



Extension FactSheet

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Ponds and Legal Liability in Ohio

Agricultural
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Series

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Liability is often a big concern for those who have a pond on their property, giving rise to many questions. Does a pond create additional liability concerns? Should a landowner take precautions to prevent access to a pond? What if a child trespasses and drowns in a pond?

In Ohio, the answers to these questions depend generally upon whether the landowner met his legal “duty of care” to the person harmed by the pond. This fact sheet explains the factors affecting a landowner’s legal duty of care to pond visitors. It also discusses how a landowner can fulfill this legal duty and how to manage a pond to prevent or limit liability for harm to visitors.

The Landowner’s Duty of Care to Property Visitors

Ohio law places a legal duty upon landowners (or possessors of property who may be tenants) to prevent harm to property visitors. If a landowner fails to meet the legal duty of care, the landowner could be liable for resulting harm. But the landowner’s legal duty to property visitors varies, depending upon why a visitor is on the property. The first step in determining if a landowner has met his legal duty is to determine why a person is on the property.

Why Is the Person on the Pond Property?

Ohio law classifies visitors according to the visitor’s purpose for being on the property, and assigns the landowner a different duty of care for different types of visitors. A landowner has the highest duty of care to someone who has been invited onto the property, and the lowest duty of care to an uninvited trespasser. The duty of care focuses on the landowner’s responsibility for protecting the visitor from being harmed by “dangerous conditions” on the property. The table on page 2 briefly summarizes how Ohio categorizes types of visitors and states the landowner’s duty of care for each type of visitor.

Has the Landowner Protected Visitors from Dangerous Conditions?

Once we’ve identified the landowner’s duty of care by determining why a person is on the property, we must analyze whether the landowner has met his duty of care by protecting the visitor from dangerous conditions on the property. This requires the landowner to identify dangerous conditions on the property and either eliminate the conditions or warn the visitor of the conditions. Additionally, in the case of trespassing children, liability depends upon whether a condition is an “artificial” condition that poses danger to children. The following explains how the law defines dangerous conditions and artificial dangerous conditions in relation to ponds.

Is a Pond a Dangerous Condition?

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.

What about a pond? 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 unwilling to impose liability on landowners for pond drownings or injuries.

What About Conditions In or Around a Pond?

There is an exception to the general rule that a pond is not a “dangerous condition.” The exception applies if a landowner

Legal Status of Visitor	Examples	Landowner's Duty
Invitee	Customers	<i>Either discover and eliminate or warn of all known and unknown dangerous conditions</i>
Licensee	Social Guest	<i>Either eliminate or warn of all known dangerous conditions</i>
Recreational User	Hiker, Fisherman	No Duty if meets Ohio Recreational User's Statute (see below)
Known Trespasser	Trespasser landowner is aware of	<i>Either eliminate or warn of all known dangerous conditions</i>
Unknown Trespasser	Trespasser landowner is unaware of	Refrain from harming by willful conduct
Child Trespasser	Trespassing child whose presence is foreseeable	Protect from dangerous artificial conditions

For a more thorough discussion of types of visitors and the landowner's duties to different types of visitors, see OSU Extension Fact Sheet ALS-1002-2000 - "Liability for Visitors to Farm Property" and "Child Trespassers and Ohio's Attractive Nuisance Doctrine" (to be published as an OSU Extension Fact Sheet).

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 this type of situation, the landowner might be liable *if* he should have foreseen that a visitor to the property could come into contact with the condition. 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.

What About Trespassing Children?

A new "attractive nuisance doctrine" in Ohio states that a landowner has a duty to protect foreseeable child trespassers from "dangerous artificial conditions" on the property. Because this is a new law, Ohio courts have not yet decided a case involving a trespassing child harmed in or around a pond.

Courts in other states that have had an attractive nuisance doctrine longer than Ohio have ruled that "natural bodies of water" are not dangerous *artificial* conditions. Some courts have gone as far as to determine that natural bodies of water can include man-made ponds. If Ohio courts follow this line of thinking, a landowner would not be liable where a trespassing child drowns in a pond, since the pond is not an *artificial* dangerous condition from which the landowner should have protected the child.

However, some courts in other states have held that hidden or unusual dangers in or around the pond do create *artificial* conditions. While a pond owner might not have a duty to protect a child from the pond itself, he would have a duty to protect the child from artificial conditions in or around the pond that pose a

hidden or unusual danger. Examples of situations considered to be "hidden or unusual dangers" in these other states include:

- Very steep banks that encourage slipping or prevent a child from climbing out
- A deep hole in a seemingly shallow pond
- Locating a pond near a populous village
- A hidden siphon mechanism under water
- A diving board

If Ohio courts follow these types of decisions, a landowner could be liable for harm to a trespassing child *if* the landowner failed to protect the child from a hidden or unusual danger in or around the pond.

Managing a Pond to Meet the Landowner's Legal Duty of Care

The following are actions a landowner can take to limit the potential of legal liability for property visitors harmed in or around a pond.

