

EVIDENCE OF LIFEGUARD NEGLIGENCE IN BAY DROWNING  
ESTATE OF POWELL v. CITY AND COUNTY OF HONOLULU

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII  
February 26, 2007

[Note: Attached opinion of the court has been edited and citations omitted.]

The instant case arose from the July 19, 2002 drowning deaths of Erik Powell and James Laughlin after an incident at the Hanauma Bay Nature Preserve ("Hanauma Bay"), in the area of the bay known as the "Witches Brew". That day, Mary Powell ("Mrs. Powell"), her husband Erik Powell, and her brother James Laughlin arrived at Hanauma Bay at around 8:30 a.m. Mrs. Powell and Laughlin asked an attendant at the visitor center how to get past the coral reef to snorkel in the area beyond the reef. According to Plaintiffs, the attendant identified the "pull line" and "buoys" that marked the channel through the reef and told them to go through there to get to the open area of the bay. At about 10:00 a.m., Powell and Laughlin entered the water and snorkeled in the inner area of the bay. They then decided to explore beyond the reef.

That day, the park attendance was 3,773. The Witches Brew and the area known as the "Toilet Bowl" were both closed because of the conditions that day. Lifeguard Daniel Neves testified that there was a lot of wind and a lot of wake in the water. Coupled with the glare, it was very hard for the lifeguards to see.

Lifeguard Clarence Moses was stationed at one of the lifeguard towers when he saw someone, later identified as Laughlin, swimming around Witches Brew Point. Laughlin appeared to be doing fine until he tried to climb out to the side of the ledge. He fell back into the water, apparently too weak to climb out. Moses sent his partner, Neves, to assist Laughlin and called his supervisor to notify him of a possible rescue. By the time Laughlin failed in his second attempt to pull himself onto the ledge, Neves had reached the end of the beach, but still had to run down to the ledge. Moses also ran down to assist. As Moses ran down, the acting supervisor, Ron Bregman, drove past on his truck, heading toward the scene. Neves jumped into the water and brought Laughlin to the ledge. Moses, Neves, and Bregman pulled Laughlin out of the water and performed CPR. Laughlin vomited during CPR and the amount of vomit made resuscitation difficult. The lifeguards continued CPR until the ambulance arrived.

After the ambulance left, the lifeguards questioned other bay patrons to determine the swimmer's identity. After they determined that he may not have been in the water alone, they called for the mobile rescue team, which operates the jet ski. Lifeguards Billy Goodwin and Rob Dorr were operating the jet ski that day. They were at Sandy Beach when they got the call. As they arrived at Hanauma Bay, Moses was going to a lookout area to get a better view of the bay. He spotted Powell's body and Goodwin and Dorr launched the jet ski. This was about half an hour after they pulled Laughlin out of the water. Goodwin and Dorr picked up Powell and performed CPR. Both Powell and Laughlin were later pronounced dead from drowning.

Defendant seeks summary judgment on all claims pertaining to Powell's death. Defendant argues that Plaintiffs can only speculate that rough ocean conditions, under staffing, and/or confusing

buoys were the cause of Powell and Laughlin's deaths. Further, Defendant asserts that Powell and Laughlin were not in fact confused by the buoys. They chose to swim past them because they wanted to see things beyond the reef.

Plaintiffs argue that Defendant is not entitled to summary judgment based solely on the fact that no one saw Powell drown because proximate cause can be established through circumstantial evidence. In Plaintiffs' view, the evidence establishes that, but for the lifeguards' gross negligence, Powell would not have drowned. In the alternative, they argue that there are genuine issues of fact that should be resolved at trial, particularly because Plaintiffs' case is based on Defendant's failure to implement adequate safety procedures. Further, Defendant should not be allowed to use the lack of adequate lifeguards as a defense because it created that condition and the condition led to Powell's drowning.

Plaintiffs note that as many as 4,000 visitors a day come to Hanauma Bay. As of July 2002, seven people had already drowned at Hanauma Bay that year. Despite this, Hanauma Bay only had four lifeguards, manning two lifeguard towers. At times there would only be two guards on duty because of breaks. Hanauma Bay increased the number of lifeguards after 2002. Further, the lifeguards testified during their depositions that it was difficult to monitor swimmers in the area because they were face down for most of the time. Bregman testified that eighty to ninety percent of rescues occurred in the cable channel, known as "the Slot", or in the outer reef because people who get caught in the current get sucked into the undertow.

