

## The Attractive Nuisance Doctrine:

Safeguard Trespassing Children  
and Preserve Property Rights

by Shannon Eckner

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## Who has a right to enter someone else's property?

Under conventional theories of liability, the duty of care owed by a landowner to an entrant on his property is based on the common-law categories of:

- *invitee* – highest duty of care
- *licensee* – no special duty of care
- *trespasser* – no duty of care

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- The only duty owed a trespasser is to refrain from "willful, wanton or reckless conduct which is likely to injure" the trespasser.
- To protect defenseless entrants, like children, when they become injured when trespassing, most states have adopted some version of the "attractive nuisance" doctrine.

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*Sioux City & Pacific Railroad v. Stout*

An owner of land could be liable for injuries to a child if the owner should have:

1. anticipated the presence of a child, and
2. failed to take reasonable measures to prevent a likely injury.

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*Stout* is based on a theory of foreseeability.

- "...when it was proved to the jury that boys [on several occasions] were at play upon the turntable...the defendant [i.e the railroad] should have anticipated that such would be the case."
- "...the jury would have reached the conclusion that the defendant [by not repairing the broken latch] had omitted the care and attention it ought to have given..."

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*Keffe v. Milwaukee & St. Paul Railway Co.:*

- Property owners should be liable for potentially harmful conditions that exist on private property because such conditions "entice" the natural curiosities of young children.

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***Keffe* is based on a theory of enticement or allurement**

- Liability was no longer based on 'foreseeability', but upon the 'legal fiction' that transforms a trespassing child into an invitee.
- "The defendant therefore knew that by leaving this turn-table unfastened and unguarded, it was not merely inviting young children to come upon the turn-table, but was holding out an allurement..."

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**Objection to *Keffe***

Because of a dislike for fictions, many jurisdictions then returned to the *Stout* Court's version of the attractive nuisance doctrine (i.e. one based on "foreseeability" rather than "enticement").

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***Second Restatement of Torts (1965):***

An owner of land is liable "if a trespassing child receives an injury due to an 'artificial condition' on the premises and the landowner knows or has reason to know the following:

- (1) that children are likely to trespass;
- (2) the condition will likely present a serious risk of danger to such children;
- (3) that children, because of their inexperience, do not realize the danger;
- (4) that the burden of removing the danger is minimal compared to the risk to children;
- (5) that the landowner does not take reasonable steps to eradicate the danger."

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Prior to 2001 **Ohio, Vermont, and Maryland** were the only states without some version of the “attractive nuisance” doctrine.

A deplorable event occurred in Ohio.

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### *Bennett v. Stanley (2001)*

- The plaintiffs (Bennett) rented a house next door to the defendants (Stanley).
- On Stanley's property was a pool described as "pond-like" filled with tadpoles, frogs, snakes, and other creatures.
- When the Stanley's moved in the pool was covered with a tarp and was fenced.
- After moving in, the Stanleys removed the tarp and fencing.
- Mr. Bennett arrived home to discover that his stepson had drowned in the Stanley's pool.
- Mrs. Bennett drowned also trying to rescue her son.
- Mr. Bennett instituted a "wrongful death" suit against the Stanleys.

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### What happened?

- The trial court found that Mrs. Bennett and the boy were trespassers.
- The appeals court upheld the decision.
- Mr. Bennett appealed the case to the Ohio Supreme Court.

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Why hadn't the Ohio Supreme court adopted previously some version of the "attractive nuisance" doctrine?

- To do so would saddle the property owners with the duty to be the insurers of all children's safety.
- This would unjustly impair property rights and it was deemed to be legally unfounded.

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### Did the Ohio Court change its mind?

- Because of societal changes in which "our use of our own property affects others more than it once did", one needed to protect "children in a changing world".
- The Ohio Court adopted the *Second Restatement's* version of the "attractive nuisance" doctrine—i.e. an owner of land is liable for the death or injury of a trespassing child, limited by the factors of foreseeability and reasonable care.
- The Court in fact went a step further and even extended the doctrine to adult rescuers injured or killed while attempting to assist children endangered by an attractive nuisance.

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That leaves Maryland and Virginia as the two remaining states with **no** version of "the attractive nuisance doctrine".

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