CHAPTER ELEVEN

PREMISES LIABILITY

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Instruction No. 11.1

DUTY OF MUNICIPALITY MAINTAIN PUBLIC WAYS

A municipality has the duty to use ordinary care to construct and maintain its [streets/sidewalks/crosswalks] in a reasonably safe condition for usual and ordinary use, or to use ordinary care to adequately warn to any dangerous condition of which the municipality knows, or reasonably should know, in sufficient time to have removed or corrected the condition, or have given adequate warning of its existence.

Comments


(2020 Supp.)

Instruction No. 11.2

DUTY OF CARE BY USER OF PUBLIC WAY

A person using [sidewalks/streets/crosswalks] has the duty to use ordinary care for [his/her] own safety. If hazardous conditions exist of which [he/she] knows or in the use of ordinary care should know, [he/she] has the duty to use the care required by such conditions.

Comments

Rider v. City of Norman, 476 P.2d 312, 313 (Okla. 1970). A municipality's duty of care to the traveling public does not extend to normal hazards which can be readily discernible. Evans v. City of Eufaula, 527 P.2d 329, 332 (Okla. 1974). Only when the hazard is "not reasonably to be anticipated by users of the street [does] a municipality
[have] a duty to eliminate the hazard or warn of its presence." Haas v. Firestone Tire & Rubber Co., 563 P.2d 620, 626 (Okla. 1976).

**Instruction No. 11.3**

**INVITEE -- DEFINED**

An invitee is one who is on the premises at the express or implied invitation of the [owner/occupant] thereof for some purpose in which the [owner/occupant] has some interest of business or commercial significance, which business may be of mutual interest, or in connection with the [owner's/occupant's] business.

**Comments**

*See Foster v. Harding, 426 P.2d 355, 360-61 (Okla. 1967).*

**Instruction No. 11.4**

**DUTY TO TRESPASSER TO MAINTAIN PREMISES -- ELEMENTS OF LIABILITY**

The [owner/occupant] of premises has no duty to make [his/her/its] premises safe for a trespasser. However, an [owner/occupant] of premises does have a duty to a trespasser, whose presence on the premises is known or reasonably should be known, not to injure [him/her] by a willful, wanton, or intentional act.

**Notes on Use**

Where the plaintiff is a child who is relying on the attractive nuisance doctrine, Instruction Nos. 11.5, 11.6, and (in appropriate cases) 11.7 should be used instead of this Instruction. Also, this Instruction may require modification if the premises where the injury occurred is used for farming or ranching. *See 76 O.S. 1991, §§ 10-15.*
Instruction No. 11.5

DUTY TO CHILDREN -- ATTRACTIVE NUISANCE DOCTRINE -- ELEMENTS OF LIABILITY

In some circumstances, an [owner/occupant] of premises may have a duty to exercise ordinary care to protect children who trespass on [his/her/its] premises from injury. If you find that [Plaintiff] was injured while trespassing on [Defendant's] land, then in order for [Plaintiff] to recover you must find all of the following to have been established:

1. The injury was directly caused by [describe the artificial condition] maintained by [Defendant] on the premises;
2. The condition was unusually attractive to children;
3. [Plaintiff] was attracted onto the premises by the condition;
4. The condition created an unreasonable risk of injury to children, which [Defendant] knew, or, as a reasonably careful person, should have known;
5. [Plaintiff] lacked the ability to appreciate or realize the risk; and
6. [Defendant], failed to exercise ordinary care to protect [Plaintiff] from injury.

Notes on Use

This instruction should generally be given with Instruction No. 11.6, which deals with the child's capacity, and Instruction No. 11.7 (unless the child is an invitee or licensee). In addition, the court should give Instruction Nos. 9.1, 9.2, and 9.6, dealing with negligence and causation.
Instruction No. 9.4, dealing with the standard of care for children in negligence cases should not be given, however. The attractive nuisance doctrine is directed to the landowner's duty of care with respect to trespassing children rather than the duty of children to protect themselves from injury. One of the elements of the attractive nuisance doctrine is that the child lacked the ability to appreciate the risk, and therefore, the defense of contributory negligence is not available to a landowner in a case where the attractive nuisance doctrine applies.

