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# FEAR-MONGERING TORTS AND THE EXAGGERATED DEATH OF DIVING

CARL T. BOGUS\*

## I. INTRODUCTION

The tort system is causing havoc, we are told. Skyrocketing malpractice premiums are driving physicians from practice.<sup>1</sup> Litigation is chilling the development of desperately needed new medicines,<sup>2</sup> enriching people who stupidly spill hot coffee on themselves,<sup>3</sup> and imposing a “tort tax” on consumer products that is putting American companies at a competitive disadvantage in the global economy.<sup>4</sup> And the tort system is even squeezing the fun out of everyday life. As Judge Edith H. Jones put it at this symposium’s conference at Vanderbilt University: “I would say, I think there have been dramatic changes in behavior as a result of lawsuits. We can’t get hot coffee at McDonald’s anymore. On playgrounds they don’t have seesaws, they don’t have sliding boards, they don’t have real high swings that we used to enjoy. We don’t have diving boards on swimming pools; a lot of fun is taken out of life.”<sup>5</sup>

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1. For example, President George W. Bush has stated: “One of the reasons people are finding their premiums are up, and it’s hard to find a doc these days, is because frivolous and junk lawsuits are threatening medicine across the country. And there’s a lot of them, people filing these suits. I call them junk suits because they don’t have any merit. The problem is they cost money to fight.” President George W. Bush, Remarks at the Baptist Health Medical Center, Little Rock, Arkansas (January 25, 2004) (transcript on file with the *Harvard Journal of Law & Public Policy*).

For a succinct explanation about why President Bush’s claims are wrong, see Carl T. Bogus, *Research Counters Furor Over Malpractice Lawsuits*, USA TODAY, March 24, 2004, at 13A. For a comprehensive treatment, see NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS (1995).

2. For analyses of some pharmaceutical cases and the impact they have on company stock, see CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS AND THE COMMON LAW 6-17, 102-14 (2001).

3. For a discussion about myth versus reality in the infamous McDonald’s hot coffee case, see *id.* at 19-21.

4. For a discussion about myth versus reality regarding the “tort tax,” see *id.* at 218-19.

5. Judge Edith H. Jones, Should Tort Law be a Form of Regulatory Law?: Remarks at the Federalist Society Student Symposium (Feb. 20, 2004) (transcript on file with the *Harvard Journal of Law & Public Policy*).

It is easy to understand why Judge Jones believes the tort system is taking the fun out of life. Claims that the tort system is driving the diving board into oblivion have been made repeatedly by tort fear mongers,<sup>6</sup> journalists, and even scholars. The *Washington Post*, for example, has reported:

Prompted initially by exponential increases in insurance rates and liability exposure—and then, in many cases, an inability to find coverage at any cost—public and private pools across the country have closed their three-meter boards. Some also have taken down one-meter boards, as well as slides, leaving only rafts, noodles, and repetitious games of sharks and minnows as diversions in the water.<sup>7</sup>

Is it indeed true that the tort system is depriving us of the joy of springing off diving boards? Does the tort system seek to ruthlessly extinguish activities that involve any risk—even small risks that provide more joy than pain—with crushing liability costs? Is the tort system a mindless agent of the “nanny state”?<sup>8</sup>

I have elsewhere made the bold claim that the tort system works so well — among other things, because it benefits from so many self-correcting mechanisms—that “while it can and occasionally does produce wrong results, it is almost incapable of flatly irrational results.”<sup>9</sup>

It was, therefore, no surprise to those who knew my work that I expressed some dubiousness about Judge Jones’s claims.<sup>10</sup> However, my co-panelist, Professor George L. Priest of Yale Law School, declared:

I have looked at diving board injuries and Judge Jones is right.

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6. Philip K. Howard sweeps with a broad brush as follows: “Visit a playground and look for a seesaw. They are rapidly disappearing, going the way of merry-go-rounds, diving boards, and other joys of childhood.” Philip K. Howard, *Lawsuits Are Drowning America*, USA TODAY MAGAZINE, March 1, 2003, at 20. In the very next sentence he adds, incongruously, “No court ever held that seesaws are too dangerous, but who will protect the school board if one youngster gets off too soon and the other child breaks an ankle?” thereby suggesting that it is not lawsuits that are so much the problem as unreasonable fear of lawsuits. It is an interesting admission coming from the chief tort fear-monger. *Id.*

7. Susan Levine, *The Fall of the High Dive; Liability Concerns Prompt Pools to Scrap the Beloved Three-Meter Board*, WASH. POST, July 13, 2002, at B1.

8. See, e.g., Ethan A. Nadelmann, *An End to Marijuana Prohibition*, NAT’L REV., July 12, 2004, at 28, 30 (suggesting that conservatives generally recoil at the “nanny state” regulating what “adults can and cannot sell to one another”); P.J. O’Rourke, *I Agree With Me: When was the Last Time a Conservative Talk Show Changed a Mind?*, ATLANTIC MONTHLY, July 1, 2004, at 50, 53 (quoting fellow conservative Bill O’Reilly as saying that, if Hillary Clinton becomes President, the United States will become a “nanny state”).

9. BOGUS, *supra* note 2, at 4.

10. Jones, *supra* note 5, at 20.

Diving boards have been removed from all public pools. The leading diving board manufacturer, Duraflex, went out of business. I talked to their officials and it was because of lawsuits. Prior to the increase in lawsuits against the diving board manufacturers and the diving board industry generally, there was no increase in accidents related to diving boards. Actually, the number of diving board accidents has been declining steadily since World War II because diving boards were getting better and they were installing them in better ways, but liability increased and companies went out of business.<sup>11</sup>

In the face of this authoritative onslaught, Judge Jones asked whether I wanted to concede my position on diving boards.<sup>12</sup> I demurred, but promised to review what Professor Priest had written and look at the area more closely.

This article is my report. I think the reader may find that the reality is both more complicated—and far more sensible—than what we have been led to believe.

## II. DIVING BOARDS

### A. Litigation

Litigation resulting from injuries involving swimming pools and diving boards is not new,<sup>13</sup> not extensive, and—contrary to Professor Priest's claim—not increasing. According to an exhaustive survey by Professor Gregory S. Munro of the University of Montana School of Law,<sup>14</sup> in the last half of the twentieth century there were a total of 52 reported case decisions involving diving boards in all courts in the United States, both state and federal.<sup>15</sup> Professor Munro observes, “[s]ome years the courts handed down no decisions involving diving

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11. *Id.* at 21.

12. *Id.* at 28.

