APRIL 2008 LAW REVIEW

CASE OF THE STATE PARK "DROWNING MACHINE"

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Landowners have a legal duty to maintain their property in a reasonably safe condition which may include a duty to warn of latent hazards of which they are aware. The risk of drowning in a natural body of water, however, is generally considered an open and obvious risk which anyone old enough to be at large is expected to know, appreciate and avoid. Within this context, an open and obvious risk is one that could not be overlooked by any observer reasonably using his or her ordinary senses. Conversely, there may be potential landowner liability where there is some concealed dangerous condition, not existing in similar bodies of water, which is unusually hazardous and constitutes a mantrap. Under such circumstances, the landowner may have a legal duty to at least warn recreational users of an unusually dangerous condition which is known or discoverable to the landowner but not apparent to recreational users through the reasonable use of their senses.

In a given situation, a court will grant summary judgment to defendant on the basis that a risk of drowning was open and obvious only when clear and undisputed evidence compels that conclusion. However, when reasonable minds can differ on the significance of given facts and/or there is some question as to whether a specific condition was open and obvious, the court will deny defendant's motion for summary judgment and allow the case to proceed to trial. At trial, a jury or judge will determine whether the scope of the risk of drowning in a particular body of water was open and obvious or a hidden and latent hazardous condition which posed a foreseeable risk of injury to individuals expected to be present on the property. In the *Cohen* case described herein, the state claims court denied the defendant's motion for summary judgment because there was some question whether the whirlpool at issue posed an open and obvious risk of drowning to state park visitors.

FATAL WHIRLPOOL

In the case of *Cohen v. State of New York*, 841 N.Y.S.2d 819 (5/2/2007), Adam Cohen, Jordan Satin and Jonah Richman drowned while attempting to rescue their friend, David Altschuler, from a natural whirlpool located in a portion of the Bouquet River known as Split Rock Falls in Adirondack State Park in Essex County, New York. The state park is managed by the New York State Department of Environmental Conservation (DEC). The facts of the case were as follows:

> On August 12, 2003, Cohen (age 19), Satin (age 19), Richman (age 18) and Altschuler (age 18) were among a group of more than 20 camp counselors from nearby summer camps who were spending their day off at a swimming area at Split Rock Falls. The group arrived at Split Rock Falls at around 12:00 p.m. and spent several hours swimming, wading and floating in the water.
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> At about 3:00 p.m., eight of the group members, including Cohen, Satin, Richman and Altschuler, decided, at Altschuler's suggestion, to go to a whirlpool area approximately 300 yards downstream from the swimming area. The group walked

> to the whirlpool through woods along the rocky shore of the river, with Altschuler in the lead.
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> Cohen, Satin, Richman and Altschuler were all described as good swimmers by friends and family. Cohen and Richman were classmates and co-captains of their high school swim team. Richman was certified as a pool and ocean lifeguard, and Cohen served as a lifeguard and swim instructor at the summer camp where he worked. Richman's mother testified that he was an "all county swimmer and set high school pool records."
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> Samuel Krause, a member of the group of eight, recalled that he, along with Cohen, Satin, Richman and Altschuler, "had all been to Split Rock Falls several times over the years. We had all swam in various different swimming holes and whirlpools there, and none of us had ever encountered any trouble in the water there before."
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> As the group approached the whirlpool, Altschuler entered the water and, after a brief period, began struggling to stay afloat. Satin jumped in the whirlpool to assist Altschuler and also began to struggle to keep afloat. Cohen and Richman then entered the whirlpool and all four quickly disappeared under the water.
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> Shortly after, Richman's body surfaced downstream and other members of the group attempted to resuscitate him, without success. The bodies of Cohen, Satin and Altschuler were recovered the following day by using an underwater camera and a drag mechanism, since the turbulent water conditions in the whirlpool precluded the use of recovery divers.

According to one of group of eight counselors who witnessed the drownings, the water at Split Rock Falls appeared higher than it had in the past, but the whirlpool where the drownings took place did not appear that it would have trapped good swimmers like the decedents underwater or that it would have been difficult to stay afloat.

