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Shopping Center Parking Lot Liability

Beverly E. Sylvester

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MORE THAN sixty-eight million automobiles were registered in the United States in 1963 alone.[1] This horde of automobiles, along with the mass exodus to the suburbs, has caused shopping centers to become integral parts of community living, and has made facilities for parking around them of principal importance. The resultant revolution in merchandising has extended the property owner's duty of care to include such parking areas.

Occupant's Duty to Use Care

An occupant of land who lawfully induces others to enter upon his property through express or implied invitation owes to them a duty to keep the parking area in a reasonably safe condition for its contemplated use and to give warning of any latent defects or concealed dangers of which he has knowledge.[2] A leading English case, *Indermaur v. Dames,* laid down the rule that the occupier of land is under an affirmative duty to protect those who enter upon his land for business purposes not only against those perils of which he knows, but also against those which he might discover with reasonable inspection.[3] These defects include snares, traps, pitfalls, and similar hazardous concealed conditions which the shopper does not know about and which he would not easily observe by the exercise of ordinary care.[4] The land holder is obligated to discover any such defec-

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[1] Automobile Facts and Figures 19 (Published by Automobile Manufacturer's Association 1964).

[2] Rodgers v. The Great Atlantic & Pacific Tea Co., 148 Conn. 104, 167 A. 2d 712 (1961); Fitz Simons v. National Tea Co., 173 N. E. 2d 534 (Ill. App. 1961); Leonardo v. The Great Atlantic & Pacific Tea Co., 164 N. E. 2d 900 (Mass. 1960); Nary v. Parking Authority, Town of Dover, 156 A. 8d 42 (N. J. Super. 1959); Goldman v. Kossove, 253 N. C. 370, 117 S. E. 2d 35 (1960).

[3] L.R. 1 C.P. 274, 35 L.J.C.P. 184, aff'd L.R. 2 C.P. 311, 36 L.J.C.P. 181 (1866).

[4] Tulsa Stockyards v. Mangrum, 380 P. 2d 534 (Okla. 1963); Bostian v. Jewell, 121 N.W. 2d 141 (Iowa 1963).

tive circumstances by reasonable inspection[5] and must warn of such dangers.[6]

In an action for injuries sustained by a seventy-three year old woman who fell over a retaining wall in a shopping center's parking area, the proprietor's duty to warn the public of unusual topography was limited to those imperfections which are not known or discoverable by the average intelligent person in his exercise of reasonable care.[7] This duty was extended to include the approaches of the store used in connection with the business[8] as well as the interior.[9] Therefore, where a store proprietor provides a parking area for the public in conjunction with his business he is held to know the risks that exist on his premises and must caution his patrons or provide measures to prevent injuries to them[10] by exercising ordinary care in keeping such premises and approaches in a reasonably safe condition.[11]

Sections 4101.01 and 4101.11 (1953) of *Page's Ohio Revised Code Annotated,* state that the owner or occupant must maintain the premises where his business is conducted *"and the premises appurtenant thereto,"* in a reasonably safe condition "to protect the life, health, safety and welfare of frequenters" of such premises.

The criterion used to measure this conduct is the degree of ordinary care[12] which would be exercised by the reasonably prudent man under similar[13] or identical circumstance.[14] The area to which the public is invited is assumed to be safe and the patrons are not expected to search for hidden dangers.[15] A com-

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5 Handleman v. Cox, 187 A. 2d 708 (N. J. 1963).

6 Behrendt v. Ahlstrand, 118 N.W. 2d 27 (Minn. 1962).

7 Underhill v. Shactman, 337 Mass. 730, 151 N.E. 2d 287 (1958).

8 Shields v. Food Fair Stores, Inc., 106 So. 2d 90 (Fla. App. 1958). E.g., sidewalks, Smith v. United Properties, Inc., 2 Ohio St. 2d 310 (1965).

