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LIABILITY IN CALIFORNIA FOR THE DROWNING OF TRESPASSING CHILDREN

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It is now well established in California that there is no liability under the attractive nuisance doctrine for the death by drowning of a trespassing child when such drowning occurs in swimming pools, reservoirs, or other open, natural, artificial, or semi-artificial bodies of water.

The leading case is *Peters v. Bowman*,[1] wherein the plaintiff brought an action to recover damages for the death of his eleven-year-old son who drowned in a pond of water on a lot owned by the defendant in the City of San Francisco. Surface water from this lot flowed into a gully. The city, in the process of street grading, had erected an embankment which prevented the runoff from reaching the gully; the water therefore, during the rainy season, would back up and form the pond. Children were known to play upon the pond, and the defendant had at times driven them off. Plaintiff, too, had warned his son not to play there. The boy ignored his father's warnings and constructed a raft of railroad ties, which he launched upon the pond. He fell off and was drowned.

The plaintiff sought to bring the case within the attractive nuisance doctrine as exemplified by the "turntable cases" (where trespassing children were injured while playing on unsecured railway turntables), recognized at this time in California.[2] This doctrine as it has developed today contains five necessary elements. The contrivance must be: (1) artificial, (2) uncommon, (3) dangerous, (4) capable of being rendered safe without destroying its usefulness, and (5) of such a nature as to virtually constitute a trap into which children would be led on account of their ignorance and inexperience.[3] The court in the *Peters* case refused to extend this doctrine, reasoning that such ponds create no more attraction to children than natural streams or pools, cannot be rendered inaccessible by ordinary means (asserting that a fence is not the answer), and that the owner of a thing dangerous and attractive to children is not because of this liable for injury to them, for it is the duty of parents to warn their children of common dangers. In distinguishing the principal case from a turntable situation, Justice Beatty (upon a petition for a rehearing) said:

> "But, with respect to dangers specially created by act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different; and such is the rule of the turntable cases, the lumber pile cases, and others of similar character."[4]

This leads to the problem of ascertaining which fact-type situations will or will not give rise to liability for the drowning of a trespassing child.

[1] 115 Cal. 345, 47 Pac. 113 (1896).
[2] Barret v. Southern Pacific Co., 91 Cal. 296, 27 Pac. 666 (1891).
[3] Morse v. Douglas, 107 Cal. App. 196, 201, 290 Pac. 465, 467 (1930).
[4] 115 Cal. 356 (1896).

Open Artificial or Semi-Artificial Bodies of Water Created by Third Parties

There is no liability for the death by drowning of a trespassing child in open artificial or semi-artificial bodies of water created by third parties upon the land of the defendant. This is demonstrated by *Peters v. Bowman*,[5] discussed *supra*, where the City of San Francisco built the embankment that caused the rainwater to fill the defendant's land. This of itself takes the case out of the attractive nuisance doctrine, for it removes the element of artificiality. As the court noted,

> "Defendant did nothing to create the pond, or to prevent the water from flowing away; and so far as he is concerned, it may be considered a natural pond."[6]

The court then brings this case within the general rule that an owner or occupant of land is under no duty to keep his premises safe for trespassers, and that pools obviously are not in the nature of a trap or hidden danger so as to bring the facts within a recognized exception to the rule of non-duty toward trespassers.[7]

Open Artificial or Semi-Artificial Bodies of Water Created by Defendant Owner or Occupant

There is no liability where a trespassing child is drowned in an open artificial or semi-artificial body of water created by the defendant owner or occupant of the land. Defendant in *King v. Simons Brick Co.*[8] removed soil and clay from his property for the purpose of making bricks, leaving a large pit of some four acres, with two acres thereof having an average depth of 25 feet. He thereafter abandoned excavation on the lot. Water began to fill the irregular surface until, after five years, the deep portions were filled with water and the more shallow spots were covered with two to eighteen inches of water. The surface was muddy, and the depth could not therefore be ascertained. The pond thus created a constant lure to the children in the neighborhood who liked to play and wade about its edges. It was a trap in so far as the deep portions were concerned, but was of itself open and obvious. Plaintiff's 12-year-old son waded into the pit. After playing about the edges of the water, he suddenly stepped into a deep pocket and was drowned. The court held that the attractive nuisance doctrine did not extend to an "unguarded pool of water," and that it is the duty of parents to warn their children of such hazards. It should be noted that the defendant created the pit by excavation, but that the filling of said pit with water was due to *natural* causes.

