While attempting to resolve Indiana's security problems, the Legislature has only compounded confusion by the enactment of the Factor's Lien Act. The solution lies in legislation which deals squarely with the problem areas and which simplifies and consolidates the entire law of chattel security. Article 9 of the Uniform Commercial Code does this by repealing existing legislation and by taking a clear and comprehensive approach toward modern chattel security problems. Article 9, or legislation approaching the problem in a similar manner, should be adopted, even if the balance of the Uniform Commercial Code is ignored. Only through such positive action can the problems inherent in chattel security be satisfactorily resolved.[98]

THE ATTRACTIVE NUISANCE DOCTRINE

In general, the possessor of land is not liable for harm to trespassers caused by his failure to put his property in a safe condition for their reception.[1] An increasing regard for human safety has led to the development of certain exceptions to this rule, among which is the so-called attractive nuisance doctrine.[2] This doctrine has been applied generally, but not uniformly, by the American courts to allow, under proper circumstances, recovery for injuries suffered by infant trespassers. Some jurisdictions have made more conservative applications of the doctrine than others and a few have rejected it altogether, but the mass of prece-

98. The fate of the Uniform Commercial Code as a whole has been left in doubt by the failure of the New York Law Revision Commission to recommend its enactment in New York. NEW YORK LEGISLATIVE DOCUMENT No. 65 (A) (1956). The Commission, after three years study, stated that codification of commercial law would be of value to both the legal profession and the public, but concluded that the Uniform Commercial Code was not satisfactory in its present form. *Id.* at 105-6. However, the Commission's report as to Article 9 of the Code is favorable. "Article 9 would accomplish a significant reform of the law of personal property security. The Commission believes that the approach taken by Article 9 as a whole is sound in theory and satisfactorily developed in most of its elements." *Id.* at 90. The Commission specifically approved the Code's approach in validating the floating lien, *id.* at 82-3, in abrogating of the rule of *Benedict v. Ratner, id.* at 81, and in adjusting priorities of claims to the proceeds of the original collateral, *id.* at 84. Thus, while codification of the entire commercial law does not appear likely in the immediate future, enactment of a comprehensive chattel security statute patterned after Article 9 would be a significant present imporvement in the Indiana law.

1. PROSSER, TORTS § 76 (2d ed. 1955); RESTATEMENT, TORTS § 333 (1934).

2. "Nuisance" because it is an unreasonable use by a person of his land, working an injury to another; "attractive" because in the early cases it was thought that an attraction to trespass was essential to the action. Though today a great majority of the states do not require an initial attraction, the original nomenclature has been retained.

dents seems conclusively to establish it as an integral part of the law of torts.

The leading American case, *Sioux City & Pacific Railroad Company* v. *Stout*,[3] was a suit by a trespassing child who was injured while playing on a railroad turntable. The Supreme Court disregarded the infant plaintiff's status as a technical trespasser and conditioned the defendant landowner's liability on a question of negligence, based on the foreseeability of the harm.[4] It was pointed out quickly in the cases that followed[5] that this test is proper when a landowner causes injury to a trespasser by an affirmative act, but the injury in the *Stout* case had been attributed to a failure to take precautions to prevent accidents. The courts appeared to be groping for other justifications for this departure from the well-settled immunity of landowners to suits by injured trespassers.

The excuse most frequently employed during the early growth of the doctrine was contrived by the Minnesota court in the second turntable case.[6] The court avoided the problem of the injured child's status as a trespasser by labeling him an "invitee," and by use of this legal fiction found a duty in an occupier to keep his premises in a safe condition and to use due care not to injure him.[7] In 1922, the Supreme Court utilized the Minnesota approach to rule against a boy who was not induced to trespass by the pool of poisoned water that killed him, but discovered it after he had come upon the land.[8] The court held that the landowner had no duty to expect the child and prepare for his safety unless, from the nature and location of the dangerous condition, an invitation to enter could be implied.

In the latest decision of the Supreme Court the problem was stated strictly in terms of foreseeability—whether particular circumstances gave rise to a duty which had not been performed.[9] That an inducement to trespass was not the sole basis of the duty to take due care was readily

3. 84 U.S. (17 Wall.) 657 (1874).

4. Mr. Justice Hunt, delivering the Court's opinion, stated: "[I]f from the evidence given it might justly be inferred by the jury that the defendant, in the construction, location, management, or condition of its machine had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, the jury was at liberty to find for the plaintiff." *Id.* at 661.

5. See, *e.g.*, Keffe v. Milwaukee & St. Paul Ry., 21 Minn. 207 (1875).

6. *Ibid.*

7. Just as dogs are lured into traps by stinking meat, the child was induced to come upon the defendant's land and into his "trap" by an attractive but dangerous condition, the turntable. *Id.* at 210. The court reasoned, in finding a fictitious invitation to enter, that "what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years." *Id.* at 211.

