LIMITED DUTY APPLICABLE TO OVERDOSE CARDIAC ARREST

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

With the spread of opioid abuse nationwide, some parks and public areas have become venues for opioid use which may result in an on site overdose. The opioid crisis has been identified as one of the Top Trends for Parks and Recreation in 2018: www.nrpa.org/blog/top-trends-in-parks-and-recreation-for-2018/

As a result, many public park and recreation agencies are grappling with an appropriate response to a potentially life threatening opioid overdose scenario on their premises. Some agencies have considered having Nalaxone readily available on site.

Nalaxone (sold under the brand name Narcan) is a prescription medicine that blocks the effects of opioids and reverses an overdose. Nalaxone does not create any intoxicating side effects. On the contrary, Nalaxone will not have any effect on an individual who has not overdosed on opioids.

At a cost of approximately thirty dollars per dose, first responders are spending more and more resources on the overdose reversal drug Nalaxone. Some local governments have spent tens of thousands of dollars on Nalaxone. https://www.npr.org/sections/health-shots/2017/08/08/541626627/first-responders-spending-more-on-overdose-reversal-drug

If Naloxone is made available on site, park and recreation agencies may then have to assume the considerable cost and administrative burden of training their personnel to properly identify and administer Nalaxone to a non-responsive individual on site who may have overdosed on opioids. A non-responsive individual, however, may or may not be in apparent cardiac arrest due to an opioid overdose. Moreover, an individual may be non-responsive due to a condition totally unrelated to opioids, including a serious head trauma or other medical condition.

When one assumes a duty that would not otherwise exist under existing law, one may assume a duty to execute that duty in a non-negligent fashion. Accordingly, once park and recreation agencies get into the business of providing Nalaxone, let alone having their personnel administer these drugs, an assumed duty must be implemented in a non-negligent fashion. In so doing, if it would lead to any unreasonable delay in prompt summoning of competent medical attention (i.e., calling 911), the agency may be worse off from a liability perspective.

Absent a statute expressly imposing a legal duty to do so, which is highly unlikely, the law would not generally require a public park and recreation agency to intervene or provide treatment in a potentially life threatening situation, like an opioid overdose. On the contrary, the law would require the public park and recreation agency and its personnel to avoid any conduct which would aggravate a potentially life threatening situation.

LEAVE NALAXONE TO EMS

Accordingly, any direct treatment and response and intervention is better left to local law enforcement and Emergency Medical Services (EMS) who are better trained and equipped to

properly handle a possible opioid overdose. Many local first responders now carry Nalaxone on emergency calls. Moreover, once the 911 call is made, the applicable landowner duty of emergency care for the agency is satisfied. Moreover, any subsequent unreasonable delay due to the negligence of the 911-call center or first responders are likely immune from any liability. In general, governmental immunity would apply to liability claims associated with unreasonable or inadequate general police protection and emergency services.

Good Samaritan immunity would not apply to a public park and recreation agency because the agency already has a landowner/invitee legal relationship with those using their facilities. Subject to jurisdictional variations, in general, a Good Samaritan statute provides limited immunity from negligence liability to individuals who try to assist an imperiled stranger, i.e. someone with whom they have no legal relationship, and therefore no duty to rescue. As landowners, however, park and recreation agencies have a very limited legal duty to rescue imperiled invitees on the premises once a life-threatening situation becomes apparent.

To satisfy the applicable duty to rescue, park and recreation agencies should be able to promptly respond to a wide variety of life threatening situations, including an opioid overdose. The appropriate response, however, does not involve any sort of medical intervention or treatment. On the contrary, the appropriate agency response should be simple and straightforward, prompt summoning of competent medical attention, i.e. call 911 to summon local Emergency Medical Services (EMS). As a result, in response to a possible opioid overdose, the administration of a prescription medication, like Nalaxone, by non-medical park and recreation personnel may be ill advised and certainly not required by law in the exercise of reasonable care under the circumstances.

RESPONSE TRAINING PRIORITIES

Any training of park and recreation personnel to respond a potential opioid overdose should, therefore, ensure the prompt summoning of competent medical attention to the scene. Accordingly, a public park and recreation agency would be better served by training which includes ongoing communications and drills between the recreation agency and local first responders to ensure familiarity with recreation sites and a rapid response by EMS to any life threatening situation. In so doing, a public park and recreation agency would avoid the significant administrative cost and burden associated with quasi EMS training and duties for recreation personnel to provide and administer Nalaxone.

