

SWIMMING AREA MANAGEMENT QUESTIONED
FOLLOWING ALLIGATOR ATTACK

James C. Kozlowski, J.D., Ph.D.
© 1990 James C. Kozlowski

The *George* decision described in the following paragraphs is fairly typical of the defenses raised by the federal government in recreational injury liability case law. As illustrated by this decision, the federal government will oftentimes claim immunity from any liability based upon the discretionary function exception to the Federal Tort Claims Act. Under this principle, the federal government and its employees are immune from liability for injuries which result from policy decisions, rather than non-immune operational determinations which merely implement existing policy.

In addition to the discretionary function defense, the federal government will usually raise the state recreational use statute as a bar to any negligence liability. Under most of these statutes, a landowner owes no duty of reasonable care to the recreational user on the premises free of charge. When the recreational use statute is applicable, any liability must be based upon proof of willful (i.e., intentional) or wanton (i.e., outrageous disregard) misconduct on the part of the landowner. Further, the federal government will oftentimes assert that the unreasonable conduct of the recreational user, rather than any negligence by federal officials, constituted the legal cause of the injury. In many instances, one or more of these defenses is effective in insulating the federal government from recreational injury liability.

This report of the *George* decision appeared in Volume 7, number 3, of the Recreation and Parks Law Reporter (RPLR). RPLR is a quarterly publication which describes recently reported state and federal court decisions which address issues of recreational injury liability. For further information regarding a subscription to RPLR, please consult the advertisement which accompanies this column or contact NRPA.

Six Reported Gator Incidents

In the case of *George v. United States*, 735 F.Supp. 1524 (M.D.Ala. 1990), plaintiff Kermit George was attacked by an alligator "while he was swimming in the Open Pond Recreation Area of the Conecuh National Forest" on July 26, 1986. The facts of the case were as follows:

The recreation area, which includes a designated swimming area, is owned and operated by the United States Forest Service. The Government now admits that the area was operated as a noncommercial recreational area, despite the fact that a small fee was charged for certain uses of the park, none of which now appears applies to the use of the swimming area. On the day of the attack, George and his unleashed dog entered the area from the rear entrance and proceeded around the park to the swimming area. George's dog preceded George into the water and then exited sometime after George had waded approximately chest deep into the designated swimming area. Shortly after his entrance into the water, George was attacked by a

large alligator, which ultimately severed George's right arm at the shoulder. The Forest Service officials admit that they had knowledge of the presence in the Open Pond Area of the 11-to-12-foot alligator which attacked George. The evidence showed that, of the 74 confirmed, nonfatal alligator attacks in the neighboring State of Florida, 53 were committed by alligators in excess of five feet in length. Furthermore Forest Service officials admit that they had received several complaints concerning the alligator prior to the attack on George. Additionally, the Government admits that it neither posted signs warning of the alligator nor attempted to remove the alligator...

On or about June 3, 1986, Harris LeMaire [Forest Technician] received complaints from unknown persons that a large alligator was following people who were fishing at Ditch Pond, a pond near Open Pond and within the recreational area... After the report received on June 3, 1986, Harris LeMaire and John Maurer [Forest Technician] suggested either trapping and removing the large alligator or posting warning signs at Open Pond... Maurer was instructed by Forest Service officials not to trap the alligator and not to post warning signs... [The forest supervisor, biologist, and district ranger] decided to take no immediate action other than monitoring the situation for several policy reasons, including their information that the alligator was in good physical condition, that the alligator had been in the area for many years and that the alligator had not attacked humans or domestic animals. They also were aware that the alligator was a protected species. [Superintendent] Brown, [biologist] Hedrick, and [district ranger] Risner also believed that posting warning signs might suggest to the public that all potential natural dangers or risks would be posted. Finally, they thought that the risk of an alligator attack was minimal and that warning signs would unnecessarily frighten the public.

The United States maintained that the Alabama recreational use statute precluded liability. Further, the United States contended the discretionary function exception to the Federal Tort Claims Act (FTCA) barred any claim. Finally, the United States argued that "George was contributorily negligent in either allowing his dog to enter the park unleashed, which was in violation of posted park regulations, or going swimming in an area George knew to be inhabited by alligators."

