INSECT STING & BITE LIABILITY: A LIMITED DUTY FOR LANDOWNERS

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The Killer Bees are Coming! In recent times, aggressive hybrid bees have been moving northward and now pose a threat to livestock, pets and human beings along our southern border. These bees are expected to continue their northerly migration. In addition, there is growing awareness and concern over ticks in wooded areas which carry Lyme disease. These bees and ticks are relative newcomers to an already extensive list of insects which pose a risk to human beings in the outdoors. In light of this perceived threat from the insect world, what is a reasonably prudent public parks administrator to do to avoid liability? As indicated by the cases presented herein, there is probably no legal duty for landowners to do anything, unless there is a clearly foreseeable risk of injury posed by a known swarm of bees or the existence of a particularly noxious insect on the premises.

Catastrophic Bee Sting

In the case of *Febesh v. Elcejay Inn Corp*., 555 N.Y.S.2d 46 (A.D. 1 Dept 1990), plaintiff Joseph Febesh was severely injured after being stung by a bee or yellow jacket at Fox Hollow Inn, a business establishment operated by defendant Elcejay Inn Corp. The facts of the case were as follows:

> On August 24, 1985 plaintiffs Joseph and Shirley Febesh attended a 50th anniversary party catered and held at Fox Hollow Inn ("the Inn"), owned by defendant Elcejay Inn Corp. Although the witnesses differed on certain points, the record is clear regarding the relevant events surrounding the incident which occurred at the party. Approximately one and one-half to two hours after arriving at the party, Joseph Febesh was on an outdoor patio of the Inn which was surrounded by shrubbery and trees, and on which hors d'oeuvres and drinks were being served, when he was stung by a bee or yellow jacket. It is undisputed that the sting resulted in anaphylactic shock and cardiac arrest, which in turn, rendered Febesh a permanent quadriplegic.
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> Introduced into evidence were numerous photographs taken by various partygoers. We have seen these photographs, which show a clean, neatly maintained patio and bar area with guests both eating and drinking. Notably, the photographs do not show bees or yellow jackets on or near the tables, bar, food, or surrounding shrubbery, all of which the court below correctly noted appeared to been maintained in a sanitary condition. Testimony was received that the area was sprayed for bees and other insects at least once a day and that, while bees had been occasionally observed on the premises, this was the first reported incident of a bee or yellow jacket stinging someone at the Inn in some 20 years.

> Neither before nor after the incident herein was a nest or hive discovered. While there had been some complaints as to the presence of "a few" or "some" or even "many" bees at the party, a former employee of the Inn, who testified on behalf of Febesh, noted that on the day in question there were only "a few bees, somewhere in the area of ten." The record is devoid of evidence tending to prove that there was a "swarm" of bees or yellow jackets at the Inn.

The jury in this case returned a verdict in favor of plaintiffs for three million dollars ($3,000,000.00). The trial court, however, found that the verdict was against the weight of the evidence in this case and ordered a new trial. Defendant Elcyjay Inn Corp ("the Inn") appealed. On appeal, the defendant Inn maintained that the trial court erred in not granting its motion for judgment notwithstanding the verdict.

As described by the appeals court, the specific issue to be considered was "whether the owner of an inn or restaurant is liable in negligence where an individual attending a party on the premises sustained severe injuries as a result of being stung by a bee or a yellow jacket while on the outdoor patio." According to the appeals court, the following review of "bee sting" cases "readily enables us to distinguish cases in which the harm is attributable to nature rather than negligence." The following cases found that the bee sting injuries were the result of defendant's negligence.

> [W]hen plaintiff turned on a shower, a number of bees came from the direction of the shower head, stinging him, causing him to slip in the tub and break his wrist. After this, a beekeeper was called to, and in fact did, remove a beehive. The court found that defendants breached their duty, both in failing to remove the bees and in failing to warn plaintiff... [W]here plaintiff, employed by defendants at their residence as a house painter, sustained injuries while fleeing a swarm of bees disturbed by defendant's spraying in an enclosed basement area where he had been directed to store his paints, the court held that viable causes of action in negligence... existed... [W]here plaintiff-employee had warned his employers that a large concentration of bees in the grass and brush of the railroad tracks made it unsafe, defendants had a duty to trim the brush and undergrowth; having failed to do so, the railroad was held liable when plaintiff was subsequently stung while working in the area. [Citations omitted.]

