

Premises Liability of Contractors & Subcontractors



R. Brent Cooper
Diana L. Faust
Cooper & Scully, P.C.
900 Jackson Street, Suite 100
Tel: (214) 712-9500
Fax: (214) 712-9450
Brent.Cooper@CooperScully.com
Diana.Faust@CooperScully.com

Historical Development

- Why Premises Treated Differently

Historical Development

- *Carlisle v. J. Weingarten, Inc.*, 152 S.W.2d 1073 (Tex. 1941)
- Premises Owner Owes “Those Who May Enter The Duty To Exercise Ordinary Care To See That The Premises Are In A Reasonably Safe Condition For Their Protection.”

Historical Development

- *McKee v. Patterson*, 271 S.W.2d 391 (Tex. 1954)
- "A General Contractor In Control Of Premises Owes A Duty To The Employees Of Subcontractors Similar To That Owed By The Owner Or Occupier Of Land To His Invitees."

Historical Development

- *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452 (Tex. 1972)
- “This Court Has Often Measured The Duty Which An Occupier Of Premises Owes To An Invitee...the Duty Is That Which Is Summarized In Restatement (Second) Of Torts Sec. 343:

Historical Development

- ***A Possessor Of Land Is Subject To Liability For Physical Harm Caused To His Invitees By A Condition On The Land, But Only If, He***
- ***(a) Knows Or By The Exercise Of Reasonable Care, Would Discover The Condition, And Should Realize That It Involves An Unreasonable Risk Of Harm To Such Invitees, And***

Historical Development

- (b) Should Expect That They Will Not Discover Or Realized The Danger, Or Will Fail To Protect Themselves Against It, And
- (c) Fails To Exercise Reasonable Care To Protect Them Against The Danger

Historical Development

- The Occupier Is Under The Further Duty To Exercise Reasonable Care In Inspecting The Premises To Discover Any Latent Defects And To Make Safe Any Defects Or To Give An Adequate Warning.
- Comment b

Historical Development

- Ch. 95 Tex. Civ. Prac. & Rem. Code (1995)

Negligent Activity v. Premises Liability

- *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex.1992).
- Generally, To Recover On A Negligent Activity Theory, One Must Have Been Injured By Or As A Contemporaneous Result Of An Activity.
- To Recover On A Premises Liability Theory, One Must Be Injured By A Condition On The Property Created By An Activity.

Negligent Activity v. Premises Liability

- Independent Theories of Recovery
 - *Clayton Williams v. Olivo* (Tex. 1997)
- Distinctions
 - Contemporaneous Activity
 - Possession or Control is Necessary for Premises Liability

Negligent Activity v. Premises Liability

- Possession Or Control
- *City of Denton v. Van Page*, (Tex.1986).
- Ordinarily, A Person Who Does Not Own Or Possess Property Assumes No Liability For Injury Under A Premises Liability Theory, Unless He Assumes Control Over, And Responsibility For, The Premises.
- Prerequisite to Liability

Negligent Activity

- “Recovery On A Negligent Activity Theory Requires That The Person Have Been Injured By Or As A *Contemporaneous* Result Of The Activity Itself Rather Than By A *Condition* Created By The Activity.”
- *Keetch v. Kroger Co.*

Negligent Activity

- “At Some Point, Almost Every Artificial Condition Can Be Said To Have Been Created By An Activity. We Decline To Eliminate All Distinctions Between Conditions And Negligent Activities.”
- *Keetch v. Kroger Co.*

Negligent Activity

- “Contemporaneous” is defined as “existing, occurring, or originating during the same time.”
 - Webster’s Collegiate Dictionary 283 (9th ed. 1986).

Negligent Activity

- Contemporaneous
- Examples of What is NOT:
 - *Corbin v. Safeway Stores, Inc.*
 - Grape On Floor
 - *Keetch v. Kroger Co.*
 - Spray On Floor 30 Minutes

Negligent Activity

- *Clayton W. Williams, Jr. Inc. v. Olivo*
 - Drill Pipe Protector From Previous Shift
 - Premises Liability
- *Saeco Electric v. Gonzalez*
 - Uncompacted Hole For 15 Days
 - Premises Liability

Negligent Activity

- *Redinger v. Living, Inc.* (Tex. 1985)
 - Finger Crushed by Operation of Box Blade
 - Contemporaneous Activity

Negligent Activity Jury Charge

- Did The Negligence, If Any, Of The Persons Named Below Proximately Cause The Occurrence In Question?
- Answer "Yes" Or "No" For Each Of The Following:
 - a. Sub Contractor _____
 - b. General Contractor _____

Premises Liability

- *Corbin v. Safeway Stores, Inc.* (Tex. 1983)
 - Actual Or Constructive Knowledge Of Some Condition On Premises
 - Condition Posed An Unreasonable Risk Of Harm
 - Owner Did Not Exercise Reasonable Care To Reduce Or Eliminate The Risk
 - Failure To Exercise Reasonable Care Proximately Caused Injury