13. *See, e.g.*, *Hammond v. Balboa Bay Club*, 317 P.2d 658 (Cal. Ct. App. 1957) (noting that during a time when a lifeguard at a private club absented himself in order to set up beach umbrellas and therefore could not have warned of the impending danger, plaintiff dived from a diving board and struck a swimmer); *Cohen v. Suburban Sidney-Hill, Inc.*, 178 N.E.2d 19 (Mass. 1961) (eight-year-old fell while climbing ladder to high diving board); *Sheehan v. Anthony Pools*, 440 A.2d 1085 (Md. Ct. Spec. App. 1982) (plaintiff alleged that injury occurred because diving board at residential pool extended from a convex rather than a straight wall so that diver was unusually close to concrete coping and that non-skid surface on board did not extend to and over edges of board).

14. Gregory S. Munro, *The Case of the Disappearing Diving Boards: The Role of Insurance in Prohibiting or Allowing Risk Taking in Society* (unpublished manuscript, on file with author) [hereinafter Munro, *Disappearing Diving Boards*]. Professor Munro generously shared the working draft of this paper with me, for which I am deeply grateful.

15. Professor Munro reviewed all appellate cases between 1949 and 1999. *Id.* at notes 76–77 and accompanying text.

boards. In other years, the courts issued between one and three decisions with no apparent pattern to the variation.”<sup>16</sup> Plaintiffs obtained judgments in somewhere between 25 percent and 42 percent of the cases reaching appeal.<sup>17</sup> The number of diving board cases resulting in reported decisions may be a small fraction of the total number filed. After all, something in the neighborhood of 95 percent of civil cases are resolved before trial, and many that are tried to conclusion do not result in reported decisions. Nevertheless, the small and steady number of reported decisions strongly suggests that there has not been an avalanche of such cases.

For reasons that will become clear shortly, the industry’s trade association, the National Spa & Pool Institute (NSPI), has become a prime target of plaintiffs who were injured while diving into swimming pools. Yet from approximately 1950 to 1990, NSPI has been sued only 17 times, and a plaintiff won a judgment against NSPI in only one case.<sup>18</sup>

Moreover, litigation has almost certainly decreased—indeed, decreased dramatically—in proportion to swimming pools and diving boards. Professor Munro reports that, over the past fifty years, the number of swimming pools in the United States has increased from 10,800 to 2.3 million.<sup>19</sup> Thus, it appears that, over the past fifty years, litigation has remained roughly constant while the number of swimming pools has increased by a factor of more than 200. The ratio of lawsuits to the industry’s products—swimming pools and accessories, including diving boards—has certainly shrunk substantially. If the industry were robust enough to successfully absorb litigation costs fifty years ago, it should be far better able to do so today.

Yet, as Judge Jones and Professor Priest claim, diving boards are

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16. *Id.* at text accompanying note 77. Generally, plaintiffs prevail in about 40 percent of product liability cases. See BOGUS, *supra* note 2, at 90.

17. Of the 52 reported appellate cases, 13 affirmed a finding of liability and an additional nine were remanded to the trial court for further proceedings. Munro, *Disappearing Diving Boards*, *supra* note 14, at text accompanying notes 77–78.

18. *In re Nat’l Spa & Pool Inst.*, 257 B.R. 784, 791 n.5 (E.D. Va. 2001).

19. Munro, *Disappearing Diving Boards*, *supra* note 14, at note 78 and accompanying text (citing Swimming Pool Data and Reference Annual from ROGER WARREN, SWIMMING POOL MANAGEMENT (1985)). This counts the number of swimming pools, not the number of swimming pools with diving boards, and suggests that in recent years the fraction of swimming pools with diving boards has decreased. There are possible other confounding factors as well. I do not know, for example, whether the ratios of claims to cases filed or of cases filed to reported appellate cases have remained constant over this period. Nevertheless, the increase in the number of pools is so enormous that, almost certainly, litigation has declined in proportion to the number of diving boards in use.

increasingly harder to find. If there are not fewer diving boards in use in the United States today, there is a smaller percentage of swimming pools with diving boards. One research firm reports that, over the past five years, the percentage of swimming pools with diving boards has declined from 50 percent to 38 percent.<sup>20</sup> Litigation is blamed as the villain, but if litigation has not increased, why are diving boards disappearing?

Solving this mystery requires understanding something about the underlying injuries, the history of litigation resulting from those injuries, and the industry's response to injuries and litigation.

### B. Injuries

Because we are focusing on diving boards, we need only concern ourselves with injuries resulting from two causes: (1) diving from a diving board and hitting the bottom of the swimming pool or, if the board is on a pier or raft in open water, the bottom of the lake or pond; and (2) diving from a diving board and hitting a swimmer. Divers do, of course, sometimes leap into the air and hit the board itself on the way down. These accidents can result in cuts, bruises, and broken bones. But in the total scheme of things, these are relatively minor injuries, and they seldom result in litigation.

The first category—divers who strike bottom—is the most significant. Too many of these accidents result in spinal cord injuries (SCI) that leave the victim permanently paralyzed; half of these SCI result in quadriplegia.<sup>21</sup>

Such accidents are surely as old as humanity itself. Long before swimming pools or diving boards, people dived from cliffs or rocks into oceans, lakes, ponds, and rivers, struck their head on the bottom, and suffered spinal cord injuries. There is even the occasional calamity that happens to someone performing a “run and plunge,” that is, running from the beach into open water and plunging headfirst into the water.<sup>22</sup>

Diving in shallow water is riskier than many people think. People tend to underestimate the velocity and distance they will travel

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20. See Amy Jo Brown, *No Diving?*, POOL & SPA NEWS, Jan. 30, 2004, 54, at 58 (reporting data compiled by P.K. Data of Duluth, GA).

21. See Munro, *Disappearing Diving Boards*, *supra* note 14, at note 44 and accompanying text (reporting Richard S. Stone conclusion that half of diving SCI injuries result in quadriplegia).

22. See, e.g., *Leonard v. Pitstick Dairy & Park, Inc.*, 560 N.E.2d 467, 469 (Ill. App. Ct. 1990) (involving a 15 year old who was rendered a quadriplegic after taking a “run and plunge” into the shallow wading area of a lake).

through water.<sup>23</sup> They also mistakenly think that their arms, extended out in front of them, will protect their head. But on the slimy and slippery bottom, their arms often slide easily apart and their head crashes, unprotected, into the bottom.

