

THEORIES OF RECOVERY OF THE CHILD TRESPASSER IN MISSOURI

The theories by which a child trespasser can impose liability upon a landowner have been growing in number and in scope, a development which is part of a larger trend toward wider accident liability.¹ The defense of trespass has afforded the landowner less and less protection when his negligence causes the death or injury of a child trespasser. Two reasons advanced to explain this development are a growing realization that the life of a child is of great value to the community and a belief that in today's urban society the landowner is in the best position to protect a trespassing child.² This note will present those theories of recovery now available to the child trespasser in Missouri and examine the considerations upon which the courts have based the present law. No attempt will be made to examine situations in which the landowner is liable to both adults and children,³ and discussion will be limited to instances in which a child may recover solely or chiefly because of his youth.

Generally, "the possessor of land is not liable for harm to trespassers caused by his failure to put the land in a reasonably safe condition for their reception."⁴ To this general rule certain exceptions have arisen which apply to all trespassers.⁵ In addition to these exceptions, there are several theories in Missouri under which children may recover when certain facts are present.

All of these theories fall within the broad concept of negligence. Dean Prosser states the elements essential to any cause of action based on negligence as:

- a. A legal duty to conform to a standard of conduct for the protection of others against unreasonable risk.
- b. A failure to conform to the standard.

1. 2 HARPER & JAMES, TORTS § 27.1, at 1432 (1956):

It would be surprising, however, if the general trend over the last one hundred years toward wider accident liability had left the land occupier's citadel untouched. It has not. The tendency of the law, here as elsewhere, has been towards an even fuller application of the requirement of reasonable care under all circumstances . . .

2. PROSSER, TORTS § 76, at 438 (2d ed. 1955).

3. Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427, 428-29 (1959):

When the occupier discovers the presence of a trespasser, and sees him heading for a concealed pitfall, he must at least cry a warning. He will be liable to travelers on the public highway who deviate from it, either inadvertently or intentionally for a purpose connected with travel, and are injured by a condition which involves a recognizable risk of harm to them in the event of such deviation. Where, to the knowledge of the occupier, there is a frequent trespass upon a small area of the land, and there is within that area a condition highly dangerous to such trespassers, several cases have held that the paramount interests of the occupier must give way, and that he must exercise reasonable care for their protection.

4. PROSSER, *op. cit. supra* note 2, at 432.

5. See note 3 *supra*.

- c. A reasonably close causal connection between the conduct and the resulting injury.
- d. Actual loss or damage resulting to the interests of another.⁶

In this area, imposition of a duty on the landowner is the primary factor to be established for a successful suit. If a plaintiff can establish that the landowner owed a duty to the child trespasser, he will encounter little difficulty in establishing the remaining elements of his cause of action. Therefore, the discussion of landowner liability in Missouri will be couched in terms of duty.

I. THE "ATTRACTIVE NUISANCE" DOCTRINE

The Missouri law of attractive nuisance had its beginnings near the turn of the century, when courts freely imposed liability upon the railroads in favor of children who were injured playing on unattended railroad turntables.⁷ Since then there has been a strong tendency not to impose liability when the facts differ materially from those of the turntable cases. In *Buddy v. Union Terminal Ry.*,⁸ decided in 1918, the supreme court stipulated that the attractive nuisance doctrine was well established in Missouri, but criticized it as being sustained on "attenuated and fragile" legal logic.⁹ It was stated that several jurisdictions has extended the principle of the first attractive nuisance case, *Lynch v. Nurdin*,¹⁰ which did not involve a trespass on land, "in that they excuse a trespass upon private real property and labor to find some logical basis for the duty to safeguard such a trespasser."¹¹ The court continued:

Ought, then, a doctrine resting, *firmly and beneficently, we concede but solely*, upon the humane sentiment of putting humanity above property . . . but otherwise ignoring legal landmarks and all other known and settled grounds of legal liability, be, absent legislation, further extended? We think not.¹²

6. PROSSER, *op. cit. supra* note 2, at 165.

7. *Berry v. St. Louis, M. & S.E.R.R.*, 214 Mo. 593, 114 S.W. 27 (1908); *Nagel v. Missouri Pac. Ry.*, 75 Mo. 653 (1882); *Koons v. St. Louis & I.M.R.R.*, 65 Mo. 592 (1877).

8. 276 Mo. 276, 207 S.W. 821 (1918). In *Buddy*, small railroad flat cars were used by defendant in extending its tracks about 150 feet from the school plaintiff attended. The plaintiff was injured when his leg was caught between some construction material and one of the cars that was being pushed by several of his fellow students. Recovery was denied, primarily on the ground that "any sort of car . . . could be converted into a dangerous machine" if "*enough children should devote themselves to the task*" of moving it. *Id.* at 291, 207 S.W. at 826.

9. *Id.* at 284, 207 S.W. at 823.

10. 1 Q.B. 29, 113 Eng. Rep. 1041 (1841). In this case a child was injured while playing upon a horse-drawn cart that defendant had left unattended in the street.

11. *Buddy v. Union Terminal Ry.*, 276 Mo. 276, 286, 207 S.W. 821, 824 (1918).

