> logic, and its inherent justice and humanity will never for a moment permit the act of a mother in saving her offspring, no matter how desperate it may have been, to be imputed to her as negligence, or at any time or in any manner used to her detriment.[19]

By making organ transplants a practical surgical procedure modern medicine has afforded man a new form of rescue. Most organ transplants, of course, will be necessary for reasons other than someone's negligence; but where as a proximate cause of defendant's negligence, an organ transplant is necessary to save a donee from imminent peril, injuries suffered as a result of donor's reasonable, voluntary act should not go unremedied because of the novelty of the rescue.

THOMAS H. VANN, JR.

TORTS—WRONGFUL DEATH—ATTRACTIVE NUISANCE DOCTRINE HELD APPLICABLE

The plaintiff, as special administrator of the estate of his deceased son, brought an action against the defendant landowner for the child's death. The child, while trespassing upon the defendant's land, had fallen from a ladder when he attempted to climb to the top of a 72-foot silo. The evidence adduced at the trial showed that the deceased, age 12, and a companion, age 14, were playing around the silo when deceased decided to climb to the top by means of the ladder affixed to the side. The purpose of the climb was to see a large number of pigeons roosting on top of the silo. Further evidence at the trial showed that these boys and many others had played on or around the silos before, and it was generally known to the landowner that the pigeons atop the silo attracted youngsters. The United States District Court for the District of South Dakota rendered judgment for the plaintiff, allowing a jury verdict of $15,482. On appeal, the Eighth Circuit Court of Appeals affirmed this decision holding that the evidence presented a question for the jury as to the landowner's negligence in maintaining such a condition on his land.[1] Recovery was allowed here under the South Dakota attractive nuisance doctrine, or more specifically under the RESTATEMENT OF TORTS section dealing with occupiers of land and followed by South Dakota courts.[2] This RESTATEMENT section is an attempt to set down guidelines for a uniform application of the at-

19. Walters v. Denver Consol. Elec. Light Co., 12 Colo. App. 145, ___, 54 P. 960, 962 (1898).
1. Cargill, Inc. v. Zimmer, 374 F.2d 924 (8th Cir. 1967).
2. Kuhn v. Watertown Cement Prod. Co., 75 S.D. 491, 68 N.W.2d 241 (1955); McLeod v. Tri-State Milling Co., 71 S.D. 362, 24 N.W.2d 485 (1946); Morris v. City of Britton, 66 S.D. 121, 279 N.W. 531 (1938). Recovery under attractive nuisance was denied in all these cases but the courts showed in all of them that South Dakota uses essentially the same elements and rationale as included in the RESTATEMENT (SECOND) OF TORTS §339 (1965). Actually, recovery was allowed in the *McLeod* case, but under a duty created by a city ordinance.

tractive nuisance doctrine.[3] Essentially it provides a test composed of five elements. If these are present ,a possessor of land is subject to liability for physical harm to trespassing children when they are harmed by an artificial condition on the land.[4]

The genesis of the attractive nuisance doctrine in the United States is found in the case of *Railroad Co. v. Stount*,[5] wherein a child who trespassed on railroad land and was injured while playing on a turntable[6] was allowed recovery from the railroad. As the doctrine gradually developed, the rationale evolved that the child had been lured to the land by some attractive but dangerous condition. This being the case, the defendant landowner was himself responsible for the trespass and therefore could not be allowed to use it against the child as a defense.[7] The child was viewed as having responded to an implied invitation to enter the premises.

The attractive nuisance doctrine has not had an easy growth but has been blasted many times as a "barefaced fiction and a piece of sentimental humanitarianism, founded on sympathy rather than law or logic, which imposed an undue burden upon landowners and industry by giving the jury a free hand to express its feelings for the injured child out of the defendant's pocketbook."[8] However, due most probably to the increased realization of the need in modern times to preserve the health and safety of children as opposed to the utility of landowners maintaining dangerous conditions on their lands, the vast majority of states adhere at least partially to the attractive nuisance doctrine.[9] In fact, only seven states still purport to reject this rule without qualification.[10]