The National Spinal Cord Injury Statistical Center reports that 800 Americans are permanently paralyzed as a result of diving accidents every year.<sup>24</sup> This is about 7.3 percent of the 11,000 SCI occurring from all causes in the United States.<sup>25</sup> Diving accidents pale in comparison to motor vehicle accidents, falls, and violence, which respectively account for 50.4 percent, 23.8 percent, and 11.2 percent of all SCI since 2000.<sup>26</sup> But diving is the largest single cause of sports-related SCI. By comparison, about forty football players from all levels—including professional, college, and high school—sustain SCI every year.<sup>27</sup>

Hospitals do not routinely collect data about where or how diving SCI occur. We do not, therefore, have exact counts about how many diving SCI occur in swimming pools, as opposed to open water, or how many calamitous dives were from diving boards, sides of swimming pools, or from some object over open water. Nevertheless, we can make some reasonable estimates. According to a large sample survey by a researcher at the University of Alabama, 65 percent of all diving SCI occur in open water and 35 percent in swimming pools.<sup>28</sup> An older study prepared for the swimming pool industry estimated the split at 75 percent open water, 25 percent swimming pools.<sup>29</sup> Using these two figures as bookends, we can estimate that between 200 and 280 SCI occur in swimming pools annually. A 2003 study

23. See *Glittenberg v. Doughboy Recreational Indus.*, 491 N.W.2d 208, 218 n.29, 224–25 (Mich. 1992) (describing testimony by six experts, including industry consultant Richard Stone).

24. *Id.* at 224. The data center name is now the National Spinal Cord Injury Statistical Center. It is located at the University of Alabama.

25. National Spinal Cord Injury Statistical Center, Fact Sheet, *Spinal Cord Injury: Facts and Figures at a Glance* (August 2004), available at <http://www.spinalcord.uab.edu/show.asp?durki=21446> [hereinafter NSCISC Fact Sheet].

26. *Id.*

27. Frank Raczkievicz, *Maroon Addresses NFL on Spinal Cord Injuries*, available at <http://www.discover.pitt.edu/media/pcc010611/Maroon.html> (last visited Dec. 2, 2004) (quoting Joseph C. Maroon, M.D., a professor in the Department of Neurological Surgery at the University of Pittsburgh).

28. Michael DeVivo, *Prevention of Spinal Cord Injuries that Occur in Swimming Pools*, Pushin' On Newsletter (Medical RRTC in Secondary Complications in SCI, Birmingham, Ala.) (Winter 1997), at <http://www.spinalcord.uab.edu/show.asp?durki=21422>.

29. This was the 1983 report by Richard Stone, a researcher at Arthur D. Little Co., who analyzed injury data for NSPI. See Brown, *supra* note 20, at 56 (stating that NSPI hired Stone), 62 (concluding 75 percent of diving SCI occur in open water).



commissioned by a diving board manufacturer estimated that approximately 169 SCI result from dives into swimming pools.<sup>30</sup> Though this estimate is somewhat smaller, it is still in the same order of magnitude.

However, not all diving accidents at swimming pools that result in SCI occur from leaps off diving boards. In fact, only a fraction of diving accidents appear to involve diving boards. As already noted, only 38 percent of swimming pools today are equipped with diving boards, and even when there is a diving board, people often dive from the side of the pool. A recent industry study estimated that only 10.2 percent of the SCI at swimming pools resulted from diving off diving boards rather than sides of pools.<sup>31</sup> Although the industry may have reasons to downplay the number of SCI implicating diving boards, the industry estimate of 10.2 percent is plausible. University of Alabama researchers report that the majority of swimming pool SCI occurs in shallow water, no more than four feet deep.<sup>32</sup> These are surely unrelated to diving boards. By applying the 10.2 percent figure to the range of estimates of all diving SCI at swimming pools, we can reasonably estimate that about 17-28 people incur SCI as a result of diving off boards at swimming pools in the United States annually.

That is a relatively small number in relation to all the people who are diving into those two million swimming pools. Still, we cannot dismiss this population, small as it may be, with a wave of the hand. Each SCI is a cruel tragedy. Many of these accidents occur to young people, who are imprisoned in wheelchairs for the rest of their lives. We cannot comprehend the joys of life lost to them. A quadriplegic will never again dance, play catch, strum a guitar, or take a stroll around the block. Occupational dreams may be lost, and fundamental human experiences such as sex, marriage, and parenthood may be beyond reach. A compassionate society wants to reduce such injuries.

Society has economic reasons for wanting to reduce these injuries as well. The social cost for every SCI is enormous. The hospital charges alone—excluding even physician fees—averaged \$192,414 for the initial stay in 1994.<sup>33</sup> The cost of health care and living

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30. This was a 2003 study conducted by diving board manufacturer S.R. Smith. Brown, *supra* note 20, at 62–63. Tom Masterson, President of S.R. Smith, Inc. of Rochelle Park, NJ, confirmed commissioning the study but declined to furnish a copy of the study because it contained proprietary information that he did not want to share with competitors. Telephone Interview with Tom Masterson (July 14, 2004).

31. The 2003 S.R. Smith study. Brown, *supra* note 20, at 63.

32. DeVivo, *supra* note 28.

33. *Id.*

expenses for a quadriplegic is \$682,957 for the first year and \$122,334 for each subsequent year.<sup>34</sup> Life expectancies for persons with SCI continue to increase.<sup>35</sup> Therefore, if each year twenty people suffer SCI from diving board accidents, and their average age at the time of the accident is 25, then the annual cost of caring for the 1,048 Americans who have suffered SCI in the past 53 years, and are still alive today, is about \$134 million.<sup>36</sup>

There is nothing complicated about why people suffer SCI from diving from a board. The principal reason<sup>37</sup> is that the water was not deep enough, and we shall deal with that at some length. The other primary reason is divers crashing into swimmers. In one such incident, for example, Scott Shropshire, a student at the University of California at Davis, who was training to make the 2004 U.S. Olympic diving team, performed a one and a half somersault from a diving board and landed on top of a fifteen year old girl who was practicing with a synchronized swimming team.<sup>38</sup> The girl was bruised; Scott was left quadriplegic. The accident happened at a public pool that permitted "joint use," that is, the diving and swimming areas were not separated by markers. The pool was confident that collisions between divers and swimmers would not occur.<sup>39</sup> None had happened before; at least, none resulting in an injury serious enough to be called to the pool's attention or to live in its institutional memory. And presumably, chaos did not reign at the pool on this particular day. Scott was working with the Diablo Divers team; the girl was working with the Walnut Creek Aquanauts. Yet obviously such accidents do occur.

