

# Law Bulletin

Law you need to know from OSU Extension's Farm Office

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## Ponds and Legal Liability: Keeping Your Head Above Water

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Do you have a pond on your property? If so, you probably worry about your liability if someone is harmed in the pond. Should you take precautions to prevent access to a pond? What should you do about trespassers? What if a child trespasses and drowns in a pond? Ohio law establishes the legal duties a landowner has to people in and around the pond, and provides protection from liability in certain situations. We explain these important laws in this bulletin.

### General rule for premises liability

Landowners can be liable for injuries to certain visitors on the premises who are harmed by a "dangerous condition" on the property if the landowner failed to warn the visitors or take steps to eliminate the danger. A dangerous condition is one that creates an unreasonable and unnecessary risk of harm that is not readily apparent to the visitor. Certain situations, although dangerous, are not considered dangerous conditions because they are ordinarily encountered or are "open and obvious" to a visitor. A landowner would not have a duty to protect a property visitor from those types of dangerous situations.

Is a pond a dangerous condition for which a landowner could be liable? Ohio courts have determined that a pond is *not* an inherently dangerous condition. Rather, a pond is an "open and obvious danger," and a person is expected to realize the risk of drowning or being harmed in a pond. Since a pond is

not considered a dangerous condition, Ohio courts have been generally unwilling to impose liability on landowners when people voluntarily use a pond.

### Exceptions to the general rule

There are a few instances when a pond can create a liability risk, however. In these situations, a landowner has a higher duty to ensure that the pond does not bring harm to a property visitor.

#### 1. Perilous conditions in and around the pond

An exception to the general rule that a pond is not a dangerous condition could apply if a landowner actively or negligently creates a perilous condition in or around the pond, such as a defective diving board, a leaky rowboat, or a hidden electrical transformer. In such a situation, the landowner might be liable *if* the landowner should have foreseen that a visitor to the property could come into contact with the condition and the landowner failed to warn the visitor or eliminate the danger. There are no instances in Ohio where a court has decided this type of claim against a pond owner, but the rule *could* be applied to a pond liability case under certain circumstances.

#### 2. Trespassing children

The "attractive nuisance doctrine" adopted by the Supreme Court of Ohio and later enacted into law by the Ohio Legislature places a duty upon landowners to protect a foreseeable child trespasser from "dangerous artificial conditions" on the property that attract the child, but for which the danger is unknown to the child. A landowner can be liable for the child's harm if the landowner failed to take steps to protect the child from the danger, even if the child was trespassing. The case raises the question of whether a manmade pond is a "dangerous artificial condition" for purposes

of liability for foreseeable child trespassers. Since the law's adoption in 2001, Ohio courts have not resolved the issue, but at least one court has suggested that evidence that a pond is artificially created could result in the landowner being subject to the attractive nuisance doctrine.

Courts in other states have determined, however, that perilous conditions in or around the pond do create artificial conditions that trigger the attractive nuisance doctrine. While a pond owner might not have a duty to try to protect a trespassing child from the pond itself, the landowner would have a duty to protect the child from the artificial perilous conditions, which could include:

- Very steep banks that cause slipping or prevent a child from climbing out;
- A deep hole in a seemingly shallow pond;
- A hidden siphon mechanism under water;
- A diving board.

A landowner who hosts these types of perils in or around a pond could be liable for harm to a trespassing child that is injured by such conditions.

### **Limiting legal liability risk for a pond**

#### *1. Locate and construct the pond with visitors in mind*

A landowner should take precautions when deciding where and how to construct a new pond, such as:

- Locate the pond as far as possible from neighbors, public streets, roads, and paths.
- Construct a manageable slope or bench that will not prevent a person from being able to climb out of the pond. State agencies recommend a 2:1 or 3:1 slope ratio to reduce potential pondweeds, but lengthening the slope ratio to 4:1 or 5:1 will result in more gentle slopes that pose less danger to people. Consult with contractors or the Soil and Water Conservation District to assess slope and bank options for the location's physiological and geological conditions.
- Remove rocks, tree stumps, or other obstacles around the shoreline before allowing the pond to fill with water.
- If possible or feasible, locate the pond near lighting or install lighting in the area.

