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# Landowners, Children and Perilous Conditions

By Judon Fambrough

**P**rudent landowners should be aware of their responsibilities to persons injured on their property, particularly children. The degree of responsibility owed to third parties depends on the legal classification of the person when injured. An injured child may fall into one of three legal categories **when accompanied by an adult**. These include an invitee, a licensee and a trespasser.

An invitee is someone who has an express or implied invitation (not just permission) to be on the premises. Generally, invitees are persons on the property for the economic benefit of both the visitor and the landowner. Business guests are an example of invitees.

Landowners owe the greatest legal responsibility to invitees. The landowner must take reasonable care to insure that the premises are safe and to give an adequate and timely notice of concealed or latent perils that are known or that a reasonable inspection would reveal.

Landowners are not absolutely liable for an invitee's safety. Texas law requires the invitee to be aware of open and obvious perils. If injury occurs, Texas law of comparative negligence governs the recovery. Invitees may recover damages as long as they did not contribute more than 50 percent toward the injury. Any contribution of less than 50 percent reduces their recovery by the corresponding percentage.

A licensee, on the other hand, is a person who has the landowner's express or implied permission (as opposed to an invitation) to be on the property. The licensee's presence must be for reasons other than the landowner's economic benefit. Social guests are an example.

## Legal Duty to Warn

The landowner has a legal duty to warn the licensee of any hidden dangers that are known to the landowner or to make the condition reasonably safe. The landowner is not required to inspect the property. Licensees have a legal duty to be on the lookout for their own safety regarding open and obviously dangerous conditions. Texas

law of comparative negligence again governs any recoveries.

And lastly, a trespasser is someone on the property without either express or implied invitation or permission. The landowner's responsibility is minimal. The landowner cannot willfully injure the trespasser except for the protection of the landowner's life or property (Subchapter D, Texas Penal Code). The landowner may not injure the trespasser by erecting unlawfully dangerous machines or contrivances such as spring guns.

Landowners should remember several points when confronted with responsibilities to visitors. First, it is not necessarily the landowner who bears the liability for injury. Rather, it rests on the person who has control or possession of the property. This person may be a lessee or renter. The term "landowner" refers here to the person who bears this obligation.

Second, the degree of responsibility is determined at the time the injury occurs, not at time of entry. A visitor's legal classification may vary from one portion of the premises to another. For example, a business customer is an invitee in the main lobby but a trespasser in an area marked "for employees only."

Third, children, as a rule, occupy the same legal classification as the adult they accompany. For example, if a child accompanies the parents into a store, the child will be an invitee unless the manager or a sign states that children are not allowed.

## Attractive Nuisance Doctrine

Children who trespass unaccompanied by an adult create a fourth category of liability. Special rules apply to protect unaccompanied, trespassing children. The rule is sometimes referred to as the infant-trespasser rule or as the attractive nuisance doctrine.

Although the name implies the doctrine is based on nuisance, the liability is predicated on the landowner's negligence in failing to exercise ordinary care to protect indiscreet, trespassing children. Originally, the doctrine applied to children injured

while playing on railroad turntables. Now it has a much broader application.

### Application of Legal Doctrine

**F**or liability to arise under the doctrine in Texas, a four-part test must be met. Many of the parts are interrelated. It sometimes is difficult to analyze one aspect without considering another. All four parts (or tests) must be met.

- First, the child, because of age, can not realize or appreciate a dangerous or perilous condition.
- Second, the landowner knew or should have known that children frequented and played in an area where a dangerous or perilous condition is located.
- Third, the dangerous condition that caused the injury was one that the landowner knew or should have known involved an unreasonable risk of death or serious bodily harm to children.
- Fourth, the utility, if any, for the landowner to maintain the dangerous condition was slight as compared to the probability of injury to children.

The first test addresses the child's ability to perceive danger. This is based both on the child's experience and intelligence. Consider-

ation must be given both to the character of the danger and to the age and maturity of the child. Some perils are obvious to very young children, whereas other perils are not.

Texas case law has developed some guidelines as to the interplay of the child's age and the ability to appreciate danger. As a general rule, children under seven years of age are presumed unable to recognize and avoid danger or a dangerous place. Children between the ages of seven and 14 present a question of fact in each instance. And finally, children more than 14 years of age are presumed able to perceive a dangerous condition. These guidelines apply in the absence of mental development ordinarily found in children of that age.