8. United Zinc & Chemical Co. v. Britt, 258 U.S. 268 (1922).

9. Best v. District of Columbia, 291 U.S. 411, 419 (1934).

apparent, since in this case the dangerous condition was not visible from outside the premises. The Court found a duty, based on anticipation of the trespass, to take reasonable precautions to prevent injury.[10]

The states, like the federal courts, have had considerable difficulty in formulating a rule to govern cases concerning injured trespassing children. The result is a wide variety of hopelessly conflicting approaches to the problem.[11] The majority position, in general, seems to follow the decision in the *Stout* case, which has been adopted and categorized in the *Restatement of Torts*.[12] While not all the states in the majority phrase the question specifically in terms of foreseeability of the trespass, realization of the risk of harm and the child's lack of appreciation of that risk, and the utility of maintaining the condition as compared to the risk involved, these elements seem to be basic considera-

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10. In Eastburn v. Levin, 113 F.2d 176 (D.C. Cir. 1940), the *Best* case was interpreted as establishing the rule that the visible attraction need not be the immediate cause of the injury. However, none of these cases settled the question whether there need be a visible attraction before the doctrine would apply. See p. 84 *infra*, for a discussion of the proper weight to be given the element of attraction.

11. Although there are many approaches to the problem, the cases may be divided into two general groups: (1) the majority, which allows recovery by infant trespassers under certain circumstances; and, (2) the minority, which rejects the attractive nuisance doctrine in all its forms. Majority: See, *e.g.* Salt River Valley Water Users' Association v. Compton, 39 Ariz. 491, 8 P.2d 249 (1932); Long v. Standard Oil Co., 92 Cal. App. 2d 455, 207 P.2d 837 (1949); Moore v. North Chicago Refiners & Smelters, 346 Ill. App. 530, 105 N.E.2d 553 (1952); Plotzki v. Standard Oil Co., 228 Ind. 518, 92 N.E.2d 632 (1950); Harriman v. Town of Afton, 225 Iowa 659, 281 N.W. 183 (1938); Saxton v. Plum Orchards, 215 La. 378, 40 So. 2d 791 (1949); Chase v. Luce, 239 Minn. 364, 58 N.W.2d 565 (1953); Hull v. Gillioz, 344 Mo. 1227, 130 S.W.2d 623 (1939); Harris v. Mentes-Williams Co., 11 N.J. 559, 95 A.2d 388 (1953); Selby v. Tolbert, 56 N.M. 718, 249 P.2d 498 (1952); Atchison, T. & S.F. Ry. v. Powers, 206 Okla. 322, 243 P.2d 688 (1952); Patterson v. Palley Mfg. Co., 360 Pa. 259, 61 A.2d 861 (1948); Gouger v. Tennessee Valley Authority, 188 Tenn. 96, 216 S.W.2d 739 (1949); Brady v. Chicago & N.W. Ry. 265 Wis. 618, 62 N.W.2d 415 (1954). Minority: See, *e.g.*, Urban v. Central Massachusetts Electric Co., 301 Mass. 519, 17 N.E.2d 718 (1938); Lewis v. Mains, 150 Me. ——, 104 A.2d 432 (1954); Morse v. Buffalo Tank Corp., 280 N.Y. 110, 19 N.E.2d 981 (1939); Hannan v. Erhlich, 102 Ohio St. 176, 131 N.E. 504 (1921); Previte v. Wanskuck Co., 80 R.I. 1, 90 A.2d 769 (1952); Trudo v. Lazarus, 116 Vt. 221, 73 A.2d 306 (1950).

12. RESTATEMENT, TORTS § 339 (1934). "A possessor of land is subject to liability for bodily harm to young childreu trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if

> (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 in 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."

tions in each jurisdiction.[13]

In recent years, more and more jurisdictions are leaning toward the *Restatement's* approach.[14] For example, until recently the New Jersey courts consistently held that landowners owed no duty to keep their premises safe for the reception of trespassing children. If the child's parents neglected their duty to protect the child and permitted him to stray, the courts could see no reason for shifting the duty to the owner of the land over which he strayed.[15] Thus, no duty except to refrain from willful or wanton injury was owed trespassers, infant or adult.[16] Then, in *Strang* v. *South Jersey Broadcasting Co.*,[17] the appellate division placed the New Jersey rule in substantial accord with the *Restatement.*

13. Indiana allows recovery by infant trespassers under the *Restatement's* foreseeability test, but often distinguishes this approach from the attractive nuisance doctrine. See, *e.g.*, Neal v. Home Builders, 232 Ind. 160, 111 N.E.2d 280 (1953); Indiana Harbor Belt R.R. v. Jones, 220 Ind. 139, 41 N.E.2d 361 (1942). The early Indiana cases followed the straight negligence approach taken by the Supreme Court in the *Stout* case. Cincinnati & Hammond Spring Co. v. Brown, 32 Ind. App. 58, 69 N.E. 197 (1903). However, in Chicago & E.R.R. v. Fox, 38 Ind. App. 268, 70 N.E. 81 (1904), and Lewis v. Cleveland, C.C. & St. L. Ry., 42 Ind. App. 337, 84 N.E. 23 (1908), the court adopted and applied the narrower "allurement—implied invitation" theory. In Drew v. Lett, 95 Ind. App. 89, 182 N.E. 547 (1932), the court spoke in terms of attraction to trespass, but in the final determination phrased the problem in terms of probability of danger rather than implied invitation.

