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SUMMONS.

(Filed August 27th, 1942.)

THE STATE OF NEW JERSEY—

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TO: THE BREAKERS, INC., a corporation of the State of New Jersey, and
HORTENSE LEVY:

YOU ARE HEREBY SUMMONED to answer the annexed complaint of HAROLD E. ROSS, a minor, by his next friend, Ann Casper, ANN CASPER and HERMAN CASPER, in an action at law in the New Jersey Supreme Court.

AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the said New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment will be entered against you. 20

WITNESS, THOMAS J. BROGAN, Esq., Chief Justice of the said Supreme Court, at Trenton, this 10th day of July, A. D. Nineteen Hundred and Forty-Two.

FRED L. BLOODGOOD, 30
Clerk.

QUINN & DOREMUS,
Attorneys.

Complaint

COMPLAINT.

NEW JERSEY SUPREME COURT.
MONMOUTH COUNTY.

10

HAROLD E. ROSS, a Minor,
by His Next Friend, Ann
Casper, ANN CASPER and
HERMAN CASPER,

Plaintiffs,

vs.

20 THE BREAKERS, INC., a Cor-
poration of the State of
New Jersey, and HOR-
TENSE LEVY,
Defendants.

Action at Law.
Complaint.

30

Plaintiffs, residing in the City of Long Branch, in
the County of Monmouth and State of New Jersey,
by way of complaint against the defendants, say
that:

FIRST COUNT

40

1. On or about August 27, 1940, and at all times
hereinafter mentioned, the defendant, The Breakers,
Inc., a corporation of the State of New Jersey,
through its agents and servants, maintained and
operated a casino with bath houses, swimming pool
and facilities for ocean bathing, in the City of Long

Branch, County of Monmouth and State of New Jersey and, as part of the services connected with the establishment, maintained a diving board at the swimming pool for the convenience and pleasure of its patrons.

2. On the day and year aforesaid the plaintiff, Harold E. Ross, was a customer of the defendant, The Breakers, Inc., and was there engaged in using the diving board over the swimming pool at the invitation of the defendant, The Breakers, Inc., and was lawfully upon the diving board aforesaid. 10

3. It then and there became the duty of the defendant, The Breakers, Inc., through its agents and servants, to so carefully and prudently maintain and guard the area in the swimming pool within which persons would dive when using the aforesaid diving board, which diving board and area of the pool were open to use by the patrons of the defendant, The Breakers, Inc., and more particularly for the plaintiff, Harold E. Ross, in a careful and safe condition and to properly guard the aforesaid area of the pool and manage the occupants of the pool so as not to endanger the lives and safety of the patrons invited to dive from the aforesaid diving board. 20

4. Notwithstanding its duty in this behalf the defendant, The Breakers, Inc., through its agents and servants, negligently, carelessly and wrongfully permitted persons to swim into the area just after a patron had dived from the diving board, without in any way having warned the diver that persons had been permitted to swim into the area under the diving board, with the result that plaintiff, Harold E. 30

Complaint

Ross, landed upon a patron who had swum into the area, and sustained the injuries hereinafter set forth.

5. Defendant, The Breakers, Inc., through its agents and servants, was negligent in the following respects:

10

(a) In not having the area under and about the diving board roped off so that swimmers would not enter said area.

(b) In not having guards or attendants stationed to ward off swimmers from entering the area under and about the said diving board.

20

(c) In not having guards or attendants warn the divers or swimmers who entered the area under the said diving board.

(d) In permitting whatever guards or attendants that may have been stationed in the area to leave their posts of duty.

(e) In failing to have the proper number of guards or attendants to guard the swimmers and divers in the area of the diving board aforesaid.

30

(f) In failing to supervise the diving from the board.

(g) In permitting the patrons to rely upon the fact that the defendant, The Breakers, Inc., through its agents and servants, would inform or notify them if any swimmers or other obstructions were in the diving area.

40

(h) Said defendant, The Breakers, Inc., through its agents and servants, was in divers other respects careless and negligent.

6. As a direct and proximate result of the negligence of the defendant, The Breakers, Inc., through its agents and servants, the plaintiff, Harold E. Ross, suffered and sustained cuts, bruises and contusions in and about his head, back, body legs and arms. He suffered permanent external and internal injuries, by reason of which he has been and will be permanently incapacitated and will be unable to earn his livelihood in the future and will lose earnings in that behalf. He more particularly suffered fractures of the vertebra. He suffered great pain and nervous shock and will in the future suffer from pain and nervous shock.

Plaintiff, Harold E. Ross, a minor, by his next friend, Ann Casper, demands as damages on the First Count the sum of Twenty-Five Thousand Dollars (\$25,000.00), together with the costs of this suit.

SECOND COUNT

1. Plaintiffs, Ann Casper and Herman Casper, repeat the allegations of the FIRST COUNT.

2. Plaintiffs, Ann Casper and Herman Casper, are the mother and father of the plaintiff, Harold E. Ross, respectively. As a result of the injuries suffered and sustained by their son, Harold E. Ross, they have been forced to expend large sums of money in and about endeavoring to cure him of his injuries and will in the future be forced so to do.

Complaint

They have been deprived of their son's services in and about the household and will in the future be so deprived. As a result of the injuries, their son will be unable to earn his livelihood in the future and plaintiffs, Ann Casper and Herman Casper, will be forced to support him.

10

Plaintiffs, Ann Casper and Herman Casper, demand as damages on the SECOND COUNT the sum of Ten Thousand Dollars (\$10,000.00), together with the costs of this suit.

THIRD COUNT

1. On or about August 27, 1940, and at all times hereinafter mentioned, the defendant, Hortense Levy, through an operating company, The Breakers, Inc., the defendant herein, owned and operated a casino with bath houses, swimming pool and facilities for ocean bathing, in the City of Long Branch, County of Monmouth and State of New Jersey and, as part of the services connected with the establishment, maintained a diving board at the swimming pool for the convenience and pleasure of its patrons.

2. On the day and year aforesaid the plaintiff, Harold E. Ross, was a customer of the defendant, Hortense Levy, and was there engaged in using the diving board over the swimming pool at the invitation of the defendant, Hortense Levy, and was lawfully upon the diving board aforesaid.

3. It then and there became the duty of the defendant, Hortense Levy, to so carefully and prudently maintain and guard the area in the swimming pool

40

within which persons would dive when using the aforesaid diving board, which diving board and area of the pool were open to use by the patrons of the defendant, Hortense Levy, and more particularly for the plaintiff, Harold E. Ross, in a careful and safe condition and to properly guard the aforesaid area of the pool and manage the occupants of the pool so as not to endanger the lives and safety of the patrons invited to dive from the aforesaid diving board. 10

4. Notwithstanding her duty in this behalf the defendant, Hortense Levy, negligently, carelessly and wrongfully permitted persons to swim into the area just after a patron had dived from the diving board, without in any way having warned the diver that persons had been permitted to swim into the area under the diving board, with the result that plaintiff, Harold E. Ross, landed upon a patron who had swum into the area, and sustained the injuries hereinafter set forth. 20

5. Defendant, Hortense Levy, was negligent in the following respects:

(a) In not having the area under and about the diving board roped off so that swimmers would not enter said area. 30

(b) In not having guards or attendants stationed to ward off swimmers from entering the area under and about the said diving board.

(c) In not having guards or attendants warn the divers or swimmers who entered the area under the said diving board. 40

Complaint

(d) In permitting whatever guards or attendants that may have been stationed in the area to leave their posts of duty.

10 (e) In failing to have the proper number of guards or attendants to guard the swimmers and divers in the area of the diving board aforesaid.

(f) In failing to supervise the diving from the board.

(g) In permitting the patrons to rely upon the fact that the defendant, Hortense Levy, would inform or notify them if any swimmers or other obstructions were in the diving area.

20 (h) Said defendant, Hortense Levy, was in divers other respects careless and negligent.

30 6. As a direct and proximate result of the negligence of the defendant, Hortense Levy, the plaintiff, Harold E. Ross, suffered and sustained cuts, bruises and contusions in and about his head, back, body, legs and arms. He suffered permanent external and internal injuries, by reason of which he has been and will be permanently incapacitated and will be unable to earn his livelihood in the future and will lose earnings in that behalf. He more particularly suffered fractures of the vertebra. He suffered great pain and nervous shock and will in the future suffer from pain and nervous shock.

Plaintiff, Harold E. Ross, a minor, by his next friend, Ann Casper, demands as damages on the THIRD COUNT the sum of Twenty-Five Thousand

Dollars (\$25,000.00), together with the costs of this suit.

FOURTH COUNT

1. Plaintiffs, Ann Casper and Herman Casper, repeat the allegations of the THIRD COUNT. 10

2. Plaintiffs, Ann Casper and Herman Casper, are the mother and father of the plaintiff, Harold E. Ross, respectively. As a result of the injuries suffered and sustained by their son, Harold E. Ross, they have been forced to expend large sums of money in and about endeavoring to cure him of his injuries and will in the future be forced so to do. They have been deprived of their son's services in and about the household and will in the future be so deprived. As a result of the injuries, their son will be unable to earn his livelihood in the future and plaintiffs, Ann Casper and Herman Casper, will be forced to support him. 20

Plaintiffs, Ann Casper and Herman Casper, demand as damages on the FOURTH COUNT the sum of Ten Thousand Dollars (\$10,000.00), together with the costs of this suit. 30

FIFTH COUNT

1. On or about August 27, 1940, and at all times hereinafter mentioned, the defendants, Hortense Levy and The Breakers, Inc., a corporation of the State of New Jersey, owned, operated and maintained a casino with bath houses, swimming pool 40

and facilities for ocean bathing, in the City of Long Branch, County of Monmouth and State of New Jersey and, as part of the services connected with the establishment, maintained a diving board at the swimming pool for the convenience and pleasure of its patrons.

10

2. On the day and year aforesaid the plaintiff, Harold E. Ross, was a customer of the defendants, Hortense Levy and The Breakers, Inc., and was there engaged in using the diving board over the swimming pool at the invitation of the defendants, Hortense Levy and The Breakers, Inc., and was lawfully upon the diving board aforesaid.

20

3. It then and there became the duty of the defendants, Hortense Levy and The Breakers, Inc., through their agents and servants, to so carefully and prudently maintain and guard the area in the swimming pool within which persons would dive when using the aforesaid diving board, which diving board and area of the pool were open to use by the patrons of the defendants, Hortense Levy and The Breakers, Inc., and more particularly for the plaintiff, Harold E. Ross, in a careful and safe condition and to properly guard the aforesaid area of the pool and manage the occupants of the pool so as not to endanger the lives and safety of the patrons invited to dive from the aforesaid diving board.

30

4. Notwithstanding their duty in this behalf, the defendants, Hortense Levy and The Breakers, Inc., through their agents and servants, negligently, carelessly and wrongfully permitted persons to swim into the area just after a patron had dived from the diving board, without in any way having warned the

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diver that persons had been permitted to swim into the area under the diving board, with the result that plaintiff, Harold E. Ross, landed upon a patron who had swum into the area, and sustained the injuries hereinafter set forth.

5. Defendants, Hortense Levy and The Breakers, Inc., through their agents and servants, were negligent in the following respects: 10

(a) In not having the area under and about the diving board roped off so that swimmers would not enter said area.

(b) In not having guards or attendants stationed to ward off swimmers from entering the area under and about the said diving board. 20

(c) In not having guards or attendants warn the divers or swimmers who entered the area under the said diving board.

(d) In permitting whatever guards or attendants that may have been stationed in the area to leave their posts of duty.

(e) In failing to have the proper number of guards or attendants to guard the swimmers and divers in the area of the diving board aforesaid. 30

(f) In failing to supervise the diving from the board.

(g) In permitting the patrons to rely upon the fact that the defendants, Hortense Levy and The Breakers, Inc., through their agents and servants, 40

Complaint

would inform or notify them if any swimmers or other obstructions were in the diving area.

(h) Said defendants, Hortense Levy and The Breakers, Inc., through their agents and servants, were in divers other respects careless and negligent.

10

6. As a direct and proximate result of the negligence of the defendants, Hortense Levy and The Breakers, Inc., through their agents and servants, the plaintiff, Harold E. Ross, suffered and sustained cuts, bruises and contusions in and about his head, back, body, legs and arms. He suffered permanent external and internal injuries, by reason of which he has been and will be permanently incapacitated and will be unable to earn his livelihood in the future and will lose earnings in that behalf. He more particularly suffered fractures of the vertebra. He suffered great pain and nervous shock and will in the future suffer from pain and nervous shock.

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Plaintiff, Harold E. Ross, a minor, by his next friend, Ann Casper, demands as damages on the FIFTH COUNT the sum of Twenty-Five Thousand Dollars (\$25,000.00), together with the costs of this suit.

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SIXTH COUNT

1. Plaintiff, Ann Casper and Herman Casper, repeat the allegations of the FIFTH COUNT.

2. Plaintiffs, Ann Casper and Herman Casper, are the mother and father of the plaintiff, Harold E. Ross, respectively. As a result of the injuries suf-

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ferred and sustained by their son, Harold E. Ross, they have been forced to expend large sums of money in and about endeavoring to cure him of his injuries and will in the future be forced so to do. They have been deprived of their son's services in and about the household and will in the future be so deprived. As a result of the injuries, their son will be unable to earn his livelihood in the future and plaintiffs, Ann Casper and Herman Casper, will be forced to support him. 10

Plaintiffs, Ann Casper and Herman Casper, demand as damages on the SIXTH COUNT the sum of Ten Thousand Dollars (\$10,000.00), together with the costs of this suit.

QUINN & DOREMUS,
Attorneys for Plaintiffs. 20

30

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Order Amending Complaint

ORDER AMENDING COMPLAINT.

(Filed Jan. 19, 1946.)

10

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

HAROLD E. ROSS, a Minor,
by His Next Friend, Ann
Casper, ANN CASPER and
HERMAN CASPER,

Plaintiffs,

20

vs.

THE BREAKERS, INC., a Cor-
poration of the State of
New Jersey, and HOR-
TENSE LEVY,

Defendants.

Action at Law.
Order Amending
Complaint.

30

This matter being opened to the Court by Messrs.
Parsons, Labrecque & Borden, and Ira J. Katchen,
Attorneys for the plaintiff, and Messrs. Durand,
Ivins & Carton, attorneys for the defendant, con-
senting thereto, and it appearing that the date of
the accident in this cause was erroneously set forth
in the original complaint as August 27th, 1940,
whereas the same occurred on July 30th, 1940, and it
being further made to appear that Tilly Levy, one
of the defendants in this cause, has been erroneously
designated as Hortense Levy, and it further being

40

Order Amending Complaint

15

made to appear that said Tilly Levy departed this life on the 9th day of June, 1945, and that her last will and testament and codicil was duly admitted to probate and that Eliza Hoeven and the president and directors of the Manhattan Company, a body corporate of the State of New York, having its principal place of business at 40 Wall Street, in the City, County and State of New York, have qualified as executrix and executors under and by virtue of said last will and testament; 10

It is, on this 9th day of January, 1946, ORDERED that the name of the defendant, Hortense Levy, be and the same is hereby amended to read, "Tilly Levy".

It is further ORDERED that Eliza Hoeven and the president and directors of the Manhattan Company, a body corporate of the State of New York, as executrix and executors of the Estate of the said Tilly Levy be substituted as defendants in this cause in the place and stead of said Tilly Levy, deceased; 20

And it is further ORDERED that paragraph No. 1 of the first count of the complaint in this cause, paragraph No. 1 of the third count of the complaint in this cause, and paragraph No. 1 of the fifth count of the complaint in this cause be and the same are hereby amended by striking out the date "August 27, 1940" and substituting the date "July 30, 1940." 30

ROBERT V. KINKEAD,
Judge.

40

ANSWER.

(Filed October 5th, 1942.)

10

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

20

HAROLD E. ROSS, a Minor,
by His Next Friend, Ann
Casper, ANN CASPER and
HERMAN CASPER,

Plaintiffs,

vs.

THE BREAKERS, INC., a Cor-
poration of the State of
New Jersey, and HOR-
TENSE LEVY,

Defendants.

Action at Law.

Answer.

30

Defendants, for their answer herein say that:

1. Defendants deny the allegations of all para-
graphs of all counts of the complaint.

FIRST SEPARATE DEFENSE TO FIRST, SEC-
OND, THIRD, FOURTH, FIFTH AND SIXTH
COUNTS.

40

1. Defendants deny they were guilty of any negli-
gence which was the proximate cause of the alleged
accident.

SECOND SEPARATE DEFENSE TO FIRST, SECOND, THIRD, FOURTH, FIFTH AND SIXTH COUNTS.

1. Plaintiff, Harold E. Ross, an infant, was guilty of contributory negligence in that he failed to exercise due care for his own safety. 10

THIRD SEPARATE DEFENSE TO FIRST, SECOND, THIRD, FOURTH, FIFTH AND SIXTH COUNTS.

1. Plaintiff, Harold E. Ross, an infant, assumed the risk of the alleged accident charged in the complaint. 20

OBJECTION IN POINT OF LAW.

Defendants hereby reserve their rights to strike the complaint of the plaintiffs at or before the date of trial on the ground that the complaint fails to set forth a cause of action.

DOHERTY and CONKLIN,
Attorneys for Defendants. 30

Reply

REPLY.

(Filed September 30th, 1942.)

10

NEW JERSEY SUPREME COURT.
MONMOUTH COUNTY.

20

HAROLD E. ROSS, a Minor,
by His Next Friend, Ann
Casper, ANN CASPER and
HERMAN CASPER,

Plaintiffs,

vs.

THE BREAKERS, INC., a Cor-
poration of the State of
New Jersey, and HOR-
TENSE LEVY,

Defendants.

Action at Law.

Reply.

30

Plaintiffs, by way of reply to the Answer of the
defendants filed herein, say that:They deny the new matter raised therein and
join issue upon the same.QUINN & DOREMUS,
Attorneys for Plaintiffs.

40

NOTICE OF TRIAL.
NEW JERSEY SUPREME COURT.
MONMOUTH COUNTY.

10

HAROLD E. ROSS, a Minor,
by His Next Friend, Ann
Casper, ANN CASPER and
HERMAN CASPER,

Plaintiffs,

vs.

THE BREAKERS, INC., a Cor-
poration of the State of
New Jersey, and HOR-
TENSE LEVY,

Defendants.

Action at Law.
Notice of Trial

20

SIR:—PLEASE TO TAKE NOTICE, that the trial
of the issue joined in this cause will be moved
before said Court, in the presence of such Judge or
Justice thereof, as shall then be holding said Court,
on the Third Tuesday of December, A. D. 1942, at
the Court House, in Freehold, in and for the County
of Monmouth, at ten o'clock in the forenoon, or as
soon thereafter as the said Court can attend to the
same.

Dated September 30, A. D. 1942.

Your obedient servants,

QUINN & DOREMUS,

Attorneys of Plaintiffs.

To DOHERTY & CONKLIN, Esqs.,

Attorneys of Defendants.

40

Substitution of Attorney

[ENDORSED]

Service of the within Notice of Trial
is hereby acknowledged this 1st day of
Oct., A. D. 1942.

10

DOHERTY & CONKLIN,
Attorney for Defendants.

SUBSTITUTION OF ATTORNEY.

(Filed April 10, 1946.)

NEW JERSEY SUPREME COURT.
MONMOUTH COUNTY.

20

HAROLD E. ROSS, a Minor,
by His Next Friend, Ann
Casper, ANN CASPER and
HERMAN CASPER,

Plaintiffs,

vs.

THE BREAKERS, INC., a Cor-
poration of the State of
New Jersey, and HOR-
TENSE LEVY,

30

Defendants.

Action at Law.
Substitution of
Attorney.

It is hereby stipulated by DOHERTY & CONK-
LIN, Attorneys of record for the defendants, THE
BREAKERS INC., a corporation of the State of New
Jersey, and HORTENSE LEVY, that DURAND,
IVINS & CARTON be substituted in their place and
stead as attorneys of record for said defendants.

DOHERTY & CONKLIN.

40

TESTIMONY.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

10

HAROLD E. ROSS, a Minor,
by His Next Friend, Ann
Casper, ANN CASPER and
HERMAN CASPER,

Plaintiffs,

vs.

THE BREAKERS, INC., a Cor-
poration of the State of
New Jersey, and HOR-
TENSE LEVY,

Defendants.

Action at Law.
Testimony.

20

Testimony taken at the Court House, Freehold,
New Jersey, on January 9th, 10th and 11th, 1946,
before Honorable Robert V. Kinkead, and a Jury.

30

APPEARANCES:

Parsons, LaBrecque, Canzona and Combs, Esqs.,
by Theodore LaBrecque, Esq., for the Plain-
tiffs.

Durand, Ivins and Carton, Esqs., by J. Victor Car-
ton, Esq., for the Defendants.

40

(In Chambers.)

MR. LA BRECQUE: If your honor please, on examining the complaint filed in this cause, your honor recalling that we have been substituted as attorneys
10 for plaintiff, we note that the defendant has been designated as "Hortense Levy" whereas in truth and in fact we have been informed that her name is "Tillie Levy" and therefore we desire to amend the name of the defendant to read "Tillie Levy" instead of "Hortense Levy".

THE COURT: I don't suppose there is any objection?

20 MR. CARTON: No, that's alright.

MR. LA BRECQUE: As a further complication the records of the Surrogate's Office disclose that Tillie Levy died on the ninth of June, 1945, and they further disclose that her Will has been offered for probate and Eliza E. Hoeven and the President and Directors of The Manhattan Company, a body corporate of the State of New York, of 40 Wall Street, New York, have qualified as executrix and executor
30 under that last Will and Testament so at this time we suggest the death of Mrs. Levy on the record and we move to substitute in her place and name the name of her executor and executrix.

MR. CARTON: No objection.

MR. LA BRECQUE: In reading the Complaint I notice that the date of the accident is set forth in the first paragraph of the first count and the first para-

graph of the third count, and the first paragraph of the fifth count as alleged to have occurred on the 27th of August, 1940. Our investigation discloses that the accident happened on the 30th of July, 1940, and we move to amend the complaint to substitute that date.

10

THE COURT: Is the correct date set forth in the other counts?

MR. LA BRECQUE: No, they read the same, I am referring to —

THE COURT: The correct date is July 30th, 1940?

MR. LA BRECQUE: July 30th, yes, your honor. 20
I have a copy of the amendment, I have included them all in one order and Mr. Carton has seen it and has a copy, so I submit it to your honor at this time.

Now, if your honor please, I notice that no claim was made in the bill of particulars for nervous shock or neurosis, and at this time I move to amend the sixteenth and seventeenth paragraphs, I think they are the ones that disclose the injury, to set forth nervous shock and neurosis.

30

MR. CARTON: I have no objection to the nervous shock, but as to the neurosis, it depends entirely on what they mean by "neurosis". If they are alleging any traumatic neurosis or anything like that, then I want to have an examination made by our physician.

My information is that the boy, for the last two or three years has been going to school, indulging in any kind of athletics that a boy that age usually in-

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dulges in, swimming and diving and playing ball. but if they are suggesting any traumatic neurosis I would want to have an examination made.

MR. LA BRECQUE: I will be willing to submit to any examination today or tomorrow.

10

MR. CARTON: No, I want to know right now, because if there is a general allegation of nervous shock I don't care, but if they are seriously pressing any claim for a neurosis I want to know it right now.

MR. LA BRECQUE: I will state what Doctor Goldberg has told me, and what he will testify to, so that counsel will get an idea. Incidentally, he made his final examination yesterday.

20

He says that the boy is definitely nervous; that some time ago he had a fainting spell; that he suffers from headaches and dizziness; that he has detected in the boy a difference in him, he seems to have a lack of any interest in his studies now or his other activities, he lacks motive, he is weak, he is underweight, and generally he thinks that those manifestations have followed the accident.

Due to that fact and due to the fact of the periodic headaches I think that notwithstanding the fact that nothing was mentioned in the original claim filed in the bill of particulars that I do want it called to the Court's attention and have the bill of particulars amended, and if Mr. Carton wishes an examination based on that and feels it is necessary, naturally we will be very glad to give it to him any time today or tomorrow. Incidentally, he has been examined by Doctor Holters for the defendants.

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MR. CARTON: That would not only require an examination but it would require a check-up as to

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Discussion

this boy's activities. We have not been apprised of any such condition, the story that we were given and that we found it to be was a dislocation of the third cervical vertebra. There has been no allegation of any neurosis whatsoever and if there is, I strenuously object to going on today, and ask for a continuance of this case until such time as we are in a position to check that up. I can find out and I can have available the various school children and other people who have been in contact with this boy over the past two or three years. 10

In fact, your Honor, this case was started by Quinn and Doremus in 1940, the case was dropped for two or three years and just resurrected in the past two or three months, and this is the first indication of any such allegation, and I am not prepared to meet it and I don't think any examination by a doctor is going to be sufficient. 20

MR. LA BRECQUE: I don't know whether the case was dropped for two or three years or not, I am not familiar with the calendar, but I know that Mrs. Casper, who is this boy's mother, retained Mr. Katchen in the spring of last year when she had received word from Mr. Lawn of Quinn and Doremus that he could not handle the case, or words to that effect. Now, what had been done before, of course I don't know, and I am not responsible for it or who drew the bill of particulars, but I think that where you are dealing with an infant you should call all these things to the Court's attention as soon as you know about them. 30

THE COURT: Well, Mr. LaBrecque, you see, Mr. Carton has no objection to your amending the Bill of Particulars, but he states that if that amendment 40

is pressed that he must, in fairness to his client, ask for such a continuance as would give him an opportunity for a thorough check-up on the boy's activities in addition to examination by his physician.

10 MR. LA BRECQUE: Well, I am willing to have an examination made either today or tomorrow.

THE COURT: You see, in other words, you would either have to waive putting in such a broad amendment, or continue the case at a time when you are right by the barrier.

20 MR. LA BRECQUE: If it were a person over twenty-one I wouldn't hesitate, but when you are dealing with a boy it is a hard thing to decide. You kind of feel like putting yourself in the Court's hands.

THE COURT: Well, of course I wouldn't want to limit the proof that you feel that you are able to produce through Doctor Goldberg, but on the other hand I can understand the position that Mr. Carton is in and he would be remiss in his duty to his client unless he stated his position to the Court and relied on the Court's discretion.

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MR. LA BRECQUE: Well, I fully sympathize with and understand the position of your Honor, and I want to do the right thing for everybody and if he needs more time—I don't think he is going to—I will tell him frankly now that we are not going to make any particular claim that he doesn't indulge in swimming or athletics since this accident at all. We are going to say that he has, that he has

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been swimming, diving, playing basketball and even football, possibly.

THE COURT: You see, Mr. LaBrecque, the element of traumatic neurosis is now injected for the first time in the case, and since that had not been specified in the Bill of Particulars as originally filed, counsel is taken by surprise. When Mr. Carton states that I can very well understand it. 10

Of course I would like to try it today, we are all here, but I don't want to coerce you into claiming this injury to the boy, amplifying the Bill of Particulars to that extent. I sort of want to leave it to your judgment and tell you that I feel that you have the right to prove that but I don't conceive, in view of Mr. Carton's objection, that you could proceed today. Now, if you want to take it up with your people and leave the burden on them, you may do that. 20

MR. LA BRECQUE: I would like to, if your Honor please, leave the burden on them and the boy to decide and have them bear the responsibility.

THE COURT: Well, of course, if Doctor Goldberg proceeds to give any testimony which would be limited or restricted by the Bill of Particulars as you consented to have the Bill finally amended, if he went beyond that and it was objected to I would have to sustain the objection. 30

MR. LA BRECQUE: Can we say this: Pending my talking to Mrs. Casper and her husband and her boy, there is no objection to the ordinary claim for nervous shock following an accident, is there?

MR. CARTON: No. 40

MR. LA BRECQUE: Following the injury to the neck. Then at this time may that amendment be granted and I will talk to them about the other one?

THE COURT: How would that read?

10 MR. LA BRECQUE: That would simply read on sixteen and seventeen "Nervous Shock" in addition to what you have already got in there.

MR. CARTON: May I state, in consenting to that amendment, it is with the definite understanding however that there are no allegations of a traumatic neurosis at this time to be testified to.

20 MR. LA BRECQUE: In other words, that would not justify us in making claim for a traumatic neurosis.

MR. CARTON: No.

MR. LA BRECQUE: There is no question about that, that wouldn't, that would have to be a separate allegation. That is why I divided it in half.

30 Now, if your honor please, Mr. Carton, upon due and proper notice to us, took the deposition of a boy who is in the Navy now, Breitkopf, his name is, he is the son of Mike Breitkopf, a lawyer in Newark whom your Honor probably knows quite well.

In connection with that deposition I don't want the same thing to happen to me that almost happened once when I had a case where there was a deposition taken by the other side and I depended on the other fellow to offer it and he did not and I almost was left at the post, as your Honor will recall, and if your Honor had not been very good to

me I would have lost the benefit of it, and I am not going to take any chances in this case but am going to offer the deposition myself, but there are however some questions and answers which I would like to object to, at this time, and they are contained in page five of the deposition, the deposition having been taken by Mr. Kingdon.

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THE COURT: Are the questions of such a delicate nature that when they are presented the objection could not be taken then?

MR. LA BRECQUE: Yes, if your honor please.

THE COURT: And argued?

MR. LA BRECQUE: I think they are. Your Honor can read them for yourself. They start here (indicating) by the mark and end here by the mark. They are clearly hearsay and elicit hearsay answers and they are immaterial and irrelevant.

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THE COURT: (Reading) "Question: Did he hit Link?" (Answer: As I recall, no." What is the objection to that?

MR. LA BRECQUE: Well, if your honor please, it is what follows, that has the harm. How does he know whether he hit Link or not.

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THE COURT: (Reading) "Question: Were you questioned right afterwards? Answer: Yes. Question: And was Link also questioned? Answer: Yes. Question: And were you questioned as to whether he had come in collision with either one of you? Answer: Yes. Question: And what was your an-

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swer to that? Answer: No. Question: And what was Link's answer? Answer: No."

I suppose you object to what Link said?

10 MR. LA BRECQUE: And what he said. In other words, what he said himself on being questioned and what Link said, that is immaterial and irrelevant, that is clearly hearsay.

THE COURT: There was no objection made at the time.

20 MR. LA BRECQUE: I didn't have to make it then, it is an objection to the materiality and to the relevancy of the testimony, and that objection can be made before the Court, and I am making it here now. I think that would clearly be prejudicial if it came out before the Jury, it is a self-serving thing, and would emphasize the fact that he told the same story now.

It seems to be that it is double hearsay, as to Link and the other fellow too, and I at this time move to strike that part of the testimony out for those reasons.

30 THE COURT: Well now, how about Link. Is Link a witness in this case?

MR. LA BRECQUE: Link has passed away, he was killed in the Army, he was dead at the time this deposition was taken, that is shown in the early part of the testimony.

THE COURT: What have you to say, Mr. Carton?

MR. CARTON: I say first that the application is premature, and the point has not been reached yet where it can be made, in fact the depositions have not been offered in evidence as yet.

Secondly, that counsel made no objection to this question at the time and he certainly can't do so now, after listening to the question, hearing the answer, and gambling on what the answer was, then some months later to pick up the record and say "Well, I don't like that and I object to it." It is my understanding, and I believe it to be the law that an objection must be made at the time the question is asked, then the relevancy of the objection is argued before the trial Court, but the objection must be stated on the record, and therefore I insist that it is proper and should be competent.

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MR. LA BRECQUE: I think counsel has misconstrued and misunderstood, as I have on occasion, the manner in which objections should be made during the taking of depositions. My understanding is, and I refer to Bradner's practice which I think is a pretty reputable book, that objections to the form of a question, such as leading questions and things of that sort must be made at the time so that the examiner, if necessary, can correct the question and elicit the necessary information. Objections to the relevancy or materiality of testimony, objections on the ground that it is improper, immaterial, hearsay,—those objections may be made before the Master or they may be made before the Court. If your Honor has Bradner's Practice I will be glad to indicate it to your Honor.

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THE COURT: Well, of course I agree in general with what you have said, and still I feel that there

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is merit to Mr. Carton's contention that strictly speaking an objection is supposed to be made at the time that the question is asked, on the theory that counsel is not allowed to wait for an answer and speculate on what the witness's answer is going to be.

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MR. LA BRECQUE: But on a matter of law the rule is otherwise. I will show your Honor a case, if you wish.

THE COURT: I think it is better to pass on the question as it arises during the trial, and in the meantime you can get the case that you have in mind.

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MR. LA BRECQUE: Yes I will, if your Honor please. Will your Honor consider my motion made now, or as of the time it is introduced in evidence?

THE COURT: Yes, now. Do you want to see your people?

(At this point Mr. LaBrecque left the room and returned in a few minutes.)

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MR. LA BRECQUE: I have talked to Mrs. Casper and she said rather than put the case off she would rather let that part of it go, concerning permanent traumatic neurosis.

In other words, I will withdraw that portion of my motion to amend the Bill of Particulars which referred to traumatic neurosis.

THE COURT: That's right, and you are just re-

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lying now on the nervous shock following the accident.

MR. LA BRECQUE: Yes.

(The Court and Counsel returned to the Courtroom.)

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(Counsel for Plaintiffs made an opening statement to the Jury.)

(Counsel for the Defendants made an opening statement to the Jury.)

MR. LA BRECQUE: If your Honor please, both sides have subpoenaed the hospital records, and the young lady from the hospital came here this morning and wanted to get back and she left the records with Mr. Carton, who has just handed them to me. The records were left, I don't know whether they are complete or not. Of course Doctor Halbshtein is coming up here and can tell us when he arrives, but in the meantime I should like to offer for identification at this time by stipulation with Mr. Carton the hospital records which the representative of the hospital produced.

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(The records referred to were marked Exhibit P-1 for identification.)

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HAROLD E. ROSS, one of the Plaintiffs, called as a witness on his own behalf and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

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BY MR. LA BRECQUE:

Q. Harold, how old are you at the present time?

A. Seventeen.

Q. When is your birthday?

A. November fourteenth, 1946.

Q. How old were you then?

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MR. CARTON: What's that?

THE WITNESS: November fourteenth.

MR. CARTON: Fourteen?

THE WITNESS: 1945, in 1946 I will be eighteen.

Q. So that on July 30th, 1940 you were then how old?

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A. Eleven.

Q. Were you going to school at that time?

A. Yes.

Q. This was during the summer vacation, I suppose?

A. Yes.

Q. What school had you been attending before that time?

A. Star of the Sea.

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Q. In Long Branch?

A. Yes.

- Q. What is your mother's name?
A. Mrs. Ann Casper.
Q. She is married a second time?
A. Yes.
Q. What is your step-father's name?
A. Mr. Herman Casper.
Q. Is your father living?
A. My step-father, yes.
Q. You live with him, do you?
A. Yes.
Q. How long have you lived with him?
A. Practically all my life.
Q. Could you swim in 1940, did you know how
to swim?
A. Yes.
Q. Where did you learn to swim?
A. My uncle taught me.
Q. Could you dive?
A. Yes.
Q. Do you know the different kind of dives?
A. Some of them.
Q. Are you familiar with the West End Casino,
did you used to go there in 1940?
A. Yes.
Q. Do you remember the day of this accident?
A. It was July thirtieth.
Q. Did you go there that day?
A. Yes.
Q. About what time did you go there?
A. About ten o'clock in the morning.
Q. With whom did you go there?
A. My uncle and my sister.
Q. Had you ever been there before?
A. Yes.
Q. When you went there did you have your bath-

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ing suit on when you went in, or where did you change?

A. In the locker.

Q. What kind of a locker was it?

A. Family locker.

Q. Did your family have a locker there?

10 A. Yes.

Q. By a "locker" what you mean is a bath-house?

A. Bath-house.

Q. How many members of your family used it?

A. All the members.

Q. Did you have a key to it?

A. Yes.

Q. Or was the key given to you?

A. Yes.

20 Q. Do you remember the number of your bath house there that year?

A. It was number ten.

Q. And had you had that bath house all season that year?

A. Yes.

Q. Do you know who was in charge of the West End Casino or the office, or the manager who was there?

A. Yes, Mrs. Prendergast.

30 Q. Did you know her yourself?

A. Yes.

Q. Did she used to be there at the place?

A. Yes.

Q. Do you remember her first name, did you know her first name?

A. I don't think I do, I just called her Mrs. Prendergast.

Q. Who was in charge of the pool there?

A. Mr. Neuschaefer—I forget.

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THE COURT: Well, can't you suggest the name to him?

Q. Is it Neuschaefer?

A. Neuschaefer, yes.

Q. Where was this swimming pool where this accident happened?

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A. In the middle of the whole place.

Q. Outside, or inside?

A. Outside.

Q. It was an open air swimming pool, is that right?

A. Yes.

Q. About how long was it, Harold?

A. Seventy-five to eighty feet.

Q. How wide was it?

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A. About half the length.

Q. Let me ask you this, did it run parallel with the ocean or did it run east and west, towards the ocean?

A. Towards the ocean.

Q. Besides swimming, what else did they have in there?

A. They had the beach and playground.

Q. No, I mean in the pool itself.

A. Oh,—diving boards.

Q. Do you remember how many they had at this particular time?

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A. They had three of them.

Q. How high was the diving board that you were using at the time of this accident?

A. Ten feet.

Q. In addition to having the pool there where you could swim and dive what other things did they have there?

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A. Refreshments, playgrounds and beaches.