12. *Id.* at 288, 207 S.W. at 825.

Until 1939, the "principle of the turntable cases" was utilized by the Missouri courts as a guideline by which to decide attractive nuisance cases, with the result that recovery was denied in most situations. In 1939, the Missouri Supreme Court decided *Hull v. Gillioz*¹³ and thereafter an interpretation of the language of that decision has been used as a basis for decisions in this area. The cases after *Hull* have strictly construed its language and have required that the plaintiff meet a rigid burden of proof with respect to a number of factors in order to establish his case. To understand the heavy burden placed upon a plaintiff whose theory is attractive nuisance, the Missouri law as given in *Hull* will be stated and its components considered.

A landowner has a duty to take reasonable precautions to protect young children who are attracted onto his land by an artificial condition that is maintained by him, that is inherently dangerous, and that has been created by more than mere casual or collateral negligence.

A. Landowner's Duty

Invariably the landowner in attractive nuisance litigation has been a railroad,¹⁴ a contractor or a building materials dealer.¹⁵ The term "landowner" refers to the possessor of the land in question, whether he be owner or lessee, and applies in construction company cases to those in control of the land.¹⁶

The courts have attempted to define the duty imposed upon a landowner. In *Hull* the court said that a landowner has a duty "to take reasonable precautions to protect children,"¹⁷ and that he has "some duty to take care to protect them."¹⁸ These general statements are of little assistance and lack substance without a consideration of the other factors to which courts look.

13. 344 Mo. 1227, 130 S.W.2d 623 (1939).

14. *Emery v. Thompson*, 347 Mo. 494, 148 S.W.2d 479 (1941); *Buddy v. Union Terminal Ry.*, 276 Mo. 276, 207 S.W. 821 (1918); *Shaw v. Chicago & A.R.R.*, 184 S.W. 1151 (Mo. 1916); *Berry v. St. Louis, M. & S.E.R.R.*, 214 Mo. 593, 114 S.W. 27 (1908); *Barney v. Hannibal & St. J.R.R.*, 126 Mo. 372, 28 S.W. 1069 (1894); *Nagel v. Missouri Pac. Ry.*, 75 Mo. 653 (1882); *Koons v. St. Louis & I.M.R.R.*, 65 Mo. 592 (1877); *Anderson v. Chicago Great W.R.R.*, 71 S.W.2d 508 (Mo. Ct. App. 1934); *Williams v. Kansas City, C.C. & St. J. Ry.*, 222 Mo. App. 865, 6 S.W.2d 48 (1928); *Featherstone v. Kansas City Terminal Ry.*, 174 Mo. App. 664, 161 S.W. 284 (1913); *Compton v. Missouri Pac. Ry.*, 147 Mo. App. 414, 126 S.W. 821 (1910); *Houck v. Chicago & A.R.R.*, 116 Mo. App. 559, 92 S.W. 738 (1906); *Dwyer v. Missouri Pac. Ry.*, 12 Mo. App. 597 (1882).

15. *Patterson v. Gibson*, 287 S.W.2d 853 (Mo. 1956); *Lentz v. Schuerman Bldg. & Realty Co.*, 359 Mo. 103, 220 S.W.2d 58 (1949); *State ex rel. W. E. Callahan Constr. Co. v. Hughes*, 348 Mo. 1209, 159 S.W.2d 251 (1941); *Hull v. Gillioz*, 344 Mo. 1227, 130 S.W.2d 623 (1939); *Kelly v. Benas*, 217 Mo. 1, 116 S.W. 557 (1909); *Morrison v. Phelps Stone Co.*, 203 Mo. App. 142, 219 S.W. 393 (1920).

16. See *Holifield v. Wigdor*, 361 Mo. 636, 642, 235 S.W.2d 564, 567 (1951).

17. 344 Mo. 1227, 1236, 130 S.W.2d 623, 627 (1939).

18. *Id.* at 1235, 130 S.W.2d at 627.

B. *The Child Trespasser*

Children involved in attractive nuisance litigation have been designated trespassers for the sake of convenience. In the development of the doctrine, the child was first designated a trespasser,¹⁹ later an implied invitee²⁰ and now either a trespasser²¹ or a bare licensee.²² The distinction between trespasser and bare licensee has rested upon the knowledge of the defendant. In *Patterson v. Gibson*, the court, in denying recovery, stated:

The child . . . was either a trespasser or a licensee; in the latter capacity persons are often referred to as "bare licensees." Giving plaintiff the benefit of the doubt, we will . . . consider him [a bare licensee], in view of the fact that children had apparently been playing on the premises while work was going on, and without being told to leave.²³

In *Emery v. Thompson*,²⁴ the court in denying recovery also considered the fact that other children had played on the premises in designating the child a bare licensee. In addition, *Emery* stated that the child did not have an implied invitation "because we have already found that a pile of ties may be attractive to small children, but are not inherently dangerous."²⁵ The decisions indicate that the courts have begged the question by examining other factors to determine whether the child was an invitee, licensee or a trespasser, for the *Patterson* reasoning was based on the allurements requirement,²⁶ while *Emery* looked to the inherent danger as well as the allurements require-

19. *E.g.*, *Nagel v. Missouri Pac. Ry.*, 75 Mo. 653 (1882). Although not expressly stated in the opinion, it is clear that the court considered the child a trespasser.

