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Landlord and Landowner Liability for Injury on the Premises

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I. Introduction

The subject of this article is generally a matter of state law. Oklahoma law will be used as an example. Oklahoma remains a very traditional state in its approach to premises liability. Although in some areas of tort law Oklahoma has been fairly progressive, the Oklahoma courts continue to adhere to traditional common law rules for the imposition of liability for owners and occupiers of land. Under these rules a landlord has fairly limited liability for personal injuries caused to his or her tenant.

However, the landlord, or the tenant standing in the same shoes as an owner of land, may be exposed to liability caused to third party entrants upon the land, depending on the circumstances of the case and based on ordinary principles of negligence. In premises liability cases, Oklahoma courts often weigh the rights of the injured party against the rights of property owners to be free from burdensome rules of liability. Currently, the balance tips toward the landowner because the judiciary tends to adhere to the traditional liability rules, including the "obvious danger" rule. The courts are generally cognizant of concerns that broadening the scope of potential liability would make the ownership of land untenable.

II. The Common Law Classifications of Invitee, Licensee, and Trespasser

Oklahoma continues to adhere to the common law classifications of invitee, licensee, and trespasser in ascertaining the duty of care owed by an owner or occupier of land toward the entrant.[1] A trespasser enters the land of the owner without permission and is owed only a duty by the owner or occupier to avoid injuring the trespasser through wilful or wanton behavior.[2] A licensee enters the premises of another for his or her own benefit or pleasure by the express or implied permission of the owner. The classic example of a licensee is a social guest. A trespasser can be elevated to the status of a licensee if the trespasser has implied permission to be on the land.

There is implied permission where the landowner is presumed to be aware of the person's presence on the land, such as a child entering a school playground during summer recess.[3] A license to be upon the land also may be implied where there "is a common interest or mutual advantage existing and enjoyed by the parties."[4] However, mere knowledge of a neighbor's remodeling project does not create an implied license to enter the adjacent's property owner's land.[5] The owner owes a duty of "ordinary care" to the licensee, which is the "duty to disclose dangerous defects which are known to him (or her) but are unlikely to be discovered by the licensee."[6]

An invitee is one "who uses the premises of another for the purpose of a

1. *See, e.g.*, Pickens v. Tulsa Metropolitan Ministry, 1997 OK 152, 951 P.2d 1079, 1083; Lohrenz v. Lane, 1990 OK 18, 787 P.2d 1274, 1276.

2. *Pickens*, 1997 OK 152, 951 P.2d 1079, 1083.

3. Brewer v. Independent School District #1, 1993 OK 17, 848 P.2d 566, 568, 571.

4. Rowell v. El Reno Junior College Foundation, Inc., 1993 OK 170, 910 P.2d 962, 964.

5. *Id.*

6. Brown v. Nicholson, 1997 OK 32, 935 P.2d 319, 321 [hereinafter *Brown*].

common interest and mutual advantage,"[7] such as a business visitor. An invitee is owed the duty of "reasonable care," meaning a duty to keep the premises in a reasonably safe condition through reasonable inspection and repairs for the reception of the invitee. The owner must protect the invitee from hidden dangers or conditions which present "a deceptively innocent appearance of safety 'which cloaks a reality of danger.'"[8] The description of the duty of care owed by the owner to a licensee as one of "ordinary care," and the duty of care owed to the invitee as the higher duty of "reasonable care," appears to be terminology unique to Oklahoma jurisprudence. Normally reasonable care and ordinary care are synonymous terms in tort law and scholars have rejected the idea of degrees of fault. However, Oklahoma courts use the term "ordinary care" in reference to licensees and "reasonable care" as to invitees.[9]

Liability in owner and occupier-of-land cases typically hinges on the classification of the entrant as a trespasser, licensee, or invitee due to the varying scope of the duty owed. Once the status of the entrant is established, the duty owed is established along with the boundaries of the potential liability. For example, the owner of land was not liable as a matter of law to an employee of his neighbor who was injured when a telegraph pole on the owner's land fell on the employee while the employee was climbing the unused, unsightly telegraph pole in order to remove the pole. The neighbor's employee was a trespasser and the owner owed no duty to the trespasser; hence, there was no liability.[10]

Examples of a licensee include a guest in a swimming pool[11] and a child entering a school playground during summer break.[12] There is no duty to repair conditions on the land on behalf of the licensee and no duty to warn of obvious dangers. Landowners are entitled to summary judgment where the dangerous condition is known or should be known to the licensee. For example, there is no duty if the swimming guest knew of the condition of a dangerous ladder into the pool before it collapsed.[13] A child was similarly not exposed to any hidden danger where the danger of falling from a slide with exposed concrete piers protruding above the ground easily could be seen.[14] In both cases, the landowner was entitled to judgment as a matter of law.

Examples of invitees include the patron of a restaurant,[15] a babysitter,[16] a roof repairman,[17] an employee of an independent contractor,[18] a security guard of the premises,[19] a patient in a hospital,[20] and a visitor to an attorney's office.[21] In some cases the status of the entrant might be unclear to the court. For example, the court skirted the issue of whether a homeless man was an invitee or licensee when the man slept outside a facility for homeless people.[22] In some cases, whether the entrant is a licensee or invitee becomes a question of fact, such as where an employee is allowed to park free in a parking garage and slips and falls on the garage ramp.[23]

