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Children deem it their prerogative to roam wherever they please. In particular, they have a tendency to wander on other people's land and meddle with anything they find there. In doing so they frequently get hurt. The problem of the liability of occupiers of land for such injuries has taken up much of the time of American courts in the last one hundred years and has resulted in many published decisions. The trial courts in Virginia have devoted much thought and time to this problem, and since 1887 twelve cases have been heard and decided by the Supreme Court of Appeals of Virginia. It is the purpose of this article to review the present state of the Virginia law as to that liability.

As to an adult trespasser who is injured by conditions (not activities) on the land of another, the general rule that the occupier of land is under no liability to the trespasser is uniformly agreed upon by the courts. It is said that he is a wrongdoer and that he has no right to demand that the land be made safe for his trespass. He is mature enough to be able to look out for himself as to all ordinary visible conditions, and to make his own decision to take his chances against latent dangers. He assumes the risk. Both in England and America, whose societies are based on the private ownership of property, it has been considered for centuries a socially desirable policy to allow a man to use the land he occupies in his own way, without requiring him to assume the burden of protecting intruders who come there without privilege or right.

There are three recognized exceptions to the general

rule of non-liability of the land-occupier to an adult trespasser. Where, to the knowledge of the occupier, there are frequent trespasses upon a small area of his land he owes a duty to use reasonable care to make conditions safe for the intruders. Also, where the occupier sees the trespasser about to encounter a latent dangerous condition, it is his duty to exercise reasonable care to warn him. In the third place, the occupier will be subject to liability to a traveler on the public highway who inadvertently or intentionally deviates from the highway and is injured by a negligently maintained condition on the land. Of course, all three of these exceptions apply to trespassing children as well as to adults. Should the *general rule* ever be applied to trespassing children?

Where the trespasser is a child, the reason for the general rule does not exist. He is immature and lacks capacity for sound judgment. He may not be capable of protecting himself against conditions which he sees or of making intelligent decisions as to what chances he will take. The assumption of risk does not seem to apply to the immature child with the same force and validity with which it applies to the mature adult. Too, the law has always recognized the added social interest in the safety and welfare of children. While it is the duty of the parents of a child to look after his safety, it is neither customary nor practical to follow the child around everywhere he goes or to confine him in the house or in a fenced yard. If the child is to be adequately protected, the one who can do it best and with the least inconvenience is the occupier of the land upon which he plays. Any duty thus imposed on the land-occupier must not be unlimited, for two reasons. Parents should not be encouraged to shed all responsibility for the safety of their children. Furthermore, the burden of making land safe for a child is no less than in the case of an adult, and the law should not place an unreasonable burden on the land-occupier to look out for other people's children. The de-

cisions show an effort to reach a compromise between the social interest in the safety of children and the social interest in the ownership and free use of land for the owner's own purposes. No court gives the child complete protection; all courts afford him some greater degree of protection than is given to an adult.

The present state of the American law is accurately set forth in the RESTATEMENT (SECOND), TORTS §339 (Tent. Draft No. 5, 1960), as follows:

§339. CONDITIONS HIGHLY DANGEROUS TO TRESPASSING CHILDREN.

> A possesser of land is subject to liability for physical harm to children trespassing thereon caused by a structure or other artificial condition upon the land, 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 condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and
>
> (d) the utility of 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.

The special rule, of which the above is a restatement, came to be known as the "attractive nuisance doctrine." This was an unfortunate misnomer. It is not a

"doctrine." The condition which causes the injury is not a "nuisance," nor need it be "attractive" to children. This name has been a deterrent to the adoption of the rule in some courts. The special rule merely means that child trespasser law is just ordinary negligence law and the fact of trespass is only one of the factors to be taken into account in determining the defendant's duty, and the care required of him; the fact of trespass does not mean that the child's recovery is barred.

At the present time the attractive nuisance doctrine is the overwhelming weight of authority in America. Less than 10 of the 51 jurisdictions refuse to follow it. What of Virginia? The cases are inconclusive. In spite of the fact that on at least two occasions the court has expressly repudiated the doctrine, none of the Virginia cases is out of accord with it.

The doctrine was first mentioned in *Clark* v. *City of Richmond,* 83 Va. 355, 5 S. E. 369 (1887), which accurately stated the doctrine in some detail but held it inapplicable to the facts of that case. The city had excavated on another's land near the public sidewalk, and a boy six years old got upon a brick wall two feet high and fifteen inches wide, which guarded the excavation, and in an attempt to walk the wall fell into the excavation and was injured.

