Residential Swimming Pools and Attractive Nuisance in California

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By JOHN A. GORFINKEL*

The residential or "backyard" swimming pool is now a commonplace in California suburbia. What is the liability of the owner or possessor of the premises with respect to a trespassing child who drowns or is injured in such a pool? This problem, a special aspect of the broader area of the so-called "attractive nuisance doctrine,"¹ has been the subject of considerable litigation in California in recent years,² culminating in the decision of the supreme court in King v. Lennen³ on December 31, 1959.

King v. Lennen sets a new course for the California courts. In order to understand the significance of that decision and to chart the probable course of future decisions, it is necessary first to review the origins of the attractive nuisance doctrine and second to trace the development of the doctrine in California. In so doing, the principal area of attention will be the limited one of the applicability, in California, of attractive nuisance to pools, watercourses and other bodies of water; cases involving other hazards will be considered only to the extent they shed light on the principal subject.

Attractive Nuisance—Origins and Development

It was a fundamental principle of the common law that, unless there was some special circumstance or condition, the owner or possessor of land owed no duty to a trespasser to maintain his property in a safe condition.⁴ The trespasser took the property as he found it and if he was injured as a result of unsafe conditions, whether natural or

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¹ See Harper & James, Torts § 27.5 (1956); Prosser, Torts 438-45 (1955); Prosser, Trespassing Children, 47 Calif. L. Rev. 427 (1959).
⁴ See Restatement, Torts § 333 (1934); Prosser, Torts 432 (2d ed. 1955); Harper & James, Torts § 27.3 (1956). This is to be compared with the liability of the owner who deliberately set traps or pitfalls to catch trespassers. See Bird v. Holbrook, 4 Bing. 628, 130 Eng. Rep. 911 (1828); Prosser, Torts 94 (2d ed. 1955); Restatement, Torts § 84 (1934).

[ 38 ]
man made, that was his misfortune. The one special circumstance here relevant was the duty owed by the possessor to trespassing children.

In 1873, in the case of Sioux City and Pacific Railroad v. Stout, a railroad was held liable for injuries received by trespassing children while playing on a turntable on defendant's premises. As formulated in that case and developed through later decisions, the elements of the doctrine were:

(i) the condition creating the harm had to be an artificial one, created, constructed or maintained by the possessor of the land;

(ii) the injured person had to be a child of "tender years";

(iii) the child, for some reason, was excused or excluded from the disabilities imposed by law on adult trespassers;

(iv) the risk which caused the harm to the child was one which was not obvious or apparent to the child; and

(v) reasonable precautions were available to minimize or eliminate the risk without impairing the utility of the condition and the possessor had failed to take such precautions.

This doctrine, sometimes called the "turntable doctrine" from the mechanical contrivance that gave rise to it, soon acquired the name of "attractive nuisance." It has been suggested, as the origin of the latter term: "'Nuisance' because of a supposed analogy to conditions dangerous to children in the highway or otherwise outside of the premises; 'attractive' because it was thought essential that the child be allured onto the premises." Although the condition causing the injury need not be, and often is not, a nuisance, and although the entry of the child on the premises need not be, and often is not, due to the lure or attraction of the condition that caused the harm, the term "attractive nuisance" has persisted. Although that term has been the subject of much justified criticism, it has acquired a familiarity, through common usage by courts and lawyers; with full recognition of its inadequacies and the errors implicit in it, it will be used in this article as a con-

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5 84 U.S. (17 Wall.) 657 (1873).
6 The cases are collected in PROSSER, TORTS 438 (2d ed. 1955); HARPER & JAMES, TORTS § 27.5 (1956).
7 On "maintained" see PROSSER, TRESPASSING CHILDREN, 47 CAL. L. REV. 427, 447-448 (1959).
8 There has been an interesting extension, by analogy, to trespassing cattle. Liability has been imposed on railroads which have left hay, salt, or molasses on the right of way and attracted cattle to their doom. See Crafton v. Hannibal & St. Joseph R.R., 55 Mo. 580 (1874). The cattle cases are collected in 41 AMERICAN DIGEST, CENTURY EDITION, RAILROADS § 1404.
9 The matter of the age of the child is discussed infra in text of article.
10 PROSSER, TORTS 439 n.21 (2d ed. 1955).
venient, shorthand method of identifying the principle and the problem under consideration.

The reception accorded the attractive nuisance doctrine by the courts of the several states has varied. Some accepted it wholeheartedly, others grudgingly and within narrow limitations, and a few totally rejected it. It is part of the common law of California, but the application of the doctrine has been erratic and, at times, confusing.

Controversial Elements of the Doctrine

In its application, three elements of the doctrine have been the subject of controversy: the nature of the condition as artificial, the age of the child, and the role the condition or device must play as a "lure," enticing the child into the initial act of trespass or into the zone of danger.

Artificial Conditions

All the cases hold and the authorities concede that the doctrine has no application to natural conditions on the possessor's land and that the possessor is under no duty to rectify or take precautions with respect to such conditions. The condition or contrivance causing the harm must be an artificial one, created or maintained on the property. One of the greatest problem areas has been where the condition, although an artificial one, simulates or is comparable to a natural hazard. The courts have been uncertain in dealing with this situation. This is one of the principal sources of difficulty and confusion in the California cases and is fully considered later in this article.

Age of the Child

The attractive nuisance doctrine applies only to a child who, because of immaturity, either does not discover the dangerous condition or does not appreciate the risks involved in meddling with it. There is a consensus among the courts that no arbitrary age limit can be fixed, above which the doctrine is no longer applicable. Rather it is a question of fact in each case whether, with respect to the particular hazard, the child was too young to appreciate the risk involved.

11 See cases collected in Prosser, TORTS 439 (2d ed. 1955); Harper & James, TORTS § 27.5 at 1448 (1956).
14 See particularly cases cited Prosser, Trespassing Children, 47 CALIF. L. REV. 427, 444 nn.73-77 (1959). There is one special statute in California, section 24400 of the Health and Safety Code, which imposes an age limit of twelve years. That section pro-
The Condition or Contrivance as a "Lure"

The role that the harm causing condition must play in luring or enticing the child on to the premises has long been a subject of dispute. Some of the early cases stressed the requirement that the injury producing contrivance or condition had to lure or entice the child into committing the initial act of trespass which brought him on to the defendant's land. The common law rule that the possessor owed no duty to the trespasser was avoided by indulging in the fiction that the device "attracted" or "invited" the child on to the premises, excused his entry and changed his status from that of trespasser to something more akin to an invitee. If, however, the child were already a trespasser before he discovered the device or condition, the attractive nuisance doctrine was held inapplicable, since then the trespass could

vides, in part, that "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 any abandoned mining shaft, pit, . . . or other abandoned excavation dangerous to persons legally on the premises, or to minors under the age of twelve years, who fails to cover or fence securely any such dangerous abandoned excavation . . . is guilty of a misdemeanor."

The quoted provision was enacted by Cal. Stat. 1949, ch. 136, § 1, p. 366. An earlier act was limited to "abandoned mineshafts, pits or other abandoned excavations dangerous to passers-by or live stock." Cal. Stat. 1903, ch. 232, §§ 1-2, p. 283. Both the present section and its predecessor have received little construction. The 1903 act was construed as protecting only the passers-by on the highway who inadvertently strayed from the road; trespassers, whether child or adult, were not within its scope; see Flick v. Ducey & Attwood Rock Co., 70 Cal. App. 2d 70, 160 P.2d 569 (1945). The courts have never clearly decided whether section 24400 permits only a criminal prosecution, or whether it also gives rise to a civil action for injuries resulting from its violation. Two cases have assumed that it would give rise to a civil action, Schaffer v. Claremont Country Club, 168 Cal. App. 2d 351, 336 P.2d 254, 337 P.2d 139 (1959) but holding the section inapplicable since the excavation had not been abandoned, and Ward v. Oakley Co., 125 Cal. App. 2d 840, 271 P.2d 539 (1954) holding that the purported cause of action under section 24400 was barred by the statute of limitations. Ward v. Oakley is, however, significant in its ruling that an action under section 24400 is distinct from an action based on common law attractive nuisance, and that where the original complaint pleaded only an attractive nuisance theory, an amendment to the complaint pleading violation of section 24400, filed more than one year after the cause of action accrued, was barred by the one year statute of limitations.