The rule applicable to suits for injuries suffered by child trespassers was stated in Indiana Harbor Belt R.R. v. Jones, *supra*, without mention of the attractive nuisance doctrine. The basis of the duty was said to be the foreseeability of the presence of children, and the duty was that of ordinary care under the circumstances. 220 Ind. at 145, 41 N.E.2d at 363. This position was limited, however, in Neal v. Home Builders, *supra*, to negligent acts done after the children were on the premises. 232 Ind. at 177, 111 N.E.2d at 289. This seems to be a misinterpretation of the *Jones* case, in which it was said that the duty "may be violated before the children arrive upon the premises, by leaving things undone which ought to have been done in anticipation of their coming." 220 Ind. at 145, 41 N.E.2d at 364.

However, the *Neal* decision included a discussion of another theory, termed an "extension" of the attractive nuisance doctrine, and applicable "when the owner knows or should know that children are likely to trespass on a part of his land on which he maintains a condition which is likely to be dangerous to them." 232 Ind. at 172, 111 N.E.2d at 287. This is essentially the same as the rule of the *Jones* case.

Although the Indiana law is not clear, the cases indicate that the more liberal position of the *Restatement of Torts* is actually, if not expressly, accepted in Indiana. See NOTE, 26 IND. L.J. 266 (1951).

14. See cases cited in note 27 *infra.*

15. See Harrington v. Greidanus, 10 N.J. Misc. 710, 160 Atl. 652 (1932); Kaproli v. Central R.R., 105 N.J.L. 225, 143 Atl. 343 (1928); Tarlucki v. West Jersey & S.R.R., 80 N.J.L. 688, 78 Atl. 149 (1910); Friedman v. Snare & Triest Co., 71 N.J.L. 605, 61 Atl. 401 (1905).

16. Before New Jersey adopted the attractive nuisance doctrine, it formulated a dangerous instrumentality rule applicable to infants and adults alike. Piraccini v. Director General of Railroads, 95 N.J.L. 114, 112 Atl. 311 (1920). Under this rule, landowners owed a duty to exercise reasonable care to protect anticipated trespassers from harm from dangerous agencies on the premises. Spenzierato v. Our Lady Monte Virgine Society of Mutual Benefit, 112 N.J.L. 93, 169 Atl. 831 (1934).

17. 10 N.J. Super. 486, 491, 77 A.2d 502, 504 (1950).

In affirming the judgment the New Jersey Supreme Court reasoned that the duty of care and protection derives from the occupier's anticipation of the child's presence on the land. "The basis of liability is the foreseeability of harm, and the measure of duty is care in proportion to the foreseeable risk."[18]

Representative of the states in substantial but not express accord is Oklahoma, which has formulated a test embodying a number of questions determining, in effect, the same elements of attractive nuisance included in the *Restatement* position: How uncommon is the instrumentality causing the harm; how attractive is it; what is the probability of children coming in contact with it; how unusually dangerous is it; is the apparent intelligence of the child such that he would reasonably be expected not to tamper because of his appreciation of the danger, or of his want of right to tamper; how feasible is it to avoid danger of harm; and, how great would be the burden of avoiding or lessening the danger?[19] These questions constitute an examination of the foreseeability of the trespass and whether the harm was reasonably to be anticipated, leading to the same results as would the four elements of the *Restatement* position.

A small number of states allowing infant trespassers to recover still employ the "invitation" fiction.[20] For example, the Arizona court, denying recovery to a child injured in an attempt to reach a bird's nest by climbing a pole carrying dangerous electric wires, admitted the existence of the attractive nuisance doctrine in the jurisdiction, but explained that the dangerous condition must induce the trespass.[21] Since in this case the bird's nest was the inducement, the doctrine was not applicable in an action to recover for injuries sustained because of contact with the electric wire.[22]

Using similar logic, the Colorado court denied recovery where the plaintiff entered a shack on the defendant's land and there found the dynamite caps which caused his injury.[23] The ground relied upon by the

18. 9 N.J. 38, 45, 86 A.2d 777, 780 (1952). In Harris v. Mentes-Williams Co., 11 N.J. 559, 95 A.2d 388 (1953), the supreme court reaffirmed the statement in the *Strang* case that section 339 of the *Restatement* is now part of New Jersey law.

19. Lone Star Gas Co. v. Parsons, 159 Okla. 52, 14 P.2d 369, 373 (1932).

20. See Salt River Valley Water Users' Association v. Compton, 39 Ariz. 491, 8 P.2d 249 (1932); Esquibel v. Denver, 112 Colo. 546, 151 P.2d 757 (1944); Harriman v. Town of Afton, 225 Iowa 659, 281 N.W. 183 (1938); Saxton v. Plum Orchards, 215 La. 378, 40 So. 2d 791 (1949); Shemper v. Cleveland, 212 Miss. 113, 51 So. 2d 770 (1951); Hull v. Gillioz, 344 Mo. 1227, 130 S.W.2d 739 (1939); Wheeler v. St. Helens, 153 Ore. 610, 58 P.2d 501 (1936); Gouger v. Tennessee Valley Authority, 188 Tenn. 96, 216 S.W.2d 739 (1949).

