TRAVEL & TOURISM PUBLICATION FAILS TO INVESTIGATE ACCURACY OF INFORMATION

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What if someone relied upon information in the "NRPA Law Review" column or the Recreation and Parks Law Reporter (RPLR) in lieu of consulting local counsel on a particular issue involving personal or professional liability? And, what if such misplaced reliance led to some legal detriment to an individual or agency? Would the National Recreation and Parks Association, as the publisher of Parks & Recreation and RPLR and/or the individual responsible for producing these materials, be liable for any resulting injury or loss? Impossible you say? Well, over the years that I've been producing this information, I have had this issue raised on more than one occasion.

As is generally the case, the perception of negligence liability tends to be much worse than the reality. The Birmingham decision described below is a rather interesting illustration of the applicable legal duty owed by publishers/authors to their readership. Suffice it to say, however, that any information contained in this or any other publication should never be relied upon as a low cost substitute for competent professional advice to meet your legal, medical, psychological, or travel and tourism needs.

READING IS FUNDAMENTAL

In the case of Birmingham v. Fodor's Travel Publications, 833 P.2d 70 (Hawaii 1992), plaintiffs Joseph and Gail Birmingham (the Birmingham) alleged that the defendant Fodor's Travel Publications, Inc. (Fodor's) was negligent in recommending Kekaha Beach Park in their publication, but failing to warn readers of dangerous surf conditions at this location. The facts of the case were as follows:

Fodor's is a publisher of travel guides and has published over 700 different travel titles world-wide since 1949. Fodor's does not author these publications, accepting writings from different travel writers regarding their personal observations and comments on locations they visit throughout the world. In 1987, Fodor's published Fodor's Hawaii 1988 (the Guide), a travel guide to the Hawaiian Islands. The Guide was compiled, researched, and edited by an international team of travel writers, field correspondents, and editors, and has been published world-wide. The Guide provides numerous descriptions of various locations and subjects to apprise the general public of choices regarding travel to and activities in the Hawaiian Islands. Fodor's neither expressly guarantees, warrants, nor endorses the locations and subjects as to which the Guide provides descriptions and information.

In February 1988, the Birmingham bought a copy of the Guide in Texas, in preparation for their honeymoon trip to Hawaii. The Birmingham were especially
interested in information on the Island of Kauai. Based on information derived from the Guide, specifically the section on Kekaha Beach, the Birminghams decided to go to Kekaha Beach to body surf, swim, and relax. The section in the Guide that the Birminghams claim they relied on in visiting Kekaha Beach states: "Kekaha Beach Park on the south shore is a long, luxurious strip of sand recalling the beaches of California. Great for dune buggy action!" Shortly after arriving at Kekaha Beach on March 15, 1988, Joseph Birmingham (Joseph) sustained personal injuries from body surfing in ocean waters off Kekaha Beach.

Fodor's moved for summary judgment, contending that, as a matter of law, it owed no duty to the Birminghams. Specifically, Fodor's claimed that "the Guide was analogous to a newspaper or magazine and that no jurisdiction addressing the issue of publisher liability for a publication of general circulation had ever held a publisher liable on the basis of breach of duty to warn, unless the publisher had guaranteed or authored the contents of the publication." The trial court agreed and granted summary judgment in favor of Fodor's. The Birminghams appealed.

In determining whether Fodor's owed a duty to warn the Birminghams of the wave and ocean conditions off Kekaha Beach," the state supreme court framed the specific issue as follows: "Is a publisher, that neither authors nor guarantees the accuracy of representations of fact contained in its publication, liable for physical injuries sustained in reliance on information contained in the publication?"

Further, the court noted the following "basic principle that a negligence action lies only where there is a duty owed by the defendant to the plaintiff."

A necessary element in a negligence action is a duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks. The existence of a duty, that is, whether such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other.

However, based upon "a review of relevant case law," the court found that "no jurisdiction has held a publisher liable in negligence for personal injury suffered in reliance upon information contained in the publication, unless the publisher authored or guaranteed the information."

Whether based on negligent misrepresentation or negligent manufacture of a defective product, the cases uniformly hold, for the same policy reasons, that, absent guaranteeing or authoring the contents of the publication, a publisher has no duty to investigate and warn its readers of the accuracy of the contents of its publications... We conclude that no cause of action for negligent misrepresentation should be recognized under the facts of this case. Plaintiff's theory, if adopted, would place upon publishers the duty of scrutinizing and even testing all procedures contained in any of their publications. The scope of liability would extend to an undeterminable number of potential readers... [Further, we note that] a number of courts had declined, on first amendment grounds, to impose such a duty on publishers... [T]o distinguish bad
advice in a "How To" book from information contained in treatises... would lead to further First Amendment problems involving content-based discrimination. More important for our purposes, however, is the chilling effect which liability would have upon publishers, an effect recognized in the cases.... Even if liability could be imposed consistently with the Constitution, we believe that the adverse effect of such liability upon the public's free access to ideas would be too high a price to pay... [G]iven the tremendous burden such a duty would place upon defendant publishers, the weighty societal interest in free access to ideas, and potentially unlimited liability, it would be unwise to impose a duty to warn of "defective ideas" upon publishers of information supplied by third party authors.

The state supreme court, therefore, concluded Fodor's had "no duty to investigate the accuracy of the contents of the books it publishes."

[W]e are reluctant to impose a new duty upon members of our society without any logical, sound, and compelling reasons taking into consideration the social and human relationships of our society.... [Further,] there are compelling policy reasons, apparently recognized by all jurisdictions addressing the issue, that militate against imposing a duty on a publisher to warn of the accuracy of its publication, absent authorship or warranty of the publication's contents...

A publisher may of course assume such a burden, but there is nothing inherent in the role of publisher or the surrounding legal doctrines to suggest that such a duty should be imposed on publishers. Indeed the cases uniformly refuse to impose such a duty. Were we tempted to create this duty, the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs... [B]ecause a publisher had no duty to investigate the accuracy of the contents of its publication, the publisher had no duty to warn its readers that the information was incomplete and not to be relied on, or that the publisher could not guarantee the accuracy of the information.

Accordingly, the state supreme court held that "a publisher of a work of general circulation, that neither authors nor expressly guarantees the contents of its publication, has no duty to warn the reading public of the accuracy of the contents of its publication."

Because the Guide was a work of general circulation, and Fodor's neither authored nor expressly guaranteed the contents of the Guide, Fodor's had no duty to warn the Birminghams of the accuracy of the information contained in the Guide... [In addition,] we hold that the Guide is not a "product," and the Birminghams have no claim for relief based on strict/product liability against Fodor's [i.e., liability without proof of fault for a defective product causing injury].

Although there is always some appeal to the involuntary spreading of costs of injuries in any area, the costs in any comprehensive cost/benefit analysis would be quite different
were strict liability concepts applied to words and ideas. We place a high priority on the unfettered exchange of ideas. We risk that words and ideas have wings we cannot clip and which carry them we know not where. The threat of liability without fault (financial responsibility for our words and ideas in the absence of fault or a special undertaking or responsibility) could seriously inhibit those who wish to share thoughts and theories... [W]ith the specter of strict liability, would any author wish to be exposed... for writing on a topic which might result in physical injury? e.g. How to cut trees; How to keep bees? One might add: Would anyone undertake to guide by ideas expressed in words either a discrete group, a nation, or humanity in general?

The state supreme court, therefore, found that "the trial court was correct in granting summary judgment in favor of Fodor's on the Birminghams' negligence claim against it."