

JANUARY 1997 LAW REVIEW

BEACH FATALITY TESTS PUBLIC RECREATION IMMUNITY STATUTE

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Several jurisdictions (most notably Virginia, Illinois, Kansas, and Minnesota) have statutes which provide limited governmental immunity for injuries sustained in public recreational facilities. Subject to minor jurisdictional variations, these statutes typically preclude liability for ordinary negligence and require proof of gross negligence, or willful/wanton misconduct, to establish a claim. The *Chapman* decision described herein provides a recent illustration of the manner in which a state appellate court interpreted the scope and applicability of one such public recreation immunity statute in Virginia. In this particular instance, the court found sufficient evidence on the record which, if proven at a new trial, could support plaintiff's claim of gross negligence in the operation of a public recreation facility.

NO ACTION, DESPITE REPEATED NOTICES?

In this case of *Chapman v. City of Virginia Beach*, LLR 1996.VA. 692 (Va.App. 1996), plaintiff Linda Chapman brought a wrongful death action against the defendant City of Virginia Beach following the death of her daughter on a city boardwalk. The facts of the case were as follows:

On December 15, 1991, Linda Chapman took her three children to the oceanfront Breakers Hotel in the City of Virginia Beach to visit relatives who were renting an apartment in the Hotel. Eight-year-old Missy and her three-year-old sister, Carolyn, went unaccompanied down to the boardwalk to play. Mrs. Chapman watched Missy and Carolyn from a window in the apartment. She saw Carolyn sitting on top of a section of a gate mounted on the boardwalk railing. Missy was pushing the gate section so that it would swing while Carolyn sat on it.

The gate was constructed by the City to allow maintenance vehicles to access the beach from the boardwalk. In its normal condition, the gate consisted of two sections, each hinged on one end to the boardwalk railing and fastened together on the other end with a metal latch. Each gate section had two nearly horizontal metal bars which tapered from their widest point at the boardwalk railing to the middle where the sections met. Sometime prior to October 1991, one section of the gate, the south section, had broken from its hinges and lay in the sand below the boardwalk. The other section of the gate, the north section, remained secured at one end to the boardwalk railing. Missy was pushing Carolyn on the north section of the gate as it swung from the boardwalk over the sand.

At some point, Missy's head became entrapped between the two metal bars in the north section of the gate. When the gate swung out over the sand, Missy's feet

JANUARY 1997 LAW REVIEW

could not touch the ground and she was left hanging by her neck. A jogger discovered Missy and notified a nearby hotel clerk. The hotel clerk attempted to resuscitate Missy, and the rescue squad was called. Missy was transported to the hospital but had suffered severe brain damage. Two days later, on December 17, 1991, Missy was pronounced dead.

Missy's parents, Linda and Donald Chapman, as co-administrators of Missy's estate, filed a wrongful death action against the City. The jury returned a \$300,000 verdict in favor of Missy's father only and \$18,618.79 for funeral expenses and medical bills. The City filed a motion to set aside the jury verdict, arguing that, as a matter of law, the evidence was insufficient to establish gross negligence. The trial court agreed and granted the City's motion and entered judgment in favor of the City. In so doing, the trial court held that, "pursuant to Code Section(s) 15.1-291, the City was only liable for gross negligence." The Chapmans appealed.

On appeal, the Chapmans argued that the trial court erred in holding that "the boardwalk was a recreational facility requiring a showing of gross negligence to impose liability on the City under Section(s) 15.1-291." Specifically, the Chapmans asserted that "the boardwalk is a street or a sidewalk, not a recreational facility" within the meaning of Section 15.1-291. As cited by the appeals court, Section 15.1-291 provided public recreation immunity as follows:

No city or town which shall operate any bathing beach, swimming pool, park, playground, skateboard facility, or other recreational facility shall be liable in any civil action or proceeding for damages resulting from any injury to the person or property of any person caused by any act or omission constituting simple or ordinary negligence on the part of any officer or agent of such city or town in the maintenance or operation of any such recreational facility.

Every such city or town shall, however, be liable in damages for the gross or wanton negligence of any of its officers or agents in the maintenance or operation of any such recreational facility. The immunity created by this section is hereby conferred upon counties in addition to, and not limiting on, other immunity existing at common law or by statute.

Under the circumstances of this case, the appeals court affirmed the trial court's holding that "the boardwalk is a recreational facility as that term is used in Section(s) 15.1-291":

The boardwalk is an area which stretches along a considerable portion of the City's beach. It is designed for recreational use, whether to access the beach itself or as a promenade for walking along the beach. Neither assigning the maintenance responsibility to the City's department of highways nor allowing vehicles to drive on the boardwalk to perform their maintenance functions transforms the nature of the facility from a place of recreation to a street.

GROSS NEGLIGENCE?

The appeals court then considered whether sufficient evidence existed to “prove gross negligence” as required by the public recreation immunity statute. On appeal, the Chapmans had argued that “the trial court erred in setting aside the jury verdict based on its holding that, as a matter of law, the actions of the City did not constitute gross negligence.” Within the context of the public recreation immunity statute, the appeals court defined “gross negligence” as follows:

Gross negligence has been described as the utter disregard of prudence amounting to complete neglect of the safety of another. It is a heedless and palpable violation of legal duty respecting the rights of others which amounts to the "absence of slight diligence, or the want of even scant care.

Several acts of negligence which separately may not amount to gross negligence, when combined may have a cumulative effect showing a form of reckless or total disregard for another's safety. Deliberate conduct is important evidence on the question of gross negligence.

