

MUST LANDOWNER PROTECT "MOONING" REVELER FROM HIMSELF?

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The very successful 1986 Congress for Recreation and Parks in Anaheim, California is history. Recreational injury liability, including risk management and insurance availability, was one of the National Issues addressed in the educational sessions of the Anaheim Congress. These sessions were well attended and proved to be very informative. Based upon the positive response to this information and continued interest in liability issues, I would anticipate that the program committee will consider similar educational sessions for the 1987 Congress for Recreation and Parks in New Orleans, Louisiana (September 18-22).

With the 1987 Congress scheduled for New Orleans, I could not help but take notice of the *Eldridge* decision described below during my review of recently reported recreational injury law cases for possible inclusion in the *Recreation and Parks Law Reporter*. The injury which prompted *Eldridge* occurred during the Mardi Gras celebration in New Orleans. This case illustrates the scope of a landowner's duty of care owed to individuals legitimately on the premises. Landowners must protect individuals on the premises from unreasonable dangers.

There is, however, no landowner duty to protect persons from reasonable hazards on the premises. Injuries associated with falls from readily observable heights are considered open and obvious hazards which anyone old enough to be at large is expected to know, appreciate, and avoid. Despite an open and obvious hazard, the landowner may still have a duty to provide protection where individuals on the premises would reasonably be distracted under the circumstances and, therefore, unable to look out for their own safety. This distraction theory is implicit in the *Eldridge* case, i.e. plaintiff alleged that he was distracted by the wild atmosphere at the Mardi Gras.

Another significant factor which determines liability is control. Generally, if the owner or occupier of land controls the premises, there will be liability for injuries attributable to unreasonable hazards on the premises. Conversely, there is no liability under circumstances where the defendant is not in control of the premises. Within this context, control involves the ability to inspect and either repair or remove known or discoverable hazards within a reasonable time. This principle is illustrated by the *Erickson* decision described herein.

BLUE MOON HITS BOURBON STREET

In the case of *Eldridge v. Downtowner Hotel*, 492 So.2d 64 (La.App. 4 Cir. 1986), plaintiff Edward Eldridge fell from a balcony of defendant's Downtowner Hotel (also known as "The Inn on Bourbon Street") during the Mardi Gras celebration in New Orleans. The facts of the case were as follows:

[O]n February 7, 1978, Mardi Gras day, Eldridge was the guest of a patron of the Downtowner in the French Quarter. While on the second floor balcony of the hotel, he observed various individuals on other balconies toying with the crowds below by

exposing their breasts or "mooning" the crowds by exposing their bare buttocks. Spurred on by the wild atmosphere in the Quarter, Eldridge climbed on the balcony railing and mooned the crowd. While on the railing Eldridge fell to the street below and was seriously injured.

Eldridge filed suit against Downtowner for 1.75 million dollars. Eldridge alleged that "Downtowner was negligent in failing to have a protective screen or a uniformed guard on the balcony to prevent just such accidents as occurred herein." The jury returned a verdict in favor of Downtowner. Eldridge appealed.

The issue before the appeals court was whether the trial court had erred in failing to instruct the jury "on a duty/risk analysis of negligence liability." As described by the appeals court, the pertinent inquiries under a duty/risk analysis were as follows: (1) whether the conduct of which plaintiff complains was a cause-in-fact of the harm; (2) whether there was a duty on the part of the defendant which was imposed to protect against the risk involved; (3) whether there was a breach of that duty; and (4) damages. In the opinion of the appeals court, Eldridge's fall "resulted solely from his own conduct."

Eldridge was not pushed off the railing, and he was neither enticed nor encouraged by defendant Downtowner to sit on the railing. Moreover, the railing was not defective. It is clear, therefore, that Eldridge's fall was in fact caused by his own want of skill, that is, in exercising bad judgment by sitting on the railing and in losing his balance.

The specific issue was, therefore, "whether Downtowner had a duty to protect Eldridge from his own conduct" under the circumstances of this case. In considering this question, the appeals court noted that it would not address "defendant's duty to protect one who is a minor, mental incompetent or intoxicated against the risk herein involved." In this particular instance, Eldridge was not a minor, nor was he a mental incompetent or intoxicated. As a result, the effect of a plaintiff's diminished capacity on the landowner's duty of care was not before the appeals court.

In the opinion of the appeals court, the risk of harm in this instance (falling while sitting on a railing on a second floor balcony) was "an obvious and reasonable risk of harm which the defendant Downtowner had no duty to protect against."

The principal juridical element of an action in negligence is a duty, apparent to reason and common sense, to avoid acts and omissions which engender an unreasonable risk of harm to others. Implicit in this notion of duty is that there are some risks which are reasonable. An individual encountering such risk bears the responsibility of dealing with and/or avoiding them. Thus, a visitor assumes the obvious, normal or ordinary risks attendant on the use of the premises and owners are not liable for injuries to a visitor when those injuries result from a danger which he

should have observed in the exercise of reasonable care.

