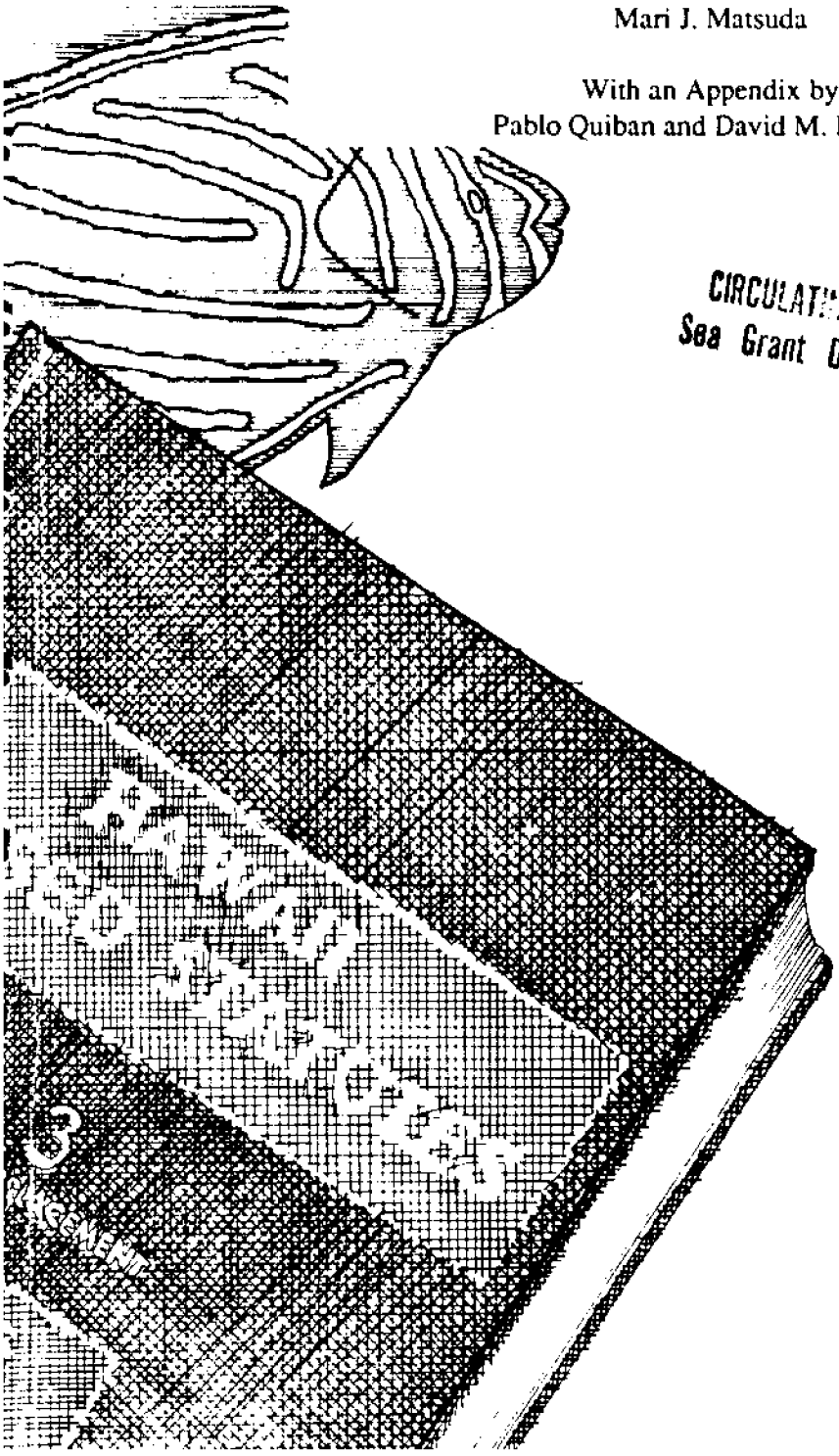
RISK MANAGEMENT

in Ocean Recreation

AN INTRODUCTION TO TORT LAW FOR MANAGERS IN THE WATER RECREATION INDUSTRY

Mari J. Matsuda

With an Appendix by
Pablo Quiban and David M. Forman



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INTRODUCTION

This paper will introduce basic concepts of tort law to managers working in the water recreation industry. The information presented here is of use to oceanfront hotel operators, pool operators, recreational water sports businesses and others whose business depends, in part or totally, on the attraction of access to ocean and water recreation. What is the liability of such businesses for drownings and personal injuries sustained by patrons? What are the issues and interests involved in the current controversy over the insurance crisis, joint and several liability, and tort reform? This paper addresses these questions, introduces the basic principles of liability, and, more importantly, suggests means of preventing injury and avoiding liability.

This paper will begin by introducing basic concepts of tort law in the first two sections. The third and fourth sections address current joint liability and insurance issues of interest to water recreation managers. The fifth section suggests specific means of avoiding liability and increasing safety. This paper concludes with editorial comments on the law of torts.

Throughout this paper, key terms are italicized and explained for nonlawyers. Some of the examples in this paper are hypotheticals — made-up examples or composites. Where examples are similar to actual cases, citations are provided. Citations to cases are given in standard legal form, with the volume numbers first, then the title, then the page. Texts of the actual cases can be found in your local law library. The latin abbreviation *cf,* which appears before some citations, means the case is analogous to the situation described in the text.

What is Tort Law?

A tort is an injury to a legally protected interest of another, typically the interest of freedom from bodily harm, done without privilege or excuse. When a patron sues a hotel for a slip and fall on a slippery deck, the patron is suing under the common law of torts. The law of each state differs somewhat, but the basic principles addressed in this paper provide a good general overview. For advice on a particular question of law in a particular state, it is wise to consult a local attorney who practices primarily in personal injury litigation.

A tort is perhaps best understood as distinguished from a criminal or contract law claim. If a patron is shot, the perpetrator has committed both a tort and a crime. The crime is an offense against the state and prosecuted by the state. The remedy for the crime is fine or imprisonment, that is, some form of public punishment by the state. The victim of the shooting also has a claim in tort. In contrast to the public nature of the prosecution and the punishment for a crime, the tort claim is private and is intended to benefit a private person. The victim, not the state, is compensated through tort law. A contract claim, in contrast to both tort and criminal claims, arises when one person breaches a legally enforceable promise to another. For example, if a patron fails to pay for the price of a boat rental after accepting use of the boat, the boat owner may sue in contract for recovery of the promised payment.

As indicated by these examples, a tort claim is brought by an injured party against the perpetrator who caused the injury. The perpetrator is called a *tortfeasor*. A primary goal of tort law is to compensate the victim for the injury. Other goals of tort law are to encourage safety through the deterrent effect of the threat of liability and to publicly and formally exact retribution from the *tortfeasor*. Providing recourse through the legal system is thought to prevent victims from taking the law into their own hands.

Typical Water Recreation Torts

The typical water recreation tort is likely to involve some kind of negligence claim.

Examples:

1. A swimming pool operator places a diving board over shallow water. A diver dies from a neck injury due to the carelessness in placement of the diving board. See H. K. Corporations v. Estate of G. Miller, 405 So.2d 218 (3rd Cir. 1981).
2. A scuba operator rents equipment to a minor who is untrained in scuba diving. As a result, the minor receives injuries and drowns.
3. A hotel on the beach advertises "excellent swimming conditions" and fails to warn of huge waves. A hotel guest is injured. See Tarshis v. Lahaina Invest. Corp., 480 F.2d 1019 (9th Cir. 1973).

These accidents are typical of the kind that will result in litigation under tort law principles. The following section will explain the rules courts use to determine whether or not to impose liability in these types of cases.

PRINCIPLES OF LIABILITY

The Negligence Standard: What Duty is Owed?

Most liability cases for water-related injuries will raise *negligence* issues. This section introduces the concept of negligence.

The Duty to Exercise Reasonable Care

All citizens are held to the *duty to exercise reasonable care* so as not to cause injury to others. What is reasonable depends on the circumstances. The courts will ask: "What would a reasonable person, of average intelligence, do in this situation?" In the case of a water injury with a defendant professional, the question will be rephrased: "What would the reasonable person in this profession do under these circumstances?" Thus, in the case of the shallow diving area, after considering the testimony of experts in the field, the courts may decide a reasonable swimming pool designer would not place a diving board over shallow water. *Cf.* O'Connell v. Continental Casualty Co., Wisconsin, Ozaukee County Circuit

Court, No. 81-CV 428, January 6, 1986; 29 ATLA LAW REPTR. 333 ($1,200,000 settlement for quadriplegia of a 15-year-old boy who dove off starting blocks set 39 inches above shallow end of pool). The determination of reasonableness will take into account technological advances. What is reasonable in one time and place may not be reasonable in another. Thus, the courts determine negligence after the fact, often to the chagrin of defendants who could not predict what the courts would find "unreasonable."

