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HIDDEN DROWNING DANGER AT RIVERSIDE PARK DAM

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

Generally, a landowner owes no legal duty to warn invitees on the premises of dangers which are open and obvious natural hazards, such as the risk of drowning in a natural body of water. Invitees are those individuals who are invited or encouraged by the landowner to access the premises for a particular purpose. A landowner, however, may owe a legal duty to warn where the general scope of the danger is hidden or unusual, an effective "mantrap" which would not be apparent to the invitee through the reasonable use of his/her senses.

In addition, most jurisdictions provide some type of limited statutory immunity for public park and recreation agencies under an applicable state tort claims act, public recreation immunity statute and/or state recreational use statute. Typically, these state statutes provide governmental immunity for ordinary negligence, requiring proof of gross negligence or willful/wanton misconduct to impose liability for injuries sustained on public recreational facilities. For example, Section 15.2-1809 of the Virginia Code provides localities immunity from liability for ordinary negligence, but not liability for gross negligence in the "operation of parks, recreational facilities and playgrounds":

> No city or town which operates any park, recreational facility or playground shall be liable in any civil action or proceeding for damages resulting from any injury to the person or from a loss of or damage to the property of any person caused by any act or omission constituting ordinary negligence on the part of any officer or agent of such city or town in the maintenance or operation of any such park, recreational facility or playground.
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> Every such city or town shall, however, be liable in damages for the gross negligence of any of its officers or agents in the maintenance or operation of any such park, recreational facility or playground.
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> The immunity created by this section is hereby conferred upon counties in addition to, and not limiting on, other immunity existing at common law or by statute.

JORDAN'S POINT PARK

In the case of *Volpe v. City of Lexington*, 281 Va. 630; 708 S.E.2d 824; 2011 Va. LEXIS 80 (4/21/2011), the Virginia Supreme Court considered whether the city owed a legal duty to warn of strong currents in a millpond at a riverside park. Assuming such a duty to warn under the circumstances of this particular case, the state supreme court would further determine whether sufficient evidence existed for a jury to impose liability on the city for gross negligence under the state recreational immunity statute, Section 15.2-1809.

Jordan's Point Park in Lexington, Virginia is located on an island and peninsula formed by the

Maury River, Woods Creek, and an old mill race. It is a 9 acre facility with picnic tables, walking trails, and canoe launch. It is currently being developed in stages and most recently was designated as a point on Virginia's Civil War Trails program for visitors to observe where Union General Hunter crossed into Lexington after shelling it in June of 1864. http://www.lexingtonva.gov/parks.htm

Charles Volpe drowned while swimming below a low-head dam during a visit to Jordan's Point Park, a riverside park owned and operated by the City of Lexington. The incident occurred at a bend in the Maury River known as Jordan's Point. Volpe's parents sued the City seeking damages for gross negligence. The trial court granted the City's motion to dismiss the lawsuit. In the opinion of the trial court, "the danger posed by the dam was open and obvious and therefore the City had no duty to warn Charles." Volpe appealed to the state supreme court.

Accordingly, on appeal, the issue before the Virginia supreme court was whether the defendant City owed a duty to warn invitees of the dangers associated with a low-head dam adjacent to a city owned riverside park.

POWERFUL HYDRAULIC

In 1940, the City acquired the low-head dam traversing Jordan's Point in the Maury River. The dam originally was constructed to raise the level of the river, forming a millpond, so water could be channeled into a millrace and used to power a mill. By the 1990s, the mill had ceased operating but the dam and the millpond remained.

At the time of Charles' death, City officials did not realize that the City owned the dam, which was part of a larger acquisition of riverside property.

The Jordan's Point dam is described as "low-head" because water cascades over, rather than through, it. As the water level rises, more water flows over the top of the dam and the velocity of the flow increases. However, the surface of the millpond remains calm and the heightened currents are not apparent to common observation. The pooled water may not appear higher than normal even when the volume of water flowing over the dam is several times greater than the normal rate.

When the water flow is high, it generates a dangerous condition on the downhill side of the dam called a hydraulic. The greater the flow of water over the dam, the more powerful the hydraulic. When a person is pulled into a powerful hydraulic, he may not be able to escape. The presence of such a potentially deadly hydraulic may not be apparent to common observation. The hydraulic created by a low-head dam is unusually dangerous because it is uniform and spans the entire river.

THE INCIDENT

On the day he died, April 23, 2006, Charles visited the park with his friend Bryc Talley ("Bryc"). Charles and Bryc planned to swim to the dam, climb onto it, and jump into the water below, as they previously had done many times without incident. Bryc testified that the river appeared

"like it did on any other day. The water was pretty smooth and flat." Bryc jumped into the millpond from the grassy bank between the tire dock and the dam. He swam over to the tire dock and got out. Then Charles entered the river from the grassy bank, and Bryc jumped in behind him. The two swam toward the center of the dam, and the water "seemed pretty much how it did on any other day."

