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Torts --Attractive Nuisance--New Rationale for Refusing to Extend Liability for Injuries Caused by Natural Conditions--Loney v. McPhillips

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approach of the Federal Rules of Criminal Procedure.⁶⁷ Alternatively, the court could follow the Uniform Rules of Criminal Procedure and allow defendants to take depositions without court order.⁶⁸ The Uniform Rules contain some protection for both the prosecution and the defense, and the court could devise further protections if such appeared necessary. A third "middle ground" alternative adopted by some states is to allow discovery depositions only on court order.⁶⁹

Whatever alternative the court may select can only be superior to the present scheme of rule 81(e). That scheme all too easily leads, as the *Nielsen* case demonstrates, to artificial construction or even misconstruction of statute and rule and to an ad hoc creation of rules of criminal procedure.

Torts—ATTRACTIVE NUISANCE—A NEW RATIONALE FOR REFUSING TO EXTEND LIABILITY FOR INJURIES CAUSED BY NATURAL CONDITIONS—*Loney v. McPhillips*, 268 Or. 378, 521 P.2d 340 (1974).

The attractive nuisance doctrine has not generally been applied to injuries arising from natural conditions on property.¹ For some time, however, commentators have urged that liability be applied regardless of the origin of the condition.² They have argued that all cases to date denying attractive nuisance liability for natural conditions have involved hazards which the child should have understood,³ and that in the great majority of instances the burden on the landowner of removing the hazard would be excessive.⁴ The claim is that should a case arise in which the child does not understand the condition and in which the burden on the landowner of protecting the child is relatively light, there is no valid reason why liability should not be

⁶⁷FED. R. CRIM. P. 15. See note 22 *supra*.

⁶⁸See note 21 *supra*.

⁶⁹See note 21 *supra*.

¹See, e.g., 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 27.5, at 1452 (1956); W. PROSSER, *THE LAW OF TORTS* § 59, at 367 (4th ed. 1971) [hereinafter cited as PROSSER]; RESTATEMENT (SECOND) OF TORTS § 339, comment *p* (1965); Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427, 446 (1959) [hereinafter cited as *Trespassing Children*]; 2 OKLA. L. REV. 537, 537-38 (1949).

²See, e.g., PROSSER § 59, at 367; *Trespassing Children* 446; Note, *Trespassing Children: A Study in Expanding Liability*, 20 VAND. L. REV. 139, 150 (1966) [hereinafter cited as *Expanding Liability*]; 2 OKLA. L. REV. 537, 538 (1949).

³PROSSER § 59, at 367; RESTATEMENT (SECOND) OF TORTS § 339, comment *p* (1965); *Trespassing Children* 446.

⁴RESTATEMENT (SECOND) OF TORTS § 339, comment *p* (1965); *Trespassing Children* 446.

extended.⁵ *Loney v. McPhillips*⁶ presented such a case. Nevertheless, the Oregon Supreme Court refused to extend attractive nuisance liability to natural conditions in that case, and in so doing relied upon a public policy that is unique to the controversy.⁷

In *Loney v. McPhillips* plaintiff brought an action under the attractive nuisance doctrine for the wrongful death of his 13-year-old son. He alleged that defendant owned a stretch of beach along the Pacific Ocean known as Cape Kiwanda. The beach was within view of a public highway, offered an excellent view of the ocean, and people often trespassed there. Plaintiff's son was trespassing at the cape with friends when he was unexpectedly swept into the sea and drowned. Plaintiff alleged that because of the tides, the wind, and the peculiar formation of a cove, the cape was particularly hazardous to spectators at high tide, and that the children, because of their youth and inexperience, were unable to recognize this danger. He sought to hold the defendant liable because of his knowledge of the danger of the cape, his awareness of frequent child trespasses, and because the danger could have been averted at little expense by putting up a fence or a sign.⁸

The public policy relied upon by the Oregon court in *Loney* was a legislatively declared one of keeping privately owned wild lands open for recreational use. The purpose of this case note is to evaluate the strength of that public policy as a reason for not extending attractive nuisance liability to natural hazards. Only the Oregon court's contribution to this controversy will be considered. No attempt will be made to resolve the broad question of whether attractive nuisance liability should in all cases be extended to natural hazards. Nevertheless, in order to put the *Loney* decision in perspective, the development of the attractive nuisance doctrine since its inception in *Sioux City & Pacific Railroad Co. v. Stout*⁹ will be traced, and some of the reasons for extending attractive nuisance liability to natural hazards will be considered.

