

SLIP AND FALL CASES AND OTHER PREMISES LIABILITY ISSUES

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RESOURCES

- Civil Deskbook (modified July 2020)
- O'Connor's Causes of Action
- Civil Practice and Remedies Code (check out our CPRC webinar!)
- Rules 500-507

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NEGLIGENCE CASES

- Negligence cases are a category of tort case
 - Person didn't do something they should have done, or
 - Did something they shouldn't have done
- Contrast with intentional torts, which is someone purposefully taking an action or causing a result
- What do we mean by a "tort case"?

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Something that is NOT a breach of contract but a party can recover money for under civil law

Generally, damage to someone's property or economic harm/bodily injury to the person

Purpose: Deter wrongful conduct, make injured parties whole

**WHAT IS A
TORT?**

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KEEP IN MIND



- Self-represented litigants may not know the legal term for their cause of action. They don't have to know the "magic words." Your job is to determine what happened and award damages if appropriate.
- Many behaviors can be punished civilly, criminally, or both. (For example, the O.J. Simpson case)
- It is not up to you to decide if the person should pursue a civil case or if a prosecution should occur.
- Process the case that has been filed with you. Do not advise someone what to file or whether to file.

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Some Helpful Definitions

- **Injury** – Includes both bodily injury and economic injury.
- **Damages** – Money a party receives based on their cause of action.
- **Actual or Proximate Cause** – This means the defendant's action resulted in the injury. Cause can be "**actual cause**" where the action directly caused injury, or "**proximate cause**" meaning the action started a chain of events that resulted in the injury.
 - To be a "proximate cause," the action has to be a "**but for**" cause, meaning "but for the action" the injury wouldn't have occurred. Also, the injury must be a foreseeable outcome of the action.

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- If the idea of proximate cause has your head spinning, don't worry: you're not alone!
- Bill runs a red light and his car strikes a car driven by Jan. Bill running the red light is the **actual cause** of Jan's damage and injuries.
- After Bill strikes Jan's car, it slides into Norah who is walking down the street, breaking her leg. Bill running the red light is the **proximate cause** of Norah's broken leg.
- When the ambulance is taking Norah to the hospital, the ambulance driver crashes, breaking Norah's arm. This injury was not a foreseeable result of Bill's action of running the light, so Bill running the red light was **not a proximate cause** of Norah's broken arm.

Understanding "Proximate Cause"

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Negligence – The Elements

1. The defendant had a legal **duty** to act in a certain way toward the plaintiff.
2. The defendant **breached** that duty.
3. The breach **caused** injury to the plaintiff.



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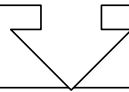
Negligence Element 1 - Duty

- A **general duty** exists to use **ordinary care** to avoid **foreseeable risk** of injury to others.
- There is **not** a general duty to provide aid or protect others, unless there is a special relationship.
- Duty can be created by a relationship between the parties.
 - For example, attorney-client, accountant-client, parent-child.
- Civil and criminal laws create statutory duties as well.
 - You have a duty to stop at a red light.

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Negligence Element 2 - Breach

In each situation where a person has a duty to another, they have what is called a **standard of care**. If they fail to meet this standard, they have **breached** their duty.



Normally, the standard is “ordinary care”, which is what an “ordinary prudent person” would have done (or not done) in that situation.

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Negligence Element 2 - Breach

- Situations where a different standard other than “ordinary care” may apply include:
 - Potential breach by a “**professional**” such as an attorney or a physician.
 - The professional is held to the standard of an **ordinarily prudent professional** would have done in that situation, rather than a non-professional.
 - **Common carriers** and **handlers of dangerous commodities** are also held to a higher standard of care.

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Negligence Element 2 - Breach

When determining what an “ordinary prudent person” would do, the defendant’s age, experience, intelligence, and knowledge are taken into consideration.



Violation of a statute is considered “**negligence per se**”, meaning the act is negligent on its face.

The defendant may be able to provide a defense to this by showing that it was necessary to violate this law – for example, speeding to rush someone having a heart attack to the hospital.

