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Torts—Attractive Nuisance—Property Owner Not Liable for Injuries Suffered by a Child Playing With a Metal Grating Imbedded in a Public Sidewalk

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the treaty as it did. First, there is some doubt as to the existence of the understanding.[32] Second, it appears that the United States Senate was not aware of the Message and, in any case, the Senate ratified a treaty and not a message written in a foreign language. Also, in light of the clear language of article VI, it cannot be said that its purpose was merely to crystallize for posterity the existing domicile rules. The treaty, though, must have some meaning. The most reasonable conclusion then is that the treaty was designed to assure that the law of the situs of personal property at the time of death would govern its disposition in cases of conflict of domicile (*i.e.*, concurrent domicile) where the personal property has been removed after the decedent's death. Thus, the disposition of movables would be accomplished in an orderly and equitable manner rather than have the dispositional rights to the movables depend, as in the instant case, on who got to the property first. This would also result in the giving "of a suitable respect for the decrees of other civilized countries. . . ."[33] In addition, if article VI is viewed in relation to article V,[34] order and equity in the disposition of an estate[35] would appear to be the object[36] of this section of the Treaty.

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TORTS—ATTRACTIVE NUISANCE—PROPERTY OWNER NOT LIABLE FOR INJURIES SUFFERED BY A CHILD PLAYING WITH A METAL GRATING IMBEDDED IN A PUBLIC SIDEWALK

Five year-old George Cuevas, plaintiff in this negligence action, was injured while playing with several other children on a public sidewalk next door to his home. Imbedded in the sidewalk was a set of hinged metal gratings covering the entrance to an unused door leading into the defendant's cellar. The mechanism by which the gratings could be locked had been broken for about a year prior to the accident, and the gratings had not been secured in any manner during that time. Plaintiffs' evidence indicated that neighborhood children played with the gratings frequently, opening the metal doors and letting them slam shut, and that the defendants, who were aware of the children's activities, nonetheless did nothing to correct the situation. Plaintiff was injured while watching a playmate

32. Nussbaum, *supra* note 6, at 196.

33. Instant case at 274, 217 N.E.2d at 645, 270 N.Y.S.2d at 586 (dissenting opinion).

34. See Matter of Schneider, 198 Misc., at 1025, 96 N.Y.S.2d at 660 (Surr. Ct. 1950), where the court stated that article V defines ". . . the *capacity* and the *power* of citizens of each nation to deal with property located within the borders of the other country."

35. See Hauenstein v. Lynham, 100 U.S. 483 (1879) (In a state where aliens were not permitted to either sell or hold real property, article V was applied so as to give the Swiss successors the lesser right of selling the real property.).

36. See generally Santovincenzo v. Egan, 284 U.S. 30 (1931) (In construing treaty its purpose and the context of the provision in question control.). See also B. Altman & Co. v. United States, 224 U.S. 583, 600 (1912) where the court adopted the definition of a treaty as "a compact made between two or more independent nations, with a view to the public welfare."

descend a vertical metal ladder into the vault, when suddenly another child ran against the open grating, slamming it down on the infant plaintiff's hand. An action was brought by the infant for the personal injuries suffered and by his father for medical expenses and loss of services, against both the property owner and the street-floor tenants, who operated a grocery business. The Supreme Court, Bronx County, dismissed the complaint as against all defendants at the close of plaintiffs' case; the plaintiffs appealed only from the court's dismissal as against the property owner. *Held*, affirmed, two judges dissenting. Liability requires both a dangerous instrumentality and attractiveness to children. A metal grating in a public sidewalk is a harmless object for which an owner is not obligated to protect others, even children, who use such harmless objects to cause themselves harm. *Cuevas v. 73rd & Central Park West Corp.*, 26 A.D.2d 239, 272 N.Y.S.2d 41 (1st Dep't 1966).

