

Commentary

Strategies For Swimming Pool Litigation

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As temperatures rise, so do the numbers of pool-related deaths and injuries, many of which involve children. Each year, about 350 children younger than five years of age drown in pools, making pool drowning second only to motor vehicle accidents as a cause of death for this age group. Further, more than 2,500 people per year visit hospital emergency rooms for pool-related accidents.

I. The First Step

As with any lawsuit, lawyers should keep in mind that the general rule of "the sooner, the better" applies. The unique nature of pool incidents makes this especially true, so it is critical to quickly interview potential witnesses, and if permissible, defendants, and take steps to secure evidence.

A. Meet The Defendant

Because ethical rules in Texas allow us to speak with defendants who are not yet represented by counsel, we advise plaintiff's lawyers here to interview the defendant. Obviously, the rules in your jurisdiction may vary, and you will have to adjust your approach to accommodate them.

Meeting the defendant provides an opportunity to explain the process and understand the defendant's point of view. Except in rare circumstances, the plaintiff's compensation will come from insurance proceeds and not from the defendant's assets. It is critical that the defendant understand this, as our experience has been that insurance adjusters often go far beyond a mere stretching of the truth when they discuss the claim with their insured.

Typically, the first meaningful conversation the insurance adjuster has with the defendant effectively changes that defendant from a reasonable person who is sorry for the loss and willing to help into a frightened, cornered animal who believes he is under attack. The plaintiff's lawyer must prepare the defendant for this conversation and make sure the defendant understands that the adjuster works for the insurance carrier, not for him. It is extremely helpful for the defendant to realize that his interests are not aligned with the financial interests of his insurer.

We explain that once the process begins formally, the insurer will hire a lawyer for the defendant, and we further explain that this lawyer is paid by the insurer. We explain that once the insurance defense lawyer is hired, our ethical rules prohibit us from contacting the defendant directly. Because of the inherent conflict in this situation, we generally recommend that the defendant engage private counsel. In cases where other firms represent the plaintiff, we will frequently represent such insured defendants for free.

B. Protect The Evidence

As mentioned, it is critical that the plaintiff's lawyer take steps to document and, if necessary, secure the evidence. For example, our firm has handled a case where a defendant, devastated by the loss of life on his property, filled the pool with dirt. While not unreasonable, it can complicate the case. In another case, we visited the pool site to find the pool drained and about to be re-graded to change its slope. This plan was concealed from us by house counsel for Traveler's Insurance.

Many swimming pool accidents happen because pool owners violate local fencing ordinances, which typically require a pool be in a secure enclosure. Again, cases have been won when prompt action allowed the plaintiff to document gates that were routinely propped open or loose boards in a picket fence that allowed a child access to the dangerous waters.

II. Theories Of Liability

As with all lawsuits, the facts of the case determine the theory of liability. Our discussion has focused on drownings, but many drownings are preceded by a diving incident. This opens the door for a variety of products liability theories not typically seen in a premises-based lawsuit.

A. Premises Liability

Whether your jurisdiction imparts premises liability via statute or via the common-law concepts of invitee-licensee-trespasser, premises liability cases are the cornerstone of swimming pool litigation. In Texas, which utilizes a common-law foundation for its premises liability, social guests invited into a private backyard pool are classified as licensees. As a licensee, an injured person must prove that: (1) a condition of the premises created an unreasonable risk of harm to the licensee; (2) the owner actually knew of the condition; (3) the licensee did not actually know of the condition; (4) the owner failed to exercise ordinary care to protect the licensee from danger; and (5) the owner's failure was a proximate cause of injury to the licensee. The requirement to prove the landowner had actual knowledge of a dangerous condition can make this a difficult standard to meet.

While private backyard pools are the most common source of litigation, accidents and injuries also happen in public pools. In these cases, the swimmer typically

pays a fee to use the pool, and this payment converts his status to that of an invitee. This lowers the proof requirement from "actual knowledge" to "knew or reasonably should have known," thus making it much more obtainable.

As to the dangerous conditions that could contribute to your client's injuries, you should consider lack of adequate warnings, poor or absent safety equipment, inaccessible safety equipment, lack of safety fencing or alarms, improper fencing, lack of supervision, and proximity of telephones.

Fences should be carefully investigated in pool accidents. Most people assume that drownings are more common when the pool is in "formal" use, but this is not the case. Most drownings, especially child and teenage drownings, occur when the pool is accessed without the landowner's knowledge or permission. This may meet the traditional definition of a "trespasser," but because of the abundance of laws and ordinances mandating such safety equipment as fences, alarms, and covers, even unauthorized access can impose liability on the landowner. Further, some states have classified swimming pools as "attractive nuisances," effectively eliminating the application of trespasser status to young children and imposing a duty to securely fence the pool.

After fences, the next most frequent source of premises claims are inadequate warnings. When a landowner posts a proper warning sign, he theoretically shifts a measure of responsibility to the swimmer (or to the swimmer's parents) to maintain the swimmer's safety. If the landowner posts a proper warning of the reasonable dangers associated with swimming but the swimmer ignores the warnings, the landowner may raise a viable defense to liability. But merely placing a sign is not enough. The sign must give an adequate warning, and very few signs meet this standard. A safety or human factors expert can prove valuable here. Do not forget that no sign is adequate when a child is too young to read or understand it, so the posting of a "swim at your own risk" sign at a private pool provides no defense unless the owner implemented other affirmative safety measures such as a fence with a gate.

