

MARGOLIS EDELSTEIN

AN OVERVIEW OF ISSUES RELATED TO SWIMMING POOL LIABILITY

STEPHEN J. BRUDERLE

HARRISBURG OFFICE
3510 Trindle Road
Camp Hill, PA 17011
717-975-8114

PITTSBURGH OFFICE
525 William Penn Place
Suite 3300
Pittsburgh, PA 15219
412-281-4256

WESTERN PA OFFICE
983 Third Street
Beaver, PA 15009
724-774-6000

SCRANTON OFFICE
220 Penn Avenue
Suite 305
Scranton, PA 18503
570-342-4231

MARGOLIS EDELSTEIN

Stephen J. Bruderle, Esquire
The Curtis Center
170 S. Independence Mall W.
Suite 400E
Philadelphia, PA 19106-3337
215-922-1100
FAX 215-922-1772
sbruderle@margolisedelstein.com

CENTRAL PA OFFICE
P.O. Box 628
Hollidaysburg, PA 16648
814-224-2119

SOUTH JERSEY OFFICE
100 Century Parkway
Suite 200
Mount Laurel, NJ 08054
856-727-6000

NORTH JERSEY OFFICE
Connell Corporate Center
Three Hundred Connell Drove
Suite 6200
Berkeley Heights, NJ 07922
908-790-1401

DELAWARE OFFICE
750 Shipyard Drive
Suite 102
Wilmington, DE 19801
302-888-1112

www.margolisedelstein.com

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APPLICABLE STATUTES

Public Bathing Law

In the Commonwealth of Pennsylvania swimming pools are governed by 35 P.S. Section 672 which is known as the Public Bathing Law. Under Section 673(2) a swimming pool is defined as "a place in the open or enclosed in any structure or building for the purpose of admitting two or more persons to bathe or swim together." Section 675 requires that the water shall be maintained at all times clean and sanitary and that the water shall be, from time to time, analyzed and tested so that it shall comply with rules and regulations of the department for the preservation of the public health. At no time shall the water be permitted to have a chemical content or quality that is injurious to the health and bodies of the patrons and users of such places.

Section 675.1(a) requires an adequate number of certified lifeguards on duty at a recreational swimming establishment. 675.1(b) allows the health department to promulgate regulations regarding the number of lifeguards required at recreational swimming establishments. This determination regarding the required number shall be made in consultation with approved certifying authorities and recreational swimming establishments.

Section 676 requires a permit for the operation of any swimming pool and sets forth the process and fee for the application. Section 679 mandates that the health department shall be permitted access to an applicable swimming pool to examine the sanitary conditions, the number of lifeguards and to identify or address any hazards or dangers. Any swimming pool that is found to be not in compliance with the provisions of the statute shall be closed forthwith and the pool drained and kept dry until compliance and permission is granted from the department.

Pennsylvania Construction Code

Swimming pools may also come under the Pennsylvania Construction Code Act at 35 P.S. Section 7210.101 et seq. This statute was enacted to provide minimal standards for construction codes across the Commonwealth where none existed and to assure that codes are consistent and uniform where they do exist. 35 P.S. Section 7210.102. This statute specifically states that it applies to all swimming pools and spas constructed or installed after July 17, 2007. 35 P.S. Section 7210.104(f)(2). The statute likewise says that it shall not be applicable to pools and spas constructed or installed prior to July 17, 2007. 35 P.S. Section 7210.104(f)(1). 35 P.S. Section 7210.301(a) states that by the end of 2007 the department shall promulgate regulations adopting the 1999 BOCA National Building Code, Fourteenth Edition as a uniform construction code. Section 7210.303 requires that all municipal building codes that do not equal or exceed the minimum requirements of the regulations promulgated under this act shall be amended to provide for the minimum requirements.

Pennsylvania Administrative Code

The Pennsylvania Administrative Code sets forth at 34 Pa. Code Section 403.26 that a swimming pool, hot tub and spa which is accessory to a one or two-family dwelling must comply with certain portions of the International Residential Code as well as the International Building Code regarding walls and fences enclosing indoor and outdoor swimming pools, hot tubs and spas as well as the International Building Code as to residential swimming pools. A swimming pool that is not an accessory to a one or two-family dwelling must comply with this chapter of the administrative code as well as the American National Standard for Public Pools issued by ANSI and APSP as well as the Public Bathing Law.