21. Salt River Valley Water Users' Association v. Compton, 39 Ariz. 491, 8 P.2d 249, 254 (1932).

22. *Ibid.*

23. Hayko v. Colorado & Utah Coal Co., 77 Colo. 143, 235 Pac. 373 (1925).

court illustrates clearly the position of the states requiring allurement. Since negligence, the court theorized, consists in maintaining an attractive nuisance which entices the trespass, not merely entices one after he has become a trespasser, and since the plaintiff could not see the box of caps before he came upon the property, the caps could not be classed as the attraction and the plaintiff could not recover.[24]

The fallacy of the allurement approach lies in the fictitious invitation upon which it is based. A man may act so as to imply an invitation, as by fitting out his premises for a playground. But when he is doing no more than use the premises for his own convenience or economic benefit, it is a perversion of language to say, merely because he has created a condition attractive to children, that he invites them to enter. The plain fact is that they do not come at his desire, and usually their presence is objectionable. They are trespassers, and nothing else. The essential question should be whether a duty of reasonable care is to be imposed, and, if so, whether sufficient care was exercised.[25]

The attractive nuisance doctrine is rejected in all forms by the latest decisions of a small number of states, which continue to denounce it as a sentimental humanitarianism founded on sympathy rather than law or logic, which imposes an undue burden on landowners and gives the jury a free hand to express its feelings for the child out of the defendant's pocket.[26] The number of jurisdictions which hold to this view has diminished in recent years as earlier decisions have been overruled,[27] and of those which still ostensibly reject the doctrine, some in reality apply it under other names,[28] while others are able to find excuses for liability

24. *Id.* at 374. This case illustrates an apparent inconsistency in the minority reasoning. It would seem that so long as a child is enticed to trespass, whether by the dangerous condition or by any other attractive condition maintained on the land, he should be accorded the fictitious status of invitee. The effect of the attraction upon the child is not mitigated by the source of the temptation, nor does allurement to trespass, coupled with the existence of a dangerous condition with which it is probable that the child will come into contact after entering, raise a probability of harm less than would be created if the dangerous condition itself had induced the entry. Nevertheless, the child is denied recovery under these circumstances.

25. See discussion, pp. 82-83 *infra.*

26. For a classic statement in opposition to the doctrine, see Ryan v. Towar, 128 Mich. 463, 467-480 (1901).

27. See, *e.g.,* LeDuc v. Detroit Edison Co., 254 Mich. 86, 235 N.W. 832 (1931); Strang v. South Jersey Broadcasting Co., 9 N.J. 38, 86 A.2d 777 (1952); Thompson v. Reading Co., 343 Pa. 585, 23 A.2d 729 (1942); Angelier v. Red Star Yeast & Products Co., 215 Wis. 47, 254 N.W. 351 (1934).

28. Virginia and West Virginia are among those states rejecting the doctrine. Virginia: Washabaugh v. Northern Virginia Const. Co., 187 Va. 767, 48 S.E.2d 276 (1948); Morris v. Peyton, 148 Va. 812, 139 S.E. 500 (1927); Kiser v. Colonial Coal and Coke Co., 115 Va. 346, 79 S.E. 348 (1913). West Virginia: Tiller v. Baisden, 128 W. Va. 126, 35 S.E.2d 728 (1945); White v. Kanawha City Co., 127 W. Va. 566, 34 S.E.2d 17 (1945); Ritz v. Wheeling, 45 W. Va. 262, 31 S.E. 993 (1898). However, both jurisdictions have adopted a dangerous instrumentality rule based upon substantially

in extreme situations.[29]

The fact that even those jurisdictions which reject the doctrine often find ways to compensate for its absence and redress injuries suffered by children who technically are trespassers indicates the social interest in conditioning the right to free use of land. However, to allow recovery on a negligence basis there must have been a violation of an existing duty owed the injured child.[30] If there is no affirmative duty, the attractive nuisance cases are wrong when tested on legal principles, however socially desirable they otherwise may seem. The basis and latitude of the duty, if any, have been the crux of the problem and the source of conflict since the doctrine originated.

The first obstacle to laying a foundation in tort, and the basis of the general rule of non-liability to trespassers, is the status of the intruder as a wrongdoer.[31] He is upon the land without the consent of the owner, from whom recovery is sought. However, the infant trespasser,[32] because of his limited mental capacity, is incapable of appreciating the

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the same elements. When the presence of the child is known or reasonably to be foreseen, and the danger of the instrumentality is hidden when handled by one unfamiliar with its use, the landowner must exercise due care to avoid injury. Washabaugh v. Northern Virginia Const. Co., *supra;* Tiller v. Baisden, *supra;* White v. Kanawha City Co., *supra;* Daugherty v. Hippchen, 175 Va. 62, 7 S.E.2d 119 (1940); Parsons v. Appalachian Electric Power Co., 115 W. Va. 450, 176 S.E. 862 (1934); Adams v. Virginian Gasoline & Oil Co., 109 W. Va. 631, 156 S.E. 63 (1930). See Beatty, *The Attractive Nuisance Doctrine in the Virginias,* 10 WASH. & LEE L. REV. 20 (1953), for an analysis and criticism of the dangerous instrumentality rule.