Premises Liability

- Owner/Occupier/Possessor
 - Own, Possess, Control
 - Occupier = Control
 - Possessor = Occupier
 - Possessor = Control
- Duty Does Not Extend Beyond Limits of Control

Premises Liability

- Control
 - Power or Authority to Guide or Manage
 - Webster's & Rendleman
 - Contractual Right to Control
 - Question of Law
 - Actual Exercise of Control
 - Question of Fact

Premises Liability

- Non-owner Who Controls Has Same Duty As Owner
 - *Wal-Mart Stores, Inc. v. Deggs*
 - General Manager Who Controls Operations Of Store May Have Duty To Maintain Premises In Condition Not Posing Unreasonable Risk Of Harm To Customers

Premises Liability

- Owner/Possessor Without Control
 - *Fifth Club, Inc. v. Ramirez* (Tex. 2006)
 - O Instruct IC To Eject Patron But Did Not Retain Right To Control Manner, So O Not Liable

Premises Liability

- Right to Control or Actual Control
 - *Pollard v. Missouri Pacific* (Tex. 1988)
 - Contractual Right of Control May Give Rise to Liability in Absence of Actual Control

Premises Liability

- Right to Control or Actual Control
 - *Wal-Mart Stores, Inc. v. Alexander* (Tex. 1993).
 - Actual Control in Absence of Contractual Right of Control May Give Rise to Liability
 - *Ensearch v. Parker*, (Tex. 1990)
 - Contract Giving O Right Order Work Changes, Make Adjustments In Contract Price, And Provide Procedure Manuals For Contractor's Employees
 - O's Reps Frequently Visited Job Site And Supervised Work

Premises Liability

- No Contractual Right of Control and No Actual Exercise of Control
 - *Coastal Marine Serv. Of Tex. v. Lawrence* (Tex. 1999)
 - Mere Possibility Of Control Not Enough To Impose Liability

Premises Liability

- *Exxon Corp. v. Tidwell* (Tex. 1993)
 - Matters of Control Must Relate to Instrumentality of Premises Causing Injury/Harm
- *Elliott Williams Co., Inc. v. Diaz* (Tex. 1999)
 - Control Retained By O Must Pertain To Details Of Performance Of Work, Rather Than End Result

Premises Liability

- *Dow Chem. Co. v. Bright* (Tex. 2002)
 - Owner/Occupier May Be Liable For Injuries Resulting From Dangers Arising From Contractor's Activities On Premises Where O Exercises Control Over Contractor's Work
 - But O Does Not Incur Duty To Ensure IC Performing Work Safely By Having "Safety Employee" On Site

Premises Liability

- *Lee Lewis Constr. Inc. v. Harrison* (Tex. 2001)
 - GC's Exercise Of Control Over Fall-Protection System Subjected It To Liability To Employees Of Subcontractor Arising From Failure Of That System

Premises Liability: Independent Contractor

- *Redinger v. Living, Inc.* (Tex. 1985)
 - If In Control Of Premises, Same Duty As Owner/Occupier
 - Duty Owed Commensurate With Control
 - Owner Or Occupier Entitled To Assume Independent Contractor Will Perform Work Safely And Take Precautions To Protect Its Employees
 - Generally, IC's Duty To Protect From Hazards Arising Out Of Activities Conducted By And Under Control Of IC

Premises Liability

- *Allen Keller Co. v. Foreman* (Tex. 2011)
 - Compliance With Strict Terms Of Contract May Absolve Contractor Of Liability For Premises Condition Created By Contractor's Work

Premises Liability

- *Strakos v. Gehring* (Tex. 1962)
 - Contractor Liable For Defect Created By Contractor's Work Where Contract Leaves Work To Contractor's Discretion, Even If Work Completed Or Accepted By Owner

Premises Liability: Independent Contractor

- *Rendleman v. Clarke*, (Tex. App.—Houston [14th Dist.] 1995, writ dismiss'd)
 - Slip & Fall on Wet Fireproofing
 - Employee of IC Not Performing Fireproofing Work Injured
 - If Control Undisputed, Must Still Obtain Jury Findings Regarding Knowledge of Danger

Premises Liability

- Types of Defects for Which Independent Contractor's Employee May Seek to Hold General Contractor Liable
 - Existing Defects or Defects Created Through Some Means Unrelated to Activity of Injured Employee
 - Defects Independent Contractor Created by Work Activity

Premises Liability

- Non Delegable Duties of Owner
 - Inherently Dangerous Activity
 - Delegating Responsibility To IC Does Not Relieve O Of Liability For Injury To Third Party Caused By Defect (Both May Be Liable)
 - *Lee Lewis*
 - Work is inherently dangerous when involves risk of danger derived from nature of activity itself
 - Excavation Work

Premises Liability

- Jury Questions
 - Control
 - *Corbin* Elements
- Without Jury Finding of *Corbin* Elements, No Right of Recovery Under Premises Liability Theory
 - *Clayton Williams v. Olivo*