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## Torts—Attractive Nuisance

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*Attractive Nuisance*

In *Levine v. City of New York*,<sup>9</sup> the city was sued for injuries sustained by the plaintiff child in a fall against a jagged end of railing on stairs which led to a public thoroughfare. Plaintiff child was attempting to walk on the railing, which inclosed a public gathering place. The Court reversed a dismissal by the Appellate Division,<sup>10</sup> and held, that there was a jury question; sufficient evidence had been presented to raise a question of fact as to the city's negligence, subsequent to the court's finding that a jury could justifiably infer a duty owing to the plaintiff child by the city.

A duty owed to the plaintiff is an essential element of a cause of action in negligence, and must be found to exist before liability for negligent conduct can attach.<sup>11</sup> But the application of the test of duty as defined in the classic case of *Palsgraf v. Long Island R.R. Co.*<sup>12</sup> danger to a foreseeable plaintiff—becomes qualified in the case of one person entering the premises of another. Then the duty will be determined with reference to the status of the person entering the premises<sup>13</sup>

The traditional categories of persons entering the premises of another are those of invitees, licensees and trespassers. What persons constitute invitees has occasioned a split of authority; some jurisdictions hold that the status arises only out of an economic relationship,<sup>14</sup> but others adopt a broader view of the term, and a landowner who throws open his premises to further a purpose of his own implies that he will take reasonable care to make the premises safe for persons

9. 309 N. Y. 88, 127 N. E. 2d 825 (1955).

10. 283 App. Div. 620, 129 N. Y. S. 2d 555 (1st Dep't 1955).

11. *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 4 N. E. 752 (1886); *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350 (1943).

12. 248 N. Y. 339, 162 N. E. 99 (1928).

13. On the theory that an owner of land may act with some impunity or his own land. PROSSER, TORTS, §77 (2d ed. 1955).

14. *Markman v. Fred P. Bell Stores Co.*, 285 Pa. 378, 132 Atl. 178 (1926), held that the proprietor of a store must keep the portion of the premises used by customers in a reasonably safe condition; *Holmes v. Ginter Restaurant Co.*, 54 F. 2d 876 (1st Cir. 1932), one entering restaurant and falling on the floor was an "invitee", to whom proprietor owed a duty to maintain the premises in a safe condition; *Braun v. Vallade*, 33 Col. App. 279, 164 Pac. 904 (1st Dep't 1917). This is in accord with position taken by the RESTATEMENT, TORTS §332.

who enter for such a purpose.<sup>15</sup> In New York there are decisions to support both views, although the weight of authority seems to support the former.<sup>16</sup>

A possessor of land is held to have an affirmative duty of care to protect an invitee on the premises not only from known dangers but from those which reasonable inspection would uncover.<sup>17</sup> In the instant case, the Court found an implied invitation, from the city to the public, in throwing open the space inclosed by the railing as a gathering spot and place of amusement. On this basis the plaintiff child could be an invitee, to whom a duty was owed of maintaining the railing in a safe condition.<sup>18</sup> The Court thus held that whether the city exercised reasonable care under the circumstances was for the jury to decide. The argument of the Appellate Division, that an invitation extends only to the purpose for which the premises were thrown open, and that an invitee who uses premises for a different purpose (the child was not invited to climb on the railing) loses his status and becomes at most a licensee or trespasser, was ignored, although this view is in accord with the prevailing rule.<sup>19</sup>

Thus, the Court appears to be straining in order to reach a result in favor of the plaintiff child, and under the guise of utilizing the invitee doctrine is applying the attractive nuisance theory,<sup>20</sup> which has been held to be inapplicable in New York.<sup>21</sup>

15. *Durning v. Hyman*, 286 Pa. 376, 133 Atl. 568 (1926). A theater proprietor impliedly warrants that a theater seat is safe, and patron, in placing herself in seat, may rely on the assumption that she has used reasonable care for her safety; *Davis v. Central Congregational Society of Jamaica Plain*, 129 Mass. 367, 37 Am. Rep. 368 (1880).

16. *Flynn v. Central R. R. Co.*, 142 N. Y. 439, 37 N. E. 514 (1894), held that whether there was an invitation (express or implied) to children playing in the park was a question of fact. Compare *Tryon v. Chalmers*, 205 App. Div. 816, 200 N. Y. Supp. 362 (3rd Dep't 1923); *Collentine v. City of New York*, 279 N. Y. 119, 17 N. E. 2d 792 (1938); *Parnell v. Holland Furnace Co.*, 234 App. Div. 567, 256 N. Y. Supp. 323 (4th Dep't) *aff'd*, 260 N. Y. 604, 184 N. E. 112 (1932).

17. *Indemauro v. Dowes*, L. R. 2 C. P. 311, 362 J. C. P. 181 (1886), (followed by all common law jurisdictions); *Haefeli v. Woodrich Engineering Co.*, 255 N. Y. 442, 175 N. E. 123 (1931).

18. *Collentine v. City of New York*, *supra*, note 16.

19. *McCluskey v. Duncan*, 216 Ala. 388, 113 So. 250 (1927); *Hudson v. Church of Holy Trinity*, 250 N. Y. 513, 116 N. E. 306 (1929), held that an invitation is limited to the purpose for which the premises were thrown open.

20. *Parnell v. Holland Furnace Co.*, *supra*, note 16. 8 N. Y. U. INTRA. L. Rev. No. 4 (1953). New York decisions allow a child trespasser to recover by finding the child an invitee (on the basis of an implied invitation) to whom a greater duty of care is owed by a landowner, rather than a trespasser or mere licensee. *Perry v. Rochester Lime Co.*, 219 N. Y. 60, 113 N. E. 521 (1916); *Dorsey v. Chautauqua Institution*, 203 App. Div. 251, 196 N. Y. Supp. 798 (4th Dep't 1922); *Wittleder v. City Electric Illuminating Co. of Brooklyn*, 47 App. Div. 410, 62 N. Y. Supp. 297 (2d Dep't 1900); *Bowers v. City Bank Farmer's Trust Co.*, 282 N. Y. 442, 26 N. E. 2d 970 (1940).

21. *Walsh v. Fitchburg Railroad Co.*, 145 N. Y. 301, 39 N. E. 1068 (1895), (the turntable doctrine); *Flaherty v. Metro Station Inc.*, 202 App. Div. 583, 196 N. Y. Supp. 2 (4th Dep't 1922).