MAY 2007 LAW REVIEW

PARK VISITOR TRESPASSER AFTER DARK

James C. Kozlowski, J.D., Ph.D.
© 2007 James C. Kozlowski

From a liability perspective, does it matter whether the injury occurred at two in the afternoon or two in the morning? In the case of *Bennett v. Napolitano*, 746 A.2d 138 (R.I. 2000), the issue before the state supreme court was "[w]hat duty, if any, does a municipality owe to an individual who walks in a city park after it has closed for the night?" In this particular case, plaintiff Donald Bennett was injured in the early morning when a tree limb fell on him within Roger Williams Park (park) in Providence, Rhode Island. The facts of the case were as follows:

> Upon returning home from work, plaintiff set out to walk his dogs at approximately 2 a.m. on September 1, 1994. On that occasion, he and his dogs trod the same route they had taken for about ten years, walking south on Farrugut Avenue and turning left onto Frederick C. Green Memorial Boulevard (boulevard), the major thoroughfare circling and contained exclusively within the city-owned park. As plaintiff continued on the boulevard, with Edgewood Lake on his right, he was struck by a falling tree limb that he approximated to be forty to sixty feet in length. The blow knocked him unconscious. When plaintiff awoke, he walked home and called emergency personnel. He was treated at Rhode Island Hospital for severe dizziness, ringing in his ear, slurred speech, blurred vision and a headache. Later that morning, plaintiff experienced the first of many seizures that are treated with medication.

The city filed a motion for summary judgment, arguing that "plaintiff was trespassing on city land after the park had closed, and therefore the city owed plaintiff a duty only to refrain from willfully or wantonly causing injury." In response, Bennett argued that the trial court had erred "in finding that he was a trespasser because he had walked his dogs on the same boulevard for ten years and had been observed by park rangers and Providence police officers during those ten years." Accordingly, Bennett claimed that he had "the implied consent of the city to walk his dogs in the park after closing. The plaintiff contended that "the city's 'implicit invitation' to him to continue his early morning walks in the park transformed him into an 'implied licensee or invitee' who was entitled to visit a park that was maintained in a reasonably safe condition."

(An invitee is an individual whose presence is within the scope of the business or public purposes of the premises. Unlike an invitee, a licensee is an individual whose presence on the premises is not encouraged, but merely tolerated or allowed by the landowner.)

In general, the state supreme court noted that a landowner owes a legal duty of reasonable care to those authorized or permitted to enter the premises (i.e., invitees and, to a lesser extent, licensees). On the other hand, with respect to individuals who enter the premises without authorization or permission (i.e, trespassers), the legal duty owed is much more limited, i.e., simply "refraining from willfully or wantonly causing injury."

> In general, municipalities, like other landowners, owe a duty to maintain their property in a reasonably safe condition for the benefit of those persons who might

> come upon the land. This duty does not extend to trespassers, however. A trespasser is one who intentionally and without consent or privilege enters another's property… [A] trespasser enters upon the property of another without any right, lawful authority, or express or implied invitation, permission, or license, not in performance of any duties to the owner, but merely for his own purpose, pleasure or convenience.

According to the state supreme court, "an individual who enters a city park after closing is a trespasser." In this particular instance, Bennett had admitted that he was "in the park after closing." Bennett, however, claimed that "the failure of the Providence police and park rangers to eject him from the park upon seeing him on his late-night excursions constituted an invitation or implied consent to him to visit the park after regular hours."

In rejecting Bennett's "suggestion of an implied invitation," the state supreme court cited the following "clear language of § 18-2 of the Providence Code of Ordinances" which provided that "Roger Williams Park shall be opened to the public from 7:00 a.m. to 9:00 p.m.," and further that "[n]o person shall enter or be within limits of said park except by the regular hours." In so doing, the state supreme court found no legal basis to support Bennett's assertion that "the city's alleged knowledge of plaintiffs late-night walks placed an affirmative duty upon Providence to affirmatively bar him from the park in order to avoid a heightened burden."

> The park was closed under a duly enacted ordinance. Local police or park rangers are not endowed with power to waive the provisions of the ordinance by affirmatively or impliedly inviting persons into the park after closing. Moreover, to conclude otherwise would be equivalent to holding that a landowner who does not aggressively exclude a trespasser thereby assumes an enhanced duty of care towards the trespasser.

Having concluded that Bennett was a trespasser at the time of his injury, the state supreme court had to apply the appropriate landowner duty of care, i.e. whether the city had effectively refrained from "willfully or wantonly" causing Bennett's injury. (Unlike ordinary negligence, with could include mere carelessness or a momentary oversight, willful/wanton misconduct requires proof of much more egregious and outrageous conduct which usually includes ongoing notice of an extremely dangerous condition in conjunction with an utter disregard for the physical well being of others.)

In the opinion of the city's forester, "the tree limb had fallen because it was internally infested with carpenter ants." The city's forester, however, noted that the damage caused by the ants was "not visible by external observation." Similarly, the state supreme court found photographs of the tree which injured Bennett "revealed apparently healthy vegetation and an abundance of green foliage." As noted by the court, Bennett himself admitted that he had "neither observed the alleged defect, nor had he noticed anything unusual or peculiar about the tree," even though Bennett stated that he had "passed the tree approximately five times per week in the three months prior to the accident." Based upon such evidence, the state supreme court found that Bennett had failed to establish any willful or wanton misconduct on the part of the city. The state supreme

court, therefore, concluded that the trial court had "properly granted summary judgment in favor of the city."

