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The Allurement Element and Attractive Nuisance

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one hand, courts are reluctant to disturb the binding force of contracts purporting to express the will and purpose of the parties, by refusing specific enforcement or by granting recission. On the other hand, they are unwilling to permit this salutory and beneficent policy to be used as a shield to protect those who have obtained from the weak, the unwary, the helpless, or the ignorant, an unconscionable and inequitable advantage. To illustrate, in *Johnston Realty and Investment Company v. Grosvenor*[31] the Michigan court refused specific enforcement because the defendant's simplicity, credulity, and lack of experience was seized upon by overzealous plaintiffs. However, a divided court resulted and the dissenting opinion favored the proposition that as long as there was no fraud, a court of equity should not aid one to escape a bad bargain.

Between these two opposite poles, there exists a sphere wherein equity may apply the "doctrine of comparative intelligence." It is important to remember that courts are reluctant and hesitate to invoke the doctrine for fear that the door be let open wide and the sanctity of contracts undermined by easy escape from specific performance of such agreements. All that may be said is that in a justiciable case, where the equities between the parties warrant, a court of chancery may compare the differences between the contracting parties and withhold the relief sought.

THE ALLUREMENT ELEMENT AND ATTRACTIVE NUISANCE

The attractive nuisance doctrine is a controversial theory which imposes liability upon the occupier of land for injuries sustained by trespassing children as a result of dangerous conditions maintained by the occupier on his premises. The doctrine is not a new one, having had its origin in English common law in the case of *Lynch v. Nurdin*.[1]

A number of American jurisdictions, most of them in the eastern industrial states, have refused to accept or apply the attractive nuisance doctrine at all, leaving the rights and liabilities of the parties for solution in accordance with the ordinary principles of negligence.[2] However, in

[31] 241 Mich. 321, 217 N.W. 20 (1928).

[1] 1 Q.B. 29, 55 Rev. Rep. 191, 113 English Reports 1041 (1841).

[2] Wolfe v. Rehbein, 123 Conn. 110, 193 Atl. 608 (1937); State To Use Of Alston v. Baltimore Fidelity Warehouse Co., 176 Md. 341, 4 A. 2d 739 (1939); Falardeau v. Malden and Melrose Gas Light Co., 275 Mass. 196, 175 N.E. 471 (1931); Ryan v. Towar, 128 Mich. 463, 87 N.W. 644 (1901); Kaproli v. Central R. of New Jersey, 105 N.J. L. 225, 143 Atl. 343 (1928); Morse v. Buffalo Tank Corporation, 280 N.Y. 110, 19 N.E. 2d 981 (1939); Merriam v. Bonded Oil Co., 76 Ohio App. 435, 65 N.E. 2d 74 (1945); Trudo v. Lazarus, 116 Vt. 221, 73 A. 2d 306 (1950); Washabaugh v. Northern Va. Const. Co., 187 Va. 767, 48 S.E. 2d 276 (1948); Tiller v. Baisden, 128 W. Va. 126, 35 S.E. 2d 728 (1945).

the majority of American jurisdictions the doctrine has been adopted.[3] The better authorities now agree that there are two chief theories upon which the doctrine is founded: (1) liability based on general negligence of the landowner; (2) liability based on implied invitation due to the temptation to enter.

This discussion is concerned with the judicial development of the "allurement" element of the implied invitation theory. The best known expression of this refinement is found in Mr. Justice Holmes' opinion in *United Zinc and Chemical Co. v. Britt.*[4] Holmes stated that before recovery can be allowed under the attractive nuisance doctrine, the object that produces the injury must have led the child to trespass.[5] This refinement, although not original, has had a marked effect on later decisions, confining the "implied invitation" theory to the "allurement" theory.[6]

The necessity of the allurement element in order to impose liability upon the occupier of land is an open question today. The modern tendency[7] of the courts is to follow a negligence theory which renders the occupier of land responsible when he knows or should know that children are likely to trespass on land where the dangerous condition is maintained, even though the instrumentality or condition does not actually attract the injured child onto the premises.[8] A number of American courts[9] have not

[3] Among the various theories advanced by the courts are: 1. the implied invitation theory, 2. the reasonabe anticipation theory, 3. the trap or pitfall theory, 4. the humanity theory.

[4] 258 U.S. 268 (1922).

[5] Justice Holmes assigned as his reason for the nonliability of the defendant the fact that the child trespassers were not attracted from the highway by the pool in which they were drowned, but were trespassers when the allurement (the pool) asserted itself upon them.

