

Strange v. Entercom

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hyponatremia, Jennifer Strange, KDND, law, legal, *Strange v. Entercom*, tort, torts, water intoxication, wrongful death

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Introduction

In January 2007, while I was revising and adding to my essay on information torts at <http://www.rbs2.com/infotort.pdf>, I read newspaper accounts of the death of Jennifer Strange, following a contest at radio station KDND in Sacramento, California, which is owned by Entercom Communications Corp. Because this is an information tort case with interesting legal issues, on 20 Jan 2007, when newspaper articles were still easily available on the Internet, I began writing this essay about the *Strange v. Entercom* case. This essay contains facts, legal arguments, citations to law, medical information about water intoxication, and history of the *Strange v. Entercom* case.

Facts in Newspapers

On Friday, 12 Jan 2007, Jennifer Lea Strange, a 28 y old mother of three children, participated in a contest at radio station KDND in Sacramento, California. The contest was called “Hold Your Wee for a Wii”, and whoever drank the most water without urinating would win a Nintendo Wii videogame console, worth approximately \$250.

Contestants were given an 8-ounce (235 ml) bottle of water to drink in two minutes, followed by a ten minute break, then another bottle.¹ After eight 8-ounce bottles, contestants were given 16-ounce (475 ml) bottles of water to drink. Jennifer Strange drank eight of the 8-ounce bottles and ten of the 16-ounce bottles, for a total of 224 ounces (6.6 liters) of water.² One of KDND’s disk jockeys remarked that Jennifer’s “stomach was so large that she looked ‘three months pregnant.’ ”³

At 09:30 PST, Jennifer Strange quit the contest, because she had a headache and felt dizzy. She won second place in the contest. She returned to her house, instead of going to work that day. At approximately 14:00 PST, her mother found Jennifer’s dead body in her house.⁴

¹ Associated Press, “Contestants Recall Sacramento Woman’s Role in Radio Water Contest,” *San Francisco Chronicle*, (14:16 PST 15 Jan 2007).

² Ryan Lillis and Christina Jewett, “In Audio Recording, Radio Hosts Talk About Water-Drinking Risks,” *Sacramento Bee*, (06:50 PST 17 Jan 2007). A different amount of water, 5.9 liters, is given in Defendants’ Trial Brief at page 3.

³ *Ibid.*

⁴ *Ibid.*

Her death was first reported in newspapers on Sunday, 14 Jan, two days after her death, after the coroner on Saturday announced his preliminary determination of the cause of death: water intoxication.⁵

During the radio program, a nurse called the station and told the disk jockey that drinking too much water could be fatal.

Judith Linder, a nurse practitioner, said she heard the Morning Rave show when she was driving into work in North Highlands on Friday morning. She found it troubling. She and two co-workers called the radio station on a speaker phone, and their comments that water intoxication can be dangerous were part of the broadcast.

A DJ retorted, asking them why they didn't join the contest. Linder said they replied: We don't want to die.

"I was thinking, 'Who else could I call?' Endangering someone's health should be against the law," Linder said.

Christina Jewett, "Radio show off air after fatality," *Sacramento Bee*, <http://www.sacbee.com/101/story/108430.html> (00:38 PST 16 Jan 2007).

On Tuesday, 16 Jan, the radio station terminated the employment of ten employees (including all of the disk jockeys on that early morning program).⁶ The station said the employees had violated the terms of their employment agreements.

The sheriff initially declined to investigate the death, because Strange's participation was voluntary.⁷ However, on Wednesday, 17 Jan, the sheriff department began a criminal investigation, after listening to the recording of the radio program,⁸ part of which is quoted below.

⁵ I searched the websites for the *Sacramento Bee* and *San Francisco Chronicle* newspapers, as well as the Google News website. The first publication is by Ryan Lillis, "Water Drinking Fatal to Woman," *Sacramento Bee*, (14 Jan 2007). The following day the story was distributed by the Associated Press and appeared in newspapers nationwide.

⁶ Aaron Davis, Associated Press, "Three DJs fired after woman dies following water-drinking contest," *San Francisco Chronicle*, (17:36 PST 16 Jan 2007); Christina Jewett and Sam McManis, "Station fires 10 over deadly radio contest," *Sacramento Bee*, (00:00 PST 17 Jan 2007).

⁷ *Ibid.*

⁸ Juliet Williams, Associated Press, "Sacramento Sheriff Investigates Death of Radio Station Contestant," *San Francisco Chronicle*, (01:18 PST 18 Jan 2007).

reckless disregard for health

The above facts were tragic enough, but KDND's disk jockeys *knew* that water intoxication could be fatal, and *knew* that the contestants were experiencing distress (e.g., severe headaches, vomiting, teeth chattering, etc.), but enthusiastically continued to encourage the contestants to drink more water, as shown by the following paragraphs from a newspaper account of a tape recording of the radio program. I argue below that these facts show that the disk jockeys had a reckless disregard for the health and safety of their contestants.

Journalists at the *Sacramento Bee* newspaper obtained a tape recording of the radio broadcast, and wrote the following in their report:

Someone in the background was heard asking about "that poor kid in college," apparently referring to Matthew Carrington, who died in 2005 after an all-night fraternity hazing.⁹

"That's what I was thinking," a host responded.

"Yeah, well, he was doing other things," someone else said.

About two hours into the contest, a woman who identified herself as Eva called the show. She warned the hosts that "those people that are drinking all that water can get sick and possibly die from water intoxication."

One host replied that "we're aware of that." Another said the contestants had signed releases, "so we're not responsible."

"And if they get to the point where they have to throw up, then they're going to throw up and they're out of the contest before they die, so that's good, right?" one host said. One of the hosts then asked a DJ stationed in the kitchen with the contestants, "Is anybody dying in there?"

"We got a guy who's just about to die," he said.