Lynchburg Tel. Co. v. *Booker,* 103 Va. 594, 50 S. E. 148 (1905), was the first case presenting facts to which the doctrine applies. The land-occupier was held liable to the trespassing child, but the decision was not expressly based on the doctrine. Without citing authority the court said:

> In legal contemplation it may be that any unauthorized entry upon the premises of another whose title extends to the centre of the earth, downward, and without limit upward, by putting one's hand through or over a boundary fence, is a tres-

> pass. It would, however, certainly seem that the trespass had reached its vanishing point when such a trespass was committed by a child eight years of age. (103 Va. at 608, 50 S.E. at 152)

The result is in complete accord with the attractive nuisance doctrine. The court avoided the use of the doctrine on the doubtful ground that, on these particular facts, the trespassing child would not be considered a trespasser.

In *Walker's Adm'r* v. *Potomac, F. & P. R. R.,* 105 Va. 226, 53 S. E. 113 (1906), the court expressly repudiated the attractive nuisance doctrine in holding the land-occupier not subject to liability to a trespassing child, twelve years old, who was injured on an unfastened and unenclosed turnable. The doctrine had its inception in America in the case of *Sioux City & Pac. R. R.* v. *Stout,* 84 U. S. (17 Wall.) 657, 21 L. Ed. 745 (1873), where recovery was allowed when a child trespassed on the railroad's land and was injured while playing with a turntable. In refusing to follow *Sioux City,* the Virginia court declined to apply the doctrine to the most orthodox facts to which the doctrine might be applied. In *Walker* the railroad knew that children constantly intruded and played on the turntable. This knowledge on the part of the railroad made the first exception to the general rule of non-liability stated above applicable. There could have been liability under either that rule or the attractive nuisance doctrine. The court apparently overlooked the former and refused to follow the latter.

The next case to arise in Virginia was *Lunsford's Adm'r* v. *Colonial Coal & Coke Co.,* 115 Va. 346, 79 S. E. 348 (1913). Here a child, three years of age, trespassed five feet from a commonly used path across railroad tracks and began to play with a broken and dangling electric wire of the defendant's by touching it against the iron rail and making flashes. The child was injured

when her clothing was ignited by a flash of fire. The court held the injury was unforeseeable and therefore the railroad was not negligent. Having thus disposed of the case, the opinion further stated, however, on the authority of *Walker,* that the land-occupier owned no duty to the child trespasser, thereby applying to children the general rule applicable to adults.

A decade elapsed before the court had an opportunity again to express itself on this matter in *Haywood* v. *South Hill Mfg. Co.,* 142 Va. 761, 128 S. E. 362 (1925). On authority of *Lynchburg,* the court held the land-occupier liable to an eleven-year-old child who was injured when he thrust a piece of an old saw through a wire fence enclosing a high-voltage electric transformer and touched the transformer, even if he were a trespasser at the time. The result, again, is in accord with the attractive nuisance doctrine, and the opinion bespeaks the very same policy considerations as are back of the doctrine. Although the case presented facts to which the rule of liability to constant trespassers upon a limited area, the rule of liability to trespassers deviating from an adjacent highway, and the rule of liability to trespassing children (*i.e.,* the attractive nuisance doctrine) were applicable, the decision does not seem to be based on any of them. All of these are exceptions to the general rule of non-liability to trespassers. The court said:

> While it is true, as a general proposition, that the owner of land owes no duty of prevision to trespassers, there are exceptions to the rule as well recognized as the rule itself. A mere technical trespass as in this case . . . or as in the case of *Lynchburg Tel. Co.* v. *Booker, supra,* are examples. (142 Va. at 766, 128 S.E. at 364)

The next two cases contain *dicta* repudiating the attractive nuisance doctrine: *Morris* v. *Peyton,* 148 Va.

812, 822, 139 S. E. 500, 503 (1927), (thirteen-year-old boy riding on running board of truck found not to be a trespasser); *Filer* v. *McNair,* 158 Va. 88, 93, 163 S. E. 335, 337 (1932), (child, eight years old, found not to be trespassing when he was injured by being caught in the ringer of a washing machine being demonstrated by defendant). *Cf.* also *Berlin* v. *Wall,* 122 Va. 425, 95 S. E. 394 (1918).