20. *Berry v. St. Louis, M. & S.E.R.R.*, 214 Mo. 593, 114 S.W. 27 (1908).

This defendant . . . permitted a dangerous machine, attractive to children as a plaything, to remain unguarded and unlocked for a long time at a place to which children habitually resorted, and upon which machine they were permitted to play without defendant's lifting a finger to prevent it. The facts of the case amount to an invitation to children to use the machine. *Id.* at 609, 114 S.W. at 33.

See 15 Mo. L. Rev. 97, 101 (1950) indicating that since *Hull* allowed the doctrine to be applied to a child trespasser, the fictional implied invitation theory was abandoned. However, only two years after the *Hull* decision the supreme court in *Emery v. Thompson*, 347 Mo. 494, 148 S.W.2d 479 (1941), cast some doubt on the abandonment by holding that "it cannot be said that he [the child] had an implied invitation." *Id.* at 498, 148 S.W.2d at 480.

21. *Hull v. Gillioz*, 344 Mo. 1227, 130 S.W.2d 623 (1939).

22. *Patterson v. Gibson*, 287 S.W.2d 853 (Mo. 1956); *Emery v. Thompson*, 347 Mo. 494, 148 S.W.2d 479 (1941).

23. *Patterson v. Gibson*, *supra* note 22, at 856-57.

24. 347 Mo. 494, 148 S.W.2d 479 (1941). The landowner had "knowledge" that the child had played upon the railroad ties because he knew that other children had been playing there for six months.

25. *Id.* at 497, 148 S.W.2d at 480.

26. See Part C *infra*. The fact that children had been playing on the premises indicated that they were attracted there.

27. See Part E *infra*.

ment.²⁷ It therefore appears that this designation has no real bearing on the question of liability, and furthermore, it should not, for even children denominated trespassers have recovered.²⁸

Implied in the doctrine is the rule that a child who realizes the dangerous quality of the condition by which he is injured cannot recover. When a court finds that a child did realize the danger involved, he is not a "young child" for the purposes of the doctrine. In Missouri there is no certain age above which a child is automatically excluded, although age is one factor in determining whether a child appreciated the danger inherent in a certain condition. One case, which refused recovery on other grounds, indicated that a fifteen year old could not successfully maintain an action under this theory unless there were a very exceptional state of facts.²⁹ Normally the age of the child is between four and ten.³⁰

C. Allurement

The *Restatement of Torts* does not include a requirement that the child be attracted onto the landowner's property by the dangerous condition.³¹ An important conflict between Missouri law and the *Restatement* is expressed in *Hull*:

28. *Hull v. Gillioz*, 344 Mo. 1227, 130 S.W.2d 623 (1939). This conclusion is in line with traditional tort law, for a landowner owes the least duty to a trespasser, a larger duty to a licensee, and a still larger duty to an invitee.

29. *Shaw v. Chicago & A.R.R.*, 184 S.W. 1151, 1154 (Mo. 1916). See *Cooper v. Finke*, 376 S.W.2d 225 (Mo. 1964). This recent case reversed and remanded a summary judgment for defendant in a case in which the attractive nuisance doctrine was advanced by a fourteen year old boy. The supreme court refused to hold as a matter of law that the plaintiff was guilty of contributory negligence, but expressed no opinion upon the application of the attractive nuisance doctrine.

30. *Patterson v. Gibson*, 287 S.W.2d 853 (Mo. 1956) (four); *Emery v. Thompson*, 347 Mo. 494, 148 S.W.2d 479 (1941) (five); *Hull v. Gillioz*, 344 Mo. 1227, 130 S.W.2d 623 (1939) (eight); *Buddy v. Union Terminal Ry.*, 276 Mo. 276, 207 S.W. 821 (1918) (ten); *Kelly v. Benas*, 217 Mo. 1, 116 S.W. 557 (1909) (nine). See Starnes, *Contributory Negligence of a Minor as a Matter of Law in Missouri*, 1959 WASH. U.L.Q. 281, 284, for a discussion of the contributory negligence of children in attractive nuisance cases.

31. RESTATEMENT, TORTS § 339 (1934). The *Restatement* would hold the landowner "subject to liability caused by a structure or other artificial condition" when the plaintiff shows:

- 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 young children involved therein.