The duties of a property owner to one injured on or by his property are customarily defined according to whether the injured party was, at the time of the injury, an invitee, a licensee, or a trespasser.[1] An invitee is one on another's property at the invitation of the owner, and the owner has a duty to exercise reasonable care to prevent harm to the invitee or the invitee's property.[2] "Invitation" is used here in a limited sense and requires that the owner receive some benefit, usually commercial, from the invitee's presence.[3] This use excludes the social invitation; a social guest is generally considered to be a licensee rather than an invitee.[4] A licensee is one on another's property with the express or implied permission of the owner, but without an invitation in the "mutually beneficial" sense required for an invitee.[5] An owner is required to refrain from affirmative acts of negligence with respect to a licensee, and he has a further duty to warn of any hidden traps or dangerous defects known to the owner, but not likely to be discovered by the licensee.[6] The infant plaintiff in the instant case was playing on a public sidewalk, where he had every right to be, and consequently cannot be fitted neatly into either category within the usual confines of these terms. The cases dealing with infants who were injured while on public ways or thoroughfares have not met the invitee-licensee issue squarely. In *Harkins v. East New York Savings Bank*,[7] the defendant's overhead fire escape had a broken latch, allowing it to rest on the public sidewalk adjacent to defendant's building. The infant plaintiff was climbing the stairway when suddenly it began to swing upward, throwing the boy to the pavement. The evidence

1. 65 C.J.S. *Negligence* § 63(1) (1966).
2. See, *e.g.*, Wilder v. Ayers, 2 A.D.2d 354, 156 N.Y.S.2d 85 (1st Dep't 1956), *aff'd*, 3 N.Y.2d 725, 143 N.E.2d 514, 163 N.Y.S.2d 966 (1957).
3. Meyer v. Manzer, 179 Misc. 355, 39 N.Y.S.2d 5 (Sup. Ct. 1943).
4. Krause v. Alper, 4 N.Y.2d 518, 151 N.E.2d 895, 176 N.Y.S.2d 349 (1958).
5. Meyer v. Manzer, 179 Misc. 355, 39 N.Y.S.2d 5 (Sup. Ct. 1943). See also 3 Warren, Negligence in the New York Courts § 1.03, at 205 (2d ed. 1964).
6. Brzostowski v. Coca-Cola Bottling Co., 16 A.D.2d 196, 199, 226 N.Y.S.2d 464, 468 (4th Dep't 1962).
7. 260 App. Div. 394, 22 N.Y.S.2d 905 (2d Dep't 1940).

indicated that the latch had been broken for several months and that children had played on the fire escape frequently during that time. It was held that the trial court erred in dismissing the complaint as a matter of law, and that a jury question had been presented. A similar holding is found in *Levine v. City of New York*,[8] where the plaintiff was injured on a stairway that was part of a public thoroughfare. Several children were playing "follow the leader" when the infant plaintiff slipped and fell, impaling her thigh on a jagged pipe railing which had broken loose from its mooring. In view of the evidence that children were known to play on the stairway and that the pipe railing had been broken for some six years prior to the accident, the Court found that a prima facie case of negligence had been established, and that the trial court had erred in dismissing the compaint as a matter of law. In the case of *Mysliwiec v. W. Lowenthal Co.*,[9] involving a boy who was cut by a wire while playing on bales of waste left in the street by the defendant, a jury verdict for the plaintiff was reinstated after being set aside by the trial court. The defendant knew that children were in the habit of playing in the area, and on appeal it was held that the jury could have found some risk of harm to be reasonably foreseeable in the light of the evidence. In none of these cases could the injury-producing instrument be construed as a hidden trap or dangerous defect unlikely to be discovered by the plaintiff; consequently, it would seem that the standard employed required simply the ordinary duty to exercise reasonable care in view of the surrounding circumstances. This, of course, characterizes the duty owed an invitee, and raises a strong implication that children injured on or by another's property, when in a public way or thoroughfare, are in effect invitees with respect to the owner of the property.[10]

New York courts on occasion have dealt with circumstances similar to those in the case at bar by applying a standard somewhat resembling the attractive nuisance doctrine.[11] Attractive nuisance provides liability for a child trespasser's physical injury caused by a dangerous condition on the land, when the possessor knows children are likely to trespass, the dangerous condition exists, and the children are unlikely to realize the risk.[12] The doctrine has been expressly rejected in New York;[13] however, it has been applied when the child was injured on a public highway or thoroughfare, and hence was not a trespasser.[14] Application of the rule has been narrowly limited, and it has been held not to apply