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[5] See also Demmer v. City of Eureka, 78 Cal. App. 2d 708, 178 P.2d 472 (1947).
[6] 115 Cal. at 348, 47 Pac. at 113.
[7] See RESTATEMENT, TORTS § 335 (1934).
[8] 52 Cal. App. 2d 586, 126 P. 2d 627 (1942).

This leads us to the recent swimming pool cases, where defendants constructed entirely artificial bodies of water, thereby fulfilling a prime requisite of the attractive nuisance doctrine—*artificiality*.[9]

In *Lake v. Ferrer*,[10] plaintiff's two-year-old child, in company with a four-year-old, wandered onto defendant's residential property from the rear of plaintiff's property. They were apparently attracted by the shining upper portions of the swimming pool ladder, which was the only part of the pool structure visible from the plaintiff's premises. Plaintiff's child fell in and drowned while playing about the pool. The parents of the deceased child alleged that they did not know of the pool's existence, since it was concealed from their view. They also claimed that the defendants knew that a small child lived on the adjoining property, and that such a child would likely be attracted to the pool, and that the defendants did not even give a "neighborly warning." The plaintiff contended that a two-year-old child could not be charged with knowledge of the danger involved in playing about bodies of water, thus distinguishing *Peters v. Bowman* and earlier cases involving older children. Defendant replied that in the absence of sufficient evidence to invoke the attractive nuisance doctrine, age is of no matter, because such age would not give rise to liability where none would otherwise exist. The Court concurred with the defendant's viewpoint, citing the *Peters* case as the leading case wherein the turntable rule was held not to extend to an open pool of water. Hence age was held to be of no instance.

In *Wilford v. Little*,[11] where a 4½-year-old trespasser drowned in a neighbor's swimming pool by falling off the diving board, the court said: "It is our opinion however, that a swimming pool and diving board is not an attractive nuisance as that term is generally used."[12] The court then refers to the California Annotations to the Restatement of Torts[13] in support of that principle. In affirming judgment for the defendant, the court stated in effect that neglect of parental care will not change a situation which is not an attractive nuisance to older children into such a situation merely because a child of very tender years has no knowledge of the danger.

The Reservoir Cases

There is no liability where a child is drowned upon land generally accessible to the public whereon there is located a reservoir or similar body of water. Defendant maintained a public cemetery in San Francisco in an area surrounded by thoroughfares. The cemetery was no longer used as a burial ground, but was kept up in the nature of a park with the previous graves remaining. It was open from 7 a.m. to 5 p.m. and great numbers of children frequented the area. Rules for expected public behavior were posted at the entrance. There was an unenclosed reservoir a short distance from the en-

[9] See RESTATEMENT, TORTS § 339 (1934).
[10] 139 Cal. App. 2d 114, 293 P.2d 104 (1956).
[11] 144 Cal. App. 2d 477, 301 P.2d 282 (1956).
[12] *Id.* at ....., 301 P.2d at 283.
[13] See CALIF. ANNOT. TO RESTATEMENT, TORTS § 339(b) (1940).

trance, constructed of concrete extending about 12 inches above an earth embankment which sloped downward from the edge of the concrete. Children often played about the reservoir. One afternoon the eight-year-old son of the plaintiff fell in the water and was drowned.

Thus, in *Polk v. Laurel Hill Cemetery Assn.*,[14] the plaintiff alleged negligence on the part of defendant for not fencing the reservoir, and for failing to post a warning sign, while having full awareness of the fact that children played there. The court excused defendant from liability under the rule of duty towards users of thoroughfares for hazardous excavations abutting the highway since the reservoir was sufficiently clear of the road and of an open nature. On the latter basis the trap approach was also excluded.