In addition to training which would ensure a prompt response to an opioid overdose emergency, parks and recreation agencies must also ensure personnel are properly trained in dealing with an occupational safety and health hazard associated with opioid abuse in public places, specifically discarded needles and syringes.
https://www.nbcdfw.com/news/health/Drug-Crisis-Syringe-Pollution-Threat-434924603.html
https://www.nrpa.org/parks-recreation-magazine/2017/june/confronting-the-opioid-outbreak-in-our-parks/

In the course of inspection and cleanup of park and recreation sites during this ongoing opioid crisis, maintenance workers are likely to encounter discarded needles and syringes with potential exposure to bloodborne pathogens. Regulations promulgated by the federal Occupational Safety and Health Administration (OSHA), 29 CFR 1910.1030, requires employers to provide

information and training to workers on methods used to control occupational exposure which would include appropriate precautions for the proper disposal of discarded needles and syringes.

SEE: Bloodborne Pathogens and Needlestick Prevention
https://www.osha.gov/SLTC/bloodbornepathogens/otherresources.html

SEE : OSHA Rule Applies To Ocean Lifeguard Position & Mouth-To-Mouth Resuscitation Task James C. Kozlowski *Parks & Recreation* . Jul 1992. Vol. 27, Iss . 7
http://cehdclass.gmu.edu/jkozlows/lawarts/07JUL92.pdf

AED & CPR ANALOGY

Within the context of an emergency response to a life-threatening situation, Nalaxone can be viewed as an intervention or treatment analogous to the use of an automatic external defibrillator (AED) or cardiopulmonary resuscitation (CPR).

An AED is a portable electronic device which can reestablish effective heart rhythm in an individual experiencing a cardiac arrest. Unlike the administration of a prescription medication, like Nalaxone, AEDs are simple to use for the ordinary layperson and becoming ubiquitous in many public places.

The applicable law for responding to potentially life threatening situations on site involving AED and CPR intervention is fairly well settled. These general principles would apply to any potentially life threatening situation, including a possible cardiac arrest associated with an opioid overdose or some cause unrelated to opioids.

Accordingly, in the absence of reported court opinions involving an opioid overdose in a park or recreation facility, existing AED and CPR case law defining an appropriate emergency response to a cardiac arrest in a recreational facility are certainly relevant and informative on the issue of Nalaxone intervention.

In general, these AED and CPR cases have reiterated the applicable legal duty of reasonable care for landowners in addressing a potentially life-threatening situation, i.e., prompt summoning of competent medical attention, a 911 call for EMS. Unless expressly required by statute, CPR and/or use of a readily available AED would not be required.

NO AED DUTY

In the case of *Wing v. Butterfield Country Club*, 2017 IL App (2d) 160900-U, | 2017 Ill. App. Unpub. LEXIS 1294, 2017 WL 2805120 (7/27/2017), plaintiff Wing claimed defendant country club "owed a common-law duty to exercise ordinary care in the provision, control, placement, and use of automated external defibrillation (AED) devices at its facility."

On February 26, 2014, plaintiff decedent, Wallace E. Wing, III, was playing paddle tennis at the defendant's facilities. While playing paddle tennis, plaintiff decedent Wing suffered a sudden cardiac arrest. Wallace Wing died of an acute myocardial infarction on that day.

In the complaint, plaintiff alleged the defendant country club "knew or should have known that plaintiff decedent suffered from a sudden cardiac arrest." Moreover, plaintiff alleged the country club "was in possession of various AED devices at its facilities and that its employees were trained to use, supply, and store the devices properly." As a result, plaintiff claimed had a "duty to render aid to plaintiff decedent by administering an AED device when plaintiff decedent suffered his sudden cardiac arrest."

In response to plaintiff's allegations of negligence, defendant country club argued it owed decedent Wing no duty to do any of the following: 1) diagnose a medical condition of cardiac arrest; 2) possess, maintain or make accessible an AED device; 3) train its employees in the use of an AED device; 4) administer the AED device to one of its members who goes into cardiac arrest.

The trial court agreed with defendant country club and dismissed Wing's lawsuit. Wing appealed.