With respect to the problem of hitting the bottom, the simple question is: how deep does the water have to be for a diving board to

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34. NSCISC Fact Sheet, *supra* note 25.

35. *Id.*

36. The life expectancy of a 25 year old is 53.4 years. WORLD ALMANAC AND BOOK OF FACTS 2004, 76 (reporting 2001 data from the National Center for Health Statistics). For the 20 people who sustained SCIs in the past year the hospital costs were \$3.85 million and the cost of care was \$12.5 million. NSCISC Fact Sheet, *supra* note 25. In addition, there are 1,048 people still alive who experienced SCIs in the 52 previous years. *Id.*

37. To my knowledge, there are no data revealing how many diving SCI occur from hitting the bottom of the swimming pool rather than a hitting a swimmer (or other object in the pool). My own survey of reported cases leads me to believe that SCI occur more frequently from colliding with the bottom than with a swimmer.

38. Charlie Goodyear, *Paralyzed Diver Wins \$28 Million Judgment; Walnut Creek Held Liable for Pool Accident*, S.F. CHRON., May 6, 2003, at A1.

39. *See id.* (The article quoted an attorney for the City of Walnut Creek, California, which owned the pool, as saying, "There was [sic] 16 or 17 years of joint use, and it worked well. It gave everyone the maximum amount of pool time.")

be reasonably safe? The higher the board, the deeper the water needs to be, because divers reach greater velocities when descending from greater heights, and the longer the deep water must extend because higher boards also propel divers further. Standard board heights are one meter and three meters above the water. Thus, we must ask how deep the water has to be under boards of these heights to ensure safety. The answer to “How deep?” has remained constant for at least seventy years. Experts have mostly agreed that the minimum depth for a one meter board needs to be nine to ten feet.<sup>40</sup> The American Red Cross, for example, recommends that diving boards be permitted only when there is at least nine feet of water.<sup>41</sup>

Eleven or even twelve feet may be better. A margin of safety can be important because sometimes the water level in a pool may be lower than normal.<sup>42</sup> Also, some diving boards have more spring and can propel a diver higher than others. The YMCA of the USA requires that, for a one meter diving board, a swimming pool be at least eleven and a half feet deep.<sup>43</sup> (The YMCA requires that water be at least nine feet deep for diving from the deck of a pool.<sup>44</sup>)

To refine this further, there must be an adequate “water envelope” around the diver. What matters is not only how deep the water is under the end of the diving board but, even more importantly, how deep the water is several feet in front of the board where the diver enters the water and how far deep water extends along the diver’s

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40. See *Cummings v. Borough of Nazareth*, 233 A.2d 874, 878–79 (Pa. 1967). In that case: (1) An architect testified that the minimum depth requirement under a one meter board was nine feet but that it was customary, in addition, to provide a further depression or “well” under the board. (2) A swimming pool expert testified that prior to 1935 the standard was nine feet and that after 1935 it was changed to eight to twelve feet, depending on the type of pool. (3) The diving coach at Lafayette College, who had taught water safety for many years, testified that prior to 1935 custom required a depth of eight and one-half feet under a one-meter board but that after 1935 the standard increased to ten feet. In a subsequent opinion, the court noted that the expert testimony offered by the plaintiff was “symbolical of the objectivity of the plaintiff’s case.” The court further indicated that additional expert testimony had been presented by the plaintiff at trial and that the defendant neither challenged this testimony nor offered any competing expert testimony of its own. *Cummings v. Borough of Nazareth*, 242 A.2d 460, 467 (Pa. 1968).

41. Fred Zeder, *Industry Trade Association Hits Bottom*, WASH. STATE TRIAL LAWYERS ASS’N TRIAL NEWS (Nov. 1998), available at [http://www.pyfirm.com/articles/industry\\_trade\\_association/](http://www.pyfirm.com/articles/industry_trade_association/). Zeder represented plaintiff in the Meneely case. See *infra* notes 71–77 and accompanying text.

42. See, e.g., *id.* (water level was five inches below normal on the day of the accident); *Pleasant v. Blue Mound Swim Club*, 262 N.E.2d 107, 109–10 (Ill. App. Ct. 1970) (water level was twelve to sixteen inches lower than normal because the pool manager was backflushing pool at time of accident).

43. ON THE GUARD II: THE YMCA LIFE GUARD MANUAL 85 (4th ed. 2001) [hereinafter YMCA LIFE GUARD MANUAL].

44. *Id.* at 196.

diagonal track through the water. The American National Standards Institute (ANSI) has standards for a couple of slightly different swimming pool configurations but, roughly speaking, ANSI's current standards for a one meter board require that the water be at least eight and a half feet under the end of the board and increase to a depth of ten feet at ten feet out.<sup>45</sup> A transition slope to shallower water beginning at that point may not be steeper than a slope with a ratio of one vertical foot for every three horizontal feet.

For a three meter board, ANSI requires that the water depth must be at least eleven feet deep under the end of the board, twelve feet deep twelve feet out, and not have a steeper transition slope than the 1:3 ratio.<sup>46</sup>

A responsible swimming pool industry would, therefore, discourage equipping swimming pools with diving boards unless the pool's deep end were at least ten feet, with deep water extending at least ten feet from the tip of the board.

But, in fact, that is not what the industry did.

### C. Industry's Response

In an effort to sell more swimming pools—particularly residential pools during the rapid expansion of suburbia beginning in the 1950s—the industry looked for ways to cut corners, both literally and figuratively. Literally, the industry cut off the corners of swimming pools by designing “hopper bottom” pools.<sup>47</sup> Instead of having a rectangular bottom with straight walls, hopper bottoms have sloping walls that converge in the middle. The diver jumps into a sort of funnel. Straight out in front of the board is a deep point that may be only two feet by two feet. From this center of the funnel the water becomes shallower in all directions. The deepest point in some hopper bottom pools is as shallow as 7.5 feet. A transition slope that starts to rise from a floor only 7.5 feet deep becomes a potential collision wall. Another similar design is the spoon-shaped pool, which differs from the hopper bottom in that curved rather than straight walls converge

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45. The reader will note that ANSI standards are less rigorous than YMCA requirements. ANSI is supported by industry and its standards are often developed in connection with industry trade association. ANSI standards for swimming pools were, at least in the past, developed in connection with the National Spa & Pool Institute and designated ANSI-NSPI standards. Current ANSI standards were promulgated in March 2003, and are more stringent than earlier iterations.