The status of the child was established as being that of an invitee for the purpose of visiting a final resting place of the dead, and it was found that when the child romped and played he went beyond the purpose for which he had a privilege. Thus the only possibility for recovery was under the turntable doctrine. In answer to this contention the court said:

> "A pond of water, it may be conceded, is always attractive to youngsters, but the dangers connected with and inherent in a lake or pond of water, natural or artificial, are obvious to everybody—even to a child old enough to be permitted by its parents to go about and play unattended upon the streets or public parks. It would not conform to the dictates of common reason to say that a child of the age of eight years old, or even much younger, does not know and fully realize that a fall into a pond of water or a deep reservoir would result in injury to him, if not in his death."[15]

Attraction to Water by an Object on or Near the Water

The owner or occupant of land is not liable for the drowning of a trespassing child when the infant is attracted thereto by an object floating on the water or attached near the water. In *Reardon v. Spring Valley Water Co.*[16] the defendant was proprietor of an open reservoir in a residential neighborhood. A fence surrounded the reservoir but it was in need of repair, having many holes and gaps through which children could easily pass. A small boat floated alongside a little landing platform. Plaintiff's five-year-old son climbed into the boat, floated out onto the water, fell from the boat, and was drowned. The court asserted that the rule of the turntable cases does not apply to unguarded bodies of water and then asked the question: "Can it be that if he falls from a rowboat left upon the water by the owner of the property and is drowned a different legal principle is involved?"[17] The court answered by citing *Peters v. Bowman* and other cases where the

[14] 37 Cal. App. 624, 174 Pac. 414 (1918). See also Betts v. San Francisco, 108 Cal. App. 2d 701, 239 P.2d 456 (1952).

[15] 37 Cal. App. at 634, 174 Pac. at 418.

[16] 68 Cal. App. 13, 228 Pac. 406 (1924). See also Ward v. Oakley Co., 125 Cal. App. 2d 840, 271 P.2d 536 (1954).

[17] 68 Cal. App. at 18, 228 Pac. at 408.

child himself had constructed the object from which he fell while paddling about, and stated that there was no difference in the two situations. Judgment for the defendant was affirmed.

The Storm Drain Cases

Beeson v. City of Los Angeles[18] was the first of the storm drain cases. The city maintained an open storm drain about twenty feet deep and twenty feet wide. At a point in the drain there was a pit about seven feet deep and seven feet square, apparently caused by water erosion during the stormy season. Miscellaneous debris blocked the free flow of water, filling the hole and leaving about a foot of muddy water in the storm drain during the periods when there was no run-off from the city streets. Children were known to play in the storm drains of the city. Plaintiff's ten-year-old son was playing and wading in the drain when he fell into the pit and was drowned. Plaintiff sought to bring the accident within the attractive nuisance concept alleging that the city was negligent in not filling the hole which constituted a trap.

Quoting from *Morse v. Douglas*,[19] the court said that for a contrivance to be within the attractive nuisance approach it,

> "must be artificial, uncommon, as well as dangerous, and capable of being rendered safe with ease without destroying its usefulness, and of such a nature as to virtually constitute a trap into which children would be led on account of their ignorance and inexperience."[20]

Applying the facts to the requirements, the court said that the water around and in the hole, and the hole itself, were not created by the city but by the forces of nature. All the other elements of attractive nuisance were apparently present—a trap in an otherwise regulation storm drain; the city could have easily filled same; the hole was dangerous and perhaps uncommon within a storm drain; the storm drain was not guarded; and children were known to play therein. Thus on the precise point that the hole itself was a result of natural causes (despite the fact that the storm drain which made the hole possible was an artificial thing) the plaintiff was denied recovery. The importance of the element of artificiality will be brought more sharply into focus in the siphon case to be discussed under the next subsection of this article.

