A Reprint from *Tierra Grande*

Texas lacks in publicly owned land. According to some sources, 97 percent of Texas is privately owned.

To encourage landowners to open their gates to the public, the Texas Legislature passed Chapter 75 of the Texas Civil Practices Code, better known as the Recreational Guest Statute. This greatly diminishes landowners' liability when their property is used for recreational purposes and shields them when guests are injured by the landowner's *ordinary negligence*.

Ordinary negligence is defined as failure to act as a reasonable person would have acted in the same or similar circumstance. As a general rule, landowners avoid ordinary negligence by warning or making the premises safe from all dangerous conditions they are aware of or that a reasonable inspection would reveal.

Under the statute, landowners (including the State of Texas) owe recreational guests no greater duty than is owed a trespasser, regardless of whether the guests are paying to enter. Liability occurs only when guests are injured by landowners' intentional, malicious or *grossly negligent* conduct. Consequently, much of the case law focuses on what constitutes gross negligence.

For example, in a case heard by the Texas Supreme Court, the plaintiffs alleged an injury was caused by the landowner's gross negligence for failing to warn of a very dangerous condition (*State v. Shumake [199 SW 3rd 279]*).

Shumake Case Facts

The Shumake family paid the defendant (State of Texas) for the right to tube down a section of the Blanco River. A few weeks earlier, several people nearly drowned at a low-water crossing where auxiliary culverts were installed to supplement the flow underneath the crossing during high water. The auxiliary culverts were not visible during flood stages.

The defendant knew of the incident, but failed to warn the family even though the Blanco was at flood stage. The Shumakes' nine-year old daughter was sucked into one of the unseen culverts and drowned.

The Shumakes sued, alleging gross negligence for failing to warn of a known dangerous condition. The defendant countered using Chapter 75 as a defense, but Chapter 75 does not protect landowners from grossly negligent conduct.

The Texas Supreme Court ruled that sufficient evidence existed to present the issue of gross negligence to a jury.

Another issue in the case was whether the landowner (the state) had a duty to warn about naturally occurring hazardous conditions. Here, the court dismissed this argument because the culverts were not naturally occurring conditions.

The case left unresolved the question of whether failure to warn of a natural hazard rises to the level of gross negligence. The high court examined this issue in 2004 in *Texas Dept. of Parks and Wildlife v. Miranda (133 SW 3rd 217)*.

Miranda Case Facts

The Miranda family paid to camp in Garner State Park. They asked the park ranger to recommend a campsite that was safe for children. While at the site, a tree limb 15 feet long and three inches in diameter fell and struck the plaintiff. She suffered extensive injuries to her head, neck and spine. She sued the state for gross negligence for failing to warn of a known dangerous condition. As in the Shumake case, the state defended under Chapter 75.

Evidence showed that at least 20 incidents of branches falling both from live and dead trees had been reported in the park. None resulted in injuries. Park staff routinely inspect and maintain the trees, pruning and trimming the dead limbs.

The branch that hit the plaintiff came from a healthy tree with no indications of decay or need of pruning. It fell from a height of approximately 50 feet, meaning that park employees could not have seen the limb clearly without climbing the tree even if the limb had been dead. A specialist testified that this was known as the "sudden branch drop syndrome."

The court ruled the park was not grossly negligent for failing to warn or make safe.

"The Mirandas failed to point to any evidence, and the record contains no evidence," ruled the court, "that shows that sudden branch drop syndrome constitutes an extreme risk of danger or that the department had actual, subjective knowledge of that risk but nevertheless proceeded in conscious disregard for the safety of others."

The ruling went on to state that park staff could not have taken any reasonable steps to minimize the dangers of an "unforeseeable and unpredictable phenomenon."

The Texas Supreme Court provided no guidelines regarding when, if ever, a landowner must warn or make safe a naturally occurring dangerous condition. The high court filled this void in 2009 in *City of Waco v. Kirwan (298 SW 3rd 618)*.

Kirwan Case Facts

The case involved a college student watching boat races from a cliff overlooking the river at a Waco municipal park. The ledge where the student was sitting, known as Circle Point Cliff, consisted of loose rocks and natural cracks. The cliff collapsed and the student fell 60 feet to his death. The site was in its natural state, not having been created or altered by the City of Waco.

In front of the cliff, the city constructed a sign stating, "For Your Safety Do Not Go Beyond Wall." The student ignored the warning. The deceased's estate and next of kin filed suit against the city, alleging liability for gross negligence.

Defining Gross Negligence

The court defined the term *gross negligence* for purposes of Chapter 75 as "an act or omission involving subjective awareness of an extreme degree of risk, indicating conscious indifference to the rights, safety, or welfare of others."

Subjective knowledge of the dangerous condition is critical.

Duty to Warn or Make Safe

As a general rule, landowners have no duty to warn or protect guests or trespassers from obvious defects or conditions. The high court, however, has never fully addressed whether a duty to warn arises with respect to naturally occurring dangerous conditions, whether or not they are open and obvious.

