ESTABLISHING RECKLESSNESS IN POOL DROWNING CASES

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I. Recklessness in Pool Cases—Suction Entrapment as an Example

Drowning is a horrible way to die. Drowning due to pool drain entrapment is downright terrifying—and it does not have to happen in the first place!

There are thousands of unintentional drownings that occur in the United States each year. There is an annual average of 283 drowning deaths (2003-2006) and 2,700 emergency room-treated submersion injuries involving children younger than 5 years old in pools and spas around the country. As Inez M. Tenenbaum, Chairman of the Consumer Product Safety Commission (CPSC) has stated, "Just one incident is one too many, and the statistics are a wakeup call and a reminder that these tragic incidents are preventable." Unfortunately, a number of these pool drownings occur because of the pool industry's blatant disregard for safety. A prime example of this disregard for the public safety is the danger imposed on consumers, especially kids, from suction entrapment—something that is completely preventable.

The recurrence of these suction entrapment tragedies over the last few decades provides striking evidence of the reckless behavior of a segment of the pool industry. As a lawyer who has prosecuted, and is currently prosecuting, an entrapment case in the civil arena, I think it instructive to give an explanation of how entrapment occurs, an overview of the history of suction entrapment, and some examples of the tragedies that have occurred. I have also included a brief note on the law of recklessness that may apply to pool cases.

Suction entrapment occurs because a pool drain cover is defective or missing. Most pools operate by cycling the water through a filtration system. In order to do this, the water must be sucked out of the pool via the drain. When the drain cover is either missing or defective, the suction causes the swimmer's hair, body, limb, jewelry, loose bathing suit, or bathing suit strap to be pulled into the drain. Thus trapped, the swimmer drowns. To understand *how* this can happen, think of the way the hose of a vacuum cleaner sticks to your palm. The body, and so on, can become stuck to the outlet in much the way. However, unlike that of a vacuum cleaner, the force of a pool's suction can be tremendous—upwards of 350 pounds of pressure for an 8-inch main drain with a standard pump! The suction can be so powerful that the victim cannot be pried

loose, even by the force of several adults tugging. Most often the suction entrapment will hold the swimmer in its grip, defying all rescue efforts, until either the vacuum is broken, or the swimmer drowns, much to the horror of would-be rescuers and onlookers. There have been cases in which children, who have sat on a drain with a missing or defective drain cover, have been disemboweled by having their intestines literally sucked out of them through their anus.

What makes entrapment such a danger to children, in particular, is that children are fascinated with the current created by the pool's circulation system. Childrens' curiosity could cause them to stick their hands or foot in the path of this powerful suction force. The danger of entrapment is compounded by the unawareness of most consumers of this danger. In addition, frequently when entrapment initially occurs, onlookers, including the parents, do not recognize a problem because they do not hear or see a swimmer or a child in trouble.

The pool industry has known about the dangers of pool entrapment since the 1960s. Once the pump-filtration system became common place, the pool industry knew of the powerful suction force that existed in the drains and, therefore, knew of the life-threatening danger. The Consumer Product Safety Commission has tracked suction entrapments since 1985 and has reported its findings in charts which separate incidents in terms of the nature of entrapment, i.e., hair entanglement, body or limb entrapments, and eviscerations, many resulting in drowning.[1] Also, through the years, there have been many successful entrapment cases brought against the industry.

One particularly noteworthy case is *Lakey v. Sta-Rite Industries, Inc.*, in which 5-year-old Valerie Lakey was disemboweled by the suction from a drain in a wading pool.[2] Apparently, just moments before the incident happened, other children had removed the pool's drain cover. Plaintiffs argued that the drain cover was faulty because it was designed only to snap into a frame and, thus, could easily be removed. Part of the evidence in that case was that Sta-Rite had information on dozens of cases of suction entrapment as well as knowledge of 12 prior lawsuits with similar claims, but it did nothing to improve safety. One of those cases went back to the 1960s (*Henry v. Britt*, 220 So. 2d 917 (Fla Dist. Ct. App. 1969)). In that case an 11-year-old boy who was an excellent swimmer was entrapped when his arm became lodged in the main drain outlet of a hotel pool. This occurred while his mother sat in a poolside chair. When she noticed that she no longer heard the noise of his splashing, she called the father who immediately came to the pool and jumped in, as did the hotel manager. The force was so strong that the two men,

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[1]It is widely believed that suction entrapment drownings are underreported and are simply labeled as death as drowning. In fact, some firefighters and other first responders have commented that they have been guilty of filing incomplete records. As one such responder reported, "Every time I ran on a drowning call . . . it was reported as a drowning—nothing about how it happened . . . I could have run across a [suction entrapment call] and never knew it."