SIGNIFICANT CASES

Consideration should be given to Rivera v. The Philadelphia Theological Seminary of St. Charles Borromeo, Inc., 747 A.2d 605 (Pa. Super. 1984). In Rivera, the plaintiff was a 12-year-old altar boy who had been invited with other altar boys by a parish priest to go swimming at the pool maintained at the nearby diocesan seminary. The adult priest who invited the boys was the only supervisor. The Rivera court noted that public bathing places and swimming pools are governed by the Public Bathing Law of 35 P.S. Section 672 et seq. Accordingly, a public swimming pool could be held liable for violation of, and was bound by the standards as set forth in that statute. In addition, the Rivera plaintiffs also sought liability as an owner or occupier of land who failed to exercise reasonable care to protect the children who it knew or should have know were coming upon its land to use its pool.

A premises liability theory was also presented in Long v. Manzo, 682 A.2d 370 (Pa. Super. 1996). In Long, there was an issue as to whether the plaintiff would be a licensee or a trespasser. The trial court granted a nonsuit where the evidence showed that the plaintiff was fully aware of the risks associated with diving into the pool.

These cases stand for the proposition that the owner or occupier of land which includes a swimming pool or spa owes a duty as a possessor of the land for those thereon. Under that framework a plaintiff is typically classified as an invitee, a licensee or a trespasser. Each of these categories has its own duty as set forth in the Restatement which has been adopted by the Pennsylvania Courts.

JOINT AND SEVERAL LIABILITY & COMPARATIVE FAULT

Joint and several liability as well as comparative fault are applicable in these cases. In Rivera, the first jury found the 13-year-old decedent 5% liable, the church associated with the inviting priest 65% liable, and the seminary which owned the premises 30% liable. The trial court directed a verdict in favor of the priest but a new trial was granted. The Supreme Court modified the award of a new trial by limiting the new trial to the seminary's proportional liability in the damages judgment entered by the Court of Common Pleas. A new trial was also permitted on the seminary's right to indemnity from the church for any payment it may be required to make

upon retrial. Accordingly, the Court permitted joint and several liability between the defendant parties as well as the finding of comparative fault for the plaintiff's own negligence.

In Long, the trial court granted defendant's motion for compulsory nonsuit which was upheld by the Superior Court. The Superior Court noted that plaintiff failed to present sufficient evidence to raise a question for the jury as to whether the plaintiff did not realize the risk involved in diving into the shallow pool. Under certain circumstances, as in Long, the defense will argue that there is no duty as to a danger where the plaintiff is aware of the risk. Under other fact patterns that duty may be breached but plaintiff's award would be reduced by the plaintiff's percentage of liability. Which of these categories a case falls into depends on the specific facts and the specific theory of liability. Note also that apportionment of liability becomes more complex where there are multiple defendants, some of whom are defendants in a strict liability cause of action and others who are not. Negligence is apportioned according to the percentage of culpability of each party. However, strict liability is found as to the product itself and then distributed among the defendants on a per capita basis.

RECREATIONAL STATUTES

In addition to the statutes referenced above, a party should be aware of the Virginia Graeme Baker Pool and Spa Safety Act at 15 U.S.C.A. Section 8001, et seq. This statute sets forth a federal swimming pool and spa drain cover standard. In 2010, the Americans With Disabilities Act was updated to include obligations for accessibility to swimming pools. These obligations take effect in March of 2011 with a compliance deadline of 2012. Lastly, a party needs to be aware of product recalls that occur from time to time. Most recently a recall was issued for several brands of pool and in-ground spa drain covers.



Stephen Bruderle defends insured and self insured entities and corporations in all manner of casualty claims, focusing on Philadelphia and the outlying counties. Mr. Bruderle has defended individuals, construction and manufacturing companies, design professionals, medical professionals, accountants, physical therapists, product manufacturers and designers, general contractors, construction managers, property owners, property management companies and a wide array of contractors and subcontractors.