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While cool and refreshing, water sports pose a danger

Just before dawn on Sept. 25, 2016, a 32-foot boat crashed in the waters off Miami's South Beach, killing all three occupants. Jose Fernandez, a promising 24-year-old Cuban born pitcher for the Miami Marlins was one of the dead along with Emilio Macias and Eduardo Rivero. Toxicology reports revealed that all three had alcohol and cocaine in their systems.

Initially, it was unclear which of the occupants was operating the boat when it inexplicably plowed into the Government Cut north jetty off South Beach.

Earlier this year, the estates of Macias and Rivero filed wrongful-death actions against Fernandez's estate, alleging that Fernandez was "legally intoxicated" while "operating his vessel."

While these actions against Fernandez's estate were filed in Miami-Dade County, the fact pattern presents an interesting question regarding the applicable law in relation to water sport activities here in Illinois. With the first official day of summer only a week away, thousands of boats have returned to inland lakes in Illinois and the shores of our largest natural resource, Lake Michigan.

Illinois courts generally hold that injuries which occur on navigable waters while parties are involved in traditional maritime activities are governed by admiralty jurisdiction and federal maritime law applies. *Schade v. Clausius*, 2016 IL App (1st)143162, ¶ 25.

Navigable waters are those which are subject to the ebb and flow of the tide or may be used to transport interstate or foreign commerce. 33 C.F.R. Section 329.4. Traditional maritime activities include recreational boating activities. *Schade*, 2016 IL App (1st)143162, ¶ 20.

Schade is the most recent case on point, holding that, pursuant to maritime law, a boat operator owes passengers a duty of exercising reasonable care under the circumstances. 2016 IL App (1st)143162, ¶ 25. This includes the ordinary duty not to unreasonably create or cause a hazardous condition that in turn injures a passenger. Id.

The *Schade* court found that maritime law applies when injury occurred while the boat was anchored in Lake Michigan. Id. at ¶ 20. The court held that the boat owner was not liable for injuries sustained when the plaintiff fell on a swim platform because it was an open and obvious danger. Id. at ¶ 28.

But, what of the boats that tool around outside navigable waters? In that case, Illinois law governs. In *Wilson v. Bell Fuels Inc.*, the plaintiff was injured when he fell from the deck of a fiberglass, twin engine 32-foot Carver boat while it was docking. 214 Ill.App.3d 868, 870 (1st Dist. 1991). The court applied Illinois common law negligence principles and determined that the dangers of standing on a boat at any time, especially when the boat is docking, were open and obvious, thus not imposing any duty upon the owner or operator to warn of the danger. Id. at 877.

Back on land, liability law regarding water-related incidents similarly relies upon general tort principles. Illinois law has long held that persons who own, occupy or control land are not required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious. *Jackson v. TLC Associates Inc.*, 185 Ill.2d 418, 424-25 (1998); *Bucheleres v. Chicago Park District*, 171 Ill.2d 435 (1996); *Mount Zion State Bank & Trust v. Consolidated Communications Inc.*, 169 Ill.2d 110, 118 (1995).

Because individuals are expected to appreciate and avoid obvious risks, as the open and obvious nature of a condition itself gives caution, defendants have no duty to guard against these dangers. *Bucheleres*, 171 Ill.2d at 118.

In Illinois, bodies of water are considered obvious dangers. *Jackson*, 185 Ill.2d at 424-25. As such, there is generally no common law duty owed to an adult or minor plaintiff who dives into a body of water. *Hagy v. McHenry County Conservation District,* 190 Ill.App.3d 833, 844 (2nd Dist. 1996); *Sumner v. Hebenstreit*, 167 Ill.App.3d 881, 886 (5th Dist. 1988); *Dowen v. Hall*, 191 Ill.App.3d 903, 907 (1st Dist. 1989).

SPORTS TORTS

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However, this general rule certainly has its exceptions. In *Jackson*, the court found that the open and obvious doctrine was not dispositive of a plaintiff's claims where a submerged pipe was alleged to have been to blame for the plaintiff's injuries. 185 Ill.2d 418, 426 (1998).

Because the location of the pipe was variable and could not be detected by swimmers, individuals could not be expected to guard themselves from the danger. Id. This hidden hazard had nothing to do with the inherent characteristics of bodies of water, but stemmed solely from the defendant's conduct. Id.

Because there was no reason for plaintiff's decedent, or anyone else, to reasonably anticipate the presence of the underwater obstruction in a lake designed and intended solely for recreational swimming the defendant owed a duty to protect and/or warn. Id.

An Illinois court has even considered liability as it pertains to rope swings, finding no duty to protect against an open and obvious danger presented by swinging off a rope and into a lake. *Bier v. Leanna Lakeside Property Association*, 305 Ill.App.3d 45, 53 (2nd Dist. 1999).

Similarly, Illinois courts find that bodies of water present open and obvious dangers to children and adults and, therefore, swimming pool owners have no duty to protect or warn. *Henson v. Ziegler*, 279 Ill.App.3d 1025, 1026-27 (3rd Dist. 1996); *Mount Zion State Bank & Trust v. Consolidated Communications Inc.*, 169 Ill.2d 110 (1995); *Osborne v. Claydon*, 266 Ill.App.3d 434, 441 (4th Dist. 1994). *Englund v. Englund*, 246 Ill.App.3d 468 (2nd Dist. 1993).

Our Supreme Court has likewise considered this issue as it pertains to Lake Michigan in *Bucheleres v. Chicago Park District*, finding no duty owed to a plaintiff who dove off a seawall and was rendered quadriplegic. 171 Ill.2d 435, 458 (1996). The court reasoned that because the water levels of Lake Michigan fluctuate, and currents change the composition of the bottom of the lake, the changing conditions present open and obvious risks to lakefront patrons who dive from the seawalls into the lake. Id. at 836.

Of course, objects surrounding those bodies of water may have hidden dangers. In *T.T. by B.T. v. Kim*, the court held that a pool tarp on a swimming pool was not an open and obvious risk that a child would be expected to recognize and appreciate. 278 Ill.App.3d 11 (2nd Dist. 1996).

A court may also find liability where the danger of the pool is not open and obvious because the pool creates an "optical illusion" of depth. *Duffy v. Togher*, 382 Ill.App.3d 1, 11 (1st Dist. 2008).

An Illinois court also recognized that while a swimming pool is an open and obvious condition, a duty to provide water of sufficient depth arises where a manmade swimming pool has a diving board. *Pleasant v. Blue Mound Swim Club*, 128 Ill.App.2d 277, 286-87 (4th Dist. 1970).

The presence of a diving board was an invitation to use the board, which implied that it may be safely used in its ordinary manner. Id. at 286-87. Water that was too shallow for the use of the built-in diving board was not a known risk and, therefore, it was not an open and obvious condition. Id.

In Illinois, boundless opportunities exist for people to enjoy sports in or around the water. Of course, the possibility of traumatic injury and even death is a harsh reality of water sports. All should use extreme caution near the water this summer — when it comes to water sport safety, we're all in the same boat.