

# Law Order

A book chronicling litigation and children's injuries shows that the types of accidents change with age

*Risk management has become a part of our vocabulary. Unfortunately, so has litigation. But we seldom give thought to what really occurs in a court of law. Just who is sued and what are the facts? The author contributed a chapter to a book on children and water injuries, targeting lawyers working with youths. The following article reviews "Children and Water Injuries," Chapter 10 of the book Children and Injuries (Lawyers and Judges Publishing Co., 2001).*

**by Annie Clement, Ph.D., J.D.**  
Special to Aquatics International

**D**rowning is the No. 4 cause of deaths from unintentional injuries in the United States, according to the National Safety Council. The numbers are even worse for children: Drowning is the second highest cause of death for youngsters aged 1 to 14, exceeded only by motor vehicle accidents. In "Children and Water Injuries," we examine the status of litigation in aquatic incidents among children — specifically, court of appeals decisions from 1990 to 1999 that reported the victim's age or status as a minor. (A court of appeals decision is the second formal step in a lawsuit. The first is the trial.)

These court of appeals decisions are the most advanced legal information the public can examine in our field. It is true that the ultimate level of court analysis is the U.S. Supreme Court. However, few of the tort or physical injury cases in aquatics ever go

beyond the state court of appeals. Court of appeals decisions also tend to represent the longest period of time parties are in litigation. Therefore, professionals should profit from understanding the facts, with reference to aquatics, within these decisions.

There were 129 cases including 132 persons — 89 boys and 43 girls. The majority of incidents occurred in pools.

Some cases referred to supervision only as an adult watching children, with no effort to ascertain the adult's capacity to rescue and/or provide standard emergency care. Aquatic incidents changed radically by age. Young children, sometimes not carefully attended, wandered into water and drowned, often at their homes or neighbors' pools. Older children experienced far fewer drownings and far more headfirst injuries, resulting in quadriplegia — often at waterfront or municipal agencies. The number of girls in relation to boys involved in incidents decreased consistently and measurably after age 5.

While the majority of cases did not involve aquatics professionals, more detail is provided here for such incidents.

**Newborns to 2-Year-Olds:** Of the 20 children in this group, 14 died, two had near-death experiences and four had brain damage. Most incidents occurred in pools; seven were in the child's home pool and five were in a neighbor's pool. One child slid into a creek, another fell into an irrigation canal and two fell over the edge of a lagoon while chasing a flock of geese. Inattention, or failure to supervise, was one of the issues

in these cases. An example of inattention was the father who failed to notice that one of the five children in his care entered the pool he was cleaning.

Unique to these decisions was the attempt to convict the mother of a child who wandered away from home and drowned in a pond. The charges: involuntary manslaughter and child endangerment. This child was believed to have been unattended for more than 45 minutes. On appeal, the conviction for child endangerment was affirmed; the court reversed the judgment for involuntary manslaughter.

When parents were held liable for failure to supervise, they pleaded "intrafamily immunity" with success. Under intrafamily immunity, the courts ruled that parents must intentionally ignore the child before a judgment against the parents is made. In most cases, the court appeared to believe that the parents were attempting to supervise their children.

**3-Year-Olds:** A 3-year-old girl was the youngest drowning case that occurred on a beach supervised by lifeguards. When she was reported missing, the guard asked the parents to search the beach and the beach house. Twenty minutes later, the third time the lifeguard was asked for help, a human chain was formed and the girl was located. She died a day later. The lifeguards and owner of the pool succeeded in court on the Recreational Use Statute of Wisconsin.

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Such statutes grant landowners immunity from liability for injuries sustained in the recreational use of their property. These statutes and their interpretation are state decisions and differ by state.

**4-Year-Olds:** In this group, eight children drowned, one had brain damage and two sustained other severe injuries. Among the pool incidents was the youngest lifeguard-protected pool death. In this public pool, eight guards were protecting 1,200 to 1,500 swimmers, a ratio of one lifeguard for at least 150 swimmers. New York required one guard for every 75 swimmers — still, the court found for the city, stating that it could not find a direct relationship between the professional's failure to adhere to the statutory law and the cause of the child's death.

