Attractive Nuisance - Liability of the United States for Accidental Drowning of Infant Trespasers in Middle Rio Grande Project Irrigation Ditches

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COMMENTS

ATTRACTIVE NUISANCE—LIABILITY OF THE UNITED STATES FOR ACCIDENTAL DROWNING OF INFANT TRESPASSERS IN MIDDLE RIO GRANDE PROJECT IRRIGATION DITCHES

Forty-four persons have drowned in the unfenced irrigation ditches of the Middle Rio Grande Project since September 9, 1959.¹ Twenty-two of the victims were infants between one year and seven years of age. The refusal of the United States Bureau of Reclamation to admit any liability for these drownings or to fence, cover, or in any way protect infants of a tender age from the hazards of drowning in the ditches has created a dilemma for the residents of the Middle Rio Grande Conservancy District.²

Perhaps the only way for the residents to require the Bureau of Reclamation or the Middle Rio Grande Conservancy District to take reasonable steps to protect infants from the obvious dangers of this public irrigation system, would be to convince the courts that these agencies should be held liable for these drownings.³

This is probably the only solution remaining due to the fact that the Board of Directors of the Middle Rio Grande Conservancy District is appointed by the Conservancy Court for six year terms.⁴ Therefore, there is virtually no opportunity to enforce the will of the community through the election process. Further, the Department of the Interior has been consistently unwilling to expend funds to implement protective measures. We are confronted with a serious conflict between the social and economic needs of the community for a public irrigation system and the patently unacceptable

¹. Dept of Interior, Bureau of Reclamation, Middle Rio Grande Project Water Safety Study 3 (1969). This is an unpublished report of the office of the Chief Engineer, Middle Rio Grande Project, Albuquerque. Three persons who drowned in the summer and fall of 1969 were added to the total in the report for purposes of this article.

². These ditches belong to the Middle Rio Grande Conservancy District, N.M. Stat. Ann. §§ 75-28-1 to -67 (Repl. 1968), but the United States, acting through the Department of the Interior, Bureau of Reclamation, has contracted to operate and maintain them.

³. There is a general reimbursement clause in the operation and maintenance contract between the Bureau of Reclamation and the Middle Rio Grande Conservancy District, para. 13 at 6-8. This clause would appear to provide for reimbursement of the Bureau by the District for financial losses incurred through tort liability.

waste of young lives through drownings in the ditches of that system.

Most jurisdictions have adopted a special rule of tort liability which distinguishes trespassing children from trespassing adults on the basis of the inability of the child to protect himself against the peril which he encounters. This theory is usually referred to by the misnomer of the "attractive nuisance" doctrine. Since the infant is usually a trespasser on the premises, some such theory is necessary to make a landowner liable at all. Recovery for the drowning of an infant is usually sought under this doctrine. The most widely accepted formulation of the attractive nuisance doctrine is contained in the Restatement of the Law of Torts (Second Edition) § 339. The tendency in jurisdictions which apply the doctrine under other circumstances, is to refuse, as a matter of law, to apply it to permit recovery for the drowning of a child unless the drowning resulted from some hidden inherent danger in addition to the water itself. Such cases usually rely on the presumption that in the absence of any latent or hidden element of danger, bodies of water ordinarily represent dangers which should be obvious to children old enough to be allowed at large. Therefore, such perils do not constitute an attractive nuisance or an unreasonable risk of death or serious bodily harm. The landowner is under no obligation to fence or otherwise guard such places, and he will not be liable for injuries or death resulting from dangers which should have been known and appreciated by the child.

The numerous cases which have limited attractive nuisance liability by setting up certain categories of conditions in which trespassing children were presumed, as a matter of law, to be capable of fully understanding have been soundly criticized by Dean Prosser:


The landowner owes the adult only the duty not to wilfully or wantonly injure him and to warn him only of dangers known by the landowner to exist after he has knowledge of the trespasser's presence on the land. James, Tort Liability to Occupiers of Land: Duties Owed Trespassers, 63 Yale L.J. 144, 145 (1953).

The soundness of such arbitrary rules as to what children may always be expected to comprehend may be open to question. The impressive number of cases of dead children, attesting their failure to appreciate the risks, is sufficient in itself to cast some doubt upon the validity of the assumption.9

In the same article, Prosser points out two groups of cases in which the fixed rules have broken down. The first group is where the landowner knows that children, who are so extremely young that they cannot be expected to appreciate the danger, are likely to trespass. Such a child is usually under six years of age. He says the absurdity of the assumption that an infant of three or four will appreciate the risk becomes too manifest when the infant is known to be in the vicinity of fire or water.

