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PRIMARY DUTY ON DIVER TO DETERMINE WHETHER IT IS SAFE TO DIVE

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There is generally no negligence liability for injuries resulting from conditions which should have been obvious to the recreational user. Further, the duty of a landowner is to warn of unreasonably dangerous conditions. Within this context, unreasonably dangerous conditions are those which are known to the landowner, but not obvious or discoverable by the recreational user through the reasonably use of his senses. If obvious or discoverable, the recreational user looking out reasonably for his own safety should be able to appreciate and avoid such hazardous conditions on the premises.

As applied to cases involving shallow water diving injuries, there is generally no legal duty to warn of the obvious danger of diving into unknown waters. On the contrary, the primary duty of care in ascertaining whether it is safe to dive is upon the diver. In determining whether the premises is unreasonably dangerous in a particular situation, courts will consider the ease with which the plaintiff could have discovered the danger. As indicated by the cases described herein, there is no landowner liability where the plaintiff needed only to walk a few feet into the water to discover that it was shallow. On the other hand, as indicated by the *Robbins* case described below, unexpected obstructions in a designated swim area would not necessarily be considered an obvious and inherent risk associated with diving.

SHALLOW DIVE DANGER OBVIOUS

In the case *Mosher v. State*, 535 N.Y.S.2d 225 (A.D. 3 Dept. 1988), plaintiff sustained quadriplegic injuries following a running dive into a swim area at defendant's state park. Plaintiff ran into the lake down a gradual slope and dove into 18 to 24 inches of water. Plaintiff claimed he had "hit something hard," but a search by lifeguards after the incident did not produce evidence of any obstructions on the sand-bottom lake.

In his complaint, plaintiff alleged that defendant was negligent in not maintaining the area in a safe condition. In addition, plaintiff alleged that defendant had negligently failed to post signs prohibiting shallow water dives. Plaintiff further claimed defendant was negligent in failing to train its lifeguards to prevent such dives given defendant's knowledge that such dives are more dangerous than the public realizes. The state claims court, however, dismissed plaintiff's case. Plaintiff appealed.

In the opinion of the appeals court, defendant had not violated any legal duty owed to plaintiff under the circumstances of this case. On the contrary, the court found that plaintiff's own conduct, rather than any alleged negligence on the part of defendant, had caused plaintiff's accident. Specifically, the court found

plaintiff's running dive had caused the force necessary for the resulting catastrophic injury. Moreover, the court found plaintiff had admitted knowing diving into shallow water was dangerous and that water depth should be ascertained before diving.

In this particular instance, plaintiff acknowledged seeing a sign prohibiting running, splashing or jousting in the water. Furthermore, the court found lifeguards would reprimand those seen sprinting into the water. Under such circumstances, the court doubted that additional signs or a more uniform reaction by the lifeguards would have prevented plaintiff's conduct given his failure to comply with the existing sign. As a result, the court found plaintiff's disregard of his own common sense regarding water depth when diving, as well as his failure to obey existing rules, had caused his "tragic misfortune." The appeals court, therefore, affirmed the dismissal of plaintiff's case.

Similarly, in the case of *Carr v. San-Tan, Inc.*, 543 N.W.2d 303 (Ia.App. 1995), plaintiff was injured while diving at a beach operated by defendant. Plaintiff alleged defendant negligent in failing to warn customers not to dive or to have water-depth markers. A jury awarded plaintiff damages, but the trial court granted judgment to defendant notwithstanding the jury verdict in favor of plaintiff. In the opinion of the trial court, there was no reasonable basis for the jury's verdict because "the danger posed by shallow water was open and obvious." Accordingly, the trial court concluded defendant did not owe a duty to plaintiff to post signs warning him of shallow water or the risks of diving into shallow water. Plaintiff appealed.

On appeal, plaintiff contended that the trial court misapplied the "open and obvious" rule by failing to consider whether defendant should have anticipated the harm, even though the harmful condition may have been open and obvious. In particular, plaintiff presented expert testimony indicating it was not uncommon for users of the beach to perform running dives, despite the knowledge or obviousness of the danger.

According to the appeals court, there is normally no duty to warn and the landowner is not liable for any injury sustained by an invitee where the risks of harm are known or obvious. Specifically, the appeals court held that "the danger of performing a running dive from a beach is obvious." Further, the court found itself "reluctant to impose a duty on a possessor of land to warn of risks based on an activity which is obviously unreasonable."