46. ANSI, DESIGN REQUIREMENTS FOR PUBLIC SWIMMING POOLS, SPAS & SPECIAL USE POOLS 2 (2003).

47. YMCA LIFEGUARD MANUAL, *supra* note 43, at 195.

toward the middle.<sup>48</sup>

The industry's trade association, NSPI, promulgated standards for these pools. But were these standards designed to ensure that swimming pools equipped with diving boards were safe or designed to provide manufacturers and installers with a legal shield from injuries, a means of claiming they were not negligent because they carefully adhered to NSPI standards?

In 1970, a teenage boy in Virginia hit his head on the transition slope in a hopper-bottom pool and was rendered quadriplegic.<sup>49</sup> Litigation ensued. The jury handed up a verdict of a cool \$1 million (\$4.82 million in 2004 dollars<sup>50</sup>).<sup>51</sup> What was significant, however, was not so much the amount of the verdict; it was that an NSPI official admitted in videotaped deposition testimony that NSPI standards had no support in scientific testing.<sup>52</sup> All of this was widely reported in industry periodicals.

Something had to be done, or swimming pool builders and diving board sellers would henceforth not be able to claim that they were reasonably relying on NSPI standards. So NSPI looked for an expert to validate its standards. NSPI first reviewed research already underway by Milton Gabrielsen, an aquatics expert at Nova University in Ft. Lauderdale, Florida. But when NSPI learned that Gabrielsen's research was already leading him to believe that NSPI standards were flawed, it looked elsewhere for an expert to hire.<sup>53</sup>

NSPI commissioned the Arthur D. Little Company in Cambridge, Massachusetts, and the principal researcher attached to the project was Richard Stone, a somewhat curious choice because he was a nuclear physicist.<sup>54</sup> Stone ultimately produced a dozen reports for NSPI. His very first report, produced in June 1974, concluded that the hopper-bottom pools were not safe and that tall, athletic, young males—who would jump the highest and farthest, and travel through

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48. *Id.* at 196.

49. *See Zeder, supra* note 41. The case, *Schutz v. Blue Dolphin*, is unreported.

50. I obtained this figure by using the Consumer Price Index calculator offered online by the Federal Reserve Bank of Minneapolis, <http://minneapolisfed.org/Research/data/us/calc/index.cfm>.

51. The case was settled for \$450,000, reportedly because settlement was achieved just moments before the jury announced its verdict. *Zeder, supra* note 41.

52. *Id.* In addition, NSPI subsequently knew that the Consumer Product Safety Commission found that hopper bottom pools complying with NSPI standards were not demonstrated to be safe. The industry vigorously, but unsuccessfully, challenged these findings before they became final. *See Zeder, supra* note 41.

53. This is according to Merle Dowd, a former NSPI official. *Id.*

54. *See id.* (reporting Stone as a nuclear physicist); Brown, *supra* note 20, at 56 (reporting Stone worked for Arthur D. Little Co.).

the water with the greatest velocity—were at particular risk.<sup>55</sup>

The industry needed a new defense, and it appears to have settled on a classic: blaming the victim. The issue was reframed from “pools were too shallow” to “people were not diving properly.”<sup>56</sup> NSPI instituted a campaign ostensibly designed to teach people how to dive properly. Dubbed “Steer Up,” the program—still featured on NSPI’s website<sup>57</sup>—instructed people to keep their back arched, to keep their arms extended over their head, and to “steer up” as they entered the water.

The notion that a modest NSPI campaign would effectively educate the American public about how to safely dive into shallow water is absurd on its face. It would cost enormous sums of money to effectively disseminate this message to everyone who swims and dives and to continuously educate new crops of children in the technique of shallow diving. NSPI surely never intended to undertake a campaign of this magnitude.

Even more importantly, as NSPI officials must surely have known, this particular task cannot be accomplished by an educational campaign designed primarily to disseminate information. It takes rigorous training to learn to reliably perform shallow dives. Consider the story of Olivia Kahn.<sup>58</sup> Olivia, 14, was a new member of her high school junior varsity swim team.<sup>59</sup> Her school had two swimming pools—a deep pool for diving and water polo and a racing pool for swimming. The racing pool was only 3.5 feet deep at both ends.<sup>60</sup> Most swimmers were expected to dive into the racing pool from starting blocks eighteen inches above the water.<sup>61</sup> (This apparently satisfied National Federation of State High School Associations guidelines, although the American Red Cross considered diving into less than five feet of water dangerous under any circumstances.<sup>62</sup>)

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55. See Zeder, *supra* note 41; Brown, *supra* note 20, at 56.

56. In his second report, issued in 1980, Richard Stone advocated that industry “teach and warn the public that diving without proper caution and training, whether it be in pools or in the natural environment, involves risk of injury to the cervical spine.” Brown, *supra* note 20, at 56 (quoting 1980 Stone report).

57. Association of Pool and Spa Professionals, *Plan Your Dive, Steer Up*, <http://www.theapsp.org/ConsumerResources/Water+Safety+and+Health+Benefits/Plan+Your+Dive+Steer+Up+-+Part+1.htm> (last visited Dec. 17, 2004).

58. See *Kahn v. East Side Union High School Dist.*, 75 P.3d 30 (Cal. 2003).

59. *Id.* at 32.

60. *Id.* at 33.

61. One team member starts inside the pool; three dive from the starting block. *Id.* at 33–34.

62. *Id.* at 34.

The team practiced twice per week. The coach testified that first, using the deep pool, he gave Olivia about four separate training sessions in shallow diving technique.<sup>63</sup> He remembered observing Olivia dive five to ten times during one of these sessions alone. After he believed she was ready, he switched Olivia's training to the racing pool. He recalled watching her dive from the deck of the racing pool about five times at one or perhaps two practices, and also recalled her diving from the starting block at least once. After all of this training, Olivia did not feel confident diving from the starting blocks into the racing pool. An assistant coach agreed; she thought Olivia needed more practice.<sup>64</sup> Teammates remarked that Olivia was going too deep. Nevertheless, the coach considered Olivia proficient enough such that—notwithstanding Olivia's own pleas that she was not ready—shortly before the event was to begin he directed her to participate in a race that required her diving from the starting block into the racing pool. Two teammates offered to give Olivia additional last minute training. They demonstrated the diving technique and watched Olivia perform two practice dives. On her third practice dive, Olivia broke her neck.<sup>65</sup>

The American Red Cross safety manual emphasizes how difficult it is to internalize shallow diving techniques. "Even an experienced diver can be seriously injured by diving improperly," it cautions.<sup>66</sup> Coaches should not allow anyone to dive into a racing pool until, by observed practice in deep water, the swimmer has "consistently established" the ability to avoid penetrating the water below two and half feet.<sup>67</sup> The literature is replete with examples of experienced but not professionally-trained divers who thought they could execute some sort of shallow dive and had done so many times before yet, on a fateful occasion, for reasons even they could not explain, mistakenly dived too deep.<sup>68</sup>

In view of how much rigorous training it actually takes to reliably make shallow dives, it is difficult to take NSPI's "Steer Up" campaign at face value. Such a campaign is likely to cause more harm than good by lulling people into believing that, having been told to arch their back and steer up, they can safely perform shallow dives.