8. 309 N.Y. 88, 127 N.E.2d 825 (1955).
9. 280 App. Div. 852, 113 N.Y.S.2d 289 (3d Dep't 1952).
10. See, Le Roux v. State, 307 N.Y. 397, 121 N.E.2d 386 (1954). See generally, James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 Yale L.J. 605 (1954).
11. Tierney v. N.Y. Dugan Brothers, Inc., 288 N.Y. 16, 41 N.E.2d 161 (1942). See Hetzel v. Buffalo Cemetery Ass'n, 16 A.D.2d 581, 584, 229 N.Y.S.2d 960, 964 (alternative holding).
12. Restatement (Second), Torts § 339 (1965).
13. Morse v. Buffalo Tank Corp., 280 N.Y. 110, 19 N.E.2d 981 (1939).
14. Tierney v. N.Y. Dugan Brothers, Inc., 288 N.Y. 16, 41 N.E.2d 161 (1942).

when the dangerous condition was not in a public way.[15] The requirements were summarized in *Parkes v. New York Telephone Co.*,[16] where the court said:

> The defendant may not be cast in damages, unless it appears (1) that the appliance attracted children, (2) that it was inherently dangerous, or led or attracted the child into or upon another object inherently dangerous, and (3) that defendant knew or ought to have known both these things.[17]

In the case at bar, liability under this test would require a finding that hinged iron gratings imbedded in a public sidewalk are, or may be, an inherently dangerous instrumentality. Objects which are of a destructive nature within their normal range of operation, [18] such as bombs,[19] have been considered inherently dangerous at common law. This list is naturally quite limited; however, an examination of several New York cases indicates that an object not "inherently" dangerous may satisfy the dangerous instrumentality requirement when the surrounding factual circumstances justify such a determination. An automobile, for example, generally is not considered to be "inherently" dangerous,[20] but in *Tierney v. New York Dugan Brothers, Inc.*,[21] a parked delivery truck was held to be a sufficiently "dangerous attraction" to uphold a verdict for the infant plaintiff. The driver left his unlocked truck with the power off and the emergency brake set, but he failed to engage the safety switch. Children climbed into the truck, started it, and the infant plaintiff fell between the moving vehicle and the curb. The Court of Appeals found a jury question had been presented. The Court said:

> A dangerous attraction in a public highway may impose liability to a child on the part of the one responsible therefore, because of failure to exercise due care although there would be no liability if the attraction were upon private premises where the child had no right to go.[22]

An automobile abandoned adjacent to a public street with gasoline remaining in its tank was "dangerous" enough to result in liability in the case of *Parnell v. Holland Furnace Co.*[23] The infant plaintiff struck two stones together near the open tank and was severely injured when the gasoline exploded. A verdict in favor of the plaintiff was affirmed. The court said:

> As to whether it was dangerous to leave the car as it was left with gasoline in its tank depends upon surrounding circumstances. The defendant furnace company must have known of the practice of children to

15. Eason v. State, 201 Misc. 336, 104 N.Y.S.2d 683 (Ct. Cl. 1951), *aff'd*, 280 App. Div. 358, 113 N.Y.S.2d 479 (3d Dep't 1952).
16. 120 Misc. 459, 198 N.Y. Supp. 698 (Sup. Ct. 1923).
17. *Id.* at 460, 198 N.Y. Supp. at 700.
18. See Cleary v. John M. Maris Co., 173 Misc. 954, 19 N.Y.S.2d 38 (Sup. Ct. 1940).
19. Kingsland v. Erie County Agricultural Soc'y, 298 N.Y. 409, 84 N.E.2d 38 (1949).
20. Vincent v. Crandell & Godley Co., 131 App. Div. 200, 115 N.Y. Supp. 600 (2d Dep't 1909).
21. 288 N.Y. 16, 41 N.E.2d 161 (1942).
22. *Id.* at 19, 41 N.E.2d at 162.
23. 234 App. Div. 567, 256 N.Y. Supp. 323 (4th Dep't 1932).

> play in the driveway and about the premises . . . . At least the jury were entitled to say that they had this knowledge and should have taken these things into consideration.[24]

A similar standard was employed in *Jaked v. Board of Education of City of Albany*,[25] where the infant plaintiff was injured while swinging on an iron gate in front of a public school. Children had swung on the gate in this fashion for approximately a year, and school officials made no attempt to discourage such play. The jury's finding that the officials were negligent in failing to secure the gate was restored on appeal. A later case was concerned with a brick wall which had collapsed, killing a student, and it was held that the defendant was not negligent since there had been no prior notice that the wall was defective.[26] *Jaked* was distinguished as a case where "the defendant had permitted pupils to swing upon it [the gate], with knowledge of its defective condition. Since the danger should have been known, the defendant was liable."[27] It has frequently been held that liability will not result in the absence of either prior knowledge of the dangerous condition or a reasonable foreseeability of harm.[28] Some recent cases, however, indicate that liability may be extended to protect even the ordinary licensee when both of these requirements are met, despite the absence of hidden traps or undiscovered defects.[29]