In *Melendez v. City of Los Angeles*,[21] another storm drain case with very similar fact circumstances, the court reached the same conclusion as regards natural causes creating the hole, but added the reasoning that the common knowledge of a ten-year-old as to the dangers inherent in bodies of water includes the fact that water running over a surface creates the probability that erosion will occur with the consequence of an uneven bottom.

[18] 115 Cal. App. 122, 300 Pac. 993 (1931).
[19] 107 Cal. App. 196, 290 Pac. 465 (1930).
[20] 115 Cal. App. at 127, 300 Pac. at 996.
[21] 8 Cal. 2d 741, 68 P.2d 971 (1937).

The Siphon Case

There may be liability where the water in which the trespassing child drowns attracts him thereto, but his drowning is directly caused by a man-made hidden trap. There is one case of this type in California. It has been termed the "siphon case." *Sanchez v. East Contra Costa Irrigation Co.*[22] appears on immediate perusal to be very similar to the storm drain cases in that the actual drowning was the direct result of a concealed trap beneath the water. In the storm drain cases the trap was a pit or hole; in the present case it was a siphon connecting an irrigation canal to a creek. There is one important difference—the siphon was man-made.

The defendant owned canals and ditches which flowed past roads and other obstructions. The Sanchez tragedy occurred at a spot where it was necessary to pass the canal water across a creek. A siphon was constructed to run from the bottom of the canal downward under the creek bed and up again on the other side. The opening into the siphon was about four feet in diameter and had no guard (such as a grate) covering it, nor was any warning sign posted in the vicinity. Plaintiff was an employee of the canal company who lived in company housing near the siphon with other families in the employ of defendant. Plaintiff's five-year-old son was playing with other children near the canal, as was their custom. The boy attempted to wet his handkerchief in the canal, which contained about three feet of muddy water, and in so doing slipped into the canal and then into the siphon which could be seen due to the discolored water. The body was recovered from about fifteen feet within the siphon.

It was admitted by the plaintiff that the defendant had no duty to guard the canal against trespassing children. However, the court decided that since the defendant knew children played about the canal, and knew that they might easily fall in, there was a duty to guard against this trap, which was *artificial* in its nature. The court said that the canal was the bait and the siphon the trap.

Luring Contrivance Attracts the Child to Water Which Is a Trap

The landowner may be liable where the water in which the child drowns is a trap, and the child is lured thereto by a contrivance particularly attractive to children of his age. In *Faylor v. Great Eastern Quicksilver Mining Co.*[23] defendant owned mining property enclosed by a barbed wire fence. There was an entrance gate with signs of "danger" and "no admittance" conspicuously posted, although children were known to cut across the property on their way to and from school, and to play there on Saturdays and Sundays. Evidence was introduced to show that the miners were warned to keep their children clear of the mine, and that plaintiff had so told his chil-

[22] 205 Cal. 515, 271 Pac. 1060 (1928).
[23] 45 Cal. App. 194, 187 Pac. 101 (1919).

dren, but that he did not know they played there. When the mine was not in operation (as over weekends) the small cars used to haul the ore from within the mine to the outside were left at the mine opening, unattended and unsecured. In a portion of the mine, called the "old tunnel," there had been a cave-in; consequently this section was no longer worked. A stope (an excavation from which ore has been removed) had previously been driven in the old tunnel to a depth of 500 feet, and covered with boards so that miners might cross. The stope was filled with water to the 150 foot level. Johnny Faylor, plaintiff's son, with his brothers, sisters, and another lad went to the premises on a Sunday to play with the little cars. With the assistance of a mine company employee (apparently off duty on this day) they pushed two of the cars into the main tunnel. There was no watchman, and the cars were not secured. Johnny pushed one into the recesses of the mine. He returned by the way of the old tunnel, but never reached the entrance to the mine. His body was subsequently recovered from the stope.

