

NO DUTY TO KEEP PREMISES REASONABLY SAFE FOR ADULT TRESPASSERS

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

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Landowners generally owe a very limited legal duty of care to adult trespassers. Specifically, landowners generally owe no affirmative duty of care to make the premises reasonably safe for recreational use by those using the land without any expressed or implied authorization from the landowner. On the contrary, landowners must simply avoid setting "mantraps" or similar negative behavior reasonably calculated to injure trespassers, usually referred to as willful/wanton misconduct. As illustrated by the cases described herein, a condition on the premises, although dangerous, will not be considered a "mantrap" or willful/wanton misconduct if it occurs within the normal course of the landowner's business. Moreover, the landowner generally owes no legal duty to adult trespassers to remedy readily observable dangerous situations.

BUSINESS PURPOSE NOT MANTRAP

In the case of *Johnson v. Rinker Materials, Inc.*, 520 So.2d 684 (Fla.App. 3 Dist. 1988), plaintiff's son was killed when the all-terrain cycle on which he was riding plummeted an excavated hill which was an inevitable part of defendant's business. In connection with its cement manufacturing operations Rinker maintained large hills of raw materials on the premises. The contours of these mounds frequently changed as the material therein was used or discarded in the cement manufacturing process. These mounds, in turn, had long attracted all-terrain cycle (ATC) enthusiasts who liked to joy-ride over them for recreational purposes.

On the night he was killed, plaintiff's son (Garrett) drove his ATC straight up one of these sand hill mounds, unaware that the opposite side had recently been excavated to create a sheer cliff. As a result, Garrett and his passenger fell over the precipice to the ground at the base of the hill. The ATC landed on top of Garrett and he died at the scene.

Garrett was well aware that this and other hills on the property were constantly being dug away by Rinker in connection with its business. Consequently, Garrett always checked out the hills prior to riding them. He did not, however, do so on this fatal night, having ridden the subject hill the previous day without incident.

In his wrongful death claim, plaintiff alleged that "Rinker had a duty to warn Garrett about the dangerous condition created by the excavation of the hill. Rinker responded that "it had breached no duty owed to Garrett because he was a trespasser to whom no duty was owed except to refrain from willful and wanton negligence."

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According to the court, the only duty owed by Rinker to Garrett, as a trespasser, was to avoid willful and wanton harm to him (which, concededly, is not involved in this case) and upon discovery of his presence, to warn him of any known dangers not open to ordinary observation.”

Citing commentary to the Restatement (Second) of Torts § 335, the appeals court found that "the danger posed by the sand hill was open to ordinary observation, and consequently, no warning of the danger was required."

The possessor of land is entitled to assume that trespassers will realize that no preparation has been made for their reception and will, therefore, be on the alert to observe conditions which exist upon the land. In addition, he is also entitled to assume that the trespassers will be particularly careful to discover dangerous conditions which are inherent in the use to which the possessor puts the land.

Applying this principle to the facts of the case, the appeals court found that "given Garrett's status as a trespasser on Rinker's land, it is clear that Rinker had no duty to warn of this danger [open to ordinary observation] and is, therefore, not legally responsible for Garrett's death."

Here, Rinker operated a cement plant and sand quarry on its premises and, in connection with its business, created sand hills thereon from which sand was constantly being removed to make cement; and as a result, the contours of the sand hills were constantly changing as an inevitable part of its business. Given the fact that the formation and alteration of such sand hills constitute an inherent condition of the use to which Rinker put its land, we think that Rinker had every right to expect that Garrett and his ATC companions would discover the dangerous condition of these hills prior to traversing them.

The appeals court, therefore, affirmed the summary judgment of the trial court in favor of defendant Rinker Materials, Inc.

TAKE PREMISES AS THEY FIND THEM

In the case of *Baldwin v. Texas Utilities Electric Company*, 819 S.W.2d 264 (Tex.App. 1991), plaintiff's husband drowned in a discharge canal while trespassing on defendant's power plant property. "No Trespassing" signs were posted along a six feet high chain link fence which was topped with barbed wire. In addition, "warning" signs were posted which were clearly visible to persons both on and off the property. The warning signs stated: "Danger, Keep Out, Deep Water, Strong Current, Stay Away For Your Own Safety."

