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Child trespassers and water hazards

By Roger T. Manwaring

Late on a warm August night, a 14-year-old girl and a group of her friends trespass on the property of a nearby apartment complex in order to swim in its pool. The pool, which is closed on the night they arrive, is fenced and locked but teenagers often trespass, either by scaling the fence or cutting through it. The girl, who knows that she cannot swim, enters the shallow end of the pool to play a tag-like game with her friends.

Although it is lit by floodlights, the pool has no interior illumination. There is a rope dividing the relatively flat shallow end from the steeply sloping deep end. Engrossed in the game, the girl fails to notice that other swimmers have removed the dividing rope in order to expand the "playing field." In the excitement of the moment, she steps over the now unmarked dividing line, slips down the sloped floor into the deep end, and nearly drowns, sustaining serious, permanent injuries.

She sues, claiming that the apart-

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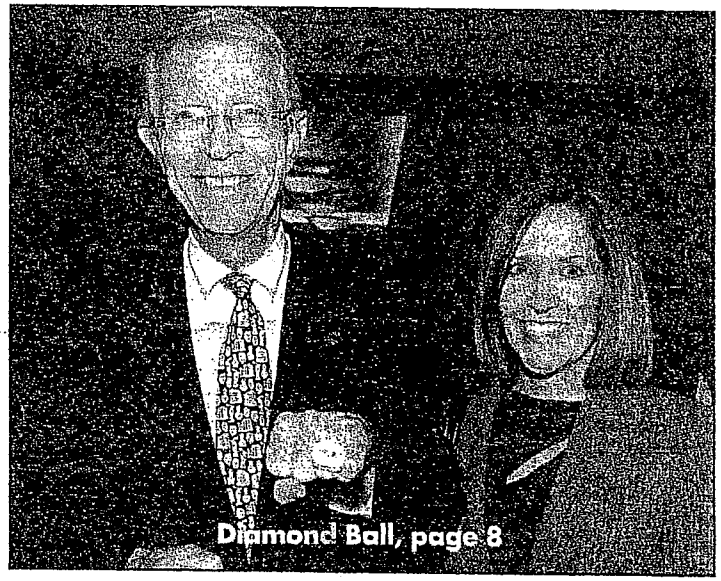

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'Consumers first'

By Mary Jane McKenna

This year, Americans face a multitude of problems that are directly tied to the economy experiencing legislation that will be targeting protection for insurance and corporate entities, and Massachusetts will not be an exception. The rights of consumers cannot be sacrificed to make corporations solvent. Our role as members of the trial bar has never been more es-

MedPay update

By John J. McMaster

The interplay between Personal Injury Protection benefits, \$8,000 in PIP has been exhausted.)

The PIP portion of the automobile policy, Part 2, states, "We will pay up to \$2,000 of medical expenses for any injured person. We will also pay medical expenses in excess of \$2,000 for expenses that are payable, or would have been payable except for a deductible, under the PIP coverage of this policy or any other Massachusetts auto policy."

In *Allstate Ins. Co. v. Bearce*, 412

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ment complex owed her a duty of reasonable care and breached that duty by, among other things, negligently installing and maintaining a dividing rope that could easily be removed.

Does she have a case? Perhaps. The greatest obstacle to the lawsuit may not be that the girl was trespassing or that she entered the water knowing she could not swim. Most significant may be her age as it relates to the obviousness of the danger posed by the water in the pool.

The Child Trespasser Statute, G.L.c. 231, §85Q

Although she was a trespasser, Massachusetts law provides that:

Any person who maintains an artificial condition upon his own land shall be liable for physical harm to children trespassing thereon if (a) the place where the condition exists is one upon which the land owner knows or has reason to know that children are likely to trespass, (b) the condition is one of which the land owner knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, (d) the utility to the land owner of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and (e) the land owner fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Section 85Q was enacted in order to "ameliorate the harsh effects of the common law rule upon child plaintiffs." At common law, a landowner owed a trespassing child only the "duty to refrain from willful, wanton, or reckless disregard for the trespasser's safety."

