

INTOXICATED TRESPASSER DROWNS IN CLOSED CITY POOL

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The *Garcia* decision described herein presents a fairly commonplace situation where an adult trespasser drowns while swimming in a closed city swimming pool. In such instances, plaintiffs generally allege that the city was negligent for failing to either prevent access to the pool, or provide supervision for those trespassers who are known to use the pool after hours.

As indicated by the *Garcia* opinion, despite the known presence of trespassing adults on hot summer nights, the city in this instant had no legal duty to summon police to expel the crowd of trespassers from the closed swimming pool or continue operation of its pool facilities beyond its operating hours. Further, given continuing efforts to secure the area and exclude illegal swimmers from its facilities after closing, the appeals court found that the city had taken "all reasonably necessary steps" to satisfy its legal duty to maintain its parks and playground facilities in a reasonably safe condition.

This description of the *Garcia* decision appears in Volume 11, number 3, of the *Recreation and Parks Law Reporter (RPLR)*. RPLR is a quarterly publication which describes recently reported state and federal court decisions which address issues of recreational injury liability. For further information regarding a subscription to RPLR, please consult the advertisement which accompanies this column or contact NRPA.

SUMMER IN THE CITY

In the case of *Garcia v. City of New York*, 617 N.Y.S.2d 462 (A.D. 1994), plaintiff Ernesto Garcia, as the administrator of the estate of Ana Garcia alleged that the negligence of the defendant City of New York had caused the drowning death of Ana Garcia. The facts of the case were as follows:

During a hot summer night on July 21, 1985, decedent Ana Garcia, a 32-year old woman, illegally entered a public swimming pool facility in Van Cortlandt Park in the late evening and well after the pool had officially closed for the day. There were approximately 50-100 illegal swimmers already in the pool area, a number of whom had coolers and were drinking alcoholic beverages. The lights were off and no lifeguards or life saving equipment were in the pool vicinity. At approximately 1AM the police and an ambulance were summoned and paramedics attempted to revive Ms. Garcia, who was removed from the pool in an unconscious state. The attempt by the paramedics proved futile and Ms. Garcia was later pronounced dead at North Central Bronx Hospital.

Decedent was accompanied to the pool by six other individuals. Various members of the group testified at trial that they had gained access to the pool either through a hole in

the surrounding chain-link fence or by climbing over a brick wall; that they were aware the pool was closed; and that they were trespassing.

There is no dispute that the members of Ms. Garcia's party had been consuming alcohol before their arrival at the pool and had continued to do so throughout the night. One of the members of the decedent's group, a Ms. Ana Pagan Torres, testified that Ms. Garcia had been drinking gin that evening. At some unknown point thereafter, Ms. Garcia entered the pool, which was only three-feet deep, became submerged and drowned.

While the New York City Department of Parks and Recreation (the "Parks Department") was aware that trespassers frequently entered the pool facility after it officially closed at 7PM, it made all efforts to exclude the night swimmers by promptly repairing the surrounding fence each time it was cut; posting the operating hours of the pool; and locking the gates, securing the area and turning the lights off after closing. A night watchman was also on duty to patrol the area and monitor the activities taking place. The watchman, who was stationed in a guardhouse near the pool, was given specific instructions not to attempt to evict the trespassers since intruders have assaulted the watchman in the past. There have been other incidents regarding municipal pools in general in which the guardhouse had been pelted with rocks and bottles as the result of various confrontations. The night watchman was directed to keep a log of the number of swimmers and to report that number to the local precinct, and to call the police when the crowd got rowdy or boisterous or when assistance was required.

The policy of the Police Department was that they would only expel the trespassers if they became boisterous or otherwise disturbed the peace in order to avoid confrontations, community unrest and a possible riot. This procedure seems to have been implemented due to prior incidents of unrest in the City, especially during hot summer nights when large crowds often frequent the parks and pool areas to escape the heat and humidity.

The jury found that "the City was not negligent in maintaining the fence surrounding the pool." Evidence presented at trial indicated that "the fence was usually breached a short time after the Parks Department made repairs, which it did on numerous occasions." The jury, however, found that "the City was negligent in failing to provide proper supervision at the pool." Accordingly, the jury returned a verdict which found "plaintiff and the City each to be 50% negligent and awarded plaintiff approximately \$2,000,000 in damages." Having found that "plaintiff had not assumed the risk so as to preclude the City's liability," the trial judge entered judgment for plaintiff, but reduced the amount of damages to \$615,343.04. The City appealed.

TRESPASSERS DICTATE OPERATING HOURS?

