

CRASH ON CHALLENGING MOUNTAIN BIKE TRAIL

James C. Kozlowski, J.D., Ph.D.

© 2017 James C. Kozlowski

In determining negligence liability, we are generally held to the reasonable person standard. What would the reasonable person do, or not do, under a particular set of circumstances? Negligence liability is more likely when one's conduct falls below that which would generally be considered reasonable care under the circumstances.

Reasonableness is a two-way street. On one hand, the provider of recreational opportunities must provide programs and facilities which are reasonably safe under the circumstances. On the other hand, those participating in recreational activities must look out reasonably for their own safety under the circumstances.

Negligence liability generally presupposes the defendant has superior knowledge of an unreasonable risk of harm which would not reasonably be known or discoverable by the plaintiff prior to the injury. Conversely, negligence liability is much less likely where the plaintiff has relative risk knowledge that 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 a known or readily perceivable danger, an individual has a general legal duty to look out reasonably for his or her own safety and avoid such obvious hazards. Accordingly, known or obvious dangers generally do not pose the requisite level of unreasonable risk of harm necessary to impose liability for negligence.

SEE: "Overview of Negligence Liability Principles In Recreation"  
<http://cehdclass.gmu.edu/jkozlows/lawarts/06JUN96.pdf>

Similarly, in determining premises liability, landowners are generally not liable for negligence when recreational injuries result from conditions on the land which are as obvious to the visitor as to the landowner, or should have been observed by the visitor in exercise of reasonable care. Accordingly, the landowner's most demanding legal duty of care is generally limited to keeping the premises free of unreasonably dangerous defects or conditions which are not known, or readily observable, to a visitor looking out reasonably for his or her own safety (i.e., hidden traps, dangers or pitfalls).

Moreover, this landowner duty of reasonable care under the circumstances takes into account the reasonable expectations of those invited to use the premises for recreational purposes. In other words, the legal duty of landowners is simply to assure that their property is no more dangerous (or safe) than it appears to be. Further, those using the premises must act reasonably using ordinary care to protect themselves and discover obvious dangers.

SEE: "Landowner Duty: Assure Premises No More Dangerous Than It Appears To Be"  
<http://cehdclass.gmu.edu/jkozlows/lawarts/02FEB96.pdf>

As illustrated by a review of reported court opinions and the case described herein, negligence

liability should be the exception rather than the rule. The case described below involved injuries sustained during a ride on a mountain bike trail in a city park.

A number of YouTube videos allow a virtual ride experience on this challenging mountain bike trail, certainly more risky than a sedentary "walk in the park."

SEE: <https://www.youtube.com/watch?v=c45I8KCGgQ0>

#### TRAIL DIFFICULTY OBVIOUS?

In the case of *Hoosier Mountain Bike Association, Inc. v. Kaler*, 2017 Ind. App. LEXIS 133 (3/23/2017), plaintiff Richard Kaler sustained injuries while riding a mountain bike trail in "Town Run Trail Park," a park owned and operated by the City of Indianapolis through "Indy Parks and Recreation." The Hoosier Mountain Bike Association, Inc. (HMBA) was responsible for maintaining the trails, which have a difficulty rating from beginner through intermediate. <https://www.visitindy.com/indianapolis-town-run-trail-park>

In the spring of 2011, an Eagle Scout, as part of his merit badge project, built a new technical trail feature along Town Run's mountain bike trail. The feature can best be described as a banked wooden turn, also known as a berm. A rider, approaching the berm, has three options for completing the turn. First, riders can avoid the berm by staying on the dirt path on its left side. Second, riders can elect to enter the berm and ride it on the low grade, or third, riders can negotiate the turn by riding the berm's more challenging high grade.

The entrance onto the wooden turn is fully tapered with the ground, while the exit is only partially tapered. A rider choosing the low grade would exit the berm with a "little jump" off the end of the feature. A rider exiting on the high grade would have to make a two-foot jump back down to the trail.

On July 9, 2011, Kaler and his girlfriend took their first trip on the trail. The mountain bike trail is shaped as a "figure 8," with an approximate length of 6 miles. When he first approached the berm, Kaler "took the low grade" on the feature. As he approached the end of the turn, Kaler could see "there was a drop" so he "pulled up on the fork and did a little bunny hop."

On their second trip around the course, Kaler's girlfriend decided to take a shorter loop back to the trailhead. She was not as "adventurous" as Kaler and was concerned about getting back to the trailhead before dusk. Despite the approaching darkness, Kaler "wanted to ride the higher grade because he knew it was more challenging."