Q. Keep your voice up, just make believe you want to talk to that railing back there so we will all hear you.

A. Yes, alright.

10 Q. You said that they had refreshments. Did they have stands where people went to buy things?

A. Yes.

Q. Did they serve lunch there?

A. Yes.

Q. Did they serve drinks there?

A. Yes.

Q. Did they serve sodas there?

A. Yes.

20 Q. Did they have a pool, a place where children played?

A. And playgrounds.

Q. Now, did you make use of those facilities?

A. Yes.

Q. Will you state whether you patronized the refreshment stand?

A. Yes.

Q. And the other things they would have there, the candy stand and things like that?

A. Yes.

30 Q. Now, was there anything particularly going on at the pool on this day?

A. There was a "Kiddies' Day."

Q. What's that?

A. Kiddies' Day.

Q. It was Kiddies' Day? Was it a week-end or a week day?

A. It was a week day.

Q. Do you remember whether there were many children there that day?

A. Yes, there was a lot there.

Q. And what were their ages, generally?

A. Around my age at that time, around eleven, twelve.

Q. Was there any special attraction there that you remember, anything that had to do with any sport?

A. Max Baer was there, and I think they had fights, I'm not sure. 10

Q. And you stayed there during most of the festivities then, whatever was going on?

A. Yes.

MR. CARTON: I object to "festivities" because there is no proof of any festivities.

MR. LA BRECQUE: "Festivities" is not the right word. 20

Q. Whatever was going on that day, Kiddies' Day, you participated in?

A. Yes.

Q. You said that there was the swimming pool. Had you ever used the swimming pool before?

A. Yes.

Q. Did anyone ever tell you not to use the swimming pool? 30

A. No.

Q. Had you ever used the diving board before?

A. Yes.

Q. Did anyone ever warn you away from that?

A. No.

Q. Now, on this particular day was there anyone swimming and diving during the course of the day?

A. Yes.

Q. And about what percentage of the boys or girls there were swimming and diving? 40

A. Most of them were swimming and diving.

Q. Did you go swimming and diving that day?

A. Yes.

Q. What were you doing just before or around four o'clock on that afternoon?

A. I was diving.

10 Q. Now, will you tell the Court and Jury whether there was anyone there, any life guard in charge of the pool while you were there that day?

A. There was no life guard there.

Q. Was there anyone else like a life guard in charge, regulating the pool?

A. No.

Q. At which end of the pool were the diving boards?

20 A. On the far end, toward the ocean, the deep water.

Q. Will you state whether there were any barriers or markers or anything else that you could see or feel, to keep swimmers away from the diving area?

MR. CARTON: I will stipulate that there weren't.

30 MR. LA BRECQUE: Alright.

A. No, there wasn't.

Q. Will you tell us whether there was anyone on duty there to warn swimmers away from the diving area?

MR. CARTON: I will agree that there was not.

A. There wasn't.

Q. Will you state whether there was anyone in charge of the diving itself, the boys that were diving off the diving board?

A. No, there wasn't.

Q. Was there any life guard on duty in that pool at all that day while you were there?

A. No.

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Q. Now, where were people allowed to swim in the pool?

A. Anywhere they liked.

Q. And when were people allowed to dive off the board?

A. Any time they wanted to.

Q. Now, about what time was it that you made your last dive, Harold?

A. Close to four o'clock.

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Q. And what kind of a day was it?

A. It was a nice day, sunny.

Q. You had been diving there before?

A. Yes.

Q. And how deep was the water at that end of the pool?

A. Nine feet.

Q. And you were eleven years old at that time?

A. Yes.

Q. Now, at the time that you made your last dive will you please tell the Court whether there were any other boys or girls that were diving too, who were diving with you, either going ahead of you or behind you?

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A. Yes, there were a lot of them on the board.

Q. How would you dive? I mean, what would you do?

A. You would wait until the one ahead of you would get out of your way, then you would dive.

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Q. You would dive one at a time, is that it, on that board?

A. Yes.

Q. Was there anyone ahead of you when you first came up to the diving board?

A. Not at that time.

10 Q. Had there been someone ahead of you?

A. There had been, but they went and dove off when I was coming up the ladder.

Q. Did you wait until that person was away?

A. Yes.

Q. Was there anyone behind you?

A. No.

Q. I don't mean diving behind you, but waiting to dive?

20 A. Yes, there was a friend of mine.

Q. Do you know where he is now?

A. In the Sea Bee's.

Q. Do you remember his name?

A. No, I forget.

Q. Was he a customer or client there?

A. I think so.

Q. Where did you used to see him, how did you meet him?

A. I just met him at the pool.

30 Q. Now, when it came your turn to dive, Harold, will you tell the Court and Jury please what you did?

A. Well, I went out on the board and I got on the board and there was nobody there, so I turned around —

Q. Where did you see there was nobody?

A. There was nobody around where I was going to dive.

40 THE COURT: You mean in the pool?

THE WITNESS: Yes, sir.

Q. When you got out to the end of the diving board did you look, I mean?

A. Yes.

Q. Was there anyone in the vicinity there that you saw?

A. No.

Q. What kind of a dive were you going to do this time?

A. I was going to do a back-jack.

Q. Will you tell the Court please just what that is, I don't remember, it is a long time since I did one.

THE COURT: Suppose you stand up, son, on the edge of the stand and just show the Jury the posture you have to take to do a back-jack.

A. (The witness stood up and indicated.) You get on the board like this, turn backwards, and then you dive forward.

Q. In other words, you walk up to the end of the diving board, then you turn your back —

A. That's it.

Q. —and you —

A. Kick your feet back.

Q. —would bring yourself near the edge of the board, walk a way, then dive forward, is that it? So that it will appear in the record too, is that generally the way you do it?

A. Yes.

Q. Had you ever done that dive before?

A. Yes, sir.

Q. Did you ever have any trouble doing it before?

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A. No.

Q. Now in this case you came out to the end of the diving board, you say you looked and you saw nothing there, then you turned your back. Did you make any other observations?

A. Yes.

10 Q. Well, just tell us briefly what you did.

A. I looked over my shoulder before I went down.

Q. Was there anyone there yet?

A. No.

Q. So then what did you do?

A. So then I dove.

Q. When you dove tell us in your own words then what happened, Harold?

A. Well, when I went down there were two boys racing underneath me.

20 Q. Which way were they going?

A. They were going, they were heading toward me.

Q. I mean, were they going towards the ocean, that is towards the—from west to east, you may call it?

A. Yes.

Q. You said that they were racing, just tell us, you saw them as you were in the air, now tell us what they were doing, as near as you could judge?

30 A. They were racing.

Q. What were they doing that led you to that conclusion?

A. They were swimming hard, they had their heads under water and were going pretty fast.

Q. In the course which they were taking and the speed they were going how did it appear to you that the passage between you and them was going to be?

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A. I was going to hit them.

Q. What did you do?

A. I tried to avoid them.

Q. And will you tell the Court and Jury please in your own words what you did in that brief space of time to try to avoid them?

A. Well, I tried to twist out of their way, but they were going fast, and it was just the thought that they would hit me, I tried to get out of the way but I didn't do it. 10

Q. What part of them did you hit?

A. I hit either one of them in the foot.

Q. What part of your body was in contact with the foot?

A. My jaw.

Q. Do you remember which side?

A. It was this side. (Indicating the left side of the jaw.) 20

Q. Now, as you twisted your body what part of your body did you twist? I mean, do you remember what you did?

A. Yes, sir, I tried to avoid them, that's all.

Q. As your jaw and this foot came in contact, what happened?

A. I had a shock and I was in a daze, everything seemed funny.

Q. You felt a shock where? 30

A. My jaw and my neck here (indicating). My back.

Q. Then how did you feel?

A. Dizzy.

Q. What did you do, you were in the water now, you had finished your dive?

A. Then I couldn't move my arm, I was paralyzed, I could only move my legs.

Q. Could you move either arm?

A. No.

Q. And how did objects around there appear to you?

A. Dazed.

10 Q. And what did you do, as nearly as you can remember?

A. Well, I tried to call for help, I tried to get out of the water but I couldn't do it and somebody came in for me.

Q. Someone did come in and pulled you out?

A. Yes.

Q. Do you remember who it was that got you out?

A. I don't remember.

20 Q. You don't know? Do you remember what they did with you?

A. They put me on the couch.

Q. How did you feel at that time, Harold?

A. I didn't feel anything at that time, only my legs, I didn't have any feeling except in my legs.

Q. Could you move your arms or shoulders or neck or head at that time?

A. Not at that time, but after a while I got my feelings back.

30 Q. After a while what happened with reference to you?

A. Well, the feeling came back, then it started to hurt me.

Q. Will you describe where did the feeling come back first?

A. It came back in my arms.

Q. And were you able, eventually, to move your arms a little?

A. Yes.

Q. And as the feeling came back to your arms what happened to you?

A. It started to pain.

Q. Will you describe to the Jury please the kind of a pain it was?

A. It was like a toothache all over your body.

Q. Had you ever felt a pain like that before? 10

A. No.

Q. Had you ever felt a pain as severe as that before?

A. No.

Q. What did you do?

A. I was crying and calling for my mother.

Q. Did they take you to the hospital?

A. Yes.

Q. Did your mother finally come? 20

A. Yes.

Q. Then what next did they do to you, Harold, after that?

A. They took me in the x-ray room and gave me an x-ray.

Q. They did?

A. Yes.

Q. And then what did they do?

A. I guess they put me in a room, I don't remember anything after the x-ray. 30

Q. Keep your voice up.

A. They gave me an x-ray then they took me to a room, that's all I remember of that.

Q. When you came to finally —

A. I was in a traction, that's like a thing around my neck and pulleys and weights on it.

Q. What kind of a thing was it that was around your neck?

A. Leather harness.

Q. These pulleys and weights, how were they fastened to your leather harness?

A. To keep my head back, kept pulling on it.

Q. Who was taking care of you there in the hospital, do you remember?

A. Nurses and doctors.

10 Q. How long was that—those pulleys and weights pulling on your neck?

A. I don't remember how long it was.

Q. Did they take more than one x-ray?

A. They took a lot of them.

Q. Were they all taken at once, or at different times?

A. Taken on different occasions.

Q. After you had worn this harness for some time, then what was done?

20 A. Then they put me in a cast.

Q. What kind of a cast was it?

A. It was a plaster cast, it went from my hips over my head.

Q. Was that put on you in the hospital or after you got home?

A. In the hospital.

Q. How long did you wear it?

30 A. I don't know—it was a long time—I don't remember.

Q. Well, when did they let you go home, how long after you were hurt?

A. Around three weeks.

Q. When you were in the hospital do you remember any of the doctors that took care of you there?

A. Doctor Ransahoff and Doctor Halbstain.

Q. Do you remember them?

A. Yes.

Q. After you got home who took care of you there?

A. My mother had a nurse.

Q. Do you remember her name?

A. Yes. Mrs. Willis.

Q. How long did she take care of you?

A. Two or three months, I think.

10

Q. Then after that who took care of you?

A. My mother had a man take care of me.

Q. What was his name?

A. Charlie, Charlie Vondreo.

Q. By the way, do you recognize this picture that I show you (indicating a photograph)?

A. Yes, that is—that was me.

Q. Is that you with the cast on?

A. Yes.

Q. Was that taken in the hospital or after you had gone home?

20

A. That was in the hospital.

Q. And does that show the cast that you wore?

A. Yes.

MR. LA BRECQUE: I offer that in evidence, if your Honor please.

MR. CARTON: No objection.

30

THE COURT: It may be marked in evidence.

(The photograph referred to was received in evidence and marked Exhibit P-2.)

Q. How did you feel while you were in the hospital?

A. Oh, I had a lot of pains while I was in there

40

and the traction was uncomfortable, I didn't feel so very good.

Q. When they put the cast on how did you feel?

A. Annoying and painful, the same, it was hot then.

Q. It was in the summer time?

10

A. Yes.

Q. How much did it weigh, do you know?

A. It must have weighed around fifty pounds.

MR. CARTON: I object, unless he knows.

Q. Did it feel heavy?

A. It felt pretty heavy.

Q. This other apparatus that you used after the cast, how did that compare in weight with the cast?

20

A. That was lighter, but it was just as big as the cast.

Q. What was it made out of?

A. It was made of leather and steel.

Q. And how did you fasten it to your body?

A. Cords, leather cords, we used to strap it onto the body (indicating).

Q. And you are pointing to underneath your arm and to the sides of your body?

A. Yes.

30

Q. When you had these things on you couldn't lift your head or your neck?

A. No.

Q. After a while did you get another kind of treatment by Doctor Halbstein and Doctor Ransahoff?

A. Yes.

Q. After you had stopped using these devices that they had on you and which you have described what was done with reference to your neck?

40

A. Well, they gave me another one, it was a collar which went over my shoulders and neck.

Q. Did you wear that as long as the other?

A. Almost as long.

Q. And then what was done with reference to your neck after that?

A. I got baking treatments.

10

Q. What kind of treatments were they and where did you take them?

A. I took them in New York at Doctor Ransahoff's office, they were like exercises, loosening the muscles and exercises.

Q. Does he have an office in New York as well as one in Long Branch?

A. Yes.

Q. You used to go to New York to take them?

20

A. Yes.

Q. Who used to take you?

A. Charlie Bondreo.

Q. That is the Charlie that you have described?

A. Yes.

Q. Do you remember whereabouts this was that you had to go for these treatments?

A. It was on Park Avenue—I don't know.

Q. And how often did you have to go for them?

A. Every day.

30

Q. And when you were receiving these treatments how did it feel?

A. My neck was feeling a little better.

Q. Well, when the treatments were going on how did it feel?

A. The treatments were alright, they weren't bad, but —

Q. Did they loosen your neck up?

A. They loosened the neck up, yes.

40

Q. So that gradually you got the use of it back to a considerable extent?

A. Yes.

Q. You don't remember how long these treatments lasted, do you?

A. I don't know,—around three or four months.

10 Q. Who was your family doctor, Harold?

A. Doctor Goldberg.

Q. Were you also seeing Doctor Goldberg during this time?

A. Yes, but not for my neck,—for, like, any other minor ailments.

Q. Doctor Halbstein devoted his attention to your neck and the rest of you Doctor Goldberg took care of, is that it?

A. Yes.

20 Q. Did you go back to school that Fall?

A. No.

Q. In September?

A. No.

Q. Do you remember when you went back to school? Your best recollection?

A. I don't know, about four months after that, I guess, when I was alright.

Q. Did you go back to school that year, during the year 1940, or did you not go until 1941?

30 A. 1941.

Q. Now, how do you feel at the present time, Harold?

A. Oh, I am pretty well.

Q. You are still at home with your mother, living at home with your mother and step-father?

A. That's right.

Q. How does your neck feel?

A. O. K. It feels alright, sometimes when I twist

it hard get a shock and it just makes the back of your neck feel like pins and needles going through.

Q. When do you get that?

A. If I twist it too hard or if I strain it.

Q. And what do you do that causes that? I mean, when do you twist it hard, or strain it?

A. Exercises, playing ball, or something.

Q. When you do that what happens. I mean, is there anything that you can feel or hear or see in your neck?

A. No, it just comes fast, just like a shock goes right through it.

Q. What do you have to do when that comes on you?

A. Well, it goes away again after a while.

Q. Now, if you hold your neck quiet for a while and then start to move it, what happens?

A. Well, it is alright for a while, you know, if I rest it it's O. K., but if—I can't strain it.

Q. After your neck has been in one position for a while, if you hold your neck steady and then you move it, what do you hear?

A. It cracks.

Q. What was the condition of your health, Harold, how did you feel before you got hurt?

A. Alright.

Q. Did you ever have anything the matter with your neck before?

A. No.

Q. When you were in the hospital did you try not to cry?

A. Yes, but it hurt.

Q. Could you help it?

A. No.

MR. LA BRECQUE: Cross-examine.

CROSS-EXAMINATION.

BY MR. CARTON:

Q. Are you sure you didn't go back to school that same year, 1940?

10 A. I didn't go back to school that year.

Q. H'm?

A. I didn't go back to school that year.

Q. Where were you going to school?

A. I went to the school at the Star of the Sea.

Q. Was your teacher's name Sister Agnes?

A. That might have been my fifth grade teacher —what grade Sister was it?

Q. Was that your teacher?

A. I don't remember her name.

20 Q. Well, as a matter of fact isn't it a fact that you graduated or passed your grades in 1941 in the Spring with an average of eighty-six?

A. Yes.

Q. And that was five points higher than your average before the accident, wasn't it—which was 81?

A. It might have been.

Q. So you didn't get kept back in school at all as a result of this accident?

30 A. No.

Q. You were promoted, weren't you?

A. Yes.

Q. Now, in the past several years you have been swimming?

A. Yes.

Q. You have been doing all sports that boys of your age usually do, haven't you?

A. Mostly.

Q. H'm?

A. Mostly.

Q. I mean, you have been diving and swimming, running and playing the usual games that school boys of your age play?

A. Yes.

10

THE COURT: Is the answer "yes"?

THE WITNESS: Yes.

Q. And you seem to get along alright, don't you?

A. Yes.

Q. Now, directing your attention to the day that this accident happened how many times had you been in the pool that year before that day?

A. Practically every day.

20

Q. In other words you had been there from—what time did you come, some time in June?

A. Yes.

Q. From some time in June and all through the month of July?

A. Yes.

Q. So you had been there perhaps thirty, forty times, is that correct?

A. Yes.

Q. And you were of course familiar with the pool and the spring-boards?

30

A. Yes.

Q. And you knew where the springboards were located?

A. Yes.

Q. You had been diving in there every other day that you went in there?

A. Yes.

40

Q. In fact you used to be around the high springboard and diving quite a lot, did you not?

A. Yes.

Q. You never had any difficulty on any other occasion up until this day, did you?

A. No.

10 Q. And you knew, did you not, that there was no separate part of the pool roped off for divers?

A. Yes.

Q. You knew that?

A. Yes.

Q. You knew that a person swimming in the pool could start at one end and swim to the other end or or any other part or any other place that he chose?

A. Yes.

20 Q. You also knew that people swimming in there had to keep out of the way of the people coming off from the board, didn't you?

A. Yes.

Q. You knew also, did you not, that it was the duty of those diving to look underneath to make sure there was a clear space before you dove?

A. Yes.

30 Q. You knew, did you not, that if someone dove off the springboard that you were on, ten feet off the water, and collided with somebody in the water that they were likely to get injured, did you not?

MR. LA BRECQUE: I object to that, if your Honor please, Counsel is losing sight of the fact that this boy was only eleven years old at the time, and I object to it on the ground that it fails to differentiate between what he may know now, when he is seventeen, and what was apparent to him at that time. I don't think the question makes that sufficiently clear and I object unless it is reframed.

40

THE COURT: Well, I suppose you could simply add to it "you knew at that time".

MR. CARTON: Yes, all my questions, Harold, are directed to what you knew at that particular time.

10

THE COURT: Alright.

Q. Do you understand the question now?

A. No.

THE COURT: In other words, when Mr. Carton asked you about your knowledge of the pool it is based on your knowledge as of 1940, the time that you were swimming there.

20

(The question was read by the Reporter.)

A. Yes.

Q. And you knew also, Harold, did you not, that there wasn't any guard or attendant that stood out there like a traffic cop, or somebody that signalled when you could come off the diving board and when you could swim. You knew there was nobody there regulating the diving or swimming, did you not?

A. Yes.

30

Q. You knew that it was a pool where those that wanted to dive dove and those that wanted to swim swam, did you not?

A. Yes.

Q. And you knew also that in view of the fact that there wasn't any guard or attendant or anybody else there saying when you could dive that it was necessary for you or anybody else in diving

40

into the pool to see that you had a clear path in front of you?

A. Yes.

Q. Now, how long had you been diving at the time this accident took place?

A. All day long.

10 Q. No, I don't mean that, but I mean for how long —

THE COURT: For two years? Was that the first year you did any diving?

A. No, I dove for about two years before then.

Q. Had you been diving in that same pool before, in other years?

A. No.

20 Q. H'm?

A. No.

Q. Other pools?

A. Yes.

Q. Somewhat similar to this one?

A. Yes.

Q. So you knew generally the practice in diving?

A. Yes.

Q. You had been diving then for a couple of years before this accident?

30 A. Yes.

Q. Did you know how to do a back-jack or were you a beginner?

A. I knew how to do it.

Q. Did you ever do any diving in competitions?

A. No.

Q. Do you know what the required dives are and the optional dives and the points that are allowed for each, and so forth, and the manner of scoring in fancy diving?

40 A. Some of them.

THE COURT: You understand Mr. Carton means your knowledge as of that time, not what you know now, but what you knew then.

THE WITNESS: No, I didn't know anything about competition.

10

Q. You have noticed boys diving, and a lot of them when they do a back-jack simply stand on the springboard and jump off, whereas to do the back-jack correctly (indicating) you throw your hands over your head, jump almost up straight, then come down, touch your feet something about like that, then lean almost directly in front of the board, under the board, that is the correct way to do it, is it not?

A. Yes.

20

Q. Is that the way you were doing it?

A. Yes.

Q. So that when you were leaning you were leaning almost under the springboard?

A. Yes.

Q. So that you would land not in the place that the average person diving off a springboard lands in the water?

A. No.

Q. In other words, the average person diving off a springboard into the water lands some distance out from the springboard, is that correct?

30

A. Yes.

Q. But a person doing a back-jack as you were about to do lands almost directly beneath the board, is that correct?

A. Yes.

Q. Let me show you a photograph and see if you

40

recognize that as showing the springboard that you were diving from.

A. Yes.

Q. And does that correctly show the springboard and the end of the pool where the springboard is located, as it existed at that time?

10

A. Yes.

BY THE COURT:

Q. Now, Harold, is that divingboard near the ocean, is that the end of the pool that is near the ocean?

A. Yes.

20

Q. And these boys that you say that you saw swimming, one of whom you say you came in contact with, they were swimming from the other end of the pool toward the ocean, is that right?

A. Yes.

MR. CARTON: I ask to have that marked for identification.

(The photograph referred to was marked Exhibit D-1 for Identification.)

30

CROSS-EXAMINATION.

BY MR. CARTON (RESUMED):

Q. Harold, does this photograph show the portion of the pool where you landed?

A. Right here. (Indicating on D-1 for identification.)

Q. Suppose you take my pen and just draw a circle, will you do that?

40

A. (Indicating on D-1 for Identification.) There is another diving board here, too. At that time there were three boards, at that time there was a small diving board there, you can see where the marks show. I would have to avoid the board there, I tried to avoid both of these boards.

Q. The question is, Harold, can you show on the photograph the portion of the water where you landed this day. Just draw a circle, if you can, where it happened. 10

A. (The witness indicated as requested on D-1 for Iden.)

MR. LA BRECQUE: Witness indicates a point apparently almost underneath the end of the diving board, the outward end of the board.

20

Q. And that is supposed to be approximately under the end of the springboard nearest Ocean Avenue?

A. Yes.

Q. The left-hand part of the picture would be the ocean, wouldn't it?

A. That would be the ocean, yes. (indicating)

Q. In other words, the rubber part of the board at the extreme end, that you jump off, that is toward Ocean Avenue? 30

A. Yes.

Q. Now, when you were on the board how many others were out there on the board?

A. One besides me.

Q. Just one?

A. That's right.

Q. And how many dives had you made off there within the last ten or fifteen minutes prior to this?

A. One or two.

40

Q. You had made one or two?

A. Yes.

Q. And the children that you referred to who were down there that day, the majority of them weren't down in the deep water in the vicinity of the springboard, were they?

10 A. Most of my friends were.

Q. Well, how many of your friends were there that had been swimming in the vicinity of the springboard?

A. I think around twenty, maybe, that I knew.

Q. I am sorry, I can't hear you.

A. Around twenty.

Q. So there were around twenty people then, at or about the time that you dove, or within a few minutes previous to that, swimming in the deep
20 water in the vicinity of the high board?

A. Well, no, you see —

Q. Is that correct?

A. My friends and I used to go swimming there at the deep end, we didn't go in the front end of the pool.

Q. Perhaps you don't understand the question. If you don't understand me, Harold, tell me. Within a period of say of fifteen minutes of the time that you dove and were injured did you notice very many
30 people swimming in the deep end of the pool, that is, where it is nine feet deep, in the vicinity in front of the springboard?

A. Yes, there were people in swimming there.

Q. I mean, was it one or two or were there a lot?

A. I don't know, they just kept coming and going, or coming across, that's how they swim.

Q. This group of children that you say were there. Isn't it a fact that most of those children were down at the westerly end of the pool?

40

A. Not all of them.

Q. No, I didn't say all of them, but the majority of them?

A. The majority of them.

Q. Were down at the westerly end of the pool?

A. Yes.

Q. Within a period of say fifteen minutes in the water directly underneath this high springboard or where a person would naturally dive off that board into the water, did you or did you not see more than one or two people swimming around there? 10

A. I saw more than two or three.

Q. Can you give us any idea of approximately how many you saw?

A. I can't, because they kept coming in the water and going out, diving and going across. 20

Q. Were there a considerable number of them?

A. Yes.

Q. So you knew, did you not, that when you dove off that springboard there was, unless you were particularly careful, a likelihood that you would collide with somebody, didn't you?

A. No.

Q. Well, isn't it a fact that you said there were quite a few people swimming right around in that immediate vicinity? 30

A. Yes, but they would go out of the water and I would wait so I wouldn't hit anyone, I wouldn't dive if I was going to hit somebody.

Q. That is what you did though.

A. Yes.

Q. When you were ready to dive what observation, if any, did you make for people before you dove?

A. I looked to see if anybody was down there. 40

Q. Where did you look from, from the end of the Board that you first got on or the end of the board that you used when you sprung off?

A. I looked at the end of the board where I sprung off.

10 Q. In other words, you walked to the end of the board?

A. Yes.

Q. Then when you got out there you turned around?

A. Yes.

Q. And had your back to the pool?

A. I looked first before I turned around.

Q. That's what I mean, then after you looked you turned around and had your back to the pool.

A. Yes.

20 Q. How long was it after you got to the end of the board and you turned around with your back to the pool before you went into the water?

A. Well, I looked over my shoulders and saw there was nobody there, so I dove.

Q. Well, you didn't get my question. Let us assume that this spring board was here (indicating) and that this is the swimming pool down here, and this is the end that you dove off, let us assume that you walked right to the top of this springboard and you walked to the end of this board, something like I did and you stood as I am standing, but you looked out at the pool and didn't see anybody there.

30

A. No.

Q. Then you turned around?

A. Yes.

Q. Looked over your shoulder, then dove?

A. Yes.

Q. How long did it take from the time you got to the end of the board, looked into the pool, saw no

40

one, turned around and dove? Was it a matter of just a second or two?

A. Around a minute.

Q. About a minute?

A. Yes.

Q. How long is a minute?

A. Sixty seconds.

10

Q. Well, I don't think that you realize what a minute is. Can you tell us when would you say a minute was? For instance, start in now and we will wait and you tell me when you think it is a minute. Don't look at the clock.

A. (after the lapse of a short time) Right about now.

Q. That is eleven seconds.

A. Eleven?

Q. Yes, eleven seconds, if the Postal Telegraph clock is correct.

20

A. That is how long it took me to dive.

Q. That is how long it took. Now, when you went out to the end of the board and looked, what was the nearest person to you in the pool?

A. I don't know, there were a lot of people in the middle of the pool but they were far from where I was going to land.

Q. That is quite a long ways, isn't it?

A. Oh, from here to that rail (indicating).

30

Q. It is longer than that if the pool is 80 feet long.

A. Yes, but that's where the people were that I was watching.

Q. Were they swimming towards the spring-board?

A. No, not at that time.

Q. H'm?

A. Not at that time, they weren't.

Q. Which way were they swimming?

40

A. Just playing in the water.

Q. What do you mean, "playing"?

A. Fooling, doing anything they felt like.

Q. I know they were doing anything they felt like, but what were they doing? You see, you were there, Harold, and we weren't, we are trying to get the picture.

A. I don't know what they were doing.

Q. Before you dove in didn't you make any effort to find out what they were doing?

A. I looked to see if they were in my way.

Q. There wasn't anybody else in your way?

A. No.

Q. Before you got to the end of the board and turned around ready to do this back-jack, when you looked again over your shoulder could you see the water?

A. Yes, I looked over my shoulder.

Q. Could you see the water under you?

A. Yes.

Q. How long was it from the time you looked over your shoulder and dove into the pool?

A. About five seconds, I guess I looked over my shoulder.

Q. When you looked the second time over your shoulder where was the nearest person?

A. I can't say because I didn't see anyone.

Q. You didn't see anyone at all?

A. No, I just dove.

Q. But after you dove, you have testified on your direct examination, you saw two people racing?

A. Yes.

Q. Did you see anybody when you were in the middle of the jack-knife, between the springboard and the water?

A. No.

40

Q. When did you find out they were racing?

A. Well, when I looked around from the top of the board there was nobody there, then I dove and they came from the side and they were racing.

Q. Maybe you misunderstood me. When did you first figure out in your own mind that these people were racing?

10

A. Because they were swimming fast.

Q. How do you know they were swimming fast?

A. Because when I looked down they were swimming fast.

Q. When you looked down when?

A. When I broke out of the dive I was coming straight then and I saw they were going fast, they were racing each other.

Q. That's what I said—you didn't see them when you were on the springboard?

20

A. No.

Q. When you went to do the back-jack, when you went out and walked into the back-jack like this (indicating) you didn't see them then, did you?

A. That's when I saw them.

Q. When you went into it like that (indicating)?

A. Yes.

Q. And that is only about a fraction of a second before you hit the water, isn't it?

A. Yes.

30

Q. And they were directly underneath you?

A. Yes.

Q. In which direction were they swimming?

A. Towards me.

Q. Towards the deep end of the pool?

A. Yes.

Q. Or towards the ocean?

A. Yes.

Q. So those boys had come then from somewhere

40

in the pool, a distance that you couldn't see when you looked the first time, and in the length of time that you were on the end of the board, looked over your shoulder at the water, did the back-jack, you saw them right underneath you.

A. That's right.

10 Q. They were swimming, were they not, towards the east?

A. Towards the ocean.

Q. That would be towards the east, and in that fraction of a second that you saw them while you were in the air coming out of the back-jack before you hit the water you determined that they were racing?

A. They were going fast, they had their heads under water, naturally I knew they were racing.

20 Q. Well, the average person swims with their head under water, do they not? Do you know how to do the crawl stroke?

A. Yes.

Q. Seventy-five percent of your swimming your head is under water, isn't it?

A. Yes.

Q. So, because a person swims with their head under water that doesn't mean that they are racing, does it?

30 A. Well, if they were going fast they were.

Q. Will you tell us how long you had these people under your observation, for how long you saw them to determine whether they were racing?

A. I just saw them and I hit them.

Q. For how long?

A. I saw that they were racing, I tried to avoid them and I hit them.

Q. No, I'm not asking you about trying to avoid

them, but how long did you see them to determine that they were racing?

A. A fraction of a second.

Q. As a matter of fact, Harold, didn't you see them before you went off the springboard?

A. No, I wouldn't have dove if I saw them.

Q. H'm?

10

A. No, I didn't see them.

Q. These people didn't come off the side of the pool, did they?

A. No, I can't tell you where they came from.

Q. From the manner in which you saw them they were swimming right alongside of each other, weren't they?

A. Yes.

Q. The two of them?

A. Yes.

20

Q. And they were David Breitkopf and Bob Linn, weren't they?

A. Yes.

Q. You knew the boys?

A. Yes, I knew them.

Q. And isn't it a fact that they were swimming towards the east?

A. Yes.

Q. Parallel with each other?

A. Yes.

30

Q. And they were practically underneath the diving board when you left the board, were they not?

A. Yes.

Q. On the day that this accident happened isn't it a fact that you had been clowning around on the springboard? By that I mean running out to the end, making believe you were going to dive and then just sort of cutting up a little bit?

A. No, I wasn't, I never fool on top of the board.

40

Q. Well, did you this day?

A. No.

Q. You are sure of that?

A. Positive.

MR. CARTON: I think that's all.

10

JAMES H. RILEY, called as a witness on behalf of the plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

20

BY MR. LA BRECQUE:

MR. LA BRECQUE: We are calling Mr. Riley out of turn by consent of counsel because he has to get back to Rutgers.

Q. Mr. Riley, where do you reside?

A. In New Brunswick, 160 Livingston Avenue.

Q. What is your business?

30 A. I am the associate professor of physical education at Rutgers University, and my business is swimming.

Q. And you have been in that business for how many years?

A. I have been at the university for thirty-one years and competed as an amateur swimmer about eight years prior to that.

Q. Will you state what competition you took part in, or qualified in as an amateur?

40

A. Well, I swam for the New York Athletic Club for eight years and was the National Champion surf record swimmer, and also swam on the American Olympic Team in 1912.

Q. Following that will you state what experience you have had in the field of swimming?

A. I was in charge of swimming at the West End Casino for many years, at many Camps and at the Colony Surf Club in the summers. In the course of my duties professionally at the University I have been President of the College Swimming Association, and was President of the Eastern Swimming Association for five years. I helped to organize the swimming forum which is nation-wide at present and has just met at Fort Lauderdale, Florida and I am on the Action Committee of that forum at present.

Q. Will you tell the Court what experience you have had in the operation of swimming pools.

A. When I was in charge of the West End Casino I would engage the lifeguards and see that their duties were carried out properly and see that they were properly trained and then I moved down to the Colony Surf Club and they put in the same features at the Colony Surf Club and had them for many years, and when I left the West End Casino I recommended to Mrs. Prendergast a man who had trained with me and who is now swimming instructor at Trenton—Al Neuschaefer.

Q. Is he in court today?

A. He is in court today.

Q. Will you point him out?

A. Will you stand up please, Al Neuschaefer?

(A gentleman in the court room stood up.)

Q. Is that Mr. Neuschaefer over there?

A. Yes.

Q. You have been familiar with the operation of swimming pools in the shore, along the shore then for a period of how many years?

10 A. At the shore I imagine a minimum of twenty years.

Q. And among the swimming pools that you have operated are the ones at the West End Casino and the Colony Surf Club?

A. Ones which I helped to operate, yes.

Q. And they are located where?

A. They are in West End, and they are almost adjacent, you might say, just a few hundred yards separating the two pools.

Q. Both on Ocean Avenue in West End?

20 A. Both on Ocean Avenue, West End.

Q. And were you the person in charge of the swimming pool at the West End Casino in 1940?

A. No, Mr. Neuschaefer was, I believe, he was in charge of swimming there, I don't know who was in charge of the pool at that time.

Q. Now will you state, Mr. Riley, whether you are familiar with the standard and generally accepted practice in the operation of swimming pools with reference to the maintenance and operation of swimming pools such as the one at the West End Casino?

A. Well, I imagine, if you want me to explain —

Q. No, the answer to that is "yes" or "no".

A. Yes.

Q. And will you state whether you are familiar with the standard and generally accepted practice in the trade regarding the precautions to be taken in connection with the operation of pools of this type in which swimming and diving are permitted?

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A. Yes.

Q. And will you state, Sir, what is the standard and generally accepted practice with reference to the operation of such a swimming pool?

MR. CARTON: I object to it unless it is fixed as of July —

10

Q. As of 1940.

MR. CARTON: 1940.

MR. LA BRECQUE: That's correct.

A. Well, I would say that —

MR. CARTON: I object to what he would say.

20

Q. In other words, what we want is the standard and generally accepted practice in the trade.

A. All right, Sir. The accepted practice is to have the pool covered properly by competent lifeguards and to protect the diver in this manner, that the lifeguard's duty consists of keeping the children from running and having violent games —

MR. CARTON: I object to this unless it has any relevancy to the accident in question. That is not evidence, it means nothing at all, about what generally happens, except in so far as it pertains to this issue.

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THE COURT: I will allow it upon the proper instruction to the Jury. I think the witness must be allowed to develop his answer and then if it appears

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that all of his answer has no bearing upon the issue presented in this case then I will strike it.

Q. You go right ahead, Mr. Riley.

A. Well, a lifeguard has —

10 THE COURT: Read the answer, please.

(The previous answer was read by the Reporter.)

A. (Continuing.) In addition to that the guard has to protect the public in the pool from any accident or from the hazard of drowning, he has to pull them out if they are in trouble, also if they have a high board and a low board he directs the traffic. In other words, he prevents any collision by being
20 present at that particular spot and timing the take-off of the diver so that there is no conflict there when he hits the water. It is also the practice at the big pools —

MR. CARTON: I object.

MR. LA BRECQUE: No, we want the standard practice.

30 THE COURT: Standard practice.

THE WITNESS: I see.

Q. In pools of this type.

A. In pools of this type the guard is supposed to cover the hazards of bathing and of diving and to regulate the traffic under the board to see that no accident occurs.

Q. That is in the event that diving and swimming are permitted in the same pool?

A. That's right.

Q. Where there is no guard will you state whether there is any standard precaution to be taken with reference to the separation of the divers and swimmers?

10

MR. CARTON: I object to it as leading.

THE COURT: I suppose that question may be leading, you can revise it and at the same time elicit the information that you have to.

Q. What other standard precautions are required in the operation of such a pool in connection with bathing and diving if there is no one to regulate traffic?

20

A. It is customary to have either corks or buoys or markers of some kind around the area where there is a hazard of contacting divers and usually the diver dives towards the area that is marked off for his protection.

Q. And is that standard practice?

A. That is standard practice. I would like to modify that to this extent —

Q. Go right ahead, Mr. Riley.

30

A. That many people conduct swimming pools who don't understand the requirements of a pool, and if they are built —

MR. CARTON: I object to this unless it is standard practice.

Q. What is the purpose of —

A. The purpose is to have a restricted area where

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swimmers can't enter and where divers can dive without hazard.

Q. And in the event that there is no such restricted area then if I understand you correctly standard practice requires a lifeguard to regulate the traffic on the diving board and the swimming in the pool?

10 A. That's right.

Q. One or the other?

A. That's correct.

Q. Who is the person who is generally charged with the duty of hiring and assigning the duties of a lifeguard?

A. As a rule it is the manager of the pool or the owner of the pool who does that. Sometimes he delegates that authority to somebody he has confidence in.

20 MR. CARTON: I object to that and move that it be stricken. It has no pertinency here.

THE COURT: Motion granted.

Q. You say that in 1940 you operated a pool yourself?

A. No, I have never operated a pool myself.

Q. I mean you were stationed at one of the pools,
30 you said.

A. I was stationed at the Colony Surf Club, I had the privilege of teaching swimming there.

MR. LA BRECQUE: I think that's all.

CROSS-EXAMINATION.