[2]This case is described in depth by the plaintiff's lawyer, John Edwards, in his book, *Four Trials* (Simon & Schuster 2004).

together, could not pull him out. Only after the power was cut was the child freed—but it was too late.

Another noteworthy case is *Levey v. Sta- Rite*. Lorenzo Peterson, a 14-year-old boy, put his arm inside the pool drain, which was not covered as it should have been. Several adults tried, but failed, to free him. He was drowning—trapped underwater—before the police broke into the pool's locked pump room and switched off the power. The boy survived, but with extremely severe brain damage. The attorneys in this case were able to obtain a large verdict by arguing that Sta-Rite could have easily undertaken the development of a device that would detect increased suction, thereby indicating that something was obstructing the pool drain, and would then trigger the pump to automatically shut off. This device, now known as a vacuum release system or safety vacuum release system (SVRS), could have been developed and integrated into the pumps or sold as an additional component. Proof was found in this case that in 1989, the year the pool pump was made, the manufacturer knew, from a long history of prior suction entrapments, that 1) the pump was dangerous, 2) that they had the technology for the automatic shut-off device that would release the suction, and 3) that such technology had existed since the 1980s.

In May 1996, 16-year-old Tanya Nickens became entrapped in the drain of a health club spa. She was pinned under 12 tons of pressure at the bottom of a hot tub and drowned. The issue again gained notoriety. This tragedy prompted stories in major newspapers around the country, as well as segments on *Oprah*, *20/20*, and the *Today Show*. As result, the New Jersey Department of health issued public safety advisories on the dangers of suction entrapment.

Then, in 2002, there was the Baker case. Virginia Graeme Baker, a 7-year-old who had been swimming unassisted since she was three, drowned after becoming entrapped underwater due to the suction force of a hot-tub drain. Following this tragedy, her mother, Nancy, became a tireless advocate for pool safety. She made pool and hot tub entrapment a national issue. Nancy received help from Graeme's grandfather, former Secretary of State, James Baker. Nancy and others uncovered and produced guidelines to prevent entrapment which had existed for over thirty years, but had only been given lip service by the pool industry. Nancy and other advocates were able to demonstrate that for decades the industry knew of entrapment, knew how to fix it, but would not; therefore, regulation was needed to save lives. As a result of intense lobbying by safety advocates and safety groups like *Safe Kids*, and despite strenuous opposition from the pool industry, Congress passed the Virginia Graeme Baker Pool and Spas Safety (VGB) Act which took effect in December 2008.

The VGB Act establishes mandatory federal requirements for entrapment avoidance. Specifically, it provides, 1) that every swimming pool or spa drain cover must conform to specific standards; 2) each public pool and spa, both new and existing, must be equipped with drain covers conforming to specific standards; and 3) each public pool and spa (pump), in addition to the conforming drain covers, needs to be equipped with one or more devices/systems designed to prevent suction entrapment such as: a safety vacuum release system (SVRS), suction limiting vent system, gravity drainage system, automatic pump shutoff system, drain

disablement, or any other system approved by the CPSC to prevent suction entrapment. Additionally, the VGB Act requires the CPSC to establish and administer public education programs on methods to prevent drowning and entrapment in pools and spas and appropriates $5M for each of the years 2008-2012 for this purpose.

Immediately, the pool industry tried to undermine the law by claiming, for instance, that the expense necessary for many public and municipal swimming pools and spas will cause them to shut down. They made this claim despite the fact that the cost of compliant covers and the second layer of protection, the safety vacuum relief system (SVRS) would be minimal.[3] Unfortunately, the pool industry, with their overwhelming resources and powerful lobbying, succeeded in having the CPSC dilute the essential safety provisions of the bill, the consequence of which was to almost completely undermine its effectiveness. The bill was designed to implement the essential layers of protection against entrapment, but the CPSC interpreted the bill as allowing a single layer of protection if a certain kind of drain cover was used.[4]

In May 2006, in reference to her advocacy and her work in trying to get VGB passed, Nancy Baker stated that she may have been powerless to save her daughter, but she hopes the fate of her youngster will empower the industry to promote safety: "I don't care what I'm up against," she says, "I've already lost my daughter. All I'm interested in is preventing another child from experiencing what Graeme did—that moment when a little 7-year-old girl recognized she wasn't coming up for a breath." And, "I dream of a day when children swimming in a pool without four-sided barrier fencing and with drain systems capable of pinning a child underwater would be just as unthinkable as children riding in a car without car seats."