[T]hey [the Missouri decisions] limit the doctrine to situations where children's trespasses are due to the attractions of a dangerous instrumentality or condition, instead of applying it to conditions and instrumentalities the children could not see or know about without first becoming trespassers.³²

In the 1951 case of *Holifield v. Wigdor*,³³ the application of this restriction is clearly demonstrated. Plaintiff's claimed that gas tanks ready to be installed and the rain-filled excavation dug for their installation constituted an attractive nuisance in that "the tanks were bright and shiny and could be easily seen from the adjacent street and 'that the tanks, their appearance, their location, the fresh dirt, the water in the hole, and the area in and about such hole became naturally attractive to such deceased child.'"³⁴ The child was drowned in the excavation, and on the allurements point the court said that the "children must be attracted to the place of injury by the *very* instrumentality or condition whose inherent danger produces the injury."³⁵ Although the court did not reach the allurements question,³⁶ it stated:

[I]t may be observed that the evidence failed to show that the deceased child, or any other children, had ever played around the tanks or the excavation. Certainly, there was no showing that either the tanks or the excavation possessed any special or peculiar attraction for children.³⁷

It may be concluded that this restriction is firmly rooted in Missouri law,³⁸ especially since the court in *Holifield* said that the condition must possess "special or peculiar" attraction for children.³⁹

32. *Hull v. Gillioz*, 344 Mo. 1227, 1235, 130 S.W.2d 623, 627 (1939). This is the qualification that the leading authorities in the tort field criticize as being "vestigial and harsh." 2 HARPER & JAMES, TORTS § 27.5, at 1450-51 (1956); PROSSER, TORTS § 76, at 440 (2d ed. 1955).

However, the federal courts retain the allurements requirement enunciated in *United Zinc & Chemical Co. v. Britt*, 258 U.S. 268 (1922). In that case, Mr. Justice Holmes said: "In the case at bar it is at least doubtful whether the water could be seen from any place where the children lawfully were and there is no evidence that it was what led them to enter the land. But that is necessary to start the supposed duty." *Id.* at 275-76.

33. 361 Mo. 636, 235 S.W.2d 564 (1951).

34. *Id.* at 639, 235 S.W.2d at 565-66.

35. *Id.* at 641, 235 S.W.2d at 567. (Emphasis added.)

36. The court held for the defendant on the ground that the condition was not inherently dangerous.

37. 361 Mo. 636, 642, 235 S.W.2d 564, 568 (1951). The court here implied that the fact that other children had played around the tanks would have been evidence that the tanks were attractive to children and had therefore attracted the plaintiff.

38. *Hull v. Gillioz*, 344 Mo. 1227, 130 S.W.2d 623 (1939); *Howard v. St. Joseph Transmission Co.*, 316 Mo. 317, 289 S.W. 597 (1926); *Shaw v. Chicago & A.R.R.*, 184 S.W. 1151 (Mo. 1916); *Smith v. Jacob Dold Packing Co.*, 82 Mo. App. 9 (1899).

39. In other words, the Missouri courts may now require that a *very appealing* condition attract the child, instead of an appealing condition.

D. Artificial Condition

The child must be attracted onto the land by a condition, not an activity. This is not to say that liability cannot attach when the child is injured by an activity while on the premises, but only that the theory of recovery would not be attractive nuisance.⁴⁰

Furthermore, the condition must be artificial, not natural, a qualification which the *Restatement of Torts* also proposes.⁴¹ This qualification is to relieve landowners of the burden of protecting child trespassers from the dangers of lakes, cliffs and caves. Many plaintiffs who have sought recovery after their child was drowned in a lake or pond maintained by a landowner have been thwarted by this requirement.⁴² Although it is generally stated that the condition must be artificial, courts have rarely used this ground to refuse recovery, but rather have stated that they refuse to extend the doctrine beyond the turntable cases.⁴³

Moreover, the attractive nuisance doctrine does not apply unless the condition has been *maintained* by the landowner. "There cannot be a nuisance, attractive or otherwise, except from a condition maintained over an unreasonable period of time."⁴⁴ Thus courts, by analogy to the common law of nuisance, have evolved the rule that a condition which is only temporary cannot render a landowner liable. This proposition is illustrated by *State ex rel. W. E. Callahan Constr. Co. v. Hughes*,⁴⁵ in which the landowner had massive cooper's buckets on his premises on which boys frequently played with no warning from the landowner's employees. The handle on one of these buckets was not fastened and fell upon a trespassing child,

40. For a discussion of theories under which both adults and children may recover when injured by activities, see *RESTATEMENT, TORTS* §§ 334, 336 (1934).

41. See note 31 *supra*.

42. *Rallo v. Hemen Constr. Co.*, 236 S.W. 632 (Mo. 1921); *Arnold v. City of St. Louis*, 152 Mo. 173, 53 S.W. 900 (1899); *Overholt v. Vieths*, 93 Mo. 422, 6 S.W. 74 (1887); *Kemp v. Doe Run Lead Co.*, 34 S.W.2d 1002 (Mo. Ct. App. 1931); *Kowertz v. Dible*, 27 S.W.2d 61 (Mo. Ct. App. 1930); *Williams v. Kansas City, C.C. & St. J.R.R.*, 222 Mo. App. 865, 6 S.W.2d 48 (1928). The most recent case on this point, *Baker v. Praver & Sons, Inc.*, 361 S.W.2d 667 (Mo. 1962), in refusing to apply the attractive nuisance doctrine when a child drowned in a pool on land being developed by defendant, said that Missouri "is committed to the view that the attractive nuisance doctrine is not applicable to 'ordinary water hazards' including ponds, water-filled quarries and pools of water in creeks and natural water courses." *Id.* at 670.