> The shallow water produced by a beach and the harm of diving into shallow water are matters which would be ascertainable by a reasonable person exercising ordinary perception, intelligence, and judgment... As a matter of law, we conclude it is unreasonable to perform a head first dive into water while running from a beach. San-Tan did not have a duty to warn Carr under the circumstances.

As a result, the appeals court concluded that the trial court did not err by granting judgment notwithstanding the verdict in favor of defendant. The appeals court, therefore, affirmed the judgment of the trial court.

MORE DANGEROUS THAT IT APPEARS?

In the case of *Robbins v. Department of Natural Resources*, 468 So.2d 1041 (Fla.App. 1 Dist. 1985), plaintiff, age 18, was paralyzed following a shallow dive from a concrete platform in a spring-fed swim area of defendant's state park. It was plaintiff's first visit to the site. The depth in front of the platform varied from 2 to 4 feet. Although the bottom was mostly sand covered, there were some large rocks in the area measuring 10 to 15 inches in diameter. At the time of the injury, the water was clear, but the splashing of the water by other swimmers and the glare of the sun affected one's depth perception. Plaintiff testified that he did not see the bottom or the rocks before diving.

Prior to the incident, the retaining wall of the concrete platform had been renovated. Following this renovation, the park superintendent and the lifeguards were aware of diving problems in the area. In particular, they were aware of several incidents in which park patrons sustained "nose scrapes" when they dove from the renovated platform. Following these incidents, the superintendent and the lifeguards discussed the need for erecting "no diving" signs," but no signs or rails were erected to prevent diving. Instead, the lifeguards were simply told to enforce a "no diving" policy in the area.

Plaintiff's expert testified that the configuration of the concrete platform invited diving. Accordingly, plaintiff's expert opined that preventive measures such as a railing or signs warning of the dangers associated with diving in the area were necessary.

The trial court dismissed plaintiff's case on the basis of assumption of risk. The appeals court, however, found that record in this case did not conclusively establish that plaintiff actually knew of the danger of executing a shallow dive in this area. According to the appeals court, assumption of risk required proof that plaintiff was fully aware of the depth and rocks in the swim area adjacent to the renovated concrete platform. In other words, plaintiff would have to be able to see the bottom clearly from and platform, subjectively recognize the risk posed by the rocks and shallow water, and proceed to dive anyway despite a known danger.

However, under the facts of this case, the appeals court found the inherent risks associated with diving from this particular platform were not necessarily known or obvious to plaintiff or other swimmers. On the contrary, the appeals court found that sufficient evidence for a jury to conclude that defendant was negligent in failing to take appropriate action once park personnel became aware of diving problems

unique to this area. Given such notice of the injury causing propensity of this particular swim area and concrete platform, the appeals court found defendant should have taken preventive measures, such as placing warning signs at appropriate locations, or otherwise advising swimmers of dangerous conditions not readily apparent to them. The appeals court, therefore, reversed the judgment of the trial court dismissing this case on the basis of assumption of risk.

EXPERIENCED DIVER, FULLY INFORMED?

In the case of *Learue by Learue v. State*, 741 S.W.2d 337 (Tenn.App. 1987), plaintiff, age 14 was injured in a dive from a concrete retaining wall between the beach and swim area in defendant's state park. The depth of the water near the wall was 2 to 3 feet. There were no depth markers or no diving signs. Prior to his dive, plaintiff had checked the depth of the water. He had also observed defendant's lifeguards diving from the wall. During the week prior to the accident, plaintiff swam in the area twice a day, including diving from wall. Defendant had no rules or guard instructions to prohibit diving from the wall. In the 20 years prior to plaintiff's accident there had been no similar diving injuries in the swim area. The state claims commission ruled in favor of defendant. Plaintiff appealed.

According to the appeals court, defendant had a legal duty to identify and eliminate obvious hazards, or identify and prohibit practices which were obviously hazardous. Specifically, the court found reasonable lifeguards would appreciate the danger of diving from a wall into 2 to 3 feet of water. As a result, the court found defendant was negligent in not eliminating the hazard posed by the wall, or prohibiting diving in the area.

On the other hand, the court found that plaintiff's contributory negligence (i.e., plaintiff's own failure to look out reasonably for his own safety) was the legal cause of his injury. As noted by the court, a child over age 14 is presumed capable of exercising reasonable care for his own safety like an adult. Further, the court found that plaintiff's general knowledge regarding safe swimming and his swimming ability indicated a failure to exercise reasonable care for his own safety under the circumstances of this case.