I. BACKGROUND

Before the *Stout* case, a landowner generally owed no duty of care to trespassers except to refrain from wilfully or wantonly injuring

⁵PROSSER § 59, at 367; RESTATEMENT (SECOND) OF TORTS § 339, comment *p* (1965); *Trespassing Children* 446-47.

⁶268 Or. 378, 521 P.2d 340 (1974).

⁷The Oregon Court relied upon a legislatively declared public policy of encouraging private landowners to allow intruders onto their property for outdoor recreational purposes. *Loney v. McPhillips*, 268 Or. 378, 384-88, 521 P.2d 340, 343-44 (1974). Apparently such a policy has not been considered by the major text writers. No mention of it is made by Dean Prosser or by Professors Harper and James in their treatises. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 27.5 (1956); PROSSER § 59. Nor does consideration seem to have been given it by the authors of the *Restatement (Second)*. See RESTATEMENT (SECOND) OF TORTS, Reporter's Notes § 339, caveat at 135 (1966).

⁸268 Or. at 379-80, 521 P.2d at 340-41.

⁹84 U.S. (17 Wall.) 657 (1873).

them.¹⁰ In *Stout*, apparently for the first time,¹¹ the defendant was held to a general negligence standard to trespassing children.¹² The court considered five elements in determining whether he had exercised reasonable care: (1) the nature of the condition, (2) the likelihood of the trespass, (3) the possibility of injury, (4) the utility of the condition to the landowner, and (5) the burden of removing it.¹³ What the *Stout* case did not do was give any rationale for treating child trespassers differently from other trespassers.¹⁴

To justify a higher standard of care to the infant intruder, the courts developed an implied invitation theory.¹⁵ If it could be shown that the child had been lured onto the property by an attractive, dangerous condition created by the landowner, the courts held that he had in effect extended an invitation to the child. The child thus went upon his property as an invitee, to whom a duty of reasonable care was owed.¹⁶

This rationale was difficult to apply and led to a departure from the general negligence rule of *Stout*.¹⁷ First, since almost every condition could hold some attraction to a small child, it was difficult to determine which ones were attractive enough to make the landowner liable.¹⁸ Second, anomalies arose when an injured child was not attracted onto the property by any condition,¹⁹ or was attracted by a condition other than the one that injured him.²⁰ Thus, if the child had not been lured onto the property by an "attractive nuisance," it was entirely possible for a landowner to be free of liability even though the trespass and subsequent injury to the child were foreseeable and the defect easily remedied.

Courts also recognized that even if the child were attracted onto the property by the dangerous object, there should be no liability if the child understood and appreciated the danger.²¹ In applying this general principle, the courts created a class of conditions to which

¹⁰See, e.g., PROSSER § 58, at 357; *Expanding Liability* 140; 26 IND. L.J. 266, 267 (1951).

¹¹*Expanding Liability* 141.

¹²84 U.S. (17 Wall.) at 661; *Expanding Liability* 141.

In *Stout* a young boy was injured while playing on a railroad turntable on defendant's right-of-way. The railroad personnel had seen the children playing on the turntable, and the turntable could have been rendered harmless to the children at little expense by latching it in place. 84 U.S. (17 Wall.) at 657-59, 662.

¹³84 U.S. (17 Wall.) at 661-62; *Expanding Liability* 146.

¹⁴See *Expanding Liability* 141.

¹⁵See *Expanding Liability* 142; 26 IND. L.J. 266, 267 (1951).

¹⁶See note 15 *supra*.

¹⁷See Note, *Liability Resulting From Artificial Bodies of Water*, 48 IOWA L. REV. 939, 940-42 (1963) [hereinafter cited as *Artificial Bodies of Water*].

¹⁸See *Banker v. McLaughlin*, 146 Tex. 434, 455, 458-59, 208 S.W.2d 843, 855, 857-58 (1948) (dissenting opinion).