[6] For criticism of Holmes' opinion in this case see Standard Oil Co. of La. v. Dumas, 183 Ark. 616, 38 S.W. 2d 17 (1931); Torts—Attractive Nuisances, 18 Iowa L. Rev. 286 (1932); Torts—Attractive Nuisances, 36 Harv. L. Rev. 113, 350 (1923); Green, Landowner v. Intruder, 21 Mich. L. Rev. 521 (1923).

[7] Prosser, Torts 619 (1941); 65 C.J.S., Negligence § 29 (5) (1950).

[8] Arkansas Power & Light Co. v. Kilpatrick, 185 Ark. 678, 49 S.W. 2d 353 (1932); Weber v. St. Anthony Falls Water Power Co., 214 Minn. 1, 7 N.W. 2d 339 (1942); Gimmestad v. Rose Bros. Co., 194 Minn. 531, 261 N.W. 194 (1935); State Ex Rel Callahan Const. Co. v. Hughes, 348 Mo. 1209, 159 S.W. 2d 251, (1941); Williams v. Kansas City Clay County and St. Joseph R. Co., 222 Mo. App. 865, 6 S.W. 2d 48 (1928); Verrichia v. Society Di M.S. Del Lazio, 366 Pa. 629, 79 A. 2d 237 (1951); Bartleson v. Glen Alden Coal Co., 361 Pa. 519, 64 A. 2d 846 (1949); Thompson v. Reading Co., 343 Pa. 585, 23 A. 2d 729 (1942); Banker v. McLaughlin, 146 Tex. 434, 208 S.W. 2d 843 (1948); Angelier v. Red Star Yeast and Products Co., 215 Wis. 47, 254 N.W. 351 (1934). For those states which do not apply the doctrine, see Wolfe v. Rehbein, 123 Conn. 110, 193 Atl. 608 (1937); Clifton v. Patroon Operating Corp., 271 App. Div. 122, 63 N.Y.S. 2d 597 (S. Ct. App. Div., 1946); Parsons v. Appalachian Electric Power Co., 115 W. Va. 450, 176 S.E. 862 (1934); Rest., Torts § 339 (1934).

[9] Holbrook Light and Power Co. v. Gordon, 61 Ariz. 256, 148 P. 2d 360 (1944); Esquibel v. City and County of Denver, 112 Colo. 546, 151 P. 2d 757 (1944); Hayko v.

accepted this negligence theory, and insist that the condition alleged to have constituted the attracive nuisance must have actually induced the child to enter the premises.

As recently as December, 1951, the Supreme Court of Arizona[10] held it essential that the pleadings show the injured child was actually led to the place of injury by the attraction of the dangerous instrumentality, and that it is not sufficient to allege that the premises were attractive to children or that children generally were attracted thereto. However, in March 1951, the Supreme Court of Pennsylvania[11] declared that although at one time the element of allurement was considered essential to recovery, it is now the rule in Pennsylvania that enticement onto the premises by the object causing the injury is not essential to impose liability on the landowner.

Curiously enough, the difference of opinion which exists throughout the United States is reflected in the decisions of the Illinois courts, which apply these mutually inconsistent views to the same or similar factual situations. In 1912, the landmark Illinois decision of *McDermott v. Burke*[12] adopted the strict allurement view that the occupier of land is not liable unless the attractive and dangerous condition which caused the injury did of itself attract the child to the premises. In this case, plaintiff, a boy of seven, was injured while playing in a house being constructed by the defendant contractor. The injury resulted from contact with a cable and sheave used by the defendant to hoist material from one floor to another. It was shown that plaintiff's sole reason for coming on the premises was to play in a pile of sand in the partly constructed house. The court, in affirming a directed verdict for the defendant, held that in order to impose liability under the attractive nuisance doctrine, the machinery which caused the injury must have been so located as to attract the child from some place where he had a right to be, and that no liability would be imposed for maintaining a machine which could only be found by the plaintiff going upon the premises as a trespasser.

However, seven years later in the case of *Ramsay v. Tuthill Building Material Co.*,[13] the Illinois Supreme Court affirmed a judgment for the

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Colorado and Utah Coal Co., 77 Colo. 143, 235 Pac. 373 (1925); Indianapolis Motor Speedway Co. v. Shoup, 88 Ind. App. 572, 165 N.E. 246 (1929); Battin v. Cornwall, 218 Iowa 42, 253 N.W. 842 (1934); Young's Adm'r v. Mahan-Jellico Coal Co., 252 Ky. 316, 67 S.W. 2d 42 (1934); Fincher v. Chicago R.I. & P.R.Y. Co., 143 La. 164, 78 So. 433 (1918); Holifield v. Wigdor, 235 S.W. 2d 564 (Mo., 1951); Hancock v. Aiken Mills, 180 S.C. 93, 185 S.E. 188 (1936).