UNDISCOVERED TRESPASSER

In the case of *Cain v. Johnson*, 755 A.2d 156 (R.I. 2000), the state supreme court reiterated the general principle that "a landowner owes a trespasser no duty except to refrain from willful or wanton conduct." Moreover, the court noted that "such a duty arises only after a trespasser is discovered in a position of danger." In this particular case, plaintiffs filed a wrongful death claim against the City of Newport and several other defendants following an incident on Newport's Cliff Walk. The facts of the case were as follows:

> At approximately 2 a.m. on August 6, 1991, Michael T. Cain (the decedent) and two friends went for a walk along a section of Newport's Cliff Walk. While walking along an area of the Cliff Walk… [T]he decedent stepped from the paved walk onto a grassy area on the ocean side of the walk. He fell from the cliff to his death after the ground beneath his feet gave way.

Plaintiffs alleged that "the defendants' negligence caused the decedent's death because defendants failed to properly inspect, maintain, and repair the Cliff Walk." In response, the City argued that it owed no such legal duty because "the decedent was a trespasser because the Cliff Walk had closed at 9 p.m." The trial court agreed and granted summary judgment in favor of the City. In so doing, the trial court noted that "a landowner owes a trespasser only the duty to refrain from willful and wanton conduct." Plaintiffs appealed.

On appeal, the initial issue before the state supreme court was whether the decedent was a trespasser at the time of the accident. As noted by the court, Newport City Ordinance § 12.32.010 (C) provided that the Cliff Walk is "closed for public use between nine p.m. and six a.m. of the following day, daily, and no person shall go upon such public areas during the hours of closing, except that the Cliff Walk shall remain open for the purpose of access to the water for fishing."

Based on this City ordinance, the state supreme court found "the decedent was a trespasser even though the Cliff Walk was not so intensively posted as to notify all possible visitors of the hours of operation." In reaching this conclusion, the state supreme court held that "an individual who, in violation of a city ordinance, entered a park after closing" is a trespasser, "even if the person is completely unaware of the ordinance." Accordingly, since "the decedent was on the Cliff Walk at about 2 a.m.," the state supreme court held that he was a "trespasser as a matter of law."

Despite the city ordinance prohibiting people from being on the walk after hours, plaintiffs argued that "the decedent had no way of knowing that the walk closed at a particular time every night" because there were "only two signs posted on either end of the walk notify people of the hours that the walk is open to the public." As a result, plaintiffs maintained that such limited notice was insufficient, given the fact that there were "numerous other unrestricted entrance points along the walk, which stretches approximately 18,000 feet along the Atlantic Ocean."

Moreover, in light of the city's knowledge that people traversed the Cliff Walk after dark, plaintiffs had urged the state supreme court to adopt the following rule set forth in the *Restatement (Second) Torts*, § 334 (1965) which takes into consideration "a landowner's knowledge of the use of his land by trespassers."

> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.

The state supreme court, however, refused to adopt *Restatement (Second) Torts,* § 334. In the opinion of the court, to do so would effectively make "irrelevant" the significant distinction between "the decedent's status as a discovered trespasser, versus an undiscovered trespasser." Accordingly, the state supreme court held that "a landowner does not owe a trespasser any duty until after the trespasser is discovered in a position of peril."

> Once the trespasser is discovered, the landowner owes the trespasser a duty to refrain from willfully or wantonly injuring the trespasser… [T]he law does not impose upon a landowner any duty toward a trespasser unless it has first discovered *him* or *her* in a position of peril… [A] landowner is under no duty to keep a lookout for trespassers… [N]o legal duty [is] imposed on defendant to anticipate the presence of plaintiffs' son as a trespasser on its property.

Applying these principles to the facts of the case, the state supreme court found "defendants did not owe the decedent any duty" because decedent was never discovered in a position of peril. As a result, the state supreme court found it "need not consider whether defendants' conduct rose to the level of willful and wanton conduct."

NATURAL CONDITION

In this particular instance, the state supreme court noted further that the extreme danger posed by an encounter with the Cliff Walk after dark should have been apparent to those traversing the area. In the opinion of the court, "a visitor to the Cliff Walk certainly should be aware of and appreciate the risks that exist along the edge of a cliff that rises approximately sixty to seventy feet from the ocean." As a result, the supreme court concluded that liability could not be imposed upon defendants for this natural condition of the land under the circumstances of this case.

> The area from which the decedent fell is clearly a natural condition of the land. With respect to the duty of care owed by a landowner for natural conditions on the land, we have held that the possessor of land owed a trespasser no duty to discover, remedy, or warn of dangerous natural conditions.
>
> Perhaps if the possessor sees a trespasser about to encounter extreme danger from such a source, which is known to the possessor and perceptibly *not* known to the

> trespasser, there may be a duty to warn (as by shouting). That is about as far as the bystander's duty to a highway traveler would traditionally go, if indeed it would go that far.

On appeal, plaintiffs had argued that "the decedent, as well as other visitors, would not be aware of the risk because the Cliff Walk is open during parts of the year when it would be dark, and, specifically, because it was dark when the decedent visited the cliff." The state supreme court rejected this argument. In the opinion of the court, visiting the cliff after dark "should increase one's awareness of the risks associated with the cliff." According to the court, "any visitor along the walk in the dark should be that much more cautious, given the height of the cliff and the inability to see adequately where one is stepping."

Accordingly, having found that "the decedent was an undiscovered trespasser" at the time of his fatal fall, the state supreme court found the City owed no duty of care to decedent and "no liability arises because of the defective condition of the land." The state supreme court, therefore, affirmed the summary judgment of the trial court in favor of the City.