29. New York is typical. The rule in this jurisdiction is that "the doctrine of attractive nuisance does not apply . . . and that the only duty which an owner of land owes to a trespasser or bare licensee is to abstain from affirmative acts of negligence or not to injure intentionally such a person." Morse v. Buffalo Tank Corp., 280 N.Y. 110, 115, 19 N.E.2d 981 (1939). See also, Mayer v. Temple Properties, 307 N.Y. 559, 122 N.E.2d 909 (1954). However, in numerous situations child trespassers have been allowed to recover under various other theories of negligence. See, *e.g.,* Mayer v. Temple Properties, *supra,* (dangerous instrumentality affirmatively created); Kingsland v. Erie County Agricultural Society, 298 N.Y. 409, 84 N.E.2d 38 (1949) (highly dangerous instrumentality); Collentine v. City of New York, 279 N.Y. 119, 17 N.E.2d 792 (1938) (foreseeability based on proximity to a playground, past trespasses, and the propensities of children); Parnell v. Holland Furnace Co., 234 App. Div. 567, 256 N.Y.S. 323, *aff'd,* 260 N.Y. 604, 184 N.E. 112 (1932) (implied invitation). Thus, it appears that in many cases the New York courts are even more liberal in allowing infant trespassers to recover than are those which follow the attractive nuisance doctrine.

30. The elements necessary to a cause of action based on negligence are: (a) A legal duty to conform to a standard of conduct for the protection of others against unreasonable risks; (b) A failure to conform to the standard; (c) A causal connection between the conduct and the injury; (d) damage resulting to the interests of another. PROSSER, TORTS § 35 (2d ed. 1955); Neal v. Home Builders, 232 Ind. 160, 167-68, 111 N.E.2d 280, 284 (1953).

31. The absence of any circumstances altering the plaintiff's status as a wrongdoer was the basis of the court's repudiation of the attractive nuisance doctrine in Bottum's Adm'r v. Hawks, 84 Vt. 370, 79 Atl. 858 (1911).

32. For a discussion of the age limitations included in the attractive nuisance doctrine, see note 73 *infra.*

moral or legal significance of his conduct.[33] But even though the child is without fault, the landowner cannot be taken to have invited or consented to the intrusion so as to owe an affirmative duty to protect the child as an invitee or licensee. The duty must rest on other grounds. There is a difference of opinion concerning the proper basis of the obligation, but the two theories generally advanced both depend upon the same element—foreseeability of the trespass.

One approach is based upon the exceptions to the traditional immunity of landowners which arise (1) if the trespasser is discovered, or (2) if the owner knows that trespassers frequently intrude upon a particular place or limited area.[34] In both of these situations the owner is required to exercise reasonable care in any activities in which he engages.[35] Since the foreseeability of the presence of a trespasser, adult or child, raises a duty of reasonable care, and since the landowner's knowledge of natural tendencies of children to roam makes their presence upon his land foreseeable, under the proper circumstances he owes the same duty to child trespassers with regard to his activities on the land.

Resort to the reasonable care test in *Sioux City & Pac. R.R.* v. *Stout,* where the injury had resulted from a failure to take preventative action to protect a trespasser, was attacked in the cases that followed as an erroneous employment of the rule.[36] Most courts were unwilling, in the early decisions, to treat an antecedent creation of a condition on the premises as an active use of the land raising a duty of care to foreseeable trespassers. However, courts are becoming increasingly willing to characterize equivocal conduct as misfeasance rather than nonfeasance.[37] For example, in 1897 the New Hampshire court declared that the movement of the works in machinery "is part of the regular and normal conditions of the premises."[38] Then, 30 years later, that same court regarded failure to stop moving machinery as active misconduct toward a trespasser.[39]

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33. Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility In Tort,* 21 MICH. L. REV. 495, 510-512 (1923).

34. PROSSER, TORTS § 76 (2d ed. 1955); RESTATEMENT, TORTS §§ 334, 335 (1934).

35. *Ibid.* The *Restatement* further limits the landowner's duty to activities involving a risk of death or serious bodily harm.

36. See p. 76 *supra.*

37. James, *Tort Liability of Occupiers of Land: Duties Owed To Trespassers,* 63 YALE L.J. 144, 176 (1953).

38. Buch v. Amory Mfg. Co., 69 N.H. 257, 262, 44 Atl. 809, 811 (1898).

39. Castonguay v. Acme Knitting Machine & Needle Co., 83 N.H. 1, 136 Atl. 702 (1927). In Strang v. South Jersey Broadcasting Co., 9 N.J. 38, 86 A.2d 777 (1951), the court regarded the failure to guard a dangerous condition created on the premises as misfeasance so as to allow a foreseeable trespasser to recover for injuries caused by that condition. Similarly, in Hobbs v. G. W. Blanchard & Sons Co., 74 N.H. 116, 65 Atl. 382 (1906), defendant's placing dynamite where a child trespasser could come in contact with it was held to be active intervention.

