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DAY CAMP SUPERVISOR LIABLE FOR LOG ROLLING FATALITY IN CITY PARK

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An unscientific observation of the *Glorioso* decision described herein and innumerable similar cases would indicate that serious injuries and attendant liability are more likely during unplanned/spontaneous activities. As illustrated by *Glorioso*, these off-the-cuff "games", in the tragic extreme, can kill more than time. Conversely, programs conducted according to time tested routines or procedures are more likely to incorporate safety rules designed to prevent or mitigate the risk of serious injury which can trigger liability.

In programming and supervising recreation activities for children, spontaneity must therefore be tempered by a thoughtful analysis of perceived or foreseeable risks of injury. Both from a common sense and a legal perspective, the reasonable adult supervisor is expected to know more than the child participant regarding the risk of injury in a particular activity.

In being able to look out for his/her own safety, a child is held to the standard of care for children of similar age, education and experience. Generally, children under 14 years of age are presumed incapable of looking out reasonably for their own safety. As a result, most children under age 14 are not expected to appreciate the dangers associated with participation in a hazardous recreation activity.

Consequently, when a child is injured in a hazardous recreation activity, the child is generally not held responsible, in whole or part, for bringing about the injury. On the contrary, a child can justifiably rely on the expressed or implied assurances of adult supervisors that participation in a particular activity is reasonably safe. Thus, the adult program leader certainly bears a greater supervisory burden when selecting and conducting recreation activities for children under 14 years of age.

This description of the *Glorioso* opinion is a revised version of Report # 89-24 from Volume 6, number 2 of the *Recreation and Parks Law Reporter* (RPLR). RPLR is a quarterly publication which describes recently reported state and federal court decisions which address issues in recreational injury liability. For further information regarding a subscription to RPLR, please consult the advertisement which accompanies this column or contact NRPA.

Hazardous Hokey Pokey

In the case of *Glorioso v. Young Mens Christian Association of Jackson*, 556 So.2d 293 (Miss. 1989), plaintiffs Wilma and Charles Glorioso (Glorioso) brought an action against defendants, Richard Grindstaff, the Young Mens Christian Association of Jackson (YMCA) and the City of Clinton, following the death of their nine-year-old son, Seth. In their complaint, Glorioso alleged that "Seth's death was caused by the negligence of Grindstaff, an employee of the YMCA, in causing a large light pole to roll down an incline crushing Seth." Glorioso further alleged that "Grindstaff knew or should have known such conduct created an unreasonably dangerous condition." In addition, Glorioso contended that the City of Clinton was negligent "in placing the pole on public property creating an unreasonably dangerous condition." The facts of the case were as follows:

> On June 11, 1985, Richard Grindstaff, a 24 year old senior counselor with the YMCA, acting within the course and scope of his employment, took Seth Glorioso and approximately 18 or 19 other children to Traceway Park to play baseball. The children were between 9 and 12 years of age. After the children had finished their baseball game, several of them gathered around and began playing on a large pole laying near the YMCA van.
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> The pole was 18-1/2 feet long, weighed 1490 pounds, was located on a flat area adjacent to a gravel road in the park, and was embedded in a slight depression with grass growing around it. The pole was laying more or less parallel with the gravel road. The ground between the pole and the gravel road was flat, but the ground on the side opposite the gravel road sloped slightly downward. Glorioso's witnesses testified there was approximately 1 to 1-1/2 feet of flat ground between the pole and the beginning of the slope but the photographs of the scene show that the slope started next to or at the pole's initial location.
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> Grindstaff promised to give a free ice cream cone as a prize to the child who could stay on the pole the longest. Some of the children got onto the pole and they managed to remain on it for approximately 10 minutes; after which Grindstaff conceived the idea of shaking the pole and moving it about.
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> Grindstaff was unable to move the log by himself and asked the help of some other children. Apparently Grindstaff and the children were leaning against a van with their feet on the log. The force applied by Grindstaff and the other children finally caused the log to move out of the small indentation which it had made in the ground. There was conflicting testimony as to how Seth fell from the log. All of the children except Seth jumped to the high side. Seth ran away from the log down the hill about five feet but then turned around and tried to jump back over it. The log caught his foot and rolled over him, killing him.
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> The police officer who investigated the accident, testified that there were 2 to 3 feet of flat area between the log and the slope. In his opinion, the pole would not have moved without some outside force and the force necessary to dislodge the pole would have probably been sufficient to propel the pole to the edge of the incline and down.

The trial court directed a verdict for the City of Clinton. The jury returned a verdict in favor of Grindstaff and the YMCA. Accordingly, judgments were entered for all three defendants. Glorioso appealed to the state supreme court.

On appeal, Glorioso argued that the trial court had erred in refusing to instruct the jury that a child of Seth's age was incapable of contributory negligence. Glorioso's rejected jury instruction read as follows:

> The Court instructs the jury that a nine year old child, such as Seth Morgan Glorioso, is presumed by law to be incapable of contributory negligence. The Court instructs the jury that Seth Morgan Glorioso cannot be charged with any knowledge of the dangerous character of a 1490 lb. creosote-treated pole situated at the top of an

> embankment nor can he be held to comprehend the dangerous consequences of engaging in the activity he was engaged in immediately before he was crushed.

At trial, defendants Grindstaff and YMCA had effectively argued that the contributory negligence of Seth Glorioso "in initially playing on the log; and ultimately jumping in the wrong direction when the log was dislodged were the proximate causes of his own death." (In raising the defense of contributory negligence, defendant contends that the victim's own conduct in failing to look out reasonably for his own safety was responsible in whole or part for the resulting injury.)

