OWNERS AND OCCUPIERS OF LAND

120.00
PREMISES

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INTRODUCTION

Over the past several years the committee has been working on streamlining the jury instructions and working to reduce redundancy. It was the committee's belief that one area of redundancy was the wording of the issues and burden of proof instructions. By combining these two instructions, the committee felt that redundancy would be reduced.

The premises instruction(s) are the first series to incorporate the new format of combined issue and burden of proof instructions.

Further, the effects of the jury's finding have been removed from the issues/burden of proof instruction and have been segmented into different components depending upon the state of the pleadings. Rather than have the committee try and draft instructions for every possible permutation or combination of affirmative defense, counter-claim, cross-claim or third-party claim, the "effects of finding" have been broken into their individual components and can be combined by the attorney as the parties appear before the court. Sample combinations to illustrate how the components go together are shown in IPI 128.04.

Under Illinois law, the duty owed by an owner or occupier of land to a third person depends upon that person's legal status. Prior to September 12, 1984, the effective date of the Premises Liability Act, 740 ILCS 130/1 et seq., non-trespassing visitors on land were divided into two categories, licensees and invitees. Section 2 of the Act abolished this distinction, as follows:

> §2. The distinction under the common law between invitees and licensees as to the duty owed by an owner or occupier of any premises to such entrants is abolished.
>
> The duty owed to such entrants is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them.

The Act applies to occurrences on and after September 12, 1984, and is not retroactive. Lorek v. Hollenkamp, 144 Ill.App.3d 1100, 495 N.E.2d 679, 681-82, 99 Ill.Dec. 232, 233-34 (2d Dist.1986); Grimwood v. Tabor Grain Co., 130 Ill.App.3d 708, 474 N.E.2d 920, 922-23, 86 Ill.Dec. 6, 8-9 (3d Dist.1985). The Act does not change the legal duty owed trespassers (§3) or users of certain recreational facilities (§4) as defined by 740 ILCS 130/1-130/5 (1994). Invitees become trespassers when they exceed the scope of the invitation. Cockerell v. Koppers Indus., Inc., 281 Ill.App.3d 1099, 1104, 667 N.E.2d 676, 680, 217 Ill.Dec. 587 (1st Dist.1996) (workers

strayed from the intended area); Briney v. Ill. Ctr. R.R. Co., 401 Ill. 181, 188, 190, 81 N.E.2d 866 (1948) (no invitation from caboose crew to boys to throw railroad switches).

Genaust v. Ill. Power Co., 62 Ill.2d 456, 343 N.E.2d 465 (1976), adopted §343 of the *Restatement (Second) of Torts* as the law governing landowner liability for negligence. The *Restatement* provides that a land possessor is liable for conditions of the land only if he:

> (1) Knows or in the exercise of reasonable care would discover the condition and should realize that the condition involves an unreasonable risk of harm to those on the land, and
>
> (2) Should expect that such persons will not discover or realize the danger, or will fail to protect themselves against it, or
>
> (3) Fails to exercise reasonable care to protect those lawfully on this land.

See also Sollami v. Eaton, 201 Ill.2d 1, 772 N.E.2d 215, 265 Ill.Dec. 177 (2002); Longnecker v. Ill. Power Co., 64 Ill.App.3d 634, 381 N.E.2d 709, 713-14, 21 Ill.Dec. 382, 385-87 (5th Dist.1978); Chapman v. Foggy, 59 Ill.App.3d 552, 375 N.E.2d 865, 16 Ill.Dec. 758 (5th Dist.1978).

As a general rule, a landowner has no duty to warn of open and obvious conditions. Genaust v. Ill. Power Co., *supra* (electricity); Bucheleres v. Chi. Park Dist., 171 Ill.2d 435, 665 N.E.2d 826, 216 Ill.Dec. 568 (1996) (body of water); Sepesy v. Archer Daniels Midland Co., 97 Ill.App.3d 868, 423 N.E.2d 942, 53 Ill.Dec. 273 (4th Dist.1981) (trucks poised on an inclined ramp). Whether a particular condition on defendant's property served as sufficient notice of its presence so as to be "open and obvious" may present a question of fact. Am. Nat'l Bank & Trust Co. of Chi. v. Nat'l Adver. Co., 149 Ill.2d 14, 594 N.E.2d 313, 171 Ill.Dec. 461; Simmons v. Am. Drug Stores, Inc., 329 Ill.App.3d 38, 768 N.E.2d 46, 263 Ill.Dec. 286 (1st Dist.2002); Pullia v. Builders Square, Inc., 265 Ill.App.3d 933, 939, 638 N.E.2d 688, 693, 202 Ill.Dec. 820 (1st Dist.1994). In Ward v. Kmart Corp., 136 Ill.2d 132, 147-48, 554 N.E.2d 223, 320, 143 Ill.Dec. 288 (1990), the Supreme Court rejected a "per se" open and obvious rule and adopted an exception described in *Restatement (Second) of Torts*, §343A. Under this "distraction exception," if the owner has reason to suspect that guests or workers may not appreciate the danger because they are distracted or preoccupied, the owner has a duty of reasonable care. In Ward, carrying a large mirror distracted the plaintiff, preventing him from seeing a concrete post located near a doorway. *Ward*, 136 Ill.2d at 135-39. In Deibert v. Bauer Bros. Constr. Co., Inc., 141 Ill.2d 430, 433, 488, 566 N.E.2d 239, 240, 243, 152 Ill.Dec. 552 (1990), the Supreme Court applied the distraction exception to circumstances in which the plaintiff had failed to look at the ground he was walking on. In Menough v. Woodfield Gardens, 296 Ill.App.3d 244, 249, 694 N.E.2d 1038, 1042, 230 Ill.Dec. 760 (1st Dist.1998), the exception applied where playing basketball distracted the plaintiff from seeing the protruding base supporting the basket.

The second exception described in *Restatement (Second) of Torts* §343A, is the "deliberate encounter" exception. A duty to warn of an open and obvious danger exists where the owner may reasonably expect the person to encounter the danger, if the advantages of proceeding outweigh the apparent risk. The standard used is that of a reasonable person in the same position

as the possessor of the premises. LaFever v. Kemlite Co., 185 Ill.2d 380, 391, 396, 706 N.E.2d 441, 448, 450, 235 Ill.Dec. 886 (1998). The plaintiff in LaFever slipped on debris near a dumpster on the defendant's property, despite the fact that he knew the materials near the dumpster posed a hazard. His job entailed emptying the dumpster, necessitating that he encounter the waste. *LaFever*, 185 Ill.2d at 386. Unless one of these exceptions is found to apply, the law does not impose a duty to warn of open and obvious dangers. Sollami v. Eaton, 201 Ill.2d 1, 772 N.E.2d 215, 265 Ill.Dec. 177 (2002).