"Make sure he signs the release," the host replied.

Ryan Lillis and Christina Jewett, "In Audio Recording, Radio Hosts Talk About Water-Drinking Risks," *Sacramento Bee*, <http://www.sacbee.com/296/story/109112.html> (06:50 PST 17 Jan 2007).

⁹ See details below, at page 15.

Another newspaper article quotes Elidia Campos, one of the approximately twenty contestants:

None of the contestants had any idea what they had gotten themselves into.

"I thought it was just water," Campos says, "that it would just flush out my body. I just assumed that because it was a contest, everything would be checked out."

Hardly. As the contestants dropped out, it became clear that some of them were having serious health problems. Not that anyone at the station seemed concerned.

"There was a girl on the floor," says Campos, who made it to the final five. "She must have been there for an hour with her teeth chattering. They were heckling her."

"Your body is 98 percent water," one of the hosts remarked to his on-air audience. "Why can't you take in as much water as you want?"

Because, as many of us in the Bay Area learned two years ago, an excess of water creates a physical shutdown. Pleasant Hill college student Matt Carrington died in 2005 of water intoxication in a hazing incident at a Cal State Chico fraternity.

In fact, Carrington's case came up on Friday. Someone in the studio mentioned "that poor kid in college," but another DJ responded that Carrington "was doing other things."

No, actually, he wasn't. As a listener who identified herself as "Eve" told the morning crew, people "can get sick and possibly die from water intoxication."

"We're aware of that," one jock replied. And another jumped in to wisecrack that everyone in the contest had signed releases, "so we're not responsible."

C.W. Nevius, "A Stupid Radio Stunt's Tragic Finale — Sacramento DJs joked as contestant guzzled fatal quantity of water," *San Francisco Chronicle*,

<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/01/18/MNGMMNKOHS1.DTL> (18 Jan 2007).

A third newspaper article gives more quotations from the radio program:

As participants in KDND-FM's water-drinking contest chugged bottle after bottle, a listener called in to warn the disc jockeys that the stunt was dangerous — and could be fatal.

"Yeah, we're aware of that," one of them responded.

Another DJ laughed: "Yeah, they signed releases, so we're not responsible. We're OK."

Those comments, and others made during the Jan. 12 "Morning Rave" radio show, appeared to give little regard to the risk of water intoxication — until a woman died just hours after imbibing nearly two gallons in that contest.

On Wednesday, the Sacramento County Sheriff's Department launched a criminal investigation into the incident, and attorneys for the family of Jennifer Lea Strange said they plan to file a wrongful death lawsuit against KDND. Details of the suit were to be announced Thursday.

Authorities decided to pursue the investigation after listening to a tape of the Jan. 12 show, obtained by The Sacramento Bee, during which DJs joked about the possible dangers of consuming too much water, sheriff's spokesman Sgt. Tim Curran said. At one point, they even alluded to a Chico college student who died during a similar hazing stunt in 2005.

"Hey Carter, is anybody dying in there?" a DJ asks during the show. "We got a guy who's just about to die," the other responds, and all the DJs laugh.

"I like that we laugh about that," another says.

"Make sure he signs the release. Get the insurance on that, please."

....

Several hours into the contest, Strange was interviewed on the air and complained that her head hurt.

"They keep telling me that it's the water. That it will tell my head to hurt and then it will make me puke," she says.

"Who told you that? The intern?" a DJ asks.

"Yeah," Strange responds. "It hurts, but it makes you feel lightheaded."

"This is what it feels like when you're drowning," one of the DJs says. "There's a lot of water inside you."

Eventually, Strange gave in and decided to accept the second-place prize: tickets to a Justin Timberlake concert. She commented that she looked pregnant, and a female DJ agreed.

"Oh, my gosh, look at that belly. That's full of water," a male DJ said. "Come on over, Jennifer, you OK?" the DJ asks. "You going to pass out right now? Too much water?"

Strange tells the talk show hosts that she could "probably drink more if you guys could pick me up."

Juliet Williams, Associated Press, "Sacramento Sheriff Investigates Death of Radio Station Contestant," *San Francisco Chronicle*, (01:18 PST 18 Jan 2007).

not criminal

On 2 April 2007, Sacramento County District Attorney Jan Scully declined to prosecute the radio station's employees for homicide.

"She knew what the contest involved when she entered it and had the option to stop or discontinue her participation in the contest at any time," said Scully, outlining how prosecutors contemplated — and ultimately decided against — filing charges of involuntary manslaughter.

"There were no observable indications or symptoms that Jennifer Strange was experiencing a serious medical emergency which would have required station employees to seek or administer medical aid to her," Scully said.
Henry K. Lee, "No criminal charges in radio stunt," *San Francisco Chronicle*, 3 April 2007.

My Initial Opinion in 2007

defenses

As discussed in my essay on information torts, at <http://www.rbs2.com/infotort.pdf>, it is remarkably difficult to hold entertainment media (e.g., radio, television, movies, videogames) legally liable for harm that they cause. Judges commonly rule that the First Amendment prevents liability, although I argue in my essay on information torts that this is a misunderstanding of U.S. Supreme Court cases, because the media is liable for defamation. Judges sometimes hold that media have no duty to protect the audience or hold that the actions of the audience are the proximate cause of injuries.

In the *Strange* case, there are minimal First Amendment issues. This case did not involve either news reporting or political speech. It was a stunt to increase the popularity of the radio program, thus increasing the profitability of the radio station. The speech involved here may¹⁰ be an element of a crime: reckless endangerment or manslaughter. Such speech is *not* protected by the First Amendment.¹¹

The radio station can offer a number of other defenses, including lack of duty to the victim, assumption of risk by the victim, any release of liability she signed, her voluntary decision to drink the water was the proximate cause of her death, etc. These defenses may seem ludicrous, but these defenses have been accepted by judges in other cases involving television programs, movies, and videogames that allegedly inspired harmful acts.¹²

¹⁰ I say *may* because there has not yet been a criminal conviction in this case, as I write this on 20 Jan 2007.