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Negligence Element 3 – Causation

- In negligence cases, the breach must be the **actual or proximate cause** of the plaintiff's injury.
- As discussed before, there is a two-part test for proximate cause:
 - **Cause-in-fact** – If the negligence was a substantial factor in the injury and whether the injury would have otherwise occurred. – “**but for**” test discussed earlier
 - **Foreseeability** – A person of ordinary intelligence should have anticipated the danger caused by the negligence.

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Defenses to Negligence Include:

Contributory
Negligence by
Plaintiff

Release
Agreement

Assumption of
the Risk (hit
by a foul ball)

Act of God

Unavoidable
Accident

Limitations

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Statute of Limitations – Tort Cases

- The statute of limitations in a tort case (both intentional torts and negligence) is two years.
- The statute in some cases does not start running until a party is aware or should have been aware of the tort.
- If the case is outside the statute of limitations, the plaintiff cannot have a judgment, even if the defendant doesn't bring that up, and even if the defendant never appears.



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REMEDIES AWARDED IN JUDGMENT

- Successful plaintiff can be awarded:
 - Actual damages
 - Exemplary damages, if appropriate (see Causes of Action and CPRC webinars for more on this topic)
 - Pre- and post-judgment interest
 - Court costs
 - **NO** attorney's fees

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A common special category of negligence cases is **premises liability** cases – these are cases where someone sues not based on the defendant’s actions, but on the condition of a premises that the defendant was responsible for.

- Standard “slip and fall” cases are in this category.

In these cases, the duty varies depending on who the potential plaintiff is and their relationship with the defendant.

PREMISES LIABILITY CASES

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Negligence vs. Premises Liability

The status of the plaintiff is relevant in premises liability cases but not other negligence cases.

If the plaintiff was injured due to ongoing activity on the premises rather than a condition of the premises, the case is a negligence case.

If they were injured due to a condition of the defendant’s premises while not on the defendant’s premises, the case is a negligence case.

- Defendant’s rotten tree falls down onto the plaintiff’s car in the plaintiff’s driveway. Plaintiff wasn’t on defendant’s property, so case is if defendant was negligent in maintenance of the tree.

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Negligence v. Premises Liability

- To be a negligence case (generally easier for plaintiff to win), the activity must be ongoing at the time of the injury.
 - *Keetch v. Kroger Co.* – spraying slick substance on plants was not “ongoing” so the slip and fall was due to a condition, rather than “ongoing activity.”
 - So which type of case did the Court find it was?
- How to handle this difference in justice court with SRLs and no specific pleading requirements?

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PREMISES LIABILITY CASES

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**“STATUSES”
IN
PREMISES
LIABILITY
CASES**

- There are three potential “statuses” that a plaintiff in a premises liability case can have and each have different duties owed to them:
- **Invitee** – Entered the premises with express or implied knowledge and for **mutual benefit**.
- **Licensee** – Entered the premises with permission but only for the **licensee’s convenience** or on business for someone other than defendant.
- **Trespasser** – Enters the premises **without lawful right or consent**, for their own purposes or out of curiosity.

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**DUTY –
PREMISES
LIABILITY
CASES**

Invitee – Defendant owes the duty to use ordinary care to keep premises in a reasonably safe condition, including inspection of the premises. Must protect or warn of known risks.

Licensee – Defendant owes a duty to use ordinary care to protect the licensee from hidden dangers known to the defendant. Must protect or warn of known risks.

Trespasser – Defendant owes a duty to not injure them willfully, wantonly, or with gross negligence (consciously disregarding reasonable care).