¹⁹See, e.g., *United Zinc & Chem. Co. v. Britt*, 258 U.S. 268 (1922); 26 IND. L.J. 266, 268 (1951).

²⁰See, e.g., *Holstine v. Director General of Railroads*, 77 Ind. App. 582, 591, 134 N.E. 303, 306 (1922); 26 IND. L.J. 266, 268 n.11 (1951).

²¹*Trespassing Children* 455-57.

the attractive nuisance doctrine would not apply no matter how attractive or dangerous they were. Children, no matter how young, were deemed, as a matter of law, to understand *natural hazards* and artificial conditions that were duplicative of nature, such as fire, water, heights, and excavations.²² This was known in many states as the common hazard exception.²³

The weaknesses of the attractive nuisance doctrine with its implied invitation rationale and common hazard exception soon became apparent, and scholars began suggesting alternative theories to justify the higher duty to trespassing children. Professor Leon Green suggested that the voluntary erection of artificial structures on property automatically gives rise to the legal duty of taking reasonable precautions to prevent injury to trespassing children.²⁴ The different standard arises because the landowner voluntarily creates conditions on his property that might prove dangerous to children whose trespass he should have anticipated.²⁵ Other scholars suggested that the duty of reasonable care could be justified by recognizing society's interest in the safety of small children.²⁶ It is neither practical nor desirable to expect parents to follow small children around or tie them to a bedpost.²⁷ Under these circumstances, the person often best situated to make certain that children are reasonably safe is the landowner upon whose land they trespass.²⁸ Finally, the imposition of a general negligence standard was urged on the ground that it was the best mechanism to balance the competing social interests in the safety of small children and the free use of private property.²⁹ These views had a significant influence on the formulation of the rule finally adopted in section 339 of the *Restatement of Torts*.³⁰

²²*Id.* at 456-57.

²³See *Pocholec v. Giustina*, 224 Or. 245, 257, 355 P.2d 1104, 1110 (1960).

²⁴Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility in Tort*, 21 MICH. L. REV. 495, 514-16 (1923).

²⁵*Id.*

Green argues that when one voluntarily undertakes certain activities, he is required by the policy of the law to assume certain affirmative duties with respect to how he carries out those activities. One who manufactures automobiles assumes an affirmative duty to inspect them to be certain they are safe. Manufacture of less dangerous products carries with it a lesser duty of inspection. Likewise, a landowner's duty of care to those coming onto his property innocently (Green refers to children as innocent trespassers because of their inability to appreciate the wrong in going onto another's property. *Id.* at 512.) varies with the danger of use to which he has put his property. *Id.* at 513-15.

²⁶See *Trespassing Children* 429; *Expanding Liability* 143-44.

²⁷*Trespassing Children* 429.

²⁸*Id.*

²⁹Hudson, *The Turntable Cases in the Federal Courts*, 36 HARV. L. REV. 495 (1923) [hereinafter cited as Hudson].

³⁰See PROSSER § 59, at 366 n.45; *Trespassing Children* 431.

Hudson suggested several items that he thought should be considered in the balancing process, and his suggestions correspond closely to the criteria of RESTATEMENT OF TORTS § 339. Among the elements he suggested in determining whether the landowner exercised due care were the foreseeability of the child's trespass, the use being made of the land, the nature of the structure or condition, and the degree of danger. Hudson 845, 851-52. See note 31 *infra*.

The *Restatement*³¹ abandoned the "implied invitation" theory.³² Under section 339 liability was based on general negligence principles.³³ The attractiveness of the condition was only one element to be considered in determining the foreseeability of the trespass, not a necessity for the imposition of liability.³⁴ Further, the *Restatement* expressed no common hazard exception for artificial conditions.³⁵ In all cases involving artificial structures, courts were to consider whether the child actually understood the danger of the condition.³⁶

Though the *Restatement* established a rule of reasonable care under all the circumstances, even those courts which adopted it still maintained an exception for certain artificial conditions.³⁷ In the late 1950's this practice finally began to break down when the California Supreme Court declared in *King v. Lennen*³⁸ that it would no longer exempt any class of conditions from application of section 339.³⁹ The inquiry in every case was to be whether the child actually understood the hazard.⁴⁰ Other courts, likewise influenced by the *Restatement*, have abandoned the common hazard exception at least as to artificial conditions, and the trend is away from the categorization of conditions and toward a standard of reasonable care under all the circumstances.⁴¹

³¹RESTATEMENT OF TORTS § 339 (1934) provides for liability to child trespassers under the following criteria:

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 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 the young children involved therein.