BY MR. CARTON:

Q. In 1940?

A. 1940.

10

THE COURT: This was at the Colony Surf Club in the Borough of West End, not at the West End Casino?

MR. LA BRECQUE: No, he was at the West End Casino before then.

MR. CARTON: It was owned by the same person, only a block or so away.

20

MR. LA BRECQUE: No.

THE WITNESS: No, Harry Reicher owned the Colony Surf Club.

MR. CARTON: In 1940?

THE WITNESS: In 1940.

Q. Mrs. Levy had owned it originally.

30

A. The Colony Surf Club Mrs. Levy never owned, she owned the West End Casino.

Q. She never owned it?

A. No.

Q. Now, Mr. Riley, tell us the number of swimming pools that you know of along the Jersey Shore. Are you familiar with the pools along the Jersey Shore?

A. When you teach swimming on the Jersey Shore

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you haven't got too much time to go around, so I'm not too familiar with other pools on the Jersey Coast.

Q. Then how are you familiar with the standard practice in existence along the Jersey Shore swimming pools?

10 A. Standard practice don't confine itself to the Shore, it confines itself to the Country and I am familiar with the swimming pools throughout the Country.

Q. Are you familiar with the standard practice in existence along the Jersey Shore in the summer of 1940?

A. On the Jersey Shore?

Q. That is my question, Sir.

A. No, I wouldn't say that I am.

20 Q. Are you familiar with the practice generally existing throughout the Country in 1940, in the summer of 1940?

A. Yes.

Q. And that is a result of what?

A. A result of reading periodicals and contact with other coaches and talking over business topics with them, how they conduct their pools and how they are operated.

30 Q. How many pools did you see in your experience during the summer of 1940?

A. The summer of 1940?

Q. Yes.

A. I don't think I saw so many in the summer of 1940, I see them more in the winter.

Q. Well, you don't see summer resort pools in the winter, do you?

A. I see them in Florida, they have pools in the winter.

40 Q. I am talking about New Jersey and not Florida,

Sir. Is this testimony that you have given what the practice is for swimming pools in Florida, or New Jersey.

A. Practice for swimming pools throughout the Country, I'm not limiting the scope of my testimony to just New Jersey.

Q. Do you say then that what you have testified to is the standard safety practice in New Jersey? 10

A. That is what it should be —

Q. Oh no, that is not my question, I am asking you not what you think it should be —

A. No, I understand that.

Q. —but what the standard safety practice is in New Jersey.

A. I would say "yes".

Q. Tell us please, in the summer of 1940, what pools had buoys or corks or markers regulating the area in which one could dive, in New Jersey. 20

A. If you don't have a lifeguard —

Q. Just answer my question, please.

A. State your question again.

(The question was read by the Reporter.)

A. I would say three that I was familiar with.

Q. What are they?

A. One was Olympic Park in Newark, or in Irvington, another one was the Colony Surf Club at West End, and the third was a pool in New Brunswick, New Jersey. 30

Q. What pool in New Brunswick?

A. It is a pool run by a Mr. Reed, it is a private pool.

Q. Has it any name?

A. Just the New Brunswick Natatorium.

Q. Indoor or outdoor?

A. Outdoor.

Q. How many other pools are there that you are familiar with or that you know of along the Jersey Shore in the summer of 1940?

A. Well, I know the Bradley pool and the pool at Asbury Park.

10 Q. Well, let us start in Spring Lake. Do you know the Spring Lake pool?

A. I do know the Spring Lake pool, I have taught there.

Q. There are three pools at Spring Lake, do you know the three pools at Spring Lake?

A. I know two pools at Spring Lake.

Q. What is that, the Casino —

A. The Casino and one municipal pool.

Q. At the south end or the north end?

20 A. I don't know whether it is at the north or south end.

Q. The one near Belmar?

A. Yes, it is the one near Belmar.

Q. Are you familiar with the Belmar pool?

A. I know the Belmar pool.

Q. Are you familiar with the Avon pool?

A. I know the Avon pool.

Q. The Bradley Beach pool?

A. I know the Bradley Beach pool.

30 Q. Do you know the Ocean Grove Pool?

A. Yes, sir.

Q. There are two pools in Asbury Park. The Natatorium —

A. That's right, I know the two pools in Asbury Park.

Q. And the Eighth Avenue pool?

A. Yes, I know the Eighth Avenue pool, I taught there.

40 Q. Allenhurst pool?

A. Allenhurst pool, that's it.

Q. Deal Pool?

A. Deal pool, I have been in that too.

Q. That is ten pools. Which one of those ten that I have named have these buoys or corks or markers that you have referred to?

A. None that I know of.

10

Q. And you still say that that is the standard practice —

MR. LA BRECQUE: I object to that, he didn't say that.

A. My statement, can I tell you what my statement was?

Q. Just answer my question please. You still say that is the standard practice where there isn't a guard there to regulate it?

20

A. Where there isn't a guard there to regulate it, yes.

Q. Was there a guard there regulating these other pools?

A. Whenever I have been there there was a guard regulating the pools.

Q. You don't get there very much, do you?

A. As I say I am not there very much in the summer, but when I have been there there has been guards.

30

Q. When do you go there, when there is a meet?

A. When there is a meet and occasionally to talk with the instructor.

Q. How many times have you been to these various pools in the territory I have mentioned prior to 1940?

A. I would say three or four times to each pool.

40

Q. Three or four times to each pool?

A. That's right.

Q. And that includes Allenhurst and the Casino at Deal?

A. That's right.

10 Q. And also includes the Spring Lake pool?

A. The Spring Lake pool.

Q. Have you ever at the Spring Lake pool, ever seen any guards standing around the springboard or regulating diving?

A. Yes, I have seen it at the one you mentioned because I taught there myself at the Spring Lake pool.

Q. When?

20 A. Mr. Neuschaefer, can you help me with the date (indicating to somebody in the Courtroom)?

Q. Just a minute, Sir, I object —

THE COURT: I smiled before when you took over the prerogative of the Court or counsel and asked Mr. Neuschaefer to stand up to be identified, but I know your heart is in the right place and there is no harm done, but you must not direct any question to Mr. Neuschaefer from the witness stand.

30 THE WITNESS: I see. Well, Mr. Neuschaefer and I taught there together one summer and I am just a little off on the date.

THE COURT: Well, can you give it to us approximately, without certifying to it that you are correct, what your best judgment is as to the date?

A. About 1942.

40 Q. 1942. Had you ever seen any guard there in 1940 or prior to 1942 regulating diving?

A. No, because when I went there —

Q. No, not "because," just a minute, Sir.

A. No.

Q. The answer is "yes" or "no."

A. No.

Q. Had you ever seen any buoys or corks there at the Spring Lake pool? 10

A. No, not at the Spring Lake pool.

Q. And it is a fact, is it not, that the Spring Lake pool is one of the outstanding pools in New Jersey?

A. As a pool it is well constructed.

Q. And managed.

A. And managed.

Q. And they have never had either one of these two requisites prior to 1940 to protect it, have they?

A. No. They have very little traffic. 20

Q. They have?

A. Well, just a few people at a time.

Q. Do you mean that, Sir? I mean, I happen to have been going there for quite a few years.

A. Well then, you must have seen me down there because I taught there.

Q. I don't recall seeing you there, but I do recall seeing a lot of people there. Isn't it a fact that that pool is particularly crowded?

A. No, that pool is not crowded, it wasn't crowded when I was there Sir, put it that way. 30

Q. Let us get to the Allenhurst pool. You say you have never seen any buoys or corks in the Allenhurst pool?

A. No.

Q. Have you ever seen any lifeguard there regulating traffic?

A. Yes.

Q. When? 40

A. Three or four times when I have been there.

Q. When?

A. In the day-time.

Q. Tell me what years?

A. Oh, I would say from 1940 on.

Q. Did you in 1940?

10 A. I think it was 1940, I won't commit myself definitely to the date, but around that time, in the last five years, for they had two Red Cross men down there, two of my own boys who I have trained and I have seen them doing it, but I can't give you definite dates on it.

Q. Would you testify affirmatively under oath that you have, in 1940 or previous to that, seen attendants or lifeguards regulating diving from the Allenhurst pool?

20 A. I am too indefinite as to dates to make a definite statement on it, Sir.

Q. The Allenhurst pool is one of the large pools along the Jersey Shore, is it not?

A. That's right.

Q. Now, the West End Casino, is that one of the large ones?

A. That's right.

30 Q. Was such a practice followed at the West End Casino?

MR. LA BRECQUE: I object to that.

A. Prior to 1940, yes.

Q. In 1940?

MR. LA BRECQUE: He said "prior to 1940."

40 MR. CARTON: He said that, and I am asking him in 1940.

A. You would like to know prior to 1940. I would say yes.

Q. Now listen to my question. Was such a practice followed in 1940 at the West End Casino?

A. In 1940?

Q. Yes.

A. No.

Q. H'm?

A. No.

Q. So, that takes in three of the largest pools along the Jersey Shore which didn't have what you say was the safety standard and where it wasn't followed in 1940.

A. That's correct.

Q. Well, will you tell the Court and Jury please why you say that was the safety—strike it out—what do you mean by the "safety standard"?

A. What the average good manager would do and does do to protect his bathers.

Q. Do you mean what in your mind he should do?

A. No, what he does do, they all should do that, but what the good manager will do and it is safety practice to do.

Q. In other words, there is no book or rule or regulation of these requirements?

A. There is no book on it and nothing has been published.

Q. And it is just opinion, your opinion and somebody else's opinion.

A. It is not only my —

Q. Just a minute, let me finish my question. It is your opinion and other people's opinion of what should or should not be done in the management and operation of a swimming pool.

A. It is my opinion and that of the American Red Cross, yes.

Q. Well, supposing you just speak for yourself and leave the Red Cross out of it.

MR. CARTON: I move that that be stricken, about the Red Cross.

10 MR. LA BRECQUE: I object.

THE COURT: No, I think I will have to allow it to stand.

Q. When you say "The American Red Cross" in 1940 did they have any rules or regulations regarding the operation of a swimming pool?

A. They have a teacher's training course —

20 Q. Answer my question please.

MR. LA BRECQUE: I submit he should be permitted to answer it in his own way, he is telling what the Red Cross does.

(The question was read by the Reporter.)

MR. CARTON: He can answer "yes" or "no."

30 MR. LA BRECQUE: I submit he should be permitted to answer in his own way, not just "yes" or "no."

THE COURT: No, I think that question clearly calls for a "yes" or "no" answer.

A. Yes.

Q. And are those rules written or otherwise?

A. They are taught in their schools.

40 Q. Are they written?

A. I'm not sure.

Q. Does the American Red Cross give courses in the operation and management of swimming pools?

A. They tell you —

Q. Or, do they give a course for lifeguards?

A. They have two courses, they have one course for lifeguards and they have one course on what they call "water safety" which has to do with water fronts and pools and that goes to a group that they used to call Red Cross Examiners and today they call it the Teachers Training Course in the Red Cross, and which includes that. 10

Q. Of the pools in New Jersey in the Monmouth County area, how many of the pools in 1940 had what you say were the standards of safety?

A. I should say the Monmouth Beach pool, Sea-Bright Beach Club — 20

Q. Has the Sea Bright Beach Club a pool?

A. Yes. It is a small pool, and at that time Bob Kipper's brother was up there in charge of the pool all day, and the Colony Surf Club, and also the Avon pool.

Q. Were you familiar with the Avon pool around 1940?

A. They had one of my men there, and he told me what he was doing and I was down to see him twice and saw what he was doing. 30

Q. You saw him down there, watching the bathers?

A. I saw him in charge of the area where the diving board was and I saw him watching to see that no accident occurred at that stand.

Q. And did he regulate that?

A. Yes, he was regulating the diving and swimming, I believe Dan mother ran the club at that time. 40

Q. Alright, that is four. Any others?

A. Well, those four I am definite about.

Q. How many pools were there along the Jersey Shore in 1940?

A. I don't know, there must be at least thirty.

10 Q. So, other than these four you would say the rest of them were all operating in violation of what you say is the safety standard?

A. No, no, not at all. I would say I am not familiar with them.

Q. I understood you to be familiar with practically all of them a few minutes ago.

A. I know that, but I don't know of the practice of all of them. I mean, when someone who is earning his living teaching swimming he can't go around and just make a survey of these things, you know.

20 Q. I don't know.

A. I don't know either, Sir, but I am only answering your question.

Q. But you are familiar with pools all over the United States?

A. Just the operators. I have seen them, talked to them professionally, just the same as you do to your colleagues, that's where you get information, from them.

30 Q. In other words, you are telling us what somebody has told you.

A. That's true, that's about it.

Q. In other words, most of this is what somebody else has told you and not what you know of your own knowledge?

A. Yes, sir.

Q. Isn't it a fact that most of this is a result of what somebody else told you and not what you know of your own knowledge?

40 A. About fifty-fifty.

MR. CARTON: If your Honor please, I move that it be stricken, any reference in his testimony which was given as a result of what somebody else told him.

MR. LA BRECQUE: I object to that, if your Honor please.

10

THE COURT: No, I think —

MR. CARTON: As hearsay.

THE COURT: —Mr. Carton, that where there is no specific book of rules setting up a standard that it could be possible, nevertheless, for the standard to spring up in the trade and that standard could be recognized by what was observed and carried on by different pools and I presume that when persons interested in swimming and in the management of pools, such as Mr. Riley seems to have been, get together with other coaches and with other teachers of swimming and managers of pools, those men talk shop, so to speak, and from the information that they relate to each other it might be said that such information came to be accepted as a proper standard which the trade observed in regard to certain safety rules for the conduct and management of the pools; so that the Court conceives that it would be proper for Mr. Riley to testify not only as to what he saw of his own knowledge but as to what he conceives to be the standard as based upon talks and exchange of opinion that he has had with such managers and with other teachers of swimming and with other managers of pools.

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MR. CARTON: May I have an exception, please, and on the additional ground that there is no proof before this Court of the competency or the fact of whether or not these people who this witness talked with were themselves experts and in a position to know.

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THE COURT: Alright, the Court will allow you an exception.

Q. Now, Sir, tell us please what managers of pools you have discussed safety operation of pools with, particularly in relation to the regulation of diving, prior to 1940?

20

A. I would say Mr. Reed in New Brunswick, Mr. Al Gordon of Fort Lauderdale, Florida,—I don't recall names too well, Sir, off-hand.

Q. Mr. Reed is the only one in New Jersey you can recall?

A. That I can recall, whose name I can recall—I have discussed it with Mr. Neuschaefer.

Q. Was he the manager of a pool?

A. Well, you see —

Q. Or is he a swimming instructor?

30

A. He manages the Trenton pool, which is an indoor pool.

Q. I am talking about outdoor pools relevant and similar to this, that's what we are talking about, rules of safety regulations, and I assume that is what your testimony has related to?

A. That's correct.

Q. Can you think of anybody else, the operator of a similar pool in New Jersey prior to 1940, or including 1940, other than Mr. Reed of New Brunswick?

40

A. Yes, Mr. Palmer at the Olympic Pool in Irvington. He is a big operator.

BY THE COURT:

Q. I presume, Mr. Riley, that what you have given us is your concept of the proper safety standards to be followed in swimming pools as based particularly here upon the safety course that the Red Cross gives, about which you have previously testified? 10

A. You are correct, Sir, that is exactly what I would base it on, in addition to the talks and observations of operations in other pools.

Q. Yes.

A. But the American Red Cross course really goes into that quite deeply and very intensively as to the protective measures for pools.

Q. Is there such a thing as a course given either in Rutgers or in any other University that you know of, similar to the course which is given by the Red Cross? 20

A. The Red Cross gives that course in nearly every University. They have their representative at every University and they have their representative in the North Atlantic Division, he was a former coach in the Army prior to giving that course and he gave that course last summer and passed some thirty men in it, and that information is passed on to all of those boys who take a guard position or a teaching position. 30

Q. There are many colleges that have a physical education course who equip their graduates to take charge of athletic activities and playgrounds and such activities as those, is that not so?

A. That is correct, Sir, and every one in our course has to take this Red Cross course and pass it in order to get credit to graduate. 40

Q. Now, do you know whether or not the different courses or the course you mentioned,—whether or not they teach anything in regard to the standard of safety to be followed in swimming pools?

A. Yes sir, they do.

10 Q. And would you say or can you tell us whether or not that standard which is so taught at these different schools conforms to the standard that you have apprised us of here today?

A. Absolutely, Sir.

20 MR. CARTON: With all due deference to your Honor, I move that the testimony in response to the Court's questions relating to what the Red Cross teaches in this connection be stricken as that does not, in the absence of competent proof, establish that because they teach it that it is the accepted practice existing as of 1940; and further that the testimony of this witness does not fix any time when the Red Cross taught such things.

30 THE COURT: Well, Mr. Carton, the Court conceives, rightly or wrongly, that in a profession where there is no accepted book of printed rules which could be accepted as the standard, that there could nevertheless spring up in that profession a certain standard which would be formulated by the exchange of views and exchange of ideas and exchange of opinion and information as to practices which were adopted at different pools throughout the Country; and where, in addition to that, safety courses as to the management of pools was taught in different schools and universities to those who proposed to become swimming teachers and athletic directors, it seems to me that a witness who was familiar with

what was taught by the Red Cross in its safety course and what was taught by the schools in their athletic courses could properly testify, in addition to the other sources of information and personal knowledge which he had upon the subject, could properly testify as to the safety standard in the management in similar pools, so for that reason the Court has allowed Mr. Riley's testimony and I will allow you an exception to the Court's ruling. 10

(An exception was noted for the defendants.)

MR. CARTON: I might state, if your Honor please, that one of my reasons for making this objection is that I know that in the past there has been considerable conflict between the operators of swimming pools and the so-called lifeguards, in that certain lifeguards and instructors were trying to force upon the managers of pools additional things to be done which would require them to employ more men and there has been friction between them because of that. 20

What I am getting at is as to whether or not that is this man's idea or whether it was what was generally accepted throughout the trade—not what he thinks, but what other people thought. I think it is pertinent. 30

THE COURT: I can see where that would be a meritorious defense and the Court would certainly permit you to offer such testimony as you could present upon that. In other words, if you could demonstrate by any witness that there was not an accepted standard in the profession or trade or that rather it was an attempt upon the part of a cer-

tain group to enforce a standard which would insure more favorable employment for members of that particular group, then of course it would be for the jury to say whether or not in not having a lifeguard on duty on the day that this accident happened the West End Casino, under any stretch
10 of the imagination, had violated any standard accepted as the standard in the trade.

MR. CARTON: Well, I am not conceding at all that there was no lifeguard at all there.

THE COURT: I am taking Harold Ross's testimony at its face value. He says that, or he testified, if the Court recalls his testimony correctly, that on the day that this accident happened there
20 was no lifeguard on duty at the pool.

MR. CARTON: We will show by plenty of proof that there was.

THE COURT: Maybe I am wrong, but that was his testimony, as I recall it.

MR. LA BRECQUE: Yes it is, and we have many more witnesses. If your Honor please, Mr. Carton
30 has, in stating his objection before your Honor, injected into the case some statements of his own concerning he knows this is going on or that is going on concerning lifeguards, and so on and I make application at this time, in view of the complete absence of any testimony, for your Honor to instruct the Jury to disregard those remarks on Mr. Carton's part.

THE COURT. I think the Jury, without any
40 comment or directions from the Court will realize,

Mr. La Brecque, that this case must be decided upon testimony which is actually presented in Court.

CROSS-EXAMINATION.

BY MR. CARTON (resumed):

10

Q. Were these courses that you have referred to taught by the Red Cross prior to 1940?

A. Yes.

Q. In those courses was it taught that it was necessary where you didn't have a lifeguard regulating the diving to rope off and segregate that part of the pool used by divers?

A. They suggested you do both, they want you to do both, not only one of them.

Q. I'm not interested in what they "want you to do." What people want you to do may or may not be the best thing. I am talking now of what was the standard accepted practice in the trade.

20

A. No, you asked me if that was taught in the Red Cross course and I am telling you that that was taught by the course, Sir.

Q. You don't understand me, Sir. Was it taught as being the standard accepted practice?

A. Yes.

Q. In your profession?

30

A. Yes.

Q. Well, this was then —

A. Yes sir.

Q. You say that was the accepted practice?

A. Yes.

Q. In other words, not the idea of the Red Cross alone, but this is what was generally done?

A. Yes.

Q. Now, do you mean to say, Sir, that with your

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knowledge of similar pools in and about New Jersey, that that was the standard accepted practice in existence before 1940?

A. Indeed I do.

10 Q. But you can't tell us any except the four pools you have mentioned, out of thirty along the Jersey shore area, where it existed, can you?

A. Well no, I can't.

Q. Now, when you taught swimming at the Colony Surf Club how many assistants did you have?

A. Usually three.

Q. Did you have three during 1940?

A. I guess I had two in 1940, I don't recall whether it was two or three, but it was probably two.

20 Q. And in all of these swimming pools that you have referred to where some of your students have been swimming instructors, did they all of them have assistants or did they sometimes work alone?

A. Well, some worked alone, some worked with assistants.

Q. And where a person worked alone it wasn't possible, was it, to be in the pool all day long?

A. It is possible to be in the pool all day, I work all day long and I think most of the other instructors do too.

30 Q. No time out for lunch or some other thing like that?

A. Well, frankly, I don't eat lunch, so I work all day long. I imagine a person with a bigger appetite would probably take time out for lunch. In recent years I don't eat lunch.

40 Q. It would be quite obvious that there would be certain times during the day when a person couldn't be there, they would have to have some privacy or go into some rooms in some other parts of the pool?

A. Correct.

Q. And on those occasions they wouldn't have the pool under observation, would they?

A. Well we are taking myself, for instance —

Q. No, we are talking about the general practice.

A. The general practice is to substitute somebody else for the person who is leaving.

10

Q. And you say that is the practice that existed prior to 1940?

A. That is the practice that exists, the pool must be covered, the beach must be covered.

Q. Let us just confine this to the pool. What do you mean "covered"?

A. That somebody has to be there to protect it so that someone wouldn't drown and so that an accident wouldn't occur and somebody is responsible. You should have a responsible person in charge of the pool who is a competent life saver.

20

Q. What do you mean by "competent life saver," a capable swimmer?

A. No, a man who has passed the Red Cross test and has been qualified and certified as having a knowledge of saving lives.

Q. Well, there are plenty of very good lifesavers who never passed that test, are there not?

A. Yes indeed, there are many.

30

Q. Some of them are just as good as those that have?

A. That is true.

Q. Why do you say "a man who has passed the Red Cross Test"?

A. In the first place, it is the most difficult thing in the world to get a job unless you pass the Red Cross test.

Q. That's not the point —

40

A. (continuing) Because they have been taught properly and their knowledge is sound and they know what to do in an emergency. A great many people who are excellent swimmers don't know what to do to revive a person after they get him out of the water.

10 Q. You are talking about the First Aid to be rendered after they are removed from the pool but I am talking about somebody regulating the manner of going in and out of the pool.

A. Can I answer that my way?

Q. Yes, go ahead.

A. A trained man is trained so he can do many things well while in his own pool. You can take a swimmer and he may be able to swim well and may not be able to get out of his own way in saving
20 somebody and he may not know resuscitation in case a person needs help of that kind, he may not even know how to take a person out of the pool unassisted. Those things are taught the trained lifeguard, not only swimming, and a trained lifeguard knows what to do at the right time.

Q. Does Mr. Neuschaefer know what to do in these times?

A. Al Neuschaefer? He does, he is an expert.

30 Q. He was there at the time, wasn't he?

A. I don't know.

Q. You know a lot of things as a result of what you have heard, do you not?

A. I heard he was there at the time, but I'm not making any statement.

MR. CARTON: I move that be stricken.

40 Q. Have you discussed this case with Mr. Neuschaefer?

A. No, I haven't discussed this case.

Q. How did you happen to be here today?

A. I was called today because Mr. Katchen has seen my work at the Colony Surf Club and he regards me highly, he thought that my testimony would be as good as that of any expert that he could get.

10

Q. So you are here at his request?

A. That's right.

Q. Now have you in the investigation of this case or in your preparation for coming here today had any information given to you as to whether Mr. Neuschaefer was present at the pool at that time?

MR. LA BRECQUE: Objected to as immaterial, irrelevant and clearly calling for the passing of the witness on hearsay testimony.

20

MR. CARTON: That is a question calling for a "yes" or "no" answer.

MR. LA BRECQUE: I object to it.

THE COURT: Well, I will hear you as to its competency, Mr. Carton.

MR. CARTON: This witness is being brought here for the purpose of attempting to establish that this pool wasn't run properly, and if one of his pupils was there at the very time that knows all of the things that he is testifying should have been done, then I think it is very important as to whether or not he was apprised of that before he was brought here, knowing that he is here for the purpose of trying to establish liability against the pool.

30

40

MR. LA BRECQUE: If your Honor please, I most certainly object—I don't know whether sometimes it is better to keep quiet when you have a point that you think the Judge is going to rule on in your favor, but I just want to add this to what I said before, that Mr. Neuschaefer may have been
10 in charge of the place, but this witness is not called for the purpose of passing on Mr. Neuschaefer's work, he hasn't even been asked that question, he is a competent man, one of the best in the Country, and the other side will undoubtedly produce a man of this type for the purpose of telling the Jury and the Court what the standard in the trade is, that is our sole purpose in bringing this witness here and any question of this type is not proper cross-examination, it is immaterial and irrelevant.
20

THE COURT: I will overrule the objection and allow the question.

MR. LA BRECQUE: May I have an exception?

(An exception was noted for plaintiff.)

(The question was read by the Reporter.)

30 MR. LA BRECQUE: I object to that, if your Honor please.

THE COURT: The Court overrules the objection and allows you an exception.

I suppose, Mr. Riley, what Mr. Carton wants to find out is, when you were coming here to testify in this case if you had been apprised of the fact that Mr. Neuschaefer was in charge of the pool on
40

the day that this accident happened? Did you know that?

THE WITNESS: Well, I knew that, I heard about the accident the very day that it happened. There were the two rival clubs, you know, one next to the other and when an accident like that happened it was quite a bit of excitement and everybody came down to tell me about it. They said this and that and the other thing about the pool, so I knew about the accident the same day that it occurred. 10

MR. LA BRECQUE: I don't think that was the question. I think the question was whether Mr. Neuschaefer was present at the time and that is the thing that I saw was hearsay because how would he know whether he was in charge of the pool. Isn't that correct? 20

MR. CARTON: No, that is not correct.

MR. LA BRECQUE: Then I take it all back. I thought he asked if he was present, there is no question about his being in charge of the pool as far as we know.

THE WITNESS: Does that answer it, Sir? Or am I wrong? I am a little confused. 30

THE COURT: Well, I think you have given an answer, Mr. Riley.

Q. Now, Sir, you have referred to the pools in Florida. Are you familiar with the Deauville pool there?

A. Yes.

Q. That is one of the largest in the Miami area is it not?

A. That's right.

Q. And they don't follow your safety standard that you have enumerated in that pool, do they?

10 A. I can check that for you right now, because I was down there at their opening show and I had a talk with Pete DesJardis and they have a new diving Tower and they have a man there to direct —

Q. Are you talking about 1940?

A. You asked me if I had seen the Deauville Pool.

Q. Sir, I am talking about, entirely about 1940. These standards, have they changed any since 1940?

20 A. No, they are the same, but you asked me if I was familiar with this pool, you didn't say in 1940 but if you had I would have told you "yes" for 1940.

Q. Well, Sir, I assume that you understand that I am talking about and addressing all of my questions as of 1940 because that is the only time that we are interested in.

A. Alright, I will keep that in mind.

Q. Are you familiar with the operation of that pool in 1940 and before?

A. In 1940, yes.

30 Q. And is it not a fact that that pool was not operated according to the standards that you have set forth?

A. It was operated according to my standards.

Q. Do you mean to say that there were guards regulating the diving there?

A. That's right.

Q. When you were there?

A. I was there in 1940, Othelda Blitry was in

charge at that time, I was down there and had a talk with her.

Q. Was this in the winter?

A. In the winter.

Q. 1939, forty or forty-one?

A. Around 1939 or forty, I have been going to Florida every winter every year, and I visit the Deauville Pool and all the Pools in that area. 10

Q. How about the Venetian Pool in Coral Gables?

A. I have been over there too.

Q. Did you ever see any of those standards employed there?

A. Indeed I have, I have seen the boards all with somebody in charge of them.

Q. How many times were you in the Venetian Pool?

A. About four times—are you familiar with the Venetian Pool, Sir? 20

Q. Well, I live within two blocks of it and have for about four years.

A. They have a forty-foot tower and I don't think anybody would have erected a forty foot tower unless they had somebody to watch the people diving there.

Q. I live within two or three blocks and have for several winters, that's how familiar I am with it. Are you familiar with the Miami Biltmore Pool? 30

A. Yes.

Q. Are the so-called standards of safety that you have enumerated in effect there?

A. Yes.

MR. CARTON: That's all.

(The Court at this point was recessed for lunch.)

DOCTOR BERNARD M. HALBSTEIN, called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

10

BY MR. LABRECQUE:

Q. Doctor Halbstein, you are a practicing physician and surgeon of this State?

A. I am.

Q. And your office is located where?

A. Long Branch, New Jersey.

Q. Do you practice jointly with any other physician?

20 A. Yes, I am associated with Doctor Nicholas S. Ransahoff.

Q. Do you specialize in any branch of medicine?

A. I specialize as an orthopedic surgeon.

Q. Orthopedic surgery has to do with what part of the body?

A. Bones, joints and muscles.

Q. You are a graduate of what medical institution?

A. Boston University.

30 Q. You graduated in what year?

A. 1935.

Q. Subsequent to your graduation will you tell us what other experience and preparation you made for that specialty?

A. After serving a year of general internship in Saint Luke's Hospital in New Bedford I took three years of hospital training in orthopedic surgery, one year at the State University of Iowa Post Graduate

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Medical School and two years as resident in orthopedic surgery at the Cincinnati General Hospital.

Q. Subsequent to that, what other experience have you had, Doctor?

A. Subsequent to that I went into private practice in association with Doctor Ransahoff. I was in practice with him for three years, then I went into the Army. I have been in the Army three years and eight months with the rank of Major and was Chief of Orthopedic Surgery at the Forty-first Evacuation Hospital. 10

Q. Doctor, do you know the plaintiff in this case, Harold Ross?

A. Yes.

Q. Will you state whether you and Doctor Ransahoff had charge of the orthopedic features of that case? 20

A. Yes.

Q. Will you state please when you first saw the plaintiff?

A. May I consult the hospital record on this?

Q. Yes. (Handing the witness Exhibit P-1 for iden.)

A. (Referring to the Exhibit) I was called in to see this boy by a local physician, Doctor Fineberg, on the 30th of July, 1940. I saw the boy at the hospital. 30

Q. Will you describe his condition at the time you saw him, Doctor?

A. At the time I saw him he was lying with his head and neck extended in a First Aid position, complaining of pain in his neck and inability to move his neck, he also had pain over the point of both shoulders and which was very sensitive to touch and he had a weakness of both arms.

Q. What was your preliminary diagnosis at that time? 40

A. My preliminary diagnosis was that he had a fracture plus a dislocation of the cervical spine.

Q. Will you indicate on yourself, Doctor, where the cervical spine is?

10 A. It is the neck region extending from the base of the head up to the top of the chest and back (indicating).

Q. What did you then do, Doctor?

A. I had him x-rayed.

Q. At the hospital?

A. Yes.

Q. And then what was done?

A. The x-ray showing a dislocation, a true dislocation with a fracture of the third cervical vertebrae on the fourth, I then —

20 Q. Do you have the original x-ray, doctor, before we go any further, the one taken on the thirtieth, the first day?

A. The original x-ray is not here, no, the early ones are not here. (After looking through a group of x-rays.)

Q. Do you have there all the x-rays, Doctor, that were used in the hospital in connection with your treatment of this boy?

A. No, I don't. They were looked up and it was found that a few of them were missing.

30 Q. You have in your hands certain x-rays that were marked Exhibit P-1 for identification as part of the records produced by the Monmouth Memorial Hospital?

A. Yes.

Q. Is that correct?

A. Yes.

40 Q. Are they x-rays which were actually used by you in connection with your treatment of this young patient?

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A. Yes.

Q. And they were relied upon by you in your diagnosis?

A. Yes.

MR. LABRECQUE: I should like to offer them in evidence.

10

MR. CARTON: No objection.

(Eight x-rays were received in evidence as one exhibit and marked Exhibit P-3.)

Q. In addition to these x-rays did you also take other x-rays?

A. Yes.

Q. And were they actually used by you in connection with your diagnosis and treatment of this patient?

20

A. Yes.

Q. Will you produce those x-rays, please, those are outside of the hospital x-rays.

(The witness produced a number of x-rays.)

MR. LABRECQUE: Witness produces two sets of x-rays, one dated June 16th, 1941, which I offer in evidence.

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MR. CARTON: No objection.

(The group of x-rays dated June 16th, 1941, was received in evidence and marked Exhibit P-4.)

MR. LABRECQUE: And one dated January 8th, 1946, which I offer in evidence.

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MR. CARTON: No objection.

(The group of x-rays dated January 8th, 1946, was received in evidence and marked Exhibit P-5.)

10 Q. Now, Doctor, Examining Exhibit P-3, the earliest x-ray which I believe is the one taken after the date of admission, July 31st, 1940, will you take that x-ray, if you please, and indicate to us what you found the condition of the cervical spine to be at the time that x-ray was taken?

(The witness stepped to the shadow-box.)

Q. Now, can you just stand sideways, Doctor, so that we can all see what you are referring to.

20 A. Yes. (Indicating on the x-ray on the shadow-box.) This x-ray taken the day following, still shows the dislocation of the third cervical vertebrae on the fourth. As we count from the top down there is one, two, three, four, five, six, seven. It doesn't show here but normally there is a line of all the vertebrae, a gradual curved line which extends this way. It is seen off at the level of the third and the fourth, the third is bent forward on the fourth, forming an acute angulation backwards. The dis-
30 location took place at the processes which are behind the bodies of the vertebrae, which is the actual presence of the joints of the pressure and these processes are still over one another.

Q. And what is the technical medical name that you give for that condition, Doctor?

A. Dislocation.

Q. A dislocation of the third upon the fourth cervical vertebra?

A. Yes.

Q. Now, Doctor, following the taking of that x-ray picture—by the way, was the boy wearing a brace when that was taken?

A. No.

Q. Now, following the taking of that x-ray, Doctor, will you tell us generally what was done?

A. I might state that this x-ray was taken during treatment of the boy. On admission I put the boy in what is called head traction. In other words, there is a sling which is passed around the boy's neck and head so that there is a pull exerted by weights at the head of the bed, that was designed to relax his muscle spasm and by gradual pull of those weights to pull the vertebrae back into alignment. 10

Q. Until the vertebrae are pulled back in alignment, Doctor, what is the boy's condition with reference to his ability to move about or move his neck or do any of the normal things that a boy can do? 20

A. He is unable to move his neck while there is a pull on it, he is able to move his legs and he is able to move his arms, also.

Q. Is that a painful position, Doctor, to be in?

A. It is not painful but it is quite uncomfortable.

Q. And this boy was then eleven years old, as I understand it?

A. Eleven or twelve, I don't recall.

Q. What did you then do, Doctor, after you had put traction on him, how long did that remain? 30

A. Approximately twelve hours.

Q. Then will you tell us what his condition was at the end of that time?

A. There was no change in his position at that time, in his condition.

Q. Then what was done after that?

A. I decided to manipulate his neck under an anesthetic in an attempt to reduce the dislocation. 40

Q. Was it dislocated on both sides, Doctor?

A. Yes.

Q. And was that done?

A. Yes.

Q. Did you do it yourself?

A. Yes.

10 Q. Will you describe what you did, Doctor, how it was done?

A. Well, the patient was given an anesthetic, I believe it was ether, and I manipulated his neck by exerting a pull with my own hands and gently rotating his neck first to one side with a gradual flexion and extension, which means bending and, bending backwards and forwards, and I was able to reduce one side, I was able to put one of the joints back into place.

20 Q. Now, Doctor, in connection with that, are these vertebrae hollow?

A. No.

Q. I mean is there a cord that goes through the vertebrae?

A. Yes.

Q. That is what I mean, and can you tell us what the cause would be of the inability to use the hands or arms or shoulders immediately following this accident?

30 A. They come out of the spinal cord which is the nerve structure that lies inside the column of the vertebrae. There are nerves which pass through small holes or foramina in the bone. These nerves extend across the shoulders, they supply the sensation to the skin from the shoulders and they also supply the muscles of the arms with motor power.

Q. And what caused them to become inactive or to cease supplying?

A. By the forward dislocation of one vertebra or

another there is a stretch of these nerves which pass through quite a narrow canal and by stretching these nerves they cause interruption of the nerve supply to that part of his body, and the patient gets a weakness of his muscles and also by the direct pressure, that gives irritation, so that there is extreme sensitivity of the skin which those nerves supply. 10

Q. Following your manipulation, your operative procedure, Doctor, will you tell us what then took place?

A. I then decided to use another method to get the other vertebra, the other site of the dislocated vertebra back into place. This procedure consisted of putting his head in a straight position, or even slide forward in bed, and continuing the strong pull by the traction apparatus. The instructions, the orders written for the nurse were to give the bed-raising apparatus one turn every hour, which meant that every hour his head would go back a little bit further, and it was felt that through the night this would gently ease that vertebra back into place. 20

Q. That was increasing the pressure on the boy's neck?

A. Yes.

Q. Each time you moved it, was it not?

A. It was—no, he had the same amount of pressure, he had the same amount of pull, but it was giving him a gradual change of position to a backward position. 30

Q. In other words, it was moving his head into an abnormal position?

A. Yes.

Q. Naturally, I see. Now, will you tell us, Doctor, what happened then?

A. As a result of that I had an x-ray taken the 40

next morning and it showed the dislocation had reduced.

