Florida State University Law Review

Volume 8 | Issue 3 Article 8

Summer 1980

Johnson v. Bathey, 376 So. 2d 848 (Fla. 1979)

Robert Santos

Torts—ATTRACTIVE NUISANCE IN FLORIDA: AN UNATTRACTIVE NUISANCE—*Johnson v. Bathey*, 376 So. 2d 848 (Fla. 1979).

Raymond Johnson, a nine-year-old boy, and his twelve-year-old brother were walking across land owned by Douglas Bathey which had been leased and farmed by Naples Limitee, Incorporated. The two boys were on the unfenced and unposted land to collect surplus vegetables at Limitee's packing house. The record supported the finding that Limitee allowed children to come to the packing house to pick up vegetables which were too small for packing. But according to the lower court, by choosing to take a shortcut across Limitee's fields, the boys had entered the premises as simple trespassers.[1] While walking across the fields, Raymond was attracted to a noisy water pump near the path the boys were taking. The water pump consisted of an engine, the pump itself, and an uncovered rotating shaft twelve to sixteen inches long, connected by two universal joints. Only the two children were present, and there were no signs, fences, or safety devices on or near the water pump. As Raymond moved closer to investigate, his shirt became caught in the two exposed universal joints. His arm was pulled into the mechanism, causing severe injury.[2] Through his mother, Raymond Johnson brought an action to recover for his injuries on the grounds that the pump was an attractive nuisance and that the defendants were negligent in its operation.[3]

The circuit court entered a summary judgment for the defendants and the Second District Court of Appeal affirmed, certifying that its decision was of great public interest.[4] The Florida Supreme Court granted plaintiff's petition for certiorari and held that a plaintiff may not recover on an attractive nuisance theory unless he was "allured" onto the premises. Since the water pump did not allure the plaintiff onto the premises he was precluded from recovery.[5] This note examines the appropriateness of this ruling.

In Florida, the general rule as to the duty of care owed by property owners to an adult trespasser is only to avoid willful and wanton harm to him.[6] This limited duty rule, however, created harsh

---

1. Johnson v. Bathey, 350 So. 2d 545, 546-47 (Fla. 2d Dist. Ct. App. 1977), *aff'd*, 376 So. 2d 848 (Fla. 1979).

2. Brief of Petitioner at 5-6, Johnson v. Bathey, 376 So. 2d 848 (Fla. 1979).

3. Johnson v. Bathey, 350 So. 2d 545, 545-46 (Fla. 2d Dist. Ct. App. 1977), *aff'd*, 376 So. 2d 848 (Fla. 1979).

4. Johnson v. Bathey, 376 So. 2d 848, 849 (Fla. 1979).

5. *Id.*

6. Johnson v. Williams, 192 So. 2d 339 (Fla. 1st Dist. Ct. App. 1966) (citing 23 FLA. JUR. *Negligence* § 24 (1959)). The court mistakenly cited to § 24. The rule the court reiterates is

results when applied to children, so courts developed the attractive nuisance doctrine as an exception to the rule of limited liability to trespassers.[7] Reasons for this exception for children have been well articulated by Professor Prosser, who stated:

> When the trespasser is a child, one important reason for the general rule of non-liability may be lacking. Because of his immaturity and want of judgment, the child may be incapable of understanding and appreciating all of the possible dangers which he may encounter in trespassing, or of making his own intelligent decisions as to the chances he will take. While it is true that his parents or guardians are charged with the duty of looking out for him, it is obviously neither customary nor practicable for them to follow him around with a keeper, or chain him to the bedpost. If he is to be protected at all, the person who can do it with the least inconvenience is the one upon whose land he strays. . . . The interest in unrestricted freedom to make use of the land may be required, within reasonable limits, to give way to the greater social interest in the safety of the child . . . .[8]

The special rule for children first appeared in 1874 in the case of *Railroad Co. v. Stout*[9] where a trespassing child, injured while playing on an unlocked railroad turntable, was allowed recovery. The "turntable doctrine," as it came to be called, required a landowner who had reason to believe that children would be attracted by a dangerous object or situation on his land to use ordinary care to protect them from injury.[10] Eventually the doctrine acquired the name "attractive nuisance."[11]

In the 1921 case of *United Zinc & Chemical Co. v. Britt*,[12] the United States Supreme Court held that the doctrine was only applicable where the children were attracted onto the land by the very object or condition that injured them. In *Britt*, two young boys had trespassed onto United Zinc's property; they died after swimming in a clear pool of water containing sulfuric acid and zinc

---

actually found at 23 FLA. JUR. *Negligence* § 54 (1959).