Locate and Construct the Pond With Visitors in Mind

Some courts have declared that locating a pond in a highly populated area or constructing a pond with steep slopes creates a dangerous condition for which a landowner could be liable. These court holdings indicate that a landowner should take precautions when deciding where and how to construct a new pond. Precautions to consider include:

- Locate the pond as far as possible from neighbors, public streets, roads, and paths
- Construct a manageable slope and bank that will not prevent a person from climbing out of the pond. State agencies recommend a 2:1 or 3:1 slope ratio to reduce potential pondweeds; lengthening the slope ratio to 4:1 or 5:1 will create more gentle slopes but more weed management requirements. Consider constructing a “bench” or a low slope area on part of the pond. Consult with contractors who construct ponds, or your local Soil and Water Conservation District, to assess pond slope and bank options for the location’s physiological and geological conditions, considering weed management and the potential uses for the pond.
- Remove rocks, tree stumps, or other obstacles around the shoreline and banks before allowing the pond to fill. Obstacles in deeper water used for fish attractors and habitat should be marked and identified through signs, maps and photo records.
- Install lighting around the pond if possible or feasible.
- Warn of exceptionally deep water, steep banks, or sudden drop-offs
- Identify swimming areas or “no access” areas
- Indicate the depth of the pond

Be aware, however, that young children may not be able to read or comprehend a sign. For this reason, a landowner should not rely solely on signs where children are at issue. The landowner should also consider using both written and visual signs to span multiple reading and comprehension levels.

Install Rescue Devices

If a visitor gets into a dangerous situation at a pond, the landowner should take steps to minimize the harm that could result. Install lifesaving equipment on a pond rescue post or other aids that could lead to rescue, 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 and location of the nearest telephone

Routinely Inspect the Pond for Dangerous Conditions

A sure way to limit liability for a pond is to eliminate any potentially dangerous condition in or around the pond. A landowner should 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 used for aquaculture or nuisance animal control

Restrict Access to the Pond

Limit or deny access to the pond by fencing or other means. This action is particularly relevant if children are known to be trespassing around the pond, which would subject the pond owner to the higher duty of care required by the attractive nuisance doctrine. Some pond owners like the thought of surrounding the pond with tall bushes rather than a fence. Where using vegetation as a means of restricting access, however, be careful of obscuring the pond to the point that it becomes a “hidden danger” that a person could stumble upon without warning.

Some townships and municipalities require fencing around swimming pools, and may require the same for ponds. A landowner should check with the local zoning authority on local ordinance requirements.

Post Signs

Posting a sign indicates that the landowner is trying to meet his or her duty of care by warning visitors of existing dangerous conditions. Place signs to point out potentially dangerous conditions so that the property visitor can avoid coming into contact with the dangerous condition. For example, a landowner could post signs to:

Educate Neighbors and Employees

Educating neighbors, particularly parents with children, is an additional action a landowner can take to protect visitors from being harmed in a pond. Be wary of talking with or showing the pond to neighborhood children without parental involvement, however. Such actions could be construed as leading the child to the danger, or might be viewed by the child 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.
- Sponsor a neighborhood or employment water safety or CPR class.
- Instruct neighbors and employees on proper use of life saving equipment on the pond rescue post.

Utilize the Recreational User’s Statute

If your pond is not located on a residential lot and you’re permitting people to use your land for recreational activities without charge, try to fall within the Recreational User’s Statute to prevent liability. The Recreational User’s Statute provides immunity from liability for harm suffered by a “recreational user” on non-residential property. The statute provides a defense to a liability lawsuit. To do so, you must:

- Grant the visitor permission to be on the property for recreational activities, such as swimming, fishing, hiking, camping, ice-skating, ice-fishing, etc. For additional protection, keep a written record of permission given, to whom, when and for what use.

- Be sure not to accept any type of fee or benefit for allowing the person to use the property.
- For added protection, provide the recreational user with a copy of the Recreational User's Statute so that he or she is aware that you have liability protection and the law does not require you to make the premises safe.

Review Insurance Policies

Make sure that your insurance provider knows that you have a pond on the property, and review the policy with your agent to understand circumstances under which insurance coverage applies or does not apply.

Maintain Detailed Records

In a liability battle, a landowner will have to prove that he took reasonable actions to fulfill the required legal duty to pond visitors. Keep detailed written, photographic, or video records of pond construction, pond inspections, elimination or 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 incur harm on pond property, 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 your attorney or insurance provider for additional advice on information he or she may need to defend a liability claim.

Conclusion

A pond on the property creates liability concerns for a landowner or tenant. A landowner should not assume that he will be automatically liable for harm resulting from the pond, however. Ohio law requires a landowner to take reasonable actions to protect property visitors from being harmed by dangerous conditions in or around the pond. A landowner who has fulfilled this legal duty by eliminating dangers or warning visitors of dangerous conditions is not likely to incur legal liability for the harm. For this reason, a landowner should understand the required duty of care owed pond visitors and take all possible actions to meet legal responsibilities.

References

Ohio Revised Code § 1533.18 et seq.

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

For more information on fish attractors, see *Placing Artificial Fish Attractors in Ponds and Reservoirs*, OSU Extension Fact Sheet A-1 at <http://ohioline.osu.edu/a-fact/0001.html>

For more information on constructing a pond safety rescue post, see *Farm Pond Safety*, OSU Extension Fact Sheet AEX-390 at <http://ohioline.osu.edu/aex-fact/0390.html>

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