

DUTY TO INSTRUCT, WARN, & DEMONSTRATE UNFAMILIAR JUMPING EXERCISE

As illustrated by *Dibortolo* decision described herein, activity instructors may have a legal duty to provide instructions (including warnings about associated dangers) and demonstrate an exercise, particularly when the activity involves children and/or unfamiliar exercises. In the case of *Dibortolo v. Metropolitan School District of Washington Township*, 440 N.E.2d 506 (Ind.App. 1882), plaintiff, Mary Ann Dibortolo, brought a negligence suit against defendant, Metropolitan School District of Washington Township (the District), for injuries she sustained during a physical education class taught by the school's physical education teacher. The facts of the case were as follows:

On March 15, 1977, Mary Ann Dibortolo was 11 years of age and a 6th grade student at John Strange Elementary School. On that day, she broke a permanent front tooth during a regularly-scheduled physical education class taught by the school's instructor, Mrs. Dorothy Merriman. Approximately half the class of about 25-30 students including the plaintiff were required to perform an exercise known as the vertical jump.

According to plaintiff's expert witness, Joanne Gassert, the safe and proper way to perform this exercise is to first stand with the body parallel and the shoulders perpendicular to the wall, and with an arm upraised, to crouch momentarily, then to jump and reach the highest possible point on the wall. Throughout her 24 years' experience as a physical education teacher, she has never permitted her students to run toward the wall in performing the vertical jump. It was her opinion that to instruct students to run or to even take a "leap step" toward the wall is to subject them to an unreasonable risk of harm. Mrs. Gassert believed that to allow such activity is to transform this relatively safe exercise into an "inherently dangerous" one.

Mrs. Dorothy Merriman, a physical education teacher since 1955, testified that she did not consult any textbooks in preparation for this exercise; however, she considered "safety aspects." According to Mrs. Merriman, she demonstrated the exercise to the students before allowing them to perform it, she had not used a floor mat placed perpendicularly to the wall, and she had not instructed the students to run toward the wall. She admitted, however, that they were taking 2 or 3 "quick steps" in the direction of the wall.

In conflict with her testimony was that of the plaintiff and three other witnesses. Stephanie Schneider, Jeff Sheets, and Stacey Occolowitz were in the same class with the plaintiff and were also participants in that day's activities. They performed the exercises ahead of the plaintiff and saw the plaintiff's mouth hit the concrete wall. They

APRIL 1998, NRPA LAW REVIEW

further testified that the plaintiff did not fall or stumble at any point before the impact. It was adduced that the plaintiff and these three students had never performed the vertical jump before that day, and that Mrs. Merriman neither demonstrated the exercise nor warned the class about any dangers associated with the exercise.

The plaintiff introduced evidence which showed that Mrs. Merriman explicitly instructed her pupils to run toward the wall to improve their performance. The record reveals that the majority of the students first stood about 6-8 feet away and then ran toward the wall before executing the vertical jump. In addition, there was testimony that the students were running on a mat placed in a position perpendicular to the wall.

Based on this evidence, the trial court entered judgment for the District. Dibortolo appealed. On appeal, Dibortolo argued that the trial court had erred in not allowing the jury to determine whether the District was negligent under the circumstances of this case.

NEGLIGENCE PRINCIPLES

As noted by the appeals court, negligence is comprised of three elements: (1) a duty on the part of defendant in relation to the plaintiff; (2) failure of the defendant to conform his conduct to the standard of care necessitated by the relationship; and (3) the injury which the plaintiff suffered as a result of this failure.

There are three questions of law regarding these elements which the court must decide before it may submit the case to the jury. The initial question is whether the law imposes a duty upon the defendant to conform his conduct to a certain standard for the plaintiff's benefit...

The duty to exercise care for the safety of another arises as a matter of law out of some relation existing between the parties, and it is the province of the court to determine whether such a relation gives rise to such duty.

In this particular instance, the appeals court found that "Mrs. Merriman had a duty to conform her conduct as a physical education teacher to a certain standard, not only for plaintiff's, but also for the other pupils' benefit":

In this case, the relationship between the parties is one of pupil and defendant's school personnel. The relationship of school pupils and school authorities invokes the well-recognized duty in tort law that persons entrusted with children, or others whose

characteristics make it likely that they may do somewhat unreasonable things, have a responsibility recognized by the common law to supervise their charges. Thus, our Supreme Court has imposed a duty upon school authorities to exercise reasonable care and supervision for the safety of the children under their tutelage.

Having found the District owed a legal duty of care to Dibortolo, the appeals court defined “the applicable standard of care” as follows:

[S]chools are not intended to be insurers of the safety of their pupils, nor are strictly liable for any injuries that may occur to them... [T]he appropriate standard is whether a defendant exercised his duty with the level of care that an ordinary prudent person would under the same or similar circumstances.

EVIDENCE OF NEGLIGENCE

Applying these principles to the facts of the case, the appeals court found sufficient evidence for a jury to find the District’s negligence caused Dibortolo’s injuries:

Viewing the evidence in the light most favorable to the plaintiff, there was sufficient evidence from which the jury could have reasonably inferred that the defendant's employee, Mrs. Merriman, was negligent in discharging her duty to exercise reasonable care for the safety of the students who were under her control by improperly instructing them to run toward the wall in executing the vertical jump, and thereby subjecting them to an unreasonable risk of harm.

