

ALLEGED POLICY BAN ON LAKE RESCUES
UNCONSTITUTIONAL DEPRIVATION OF LIFE

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The *Ross* decision described below illustrates a growing tendency among plaintiffs in recreational injury lawsuits to combine their negligence claims with allegations of civil rights liability under Chapter 42, section 1983 of the United States Code (42 U.S.C. § 1983). As illustrated by the *Ross* case, municipalities and individual officials may be liable for injuries caused by clear public policies which deprive individuals of their civil rights under federal law and the United States Constitution.

Under traditional negligence liability, plaintiff's recovery (and the contingency fee available to plaintiff's attorney) is usually limited to the amount of provable damages based upon the extent and gravity of the resulting injury. However, attorney fees under federal civil rights statutes are not necessarily limited by the dollar value attributable to the resulting injury. Federal civil rights statutes, such as section 1983, provide separate provisions for reasonable attorney fees if the plaintiff prevails. These reasonable attorney fees may indeed exceed the amount of actual damages. As a result, wherever possible, it is advantageous to plaintiff's attorney to fashion a civil rights claim in a recreational injury lawsuit against a state or local entity.

In addition, a viable section 1983 claim establishes federal jurisdiction. This allows plaintiff's case to be heard in a federal court, rather than a state court. Plaintiff's attorney may feel federal courts in the applicable jurisdiction are more likely to impose municipal liability and award greater damages than a state court. Further, the existence of civil rights claims, in additions to claims of ordinary negligence, increase the likelihood of preserving points for appeal. This was the situation in *Ross*, the appeals court affirmed the dismissal of plaintiff's negligence claims, but allowed her civil rights claims to proceed to trial.

Unauthorized Rescuers Subject to Arrest

In the case of *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990), plaintiff Ollie Ross brought this action following the drowning death of her son, William, in Lake Michigan. The facts of the case were as follows:

On August 11, 1985, the city of Waukegan, Illinois, held the Waukegan Lakefront Festival on the shores of Lake Michigan. Twelve-year old William Ross attended the event but abandoned the day's organized activities for a stroll with a friend on a breakwater that extended out into the lake. At the tip of the breakwater, William fell into the water and sank. Immediately, William's friend ran for help.

The plea of William's friend was answered promptly by on-duty Waukegan emergency personnel located at the nearby festival. Within ten minutes of William's entry into the water, two lifeguards, two firefighters, and one police officer were on the scene with equipment to effect a rescue. In addition, two nearby scuba-diving civilians offered the assistance of themselves, their boat, and their equipment.

Before any rescue attempt could begin, however, Lake County Deputy Sheriff Gordon Johnson arrived in a marine patrol boat. The city of Waukegan and Lake County had previously entered into an intergovernmental agreement that required the county to provide all police services in the entities' concurrent jurisdiction on Lake Michigan. Under its authority to police the lake, the county and its sheriff had promulgated a policy that directed all members of the sheriff's department to prevent any civilian from attempting to rescue a person in danger of drowning in the lake. This policy contemplated that only divers from the city of Waukegan Fire Department could carry out such a rescue.

With this policy in mind, Deputy Johnson ordered all of the persons then on the scene to cease their rescue efforts. When the civilian scuba divers stated that they would attempt the rescue at their own risk, Johnson responded that he would arrest them upon their entry into the water and even positioned his boat so as to prevent their dive. A Waukegan police officer agreed that Johnson had authority over the scene and advised his fellow city employees that they should heed Johnson's instructions.

A full twenty minutes after the initial rescuers arrived at the scene and approximately thirty minutes after the boy had fallen into the water, the officially authorized divers finally retrieved William's body. Although William showed clinical signs of life after being pulled from the water, he was declared dead the following morning...

The United States Army Corps of Engineers built and maintained the breakwater. At the point where William fell off, part of the breakwater had broken away and had exposed a large crack. At the crack, the pitch of the breakwater's sloping angle suddenly became more pronounced and likely contributed to William's fall. Although the Army Corps of Engineers was aware of the break-water's condition, it did nothing to repair the crack.