Plaintiffs argue that the lack of appropriate safety measures at Hanauma Bay on the day in question was the proximate cause of Powell and Laughlin's death. Given the conditions on the day in question, the outer reef was closed. Powell and Laughlin, however, were able to swim through the channel undetected and were gone for at least an hour. Plaintiffs argue that there should have been more safety precautions to adequately monitor the closed area and to warn visitors to stay away from the area. If such procedures had been in place, Powell and Laughlin would not have entered the area.

Plaintiffs also argue that, based on the lifeguards' deposition testimony, Hanauma Bay was grossly understaffed and, if there had been more lifeguards, Powell and Laughlin would have been spotted sooner. Further, the single emergency rescue jet ski served Kailua Beach, Waimanalo, Makapuu, Sandy Beach, and Hanauma Bay and had to be towed by truck between the beaches. Neves testified that one jet ski is not sufficient to cover these areas and that, if the jet ski had been on site, both men might have been saved.

Ralph Goto, the administrator for Ocean Safety and Lifeguard Services, testified that he had the authority to transfer lifeguards from one beach park to another, but that he had never done so. Goto also considered assigning a lifeguard to be in the water but concluded that wasn't justified. James Howe, the highest officer under Goto, testified that, despite the number of drowning incidents at Hanauma Bay that year, he did not ask for additional lifeguards.

In addition, Plaintiffs argue that the buoys marking the cable channel were misleading to swimmers. There was no indication that the buoys marked a dangerous area; they appeared to invite swimmers to venture through the marked area to the outer reef. Mrs. Powell thought that

the buoys were a pull line, based on the information she got from the visitor center attendant. Further, the buoys are not marked with any warnings and their purpose is not clear. Even Bergman testified at his deposition that they served as a warning, but "[i]t might help them when they are trying to return to shore outside the reef. It may help them identify where they can swim through, rather than swim over the reef." Plaintiffs argue that whether these circumstances were a substantial factor in Powell's death is a factual determination for the jury to decide.

## CAUSATION

In diversity cases, federal courts apply state substantive law. Under Hawaii law, an actor's negligent conduct is a legal cause of harm to another if (a) his or her conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his or her negligence has resulted in the harm.

The first prong of the test for the presence of legal causation contemplates a factual determination that the negligence of the defendant was more likely than not a substantial factor in bringing about the result complained of. In this regard, a defendant's negligence need not have been the whole cause or the only factor in bringing about the harm. It is enough that his or her negligence was a substantial factor in causing [the] plaintiff's injuries. The second prong contemplates whether there are policy concerns or rules of law that would prevent imposition of liability on the negligent party although his or her negligence was clearly a cause of the resultant injury.

Defendant argues that it is entitled to summary judgment as to all claims arising from Powell's death because there is no evidence that Defendant's actions were a substantial factor in bringing about his death. No one saw what happened to Powell and Laughlin between the time that they swam past the coral reef until Moses saw Laughlin swimming near Witches Brew Point. Further, no one saw the events that led up to Powell's death. Defendants argue that any number of factors, which are unrelated to the dangerous conditions of the day and Defendant's alleged failure to warn Powell of those conditions, could have caused his death. For example, Powell could have had severe cramps in the water because he ate a big meal shortly before swimming. Defendant therefore argues that, even construing the evidence in the light most favorable to Plaintiffs, they cannot establish a prima facie case because they cannot prove the element of causation.

As noted above, the causation issue requires "a factual determination that the negligence of the defendant was more likely than not a substantial factor in bringing about" Powell's death. It is undisputed that Powell: went snorkeling at Hanauma Bay; entered an area that was supposed to be closed due to dangerous conditions that day; and eventually died from drowning. It is true that no one knows the precise events which lead to his drowning, but the fact remains that Powell died while engaged in an activity that Defendant invites the public to engage in at Hanauma Bay and his death was related to this activity.

Plaintiffs have argued that Defendant's negligence in the following areas contributed to the proximate cause of Powell's death: the rough conditions on that day and Defendant's failure to adequately warn swimmers or to keep them away from dangerous areas; an insufficient number of lifeguards to monitor the number of people at Hanauma Bay; and the fact that the buoys sent

conflicting signals to swimmers and led them to believe that they could swim through those areas. Plaintiffs have offered some evidence in support of each of these factors.

Even assuming, *arguendo*, that another factor unrelated to the City's conduct contributed to Powell's death, these allegedly negligent actions and omissions could have also been substantial factors. This Court finds that there are genuine issues of material fact regarding the cause of Powell's death and that the jury must make the factual determinations relevant to causation.

This Court therefore DENIES Defendant's request for summary judgment as to Plaintiffs' claims arising from Powell's death based on their alleged failure to establish causation.