Plaintiff obtained a verdict that the cars, tunnel, and stope together were an attractive nuisance under the turntable rule. The appellate court affirmed and broadly stated the attractive nuisance rule as follows:

> "Those who place an attractive but dangerous contrivance in a place frequented by children, and knowing or having reason to believe, that children will be attracted to it, and subjected to injury thereby, owe the duty of exercising ordinary care to prevent such injury to them, because such persons are charged with knowledge of the fact that children are likely to be attracted thereto and are usually unable to foresee, comprehend, and avoid the danger into which they are thus knowingly allured."[24]

This court, like others, quoted *Peters v. Bowman* to show the elements necessary to the attractive nuisance idea in relation to the contrivance, i.e. that the thing must be artificial, uncommon, and in the nature of a trap and easily rendered safe wihout impairing its usefullness. As to the matters of attractiveness and the trap, the court likened the push cars and the tunnel to the bait, saying that the cars and tunnel presented a challenge of advenure to young children, and that the concealed stope was the trap hidden in the recesses of the old tunnel where the boys could be expected to wander in their exciting play.

In discussing whether proper care had been taken, whether the children were old enough to have anticipated the danger, and if decedent was contributorily negligent, the court declared that these were questions for the jury, and that there was sufficient evidence pro and con to reach the decision for the plaintiff.

Water Concealed from View Constituting a Trap

There may be liability where the water is concealed from view in a manner as to constitute a trap. Plaintiff, in *Blaylock v. Jensen*,[25] was a girl

[24] *Id.* at 199, 187 Pac. at 103.

[25] 44 Cal. App. 2d 850, 113 P.2d 256 (1941). See also Long v. Standard Oil Co., 92 Cal. App. 2d 455, 207 P.2d 837 (1949).

of about thirteen years who brought an action for injuries suffered by being mired in an oil sump on property in possession of the defendants. Plaintiff and friends were walking along a highway when they heard plaintiff's dog barking from the adjoining property. The children went onto the land and found that the dog could not extricate himself from what the plaintiff described as "just black with dirt and I could not tell what it was." Witnesses testified, "it looked brown" and it was "covered with sand and had black streaks on it." Plaintiff, intent on rescuing her dog, walked about ten feet onto the sump, and suddenly became mired, being unable to progress or retreat. She fell, and then lay on her side for several hours before being rescued. With the exception of her head and left arm she was completely submerged.

The court gave judgment for plaintiff, asserting that the decision could be upheld "under the general rule that a landowner may not construct or maintain a trap or pitfall into which he knows or has reason to believe that a trespasser will probably fall."[26] Nothing appears in the report as to the frequency of trespassing on the particular property, but since the land was but one mile from the town of Nipoma, and near a highway, it was probably not so remote from population as to make trespassing an infrequent occurrence, and therefore, within the above stated general rule. On the issue of contributory negligence the court decided that the age of the child should be considered, plus the fact that she had never seen this particular sump or, for that matter, any oil sump, and that it was not contributory negligence as a matter of law to attempt to rescue the dog unless the risk in so doing was "wanton and unreasonable." In passing, the court stated that the liability in such a case might well extend to injuries suffered by an adult under similar circumstances. The inference apparently is that while the general rule of liability to trespassers for hidden traps applies to all trespassers, the peculiar fact situation must be studied, for a child might not be chargeable with the same degree of knowledge concerning a particular hazard—i.e., what should be recognizable as a trap to an adult may not be so recognizable to a child. Thus if children were known to trespass, the standard of care might be higher. Oil, not water, formed the trap in the present case, but it can be seen that a pond of water too, might be so covered with scum or weeds as to be not recognizable for what it is except under close scrutiny.