Section 85Q imposes a duty of reasonable care to trespassing children if its conditions are satisfied. To recover under §85Q, a child trespasser must satisfy all five of its conditions. The statement provides that:

The lack of experience and judgment normal to young children may prevent them from realizing that a condition observed by them is dangerous or, although they realize that it is dangerous, may prevent them from appreciating the full extent of the risk ...Where a child fully understands the danger, but nevertheless voluntarily encounters the risk, his actions are not merely negligent but negate any duty of reasonable care owed by the defendant landowner.

The law protects children "from those conditions which, though observable by adults, are likely not to be observed by children, or which contain the risks the full extent of which an adult would realize but which are beyond the imperfect realization of children. It does not extend to those conditions the existence of which is obvious even to children and the risk of which should be fully realized by them," Restatement (Second) Torts §339, comment i. It does not hold a landowner responsible for the harm resulting to children resulting from a reckless "spirit of bravado" or in gratifying "some other childish desire ... with as full a perception of the risks which they are running as though they were adults." Id.

"The resulting test is whether a child of like age, intelligence, and experience would fully appreciate the hazard of intermeddling with an artificial condition existing on a piece of property as intelligently as an adult." Jackson, 1993 WL 818727, *4.

The "status of 'child' for purposes of the rule will vary with the nature of the hazard. It may range as high as 16 or 17 years of age. As the age of the child increases, the conditions become fewer for which there can be recovery."

Whether a teenager fully appreciates the risk posed by a given condition is generally a question of fact to be determined by the jury. In an extreme case, however, a court may rule, as a matter of law, that a particular hazard is so obvious water hazard rule. However, it is not clear that under Massachusetts law bodies of water are always deemed obvious to all children.

(a) Massachusetts law as to obvious water hazards.

The cases on which defendant complex would probably rely, including *O'Sullivan v. Shaw*, 431 Mass. 201 (2000); *Phachansiri v. City of Lowell*, 35 Mass. App. Ct. 576 (1993) and *Davidson v. MDC*, 1997 WL 1368044 (Mass. Super. Dec. 26, 1997), do not dictate that, as a matter of law, water hazards are always obvious to children of all ages and under all circumstances.

O'Sullivan involved an adult guest who dove into shallow water in a swimming pool. The court ruled for the defendant landowner because the danger of "diving headfirst into the shallow end" of a pool was open and obvious. While *O'Sullivan* does deem a water hazard obvious, it involved diving and an adult plaintiff. Clearly, diving presents risks very different from wading in shallow water.

Davidson also is distinguishable because it involved diving into shallow water by a 16-year-old plaintiff. The court held that the plaintiff could not recover under §85Q because the danger was obvious and the plaintiff was, therefore, engaged in behavior which a normal 16 year-old would not do.

More relevant is *Phachansiri*, in which a 5-year-old was injured and his 7-year-old brother was killed when they slipped into a swimming pool which had been drained but had filled with ground water. Considering liability under §85Q, the jury decided that the defendant knew that children were likely to frequent the pool but also decided that the condition of the pool did not pose an unreasonable risk to children. Holding that the jury's two answers were not inconsistent, the Appeals Court noted that:

"The jury could have concluded that the danger of water in a pool is one that could reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at not need a warning").

Although *Phachansiri*, *Rodriguez* and *Feliciano* seem to refer to a rule of law that water hazards are always obvious even to children, the 14-year-old girl in our example can make a reasonable argument that Massachusetts courts do not apply such a rule mechanically. *Phachansiri* did not rule that water hazards are always, as a matter of law, obvious to all children. The court merely held that the jury could have found that water in a pool is an obvious hazard, indicating that the determination in any given case is still a question of fact. Neither *Rodriguez* nor *Feliciano* actually concerned a water hazard.

Further, in *Godsoe v. Maple Park Properties, Inc.*, 2007 WL 2316468 (D. Mass. Aug. 9, 2007), a case not involving trespass, the court held that the shallow depth of a lake, the bottom of which had been graded like a swimming pool, was not obvious as a matter of law to the minor plaintiff. Id. at *4. The *Godsoe* court denied summary judgment holding that "the conditions of the lake and the lake water raise a question of whether the water depth was open and obvious ..."