Comments

The Oklahoma Supreme Court summarized the attractive nuisance doctrine in *Lohrenz v. Lane*, 787 P.2d 1274, 1277 (Okla. 1990), as follows:

While the defendants would generally be under no duty to trespassers, other than to avoid willfully, wantonly or intentionally harming them, the attractive nuisance doctrine provides an exception to this rule. When children of tender age are injured as a result of their trespass, bringing them into contact with a dangerous condition on the premises, the attractive nuisance doctrine imposes a higher duty of care by the landowner. Listed in *Knowles v. Tripledee Drilling Co., Inc.*, [771 P.2d 208, 210 (Okla. 1989)], are factors to be considered in determining whether this doctrine applies. Generally, such issues must be submitted to a jury. (footnotes omitted)

Although the language of this Instruction is simplified for the sake of juror comprehension, the Committee on Uniform Jury Instructions believes that this Instruction incorporates all the factors listed in the *Knowles* case that are to be submitted to the jury.

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**Instruction No. 11.6**

**DUTY TO CHILDREN -- ATTRACTIVE NUISANCE DOCTRINE -- ABILITY OF CHILD**

In deciding whether [Plaintiff] lacked the ability to appreciate or realize the risk, you should take into account that:

[Select the appropriate instruction from the following:]
[For children less than 7 years old]- As a matter of law a child under 7 years old has no ability to appreciate the risk from dangerous conditions. Since [Plaintiff] was less than 7 years old at the time of [his/her] injury, you are instructed that [he/she] lacked this ability.

[For children between 7 and 14 years old]- A child between 7 and 14 years old is presumed to lack the ability to appreciate the risk from dangerous conditions. Since [Plaintiff] was between 7 and 14 years old at the time of her injury, you are to presume that [he/she] lacked this ability. This presumption may be overcome, though, and the [owner/occupant] has the burden of proving by the greater weight of the evidence that [Plaintiff] had the ability to appreciate the danger on the premises at the time of [his/her] injury.

[For children 14 years and older]- [Plaintiff] has the burden of proving by the greater weight of the evidence that [he/she] lacked this ability.

Notes on Use

The trial court should select the appropriate instruction for the child's age. In order for the doctrine of attractive nuisance to apply, the plaintiff must lack capacity to appreciate the danger. Lack of capacity is subject to a conclusive presumption for children under 7 years, to a rebuttable presumption for children between 7 and 14 years, and to no presumption for children 14 years and older. A child who is 7 years or older and is found to have had capacity to appreciate the danger on the premises will be treated as an adult trespasser.

Comments

See Knowles v. Tripledee Drilling Co., Inc., 771 P.2d 208, 210 (Okla. 1989), where the Oklahoma Supreme Court described the distinctions based on the ages of children, as follows: "[C]hildren under the age of 7 years and, in the absence of evidence of capacity, those children between 7 and 14 years of age have been presumed to be incapable of contributory negligence resulting in a greater degree of care being owed to these children by a landowner." See also Keck v. Woodring, 208 P.2d 1133, 1136, 201 Okla. 665, 667 (1949), where the Oklahoma Supreme Court said:
It may be stated as a settled rule in this state that after the age of fourteen all minors are prima facie presumed to be capable of the exercise of judgment and discretion. Plaintiff being over the age of fourteen, and there being no evidence of lack of capacity, but, on the contrary, there being evidence that plaintiff was of advanced intelligence, the trial court should have held as a matter of law that the rule of attractive nuisance could not be invoked.

See also Guilfoyle v. Missouri, K. & T.R.R., 812 F.2d 1290, 1292 (10th Cir. 1987) (trial court erred in permitting the jury to apply the attractive nuisance doctrine).