The owner of the premises owes a duty to use reasonable care to maintain the property for the reception of an invitee. However, the landowner must know or should know of the potential danger before there is an obligation to either repair the dangerous condition or warn of the hazard.[24] If there is no evidence showing that the owner knew or should have known of the danger, then the owner is entitled to judgment as a matter of law.[25] For example, when a homeowner did not know that boards under the roof were rotten nor could have known because a layer of shingles was on top of the boards, the homeowner was not liable when a roofer fell through the roof.[26] Similarly, the landowner in "slip and fall" cases must know or have constructive knowledge that the dangerous substance is on the floor and that the substance has been there sufficient time to allow the removal of the dangerous substance in the exercise of reasonable care.[27]

The owner's duty to the invitee includes providing a reasonably safe means of ingress and egress from the property. This duty may be breached by placement of a sign obstructing the invitee's vision coming out of the parking lot. In *Boudreaux*, a patron of a Sonic restaurant could not see the street due to the restaurant's drive-in window sign. The patron pulled out and struck a motorcycle killing the driver. Although the court noted that a landowner is under no duty to remedy obstructions caused by natural conditions upon the land, the landowner did have a duty not to create an artificial condition that created a hazardous exit by obstructing the vision of the invitee. The motorcyclist struck by the patron pulling out of the Sonic restaurant was a foreseeable plaintiff that was foreseeably endangered by the negligent placement of the Sonic sign.[28]

7. *Brown*, 935 P.2d 319, 321.
8. *Pickens*, 951 P.2d 1079, 1084.
9. *Brown*, 935 P.2d 319, 321.
10. *Rowell*, 910 P.2d 962.
11. King v. Lunsford, 1993 OK CIV APP 70, 852 P.2d 821.
12. *Brewer*, 848 P.2d 566.
13. *King*, 852 P.2d 821.
14. *Brewer*, 848 P.2d 566.
15. Boudreaux v. Sonic Industries, Inc.,1986 OK CIV APP 14, 729 P.2d 514.
16. Avard v. Leming, 1994 OK 12, 889 P.2d 262.
17. McKinney v. Harrington, 1993 OK 88, 855 P.2d 602.
18. Marshall v. Hale-Halsell Co., 1997 OK 3, 932 P.2d 1117.
19. Young v. Bob Howard Automotive, Inc., 2002 OK CIV APP 8, 52 P.3d 1045.
20. Harrison v. St. Joseph's Regional Medical Center of Northern Oklahoma, Inc., 1995 OK CIV APP 61, 904 P.2d 146. However, a patient in a hospital is owed a higher duty of care based on the patient/hospital relationship than is owed to an invitee. *Id.*
21. Hodge v. Morris, 1997 OK CIV APP 53, 945 P.2d 1047.
22. *Pickens*, 951 P.2d 1079.
23. *Brown*, 935 P.2d 319.
24. *Avard*, 889 P.2d 262.
25. *McKinney*, 855 P.2d 602.
26. *Id.*
27. Hodge v. Morris, 1997 OK CIV APP 53, 945 P.2d 1047.
28. *Boudreaux*, 729 P.2d 514.

Some jurisdictions have abandoned the common law classifications of invitee, licensee, and trespassers following the lead of the California Supreme Court in *Rowland v. Christian*.[29] Some states simply impose the duty to use reasonable care under the circumstances upon landowners regardless of the status of the entrant, or at least disregard the formal distinction between licensee and invitee. The status of the entrant remains relevant, however, on the issue of the foreseeability of the risk of harm. Oklahoma courts continue to explicitly reject *Rowland v. Christian* and reaffirm their commitment to the common law categories.[30]

III. The Attractive Nuisance Doctrine

The attractive nuisance doctrine is an exception to the no-duty rule toward trespassers and imposes a duty toward trespassing children when they are exposed to the dangers of an attractive nuisance. The attractive nuisance doctrine weighs societal interests in protecting children against the landowner's interest in using his or her property for any lawful use. In Oklahoma, the following factors must be weighed to determine if a condition upon the land is an attractive nuisance:

- How uncommon the instrumentality is;
- how unusually dangerous the instrumentality is;
- how attractive the instrumentality is;
- the probability of children coming into contact with the instrumentality;
- whether the probability is so localized that harm can be avoided, or whether the probability is such that there is no indication of when and where the contact will occur;
- how feasible it is to avoid the danger of harm;
- how great is the burden of avoiding the harm;
- the effect of placing such a duty on a party; and
- whether the child has an apparent intelligence and consciousness of the circumstances such that she/he could reasonably appreciate the danger or the lack of right to tamper with the instrumentality so that the duty to protect should not be imposed.[31]

However, natural objects that have an apparent or open danger, knowledge of which is common, are not attractive nuisances. Because drowning is a known danger, neither swimming pools,[32] ornamental fish ponds,[33] nor stock ponds[34] are attractive nuisances. However, liability may be imposed for violations of ordinances mandating fences and locked gates around swimming pools.[35] The rationale behind this rule is that the "danger of drowning...*is an apparent open danger, the knowledge of which is common to all*; and there is no just view consistent with recognized rights of property owners which would compel one owning land upon which such water, or part of it, stands and flows, to fill it up, *or surround it with an impenetrable wall*."[36] A landowner generally has "no duty to fence out his neighbor's child."[37] Artificial conditions that might qualify as an attractive nuisance include an oil well pump jack being ridden as a seesaw,[38] and potentially playground equipment,[39] where the condition presents a hidden danger. However, if the owner or occupier of the playground equipment or attractive nuisance is a political subdivision, such as a city or school board, section 155 (7) of the Oklahoma Political Subdivision Torts Claim Act exempts the attractive nuisance from its coverage, meaning that governmental immunity precludes recovery.[40]

The age of the injured child is an important factor in determining liability under the attractive nuisance doctrine. The age of the child addresses the issue of whether the child can appreciate the extent of the risk. The attractive nuisance doctrine is inappropriate if the child is old enough to appreciate the danger. However, the child's appreciation of the danger is normally a question of fact for the jury. Thus, a jury could conclude that a twelve year-old boy did not fully appreciate the danger of riding a small oil rig pump as a seesaw even though he knew that large oil rigs were dangerous.[41]

It is important to note that the attractive nuisance doctrine is aimed at protecting children of tender years and does not apply to adults, "regardless of their mental capacity."[42] In *Weaver*,[43] Fred Weaver was a twenty-six year-old man with a mental capacity between a five and seven year-old child. He lived at the Enid State School. Within

29. 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968).