The second group of cases where the arbitrary rule is useless is where the court finds that there was some so-called enhanced risk which was greater than that which will normally accompany such a condition. These include cases of concealed or masked dangers, cases of special attractions, cases of dangerous conditions on or near a public place where children usually play, or where a landowner, because of his knowledge of past trespasses and the dangerous condition, is made aware of an increased probability of some injury. According to Prosser, a great many of such cases turn upon factors which do not bear upon the child's appreciation of the risk at all, and those cases cast additional doubt upon the validity of any such fixed rules. He suggests that each case be considered in light of all its particular facts.10

Only one case seeking recovery for the drowning of an infant in a Middle Rio Grande Project irrigation ditch has been reported.11 This Comment will analyze that decision as a point of departure for discussing a recent line of other New Mexico attractive nuisance cases, rendered since that decision. These decisions alter New Mexico's application of that doctrine by rejecting the legal presumption of a child's capacity to comprehend and avoid the danger of any fixed category of conditions.12 It seems that New Mexico has now unshackled itself from the fiction that infants of tender ages are capable of realizing the danger of drowning in open water hazards. There is now a realistic probability that, given the proper factual

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10. Id. at 458-61.
situation, the attractive nuisance doctrine, as it appears in the Restatement of the Law of Torts (Second Edition) § 339, can be applied in wrongful death actions to obtain recovery for drownings of infants in unprotected irrigation ditches.\(^\text{13}\)

Josephine Foster sought recovery against the United States for the death of her two children, aged four and seven, under provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 \textit{et seq.} The children had drowned in an irrigation ditch belonging to the Middle Rio Grande Conservancy District which the United States, acting through the Department of the Interior, Bureau of Reclamation, had contracted to operate and maintain. It was alleged that the government had maintained an attractive nuisance, and that it had been negligent in not having guardrails along a bridge and in not keeping fences in the proper state of repair. Recovery was denied on three grounds: first, the mother had been contributorily negligent in allowing the children to cross the ditch without proper supervision; second, the plaintiff failed to sustain her burden of proof that the deaths of the children had been caused by the negligence of the government; and third, under New Mexico case law, the attractive nuisance doctrine imposed no liability on the federal government for drownings in an irrigation ditch. The court also held that the facts did not bring the case within the provisions of the Federal Tort Claims Act,\(^\text{15}\) exempting the government from liability where discretion of officials or employees is involved.\(^\text{16}\) This decision of the United States District Court for New Mexico was affirmed in a memorandum opinion by the Tenth Circuit Court of Appeals.\(^\text{17}\)

\(^\text{13}\) The discussion of New Mexico case law in this Comment assumes that New Mexico has generally accepted the attractive nuisance doctrine as set out in Restatement (Second) of Torts § 339 (1965); see cases cited note 12 supra; McFall v. Shelley, 70 N.M. 390, 374 P.2d 141 (1962); Klaus v. Eden, 70 N.M. 371, 374 P.2d 129 (1962); Mellas v. Lowdermilk, supra note 8; Selby v. Tolbert, 56 N.M. 718, 249 P.2d 498 (1952); Barker v. City of Santa Fe, 47 N.M. 85, 136 P.2d 480 (1943).

New Mexico does not limit application of the doctrine to cases of landowner liability but applies it equally to dangerous items of personal property whether on public or private property. There is no requirement that a child actually have been attracted to the premises itself. McFall v. Shelley, \textit{supra} at 392, 374 P.2d at 143. New Mexico recognizes that attractive nuisance liability is basically liability for negligence: \ldots we see nothing different in the so-called law of attractive nuisance and the general law of negligence, except that involved is a recognition of the habits and characteristics of very young children. Klaus v. Eden at 375.

This position is recognized by the addition of a sub-section (e) to Restatement (Second) of Torts § 339 (1965): the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children. \textit{See also} 3 Natural Resources J. 193 (1963).

\(^\text{14}\) Foster v. United States, \textit{supra} note 8, at 525.


\(^\text{16}\) Foster v. United States, \textit{supra} note 8, at 528.

\(^\text{17}\) Foster v. United States, 280 F.2d 431 (10th Cir. 1960).
After the Foster decision, the Federal Tort Claims Act was amended to provide:

(A) An action shall not be instituted upon a claim against the United States which has been presented to a federal agency, . . . unless such federal agency has made final disposition of the claim.\textsuperscript{18}

Therefore, now a litigant must first exhaust his administrative remedies before he can file a tort claim against the United States in federal court, "... in the same manner and to the same extent as a private individual under like circumstances..."\textsuperscript{19} New Mexico case law would apply in determining the tort liability of the United States. The court's rationale for refusing to hold the United States liable under the attractive nuisance doctrine was explained as follows:

Liability under the attractive nuisance doctrine does not appear to exist in cases such as the present proceeding. The New Mexico decisions, in the absence of additional facts, seem to reject the attractive nuisance theory.\textsuperscript{20}

This position was supported by the following New Mexico cases: Selby v. Tolbert, Barker v. City of Santa Fe and Mellas v. Lowdermilk.\textsuperscript{21} Relying upon the authorities and the facts adduced in the action, the court denied plaintiff's prayer for relief.