43. See note 12 *supra* and accompanying text.

44. *State ex rel. W. E. Callahan Constr. Co. v. Hughes*, 348 Mo. 1209, 1215, 159 S.W.2d 251, 254 (1941). See the language in *Hull* stressing the fact that the condition had existed for months prior to the accident. *Hull v. Gillioz*, 344 Mo. 1227, 1238, 130 S.W.2d 623, 629 (1939).

45. 348 Mo. 1209, 159 S.W.2d 251, *quashing* *Street v. W. E. Callahan Constr. Co.*, 147 S.W.2d 153 (Mo. Ct. App. 1941).

killing him. The handles were supposed to be fastened by rings so that they would stay upright. The Missouri Supreme Court said:

We will assume, without deciding, that the court of appeals found that the relator *left* the handle up with the ring unattached. Even though such be assumed, it will be conceded, we think, that there was no evidence, so far as appears in the opinion, when, if ever before, or over what period relator had *left* this bucket handle standing with the ring unattached. Absent such evidence, the single act of leaving the offending handle standing, with the ring unattached, was no more than "mere casual negligence," and not evidence sufficient to establish that defendant *maintained* an attractive nuisance.⁴⁶

E. Degree of Negligence and Inherent Danger

The court in *Hull v. Gillioz* stated that the Missouri cases "limit the doctrine to instrumentalities and conditions which are inherently dangerous instead of applying it to conditions in which danger has been created by mere casual negligence under particular circumstances."⁴⁷ Elsewhere in the opinion the court indicated that there is no liability if the danger arises "from mere casual or collateral negligence of others."⁴⁸ On motion for rehearing, evidently aware that elucidation was necessary, the court stated,

[T]o make the doctrine applicable . . . it must be a condition which is so dangerous at all times that, without the concurrence of any casual or collateral negligence of third persons to increase the danger at or near the time of the injury, it should reasonably be anticipated as likely to cause injury to children . . .⁴⁹

This language demands close inspection, for it is this aspect of inherent danger and the related concept of casual or collateral negligence which have been the bases for the almost uniform decisions in favor of landowners. On its face inherent danger would seem only to refer to the degree of danger and its intrinsic nature. In *Hull* it was found that precariously piled steel beams were inherently dangerous, but there was an indication that steel beams piled carefully would not be inherently dangerous under normal circumstances because they would not "reasonably be anticipated as likely to cause injury to children."⁵⁰ However, the *Hull* opinion stated that lumber, however

46. *Id.* at 1215, 159 S.W.2d at 254.

47. 344 Mo. 1227, 1235, 130 S.W.2d 623, 627 (1939).

48. *Id.* at 1236, 130 S.W.2d at 628.

49. *Id.* at 1237-38, 130 S.W.2d at 629.

50. *Id.* at 1238, 130 S.W.2d at 629. When the Missouri courts hold that a condition is not inherently dangerous, they are excluding those conditions which they do not consider to be within their concept of attractive nuisances. For example, the supreme court said that it would not extend the doctrine to ponds and cited a number of decisions in which recovery was denied; it then said that "these cases, quite evidently, have been decided on the principle that a pond, whether natural or artificial, is not inherently dangerous." *Holifield v. Wigdor*, 361 Mo. 636, 641, 235, S.W.2d 564, 567 (1951). The court apparently

piled, could not come within the attractive nuisance doctrine.⁵¹ It is not clear how or why the court made this distinction between steel beams and lumber. Certainly either instrumentality could cause death or serious injury to a trespassing child. The language concerning lumber was utilized two years later in *Emery v. Thompson*,⁵² in which the court held that if lumber could never be inherently dangerous, neither could railroad ties, no matter how they were piled. The artificiality of the distinction between the inherent danger of steel beams and railroad ties makes the *Hull* and *Emery* decisions inconsistent. The manner in which *Emery* and other decisions have interpreted *Hull* with respect to inherent danger indicates that if facts identical to *Hull* arose today, recovery would be denied, although, paradoxically, the court would undoubtedly rely on the *law* stated in *Hull* for its decision.

After the concept of inherent danger was "explained" by the court in *Hull*, the traditional exception of intervening force was stated in the phrase "without the concurrence of any casual or collateral negligence of third persons."⁵³ The court evidently meant to indicate that if the collateral or casual negligence of a third person caused the dangerous condition, the landowner would not be liable. However, *Emery*⁵⁴ indicated plaintiff must demonstrate that the *landowner* was more than "casually or collaterally" negligent in order to make a case. In *Emery* the court said "the danger, if any, arising from a pile of ties would be the negligent manner in which they were piled, therefore, the danger would be from mere casual or collateral negligence of others in piling the ties."⁵⁵ Notwithstanding the court's reference to "of others," there is no indication that anyone but the defendant was responsible for the negligent placement of the ties.

The paradox discussed with respect to the inherent danger qualification is present throughout the attractive nuisance area. The fact that recovery was granted in the *Hull* case, which fully set out the attractive nuisance doctrine, might lead the uninitiated to suspect that a cause of action is easily established. However, since the *Hull* decision in 1939, no appellate court

meant that these conditions cannot be attractive nuisances, but to give as a reason for this that they are not inherently dangerous is to give no reason at all unless that term is defined. See 15 Mo. L. Rev. 97, 100 n.10 (1950) for a discussion of whether the inherently dangerous limitation "is really a limitation at all or whether it is not another way of attempting to define an attractive nuisance."