Mere passive use of land creates no obligation to render it safe for others but once the owner puts his property to a use involving unreasonable risks of harm to others, an obligation then arises to take measures to prevent injuries from such use.[40] Once the activity is undertaken, there is a continuing duty of reasonable care under the circumstances.[41]

The other point of view is that anticipation of the presence of members of an important class of citizens—children—in a position of peril, coupled with their lack of appreciation of the risk encountered, is sufficient to require landowners, who are in the best position to protect them, to exercise care commensurate to the risk involved. Thus, the basis of the duty is said to be the value of child life to the community and the probability of harm to that interest.[42]

The *Restatement of Torts*[43] incorporates the well established rules of negligence to bring the attractive nuisance doctrine out of the discord and confusion that resulted from the early cases. Since it applies only to injuries "caused by a structure or other artificial condition" maintained on the land, mere passive ownership of land is not sufficient to raise a duty to protect infant intruders. The owner must be making an affirmative use of the land. The elements of anticipation of the trespass, essential to raise a positive obligation, and foreseeability of harm, which determines the standard of conduct to be exacted from the landowner, are also required.

Inasmuch as this position has received such widespread acceptance as to be recognized as the modern approach, a more detailed examination of its application seems worthwhile. The first requirement, that the place where the condition is maintained be one upon which the possessor knows or should know that children are likely to trespass,[44] does not mean that he must guard against every contingency. There must be a

40. Green, *supra* note 33, at 513-522. If an owner erects a building or makes improvements artificially changing the natural condition of his land, he not only is bound to see that the improvements as planned do no harm to others on the land without fault, but he and his successors must maintain them in such condition as to render harm improbable. Bohlen, *The Duty of a Landlord Toward Those Entering His Premises of Their Own Right*, 69 U. PA. L. REV. 340, 341 (1921).

41. *Ibid.*

42. James, *supra* note 37, at 163. See, *e.g.*, Lone Star Gas Co. v. Parsons, 159 Okla. 52, 14 P.2d 369, 372 (1932). This is the reasoning employed by the Indiana courts in finding a duty. In Indiana Harbor Belt R.R. v. Jones, 220 Ind. 139, 145, 41 N.E.2d 361, 363 (1941), the court stated, "the probable presence of children upon property where a dangerous activity is being carried on, imposes a duty of ordinary care to anticipate their presence by keeping a lookout for them." See also Cincinnati & Hammond Spring Co. v. Brown, 32 Ind. App. 58, 61, 69 N.E. 197, 198 (1903). But see dissenting opinion of Emmert, C.J., in Plotzki v. Standard Oil Co., 228 Ind. 518, 525, 92 N.E.2d 632 (1950).

43. See note 12 *supra*.

44. *Ibid.*

reasonable basis to expect the presence of children at the place of danger.[45] Lack of foreseeability was found in *Jennings* v. *Glen Alden Coal Co.*[46] There a boy, drowned while swimming in a water-filled strip mine located in an isolated area one-half mile from the nearest road or habitation, was denied recovery under the attractive nuisance doctrine. Evidence that children had, on two previous occasions, gone swimming in the pool was insufficient to give the defendant knowledge of, or reason to anticipate, the trespass.[47]

It is here that the element of allurement properly is considered, not to determine conclusively the existence of a duty by making the child an invitee, but rather to determine whether the trespass was foreseeable.[48] An unusual artificial condition naturally attracts the attention of a child and, the youthful mind being inquisitive, often leads him to investigate.[49] Similarly, if such a condition on the defendant's land offers amusement or pleasure, knowledge of the propensities of children, their natural inclination to yield to temptation and follow that which attracts them, should charge the landowner to anticipate their presence.[50]

Even without allurement, foreseeability of the intrusion may be found, based on other grounds, such as accessibility of the condition,[51] proximity to inhabited areas,[52] and past trespasses.[53] Any evidence that would lead a reasonable man to anticipate the trespass is sufficient. Thus, in *Long* v. *Standard Oil Co.*,[54] where a three-year-old child fell into a concealed, water-filled excavation located approximately 100 yards

45. PROSSER, TORTS 440 (2d ed. 1955); RESTATEMENT, TORTS § 339, comment *b* (1934). "[P]ractically all the cases hold, in effect, that if the landowner had no reason to suppose that children would resort to the premises . . . he owed no duty to guard against barely possible injury." Baxter v. Park, 44 S.D. 360, 184 N.W. 198, 200 (1921). "There must be a reasonable expectation of the presence of children at the time and place of danger before there arises a duty to guard them from that danger." Hardy v. Missouri Pac. R.R., 266 Fed. 860, 863 (8th Cir. 1920).

46. 369 Pa. 532, 87 A.2d 206 (1952).

