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Torts - Negligence - Duty of Swimming Pool Operators

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105, 273 N.W. 725 (1937). It was held a prejudicial error to instruct the jury to apply the adult rule to a thirteen year old plaintiff, who was struck by an automobile. *Quinn* v. *Ross Motor Car Co.*, 157 Wis. 543, 147 N.W. 1000 (1914).

Wisconsin does not apply the criminal law presumption that a child under seven is conclusively incapable of blameworthy conduct. *De Groot* v. *Van Akkeren*, 225 Wis. 105, 273 N.W. 725 (1937). However, a child of one, two, and three years respectively, are conclusively presumed to be incapable of contributory negligence. *Le May* v. *City of Oconto*, 229 Wis. 65, 281 N.W. 688 (1938); *O'Brien* v. *Wis. Central Ry. Co.*, 119 Wis. 7, 96 N.W. 424 (1903); *Pisarek* v. *Singer Talking Machine Co.*, 185 Wis. 92, 200 N.W. 675 (1924). The Wisconsin Supreme Court held that a child of five may be capable of contributory negligence, although the plaintiff in the case was found conclusively incapable of contributory negligence. *Ruka* v. *Zierer*, 195 Wis. 285, 218 N.W. 358 (1928). Children of six and seven years, respectively, may be found guilty of contributory negligence. *De Groot* v. *Van Akkeren*, 225 Wis. 105, 273 N.W. 725 (1937); *Mueller* v. *O'Leary*, 216 Wis. 585, 257 N.W. 161 (1935).

ALVIN M. BRUSS.

Torts—Negligence—Duty of Swimming Pool Operators.—Plaintiff's eleven year old son went to defendant's pool to swim. He was with a 4-H Club group under the supervision of two Red Cross swimming instructors. There was present a third lifeguard employed by the defendant. The boy drowned. Plaintiff charged negligence on the part of the defendant for 1) failing to prevent deceased from entering the pool ahead of the rest of the group, 2) failing to give personal notice of the depth of the water to the deceased, 3) failing to ascertain if deceased could swim before permitting him to enter the pool, 4) failing to employ enough lifeguards to discover the disappearance of the boy in time to prevent his drowning. There was a directed verdict for the defendant.

Held: judgment affirmed, since as to point 1) there was no duty resting on the defendant with respect to the care of the swimmers because they were accompanied by two Red Cross life guards; as to point 2) there was no duty to give personal notice of the depth of the water, because the depth was clearly marked on the sides of the pool and the danger was obvious; as to point 3) there was no negligence in failing to ascertain that the decedent could not swim, because it would not have been the defendant's duty to keep him out of the water; and as to point 4) there was no causal connection between the drowning and the failure to provide more guards since none of the other 150 swimmers noticed the decedent's disappearance. *Hecht* v. *Des Moines Playground and Recreation Association*, (Iowa 1939) 287 N.W. 259.

The operator of a swimming pool is not an insurer of his patron's safety but owes only reasonable care to provide for his safety. *Sistrunk* v. *Audubon Park Natatorium, Inc.*, (La. 1935) 164 So. 667. What constitutes reasonable care depends on the circumstances in each case. *Nordgren* v. *Strong*, 110 Conn. 593, 149 Atl. 201 (1930). A Nebraska case, where the deceased went to defendant's pool under the supervision of Boy Scout swimming instructors, held that defendant's duty was fulfilled when a sufficient number of guards was supplied. Who supplied the guards was held to be immaterial. *Nolan* v. *Y.M.C.A.*, 123 Neb. 549, 234 N.W. 639 (1932). This holding in effect states that the operator of a swim-

ming pool can delegate to another his duty to supply reasonable protection for his patrons. However, in most instances the courts follow the doctrine that the duty of the operator of a public place, to exercise reasonable care to see that the premises are safe for business visitors coming upon them, cannot be delegated to another. Where a customer was injured by the collapse of the seats in the concession of a sub-concessioner of a carnival company, it was held that the carnival company was liable since it retained the right to supervise and control the entire premises. *Rubin & Cherry Shows* v. *Dinsmore,* 88 Ind. App. 616, 164 N.E. 304 (1928). Where a city hired an independent contractor to repair the lights in a park, and a child was injured by falling into an open ditch left by the contractor, the city was held liable, not for the negligence of the contractor, but for its own negligence in failing to have the premises in a reasonably safe condition for persons coming upon them. *Lewis* v. *Kansas City,* (Mo. 1938) 122 S.W. (2d) 852.