In another situation, a child entered a pool, passing a "no trespassing" sign that the child was unable to read. The child's family was unsuccessful at trial.

**5-Year-Olds:** One 5-year-old drowned in a lake and another in a pond, while three drowned in pools. One boy, at the completion of his swim class, asked his instructor if he could jump from the high board. His first jump was good. On the second jump, he turned to talk to his sister, lost his balance and fell to the cement floor beneath the board. The owners of the pool were successful in court on political subdivision tort immunity.

**6-Year-Olds:** Seven children died, two were brain-damaged and two suffered other severe injuries. Among the nine pool incidents, three were municipal, three were residential (such as an apartment complex) and one each occurred at a house, mobile home and hotel. One youth experienced brain damage in his coach's home pool while attending a party for his athletic team. His parents were unsuccessful in their lawsuit against the not-for-profit corporation that sponsored the event. They were not able to prove that the sponsor owed the boy a duty to protect him from the danger associated with the party.

**7-Year-Olds:** Drownings were in a municipal pool, a pond, a pool made to look like a beach and a lake. The lake incident involved the youngest drowning in which currents and drop-offs were responsible. In this case, an adult attempted to rescue the girl. Both drowned. The complaint for negligence and civil rights was dismissed in favor of the defendant.



Mark Edelman

Boys will be boys, which is why boys are more likely to get injured than girls.

Another youth drowned in a municipal pool after entering through a hole dug under a chain link fence. Here, the trial and appellate courts found for the city.

**8-Year-Olds:** This group was involved in fewer incidents than any other. Three boys drowned in swimming pools — one each in a municipal, home and apartment pool. Although evidence provided to the court suggested that guards supervising the boy who drowned in the municipal pool were inattentive, the city was successful in court under the Wisconsin Recreational Use Statute, mentioned previously.

**9-Year-Olds:** Six drowned, one had massive dental injuries, another fell into a drainage ditch while fishing and two sustained brain damage, one as a result of an incident in a wave pool and another while diving from racing blocks into 3½ feet of water. The latter had just yelled to her parents to watch her make the headfirst entry. Her parents were successful in their lawsuit against the city of Philadelphia. In the wave-pool incident, the boy remained trapped by a 75-horsepower blower on the bottom of the pool. His father received a wrongful death judgment against the city for

\$75,000. The Ohio Supreme Court affirmed the trial court's decision.

**10-Year-Olds:** Five of these cases were headfirst entries. One was a drowning; the other four resulted in head and spine injuries, all severe. One child failed to surface after falling from a diving board; another fell from a diving tower; a third hit her head where the pool sloped up, following a dive from a 3-meter board; and a fourth dove from a rock structure into the ocean. Other children drowned in a boat, a canal and a river. In the case of the boy who failed to surface after falling from the diving board, a swimmer reported the incident to one of the six lifeguards present at the pool. The guard said he had not seen the incident. A patron rescued the boy. The court found for the Zion (Ill.) Park District on the basis of local governmental tort immunity.

**11-Year-Olds:** Six drowned, one experienced severe head injuries as a result of moving headfirst into the water from a pool slide and another sustained serious injuries when her buttock was caught in a pool drain. Two of the three girls were swimming under supervision. However, the persons supervising were not able to rescue the victims or provide CPR. An interesting observation in this group was the number of incidents related to currents and waves. A nonswimmer playing in the water was caught in a current; a large wave took a group of children out into the water in another situation; and two youths were pulled underwater by currents near a dam. The courts found for the defendants in all three cases; the last two were on immunity.

**12-Year-Olds:** Two of the injured were girls moving headfirst into the water, one from a high board and another from a platform at a municipal beach. The high-board girl hit the concrete floor beneath the board; the girl moving from the platform broke her neck hitting the bottom of the lake. Defendants in the platform incident succeeded on an Ohio Immunity Statute. In a near-drowning incident, a patron noticed a child on the bottom of a large municipal pool on the first day of the swim season. The city of Cleveland lost its case when it was revealed that the senior guards had left the pool, and that the guards on duty were not able to make a quick 911 call.