The New Mexico supreme court allowed recovery in both Selby v. Tolbert and Barker v. City of Santa Fe by applying the criterion of the Restatement of the Law of Torts § 339. However, both of these cases involved hidden dangers not apparent to the children who were injured. The Selby child was injured after being attracted onto a vacant lot by the melted red glass on a burned out semi-trailer. The propped-up trailer fell over on the child. The Barker child went onto the premises of a city sewage plant to retrieve a hat which had blown there. The top of the sewage tank was covered with a thick sludge which gave the appearance of being solid. She stepped onto the sludge and was drowned in the tank.

Mellas v. Lowdermilk denied recovery for the drowning of a nine-year-old boy on the grounds of contributory negligence. The child had drowned while swimming, without permission, in a pond maintained on defendants' business premises. The pond was approximately one thousand feet west of a main highway and was not visible from the highway. The premises were fenced and "no tres-

\textsuperscript{18} Federal Tort Claims Act, 28 U.S.C. § 2675(a) (1965).
\textsuperscript{19} Id. § 2674.
\textsuperscript{20} Foster v. United States, supra note 8, at 526.
\textsuperscript{21} See cases cited note 13 supra.
passing” and “no swimming” signs were posted. Plaintiffs’ allegation that the pond was an attractive nuisance was rejected and the court refused to extend the doctrine to cases of patent and visible alluring dangers:

Ponds, pools, lakes, streams, and other waters embody perils that are deemed to be obvious to children of tenderest years; and as a general proposition no liability attaches to a proprietor by reason of death resulting therefrom to children who have come upon the land to bathe, skate, or play.22

Although it is possible to question the wisdom of legally presuming a young child’s capacity to comprehend and avoid the dangers of water hazards, the federal court in Foster v. United States was required to apply New Mexico law, and it appears to have correctly interpreted the position of the New Mexico supreme court at that time. Fortunately, the legal efficacy of that presumption was later reviewed and rejected in the line of cases discussed below.

It was held in Martinez v. C. R. Davis Contracting Company that the evidence supported the finding that defendant-contractor, by permitting a water-filled sewer excavation to go unguarded except for one watchman, and barricades generally around the area, but not around individual excavations, was negligent in failing to exercise due care for the safety of a fourteen-year-old boy who drowned while swimming in the excavation.23 The excavation was in a densely-populated area where children were known to have been playing. The opinion distinguished the Mellas case on the facts, saying it was affirmatively established in that case that the defendant was free of negligence in maintaining the pond in which the nine-year-old boy drowned.24 More importantly, the fourteen-year-old boy was held not to be contributorily negligent as a matter of law, and the court pointedly stated that insofar as the dicta in the Mellas case stated a rule of due care of a minor different from the holding in this case, such rule was not controlling.25 When necessary to determine whether a child of a certain age was negligent, the court said it could see no reason for a different rule where lakes or ponds were involved than where other known dangerous instrumentalities caused the injury. It concluded that the question of a minor’s negligence was an issue of fact and the defendant had the burden of establishing affirmatively the defense of contributory

24. Id. at 476, 389 P.2d at 598.
25. Id. at 477, 389 P.2d at 599.
negligence. The court gave this test by which to measure the conduct of a child:

\[ \ldots \text{whether the child exercised that degree of care ordinarily exercised by children of like age, capacity, discretion, knowledge and experience under the same or similar circumstances for his own protection.}\]

The issue of attractive nuisance was not raised by the plaintiffs in this case. They sought recovery based on negligence. A strong dissent made note of this point. However, the main issue decided was whether or not the child had the capacity to comprehend and avoid a dangerous condition. Only if the child had such appreciation of danger would he have been capable of contributory negligence. This is also an essential question in an attractive nuisance case, for if a child has such appreciation, the attractive nuisance doctrine cannot be applied as a basis of liability. If the child does not have such an appreciation of danger, the defense of contributory negligence cannot be used to bar recovery. In any case, there is little difference in the law of attractive nuisance and the general law of negligence, except in the recognition of the habits and characteristics of very young children.

Two later attractive nuisance cases, decided in 1965, further weakened the authority of the *Mellas* case.