In her complaint, Ross brought this suit against the defendant United States because "the Army Corps of Engineers owned the breakwater." Pursuant to 42 U.S.C. § 1983, Ross also sued Deputy Johnson "in both his individual and official capacity, alleging that Johnson violated William's civil rights by interposing state power to prevent rescue." Further, Ross brought actions against the city of Waukegan, the sheriff of Lake County, and the county itself "for promulgating policies that led Deputy Johnson to prevent William's rescue." The federal district court dismissed Ross's complaint against all defendants prior to trial. Ross appealed the dismissal orders, seeking a full trial to consider the merits of her negligence and civil rights claims against the defendants.

As noted by the appeals court, all doubt is resolved in favor of the plaintiff in reviewing a lower court's decision to dismiss plaintiff's claims prior to trial.

The allegations in the plaintiff's complaint portray a stunning abuse of governmental power. Because we review this case after successful motions for summary judgment and for dismissal of the complaint, we have taken the facts in the light most favorable to the nonmoving plaintiff [i.e. Ross] and have drawn all possible inferences in her favor. Thus, we have outlined the facts with these principles in mind, and our recitation should not be interpreted as an opinion on the veracity of any of the plaintiff's allegations. In addition, it should be remembered that none of the actors in this tragedy have had their

day in court to disprove the plaintiff's claims.

Applying this standard of appellate review to the facts of the case, the appeals court found that it "must assume that William would have survived had Deputy Johnson not stopped the initial rescuers."

Initially, the appeals court considered Ross' negligence claims against the defendant United States. As noted by the court, Ross' "claim against the United States arises under the Federal Tort Claims Act (28 U.S.C. §§ 2671-2680) and relies on the status of the United States as owner of the breakwater." Pursuant to Federal Tort Claims Act, the appeals court stated that the federal government, in this instance, "is liable to the same extent that a private landowner would be liable under Illinois law." Consequently, the appeals court applied the following principles of Illinois law to determine whether the United States had landowner liability in this particular instance.

Private Illinois landowners do not guarantee the safety of children on their land. A landowner is under a duty to protect children from negligence only if (1) the land-owner knows that children frequent the premises and (2) a dangerous condition exists on the land that is likely to cause injury to children who, by reason of their immaturity, are incapable of appreciating the risk involved.

Even assuming that the United States government, acting through the Army Corps of Engineers, should have known that children frequented its breakwater, Ross cannot show that William was incapable of appreciating the risk involved. The risk involved in this case was the possibility that William would fall off the breakwater and drown. Agreeing with the Restatement (Second) of Torts, a legion of Illinois cases have held that the risk of drowning is one generally appreciated by children, even children of a much lesser age than twelve-year old William.

There are many dangers, such as those of fire and water, or of falling from a height, which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large. [Restatement (Second) of Torts § 339 comment j (1965)].

Applying these principles to the facts of the case, the appeals court found that "the United States, as a landowner, did not owe William a duty to protect him from this harm... [b]ecause the risk of falling off the breakwater and drowning is one generally appreciated by children of William's age." Specifically, the appeals court found that "William was certainly aware that Lake Michigan lurked a few feet away at the bottom of the sloping breakwater." In so doing, the appeals court rejected Ross' argument that this particular breakwater was unreasonably dangerous under the circumstances.

Much of Ross' argument is devoted to casting the breakwater as a menacing hazard, so "dangerously slanted" that a young boy would not appreciate the risk of falling... [In addition, Ross contended that] the breakwater becomes an even greater danger, with a half-hidden crack "making the pitch of the sloping angle of the Breakwater's surface" much more pronounced. Thus, according to Ross, the hazard in this case was not Lake Michigan but the breakwater itself. No matter how the plaintiff attempts to address it, the risk involved in this case is nothing more than the risk of falling and drowning.

All waterfront landowners cannot be expected to guard against the risk that a boy will

find the water an attractive playground. Every man who has been brought up with the freedom allowed to American boys knows that you might as well try to dam the Nile with bulrushes as to keep boys away from ponds, pools and other bodies of water. Recognizing a legal duty on the part of the United States to protect William from harm on the breakwater would be akin to imposing a rule of absolute liability. Because Illinois law only imposes liability on landowners for those harms that are foreseeable, the United States was properly dismissed as a defendant from the suit.