The failure to behave reasonably in light of all the circumstances is called a *breach* of duty.

Special Duties

The duty to behave reasonably may include the duty to take extreme caution in particular circumstances. For example, cases in which young children are involved, the courts may impose a higher duty of care.

Example: Ace Motel allowed the use of a pool to all its guests. Ace knew children played around the pool but did not cover or adequately fence the area. A child plays in the pool area and falls and drowns. See Gault v. Tablada, 400 F. Supp. 136 (S.D. Miss. 1975).

In this case, Ace Motel may be held to a higher duty because of the particular vulnerability of children. The motel either should have increased supervision of the children or foreclosed access to the pool. It was not reasonable to do otherwise, considering the propensity of young children to seek out the attraction of a swimming pool. In legalese, this is called the *attractive nuisance* rule.

In some states, hotels and operators of public transportation, such as ferries, are held to a higher duty because of their special relationship with guests. This is called *"innkeeper"* or *"common carrier"* duty. The rationale is that guests depend upon proprietors to keep premises safe. The hotel operator, for example, is the only entity with the power to institute safety procedures. The hotel opens its premises to the public and makes a profit from the guests. In turn, the hotel is expected to inspect and make the premises safe.

Conversely, in some states landowners owe a lesser duty to trespassers. The trend, however, is to impose the duty of reasonable care to prevent injuries to trespassers. (*Cf.* Noble v. Sunset Pools, Ariz. Maricopa County Superior Court, No. C-481517, February 28, 1986; 29 ATLA L. REPTR. 327 [trespasser sues homeowner's association and others for injury sustained in condominium's pool].)

Industry Custom and Duty

The custom in a particular industry is relevant, but not controlling, in determining duty. At a minimum, a defendant professional is expected to keep abreast of the safety

practices of the industry. Meeting prevailing safety practices, however, may not be sufficient to provide a defense.

Examples:

1. In the case of the shallow diving area, testimony may show all other swimming pool manufacturers in the community place diving boards over water at least 8 feet deep. The defendant who fails to meet this industry practice has not acted reasonably, and liability will be imposed.

2. Plaintiff is injured when he falls out of a rented outboard boat. The boat continues to run after plaintiff falls out, and plaintiff is seriously injured by the motor. Plaintiff claims defendant boatowner was negligent in failing to install a "deadman" device in the boat to shut off the motor when the operator falls out of the boat. Defendant introduces evidence that the industry custom in the community is NOT to install deadman switches. The court may find the fact that everyone in the industry has acted without care is no excuse. In that case, compliance with industry custom will not absolve the defendant. *Cf.* Boatland of Houston v. Bailey, 609 S.W.2d 743 (Tex. 1980).

3. Plaintiff drowns when he suffers a heart attack while swimming at a hotel beach. A hotel lifeguard attempts to rescue the victim but is unsuccessful in reaching the victim in time. The estate of the victim sues the hotel, claiming that if three lifeguards, instead of the two who were present, had been posted on the beach, at least one of them would have been able to reach the victim in time to save his life. Defendant introduces evidence of industry custom to place one lifeguard on a beach the size of the hotel's. Other experts testify that the defendant complied with standard lifeguard placement ratios.

   In this case, the evidence may be sufficient to convince the court that the defendant's compliance with industry standards indicates reasonable behavior under the circumstances.

Statutes and Government Regulations

Violations of statutes and government regulations are considered in determining reasonableness. In some states, the violation of a safety regulation is conclusive proof of negligence. In others, the violation is admitted in court as evidence, but not conclusive evidence, of negligence. The best practice is, of course, to comply with all laws, seeking legal counsel where necessary to assure compliance.

Products Liability

In addition to ordinary negligence, another class of tort that water managers may encounter is *products liability*. Products liability is simply injury by a product. A defendant can be found liable for failing to maintain equipment properly, for continuing to use dangerous outmoded equipment, or for misusing products in a way that injures patrons. An operator may also become a plaintiff in a suit against the manufacturer of a product if the product causes the operator to incur liability.

Example: In the case in which a patron is injured by an outboard motor because of failure to incorporate a deadman switch, the operator can in turn sue the manufacturers of the boat for indemnification, that is to cover the liability incurred by the boat lessor to the patron. See Tisdale v. Teleflex, Inc., 612 F. Supp. 30 (D.S.C. 1985).

Strict liability for product injury is a recent development that covers unreasonably unsafe products. *Strict liability* means the normal negligence standard (i.e., the duty of reasonable care) is set aside in order to make it easier for the plaintiff to recover. It is replaced with a new standard that focuses on the condition of the product rather than the conduct of the manufacturer, owner, or operator. This standard is variously expressed as imposing liability for unreasonably unsafe products or for "failure to meet consumer expectations of safety." Negligently designed above-ground swimming pools are an example of the type of product susceptible to products liability claims. See Gilbert, *Promoting Above Ground Pool Safety Through Litigation*, Trial, November 1982, at 81.

The law of products liability is changing rapidly. The bottom line is there is increased possibility of liability and litigation whenever a person is injured by a product.

Intentional Torts

Intentional torts include battery (touching without consent), and assault (threats of bodily harm). These types of torts are less frequently the subject of litigation in water recreation cases but are a potential source of liability.

Example: A lifeguard in attempting to calm a delirious sunstroke victim slaps the victim in the face several times causing a serious eye injury. The lifeguard and her employer may be liable for assault and battery if the action was not within the scope of proper first aid.

Premises Liability

Premises liability is a special kind of liability arising from the ownership or control of property and buildings. Persons in control of premises have a duty to keep the premises reasonably safe for persons expected to come upon the premises. As discussed above, some states require extreme care when persons in special relations, such as paying guests, are

expected upon the premises. This special duty includes the duty to inspect for hazards, to correct and eliminate hazards, and to warn against unavoidable hazards.

Example: A hotel owns a wharf frequented by muggers and thieves. Several attacks upon tourists and guests have occurred on the wharf. Some courts would hold that the hotel has a duty to keep tourists and guests informed of the danger and to avoid injury by taking reasonable precautions. This might include installing lights, hiring security guards, warning patrons, or even closing the wharf if necessary.

Emotional Distress

In some states, bystanders and witnesses to accidents can claim damages for negligent infliction of emotional distress.

Example: Plaintiff is on a negligently designed boat that goes out of control, running over plaintiff's daughter, who was waterskiing. Plaintiff watches helplessly as the daughter is killed in a gory scene.

Plaintiff may recover for negligent infliction of emotional distress in some states, including California and Hawaii.

Causation

The preceding sections discussed the appropriate standards of care. In addition to breach of the duty of care, every tort case has an additional element: causation. There are two elements of causation the plaintiff must prove.

First, the plaintiff must provide *cause-in-fact*, also known as *but-for* causation. This simply means the plaintiff must show the breach of the defendant was the actual cause of the injury. That is, if the defendant had not breached, the plaintiff would not have been injured.

Examples: Plaintiff is electrocuted when an employee negligently allows a live electric wire to drop into a pool that plaintiff is swimming in. The negligence of the employee caused the injury.

Plaintiff suffers a heart attack and falls into a swimming pool. The edge of the pool is covered with slippery tile. The coroner's report states plaintiff died instantly from a massive heart attack. The death was caused by the heart attack not by the slippery tile, thus no cause-in-fact on the part of the hotel.

In addition to cause-in-fact, the plaintiff must also show *proximate cause*, also known as *legal cause*. This is a difficult legal concept, and complete understanding of it eludes even some lawyers and law students. What proximate cause means, in simplified terms, is that the

breach of the defendant is close enough in time, space, and logical connection to the injury of the plaintiff, such that it is fair to impose liability. If the injury is too remote in the sequence of events, there will be no liability, even if a duty was breached and even though cause-in-fact exists. The determination of proximate cause is essentially one of public policy, incorporating the court's assessment of fairness and social responsibility.

Example: A plaintiff suffers injuries while scuba diving with faulty equipment. The scuba equipment rental company was negligent in maintenance of the equipment. While the injured diver is being whisked off to the emergency room, the ambulance runs over a small child.

In this case, the rental company was negligent and their negligence was a but-for cause of the injury to the child. If the equipment was not faulty, there would have been no injury, no ambulance, and no running over.

The running over, however, was remote in time, space, and sequence from the initial negligence in failing to maintain the equipment. Thus, a court is likely to find there is *no proximate cause* connecting the child's injuries to the initial negligence.

Damages

Duty, *breach*, and *causation*, three of the four major elements of a negligence case, have now been covered. The last element is *damages*. As a general rule, the plaintiff is entitled to be made whole — to receive enough money to place the plaintiff in the position the plaintiff was in before the accident. Damages are awarded for medical expenses, pain and suffering, loss of earnings, loss of enjoyment of life, and other expenses associated with the injury, such as rehabilitation costs and special equipment. Spouses or children of injured victims may also have claims for *loss of consortium*, that is for the loss of companionship and familial relations caused by the injury. In cases in which the victim dies, the family will have a claim for *wrongful death*.