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According to the court, a landowner has “no obligation to maintain his premises in a safe condition for strangers entering without authorization.” On the contrary, the court found trespassers “must take the premises as they find them, and, if they are injured by unexpected dangers, the loss is their own.” Further, the court found “a landowner may assume that persons will not penetrate his boundaries uninvited”:

If one uses his premises for private purposes, he has no reason to expect visitors other than those especially invited by him; and hence is under no obligation to keep his premises in a safe condition for the protection of those who may enter thereon without his invitation. It may be more convenient for him and those who live and work thereon to allow the premises to remain in a condition that would be unsafe as to strangers. Under such circumstances, strangers having no business thereon of interest to the owner have no right to demand that such owner keep his premises in such condition that they may enter thereon in safety at their will.

The rule that there is no duty to keep premises safe for trespassers.. It would be placing an unreasonable burden upon the property owner to require that him to keep his premises safe for strangers who come uninvited on his land for purposes of their own.

Accordingly, the appeals court found landowner liability for trespasser injury requires proof of gross negligence. Within this context, the court defined “gross negligence” as “that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.”

In this case, plaintiff conceded that “gross negligence” was the “appropriate standard of care” owed to trespassers on the premises. Plaintiff, however, contended that defendant was grossly negligent in failing to “take further precautions to protect trespassers from the danger of drowning.” The court, however, held that defendant’s conduct did “not reflect an attitude of conscious indifference to the rights and safety of Baldwin and others.” Specifically, the court found the existence of a six foot chain link fence topped by three strands of barbed wire did not reflect the “entire want of care” required for gross negligence.

FISH “ATTRACT” TRESPASSING ANGLERS

Similarly, in the case of *Smither v. Texas Utilities Electric, Co.*, 824 S.W.2d 693 (Tex.App. 1992), plaintiff’s husband drowned in a canal within defendant’s power plant. The site of the drowning was an area where falling water created highly turbulent currents which attracted fish swimming up the canal to feed. The presence of fish, in turn, attracted fishermen several of whom drowned in the turbulent waters. In fact, since 1982, four other fishermen had drowned at this site. Like Smither, all of these

fishermen were trespassers. The most recent drowning had occurred just two weeks prior to Smither's death.

Under such circumstances, plaintiff alleged that defendant had failed to exercise reasonable care and that it should have taken additional safety precautions. Specifically, Smither's offered the following opinion of a "water safety expert" who testified that defendant (TU) was negligent:

TU failed to exercise reasonable care and that it should have taken additional safety precautions such as putting an additional fence around the weir area or over the top of the weir area, putting boulders in the area below the weir to break up the hydraulic action, eliminating the fish so as to make the area less attractive to fishermen and posting stronger warning signs.

As noted by the court, a number of "no trespassing" signs were attached to a six foot high chain link fence topped with three strands of barbed wire. Other signs were located within the fence line proclaiming, "DANGER, KEEP OUT, DEEP WATER-STRONG CURRENT, 'STAY AWAY!' FOR YOUR OWN SAFETY."

Under the circumstances of this case, the appeals court found "it is undisputed that Smither was a trespasser and it is also undisputed that TU knew of the dangerous condition on its premises." According to the court, "a landowner or premises occupier owes to a trespasser only the duty not to injure him willfully, wantonly, or through gross negligence." Further, the court defined gross negligence as "that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it."

The premises occupier does not owe a trespasser the duty to warn of or make safe dangerous conditions known to it. It has only the duty to refrain from injuring the trespasser through willful, wanton or grossly negligent acts or omissions. The acts or omissions in question refer to the activities or conduct of the occupier on the premises, not the conditions of the premises. Trespassers entering land owned or occupied by another without permission and for their own purposes take the premises as they find them and the occupier owes them no duty to warn them of a dangerous condition or to make the premises safe.

