

## **McGarry v Sax**

### **Special relationship as basis for duty; assumption of the risk.**

Plaintiff attended a skateboarding exhibition in the parking lot of a skateboard retailer. At the end of the show, t-shirts, stickers and other products were thrown to the crowd. The promoters then notified the crowd a skateboard deck would be thrown to the assembled group. Plaintiff, because of his height, was able to grab the board. He was then pushed and shoved to the ground until the board was wrested away from him. Plaintiff sustained injuries in the melee. He sued the defendant retail store and the promoters.

The case came to the Third DCA following grant of a summary judgment for the defendant retail store by the trial court in Placer County. Plaintiff's complaint sounded in negligence. The trial court found plaintiff failed to establish the first element of negligence, duty.

As a general rule, one owes no duty to control the conduct of another, or to warn those endangered by such conduct. Such a duty may arise, however, if a **special relation** exists between the actor and the third person that imposes a duty upon the actor to control the third person's conduct, or a special relation exists that gives the other a right to protection from the actor. Because the injuries to plaintiff here were inflicted by third persons, defendants sought to invoke the special relationship doctrine.

The Third DCA noted the plaintiff had not plead nor claimed the existence of a special relationship. Plaintiff did claim the defendants, like everyone, were under a duty to refrain from conduct creating an unreasonable risk of harm to others. The act

of throwing a skateboard into a crowd of skateboarders breached that duty. It was reasonably foreseeable injury would result.

The Court pointed out that the use of special relationships has been eclipsed by policy factors, enumerated in ***Rowland v Christian*** (1968) 69 Cal 2d 108. The first inquiry under that important case is **whether the harm was foreseeable**. To be foreseeable, and thus support a duty of care, the foreseeability must be reasonable.

**The degree of foreseeability must be high enough to charge the defendant with the duty to act on it. If injury to another is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct, the court will label the injury reasonably foreseeable and go on to balance the remaining Rowland factors.** Here, the Court found the reaction of the crowd was foreseeable, which generally would impose a duty of care so as not to create an unreasonable risk of injury to others.

The defendant argued that despite an apparent duty to avoid the harm encountered by the plaintiff, the **doctrine of assumption of the risk** acted to abrogate the duty to plaintiff. ***The Court explained that the nature of the activity and the parties relationship to the activity determines whether the doctrine applies.*** The activity in question had aspects of a competitive sporting event. Plaintiff was a willing participant. The possibility that a competitor for the tossed skateboard might be injured was an inherent risk of the competition.

Thus, the defendants did not owe the plaintiff a duty of care. The determination of duty in this case does not hinge on foreseeability but rests on a consideration of the nature of the activity and the relationship of the parties to the activity.

The judgment for the defendant was affirmed.