 (1949); *Hernandez v. Santiago Orange Growers' Ass'n*, 110 Cal. App. 229, 293 Pac. 875 (1930); *McCall v. McCallie*, 48 Ga. App. 99, 171 S.E. 843 (1933); *McComb City v. Hayman*, 124 Miss. 525, 87 So. 11 (1921).

⁷ See *Williams v. Bolding*, 220 Ala. 328, 124 So. 892 (1929); *Phipps v. Mitze*, 116 Colo. 288, 180 P.2d 233 (1947); *Erickson v. Minneapolis, St. P. & S.S.M. Ry.*, 165 Minn. 106, 205 N.W. 889 (1925); *Erickson v. Great Northern Ry.*, 82 Minn. 60, 84 N.W. 462 (1900); *Riggle v. Lens*, 71 Ore. 125, 142 Pac. 346 (1914); *McHugh v. Reading Co.*, 346 Pa. 266, 30 A.2d 122 (1943); *Ray v. Hutchinson*, 17 Tenn. App. 477, 68 S.W.2d 948 (1933); *Stimpson v. Bartex Pipe Line Co.*, 120 Tex. 232, 36 S.W.2d 473 (1931); *Angelier v. Red Star Yeast & Products Co.*, 215 Wis. 47, 254 N.W. 351 (1934).

It should be noted that latent or hidden danger in this context means danger which would not be perceptible to a child although it might be readily apparent to an adult. See *RESTATEMENT, TORTS* § 339 at 922 (1934).

⁸ See *Dunbar v. Olivieri*, 97 Colo. 381, 50 P.2d 64 (1935); *Goss v. Shawnee Post No. 3204, V.F.W.*, 265 S.W.2d 799 (Ky. 1954); *Erickson v. Great Northern Ry.*, note 7 *supra*. *Contra*, *Missouri Pac. R.R. v. Lester*, 219 Ark. 413, 242 S.W.2d 714 (1951).

The cases are collected in Annot., 27 A.L.R.2d 1182, 1187 (1953).

The above cases involve openly flaming fires and are distinguishable from cases involving injuries caused by hot ashes and cinders, which are characteristically highly deceptive. Cf. *Fitzmaurice v. Connecticut Ry. & Lighting Co.*, 78 Conn. 406, 62 Atl. 620 (1905); *Rush v. Plains Township*, 371 Pa. 117, 89 A.2d 200 (1952); *Cox v. Ince*, 274 S.W.2d 865 (Tex.Civ.App. 1954). See also Annot., 42 A.L.R.2d 921, 930 (1955).

⁹ Among the courts' reasons for refusing to apply the attractive nuisance doctrine to natural and artificial bodies of water are the child's appreciation of the danger in playing in and about the water, and the exorbitant cost and concomitant destruction of the utility of the body of water if the land occupier is required to erect protective barriers. See, e.g., *Luallen v. Woodstock Iron & Steel Corp.*, 236 Ala. 621, 184 So. 182 (1938); *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113 (1896); *Phipps v. Mitze*, 116 Colo. 288, 180 P.2d 233 (1947); *McCall v. McCallie*, 48 Ga. App. 99, 171 S.E. 843 (1933); *Peters v. Town of Ruston*, 167 So. 491 (La. App. 1936); *Atchison, T. & S.F. Ry. v. Powers*, 206 Okla. 322, 243 P.2d 688 (1952).

A few cases, however, have found reason to invoke the doctrine in those instances

places.¹⁰ However, in two recent decisions, *Simmel v. New Jersey Coop Co.*,¹¹ and *Lorusso v. De Carlo*,¹² the Superior Court of New Jersey has again rejected the prevailing rule and applied the attractive nuisance doctrine to afford relief for injuries suffered by infants who were burned in fires while trespassing upon the defendants' land.¹³

Historically, the courts hesitated to disturb the sanctity of the land occupier's right to the exclusive possession and control of his property.¹⁴

in which some feature in or about the water has made it exceptionally inviting to children. See, e.g., *Allen v. William P. MacDonald Corp.*, 42 So.2d 706 (Fla. 1949) (white sand banks around the pond); *City of Pekin v. McMahon*, 154 Ill. 141, 39 N.E. 484 (1895) (logs and timbers floating about in the pond); *Kansas City v. Siese*, 71 Kan. 283, 80 Pac. 626 (1905) (sewer pipes extended across the surface of the water); *Saxton v. Plum Orchard, Inc.*, 215 La. 378, 40 So.2d 791 (1949) (small timbers in water).

