Liability and Warnings in Natural Aquatic Environments: A Case Law Analysis

DANIEL P. CONNAUGHTON
JOHN O. SPENGLER
&
BRIAN P. BURKET
University of Florida

Recreational swimming was the most popular participation sport in the United States in 2000 with 94 million participants (Sporting Goods Manufacturing Association, 2001). A large amount of recreational swimming and related activities take place in natural aquatic environments at public and semi-public locations. With an increasing population base and demand for aquatic resources, the increased use of natural aquatic environments is likely to continue.

Natural bodies of water, which include oceans, lakes, rivers, and ponds are often easily accessible since many are open for public use, while others, given their size and location, are difficult to restrict use. Recreational participants that use these areas are susceptible to drowning, near drowning, and spinal cord injuries due to a variety of potential dangers unique to each site. Common to all aquatic locations is the possibility of drowning. In 1998, 4,406 people drowned in the United States (National Center for Injury Prevention and Control (NCIPC), 2001a). Drowning was a leading cause of unintentional death for all ages in 1998, and the second leading cause of unintentional death for children ages 1-14 that same year. Approximately, 50-75% of these drownings occur in natural bodies of water (Centers for Disease Control and Prevention, 2001).

Although the exact incidence of near-drowning is unknown, it is estimated to be from 2 to 20 times as common as drowning (Weinstein & Krieger, 1996). For every child that drowns, it is estimated that another 4 are hospitalized and 16 receive treatment in an emergency-department for near-drowning (NCIPC, 2001b).

Injuries and drownings from swimming or diving in lakes, rivers and ponds may be attributed to subsurface conditions, animal attacks, the inexperience of swimmers, and/or management's failure to supervise and warn the users of these and other dangers. Every natural aquatic floor is unique in

its composition and contour, which creates potentially dangerous conditions such as submerged rocks and trees and sudden, deep drop-offs. Aggressive animals, including alligators and snakes, are another hazard that may result in injury or death if proper precautions are not taken. In particular, inexperienced swimmers are often more vulnerable to these hazards because of their lack of body control and knowledge of the existing conditions of a site.

Ocean beach swimming is susceptible to additional dangers. In 2000, United States beach attendance was over 264 million. Over 70,000 of these participants were rescued by lifeguards (United States Lifesaving Association, 2001). A substantial number of these ocean rescues may be attributed to the conditions that are inherent to the site, including strong currents and waves. Strong currents, including rip currents, have the potential for exhausting swimmers to the point of total fatigue, often resulting in near-drowning or drowning. Waves can drive swimmers into the ocean floor, or into other bathers or objects, causing potentially serious injuries.

In addition to swimming injuries, and drowning, diving into natural aquatic areas frequently results in spinal cord injuries. Recreational diving accounts for more than 75% of all acute spinal cord lesions that are recreation related, and this percentage is predicted to increase (Blanksby, Wearne, Elliot, & Blitvich, 1997). In a study conducted by Devivo and Sekar (1997), 57% of spinal cord diving injuries occurred in natural aquatic environments. These injuries can be a result of diving into shallow water or colliding with a submerged object. Diving from man-made objects such as docks and seawalls or from natural objects such as cliffs and rocks are often the means by which spinal cord injuries occur.

Dangers are common and many may not be obvious to the swimmers recreating at a particular location. The combination of the accessibility of swimming sites and the potential for severe injuries or death results in significant risks of litigation for the owner/operator of the area involved. Therefore, administrators must take proper action to protect themselves from liability and provide for the safety of swimmers. Aquatic administrators can learn about important legal issues and risk management implications by reviewing relevant legal cases. Knowledge gained from cases can be used in the planning and management of natural aquatic environments.

DIVING

Plaintiff Prevails

Diving into natural bodies of water carries unique risks. Shallow water depth and submerged objects such as rocks and tree stumps can create serious risks for a diver that can potentially result in severe injury or death. The following cases involve negligence claims where a key component of the claim was the failure to warn of the hazards associated with diving at a particular site.

In *Thibodeau v. Mayor and Councilmen of Morgan City* (1993), a 22-year-old man was rendered a quadriplegic when he dove into a shallow lake owned by the defendant state and leased to the defendant city. The water of the lake was murky, obstructing the view of the bottom, which varied in depth from two to six feet. Signs were posted at the lake, which read, "Swim and Dive at Your Own Risk. City of Morgan City Has No Liability Insurance." Before the plaintiff's accident there had been four or five diving accidents at the lake that resulted in people becoming paralyzed. The plaintiff brought suit claiming that the defendants were negligent in failing to either eliminate the danger of diving or in reducing the danger by providing adequate warning signs. The trial court rendered judgment in favor of the plaintiff, finding him, the city, and the state equally at fault (p. 598). The plaintiff was awarded a multi-million dollar verdict.

On appeal, the defendant alleged among other things, that the plaintiff's expert should not have been allowed to testify as to the inadequacy of the signage at the lake. The appellate court found that the expert's testimony was properly admitted and that the city failed to adequately warn of the danger of diving into the shallow water (*Thibodeau*). The city contended it complied with its duty to warn of the shallowness of the lake by its posting of the "dive at your own risk" signs. It contended that "risk," meant danger and that since the risk most commonly associated with diving in shallow water is fracturing one's cervical spine, the signs provided adequate warning.