Q. Then what did you do?

A. I kept him in that position for approximately four days.

10 Q. And what was his condition at the end of that time, Doctor?

A. At the end of that time he was much improved, he had already begun to get increasing muscle power in his arms and the skin over his shoulders was less sensitive, but still somewhat sensitive.

Q. What do you mean, Doctor? You have been elaborating on the sensitiveness of his shoulders. Tell us about that, will you?

20 A. Yes. Well, he would complain of a burning sensation in the skin over his shoulders. On touching the skin gently, just rubbing it, he complained that it was very sensitive and he couldn't stand the touch.

Q. Couldn't stand the pain?

A. Well, he could stand it but he complained of it.

Q. And how did he complain, I mean, how would you know that it was hurting him?

A. He would tell the nurse and he would tell me. I would ask him if he had any complaints and he would say "My shoulder still burns."

30 Q. What was that due to, Doctor?

A. Well, as I say, the spinal nerves were impinged upon by the dislocation, that irritated by direct pressure that vertebra above and that caused a reaction in the skin which they supply, which is a normal sensitivity.

Q. Then what was done, Doctor?

40 A. After we were satisfied that the—after I was satisfied that the neck was reduced by x-ray and also by clinical examination, namely that he had

complete rotation of his neck, rotation ability, I put a plaster jacket on him to hold his neck in that position.

Q. And will you describe the extent of it, Doctor?

A. The plaster jacket goes over the top of the head—the plaster jacket includes the head and neck and the trunk, that pulled and maintained the head and neck in a hyper-extended position. 10

Q. And by “hyper-extended” you mean as far back as you could get it?

A. As far back as possible, yes.

Q. Doctor, he wore that in bed, did he?

A. Yes.

Q. Was he able to turn over or was he supposed to lie in one certain position?

A. He could turn, he could turn on his sides with help, he couldn't turn on his stomach very freely, but all his turning motions had to be done with the aid of someone else. 20

Q. Do you have any photograph to demonstrate the extent of the jacket and the manner in which he wore it in bed?

A. Yes, I have two photographs taken for my personal records. (Handing Mr. LaBrecque two photographs.) They show him in it and after the application of that collar. 30

MR. LABRECQUE: I offer these photographs in evidence, if your honor please.

MR. CARTON: No objection.

(The photographs referred to were received in evidence and marked Exhibits P-6 and P-7 respectively.) 40

Q. How long did he wear that plaster cast, Doctor?

A. He wore that cast or similar casts over a period of six months.

Q. And who attended him during that time?

A. I did.

10 Q. And your associate, Doctor Ransahoff?

A. Yes.

Q. At the end of that time, Doctor, what was done?

A. At the end of that time he was placed in a brace.

Q. Before we come to the brace, will you tell us, please, how long he remained in the hospital under your care?

20 A. He was discharged on the sixteenth of August, which makes it eighteen days.

Q. I show you a bill and I ask you if you recognize that as the bill of the hospital for the time that he was in the hospital?

A. I don't recognize the bill, I have never seen it before,—I recognize it as a bill from the hospital.

Q. Will you examine it and tell us whether it is a bill for treatment for Harold E. Ross during that period?

30 A. Yes, it is a bill for treatment of Harold Ross during that period.

Q. Do you know the charges that were made?

A. Yes.

Q. Do you recognize that as the charges for the time that you were attending him at the hospital?

A. Yes.

Q. Can you tell us whether those charges were fair and reasonable?

A. Yes, they were fair and reasonable.

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MR. LABRECQUE: I offer the bill.

MR. CARTON: The bill is objected to.

THE COURT: The amount may be stated in the record.

10

Q. Will you state the amount, Doctor?

A. The total amount is \$491.90.

Q. And can you tell us, so that the Court and Jury may have the benefit of it, of what the different items are that enter into it, and the charge for each?

MR. CARTON: Well, if your Honor please, there is no dispute about the reasonableness of the charge, the total amount is all that is necessary.

20

MR. LABRECQUE: I will offer it for identification at this time and after it has been marked I just want to bring out the charges for nurses.

(The hospital bill was marked Exhibit P-8 for identification.)

Q. I notice, Doctor, that charge was made for nurses.

A. Yes.

30

Q. Private nurses.

A. Yes.

Q. Will you state, Sir, whether it was necessary that that private nursing service be rendered?

A. Yes it was.

Q. Will you state why it was necessary?

A. The boy had to be turned frequently in order not to develop pressure sores from the cast, he had to be fed by someone else because he couldn't feed

40

himself, he couldn't see as he was bringing his hand to his mouth, and he couldn't see what he was reaching for while eating. He had to have bed-pan care and he was unable to turn by himself or get in and out of bed by himself.

10 Q. And as a result of that was it necessary that he be attended by private nurses while he was there?

A. Yes.

Q. Now, doctor, when you finally let him go home, was it necessary for him still to have care of that type?

A. It was necessary that he have care of that type by someone.

Q. And do you recall that Mrs. Willis, a practical nurse, took care of him when he went home?

20 A. I do recall that, absolutely.

Q. Well, was it necessary that she take care of him or that someone competent take care of him?

A. It was necessary that someone take care of him.

Q. Doctor, what was his condition when you allowed him to leave the hospital and go home at the expiration of eighteen days?

30 A. At the expiration of eighteen days the thing I was mainly interested in was whether the cast was holding him properly, and I was satisfied that it was. I have a note here stating that he had no nervous disturbances, which meant that he had recovered completely from his nerve injury.

Q. Now, Doctor, by the "nerve injury" you mean the condition that was causing him sensitivity and pain in his shoulders and so on?

A. Yes.

Q. Is that right?

A. Yes.

Q. By "sensitivity" you mean, Doctor,—is sensitivity for instance demonstrated when a dentist touches a nerve in your tooth?

A. Yes.

Q. Is that what you have reference to as sensitivity?

A. Yes.

Q. Doctor, after he went home you continued to treat him?

A. Yes.

Q. And during the time that he was wearing that plaster-cast what happened with reference to his teeth, do you recall?

A. Yes. Of necessity the cast had to be braced up on his chin in order to hold his head back, his teeth still being in the growing stage, his upper teeth began to grow outward, but it was something which just had to be allowed because the maintenance of his neck in an extended position was the more important of the two.

Q. Was that unavoidable at that time?

A. Yes.

Q. Now, Doctor, do you have an x-ray there that you can demonstrate to us to show the progress that was made between this x-ray which has been offered in evidence, taken on the thirty-first of July, and the day when he was x-rayed shortly after he was discharged from the hospital on the twenty-seventh of August, 1940.

A. He was discharged from the hospital on the sixteenth of August.

Q. That's right, but I don't see one taken on the sixteenth, that's why I gave you that one. Here is one for the thirteenth, perhaps that would be more helpful.

(The Doctor placed the x-ray on the shadow-box.)

Q. Is he wearing a cast in this?

A. He is wearing a cast, yes. This former x-ray shows the forward dislocation of the third on the fourth cervical vertebra. This x-ray shows that
10 there is no dislocation, it shows that there is a normal line and curve of the vertebra as followed by the second vertebra to a pencil or crayon line which has been superimposed on it.

MR. CARTON: May I have the dates of those x-rays?

MR. LABRECQUE: The thirteenth of August.

20 MR. CARTON: Both of them?

THE WITNESS: No, the date of this one is the thirty-first of July.

Q. Now, Doctor, the condition that is shown in that x-ray on the thirteenth of August is the condition which was being artificially maintained by the cast, is that correct?

A. Exactly.

30 Q. You say that the cast was worn by him until when, Doctor, approximately?

A. About March or April. I can tell that more exactly here (examining the x-ray). No, I don't have it here, I am sorry, but it was approximately six months.

Q. Do you have a picture which was taken after the cast was taken off, Doctor, which will show the difference between the condition of the neck when

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he had the cast on and the neck after he started using that first brace?

A. Yes. After he used the first brace, you say?

Q. Yes.

A. Yes, I believe there is one (handing Mr. La Brecque an x-ray). This is an x-ray taken in November of 1940.

10

MR. LA BRECQUE: I offer it in evidence.

MR. CARTON: No objection.

(The x-ray referred to was received in evidence and marked Exhibit P-9.)

Q. Now, will you demonstrate in this x-ray taken November 29th, 1940, just what changes had taken place when he was wearing the brace?

20

A. Well, the x-ray shows that he was in essentially normal alignment and being maintained by the brace.

Q. The heavy white portions of the picture on the outside, are they the metal part of the brace that are showing prominently there?

A. Yes.

Q. Now, the alignment of the cervical spine which is shown there, is that the normal alignment?

30

A. Yes.

Q. In other words, you were maintaining the normal alignment by the use of the brace?

A. Yes.

Q. Do you have, Doctor, an x-ray taken after the brace was removed, to show the condition at that time?

A. Yes.

Q. And will you produce that one, please?

40

A. (Indicating) This is an x-ray taken approximately one year, eleven months after the injury.

Q. Does it show the condition of the teeth, by the way, that you were describing to us?

A. Yes, it shows the teeth to be somewhat pointing outwards.

10 Q. What can you tell us as to the alignment of the vertebrae there, Doctor?

A. The vertebrae showed that there is no dislocation present but the normal curve of the neck is not there, instead of that there is a forward bend, above the site of the dislocation.

Q. In other words, Doctor, when the support for the chin and head was removed, what happened to the alignment of the cervical spine there?

A. It went out of alignment.

20 Q. And how did it point? Will you indicate with the pointer what the proper alignment should have been?

A. The true alignment should have been a curve going this way (indicating).

Q. Now, Doctor, after the brace was taken off, what next was done?

A. He was given exercises.

Q. And will you describe the type of exercises that he was given?

30 A. He was given all exercises designed to strengthen the muscles of his neck. These exercises, as a matter of fact, were started before his brace was taken off, in preparation of the time when he would discard his brace.

Q. And those exercises were given by you or Doctor Ransahoff?

A. They were given by a physiotherapist.

Q. Do you know the results that were being produced by those exercises?

A. Yes.

Q. How often were those exercises given, or whatever they are?

A. Those exercises—at that time the boy moved to New York and he was taken care of at Doctor Ransahoff's New York office.

Q. Do you have any record there that would show the — 10

A. I have the record here for his New York treatments, that was sent down from his New York office.

Q. When were those treatments started?

A. Those treatments were started on January 9, 1941.

Q. And how often were they given?

A. There is a record here—they were given daily for two months.

Q. Will you tell us what the result of those treatments was, Doctor? 20

A. I have a note here taken during a visit to Long Branch, where he came in the Long Branch office, stating that he is responding to exercises.

Q. Did you see him after the exercises were completed?

A. Yes.

Q. And examine him?

A. Yes.

Q. Now, at the time the exercises were started 30 could he move his neck or did he have any efficient use of it.

A. At first he didn't have efficient use of it.

Q. After the treatments and exercises were finished what can you tell us regarding the use that he had of his neck?

A. He had pretty good use of his neck.

Q. What was the cost of those treatments, Doctor?

A. Well, there is a total bill of the New York office which is \$195.00.

Q. That would be at the rate of how much a treatment?

A. Five dollars.

10 Q. Will you state whether that is a fair and reasonable charge?

A. I would say it was fair and reasonable.

Q. Do you have the bill here?

A. Yes (handing the bill to Mr. LaBrecque).

MR. LA BRECQUE: Will you allow me to offer it for identification at this time.

(The bill referred to was marked Exhibit P-10 for identification.)

20 Q. Did you at my request have an x-ray taken yesterday so that you might demonstrate today what the additional condition of his neck is up to the present time?

A. Yes.

Q. And that has been offered in evidence, as I understand it?

A. Yes sir.

30 Q. Will you produce that please?

(The witness placed the x-ray on the shadow box.)

Q. Now, will you state what changes or improvements have taken place since that time?

A. This x-ray shows an essentially normal alignment of the cervical spine with the normal curve of the vertebrae and no evidence of dislocation.

40 Q. The dislocation has completely disappeared?

Dr. Bernard M. Halbstein—Direct

A. Yes.

Q. And the curve itself has been restored?

A. Yes.

Q. As a result of your treatment and that of Doctor Ransahoff?

A. Yes.

Q. Alright, Doctor, you may sit down. Now, what was your bill and that of Doctor Ransahoff? I suppose you submitted a joint bill together for your treatment? 10

A. Yes.

Q. What was the amount of your joint bill?

MR. CARTON: Pardon me, what was this \$195.00?

MR. LA BRECQUE: That was for the treatments at Doctor Ransahoff's New York office by the physiotherapist. 20

MR. CARTON: That is not Doctor Ransahoff's bill?

MR. LA BRECQUE: No, no that's not their bill for their treatment.

Q. What was the amount of your bill, yours and Doctor Ransahoff's, for the treatment that you gave this young man? 30

A. I have it here—the total bill for treatment in Long Branch was \$540.00.

Q. Has any of that been paid so far, Doctor?

A. Three hundred dollars of that was paid.

Q. So that there is a balance of \$240.00?

A. Yes.

Q. Is that correct?

40

A. Yes.

Q. And I show you a bill and ask you whether this is your final bill showing the status of the account?

A. It is.

Q. With reference to that treatment?

10 A. It is.

MR. LA BRECQUE: I offer this for identification.

THE COURT: It may be marked.

(The bill referred to was marked Exhibit P-11 for identification.)

20 Q. Do you know where the original collar was purchased that you prescribed?

A. I believe it was purchased from Robert Linda.

Q. I show you a bill from Robert Linda for such a collar and I ask you if it represents a bill for the collar which you prescribed?

A. Yes.

Q. What is the total charge for that?

A. The total charge is \$65.00.

30 Q. Will you state whether that is a fair and reasonable charge?

A. Yes.

MR. LA BRECQUE: I offer that for identification.

(The bill referred to was marked Exhibit P-12 for identification.)

40 Q. The second collar, from whence did he obtain that?

A. That was obtained from the Hospital for Joint Diseases.

Q. What was the charge for that?

A. \$5.75.

Q. Was that a fair and reasonable charge?

A. Yes.

10

MR. LA BRECQUE: I offer that for identification.

(The bill referred to was marked Exhibit P-13 for identification.)

Q. Now, you say that the patient was originally referred to you by Doctor Feinberg?

A. Yes.

Q. Do you know the name of the family physician? 20

A. I believe it was Doctor Goldberg.

Q. Now, Doctor, can you tell us whether in this case, you having examined the patient and treated him throughout his illness, can you tell us whether in this case there is any permanent disability?

A. At my last examination of this patient, which was yesterday, he exhibited a normal range of motion, a normal muscle strength of his arms, a normal skin sensation. In questioning him regarding his complaints, if any, which would be considered history, he states that he does have some disability and this was in the nature of a tiredness of his neck muscles after exertion, such as a game of basketball. His neck does not restrict him in any activity, however, but he notes that there is a tired feeling in his neck when he is generally tired and after such exertion as I have mentioned. He also states that he has a slight clicking sensation in his neck, which 30

40

occurs approximately once a month, which disappears quite rapidly, however. I think he told me it lasts three or four minutes. On examination his neck could not be distinguished from a normal neck yesterday.

10 Q. What is your opinion, Doctor, as to whether those conditions that he has described to you are the normal conditions to be expected following an injury of this type?

A. Yes, they are.

Q. Will you state, Doctor, whether those conditions will ever clear up in your opinion?

A. That is hard to state. It is hard to state at this time whether that will clear up or not.

20 Q. What therefore, in your opinion, is the amount if any of any permanent disability that you would allow to this young man in a case of this type?

MR. CARTON: I object to that, if your honor please, because there is no proof that there is any.

THE COURT: Objection sustained.

Q. Doctor, have you treated cases of this type before?

A. Yes.

30 Q. And have you attempted to estimate in terms of disability on the basis of the condition of the patient, the history that you obtained, his complaints and so on?

A. Yes.

Q. And in a case of this kind, leaving aside your own clinical diagnosis—in other words, taking into consideration both subjective and objective findings, are you able to state whether there is any permanent disability?

A. Yes.

Q. And will you so state?

A. I would state that there is some permanent disability.

Q. Are you able to estimate it, Doctor?

A. In figures, or in —

Q. Well, in percentages.

10

A. I would say that he has a five percent total disability.

Q. That is based principally upon what, Doctor?

A. That is based on the severity of his injury, the nature of his injury and the likely consequence in future years that he will have as a result of that injury.

Q. Doctor, did you, in taking the case, obtain a history of an accident or of the cause of the young man's disability?

20

A. Yes.

Q. And will you state please what that history was?

A. Yes.

Q. Do you have your office records there?

A. I think it would be preferable to read it. (Reading) "On July 30th, 1940"—I dictated this note—"About two hours ago he dove off the high divingboard and hit someone in the water. He seemed to be paralysed in the water and was taken out by bystanders and a diagnosis of a neck injury was made. He was immediately removed to the hospital by Doctor Feinberg and a collar was applied temporarily."

30

Q. Now, Doctor, what in your opinion then was the cause of the condition for which you treated this young man and the condition which you now find, as you have testified to and demonstrated in the x-rays?

40

A. It is my opinion that his condition was caused by the dive and striking someone in the water.

MR. LA BRECQUE: Take the witness.

CROSS-EXAMINATION.

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BY MR. CARTON:

Q. Doctor, such a condition could be caused by a person diving off the high springboard and suddenly attempting to twist himself in the air and striking the water without colliding with anybody else too, couldn't it?

20 A. This condition has to take place on acute flexion, in other words, a sharp injury causing the head to jerk forward.

Q. Can you answer my question, Doctor?

A. Yes it could.

MR. CARTON: That's all, Doctor, thank you.

BY MR. LA BRECQUE:

Q. There has to be a rather severe jerk to the head to cause that does there not, Doctor?

30 A. Yes.

MR. LA BRECQUE: That is all.

DOCTOR HARRY D. FEINBERG, called as a witness on behalf of the plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. LA BRECQUE:

Q. Doctor, I see you wear the badge of honor too, is that right?

A. Yes sir.

Q. You just got back too, did you?

A. I did, three weeks ago.

Q. Do you know the plaintiff in this case, Harold Ross?

A. I do, I treated him.

Q. Did you treat him immediately following his accident?

A. Yes sir.

Q. And that accident took place where, according to your history?

A. At the West End Casino.

Q. Will you describe when, where and in what condition you found your patient when you first saw him?

A. I saw him on July 30th, 1940. I was called to the West End Casino and this boy had pain in the back of his neck and his shoulders and he had received an injury to the back of his neck and I put the head down in extreme extension and sent him to the hospital, the Monmouth Memorial Hospital, and there I put a halter on him with a rod that I thought would hold it and a pulley and a weight to keep his neck extreme extended, then I called Doctor Halbstein to see him. The next day, July 31st, Doctor

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30

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Halbstein manipulated his neck and reduced the dislocation of his neck.

Q. Doctor, what was your fee for taking care of him during the time that you did?

A. My bill was \$25.00.

Q. And that was paid?

10 A. It was paid.

Q. I am showing you now the bill itself?

A. Yes sir.

MR. LABRECQUE: I offer that for identification.

(The bill referred to was marked Exhibit P-14 for identification.)

20 Q. Will you state, Doctor, whether the condition in which you found the patient at the time you saw him indicated much suffering and pain on his part?

A. He had a lot of pain in the back of his neck and shoulders which was relieved by extending the neck.

Q. How was he maintaining himself, I mean?

A. Well, at the time I saw him he was lying down near the pool, at least he wasn't in the water when I saw him, and he had a lot of pain.

30 CROSS-EXAMINATION.

BY MR. CARTON:

Q. You were called there by the management, Doctor?

A. I was called there by the management, yes.

MR. CARTON: That's all.

DOCTOR JACOB GOLDBERG, called as a witness on behalf of the plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION

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BY MR. LA BRECQUE:

Q. Doctor, you are a practicing physician and surgeon of this State, are you?

A. Not surgeon, but physician.

Q. Are you the family physician for Harold Ross and the members of his family?

A. Yes sir.

Q. And were you their family physician back in 1940 or thereabouts?

20

A. Yes sir.

Q. And do you know Harold Ross?

A. Yes sir.

Q. Will you describe his physical condition prior to the date of this accident, how was he?

A. He was, I judge he was a perfectly normal boy, a school boy, I found no unusual complaints except the usual complaints and conditions that a boy of eleven would get.

Q. Following the accident, Doctor, did you have occasion to treat him?

30

A. Yes sir.

Q. And of course you didn't do the orthopedic work which it has been testified that Doctor Halbshtein and Doctor Ransahoff did, but did you treat him outside of the orthopedic work, Doctor?

A. Yes sir.

Q. And will you describe briefly what you treated him for?

40

A. I treated him on several occasions for headaches and dizziness.

MR. CARTON: May we have the time fixed for this please?

10 A. (Continuing) I treated him February 28th, 1941, February 15th, 1941, weakness, fainting, dizziness, headaches. One morning he had fainted completely and his mother called me, it was eight o'clock in the morning, and I had to treat him for this fainting spell. On June 30th, 1941, I treated him for restlessness, nervousness, headaches. February 10th, 1942, for grippe. July 2nd, 1942, for vomiting, weakness, headaches. March 8th, 9th, 10th and 13th, 1944, headaches, dizziness, weakness. I advised an
20 eye examination which was done by Doctor Lasky in March, 1944, and I spoke to him this morning. He didn't think he needed any glasses but he gave him some eye exercises to improve his diplopia, that is double vision because —

MR. CARTON: I move all this be stricken unless it is going to be directly tied up to be a result of this accident.

30 THE COURT: That must be tied up, or the motion will be granted.

MR. LA BRECQUE: I am going to give that.

Q. Did you obtain from this patient a history of the accident which has been described by Doctor Harry Feinberg?

A. Yes sir, I did obtain a history.

Q. Are any of those conditions for which you

treated the patient related to the injury which this patient sustained?

A. Yes sir.

Q. Will you describe which one of them are?

A. The headache and the dizziness, the weakness that he presented.

Q. For treating him for those injuries, those conditions, Doctor, did you make any charge? 10

A. Yes sir.

Q. And what was the amount of your charge?

A. \$48.00.

Q. Is that a fair and reasonable charge?

A. Fourteen visits, which I think is fair and reasonable.

Q. Does this have anything to do with usual childhood diseases or colds or grippe or anything else?

A. No sir. 20

Q. Is this the bill?

A. Yes sir.

MR. LA BRECQUE: I offer it for identification.

(The bill referred to was marked Exhibit P-15 for identification.)

Q. Does that bill, Doctor, include all the treatment you have given him since the date of the accident up to the present time? 30

A. Since the time I treated him, which was in 1941.

Q. Does it include all the treatments from 1941 up to the present time?

A. Yes sir.

Q. Everything?

A. What do you mean by "everything"?

Q. All the treatments you have given him. In 40

other words, if you have treated him for any condition.

A. Yes sir, I have treated him for other conditions that have no reference to his accident, I have treated him for conditions which have no connection with his accident.

10 Q. You have told us one here which has no connection, such as grippe. How was grippe as a result of the accident?

A. I think it is related to it because of the lowered resistance.

MR. LA BRECQUE: That's all.

MR. CARTON: No questions.

20

—
RUTH BREITKOPF, called as a witness on behalf of the plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

30 BY MR. LA BRECQUE:

Q. Mrs. Breilkopf, you live where?

A. Newark.

Q. And do you have a summer home here along the shore?

A. No.

Q. You summer down here along the shore, do you?

A. Yes sir.

40

Ruth Breitkopf—Direct

Q. And you are the wife of Michael Breitkopf, a member of the Bar of this State?

A. Yes sir.

Q. Do you have a son?

A. Two sons.

Q. Do you have one named David?

A. That's right.

10

Q. And he is serving now in the Armed forces, as I understand it?

A. Navy.

Q. He is in the Navy, and do you remember July 30, 1940?

A. Yes.

Q. Where were you on July 30, 1940?

A. West End Casino.

Q. Did you also have a membership there?

A. Yes.

20

Q. Family membership?

A. Yes.

Q. And who accompanied you to the Casino on this day?

A. My sons.

Q. Both of them?

A. Yes.

Q. Was there anything special going on on that day, if you recall?

A. Well, there was a very large crowd there.

30

Q. What kind of people were they, I mean as to their ages?

A. Well, a lot of children.

Q. Was there any special attraction that you remember?

A. I don't remember.

Q. You do recall that there were a lot of children there that day?

A. Yes.

40

Q. And when you were there with your two children were you near the pool?

A. Yes.

Q. The swimming pool?

A. Yes.

10 Q. Do you remember whether your son David was swimming that day?

A. Yes he was.

Q. And was he swimming in the afternoon around four o'clock?

A. Yes.

Q. How far were you away from the pool, approximately?

A. About twenty-five feet, I guess.

20 Q. And during the afternoon when you were there was there any lifeguard in attendance at the pool?

A. No.

Q. And was there any lifeguard regulating the diving at the end of the pool?

A. No.

Q. Was there any lifeguard directing the swimmers?

A. No.

Q. Did you see the accident, Mrs. Breitkopf?

A. No, I didn't.

30 Q. What was the first thing that directed your attention to the fact that there had been an accident?

A. Well, I saw the boy being carried out and laid on the couch and I went over and looked, I thought maybe it was David.

Q. Will you describe his condition? What did you notice about him?

A. He was crying and he was hurt very badly, you could see that.

Ruth Breitkopf—Cross

Q. What was done?

A. Well —

THE COURT: Did they give him First Aid or anything like that?

A. They called the Doctor, I think, right away. 10

Q. Was your boy there, David?

A. Yes.

Q. Did you know this boy at the time of the accident?

A. No, no I didn't.

Q. You didn't know him at all?

A. No.

MR. LA BRECQUE: I see, take the witness.

20

CROSS-EXAMINATION.

BY MR. CARTON:

Q. How do you happen to be here today, Mrs. Breitkopf?

A. Here?

Q. Yes.

A. I was asked to come down.

Q. By whom?

30

A. By Mrs. Casper.

Q. I can't hear you.

A. I was asked to come down by Mrs. —

Q. Mrs. Casper?

A. Yes.

Q. How long have you known her?

A. About four years.

Q. Do you know Mr. Neuschaefer?

A. Yes.

40

Q. Was he there that day?

A. I didn't see him.

Q. Do you know whether he was there or not?

A. No.

10 MR. LA BRECQUE: I submit that if she didn't
see him how does she know whether he was there
or not.

MR. CARTON: Because she has testified —

THE COURT: I think it is a proper question.

A. I don't remember, I have seen him there other
times but I don't remember that day.

20 Q. You know he is in charge at the pool, don't
you?

A. He is a swimming instructor.

Q. And he has supervision of the pool, does he
not?

MR. LA BRECQUE: I submit that is not a mat-
ter for this witness to develop, who has superintend-
ence of the pool is not a matter for her to develop,
that is a matter of defense.

30 THE COURT: Mrs. Breitkopf, I think, is intelli-
gent enough to say if she doesn't know. Can you
answer that question?

THE WITNESS: What is it now?

MR. CARTON: Do you know whether he was
the superintendent of the pool.

MR. LA BRECQUE: Whether he was in charge
40 of the pool or not.

A. He gave swimming lessons and I guess he was in charge of the place.

MR. LA BRECQUE: I move to strike that out, if your Honor please.

THE COURT: Yes, I will strike the latter part 10
out.

Q. You have seen him in and about the pool?

A. I have seen him giving lessons at the pool.

Q. Yes, and you saw him walking in and out and around the pool?

A. Every time I saw him he was giving lessons.

Q. Do you know whether or not he was there when this accident happened?

A. No I don't.

20

Q. You don't know?

A. No.

Q. There were, were there not, some five or six attendants who acted as locker boys, three on either side of the pool?

A. Locker boys, yes.

Q. They were there that afternoon, were they not?

A. There were always locker boys there.

Q. And those locker boys, if they saw any rough- 30
house or anything like that occur would stop it, wouldn't they?

A. I don't think that they had anything to do with the pool.

Q. I am sorry, I can't hear you.

A. I say I never saw them doing anything at the place.

Q. Did you ever see any roughhouse around the pool?

40

A. I don't know.

Q. You never did, did you? The pool was very well run, wasn't it?

A. Yes.

10 MR. LA BRECQUE: I move to strike that out, I object, if your honor please, on the ground that it calls for a conclusion of the witness.

THE COURT: The Court will allow it.

MR. LA BRECQUE: May I have an exception?

Q. The pool was well run, wasn't it?

A. Yes.

20 MR. CARTON: That's all.

MARTHA W. WILLIS, called as a witness on behalf of the plaintiffs and being first duly sworn, testified as follows:

30 DIRECT EXAMINATION.

BY MR. LA BRECQUE:

Q. Mrs. Willis, where do you live?

A. Five Melrose Terrace, Long Branch.

Q. And what is your occupation?

A. I do practical nursing.

Q. And you have been doing that over what period of years?

A. A period of thirty years.

Q. And do you do practical nursing at the direction of different physicians?

A. Yes, different physicians.

Q. And will you state what physicians have recommended or employed you for that purpose?

A. Since I have been in Long Branch I have been working under Doctor Goldberg for ten years. 10

Q. Upon the discharge or release of Harold Ross from the Monmouth Memorial Hospital in August, 1940, did you have anything to do with his care?

A. I did.

Q. Will you tell us please what you were required to do and what were the hours that you worked?

A. I worked twelve hours a day, took care of Harold, we called him Junior, and I used to wash and dress him and feed him, take him out for airings, take him over to the beach in a wheel-chair and to the park. 20

Q. And are those the usual duties of a practical nurse?

A. Yes sir they are.

Q. You worked for how many weeks?

A. I worked nine weeks.

Q. And what charge did you make for your services?

A. I got \$50.00 a week for twelve hours work a day. 30

Q. That is \$450.00?

A. Correct.

Q. Was your bill paid to you?

A. Yes it was.

Q. And I show you a receipt and I ask you whether that is the receipt and one bill which you submitted for your services.

A. It is. 40

Q. It has been paid?

A. It has.

Q. Now, I notice it is dated October 1st, what date did you receive the money?

A. I got it in different periods, but I made the bill out in full.

10 Q. And that is the entire sum which you received, \$450.?

A. It is.

Q. Is that a fair and reasonable charge?

A. Very, well, it really is a fair price, yes.

MR. LA BRECQUE: I offer the bill for identification.

(The paper referred to was marked Exhibit P-16
20 for identification.)

Q. What was Harold's condition at the time and during the time you were taking care of him?

A. He was very nervous, irritable, he was cranky, nobody could do anything with him. I used to massage his arms and legs for him, wash him, dress him and feed him.

Q. Can you tell us whether he was in pain or discomfort?

30 A. He was in pain lots of times.

Q. You were the one who took care of him during those periods?

A. I was the one who took care of him.

MR. LA BRECQUE: That's all.

MR. CARTON: No questions.

JOHN F. LYNCH, called as a witness on behalf of the plaintiffs and being first duly sworn, testified as follows:

Q. Where do you live, Sir?

A. 121 Center Avenue, Atlantic Highlands. 10

Q. Are you any relation to Harold Ross?

A. I am his Uncle.

Q. Were you present with him on the day this accident happened?

A. I was present with him at the pool but not in the swimming pool.

Q. You weren't swimming then?

A. No, I wasn't swimming.

Q. What time did he come there that day, do you recall? 20

A. I believe ten o'clock in the morning, we all went there together, he and his little sister and I.

Q. You brought them there that day, did you?

A. Yes.

Q. You remained there for how long?

A. Until the accident happened.

Q. You didn't see the accident, as I understand?

A. No, I didn't.

Q. Were there any refreshment stands there at the place? 30

A. Oh yes.

Q. And can you tell us whether you or the boy patronized the stands during the day?

A. I think the boy and his sister Eileen did.

Q. Did you have lunch there?

A. We had lunch there, they had their lunch with them but they needed more anyway.

Q. So you bought whatever they needed there?

A. Whatever they wanted they bought, that's the usual procedure.

Q. Had you ever been there before?

A. Yes, about four times.

Q. What was the first notice you had that there had been an accident?

10 A. When I seen the crowd collect on the side of the pool.

Q. What did you do then?

A. I immediately went to see what had happened, I called the girl and squeezed my way through to find out who it was and when I found out it was the kid naturally I got all excited.

Q. What did you do then?

A. They called some doctor and brought the ambulance down there, the kid was crying and he was
20 crying for his mother, so I wanted to go to the hospital with him but I figured the best thing to do would be to get ahold of his mother first, so I hopped in my car and got his mother and brought her to the hospital.

Q. You say you went home to get his mother?

A. I went home and got his mother and took her to Long Branch to the hospital, I believe it is the Memorial Hospital.

Q. You took her to the hospital, did you?

30 A. Yes sir.

Q. Was there anything special going on there that day?

A. There was a big gang of kids there, an exceptionally big bunch of children there, I think they had some sort of a day for the children there, I believe it was Maxey Baer, if I'm not mistaken, putting on a little show for the kids, I didn't see the show.

Q. Were there many children there?

A. Yes, an exceptionally large gang of children.
40

Q. How did their age compare with the age of Harold?

A. Off-hand I would say—it is quite some time, but off-hand I would say running from nine to about fourteen or fifteen.

Q. Was there any lifeguard in charge of the pool there directing the diving? 10

A. I didn't see any, in fact I noticed that myself. I had a friend of mine with me, he is a Major over in Indonesia now, and I ——

Q. You did notice that there was no lifeguard there?

A. That's right.

MR. LA BRECQUE: Cross-examine.

CROSS-EXAMINATION. 20

BY MR. CARTON:

Q. I suppose, as a result of the dangerous condition that you saw there, you went to your nephew and told him to be particularly careful, did you?

A. I certainly did.

Q. You did?

A. Yes.

Q. Did you keep an eye out on him yourself? 30

A. As much as possible, yes.

Q. You weren't there, however, when this accident happened, were you?

A. No, I was ——

Q. You didn't want him on the high board, did you?

A. I saw him out on the high board three or four or five times, he had gone out there many times.

Q. He was experienced on the high board?

A. Yes, in fact he got so he was quite proficient in diving and swimming, in fact he was better than I was.

Q. Were you watching him on the high board?

A. No.

Q. You said something about Max Baer putting
10 on a show for the children, did you see that?

A. No.

Q. Do you know anything about anybody putting on a show for the children that day?

A. I heard that in the place.

Q. Is this all you know, what you heard?

A. That's right.

MR. CARTON: I move it be stricken.

20 MR. LA BRECQUE: Oh, I object to it being stricken, that there were a lot of children there.

MR. CARTON: There is no motion to that effect. That's all.

(At this point the hearing was adjourned until the next morning at ten o'clock A. M.)

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Thursday, January 10th, 1946.

(The trial was resumed at ten o'clock A. M.)

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MR. LA BRECQUE: If your honor please, at this time I would like to offer in evidence deposition taken on the part of the defendant before Joseph C. Kingdon, 2nd, a Supreme Court Examiner, on July 19th, 1945, at Mr. Carton's office in Asbury Park, reserving the right to object to any questions which I might deem irrelevant and improper.

20

MR. CARTON: If your Honor please, I object to that on the ground that this is my evidence, he was my witness and I took these depositions and I am going to offer them as part of my case. I think the record will show that they were taken at my instance entirely, without any solicitation or suggestion from the plaintiff, and it is part of my case and I want to offer them as part of my case.

MR. LA BRECQUE: I think the Statute is very clear that either side may offer it and I offer it for the reason that it is properly part of our case. As a matter of fact, if it had not been taken by counsel for defendants we would have taken it, because the witness was going into the Navy and was stationed at a Boot Training Camp at that time.

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THE COURT: It may be marked.

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(Copy of deposition referred to was received in evidence and marked Exhibit P-17.)

10 MR. LA BRECQUE: If your Honor please, for the purpose of reading the deposition, I think the customary procedure is for counsel who called the witness to read the direct and counsel who cross-examined to read the cross. I will be glad to co-operate with counsel on that, or, if necessary, I will read the entire deposition.

MR. CARTON: No, I want to read my own.

MR. LA BRECQUE: Will you go ahead?

20 MR. CARTON: Is it your Honor's thought that we should present this to the Jury now?

THE COURT: I feel this way, Mr. Carton, I feel that if the Court is assured that they are going to be a part of the case that properly they should be presented when you are presenting the testimony on behalf of the defense; and if you see fit not to read them, then I feel that Mr. LaBrecque would have the right to offer them at that time.

30 MR. CARTON: There is no question about that, we went to a lot of trouble getting them and I certainly do want to offer them.

THE COURT: I think, Mr. LaBrecque, that having Mr. Carton's assurance that he proposes to offer the testimony as a part of his case, that since the depositions were taken at his instance he has the right to read them as part of the defense's testimony.

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MR. LA BRECQUE: Well, I have been trying to figure my time before examining the next witness, who is not here yet. I have one other witness who is here.

THE COURT: Why not put him on the stand, if he is here?

10

MR. LA BRECQUE: It is Mrs. Casper. Well, it has been offered in evidence and we have counsel's assurance that it will be read, and if it is not I will read it to the Jury, because I think it is important that it be read as soon as possible.

MR. CARTON: It will be, there is no question about that.

20

ANN CASPER, one of the plaintiffs, called as a witness on her own behalf and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. LA BRECQUE:

30

Q. Mrs. Casper, where do you live?

A. 1132 Elberon Avenue, Elberon.

Q. And what is your occupation?

A. Housewife.

Q. I mean, do you have a rooming-house?

A. No, not now.

Q. Did you rent rooms in 1940?

A. I did, yes.

40

Q. You are the mother of Harold Ross, the plaintiff in this case?

A. Yes, sir.

Q. And he is now how old?

A. Seventeen.

Q. And he lives at home with you?

10 A. Yes sir.

Q. Have you any other members of your family, sisters or brothers of Harold?

A. His sister Eileen.

Q. She lives at home with you also?

A. Yes sir.

Q. You are married a second time, are you?

A. Yes.

Q. Your second husband's name is what?

A. Herman Casper.

20 Q. What was the condition of Harold's health before July 30th, 1940?

A. Well, he was in perfect health outside of colds, he had measles —

Q. Did he ever have any trouble with his head or his neck before?

A. No, sir.

Q. Did he know how to swim?

A. He was an excellent swimmer.

Q. Did he dive?

30 A. Yes.

Q. Are you familiar with the West End Casino? Have you ever had any business dealings with them?

A. Yes.

Q. And over what period of time?

A. Well, it started in 1939.

Q. And with whom did you deal there?

A. Mrs. Prendergast.

Q. Was your family a member of the West End Casino in the year 1940?

40

Ann Casper—Direct

A. Yes.

Q. Did you have a membership card?

A. We had two membership cards.

Q. They issue one for male and one for female, is that correct?

A. That's right.

Q. What kind of membership was it?

10

A. A family membership.

Q. I show you two cards and I ask you whether these are the cards which were issued to you for the year 1940?

A. Yes, sir.

MR. LA BRECQUE: I offer them in evidence.