The "notice" requirement of *Restatement* §343 has long been recognized in Illinois. The property owner or occupier must have either "actual" or "constructive" notice of the dangerous condition to impose liability. Sparling v. Peabody Coal Co., 59 Ill.2d 491, 322 N.E.2d 5, 9-10 (1974); Perminas v. Montgomery Ward & Co., 60 Ill.2d 469, 328 N.E.2d 290 (1975). Without evidence that the owner knew or should have discovered the condition had he exercised ordinary care, liability cannot be imposed. Kostecki v. Pavlis, 140 Ill.App.3d 176, 488 N.E.2d 644, 646, 94 Ill.Dec. 645, 647 (1st Dist.1986); Hresil v. Sears Roebuck & Co., 82 Ill.App.3d 1000, 403 N.E.2d 678, 38 Ill.Dec. 447 (1st Dist.1982); Clarke v. Rural Electric Convenience Coop. Co., 110 Ill.App.3d 259, 442 N.E.2d 278, 280-81, 66 Ill.Dec. 6, 8-9 (4th Dist.1982).

Case law departs from the "notice" requirement of *Restatement* §343 when the plaintiff shows, through direct or circumstantial evidence, that the dangerous condition arose from the defendant's acts or as part of his business. Reed v. Walmart Stores, Inc., 298 Ill.App.3d 712, 233 Ill.Dec. 111, 700 N.E.2d 212 (4th Dist.1998). In Reed, the court indicated that an action may be based upon either ordinary negligence or premises liability-or both. In determining that the plaintiff in Reed was not required to prove notice, the court stated that "plaintiffs are masters of their complaint and are entitled to proceed under whichever theory they decide, so long as the evidence supports such a theory." *Id.* at 717-18 *see also* Piper v. Moran's Enters., 121 Ill.App.3d 644, 652, 459 N.E.2d 1382, 77 Ill.Dec. 133 (5th Dist.1984) (grocery patron fell after catching her foot in the slats of a pallet while trying to reach a carton of soda stacked at its rear); Donoho v. O'Connell's, 13 Ill.2d 113, 122, 148 N.E.2d 434 (1958) (slip and fall involving a piece of grilled onion at a restaurant); Rutzen v. Pertile, 172 Ill.App.3d 968, 979, 527 N.E.2d 603, 123 Ill.Dec. 140 (2d Dist.1988) (foot went through board on pier used by boating patrons of supper club). In such cases, the landowner owes a duty of exercising ordinary care for the safety of those lawfully on his property. Piper v. Moran's Enters., *supra*; Rutzen v. Pertile, *supra*; Donoho v. O'Connell's, Inc., *supra*.

An owner owes no duty to a trespasser for the condition of the premises, until the trespasser's presence on the land is either known or should be known, after which the owner has a duty not to cause injury willfully or wantonly. Morgan v. N.Y. Cent. R.R., 327 Ill. 339, 344, 158 N.E. 724, 726 (1927). If, however, the property owner knew or should have known that an artificial condition on his property presented a risk of death or serious bodily injury, and if the owner knew of, or had reason to anticipate, the presence of trespassers in dangerous proximity to the hazard, then the property owner had a duty to exercise ordinary care to warn of the condition. Lee v. Chi. Transit Auth., 152 Ill.2d 432, 605 N.E.2d 493, 178 Ill.Dec. 699 (1992) (applying the *Restatement (Second) of Torts* §337). In addition, if the owner knew or should have known that the trespasser was in a position where the owner's activities could endanger the trespasser, then the owner has a duty of ordinary care to avoid injuring others from those activities. Votava v.

Material Serv. Corp., 74 Ill.App.3d 208, 392 N.E.2d 768, 771-72, 30 Ill.Dec. 113, 116-17 (2d Dist.1979).

A final area is the landowner or occupier's potential liability for injury to trespassing children. Kahn v. James Burton Co., 5 Ill.2d 614, 126 N.E.2d 836 (1955), rejected imposing strict liability on landowners under the common law doctrine of “attractive nuisance,” and in its place recognized a negligence cause of action based upon the foreseeability of risk to children on the premises and the relative expense in remedying dangerous conditions. Such actions could be maintained regardless of whether the injured child was lawfully on the premises. *See* IPI 120.10. Later cases continue to recognize that the duty owed to children is essentially a negligence concept and has based liability on the foreseeability of injury to children. Corcoran v. Village of Libertyville, 73 Ill.2d 316, 325-26, 383 N.E.2d 177, 22 Ill.Dec. 701 (1978); Mt. Zion State Bank & Trust v. Consol. Commc'ns, Inc., 169 Ill.2d 110, 660 N.E.2d 863, 214 Ill.Dec. 156 (1995). The landowner has no duty, however, to protect children from obvious risks that they would be expected to appreciate and avoid. Cope v. Doe, 102 Ill.2d 278, 286, 464 N.E.2d 1023, 80 Ill.Dec. 40 (1984) (thin ice on a pond); *Mt. Zion*, 169 Ill.2d at 120, 660 N.E.2d at 870, 214 Ill.Dec. at 165 (an above ground pool); Logan v. Old Enter. Farms, Ltd., 139 Ill.2d 229, 241, 564 N.E.2d 778, 784, 151 Ill.Dec. 323 (1990) (climbing a tree); Bucheleres v. Chi. Park Dist., 171 Ill.2d 435, 455, 665 N.E.2d 826, 216 Ill.Dec. 568 (1996) (diving into a large body of water with fluctuating water levels and bottom composition). Where a child is harmed not by the owner, but by the acts of another trespasser, ordinary negligence rules apply. *Mt. Zion*, 169 Ill.2d at 124.

This chapter deals only with the liability of the owner or occupier of land for conditions on his premises. It can be used in conjunction with the instruction on liability for falls on snow and ice. (IPI 125.01).

120.01 Trespasser--Definition

A trespasser is a person who goes upon the premises of another without express or implied right. [A person can become a trespasser by going (beyond an area where he/she was invited) (into an area where he/she was not invited).]

Notes on Use

For trespassing children, refer to IPI 120.05 and IPI 120.10, as well as the Comment below.

Use the bracketed section if there is an issue concerning the scope of the invitation or the right of the plaintiff to go beyond a limited area. If there is an issue as to the scope of the invitation or permission, refer to IPI 120.06 in addition to this instruction.