15 See, e.g., Keefe v. Milwaukee & St. Paul R.R., 21 Minn. 207, 18 Am. Rep. 393 (1875). Cf. Sioux City v. Stout, supra note 5, which did not stress the role of the turntable as the initial lure.

16 "To treat the plaintiff as a voluntary trespasser is to ignore the averments of the complaint, that the turntable, which was situate in a public (by which we understood an open, frequented) place, was, when left unfastened, very attractive, and, when put in motion by them, was dangerous to young children, by whom it could be easily put in motion, and many of whom were in the habit of going upon it to play. The turntable, being thus attractive, presented to the natural instincts of young children a strong temptation; and such children, following, as they must be expected to follow, those natural instincts, were thus allured into a danger whose nature and extent they, being without judgment or discretion, could neither apprehend nor appreciate, and against which they
not be excused or justified. The high water mark of insistence on the lure factor was the case of *United Zinc v. Britt* where trespassing children were killed in a pool in the basement of defendant’s abandoned plant. The pool, although giving the appearance of clear water, had been poisoned with acid. It was not visible from any public way or area. Recovery was denied, the court stating in part “there is no evidence that it [the pool] was what led them to enter the land . . . [and] that is necessary to start the supposed duty.”

A more picturesque phrasing of this lure concept was that the condition or contrivance must attract the child “as a bait attracts a fish or a piece of stinking meat draws a dog.”

Most of the American courts have abandoned insistence on the condition of luring the child into the initial trespass and substituted for it the requirement that the circumstances be such that the possessor of the property knew or should reasonably have foreseen that the area on which the condition existed was one where children were likely to intrude. The lure of the condition may still have a role in that an enticing device, readily visible from a public way, is a predicate for a finding that the possessor should foresee that children are likely to trespass, but if the circumstances are such that children are known frequently to intrude in the area or are likely so to intrude, then the fact that the harm causing condition is not visible until after the entry will not absolve the possessor from liability.

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18 258 U.S. 268 (1921). This was a diversity case, and was decided as a matter of general common law under the then prevailing rule of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Since *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) federal courts in diversity cases must follow the common law rules of the state wherein they sit and *United Zinc v. Britt* has applicability only in the District of Columbia and other areas where federal, rather than state law, governs the rights of the parties. In two cases, arising in the District of Columbia, the *United Zinc* case has been distinguished and explained away. In *Best v. District of Columbia*, 291 U.S. 411 (1934) a child had been injured when he was playing on a wharf and fell as a result of a defect. In reversing a nonsuit granted on the basis that there was no showing that the child was injured by the condition that induced his intrusion, the Supreme Court said that the wharf was “a likely place for children to play” and the defendant “had reason to anticipate that use.” *United Zinc* was explained on the ground that the defendant there had no duty to anticipate the presence of children trespassing on the property. *Eastburn v. Levin*, 113 F.2d 176 (D.C. Cir. 1940) is to the same effect.

19 *Id.* at 276.

20 PROSSER, TORTS 440 & nn.32-33 (2d ed. 1955); HARPER & JAMES, TORTS § 27.5 at 1450 (1956).
The California Cases from 1891 to 1949
And the "Natural Hazards" Exception

California adopted the attractive nuisance doctrine in 1891 when Barrett v. Southern Pacific Co. applied it to the classical instance of a railroad turntable. The basis stated for the holding was:

If defendant ought reasonably to have anticipated that leaving this turntable unguarded and exposed, an injury such as plaintiff suffered was likely to occur, then it must be held to have anticipated it, and was guilty of negligence in thus maintaining it in its exposed position. It is no answer to this to say that the child was a trespasser, and if it had not intermeddled with defendant's property it would not have been hurt, and that the law imposes no duty upon the defendant to make its premises a safe playing-ground for children.

In the forum of law, as well as of common sense, a child of immature years is expected to exercise only such care and self-restraint as belongs to childhood, and a reasonable man must be presumed to know this, and required to govern his actions accordingly. It is a matter of common experience that children of tender years are guided in their actions by childish instincts, and are lacking in that discretion which is ordinarily sufficient to enable those of more mature years to appreciate and avoid danger, and in proportion to this lack of judgment on their part, the care which must be observed toward them by others is increased. And it has been held in numerous cases to be an act of negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery which they would naturally be tempted to go about or upon, and against the danger of which action their immature judgment opposes no warning or defense.

All the California cases subsequent to Barrett v. Southern Pacific Co. have recognized that attractive nuisance is a part of California law, but the general tenor of the decisions prior to 1958 was to give the doctrine no more than a grudging acceptance. It was characterized as a "definitely limited" doctrine imposing "an exceptionally harsh

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21 91 Cal. 296, 27 Pac. 666 (1891).
22 Id. at 302-03, 27 Pac. at 667.
23 None of the cases hereafter considered has denied the existence of the doctrine; in every case in which the court held for the defendant, the attractive nuisance doctrine was accepted as part of California law, but said to be inapplicable under the circumstances.
24 Camp v. Peel, 33 Cal. App. 2d 612, 613, 92 P.2d 428, 429 (1939). See also Brown v. Reliable Iron Foundry, Inc., 174 Cal. App. 2d 294, 344 P.2d 63 (1959) decided less than three months before King v. Lennen: "It is the generally accepted rule to restrict and limit, rather than extend, the doctrine of 'attractive nuisance.'"

In Knight v. Kaiser Co., 48 Cal. 2d 778, 312 P.2d 1089 (1957), holding that a sand pile did not constitute an attractive nuisance, the court stated the "generally accepted rule . . . [is] to restrict and limit, rather than to extend, the doctrine of 'attractive nuisance.' It is a doctrine to be applied cautiously. . . ."
rule of liability." In the main, the decisions were consistent with this cautious and limited approach.

In 1896, in Peters v. Bowman the California Supreme Court imposed a major limitation on the application of the doctrine. Peters involved the death of an eleven year old boy who drowned in a pond on defendant's vacant lot in San Francisco. A judgment for defendant was affirmed. The argument of plaintiff that recovery should be allowed under the rule of the "turntable cases" was rejected, and the rule stated that hazards which duplicate or simulate natural hazards were outside the attractive nuisance doctrine, as a matter of law. The court therein stated:

A turntable is not only a danger specially created by the act of the owner, but it is a danger of a different kind to those which exist in the order of nature. A pond, although artificially created, is in no wise different from those natural ponds and streams which exist everywhere, and which involve the same dangers and present the same appearance and the same attractions to children. . . . The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon, to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing, and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to common dangers existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care.

Peters v. Bowman was followed in Polk v. Laurel Hill Cemetery Ass'n, involving the death of an eight year old boy who drowned in a reservoir, in a cemetery in a residential area. The complaint alleged that, while no longer used for burial, the cemetery was maintained as a "place of adornment and attraction . . . open to the public daily."