According to Bryc, "it wasn't until we got right up next to it that you could tell a significant difference in the current." The current "was just instant how it picked up." It swept Charles, and then Bryc, over the dam. Bryc found himself spinning in a hydraulic which he had never experienced, but managed to escape to shore. Charles did not escape the hydraulic. Police recovered his body more than 22 hours later at the base of the dam.

Defense witnesses testified that they also visited Jordan's Point on April 23, 2006, but would not swim because the river appeared dangerous. They testified that it had rained for several days and the river was "high," "turned up," "really white and brown," "muddy," and "obviously dangerous." From the park, they saw the water pour over the dam faster than usual. Emily J. Heizer testified that she entered the river at the tire dock, but got out immediately because she felt a powerful current. She stated: "the edge of the dam was all white, with the water rolling back, I guess, hitting it, all white." She testified that the sound of water rushing over the dam was amplified, and that the conditions on that day were the worst she had seen.

SAFETY CONCERNS

In January 1997, City officials formed a committee to plan a public park at the City-owned riverfront at Jordan's Point. At the initial committee meeting, participants offered a variety of suggestions regarding the proposed park, including "regained public access to the water." City officials planning the park viewed it as "a place where people should be able to swim."

In 1998 the City hired an architecture firm to create a master plan for the park. According to notes from its September 2, 1998 meeting, the committee and the park's architect were "concerned about safety from the beginning, but we want swimming." The master plan, dated August 23, 1999, set forth as a purpose of the park: "To provide a place for the citizens to access the River." The plan proposed using an existing tire dock, located 85 feet upstream from the dam, as the flatwater canoe launch. Part of the City's plan was to encourage and provide an opportunity for people to swim in the millpond. The City envisioned swimmers accessing the water from the tire dock and a grassy bank between the tire dock and the dam.

Thereafter, the committee met in October 1999. The minutes reflect that Andrew P. Wolfe, representing the Maury River Traditional Small Craft Association, questioned the location of the canoe launch due to concern of flooding. Committee member Carlton Abbott "acknowledged that the currently shown boat launch location is not ideal given the dam's proximity and cross currents." The minutes state that Abbott "also mentioned that techniques are available such as a cable with drop straps to prevent boating accidents at dams."

In 2004, City Manager T. Jon Ellestad approached the owner of the property across the river from the city park about running a safety cable from the park to his property. The City never

installed a safety cable.

In 2001 the City submitted a grant application for the proposed park to the Virginia Department of Transportation ("VDOT"). The application stated that the "Safety Impact," in part, would be that "[s]afe flatwater and whitewater canoe launches will be established using [previous] pavement and other stream bank stabilization measures." City Manager T. Jon Ellestad testified that moving the canoe launch away from the dam was a justification for the grant. The City received $462,000 in grants from VDOT to create the Jordan's Point Park and implement the safety features proposed in the grant application. However, the City did not move the canoe launch from the tire dock. Likewise, prior to Charles' death the City did not take any safety precautions with respect to swimming in the river.

As planned, swimmers visiting the park accessed the millpond from the canoe launch. On most days, with very little water flowing over the top of the dam, the millpond was a placid pool with little detectable current. Swimmers climbed onto the dam without difficulty, and some jumped from the dam into the river below the dam.

DUTY TO WARN

On appeal, Volpe argued that the trial court had erred in "ruling that the City, as a matter of law, did not have a duty to warn Charles." According to the Virginia supreme court, "a landowner owes an invitee the duty of using ordinary care to maintain its premises in a reasonably safe condition and to warn of any hidden dangers."

> An invitee has the right to assume that premises are reasonably safe unless a dangerous condition is open and obvious. An owner has no duty to warn its invitee of an unsafe condition which is open and obvious to a reasonable person exercising ordinary care for his own safety. Such notice is not required where the dangerous condition is open and obvious, and is patent to a reasonable person exercising ordinary care for his own safety.

Further, the court noted that "[t]he owner of a swimming pool or lake to which the general public is invited for a consideration [i.e. fee or economic benefit] must exercise ordinary care for the safety of his patrons."

> He must make reasonable provisions to guard against those accidents which common knowledge and experience teach are likely to befall those engaged in swimming and other aquatic sports for which he has provided facilities, but the owner is not an insurer of the safety of his patrons.

On the other hand, the court acknowledged landowners generally do not owe a legal duty to warn of the natural, "ordinarily encountered" hazards of a body of water.

> This Court has held that the danger of drowning in an excavated quarry was "natural, open, and obvious," despite a sheer, manmade drop-off from a shelf of knee-deep water. While tragic accidents of the nature disclosed are always

> possible, they are not any more likely to happen in this artificial pond than in a natural stream of water. Such danger is natural, open, and obvious, and is ordinarily encountered in most places where children gather to wade or swim.