47. 369 Pa. at 535, 87 A.2d at 208. That the perils of water are obvious to children at an early age was an alternative ground for the decision in this case. *Id.* at 536, 87 A.2d at 208.

48. Koch v. Chicago, 297 Ill. App. 103, 111, 17 N.E.2d 411 (1938); Drew v. Lett, 95 Ind. App. 89, 97, 182 N.E. 547 (1932); Lone Star Gas Co. v. Parsons, 159 Okla. 52, 14 P.2d 369, 373 (1932); Thompson v. Reading Co., 343 Pa. 585, 23 A.2d 729,735 (1942).

49. Koch v. Chicago, *supra.*

50. Sanchez v. East Contra Costa Irrigation Co., 205 Cal. 515, 517, 271 Pac. 1060, 1061 (1928).

51. See, *e.g.*, Thompson v. Reading Co., 343 Pa. 585, 23 A.2d 729, 735 (1942).

52. Long v. Standard Oil Co., 92 Cal. App. 2d 455, 207 P.2d 837 (1949); Chase v. Luce, 239 Minn. 364, 58 N.W.2d 565 (1953); Strang v. South Jersey Broadcasting Co., 9 N.J. 38, 86 A.2d 777 (1952).

53. Wagner v. Kepler, 411 Ill. 368, 104 N.E.2d 231 (1951); Chase v. Luce, 239 Minn. 364, 58 N.W.2d 565 (1953); Patterson v. Palley Mfg. Co., 300 Pa. 259, 61 A.2d 861 (1948).

54. 92 Cal. App. 2d 455, 207 P.2d 837 (1949).

from a housing project where 1200 children lived, it was held that, considering the proximity of the community, the defendant should have realized that the presence of children was likely. In *Chase* v. *Luce*,[55] where the defendant admitted he knew there were numerous small children in the area, and that his employees had chased children away on several occasions, the court held the jury's finding of foreseeability to be justified.

The second requirement limits the landowner's liability to injuries caused by conditions he realized, or should have realized, as involving an unreasonable risk of serious harm to young children.[56] If a reasonable man in the same situation would have foreseen no danger, the landowner is not held responsible for his failure to take precautions. In addition, it may be assumed that dangers which are commonly known, such as the usual risks of water,[57] falling from a height,[58] moving machinery,[59] and of soil caving in,[60] will be understood and appreciated by any child old enough to be allowed to wander.

Thus, where an eleven-year-old drowned in a water-filled excavation, the defendant escaped liability.[61] That the dangerous condition was located only 50 yards from a street, in plain view of the sidewalk, had an uneven bottom in which were deep holes and drop-offs, and was frequented by large numbers of children, was considered irrelevant.[62] Children are presumed to know the dangers of water, and the danger here, though the pool was artificial, was still that of drowning.[63] A different rule applied in *Sanchez* v. *East Contra Costa Irrigation Co.*,[64] where a large syphon-hole, wholly unguarded and concealed from view, was located in the water. While the defendant need not have guarded against the open and obvious danger of a stream of water, the children who fre-

55. 239 Minn. 364, 58 N.W.2d 565 (1953).

56. See note 12 *supra*.

57. Plotzki v. Standard Oil Co., 228 Ind. 518, 92 N.E.2d 632 (1950); Lockridge v. Standard Oil Co., 124 Ind. App. 257, 114 N.E.2d 807 (1953); Atchison, T. & S.F. Ry. v. Powers, 206 Okla. 322, 243 P.2d 688 (1952).

58. Neal v. Home Builders, 232 Ind. 160, 190, 111 N.E.2d 280, 294 (1953); McHugh v. Reading Co., 346 Pa. 266, 30 A.2d 122 (1943).

59. Giddings v. Superior Oil Co., 106 Cal. App. 2d 607, 235 P.2d 843 (1951); Jones v. Louisville & N.R.R., 297 Ky. 197, 179 S.W.2d 874 (1944).

60. Anderson v. Reith-Riley Const. Co., 112 Ind. App. 170, 44 N.E.2d 184 (1942).

61. Plotzki v. Standard Oil Co., 228 Ind. 518, 92 N.E.2d 632 (1950).

62. 228 Ind. at 521, 92 N.E.2d at 634.

63. *Ibid.* In a later case, where a child drowned in the same excavation here involved, the court held that the fact that the defendant maintained a small raft on the water made no difference. The danger remained the same, and the plaintiff was denied recovery. Lockridge v. Standard Oil Co., 124 Ind. App. 257, 114 N.E.2d 807 (1953).