30. *See, e.g.*, *Pickens*, 951 P.2d 1079, 1083; *Lohrenz*, 787 P. 2d 1274, 1276; Sutherland v. St. Francis Hospital, 595 P.2d 780 (Okla. 1979).

31. *See* Knowles v. Tripledee Drilling Co., 1989 OK 40, 771 P.2d 208, 210. These factors parallel those found in the RESTATEMENT (SECOND) OF TORTS § 339 (1964).

32. Lofton v. Green, 1995 OK 109, 905 P.2d 790.

33. Dennis v. Spillers, 199 Okla. 311, 185 P.2d 465 (1947).

34. *Lohrenz*, 787 P.2d 1274.

35. *Lofton*, 905 P.2d 790.

36. *Lohrenz*, 787 P.2d 1274, 1278 (emphasis in the original).

37. *Id.*

38. Knowles v. Tripledee Drilling Co., Inc., 1989 OK 40, 771 P.2d 208.

39. *Brewer*, 848 P.2d 566. The *Brewer* court acknowledged that playground equipment could be an attractive nuisance but under the circumstances there was no liability because the hazard of exposed concrete piers and lack of railing on the slide were obvious risks.

40. *Brewer*, 848 P.2d 566, 570-571.

41. *Knowles*, 771 P.2d 208, 210-211.

42. *Weaver*, 1990 OK CIV APP 39, 839 P.2d 672.

43. *Id.*

one-quarter to one-third mile of the Enid State School was a grain storage elevator. Fred died when he fell from a ladder on the premises of the grain elevator. The court affirmed the summary judgment for the grain elevator owner and operator because he did not owe Fred a duty as a trespasser and the attractive nuisance doctrine was inapplicable to an adult even if the adult had a mental capacity of a child of tender years.

The *Weaver* decision is troubling to some due to the close proximity of the Enid State School to the grain elevator. Was it foreseeable that mentally impaired adults from the school would frequent the elevator? Was it an ongoing problem known by the owner or occupier? The dismissal as a matter of law is questionable because it does not answer these questions. Fred could have been a licensee with an implied license to be on the land if residents of the Enid State School were frequently found around the grain elevator. There is a duty to warn frequent trespassers of unknown hazards. Although height is generally a known hazard, a landowner might still have a duty to warn if the landowner knows the frequent entrant subjectively did not realize the risk of harm. Given the proximity of the grain elevator to the state school, the landowner might have realized the increased danger to the state school residents. But, the resolution of this case as a matter of law is indicative of Oklahoma's adherence to the traditional common law approach toward liability of landowners and its reluctance to broaden the boundaries of potential tort recovery.

IV. The Obvious Danger Rule

The obvious danger rule is probably one of the biggest thorns in plaintiffs' attorneys sides. Conversely, one of the main defensive arguments is the risk that the entrant confronted was an obvious one. Generally, tort cases are ripe for jury consideration because of the fact-intensive nature of the controversies. However, the obvious danger rule allows many cases to be resolved as a matter of law without submission of the case for jury consideration. An owner or occupier of land owes no duty to alleviate an obvious hazard on the land nor to warn of its existence to either a trespasser, licensee, or invitee: "There is no duty to warn of defects or conditions which are open and obvious, that is, readily observable, but conversely, there is a duty to warn of hidden defects, traps, snares and pitfalls."[44]

Examples where hazards have been held to be obvious, so that the landowner was entitled to prevail as a matter of law, include being struck by lightening on a golf course,[45] the danger of running over one's own foot,[46] a wet floor,[47] speed bumps,[48] water on an exterior steel staircase that was the only means of ingress and egress,[49] the danger of tripping over a bright orange electrical cord stretched across a shopping aisle,[50] the danger of slipping in a four to five foot puddle of water inside a bathroom stall,[51] falling from a slide onto exposed concrete piers protruding above the ground,[52] and the danger of falling asleep on top of and then rolling off of a retaining wall that was seven to nine feet high.[53]

Many believed that the obvious danger rule would be modified with the enactment of Oklahoma's comparative negligence statute. The landowner negligence and the negligence of the entrant in exposing himself or herself to the obvious danger would be compared and the entrant's recovery would be diminished according to his or her percentage of fault so long as the entrant's negligence was not more than the owner's negligence.[54] However, the obvious danger rule goes to the issue of duty and primary negligence. If there is no duty, there is no primary negligence and the issue of comparative negligence is never reached. Therefore, the obvious danger rule is alive and well even with the advent of comparative negligence.[55]

As with any rule, the obvious danger rule has exceptions. The goal of the plaintiff's attorney is to bring the facts of his or her case within an exception and to present those extenuating facts from the pleading stage on to avoid a resolution of the case for the defendant as a matter of law. It might be easier to use a crystal ball to predict what will or will not be obvious as a matter of law than to use the case law as a predictor. Needless to say, it is difficult to reconcile some of the cases in this area of law.