We pass no judgment on whether Mrs. Merriman's conduct of instructing the students to perform the exercise in this manner constituted negligence. This is a question of fact more appropriately reserved for the jury. Thus, we limit our review of the evidence to the precise determination of whether there was sufficient evidence to warrant the jury's consideration.

The plaintiff produced evidence which indicated that Mrs. Merriman did not demonstrate the exercise before she allowed the students to perform it. The plaintiff also introduced evidence that the students, including the plaintiff, were expressly instructed to run toward the wall if they wished to attain a higher score.

Expert testimony was offered to show that the proper method for performing this exercise is to stand parallel to the wall, and that to permit, much more, instruct students

to run toward the wall is to subject them to an unreasonable risk of injury. The jury may have given weight to this expert testimony and reached a rational inference that the teacher's conduct exposed the students to an unreasonable risk. The fact that Mrs. Merriman denied having instructed the students to run during this exercise only demonstrates that the evidence was at least in a state of conflict such that reasonable minds might draw differing conclusions. To enter judgment on the evidence in the face of such conflicting evidence was improper...

[I]n the instant case, the evidence that Mrs. Merriman did not demonstrate the exercise, that she specifically directed the students to run during a structured physical education activity such as the vertical jump, when juxtaposed with the expert testimony that such an instruction is not only erroneous, but is also unsafe, would have entitled a jury to reasonably infer that the teacher's conduct exposed the students to an unreasonable risk.

In addition, the appeals court found "sufficient evidence from which the jury could have justifiably concluded that Mrs. Merriman's instructions were the proximate cause of plaintiff's injury":

A proximate cause of plaintiff's injury is one which sets in motion the chain of circumstances leading to the injury. An essential element of proximate cause is considered to be the foreseeability of an injury. The negligence will be deemed to have been the proximate cause of the injury where the injury was one which, under the circumstances, should have been reasonably foreseen.

The record indicates that the plaintiff did not fall or stumble as she approached the wall. Nor was there evidence that an intervening event, such as another pupil tripping or obstructing the plaintiff's path, occurred. Thus, the jury may well have found that the injury which the plaintiff incurred in colliding with the wall was a direct and foreseeable consequence of running toward the wall in compliance with the teacher's instruction.

PARTICIPANT AT FAULT?

On appeal, the District argued that the trial court's "judgment on the evidence was proper because the plaintiff was contributorily negligent and/or incurred [i.e., assumed] the risk of her injury as a matter of law." As noted by the appeals court, assumption of risk (referred to as "incurred risk" in Indiana), is generally a question to be resolved by the jury. In so doing, the jury must determine whether "the plaintiff had actual knowledge of the danger caused by the defendant and that he understood and appreciated the risk." Under the circumstances of this case, the appeals court found sufficient evidence

for a jury to find that Dibortolo has not necessarily assumed the risk of injury:

In light of the evidence here that the plaintiff had participated in the exercise as part of the physical education course, had never performed the vertical jump before the day of the injury, had no knowledge of the proper way to perform this exercise, and had no actual knowledge of the danger caused by defendant's alleged instructions, we cannot agree with defendant that the only inference that could have been derived from the evidence was that the plaintiff incurred the risk of her injury.

Similarly, the appeals court found the evidence did not necessarily lead to the conclusion that Dibortolo was "contributorily negligent as a matter of law." On the contrary, the appeals court found evidence suggesting that Dibortolo had acted reasonably under the circumstances of this case.

The evidence that she did not stumble, fall or engage in unusual behavior which deviated from the other students' behavior may also be construed by the jury as an absence of the plaintiff's contributory negligence...

The rule has long been adopted in Indiana that the standard of care applicable to a child engaged in the type of activity characteristically engaged in by children is that degree of care that would ordinarily be exercised by children of like age, knowledge, judgment and experience under similar circumstances...

In the instant case, there was evidence that the plaintiff, who was eleven years old on the day of the accident, was to perform the exercise for the first time, as were some of her classmates, and was relying on the teacher's directions for guidance. Reasonable minds may differ as to whether the plaintiff had the ability to realize and appreciate the danger of an unfamiliar and improperly-taught exercise. Reasonable men may also draw divergent inferences from the evidence that the plaintiff had performed the exercise in a manner similar to that of the other students in the same grade, in accordance with the teacher's instructions.

Since the evidence did not necessarily lead to the conclusion that Dibortolo was either contributorily negligent or had incurred the risk of her injuries, the appeals court found the trial court had erred in entering judgment for the District. The appeals court, therefore, reversed the judgment in favor of the District and remanded (i.e., sent back) the case to the trial court for further proceedings. On remand, a jury would consider Dibortolo's negligence claims and the District's defenses, i.e., assumption of risk and contributory negligence.

APRIL 1998, NRPA LAW REVIEW

Dr. Kozlowski is an associate professor in the Health, Fitness, and Recreation Resources program at George Mason University. He is also legal/legislative counsel for the NRPA Division of Public Policy. E mail: jkozlows@gmu.edu GMU Hhomepage: <http://mason.gmu.edu/~jkozlows/>