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Trespassing Children: A Study in Expanding Liability

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too concerned with this problem, and they consistently assert jurisdiction to reduce the discharge penalty on the ground that the power is implied in their authority to decide and adjust the dispute submitted by the parties.

The courts, in actions to vacate or enforce awards, have shown a general tendency to favor the arbitrator's assertion of power to modify the penalty imposed unless this power is clearly denied him by the collective agreement or submission. This tendency indicates that arbitrators will be given some leeway in formulating adequate remedies for the breach of collective bargaining agreements. Looking to the future, one wonders whether arbitrators will be allowed to formulate additional and more controversial remedies under the implied authority rationale. It is reasonable to assume, however, that there will be a corresponding development in the arbitral remedy power as the arbitration process increasingly becomes the principal means for resolving labor disputes.

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Trespassing Children: A Study in Expanding Liability

I. INTRODUCTION

In the winter of 1869, three small boys found a new and extraordinary plaything placed in their midst by the Sioux City Railroad—a turntable for reversing the direction of locomotives. Despite warnings by railroad employees that the turntable was dangerous, the children could not resist the temptation of playing upon it. While the other boys were rotating the turntable, six-year-old Henry Stout attempted to climb upon it and suffered an injury to his foot. His parents, as next of friend, instituted a lawsuit against the railroad which eventually reached the Supreme Court of the United States.[1] "The . . . decision . . . initiated the most controversial common-law doctrine of its era . . . . 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."[2]

The doctrine first enunciated in the *Stout* case has been given many labels: for example, the "turntable doctrine," "infant trespasser doc-

1. Sioux City & P.R.R. v. Stout, 84 U.S. (17 Wall.) 657 (1873).

2. Green, *Landowners' Responsibility to Children*, 27 TEXAS L. REV. 1 (1948). See Hardy v. Missouri Pac. R.R., 266 Fed. 860, 861 (8th Cir. 1920) (Stone, J.).

trine," "attractive nuisance doctrine," and "playground doctrine."[3] All are somewhat inaccurate, however, in that they fail to provide a clue either to the doctrine's purpose or to its dimension. Nevertheless for convenience, the doctrine hereinafter will be referred to as the "attractive nuisance" doctrine, which comes as close as any to an accurate description and also possesses the virtue of common usage.

This note will first trace the historical development of the doctrine. It will then demonstrate why each new case must be viewed against this background and indicate the methods used by some courts in circumventing the normal rule. A discussion of the relation of judge and jury in the trial of these cases will follow, after which an effort will be made to provide an analytical approach in determining the duty owed. Finally, the trends and developments emerging in this area of the law will be observed. Heeding the admonition of an American writer that, "In studying the cases the trouble too frequently is in the difference between what the courts say and what they decide,"[4] the writer will seek to examine the cases both by analyzing their internal logic and by attempting to synthesize their results.

II. HISTORY OF THE LAW RELATING TO LANDOWNERS AND TRESPASSING CHILDREN

At its inception, the law of torts granted the landowner immunity from liability for negligence to trespassers, imposing upon him only a duty to refrain from willful or intentional misconduct toward one on his property without consent or invitation.[5] Thus, if Henry Stout were to recover for his injury, an inroad had to be made on this immunity.[6] Notwithstanding the Supreme Court's mention of the "trap-

3. See Sioux City & P.R.R. v. Stout, *supra* note 1 (turntable doctrine); Pickens v. Southern Ry., 177 F. Supp. 553 (E.D. Tenn. 1959) (playground doctrine); Keffe v. Milwaukee & St. P.R.R., 21 Minn. 207, 18 Am. Rep. 393 (1875) (attractive nuisance doctrine stemming from the requirement of an allurement or enticement).

4. ELDREDGE, MODERN TORT PROBLEMS 166 (1941). See, *e.g.*, Kahn v. James Burton Constr. Co., 5 Ill. 2d 614, 126 N.E.2d 836 (1955).

5. See Eldredge, *Tort Liability to Trespassers,* 12 TEMP. L.Q. 32 (1937); James, *Tort Liabilty of Occupiers of Land: Duties Owed to Trespassers,* 63 YALE L.J. 144 (1953).

6. It should be noted, however, that while there was some authority for the position taken by the Court, it was not directly in point. In an early English case, said to be the origin of the doctrine, a child was a trespasser in climbing upon au unattended cart standing in the street. Recovery was allowed when another child struck the cart causing it to start and the plaintiff was thrown off. Lynch v. Nurdin, 1 Q.B. 30, 113 Eng. Rep. 1041 (1841). Interestingly enough, the question of duty was assumed here as it was by the Supreme Court in *Sioux City*. Also, the cart was in a public street where it could be said that defendant owed a duty of active care. See also Daley v. Norwich & Worcester R.R., 26 Conn. 590 (1858); Birge v. Gardiner, 19 Conn. 506 (1849). In *Birge,* a seven-year-old boy was injured by the fall of a gate which defendant had placed on his land in close proxity to a public lane. The defendant was held liable on a theory of gross negligence. This can be classified with those cases where a ditch is dug too near a high-

stinking meat" analogy,[7] indicating willful or intentional misconduct, it was clear that the turntable was incident to the reasonable conduct of the business of railroading and was not placed there by the defendant with any intent to attract or inflict harm upon children. Therefore, even though the Court did not alter the duty owed to adult trespassers, it did impose a greater duty upon the landowner with regard to trespassing children—*i.e.*, that of refraining from negligent conduct.[8] What was the basis for this new duty? Since the courts had always been committed to "the principle of affirmative conduct as the basis of a duty of care,"[9] this new duty was based upon the landowner's activity on his premises.[10] The early beginnings of industrialism had now been given recognition by the Court.[11]

However, two problems still remained: (1) why should one differentiate between the adult trespasser and the child trespasser? (2) how should this differentiation be made? Unfortunately, these questions tended to merge; for in 1875, if one could construct a recognizable legal mechanism by means of which he could explain *how* to reach a given result, he very likely felt he had already answered the question: "why construct such a mechanism in the first place?" Given this mechanistic approach to jurisprudential reasoning, the Court's method of handling Henry Stout's case is understandable—it simply explained *how* to reach a given result. One could avoid the harshness

way and the party is injured when wandering off the public way. In *Daley*, the child was injured by a passing train while playing on the defendant's track. The decision rested on the "constant trespasser" theory, rather than attractive nuisance.

7. The Supreme Court cited the case of Bird v. Holbrook, 4 Bing. 628, 130 Eng. Rep. 911 (1828), where the plaintiff trespasser was injured by a spring gun set by the defendant on his land. 84 U.S. at 661. Yet, this condition, like the baited trap in Townsend v. Wathan, 9 East 277, 103 Eng Rep. 579 (K.B. 1808), involved the intentional infliction of injury.

8. The court stated, "a railway company is not . . . exempt from responsibility to such strangers for injuries arising from its negligence . . . ." 84 U.S. at 661.

9. Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 AM. L. REGISTER 209 (1905); Morison, *A Re-examination of the Duty of Care*, 11 MODERN L. REV. 9 (1948).

10. "[I]t gradually became apparent through the decisions . . . that it was being applied to situations made dangerous through machines and construction enterprises and was being denied application to the situations usually attendant on farm, home, simple commercial ownership, and activities against which no effective protection could be given." Green, *supra* note 2, at 8. Illustrations of the latter activities included standing railway cars, materials on rights of way, railway yards, poles erected for wires, buildings, roofs, vehicles, walls. See also Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility In Tort*, 21 MICH. L. REV. 495 (1923).

11. "The railroad company had mechanized its land. It was no longer a mere landowner with the simple things attendant upon feudal or rural land ownership . . . . Unless the landowner was to be treated differently from other machine owners and operators active in society the principles of negligence which made them liable were applicable to the railroad. It had undertaken the obligations of landowning with machinery. The distinction between nonfeasance and misfeasance was no longer valid with respect to this sort of landowning." Green, *supra* note 2, at 6.

of immunity from liability to trespassers by labeling Henry something other than a trespasser. If he were found to be a licensee or invitee, imposition of a greater duty could follow.[12] A Minnesota court, in *Keffe v. Milwaukee & St. Paul R.R.*, enunciated the "attractive nuisance" doctrine in precisely these terms. Raising the child to the status of an invitee, the court said:

> The difference between the plaintiff's position and that of a voluntary trespasser . . . [is that] the plaintiff was induced to come upon the defendant's turntable by the defendant's own conduct . . . . And when one goes upon the land of another, not by mere license, but by invitation from the owner, the latter owes him a larger duty.[13]

Thus, the idea of "known attractiveness" became the "legal equivalent of invitation."[14] This gained impetus and, in 1921, was recognized by the Supreme Court in one of the most criticized opinions yet to arise under the doctrine.[15] The critics, recognizing the inadequacy of this mechanistic approach to the imposition of liability, advocated that the concept of "attractiveness as an implied invitation" be abandoned, that the child be recognized for what he was—that is, a trespasser, and that the attractiveness of the condition be considered only as evidence of foreseeability of the trespass.[16] In 1934, the drafters of

12. See James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605 (1954); Paton, *Invitees*, 27 MINN. L. REV. 75 (1942); Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942).

13. Keffe v. Milwaukee & St. P.R.R., *supra* note 3, at 210, 18 Am. Rep. at 396. See also Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 513, 877 (1930).

14. Townes, *Is a Re-Statement of the Law As To Liability Arising From Dangerous Premises Desirable and Practicable? Part I*, 1 TEXAS L. REV. 1 (1922); Townes, *Is a Re-Statement of the Law As To Liability Arising From Dangerous Premises Desirable and Practicable? Part II*, 1 TEXAS L. REV. 389 (1922).

15. United Zinc & Chem. Co. v. Britt, 258 U.S. 268 (1922). Two boys were poisoned as a result of wading in a contaminated pool in defendant's abandoned cellar. Recovery was denied on grounds that the boys had not been enticed on the premises by the pool. This decision marked the first clear enunciation of the attractive nuisance doctrine by the Supreme Court. However, in Union Pac. Ry. v. McDonald, 152 U.S. 262 (1893), the attractiveness concept had been mentioned by the Court. Here a small boy, unaware of its presence, fell into a burning slack pit maintained by the railroad, while running along its narrow path. There was a statute requiring slack pits to be fenced and providing a penalty for non-compliance. While Mr. Justice Harlan based his opinion on the maintenance of a dangerous condition which defendant had reason to know "would attract the interest or curiosity of passers-by," the boy was not attracted by the pit, but was unaware of the danger. Also, the path was semi-public. Thus, this case would better seem to fit into the category of those cases holding that the landowner must warn licensees of a hidden peril since the plaintiff would have recovered in this case even if he had been an adult. In Best v. District of Columbia, 291 U.S. 411 (1934), the *Britt* case was cited with approval. See also Eastburn v. Levin, 113 F.2d 176 (D.C. Cir. 1940), which rejected *Britt*. See Wilson, *Limitations on the Attractive Nuisance Doctrine*, 1 N.C.L. REV. 162 (1923), for a discussion of these cases.