The trial court found that the signs "simply advise that no lifeguard is provided and the owner intended to accept no responsibility" (p. 603). The appellate court agreed and stated,

> [t]he particular risk in this case, the shallow water, was not obvious to the casual observer due to the turbidity of the water, and the signs did nothing to point out this risk. Furthermore, [the expert] testified that people today do not have an appreciation of the inherent danger of

> diving into shallow water. A visitor to Lakefront Parkway may have thought the 'risk' referred to on the sign was scraping oneself on a cypress root or being bitten by a snake (*Id.*).

The court went on, stating,

> [t]he lack of adequate signs clearly was a breach of the City's duty to the public, and to plaintiff, to warn that diving in the shallow water could result in crippling injuries. The failure of the City to take the minimal and inexpensive preventive measure of posting an adequate warning sign was unreasonable considering the probability and magnitude of the potential harm (*Id.*).

In *Robbins v. Department of Natural Resources* (1985), a lawsuit was brought against the state of Florida to recover damages arising out of injuries sustained in a diving incident at a state park. The 18-year-old plaintiff was visiting the spring-fed swimming area for the first time. After swimming with his friends for a while, and thinking it was safe to dive, the plaintiff did a short running dive from a concrete platform located at the edge of the water. His head struck an object on the bottom. The injuries he sustained resulted in quadriplegia.

The swimming area was surrounded by a concrete retaining wall and the location where the plaintiff entered the water had a wide concrete platform leading to the edge of the water. The depth of the water in that area varied from about two to four feet. Although the bottom was mostly sand and gravel, there were large rocks embedded in it that rose up to within 10 to 15 inches from the surface of the water. The water was generally clear and the bottom ordinarily visible, but such visibility was often obscured by such things as splashes from other swimmers and the reflection of the sun. According to the testimony of an expert, the shape of the retaining wall and the concrete platform invited diving. The expert stated that he believed this called for measures to prevent injury including the installation of a rail at the edge of the platform to prevent diving, or the posting of warning signs regarding the dangers of diving in that area.

According to the assistant park superintendent and one of the lifeguards, the park had experienced problems with diving in that area which resulted in minor injuries such as "nose scrapes." As a result, the park's superintendent and assistant manager discussed the need for "no diving" signs. Prior to the accident, no such signs had been erected, nor had a rail been placed at the edge of the platform. Also, there were no markers indicating the water depth. Instead, the lifeguards were simply instructed to enforce a no-diving policy.

The trial court ruled in favor of the defense relying upon the defense of express assumption of risk (p. 1043). On appeal, the court stated, "A party relying on such defense must show that the plaintiff *subjectively* appreciated the risk giving rise to the injury" (p. 1044). The record in the case did not establish that the plaintiff actually knew of the danger of diving in that area. Additionally, there was evidence from which the jury may have found that the state was negligent in failing to take appropriate action, such as the placement of warning signs at strategic places in order to advise swimmers of dangerous conditions, which may not have been apparent to them, and that such negligence was the proximate cause of the plaintiff's injury. The record also did not establish conclusively that the negligence of the plaintiff was the sole proximate cause of his injury. The judgment in favor of the defendant was reversed and the case was remanded for further proceedings.

In *Schell v. Keirsey* (1984), a 12-year-old camp counselor, assisting in the supervision of some handicapped children, sustained a cervical spine fracture when she dove from the upper level of the diving platform into the lake at a summer campground facility. The dive, which resulted in the injury, was not made from the diving board, but instead from the platform to which the diving board was attached. There were no railings on the platform, nor were there any warning signs or depth markers. The water was murky and it was not possible to see the bottom. Although the water under the diving board was nine feet deep, unknown to the plaintiff, the water was only four feet deep at the spot where she dove. The Court of Appeals, affirming the decision of the trial court, stated that the layout of the platform was an open invitation to a child to dive from it and that there was a deceptively dangerous condition unknown to the plaintiff (p. 273).

In *Davis v. United States* (1983), while diving into Devil's Kitchen Lake in the national wildlife refuge a swimmer struck his head on a rock outcropping and was rendered a quadriplegic. The swimmer then brought suit for damages. The trial court determined the plaintiff's damages to be $4,047,000.00. However, applying comparative negligence, the court found that the accident was due 75% to his own negligence and 25% to that of the government, and therefore awarded him $1,012,000.00 (p. 423). He appealed, contesting that he was entitled to full damages or at least more than 25 percent; the government cross-appealed, contesting liability.

In the nine years preceding the accident, there had been five other serious diving accidents at another lake in the refuge. Knowing there was swimming in Devil's Kitchen Lake and fearing that the subsurface rocks in the lake could cause serious injuries, the government closed the lake to swimming except for a beach at one end of the lake, and posted along the refuge's roads leading to

the lake, signs of moderate size reading, "No Swimming in Devil's Kitchen Lake." Underneath each sign a slightly smaller one had been erected stating, "No Diving." Neither the size nor the color of the signs (white on blue) indicated danger, and there was no reference to the subsurface rocks or to any other danger.