In *Rieder* v. *Garfield Manor Corp.,* 164 Va. 192, 178 S. E. 667 (1935), a seven-year-old boy trespassed into defendant's tool house and took therefrom several dynamite caps one of which exploded and injured him when he later picked it with a knife. The trial court's ruling in striking out all the plaintiff's evidence was affirmed on appeal. The entire opinion was devoted to showing that the land-occupier was not negligent. If it is to be inferred from the pains the court took to find there was no negligence that it thought the land-occupier owed a duty to use care for the safety of the trespassing child of tender years, the opinion gives no indication whether that duty is imposed by the attractive nuisance doctrine or the rule applicable to constant trespassers upon a limited area, both of which were applicable to the facts.

Daugherty v. *Hippchen,* 175 Va. 62, 7 S. E. 2d 119 (1940), is the key case in determining what the Virginia law is in this area. The plaintiff, a child eight years of age, in company with several other children, went into the defendant's tool house through an open door and, upon leaving, took several dynamite caps. Later the plaintiff was picking at one of the caps with a pin when it exploded causing injury to him. The facts were such that only the general rule of no duty to use reasonable care for the safety of trespassers, whether adults or children, or the exception to this general rule, known as the "attractive nuisance doctrine," applicable to trespassing children of tender years, was applicable. The defendant was held liable. The opinion avoided using the term "at-

tractive nuisance'' and conveniently ignored the former opposed cases, but the language of the opinion precisely describes the doctrine and its limitations. Note the following language which is in essence a statement of the attractive nuisance doctrine:

> There may be cases of trespassers who are not entitled to a recovery for injuries sustained from explosives while unlawfully on the premises of another unless wantonly inflicted, but this rule has no application where children of immature years are concerned. The courts throw a safeguard around such children to protect them in their childish instincts from the dangerous nature of explosives of which they have no proper understanding. This is especially true where the keeper of explosives knows, or should know, that children of tender years play or are likely to play around the storehouse. Liability may exist where a child of tender years is involved and not exist in the case of a child of more mature years.
>
> . . . If the one who keeps explosives is negligent in leaving them in a place accessible to children who he knows or should know are accustomed to play nearby, the fact that the child is a trespasser will not relieve the owner from liability. The same is true of other dangerous instrumentalities. (175 Va. at 75, 7 S.E. 2d at 120)

For Virginia authority, the court relied on the *Haywood* and *Lynchburg* cases which held liability to the trespassing children. It should be observed that the *Walker* case, which expressly repudiated the attractive nuisance doctrine and which had not been expressly overruled, was ignored in the opinion, though cited and relied on in the defendant's brief.

Lest the true meaning of this decision be doubted, the non-Virginia authorities cited by the court in support of its holding should be examined. Three authorities were

relied on. One, *Sedita* v. *Steinberg,* 105 Conn. 1, 134 Atl. 243 (1926), was not in point since the child plaintiff was not a trespasser. The court then cited the section of *American Jurisprudence* which sets out the attractive nuisance doctrine. The third authority was a leading case, *Smith* v. *Smith-Peterson Co.,* 56 Nev. 79, 45 P. 2d 785, 48 P. 2d 760 (on rehearing) (1935), which applied the doctrine. In clarifying the first opinion in *Smith* the Nevada court, on rehearing, recognized the division of authority throughout the United States and expressly chose the attractive nuisance doctrine. In doing so, all of §339 of the Restatement of Torts (1934), which is an authoritative statement of the attractive nuisance doctrine, and substantially all of *Comment a* to that section were quoted.

The next case to reach the Court of Appeals, *Dennis* v. *Odend 'Hal-Monks Corp.,* 182 Va. 77, 28 S. E. 2d 4 (1943), was distinguished from *Daugherty* on its facts, and was decided for the defendant. While repairing the roof of a nearby building, the defendant parked his truck at the curb on the street in close proximity to a sand pile known by the defendant to be a favorite place of play for the neighborhood children. Near the rear of the truck, in plain view of the children, were left tools and repair materials, including a Pepsi-Cola bottle, with its original colorful label attached, containing muriatic acid. The plaintiff, a three-year-old child, obtained possession of the bottle and drank some of its contents and as a result was seriously injured. The defendant was held not liable on the theory "that such an event could not be foreseen by even the most careful and prudent person." Having decided that the injury was unforeseeable and therefore the defendant was not negligent, it became unnecessary to refer to the attractive nuisance doctrine. It is obvious, however, that the court considered the defendant to be under a duty to the trespassing child. If there had been no duty of care it would have been

unnecessary for the court to discuss negligence, *i.e.,* the failure to exercise care. The existence of a duty to use due care for the safety of trespassing children, which is the attractive nuisance doctrine, was made clear when the court closed its opinion by saying:

> The defendant emphasized the fact that in this case the child was a trespasser. We give little thought to this in the case of a child of such immature years. In fact we said in the *Daugherty-Hippchen Case, supra,* that the rule regarding trespassers has no application where children of immature years are concerned. (182 Va. at 83, 28 S.E. 2d at 7)

Having in mind the only Virginia cases holding liability to trespassing children, the court in *Baecher* v. *McFarland,* 183 Va. 1, 31 S. E. 2d 279 (1944) held that a barbed-wire fence does not "attract children" as do electric wires or dynamite caps. Thus, a five-year-old trespassing child who, after climbing upon a fence, fell and was injured when she came in contact with one of the barbs was denied recovery.

In *Town of Big Stone Gap* v. *Johnson,* 184 Va. 375, 35 S. E. 2d 71 (1945), an eight-year-old boy was injured while he and a playmate were playing on a road scraper left after working hours near a playground area. The plaintiff grounded his action on the attractive nuisance doctrine. In summarizing the doctrine the court said: "The two necessary elements of the tort are that the appliance is known to be attractive to children and known to be dangerous to them." Then it proceeded to hold that the defendant had no reason to think that the road scraper would be attractive to children, nor was there any proof that it was dangerous to children as is true in the case of dynamite caps or moving machinery such as a washing machine. The court did not repudiate the doctrine, but held that the facts of this case did not

meet its requirements. As an alternate ground of decision, the court found that the defendant was not guilty of the degree of negligence required for recovery. Both grounds of decision presuppose a duty to trespassing children such as that imposed by the attractive nuisance doctrine.

The most recent decision is *Washabaugh* v. *Northern Va. Const. Co.*, 187 Va. 767, 48 S. E. 2d 276 (1948). In conducting its business of quarrying rock, the defendant maintained a large, unenclosed pit which stayed filled with water of varying depths. The water being muddy, it was impossible to distinguish the shallow from the deep water. To the knowledge of the defendant, children customarily swam, waded, and played in the pit. The plaintiff, nine years old, while playing on a raft, fell off and was drowned. In holding no liability, the court found that the quarry was not the type of condition on land to which the attractive nuisance doctrine applies. Although the opinion did not expressly say so, a close analysis leaves no doubt that Virginia has embraced the attractive nuisance doctrine. The opinion expressly treated the case as one involving the doctrine. After referring to the earlier Virginia cases, some of which held in accord with the doctrine while others repudiated it, the court said:

> In order for the doctrine to apply, the danger of the instrumentality must not only be hidden or latent, but the instrumentality must be easily accessible to children and in a location where it is known that children frequently gather. (157 Va. at 770, 48 S.E. 2d at 278)

The holding in *Washabaugh* that the danger was not latent, and therefore the doctrine did not apply, is a commonly accepted limitation on the doctrine of attractive nuisance. See RESTATEMENT (SECOND), TORTS §339 (d) and comment *i* (Tent. Draft No. 5, 1960). In support

of its decision for the defendant, the court cited and relied on four authorities: (1) *Peters* v. *Bowman,* 115 Cal. 345, 47 Pac. 113 (1896). The attractive nuisance doctrine is well established in California. (2) *Stendal* v. *Boyd,* 73 Minn. 53, 75 N.W. 735 (1898). Minnesota was the first state in America to adopt the doctrine. (3) Four separate annotations in the *American Law Reports,* each of which is entitled "Attractive Nuisances." (4) Twelve sections in *American Jurisprudence* all of which are located in a chapter headed "Attractive Nuisances."

For a while, the Virginia cases seemed to have developed a rule of their own known as the "dangerous instrumentalities" rule. The court applied this rule with the exact same results as would have been true had the attractive nuisance doctrine been used. Since Virginia in reality follows the doctrine, it would be a long step toward clarification of the law in Virginia if the court would expressly admit that the attractive nuisance doctrine, with its generally accepted limitations, is the law of this state and has been for sometime. We need only make the language of the opinions accord with the results of the decisions.