



Extension FactSheet

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Landowner Liability for Trespassing Children: Ohio's New Attractive Nuisance Doctrine

Agricultural
Law
Series

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Introduction

Children often stray onto property without permission, attracted by an enticing condition such as a swimming pool, machinery, or an abandoned building. If a trespassing child suffers harm when drawn to an enticing condition, is the landowner liable? A new law in Ohio could allocate liability to the landowner, under certain circumstances. The “attractive nuisance doctrine” places a duty upon landowners to protect foreseeable child trespassers from dangerous conditions on the owner’s property.

This recent change in Ohio law creates new liability concerns for landowners. The following explains the attractive nuisance doctrine and suggests actions a landowner can take to limit potential harm to children from dangerous conditions on the property, and also limit the possibility of legal liability for such harm.

Background

Historically, a property owner owed no duty under Ohio law to protect unknown trespassers, including children, from dangerous conditions on the property. In recent years, most other states adopted laws that distinguished trespassing children from trespassing adults, placing a higher responsibility upon a landowner for child trespassers. The issue of liability for child trespassers arose many times in Ohio court cases, but our courts repeatedly refused to heighten a landowner’s duty for trespassing children.

The Ohio Supreme Court has the authority to adopt a new legal theory or rule, as long as it does not conflict with laws created by the Ohio legislature. In 2001, the Supreme Court decided to adopt the “attractive nuisance doctrine,” a different approach to landowner liability for trespassing children. Under the new law, a property owner could be liable, in some circumstances, for injuries to trespassing children. The premise of the attractive nuisance doctrine is that:

- Children cannot fully comprehend the dangers they encounter.
- A property owner who maintains dangerous conditions on the property and knows that children are likely to come onto the property has a heightened responsibility to those children.

In creating the new law, the Ohio Supreme Court reasoned that additional protection from dangerous conditions is necessary for children because people in Ohio now live more closely together than in the past, exposing children to more dangers. The attractive nuisance doctrine attempts to protect children from unknown dangers nearby, while continuing to recognize the rights of landowners to use their property within the limits of the law.

The Ohio Attractive Nuisance Doctrine Case

The case that brought the issue of attractive nuisance before the Ohio Supreme Court was *Bennett v. Stanley*, decided by the Ohio Supreme Court in June 2001. The case involved a drowning in an abandoned swimming pool at the Stanley residence. The pool had filled with about six feet of rainwater and had become pond-like. The pool was not enclosed with fencing, nor were there any warning or “no trespassing” signs posted. One of the Bennett children went to the pool to look for frogs, and fell into the pool and drowned. His mother also drowned in an apparent rescue attempt.

The Common Pleas Court heard the case and determined that the Stanleys were not responsible for their neighbors’ deaths, basing the decision upon the law at the time - that landowners were not responsible for harm to unknown trespassers. On appeal, the Court of Appeals agreed that the landowners were not responsible because Ohio law did not recognize a duty to protect trespassing children. The victims’ family appealed the case to the Ohio Supreme Court, which decided to change the status quo and adopt the attractive nuisance doctrine.

Liability Applies to the Possessor

The attractive nuisance doctrine applies to the “possessor” of the property. The possessor is the party that had authority and control over the property where the harm occurred, which could be the landowner, a renter or a leaseholder. Property includes both land and buildings. For simplicity, we use the term “landowner” hereafter to refer to the possessor of the property.

When Does the Attractive Nuisance Doctrine Apply?

The attractive nuisance doctrine creates limited circumstances under which a landowner could be liable for harm to trespassing children. It applies only when the harmed party can prove that increased liability upon the landowner is warranted. To establish liability, the harmed party must offer evidence of each element of the attractive nuisance doctrine:

1. The landowner knows or has reason to know that children are likely to trespass in the area of a dangerous artificial condition
2. The artificial condition poses an unreasonable risk of death or serious bodily harm to children
3. The children cannot discover the danger of the condition or realize the risk posed by the condition
4. The utility of the condition and the burden of eliminating the danger are slight compared with the risk posed to children
5. The possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children

Liability does not fall upon the landowner unless the harmed party proves that *all five* of the above elements existed. Since each element is based upon the subjective opinion of the judge or jury, both the harmed party and the landowner have the opportunity to state why the element did or did not exist. If the landowner can convince the judge or jury that just one condition did not exist, the harmed party cannot base its liability claim on the attractive nuisance doctrine. This legal mechanism ensures that the attractive nuisance doctrine does not impose automatic liability on the landowner; instead, it only imposes liability on the landowner who is irresponsible in managing his or her property.

What is an “attractive nuisance”?