¹⁰ Cf. *Sanders v. Baird*, 195 Ark. 535, 112 S.W.2d 966 (1938); *Coon v. Kentucky & Ind. Terminal R.R.*, 163 Ky. 223, 173 S.W. 325 (1915). See also RESTATEMENT, TORTS § 339, illustration 3, at 923 (1934).

¹¹ 47 N.J. Super. 509, 136 A.2d 301 (App. Div. 1957), *rev'd*, — N.J. —, 143 A.2d 521 (1958). The employees of the Department of Public Works of Hoboken set on fire their daily collection of rubbish and left it burning unattended on the defendant's vacant property. The four-year old plaintiff, who lived across the street from the property in a housing project and often played on the defendant's property, was seriously burned while playing near one of the fires.

¹² 48 N.J. Super. 112, 136 A.2d 900 (App. Div. 1957). As in the *Simmel* case, a four-year old plaintiff was burned by a fire started by a third party on the defendant's premises.

¹³ In the *Simmel* case, the Supreme Court of New Jersey recently ordered a new trial on the ground that the lower court had failed to instruct the jury correctly concerning the requirement that the defendant have *actual* knowledge of the existence of the fire.—N.J.—, 143 A.2d 521, 526 (1958).

In the *Lorusso* case, the Appellate Division reversed the trial court's dismissal of the plaintiff's action and ordered a new trial on the ground that it was for the jury to decide whether it was reasonably foreseeable that the trespass would occur and that the plaintiff would be injured.

Unlike the *Simmel* case, here the Appellate Division dealt with the child's insufficient intelligence and experience to appreciate the danger of fire. See also *Arkansas Valley Trust Co. v. McLroy*, 97 Ark. 160, 133 S.W. 816 (1911); *Hoff v. Natural Refining Products Co.*, 38 N.J. Super. 222, 118 A.2d 714 (App. Div. 1955). Cf. RESTATEMENT, TORTS § 339 comment *c* (1934), which notes that the age, intelligence and experience of the trespasser are important factors in determining the liability of the land occupier.

The doctrine does not extend, however, to children who recklessly encounter an instrumentality, knowing it to be dangerous. See, e.g., *Garrett v. Arkansas Power & Light Co.*, 218 Ark. 575, 237 S.W.2d 895 (1951); *Clark v. Pacific Gas & Electric Co.*, 118 Cal. App. 344, 5 P.2d 58 (1931); *Dennis' Adm'r v. Kentucky & W.Va. Power Co.*, 258 Ky. 106, 79 S.W.2d 377 (1935); *Hight v. American Bakery Co.*, 168 Mo. App. 431, 151 S.W. 776 (1912). See also *Eldredge*, *supra* note 3, at 49; 23 MINN. L. REV. 241 (1938).

¹⁴ In feudal England the land occupiers were sovereigns within their domains, even

This veneration of land ownership depended upon notions of the economic importance and social desirability of the free use and exploitation of land.¹⁵ So long as the country was predominantly agrarian, there was no need for exception to the land occupier's traditional immunity from liability to trespassers, even infant trespassers.¹⁶ Increasing industrialization and urbanization, however, brought about the realization that there had to be some reconciliation between the land occupier's interest in the exclusive use of his premises, free from any duty of reasonable care toward trespassers, and the community's interest in the safety of its children.¹⁷

In *Sioux City R.R. v. Stout*,¹⁸ the United States Supreme Court first recognized a duty on the part of the land occupier to refrain from tolerating or maintaining dangerous artificial instrumentalities in locations where he has reason to expect children will trespass.¹⁹ This decision was at first rejected firmly by other courts²⁰ because the theory upon which it rested, that the land occupier owed a duty of due care to infant trespassers, was repugnant to the land occupier's traditional position in Anglo-American life.²¹ It was feared that the land occupiers

as to the king. Hence, there was no basis for imposing upon them any duty toward trespassers. See ELDREDGE, *MODERN TORT PROBLEMS* 164 (1941).