115 Cal. 345, 47 Pac. 598 (1896).

On its facts, Peters v. Bowman may well have been correct in holding for defendant, since the pond had not been created or maintained by defendant but resulted from the act of the city in erecting an embankment which prevented the normal drainage of surface water from defendant's property. But the Peters decision did not rest on this point. See the reference to this argument in Polk v. Laurel Hill Cemetery Ass'n, 37 Cal. App. 624, 174 Pac. 414 (1918).

Id. at 355-56, 47 Pac. at 599.

The reservoir, sixteen feet deep, was maintained "immediately alongside" one of the main driveways. The trial court sustained defendant's demurrer and the appellate court affirmed, stating:  

A pond of water . . . 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 in the public parks. It would not conform to the dictates of common reason to say that a child of the age of eight years, 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. . . . A pond of water, whether natural or artificial, is not to be included in the same class with turntables and other complicated machinery, the inherent dangers of which are not obvious to a child.

In Doyle v. Pacific Electric Co., the "natural hazards" doctrine was applied when the plaintiff fell from a catwalk through a skylight and the danger of falling was said to be a common risk, obvious to all and therefore within the principle of Peters v. Bowman.

Until overruled by King in 1959, Peters v. Bowman was consistently followed in principle in all cases involving death or injury in artificial bodies of water and the natural hazards exception was extended to death or injury from falling from contrivances such as a scaffolding which was said to duplicate the natural hazard of falling while climbing a cliff or a tree.

The "Trap" Exception to the "Natural Hazards" Exception

In Faylor v. Great Eastern Quicksilver Mining Co., plaintiff recovered for the death of an eleven year old boy who was playing in an abandoned mine tunnel and fell into an open and unprotected stope. Peters v. Bowman was held inapplicable. The stope in the dark tunnel was characterized as a "concealed danger" and a "trap" while the pond in Peters was described as open and obvious. Faylor placed considerable reliance on Polk v. Laurel Hill Cemetery Ass'n, the court stating: "In Polk v. Laurel Hill Cemetery Ass'n, supra, the rule

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30 Id. at 634, 174 Pac. at 418.
32 Peters v. Bowman had anticipated this situation: "Are we to hold that every owner of a pond or reservoir is liable in damages for any child that comes uninvited upon his premises and happens to fall in the water and drown? If so, then upon the same principle must the owner of a fruit tree be held liable for the death or injury of a child who, attracted by the fruit, climbs into the branches and falls out? But this, we imagine, is an absurdity, for which no one would contend. . . ." 115 Cal. at 356, 47 Pac. at 599.
34 37 Cal. App. 624, 174 Pac. 414 (1918).
of the turntable cases was applied to a reservoir of water in which a child was drowned, apparently because the reservoir was so concealed as to be dangerous to persons passing near it. . . .”\textsuperscript{35} This reliance on \emph{Polk} was misplaced and the interpretation incorrect; the court in \emph{Polk} had held “the complaint fails to state a cause of action for damages against the defendant, and . . . therefore, the demurrer thereto was properly sustained.”\textsuperscript{36} Whether \textit{Faylor} would have reached the same result, had the court not misconstrued \textit{Polk}, is pure conjecture, but it is curious to find that the case which became a leading case\textsuperscript{37} in California on the subject of “trap” was of such doubtful parentage.

The trap exception was first applied in a drowning case in \textit{Sanchez v. Contra Costa Irrigation Dist.},\textsuperscript{38} the “siphon case,” when a boy of five, while playing near an irrigation canal, fell into the canal, slipped or was drawn into a siphon that carried the canal under a creek, and drowned. The water in the canal was muddy and the existence of the siphon could not be ascertained from the surface. The court characterized the siphon as an artificial contrivance, not having a counterpart in nature, and therefore an “unknown, concealed and unguarded danger.”\textsuperscript{39} There are two alternative bases for this decision, as an exception to the doctrine of \textit{Peters v. Bouman}. One is that the siphon, by creating an unusual and unanticipated suction, drew the boy into it; the other is that the unanticipated and unguarded siphon was an extraordinary hazard and recovery would have been allowed even if he fell, rather than was sucked, into it. Since it could not be determined whether the boy fell into the hole or was sucked into it,\textsuperscript{40} and since the \textit{Sanchez} opinion did not expressly mention the danger of any suction, it could be supposed that \textit{Sanchez} established an exception to \textit{Peters} in that while a child would assume the ordinary hazards of drowning, an apparently shallow pool or watercourse which gave no indication of the presence of sudden drops, pits or extreme depths, would qualify as a “trap” or an attractive nuisance.

This theory of the \textit{Sanchez} case was urged, but rejected, in two subsequent cases, \textit{Beeson v. City of Los Angeles},\textsuperscript{41} and \textit{Melendez v.}
City of Los Angeles. In Beeson, a ten year old boy drowned while playing in an open storm drain. The complaint alleged that defendant maintained this open storm drain and, except at one place, the water in the drain was not more than a foot deep; that there was a hole or pit about seven feet deep, six feet wide and eight feet long at a point near where a concrete conduit entered into the storm drain and the pit was concealed by debris in the water; that the pit had formed as a result of erosion and improper maintenance and that defendant knew of the condition. The appellate court, affirming a judgment for defendant, held that the complaint did not state a cause of action, since "a pond, excavation, or pool of water is not an attractive nuisance." Referring to the claim that the pit was a trap, the court said that it "was not a contrivance or an appliance created by the act of the owner of the property. It was caused either by the water falling into the drainage ditch from the cement drain or by the banks of the ditch caving in and forming a dam, probably by both." The facts in the Melendez case were substantially the same, except that the decedent was eleven and the location of the storm drain and pit different. A judgment for defendant on demurrer, was affirmed, the Beeson case cited with approval, and the existence of holes, pits and the like in what would appear to be a shallow pond or canal brought within the "natural hazards" exception by this rationale:

In the former case [Beeson] the court took into consideration the common knowledge that the perils of water are instinctively known even by a boy of ten years of age and the further fact that water running over soil operates against the probability of a continuous even bed.

It would appear, at this point, that the distinction between these cases and Sanchez, if we eliminate the possibility of the suction factor, lay either in the fact that in Sanchez the pit was created by positive act of the defendant and not by natural causes, or that water running over concrete, as contrasted with soil, does not create the probability of an uneven bed.

However, in King v. Simons Brick Co., Melendez and Beeson were extended and applied to absolve the defendant from liability when the

42 8 Cal. 2d 741, 68 P.2d 971 (1937).
43 115 Cal. App. 122, 128, 300 Pac. 993, 996 (1931).
44 Ibid.
45 8 Cal. 2d 741, 747, 68 P.2d 971, 974 (1937). There is nothing in the Beeson opinion about the "fact that water running over soil operates against probability of a continuous even bed." This reference to Beeson in Melendez is apparently to the statement quoted above, that the pit was due to the action of the water and not to a positive act of the possessor.
46 The ditch in Sanchez was constructed of concrete.
drowning occurred in a clay pit which had been excavated by the defendant and became filled with water after the company ceased operations. Water covered about four acres with two acres having a depth of less than two feet and two acres having a depth of twenty-five feet. The water was opaque, the bottom could not be seen, and a boy of twelve drowned when he was wading in the shallow portion and plunged into the deep hole.

This, it is submitted, was carrying Peters, Beeson and Melendez to an extreme not warranted by either the holdings in those cases or the reasons expressed in those opinions. The sudden drop off, in opaque water, was a concealed danger; the pond was stagnant, so the element of flow of water was absent; the pit had been created by the operations of the defendant and not by natural processes of erosion. It is difficult, if not impossible, to see how this result could be reconciled with Sanchez unless Sanchez was to rest solely upon the assumption that the decedent was sucked into the siphon and without that suction there was no liability. This is an assumption that none of the cases had ever made.  

