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LIMITED LIABILITY FOR DROWNING IN NON-SWIMMING AREA OF PARK

Recently, I received the following inquiry which was apparently prompted by a "court case regarding a youngster who had unfortunately drowned in a non-swimming area of a park located adjacent to a body of water":

> Can a municipality be held liable for failing to post a waterfront area of a park with "no swimming" signs, in the absence of any hidden hazards, e.g. an undertow, and in the absence of any suggestion that there is active supervision, i.e. lifeguards? Is the answer different if, years earlier, it had been a designated swimming area?

The cases cited herein, illustrate several general principles of law which courts may apply in determining landowner liability for a drowning in public recreation areas not designated for swimming.

OPEN & OBVIOUS DANGER DOCTRINE

In the case of *Casper v. Charles F. Smith & Son, INC*., 560 A.2d 1130 (Md. 1989), two girls, ages 7 and 8, nearly drowned and sustained brain damage after falling through ice covering a stream within the "immediate area" of a city park. As noted by the state supreme court, "the residents of the area have long treated this portion of Moore's Run as a part of the park." As a result, "for the purpose of determining the City's legal duty of care in this particular instance," the court "assumed plaintiffs were invitees to property which was part of a park."

As described by the court, "the duty owed to an invitee by an occupier of land is to use reasonable and ordinary care to keep his premises safe for the invitee and to protect the invitee from injury caused by unreasonable risk which the invitee, by exercising ordinary care for his own safety, will not discover." Moreover, the court noted that an owner or occupier of land is generally not under any legal duty to warn invitees of dangerous bodies of water because "water in the form of a stream or pond constitutes an open, obvious, and patent danger." Applying these principles to the facts of the case, the court found the following evidence did not "demonstrate a breach of duty owed to an invitee."

> The children were old enough to be at large, in the area of their homes where the stream had always been, and they were charged by law with the knowledge of the dangers of water, both in its flowing and its frozen form. Whether natural or artificial, streams and ponds will have shallow areas and deep areas, and that fact of life must be anticipated... [I]t is a part of the doctrine of open and obvious danger applicable to bodies of water that knowledge of these perils, including sudden or unexpected depths, is charged to children of sufficient age to be permitted to go abroad without supervision...

> Bodies of water like the stream involved in this case have historically and consistently been afforded distinctive treatment in the law relating to landowners' liability. The necessity, or at least desirability, of maintaining such bodies of water, coupled with known inherent dangers and the difficulty of effectively protecting against those dangers, have led courts across the country to pronounce water an "open and obvious danger," for which no warning or special precaution is ordinarily needed...
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> A body of water - either standing as in ponds and lakes, or running as in rivers and creeks, or ebbing and flowing, as on the shores of seas and bays - is a natural object incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land; the danger of drowning in it is an apparent open danger, the knowledge of which is common to all; and there is no just view consistent with recognized rights of property owners, which would compel one owning land upon which such water, or part of it, stands or flows, to fill it up, or surround it with an impenetrable wall...

The state supreme court, therefore, affirmed the judgment of the lower court in favor of the City of Baltimore and the other defendants. In reaching this conclusion, however, the state supreme court did not hold that "a body of water can never create an unreasonably dangerous condition requiring some type of action by the landowner or occupier, either to correct the problem or to warn of its presence." Rather, the court did "not find such a condition to have existed here."

> Moore's Run in this area presented a danger, but it was not a danger so different from that of other bodies of water so as to remove it from the applicability of the open and obvious doctrine... [T]here was simply nothing that obscured the fact that Moore's Run, as a matter of law, signaled its own lethal danger.

INTENDED RECREATIONAL BODY OF WATER?

Similarly, in the case of *Mostafa v. City of Hickory Hills*, 287_Ill. App. 3d 160, 677 N.E.2d 1312, (1997), the court found no governmental liability for drownings in a public park. In this case, two children, ages two and three, drowned in a manmade lagoon in a public park near a playground. In their complaint, the two families alleged that the defendant park district was negligent in failing to prevent children from drowning in the lagoon. In so doing, the families emphasized "the young age of decedents and their inability to appreciate the dangerous nature of the lagoon." In response, the Park District asserted that "it owed no duty to protect the young boys from the apparent danger of the lagoon, erect a fence around the lagoon, or erect a sign stating the depth of the water." The trial court agreed and granted the Park District's motion to dismiss the families' claims. In the opinion of the trial court, "Illinois law did not impose a duty on the Park District because the dangerous nature of the lagoon was open

and obvious to the children." Plaintiffs appealed.

