

MEMORANDUM

To: Senior Partner Professor Louisa Waldner
From: Junior Associate **Timothy Ducey**
Re: Russell Pratt, file number 2009-27; duty to child trespasser
Date: November 16, 2009

Statement of Facts

On September 10, 2009, Russell Pratt, the six-year-old son of Marlene Pratt, seriously injured himself while playing basketball on the property of Mr. George Dunn. Mr. Dunn owns a freestanding basketball hoop, placed on his driveway, about twenty feet from his garage, and the neighborhood kids sometimes used this hoop for their games. At the time of the accident, Russell and his friends were playing “Stars of the NBA,” a game in which they pretend to be various NBA players through imitation of the players’ moves. Russell, in imitating LeBron James, attempted to jump off a woodpile recently delivered to Mr. Dunn’s property and placed about three feet from the basket. After climbing to the top of the woodpile, Russell started to jump toward the basket when the pile shifted under him, causing him to lose his footing and fall to the ground. Falling on his tailbone, Russell compressed two vertebrae in his back, and the injury forced him to spend several days in hospital. He may require back surgery in the future.

The Pratts live in a residential neighborhood of Chico, CA. There are no fences between the yards, and the houses all have long driveways. Many of the residents of this neighborhood have basketball hoops, and the neighborhood kids use all of them for their games. On the day of the accident, Russell and his friends elected to use Mr. Dunn’s hoop in part because the large woodpile some 12 feet in diameter would allow them to jump toward the basket from an elevated height of about four feet.

Although Mr. Dunn is rarely seen around the neighborhood, he did talk to the neighborhood kids in July of 2009. His young nephew, Jimmy, visiting, Mr. Dunn asked the kids to let Jimmy join them and invited them to use his basketball hoop. Mr. Dunn also has a load of wood delivered every summer, and he spends several days stacking it in a bin in his garage. At the time of the accident, he had yet to commence stacking his wood.

Mrs. Pratt requested Mr. Dunn pay part of the expenses stemming from Russell's injury. In response, Mr. Dunn contends Russell was trespassing at the time of the accident, and, therefore, Mr. Dunn takes no responsibility for Russell's injuries. Mr. Dunn thus refuses Mrs. Pratt's request to help with Russell's medical bills.

Question Presented

Under California common law, did Mr. George Dunn, a landowner, owe Russell Pratt, the six-year-old minor son of Marlene Pratt, a duty to ensure Russell did not injure himself while playing on a potentially dangerous and unsafe woodpile while on Mr. Dunn's private property in spite of the fact Russell was trespassing at the time of the accident?

Brief Answer

Yes, under California common law, Mr. Dunn did owe Russell a duty to ensure he was not injured while on Mr. Dunn's property. It was foreseeable that Russell Pratt and his friends might decide to play on Mr. Dunn's property, and the woodpile could reasonably be foreseen to pose a risk for injury. Furthermore, Russell's status as a trespasser does not eliminate Mr. Dunn's duty to protect Russell from injury.

Discussion

Mrs. Marlene Pratt has a solid case of negligence against Mr. George Dunn relating to the injury of Mrs. Pratt's minor son, Russell. Mrs. Pratt's claim is grounded on the element of duty.

Specifically, this duty can be traced to California Civil Code § 1714(a) which states:

Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought injury upon himself or herself. Cal. Civ. Code § 1714(a) (Lexis current through Ch. 634 of the 2009-2010 Reg. Sess.).

Furthermore, Mr. Dunn's contention Russell trespassed onto Mr. Dunn's property, while potentially legally viable at one time, is no longer sustainable as of the 1968 landmark California Supreme Court decision in the case of *Rowland v. Christian*. In this case, the court held a landowner must act "as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative." *Rowland v. Christian*, 69 Cal. 2d 108, 119 (Cal. 1968). Additionally, *Rowland v. Christian* presented several factors to aid in the determination of landowner duty in conjunction with California Civil Code §1714(a). Chief among these factors was "the foreseeability of harm to the plaintiff." *Rowland*, 69 Cal. 2d at 113. After a thorough review of the facts at hand, it is highly probable it would have been foreseeable for Mr. Dunn to have anticipated Russell Pratt's injury. Thus, Mr. Dunn owed Russell Pratt a duty to prevent the injury Russell sustained while on Mr. Dunn's property.

It is well known at common law that "to establish liability on a negligence theory, a plaintiff must prove duty, breach, causation, and damages." *Conroy v. Regents of University of California*, 45 Cal. 4th 1244 (Cal. 2009). As threshold issues, these elements must be established to bring a case of negligence against a defendant. Given the facts evinced by Mrs.