On the day of the accident, the plaintiff and two friends decided to swim at the lake. One friend inflated a raft and floated out on it. Davis and the other man swam around for a short time without incident, then got out, and walked to a point on the shore opposite their friend on the raft. The shore in that area was a stone ledge about three feet above the surface of the water. The lake water seemed clear to the plaintiff; however, he testified that there was a glare from the sun. The two men decided to swim out to their friend on the raft. They then took running dives and, while in the air, the plaintiff dropped his arms to his side. He landed headfirst on a rock, which protruded from the bottom of the lake to a point about a foot-and-a-half below the surface, and fractured his spine. The other man struck the same rock but only scraped his chest.

On appeal from the district court's decision on damages, in application of Illinois statutory law, the court held that the government failed to adequately warn visitors that swimming in the rocky lake, at other than the beach area, was very hazardous (*Id.*). The court noted "the 'No Swimming' sign was not much good as a warning of danger; the prohibition it laconically announced could just as well have been intended to protect the lake from swimmers as vice versa" (*Id.*). The 'No Diving' sign also left too much for the imagination.

The court further held that

> [i]t would not have cost much to amend the 'No Diving' sign to add 'Danger: Subsurface Rocks,' and to have posted these signs where swimmers could be expected, such as the gravel widened spot where Davis and his friends parked their car, as well as at the entrances to the refuge. . . In view of the gravity of diving accidents, their incidence at the nearby lake, and the possibility, well illustrated by this case, that swimmers might simply be oblivious to the danger of subsurface rocks, especially since the refraction of light in water can cause a person to misjudge depth, signs such as we have described might well have been highly beneficial. If they had been posted and had prevented this accident, their benefits would have been measured in the millions of dollars and their costs in the thousands or less (p. 424).

In *Stephens v. United States* (1979), the defendant was found guilty of willful and wanton misconduct because they knew of the existence of a hidden

danger, submerged tree stumps, and failed to prohibit diving in the area, nor did they warn or post any signs. The plaintiff suffered serious injuries resulting in quadriplegia when he dove into murky water at a reservoir lake and apparently struck his head on a submerged tree stump. The court noted that the government knew that, since its creation, the lake contained tree stumps. The government allowed the contractor who cleared the land to leave stumps to a height of six feet all over the reservoir area. Depending on the water level, the stumps might be exposed or submerged. At least two of the park rangers knew of the stumps in the lake. The government also knew that thousands of people came to the lake each day and that the stumps posed serious safety dangers to swimmers and divers. The only warning statement made by the government, regarding the stumps, was a caution contained on the back of a brochure. However, this brochure was distributed only to people who camped and paid a fee. Daily users were not provided with this information.

The court noted that it was obviously foreseeable that visitors would engage in all types of water activities unless they were warned or otherwise prohibited. The court concluded that in view of the obvious danger the stumps posed, the government failed to adequately warn of the danger or prevent swimming or diving (p. 1017). In view of the government's knowledge, the probability and gravity of harm, the total failure to warn, and the ease in which a warning could have been made, the court found willful and wanton misconduct on the part of the government.

In *Jackson v. TLC Associates, Inc.* (1998), a 19-year-old experienced swimmer died from complications related to injuries he sustained after diving into a commercial, man-made lake, owned and operated by the defendant and designed for recreational swimming. The issue in this case was whether the defendant had a duty to protect the decedent from the risks associated with diving into the water, from the shore, in the proximity of a submerged and unmarked pipe, which was not visible from the surface. The trial court held that the defendant did not owe such a duty and entered summary judgment in their favor (p. 461). The appellate court affirmed the lower court's ruling (*Id.*).

In the "deep end" of the lake, the bottom was composed of silt that gave the water a murky appearance. This made it impossible to see beneath the surface of the water. Patrons standing on shore had no means to gauge the lake's depth or detect the presence of any submerged obstructions, although the area was marked with a floating rope. Prior to the tragic dive, the decedent had previously visited and dove into the lake, and had recently witnessed a lake employee diving into the lake from the "deep" end. After paying his admission fee, the decedent attempted to dive into the same area of the lake.

Unfortunately, that dive resulted in cervical and thoracic spine fractures that led to further complications and his death.

Subsequently, the decedent's mother sued TLC alleging they

> had been negligent in the way they maintained the lake, in not providing lifeguards, in failing to adequately warn swimmers that they should not dive into or enter the water in areas where hidden hazards may be present, and in allowing a dangerous obstruction in an area where persons were allowed to swim and dive when TLC knew or should have known of the dangerous obstruction (p. 422).

The plaintiff believed that her son's injuries were caused when he struck his head on a submerged section of a plastic pipe used by the defendant to adjust the lake's water level. The two-inch pipe was black in color, not anchored down, was regularly moved to different locations, and did not always remain in the water. On the day of the injury, it extended into the "deep" end of the lake close to the point where the decedent dove. A witness testified that the pipe ran along the shore and then disappeared as it entered the water where the dive was made. An inspector with the Illinois Department of Public Health testified that if the pipe was in the area of the dive, as the plaintiff claimed, it would have been a likely cause of the decedent's injuries.