9 Seng v. American Stores Co., 384 Pa. 338, 121 A. 2d 123 (1956).

10 Handleman v. Cox, *supra* n. 5; Slobodzian v. Beighley, 164 A. 2d 923 (Pa. 1960).

11 Horvill v. Swift & Co., 117 S.E. 2d 202 (Ga. App. 1960); Perez v. Ow, 19 Cal. Rptr. 372 (Cal. App. 1962).

12 Raper v. McCrory-McLellan Corp., 130 S.E. 2d 281 (N. C. 1963).

13 Peters v. The Great Atlantic & Pacific Tea Co., 72 So. 2d 562 (La. App. 1954).

14 S. S. Kresge Company v. Holland, 158 F. 2d 495 (6th Cir. 1946).

15 Hook v. Point Montara Fire Protection District, 28 Cal. Rptr. 560 (Cal. App. 1963).

plaint alleging injuries sustained by a minor who fell off of his motor bicycle at a defective entranceway connecting a street to a parking area was sufficient to state a cause of action.[16] Negligence in such situations is the omitting of an act which a man of ordinary prudence would do by way of exercising reasonable care in managing his property.[17] Yet the possessor of land used in general commerce is not the insurer of its users' safety, and is under no duty to reconstruct this land to obviate normal, ordinary and obvious risks encountered by the users.[18] Neither is he obligated to construct barriers for automobile bumpers along the parking lot for the protection of customers on the sidewalks in front of the stores.[19]

However, a proprietor could reasonably anticipate a frantic crowd of customers when, in holding an anniversary sale on his parking lot, paper plates were dropped from an airplane and which were redeemable for merchandise by store managers.[20] Patrons in a shopping center parking area provided by a store are considered "invitees" of the property holder.[21]

Actual or Constructive Notice

No presumption of fault arises on the part of the occupier of property merely because a customer is injured.[22] Therefore, the doctrine of *res ipsa loquitur* is held inapplicable to slip and fall cases.[23] Defects in the premises must be shown to have existed for such a period of time as to have given the storekeeper actual

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[16] Shields v. Food Fair Stores, Inc., *supra* n. 8.

[17] Saeter v. Harley Davidson Motor Co., 8 Cal. Rptr. 747 (Cal. App. 1960).

[18] Capobianco v. Yacovilli Restaurant, Inc., 360 S.W. 2d 302 (Mo. App. 1962); Brown v. Alabama Food, Inc., 190 A. 2d 275 (D.C. Cir. 1963); Raper v. McCrory-McLellan Corp., *supra* n. 12.

[19] Beaney v. Carlson, 174 Ohio 409, 189 N.E. 2d 880 (1963).

[20] Hicks v. M. H. A. Inc., 129 S.E. 2d 817 (Ga. App. 1963).

[21] *Ibid;* Kelley v. Goldberg, 288 Mass. 78, 192 N.E. 513 (1938); Gray v. Watson, 189 S.E. 616 (Ga. App. 1936); Bremer v. Smith, 191 A. 395 (Pa. Super. 1937).

[22] Sattler v. The Great Atlantic & Pacific Tea Co., 18 F.R.D. 271 (D.C. 1955).

[23] *Ibid;* Raper v. McCrory-McLellan Corp., *supra* n. 12; Hallett v. Furr's Inc., 378 P. 2d 613 (N. M. 1963); Hays v. Maison Blanche Co., 30 So. 2d 225 (La. App. 1947); Bremer v. Smith, *supra* n. 21.

or constructive notice of them,[24] or there must be a showing of carelessness in the general practices of the proprietor.[25]

Defendants were held not liable for plaintiff's injuries in the absence of any proof showing how long melting ice cream[26] and, in another case, a slippery substance[27] had been on parking spots whereas holes[28] in parking lots have been held to be constructive notice.

A defendant who runs a sewer line through his shopping center parking lot and fills it with dirt up to the level of the surrounding concrete has notice from the very nature of this work of the hazardous condition created for patrons driving across such an area the day after a rainfall.[29]

The absence of any evidence showing how long an icy condition existed on a parking lot prevented a showing of liability of a defendant.[30] The law of Ohio[31] and that of other states[32] does not impose a duty upon a store owner to remove the natural accumulation of snow and ice, provided the area is otherwise maintained in a non-hazardous condition.[33] While the storm is

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[24] Norwood v. Belk-Hudson Company of Valdosta, 129 S.E. 2d 810 (Ga. App. 1963): Brophy v. Clisaris, 368 S.W. 2d 553 (Mo. App. 1963); Haefeli v. Woodrich Engineering Co., 255 N. Y. 442, 175 N.E. 123 (1931); Wild v. Atlantic Refining Co., 195 F. 2d 151 (3rd Cir. 1952); Bremer v. Smith, *supra* n. 21; Norris v. Belk's Dept. Store of Dunn, N. C., Inc., 130 S.E. 2d 537 (N. C. 1963).