The first case applied §339, Restatement of the Law of Torts, in affirming recovery for injuries sustained by a ten-year-old boy when he fell into an open ditch excavation while playing and jumping on defendant's school grounds. The *Mellas* decision was held not to stand for the proposition that certain conditions or instrumentalities do or do not constitute an attractive nuisance. The test of foreseeability of harm to a child under the particular circumstances was held to be the crucial consideration in the *Mellas* case. In other words, was the danger one the landowner could reasonably expect the child to fully understand and avoid? The court held in the instant case that once it is established a defendant knew children were trespassing to play it becomes a question of fact for the jury to determine whether the defendant exercised that degree of care for the protection of the children which the circumstances required.

*The Martinez v. C. R. Davis Construction Company*
rule for measuring the conduct of a minor in determining contributory negligence was once again approved.

There was contradictory evidence in this case as to whether the child understood the condition and realized the risk. In the *Mellas* case, there was no evidence to show the child did not have the capacity to understand the condition and realize the risk of drowning. This decision did not specifically reject the legal presumption raised in the *Mellas* case, and it is possible to interpret this decision as implying that such a legal presumption might still be raised in the absence of such contradictory evidence.31

... if reasonable minds can differ as to whether a child because of his youth discovered the condition or realized the risk involved ... , then it becomes an issue of fact for the jury under proper instructions.32

A dissent, by Chief Justice Carmody and Justice Noble, who also dissented from the *Martinez v. C. R. Davis Construction Company* decision,33 argued that the excavation embodied no danger not readily apparent to everyone, even young children. They felt the effect of this decision was to make a landowner an insurer of the safety of children. They once again argued that the attractive nuisance doctrine should not be extended to cover cases of patent visible and alluring dangers other than those arising from mechanical devices.34

The second case was an action to recover damages for injuries sustained by a seven-year-old boy when he fell from a stack of culvert pipes while playing.35 On appeal from the granting of summary judgment for defendants, the court held the trial court had erred in concluding, as a matter of law, that the culvert pipes had not constituted an attractive nuisance. It said:

... this court has never sanctioned attempts to place cases involving the doctrine of attractive nuisance in a rigid category on the basis of the type of condition involved. Whether the maintenance of a specific condition can give rise to liability for harm to trespassing children must necessarily turn on the facts of the particular case.36

Chief Justice Carmody and Justice Noble dissented once again, expressing their concern because it appeared the summary judgment
rule was no longer being applied to cases involving trespassing children. While admitting that it is not for the best to adopt rigid categories which may or may not fall within the so-called attractive nuisance doctrine, they expressed concern with the instant case because they felt it was obvious that the defendants did not know, or have any reason to know, that the culvert pipes involved an unreasonable risk of death or serious bodily harm to children. This issue, they felt, should have been decided as a matter of law. The dissent concluded by warning that if the rule, developed in Martinez v. C. R. Davis Construction Company, Saul v. Roman Catholic Church and the instant case, were followed to its logical conclusion it seemed that there would be literally no artificial condition which, depending upon its use, could not somehow be considered highly dangerous to a trespassing child.

A review of the New Mexico authority makes it difficult to understand why Foster v. United States, decided in 1959, has been the last reported case on the liability of the United States for drowning of infants in irrigation ditches. Elmer Nitzchke, an attorney in the office of the Field Solicitor, Bureau of Reclamation in Albuquerque, disclosed that not one administrative claim under the Federal Tort Claims Act has since been filed by parents of drowned children. Under New Mexico law, it appears that a well-pleaded case would at least have to be sent to a jury. One of the main advantages of the attractive nuisance doctrine is in getting an infant trespasser case beyond summary judgment or a directed verdict. As was pointed out earlier, even in most jurisdictions where § 339, Restatement of the Law of Torts, has been adopted as law, there are certain classes of dangers that have been recognized, such as fire and water, which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large. In the absence of a special risk or hidden danger, the child will probably not discover or appreciate, § 339 ordinarily has no application to such conditions. In those jurisdictions, it is still difficult to avoid summary judgment or a directed verdict in infant trespasser drowning cases. This is the important distinction for New Mexico practitioners, since now under New Mexico law, plaintiff does not have the burden of overcoming the presumption about a child’s ability to comprehend the danger of drowning. The defendant has the burden of establishing affirmatively that

37. Id. Probably a reference to the summary judgment rule, N.M.R. Civ. P. 56.
38. Id. at 643, 409 P.2d at 495-96.
39. Id. at 644, 409 P.2d at 496.
40. Saul v. Roman Catholic Church, supra note 12, at 164, 402 P.2d at 50-51.
41. Restatement (Second) of Torts § 339, comment j at 203 (1965).
the child did have the capacity to comprehend and avoid the danger if he wants to raise the defense of contributory negligence and avoid application of the attractive nuisance doctrine. The plaintiff must only be sure his pleadings can meet the tests of § 339, Restatement of the Law of Torts.

To determine the probability of success of a wrongful death action against the United States, §339 will be applied to the potential facts of such a drowning in the Middle Rio Grande Project area, while comparing it to New Mexico case law (taking the sub-sections of §339 in order):

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if . . .