Pratt, causation and damages are quite clear. The unstable wood of Mr. Dunn's woodpile caused Russell to fall. Russell hit the ground squarely on his tailbone, injuring the vertebrae in his back and requiring extensive medical care. Russell's injuries are unquestionably the damages in this possible negligence claim. What must be further analyzed is whether Mr. Dunn owed Russell a duty to prevent injury when Russell entered upon Mr. Dunn's property. If a duty was owed, it is fair to say Mr. Dunn breached that duty in allowing Russell to injure himself. If no duty was owed by Mr. Dunn, there can be no breach, and thus, no negligence claim is viable.

§1714(a) of the California Civil Code dates to 1872, and while courts have used this civil code section as a basis for duty, the courts have further enunciated the major considerations for duty over time. In the case of *Ann M. v. Pacific Plaza Shopping Center*, the California Supreme Court explained "duty is an allocation of risk determined by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed." *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal.4th 666, 678-679 (Cal. 1993). In *Rowland v. Christian*, the court defined the major factors for determination of the existence of duty as the following:

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. *Rowland*, 69 Cal. 2d at 113.

Of the factors for duty set out in *Rowland v. Christian*, the most important is foreseeability. However, before focusing in depth on foreseeability, the other factors must also be evaluated in light of the facts at hand. The second and third factors ---"degree of certainty that the plaintiff suffered injury" and "the closeness of the connection between the defendant's conduct and the injury suffered"--- are related in that they both concern the injury. *Id.* There is no question Russell Pratt was injured when he fell from Mr. Dunn's woodpile. Russell's hospitalization for two compressed vertebrae and the possibility he may require back surgery in

the future show beyond any doubt he was injured. The third factor is also clear. Had the woodpile not been in Mr. Dunn's yard, Russell would not have climbed on top it and then fallen, causing his injury. Mr. Dunn merely needed to move his wood to his garage to eliminate it as a possible danger. Mr. Dunn's conduct, that is, his lack of action in moving his wood, directly caused Russell's injury, and thus is very closely connected to the injury.

The remaining factors all deal with policy considerations, namely what is in the best interest of the community. Concerning the "moral blame attached to the defendant's conduct," Mr. Dunn does have a moral obligation to ensure the youth of his neighborhood remain healthy and strong. *Id.* All adult citizens of a community have a civic and moral responsibility to assist children. While some adults of any community by choice may not have children or may not become involved in youth activities, all adult members of a community have an obligation to ensure the safety of their city's children. Whether this safe-guarding be through eliminating potential hazards on one's property or watching out for suspicious individuals, the moral obligation adults have to create a safe and healthy environment for youth is ever constant. In breaching his moral obligation and allowing his property to become unsafe for minors, moral blame can be attributed to Mr. Dunn.

"The policy of preventing future harm," is directly related to moral obligation. *Id.* Just as a community has an obligation in the present to keep its youth safe, so too should it keep them safe for the future. It may be cliché, but the youth are the leaders of tomorrow, and a policy of preventing harm to children is always a good thing. If Mr. Dunn is found liable for Russell's injuries, the decision will surely resonate with other members of this community, and they will most likely take action to ensure their property is free of potential hazards that could harm others, children and adults alike.

The next two factors for duty given in *Rowland v. Christian* are “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.” *Id.* Both of these factors relate to costs and burdens imposed upon the defendant and then the community at large. With regard to Mr. Dunn’s burden, as it relates to the facts of the case, he had a burden to make his property safe through removal of his woodpile to a place on his property where it was foreseeable children could not be harmed. This was not an unreasonable burden given that he works on his woodpile every year.

Furthermore, should Mr. Dunn be liable for Russell’s injuries, his burden will also be financial, and the cost could be significant. In evaluating Mr. Dunn’s ability to meet this burden, a thorough analysis of his finances will be necessary. However, from what facts have been given, it seems Mr. Dunn does have reasonable means to pay for items beyond those essential for his well-being. His possession of a basketball hoop and his yearly purchase of a large quantity of wood indicate this. At a minimum, it is foreseeable a payment plan of installments could be established so that Mr. Dunn could meet his liability to assist with Russell’s medical expenses.

Turning from Mr. Dunn to the community at large, the greatest consequence “to the community of imposing a duty to exercise care with resulting liability for breach” would be mainly the serving of a warning. *Id.* Landowners in the Chico area would have a greater understanding of their duty and moral obligation to make their land safe. Most likely, they would monitor their property to ensure no hazardous articles or obstacles were on it. And, should they find a potential danger on their land, they would take steps to eliminate it. For some people, monetary cost might be required to heighten the safety of their land. However, for most individuals, such monetary cost would be nominal when compared to the alternative of possible legal action should a person be injured on their property. For the community at large, a safer

environment would benefit all; the consequences of a duty to exercise care would most assuredly be for the better.