The appeals court then considered Ross' allegations of civil rights liability under 42 U.S.C. § 1983 against the defendant City of Waukegan for depriving her son of his constitutional rights. According to the appeals court, "the City of Waukegan can only be liable if it had an official policy or custom that caused an injury to be inflicted on the plaintiff." Accordingly, Ross had alleged that "the city had a policy directing its employees to acquiesce in the unconstitutional actions and policies of the county." Specifically, Ross argued that the city should be liable "because its policy caused city emergency personnel to stand idly by while Deputy Johnson forbade efforts to rescue William." The appeals court rejected this argument.

Stripped of their surplusage, the plaintiff's allegations stand for nothing more than the proposition that the city of Waukegan's emergency personnel followed established procedure and thereby failed to save William from drowning. Absent a constitutional duty to provide these rescue services, however, the city cannot be held liable. On this point, we need do no more than cite the line of precedent from the Supreme Court and this court, holding that the government's failure to provide essential services does not violate the Constitution. The plaintiff's allegations of municipal policy cannot surmount the main obstacle to her claim: the city simply had no constitutional obligation to save William's life.

As a result, the appeals court concluded that "the city of Waukegan should be dismissed as a defendant to this suit."

The appeals court then considered the potential liability of defendant Lake County under the circumstances of this case. As in the case of defendant Waukegan, the appeals court stated that "Lake County can only be liable if one of its official policies or customs caused injury to William." Reiterating the appropriate standard of appellate review described above, the appeals court stated it would "accept as true the plaintiff's allegations that the county had a policy that required Deputy Johnson to prevent any unauthorized person from attempting to rescue another person in danger of drowning."

As the complaint frames the facts, unauthorized persons on the scene could have saved William's life, making the policy a direct cause of his death. As alleged in the plaintiff's complaint, the county had a policy that "required Johnson to forbid and prevent any civilian, not explicitly authorized to do so, from attempting to rescue a person in danger of drowning, and to continue to restrain and prevent such rescue until the arrival of divers from the Waukegan Fire Department, even though the proximate result of such conduct would or could be the serious injury or death of the drowning victim."

On appeal, the county had argued that "proof of a single incident of unconstitutional activity is not sufficient to [establish a policy and, thus,] impose municipal liability [under 42 U.S.C. § 1983] unless it was the result of a facially unconstitutional policy." The appeals court rejected this argument.

[T]he purpose of the "official policy" requirement is to distinguish between the act of a municipality and the acts of its employees. Requiring proof of more than one application of an alleged policy helps to establish the existence of the policy and attribute any harm to the municipality. Where a particular course of action is authorized by a municipality's authorized decisionmakers, it represents a policy rightly attributed to the governmental entity, and in such a case, there is no need to resort to proof of the policy's multiple applications to attribute its existence to the municipality. Ross' complaint implies that the alleged policy came from the highest level of decisionmakers in the county government and in the sheriff's department. In such a case, even a single application of the policy is fairly attributed to the county.

In the opinion of the appeals court, Ross' allegation that "the county arbitrarily denied William his fourteenth amendment right to life" was sufficient, if later proven at trial, to establish civil rights liability under 42 U.S.C. § 1983. Further, the appeals court found that "the policy alleged by Ross is itself unconstitutional."

Viewed in a traditional constitutional framework, the county's policy runs afoul of the fourteenth amendment. The plaintiff does not allege that the county had a policy of refusing to supply rescue services. Rather, the wrong suffered by the plaintiff and her decedent is the county's forced imposition of services that William did not want or need; the plaintiff alleges that the county had a policy of arbitrarily cutting off private sources of rescue without providing a meaningful alternative.

[In an earlier case], we rejected a section 1983 plaintiff's claim that a municipality's failure to dispatch an ambulance to a dying woman was an unconstitutional deprivation of life. Nevertheless, we suggested that where the state greatly increased the risk while constricting access to self-help, a constitutional injury occurred. When a state cuts off sources of private aid, it must provide replacement protection. The plaintiff alleges that Lake County had a policy of cutting off private aid to drowning victims, even where the county's replacement protection would not effect a rescue. Because the county's policy led to the deprivation of William's constitutionally protected right to life, the plaintiff's claim is cognizable under section 1983.

