Pools, Parks and Other Recreational Programs:
Your Duty to Evaluate Hazards to Participants Just Got Much Broader

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Any time a municipality is sued for negligence, the first line of defense is the immunity provided for in Section 893.80 of the Wisconsin Statutes. Section 893.80 provides that municipalities are immune from liability, with some exceptions, whenever it is alleged that the liability stems from the negligent performance of discretionary tasks by the municipality's employees and agents. Generally speaking, this immunity has been attributed to a multitude of situations—from slip and falls in government buildings, to the negligent provision of advice regarding retirement benefits.

One exception, the "ministerial duty" exception, applies when a law, policy, or regulation imposes, prescribes, and defines the time, mode, and occasion of the performance of an act with such certainty that nothing remains for judgment or discretion. In such a case immunity is lost. Another exception is the "known danger" exception. The known danger exception is a subset of ministerial duty exception. The known danger exception applies when the duty to act in a certain manner is not directed by a law, policy, or regulation, but rather the duty is created by circumstances where the nature of the danger is compelling and known to the public officer and is of such force that the public officer has no discretion to act.

Exceptions to Governmental Immunity

Ministerial Duty Exception

Applies when a law, policy, or regulation imposes, prescribes, and defines the time, mode, and occasion of the performance of an act with such certainty that nothing remains for judgment or discretion.

Known Danger Exception

Applies when the duty to act in a certain manner is not directed by a law, policy, or regulation, but rather the duty is created by circumstances where the nature of the danger is compelling and known to the public officer and is of such force that the public officer has no discretion to act.

Recently, the Wisconsin Supreme Court issued a decision that appears to have drastically expanded both the ministerial duty and known danger exceptions. In Engelhardt v. City of New Berlin, 2019 WI 2 (Jan. 4, 2019), the Wisconsin Supreme Court held that the City of New Berlin was not immune from being sued over the death of an eight-year-old girl when she drowned at summer camp. The Court invoked the known danger and the ministerial duty exceptions in holding that the City was not entitled to immunity.

The girl was taken to an aquatic center on a summer camp field trip run by the City of New Berlin. The girl's mother informed the camp coordinator prior to the trip that her daughter could not swim. The coordinator told her mother that staff would evaluate the girl's swimming ability at the pool and that she could be limited to using the splash pad area. Unfortunately, this did not happen. In the commotion of 77 campers arriving at the center, the girl apparently went unobserved and was then discovered by lifeguards in the pool. The girl died as a result of the incident.

The girl's parents sued the City. The City moved for summary judgment arguing that it was immune from suit pursuant to Wis. Stat. § 893.80(4). This issue eventually reached the Supreme Court.

The Court analyzed the circumstances of the girl's death in light of other Wisconsin cases that applied the known danger exception. The Court explained that the danger associated with bringing a young

child who cannot swim to a busy aquatic center along with 76 other children was apparent. The Court stated that serious injury or death can occur suddenly in such a circumstance and that some precautions must be taken to lessen the risks. Ultimately, the Court held that the situation created a ministerial duty to test the girl's swimming ability before she entered the pool, and accordingly the known danger exception barred immunity.

Prior to this case, the known danger exception had been rarely applied. Specifically, it was reserved for situations that were an "accident waiting to happen." In these scenarios, the courts have found that the public officer did not have the discretion to do nothing.

The Englehardt case does not fall neatly into the confines of previous known danger cases. Never before has a pool been found to be an inherently dangerous condition. Likewise, there was no evidence that New Berlin had experienced close calls involving other children prior at this pool. Rather, the Court inferred a duty to act out of the circumstances of the case, concluding that knowledge of a particular child's inability to swim means that that the City should not have permitted the child in the pool until her swimming ability was evaluated. Inherent in the Court's decision was that it expected the City to have the girl constantly monitored while she was at the aquatic center, or at least until she was tested and sent to the splash pad area.

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The take away from this case is that municipalities and school districts should greatly consider revisiting their pool, park, and recreation policies to ensure that procedures are in place to make sure that children are being screened prior to entering a pool. More specifically, pool facilities should be regulated to make sure that children cannot access the pool unsupervised. Additionally, some measures should be taken to assess children's swimming ability prior to being given access to the pool. Finally, if a parent informs the municipality that a child cannot swim, procedures need to be put in place to prevent that child from entering the pool area unsupervised. Whether that requires a designated staff member to provide one-on-one supervision or restricting the child to an area away from the pool or barring students who cannot swim or pass a swim test from using the facilities, something needs to be done.

It is also significant that there could be other situations where similar hazards might arise. For example, activities within parks that are adjacent to a lake or river could present similar concerns. While municipalities and school districts are still afforded the protection of government immunity, this recent decision should be a warning that courts may be applying a broader scope to the known danger exception.

At a minimum, any municipality that operates pools or summer camps that would provide children with access to pools or bodies of water should review its pool or park and recreation policies. Please contact WCMIC or CIC for further information or assistance.