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Torts - Attractive Nuisance - Artificial Pools of Water as Attractive Nuisances

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the effect that, where there has been a conspiracy to violate more than one statute, a trial for conspiracy to violate one does not bar a prosecution for a conspiracy to violate the others.[20] Respectable authority may, however, be found to support a view to the contrary.[21]

In the foregoing cases the courts have been unable to formulate a hard and fast rule which will guarantee justice in all situations. Although the "same evidence" test is probably the better rule for deciding identity of offenses in most criminal cases, it is possible that an application of the "same transaction" test would produce better results in conspiracy cases. As pointed out in the *Short* case, the prosecution is for the criminal agreement or transaction and not for the specific overt acts. Since the prosecution is for the agreement, a slight divergence in the evidence or the time, place, parties, overt acts, or statutes violated should not give rise to numerous prosecutions for the same conspiracy.

The question of identity of offenses involving divergent factual situations does not lend itself to determination by strict rules of law. It is probable that more just results would be obtained by freeing the courts from such rules and allowing them discretion in deciding the question on the basis of broad principles of public policy.[22] However, the court in the principal case is correct in placing on the defendant the burden of proving that the former prosecution was for the same offense[23] and in holding that the defendant will not be heard to criticize a judgment which he insisted should be granted.[24]

Wilmar Pewsey

TORTS—ATTRACTIVE NUISANCE—ARTIFICIAL POOLS OF WATER AS ATTRACTIVE NUISANCES. Defendant, a land owner in an area frequented by children, dug an uneven excavation near a public street. He allowed water to collect, thus creating a pond varying in depth from a few inches to more than eight feet. P's son, an eleven-year-old boy, was drowned while wading in the pool when he stepped into a depression. P sued for damages on the theory the pond was an attractive nuisance. In dismissing the suit, the Supreme Court of Indiana *held,* with two judges dissenting,[1] that such artificial pools

[20] Lewis v. United States, 4 F.2d 520 (5th Cir. 1925); United States v. Owen, 21 F.2d 868 (N.D. Ill. 1927).

[21] Manning v. United States, 275 Fed. 29 (8th Cir. 1921); United States v. Weiss, 293 Fed. 992 (N.D. Ill. 1923).

[22] Hall, *op. cit. supra* note 9, at 908.

[23] Johnson v. United States, 124 F.2d 101 (5th Cir. 1941); Kastel v. United States, 23 F.2d 156 (2d Cir. 1927).

[24] Haugen v. United States, 153 F.2d 850, 851 (9th Cir. 1946); United States v. Jones, 31 Fed. 725 (S.D. Ga. 1887).

[1] The dissenting judges stated that when there is an affirmative act done by man which creates a body of water, that man must use due care under the circumstances to avoid injury to others. The excavation attracted the infant and there was a duty on the part of the defendant to act affirmatively to avoid injury. The condition was likened to a trap.

are similar to natural bodies of water and do not therefore constitute attractive nuisances. *Plotzki v. Standard Oil Co.*, 92 N.E.2d 632 (Ind. 1950.)

An elementary statement of the attractive nuisance doctrine is that one who maintains on his property a dangerous instrumentality or object which reasonably can be expected to attract children is under a duty to exercise reasonable care to protect them.[2] The courts have laid down four conditions as prerequisites to liability: (1) the land owner must know or be reasonably chargeable with knowledge that the children will trespass upon the property; (2) the land owner must know or be reasonably chargeable with knowledge that the condition involves unreasonable risk to children; (3) the condition must be such that it will not be discovered or the risk appreciated by the children due to their inexperience; (4) the attractive condition must be of slight utility to the possessor as compared with the risk borne by the children.[3]

The majority of jurisdictions, however, do not apply the attractive nuisance doctrine to ponds, pools, streams, and other bodies of water.[4] These jurisdictions have abandoned the distinction between the natural bodies of water which are classed as acts of God for which there is no liability, and artificial ponds created by man.[5] The structures of artificial and natural bodies of water, the courts have stated, resemble each other to such a degree that the dangers involved in an artificial pond are no greater than in a natural one.[6] Consequently, there should be no liability for the maintenance of artificial ponds any more than for natural ones. Also children are ordinarily instructed at an early age concerning the dangers of lakes and rivers so that the injuries resulting from them are comparatively rare.[7] These cases which have refused to extend the doctrine of attractive nuisance to artificial bodies of water have proceeded, in some instances, upon the theory that to impose liability upon the owners of land would create hardship because of the widespread use of artificial ponds.

The dissenting justices in the instant case, with considerable logic, characterize reasons such as the foregoing as "ativistic" and "dog-

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[2] Railroad Company v. Stout, 17 Wall 657 (U.S. 1873); Morse v. Douglas, 107 Cal. App. 196, 290 Pac. 465 (1930); Stark v. Holtzclaw, 90 Fla. 207, 105 So. 330 (1925); Siddall v. Jansen, 186 Ill. 43, 48 N.E. 191 (1897).