³²See PROSSER § 59, at 366; RESTATEMENT OF TORTS § 339, comment *a* (1934); *Trespassing Children* 447-50; *Expanding Liability* 142-43.

³³*Trespassing Children* 466-69; *Artificial Bodies of Water* 944.

³⁴PROSSER § 59, at 368; *Trespassing Children* 449; *Artificial Bodies of Water* 945.

³⁵See note 31 *supra*; *Artificial Bodies of Water* 942, 944.

³⁶See RESTATEMENT OF TORTS § 339, comment *c* (1934).

³⁷*Artificial Bodies of Water* 943.

³⁸53 Cal. 2d 340, 348 P.2d 98 (1959).

In *King v. Lennen* a one-and-a-half-year-old child drowned in a neighbor's swimming pool. Under prior California case law there would have been no recovery because a water hazard was not an "attractive nuisance." *Id.* at 342-44, 348 P.2d at 99-100.

³⁹*Id.* at 344-45, 348 P.2d at 100.

There was some indication that California would not only apply the *Restatement* to artificial conditions, but to natural ones as well. *Id.*

⁴⁰*Id.*

⁴¹See, e.g., *Zorn v. Bellrose*, 22 Ill. App. 2d 331, 160 N.E.2d 685 (1959); *Martinez v. Louis Lyster, General Contractor, Inc.*, 75 N.M. 639, 409 P.2d 493 (1965); *Artificial Bodies of Water* 947.

In Oregon, attractive nuisance law has generally followed the trend outlined above. For some time the courts struggled with the question of what constituted an attractive nuisance.⁴² Finally, in *Pocholec v. Giustina*,⁴³ Oregon adopted a rule very similar to section 339 of the *Restatement (Second) of Torts*,⁴⁴ and followed the California rule of *King v. Lennen*.⁴⁵ Later, in *Bosin v. Oak Lodge Sanitary District*,⁴⁶ it adopted the new formulation of the rule set out in the *Restatement (Second)*.⁴⁷

With a trend toward a rule of general negligence in attractive nuisance and the abolition of exempt categories for artificial conditions, scholars have been urging that the natural condition exception be abolished also.⁴⁸ They insist that the criteria of the *Restatement (Second)*; requiring a showing that the child did not understand the condition⁴⁹ and that the burden of removal on the landowner would not have been excessive,⁵⁰ will protect every legitimate interest of the landowner.⁵¹ In a caveat to section 339 of the *Restatement*

⁴²See 33 ORE. L. REV. 233, 234-35 (1954).

⁴³224 Or. 245, 355 P.2d 1104 (1960).

⁴⁴244 Or. at 252, 355 P.2d at 1107-08. The court adopted Dean Prosser's refinements of RESTATEMENT OF TORTS § 339. See *Trespassing Children* 469. Dean Prosser's formulation differs slightly from the rule finally adopted in RESTATEMENT (SECOND) OF TORTS § 339. One such difference is that the *Restatement (Second)* requires that the injury arise from an "artificial condition," and Dean Prosser's formulation requires only that the injury arise from a "condition." In arguing before the Oregon Supreme Court, plaintiffs' counsel in *Loney* relied upon this word difference and the fact that the court had previously adopted Dean Prosser's formulation of the rule and not the *Restatement's*, in an attempt to persuade the court that attractive nuisance liability could extend to natural conditions under prior Oregon case law. Brief for Appellant at 6, *Loney v. McPhillips*, 268 Or. 378, 521 P.2d 340 (1974).

⁴⁵*Pocholec v. Giustina*, 224 Or. at 257-60, 355 P.2d at 1110-11.

⁴⁶251 Or. 554, 447 P.2d 285 (1968).