On the other hand, the following cases cited by the appeals court found that the following bee stings were the result of nature, rather than any negligence on the part of defendant.

> [W]hile on a riding path, plaintiff and her horse encountered a swarm of bees. Plaintiff was thrown to the ground after the bees stung her horse; she sustained serious injuries. The court held that because there was no substantial proof that anyone ever previously encountered a *swarm* of bees on the bridle path, it cannot be said reasonably that knowledge of the occasional presence of a bee or other stinging insect along a path would justify a finding of negligence against defendant if he led a group of his riding guests over it without disclosing this information to them. Neither was defendant held liable... where plaintiff was stung by a bee or yellow jacket in defendant's store, in view of the absence of knowledge of such a danger... [Similarly, in another case,] the court

> declined to hold a duty owing where, when a defendant demolished a courthouse wall, there was a swarming of an unusually large amount of bees which stung plaintiff's rare Basenji dog to death. [Emphasis of court; citations omitted.]

Applying these principles to the facts of this case, the appeals court agreed with the trial court that "the presence of ten or even more bees was insufficient to impose upon defendant a duty, the breach of which would impose liability."

> We are, in particular, mindful of the lack of prior incidents of this sort at the Inn; the fact that Febesh was not attacked by a swarm of bees or yellow jackets, but rather by one such insect; the absence of a nest or hive; and the generally sanitary conditions of the Inn. We also note that Febesh, who was one of over 50 partygoers, was not stopped from going indoors.

The appeals court, however, found that the trial court had erred in not granting the defendant's motion for judgment notwithstanding the verdict because "the only rational conclusion to be reached was one in favor of defendant." The appeals court, therefore, entered judgment for defendant Elcejay Inn Corp.

Indigenous Spider Bites Guest

In the case of *Brunelle v. Signore*, 263 Cal.Rptr. 415 (Cal.App. 4 Dist. 1989), plaintiff David Brunelle was injured when he was bitten by a spider in a vacation home owned by defendant Anthony Signore. The facts of the case were as follows:

> In September 1986, Brunelle spent the weekend at Signore's vacation home in Cathedral City, a structure which abutted the desert. During the weekend Brunelle was bitten by a Brown Recluse Spider. (The Brown Recluse Spider is a relatively small, tan to brown spider, which, with its legs extended it approximately the size of a half dollar. It can be easily identified by a violin or fiddle-shaped marking on its back.) As a result of the spider bite, Brunelle was severely injured: The venom released by the spider bite destroyed tissue in Brunelle's right foot, his foot was swollen, infected and had ulcerated lesions. Within 24 hours Brunelle was unable to walk or even stand as a result of swelling and intense pain. Because of the severity of his injury, Brunelle was required to take a two-month medical leave from his work. He then returned to work part-time in a wheelchair for almost two months, before resuming work on a full-time basis. Approximately eighteen months after the bite, Brunelle described his foot as being totally fatigued after a day at the office, and stated that dress shoes aggravated his foot and caused swelling and discomfort.

Brunelle alleged that Signore was negligent in the maintenance and operation of his property. Specifically, Brunelle argued that Signore failed to warn him regarding the property's safe use and, therefore, the property was in a dangerous condition which caused his injuries. Signore responded that "he owed no duty of care to Brunelle with reference to the risk to which plaintiff was exposed." The trial court agreed and granted summary judgment in favor of defendant Signore. Brunelle appealed.