16. Green, *supra* note 2, at 6. For a discussion of the Supreme Court cases and their impact on the federal courts, see Hudson, *The Turntable Cases in the Federal Courts*, 36 HARV. L. REV. 826 (1923).

the *Restatement of Torts* adopted this view by treating the rule as one of ordinary negligence liability "and the fact that the child is a trespasser . . . [is] merely one fact to be taken into account, with others, in determining the defendant's duty, and the care required of him."[17] Since its adoption, the *Restatement* has been instrumental in guiding the development of the law away from "attractiveness as an implied invitation" by recognizing that the legal status of the child is that of a trespasser and that "allurement, temptation, has its place in these cases but not on the fictitious idea that it is an invitation, but on the perfectly true idea of materiality in determining the issue of reasonable apprehension of hurt."[18]

Forced to abandon efforts to answer both the "why" and the "how" of the doctrine in a single thrust, by raising the child to the status of an invitee, the courts found it necessary to return to the problem of formulating a rationale for differentiating between the adult trespasser and the child trespasser. Thus, they attempted to justify imposition of a greater duty to the child.[19] Stated in its simplest terms, an adult trespasser "is old enough to be able to protect himself against all ordinary visible conditions, and to make his own decision to take his chances as to what he cannot see."[20] However, the child "because of his immaturity and lack of judgment . . . may be incapable of understanding and appreciating all of the possible dangers which he may encounter in trespassing, or of making his own intelligent decision as to what chances he will take."[21] Yet, this justification was incomplete without the realization that children are valuable to society and the law should protect them.

> Children are vital to our way of life. Their physical welfare is worthy of the law's protection. When any person's activities too severely prejudice their welfare we may expect government to take a hand . . . . It gives immunity still but under a doctrine of negligence.[22]

Thus, American courts added the social value of human life to the

17. *Prosser, Trespassing Children*, 47 CALIF. L. REV. 427, 432 (1959); RESTATEMENT, TORTS § 339 (1934); 2 HARPER & JAMES, TORTS § 27.5 (1956).

18. Townes, *supra* note 14, at 8.

19. In Eastburn v. Levin, *supra* note 15, at 178, the court said, "Imposing responsibility is more apt to make occupants careful than denying responsibility is to make children careful; occupants may know little about law, but children know nothing about it, and children will play where they can." Several courts, however, have asserted various reasons for rejecting the doctrine. Note, Nelson v. Burnham & Morrill Co., 114 Me. 213, 95 Atl. 1029 (1915) (that the doctrine is grounded on sympathy rather than sound legal doctrine); Hannan v. Ehrlich, 102 Ohio St. 176, 131 N.E. 504 (1921) (shifts duty of caring for children from parents to the public); Bottum's Adm'r v. Hawks, 84 Vt. 370, 79 Atl. 858 (1911) (would make the landowner an insurer of the child's safety); Note, 1959 DUKE L.J. 137.

20. Prosser, *supra* note 17, at 428.

21. *Id.* at 429.

22. Green, *supra* note 2, at 12.

list of those social values afforded legal protection. The cloak of this protection would extend to those unable to protect themselves.

Yet, the question remained: why should this duty be imposed upon the landowner when the parent of the child, whose supervision and discipline were faulty, would share in the recovery?[23] One commentator has answered the question in the following manner:

> When . . . [the landowner] burdens his land with machinery, construction, and developments of many sorts as an incident to his activities which create conditions beyond the appreciation of children, instead of throwing further burdens on already heavily pressed parents, government has said to the landowner in effect that since he creates these hazards in the community; since he should know that children will come in contact with them and will probably be hurt . . . since children can only be developed through the enjoyment of the freedom the community affords; and since parents cannot effectively protect them from dangers attendant upon such activities, the landowner is required to use reasonable means to protect [them] . . . .[24]

The scientific and technological developments of the mid-nineteenth century brought about the phenomenon of "landowning with machinery." The benefits created new responsibilities to that element of society deemed worth protecting but unable to protect itself. Further, the landowner was in the best position to effectuate the social policy of protection of human life.[25]

Once the rationale for different treatment of child and adult trespassers had been formulated, it was easier to visualize the elements of the doctrine, which, together, served as the mechanism for providing solutions to the concrete problems raised by meandering children. It should have been evident to the courts that what is required in each case is a forthright statement of the opposing values to be balanced: the landowner's right to free use of his property and the child's right to protection from injury. While the landowner's immunity was restricted in *Sioux City*, he was not made an insurer of the child's safety. He still had a right to free use of his property. Where this right ends and the duty begins, however, poses a recurring problem in the development of the doctrine. "Compromise after compromise has been effected between the social value of human life and the

23. Smith, *Liability of Landowners To Children Entering Without Permission*, 11 HARV. L. REV. 349 (1898).

24. Green, *supra* note 2, at 12, 13.

25. 'If . . . [the child] is to be protected at all, the person who can do it with the least inconvenience is the one upon whose land be strays . . . . The interest in unrestricted freedom to make use of the land may be required, within reasonable limits, to give way to the greater social interest in the safety of the child . . . .' PROSSER, TORTS § 59, at 372 (3d ed. 1964).

social value of the unrestricted use of land."[26] In this process of development the Anglo-American law "has varied from the attitude of an irritable nurse, who regards castigation as more appropriate than compensation for harm which the child has brought upon itself, to that of an indulgent parent who considers that the world ought to be made a safe place for her offspring."[27] Yet, in recent years the decisions, while purporting to balance the competing interests, have indicated a tendency to favor the injured child.[28] We are now in a period of expanding liability.

III. Development of the Attractive Nuisance Doctrine Through the Restatement

Perhaps one explanation for this expansion lies in the manner in which the particularization of the elements to be considered by judge and jury in balancing the competing interests has developed. To understand this process of particularization it may be helpful to trace its development through the following phases: the jury instruction in *Sioux City;* the *Restatement of Torts;* and the *Restatement (Second) of Torts.* Finally, the observations of Dean Prosser in 1959 will be considered.

The trial judge charged the jury in *Sioux City* to consider the dangerous nature of the instrumentality as to its likelihood for causing injury if left unguarded or unlocked.[29] Further, the jurors were asked

26. Eldredge, *op. cit. supra* note 4, at 166. Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right,* 69 U. Pa. L. Rev. 340 (1921).

27. Winfield, Torts 300 (7th ed. 1963).

28. Reynolds v. Willson, 51 Cal. 2d 94, 331 P.2d 48 (1958) (Spence, J., dissenting). In Simmel v. New Jersey Coop Co., 47 N.J. Super. 509, 136 A.2d 301 (App. Div. 1957), the court never mentioned the necessity of balancing the utility of allowing the condition to exist and the burden of removing it over against the risk of harm to the child, but leaned toward the child's interest. "The jurisprudence of the past gave to the occupier of land a special privilege to be careless. But today the broad tendency of the law is to impose upon him, as upon other members of society, a duty to exercise reasonable care to avoid injuries to others." *Id.* at 513, 136 A.2d at 303. "[T]wentieth century ideals of humanity and awareness of social problems occasioned by increasing density of population, gainful employment of mothers, and an increasingly greater number of dangerous artificial objects on populated land would seem to promote an extension of the doctrine." Note, 1 Ariz. L. Rev. 169, 172-73 (1959). *But see* Debevec, *Is the Attractive Nuisance Doctrine Outmoded?* 5 Clev.-Mar. L. Rev. 85 (1957).

29. The charge was as follows, "That to maintain the action it must appear by the evidence that the turntable, in the condition, situation, and place where it then was, was a dangerous machine, one which, if unguarded or unlocked, would be likely to cause injury to children; that if in its construction and the manner in which it was left it was not dangerous in its nature, the defendants were not liable for negligence; that they were further to consider whether, situated as it was the defendants' property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if

to consider whether the instrumentality was so situated that the landowner had reason to anticipate that "children would be likely to resort to it" and thus be injured. Thus, three principal elements are discernible in the first enunciation of the doctrine: (1) the nature of the condition, (2) the likelihood of the trespass, and (3) the possibility of injury. Whether the possibility of injury included a consideration of the child's appreciation of the risk and whether this was to be measured by an objective or subjective standard was not made clear. When the case reached the Supreme Court, an additional element entered the picture—the utility of the landowner's conduct and the burden placed upon him to remedy the dangerous condition.[30]

In 1934, the drafters of the *Restatement of Torts* laid down the following rule: the possessor is subject to liability to young children trespassing on his land for bodily harm resulting from conditions maintained there if four requirements are met.[31] The burden rested upon the plaintiff to show that: (1) the place is one where the possessor knows or should know that children are likely to trespass; (2) the condition involved an unreasonable risk of death or serious bodily harm; (3) the child because of his youth was incapable of appreciating the risk involved; and (4) the utility to the possessor of maintaining the condition, when balanced against the risk to the child, was so slight as to demand that the possessor act affirmatively to remedy the risk. This definitive and carefully worded statement reveals several judicial limitations imposed on the doctrine since its first enunciation. For example, courts had often insisted that the doctrine

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they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence." 84 U.S. at 659.

30. The words "if unguarded or unlocked" assumes that there was a duty to act and doesn't ask the jury to consider utility. However, a consideration of the utility of allowing the condition to exist and the burden of removing it appears in the opinion by Mr. Justiee Hunt. "This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch." 84 U.S. at 662.

31. RESTATEMENT, TORTS § 339 (1934): "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, 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 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 to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

be applicable only to "children of very tender years."[32] Some courts even went so far as to adopt a mechanistic approach, holding the doctrine inapplicable as a matter of law to children of a certain age.[33] To emphasize further the limited nature of the interest to be protected, courts had granted recovery only for "bodily harm."[34] Also, they required that the dangerous condition be "maintained" by the landowner, thus exempting him from liability for injuries inflicted as a result of the activity of third parties permitted on his premises.[35] However, by using the language "should know," they also indicated that the possessor was under a duty to inspect the premises. Finally, the doctrine was restricted to artificial conditions on the land.

While the *Restatement* was helpful in defining the elements to be considered, several problems remained. What was a condition involving an unreasonable risk of death or serious bodily harm? This element appeared to embody two distinct concepts—the risk of some harm and the extent of the harm.[36] In addition, though the first jury charge had emphasized that the standard was one of negligence, a reading of the *Restatement* could lead one to believe that the landowner was being made an insurer of the child's safety.

In 1965, the *Restatement (Second)* evidenced the expansion of liability which had occurred during the thirty year period. The pendulum had swung from an emphasis on the landowner's right to free use of his property to an emphasis on the child's interest in freedom from harm.[37] Since the earlier doctrine had been applied to children

32. See, *e.g.*, Central of Ga. R.R. v. Robins, 209 Ala. 6, 95 So. 367 (1923); Drew v. Lett, 95 Ind. App. 89, 182 N.E. 547 (1932); Louisville & N.R.R. v. Hutton, 220 Ky. 277, 295 S.W. 175 (1927); Empire Gas & Fuel Co. v. Powell, 150 Okla. 39, 300 Pac. 788 (1931); Schulte v. Willow River Power Co., 234 Wis. 188, 290 N.W. 629 (1940).

33. See, *e.g.*, Garrett v. Arkansas Power & Light Co., 218 Ark. 575, 237 S.W.2d 895 (1951) (14 years); Soles v. Edison Co., 144 Ohio St. 373, 59 N.E.2d 138 (1945) (14 years); Texas Power & Light Co. v. Burt, 104 S.W.2d 941 (Tex. Civ. App. 1937) (14 years).

34. See, *e.g.*, Katz v. Helbing, 205 Cal. 629, 271 Pac. 1062 (1928); Vills v. City of Cloquet, 119 Minn. 277, 138 N.W. 33 (1912); Lone Star Gas Co. v. Parsons, 159 Okla. 52, 14 P.2d 369 (1932).

