THE STANDARD
NEW ENGLAND'S INSURANCE WEEKLY
Published Since 1865 Boston, Mass.
February 14, 2014 Vol. 274 No. 6

Morrison Mahoney LLP

LEGAL Dimensions

By William Joseph Flanagan, Partner
Amy B. Parker, Associate Boston Office

No Duty, No Case: When Summary Judgment is Appropriate in Negligence Actions

The phrase "summary judgment is rarely granted in negligence actions" is commonly recited in court opinions and briefs in opposition to motions for summary judgment. Yet, the use of the word "rarely" in this oft-cited statement is not entirely accurate. Summary judgment is appropriate in cases in which the plaintiff cannot prevail as a matter of law. This article will describe situations in which the plaintiff cannot prevail as a matter of law in negligence actions due to the lack of one of the key ingredients necessary to prove her case — the existence of a duty of care. There are many such cases that can indeed be won without the expense and risk of a jury trial.

In order to prove negligence of a defendant, a plaintiff must show that the defendant had a duty of care, that the defendant breached that duty of care, and that the defendant's breach was the proximate cause of the plaintiff's injury. Whether a duty of care exists is a question of law, appropriate for the court, rather than a jury, to decide. Where there is no duty of care owed to another, there can be no negligence. In determining whether a duty of care exists, a court must consider social values and customs as well as appropriate social policy. **Davis v. Westwood Group**, 420 Mass. 739, 743 (1995).

No Duty to Pedestrians

While it is well-established that a landowner owes a duty of reasonable care to all lawful visitors, this duty is not without boundaries. One such recognized boundary is that the duty of reasonable care to all lawful visitors does not include a duty to provide safe passage over a public street. A multitude of jurisdictions, including Massachusetts, have been reluctant to expand the scope of a landowner's duty with respect to adjacent roads, finding that such an imposition would be contrary to "sound social policy." **Davis**, 420 Mass. at 744 n.10, 747; see also **Ferreira v. Strack**, 636 A.2d 682, 688 (R.I. 1994) (finding it would be contrary to public policy to allow a private landowner to assume control of a public highway and therefore, a landowner cannot assume a duty to control traffic on public way). As the Supreme Judicial Court observed, to impose such a duty would make the private party "an insurer of safety of travelers and pedestrians" on state-owned and state-controlled highways. **Davis**, 420 Mass. at 747.

For example, a Massachusetts business owner did not owe a duty to a pedestrian who was injured when crossing a public street from the owner's racing track to the owner's parking lot. **Davis**, 420 Mass. at 743-44. Nor did a Rhode Island church have a duty to a parishioner struck by an automobile when crossing a public street between the church and the church parking lot following a midnight mass on Christmas Eve. **Ferreira**, 636 A.2d at 688. Similarly, a New

S·P 1865 Standard Publishing Corporation
www.spcpub.com

Hampshire business owner's requirement that a customer cross the street to pick up tickets for admittance to an event did not impose a duty on the business to protect the customer from motorists on the public street. **Chouinard v. N.H. Speedway**, 829 F. Supp. 495, 502 (D.N.H. 1993). And, a restaurant did not have a duty to provide patron with safe passage to the restaurant's parking lot located across a public street. **Swett v. Village of Algonquin**, 523 N.E.2d 594 (Ill. App. Ct. 1988).

As the cases cited above demonstrate, several courts have held that landowners have no duty to ensure safe passage across public ways. Many courts have also held that landowners do not have a duty to warn or remedy the danger posed by traffic on either their private property or adjacent ways. See, e.g., **Young v. Atlantic Richfield Co.**, 400 Mass. 837, 842-43 (1987) (finding gas station had no duty to warn patrons of danger posed by increased traffic due to placement of air pump on property); **Glick v. Prince Italian Foods**, 25 Mass. App. Ct. 901, 904 (1987) (recognizing that the danger posed by out-of-control automobiles is obvious); **Polak v. Whitney**, 21 Mass. App. Ct. 349 (1985) (finding landowner had no duty to warn of the obvious risk of sleeping in a parked car adjacent to road).

