UNSIGNED BULKHEAD CREATES "ILLUSION OF SAFETY" FOR DIVING

James C. Kozlowski, J.D., Ph.D.

Shallow water diving injuries in areas not designated for swimming (i.e., rivers, lakes, ponds, etc.) constitute the most recurrent situation within the body of reported case law involving recreational injury liability. While commonplace, the great majority of these shallow water diving decisions are decided in favor of the defendant landowner. Absent some submerged danger which would not be apparent to the diver, the courts usually find that shallow water dives constitute an open and obvious danger which an individual, looking out reasonably for his own safety, should know, appreciate and avoid. The old adage "Look before you leap" makes good common sense and good legal sense in these cases. However, in the Socorro decision described herein, the court found one of these submerged hazardous situations which would not necessarily be apparent to recreational users. Further, signage by the defendant city was incomplete and inconsistent which could lead the recreational user to believe that the more dangerous unsigned area was perhaps safer than it appeared.

This description of the *Socorro* decision is an abridged version of the report which appeared in Volume 7, 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.

Shallow water diving case law is extensively reviewed in the videotape series of the "National Workshop on Aquatic and Water Recreation Liability." This videotape series is a cooperative effort of the National Aquatic Section of NRPA and the George Mason University Center for Recreation Resources Policy. In addition to shallow water diving liability, the three volume series provides more than five hours of discussion of recent case law on the many topics including: general liability principles in aquatics, lifeguard liability, retention pond drownings, warning signs, trespasser liability, and recreational use immunity. The three volume VHS set is $350.00, however, NRPA members receive a special rate of $175.00. For further information on the aquatics liability videotape series contact Dr. Brett Wright, George Mason University, Center for Recreation Resources Policy, 4400 University Drive, Fairfax, Virginia 22030-4444, (703) 323-2826.

Head Banging Rip Rap

In the case of *Socorro v. Orleans Levee Board*, 561 So.2d 739 (La.App. 4 Cir. 1990), plaintiff Franz Socorro sustained quadriplegic injuries "when he dove from the bulkhead at Breakwater Point in New Orleans and struck a submerged object on the bottom of Lake Pontchartrain." The facts of the case were as follows:

Socorro is a Venezuelan citizen who was enrolled as a student at Delgado Community College in New Orleans in the fall of 1983. (Socorro was studying in the United States on a student visa. He had been in this country for only about five weeks.) After class on the afternoon of October 19, 1983, Socorro and a friend Ronald Clarke, bought a six-pack of beer and drove out to Lake Pontchartrain for a swim. As they proceeded down Lakeshore Drive looking for a suitable place to swim, they noted numerous "no swimming" and "no diving" signs at various points along the lakefront. They eventually reached the western end of Lakeshore Drive, where they finished their beer and watched a number of people boating and windsurfing. Socorro wanted to swim but refrained from doing so because of the prohibitory signs posted along the lakefront. It appeared to them, however, that a number of people were swimming and windsurfing near Breakwater Drive. Socorro and Clarke drove to the end of Breakwater Drive, hereinafter called "the Point," where they hoped to go swimming themselves.

While en route down Breakwater Drive, Socorro and Clarke noticed rocks and boulders ("riprap") extending from the water on both sides of the road. When they reached the Point, they observed a number of people swimming and windsurfing in the waters adjacent to it. They saw no signs prohibiting swimming or diving, and concluded that those activities were permitted. The Point itself was surrounded on three sides by a vertical concrete bulkhead. The top of the bulkhead was flat, about fifteen inches in width, and stood about one foot above ground level of the Point. There was no visible riprap in the waters adjacent to the bulkhead.

Socorro had never been to the Point before. Clarke had been there several times but had never attempted to swim in the surrounding waters. Upon reaching the bulkhead, they observed the water but failed to ascertain the water conditions, except to note that it appeared dark and deep. Clarke jumped feet first from the bulkhead into the water four to five feet below. He testified that he never touched the lake bottom or any objects on the bottom. Socorro, who had been a competitive swimmer and diver in Venezuela, noted that the water was very dark, but apparently made no attempt to ascertain the depth. He executed two flat racing dives in a southerly direction from the bulkhead. These dives were without incident. Like Clarke, Socorro did not touch bottom or any objects on the bottom.