⁴⁷*Id.* at 558-59, 447 P.2d at 287.

RESTATEMENT (SECOND) OF TORTS § 339 provides the following:

Artificial Conditions Highly Dangerous to Trespassing Children

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 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 protect the children.

⁴⁸See note 2 *supra*.

⁴⁹RESTATEMENT (SECOND) OF TORTS § 339, comment *m* (1965).

⁵⁰RESTATEMENT (SECOND) OF TORTS § 339, comment *n* (1965).

⁵¹See, e.g., *Trespassing Children* 446-47; *Expanding Liability* 150. See also 2 OKLA. L. REV. 537, 539 (1949).

(*Second*), the authors refused to express an opinion on natural conditions because the case law indicates no liability for injuries resulting from them.⁵² But the authors explained that in the cases decided dealing with natural conditions, there would have been no liability even had the *Restatement (Second)* been applied, because the children understood the hazard.⁵³ They further explained that in the great majority of cases there would be no liability because the burden on the landowner of removing the hazard would be excessive.⁵⁴ The *Restatement (Second)*, therefore, left open the possibility of liability in a situation where the hazard could not be understood by the child and the burden of removal was light.⁵⁵

II. INSTANT CASE

In refusing to extend liability to natural conditions in *Loney v. McPhillips*, the court did not rely upon the traditional arguments. Rather, the basis for the decision was a legislatively declared public policy of encouraging landowners to allow public access to their lands for outdoor recreational purposes.⁵⁶ This policy, hereinafter referred to as the free access policy, is embodied in an Oregon statute that relieves a landowner of liability to intruders coming onto his property for recreational purposes, unless the landowner is guilty of a "reckless failure to warn" of a hazardous condition.⁵⁷ The protection of the statute is available to owners of range land, agricultural land, forest land, and land adjacent to the ocean.⁵⁸ The court declared that extending liability under attractive nuisance to natural conditions would lead to the closure of private lands and would frustrate the policy behind the statute.⁵⁹

⁵²RESTATEMENT (SECOND) OF TORTS § 339, comment *p* (1965).

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶268 Or. at 384-88, 521 P.2d at 343-44.

⁵⁷ORE. REV. STAT. §§ 105.665, 105.675 (1974).

⁵⁸ORE. REV. STAT. § 105.655(2) (1974).

⁵⁹268 Or. at 388, 521 P.2d at 344.

One wonders why the Oregon statute did not preclude liability in *Loney* without need to consider attractive nuisance liability for natural conditions. The statute provides that:

(1) An owner of land owes no duty of care to keep the land safe for entry or use by others for any recreational purpose or to give any warning of a dangerous condition, use, structure or activity on the land to persons entering thereon for any such purpose.

ORE. REV. STAT. § 105.665(1) (1974). It further provides that a person does not, by inviting others to come onto his property for recreational purposes, "extend any assurance that the land is safe for any purpose" or "confer upon such persons the legal status of an invitee or licensee." ORE. REV. STAT. § 105.665(2) (a)-(b) (1974). Recreational purposes, according to the Oregon statute, include sightseeing. ORE. REV. STAT. § 105.655(4) (1974). No exception from the statute's grant of immunity is expressed for child intruders. The only exceptions expressed are for the landowner's "reckless failure to . . . warn of a hidden danger," or for his negligence to those from whom he receives compensation for allowing them to use his land. ORE. REV. STAT. § 105.675 (1974).

It appears that the facts of the *Loney* case were within the statute. The land in-

III. ANALYSIS

Assuming the allegations of the complaint to be true, *Loney v. McPhillips* was a case where defendant could have been liable under section 339 had the condition been artificial.⁶⁰ The danger at high tide, created by the cove, was not easily recognizable by children, and the burden of alleviating it consisted of putting up a fence or warning sign.⁶¹ Further, an extension of liability to natural hazards in *Loney* would not have been without precedent in Oregon. Three Oregon decisions, *Pocholec*,⁶² *Bosin*,⁶³ and *Karoblis v. Liebert*,⁶⁴ categorically declared that Oregon would no longer classify conditions. Although these cases dealt with artificial conditions, they contained dicta upon which the court could have relied to extend attractive nuisance liability to natural hazards. The court's refusal, therefore, to impose liability draws particular attention to the court's rationalization for that refusal: the effectuation of the free access policy. In addition, it should be noted that with growing urbanization and a resulting scarcity of wild lands available for outdoor recreation, the free access policy will undoubtedly be considered by a growing number of state legislatures and courts.⁶⁵

