NO DUTY TO PROVIDE CPR IN PLAYGROUND DEATH: FIRST-AID DUTY DEFINED

In the case of *Applebaum v. Nemon*, 678 S.W.2d 533 (Tex. App. 14 Dist. 1984), David and Suzanne Nemon brought a wrongful death action against defendant Montessori Educational Corp. of Texas (doing business as Houston Children's Center) after their two-year-old son, Howard Nemon, died while in the custody and care of the Center. Nemon also sued the officers and employees of the Center: Sanford Applebaum, Marilyn Applebaum, Noreen De Boy, and Jackie Jones. The facts of the case were as follows:

After Howard was delivered to the day care center on December 19, 1980 by his parents, he was taken outdoors for twenty to twenty-five minutes of free play. Jackie Jones observed Howard playing on various equipment. A short time later, Jackie Jones began lining the children up to return inside and **discovered Howard with his head on the playground equipment known as the platform, feet touching the ground with his hands near his head. After Howard did not respond to clapping hands, she went over and picked Howard up and laid him on the platform. She then summoned Sanford Applebaum who examined Howard for ten seconds and then called the operator to obtain an ambulance.** Applebaum returned to Howard and rendered mouth-to-mouth resuscitation for two to three minutes. He then telephoned the fire department direct for an ambulance a second time, because the ambulance had not yet arrived. He returned to Howard and continued mouth-to-mouth resuscitation until the ambulance arrived.

Howard was transported by the ambulance to Southwest Memorial Hospital. He was later transported to Texas Children's Hospital where he was pronounced dead at 2:59 p.m. on December 22, 1980. Howard was brain dead at the time he first received treatment at the hospital.

At trial, the jury failed to find that Howard Nemon was injured on the playground. The jury did, however, find that the proximate [i.e. legal] cause of Howard's death was defendants' negligence. Specifically, the **jury found that the day care center had failed to "to provide adequate lifesaving aid to Howard" and failed to "to instruct its employees in proper measures to be taken in an emergency."** Based on the jury's verdict, the trial court entered a judgment for the Nemons in the amount of $304,822.53. Applebaum and the other defendants appealed.

On appeal, **Applebaum maintained that the defendants "did not owe a duty to provide adequate lifesaving aid or to instruct its employees in emergency procedures."** As noted by the appeals court, **"there can be no liability if the defendant has not breached a duty which he owned to the plaintiff."** In this particular instance, there was **no state statute or regulation which imposed specific duties of care, such as first-aid and emergency instructions, on day care centers.** The issue was, therefore, "whether these duties arise from the common law." Unlike statutes and regulations created by the enactment of legislatures, the term "common law" within this context refers to the tradition of general legal principles derived from the judgments and decrees of courts over generations.

According to the appeals court, a "deeply rooted" common law doctrine is that **"a person owes no duty to render aid to one for whose initial injury he is not liable."** On the other hand, the appeals court acknowledged that other jurisdictions have held that **"certain relationships may impose a duty to render assistance to one for whose initial injury he is not liable."** In this instance, the court characterized the relationship between a child and a day care center as "an economic one in which the day care center in exchange for a fee agrees to care for the child and to protect the child from harm during the time the child is in the custody of the day care center." Consequently, in the opinion of the court, this **relationship "included both an implied agreement and a duty to render reasonable assistance to a child in its custody who becomes imperiled."**

The **Restatement of the Law of Torts Second § 314** would impose a similar duty when an owner or occupier of land holds his land **open to the public and invites the public to use the premises for a specified purpose** (e.g. day care center services). Under such circumstances, **the Restatement would require the owner or occupier to give members of the public "first aid after he knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others."** The **duty to provide first-aid would also be imposed on "one who is required by law to take or voluntarily takes custody of another under circumstances such as to deprive the other of his normal opportunities for protection."** The Restatement provides the following example of a situation where § 314 would impose liability for failing to provide first aid:

> A small child sent by his parents for the day to B's kindergarten. In the course of the day A becomes ill with scarlet fever. Although recognizing that A is seriously ill, B does nothing to obtain medical assistance, or to take the child home or remove him to a place where help can be obtained. As a result, A's illness is aggravated in a manner which proper medical attention would have avoided.

The appeals court adopted these principles of the Restatement and imposed a duty on day care centers to render aid to children in their custody. This standard of care is articulated in a comment to § 314 as follows:

> **The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured. He is not required to take any action beyond that which is reasonable under the circumstances. In the case of an ill or injured person, he will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician, or to those who will look after him and see that medical assistance is obtained.** He is not required to give any aid to one who is in the hands of apparently competent persons who have taken charge of him, or whose friends are present and apparently in a position to give him all necessary assistance.

