

The Attractive Nuisance Doctrine

In most instances, a possessor of property is not liable to a trespasser for physical harm caused by the failure to exercise reasonable care to make the land reasonably safe. However where the trespasser is a child, the doctrine of attractive nuisance imposes on the possessor of land a duty to exercise reasonable care when certain special conditions exist. Arizona follows the rule that an attractive nuisance exists when the following conditions are present:

- 1) 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
- 2) 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 children and
- 3) The children, because of their youth, do not discover the condition or realize the risk involved in intermeddling with it in coming within the area made dangerous by it and
- 4) Utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved.

This formulation of the rule of attractive nuisance was first adopted in Arizona in *MacNeil vs Perkins* (1958), where the Court found the owners of a mining camp liable to two children (ages 13 and 11) who were injured due to a small concrete powder magazine with a two foot square steel door which contained dynamite caps, blasting caps and electrical detonators. This door was never padlocked by the owners of the mining camp and was at all times left open. The two boys who had visited the camp proceeded to take a box of dynamite caps from the powder magazine and heat them over a fire. They were seriously injured in the subsequent explosion.

In *Brown vs Arizona Public Service Company* (1990), our courts found the basis for liability against APS based upon the attractive nuisance doctrine. A 16 year old high school student had spotted a cat on top of a utility pole in a neighbor's yard. Attached to the pole was a vertical pipe held by iron supports approximately six inches out from the wooden pole. The boy climbed the pole in an effort to retrieve the cat as he had assumed that the pipe was there to make it easy to climb up the pole and had not seen any signs or fencing so as to warn him of any danger in climbing the pole. When he reached the top of the pole, he received electric shock, fell and sustained serious injuries. APS argued that the dangerous artificial condition causing the injury must be one which actually attracts the child once the child is on the property. The court rejected APS's interpretation of Arizona law and found that the doctrine of attractive nuisance does not require that a child be attracted by the same artificial condition that ultimately injured him. In this case, it was the cat and not the power pole itself that had attracted the boy to climb the pole.

A very recent case in Tennessee discussed the liability of an apartment complex to a 16 year old boy who was rendered paralyzed when he dove into a pool at an apartment complex. The boy was a good athlete and an experienced swimmer. He and two friends had climbed a fence surrounding a swimming pool located at an apartment complex as the pool was closed and the

gate to the fence was locked. The apartment complex had signs posted around the pool warning of no life guard being on duty and that the pool was for the use of tenants only. Neither the boy nor his friends were residents or guests of residents at the apartment complex. The boys had swam in the pool approximately four hours before the incident took place when he dove into the pool, struck the bottom, fractured two vertebrae and was rendered a quadriplegic. The apartment complex was sued by the boy and his mother and the jury awarded damages in the sum of \$400,000. The apartment complex appealed the jury verdict. The court found that the pool was not an attractive nuisance and presented no unusual or hidden danger as it did not create an unreasonable risk of death or serious bodily injury. One judge disagreed with the majority opinion of the court and felt that there was ample evidence for a jury to conclude that the apartment management company should be liable because there were numerous defects in the pool, including the following: inaccurate depth markers, no sign prohibiting diving, and an inadequate fence because the fence permitted persons to enter as there was an opening between a wall and the fence area. The dissenting judge pointed to the expert witnesses' testimony that because of these hidden hazards, a person like the boy who was injured may not have been able to assess the risk and consequently the doctrine of attractive nuisance should have been applied. A case with similar facts had not yet reached the Arizona courts, but we all must remain aware of the increased duty of care which exists with regard to children due to the application of the attractive nuisance doctrine.

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