The Drowning Cases from 1949 to 1959
And the Restatement of Torts, Section 339

The publication of the official draft of the American Law Institute’s Restatement of the division of the law of torts relating to negligence was authorized in May, 1934, and appeared in print later that year. The subject of “attractive nuisance” was covered in section 339. That section has been characterized as “perhaps its most successful single achievement,” and “a new point of departure for the modern law.” It received almost no attention in California from 1934 to 1949. Since 1949 it has been the subject of major concern in the California decisions. Because of its importance in the development of the current California doctrine, the entire section is quoted:

A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains thereon, if

(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

48 The opinion merely states: “He fell into the main canal . . . and then, evidently, slipped into the syphon . . . .” 205 Cal. at 516, 271 Pac. at 1061.
49 PROSSER, TORTS 440 (2d ed. 1955).
50 Melendez v. Los Angeles, 8 Cal. 2d 741, 68 P.2d 971 (1937) seems to be the only drowning case prior to 1949 which referred to section 339; the court found no inconsistency between its holding and the Restatement section.
(b) 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 such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.

In considering the relationship between section 339 and the California cases that follow, two aspects of that section are particularly significant:

(i) the requirement that the condition constitute a lure is eliminated; the test is whether the possessor knows or may reasonably foresee that children will intrude and meddle; and

(ii) the age of the child, the nature of the condition, and the obviousness of the risk are elements to be taken into consideration in determining the ultimate question, viz., whether the possessor, as a reasonable man, should foresee the likelihood of intrusion by children too young to comprehend the risk.

Beginning in 1949, the California courts repeatedly stated that California law was in accord with section 339 of the Restatement of Torts, but the tenor of decisions in attractive nuisance cases involving "natural hazards" was such as to indicate either a misunderstanding of the implications of section 339 or a misconception of the import of the prior decisions.\(^{51}\) Thus it should have been clear that the holdings in Peters v. Bowman, Polk v. Laurel Hill Cemetery Ass’n, Beeson v. Los Angeles, Melendez v. Los Angeles and King v. Simons Brick Co.—that the hazards in those cases were not attractive nuisances, as a matter of law—were inconsistent with the principle stated in section 339. It was not until the decision in King v. Lennen in 1959 that the inconsistency was acknowledged.

The first drowning case in California to place major reliance on section 339 was Long v. Standard Oil Co.\(^{52}\) The facts of the case were such that it is doubtful if it should have been decided on the attractive nuisance doctrine. The defendant had dug a pit eight feet deep on private property to reach its underground pipe lane and repair a leak.\(^{53}\) After making the repairs, defendant permitted the excava-
tion to remain. Water, oil seepage and debris accumulated filling it to within two or three feet of the surface of the adjoining land which was uneven and covered with weeds and grass. One entire side of the excavation and part of a second were completely unprotected; the remaining sides were partly protected by a rope, attached to posts, but the rope sagged in places to within one foot of the surface. The excavation was within ten feet of a public way, in an area between two large housing projects and there was evidence that adults and children living in the two projects frequently traversed the area. A boy, aged three years and ten months, fell into the excavation and was drowned. The defendant was held liable. It is difficult to conceive of a more dangerous condition and one which, once the predicate of constant intrusion by trespassers was established, would have subjected the possessor to liability for injury to trespassing adults as well as children. There can be no doubt of the correctness of the result. The significance of the Long decision is not in its holding, but in its assertion that section 339 of the Restatement was established law in California, and the effect given that assertion in later cases.

Between 1949 and 1956, four significant cases were decided; two involved drownings and two did not. In the non-drowning cases of defendant had only an easement, its subsequent conduct in not restoring the surface would have rendered it liable to a trespasser, regardless of the attractive nuisance doctrine. See Langazo v. San Joaquin L. & P. Corp., 32 Cal. App. 2d 678, 90 P.2d 825 (1939); Yee Chuck v. Stanford University, 179 Cal. App. 2d 405, 3 Cal. Rptr. 825 (1960); RESTATEMENT, TORTS § 381 (1934).

Such a case would be within the principle of section 355 of the Restatement of Torts. See Malloy v. Hibernia Savings & Loan Society, 78 Cal. XIX, 3 Cal. Unrep. 76, 21 Pac. 525 (1889). In that case a boy of nearly four fell into a cesspool dug by the defendant within ten feet of a public street. The pit was ten feet deep and about nine feet by six feet in area. It had become filled with debris and was without safeguard, fence or covering. Recovery was allowed. In Loftus v. Dehail, 133 Cal. 214, 217-18, 65 Pac. 379, 380 (1901), referring to the Malloy case, the supreme court said: "It is true that damages were there sought for the death of an infant occasioned by falling into a cesspool; but the complaint would have been sufficient to have warranted a recovery had an adult been killed under the same circumstances; for the complaint showed a veritable trap,—a cesspool open and unguarded, yet with its surface covered with a layer of deceptive earth to a level with the adjacent land. Into such a trap any one, adult or child might have walked." See also Blaylock v. Jensen, 44 Cal. App. 2d 850, 851-52, 113 P.2d 256, 257 (1941) where a thirteen year old girl was caught in an oil sump twenty to thirty feet from a public way while endeavoring to rescue a dog, and the court stated: "Defendant argues that the sump was not an 'attractive nuisance,' and that since plaintiff was a trespasser defendant was under no obligation to plaintiff to keep the premises in a safe condition. Although the trial court found that defendant 'knew that it (the sump) was attractive to children' the liability of defendant need not be predicated upon the attractive nuisance doctrine. The conclusion of the trial court may be sustained 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."
Marino v. Valenti and Copfer v. Golden, the California law was said to be substantially as stated in section 339 of the Restatement, and Long v. Standard Oil Co. cited to that effect. In Marino one child had been killed and several injured by the explosion of dynamite caps which the children had found in an abandoned shack near a public way; the attractive nuisance doctrine was held applicable. In Copfer recovery was allowed when a child was injured in a fall from a mechanical contrivance on property maintained as a junk yard. In the two drowning cases, Betts v. San Francisco and Ward v. Oakley Co., recovery was denied. In neither case did the court mention Restatement section 339. The facts of the Betts case were such that under section 339 recovery was doubtful, in view of the precautions taken by the defendant to safeguard the premises. However, Ward v. Oakley Co. was a clear case for liability on the facts pleaded, if section 339 was the law in California. The complaint in Ward alleged that defendant's mining operations had created a peculiar and artificial soil condition which resulted in two children being "dragged and sucked under" while wading in what was apparently a shallow slough on defendant's property. The trial court sustained defendant's demurrer without leave to amend and the appellate court affirmed on the authority of Peters v. Bowman and its successors. The Sanchez case was explained as involving a "hidden or concealed trap" and Beeson, Melendez and King v. Simons Brick Co. were cited as supporting the judgment of the court. It is difficult to understand why section 339 was ignored, or how the condition, as alleged in Ward, was any less dangerous, any less artificial, or any less concealed than in Sanchez.

Two drowning cases decided in 1956 clearly indicated that the California law was in a chaotic state.

In Lake v. Ferrer, a child of two and one-half years drowned in a swimming pool on defendant's property. The complaint pleaded all the elements of a cause of action under Restatement section 339, but the trial court sustained a general demurrer to the complaint. The district court of appeals affirmed, holding, in accordance with Peters v. Bowman, that a pool of water could not be an attractive nuisance,
as a matter of law. The court's opinion was largely a quoting of respondent's brief, but with apparent approval of such statements as "no matter how young a child may be, its age will not cast its care upon a stranger" and the attractive nuisance doctrine is definitely limited and "exceptionally harsh rule of liability . . . not to be extended." Restatement section 339 was not referred to. The decision in Lake v. Ferrer was filed on February 8, 1956.

