

**A lifeguard, by training and experience, is expected to be prepared at a moment's notice to rush to the rescue of those in danger of drowning. A lifeguard's duty is not an obligation which can be discharged by inattention to the activity in the pool and a lack of the awareness of the serious nature of the responsibility imposed upon the position.<sup>1</sup>**

Drownings can happen quickly and quietly anywhere there is water. Everyday in the USA, on average, 10 people die from unintentional drowning.<sup>2</sup> Most drownings occur in residential pools. Drownings in pools with lifeguards are uncommon.<sup>3</sup>

One nationwide study reports a total of 140 deaths at pools with lifeguards from 2000 - 2008.<sup>4</sup> That study also reports that non-lifeguards first identified the drowning victim twice as often as did the lifeguards. The New York State Health Department, which oversees more than 7400 public swimming pools and more than 1300 public bathing beaches staffed with lifeguards, reports 171 drownings from 1987 - 2010.<sup>5</sup> The Nassau County Health Department regulates 636 pool and other facilities with lifeguards.<sup>6</sup> The last reported drowning was in July 2007 at a calm water beach on the North Shore.<sup>7</sup>

In Nassau County, County lifeguard certification requires lifeguards to pass tests in swimming, water safety, and first aid every three years.<sup>8</sup> In addition to regular testing,

training and drills, local pools may require lifeguards to certify annually in the use of an AED and in CPR. There are presently 4,734 certified lifeguards in Nassau County. 1400 of the lifeguards, almost 30%, are under the age of 21.<sup>9</sup>

Regardless of a lifeguard's age, lawsuits on behalf of drowning victims based on claims of lifeguard negligence are not uncommon. In such cases, the law recognizes that tragic drownings occur despite the efforts of trained and competent lifeguards, and in the absence of any lifeguard wrongdoing. A lifeguard is not an absolute insurer of the safety of swimmers.<sup>10</sup> To impose liability, a lifeguard must be proven to be negligent. Lifeguards are trained to monitor the pool and its surroundings, to supervise patrons, to inform and educate patrons about potential for injury, and to enforce pool rules and regulations. Lifeguard liability, governed by ordinary principles of negligence, requires a breach of duty. The duties

of a lifeguard, as variously described by the courts,<sup>11</sup>

include the duty:

- . to exercise due care in his/her supervision of the pool;
- . to exercise due care to prevent accidents;
- . to maintain order in the pool for patron's safety; and
- . to promptly, efficiently and competently rescue bathers known to be in danger.

It is beyond dispute that a lifeguard who is inattentive, who delays in the performance of a duty, or

otherwise fails to perform a duty may be deemed negligent in a resulting drowning. As the cases demonstrate, general legal principles of negligence will apply in determining whether a lifeguard was negligent. Whether or not a meritorious claim of lifeguard negligence exists will be based upon the unique facts and circumstances of each case, and the nature and extent of the proof proffered by the parties.

Simply, because a drowning has occurred in the presence of a lifeguard is not enough to withstand a motion for summary judgement. For example, in *Curcio vs. City of New York*,<sup>12</sup> the drowning victim was a twenty two (22) year old college student and a member of a swimming team. The court concluded that City's obligation was to provide an adequate degree of supervision; which it did by furnishing an experienced and competent lifeguard; who was first to see the drowning victim in water; and gave instant attention to the victim's removal from the pool and to efforts at resuscitation.

In *Ray v. State of New York*,<sup>13</sup> the Court reasoned that the State had a duty to maintain parks in a reasonably safe condition, including the provision of an adequate degree of general supervision by lifeguards. Even though the drowning victim was first found by a non-lifeguard, the court found that

no triable issues of fact existed regarding lack of supervision, and a five (5) year old drowning victim's case was dismissed where proof was proffered by the State that it employed properly trained and certified lifeguards and that the lifeguard acted pursuant to applicable State protocol and American Red Cross guidelines. And in *Bumpher v. County of Westchester*,<sup>14</sup> the court affirmed the granting of summary judgement to defendant where defendant demonstrated *prima facie* entitlement to judgment as a matter of law by proffering evidence that it discharged the duty of general supervision owed by providing an experienced and competent lifeguard.

Not all such cases are so readily dismissed. In *Williams v. City of New York*,<sup>15</sup> a jury's determination of lifeguard negligence and finding that the drowning at issue was 25% the City's fault was affirmed. The plaintiff suffered an epileptic seizure in pool; was rescued with CPR performed by lifeguard; and died 11 days later. The court reasoned that City lifeguards had a duty to exercise ordinary care in providing adequate supervision at the pool, that a person suffering an epileptic seizure would have been struggling on the surface of the water before drowning, and it was not against the weight of

the evidence for jury to conclude that the failure of the lifeguard to notice the victim struggling and respond sooner was negligent. In *Pierce v. Village of Ravena*,<sup>16</sup> in opposition to defendant's motion to dismiss, proof was adduced by plaintiff sufficient to establish negligence. The lifeguard had been called to the precise location where drowning victim went down, but instead the lifeguard started a futile search elsewhere around pool. The plaintiff argued that the prompt utilization of the time available could have resulted in a saved life as the decedent was still alive when taken from water. In denying defendant's motion to dismiss, the Court reasoned that a lifeguard was employed in the interest of safety, and one would expect a lifeguard to promptly and competently undertake the rescue of a bather who had gone down in the water.

