RAINWATER ACCUMULATED IN CLOSED CITY POOL RAISES ATTRACTIVE NUISANCE RISK

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The March 1992 law column entitled "Swimming Pool Not 'Attractive Nuisance' in Teen Trespassing Diving Injury," described a case in which a teenager was seriously injured in an apartment complex swimming pool after scaling a six-foot high fence to gain access. As noted in this article, "[t]here is a popular misconception that landowners will be liable for maintaining an 'attractive nuisance' when a teenage trespasser drowns or is seriously injured after gaining access to a closed swimming pool."

The attractive nuisance doctrine is not generally applicable to teenage trespassers. Further, a swimming pool does not ordinarily present the type of latent danger or "trap" situation which would impose landowner liability for a trespasser injury on the premises. In such situations, the landowner has no legal duty to make the premises "trespasser proof." Rather, any legal duty owed pursuant to the attractive nuisance doctrine would be satisfied by simply securing the premises to a degree which sufficiently denies access to child trespassers of "tender years." Within this context, "tender years" usually refers to child trespassers seven years of age or under.

The Latimer decision described herein presents such a situation in which the premises were allegedly not sufficiently secure to deny access to a 5 year-old trespasser. Specifically, a hole in a fence apparently allowed children to gain access to a closed swimming pool in which a significant amount of rainwater had accumulated. As noted above, "an ordinary swimming pool does not ordinarily present the type of latent danger or 'trap' situation which would impose landowner liability for a trespasser injury on the premises." On the other hand, the swimming pool in the Latimer case illustrates a rather commonplace situation which could constitute the type of "trap," particularly for children of tender years, which could trigger landowner liability for negligence or attractive nuisance liability.

Youthful Curiosity & Lack of Judgment

In the case of Latimer v. City of Clovis, 83 N.M. 610; 495 P.2d 788 (1972), plaintiff Robert Latimer brought a wrongful death action against the defendant City of Clovis after "Mack Allen Grayes, age 5, drowned after falling into water in a fenced swimming pool located in defendant's park." The facts of the case were as follows:

The park was across the street from where Mack lived with his mother, brothers and sister. The family had lived at this location for approximately five years. The park is open the entire year; the pool is open from June to September. A contractor, in connection with submitting a bid for construction work at the pool, inspected the pool on or about April 7, 1969. At the time of this inspection there was no collection of water any place within the pool area. On the accident date, April 18, 1969, water had collected in the deep end of the pool to a depth of slightly less than six feet. There is an "estimate" that the water had collected after a rain.

On the accident date, the mother, accompanied by her children, went to the park to play softball. She gave her sons permission to play on the swings. After playing on the
swings, monkey bars and see-saw, running some races and wrestling with one another, the boys' attention was directed to a hole in the fence around the pool.

The boys were: Mike Grayes, age 7, Mack and his twin brother Mark, and a friend named Gregory. Mike saw the hole in the fence and asked the other boys if they wanted to come into the pool with him. They went through the hole in the fence. They went down into the dry portion of the pool, threw rocks into the water in the deep end and played around the edge of the pool before Mack fell in. The estimated time from entry into the pool area until Mack's fall is ten minutes.

The estimated distance from the pool to where the mother was playing softball varies from 50 feet to one-half block. The pool area was visible from where the mother was playing softball. The mother could have seen the boys enter the pool area if she had kept an eye on them.

The Grayes children had been specifically warned about the hazards of water. According to the mother, they knew or should have known of the dangers related to water. The mother had told Mike not to go into the pool area when it was closed. She had warned Mack to stay away from the pool; that the water was not safe.

Mike had seen other, and older, children climb the fence and go into the pool area, but the time and date of this observation is not clear. On the day of the accident, the mother did not know the boys had entered the pool area, and Mike had forgotten he wasn't supposed to be in the pool area. According to the grandfather, he had explained the danger of water but Mack, the deceased, "wasn't aware of it because he was too young;" he had no knowledge of danger.

There is nothing indicating that prior to April 18, 1969, anyone knew that water had collected in the deep end of the pool. The boys saw the water after entering through the hole in the fence. The affidavit of defendant's superintendent of parks states that he is in charge of the upkeep and maintenance of the park and pool; that he had been in and around the park pursuant to his duties as superintendent and was unaware that water had collected in the deep portion of the pool until subsequent to the drowning.

