LAW REVIEW, OCTOBER 1988

IN SEARCH OF THE ADEQUATE WARNING SIGN: COMMUNICATION IS THE KEY

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Like the surfer in search of the perfect wave, we in the recreation field are in constant pursuit of the perfect warning sign. Like the perfect wave, however, the perfect warning sign may present an unattainable ideal. No warning sign, no matter how graphic or detailed, will insulate the owner of recreational lands from a lawsuit. Rather than a shield against liability, the warning sign should be viewed as a piece of evidence indicating the reasonableness of the landowner under the circumstances.

The provider of recreational lands is not an insurer of safety. On the contrary, the landowner must simply provide premises which are reasonably safe for recreational use. Despite such reasonableness on the part of the landowner, recreational users may still be injured. Life is a risky proposition; accidents do happen. Liability will only be imposed, however, when the conduct of the landowner creates an unreasonable risk of injury to the recreational user. In determining reasonableness, the foreseeable risk of injury is weighed against the corresponding burden of precaution necessary to address such foreseeable risks. Further, this reasonableness standard is a two-way street. Both the provider of recreational lands and the recreational user must act reasonably under the circumstances. While the landowner must provide reasonably safe facilities, the recreational user must also act reasonably under the circumstances to look out for his or her own safety.

Within this context, a warning sign is simply a burden of precaution which the landowner should take to apprise the recreational user of unreasonable dangers on the premises. Specifically, such hazards are foreseeable because they are known or discoverable to the landowner. On the other hand, the reasonable recreational user would not necessarily be expected to know, discover, or appreciate the risk of injury under the circumstances. An adequate warning sign, therefore, takes the landowner's knowledge of foreseeable, yet hidden, hazards on the premises and communicates this information to the recreational user. With this information, the recreational user can then avoid such hazards anti look out reasonably for his or her own safety.

On the other hand, no warning is required if a hazard is already known or open and obvious to the recreational user. Certain hazards are considered open and obvious to any child old enough to be at large. For example, the risk of drowning in a natural body of water (assuming no unreasonably dangerous submerged conditions) is generally considered an open and obvious hazard. Similarly, the fact that fire is hot and can cause burns or falls from obvious heights will result in injury are generally considered ()pen and obvious hazards. In most instances, courts have found no legal duty to warn individuals of such open and obvious dangers.

In those instances where the danger is not open and obvious, a warning sign should take a hidden

hazard and make the attendant risk of injury, readily apparent to the recreational user. As a result, the legal adequacy of any warning sign is directly related to its ability to communicate and educate the recreational user to unreasonable hazards on the premises. Conversely, a warning sign is less than adequate when it fails to communicate such hazard information to the average recreational user under the circumstances.

For example, a billboard which reads like the Rosetta stone at the entrance to a facility may contain all the necessary risk information, but it will be an inadequate warning sign if the average user passes in an automobile at 30 miles per hour. Under the circumstances, this bill board could not reasonably be expected to communicate hidden dangers to the user and make them open and obvious. (Note: If any of your signs even remotely resemble the following dictionary definition of the Rosetta stone, they are probably inadequate: "a black basalt stone found in 1799 that bears an inscription in hieroglyphics, demotic characters, and Greek, celebrated for having given the first clue to the decipherment of Egyptian hieroglyphics.")

Speaking of hieroglyphics and demotic characters, the four or more rows of international signage that greet visitors to many facilities may also prove less than adequate. Within these rows and rows of crossed-out symbols, anything and everything is proscribed: dogs, alcohol, diving, swimming, fireworks, firearms, etc. You name it, it's probably prohibited. Despite its dubious value as pseudo-modern art, this attempt at apprising the user of every conceivable safety, police, and housekeeping regulation creates sensory overload. With so much information competing for the attention of the reader, the essential burden of precaution message regarding foreseeable risks of injury is lost. In this area of warning signs, less is oftentimes more. In regard to placement and information content, keep the message clear; limit warning signs to those activities and areas where the foreseeable risks of serious injury are greatest.

Warning brochures are subject to the same risk of sensory overload. Oftentimes, essential warning information is lost in a morass of marketing and interpretive information about a site or activity. Segregate and differentiate warnings from other information in a brochure which is unrelated to foreseeable risks facing the recreational user. In addition, make warning information conspicuous through the use of bolder colors and typeface. It is also advisable to place warnings on the outside of a brochure, rather than burying necessary risk information inside the text where it is less likely to be seen or read.

HOW HOT IS HOT?

An adequate warning should not leave too much to the imagination of the recreational user. For example, in the case of *Van Gordon v. Portland General Electric*, 693 P.2d 1285 (Ore. 1985), the warning signs in an area containing thermal pools read "HOT WATER." (Recreation & Parks Law Reporter #85-18) These signs did not communicate sufficiently, i.e., take a hidden hazard known to the landowner and make it open and obvious to the recreational user. How hot was hot? The foreseeable

risk of injury is not communicated by such nebulous language.

In this particular instance, the temperature of the water could vary dramatically from pool to pool. Van Gordon, age two, had his legs and feet scalded when he fell backward into a thermal pool. This particular pool was adjacent to a thermal pool which Van Gordon's grandmother had tested and found the water temperature suitable for wading. Unlike the term "hot water," subsequent signage did a much better job of communicating the risk associated with temperature variation to the recreational user. The new signs contained the following language:

> Caution: Hot Water.... Some water and rock temperatures in this area are high enough to cause burns .... Activities of children and pets should be monitored closely.