As noted, the landowner has a duty to keep the premises reasonably safe from hidden dangers, traps, and snares.[56] Accordingly, the obvious danger rule does not apply to a "condition presenting a deceptively innocent appearance of safety 'which cloaks a reality of danger.'"[57] For example, black ice is not an open and obvious danger as a matter of law because it is clear and practically invisible. "Black ice is not an ordinarily perceptible hazard."[58] Likewise, a large glass bowl filled with a seasonal display of pumpkins that concealed a sharp portion of the glass

44. Holt v. State, 1996 OK CIV APP 101, 927 P.2d 57, 62.

45. Grace v. City of Oklahoma City, 1997 OK CIV APP 90, 953 P.2d 69. Why are so many golfers hit by lightening? They can be higher than their surroundings and can become a human lightening rod. Is this truly so obvious to preclude a duty to warn as a matter of law? Some jurisdictions have imposed a duty to warn golfers of approaching lightening.

46. *Marshall*, 932 P.2d 1117.

47. Williams v. Tulsa Motels, 1998 OK 42, 958 P.2d 1282; Hatcher v. Super C Mart, 2001 OK CIV APP 59, 24 P.3d 377.

48. Billings v. Wal-Mart Stores, Inc., 1992 OK CIV APP 102, 837 P.2d 932.

49. Esther v. Wiemer, 1993 OK CIV APP 145, 859 P.2d 1140.

50. Southerland v. Wal-Mart Stores, Inc., 1993 OK CIV APP 12, 848 P.2d 68.

51. Kastning v. Melvin Simon & Associates, Inc., 1994 OK 68, 876 P.2d 239. When you gotta go, you gotta go. The plaintiff had to step through the puddle to get to the toilet. What else was the plaintiff to do?

52. *Brewer*, 848 P.2d 566.

53. *Pickens*, 951 P.2d 1079. The defendant was a shelter for homeless people and knew that homeless people slept on the retaining wall if the shelter was full. It also knew many homeless people drank around it's shelter. The court declined to impose a heightened duty of care based upon the relationship between the shelter and people with impaired mental faculties, the recipients of the shelter's services. Arguably, this relationship increased the shelter's knowledge of potential risks of harm.

54. Title. 23 Okla. Stat. 2001 § 13.

55. *Southerland*, 848 P.2d 68.

56. *Brown*, 935 P.2d 319, 322.

57. *Pickens*, 951 P.2d 1079, 1084.

58. Brown v. Alliance Real Estate Group, 1999 OK 7, 976 P.2d 1043, 1045.

bowl created a material issue of fact for jury determination as to whether there was an obvious danger because it might not be noticed.[59]

One of the best tests of obvious dangers is as follows: "[T]he characteristic of an item as being observable, whether a glass bowl or a cardboard box, cannot, by itself, require that item to be declared as a matter of law an open and obvious danger." The danger is not *ipso facto* an obvious danger just because it was observable. "[T]hat is not the test. All of the circumstances must be examined to determined whether a particular condition is open and obvious to the plaintiff or not."[60] A question of fact was thus created when the plaintiff tripped over a cardboard box in a shopping aisle when the plaintiff said she didn't see it because it was partially concealed by shelves containing merchandise.[61] Spilled milk that was partially cleaned up was not necessarily obvious to the plaintiff.[62] Similarly, a chunk of rock-like debris on a walkway was not obvious as a matter of law because the debris "did not contrast markedly from the color of the sidewalk."[63]

Furthermore, diversion of the plaintiff's attention away from the obvious danger may preclude summary disposition of the case.[64] Involuntary propulsion into a danger precludes resolution of the obvious danger issue without jury deliberation.[65] If the owner or occupier of land increases the risk attending an obvious hazard, the issue of whether the extent of the danger was obvious to the entrant will be for the jury to decide. For example, disintegrating weather-stripping might cause a hidden snare and increase the ordinary risk of a parking garage ramp.[66] Or, liability may be imposed when the landowner increases the natural risk from ice on a sidewalk by increasing the natural accumulation of the ice through the placement of a drain pipe.[67]

The goal of the plaintiff's attorney is to discount the observable characteristic of the danger by arguing that the facts of the case indicate that the danger was not obvious to the individual plaintiff. Even if the plaintiff's argument survives a motion for summary judgment on the obvious danger rule, the plaintiff must still establish that the condition was the cause of the injury to the plaintiff.[68] Furthermore, an obvious danger presented by a condition on the land can impact the ultimate jury verdict in three ways. First, the jury could find that the condition was an obvious danger as a question of fact and exonerate the landowner from liability on that basis. Second, the jury could consider the behavior of the plaintiff and reduce the plaintiff's recovery under the comparative negligence system.[69] Third, assumption of the risk is a separate defense that did not merge into the comparative negligence system. Thus, assumption of the risk remains a total bar to recovery.[70] A jury could preclude any recovery by the plaintiff under the doctrine of assumption of the risk when the plaintiff voluntarily encounters the obvious risk.

The mere fact a danger is "obvious" does not mean it does not expose entrants to unreasonable risks of harm. For example, stringing an orange extension cord across a shopping aisle creates an unreasonable risk of harm to invitees precisely because an invitee is likely to trip and fall.[71] The orange extension cord deliberately placed on the floor became a trip-line and constituted a "trap" or a "snare" despite the fact that it was easily visible.

Oklahoma's position, that the landowner owes no duty to such an invitee because the danger created is glaringly so, may not fully reflect the relevant issues. The real issues should include: was the condition unexpected; did the condition create an unreasonable risk of harm; and did the landowner fail to use reasonable care toward the invitee. Currently, however, the obvious danger rule is a significant hurdle to recovery for injuries caused by hazards on the land and provides an effective defense argument in many cases. Clearly, it also serves the purpose of judicial efficiency while sometimes apparently ignoring other issues in the resolution of some cases.