In addition, *punitive* or *exemplary* damages are awarded in particularly egregious cases, in which the defendant has acted willfully and wantonly in reckless disregard of safety.

Example: A tour boat operator knowingly fails to provide life vests as required by law. When warned by an employee of the potential danger, the operator says "If I have to buy life vests, I won't make as much profit as I did last year." When the employee threatens to report the violation to authorities, the operator fires the employee and continues operating the boat.

The poorly maintained boat springs a leak while overloaded with tourists. The boat sinks, and several tourists drown because of insufficient life vests.

The jury decides the owner acted in reckless disregard of safety and awards $1 million in punitive damages in addition to the usual damages.

Typical Defenses

Typical primary defenses in a tort case are those that refute the elements of the plaintiff's case. For example, the defendant may claim that it acted reasonably under the circumstances or that any negligence was not the but-for or proximate cause of the injury. The defendant may also try to show the plaintiff did not suffer damages.

In addition to refuting the plaintiff's case, the defendant can raise *affirmative defenses*. These are defenses the defendant introduces and proves. The most common are those that attribute the injury to the plaintiff's own fault. *Assumption of risk* is a defense that argues the plaintiff knew of and accepted dangerous conditions.

Example: Before embarking upon a leaky ship, a tourist asks, "Do you have life jackets on board?"

The captain answers, "No, can you swim?"

The tourist gets on board with knowledge of the risk. In a subsequent lawsuit, the defendant may claim the plaintiff assumed the risk and therefore is not entitled to sue. For reasons of public policy, this defense is not favored by the courts and has been eliminated in some jurisdictions.

A related defense that is still the law in most jurisdictions is the principle of *contributory* or *comparative* fault. Under this rule, if the plaintiff is careless and causes, in part, his or her own injury, the defendant's liability is either reduced or eliminated, depending upon state law.

Example: Three young adults are drinking and horseplaying around a pool. They are warned several times to stop running and wrestling by the pool, and the hotel refuses to serve them additional drinks. One of the guests continues to run near the pool and slips into the pool, sustaining injuries.

The defendant argues it should not be liable for the injuries since they were caused by the plaintiff's own carelessness. The jury agrees and refuses to award damages to the plaintiff.

Alternatively, the jury might find the plaintiff is 50% liable for the accident and the defendant is 50% liable for the accident. This may result in apportionment of the damages, depending on the law of the state involved.

RISK-SPREADING RULES

Vicarious Liability

Various rules exist in tort law to spread the risk of loss to more than one individual. The rule of comparative fault, discussed in the previous section, spreads the risk between the plaintiff and defendant. The rule of *vicarious liability* spreads the loss between employees and employers. If an employee, acting within the scope of employment, causes injury to another, the employer as well as the employee is liable for the damages. This rule is particularly important in the modern business environment because many employers are corporations that can act only through employees. The rule of vicarious liability, or *respondeat superior* (let the superior respond for damages) allows injured victims to sue corporations for the negligent acts of corporate agents. (*Cf.* Kaiser v. Traveler's Ins. Co., 359 F. Supp. 90 [E.D. La. 1973].)

Example: A pool supervisor negligently overchlorinates a pool, causing several hotel guests to suffer chemical injury. The supervisor is liable, and the hotel corporation is also vicariously liable for the injuries.

Joint and Several Liability

When more than one individual is liable for an injury, as in the previous hypothetical involving the pool supervisor, the plaintiff is entitled to only one recovery. The plaintiff may sue either or both parties but may recover only one set of full damages. Either party may join other defendants in the litigation seeking *contribution*, or a sharing of the obligations to the plaintiff. Each defendant, however, is required to pay the full amount of damages to the plaintiff whether or not the others can pay. The injured plaintiff is entitled to collect only the amount of the judgment, thus if all defendants are solvent, each will likely pay a portion of the judgment.

In the employer/employee situation, the employer often ends up paying the lion's share of the damages, because typically the employee doesn't have sufficient capital to compensate the injured victim. The rule that each defendant must pay the full damages if the others are unable to pay is called the "one percent rule" by critics, because the defendant who is apportioned only one percent of the liability can be responsible for the full damages in many jurisdictions.

Example: A boat pilot becomes drunk at Apple Bar. The pilot then takes plaintiff for a ride in a leaky boat owned by Negligent Boats.

Plaintiff is injured when the boat goes under. Plaintiff sues Apple Bar for serving pilot too many drinks, Negligent Boats for providing a leaky boat, and pilot for negligent piloting.

The jury apportions responsibility for the accident as follows:

Apple Bar:	10%
Pilot:	10%
Negligent Boats:	80%

Pilot has no money. Negligent Boats subsequently goes bankrupt because of a rash of lawsuits. In many states, plaintiff may collect full damages from Apple Bar, even though the jury found that Apple Bar was comparatively responsible for only 10% of the injury.

Why does this law seem fair to the courts? First, this rule arises from the tradition and history of tort law. Under the old English law and the law inherited in the United States, the plaintiff could sue any person who acted in concert with others to cause the plaintiff's injuries and recover full damages from that person, regardless of how many other persons also caused the injury. This rule was originally applied in cases of defendants acting together, as in a conspiracy. The rule was one of individual responsibility and moral wrath: let the wrongdoer pay the innocent victim. The court would offer no assistance to wrongdoers who wanted to force others to pay part of the damages. This rule was relaxed by allowing the wrongdoer to join other defendants and to seek contribution from them. Second, the rule is seen as fair because each defendant, in order to be responsible for damages, must be found to have (1) breached the duty of reasonable care, (2) been a but-for cause of the accident, and (3) been a proximate cause of the accident.

A movement is afoot in many states to legislate alterations to the rule of joint and several liability, so each defendant pays only part of the damages. This proposal has met with mixed response. Objections to altering the rule include the need to compensate innocent victims and the basic fairness of requiring the person who causes an injury to pay for it in full. Changes in the law of liability may lead to unexpected and unfortunate results. For example, many defendants are also plaintiffs in other contexts. Hotels that are sued in tort and that may favor the elimination of joint and several liability may regret that position when they must sue a negligent supplier or outside contractor for property damages and find themselves limited in the damages they can collect. Elimination of the rule will also result in increased litigation over who should and should not be a defendant in a given lawsuit. The defendants will have an interest in increasing the number of defendants so as to decrease their individual liability, and the plaintiffs will attempt to limit the number of defendants.

The argument in favor of eliminating the rule is that businesses cannot absorb the burden of full liability and in fairness should only have to pay a pro rata share. This is particularly true when a defendant's fault is small in comparison to other responsible parties.

The battle over joint and several liability and other elements of tort reform are related to broader issues of public policy, such as the appropriate form of regulation of the insurance industry, the role of government in compensating the injured, and the degree to which a community adheres to concepts of individual responsibility and free will. The debate continues in state legislatures, as well as in the U.S. Congress, over various tort reform proposals.

INSURANCE

The law of insurance is of particular interest to businesses that need to avoid devastating, unpredictable losses. Insurance provides the security needed to encourage investment and business growth. This section provides a basic introduction to liability insurance.

The standard liability insurance contract provides indemnification and defense. The *duty to indemnify* is the duty to pay for any damages incurred in liability lawsuits. The *duty to defend* is the duty to provide a lawyer and to pay for the costs of litigation in defending against personal injury claims. The typical policy will include liability limits and will exclude coverage for certain types of liability.

In addition to the explicit terms of the contract, there is an implicit, unwritten promise of good faith in every insurance contract. This means the insurance company is required to deal fairly with the insured and to comply promptly with the duty to defend and indemnify. *Bad faith refusal to defend and indemnify* may lead to increased liability on the part of the insurance company, including liability for damages assessed against the insured that exceed policy limits. This is one of the growing areas of litigation today.

Another frequent complaint against insurance companies is astronomically rising premiums. Many businesses report they cannot continue to operate profitably given rising insurance costs. Others are faced with complete inability to obtain insurance or with policy cancellations. The insurance industry is regulated by state agencies, and these agencies may provide some relief from the insurance crisis. Legislation at the state and national level is also pending. Consumer advocates, such as Ralph Nader, suggest the insurance crisis is the fault of poor management of insurance companies, which depend on the investment market for their profitability. Insurance companies claim increasing litigation, high jury awards, and high attorney fees are the causes of the crisis. Statistics indicate, however, the litigation rate has not increased significantly in the years preceding major premium hikes. Consumers of insurance products are urged to consider critically the arguments relating to the complex question of insurance.

RISK PREVENTION

Litigation is costly. Large tort judgments represent costly outlays in attorneys' fees, management time, litigation expenses, and insurance resources. Tort judgments affect the goodwill and reputation of a business and lead to premium increases.

Risk prevention refers to the steps a business can take to avoid tort liability. In addition to avoiding the expense and business losses engendered by litigation, there is of course a moral obligation to avoid injury to customers whenever possible.