On February 16, 1956, the United States district court for the northern district of California, in Anderson v. United States, reached the opposite result in a suit under the Federal Tort Claims Act. Section 339 of the Restatement was said to be the law of California, the court citing Long v. Standard Oil Co. and Copfer v. Golden. Ward v. Oakley was ignored; Lake v. Ferrer had not yet appeared in print. In Anderson, a three year old boy had drowned in a concrete canal maintained by an agency of the United States. There were no peculiar mechanical contrivances such as the siphon in Sanchez, and there was nothing comparable to the hidden dangers in Long. The facts were such that it was a clear case for liability if section 339 were the law in California; it was a clear case for non-liability if, as Ward v. Oakley and Lake v. Ferrer had held, Peters v. Bowman was still the law in California.

In 1957 the "natural hazards" exception was applied in Knight v. Kaiser Co. when a child of ten, playing in a sand pile on defendant's property, was killed when the pile collapsed and smothered him. The supreme court affirmed the action of the trial court in sustaining a general demurrer to plaintiff's complaint and held that attractive nuisance did not apply, as a matter of law:

As far as attractiveness to children is concerned there is no significant difference between a body of water and a sand pile. Pools of water and sand piles duplicate the work of nature and are not uncommon. In fact a pool of water is far more dangerous. The dangers connected with and inherent in a sand pile are obvious to everyone,

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65 Id. at 117, 293 P.2d at 106.
68 Defendant maintained a canal with steep sloping sides, the top of which was several feet above ground level. Although the area had been fenced at one time, the fence was in disrepair. Defendant had notice of frequent trespassing in the area and of the hazard created by the canal. There had been several drownings of children within recent years. A child wandered up the embankment, fell into the canal and drowned. There was nothing to show that the canal or the water in it was any different from an ordinary stream or water course. As of Jan. 1, 1961, Anderson had not been cited or discussed by any California case.
70 Id. at 782, 312 P.2d at 1091-92.
even to a child old enough to be permitted by its parents to play unattended.

Section 339 of the Restatement was held inapplicable since the risk involved was said to have been one which should have been apparent to and appreciated by children. Lake v. Ferrer was cited with approval.

In Lopez v. Capital Co., the natural hazard doctrine was applied when a boy of seven fell from a metal scaffold on the front of a building undergoing repairs. The scaffold was described as similar to the "monkey bars" in playgrounds and was readily accessible to the street. Although the complaint indicated that the scaffold was planked with "loose, wobbly and insecure boards," defendant's demurrer was sustained and the judgment of dismissal affirmed on appeal.

Between Lake v. Ferrer and King v. Lennen four more drowning cases were decided, two for defendant and two for plaintiff. Wilford v. Little affirmed the trial court's sustaining of a demurrer to a complaint which alleged the drowning of a four and one-half year old boy in a swimming pool on defendant's property. A special lure factor was pleaded in the presence of a diving board which allegedly had attracted the child as similar to a see-saw and from which he fell into the pool. In Van Winkle v. City of King, recovery was denied when the deceased, who was two years and ten months old, drowned in a pool in defendant's sewage disposal plant. In both cases Peters v. Bowman and its progeny were invoked; attractive nuisance, with the one exception of the hidden trap type of case, was said to be inapplicable.

72 It may be that the result in Lopez is due to the wording of the complaint which apparently alleged that plaintiff fell from the scaffold and not that he fell or slipped because of the "loose, wobbly and insecure boards." Query, if the boards had slipped, would Lopez have been decided for plaintiff on the "trap" theory? In this respect, cf. Helguera v. Cirone, 178 Cal. App. 2d 232, 3 Cal. Rptr. 64 (1960) also a scaffold case, overruling Lopez v. Capital Co., and distinguishing between the obvious risk of a fall from a scaffold and the not so obvious risk, if the fall is caused by a defect in the scaffold, with Brown v. Reliable Iron Foundry, Inc., 174 Cal. App. 2d 294, 344 P.2d 633 (1959) in which Lopez was cited for the proposition that "attractive nuisance [was] inapplicable as a matter of law." See also Doyle v. Pacific R.R. Co., 6 Cal. 2d 500, 59 P.2d 93 (1936) and Severance v. Rose, 151 Cal. App. 2d 500, 311 P.2d 866 (1957). In the Doyle case a boy nearly fourteen was seated as a spectator, in the balcony of the auditorium. He climbed a ladder fastened against the wall through an opening in the ceiling, traversed the attic over planks laid on the joists to a canvas covered skylight, stepped on to the canvas and fell through the skylight to the main floor twenty feet below. Judgment for the defendant seems correct on the basis that it could hardly be expected to anticipate the presence of intruders into the area of risk. In Severance, the decision can be supported on the grounds that the hazard was obvious to a child of ten.

to bodies of water, regardless of the age of the child. Presumably if the child were old enough to escape the surveillance of parents or guardians and find his way to the pool, he was old enough, as a matter of law, to comprehend the danger.

In Reynolds v. Willson, recovery was allowed under special circumstances. In this case a child of two years and three months sustained serious injuries when he nearly drowned in defendant's swimming pool. The pool was the typical residential swimming pool, shallow at one end and deep at the other, with an abrupt drop from the shallow to the deep end. The pool had been partially drained for the winter, leaving just enough water in it to cover the bottom at the shallow end. Decomposed leaves and dirt accumulated in the pool and algae formed on the concrete surface beneath the water, making the floor of the pool slippery. Apparently the child had fallen or slipped into the deep end but was found in time for artificial respiration. The appeal was from an order denying defendant's motion for judgment notwithstanding the verdict. Plaintiff advanced three theories to support the verdict, (i) attractive nuisance under section 339 of the Restatement, (ii) trap and (iii) status as an invitee.

The court conceded that the facts met the test of section 339 and stated that the course of prior decisions was consistent with section 339. Peters v. Bowman and its progeny were said to be consistent with section 339, but some rather tenuous distinctions were made. Lake v. Ferrer and Wilford v. Little were cited with approval, and as supporting the statement, "It is established in this state that a private swimming pool is not an attractive nuisance as a matter of law."  

\[75\] 51 Cal. 2d 94, 331 P.2d 48 (1958).

\[76\] Id. at 103-06, 331 P.2d at 54-55. "In Polk v. Laurel Hill Cemetery Assn. . . . it was held that no dangerous condition existed in the maintenance of the reservoir; that if any dangers existed they were . . . apparent to a child of the decedent's years." "In Brown v. City of Los Angeles . . . the facts do not show that any unusual hazard was present in the pool." "In . . . Betts v. City and County of San Francisco . . . it was held that the [moss-covered] spillway was an obvious hazard visible to anyone. . . ." "In Ward v. Oakley Co. . . . the peculiar characteristic of the mud was that of a natural rather than an artificial condition." No real attempt was made to distinguish or explain Melendez v. City of Los Angeles or King v. Simons Brick Co. Cf. dissenting opinion of Spence, J., 51 Cal. 2d 94, 107, 331 P.2d 48, 56: "[The majority] opinion purports to distinguish, rather than to disapprove, the prior decisions in which liability has been denied, but I am of the opinion that no tenable distinction can be made. In other words, the majority opinion here cannot be reconciled with the prior decisions, and the labored but futile attempt of the majority opinion to bring them into harmony has the unfortunate result of leaving the law in hopeless confusion."

\[77\] Id. at 100, 331 P.2d at 52. The quoted sentence is itself ambiguous and is susceptible to two interpretations. It may mean, "It is established in this state, as a matter of law, that a private swimming pool may not be an attractive nuisance," or it may mean, "It is established in this state that whether a private swimming pool is an attractive nuisance is a matter of fact for the jury and not a matter of law for the court."
The court then considered the manner of the maintenance of the pool as a trap and agreed that the verdict was also supportable on this theory.\textsuperscript{78}

\textit{Reynolds} may well have been the high point of misunderstanding the relation of section 339 to pools and other “natural hazards.” It asserted that section 339 was the law in California and applicable to the hazard of a slippery swimming pool, that “trap” was something distinct from liability under section 339, and then proceeded by its review of the cases to demonstrate that in no drowning case had liability been found, unless the hazard was a “trap.”\textsuperscript{79}

\textit{Schaffer v. Claremont Country Club}\textsuperscript{80} presented a peculiar situation in that while death resulted from drowning, liability was predicated on the condition of the adjacent land and not on the condition or maintenance of the body of water. The property had previously been a quarry; after being abandoned as a quarry, it was kept by defendant as a reservoir.\textsuperscript{81} The sides of the excavation sloped and the rock was crumbly. The decedent, aged eight, was climbing on the slope when the rock gave way, precipitating him into the water.