NO DUTY, NO LIABILITY

To "state a claim for negligence," the appeals court noted "a plaintiff must plead a duty owed by a defendant to that plaintiff, breach of that duty, and injury proximately caused by that breach of duty." In determining whether a defendant owes a plaintiff a duty, the appeals court would consider the following:

> (1) whether the plaintiff's injury was reasonably foreseeable, (2) the likelihood of injury, (3) the magnitude of the burden of guarding against injury, and (4) the consequences of placing a burden on defendant.

Based on these factors, if the court determined "there is no duty," then the court would find "a plaintiff cannot recover."

In this particular instance, plaintiff had argued, "it was reasonably foreseeable that an individual may suffer a sudden cardiac arrest when engaged in strenuous athletic activities at defendant's facilities." Moreover, plaintiff claimed, "defendant's possession of AED devices at its facilities seems to suggest that the likelihood of cardiovascular-related injuries were a likely occurrence as well." Having purchased and AED device for its facility, plaintiff argued further that the defendant country club has assumed the legal burden to maintain and control AED devices.

The appeals court agreed that it was foreseeable that a cardiac arrest might occur at defendant's facilities. Further, the appeals acknowledged defendant's purchase of AED devices confirmed "the foreseeability of an injury like that suffered by plaintiff decedent." That being said, however, the appeals court did not agree that the mere purchase of AED devices should create a common law duty of care to use an available AED device in the treatment of sudden cardiac arrest. According to the appeals court, the burden of such an AED duty of care would discourage businesses from purchasing AED devices in the first place to avoid increased liability exposure.

The appeals court, therefore, found "no common law duty owed to the plaintiff" to place, maintain and use an available AED device.

RESTATEMENT DUTY OF CARE

On appeal, plaintiff had further argued that "section 314A Restatement (Second) of Torts, creates a common-law duty on defendant to render aid by administering an AED device to the plaintiff decedent." (A Restatement is an authoritative treatise, issued by the American Law Institute, which summarizes the general common law principles of traditional tort law in the United States. A Restatement does not have the force of law in and of itself, but it obtains legal authority when adopted by the courts.)

As described by the appeals court, section 314A Restatement (Second) of Torts provided the following:

> The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured. He is not required to take any action beyond that which is reasonable under the circumstances. In the case of an ill or injured person, he will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician, or to those who will look after him and see that medical assistance is obtained." Restatement (Second) of Torts § 314A, Comment *f*, at 120 (1965).

Similarly, the appeals court noted that "a possessor of land who holds it open to the public is under a duty to members of the public to protect them against unreasonable risk of physical harm, and give them first aid after it knows or has reason to know that they are ill or injured."

However, in the opinion of the appeals court, "[t]he use of a defibrillator requires specific t raining and we believe that its use is far beyond the type of 'first aid' contemplated by Restatement section 314A."

As a result, the appeals court concluded defendant country club "owed plaintiff no common-law duty to use an AED device on plaintiff decedent."

> [W]e cannot say that defendant in the present case had a common law duty to use the AED device on plaintiff decedent as the use of such a device is not the type of first aid contemplated by the Restatement section 314A, even though plaintiff assures us that such a device is quite "foolproof."

The appeals court, therefore, affirmed the judgment of the trial court dismissing Wing's claim against the defendant country club.

NO SKILLED TREATMENT REQUIRED

In the case of *L.A. Fitness International, LLC. v. Mayer*, 980 So.2d 550 (Fla.App. 4/23/2008) plaintiff Julianna Mayer alleged defendant fitness center had negligently failed to render aid during a medical emergency. Mayer's father, Alessio Tringali, died as a result of a cardiac arrest he

suffered while using a stepping machine at L.A. Fitness in Oakland Park, Florida. In response, L.A. Fitness argued that it had satisfied its duty to render assistance to the deceased as a matter of law when it promptly summoned professional medical assistance for him. A jury returned a verdict in favor of Mayer as the representative of her father's estate. L.A. Fitness appealed.

Robert Strayer, an L.A. Fitness sales representative, testified that he was sitting at his desk at the Oakland Park L.A. Fitness around 9 p.m. on April 3, 2003 when he heard someone call for help. Strayer got up from his desk, told the receptionist to call 911, and ran to the back of the gym. Strayer observed Alessio Tringali lying on his back surrounded by L.A. Fitness patrons.

According to Strayer, Tringali was bleeding from a cut on his head and shaking from small convulsions. Strayer, who was certified in CPR, believed Tringali was having a seizure or a stroke. Because Strayer believed Tringali had fallen off a nearby stepping machine and may have sustained a concussion to his head or hurt his neck or back, he did not perform a "chin tilt" to open his airway, which is one of the first steps in CPR. Based on his observations and belief that Tringali was having a seizure or stroke, Strayer decided not to attempt CPR and possibly make matters worse.