The Restatement also adopts a case by case approach. The first paragraph of comment "j" recognizes the obvious water hazard rule, stating:

There are many dangers, such a [sic] those of fire and water, or of falling from a height, which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large. To such conditions the rule stated in this Section ordinarily has no application, in the absence of some other factor creating a special risk that the child will not avoid the danger, such as the fact that the condition is so hidden as not to be readily visible, or a distracting influence which makes it likely that the child will not discover or appreciate it. Restatement §339 com. "j".

However, the second paragraph of comment "j" indicates that the Restatement does not

ment which provides:

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Restatement §339, com."j".

Massachusetts law recognizes such a trap exception to the open and obvious danger rule (applied in *O'Sullivan v. Shaw* to the adult who dove into shallow water). The courts have recognized that a landowner may have a duty of due care with respect to an otherwise obvious danger where the circumstances are such that the owner should foresee that visitors may be distracted or otherwise unlikely to notice the obvious condition. Whether a landowner should have foreseen that the plaintiff would be distracted is a question of fact for the jury. *Bradshaw*, 2005 WL 1869170, *2.

The circumstances of the plaintiff 14-year-old's use of the pool, which arguably should have been foreseen by the defendant apartment complex, were such that she was not aware of the absence of the dividing rope. As might be expected of children in a pool, she was engaged in play and distracted from noticing the absence of the rope or appreciating the dangers thereby created.

Cases from other jurisdictions recognize the "trap" exception, often applying it to situations where water appeared safe but concealed an abrupt drop into deeper water or where there was a danger that a child would slip into the water. In *Mennetti v. Evans Construction Co.*, 259 F. 2d 367, 370-71 (3rd Cir. 1958), a minor died after slipping into a rain-filled ditch. The court stated:

"The appellees argue that appellant's minor decedent must be taken to have realized the hazard involved in the ditch filled with water. The same argument was recently rejected by the Pennsylvania Supreme Court in the case of *Cooper v. City of Reading*, 392 Pa. 452, 140 A.2d 792, 797 (decided May 2, 1958). There the city discharged its storm drainage water into the bed of a former canal, causing a pool to form at the outlet pipe. The court said that the pool created an unreasonable risk of harm to child trespassers by the very fact that the pool was deceptively shallow at its edges and therefore innocent in appearance.'

"In the present case, there was evidence that the water in the ditch was muddy so that its depth was deceptive, especially to children accustomed to playing in the shallow pools which existed on the tract. Furthermore, the ditch was at the low point of slightly higher surrounding lands; it was at a place where a shallow pool of water would naturally gather. In addition, the jury could have found that the gradually sloping ramp leading into the ditch would tend to give to the pool a deceptive appearance of shallowness."

Similarly, in *Simmons v. Whittington*, 444 So. 2d 1357 (La.App. 1984), the landowner had installed an above-ground pool which appeared to be uniform in depth but had then dug out the bottom so that, while the sides remained at about three-and-one-half foot depth, the pool floor sloped sharply to a deep end more than 5 feet in depth. A trespassing child, who knew he could not swim, went into the pool, was able to stand in the shallow end, but then stepped off the ledge and sank into the deeper waters. The court said:

"We agree with the trial court that the dangers inherent in this pool were to a substantial degree hidden from one who had never before been in it. While Michael was aware he could not swim, upon first entering the pool he was able to stand on the bottom. He was obviously unaware that the same was not true for the entirety of the pool. It appeared to be an above-ground pool of uniform depth and there were no contrary indications. A child's carelessness in entering a pool with which he is unfamiliar is one of the risks against which the pool's owner has a duty to take precautions. The risk encountered here is clearly encompassed within the duty not to create an unreasonable risk of harm in a neighborhood peopled by inquisitive and impulsive youngsters."

Id. at 1361.

Also relevant is *Davies v. Land O'Lakes Racing Assoc.*, 244 Minn. 248 (1955). A child drowned when he entered an apparently shallow puddle which concealed a drop off into a 6-foot deep excavation with vertical sides. Rejecting the defendant's contention that liability should not be imposed under Restatement §339 because water hazards are obvious, the court stated:

"It is generally conceded that the ordinary body of water, even though it be artificial, while it does involve the risk of death or serious harm, does not constitute an unreasonable risk thereof because even a child to some extent appreciates the risks that are connected with it ...