In the instant case, the court examined in detail the question of whether there is a general duty to lock or secure devices imbedded in public sidewalks, and held the existing duty to be limited to maintaining sidewalk openings so as not to create an undue risk to pedestrians.[30] Liability based on any doctrine akin to attractive nuisance was rejected on the grounds that the iron gratings were not a dangerous instrumentality,[31] and, on this point, *Jaked* was distinguished as a situation in which the defendant was under a statutory duty to maintain "reasonably safe conditions" for its pupils. The court concluded, in summary, "that one is not obligated to protect users, including children, who may use harmless things to cause themselves harm."[32] The duty is not evoked even when "the owner of the harmless things . . . learns of the children's mis-

24. *Id.* at 570, 256 N.Y. Supp. at 326, 327.
25. 198 App. Div. 113, 189 N.Y. Supp. 697 (3d Dep't 1921), *aff'd*, 234 N.Y. 591, 138 N.E. 458 (1922).
26. White v. Board of Educ. of Troy, 149 Misc. 324, 268 N.Y. Supp. 12 (Sup. Ct. 1933).
27. *Id.* at 326, 268 N.Y. Supp. at 14.
28. See, *e.g.*, Bolsenbroek v. Tully & Di Napoli, Inc., 12 A.D.2d 376, 212 N.Y.S.2d 323 (1st Dep't), *aff'd*, 10 N.Y.2d 960, 180 N.E.2d 61, 224 N.Y.S.2d 280 (1961); Schiff v. John Arborio, Inc., 12 A.D.2d 680, 207 N.Y.S.2d 759 (3d Dep't 1960); Meyers v. 120th Ave. Bldg. Corp., 9 A.D.2d 931, 195 N.Y.S.2d 163 (2d Dep't 1959), *aff'd*, 11 N.Y.2d 871, 182 N.E.2d 291, 227 N.Y.S.2d 685 (1962); Whipple v. State, 282 App. Div. 557, 125 N.Y.S.2d 52 (4th Dep't 1953); Bauman v. Be-Jel Realty Corp., 171 Misc. 845, 12 N.Y.S.2d 485 (Sup. Ct. 1939), *aff'd*, 259 App. Div. 733, 19 N.Y.S.2d 311 (2d Dep't 1940).
29. Brzostowski v. Coca-Cola Bottling Co., 16 A.D.2d 196, 226 N.Y.S.2d 464 (4th Dep't 1962); Popkin v. Shanker, 36 Misc. 2d 242, 232 N.Y.S.2d 574 (Sup. Ct. 1962).
30. Cuevas v. 73rd & Central Park West Corp., 26 A.D.2d at 241, 272 N.Y.S.2d at 43 (1st Dep't 1966).
31. *Id.* at 240, 272 N.Y.S.2d at 42.
32. *Id.* at 242, 272 N.Y.S.2d at 44.

chievous or playful proclivities."[33] The dissent argued that a duty to protect non-trespassing children may be created when an owner *knows* that children are playing with his "harmless" object in a manner in which some risk of harm is foreseeable. The cases relied on in the majority opinion were distinguished on the grounds that "none of the cited cases treats with a situation where the children had been known by the defendant to be playing, for some time before the accident, with the particular instrumentality involved."[34] It was pointed out that dangerous attractions had been found in many cases,[35] indicating that "an article which may ordinarily be harmless, can be turned into a dangerous instrumentality by the manner in which children handle it."[36] On this reasoning it was maintained by the dissent that a jury question had been presented.