Further, the appeals court noted that it was “usually a matter of fact” for a jury to decide “[w]hether gross negligence has been established” in a particular case.” In addition, the appeals court acknowledged that “[t]he jury verdict should be reinstated if there is any credible evidence to support it”:

In reviewing the action of the trial court here, the plaintiffs, having received a favorable jury verdict, are entitled to the benefit of all substantial conflicts in the evidence and all fair inferences which can be drawn from the evidence.

In this particular case, the appeals court found a reasonable jury could conclude that “the cumulative effect of these circumstances constitutes a form of recklessness or a total disregard of all precautions, an absence of diligence, or lack of even slight care”:

The record in this case shows that all the gates on the boardwalk, like the gate in issue, were supposed to be kept closed except when city personnel opened them to perform maintenance tasks.

William Lonnie Gregory, supervisor of the city department in charge of maintaining the gate, was informed on at least three occasions prior to Missy's accident that the gate was broken. These reports were made by Wayne Lee Creef, the employee charged with inspecting and reporting maintenance problems in the resort area of the City. The first report followed an event called the Neptune Festival, an event held at the end of September. A second oral report was made in October. In the early or middle part of November, Creef again reported the broken

JANUARY 1997 LAW REVIEW

gate. He put this report in writing, "assuming that it was going to be a work order put into effect."

Gregory had the authority to schedule and initiate repair of the gate but did not direct that any immediate action be taken in response to Creef's reports. Gregory made a deliberate decision not to order that the gate be repaired or that the north section be secured at the time the reports were made because "most of the maintenance work that the City does on the boardwalk is done in the spring prior to the tourist season"...

The accident occurred in an area constructed and maintained by the City as a recreational facility. The purpose of such an area is to attract visitors of all ages to come to and enjoy the facility, in this case, the beach and boardwalk. Under the City's own operating procedures, the gates were to be closed unless City employees were performing maintenance functions. Despite repeated notices by its own employee, the City did not take any action. The decision not to take any action was deliberate.

Having found "credible evidence to support the jury verdict," the appeals court found "the trial court erred in setting aside the jury verdict." The appeals court, however, did not reinstate the jury's verdict because it may have been based upon the following inappropriate expert opinion testimony by plaintiffs' "human factors psychologist":

[Plaintiffs' expert testified at trial that] the physical properties, configuration, and unsecured condition of the gate section created a hazard and that it was reasonably foreseeable that a child's head could become entrapped in the gate section.

According to the appeals court, such expert witness testimony was "inappropriate for matters of common experience":

It was within the common knowledge of the jury that the area was a recreational area that attracted children and the evidence introduced at trial showed the size of the opening between the two metal bars in the gate section. Whether the condition of the gate section created a dangerous condition and whether it was reasonably foreseeable that an injury could occur as a result of the gate's condition were issues within the range of common experience.

The appeals court, therefore, remanded (i.e., sent back) this case to the trial court for a new trial "consistent with this opinion." In so doing, the appeals court found further that the trial court had erred in allowing the City's requested jury instruction regarding contributory negligence.

JANUARY 1997 LAW REVIEW

CONSTANT SUPERVISION OF CHILD?

At trial, the City had successfully argued that “it was entitled to the instruction because Mrs. Chapman was negligent when she allowed the children to play unsupervised without protection or any means of rescuing them from harm.” In particular, the City contended that Mrs. Chapman was negligent because she “saw her children swinging on the gate and neither attempted to stop them nor to secure the gate.” Based upon such evidence, the City claimed that “the jury was entitled to determine whether Mrs. Chapman was contributorily negligent.” The appeals court rejected this argument. As noted by the appeals court, “the law does not impose upon parents the absolute duty” to provide children with strict and constant supervision:

A parent has a duty to exercise ordinary care for the child's safety, but this duty does not impose an absolute requirement that a parent oversee and guide a child's activities every moment.

Applying this principle to the facts in this case, the appeals court found the evidence was “insufficient to support an instruction on contributory negligence”:

Mrs. Chapman did not have an absolute duty to stand next to her eight-year-old daughter every moment. Missy was familiar with the area and Mrs. Chapman's supervision of her was reasonable under the circumstances.

The record shows that the Chapmans were frequent visitors to the Breakers. Mrs. Chapman's aunt and uncle had lived in an apartment in the Breakers from September through April each year for a number of years. Mrs. Chapman went there “at least two or three times a week” to prepare meals and visit and took her children with her. During these visits, Missy and Carolyn often played on the boardwalk and were familiar with it.

The record also reflects that on the day of the accident, Mrs. Chapman was watching her daughters from a window of the apartment. She saw them feeding the sea gulls and saw Missy pushing Carolyn on the gate. She turned away for “just a couple of minutes” and, when she looked back, she saw a man, the hotel clerk, standing with Missy. Fearing that Missy would be kidnapped or otherwise harmed, Mrs. Chapman screamed and ran out of the building to the boardwalk. The jogger who found Missy testified that only a “couple of minutes” passed between the time she saw Missy and returned to the gate with the hotel clerk.

As a result, in the new trial, a new jury would not receive any instructions regarding contributory negligence on the part of Mrs. Chapman. On the other hand, consistent with this opinion, the jury would apply the gross negligence standard in determining governmental liability under the public recreation immunity statute. In addition, the appeals court also directed the trial court to address the Chapmans’ separate allegations of “public nuisance based on a claim of injury

JANUARY 1997 LAW REVIEW

resulting from a condition which is dangerous to the public.”