

RISK OBVIOUS IN PROHIBITED JETTY DIVE
DESPITE LIFEGUARD'S ACQUIESCENCE

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As indicated by the *Heard* decision describe herein, a municipality generally has no legal duty to protect those using its recreation areas from dangers which are inherent in an activity, like diving, "so far as they are obvious and necessary." Specifically, the New York state supreme court found in this particular instance that ocean diving from a jetty presented an obvious risk of injury to plaintiff. Further, once the city's lifeguard made it clear the diving from the jetty was to cease, there was no further duty of "strict or immediate supervision to protect users of the beach from obvious risks." This decision by the New York state supreme court affirms the decision of the state court of appeals, *Heard v. City of New York*, 186 A.D.2d 108; 587 N.Y.S.2d 711 (1992) which appeared in Report #93-24, Volume 10, number 2, of the *Recreation and Parks Law Reporter*.

No Misrepresentation of Safety

In this case of *Heard v. City of New York*, 603 N.Y.S.2d 414; 82 N.Y.2d 66; 623 N.E.2d 541 (1993), plaintiff David Heard sued the defendant City of New York alleging that the negligence of a city lifeguard had caused his injuries. The facts of the case were as follows:

Heard was seriously injured when he dove off a jetty into shallow water at Rockaway Beach in Queens. Moments earlier, a lifeguard had ordered Heard and his companions to leave the wooden structure. Heard resisted the order, telling the lifeguard he wanted to make one more dive. The lifeguard repeated the order but finally acquiesced in the face of Heard's insistence...

The testimony at trial established that Heard, age 17, came to the beach with a group of friends. There is a series of wooden jetties along the beach, each approximately 40 feet long and extending into the ocean perpendicular to the waterline. The structures were installed at mid-century to control erosion. Over time, they have become covered with sand, and now only the bulkhead at the ocean end remains visible. It was from one of these bulkheads that Heard and his companions began jumping and diving shortly after their arrival.

According to trial testimony, the boys, for a period of 10 to 15 minutes, repeatedly climbed on the jetty and jumped off without incident. Several hours later, as high tide approached, the group returned to the jetty. There, for another 15 or 20 minutes, the boys jumped and dove in all directions. Three or four times, Heard dove seaward toward an oncoming wave, using a "racing dive" employed by swimmers when they enter shallow water. Heard testified that when he stood in the water, the waves broke

below his shoulders. His companions likewise placed the depth at five to six feet. Lifeguards on duty, however, recalled the water level as being two feet or less.

While the boys were diving, lifeguard Stuart Gottlieb approached them and told them to get off the jetty. The parties disagree on exactly what followed, but it is undisputed that Heard refused to leave and indicated in some fashion that he wanted to make one more dive. Gottlieb, in turn, repeated his order, but Heard continued to resist. Finally, Gottlieb told him he could go ahead. Heard waited for a wave and attempted a shallow-water racing dive. He hit the water about five feet from the jetty and sustained paralyzing injuries. The evidence did not establish what Heard hit as he entered the water.

The jury determined that "lifeguard Gottlieb had given Heard permission to dive, that defendant was negligent and Heard was not, and that defendant's negligence caused the injury." This determination, however, was reversed on appeal. In the opinion of the appeals court, "the causes of Heard's injuries were the sandbar around the jetty and his insistence on taking another dive, rather than any negligence on defendant's part." Having found no evidence to establish Heard's negligence claims against the City, the appeals court ordered that Heard's case be dismissed. Heard appealed to the state supreme court.

On appeal to the state supreme court, Heard argued that the lifeguard's conduct in this instance constituted "a breach of the municipality's recognized duty of general supervision." The state supreme court, however, found that Heard's allegations of inadequate supervision "will not support liability on the facts presented."

The scope of the duty to supervise varies according to the circumstances but, in the operation of recreational areas, it does not extend to protecting patrons from the dangers inherent in the sport so far as they are obvious and necessary. Even when an agent of the municipality expressly authorizes swimming in a location where the municipality has banned it, a swimmer continues to assume the obvious and necessary risks, unless a representation as to safety has been given. Heard here failed to show that the risk actually encountered was unusual to ocean diving or not obvious.

Moreover, the lifeguard was present and made clear that diving from the jetty was to cease and the municipality was not required to do more. Its duty to provide adequate general supervision did not extend to providing "strict or immediate supervision" to protect users of the beach from obvious risks. To the extent that Heard's case was premised on the duty to supervise, the complaint was properly dismissed.

The state supreme court then considered whether, under the circumstances of this case, a legal duty arose "from negligent words or acts that induce reliance."