On appeal, Brunelle argued that "the questions of foreseeability and reasonableness of Signore's actions are questions of fact for the jury to decide," and, therefore, the trial court erred in dismissing this case on a motion for summary judgment. Consequently, the issue on appeal was "whether defendant Signore owed plaintiff Brunelle a duty of care to protect Brunelle from or prevent Brunelle's injury as a result of a spider bite in Signore's home." As noted by the appeals court, "the general rule in California is that all persons have a duty to use ordinary care to prevent others being injured as a result of their conduct."

> As explained by the California Supreme Court, duty is not an immutable fact of nature but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection. Whether a duty of care exists is a question of law to be determined on a case-by-case basis.
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> In making its determinations, the court must weigh several factors. The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

As noted by the appeals court, there was no case law in California or other jurisdiction "in which an owner or occupier of a *private residence* was held liable for injuries sustained as a result of an insect or spider bite." Further, while acknowledging that there was no California case law on the question, the appeals court found that other jurisdictions have split on the specific issue of whether "*a business or hotel/motel* may be held liable for plaintiff's injury as a result of an insect or spider bite sustained on the premises." (Emphasis of court.) One of the decisions cited by the court from a state appeals court in Georgia had found that "in the absence of knowledge of such a danger, i.e., the presence of or imminent attack by a flying, stinging insect, there was no duty on the part of the proprietor to take specific steps to prevent the injury by a bee or yellow jacket." Similarly, the appeals court in this particular case found that "an owner or occupier of a private residence does not have a duty to protect or prevent bites from harmful insects" under the following circumstances:

> (1) it is not generally known that the specific insect is indigenous to the area; (2) the homeowner has no knowledge that a specific harmful insect is prevalent in the area where his residence is located; (3) the homeowner has on no occasion seen the specific type of harmful insect either outside or inside his home; and (4) neither the homeowner nor the injured guest has seen the specific insect that bit the guest either before or after the bite occurred.

In the opinion of the appeals court, it would be "unfair and against public policy" to impose liability for insect bites "where the owner or occupier of the premises had no reason to anticipate or guard against such an occurrence."

> Imposition of a duty, even in those cases where the homeowner shared general knowledge with the public at large that a specific harmful insect was prevalent in the area but the homeowner had not seen the specific harmful insect either outside or inside his home, would impose a duty on the owner or occupier of the premises that would also be unfair and against public policy. In either of these instances, the burden on the landowner would be enormous and would border on establishing an absolute liability [i.e., liability without any proof of fault or negligence]. Further, the task of defining the duty and the measures required of the owner or occupier of private residences to meet that duty would difficult in the extreme. In addition, it would very likely require homeowners to acquire additional costly insurance, even assuming such insurance were available.

The appeals court also considered Brunelle's argument that "Signore had knowledge there were other dangerous insects, i.e., black widow spiders and scorpions, on his property and thus should have taken precautions and/or warned Brunelle against the danger." In the opinion of the appeals court, this argument was "not persuasive."

> Here Brunelle urges imposition of a duty because Signore had general knowledge of the prevalence of other harmful insects around his home and also urges that Signore had a duty to use a professional exterminator and/or exterminate his house himself "more frequently" and also to hire a professional cleaning person or persons to clean Signore's home when he (defendant) was not in residence. However, that foreseeability which an owner or occupier of a residence shares with the public at large does not, per se, impose a duty on such owner or occupier to procure professional exterminators and/or cleaning crews to "de-bug" his residence, inside and out, on a periodic basis. An owner or occupier of property is not an insurer of the safety of persons on the premises. His responsibility is not absolute, or based on a duty to keep the premises absolutely safe. The law does not impose a duty of extraordinary care. Imposition of such a duty here... would impose an intolerable burden on homeowners and would in effect impose an absolute liability on the homeowner for injuries caused by insect or spider bites on their premises.

As a result, the appeals court concluded that "Signore, as a matter of law, had no duty to protect against the risk that Brunelle would sustain injury as a result of a spider bite." Consequently, the appeals court found that "the trial court correctly determined that Signore was entitled to judgment as a matter of law." The appeals court, therefore, affirmed the judgment of the trial court in favor of defendant Signore.