As noted by the state supreme court, "[t]he law with respect to contributory negligence on the part of minors is clear":

> A minor child between the ages of seven and fourteen years is prima facie [i.e., on its face] presumed not to be possessed of sufficient discretion to make him guilty of contributory negligence, and hence the defendant who raises such defense has a greater burden to prove the same than in a case where the plaintiff is not a minor child. Such a presumption, however, is rebuttable by showing exceptional capacity.

The state supreme court agreed with Glorioso that "the jury could have easily concluded, in the absence of the requested instruction, that Seth Glorioso was negligent in playing on the log and in jumping the wrong way when it began to roll and was responsible for his own death." Given the presumption that a nine-year-old child is incapable of contributory negligence, the state supreme court found that a jury verdict for defendants based upon victim fault would be "erroneous and contrary to the law of this state." The state supreme court, therefore, concluded that the trial court "erred in not giving the requested instruction."

On appeal, Glorioso argued further that the evidence at trial established conclusively that "Grindstaff breached a duty owed to Seth Glorioso and that this breach was the cause in fact and proximate cause of Seth's death." Since "the jury's verdict was contrary to the overwhelming weight of the evidence," Glorioso contended that they were entitled to a judgment in their favor.

According to the state supreme court, Grindstaff, and the YMCA, "owed a duty to the Glorioso to properly supervise her minor child, Seth Morgan Glorioso, in carrying out the activities in connection with the day camp which they were providing and charging for." Further, Grindstaff and the YMCA "owed a duty to the minor, Seth Morgan Glorioso, not to cause or encourage him to engage in unsafe and hazardous activities." Applying these principles to the facts of the case, the state supreme court concluded that "the action and conduct of Grindstaff in encouraging the minor child, Seth Glorioso, to stand on top of the 1,490 pound pole while Grindstaff moved it in an attempt to cause the children to fall off was a breach of these duties."

The specific issue before the state supreme court was, therefore, "whether Seth Glorioso's death was the proximate result of the negligence of Grindstaff." As characterized by the court, the "question of proximate cause turns on the foreseeability of injury." Under the circumstances of this case, the supreme court found "Grindstaff could have foreseen the possibility of injury as a result of attempting to dislodge the log." According to the court, "but for the acts of Grindstaff this accident would not have occurred".

> The death of Seth Glorioso was unquestionably caused by a large, wooden pole weighing 1,490 pounds and 18.5 feet long rolling over him. The log was set in motion by the instigation and physical action of Grindstaff and several children acting under his direction, which efforts caused the log to leave the small indentation which it made in the ground and to roll down the bank on top of Seth. Thus the chain of successive events can be described incontrovertibly as having begun with the actions of Grindstaff and having ended in the death of Seth Glorioso. Physical cause is therefore undeniable.
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> Grindstaff admitted that the log was at rest, at the top of an incline, before he began to move it. He also admitted that he knew "if the log was actually moved it would cause harm." Also, he made a statement that he was not trying to dislodge the pole but roll it... [E]very adult person of ordinary intelligence must be presumed to understand the general law of gravity... Thus, charging Grindstaff with the knowledge of a reasonably intelligent adult, he should have foreseen that by forcing the log out of its state of rest, on the edge of an incline, it would continue to roll until stopped by some external force.

Having found that Glorioso "established [the four elements for negligence liability] duty, breach, causation and proximate cause," the state supreme court concurred with Glorioso that the "jury verdict was contrary to the overwhelming weight of credible evidence." Consequently, the state supreme court concluded that the trial judge erred in not granting judgment to Glorioso against Grindstaff and the YMCA.

On appeal, the state supreme court also addressed Glorioso's contention that the City of Clinton's "placement of the pole in a dangerous position constituted a breach of the duty not to create an unreasonable danger."

> To prove the city negligent, plaintiffs must establish a breach of duty. In order to establish a claim of negligence against a defendant, however, it must appear that the offending defendant violated some duty owed to the plaintiff.
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> A person using municipal property is considered an invitee and the municipality is charged with the exercise of ordinary and reasonable care to insure that the property is safe. The municipality is charged with a duty to warn of known dangerous conditions.

However, under the circumstances of this case, the state supreme court found that "the actions of Grindstaff in moving the log was an independent intervening cause." The court defined "the rule as to an intervening cause" as follows:

> Although one may be negligent, yet if another, acting independently and voluntarily, puts in motion another and intervening cause which efficiently thence leads unbroken in sequence to the injury, the later is the proximate cause and the original negligence is relegated to the position of a remote and, therefore, a non-actionable cause. Negligence which merely furnishes the condition or occasion upon which injuries are received, but does not put in motion the agency by or through which the injuries are inflicted, is not the proximate cause thereof.

Applying this definition to the facts of the case, the supreme court found that the alleged negligence of

the City in leaving an unattended telephone pole in the park was not the legal cause of the child's death.

> Assuming, arguendo [i.e. accepting a statement of fact as true merely for the sake of argument], (and we do not so hold) the City of Clinton was negligent in placing the pole in its initial location, the act of Grindstaff in dislodging the pole was an independent, intervening cause... The facts in this case are that the pole was secure and that it was moved out of its "bed" only after considerable effort by Grindstaff and the children... The undisputed facts in the record show that the external force applied by Grindstaff and the other children was the act which caused the pole to roll, which in turn resulted in Seth Glorioso's injuries.

The state supreme court, therefore, affirmed the judgment of the trial court in favor of the City of Clinton. Having found Grindstaff and the YMCA liable for negligence, the state supreme court remanded (i.e., sent back) this case to the trial court to conduct "a trial on the issue of damages only against Grindstaff and the YMCA."

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