

OVERVIEW OF NEGLIGENCE LIABILITY PRINCIPLES IN RECREATION

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As illustrated by the case reports described herein, the law applies a "reasonableness standard" in determining whether negligence liability should be imposed on a particular individual's conduct when such conduct results in injury. Under this reasonableness standard, the risk reasonably to be perceived determines the legal duty to be obeyed. Perceived risk presupposes that the general scope of danger and risk of injury is foreseeable. Within this context, a foreseeable risk of injury is not a mere possibility, but a probability. Based upon one's own experience, or the common understanding of reasonable persons similarly situated, a general set of circumstances have caused injury before and are likely to cause future injuries, unless certain precautions are taken.

For negligence liability, one need only reasonably foresee that *an* injury may result from a dangerous condition on the premises. Accordingly, the particular manner in which the injury occurs need not be foreseen. On the other hand, plaintiff's injury must occur within the general scope of danger attributable to defendant's negligent conduct. In other words, defendant must actually know, or reasonable persons in similar circumstances would know, that such negligent conduct would result in this type of injury.

Negligence is conduct involving an *unreasonable* risk of harm. In determining whether a particular risk is unreasonable, courts will consider the social interests involved. In so doing, courts will weigh the risk created by particular conduct against the social utility of such conduct. Negligence will be imposed where the magnitude of the risk associated with defendant's actions outweighs the social utility of this particular conduct or activity.

Negligence liability also presupposes that defendant has superior knowledge of an unreasonable risk of harm which would not reasonably be known by the plaintiff prior to the injury. Conversely, there is generally no negligence liability where the plaintiff has relative risk knowledge which equals or exceeds defendant's, or the hazardous condition was readily observable by plaintiff through the reasonable use of his or her senses. In light of known or readily perceivable danger, the plaintiff has a legal duty to look out reasonably for his or her own safety and avoid such hazards. Accordingly, known or obvious dangers do not pose an unreasonable risk of harm necessary to impose liability for negligence.

In addition, negligence liability presupposes that the defendant had some degree of control over the unreasonable risk of harm which caused plaintiff's injury. As a result, there is generally no negligence liability for allegedly dangerous conditions which the defendant does not own, possess, or control. For example, there is generally no negligence liability for allegedly dangerous conditions on adjacent property over which the landowner has exercised no control.

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FORESEE "AN" INJURY, NOT "THE" INJURY?

In the case of *Hueston v. Narragansett Tennis Club, Inc.*, 502 A.2d 827 (R.I. 1986), plaintiff was injured while retrieving a tennis ball in defendant's facility. During the course of play, tennis balls would travel over a curtain and lodge in the wall between a horizontal girder and insulation. Plaintiff injured her finger when she jumped back to clear a lower girder and caught her ring in the girder where her ball had lodged.

In her complaint, plaintiff alleged that defendant was negligent in its maintenance and operation of the facility, specifically the exposed girders. Plaintiff testified that she had seen others, including defendant's tennis pros, climb the wall as she had done a number of times to retrieve tennis balls which became lodged in the girders. In response, defendant acknowledged that it owed plaintiff a legal duty of care to guard against usual occurrences. However, under the circumstances of this case, defendant contended that it had no legal duty to guard against unusual events, i.e. someone catching their ring on an exposed girder.

As described by the court, negligence liability involves a failure to exercise that degree of care for the safety of another which a reasonably person would exercise under similar circumstances. Within this context, the requisite degree of care and ordinary prudence is based upon the danger to be apprehended, i.e., whether the injury is foreseeable. According to the court, foreseeability relates to the natural and probable consequences of an act. The issue in this case was, therefore, whether plaintiff's unusual injury was foreseeable under the circumstances of this case.

Applying this "foreseeability" principle to the facts of the case, the court found that plaintiff's wearing an unusual ring was not the sole cause of her injury. On the contrary, the court found evidence that the exposed girders in defendant's facility created a foreseeable risk of injury to patrons retrieving their tennis balls which could have remedied at little cost. Further, the court found that plaintiff did not necessarily perceive the risk of injury associated with climbing the wall because she had seen other patrons, including defendant's tennis pros, doing the same stunt. As a result, the court found that plaintiff had not assumed the risk of injury. In other words, under the circumstances of this case, plaintiff did not necessarily know and subjectively appreciate the extent of risk incurred by climbing the girder to retrieve her tennis ball. As a result, the court found that defendant's negligence in allowing exposed girders in its tennis facility was, in part, responsible for causing plaintiff's injury.