### Location of condition

The second part of the test involves the location of the dangerous condition. Some states—but not Texas—hold that the dangerous device or condition must be in close proximity to a legal path or highway. The child must see the peril prior to the trespass. In other words, the viewing of the dangerous condition from a legal vantage point

becomes an alluring factor (or implied invitation) for the child to enter. If the child notices the object after the trespass occurs, the landowner is not liable because there was no prior allurement or implied invitation.

Texas does not subscribe to this rule. It is sufficient if the landowner knew, or should have foreseen, that children were using or apt to use the premises where the dangerous condition was maintained. The location of the device or condition and its proximity to a path or highway is important in Texas only as the question of foreseeability of the child's presence.

The question of the attractiveness of the condition may be on the wane. In the Texas case of *Eaton v. R. B. George Investment, Inc.*, the defendant questioned the attractiveness of an abandoned dipping vat to children. The Texas Supreme Court

held that the attraction is important only as it relates to the foreseeability of the children at that location.

The third part of the test is similar to the second part. The landowner must know, or should have known, that the condition presented a danger to trespassing children. Little case law exists on this point. If children are injured, the court practically assumes the landowner should have known of the danger.

However, the court grants the landowner some relief. The doctrine applies only when the

child is injured by humanly created objects or conditions. Injuries caused by natural conditions on the property are excluded. The courts have held that the characteristics and dangers of natural objects and forces, such as lakes, rivers, trees and the like are common knowledge and obvious to children of all ages.

Thus, it makes a great deal of difference whether a child's injuries stem from falling out of a tree or falling off a ladder. One is natural; the other is manufactured. However, the rule for natural objects must be scrutinized closely when applied to water. Water is a natural object that can be artificially retained at a specific location. If a body of water is being artificially impounded, the owner is potentially liable.

### Balancing Utility

The fourth test balances the utility to the owner with the danger to children. Many objects or conditions, such as farm machinery, found on a landowner's property are vital to the landowner's livelihood. Other objects, such as abandoned windmills, discarded equipment or scrap lumber, are

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***The attractive nuisance doctrine applies to humanly created objects or conditions. Injuries caused by natural conditions on the property are excluded.***

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less important. In many cases the critical question centers on the usefulness of the dangerous condition (or object) to the landowner and the cost of making it safe.

For instance, in the case of *Eaton v. R. B. George Investment Company* the landowner was held liable for the drowning of a three-year-old child in an uncovered dipping vat that had not been used for more than two years. It was no longer useful to the defendant. A couple of hours with a saw, hammer and \$30 in material would have remedied the problem.

In the case of *Banker v. McLaughlin*, the defendant excavated and abandoned an area in a residential section. It filled with water, and a child drowned. The defendant was held liable because the excavation that could have been drained into a nearby ditch by turning a few shovels of dirt. In *Flippen-Prather Realty Co. v. Mather* the defendant was held liable for the drowning of a child in an unguarded and abandoned well located in a residential area. In both cases, the utility of the condition to the defendant was nonexistent.

**B**y contrast, in two Texas cases the defendant was exonerated for the drowning of children. In both cases the children drowned in large artificial lakes maintained by a railroad company as a source of water for its engines and boilers. Neither lake was situated in a residential area. One lake was fenced and equipped with warning signs. Both lakes provided water in the normal course of business to the railroad.

Locating any structure in a residential area where children play is suspect. In *Timmons v. Texas Utilities Electric Co.*, a 14-year-old boy was electrocuted by arcing from wires when he climbed an electric tower. The tower, located in an area heavily populated with children, was surrounded by a barbed-wire, 12-foot barricade. A small danger sign was posted. The boy had been warned not to climb the tower. He was intoxicated when the accident occurred. The electrical company was held liable under the attractive nuisance doctrine. While a normal 14-year-old can appreciate the dangers of coming into direct contact with live wires, the danger of electrical arcing is not within common knowledge at that age.

The Texas Supreme Court in 1997 overturned the lower courts' decision in this case. The young person's appreciation of the dangers of electrical wires, not necessarily arcing, rendered the doctrine inapplicable.

The potential liability faced by a landowner when a child is injured or killed is addressed both by case law and statutes. The list of recoverable items varies with the seriousness of the injury to the child and with the degree of landowner's culpability.