[3] It has been stated that the courts generally follow these four conditions as set forth in the Restatement, Torts § 339 (1934). Prosser, Torts § 77 (1941); United Zinc Co. v. Britt, 258 U.S. 268 (1922). (The attractive nuisance must attract from off the premises. However, this condition has been recognized in only a minority of the states. Harper, Torts § 93 (1933).

[4] Luallen v. Woodstock Iron & Steel Corp., 236 Ala. 621, 184 So. 182 (1938); King v. Simons Brick Co., 52 Cal. App. 586, 126 P.2d 627 (1942); Peters v. Bowman, 115 Cal. 345, 47 Pac. 113 (1896); Harriman v. Incorporated Town of Afton, 225 Iowa 659, 281 N.W. 183 (1938); Dornick v. Wierton Coal Co., 109 Pa. Super. 400, 167 Atl. 617 (1933).

[5] Peters v. Bowman, *supra* note 4; Stendal v. Boyd, 73 Minn. 53, 75 N.W. 735 (1898).

[6] Robbins v. Omaha, 100 Neb. 439, 160 N.W. 749 (1916).

[7] *See* Anderson v. Reith-Riley Const. Co., 112 Ind. App. 170, 44 N.E.2d 184 (1942).

matic."[8] Practically speaking, the probability that sharp declivities will exist in an artificial body of water created by drainage into an excavation is considerably greater than the possibility that such declivities will be found in a natural formation.[9] The courts in a limited number of jurisdictions have allowed recovery in situations closely analogous to the facts in the principal case[10] based on the unnatural hidden dangers involved.[11] In *Sanchez v. East Contra Costa Irrigation Co.*,[12] the court stated that even though the children assumed the risk of a body of water they did not assume the risk of an unknown and unguarded hole in the bottom of that body. The objection that liability imposed upon the owner of land would create hardship upon that owner may be answered by pointing out that all the attractive nuisance doctrine imposes is the duty to exercise reasonable care. The courts which have allowed recovery in such cases do not appear to have worked a hardship or to have imposed unreasonable duties upon land owners.

It is self-evident that a blanket extension of the attractive nuisance doctrine to include a whole new general field would be indiscreet. However, a limited application of the doctrine, covering situations wherein the danger is great and could be easily or inexpensively remedied, should not be a violation of our historical concepts of property.

Daniel Twitchell

WILLS—DESCENT AND DISTRIBUTION—RIGHT OF MURDERER'S HEIRS TO INHERIT FROM VICTIM. A Kentucky statute[1] precluded petitioner's father from inheriting property from his par-

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[8] 92 N.E.2d at 641.

[9] See, *e.g.*, such cases as Sanchez v. East Contra Costa Irrigation Co., 205 Cal. 515, 271 Pac. 1060 (1928) (syphon in bottom of canal); Saxton v. Plum Orchards, 215 La. 378, 40 So.2d 791 (1949) (steep bank hidden under water of artificial pond).

[10] Coeur d' Alene Lumber Co. v. Thompson, 215 Fed. 8 (9th Cir. 1914) (child drowned in cistern covered by water); Malloy v. Hibernia Sav. & Loan Soc., 3 Cal. Unrep. 716, 21 Pac. 525 (1889) (sewage pit); Indianapolis v. Williams, 58 Ind. App. 447, 108 N.E. 387 (1915) (hole in bed of natural stream caused by sewage discharge; municipal corporation liable the same as a person if negligent); Indianapolis v. Emmelman, 108 Ind. 530, 9 N.E. 155 (1886) (excavation in bed of natural stream); Saxton v. Plum Orchards, *supra* note 9; Tucker v. Draper, 62 Neb. 66, 86 N.W. 917 (1901) (well); Bjork v. City of Tacoma, 76 Wash. 225, 135 Pac. 1005 (1913) (wooden flume with trap door in bottom).

[11] City of Pekin v. McMahon, 154 Ill. 141, 39 N.E. 484 (1895) (log floating upon pool; where some factor other than the mere existence of the pool attracts the children there is recovery); Kansas City v. Siese, 71 Kan. 283, 80 Pac. 628 (1905) (structure on pond); Price v. Atchison Water Co., 58 Kan. 551, 50 Pac. 450 (1897) (structure upon the water).

[12] 205 Cal. 515, 271 Pac. 1060 (1928).

[1] Ky. Rev. Stat. § 381.280 (1946): "If the . . . heir-at-law . . . takes the life of the decedent and is convicted therefor of a felony, the person so convicted forfeits all interest in and to the property of the decedent . . . and the property interest so forfeited descends to the decedent's other heirs-at-law, unless otherwise disposed of by the decedent."