According to the court, the imposition of such a duty was "consistent with the **Minimum Standards for Day Care Centers** promulgated by the Texas Department of Human Resources."

As described by the court, these **standards required "day care centers to give first aid when needed, to call the physician named by the child's parents in the case of critical injury or illness, and to take the child to the nearest emergency room when necessary."**

Under most circumstances the appeals court found that **"a defendant will not be required to do more than administer whatever initial aid he reasonably can and knows how to do, and take reasonable steps to place the injured person in the hands of a competent physician."** On the contrary, **to provide aid beyond what an individual "reasonably can and knows how to do," would provide a basis for negligence liability. "[I]f the person who is charged with the duty to render aid is not possessed with medical training and he undertakes to render medical assistance, he may be liable if such assistance is found to be detrimental."**

Applying these principles to the facts of the case, the appeals court considered **whether Applebaum and the other defendants had "acted reasonably under all the circumstances in their rendition of aid."** The Nemons had argued that Applebaum should have rendered life-saving aid in the form of cardiopulmonary resuscitation (CPR) to their son. The appeals court rejected this argument.

According to the appeals court, Applebaum and the other **defendants "had a duty to render assistance," but "they had no duty to provide life-saving aid to Howard Nemon which requires special training to acquire."** As described by the court, **CPR "is a simple technique to learn and administer, [but] it is a skill which is not commonly known and must be acquired through training."**

> We recognize that Applebaum had a **duty to procure medical assistance as soon as reasonably possible upon discovering Howard Nemon in an unconscious state.** But we **cannot find any basis in the common law for requiring defendants to have medically trained employees who can administer CPR or some other type of life saving aid.** Day care centers are regulated by the Texas Department of Human Resources. The Department does not require medical training or expertise of day care center employees. **Such a requirement, if considered wise and valuable, should be imposed by the [Texas state] legislature or the Department of Human Resources and not by this court.**

The appeals court also considered whether the duty of the day care center to Howard Nemon encompassed "a duty to prepare beforehand for medical emergencies concerning the children in their custody by instructing its employees on emergency measures." The Nemons had argued that defendants violated their legal duty to render assistance by failing "to assign responsibilities to its employees in the event of an emergency and to conduct emergency drills to practice these responsibilities." The appeals court disagreed. **According to the court, the duty defendants owed to Howard Nemon "was not to instruct its employees in emergency procedures beforehand, but was to act reasonably under all circumstances in the rendition of aid to Howard Nemon."**

> **We can find no authority which holds that the duty to render aid requires**

> **preparation to deal with a medical emergency prior to its occurrence. The Texas Department of Human Resources minimum standards for day care centers requires that emergency telephone numbers be posted by a telephone which is accessible to all staff members. Apart from this requirement, there is no state law or regulation which requires day care centers to instruct its employees in procedures for medical emergencies or to conduct drills. The duty to render aid as it has developed in the common law does not arise until after the emergency has occurred.**

The appeals court further rejected Nemons' contention that their son's death was proximately caused by (1) the defendants' failure to render CPR, and (2) the delay in the arrival of the ambulance caused by defendante' failure to instruct its employees in emergency procedures.

> **To support a finding of proximate cause, the medical testimony must establish a reasonable medical probability that the failure of Mr. Applebaum to render CPR caused the death of Howard Nemon. In the absence of reasonable probability, the inference of causation amounts to no more than conjecture or speculation. A mere possibility that a certain omission by defendants caused the death is insufficient [to establish liability]...** Howard Nemon was discovered unconscious and not breathing. There is no evidence as to how long he was in that state before discovery . . .
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> **There simply is no evidence that shows a reasonable medical probability that administration of CPR or any other medical treatment would have saved Howard Nemon. Neither is there any evidence that instruction of defendants' employees in emergency procedures would have probably saved Howard's life.** Even assuming that the failure to prepare beforehand delayed the arrival of the ambulance, there is no evidence showing a reasonable medical probability that if aid had been rendered by the ambulance service absent any delay caused by defendants Howard would have been saved.

The appeals court, therefore, concluded that the Nemons had "completely failed to prove that the omissions of defendants which the jury found to be negligent proximately caused Howard Nemon's death." Absent such proof, the court found "there can be no liability." As a result, the appeals court reversed the judgment of the trial court and rendered judgment that the Nemons "take nothing" against Applebaum and the other defendants.