The Best Defense: Meeting the Standard of Care

The best defense in any tort suit, and the course of action expected of all citizens in our society, is to exercise reasonable care at all times. In practical terms, this means institutionalizing the exercise of care in a business. The following section will discuss ways to do this.

Safety Audits

Risk prevention experts are available for consultation with businesses. They can inspect premises and equipment and observe operations to point out avoidable risks. The advantage of bringing in outsiders for an audit is that they can look at operations with fresh eyes and see things those operating from within cannot see. They can also bring training and expertise in risk prevention, knowledge of statistics, and familiarity with legal standards.

Small businesses can conduct audits from within. This can consist of regular management inspections and meetings to discuss sources of risk, means of prevention, new developments in safety, employee training in safety, accident reports, and internal procedures. Small businesses can pool resources with others in the industry to conduct seminars on safety.

If internal or external reports indicate unreasonable risks, immediate action is required to remedy those risks. The greatest dangers — those likely to cause death or serious injury — should be dealt with first. Failure to remedy known risks can lead to greater liability. A familiar example is the Ford Pinto case, in which punitive damages were awarded for failure to remedy the known risk of explosion in rear-end collisions.

One test the courts consider in judging whether risks are unreasonable is to weigh the probability of injury and the seriousness of probable injury against the cost of preventing the injury. The slight possibility of injury may justify inexpensive measures to eliminate the risk. It may not justify expensive measures. However, because many water injuries are serious, even somewhat burdensome and expensive means of warning and prevention may be appropriate.

Institutionalizing Safety: The Pattern and Practice Rule

Institutionalizing safety requires creation of specific, regularly followed safety procedures. This creates a pattern and practice of safety that will help show your company behaves reasonably.

For example, in the area of employee training, a regular system of safety training should be provided for all new employees. As a matter of routine, all new employees should undergo training and testing to assure that they understand the safety needs of your operation. Someone in your business should be assigned the task of certifying that new employees have received necessary training. A standardized checklist and report to management is useful in this regard.

The purpose of a procedure for safety training is to build a record. If an accident occurs, a company with regular safety procedures can go before the judge or jury with evidence that it has behaved reasonably; it had regular procedures that everyone followed; and it did everything it could to avoid accidents. This pattern shows the company has met the standard of care.

Regular procedures should be adopted for accident reporting and investigation, equipment checks, first-aid training and refresher courses, and safety audits.

Industry Standards

Businesses within a given industry can band together to standardize safety procedures. Manufacturers, for example, can agree to minimum standards for product safety and use self-policing and ratings systems to ensure uniformity. Cooperation with such systems is voluntary, but many manufacturers will find cooperation advantageous for the following reasons.

First, compliance with industry standards is evidence of due care. As stated previously ("Industry Custom and Duty" section), compliance does not conclusively prove due care, as an entire industry can be lax in its standards. Standards fairly derived with the goal of maximizing safety, however, will be strong evidence of due care. At the minimum, compliance with industry standards will show a good faith effort to achieve safety and will put the defendant in a sympathetic posture before a jury.

Second, compliance with voluntary standards will ward off unnecessary government regulation. Industries that are able to maintain good safety records without government regulation are best able to avoid the potentially complex administrative process involved with government-mandated safety requirements.

Finally, the process of drafting and complying with industry standards serves an educative function. Awareness of safety concerns and state-of-the-art accident prevention is

heightened when industry insiders gather forces to adopt and encourage compliance with standards.

Waivers and Warnings

Managers often ask if posting warnings or soliciting signed waivers of liability will absolve them of liability. The answer is: "Possibly, but not always." If there is negligence in the first instance, such as failure to have safety equipment, the fact that the victim signed a waiver-of-liability form will mean little. The courts often find such forms unenforceable as contrary to the public interest in safety. The old trick of posting signs disclaiming liability is even less effective. Warnings can be more effective than waivers and have served to limit liability in some cases. Nonetheless, while a strongly worded warning informing patrons of the full extent of potential harm may provide some defense, it is not as effective as elimination of all hazards wherever possible.

Failure to erect warnings, on the other hand, can constitute negligence. Specific, simply worded, clearly visible, and serious-looking (i.e., no hearts and flowers) signs should be posted to warn of potential dangers. A safety engineer or human factors analyst can help devise effective signs and warnings. Problems to consider in devising warnings are whether the anticipated readers are literate in English, whether the sign gives too much or too little information, whether pictographs are necessary to explain the danger, and whether signs should be changed to accommodate changing natural conditions. The bottom line is effectiveness.

An effective warning is one that works in actual practice to deter patrons from engaging in dangerous activity. Warnings and "house rules" should be reinforced by personnel.

Example: Dive Shop A posts a small sign that states: "Diving can be dangerous. We are not liable for injuries."

Dive Shop B instructs employees to read to all new customers a statement describing actual diving deaths and injuries and urges customers to take diving lessons only if they understand the risks involved. Several customers decide not to proceed after hearing the warning. Others sign a clearly worded waiver form, after reading it aloud.

Dive Shop A may get more business, but Dive Shop B is in a better position to argue it gave full and fair warning to customers who then proceeded at their own risk. Even Dive Shop B, however, remains subject to some tort actions.

Posting warnings that "children must be accompanied by an adult" will probably not obviate liability for negligence. However, it may provide a basis for arguing a parent should

share in liability for any injury. This is particularly the case if the warning is clear, obvious, and reinforced by management.

Example: Greenacres Hotel has a boldly printed warning sign which includes the words "No Children Under 14 Allowed in Pool Area Without Adult Supervision." Greenacre employees regularly enforce the rule, and all guests with children are reminded of the rule when they check in, as a matter of regular hotel procedure. If an accident involving a child occurs, the hotel is in a good position to argue the parents are at least partially to blame.

Remember that posting signs is not enough. Signs should be inspected, maintained, and periodically assessed for effectiveness. Signs should be an adjunct to, not a substitute for, other risk management measures.

The Role of Government and Grants of Immunity

In the history of regulated industries, there is evidence that some industries actually seek government regulation in order to avoid cutthroat competition. In the area of safety, operators using maximum safety techniques may find they are unable to compete effectively with unsafe competitors. This may eventually lead to the need for government-enforced safety regulations.

In addition, the public may demand government regulation if industry is lax in self-policing. Boating safety regulations, building codes, and Occupational Safety and Health Administration (OSHA) regulations are mandatory safety provisions that may be familiar to water recreation managers. Safety laws, such as rules restricting nearshore use of motorized water vehicles and minimum age requirements for water vehicle use, should be welcomed by industry as a means of obtaining state aid in keeping the waters safe.

As with industry standards, compliance with government regulation is evidence of due care but is generally not controlling. Thus a hotel that follows minimum building code specifications is still potentially subject to liability for negligent pool design. Industry sometimes succeeds in obtaining legislative grants of immunity as a quid pro quo for accepting regulation. For example, beachfront operators may seek exemptions from tort liability on the condition they comply with strict government safety regulations. The restaurant industry in California successfully lobbied the state legislature for limits on liability for serving liquor to individuals who become intoxicated and injure others. Grants of immunity are sometimes declared unconstitutional by the courts on due process and equal protection grounds. Doctors, architects, and engineers in some states have successfully lobbied for special treatment in tort law.

The trade-off of immunity for regulation may be objectionable to those who feel government intervention is always an evil. Others may find government regulation and the certainty it provides is preferable to the openended, ever-changing law of tort liability.

CRITICISM OF THE LAW OF TORTS

Critics of the tort law system include both plaintiffs and defendants. Plaintiffs point out tort judgments often fail to compensate for the full extent of injuries. The system is unpredictable in results, so some plaintiffs receive far less than others, even in similar cases. The sympathies of judges and juries, the skills of the attorneys, and other factors lead to variation in awards. Most of the money expended in the tort system — court costs, attorneys' fees, insurance company overhead, costs of discovery (the process of taking written and oral testimony before a trial begins) — never reaches the tort victim. Most of the money that enters the tort system, in fact, goes to such tertiary costs rather than to victim compensation.

Defendants also object to the lack of predictability in the system and report horror stories of undeserving plaintiffs receiving large awards. Rising insurance costs plague many businesses.

Alternatives to the tort system include state-sponsored compensation plans. Worker's compensation is a state-sponsored compensation plan with which water resource managers have probably had some contact. Under worker's compensation, injured workers are compensated at a predetermined rate and are not allowed to sue the employer for tort damages. Worker's compensation awards are generally smaller than tort awards, and they are available to a wider range of victims. The trade of swift, sure, broad, and easy recovery for the large tort award was seen as fair by both industry and labor at the time most states adopted the worker's compensation laws. Both sides, however, continue to have complaints about the system.

In terms of general philosophical attitudes, the tort system is consistent with the principles of individualism, free enterprise, and freedom from government interference. A state-sponsored accident compensation plan, grants of immunity, government safety standards, and other modifications of the tort law system represent fundamental changes in philosophy.