51. *Hull v. Gillioz*, 344 Mo. 1227, 1237, 130 S.W.2d 623, 628 (1939).

52. 347 Mo. 494, 148 S.W.2d 479 (1941).

53. 344 Mo. 1227, 1237-38, 130 S.W.2d 623, 629 (1939).

54. 347 Mo. 494, 148 S.W.2d 479 (1941).

55. *Id.* at 498, 148 S.W.2d at 480. See 7 Mo. L. Rev. 474, 477 (1942), in which it was said that the *Hull* opinion made it clear that "casual negligence is not a term applied to the conduct of third persons only."

has granted recovery under this doctrine.⁵⁶ Without the *Hull* decision, Missouri, for all practical purposes, would be without an attractive nuisance doctrine.⁵⁷

II. THE "EXPLOSIVE" DOCTRINE

A duty to protect trespassing children from harm is imposed upon one who uses or has control of explosives or other highly dangerous substances.

If Missouri were among those jurisdictions that have adopted the *Restatement of Torts* analysis of attractive nuisance law,⁵⁸ the explosive or inherently dangerous substance doctrine would come within the *Restatement* instead of being a separate exception to the general rule of non-liability of the landowner. Since Missouri law requires attraction onto the land by the condition,⁵⁹ the Missouri courts have had to carve out an exception to render a landowner liable when a child trespasser is injured by an explosive or other inherently dangerous substance with which he comes in contact *after* the original trespass. The leading case of *Boyer v. Guidicy Marble, Terrazzo & Tile Co.*, states the rule:

[T]hat one who is under the duty to decide the care in using, maintaining and handling extremely dangerous explosives which a reasonably careful person would exercise under the same or similar circumstances, owes a duty especially to children and those of immature judgment, irrespective of the fact that the status of the person may be that of trespasser or licensee.⁶⁰

This doctrine, which has been the basis of numerous cases involving various types of explosives,⁶¹ has been extended to substances of a highly dangerous nature, especially highly volatile liquids.⁶²

56. In the light of the strict nature of the doctrine, it is unlikely that recovery has been obtained on the trial level and has not been appealed.

57. *Hull* might possibly have been decided on the ground that a landowner owes a duty not to injure licensees by willful or wanton conduct. For a review of the Missouri law regarding licensees, see *Anderson v. Cinnamon*, 282 S.W.2d 445, 447 (Mo. 1955).

58. Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427, 448 n.119 (1959). See note 31 *supra*, for RESTATEMENT, TORTS § 339 (1934).

59. See note 31 *supra* and accompanying text.

60. 246 S.W.2d 742, 745 (Mo. 1952).

61. *United States v. Stoppelman*, 266 F.2d 13 (1959) (live blank cartridges left after Marine Corps maneuver); *Kansas City ex rel. Barlow v. Robinson*, 322 Mo. 1050, 17 S.W.2d 977, 32 S.W.2d 1075 (1929) (dynamite caps left in basement of unlocked and unguarded building); *Kennedy v. Independent Quarry & Constr. Co.*, 316 Mo. 782, 291 S.W. 475 (1926) (dynamite caps left in unlocked box in shed near quarry); *Diehl v. A. P. Green Fire Brick Co.*, 299 Mo. 641, 253 S.W. 984 (1923) (dynamite caps tossed aside by defendant onto right of way); *Shields v. Costello*, 229 S.W. 411 (Mo. Ct. App. 1921) (dynamite caps dropped by defendant). See also *Lottes v. Pessina*, 174 S.W.2d 893 (Mo. Ct. App. 1943), in which the defendant left fireworks lying at the place of a display, a city park, and the court held that the child was not a trespasser because he was at a place where he had every right to be.

62. *Alligator Co. v. Dutton*, 109 F.2d 900 (1940) (semi-explosive liquid residue

The court in *Boyer* cited three cases as authority for the rule it announced.⁶³ The first of these rather summarily stated, with no Missouri authority, that "it is the general rule of law that to leave exposed and unguarded, on accessible premises, an explosive which is found by trespassing children is negligence."⁶⁴ The court said nothing more on this point, leaving an inference of strict liability. Another case cited by *Boyer* also seems to recognize that a duty is imposed on a user of highly dangerous explosives, but again the court is very general in stating the proposition.⁶⁵ The third case, *Diehl v. A. P. Green Fire Brick Co.*,⁶⁶ stated that it was the jury's function

to say whether reasonably prudent and careful men would have so disposed of such a dangerous agency at a place where such dynamite caps might be found and cause injury. The plaintiff and his brother found the caps, and plaintiff was injured thereby. [The defendant] knew these and other children had been, and were likely to be, about the premises. We think these facts sufficient to show actionable negligence.⁶⁷

However, the *Diehl* case did not involve a trespass, since the plaintiff was in the habit of taking meals to his father, who worked for defendant, and found the caps not on defendant's property but on a railroad right of way, where the employees of defendant had thrown them. Nevertheless the court in *Boyer* was satisfied to use *Diehl* and the two other cases as authority for the rule it said was Missouri law. This might tend to indicate that the proposition was not well-established, were it not that the doctrine is generally recognized throughout the United States, usually coming within the purview of the attractive nuisance theory.⁶⁸

The fact that the child in *Boyer* was seventeen years old indicated that the Missouri courts are quite liberal in applying this doctrine. *Boyer* does say that age may be an important factor in determining the defendant's ability to foresee the injury, but the court refused to fix an arbitrary limit,

from defendant's raincoat processing caught fire); *Paisley v. Liebowitz*, 347 S.W.2d 178 (Mo. 1961) (oleum spirits used by defendant contractor caught fire).