The basis of this rule is the ordinary negligence basis of a duty to exercise reasonable care to avoid inflicting foreseeable harm on another. The possessor has a duty to use reasonable care as to conditions against which a child may not be expected to protect himself. A child going onto, or into, a ditch owned by the Middle Rio Grande Conservancy District and operated by the Bureau of Reclamation is probably a trespasser, but even if he is not, application of §339 is not limited to trespassers. The same duty is owed by a possessor to a child licensee or invitee. When applying §339, the status of the child on the land makes no particular difference. One of the changes made in the introductory clause of §339 in the second edition to the Restatement to the Law of Torts was to drop the word "young" which preceded "child". This recognizes that the scope of its application is not limited only to young children. In New Mexico, recovery has even been allowed for the drowning of a fourteen-year-old boy. Thus, recovery for the drowning of an infant, aged one to seven, would seem to present no problem.

As in all negligence cases, the dangerous condition must have been the proximate cause of the physical harm. Finally, the introductory clause requires that the condition causing the injury be an artificial one. All of the irrigation ditches of the Middle Rio Grande Project are artificial.

42. Martínez v. C. R. Davis, supra note 12, at 477, 389 P.2d at 599.
44. Restatement (Second) of Torts §339, at 197 (1965).
45. Klaus v. Eden, supra note 13, at 375, 374 P.2d at 131. Restatement (Second) of Torts §339, comment b at 198 (1965).
46. Prosser, supra note 9, at 442-443.
47. Martínez v. C. R. Davis Co., supra note 12. This was not an attractive nuisance case; however, the principles of negligence law applied by the court were the same as would have been applied in an attractive nuisance case.
(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. . . . 48

Most decisions are agreed that unless a landowner knows of the attractive condition of his land, or of past trespasses by children, or is constructively chargeable with such knowledge because of the prolonged frequency of past trespasses, there is no liability. 49 In New Mexico, it is not required that a child actually be attracted to the premises by the artificial condition itself. 50 It is sufficient if the possessor knows or should know that children are likely to trespass upon a part of the land upon which there is a condition likely to be dangerous to them because of their immaturity. 51

The Bureau of Reclamation can certainly be charged with actual knowledge of the propensity of children and adults to enter onto their ditch rights-of-way and into their ditches. In fact, they have encouraged such intrusions by entering into an agreement with the New Mexico Department of Game and Fish to stock the ditches with fish. 52 They have been on actual notice of this propensity for many years through numerous news articles, information from their own ditch riders, the Foster v. United States litigation, and now the Bureau of Reclamation has taken official cognizance of the drownings by including detailed statistics on the drownings in its unpublished Middle Rio Grande Project Water Safety Study. 53

(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. . . . 54

A possessor would be liable only if he knows or has reason to know that a particular condition exists which is likely to be dangerous to trespassing children. Such knowledge would raise a duty to exercise reasonable care to keep that part of the land upon which he should recognize the likelihood of children trespassing free from those conditions which, though observable by adults, are not likely to be observed and appreciated by children. 55 Again, we are faced with the problem of determining what risks are obvious to children and

48. Restatement (Second) of Torts § 339(a) (1965).
49. Prosser, supra note 9, at 451.
50. McFall v. Shelley, supra note 11, at 392, 374 P.2d at 143.
51. Restatement (Second) of Torts § 339, comment e at 200 (1965).
53. Supra note 1. Prosser, supra note 6, at 451.
54. Restatement (Second) of Torts § 339, sub-section (b) at 197 (1965).
55. Id., comment i at 202.
should be fully appreciated by them. There could be no recovery if a child, who fully perceived the risks of drowning, went ahead and recklessly exposed himself to a danger of drowning. The New Mexico case law on this point has been sufficiently discussed previously in this Comment. However, it is important to add, even in states which still recognize a legal presumption that water hazards are within the capacity of young children to comprehend and avoid, there is still a general rule that if a possessor knows that children too young to appreciate such dangers are likely to trespass on his land, he may still be subject to liability under § 339. It is difficult to determine what constitutes an unreasonable danger to a child. New Mexico courts have held that three stacked 42-inch culvert pipes could be an unreasonable danger to a playing seven-year-old child who fell from the pipes, or that a hole in a school yard approximately two and one-half feet by three feet and about thirty inches deep was an unreasonable danger to a child of ten years if left open and uncovered without flares or barricades. Prosser suggests this test:

... the unreasonable character of the risk must be determined by weighing the probability that some harm will occur, and its gravity if it does occur, against the burden of taking precautions against it.