7. Crutchfield v. Adams, 152 So. 2d 808, 812 (Fla. 1st Dist. Ct. App. 1963).

8. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 59 (4th ed. 1971).

9. 84 U.S. (17 Wall.) 657, 665 (1873).

10. *See Railroad Co.*, 84 U.S. at 659, 661.

11. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 59 (4th ed. 1971). " 'Nuisance' because of a supposed analogy to conditions dangerous to children in the highway or otherwise outside the premises; 'attractive' because it was thought essential that the child be allured onto the premises." *Id.* at n.37.

12. 258 U.S. 268, 275-76 (1922).

sulphate.[13] The Court, per Justice Holmes, held that since "there [was] no evidence that [the pool of poisoned water] led them to enter the land," the doctrine of attractive nuisance did not apply.[14] In 1940, the Court of Appeals for the District of Columbia noted in *Eastburn v. Levin*[15] that the United States Supreme Court had overruled *Britt* in *Best v. District of Columbia*[16] and had established that "the visible attraction need not be the immediate cause of injury."

Section 339 of the Restatement (Second) of Torts also rejected the requirement of allurement and replaced it with a foreseeability test. Under the Restatement view a landowner is liable for harm caused to unsuspecting children by a dangerous artificial condition upon the land if the landowner had reason to know that the condition created a risk of serious harm and failed "to exercise reasonable care to eliminate the danger or otherwise to protect the children."[17]

To determine whether the landowner exercised reasonable care, the Restatement provides for a balancing of the severity of the

---

13. *Id.* at 274.

14. *Id.* at 276.

15. 113 F.2d 176, 177 (D.C. Cir. 1940). For a complete treatment of attractive nuisance law as applied to machinery, see Annot., 62 A.L.R.2d 898 (1958).

16. 291 U.S. 411 (1934). *Best* cited *Britt* with approval but the decision is inconsistent with *Britt*. In *Britt*, Justice Holmes noted that in order to hold a landowner liable for injuries to trespassing children, the dangerous object must be "shown to have been the inducement that led the children to trespass [or be] shown to have been the indirect inducement because known to the children to be frequented by others." 258 U.S. at 276. In *Best*, Chief Justice Hughes, speaking for a unanimous Court, held that a landowner could be held liable for the injuries to children trespassing on a dangerously-maintained wharf when the children were induced to trespass not by the wharf but by nearby sandpiles. 291 U.S. at 419-20.

17. RESTATEMENT (SECOND) OF TORTS § 339(e) (1965). The entire section reads as follows:

> *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 of 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 incoming 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 to protect the children.

Id. § 339.

risks to the child trespassers against the utility of the activity and the burden to the landowner of providing protection through precautionary measures.[18] If the landowner has reason to foresee the presence of children and there is a high risk of harm by some artificial condition, the landowner must exercise reasonable care.[19] The Restatement position gives precise form to the original spirit of the attractive nuisance doctrine. By recognizing the social value of protecting children and by endorsing an exception to the policy of allowing property owners' free use of their land, the law imposes a degree of risk upon the very fact of ownership or possession.

The issue left unresolved by the district court of appeal in *Johnson v. Bathey*[20] and confronted by the Supreme Court of Florida was whether Florida would follow the Restatement of Torts or the prior Florida Supreme Court case of *Concrete Construction, Inc. v. Petterson*[21] decided in 1968. The specific issue was whether Florida should dispense with the requirement of "allurement."[22] The Restatement does not require allurement, but the decision in *Concrete Construction* does.[23]

In *Concrete Construction*, a child trespassing on a construction site found .22 caliber cartridges used for driving screws into concrete walls. The child was injured when one of the cartridges he took home exploded.[24] The Florida Supreme Court held that the defendant construction company was not liable to the child.[25] The court stated that since it first approved the attractive nuisance

---

18. *Id.* § 339(d).

19. *Id.* § 339(a), (b) & (e).

20. 350 So. 2d 545, 548 (Fla. 2d Dist. Ct. App. 1977), *aff'd*, 376 So. 2d 848 (Fla. 1979).

21. 216 So. 2d 221 (Fla. 1968).

22. 376 So. 2d at 849.

23. 216 So. 2d at 223. In the four-to-three decision of *Concrete Construction*, the dissenting opinion pointed out that the defendant in that case clearly knew or had reason to know that there was an unreasonable risk of serious bodily harm to children from the dangerous condition. The dissent added, "[there is] no real disparity between the statement of this rule from Sec. 339, Rest. Torts, and the expressions in our cases applying the doctrine of attractive nuisance." *Id.* The fundamental requirement is the allegation that the "defendant had reason to know children would come onto the premises as trespassers," and the dissenting judges felt that the doctrine of attractive nuisance "is simply a label better defined by the Restatement rule." *Id.* at 223.

