Appellate Reports and Shorter Takes

Duty-of-care issues, particularly involving premises-liability cases where the premises abut a public street

By Jeffrey I. Ehrlich

Vasilenko v. Grace Family Church

(2017) 3 Cal.5th 1077 (Cal. Supreme)

Who needs to know about this case?

Lawyers litigating duty-of-care issues, particularly involving premises-liability cases where the premises abut a public street.

Why it's important:

Holds that a landowner does not have a duty to assist invitees in crossing a public street when the landowner does no more than site and maintain a parking lot that requires invitees to cross the street to access the landowner's premises, so long as the street's dangers are not obscured or magnified by some condition of the landowner's premises or by some action taken by the landowner. In other words, the Court held that the foreseeability of the risk caused by having an overflow parking lot sited across a busy street did not create a duty of care.

Synopsis:

Defendant Grace Family Church is located on Marconi Avenue in Sacramento. Marconi Avenue is five lanes wide, with two lanes in each direction, separated by a universal left turn lane. The nearest intersection to the Church was at Root Avenue, about 50 to 100 feet east; there were no traffic signals or crosswalks at the intersection. The Church had an agreement to use the parking lot of a swim school located on the opposite side of Marconi Avenue for overflow parking.

On a rainy night in November 2010, plaintiff Aleksandr Vasilenko sought to attend a seminar at the Church. When he arrived, a church member volunteering as a parking attendant informed him that the main lot was full and told him to park at the swim school lot across the street. The attendant did not tell him where to cross Marconi Avenue to reach the Church, and did not tell him that the Church had posted crossing volunteers at Marconi and Root Avenues. Vasilenko, along with two others, attempted to cross in the middle of the block directly opposite the Church. Midway across, he was hit and injured by an oncoming car.

He and his wife sued the Church for negligence and loss of consortium. He alleged that the Church created a foreseeable risk of harm by maintaining an overflow parking lot in a location that required invitees to cross Marconi Avenue, and that the Church was negligent in failing to protect against that risk. He also alleged that the Church was negligent in failing to adequately train or supervise its parking attendants.

The Church moved for summary judgment, arguing that it did not have a duty to assist Vasilenko with crossing a public street it did not own, possess, or control. The trial court granted the Church summary judgment; a divided panel of the Court of Appeal reversed. The Supreme Court granted review and affirmed in a unanimous opinion.

The Court did not make new ground in articulating the legal standards that were used to address the issue of duty. Duty is a legal issue, subject to de novo review. In many cases, a duty of care is derived from Civil Code section 1714, subdivision (a), which establishes the general duty of each person to exercise, in his or her activities, reasonable care for the safety of others. The Court has previously explained that, "in the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where 'clearly supported by public policy.'"

"In determining whether policy considerations weigh in favor of such an exception, the Court looks to the factors discussed in *Rowland v. Christian* (1968) 69 Cal.2d 108, 112: "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." In applying the *Rowland* factors the Court does not ask whether these factors "support an exception to the general duty of reasonable care on the facts of the particular case before us, but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy."

Here, because "the general duty to take ordinary care in the conduct of one's activities" applies to choosing the location of a parking lot for one's invitees and to training one's employees, "the issue is ... properly stated as whether a categorical exception to that general rule should be made" exempting those who

own, possess, or control premises abutting a public street from liability to invitees for placing a parking lot in a location that requires invitees to cross the public street. (The Court referred to those who own, possess, or control premises as "landowners," regardless of their legal title over property.)

In general, the rule is that, "in the absence of a statute a landowner is under no duty to maintain in a safe condition a public street abutting upon the landowner's property unless the landowner created the danger." This rule provides the rule of decision in the case.

The Court has previously noted that the *Rowland* factors fall into two categories. Three factors – foreseeability, certainty, and the connection between the plaintiff and the defendant – address the foreseeability of the relevant injury, while the other four – moral blame, preventing future harm, burden, and availability of insurance – take into account public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief.

With respect to foreseeability factors, the first two support a finding of duty. It is foreseeable that an invitee directed to park in an overflow lot on the other side of a public street might be struck by oncoming traffic while crossing the street to or from the parking lot, and the Church did not contest that the general type of injury Vasilenko suffered was foreseeable. It was similarly certain that Vasilenko was injured when he was struck by a car and that his injury is compensable at law.

With respect to the third factor – the closeness of the connection between the defendant's conduct and the injury suffered, "Vasilenko's injury resulted from the confluence of several events – this decision to cross the street at a certain time and place, and a driver approaching at that moment and failing to avoid the collision." Each of these circumstances was independent of the landowner's conduct. Hence, "[b]ecause landowner's conduct bears only an attenuated relationship to the invitee's injury, we conclude that the closeness factor tips against finding a duty."

With respect to the public-policy factors – prevention of future harm, burden, moral blame, and the availability of insurance, the Court also concluded that the balance tipped against a finding of duty. A landowner has limited ability to reduce the risk of injury from crossing a public street. It cannot regulate traffic flow, direct traffic, or install traffic control devices or signs. Volunteer crossing aides would not only lack the legal authority to direct or stop traffic; their presence "might inadvertently convey to invitees that they *do* possess authority to direct traffic and thereby cause invitees to rely on such assistance to their detriment."