63. *Kansas City ex rel. Barlow v. Robinson*, 322 Mo. 1050, 17 S.W.2d 977, 32 S.W.2d 1075 (1929); *Kennedy v. Independent Quarry & Constr. Co.*, 316 Mo. 782, 291 S.W. 475 (1926); *Diehl v. A. P. Green Fire Brick Co.*, 299 Mo. 641, 253 S.W. 984 (1923).

64. *Kansas City ex rel. Barlow v. Robinson*, *supra* note 63, at 1059, 17 S.W.2d at 981.

65. *Kennedy v. Independent Quarry & Constr. Co.*, 316 Mo. 782, 790, 291 S.W. 475, 477 (1926).

66. 299 Mo. 641, 253 S.W. 984 (1923).

67. *Id.* at 655, 253 S.W. at 988.

68. For an exhaustive discussion of this area and its relationship to the attractive nuisance doctrine, see Annot., 10 A.L.R.2d 22 (1950).

stating that age is only one of the factors that must be considered.⁶⁹ The rule that the child need not be injured on defendant's land,⁷⁰ and the fact that the courts are not likely to allow an intervening force to prevent plaintiff's recovery,⁷¹ are additional manifestations of this liberal tendency.

The rule applied when child trespassers come in contact with explosives is now well established in Missouri law. In almost every case, the user of explosives or other dangerous substances has a duty to prevent children from obtaining them, in spite of the fact that the children may be trespassers. The basic premise underlying this rule is that a child should not be charged with knowledge of the danger involved.

III. THE "HARD-BY" DOCTRINE

A landowner has a duty to children who have a tendency to deviate from the public way to protect them from dangerous conditions upon the land.

This rule, known as the "hard-by" rule, is expressed in the *Restatement of Torts* in language similar to Missouri law:

A possessor of land abutting upon a public highway is subject to liability for bodily harm caused to young children by an excavation or other artificial condition maintained by him thereon so close to the highway that it involves an unreasonable risk to such children because of their tendency to deviate from the highway.⁷²

An early case in this area is *Witte v. Stifel*, which stated the general rule that "he who owns property must so use it as not to unnecessarily injure others."⁷³ After determining that the facts did not come within the attractive nuisance doctrine, the court denied recovery, holding that the child

69. *Boyer v. Guidicy Marble, Terrazzo & Tile Co.*, 246 S.W.2d 742, 746-47 (Mo. 1952).

70. *E.g.*, *Boyer v. Guidicy Marble, Terrazzo & Tile Co.*, *supra* note 69, where the plaintiff took the dynamite cap home and struck a nail into it.

71. *E.g.*, *Diehl v. A. P. Green Fire Brick Co.*, 299 Mo. 641, 253 S.W. 984 (1926), where plaintiff's mother examined one of the dynamite caps and handed it back to the child; the court stated that this was at most concurrent negligence and "not sufficient to break the causal connection between defendant's negligent act and the injury." *Id.* at 661, 253 S.W. at 990. *But see* *Kennedy v. Independent Quarry & Constr. Co.*, 316 Mo. 782, 291 S.W. 475 (1926), in which the court held that the fact that another trespasser had acquired the dynamite caps by which plaintiff was injured was an efficient intervening cause, because the actor was a person nearing maturity and conscious of his wrongdoing. *Id.* at 797, 291 S.W. at 481.

72. *RESTATEMENT, TORTS* § 369 (1934).

73. 126 Mo. 295, 300, 28 S.W. 891, 892 (1894). In this case a boy of seven met his death when he pulled down upon himself a heavy stone which was resting over a window of an unfinished house that fronted upon a public street only a short distance from the sidewalk.

was a mere intruder and trespasser because the defendant did not know that children were in the habit of playing in the area.⁷⁴ The court said:

The deceased had left the sidewalk, and stepped over the bounds and passed the limits to which he was restricted by the street and sidewalk; and therefore this case does not come within the rule which requires one person to so protect a building upon his own premises, or of which he may be in control, which is dangerous to others, passing along a public street.⁷⁵

In *Wells v. Henry W. Kuhs Realty Co.*,⁷⁶ the supreme court acknowledged its reliance upon the *Restatement*. In that case a young boy had entered the landowner's premises in pursuit of a flying bug and was injured when he fell upon broken glass in a dump maintained by the landowner. The supreme court, in reversing the lower court's holding that plaintiff had failed to state a cause of action,⁷⁷ stressed the fact that the landowner knew the propensity of children to wander in play and knew that children were accustomed to play in an alley adjacent to the premises.⁷⁸ The shift from the *Witte* rationale, which appeared to limit liability to those situations in which a child was injured while on the public way, to the *Wells* case is apparent.⁷⁹