(There being no objection the cards referred to were received in evidence and marked Exhibits P-18 and P-19 respectively.)

20

Q. Now, you say that these were issued as a membership?

A. Yes.

Q. Was there a bath house assigned to you?

A. Yes.

Q. And what was the number of that bath house?

A. Number ten.

Q. Can you state whether that bath house was used by you and the members of your family in June and July 1940?

30

A. Oh yes, mostly by the children, we weren't there very often.

Q. And by "the children" you mean Harold and Eileen?

A. Yes.

Q. Where was the bath house located? I mean was it an individual locker or a family box or —

40

A. It was an individual locker, it was just for us.

Q. I mean could it be used by the entire family?

A. Yes.

Q. Now, do you remember whether Harold and his sister used the bath house and the pool during the year 1940?

10 A. Every day except when it rained.

Q. Do you recall July 30th, 1940?

A. Yes, sir.

Q. Incidentally, was there a pool at that place?

A. Yes.

Q. Do you recall the pool?

A. Yes.

Q. In July 1940 did your son go there, on July 30, 1940?

A. Yes, sir.

20 Q. Do you recall with whom he went?

A. He went with his Uncle and his sister.

Q. That is your brother, is it, or your —

A. Yes.

Q. —brother-in-law?

A. My brother.

Q. And about what time did they go?

A. They left somewhere around ten o'clock in the morning.

30 Q. Now, most of the time the children would go to the pool, would they, or to the Casino?

A. Yes.

Q. Did you go there yourself?

A. Very seldom.

Q. Do you know who was in charge there?

A. Well, I knew Mr. and Mrs. Prendergast.

Q. Can you tell us so that we can identify them by their first names?

A. Well, one was Joseph Prendergast and the

other one I called Bunny, that's the only name I knew her by.

Q. In addition to operating the pool and bath houses did they have other things there?

A. Yes, they had a restaurant, a place to eat, soft drinks, and so on, and several bars there.

Q. A bar there?

10

A. Several bars.

Q. About what time did your son and brother and daughter go there on July 30th?

A. They went in the morning right after breakfast, about ten o'clock.

Q. And they remained how long?

A. Well, they remained there until the accident occurred.

Q. What was the first notice that you had that an accident had occurred?

20

A. The first—the girl—my maid called and said they had called and said there was an accident.

Q. You were operating at that time a rooming house, is that correct?

A. I had two houses, I had a house on the ocean front and one on Second Avenue.

Q. As a result of that call will you tell us what you did?

A. Well, then my brother came and took me to the hospital.

30

Q. And when you got to the hospital what did you do and see?

A. Well, I seen my son laying on a stretcher.

Q. Will you describe to the Court and Jury what his condition was at the time as you observed it?

A. Well, he was quite bad, I mean he looked—his neck was lying on the side and he was crying, that's all.

40

Q. Do you remember what he was saying, if anything, as he was crying?

A. I asked him what happened —

MR. CARTON: I object to that.

10 THE COURT: Sustained.

Q. Did you remain with him for a while?

A. Yes, I stayed there all night.

Q. While you were with him did any change take place or —

A. Well, he said he fell —

Q. No, you can't tell us what he said. What did you notice yourself as to him?

A. You mean what the Doctor did, or what?

20 Q. Did the Doctor come there?

A. Yes.

Q. And did they do something to him?

A. Yes.

Q. Did he eventually stop crying, or did he keep on crying, or what happened?

A. Well, he went to sleep.

Q. Did they give him anything?

A. They gave him something to put him to sleep.

Q. Then when did you see him again after that?

30 A. Well, I stayed there most of the night, until morning and I went home and came back again.

Q. How about the next day, how was he the next day?

A. Well, he was the same way the next day, I mean he was still in pain.

Q. Did you stay with him a good part of the time in the beginning?

A. Day and night, practically.

Q. How was he, will you tell us, please, in your

40

own words,—you see this is five or six years ago and we weren't there, we don't know.

A. Well —

Q. What was he doing, how was he acting?

A. He was crying most of the time, and moaning about his pain and the doctor put his neck in traction.

10

Q. Did you try to touch him any place? When you put your hands on him what would be his reaction?

A. The nurse wouldn't let me touch him.

Q. Were there any nurses there, Mrs. Casper?

A. Yes, there was one there all the time.

Q. How many nurses did you have to have each day?

A. Three.

Q. Did you pay them?

20

A. Yes, sir.

Q. Through the hospital?

A. Yes.

Q. Do you remember their names?

A. Well, I remember Miss Carson and I don't remember the other two names.

Q. The hospital got them, you didn't get them, I suppose?

A. Yes.

Q. How long did your son stay in the hospital?

30

A. Well, almost three weeks, I think.

Q. Do you remember when they put the plaster cast on him?

A. Yes.

Q. When they put the plaster cast on him how would he lie in bed?

A. He was laying flat on his back.

Q. What was his position as far as his head was concerned?

40

- A. His head was pulled back with the cast.
Q. How long did he wear that cast?
A. Well, it seems a couple of months to me, I think
it was two months.
Q. Then what did he wear after that?
A. He wore a cast made of leather and steel.
10 Q. When you took him home from the hospital
did he still have the cast?
A. Oh yes.
Q. Could he help himself?
A. No.
Q. He couldn't help himself at all?
A. No.
Q. And what was it necessary for you to do in
order to provide for him at home?
A. Well, I couldn't take care of him myself, I had
20 to get a nurse.
Q. Did you get someone?
A. Yes.
Q. Whom did you get?
A. Mrs. Willis.
Q. How did you get her?
A. Well, I called Doctor Goldberg and asked him
if he knew anybody.
Q. Was Doctor Goldberg your family physician?
A. Yes, sir.
30 Q. And he got Miss Willis for you?
A. Yes, sir.
Q. How much did you pay her?
A. I paid her fifty dollars a week.
Q. For how many weeks?
A. I think practically about nine weeks.
Q. Now, did you pay the hospital bill?
A. Yes.
Q. And that amounted to four hundred and
40 ninety-one dollars and some cents, is that correct?

A. Yes.

Q. In the hospital Doctor Halbstein and Doctor Ransahoff had been taking care of your son. After he got out of the hospital who took care of him?

A. Well, they still took care of him.

Q. How did you get him back and forth to their office?

10

A. Well, we took him in the car.

Q. You used to take him back and forth yourself in the car, did you?

A. Yes.

Q. And after the nine weeks that you had Mrs. Willis whom did you have taking care of your son?

A. We moved to West New York then and I had to hire a man to take care of him.

Q. Do you remember who he was?

A. His name was Charlie Bondreo.

20

Q. What is he? I mean, is he a practical nurse or is he —

A. No —

Q. I mean, is he just an ordinary man?

A. Yes.

Q. That was willing to do the work?

A. I took care of my son myself then, but he just took Harold to New York for his treatments.

Q. In other words, was it necessary that your son be taken to Doctor Ransahoff's office in New York?

30

A. Yes.

Q. For certain of these treatments?

A. Yes, every day.

Q. And about how often, how many times was that done, do you recall?

A. I beg your pardon?

Q. How many treatments altogether did he have to take?

40

A. I do know that he went there for two months, I don't just know how many treatments he took.

Q. Did this man Charlie have to take him each day?

A. Yes, he took him every day.

Q. How much did you pay Charlie for that service?

A. Twenty-five dollars a week.

Q. That is just that or were you boarding him —

A. Well, he lived with us.

Q. He lived at home with you besides?

A. Yes.

Q. Did he perform any other service for you at that time?

A. No.

Q. Have you any way of telling how much it cost to board him?

A. I didn't figure that —

Q. How much did you say you paid this man?

A. I paid him \$25.00 a week.

Q. And board?

A. Yes.

Q. And did he live with you too?

A. Yes.

Q. Now, where were you living then? Did you move up near Doctor Ransahoff's New York office or did you live down here when the boy was being taken back and forth to New York?

A. We lived in West New York.

Q. So that it was necessary to go from West New York to New York City?

A. To New York, yes.

Q. How much did that cost, transportation back and forth to the doctor in New York each day?

A. I think about a dollar or something like that,

I don't know, I gave him two dollars but I think it cost about a dollar.

Q. You had to pay the transportation of both of them, or did Charlie pay his own transportation?

A. No.

Q. You had to pay for both of them?

A. Yes.

Q. Now, as a result of that, Mrs. Casper, did your son's condition improve as a result of those treatments?

A. Yes.

Q. When he was wearing the large brace, the first one that he had on, did he have any use of his neck or his shoulders or his head?

A. No.

Q. When he was wearing the collar was he able to use them, use his neck or his shoulders?

A. When he wore the second one or the small one?

Q. The second one, the small one, the last one?

A. Yes. Well, he couldn't move his neck until he got the exercises, but after that he could move it.

Q. How long was it after he was hurt before he was able to discard all these artificial things that were being used to support his head?

A. Well, when he went back to school I know he still had the collar on then.

Q. Do you remember when that was, approximately?

A. I know it was in 1941 but I don't know —

Q. The beginning of 1941, would you say?

A. Yes.

Q. And he still had the collar on then?

A. Yes he did.

Q. Would you say that he wore one or the other of these collars until June of 1941, eleven months afterwards?

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A. I think so, yes.

Q. Now, when he took the collar off, did he take it off all at once, or gradually?

10 A. Gradually, that is what I wanted to say, he didn't wear it all the time, when he went back to school he didn't wear it every day, just when his neck hurted him.

Q. Before that was he allowed to take it off for a little while each day, at first?

A. Yes.

Q. Is that right?

A. Sometimes he took it off in the daytime and wore it at night so that in case he moved during his sleep he wouldn't dislocate his neck.

20 Q. While Mrs. Willis was taking care of him at home, after he came from the hospital the third week, and from then on, will you tell us how he was at home? I mean, you had a chance to observe him there even better than in the hospital, didn't you? How was he acting?

A. Well, he was nervous and cranky, I think from the cast.

Q. Did you get a bill from Doctor Fineberg?

A. Yes.

Q. Is this the bill, it is for \$25.00 (handing the bill).

30 A. Yes.

Q. And you purchased a brace from Mr. Robert Linder?

A. Yes.

THE COURT: You may lead her as to the amounts.

Q. The amount of that was \$65.00?

A. Yes.

40 Q. That has been paid already too, has it not?

A. Yes.

Q. You also purchased a second collar from the Hospital for Joint Diseases on Madison Avenue, New York?

A. Yes.

Q. And the amount of that was \$5.75?

A. Yes.

10

Q. You received a bill totalling the sum of \$540.00 from Doctors Ransahoff and Halbstein together for treatment, is that correct?

A. Yes.

Q. And you have already paid on account of that bill \$300.00?

A. Yes.

Q. And you owe \$240.00 still?

A. Yes.

Q. Now, in addition to that you received a bill for treatments for the period from January 9, 1941 to February 25th, 1941?

20

MR. CARTON: If your honor please, we have been all over this.

MR. LA BRECQUE: I want to show that she paid them or is obligated to pay them.

MR. CARTON: It doesn't make any difference whether they are paid or not, it is what the reasonable charges are, and they are all in evidence.

30

THE COURT: Well, so long as Mr. Carton concedes that there is no dispute about the reasonableness of the charges, and if they have all been heretofore proven by the various witnesses who have taken the stand prior to Mrs. Casper, I think perhaps it is repetitious.

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MR. LA BRECQUE: If your Honor please, I think it might be helpful to all concerned to have the bills marked in evidence. They have been marked for identification already, but I feel that because there are a lot of figures to keep in mind they should be in evidence at this time, and I so offer them.

10

MR. CARTON: I object to that.

THE COURT: Of course I will have to sustain Mr. Carton's objection. The bills themselves are not admissible, and he has stated that he has no objection to any of them as reasonable charges and they may be read into the record. I think they have already been read into the record.

20 MR. LA BRECQUE: My thought is that they are separated in the record and spaced apart and it might be easier to have a little recapitulation of them here.

CROSS-EXAMINATION.

BY MR. CARTON:

Q. Mrs. Casper, when did you move to West New
30 York?

A. In the Fall.

Q. What month, do you remember?

A. No I don't.

Q. H'm?

A. Not exactly, I don't remember, I know it was when it started to get a little cold.

Q. October or November.

A. I think October.

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Q. How long did you continue to live in New York?

A. I stayed in West New York until the following summer.

Q. Until when?

A. Until the following summer, 1941.

Q. Then you came back here again?

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MR. LA BRECQUE: This is West New York.

THE WITNESS: That's right, West New York.

MR. CARTON: That's what I said.

MR. LA BRECQUE: You said "New York" just now.

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MR. CARTON: That's all.

MR. LA BRECQUE: My other witness, Judge Presley, was to be here at ten-thirty. I was going to see if he is outside but am informed that he is not here yet. Outside of that we are ready to close.

(After side-bar conference.)

THE COURT: It may be noted on the record that Mr. Carton at the close of the plaintiff's testimony proposes to make a motion, and the Court is reserving that right to Mr. Carton, in view of the fact that Judge Presley, who is a witness for the plaintiff, has not as yet arrived in Court, and Mr. Carton is only consenting now to proceed with his case in order to save time, to save any lost motion.

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MR. CARTON: And with that, if I might respectfully suggest that when my motion is made it will

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be made as of Mr. LaBrecque's case, as of the plaintiff's case only, without regard to anything we may in the meantime offer by way of defense.

THE COURT: That's right.

10 MR. CARTON: I will read the deposition of David Breitkopf into the record.

THE COURT: Well now, Mr. LaBrecque, I don't know that these cases are helpful to you—you, I understand, are going to object to certain questions on the ground that the answers would constitute hearsay.

MR. LA BRECQUE: That's right, your Honor.
20 Well, on the ground that they are immaterial and irrelevant and of course they are immaterial and irrelevant because they are hearsay.

THE COURT: Well, I think this, that this case here does not go as far as to say that you can remain silent as of the time the depositions are taken and press your objection at the time of the trial, because, as Mr. Carton pointed out, yesterday, such a procedure would enable counsel to remain silent and
30 speculate on the answer, then in the event that the answer was unfavorable to object to the question.

MR. LA BRECQUE: I think the Court's decision there holds that on matters of procedure, such as leading questions I have to, but on questions of this type I can reserve my objection until the time of the trial when I can make it for the first time, as was done there, it was made for the first time and there was absolutely nothing taken before. That is exactly
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in point. There is another case there that is later, but that is to the same effect.

(After side-bar argument.)

THE COURT: I can't see that this decision would go so far as to give counsel on one side the advantage and being in the position of objecting and having the evidence excluded. 10

MR. LA BRECQUE: Just so the record is straight and so that there may be no question —

THE COURT: I think we can keep the record straight if you proceed to read the deposition.

MR. LA BRECQUE: All right, then I will object, you will rule and allow me an exception. 20

THE COURT: I think so.

MR. CARTON: If the Court please, on behalf of the defendant The Breakers, Inc. I offer in evidence deposition of David Breitkopf taken before Joseph C. Kingdon, 2nd, a Supreme Court Examiner on July 19th, 1945 in the presence of Mr. LaBrecque and myself. 30

MR. LA BRECQUE: I think it should appear that this is the same deposition that has already been marked in evidence for the plaintiff, Exhibit P-17.

(The deposition referred to was received in evidence and marked Exhibit D-2.)

MR. CARTON: With the Court's permission I will proceed to read. 40

(Reading.) "This is a deposition taken in the above entitled matter with the consent of counsel before me, Joseph C. Kingdon, 2nd, a Supreme Court Examiner of the State of New Jersey, on July 19th, 1945 at eleven o'clock A. M., at the office of Durand, Ivins & Carton, Esqs., 733 Mattison Avenue, Asbury
10 Park, N. J., in the presence of Theodore J. LaBrecque, Esq., of Parsons, LaBrecque, Canzona & Combs, Esqs., attorneys for the plaintiffs, and J. Victor Carton, Esq., of Durand, Ivins & Carton, Esqs., attorneys for the defendants.

It is agreed that the deposition shall be taken stenographically and the signature of the witness waived. Signed by Joseph C. Kingdon, 2nd, Supreme Court Examiner of New Jersey.

20

DAVID J. BREITKOPF, sworn.

Questions by Mr. Carton:

Question: Mr. Breitkopf, I see by your uniform that you are in the United States Navy.

Answer: Yes, sir.

Question: And you are stationed where?

Answer: Sampson, New York.

30 Question: And you are home on furlough?

Answer: On leave.

Question: Where is your residence, your home residence?

Answer: Newark, New Jersey.

Question: Newark, New Jersey?

Answer: Yes, sir.

Question: And you are the son of Michael Breitkopf, an attorney in Newark?

Answer: Yes.

40

Question: I direct your attention to July 30th, 1940 and ask you whether or not on that afternoon you were in swimming at the pool at the West End Casino?

Answer: Yes.

Question: Had you been accustomed to go there on other occasions besides that? 10

Answer: Yes.

Question: Do you reside at the shore during the summer?

Answer: Yes, sir.

Question: Whereabouts?

Answer: Well, at that year we were in West End.

Question: I see. Now, do you know Harold Ross, also known as Harold Casper?

Answer: Yes, now I do.

Question: Did you know him on that day? 20

Answer: At that time I knew about him, but I really didn't know him.

Question: You knew who he was?

Answer: I knew who he was, yes, sir.

Question: Now, on that particular afternoon were you in the pool?

Answer: Yes, sir.

Question: Who was in the pool with you?

Answer: A friend, Robert Link.

Question: And he, according to the information 30 we have, has been killed?

Answer: Yes, sir.

Question: In the Army?

Answer: That's right.

Question: Where were you and Robert Link swimming?

Answer: Well, we were swimming toward the deep end of the pool, right about in the center of the pool.

Question: Right about in the center of the pool?

Answer: Yes, sir.

Question: And did you see Harold Ross come off the springboard?

Answer: No.

10 Question: I see. What is the first thing that you noticed?

Answer: Well, the first thing I noticed was him going by me in the water.

Question: Going by you in the water?

Answer: Yes, sir.

Question: Did he land close to you?

Answer: Yes.

Question: And was there anybody else in the immediate vicinity except you and Robert Link?

20 Answer: I think that is about all there was there, just me and him, to my closest recollection.

Question: And Link, is that correct?

Answer: Yes.

Question: Did he hit you?

Answer: No.

Question: Did he hit Link?

Answer: As close as I can recall, no.

Question: No. Were you questioned right afterwards?"

30 MR. LA BRECQUE: Objected to.

THE COURT: Overruled.

MR. LA BRECQUE: On the grounds previously stated.

THE COURT: Yes.

40 MR. LA BRECQUE: Exception.

“Question: Were you questioned right afterwards?

Answer: Yes.

Question: And was Link also questioned?

Answer: Yes.”

MR. LA BRECQUE: Objection, if your Honor please. 10

THE COURT: Overrule the objection.

MR. LA BRECQUE: Exception.

“Question: And was Link also questioned?

Answer: Yes.”

MR. LA BRECQUE: Objection. 20

MR. CARTON: I am just reading this so as to get the continuity. Could we, if your Honor please, have it noted on the record that Mr. LaBrecque's objection goes to the next three or four questions, so that it won't break the continuity?

THE COURT: Yes, the objection will be overruled and exception allowed.

“Question: And was Link also questioned? 30

Answer: Yes.

Question: And were you questioned as to whether or not he had come in collision with either one of you?

Answer: Yes.

Question: And what was your answer to that?

Answer: 'No'.

Question: And what was Link's answer?

Answer: 'No'."

MR. LA BRECQUE: That is the end of my objection, if your Honor please, from now on there is no objection to the questions.

10

"Question: Now, after he came in the pool close to where you two were swimming, what happened—what did you and Link do?

Answer: Well, we stopped swimming and seen him go up and down in the water. First we didn't think anything of it, you know; he might have been fooling around or something. Then we saw he was really in trouble, so Link brought him over to the edge of the pool and I helped him out of the pool.

20

Question: And after he was taken out of the pool, what happened then?

Answer: Well, we took him out and put him on a chair there, and someone came and took him over to the couch.

Question: Then he was subsequently —

Answer: Yes, then an ambulance came and took him away.

Question: In an ambulance?

Answer: Yes, sir.

30

Question: Now, have you seen him any since this accident happened?

Answer: Have I seen Ross?

Question: Ross.

Answer: Yes, yes, sir.

Question: Where have you seen him?

Answer: I have seen him in the pool down at the shore when I came last summer and the year before.

Question: In what pool?

Answer: In the Colony Surf.

40

Question: That is —

Answer: Next door, yes.

Question: A short distance away. And last summer and the year before when you saw him in this other pool, what did you notice him doing?

Answer: He was swimming and playing and everything.

10

Question: Was he acting, insofar as you could observe, normally?

Answer: He was normal, yes.

Question: Did he give any indication of any injury?

Answer: No.

Question: How old are you now?

Answer: Eighteen.

Question: How old were you when this happened?

20

Answer: I guess I was just about fourteen then.

MR. CARTON: Fourteen? All right, cross-examine."

MR. LA BRECQUE: This is cross-examination, if Your Honor please, by Mr. LaBrecque.

"Question: Did you belong to the West End Casino? Were you a member?

30

Answer: Yes.

Question: Have what is known as a family membership?

Answer: Yes, sir.

Question: In other words, your father was a member and that entitled you all to swim there?

Answer: Yes.

Question: Were many people in the pool on this day?

40

Answer: Yes, it was very crowded.

Question: Was there anything special going on there?

Answer: I think there must have been something going on, some kind of a children's day or something like that.

10 Question: Was it crowded mostly with young folks or with adults?

Answer: Well, they had a camp in there, what was the name of it—there was some boys' club or something like that came in. It was mostly young fellows and children.

Question: I see; you say you were at the deep end of the pool but more near the middle?

Answer: That's right.

20 Question: You were then about half way from the deep end to the shallow end, is that it?

Answer: No. Well, the pool is about seventy feet long and I must have been only about twenty feet or fifteen feet from the edge.

Question: I see. You mean from the end?

Answer: From the deep end.

Question: From the deep end; and there were diving boards there, were there?

Answer: Yes.

Question: How many diving boards were there?

30 Answer: Well, I am not sure about that. I am not sure, but there is two now. There was a third one, but I don't think it was there at that time.

Question: Your answer is, then, that there were two or three diving boards?

Answer: At least two, yes.

Question: Were they all on the same level?

Answer: No, they were different levels. One was a low board and one was a high board.

Question: Now, at that time were you personally acquainted with Harold Ross at all?

Answer: No.

Question: You just knew that he was also a member there?

Answer: Yes.

Question: His folks were patrons of the place?" 10

MR. CARTON: Objection. When Mr. LaBrecque stated "His folks were patrons of the place" I objected on the ground "unless he knew that" and then the witness stated that he wasn't sure whether his folks were members but he was there all the time.

MR. LA BRECQUE: His answer was: "Well, I wasn't sure whether his folks was a member, but I 20 knew that he was there all the time."

"Question: This pool, you say, is 70 feet long?

Answer: Yes, sir.

Question: Is it covered? I mean, is there a roof over it?

Answer: No, just open-air.

Question: It is out in the open?

Answer: Yes.

Question: And about what time did this accident 30 happen, approximately?

Answer: Well, to be approximate, about 3:30, 3 o'clock.

Question: Was the pool pretty well crowded this day?

Answer: Yes.

Question: You and Link, there were just the two of you together?

Answer: Yes.

Question: Your party was you and Link?

Answer: That's right.

Question: Is he older or younger than you?

Answer: He was older.

Question: Now, before you noticed that Ross was in trouble in the water, had you seen him at all?

10 Answer: No, I didn't see him on the high board.

Question: You didn't see him dive into the water?

Answer: No.

Question: What was the first indication that you had that he had dived into the water?

Answer: Only when he passed me by in the water, just missed me.

Question: Was he swimming then?

20 Answer: No, he was coming down from the board.

Question: I see.

Answer: Just entered the water.

Question: As he was entering the water he was very close to you, is that right?

Answer: Yes.

Question: And at that time the pool was quite crowded?

Answer: Yes, sir.

Question: You don't know who he did strike?

30 Answer: No.

Question: Well, when he entered the water, did you follow him from that time on until he came up?

Answer: No, we swam over to the edge by that time, and then he came up and we seen him bobbing up and down in the water.

Question: What do you mean by 'bobbing up and down'?

40 Answer: Well, his head was—I don't know—sort of wiggling. I can't exactly explain that. Then we

saw that he was in trouble, so we pulled him over to the side.

Question: Well, was he swimming in the water?

Answer: No, he was just coming above the water and under, swinging his arms, but he wasn't swimming.

Question: Did he seem to have control of himself? 10

Answer: No.

Question: How deep is the water at the place where he dove in?

Answer: Nine foot.

Question: And was the pool filled? With water, I mean.

Answer: Yes, sir.

Question: Do you know any of the other boys at the point where he dove in that were there besides Link? 20

Answer: Well, I didn't know the boys at that time, but I know some of the boys that are at the pool every day.

Question: I see. But I mean, did you recognize anyone that was near where he entered the water?

Answer: I don't remember that.

Question: You don't remember who they were. Now, who was the first person to get to him after you noticed that he was in distress? 30

Answer: Link.

Question: And besides you and Link, did anyone else help him?

Answer: No.

Question: Now, how far did you have to tow him or carry him in order to get him out of the pool?

Answer: About ten feet.

Question: Was he able to help himself at that time? 40

Answer: No.

Question: Then when you got him to the edge of the pool, was he able to help himself out?

Answer: I helped Link get him out of the pool.

Question: You boys had to get him out?

Answer: Yes, and we put him on a chair on the
10 side there.

Question: Up to that time was there anyone else helping you?

Answer: No.

Question: Or were you just doing it yourselves?

Answer: Just ourselves, yes.

Question: Was there any lifeguard in charge of the pool that day?

Answer: Well, I didn't see any.

Question: And up to the time that you had taken
20 this boy in distress out of the water helped to get him out of the pool and helped to get him in the chair, had any lifeguard or anyone else come to help you?

Answer: No, not at that time.

Question: At the time that you were swimming in the pool, was diving going on, too?

Answer: Yes.

Question: Will you tell me whether there was any separation of the diving area and the swimming
30 area?

Answer: No.

Question: Were there any restrictions or were you —

Answer: You were allowed to swim anywhere.

Question: And was there any limitation of the time when diving was permitted?

Answer: No.

Question: Was there any lifeguard in charge of the pool at that time?
40

Answer: I didn't notice any at that time.

Question: Was there anyone giving instructions or in charge of the pool?

Answer: In diving and swimming? No.

Question: Were there any barriers or floats or cork, lines of demarcation between the diving area and the swimming area?

10

Answer: Nothing.

Question: Were there any notices posted limiting the place where you could swim and the place where you could dive?

Answer: No.

Question: How long had you been there that afternoon?

Answer: I was there around three or four hours up until that time.

Question: I see; up until that time. And during that time had people been using the diving boards?

20

Answer: Yes.

Question: And had people been swimming?

Answer: Yes sir.

Question: After you put him in the chair, what did you then do with the plaintiff, Mr. Ross?

Answer: Well, someone else came over and took him to a couch in the back of the pool.

Question: Who was that someone else, do you remember?

30

Answer: I don't remember.

Question: That was about how long after the accident had happened?

Answer: Well, from the time we got him to the chair, and then about a minute or so after that someone came and took him back.

Question: Was it another patron of the place that did that?

Answer: I don't know.

40

Question: Was it anyone in uniform?

Answer: No.

Question: Any official?

Answer: I don't remember who it was.

Question: Well, was there anything that drew
10 your attention to the fact that it was anyone in au-
thority?

Answer: No. I guess I was excited at the time.

Question: Alright. And then he was taken
where?

Answer: Then they took him to the back part of
the pool and put him on a sofa, couch, like.

Question: And what was his condition at that
time?

Answer: Well, he kept moaning, making noises,
and he lay still. His neck was bent. They straight-
20 ened him out. I don't know who it was.

Question: His neck was bent?

Answer: You could tell it was something abnor-
mal.

Question: Where was the bend, what part of his
neck?

Answer: I don't recall, it looked funny to me. It
wasn't right.

Question: You just pointed with your hand to
the back of your neck.

30 Answer: I guess it was around here (indicat-
ing)."

MR. LA BRECQUE: And he indicated the back
of his neck. The answer continues: "It looked sort
of out of place. You could tell that there was some-
thing wrong.

Question: Now, how long did he stay there on
the sofa?

Answer: Well, it must have been about five minutes before the ambulance came, or maybe a little more, five or ten minutes.

Question: Then they took him away?

Answer: Yes.

Question: Now, you say someone questioned you afterwards? 10

Answer: Yes.

Question: Who was it that questioned you, and how long? I mean, was it someone right there at the time of the accident or soon afterwards?

Answer: This is someone connected with the pool, the manager or someone.

Question: I see; and that was about how long after the accident?

Answer: Half an hour or so; about fifteen minutes. 20

Question: About fifteen minutes later someone connected with the pool approached you and asked you —

Answer: Yes, and Linn wrote down that statement, but they didn't ask me for a statement.

Question: Is that your partner Link—is that who you mean?

Answer: Yes, Link, I mean.

Question: Up to the time that they took Mr. Ross away, was he able to talk rationally or act normally? 30

Answer: No.

Question: Was he doing any talking at all?

Answer: Well, he said—I guess he was in pain, or something. He must have been making some noise. He was making it.

Question: You mean by that that he was moaning?

Answer: Well, yes, I guess, and I think he kept

saying that he hit something in the water. I remember that.

Question: And from the way he was acting, would you conclude that he was in pain?

Answer: Yes."

10 MR. LA BRECQUE: That's all,—Mr. Carton has a few questions.

MR. CARTON (reading): "Question: You were asked, Mr. Breitkopf, something about whether you knew who he hit. Did he hit anyone, to your knowledge?

Answer: No.

20 Question: And did you say you and Link were the only ones in the immediate vicinity of where he landed?

Answer: Yes sir."

MR. LA BRECQUE: Question by me:

"Question: He struck the water head-first?

Answer: Yes.

Question: I mean in the usual diving position, did he?

30 Answer: Well, I didn't see him exact come through the water. I felt it more. You know what I mean. I was facing forward and he came in about half way in back of me.

Question: In other words, you didn't actually see him entering the water?

Answer: No.

Question: I see; but you noticed nothing unusual about the way that he struck the water, did you?"

MR. CARTON: Objection.

“Answer: I didn’t see him.

Question: Alright. And was he to the right rear of you or the left rear of you when he struck the water?

Answer: I don’t remember.

Question: I see.

Answer: It could be either side.

10

Question: Do you know who was to the rear of you when he struck the water, what persons were swimming there?

Answer: The only one that was swimming was Link, alongside of me.

Question: He was alongside of you. I mean in back of you.

Answer: No, alongside of me, because Ross came in almost in between us.

Question: Now, you say the majority of the persons swimming in the pool at that time were not adults, were children, is that right?

20

Answer: They were the regular members, and then this boys’ club. I know there was extra children there.

Question: I suppose some of them were in the shallow end?

Answer: They were all over the place.

Question: Some were swimming?

Answer: Yes.

30

Question: Some were fetching?

Answer: Yes, everything.

Question: And different forms of aquatic activity?

Answer: Yes, sir.”

MR. LA BRECQUE: That was all by either side.

MR. CARTON: If your Honor please, I would

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like to recall Mrs. Casper for an omitted question or two, please.

ANN CASPER, resumed the stand and testified
10 further as follows:

CROSS-EXAMINATION.

BY MR. CARTON:

Q. Mrs. Casper, I direct your attention to Exhibits P-18 and P-19, membership cards of the West End Casino for you and your husband, Herman Casper. Did you pay anything for these?

20

MR. LA BRECQUE: Objected to on the ground that it is immaterial.

THE COURT: Over-ruled.

MR. LA BRECQUE: Exception, please.

A. No sir, I didn't pay for them—in a way I did, I will tell you how we arranged it with Mrs. Prendergast —

30

Q. You have answered my question. Now, let me ask you some other questions —

THE COURT: Read the question.

(The question was read by the Reporter.)

MR. LA BRECQUE: I submit the question has not been fully answered yet. She said "In a way she

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did, in a way she didn't". She is telling the Court and counsel wants to stop her, I submit she should be permitted to explain.

THE COURT: I will permit you to bring that out.

10

Q. Isn't it a fact, Mrs. Casper, that the orchestra that played at the pool, Tommy Tucker's Orchestra, boarded at your house?

A. Yes, in both houses.

Q. What's that?

A. In both houses.

Q. What do you mean "in both houses"?

A. We had two.

Q. Oh, you operated two boarding houses?

A. One apartment house and one boarding house. 20

Q. You operated an apartment house and a boarding house and the orchestra roomed there?

A. Yes.

Q. And isn't it a fact that because of the fact that the orchestra roomed there that you and your husband were given a complimentary pass or ticket to the pool?

A. I got the tickets from Mrs. Prendergast —

THE COURT: Mr. Carton is entitled to have that question answered, Mrs. Casper, affirmatively, one way or the other. 30

(The question was read by the Reporter.)

A. Yes, I reduced the rates for the band and she gave me the tickets.

Q. You reduced the rates for the band?

A. Yes.

40

Q. And then isn't it a fact that you rarely ever used the pool yourself?

A. Oh well, I worked, I didn't have time.

Q. But you would come down there on Saturday nights and when they had evening affairs on some occasions?

10 A. Yes, and sometimes in the daytime.

Q. A little louder, please.

A. And sometimes in the daytime.

Q. And then didn't you speak to Mrs. Hoeven and ask her if she would allow the boy to come in and have the use of the pool?

A. I never spoke to Mrs. Hoeven.

Q. You never spoke to her at all?

A. Only once, about a job for some boy.

20 MR. CARTON: That's all.

RE-DIRECT EXAMINATION.

BY MR. LA BRECQUE:

Q. Mrs. Casper, you said that this pass was given—I call it a pass, it is a membership entitling you and your family to the privileges of the club—but aside from that, you say it was given to you by Mrs.

30 Bunny Prendergast?

A. Yes.

Q. Who was the owner of the place there?

A. Mrs. Levy.

Q. She was the top person?

A. Yes.

Q. Now what was Mrs. Bunny Prendergast's job there, what did she customarily do there?

A. She sold the tickets and membership cards.

Q. She would sell these memberships to the public?

A. Yes.

Q. And they would entitle the people who —

MR. CARTON: Don't lead her, please.

10

MR. LA BRECQUE: Alright, strike it out.

Q. And she was the one that had charge of selling the memberships?

A. Yes.

MR. CARTON: I object to it as leading, if your Honor please.

THE COURT: Well, I suppose —

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MR. CARTON: Because it isn't the fact.

THE COURT: —I have to allow Mr. LaBrecque a certain amount of leeway in view of the fact that this is testimony that you brought out.

MR. CARTON: He is saying she was the one who had charge of selling the memberships. That is not the fact and Mr. LaBrecque is asking a leading question here which she is —

30

THE COURT: Please read the question and the answer.

(The last two questions and answers were read by the Reporter.)

THE COURT: It is a sort of reiteration of her testimony.

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Q. Now, when did you obtain this ticket which has been offered in evidence, or these two tickets, we have one for a male and one for a female, which have been offered in evidence, from Bunny, or Mrs. Prendergast,—how long before the accident?

10 A. Well, I got them in the beginning of the season, in June.

Q. You said that you had some arrangement with her?

A. Yes.

Q. Whereby you say you paid for it?

A. Yes.

Q. Will you tell us just what that arrangement was, in your own words?

20 A. Well, when she had guests, I mean that she had no place for, you know, from the Club or anywhere, I would take them and give them special prices.

Q. Now, in particular during the year 1940 was there anyone connected with the Club that you had over at your place?

A. I had Tommy Tucker's Band there.

Q. Who sent Tommy Tucker's Band over there?

A. Mrs. Prendergast.

Q. And who paid for their room and board there?

A. They paid their own.

Q. Who did?

30 A. Tommy Tucker and his band.

Q. And who made the arrangements for their staying there?

A. Mrs. Prendergast.

Q. And in connection with the issuance of this ticket to you you say that you gave them a special price?

A. Yes.

40 MR. CARTON: If your Honor please, now she didn't say that.

MR. LA BRECQUE: Yes she did, before, and I will have it read, if necessary, your Honor.

MR. CARTON: He says "In connection with the issuance of this ticket to you she gave them a special price". Now, that may be Mr. LaBrecque's argument, but this witness has not said that.

10

BY THE COURT:

Q. Now, Mrs. Casper, suppose that you tell us how you came to get the two tickets entitling you and your family to the privileges of the West End Casino for the summer of 1940.

A. Well, after the band was settled in my places and the prices was made for them, and that's when she gave them to me.

20

Q. Well, but was anything said?

A. Yes.

Q. By Mrs. Prendergast?

A. Yes, she told me that's why she gave them to me, because I gave reduced rates to the band.

BY MR. LA BRECQUE:

Q. Now, in addition to that, how long had you been taking care of other guests at the West End Casino and giving them special rates, their ordinary guests that were sent to you?

30

A. You mean before 1940?

Q. Yes, before 1940.

A. Just the year before.

Q. The year before you had started that?

A. I did, I had Victor Simms there.

40

BY THE COURT:

Q. Did Mrs. Prendergast say anything about the special rates that you were giving her guests at the time that she presented these tickets to you?