But unfortunately the unthinkable has happened again and again. In Connecticut, in the summer of 2007, a 6-year-old boy, an excellent swimmer, was swimming in the family pool when his arm became entrapped in the drain below the water line on the side of the pool. His father dove into the pool to try to pull him out but the force of the pump was too powerful. Only after his mother reached the basement of the house where the master power shut-off switch was located, did the boy's arm come out and he was freed. But it was too late. He drowned and could not be revived. In addition to a defective cover that allowed the suction drain opening to be exposed, the pool had only a single drain for the pump involved and no SVRS that would have instantaneously shut down the powerful suction force. Ironically, this was a new pool, having been built in 2006/2007, and was touted as a "high end pool."

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[3] *See* Poolandspa.org, *What is the Virginia Graeme Baker Safety Act for Pools & Spas and Why You Should Care* (Jan. 13, 2009), *available at* http://www.poolandspa.com/page6174.htm.

[4] *See* Press Release, Pool Safety Council, *Consumer Product Safety Commission Reverses Federal Law, Puts Swimmers in Grave Danger* (Mar. 5, 2010), *available at* http://www.poolsafetycouncil.org/releases/cpsc_3_5_10.html; Rebecca Robledo, *Members of Congress Protest VGB*, Pool & Spa News (June 24, 2010), *available at* http://www.poolspanews.com/2010/071/071n_cpsc.html.

This case, again, demonstrates the tragic fact that although most consumers—most homeowners, including the Connecticut parents of this 6-year-old, did not know of the dangers of suction entrapment in a pool, the pool industry *did* know and had known only too well *for over thirty years*.

In addition to our civil suit in Connecticut against the pool company who built the pool,[5] the engineer who approved the pool plans in violation of the building codes, the Town who approved the pool in violation of the Code, and the manufacturers of the drain cover, the pump and the pump motor, there is an ongoing criminal prosecution. The pool company's owner and president is being prosecuted for manslaughter.

The industry has known for years that if pools have multiple layers of protections, a child would never again experience the terror-filled recognition that he or she was never coming up for a breath and was going to drown. To have multiple layers of protection against entrapment means having dual drains (because with dual drains if one drain is blocked, the other will act to eliminate the force of suction), anti-entrapment drain covers, and the safety vacuum release system (which automatically senses that something is covering the drain and automatically relieves the suction force from the pump).

Safety advocates and enlightened legislators have been fighting in municipal and State governments to have these multiple layer requirements in both local and state codes. Unfortunately, only a handful of local governments have such minimum safety rules. At the time of the 2007 tragedy, Connecticut had a state building Code that required dual drains and Vacuum Safety Relief Systems. That Code helps provide the basis for not only a manslaughter prosecution that was brought against the pool company that installed the pool in violation of the building Code, but also for civil claims of recklessness.

These aforementioned cases clearly show a history of knowledge by the pool industry of suction entrapment. The lack of interest, by the pool industry, in ensuring that safety devices be developed and installed to prevent these occurrences from being repeated shows a *blatant disregard* of the danger of entrapment and the devastating effects the resultant tragedies have on the victims' families. Despite efforts to educate the pool industry and the public about entrapment and the safety measures that need to be installed on all pools and spas, the pool industry, through their lobbyists, have made the decision to focus their efforts, instead, on hampering effective safety measures that would eliminate the danger.

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[5]In this case, the family set up a foundation dedicated to pool and water safety and child safety, and pledged that all net financial recovery to them would be placed in this foundation. A gratifying by-product of doing these types of cases is that often the victims' families will become effective safety advocates for stronger safety rules and for building codes that will save lives. *See* AP, *Mothers of 2 Kids Who Drowned Champion Pool Safety*, ABC (Aug. 2, 2010), *available at* http://www.wjla.com/news/stories/0810/760468.html.

II. A Brief Note on the Law of Recklessness

An actor's conduct is in reckless disregard of the safety of another if:

> "[H]e intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him."

Restatement (First) of Torts §500.