[25] Peters v. The Great Atlantic & Pacific Tea Co., *supra* n. 13; Greeves v. S. H. Kress & Co., 198 So. 171 (La. App. 1940).

[26] Perez v. Ow, *supra* n. 11.

[27] Doherty v. Providence Journal Co., 181 A. 2d 105 (R. I. 1962).

[28] Seigel v. Detroit City Ice & Fuel Co., 324 Mich. 205, 36 N.W. 2d 719 (1949); Willis v. Rivermines I. G. A. Supermarket, 350 S.W. 2d 437 (Mo. App. 1961).

[29] Nydegger-Friedman Realty Corporation v. Sweeney, 271 F. 2d 954 (4th Cir. 1959).

[30] Hall v. Safeway Stores, Inc., 360 S.W. 2d 536 (Tex. App. 1962); Daley v. Sears, Roebuck & Co., 182 F. 2d 347 (6th Cir. 1950); Rodofsky v. Stop & Shop, Inc., 164 N.E. 2d 158 (Mass. 1959).

[31] Martinelli v. Jerry Cua Market, 184 N.E. 2d 514 (Ohio App. 1962); Straley v. Keltner, 164 N.E. 2d 186 (Ohio App. 1959); Levine v. Hart Motors, 143 N.E. 2d 602 (Ohio App. 1955); Turoff v. Richman, 61 N.E. 2d 486 (Ohio App. 1944).

[32] Brent v. Bank of Aurora, 132 Colo. 577, 291 P. 2d 391 (1955); Bersch v. Holton Street State Bank, 247 Wis. 261, 19 N.W. 2d 175 (1945); Crawford v. Soennichsen, 175 Neb. 87, 120 N.W. 2d 578 (1963).

[33] Wise v. The Great Atlantic & Pacific Tea Co., 115 N.E. 2d 33 (Ohio App. 1953).

still in progress the storekeeper has no duty and the invitee must protect himself.[34]

A contrary view was held in *Evans v. Sears, Roebuck and Company* where a judgment for the plaintiff was sustained despite the fact that the storm had ceased only an hour prior to the plaintiff's fall. Evidence indicated that ice had been on the lot for a whole day before the snow storm, thereby allowing sufficient time for its removal by the defendant.[35]

There is a duty to remove a hazardous artificial accumulation of snow and ice,[36] and liability will result from an unreasonable failure to remove it.[37] Where defendant's snow plow piled the snow at the end of his parking lot and alternate days of different temperature ranges caused some of the snow to melt and then accumulate into a rough rutted frozen surface, a duty arose to correct this defective condition.[38] When a business visitor can plainly see and easily avoid the danger created by the weather conditions he may be precluded from damages.[39] It will be for the jury to decide the carelessness of the customer or the negligence of the store operator.[40]

Proximate Cause

A nine year old child in the parking lot of defendant's store was struck by a vehicle traveling in the wrong lane of traffic. Although the store operator was negligent in not replacing the worn-off marking lanes, the independent act of the motorist was the proximate cause of the injury.[41] In an action to recover for injuries received by a minor who alighted from his uncle's car to play on a merry-go-round provided on a supermarket's parking lot and was struck by the automobile of a third person, the plaintiff still had to establish the relationship between his injury and

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[34] Hallett v. Furr's Inc., *supra* n. 23.

[35] 104 S.W. 2d 1035 (Mo. App. 1937).

[36] Zide v. Jewel Tea Co., 188 N.E. 2d 383 (Ill. App. 1963).

[37] Merkel v. Safeway Stores, Inc., 187 A. 2d 52 (N. J. Super. 1962).

[38] Fitz Simons v. National Tea Co., *supra* n. 2.

[39] Morris v. The Great Atlantic & Pacific Tea Co., 384 Pa. 464, 121 A. 2d 135 (1956); Crawford v. Soennichsen, *supra* n. 32; Crenshaw v. Firestone Tire & Rubber Co., 380 P. 2d 828 (N. M. 1963).