In *Johnson*, the district court acknowledged that pursuant to the decision in *Concrete Construction*, the definition of attractive nuisance set out by the Restatement was not the law of Florida. 350 So. 2d at 548. The court stated, "We are obligated to follow the pronouncements of our Supreme Court, even though at times we might disagree, ... Yet, we are convinced that Section 339 of the Restatement of Torts states the better rule." *Id.* at 548.

24. 216 So. 2d at 222.

25. *Id.* at 223.

doctrine in 1925 in *Stark v. Holtzclaw*,[26] "[W]e have steadfastly held that it must be alleged that [the] defendant allured the youthful plaintiff upon the dangerous premises . . . ."[27] The Florida Supreme Court in the one-page *Johnson* opinion accepted this position rather than the Restatement view.[28]

The supreme court, however, could have easily adopted the Restatement view consistently with its prior decisions. Section 339 of the Restatement of Torts was quoted extensively with approval by the supreme court in the 1955 decision of *Cockerham v. R.E. Vaughan, Inc.*[29] The *Cockerham* court cited the Restatement and the 1954 case of *Carter v. Livesay Window, Inc.*[30] as the rule of liability in attractive nuisance cases.[31] In *Carter*, the Florida Supreme Court en banc reversed the summary judgment of the district court, holding that "[t]he test to be applied . . . is whether a reasonably prudent person should have anticipated the presence of children" where the defendant created the dangerous situation.[32] In these early Florida attractive nuisance cases the courts followed the Restatement position by applying a negligence standard. As the Second District Court of Appeal held in the 1961 case of *Banks v. Mason*,[33] the doctrine of section 339 "is well established in the jurisprudence of this state."[34] The First District Court of Appeal in the 1963 case of *Crutchfield v. Adams*[35] also cited section 339 of the Restatement as the correct rule of law in attractive nuisance cases.[36] The *Crutchfield* case was similar to *Johnson* in that the plaintiff was allegedly attracted to and injured by an exposed electric water pump after he entered the property to play with the landowner's child. The landowner was alleged to know that children had been on the premises in the past; his failure to take precautionary measures was advertent.[37] The district court held that it was error for the lower court to dismiss the complaint, even though it was not alleged that the plaintiff had been "allured" onto

26. 105 So. 330 (Fla. 1925). *Stark* is apparently the first Florida case to recognize the attractive nuisance concept.
27. 216 So. 2d at 223.
28. 376 So. 2d at 849.
29. 82 So. 2d 890 (Fla. 1955).
30. 73 So. 2d 411 (Fla. 1954).
31. 82 So. 2d at 892.
32. 73 So. 2d at 413.
33. 132 So. 2d 219 (Fla. 2d Dist. Ct. App. 1961).
34. *Id.* at 220.
35. 152 So. 2d 808 (Fla. 1st Dist. Ct. App. 1963).
36. *Id.* at 810.
37. *Id.* at 809.

the premises.[38]

The case which most strongly suggests that *Johnson* should have adopted the Restatement view is the prior Florida Supreme Court case of *Green Springs, Inc. v. Calvera*.[39] In *Green Springs*, a homeowner and builder of a housing project were sued for negligence when a nine-year-old girl died after a planter on the side of one of the houses fell upon her.[40] In discussing the attractive nuisance doctrine, which was held to be inapplicable because the child was not a trespasser, the court stated:

> Perhaps the phrase "attractive nuisance" has become an unattractive nuisance. There never was a time when a nuisance, in the old equity sense, was required in an "attractive nuisance" case. And the idea of attraction has led sound courts, including this one, [citing *Concrete Construction*] into nearly evenly split decisions which may distract lawyers from the fundamentals on which the duty of care toward one's fellow man depends.[41]

The court then went on to state:

> What we are dealing with when we speak of "attractive nuisance" is merely a set of circumstances relating to the innocence of danger on a child's part, the likelihood of trespass and consequent danger and the foreseeability of this chain of circumstance on the part of one who would not owe as great a duty of care toward an adult trespasser. All of these factors are to be considered in the light of the utility of maintaining the dangerous condition and the cost of eliminating the danger. All of these may combine to impose upon the landowner or possessor or, as in *Carter v. Livesay Window Company*, the person responsible for the dangerous condition of the land, a duty of care. *All of this specification of principle is adequately covered by Restatement Torts 2d, § 339,* and by a voluminous literature.[42]

Amazingly, the *Johnson* court failed even to mention the *Green Springs* decision.

The Florida Supreme Court also failed to analyze decisions in other jurisdictions which have adopted the Restatement position.