Reckless conduct may consist of not only a failure to act, when there is a duty to act, but also affirmative conduct. *Sandler v. Commonwealth*, 644 N.E.2d 641 (Mass. 1995). Of utmost importance is the seriousness of bodily harm. Where a bicyclist was injured when he fell into an uncovered drain in an unlit bicycle tunnel, the court held that despite knowing of the dangers posed by the "chronically absent drain covers in [the] chronically unlit tunnel," that there was no high degree of risk that death or serious bodily injury would have resulted from the defendant's alleged acts. *Sandler v. Commonwealth*, 644 N.E.2d 641 (Mass. 1995). That case may be contrasted with entrapment cases where the industry had known for thirty years that not having these adequate protections to prevent entrapment will result in death and disembowelment.

Reckless misconduct differs from negligent misconduct in that (a) "reckless misconduct requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man," and (b) "the actor . . . must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. *Id., comment g*. In general, "[r]recklessness looks to the tortfeasor's state of mind. Recklessness is an aggravated form of negligence which differs in quality, rather than in degree, from ordinary lack of care." *Hatch v. V.P. Fair Found., Inc*., 990 S.W.2d 126 (Mo. Ct. App. 1999). "Negligence is one kind of tort, an unintentional injury usually predicated upon failure to observe a prescribed standard of care while a willful, wanton, reckless injury is another kind of tort, an intentional injury often based upon an act done in utter disregard of the consequences." *Id.*

Reckless misconduct differs from intentional wrongdoing in that "[w]hile an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it." *Restatement (First) of Torts* § 500, comment f. It is enough that a reckless actor "releases or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless." *Id.*

Recklessness in criminal cases based upon a failure to follow the guidelines of building or fire codes is not unheard of, yet is a relatively novel implementation of law." *State v. Derderian*, No. K1/03-654A, K1/03-655A, 2005 WL 3338337, at *9 (R.I. Sup. Ct. Dec. 5, 2005). The goal of

safety in fire and building codes "is important enough to criminalize violations with no requirement of criminal mens rea. Strict criminal liability is not necessarily a denial of due process." *Id.* Courts have recognized the trend that

> [s]ince the turn of the century, there has been an increasing tendency to impose criminal sanctions without regard as to whether the accused knew his actions were prohibited or illegal. This has come about by the legislative regulation of various industries, trades or activities that affect the public's health and safety.

Id.

In *Derderian*, the basis of the misdemeanor manslaughter counts was the defendants' alleged failure to follow the requirements of the fire safety code. Specifically, defendants, owners of a nightclub, affixed foam to the walls of the nightclub to muffle the sound of the music. The foam was not adequately fire resistant and caused a fire to spread throughout the club, ultimately resulting in the death of one hundred people. *Id.* at *1.

In *L'Esperance v. Benware*, 830 A.2d 675 (Vt. 2003), the Supreme Court of Vermont held that evidence was sufficient to show that a landlord acted with reckless or wanton disregard to tenants' safety and rights by renting a house that was in violation of health and safety codes. The tenants in *L'Esperance* claimed that their heat was inadequate, the water was not working properly, the foundation appeared to be deteriorating, the water contained E. coli bacteria, and the heat and electric bills were extraordinarily high. *Id.* The court found that the jury could have reasonably concluded that the landlord's conduct demonstrated a reckless or wanton disregard for plaintiffs' safety due to the evidence submitted at trial, which consisted of a testimony regarding a Department of Labor and Industry inspection report which ordered the landlord to make repairs due to significant electrical and fire code violations at the property. *Id.* at 682.

In *Greystone Condominium Ass'n, Inc. v. Boulder Run, LLC*, No. CV 000370368, 2001 WL 543251 (Conn. Super. Ct. May 7, 2001), the Superior Court determined that a municipality can conduct itself in a reckless manner and have reckless intent.

> Recklessness is a state of consciousness with reference to the consequences of one's acts . . . The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them.

Id.

In *Greystone*, plaintiffs claimed that the Town of Shelton was reckless in that it issued Certificates of Occupancy despite numerous, flagrant, and substantial violations of the building and fire codes. *Id.; see also Mountaindale Condominium Ass'n, Inc. v. Zappone*, 757 A.2d 608 (Conn. App. Ct. 2000) (condominium association brought action against town and town fire

marshal alleging reckless issuance of certificates of occupancy warranting that units of condominium complex were in substantial compliance with relevant building codes and that construction of units was in violation of building and fire codes).

III. Conclusion

I am hopeful that we, as trial lawyers, will always continue to do our part to force industries, like the pool industry, to adhere to safety guidelines and standards and to force them to make safety a priority so that needless tragedies, like suction entrapment, never happen again.