Roger Williams University Law Review

Volume 7 | Issue 2 Article 25

Spring 2002

2001 Survey of Rhode Island Law: Cases: Tort Law

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Tort Law. *Barone v. Christmas Tree Shop*, 767 A.2d 66 (R.I. 2001). The Rhode Island Supreme Court held that a claim of negligence in a slip and fall case must include evidence of the nature and extent of the slippery substance, along with evidence concerning the length of time the substance was present at the site.

FACTS AND TRAVEL

Plaintiff Caroline Barone (plaintiff) entered The Christmas Tree Shop (defendant or shop) at approximately 10 A.M. on a snowy wet day.[1] While perusing the merchandise, plaintiff slipped and fell, fracturing her leg.[2] Plaintiff testified that she fell on a wet substance, but did not notice any water on the floor while she was awaiting assistance.[3]

Judith Kerr (Kerr), the assistant store manager, testified that the entrance area of the store was carpeted and mats designed to absorb excess water were present near the entrance.[4] Kerr also testified that the floor where the plaintiff fell was clean and dry at the time of the accident.[5]

The trial judge granted the defendant's motion for the entry of judgment as a matter of law, stating that no evidence had been offered regarding the condition of the floor at the exact location where the plaintiff fell.[6] Plaintiff appealed.[7]

ANALYSIS AND HOLDING

The supreme court found it determinative that no testimony was received concerning the nature and extent of any water on the floor at the precise location where plaintiff fell.[8] It is settled law that a plaintiff who has fallen and is claiming negligence must present evidence proving that he or she fell because of an unsafe condition that the defendant was or should have been aware, and that the condition existed for a long enough time to allow the owner or

1. Barone v. Christmas Tree Shop, 767 A.2d 66, 67 (R.I. 2001).
2. *Id.*
3. *Id.*
4. *Id.* at 67-68.
5. *Id.* at 68.
6. *Id.*
7. *Id.*
8. *Id.*

occupier of the premises to remedy the situation.[9] In the instant case, evidence regarding the nature and extent of the water at the site of the fall was not presented.[10] Furthermore, no evidence regarding the length of time the slippery substance was present at the location was introduced.[11] As there was a complete absence of evidence substantiating a claim of negligence against the defendant, the trial justice did not err in granting a motion for judgment as a matter of law.[12]

Justice Goldberg dissented. In her dissent she pointed out that both the plaintiff and her sister testified that there were puddles of water at various locations within the shop.[13] In addition, the presence of absorbent floor mats at the entryway was not established.[14] Since the plaintiff had identified the substance she slipped on as water in her testimony, the finding of the trial justice that there was no evidence offered as to the condition of the precise location of the floor that the fall occurred was incorrect.[15] This impermissible determination of fact by the trial justice constituted a violation of Rule 50 of the Superior Court Rules of Civil Procedure.[16] Enough evidence existed in this case to create an inference of negligence.[17]

CONCLUSION

Since the plaintiff failed to present any evidence of the nature and extent of the "slippery substance" at the site of her fall in the defendant's shop, the judgment of the superior court was affirmed.[18]

Susan Knorr Rodriguez

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9. *Id.* (citing Massart v. Toys R Us, Inc., 708 A.2d 187, 189 (R.I. 1998)).
10. *Id.* at 68.
11. *Id.*
12. *Id.*
13. *Id.* at 69.
14. *Id.*
15. *Id.* at 70.
16. *Id.*
17. *Id.* at 71.
18. *Id.* at 69.

Tort Law. *Flanagan v. Wesselhoeft*, 765 A.2d 1203 (R.I. 2001). (1) The trial court's refusal to allow pediatric surgeon to question a patient's mother regarding informed consent was not an abuse of discretion where the questions were repetitious of surgeon's long cross-examination of mother. (2) Articles from two medical journals were not admissible, under the learned treatise exception to the hearsay rule, for use in cross-examining defendant pediatric surgeon and his medical expert, where no expert witness had authenticated the articles as reliable. (3) Deposition testimony of patient's father that two physicians had told him that defendant pediatric surgeon's performance of surgery on patient had violated the standard of care was inadmissible hearsay in medical malpractice trial, where the declarations were offered to prove that the surgeon had violated the standard of care. (4) Minor patient's parents failed to preserve appellate review of their constitutional challenge to Rhode Island statute regarding prejudgment interest in medical malpractice actions, where Attorney General had not been served with a copy of the proceeding and had not been given an opportunity to be heard at the trial level.