¹¹ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now."); *Street v. New York*, 394 U.S. 576, 594 (1969) ("... nothing in this opinion would render the conviction impermissible merely because an element of the crime was proved by the defendant's words rather than in some other way."). See also *Weirum v. RKO General, Inc.*, 539 P.2d 36, 40, 123 Cal.Rptr. 468, 472 (Cal. 1975) ("The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.").

¹² See cases cited in Ronald B. Standler, *Infotorts*, <http://www.rbs2.com/infotort.pdf> (1998) and Ronald B. Standler, *Proximate Cause in Infotorts*, <http://www.rbs2.com/infotort2.pdf> (2007).

The strongest defense for the radio station is that the contestants participated voluntarily. However, in promoting the contest and encouraging participants during the contest, the disk jockeys *knew* that drinking too much water could be fatal, while the contestants did *not* know that essential fact. In my opinion, a reasonable person would not risk death for a chance to win a \$250 game. So a key legal issue is whether the disk jockeys had a legal obligation to inform the contestants that drinking too much water could be fatal.

duty

The leading case in California on the legal duty of a radio station in holding a dangerous contest is *Weirum*, which is discussed in detail below, beginning at page 11. When there is no precedent for establishing a legal duty, judges in California consider seven issues:

“All persons are required to use ordinary care to prevent others being injured as the result of their conduct.” [citations omitted]

A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are [1] the foreseeability of harm to the plaintiff, [2] the degree of certainty that the plaintiff suffered injury, [3] the closeness of the connection between the defendant's conduct and the injury suffered, [4] the moral blame attached to the defendant's conduct, [5] the policy of preventing future harm, [6] the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and [7] the availability, cost, and prevalence of insurance for the risk involved. [citations omitted]

Rowland v. Christian, 443 P.2d 561, 564, 70 Cal.Rptr. 97, 100 (Cal. 1968), citing, amongst other cases, *Raymond v. Paradise Unified School District*, 31 Cal.Rptr. 847, 851-852 (Cal.App. 1963).¹³ Applying these considerations to the facts in *Strange*, first her death was foreseeable, because a nurse called the disk jockeys and told them the contest could be fatal, and also because the disk jockeys knew of the death of Carrington from water intoxication during a fraternity initiation rite.¹⁴ Second, the likelihood of the injury was high, given that there was one death amongst approximately 18 contestants. Third, the disk jockeys encouraged Strange to continue drinking water, even after they knew she was in acute distress, and then KDND failed to rescue Strange, as explained below, at page 13. Fourth, the disk jockeys encouraged contestants to harm themselves — and the disk jockeys did nothing to rescue contestants afterwards — which is

¹³ Judges in other states use a similar list of issues, for example, Colorado: *A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc.*, 114 P.3d 862, 868 (Colo. 2005), quoting *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 46 (Colo. 1987) (“... [1] the risk involved, [2] the foreseeability and [3] likelihood of injury as weighed against [4] the social utility of the defendant's conduct, [5] the magnitude of the burden of guarding against injury or harm, and [6] the consequences of placing the burden upon the defendant.”). In Texas: *Bird v. W.C.W.*, 868 S.W.2d 767, 769 (Tex. 1994) (“In determining whether to impose a duty, this Court must consider the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and the consequences of placing that burden on the actor.”).

¹⁴ See some other cases of fatal water intoxication, at page 14, below, and the articles in the medical literature, beginning at page 17, below.

immoral conduct. The sarcastic and joking remarks of disk jockeys while contestants were harming themselves is further evidence of immoral conduct. Fifth, a multi-million dollar punitive damage award would deter future dangerous stunts to promote radio programs. Sixth, winning a prize worth \$250 is trivial benefit for an appreciable risk to life, furthermore there is no social benefit to a public contest that invites contestants to humiliate — and possibly kill — themselves. Furthermore, not holding dangerous contests would minimally burden a radio station. Applying these seven considerations to *Strange*, the court should enforce the general rule that KDND has a duty to use ordinary care to protect its contestants from harm.

The proof of duty in a tort case becomes easier if some of the defendants are first convicted of criminal charges, so that violation of a statute is breach of a duty.¹⁵ On the other hand, liability insurance is not available for criminal acts.

recklessness

The quotations from newspapers, above beginning at page 4, show a reckless disregard for the health of the contestants. The disk jockeys had actual knowledge — both from the death of Carrington and from nurse Eva, who called during the program — that drinking large amounts of water was dangerous, possibly fatal. The disk jockeys had actual knowledge that the contestants were experiencing distress (e.g., severe headaches, vomiting, teeth chattering, etc.). However, the disk jockeys ignored the risk of death and ignored the acute distress of the contestants, while the disk jockeys enthusiastically continued to encourage the contestants to drink more water. These facts prove that the disk jockeys were reckless — one step worse than negligent, but better than intentionally causing harm — in their conduct toward contestants.

public policy

This case is about more than the death of one woman. It is about the legal responsibility of so-called entertainment when entertainers urge people to do dangerous activities. The family of Jennifer Strange hired Roger Dreyer, a personal-injury attorney in Sacramento, to file a wrongful death lawsuit against station KDND.¹⁶ In his initial interviews with journalists, Dreyer skillfully focused on public policy issues of the recklessness of the disk jockeys. Just days after Dreyer was hired, journalists were reporting on the public policy aspects of the case. For example:

Two weeks ago, the movers and shakers in national radio networks had never heard of a Sacramento housewife named Jennifer Strange.

They know her now.

¹⁵ Restatement Second of Torts § 286 (1965).