[40] The Great Atlantic & Pacific Tea Co. v. Chapman, 72 F. 2d 112 (6th Cir. 1934); King Soopers, Inc. v. Mitchell, 140 Colo. 119, 342 P. 2d 1006 (1959).

[41] Booth v. Warehouse Market, Inc., 286 P. 2d 721 (Okla. 1955).

the defendant's breach of duty. The Supreme Court held that the defendant's motion for a directed verdict should have been granted since the absence of a protective enclosure around the merry-go-round did not directly contribute to the accident.[42]

In *Safeway Stores, Inc. v. Musfelt* the retailer maintained his parking spaces adjacent to the sidewalk so that customers had to drive across the walk to use the parking facilities. Plaintiff was struck by an unknown careless driver backing across the abutting sidewalk. For the resulting injuries she sued Safeway. Although the defendant had a responsibility with respect to pedestrians using the walk he could not provide against the negligent acts of an unknown third person.[43]

Statutory Standards of Care

An ordinance or statute may impose a higher standard of care.[44] Neglect of the statutory duty must be the proximate cause of an injury to constitute a cause of action.[45]

In *Peterson v. Safeway Stores, Inc.* the negligence of the plaintiff was to be considered by the jury, even though defendant failed to roughen the surface of a ramp leading from the parking lot to the store entrance as required by a city ordinance.[46] In *Burroughs v. Ben's Auto Park* the issues of negligence and proximate cause were for the jury. In this case the plaintiff fell over a twelve foot unguarded wall—the top of which was level with the driving surface of the parking lot. An order of the Commander of the Western Defense established regulations for dimming lights. However, the light intensity where the plaintiff fell was less than that which the regulation allowed.[47]

In a similar case, although no ordinance was involved, a store operator switched off his lights to indicate he was closing for the evening as the plaintiff left the premises. Plaintiff stepped over a retaining wall and fell down a descending ramp. This area was not part of the parking section provided by the store

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[42] Jackson v. Pike, 87 So. 2d 410 (Fla. 1956).

[43] 349 P. 2d 756 (Okla. 1960).

[44] Widell v. Holy Trinity Catholic Church, 121 N.W. 2d 249 (Wis. 1963).

[45] Sisk v. Ball, 371 P. 2d 594 (Ariz. 1962); Kendrick v. Atchison T. & S. F. Ry. Co., 320 P. 2d 1061 (1963).

[46] 7 Cal. Rptr. 924 (Cal. App. 1960).

[47] 27 Cal. 2d 449, 164 P. 2d 897 (1945).

proprietor and belonged to another, but that fact was considered unimportant.[48] An inadequately lighted lot may constitute a dangerous condition for those invited upon the property if it causes customers to trip over wooden curbing,[49] concrete coping between parking lanes,[50] or unknown objects.[51] Customers must not be unreasonably exposed to danger[52] caused by insufficient illumination.[53]

In a Texas case the court held that a store, by announcing its grand opening, does not warrant that the parking area is fully completed and in safe condition. A hazardous partial gravel surface—the cement surfacing incomplete—is as apparent to the person injured as to the land owner.[54] There is no liability where the danger is known equally to the invitee and the owner.[55]

In a completed area it is not negligent to maintain changes in elevation which are obvious to the public and should be expected.[56] Should plaintiff obstruct his own view by large packages or bundles, certainly he is not absolved from exercising reasonable care and observation.[57]

A greater duty of care and observation is placed upon a handicapped person such as one who is semi-blind[58] or whose

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[48] The Great Atlantic & Pacific Tea Co. v. Pedersen, 247 F. 2d 4 (1st Cir. 1957).

[49] McFarland v. Sears, Roebuck and Co., 91 S.W. 2d 615 (Mo. App. 1936).

[50] Downing v. Drybrough, 249 S.W. 2d 711 (Ky. App. 1952).

[51] Nelson v. The Great Atlantic & Pacific Tea Co., 137 A. 2d 599 (N. J. Super. 1958).

