

## Can A Landlord Be Held Liable For A Child Drowning?

In order to establish the claim for negligence against a landlord, the party bringing the suit must show:

1. The existence of a duty recognized by the law, which requires the landlord to conform to a certain standard of conduct;
2. A breach of that duty;
3. A causal connection between the breach and the injury, and;
4. Actual injuries or damages.

The nature of a landlord's duty to the tenant was set forth by the Arizona Supreme Court in *Cummings v. Prarter* (1963) where it was stated:

"The landlord is under a duty of ordinary care to inspect the premises when he has reason to suspect defects existing at the time of the taking of the tenancy and to either repair them or to warn the tenant of their existence. In other words, he is under the duty to take those precautions for the safety of tenant as would be taken by a reasonably prudent man under similar circumstances."

In *McCloud v. Newcomer*, the Court of Appeals was presented with the question of the landlord's duty to the child of a tenant, that being a two-year-old who suffered severe brain damage in an unfenced pool at the leased premises. While the lease did not specifically identify the two-year-old as an occupant or tenant under the lease, the Court found that he was entitled to occupy the house and was owed the same duty as the named tenant under the lease. The Court characterized the landlord's duty as:

"To exercise such care as a reasonably prudent person would exercise towards children under similar circumstances, those circumstances being the presence of an unfenced pool in the backyard of a house rented to a family with small children."

In characterizing the duty of the landlord in this case, the Court then went on to examine whether the duty was breached, in that, whether the swimming pool in and of itself constitutes an unreasonably dangerous condition. In order to examine this question, the Court found that all relevant circumstances including the landlord's awareness of the child's age and the attendant risks were considerations that were appropriate. This is not a determination that is made by the Court in favor of either the landlord or the tenant, because it is a determination that must be made by the trier of fact, namely the jury to determine whether the unfenced condition of the swimming pool was unreasonably dangerous or not in these circumstances.

The landlord in *McCloud v. Newcomer* did argue that whenever a parent with children rents a residence, it is solely the parents' responsibility to ensure the safety of the children from obvious danger and not that of the landlord. The Court specifically rejected this position and stated that:

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"The mere fact that a child resides with parents will not relieve a landlord from his or her duty... in the case of 'open and obvious' dangers to children too young to realize them, however, the landlord and parents may agree that the parents will assume the full duty of making those repairs or taking the proper and realistic measures which will protect their children from a recognized specific hazard. Such would constitute a discharge of duty by a landlord..."

Consequently, the Court agreed that, the child's parents may agree to assume the duty owed by the landlord.

However, the Court refused to find that a pool unfenced from the rest of the backyard is unreasonably dangerous as a matter of law and found that the determination must be made upon the facts of each case with the overriding questions being:

whether or not the landlord satisfied the duty to take such precautions that a reasonably prudent landlord would take to protect young children residing on lease premises with an unfenced pool. It should be noted that even if the child's parents were somehow contributorily negligent to the resulting injury to the child, this type of negligence cannot be imputed to the child and will consequently not constitute a defense for the landlord.

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