¹⁵ James, *supra* note 3, at 146.

¹⁶ For a concise history of the development of the law in this field see Green, *Landowner's Responsibility to Children*, 27 *TEXAS L. REV.* 1 (1948).

¹⁷ "The doctrine represents a prudent and essential accommodation of the landowner's right to the use of his land and society's interest in the humane [*sic*] and the protection of the life and limb of its youth and the individual's interest in personal security. The correlative burden on the landowner, small in comparison to the larger interests to be served, is a necessary concession to the common welfare." *Strang v. South Jersey Broadcasting Co.*, 9 N.J. 38, 45, 86 A.2d 777, 780 (1952). See also *Thompson v. Reading Co.*, 343 Pa. 585, 23 A.2d 729 (1942). See Eldredge, *supra* note 3, at 48; Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 120 (1924).

¹⁸ 84 U.S. (17 Wall.) 657 (1873).

¹⁹ The Court, however, also cited three cases as "authorities" for its decision. See note 3 *supra*.

²⁰ See *Nelson v. Burnham & Morrill Co.*, 114 Me. 213, 95 Atl. 1029 (1915); *Ryan v. Towar*, 128 Mich. 463, 87 N.W. 644 (1901); *Frost v. Eastern R.R.*, 64 N.H. 220, 9 Atl. 790 (1887); *Walsh v. Fitchburg R.R.*, 145 N.Y. 301, 39 N.E. 1068 (1895); *Dobbins v. Missouri, K. & T. Ry.*, 91 Tex. 60, 41 S.W. 62 (1897). "It is believed to be the most remarkable instance in common-law jurisprudence of the survival of a doctrine which has been condemned so vigorously by so many courts." Green, *Landowner's Responsibility to Children*, 27 *TEXAS L. REV.* 1 (1948).

²¹ It has been said, "The opinion failed to grapple with the paramount conceptual difficulty in the case, . . . that lack of duty to use affirmative care towards trespasser." James, *supra* note 3, at 161.

would become insurers of children's safety.²² Recognizing, however, the essential justice of the result in the *Stout* case, the courts searched for a more acceptable device for attaining the same result in similar cases. The product of this search was the "invitation" or "allurement" concept.²³ Having thus elevated the child to the status of at least a technical invitee, the courts were then willing to impose liability upon the land occupier on the theory that, by attracting or luring the child upon his premises, he assumed a moral and legal duty of exercising due care to protect the child.²⁴

Fortunately, most courts have discarded the "invitation" or "allurement" limitation and have come to accept the doctrine originally set forth in the *Stout* decision.²⁵ The element of attraction is now important

Although various considerations prompted the courts to reject the doctrine, see notes 4 *supra* and 22 *infra*, none was more important than the feeling that the Court had ignored the long-standing rule that the land occupier owed no duty of due care to trespassers, regardless of their age, intelligence, and experience. The inroad upon his traditional immunity, which the Supreme Court proposed, was regarded by the courts as unwarranted and dangerous to the land occupier's protected position. See Green, *Landowner's Responsibility to Children*, 27 TEXAS L. REV. 1 (1948).

²² See *Frost v. Eastern R.R.*, 64 N.H. 220, 9 Atl. 790 (1887).

²³ The Supreme Court of Minnesota, in *Keefe v. Milwaukee & St. Paul R.R.*, 21 Minn. 207 (1875), was the first court to apply the fiction of an implied invitation to the child due to the attractiveness of the instrumentality or condition, thereby evading the "trespasser" label and removing the most objectionable element of the *Stout* decision.

