

Assumption of the Risk

A divided First Department recently addressed the doctrine of assumption of the risk as it pertains to a child. The decision in Clark v. Interlaken Owners, Inc., et.al., is also interesting for the fact that the Appellate Division addressed an issue to which no objection was made at the trial.

The infant plaintiff in Clark was five years old at the time of the incident. The plaintiff's finger was crushed while he was playing on heavy equipment belonging to defendant Andem Construction, which had been hired by the property owner, Interlaken. The equipment was being stored on Interlaken's property during Andem's four week construction project. The area was roped off by caution tape, however, access was easily obtainable by walking under the tape.

The incident occurred after construction had ended for the day. The infant plaintiff attempted to climb the rungs of a ramp attached to a trailer. The ramp was not secure and collapsed, causing the plaintiff to catch his finger between the ramp and an adjacent piece of equipment.

The trial court charged the jury that they could find that the plaintiff assumed the risk of his injury and the jury found that the plaintiff was 75% responsible for his injuries and Andem 25% responsible. On appeal, the plaintiff argued that the trial court erred by including the charge on assumption of the risk in its instructions to the jury.

The doctrine of assumption of the risk provides a defense to a personal injury claim if it is shown that the condition or activity that caused the injury involved an inherent, known and obvious risk that was voluntarily assumed by the plaintiff. The court cautions however, that "awareness of the risk is not to be determined in a vacuum but, rather, against the background of the skill and experience of the particular plaintiff." For the doctrine to apply, the plaintiff must

have the capacity to understand and fully appreciate the risk involved. After giving the definition, the majority quickly concluded that the five year old plaintiff could not appreciate the risk involved and as such, could not, as a matter of law, have assumed the risk of his injury.

The most interesting part of the decision is how the court deals with the defendant's argument that since the plaintiff failed to object to the inclusion of the assumption of the risk instruction when it was given and therefore the error was not preserved for review. The majority agreed that, generally, failure to object precludes review, however, in the instant case, the court held that the error in the charge was "so fundamental as to warrant reversal" it exercised its discretion to review in the interest of justice.

The rather spirited dissent attacks the majority, not only because they chose to decide the unpreserved issue, but also because the majority seems to reach its conclusion based solely upon the age of the plaintiff. The dissent begins citing precedents which hold that there is no per se rule with regard to the age at which a child cannot legally assume a risk and thereby not be responsible for comparative fault for his or her injury. Rather, "only where the circumstances admit of only one inference may the court decide as a matter of law what inference shall be drawn." Hence, although a child may be too young to have the experience which would enable it to realize the danger, and too young to enable it to avoid the danger, a child's age does not alone determine its capacity to care for itself and to avoid danger. If conflicting inferences may be drawn regarding the child's ability to understand the dangers posed by its conduct, a factual issue is presented and the case must be presented to the jury. Under those principles, the New York courts have concluded that even four year old children are not *non sui juris* as a matter of law.

In support of the argument that the question of assumption of the risk is factual, the

dissent points to the fact that the child's parents allowed him to play without supervision in the area of the accident, which implies that they felt he was sufficiently capable of appreciating dangers and risks. Additionally, the dissent correctly points out that this was not a case which required any degree of sophisticated knowledge was being required of the child.

The dissent felt that, under the circumstances, to deny the defendants a charge of assumption of the risk came close to suggesting a strict liability regime for construction site accidents involving trespassing children. The dissent felt that the better course of action would be to let the jury decide the extent to which the child could have perceived the possibility of danger, and either did or did not take such risks into account when entering the construction premises.

Open and Obvious Defects I

Recently, we discussed the court's ongoing treatment of incidents involving open and obvious defects. Despite a number of recent cases in this area, it remains somewhat in flux as the following two cases show. In Cohen v. Shopwell, Inc., 2003 NY App. Div. LEXIS 10479, the plaintiff visited a supermarket which was undergoing a renovation project. Upon arriving at an aisle, the plaintiff found his path obstructed by three workers lying across the floor with their heads under a counter and their legs extending nearly all way across the aisle. Plaintiff successfully stepped over the legs of all three workers when he passed in one direction. When he returned in the other direction, he successfully stepped over two of the workers, but in stepping over the third worker, he tripped and fell when the man raised his leg. The plaintiff brought suits against the owner of the supermarket and the contractors involved in the renovation project. Upon completion of discovery, the court granted the defendants summary judgment motions and dismissed the plaintiff's complaint on the ground that the accident was "entirely the

fault of the plaintiff and cannot be said to have resulted from any dangerous condition created by any of the defendants.”