35. Prosser, *supra* note 17, at 447.

36. Bauer, *The Degree of Danger and the Degree of Difficulty of Removal of the Danger As Factors in "Attractive Nuisance" Cases*, 18 MINN. L. REV. 523, 525 (1934).

37. RESTATEMENT (SECOND), TORTS, § 339 (1965): "A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an 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 with it or in coming within the area made dangerous by it, and (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 (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children."

seventeen and eighteen years of age, the adjective "young" was deleted,[38] and the following standard proposed: "Did the child appreciate the risk?" This change indicated a rejection of the mechanical approach to the solution of concrete problems involving a balancing of competing social values. The original limitation of liability to "bodily harm" had now been extended to include injury to property.[39] Since a number of decisions had imposed liability on the landowner for conditions created by a third party, the word "exist" was substituted for "maintained."[40] Each of these alterations indicated a preference for the interest of the injured child while imposing an additional burden on the landowner. However, to emphasize that the landowner was under no duty to inspect the premises, the words "should know" were changed to "have reason to know."[41] To insure consideration of the possessor's right to free use of his property, the trier would now be required to consider not only the "utility to the possessor of allowing the condition to exist," but the "burden of eliminating the danger."[42] This alteration indicated a further particularization of the elements to be considered in the balancing process. Finally, to remove any doubt which may have existed in the original *Restatement* concerning the landowner's duty to refrain from negligent conduct, a fifth subsection was added.[43] No effort was made, however, to particularize further the requirement that the condition involve an "unreasonable risk of death or serious bodily harm." Again, it is submitted that such a particularization would be helpful in assuring not only that the "risk

38. See, *e.g.*, E. I. DuPont de Nemours & Co. v. Edgerton, 231 F.2d 430 (8th Cir. 1956); Harris v. Indiana Gen. Serv-Ice Co., 206 Ind. 351, 189 N.E. 410 (1934); Texas Power & Light Co. v. Burt, *supra* note 33.

39. The words "bodily harm" were changed to read "physical harm." RESTATEMENT (SECOND), TORTS § 339 (1965). However, the writer's research has produced only one case where recovery was granted for injury to property and here the doctrine was misapplied. Commercial Union Fire Ins. Co. v. Blocker, 86 So. 2d 760 (La. 1956) (recovery for property damage done to a third party adjoining landowner).

40. McGettigan v. National Bank, 320 F.2d 703 (D.C. Cir. 1963), 11 AM. U.L. REV. 190 (1962). The doctrine is not inapplicable because the dangerous condition (flare in a rundown building) was not created by the landowner, but by a third person, even a trespasser. See Cour d'Alene Lumber Co. v. Thompson, 215 Fed. 8 (9th Cir. 1914); Johnson v. Clement F. Sculley Constr. Co., 255 Minn. 41, 95 N.W.2d 409 (1959); Smith v. Post 212, 241 Minn. 46, 62 N.W.2d 354 (1954); Lorusso v. DeCarlo, 48 N.J. Super. 112, 136 A.2d 900 (App. Div. 1957); Simmel v. New Jersey Coop Co., *supra* note 28.

41. See McGettigan v. National Bank, *supra* note 40, where Circuit Judge Fahy followed and applied the proposed *Restatement* change from "should know" to "have reason to know." See also Mayfield Water & Light Co. v. Webb's Adm'r, 129 Ky. 395, 111 S.W. 712 (1908); White v. Stifel, 126 Mo. 295, 28 S.W. 891 (1895); Pietros v. Hecla Coal & Coke Co., 118 Pa. Super. 453, 180 Atl. 119 (1935).

42. Dugan v. Pennsylvania R.R., 387 Pa. 25, 127 A.2d 343 (1956); Courtright v. Southern Compress & Warehouse Co., 299 S.W.2d 169 (Tex. Civ. App. 1957).

43. See Prosser, *supra* note 17, at 466. RESTATEMENT (SECOND), TORTS § 339 (1965): ". . . (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children."

of some harm" be considered, but that the "extent of the harm" must be of such a substantial quality as to involve an unreasonable risk of death or serious bodily harm.

In 1959, Dean Prosser suggested several changes which were later included in the *Restatement (Second)*.[44] Three of his proposals did not appear in the final draft. Yet, they may prove helpful in evaluating the need for additional particularization of the elements as well as helping predict the course of future developments in the law of attractive nuisance. Dean Prosser suggested that section 339 be extended to include possessors of chattels as well as landowners;[45] that liability be imposed for natural conditions existing on property;[46] and that the wording of the *Restatement* be changed to allow consideration of the general social utility of the condition to the community as well as "utility to the possessor."[47] While the tentative draft of the *Restatement (Second)* included the last two recommendations, there was no mention of extending the section to possessors of chattels.[48] These proposals reflect an expansion of the possessor's ambit of liability while attempting to assure that the right to free use of his property will be considered through the recognition of the utility of his conduct to the larger community. Even though the doctrine has been applied to possessors of chattels, usually these cases can be decided under the general rules of foreseeability of harm and scope of the risk which have traditionally governed this area of liability for negligence.[49] This raises the question: Why not decide all cases involving

44. Prosser, *supra* note 17.

45. *Id.* at 436. Doyle v. City of Chattanooga, 128 Tenn. 433, 161 S.W. 997 (1913); Waddell v. New River Co., 141 W. Va. 880, 93 S.E.2d 473 (1956); Kressine v. Janesville Traction Co., 175 Wis. 192, 184 N.W. 777 (1921); Lynch v. Nurdin, *supra* note 6.

46. Prosser, *supra* note 17, at 446. While there has been no American case on the point, an English case has indicated that the distinction should not turn on the nature of the condition, natural or artificial, but whether it was obvious to the child. City of Glasgow v. Taylor, [1922] 1 A.C. 44 (Scot.). Here, however, the child was found to be a licensee. Also, the bush bearing the poisonous berries had been planted in the park. See 2 OKLA. L. REV. 537 (1949).

47. Prosser, *supra* note 17, at 463. See Peunington v. Little Pirate Oil & Gas Co., 106 Kan. 569, 189 Pac. 137 (1920); Coughlin v. U.S. Tool Co., 52 N.J. Super. 341, 145 A.2d 482 (App. Div. 1958); Dugan v. Pennsylvania R.R., *supra* note 42; Courtright v. Southern Compress & Warehouse Co., *supra* note 42.

48. The word "artificial" was deleted in the title to the section, but not in the black letter text. Subsection (d) was changed to read "the utility of the condition." RESTATEMENT, TORTS, subsection *d* (Tent. Draft No. 5, 1960).

49. A distinction should be made between chattels which come within the language of the *Restatement* "machinery in motion" and, therefore, constitute a condition on the property for which the possessor may be liable, and chattels on the street such as a peddler's cart and a moving truck, where application of the general rules of negligence appear more appropriate. See Nashville Lumber Co. v. Busbee, 100 Ark. 76, 139 S.W. 301 (1911); Landers v. French's Ice Cream Co., 98 Ga. 317, 106 S.E.2d 325 (1958); Molliere v. American Ins. Group, 158 So. 2d 279 (La. App. 1963), 18 ARK.

child trespassers under the general rules of negligence without resorting to a balancing of the specific elements? It is suggested that the elements of the *Restatement*, as reflected in the case law, provide helpful guidelines for the jury in balancing the interests and should not be abandoned. To do so would substitute the general for the particular, thereby sacrificing consideration of the landowner's interest. The expansion of the doctrine to natural as well as artificial conditions would appear reasonable. But, since no case has arisen on this point—and until such a case arises the drafters are unwilling to express their opinion in anything more than a caveat[50]—this particular suggestion appears to be of little consequence. Finally, in light of the growing interdependence of our modern society, a consideration of the "general social utility of the condition to the community" would seem desirable.

In conclusion, the development of the doctrine since the *Sioux City* decision represents an effort to hammer out a compromise between competing social values by means of a particularization of the elements which will aid the trier in this balancing process. Necessarily, the result reached will reflect the weight assigned any given element by those parties asked to perform the balancing process. It is here that greater court control appears both desirable and necessary if each new case is to be considered against the doctrine's historical development.

IV. RESTRICTIONS EMPLOYED TO CIRCUMVENT THE NORMAL RULE

An examination of the development of the "attractive nuisance" doctrine would be incomplete without some mention of the "restrictions" employed by some courts to circumvent its application in particular cases. It is suggested that these are "restrictions" in a peculiar sense in that they merely represent a priori determinations by some courts with regard to certain factors to be balanced. They are the product of the balancing process of competing interests by those courts which have had occasion to consider cases involving trespassing children.

While eight American jurisdictions purport to reject the doctrine, some of these have granted the child trespasser "qualified protection."[51]

L. REV. 178 (1964); Courtright v. Southern Compress & Warehouse Co., *supra* note 42; Kelly v. Southern Wis. Ry., 152 Wis. 328, 140 N.W. 60 (1913); Montgomery Ward & Co. v. Ramivez, 127 S.W.2d 1034 (Tex. Civ. App 1939), 18 TEXAS L. REV. 97 (1939). For a good discussion of the liability of possessors of chattels to trespassing children, see 36 NEB. L. REV. 362 (1957); 42 IOWA L. REV. 463 (1957).

50. RESTATEMENT (SECOND), TORTS § 339 (1965). "Caveat: The Institute expresses no opinion as to whether the rule stated in this Section may not apply to natural conditions of the land."

51. Lewis v. Mains, 150 Me. 75, 104 A.2d 432 (1954); Ritter v. City of Baltimore, 219 Md. 477, 150 A.2d 260 (1959); McGuiness v. Butler, 159 Mass. 233, 34 N.E. 259 (1893); Devost v. Twin City Gas & Elec. Co., 79 N.H. 411, 109 Atl. 839 (1920);

In one such jurisdiction there is some indication that the *Restatement* will be followed in the next appropriate case.[52] Another jurisdiction has allowed recovery in "exceptional cases," but has expanded the meaning of this phrase to such a degree as to indicate acceptance of the *Restatement* position.[53] Other jurisdictions impose liability on the landowner in cases involving "dangerous instrumentalities."[54] One commentator has indicated that the failure of the remaining jurisdictions to accept the doctrine may be attributable to the absence of cases where its application would be appropriate.[55] Thus, in those jurisdictions purporting to reject the doctrine, the rejection has by no means been complete. Rather, it has evidenced the assignment of a greater weight to the interest of the landowner by an a priori determination that certain elements are of more importance than others.

Likewise, in the majority of those jurisdictions recognizing the doctrine, determinations have been made as to its applicability in certain types of situations. Most of the courts have traditionally recognized the so-called "common hazards" exception. It is based on a determination that there are certain conditions such as water, fire, and heights which the child should appreciate.[56] Thus, as a matter of law the child should not be allowed to recover. This mechanistic

Carbone v. Mackchil Realty Corp., 296 N.Y. 154, 71 N.E.2d 447, 59 N.Y.S.2d 529 (1947); Hannan v. Ehrlich, *supra* note 19; Houle v. Carr-Consol. Biscuit Co., 85 R.I. 1, 125 A.2d 143 (1956); and Bottum's Adm'r v. Hawks, *supra* note 19.

52. In Labore v. Davison Constr. Co., 101 N.H. 123, 135 A.2d 591 (1951), the New Hampshire court indicated that although the *Restatement* was generally accepted in this jurisdiction it was inapplicable to the facts of the particular case.