Instruction No. 11.7

**DUTY TO CHILDREN -- IN ABSENCE OF ATTRACTIVE NUISANCE**

If you determine that [Plaintiff] was a trespasser and [he/she] has not proven all the elements under the attractive nuisance doctrine, then the [owner/occupant] of premises had no duty to make the premises safe for [him/her]. However, the [owner/occupant] of premises did have a duty not to injure [him/her] by a willful, wanton, or intentional act, if the [owner/occupant] knew or reasonably should have known of [his/her] presence on the premises.

**Notes on Use**

This instruction should not be given unless there is some basis for a finding that the defendant caused injury by a willful, wanton, or intentional act.
Instruction No. 11.8

**LICENSE -- DEFINED**

A licensee is one who is on the premises of another by [tolerance/permission, express or implied] of the [owner/occupant] thereof for purposes in which the [owner/occupant] has no business or commercial interest.

**Comments**

*See Foster v. Harding, 426 P.2d 355, 360 (Okla. 1967).*

Instruction No. 11.9

**LESSOR'S LIABILITY FOR INJURY FROM A LATENT DEFECT**

A [lessor/landlord] is liable for any [injuries/losses] to a [lessee/tenant] [or to another on the premises with the [lessee's/tenant's] permission] resulting from a defect in the premises if you find that the following have been established:

1. The defect was known or in the use of ordinary care should have been known by the [lessor/landlord];

2. The defect caused an unreasonable risk of danger or harm to the [lessee/tenant] [or his property] [or to others on the premises with the [lessee's/tenant's] permission];

3. Such [injuries/losses] were directly caused by the [lessor's/landlord's] failure to exercise ordinary care to warn the [lessee/tenant] of the defect;

4. The defect was not obvious or plainly visible;
5. The [lessee/tenant] was unaware of the defect; and

6. The [injury/loss] occurred before the tenant could, by using ordinary care, discover the defect.

**Notes on Use**

The instruction states the basic rule concerning the liability of a lessor for injuries caused by a latent defect of which he had knowledge or which, because of knowledge of other facts, he had notice of and should have been aware of as a reasonably prudent person. This instruction does not apply where the leased premises are to be opened to the public and the lessor is aware of such fact. Neither is the instruction applicable in a situation where the plaintiff is seeking relief for the landlord's negligent failure to perform a covenant to repair or for the landlord's negligence in making repairs he is voluntarily undertaking to make.

**Comments**


**Instruction No. 11.10**

**Instruction No. 11.10**

**Duty to Invitee to Maintain Premises -- Generally**

It is the duty of the [owner/occupant] to use ordinary care to keep [his/her/its] premises in a reasonably safe condition for the use of [his/her/its] invitees. It is the duty of the [owner/occupant] either to remove or warn the invitee of any hidden danger on the premises that the [owner/occupant] either actually knows about, or that [he/she/it] should
know about in the exercise of reasonable care, or that was created by
[him/her/it] [or any of [his/her/its] employees who were acting within
the scope of their employment]. This duty extends to all portions of the
premises to which an invitee may reasonably be expected to go.

Notes on Use

This instruction should generally be used with Instruction Nos. 11.11 and
11.12, dealing with the definition of a hidden danger and the defense that a
danger is open and obvious, and with Instruction Nos. 9.1, 9.2, and 9.6,
dealing with negligence and causation.

The trial court is encouraged to modify this generally worded instruction
to fit the facts of the particular case. For example, if the case arose out of a
slip and fall on a banana peel in a grocery store, the instruction might read:

A grocery store has a duty to keep its floor reasonably safe
for its customers. A grocery store has a duty to either
remove or warn its customers of any dangerous objects on
the floor, such as banana peels, that store employees
actually knew about, or should have known about in the
exercise of reasonable care, that were put on the floor by a
store employee. This duty covers all parts of the store
where customers may reasonably be expected to go.