V. Liability for Criminal Attacks Occurring on the Premises

Generally, a landowner does not owe a duty to protect invitees from injury caused by criminal attacks.[72] The criminal attack traditionally was considered the proximate cause of any injury caused to an entrant upon the land, and the criminal behavior was considered a sufficient superceding intervening cause to break the causal connection between any negligence on the part of the landowner and the injuries of the entrant. Oklahoma

59. Phelps v. Hotel Management, Inc., 1996 OK 114, 925 P.2d 891; *accord* Brown v. Wal-Mart Stores, Inc., 11 F.3d 1559 (10th Cir. 1993) (danger from stacking of peg boards not obvious) [hereinafter *Brown v. Wal-Mart Stores*].

60. Zagal v. Truckstops Corporation of America, 1997 OK 75 ¶ 9, 948 P.2d 273, 275.

61. *Id.*

62. Moore v. Albertson's Inc., 2000 OK CIV APP 58, 7 P.3d 506.

63. Julian v. Secured Investment Advisors, 2003 OK CIV APP 81, 77 P.3d 604, 608.

64. Hansen v. Academy, LTD., L.P., 2006 OK CIV APP 63; Smedsrud v. Powell, 2002 OK 87, 61 P.3d 891; *see also* Williams v. Tulsa Motels, 1998 OK 42, 958 P.2d 1282 (dissenting opinion). The dissent argued that a maid motioning the plaintiff around a wet floor masked the danger of the wet floor and created an issue of fact for the jury to resolve.

65. *Brown v. Wal-Mart Stores*, 11 F.3d 1559 (Even though plaintiff knew cinder blocks were in the parking lot, she was propelled backwards over the blocks and Wal-Mart should not have left the cinder blocks in the parking lot after the plant display was removed.).

66. *Brown*, 935 P.2d 319.

67. Krokowski v. Henderson National Corp., 1996 OK 57, 917 P.2d 8.

68. Gillham v. Lake Country Raceway, 2001 OK 41, 24 P.3d 858. The plaintiff testified that he didn't really know what he slipped on; this was fatal to the plaintiff's case.

69. *Harrison*, 904 P.2d 146; *Lofton*, 905 P.2d 790. In *Lofton*, the mother of a child who drowned in the neighbor's unfenced swimming pool brought a wrongful death action. The neighbor had violated a fencing law and was held liable. The jury found the plaintiff 50% at fault, assessing the total damages for the wrongful death at $4,200, meaning the plaintiff recovered $2,100. The plaintiff recovered $4 in excess of the burial expenses. The Oklahoma Supreme Court rejected the argument that the award was inadequate and affirmed the verdict. As the dissent pointed out, the $4 would barely cover the cost of a Happy Meal from McDonald's. Suffice it to say, it is hard to imagine the court overturning any award on the grounds of inadequacy given that $2,100 for the wrongful death of a child was upheld.

70. Byford v. Town of Asher, 1994 OK 46, 874 P.2d 45; Thomas v. Holliday, 1988 OK 116, 764 P.2d 165.

71. *Southerland*, 848 P.2d 68.

72. Davis v. Allied Supermarkets, Inc., 547 P.2d 963 (Okla. 1976).

follows this traditional common law rule absent exceptional circumstances.

The imminent danger rule is one exceptional circumstance where the landowner may be found liable to the invitee for injuries inflicted by a criminal attack. The imminent danger rule provides, as follows:

> An invitor does not have a duty to protect invitees from criminal assaults by third persons, unless the invitor knows or has reason to know that the acts of the third person are occurring, or are about to occur.... When an invitor has knowledge that an invitee is in imminent danger, the invitor must act reasonably to prevent injury.[73]

In order for liability to be imposed under the imminent danger rule, the landowner must have knowledge or constructive knowledge that a criminal attack could occur in the immediate future because of current disruptive or suspicious behavior that the landowner observes or should have observed. This knowledge of the potential of imminent criminal behavior exposes entrants upon the land to an unreasonable risk of harm because a criminal attack is so likely to occur based on the current disruptive or suspicious behavior. Due to the exceptional circumstances, the owner or occupier of land must use reasonable care to protect the invitee from the criminal attack which usually means contacting the police upon signs of trouble.

For example, in *Taylor v. Hynson,* "skinheads" entered a McDonald's restaurant and started name-calling, using profanity, and threatening patrons. The manager asked them to leave the building but did not expel them from the parking lot. Mr. Taylor, an African-American man, entered the parking lot and the skinheads began yelling racial slurs. A customer/witness asked the manager to call the police and the manager refused. About one minute after the request, a fight began. The witness also stated that there was about four minutes between the start of the problem and the fight. The police arrived four minutes after the fight ended with a response time of one minute.

The Supreme Court held that summary judgment in favor of McDonalds was inappropriate because the manager "knew that the assault was occurring or was about to occur" and there was a dispute regarding a material fact as to "whether, if she [the manager] had such knowledge, she acted reasonably under the circumstances."[74] In other words, once the manager knew a criminal attack was imminent, the manager owed a duty to protect the invitee from the unreasonable risk of harm caused by an imminent criminal attack and perhaps breached that duty by not calling the police in a more expeditious manner.