The final factor of landowner duty that must be weighed is “the availability, cost, and prevalence of insurance for the risk involved.” *Id.* Health insurance is very expensive, and children only compound costs for a family. While Mrs. Pratt may have insurance for Russell, it cannot be certain, and furthermore, even if she does, her insurance may not cover all expenses related to Russell’s injuries. It is fair to ask Mr. Dunn, if he is found liable, to assist with any costs Mrs. Pratt may incur for Russell’s medical care.

Having considered the aforementioned factors concerning duty owed by a landowner under *Rowland v. Christian*, the critical factor of “foreseeability of harm to the plaintiff” must now be analyzed. *Id.* The facts will show it was foreseeable that Russell Pratt and his friends would choose to play on Mr. Dunn’s property. In order to determine foreseeability, the court will ask the “degree of care required of a possessor” of land, and the major question to be answered in assessing such care is “the likelihood that persons will be present on the property at a particular time and place.” *Beard v. Atchison, T. & S. F. R. Co.*, 4 Cal. App. 3d 129, 136 (Cal. App. 2nd Dist., Div. 2 1970). Made even more clear, “under *Rowland v. Christian* the extent of a possessor’s duty is controlled by the foreseeability of the risk and not by the status of the person injured.” *Id.* Thus, it matters not whether the injured person is an invitee, licensee, or trespasser. Rather, the question is one of landowner duty, which comes down to foreseeability.

In *Rowland v. Christian*, the court ruled it was foreseeable a social guest invitee would use a property’s facilities and was thus entitled to a warning from the landowner concerning a defective bathroom faucet. *Rowland*, 69 Cal. 2d 108. In this case, James Rowland entered Nancy Christian’s apartment, and, upon using the bathroom, Mr. Rowland suffered a severe hand

injury when using the cracked “knob of the cold water faucet on the bathroom basin.” *Id.* at 110. Miss Christian had not warned Mr. Rowland, but she “alleged contributory negligence and assumption of risk” *Id.* The California Supreme Court used this as an opportunity to clarify and simplify California’s law concerning landowner duty. No longer would the focus be on whether the plaintiff was an invitee, licensee, or trespasser. Rather, the new focus of the law would relate to society’s “increasing regard for human safety,” thus abolishing plaintiff’s assumption of risk, regardless of the plaintiff’s status. *Id.* at 114. The defendant would now have to prove the plaintiff’s assumption of risk, a major departure from prior law. The court held “the proper test to be applied to the liability of the possessor of land in accordance with section 1714 of the Civil Code is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others.” *Id.* at 119. Upon ruling in favor of Mr. Rowland, the court explained “whether or not a guest has a right to expect that his host will remedy dangerous conditions on his account, he should reasonably be entitled to rely upon a warning of the dangerous condition so that he, like the host, will be in a position to take special precautions when he comes in contact with it.” *Id.*

Since 1968, numerous subsequent cases have applied the rules set forth in *Rowland v. Christian*. In *Beard v. Atchison, Topeka and Santa Fe Railway Company*, the court considered foreseeability, assumption of risk, and contributory negligence as they related to a minor who was hit by a train. *Beard v. Atchison, T. & S. F. R. Co.*, 4 Cal. App. 3d 129. In this personal injury case, plaintiff Alfred Beard, a 14-year-old minor, lost both of his legs when he was run over by a moving train as he attempted to climb aboard. The plaintiff argued foreseeability of risk existed because “the railroad knew, or should have known, that children regularly hopped rides at this particular location and negligently failed to take action to prevent such activity,

either by maintaining a better lookout on the train or a stricter police of its right-of-way.” *Id.* at 137. The court ruled the plaintiff’s argument “could qualify as proof of actionable negligence under section 1714.” *Id.* at 137.

Furthermore, in *Beard v. Atchison, T. & S. F. R. Co.*, the court considered assumption of risk as it related to the new rules set forth in *Rowland v. Christian*. The court found “under the new rule, proof of trespass no longer creates a presumption that the trespasser took the property as he found it, and a trespassing adult need not rebut the presumption that he assumed the risk of the possessor’s negligence in going upon the property. A fortiori, a trespassing child is entitled to the benefit of the same rule.” *Beard*, 4 Cal. App. 3d at 136-137. Thus, neither an adult nor a child needed to prove assumption of risk when entering upon another’s property. Alfred Beard, a minor, thus did not have to assume any risk when he attempted to board the train that severed his legs.