No Duty to Warn of Open and Obvious Dangers

The duty of a landowner to exercise reasonable care to lawful visitors includes an obligation to maintain the property in a reasonably safe condition. **Davis**, 420 Mass. at 743. This duty, however, does not include an obligation to warn of dangers which are open and obvious. For example, the risk of being injured by a foul ball hit into the stands while attending a baseball game is "as a matter of law, sufficiently obvious" to relieve a defendant from any duty to warn of the danger. **Costa v. Boston Red Sox Baseball Club**, 61 Mass. App. Ct. 299, 303 (2004). Although the Supreme Judicial Court recently broadened a landowner's duty to remedy certain unreasonable dangers of which the landowner has reason to expect a lawful visitor to proceed to encounter despite the obvious risks, **Dos Santos v. Coleta**, 465 Mass. 148, 154-58 (2013), the law remains that a landowner does not have a duty to warn where "it is not reasonably foreseeable that a visitor exercising (as the law presumes) reasonable care for his own safety would suffer injury from such blatant hazards." Id. (quoting **O'Sullivan v. Shaw**, 431 Mass. 201, 204, 211 (2000)).

In Dos Santos, the Court found a duty to remedy the open and obvious danger of diving from a trampoline into a two-foot deep inflatable pool where the landowner had created the hazard with the expectation that persons would encounter it for "fun," and therefore, the plaintiff's injury was reasonably foreseeable. Yet, in O'Sullivan, there was no duty to warn where it was not reasonably foreseeable that the plaintiff would dive headfirst into the shallow end of a landowner's in-ground pool, rather than use the diving board at deep end of pool. Similarly, in Costa, there was no duty to warn where it was not reasonably foreseeable by the landowner that persons attending a baseball game would not be aware of the potential hazard of foul balls being hit into the stands. The duty to remedy was not discussed in Costa and O'Sullivan, presumably because the landowners in those cases could not have remedied the "danger" posed by a foul ball hit into the stands and the shallow-end of an in-ground pool. In Dos Santos, however, the landowner could have remedied the danger by not placing the trampoline adjacent to an inflatable pool.

No Duty to the Public on Land Used for Recreation

Another instance in which a duty of care may not be imposed on a landowner is when a plaintiff is injured while on property utilized for the benefit of the public for recreational purposes. The Recreational Use Statute, Mass. Gen. Laws ch. 21, § 17C, provides relief from liability for any owner who allows the public to use their land for recreation at no charge absent willful, wanton, or reckless conduct. The protection afforded under this statute is broad, and has been applied to shopping malls that permit recreational walking for "mall walkers," or those who visit the mall for the purpose of walking during the early morning hours before stores are open and who have no intention of shopping. **Nitishin v. The Musicland Group, Inc.**, 2005 WL 3627262 (Mass. Super. Ct. 2005).

While the imposition of a fee to use the land negates the protection afforded under the statute, voluntary payments made by persons using the land do not limit the protection. Nor does a registration fee paid by parents to a landowner to cover incidental costs associated with a child's participation in a sports league on the property. **Seich v. Town of Canton**, 426 Mass. 84 (1997); but see **Marcus v. City of Newton**, 462 Mass. 148 (2012) (payment of registration fee by softball player to reserve city fields for certain blocks of time for softball league did not protect city from liability under recreational use statute for injury to player by falling tree). In fact, as long as members of the public may enter the land without charge for purposes of recreational use, other fees charged for certain uses of the land will not subject the landowner to liability. **Hardy v. Loon Mountain Recreation Corp.**, 276 F.3d 18 (1st Cir. 2002) (holding that fee paid for gondola ride to top of mountain was not a "charge" as contemplated under New Hampshire recreational use statute because any person could hike up to the mountain without paying a fee). In Hardy, the First Circuit Court of Appeals observed that courts in other jurisdictions have held that private instructor fees, campground facility fees, and parking fees were not charges for purposes of recreational use statutes.

In sum, summary judgment in negligence actions is entirely appropriate where no duty of care exists as a matter of law, and the above examples illustrate that courts have repeatedly rejected plaintiffs' attempts to impose a duty of care on defendants where such imposition would be contrary to sound public policy or existing law. There is no need for a jury trial to make such a determination. ■