A. Yes.

10 Q. What did she say in that regard?

A. She said that is the reason they were giving me the membership was on account of giving the reduced rates.

Q. I see, to the guests as well as the orchestra?

A. Yes, and also she gave me reduced rates if I had extra people coming in that wanted to go there for the day, she would charge half rates.

BY MR. LA BRECQUE:

20

Q. In other words, it was a business arrangement between you?

A. That's right, yes.

Q. That had been going on during that year?

A. That's right.

MR. LA BRECQUE: That's all.

BY MR. CARTON:

30

Q. You gave the reduced rates to the orchestra when they came to your place?

A. Yes, and to her guests.

Q. And up to that time you hadn't had any discussion with Mrs. Prendergast about the reduced rates, had you?

A. Well, the year before I had.

Q. About the orchestra?

A. I also gave the other band reduced rates.

40

Q. No, I am talking about the orchestra now.

A. I beg your pardon.

Q. Up until the time that the orchestra came and made arrangements with you, you hadn't had any discussion with Mrs. Prendergast about the orchestra coming and giving them any reduced rates, had you?

10

A. Yes I had.

Q. Before they came there?

A. Yes, before they came there, she knew they were coming.

Q. Not before the guests came there but before the orchestra came there did you have any discussion with her about the reduced rates?

A. Yes I did.

Q. Didn't you tell us that after you gave them the reduced rates then she gave you the cards?

20

A. I was supposed to have them before that but she just gave them to me afterwards.

Q. What do you mean "you were supposed to have them before"?

A. Well, I only got them two days after the band came there.

Q. Did you tell her that you would give her reduced rates if she gave you cards?

A. That's right.

Q. You didn't tell us that before. Alright, that's all.

30

BY MR. LA BRECQUE:

Q. Prior to the beginning of the season had Mrs. Prendergast written you informing you that the orchestra was going to be down that year, that orchestra?

A. I think the letter is there that she wrote (indi-

40

cating the table in front of Mr. LaBrecque). She either wrote or called me.

THE COURT: I understand, it appears from Mrs. Casper's testimony that the family membership was given to her by Mrs. Prendergast in exchange for
10 Mrs. Casper's giving a special rate to the members of the orchestra and also giving a special rate to such guests as Mrs. Prendergast might have during the season.

MR. LA BRECQUE: That's all. I rest, subject to calling Judge Presley.

(There was a short recess.)

20

ELDON C. PRESLEY, called as a witness on behalf of the plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

30 BY MR. LA BRECQUE:

Q. Your full name is what, Sir?

A. Eldon C. Presley.

Q. You are a member of the Bar of this State?

A. Yes I am.

Q. And you reside where?

A. 1601 Woodgate Avenue, West End.

Q. Do you hold any official position in Long Branch?

40

A. I am Police Recorder.

Q. Do you know any of the parties to this suit personally?

A. Well, I know who they are.

Q. Do you know where the West End Casino is?

A. Yes.

Q. And do you recall July 30th, 1940, being at the Casino? 10

A. Yes.

Q. And do you recall an accident taking place there on that day?

A. Yes.

Q. About what time did the accident occur?

A. It was in the afternoon.

Q. Do you recall the time, approximately?

A. No.

Q. As nearly as you can remember. 20

A. As near as I can say it was in the middle of the afternoon.

Q. Where were you at the time of the accident?

A. Sitting on the side of the pool, facing north.

Q. And where was that with reference to the diving boards in the pool?

A. The diving board was just about ahead of me.

Q. Was there anyone with you?

A. Yes, Father Connelly.

Q. What is his full name and his capacity? 30

A. I have never called him anything but "Father Connelly", at that time he was curate of the Star of the Sea Church.

Q. In Long Branch?

A. Yes.

Q. Were you sitting or standing?

A. I was sitting on the edge of the pool with my feet in the water.

Q. Where was he?

A. He was in the water.

Q. Which way was he facing?

A. He was facing me.

Q. Did you see the Ross boy on that day?

A. Yes.

10 Q. Did you notice him at about the time of the accident?

A. I looked up at one point and I noticed that a diver was leaving the board and that he was about to come in contact with a swimmer who was in the water, and that's the point that I first noticed him.

Q. Who did the diver turn out to be?

A. I always thought his name was Casper, but his name, I guess, is Ross.

Q. Do you remember what kind of a dive he was making? Are you familiar with diving yourself?

20 A. Yes I am.

Q. And how far in the air was he at the time you actually set your eyes on him?

A. Well, he was diving from the high board and he was, I should say, half-way distant when I noticed him, half-way from the board to the water.

Q. Was there anyone under him in the water?

A. There was a swimmer.

Q. How many swimmers?

30 A. Well, there were several, but the one, of course, that I was drawing my attention to, because I could see that they were going to strike each other.

Q. What did you see the diver do?

A. Well, he made a turn in the air in an attempt to avoid striking the other boy. The other boy was Mike Breitkopf's son, his second son, I don't know his name.

Q. And then what happened?

A. Then I thought that he had missed him.

Q. What part of —

MR. CARTON: What was that?

THE WITNESS: I thought that he had missed him.

Q. When he struck the water what part of the Breitkopf boy would you say was nearest to him? 10

THE COURT: What part of the Breitkopf boy's body, his hands or his feet?

A. His feet.

Q. What can you tell us as to which way the Breitkopf boy was swimming? Could you tell us that, if you recall?

A. That I don't recall.

Q. Had you been there all that afternoon? 20

A. Yes.

Q. After you saw this did you keep on watching the swimming and diving right along?

A. Well, I stayed there for about an hour after.

Q. Well, when did you find out that something had happened? You say that you thought that he had missed the Breitkopf boy.

A. Well, there was a commotion around then.

Q. What did you do?

A. Then I went over to see what it was, and I 30
went to —

Q. What did you see?

A. That the boy was hurt, the Ross boy was hurt.

Q. Where was he taken, do you recall?

A. I do recall that the ambulance came and took him away.

Q. You don't remember about how long?

A. And the doctor was summoned at that time, I believe.

Q. You had been there about how long before this accident occurred?

A. That I don't know.

Q. Had the diving board been in use before this accident occurred?

A. Oh yes, oh yes.

10 Q. Was there any lifeguard or other person regulating the diving or swimming there?

A. Well, as I said, there is no lifeguard, but there were persons around there, of course.

Q. I mean was there anyone in charge to tell the divers when they might dive and to shoo —

A. No.

Q. —away the people that were swimming?

A. No.

20 Q. Was there any separation of divers and swimmers?

A. No.

Q. Were there any signs limiting the place where swimming could take place or where diving could take place, stating "no swimming here" or anything like that?

A. No, I —

Q. Do you recall any?

A. —can't answer that one way or the other.

Q. There was no lifeguard there?

30 A. No.

Q. Were there any ropes to separate the diving and swimming sections?

A. No.

Q. Will you tell us as to the number of people that were there that day, as to what type of people? Was there anything special going on that day?

A. Not to my knowledge.

Q. Were there any children there that day?

A. Oh, there are always children there, yes.

Q. Can you tell us whether the children were using the pool?

A. Oh yes.

Q. Can you tell us whether the children were using the diving board?

A. Yes.

10

MR. LA BRECQUE: Take the witness.

CROSS-EXAMINATION.

BY MR. CARTON:

Q. You were asked, Judge, about any signs. There is a sign, is there not, "Diving at Your Own Risk," and I show you Exhibit D-1 for identification and ask you if that correctly shows the scene of the diving board and the pool and also the sign that was there? 20

A. That is a picture of the scene.

Q. How about that sign?

A. I confess I never noticed it before, Mr. Carton.

Q. You don't know whether it was there or not?

A. No.

Q. I see. You said that there were no lifeguards there. Do you know Mr. Neuschaefer? 30

A. Yes.

Q. He was there, was he not?

A. I thought—I always thought that he was an instructor. Yes, Mr. Neuschaefer was there.

Q. Mr. Neuschaefer, you know, is an expert swimmer?

A. Yes.

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Q. And is it also not a fact that there were five or six locker boys in attendance there at all times?

MR. LA BRECQUE: I object to that.

10 MR. CARTON: May I finish, please?

MR. LA BRECQUE: Go ahead.

Q. That were high school students or college students, all of whom were swimmers?

MR. LA BRECQUE: I object, if your Honor please.

20 THE COURT: That is a preliminary question and by itself, alone, it wouldn't be helpful to either side of the case, but I feel that he must be permitted to answer it for what may follow.

MR. LA BRECQUE: My reason is because he has put so many things in one question. "High school boys and college boys who are also swimmers." All those things put this witness in a position of saying whether high school boys are swimmers and locker boys are swimmers.

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MR. CARTON: I will withdraw the question and ask it this way:

Q. Is it not a fact that there were some five or six locker boys in attendance at the pool?

A. Oh yes.

Q. Can you tell us whether or not it is a fact that you know that these boys were high school

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and college boys who worked there during the summer?

MR. LA BRECQUE: I object to that unless the source of the witness' knowledge is elicited.

THE COURT: Well, were they boys of a mature age? 10

A. I would say that year they averaged around sixteen to eighteen.

THE COURT: Were they swimmers, do you know whether or not those locker boys were swimmers?

THE WITNESS: No, I don't know that. 20

Q. You never saw them in the pool, you don't know whether they were swimmers or not?

A. No.

MR. CARTON: I see, that's all.

RE-DIRECT EXAMINATION.

BY MR. LA BRECQUE: 30

Q. You say that you never knew that Mr. Neuschaefer was a lifeguard, you considered him a swimming instructor?

A. Yes, and a very good one.

Q. A very good one, right, and where did he give his instructions?

A. In what we used to call the middle sized pool—there are three pools there at West End.

Q. Is this the pool —

A. No, this is the big one.

Q. I see, in some other pool he would give his instructions, is that right?

A. You show it in the picture.

Q. I see, it is away from this pool (indicating)?

10 A. Yes.

Q. Does that show it?

A. No, it doesn't.

THE COURT: Identify it.

MR. LA BRECQUE: He says it doesn't show, referring to Exhibit D-1 for identification, that doesn't show it.

20 THE WITNESS: No, it would be directly north of this pool, with a little parkway in between.

Q. I see, alright. Now, at the time that this accident happened was there anyone regulating the swimming and diving at this point where the boys were diving in the water, where the boards were?

A. No.

30 MR. LA BRECQUE: That's all. We rest.

MR. CARTON: I have a motion, if your Honor please.

THE COURT: Do you desire to make it in Chambers?

MR. CARTON: Yes, I think so.

(The Court and Counsel adjourned to Chambers.)

MR. CARTON: If your Honor please, at this time I move for a non-suit on behalf of the defendant whose amended name, as it now appears in the record, is Eliza E. Hoeven and the President and Directors of the Bank of Manhattan Company, who was originally designated in the Complaint as Hortense Levy, the name Hortense Levy having been amended to Tillie Levy, and it being suggested on the record the death of Tillie Levy. 10

The purpose of this motion is that there is no evidence whatsoever to associate or tie in this defendant as anything more than the owner of the pool, and certainly no evidence to show that she was the operator of the pool.

MR. LA BRECQUE: I might say, if your Honor please, that the only evidence is that she is the owner, and while I don't want to consent to the motion, in view of the fact that I represent a minor, I do concede that there is no evidence to connect her with the operation except through The Breakers, Inc., a corporation that did actually and admittedly operate it. 20

THE COURT: Well, the relationship between the Breakers, Inc. and Mrs. Levy, to refer to her by her own name, was that of lessor and lessee? 30

MR. LA BRECQUE: Apparently, as far as we know. Mr. Carton's opening gave me more knowledge than I had before of that.

THE COURT: Alright, under those circumstances the motion for the non-suit as to the defendants specified in Mr. Carton's motion is granted. 40

MR. CARTON: Now, if your Honor please, on behalf of the Breakers, Inc., I move for a non-suit on the following grounds:

10 First: There is no evidence that the injury sustained by this boy was the natural and proximate result of any negligence on behalf of the remaining defendant, The Breakers, Inc.

THE COURT: Well, suppose that we take your motion point by point, and as you make your point to have Mr. La Brecque answer it. I think that would be more orderly and the Court will be in a much better position to dispose of the points.

20 MR. CARTON: If your Honor please, the only indication or testimony whatsoever of any alleged negligence in this case now is the failure on behalf of this defendant to have one of two things done; either to have the pool roped off by means of floats or otherwise to such an extent so that the swimmers could not come in the same area wherein those using the diving board were, or in the absence of that to have a lifeguard there who more or less would act as a traffic cop and would regulate the diving, saying when this one could dive and when that one could dive.

30 There is some testimony on behalf of Mr. Riley, the expert produced on behalf of the plaintiff, that that is standard practice in the operation of swimming pools, but assuming for the sake of this argument that that is so, there is no proof whatsoever that the failure to have such a guard there or to have the pool so roped off was the natural and proximate cause of the injury sustained by this boy.

40 The testimony in the case is that this boy went to the end of the springboard and looked to see

whether or not the way was clear, turned around and within a matter of five seconds when there was no one in his view, walked to the end of the board—well, perhaps I am ahead of myself,—that he made an observation first looking forward, and in the time that he suggested as a minute on the witness stand, and when checked with the clock it developed that it was eleven or twelve seconds, he stated that he had looked over and there was no one there and that he then proceeded to the end of the board, took another look and in the space of five seconds approximately he dove into the pool, and when he dove into the pool, or when he looked a few seconds prior to that there was no one in the immediate vicinity of where he landed. His uncontradicted testimony is that he landed almost underneath the board where he has indicated on the photograph that was marked in evidence, and in stating that he did a back-jack—now, I don't know how familiar your Honor is with the sport of diving, but a back-jack in fact is a dive which is done by the person walking to the end of the board something like this (demonstrating) and then they turn around like this, and the springboard is here, and they go out in a position like that and then go in the water that way, and dive, and they land almost directly underneath the board. There was no one in that immediate vicinity and if that is so, certainly no lifeguard that they might have had there or any attendant or anybody else to regulate diving would have been of any avail, because according to the boy's testimony, if he is to be believed, there was no one there at the time, so how can it be said that anything that the operators of the pool did or neglected to do was the natural and proximate cause of this boy's injury?

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10 Rather, on the other hand, it is a case where he, in diving into the pool, was looking out for himself and the condition that he said was clear, and there was nobody else there. If the condition was clear, as he said, to him, how could it be anything different to anybody else who might have been there on behalf of the pool?

(Mr. La Brecque gave his argument in opposition to the motion.)

(After further argument and citation of cases.)

20 THE COURT: The Court is satisfied, Mr. Carton, that the evidence offered on behalf of the plaintiff discloses that there is a standard of care in the swimming pool trade or profession of managing and operating swimming pools. The testimony of the plaintiff would lead to the conclusion that it was requisite on the part of the defendant to do either one of two things to provide a proper standard of safety for the patrons of the pool, namely, to either segregate that part of the pool from swimmers where the diving took place, either by means of floats or ropes or buoys or whatever might be used to sequester the particular diving area, or in 30 the absence of buoys or ropes or floats sequestering the diving area to provide a lifeguard or someone who would, so to speak, direct traffic in the pool, someone who would warn divers that it was inopportune to dive at a particular time, or someone who would warn swimmers away from the area of the diving board at a time when a dive was being taken.

40 Now, the argument that you have made as to the point as to whether or not even if such a guard

Motion for Non-suit

had been on duty that day whether the guard could have prevented this accident is arguable to the Jury; all that the Court can rule on is that the plaintiff has produced testimony which, if it leads the Jury to conclude that this accident happened as a result of negligence upon the part of the defendant that it might also be inferable that a guard on duty could have prevented this accident; so that as the evidence now stands, if the case were submitted to the Jury without any further testimony being offered, the Court is satisfied that a verdict rendered in favor of the plaintiff upon this testimony would have to be upheld.

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I deny your motion and allow you an exception.

MR. CARTON: My second ground of my motion for a non-suit, if the Court please, is that the infant plaintiff assumed the risk. My argument in this connection, if your Honor please, is that the individual assumes the ordinary risks of his voluntary acts and the environment in which he voluntarily places himself, and where one engages in a sport as swimming and diving, and he puts himself in a position of enjoying that sport, and in this particular case to use a springboard in a pool which, according to the testimony, had a lot of people in and about the pool, he, by going off the springboard and diving into that water assumes any risk.

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(After argument and citation of cases.)

THE COURT: The Court rules that the defense of assumption of risk upon the facts in this case is one which must be decided by the Jury as a factual question, rather than as a question of fact by the Court.

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10 The Court is mindful of the fact that the plaintiff was approximately eleven and a half years of age at the time of the happening of this accident, and is also mindful of the fact that he was familiar with diving and would be expected under the law to use such judgment in diving as a boy of his age and experience would ordinarily be expected and required by the law to use.

So that upon a consideration of the testimony which has been offered the Court feels that a Court could not properly pass upon this question and decide it affirmatively either one way or the other, because the question, in the Court's opinion, is clearly a factual one for the Jury to be decided upon all of the evidence.

20 The Court will give a proper instruction to the Jury to the general effect that if the Jury feels that the infant plaintiff assumed the risk involved in diving as he did, under the precautions that he says he took, at the time he was executing the dive, that then, under those circumstances, the Jury would have to find a verdict of no cause of action in favor of the defendant.

The Court will allow Mr. Carton an exception to the Court's ruling.

30 MR. CARTON: My third point, if your Honor please, is that I move for a non-suit on behalf of the same defendant, The Breakers, Inc., on the ground of contributory negligence.

40 While I am well aware of the fact that in most cases contributory negligence is a question of fact to be determined by the Jury under proper instructions, nevertheless the negligence in this case, I submit, is so flagrant that regardless of any alleged negligence on behalf of the operators of the pool I

submit that a non-suit should be granted on that ground.

(After argument.)

THE COURT: The Court feels that so far as the defense of contributory negligence is concerned that it poses a problem which must be decided factually by the Jury rather than as a question of law by the Court. 10

I deny Mr. Carton's motion on that particular ground and allow him an exception.

MR. CARTON: My fourth and last point in my motion for a non-suit for this same defendant is that under the evidence as now submitted there is nothing to go to the Jury because of the fact that there is no requirement in law for the proprietor of an amusement park or of a place of amusement such as the defendants in this case to protect patrons from obvious risks that are incidental thereto, and that the risk that the boy took in diving off the springboard was an obvious risk incidental to the use and operation of a pool and springboard and that there is no such requirement by law requiring any protection on behalf of the defendants from such an obvious risk. 20 30

(After argument.)

THE COURT: I concede that Mr. Carton has correctly stated the law as to the responsibility of the defendant where an obvious risk is involved; but the Court rules that the Jury must decide factually whether the risk of diving from the diving board in this case was such an obvious risk, and if the Jury 40

finds that it was an obvious risk there must be a verdict by the Jury in favor of the defendant.

MR. CARTON: May I have an exception to your Honor's ruling?

10 THE COURT: Oh yes, surely.

(The Court and Counsel returned to the Courtroom.)

20 MAXWELL VOGT, called as a witness on behalf of the defendant and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. CARTON:

Q. You live where?

A. 406 Greylock Parkway, Belleville, New Jersey.

30 Q. Your business is what?

A. Swimming coach.

Q. How long have you been a swimming coach?

A. Seventeen years.

Q. What experience have you had in swimming?

A. Well, I have been swimming coach at the Newark Athletic Club, Newark Academy —

Q. You are the coach there now?

A. Yes.

Q. Yes, go on.

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A. And in the summers I am at the Orange Lawn Tennis Club in South Orange.

Q. Do you have any official connection or capacity with amateur swimming in New Jersey?

A. I am chairman of the New Jersey Association of the Amateur Athletic Union and I am also on the National A. A. U. swimming committee.

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Q. And in that capacity are you familiar with rules of safety and conduct in and about swimming pools?

A. I believe so.

Q. Mr. Vogt, will you tell us whether it is generally the standard and accepted practice in the operation of swimming pools to have—and to protect people using springboards, to have one of two things; either to have a person at the diving board to act in the capacity of lifeguard or otherwise to warn the divers when they can go off the board, or swimmers that they could swim in that immediate vicinity, or in the absence of them to have the area of the pool used for diving roped off by means of floats or otherwise to preclude persons swimming from coming in contact with those coming off the springboard?

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MR. LA BRECQUE: Object to on the ground that the witness has not been qualified.

30

THE COURT: Well, I will permit you to cross-examine him. He is a witness who has had, apparently, a long experience with the swimming profession. He has given us his background and he has been connected with swimming pools at the Newark Athletic Club and the club that he mentioned in Orange, he is Chairman of the swimming committee

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of the A. A. U. in the State of New Jersey, is that right?

THE WITNESS: That's right, Sir.

10 THE COURT: I will permit you to cross-examine him.

MR. LA BRECQUE: I'm not questioning his qualifications as a swimmer, I understand he is a pretty good one, but I am referring to him as the operator of a pool.

CROSS-EXAMINATION.

20 BY MR. LA BRECQUE:

Q. You say that you are in charge of the Orange Lawn Tennis Club pool?

A. In South Orange, that's right, Sir.

Q. Do you have charge of any other pools, or have you had charge of any other pools?

A. Yes sir, I have been at the Yountakoh Country Club at Nutley, and also the Maplewood Country Club, Maplewood.

30 Q. Have you ever had charge of any clubs along the Shore?

A. No sir.

Q. Is the Orange Lawn and Tennis Club a private club?

A. That's right, Sir.

Q. It doesn't invite the public?

A. No.

Q. It is for members only?

A. Members and guests.

40 Q. And how large is the pool there?

A. Seventy-five by twenty-five.

Q. How many members do you have there?

A. Oh, I think there is, roughly, three hundred and sixty—that is three hundred and sixty families.

Q. And do you have any resort trade?

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THE COURT: Let us get that clearly, that 360 families?

THE WITNESS: Families, yes, they may range anywheres from a single person to a family of possibly seven or eight.

THE COURT: And then the guests of the families.

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THE WITNESS: And the guests, that's right, Sir.

Q. And the other one that you mentioned, Yountakoh?

A. Yountakoh Country Club.

Q. That is a private club too?

A. Right now that is being operated by the Federal Telephone and Radio, it has been sold.

Q. Was that a private club in 1940?

30

A. Yes sir.

Q. Were you operating any pools in 1940?

A. No sir, I did camp work in 1940.

Q. Did you operate any pools prior to 1940?

A. Yes sir.

Q. When?

A. The Maplewood Country Club, 1935, six, seven.

Q. And then you went out of the business and came back into operating pools when?

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A. 1942.

Q. Did you ever operate any resort swimming pools?

A. No sir.

Q. Are you familiar with the practice carried on in resort swimming pools?

10 A. I believe so.

Q. And where did you obtain that information?

A. Well, I am a qualified Red Cross Water Safety Director.

Q. Do you know the Colony Surf Club at all?

A. Colony? I know where it is.

Q. Have you ever swum in it?

A. In the Colony? No sir.

Q. Do you know the West End Casino at all?

20 A. Yes, sir. I have been there just once.

Q. When was that?

A. Eight or ten years ago, I don't recall when.

Q. Do you know who was in charge of the pool at that time?

A. I believe it was Mr. Riley.

Q. Mr. Riley himself?

A. I'm not sure.

Q. You aren't sure?

A. No sir.

30 Q. You know Mr. Riley, of course?

A. Yes sir.

Q. He has been the head of your association?

A. The A. A. U. do you mean?

Q. Well now, you mentioned the National Swimming Committee.

A. I believe he is also on that,—yes, he was on it—I don't know whether he is on it today or not.

40 MR. LA BRECQUE: I think it is obvious, if your Honor please, that this man has had no experience along the shore operating pools.

THE COURT: Well, now, Mr. La Brecque, Mr. Vogt has testified that in 1935, 1936 and 1937 he was the manager of the Maplewood —

THE WITNESS: Maplewood Country Club.

THE COURT: Of the swimming pool at the Maplewood Country Club. 10

THE WITNESS: That's right.

THE COURT: And then in 1942 —

THE WITNESS: I was at the Yountakoh Country Club at Nutley.

THE COURT: And the manager of the swimming pool there? 20

THE WITNESS: That's right.

THE COURT: And during all those years did you have any interest in swimming pools, Mr. Vogt, so that you would go around to see what standard of care was taken at different pools?

THE WITNESS: Well no, my interest was in Meets, wherever they had swimming meets I was as a rule an official at one of them, so I had a pretty good idea of the lay-outs. 30

BY THE COURT:

Q. How many pools would you say that you have visited in the past ten years?

A. Oh, I would say at least a hundred different ones.

Q. A hundred, and you know all the pools in New Jersey and the Metropolitan area?

A. That's right.

10 Q. And the testimony that you are about to give us today as to the standard of care which is recognized in the swimming pool trade or profession is based upon the knowledge which you have acquired as the manager of a pool and the knowledge which you have acquired as a result of attending swimming meets in different pools, and perhaps swimming in different pools yourself?

A. That's right, Sir.

20 Q. And also talking with other managers of pools, did you, when you got together with them, sort of talk shop and find out what the other fellow was doing?

A. On many occasions.

THE COURT: On many occasions. The Court will qualify the witness.

30 MR. LA BRECQUE: May I just ask him one more question, apropos to the question your Honor asked?

Q. Mr. Vogt, in attending these meets, do these meets have reference to swimming and diving both?

A. Most of them do, yes sir.

Q. And of course you are speaking of the professional people who —

A. Amateur swimmers and divers.

Q. I mean amateur swimmers and swimmers who have no experience in the matter of —

A. They are mostly all youths.

Q. That's what I mean, but I mean they are competent people who are generally from sixteen years of age upwards, is that right?

A. Well, they are not children, youngsters, although we have children racing anywheres from eight up.

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Q. I mean they are people who have been trained for competition in pools?

A. That's right.

Q. Is that the best way of putting it?

A. That's right.

BY THE COURT:

Q. Well, Mr. Vogt, I presume that during such times the pools that you have visited were not being used for swimming meets, that the pools were usually open to the general public or to such swimmers as might be at the pool at that time, is that correct?

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A. That's right, Sir, yes Sir.

Q. So that you were in a position to judge the conduct of that pool and the standard of care observed there and your knowledge was not limited to the care that was observed at the time that a swimming meet itself was actually under way?

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A. That's right, Sir.

THE COURT: The Court will qualify the witness as an expert.

MR. LA BRECQUE: Will your Honor allow me an exception?

THE COURT: Or rather, will permit him to be qualified as an expert.

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BY MR. CARTON:

Q. I don't know whether you will remember my question, after all that.

10 A. No.

Q. The question was: Is it a fact that there is a standard of care in the operation of swimming pools requiring either one of two things; either that it be roped off, as I have indicated, or that they have somebody there in attendance directing the diving and swimming?

20 A. No, I don't believe that it is the standard practice that I know of, and as far as any roping off of the diving area, why I don't recall seeing any pools that have the diving area roped off, that is, with buoys. Now they do put the buoys there to differentiate between the deep and the shallow water, but not right around the diving board, because there is always the possibility of diving on the rope or the buoy.

Q. And that could be very serious in itself, could it not?

A. That's right, Sir.

30 MR. CARTON: That's all.

CROSS-EXAMINATION.

BY MR. LA BRECQUE:

Q. Did you ever hear of such a practice as what counsel has referred to or did you ever hear of it being kept up in the industry?

40 A. No sir.

MR. CARTON: I object to it as not a question whether he has ever heard of it or not, some pools may do it and some may not, the question is what is the accepted standard practice and that is the only point before this Court.

THE COURT: I suppose that counsel would have the right, upon cross-examination, to develop whether or not Mr. Vogt had observed the particular precautions being taken in such a great number of pools that he would be asked to reconcile that testimony with his statement that it was not the accepted standard. 10

MR. LA BRECQUE: That's what I mean.

Q. Did you ever hear of the practice of having a lifeguard in attendance at a pool? 20

A. Oh yes.

MR. CARTON: I object to that, if your Honor please, because that is not the point —

THE COURT: Yes, I sustain the objection.

Q. What do you say is not standard practice, Sir?

A. What is not standard practice? 30

Q. Yes.

A. Well, it wouldn't be standard practice if you didn't have anybody around the pool to take care of it.

Q. In other words, there should be someone there in charge of the pool, is that what you mean?

A. Someone has to run it.

Q. And does that someone have to be a competent lifeguard? 40

A. As a rule I would say "yes."

Q. Yes, that is standard practice, isn't it, to have a competent lifeguard in charge of a pool?

A. That's right, Sir.

Q. And what is the purpose of that practice?

10 A. Well, to watch the swimmers in case somebody gets in distress.

Q. That is one purpose?

A. If somebody gets a cramp or a mouth full of water or a fainting spell you have got to have someone to pull them out.

Q. What other purpose?

A. To keep order.

Q. What do you mean by "keeping order"?

A. Allow no rowdyism.

20 Q. What is another purpose of that standard practice?

A. I don't know whether there is any more, except as far as keeping order around the pool.

Q. You mean keeping people from running into one another, bumping into one another?

A. That's right, rowdyism, I am talking about.

Q. Keeping divers from going on swimmers?

30 A. No sir. I think a diver going off a diving board has a perfect vision of the pool and he should be able to see if anybody is in his way.

Q. You do, and watching swimmers so they won't be hurt by divers?

A. I don't think that—no matter how many lifeguards you have—I don't think that they can control all the swimmers.

Q. No, but don't you think they can control the swimmers around the diving board?

A. I suppose they could.

40 Q. And the general purpose then of the standard practice of having a lifeguard in charge is safety,

is that it, protecting the people that are using the pool?

A. To the best of his ability, yes.

Q. That's right, that is the purpose of it. Now, is there any greater danger, in your opinion, when diving and swimming are permitted in the same area?

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A. Well, there is always a case of danger somewhere.

Q. There is greater danger, isn't there?

A. I wouldn't say "greater danger."

Q. Isn't there greater danger when you allow diving and swimming in the same area than there would be if you had only swimming or only diving there?

A. Naturally there would be.

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MR. CARTON: I object to that, I don't see where it has any relevancy.

THE COURT: Sustained.

MR. LA BRECQUE: That's all.

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AL NEUSCHAEFER, called as a witness on behalf of the defendant and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

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BY MR. CARTON:

Q. Mr. Neuschaefer, where do you live?

A. I live at 415 Saint Luke's Drive, Trenton, New Jersey.

Q. Your business is what?

A. I am a teacher at the Trenton High School in charge of swimming.

20 Q. You have been connected with swimming for how long?

A. About twenty years.

Q. What has been your experience generally in that regard?

30 A. I have been on the swimming committee of the State of New Jersey, A. A. U. for, I don't know, as long as I can remember, I am Secretary-Treasurer of the National Swimming Coach's Association, I am a member of the Diving Committee of the National Collegiate Association, I am a member of the National Collegiate Rules Committee, I was in charge of the program at Fort Lauderdale during the Christmas holidays at which we have every college, high and prep school coach of any consequence in the Country. During the summer time I have been along the seashore here, I have been at the West End Casino for about seven or eight years, I was at the Spring Lake Tennis and Bath Club for one year, I was at the Colony Club for

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one year, I had charge of the lifeguards of the City of Trenton, —

Q. At the Municipal Pool?

A. No, I had all the municipal pools in Trenton, I had charge of all the guards, and I have also been on the examining committee for the State for their lifeguards and captains and I have examined guards from North Jersey down to Atlantic City. 10

Q. And in the summer of 1940 where were you?

A. I was in charge of swimming at the West End Casino.

Q. West End Casino?

A. That's right, I had the privilege of teaching swimming there.

Q. And what else, if anything, did you do there?

A. Well, I had charge of any injuries, I had the Red Cross station there and if anybody was hurt they came to me and I generally took care of them. Sometimes somebody fell or had a splinter in their foot or something of that sort. I also, when any misconduct was brought to my attention I stopped it. By that I mean this: If some of the kids were cutting up, rough-housing or had been playing tag around the pool and it was brought to my attention I stopped it. 20

Q. Were you generally in and about the pool during the day? 30

A. I was there practically every day all day except possibly for lunch hour.

Q. And had you, at some time previous to the day that the accident occurred, had occasion to speak to Harold Casper in reference to —

A. Yes, I spoke to him and I spoke to a good many other boys if I thought they were taking unnecessary chances.

Q. Where were you — 40

THE COURT: Was your question, Mr. Carton, did Mr. Neuschaefer speak to the infant plaintiff in this case?

MR. CARTON: Yes.

10 THE COURT: Did you refer to him as Casper or as Ross?

MR. CARTON: Yes sir.

THE COURT: That's what threw me.

MR. CARTON: I mean, Ross and Casper is the same person, he was sometimes known as one name and sometimes the other.

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Q. Where were you at the time of the accident?

A. I don't know whether you know the lay-out at West End, but we have two parallel pools that are about a hundred feet long by about thirty feet, and they run east and west, and we have a pool —

THE COURT: That would be toward the ocean and away from it?

30 THE WITNESS: That's right, at right, at right angles to the ocean, your Honor.

A. (continuing) They are rectangular and that deep pool runs from about four feet to about ten and the shallower pool, which is north of that pool, runs from about four feet or from about two feet to four feet, and we use that for a teaching pool. At the end of that pool we had a baby pool which was about a foot and a half deep, and I was continually in that

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teaching pool, from early morning, from about nine o'clock until about five in the afternoon.

Q. How far is that pool from the other pool?

A. That is about ten feet.

Q. Now, this accident was called to your attention. You didn't see it, did you?

A. The accident? No, I didn't see the accident, do 10
you want me to explain that to you?

Q. No, not necessarily, if you will just follow my questions, please. After it was called to your attention what did you do?

A. When it was called to my attention I went over and saw the boy and called —

Q. Where?

A. On the side of the pool toward the bandstand.

Q. What did you do?

A. Well, I immediately told them to leave the boy 20
there and get the help of the pool doctor, who was Doctor Feinberg, and he came immediately and they removed the boy, because from my own experience in football and other sports, when I see a boy injured very badly I think the best thing to do is to leave him alone, because I don't know enough about the case to bother him.

Q. As a rule it is also dangerous to move an injured person?

A. That's right, I always think it best to leave him 30
there, that has been my own experience.

MR. CARTON: That's all.

CROSS-EXAMINATION.

BY MR. LA BRECQUE:

10 Q. Then you were in the training pool, or the middle pool when this accident happened, at that time?

A. That is the pool alongside the big pool, yes.

Q. You weren't watching the swimmers or divers?

A. No, positively not.

Q. Was there any lifeguard detailed to take charge of the big pool?

A. We had no lifeguard there.

Q. Did you recommend such a lifeguard?

20 MR. CARTON: I object to it as immaterial.

THE COURT: I will hear you on that.

MR. LA BRECQUE: Perhaps I should withdraw it now and bring out another question first.

Q. You were qualified as a person competent on pools?

A. Yes, I have a teacher's certificate from the Red Cross.

30 Q. You didn't mention whether it was standard practice to have a lifeguard detailed at a pool of this type for the safety of the persons using it. Can you answer that question?

MR. CARTON: I object to it as not cross-examination. I didn't ask him anything about that. If he wants to make him his own witness I have no objection.

MR. LA BRECQUE: I think it is cross-examination. Counsel has gone to a lot of trouble to qualify this man and that is the one question that he left out, whether it was standard practice for a pool of this type to have a lifeguard there.

THE COURT: No, the Court must rule that that 10
would be going beyond the proper elements of cross-examination. You have a perfect right to make Mr. Neuschaefer your own witness and to ask the question that you propound.

MR. LA BRECQUE: I want to ask him on cross-examination about this point, since it is admitted by Mr. Neuschaefer that there was no one detailed by the operators of the pool to take care of this pool, I should be permitted to bring out that their method 20

THE COURT: He has not himself said anything at all about the standard in the profession.

MR. LA BRECQUE: That is what I was asking him, if your Honor please. I thought that counsel was going to ask him, but if your Honor rules against me may I have an exception?

THE COURT: I must, under the circumstances. 30
If Mr. Carton had asked Mr. Neuschaefer anything at all about what the proper standard was for the conduct of a swimming pool then your question that you asked on cross-examination would have been perfectly proper.

Q. Did you recommend to the operators of the pool that there should be a lifeguard assigned to that pool? 40

MR. CARTON: Objected to as immaterial. That is the same question he just asked.

THE COURT: Sustained.

MR. LA BRECQUE: Exception.

10

Q. How many lifeguards did you have there, Mr. Neuschaefer?

A. We had two lifeguards.

Q. And where were they detailed to work?

A. They were stationed on the beach.

Q. There were no lifeguards at the pools at all?

20

A. Except on rainy days or when nobody was on the beach, if we closed the beach due to the fact that the ocean was too rough, we would then detail the beach guards on the pool.

Q. Was this a rainy day when they were detailed to the pool?

A. No, this was a very nice day, a perfect day, it was sunny and there was quite a crowd in the pool.

Q. And on clear days they were taken from the pool and put out on the beach?

A. That's right.

Q. Were you familiar with the pool the year before, 1940?

30

A. Yes I was.

Q. There was a lifeguard detailed to the pool by Mr. Riley that year, was there not?

MR. CARTON: I object to it as immaterial.

THE COURT: Sustained.

MR. LA BRECQUE: Exception, please.

40

Q. There were a lot of children at the pool this day, were there not, Mr. Neuschaefer?

A. I would say the normal crowd on a nice day.

Q. Well, there was an outside crowd there that day, wasn't there?

A. I'm not certain about that, I have a faint recollection that we did have an outside crowd there but I'm not certain about that. 10

Q. And most of the people that were there at this time of the day were children, weren't they, young boys and young girls.

A. Well, naturally there would be more children during the day or over the holidays.

Q. That's what I mean, that's all.

A. We had a lot of grown-ups, too.

MR. LA BRECQUE: That's all. 20

BY MR. CARTON:

Q. You were subpoenaed here yesterday by Mr. LaBrecque, were you not?

A. That's right.

MR. CARTON: That's all.

BY MR. LA BRECQUE: 30

Q. You weren't subpoenaed by the other side yesterday?

A. No sir.

(At this point there was the noon recess.)