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CHANGE IN STATUS

- Some circumstances can result in a change in the plaintiff's status:
 - Tolerated trespasser – upgrade to licensee
 - Emergency trespasser – upgrade to licensee
 - Volunteer rescuer trespasser – upgrade to licensee
 - Trespassing child due to “attractive nuisance” – upgrade to invitee

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CHANGE IN STATUS

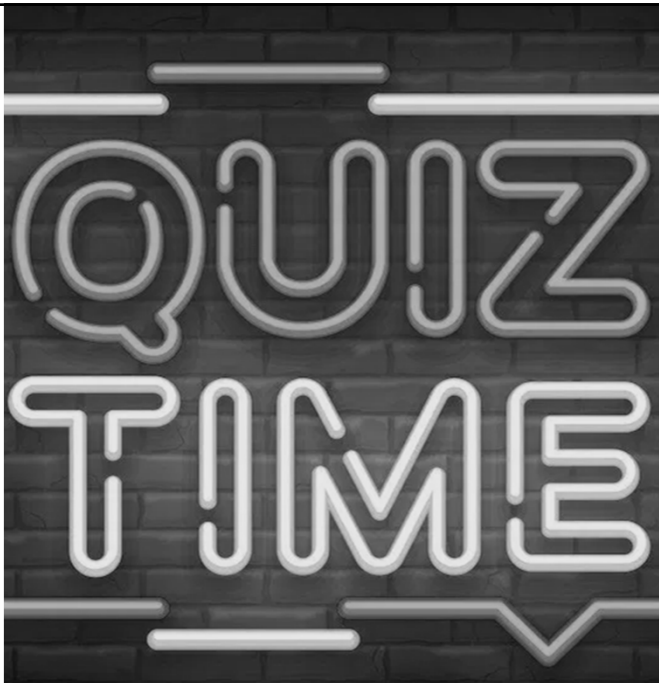
- Unforeseen departure by invitee/licensee – downgrade to trespasser
- Recreational use of premises – duty set by statute (CPRC Ch. 75): duty not to injure by gross negligence, malicious intent, or bad faith – why?
 - “Recreation” defined in CPRC 75.001(3) and 75.002(e)

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WHEN PLAINTIFF STATUS IS IRRELEVANT

- Duty set by statute or ordinance
- Easement holder owes duty of ordinary care (someone trespassing on land injured by a power line is not a trespasser to the power company b/c of easement, so power company's duty is that of ordinary care)

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Write down the status of each of the following plaintiffs:

1. Building inspector
2. Door-to-door salesman before/ after invited into home
3. Employee on duty/ off duty in break room
4. Neighbor coming to borrow tools
5. Social guest
6. Subtenant without defendant's permission

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SUIT BY INVITEE

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ELEMENTS

1. Plaintiff was an invitee
2. Defendant was a possessor of the premises
3. Condition on the premises posed "unreasonable risk"
4. Defendant knew or should have reasonably known
5. Defendant breached duty by failing to warn or by failing to make condition reasonably safe
6. Defendant's breach was actual or proximate cause of injury

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ELEMENT 1 – PLAINTIFF WAS AN INVITEE

- Remember this requires an express or implied invitation and mutual benefit
 - Window shopper – invitee, but person crossing store's parking lot to get to another store – no mutual benefit, not invitee
 - Working social guest – cases go both ways
 - Tenant is an invitee of landlord if landlord retains control of premises or concealed defects
 - Employees, meter readers, mail carriers, church/club members

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ELEMENT 2 – DEFENDANT WAS POSSESSOR

- This requires the defendant is shown to be responsible for the premises as described above.

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ELEMENT 3 –
CONDITION POSED UNREASONABLE RISK

- Texas Supreme Court – “Sufficient probability of a harmful event occurring that a reasonably prudent person would have foreseen the likelihood of that event or similar event.”
– *Seideneck v. Cal Bayreuther Assocs.*
- Very fact-dependent and subjective

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ELEMENT 3 –
CONDITION POSED UNREASONABLE RISK

- Factors that courts have weighed:
 - Was it clearly marked?
 - Height
 - Past injuries/complaints
 - Is it unusual?
 - Construction or placement serve as a warning?
 - Were reasonable alternatives available?
 - Did it meet applicable safety standards?