Comment

A trespasser is one who enters the premises of another without permission, or without express or implied invitation. *Restatement (Second) of Torts* §329 (1965); Ill. Cent. R.R. Co. v. Eicher, 202 Ill. 556, 560, 67 N.E. 376, 378 (1903); Grimwood v. Tabor Grain Co., 130 Ill.App.3d 708, 711-12, 474 N.E.2d 920, 922, 86 Ill.Dec. 6, 8-9 (3d Dist.1985). The court in Trout v. Bank of Belleville, 36 Ill.App.3d 83, 87, 343 N.E.2d 261 (5th Dist.1976), cited IPI 120.01 and defined "trespasser" as one who enters property "without permission, invitation, or other right, and intrudes for some purpose of his own, or at his convenience, or merely as an idler." Trout v. Bank of Belleville, 36 Ill.App.3d 83, 87, 343 N.E.2d 261, 264-65 (5th Dist.1976) (citing 62 Am. Jur. 2d, *Premises Liability* (1972) and IPI). A trespasser is also someone who, after being invited upon the premises, goes to another area beyond the scope of the invitation. Cockrell v. Koppers Indus., Inc., 281 Ill.App.3d 1099, 1104, 667 N.E.2d 676, 680, 217 Ill.Dec. 587 (1st Dist.1996) (workers straying from the intended worksite are trespassers). Whether a person is a trespasser or someone lawfully on the premises is a question for the jury. Eshoo v. Chi. Transit Auth., 309 Ill.App.3d 831, 836, 723 N.E.2d 339, 343, 243 Ill.Dec. 307 (1st Dist.1999) (finding a jury should determine whether a fare-paying passenger, who left an "el" platform to urinate on the tracks, was a trespasser).

Lee v. Chi. Transit Auth., 152 Ill.2d 432, 605 N.E.2d 493, 178 Ill.Dec. 699 (1992), provides an exception that changes an owner's duty to a trespasser. Prior to Lee, a landowner or occupier owed a trespasser the duty of not willfully or wantonly causing injury. Marcovitz v. Hergenrether, 302 Ill. 162, 167, 134 N.E. 85, 88, (1922); Votava v. Material Serv. Corp., 74 Ill.App.3d 208, 212, 392 N.E.2d 768, 771, 30 Ill.Dec. 113 (2d Dist.1979). Lee altered this traditional rule, by imposing a duty of ordinary care to trespassers who are known or should be known to the owner. The Illinois Supreme Court reached this decision through the following analysis. The *Restatement (Second) of Torts* §337 imposes liability on owners for highly dangerous, artificial conditions, which endanger known trespassers. For a duty of ordinary care to apply under §337, the owner or occupier must know, or have reason to know, of the trespasser's presence. The *Restatement* defines "reason to know," in §12, as having "information from which a person of reasonable intelligence ... would infer that the fact in question exists." *Lee*, 152 Ill.2d

at 448. The Lee court determined that the record showed reasonable anticipation by the CTA of a trespasser's presence, therefore an ordinary duty of care applied. *Id*. at 449, 452. The court noted that §337, *comment a*, did not render the "reason to know" requirement inapplicable. In support, the court turned to an Arizona Supreme Court case, Webster v. Culbertson, 158 Ariz. 159, 761 P.2d 1063 (1988) (barbed wire stretched across land used by trespassing equestrians). *Webster*, 158 Ariz. at 161. The Webster court determined that the "actual notice" requirement of *comment a* did not trump the "reason to know" requirement of §337. *Id*. The result was that, as the Lee court noted, "the [Webster court] placed a duty to warn on a person who maintains a dangerous artificial condition when the person is aware of the possibility that others will come into dangerous proximity of the condition." *Lee*, 152 Ill.2d at 451.

An owner's duty to trespassing children is somewhat unique. Illinois rejects strict liability under the "attractive nuisance" doctrine and instead places a duty on the landowner or occupier based upon the foreseeability of risk to the trespassing child. *See* IPI 120.10; *Restatement (Second) of Torts* §339 (1965); Kahn v. James Burton Co., 5 Ill.2d 614, 622, 126 N.E.2d 836, 840 (1955); Corcoran v. Village of Libertyville, 73 Ill.2d 316, 325-26, 383 N.E.2d 177, 180, 22 Ill.Dec. 701 (1978); Mt. Zion State Bank & Trust v. Consol. Commc'ns, Inc., 169 Ill.2d 110, 116, 120, 660 N.E.2d 863, 868, 869, 214 Ill.Dec. 156 (1995). The landowner has no duty, however, to protect trespassing children from obvious risks they would be expected to appreciate and avoid. *See, e.g., Mt. Zion*, 169 Ill.2d at 120, 660 N.E.2d at 870, 214 Ill.Dec. at 165 (an above ground pool).

Policemen, firemen and other public officials, entering the premises in their official capacity, are not considered trespassers and are owed a duty of ordinary care as to the condition of the premises. Dini v. Naiditch, 20 Ill.2d 406, 417, 170 N.E.2d 881 (1960); Fancil v. Q.S.E. Foods, Inc., 60 Ill.2d 552, 556-57, 328 N.E.2d 538, 540-41 (1975) (applying *Restatement (Second) of Torts* §§345, 343 (1965)); Horn v. Urban Inv. & Dev. Co., 166 Ill.App.3d 62, 66, 519 N.E.2d 489, 491, 116 Ill.Dec. 597 (2d Dist.1988). The "fireman's rule," however, absolves the owner of liability, where the owner owes no duty to the fireman or policeman for the fire or criminal activity necessitating their presence on the premises. These are viewed as inherent risks of those occupations. Washington v. Atlantic Richfield Co., 66 Ill.2d 103, 108, 361 N.E.2d 282, 285, 5 Ill.Dec. 143 (1976); Court v. Grzelinski, 72 Ill.2d 141, 379 N.E.2d 281, 19 Ill.Dec. 617 (1978). The fireman's rule subsumes the deliberate encounter exception outlined in LaFever v. Kemlite Co., 185 Ill.2d 380, 706 N.E.2d 441, 235 Ill.Dec. 886 (1998) as the nature of a fireman's job is deliberately to encounter certain dangers that are known to them to be inherent in their job. Smithers v. Ctr. Point Props. Corp., 318 Ill.App.3d 430, 741 N.E.2d 1152, 251 Ill.Dec. 974 (1st Dist. 2000). An owner or possessor protected by the fireman's rule owes no duty to the plaintiff and may not be liable, even potentially, for the plaintiff's injury or wrongful death. Vroegh v. J & M Forklift, 165 Ill.2d 523, 531, 651 N.E.2d 121, 126, 209 Ill.Dec. 193 (1995). The Second District in Zimmerman v. Fasco Mills Co., 302 Ill.App.3d 308, 704 N.E.2d 949, 35 Ill.Dec. 376 (2d Dist.1998) found that the fireman's rule does not protect an owner from a risk that is unreasonable and unknown to the firefighter and held the fireman's rule inapplicable to the specific facts of the case. In Hedberg v. Mendino, 218 Ill.App.3d 1087, 1090-91, 579 N.E.2d 398, 399, 161 Ill.Dec. 850 (2d Dist.1991), the Second District declined to extend the fireman's rule to a situation where a police officer tripped on a broken sidewalk while responding to a call

about a prowler. The Second District noted that the police officer was injured by a cause independent of the emergency he was investigating. *Hedberg*, 218 Ill.App.3d at 1093.

120.02 Duty To An Adult Lawfully On The Property--Condition Of Property

It was the duty of [defendant's name], as an (owner) (occupier) (other) of the property in question, to exercise ordinary care to see that the property was reasonably safe for the use of those lawfully on the property.