The trial court granted the defendant summary judgment after TLC argued that they had no duty to prevent and warn the decedent of making such a dive (*Id.*). They argued that no duty was owed because he was an experienced adult swimmer who should have known better than to dive into murky water. TLC believed that the danger was open and obvious. The appellate court affirmed the lower court ruling in favor of the defendant (p. 423).

The Supreme Court of Illinois reversed and remanded the case arguing that they did not believe that the open and obvious doctrine was dispositive of the plaintiff's claims (p. 427). According to the plaintiff, the danger in this case was the presence of the submerged pipe which could not be detected by swimmers and whose location periodically changed. The presence of that hazard did not have anything to do with the inherent characteristics of bodies of water; rather it stemmed from the defendant's conduct. The court stated that no patron of the lake should reasonably have anticipated the presence of the underwater pipe or the injuries it could cause. Rather, patrons had the right to assume the facility was properly prepared and that appropriate measures had been taken to make it safe to use.

Finally, the Supreme Court stated that adding to the danger posed by the submerged pipe was the fact that TLC employees would periodically change its location (p. 426). One day a certain section of the lake may be free of the

danger, however, on another day the pipe may be moved to that area. The court further stated that without any warnings or markings, patrons would have no way of determining that the risks had changed. Most importantly, patrons would have no way of knowing that the risks even existed.

Diving: Defendant Prevails

In *Smith v. Chicago Park District*, (1995), a young man was injured when he dove into Lake Michigan from a large rock formation and struck a submerged rock. The area from which he dove was managed by the Chicago Park District. On the day of the incident, there were about twenty other people on this and other rock formations. Some were jumping and diving into the water and climbing out of the water on a metal ladder that had been built into one of the rocks. The evidence did not indicate that adequate warning signs were present in the area.

The plaintiff sued the Chicago Park District for negligence claiming they demonstrated willful and wanton misconduct in failing to warn him of an unreasonable risk of harm presented by the submerged rocks. The Court of Appeals reversed the lower court verdict for summary judgment in favor of the defendant (*Id.*). The Court held that the submerged rock constituted an unreasonable risk of harm and that the defendant could have discovered the submerged rock through the exercise of ordinary care. Thus, the defendant was negligent in failing to warn the plaintiff of an unreasonable risk that could have been discovered through the exercise of ordinary care.

The case was appealed to the State Supreme Court, which reversed the Court of Appeals ruling and held for the defendant Park District (*Smith v. Chicago Park District*, 1996). The court based its decision on the belief that diving into Lake Michigan presents open and obvious risks, the risks of diving are reasonably foreseeable, and imposing a duty on the Park District to prevent diving would impose an unreasonable burden upon the District. Summary judgment was granted.

In *Caraballo v. United States* (1987), the plaintiff brought an action for injuries he sustained when he dove from a remnant of an old pier into shallow water at a national park. The trial court found the government 30% negligent and awarded the plaintiff $1,170,808.00. The district court judge concluded that the government had failed to adequately warn that swimming and diving were prohibited (p. 21). Since they were not written in Spanish, the court also found that whatever signs were present were insufficient to warn the public, particularly the Hispanics who were heavy users of the area. Furthermore, the district court also credited the plaintiff's witnesses who testified that the

patrols on the beach were inadequate, since no one had stopped people from swimming and using the beach (*Id.*).

At the time of the incident, the plaintiff was a 39-year-old adult who had been swimming many times before. The court stated,

> the depth of the water where the plaintiff dove 'was two and one-half to three feet deep. The shallowness was clearly visible from the point at which the plaintiff was diving as people were wading and swimming in the area. It should have been observed from their own height what the depth of the water was.' Under these circumstances, it was not the government's negligence in failing to post signs or adequately patrol that caused the plaintiff's injury. The proximate cause of his injury was his own act. . .of diving headfirst into water that was observably shallow (p. 23).

For this reason, the Court of Appeals held that, under New York law, the plaintiff's decision to dive head first into three feet of water was the unforeseeable superseding cause of his injuries, which barred liability against the United States (*Id.*). Accordingly, the district court's judgment was reversed and the complaint was dismissed.

In *Judd v. United States* (1987), the plaintiff sued the National Forest Service for injuries he sustained as a result of an attempted dive into a natural pool located in a national forest. On the day of the accident, after arriving at the pool, the plaintiff and a friend swam and dove off the rocks for about two hours. There were also other people swimming and diving that day. The plaintiff tested the depth of the water and began diving from rocks 10 to 15 feet in height. The plaintiff decided to try a high dive from a rock approximately 35 feet above the water. He attempted a swan dive and hit his head on something, presumably the bottom. Due to his injuries, the plaintiff was rendered a quadriplegic. His theory was that had a sign been posted, warning of the hazards of diving into the pool, he would not have attempted his dive.

The court held that the pool in question was not defined as a "resort" within the meaning of the California Health & Safety Code, thus no duty to warn was created (p. 1511). Furthermore, the court could not find that the failure to post warning signs "caused" the plaintiff to attempt his dive, despite his testimony that he would not have dived if there had been a warning sign. The court felt that the hazards of this dive were readily apparent to a reasonable person. Furthermore, the plaintiff was an accomplished diver who competed on his high school varsity diving team. The bottom of the pool was visibly shallow and rocky in spots. An expert witness testified that only

intoxicated persons and extreme risk takers would have attempted that dive. For these groups, a sign would be unlikely to deter an attempt. The natural risks were readily apparent to the plaintiff. For these reasons, judgment was entered for the defendant (p. 1513).