While a landowner might place a sign on its premises warning of the danger of crossing the street, "the danger posed by crossing a public street midblock is obvious, and there is ordinarily no duty to warn of obvious dangers."

While it might be desirable to encourage landowners to choose the safest parking options, it is likely to be difficult in many cases to reliably assess which of several parking options was the safest at the time the invitee is directed to park. These considerations include the volume and speed of traffic along the streets in the area, the volume of traffic to and from the landowners' premises and neighboring properties, crime rates and perceptions of safety on the sidewalks, and the location of crosswalks and traffic-control devices. "Although the relative safety of one lot compared to others may sometimes be obvious, it is more typical that a landowner must choose among options with competing advantages and disadvantages, not all of which may be known to the landowner when deciding." Ultimately, the Court determined that the various burdens that might result from imposing a duty weigh against finding a duty.

As to moral blame, it is unclear what effective and affordable ameliorative steps a landowner in the Church's position could have taken, so this factor does not point toward imposing a duty.

With respect to insurance, "Neither party has provided sufficient information to settle the question of insurance one way or the other; we can conclude only that insurance could be available to the landlord, the invitee, and the driver. We find that the insurance factor weighs neither for nor against imposing a duty here."

In sum, the Court found that two of the *Rowland* factors – foreseeability and certainty – weigh in favor of finding a duty, while four – closeness, preventing future harm, burden, and moral blame – weigh against duty, with the insurance factor weighing in neither direction. But the duty analysis requires more than simply counting up factors on either side. "In this case, the policy of preventing future harm looms particularly large. In light of the limited steps the landowner can take to reduce the risk to its invitees, especially when compared to the ability of invitees and drivers to prevent injury, and in light of the possibility that imposing a duty will discourage the landowner from designating options for parking, we hold that a landowner who does no more than site and maintain a parking lot that requires invitees to cross a public street to reach the landowner's premises does not owe a duty to protect those invitees from the obvious dangers of the public street."

This case did not involve allegations that some condition of the premises obscured or magnified the risk of harm, or that the landowner knew or should have known that its invitees included "persons who may not appreciate the danger of the public street, such as unaccompanied children. We express no view on the existence of a duty in such scenarios."

Short(er) takes: Duty of care; prescription-drug warning labels; generic drugs:

T.H. v. Novartis Pharmaceuticals Corp. (2017) __ Cal.5th __ (Cal. Supreme).

Holds that "a brand-name drug manufacturer owes a duty of reasonable care in ensuring that the label includes appropriate warnings, regardless of whether the end user has been dispensed the brand-name drug or its generic bioequivalent. If the person exposed to the generic drug can reasonably allege that

the brand-name drug manufacturer's failure to update its warning label foreseeably and proximately caused physical injury, then the brand-name manufacturer's liability for its own negligence does not automatically terminate merely because the brand-name manufacturer transferred its rights in the brand-name drug to a successor manufacturer."

In *T.H.*, the Court held that the trial court should have overruled the demurrer by Novartis, the manufacturer of the brand-name drug Brethine, who had been sued by two fraternal twins claiming to have been injured by the generic equivalent of Brethine. They alleged that Novartis failed to update its warning label for Brethine, which resulted in a defective warning for the generic drug their mother was prescribed. The Court explained, "Time and again we have recognized how the overall policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible."

A brand-name drug manufacturer is not only in the best position to warn of a drug's harmful effects, it is also the only manufacturer with the unilateral authority under federal law to issue such a warning for the brand-name drug or its generic bioequivalent. Although federal regulations impose a continuing duty on the brand-name manufacturer to update and maintain an adequate warning label, a brand-name manufacturer's incentive to comply with that duty declines once the patent expires and generic manufacturers enter the market, since the market share for the brand-name drug at that point "may drop substantially."

The possibility that any consumer injured by a deficient drug label, including those who were dispensed the generic bioequivalent drug, could assert a claim of warning label liability restores the brand-name manufacturer's incentive to update the warning label with the latest safety information, even as the brand-name drug's market share declines.

The brand-name drug manufacturer is the only entity with the unilateral ability to strengthen the warning label. So a duty of care on behalf of all those who consume the brand-name drug or its bioequivalent ensures that the brand-name manufacturer has sufficient incentive to prevent a known or reasonably knowable harm.

Against the public interest in preventing harm, we must balance the defendant's burden and the consequences to the community of imposing a duty of care. The burden that matters, though, is not the cost of compensating individuals for injuries that the defendant has actually and foreseeably caused. As we recently explained, "shielding tortfeasors from the full magnitude of their liability for past wrongs is not a proper consideration in determining the existence of a duty. Rather, our duty analysis is forward-looking, and the most relevant burden is the cost to the defendants of upholding, not violating, the duty of ordinary care."

Under warning label liability, the brand-name drug manufacturer is liable only in a narrow circumstance – when deficiencies in its own label foreseeably and proximately caused injury. If instead tort law simply carved out those who were given the generic bioequivalent from obtaining otherwise available compensation for injuries attributable to the brand-name drug manufacturer's defective warning label, then consumers would insist on the brand-name drug over the cheaper bioequivalent, inflating health costs with no corresponding increase in safety and in contradiction to the stated federal policy of making low-cost generic drugs more available.


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