[10] Lee v. Salt River Valley Water Users' Assn., 238 P. 2d 945 (Ariz., 1951).

[11] Verrichia v. Society Di M.S. Di Lazio, 366 Pa. 629, 79 A. 2d 237 (1951).

[12] 256 Ill. 401, 100 N.E. 168 (1912). Accord: Donaldson v. Spring Valley Coal Co., 175 Ill. App. 224 (1912).

[13] 295 Ill. 395, 129 N.E. 127 (1920).

plaintiff for the death of his minor son, even though the evidence showed that the child's reason for coming on the premises was totally disconnected with the instrumentality, a large sand bin, which caused his death. *McDermott v. Burke*[14] was distinguished on the ground that it did not appear in that case that the defendant knew that children had been in the habit of coming to the partly constructed houses to play, while in the *Ramsay* case, the evidence showed that children had been in the habit of coming to play in the sand bins, this fact being well known to the defendant's employees. The court concluded that if the owner knew that children came upon the premises and played around the sand bin structure, which was dangerous and attractive, it was not essential that the bins be visible from the street, or that the plaintiff should have been attracted to the premises by them. This marks the first appearance in Illinois courts of the negligence theory, which the authorities speak of as the modern view.

In 1925, five years after the decision in the *Ramsay* case, the Illinois Supreme Court once again applied the allurement theory of the *Burke* case, even though the evidence did tend to show that friends of the deceased child has previously played near the fatal spot.[15] In 1928, this same court held that a defendant contractor could not be held liable, where there was no evidence that the plaintiff was attracted to the building by the plank on which he was injured, and it appeared from plaintiff's own testimony that he was attracted to the building by other children whom he saw playing there.[16] Testimony in this case revealed that boys had played on the premises previously, and that defendant's servants were working on the buildings at the time. From these facts, it is difficult to see how the court could reach the conclusion that there was no evidence at any time that defendant or his servants knew that boys had played in the building previously. It seems clear that there was such evidence, and that the court was thus in the dilemma of applying either the negligence theory of the *Ramsay* case, which in view of the facts it should have applied, or the allurement theory of the *Burke* case, which it did apply. The court cited both of these cases, but the impression one receives from reading the language of the court is that the attractive nuisance doctrine, because it is an exception to the rule of non-liability of the occupier of land to trespassers, must be very cautiously applied and strictly confined, rather than extended and encouraged.

This case was followed by a long line of Illinois decisions[17] which

[14] 256 Ill. 401, 100 N.E. 168 (1912).

[15] Mindeman v. Sanitary District of Chicago, 317 Ill. 529, 148 N.E. 304 (1925).

[16] Darsch v. Brown, 332 Ill. 592, 164 N.E. 177 (1928).

[17] Wood v. Consumers Co., 334 Ill. App. 530, 79 N.E. 2d 826 (1948); Rokicki v. Polish Nat. Alliance, 314 Ill. App. 380, 41 N.E. 2d 300 (1942); Germann v. Huston,

applied the allurement theory of the *Burke* case. In one case, the court said: "The emphasis placed in these two decisions[18] upon the element of attractiveness or allurement follows a consistent indication running through all the cases in which the general question has been before the court, that the attractiveness or allurement of the dangerous agency or of other agencies in intimate juxtaposition to such dangerous agency is of paramount importance in determining liability."[19]

During this period we find the negligence theory of the *Ramsay* case asserting itself only in rare instances. In one decision,[20] the court made a one line declaration that it was not essential that an attractive nuisance be visible from the street. This statement seems to have been made as a mere afterthought, for the court made no further exposition of the statement, and made no attempt to show how it was applicable to the facts in controversy.

In *Cicero State Bank v. Dolese and Shepard Co.*,[21] a factual situation was presented very similar to that in *Wood v. Consumers Co.*,[22] the latest Illinois decision directly in point. In both cases, plaintiff's intestate was drowned in a pond on defendant's land. In the *Cicero* case, the only reason the child came upon the premises was to salvage toys from the area surrounding the pond; the pond could not be seen from any spot where the child had a right to be. The evidence showed that children customarily went to the dumping grounds adjacent to the pond to salvage articles, and that literally hundreds of persons were on the premises at all hours of the day and night. The court applied the negligence theory of the *Ramsay* case and allowed recovery, holding that it was not always necessary that an attractive nuisance be visible from the street, and that the fact that the child is first attracted on the premises by an instrumentality other than the one inflicting injury is not decisive.