George alleged that the United States "was negligent in failing to warn users of Open Pond area of the presence of alligators and/or failing to remove the alligator that attacked George in the swimming area." The United States responded that these allegedly negligent decisions were discretionary and, thus, insulated from liability by pursuant to 28 U.S.C. § 2680(a) which provided as follows:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance of the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Specifically, the United States argued that the forest officials' decision not to remove the alligator, nor erect barriers around the designated swimming area, nor post warning signs was a discretionary function because it was based upon their "considering whether or not remedial measures were required." Following such consideration, the forest officials had determined that "the alligator(s) posed no threat to the park visitor or, at least, no more than a threat than poisonous snakes and other natural hazards which one would expect to be present in a national forest located in South Alabama."

As noted by the federal district court, "at least six incidents of aggressive alligator behavior had been reported to various forest officials." Further, the court found that the alligator problem had been reported to forest service headquarters by a district ranger with a recommendation to post warning signs. According to the federal district court, the issue was, therefore, whether discretionary function immunity applied notwithstanding the fact that "the Forest Service had actual knowledge of the alligator problem and failed to take any corrective or preventative measures." As described by the federal district court, the United States Supreme Court had defined discretionary function immunity as follows:

[T]he discretionary function or duty that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operation of government in accordance with official directions cannot be actionable...

[The Supreme Court has] set forth several factors useful in determining when the acts of a Government employee are protected from liability... [T]he first consideration should be the nature of the conduct, rather than the status of the actor. Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee - whatever his rank - are of the nature and quality that Congress intended to shield from tort liability. The second factor is whether or not the Government is acting in its role as a regulator of the conduct of private individuals... In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect.

Moreover, assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. The basis for the discretionary function exception was Congress' desire to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the

medium of an action in tort. The exception, properly construed, therefore, protects only governmental actions and decisions based on considerations of public policy... In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment.

Applying these principles to the facts of the case, the court stated that the issue to be resolved was, therefore, "whether the forest officials had discretion to make the choice of not taking any remedial measures with respect to the alligator problem." If such discretion existed, the court would then have to determine "whether such choice was one which Congress intended to shield from liability by virtue of § 2680(a) [the discretionary function exception to FTCA liability]." Under the circumstances of this case, the court found that "no reasonable range of choices existed as to the failure to take some action and, thus the discretionary function exception is inapplicable."

[T]he presence of the alligator was not open and obvious to a person who chose to use the swimming area. Furthermore, one of the primary purposes (if not the primary purpose) of the national forest was to provide a recreation area for individuals who chose to visit the park... [S]everal of the forest officials testified that the alligator involved in this attack had lost his fear of man. Therefore, Defendant consciously disregarded a known risk by failing to take any steps whatsoever to protect the users of the swimming area...

[N]o element of choice was presented when the Government failed to remove or warn of the presence of alligator(s) in the swimming area... Since the danger presented by the reptile(s) was known by the forest officials, there was no discretion to fail to take any remedial measures. Surely, it cannot be contended that the forest officials had discretion to decide whether the overriding policy considerations of protecting the alligator(s) and the natural state of the area outweighed the safety of humans using the designated swimming area. Despite the fact that regulations were in place to not only protect the alligator(s), which at the time of this incident, were on the endangered species list, but to also preserve the natural state of the park, this Court finds that the existence of such does not invoke the protection of § 2680 in derogation of human rights.

Irrespective of the existence of such regulation and the interpretation thereof, it cannot be gainsaid that the Government, the same as a private individual, is under a duty to protect others from hidden dangers they are unaware of when such dangers pose a significant risk of serious bodily injury or death. Thus, no choice presented itself to the forest officials as to whether or not to take remedial measures to protect the individuals using the area.

The federal district court acknowledged that "the decision of whether to have a swimming area and what measures to take to protect individuals once the alligator problem arose were vested within the sound discretion of the Forest Service and, thus, protected from 'judicial second-guessing' by § 2680."

However, the court found that "the decision to do nothing in spite of the known danger was not an option... the Forest Service had available to them."

To contend that the decision to do nothing was discretionary because the Forest Service was under an affirmative duty to protect the alligator(s) and the scenic beauty of the park is ludicrous. If this Court were to hold that the discretionary function exception barred this suit, it would, in effect, be elevating the well-being of an alligator to a level deserving more protection than that of a human. The park was obviously built to provide a recreational area for those desiring to use such, not as a wildlife habitat where the safety of humans through their incidental use takes a back seat to the viewing of reptiles in their natural habitat. If the Forest Service were desirous of this result, it would not have created the recreational areas. The decision to do so was discretionary, but once the decision was made, the Forest Service was under a duty to act reasonably for protection of humans, particularly against hidden dangers known to the Service.