FACTS AND TRAVEL

On August 30, 1989, plaintiff, Donna Flanagan (Flanagan or plaintiff), brought her eleven-month-old daughter, Ashley, to defendant Dr. Conrad Wesselhoeft (Wesselhoeft or defendant), a surgeon, to examine an enlarged cervical node below Ashley's right ear.[1] The examination lasted about five or six minutes; Wesselhoeft informed Flannagan the node would have to be removed and biopsied.[2] The defendant warned only of the risk of infection and bleeding; no further discussion took place between the initial consultation and the surgery.[3] The surgery took place on September 27, 1989.[4] About a month after the surgery Flanagan noticed the child seemed to be "winging"; a condition resulting in a drooping shoulder and protruding scapula.[5] This condition was later diagnosed as a probable severed spinal accessory nerve in the child's

1. Flanagan v. Wesselhoeft, 765 A.2d 1203, 1205 (R.I. 2001).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

neck resulting from the surgery performed by defendant.[6] Another surgeon, Dr. Melvin Rosenwasser, performed corrective surgery and successfully repaired the severed nerve.[7] After convalescing, Ashley fully recovered.[8]

In September, 1992, plaintiffs filed an action against Wesselhoeft and a resident physician at Rhode Island Hospital.[9] In that case, the superior court ruled in favor of defendant on a judgment as a matter of law and the state supreme court reversed and remanded for a new trial.[10] Upon remand, in front of a jury, a judgment for plaintiffs was reached with damages assessed at $209,446 in favor of the child and $41,889 in favor of the mother.[11] Wesselhoeft appealed arguing three points: (1) that the trial court erred in sustaining several of plaintiff's objections to cross-examination questions of Donna Flanagan regarding her knowledge of the risks of surgery and whether she would have gone ahead with the surgery regardless of the risks;[12] (2) that the trial court erred in allowing excerpts from medical publications, used as part of the subject of cross-examination, to be read into evidence without first having been authenticated by an expert, and;[13] (3) the trial court erred in allowing a deposition to be read into evidence that contained hearsay statements.[14] Flanagan cross-appealed challenging the constitutionality of a Rhode Island statute that fixes the date of prejudgment interest in medical malpractice cases.[15]

ANALYSIS AND HOLDING

The court handled the issues in "order of their importance" starting with the issue of the cross-examination of Flanagan.[16] Flanagan was cross-examined by defense counsel who attempted to get her to admit "that had she been warned of the 1 percent possibility of damage to the accessory nerve and the possibility of

6. *Id.*
7. *Id.* at 1205-06.
8. *Id.* at 1206.
9. *Id.*
10. *Id.* at 1205.
11. *Id.*
12. *Id.* at 1206.
13. *Id.* at 1208.
14. *Id.* at 1210.
15. *Id.* at 1211.
16. *Id.* at 1206.

malignancy that she nevertheless would have authorized the operation."[17] The trial court sustained several objections to questions about Flanagan's informed consent because a number of questions along that line were repetitious and assumed facts not in evidence.[18] Wesselhoeft argued that the trial justice's ruling constituted reversible error.[19]

The supreme court held that the "scope and extent of cross-examination are subject to limitations within the sound discretion of the trial justice," and that such rulings will not be overturned without a "clear abuse of discretion."[20] In addition, the trial court may, subject to an abuse-of-discretion standard, exclude questions on cross-examination that could mislead the jury.[21] Here, there was ample evidence regarding Flanagan's informed consent, given the totality of the evidence to show that errors committed by the trial justice, if any, were harmless.[22]

The court next turned to the issue of the plaintiff's cross-examination of Wesselhoeft and his expert witness, Dr. Peter Altman, while using treatises that had not been authenticated.[23] The use of treatises is proper, pursuant to Rule 803(18), if "'established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence, but may not be received as exhibits.'"[24] The attorneys properly used two medical journals,[25] but Flanagan argued that without the evidence suggested in other unauthenticated journals, there was no evidence to support a jury verdict on the negligence count. The court held the trial justice erred by permitting the use of the unauthenticated articles in certain medical journals.[26] However, the court stated that that the refusal by Wesselhoeft and Altman to recognize as authoritative these articles "strained all credulity."[27] Moreover, other evidence, including admissions by Wesselhoeft himself, "would certainly