Judging from what the New Mexico supreme court has held to be an unreasonable danger, it is logical to assume that irrigation ditches of the Middle Rio Grande Project would qualify, especially after the drowning of twenty-two infants between the ages of one and seven in the last ten years. There are 1,188 miles of these ditches, many lying alongside heavily populated residential areas. The water flows at a velocity ranging from 2.0 to 3.5 feet per second, the ditches are from 4.2 feet to 8.0 feet in depth. The minimum base width of these ditches is 6 feet. A child, under the age of seven, who fell into the current of one of these ditches would almost inevitably be drowned. The argument is often made, as it was in the dissent to Martinez v. Louis Lyster General Contractor, Inc., that the duty of protecting children should fall on the parents. Within reason, this argument certainly has merit. But children are vital members of society and their physical welfare is

56. Id., comment j at 203.
57. Martinez v. Louis Lyster, supra note 12.
59. Prosser, supra note 9, at 452.
worthy of the law's protection. Accepting these principles as undeniably true, one commentator took this position on parental responsibility:

When he [the landowner] burdens his land with machinery, construction, and developments of many sorts as an incident to his activities which create conditions beyond the appreciation of children, instead of throwing further burdens on already heavily pressed parents, the government has said to the landowner in effect that since he creates these hazards in the community; since he should know that children will come in contact with them and will probably be hurt; since he can fence, guard, or otherwise render them harmless by relatively inexpensive means; since children can only be developed through the enjoyment of the freedom the community affords; and since parents cannot effectively protect them from the dangers attendant upon such activities, the landowner is required to use reasonable means to protect these young citizens from the risk of injury on his premises. . . .

An argument has also been made for extension of the attractive nuisance doctrine based upon twentieth century ideals of humanity and awareness of social problems occasioned by increasing density of population, gainful employment of mothers, and an increasingly greater number of dangerous artificial objects on populated land. This approach does not seem oppressively burdensome to the landowner. No one should advocate such a high level of landowner duty to trespassing children as to make a public irrigation system financially inoperable, but, on the other hand, greatly increased risks of death should require greatly increased expenditures for protection of young children.

(c) The children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and . . .

The rationale for distinguishing trespassing children from trespassing adults rests upon the recognition that children are not always capable of protecting themselves from danger. If a possessor knows that children are unlikely to realize the full extent of a danger, the possessor will still not be liable to a child who in fact discovers the condition and appreciates the full risk, but recklessly chooses to encounter it. The question in such a case is not what the

64. Restatement (Second) of Torts § 339(c) (1965).
65. Id., comment m at 204.
possessor may expect of the child, but what the child understands in fact.\textsuperscript{66}

The wording, "because of their youth," is liable to cause some difficulty.\textsuperscript{67} At what age should § 339 cease to apply to child trespassers? Prior to the enunciation of the rule on due care required of a minor in \textit{Barker v. City of Santa Fe}, the New Mexico supreme court found that a child of ten years did not appreciate the danger of stepping onto apparently solid-looking sludge floating on the top of a fenced sewage tank in which she drowned.\textsuperscript{68} Another child of eight years was held not to appreciate the danger of a propped-up burned out semi-trailer which fell on him.\textsuperscript{69} \textit{Contra}, a child of nine years was held to have been contributorily negligent for swimming in an artificial pond which was fenced and around which "no swimming" and "no trespassing" signs were posted.\textsuperscript{70} Since the above mentioned rule was adopted, children of seven, ten, and fourteen years have been held not to have appreciated the dangers of a shallow unprotected ditch excavation, stacked culvert pipes, and an improperly guarded sewage excavation filled with water.\textsuperscript{71} New Mexico appears committed to allowing the jury to decide the question posed in sub-section (c) according to the facts of the particular case. If this conclusion is correct, it would be very difficult for the Bureau of Reclamation to persuade a jury that the average child under seven years of age is capable of fully realizing the risk of drowning. A risk of drowning would probably never occur to the average infant of that age, especially if he were absorbed in the pursuit of fun.

\begin{itemize}
\item[(d)] the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk involved, and. . . \textsuperscript{72}
\end{itemize}

The comparison of the recognizable risk to children, with the utility to the possessor of maintaining the condition is important in determining whether a condition involves an unreasonable risk to children. The risk is not unreasonable unless it involves a grave risk which could be obviated without any serious interference with

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\item \textsuperscript{66} Prosser, \textit{supra} note 9, at 461. The reader should refer back to the discussion of the Martinez v. C.R. Davis Construction Company case for the rule by which conduct of a minor is measured in New Mexico. \textit{Supra} note 28.
\item \textsuperscript{67} Comment, 3 Natural Resources J. 193, 200 (1963).
\item \textsuperscript{68} Barker\textit{ v. City of Santa Fe}, \textit{supra} note 13.
\item \textsuperscript{69} Selby\textit{ v. Tolbert}, \textit{supra} note 13.
\item \textsuperscript{70} Mellas\textit{ v. Lowdermilk}, \textit{supra} note 13.
\item \textsuperscript{71} Cases cited \textit{supra} note 12.
\item \textsuperscript{72} Restatement (Second) of Torts § 339(d) (1965).
\end{itemize}
the possessor’s legitimate use of his land.\textsuperscript{73} The rationale behind this rule is the public’s interest in possessors’ free use of their land. However, in recognition of the perhaps greater public interest in preventing the waste of young human lives, the observations of one writer have obvious merit:

To require the removal of a great danger only in those cases in which such removal can be accomplished with "slight expense and little inconvenience" would seem somewhat extreme, for great dangers may render necessary great care, involving more than slight expense and little inconvenience.\textsuperscript{74}

The same author suggests the following tests for determining the utility to the possessor of maintaining the condition: first, the economic usefulness of the dangerous article; second, the cost of removal of the danger; third, the physical difficulties to be encountered in removing the danger; and fourth, the degree of interference of such removal with defendant’s business.\textsuperscript{76} In a situation where the public has a clear and definite interest in the maintenance of a condition, the utility of what a defendant is doing should not be divorced from the utility of the way it is done.\textsuperscript{76} For example, although few people would question the social utility of maintaining a public system of irrigation ditches, there must be ways to continue operation of such a system while also minimizing the danger to infants of drowning.

This sub-section has been referred to in most of New Mexico’s attractive nuisance cases, but in only one of those is there any discussion of it.\textsuperscript{77} That discussion speaks of the usefulness of natural and artificial bodies of water to New Mexico’s mining industry, to livestock men, to farmers, and to fruit growers. It notes that such bodies of water are practically impossible to render harmless, are indispensable for the maintenance of life and property, and then argues against extension of the attractive nuisance doctrine to cover such water hazards. Later cases rejected this inflexible approach of classifying certain conditions as attractive nuisances.\textsuperscript{78}

The economic and social utility provided by bodies of water is not to be denied, but the court gave short shrift in its opinion to the

\textsuperscript{73} \textit{Id.}, comment n at 205.
\textsuperscript{74} Bauer, \textit{The Degree of Danger and the Degree of Difficulty of Removal of the Danger in "Attractive Nuisance" Cases}, 18 Minn. L. Rev. 523, 538 (1934).
\textsuperscript{75} \textit{Id.} at 540.
\textsuperscript{76} Prosser, \textit{supra} note 9, at 464.
\textsuperscript{77} Mellas v. Lowdermilk, \textit{supra} note 8, at 369, 271 P.2d at 403.
\textsuperscript{78} \textit{Supra} note 12.
public interest of protecting the lives of infants. It would indeed be
difficult to render all water hazards harmless to older children, but
at least a reasonable effort should be made to render irrigation
ditches in highly populated areas harmless to infants. Fencing would
protect the younger children. Covering the ditches would probably
protect all children. If fences were just placed between populated
areas and ditches, leaving one side of the ditch open for service
vehicles, there would be little interference with the operation of the
irrigation system. Covering would not only act as a protective fea-
ture, it would also increase the efficiency of the system by reducing
water loss due to evaporation. An interview with the Area Engineer
of the Bureau of Reclamation also disclosed that velocities of water
could be regulated to prevent silt build-up in the ditches thereby
eliminating any necessity for cleaning out of the ditches at periodic
intervals.

Increased efficiency could well be attractive to taxpayers when
they consider the estimated value per acre-foot of water in the Río
Grande basin for agricultural uses as compared with recreational
and industrial uses.79

<table>
<thead>
<tr>
<th></th>
<th>Agricultural</th>
<th>Recreation</th>
<th>Industry</th>
</tr>
</thead>
<tbody>
<tr>
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<td>$44 to $51</td>
<td>$212 to $307</td>
<td>$3,040 to $3,989</td>
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A lopsided concern over the freedom of a possessor to use his
land as he sees fit seems to be prevalent throughout much of the
case commentary in this area. The freedom of land use of a home-
owner, whose backyard borders a large irrigation ditch is also im-
portant. The purchase of a home should entitle a person to a rea-
sonably safe and secure environment for the rearing of a family
without the nagging worry that a toddler will escape supervision
for a few minutes and be swept away in the muddy current.

During an interview, Mr. Rowland Fife, Area Engineer, Bureau
of Reclamation, estimated that the cost of fencing both sides of all
the ditches or of covering all of the ditches in the Middle Río
Grande Project could run as high as $15,000,000.00. That assumes,
of course, that fencing of all ditches is necessary to provide any
protection. The Bureau of Reclamation's own Water Safety Study
presents for consideration a plan for selective fencing or covering
on a priority basis with Class A hazard areas receiving first pri-

80. Supra note 1.
101 miles of the total 1,188 miles of ditches in the system, lie in class A hazard areas. The study defines the class A hazard classification as: "Those hazardous locations and structure sites readily accessible to the public from an adjacent or nearby city or school and subject to numerous and frequent visits from the public."