53. Following the early English case of Lynch v. Nurdin, *supra* note 6, the New York courts have granted recovery for injuries caused by chattels in the public highway. See Tierney v. New York Dugan Bros., 238 N.Y. 16, 41 N.E.2d 161 (1942). Also, where the condition is found to be "inherently dangerous," the courts have granted recovery. Mayer v. Temple Properties, 307 N.Y. 559, 122 N.E.2d 909, 129 N.Y.S.2d 228 (1954). Also, the New York courts have granted recovery on the basis of the now rejected "enticement" theory, Dorsey v. Chatauqua Institution, 203 App. Div. 251, 231 N.E. 669, 196 N.Y. Supp. 798 (4th Dep't 1922). See also Popkin v. Shanker, 36 Misc. 2d 242, 232 N.Y.S.2d 574 (Sup. Ct. 1962). The child was playing with a lawnmower in defendant's yard. The court held that the complaint stated a cause of action. "While the so-called doctrine of attractive nuisance is not generally applied in this state, a jury, in determining what would be reasonable care under the circumstances, is entitled to take into consideration the well known propensity of children to climb and play." *Id.* at 244, 232 N.Y.S.2d at 576. Note, 8 N.Y.U. INTRA. L. REV. 224 (1953).

54. These jurisdictions are West Virginia and Virginia. See Justice v. Amherst Coal Co., 143 W. Va. 353, 101 S.E.2d 860 (1958) (inflammable oil filter). *Cf.* 60 W. Va. L. REV. 393 (1958). See also Washabaugh v. Northern Va. Constr. Co., 187 Va. 767, 48 S.E.2d 276 (1948); Daugherty v. Hippchen, 175 Va. 62, 7 S.E.2d 119 (1940).

55. Prosser, *supra* note 17, at 435.

56. Baker v. Praver & Sons, Inc., 361 S.W.2d 677 (Mo. 1962) (attractive nuisance doctrine inapplicable to "ordinary water hazards"). See 33 U. CINC. L. REV. 124 (1964). See generally Kravetz v. B. Perini & Sons, 252 F.2d 905 (3d Cir. 1958) (falling from height); Plotzki v. Standard Oil Co., 228 Ind. 518, 92 N.E.2d 632 (1950)

approach has been abandoned by some courts in cases involving ponds and other bodies of water. Two distinct stages of development are discernible. Certain courts have held that a body of water alone is not sufficient, but that an "exceptional circumstance" such as a floating raft,[57] the presence of animals,[58] the existence of white sand creating the appearance of a beach,[59] the maintenance of a diving board,[60] or the ease of accessibility and view,[61] is necessary to bring the condition within the doctrine. Others have not required an "exceptional circumstance." The question is whether the child appreciated the risk—it being realized that even a very young child will likely appreciate the dangers of water, but leaving this to a case-by-case determination.[62] Where the condition is one involving the hazard of fire, there appears to be a similar line of development. If the fire is a latent condition, the courts seem more willing to abandon the limitation.[63] However, some courts have rejected this restriction even where the fire was patent, reasoning that the child failed to appreciate

(artificial pond); Rhodes v. City of Kansas City, 167 Kan. 719, 208 P.2d 275 (1949) (fire); Zagar v. Union Pac. R.R., 113 Kan. 240, 214 Pac. 107 (1923) (falling from height); McCay v. DuPont Rayon Co., 20 Tenn. App. 157, 96 S.W.2d 177 (1935) (water); Hancock v. Aiken Mills, 180 S.C. 93, 185 S.E. 188 (1935) (fire).

57. Ansin v. Thurston, 98 So. 2d 87 (Fla. Dist. Ct. App. 1957).

58. King v. Lennen, 53 Cal. 2d 340, 348 P.2d 98 (1959), in which there was a block wall with a 6 foot opening and wooden fence on the other side with openings through which children could readily enter. Defendant permitted a cow, two dogs, and three horses to roam near the pool. Defendant's daughter had acted as babysitter for the one and one-half year old drowned child and had taken him there to play with the animals on previous occasions. For a discussion of the California water cases, see Note, 32 So. CAL. L. REV. 421 (1959); Note, 6 U.C.L.A. REV. 487 (1959); Note, 1 WASHBURN L.J. 310 (1961).

59. Ansin v. Thurston, *supra* note 57; Calleher v. City of Wichita, 179 Kan. 513, 296 P.2d 1062 (1956).

60. Smith v. Evans, 178 Kan. 259, 284 P.2d 1065 (1955) (water-filled sand pit and diving board).

61. Reynolds v. Willson, *supra* note 28 (hole in wall with hinges attached; pool visible to some 60 children playing in the street).

62. "While a child is more likely to be aware of a dangerous condition which is common than of one which is unusual, it seems obvious that the common nature of a danger, such as that of drowning in a pool, should not bar relief if the child is too young to realize the danger." King v. Lennen, *supra* note 58, at 344, 348 P.2d at 100. Thus, while the court mentioned exceptional circumstances, it appears that the court felt that these were not necessary in order to let the jury have it. See also Reynolds v. Willson, *supra* note 28. For a good review of the California decisions involving the common dangers, see 48 CALIF. L. REV. 348 (1960). The writer indicates that prior to 1958, California courts established rigid categories of common and obvious dangers where recovery was barred as a matter of law. Now, these cases are being treated like other attractive nuisance cases under *Restatement* § 339. See also 11 HASTINGS L.J. 344 (1960).

63. Union Pac. Ry. v. McDonald, *supra* note 15. Ford v. Blythe Bros. Co., 242 N.C. 347, 87 S.E.2d 879 (1955) (hot ashes).

the risk.[64] Finally, in those cases involving "falls from heights," the courts do not appear to be moving as rapidly.[65] Recovery has been allowed where there was a latent danger in the structure itself[66] or an "additional element."[67] These decisions are based upon the failure of the child to appreciate the defective condition rather than upon his failure to appreciate the danger inherent in heights. No decision has been found where the case was sent to the jury solely on the question of whether the child appreciated the danger of the height itself.

Another a priori determination made by some courts reflects a desire to distinguish between patent and latent dangers by holding as a matter of law that the child could not recover for injuries resulting from the "patent variety."[68] However, recently the term "latent" has been expanded to include dangers "hidden from the appreciation of the child."[69] Thus, as in the "common hazard" cases, the sole test would be, "Did the child appreciate the risk?"

Certain jurisdictions have refused to apply the attractive nuisance doctrine on grounds of a "conclusive presumption that the doctrine

64. Simmel v. New Jersey Coop Co., *supra* note 28 (burning rubbish on vacant unfenced lot across street from large housing project with 700 families and 1000 children). See 8 CATH. L. REV. 119 (1959). See also Lorusso v. DeCarlo, *supra* note 40, 1959 DUKE L.J. 137.

65. Gowen v. Willenborg, 366 S.W.2d 695 (Tex. Civ. App. 1963) (danger of falling was open and obvious, even to small children). Pennsylvania has consistently held that in situations involving a fall from a stationary object, that the child appreciated the risk and, therefore, subsection (c) of the *Restatement* would bar recovery. Kravetz v. B. Perini & Sons, *supra* note 56. In Helguera v. Circone, 178 Cal. App. 2d 232, 3 Cal. Rptr. 64 (1960), the following dictum appears siguificant, "We have an important factor not present in the ordinary case of a fall by a climbing child. In the ordinary building operation in which a scaffolding for the use of workmen is carefully and properly constructed the only danger to children climbing upon it is the danger which in inherent in the possibility that any climbing child may fall from the object upon which he climbs. In such circumstances, it would probably rarely happen that the existence of condition 4 of section 339 . . . (utility to the possessor and burden of removal), Restatement of Torts, could be proved, since the cost of any preventive measures . . . would in most cases be prohibitive." *Id.* at 238, 3 Cal. Rptr. at 68. See also Lopez v. Capitol Co., 141 Cal. App. 2d 60, 296 P.2d 63 (1956), in which a 7 year old was injured when he climbed and fell from a scaffolding erected on a sidewalk.

66. Helguera v. Circone, *supra* note 65. See also Chace v. Luce, 239 Minn. 364, 58 N.W.2d 565 (1953), where a similar result was reached.

67. Smith v. Springman Lumber Co., 41 Ill. App. 2d 403, 191 N.E.2d 256 (1963) (in addition to the height of the oil tank sitting on the concrete blocks, it was covered with a greasy substance).

68. Alabama Power Co. v. Kirkpatrick, 268 Ala. 338, 105 So. 2d 855 (1958), 11 ALA. L. REV. 200 (1958); Erickson v. Minneapolis, St. P. & S. Ste. M. Ry., 165 Minn. 106, 205 N.W. 889 (1925); Schroeder v. Texas & Pac. Ry., 243 S.W.2d 261 (Tex. Civ. App. 1951).

69. In Brittain v. Cubbon, 190 Kan. 641, 378 P.2d 141 (1963), the Kansas court said, "a *concealed danger* extends to things hidden from appreciation of persons injured, as well as to things hidden from the eye." *Id.* at 645, 378 P.2d at 145. See also Esquibel v. City & County of Denver, 112 Colo. 546, 151 P.2d 757 (1944); Bass v. Quinn-Robbing Co., 70 Idaho 308, 216 P.2d 944 (1950).

is inapplicable to a child of a certain age."[70] This limitation is not in accord with the position taken in the *Restatement (Second)*. Its view is that the "youth" of the child is no longer important, the controlling factor being his appreciation of the risk.

Two jurisdictions developed the so-called "playground rule,"[71] whereby the landowner "must have actual knowledge that children are using the property for a playground." This is more restrictive than the *Restatement* standard of "has reason to know."[72] However, one of these jurisdictions has expressly adopted the *Restatement* and it appears that the remaining jurisdiction may follow.[73]

Finally, one jurisdiction has determined that only in cases involving "inherently dangerous" conditions will the attractive nuisance doctrine be applied.[74] Once again the concept of inherently dangerous has been expanded to include "dangerous substances."[75]

As noted before, the decision in the attractive nuisance case is reached by a balancing of competing interests, as manifested in certain elements which have been laid down by the courts and the *Restatement*. The result reached in any given case must necessarily depend upon the weight assigned to each element. While a further refinement of certain elements is needed, by and large they have been adequately developed so as to achieve a just result in the particular case if properly applied. It is to this application that attention will next be directed.

V. PROVINCES OF JUDGE AND JURY

The application of any rule of law is dependent upon the function-

70. Columbus Mining Co. v. Napier's Adm'r, 239 Ky. 642, 40 S.W.2d 285 (1931) (age 15, driftmouth); McKenna v. City of Shreveport, 16 La. App. 234, 133 So. 524 (1931) (age 10, pond); Empire Gas & Fuel Co. v. Powell, *supra* note 32 (above 14 years); Bentley v. South-East Coal Co., 334 S.W.2d 349 (Ky. 1960), 50 KY. L.J. 100 (1961).

71. It is interesting, however, that the courts use the terms "attractive nuisance" and "playground doctrine" interchangeably. Weimer v. Westmoreland Water Co., 127 Pa. Super. 201, 193 Atl. 665 (1937); Anderson v. Peters, 22 Tenn. App. 563, 124 S.W.2d 717 (1938).