The park ranger who supervised the rescue/recovery effort (Larow) testified that the "falls that are upstream from that location are a known swimming area." He characterized the location of the drownings as "not a high-use area… in the neighborhood of an eighth to a sixteenth of a mile" from the main swimming area. According to Larow, the whirlpool was “turbulent and dangerous,” a "boil, hydraulic [the most dangerous feature on a river] that was formed by water coming over a rock and then taking a hard right-hand turn and the going on downstream." When the water level is high, as it was on the day of the drownings, the hydraulic effect becomes stronger and stronger, like a riptide, holding anything caught in the recirculating water. According to Larow, the ordinary lay person without whitewater experience would not know the difference between low hydraulics and dangerous high hydraulics.

Larow referred to the conditions in the whirlpool as a "Maytag effect" resulting from "the current powerfully crashing into the rocks and forcing air into the water. The water is churning, then is

strong enough to pull swimmers under the water." In his deposition, Larow described the "Maytag effect" as follows:

> [T]here is a phenomena when you aerate water it loses the ability to, say, swim in it or even a propeller from a motorboat, say, so that it makes whatever type of effort to get through that water ineffective. . . .
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> [T]he Maytag effect is again with a hydraulic, primarily in white water in the rivers around here. When somebody is dumped into one of these holes, as they're called, which again is a hydraulic, depending on the way the hydraulic was formed, it tends to keep the person in the hydraulic. And what it does is it brings the person under water. It brings them to the upstream side of the hydraulic. It allows them to surface, and if they're lucky they can get a breath of air, but then as they get to the downstream side of the hydraulic it sucks them back under, and it continually keeps a person in a circular fashion which, again, the river people call it a "Maytag effect."

Larow stated further that "when the hydraulic is big enough it's called a 'drowning machine'." While Larow was aware of signage in Adirondack Park warning of "high fire danger" when conditions warranted it, as well as "no camping" or "no parking" signs, he could not recall any "instances of the public being warned of a danger posed in Adirondack Park due to the condition of a river or stream."

A regional ranger (Streiff) also testified that it was "common knowledge that the "falls and shoots at Split Rock Falls were more turbulent and the volume of the water greater and faster" than normal" on the day of the drownings. In so doing, however, Streiff acknowledged that the Split Rock Falls area was a "known swimming area." When asked if the State "had warned of transient dangerous situations in the past," the regional ranger testified that the State had "given warnings out when we have high snow pack for the risk of avalanches" and that the warning was given through "signage."

The ranger in charge of rescue/recovery for this incident (Russell) testified that access points to trails in Adirondack Park may "have signs indicating what is or is not permitted in that area" depending on activity in the area. Russell further testified that he was aware that "groups of people, families" would wade and jump into the primary swimming area at Split Rock Falls, but was not aware of people swimming at the specific location of the drownings.

While unaware of any prior drownings at the location, Russell said rescue/recovery divers were given specific instructions "not to go into any of the swift waters." The ranger went onto describe the drowning location as "a turbulent, white water condition." In so doing, however, Russell testified that he was "not aware of any portion of the Adirondack Park ever being closed or having warning signs placed due to a dangerous condition."

The state police captain who responded to the scene of the drownings (La Fountain) testified that the situation at the whirlpool at Split Rock Falls on August 12, 2003 was far too dangerous to

allow any of his divers to go into the water, “any diver that went into that water would have become a victim himself at that location." La Fountain described the whirlpool as follows:

> There was a large volume of water that was coming down rapidly by the falls, resulting in a great deal of aeration, white foamy water, which, number one, when you see white foamy water, I've been instructed that you cannot remain buoyant in that water to begin with because of the aeration; although, breathing that is obviously going to create distress and eventual drowning. And also you could see the force of the water swirling around. I could not tell, just by looking at, but you would be sucked under the water, but it appeared that that would be what would happen and did happen to these young men.

LATENT DANGER

Based upon the pretrial evidence in this case, claimants (hereinafter referred to collectively as “Cohen”) alleged that the defendant State “knew of the dangerous condition of the Split Rock Falls swimming area and knew that people would be frequenting the swimming area, yet failed to prohibit such use or to warn of the latent dangerous condition of the whirlpool located near the main swimming area.”

As noted by the state claims court, “the State clearly owes a duty to claimants and others entering upon its property to maintain it in a reasonably safe condition under the circumstances.” In so doing, however, the court acknowledged that the State is “not obligated to insure against every injury which may occur.” On the contrary, the court found any liability would require proof of a dangerous condition:

> The State's liability for injury resulting from an alleged dangerous condition is premised upon proof that it either created the alleged dangerous condition or knew, or in the exercise of reasonable care, should have known that a dangerous condition existed but, nevertheless, failed to remedy the situation within a reasonable time period.
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> Where there is insufficient proof that the defendant created or had actual notice of the condition, liability turns on the issue of whether defendant had constructive notice. To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it.