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ELEMENT 4 – DEFENDANT KNEW OF CONDITION

- This requires that the defendant either knew or should have known of the condition
 - Remember that the defendant does have a duty to inspect the premises for an invitee
 - So if they failed to inspect, and an inspection would have revealed the condition, the defendant should have known of the condition

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ELEMENT 4 – DEFENDANT KNEW OF CONDITION

- In slip-and-fall cases, can prove knowledge with evidence:
 - Defendant placed the substance on the floor;
 - Defendant knew substance was on the floor and negligently failed to remove it; **or**
 - Substance was on the floor so long that, in the exercise of ordinary care, it should have been detected and removed

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	<p>WHAT IF THE PLAINTIFF IS AWARE OF THE CONDITION?</p>	<ul style="list-style-type: none"> • This can have two potential effects on the case: <ul style="list-style-type: none"> • It may eliminate the duty to warn or to make safe • It may add the concept of “proportionate responsibility” – see the Causes of Action and CPRC webinars for more on this topic
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<div data-bbox="407 1251 1214 1373" style="border: 1px solid black; padding: 10px; margin: 0 auto; width: fit-content;"> <p>ELEMENT 5 – DEFENDANT BREACHED ITS DUTY</p> </div> <ul style="list-style-type: none"> • This can be shown by the defendant either: <ul style="list-style-type: none"> • Failing to inspect, • Failing to warn, or • Failing to make the condition safe • Does not have duty generally to both warn AND make safe, and does not have duty generally to warn of open and obvious danger
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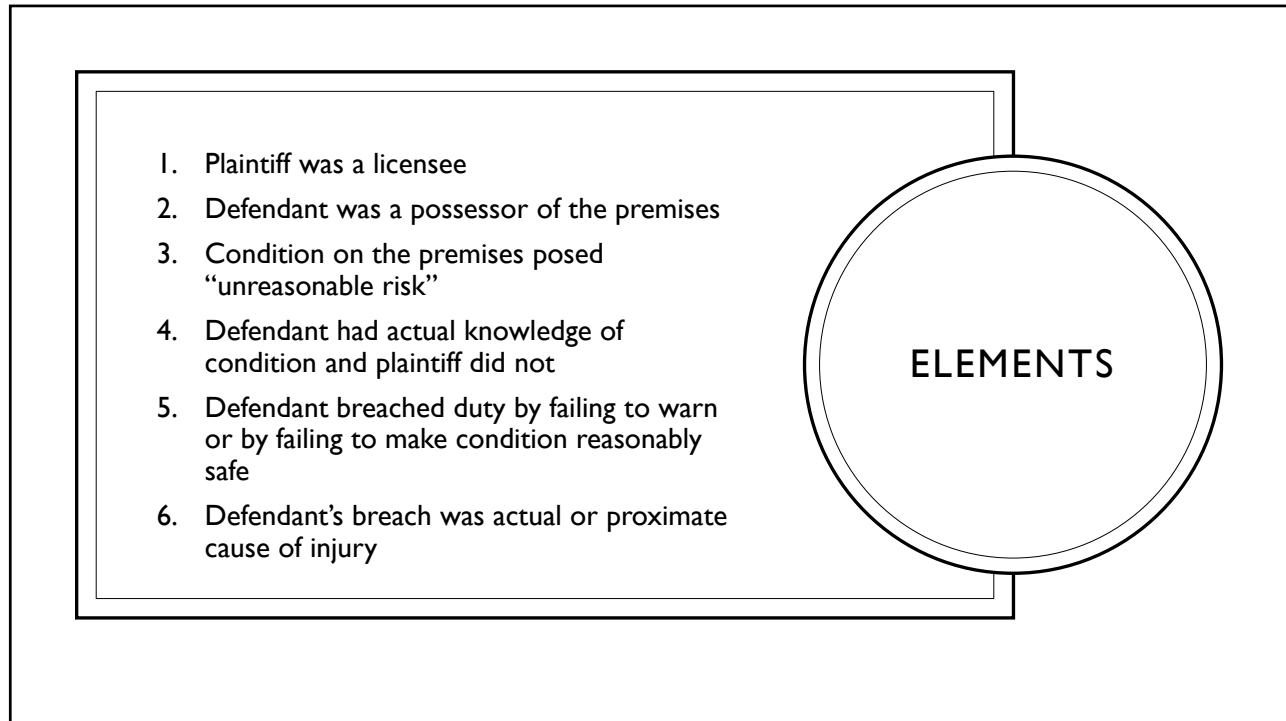
**ELEMENT 6 –
THE BREACH CAUSED THE DAMAGES**