72. Pickens v. Southern Ry., 177 F. Supp. 553 (E.D. Tenn. 1959).

73. See Troutman, *The Passing of the Doctrines of Attractive Nuisance and Playground Rule in Pennsylvania*, 62 DICK. L. REV. 159 (1958). In 27 TENN. L. REV. 430 (1960), the writer indicates that Tennessee may be moving away from the requirement of attraction by the dangerous instrumentality, to adopt the *Restatement*. If so, this doctrine would, to a considerable extent, replace the playground rule. In this regard, see Pickens v. Southern Ry., *supra* note 72; Birdsong v. City of Chattanooga, 204 Tenn. 264, 319 S.W.2d 233 (1958).

74. Missouri. See 28 MO. L. REV. 147 (1963).

75. *Ibid.* The writer indicates that Paisley v. Liebowits, 347 S.W.2d 178 (Mo. 1961), represents a parallel doctrine used by the Missouri courts to get around the limitation of "inherently dangerous" which they had put on the attractive nuisance doctrine without undergoing the judicial embarassment of overruling their decisions. Also, the defendant was a possessor of a chattel rather than a landowner.

ing of judge and jury. Thus, the province of each must be defined. One commentator has suggested that a "negligence case" consists of four elements: (1) the right-duty element; (2) the negligence element; (3) the damage element; and (4) the causal relation element.[76] Under this analysis the right-duty element is a question of law for the judge, "while the problems of negligence, damages and causal relation, if there is an issue raised as to them by the evidence, are . . . [questions of fact] for the jury under instructions."[77] The *Restatement (Second)*, applying this analysis of the separation of function of judge and jury, sets forth the following functions to be performed by the court:

> In an action for negligence the court determines:
> (a) whether the evidence as to the facts makes an issue upon which the jury may reasonably find the existence or non-existence of such facts;
> (b) whether such facts give rise to any legal duty on the part of the defendant;
> (c) the standard of conduct required of the defendant by his legal duty;
> (d) whether the defendant has conformed to that standard, in any case in which the jury may not reasonably come to a different conclusion;
> (e) the applicability of any rules of law determining whether the defendant's conduct is a legal cause of harm to the plaintiff; and
> (f) whether the harm claimed to be suffered by the plaintiff is legally compensable.[78]

If the judge should find that the facts raise a legal duty, that reasonable minds may differ as to whether the defendant has conformed to the standard of conduct required of him, and if the requirements of causation and legally compensable harm are met, then the case should be submitted to the jury under proper instructions.[79] It should be noted, however, that "where the existence of the duty will depend upon the existence or non-existence of a fact as to which the jury may reasonably come to either one of two conclusions . . . that it becomes the duty of the court to instruct the jury as to the defendant's duty, or absence of duty, if either conclusion as to such fact is drawn.[80] It is submitted that the duty of the court in this regard is most important in the attractive nuisance case where defendant's duty is raised by the

76. GREEN, JUDGE AND JURY 53 (1930).

77. *Id.* at 54. *But see* Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111 (1924).

78. RESTATEMENT (SECOND), TORTS § 328B (1965).

79. RESTATEMENT (SECOND), TORTS § 328C (1965): "In an action for negligence the jury determines, in any case in which different conclusions may be reached on the issue: (a) the facts, (b) whether the defendant has conformed to the standard of conduct required by the law, (c) whether the defendant's conduct is a legal cause of the harm to the plaintiff, and (d) the amount of compensation for legally compensable harm."

80. RESTATEMENT (SECOND), TORTS § 328B., comment *b* (1965).

existence of four facts: (a) the place is one where children are likely to trespass; (b) the condition is one which the possessor knows or has reason to know will involve an unreasonable risk of death or serious bodily harm to such children; (c) the children do not appreciate the risk involved in meddling with the condition; and (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight when balanced against the risk to children involved. To understand better the allocation of functions between judge and jury in an attractive nuisance case, it is helpful to see what the courts have said and done in this regard.

Some decisions indicate that the question of whether a condition constitutes an attractive nuisance is a preliminary one for the judge.[81] Viewed in light of the *Restatement*, this would appear to limit the court's considerations to the likelihood of injury and the dangerous nature of the condition, leaving the questions of the child's appreciation of the risk and the utility to the possessor of maintaining the condition for the jury to decide.[82] Other courts have stated that the preliminary question for the court is whether a duty is owed this plaintiff.[83] Under the *Restatement* this should allow the court, before submitting the case to the jury, to consider the likelihood of the trespass, the dangerous nature of the condition, the child's appreciation of the risk, and the utility to the possessor, since the duty is said to arise from a combination of these facts.[84] There is a problem,

81. Courtright v. Southern Compress & Warehouse Co., *supra* note 42. General rules of negligence applied to child who fell from and was run over by one of defendant's trailers in a public street. The court held the complaint failed to state a cause of action under the attractive nuisance doctrine. See 9 BAYLOR L. REV. 235 (1957). It is interesting to note the broad language of the court to the effect that the attractive nuisanee doctrine would have no applieation to moving vehicles, though the narrow holding was based on the absence of subsection (d) of the *Restatement* (utility of the possessor's conduct and burden of removal). See also Molliere v. American Ins. Group, *supra* note 49 (peddler's truek was not an attractive nuisance); Staley v. Security Athletic Ass'n, 152 Colo. 19, 380 P.2d 53 (1963); Pocholec v. Guistino, 224 Ore. 245, 355 P.2d 1104 (1960). In some jurisdictions the attractive nuisance doctrine is made inapplieable as a matter of law on the basis of a conclusive presumption that the doctrine does not apply to a child of age 14. See Alabama Power Go. v. Kirkpatrick, *supra* note 68; Baker v. Praver & Sons, Inc., *supra* note 56 (attractive nuisance doctrine inapplicable to ordinary water hazards).

82. Pocholec v. Guistino, *supra* note 81.

83. McClelland v. Baltimore & O.C.T. Ry., 123 F.2d 734, 738 (7th Cir. 1941); Mann v. Kentucky & Ind. Terminal R.R., 290 S.W.2d 820 (Ky. App. Ct. 1956), 46 KY. L.J. 181 (1957); Gowen v. Willenborg, *supra* note 65; Massie v. Copeland, 149 Tex. 319, 233 S.W.2d 449 (1950).

84. Yet, in Gowen v. Willenborg, *supra* note 65, the court's decision turned on subsection *b* of the *Restatement* (nature of the condition). Thus, under the approach suggested in this article, the court's consideration of the four elements of the duty may terminate at any stage, as it did in this case, when there was not sufficient evidence adduced so that reasonable minds could differ as to the unreasonable nature of the condition.

however, in trying to delineate where the duty begins in terms of the *Restatement* requirements. This is largely due to the fact that the duty and the breach of it tend to merge. For example, the utility to the possessor of maintaining the condition is a fact giving rise to the duty, but it is also important in determining the standard of conduct required of the defendant by his legal duty.[85] Finally, those courts viewing the attractive nuisance case as one of ordinary negligence would send the case to the jury upon a finding of "the foreseeability of harm to the child."[86] Yet, they often fail to recognize that the "duty is not always coincidental with the foreseeable possibility of harm." Situations may arise where harm is foreseeable, but the defendant may be under no duty to act at all.[87]

The general statements concerning court control provide a basis for an examination of what is actually done with some of the problems and the resulting effects. There is a tendency to leave the balancing of the "utility of allowing the condition to exist" and "the burden of eliminating the condition" against the "risk of harm to the child," to the jury. It is suggested that in some cases this has resulted in making the defendant an insurer under a "cost of doing business" theory rather than holding him to a standard of reasonable conduct.[88] While the writer would concede that in most instances this requirement presents a jury question, it poses an opportunity for jury abuse. Though one may only speculate regarding the deliberations of a

85. Kahn v. James Burton Constr. Co., 5 Ill. 2d 614, 126 N.E.2d 836 (1955). "Reasonable care depends to some extent on the utility of the harmful agency to the occupier and inconvenience or expense that he would incur in safeguarding it." 1955 U. ILL. L. F. 630, 631. See also 1 VILL. L. REV. 181 (1956). *Contra*, Morris v. Lewifs Co., 331 Mich. 252, 49 N.W.2d 164 (1951).

86. Novicki v. Blaw-Knox, 304 F.2d 931 (3d Cir. 1962); MacNeil v. Perkins, 84 Ariz. 74, 324 P.2d 211 (1958); American Nat'l Bank & Trust Co. v. Pennsylvania R.R., 59 Ill. App. 2d 406, 202 N.E.2d 79 (1964); Stewart v. DuPlessis, 42 Ill. App. 2d 192, 191 N.E.2d 622 (1963); Smith v. Springman Lumber Co., *supra* note 67; Pier v. Schultz, 177 N.E.2d 264 (Ind. App. 1961); Kahn v. James Burton Constr. Co., *supra* note 85; Lorusso v. DeCarlo, *supra* note 40.

87. Johnson v. Clement F. Sculley Constr. Co., *supra* note 40; Pickens v. Southern Ry., *supra* note 72. See Halloran v. Belt Ry., 25 Ill. App. 2d 114, 166 N.E.2d 98 (1960). "Every person owes to all others a duty to exercise care to guard against injury, which may naturally flow as a reasonably probable and foreseeable consequence of his act . . . . The duty to exercise ordinary care to avoid injury to another can extend to remote and unknown persons." *Id.* at 119, 166 N.E.2d at 100. See also Menneti v. Evans Constr. Co., 259 F.2d 367 (3d Cir. 1958), which held that the ditch was so situated that reasonable men could have foreseen that it would fill with water and thus, constituted a dangerous condition. Therefore, defendant was held to have "maintained" a dangerous condition on his property, even though the ditch had become filled with water less than 30 hours prior to the fatal accident. *Cf.* Shnmel v. New Jersey Coop Co., 47 N.J. Super. 509, 136 A.2d 301 (App. Div. 1957).

88. American Nat'l Bank & Trust Co. v. Pennsylvania R.R., *supra* note 86; Kahn v. James Burton Constr. Co., *supra* note 85; Maun v. Kentucky & Ind. Terminal R.R., *supra* note 83; Martinez v. C. R. Davis Contracting Co., 73 N.M. 474, 389 P.2d 597 (1964) (good dissenting opinions).

jury, it is questionable whether this factor is carefully considered, especially in those cases of extensive injury where jury sympathy is no small factor in reaching the result.[89] It is submitted that a careful consideration of this element is necessary, however, if the landowner's right of "restricted free use" is to be protected.[90] Also, there is a tendency on the part of the courts to treat "reasonable care" as always being a question of fact.[91] Once again, while in most instances reasonable minds could differ, this is not always the case.[92]

In light of what the courts have said and done with regard to the allocation of functions between judge and jury, greater court control appears to be both desirable and necessary. This might best be accomplished in the following manner. Under the *Restatement* section discussed earlier the judge must determine "whether the evidence as to the facts makes an issue upon which the jury may reasonably find the existence or non-existence of such facts" and "whether such facts give rise to any legal duty on the part of the defendant." Since under *Restatement* section 339 four facts are necessary to give rise to a legal duty on the part of the landowner, the judge should give each of these independent consideration, applying the standard "whether reasonable minds might differ" to the evidence adduced on each fact. Thus, he might find that the place where the condition existed was not one upon which the possessor knew or had reason to know that children were likely to trespass and that reasonable minds, in light of the evidence adduced on this point, could not differ.[93] Therefore,

89. Novicki v. Blaw-Knox Co., *supra* note 86 (child mangled between perimeter of wheel and cogs); MacNeil v. Perkins, *supra* note 86 (dynamite caps exploded, one boy blinded in both eyes, one lost his left leg and left arm, third was blinded in left eye, ages 13, 11 and 16); King v. Lennen, *supra* note 58 (1½-year-old child drowned); Reynolds v. Wilson, 51 Cal. 2d 94, 331 P.2d 48 (1958) (2-year-old child paralyzed); Andrews v. General Contracting Co., 37 Ill. App. 2d 131, 185 N.E.2d 354 (1962) (permanent disability requiring 58 trips to the hospital); American Nat'l Bank & Trust Co. v. Pennsylvania, *supra* note 86 (boy suffered traumatic amputation of both legs when hitching ride on train); Mann v. Kentucky & Ind. Terminal R.R., *supra* note 83 (boy age 2½ lost right arm and leg).