Some states and municipalities have laws requiring the posting of specified signs under certain circum-

stances. This includes the common sign warning of "no lifeguard," and less-common restrictions of the hours of pool operations. Here, the failure to obey any of these signage laws may be sufficient to establish negligence on a per se basis.

B. Active Negligence

Beyond a straight premises liability case, a plaintiff may also file suit for the active negligence of the landowner, the pool operator, the pool maintenance company and/or that of its employees.

Consider accidents caused by pool equipment. If the equipment was improperly installed, you might have an active negligence claim against the installers. Our firm has handled cases where pool installers installed the wrong type of diving board for the depth of the pool. Various board lengths and construction methods utilized in making diving boards will mandate a minimum safe water depth. When an installer uses an overly long board and a diver is subsequently injured in a dive, the installer faces significant liability. Another of our cases involved murky water that hampered the discovery of a young child. Our firm has also handled a case where the depth markings on the pool itself were wrong and indicated the pool was deeper than it actually was. Beyond a negligence claim, this fact pattern allowed us to proceed under the theory that the pool owner breached an express warranty.

Such problems place liability on the pool owner. The issue turns on whether a pool owner knew or should have known the equipment or markings were unsafe when viewed objectively using a reasonable-person standard. If the pool equipment was clearly damaged or was completely missing, or if the pool had experienced a history of problems arising from the equipment, the analysis is very simple. Beyond an obvious defect, however, certain fact patterns will reveal that the pool owner had actual knowledge of the need to inspect or repair the pool equipment. Perhaps third parties (other guests or inspectors) had given notice of a deficiency. In the past, many liability insurers provided instructions to their clients concerning annual pool inspections, and this has been used to show that the pool owner knew of the need to conduct inspections.

Pool drains cause many drownings, and the pool owner has a duty to maintain the drain and the associated

pump, and to follow the manufacturer's instructions and warnings. Beyond this minimum compliance, however, a pool owner or operator can improve the safety of pool drains through the installation of emergency shut-off valves, alarms, grates, and covers and through routine inspection and maintenance of these devices. A failure to do so can form the basis for a negligence claim.

Lifeguards are another source of pool liability. The threshold inquiry is whether a lifeguard is necessary. While the general rule is that lifeguards are not required, a lawyer should always consider any past incidents at an unsupervised pool. It is not hard to argue that prior accidents have placed the landowner on notice that a lifeguard is needed. And once the lifeguard is on site, that lifeguard has a duty to act reasonably. It is very important to identify the lifeguard's employer as the employee probably has insufficient assets or insurance to compensate your injured client. It is common at apartment complexes and private community pools for the lifeguards to be employees of someone other than the landowner, typically a local non-profit agency.

Direct liability is also possible in the lifeguard context under a negligent hiring, training, or retention theory. Lifeguards require certain skills, training and certifications for their job, and the failure of an employer to make sure these requirements are in place and current could impose direct liability.

A step down from a formal lifeguard is the parent, pool owner, or even relative who volunteers to supervise a child. While the law does not impose a duty on such persons to volunteer, once they do, they have a responsibility to act reasonably. Current pool safety doctrine promulgated by the YMCA mandates that an adult should maintain constant, personal visual surveillance of children while they are in or near a pool. Almost by definition, a drowning death implies this standard was breached.

While drownings and spinal cord injuries are the most tragic events at a pool, more common are injuries arising from slip-and-fall accidents in the pool area. Because the slippery conditions surrounding a swimming pool create a high risk of such accidents, landowners must take reasonable steps to surround their pool area with non-slip surfaces and take affirmative

actions to reduce the likelihood of slip-and-fall events. Such actions would include warnings to guests and drains designed to reduce puddles around the pool. Because water on a pool deck is an expected condition, the plaintiff in a slip-and-fall case would have to show the pool owner was negligent in creating the puddle or allowing it to remain after receiving notice that it was there. But another possibility is the negligent choice of pool decking. Some surfaces, especially tile, are so slippery when wet that a plaintiff would have little trouble showing that the pool owner was negligent in choosing this material and was aware of its slippery nature.

C. Products Liability

The abundance of equipment (rails, ladders, and especially diving boards) used in a pool make a strict products liability lawsuit a frequent possibility. In this area, the most common problems arise from diving boards and often require significant investigation to identify the responsible defendants.

Consider the example discussed above where the wrong diving board was installed. Diving boards have a label indicating the minimum required water depth for safe usage. But what happens if the pool's depth is marked incorrectly, indicating a greater depth than actually exists? Does the diving board installer have a duty to verify the depth markings? Or is the company that marked the pool solely responsible?

When the correct pool equipment is used but installed improperly, expert testimony is vital to winning the case. This is why it is so important to become involved early. Once a broken diving board is replaced, the plaintiff has probably lost the opportunity to investigate whether improper installation contributed to the board's breaking.