¹⁶ Aaron Davis, Associated Press, “Family to Sue Radio Station Over Water Death,” *San Francisco Chronicle*, (17:04 PST 18 Jan 2007).

When Strange died Jan. 12 of water intoxication after a morning radio stunt on Sacramento station KDND went wrong, it sent a jolt through the industry. And this may not get resolved with a radio network issuing an apology and offering cash to make everything go away.

C.W. Nevius, "Can Death Dent Media's Humiliation Fad?," *San Francisco Chronicle*, <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/01/21/MNG2ONMB4E1.DTL> (21 Jan 2007).

termination of employment

At first glance, the fact that the radio station fired ten of its employees on Tuesday, 16 Jan, only four days after Jennifer's death, seems to show that the station found the actions of their employees to be reprehensible. There are three reasons why terminating their employment was probably a mistake for the station:

1. Under the long-standing doctrine of *respondeat superior*, the station is legally responsible for the actions of its employees, so terminating their employment does *not* affect the liability of the radio station.
2. The termination of employment may be an admission of misconduct by the station. On the other hand, this admission may not be important, because the misconduct is obvious: a woman died during a stupid stunt by the disk jockeys.
3. And firing the employees means that the employees no longer have a reason to be loyal to the station, which means that the employees could now cooperate with plaintiff's attorney during the wrongful death litigation. The radio station probably has more assets and probably has more insurance coverage than all ten of the employees combined, so that suing the radio station may make more sense than suing the employees individually.

safer alternatives

After reviewing the medical literature, below at page 17, there is probably not a safe way of quickly drinking large volumes of liquid without urinating. Given the danger of this stunt, at least, the disk jockeys *should* have arranged for paramedics or a registered nurse to be available, to monitor the health of contestants, and stop the contest if people were in distress.

There is no shortage of quiz questions that could be asked of contestants, without danger to their health.

Weirum v. RKO

To the best of my knowledge in 2007, there is only one case nationwide in which a radio/television program has been held responsible for death. Remarkably, that case is in California, where it is still good law for the *Strange* case.

Weirum v. RKO, 539 P.2d 36, 123 Cal.Rptr. 468 (Calif. 1975) involves KHJ radio station's contest that lead to a death in a fatal car race. In *Weirum*, a disk jockey, Steele, was in a "conspicuous red automobile", traveling to various locations in the Los Angeles area, while the radio station broadcast hints about his location. The first listener to find him would win a prize. Two children, in separate cars, were racing on city streets, following the disk jockey's car. One or both of the children negligently forced a third car off the road, and the occupant of the third car died. Plaintiff sued the two children and their parents, the manufacturer of decedent's car, and the radio station. The insurance company for one of the children settled with plaintiff prior to trial by paying the policy limits. The jury awarded plaintiff \$300,000 in damages to be paid by the radio station and other child.¹⁷ The radio station appealed and the California Supreme Court unanimously upheld the jury verdict.

In deciding that the radio station owed a duty of care to the decedent, the California Supreme Court focused on the foreseeability of the harm to decedent:

We conclude that the record amply supports the finding of foreseeability. These tragic events unfolded in the middle of a Los Angeles summer, a time when young people were free from the constraints of school and responsive to relief from vacation tedium. Seeking to attract new listeners, KHJ devised an 'exciting' promotion. Money and a small measure of momentary notoriety awaited the swiftest response. It was foreseeable that defendant's youthful listeners, finding the prize had eluded them at one location, would race to arrive first at the next site and in their haste would disregard the demands of highway safety.

Indeed, 'The Real Don Steele' testified that he had in the past noticed vehicles following him from location to location. He was further aware that the same contestants sometimes appeared at consecutive stops. This knowledge is not rendered irrelevant, as defendant suggests, by the absence of any prior injury. Such an argument confuses foreseeability with hindsight, and amounts to a contention that the injuries of the first victim are not compensable. "The mere fact that a particular kind of an accident has not happened before does not ... show that such accident is one which might not reasonably have been anticipated." (*Ridley v. Grifall Trucking Co.* (1955) 136 Cal.App.2d 682, 686, 289 P.2d 31, 34.) Thus, the fortuitous absence of prior injury does not justify relieving defendant from responsibility for the foreseeable consequences of its acts.

It is of no consequence that the harm to decedent was inflicted by third parties acting negligently. Defendant invokes the maxim that an actor is entitled to assume that others will not act negligently. (*Porter v. California Jockey Club, Inc.* (1955) 134 Cal.App.2d 158, 160, 285 P.2d 60.) This concept is valid, however, only to the extent the intervening conduct was

¹⁷ *Weirum v. RKO General, Inc.*, 119 Cal.Rptr. 151, 153 (Cal.App. 1975), vacated by, 539 P.2d 36, 38-39, 123 Cal.Rptr. 468, 470-471 (Calif. 1975).

not to be anticipated. (*Premo v. Grigg* (1965) 237 Cal.App.2d 192, 195, 46 Cal.Rptr. 683.) If the likelihood that a third person may react in a particular manner is a hazard which makes the actor negligent, such reaction whether innocent or negligent does not prevent the actor from being liable for the harm caused thereby. (*Richardson v. Ham* (1955) 44 Cal.2d 772, 777, 285 P.2d 269.) Here, reckless conduct by youthful contestants, stimulated by defendant's broadcast, constituted the hazard to which decedent was exposed.

It is true, of course, that virtually every act involves some conceivable danger. Liability is imposed only if the risk of harm resulting from the act is deemed unreasonable — i.e., if the gravity and likelihood of the danger outweigh the utility of the conduct involved. (See Prosser, *LAW OF TORTS* (4th ed. 1971) pp. 146-149.)

We need not belabor the grave danger inherent in the contest broadcast by defendant. The risk of a high speed automobile chase is the risk of death or serious injury. Obviously, neither the entertainment afforded by the contest nor its commercial rewards can justify the creation of such a grave risk. Defendant could have accomplished its objectives of entertaining its listeners and increasing advertising revenues by adopting a contest format which would have avoided danger to the motoring public.