AFTERNOON SESSION.

BLOOMFIELD HULICK, called as a witness on behalf of the defendant and being first duly sworn, testified as follows:

10

Q. Mr. Hulick, you live where?

A. 201 Euclid Avenue, Loch Arbor.

Q. Are you connected with the Allenhurst Pool?

A. I have been the manager there for five years.

Q. Prior to being the manager for the past five years have you been a patron there for years?

A. I have been around there for, oh, at least thirty years, in addition to that.

20 Q. As manager of the Allenhurst Pool are you familiar with the operation of resort swimming pools?

A. Yes, yes.

Q. It has been testified, Mr. Hulick, that it is the practice at the Allenhurst Pool in connection with the diving to have either the pool roped off in the area of the diving board, to segregate the diving area from the swimming area, or to have a guard or attendant standing in the vicinity of the diving board to regulate the diving —

30

MR. LA BRECQUE: I object to that on the ground that the testimony was that a lifeguard was used at the Allenhurst pool and not the separation of swimmers and divers.

THE COURT: Well, Mr. Carton put it in the alternative, he used the word "or", so I think that the question is proper.

40

Bloomfield Hulick—Direct

Q. Are either one of those practices in effect or have they ever been in effect at the Allenhurst pool?

A. To my knowledge they have never been in effect.

Q. Do you know of any such safety rule of operation of swimming pools requiring either one or the other of these?

10

MR. LA BRECQUE: I object on the ground that the witness has not been qualified.

THE COURT: Sustained.

Q. Mr. Hulick, as the manager of the Allenhurst pool for the past five years what experience have you had or what observations have you made as to the operation of other swimming pools?

20

A. I have been, of course, to other pools, at Spring Lake and Deal and they are the two, in addition to the Allenhurst pool that I am more familiar with, and—do you want me to state whether I saw any regulation —

Q. Yes, have you ever been in those pools?

A. No, I have never seen any regulation of that kind.

MR. LA BRECQUE: I object to that, if your Honor please.

30

THE COURT: Sustained.

MR. CARTON: If your Honor please, I submit that this is proper, not necessarily from this man as an expert, but as to whether or not that is in effect there, in view of the fact that they are both large pools in the shore area.

40

THE COURT: I don't recall Mr. Riley's testimony. If Mr. Riley testified that the standard which he said was the accepted standard for swimming pools was observed at these particular pools, then I think that this witness' testimony on that point would be perfectly competent.

10

MR. CARTON: If I may interrupt your Honor, when I tried to pin him down to it, it is my recollection of his testimony that he named five pools where this was in effect, one was the Spring Lake Pool, the second Avon, the third was Allenhurst, the fourth Monmouth Beach Pool and the fifth Olympic Park Pool.

20

THE COURT: And now what does this witness say, what pools does he say he is familiar with?

MR. CARTON: Deal, Spring Lake and Allenhurst.

THE COURT: Well, Spring Lake, you could certainly ask him as to the Spring Lake pool.

Q. Have you ever seen any such practice in effect in the Spring Lake pool?

A. Never.

30

MR. CARTON: That's all.

CROSS-EXAMINATION.

BY MR. LA BRECQUE:

Q. I didn't get the answer to the last question.

A. I have never seen any such regulation.

Q. What is your occupation?

40

A. Manager for the Borough of Allenhurst of the Allenhurst pool.

Q. Is that your only occupation?

A. That is the main operation.

Q. What pools did you manage before that time?

A. None, Sir.

Q. What pools were you connected with in an executive capacity? 10

A. None.

Q. What experience have you had in training lifeguards or assigning them to their duties?

A. None, with the exception of the experience that I have got in the operation of this pool and the experience that I got in connection with talking to owners of other pools.

BY THE COURT: 20

Q. Did you do any talking and checking up with other managers or owners of pools at the time that you were about to enter upon your duties here?

A. Yes sir.

Q. You wanted to find out how their pools were conducted?

A. That's right, and I have been around them a great deal.

Q. So that you could use that information in the management of your own pool, is that right? 30

A. That's right.

Q. How many other pools have you checked with?

A. Monmouth Beach pool, Spring Lake, Deal, Point Pleasant.

Q. That was both by observing and by communicating or speaking with the ones who ran those pools?

A. That's right. 40

BY MR. CARTON:

Q. Mr. Hulick, you are an official of the Township of or the Borough of Loch Arbor, are you?

A. No.

Q. Allenhurst?

10 A. No, I am not, the Allenhurst Beach Club is owned and operated by the Borough of Allenhurst and they employ a manager.

CROSS-EXAMINATION.

BY MR. LA BRECQUE (resumed):

Q. You say that you have trained no lifeguards?

20 A. No, they come to us, when we hire lifeguards we get their recommendations and they come with a certificate that they have been through the regular procedure that entitles them to qualify as lifeguards.

Q. Where do you obtain your lifeguards?

A. Some of them through a man by the name of McLaughlin who has been our swimming instructor there for years, and —

Q. Where is he from?

30 A. He is from Haddonfield, and he is the swimming instructor and has the swimming concession at Deal, Spring Lake and Allenhurst and I'm not sure whether he takes in somewhere else or not.

Q. He is the man that is really in charge of the lifeguards and assigning their duties and training them, isn't he?

A. No, I don't think he does the training.

40 Q. Well, you say you get them through him. You mean that he gets boys from colleges like Rutgers that have these certificates?

A. We get quite a lot of applications, then we get some through the Red Cross training school—there is one that came in today.

Q. Mostly you get young college boys from around New Jersey, Rutgers, Princeton?

A. That's right.

Q. Did I understand you to say that there is no lifeguard assigned to your swimming pool? 10

A. There is no lifeguard especially assigned to the swimming pool.

Q. Well, do you have a lifeguard on duty at the pool?

A. We have a pool and the ocean bathing and the lifeguards are on duty at all times for the ocean bathing.

Q. How many lifeguards do you have?

A. I beg your pardon? 20

Q. How many lifeguards do you have?

A. We have two.

Q. Altogether?

A. Right.

Q. And are they supposed to take care of the pool and the ocean?

A. No, Mr. McLaughlin has the swimming concession at the pool and he is the swimming instructor there, he also looks after the lifeguard conditions of the pool. In addition we have a physical director, a young lady that is a very good swimmer, that is qualified, and she has supervision of the pool too. 30

Q. Oh, I see, so that you have someone supervising the pool at all times?

A. Yes, that's right.

Q. And that is standard practice in the interests of safety, isn't it?

A. Well now, when you say "at all times" I would qualify that, I would say it isn't at all times. 40

Q. Well, generally.

A. They are around there a big part of the time, but their duties doesn't require them to be on guard at that pool at all times.

Q. What are the hours the pool is in operation?

A. Nine o'clock in the morning until six at night
10 up until the first of July, then from nine to seven.

Q. And it is their duty generally, aside from the times that they may be absent doing something else, to be on duty there at the pool?

A. That's true, that is part of their duty, yes.

Q. And are they the ones who supervise the operation of the pool?

A. No.

Q. Who is the one that does that?

A. It is under no special supervision except the
20 fact that the people that use the pool are supposed to use ordinary precautions.

Q. Who is it that you have there that is supposed to be able to go in the pool if they are taken ill in the water with cramps, for instance?

A. These ones that I have mentioned, beside the fact that we also have the bathhouse attendants that are right on the edge of the pool on both sides, they give an occasional glance, so they are there should
30 anything happen.

Q. Who is it that is supposed to police the place and stop people from running around and chasing one another and things of that sort?

A. We have a special policeman that is on duty on all the beach stations, he takes in the entire beachfront, we run from Allen Avenue up to the Deal line, we have the ocean bathing and the cabanas and the pool and the bath houses so that he circles around them all, this special officer circles
40 around and covers the whole station.

Father Henry J. Murphy—Direct

Q. You have mentioned three people that were on duty at the pool. Is there one of these three people usually there all the time?

A. No, there are times that they aren't any of them there.

Q. Well, generally is there one of them there all the time? 10

A. I should say generally there would be one.

Q. While swimming and diving is going on?

A. Yes.

Q. Do you have a diving board there?

A. We have two diving boards, one high and one low.

MR. LA BRECQUE: I think that's all.

20

FATHER HENRY J. MURPHY, called as a witness on behalf of the defendants and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. CARTON: 30

Q. Father, you are a Catholic Priest?

A. That's right.

Q. Where do you live, Father?

A. Jersey City.

Q. I direct your attention to the summer of 1940 and particularly July 30th, 1940. Were you present at the pool at the West End Casino when an accident occurred?

40

A. I was present.

Q. Who was there with you at that time, Father?

A. I had a group of young boys and girls of grammar school age. It was the graduating class of my school and I took them down there on an outing on that particular day.

10 Q. Approximately how many were there?

A. About thirty-five.

Q. About thirty-five?

A. That's correct.

Q. And was there any particular event going on there, or were you just taking them there to let them use the pool?

A. It was an ordinary day and we just went down for the outing.

20 Q. Where were you when the accident occurred, Father?

A. I was approximately fifteen feet from the board, sitting on the side lines.

Q. I see, and will you tell us in your own words just what you saw?

30 A. At the time my attention was attracted to this young boy he was about to dive, and he went to the end of the board and then he would go back. He did that two or three times and all the time he was attracting considerable attention, because people were watching for him to dive. Then finally he came out and took a back dive, as I remember. At that time I couldn't tell just what happened in the water, although when they took the boy out of the water I went over to the side of the pool and then I went out to the office where they took the young man, and I wondered whether he was seriously ill or not, and I wanted to know whether he was a Catholic boy or not. That was all I remember.

40 Q. And your purpose, I suppose, in going out

Father Henry J. Murphy—Direct

there was so that if he was one of your faith he would need certain religious rites if anything serious developed?

A. That's correct.

Q. Would you say this boy was clowning and —

MR. LA BRECQUE: I object to the characterization. 10

Q. Well, will you describe in such detail as you can, Father, just what he was doing?

A. I think the best way to tell you is that he just went out to the end of the board and he made one or two attempts and went back again and came out again and did the same thing and then finally he came out and took an ordinary back dive.

Q. Did that attract attention? 20

A. In the beginning the attention was attracted because he was jumping on the board.

Q. He was?

A. But I don't think there was any attention attracted after that.

Q. Now, Father, can you tell us whether or not he came in collision with anyone or whether he came close to any one or what happened as he hit the water?

A. From where I was sitting I couldn't tell because I didn't have a clear vision of the water itself, thus if anybody was near, I know it was close but I couldn't tell whether he had struck anybody or not. 30

MR. CARTON: That's all, Father, thank you.

CROSS-EXAMINATION.

BY MR. LA BRECQUE:

Q. Father, there were quite a number of boys and girls there that day besides your own group, weren't there?

A. Yes, I think there were.

Q. Ranging from nine years old, perhaps to about 14?

A. I suppose it would be that age, I know there were young boys and girls there.

Q. And they were having a good time?

A. That's right.

Q. Acting as boys and girls that age usually do?

A. That's right.

Q. Is that right?

A. Yes.

Q. And some of those boys and girls were running around, I suppose?

A. Yes, I presume they were.

Q. Some of them were running up and down that little platform that the diving board is on?

A. I wouldn't say that.

Q. There was a little ladder that went up to, was there not?

A. That's right.

Q. And they would go up and down that and were playing generally around the diving board, isn't that true?

A. No, I wouldn't say whether they were playing at the diving board, I didn't see that.

Q. Well now, generally, Father, all the young boys and girls that were there were having a good time?

A. That is correct.

Q. Is that right?

A. Yes.

Q. And this young boy that you say you recognized, who was the one that you saw dive from the board, you say that he went to the end of the board a couple of times?

A. That's right.

10

Q. And then went back?

A. That's correct.

Q. Did you look down in the water to see if there was anyone in the water that deterred him from jumping?

A. There were some people swimming at that time.

Q. I see, and of course you didn't know the reason why he went back, you couldn't tell from where you were, could you?

20

A. Well, I presumed that they are the ordinary actions of a boy, he would just go out to the end and go back.

Q. Just a normal eleven or twelve year old boy having fun, is that right?

A. That's correct.

Q. There was nothing unusual about that, you have had dealings with boys yourself.

A. I certainly have.

30

Q. There was nothing unusual about that, was there?

A. No, I don't think so.

Q. To you he acted as a normal boy would act?

A. That's right.

Q. Finally you did see him make a dive?

A. Yes, I did.

Q. And he made his dive and to make his dive he walked to the end of the board, didn't he, Father?

40

A. Correct, that's correct.

Q. And then he turned around to make what we call a back-jack, is that right?

A. That is correct.

Q. You couldn't see whether there was anyone under him at that time?

10 A. No, I couldn't really tell whether he had struck anybody or not, there were several swimming there, I couldn't tell that.

Q. How long after you saw this boy make his dive was it that you first became aware of the fact that something had happened in the water, can you tell me, approximately, Father?

A. Not long after, because —

Q. Five minutes?

20 A. No, it was immediately after that is when the boy came to the surface.

Q. Did you see him coming to the surface?

A. I did, yes.

Q. Was there anyone near him when he came to the surface?

A. I think there were, in fact one of the men that was swimming went after the boy.

Q. I see.

30 A. And then I went around to the side of the pool to ask whether he was seriously hurt or not.

Q. But everyone generally, all the boys and girls were having a good time that afternoon?

A. Oh yes.

MR. LA BRECQUE: I think that's all, Father.

ARTHUR FRANCIS HEALEY, called as a witness on behalf of the defendant and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. CARTON:

10

Q. Mr. Healey, you live where?

A. In Jersey City.

Q. Jersey City?

A. Yes.

Q. And you were down here with Father Murphy at the pool on the day in question?

A. I was one of the group, yes sir.

Q. Where were you, Mr. Healey, when this accident happened? 20

A. I was seated on the south side of the pool, in the pool facing south, with my feet in the water and I noticed this boy go out to the end of the diving board, he went out and came back, and he looked like he was showing off, to me.

MR. LA BRECQUE: I move to strike that speech out, if your Honor please.

30

THE COURT: Motion granted.

Q. Go ahead.

A. Well, he came out there and he gave me the impression that he was trying to attract attention.

MR. LA BRECQUE: I move to strike it.

THE COURT: Motion granted.

40

Q. Were his actions such as did attract attention?

10 A. Yes he did, and from my impression, why it appeared to me as though the boy didn't look down to see if there was anybody down below before he dove, and I kept on watching him as he dove, I thought he hit somebody, so I immediately dove
over after the man that he had hit, I thought he had hit, when I came to that man he seemed to swim away and the boy was taken out by somebody else and brought to the side of the pool.

MR. CARTON: That's all.

CROSS-EXAMINATION.

20 BY MR. LA BRECQUE:

Q. It looked as if the boy had struck somebody, did it?

A. Yes sir, it did.

Q. I see, and did it make a thud when the boy struck someone?

A. No.

Q. What was that?

A. No, other than it looked to me, he came so close to him.

30 Q. Have you had any experience with boys, Mr. Healey?

A. Yes sir.

Q. And with boys eleven and twelve years of age?

A. Yes sir.

Q. There was a crowd of boys there that day, wasn't there?

A. You mean from the other crowd?

Q. No, not only yours, but the regular boys that were there too, weren't there?

A. Yes sir.

Q. And a large number of them were swimming and diving, isn't that true?

A. That's right.

Q. And generally they were all having a good time, weren't they? 10

A. Yes sir.

Q. And some were attracting attention and some of them were more quiet?

A. That's right.

Q. You saw the boy go back and forth to the end of the board several times?

A. Yes sir.

Q. Three times I think you said. Did you notice whether there was anyone swimming in the water underneath? 20

A. Yes there were.

Q. On the previous times?

A. Yes sir.

Q. There were. So that wasn't the time to dive then, was it, with someone in the water underneath you?

A. No, it wouldn't be the time to dive.

Q. So the third time, the time that he made his dive, did you notice whether there was anyone underneath him when he started to make his dive? 30

A. Well yes, I did.

Q. And how many people were there?

A. I would say two or three swimmers.

Q. Right underneath him?

A. Yes sir.

Q. And you saw them there, did you?

A. Yes sir.

Q. Were they swimming, moving or standing still there?

A. No, they were in the deep part of the water, swimming.

Q. Swimming which way?

10 A. Both sides, one going north and one going south.

Q. Two people now, you are describing?

A. Two or three, yes sir.

Q. You are sure of two people, one going north

A. Yes sir.

Q. —and one going south?

A. Yes sir.

20 Q. When he did make his dive you say that it looked like to you like he hit one of them?

A. Yes sir.

Q. As the boy was walking out to the end of the board to make his forward dive which way was he looking?

A. You mean when he made the dive?

Q. Yes.

A. He made a back-jack-knife dive.

Q. Which way was he looking as he walked to the end of the board from the platform?

30 A. I couldn't tell you that.

Q. Didn't you see him?

A. Yes I did.

Q. You were watching him and you have already told us how he went back and forth. Now, when he was walking back and forth to the end of the board which way was he facing?

A. He was facing west.

Q. That is he was facing the end of the pool where the swimmers were generally, wasn't he?

A. That's right.

Q. He was looking in that direction, wasn't he?

A. Yes sir.

Q. Then he turned around before he made his back-jack, didn't he?

A. That's right.

Q. Was it when he was walking out towards the end that you noticed these people, or after he had turned around? 10

A. The people were there at all times, as far as I know.

Q. I want to know whoever you did notice. You said you saw two or three people, three people?

A. Yes.

Q. Now, did you notice them when he was walking out towards the end of the board, or did you notice them after he had turned around, when he was about to make his dive? 20

A. I noticed them before he went out, before he started to go out.

Q. Then they weren't swimming, they were more or less stationary there, weren't they?

A. It was very dangerous to dive at the time that he was —

MR. LA BRECQUE: Just a minute, Sir. I move to strike that out as not responsive. 30

THE COURT: Motion granted.

Q. Well, they weren't swimming, they were more or less stationary around the end of the board, is that what you mean?

A. No, there is ten foot of water there, they were swimming, and they were coming towards him from

two sides, and there may have been more than three people there.

Q. You have described three, one coming this way, one coming that way —

A. There were at least two or three people there, yes.

10 Q. Did you yell or anything at him?

A. No, but I was surprised when he dove, I couldn't understand.

Q. How close were you to him?

A. I would say twenty-five feet away.

Q. Were there any other boys diving?

A. Not on the high diving board.

Q. No other boys diving?

A. Not at that time, no sir.

20 Q. Didn't you say before that he was holding up the other boys that wanted to dive on the board, in your direct examination?

A. No, sir, no, sir.

Q. Didn't you say that everybody was looking at him because he was holding up the other boys that were waiting to dive?

A. No, sir.

MR. LA BRECQUE: I think that's all.

30

40

JOSEPH H. PALMER, called as a witness on behalf of the defendants and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

10

BY MR. CARTON:

Q. Mr. Palmer, you live where?

A. 911 Chancellor Avenue, Irvington.

Q. And your business is what?

A. I am manager of the Olympic Park Swimming Pool.

Q. And the Olympic Park Swimming Pool is located where?

A. At the end of Forty-third Street in Irvington, but it is also in Maplewood, the line of Maplewood goes through it, in other words, the pool itself is in both Townships. 20

Q. How long have you been manager of that pool?

A. Twenty-four years.

Q. In addition to that pool are you familiar with other swimming pools?

A. Yes sir.

Q. And are you familiar with the safety rules and precautions to be taken in the operation of swimming pools? 30

A. Yes, I think I could qualify.

Q. This pool that you refer to, the Olympic Park Pool, how large a pool is it?

A. The pool is two hundred foot wide and four hundred foot long, has a water capacity of four million gallons.

Q. And what can you tell us with relation to the

40

size of that pool in relation to other pools around the East?

10 A. It is the largest pool in the United States of its kind; there is a pool in California that is filled with ocean water and has over eighty thousand square feet of surface, but the Olympic Pool is a fresh water pool with a reconditioned outlet, or the water, in other words, is reconditioned twenty-four hours a day with the same treatment that your drinking water gets.

Q. How many people bathe in your pool?

A. In a day or take a year, or what?

Q. Well, for instance, in a day, what was your maximum in a day?

A. The maximum that I bathed in one day was 9,953.

20 Q. Almost ten thousand people?

A. I couldn't get the other 43 that day to make the record.

Q. How many people have you bathed there over the period of time you have been operating?

A. Around in the middle of last August we passed our four millionth swimmer.

Q. I show you a photograph and ask you if that is a photograph of the Olympic Park Pool of which you have been manager for twenty-four years?

30 A. Yes, that is the Park.

Q. And in that pool do you have diving boards?

A. Yes sir.

Q. How many?

A. Seven.

Q. And what are the heights of those boards?

A. We have them from three foot, five foot, seven foot, ten and eleven.

Q. And where are these boards located?

40 A. There is two in the center of the pool, what we

call the raft, which is 150 foot off of the deep end, or the center of the 200 foot width of the pool, which would be 100 feet from each side of the pool. There is a seven foot board and an eleven foot board.

Q. And is that raft that you have referred to shown in the center of this photograph (indicating)?

A. This would be this one here (indicating).

10

Q. The center of this photograph?

A. That's right, and that is in the center, or 100 feet from here to here to here and around 150 feet from the end of the pool.

Q. And that is located in the deep end of the pool, is it?

A. That's right.

Q. Does this photograph correctly show the pool? Does it correctly show the conditions existing in the pool?

20

A. At that time we had the two boards there (indicating) the difference is in this platform here, there is two boards instead of one, outside of that the pool is the same.

MR. CARTON: I offer it.

MR. LA BRECQUE: Objected to as immaterial and irrelevant.

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MR. CARTON: The purpose of my offer is to show the type of pool that this man is the manager of, to let the Jury and the Court see what his experience is in the operation of the pool and to show the manner of erection of the diving boards and where they are located.

THE COURT: Objection sustained.

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MR. CARTON: May I have an exception, please?

THE COURT: You may.

Q. Will you tell us whether or not, in your experience as the operator of the largest swimming pool, 10 fresh water pool in the Country and the largest one in the East, whether or not it is a customary practice in the operation of swimming pools to regulate the diving by having one of two things, first either a lifeguard or an attendant at the springboard to regulate when the people may go on and off the boards, or in the absence of that have the pool segregated or marked by lines or buoys immediately in front of the diving boards?

20 MR. LA BRECQUE: I object on two grounds, if your Honor please. First, because the witness has not been qualified; and secondly because counsel has not included in the question the testimony to which we have directed our complaint, namely, the lifeguard is not there only to regulate the diving, but to keep swimmers away when there is someone going off the diving board.

30 MR. CARTON: Well, I will add the latter to my question.

THE COURT: The question could be easily revised if that were the only objection, Mr. Carton. The Court does not feel that you have qualified Mr. Palmer thus far as an expert. He is an expert so far as his own pool is concerned and he can testify as to anything in connection with the management and the operation of the Olympic Pool, but you have not qualified him to testify as to any standard which 40

might be generally accepted in the swimming pool trade.

Q. Mr. Palmer, in addition to the operation of your own pool are you familiar with the operation of other swimming pools?

A. I am.

10

Q. And in connection with that and in your operation and management of this swimming pool have you talked to operators of other swimming pools, particularly in relation to the safety of operation?

A. Well, I dare say this to you, that in twenty-four years, being the operator of the biggest pool of the East, I have been consulted on construction, maintenance, reconditioning of water and so forth

Q. And of safety operation of pools?

20

A. And safety operations of pools is something that I really think I am qualified on because I might say this to you, that there has been no fatal accident in my —

MR. LA BRECQUE: Now, if your Honor please, we move to strike it and I ask your Honor to instruct the Jury to disregard it completely.

THE COURT: The Court will so do.

30

Q. And have you, in connection with such type of work, kept abreast of it by subscribing to and reading of magazines relating to swimming pools —

A. Yes sir.

Q. Wherein such safety operations are discussed and are the subject of discussion in the monthly issues of such magazines?

A. I have.

40

Q. And I show you what purports to be the October and November, 1945, issue of Beach and Pool and Swimming and ask you if you are familiar with these?

A. Yes, we subscribe to them.

10 Q. And do you take occasion to go through it and examine it in that connection?

A. That's right.

MR. CARTON: Now, if your Honor please, I think the man is qualified.

THE COURT: I will permit Mr. LaBrecque to cross-examine before I pass on Mr. Palmer's qualifications.

20 CROSS-EXAMINATION.

BY MR. LA BRECQUE:

Q. Do I understand you to say that you have operated just one pool, Mr. Palmer, this is the only pool that you have ever operated?

A. That's right.

Q. Did you have anything to do with the construction of the pool?

30 A. I did.

Q. So that the pool itself is your idea of how a pool should be constructed, isn't it?

A. In conjunction with the engineers on the pool, they drew the pool up and laid the plans for it.

Q. You didn't have anything to do then with laying it out or with prescribing the different things that should be put into the pool itself?

A. That's right. They used the plumbing and

heating structure, they installed all the infiltration and piping of the pool at my direction.

Q. And that had to do with bringing the water into the pool and purifying it, is that right?

A. That's right, and the installation of it.

Q. You were trained in the plumbing and heating game, were you?

10

A. That's right.

Q. After you built this pool you decided to take over the operation of it, is that it?

A. I wouldn't say that. From 1923 until 1930, 1934 I reconditioned the water and with an assistant looked after the running of the pool. From 1934 on I gave it full time.

Q. Do you hire the lifeguards?

A. I hire everything.

Q. You assign them their duties?

20

A. I do.

Q. Did I understand you to say that you are familiar with swimming pools generally in the Country and how they are conducted?

A. Certainly, I have been —well, I don't know just how you are meaning that. I feel that I can qualify as a man who has been in the pool business for twenty-four years, I have been in pools all in the East.

Q. Have you travelled extensively examining pools and knowing their safety precautions?

30

A. Not extensively, no.

Q. Have you attended conferences of swimming coaches and professional men having to do with swimming at or safety precautions in swimming pools, when that was being discussed?

A. What makes you think that comes under coaches?

Q. I don't know. Most of the men that were here

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are swimming coaches, they seemed to know about pools. Mr. Neuschaefer, Mr. Riley, Mr. Vogt, they are all swimming coaches, don't you think that they are —

- 10 A. I may say this to you,—as a pool operator—the swimming coaches and the A. A. U. and the American Red Cross come to us for the use of our facilities to hold their meets which they have amongst themselves, none of them have any pools of their own, except there might be a pool in a college like Rutgers, but some of the different schools don't have that size pool and they are the ones that come and use my pool.

Q. Who is the coach at Rutgers that has charge of the pool up there?

- A. Mr. Riley.
20 Q. What is his first name?

A. Jim.

Q. You know him very well, don't you?

A. Yes sir.

Q. He is known all over the Country?

A. As to what?

Q. As a man high in the profession.

A. I just don't agree with you as far as—well, let's skip it.

- 30 Q. I see, alright, you mean you don't agree with him?

A. I don't agree with you either.

Q. Have you examined the pools along the shore?

A. I have been in the pools along the shore, yes.

Q. Have you ever examined the Colony Surf Club pool?

A. I have seen the pool, I never just went in and examined it, I might say this to you, that nobody was there.

- 40 Q. Could you say to me when it was that you were in the Colony Surf pool?

A. No, I can't, it would have been after it closed, the season in my pool usually runs to about the seventh of September and it would be after that, and as a rule these pools are empty when I get down to them unless there is something special going on on the day that I would leave my pool to go down to that pool, which is very rare in the summer time. 10

Q. Did you ever examine the West End Casino pool when it was in operation in 1940 or thereabouts?

A. I saw it thereabouts.

Q. When?

A. I saw it thereabouts, possibly 1939, maybe 1941 was the last time I was there.

Q. When it was in operation?

A. Not in operation, it was empty.

Q. Did you ever examine the Colony Surf pool when it was in operation? 20

A. No, I didn't.

Q. Did you ever examine the Allenhurst Pool when it was in operation?

A. Allenhurst?

Q. That's right.

A. I have seen that in operation, and the one at Deal.

Q. How long ago?

A. Oh, possibly eight or nine years ago.

Q. You haven't seen them since? 30

A. Not that particular pool, no.

MR. LA BRECQUE: I submit, if your Honor please, the witness has not qualified.

BY THE COURT:

Q. Mr. Palmer, how many pools have you seen actually in operation?

A. Oh, to be honest, your Honor, I would say 40

fifty. I have been called in consultation in Trenton, Philadelphia and other pools, where I have had to make a quick trip to the pools where they have had trouble with the chlorination and the water conditions, to help them out.

10 Q. When you went there the pool would actually be in operation?

A. It would be in operation.

Q. And you saw how the management or the operator of the pool conducted it, is that right?

20 A. That's right, and I might say to you that if a place is running the data and plans and stuff which I have, maybe they are supplied to the beach pools and camp pools that have these problems and so forth that they send to the different pool operators and that way we get the data from each other and on any conferences we go to of the association we try to work out each other's problems and troubles and try to eliminate them.

Q. Yes. Well, I presume that as the operator of the biggest fresh water swimming pool in the Country that you have naturally kept yourself abreast of conditions in the trade?

A. We have got to.

30 Q. Particularly of such standards of safety as might spring out in the trade and become generally accepted in the trade?

A. That's right.

Q. So that you observed the standard of safety, did you, in these fifty different pools that you say you saw in operation?

A. Yes sir.

BY MR. LA BRECQUE:

40 Q. Your work with them has been mostly in connection with the purity of water, has it not?

A. I am the manager of the pool, I make the money, hire, fire, spend the man's money and I do everything but sign checks. I don't know what other answer I can give you.

Q. I mean when you examined these other pools, you say you are called into conference, you have been called for a conference principally with reference to the systems for bringing in and purifying the water? 10

A. That's right.

Q. And it is in connection with the water supply trouble that you have been concerned, is it not?

A. Yes sir, as far as consultation in these pools, Philadelphia, Trenton and so forth.

MR. LA BRECQUE: I submit I still feel the same way, your Honor. 20

THE COURT: Mr. Palmer has told the Court in answer to the Court's question that when he went to these fifty different pools he observed the standard of safety that had been maintained in these fifty different pools, and also as the operator of the largest fresh water swimming pool in the Country he has kept himself abreast of any standards that might be adopted or accepted by his trade.

BY THE COURT: 30

Q. By the way, Mr. Palmer, the pool that you referred to as the salt water pool, is that the Fleisshammer pool in San Francisco, is that it?

A. Yes sir.

Q. That is the only one in the Country bigger than yours?

A. That is a pool on a T shape, it has a larger 40

water surface, they have 80,000 square feet of surface.

10 Q. I see, so that you say unqualifiedly, do you not, if the Court understands your testimony correctly, that you have kept yourself abreast of standards of safety that the swimming pool trade have adopted, or have accepted?

A. I have got to say "yes" to that or the people who are my employers wouldn't have me there.

Q. It is either "yes" or "no".

A. It is "yes".

THE COURT: I will permit him to answer the question.

DIRECT EXAMINATION.

20

BY MR. CARTON (Resumed):

30 Q. Now, I asked you whether or not it is the standard practice in safety operation of swimming pools to either have a lifeguard in attendance to regulate swimmers and divers, particularly divers coming off the springboard, or in the absence of that to have lines segregating the portion of the pool that people coming off the springboard might use?

A. As far as any standard being set up in diving boards, diving areas, there has never been a standard because there has never been any kind of a standard set up for a safety standard. I could tell you in reference to diving boards, the height of it or the length of it to conform with the A. A. M. standard or any other collegiate diving rules.

40 Q. Well, to specifically answer my question "yes" or "no" is there such a standard as I have stated?

A. There is no such standard.

Q. In the operation of a swimming pool, is it or is it not a fact that some swimming pools have springboards not on the side of the pool but set on an island or some place out in the center of the pool?

A. Oh yes.

Q. And do you have such a type of springboard 10
in your pool?

A. Yes we have two boards out on the island.

Q. Is it the general practice to have a guard stationed to regulate the diving or to keep swimmers away from those diving?

A. We don't in our pool.

Q. When you say you don't in your pool that 20
wouldn't be a competent answer, Mr. Palmer, we are concerned here with the standard that is generally accepted in the trade. Now, is it the standard in the trade to have a guard, or any other person there, not necessarily a lifeguard, to have someone there regulating traffic, so to speak, so far as the divers and the swimmers are concerned to make sure that they won't come in contact with one another?

A. There is not.

CROSS-EXAMINATION.

30

BY MR. LA BRECQUE:

Q. Is it standard practice to have a lifeguard on duty at a swimming pool of this type?

A. We have anywhere from five to ten lifeguards in attendance all the time the pool is open.

Q. That is standard practice, isn't it?

A. H'm?

Q. It is standard practice, isn't it, to do that?

40

A. You say "standard practice". There is no standard in swimming pools.

Q. Well, I don't mean "standard" like you would run for a hundred yard course and say that is the standard course for Olympic competition, or you set your board ten feet above the water and say that is the standard height for diving, I mean standards of safety, things —

A. There is no standard.

Q. Just a moment, Sir. I mean standards of safety, things that you do for the protection of the public that is using your pool.

A. And I have got to come back at you and say there is and has never been any standard set to put one area for one guard to take care of.

Q. What do you have guards for in your pool?

20 A. We have guards in a pool for safety protection, to look after the welfare of our patrons.

Q. What do you mean by that?

A. I mean by that that if a man swimming has a cramp, he goes under, excitement, hysteria, epileptic fits, almost anything.

Q. In the interests of safety, in other words.

A. In the interest of safety and getting him out of the water.

30 Q. Who do you have there charged with the duty of seeing that bathers don't injure one another, by running into one another, racing up and down the pool, pushing people around?

MR. CARTON: I object to that because it embraces several things.

THE COURT: Unless you make it clear, Mr. LaBrecque, that the guard would be assigned specially to that duty, you see, the question would be

unfair, because naturally I presume that Mr. Palmer would have to answer that it would be the duty of a lifeguard, if he saw one patron injuring another, to interfere, and that is what he said his lifeguards were there for, the welfare of his patrons.

MR. LA BRECQUE: I understand your Honor's point, I am just thinking back now, to Mr. Riley's testimony, he described the various duties of a lifeguard. 10

Q. Whose duty is it, Sir, to maintain order in the premises, in the pool, I mean?

A. We have three special policemen.

Q. Do they swim?

A. They can.

Q. Are they in bathing suits? 20

A. No, they are in uniform.

Q. Who is it that is supposed to swim in the pool and maintain order in the pool itself?

A. The lifeguards are stationed so many feet apart around the pool. There is a Captain appointed in the beginning of the season whose duty it is to take charge of the lifeguards, we have six, eight, ten lifeguards. The Captain, of course, is the man that sees that the lifeguards are in their places, maintain their places. 30

Q. Every well run pool has a lifeguard assigned to it, doesn't it?

A. Well, I would say that every well run pool should have a lifeguard.

THE COURT: They should have somebody there?

THE WITNESS: Qualified to —

THE COURT: Who can save a person in distress?

THE WITNESS: That's right.

Q. And someone who has some authority to go in the pool and to save a person in distress?

10 A. That's right.

Q. Or to do whatever other things are necessary for safety, isn't that right?

A. That's right.

Q. Now, you have mentioned that you have a couple of your boards at the island?

A. I didn't say we had them on an island.

Q. Well, an island in the middle of the pool.

A. I said the diving boards were on the island.

Q. That's what I said, "a couple of boards" I said.

20 A. You said "guards".

Q. Boards, I said, diving boards. Do you know of any other pool along the shore that has such a situation?

A. The boards in the center of the pool?

Q. That's right.

A. Along the shore?

Q. Yes.

30 THE COURT: I don't suppose there is a pool along the shore big enough.

A. I don't believe they have one along the shore big enough to dive off the center.

Q. Your lifeguards are stationed how far apart around the pool?

A. Well, I would have to go across the water to really measure that, because if I went from one guard around the pool to the next guard —

Q. Approximately?

A. I would say a hundred feet.

Q. They are a hundred feet apart?

A. Yes sir, they all can get to a point of 100 feet away from each other.

Q. And of course some of the diving boards are along the edge of the pool, is that right?

A. That's right.

Q. Where the guards are stationed?

A. Some of them.

Q. And then there are guards on the sides opposite the center of the pool where your two extra boards are, aren't they?

A. That's right.

Q. So that if an accident happened by the diving boards the guard nearest would be the one to go there and take charge, is that right?

A. I grant you that.

Q. And when people are swimming and diving at the same time, especially children, and your guard is on duty at the diving board or near it wouldn't it be his duty, in the event that there was liable to be a collision, to warn the diver or the swimmer or to give some outcry or notice of what he could see there?

A. Well, my experience is this: That we don't, we haven't watched the swimmer, it is the diver that has got to watch the water.

Q. I see, do you mean to say that if your man is on duty at or near the diving board and saw that a collision was liable to take place between two patrons, a diver and a swimmer, that it wouldn't be his duty to give some notice or outcry that would stop it?

A. It is very well from the way you are putting it, but is it possible to warn a man in the snap of a second?

Q. I'm asking you, wouldn't it be his duty if he could do it?

A. If he could do it, yes, if he could do it to prevent an accident.

Q. Certainly, and if he could see it in time to—
10 before the diver went off the board he could prevent an accident, couldn't he?

MR. CARTON: Well, if your Honor please, it seems to me that is speculative.

THE COURT: Yes. You see, Mr. LaBrecque, we must keep in mind that in this case the issue before the Jury is whether or not there was any departure or deviation by the defendant company from the standard of safety which was recognized or accepted
20 in the swimming pool profession or trade.

MR. LA BRECQUE: I think I have covered that sufficiently.

RE-DIRECT EXAMINATION.

BY MR. CARTON:

Q. Do you have any lifeguard stationed at these
30 two high springboards in the island?

A. No, we don't.

Q. And are the lifeguards stationed around the pool stationed immediately alongside of the springboards?

A. Yes—not on the high boards, I would say that the low boards, which are anywheres from three to four feet above the water, well, they would be nearer to them than they would be to the high boards. In other words, the stands the lifeguards
40

sit on are we will say here, maybe the next board is twenty-five feet, and the next is seventy-five feet around the edge of the pool, that is the low boards.