The two friends then decided to stage a race. They climbed to the top of the bulkhead, planning to dive together from there. There was a false start, and Socorro dove in while Clarke remained on the top of the bulkhead. As Socorro entered the water, he struck his head on a submerged object believed to be rip rap lying on the lake bottom about ten feet from the bulkhead.

Socorro sued the City of New Orleans, the Board of Commissioners for the Orleans Levee District, and the State of Louisiana. The trial court found the City 60% at fault, the Levee Board 30% at fault, and Socorro 10% at fault. The trial court imposed no liability on the State of Louisiana. The trial court assessed damages accordingly in excess of $8 million. The City, the Levee Board, and Socorro appealed.

In this particular instance, the appeals court found that the defendant Levee Board had never obtained "ownership, custody or control of the lake bed in the area where Socorro dove." Accordingly, the appeals court reversed the judgment of the trial court which had found the defendant Levee Board 30% liable. On the other hand, the appeals court found that the location of the accident was under the control and custody of the defendant city. The appeals court provided the following description of the area where the accident occurred:

> The Point, from which Socorro dove when he was injured, forms the easterly top of Breakwater Drive, a street actually built atop the crown of a breakwater. Constructed by the City in 1939 as part of a Works Progress Administration (WPA) project, the breakwater begins at the northwest corner of West End Park, extends in a peninsular fashion north into Lake Pontchartrain, then turns east almost ninety degrees and ends where the New Basin Canal and the Municipal Yacht Harbor enter Lake Pontchartrain. The breakwater forms the westerly and northerly boundaries of the Municipal Yacht Harbor and protects the Harbor from inclement weather and the elements. It is constructed of pieces of asphalt and concrete paving of varying sizes called riprap. The width of the breakwater at its base (underwater) is approximately one hundred feet, with a narrowing slope as it rises out of the water. The photographs in evidence give a clear visual appreciation of the sloping riprap on both sides of the breakwater as it rises from the lake bottom.
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> Breakwater Drive extends the entire length of the breakwater and ends at the Point. Although the Point is part of the breakwater, its configuration and construction is different from the rest of the breakwater. It consists of a vertical concrete bulkhead and extends upward from the lake bottom to a height approximately one foot above the inside street level. The bulkhead forms a semi-circle around the Point, protecting the end of the breakwater where it meets the lake. The circumference of the Point is large enough to allow vehicular traffic to make a "U" turn at the end of Breakwater Drive, as well as allow for parking along its inner side. Standing on top of the bulkhead and looking straight down, one does not see sloping riprap, but only the surface waters of Lake Pontchartrain. It is from this bulkhead that Socorro dove into Lake Pontchartrain.

As noted by the appeals court, the plaintiff, in this case Socorro, "has the burden of proving that the injury-causing things in defendant's custody posed an unreasonable risk of harm, i.e., were defective" to establish negligence liability.

> In determining whether a given risk is unreasonable... the court must balance the probability of the harm which may ensue versus the utility of the thing in its condition on the date of the accident. The rights and duties of the parties must also be considered. This will necessarily involve examination of the conduct of both parties, i.e., was plaintiff's conduct, as it relates to the thing, reasonable; were defendant's actions or lack therefore unreasonable under the circumstances... Thus, our duty is to examine the risks involved and determine their reasonableness in light of the social utility of the area and the burden which may be imposed on the responsible party.

Under the circumstances of this case, the appeals court found that "the evidence supports the finding [of the trial court] that the breakwater and the Point posed an unreasonable risk of harm."

> John Price and Brian Amond, two divers who inspected the lake in the area where Socorro was injured, testified that the water was approximately three to three and one-half feet deep. They testified that the lake bottom had a gradual but definite slope moving away from the seawall. Price testified the bottom consisted of oyster shells, gravel and a large amount of broken paving material for erosion control (rip rap). These chunks of asphalt debris were found in an area six to twelve feet from the bulkhead. The pieces ranged in size from six inches to six feet in diameter and were approximately six inches thick. The chunks were scattered about unevenly. Some were lying flat on the bottom. Others were partially buried in the bottom and protruding upwards on an angle. The largest pieces stood fourteen to fifteen inches above the bottom and approximately two to two and one-half feet from the surface.
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> Amond testified that he found chunks of paving material from one to five feet in length, some lying on the flat lake bottom and some partially buried. In the general area he saw at least fifty to seventy pieces of debris lying approximately fifteen feet from the bulkhead in three to five feet of water. Amond also testified that based on this knowledge and experience with powerful movement of water, he would expect currents to move chunks of rip rap away from the underwater portion of the breakwater and into the lake bottom.