Issues of lifeguard liability often arise in context of diving injuries. New York Courts have consistently held that a plaintiff with actual knowledge that he/she is diving into shallow water has engaged in reckless conduct constituting the sole legal cause of any ensuing injuries, thus absolving any defendant of negligence. See, *Tkeshelashvili v. State of New York*,<sup>17</sup> where the defendant was granted summary judgment when a

swimmer was injured diving off a dam into shallow water at a lake in a state park. In *Heard v. City of New York*,<sup>18</sup> the plaintiff was seriously injured when he dove off a jetty into shallow water. The lifeguard had first ordered the plaintiff to leave the jetty, but plaintiff resisted the order. The lifeguard then acquiesced, and let plaintiff make one more dive. Plaintiff's case was dismissed, as despite the lifeguard's involvement, the plaintiff diver assumed obvious shallow water risk involved. Similarly, in *Cimino v. Town Hempstead*,<sup>19</sup> the plaintiff was injured when he was knocked down by a wave while body surfing in waves 8 to 10 feet high. The Court ruled that the Town's lifeguards had no legal duty to warn beachgoers of readily observable conditions. In *Buckley v. State of New York*,<sup>20</sup> defendant was denied summary judgement where the lifeguard permitted recreational swimmers to dive off starting blocks into shallow water at the pool in derogation of the pool's policies; and where proof was also proffered that the training, supervision and oversight of the lifeguards at the pool was inadequate.

Issues of lifeguard liability can even arise in an out of water context. For example, in *McAuliffe v. Town of New*

*Windsor*,<sup>21</sup> the Court affirmed a summary judgment dismissal of a plaintiff's action for injuries sustained from a lightning strike. The Court reasoned that the lifeguard's duty had been discharged, when upon the commencement of rain and thunder, the lifeguard had directed all swimmers to get out of water, leave the beach area and to take cover. The degree of general supervision required of a lifeguard did not include the obligation to make certain that the patron thereafter took proper shelter from lightning.

Lifeguards can be plaintiffs, too. A lifeguard has been permitted to sue for personal injuries arising out of a slip and fall as she was descending from a lifeguard stand on newly installed tile coping around the pool. *Mayerman v. Perkins Eastman Architects, P.C.*<sup>22</sup> Another lifeguard was permitted to sue for injuries sustained in a CPR recertification course when the lifeguard was injured when used by the instructor to demonstrate the head tilt chin lift technique. *Schoenlank v. YMCA of Yonkers.*<sup>23</sup>

Much is expected of and should be expected from a trained lifeguard employed in the interests of patron safety. Lifeguards must provide diligent supervision, but parents and

others at pool-side must be diligent, too; especially when children are involved. With the life of a potential drowning victim at stake, being a lifeguard is not just another summer job.

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  14. *Bumpher v. County of Westchester*, 300 A.D. 2d 525, 752 N.Y.S. 2d 559 (2nd Dept 2002)
  
  15. *Williams v City of New York*, 71 A.D.3d 1135, 898 N.Y.S.2d 208 (2d Dept 2010)
  
  17. *Pierce v. Village of Ravena*, 174 Misc. 774, 222 N.Y.S.2d 32

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(Sup. Ct. Albany Co. 1940)

18. *Tkeshelashvili v. State of New York*, 18 N.Y.3d 199, 960 N.E.3d 414, 936 N.Y.S.2d 645 (2011)

19. *Heard v. City of New York*, 82 N.Y. 2d 66, 623 N.E.2d 541, 603 N.Y.S. 2d 414 (1993)

20. *Cimino v. Town of Hemsptead*, 110 A.D.2d 805, 488 N.Y.S.2d 68 (2<sup>nd</sup> Dept 1985)

21. *Buckley v. State of New York*, 34 Misc.3d 879, 938 N.Y.S.2d 734 (Court of Claims 2011)

22. *McAuliffe v. Town Of New Windsor*, 178 A.D.2d 908, 577 N.Y.S.2d 942 (3<sup>rd</sup> Dept 1990)

23. *Mayerman v. Perkins Eastman Architects, P.C.*, 34 Misc.3d 1227(a), 950 N.Y.S.2d 609 (Sup. Ct. New York Co. 2012)

24. *Schoenlank v. Yonkers YMCA*, 47 A.D. 3D 927, 845 N.Y.S.2d 69 (2<sup>nd</sup> Dept 2007)