The First Department noted that there was no question that the risk in question was open and obvious, as the plaintiff admitted that he was fully aware of the worker’s legs as he stepped over them. Nevertheless, the Appellate Division reversed the lower court, holding that it was a question for the jury whether the supermarket or its contractors created an unreasonably dangerous condition by conducting the renovation work in question where the aisle was open to shoppers. The court noted that even if the jury concluded that the condition was really observable and was actually observed by the plaintiff, those were merely factors to be considered for the jury in determining the issue of comparative fault. This result is in accord with a number of recent cases, including the case discussed in our November 2003 newsletter.

Open and Obvious Defects II

The most recent decision involving an open and obvious defect is the First Department’s decision in Jones v. Presbyterian Hospital and The City of New York, 2004 N.Y. App. Div. LEXIS 687. In Jones, the plaintiff allegedly fell while descending two steps in an auditorium owned and operated by the defendants. The stairs led from the last row of seats where the plaintiff had been sitting down a central aisle. The plaintiff testified that she had been to the auditorium between five and six times before the accident, although she could not recall exactly where she had sat on those prior occasions. It was undisputed that the plaintiff had descended the two steps minutes before the incident occurred. Additionally, the plaintiff admitted that he was conscious of the fact that his row was higher than the aisle and remembered that he had to make a descent. The plaintiff claimed that he forgot about the “middle” step and, even though he was looking down, it appeared to him that there was only step, since the stairs were covered with

the same carpeting as the aisle.

The defendants moved for summary judgment apparently, arguing that the plaintiff's claims were barred, as he fell as a result of an open and obvious defect. It appears that the trial court agreed with that and dismissed the plaintiff's complaint based upon the open and obvious doctrine. The majority in the Appellate Division affirmed the trial court's decision, but on a different rationale.

The majority found that, as a matter of law, the steps did not pose a reasonably foreseeable hazard, and thus the open and obvious doctrine invoked by the trial court was irrelevant. The majority went on to cite the rule that the defendants "were under no duty to warn of or otherwise protect plaintiff from a condition that posed no reasonably foreseeable hazard."

It appears that whether a defect is "open and obvious" or "not a reasonably foreseeable hazard" is largely a matter of semantics. As noted earlier, it had appeared from recent decisions that the courts were attempting to limit the use of the open and obvious doctrine as a complete defense by defendants, indicating that it merely goes to the plaintiff's comparative negligence. The Jones decision seems to open a new area for defendants to use as a defense to plaintiff's trip and fall claims.

We also note that Justice Saxe wrote a fairly lengthy and vigorous dissent in the Jones action in which he argues that the majority was usurping jury's role of fact finding. Given all the issues raised by Jones, we expect to see a number of cases in this area in the near future.

Ad Damnum

While not of great significance, it is interesting to note that the legislature recently amended CPLR §3017, which governs the demands for relief in complaints. Until recently, in all personal injury actions, the plaintiff had to include the amount of damages being claimed in

the complaint. As the plaintiff was not permitted to recover an amount in excess of the number contained in the and damnum clause, the typical practice was to include a number far in excess of what a case was worth. The number was completely arbitrary, and, typically, in cases handled by our office, resulted in our office being contacted by the insureds who expressed outrage that they were being sued for “10 million dollars” or some such number. Additionally, in more celebrated cases, newspapers typically reported that plaintiff’s were seeking millions of dollars for whatever lawsuit they had brought.

It appears that the legislature has firmly realized the essential uselessness of requiring the amount of relief sought from the pleading and, as of October 20, 2003, it is no longer required.