

MiniCo e-Risk Newsletter

Attractive Nuisances

As a self-storage facility owner/operator one of the things you have to be concerned about is the possibility of children entering your self-storage property and becoming injured or worse. Unfortunately, for the operator, the general statement of law is that even if the child trespasses onto your land, if you have not taken adequate measures to avoid children hurting themselves and you could have taken these precautions reasonably, you may be liable for the injury or death of the child. This is known as the Attractive Nuisance doctrine. Please excuse the next paragraph which contains some legalese however, some of you may be interested.

The Restatement of Law Second, (Torts) is where most states get their definition of their laws by adopting the language from the Restatement. The Restatement provides us a good definition of the attractive nuisance doctrine which is as follows: You as the owner of land are subject to liability for physical harm to children trespassing on your land caused by an artificial condition on your land if:

a) the place where the condition exists is one upon which you know or should have reason to know that children are likely to trespass; and

b) the condition is one of which you know or have reason to know and which you realize or should realize will involve an unreasonable risk of death or serious bodily harm to such children; and

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

d) the utility to you of maintaining the condition and the burden of eliminating the danger are slight compared with the risk to children involved; and

e) you fail to exercise reasonable care to eliminate the danger or to otherwise protect the children. (paraphrased from the Restatement of Law 2d, Torts [1965], Section 339)

The attractive nuisance doctrine can also apply to adults if there injury or death is suffered in an attempt to rescue a child from a danger created by your negligence.

Many states have adopted the Restatement, this is why I have paraphrased the Restatement to you as the law for this proposition. Between 10 and 15 states have their own attractive nuisance rule.

Of course, leave it to lawyers and courts to name a doctrine such as attractive nuisance and then spend years deciding that the doctrine name is a misnomer. The phrase "attractive" is not accurate because the courts have generally applied this doctrine saying the dangerous condition need not actually be attractive to children. Additionally, nuisance has become misnomer because it is really a negligence standard rather than a "nuisance" law. Thus, the lawyers are now saying you should not call it the attractive nuisance doctrine and instead should refer to it as "Artificial conditions highly dangerous trespassing children;" however, for this article we will continue to call it the attractive nuisance doctrine.

How does this apply to you? There are all sorts of potentially unsafe conditions (to children at least) on your property. Lets identify a few: Your automatic gate. It may be very attractive for neighborhood children or children of your tenants to want to watch how the gate operates from up close while it is opening and closing. Unfortunately, this can result in serious injury. Not only is the gate generally an electric item thereby having transformers and other wiring but, the moving parts can easily catch or crush part of a child. If there is a reasonable way to protect the child from this type of injury, it needs to be done. Several of you leave empty units unlocked. This is probably the perfect definition of an attractive nuisance at a Self Storage facility. If the child gets stuck in a unit and you could have easily and inexpensively put a disposable lock or other type of safety on the door to prevent children from getting in and getting stuck, in most jurisdictions you would be liable for the injury to that child. The rolling door is also a risk by itself, another reason to secure vacant units. Often, Self Storage operators offer storage containers or mobile storage containers at their property, some have them on display. This is another potential attractive nuisance especially if it would be easy to secure the unit from being entered or climbed or knocked over with a lock or other safety device. If a child gets stuck or injured in one you would potentially have exposure for the child's injuries. The same can be said for vehicles stored at your property and I am referring to all sorts of vehicles, the facility's golf cart, rental trucks

and even stored boats. All of these items if not properly secured could pose a hazard of injury to children. I am certain the golf cart issue is obvious. Rental trucks must not only be locked but the trailer or storage portion of the truck must also be secured so a child does not injure himself lifting or lowering the back door and/or getting stuck in the trailer portion of the truck. Since these injuries are foreseeable and inexpensive to avoid you have exposure. Many of you have boats left by tenants on trailers. The tongue of the trailer is either balanced on cinder blocks or raised and lowered by a winch or both. This is another easy spot for a child to become injured (it is too attractive for a child to become infatuated with figuring out how the boat stands up on the blocks.)

The problem with this area of the law is that you are liable for injuries to children even if they are wrongfully trespassing on your facility. Thus, a “no children” on the facility rule in your lease does not help you avoid the liability. Any neighborhood child who climbs the fence and gets stuck, hurt or injured as a result of something you could with little expense and relatively simply have avoided, you are potentially exposed to liability.

You can avoid liability for these types of injuries by performing a safety audit. If there are items at your facility that you think children could get into, onto, etc., even if unauthorized, and injure or kill themselves and there is an inexpensive way to protect them from that injury, you have a duty to protect the children or face liability. Your audit should take a serious look at items such as gates, vehicles, empty units, trucks, the portable storage boxes or container to see if there are ways to ensure the children will not hurt themselves to see if there are ways to ensure the children will not hurt themselves on these items. If you can find that way and it does not place an unreasonable burden (this is a legal term, you should check with your attorney for assistance on what is unreasonable) then you should make the change, repair or safety improvement.

Jeffrey J. Greenberger is a partner at the law firm of Katz, Greenberger & Norton LLP in Cincinnati, Ohio where he concentrates his practice in the area of commercial real estate, including self-storage. Jeffrey is a regular contributor to the *Mini-Storage Messenger* and *Inside Self-Storage Magazine*, and is a regular presenter at industry trade shows. Jeffrey’s self-storage website, www.selfstoragelegal.com provides a

past-article database, as well as other information about Jeffrey's opinions and research about the self-storage industry. Jeffrey can be reached through his website, or jjg@kgnlaw.com, or you may reach Jeffrey by mail, care of Katz, Greenberger & Norton LLP, 105 East Fourth Street, Suite 400, Cincinnati, Ohio 45202, or via telephone at (513) 721-5151.