

A shopping mall located near an interstate highway exit is surrounded by a paved parking area. Each entrance to the parking area has a sign reading, "City Ordinance: NO TRESPASSING from midnight to 6 a.m."

A weary cross-country traveler had begun to doze while driving. Concerned that he would cause a car accident, he looked for a place to sleep. At 2:00 a.m., the traveler saw the shopping mall from the road and exited the highway. In his exhausted state, the traveler failed to notice the city ordinance signs. The traveler pulled into the open gates of the parking area to rest and immediately fell asleep.

An hour later, the traveler suffered a serious personal injury when a light pole fell onto his car. Unbeknownst to the mall owner, a mall patron had backed her truck into the pole the previous day. The damage to the light pole was not readily visible upon a reasonable inspection. However, an inspection by the maintenance company hired by the mall owner would have revealed that the pole was dangerously off-balance.

The traveler sued the mall owner in a negligence action for damages stemming from personal injuries and property damage suffered when the light pole fell.

In a jurisdiction that follows the traditional approach regarding a land possessor's duty to land entrants, which of the following is likely to be the mall owner's best defense?

- A. The mall owner did not know of the risk posed by the light pole.
- B. The mall owner could not reasonably foresee that the traveler would enter the parking area.
- C. The traveler assumed the risk of injury when he entered the parking area at a prohibited time.
- D. The traveler's violation of the ordinance prohibiting trespassing was negligence per se.

### Explanation:

To be liable for negligence, the defendant must have breached a duty owed to the plaintiff. Under the traditional approach, **land possessors** owe no duty to unknown or unanticipated trespassers.\* But they do owe a **limited duty to known or anticipated trespassers** to:

**warn** the trespasser about **hidden, artificial dangers** (ie, man-made dangers) that are **known** to the land possessor **but unlikely to be discovered** by the trespasser *and*

use reasonable care while conducting activities on their land.

Here, the traveler trespassed when he entered the parking lot at 2:00 a.m. because entry is prohibited between midnight and 6:00 a.m. Not only was his presence foreseeable, it was anticipated—as evidenced by the "no trespassing" sign at each entrance—so the mall owner owed the traveler a limited duty of care (**Choice B**). But since the mall owner did not know of the risk posed by the light pole, the mall owner did not breach any duty owed to the traveler and so cannot be liable for negligence. Therefore, that is the mall owner's best defense.

\*The traditional approach is followed in about half the jurisdictions. The other half follow the modern approach, under which land possessors owe a duty of reasonable care to all land entrants (except flagrant trespassers).

(**Choice C**) Implied [assumption of the risk](#) arises when a plaintiff voluntarily encounters a known, specific risk. Here, the traveler did not know of the risk posed by the light pole. But even if he had, in most comparative fault jurisdictions (the default rule on the MBE), a plaintiff's assumption of the risk merely reduces recovery.

(**Choice D**) The traveler's violation of the ordinance was not [negligence per se](#) since the harm he suffered as a result of the damaged light pole was likely not of the type that the "no trespassing" ordinance was designed to prevent. Even if it were, this would only establish that he was contributorily negligent, which would reduce (but not bar) his recovery.

### Educational objective:

A land possessor owes a duty to known or anticipated trespassers to (1) warn them about hidden, artificial dangers that are known to the land possessor but unlikely to be discovered by trespassers and (2) exercise reasonable care while conducting activities on the land.

### References

Restatement (Second) of Torts § 337 (Am. Law Inst. 1965) (duty to known trespassers).

## Land possessor's duty to land entrants