3. It must be noted that there is a fundamental difference between the attractive nuisance doctrine as derived from case law and the RESTATEMENT rule. This difference is that attractive nuisance is based on an enticement or attraction of the infant to the land. This factor is now eliminated from the RESTATEMENT (SECOND) OF TORTS. See Morris v. City of Britton, 66 S.D. 121, 279 N.W. 531 (1938).
4. The basic elements in the RESTATEMENT section, summarized briefly, are: (A) The landowner knows or should know the children are coming onto his land; (B) the landowner knows or should know that the condition on his land involves an unreasonable risk of harm to such children; (C) the children, because of their youth, do not realize the danger; (D) the utility to the landowner of maintaining the condition and burden of eliminating the danger are slight as compared with the risk involved to the children; (E) the landowner fails to exercise reasonable care to eliminate the danger or otherwise protect the children.
5. 84 U.S. (17 Wall.) 657 (1873).
6. A revolvable platform such as a pivoted structure that supports a platform or track and revolves in a horizontal plane for turning wheeled vehicles such as locomotives. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2469 (1961).
7. *See* Keffe v. Milwaukee & St.P.R.R., 21 Minn. 207 (1875).
8. *See* W. PROSSER, TORTS §59, at 373 (3d ed. 1964). The classic denunciation of the attractive nuisance doctrine is found in Ryan v. Towar, 128 Mich. 463, 87 N.W. 644 (1901).
9. For two informative discussions on the development of the landowner's liability to trespassing children see: Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility in Tort*, 21 MICH. L. REV. 495 (1923); Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427 (1959).
10. *See* W. PROSSER, TORTS §59, at 373 (3d ed. 1964). These states appear to be Maine. Maryland, Massachusetts, New Hampshire, Ohio, Rhode Island, and Vermont. *But see* Labore v. Davison Constr. Co., 101 N.H. 123, 135 A.2d 591 (1957).

The attitude of the Georgia courts toward the attractive nuisance or "turntable" doctrine (as it is called in Georgia) can be characterized as one of strict construction. A widely recognized principle in Georgia law is that, generally, a property owner owes no duty to a child trespasser, except not to willfully or recklessly injure him.[11] In *Mandeville Mills v. Dale,* Judge Powell, speaking of trespassers to land, observed that:

> [L]iability arises only where the injury has been occasioned by the willful and wanton negligence of the proprietor or owner. No duty of anticipating his [the trespasser's] presence is imposed; and . . . no duty arises of keeping the usual condition of the premises up to any given standard of safety, except that they must not contain pit-falls, man-traps, and things of that character.[12]

Georgia accepted the "turntable" tenet at a very early date in the case of *Ferguson v. Columbus & Rome R.R.*[13] Here a minor child actually injured while playing on a railroad turntable was allowed recovery on the theory that he was attracted and allured to the dangerous instrumentality. The Georgia courts, however, have been loathe to extend the doctrine as far as the majority of states, usually denying recovery for a trespassing child's injuries or death unless the case falls squarely within the rule of *Ferguson.* Demonstrative of the limitations which Georgia courts place upon the "turntable" doctrine are the words of Judge Bell in the case of *Martin v. Seaboard Airline R.R.:*

> [B]oth the Supreme Court of Georgia and the Georgia Court of Appeals have consistently through the years limited the scope of operation of the "turntable" doctrine both by their statements of policy and their decisions on facts. The Georgia courts, although applying this doctrine, have restricted its application to situations in which the dangerous instrumentality must be one of actual and compelling attraction for children.[14]

Further evidence of Georgia's limited application of the "turntable" doctrine is given in a brief review of some of the cases.[15] In the case of *Southern Cotton Oil Co. v. Pierce*[16] the defendant maintained a seedhouse, the doors of which were kept open, making the place attractive to children. The Supreme Court of Georgia denied recovery for a child who was attracted to the seedhouse and upon entering was injured by a conveyor which ran between the seedhouse and an adjoining building. In the *Pierce* case the court referred to their opinion in *Savannah, Fla. & W. Ry.*

11. Atlantic Coast Line R.R. v. O'Neal, 180 Ga. 153, 178 S.E. 451 (1934); Butler v. Brogdon, 110 Ga. App. 352, 138 S.E.2d 604 (1964); Cook v. Southern Ry., 53 Ga. App. 723, 187 S.E. 274 (1936).
12. 2 Ga. App. 607, 609, 58 S.E. 1060, 1061 (1907).
13. 77 Ga. 102 (1886).
14. 101 Ga. App. 819, 822, 115 S.E.2d 248, 251 (1960).
15. Aside from the cases, the statutory basis in Georgia for the "turntable" doctrine is found in GA. CODE ANN. §105-401 (1956 Rev.).
16. 145 Ga. 130, 88 S.E. 672 (1916).

v. Beavers[17] which held that the "turntable" doctrine would not be extended in Georgia past the actual situation of a child injured on a railroad turntable as in the *Ferguson* case. More recently, in the case of *Hornsby v. Henry*,[18] the Court of Appeals of Georgia decided not to extend the doctrine to allow recovery for the death of a child killed as he played with companions on an abandoned gasoline truck. It appeared that while playing on the truck one of the boys had struck a match exploding the gasoline and killing the child. Similarly, recovery under the "turntable" doctrine has been denied where the instrumentality on or condition of the land causing the child's injury was: an unguarded and alluring excavation;[19] a moving freight car upon a railroad track;[20] a two-foot deep drain constructed for the purpose of carrying off surface water;[21] a bannister on the second floor of a movie theater;[22] a pond or other water hazard;[23] an unguarded freight elevator[24] and many other examples.[25]

Even though limited in application, it must be re-emphasized that the Georgia courts do recognize the "turntable" principle. In the case of *Atlantic Coast Line Railroad Co. v. O'Neal* Justice Hutcheson reflected the attitudes of Georgia courts on the definition of attractive nuisance when he observed:

> An attractive nuisance is maintained where an owner keeps premises in such a state or condition as to lure and attract children to play upon or around some dangerous instrumentality; and of course, where such a state of facts exists, the owner or creator of such "attractive nuisance" owes a higher measure of duty to the public generally than it does when this principle is not applicable.[26]

The case of *Starland Dairies, Inc. v. Evans*[27] intimates that a horse-drawn milk wagon might be considered an attractive nuisance so as to fall under the Georgia "turntable" doctrine. However, the court found here that the defendant was liable because the injured child was a licensee, thus avoiding the question of recovery under the "turntable" principle had the child been a mere trespasser attracted to the milk wagon. *Southern Bell Telephone & Telegraph Co. v. Brackin*, while recognizing that the "turntable" principle is utilized in Georgia, determined that it only comprehends instrumentalities "inherently dangerous, as well as attractive, to the finder,

17. 113 Ga. 398, 39 S.E. 82 (1901).
18. 68 Ga. App. 171, 22 S.E.2d 326 (1942).
19. Seaboard Airline Ry. v. Young, 20 Ga. App. 291, 93 S.E. 29 (1917).
20. Underwood v. Western & A. R.R., 105 Ga. 48, 31 S.E. 123 (1898).
21. City of Rome v. Cheney, 114 Ga. 194, 39 S.E. 933 (1901).
22. Augusta Amusements, Inc. v. Powell, 93 Ga. App. 752, 92 S.E.2d 720 (1956).
23. Fickling v. City Council of Augusta, 110 Ga. App. 330, 138 S.E.2d 437 (1964); McCall v. McCallie, 48 Ga. App. 99, 171 S.E. 843 (1933).
24. Haley Motor Co. v. Boynton, 40 Ga. App. 675, 150 S.E. 862 (1929).
25. *See, e.g.*, Anderson v. B. F. Goodrich Co., 103 Ga. App. 453, 119 S.E.2d 603 (1961); Sewell v. City of Atlanta, 45 Ga. App. 166, 164 S.E. 70 (1932).
26. 180 Ga. 153, 154, 178 S.E. 451, 451 (1934).
27. 105 Ga. App. 813, 125 S.E.2d 682 (1962).

such as weapons, explosives, turntables, or objects of that type, which are not commonplace."[28] It is of interest to note that Georgia has allowed recovery under "turntable" doctrine rationale in several cases where a child was attracted to and injured by dynamite or other explosives which had been left exposed and unguarded.[29]

It should be apparent from the foregoing materials and cases that the attractive nuisance or "turntable" concept is narrowly construed in Georgia. In summary, for the trespassing child to recover for injury, it appears that the instrumentality by which he is injured must be of actual and compelling attraction to the child[30] and be of an inherently dangerous character.[31] Also, the landowner must know or have reason to know of the childrens' presence on or near the injury-producing object[32] and should know that it creates an unreasonable risk of harm to the children of which they may not be cognizant by reason of their youth.[33] It is evident that the great majority of Georgia cases decided on this issue have not fallen within these strictly construed criteria.

It should be pointed out that had the principal case[34] been litigated in Georgia, the conclusion is almost inescapable that recovery would have been denied. Whether this would be an equitable and fair decision of the case in Georgia is only a matter of speculation. Obviously, it would not have been in South Dakota. This writer is in no way advocating a complete re-determination of the standards to be used in deciding Georgia cases under the "turntable" principle. However, due to the rigid adherence to the doctrinal standards in Georgia thus far, for recovery to be obtained it would be necessary for the child who is enticed onto another's premises and then injured, to be very careful to select an attractive and injury-producing instrumentality which fell within the confines of our strict doctrine. This, of course, would be absurd. As many legal problems tend to be, this is a problem of the balancing of interests. There must be a compromise between the legitimate interest of landowners to use their land for their own purposes with reasonable freedom and the interest of society in protecting immature children from unrealized danger. Some relaxation of the standards would appear to be necessary.

CARL C. JONES, III

28. 215 Ga. 225, 109 S.E.2d 782 (1959).
29. *See, e.g.*, Lee v. Georgia Forest Prod. Co., 44 Ga. App. 850, 163 S.E. 267 (1932); Wallace v. Matthewson, 143 Ga. 236, 84 S.E. 450 (1915).
30. Martin v. Seaboard Airline R.R., 101 Ga. App. 819, 115 S.E.2d 248 (1960). It is interesting to note that this requisite has been deleted in the RESTATEMENT (SECOND) OF TORTS §339 (1965).
31. Roach v. Dozier, 97 Ga. App. 568, 103 S.E.2d 691 (1958).
32. Starland Dairies, Inc. v. Evans, 105 Ga. App. 813, 125 S.E.2d 682 (1962)
33. Fickling v. City Council of Augusta, 110 Ga. App. 330, 138 S.E.2d 437 (1964).
34. Cargill, Inc. v. Zimmer, 374 F.2d 924 (8th Cir. 1967).