Notes on Use

This instruction is to be used if the injury is to an adult lawfully on the premises. Use this instruction if the injury was caused by the condition of the premises. This instruction should also be used if the injury was caused by the condition of property owned or occupied by a local public entity. See Wojdyla v. City of Park Ridge, 209 Ill.App.3d 290, 293, 568 N.E.2d 144, 145, 154 Ill.Dec. 144 (1st Dist.1991). If the plaintiff is alleging an activity of the owner caused the injury, use the appropriate instructions for a negligence case. See Reed v. Wal-Mart Stores, Inc., 298 Ill.App.3d 712, 700 N.E.2d 212, 233 Ill.Dec. 111 (4th Dist.1998).

This instruction and IPI 120.03 should be combined in three paragraphs if there is a question of fact as to whether the plaintiff was a trespasser. Begin with this instruction, IPI 120.02, and add IPI 120.03 as the second and third paragraphs. IPI 120.01, the definition of a trespasser, should also be given.

Comment

The Illinois Supreme Court adopted §343 of the *Restatement (Second) of Torts* governing landowner liability for negligence in Genaust v. Illinois Power Co., 62 Ill.2d 456, 343 N.E.2d 465 (1976). The *Restatement* provides that a land possessor is liable for conditions of the land if he fails to exercise reasonable care to protect those lawfully on the land. However, as a general rule, a landowner has no duty to warn of open and obvious conditions. Sepesy v. Archer Daniels Midland Co., 97 Ill.App.3d 868, 423 N.E.2d 942, 53 Ill.Dec. 273 (4th Dist.1981). Whether or not a condition is open and obvious may present a question of fact. Am. Nat'l Bank & Trust Co. of Chi. v. Nat'l Adver. Co., 149 Ill.2d 14, 594 N.E.2d 313, 171 Ill.Dec. 461 (1992); Simmons v. Am. Drug Stores, Inc., 329 Ill.App.3d 38, 768 N.E.2d 46, 263 Ill.Dec. 286 (1st Dist.2002); Pullia v. Builders Square, Inc., 265 Ill.App.3d 933, 939, 638 N.E.2d 688, 202 Ill.Dec. 820 (1st Dist.1994). There are two exceptions to the open and obvious rule: the “distraction exception” set forth in Ward v. Kmart Corp., 136 Ill.2d 132, 147-48, 554 N.E.2d 223, 143 Ill.Dec. 288 (1990), and the “deliberate encounter exception” set forth in LaFever v. Kemlite Co., 185 Ill.2d 380, 391, 706 N.E.2d 441, 235 Ill.Dec. 886 (1998). Under the “distraction exception,” if the owner has reason to suspect that guests or workers may not appreciate the danger because they are distracted or preoccupied, the owner has a duty of reasonable care. In Ward, carrying a large mirror distracted the plaintiff, preventing him from seeing a concrete post located near a doorway. *Ward*, 136 Ill.2d at 135-39. In Deibert v. Bauer Bros. Constr. Co., Inc., 141 Ill.2d 430, 433, 566 N.E.2d 239, 240, 243, 152 Ill.Dec. 552 (1990), the court applied the distraction exception to circumstances in which the plaintiff had failed to look at the ground he was walking on. In Menough v. Woodfield Gardens, 296 Ill.App.3d 244, 249, 694 N.E.2d 1038, 1042, 230 Ill.Dec. 760 (1st Dist.1998), the exception applied where playing basketball distracted the

plaintiff from seeing the protruding base supporting the basket. Under the deliberate encounter exception outlined in LaFever, a landowner has a duty to warn of an open and obvious danger where the landowner may reasonably expect a reasonable person to encounter the danger given that the advantages of proceeding outweigh the apparent risk. The standard used for the reasonable expectation is that of a reasonable person in the same position as the possessor of the premises. *LaFever* at 396.

120.03 Duty To Adult Trespasser--Condition Of Property

It was the duty of [defendant's name], as an (owner) (occupier) (other) of the property in question, to refrain from willful and wanton conduct which would endanger the safety of (a) trespasser(s) on the property.

[However, if [defendant's name], knew of, or reasonably should have anticipated, the presence of [a] trespasser(s) where a condition on [defendant's name] property presented a risk of death or serious bodily injury and that the trespasser(s) would not discover or realize the risk involved, then [defendant's name] had a duty to exercise ordinary care to warn of that condition.]

Notes on Use

This instruction is to be used if the injury is to an adult trespasser on the landowner's premises. The last bracketed sentence should be used when there is an issue of negligently failing to warn a trespasser. See Comment below.

If the trespasser is a child, use IPI 120.05 and IPI 120.1.

Comment

A trespasser is one who enters the premises of another without permission or without express or implied invitation or one who goes beyond the scope of his invitation onto the premises. While a landowner or occupier does not owe a duty to a trespasser to see that the premises are safe for his use, (*See* Marcovitz v. Hergenrether, 302 Ill. 162, 167, 134 N.E. 85, 87-88 (1922); Smith v. Goldman, 53 Ill.App.3d 632, 368 N.E.2d 1052, 11 Ill.Dec. 444 (2d Dist.1977), a landowner or occupier owes a duty to trespassers to refrain from willful and wanton conduct. Bofman v. Material Serv. Corp., 125 Ill.App.3d 1053, 1064, 466 N.E.2d 1064, 1072-73, 82 Ill.Dec. 262, 270-71 (1st Dist.1984). If, however, a property owner knew or should have known that an artificial condition on his property presented a risk of death or serious bodily injury, and if the owner knew of or had reason to anticipate the presence of trespassers in dangerous proximity to the hazard, then the property owner had a duty to exercise ordinary care to warn of the condition. Lee v. Chi. Transit Auth., 152 Ill.2d 432, 605 N.E.2d 493, 178 Ill.Dec. 699 (1992), applying the *Restatement (Second) of Torts* §337. For a duty of ordinary care to apply under §337 of the *Restatement (Second) of Torts*, the landowner or occupier must know, or have reason to know of the trespasser's presence. As the Lee Court noted, “reason to know” is defined under the *Restatement* as having “information from which a person of ‘reasonable intelligence would infer that the fact in question exists.’ ” *Lee* 152 Ill. 2d at, 448. Policemen, firemen, and other public officials entering premises in their official capacity are not considered trespassers and are owed a duty of ordinary care as to the condition of the premises. Dini v. Naiditch, 20 Ill.2d 406, 417, 170 N.E.2d 881 (1960); Fancil v. Q.S.E. Foods, Inc., 60 Ill.2d 552, 556-57, 328 N.E.2d 538, 540-41 (1975) (applying *Restatement (Second) of Torts* §§345, 343 (1965)); Horn v. Urban Inv. & Dev. Co., 166 Ill.App.3d 62, 66, 519 N.E.2d 489, 491, 116 Ill.Dec. 597 (2d Dist.1988). Given that the nature of a fireman's job is to deliberately encounter certain dangers that are known to them to be inherent in their job, landowners owe no duty to

firemen as to the hazards inherent in fire fighting. Smithers v. Ctr. Point Props. Corp., 318 Ill.App.3d 430, 741 N.E.2d 1152, 251 lll.Dec. 974 (1st Dist.2000).