In the case of *Rowland v. City of Corpus Christi* (1981), the plaintiff dove from a seawall into the marina breakwaters causing a spinal fracture. He brought suit against the city alleging that the city knew or should have known, and that the city failed to give him proper warning of the condition that caused his injury. The duty owed to the plaintiff was that of a trespasser or licensee, not that of an invitee, because swimming was allegedly prohibited at the site of the accident. However, the plaintiff contended that permission to swim was granted through a telephone conversation. If the plaintiff was a trespasser, the only duty owed by the City was to not injure him willfully, wantonly or through gross negligence. If he was a licensee, then the City had a duty to warn or make safe any dangerous conditions of which the City had actual knowledge. The court held that there was no evidence that the City had *actual knowledge* of the dangerous condition upon which the plaintiff struck his head (p. 935). The City's duty to the plaintiff did not extend to making safe or warning him of each and every geological formation on the bottom of the bay. The judgment of the trial court for the defendant was affirmed (*Id.*).

Diving Cases: Key Findings and Risk Management Tips

The cases provide insight into situations when it was alleged that the owner/operator of a natural aquatic environment failed to meet their duty of care. Where the dangerous condition is found to be open and obvious to the plaintiff, the defendant often prevails. Therefore, a key issue is what conditions will prevent a person from recognizing an underwater hazard such as a submerged tree stump, rock, or a shallow water bottom? Several cases illustrated that murky water can create a situation where it is not apparent to the swimmer/diver that a hazard exists. Additionally, even if the water is clear, glare from the sun might obscure the hazards beneath the water's surface. Evidence that the water was unclear or that the sun's glare obstructed a view of objects beneath the surface might defeat a defendant's claim that a danger was open and obvious.

Another typical key issue is the sufficiency of warnings. The placement of warning signs, their type, color, and wording all are important to the outcome of a case where someone claims that the defendant failed to adequately warn of a hazard. The cases indicate that "swim at your own risk," or "no diving" and "no swimming" signs might not be sufficient to serve as proof of a

defendant's duty to warn. The reason is that they often do not point out the particular (specific) risk or have the necessary effect of discouraging people from diving in the hazardous area. Additionally, as was illustrated in the *Davis* case, the color and size of a warning size is important. A small sign with blue on white wording was not found to be an adequate warning that would indicate danger. Also, an understanding of the site's visitors is important. For example, as illustrated in *Caraballo*, when a large Hispanic population visits an area, signs should have international symbols and/or have Spanish language in addition to English.

Additionally, as illustrated in the case examples, signs should be placed in strategic locations to provide the best opportunity for those contemplating a dive to see and understand the sign. The placement and location of signs is of increased significance where there is a structure that invites diving, such as a retaining wall, or as in *Schell*, a diving platform. Furthermore, the method of communication by which a warning is given is important. As illustrated in *Stephens*, a warning on the back of a park brochure might not be viewed as an adequate warning to potential divers of the specific dangers in the aquatic environment. Finally, as illustrated, warnings become essential at sites where there have been previous diving injuries or where there are known hazards such as tree stumps.

SWIMMING

Lakes and Subsurface Contour

Swimming in natural aquatic environments also presents a unique set of potential hazards. Failure to warn claims in negligence lawsuits are presented in the following cases where swimmers encountered drop-offs on the lake bottom and where swimmers were attacked by alligators on public property.

In *Navarro v. Country Vill. Homeowners'Assoc.* (1995), Jaun Navarro drowned in a lake in his residential development. At the time of the incident, he was with his two daughters wading into the water of a designated swimming area. He did not know how to swim. The beach was near a picnic area and had posted signs that stated, "Swim at Your Own Risk" and "Deep Water." As Mr. Navarro waded out from shore, he encountered a steep and sudden drop-off where the water was over his head. As a result, he drowned. His family sued the homeowners' association alleging negligence for failing to warn of the drop off.

The Florida Court of Appeals affirmed the trial court's decision in favor of the defendant. The general rule in Florida is that the owner of an artificial body of water is not guilty of negligence for drowning unless it is constructed to constitute a trap or there is a concealed danger. The Court held that the sharp change in depth did not constitute a concealed dangerous condition (p. 168). Therefore, the defendant was not found liable for negligence in connection with the plaintiff's death.

In *Kesner v. Trenton, et al* (1975), a family was on an outing when two sisters, both non-swimmers, went wading in a lake. Shortly after they entered the water they slipped or stepped into a culvert that had been dug from the lake bottom for the purpose of channeling water to a dam site on the lake. This culvert was approximately ten feet deep and dropped off quickly from an area that was only knee deep. Neither the sisters nor any other family members were aware of the existence or location of the hidden culvert. There were no markers, buoys, signs, or other indicators alluding to the existence of the culvert or to the hazards of the swimming area. However, the defendant testified that he previously had roped off the area in order to restrict swimmers from the potential danger. Apparently, boats using the area cut or destroyed the rope one or two weeks prior to the incident, however, they were not replaced. The Supreme Court of Appeals for West Virginia affirmed the district court's decision that the culvert was a hidden danger and its decision that the plaintiff should recover damages (p. 889).