There is nothing indicating how long the hole had existed in the fence. The grandfather characterized the hole in the fence as a three foot opening and stated that anybody that had been there should have seen the opening. The mother and Mike stated they were unaware of the hole prior to the accident. The park superintendent made no statement in his affidavit concerning the hole. There is nothing in the record indicating either knowledge or lack of knowledge on the part of the City concerning the hole.

The trial court granted the City's motion for summary judgment. In the opinion of the trial court, there was no evidence of negligence on the part of the City and "no liability under the doctrine of attractive nuisance." Specifically, the trial court found that "the decedent and his parents had assumed the risk of drowning under the circumstances of this case." Latimer appealed.

The primary issue on appeal was whether the facts of this case could establish liability under the doctrine of attractive nuisance. As described by the appeals court, the three elements of the doctrine of
attrACTIVE NUISANCE WERE AS FOLLOwING:

1. The place where the condition is maintained is one upon which the possessor knows or should know that children are likely to trespass.

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.

3. The children, because of their youth, do not discover the condition or realize the risk involved in intermeddling in it or coming within the area made dangerous by it.

The City maintained that "the attractive nuisance doctrine does not apply where the hazard is patent; that there must be a hidden or unusual element of danger." Specifically, under the circumstances of this case, the City contended that "waters embody perils that are deemed obvious to children of the tenderest years." The appeals court, however, found that the above stated facts were sufficient to support "a justifiable case for the application of the attractive nuisance doctrine."

In order to discover whether there is any condition which will be likely to harm trespassing children... involving unreasonable risks... the test of foreseeability of harm to a child under the particular circumstances is the crucial consideration. If the water hazard in this case was not an unreasonable risk as a matter of law, certainly a factual question exists concerning that risk...

Whether the maintenance of a specific condition can give rise to liability for harm to trespassing children must necessarily turn on the facts of the particular case... The attraction may outweigh the awareness of the hazard, even when the child has been warned about the hazard. The doctrine of attractive nuisance is a recognition of the habits and characteristics of young children - their natural curiosity and lack of judgment.

The fact that warnings had been given does not eliminate the question of whether there was a realization of the risk. Even though cautioned... by his parent, the natural attraction of the object and its condition outweighed the direction of the parent in the mind of the child... Although warnings had been given, Mike stated that he had forgotten he wasn't supposed to go in the pool area. Further, the grandfather stated that Mack, the deceased, didn't know of the danger because he was too young. A factual issue existed as to the deceased's appreciation of the risk...

In addition, the appeals court found that there was sufficient evidence for a jury to conclude that the City should have known about the water in the pool and realized that it posed an unreasonable risk of death or serious bodily harm to children.

The issue is whether the City made a showing that it did not know or should not have known about the water in the pool. The City's showing is that no water was in the pool on or about April 7th, that almost six feet of water was in the deep end of the pool on April 18th and an "estimate" that the water collected after a rain. The superintendent in charge of upkeep and maintenance of the pool states he was unaware of the water prior
to the accident. This is an affirmative indication of lack of knowledge by the City. It is not a showing that the City should not have known about the water since the superintendent states that he was in and around the park pursuant to his duties. Those duties included maintenance of the pool. There is a factual issue as to whether the City should have known about the water in the pool.

As a result, the appeals court concluded that "the trial court erred in granting summary judgment on the basis there was no liability under the attractive nuisance doctrine."

The appeals court then considered whether there any evidence of negligence under the circumstances of this case. According to the appeals court, "[t]here is really nothing different in the so-called law of attractive nuisance and the general law of negligence, except that involved is a recognition of the habits and characteristics of very young children."

"Negligence" encompasses within its meaning the concepts of foreseeability of harm to the person injured and of the duty to use ordinary care... Where the circumstances provide a factual basis for application of the [attractive nuisance] doctrine then a higher degree of care is required to be exercised in order that young children may not be injured or killed by property or instrumentalities which they should not approach or become involved with. This "higher duty" requirement is simply this: As the danger that should reasonably be foreseen increases, so the amount of care required also increases. Thus, the attractive nuisance doctrine encompasses the same concepts of "foreseeability" and "duty" that are the basis of the general law of negligence.