The treacherous nature of the slope was regarded as an unusual and concealed danger, comparable to a trap, although why it was less obvious or more hazardous to a boy of eight than the spillway in \textit{Betts} was to a boy of seven is not apparent, and although previous cases had indicated that the risk of falling, unless there was a hidden pit or trap, was within the “natural hazards” exception.

Section 339 was said to be the law in California,\textsuperscript{82} but with overtones of the trap theory.

One other “natural hazard” case needs special mention. In \textit{Courtell v. McEachen},\textsuperscript{83} a hazard from fire was held to be within attractive nuisance, in reliance on section 339, where the evidence indicated that the fire was smoldering, without flame, as a result of the earlier burning of some debris, and thus gave no indication of its existence.

In addition to the drowning, scaffold and fire cases, several other decisions rendered after \textit{Lake v. Ferrer} asserted that California law...
was consistent with or had adopted the principle of Restatement section 339.\(^{84}\)

In the main these cases assumed, without too much critical analysis, that section 339 was consistent with the general course of the earlier cases, but there was an increasing awareness that all was not as it seemed. This awareness, which had first clearly manifested itself in the dissenting opinion in the *Reynolds* case,\(^8^{5}\) was forcefully expressed in *Garcia v. Soogian*.\(^8^{6}\)

In that case a child, aged twelve years and eight months, was injured when she tried to jump over some prefabricated building panels on defendant's property, fell and was injured. Plaintiff recovered judgment in the trial court. On appeal, all members of the supreme court agreed on a reversal of the judgment, but divided on the question whether the case should be remanded for a new trial or with directions to enter judgment for defendant. The view of the majority, in support of remand for a new trial, was that Restatement section 339 was the law in California and under that section "There is no justification for regarding the commonness of a condition as having a decisive significance independent of the obviousness of the risk."\(^8^{7}\)

The minority opinion insisted that there was an irreconcilable inconsistency between the earlier California cases and either Restatement section 339 or the manner in which it was now being applied.\(^8^{8}\)


\(^{85}\) Quoted *supra* note 76.

\(^{86}\) Quoted *supra* note 51.


\(^{88}\) It is not clear whether the minority was urging that section 339 was not the law in California, or whether it was urging that the early cases were entirely consistent with section 339 and the later decisions, particularly *Reynolds v. Willson*, *Copfer v. Golden*, and *Courtell v. McEachen*, were misconstructions or misapplications of section 339 in that in those cases the children were chargeable, as a matter of law, with realization of the risk involved in meddling with the condition or in coming within the area made dangerous by it. See, e.g., the reference to *Copfer v. Golden*, *supra* note 87 at 116-17, 338 P.2d at 439 as an "erroneous interpretation of section 339."
King v. Lennen—The Clarification Process

King v. Lennen, 89 decided by a divided court on December 31, 1959, finally clarified the situation by its recognition that section 339 was the law in California, that under section 339 an ordinary swimming pool could be an attractive nuisance, and that such a holding was clearly inconsistent with the Peters v. Bowman line of decisions.

The appeal was from a judgment for defendants entered after their demurrer to plaintiff's complaint had been sustained. The essential allegations of the complaint were: plaintiff's son, aged one and one-half years, had drowned in defendants' swimming pool; the parties lived diagonally across an intersection from each other; defendants occupied a corner lot and the pool was located about thirty feet distant from one street; defendants' property had a concrete wall along that street, with an opening four feet wide directly opposite the pool and a rail fence along the other street, with openings through which children could easily enter; no adults remained at home on defendants' property on weekdays, and none was at home the day of the drowning; defendants' teen-age daughter often performed baby-sitting chores for plaintiffs and frequently brought the decedent to play by the pool; defendants kept a cow, two dogs and three horses on their property, and these animals were allowed to roam freely on the property and near the pool; the pool was the usual residential pool, with a depth of from three and one-half to nine feet; the water was dirty and opaque and its depth could not be judged by observation; there were no ladders or holds on the sides of the pool. Summarizing the allegations, the majority opinion commented: 90

The animals and the pool could be seen by children of tender years who regularly used the streets adjacent to defendants' premises, and, as defendants knew or should have known, such children, attracted by what they saw, habitually entered the premises and played with the animals and in and about the pool.

The majority tested the complaint against the requirements of section 339 thus: 91

It is specifically alleged that defendants knew or should have known that children of tender years habitually entered the premises and played in and about the pool and that defendants knew or should have known that Boyd [the decedent] had frequently been brought to the vicinity of the pool by their daughter with the result that he had become attracted to it. The allegations describing the condition of defendants' pool and the surrounding premises, includ-

90 Id. at 342, 348 P.2d at 99, 1 Cal. Rptr. at 666.
91 Id. at 345, 348 P.2d at 100-01, 1 Cal. Rptr. at 667-68.
ing the absence of an adequate fence or other safeguards, state facts sufficient to permit a trier of fact to find that defendants should have realized that a serious danger of drowning was presented with respect to any unsupervised child of Boyd's age who might come to the pool. Obviously it could be found that a child of one and one-half years would not understand the risk involved in being near a swimming pool, and it is alleged that Boyd did not know the danger. The last of the requirements set forth in section 339 was also sufficiently covered by the allegations that the utility to defendants of maintaining the condition was slight as compared with the risk to young children and that reasonable safeguards could have been provided at little cost.

For the proposition that section 339 was the law in California, the majority cited Reynolds v. Willson, Garcia v. Soogian, and Courtell v. McEachen. Garcia and Courtell were said to sustain the proposition that a common condition duplicating nature might be an attractive nuisance under the principles of section 339:  

[In Garcia we held that] ... the circumstance that a condition giving rise to injury is common in character does not necessarily exclude liability, that the ability to appreciate danger varies with the age and mental capacity of the child, and that what is important is not whether conditions are common in character but whether their dangers are fully understood by children. In Courtell v. McEachen ... we held that a young trespassing child who was injured by a common condition, namely fire or embers, might recover ... and that it was for the trier of fact to determine whether the child was injured by a risk not obvious to her.... [It] seems obvious that the common nature of a danger, such as that of drowning in a pool, should not bar relief if the child is too young to realize the danger. Even very young children cannot always be kept under the supervision of their parents.

The majority opinion recognized that its decision and reliance on section 339 were completely inconsistent with most of the decisions prior to Garcia v. Soogian and Courtell v. McEachen, which the court stated:

[Had] ... reasoned that the "attractive nuisance" doctrine does not apply unless the dangerous condition is uncommon and different from natural conditions which exist everywhere and that a body of water, natural or artificial, is a common danger and therefore, as a matter of law, will not subject the possessor to liability for the drowning of a trespassing child, even if that child is too young to appreciate the danger.