If the evidence shows that Heard dove into the water in justifiable reliance on the lifeguard's negligent words or acts, a prima facie case [i.e., sufficient facts alleged which,

if proven, would establish negligence] was made and properly presented to the jury. It is not enough for Heard to say that the City's lifeguard could have prevented his conduct by withholding permission. The issue is causality--in short, not what defendant could have prevented, but what defendant proximately caused by inducing reliance.

As noted by the court, "an assumed duty, or a duty to go forward, may arise once a person undertakes a certain course of conduct upon which another relies." In this instance, the court found the specific question was "whether defendant's conduct placed plaintiff in a more vulnerable position than plaintiff would have been in had defendant done nothing." Under the circumstances of this case, the state supreme court found that "the lifeguard's failure to insist that Heard leave the jetty was not a breach of duty proximately causing Heard's injuries."

No such causal connection is to be found in the present case. The mere fact that the lifeguard undertook to remove the boys from the jetty neither enhanced the risk Heard faced, created a new risk, nor induced him to forego some opportunity to avoid risk. Simply stated, the lifeguard's actions created no justifiable reliance. Heard was in no worse position once the lifeguard acquiesced in his dive than if the lifeguard had stood by and done nothing.

The state supreme court also considered whether "the lifeguard's assent to the dive was a negligent misrepresentation as to the safety of the dive and that Heard foreseeably relied upon it to his own detriment." As described by the state supreme court, negligence liability can be established "when one familiar with a hazard offers direct assurances of safety to one who is unfamiliar with the hazard and who foreseeably relies upon those assurances." On the other hand, the state supreme court acknowledged that negligence liability based upon this "misrepresentation theory" requires proof of justified and "necessary reliance" under the circumstances.

Not every misstatement, however, gives rise to a valid cause of action. For there to be an actionable claim, the defendant must be under a duty to the plaintiff to exercise reasonable care in giving the information, and plaintiff's reliance upon the information must be foreseeable... There must be knowledge or its equivalent that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that if false or erroneous he will because of it be injured in person or property. Finally the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care.

No liability arises, however, when the statements are made in circumstances where reliance is unforeseeable or unjustified... [T]he determination of whether defendant, by negligent misrepresentation, breached a duty to plaintiff and proximately caused the injury turns on the reasonableness of both parties' conduct. Defendant must have imparted the information under circumstances and in such a way that it would be reasonable to believe plaintiff will rely upon it; plaintiff must rely upon it in the reasonable

belief that such reliance is warranted. Restatement (Second) of Torts § 311, comments b, c.

Applying these principles to the facts of the case, the state supreme court found Heard's evidence was "insufficient to establish the necessary reliance under a misrepresentation theory."

Heard and his companions had been jumping and diving from the jetty for several minutes. They had done so earlier in the day as well. Thus, while the lifeguard may have been informed of the general hazards of their conduct as part of his training, Heard had at least some familiarity with the area based on his immediate experience and that of his companions. In fact, Heard exhibited his appreciation for the hazards involved by employing a shallow-water racing dive. In making his request of the lifeguard, he was not a person wholly without knowledge seeking assurances from one with exclusive knowledge.

Moreover, the lifeguard made no explicit representation that diving was safe. Nothing about the exchange suggested that the lifeguard was imparting exclusive information about safety upon which Heard should rely. To the contrary, he clearly communicated to the boys that they were to leave the jetty. While his decision to permit Heard one last dive was inconsistent with that message, such inconsistency did not revoke the prior admonition or, according to the testimony, even create an ambiguity in the minds of the divers as to whether they were to leave the jetty. The evidence establishes that the lifeguard initially refused Heard's request and gave in only after Heard continued to press for permission.

At best, then, the lifeguard's statement was a reluctant assent that may have implicitly minimized the risk. In looking at the nature and context of the lifeguard's statement as presented in plaintiffs' evidence, however, we conclude that no reasonable person in Heard's position would have relied on such a statement in deciding to dive and that no jury could reasonably have found to the contrary.

In the context of his continuing order that the jetty be cleared and his obvious reluctance to accede to Heard's wishes, the lifeguard was as much warning of danger as vouching for safety. In the face of such ambiguity, a reasonable person would not have relied upon the lifeguard's reluctant assent to decide to undertake an obvious hazard. That being so, as a matter of law, the lifeguard's statement was not a breach of duty that proximately caused Heard's injuries.

The state supreme court, therefore, affirmed the judgment of the appeals court which had dismissed Heard's claims against the defendant City of New York.