

*Spring, 2018*

## AEI CLAIMS LAW QUIZ?

### WHY DID THE INVITEE CROSS THE ROAD?

*[Ref. Tort Concepts Para. 1.05]*

**FACTS:** The plaintiff, Vasilenko, went to the defendant's church to attend a seminar on a rainy evening in November 2010. When he arrived a church member volunteering as a parking attendant informed him that the main lot was full and directed him to park at the swim school lot located across the street from the church on Marconi Avenue, a five lane roadway with a 50 mile per hour posted speed limit. The church had an agreement to use the swim school lot for overflow parking when the church's main lot was full. The attendant did not tell the plaintiff where to cross the street to reach the church nor did he tell him that the church had posted volunteers at an intersection 50 feet from the church to help people cross Marconi Avenue. The plaintiff attempted to cross in the middle of the block directly across from the church. Midway across he was hit by a car and injured. Vasilenko sued the church for negligence. He argued that the church created a foreseeable risk of harm by maintaining an overflow parking lot in a location that required invitees to cross a dangerous roadway. The church acknowledged that the risk of harm was foreseeable, but argued that it had no control over the public street and therefore did not owe Vasilenko a duty to prevent his injury.

**QUESTION:** Does a landowner that provides a designated off-site parking lot for use by its invitees have a duty to protect the invitees from the dangers of a public road that runs between the lot and the landowner's premises?

**ANSWER:** No, according to *Vasilenko v. Grace Family Church*, 404 P3d 1196 (Cal. 2017). The California Supreme Court held that although there was a foreseeable risk of harm, and the church could have taken steps to decrease the danger, public policy considerations weigh against imposing a duty of care on the landowner.

The court began its analysis by recognizing that a landowner is under no duty to maintain a public street abutting the landowner's property in a safe condition unless the landowner created a dangerous condition. The reason for this rule is that a landowner has no right to control the property of another, including streets owned and maintained by the government. The court continued by discussing whether public policy considerations favor imposing a duty on landowners. The court observed that all pedestrians on public streets face some risk of injury. But the question is: does a

landowner that locates a parking lot on the opposite side of a public street so that its invitees must cross that street to reach the landowner's premises owe a duty to its invitees to provide safe passage from the lot to the landowner's premises?

To determine whether public policy considerations weigh in favor of imposing a duty of care courts have considered:

- ◆ the foreseeability of harm to the plaintiff,
- ◆ the degree of certainty that the plaintiff would suffer injury,
- ◆ the closeness of the connection between the defendant's conduct and the injury to be suffered,
- ◆ the moral blame attached to the defendant's conduct,
- ◆ the policy of preventing future harm, and
- ◆ the extent of the burden placed on the defendant to prevent the harm.

This court found that it was foreseeable that the plaintiff could be injured while crossing the street. The court held, however, that foreseeability is not synonymous with duty. There was no close connection between the defendant's conduct and the injury because the driver's conduct was independent of the landowner's conduct. The court said that unless the landowner impaired the invitee's ability to see and react to passing motorists, the invitee's decisions about when, where, and how to cross were independent of anything the landowner did or didn't do. The court concluded that because the landowner's conduct bore only an attenuated relationship to the invitee's injury, the closeness factor tipped against a finding of duty.

The court next addressed the prevention of future harm, the burdens that might be imposed on the defendant, and moral blame attached to the defendant's conduct. The court explained that the defendant was limited in its ability to reduce the risk of injury from crossing Marconi Avenue because California law prohibits landowners from erecting lights or signs on public streets. In contrast to landowners, other entities such as the government, drivers, and invitees themselves had a greater and more direct ability to reduce the risk.

The court further recognized that imposing a duty on landowners in this situation could result in significant burdens on them. Landowners would have to continuously monitor the dangers of the abutting street and other streets in the area to determine which ones become more or less safe, and they may have to relocate their parking lots as conditions change. The court found that it would be extremely difficult for the defendant to determine the safety of a parking lot with accuracy. Finally, the court held that with respect to moral blame it was unclear what effective and affordable preventive steps a landowner in the defendant's position could have taken.

Explaining its conclusion in favor of the defendant, the court said:

In this case, the policy of preventing future harm looms particularly large. In light of the limited steps the landowner can take to reduce the risk to its invitees, especially when compared to the ability of invitees and drivers to prevent injury, and in light of the possibility that imposing a duty will discourage the landowner from designating options for parking, we hold that a landowner who does no more than site and maintain a parking lot that requires invitees to cross a public street to reach the landowner's premises does not owe a duty to protect those invitees from the obvious dangers of the public street.

This case illustrates the role of duty in establishing an insured's potential liability for negligence. It is a fundamental element of tort liability and should not be overlooked in any evaluation of a negligence claim.