We believe that the circumstances and the evidence in this case combine to form a sufficient basis for the jury's finding that this particular body of water in its condition on the day in question involved more risk than an ordinary water hazard and amounted to a condition, created by defendants, involving an unreasonable risk of death or serious bodily harm to children within the meaning of Restatement, Torts, s 339 ...

"There are ... decisions in other jurisdictions which are in point. In those cases liability has

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been imposed on the possessors of land for the drowning of children, whether trespassers or not, caused when they were wading in water beds, regarded as safe and to all appearances involving no more than the ordinary risks of a body of water, and then suddenly stepped off into a deep hole created or maintained by the defendant." *Coeur d'Alene Lumber Co. v. Thompson*, 9 Cir., 215 F. 8, L.R.A.1915A, 731 (boys wading in shallow pool of water surrounded by piles of sawdust on defendant's land suddenly step off into deep hole or well); *Ide v. City of St. Cloud*, 150 Fla. 806, 8 So. 2d 924 (city maintaining bathing beach allowed deep hole in lake to remain unguarded); *Dinnihan v. Lake Ontario Beach Imp. Co.*, 8 App. Div. 509, 40 N.Y.S. 764 (dangerous hole in bathing beach); *City of Altus v. Millikin*, 98 Okl. 1, 223 P. 851 (city's failure to construct spillway which caused formation of a pond generally shallow but containing a dangerous hole where excavations had been made); *City & County of Denver v. Stutzman*, 95 Colo. 165, 33 P. 2d 1071 (child wading in Platte river, generally shallow but in some places knee deep, stepped into large hold dredged in the bottom of the river by defendant city); *Sanchez v. East Contra Costa Irrigation Co.*, 205 Cal. 515, 271 P. 1060 (children playing at edge of irrigation canal held to have assumed risk of open and obvious danger incident to canal but not to have assumed risk of unknown, concealed, and unguarded danger incident to a large siphon constructed at one point in canal by defendant); *City of Indianapolis v. Williams*, 58 Ind. App. 447, 108 N.E. 387 (child wading in stream running through city in which children usually waded stepped into a large and deep hole caused by flow of water into stream from sewer constructed by defendant city)." Id. at 255-58.

The 14-year-old plaintiff might argue successfully that the dangers of the apartment complex swimming pool were not obvious as a matter of law, and, therefore, that she has satisfied the requirement of §85Q(c) that, because of her youth, she did "not discover the condition or realize the risk involved in intermeddling with it." Because the dividing rope had been removed, the pool in which she was injured presented risks greater than those of pools in general and greater than the risks posed by that very pool on earlier occasions when the plaintiff may have been in it or when she entered the pool on this occasion. The absence of the rope caused the location where the floor began its slope into the deep end of the pool to be concealed, thereby creating a trap.

The absence of the dividing rope arguably increased the danger to the girl in at least two ways: (1) the rope was not there to warn her that the slope into deeper water began at that location, a warning she no doubt would have heeded, as she knew she could not swim and (2) had the rope been present, plaintiff could have grabbed it to stop herself from slipping into the deep water after having stepped onto the sloping floor.

The interplay between the child trespasser statute, G.L.c. 85Q, and the obvious water hazard rule remains less than crystal clear. Like other determinations as to whether a trespassing child noticed and appreciated fully the danger posed by a condition on the defendant's land, whether §85Q(c) is satisfied where the danger arises from a body of water is probably a question of fact for the jury. Even if the courts were to rule that water is obvious as a matter of law, evidence that the water contained any unusual, exceptional or hidden dangers would likely raise a jury issue as to whether a trap existed, rendering the obvious water hazards rule inapplicable.

When claiming that a water hazard was not obvious to a trespassing child, the nature of the hazard should be carefully defined. Instead of arguing generally that the child did not understand the risk posed by a pool full of water, the plaintiff should perhaps define the danger more narrowly, as in the hypothetical just discussed, by focusing on a particular danger (e.g. the absence of a rope, slope of the floor, etc.) in the design or maintenance of the pool or other water body.

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