Weirum v. RKO, 539 P.2d 36, 40 (Calif. 1975).

The California Supreme Court held that the radio station has a duty not to create an undue or unreasonable risk of harm. *Weirum*, 539 P.2d at 41.

While I like the result in *Weirum*, and this case remains good law in the state of California, this case has *not* been accepted by courts in other states, during the past thirty years, as shown in my essay on infotorts.

In *Weirum*, there was the issue of negligence of the children-drivers being a superseding cause of decedent's death, while in *Strange* there will be the issue of voluntary drinking of the water by Strange being a superseding cause of her death.

There is another way to distinguish *Strange* from *Weirum*. In *Weirum*, the decedent was *not* a participant in the radio station contest. In *Strange*, the decedent was a voluntary participant in the contest, although one wonders about whether she would have willingly participated if she knew the contest could kill her.

There is one set of facts in *Strange* that makes a stronger case for liability of the radio station KDND than for radio station KHJ in *Weirum*. The disk jockeys at KDND were *aware* that the contestants were in acute distress, but the disk jockeys enthusiastically encouraged the contestants to continue to drink more water, thus pushing them closer to death. In contrast, the disk jockey in *Weirum* was *not* aware that two teenaged drivers were following him, when the accident

occurred.¹⁸ I think it is obvious¹⁹ that the disk jockeys at KDND had a reckless disregard for the health and safety of their contestants, while the radio station KHJ in *Weirum* was only negligent.

Despite these factual differences between the *Weirum* and *Strange* cases, in my opinion (1) the *Weirum* case is applicable to the facts in *Strange*, and (2) the holding in *Weirum* establishes a clear duty that KDND breached.

Legal Duty to Rescue

In American law, a person generally has no legal duty to rescue someone in peril. A person on a dock can see a person in the water, “in dire peril, ... [and] may sit on the dock, smoke his cigar, and watch the other drown.”²⁰

However, the rule is different if D’s act (or failure to act) *caused* the peril. Then, D would be negligent in not protecting the victim from the peril.²¹ In the *Strange* case, the disk jockeys *knew* that the contestants were in acute distress (e.g., severe headaches, vomiting, teeth chattering, etc.), but let the contestants go home. Letting these suffering contestants drive their cars was negligent,²² although no one was hurt in an automobile accident. Letting the contestants go home, without giving them electrolyte tablets or at least urging them to seek medical care, was negligent. In fact, Jennifer Strange went home and died, although her death could have been prevented by medical care. In other words, the disk jockeys poisoned Jennifer Strange, and then failed to give her the antidote to the poison. From this point of view, the disk jockeys (1) not only created her peril by giving her dangerous amounts of water to drink, (2) but also failed to rescue her from the peril. There are *two* separate and independent harms. I think the first was reckless disregard for her safety and health, the second was negligent conduct in failing to rescue her from the water intoxication.

¹⁸ *Weirum v. RKO General, Inc.*, 119 Cal.Rptr. 151, 153 (Cal.App. 1975) (“There was no evidence that Steele or O’Brien, the driver of the car, were aware of the cars following behind them.”), *vacated by*, 539 P.2d 36, 123 Cal.Rptr. 468 (Calif. 1975).

¹⁹ See the facts quoted from newspapers, beginning at page 4 above.

²⁰ Restatement Second of Torts, § 314, comment *c*, p. 117 (1965).

²¹ Restatement Second of Torts, § 302 comment *a*, p. 82 (1965).

²² By analogy with liability cases involving taverns that serve patrons alcoholic beverages, then let an obviously intoxicated patron drive his/her car. See *Coulter v. Superior Court*, 577 P.2d 669, 145 Cal.Rptr. 534 (Cal. 1978); *Vesely v. Sager*, 486 P.2d 151, 95 Cal.Rptr. 623 (Cal. 1971). The civil liability was repealed by statute in California in 1978, which gives immunity to sellers of alcoholic beverages for their negligently serving intoxicated patrons.

Other Cases

The death of Jennifer Strange is not the only recent death from water intoxication. My quick search on the Internet during 22-25 Jan 2007 found five cases since Jan 2002 that were reported nationwide by journalists:

- **April 2002** Cynthia Lucero, a 28 y old woman running in the Boston Marathon, suffered hyponatremia, collapsed while running the race, was taken to a hospital in an ambulance, but physicians at the hospital were unable to reverse her coma, and she died two days later. Website created by friends and family: <http://www.remembercynthia.com/>
- **9 June 2002** Cassandra Killpack, a 4 y old girl in Provo, Utah, died of water intoxication. Her 26 y old adoptive mother used water intoxication to punish Cassandra for misbehaving. The mother forced Cassandra to drink more than one gallon (3.8 liters) of water. In Oct 2005, a jury found the mother guilty of child-abuse homicide.²³ The mother, Jennete Killpack, was sentenced by a judge to between 1 and 15 years in prison.²⁴ In April 2006, The Utah Board of Pardons and Parole decided that Jennete will spend at least five years in prison.
- **14 Oct 2002** Rosita Gonzalez, a 3 y old girl in Fort Lauderdale, Florida, died of water intoxication after her babysitter, Nancy Gayoso, forced her to drink a large volume of water as punishment. Gayoso was later found not mentally fit to stand trial for murder.²⁵
- **12 March 2003** Walter Dean Jennings, an 18 y old student at Plattsburgh State University, in New York, died of water intoxication following hazing at a fraternity initiation ceremony. Eleven members of the fraternity were arrested.²⁶ One fraternity member, 25 year-old William Katz, pled guilty to first-degree hazing and second-degree coercion for intimidating pledges to take part in a hazing ritual called water torture, and Katz was sentenced to a year in jail.²⁷

²³ Jesse Hyde, "Split verdict surprises and stuns the Killpacks," *Deseret Morning News*, (12 Oct 2005).