In the *Wood* case, the evidence disclosed that children had visited the pond to swim several years before, and one witness testified that ten years before the trial of the case he and five other children were skating on the pond. There was also some evidence that children had been known to

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302 Ill. App. 38, 23 N.E. 2d 371 (1939); Rodgers v. Alton R. Co., 288 Ill. App. 462, 6 N.E. 2d 244 (1937); Howard v. City of Rockford, 270 Ill. App. 155 (1933); Wolczek v. Public Service Co. of Northern Illinois, 342 Ill. 482, 174 N.E. 577 (1931); Matijevich v. Dolese & Shephard, 261 Ill. App. 498 (1931); Burns v. City of Chicago, 338 Ill. 89, 169 N.E. 811 (1930) rev'g 248 Ill. App. 204 (1929); City Trust and Savings Bank v. City of Kankakee, 254 Ill. App. 489 (1929).

[18] The Court was referring to: Deming v. City of Chicago, 321 Ill. 341, 151 N.E. 886 (1926); Stedwell v. City of Chicago, 297 Ill. 486, 130 N.E. 729 (1921).

[19] Burns v. City of Chicago, 338 Ill. 89, 169 N.E. 811 (1930).

[20] Plotkin v. Winkler, 323 Ill. App. 181, 55 N.E. 2d 545 (1944).

[21] 298 Ill. App. 290, 18 N.E. 2d 574 (1939).

[22] 334 Ill. App. 530, 79 N.E. 168 (1912).

play in the sand piles adjoining the pond. The court held that the defendant would not be held liable even if the pond was an attractive nuisance for the trespass was not induced by the allurement of the pond. The court went on to say that it is necessary that the dangerous condition be so located as to attract children from some place where they may be expected to be, and that the defendant could not be held liable for a dangerous condition which could only be found by children going upon his premises as trespassers.

What then is the conclusion to be reached after a study of the Illinois decisions? It seems that the Illinois courts have been reluctant to follow the negligence theory, which insists that the element of attraction should not be essential in determining liability. The allurement theory of the *Burke* case remains strong today, as evidenced by the holding in *Wood v. Consumers Co.*;[32] this theory is consistent with the tendency of the majority of Illinois decisions to limit and to apply cautiously the attractive nuisance doctrine rather than to extend it. The negligence theory of the *Ramsay* case will be kept in reserve by the courts, and will be applied only in extreme factual situations in which the occupier of land has been obviously negligent to the extent almost of willful and wanton conduct.

CHANGE OF BENEFICIARY CLAUSES AND THEIR INTERPRETATION

A common but perplexing problem in the insurance field is the construction of terms and conditions embodied in the change of beneficiary clause within the usual contract of life or accident insurance. Upon first impression, it would seem that the rights and duties of the parties are governed by the terms of the contract. Ordinarily, this assumption would be proper, but in the light of some recent decisions which construe the same or substantially the same language to have different meanings, the assumption weakens considerably.

Generally, the right to change a beneficiary depends on whether the insured has reserved this right in the contract of insurance. Unless such right is reserved, the beneficiary has an absolute, vested interest which cannot be revoked.[1] Today, most contracts of insurance reserve the right to change beneficiary by giving the insured an irrevocable option to change the beneficiary at will.[2]

[23] Ibid.

[1] Kurgan v. Prudential Ins. Co., 340 Ill. App. 178, 91 N.E. 2d 620 (1950); West v. Pollard, 202 Ga. 549, 43 S.E. 2d 509 (1947); Hintz v. Hintz, 78 F. 2d 432 (C.A. 7th, 1935); Arnold v. Equitable Life Assurance Soc., 228 Fed. 157, (S.D. Iowa, 1915); Bilbro v. Jones, 102 Ga. 161, 29 S.E. 118 (1897).

[2] Stone v. Stephens, 155 Ohio St. 595, 99 N.E. 2d 766 (1951); Kurgan v. Prudential Ins. Co., 340 Ill. App. 178, 91 N.E. 2d 620 (1950); West v. Pollard, 202 Ga. 549, 43 S.E. 2d 509 (1947); Parks v. Parks, 288 Ky. 435, 156 S.W. 2d 480 (1941); Atkinson v. Metropolitan Life Ins. Co., 114 Ohio St. 109, 150 N.E. 748 (1926).