Under the common law (case law) developed by the Texas appellate courts, landowners owe no duty to warn or protect against naturally occurring conditions. However, the question in this situation lies in applying statutory law, not common law. The Texas Supreme Court issued the following test for courts to consider when determining liability for failing to warn of a naturally occurring dangerous condition under Chapter 75.

Without going into detail, the test boils down to weighing the foreseeability of the risk and the likelihood of its causing harm against the social impact of burdening the landowner with liable.

Foreseeability of Risks, Likelihood of Harm

Nature is full of risks. It is foreseeable that human interaction with nature may lead to injuries and possibly death. Because the risks inherent in nature are ordinarily foreseeable both to the landowner and the recreational user, a landowner may assume that no warning is needed.

The foreseeability test requires the landowner to perceive the *general* danger of the risk to the guests, not the exact sequence of events that produce the harm. However, foreseeability alone is not sufficient to justify imposing a duty on landowners to warn of a natural condition. The likelihood of the condition causing harm to the user must also be considered.

Likelihood of harm depends on the location and type of condition. A key factor is the number of similar accidents or incidents that occurred at that location. In the Waco case, no injuries of this type had occurred. So the foreseeability of the harm was present, but not the likelihood.

Social Impact of Holding Landowner Liable

From a practical point, the court reminded itself that the purpose of Chapter 75 was to encourage landowners to open their lands to visitors by limiting liability. Therefore, it would be contrary to the intent of the statute to require landowners to seek out and warn of every naturally occurring condition on their property that might be dangerous. The burden would be too immense.

As a general rule, landowners owe no duty to recreational guests to warn or make safe every possible naturally occurring dangerous condition on their property. However, that is not to say that the duty to warn will never arise.

As a general rule, *landowners owe no duty to recreational guests to warn or make safe every possible naturally occurring dangerous condition on their property.*

The court wrote in the Waco case, "We can envision a circumstance where a landowner knows of a hidden and dangerous natural condition that is located in an area frequented by recreational users, where the landowner is aware of deaths or injuries related to that particular condition, and where the danger is such that a reasonable recreational user would not expect to encounter it on the property. In those circumstances, the foreseeability and likelihood of the risk of harm might outweigh the burden of imposing the duty of care on the landowner. But such a situation is not present in this case."

Definitive Information Required

While the court addressed the issue of liability for naturally occurring conditions, it left many questions unanswered. The court did not rule that a landowner *would never* be liable for gross negligence related to a natural condition. But, at the same

time, it never defined a *naturally occurring condition*. The ruling stated, "We do not strive to define in this case which conditions are transformed from 'natural' to 'artificial' due to a landowner's modifications. Nor do we hold that a party may escape liability if it acts with malice or in bad faith, even if the conduct relates to a natural condition."

In the Shumake case, would it have mattered if the daughter drowned because of the vortex created by the low-water crossing and not because she was sucked into the culvert? Would the vortex be considered man-made or naturally occurring?

Defense for Gross Negligence

While gross negligence is not protected by Chapter 75, Texas common law recognizes a legal defense known as an *assumption of the risk*. The elements of this defense are set forth in Center publication 570, *The Texas Deer Lease* (http://recenter.tamu.edu/pdf/570.pdf). It is unclear whether this common law defense is valid against statutory gross negligence as defined by the high court.

All the common-law elements of an assumption-of-the-risk defense are covered in the release of liability form found at the end of the *Deer Lease* publication. Likewise, in accordance with the *Miranda* decision, a blank space is provided on the form for landowners to list all accidents or incidences of injury that occurred on the property within the last five years. This disclosure attempts to warn the guests of dangerous conditions they are not apt to perceive.

No doubt, more details regarding the duty to warn of naturally occurring hazards will be ironed out in future litigation.

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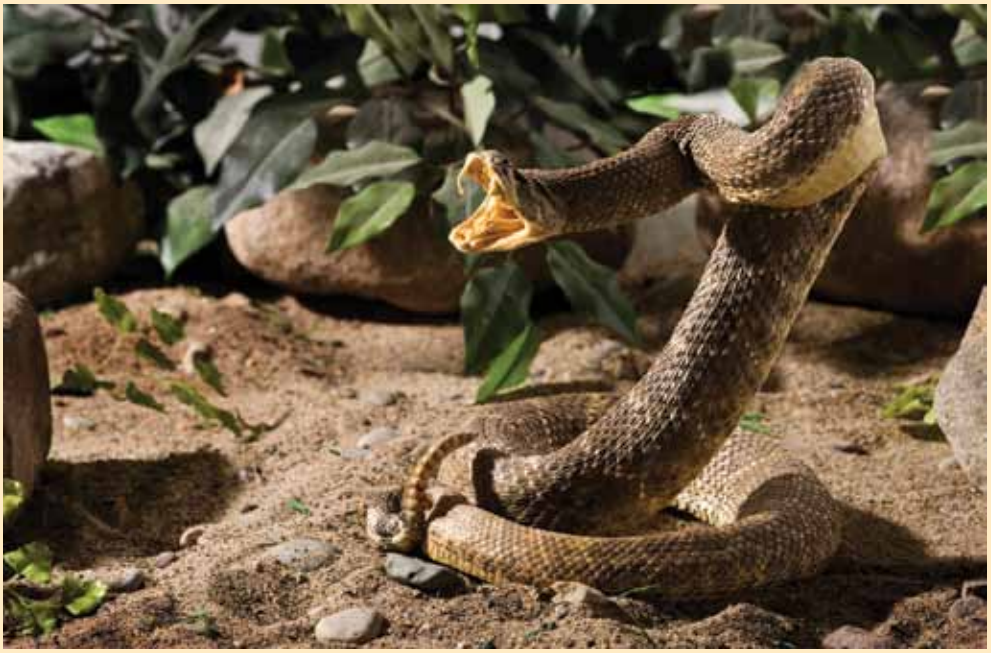
THE TAKEAWAY