[52] Crampton v. Kroger Co., 162 N.E. 2d 553 (Ohio App. 1959); Campbell v. Hughes Provision Co., 153 Ohio 9, 90 N.E. 2d 694 (1950); J. C. Penney Co. Inc. v. Robison, 128 Ohio 626, 193 N.E. 401 (1934); S. S. Kresge Co. v. Fader, 116 Ohio 718, 158 N.E. 174 (1927).

[53] Reed v. Ingham, 125 So. 2d 301 (Fla. App. 1960); Dean v. Safeway Stores, Inc., 300 S.W. 2d 431 (Mo. 1957); Cathcart v. Sears, Roebuck & Co., 183 A. 113 (Pa. Super. 1936).

[54] Casteberry v. Levine's Inc., 351 S.W. 2d 114 (Tex. App. 1961).

[55] Hoffman v. The Kroger Co., 340 S.W. 2d 152 (Mo. App. 1960); Barrow v. James, 130 S.E. 2d 352 (Ga. App. 1963).

[56] Watkins v. Piggley Wiggley Bird Co., 31 F. 2d 889 (8th Cir. 1929); Boyle v. Preketes, 260 Mich. 629, 247 N.W. 763 (1933); Albachten v. Golden Rule, 135 Minn. 381, 160 N.W. 1012 (1917); Dickson v. Emporium Mercantile Co., 193 Minn. 629, 259 N.W. 375 (1935); Haddon v. Snellenburg, 293 Pa. 333, 143 A. 8 (1928); Main v. Lehman, 294 Mo. 579, 243 S.W. 91 (1922); Seal v. Safeway Stores, 48 N. M. 200, 147 P. 2d 359 (1944); Smith v. United Properties, Inc., 2 Ohio St. 2d 310 (1965) (sidewalk).

[57] Coleman v. Colonial Stores, Inc., 130 S.E. 2d 338 (N. C. 1963); Safeway Stores, Inc. v. McCoy, 376 P. 2d 285 (Okla. 1962).

[58] DiMenna v. City of Philadelphia, 381 Pa. 596, 114 A. 2d 123 (1955).

sight is in any way defective.[59] Such a person who voluntarily subjects himself to danger,[60] does so at his own risk.[61]

Oily spots on a parking lot frequented by a business visitor almost every day for a number of years were held to be known to the customer who slipped on such spot.[62] The customer assumed the consequences by having knowledge of such conditions and may be barred from recovery.[63] Such conduct falls below the standard to which the plaintiff must conform.[64]

Parking Lot as Nuisance

Despite the conveniences provided by a collective group of business enterprisers, the use of an adjoining parking lot in conjunction with such businesses has been held a public nuisance if it is immediately adjacent to a residential area. Noise, fumes, dust and blocked traffic reduce the value of the neighboring property. There is a duty not to infringe upon the rights of a neighbor.[65]

Contrary views have been held that parking lots are not a nuisance *per se* even though located in a residential neighborhood and redress could be obtained only if an area became a nuisance in fact.[66]

Landlord-Tenant Relationships

It is well established that a landlord is liable for injuries sustained by a third person because of the landlord's negligence in connection with any portions of the premises that he controls.[67]

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[59] Riddell v. The Great Atlantic & Pacific Tea Co., 192 Tenn. 304, 241 S.W. 2d 406 (1951).

[60] Goade v. Benevolent & Protective Order of Elks, Pomona, Cal., Lodge No. 798, 28 Cal. Rptr. 669 (Cal. App. 1963).

[61] Mills v. Springfield, 142 N.E. 2d 859 (Ohio App. 1956).

[62] Plotner v. The Great Atlantic & Pacific Tea Co., 59 Ohio App. 367, 18 N.E. 2d 409 (1938).

[63] Benton v. United Bank Building Co., 223 N. C. 809, 28 S.E. 2d 491 (1944); Bolen v. Strange, 192 S. C. 284, 6 S.E. 2d 466 (1939).

[64] Henderson v. Kansas Power & Light Co., 380 P. 2d 443 (Kan. 1963).

[65] Rhodes v. A. Moll Grocery Co., 95 S.W. 2d 837 (Mo. App. 1936); City & County of San Francisco v. Safeway Stores, Inc., 310 P. 2d 68 (Cal. App. 1957).

[66] Hannum v. Oak Lane Shopping, 383 Pa. 618, 119 A. 2d 213 (1956); Essick v. Shillam, 347 Pa. 373, 32 A. 2d 416 (1943).