In the opinion of the appeals court, this testimony clearly demonstrated that "rip rap of various sizes was scattered about the lake bottom." Consequently, the appeals court found that "this area posed a danger [for divers] which was exacerbated by the Point's deceptive and alluring features." Similarly Socorro's expert witness in aquatics testified as follows that "the Point and the adjacent waters... was a dangerous area":

> [This expert witness] stated that the height and configuration of the bulkhead served as an invitation to use it for a platform and dive off. Because there were no rails, barriers or prohibitory signs to deter such activity, he opined the bulkhead created an "illusion of safety". He further testified that the hazards of such an illusion are specifically recognized in the field of aquatics safety and in the recreation industry, as evidenced by the applicable guidelines calling either for the elimination or prevention of such alluring situations. This "illusion of safety" was further emphasized by the fact that there were numerous signs posted along other sections of the lakefront prohibiting swimming or diving with a complete absence of such signs at the Point. Under these circumstances, one could reasonably conclude that these activities were not only permitted at the Point, but were safe.

Socorro's expert witness further testified that "this type of accident could have been prevented through the use of very simple and inexpensive measures such as warning or prohibitory signs on the bulkhead or in the water close to the bulkhead or a rope railing or other type barrier to prevent diving from atop the bulkhead." Socorro's expert "estimated the expense for minimal prevention (signs or a rope railing) to be approximately ten dollars." According to this expert witness, "Socorro fit the profile of 100 diving accidents

occurring in natural waters - 88% of the injured divers were males, the average age was 22.5 years, most were strangers to the area, 80% were injured within the first three dives and more importantly, *in every instance they had not been warned in any manner* that there was a danger there in that particular location." Given such testimony, the appeals court concluded that "the evidence supports the finding that the breakwater and the Point posed an unreasonable risk of harm."

> The reasonableness of the above described dangerous areas, i.e., the breakwater and the Point, is determined by balancing the intended and actual use of the areas with whatever harm they pose and the burden of correcting or minimizing that harm.
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> The social utility of the breakwater, the Point and the adjacent waters needs little discussion... [T]his area is frequently used for recreational activity. If the risks could be prevented only by closing the area to the public, then arguably, the utility of the area would outweigh the risks, and the risks could be considered reasonable. However, the evidence suggests that minimal, inexpensive preventive measures such as posting signs along the top of the bulkhead or simply painting "warning" signs on the bulkhead would be sufficient to warn of the danger posed by the breakwater and the Point. There is no evidence to suggest any protective measures were taken by the City.

Having found that this area posed an unreasonable risk of harm, the appeals court concluded that the City of New Orleans "must bear a portion of the responsibility for Socorro's injuries." Within this context, the appeals court defined negligence liability as follows:

> [A] defendant's relationship with the situs of the accident can form the basis of fault [for negligence liability]... [To establish negligence liability,] the plaintiff must prove that the thing created an unreasonable risk of injury that resulted in damage, that the owner *knew* or *should have known* of the risk and that the owner/possessor failed to either remedy the situation, render the thing safe or take steps to prevent injury. He must discover any unreasonably dangerous condition on his premises and either correct it or warn potential victims of its existence. He does not have to insure against the *possibility* of injury but must act as a reasonable man in view of the probability of injury.
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> A causal relationship must also exist between the harm and the negligent conduct or risk. It must be proved by either direct or circumstantial evidence and must exclude other reasonable hypotheses with a fair amount of certainty. The conduct or risk must be the cause-in-fact of the injury, a factual determination to be made by the trier of fact which is entitled to great weight and which will not be disturbed on appeal unless manifestly erroneous. One must conclude that the victim would not have encountered the harm *but for* negligence or the creation of the risk. This duty is owed by municipalities, political subdivisions and public entities, as well as private individuals.

Applying these principles to the facts of the case, the appeals court found that the fully supported the trial court's judgment regarding "the duty which the City owed to Socorro to protect him from injury and the breach of that duty."