INJURY WITHIN SCOPE OF DANGER?

In the case of *Jenkins v. City of Miami Beach*, 389 So.2d 1195 (1980), plaintiff was injured when she was struck in the eye by a piece of copper wire thrown by another child. The piece of protruding copper wire had been pulled from a broken water fountain in defendant's city park. Plaintiff alleged that defendant was negligent in its maintenance of the water fountain and such negligence was legal cause of her injury. In addition, plaintiff alleged that the injury was reasonably foreseeable given defendant's

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knowledge of previous incidents of vandalism and unruly conduct by minors in the park at night. Under the circumstances of this case, the court stated that defendant would be liable for the negligent maintenance of the water fountain only if the intervening criminal act of the boy was foreseeable. Specifically, the court would find plaintiff's injury foreseeable if the resulting harm that occurred was within the scope of danger attributable to defendant's negligent conduct.

Applying these principles to the facts of the case, the court found that defendant's alleged negligent maintenance of the fountain did not make it foreseeable that a child would use the protruding copper coil wire as a "fortuitous missile" to hurl at plaintiff. On the contrary, the court found no evidence that defendant had knowledge that its failure to maintain the fountain would result in this type of eye injury. Similarly, the court found no evidence "in the field of human experience" that the existence of a loose coil on a park water fountain had frequently resulted in its being "used as a missile to assault others." As a result, the court concluded that the defendant had no legal duty to have foreseen and taken precautions to prevent such an occurrence in the park.

SOCIAL UTILITY OUTWEIGHS ANY RISK?

In the case of *Cavaliere v. Adults for Kids*, 386 N.W.2d 667 (Mich.App. 1986), plaintiff was injured when the vehicle in which he was driving was struck from behind by another motorist. Plaintiff alleged that this motorist was distracted by defendant's highway display. Specifically, plaintiff alleged that Adults for Kids and the county were negligent in allowing a helicopter to land and placing military equipment and exhibits near the highway. Accordingly, the issue before the court was whether a reasonable person under these circumstances could, or should, have anticipated drivers would be so distracted by these sights that drivers would neglect their driving responsibilities.

As a general rule, the court noted that landowners may not create an unreasonable risk to those traveling on an adjacent public roadway. However, under the circumstances of this case, the court found that the social utility of defendant's potentially attractive roadside activity outweighed any risk to passing motorists. In so doing, the court noted that there was no allegation that defendant's activities were conducted improperly or in violation of any law.

Specifically, the court found no indication that the helicopter obstructed or descended into traffic, or had roared across the highway in an unanticipated or terrifying manner. Rather, the court found it was the conduct of the other vehicle which was unreasonable in allowing himself to become distracted by an interesting sight along the road. As a result, the court found that the accident was not caused by defendant's roadside display. Moreover, the court found that helicopters were common and routine in today's world. Since the conditions created by defendant's activities were not unusual, unexpected, or unnatural, the court concluded that defendants did not have a legal duty to refrain from placing distracting exhibits, or screen the exhibits from passing motorists. In addition, the court found that defendants owed no legal duty to warn motorists of potentially distracting exhibits or activities near the highway.

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UNREASONABLE RISK?

Similarly, the court in *Lompoc Unified School District v. Superior Court*, 26 Cal.Rptr.2d 122 (Cal.App. 1993) found that defendant had no legal duty to screen its athletic field so the football game could not be seen or heard by passing motorists. Plaintiff was struck by a car while riding his bicycle on a public street next to defendant's school property. Apparently, the operator of the motor vehicle which struck plaintiff was momentarily distracted by the football game and scantily clad spectators.