Similarly, employees of Mama Lou's Restaurant observed an individual loitering in the parking lot for three hours and the employees stated that the individual appeared to be contemplating criminal behavior. However, the police were never called. An issue of fact was created as to whether Mama Lou's had reason to know that criminal acts were about to occur and whether Mama Lou's breached a duty to its customer who was injured in a purse-snatching incident by the suspicious person in the parking lot.[75]

However, a landowner is not liable for third party attacks in the parking lot if the owner lacks actual or constructive knowledge of the impending attack.[76] For example, in *Skelkett v. Hardee's Food Systems, Inc.*,[77] a patron of a Hardee's restaurant suffered an unprovoked attack by a third party while waiting in line. The summary judgement in favor of Hardee's was affirmed because it was uncontroverted that there was minimal time between the racial slur and the unprovoked attack and the personnel could have done nothing to prevent the attack. "There was no evidence that Hardee's delayed in summoning the police or did anything to hinder an investigation."[78] As stated by the court, "[e]ven in cases where business invitors have been held liable for the intentional harmful acts of third persons, some evidence of prior knowledge of the dangerous situation with sufficient time to act was present to create a duty to use ordinary care."[79]

Many jurisdictions have broadened the scope of a landowner's liability for criminal attacks against invitees when the criminal attacks are generally foreseeable, based on the location of the business in a high-crime area or based on prior incidents of criminal attacks occurring on the premises. These jurisdictions follow *Comment f* of the *Restatement (Second) of Torts* section 344 (1965), which provides (emphasis added):

> Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring or are about to occur. *He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should*

73. Taylor v. Hynson, 1993 OK 93, 856 P.2d 278, 282.

74. *Id.*, at 281.

75. Edington v. A & P Enterprises, Inc., 1994 OK CIV APP 54, 900 P.2d 453; *accord* McClure v. Group K Enterprises, Inc., 1999 OK CIV APP 29, 977 P.2d 1148 (In *McClure*, the plaintiff was struck in the mouth by a flying beer bottle while on the dance floor of the Midnight Rodeo club. The jury assessed her damages at $40,000. The Midnight Rodeo had a policy against glass bottles on the dance floor which it did not enforce. Furthermore, many assaults had been reported on the premises. The court held that the flying beer bottle was reasonably foreseeable under the circumstances, given the defendant's non-enforcement of its own policy. The "creation of the dangerous condition was therefore a proximate cause of injury despite the intervening act of the third person.").

76. Wells v. Boston Avenue Realty, 125 F.3d 1335 (10th Cir. 1997).

77. Skelkett v. Hardee's Food Systems, Inc., 1993 OK CIV APP 11, 848 P.2d 63, 67.

78. *Id.*, 848 P.2d at 67.

79. *Id.* at 66.

> *reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.*

Although the italicized portion of *Comment f* has been cited with approval by the Oklahoma Court of Civil Appeals,[80] the Oklahoma Supreme Court has yet to adopt its philosophy.[81]

Accordingly, the Marriott Hotel was exonerated from liability as a matter of law for a criminal attack on a patron of Russells Bar that occurred around 2:00 a.m. in the hotel parking lot. Russells had no specific knowledge to indicate that the particular attack was about to occur even though there had been at least two previous attacks in the parking lot, it was common to have altercations at closing time, and most incidents occurred between midnight and 2:00 a.m.[82] However, a dissent urged the adoption of *Comment f* and would have allowed the case to go forward based on the general foreseeability of the attack due to prior similar incidents.[83]

Furthermore, the Court of Civil Appeals used the *Comment f* philosophy to affirm a summary judgment in favor of Bob Howard Automobiles when a night security guard was shot and killed.[84] The court said the attack was unforeseeable because Bob Howard had not experienced any violent crime and there was a low incidence of criminal activity in the surrounding area. Thus, the court looked to the unforeseeability of the attack, not the lack of notice of an impending attack, as the justification for denying liability.

The Court of Civil Appeals' decisions could be used to support an argument to the Oklahoma Supreme Court to broaden the scope of liability for criminal attack when criminal behavior is foreseeable under the circumstances. The Oklahoma Supreme Court has not expressly rejected the approach of *Comment f*.[85] Furthermore, an expansion of the liability of a landowner for criminal attacks upon invitees that are foreseeable due to a "history of criminal activity"[86] would be consistent with the treatment of a landlord's potential liability for criminal attacks against tenants, as discussed below.

VI. Tort Liability and the Landlord/Tenant Relationship

The Oklahoma Residential Landlord and Tenant Act (Act)[87] provides that a landlord of a dwelling, other than a single-family residence, must "keep all common areas of his building, grounds, facilities and appurtenances in a clean, safe and sanitary condition."[88] However, the Act does not create a new tort cause of action and the common law rules continue to apply for recovery of personal injury.[89]

The scope of the liability of the landlord can be described as follows:

> Under Oklahoma law, where property is leased for public purposes, and at the time of leasing there is a condition of which the landlord knows, rendering the premises unsafe for the proposed purpose, the landlord may be liable to third parties who are injured by reason of the dangerous condition....However, absent a defective condition in the premises leased, the owner of a leased premises bears no liability to an injured third party where the owner/lessor has relinquished control of the premises to the lessee.... It appears clear, then, that a *lessee* is liable to a third party injured on the leased premises only when the lessee (1) has control of the premises, (2) has had a reasonable opportunity to inspect the premises, and (3) could have discovered the defect upon inspection.[90]

In other words, the general rule is "that the owner of a leased premises is not liable to an injured third party when the lessor has given up the right to control the leased premises" absent a defective condition in the premises leased.[91]

Traditionally, the landowner was not liable for personal injuries caused by a negligent failure to repair the leased premises;[92] rather, the lessor would only be liable to the lessee for injuries caused by negligent repair of the leasehold.[93] Unless repairs were negligently made, the exclusive remedy of the tenant for a failure to repair a dangerous condition on the leasehold was to make the repair and deduct the expense of the repair from his or her rent after giving proper notice or to vacate the premises with relief from any further payment of rent.[94] However, the lessor did have the duty to use reasonable care to maintain the common areas over which he or she maintains control. But, the duty to maintain the common areas does not apply to obvious conditions, such as ice or snow on sidewalks.[95]

Recently, the potential for a landlord's liability for criminal attacks upon tenants

80. McClure v. Group K Enterprises, Inc., 1999 OK CIV APP 29, 977 P.2d 1148, 1150.

81. Folmar v. Marriott, Inc., 1996 OK CIV APP 51, 918 P.2d 86, 88.

82. *Id.*

83. *Id.* (Hansen, J., dissenting).