120.04 Duty To Children Lawfully On Property--Condition Of Property

It was the duty of [defendant's name], as an (owner) (occupier) (other) of the property in question, to exercise ordinary care to see that the property was reasonably safe for the use of children lawfully on the property.

Notes on Use

This instruction is to be used if the injury is to a non-trespassing child on the premises. In addition to this instruction, use IPI 120.08. The duty stated here is the same as IPI 120.02, which applies to all persons lawfully on the premises. The purpose of this instruction is to distinguish between the duty to trespassing children and the duty to children lawfully on the premises.

If the child is a trespasser, use IPI 120.05 and IPI 120.10.

Comment

Ordinary negligence concepts are used in a case involving children lawfully on the property.

120.05 Duty To Trespassing Children--Condition Of Property

If [defendant's name], an as (owner) (occupier) (other) of the property in question knew of or reasonably should have anticipated the presence of [a child] [children] near a condition on [defendant's name] property which presented a risk of injury which children would not appreciate, and where the expense or inconvenience of remedying the condition is slight compared to the risk, then the (owner) (occupier) (other) has a duty to remedy the condition or protect children from injury resulting from the condition.

Notes on Use

Use IPI 120.10 in addition to this instruction for injury caused by condition of property to trespassing children. Combine the appropriate instructions from the 128.20 series. If contributory negligence is an issue, use IPI 128.02 and the appropriate instruction from the 11 series; if there is no issue of contributory negligence, use IPI 128.01.

Comment

The duty owed to a trespassing child injured as a result of a condition of a landowner's or occupier's property was outlined in Kahn v. James Burton Co., 5 Ill.2d 614, 126 N.E.2d 836 (1955). In Kahn, the Illinois Supreme Court departed from the traditional strict liability "attractive nuisance" doctrine imposed upon landowners and occupiers of property, and instead, recognized a negligence cause of action based upon the foreseeability of risk to children on the premises and the relative expense in remedying dangerous conditions. The court in Mt. Zion State Bank & Trust v. Consol. Commc'ns, Inc., 169 Ill.2d 110, 660 N.E.2d 863, 214 Ill.Dec. 156 (1995), said that the attractive nuisance doctrine, although abandoned, retained utility in analyzing duty. The court held: "That an attraction or allurement existed on the land is significant insofar as it indicates that the trespass should have been anticipated." *Mt. Zion*, 169 Ill.2d at 118. Illinois case law, following Kahn, embraced the principle that a duty owed to trespassing children is essentially a negligence concept based upon the foreseeability of injury to children balanced against the relative expense in remedying dangerous conditions. Corcoran v. Village of Libertyville, 73 Ill.2d 316, 325-26, 383 N.E.2d 177, 22 Ill.Dec. 701 (1978); Mt. Zion State Bank & Trust v. Consol. Commc'ns, Inc., *supra*. However, a landowner's liability to a trespassing child is not absolute. A landowner or occupier has no duty to protect trespassing children from obvious risks that a child would be expected to appreciate and avoid. Cope v. Doe, 102 Ill.2d 278, 286, 464 N.E.2d 1023, 80 Ill.Dec. 40 (1984) (thin ice on a pond); *Mt. Zion*, 169 Ill.2d at 120 (an above ground pool); Logan v. Old Enter. Farms, Ltd., 139 Ill.2d 229, 241, 564 N.E.2d 778, 784, 151 Ill.Dec. 323 (1990) (climbing a tree); Bucheleres v. Chi. Park Dist., 171 Ill.2d 435, 455, 665 N.E.2d 826, 216 Ill.Dec. 568 (1996) (diving into a large body of water with fluctuating water levels and bottom composition).

120.06 Duty To Persons On Premises--Scope Of Invitation--Condition Of Premises

It was the duty of defendant, [defendant's name], as an (owner) (occupier) (other) of the property in question, to exercise ordinary care to see that the property was reasonably safe for the use of those lawfully on the property. [That duty extends only to the portion of the premises onto which the person has either expressly or impliedly (been invited) (or) (been given permission) to use (or) to that portion the (owner) (occupier) (other) might reasonably expect him to use in connection with the (invitation) (permission) (and) only to that manner of use which the (owner) (occupier) might reasonably expect in connection with the express or implied (invitation) (or) (permission)].

[However, if [plaintiff's name], was on a portion of the premises to which he was not expressly or impliedly (invited) (or) (permitted) (or) which the (owner) (or) (occupant) would not reasonably expect him to use in connection with the (invitation) (or) (permission) (or) was using the premises for a purpose other than that for which he was (invited) (or) (permitted) (or) (for which the (owner) (occupier) might reasonably have expected him to use the premises), then it was the duty of the defendant to refrain from willful and wanton conduct which would endanger the safety of the plaintiff.]

Notes on Use

If there is no issue as to the scope of the invitation or permission, use IPI 120.02 instead of this instruction.

The second sentence should be used only where there is a dispute as to whether plaintiff was in an area beyond the scope of his express or implied permission at the time of the occurrence. The last part of the bracketed phrase should be used only when there is an issue of whether the plaintiff's manner of use of the premises exceeded the express or implied permission. The entire bracketed sentence in the first paragraph can be used if scope of invitation and manner of use are disputed.

In the alternative, the last bracketed paragraph should be used only if plaintiff has pled that defendant was guilty of willful and wanton conduct toward a trespassing plaintiff.

Comment

A trespasser is one who enters the premises of another without permission or without express or implied invitation. *Restatement (Second) of Torts* §329 (1965); Ill. Cent. R.R. Co. v. Eicher, 202 Ill. 556, 560, 67 N.E. 376, 378 (1903); Grimwood v. Tabor Grain Co., 130 Ill.App.3d 708, 711-12, 474 N.E.2d 920, 922, 86 Ill.Dec. 6, 8-9 (3d Dist.1985). The court in Trout v. Bank of Belleville, 36 Ill.App.3d 83, 87, 343 N.E.2d 261 (5th Dist.1976), cited IPI 120.01 and defined "trespasser" as one who enters property "without permission, invitation, or other right, and intrudes for some purpose of his own, or at his convenience, or merely as an idler." Trout v. Bank of Belleville, 36 Ill.App.3d 83, 87, 343 N.E.2d 261, 264-65 (5th Dist.1976) (citing 62 Am. Jur. 2d, *Premises Liability* (1972) and IPI). A trespasser is also someone who, after being invited upon the premises, goes to another area beyond the scope of the invitation. Cockrell v. Koppers

Indus., Inc., 281 Ill.App.3d 1099, 1104, 667 N.E.2d 676, 680, 217 Ill.Dec. 587 (1st Dist.1996) (workers straying from the intended worksite are trespassers). Whether a person is a trespasser or someone lawfully on the premises is a question for the jury. Eshoo v. Chi. Transit Auth., 309 Ill.App.3d 831, 836, 723 N.E.2d 339, 343, 243 Ill.Dec. 307 (1st Dist.1999) (finding a jury should determine whether a fare-paying passenger, who left an "el" platform to urinate on the tracks, was a trespasser).