The decision in *Wells* and other cases⁸⁰ made it clear that both adults and children are protected if they inadvertently deviate from the public way and are harmed by a dangerous condition maintained by the landowner. But it now appears that the doctrine as applied to children grants them a wider area in which to deviate.⁸¹ In *Winegardner v. City of St. Louis*, the court said: "It may well be that the [*Wells*] case . . . should not be construed as necessarily confining the application of section 369 of the *Restatement* . . . to an 'inadvertent deviation' by a child; it may well embrace, under given fact situations, intentional deviations."⁸² However, the court held that the doctrine did not apply when a child drowned in a quarry after travelling a substantial distance from a public road.⁸³

74. *Id.* at 305, 28 S.W. at 893.

75. *Ibid.*

76. 269 S.W.2d 761 (Mo. 1954)

77. *Id.* at 767.

78. *Ibid.*

79. *Id.* at 768.

80. *E.g.*, *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219 (1880).

81. In the *Wells* case the court indicated that its decision was based on the fact that the child inadvertently deviated. *Wells v. Henry W. Kuhs Realty Co.*, 269 S.W.2d 761, 768 (Mo. 1954).

82. 346 S.W.2d 219, 220 (Mo. 1961).

83. *Id.* at 221. The decision did not consider whether the sixteen year old decedent was a child for the purposes of the rule.

A case similar to *Winegardner*, *Baker v. Prayer & Sons, Inc.*, 361 S.W.2d 667 (Mo.

Although *Winegardner* imposed factual limitations, the "hard-by" doctrine is well established in Missouri and the courts have indicated that liability will attach quite freely, giving the landowner few of the advantages which he enjoys under the attractive nuisance doctrine.

CONCLUSION

The recent case of *Cox v. Gros*⁸⁴ involved an injury sustained by a child trespasser who fell upon a piece of sharp marble on the landowner's premises. The Missouri Supreme Court discussed the three theories of liability which have been presented in this note as exceptions to the general rule that landowners have no duty to child trespassers. In *Cox* the plaintiff conceded that the facts given in the petition did not come within the scope of any of the three theories, but urged that the court adopt the *Restatement of Torts* rule.⁸⁵ In refusing to extend Missouri law to embrace the *Restatement*,⁸⁶ the court indicated that unless the facts come within one of the three theories there can be no relief for the child trespasser.

Thus the court again refused to extend its attractive nuisance doctrine, following the strong tradition which underlies many of its decisions in this area. In echoing the restrictive reasoning of the *Buddy* case,⁸⁷ enunciated in 1918, the court reaffirmed its allegiance to the rules laid down in the *Hull* case. Therefore, the requirements of an inherently dangerous condition and of allurement onto the land by that condition remain firmly entrenched in Missouri law.

Because of a strict attractive nuisance doctrine, Missouri law has evolved liberal doctrine in the two collateral areas of explosive and "hard-by" litigation. The courts have imposed upon the users of explosives or other highly dangerous substances a duty to protect children from harm which might result from misuse of these instrumentalities. This rule approaches absolute liability in order to force users of these materials to exercise that degree of care consistent with the great risk involved. In a like manner the Missouri courts have imposed a heavy burden on landowners whose property abuts

1962) denied recovery when the child drowned in a pool on land which defendant was developing. An attractive nuisance contention was also refused.

84. 360 S.W.2d 691 (Mo. 1962).

85. RESTATEMENT, TORTS § 339 (1934).

86. The specific ground on which this refusal was made was that plaintiff did not claim that the condition which caused the injury attracted the child onto the land. See text accompanying notes 31-39 *supra*.

Another case in which plaintiff argued that the court should adopt the *Restatement* view was *Blavatt v. Union Elec. Light & Power Co.*, 335 Mo. 151, 71 S.W.2d 736 (1934), but the court refused. In that case a boy of fifteen died from injuries sustained when he came in contact with high-tension wires within defendant's substation.

87. See notes 8-12 *supra* and accompanying text.

a public way, for children have been granted a wide area in which to deviate, and these deviations need not be inadvertent for the "hard-by" doctrine to apply. Many of the situations in which Missouri courts have granted recovery in explosive and "hard-by" cases would come within the attractive nuisance doctrines of other jurisdictions in this country.

There has been an uneven development in Missouri of a comprehensive body of law that would impose on landowners a burden of taking precautions to prevent harm to trespassing children because of the rigidity of the courts when they consider the attractive nuisance doctrine. Although the explosive and "hard-by" theories impose this burden of precaution, uniformity of justice as well as policy considerations should require that it also be placed upon those landowners who have dangerous conditions on their premises. If the Missouri courts allowed the policy considerations which have evolved from the two collateral theories of landowner's liability to guide them in the attractive nuisance area, the inconsistencies in Missouri law would be resolved, and Missouri would follow the general trend in this country toward wider accident liability.