#### *2. Routinely inspect the pond for dangerous conditions*

A sure way to limit liability for a pond is to address potentially dangerous conditions in or around the pond. Regularly inspect the pond area, seeking out and removing hidden or potentially dangerous conditions such as:

- Obstacles under the water or near the shore or bank;
- Poorly maintained structures such as diving boards, piers, or swings;
- Leaky or unstable boats, rafts, or other vessels;
- Traps or cages for wildlife.

#### *3. Restrict access to the pond*

Limit or deny access to the pond by fencing or other means, especially if children might be trespassing around the pond. Some owners prefer surrounding the pond with tall bushes rather than a fence, but take care not to obscure the pond so that it becomes a "hidden danger." Some townships and municipalities may require fencing around ponds. Check with the local zoning authority on local requirements.

#### *4. Post signs*

Warn visitors to keep them from coming into contact with a danger in or near the pond. For example, post signs to:

- Warn of deep water, steep banks, sudden drop-offs or underwater obstacles like stumps, pumps and fish attractors;
- Identify "no access" areas;
- Indicate the depth of the pond.

Be aware that young children may not be able to read or comprehend a sign. If there are children nearby, use both written and visual signs that span multiple reading comprehension levels.

#### *5. Install rescue devices*

Install a "pond rescue post" that contains lifesaving equipment and other aids that could help rescue a visitor, such as:

- Ladders, benches, or other devices to help a person climb out of the water;

- Nylon rope with a life buoy, long enough to reach the middle of the pond;
- A bamboo or other lightweight pole;
- A telephone, megaphone, siren, or emergency flashing light;
- Emergency telephone numbers.

#### 6. Educate neighbors and employees

Educate neighbors about the pond and its dangers, particularly parents with children. However, be wary of showing the pond to neighborhood children without parental involvement, because the children could view being shown the pond as an invitation to use the pond. Consider the following education measures:

- Advise neighbors and employees of the existence of the pond, all potential dangerous conditions in or around the pond and available rescue devices.
- Host a water safety or CPR class.
- Instruct neighbors and employees on proper use of life saving equipment.

#### 7. Utilize the Recreational User's Statute

If a pond is not located on a residential lot and the landowner allows people to use the non-residential land for recreational activities without charge, Ohio's Recreational User's Statute might shield the landowner from liability. The Recreational User's Statute provides a landowner with a defense that could result in immunity from liability if the recreational user is harmed while engaging in the recreational activity. To qualify for the law's protection, a landowner must:

- Grant the recreational user permission to use the property for recreational activities. Consider having a witness, written record or other way of verifying permission.
- Be sure not to accept any type of fee or benefit for allowing the person to use the property.

#### 8. Review insurance policies

A landowner should ensure that the property insurance provider is aware of a pond on the property. Review the insurance policy to understand circumstances under which insurance coverage applies or does not apply.

#### 9. Maintain detailed records

In a liability battle, a landowner will have to prove that the landowner took reasonable actions to eliminate dangerous conditions, to warn visitors about the pond and its dangers or to freely allow for recreational use of the pond. A landowner should keep detailed written, photographic, or video records of pond construction, pond inspections, maintenance measures, safety devices installed, verbal warnings provided, meetings or conversations with neighbors or other users, and permission to use a non-residential pond for recreational activities.

If a visitor does suffer harm, a landowner should create a record of the incident. Immediately document where and how the injury occurred, conditions in and around the scene of the injury and any conversations with the visitor, including warnings or instructions provided. Note all witnesses and take photographs or videotapes of the accident scene. Contact the property insurance provider right away for additional advice on information needed to defend a liability claim.

#### Ohio laws and helpful resources

Ohio Attractive Nuisance Doctrine and duties owed to trespassers, Ohio Revised Code § 2305.402.

Ohio Recreational User's Statute, Ohio Revised Code § 1533.18, and § 1533.181.

*Bennett v. Stanley*, 92 Ohio St. 3d 35 (2001).

eXtension, Farm Pond Safety, <http://articles.extension.org/pages/63139/farm-pond-safety>.

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