Twelve cases were specifically disapproved "insofar as their lan-

92 Id. at 344, 348 P.2d at 100, 1 Cal. Rptr. at 667.
93 Ibid.
94 The twelve cases listed were: Knight v. Kaiser, 48 Cal. 2d 778, 312 P.2d 1089 (1957); Melendez v. City of Los Angeles, 8 Cal. 2d 741, 68 P.2d 971 (1937); Doyle
guage or holdings are contrary to the views expressed. . . ."95 The importance of this disapproval in clarifying the state of the law, is best manifested by the fact that seven of the twelve cases disapproved by the King majority had been said, by the majority in Reynolds v. Will-son to be entirely consistent with Restatement section 339.96

King v. Lennen was followed two months later by Helguera v. Cirone.97 involving injury to a boy of seven who fell from a scaffold on a building under construction. The complaint alleged that the scaffold was defective and that it was in an area where conditions constituted "an invitation to minor children" to enter and play. The court recognized the change in the law effected by King v. Lennen.98

It appears particularly significant to us that the King case expressly overruled Knight v. Kaiser . . . which is more analogous to the instant case than any of the other recent California cases. Thus, it appears that at the present time, a very liberal view is to be taken in considering whether the allegations of a complaint sufficiently satisfy the third and fourth conditions of section 339.

Referring to the scaffold case of Lopez v. Capital Co., the court recognized that while attractive nuisance had heretofore not been applied in climbing cases:99

... [I]n view of the recent decisions of our Supreme Court, we are forced to conclude here that the complaint states a cause of action against the defendant, and it is left to a jury to determine whether the facts adduced at the trial satisfy the third and fourth conditions of section 339 of the Restatement of Torts.

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95 53 Cal. 2d 340, 345, 348 P.2d 98, 100, 1 Cal. Rptr. 665, 667 (1959). A word of caution is needed here; it is to be emphasized that the disapproval in King v. Lennen does not mean that all of the cited cases are overruled or that, in another case identical in its facts, with one of the twelve, the opposite result would necessarily be reached. For example, non-recovery in the Doyle case seems warranted on the premise that plaintiff's presence in the area of the risk was completely unforeseeable.


97 178 Cal. App. 2d 232, 3 Cal. Rptr. 64 (1960).

98 Id. at 237, 3 Cal. Rptr. at 67.

99 Ibid.
Attractive Nuisance in California—What of the Future?

Assuming that King v. Lennen continues as the accepted doctrine in California, what does it portend for the future? Several observations are in order.

The Nature of the Condition as an Issue of Fact and Not of Law

The principal significance of King v. Lennen is that what has heretofore been treated largely as a matter of law is now an issue of fact. From Peters v. Bowman through Lake v. Ferrer and Wilford v. Little, a pool or pond, as a matter of law, was not an attractive nuisance. With King v. Lennen, the distinction between artificial conditions simulating natural conditions and artificial contrivances not having a counterpart in nature has been abandoned as a matter of law; it still exists as an issue of fact. Here the language of the Restatement is particularly important. Section 339 provides that the possessor is not liable unless “the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it,” and absolves the possessor from liability for injury resulting from “those conditions the existence of which is obvious even to children and the risk of which is fully realized by them.”

The proper interpretation and application of these qualifications was the principal source of confusion in those cases, prior to King v. Lennen, which had asserted that California law was in accord with the Restatement, but had said that a pool of water was such an obvious risk, regardless of the age of the child and regardless also of hidden depths or holes, that it could not qualify as an attractive nuisance. It would appear now that a normal swimming pool, pond or water course, while not an attractive nuisance to a child of ten or twelve, may well be an attractive nuisance to a child of two or three, if the possessor has knowledge or should foresee that children of such age may be too young to appreciate the risk and may intrude on the property. It would also appear that while a normal pool or water course is an obvious risk or hazard to a child of twelve, if there are hidden dangers in the form of sudden drops or pits, masked by surface conditions, it is an attractive nuisance to a child who, while he may be old enough to appreciate the normal hazards, is unaware of the hidden dangers. It is here that the “trap” concept of the Faylor and Sanchez cases is still important.

100 This is not to say that every case in which attractive nuisance is alleged necessarily involves a matter for the trier of the facts. See Joslin v. Southern Pacific Co., 189 Cal. App. 2d — , 11 Cal. Rptr. 267 (1961) holding that a complaint alleging injury to a twelve year old boy, who tried to jump on a train moving slowly along a public street, did not state a cause of action because, as a matter of law, the risk was obvious and the burden of adequate precautions an impossible one.
The Concept of a "Trap" in the California Cases

As previously noted, there have been frequent references in the California cases to the condition or contrivance as an alleged "trap," and in every drowning case prior to 1959 which sustained recovery for plaintiff, the condition was characterized as a "trap." This has led to some confusion as to whether the trap concept was something apart from attractive nuisance, was inherent in it or was merely one factor to be considered in determining whether attractive nuisance applies.\(^{101}\)

There are three situations in which a condition of the premises, that might be described as a trap, should subject a possessor of land to liability to a trespasser. The first is where the possessor intentionally creates hazards in the form of pits, spring guns or actual traps to injure or catch known or anticipated trespassers, whether adult or child. Here liability for battery is imposed if injury is inflicted that exceeds the privilege of the possessor.\(^{102}\)

The second is where the possessor creates or maintains, in a limited area, a condition dangerous to known trespassers and the danger is not obvious. Here there is a duty to use reasonable care to provide safeguards, by warning or otherwise, for such trespassers, and a failure to exercise such a degree of care will result in liability to either an adult or child.

The third is where the condition is dangerous to children trespassing and meddling because of a characteristic that is not obvious or apparent to children. In this connection to call the condition a trap is to say no more than that the hazard was one that would not be apparent to the intruder. For example, conceding that the hazard of drowning is obvious to a ten year old child, if death or injury results not from the natural hazard of drowning but from the fact that the pool is poisoned with industrial waste, the injury causing condition is not obvious. The attractive nuisance doctrine is applicable, and calling the condition a trap is no more than a shorthand labelling technique, for saying, in the words of section 339, that "the children . . . do not discover the condition or realize the risk involved."\(^{103}\)

\(^{101}\) For example, Doyle v. Pacific R.R., 6 Cal. 2d 550, 59 P.2d 93 (1936), seems to have regarded the "trap" aspect as part of the general "attractive nuisance" doctrine in that the condition, characterized as a trap, was a danger not obvious or apparent to the trespassing child. However, both Faylor v. Great Eastern Quicksilver Mining Co., 45 Cal. App. 194, 187 Pac. 101 (1919) and Reynolds v. Willson, 51 Cal. 2d 94, 331 P.2d 48 (1958) appear to have treated "trap" as something distinctly different from attractive nuisance.

\(^{102}\) See supra note 4.

\(^{103}\) On this theory there was no justifiable basis for the distinction between the Sanchez case and the Melendez, Beeson, Ward and King cases.
The Lure Problem

Prior to King v. Lennen, California had not clearly settled the matter of the role of lure or enticement in attractive nuisance cases. The earlier cases\(^{104}\) had stressed the significance of the dangerous contrivance as a lure, but it was not clear whether the courts had in mind the strict requirement of the United Zinc case that the contrivance must itself lure the child onto the premises, or whether the courts were merely holding that the nature of the device was such that it was foreseeable that children, once on the premises might be attracted to it.\(^{105}\) Many of the decisions, whether sustaining or denying recovery, had emphasized that either the contrivance, or something else on the property, attracted the child to the premises.\(^{106}\) For example, in Marino v. Valenti,\(^{107}\) the dilapidated shack in which the dynamite caps were found, readily visible to children on the public way, was said to have been a lure, enticing children to enter and explore. And, without specifically saying so, the court approached the box of dynamite caps

\(^{104}\) See Gianinni v. Campodonico, 176 Cal. 548, 552, 169 Pac. 80, 82 (1917): "It is an essential ingredient to a cause of action to which the 'turntable cases' doctrine applies that the minor should have been attracted to the premises by a childish curiosity and desire to play thereon." See also Barrett v. Southern Pacific Co., 91 Cal. 296, 27 Pac. 660 (1891).