64. 205 Cal. 515, 271 Pac. 1060 (1928).

quently played in the stream could not have known of this added danger.[65]

There are many common, normally harmless, objects, such as a lawn roller,[66] railroad spikes,[67] or empty barrels,[68] with which children cannot reasonably be expected to tamper, or to sustain any substantial harm if they do.[69] When injury results from contact with one of these common objects, the landowner will not be held liable unless he has some special knowledge of its characteristics which apprises him of the danger.[70]

Failure of the child, because of his youth, to discover the condition or realize the risk it involves, is also made essential to recovery by the modern approach.[71] The law, however, does not require that the child's age prevent him from both discovering the condition *and* realizing the risk. Either is sufficient to give him the protection of the doctrine, if the other requirements are satisfied.[72] Since one important reason for this exception to the general rule of non-liability is the child's lack of comprehension of danger and, consequently, his inability to care for himself, the doctrine should not be employed where he fully appreciated the risk of his venture. For this reason, it does not include children of sufficient age and mental capacity[73] to be competent, under the circumstances, to look out for themselves.[74]

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65. This result is entirely consistent with the *Plotzki* decision. There, the court was careful to point out that the rule applies to an artificially created pond, "provided that it merely duplicates the work of nature without adding any new dangers." 228 Ind. at 521, 92 N.E.2d at 634.

66. Verrichia v. Society Di M.S. Del Lazio, 366 Pa. 629, 79 A.2d 237 (1951).

67. Genovese v. New Orleans Public Service Co., 45 So. 2d 642 (La. App. 642, 1950).

68. St. Louis, I.M. & S. Ry. v. Waggoner, 112 Ark. 593, 166 S.W. 948 (1914).

69. For example, in Verrichia v. Society Di M.S. Del Lazio, 366 Pa. 629, 632, 79 A.2d 237, 238-9 (1951), the court stated, "to hold that defendant should have anticipated that a three hundred pound roller standing on end on level ground would fall of its own volition would be going far beyond the standard of care required of reasonable men. . . . Clearly the roller was not a condition that was reasonably likely to cause harm within the meaning of section 339."

70. Genovese v. New Orleans Public Service Co., 45 So. 2d 642 (La. App. 642, 1950).

71. See note 12 *supra*.

72. Brady v. Chicago & N.W. Ry., 265 Wis. 618, 624, 62 N.W.2d 415, 418 (1954).

73. In Harris v. Indiana General Service Co., 206 Ind. 351, 189 N.E. 410 (1934), the court held the defendant liable for injuries suffered by an eighteen-year-old trespasser on the basis of foreseeability of the injury. Normally, a boy this old would have been denied recovery, but this plaintiff, because of a childhood disease, had the limited mental capacity and attainments of a six-year-old. Consequently, he could not have appreciated the risk. "In a large measure, each case must be determined in this respect, not alone by the age, but by the degree of mentality and intelligence possessed by the child, as shown by the evidence, to observe and appreciate the particular danger." McKiddy v. Des Moines Electric Co., 202 Iowa 225, 229-30, 206 N.W. 815, 817 (1926).

74. A few courts have set an age limit at fourteen, Moseley v. Kansas City, 170 Kan. 585, 228 P.2d 699 (1951); Kentucky Utilities Co. v. Earles' Adm'r, 311 Ky. 222 S.W.2d 929 (1949); but most jurisdictions hold that it is undesirable to set any fixed limit. Lockridge v. Standard Oil Co., 124 Ind. App. 257, 267, 114 N.E.2d 807, 812 (1953).

It is fundamental that the standard of conduct which is the basis of the law of negligence is determined by balancing the risk, in light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest the actor is asserting, and the expedience of his conduct.[75] This is the function performed by the fourth requirement. The utility to the landowner of maintaining the dangerous condition must be slight as compared to the risk it involves.[76]

A turntable, for example, may be essential to the proper operation of a railroad, and at the same time, may be hazardous to meddling children. The mere fact that it is maintained where contact with trespassing children is probable is not sufficient to make the railroad company liable.[77] If, however, the device could be rendered harmless by a simple safeguard, such as a lock bar, to fail to do so would create an unreasonable risk.[78] Similarly, though a house in the process of construction is admittedly a condition of great social utility, failure to take certain minor precautions, such as locking the door or barricading the stairway, gives slight benefit to the owner, compared to the risk of injury involved.[79] Where the utility of maintaining the condition in its dangerous state is great, though the risk of harm may be substantial, the public interest in the free use of land excuses the landowner from taking burdensome precautions.

The attractive nuisance doctrine does not make landowners insurers of trespassing children. The foundation of the doctrine is liability based upon fault. When a landowner creates a dangerous condition on his land, the doctrine charges him with the knowledge that children do, in fact, trespass under certain circumstances, and exacts from him a duty to take reasonable efforts to safeguard them from the danger when their presence and helplessness are, or should be, known to him.

The decisions show an effort to effect a compromise between the interest of society in preserving the safety of a numerous and socially important class of citizens, and the interest of landowners to use their land with reasonable freedom. The attractive nuisance doctrine, as expressed by the *Restatement of Torts,* is a realistic, and legally sound, approach to this difficult problem.

See James, *supra* note 37, at 167; NOTE, 23 MINN. L. REV. 241 (1938). Seldom have children above the age of fourteen been protected.

75. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

76. See note 12 *supra.*

77. Thompson v. Reading Co., 343 Pa. 585, 591, 23 A.2d 729, 732 (1942).

78. *Ibid.* See also Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall.) 657 (1874); *cf.* Chase v. Luce, 239 Minn. 364, 58 N.W.2d 565 (1953).

79. *Ibid.*