Lakes: Animal Encounters

In *George v. United States* (1990) the plaintiff was attacked by an alligator while swimming in a designated swimming area on United States Forest Service (USFS) property in Alabama. On the day of the attack, Mr. George entered a USFS recreation area from the rear entrance with his dog, walked to the swimming area, and waded into chest deep water. He did not realize that a 12-foot alligator was in the area. The alligator attacked Mr. George and severed his right arm at the shoulder. He brought suit against the USFS claiming they failed to warn him of the alligator and the potential for harm.

Testimony at trial revealed that previous visitors to the area had been followed by a large alligator while fishing and that the alligator had no apparent fear of humans. However, the USFS had not posted warning signs or given verbal warnings to visitors of the potential for an alligator attack. The reasons given for not warning was that the alligator had not previously attacked humans or animals, posting warning signs might have suggested to the public that all potential natural hazards would be posted, the risk of an

alligator attack was minimal, and warning signs would unnecessarily frighten the public.

The court found that there was substantial evidence that the USFS had actual knowledge of an alligator problem and failed to take corrective measures (p. 1528). Previous visitor complaints of an aggressive alligator were sufficient to find a duty to warn. The court did not feel that the occurrence of actual attacks on domestic animals or humans by the alligator was necessary to find that the Forest Service had a duty to warn of alligator attacks in the area. The plaintiff prevailed in the case.

In the case of *Palumbo v. State of Florida* (1986), the plaintiff student was bitten by an alligator while swimming in a lake at a recreational park operated by a state university. A sign posted at the boat launch area where the plaintiff entered the water read, "No Swimming Allowed." Several signs posted around the park made reference to alligators and the dangers they posed. Other signs in both swimming and non-swimming areas contained swimming regulations. On the day of the incident, the plaintiff noticed that a sailboat had capsized and appeared to have its mast stuck in the mud. He decided to swim out to the boat in order to help right it and simply get some exercise. During his swim, he was attacked and severely injured by an alligator.

The court held that in not taking measures to prevent alligators from moving from the state park to the adjoining recreational park, and not providing alligator spotters, the university was clearly engaged in discretionary decisions, which provided immunity from liability (p. 354). The court also held that the plaintiff's total disregard of clear warnings and regulations, in the form of signage, was the sole proximate cause of his injury (*Id.*). The plaintiff had visited the park at least 25 times prior to the incident. He testified that he noticed the signs at the park, but said he never read them. The court responded by stating, "A party cannot close his eyes and his mind and thereby impose liability on another when there would otherwise be none" (*Id.*). The trial court's decision in favor of the state was affirmed.

Lake Swimming Cases: Key Findings and Risk Management Tips

The previous cases illustrate many of the unique hazards that lake swimmers may encounter. Where a person is injured due to a sudden drop-off in a lake bottom, the necessity to warn becomes especially critical when the feature might be viewed as a trap or concealed danger. This determination is one that is open to interpretation depending upon the specific circumstance(s). However, it would be wise for the owner/operator to ensure that warnings are given for the safety of swimmers and to reduce the probability of liability

when a known drop-off in the lake bottom exists and where it is foreseeable that people might wade or swim at that location. Additionally, if an area is roped off or warning signs have been posted, the warnings should be properly maintained.

Encounters between humans and aggressive animals can have tragic consequences. As habitat for wild animals continues to decrease, human encounters with certain species becomes more frequent and foreseeable. Several cases from the southern region of the United States illustrate the issues raised when alligator attacks have occurred. These cases illustrate the importance of foreseeability when warnings are at issue. In *George*, the court found that warnings were necessary even in the absence of prior attacks on domestic animals or humans by an aggressive and habituated alligator. Complaints from fishermen of being followed by the alligator were sufficient to find that an attack was foreseeable and that warnings were necessary. Additionally, the case suggests that it is no excuse to claim that warning signs were not posted out of fear that the signs would unnecessarily frighten the public.

BEACHES: OCEAN CONDITIONS

Ocean swimming can also be a dangerous activity. Conditions are often difficult to predict and are beyond human control. Therefore, evidence of warnings is often a key issue in cases where ocean swimmers are injured or drown. The following cases provide examples of issues raised where injuries and deaths occurred due to waves, currents, and subsurface conditions.

In *Princess Hotels International v. Pearson, et al* (1995), a hotel patron drowned while swimming in the ocean on property adjacent to the hotel. The deceased was vacationing at the hotel and decided to go swimming with his former wife from a beach on adjacent government property. On their way to the beach on the other side of a seawall, they walked through the lobby in their swim clothes without any response from the hotel personnel. To reach this area one had to pass through a gate with a large sign, which the hotel had posted. The sign stated with red capital letters on a white background

> WARNING: Swimming in the Ocean Can Be Dangerous. The Beach is Federal Property and the Hotel is Not Responsible for any Act Occurring in This Area. Use the Beach and Water at Your Own Risk. Do Not Visit the Beach at Night. Do Not Go Far From the Hotel at Any Time.