17. *Id.*
18. *Id.* at 1207.
19. *Id.* at 1206.
20. *Id.* at 1207.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* (quoting R.I. R. Evid. 803(18)).
25. *Id.*
26. *Id.* at 1209.
27. *Id.*

have supported a jury determination of negligence."[28] Thus, any error was not prejudicial.[29]

The court next turned to whether the trial justice erred by allowing the deposition of John Flanagan, the father of Ashley, to be read to the jury.[30] The deposition contained hearsay statements made by other doctors, which concluded that Wesselhoeft had not properly isolated and avoided injury to the accessory nerve.[31] The court found the reading of the deposition to be a violation of Rules 801(c) and 802 of the Rhode Island Rules of Evidence.[32] Although a deposition may be read into evidence, it must be admissible evidence.[33] Here, the evidence was hearsay and not admissible.[34] However, this error was harmless given the existence of other evidence that supported the jury's finding that defendant was negligent in failing to isolate and avoid injury to the nerve.[35]

Lastly, the court addressed plaintiffs cross-appeal challenging the constitutionality of a Rhode Island statute which provides that "prejudgment interest in medical malpractice actions begins on the date of the written notice of the claim or the filing of the action, whichever occurs first."[36] The court indicated that the law was constitutional, but did not rule specifically on the issue, as the plaintiffs had not served the Attorney General a copy of their challenge in superior court.[37] Since the Attorney General was not given the opportunity to be heard at the trial level, there was no issue that could be properly reviewed.[38]

CONCLUSION

In *Flanagan v. Wesselhoeft*, the Rhode Island Supreme Court held that: the trial court did not abuse its discretion refusing to allow a repetitious cross-examination; articles from two medical journals were not admissible for cross-examination when the jour-

28. *Id.* at 1210.
29. *Id.*
30. *Id.*
31. *Id.* at 1211.
32. *Id.* at 1210.
33. *Id.* (quoting Super. Ct. R. Civ. P. 32).
34. *Id.*
35. *Id.* at 1211.
36. *Id.*
37. *Id.*
38. *Id.*

nals had not authenticated the articles; deposition testimony was inadmissible hearsay in medical malpractice trial, where the declarations were offered to prove that the surgeon had violated the standard of care; and the plaintiff's failed to preserve appellate review because the Attorney General had not been served with a copy of the proceeding and had not been given an opportunity to be heard at the trial level.

Joseph M. Proietta

Tort Law. *Martinelli v. Hopkins*, 787 A.2d 1158 (R.I. 2001). A town is engaged in a governmental function when issuing an entertainment license and is therefore is generally protected from liability, subject to certain exceptions, under the public-duty doctrine. However, when a town does not inquire about possible conditions that could result in harm to the public before granting the entertainment license, the issuance of the license can be considered egregious conduct and the town loses its protection under the public-duty doctrine.

FACTS AND TRAVEL

Frank Hopkins conducted an annual outdoor festival on his property in the Town of Burrillville that grew from 175 attendees in 1979 to approximately 4500 attendees in 1992.[1] By 1990, before issuing an entertainment license to Hopkins, the Burrillville Town Council required Hopkins to hire a private security firm, ensure that the music was shut down by midnight, provide an adequate number of outdoor toilets, and assume responsibility for the expense of detail police officers called in by the Chief of Police.[2] Hopkins only ordered fifty portable toilets to accommodate over 4000 people for the 1992 festival and he told the security firm that he hired that there would only be 2000 to 2500 people in attendance.[3] In response to Hopkins' representation about numbers, the Chief of Police only assigned seven police officers to assist him in handling police duties at the festival.[4]

That evening, the crowd quickly grew to about 4500 people.[5] Free beer was served in mugs, as well as in quart, one-gallon and five-gallon containers.[6] Before long, numerous people became drunk and unruly.[7] The lines to the outdoor toilets grew so long that people began to climb over a snow fence that had been set up along the parameter of the property in order to relieve themselves in the woods.[8] Although the Chief of Police had become aware that the crowd had become intoxicated and unruly, he made no attempt

1. Martinelli v. Hopkins, 787 A.2d 1158, 1162-63 (R.I. 2001).
2. *Id.* at 1162.
3. *Id.* at 1163.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

to close down the festival for fear that the crowd might riot.[9] The Chief of Police also allowed the band to play fifteen minutes past the midnight deadline.[10] However, the band did not stop playing until the Chief of Police threatened them at 12:30 a.m.[11] Meanwhile, between midnight and 12:20 a.m., a group of rowdy attendees climbed over the plastic fence and while doing so, a rotted tree, to which the fence was attached, toppled and fell upon Michael Martinelli rendering him a paraplegic.[12] Martinelli later commenced this action.