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63. *Id.* at 35.

64. *Id.* at 34.

65. *Id.*

66. *Id.* at 34 (quoting manual).

67. *Id.* (quoting manual).

68. *See, e.g., Corbin v. Coleco Indus.*, 748 F.2d 411, 413 (7th Cir. 1984) (stating plaintiff intended to do a belly flop but "for some reason" entered the water head first).

The true value of the campaign is that it supports arguments that people injure themselves by diving improperly. If you crash into the bottom, it's your own fault; you should have arched your back and steered up. In liability terms, the victim misused the swimming pool by diving too deeply. He assumed the risk by not diving properly.

According to one of the industry's key strategists, the strategy was successful. Writing in an industry publication, he said:

Although a relatively small number of people continue to suffer spinal-cord injuries from diving into swimming pools, it is a fact that the cause of these injuries is attributed by an increasing number of courts to the action of the individual diver. . . .

A U.S. District Court judge in Kansas said as much earlier this year, in dismissing a diving-injury lawsuit. It was not a failure to warn that caused plaintiff's injury, he said; what caused the injury was plaintiff's decision to dive headfirst into obviously shallow water.<sup>69</sup>

"[P]ools are always safe for their intended use," he adds.<sup>70</sup>

Serving its member manufacturers and installers, NSPI continued to approve standards purporting to match various diving boards with swimming pools. For example, NSPI approved the S.R. Smith 606 and 808 diving boards for NSPI Type II hopper bottom pools.<sup>71</sup> On October 26, 1982, Robert Weiner, a consultant for NSPI, sent NSPI a letter stating that his tests revealed that those boards presented serious risks of SCI when used on Type II pools.<sup>72</sup> He said that the boards were launching divers on trajectories that caused them to enter the water at greater velocities and farther from the board's tip than other boards. Weiner recommended that NSPI stop approving these diving boards on Type II pools; he also asked NSPI to inform S.R. Smith of his test results and recommendations. NSPI did neither.

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69. Richard W. Cohen, *Who's Really Responsible for Diving Accidents?*, AQUA, Sept. 1991, at 12.

70. *Id.* at 14. Cohen goes on to suggest that although they do not prevent injuries, warning labels are a useful adjunct to the blame-the-victim theme. He writes:

There is an important value in the industry's commitment to warning messages, even though warnings do not prevent quadriplegic injuries in swimming pools. As every parent of teenagers knows from experience, warnings of the possible consequences of risk-prone behavior seldom deters the intended activity.

*Id.*

71. Zeder, *supra* note 41; *Meneely v. S.R. Smith, Inc.*, 5 P.3d 49, 51 (Wash. Ct. App. 2000), *appeal denied*, 21 P.3d 290 (Wash. 2001).

72. Zeder, *supra* note 41.



*D. Disclosure*

It is generally acknowledged<sup>73</sup> that the single case that has had the greatest impact on the industry involved sixteen-year-old Shawn Meneely's fateful dive in 1991.<sup>74</sup> Shawn, a high school honor student, was spending the day with a classmate.<sup>75</sup> The two boys were invited to the home of John Williamson, the classmate's grandfather, in Kennewick, Washington. Williamson had an NSPI Type II hopper bottom swimming pool, which was 7'9" deep at its deepest point.<sup>76</sup> The pool had been installed in 1965; in 1974, Williamson replaced the original diving board with an S.R. Smith 606.<sup>77</sup> The board carried a label stating it had been approved by NSPI for Type II pools.<sup>78</sup>

The two boys were asked to supervise two younger cousins in the early afternoon, during which time the two older boys gave their cousins swimming lessons in the shallow end of the pool.<sup>79</sup> Late in the afternoon, Shawn and his friend were allowed to use the pool by themselves. As kids will do, the two boys vied for who could make the biggest splash by doing cannonballs from the diving board. After a few such dives, Shawn jumped off the board headfirst with his arms and legs extended, intending to produce a large splash, but at the last moment he pulled his arms and legs into his body, entering the water in what is sometimes referred to as a "sailor's dive."<sup>80</sup> Shawn hit his head on the transition slope and was rendered quadriplegic.

The jury handed up an eleven million dollar verdict, apportioning responsibility at sixty percent to NSPI, thirty percent to S.R. Smith, and ten percent to the diving board installer.<sup>81</sup> The money itself was significant. Based on this judgment alone, NSPI filed for

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73. See, e.g., Kenneth Bredemeier, *Rules or Advice? Pool-Safety Cases Target Trade Group*, WASH. POST, Nov. 11, 2002, at E1; Brown, *supra* note 20 (both suggesting the Meneely case had a large impact on the industry).

74. *Meneely*, 5 P.3d at 51.

75. Zeder, *supra* note 41.

76. *Meneely*, 5 P.3d at 52.

77. *Id.* There was some dispute whether John Williamson's pool was a Type II pool. At its deepest point it was three inches deeper than a standard Type II pool. However, it was shorter (19' rather than 22') from the end of the pool to the top of the transition slope, and the transition slope was steeper (2:1 rather than 3:1 rise) than the standard Type II. Plaintiffs' experts testified that the pool in question was within practical limits the same as a Type II pool, and that the transition slope of the Williamson pool matched that of a Type II pool at the point where Shawn hit his head. *Id.* at 52.

78. *Id.* at 51-52.

79. *Id.* at 52.

80. Telephone Interview with Tom Masterson, President of S.R. Smith, Inc. (June 29, 2004) (describing this as a "sailor's dive").

81. Zeder, *supra* note 41.

reorganization under Chapter 11 of the bankruptcy laws.<sup>82</sup>

Even more significant was the disclosure. Through discovery, the plaintiff's attorney learned that NSPI had long known that hopper bottom pools complying with its standards were unsafe and that the S.R. Smith 606 diving board was unsafe for such pools.<sup>83</sup> Because this case went to trial and the evidence was presented in a public courtroom, rather than being suppressed by a confidentiality covenant in a settlement agreement, the evidence became public for the first time.