Eldridge had argued that "because of the wild atmosphere of Mardi Gras and the fact that traditionally women would expose themselves from the balconies, defendant Downtowner should have foreseen that an accident was likely and was under an obligation to protect Eldridge from himself." For the following two reasons, the appeals court found "no merit" in Eldridge's argument:

[F]irst, absolutely no evidence was offered at trial demonstrating that anyone had ever fallen from the balcony during Mardi Gras or even that people sat on the balcony railings. Second, cases cited by Eldridge in support of his argument involved plaintiffs that were in some way incapacitated, i.e. minority, intoxication, insanity, etc... In the instant case, no evidence was introduced demonstrating that Eldridge was in any way incapacitated. In fact, he knowingly and voluntarily placed himself at risk. Although the parties have made much of the fact that Eldridge was "mooning" the crowd prior to his fall, his injuries resulted from falling off a railing and not mooning the crowd. This is to say that Eldridge could have mooned the crowd while standing on the balcony or he could have sat on the railing without mooning the crowd. In the former instance his conduct, while illegal, could not have led to the injuries complained of.

The appeals court noted that "Downtowner was not in violation of any statute at the time of Eldridge's injury." As a result, the appeals court found that "the trial court was not required to charge the jury that Downtowner had a duty to protect patrons from the type of conduct engaged in by Eldridge herein." The appeals court also rejected Eldridge's contention that "the trial court erred in denying his efforts to show measures taken by other hotels to protect similarly situated patrons."

Eldridge cites no authority for this argument. No evidence was adduced at trial demonstrating that other protective measures were required by law. To have allowed evidence of other protective measures would have opened the door to innumerable extraneous considerations such as size and crowd capacity of other hotel balconies, height and structure of balcony railings, entrance requirements of other hotels, etc. This is to say that a hotel's decision to utilize certain protective measures may well be governed by considerations other than protecting a patron from his own carelessness.

The appeals court, therefore, affirmed the judgment of the trial court in favor of defendant Downtowner.

CONCESSIONAIRE CONTROL AT STATE PARK?

In the case of *Erickson v. Brennan*, 513 A.2d 288 (Me. 1986), plaintiff Ralph Erickson injured his back when he slipped in a puddle of water while servicing refrigeration equipment in the concession stand at Crescent Beach State Park. The injury occurred on May 30, 1978. Initially, Erickson sued the State of Maine as the owner of the concession stand. However, this claim was dismissed for Erickson's failure to comply with the notice requirement of the state tort claims act. Following the dismissal of Erickson's claim against the State, he filed a claim against defendant James Brennan as operator of the concession stand. The facts of the case were as follows:

Both the concession stand and the equipment located therein were owned by the State of Maine. At the time of the injury the State, in accordance with its usual practice, was preparing the park for the summer season. As part of the preparations, the State annually hired Erickson to service the refrigeration equipment. Brennan was informed that the park was ready to open for the season by the park manager only after Erickson serviced the equipment.

Brennan operated the concession at the park from 1969 to 1981 pursuant to an agreement with the State to dispense "seafoods, sandwiches, tonic, ice cream, candy and sundry articles". In 1978 the agreement in existence with the State gave Brennan access to the stand from April 1 to November 30. Brennan, however, did not open the stand until the second week of June. In fact, Brennan had not entered the premises since its closing in the fall of 1977.

Brennan argued that "he was not in possession of the land at the time of the injury and thus owed no duty to Erickson." The trial court agreed and granted a motion for summary judgment to Brennan. Erickson appealed.

As described the appeals court, "a possessor of land owes a duty to use reasonable care to all persons lawfully on the premises" under Maine law. Consequently, liability for defects on the land causing injury involves the threshold issue of "whether the individual in question was a possessor of land at the time of the injury." In defining "a possessor of land", the appeals court cited the following definition found in *The Restatement (Second) of Torts* 328E (1965):

(a) a person who is in occupation of the land with the intent to control it; (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or; (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under (a) and (b).

Applying these principles to the facts of the case, the appeals court found that "Brennan was not in possession and control of the premises at the time of Erickson's injury."

On the record before us, consequently, the central question becomes whether the State, subsequent to the fall of 1977 and at the time of Erickson's injury, occupied the premises with intent to control it, within the meaning of Section 328E(b). The unchallenged affidavits [i.e. out of court sworn statements] submitted in support of the summary judgment motion show that (1) Brennan did not occupy the concession stand following its closing in the fall of 1977 until June 1978, (2) the State had assumed control of the concession stand to prepare for the season and had hired Erickson to service the equipment, (3) the manager of the park did not inform Brennan that the concession stand was ready to open until after Erickson's work was completed.

The appeals court, therefore, concluded that the trial court "was correct in granting summary judgment in Brennan's behalf." As a result, the appeals court affirmed the judgment of the trial court in favor of defendant Brennan.