While swimming from this beach, the deceased encountered strong rip currents and large waves. He was unable to swim in these conditions and drowned. His former wife brought suit against the hotel claiming they were negligent in failing to warn of the dangers of ocean swimming. The trial court found that the hotel had breached its legal duty to warn guests of the dangers of ocean swimming since they commercially benefited from the adjacent beach (p. 459). This decision was reversed on appeal.

The appellate court held that the hotel had no legal responsibility to warn (p. 457). The court held that a duty is required when there is both control over the premises and commercial benefit (*Id.*). Since the hotel had no control over the adjacent beach or ocean, it was not liable to the plaintiff. Therefore, factual issues surrounding the sufficiency of the warning were not discussed.

The court in *Andrews v. State of Florida* (1990) reversed a judgment in favor of the defendant. The parents of a child who drowned in the waters at a state recreational area brought an action against the state based on its alleged negligent failure to post signs warning of known dangerous currents and for failing to provide lifeguards close enough to the area of the incident. On the day of the drowning, the plaintiff's son was evidently swept away by a strong current from the gulf as he was wading in the water.

Prior to the state acquiring control of the area, a local city erected signs at the beach warning of a strong undertow, prohibiting swimming in that area, and directing the public to swim in another designated area. Upon the state's acquisition of the area, they removed this signage because, according to park officials, the signs were not necessary. There were questions as to whether the state had designated the area where the drowning occurred as a swimming area. A police officer that assisted at the drowning scene, testified that on the day of the accident, he observed signs in that area which stated "No lifeguard on duty. Swim at your own risk." He further stated that based upon his knowledge of the area, he believed the area was in fact a swimming area.

The trial court entered summary judgment for the state after finding as a matter of law that the state had not waived its sovereign immunity for purposes of this judgment (p. 86). On appeal, the court stated that if the state had designated the area in question as a swimming area, "then it was obligated to operate that facility safely and to that extent would have waived its sovereign immunity" (p. 89). There was an abundance of evidence that showed the park's visitors were using the beach as a swimming area with the knowledge of the state. Additionally, two witnesses testified that on the day of the drowning, they observed signs at the beach, which indicated that swimming was permitted, but at the individual's own risk. The court concluded that there was at least an issue of material fact in dispute regarding

whether the state led the public to believe the beach was a designated swimming area (*Id.*). The judgment in favor of the state was reversed and remanded for further proceedings.

The hazards of ocean wave action were at issue in *Cimino v. Town of Hempstead* (1985). The plaintiff suffered severe injuries when he was struck from behind by a large wave as he was exiting the water at the defendant's beach. He alleged that the town, through its lifeguards, had a duty to warn him of the existing wave conditions or to close the beach because of those conditions. However, the plaintiff had observed himself that the waves were high and that the water conditions were turbulent. Other bathers told him that the ocean was "really rough" that day. Furthermore, he had already experienced the water conditions for 20 minutes before the incident. Upon entering the water for a second time, after observing that the waves were 8 to 10 feet in height and were knocking people down, he engaged in body surfing for about 15 minutes. He was then injured as he was exiting the water.

The court held that while the city owed a duty of care, it did not owe the plaintiff a duty to warn of the wave action where water conditions were readily observable to all and were in fact not only observed by the plaintiff but actually physically experienced by him when he entered the water on two separate occasions. The court noted that, "the value of a warning is particularly questionable where, as here, the claimant knew or should reasonably have known of the dangers posed" (p. 69). Additionally, the court stated, "it is well settled that there is no duty to warn against a condition that can be readily observed by the reasonable use of senses" (*Id.*). The court concluded that the defendant had no duty to close the beach merely because of the wave activity (p. 70). The wave conditions had been worse on each of the two days before the day of the plaintiff's injury, and there was no evidence that any similar accidents occurred on either of those days, or even on any prior occasion.

In *Tarhis v. Lahaina Investment Corporation* (1973), the plaintiff was injured as a result of being thrown on the beach by a "huge wave" in front of a Hawaiian resort hotel. The plaintiff alleged that the hotel's advertising brochure stated that, "The sea is safe and exhilarating for swimming. . ." and that she should have been warned that a surging, powerful surf was a dangerous condition. On the day of the incident, the hotel had posted four signs on the beach, two of which stated, "CAUTION Red flag on beach indicates dangerous surf conditions. Guests please use swimming pools." The other two signs read: "NOTICE to our guests, Red Flag on beach indicates dangerous surf. Please use swimming pools." Six red flags were allegedly positioned in front of the hotel's beach and were admittedly seen by the

plaintiff. However, the plaintiff stated that she did not see the signs warning of the dangerous surf conditions, nor did she receive any verbal warning from the defendant concerning those conditions. Noting the existence of "slight waves," the plaintiff and her companions entered the water where, a few minutes later, the injury occurred.

The court held that the dangers inherent in swimming in the ocean on the day of the incident "should have been known to the appellant as an ordinary intelligent person" and therefore the defendant was under no duty to warn the plaintiff of the dangerous surf conditions (p. 1020). However, the court ruled that whether or not the ocean would have appeared dangerous to an ordinary intelligent person was a question for the jury (p. 1021). Therefore, the court reversed the trial court's decision for summary judgment and the case was remanded.