To establish negligence, the appeals court noted that "a plaintiff must show that the defendant was negligent and that such negligence was a substantial factor in bringing about the events which caused plaintiff's injuries." Applying these principles to the facts of the case, the appeals court found that the City had taken "all reasonably necessary steps to secure the area and exclude illegal swimmers from its facilities after closing."

With regard to the instant case, a municipality has a duty to maintain its parks and playground facilities in a reasonably safe condition. However, a municipality is not an insurer of the safety of those who use its facilities, and its only duty is to exercise ordinary care in the supervision, construction and maintenance of those facilities... Plaintiff's argument that the municipality breached its duty by failing to provide life saving equipment, a life guard, and by neglecting to turn the lights on after closing is misplaced.

The municipality was under no duty to continue operation of its pool facilities beyond its operating hours. Plaintiff's contention would lead to the incongruous result of having the trespassers dictate the operating hours of a public pool or subject the City to liability for injuries sustained by intruders. Moreover, even if a lifeguard had been provided, there is no evidence that his/her presence would have avoided the death of the decedent.

Further, the appeals court found that "Garcia's contention that the night watchman should have taken some action or called the police to expel the crowd is equally unpersuasive."

The night watchman who was alone and unarmed was instructed not to confront the intruders for his own safety. The temporary presence of police would not have kept the trespassers out. Decedent's companion, Ms. Torres, testified that the police had in the past chased people away, but as soon as the police departed, they would again reenter the pool. Any attempt by the City to exclude illegal swimmers from the pool after closing would have been ineffective, unfeasible or simply too costly. The City would have had to have deployed a regiment of police officers to guard the subject pool at all times after closing to effectively keep trespassers out. The City is not charged with such a duty.

Further, it has long been held that a municipality's provision of police protection to its citizenry is a resource allocating function that is owed to the public at large and is best left to the discretion of the policy makers. Plaintiff makes no attempt to demonstrate a special relationship and it was, therefore, within the Police Department's discretion, in the interests of avoiding community unrest, to refrain from ejecting trespassers from the pool unless they became unruly or disturbed the peace. As a result, plaintiff's argument is untenable.

In addition, the appeals court found that Garcia's conduct was "the sole proximate cause of their injuries."

Even assuming that the municipality was negligent to some degree in failing to keep illegal swimmers out of the pool area and in failing to provide supervision, which the evidence herein does not support, such negligence would not have been a substantial factor in bringing about Ms. Garcia's injuries and death...

In the instant case, an autopsy revealed that decedent had died of asphyxia by drowning and that her blood alcohol level at the time of death was .23%, or more than twice the legal limit for driving while intoxicated in New York State. Testimony elicited by defendant City from Dr. Mark Taff, a medical expert, disclosed that an individual of Ms. Garcia's size could attain the foregoing blood alcohol level by drinking the equivalent of 11-12, 12 ounce cans of beer within one hour. Dr. Taff continued that in layman's terms, Ms. Garcia "was drunk at the time of her death" and in all probability manifested a number of symptoms of intoxication, including slurred speech and muscular uncoordination.

Under the circumstances of this case, the appeals court also found Garcia had "assumed the risk of her own conduct which acts as a bar to her recovery."

While the doctrine of assumption of risk is no longer an absolute defense, it is necessary and proper, when measuring a defendant's duty to a plaintiff, to consider the risks assumed by the plaintiff. As a general rule, participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of their participation... The foregoing must be read in conjunction with the proposition that one who engages in water sports assumes those reasonably foreseeable risks which are inherent in that activity.

In the case at bar, the evidence supports no other conclusion than that the reckless and culpable conduct of decedent in knowingly entering the pool facility after it was closed for the day, well after dusk, where no illumination, lifeguards or life-saving equipment were present and, thereafter, choosing to enter the pool unaccompanied in a heavily intoxicated state, with the concomitant impairment of her sensory perception and muscular coordination, was the sole legal cause of her injuries and subsequent death. The fact that decedent drowned in a pool with a uniform depth of three feet further substantiates the foregoing conclusion.

Even if an agent of the municipality had expressly authorized the use of the pool after closing, a swimmer continues to assume the obvious and necessary risks unless a representation as to safety has been imparted. Although this was a tragic and unfortunate incident, Ms. Garcia must be charged with the responsibilities and consequences of her own imprudent conduct, which included the undertaking of a water sport activity in a dark pool while heavily intoxicated.

As a result, the appeals court concluded that Ana Garcia's "reckless conduct, coupled with the inherent risks to one engaging in water sports constitutes an unforeseeable superseding event which absolves

defendant from any liability." The appeals court, therefore, reversed the judgment of the trial court in favor of plaintiff and ordered that Garcia's case be dismissed.