DECEMBER 1998 NRPA LAW REVIEW

LIFEGUARDS HAD NO TRAINING OR POLICY FOR DIALING "911"

As a general rule, lifeguards owe a two-fold legal duty of care to (1) observe for swimmers in distress and (2) when distress is observed attempt a reasonable rescue. As illustrated by the *Cater* decision described herein, glare conditions in a swimming pool may present an unreasonable risk of harm, if the glare obstruct's a lifeguard's view and ability to observe for swimmers in distress.

Moreover, *Cater* suggests that a reasonable rescue requires lifeguards to have the knowledge necessary to handle an emergency when it arises. In this particular instance, the *Cater* court found it "appalling" that "something as basic and important as dialing '911' was not within the city employees' grasp."

State law defines when (or even if) governmental entities can be held liable for negligence. In many jurisdictions, state law provides blanket immunity for governmental entities, subject to certain exceptions. In *Cater*, state law provided that a municipality could be held liable for maintaining a nuisance in public grounds, which included public swimming pools. Alternatively, state law provided that a municipality could be held liable for allowing its personnel or facilities to operate in a wanton or reckless manner.

As illustrated by *Cater,* many jurisdictions provide limited governmental immunity to public recreation facilities. Typically, as in *Cater*, state law provides no governmental liability for ordinary negligence. Instead, liability must be based upon proof of reckless misconduct. As noted by the *Cater* court, recklessness involves actual knowledge, or total disregard of an unreasonable risk of physical harm to another which is substantially greater than ordinary negligence. *Cater* presents a situation where the Ohio supreme court found evidence of reckless misconduct based upon a city's failure to have a policy or train its lifeguards in dialing "911" following a near drowning incident.

UNAUTHORIZED LUNCH BREAK

In the case of *Cater v. City of Cleveland,* ___ Ohio St.3d ___, (Ohio, 1998), plaintiff Valerie Cater's twelve-year-old son, Darrall Cater, lost consciousness from nearly drowning in the city of Cleveland's Alexander Hamilton indoor swimming pool. As a result of the near drowning, Darrall developed acute bronchial pneumonia and was declared brain dead four days later. Valerie Cater, as administrator of Darrall's estate, along with Darrall's father, Lawrence Cater, sued the defendant City of Cleveland alleging that the city acted negligently and/or recklessly in operating the swimming pool and causing Darrall's death. The facts of the case were as follows:

> On June 14, 1993, the near drowning occurred on the first day of the summer swim

season at the Alexander Hamilton indoor swimming pool. On that day, there were four Red Cross certified lifeguards on duty. Lisa Hutson, a year-round physical director, was the senior guard. The other lifeguards on duty were Willie Hodge, who was also an experienced year-round physical director; Mark McDougall, who was hired as a summer lifeguard and had ten years' lifeguarding experience; and Damon Carter, who had recently been certified as a lifeguard in May 1993, and was beginning his first day as a lifeguard.

Open swim was scheduled to take place from 1:00 to 4:30 p.m. From 1:00 p.m. until about shortly after 3:00 p.m., all four guards patrolled the pool. Hutson walked around the perimeter of the pool deck, while the other three guards were stationed at the lifeguard chairs, two of which were located at the deep end and one was located at the shallow end.

At around 3:00 p.m., however, Hutson and Hodge left their posts, and took an unauthorized lunch break. Even though it was against pool policy to take lunch breaks during open swim periods, Hutson, who was nearly nine months pregnant, asked Hodge to buy them lunch. When Hodge returned around 3:30 p.m. with sandwiches, he and Hutson ate lunch in the lobby, while the other two guards remained at the pool. Rookie guard Carter sat in the high lifeguard chair at the deep end, while McDougall watched the shallow end of the pool from his guard chair. A folding chair that was located at the deep end, and which had previously been occupied by one of the other guards, was left empty.

At approximately 3:40 p.m., swimmers notified McDougall and Carter that there was a boy at the bottom of the pool. The boy, later identified as Darrall Cater, was found at the bottom of the deep end, in seven feet of water, in an area within five to fifteen feet from the previously occupied folding guard chair. Carter explained that he had not seen Darrall in distress because glare interfered with his visibility. The glare was caused by sunlight that reflected off a glass-paneled wall that ran along the side of the pool, directly behind the high lifeguard chair where Carter sat. City employees, including the aquatics manager for the city of Cleveland, were aware of the glare problem at the pool and conceded that there was no training on how to deal with the glare.

Upon seeing Darrall at the bottom of the pool, McDougall dove in the water, pulled Darrall out of the pool and began CPR. Howard McKeller, the recreation center manager for the pool, who was responsible for all pool employees at that location, was returning to the facility when he heard the whistle blow. Upon hearing the whistle and seeing commotion, McKeller ran to the pool area and assisted McDougall with

> resuscitation attempts on Darrall.
>
> In the meantime, at least three city employees attempted to dial 911, but were unable to get an outside phone line. Carter said that he tried to dial 911 five or six times but could not get through. Physical director Hutson and a custodian made several attempts to dial 911, but they, too, did not know how to use the phone system. These employees were never instructed on the use of 911 and were never told that it was necessary first to dial a nine to get an outside line. When asked about the lack of training, center manager McKeller testified that he just assumed that the guards had been briefed how to get an outside line to dial 911. Eventually, someone was able to make the 911 call. However, paramedics did not arrive at the pool until about 4:10 p.m., nearly thirty minutes after Darrall's body was discovered at the bottom of the pool.
>
> One of Darrall's treating physicians at the hospital testified that Darrall had been deprived of oxygen for at least five minutes before resuscitation attempts were underway. According to the coroner, Darrall died as a result of the near drowning...
>
> Following an internal investigation by the city, physical directors Hutson and Hodge, and the center's manager, McKeller, were found to have violated several city policies by failing to ensure that the pool was properly staffed at all times; wantonly or willfully neglecting the performance of their assigned duties; leaving the job or work area during regular working hours without authorization; failing to remain at their posts except in cases of emergency or when properly relieved; failing to maintain required standards of performance; and failing to observe official safety rules or common safety practices. Due to their misconduct, Hutson and Hodge were each suspended for forty-five days. McKeller was suspended for three days.