90. For a case where utility was considered, see Taylor v. Alaska Rivers Nav. Co., 391 P.2d 15 (Alaska 1964) (utility was the basis for reversing the trial court's dismissal of plaintiff's cause), 6 WM. & MARY L. REV. 95 (1965). See also Dezendorf Marble Co. v. Gartman, 333 S.W.2d 404 (Tex. Civ. App. 1960) (jury apparently considered each of the requirements of the RESTATEMENT).

91. Kahn v. James Burton Constr. Co., *supra* note 85.

92. See Staley v. Security Athletic Ass'n, *supra* note 81 (defendant acted reasonably); Martinez v. C. R. Davis Contracting Co., *supra* note 88 (court might have found that defendant, by barricading the area where the 6 manholes were located and keeping a guard on duty from 4-12 P.M., had exercised reasonable care). See generally note 88 *supra*.

93. King v. Lennen, *supra* note 58. There was no indication that children other than the deceased had ever come to the pool to play; however, the case went to the jury and a verdict was returned for the plaintiff. In Kahn v. James Burton Constr. Co., *supra* note 85, no children had been seen playing on the lumber before the accident. Klaus v. Eden, 70 N.M. 371, 374 P.2d 129 (1962) (summary judgment for defendant

a granting of defendant's motion for a directed verdict would be proper without further consideration of the remaining requirements. Likewise, the judge might grant a similar motion based upon a finding that reasonable minds could not differ on the fact that the condition was not one involving an unreasonable risk of death or great bodily harm,[94] that the child appreciated the risk,[95] or that the utility of the condition and the burden of eliminating the danger outweighed the risk to the child.[96] On the other hand, the judge may find that reasonable minds could differ as to any or all of the facts which raise a legal duty on the part of the defendant. Then he should "instruct the jury as to the defendant's duty, or absence of duty, if either conclusion as to such fact is drawn."[97] Furthermore, under the *Re-*

was based on subsection (a) of the *Restatement*). Defining anticipation as meaning probability, rather than possibility, the New Mexico court required actual knowledge, similar to the playground doctrine. The court concluded that since defendant had made 100 landings and never seen a child, this requirement was not met. For a discussion of this case and the *Restatement* requirements see 3 NATURAL RESOURCES J. 193 (1963). Sherman v. Seattle, 57 Wash. 2d 233, 356 P.2d 316 (1960) (no evidence that children had played on the lift prior to the accident).

94. Holland v. Niemi, 55 Wash. 2d 85, 345 P.2d 1106 (1959) (skiff or boat leaning against wall was held not dangerous in itself and not an agency likely to result in injury to those coming in contact with it).

95. Novicki v. Blaw-Knox, *supra* note 86 (court might well have decided that the mangled boy appreciated the risk rather than leaving it to the jury); MacNeil v. Perkins, *supra* note 86 (court might have found that the child appreciated the risk. However, when the case was submitted to the jury, the door of sympathy for their excessive injuries was opened, especially since the accident could have been avoided by a 39¢ lock on the door of the powder magazine); Garcia v. Soogian, 52 Cal. 2d 107, 338 P.2d 433 (1959) (court pointed out that the 12-year-old child understood the danger involved); American Nat'l Bank & Trust Co. v. Pennsylvania R.R., *supra* note 86 (judge might have found that 13-year-old boy appreciated the risk involved in hitching trains).

96. Courtright v. Southern Compress & Warehouse Co., 299 S.W.2d 169 (Tex. Civ. App. 1957). The holding of the court was apparently based on the absence of subsection (d) of the *Restatement* (utility of possessor's conduct and burden of removal), though there was broad language to the effect that the attractive nuisance doctrine was inapplicable to moving vehicles. See also American Nat'l Bank & Trust Co. v. Pennsylvania R.R., *supra* note 86. In cases involving falls from stationary objects it has been indicated that subsection (d) should be an important factor. *E.g.*, Helguera v. Circone, *supra* note 65. The development in the California building construction cases is interesting. In Puchta v. Rothman, 99 Cal. App. 2d 285, 221 P.2d 744 (1950), affirming a demurrer for the defendant, the court said, "Even under the attractive nuisance rule an owner is not expected to destroy or impair the usefulness of his property in order to safeguard trespassing children." *Id.* at 290, 221 P.2d at 748. This case was followed in Lopez v. Capitol Co., *supra* note 65. However, this position has been modified where it has been found that the utility was slight. See Woods v. City & County of San Francisco, 148 Cal. App. 2d 958, 307 P.2d 698 (1957), where it was held that the mere fact that machinery is located in a building under construction does not eliminate the attractive nuisance doctrine as a matter of law. Finally, the recognition that there is no hard and fast rule, but that each case must be judged on its own facts has been reached. Garcia v. Soogian, *supra* note 95. See also Swerdfeger v. Krueger, 145 Colo. 180, 358 P.2d 479 (1960). *Cf.* 33 ROCKY MT. L. REV. 445 (1961).

97. RESTATEMENT (SECOND), TORTS § 328B, comment *b* (1965).

statement the judge should be allowed to consider whether the defendant has exercised reasonable care and to withhold the case from the jury if reasonable minds could not come to a different conclusion. While the judge should not attempt to balance each of the five elements against one another by assigning a certain weight to any one, defendant's motion should be granted if plaintiff fails to produce sufficient evidence as to any one of the facts raising the duty, or if reasonable minds could not differ on the issue of whether the defendant had conformed to the standard of care. This approach of moving from the general (attractive nuisance, duty, foreseeability) to the specific (each of the four facts giving rise to a legal duty on the part of the defendant considered separately), it is believed, would insure the judge's consideration of all the facts necessary to raise a legal duty on the part of defendant and make out a prima facie case for the jury under the doctrine.[98] It should also reduce the possibility of reversal on appeal. Finally, it would achieve a just result in the particular case by providing a greater likelihood that the interests of all parties will be carefully considered.

It cannot be denied, however, that the fact situations in most attractive nuisance cases demand submission to the jury. Since the results of the decisions do not disclose whether the jury is completely unaware of the requirements, or is aware of the requirements but is ignoring them, better-drawn instructions may be of some benefit. Thus, if the judge, after applying the standard of "whether reasonable minds might differ" to the proof adduced on each of the five elements, feels there is a sufficient question on each to justify submitting the case to the jury, he should, through carefully drawn instructions, clearly identify each of the relevant facts. It is submitted that he should not assign any particular significance or weight to any of the four elements, but should leave this to the jury, after outlining the balancing process to the jurors. He should indicate that the elements which they are to consider are manifestations of two competing interests: the interest of the child in freedom from harm and the interest of the possessor in the right to free use of his property. The jury should be told to keep these interests before them when considering each element, recognizing the burdens which will be placed on either party by the result which they may reach.

In conclusion, the tendency of the trial judge to allow the negligence case to go to the jury is of special importance in the trial of an

98. This would avoid the situation in Pocholec v. Guistino, *supra* note 81, where the court, unable to reconcile appreciation of the risk and contributory negligence, sent this requirement to the jury. In Martinez v. C. R. Davis Contracting Co., *supra* note 88, it is believed that a more careful weighing of the requirements, especially subsection (d) (utility of the possessor's conduct and burden of removal) may have produced a different result.

attractive nuisance case because the likelihood of jury sympathy probably is greater than in negligence cases involving adult plaintiffs. Also, the reluctance of reviewing courts to reverse a trial judge's refusal to grant a demurrer, directed verdict, or judgment notwithstanding the verdict,[99] as well as their willingness to reverse his rulings granting such motions,[100] further amplifies the importance of and limitation on court control at the trial stage. It is submitted that the procedure heretofore discussed with regard to allocation of functions between judge and jury will assure that each new case is considered against the background of the doctrine's development and that each of the competing interests will be consciously considered by both judge and jury.

VI. Duty of Landowners To Act at All

There is also a need for the court to consider the nature of the landowner's duty to the child trespasser. As indicated earlier, the tendency to make the duty commensurate with the scope of foreseeable harm in attractive nuisance cases has resulted in sending cases to the jury which might have been decided as a matter of law.[101] Thus, two questions arise: What are the elements of the duty? Who decides the question of duty?

Using the *Restatement* as a point of departure, an analytical ap-

99. Reynolds v. Willson, *supra* note 89. The court said that a judgment notwithstanding the verdict may be granted only "where, disregarding conflicting evidence on behalf of the defendants and giving to plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff." *Id.* at 99, 321 P.2d at 51. See also Stewart v. DuPlessis, *supra* note 86; Andrews v. General Contracting Co., *supra* note 89; Brittain v. Cubbon, *supra* note 69; Smith v. Evans, *supra* note 60; Martinez v. C. R. Davis Contracting Co., *supra* note 88; Pocholec v. Guistino, *supra* note 81; Hyndman v. Pennsylvania R.R., 396 Pa. 190, 152 A.2d 251 (1959).

100. Novicki v. Blaw-Knox, *supra* note 86; Menetti v. Evans Constr. Co., *supra* note 87; Taylor v. Alaska Rivers Nav. Co., *supra* note 90; Helguera v. Circone, *supra* note 65; MacNeil v. Perkins, *supra* note 91; Henry v. Robert Kettell Constr. Corp., 44 Ill. App. 2d 356, 194 N.E.2d 535 (1963); Halloran v. Belt Ry., *supra* note 87; Harris v. Indiana Gen. Serv-Ice Co., 206 Ind. 351, 189 N.E. 410 (1934); Pier v. Schultz, *supra* note 86; Galleher v. City of Wichita, *supra* note 59; Mann v. Kentucky & Ind. Terminal R.R., *supra* note 83; Scheu v. Newsham, 157 So. 2d 760 (La. App. 1963); Lyshak v. City of Detroit, 351 Mich. 230, 88 N.W.2d 596 (1957); Lorusso v. DeCarlo, 48 N.J. Super. 112, 136 A.2d 900 (1957). *But see* McGettigan v. National Bank, 320 F.2d 703 (D.C. Cir. 1963); Alabama Power Co. v. Kirkpatrick, *supra* note 68; Staley v. Security Athletic Ass'n, *supra* note 81; Beasley v. Guerriero, 123 So. 2d 774 (La. 1960); Baker v. Praver & Sons, Inc., *supra* note 56; Klaus v. Eden, *supra* note 93; Birdsong v. City of Chattanooga, *supra* note 73; Gowen v. Willenborg, *supra* note 65; Courtright v. Southern Compress & Warehouse Co., *supra* note 96.

101. *Supra* note 88.

proach will be suggested which may be useful in this regard. It may be said that the duty arises when: (a) the place where the condition exists is one on which the possessor knows or has reason to know that children are likely to trespass; (b) the condition is one which involves an unreasonable risk of death or serious bodily harm; (c) the child fails to appreciate the risk; and (d) the utility to the possessor of allowing the condition to exist and the burden of eliminating the danger are slight when compared to the risk involved.