²⁴ Even the United States Supreme Court adopted the requirement of allurement or invitation in *United Zinc & Chem. Co. v. Britt*, 258 U.S. 268 (1922). See also *Salt River Valley Ass'n v. Compton*, 40 Ariz. 282, 11 P.2d 839 (1932); *Hayko v. Colorado & Utah Coal Co.*, 77 Colo. 143, 235 Pac. 373 (1925); *McDermott v. Burke*, 256 Ill. 401, 100 N.E. 168 (1912); *Seymour v. Union Stock Yards & Transit Co.*, 224 Ill. 579, 79 N.E. 950 (1906).

See also Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 513, 526-27, 877 (1930-31).

²⁵ One reason for the abandonment of the "allurement" fiction was that it imposed severe restrictions in cases where recovery by the injured child seemed the only conscionable result. Thus, in *United Zinc & Chem. Co. v. Britt*, 258 U.S. 268 (1922), recovery was denied two boys who were poisoned by swimming in a pool of contaminated water located on the defendant's premises. The Court reasoned that because the plaintiffs did not see the pool until they had entered the defendant's land, it could not be said that they were lured by the pool. See also *Hayko v. Colorado & Utah Coal Co.*, 77 Colo. 143, 235 Pac. 373 (1925). Such cases emphasize the failure of some courts to recognize the justification for the doctrine, *i.e.*, that the lives of its children are usually of greater value to the community than the instrumentality maintained by the defendant. 2 HARPER & JAMES, TORTS § 27.5, at 1450 (1956).

Some states, however, still cling to the invitation fiction. See *Salt River Valley Water Users' Ass'n v. Compton*, 39 Ariz. 491, 8 P.2d 249 (1932); *Esquibel v. Denver*, 112 Colo. 546, 151 P.2d 757 (1944); *Harriman v. Incorporated Town of Afton*, 225 Iowa 659, 281 N.W. 183 (1938); *Saxton v. Plum Orchards*, 215 La. 378, 40 So.2d 791 (1949); *Shemper v. Cleveland*, 212 Miss. 113, 54 So.2d 215

only in so far as it may mean that the presence of the child is to be anticipated.²⁶ There remains the question whether courts should further extend the attractive nuisance doctrine to include cases involving patent risks of harm.

The instant cases are not the first in which New Jersey has permitted recovery by an infant injured by fire.²⁷ The New Jersey Court of Errors and Appeals in 1920 permitted recovery by a five-year old child who was burned in a fire on the defendant's premises, not on the attractive nuisance theory, but on the theory that the property owner was negligent in the use of a "dangerous instrumentality."²⁸ In 1952 the New Jersey Superior Court adopted the theory reiterated in the instant cases and declared that New Jersey law permitted recovery under the attractive nuisance doctrine for injuries resulting to children from fire.²⁹

By contrast, the courts of other jurisdictions maintain that the land occupier has the duty to protect trespassing children from only those dangers which they are unlikely to observe and appreciate³⁰ and that the doctrine of the attractive nuisance has no application if in fact the child appreciates or should appreciate the danger of a certain instrumentality or condition. These courts hold that fire is among those "common

(1951); *Wheeler v. City of St. Helens*, 153 Ore. 610, 58 P.2d 501 (1936); *Gouger v. Tennessee Valley Authority*, 188 Tenn. 96, 216 S.W.2d 739 (1949).

²⁶ *Eldredge*, *supra* note 3, at 50. See also *Wolfe v. Rehbein*, 123 Conn. 110, 193 Atl. 608 (1937); *Larson v. Equity Cooperative Elevator Co.*, 248 Wis. 132, 21 N.W.2d 253 (1946).

²⁷ See *Piraccini v. Director General of Railroads*, 95 N.J.L. 114, 112 Atl. 311 (E. & A. 1920); *Strang v. South Jersey Broadcasting Co.*, 10 N.J. Super. 486, 77 A.2d 502 (App. Div. 1950), *aff'd*, 9 N.J. 38, 86 A.2d 777 (1952).