As the insurance crisis continues, legislators will look for creative solutions. As with any change to the law, all the social, philosophical, economic, and moral considerations involved require careful consideration. Stop-gap solutions may prove detrimental to both industry and injured persons and may have unpredictable ill-effects.

TORT REFORM AND ALTERNATIVES

There are four basic ways to deal with the problem of injury:

1. Do nothing/let the loss fall where it may
2. Follow the judicially created common law of torts or some statutory variation thereof

3. Create social insurance for accidental injury
4. Use regulatory and criminal law to reduce accidents

The first alternative of letting the loss fall where it may is the free market alternative. Under that alternative injured people would be responsible for their own injuries. They could purchase their own insurance or use savings to pay for the costs of their injuries. The market would eventually close down dangerous businesses because no one would patronize them. People would get as much safety as they are willing to pay for. The cautious could contract for extra safety. The obvious problem with this alternative is that many people will not be able to absorb the cost of serious injury, and many persons causing injury will go unpunished.

The second alternative, the common law of torts, is the one with which we are familiar. Those who cause injuries pay for them. The problems with this system, including the costs of litigation, have led many state legislatures to enact statutes modifying the law of torts. Statutes have, for example, imposed penalties for frivolous lawsuits, set maximums for damage awards, shortened the time for bringing lawsuits, and eliminated joint and several liability.

Social insurance plans, akin to social security, could cover accidental injury. In New Zealand, a nationwide government accident insurance program has virtually replaced the law of torts. The advantage of such a program, as discussed above, is that the majority of dollars put into the program go to injured people and recovery is uniform, swift, and sure. Disadvantages include the loss of the deterrent effect and the philosophical opposition, by some, to social welfare systems.

Finally, regulatory and criminal law systems can deal with the problem by attempting to eliminate the cause of injury by forcing people to use care. Traffic laws, OSHA rules, and manslaughter charges against drunken drivers are examples of such efforts.

The problem of injury is a complex one. The tort system has endured because the idea of finding fault and making wrongdoers pay is culturally acceptable in our society. New Zealand's experience with a radically different system deserves watching, as do the effects of various tort reform schemes.

CONCLUSION

The law of torts is accessible to water resource managers. Behind the legal jargon lie basic principles that are consistent with community values: the goal of injury prevention, the belief in individual responsibility, and the need to compensate the injured. The law of torts reflects political and economic conflicts, and is thus subject to change and reform. In the interim the best course for prudent managers is to engage in aggressive risk-prevention programs. A safety-first policy engenders the consumer confidence that is vital to the continued success of the water recreation industry.

APPENDIX

Tort Decisions: Water-Related Recreational Injury

by Pablo Quiban and David M. Forman

Introduction

This appendix is made available to managers of water-related facilities so they will be aware of the liabilities and risks of the services they provide. It is hoped, such knowledge will be used to produce a safer environment for those who enjoy water recreation.

This appendix represents a sampling of existing cases from various types of water activities. While it is not a complete compilation, the summaries give a basic picture of water tort liability, defenses, and safeguarding procedures.

The format of this particular case index focuses on location and type of activity. Within each section, citations of the individual cases are provided for the reader's reference and follow this form: case name, location of published decisions, followed by the year and court in which a decision was reached (lower court first, then appellate courts, if any). A year by itself indicates that the highest court in the jurisdiction heard the case, otherwise the actual court is named.

For example, a published decision for Flynn v. Kalb, 341 F.2d 582 (4th CIR. 1965) can be found in volume 341, page 582, of the Federal Reporter, Second Series. The decision was reached in 1965 in the U.S. Court of Appeals, 4th Circuit.

The following is a list of references which appear in this appendix:

A.2d	Atlantic Reporter, Second Series
App.D.C.	Appeal Cases, District of Columbia
App.Div.	Appellate Division
ATLA L. REP.	Association of Trial Lawyers of America Law Report
Cal.3d	California Reports, Third Series
Cal.App.2d	California Appellate Reports, Second Series
Cal.App.3d	California Appellate Reports, Third Series
Cal.Rptr.	California Reporter
Colo.	Colorado Reports
F.Supp.	Federal Supplement
F.2d	Federal Reporter, Second Series
Fla.App.	Florida Appellate Reports
Ga.	Georgia Reports
Ga.App.	Georgia Appellate Reports
Hawaii	Hawaii Reports
Hawaii.App.	Hawaii Appellate Reports
Ky	Kentucky Reports
Ky.App.	Kentucky Appellate Reports

Ill.App.2d	Illinois Appellate Reports, Second Series
La.	Louisiana Reports
Misc.2d	Miscellaneous Reports, Second Series
Md.	Maryland Reports
Miss.	Mississippi Reports
Mo.	Missouri Reports
Mo.App.	Missouri Appellate Reports
N.E.2d	Northeastern Reporter, Second Series
N.J.Super.	New Jersey Superior Court Reports
N.Y.S.2d	New York Supplement, Second Series
Nev.	Nevada Reports
P.2d	Pacific Reporter, Second Series
R.I.	Rhode Island Reports
S.E.2d	Southeastern Reporter, Second Series
So.2d	Southern Reporter, Second Series
S.W.2d	Southwestern Reporter, Second Series
Tex.Civ.App.	Texas Civil Appeals Reports
Va.	Virginia Reports
Vt.	Vermont Reports
Wash.2d	Washington Reports, Second Series
W.Va.	West Virginia Reports
Wash.App.	Washington Appellate Reports

TABLE OF CASES

SCUBA DIVING

SNORKELING

SURFING

SWIMMING POOLS -- OTHER

SWIMMING POOLS -- HOTEL OR MOTEL OWNER

WATER AMUSEMENT PARKS

WATERSKIING

Cases

Beaches

1. Flynn v. Kalb, 341 F.2d 582 (4th CIR. 1965)
   A swimmer was injured at a public beach at which there was insufficient supervision. The appellate court affirmed the lower court's decision that the matter did not require summary adjudication but should be decided by a jury.

2. Tarshis v. Lahaina Investment Corporation, 480 F.2d 1019 (9th CIR. 1973)
   A hotel guest was injured when she entered the ocean near the hotel and was thrown on the beach by a large wave. The hotel had issued a brochure which stated the nearby beach was "safe and exhilarating for swimming." The appellate court found that the owner of the hotel had not fulfilled the duty to warn its guests of dangerous conditions along the beach frontage. The warning system used by the hotel was determined to be insufficient, because it did not make the danger obvious to persons of normal intelligence. This ruling was a reversal of the lower court ruling.

3. Asato v. Matsuda, 55 Hawaii 334, 519 P.2d 1240 (1974)
   A beach patron was struck by a floating log while picking limu (seaweed) at a public beach. Floating logs were a common occurrence there. The state was found negligent in not warning of the dangerous condition. The Hawaii Supreme Court affirmed the First Circuit Court decision.

4. Baroco v. Araserv, Inc., 621 F.2d 189 (5th CIR. 1980), rehearing denied 627 F.2d 239 (5th CIR. 1980)
   A man went to the aid of a swimmer in trouble. A lifeguard on duty swam to the pair, but the man panicked and drowned in the large, choppy waves. The operator of the beach was under contract with the state. The terms of this contract required that the operator hire two lifeguards and provide all necessary lifesaving equipment. The Alabama District Court found that at the time of the man's drowning, the beach operator had hired only one lifeguard, and no lifesaving equipment was present at the beach. As a result, the operator of the beach was found liable for the man's death. The decision was affirmed on appeal to the Fifth Circuit Court of Appeals.

5. Kaczmarczyk v. City and County of Honolulu, 65 Hawaii 612, 656 P.2d 89 (1982)
   A beachgoer drowned after entering the ocean, becoming caught in a current, and getting swept out to sea. The lower court ruled the city and county (and state as codefendant) failed in its duty to warn that powerful surf represented an unapparent danger. The Hawaii Supreme Court affirmed as to the state but reversed the ruling with regard to the city's liability.

6. Littleton v. City and County of Honolulu/State of Hawaii, 66 Hawaii 55, 656 P.2d 1336 (1982), later proceeding 708 P.2d 829 (Hawaii.App. 1985)
A person picking ogo (seaweed) was struck by a floating telephone pole near a beach operated by the city. The city was aware of the dangerous condition but did not provide warnings of this repeatedly occurring hazard. The pole was determined to have come, most recently, from abutting state waters. The lower court determined the state had a duty to clean the debris, but the judge dismissed the contention that the city had failed in its duty to warn. The Hawaii Supreme Court affirmed the state's liability and reversed the ruling with respect to the city. The higher court stated the question of the city's liability was properly a question for a jury to decide.