Some cases may involve additional issues, such as whether the invitee
went outside the area of his invitation or remained on the premises beyond
the time of his invitation, and the general instruction will need to be
modified for these cases. In addition, the general instruction may need to
be modified for a case where a danger resulted from an intervening action
by another person that the defendant should have reasonably anticipated.
An example is Lingerfelt v. Winn-Dixie Tex., Inc., 1982 OK 44, 645 P.2d
485, where the Oklahoma Supreme Court held that a grocery store could
be found liable to a customer on account of a hidden danger created by
other customers that the grocery store should have reasonably anticipated.
The Supreme Court reversed a defense verdict and ordered a new trial on
account of the denial of a requested jury instruction on a dangerous
condition created by the means the grocery store used to display its
products. See also Cobb v. Skaggs Cos., Inc., 1982 OK CIV APP 46, ¶
12, 661 P.2d 73, 76 (“Merchandising methods that involve unassisted
customer selection create problems with dropped or spilled merchandise.
The courts have come to recognize that self-service marketing methods necessarily create the dangerous condition.”).

In a case where there is a duty for open and obvious dangers under *Wood v. Mercedes–Benz of Okla. City*, 2014 OK 68, ¶ 9, 336 P.3d 457, 460, the word “hidden” in the second sentence of the Instruction should be deleted.

Comments

The following statement of a property owner's duty to invitees is from *Williams v. Safeway Stores, Inc.*, 1973 OK 119, ¶ 3, 515 P.2d 223, 225:

A storekeeper owes customers the duty to exercise ordinary care to keep aisles and other parts of the premises ordinarily used by customers in transacting business in a reasonably safe condition, and to warn customers of dangerous conditions upon the premises which are known, or which should reasonably be known to the storekeeper, but not to customers. [Citations omitted.]. Knowledge of the dangerous condition will be imputed to the storekeeper if he knew of the dangerous condition, or if it existed for such time it was his duty to know of it, or if the condition was created by him, or by his employees acting within the scope of the employment. [Citations omitted.]

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**Instruction No. 11.11**

**Hidden Danger -- Definition**

A hidden danger is a dangerous condition that the invitee [licensee] does not actually know about and would not be expected to observe in the exercise of ordinary care. A hidden danger may be totally or partially obscured from sight but it need not be if the circumstances are such that the invitee [licensee] would not be expected to observe the dangerous condition in the exercise of ordinary care.
Notes on Use

This Instruction and the following Instruction on Open and Obvious Dangers should be used together. In the hypothetical example from Instruction No. 11.10, this instruction might be modified as follows:

A banana peel lying on the floor might be a hidden danger if [the Customer] did not actually see it and would not be expected to notice it in the exercise of ordinary care. A banana peel does not need to be totally or partially obscured from sight in order to be a hidden danger if the circumstances are such that [the Customer] would not be expected to notice it in the exercise of ordinary care.

Comments

In Woodall v. Chandler Material Co., 716 P.2d 652 (Okla. 1986), the Oklahoma Supreme Court reversed a judgment for the defendant, because the trial court refused to give an instruction that the plaintiff had requested to clarify the meaning of a "hidden danger."

Instruction No. 11.12

Open and Obvious Danger

The [owner/occupant] has no duty to protect invitees [licensees] from or warn them of any dangerous condition that is open and obvious, because an open and obvious danger is ordinarily readily observable by invitees [licensees].

Notes on Use

Even if a dangerous condition is open and obvious, a property owner may be liable for an injury to an invitee, if the property owner had reason to know that the dangerous condition would cause harm to the invitee despite the invitee's knowledge, the property owner caused or contributed to the dangerous condition, and the injured party was required to be on the premises. Wood v. Mercedes–Benz of Okla. City, 2014 OK 68, ¶ 9, 336 P.3d 457, 460. The general instruction above should not be given where the court determines that Wood applies.
Comments