The Annual Report of the Board of Commissioners of the Middle Rio Grande Conservancy District, for the fiscal year ended August 31, 1968, shows total receipts of $2,207,310.02. The same report also reflects a surplus balance of $1,446,540.46. This latter figure apparently represents several years accumulation of excess receipts over disbursements. That portion of the report is reproduced below:

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<table>
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<tr>
<td>Balance August 31, 1967</td>
<td>$1,180,534.75</td>
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<tr>
<td>Add—Excess Receipts over Disbursements</td>
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<tr>
<td>Balance August 31, 1968</td>
<td>$1,446,540.46</td>
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Represented by the Following:

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<tr>
<th>Description</th>
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<tr>
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<td>$798,104.55</td>
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<td>Construction Fund</td>
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<td>$294,569.83</td>
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In view of the highly solvent financial condition of the District, any protestations to a jury that a selective fencing program would be financially burdensome should fall on unsympathetic ears. Based on the $15,000,000.00 cost estimate cited earlier, if only the areas of greatest hazard in the district, or according to the Water Safety Study, eight percent of the ditches were fenced or covered first, the cost of such a project, based on eight percent of $15,000,000.00, should be about $1,200,000.00. The implications of this reasoning should be clear. The necessary funds could be paid to the Bureau

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of Reclamation out of the surplus accounts by the Middle Rio Grande Conservancy District, and, in accord with their operation and maintenance contract, the Bureau of Reclamation could carry out a program of selective fencing or covering based on the findings of its Water Safety Study.

Legally, such an investment would appear to be prudent for both agencies. A reasonable man could be expected to enclose the areas where there is the highest risk of infant drownings first. A good faith effort to do what is financially possible in the way of enclosure would strengthen their position in the eyes of a court. They would have done all a reasonable man could have been expected to do under the circumstances to alleviate the danger to infants.

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.82

This sub-section was added to § 339 in the second edition of the Restatement of the Law of Torts. It expressly recognizes the previously implicit assumption that liability under this section is liability for negligence. A possessor of land is only liable to the trespassing child if he fails to conform to the conduct of a reasonable man under like circumstances. If he exercises all reasonable care to make a condition safe, or to protect the children, and still does not succeed, there is no liability.88 The circumstances, the location of the condition, and the age of the child are important in determining what is reasonable. The question is normally for a jury, unless there is a clear disproportion between the burden and the danger.84 The recognition that attractive nuisance liability is essentially liability for negligence is well established in New Mexico.85

Neither the Bureau of Reclamation, nor the Middle Rio Grande Conservancy District has taken affirmative action to protect infants from exposure to drowning in their ditches. One reason given for their inaction is that to accept any responsibility, for even partial enclosure of the ditches, would leave them liable to a flood of tort litigation. It is unconscionable to allow a complete abdication of responsibility on such grounds. The limitation of choices to either complete enclosure of every foot of every ditch or complete refusal to offer any safeguards, does not demonstrate a reasonable basis on which to formulate sound social policy. It should not be condoned. The courts have an opportunity in this instance to formulate a

82. Restatement (Second) of Torts § 339(e) (1965).
83. Id., comment e at 206.
84. Prosser, supra note 9, at 468.
85. Selby v. Tolbert, supra note 13.
flexible approach to this problem. They could require the Bureau of Reclamation to assume the duty of taking only reasonable precautions. The Bureau should not be penalized for good faith attempts to protect infants in high population areas where the per capita exposure to drowning is greatest. There should be no duty of enclosure in essentially rural areas where only intermittent exposure to drowning can be expected. Neither should the Bureau be held liable for drownings which occur because of conditions they are in good faith unable to prevent or control.

One tragic question lurks behind this entire discussion. How many infants must drown before a court will decide the risk is unreasonable and will require the danger to be alleviated? More specifically, how many young lives must be wasted before a court feels the expenditure of several million dollars on fencing or covering of ditches is justifiable? If the courts hold that such a large expenditure cannot be justified in this type of situation, then they will be ignoring a great social responsibility.

Twenty-two young lives have already been wasted. The sacrifices these young victims and their parents have made certainly justify at least a substantial preventive effort from the Bureau of Reclamation and the Middle Rio Grande Conservancy District. It appears, now, that a reasonable effort could be forced by the use of litigation.

JOHN M. EAVES

86. Of a total twenty-one children who drowned, thirteen, or sixty-one percent, drowned in the heavily populated Albuquerque Division. Drownings in the summer of 1969 are not included above. Supra note 1.