Having found "no reasonable range of choices existed with respect to the Forest Service's inaction," the court concluded that "the discretionary function doctrine of 28 U.S.C. § 2680(a) is inapplicable." Further, the court stated: "The decision to not at least warn the intended beneficiaries of the government-provided recreation area of the presence of large alligators in the swimming area (assuming there was a possible choice involved) was not one which this Court believes Congress intended to shield from liability by virtue of 28 U.S.C. § 2680(a)."

The federal district court also considered whether the United States was immune from liability under the circumstances of this case pursuant to the state recreational use statute (Code of Alabama, 1975, §§ 35-15-1, et seq; and §§ 35-15-20, et seq.). The United States had argued that it was not liable "because there was no 'willful or malicious failure to guard or warn against a dangerous condition' as required" by the state recreation use statute. As noted by the court, however, the state recreation use statute limited immunity under the state recreational use statute in pertinent part as follows:

Nothing in this article limits in any way legal liability which otherwise might exist when such owner has actual knowledge... that a condition... exists which involves an unreasonable risk of death or serious bodily harm; that the condition... is not apparent to the person or persons using the outdoor recreational land; and that having this knowledge, the owner chooses not to guard or warn, in disregard of the possible consequences.

Applying this statutory language to the facts of the case, the court found that the state recreational use statute "does not require a willful or malicious act on the part of the landowner in order for liability to attach." Further, the court found that "such condition was not apparent to George and that the Government had actual knowledge of the alligator or of the facts that he was large and had lost his natural fear of humans and was, therefore, dangerous." Despite such actual knowledge, the court found the Government "failed 'to guard or warn' in disregard of the possible consequences." The court, therefore, concluded that the Government's "defense predicated on the Alabama Recreational Use Statute must fail."

In addition, the federal district court considered the Government's contention that "George was aware of the presence of alligator(s) in Open Pond and, thus, assumed the risk of injury when he entered the swimming area." The court found this argument to be "without merit."

George testified that he knew alligators were present in Open Pond but that he was unaware that there were any of the size of the reptile that took his arm. This Court finds by a preponderance [i.e., greater weight] of the evidence that George was not aware that an alligator approximately 11 feet in length inhabited the Open Pond waters. Furthermore, this Court finds that George had no knowledge of the danger presented by his entering the swimming area. Thus, this Court finds that George did not assume the risk of injury by entering the swimming area on July 26, 1986, notwithstanding his knowledge of the presence of alligators in Open Pond.

Finally, the court considered the Government's contention that George was guilty of contributory negligence based upon "George's failure to have his dog on a leash while in the park which, thus, allowed the dog to precede George into the swimming area." Specifically, the Government argued that "the presence of the dog attracted the alligator into the swimming area." As characterized by the court, the alleged contributory negligence arose from the fact that "George violated park regulations by allowing his unleashed dog to accompany him into the park on the occasion in question." Once again, the court found the Government's argument to be "without merit."

The asserted contributory negligence is that George violated the National Park's leash law and that this violation was the proximate cause of the loss of his arm and related damages. The fact that George's dog violated regulations by being unleashed is and was of little interest to this Court or to the subject alligator. It may be speculated that the dog's presence lured the alligator to George. There is some evidence that alligators are known to enjoy dog meat, but the preponderance of the evidence shows that alligators are not discriminatory in their tastes and are well known to dine on whatever is convenient. The presence in this alligator's stomach of fish stringers, a broken bottle neck and a pine cone in ample evidence that, had the dog been convenient, the leash would not have interfered with the alligator's breakfast, whether or not this particular alligator had a preference for dog meat. This Court finds that the fact, that George violated park regulations by not keeping his dog on a leash in the park, was not a proximate or contributing cause to his injuries and damages.

The federal district court, therefore, entered judgment in favor of plaintiff Kermit George.

Dr. Kozlowski is the associate director of the George Mason University Center for Recreation Resources Policy, Fairfax, Virginia. He is also the author of the Recreation and Parks Law Reporter and Legal Issues in Recreation Administration.