²⁸ *Piraccini v. Director General of Railroads*, *supra* note 27. The court declined to follow the older rule enunciated in *Harrington v. Griedanus*, 10 N.J. Misc. 710, 160 Atl. 652 (Sup. Ct. 1932), that a landowner owed no duty to protect trespassers against harm caused by his negligent conduct.

²⁹ *Strang v. South Jersey Broadcasting Co.*, 10 N.J. Super. 486, 77 A.2d 502 (App. Div. 1950), *aff'd*, 9 N.J. 38, 86 A.2d 777 (1952). There the defendant's janitor had built a small trash fire on the defendant's land, which was located near a playground. The janitor left the fire unattended. The five-year old plaintiff was later found with his clothes on fire. The court adopted the doctrine as formulated by the RESTATEMENT, TORTS § 339 (1934). Thus, the court firmly established that, given the existence of those circumstances enunciated in the Restatement, a landowner has a duty to protect a trespassing child. See also the later case of *Harris v. Menten-Williams*, 11 N.J. 559, 95 A.2d 388 (1953). For a discussion of the doctrine see, *Lubetkin, The Attractive Nuisance Doctrine—Its Status in New Jersey*, 8 RUTGERS L. REV. 378 (1954).

³⁰ See cases cited note 8 *supra*.

and obvious" dangers which even very young children are capable of appreciating and avoiding.³¹ Furthermore, they assert that fire is not a hidden or latent danger which creates an unreasonable risk of harm for the unwary child.³²

Another factor in the refusal of these courts to allow recovery for injury by fire is their frank recognition of the impossible burden which would be placed upon the land occupier if he were required to guard against every possible threat which conditions upon his premises pose for trespassing children.³³ As with bodies of water³⁴ and high places,³⁵ most courts have felt that the recognition of a duty to guard against injury by fire would place upon the land occupier a burden outweighing the risk of harm which fire creates.

In the *Lorusso* case the New Jersey court has rejected the position of other jurisdictions as "unrealistic," on the theory that ". . . very young children do not have the capacity to estimate or appreciate the danger of playing around or with fire."³⁶ Those New Jersey decisions granting recovery to infants injured by fire under the older "dangerous instrumentality" rule undoubtedly weighed heavily in the resolution of the instant cases. Nevertheless, it is worthy of note that the court has given a breadth to the attractive nuisance doctrine denied by great weight of authority. Thus the New Jersey court has committed itself to a liberal approach which logically may expand the attractive nuisance

³¹ See cases cited note 8 *supra*.

³² See cases cited note 7 *supra*.

³³ "It is not everything which may attract a child that can be regarded as an attractive nuisance, for there is no limit to the class of objects which may be attractive to a normal child even though he be less than 10 years of age." *Moseley v. Kansas City*, 170 Kan. 585, 591, 228 P.2d 699, 704 (1951). See also *Hayko v. Colorado & Utah Coal Co.*, 77 Colo. 143, 235 Pac. 373 (1925).

³⁴ See cases cited note 9 *supra*.

RESTATEMENT, TORTS § 399d (1934), also lays down the requirement that the utility of the instrumentality or condition to the possessor be slight as compared to the risk to young children. This clause protects the landowner in certain instances where the continued maintenance of the instrumentality or condition is in the public interest. An apt illustration is provided by farm machinery. The Restatement recognizes its inevitable danger "to children who meddle with it," but it also points out its importance to agriculture and thus permits it to be maintained "if kept in a proper place and condition." RESTATEMENT, TORTS § 339, comment on cl. (d) (1934).

³⁵ See cases cited note 10 *supra*. "Surely, it would be an intolerable burden to require a landowner 'to guard every stairway, cellarway, retaining wall, shed, tree and open window on his premises, so that a child cannot climb to a precipitous place and fall off.'" James, *supra* note 3, at 168.

³⁶ — N.J. Super. at —, 136 A.2d at 903.

doctrine to include other patently dangerous artificial instrumentalities and conditions.