In his complaint, plaintiff alleged that the visibility of the athletic field 140 ft. from the public sidewalk caused a "carnival-like atmosphere" which created an unreasonably dangerous condition for bystanders, pedestrians, bicyclists, and motorists. In particular, plaintiff claimed that defendant had negligently cut back hedges which had previously served as a "distraction barrier." Accordingly, the issue before the court was whether defendant owed any legal duty to foresee and prevent harm under the circumstances of this case, i.e., allowing the public an unimpaired view of the football game and spectators.

According to the court, landowners owe a legal duty of reasonable care to use and manage their land in a manner which does not injure users of abutting streets and sidewalks. On the other hand, the court noted that, generally, there is not landowner liability for allegedly dangerous conditions on property which the defendant does not own, possess, or control. Specifically, the court found that a landowner's legal duty does not normally extend to persons outside the premises on adjacent highways or sidewalks. Applying these principles to this particular instance, the court held that defendant's trimming the hedge did not create an unreasonably dangerous (i.e., negligent) condition on the premises. As a result, the court concluded that defendant owed no legal duty to users of the adjacent street to "shroud" athletic activities so activities could not be seen or heard by passing motorists. Like the "traveling Argonauts", the court found that those using the roadways adjacent to defendant's land must be alert to dangers and must "sail past unusually or scantily attired pedestrians" attending a high school football game.

RELATIVE RISK KNOWLEDGE

In the case of *Coates v. Mulji Inn, Inc.*, 342 S.E.2d 488 (Ga.App. 1986), the court noted that landowner liability is based upon the landowner's superior knowledge of an unreasonable risk of harm which is not reasonably known to those authorized to use the premises (i.e., invitees). Within this context, superior risk knowledge must be related to the *significance* of readily observable physical facts. In other words, negligence liability is more likely where the defendant has greater comprehension than the plaintiff of the quantity and quality of danger associated with a particular set of circumstances.

In this particular case, plaintiff, age 17, drowned in defendant's motel pool. At the time, it was dusk and the pool lights were out. Further, the water was cloudy and there was no buoy line dividing the shallow water from the deep end of the pool. The issue before the court was whether the risk of drowning under such adverse circumstances should have been obvious to plaintiff.

As noted by the court, landowner's are not liable for readily observable conditions which should be

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known and appreciated by their invitees. Specifically, the court found no legal duty to warn against obvious risks because the invitee, through the reasonable use of his senses, has any risk knowledge conveyed by such a warning. However, under the circumstances of this case, the court found sufficient evidence that the defendant pool operator had greater knowledge than plaintiff of the increased risk of drowning associated with the lack of pool lighting. Having found that the risk significance of these readily observable facts were not equally known to the pool operator and plaintiff at the time of the drowning, the court found sufficient evidence to impose negligence liability on defendant.

HAZARD OFF PREMISES, NO DUTY TO FENCE

In the case of *Hanks v. Mount Prospect Park District*, 614 N.E.2d 135 (Ill.App. 1993), the court considered whether it was negligent to locate a playground immediately contiguous to a driveway or parking lot. Plaintiff, age 5, was struck by a car while crossing a parking lot after leaving defendant's public playground. In his complaint, plaintiff alleged that defendant's failure to place a barrier between the playground and the driveway, or to provide a crosswalk warning motorists of children, created a hazardous and unreasonably dangerous condition. Accordingly, the specific issue before the court was whether the park district owed a legal duty to plaintiff and other children to place the playground in a safe location and provide a safe means of ingress and egress from this particular playlot.

As described by the court, the legal basis for negligence liability is the "foreseeability" of injury to the child. Specifically, the court found a legal duty to remedy conditions on the premises which are dangerous to children. Within this context, foreseeability arises from the child's inability to comprehend the risk of injury associated with a danger on the property in conjunction with the landowner's knowledge of the children's presence on the premises. However, under the circumstances of this case, the court found no allegation of any dangerous condition on the playground. Further, the court found that the condition of defendant's property did not increase the danger in the adjacent parking lot. As a general rule, the court noted there is no negligence liability where the landowner has exercised no control over adjacent property.

Applying this principle to the facts of the case, the court found defendant had no legal duty to erect a fence, or take other steps to prevent injury on the roadway adjacent to the playground. To impose such a duty, in the opinion of the court, would place an "intolerable burden" on the park district to protect children from traffic injuries by restricting access or relocating every park and playground.