ATTRACTIVE NUISANCE DOCTRINE

Fact Pattern:

Homeowners purchased a home with a swimming pool. The pool was enclosed by fencing and a brick wall, and was covered by a tarp. Homeowners removed the tarp and fencing on two sides of the pool, and although they drained the pool, they allowed rainwater to collect in the pool to a depth of over six feet. The pool became a pond. It contained no ladders, the sides were slick with algae, and frogs and tadpoles lived in the pool. Plaintiff's family rented the house next to homeowners several months after homeowners purchased their house. Plaintiff was married and the father or stepfather of three young children. Homeowners were aware that children lived next door and evidence showed that there was some fencing between the properties, but with an eight-foot gap. One day, plaintiff arrived home to find his stepson, aged 5 and wife unconscious in homeowners' pool. The mother had drowned while trying to save her child. Both later died.

Question:

Whether property owners have a heightened duty of care to protect child trespassers from dangers upon their land, and does the duty of care extend to an adult who attempted to rescue a child from the attractive nuisance?

Rule

Synopsis Rule of Law: A possessor of land is subject to liability for physical harm to children trespassing caused by an artificial condition upon land if:

(a) the possessor knows or has reason to know that children are likely to trespass on that place-Likelihood of trespass;

(b) the possessor knows or has reason to know the condition will involve unreasonable risk of death or serious bodily harm to such children-Danger;

(c) because of their youth the children do not discover the condition or realize the risk involved-Children ignorant of risk

(d) the risk of harm to the children outweighs the possessor's utility of maintaining the condition and his burden of eliminating it-Utility;

(e) the possessor fails to exercise reasonable care to eliminate the danger or to otherwise protect the children-Lack of reasonable care.

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Discussion

To protect children who are unable to appreciate the risk of an object, dangerous animal, lumber pile, abandoned car, trampoline or swimming pool on the property of another, most states have adopted some version of the "attractive nuisance doctrine." Only Maryland and Virginia have no version of the attractive nuisance doctrine. Courts recognize that a child is usually less able to appreciate the dangers posed by strange and unsafe conditions than an adult and children trespass more frequently than adults and therefore danger to them is more foreseeable. Property

owners are liable for potentially harmful conditions that exist on private property because such conditions entice the natural curiosities of young children. In this case, the owner of the property with the pool knew that young children lived next door and knew that the pond-like conditions of the drained swimming pool posed an unreasonable risk to such children. Because of his youth, the child could not realize the risk of playing near the pool, the burden to the homeowner of eliminating the hazardous condition was slight compared to the risk, and the homeowner failed to use reasonable care to eliminate the danger.

While the attractive nuisance doctrine is not usually applicable to adults it may also be invoked by an adult seeking damages for his or her own injury if the injury was suffered in an attempt to rescue a child from a danger created by the defendant's negligence.

How young must a child be in order to gain the benefit of the rule? The child must be young enough that he or she is unable to appreciate the risk of the particular condition. This means that where the risk is a familiar one, such as drowning in a body of water, a relatively young child may be expected to understand the risk. A power cable, on the other hand, may pose a sophisticated danger that even a child of sixteen will not be expected to fully comprehend the risk of contact. A court will evaluate each child on a case by case basis.