The Attractive Nuisance Doctrine:
Safeguard Trespassing Children and Preserve Property Rights
by Shannon Eckner

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

• 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.
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.

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…”

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.
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..."

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").

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."
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.

**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.

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.
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.

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.

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