In response to Cater's lawsuit, the City of Cleveland argued that it was immune from liability under state law. The trial court agreed and granted the city's motion for directed verdict. In so doing, the trial court effectively dismissed Cater's negligence claims against the city without consideration by a jury. In the opinion of the trial court, the trial court the City was immune from any liability under state law because "the city had hired qualified personnel, had proper rules and regulations in place, and did not act in a reckless or wanton manner." The court of appeals affirmed. In finding the city immune from liability, the appeals court held that "the city did not act in a wanton or reckless manner in its discretionary decision making in the operation of the pool." The state supreme court subsequently granted Cater's petition to review this decision by the lower courts.

GLARE OBSTRUCTED VIEW?

As noted by the state supreme court, a political subdivision is “liable for injury, death, or loss to persons or property caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, viaducts, or public grounds within the subdivisions open, in repair, and free from nuisance.” Moreover, the state supreme court found “an indoor municipal swimming pool, which is open to the general public also falls within the definition of ‘public grounds’."

> [A] political subdivision is obligated to keep its public grounds free from nuisance. The phrase "public grounds" has been interpreted to include such areas as municipally owned and controlled parks that are established and maintained for the general public.

On appeal, Cater argued that the glare conditions at the pool constituted a nuisance on public grounds. Accordingly, the issue to be resolved was “whether there was sufficient evidence presented of a nuisance to overcome the city's motion for a directed verdict.”

According to the state supreme court, “the political subdivision must have had either actual or constructive knowledge of the nuisance” for liability to be imposed on a political subdivision for a nuisance. Under the circumstances of this case, the supreme court found “sufficient evidence presented to satisfy this notice requirement.”

> Here, there was evidence presented that glare emanating from the wall of glass panels obstructed the lifeguard's view and prevented him from seeing Darrall struggling in the water and ultimately lying at the bottom of the pool...
>
> Not only was there testimony that the glare obstructed the lifeguards' view, but there was also evidence that the city was aware that glare was a problem at the pool. Both the aquatics manager for the city of Cleveland and the recreation center manager testified that they knew that glare was a problem and conceded that lifeguards had not been instructed on how to deal with the glare. They also acknowledged that there were no pool policies addressing this concern.
>
> We recognize that glare can exist at all pools (as the aquatics manager testified). Nevertheless, we are not testing the merits of the underlying claim here. Instead, we are deciding whether the trial court erred in directing a verdict for the city, which we believe it did.

Consequently, the supreme court found that the nuisance exception to governmental immunity was applicable and further proceedings were necessary to determine “whether the city created an unreasonable risk of harm by maintaining hazardous glare conditions in the pool.”

RECKLESS LACK OF POLICY, TRAINING?

The state supreme court also considered whether the city was not entitled to governmental immunity "because the city acted in a reckless or wanton manner."

> The political subdivision is immune from liability if the injury [or] death * * * resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources, unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner...
>
> This court has defined the term "reckless" to mean that the conduct was committed knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

On appeal, Cater contended that a jury should have considered "whether the city acted recklessly in its use of its facility and equipment, in its failure regarding the use of 911 on its emergency phone system." The state supreme court agreed that "the issue of the city's allegedly reckless or wanton use of its equipment, in failing to institute a training policy regarding the use of the 911 emergency phone system" should have been considered by a jury.

> Since reasonable minds can differ as to whether the city allowed a nuisance to exist and as to whether the city acted in a wanton or reckless manner in its use of its facilities and equipment ...by failing to institute policies or training regarding the use of the 911 emergency number, we find that the trial court erred in directing a verdict for the city...
>
> The evidence overwhelmingly established that three city employees were unable to contact 911, despite several attempts to do so. It was further shown that these employees were never trained on the use of the phone system. As a result of their failure to contact 911, there was about a thirty-minute delay in Darrall's treatment.
>
> The fact that the city had no policy in place or training regarding 911 is appalling. The seriousness of these omissions is highlighted by the fact that more than one hundred swimmers, mostly children unaccompanied by adults, frequented the city pool that day. However, something as basic and important as dialing 911 was not within the city employees' grasp. Not only did two of the senior lifeguards create a dangerous situation by leaving the pool area during an open swim session, but the city, in its admitted failure

> to train its employees on the use of 911, left them without the knowledge necessary to handle the emergency as it arose. We are unwilling to grant immunity to the city under this provision, and to find, as argued, that the city did nothing wrong on the day Darrall suffered a near drowning.

Accordingly, the state supreme court reversed the judgment of the court of appeals and remanded the cause to the trial court for a new trial. On remand, the trial court would conduct further proceedings in which a jury would determine whether the city was liable for either creating a nuisance and/or acting recklessly under the circumstances of this case.