Kaler reached the berm again around 9:30 p.m. Feeling "capable of riding that high line," Kaler sped up and rode the berm "as high as he could possibly ride it with his skill set." As he was near the end of the berm's high grade, he "just saw himself lose control and just knew he was dropping." Kaler "didn't see the drop, nor was he aware of the drop" at the end of the high grade turn, instead he "thought it tapered off." Due to the fall, Kaler sustained lacerations to his spleen and kidney. After calling his mother and girlfriend to inform them that he had crashed, he rode his bicycle back to the trail head. That evening, Kaler and his girlfriend went out for dinner.

## JULY 2017 LAW REVIEW

Around 1:30 a.m. on the following morning, Kaler went to the hospital where he was diagnosed with lacerations to his spleen and kidney. On discharge, Kaler was offered physical therapy but refused it because he "didn't feel it was necessary." Kaler's recovery did not last long and he participated in a 100-mile bicycle ride later that summer.

Kaler filed a premises liability claim against the City. The City filed a motion for summary judgment. Summary judgment would effectively dismiss Kaler's claim prior to trial. The trial court denied the City's motion for summary judgment. The City appealed. (After the trial court denied summary judgment, defendant Hoosier Mountain Bike Association settled with Kaler and was dismissed from the case.)

### LANDOWNER LIABILITY

On appeal, the City argued that the trial court had erred in not granting the City's motion for summary judgment in Kaler's premises liability claim. In so doing, the City contended Kaler had failed to allege sufficient facts to support his claim of premises liability.

The appeals court noted that all parties had agreed that Kaler was an invitee of the City when his injuries occurred in Town Run Trail Park. As described by the court, the following three-part test would be applied to determine "a landowner's liability for harm caused to an invitee by a condition of its land":

A landowner can be held responsible only if the landowner:

- (a) Knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) Should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) Fails to exercise reasonable care to protect them against the danger.

Applying this test to the facts of the case, the appeals court found the evidence presented by Kaler did not satisfy "the duty component of premises liability." Specifically, the evidence failed to suggest that Kaler would not discover or realize the allegedly dangerous condition on the land. On the contrary, the appeals court found "it was objectively reasonable for the City under the facts of this case to expect Kaler to appreciate the risks of riding the trail and take suitable protections."

Moreover, the appeals court noted that the "trail's difficulty was advertised as appropriate for beginner through intermediate." Further, the court found "Kaler's own deposition characterized himself as an experienced bicyclist, who had ridden a fairly sophisticated trail before and who "always enjoyed the obstacles."

Kaler had conceded that to "try to get an idea of the technical requirements of the trail," he would get off his bike, especially if he noticed something "as a danger." Moreover, Kaler admitted that a fall "was just a general consequence of the sport." In this particular instance, however, Kaler did not step off his bike and inspect the berm's high grade prior to riding it in the approaching darkness. Instead, since he had ridden the trail the first time without any problems, Kaler

decided to make a second run even though it was "getting dark." Kaler was insistent that he "wanted to ride the higher grade because he knew it was more challenging."

Accordingly, based on Kaler's own deposition testimony, the appeals court concluded "the City could objectively and reasonably have expected an experienced bicyclist to realize the risks a beginner to intermediate trail would present and take appropriate precautions."

In determining potential landowner liability, the appeals court further considered whether the City knew or should have known of an unreasonable risk of harm to invitees, like Kaler, on the bike trail. In the opinion of the appeals court, the evidence had failed to establish that "the City had actual or constructive knowledge of a condition on the trail that involved an unreasonable risk of harm to Kaler." Moreover, the court found "the expectation of a bicycle crash is a risk inherent to riding trails" which did not pose an unreasonable risk of harm. In so doing, the appeals court noted "Kaler's own deposition unequivocally affirms that being involved in a bicycle crash was just a general consequence of the sport." In particular, the court found Kaler himself had stated in his deposition that he "expected to get in a wreck at least every other time he rode, and he would routinely fall off the bike over obstacles."

Having found "the designated evidence conclusively established that two of the elements of the premises liability test are not satisfied," the appeals court concluded "the trial court erred by denying summary judgment to the City."

#### IMPRUDENT BIKER

On appeal, the City had also argued that premises liability was precluded because Kaler was contributorily negligent in bringing about his own injury. As defined by the appeals court, a plaintiff is contributorily negligent when the plaintiff's conduct "falls below the standard to which he should conform for his own protection and safety."