Applying these principles to the facts of the case, the appeals court found sufficient evidence to indicate that the collected water in the City's pool posed a foreseeable risk of harm.

A municipality may be negligent if it has actual or constructive knowledge of the condition causing injury. Thus, the City may be negligent if it knew or should have known of the water hazard in this case. In discussing the elements of the attractive nuisance doctrine, we held that... [sufficient evidence existed for a jury to find that the City should] have known of the water collected in the pool and... [should] have known of the likelihood of children to trespass....

Accordingly, the appeals court found that sufficient evidence existed for a jury to find that the City could reasonably foresee that trespassing children might drown in a closed swimming pool filled with accumulated rainwater. The appeals court, therefore, found that the trial court had erred in granting summary judgment to the City on the basis that "no evidence of negligence on the part of the City."

Similarly, the appeals court found that the trial court had erred in finding that the decedent had assumed the risk of drowning and was guilty of contributory negligence in this instance.

In discussing the elements of the attractive nuisance doctrine, we held that defendant failed to show that Mack, age 5, realized the risk involved. In so holding we referred to the statement of the grandfather that Mack did not know of the danger because he was too young. For assumption of risk to apply, Mack must have known of the dangerous situation...
New Mexico Uniform Jury Instructions limit the question of ordinary care on the part of a child to those seven years of age or older, but presume a child under seven years of age is incapable of contributory negligence. On the basis of the foregoing, we are of the opinion that the five year old decedent could not be contributorily negligent as a matter of law.

As noted by the appeals court, the City had maintained that "the mother was negligent because she was playing softball, forgot to watch out for her children and failed to exercise reasonable parental care." In addition, the City claimed that "the father was negligent because he abandoned his family and failed to render any type of parental control over the decedent." The appeals court disagreed and concluded that the trial court had erred in granting the City's motion for summary judgment on the basis that "the parents were negligent and their negligence was the proximate cause of the death."

To be negligent, each of the parents must have failed to act as a reasonably prudent person in the exercise of ordinary care. Ordinary care is a relative term; it depends upon the circumstances... [E]ven if either of the parents was negligent, reasonable minds could differ as to whether such negligence was the proximate cause of the death. Here, on the showing in the record, reasonable minds could differ on the question of proximate cause.

In addition, the appeals court found the doctrine of assumption of risk was inapplicable because the City had failed to show that either of the parents knew of the water hazard." Since assumption of risk involves a voluntary encounter with a known danger, the appeals court found the parents' lack of knowledge was "sufficient to prevent application of the doctrine of assumption of risk." Accordingly, the appeals court found that the trial court "erred in granting summary judgment on the basis that the parents assumed the risk."

The appeals court, therefore, reversed the summary judgment in favor of the City and remanded (i.e., sent back) this case to the trial court for a jury to consider Latimer's wrongful death claim against the City. Specifically, the appeals court ordered further proceedings to determine the whether the decedent was a child trespasser of tender years within the context of attractive nuisance doctrine or landowner liability for negligence:

[W]e have not ruled that the City's liability is to be determined solely on the basis of the water in the pool. Consideration must be given to the fact, undisputed in this appeal, that there was a hole in the fence. Nor have we ruled on decedent's status; specifically, we have not ruled that decedent, playing in a public park, was or was not a trespasser when he entered through the hole in the fence...

In addition to the element of foreseeability there is the concept of duty. That duty depends on the status of Mack, the deceased. In discussing the attractive nuisance doctrine, we assumed that plaintiff's status was that of a trespasser. Our concern here is with decedent's status independent of the doctrine. Again, we assume, but do not decide, that decedent was a trespasser.

Generally speaking, a defendant owes no duty to an undiscovered trespasser except to refrain from wilfully or wantonly injuring the trespasser. Where, however, the trespasser is discovered or reasonably should have been anticipated, the duty is that of ordinary
care to prevent injury to the trespasser.

An owner owes no duty to a trespasser unless his presence on the premises is either known or from facts and circumstances should reasonably have been anticipated. However, the owner is under a duty not to willfully or wantonly injure a trespasser. If an owner knows or from facts known to him should reasonably anticipate the presence of a trespasser in a place of danger then the owner is under a duty to use ordinary care to prevent injury to him. Before the City's duty to decedent, as an assumed trespasser, can be decided, it must first be determined whether defendant should reasonably have anticipated the trespasser.