Perhaps the rigid categorization of particular instrumentalities and conditions as falling within or beyond the scope of the attractive nuisance doctrine is not the most realistic solution to the problem.³⁷ It would be difficult to show that liability should be imposed upon the land occupier for injuries caused by any particular instrumentality or condition in all imaginable fact situations.³⁸ Undeniably in many cases the child would or should appreciate the danger inherent in fire, and in such cases his injuries should not be compensable. But any rule which holds that all children in all instances should appreciate the danger inherent in such conditions, thus making the nature of the condition itself the sole criterion for determining the land occupier's liability, ignores the desirability of a more flexible approach to the problem which would judge the conduct of both parties by what is reasonable in the light of all the circumstances. Such a plastic attitude is available under the rule of the Restatement of Torts,³⁹ which gives appropriate weight in the determination of each case to all the relevant circumstances, *e.g.*, the

³⁷ It has been pointed out that the law tends toward classification or categorization because of "the repetition of sets of circumstances having certain common factors." *Sinclair Prairie Oil Co. v. Smith*, 186 Okla. 631, 634, 99 P.2d 903, 907 (1940). However, due to variation in the attendant circumstances, one case or a number of like cases should not automatically determine the results of subsequent cases, "unless the attendant circumstances have first been given due consideration and found not to justify a rational distinction." *Id.* at 634, 99 P.2d at 907. Hence, the tendency of some jurisdictions to classify certain instrumentalities and conditions, *e.g.*, fire, bodies of water, and high places, as lying beyond the scope of the attractive nuisance doctrine for one reason or another, ignores the essential importance of the varying circumstances. See Hudson, *supra* note 3, at 847.

³⁸ It has been urged that the Supreme Court did not contemplate the establishment of rigid rules or categories, *e.g.*, trespasser, licensee, or invitee, when it first imposed liability upon the land occupier in *Sioux City R.R. v. Stout*, 84 U.S. (17 Wall.) 657 (1873). Instead, the opinion envisioned the application of a simple standard of due care, viewing the decision "as one of the insufficiency of the evidence to base a finding that the defendant had been negligent with reference to the plaintiff." Hudson, *supra* note 3, at 847. It would seem that the courts have sought to avoid the unpopular imposition upon the land occupier of any duty toward trespassers by employing categories or fixed rules in place of the standard of due care. But these categories are inadequate, as is evidenced by their being further subdivided to meet the needs of the particular case, *e.g.*, technical trespassers, tolerated intruders, bare licensees, implied licensees, etc. The resulting confusion and uncertainty and the inadequacy of the categorization method have led to the demand for a more flexible approach to the problem. Hudson, *supra* note 3, at 847.

³⁹ RESTATEMENT, TORTS § 339 (1934). See note 3 *supra*.

personal or social utility of the subject activity,⁴⁰ the relative ease of providing safeguards against injury,⁴¹ and the extent to which it was foreseeable that trespass and ensuing harm would occur.⁴²

⁴⁰ RESTATEMENT, TORTS § 339d (1934). The courts have long recognized that certain activities, though dangerous and sometimes harmful to the public, are in the community's best interests and warrants the law's protection. Hence, the utility of the instrumentality or condition which causes the injury to the trespassing child must always be considered in determining the question of liability for the injury. See *Schock v. Ringling Bros. & Barnum & Bailey Combined Shows*, 5 Wash. 2d 599, 105 P.2d 838 (1940).

⁴¹ See *Hunsche v. Southern Pac. Co.*, 62 F. Supp. 634 (D.C. Cal. 1945); *Brown v. Chesapeake R.R.*, 135 Ky. 798, 123 S.W. 298 (1909); *McCay v. Du Pont Rayon Co.*, 20 Tenn. App. 157, 96 S.W.2d 177 (1935).

⁴² RESTATEMENT, TORTS § 339a (1934).

In the absence of reasonable foreseeability of the harm's occurring, the majority of the courts refuse to impose liability. See *Hardy v. Missouri Pac. R.R.*, 266 Fed. 860 (8th Cir. 1920); *Jennings v. Glen Alden Coal Co.*, 369 Pa. 532, 87 A.2d 206 (1952).