Before the trial, a consent order was entered granting the town's motion for partial summary judgment and the town's liability was capped at $100,000 pursuant to section 9-31-3 of the Government Tort Liability Act.[13] A superior court jury awarded Martinelli $2 million and determined the town was twenty percent negligent.[14] The trial justice found that the town was acting in a governmental function when it issued the entertainment license, but the town's conduct in both issuing the license and in not containing the festival once it got out of hand was egregious, therefore it was liable under the egregious conduct exception to public-duty doctrine and was not protected from liability.[15] Therefore, in accordance with the consent order that had been entered into by the town and section 9-31-3, the trial justice limited Martinelli's recovery from the town to $100,000.[16]

After the trial, the town renewed its motion for judgment as a matter of law, claiming that Martinelli failed to show that the town's actions were the proximate cause of his injuries.[17] In the alternative, the town filed a motion for a new trial.[18] Martinelli filed a post-trial motion seeking relief from the consent order earlier agreed upon by counsel for both parties.[19] He sought relief

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 1164. Section 9-31-3 provides "in any tort action against any city of town. . . , any damages covered therein shall not exceed the sum of $100,000. . . ." R.I. Gen. Laws § 9-31-3 (2000).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

from the statutory cap on the town's liability asserting that the town's police detail, while performing security guard type activities at the festival, was acting in a private function and not in a governmental function and in doing so, they acted in a negligent manner.[20] The trial justice denied all of the motions and both the plaintiff and the town filed cross-appeals with the Rhode Island Supreme Court, which denied the cross-appeals and affirmed the lower court's judgment.[21]

ANALYSIS AND HOLDING

In his appeal, Martinelli argued for the abolition of the public-duty doctrine and, in the alternative, that the public-duty doctrine should not apply in this case because the police were carrying out the same duties as those carried out by the private security detail.[22] He also argued that two exceptions to the public-duty doctrine were applicable to the case.[23] While the court found Martinelli's argument for the abolition of the public-duty doctrine compelling, the court refused to consider these arguments because of the stipulated agreement between the parties limiting his recovery from the town to $100,000 in damages.[24]

The town claimed on appeal that the trial justice erred in applying the public-duty doctrine's egregious conduct exception to the facts of the case. The court held that while the town was engaged in a governmental function when it issued the entertainment license to Hopkins and therefore protected under the public-duty doctrine, the fact that it acted in an egregious manner stripped the town's immunity from liability.[25] Under the public-duty doctrine, the immunity enjoyed by the state is lifted in three situations: when the state owes a special duty to the defendant, when the act is egregious, and when the state is performing a duty normally performed by a private entity.[26]

The court found that in past years the Chief of Police had objected to the issuance of Hopkins' permit, stating that each year

20. *Id.*
21. *Id.* at 1164-65.
22. *Id.* at 1166.
23. *Id.*
24. *Id.* at 1166-67.
25. *Id.* at 1167.
26. *Id.* (citing Schultz v. Foster-Glocester Regional School District, 755 A.2d 153, 155 (R.I. 2000) (quoting Kuzniar v. Keach, 709 A.2d 1050, 1053 (R.I. 1998))).

problems associated with the crowds at the festival had escalated and that the Chief of Police made the council aware of the large crowds and the mass consumption of free beer.[27] In light of this information, the town continued to issue permits for the festival without ever inspecting the premises in which the festival was taking place.[28] The town was on notice that the large crowds and unruly behavior presented certain risk to the spectators and by issuing the entertainment license nonetheless, the town acted in an egregious manner.[29]