[67] 32 Am. Jur. Landlord And Tenant, § 768 (1941); Schallinger v. The Great Atlantic & Pacific Tea Co., 334 Mass. 386, 135 N.E. 2d 655 (1956); Harrison v. Struich, 19 Ohio L. Abs. 374 (Ohio App. 1935).

If he leases out a part of the premises while retaining control over another part, he will be subject to liability upon the other part.[68]

A landlord would not be liable for injuries sustained by an invitee upon the rented premises not under his control.[69] An action was properly dismissed against the lessors of a supermarket where evidence proved that the lessees had exclusive possession of the premises in the area where plaintiff was injured.[70] The lessee owed the duty to keep the premises in a reasonably safe condition for invitees. But should the lessor extend an invitation to the public for his own purposes his liability is not absolved.[71] The same is true of a tenant who exercises control outside of the portion of the premises leased by him.[72]

When premises are leased for the admission of the public the lessor is under an affirmative duty to inspect and repair the premises *before* transferring possession. Otherwise he may be liable to a third party for a dangerous condition existing on the land at the time of the transfer.[73] Some courts have said that the lessor has invited the public to enter and his responsibility to the public is so great he can not shift it to the tenants.[74] There are opinions to the contrary.[75]

Fraud or deceit notwithstanding the doctrine of *caveat emptor* applies to the lessee, for with the lease he acquires control of the property. This control forms the basis of his duty to use ordinary care as to the condition of the premises.[76] If the lessor was aware of latent defects in the property which were concealed from the lessee this would be sufficient to charge the land

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[68] Siegel v. Detroit City Ice & Fuel Co., *supra* n. 28; Murphy v. Illinois State Trust Co., 375 Ill. 310, 31 N.E. 2d 305 (1941); Durkin v. Lewitz et al., 123 N.E. 2d 151 (Ill. App. 1954).

[69] Shepard v. Worcester County Institution for Saving, 304 Mass. 220, 23 N.E. 2d 119 (1939); Harrison v. Struich, *supra* n. 67; Schallinger v. The Great Atlantic & Pacific Tea Co., 334 Mass. 386, 135 N.E. 2d 655 (1956).

[70] Cole v. McGhie, 361 P. 2d 938 (Wash. 1961).

[71] McCarthy v. Isenberg Bros. Inc., 321 Mass. 170, 72 N.E. 2d 422 (1947).

[72] Johnston v. De La Guerra Properties, Inc., 28 Cal. 2d 394, 170 P. 2d 5 (1946).

[73] Burroughs v. Ben's Auto Park, *supra* n. 47.

[74] Tulsa Entertainment Co. v. Greenlees, 85 Okla. 113, 205 P. 179 (1922); Junkermann v. Tilyou Realty Co., 213 N. Y. 404, 108 N.E. 190 (1915).

[75] Davis v. Schmitt Bros., 199 App. Div. 683, 192 N. Y. S. 15 (1922); Karlowski v. Kissock, 275 Mass. 180, 175 N.E. 500 (1913).

[76] Young v. Beattie, 172 Okla. 250, 45 P. 2d 470 (1935).

owner with liability for injuries received as a result of such defects.[77] There would be no duty to disclose conditions known to the tenant[78] or conditions so obvious he might reasonably be expected to discover them.[79]

Conclusion

It is well recognized that the party actually controlling the premises has conventional liability. His duty to keep the premises in a reasonably safe condition has been extended to the parking areas of shopping centers.

A customer also has a duty to exercise reasonable care. Such person may be precluded from damages when abnormal conditions on the parking lot are obviously present.

Points open to question are those involving latent and patent defects upon the property and the duties of the lessor prior to execution of the lease.

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[77] Colorado Mortgage and Inv. Co. v. Giacomini, 55 Colo. 540, 136 P. 1039 (1913); Anderson v. Robinson, 182 Ala. 615, 62 So. 512 (1913).

[78] Manes v. Hines & McNair Hotels, 184 Tenn. 210, 197 S.W. 2d 889 (1946).

[79] Shegda v. Hartford-Connecticut Trust Co., 131 Conn. 186, 38 A. 2d 668 (1944).