²⁴ Jared Page, "Killpack receives prison sentence," *Deseret Morning News*, (7 Jan 2006).

²⁵ "Judge: Baby Sitter In Water Intoxication Death Still Not Competent," (12:33 EST 13 Dec 2005) <http://www.local10.com/news/5526036/detail.html> .

²⁶ Anna Jolly, "Eleven in Fraternity Charged," Plattsburgh, NY *Press-Republican* (1 May 2003).

²⁷ WNBZ news summary, <http://www.wnbz.com/December%202003/122403.htm> (24 Dec 2003).

- **2 Feb 2005** Matthew Carrington was the victim of a fraternity hazing at California State University at Chico, where his fraternity forced him to drink large quantities of water, do push-ups, and stand in wet clothing in a cold basement. Carrington died of water intoxication.²⁸ On 28 Oct 2005, one fraternity member pled guilty to involuntary manslaughter and misdemeanor hazing and was sentenced to a year in jail. Two fraternity members pled guilty to being an accessory to manslaughter and to misdemeanor hazing, and were sentenced to a half-year in jail. A fourth fraternity member pled guilty to misdemeanor hazing, and was sentenced to 90 days in jail.²⁹ See the website by Matt Carrington's parents: <http://www.wemissyoutmatt.com/> .

legal cases

My search of Westlaw on 25 Jan 2007 found 22 cases nationwide that mention "water intoxication", of which the following are noteworthy:

- **May 1976** Dennis Voter forced a 7 y old girl to drink two gallons of water. She died. Voter was convicted of second-degree homicide and an appellate court affirmed. *Maine v. Voter*, 388 A.2d 923 (Me. 1978).
- **October 1988** Mother's boyfriend forced her 6 y old son "to drink large quantities of water over the next two to three hours." Boy died of water intoxication. Trial court sentenced the boyfriend, Jonathan Crawford, to life in prison for first-degree murder and an appellate court affirmed. *North Carolina v. Crawford*, 406 S.E.2d 579 (N.C. 1991).
- **August 1990** Physician infused patient with 5% dextrose (no sodium), patient developed water intoxication and died. *Langvardt v. Horton*, 581 N.W.2d 60 (Neb. 1998).
- **before 1997** Foster mother murdered "developmentally disabled" 16 y old girl by water intoxication. Mother sentenced to six years in prison. *California v. Mancini*, unreported.³⁰

²⁸ Mark Lore, "Fraternal Instincts," *Chico News and Review*, (10 March 2005).

²⁹ Greg Lucas, "Four Plead Guilty in Hazing Death, Begin Jail Terms," *San Francisco Chronicle* (29 Oct 2005); Mark Lore, "Guilty Pleas Don't Ease Pain," *Chico News and Review*, (3 Nov 2005).

³⁰ The prosecuting attorney and expert witness for the prosecution wrote a paper in a medical journal describing three cases: A.I. Arieff, B.A. Kronlund, "Fatal Child Abuse by Forced Water Intoxication," *Pediatrics*, Vol. 103, pp. 1292-1295 (June 1999). This paper also contains medical data for the *Voter* and *Crawford* cases.

- **September 1999** Madarash forced a 5 y old girl to “drink a 48-ounce Diet Pepsi within a matter of minutes”, then physically abused the girl. The girl died from water intoxication. Madarash was found guilty of homicide by child abuse, and an appellate court affirmed. *Washington v. Madarash*, 66 P.3d 682 (Wash.App. 2003).

These ten cases — five in the news media, four in reported appellate cases, and one in a medical journal — show that water intoxication is a foreseeable cause of death. The following cases reported in medical journals gives additional support that water intoxication is a foreseeable cause of death.

However, most people — including Jennifer Strange — are not aware that water intoxication can be fatal. This general ignorance does not excuse defendants’ conduct, because the defendants *knew* that water intoxication could be fatal: (1) one of the disk jockeys recalled the death of Matthew Carrington and (2) a nurse called the program and told the disk jockeys that water intoxication could be fatal.

Medical Literature

On 21 Jan 2007, I searched the PubMed database for reports in the medical literature on water intoxication. As expected, there are published reports of distress, and a few deaths, amongst long-distance runners, athletes, and military trainees, who quickly drank a large volume of water following exertion. There are also reports of deaths of psychiatric patients from self-induced water intoxication. And there are a few published articles on water intoxication as a form of child abuse.

Water intoxication is the opposite of dehydration. In many water intoxication cases, the patient excretes (e.g., in sweat or diarrhea) sodium ions and water, then drinks water, thus reducing the concentration of sodium ions in the blood, a condition called hyponatremia. In other water intoxication cases, the patient ingests large quantities of water (more than five liters for an adult) in a short time (less than a few hours), which also produces hyponatremia. Either way, this hyponatremia causes cerebral edema, which initially produces headache, dizziness, confusion, nausea, and can later produce seizures, coma, and death. Hyponatremia causes other serious problems in the body (e.g., pulmonary edema), but the cerebral edema usually kills the patient first.

Gatorade®

Athletes sweat and lose both water and electrolytes. Giving them plain water to drink produces symptoms of water intoxication, because the electrolytes are not being replaced. In 1965, Prof. James Robert Cade and three other physicians at the University of Florida Medical School invented the sports drink now known as Gatorade®, which contains 460 mg/liter of sodium, 125 mg/liter of potassium, 5.8% sugars, and flavorings. Having the University of Florida football team drink Gatorade® “significantly reduced the incidence of heat-related illnesses.”³¹ Gatorade® was said to be the secret weapon that allowed the University of Florida football team to win games in 1966. The inventors sold their formula to Stokely-Van Camp, which began selling the Gatorade® drink in 1967. Mentioning the Gatorade® story may be a good way to educate jurors about the importance of also including electrolytes when people drink large volumes of water, because it takes a familiar item — Gatorade® — and relates it to technical medical issues in the *Strange* case.