84. Young v. Bob Howard Automotive, Inc., 2002 OK CIV APP 80, 52 P.3d 1045.

85. Wells v. Boston Avenue Realty, 125 F.3d 1335, 1338 (10th Cir. 1997).

86. Lay v. Dworman, 1986 OK 85, 732 P.2d 455, 459.

87. Tit. 41 Okla. Stat. 2001 §§ 101, *et seq.*

88. *Id.* at § 118(A)(1).

89. Kirchner v. Chattanooga Choo Choo, 10 F.3d 737 (10th Cir. 1993); Weatherall v. Yorktown Homeowner's Association, Inc., 1993 OK CIV APP 59, 852 P.2d 815.

90. Strader-Faiazi v. Edmond Fourth of July Festivals, 2001 OK CIV APP 93 ¶ 5, 28 P.3d 1161, 1162-1163.

91. Sheffield v. Link, 550 F. Supp. 11, 12 (W.D. Okla. 1981).

92. King v. Collins, 190 Okla. 601, 126 P.2d 76 (1942); Alfe v. New York Life Insurance Co., 160 Okla. 87, 67 P.2d 947 (1937); Young v. Beattie, 172 Okla. 250, 45 P.2d 470 (1935).

93. Beard v. General Real Estate Corporation, 229 F.2d 260 (10th Cir. 1956); Downs v. Longfellow Corp., 351 P.2d 999 (Okla. 1960); Buck v. Miller, 198 Okla. 617, 181 P.2d 264 (1947).

94. King v. Collins, 190 Okla. 601, 126 P.2d 76 (1942); *Alfe*, 67 P.2d 947 (1937); *Young*, 45 P.2d 470 (1935).

95. *Kirchner*, 10 F.3d 737; *Weatherall*, 852 P.2d 815.

has been increasing. In the landmark case of *Lay v. Dworman*,[96] the Oklahoma Supreme Court held that the landlord has "a duty to use reasonable care to maintain the common areas of the premises in such a manner as to insure that the likelihood of criminal activity is not unreasonably enhanced by the condition of those common premises."[97] The foreseeability of the risk can be established either through a history of criminal activity in the apartment building or from the nature of a defect in the dwelling.[98] In *Lay*, the plaintiff was assaulted and raped in her apartment, and sued the owners alleging negligence because the plaintiff's apartment had a defective lock, the defendants had knowledge of the defective lock and knowledge of criminal activities in the complex, and the defendants subsequently failed to make the necessary repairs, allowing the rapist to gain entry into the plaintiff's apartment.[99] In reversing the trial court's dismissal of the plaintiff's cause of action, the Supreme Court stated,

> Thus, by retaining control over aspects of the premises such as door and window locks or alarm devices which directly relate to security, the landlord faces potential liability when the circumstances are such that a reasonable man would realize that a failure to act would render one relying on those actions susceptible to criminal acts.[100]

In order to impose liability on the landlord for criminal attacks upon a tenant, the two crucial prerequisites are foreseeability and exclusivity of control.[101] Foreseeability can be established through proof that the landlord had knowledge of prior similar conduct occurring on the premises. Exclusivity of control is established if the landlord has exclusive control over an ineffective security device or measure and the ineffective measure enhanced the probability of the criminal attacks.[102]

For example, the plaintiff in *Cordes* had requested deadbolt locks for her apartment. The landlord refused and also refused her request to install and pay for her own deadbolt. The plaintiff was raped in her apartment. Prior to the rape, an unknown person had tried to break into the apartment. The affidavit of a security expert stated that inadequate locks made the attack on the plaintiff foreseeable and a deadbolt would have been resistant to a pry bar which was used to break into the door in this case. The *Cordes* court held that summary judgment for the landlord was not appropriate because the landlord had retained exclusive control over the locks by the refusal to install deadbolts and because the criminal attack was foreseeable under the facts of this case.[103]

However, there is no liability when the circumstances of the attack are such that the landlord lacks control. For example, summary judgement for the landlord is appropriate when the rapist uses the victim's own keys to gain entrance into the apartment,[104] or when the assailant breaks a second-story window to gain entrance to the apartment.[105]

Clearly, the landlord can be held liable for foreseeable criminal attacks upon his or her tenant so long as the landlord has control over a defective security measure and the failure of the security measure increased the probability of the criminal attack. One can argue that a similar approach should be used for the imposition of liability of an owner of land when an invitee suffers a criminal attack on the premises, in lieu of the doctrine discussed *supra* in Part V. Given the approach by the Oklahoma Supreme Court in the landlord/tenant cases, it would appear that the Court might expand potential liability in the invitor/invitee arena by allowing liability for criminal attacks when the attack was foreseeable and the invitor had exclusive control over an ineffective security system, instead of imposing liability only in those cases where the attack is imminent. At this time, however, such a change is speculative.