- Can be actual or proximate cause
- Remember, must be foreseeable
- If the damages would have occurred even if the defendant didn't breach, there is no causation

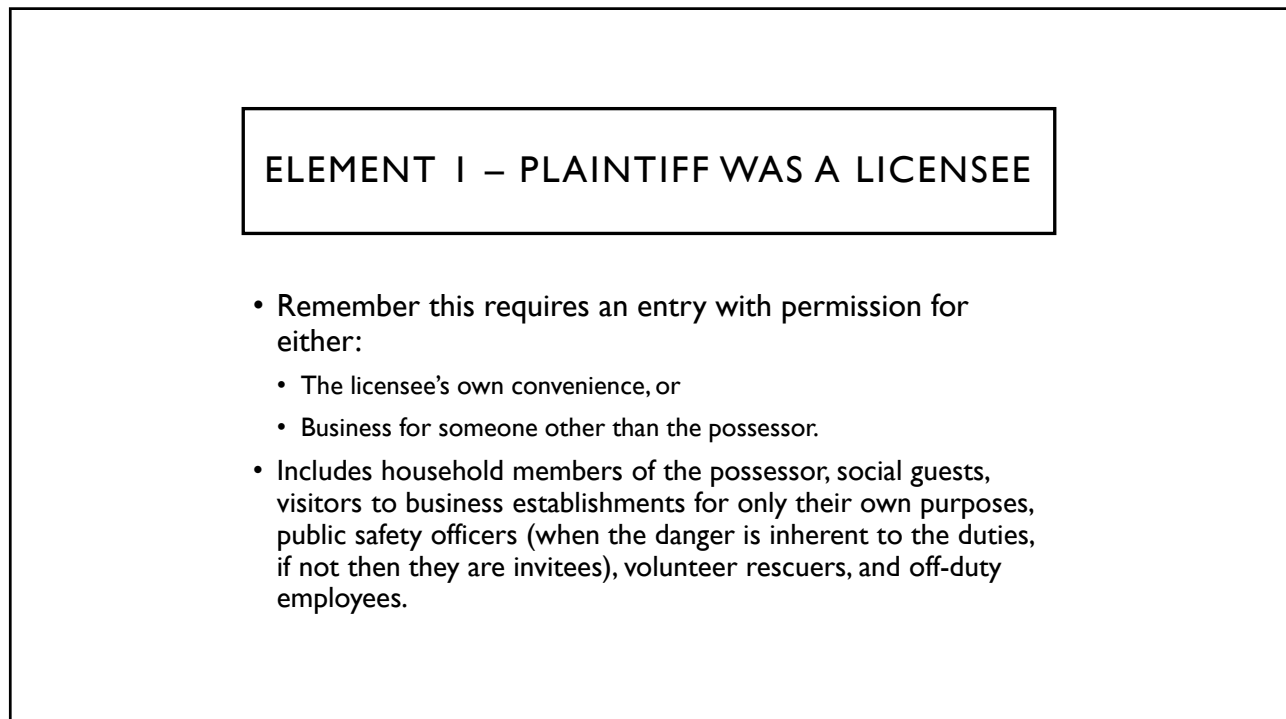
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SUIT BY LICENSEE

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**ELEMENT 2 –
DEFENDANT WAS POSSESSOR**

- This requires the defendant is shown to be responsible for the premises as described above.

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**ELEMENT 3 –
CONDITION POSED UNREASONABLE RISK**

- Same analysis of “unreasonable risk” applies as was discussed in the invitee section.

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ELEMENT 4 – DEFENDANT KNEW OF CONDITION

- This requires that the defendant had actual knowledge of the condition
 - Remember that the defendant **does not** have a duty to inspect the premises for a licensee
 - So if they failed to inspect, and an inspection would have revealed the condition, the defendant would still not be liable if they did not actually know of the condition

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WHAT IF THE
PLAINTIFF IS
AWARE OF
THE
CONDITION?