Water Is in Nature of a Concealed Trap and in Close Proximity to a Thoroughfare

Malloy v. Hibernia Savings & Loan Society[27] was an early California case that never reached a final decision. Plaintiff's four-year-old son was drowned in defendant's cesspool, which was ten feet from a public street. Plaintiff alleged that defendant was negligent in leaving the cesspool unguarded after removing a fence and housing from over the pool. Defendant's

[26] 44 Cal. App. 2d at 852, 113 P.2d at 257.
[27] 3 Cal. Unrep. 76, 21 Pac. 525 (1889)

demurrer was sustained. Plaintiff appealed, contending that great caution is required of persons having dangerous works or excavations exposed near a public street. Appellee maintained that since the deceased was a trespasser, no such duty was owed. The appellate court reversed, holding that the complaint stated a cause of action.[28]

In a later case,[29] the court, in referring to the *Malloy* case, stated that the complaint would have been sufficient to warrant recovery had it been an adult rather than a child who had been killed.

Thus we have run the gamut of fact-type situations regarding the liability of a possessor of land for the death of a trespassing child by drowning. The matter as presented is well settled. However, there is one problem that looms continuously larger in the California picture—that of small children and the modern swimming pool. One need but drive leisurely through almost any of the California suburbs to see the mushrooming of swimming pools. Although these pools are still the exception rather than the rule, their number continues to increase. With this rapid growth of the swimming pool as an adjunct to the California home there is bound to be a corresponding increase of drowning tragedies, particularly where trespassing children of very tender years are concerned, who, escaping for a moment the eyes of their watchful mother, will wander across from adjoining property and fall into the shining water. This could be prevented. The answer lies in legislation which perhaps will be an outcome of repeated lawsuits on this precise subject. It will be noted that both the *Lake v. Ferrer* and *Wilford v. Little* cases occurred in 1956.

True, the courts say that a parent has a duty to guard such little children, but with residence on top of residence it is so simple for a child to quickly dash off while the parent is engaged in some momentary task. The child might get pricked by a rose bush or fall on some bricks, but it is only in a very unusual occurrence of this nature that death or serious bodily harm would result. However, if in that moment when the child strays away, he falls into a swimming pool, his death is an almost certain result.

In *Peters v. Bowman* the court noted that a fence around a body of water will not keep a child out—but the court was speaking in terms of active youth of at least the age of five or six years. A fence around the pool or around the property would certainly be effective to keep out children of such tender years as must still struggle to mount stairways. A statute requiring property owners to erect some substantial type of fence or hedge or other sufficient guard around the pool seems like a logical answer to the problem.

There is a related statute in the California Health and Safety Code,[30] the context of which follows:

> Every person owning land in fee simple or in possession thereof under lease or contract of sale who knowingly permits the existence on the premises of

[28] There are no further reports on this case.

[29] Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379 (1901).

[30] CALIF. HEALTH AND SAFETY CODE § 24400.

> any abandoned mining shaft, pit, well, septic tank, cesspool, or other abandoned excavation dangerous to persons legally on premises, *or dangerous to minors under the age of 12 years,* who fails to cover or fence securely any such abandoned excavation and keep it so protected, is guilty of a misdemeanor. (Emphasis added.)

This code section was enacted in 1939 and amended in 1949, and apparently there are no cases as yet in which liability was predicated thereon.[31] The issue was raised in *Ward v. Oakley Co.*,[32] but the "purported" liability thereunder was barred by the statute of limitations;[33] hence the question as to whether the failure to observe this act is negligence per se is apparently still an open question. With the exception of *King v. Simons Brick Co.*, the cases in this article to which the statute might be applicable on their fact situations occurred before its enactment. There was no mention of the statute in the *King* case.

An enactment of this type constructed particularly to apply to swimming pools would probably have the desired effect of making much less likely the drownings of the very young children who have no clear understanding of the hazards attendant to an unguarded body of water.

The California courts have established their precedent for nonliability where open, unguarded bodies of water are concerned. It is the duty of the legislature, therefore, to insure that the swimming pool drownings are not needlessly multiplied in the future, when a swimming pool will likely join the two car garage as typical of California homes.

[31] 41 WEST'S ANN. CALIF. CODES § 24400 (1955).
[32] 125 Cal. App. 2d 840, 271 P.2d 536 (1954).
[33] *Id.* at 851, 271 P.2d at 543.