As noted by the appeals court, "[c]ustomary rules of ordinary negligence govern the liability of owners and occupiers of land upon which a child is injured":

> Owners and occupiers can be liable for injuries sustained by children on the land; however, if the dangerous condition on the land poses an obvious risk of danger that children would be expected to appreciate and avoid, the owner is under no duty to remedy the condition. Specifically, owners or occupiers of land generally do not owe a duty to protect children from falling into bodies of water and drowning or potentially drowning...

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> The issue in cases involving obvious dangers, like fire, water or height, is not whether the child does in fact understand, but rather what the possessor may reasonably expect of him. The test is an objective one, grounded partially in the notion that parents bear the primary responsibility for the safety of their children. Stated again, where a child is permitted to be at large, beyond the watchful eye of his parent, it is reasonable to expect that that child can appreciate certain particular dangers.

Applying these principles to the facts of the case, the appeals court held that "the Park District owed no common law duty to protect decedents from the lagoon." In so doing, the appeals court rejected plaintiffs' argument that the alleged dangerous condition was not obvious because "the murky water in the lagoon prevented decedents from ascertaining the depth of the water."

> [E]ven when children are on the premises, an owner or occupier has no duty to protect against blatantly obvious dangers... [The Park District] could have regarded the nature of the lagoon as an open and obvious danger despite the fact that decedents might not have been able to see through the water... [N]o object or condition concealed the presence of the lagoon... The Park District therefore owed no common law duty to protect decedents from any dangers associated with the lagoon, as a matter of law.

Under state law, the court noted that the park district had a legal duty "to exercise ordinary care to maintain its property in a reasonably safe condition for people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used." However, under the circumstances of this case, the court found the park district had no duty to protect the youngsters from the lagoon because "the Park District did not intend for the lagoon to serve as a recreational body of water, such as a swimming pool or lake." Having concluded that "the Park District owed no duty to prevent plaintiffs' decedents from falling into the lagoon," the appeals court affirmed the judgment of the trial court dismissing plaintiffs' claims.

MINORITY VIEW

In contrast to *Casper* and *Mostafa*, the Washington state supreme court, in the case of *Degel v. Majestic Mobile Manor*, 914 P.2d 728 (Wash. 1996), held that "a landowner is not exempt from the duty to exercise reasonable care to protect invitees against potentially dangerous conditions on the land solely because the potential danger includes risks which are inherent in a natural body of water." In this particular case, a two-year-old was seriously injured when "he slid down a steep embankment and into a fast flowing creek adjacent to the play area near his home." In this case, the state supreme court rejected what it characterized as the "natural bodies of water doctrine" which "exempts a landowner from the duty to exercise reasonable care to protect against the hazards of bodies of water." In so doing, the Washington state supreme court held that a jury should determine whether the particular harm posed by the fast flowing creek should have been anticipated by the landowner and whether reasonable care was taken to protect against the harm to young Degel in light of all the circumstances.

DISCRETION TO DESIGNATE SWIM AREA

In the case of *Warren v. Palm Beach County*, 528 So.2d 413 (Fla.App. 4 Dist. 1988), the court found no evidence that a lake in a county park was to serve as a designated swimming area. In this particular case, plaintiff sustained quadriplegic injuries when he dove into a lake which was part of a public park. Warren alleged that the defendant county was negligent in failing to give "any warning about the hazardous diving condition."

As a general rule, the court noted that "a private owner of a natural or artificial body of water, not held out as a swimming facility, is not liable for dangerous conditions therein." Moreover, the court found "[a] government unit has the discretionary authority to operate or not operate swimming facilities and is immune from suit on that discretionary question." Conversely, the court acknowledged that, "once the unit decides to operate the swimming facility, it assumes the common law duty to operate the facility safely, just as a private individual is obligated under like circumstances."