Although the industry's campaign to blame the victim is running into difficulty, it still makes the attempt. Here, for example, is part of an interview that an industry publication conducted with Shawn Meneely in 2001 (when Shawn was 25 years old):

Q. Do you remember the accident vividly? Were you surprised by the results of the horseplay that was going on?

A. I don't think I'd call it horseplay. We were just doing regular kid stuff. Yeah, I was totally shocked. Who thinks they are going to get hurt in a swimming pool, ya know.<sup>84</sup>

It is not sensible to maintain that swimming pools are safe only when divers have the same degree of training and skill and take the same degree of care as, say, parachutists. As courts have long since held, the presence of a diving board is an invitation to dive.<sup>85</sup> People reasonably assume that the water is sufficiently deep such that they will not risk permanent paralysis by diving from a board that was placed there for the very purpose of diving into the pool. Is a diving board reasonably safe if the diver must hit the center of an imaginary bull's-eye in the water? Does it make sense to argue that divers assume the risk of quadriplegia if they jump too far, or not far enough, or land to the right or left of an imaginary midline, or fail to execute a shallow dive?

The *Meneely* case, with its accompanying revelations, panicked the industry. The case was featured on the CBS newsmagazine *60*

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82. In re *Nat'l Spa & Pool Inst*, *supra* note 18, at 785.

83. See notes 47–72 and accompanying text. NSPI also knew that the Consumer Product Safety Commission had determined that hopper bottom pools complying with NSPI standards were not demonstrated to be safe. The industry vigorously, but unsuccessfully, challenged these findings before they became final. See *Zeder*, *supra* note 41.

84. *Aqua Asks Shawn Meneely*, AQUA, March 2001, at 16.

85. See, e.g., *Chauvin v. Atlas Ins. Co.*, 166 So. 2d 581, 584 (La. Ct. App. 1964); *Brown v. Hayden Island Amusement Co.*, 378 P.2d 953, 958 (Or. 1963) (both stating a diving board is an "invitation to dive").

*Minutes*. This was the third time that a national television broadcast had focused on the danger of diving boards and paralysis; pre-*Meneely* stories had been done on ABC's *20/20* and the syndicated program *Inside Edition*. What was different this time was that it was revealed that the industry deliberately concealed the danger of diving into shallow pools—indeed, that it knowingly created the danger by promoting shallow pools and representing them to be safe for diving. The industry had reason to be concerned. In all probability, only a tiny fraction of the 17-28 people<sup>86</sup> who suffer SCI as a result of diving board accidents was filing lawsuits.<sup>87</sup> What if the publicity, combined with the revelation that the industry knowingly and deliberately promoted swimming pools unsafe for diving, drove up the number of lawsuits?

Two questions remain: (1) What impact has litigation had on diving boards?; and (2) Has that impact been socially beneficial or deleterious?

### III. THE EXAGGERATED DEATH OF DIVING

As previously noted, one research firm says that the percentage of swimming pools with diving boards in the United States has declined from 50 percent to 38 percent.<sup>88</sup> I do not know whether this figure is accurate. I do not know how the figure was derived and am not aware of any other information that confirms or disputes it. But even assuming its accuracy, the figure tells us very little. To evaluate what impact litigation has had on diving, we must know exactly where, and why, that reduction is taking place. Have diving boards been removed from pools less than eleven feet deep but remained at deeper pools? Are new pools not being equipped with diving boards because liability insurance is too expensive or because constructing a sufficiently deep pool is too expensive? If a deep pool does not have a diving board, is it because the insurance was prohibitive or because the owners did not want to dedicate a portion of the pool to diving?

This is a subject on which people have long leapt to conclusions

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86. See *supra* note 32 and accompanying text.

87. See Robert A. Prentice & Mark E. Roszkowski, "Tort Reform" and the Liability "Revolution": *Defending Strict Liability in Tort for Defective Products*, 27 GONZ. L. REV. 251, 258 (1991-92) (reviewing various studies that show that only a tiny fraction of people who are injured—e.g., three percent of people who are injured in non-work, non-automobile settings—file lawsuits). Moreover, the data we have about the numbers of lawsuits filed, though not definitive, suggests the number of lawsuits is less than the number of diving SCI. See *supra* notes 12-20 and accompanying text.

88. See *supra* note 20 and accompanying text.

based on rumor, gossip, or limited personal observation. For example, in 1987 Professor Priest wrote in one article that “diving boards have been removed from school swimming pools,”<sup>89</sup> and in a second article asserted that “diving boards removed from city schools have not been replaced.”<sup>90</sup> Professor Priest cites a single source for both statements: a 1986 report by an advisory commission to the governor of New York State.<sup>91</sup>

That report deals with insurance and the alleged torts crisis generally; it mentions swimming pools in passing several times, never with more than a phrase or single sentence at a time. Professor Priest cites two separate pages in the report. One page contains the sweeping statement that “diving boards in New York City schools are no longer in use.”<sup>92</sup> The other statement laments, in nearly hysterical terms, that “[f]unctional unavailability . . . is clearly present in endemic proportions with respect to important forms of risk, many of them associated with public activities,”<sup>93</sup> and goes on to list a disturbing number of such activities that are presumably no longer available (or are *functionally* unavailable, if that is different) including “some ski slopes, swimming pools with active diving boards, amusement parks, gymnasiums containing trampolines, etc.”<sup>94</sup>

At neither spot does the Commission cite its source for the proposition that diving boards—either all or some, the report appears inconsistent—have been removed from swimming pools at New York City schools. The Commission, however, refers to its source elsewhere: “The fact that, *we are told*, the diving boards in New York City schools cannot now be used because of liability cost concerns is emblematic of . . . socially useful but legally vulnerable activities.”<sup>95</sup> *We are told?* That seems emblematic of the foundation of so many of the hyperbolic claims regarding disappearing diving boards.<sup>96</sup>

89. George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1522 (1987).

90. George L. Priest, *Puzzles of the Tort Crisis*, 48 OHIO ST. L.J. 497, 497 (1987).

91. STATE OF NEW YORK, INSURING OUR FUTURE: REPORT OF THE GOVERNOR'S ADVISORY COMMISSION ON LIABILITY INSURANCE (April 7, 1986).

92. *Id.* at 15.

93. *Id.* at 23.

94. *Id.* at 24.