**13-Year-Olds:** The youngest victim of horseplay occurred when a boy, a weak swimmer, was forced by an acquaintance to jump from the diving board during a party.

## Water Incidents by Age

Age	Cases	Boys	Girls	Deaths	Headfirst
2	18/20*	12	8	14	0
3	6	3	3	6	0
4	11	9	2	8	0
5	7/8*	5	3	5	1
6	11	8	3	7	0
7	4	3	1	4	0
8	3	3	0	3	0
9	10	5	5	6	1
10	9	7	2	5	5
11	8	5	3	6	1
12	9	6	3	0	2
13	11	6	5	0	4
14	11	8	3	3	8
15	11	9	2	3	8
<b>Totals</b>	<b>129</b>	<b>89</b>	<b>43</b>	<b>70</b>	<b>30</b>

\*Two or more swimmers in a single case  
(Children and Injuries, Lawyers and Judges Publishing Co., 2001).

He jumped, but failed to surface; he died a day later. A headfirst incident occurred as part of a junior lifeguard freestyle swim competition. While running down the beach, the boy stepped on something, lost his balance, fell on his face and was rendered a quadriplegic. Judgment was non-suit, or the inability to prove the case. At issue was whether the swimmer took a racing dive or tripped.

**14-Year-Olds:** Eight of the incidents were dives or jumps. All resulted in severe head and neck injuries. The open-water dives included the following: one was into shallow water as a girl moved toward her watercraft; one was part of a rescue when a boy took a shallow dive and hit his head; and another involved head contact with a submerged dirt

embankment covering a pipeline. One of the dives was from a trampoline into an aboveground pool. The boy's family sued the manufacturers of the pool, pool liner and trampoline. The pool liner and trampoline manufacturers succeeded; further proceedings were recommended for the pool manufacturer. Results were not available.

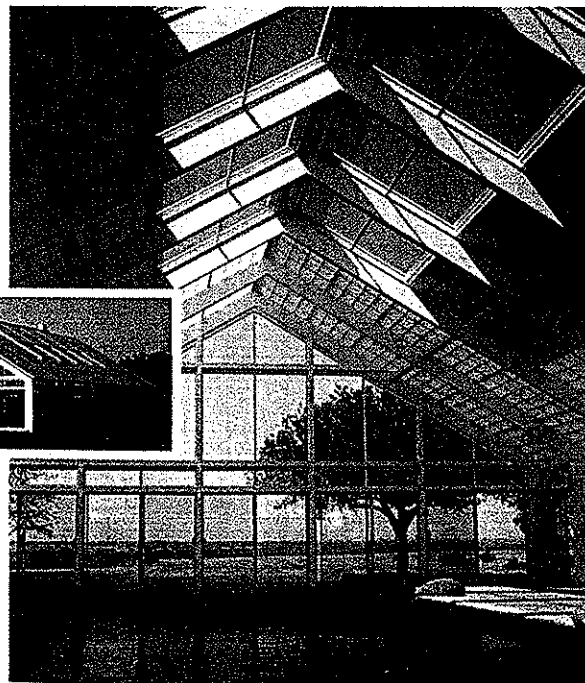
**15-Year-Olds:** Eight children sustained severe head and neck injuries. Two boys were injured while executing racing starts from blocks into shallow water, and others dove into aboveground pools. An example of shallow-water lake injuries was a boy who walked out into shallow water and dove in, hitting his head and becoming a quadriplegic. The defendant won at trial, but the court of appeals reversed the ruling, ordering a new trial. **AI**

Annie Clement, a professor at Barry University in Miami Shores, Fla., is author of Law in Sport and Physical Activity and Legal Responsibility in Aquatics. A past president of the National Association for Sport and Physical Education, she is the author of three books, 11 book chapters and more than 80 articles.

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