There are several webpages about the discovery of Gatorade®:

1. Arline Phillips-Han, “Dr. Robert Cade — saga of the world’s best-selling sports drink and the creative physician scientist behind it,” *University of Florida Health Science Center News*, <http://www.news.health.ufl.edu/story.aspx?ID=703> (24 Feb 2003).
2. Joe Kays & Arline Phillips-Han, “Gatorade — The Idea that Launched an Industry,” *Explore: Research at the University of Florida*, <http://www.rgp.ufl.edu/publications/explore/v08n1/gatorade.html> (Spring 2003).
3. Darren Rovell, “Highlights from the History of Gatorade,” *American Management Association*, http://www.amanet.org/books/catalog/0814472990_Timeline.htm (no date).

medical bibliography

In chronological order:

August G. Swanson and O.A. Iseri, “Acute encephalopathy due to water intoxication,” *New England Journal of Medicine*, Vol. 258, pp. 831-834 (24 April 1958).

Matthew Ferguson and M.M. O’Brien, “Heat Stroke in New York City. Experience with Twenty-Five Cases,” *New York State Journal of Medicine*, Vol. 60, pp. 2531-2538 (15 Aug 1960).

³¹ James Robert Cade, H.J. Free, A.M. DeQuesada, D.L. Shires, L. Roby, “Changes in Body Fluid Composition and Volume During Vigorous Exercise by Athletes,” *Journal of Sports Medicine Physical Fitness*, Vol. 11, pp. 172-178 (Sep 1971).

J.R. Cade, H.J. Free, A.M. DeQuesada, D.L. Shires, L. Roby, "Changes in Body Fluid Composition and Volume During Vigorous Exercise by Athletes," *Journal of Sports Medicine Physical Fitness*, Vol. 11, pp. 172-178 (Sep 1971). (This paper is by the team of physicians who developed Gatorade®. They showed that sweat has a lower sodium concentration than blood plasma.)

D.L. Costill and K.E. Sparks, "Rapid Fluid Replacement Following Thermal Dehydration," *Journal Applied Physiology*, Vol. 34, pp. 299-303 (Mar 1973).

D. Baran, T.A. Hutchinson, "The Outcome of Hyponatremia in a General Hospital Population," *Clinical Nephrology*, Vol. 22, pp. 72-76 (August 1984).

R. Tyler Frizzell, G.H. Lang, D.C. Lowance, S.R. Lathan, "Hyponatremia and Ultramarathon Running," *Journal of the American Medical Association*, Vol. 255, pp. 772-774 (14 Feb 1986). (Reports two cases of acute water intoxication during a long race in Oct 1983: (1) a 24 y old medical student who ran 100 km, while drinking approximately 20 liters of fluid, including 12 liters of Gatorade® and (2) a 45 y old physician who ran 80 km, while drinking approximately 24 liters of fluid, including 7 liters of Gatorade®. At that time, medical dogma was that runners should drink a large volume of plain water during the race, and that Gatorade® contained too much sodium. These two cases proved the dogma was wrong.)

W. Douglas B. Hiller, "Dehydration and Hyponatremia During Triathlons," *Medicine and Science in Sports and Exercise*, Vol. 21, pp. S219-S221 (Oct 1989). (Reports hyponatremia in races lasting more than four hours.)

Thomas P. Garigan, D.E. Ristedt, "Death From Hyponatremia as a Result of Acute Water Intoxication in an Army Basic Trainee," *Military Medicine*, Vol. 164, pp. 234-238 (Mar 1999). (Reports first known death of U.S. Army basic trainee from water intoxication. The trainee drank 8 quarts of water and "complained of dizziness, 'throbbing' headache, and nausea." The trainee was incorrectly diagnosed as dehydrated, so he was encouraged to drink an additional 10 quarts of water in 90 minutes.)

Allen I. Arieff, B.A. Kronlund, "Fatal Child Abuse by Forced Water Intoxication," *Pediatrics*, Vol. 103, pp. 1292-1295 (June 1999). (Reports death of three children from forced water intoxication, a new form of child abuse.)

Karen K. O'Brien, et al., "Hyponatremia Associated with Overhydration in U.S. Army Trainees," *Military Medicine*, Vol. 166, pp. 405-410 (May 2001). (Review of 17 cases.)

John W. Garner, "Death by Water Intoxication," *Military Medicine*, Vol. 167, pp. 432-434 (May 2002). (Explains new U.S. Army recommendation to limit water consumption to 1.5 quarts/hour and 12 quarts/day.)

G. Loas, E. Mercier-Guidez, "Fatal Self-Induced Water Intoxication Among Schizophrenic Inpatients," *European Psychiatry*, Vol. 17, pp. 307-310 (Oct 2002). (Reports three deaths of psychiatric patients in one department of France during 1986-1998 from self-induced water intoxication.)

D.J. Farrell and L. Bower, Letter: "Fatal Water Intoxication," *Journal of Clinical Pathology*, Vol. 56, pp. 803-804 (Oct 2003). (64 y old woman began compulsively drinking water and she died with a serum sodium level that was 67% of normal.)

Sanjay M. Bhananker, R. Paek, M.S. Vavilala, "Water Intoxication and Symptomatic Hyponatremia After Outpatient Surgery," *Anesthesia & Analgesia*, Vol. 98, pp. 1294-96 (May 2004). (On advice of a naturopathic physician, a 40 y old woman drank 10 liters of water in a few hours before and after outpatient surgery, and she developed water intoxication.)