---

38. *Id.* at 813.
39. 239 So. 2d 264 (Fla. 1970).
40. *Id.* at 265.
41. *Id.*
42. *Id.* at 266 (footnotes omitted) (emphasis added).

In *Anderson v. Cahill*[43] the Missouri Supreme Court noted that the requirement of enticement and allurement of the trespassing child by the dangerous object or condition had been eliminated when the Restatement of Torts' foreseeability test had been adopted as the law of Missouri. In *McFall v. Shelly*,[44] the New Mexico Supreme Court stated, "[W]e have generally accepted the doctrine as set out in Section 339 of the Restatement of Torts." The court noted that it followed the majority rule "which does not require that the child be actually attracted to the premises by the artificial condition itself."[45] Pennsylvania has also held that the Restatement of Torts provided the proper rule regarding the attractive nuisance question.[46]

Other states have modified the allurement requirement by considering it an element for determining the foreseeability of a child's trespass. The Illinois case of *Geiger v. Fisher*[47] adopted this position by holding that "the element of attraction is significant only insofar as it bears on the foreseeability of children." Texas has also followed this position as exemplified by the case of *Eaton v. R.B. George Investments, Inc.*[48] The supreme court of that state said that liability would exist if the conditions of section 339 of the Restatement of Torts were satisfied.[49]

California and New York have gone the furthest in protecting the child plaintiff by adhering to a single standard of reasonable care under the circumstances whereby foreseeability becomes the *sole* theoretical measure of liability. Both have also abolished the distinction between licensees, invitees, and trespassers, applying instead a single standard of care. The prominent cases are the New York case of *Basso v. Miller*[50] and the California case of *Rowland v. Christian.*[51]

The opportunity for Florida to follow this trend and to reconcile the inconsistencies of its past law came before the Florida Supreme

---

43. 485 S.W.2d 76, 79 (Mo. 1972).

44. 374 P.2d 141, 143 (N.M. 1962).

45. *Id.* (citing Selby v. Tolbert, 249 P.2d 498 (N.M. 1952)).

46. Bartleson v. Glen Arden Coal Co., 64 A.2d 846, 849-50 (Pa. 1949).

47. 244 N.E.2d 848, 851 (Ill. Dist. Ct. App. 1968). *See also* Kahn v. James Burton Co., 126 N.E.2d 836, 842 (Ill. 1955).

48. 260 S.W.2d 587 (Tex. 1953).

49. *Id.* at 590. *See also* Massie v. Copeland, 233 S.W.2d 449 (Tex. 1950).

50. 40 N.Y.2d 233 (1976). *See* 44 N.Y.U.L. REV. 426 (1969).

51. 443 P.2d 561 (Cal. 1968). Other cases involving the abolishment of these categories include Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972); Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971); Pickard v. City & County of Honolulu, 452 P.2d 445 (Hawaii 1969).

Court in *Johnson*. The court elected to follow a standard of liability which is contrary to the spirit of the attractive nuisance doctrine and the public policy of protecting innocent children.

In *Johnson*, children were known to frequent the defendants' fields.[52] Plaintiff argued, to no avail, that an owner or occupier of property who knows that children will enter onto the premises should be under a special duty of care to protect them from being injured by any "hidden" nuisances which may be dangerous.[53] By allowing the landowner and occupier to escape liability because the plaintiff was not allured onto the premises, the *Johnson* doctrine could have disastrous consequences.

The Florida Supreme Court in *Johnson* overlooked the basic purpose of the attractive nuisance doctrine. Because of a child's immaturity and lack of judgment, he is incapable of understanding and appreciating all possible dangers he might encounter while on another's property. The interests of the landowner in unrestricted use of his property must yield to the greater social interest in protecting children. The landowner must assume some of the responsibility for a child's presence on the premises when the child's presence is foreseeable. He should be required to employ reasonable care when maintaining artificial conditions if the danger might not be appreciated by children. The doctrine of attractive nuisance is simply one of reasonable care when considered in its broadest terms. The Supreme Court of Florida has construed it narrowly by requiring allurement of the child onto the premises by the dangerous object or condition, making the doctrine of attractive nuisance in Florida truly an unattractive nuisance.

ROBERT SANTOS

52. *Johnson*, 350 So. 2d at 547. The Second District Court of Appeal in this case found that "[t]here is ample evidence in the record below to reflect that children were permitted to come to the packing house to pick up culls. Furthermore, the farm management knew that children sometimes went into the fields because they had run them out on previous occasions." *Id.*

53. Brief of Petitioner at 20-21, Johnson v. Bathey, 376 So. 2d 848 (Fla. 1979).