- If the plaintiff is a licensee and is aware of the condition, they are ***unable to receive a judgment.***

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ELEMENT 5 – DEFENDANT BREACHED ITS DUTY

- This can be shown by the defendant either:
 - Failing to warn, or
 - Failing to make the condition safe
- Does not have duty generally to both warn AND make safe, and does not have duty generally to warn of open and obvious danger

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ELEMENT 6 – THE BREACH CAUSED THE DAMAGES

- Can be actual or proximate cause
- Remember, must be foreseeable
- If the damages would have occurred even if the defendant didn't breach, there is no causation

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SUIT BY TRESPASSER

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ELEMENTS

Plaintiff was a trespasser

Defendant was a possessor of the premises

Condition on the premises posed
“unreasonable risk”

Defendant breached duty by acting willfully,
wantonly, or with gross negligence

Defendant’s breach was actual or
proximate cause of injury

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ELEMENT 1 – PLAINTIFF WAS A TRESPASSER

- Remember this requires an entry without permission for the plaintiff's own purposes, pleasure, or convenience.
- Also remember the discussion earlier of "upgraded" status for:
 - Tolerated trespassers – licensee
 - Children brought by an "attractive nuisance" – invitee
 - Volunteer rescuers, or those entering due to emergency – licensee
- And that a licensee or invitee can become a trespasser if they make an unforeseen departure

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TOLERATED TRESPASSERS

- Requires a showing of:
 - Actual knowledge of trespassers
 - Can't be implicit invitation, that creates licensee status
 - No steps to prevent or discourage
 - Unless steps would be unduly burdensome or futile

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**ELEMENT 2 –
DEFENDANT WAS POSSESSOR**

- This requires the defendant is shown to be responsible for the premises as described above.

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**ELEMENT 3 –
CONDITION POSED UNREASONABLE RISK**

- Same analysis of “unreasonable risk” applies as was discussed in the previous sections.

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ELEMENT 4 – DEFENDANT BREACHED ITS DUTY

- This can be shown by the defendant either:
 - Displaying gross negligence (extreme degree of risk given the circumstances) or
 - Intending to injure the trespasser
- Does not have duty to warn or make safe

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ELEMENT 5 – THE BREACH CAUSED THE DAMAGES

- Can be actual or proximate cause
- Remember, must be foreseeable
- If the damages would have occurred even if the defendant didn't breach, there is no causation

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ATTRACTIVE NUISANCES

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ELEMENTS

Plaintiff was a trespassing child

Defendant was a possessor of the premises

Defendant knew or should have known there was an artificial condition on the premises and children would likely trespass

Artificial condition on the premises posed "unreasonable risk"