120.07 Reserved

120.08 Issue/Burden Of Proof Premises/Condition/Distraction

[In Count __], [plaintiff's name] seeks to recover damages from the defendant [defendant's name]. In order to recover damages, the plaintiff has the burden of proving:

First, there was a condition on the [property] [land] [building] [other] which presented an unreasonable risk of harm to [people] [children] on the property.

Second, the defendant knew or in the exercise of ordinary care should have known of both the condition and the risk.

Third, the defendant could reasonably expect that [people] [children] on the property [would not discover or realize the danger] [or] [would fail to protect themselves against such danger].

Fourth, the defendant was negligent in one or more of the following ways:

a) _____,

b) _____,

c) _____,

Fifth, the plaintiff was injured.

Sixth, the defendant's negligence was a proximate cause of the plaintiff's injury.

Notes on Use

This instruction combines the issues instruction and burden of proof instruction into one instruction. Use this instruction for premises liability cases, including those in which the plaintiff claims that he/she was distracted and failed to observe an open and obvious defect on the property. It is also appropriate for cases involving children who were lawfully on the premises. For trespassing children, use IPI 120.10. If the action alleges that an activity on the premises caused the injury or that the dangerous condition arose as part of the defendant's business, use IPI 20.01 and IPI B10.03. If there is a dispute as to ownership of the property, add the following paragraph and label it “First”:

First, the defendant, [owned] [controlled] [managed] the property.

This instruction should be combined on the same page with the appropriate instructions from the 128 series. If contributory negligence is an issue, use IPI 128.02. If there is no issue of contributory negligence, use IPI 128.01. See Simich v. Edgewater Beach Apartments Corp., 368 Ill.App.3d 394, 306 Ill.Dec. 535, 857 N.E.2d 934 (1st Dist. 2006), for a limitation on the use of this instruction.

Notes revised April 2007.

Comment

Traditionally, a landowner or occupier owed no duty to a trespasser or a person legally on the premises, except not to willfully or wantonly cause injury. *Restatement (Second) of Torts* §336 (1965); Marcovitz v. Hergenrether, 302 Ill. 162, 167, 134 N.E. 85, 88 (1922); Bofman v. Material Serv. Corp., 125 Ill.App.3d 1053, 1064, 466 N.E.2d 1064, 1072, 81 Ill.Dec. 262 (1st

Dist. 1984); Votava v. Material Serv. Corp., 74 Ill.App.3d 208, 213, 392 N.E.2d 768, 771-72, 30 Ill.Dec. 113, 116-17 (2d Dist. 1979) (citing IPI); Lee v. Chi. Transit Auth., 152 Ill.2d 432, 472, 605 N.E.2d 493, 511, 178 Ill.Dec. 699 (1992). The duty owed to both trespassers and people legally on the premises has changed to a shifting standard or a duty based upon knowledge of conditions on the property and the risk of harm to people who frequent the property. It is expected that people on the premises will notice and avoid open and obvious dangers. However, the owner has a duty to warn others about dangerous conditions on the property where the owner or occupier knows or should know that people will approach the hazard while distracted, Ward v. Kmart Corp., 136 Ill.2d 132, 149-50, 554 N.E.2d 223, 143 Ill.Dec. 288 (1990), or will perceive an economic necessity to deliberately encounter the danger. LaFever v. Kemlite Co., 185 Ill.2d 380, 395, 706 N.E.2d 441, 449, 235 Ill.Dec. 886 (1998).

For persons legally on the premises, the owner owes a duty of reasonable care. The Premises Liability Act states an owner's duty to non-trespassers is one of reasonable care under the circumstances. The Act abolishes the common-law distinction between the invitees and licensees. 740 ILCS 130/2 (West 1998), effective September 12, 1984; Erne v. Peace, 164 Ill.App.3d 420, 423, 517 N.E.2d 1203, 1205, 115 Ill.Dec. 517 (2d Dist. 1987). Open and obvious hazards on the premises are expected to be noticed and avoided. Deibert v. Bauer Bros. Constr. Co., 141 Ill.2d 430, 439, 566 N.E.2d 239, 152 Ill.Dec. 552 (1990). An owner has no duty regarding open and obvious dangerous conditions except in two situations. *See Restatement (Second) of Torts* §343A. First, the open and obvious exception does not apply where something distracted the person, or where he deliberately encountered danger out of economic necessity. LaFever v. Kemlite Co., 185 Ill.2d 380, 391, 706 N.E.2d 441, 448, 235 Ill.Dec. 886 (1998). Second, the owner or occupier does have a duty to warn about dangerous conditions on the property if he knows or should know that people on the premises with permission could approach the hazard while distracted, Ward v. Kmart Corp., 136 Ill.2d 132, 149-50, 554 N.E.2d 223, 143 Ill.Dec. 288 (1990), or will do so deliberately out of economic necessity, LaFever v. Kemlite Co., 185 Ill.2d 380, 391, 706 N.E.2d 441, 448, 235 Ill.Dec. 886 (1998).

The rule applicable to trespassers is that an owner owes a duty of ordinary care regarding conditions on the property if the property owner knows, or should know, that an artificial condition on the property presents a risk of death or serious bodily injury, and if the owner knows about or anticipates the trespasser's presence in dangerous proximity to the condition. Lee v. Chi. Transit Auth., 152 Ill.2d 432, 472, 605 N.E.2d 493, 511, 178 Ill.Dec. 699 (1992) (applying the *Restatement (Second) of Torts* §337). The terms of *Restatement* §337 limit the application of the rule to “artificial” conditions. However, *Comment b* states:

> The few cases in which the situation covered by this Section has arisen have involved artificial conditions with a risk of death or serious bodily harm to the trespasser, and such harm has in fact resulted. No reason is apparent, however, for any limitation of the rule to such cases, and it may reasonably be expected to apply to natural conditions on the land, or to the risk of harm less than death or serious bodily harm, including harm to the trespasser's property.

So far, no Illinois case sets forth whether this rule extends to natural conditions for either a trespasser or a person lawfully on the premises. Burns v. Addison Golf Club, 161 Ill.App.3d 127, 130-31, 514 N.E.2d 68, 71, 112 Ill.Dec. 672 (2d Dist. 1987) (no liability for injury caused by the open and obvious, natural condition of an exposed tree root). The court in Burns v. Addison Golf Club analogized the hazard posed by a tree root to that of snow and ice under the natural accumulations rule. For accumulations of snow and ice, an owner generally is not liable for resultant injuries. However, a limited exception to this rule can impose liability if the owner aggravated or acted in a way that caused the natural condition to become an unnatural condition. Harkins v. Sys. Parking, Inc., 186 Ill.App.3d 869, 872, 542 N.E.2d 921, 923-24, 134 Ill.Dec. 575 (1st Dist. 1989) (no liability for a fall on a snowy and icy parking lot); Endsley v. Harrisburg Med. Ctr., 209 Ill.App.3d 908, 910, 568 N.E.2d 470, 471, 154 Ill.Dec. 470 (5th Dist. 1991) (liability for ruts in an ice-covered sidewalk, where defendant directed traffic solely on that path); Wittaker v. Honegger, 284 Ill.App.3d 739, 743, 674 N.E.2d 1274, 1276, 221 Ill.Dec. 169 (5th Dist. 1996) (extending liability to loose driveway gravel on highway).