Lack of reasonable care that an ordinary person would exercise in like or similar circumstances is the factor upon which the presence or absence of negligence depends. Expressed another way, contributory negligence is the failure of a person to exercise for his own safety that degree of care and caution which an ordinary, reasonable, and prudent person in a similar situation would exercise.

In this particular instance, the City claimed "Kaler is foreclosed from any recovery because of his failure to exercise the care a reasonable, prudent mountain biker should have exercised."

As noted by the appeals court, at the time of the incident, a premises liability claim against governmental entity, like the City, was still subject to "the common law defense of contributory negligence." Accordingly, the appeals court acknowledged: "even a slight degree of negligence on Kaler's part, if proximately contributing to his claimed damages, will operate as a total bar to his action for damages against the City."

(In many jurisdictions, the common law defense has been replaced by comparative negligence statutes. Unlike the common law contributory negligence defense, a comparative negligence

statute does not preclude liability based on any degree of fault on the part of the injured plaintiff. Instead, an applicable comparative negligence statute generally reduces the plaintiff's recovery by the percentage of fault attributable to an injured plaintiff's unreasonable behavior.)

Under the circumstances of this case, the appeals court found Kaler was not "completely free of all negligence." Rather, the court found "Kaler contributorily negligent" in bringing about his own injury. In the opinion of the appeals court, "Kaler knew and understood the precautions a reasonably prudent mountain biker should take—inspect the feature prior to riding it—but chose not to follow them."

In his deposition, Kaler affirmed that in trying to build a skill, it would not be unusual for him to get off his bike and look at the obstacles. He also acknowledged that he knew the berm's high grade would be challenging because he had just started riding high berms and had never ridden a berm as steep as the one at Town Run.

According to the court, there was "no evidence that the jump from the high grade was obscured from view." On the contrary, the court found Kaler had acknowledged he could see "there was a drop" as he "approached the end of the turn during his first ride on the berm." Most significantly, the court found Kaler had "conceded that he could have anticipated the drop from the high grade had he taken the precaution a reasonable bicyclist riding an unfamiliar trail would take."

After a successful first run on the berm's low grade, Kaler decided to ride the feature again. Despite the approaching darkness, he planned to ride the berm's high grade as high as he possibly could because it would be "really cool to ride it and get that speed." Notwithstanding the coolness factor, Kaler conceded that riding obstacles posed a risk of bodily injury as crashes were a general consequence of the sport. Typically, to get an idea of the technical requirements of a trail, the biker "would get off his bike."

Based on this pretrial evidence from Kaler's deposition testimony, the appeals court concluded Kaler was not "completely free of all negligence."

Having found no pretrial evidence which would support Kaler's claim of premises liability, the appeals court concluded summary judgment in favor of the City was warranted. Moreover, the appeals court held "Kaler was contributorily negligent when riding the City's mountain bike trail at Town Run." The appeals court, therefore, reversed the trial court's denial of the City's motion for summary judgment.

#### PARK POT HOLE FATALITY

In contrast to the outcome in the *Kaler* case described above, the state court in the case of *Phelan v. State*, 2005 NY Slip Op 25506 (NY 6/29/2005) found a depression in a park roadway was an unreasonably dangerous condition which caused a fatal fall during a bike ride. In this particular instance, unlike Kaler's mountain bike crash, the court found the premises defect was not

## JULY 2017 LAW REVIEW

reasonably observable or considered an inherent risk while riding a bike on this particular park roadway.

SEE: "Park Pot Hole Fatality" <http://cehdclass.gmu.edu/jkozlows/lawarts/09SEP06.pdf>

\*\*\*\*\*

In addition to the link cited above, a search of Town Run Trail Park on YouTube produces a number of videos which provide a virtual experience of riding the mountain bike trail which formed the backdrop for the court opinion described herein.

[https://www.youtube.com/results?search\\_query=town+run+trail+park](https://www.youtube.com/results?search_query=town+run+trail+park)

<https://www.youtube.com/watch?v=m9ht0jJ4uZg>

<https://www.youtube.com/watch?v=aPoRiNciyH4>

<https://www.youtube.com/watch?v=3AVIPLSnyle>

\*\*\*\*

James C. Kozlowski, J.D., Ph.D. is an attorney and associate professor in the School of Recreation, Health, and Tourism at George Mason University in Manassas, Virginia. E Mail: [jkozlows@gmu.edu](mailto:jkozlows@gmu.edu) Webpage with link to law review articles archive (1982 to present): <http://mason.gmu.edu/~jkozlows>