Accordingly, to have these claims dismissed on a motion for summary judgment, the State had to establish that it “had no notice of a dangerous condition and did not create a dangerous condition which posed a foreseeable risk of injury to individuals expected to be present on the property.” In this particular instance, the claims court found no evidence that the State knew or created the alleged dangerous condition.

> The State's employees had not visited the specific whirlpool in which the decedents drowned prior to August 12, 2003 and therefore lacked actual notice of

> the allegedly dangerous condition. Further, the naturally occurring whirlpool was obviously not created by defendant, but instead consisted of the natural terrain aggravated by the rainy weather leading to August 12, 2003.

Cohen, however, claimed the State knew, or should have known, of the dangerous condition at Split Rock Falls based upon a prior drowning incident in the area under very similar circumstances in 1998. In fact, one of the state park rangers at the scene of the 1998 drowning would also prepare the state police report regarding the drownings of Cohen, Satin, Richman and Altschuler in 2003. In the earlier incident, a 21 year old college student, Trevor Green, had visited Split Rock Fall with several friends:

> According to the State Police report, on June 26 1998, the river was extremely high and very turbulent, due to a severe rainstorm during early-morning hours of June 26, 1998. The affirmation given to police by Green's friend, Daniel Patrick Molloy, Jr., states that the group climbed up to a ledge from which Green jumped into the water. After surfacing, Green stated to the group that "you better be a good swimmer because there was a lot of water pressure churning."
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> Green then jumped from the ledge again. He surfaced shortly afterwards and appeared to be struggling to stay afloat. He then went under and surfaced again on the opposite side of the small pool area, still struggling and went under again. The next time he surfaced he was approximately 30 feet from where he was seen previously. He appeared to be unconscious and was floating face down before going over a waterfall. Green's body was later recovered by a cold water rescue team.

In addition, Cohen had offered expert witness testimony from an individual with a background in whitewater safety and rescue training to explain the causal relationship between the latent dangerous condition, i.e., “the phenomena of hydraulics and aerated water,” and the drownings, According to Cohen’s expert, “the conditions in the area of Split Rock Falls on August 12, 2003 were so extremely dangerous” because “[t]here were potential lethal dangers of which most people are unaware.”

> [T]he conditions in the area of the pools at Split Rock Falls on August 12, 2003 were extremely dangerous due to the effects of "hydraulics" and the aeration of the water found within them. It is further my opinion that those conditions are not usually known by people who have not had training or substantial experience in whitewater. Based upon my experience and training, it is further my opinion with a reasonable degree of certainty, that the dangers of river "hydraulics" and the aeration of the water within them in whitewater situations are not readily apparent or observable to persons who have not had training or substantial experience in whitewater. Instead, to the vast majority of people, the dangers of "hydraulics" and aeration of water in whitewater situations are hidden, unknown, and unseen.

As a result, Cohen's expert concluded that "signs should have been conspicuously posted warning persons who went to swim at Split Rock Falls of the dangers of 'hydraulics' and the aeration of the water, and that the water was not safe for swimming."

ASSUMED RISK

In response to Cohen's claims, the State contended that it owed no duty to the decedents because the boys had "assumed the risk inherent in the activities in which they voluntarily participated." The State, therefore, filed a motion for summary judgment which, if granted, would effectively dismiss Cohen's claims.

As noted by the claims court, "a person who is injured while voluntarily participating in a sports activity may not recover if the injuries were caused by an occurrence or condition which was a known, apparent or reasonably foreseeable consequence of the participation." Moreover, the claims court found the State had produced sufficient evidence to show that "the surviving members of the group who visited the whirlpool, as well as members of the larger group of counselors, were aware of the open and obvious dangerous nature of the whirlpool."

One of the counselors who witnessed the drownings testified that they "had decided the water was too high and dangerous to go into." Shortly thereafter, however, this witness saw "David was in the water" and a second or two later "Jonah, Adam and Jordan all went into the water" in an apparent attempt to save David, after which "all of them were dragged under by the current." According to this witness, it was obvious that "jumping into the water to try and save them would be futile."