The term “attractive nuisance” is a bit of a misnomer, but refers to *artificial conditions* on the property that are *dangerous yet attractive* to children. Obvious examples of attractive nuisance situations on farm property include:

- swimming pools
- chemicals and chemical storage areas
- grain bins
- manure lagoons
- water wells and cisterns
- heavy equipment
- machinery and tools
- gas and water tanks

Some dangers, such as an open fire, are thought to be so “obvious” that even young children are expected to understand the danger. The attractive nuisance doctrine does not apply to an “obvious” danger, if the child is aware of the danger. However, it is likely that a court will examine the dangerous condition and the individual child’s ability to comprehend the danger when deciding whether to apply the attractive nuisance doctrine.

Animals as Attractive Nuisances

Animals tend *not* to be considered attractive nuisances, particularly common domestic animals such as farm animals and pets. However, the more dangerous or exotic an animal is, the more responsibility the owner has to protect a trespassing child from the animal. In cases from other states, courts have stated that a vicious German Shepherd dog, a caged chimpanzee, and a horse may constitute an “attractive nuisance.”

Ponds as Attractive Nuisances

Although no Ohio courts have decided a case on the matter, other states have determined that man-made farm ponds, which merely duplicate the work of nature, are not generally thought to be “artificial” dangerous conditions. However, some states have found that ponds can be considered an attractive nuisance when there is an unusual condition or artificial feature in the pond that poses danger. Unknown, concealed or hidden dangers such as logs, debris or drains could qualify a pond as an attractive nuisance. Although not common, some courts have declared ponds with unusually steep banks to be an artificial dangerous condition.

Duty of the Land Owner Under the Attractive Nuisance Doctrine

Where a landowner maintains a dangerous artificial condition on the property and knows that children trespass near the condition, the landowner must take reasonable precautions to prevent trespassing children from potential harm. Reasonable precautions include:

- assessing all artificial conditions that create an unreasonable risk of injury to children
- determining if children are likely to trespass near the identified conditions
- taking steps to eliminate the dangerous condition or protect children from coming into contact with the condition

Where a landowner has taken reasonable precautions to protect trespassing children from dangerous artificial conditions on the property, the law considers the landowner as having met his or her legal duty, and liability will not accrue upon the landowner.

Child Trespassers and their Adult Rescuers

The attractive nuisance doctrine applies to adults in only one specific circumstance. If a child is in danger due to an attractive nuisance and an adult attempts to rescue the child, the attractive nuisance doctrine may hold the landowner responsible for the rescuer’s injuries in addition to the child’s injuries.

Avoiding an Attractive Nuisance Lawsuit

The property owner should regularly inspect his or her property to be aware of all dangerous artificial conditions that may exist on the property. Unnecessary dangerous conditions should be eliminated if possible.

Keeping children away from the dangerous condition is perhaps the most effective means of limiting liability. Exclusion can be accomplished by fencing, restricting access, and locking doors and gates. Signs can be helpful in limiting liability but the

landowner should not rely on them completely. Young children may not be able to comprehend the meaning of the sign, if they are able to read at all.

If the landowner has a necessary dangerous condition on the property, the landowner can consider the following steps to limit liability:

- Install rescue devices for conditions like ponds or manure lagoons, such as flotation devices, rope, and a long lightweight pole.
- Make sure all shields and protective devices are properly in place on machinery and equipment.
- Educate the parents of neighbor children on the dangers of the existing condition.
- Install alert devices near dangerous conditions, such as a telephone, megaphone, siren or emergency flashing light.
- Store dangerous machinery, equipment, or chemicals in locked buildings.

A landowner should document all actions taken to meet the legal duty required by the attractive nuisance doctrine. Maintain a record of property inspections, corrective measures, and protective actions. Take photographs or videotape the property. If an accident occurs, photograph the accident scene, obtain witness names and reports and document any other property conditions that could have affected the situation, such as weather.

Steps taken to limit liability can never be fool-proof. Therefore, the landowner should have liability insurance for the property and review the policy with the insurance agent to be sure all dangerous conditions are included in the policy.

Conclusion

While the attractive nuisance doctrine may hold landowners liable for harm to trespassing children, it does not automatically do so. The harmed party faces a substantial burden of proving that the five specific elements of the attractive nuisance doctrine existed when the injury occurred. A landowner can take precautions to help limit his or her liability by eliminating or restricting access to dangerous artificial conditions on the property.

References

Bennett v. Stanley, 92 Ohio St.3d 35 (2001)
Restatement of Torts, Second §339

Ohio State Bar Association, “*Law You Can Use – Landowner or Tenant Could be Responsible for Harm to Trespassing Children*”

OSU Extension Fact Sheet, “*Liability for Visitors to Farm Property*”, ALS-1002-2000

OSU Extension Fact Sheet, “*Ponds and Legal Liability in Ohio*”, ALS-1006-03

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