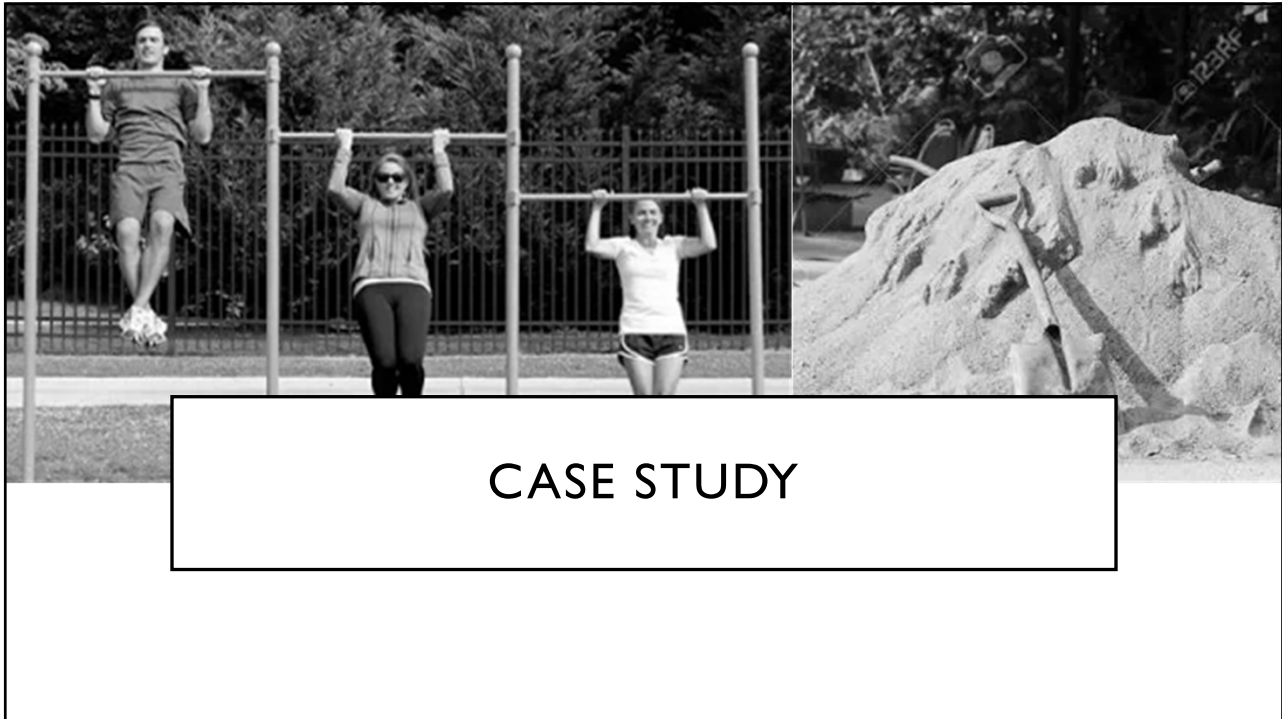
Plaintiff was unaware of the risk due to youth

Utility to defendant and burden of eliminating danger were slight compared to risk to children

Defendant breached duty by not exercising reasonable care

Defendant's breach was actual or proximate cause of injury

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**ELEMENT 1 –
PLAINTIFF IS TRESPASSING CHILD**

- No set age requirement, simply “too young” to appreciate the risk of the condition.
- Successful plaintiffs are usually under the age of 12
– *Texas Utils. Elec. Co. v. Timmons*
- Element 5 gets into this on a deeper level.

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**ELEMENT 2 –
DEFENDANT WAS POSSESSOR**

- This requires the defendant is shown to be responsible for the premises as described above.

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**ELEMENT 3A –
DEFENDANT HAD KNOWLEDGE OF
ARTIFICIAL CONDITION**

- Does not apply to natural conditions
 - For example a child drawn to a pond on a property and is injured – no “attractive nuisance” case

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**ELEMENT 3B –
DEFENDANT HAD KNOWLEDGE THAT
CHILDREN WOULD LIKELY TRESPASS**

- Proven if facts and circumstances would indicate to a person of average intelligence that children would be likely to frequent the property.
 - Can consider the “attractiveness” of the nuisance

- No duty to investigate whether children are trespassing or likely to trespass.

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**ELEMENT 4 –
ARTIFICIAL CONDITION POSED
UNREASONABLE RISK**

- Must show that the condition created an unreasonable risk of death or serious bodily injury for children.

- Playground equipment is “open and obvious” risk, so no attractive nuisance liability. Blake thought the tines were playground equipment. How does this affect our case study?

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ELEMENT 5 – PLAINTIFF'S LACK OF UNDERSTANDING OF RISK

- Plaintiff must show that, because of youth, the plaintiff did not:
 - Discover the condition,
 - Realize the inherent risk in meddling with the condition, **or**
 - Realize the risk in coming within the area made dangerous by the condition

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ELEMENT 6 – BALANCE OF RISK VS. UTILITY

- Plaintiff must show that the utility to the defendant of maintaining the condition and the burden of eliminating the danger were slight compared with the risk to children.

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ELEMENT 7 – BREACH OF DUTY BY DEFENDANT

- If other elements are met, defendant owes same duty of reasonable care that they owe an invitee, including duty to inspect and duty to warn or make safe.

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ELEMENT 8 – THE BREACH CAUSED THE DAMAGES

- Can be actual or proximate cause
- Remember, must be foreseeable
- If the damages would have occurred even if the defendant didn't breach, there is no causation

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