Generally, the first requirement has presented no real problem in the cases. However, there will always be the fact question of what is sufficient to make a defendant aware of the likelihood of trespass.[102] If there is sufficient evidence that the possessor knew or had reason to know that children would probably trespass, this element of the duty is met. The second requirement may be reduced to two distinct questions which the decisions have failed to distinguish—the distinction between the risk of some harm and the extent of this harm. Thus, (a) was there an unreasonable risk of some harm? (b) was the harm a very great one, involving death or serious bodily harm, rather than a minor injury? What is important, however, is not whether great harm was actually done, but whether there was a risk of it. For example, there is no question that a dynamite cap presents an unreasonable risk of some harm when left in a place accessible to the hands of those not trained in its handling.[103] It is equally clear that the extent of the harm which may result from the explosion of such a cap is very great, though the injury actually inflicted in the particular case may be minor. However, while a rusty nail in a plank of wood left in a place equally accessible to children may impose an equally great risk of some harm, the extent of the harm likely to be inflicted by the nail could not be said to be as great as that of the dynamite cap. Thus, in any given case where the likelihood of trespass remains the same, but the condition is altered, the duty to act is variable at this stage of our analysis.

In regard to the third element of the duty, the ability of the child to appreciate the risk, it is difficult to provide a detailed analysis because this involves largely a fact determination which will necessarily be different in each case. However, it is suggested that the distinction between the child's appreciation of the risk and the defense

102. King v. Lennen, *supra* note 58. There was no indication that children other than the deceased boy had ever come to the pool to play, yet the court did not consider this. The fact that this child had played at the pool before was sufficient. However, in Klaus v. Eden, *supra* note 93, the court denied recovery on the basis of subsection (*a*) of the *Restatement*, saying that in over 100 trips the defendant had never seen a child near the landing field.

103. Mullen v. Chicago Transit Authority, 33 Ill. App. 2d 103, 178 N.E.2d 670 (1961).

of contributory negligence must be made clear to the jury. The former is subjective—did the plaintiff in this case appreciate the risk involved in the particular condition? The latter involves an objective determination of whether the child plaintiff was negligent in failing to appreciate the risk; that is, whether other children of like age, intelligence, and experience would have appreciated it.

The last element may be subdivided for the purpose of analysis. While the *Restatement* has refused to extend the law beyond "utility to the possessor," it would seem desirable for the courts to consider the utility to the community at large in having railroads and missile bases. Yet, even if the condition no longer has any utility, but is existing in the state of junk or debris,[104] there is the further consideration of the "burden of eliminating it." This necessarily involves consideration of (a) the cost of removal, (b) the physical difficulties involved in removal, and (c) the degree of interference with the owner's use of the property or his business.[105] Even though dynamite caps have a definite utility, the proper question is whether leaving the caps scattered on the ground in a quarry frequented by children is of any greater utility than storing them in a locked shed.[106] In this instance, the utility probably would not outweigh the risk, since the burden imposed would be only one of patrolling and picking up. However, the presence of rusty nails in planks of wood remaining after the demolition of a building for a reasonable time before removal and reconstruction presents a more difficult question.[107] When the utility of this conduct is balanced against the risk to the child, and the burden of immediate removal is considered, a different result might well be reached. While no specific conclusions can be drawn as a result of this balancing process, the following may be helpful as

104. See McGettigan v. National Bank, *supra* note 100; Novicki v. Blaw-Knox Co., *supra* note 86 (simple process of wiring the wheels down took 30 minutes and it had been the previous custom of the defendant to do this); Andrews v. General Contracting Co., *supra* note 89 (hardly questionable that the condition had utility, since the defendant subsequently fenced the area rather than hauling the machinery, etc., away); Smith v. Springman Lumber Co., *supra* note 67 (child fell from rusty, unused, fuel oil tank).

105. Bauer, *The Degree of Danger and the Degree of Difficulty of Removal of the Danger in "Attractive Nuisance" Cases*, 18 MINN. L. REV. 523, 540 (1934).

"The cost of fencing is relevant for the purpose of showing one arguably feasible method of removing or minimizing the danger. However, a fence may cost very little and yet be infeasible in the particular use of the land to which defendant is putting it. If railroad cars and logging trucks are moving to and from the pond which would require a fence to be open at various entry and exit points, it is possible that the fence would not materially reduce the danger, and, therefore, would not be feasible, considering defendant's use of the land." Pocholec v. Guistino, *supra* note 81, at 262, 355 P.2d at 1112. Therefore, we must distinguish feasibility of operation of the log pond from feasibility of cost. See Novicki v. Blaw-Knox Co., *supra* note 86; Smith v. Springman Lumber Co., *supra* note 67; Scheu v. Newsham, *supra* note 100.

106. Dezendorf Marble v. Gartman, *supra* note 90.

107. Brittain v. Cubbon, *supra* note 69.

general guidelines for counselling a client: assuming that the other elements have been met, if the risk and extent of harm are great and removal easy, a failure to act resulting in injury may mean the imposition of liability.[108] If the risk and extent of harm are small, but the utility of the actor's conduct and the burden of removal are substantial, there may be no duty to act at all.[109] Unfortunately, these clearcut situations seldom arise in the law, and where they appear, a more conscious consideration by the judge may result in deciding the case as a matter of law. Even so, if the question does go to the jury the instructions should clearly identify these elements and, therefore, aid the jurors in performing the balancing process.

As mentioned in the earlier discussion of allocation of functions between judge and jury, the judge will consider each of the four elements which comprise the duty, as well as the fifth element of reasonable care under the circumstances. However, he will consider each of the elements individually, applying the standard of whether reasonable minds could differ as to each. He should not balance the elements against each other. Only if reasonable minds could differ on each of the elements, will he submit the case to the jury. Thus, there will be a preliminary and, perhaps, a final determination by the judge as to whether a duty was owed the particular plaintiff. If the case is sent to the jury, it will necessarily consider the duty question in balancing each of these five elements.

VII. TRENDS AND DEVELOPMENTS

In concluding a discussion of the attractive nuisance doctrine, it seems appropriate to consider those trends and developments tending toward a further expansion of liability. As noted earlier, there is an increasing tendency to let the attractive nuisance case go to the jury

108. See McGettigan v. National Bank, *supra* note 100 (remove the trash or board up the premises); Reynolds v. Willson, *supra* note 89 (hole in wall with hinges attached, but no gate; cost of gate was $25.00); Helguera v. Circone, *supra* note 65 (utility of remedying the defective condition in the scaffold was slight); Pier v. Schultz, *supra* note 86 (removal of old building materials, buckets, cans, steel barrels, boxes, etc., from unimproved lots); Scheu v. Newsbam, *supra* note 100 (guard rail enclosing the belt); Commercial Union Fire Ins. Co. v. Blocker, 86 So. 2d 760 (La. App. 1956) (lock tractor); Swanson v. City of Marquette, 357 Mich. 424, 98 N.W.2d 574 (1959) (repair holes in wooden fence and in transformer); Lyshak v. City of Detroit, *supra* note 100 (repair holes in fence); Chase v. Luce, 239 Minn. 364, 58 N.W.2d 565 (1953) (turn key in lock of house under construction); Paisley v. Liebowits, *supra* note 75 (petroleum spirits put in brush room); Pickens v. Southeru Ry., *supra* note 72 (child injured by turntable which lock could have prevented); Dezendorf Marble Co. v. Gartman, *supra* note 90 (patrolling and picking up dynamite caps). *But see* Beasley v. Guerriero, *supra* note 100 (no cause of action where child suffoeated in refrigerator left in unlocked house), criticizcd in 10 LOYOLA L. REV. 270 (1961).

109. Beeson v. Los Angcles, 115 Cal. App. 122, 300 Pac. 993 (1931); Molliere v. American Ins. Group, 158 So.2d 279 La. App. 1963); Dugan v. Pennsylvania R.R., 387 Pa. 25, 127 A.2d 343 (1956).

if it is foreseeable that some harm to the child may have resulted from allowing the condition to exist.[110] Also, there is an apparent failure to consider adequately the "utility to the possessor of allowing the condition to exist" and the "burden of removal."[111] In addition, methods for circumventing the normal rule are gradually being abandoned, resulting in a rejection of the "mechanistic approach to jurisprudential reasoning" which plagued the doctrine from its inception.

Another interesting development is the imposition of liability on the landowner for conditions on his premises which attract children if the trespassing child is then injured on the premises by a condition other than the attracting one,[112] or, if after leaving the premises, the child is injured outside the property by a condition not under the control of the landowner.[113] While these cases partake of the "attractiveness" requirement which the *Restatement* has rejected, and while they signal an expansion of liability, the desirability of which is ques-

110. "Unfortunately, the court in the instant case (Kahn v. James Burton Constr. Co., *supra* note 85) failed to see the problem as one of duty in relation to intervening events. Instead the court seemed to hold that the foreseeability of harm ipso facto established the supplier's responsibility." 1955 U. ILL. L.F. 630, 632. Thus, there should be a closer consideration of several concepts; that duty is not commensurate with foreseeability, the concept of intervening responsible agency, the concept of shifting responsibility. See also 10 SW. L.J. 207 (1956). Andrews v. General Contracting Co., *supra* note 89 (writer would question whether the defendant had any duty to act at all).

111. In regard to Halloran v. Belt Ry., *supra* note 87, writer indicates that the court might have considered the utility factor more fully. See 21 LA. L. REV. 853 (1961). See also Helguera v. Circone, *supra* note 65; Kahn v. James Burton Const. Co., *supra* note 85 (failure to consider utility produced the practical result of making lumber company an insurer); Simmel v. New Jersey Coop Co., *supra* note 87 (court never mentioned utility or burden of removal); 20 GA. BAR. J. 555 (1958) (writer contends that *Simmel* imposed an unconscionable burden on the landowner); 60 W. VA. L. REV. 393 (1958) (indicates that while the result in *Simmel* may be practicable in highly urbanized jurisdictions, it would not seem desirable or necessary to impose such an additional burden on possessors in jurisdictions such as West Virginia with few densely populated areas). *But see* Pocholec v. Guistino, *supra* note 81, where the court bent over backwards to consider utility and found for the defendant.

112. Henry v. Robert Kettell Constr. Corp., *supra* note 100 (boy attracted to house under construction hit by truck driven by defendant's employee). "An instrumentality may come within the attractive nuisance rule if it is so placed as to be a part of a general environment which is attractive to children." *Id.* at 360, 194 N.E. 2d at 538. See also O'Donnell v. City of Chicago, 289 Ill. App. 41, 6 N.E.2d 449 (1937).