As the group approached the whirlpool, David's brother, Benjamin Altschuler, told the State Police that he had "yelled for my brother and told him not to jump because of how strong the current looked" but "he jumped in anyway." Similarly, Satin's girlfriend, advised Satin not to go to the whirlpool because the water was too high. Another member of the group, described "one big waterfall, with whirlpools," saying "[i]t was crazy; we were not going to get in there."

Accordingly, the State contended that "the decedents were also presumably aware of, and assumed, the risk posed by entering the whirlpool… despite warnings of other counselors not to do so." The State, therefore, maintained that it "owed no duty to decedents under the circumstances."

According to the claims court, to rebut the State's "no duty" argument and establish a negligence claim, Cohen had to show that the particular facts and circumstances of this case imposed a legal duty of care on the State to exercise reasonable care. Specifically, Cohen had to demonstrate that the decedents "fell within a zone of foreseeable harm" and "the reasonably foreseeable risks included the injury-producing incident." In the opinion of the claims court, the following facts were sufficient to bring into question "whether drowning in the aerated hydraulic encountered by decedents, during their attempt to save Altschuler from the whirlpool, was a known, apparent or reasonably foreseeable consequence of their actions."

> The close proximity of the drowning site to the Split Rock Falls swimming area frequented by swimmers during the summer, located along a main highway and near a trailhead, as opposed to a less frequented, more remote wilderness area; the knowledge of DEC employees, including both rank and file Forest Rangers and DEC management personnel, that swimmers frequented the area in the summer and that heavy rains had left the water at Split Rock Falls high and turbulent; the knowledge of DEC employees of the heightened dangerousness of an aerated hydraulic, along with the knowledge that visitors to Split Rock Falls may fail to perceive the extraordinary hazard posed by an aerated hydraulic; and the State's knowledge of a prior similar occurrence at Split Rock Falls within the previous five years.

EMERGENCY DOCTRINE

Further, in attempting to save the life of Altschuler, the claims court found the actions of Cohen, Satin, and Richman were not necessarily "wanton, reckless or rash," because there was some question "whether the decedents were aware of the magnitude of the danger posed by the aerated hydraulic in the whirlpool." Given "the context of the emergency they faced," the claims court, therefore, rejected the State's argument that the decedents had voluntarily assumed the risk of drowning in entering the whirlpool to rescue Altschuler.

> The common-law emergency doctrine which recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context' provided the actor has not created the emergency.

As noted by the court, the law encourages bravery in the face of peril. Moreover, "[i]t has long been recognized that danger invites rescue and that negligence which places a person in danger is actionable not only by the initial victim but also by his or her rescuer."

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer.

CONCLUSION

The State had also maintained that it was precluded from placing any warning sign at or near Split Rock Falls because the management plan for this area (The Dix Mountain Wilderness Area Unit Management Plan) "specifically provided for the "minimum use of signs necessary to manage and protect the wilderness resource and provide for user safety." The claims court rejected this argument. According to the court, minimum use of signs did not mean "no use" of

warning signs. On the contrary, the court found further trial proceedings were necessary to determine "[w]hether a warning sign should have been posted or would have prevented the drownings." As a result, the claims court denied the State's motion for summary judgment.

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NOTE: On April 8, 2008, the appeals court reversed the above described decision of the claims court and dismissed plaintiffs' claims against the State. In so doing, the appeals court based its decision on the principle noted above, i.e., "The risk of drowning in a natural body of water, however, is generally considered an open and obvious risk which anyone old enough to be at large is expected to know, appreciate and avoid. Within this context, an open and obvious risk is one that could not be overlooked by any observer reasonably using his or her ordinary senses." Under the circumstances of this case, the appeals court rejected the finding of the claims court that there may be a legal duty to warn of "some concealed dangerous condition, not existing in similar bodies of water, which is unusually hazardous and constitutes a mantrap," i.e., the hydraulics around the falls.

COHEN v STATE OF NEW YORK

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

2008 NY Slip Op 2939

April 3, 2008

Appeal from an order of the Court of Claims (Milano, J.), entered May 22, 2007, which denied defendant's motion for summary judgment dismissing the claims.