According to the court, plaintiff obviously knew that if he entered the water at any angle, and dove too deep he would surely injure himself. In so doing, the court acknowledged that plaintiff may not have fully appreciated the dire consequences of not making a shallow dive. Moreover, the court found that defendant's failure to warn of the depth in the swim area had not caused plaintiff's injury because plaintiff had already determined the depth of the water and he was fully informed of its condition. The appeals court, therefore, affirmed the judgment in favor of defendant.

APPRECIATE RISK, NOT NECESSARILY AVOID IT

In the case of *Hagy v. McHenry County Conservation District*, 546 N.E.2d 77 (Ill.App. 1989), plaintiff, age 15, broke his neck diving into a "swimming hole" located in a moderately flowing stream. Defendant had acquired the land in 1980, but had left it in a natural state with no recreation development. Plaintiff described the site as being "like a park," although he admitted seeing no signs or fences on the site. Prior to the incident, plaintiff had visited the site many times in the past for swimming and diving, including two times per week the preceding summer. Plaintiff admitted that he was an experienced swimmer and diver.

Plaintiff was injured during his first visit of the year to the site when he dove from an 8 to 12 foot high embankment adjacent to the swimming hole. It did not occur to plaintiff to check the depth of the creek before diving because he dove there before. The depth of the stream in the area of the swimming hole went from a minimum of 5 to 6 feet to a maximum of 10 to 12 feet. Following a "straight dive," plaintiff struck his head on the creek bed and was rendered quadriplegic.

In his complaint, plaintiff alleged that defendant had negligently permitted the existence of a "dangerous condition" because the muddy condition of the swimming hole gave the appearance of uniform depth. Further, plaintiff claimed defendant was negligent in failing to warn or prohibit swimming and diving in the area because defendant knew that the public frequented this area for public recreational use. Accordingly, plaintiff contended that defendant was negligent in failing to inspect and maintain the bottom of the creek and such negligence made the land unsafe for public use.

In response, defendant argued that it owed no legal duty to remedy a condition which presented an obvious risk of injury. Plaintiff countered with testimony from an aquatics expert indicating the dangerous condition was not obvious due to the effect of ongoing erosion in the area which was concealed by the muddy stream flow. The trial court granted summary judgment to defendant. Plaintiff appealed.

Citing "customary rules of negligence," the appeals court noted that the foreseeability of harm determines landowner liability for injuries to children entering the land. In so doing, however, the court acknowledged that there is generally no legal duty for the landowner to remedy a dangerous condition which presents obvious risks which children would be expected to appreciate and avoid. The court cited three examples of such obvious: burns from fire, drowning in water, and injuries associated with falls from heights. The specific issue in this case was, therefore, whether the no duty rule regarding obvious dangers to children included diving into water.

Under the circumstances of this case, the court found the 15-year-old plaintiff was mature enough to appreciate the danger of diving from a 8 to 12 foot high cliff into a muddy creek. As characterized by the court, the risk of diving into water was a combination of the obvious risks associated with water

falling from heights. Specifically, the court found plaintiff's vertical dive into muddy water presented posed obvious risk of injury associated with falling from a height. Under such circumstances, looking out reasonably for his own safety, plaintiff was expected to understand, appreciate, and avoid the obvious risk of diving into waters of uncertain depth.

In determining whether a particular condition presents "obvious risks which children would be expected to appreciate and avoid," the court found it appropriate to consider the minor's knowledge of a given situation, particularly where the minor's understanding of an alleged dangerous condition is greater than the typical minor of similar age. Applying this principle to the facts of the case, the court found plaintiff's diving experience and familiarity with the site was at least equal to defendant's knowledge of risks on the premises. In the opinion of the court, plaintiff was able to appreciate the risk of injury associated with diving into this particular body of water, but chose to undertake it. In so doing, the court noted that there was nothing unusual or deceptive about the meandering creek water which would present special or indiscernible dangers beyond the understanding and appreciation of the 15-year-old plaintiff.

Given the large number of cases involving teenage boys and diving accidents, plaintiff had argued on appeal that the trial court had erred in presuming that diving presented "obvious risks which children would be expected to appreciate and avoid." The appeals court rejected this argument. According to the appeals court, the lack of mature judgment among teenage boys did not negate their ability to recognize or appreciate the obvious risk of diving. Rather, the court found the frequency of such cases suggests that teenage boys tend to undertake such obvious risks. As noted by the court, the important fact is whether the minor can appreciate the risk, not that he will in fact avoid it.