Many of the countless chafings inevitable in the infinite maze of human relationships are assessed according to the single broad standard of negligence law, requiring simply that one exercise reasonable care so as not to cause harm to others or their property. A variety of refinements have developed over the years, seeking to further define and clarify this duty within the framework of particular situations; the attractive nuisance doctrine and the invitee-licensee-trespasser distinctions exemplify but two of the many familiar attempts. The benefits to be derived from the use of these classifications is obvious, since the standards provided are seemingly clear-cut and mechanical within the narrow limits of their applicability. Frequently, however, the courts are faced with factual circumstances which fall within the fringe areas of some doctrine, and in such cases the courts occasionally overlook the fact that negligence doctrines are, after all, mere attempts to define the fundamental duty to exercise reasonable care. A recent case dealt with an infant who had fallen into an excavation located on private property, but only some twenty feet off the public highway.[37] The trial court indicated that attractive nuisance principles might be taken into consideration, but on appeal it was held that the charge to the jury on this point was confusing and inadequate, for "in the final analysis, the particular facts of each case applied to general principles of negligence law will determine liability."[38] This reasoning had been advanced in *Kermarec v. Compagnie Generale*,[39] where the licensee-invitee distinctions were said to have reached a point such that the increasingly subtle "classifications and sub-classi-

33. *Ibid.*
34. *Id.* at 247, 272 N.Y.S.2d at 48.
35. The dissent examined in detail the "dangerous conditions" found in Tierney v. N.Y. Dugan Brothers, 288 N.Y. 16, 41 N.E.2d 161 (1942); Harkins v. East New York Savings Bank, 260 App. Div. 394, 22 N.Y.S.2d 905 (2d Dep't 1940); Parnell v. Holland Furnace Co., 234 App. Div. 567, 256 N.Y. Supp. 323 (4th Dep't 1932); and Jaked v. Board of Education of Albany, 198 App. Div. 113, 189 N.Y. Supp. 697 (3d Dep't 1921), *aff'd*, 234 N.Y. 591, 138 N.E. 458 (1922).
36. Instant case at 246, 272 N.Y.S.2d at 48.
37. Molnar v. Slattery Contracting Co., 8 A.D.2d 95, 185 N.Y.S.2d 449 (1st Dep't 1959).
38. *Id.* at 99, 185 N.Y.S.2d at 454.
39. 358 U.S. 625 (1959).

fications bred by the common law have produced confusion and conflict."[40] The Court indicated that, as a consequence, "the common law has moved, unevenly and with hesitation, toward 'imposing on owners and occupiers a single duty of reasonable care in all the circumstances.' "[41]

The trend of the law in this direction can be seen both in this state and in other jurisdictions.[42] A pertinent case involved an infant who, with two other boys, entered the defendant's bottling plant through an open garage door and asked for a bottle of "Coke" from an employee.[43] The request was granted, and the employee returned to his work. Upon finishing his drink, the youngster walked to a moving conveyor belt some fifteen feet away and placed his empty bottle on it. The bottle began to fall through a hole in the belt; the plaintiff attempted to retrieve it and caught his arm in the conveyor machine. It was held, in the Appellate Division, that the child was a licensee since there was an implied consent to remain upon the premises, and that liability was possible should the moving conveyor belt be found to have been a trap. Judge Halpern, speaking for the court, then rejected the requirement that a trap be found, saying:

> Indeed, in the case of injury to a child licensee, it is not necessary to use the characterization of a "trap" in order to sustain a recovery. The duty of the occupier of the premises may be stated in terms of a duty to exercise reasonable care under all the circumstances.[44]

In the instant case, the infant plaintiff's status as either an invitee or a licensee was not established by the court. It has been suggested earlier that the infant plaintiff was, in effect, an invitee, and as such was owed the duty of reasonable care in all the circumstances. Even if the court had found that the child was a bare licensee, he was owed substantially the same duty if we accept the reasoning in the *Coca-Cola* case. A consideration of these issues would have acknowledged the current trends with regard to landowners' and occupiers' liability toward children; furthermore, it would have relieved the court of the semantic difficulties encountered in applying the attractive nuisance doctrine within the rather uncertain limitations of its acceptance in New York.[45]

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40. *Id.* at 631 (dictum).
41. *Ibid.*, quoting in part from Chief Judge Clark's dissent in the Circuit Court, 245 F.2d 175, at 180 (2d Cir. 1957).
42. Lyshak v. City of Detroit, 351 Mich. 230, 88 N.W.2d 596 (1958); Brzostowski v. Coca-Cola Bottling Co., 16 A.D.2d 196, 226 N.Y.S.2d 464 (4th Dep't 1962).
43. Brzostowski v. Coca-Cola Bottling Co., *supra* note 42.
44. *Id.* at 210, 226 N.Y.S.2d at 470.
45. *Id.* at 203, 226 N.Y.S.2d at 472, where Judge Halpern suggests that attractive nuisance does apply, after all, only to *trespassing* children.