\(^{105}\) See 35 CAL. JUR. 2d, Negligence, §156 (1957): "To render the attractive nuisance doctrine applicable, the contrivance or machinery involved must be both attractive and dangerous to children, and the injured child must actually have been attracted to the premises by childish curiosity and a desire to play thereon." (Emphasis added.) Does "thereon" mean the premises—or the contrivance? Does the statement import that the contrivance attract the child? Or merely that "childish curiosity" lead the child onto the premises? In footnote 20 to the cited text, Betts v. San Francisco, 108 Cal. App. 2d 701, 239 P.2d 456 (1955), is explained as follows: "Liability . . . was denied where the victims were not attracted to the reservoir in which they drowned by a desire to play therein . . . ." Cf. in this regard Severance v. Rose, 151 Cal. App. 2d 500, 311 P.2d 866 (1955) which emphasizes the importance of the contrivance as a "lure" with Woods v. San Francisco, 148 Cal. App. 2d 958, 307 P.2d 698 (1957); Elder v. Sepulveda Park Apts., 141 Cal. App. 2d 675, 297 P.2d 508 (1956), and Copfer v. Golden, 135 Cal. App. 2d 623, 288 P.2d 90 (1955).

\(^{106}\) Taylor v. Great Eastern Quicksilver Mining Co., 45 Cal. App. 194, 203, 187 Pac. 101, 103 (1919) is replete with references to the lure of the tunnel which, like a cave, has been "since the days of Ali Baba, Robinson Crusoe and the Count of Monte Cristo, irresistibly attractive to boys." Lopez v. Capital Co., 141 Cal. App. 2d 60, 65-66, 296 P.2d 63, 65 (1956): "The applicability of the doctrine involves the element of lure to children." Doyle v. Pacific Electric Ry. Co., 6 Cal. 2d 550, 553, 59 P.2d 93, 94 (1936): "From his seat, he did not see any part of the apparatus connected with the injury which he later suffered . . . there is no evidence tending to prove that by means of any attractive nuisance or other invitation the plaintiff was by the defendants drawn into the commission of any act which led to the accident and injury." See also references to the importance of allurement or "implied invitation" in Bradley v. Thompson, 65 Cal. App. 226, 223 Pac. 572 (1924) and Solomon v. Red River Lumber Co., 56 Cal. App. 742, 206 Pac. 498 (1922).

\(^{107}\) 118 Cal. App. 2d 830, 259 P.2d 84 (1953).
within the shack, as a lure within a lure. *Reynolds v. Willson* mentioned that the jury could find a pool partially filled with water was "more attractive" to children. The uncertain state of the California law on this subject is also indicated by the fact that in many of the cases in which recovery was denied, the plaintiff, in his complaint, believed it desirable, if not absolutely necessary, to plead some specific lure or enticement as justifying the initial trespass. In *Wilford v. Little*, the pool, plus its diving board, was alleged to be a special attraction to children. In *Lake v. Ferrer*, the complaint alleged a "lustrous metallic" ladder, visible from plaintiff's property, as the lure that enticed the child onto the defendant's property. *King v. Lennen* is replete with references to the presence, on defendants' property, of the animals (a cow, two dogs and three horses) which attracted children on to the premises, as well as the visibility of the pool from the street.

However, Restatement section 339 eliminates the lure requirement. This is clearly expressed in the comment on clause (a) as follows:

It is not necessary that the defendant should know that the condition which he maintains upon his land is likely to attract the trespasses of children or that the children's trespasses shall be due to the attractiveness of the condition. It is sufficient to satisfy the conditions stated in Clause (a) that the possessor knows or should know that children are likely to trespass upon a part of the land upon which he maintains a condition which is likely to be dangerous to them because of their childish propensities to intermeddle or otherwise. Therefore, the possessor is subject to liability to children who after entering the land are attracted into dangerous intermeddling by such a condition maintained by him although they were ignorant of its existence until after they had entered the land, if he knows or should know that the place is one upon which children are likely to trespass and that the condition is one with which they are likely to meddle.

The basic principle of this provision, conforming to what appears to be the current majority view, has been expressed as "the element of allurement, enticement or attraction onto the land in the first instance is not essential, and is important only in so far as it may mean that the trespass is to be anticipated."109

In some of the more recent cases, discussing section 339, the California courts have recognized that neither lure nor implied invitation is essential. The clearest statement of that view is in *Copfer v. Golden*;110

Thus one is negligent in maintaining an agency which he knows or reasonably should know to be dangerous to children of tender years at a place where he knows or reasonably should know such children

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are likely to resort or to which they are likely to be attracted by the agency, unless he exercises reasonable care to guard them against danger which their youth and ignorance prevent them from appreciating. If to the knowledge of the owner, children of tender years habitually come on his property where a dangerous condition exists to which they are exposed, the duty to exercise reasonable care of their safety arises not because of an implied invitation but because of the owner’s knowledge of unconscious exposure to danger which the children do not realize. [Emphasis added.]

It would seem, therefore, that since California has never clearly adopted the strict lure requirement of the United Zinc case, that since the decision in King v. Lennen expressly adopts section 339 of the Restatement, plaintiff need plead and prove only that the presence of trespassing children was known or foreseeable. The dangerous condition, as a lure, is significant only as evidence on the issue of knowledge of the likelihood of trespassing children. If there is evidence establishing that the possessor knew that children trespassed in the area of the dangerous condition, it is immaterial whether they were or were not lured into committing the initial trespass by that condition.

**The Scope of Liability**

It must not be forgotten that the liability of the possessor is not an absolute liability, but is rooted in negligence, and therefore will depend upon a weighing of the three factors of the social utility of the condition, the risk or hazard it poses, and the practicability of taking adequate precautions. The risk factor is in turn a composite of the probability of harm and the seriousness of such harm as may result. These factors become of major importance when considering the potential liability of property owners maintaining "back-yard" swimming pools.

The utility of such conditions, important as they may be as a matter of social status, is not likely to be highly regarded, when compared with such conditions as railroad turntables, power lines, sand and gravel pits, farm and other machinery, which have, in the past, been regarded as within the attractive nuisance doctrine. It cannot be denied that such pools create a probable risk of serious harm to trespassing children too young to appreciate the danger. It would seem therefore that the decision in any pool case, in the future, will depend almost entirely upon two factual questions: whether it was located in an area in which young children were likely to intrude, and whether the possessor took reasonable precautions to prevent intrusion.

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111 Restatement, Torts § 339 (1934); Prosser, Trespassing Children, 47 Calif. L. Rev. 427, 466-69 (1959).
or make the premises safe. Obviously, the possessor cannot be required to make his premises secure against any and all child trespassers, but it would seem that the possessor of property with a pool in his yard, in a residential neighborhood, is now under a duty adequately to fence or otherwise safeguard his property in such a manner that children too young to appreciate the hazards of the pool will also be too young to scale the fence, manipulate the gates, or get by the safeguards. If the possessor can afford the luxury of the pool, he will have to afford the added expense of such safeguards.