In any personal-injury situation, Texas case law holds that the responsible party (in this instance, the landowner) is liable for all damages directly and proximately caused by the injurious acts. The recoveries are known as actual damages.

## Actual Damages

The list of actual damages in personal-injury cases includes:

- Mental and physical pain and suffering
- Any aggravations to pre-existing physical conditions
- Loss of time and earnings from a job
- Impairments to the future earning capacity
- Reasonable medical, nursing and hospital expenses incurred in the past and that will be incurred in the future
- Any decreased life expectancy resulting from the injury

In addition, when the personal injuries are caused by malicious, oppressive, deliberate acts or by the gross negligence of the landowner, the plaintiff may recover exemplary (or punitive) damages. Exemplary damages are awarded to punish the defendants for reprehensible behavior. No recovery of exemplary damages is possible, however, without first recovering some actual damages. One is predicated on the other.

Effective September 2, 1987, caps were placed on the recovery of punitive damages. According to Section 41.008(c) of the Texas Civil Practices and Remedies Code, exemplary damages may not exceed (1) \$200,000 or (2) twice the amount of economic damages plus any noneconomic damages found by the jury not to exceed \$750,000.

Whenever the injury is fatal, Section 71.021 of the Texas Civil Practices and Remedies Code provides that all causes of actions that could have been brought by the victims for personal injuries survive the victim's death. The victim's heirs, legal representatives or estate may pursue the recovery.

In addition to bringing an action for the victims' personal injuries, the parents may sue for the:

- Reasonable medical expenses paid by the parents for the child
- Reasonable funeral expenses paid by the parents for the child
- Reasonable expenditures for a monument or tombstone
- The pecuniary (monetary) value of the services the child would have rendered from the date of death until reaching majority, less the expenses that would have been incurred for maintenance and education of the child during the same period
- The value of any benefits the parents had a reasonable expectation of receiving from the child after reaching majority

## Legislative Caps on Landowner Liability

**E**ffective September 1, 1995, Section 75.004 of the Texas Civil Practices and Remedies Code was amended to limit landowners' liability in general. Caps were placed on recoveries for acts or omissions caused by an

owner, lessee or occupant of land whenever the condition of the property causes the injury. The limits apply when the owner, lessee or occupant has insurance coverage equal to or greater than the following amounts:

- \$500,000 for each person;
- \$1,000,000 for each single occurrence of bodily injury or death; and
- \$100,000 for each single occurrence for injury to or destruction of property.

Effective September 1, 1997, Section 75.004 of the Texas Civil Practices and Remedies Code was changed again to specifically address recreational guests on agricultural land. Recreational guests according to the statute include anyone entering for hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, studying nature (including bird watching), cave exploring, water-skiing and for other water sports and conducting other activities associated with enjoying nature or the outdoors.

If the owner, lessee or occupant of agricultural land consents to the entry, he or she does not assure that the premises are safe or assume a greater liability than is owed a trespasser. This degree of liability continues until the total charges collected during the previous calendar year exceed four times the amount of ad valorem taxes imposed on the premises during the same period.

Effective September 1, 1997, the caps on recoveries for acts or omissions caused by an owner, lessee or occupant on agricultural land also

changed. The limits apply when the owner, lessee or occupant has insurance coverage equal or greater than the following amounts:

- \$1 million for each occurrence,
- \$1 million for each single occurrence of bodily injury or death and
- \$1 million for each single occurrence for injury to or destruction of property.

The 1995 caps remain for nonagricultural land.

The 1997 statute clarifies that the recreational guests can be either a licensee (social guest) or invitee without changing the landowner's liability as long as the charges for entry remain less than the threshold. However, the entry must be on agricultural land. Agricultural land is defined as land used in the production of plants and fruits grown for human or animal consumption or for the production of fibers, floriculture, viticulture, horticulture or seeds. The term also includes land used to raise domestic or native farm or ranch animals.

Unaccompanied trespassing children represent a special exception to the rules regarding a landowner's responsibility to invitees, licensees and trespassers. Because of a child's inability to perceive dangerous conditions, the law imposes the duty on the landowner to make the land safe. However, the law does not impose an oppressive or unreasonable duty to make **all** conditions safe.

Other publications on the topic are available from the Real Estate Center, Texas A&M University, College Station, Texas 77843-2115.

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