Boating

1. Sorensen v. Hutson, 175 Cal.App.2d 817, 346 P.2d 785 (4th Dist. 1959)
A woman in a bathing area lost her arm and suffered several other injuries when she was struck by a boat that collided with another boat just offshore. The lessee of the shore area permitted bathing, boating, and waterskiing but set no speed limit and did not patrol the area. The District Court of Appeal affirmed the lower court ruling granting a nonsuit to the owners of the land but holding the boat operators and the lessee of the shore area liable for the woman's injuries.

2. Seaboard Properties, Inc. v. Bunchman, 278 F.2d 679 (5th CIR. 1960)
A man injured his back while on a chartered fishing trip under rough weather conditions (high winds and choppy seas). He was not familiar with the potential hazards of a boat traveling under such conditions. While hanging onto his seat, the man asked the guide to slow down. The skiff then hit a wave causing the man to become airborne. On the way back down, his back was broken. The district court found the operators of the fishing club negligent, in that they had failed to warn of the dangers involved. The appellate court affirmed the ruling.

3. Cozine v. Hawaiian Catamaran, Ltd., 49 Hawaii 77, 412 P.2d 669 (1966), reh. den. 49 Hawaii 267, 414 P.2d 428 (1966)
A passenger on a catamaran cruise was injured when the mast of the catamaran snapped and struck her on the head. Cross-examination of the passenger's statements regarding the pain and suffering that she endured was restricted in the lower court. The appellate court held that the lower court decision to restrict cross was prejudiced; a new trial was awarded and the ruling was reversed. Rehearing was denied because a motion to strike was not properly objected to.

4. Stewart v. Stephens, 225 Ga. 185, 166 S.E.2d 890 (1969)
A boy swimming in a lake was run into and cut to death by a boat operated, with consent, by a boatowner's 13-year-old daughter. The lower court found that the Game and Fishing Commission exceeded its authority in adopting a rule that the owner of a watercraft was liable for any injury occasioned by its negligent operation. The Georgia Supreme Court affirmed this part of the decision but found that the lower

court had erred in not applying the family-purpose doctrine. According to the Supreme Court, the family-purpose doctrine as applied to cars is applicable to boats. The father was held liable for the negligent operation of the boat because parental permission to use the boat for the purpose of pleasure (or convenience) was given.

Bodysurfing

1. Rogers v. County of Los Angeles, 39 Cal.App.3d 857, 114 Cal.Rptr. 540 (2d Dist. 1974)
   A bodysurfer was pulled from hard-breaking surf by other surfers. He was blue, bloated, and not breathing, but his heart was beating. Lifeguards administered first aid, and the bodysurfer became semiconscious; at this moment the bodysurfer's friends informed the lifeguards that he had asthma. The lifeguards then placed him in a sitting position, whereupon he lost consciousness a second time. The bodysurfer claims it was the placing of his body into a sitting position which caused the spinal injuries that rendered him a partial quadriplegic. The lower court ruled the lifeguards used the proper degree of care and could not be held liable for the injuries. The decision was upheld on appeal.

2. Buchanan v. City of Newport Beach, 50 Cal.App.3d 221, 123 Cal.Rptr. 338 (4th Dist. 1975)
   A swimmer was injured at a popular bodysurfing spot called "The Wedge." The refraction wave which caused the injury developed as a result of a steep slope in the shoreline, a condition which was created by the city (via construction of a jetty and deposit of dredged sand onto the beach from the nearby channel). The court found the city negligent in not posting signs warning of dangerous conditions that existed at a public beach.

3. Kleinke v. City of Ocean City, 163 N.J.Super. 424, 394 A.2d 1257 (1978)
   A swimmer was injured when struck by a bodysurfer. The city claimed that according to federal statutes, "neither a public entity nor a public employee is liable for an injury caused by a condition of an unimproved public property...(where unimproved property is not limited to natural conditions)." The lower court stated 3- to 6-foot surf can be seen as a dangerous condition that requires warning. The city was found negligent in not having its lifeguards stationed in their proper positions, because the requirements for supervision at "public recreational facilities" includes beaches.

Note: In Sharra v. Atlantic City, 199 N.J.Super. 535, 489 A.2d 1252 (App.Div. 1985), the court states: "[w]e overrule Kleinke insofar as it holds that a body surfer in 3- to 6-foot surf constitutes a 'dangerous condition'." Only the physical condition of the property itself, and not activities on the property, requires warning.)

Diving

1. Boll v. Spring Lake Park, Inc., 365 Mo. 1179, 358 S.W.2d 859 (Mo. 1962)
A visitor to a recreational area broke his neck and suffered paralysis after diving into a swimming pool at a depth of 3 feet. There was no lifeguard present, and the water was murky. No depth markers were present. The court ruled that the proprietor of the recreational area was not required to ensure the patron's safety but found the proprietor negligent in failing to provide reasonable care.

2. Pleasant v. Blue Mound Swim Club, 128 Ill.App.2d 277, 262 N.E.2d 107 (4th Dist. 1970)
A member of the Blue Mound Swim Club dove into the club pool, suffering injuries upon striking the bottom. The pool had recently undergone backflushing treatment, a process during which the depth of the water is lowered. The manager warned two other boys to be careful because the water level had been lowered but did not provide any warning to this particular diver. It was established that the manager was aware of the diver's presence because the manager watched him sign in. The court found that the existence of a diving board represented an invitation, so the diver was not guilty of contributory negligence (it was reasonable for him to assume a safe depth). Therefore, the swim club was held liable.

3. Blythe v. Williams, 356 So.2d 334 (1978)
A camper suffered injury after diving into a swimming hole from a cable swing. The appellate court reversed summary judgment against the camper with directions for further proceedings. The court stated that factual issues existed as to whether the campground operators were negligent (in providing the swing and failing to provide warnings) or if the camper was negligent in using the swing after finding nearby areas too shallow for its use.

4. Sonnier v. Dupin, 416 So.2d 1371 (La. 1982) cert. den. 420 So.2d 984 (3d CIR. 1982)
During a Boy Scout outing, a 16-year-old scout dove into a creek and struck the bottom, leaving him paralyzed and a quadriplegic. Members of the sheriff's department, which sponsored the outing, were roping off a swimming area when several scouts began diving into the water. The injured scout knew the depth of the water was about 2 to 3 feet and made two dives. Because of this knowledge, the court ruled that the diver was guilty of contributory negligence and assumption of risk, which barred any recovery.

5. Schell v. Keirsey, 674 S.W.2d 268 (Mo.App. 1984)
The operator of a campground erected a platform with a diving board. A camp counselor made several dives from the diving board without any problem; on her last dive, she dove from the platform but away from the area under the diving board. The water into which she dove was only 4 feet deep. Upon striking the bottom the counselor suffered a broken neck. There were no warning signs or depth markers, and the water was murky. The court found the operator of the campground negligent (for

not posting warnings). In the court's opinion, it should have been expected that someone might have dived from the platform and not the diving board.

6. Bangs v. Pat Harrison Waterway District, 28 ATLA L. REP. 79 (1985)
A footbridge was constructed by the city above the shallow water of a tidal creek. An individual, who had swum there all his life, dove from the footbridge and broke his neck rendering him a quadriplegic. No warning signs were posted. The case was settled out of court.

Jet Skiing

1. Dumez v. Harbor Jet Ski, Inc., 117 Misc.2d 249, 458 N.Y.S.2d 119 (1981)
A patron of the jet ski company, who had signed a release form, suffered injuries while using one of the company's rentals. The court found in favor of the proprietor since the company did not have sufficient control of the environment in which the jet ski was operated. The court determined that the proprietor could not have assured operation within the boundaries it set, nor could it assure the safe use of the jet ski therein. A motion to dismiss the release was denied. The ruling was affirmed on appeal.

2. Martell v. Boardwalk Enterprises, Inc., 748 F.2d 740 (2d CIR. 1984)
A jet skier lost part of his arm in a collision with a boat rented from the same company. The injured skier and the operator of the boat were both inexperienced. An employee of the rental agency gave operational instructions and the basic rule that all vehicles should stay 200 feet away from each other. At the time of the accident, heavy traffic caused choppy water in the area. The court determined that these conditions created waves large enough to obscure visibility and accepted testimony that jet skis in general do not operate well in rough or choppy water conditions. The proprietor was found negligent because its employee had failed to warn of the possible dangers involved. The proprietor's liability was affirmed on appeal.

Lakes-Ponds-Rivers-Streams

1. Gluckauf v. Pine Lake Beach Club, Inc., 78 N.J.Super. 8, 187 A.2d 357 (1963)
A patron of a beach club drowned in a lake that was part of the beach club. The operator of the beach club was found negligent in not having lifesaving equipment on hand such as ring buoys, heavy lines, bamboo poles, and grappling irons. The decision was affirmed on appeal.

2. Rodrigue v. Ponchatoula Beach Development Corporation, 244 La. 468, 151 So.2d 157 (1963), cert. den. 152 So.2d 562 (1st CIR. 1963)
At a beach resort, a patron who was not a very good swimmer drowned in a river area that was not designated for swimming. He paddled himself on a rubber inner tube into water that was above his head and not designated for swimming. The lower court held

the proprietor negligent. The appellate court reversed and rendered judgment for the proprietor, finding the patron contributorily negligent.