> We have already determined that the breakwater and the Point created a dangerous condition. After review of the evidence, we are satisfied that the City knew or should have known of the danger.
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> The Point and Breakwater Drive constitute a public recreation area. The public has engaged in swimming and other water sports in the waters off the Point for years. Douglas Kennedy, maitre'd at the Southern Yacht Club for twenty-three years, testified that over the years he has seen numerous swimmers in the water off the Point, particularly on weekdays when boat traffic is light. (The Southern Yacht Club is located directly across from the Point, separated only by the entrance to the Municipal Yacht Harbor.)
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> Thus, the facts and circumstances surrounding Socorro's injury, i.e., the shallow murky waters off the Point, the presence of large chunks of rip rap lying on the lake bottom, the inviting and alluring nature of the bulkhead which created an "illusion of safety", the regular use of the water off the Point (a dedicated recreation area) by the public for swimming and other water sports, and the clear absence of any warning or prohibitory signs or barriers as were present along other areas of the lakefront, all served to create an unreasonably dangerous risk of which the City knew or should have known. The record amply supports the trial court's conclusion that this risk, which the City knew or should have known about, was a cause-in-fact of Socorro's injuries.

The appeals court further rejected the City's contention that "its failure to warn or otherwise protect plaintiff from diving into the waters off the Point was a discretionary policy making decision immune from liability under the state tort claims statute. According to the appeals court, discretionary function immunity only applied to "conduct which is political, governmental, policy related and hence, purely discretionary in nature."

> Once the government does undertake to supply a service, then it must be held responsible for negligent acts in supplying the service. This means that the discretionary exception only reaches the discretionary decision as to whether to supply the service or not. But once the discretionary decision has been made to supply the service, then the very purpose of the Tort Claims Act was to waive sovereign immunity and allow recovery for negligent actions of the government beyond the discretionary decision...
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> Once the City opened the area in question to the public as a recreational area, it had an affirmative duty to warn of the hidden dangers associated with diving and swimming. The evidence amply demonstrates that the City knew or should have known of the unreasonable risk of harm. Its failure to warn against or lessen the danger was not a policy making or discretionary decision.

The appeals court, however, agreed with the City that "the trial court had erred in allocating only 10% comparative fault to Socorro."

> [T]here are inherent dangers... in every body of water and the facility itself served as a warning of the dangers, especially to those who are of the age of discretion; in the absence of some hidden or concealed danger, there is no duty... to provide safeguards... such as fences or warning signs... [In] the instant case... the rip rap presented a *concealed or hidden* danger in the area where Socorro dove. Therefore, we find no merit in the City's argument that it had no duty to warn... The jurisprudence has clearly recognized the primary duty of the swimmer or diver in ascertaining whether it is safe to conduct such activities in unknown waters... [I]n light of the strong legal reasoning that a swimmer or diver has a primary duty to determine the safety of such inherently dangerous activities, we believe the trial court was clearly wrong in apportioning only 10% of the fault to Socorro. Given the circumstances of this case, especially the "de facto" swimming and diving expertise of Socorro, we are of the opinion he is seventy-five percent (75%) at fault.

Accordingly, the appeals court apportioned fault at 75% for Socorro and 25% for the City of New Orleans. Further, after a lengthy review of Socorro's limitations, life expectancy, and the cost of his care, the appeals court assessed damages for present/future medical expenses and lost earning capacity at $4.83 million. Pain and suffering damages were assessed at $3.5 million. However, the City's 25 % share of this amount was subject to a $500,000 limitation on damages for pain and suffering. The appeals court, therefore, entered an amended judgment against the defendant City of New Orleans for damages in excess of $1.33 million.

In a dissenting opinion, one of the judges of the appeals court disagreed that "the City owed Socorro an affirmative duty to warn of the open and obvious danger of diving into untested, murky water..."

> In holding the City liable, the majority emphasizes that the City is a public body which is in a good position to absorb the costs of plaintiff's tragic accident by redistributing them to the community. Although plaintiff's accident is tragic, the result reached by the majority is hardly socially sound in light of the fact that the risk which plaintiff encountered when he dove from the bulkhead was not unreasonable, but open and obvious to anyone of plaintiff's age and experience.

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Dr. Kozlowski is the associate director of the George Mason University Center for Recreation Resources Policy, Fairfax, Virginia. He is also the author of the *Recreation and Parks Law Reporter and Legal Issues in Recreation Administration.*