113. Halloran v. Belt Ry., *supra* note 87 in which a boy slipped and fell under a moving train about 30 feet from sand pile which was located on defendant's material yard adjoining railroad embankment and on which pile the boy had been playing. There was no fence around the property and children had been playing in the sand and around the brick piles since the yard was built. Thus, the rule could reasonably be applied where defendant was responsible for the creation of the attraction notwithstanding the fact that it did not own or control the premises on which plaintiff was injured. See Best v. District of Columbia, 291 U.S. 411 (1934) (dangerous condition causing injury was hole in defendant's wharf and not the piles of sand upon which the children had previously played).

tionable,[114] authority for this expansion may be found in the language of the *Restatement—i.e.*, "or in coming within the area made dangerous by it."[115]

It should be noted that liability under the doctrine is now being imposed upon the possessor of chattels as well as landowners. Though Dean Prosser has suggested this is an appropriate extension of the doctrine, and while it may indicate the desirability of deciding all attractive nuisance cases under a general negligence standard, it would appear, as suggested earlier, that these cases might best be decided under the general negligence principles of duty and foreseeability without resort to the attractive nuisance doctrine.[116]

In addition to possessors, the doctrine has been applied to third parties who have no possessory interest in the premises but are merely engaged in activities thereon. While the change in the *Restatement (Second)* from "maintained" to "exist" would justify imposition of liability on the possessor for the acts of the third party, this provides no justification for application of the doctrine to third parties having no possessory interest. Among these are decisions involving excavations for sewers and extensive road building projects, which appear to reach less than desirable results in imposing liability on the building contractor.[117] The demolition of a building where the remains are no longer serving a useful purpose provides another example of the

114. Halloran v. Belt Ry., *supra* note 87. "It had notice, direct or otherwise, that children habitually came upon its premises to play upon the sand piles. A duty arose to exereise due care for their safety, if they were exposed to danger in the immediate approach to its premises. The attractiveness of the premises or the instrumentality is an important and controlling factor . . . . He was still in the same dangerous environment into which he had been attracted and allured by the sandpile." *Id.* at 119-20, 166 N.E. 2d at 101.

115. RESTATEMENT (SECOND), TORTS § 339 (1965): "(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."

116. See Nashville Lumber Co. v. Busbee, 100 Ark. 76, 139 S.W. 301 (1911); Landers v. French's Ice Cream Co., 98 Ga. 317, 106 S.E.2d 325 (1958); Molliere v. American Ins. Group, *supra* note 109; Courtright v. Southern Compress & Warehouse Co., 299 S.W.2d 169 (Tex. Civ. App. 1957); Montgomery Ward & Co. v. Ramivez, 127 S.W.2d 1034 (Tex Civ. App. 1939); Kelly v. Southern Wis. Ry., 152 Wis. 328, 140 N.W. 60 (1913).

117. Hankins v. Southern Foundation Corp., 216 F. Supp. 554 (D.D.C. 1963) (excavations left unbarricaded, therefore, not as strong a case as *Martinez*); Galleher v. City of Wichita, 179 Kan. 513, 296 P.2d 1062 (1956) (pond left after excavation of river bank); Martinez v. C. R. Davis Contracting Co., *supra* note 88 (general area barricaded, but this was not sufficient). It is believed that Birdsong v. City of Chattanooga, *supra* note 73, while not presenting as strong a case as *Martinez*, does reach the kind of result which appears desirable in these cases. See Mennetti v. Evans Constr. Co., *supra* note 87, where the court indicated that neither the independent contractor nor possessor made an effort to rope off the ditch or post warnings that the ditch was there. This was especially important since the court said it was the ditch and not the water which constituted the dangerous condition. In conclusion, it is suggested that a warning should be sufficient in these cases, unless roping off the area could be done with a minimum of inconvenience and expense.

imposition of liability on one who is not a landowner.[118] Another category of non-landowners to whom the doctrine has been applied is the independent contractor and third party supplier.[119] While the *Restatement (Second)*, section 383, may justify application of the doctrine to these defendants, no case has been found where the court cited this section as authority for extension of the rule.[120] Rather, like the cases involving injury to the child exiting from the premises where the condition exists and those dealing with possessors of chattels, the courts, without clear reasoning or authority, have found the doctrine applicable.

An area where some courts have imposed liability apparently beyond the ambit of *Restatement*, section 339, involves an "activity" on the premises rather than a condition. While the comments to the *Restatement (Second)* indicate that "machinery in motion is a condition" within the meaning of its use of that term, it is doubtful that the comments should be construed broadly enough to include some of the results in cases applying the section.[121] It is difficult to understand why the drafters included separate sections for activity and condition relating to constant and known trespassers but made no effort to expand the present *Restatement* section 339 to include activity or to insert another applicable section.[122]

A positive factor emerging from the opinions is the willingness of the courts to spell out what would have been "reasonable care" under the circumstances.[123] While the writer would question the fairness

118. Brittain v. Cubbon, *supra* note 69.

119. Stewart v. DuPlessis, *supra* note 86 (plastering contractor); Kahn v. James Burton Constr. Co., *supra* note 86; Commercial Union Fire Ins. Co. v. Blocker, *supra* note 108; Johnson v. Sculley Constr. Co., 255 Minn. 41, 95 N.W.2d 409 (1959).

120. RESTATEMENT (SECOND), TORTS § 383 (1965): "One who does an act or carries on an activity upon land on behalf of the possessor is subject to the same liability, and enjoys the same freedom from liability for physical harm caused thereby to others upon and outside of the land as though he were the possessor of the land."

121. Simmel v. New Jersey Coop Co., *supra* note 87. Due to the fact that the city dumped rubbish on these lots continually, the activity of burning took place regularly. Therefore, this would appear to be an activity rather than a condition. American Nat'l Bank & Trust Co. v. Pennsylvania R.R., *supra* note 86 (boy run over by train while hitching; could, perhaps, be classified as "machinery in motion"); Lyshak v. City of Detroit, 351 Mich. 230, 88 N.W.2d 596 (1957) (golf course, boy lost eye).

122. RESTATEMENT (SECOND), TORTS §§ 334, 336 (1965).

123. McGettigan v. National Bank, *supra* note 100 (remove the trash or board up the premises); Menneti v. Evans Constr. Co., *supra* note 88 (guard rail, rope ditch off, post warning); Reynolds v. Willson, *supra* note 89 ($25.00 gate); Halloran v. Belt Ry., *supra* note 110 (a watchman but no fence); Brittain v. Cubbon, 190 Kan. 641, 378 P.2d 141 (1963) (fencing, patrolling, warning signs); Commercial Union Fire Ins. Co. v. Blocker, *supra* note 108 (lock tractor, put watchman on duty; this was the usual custom but had not been followed on the occasion when the injury occurred); Paisley v. Liebowits, *supra* note 75 (petroleum spirits in "brush room"); Simmel v. New Jersey Coop Co., *supra* note 87 (fencing); Hyndman v. Pennsylvania R.R., *supra* note 99 (anti-climb gate insufficient; could provide heavier insulation of lines, post warning signs, erect fence around pole, remove ladder). However, some courts have not indi-

of the resulting burdens which would be imposed on the landowner in meeting such requirements, this kind of specificity is helpful to the attorney in advising his client.

As one writer has indicated, the defense of contributory negligence has been eroded to such a degree that its application and effect in negligence cases has declined.[124] There is some indication of this situation in those attractive nuisance cases deeming subsection (c) of the *Restatement* ("appreciation of the risk") to be inconsistent with the defense of contributory negligence.[125] The writer has suggested that this is clearly not the case. As noted earlier, the "appreciation of the risk" is a subjective standard applicable to the plaintiff. It is a necessary element of his case. Contributory negligence, on the other hand, is an objective standard which measures the conduct of the particular plaintiff against other children of like "age, intelligence, and experience." It is an affirmative defense to be set up by the defendant as a bar to plaintiff's recovery. Thus, while this particular child may not have appreciated the risk, it is still possible that he was guilty of contributory negligence in failing to do so. This bars his recovery or, at least, mitigates his damages.[126] It is true that some jurisdictions have invoked a conclusive presumption that a child of certain age is incapable of contributory negligence, thus making the defense unavailable.[127] However, in those jurisdictions where the defense is available there is an apparent tendency on the part of the courts to consider it as a fact question for the jury. Since it is likely that the jury fails to understand the distinction between "appreciation

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cated what kind of safeguards would be reasonable under the facts of the case. See King v. Lennen, 53 Cal. 2d 340, 348 P.2d 98 (1959); Johnson v. Sculley Constr. Co., *supra* note 119.

124. Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1, 7 (1946).

125. Larnel Builders, Inc. v. Martin, 110 So. 2d 649 (Fla. App. 1959). Speaking of the two doctrines of attractive nuisance and contributory negligence, the court said, "The concepts are elosely related but, in the final analysis, irreconcilable." *Id.* at 650. See also Pocholec v. Guistino, *supra* note 81.

126. Nechodomu v. Lindstrom, 273 Wis. 313, 78 N.W.2d 417 (1956). "The jury could well have concluded from the evidence . . . that this nine-year-old boy, even though he did not realize the risk involved in placing his hand inside the mixer, nevertheless failed to exercise the degree of care which is ordinarily exercised by children of his age, experience, and intelligence . . . . This is because the test in determining negligence, and this includes contributory negligence, is an objective and not a subjective one. Therefore, whether the actor did or did not appreciate the danger of the situation may be of no materiality." *Id.* at 327a–27b, 78 N.W.2d at 418. See also 1960 WIS. L. REV. 692. See Novicki v. Blaw-Knox, *supra* note 86, where the court seems to confuse appreciation of the risk with contributory negligence. Patterson v. Palley Mfg. Co., 360 Pa. 259, 267, 61 A.2d 861, 865 (1948).

127. In most jurisdictions where the presumption exists, the age limit is 7. Walston v. Greene, 247 N.C. 693, 102 S.E.2d 124 (1958); Smith v. Waldman, 193 Pa. Super. 166, 164 A.2d 20 (1960); Chitwood v. Chitwood, 159 S.C. 109, 156 S.E. 179 (1930).

of the risk" and contributory negligence, more carefully drawn instructions appear desirable.

Finally, the tendency to leave the question of intervening cause to the jury has produced the result that any intervening cause is foreseeable. Therefore, the defendant no longer has this available as an effective weapon in his arsenal.[128]

VIII. Conclusion

When confronted with a case involving a child plaintiff, attorneys and the courts should recognize that the doctrine of attractive nuisance is only one of several theories on which the plaintiff may proceed against a landowner. The status of a plaintiff should first be determined. If the child is a trespasser, then either the constant trespasser theory,[129] the known trespasser theory,[130] or the doctrine of attractive nuisance may be applicable. It is possible, however, that the court may reject any one or all of these theories and decide the particular case under the general negligence principles of foreseeability of harm and scope of the risk.[131] If, on the other hand, the child occupied the status of a licensee or an invitee, other sections of the *Restatement* would be applicable.[132] Where the attractive nuisance doctrine is applicable, it is submitted that each new case should be considered against the doctrine's historical purpose and within its dimensions as set forth in the *Restatement (Second)*. The courts should recognize that application of the doctrine involves a balancing of the competing social values of the landowner's right to free use of his property and the interest of the child in freedom from harm. These interests will be adequately balanced if the elements of *Restatement* section 339 are considered individually by the judge and the case is submitted to the jury with a well-drawn instruction. Of course, submission to the jury should take place only if there is sufficient evidence adduced on each element so that reasonable minds could differ. It is submitted that this approach will produce well-reasoned opinions and just results in each new attractive nuisance case.

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128. MacNeil v. Perkins, *supra* note 86; Stewart v. DuPlessis, *supra* note 86; Johnson v. Sculley Constr. Co., *supra* note 119.

129. Restatement (Second), Torts §§ 334, 335 (1965).

130. Restatement (Second), Torts §§ 336, 337, 338 (1965).

131. *Supra* note 116.

132. Restatement (Second), Torts §§ 341, 341A, 342, 343, 343A, 343B, 344 (1965).