This instruction is based on *Henryetta Construction Co. v. Harris*, 1965 OK 88, ¶ 7, 408 P.2d 522, 525–26 and *Beatty v. Dixon*, 1965 OK 169, ¶ 13, 408 P.2d 339, 343–44. A property owner's responsibility to protect invitees in some circumstances from known dangers is discussed in Restatement (Second) of Torts § 343A comment f (1965) and Restatement (Third) of Torts: Physical and Emotional Harm § 51 comment k. For example, the Oklahoma Supreme Court held in *Wood v. Mercedes–Benz of Okla. City*, 2014 OK 68, ¶ 9, 336 P.3d 457, 460, that a property owner had a duty to protect an invitee from hazardous conditions even though the invitee was aware of them because it was foreseeable that the invitee would be harmed. See also *Martinez v. Angel Expl., LLC*, 798 F.3d 968, 977 (10th Cir. 2016) (“A landowner’s duty [under Oklahoma law] to keep the premises in a reasonably safe condition for invitees extends to both latent dangers and at least some obvious dangers with foreseeable harms to a class of visitors required to be on the premises.”); *Jack Healey Linen Serv. Co. v. Travis*, 1967 OK 213, ¶ 9, 434 P.2d 924, 927 (“Plaintiff's familiarity with the general physical condition which may be responsible for her injury does not of itself operate to transform the offending defect into an apparent and obvious hazard.”).

(2020 Supp.)

**Instruction No. 11.13**

**DUTY TO LICENSEE TO MAINTAIN -- PREMISES -- GENERALLY**

The [owner/occupant] of premises has a duty to a licensee, whose presence on the premises is known or reasonably should be known, not to injure [him/her] 1) by a willful or wanton act, or 2) by needlessly exposing [him/her] to danger by a failure to warn of any hidden danger on the premises that is known to the [owner/occupant] and that the licensee is not likely to discover by [himself/herself]. This duty is limited to any hidden danger that the [owner/occupant] actually knows about, and the [owner/occupant] has no duty to inspect the premises for hidden dangers.

**Notes on Use**

This instruction should generally be used with Instruction Nos. 11.11 and 11.12, dealing with the definition of a hidden danger and the defense that a danger is open and
obvious. This instruction may require modification if the premises where the injury occurred is used for farming or ranching. See 76 O.S.1991, §§ 10-15.

Comments

The Oklahoma Supreme Court highlighted the difference between the standard of care owed to licensees and invitees in *Henryetta Constr. Co. v. Harris*, 408 P.2d 522, 531-32 (Okla. 1965), as follows:

To a bare licensee the possessor of land owes merely the duty to exercise reasonable care to disclose to him dangerous defects which are known to him and are unlikely to be discovered by the licensee. Toward the business visitor, such as plaintiff, the possessor owes the additional duty to exercise reasonable care to make the premises reasonably safe for the reception of such visitor. (emphasis in original)

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**Instruction No. 11.14**

**LESSOR'S LIABILITY AS AFFECTED BY [HIS/HER] PROMISE TO MAKE SPECIFIC REPAIRS TO PREMISES**

When a [lessor/landlord] has agreed to make specific repairs and the defect[s] to be repaired create[s] an unreasonable risk of injury to persons upon the premises, and such risk could have been prevented if the [lessor/landlord] had made the repairs, the [lessor/landlord] is then liable for injuries directly caused by [his/her/its] failure to use ordinary care to perform [his/her/its] agreement.

**Notes on Use**

This instruction is applicable when the landlord's promise would be otherwise enforceable in a contract action. When such is not the case, the landlord may still be liable under the rule set out in Instruction 11.15.

**Comments**

Instruction No. 11.15

LIABILITY OF LESSOR WHO UNDERTAKES REPAIR OF PREMISES

If a [lessor/landlord] voluntarily undertakes to make repairs, [he/she/it] is under a duty to use ordinary care to make such repairs.

Notes on Use

Whenever this instruction is given, Instruction 9.3 defining "ordinary care" should also be given.

Comments

Beard v. General Real Estate, 229 F.2d 260, 262 (10th Cir. 1956), indicates that Oklahoma follows the common law in imposing liability on a landlord for negligent repairs.