

Waterfront Risk



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Waterfront cottage owners are now legally obligated to consider whether or not their actions might have increased the likelihood of serious injuries on their property.

When assessing liability risks for waterfront properties, underwriters must consider two important questions. First, has the insured taken any actions that would heighten the prospect of serious injuries occurring on the insured's property? If so, what can be done to minimize such risks?

These issues came up in the 2009 New Brunswick Court of Appeal decision in *Brown et al. v. Keenan et al.* The insureds, Rex and Carolyn Brown, had constructed a dock with attributes leading one to believe that the depth of the water was much greater than it actually was. They had added to this perception by mooring their large motorboat between the arms of the dock. Simple and inexpensive steps could have been taken to negate this heightened risk. *The Keenan v. Brown* decision demonstrates that cottage owners and their insurers should ask these questions and not simply rely on local custom. This article will focus on the standard of care applicable to waterfront property owners NBCA 81.

BACKGROUND

Litigation in *Brown* arose as a result of a diving accident that occurred in the early morning hours of Aug. 6, 2001. The plaintiff, Courtney Keenan, after spending an evening at a party with a group of friends, went back to the Browns' lakefront cottage property at the invitation of one of the defendants' adult children. Keenan was in his early 20s and had been consuming alcohol that night.

Two women from the group went into the water to cool off. They were crouched down in the water next to the defendants' dock. Because they were crouched down, the water level was up to their necks.

The defendants' dock was 32 feet long leading from the cottage/shore line. The Browns had moored an 18-foot motorboat between the two arms of the dock. Also, two ladders led into the water from the dock.

Keenan ran down the length of the dock and dove head first into the water. He suffered injuries that left him a tetraplegic. The plaintiff brought an action in negligence against the defendant property owners.

SUMMARY OF DECISIONS

Evidence at trial revealed the water level at the end of the dock was between two and two-and-one-half feet. The trial judge found the "visual

cues” present on the night in question — including the women crouched in the water, the presence of the large boat, the presence of the ladder and the length of the dock — led the plaintiff to believe that the water at the end of the dock was much deeper than it in fact was.

There was no warning that the depth of the water was insufficient for diving.

The trial court determined that Keenan and the Browns were both liable for Keenan’s injuries and apportioned liability equally between them. The Browns appealed and alleged a number of errors on the part of the trial judge. They submitted that there was no duty of care, the trial judge incorrectly selected and applied the standard of care, erred in finding causation between the Browns’ actions and the plaintiff’s injuries and finally challenged the court’s apportionment of liability. The Court of Appeal dismissed the appeal.

STANDARD OF CARE FOR WATERFRONT PROPERTY OWNERS

The trial court and the Court of Appeal in *Keenan* applied the common law standard of care for negligence in assessing liability against the Browns. The Supreme Court of Canada established the test in *Ryan v. Victoria (City) et al.* in 1999. The test requires that a person exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. This test supplanted the common law of occupiers’ liability, which had previously been the law in New Brunswick.¹

Both the trial court and the Court of Appeal found the Browns had not met the standard of care expected of them. In coming to this conclusion, the trial judge stated as follows:

“It is foreseeable that the shallowness of the lake could lead to injuries,” the trial judge wrote. “The evidence reveals that the Browns realized that the shallow water presented a hazard. Mr. Brown said they built the float so that people could swim ‘in a safe atmosphere.’ Mrs. Brown said they advised strangers

that the water was shallow. Jennifer Keilty said she warned her children not to jump in the water because ‘it’s not safe.’ Therefore I find that not only was the hazard foreseeable, it was actually foreseen.

“Dr. Wilson listed a number of ‘cues’ which led Keenan to conclude that the water was deep...[T]here was the 32-foot dock leading from the bottom of the stairs straight out into the lake.

Suffice it to say that cottage dwellers will now have to re-evaluate the precautions to be taken to avoid a foreseeable risk of harm of the kind that has materialized in *Brown et al. v. Keenan et al.*

For some, including Keenan, this was both an invitation and a means to dive into the lake. It not only facilitated his dive, it allowed him to run a considerable distance before executing it.

“In addition, there were two ladders attached to the dock and an 18-foot boat was located between the two arms of the H. These reinforced Keenan’s perception that the water was deep enough for him to dive safely.

“These structures were all created by the Browns. If they had not been there, Mr. Keenan would have had to wade into the lake. The intrinsic hazard created by the shallow water was increased by the presence of the dock.”

The court went on to find that having built the dock, the Browns could have taken steps to prevent guests from diving — including installing a barrier at the end of the dock and posting signage warning of the shallow water. The trial decision is significant because it cautions property owners to consider the perceptions of those who are invited onto their properties. Although the Browns did not set out to misrepresent the depth of the water, their actions had

this unintended consequence.

On appeal, the Browns argued that they had met the standard of care. They submitted that a reasonable cottage owner should not be expected to post signage warning of shallow water or erect a barrier at the end of the dock because the threat of shallow water was obvious. They further argued that other property owners in the province did not take the steps the trial court required. The Court of Appeal recited the trial judge’s findings about the perception created by the presence of the dock and the motorboat and addressed the Browns’ arguments as follows:

“The second prong of the Browns’ second ground of appeal hinges on the validity of the argument that the trial judge erred in fixing the standard of care by reference to the erection of a warning sign or barrier at the end of the dock (to take reasonable measures to ensure that persons, such as guests, were aware of the inherent risk of harm should they decide to dive from the dock),” the Appeal Court wrote. “The Browns argued that there was no evidence that this standard is followed anywhere in the province. In effect, the Browns are arguing that they had acted no differently than any other cottage owner. In our view, this is not the case where the court should be drawn into a legal analysis of the role of ‘custom’ as a means of exonerating a defendant from civil liability. Suffice it to say that cottage dwellers along the shores of Skiff Lake will now have to re-evaluate the precautions to be taken to avoid a foreseeable risk of harm of the kind that materialized in the present case... (Emphasis added.)”

The Court of Appeal has provided clear guidance that should be observed both by property owners and their insurers. In order to meet the standard of care, property owners have to consider what risks are foreseeable and what can be done to address those risks. ≡

¹ See the Court’s discussion of the history of occupiers’ liability law in New Brunswick in *Reid v. Hatty* (2005), 279 N.B.R. (2d) 202 (C.A.)).