An EMT for the City of Oakland Park Fire Rescue testified that she responded to L.A. Fitness with two other EMT's. The EMT testified that Fire Rescue received a call from Fitness at 9:18 p.m., and that they arrived at Fitness at 9:21 p.m. EMTs shocked the defendant with an AED at 9:21 p.m. and then again at 9:24 p.m. but were unable to re-establish a pulse.

Medical experts testified that, more likely than not, Tringali would have been revived by paramedics if he had been given CPR by Fitness employees. On the other hand, these medical experts also testified that a layperson could easily confuse gasping with breathing and shaking of the head, as observed by Strayer, with seizures.

To resolve this case, the appeals court would determine the nature and scope of the duty a health club or gym owes to a patron who is injured while exercising on its premises. In so doing, the appeals court found a "special relationship" existed between L.A. Fitness and its members. As a result, as with any business owner, L.A. Fitness had a duty to use reasonable care in rendering aid to Tringali when he became ill or injured.

In defining the scope and applicability of this duty of emergency care, the appeals court reiterated the following principle espoused in the Restatement of Torts (Second) § 314A "that a proprietor is under an ordinary duty of care to render aid to an invitee after he knows or has reason to know the invitee is ill or injured." In so doing, the appeals court took particular note of comment (f) to the Restatement (Second) of Torts §. 314A:

> f. The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured. He is not required to take any action beyond that which is reasonable under the circumstances. In the case of an ill or injured person, he will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician, or to those who will look after him and see that medical assistance is obtained.

On appeal, L.A. Fitness argued that it had met the above-cited "Restatement" standard. In particular, L.A. Fitness claimed their employees immediately advised their staff to call 911 when they heard a call for help. Moreover, when these employees checked on Tringali's condition, they noted the cut on his head and the position of his back. As a result, the employees decided not to attempt CPR because Tringali appeared to be breathing and moving him might worsen a possible head or neck injury. Based upon these facts, L.A. Fitness claimed it had "fulfilled its common law duty to render aid and secure medical assistance for Tringali."

As noted by the appeals court, "a business proprietor cannot 'ignore' an injured or incapacitated patron and must 'take some minimal steps to safeguard' him." That being said, the appeals court acknowledged that these "minimal steps" would not include and "does not create a duty to perform medical rescue procedures on him":

> Courts in other jurisdictions which have examined the issue of a business owner's duty to injured patrons have generally held that a business owner satisfies its legal duty to come to the aid of a patron experiencing a medical emergency by summoning medical assistance within a reasonable time. They have declined to extend the duty of reasonable care to include providing medical care or medical rescue services.

Moreover, the appeals court found the Restatement's "first aid" obligation to provide "first aid" to invitees on the premises did not include "the duty to perform skilled treatment, such as CPR." On the contrary, the appeals court found reasonable first aid "requires no more assistance than that which can be provided by an untrained person." In accordance with this common understanding of the term, the appeals court found "first aid" may include: calling for help; positioning a victim; controlling a victim's bleeding by applying pressure; manually stabilizing the head of a blunt trauma victim so the head, neck and spine do not move and are kept in line; and applying cold packs to soft-tissue injuries such as sprains and muscle contusions. According to the appeals court, CPR would be considered more than mere "first aid" because it requires training:

> Although the procedure for CPR is relatively simple and widely known as a major technique for saving lives, it nonetheless requires training and re-certification. Unlike first responders, for whom performing CPR is routine, non-medical employees certified in CPR remain laymen and should have discretion in deciding when to utilize the procedure.

As a result, under the circumstances of this case, the appeals court concluded "L.A. Fitness, through its employees, fulfilled its duty of reasonable care in rendering aid to the deceased by summoning paramedics within a reasonable time." The appeals court, therefore, reversed the judgment of the trial court and, on remand, ordered the trial court to enter judgment in favor of defendant L.A. Fitness.

****

James C. Kozlowski, J.D., Ph.D. is an attorney and associate professor in the School of Recreation, Health, and Tourism at George Mason University in Manassas, Virginia. E Mail: jkozlows@gmu.edu Webpage with link to law review articles archive (1982 to present): http://mason.gmu.edu/~jkozlows