June 23, 2004

Kim Kosko
New Jersey Sea Grant
Building 22
Fort Hancock
Highlands, NJ 07732

Dear Kim,

Recently you contacted us with a question about the liability issues surrounding the posting of rip current warning signs on New Jersey public beaches. As I understand it, your specific question was whether posting the signs would increase a town's liability risk. This letter contains the results of my research into the applicable law. Please be aware that the National Sea Grant Law Center does not offer formal legal advice, and that this letter is intended for informational purposes only.

Under the doctrine of sovereign immunity, a governmental entity may only be sued if the government has given its consent. In New Jersey, public entities are liable for their negligence only as provided in the New Jersey Tort Claim Act (TCA).[1]

> A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
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> > a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
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> > b. a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.[2]

A number of exclusions in the TCA narrow this seemingly broad waiver of sovereign immunity. First, "neither a public entity nor a public employee is liable for an injury caused by a condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach."[3] In addition, "neither a public entity nor a public employee is liable for any injury caused by a condition of the unimproved and unoccupied portions of the tidelands and submerged lands, and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets and straits owned by the State."[4] Of particular relevance to the rip current issue, New Jersey courts have consistently held that "there can be no liability on the part of the municipality for injuries caused exclusively by the action of the ocean."[5]

In the comments to the TCA, contained in the Report of the Attorney General's Task Force on Sovereign Immunity (May 1972), the legislature states its underlying rationale for the "unimproved property" immunity provisions as follows:

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[1] N.J. Stat. §§ 59:1-2 – 59:12-3.
[2] N.J. Stat. § 59:4-2.
[3] *Id.* §59:4-8.
[4] *Id.* §59:4-9.
[5] *Stempkowski v. Manasquan*, 208 N.J. Super. 328, 332 (N.J. Super. Ct. 1986).

> Sections 59:4-8 and 59:4-9 reflect the policy determination that it is desirable to permit the members of the public to use public property in its natural condition and that the burdens and expenses of putting such property in a safe condition as well as the expense of defending claims for injuries would probably cause many public entities to close such areas to public use. In view of the limited funds available for the acquisition and improvement of property for recreational purposes, it is not unreasonable to expect persons who voluntarily use unimproved public property to assume the risk of injuries arising therefrom as part of the price to be paid for benefits received. A similar statutory approach was taken by the California Legislature. Cal.Gov't Code § 831.2, § 831.4, and § 831.6
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> The State of New Jersey possesses thousands of acres of land set aside for the specific purpose of recreation and enjoyment. The Division of Fish, Game and Shell Fisheries has 127,000 acres, the Division of Parks and Forests 280,500 acres, the Division of Water Resources 7,600 acres and the Division of Marine Police has estimated upwards of 500,000 acres including all of the land in New Jersey now or formally [sic] flowed by the tides. The exposure of hazard and risk involved is readily apparent when considering all the recreational and conservation uses made by the public generally of the foregoing acreages, both land and water oriented. Thus, in sections 59:4-8 and 59:4-9 a public entity is provided an absolute immunity irrespective of whether a particular condition is a dangerous one.
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> In addition it is intended under those sections that the term unimproved public property should be liberally construed and determined by comparing the nature and extent of the improvement with the nature and extent of the land. Certain improvements may be desirable and public entities should not be unreasonably deterred from making them by the threat of tort liability.[6]

Simply stated, coastal towns will be immune from liability for injuries caused solely by the ocean, i.e. a rip current or waves. Furthermore, Long Beach's attorney is correct that there is no duty to warn the public about the dangers of swimming in the ocean. In a case involving a surfer who broke his neck after being struck by several large waves, the New Jersey Supreme Court stated that the ocean is not "a dangerous condition on public property for which defendant had a duty to warn bathers independent of providing lifeguards."[7]

Although beach towns have no legal duty in New Jersey to warn bathers about the dangers of rip currents, there is no reason why they should refrain from posting signs. The posting of general warning signs will not destroy the immunity provided by the TCA. There are no cases on point in New Jersey, but there are in California. California cases are obviously not controlling in New Jersey, but the TCA was modeled after the California Tort Claim Act and the New Jersey courts continue to look to the California courts for guidance.[8]

In *McCauley v. City of San Diego*, a man injured after falling off a cliff in a recreational area sued the city contending that its signs warning of slippery trails were an "ineffective and unprofessional attempt to warn the public of the dangerous nature of the cliffs."[9] The plaintiff's position was that by placing signs the city had assumed responsibility for risk management and should be responsible for its negligence in failing to warn the public properly. The California Court of Appeals disagreed and granted the city immunity primarily on public policy grounds. The court acknowledged that the city could have avoided liability by not posting the signs and concluded

[6] *Freitag v. County of Morris*, 177 N.J. Super. 234, 237 (N.J. Super. Ct. 1981).
[7] *Fleuhr v. City of Cape May*, 159 N.J. 532, 538 (N.J. 1999).
[8] *Levin v. County of Salem*, 133 N.J. 35, 52 (N.J. 1993).
[9] *McCauley v. City of San Diego*, 190 Cal. App. 3d 981, 988 (Cal. Ct. App. 1987).

that “public policy is promoted by the minimally burdensome and passive intervention of sign placement so long as the public entity's conduct does not amount to negligence in creating or exacerbating the degree of danger normally associated with a natural condition.”[10]

The court issued a similar ruling after a novice dune rider was paralyzed when his ATV slid down a dune at Pismo State Beach, holding that “public policy would support signs erected [] warning of the natural condition of the dunes at Pismo State Beach which would constitute neither an improvement nor a voluntary assumption of a public protection service removing immunity.”[11]

These cases and others lead California to amend its Tort Claim Act in 1987. The California act now contains a provision which states:

> public beaches shall be deemed to be in a natural condition and unimproved notwithstanding the provision or absence of public safety services such as lifeguards, police or sheriff patrols, medical services, fire protection services, beach cleanup services, or signs. The provisions of this section shall apply only to natural conditions of public property and shall not limit any liability or immunity that may otherwise exist pursuant to this division.[12]

In my opinion, the City of Long Beach will not increase its liability risk by placing the rip current signs. Although the TCA does not contain a provision similar to the California amendment, the New Jersey courts are likely to interpret the TCA similarly.[13] The placement of signs will not improve the property to the point where the “unimproved immunity” provision is inapplicable. “Public property is no longer ‘unimproved’ when there has been substantial physical modification of the property from its natural state, and when the physical change creates hazards that did not previously exist and that require management by the public entity.”[14] The city will remain immune from suit under §§ 59:4-8 and 59:4-9.

I hope you find this letter helpful. Please let me know if you have further questions. Thank you for bringing you questions to the National Sea Grant Law Center.

Sincerely,

Stephanie Showalter
Director, National Sea Grant Law Center

[10] *Id.* at 990.
[11] *Mercer v. State of California*, 197 Cal. App. 3d 158, 170 (Cal. Ct. App. 1987).
[12] Cal. Gov. Code § 831.21(a) (2005).
[13] The amendment and subsequent California cases have been cited favorably by the New Jersey courts. *See Fleuhr v. City of Cape May*, 159 N.J. 532, 538 (N.J. 1999).
[14] *Troth v. State*, 556 A.2d 515, 521 (N.J. 1989).