

ROUGHHOUSING CAUSES INJURY IN GUARDED LAKE

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Generally, lifeguards owe a two-fold duty to swimmers under their supervision. First, lifeguards have a duty to observe swimmers under their supervision for signs of distress. Second, when distress is observed, lifeguards owe a duty to attempt a rescue. As indicated by the *Magnello* case described herein, lifeguards also have a duty to control potentially dangerous activities in swimming facilities under their supervision.

PREVENTIVE SUPERVISION

In the case of *Maganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977), plaintiff Samuel Maganello was injured on Labor Day 1973 at Permastone Lake, a recreational facility and lake owned by defendant Permastone, Inc. The facts of the case were as follows:

Permastone charged a fee to members of the public to use the lake and adjacent facilities. On September 3, 1973, Maganello paid the fee for himself and his family. Permastone employed lifeguards at Permastone Lake for safety purposes. Lifeguards were present and on duty on the day and during the hours in question. After Maganello had been at the lakeside for some time, he entered the water near the sliding board. Maganello's children slid down the board while he stood by to catch them and otherwise look after their safety. The water was about chest high on Maganello in the sliding area. The sliding continued for approximately one hour.

While this was going on, some young men, located about 20 to 30 feet away, began standing on the shoulders of one another and jumping backwards into the water. This activity continued for at least 20 minutes during which time the young men either gradually or suddenly moved closer to the slide.

Maganello, thinking his children had been in the water long enough, sent them ahead to the pier. While he was swimming behind them to the dock, one of the young men jumped backwards from the shoulders of another and fell back upon Maganello's head and neck, forcing him under the water. When Maganello surfaced, he appeared to have been "knocked silly." A friend assisted him to the pier where he rested about five minutes. Sometime later, a man who was apparently the father of the young man involved, came up and apologized for the conduct of his son.

Earlier, Maganello had observed the young men doing backflips but stated... "I did not see any danger to myself or my children or the people around the slide while I was there with the children. The last time I saw the men they were far enough away that I was not concerned about them."

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The lifeguards on duty were 16 to 17 years of age and, according to the testimony, at times appeared to be paying more attention to the young female patrons than to the swimmers. These lifeguards did nothing to stop or control what Maganello described as "horseplay" and did not come to Maganello's aid at any time after he was injured.

Maganello's medical expert testified that Maganello "had sustained a five percent permanent neck disability which could have been caused by the blow received at Permastone Lake." After Maganello had presented his evidence, the trial court dismissed Maganello's claim against Permastone. Maganello appealed.

The appeals court affirmed the trial court's action. In the opinion of the appeals court, "the activity did not become dangerous until Maganello and those engaged in doing backflips had moved close enough together for Maganello to be in striking range, and that the activity, after it had become dangerous to Maganello, did not exist long enough to put Permastone on notice." Maganello then appealed to the state supreme court.

The state supreme court defined the general legal duty imposed on the owner or proprietor of a "facility used for public amusement... to protect invitees against the acts, negligent or intentional, of third parties" as follows:

The owner is not an insurer of the safety of his patrons but he must exercise ordinary and reasonable care for their safety lest he be held liable for injury to a patron resulting from breach of his duty... In the place of amusement or exhibition, just as in the store, when the dangerous or condition or activity arises from the act of third persons, whether themselves invitees or not, the owner is not liable for injury resulting unless he knew of its existence or it had existed long enough for him to have discovered it by the exercise of due diligence and to have removed or warned against it.

The proprietor is liable for injuries resulting from the *horseplay or boisterousness* of others, regardless of whether such conduct is negligent or malicious, if he had sufficient notice to enable him to stop the activity. But in the absence of a showing of timely knowledge of the situation on his part, there is no liability... In the instant case, uncontroverted testimony established that the "horseplay" had continued unabated for at least 20 minutes before Maganello was injured.

The vigilance required of a proprietor in detecting potentially dangerous activity will vary with the circumstances... The vigilance required of the owner of the arena in discovering a peril to the invitee and the precautions which he must take to guard against injury therefrom will vary with the nature of the exhibition, the portion of the building involved, the probability of injury and the degree of injury reasonably foreseeable. The same considerations apply in determining the vigilance required of the owner of a recreational facility.

As described by the state supreme court, the specific and more demanding duty of care for operators of swimming facilities was as follows:

The duty imposed is greater with respect to a swimming facility where the water poses inherent dangers and the lifeguards are employed for the specific purpose of keeping a lookout over all patrons. At least as to paying invitees, swimming pool operators must exercise ordinary care to provide a sufficient number of competent attendants to supervise bathers and to rescue any of those who appear to be in danger. The supervision required is not merely for the purpose of warning those who are in imminent danger or rescuing those who have already been injured, but includes the duty to guard the swimming facility and surrounding areas for potentially dangerous activities. Preventive supervision at a pool or lake poses little additional burden on the proprietor and results in the avoidance of many unnecessary water related accidents.

While rough or boisterous play in water is not dangerous *per se* (i.e. in and of itself), hazardous consequences to other swimmers and bathers are clearly reasonably foreseeable when such activities are left unattended and unrestricted. If rough or boisterous play is to be permitted at all, it should be confined to a restricted area or, at a minimum, closely guarded... The law does not require the owner to take steps for the safety of his invitees such as will unreasonably impair the attractiveness of his establishment for its customary patrons. However, this does not alter the proprietor of a public establishment's duty to see that all permitted activities are conducted in a reasonably safe manner.

Applying these principles to the facts of the case, the state supreme court found "the activity here in question, backflips done from off another's shoulders, qualifies as a 'rough or boisterous' activity."

The nature of the activity was such that its participants could reasonably be expected to change direction and move to different locations posing danger to other swimmers and bathers... Presumably, many people were engaged in recreational activity in Permastone Lake on Labor Day; the "acre or two" lake was described as "moderately crowded." Without question, Permastone owed a duty to all its patrons, including Maganello, either to prohibit roughhousing or to closely supervise it.

As a result, the state supreme court concluded that the trial court had erred in dismissing Maganello's case without consideration by a jury. In the opinion of the court, "a jury question has been presented as to whether Maganello's injury was proximately caused by a breach of this duty" owed by Permastone to prohibit or supervise roughhousing in their swimming facility. The state supreme court, therefore, reversed judgment for Permastone and sent this case back to the trial court for resolution of Maganello's claim by a jury.

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