Traditional product defect concepts -- design defect, manufacturing defect, and marketing defect -- are also applied to pool equipment. While our firm has seen diving boards that vary greatly in the safety of their design and has seen diving boards with pure manufacturing defects, the typical problem is marketing. The industry is improving, but in the past, warning and instructional labels were inadequate with regard to installation parameters and to the intended use. A board that is safe for a child may not be safe for a 200-pound man, yet the label fails to warn of this risk

and the board's packaging depicts large men diving into the water.

Especially with homeowners, the retail seller is often asked to give significant advice and consultation in the sale of pool equipment and diving boards. These sellers have a duty, and generally an implied warranty of fitness, when they select pool equipment and recommend it to their customers. Even stating that a piece of pool equipment is safe when it is not can amount to misrepresentation.

Finally, one piece of equipment is usually installed when the pool is built -- the pool drain -- and it is a frequent source of injuries. As with other pool equipment, the manufacturer, distributor, or seller of the drain can have liability. In Fort Worth, Texas, a pool drain with overly strong suction was considered a contributing cause to the deaths of four persons in a public water garden. Because many pool drains create suction too strong for a child to overcome, the child can become trapped as he or she approaches the drain. Significant jury awards have been assessed against manufacturers of pool drains under a design defect theory for not adopting a safer design. Again, prompt analysis of the evidence by an expert is essential to effectively prosecuting these claims.

III. Potential Pitfalls

A. Plaintiff's Negligence

Swimming pools can be dangerous places, so whether your jurisdiction allows jury instructions or questions on "assumption of risk" or "open and obvious danger," or whether your jurisdiction follows a comparative negligence scheme, the negligence of the plaintiff will usually be a factor.

But do not fail to overlook two safe harbors for your client. Many states set an age limit below which a child, as a matter of law, cannot be negligent. This will generally serve to shield the child from having his own recovery reduced by his own negligence.

Because pool-related injuries to a child can begin with less-than-optimal parental supervision, a parent's negligence is sometimes an issue. Be sure to know the law in your jurisdiction on parental immunity. Many states greatly restrict the ability for a parent to be found negligent in the supervision of a child. This means that the parent's negligence will not serve to

reduce the child's claim and in some states, will not reduce their own claim.

As mentioned above, unheeded warning signs potentially shift some negligence onto the plaintiff. Never overlook that warning signs often fail to comport with current standards for adequacy and that an expert can prove invaluable here. Even so, many lawsuits involving injuries from shallow-water dives are not successful because the defendants can show the plaintiff knew the depth of the water and should have known the associated danger. In addition, some states have enacted statutory protections for homeowners against diving-related claims.

When confronted with such facts, always make sure the water depth is accurately indicated. It is often wrong, and the negligence pendulum will surely swing back toward the defendant if his pool showed an incorrect water depth. Also, seek expert advice on the design of the pool itself. Some pools have such a steep incline from the deep to the shallow end that a diver would be forced to drop straight from the end of the diving board to avoid waters that are unsafely shallow. The bottom line here is not to make assumptions about your client's liability without independently investigating all the facts.

B. Alcohol

It is reported that more than one-half of all diving injuries involve the use of alcohol. But the defendant will have the burden of showing the alcohol contributed to the accident or injury. For example, if the pool was too shallow for an installed diving board, no degree of sobriety would have made the dive safe.

C. Recreational Use Statutes

"Recreational Use Statutes" are laws intended to promote public recreational use of privately-owned land. The statutes give landowners broad immunity from liability for injuries to users pursuing recreational activities on the owner's land. Several states have included swimming pools and ponds under the recreational use

statutes while others have expressly excluded them, citing the unique risks involved.

In most jurisdictions, these statutes state that a landowner owes the recreational user (*i.e.*, the swimmer) neither a duty of care to keep the property safe nor a duty to give any warning of a dangerous condition on the property. Effectively, such statutes lower the swimmer's status from a licensee to a trespasser.

D. Governmental Immunity

Many swimming and diving accidents occur at public pools owned by governmental units that generally enjoy immunity from suit, immunity from liability, or both. In such cases, the plaintiff's lawyer must become familiar with the tort-claims statutes in the target jurisdiction. The states vary widely in this area, from some statutes that provide a limited waiver of immunity in certain circumstances to others that completely abrogate a municipality's immunity when operating a pool. A little legal research will quickly clarify this point.

But never forget that many accidents at public pools involve parties other than the governmental entity. Do not overlook the liability of private sellers, installers, and maintainers of pool equipment, and do not forget that many municipalities outsource their life-guard responsibilities to local not-for-profit agencies. Except in very rare circumstances, these potential defendants do not enjoy governmental immunity.

IV. Summary

Swimming injuries are the second leading cause of death among small children, and diving injuries often lead to catastrophic injuries requiring lifelong care. Such plaintiffs require high-quality representation to maximize their opportunity for meaningful compensation for their loss. By securing early cooperation from a defendant and by taking prompt steps to identify and secure the evidence, a practitioner has the best opportunity to employ the liability theories discussed above and thereby maximize his client's potential for recovery. ■