120.09 Issue/Burden Of Proof Premises/Deliberate Encounter

[In Count __], [plaintiff's name] seeks to recover damages from the [defendant's name]. In order to recover damages, the plaintiff has the burden of proving:

First, there was a condition on the [property] [land] [building] [other] which presented an unreasonable risk of harm to [people] [children] on the property.

Second, the defendant knew or in the exercise of ordinary care should have known of both the condition and the risk.

Third, the defendant could reasonably expect that a reasonable person in plaintiff's position, knowing of the condition, would proceed to encounter it because the advantage of doing so outweighs the apparent risk.

Fourth, the defendant was negligent in one or more of the following ways:

a) _____,

b) _____,

c) _____,

Fifth, the plaintiff was injured.

Sixth, the defendant's negligence was a proximate cause of the plaintiff's injury.

Notes on Use

This instruction combines the issues instruction and burden of proof instruction into one instruction. Use this instruction when the issues involve the plaintiff's deliberate encounter with an open and obvious defect on the defendant's premises. If the action alleges an activity which is negligent, rather than a dangerous condition on the premises, see Notes on Use for IPI 120.02 and Reed v. Walmart Stores, Inc., 298 Ill.App.3d 712, 700 N.E.2d 212, 233 Ill.Dec. 111 (1998). This instruction should be combined with the appropriate instructions from the 128 series. If contributory negligence is an issue use IPI 128.02. If there is no issue of contributory negligence, use IPI 128.01.

Comment

The deliberate encounter exception extends owner liability to circumstances in which the open and obvious rule would otherwise bar liability. LaFever v. Kemlite Co., 185 Ill.2d 380, 391, 706 N.E.2d 441, 448, 235 Ill.Dec. 886 (1998).

The Court assessed the defendant's duty by examining foreseeability, likelihood of injury, the magnitude of the defendant's burden to prevent the injury, and the consequences of placing this burden on the defendant. It also applied the foreseeability analysis of *Restatement (Second) of Torts* §343 (1965), as well as addressed the open and obvious rule set forth in §343A of *Restatement (Second) of Torts* (1965). The Court noted that §343A relieves possessors and owners of land from liability for open and obvious dangers. However, the Court noted that the open and obvious rule is not limitless in scope, but rather, it is limited by the distraction and deliberate encounter exceptions. To define the “deliberate encounter exception,” the Supreme Court turned to the *Restatement (Second) of Torts* §343A, *Comment f*, at 220:

> [H]arm may be reasonably anticipated when the possessor "has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.

LaFever v. Kemlite Co., 185 Ill.2d 380, 391, 706 N.E.2d 441, 448, 235 Ill.Dec. 886 (1998). Under the *Restatement*, liability flows from the owner's knowledge of his premises and what he could expect a person to do, when encountering any hazards. LaFever (citing *Restatement (Second) of Torts* §343A, *Comment f*, at 220). Economic necessity is a factor to be considered in the deliberate encounter exception to the open and obvious rule. LaFever v. Kemlite Co., 185 Ill.2d 380, 391, 706 N.E.2d 441, 448, 235 Ill.Dec. 886 (1998).

120.10 Issue/Burden Of Proof--Injury To Trespassing Children

[In Count __], the minor plaintiff, [plaintiff's name], by [guardian's name], his/her Guardian, seeks to recover damages from defendant [defendant's name]. In order to recover damages, the plaintiff has the burden of proving:

First, the defendant knew, or in the exercise of ordinary care, should have known, that children frequented defendant's [property] [land] [building] [other].

Second, there was a [condition] [activity] on defendant's [property] [land] [building] [other] that presented a risk of harm to children that they would not appreciate due to their immaturity.

Third, the expense or inconvenience to the defendant in protecting children against the [condition] [activity] would be slight in comparison to the risk of harm to them, and that in (failing to act) (acting) the defendant was negligent in one or more of the following ways:

a) _____,

b) _____,

c) _____,

Fourth, the minor plaintiff was injured.

Fifth, the [condition] [activity] was a proximate cause of the injury or damage to the minor plaintiff.

Notes on Use

This instruction should be used where injury is claimed to a trespassing child as a result of some condition of the premises. If the child was lawfully on the premises, use IPI 120.08. This instruction should be combined with the appropriate instructions from the IPI 128 series. If contributory negligence is an issue, use IPI 128.02. If there is no issue of contributory negligence, use IPI 128.01.

Comment

For injuries to a trespassing child, the duty of a landowner or possessor turns upon the foreseeability of harm to the child, and the child's ability to appreciate danger on the property. The leading case, Kahn v. James Burton Co., 5 Ill.2d 614, 126 N.E.2d 836 (1955), rejected the implication in the attractive nuisance doctrine that the dangerous condition had to lure children into trespassing on the premises. Instead, Kahn established that the cornerstone of liability was foreseeability of harm to children. This test eliminated the need for distinctions between invitees, licensees, and trespassers. Corcoran v. Village of Libertyville, 73 Ill.2d 316, 326, 383 N.E.2d 177, 22 Ill.Dec. 701 (1978), refined the landowner's duty by stating “The essence of the Kahn principle is to impose a duty ... to remedy conditions which, although considered harmless to adults, are dangerous to children who foreseeably wander onto the premises.” This duty does not extend to remedying obvious risks that courts have held children are capable of “appreciating.” *Id.* at 326 (ditch in park); Mt. Zion State Bank & Trust v. Consol. Commc'ns, Inc., 169 Ill.2d 110, 117, 660 N.E.2d 863, 868, 214 Ill.Dec. 156 (1995) (above ground pool); Cope v. Doe, 102 Ill.2d 278, 286, 464 N.E.2d 1023, 80 Ill.Dec. 40 (1984) (thin ice on a pond); Logan v. Old Enter. Farms, Ltd., 139 Ill.2d 229, 241, 564 N.E.2d 778, 784, 151 Ill.Dec. 323 (1990) (climbing a tree);

Bucheleres v. Chi. Park Dist., 171 Ill.2d 435, 455, 665 N.E.2d 826, 216 Ill.Dec. 568 (1996) (diving into a large body of water with fluctuating water levels and bottom composition). Where the child is harmed not by the owner, but by another trespasser, ordinary negligence rules govern and apply to the activity of the other trespasser. *Mt. Zion*, 169 Ill.2d at 124.