The town also claimed that even if it was negligent, there was no evidence to show that the town's negligence caused Martinelli's injuries.[30] The town argued that the causal connection between negligence and a plaintiff's injury must be shown by evidence and not based on speculation.[31] The court stated that while the town's argument is true, negligence and proximate cause may also be shown by reasonable inference from the facts.[32] The court concluded that the town should have know of the dangers inherent in a large crowd gathering together to consume large quantities of free beer.[33] The town failed to inquire about the quantities of free beer that would be offered, the number of toilets that would be available, or the number of security personnel that would be on hand.[34] The court also pointed out the fact that even though the Chief of Police was aware that the event was out of hand by 11:30 p.m., despite his authority to shut the event down at any time, he did not force the band to stop playing until 12:30 a.m.[35] It was during this time period in which Martinelli received his injuries.[36] The court held that the town's negligent issuance of the license, coupled with the Chief of Police's failure to close down the event once it became unruly, was a proximate cause of Martinelli's injury.

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27. *Id.* at 1168.
28. *Id.*
29. *Id.* at 1168-69.
30. *Id.* at 1169.
31. *Id.* (quoting Kurczy v. St. Joseph Veteran's Association, Inc., 713 A.2d 766, 771 (R.I. 1998)).
32. *Id.* (quoting McLaughlin v. Moura, 754 A.2d 95, 98 (R.I. 2000) (quoting Skalling v. Aetna Ins. Co., 742 A.2d 282, 288 (R.I. 1999))).
33. *Id.*
34. *Id.*
35. *Id.* at 1169-70.
36. *Id.*

CONCLUSION

A town is engaged in a governmental function when issuing an entertainment license and is therefore protected from liability under the public-duty doctrine. However, when a town does not inquire about possible conditions that could lead to harm to the public upon granting the entertainment license, the issuance of the license can be considered egregious conduct and the town loses its protection under the public-duty doctrine.

Joe H. Lawson II

Tort Law. *Ohms v. State Dept. of Trans.*, 764 A.2d 725 (R.I. 2001). The Rhode Island Supreme Court held that a moped lessor had no duty to warn a lessee of hazards that might be encountered on all the highways, roadways, and trailways upon which a lessee may travel.

FACTS AND TRAVEL

Joanne S. Ohms (Ohms or plaintiff) leased a moped from Aldo's Mopeds, Inc. (Aldo's or defendant) to tour Block Island on or about August 5, 1994.[1] Ohms had signed a lease agreement, which, among other things, contained a warning regarding the hazardous travel conditions that were present on Block Island.[2] Ohms had experience with driving mopeds on Block Island, having done so on four other occasions.[3] However, on August 5, 1994, the plaintiff took an outing to a portion of the island that she had never previously explored.[4] During this expedition, the moped "tipped and 'went down' on the road."[5] Ohms alleged that she was injured as a result of gravel, pebbles, and debris in the road which caused the moped to go down.[6]

Ohms filed a negligence suit against Aldo's, "alleging that it had failed to warn her of known and/or foreseeable conditions that existed on the roads on which people might drive a moped on Block Island."[7] The defendant filed a motion for summary judgment, which a justice of the superior court granted, holding that Aldo's did not have a duty to warn Ohms or any other lessee about dangerous conditions that exist on public roads.[8]

ANALYSIS AND HOLDING

The supreme court stated that whether Aldo's had a duty to inform the plaintiff of the existence of dangerous road conditions was a question of law to be decided by the trial or motion justice.[9] The court also stated that a summary judgment would be affirmed

1. Ohms v. State Dept. of Trans., 764 A.2d 725, 726 (R.I. 2001).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 727.

if the court, after *de novo* review, concludes "that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law."[10] The court concluded that there exists no duty on the part of the lessor of a vehicle to warn a lessee of hazards that may be encountered on various roadways over which the lessee may travel.[11] The court also concluded that the warning found in the lease agreement was adequate to apprise the plaintiff of any roadway dangers she might encounter.[12]

CONCLUSION

The Rhode Island Supreme Court denied and dismissed the plaintiff's appeal, finding no error with the court's finding that there was no duty on the lessor to wan a lessee of possible hazards.

Michelle M. Alves

10. *Id.* (citing Woodland Manor III Assocs. v. Keeney, 713 A.2d 806, 810 (R.I. 1998) (quoting Rotelli v. Catanzaro, 686 A.2d 91, 93 (R.I. 1996)).

11. *Id.*

12. *Id.*