

June 1956

## Torts–Attractive Nuisance Doctrine

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### Recommended Citation

G. H. W., *Torts–Attractive Nuisance Doctrine*, 58 W. Va. L. Rev. (1956).

Available at: <https://researchrepository.wvu.edu/wvlr/vol58/iss4/23>

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sufficient on demurrer. The addition of these allegations converted the first count into a special count based upon two separate express or special contracts. *Held*, that "As the count fails to set forth the substance of these contracts, the consideration upon which each is based, the promise of the defendant, and the breach of each such contract, it is fatally defective and as it does not sufficiently state a cause of action in either general or special assumpsit, the demurrer to it should have been sustained". *Wright v. Standard Ultramarine and Color Co.*, 90 S.E.2d 459 (W. Va. 1955).

This decision should serve as a strong caveat to those who draft common counts. It shows that more than a mere surplusage may result when the draftsman does not stay within the bounds of common count requirements.

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TORTS--ATTRACTIVE NUISANCE DOCTRINE.—*D* refinery company installed a ramp from a river bank to its docking facility where barges with gasoline cargoes were moored for unloading. *D* knew that boys sometimes played on their riverside premises. *P*, 9 years old, and a group of companions noticed that a disconnected hose on a barge was dripping gasoline into the river. They boarded the barge and obtained some of the gasoline. Proceeding to their normal play area, they put some of the gasoline in a bottle and set fire to a fuse which they had made with wrapped paper. When the fuse burned down to the gasoline, the bottle burst open and burning gasoline spilled on the ground. *X*, 14 years old, deliberately threw gasoline on the fire while *P* was attempting to stamp it out, and the resultant explosion burned *P*'s leg. *P* sued *D* alleging that *D* maintained an "attractive nuisance" which was the proximate cause of his injury. The district court gave judgment for *P*.

On appeal, *held*, that West Virginia has repudiated the "attractive nuisance" doctrine. A less rigid doctrine has been employed which emphasizes ". . . that, in order for liability to exist, (1) the presence of the child at the dangerous instrumentality must have been either known or could have been reasonably anticipated; and (2) the danger of the instrumentality must be hidden, concealed or latent to one who is not familiar with its uses". Here, "there was nothing *latent* about the danger resulting from the gasoline flowing from the hose". Extraneous application of heat or flame

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was necessary before there would be any danger of inflammability and *P* and his companions knew that gasoline was highly inflammable "for they took it for the express purpose of making a fire". The court then concluded that there was insufficient evidence to take the case to the jury on the question of *D*'s negligence and reversed the district court's judgment. *Elk Refinery Co. v. Majher*, 227 F.2d 816 (4th Cir. 1955).

West Virginia's repudiation of the attractive nuisance doctrine was effected in the leading case of *Ritz v. City of Wheeling*, 45 W. Va. 262, 31 S.E. 993 (1898). Subsequent cases have been in accord. See, e.g., *Tiller v. Baisden*, 128 W. Va. 126, 35 S.E.2d 728 (1945).

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