volved was beach land and would have fit the statutory limitation for land contiguous to the ocean. ORE. REV. STAT. § 105.655(2) (1974). See ORE. REV. STAT. § 390.650 (1974). The plaintiff's son was on the land for recreational purposes within the meaning of the statute, and as pointed out above, there was no exception for child trespassers. It would seem that plaintiff could only recover by proving defendant's "reckless failure to . . . warn" rather than negligence. Nevertheless, the court relied upon the public policy behind the statute and not the statute itself. See 268 Or. at 388, 521 P.2d at 344.

The reason for the court's reliance upon the policy of the statute and not the statute itself may have been a desire to avoid a particularly knotty problem that often arises with statutes such as the Oregon one here under consideration. *Loney v. McPhillips* was decided on a demurrer (268 Or. at 380, 521 P.2d at 341), and in a code pleading state, like Oregon, matters of affirmative defense cannot be raised on demurrer. See ORE. REV. STAT. §§ 16.260, 16.290 (1974). When faced, therefore, with a statute like the Oregon statute, courts must decide whether the statute destroys the cause of action or merely provides an affirmative defense to it. See generally *Ellis v. Black Diamond Coal Mining Co.*, 265 Ala. 264, 90 So. 2d 770 (1956). If the Oregon statute provides an affirmative defense and does not destroy the cause of action, the statute could not have been raised on demurrer. The Oregon Court may have decided merely to apply the public policy behind the statute to avoid having to decide this issue. The question was not briefed by either party.

⁶⁰Because *Loney* was decided on demurrer (268 Or. at 380, 521 P.2d at 341), the truthfulness of the complaint was never judicially determined.

⁶¹268 Or. at 380, 521 P.2d at 341. The facts in *Loney* are surprisingly similar to an example posited by Dean Prosser in his argument for extending liability to natural conditions:

Suppose a beach, on which young children in the neighborhood habitually trespass, wade, and swim, with a hidden drop-off ten feet from shore. If it were an artificial beach, the owner would at least be required to put up a warning sign. Is he absolved from that responsibility by the fact that the beach has always been there, and he has not changed it? The prediction may be ventured that he is not.

Trespassing Children 446-47 (footnotes omitted).

⁶²224 Or. at 257-60, 355 P.2d at 1110-11.

⁶³251 Or. at 560, 447 P.2d at 288.

⁶⁴263 Or. 64, 69-70, 501 P.2d 315, 318 (1972).

⁶⁵Wisconsin has a statute similar to Oregon's which relieves landowners of liability to

In considering attractive nuisance liability in light of the free access policy, three questions are apparent. (1) Does the free access policy justify limiting liability under attractive nuisance to artificial conditions? (2) What limitations on the scope of the natural hazards exception does the free access policy suggest? (3) To what standard of care should the landowner be held if, under the natural condition exception to attractive nuisance liability, he has no duty to exercise reasonable care?

A. Does the Free Access Policy Justify Denying Attractive Nuisance Liability for Natural Conditions?

This case note does not attempt to suggest an ultimate answer to the above-stated question. The problem posed is too broad in scope and too colored by peculiar local or regional conditions to lend itself to a simple solution. A rational and sustainable conclusion can be reached in any given jurisdiction, however, only if several factors are considered. The first is the degree of closure of recreational lands that will result if owners thereof are subjected to liability for injuries caused by natural conditions.

It seems inevitable that some closure of private lands will result from an extension of liability. It may be true, as many commentators argue, that attractive nuisance liability for natural hazards will not put much additional burden on the landowner.⁶⁶ But the extent of closure will depend not upon what the additional burden actually is, but upon what the landowner's perception of his additional burden is. If the landowner is uncertain about the possible extent of his liability, or if he is afraid of possible law suits, he might be induced to close off his land.