In this particular instance, the court noted "Charles had the status of an invitee" because "the park and the millpond were thrown open to the public and Charles entered pursuant to the purposes for which the park was open." In so doing, the state supreme court agreed with the City that "the natural, 'ordinarily encountered' dangers of the Maury River at Jordan's Point were as a matter of law open and obvious to Charles." However, under the circumstances of this particular case, the state supreme court did not agree that "a deadly, hidden hydraulic created by the unusually strong current at the low-head dam was open and obvious as a matter of law."

> The mere existence of an unguarded body of water does not of itself render the owner liable for the death of a child drowned therein, but if some feature or element of the instrumentality or premises operates as a hidden danger or trap, liability may arise against the owner.
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> An occupant of premises does not guarantee an invitee's safety, but has the duty to warn an invitee of any unsafe condition about which the occupant knows, or should know, unless the unsafe condition is open and obvious to a person using care for his own safety.

Applying these principles to the facts of this particular case, the state supreme court found evidence indicating "the hydraulic at Jordan's Point was unlike any naturally occurring feature of a river."

> Specifically, the increased current above the manmade dam and the hydraulic created below were not always visible to a swimmer and were not always present. Unlike a natural hydraulic, the hydraulic in which Charles drowned spanned the river in a straight line, making escape exceptionally difficult.

As a result, the state supreme court determined that the trial court had "erred in holding as a matter of law that the dam presented an open and obvious danger" and dismissing the case without a trial. Accordingly, under the circumstances, the state supreme court found a jury should have determined whether the dam presented an obvious danger or a hazardous trap imposing a legal duty to warn.

GROSS NEGLIGENCE

On appeal, Volpe had argued further that the trial court had erred in finding insufficient evidence "for a jury to find that the City had acted in a grossly negligent manner." As cited by the state supreme court, a 1996 Virginia supreme court opinion in the case of *Chapman v. City of Virginia Beach*, 252 Va. 186, 475 S.E.2d 798 (1996) had defined "gross negligence" within the context of Section 15.2-1809, the state recreational immunity statute as follows:

> [Gross negligence is] the utter disregard of prudence amounting to complete

> neglect of the safety of another. It is a heedless and palpable violation of legal duty respecting the rights of others which amounts to the absence of slight diligence, or the want of even scant care. Several acts of negligence which separately may not amount to gross negligence, when combined may have a cumulative effect showing a form of reckless or total disregard for another's safety. Deliberate conduct is important evidence on the question of gross negligence. Whether gross negligence has been established is usually a matter of fact to be decided by a jury.

In *Chapman*, an eight-year-old girl died after her head became entrapped in a broken gate which controlled access to a city boardwalk and beach. The Virginia supreme court found the gate was located on a public recreational facility and, therefore, subject to the state recreational immunity statute, Section 15.2-1809. However, under the circumstances of this particular case, the state supreme court found sufficient evidence for a jury to find the death was caused by gross negligence on the part of the city. Specifically, despite repeated notices by its own employees that the gate was broken and in need of repair, the city made a deliberate decision not to take any remedial action because "most of the maintenance work that the City does on the boardwalk is done in the spring prior to the tourist season." See "Beach Fatality Tests Public Recreation Immunity Statute," *Parks & Recreation*, January1997 http://classweb.gmu.edu/jkozlows/lawarts/01JAN97.pdf

Similarly, applying the definition of "gross negligence" from *Chapman* to the facts of this particular case, the state supreme court found a jury should have been allowed to determine "whether the cumulative effect of these circumstances constitutes a form of recklessness or a total disregard of all precautions, an absence of diligence, or lack of even slight care."

> City Manager Ellestad testified that he knew the river could be particularly dangerous in certain conditions because of the proximity of the low-head dam and could be hazardous even when the millpond appeared "relatively normal." Director of Public Works David Woody testified that he was aware of the existence of the hydraulic during the planning of the park, and he knew that the accelerating currents at the top of the dam and the hydraulic below were present only in certain conditions. He also knew that in certain conditions, the hydraulic would be deadly. It is undisputed that despite the City's knowledge of these dangers, prior to Charles' death the City did not take any safety precautions for its invitees swimming in the river.

CONCLUSION

Having found "credible evidence to support a jury finding of gross negligence," the state supreme court concluded that the trial court had erred. The trial court erred in dismissing Volpe's claim. The state supreme court, therefore, reversed the judgment of the trial court and remanded [i.e. sent back] the case for further proceedings consistent with this opinion. On remand, a jury would consider whether the City had a legal duty to warn and whether there was evidence of gross negligence under the circumstances of this case.

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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