Finally, regarding contributory negligence in the case of Alfred Beard, the court ruled “it was for the jury to decide whether the plaintiff in light of his age, intelligence, and experience was negligent in hopping on the train.” *Id.* at 141.

In *Isaacs v. Huntington Memorial Hospital*, the California Supreme Court also considered foreseeability in light of *Rowland v. Christian* when a doctor was shot in his hospital’s research parking lot. *Isaacs v. Huntington Memorial Hospital*, 38 Cal. 3d 112 (Cal. 1985). The doctor in this case asserted that even though no prior criminal activity had occurred in the parking lot area, the hospital was nonetheless negligent because it failed to provide adequate security given the hospital was located in a high crime area. The court, in utilizing *Rowland v. Christian* held “while prior similar incidents are helpful to determine foreseeability, they are not required to establish it.” *Isaacs*, 38 Cal. 3d at 135.

Applying the precedent cases to the facts at hand in the matter of Russell Pratt's injury, it is very clear Mr. Dunn owed Russell a duty as a landowner to ensure Russell's safety. Because Mr. Dunn lives in a neighborhood in which many children also live, it is certainly foreseeable that children will play in the areas near his property. As he had invited the neighborhood kids to use his basketball hoop when his nephew visited, it could also be reasonably inferred by the children such an invitation was an open invitation to use Mr. Dunn's property in the future. Even if the children were trespassing, as Mr. Dunn claims they were, under *Rowland v. Christian*, the children's status as trespassers does not factor into whether Mr. Dunn owed the children, and specifically Russell, a duty to ensure safety. Rather, it must be asked whether Mr. Dunn, in accordance with Civil Code §1714(a) "acted as a reasonable man in view of the probability of injury to others." *Rowland*, 69 Cal. 2d at 119. Clearly, Mr. Dunn did not act reasonably as he failed to foresee minors might be interested in using his basketball hoop. Furthermore, Mr. Dunn did not consider his woodpile would prove very exciting to the kids as they could jump off it towards the basket. He had a duty to remove the wood, and he did not.

Additionally, the fact that there were no prior accidents on Mr. Dunn's property involving the neighborhood youth did not preclude Mr. Dunn from his landowner duty. As shown in *Isaacs v. Huntington Memorial Hospital*, "prior similar incidents...are not required to establish it [foreseeability]" *Isaacs*, 38 Cal. 3d 112 at 135. The fact that children were playing in his neighborhood should have been enough of a warning for Mr. Dunn to anticipate they might use his property in the future. A duty was owed.

In response to the claim he owed the neighborhood children a duty to keep his property safe, Mr. Dunn may assert assumption of risk and contributory negligence. However, as ruled in *Rowland v. Christian* and applied in *Beard v. Atchison, T. & S. F. R. Co.*, risk no longer need be

assumed when one enters onto the property of another because a landowner owes a duty to anyone entering upon his or her property under Civil Code §1714(a) as applied in *Rowland v. Christian*. And, in response to the contributory negligence claim, a jury will most likely determine it was beyond the “age, intelligence, and experience” of Russell Pratt to understand he was acting negligently when he climbed to the top of Mr. Dunn’s woodpile and attempted to jump toward the basket. *Beard*, 4 Cal. App. 3d at 141.

Thus, because it was foreseeable that children might play on his property, particularly because of his basketball hoop and his woodpile, Mr. George Dunn, as a landowner, owed Russell Pratt and his friends a duty to ensure Mr. Dunn’s property was safe.

Conclusion

“Duty is an allocation of risk determined by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed.” *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal.4th 666, 678-679. It is very clear Mr. George Dunn, a landowner, owed Russell Pratt, a minor, a duty to ensure Mr. Dunn’s property was safe. Under California Civil Code §1714(a) and the rules established in the 1968 California Supreme Court Case of *Rowland v. Christian*, a landowner must “act as a reasonable man in view of the probability of injury to others” regardless of whether one is an invitee, licensee, or trespasser upon another’s property. *Rowland*, 69 Cal. 2d at 119. Mr. Dunn did not act reasonably in electing to not remove his woodpile. The burden on Mr. Dunn to remove his wood was light. The foreseeability of harm, especially to minors, on his property was great. Mr. Dunn had a moral and social responsibility to make his property safe. He did not take responsibility. His negligence, his lack of duty, caused a severe injury, and Mrs. Marlene Pratt should be able to recover medical expenses from Mr. Dunn relating to Russell Pratt’s injury sustained while on Mr. George Dunn’s property.