Estimating how much closure will occur is a more difficult task, and perhaps is one that can better be undertaken by legislative rather than judicial bodies. Nevertheless, whichever body is considering the question should consider the type of land that is useful for outdoor recreation. Much of the land so suited will be far removed from the population centers, and the frequency of child trespass, particularly without parental supervision, will be greatly reduced. Owners of

intruders for recreational purposes. WIS. STAT. ANN. § 29.68 (1973). A consideration of the legislative history of the Wisconsin statute gives some indication of the growing demand for outdoor recreation areas. A group of forest land owners sent out circulars inviting hunters onto their property in an effort to reduce deer herds that were causing substantial tree damage. They soon became concerned, however, about the possible liability that could arise should any of the invited hunters be injured on their property. In an effort to forestall liability, the forest land owners influenced the Wisconsin legislature to consider the bill relieving them of liability to those entering their land for recreational purposes. Once it was introduced, however, the bill received support from sportsmen. Apparently the demand for outdoor recreation areas was great enough that sportsmen were willing to bear the risk of injury to induce private owners to keep their lands open. 1964 WIS. L. REV. 705, 709, 713.

⁶⁶See, e.g., *Loney v. McPhillips*, 268 Or. at 389, 521 P.2d at 345 (dissenting opinion); *Trespassing Children* 446; 2 OKLA. L. REV. 537, 539 (1949).

remote property will likely be much less afraid of attractive nuisance liability and hence much less inclined to close off their property. The greatest incidence of closure caused by the imposition of attractive nuisance liability will undoubtedly occur on property near cities. Much of this property will not be suited to outdoor recreation and its closure will not be detrimental to the free access policy.

Once it is determined that significant closure will occur from extending liability, there still remains the problem of weighing competing social interests. On the one hand is the interest of society in the safety of the child; on the other, the interest in keeping lands suitable for outdoor recreation open in the face of growing urbanization and the resulting scarcity of such lands. In determining whether liability should be extended, factors such as the current and future availability of wild lands, the amount that is in state, federal, and private ownership, and the present and future demand for such lands should be considered. Also to be considered is the actual effect on child safety of a refusal to extend liability to natural conditions. If, as Dean Prosser argued, liability under section 339 would not arise in the great majority of cases for natural conditions and indeed would not have arisen in any of the reported natural condition cases before 1971,⁶⁷ it appears that attractive nuisance liability for natural hazards would have, at best, a miniscule effect on child safety. In analyzing that effect, however, just as in analyzing the effect on closure, the landowner's anticipation of increased liability, and not just the actual increase, must be considered. If landowners anticipate a high risk of financial loss resulting from imposition of liability and take precautionary measures on their land to avert that loss, perhaps lands will become significantly safer for the child trespasser.

B. What Limits on the Scope of the Natural Conditions Exception to Attractive Nuisance Liability Are Suggested by the Free Access Policy?

If a state decides that the public interest in keeping outdoor recreation lands available justifies limiting attractive nuisance liability to artificial conditions, it is questionable whether that limitation should apply to all land in the state. In limiting the extent of a landowner's liability to trespassers on recreational lands, states have recognized that under certain circumstances it is in the public interest to encourage landowners to allow trespass to their property. But since the reason for encouraging the allowance of trespass is to provide more outdoor recreational areas, the limitations on liability should not apply to landowners whose lands are unsuitable for outdoor recreation. For example, industrial or commercial property is not suitable for such purposes, and there can be no public interest in encouraging owners of such property to allow trespass for outdoor

⁶⁷PROSSER § 59, at 367. See also RESTATEMENT (SECOND) OF TORTS § 339, comment p (1965); *Trespassing Children* 446.

sportsmen. The Oregon statute is limited in application to owners of agricultural land, forest land, range land, and land adjacent to the ocean.⁶⁸ Yet, in applying the public policy behind the statute and refusing to extend liability to natural hazards, the Oregon court apparently included all landowners in the state.⁶⁹ Giving such protection to all landowners to encourage them to open their lands for recreational use, regardless of whether their lands are suitable for that use, hardly seems justified. The Oregon court should have granted a natural hazard exemption from attractive nuisance liability only to owners of recreational lands. The free access policy relied on by the court can sustain no broader an exemption.