95. *Id.* at 87 (emphasis added).

96. Were diving boards removed as a result of a policy promulgated by the school department? One might expect that, if so, the Commission would obtain the written directive calling for the removal of diving boards and investigate the reasons for it. Was it because of insurance, the realization that the pools were not deep enough for diving, concerns about adequate supervision and mixed use, or a budgetary decision to lay off diving instructors and discontinue diving competitions?

I am not sure to what extent diving boards have been removed from America's pools—public or residential—but I am now reasonably sure that no one knows. Here are a few things that I do know:

- The president of diving board manufacturer S.R. Smith Inc. tells me that his company's sales have increased every year for the past five years.<sup>97</sup>

- The president of Inter-Fab Incorporated, the other main manufacturer of residential diving boards, tells me that Inter-Fab's diving board sales are strong but not growing.<sup>98</sup>

- The executive vice president of Duraflex International Corporation (the company that Professor Priest thought went out of business because of liability, and the primary manufacturer of competitive diving boards) tells me that her company is alive, well, and thriving, and that its sales have increased by five to ten percent every year since 1957. She says while Duraflex has never gone out of business, in 1968 it made a business decision to gradually withdraw from the residential diving board market because it believed "the residential market was a source of potential problems because most home pools are too small." She says no case forced the company's hand. It phased out from this market over a ten year period. When I asked her whether diving boards have been eliminated from high schools or colleges, she told me that Duraflex is shipping diving boards to *both* high schools and colleges every week. She told me that, about ten years ago, the company's sales to high schools in Iowa declined dramatically because, she believes, "Iowa revised their codes for dimensions for diving safety, and most high school pools and municipal pools did not meet the new standards." However, she says "sales to Iowa appear to have recovered, perhaps due to new construction of deeper pools." She is not aware of any sweeping discontinuance of diving in public pools, high school, or colleges elsewhere. Overall, Duraflex's sales of diving boards have been stable over many years, ranging between 1,200 and 1,400 annually.<sup>99</sup>

- The president of United States Diving, Inc., the national association of diving clubs, coaches, and athletes, tells me that over the past three years, the number of member clubs has declined from

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97. Telephone Interview with Tom Masterson, *supra* note 80.

98. Telephone Interview with Michael Hagerty, President, Inter-Fab Incorporated (July 22, 2004).

99. Telephone Interview with Jan Rude, Executive Vice President, Duraflex International Corporation (July 22, 2004), supplemented by e-mail messages of the same date (on file with author).

315 to 285 and there has been a corresponding drop in the numbers of coach and athlete members. He attributes the drop to the economy.<sup>100</sup>

- The person who handled my inquiry at the Men's Swimming and Diving program at the University of Michigan informs me that the University of Michigan maintains diving boards (one meter and three meter, plus a ten meter platform) at a diving well, that is, a pool used exclusively for diving. He advised that all Big Ten universities except the University of Illinois have swimming and diving programs that include diving.<sup>101</sup>

- The only public swimming pools in my town (which has a beach on Narragansett Bay) are at the YMCA. When I asked the director of aquatics why those pools do not have diving boards, he told me it is because they are not 11'6" deep.<sup>102</sup>

- The YMCA's representative to the board of directors of United States Diving tells me he believes the YMCA standards are too stringent, and as a result diving boards have been unnecessarily removed from many existing YMCA swimming pools.<sup>103</sup>

- The NCAA Diving Chairman tells me that "diving is flourishing.... Anytime a community pool is built, diving boards (mostly 1 meter) are added." He notes that diving boards are sometimes omitted from pools built for private use, such as YMCA's and country clubs', but believes that is "mostly due to a lack of funds, not risk of injury."<sup>104</sup>

#### IV. CONCLUSION

Is litigation the death of diving? Almost certainly not. Paraphrasing Mark Twain,<sup>105</sup> reports of the death of diving have been grossly

100. Telephone Interview with Todd Smith, Executive Director, United States Diving (July 21, 2004).

101. Telephone Interview with Paul Dickerson, Media Contact for Men's Swimming and Diving, University of Michigan (July 20, 2004).

102. Interview with Chris Silman, Head of Aquatics, East Bay (Rhode Island) YMCA (July 16, 2004).

103. E-mail message from Donald Leas, International Chair for Diving of World International Games, Director of Diving Competitions for YMCA-USA, and YMCA-USA's representative to United States Diving's board of directors (July 21, 2004) (on file with author).

104. E-mail message from Kevin Lawrence, University of North Carolina Diving Coach and NCAA Diving Chairman (July 21, 2004) (on file with author).

105. When Mark Twain was visiting a cousin in London, he became ill. A newspaper reporter informed Twain that a New York newspaper had reported he had died and asked Twain whether he wanted to respond. Twain answered, "Say the report is exaggerated." Mark Twain, *The Report of My Death* (Apr. 3, 1906), in MARK TWAIN IN ERUPTION 252-53 (Bernard De Voto ed., 1940).

exaggerated.

Litigation has reduced the percentage of swimming pools that are equipped with diving boards, but in the main that is surely for the good. Many, and probably most, of the pools from which diving boards have been removed are simply too small for safe diving. In other instances, diving boards have probably been removed from some public pools of sufficient depths because the facility has decided it did not want to dedicate a portion of the pool for diving and thought mixed use too risky. The removal of these boards will reduce the number of tragic SCI injuries and perhaps some fatalities.<sup>106</sup> Will some fun be eliminated as well? Of course it will. But it is difficult to argue that the trade-off—less fun for fewer SCI—is unreasonable. How many dives add up to the joy that is lost over a lifetime by a young person suffering a spinal cord injury?

Undoubtedly, there is confusion about the risks of diving, and boards have probably been removed from adequately deep pools at the demand of insurance underwriters or facility directors who mistakenly have the impression that diving is inherently risky. The confusion is exacerbated by the industry itself, which muddies the water by blaming the victim.

Confusion is also being sown by tort-mongers who promote the myth that the tort system is mindlessly imposing liability on diving boards. What we need is clarity about the real risks of diving, so that we can have diving boards where it is safe to dive.

The next time Judge Edith Jones walks to the head of a swimming pool and finds that the diving board is gone, she ought to check the depth. If she finds plenty of water and the diving board has been removed for no good reason, she ought to blame not the tort lawyers, but the tort fear-mongers.

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106. Someone experiencing an SCI in the water will drown unless rescued. Someone who experiences an SCI at the bottom of a swimming pool cannot call for help and will drown unless others notice his dilemma.