On the other hand, a warning can be adequate without apprising the recreational user of every specific detail regarding potential hazards. In other words, it is sufficient to put the recreational user on general notice of the foreseeable risk of injury involved. For example, in the case of *Clem v. United States*, 601 F.Supp. 835 (1985), the National Park Service (NPS) provided recreational users with several general warnings regarding the potential hazards associated with swimming in Lake Michigan. In the opinion of the court, it was sufficient for NPS to advise recreational users that swimming in Lake Michigan could be treacherous without specifically warning of the undertow condition which drowned plaintiff. (Recreation and Parks Law Reporter #8516).

As stated above, warning signs can be a burden or precaution. Consequently, under the reasonableness standard, their placement should be related to the foreseeable risk of injury under the circumstances. In other words, warning signs should be placed in close proximity to the hazard itself. In many instances, courts have found placement of existing warning signs failed to communicate necessary risk information to the injured recreational user.

Specifically, lesser used, yet reasonable, routes taken by injured recreational users to reach potentially hazardous areas oftentimes do not contain warning signs. This was the situation in the Van Gordon case cited above. Existing warning signs were not visible on the route Van Gordon and his grandmother took from the picnic grove to the thermal pools.

Clearly, warning signs that are limited to main access routes are less likely to communicate necessary hazard information to all those foreseeably at risk. As a result, warning signs (or any warning system) should be sufficiently comprehensive to reasonably communicate to all recreational users on the site, including lesser-used access points. In this same vein, it would be unwise to limit distribution of warning brochures to recreational users who pay for certain services, like campsites. Under the reasonableness standard, other recreational users, legitimately on the site, must have the same warning information communicated to them, as long as they are subject to the same foreseeable risks.

The warning system which communicates necessary, risk information to those foreseeably at risk can utilize a variety of media. Signage, brochures, site maps, in-person communication by facility personnel are just a few of the possibilities. In addition, the risk information is more likely to be communicated if the recreational user has several opportunities to heed the warning in one or more media. The following snowmobile example illustrates this point.

This particular snowmobile trail contained a potential hazard known to the landowner, but not necessarily obvious to the recreational user. Specifically, a scenic part of the trail at the top of the mountain was subject to severe weather and an occasional "white out" (blinding snow storm). During such severe weather, the trail could disappear and imperil even the most experienced snowmobiler. This potentially hazardous condition would not necessarily be apparent to the unwary snowmobiler ascending the mountain trail until it was too late.

In this situation, there were at least three opportunities to communicate warning information to recreational users. Most snowmobilers received trail maps and instructions when they rented their vehicles. These trail maps could be color-coded to advise the user of those trail sections susceptible to severe weather changes and obliteration in a white out. Further, warnings of this potential hazard could be included in the verbal instructions given to those renting snowmobiles. This same color coded information could be added to the existing site map at the entrance to the snowmobile trail. Finally, a specific warning sign could be placed at a point in the trail where the user, aware of existing weather conditions, had the option of proceeding to the top of the mountain or taking an alternate route.

Given several opportunities to apprise oneself of necessary warning information, the recreational user is better able to look out for his or her own safety. If the user ignores readily available warnings, any resulting injury will be caused by the unreasonable conduct of the recreational user, not the landowner. For example, in the case of *Palumbo v. State Game and Fresh Water Fish Commission*, Fla.App., 487 So.2d (1986), the plaintiff was injured when he entered a lake containing alligators. The areas surrounding the lake contained a series of signs containing language and symbols illustrating the alligator hazard. Although the plaintiff had been to the site on numerous occasions, he maintained that he had never read the signs. Plaintiff, therefore, argued that his conduct was not unreasonable because the warning information had not been communicated to him. The court rejected this argument. In the opinion of the court, it was irrelevant whether plaintiff had actually read the signs. As long as he was given a reasonable opportunity under the circumstances to read the warning message, he would be charged with the knowledge that "would be obvious to him upon the ordinary use of his senses." (Recreation & Parks Law Reporter #86-24).

The color, size, and shape of warning signs is also a factor which can enhance or detract from the communication objective, i.e., taking a hidden hazard and making it open and obvious. In the case of *Davis v. United States*, 716 F.2d 418 (1985), plaintiff was injured when he dove onto a rock outcropping which was about 18" below the surface of a man-made lake. Although entrance signs to the

site indicated swimming and diving was prohibited, the court found this signage to be inadequate under the circumstances. As stated by the court: "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 possible hazard to a swimmer or diver, for that matter, to the fact that swimming was permitted at the beach." (Recreation & Parks Law Reporter #84-10) Presumably, a more adequate warning sign would have been red on white containing an appropriate international symbol with the folk)wing language: "No Swimming or Diving: Danger-Submerged Rocks?

People are most familiar with size, shape, and coloring of signage taken from the areas of traffic and occupational safety. Even the youngest child can tell you: "green means go; yellow means caution; and red means stop." Similarly, green signs direct or permit certain conduct; yellow signs identify, risks and urge caution; while a red sign spells danger and prohibits certain behavior.

Since existing traffic signs and other warnings encountered in everyday life are more familiar to people, they are usually better able to communicate risk and safety information than the rustic gold and brown signs which are commonplace in many park and recreation facilities. Therefore, wherever appropriate, it would behoove the recreation field to adopt many of the signs already being used in traffic and occupational safety. Further, the traditional rustic brown and gold signage is not only less familiar and conspicuous to many people, it is usually less adequate in communicating risk information. Specifically, this "one size fits all" signage fails to distinguish and segregate essential risk and safety information from the more mundane details of site interpretation and housekeeping regulations. Arguably, this rustic signage may be more aesthetically pleasing. However, in the event of a lawsuit, the adequacy, of warning signs will be judged by their ability to communicate the foreseeable risk of injury, not aesthetics.