C. To What Standard of Care Should the Landowner Be Held if, Under the Natural Conditions Exception to Attractive Nuisance Liability, He Has No Duty To Exercise Reasonable Care?

If no natural condition exception is recognized, an owner of recreational properties will be held to a standard of reasonable care under the attractive nuisance doctrine. If, however, a court or legislature recognizes a natural condition exception, the question arises as to what standard of care the landowner will be held. One obvious alternative standard is found in the common law rule that a landowner is liable only if he wilfully and wantonly injures a trespasser. The rigor of this standard is *de minimus*; liability could be imposed only in exceptional cases of extreme landowner misconduct.

Another alternative standard—a standard higher than the common law standard yet lower than the reasonable care standard of the attractive nuisance doctrine—may exist. The Oregon statute would impose liability on the landowner for a “reckless failure” to guard against or warn of a dangerous condition.⁷⁰ Whether this standard is different from the common law standard of “wilfully and wantonly” inflicting injury is uncertain. It appears, however, that the common law standard reached only the active negligence of the landowner, and would not reach a failure to warn, unless that failure were extreme. Imposing liability on the landowner for a reckless failure to warn would arguably, therefore, give more protection to the child than the common law rule.

Theoretically at least, any landowner liability, even the minimal liability of the common law rule or the Oregon statute, will induce some closure and will be inconsistent with the free access policy. As a practical matter, however, imposition of the common law rule or the higher Oregon standard will not likely result in much closure. A minimal standard of care, because more easily met, is not likely to

⁶⁸ORE. REV. STAT. § 105.655(2) (1974). The Oregon legislature apparently recognized the problem referred to in the text and carefully limited the immunity to owners whose lands would most likely be suitable for outdoor recreation.

⁶⁹268 Or. at 387–88, 521 P.2d at 344.

⁷⁰ORE. REV. STAT. § 105.675 (1974).

create among landowners as much uncertainty about liability or fear of litigation. Free of these concerns, a landowner is not likely to take precautionary measures such as closure.

IV. CONCLUSION

Section 339 of the *Restatement (Second) of Torts* requires a weighing of the risk of injury to the child against the utility of the condition to the landowner and the burden on him of removing it.⁷¹ Dean Prosser once suggested that not only the utility of the condition to the landowner, but also its utility to society should be considered.⁷² The Oregon court, in refusing to extend attractive nuisance liability to natural conditions because of a public interest in keeping wild land open, in fact considered the utility of the condition to society. But the refusal to extend liability to natural hazards under attractive nuisance for the reason given by the court can only be justified for landowners whose land is suitable for outdoor recreation.

Torts—MEDICAL MALPRACTICE—SOURCES OF A PHYSICIAN'S STANDARD OF CARE: THE MEDICAL PROFESSION OR THE COURTS—*Helling v. Carey*, 83 Wash. 2d 514, 519 P.2d 981 (1974).

In 1959, Barbara Helling consulted Thomas F. Carey and Robert C. Laughlin, medical doctors and partners specializing in the practice of ophthalmology, concerning myopia and was fitted with contact lenses. In September 1963, she contacted them again regarding irritation to her eyes, and over the next 5 years further consultations took place.¹ The doctors considered Mrs. Helling's visual problems to be solely related to complications with her contact lenses until they tested her eye pressure and field of vision in October 1968. As a result of these tests, the doctors discovered that Mrs. Helling, who was then 32 years of age, had glaucoma² and that she had lost her peripheral vision and a significant portion of her central vision. Mrs.

⁷¹RESTATEMENT (SECOND) OF TORTS § 339, comment n (1965).

⁷²*Trespassing Children* 463.

¹These additional consultations occurred in October 1963, February 1967, September 1967, October 1967, May 1968, July 1968, August 1968, September 1968, and October 1968.

²Plaintiff was found to be suffering from primary open angle glaucoma, a condition in which the nourishing fluids of the eye are unable to escape and flow from the eye properly. This condition causes an increase in intraocular pressure which ultimately results in damage to the optic nerve and permanent and irreversible loss of vision. 83 Wash. 2d at 515, 519 P.2d at 981.