The appeals court further rejected the county's argument that "the policy alleged by the plaintiff does not evince a deliberate indifference or recklessness toward human life, either of which is a necessary prerequisite to a constitutional violation."

We take the policy alleged in the plaintiff's complaint at its face value. The plaintiff alleges that the county had a policy that prevented rescue even of persons "in danger of drowning." Thus, as portrayed in the plaintiff's complaint, Lake County's policy not only tolerated a risk that someone might drown but actually contemplated that some persons would die for the sake of preventing harm to private rescuers. Protecting the lives of private rescuers rather than the lives of those drowning in the lake is an arbitrary choice. While no one suggests that the county desired to see people die in the waters of Lake Michigan, its alleged policy demonstrates a disregard for the value of the lives lost because of its enactment.

Whether the plaintiff is later able to prove the existence of Lake County's policy is

inconsequential to our decision. As we must [in reviewing the dismissal order prior to trial], we reached our decision assuming the truth of the plaintiff's complaint, and our discussion does not relieve the plaintiff of her burden to eventually prove her case by a preponderance of the evidence. The allegations in the plaintiff's complaint were sufficient to state a cause of action against Lake County...

Having found that Lake County's alleged no private rescue policy "illegally deprived [William] of his life within the meaning of the fourteenth amendment," the appeals court then considered the issue of defendant Gordon Johnson's liability for depriving William Ross of his constitutional rights. As described by the appeals court, an individual official is liable for implementing a clearly established public policy which deprives individuals of their constitutional rights.

Because Deputy Johnson acted under the color of state law to cause this deprivation, he is liable unless he is entitled to qualified immunity on the grounds that the law was not clearly established at the time of the accident. We are mindful of the Supreme Court's admonition that the contours of the constitutional right in question "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Consequently, we must decide whether it was clearly established on August 11, 1985 [the date of the incident], that a citizen in peril for his life had a constitutional right that prevented a police officer from cutting off private avenues of lifesaving rescue without providing an alternative. We believe that this right was clearly established on that date... [T]he state cannot arbitrarily assert its power so as to cut short a person's life.

Applying these principles to the facts of the case, the appeals court found that "a reasonable police officer in Deputy Johnson's position should have known that he could not use that authority to prevent private rescue efforts."

When Johnson arrived on the scene, the complaint alleges that trained, on-duty rescue personnel were present. The identity of these persons should have been known to Johnson either through the uniforms they were wearing or through a few questions that Johnson could have quickly asked. There was simply no rational reason for Johnson to prefer "authorized" but equally competent rescuers located away from the scene.

The appeals court further rejected Johnson's argument that "his actions were at most negligent, an insufficient mental state for a constitutional violation."

There is no suggestion in the complaint that Johnson maliciously desired the boy to die. But intent is not always required to establish a due process violation; our precedents have accepted recklessness as a proxy for actual intent. For recklessness in the constitutional sense, the state actor must ignore a known and significant risk of death.

Accordingly, the appeals court found that "Ross has pleaded sufficient facts for a jury to conclude that Johnson acted in a reckless manner."

When he arrived on the scene, Johnson knew that the boy had already been under the water for at least a few minutes, and because of his training, Johnson also knew that it could take as little as five minutes for a person to die by drowning. Either through their

uniforms or through a quick inquiry, Johnson could have readily ascertained that the alternative on-site rescue personnel were qualified to save the drowning boy. Nevertheless, Johnson waited until twenty minutes later for the "authorized" rescue squad to arrive. Using the facts alleged in the plaintiff's complaint, it is clear that Johnson knew there was a substantial risk of death yet consciously chose a course of action that ignored the risk. Such conduct is reckless.

As a result, the appeals court reversed the summary judgments of the lower court in favor of defendant Johnson and defendant Lake County and remanded (i.e. sent back) this case to the federal district court "for further proceedings in accordance with this opinion." On remand, the district court would fully consider Ross' allegations of civil rights liability under 42 U.S.C. § 1983 against Johnson and Lake County. The order of the appeals court further affirmed the summary judgments of the lower court dismissing Ross' claims against the defendant United States and the defendant city of Waukegan.

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