VII. The Statute of Repose

In Oklahoma, no cause of action may be brought to recover damages "for any deficiency in design...or construction of an improvement in real property" more than ten years after substantial completion of such an improvement. The statute covers owners and tenants of real property as well as contractors, engineers, and architects.[106] Moreover, there is no liability for defective design if the danger of the design is obvious.[107]

However, the statute of repose only applies to a design defect and does not preclude a cause of action for failure to warn of the danger. In *Abbott v. Wells*,[108] the plaintiff entered the Wells building in Sapulpa and fell upon entering the bathroom, because the bathroom floor was higher than that of the hallway leading to the restroom. The Wells building was built in 1918 and any cause of action for the defective design of the building was barred by the statute of repose. However, there was still potential liability for a failure to warn of the dangerous condition. Thus, the statute of repose is inapplicable to cases arguing a failure to warn. It would appear that if there is a design flaw in a building, it could always be argued that there was a failure to warn of the hazard created by the defective design, unless the danger was obvious or a warning was posted. The Supreme Court has created a loophole in the statute of repose because in some

96. 1986 OK 85, 732 P.2d 455.

97. *Id.*, 732 P.2d at 458.

98. *Id.* at 459.

99. *Id.*

100. *Id.*; Burkhart v. Ward, 1991 OK CIV APP 98, 861 P.2d 317 (Foreseeability of criminal attack was a question of fact for the jury.).

101. Cordes v. Wood, 1996 OK 68 ¶ 6, 918 P.2d 76, 78-79.

102. *Id.*, 918 P.2d at 79-80.

103. *Id.*, at 77 & 79.

104. Mengel v. Rosen, 1987 OK 23, 735 P.2d 560.

105. Rodgers v. Rosen, 1987 OK 37, 737 P.2d 562.

106. Title 12 Okla. Stat. 2001 §§ 109-113.

107. *Pickens*, 951 P.2d 1079.

108. 2000 OK 75, 11 P.3d 1247.

cases the statute can now be bypassed by simply rephrasing the complaint in terms of a failure to warn.

VIII. Conclusion

Oklahoma stringently adheres to the common law categories of licensee, invitee, and trespasser in owner and occupier of land cases. It is doubtful that Oklahoma courts will move to broaden this potential liability. The traditional approach protects the landowner from over-burdensome liability with the added bonuses of supporting judicial efficiency and creating predictability and consistency of results. However, the goals of predictability and consistency of results are not so clear in the murky application of the obvious danger rule. The rule that a landowner has no duty to protect against obvious dangers could be replaced by one of reasonable care if the entrant is an invitee, so that the issue simply would be whether the condition on the land created an unreasonable risk of harm to the invitee. The obviousness of the condition could still be considered under comparative negligence rules and with the defense of assumption of the risk. The courts also could make the standard of liability for criminal attacks more consistent, whether the case deals with an invitee or a tenant. The determining factors in both type of cases could be made to hinge on the foreseeability of the criminal attack, the ability to control any security measure or device, the failure to use reasonable care in implementing or maintaining the security measure, and whether reasonable care would have significantly reduced the likelihood of the criminal attack. Greater consistency in the area of criminal attacks and in the area of the obvious danger rule would allow the courts to better constrain the natural tendency in tort law to generate uneven results in like cases based on jury verdicts, while promoting predictability and certainty in the law.

HUD Proposes RESPA Enforcement Website; Would Allow Public to Submit Complaints to HUD Directly Online*

On November 8, 2005, HUD filed a Notice of Proposed Information Collection in the *Federal Register* requesting comments on a proposed RESPA Website Complaint Questionnaire. The RESPA Website Complaint Questionnaire would establish a common website for consumers, settlement service providers, and the general public to submit complaints of RESPA violations directly to HUD. The information collected would be used to investigate the alleged RESPA violations. Comments on HUD's proposal were due by January 9, 2006. For a copy of the notice, *see* http://hudclips.org/sub_nonhud/cgi/nph-brs.cgi?d=FR05&s1=FR-4975-N- 36$%5bNO%5d&SECT5=FR05&SECT1=TXTHLB&l=50&u=./cgi/newsdoc_run.cgi&p=1&r= 1&f=G.

* Excerpted from *Infobytes*, Buckley Kolar LLP (Nov. 11, 2005). Reprinted with permission.

Privacy Notice Update*

A missing piece from the regulatory relief legislation being considered in Congress this year is a request from various trade associations to eliminate the costly, and duplicative, annual privacy notice when there has been no change in conditions or activities. Separate legislation has been introduced and passed in the House but the future outcome is in doubt. Part of the reason for the delay in congressional action is that the regulators have announced they are studying the issue.

Following extensive research by an outside consultant, federal regulators released a 2006 report on a possible new short-form privacy notice. The report, *Evolution of a Prototype Financial Privacy Notice*, was developed after research with a small number of consumers in an effort to develop more meaningful disclosures. The report concluded that consumers need a context in order to understand the information in privacy notices, and that a tabular format with a glossary is the most effective way to communicate such information. The template developed is two pages with an optional third page for institutions that must provide the opt-out option.

The current annual notices, required by the Gramm-Leach-Bliley Act, must describe the information institutions collect about consumers, the information they share and, in certain instances, how to opt out from information-sharing. Critics complain the notices are too complicated and provide little meaningful information, while institutions complain that the notices are costly and are disregarded by customers.

The 2006 report concludes the first phase of a multi-year interagency project to develop more meaningful privacy notices. Regulators were careful to stress that no decisions will be made about the notice until the next phase of the project—statistical sampling of a broad spectrum of consumers on the usefulness of the notice—is competed. The 2006 report is *available at* www.fdic.gov/news/news/press/2006/pr06033.html.

* Our thanks to Heartland Community Bankers, the Mid-Month Report, MMR-06-7, June 13, 2006, for providing this information.