Christopher S.D. Almond, et al., "Hyponatremia Among Runners in the Boston Marathon," *New England Journal of Medicine*, Vol. 352, pp. 1550-1556 (14 Apr 2005). (Measured hyponatremia in 13% of 488 runners in a marathon. Risk of hyponatremia was greater in runners who consumed more than 3 liters of fluid during the approximately four hour race.)

A.H. Whitfield, "Too Much of a Good Thing? The Danger of Water Intoxication in Endurance Sports," *British Journal of General Practice*, Vol. 56, pp. 542-545 (July 2006). (Says mild dehydration is not dangerous in marathon runners, while hyponatremia can be fatal.)

These articles in the medical literature, and many other articles, show that the medical profession is well aware of the hazards of electrolyte disturbances, including water intoxication. That's why the nurse called the KDND disk jockeys during the program to tell them that drinking too much water can be fatal.

Litigation in *Strange v. Entercom*
complaint

On Thursday, 25 Jan 2007, Roger Dreyer filed the wrongful death complaint in California Superior Court in Sacramento, California. A copy of the complaint is posted on the Internet at:

- <http://www.thesmokinggun.com/archive/years/2007/0125073wii1.html>
- http://cbs5.com/reference/local_file_025142925
- <http://news.corporate.findlaw.com/hdocs/docs/pi/strangekdnd12507cmp.html>
- <http://news.findlaw.com/hdocs/docs/pi/strangekdnd12507cmp.html>

There are four counts in the complaint: both wrongful death and survivor's action for each of negligence and reckless conduct.

First, the complaint alleges negligence by KDND and its employees in that the employees knew that consuming large volumes of water could cause physical injury or death, but the Defendants "failed to conduct a reasonable investigation to determine the relative health risks" and the Defendants "negligently failed to identify specific health risks or inform contest participants". Furthermore, Defendants "negligently failed to provide any assistance, medical or otherwise, to any of the contestants".

Second, the complaint specifies a survivor's action on the basis of negligence by Defendants. This count includes punitive damages for "willful and knowing disregard of decedent's safety".

Third, the complaint says "if it is determined that Defendants had no legal duty of care to the decedent," then it is alleged in the alternative that "Defendants acted recklessly and/or intentionally in causing the death of Jennifer Strange", thus entitling Plaintiffs to win the same damages as in Count One.

Fourth, the complaint specifies a survivor's action on the basis of reckless or intentional conduct by Defendants, thus entitling Plaintiffs to win the same damages as in Count Two.

trial

The plaintiffs settled their claims against the individual employees of the radio station for \$ 100,000. The only defendants at trial were Entercom, the company that operated the radio station in Sacramento, and its parent company in Boston. Opening statements began on 17 Sep 2009, closing arguments were on 13-14 Oct 2009.

An economist estimated that the present cash value of the remainder of 28 y old Jennifer's life, assuming she continued to work until age 62 y, was \$ 1,880,000.

The attorney for the radio station argued that:

1. Jennifer's death was *not* foreseeable, because there have been only 18 deaths from acute water intoxication in the past 30 years, and 80% of those decedents were "psychotics".³²
 2. Jennifer herself was negligent when she continued to drink water after not feeling well and after watching other contestants vomit.
 3. *if* the jury found the defendant liable, "reasonable compensation" would be \$ 4,500,000.
- The defendant's attorney called only four witnesses during a one-day defense of the radio station.

After nine days of deliberation, the jury found on 29 Oct 2009:

- there was no negligence by Jennifer
- the local radio station was solely responsible, the parent company had no responsibility
- the economic damages were \$ 1,477,118 (e.g., loss of future wages and homemaking services)
- the non-economic damages totalled \$ 15,100,000 for loss of her love and companionship

no appeal

Entercom quickly decided not to appeal the verdict. The lack of an appeal means that *Strange v. Entercom* has no precedential value anywhere. If Entercom had appealed, an appellate judge could have endorsed the jury's decision and created binding precedent for use in deciding future claims against entertainment programs in California. Entercom's insurance company will pay approximately \$ 16.58 million to the widow of Jennifer Strange.

³² Those alleged facts are contradicted by my search of the literature, see pages 14 and 17, above.

links to trial information

Superior Court of California, County of Sacramento

William A. Strange et al. vs. Entercom Sacramento LLC et al. case information

<http://www.saccourt.ca.gov/general/public-cases/strange-vs-entercom.aspx> (trial schedule)

<https://services.saccourt.com/publicdms2/defaultdms.aspx?Legacy=07AS00377> (documents)

Andy Furillo, "Sacramento radio water-death trial to begin," *Sacramento Bee*,

<http://www.sacbee.com/ourregion/story/2166048.html> (8 Sep 2009 15:43 PT).

Andy Furillo, "Defense rests after calling four witnesses in water-intoxication case," *Sacramento*

Bee, <http://www.sacbee.com/news/story/2236231.html> (7 Oct 2009 09:27 PT).

Andy Furillo, "Defense argues against big award in fatal radio contest case," *Sacramento Bee*,

<http://www.sacbee.com/courts/story/2254761.html> (15 Oct 2009 00:00 PT).

Andy Furillo, "Jury awards \$16.57 million to radio contestant's survivors," *Sacramento Bee*,

<http://www.sacbee.com/ourregion/story/2292567.html> (29 Oct 2009 17:05 PT).

Conclusion

Strange v. Entercom is an important contemporary case about holding entertainment media responsible for the harms they cause. Because the radio station chose not to appeal, this case is not precedent for any future cases. However, one can be certain that businessmen who manage talk radio programs understand that *Strange v. Entercom* means programs can be liable for harm that it causes.

This document is at www.rbs2.com/KDND.pdf

My most recent search for court cases on this topic was on 25 Jan 2007.

first posted 24 Jan 2007, revised 9 Feb 2012

return to my homepage at <http://www.rbs2.com/>