After Kahn, the test for imposing liability is as follows: (1) the occupier knows that young children frequent the vicinity; (2) there is a defective structure or dangerous agency present on the land; (3) that structure or agency is likely to cause injury because of the child's inability to appreciate risk; and (4) the expense of remedying the situation is slight. Trobiani v. Racienda, 95 Ill.App.2d 228, 233, 238 N.E.2d 177, 179 (1st Dist.1968); *accord* LaSalle Nat'l Bank v. City of Chi., 132 Ill.App.3d 607, 478 N.E.2d 417, 424, 88 Ill.Dec. 102, 109 (1st Dist.1985); Cummings v. Jackson, 57 Ill.App.3d 68, 372 N.E.2d 1127, 14 Ill.Dec. 848 (4th Dist.1978); Dickeson v. Baltimore & O.C.T.R. Co., 73 Ill.App.2d 5, 32, 220 N.E.2d 43, 46 (1st Dist.1965).

If the owner lacks knowledge of the trespasser's presence, no duty applies, except not to willfully and wantonly cause injury. Eshoo v. Chi. Transit Auth., 309 Ill.App.3d 831, 837, 723 N.E.2d 334, 243 Ill.Dec. 307 (1st Dist.1999). Case law extends this rule to trespassing children. *Id*.; *Mt. Zion*, 169 Ill.2d at 116; *Kahn*, 5 Ill.2d at 624. However, where the owner knows, or reasonably should know, of the trespasser's presence, a duty of ordinary care applies. *Eshoo*, 309 Ill.App.3d at 837. The Appellate Court uniformly interprets Kahn to mean that a person must use ordinary care to protect children from dangerous conditions, whether created by the defendant or found on his property. Melford v. Gaus & Brown Constr. Co., 17 Ill.App.2d 497, 151 N.E.2d 128 (1st Dist.1958) (unguarded excavation); Runions v. Liberty Nat'l Bank, 15 Ill.App.2d 538, 147 N.E.2d 380 (1st Dist.1957) (playground equipment formed a natural ladder to garage roof); Kleren v. Bowman, 15 Ill.App.2d 148, 145 N.E.2d 810 (2d Dist.1957) (child rode a bicycle off parking lot and fell down an embankment); Wilinski v. Belmont Builders, Inc., 14 Ill.App.2d 100, 143 N.E.2d 69 (1st Dist.1957) (rung broke on a homemade ladder at a construction site).

If there are disputed facts or differing inferences from undisputed facts, the trespasser status of the child is a question for the jury. *Eshoo*, 309 Ill.App.3d at 836, 723 N.E.2d 339, 343, 243 Ill.Dec. 307 (1st Dist.1999) (jury determines whether a fare-paying, minor-passenger, who left an “el” platform to urinate on the tracks, was a trespasser). Cases applying Kahn to children lawfully on the premises, include: Cope v. Doe, 102 Ill.2d 278, 286, 464 N.E.2d 1023, 80 Ill.Dec. 40 (1984) (partially frozen pond on apartment grounds); Alop v. Edgewood Valley Cmty. Ass'n, 154 Ill.App.3d 482, 507 N.E.2d 19, 107 Ill.Dec. 355 (1st Dist.1987) (fall on asphalt surface of playground); Logan v. Old Enter. Farms, Ltd., 139 Ill.2d 229, 564 N.E.2d 778, 151 Ill.Dec. 323 (1990) (fall from tree).

120.11 Issue/Burden Of Proof--Premises/Willful And Wanton

[In Count __], plaintiff [plaintiff's name] seeks to recover damages from the defendant [defendant's name]. In order to recover damages, the plaintiff has the burden of proving:

First, there was a condition on the [property] [land] [building] [other] which presented an unreasonable risk of harm to [people] [children] on the property.

Second, the defendant knew of [or] [was willful and wanton in failing to discover] both the condition and the risk.

Third, the defendant could reasonably expect that [people] [children] on the property would not discover or realize the danger.

Fourth, the defendant was willful and wanton in one or more of the following ways:

a) _____,

b) _____,

c) _____,

Fifth, the plaintiff was injured.

Sixth, the defendant's willful and wanton conduct was a proximate cause of the plaintiff's injury.

Notes on Use

This instruction should be used if the condition is claimed to be a result of willful and wanton conduct. With respect to defendant's claim that plaintiff contributed to the injury, Poole v. City of Rolling Meadows, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), held that a plaintiff's contributory negligence is a damage-reducing factor if the defendant's willful and wanton conduct was “reckless,” but not if it was “intentional.”

This instruction should be combined with the appropriate instructions from the IPI 128 series. If contributory negligence is an issue, use IPI 128.02. If there is no issue of contributory negligence, use IPI 128.01.

Comment

Traditionally, an owner's duty not to act in a willful or wanton manner applied toward both trespassers and persons legally on the premises. *Restatement (Second) of Torts* §336 (1965); Marcovitz v. Hergenrether, 302 Ill. 162, 167, 134 N.E. 85, 88 (1922); Bofman v. Material Serv. Corp., 125 Ill.App.3d 1053, 1064, 466 N.E.2d 1064, 1072, 81 Ill.Dec. 262 (1st Dist.1984); Votava v. Material Serv. Corp., 74 Ill.App.3d 208, 213, 392 N.E.2d 768, 771-72, 30 Ill.Dec. 113, 116-17 (2d Dist.1979) (citing IPI); Lee v. Chi. Transit Auth., 152 Ill.2d 432, 472, 605 N.E.2d 493, 511, 178 Ill.Dec. 699 (1992).

For a discussion of the law concerning trespassers, see the Comment to IPI 120.08.

An owner behaves in a “willful and wanton” manner if he has either a deliberate intent to harm, or an utter indifference to, or a conscious disregard for, the safety of others. Sumner v. Hebenstreit, 167 Ill.App.3d 881, 886, 522 N.E.2d 343, 118 Ill.Dec. 888 (5th Dist.1988) (citing

Hocking v. Rehnquist, 44 Ill.2d 196, 201, 254 N.E.2d 515, 518 (1969)). In premises liability cases, a landowner or possessor acts willfully and wantonly when failing to warn of a dangerous condition that actually is concealed. *Sumner*, 167 Ill.App.3d at 886. For persons lawfully on the premises, the occupier of land has no duty to render a condition safe, or to discover an unsafe condition. Stephen v. Swiatkowski, 263 Ill.App.3d 694, 701, 635 N.E.2d 997, 1003, 200 Ill.Dec. 658 (1st Dist.1994) (citing Schoen v. Harris, 108 Ill.App.2d 186, 190, 246 N.E.2d 849 (1969)). Instead, the open and obvious exception applies. *Stephen*, 263 Ill.App.3d at 702; LaFever v. Kemlite Co., 185 Ill.2d 380, 391, 706 N.E.2d 441, 448, 235 Ill.Dec. 886 (1998).