3. Bolduc v. Coffin, 133 Vt. 67, 329 A.2d 655 (1974)
A boy drowned in the swimming area of a large camping, swimming, and picnic facility. The swimming area was a large 4-1/2-acre pond; no lifeguards were on duty, or hired. There were three signs in obvious areas on land indicating that no lifeguards were on duty and that patrons swam at their own risk. On the day of the drowning, there were 150 other people swimming in the pond, none of whom noticed the disappearance or drowning of the boy. The court determined since none of the other 150 swimmers noticed the death of the boy, the absence of a lifeguard was not a proximate cause of the child's death. The proprietors were found not negligent. The decision was affirmed on appeal.

4. Kesner v. Trenton, 158 W.Va. 997, 216 S.E.2d 880 (1975)
Two young girls, wading at a swimming facility, drowned in 10 feet of water after slipping in a culvert. The facility was maintained by a marina operator. No warning signs were posted (the area was not marked at the time of the incident although it had been roped off previously). The hazard was not readily apparent. The court ruled that the marina operator owed a duty of care and was negligent for failing that duty. The decision was affirmed on appeal. (A new trial was awarded on the issue of damages).

5. Kavanaugh v. Daniels, 549 S.W.2d 526 (Ky.App. 1977)
An 11-year-old boy drowned at a lake facility. The court determined that the Department of Health swimming pool regulations did not apply to lake swimming operations. Consequently it was established that the operator of the facility had the lifesaving equipment on hand which was required by state law. The lower court ruled the operator of the facility did all that was necessary to exercise ordinary care in attempting to rescue the boy. The decision was affirmed on appeal.

6. Ochampaugh v. City of Seattle, 91 Wash.2d 514, 588 P.2d 1351 (1979)
Two boys who could not swim drowned in a pond that was frequented by neighborhood children. The pond was an excavation created by the city, and had filled with water naturally. The court determined that the pond in its water-filled state was not an "excavation"; as such, the city was not required to put a fence around it. The court further ruled that the pond was not an attractive nuisance since it lacked any unusually attractive features (compared to nearby natural ponds). Therefore, the city was found not negligent. The decision was affirmed on appeal.

7. Hill v. State and Houck, 121 R.I. 353, 398 A.2d 1130 (1979)
A young swimmer drowned at a swimming facility. She was found halfway down the steep drop-off of a lake's slope. The area was not roped off, and no warning signs were posted. A lifeguard at the facility refused to conduct a water search until he had received permission from the captain of the lifeguards; the search was delayed several minutes. The lower court issued a summary judgment for state and proprietor. The

appellate court vacated this judgment stating that causation should have been decided by a jury (reasonable inferences could be made for the adverse party, as well as against, so a directed verdict was not appropriate).

Scuba Diving

1. Handelman v. Victor Equipment Co., 21 Cal.App.3d 902, 99 Cal.Rptr. 90 (2d Dist. 1971)
An experienced sport diver suffered injuries after using equipment rented from the proprietor. The tank he was given contained an incorrect mixture of diving gas, resulting in oxygen poisoning. The proprietor was found negligent, but the diver was limited in the amount of damages he could collect since no substantial impairment arose.

2. Hewitt v. Miller, 11 Wash.App. 72, 521 P.2d 244 (1974), reh. den. 84 Wash.2d 1007 (1974)
On the second day of a diving class, a diver disappeared beneath the surface and could not be found. The diver had signed a release which conspicuously acknowledged the possibility of death. The court found no willful negligence on the part of the proprietor. Lack of liability was affirmed on appeal.

3. Goddard v. Virgin Island Diving Schools, Inc., 28 ATLA L. REP. 39 (1985)
A diver rented equipment from a diving school to explore a wreck 30 feet below the surface. The proprietor had modified an oral inflation hose on the scuba equipment to accommodate a power inflator. This apparatus was poorly maintained, causing a blowout of the bouyancy compensator and subsequently the diver's death. The jury verdict found the proprietor liable for his death.

Snorkeling

1. Garber v. Prudential Insurance Company of America, 203 Cal.App.2d 693, 22 Cal.Rptr. 123 (2d Dist. 1962)
An agent of a magazine hired a photographer to take underwater pictures. In a swimming pool, two subagents of the magazine gave the photographer, an inexperienced diver, a crash course (1-1/2 hours) on how to snorkel and dive. The following day the diver was taken to the photograph site and snorkeled about the area without difficulty. He returned to shore and put on the necessary gear. Upon returning to the water, the photographer began to take in water through his snorkel. He was taken to shore but resuscitation efforts failed. The court found the magazine, as a corporation involved in underwater activity, did not provide the proper training or necessary lifesaving equipment; the magazine was found guilty of a negligent breach of assumed duty. There was no contributory negligence on the part of the photographer; when the subagents of the magazine believed he was sufficiently trained, he had no reason to think otherwise. The decision was affirmed on appeal.

2. Scholl v. Town of Babylon, 95 A.2d 475, 466 N.Y.S.2d 976 (2d Dept. 1983)
A person outfitted with snorkeling gear and crabbing in navigable waters was struck by a boat and killed. Reversing a lower court decision, the appellate court ruled that admiralty law applied to this case. As such, the case should be governed by the rule of comparative negligence and not contributory negligence.

Surfing

1. Landrum Mills Corporation v. Ferhatovic, 317 F.2d 76 (1st CIR. 1963)
As a patron was about to leave the hotel's swimming area, he was struck in the face by a surfboard. The lower court found the hotel negligent in allowing the use of surfboards in a bathing area and not providing adequate supervision. The decision was affirmed on appeal.

2. Grob v. State, 42 Misc.2d 791, 249 N.Y.S.2d 184 (1964)
A swimmer at a public beach was struck in the ear by a lifeguard's surfboard. The lifeguard, who had been patrolling the area by surfing, saw the swimmer 18 feet in front of him. The lifeguard attempted to swerve the board away from the swimmer, but the wave he was riding broke in the opposite direction, causing the board to go out of control and strike the swimmer. The court found the lifeguard negligent, because he knew which way the waves were breaking and was familiar with the beach, and because surfing to patrol a beach was a dangerous practice.

Swimming Pools — Other

1. Carreira v. Territory of Hawaii, 40 Hawaii 513 (1954)
A sixth grade boy drowned in a saltwater swimming pool. At the time, he was on a school picnic outing supervised by a manager, matron, and lifeguard. None of these individuals saw the boy disappear in the pool. The lower court dismissed the case, stating the necessary precautions for rescue had been provided. On appeal, this decision was reversed and remanded for further proceedings; the appellate court determined the territory could be found negligent by a reasonable jury.

2. Smith v. Jung, 241 So.2d 874 (1970)
A young tenant drowned at an apartment complex pool. No trained lifeguard was on duty, and no lifesaving equipment was on hand at the time of the drowning. The owner and operator of the complex was found liable for the boy's death.

3. Fowler Real Estate Company v. Ranke, 181 Colo. 115, 507 P.2d 854 (1973)
A group of nine boys was invited to swim in an owner's pool. One of the boys, who was not a strong swimmer, was found unconscious in the deep end of the pool. The boy had been warned previously to get out of the deep portion but apparently ventured back in. Large amounts of food present in the boy's body hindered attempts at artificial and mouth-to-mouth resuscitation. The owner was held not liable, and no recovery was allowed due to the contributory negligence of the boy.

4. Kopera v. Moschella, 400 F.Supp. 131 (SD Miss. 1975), affd. 526 F.2d 1405 (5th CIR. 1976)
A 6-year-old tenant died at an apartment complex. Although no witnesses were present, it was presumed the child fell into the pool, where he drowned. The pool was not fenced, did not have a lifeguard on duty, did not have lifesaving equipment, and was not covered during winter months. The court found that the apartment complex owner breached his duty of care to provide reasonably safe accommodations and to maintain the premises in a reasonably safe condition. The decision was affirmed on appeal.

5. Dartez v. Gadbois, 541 S.W.2d 502 (Tex. Civ. App. Houston 1st Dist.)
A young boy lost his eye after being struck by a berry while in a swimming pool. The boy had been engaged in a berry-throwing fight with a friend at the time. The horseplay had been going on for a while and was witnessed by a lifeguard, but he did not stop the activity. The court did not allow recovery based on the contributory negligence of the injured boy because he had also been throwing berries. The decision was affirmed on appeal.

6. S & C Company v. Horne, 218 Va. 124, 235 S.E.2d 456 (1977)
A first-time visitor to an apartment complex pool was seen splashing and diving for an object at the bottom of the pool. After splashing for a while longer, the 14-year-old boy disappeared. He was found and pulled to the surface by another swimmer. The lifeguard on duty was not in his elevated chair at the time; he was eating ice cream with some friends. He did not attempt resuscitation because the boy was frothing. Instead, he gave a coin to one of the bystanders to call for help. Because he was not in his elevated chair, the lower court found that he had breached his duty to exercise ordinary care for the safety of a pool patron and was therefore liable for the boy's death. The decision was affirmed on appeal.