However many of the swimming pool cases seem to indicate that the proprietor's duty is fulfilled when a sufficient number of guards is supplied. Even where a drowning occurred in a pool while the lifeguard was in the locker room attending to other duties the court said, "The duty of exercising ordinary care required the defendant to provide an adequate degree of general supervision. The city performed its duty by furnishing a lifeguard, experienced and competent." *Curcio* v. *City of New York,* 275 N.Y. 20, 9 N.E. (2d) 760 (1937). But there are holdings *contra.* Where the decedent drowned in a pool while one of the guards was giving diving lessons and a second guard was talking to a girl it was held that the defendant was liable for the negligence of the lifeguards. *Lipton* v. *Dreamland Park Co.,* 121 N.J.L. 554, 3 A. (2d) 571 (1939). Where the attendants in a theater upon discovering a fire fled without attempting to put it out and the plaintiff was injured in the resulting panic, the theater operator was held liable. The court said that one who collects a large number of persons for gain or profit must be vigilant to protect them. *Topley* v. *Ross Theater Corp.,* 275 N.Y. 144, 9 N.E. (2d) 812 (1937). Under these holdings the defendant's duty would be to supply lifeguards who would take all measures reasonably necessary for the safety of the swimmers.

Louisiana raises the presumption of negligence if a person drowns in a pool policed by lifeguards. The defendant must refute this presumption. *Rome* v. *London & Lancashire Indemnity Co. of America,* (La. 1936) 169 So. 132. *Contra: Mahr, Administrator* v. *Madison Square Gardens Corporation,* 242 N.Y. 506, 152 N.E. 403 (1926). An Indiana case following the New York case distinguishes the Rome case on the ground that a contractual relationship arose from the fact that in the Rome case the decedent paid an admission fee. In the principal case the deceased paid an admission fee.

As to point (2) the proprietor of a swimming pool or beach need give warning only of dangers not known to the patron or a person of ordinary intelligence. *Johnson* v. *Bauer,* (Mass. 1935) 198 N.E. 739. The dangers of an open body of water are obvious even to a child of very tender years. *Polk* v. *Laurel Hill Cemetery Ass'n.,* 37 Cal. App. 624, 174 Pac. 414 (1918); *Avery* v. *Morse,* 267 N.Y.S. 210, 149 Misc. 318 (1933).

It has been held that it is not negligence on the part of a swimming pool proprietor to fail to determine whether a patron could or could not swim before permitting him to enter the pool. *Mullen* v. *Russworm,* 169 Tenn. 650, 90 S.W. (2d) 530 (1936). The court reasoned that under a contrary rule the ordinary city boy would never learn to swim. This reasoning is fallacious in the face of

the fact that many agencies, such as the Boy Scouts, Y.M.C.A., and municipal social centers, hold classes to teach swimming to city youngsters. Had the lifeguard in the principal case known that the boy was unable to swim, he could have kept a closer watch over him and probably prevented the drowning.

As to the holding in the principal case that there was no causal connection between the drowning and the failure to have a greater number of lifeguards, it would seem that reasonable men might well differ and that the question is one for the jury. The court's reasoning that a larger number of guards would not have caused decedent's drowning to be observed, since none of the other swimmers noticed it, overlooks the fact that in a large group of this kind one person is apt to be wholly unobserved by those around him who are likely to be absorbed in their own activities. The lifeguard, on the other hand, should be engaged exclusively in watching for swimmers who are in difficulty. However, the court's holding that three lifeguards were sufficient seems correct, not for the reason which the court gave, but for the more obvious one that it would hardly be reasonable to require the attendance of more than three lifeguards to look after 150 swimmers. A jury verdict that two lifeguards were sufficient for 200 swimmers has been upheld. *Mullen* v. *Russworm, supra.*

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