Applying these principles to the facts of this particular case, the court concluded defendant was not operating a swimming facility at the lake where the injury occurred. Specifically, at the time of the accident, the court noted "there were no signs permitting swimming or diving." Moreover, the court cited a county ordinance which expressly prohibited swimming "in any waters or waterways in or adjacent to any park, except in such waters and at such places... where swimming is permitted... [and so] designated by official signs and markings." Accordingly, the court concluded that "the county here could not be liable since it did not create a designated swimming area."

Furthermore, the court found commonplace use of the park lake for swimming was insufficient to create a designated swimming area and, therefore, such use did not impose a legal duty on the government to safely operate a swimming facility.

> It matters not that there was some evidence that in spite of the ordinance the lake was commonly used for boating and water-skiing, and that there were no signs posted which specifically prohibited swimming and diving. Since the county did not designate Lake Osborne as a swimming area and did not in any manner contribute to the condition of the water or the lake bottom alleged to have presented an illusion of depth, it cannot be held liable to Warren.

SWIMMING ACCEPTED PARK ACTIVITY

In contrast, the court in *Andrews v. Department of Natural Resources*, 557 So. 2d 85 (Fla.App. 1990) found the government may have unknowingly created a designated swimming area when it removed signage in a state park and a park brochure indicated swimming was an accepted activity in the park. In the opinion of the court, the facts of this case were distinguishable from the injury in *Warren v. Palm Beach County* wherein the body of water, "although owned by the county, had never been designated as a swimming area." Specifically, the court found "abundant evidence...which showed that Dog Beach also was being used by the park's visitors as a swimming area with the knowledge of the state or its employees, e.g., lifeguards.

> [W]itnesses testified they observed signs at Dog Beach on the day of drowning incident indicating that swimming was permitted in that area but at the individual's own risk. The state had also removed signs indicating the designated swimming area as well as that designation on the brochure's map illustration; instead, the brochure merely indicated that swimming was an accepted activity in the park.

In this particular instance the state had acquired the park site from the city. While the park was under the city's control, "there were signs erected at Dog Beach warning of a strong undertow, prohibiting swimming in that area, and directing the public to swim in the designated swimming area only, which was generally known as Dunedin Beach." However, when the state acquired the park site, it removed this signage because state park officials felt "the signs were not necessary." The court, however, found this change of circumstances and the following facts may have "led the public to believe that Dog Beach was a designated swimming area."

> Officer Rogers, a City of Dunedin police officer for thirteen years who assisted at the drowning incident, testified that on that day he observed signs at Dog Beach which read "No lifeguard on duty. Swim at own risk." He further stated that based upon his knowledge of the area he believed Dog Beach was in fact a swimming area. A lifeguard employed by the state and stationed at Dunedin Beach on the day of the drowning testified by deposition that he believed swimming at Dog Beach was not prohibited but

> was at one's own risk. Another state lifeguard on duty on that day stated that previously he had noticed people swimming in the Dog Beach area of the park. Park officials were aware that adults and fisherman waded in the water, and the officials rarely would ask waders to leave the water. When discussing the park rangers' duties at Dog Beach, Brannaka stated that "all these people were advised by the rangers of the safety hazards from the dogs and the currents in the past. Swimmers especially were advised."
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> Brannaka's deposition established that in spring 1980 the state determined that the portion of Honeymoon Island known as Dunedin Beach should become the park's only designated swimming area. The designation was not reduced to rule or regulation, and the state could not produce any document evidencing that designation. The brochure issued months prior to the accident and contained in the record on appeal, which is distributed by the state upon entry into the island, does not mention any designated swimming areas at Honeymoon Island, but states: "The clear Gulf waters are enjoyed for swimming and sun bathing." Brannaka maintained, however, that the brochure which was being distributed to the public on the date of the drowning did in fact depict on the map illustrated above Dunedin Beach as the designated swimming area.

Having found the state was on notice that individuals were swimming in a beach area of the state park, and that the area was known by park officials for dangerous currents, the court found sufficient evidence to establish a designated swimming area and a legal duty to adequately warned park visitors of this danger.