On August 12, 2003, a group of approximately 20 to 30 young adults who were working as counselors at summer camps in the Adirondacks went to a popular swimming hole in an area of the Adirondack State Park located on the Boquet River in Essex County known as Split Rock Falls for a day of swimming and relaxing. Adam Cohen, Jonah Richman and Jordan Satin (hereinafter collectively referred to as decedents) and David Altschuler were among those in the group. At approximately 3:00 P.M. that day, Altschuler, decedents and a few others decided to go to a whirlpool area downstream from the main swimming hole. The water in the whirlpool area was turbulent and 15 feet higher than normal due to recent heavy rains. Although warned by his brother not to enter the water due to the strong current, Altschuler did so anyway and struggled to stay afloat. In response, decedents jumped in to save him. Tragically, all four young men drowned.

As a result of decedents' deaths, claimants, as administrators of decedents' estates, filed claims against defendant alleging negligence and wrongful death. Following joinder of issue, defendant moved for summary judgment dismissing the claims. The Court of Claims denied the motion, resulting in this appeal.

Initially, we note that "[a]s a landowner, [defendant] is subject to the same rules of liability as a private citizen and must act reasonably in view of all the circumstances" As such, defendant "has a duty to take reasonable precautions to prevent accidents which might foreseeably occur as the result of dangerous terrain on its property" by posting warning signs or otherwise neutralizing dangerous conditions. However, the duty to take reasonable precautions does not extend to open and obvious conditions that are natural geographic phenomena which "can readily be observed by those employing the reasonable use of their senses" In such situations, defendant is not liable for injuries caused thereby.

Resolution of the case at hand turns upon whether the whirlpool area where the tragic drownings occurred presented the type of danger triggering a landowner's duty to take reasonable precautions. The location and appearance of the whirlpool area are relevant to this inquiry. While the main swimming hole commonly used by visitors at Split Rock Falls is located near a main highway, evidence was presented that the whirlpool area where the deaths occurred is not a high use area, nor is it easily accessible from this point. Rather, it is situated approximately 300 yards to one quarter of a mile downstream from the swimming hole and is not connected to it by a footpath. There are only two means of reaching it, either by manuvering along the rocky shoreline, as the small group of counselors did in this case, or by walking along the roadway and cutting down a steep embankment through the woods.

Rescue personnel described the whirlpool area as a "cavern-like area" creating a "hydraulic, that was formed by water coming over a rock and then taking a hard right-hand turn and then going downstream" and also "a box" in which "a large volume of water . . . was coming down rapidly by the falls, resulting in a great deal of aeration, white foamy water." Officials agreed that heavy rains during the weeks preceding the incident in question raised the water level 15 feet higher than normal, significantly increasing the turbulence. In fact, divers were unable to enter the water to undertake rescue efforts immediately after the incident due to the dangerous condition presented by the raging water.

Furthermore, it is evident from the statements of the camp counselors present at the scene that they were aware of the high water level and ensuing danger presented by the turbulent conditions. One counselor described the whirlpool area as approximately seven feet across, with "water spinning in a circle pretty fast." Others, including Altschuler's brother, recognized the danger that the strong current presented, even to strong swimmers like the victims and, for that reason, chose to stay out of the water. In fact, Altschuler's brother urged Altschuler to do the same, to no avail. Significantly, another counselor who witnessed the incident observed that, given the rough water, "[i]t was obvious . . . that jumping in the water to try to save them would be futile."

The observations of the counselors and rescue personnel, as well as the compelling photographic evidence in the record, establish that the whirlpool area was an open and obvious hazard that comprised a part of the natural environment of the Boquet River, the danger of which was readily apparent to a person reasonably using his or her senses. This, combined with the fact that the area was not easily accessible from the more commonly used main swimming hole, leads us to conclude that defendant did not owe a duty to neutralize the danger presented thereby. This conclusion is consistent with those cases which have held that a landowner does not owe a duty

with respect to natural transitory conditions existing in bodies of waters, such as the presence of sandbars, rip currents or rogue waves, and the dangers created by them.

In an effort to defeat defendant's motion, claimants presented evidence that the whirlpool created a hazard by virtue of its tendency to pull swimmers underwater, creating, in effect, a "drowning machine," which was not apparent from viewing the surface or readily known by individuals not experienced with white water. Even accepting this evidence as true, the unknown mechanics of the whirlpool do not transform it into a latent danger imposing a heightened duty on defendant. Nor does the fact that another drowning previously occurred in the same vicinity impose such a duty on defendant. In view of the foregoing, we find that defendant cannot be held liable for negligence or wrongful death under the particular circumstances presented. Accordingly, defendant's motion must be granted and the claims dismissed.