7. Oliver v. City of Atlanta, 147 Ga.App. 790, 250 S.E.2d 519 (1978)
A boy drowned in the pool of a recreation area that had been closed for several months. He was trespassing. There was a 10-foot-high fence around the pool, "Keep Out" signs were posted, and the gate was locked. The court ruled that because no willful or wanton conduct could be proved on the part of the proprietor, the boy's family could not recover damages. The decision was affirmed on appeal.

8. Bird v. T.M. Delta Partners, Ltd., 28 ATLA L. REP. 281 (1985)
A 3-year-old boy suffered severe brain damage as a result of a near drowning. The pool was located at an apartment complex. A maintenance man removed the gate to the entrance of the pool to effect repairs. The boy wandered through the open fence and fell into the pool. The boy's family asked the court to find the proprietor liable, alleging that the pool (because it was not entirely closed off) was an attractive nuisance. The case was settled out of court.

Swimming Pools — Hotel or Motel Owner

1. Kalm, Inc. v. Hawley, 406 S.W.2d 394 (Ky. 1966)
A motel patron performed a pikedive from the edge of the motel pool, halfway between the 8-foot and 5-foot depth markers. He struck his head on the bottom of the sloped pool and suffered injuries. The patron knew the pool sloped up at the point of his dive. The lower court found for the patron. However, the appellate court stated that when a proprietor has provided special facilities for diving, consisting of a diving board, there is no invitation for its patrons to dive elsewhere except at their own risk. In a reversal of the lower court ruling, the proprietor was absolved of liability due to the patron's contributory negligence. The decision was affirmed on cross appeal.

2. Keating v. Jones Development of Missouri, 398 F.2d 1011 (5th CIR. 1968)
A swimmer was injured when another hotel patron jumped backwards off of the hotel pool springboard and landed on him. The hotel did not provide supervisory personnel or instruct its patrons in the proper use of its equipment. The appellate court reversed the lower court's summary judgment against the injured swimmer. The hotel operator was found liable.

3. Gordon v. C.H.C. Corporation, 236 So.2d 733 (Miss. 1970)
A 10-year-old boy drowned while trespassing at a motel pool. The lower court determined the boy was intelligent enough to appreciate the dangers of the pool. There was nothing hidden or concealed about the pool, so it could not be considered an attractive nuisance. The motel operator was not held liable. The decision was affirmed on appeal.

4. Twardowski v. Westward Ho Motels, Inc., 86 Nev. 784, 476 P.2d 946 (1970)
A young girl was injured by falling off a hotel's pool slide. The girl had tested the lower rails before climbing, but as she neared the top of the slide, the handrails broke. It was submitted to the jury that there is a duty to inspect the slide for latent or concealed dangers, and if a reasonable inspection would have revealed such dangers, the proprietor could be charged with constructive notice of those dangers. The lower court judge set aside the jury's verdict for the girl, stating a failure to sustain burden of proof. The appellate court determined that inferences drawn in the most favorable light (for the girl) could be made by a reasonable jury; therefore, the judgment notwithstanding verdict was vacated and the jury verdict awarding damages to the girl was reinstated.

5. Haft v. Lone Palm Hotel, 3 Cal.3d 756, 91 Cal.Rptr. 745, 478 P.2d 465 (1970)
A man and his son, both of whom could not swim, drowned in a motel swimming pool. No witnesses saw the drownings. No lifeguard was on duty. No depth markers were placed in the pool. No warnings were posted stating there was no lifeguard on duty. If the motel operators had posted adequate warnings, they would not have been statutorily required to provide a lifeguard. On this basis the superior court entered judgment for the motel operators. This opinion was reversed on appeal. The appellate

court stated that because no lifeguard was provided and no signs were posted warning of this fact, the motel operators could be found liable.

6. Smith v. Americana Motor Lodge, 39 Cal.App.3d 1, 113 Cal.Rptr. 771 (1974)
Two sisters ignored their mother's warning and went to their motel's swimming pool instead of the laundromat. The girls, both able to read, disregarded a sign posted outside of the pool warning that no lifeguard was on duty and that all children must be accompanied by an adult. The girls drowned in the pool. The girls' mother alleged the motel violated a statute which required that a safety rope and buoys be placed at the pool surface near the break from shallow to deep water. The court found the girls guilty of contributory negligence and barred any recovery from the motel's operators. The decision was affirmed on appeal.

7. Hooks v. Washington Sheraton Corporation, 188 App.D.C. 71, 578 F.2d 313 (1978)
A hotel patron dove from a diving board into the shallow water of a pool. He suffered injuries that rendered him a quadriplegic. The diving board was operated and maintained by the hotel over water that was of insufficient depth. The hotel operators were held liable. The decision was affirmed on appeal.

8. Stoddard v. Holiday Inns, Inc., 27 ATLA L. REP. 226 (1984)
A hotel patron dove into a pool and suffered injuries by striking the bottom. The diver alleged that the pool had an overly expansive shallow end and that it did not have adequate depth, width, slope, underwater lighting, color contrasting tiles between the pool bottom and the sides, nor any signs warning that the pool was unsafe for diving. The case was settled out of court.

9. Swann v. Summit Mortgage Co., 27 ATLA L. REP. 274 (1984)
A hotel patron drowned in a swimming pool. The pool had filtration and drainage problems that caused the water to become cloudy from heavy use. There was no lifesaving equipment at the pool and no lifeguard on duty. The pool had been ordered closed for repairs due to a drowning 7 days prior. The pool was never closed, and no repairs had been performed. The case was settled out of court.

10. Brown v. Harlan & XYZ Insurance Co., 468 So.2d 723 (5th CIR. 1985), motion to dismiss gr., app. den. 472 So.2d (La. 1985)
A motel patron who could not swim was wading in the shallow water of the motel pool when she slipped into the deep water and drowned. The patron was aware of the dangers of a pool and of the fact that no lifeguards were on duty, and she accepted this risk when she entered the pool. The lower court dismissed the case, and the appellate court affirmed the decision.

Water Amusement Parks

1. Hylazewski v. Wet 'N Wild, Inc., 432 So.2d 1371 (Fla.App. D5 1983)
An amusement park patron was struck by a raft that had been hurled into him by the

action of a wave-making machine. The patron was not aware of the machine. The park operators failed to warn its patrons of the unapparent dangers that existed in the facility. The lower court dismissed the case, but on appeal the operators were found negligent.

2. Carroll v. Astroworld, Inc., 28 ATLA L. REP. 34 (1985)
An amusement park patron lost control on a water slide and struck her head on a concrete wall, causing severe brain damage. Negligence in the construction and design of the slide was alleged. The case was settled out of court.

Waterskiing

1. Hennington v. Curtis, 248 Miss. 435, 160 So.2d 193 (1964)
A patron of a waterskiing park fell off her skis; as the boat circled back to retrieve her skis, both the driver and lookout failed to notice the location of the skier. The tow line rubbed against the skier's neck. As she attempted to lift the rope from her neck with her left hand, her ring finger and the first joint on her middle finger were severed by the line. The proprietor had provided a safe place to ski along specific guidelines; a lookout was required to accompany every driver. The lower court found in favor of the skier. However, on appeal, the higher court determined that the injury was not the result of any condition that the proprietor could control. Judgment was reversed, because negligence could only be ascribed to the driver and the lookout.

2. Vann v. Willie, 284 Md. 182, 395 A.2d 492 (1978)
A swimmer on his daily swim in a river used for recreational purposes, was struck by a boat which was turning around to pick up a water-skier. The swimmer was doing the crawl stroke and did not see or hear the oncoming boat. There was a crack in the windshield of the boat. The swimmer alleged negligence in operating an unseaworthy boat. However, there was no indication that the operator would have seen the swimmer if there had not been a crack in the windshield. The lower court directed a verdict for the operator of the boat and the water-skier (no action could be taken against the skier as he was not in a position to control the boat). The verdict was affirmed on appeal.

3. Stansbury v. Hover, 366 So.2d 918 (1st CIR. 1978)
A 14-year-old boy lost his arm on a waterskiing trip. He was an inexperienced skier. At the time of the incident he was winding up a tow rope that was partially submerged in the water. Without warning, the boat operator started up the boat to go pick up another skier. The acceleration of the boat caused the rope to pull on the boy's arm. Thinking he would be pulled into the motor, the boy dove off the boat. The rope tightened and the slack ran out, jerking the boy's arm and severing his tissue to the bone. His arm was subsequently amputated at the elbow. The court found no contributory negligence on the boy's part. The owner of the boat, however, was found negligent in failing to properly instruct the boy and the operator of the boat on proper safety procedures.