

Twelve long years, and a sandbar expert

Picture this: It's Aug. 28, 1999, a beautiful summer day. You're 17, standing on the beach at Lake Huron with a friend. You're an experienced swimmer and an athlete. Your friend dashes into the waves a few feet to your left and leaps, dolphin-backed, into the surf. He's way ahead of you, challenging you to follow.

You steel yourself for the chill of the water and sprint into the lake, following your pal in. You arc into the water, head-first, hands in front of you. You've done this many times—you know the drill for diving into a lake.

Then all hell breaks loose: It's like you've dived into a brick wall underwater. For a moment you sense a terrible pain in your neck. You lie floating face down in the water, and, dreamlike, you see you're floating over a large mound of sand...and all fades to nothing.

And that dire accident is at once the last step you'll take unassisted, but the first step in a classic personal injury lawsuit that might never have settled—save for a chance hallway conversation between a young victim and a lawyer with a sixth sense for a liability case.



BRENDAN HOWLEY

Like any good litigator, Alf Kwinter always has an eye for the main chance, which in this case was a quadriplegic young man in a wheelchair in his office, discussing a paratransit issue. The wheelchair-bound 19-year-old was there on another matter when Kwinter asked him what he'd done to win compensation for the loss of a normal life at such a young age.

He said he'd made the rounds of the personal injury law firms. No lawyer he'd consulted believed there was any liability—his case was a no-hoper. Kwinter guided the young man (anonymized by court order; settlement quantum sealed) into his office for an interview, launching a 12-year pilgrimage through trial, reversal upon appeal and a remarkable settlement.

The Pinery Provincial Park is an idyllic place of white sand beaches that run for kilometres. On summer weekends, thousands flock to the lakeside. But in Pinery's waters

were a legal no-man's-land, until Alf Kwinter and associate Jason Singer began researching the law of personal injuries at public beaches.

An accidental discovery—Kwinter's career is rich with such coincidences—revealed an Australian public beach liability precedent stemming from an incident at Bondi Beach in Sydney, which inspired serious thinking if not optimism in-house at Singer Kwinter that the forensics of the accident itself were grounds for liability. Further digging revealed that most provincial ocean beaches in British Columbia, particularly in the Tofino area, were in fact posted with warnings of underwater hazards, undertows and riptides. On holiday in Barrie, Ont., Kwinter noted signage warning swimmers of sudden dropoffs offshore.

The liability, as detailed in the *Occupiers Liability Act*, turned on the issue of whether the plaintiff could have been aware of the potential hazard posed by underwater sandbars at an unposted public beach. At the time of the accident, there were no signs at the provincial park anywhere warning of the hazard to uninformed divers and swimmers of migrating under-



Singer

water sandbars offshore.

Damages were agreed to. At trial, the plaintiff's mother told court that when she inspected the lake within days of the accident, she found the levels of the sandbars beneath the water's surface were "all over the place...in some cases eight feet deep, in others ankle-deep."

Kwinter and Singer are nothing if not thorough: they discovered an academic expert on sandbars whose life work included the movements of the Pinery's offshore sand formations.

Brian Greenwood, a sedimentary geologist at the University of Toronto Scarborough, gave evidence at trial before Justice Blenus Wright that he had never considered the hazards to swimmers of the moving sandbars, but also that the plaintiff could not have predicted when and where those hazards might be. The trial judge held that the plaintiff must have known he faced the hazards of the "bottom of the lake," despite both the plaintiff's and Greenwood's evidence that the diving youth had not struck the lake bottom but rather a sandbar. Greenwood added that when

the lake surface is rippled or in waves, it's impossible to see beneath the water surface, precisely the case the day of the accident.

Justice Wright found for the Province of Ontario, represented by the Ministry of Natural Resources and the Attorney General, dismissing Kwinter's action. Kwinter embarked on an appeal, which reversed the Wright decision in its entirety, citing three errors in the trial judge's reasons: that the plaintiff had been negligent in his own actions; that the plaintiff had struck his head on the lake bottom and not a sandbar; and, finally, that, "in any event the sandbars did not constitute a hazard to swimmers for which the respondents could be held liable under the *Occupiers Liability Act*."

Kwinter's appeal succeeded (reasons by Justice S.T. Goudge, with Justices Dennis O'Connor and HS Laforme in agreement) and a new trial was ordered. The province settled out of court but the dollar figure is sealed. This was a tragedy where a very good swimmer, well-travelled and familiar with beach swimming, who had dived hundreds if not thousands of times, found justice because the Singer Kwinter team created a case out of sheer persistence, held fast through trial, won an appeal and negotiated a rightful settlement.

And as of an inspection in March 2012, there were still no signposts warning of the dangers of underwater sandbars at the Pinery Provincial Park. ■

Brendan Howley, a former freelance investigative reporter for CBC-TV's The Fifth Estate, has covered court matters in Ontario since 1989.

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