Enjoying nature has inherent risks. Texas statutory law generally protects landowners when injuries occur as a result of naturally occurring hazards. The Texas Supreme Court created a test for courts to consider in determining if landowners are liable for failing to warn guests of such dangers.



Liability for Dangerous Critters

While the Texas Supreme Court recently ruled on the liability to warn of naturally occurring dangerous conditions, the high court has never ruled on landowners' obligation to warn of dangerous indigenous animals and insects, such as snakes and spiders. Several Texas appellate courts have done so. Here is a summary of those decisions, all of which favor the landowner.

The appellate decisions focus on a term called *ferae naturae* or free in nature. Basically, if the critter is free in nature and in its natural habitat, there is no duty to warn of its presence.

The leading case is *Gowen v. Willenborg (366 SW 2d 695 [1963])*. The case involved a minor who fell from a billboard when stung by wasps. The parents sued the company responsible for maintaining the billboard for failing to warn or make the area safe. A reasonable inspection, they argued, would have revealed the presence of the wasps.

The court ruled that the ferae naturae doctrine barred the plaintiff's negligence claim.

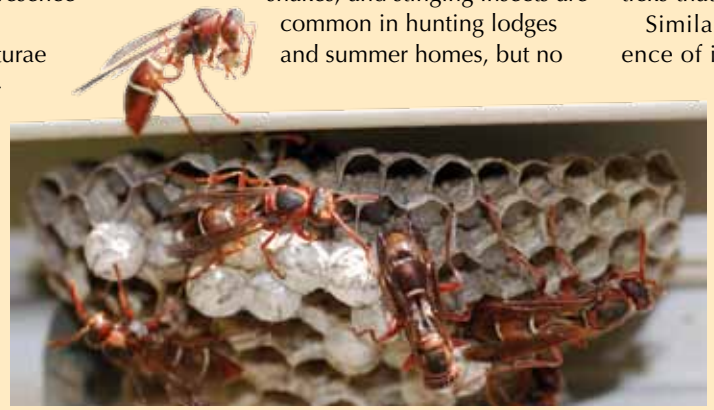
"In general," it said, "the law does not require an owner or possessor of land to anticipate the presence of or guard invitees against the harm from wild animals unless he or she has reduced them (the wild animals) to possession, harbors them, or has introduced the wild animals onto the premises which are not indigenous to the locality."

The court examined whether the billboard structure (an artificial condition) without the wasps constituted an unreasonable dangerous condition. It found that it did not.

"The presence of dangerous insects or animals in or near an artificial condition or structure, which does not in itself involve an unreasonable risk of death or serious bodily injury to a trespassing child, does not transform such a construction or structure into one involving such a risk," the court ruled.

Then, based on this finding, the court went on to rule on issues of interest to most Texas landowners.

"Artificial conditions, such as farm ponds, frequently become the abode of poisonous snakes, and stinging insects are common in hunting lodges and summer homes, but no cases have been found where a duty of ordinary care (negligence) has been imposed on the owner or possessor of such premises," the ruling stated.



A federal district court followed the *Gowen* decision in *Riley v. Champion Int'l. Corp. (973 F. Supp. 634 [1997])*. A logger who was an independent contractor sued Champion for failing to warn of the presence of Lyme disease on the premises. The logger contracted Lyme disease after being bitten by ticks on the defendant's land.

The federal court ruled that although the defendant owed the plaintiff the duty to warn of hidden dangers or defects, the duty did not include a warning of the presence of indigenous wild animals, such as the ticks that bit the plaintiff.

Similar decisions addressed the presence of insects and snakes. The San Antonio Court of Appeals imposed no liability on the owners of a recreational park for failing to warn of the presence of fire ants *(Nicholson v. Smith [986 SW 2d 54])*.

In the *Shumake* case, a Texas Supreme Court Judge made the following statement even though it is not necessarily related to the case: "A landowner has no duty to warn or protect trespassers from obvious defects or conditions. Thus, the owner may assume that the recreational user needs no warning to appreciate the dangers of natural conditions, such as a sheer cliff, a rushing river, or even a *concealed rattlesnake*."

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