As "evidence of TU's conscious indifference" indicative of gross negligence, Smither relied upon the deposition testimony of TU's plant manager that "he was aware of the drownings, and that he had called a company engineer who recommended that an additional fence be erected around the weir area, which was never done." The court, however, found that "Smither's drowning resulted not from any conduct of TU on the premises, but from a dangerous condition."

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The fence and the "no trespassing" signs would have the effect of ensuring that anyone entering the premises would be a trespasser... The additional signs warning of the dangerous waters were not required as to a trespasser, but do show a conscious concern of TU for the safety even of trespassers.

Moreover, the court rejected Smither's contention that defendant's knowledge of the dangerous condition and the four prior drowning deaths was evidence of gross negligence. Specifically, the court held that defendant did not have a legal duty to do "more to warn Smither and other trespassers of the danger and to make the condition less attractive and more safe."

NO DUTY TO REMEDY OBVIOUS DANGER

In the case of *Bialek v. Moraine Valley Community College School District 524*, 642 N.E.2d 825; 204 Ill.Dec. 924 (Ill.App. 1994), plaintiff, age 25, was injured while playing touch football on a field owned by defendant. Plaintiff ran into a goalpost on defendant's property and suffered severe injuries to his face (broken nose) and groin (lacerated penis and gash in lower abdominal region). At the time, Bialek was playing in a football game with adult friends. The men were not authorized to use the premises on which they located their game.

In his complaint, Bialek alleged that "Moraine was willful and wanton in its maintenance of its campus in that (a) it failed to remove a dangerous condition--the goalpost and bracket--from its premises; (b) it failed to warn Bialek of the presence of the goalpost and bracket; and (C) it failed to pad the goalpost and bracket." Moraine responded that "if it did owe such a duty, Bialek failed to establish that it acted in a willful and wanton manner in its upkeep of the goalpost" because "the school had not received any prior complaints about injuries suffered on the structure."

The specific issue on appeal was, therefore, whether Moraine owed Bialek a legal duty of care "to remedy a condition on its property which was open and obvious." In this particular instance, the appeals court found that Bialek "was a trespasser, to whom is owed a lesser standard of care, i.e. to be protected only from willful and wanton conduct." Furthermore, when a condition is "open and obvious," the court found a landowner owes no duty to the trespasser to "remedy the condition." On the contrary, the only legal duty owed to trespassers is to "refrain from willful and wanton conduct."

As defined by the court, "the quantum of evidence necessary to establish willful and wanton conduct" as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property."

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Willful and wanton conduct consists of more than mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible future emergency. Thus, willful and wanton conduct requires a "conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. *Restatement (Second) of Torts* § 500, Comment g at 590 (1965)..

Willful and wanton conduct may be found to exist where the local public entity takes no action to correct a condition even though it was informed about the dangerous condition and knew that other persons had previously been injured because of the dangerous condition. Also, a local public entity may be found to have engaged in willful and wanton conduct when it intentionally removes a safety feature from its recreational property. However, where there are no facts or allegations to show that the local public entity engaged in any intentional act or knew of other injuries or accidents caused by the allegedly dangerous condition, the conduct of the local public entity does not rise to the level of willful and wanton conduct.

Applying these principles to the facts of the case, the appeals court concluded that "the evidence in this case does not satisfy the standards" for willful and wanton misconduct. On the contrary, the appeals court found that Moraine's conduct in this case was, "at worst, negligent and does not remotely approach the level Illinois courts have required to constitute willful and wanton, as a matter of law."

Moraine had no notice of prior injuries which had occurred as a result of the goalpost structure; nor did it remove safety features that had been attached to the structure. Furthermore, the fact that Moraine padded the goalposts on its official football field located on a different campus establishes little, if anything, in the context of an allegation of willful and wanton conduct.

The appeals court, therefore, reversed the judgment of the trial court in favor of Bialek and entered judgment for Moraine.