In the case of *Bucher v. Dade County* (1977), the contour of the ocean floor was an issue. In this case, a negligence action was brought for an injury to a 15-year-old boy who fell into the water resulting in a fractured neck and partial paralysis. On the day of the incident, the boy was on an outing with his high school marching band and had been in and out of the water at the beach all day. Later in the day, he entered the water again to wash off some sand. As he did, he slipped into a small sandy incline, less than one foot deep, which was caused by changing tides. This caused him to fall head first into the water, which resulted in the injury.

The plaintiff alleged that the county was negligent in failing to warn of the hidden incline by posting signs warning of such alleged dangerous condition. The issue involved in the appeal was whether Dade County had a duty to warn people of the presence of small sandy inclines under the shallow water, which were constantly filling and changing with the tides.

The court held that the county had no such duty and affirmed the decision of the lower court. The court stated that it was clear that the incline into which the plaintiff slipped was a natural condition of the shoreline and was continually changing due to the tides (p. 91). The plaintiff had been playing part of the day without incident in the area where he eventually fell. Furthermore, the water was very shallow in that area and the sloping incline was no more than one foot deep. Under those conditions, the court could not say that the condition was so dangerous that the county should have warned swimmers about it. Such a danger should be taken as obvious to all those who use the beach. That was the first such incident at that beach and it could not in any way have been foreseen.

Ocean Swimming Cases: Key Findings and Risk Management Tips

Ocean conditions often present unique and sometimes hazardous situations for swimmers. Hotels and resorts are frequently located adjacent to beach property owned by another entity. Where this occurs, it is important to inform patrons that the beach is not owned or managed by them. Though the sufficiency of warnings was not at issue in *Princess Hotels*, attention to detail on the adequacy of warnings is important for managers of property on, or adjacent to, a beach. Where beach property is under the direct control of an organization, as demonstrated in *Andrews*, warnings of specific hazardous conditions should be provided where patrons might be led to believe (through action or inaction) that the beach was a designated swimming area. Finally, to reduce the risk of liability, it would be prudent for owners/operators of beach areas to warn of conditions that increase the risk of danger where natural forces such as hurricanes or other storms alter ocean currents or wave conditions.

SUMMARY

The failure to warn aquatic patrons of dangers and risks constitutes possible negligence liability. Generally, if the operator of an aquatic facility knows of the existence of a latent or concealed defect or peril which is not known or likely to be discovered by a patron, he or she must either correct it or warn of its existence. Where warnings are provided, a key issue becomes whether the warning was adequate to put swimmers on notice of the danger.

Considerations as to the adequacy of warnings include the placement of warning signs, and characteristics of the warning such as type, color, and wording. Additionally, the method of communication represents an important consideration, i.e. whether the warning is given verbally, by sign, or contained in a brochure. Further, the cases demonstrate that, not only must there be a general warning, but courts have held defendants liable for not providing warnings that are specific enough to adequately warn of the danger or risk.

When swimmers are injured or drown in lakes or ponds, subsurface conditions or encounters with aggressive animals are sometimes the cause. Warnings are very important in these aquatic environments, especially where an underwater feature might be viewed as a trap or concealed danger, or where injury is foreseeable. Beaches also present a unique set of dangers. Currents, waves, and subsurface conditions all contribute to injuries and deaths. Specific warnings of unusual ocean conditions should be employed to reduce the

probability of injury and potential liability. As the cases illustrate, natural aquatic environments present a unique and diverse set of liability issues for owners and operators to consider. Warnings are an integral part of a risk management plan designed to increase safety and reduce liability.

ABOUT THE AUTHORS

DANIEL P. CONNAUGHTON is currently an Assistant Professor in the Department of Exercise and Sport Sciences at the University of Florida. He received a B.S. in Exercise and Sport Sciences (Pedagogy) and a M.S. in Recreational Studies from the University of Florida, a M.S. in Physical Education (Administration) from Bridgewater State College, and his Ed.D. in Sport Administration from the Florida State University. He has held management positions in campus and public recreation departments, aquatic facilities, and health/fitness programs. At the University of Florida, Dr. Connaughton teaches classes in the areas of sport law and sport management.

JOHN O. SPENGLER is currently an Assistant Professor in the Department of Recreation, Parks and Tourism at the University of Florida. He received a B.A. in Exercise Science from Wake Forest University, a Masters Degree in Recreation, Parks and Tourism from Clemson University, a law degree (J.D.) from the University of Toledo, and a Ph.D. from Indiana University in Human Performance. He has managed recreational sport programs and coached various recreational sports. At the University of Florida, Dr. Spengler teaches classes in the areas of programming and leadership, and sport and recreation law.

BRIAN P. BURKET is a graduate student in the Department of Recreation, Parks and Tourism at the University of Florida. He is pursuing a M.S. degree with an emphasis in natural resource recreational management. Brian earned a B.S. degree in Zoology from the University of Florida. His research interests include recreational impacts, crowding concerns, and legal issues in outdoor recreation.

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