Q. You said something about six and ten lifeguards. Do you have two different numbers there?

A. Well, I will say this to you. Prior to the War, when we had qualified lifeguards, or college men who had passed the American Red Cross School of Acquatics and were given instructor's certificates, and were qualified to be lifeguards, we maintained five or six lifeguards. Then, due to the War, when our eighteen, nineteen and twenty year old boys were to War, we had to go to the sixteen and seventeen year olds who weren't graduates of a school for lifeguards or the American Red Cross course and we couldn't get someone that could handle himself or knew how to handle someone that is in the water, so we had to have ten instead of six. 10 20

Q. In other words, they weren't as qualified as the older ones?

A. They weren't as qualified, the younger men, so it behooved us to have more than to have a few.

MR. CARTON: That is all.

— 30
 LANSDELL ANDERSON, called as a witness on behalf of the defendant and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. CARTON:

Q. Mr. Anderson, you live where?

A. Middletown, New Jersey. 40

Q. Your business at the present time is what?

A. Photographer and writer.

Q. For whom are you a photographer?

A. Field and Stream and one of the McGraw-Hill publications.

Q. Field and Stream is a national magazine?

10 A. That's right.

Q. Directing your attention to on or about 1940 what was your business?

A. I was with the Newark Evening News as the sport photographer, in fact I was the only sport photographer there for a period.

Q. How long were you with the Newark Evening News?

A. A couple of years.

Q. Have you had any experience in swimming?

20 A. Yes, I have had a lot of experience in swimming.

Q. Did you ever do any diving?

A. I would say a great deal.

Q. Were you at one time the Inter-Scholastic Fancy Diving Champion?

A. That's right.

Q. And were you at one time a member of and the Captain of the Princeton Swimming Team?

30 A. I was Captain of the Freshman Team and in later years I was a member of the Varsity Team.

Q. Did you compete in Inter-Collegiate diving?

A. I did.

Q. During the summer-time have you competed in the various pools up and down the New Jersey Shore?

A. Quite a few.

Q. On or about 1940, in connection with your work as a sports photographer for the Newark Even-

ing News did you have occasion to visit various pools in and about New Jersey?

A. I was in several pools, or a large number of pools at that time.

Q. And approximately how many pools are you familiar with and the operation of during about that time?

10

A. Can I break that up into two answers?

Q. Surely, yes.

A. When you say "familiar with the operation" I am talking now as just an observer who happens to be in a pool. Is that correct?

Q. Yes.

A. Well, I know the number of pools that I have been in would exceed twenty, I wouldn't want to say just how many, but I have been in an awful lot of pools up and down the Atlantic Coast.

20

Q. Did you ever teach swimming?

A. Yes, I did teach swimming.

Q. Where did you teach swimming?

A. At the Avon pool, Avon, New Jersey.

Q. Did you ever act as lifeguard when you were in College?

A. I did act as a lifeguard, not in a pool, strictly.

Q. Whereabouts did you act as a lifeguard?

A. Well, I was a lifeguard at Rye, New York, I was a lifeguard at Avon, I was swimming instructor also, besides being a lifeguard, and at the Eighth Avenue pool Asbury Park it was sort of a keeping in shape, training, during the summer.

30

Q. In connection with your business as sports photographer of the Newark News did you have occasion to go to various pools and take photographs?

A. I took photographs in pools of, well, twenty cities when there would be some girl or celebrity

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that would come in and we would want to get their picture.

10 Q. And as such you have become familiar with and know what are the generally accepted standards of practice as to safety of divers, taking into consideration your experience and years of observation, as you said, as a newspaper photographer and sports writer?

MR. LA BRECQUE: Objected to on the ground that the witness is not qualified to state what the standards are.

BY THE COURT:

20 Q. Let us see if you are qualified. When you were going around to the various pools either as a diver and swimmer yourself or as a teacher or in your profession as a newspaper photographer did you make observation in the different pools as to the standard of safety which had been adopted by each pool?

A. You would have to say whether I was qualified or not. I can't answer that with a "yes" or "no", I can say that certainly —

30 Q. You give me the answer and I can tell whether you are qualified if you will answer my question.

A. Alright.

Q. In other words what I want to know is whether you made any observation in the various pools that you have been in whether in New Jersey or in Florida or any part of the Country, it doesn't make any difference so long as it is a small pool.

A. Right.

40 Q. Whether you observed the standard of safety in the particular pools that you were in, whether

you were there at that pool as a swimmer, as a diver, as a lifeguard, as a teaching instructor, or as a newspaper photographer, that doesn't make any difference, just so long as you did make the proper observation.

A. I most certainly did, I made those observations, I would be in this pool or in that pool. 10

Q. Being interested in swimming and in swimming pools did you keep abreast of any standard of safety that might be adopted or accepted in the trade?

A. I wouldn't say that I have made it my business to keep abreast of anything of that nature.

Q. Except by observation?

A. Except as I have seen it up to the War—we are talking about, I believe it was mentioned, 1940—up to the beginning of the war at least. 20

THE COURT: I think, Mr. La Brecque, that this witness has qualified. He has been for many years interested in swimming and in diving, he has taught swimming, he has been a lifeguard, and as a newspaper man he has gone around the various pools and taken pictures of the various swimming meets and he says that in the different pools that he has visited in all of these activities he has observed the standard of safety which was adopted by the different pools. 30

MR. LA BRECQUE: May I just ask one question that might clarify one thing?

BY MR. LA BRECQUE:

Q. When did you cease active competition, doing your actual swimming in competitions?

A. Actual competition, I would say 1929, thirty.

10 Q. And when did you cease your actual swimming activities as a teacher or as a coach, I forget which you said?

A. Not at that time, before that.

Q. I see.

A. No, I am wrong there, no, it would be later than that as a coach.

Q. 1932?

20 A. It would be later than that, I am not positive of that date but I would say it would go up to 1934 or five.

Q. Then you went into, you got into the sports game in the newspaper profession, is that it?

A. No. I did later, though.

Q. So that your activities after 1934 and five, your connection with swimming pools has been in connection with your activity in sports for Field and Stream and McGraw-Hill and your newspaper work?

30 A. I said particularly for the Newark Evening News I did newspaper work, and I also have three children, consequently we all do quite a bit of swimming, and I live in Florida in the winter time so I can tell you a little about the swimming pools around there.

Q. You can tell us what you see when you happen to be there.

A. As an observer.

40 Q. You said you can't tell us the standard of safety of operating pools in 1940, can you?

A. I don't know this pool, only the pools I have been in, I have seen what they did there.

Q. At the particular time you were there?

A. At that pool.

Q. But you are not familiar with the general standards of safety that are carried on by individuals or by operators of well regulated pools? 10

A. I suppose they are well regulated pools and I have observed what has been done there when I have been in those pools.

Q. Your knowledge is that of a bystander who doesn't operate a pool, seeing what is going on in there under your eyes? Just the average person observing what is going on?

A. I'm not the usual average person because I have been a swimming instructor — 20

THE COURT: I think, without any further loss of time, the Court is absolutely justified in qualifying Mr. Anderson as an expert and will permit Mr. Carton to examine him along those lines and allow you an exception.

DIRECT EXAMINATION.

BY MR. CARTON (resumed): 30

Q. Mr. Anderson, can you tell us whether or not it has been your observation, covering the field of experience that you have had, whether or not there is any safety rule in the operation of swimming pools and particularly as to swimmers and divers, whether it requires one of two things, first to have an attendant or a lifeguard stationed in the vicinity of the diving board to warn the divers or swimmers when they may go in and out of the water, and sec- 40

only, in the absence of that to have the pool marked off by means of ropes, buoys, corks or otherwise?

A. That is not standard practice.

10 MR. LA BRECQUE: That is the question I was objecting to and your Honor has allowed me an exception to that?

THE COURT: Yes.

THE WITNESS: I said that is not a practice that I have ever seen.

Q. Have you ever seen any such practice as that?

20 A. No, I have never seen a traffic cop on a high board or low board, I have never seen an area roped off, because the rope wouldn't be any good because the man diving off the board would go under the rope and the rope would have no effect, except on a swimmer who swam on the top of the water.

Q. Are you familiar with the Spring Lake Pool?

A. I am.

Q. Have you been in and out of that pool?

A. I have.

Q. Over what years?

30 A. I have been in that pool very often, when they had their largest crowd there, Saturdays and Sundays.

Q. Have you also been in and out of the Monmouth Beach Pool?

A. I have been in and out of the Monmouth Beach Pool also.

Q. Have you been in and out of the Allenhurst Pool?

A. I have.

40 Q. It has been testified that in so far as the Spring

Lake Pool and Allenhurst Pool are concerned that one of those two suggested rules which I have just referred to has been in effect. Have you ever seen any such rule in effect in either one of those two pools?

A. I have not.

10

CROSS-EXAMINATION.

BY MR. LA BRECQUE:

Q. Did you ever see the Spring Lake pool in operation without a lifeguard in attendance?

A. I wouldn't say that every minute I have been in that pool that a lifeguard has been in attendance because if I recall the man who taught swimming there was always down at the shallow end teaching swimming to somebody.

20

Q. In the same pool?

A. From one end to the other is a darned good shove.

Q. Did you ever see the Monmouth Beach pool without someone in attendance there?

A. I would say "yes." I don't recall always being impressed by having somebody around watching things that closely. They have locker boys there.

Q. Do you say that you can tell us the standards followed by well regulated pools in 1940 with reference to lifeguards? Do you say that you can tell us those standards?

30

A. I can tell you whether pools that I have been in have had a lifeguard that has been consistently stationed at the pool to watch the pool, or whether there has been anyone in there at all at the time.

Q. Is there generally a lifeguard stationed at the Monmouth Beach pool?

40

A. No, there generally isn't. When Sullivan was there quite a number of years there wasn't one there all the time stationed right in the middle of that pool.

Q. Isn't it standard practice in pools to have a guard in attendance?

10 A. No, I don't think it is, and this pool didn't have one which you mentioned a minute ago.

Q. The Spring Lake Pool didn't have one?

A. I said the Spring Lake pool didn't have one there at all times.

Q. What other pools have you examined besides Spring Lake, Monmouth Beach and Avon?

A. Well, I was a member of the Allenhurst Pool for a good number of years.

Q. Is there a lifeguard there in attendance?

20 A. No, there was no lifeguard there in attendance.

Q. You never saw one there?

A. I have seen lifeguards in that pool, I have seen the beach guards walk through, I have seen the instructor there, he might be in the pool or he might be giving a lesson in the tent on a table.

Q. In the pool?

30 A. No, in a tent where he couldn't see the pool. I haven't seen a lifeguard stationed there, and also the pool at Eighth Avenue, I also mentioned Asbury Park at Eighth Avenue.

Q. You say you never saw a lifeguard at Eighth Avenue?

A. I worked there for quite a while but there was none there.

Q. What was your job there?

A. Teaching swimming.

40 Q. There was no lifeguard there at the Eighth Avenue Pool?

A. There was no lifeguard then at the Eighth Avenue Pool.

Q. Didn't they employ a lifeguard at the Eighth Avenue Pool for the very purpose of taking care of the people?

A. I told you that I was a swimming instructor there and at that time there was no guard in that pool to take care of the pool. 10

Q. When was that?

A. That was up until around 1930, somewhere in there, I'm not sure of that, I would have to check on that exactly.

Q. We are talking about 1940, have you been in there around 1940?

A. Just a minute, I didn't see that pool in 1940, I have been in that pool as an observer since then, I told you that I worked in that pool, you asked me if there was any guard there, I said "no." 20

Q. Have you been in the Eighth Avenue Pool in 1940?

A. No, I would say I was in there after 1935.

Q. Were you there in 1940?

A. That's a difficult one to answer, I wouldn't want to say whether I was or wasn't there in 1940. I will say that in 1940 as in 1939 and up until the War I generally had a swim there at least five or six times in the year, and my favorite pool, naturally, was Eighth Avenue, and I generally didn't go through Asbury Park with my youngsters without having a swim there, it isn't likely I did. 30

Q. Isn't it true that in 1940 and right up to the present time there is a lifeguard employed by the City or the concessionaire there who is on duty at all times?

A. I don't know the person.

Q. You say the last time you were there,—was 40

there any lifeguard there the last time you were there? When was the last time you were there?

A. I told you it would be around that year.

Q. Wasn't there a lifeguard on duty there then?

10 A. I don't think there was a definite lifeguard on duty then, I think there was a swimming instructor there on duty, teaching swimming at that time, but I'm not positive he was definitely a lifeguard.

Q. Isn't it the practice to allow the lifeguards to teach swimming?

A. I told you they do, naturally they take an interest in the case they have, certainly, but they are in a tent outside or out to lunch, they aren't in the pool.

20 Q. There is no tent on Eighth Avenue?

A. No, but there is at Allenhurst.

Q. So whoever is in the tent isn't performing his duties watching the pool?

A. No, but how can he perform his duties as an instructor and watch the pool, too?

MR. LA BRECQUE: I think that's all.

30 ORLO JENKINSON, called as a witness on behalf of the defendant and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. CARTON:

Q. Mr. Jenkinson, you live where?

40 A. Point Pleasant, 820 Oak Terrace.

Q. Are you the proprietor of the Jenkinson's Pool and Pavilion in Point Pleasant?

A. That's right.

Q. And you have been for how long?

A. Well, since it was built in 1928.

Q. Have you operated the pool since that time?

A. Yes sir.

10

Q. Are you familiar with the operation of other pools in and about Monmouth County and Ocean County area?

A. To quite a degree, yes sir.

Q. Can you tell us whether or not, being a pool operator yourself since 1928, whether or not you having seen the operation of other pools and talked to people that operated other pools you know generally what the safety rules are for safety in swimming pools?

20

A. I believe I do, Sir.

Q. Can you tell us whether or not there is any rule of safety in the operation of swimming pools that requires one of two things, either a man to act as a guard to warn divers when they may or may not go off the springboards, or in the absence of that to have a certain area of the pool roped off to prevent swimmers from coming into that area?

A. They don't.

30

MR. CARTON: That's all.

CROSS-EXAMINATION.

BY MR. LA BRECQUE:

Q. What pools have you managed in addition to your own?

A. None.

40

Q. Do you belong to any association of pool owners?

A. The National Association of Amusement Parks, Beaches and Pools.

Q. What kind of an organization is that, a group that own and manage pools?

10 A. Amusement Parks and pools, it is National, over the whole Country.

Q. Are there any members of that association around Monmouth County?

A. Why yes, there are, they may not have pools but you see, that takes in Amusement Parks, beaches and concessionaires.

Q. It includes owners of pools and in addition to that what other type of people does it include?

20 A. Park people, people that have amusement parks, run restaurants, amusement concessions, bathing concessions, and of course all things that you would find in amusement parks.

Q. And that association is like a national association or club?

A. That's right.

Q. You have had that association for how long?

A. I believe it has been organized for over twenty-five years, I have attended it off and on since 1929.

30 Q. You say, Mr. Jenkinson, that you are familiar with the standard practices followed by the operators of pools in connection with safety?

A. I believe I am, I believe so, yes sir.

Q. And isn't one of the standard practices that there shall be on duty at the pools a lifeguard?

A. Well, after a fashion, yes. We use a lifeguard but the lifeguard is also the swimming instructor, our pool being not so large. We don't have another

lifeguard in the pool while he or she might be instructing, we allow them to be the lifeguard at the same time and we have never had any trouble in the years of operation we have had.

Q. You have a very small pool so that the swimmers are close to the lifeguard practically all the time, aren't they?

10

A. Our pool is forty by one-twenty.

Q. So that the lifeguard is permitted to give lessons on the side and keep the money?

A. Not "permitted" we want him or her to do it.

Q. That is part of his contract, his duty, isn't it?

A. Yes.

Q. So that what you do is put in a swimming instructor and lifeguard in one who does the whole job for a flat fee?

20

A. Well, in and out of the pool.

Q. When he is teaching swimming he is where?

A. They are in or out of the water, as the case may be.

Q. But the pool is in his charge and in his supervision?

A. Well, to a degree, yes.

Q. Unless you are there, you are over him, I suppose, then you take charge?

A. I have a manager too.

30

Q. You have a manager over him too?

A. Yes sir, he is in and out.

Q. Who is the person in charge of rescuing people, policing the place and seeing that the bathers are not disorderly?

A. We try to do it with everybody that works for us, to a degree.

Q. Who is the man that goes in the water or goes on the diving board or wherever there may be any disorderly conduct committed and warns them?

40

MR. CARTON: I object to that as immaterial, somebody that might be guilty of disorderly conduct.

THE COURT: Sustained.

10 Q. What are the duties of your lifeguard that are required?

A. Well, we try to have them give the lessons, and after they are through with the lessons, of course, anybody giving lessons can't help but hear somebody cry out, if there were any trouble he would hear it.

Q. Well, is it a part of the duty of the lifeguard to give lessons?

A. Both, I would say.

20 Q. Well, his first duty is to guard life, isn't it, safety?

A. That would be true.

Q. Safety in the pool, the giving of lessons would be something on the side.

A. I suppose when he would be giving lessons his whole attention wouldn't be to the life-saving, but we have enough people in and out of the pool that if a bather were in trouble or in any danger or if anything should happen we would take care of it right away.

30

THE COURT: The locker boys can swim too?

THE WITNESS: Oh yes.

Q. Do you have somebody watching all the time?

A. Not watching but several employees around.

Q. Of course the fact that a lifeguard can teach

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swimming is an added attraction to your pool, it brings more people there, isn't it?

A. Well, I suppose that is so.

MR. LA BRECQUE: I think that's all.

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ROBERT M. HOLMES, called as a witness on behalf of the defendant and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. CARTON:

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Q. Mr. Holmes, you are Mayor of Avon?

A. I am.

Q. And you have been connected with the municipal council there for many years?

A. I have.

Q. And as Mayor are you familiar with the operation of the beachfront in Avon and particularly the Avon Swimming Pool?

A. Yes, they have come under my personal jurisdiction. 30

Q. How long have you been familiar with the operation of the Avon swimming pool?

A. Since 1930, one year before I took the oath as Mayor. The first time I was granted by the Borough the right to run the swimming events in the summer and since then officially.

Q. It has been testified that at the Avon Pool that one of two things is in effect there; that in the vi-

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10 cinity of the diving boards there is either a life-guard or an attendant there to regulate diving, when people may go on or off the springboard, or in the absence of that a line or rope or something to segregate that certain area for divers and keep swimmers away. Are either one of those practices in effect at the Avon Pool or have they been at any time?

MR. LA BRECQUE: I object, if your Honor please, on the ground that the witness is not qualified and on the ground that the question is improper because no one has testified as yet that there is a separation between the swimmers and divers at the Avon Pool.

20 (The question was read by the Reporter.)

THE COURT: I think Mr. Riley testified there was someone in charge regulating diving, I don't think he said anything about the line.

MR. CARTON: No, I don't think he did either, but I said "two things" I want to make my question all-inclusive.

30 THE COURT: I think that in the interests of accuracy you should eliminate that part of your question pertaining to any sequestered area.

MR. CARTON: I might state also that I am not calling this witness as an expert or qualified him on the standards.

40 Q. Mayor, will you tell us whether or not there has ever been in effect at the Avon Pool a guard

or an attendant regulating the diving off the diving boards, saying when people may or may not go off the board?

A. No sir.

CROSS-EXAMINATION.

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BY MR. LA BRECQUE:

Q. Mayor, how many lifeguards do you have at the pool?

A. None.

Q. You have no lifeguard at all?

A. No lifeguards at the pool.

Q. You have never had a lifeguard?

A. We have never had a lifeguard at the pool, no sir.

20

Q. Do you have anyone in attendance there?

A. There is a girl there on her own, she is a swimming instructor on a fee basis but she is there on her own hours, has nothing to do with saving life, just giving instruction, for which she gets 75% of the fee taken in.

Q. Who have you in charge, Mayor, to rescue people in the event they are taken with cramps?

A. The locker boys are high school boys of working age, who have working papers, and there are three locker boys.

30

THE COURT: They are all swimmers, are they?

THE WITNESS: They are all swimmers, they must be swimmers, yes.

Q. They are not qualified life-saving men?

A. They aren't necessarily, they don't have to take a test, no.

40

Q. And they haven't taken the test then?

A. But they must be qualified by the instructor from High School that they are capable of swimming.

Q. That is all the protection you have at that pool?

A. That's all the protection we have.

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MR. LA BRECQUE: I see, I think that is all.

ELIZA E. HOEVEN, called as a witness on behalf of the defendant and being first duly sworn, testified as follows:

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DIRECT EXAMINATION.

BY MR. CARTON:

Q. Mrs. Hoeven, you are the sister of Mrs. Levy who was the owner of the West End Casino Pool?

A. I am.

Q. And in the year of 1940 were you connected with the pool?

30

A. I was.

Q. And what was your capacity?

A. Treasurer.

Q. And as such were you there daily?

A. I was.

Q. Were you in charge of the pool?

A. I was in charge mostly of everything around.

Q. Will you tell us how long you operated the Pool?

40

A. From 1933.

Q. Until when?

A. 1942, including 1942.

Q. Now, Mrs. Hoeven, will you tell us first what precautions you took, if any, for the protection of bathers in the pool?

A. Well, Mr. Neuschaefer was the swimming master and he was also to take care of the pools, and we had three, and the locker boys, we had six, three on each side of the pool, and of course they were always on the look-out in case anything happened. 10

Q. How old were those six locker boys?

A. Why, I should say from seventeen to eighteen.

Q. Seventeen to eighteen?

A. Yes.

Q. And were these boys swimmers?

A. Yes.

Q. Was one of the requirements of your locker boys that they had to be a capable swimmer? 20

A. Oh yes, they were all very capable swimmers.

Q. And you had three of these locker boys on each side?

A. Three on each side.

Q. As well as Mr. Neuschaefer, is that correct?

A. Yes.

Q. Were you there the day that this accident happened?

A. I was. 30

Q. Did you see the accident?

A. I did not.

Q. And when the accident was called to your attention what did you do?

A. I immediately called Doctor Feinberg and he came almost immediately, just as quickly as he could.

Q. Then was the ambulance also called?

A. Oh yes, the ambulance took the boy to the hospital.

Q. It came to West End Casino and took him to the hospital?

A. Yes.

10 CROSS-EXAMINATION.

BY MR. LA BRECQUE:

Q. Do you have any lifeguards at all at the West End Casino?

A. Yes, we had two lifeguards.

Q. When it was rough in the ocean they were in attendance at the pools, weren't they?

A. They would come up because we closed the
20 ocean to bathers in very bad weather.

Q. Then they would be in attendance at the pool?

A. Yes, yes, they put their time in there because they had to put their time in.

Q. What were their duties?

A. The same as their duties would be on the beach.

Q. What was that?

A. To watch the pools and the bathers, whoever was in the pool.

30 Q. To warn them away from forbidden area or dangerous areas?

A. No, just watch the pool, naturally, and the people that were bathing and see that they wouldn't be injured.

Q. That's right, and on the beach they warned people away from dangerous areas?

A. Oh yes.

Q. I suppose they did the same in the pool?

A. Kept them in beyond the ropes on the beach.

Q. In general their duty was for the safety of the people who were using your place?

A. Yes.

Q. You sell memberships to different people?

A. Yes we do, it is a club membership.

Q. And you invited them to come in there and make use of what you had to offer, is that right? 10

A. Yes.

Q. You say that Mr. Neuschaefer was supposed to be a lifeguard also?

A. No, Mr. Neuschaefer was the swimming master and also had charge of the pools, everything that took place in the pools, the water sports and everything that pertained to the pools in any way, shape or form was what he had charge of.

Q. You didn't hire a lifeguard for the pool that year, did you, 1940? 20

A. No, we never hired a lifeguard for the pool particularly.

Q. You never assigned any lifeguard to the pool except when you didn't have any duties for them outside, did you?

A. Because they filled in the day there.

Q. That's what I mean, but aside from that there was never a lifeguard assigned to the pool in 1940, was there? 30

A. No.

Q. Mr. Neuschaefer, you say, was supposed to be the lifeguard in charge of the pool?

A. He was supposed to take care of everything that went on in the pools.

Q. What do you mean by that?

A. Watch everything that went on, it didn't make any difference what it was, swimmers and divers and so forth. 40

Q. There are three pools, aren't there?

A. Yes.

Q. Do you mean to say that he didn't have any more than just that single man who was supposed to take care of the swimmers in three different pools?

10 A. The locker boys who we had on each side looked all the time and watched anything that might happen.

Q. Who hired them?

A. I hired the locker boys.

Q. Are you an expert swimmer?

A. No, I am not.

Q. What qualifications do you have to judge the ability of the locker boys to save life?

20 A. Well, I used to watch them swim each night, the boys were always allowed to go in the water after the day was over and they were every one of them very good swimmers.

Q. You had a good many of your guests that were very good swimmers too, didn't you?

A. Yes.

Q. But none of them were qualified life-saving people. None of these locker boys had a life-saving certificate?

A. Well, I don't think so.

30 Q. And they ordinarily wear their street clothes, don't they?

A. They have a uniform.

Q. They have a uniform on?

A. Yes.

Q. They weren't ready to go in the water, were they?

A. Oh yes they were, they were very alert.

Q. You mean if they took their uniform off then they would have gone in the water?

40

A. Well, they would have done their job.

Q. You were in charge up to 1942 did I understand you to say?

A. From 1933 to 1942.

Q. Now, Mrs. Hoeven, who was the one that decided that there wasn't going to be any lifeguard in this pool, was it you or Mr. Neuschaefer? 10

A. Why nobody decided that there wasn't going to be a lifeguard. Mr. Neuschaefer, that was his job, to take care of the pools, he was an expert swimmer and diver and I certainly figured he knew how to save anybody if there was any trouble.

Q. Who did you depend on to get the lifeguards, decide what lifeguards to hire?

A. Mr. Neuschaefer got them from the college.

Q. Do you know who the lifeguards were that year? 20

A. I don't, off-hand.

Q. Weren't they two young men from Rutgers?

A. Trenton.

Q. Trenton?

A. Yes.

Q. I see.

A. I am sure they were from Trenton, Mr. Neuschaefer was the one in charge of that, I think he took care of all that, Mr. Neuschaefer did.

Q. You say he was the man in charge? 30

A. I do, I left that to Mr. Neuschaefer, all the hiring.

Q. And didn't Mr. Neuschaefer recommend to you when the arrangements were made that there should be a lifeguard on this pool?

A. He didn't.

MR. CARTON: I object to that question as immaterial.

THE COURT: Sustained.

THE WITNESS: He did not.

Q. What time did this accident occur, just approximately?

10 A. Late in the afternoon, around three, three-thirty, between three and four o'clock, just the time I don't know.

Q. And the locker boys, what are their duties, where do they work?

A. The locker boys take care of the pool after the day is over and the lockers. They have a key room that people go to to get their key to go to their bath house.

Q. You have one key room for all the bath houses?

20 A. They get the keys, these people come in and get their keys and go to the bath house.

Q. Who is it that gives out the keys?

A. The attendant in the key room.

Q. Who is that?

A. I don't just know who it was at that time.

Q. What about the locker boys, where are the lockers that they looked after, that they worked on?

A. Well, they are in the vicinity of the pools.

30 Q. Do you have bath houses, covered bath houses or closed bath houses?

A. Yes, covered.

Q. Is that where the lockers are that the locker boys work on?

A. They don't work in there.

Q. Are there any lockers outside?

A. No, the lockers are all in the house.

Q. They are all inside, under cover?

A. They are all inside, naturally.

Q. And the locker boys duty is probably to furnish soap and towels and things?

A. No, we use no soap.

Q. All right, whether they furnish soap or not, they furnish the facilities for cleaning you, for drying you off afterwards, don't they?

A. No, that is gotten in the key room when they get there. 10

Q. What do the locker boys do in the locker?

A. They don't do anything in the lockers until the day is over. When the day is over they go through the lockers, collect the soiled towels, and then they are all put together and given to the laundry.

Q. Then they don't go to work until the day is over?

A. No, they are on the alert all day.

Q. Aren't the people calling for towels all day long? 20

A. Occasionally, yes, they get them when they come in.

Q. Every time someone goes in and out of the water there is need for a boy, isn't there?

A. Not necessarily.

Q. Generally, not all the time, but generally the locker boys have duties to perform regarding the needs of the bathers?

A. Yes. 30

Q. What time do they go on duty?

A. Eight o'clock in the morning.

Q. Until you close at six?

A. At six.

Q. They have many duties in addition to the furnishing of umbrellas and work of that type and generally attending to the wants of the people, don't they?

MR. CARTON: I object to the question, it covers too many things.

THE COURT: I will sustain the objection.

Q. What other duties do they have?

10 A. Well, when the day was over they took care of the umbrellas and took them down and put them away for the night.

Q. Who put the umbrellas out?

A. They put them out before the place opened in the morning.

Q. What other duties do they have besides putting the umbrellas out?

A. I can't say.

Q. Who put up the seats for the customers' use?

20 A. Porters.

Q. Who kept the place clean and policed?

A. Porters.

Q. The same boys?

A. No, porters.

Q. What other duties did the locker boys have to perform?

A. I can't say what things there they had to perform.

30 Q. You start them off in the morning at eight o'clock, what is the first job when they come to work there?

A. Their first job was in the bath houses, to have them in perfect order before the people start to come in.

Q. I thought you said they cleaned them up the night before?

A. Not necessarily, I said they took the towels out the night before to be able to send them to the laundry.

40

Q. When do they clean the bath houses?

A. Sometimes at night, sometimes in the morning, it all depends on how the people came in and went out.

Q. How many bath houses do you have there?

A. I think three hundred and some odd.

Q. How many lockers? 10

A. They are bath houses and lockers, we call them bath houses.

Q. How many members do you have there?

A. Well, we had about twelve hundred members.

Q. And how many locker boys do you have there?

A. Six.

Q. Six locker boys? They were kept pretty busy?

A. Well, they seem to have been.

Q. They had plenty to do, cleaning out over three hundred lockers, didn't they? 20

A. Well yes, they did. Of course they weren't always occupied all the time and maybe some days the people wouldn't come, then they wouldn't have to go in the locker.

Q. How did they know when the people hadn't come, from the outside?

A. They knew, they had their own way of knowing.

Q. How was that?

A. I suppose from the key rooms, they could see whether the key was out. 30

Q. They got that information where the people got their keys, didn't they?

A. Keys and towels, yes.

MR. LA BRECQUE: I think that's all.

RE-DIRECT EXAMINATION.

BY MR. CARTON:

10 Q. I show you this photograph (Exhibit D-1 for
identification) that I would like to ask you if you
would look at, please, and tell us whether that cor-
rectly portrays the condition existing at the time the
accident happened?

A. It certainly does.

MR. CARTON: I will offer it.

(The photograph previously marked Exhibit D-1
for identification was received in evidence and
20 marked Exhibit D-1.)

Q. I show you Exhibit D-1 and ask you if this sign
(indicating) "Diving at your own risk" was there
at that time?

A. It certainly was.

RE-CROSS EXAMINATION.

BY MR. LA BRECQUE:

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Q. There were a great many children there this
day, were there not, Mrs. Hoeven?

A. Well, of course there were always a number of
children at the pool because practically all the fam-
ilies had children and naturally they used the
pools.

Q. In the daytime on week days it was mostly
children that would be there?

40

Joseph W. Prendergast—Direct

A. There were always children, of course mothers and there was a lot of children there.

Q. Children of all ages were permitted to be in the pool and use it?

A. Of course, they were children of the members.

Q. That's right, or their guests?

A. Yes.

10

MR. LA BRECQUE: That's all.

JOSEPH W. PRENDERGAST, called as a witness on behalf of the defendant and being first duly sworn, testified as follows:

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DIRECT EXAMINATION.

BY MR. CARTON:

Q. Mr. Prendergast, you are the manager of the pool?

A. That's right.

Q. And you were such in 1940?

A. That's right.

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Q. And who was in charge of the operation of the pool?

A. Well, I was the manager of the place, Mr. Neuschaefer was in charge of the swimming and surf and general director to take care of the safety of the pools.

Q. And in addition to Mr. Neuschaefer did you have anyone else in the way of attendants who were capable and competent swimmers?

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A. Yes, all of our locker boys are, we have six boys.

Q. They were all capable swimmers?

A. Very capable.

Q. You didn't see the accident, did you?

A. No, I wasn't there at the time it happened.

10

MR. CARTON: That's all.

CROSS-EXAMINATION.

BY MR. LA BRECQUE:

Q. Did your locker boys have any certificates from the Red Cross or from any other life saving organization certifying to their competency?

20 A. Most of them were college boys, most of the boys we had were college boys.

Q. I asked you did they have certificates from the Red Cross or any other life saving organization?

A. That I couldn't swear to.

Q. You had no requirements that they have certificates?

A. Only that they were good swimmers, and I saw to that myself, that they were good swimmers.

30 Q. Have you ever qualified as a life saver or received a life saving certificate from the Red Cross?

A. No, I don't know how to swim.

Q. Now, Mr. Prendergast, are you the one that hired Mr. Neuschaefer, or did Mrs. Hoeven?

A. Well, in conjunction, we both talked it over.

Q. The two of you did it together?

A. Yes.

Q. You were in Avon at the time that this accident happened, were you?

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Charge of the Court

A. No, I think I was in Town for a few minutes, if I recall right.

Q. The name of the party who operated the pool was The Breakers, Inc., a corporation, is that right?

A. That's right.

Q. Were you working for that corporation?

A. Yes, I was manager.

Q. I see, you were manager.

A. I was also Secretary of the corporation.

10

MR. LA BRECQUE: I think that's all.

MR. CARTON: That's all, we rest. I move for a directed verdict of no cause of action as to the defendant, Breakers, Inc. on the same grounds and for the same reasons enumerated by me in my motion for a non-suit.

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THE COURT: The Court will deny your motion and allow you an exception.

(Counsel for the Defendant summed up.)

(Counsel for the Plaintiff summed up.)

(The Court charged the Jury as follows:)

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Members of the Jury, at the outset of this suit for damages which has been instituted by Harold E. Ross, a minor, by his next friend, Ann Casper, Ann Casper, and Herman Casper, as plaintiffs, there were more than one defendant and upon a motion by Mr. Carton, attorney for defendants, at the conclusion of the plaintiff's case, those other defendants were eliminated so that now it becomes your duty at the close of this case to decide whether or not there is any lia-

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bility extending from the remaining defendant, The Breakers, Inc., to the plaintiffs.

10 This law suit, as you have gathered from the testimony, is based upon an accident which happened at the West End Casino swimming pool somewhere along about mid-afternoon on July 30th, 1940. At that time Harold Ross was bathing in the pool and he was injured while diving from the ten foot diving board at the easterly end of the pool, which was the end of the pool which was nearest to the ocean.

20 It appears from the testimony that Harold's mother, Mrs. Casper, had made some arrangement with Mrs. Prendergast, who seems to have been the manager of the pool at that particular time, whereby Mrs. Casper and Harold and the members of the Casper family were given the bathing privileges at the pool for the summer of 1940, and in taking advantage of that privilege Harold had been going to the pool almost every day up to the time the accident happened from some time in June, if the Court recalls the testimony correctly.

30 So that you start at the outset with a consideration of your problem by reflecting that Harold was a boy approximately eleven and a half years old at the time this accident happened, he would have been twelve years old on the thirtieth of November, 1940; and he was a boy of that age who had been in the pool frequently and had dived from the diving board frequently. He testified that at the time the accident happened he had walked out on the board and that there was a lapse of about twelve seconds from the time that he walked out to the time that he turned around before his dive. He was doing what was called a jack-knife dive which necessitated his turning his back to the pool. He testified further that he looked over his right shoulder before he

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Charge of the Court

started to execute that dive, and that he saw nothing, nor had he seen anything to interfere with him as he looked out before he turned around. As he executed the dive he testified that he saw two boys swimming from apparently the westerly end of the pool toward the easterly end and that their direction was such that it would bring them almost directly under the diving board. That seeing that he made a twist while his body was in the air but that nevertheless the foot of one of these boys struck him on the jaw or neck or some part of his body. 10

Now, it is the contention generally of the plaintiffs that Harold was injured because of the failure of the defendant company to use reasonable care to protect Harold and the other patrons who were using the pool at that particular time, and in support of the plaintiff's claim of negligence the plaintiffs have produced here a Mr. Riley, who has qualified as an expert, and who has testified that the standard of safety in the swimming pool trade requires a pool to either have a sequestered diving area—that is an area where swimmers would not be permitted to enter and which would be marked off either by buoys or ropes or something like that; or that the pool should have a lifeguard or some other person whose duty it would be to regulate traffic in the pool, so to speak. That is to say he would warn swimmers of any danger which might be incurred by virtue of a diver, and he might, on the other hand, warn a diver of the danger of coming in contact with a swimmer. It is the contention of the plaintiffs that as a result of what they allege to be the defendant's negligence that this boy received injuries at that time which necessitated his being taken to a hospital and confined there for a certain period of time and which required medical 20 30 40

treatment which has resulted in a considerable amount of out of pocket expenses and expenses in other directions, about which the Court will comment subsequently.

Now then, as against that, members of the Jury, the defendant vigorously contends that it has violated no duty which it owed to Harold Ross or to any other of its patrons. The defendant has produced here a number of witnesses whom the Court has permitted to qualify as experts, and those expert defendant witnesses have testified that there is no standard in the swimming pool trade which requires a swimming pool operator to either sequester the diving area or to engage a lifeguard or any other person who would regulate the swimming pool traffic. So there of course you have a factual question which can only be decided by you members of the Jury.

The law you must accept from the Court. You may not like the law but you are bound by it, and the Court is bound by it, and every one of our citizens is bound by it, and you have to accept it as it is propounded to you by the trial Judge; but when it comes to deciding the facts it doesn't make a particle of difference as to the manner that the Judge or counsel thinks, you should decide the facts. When you go into the Jury-room you are supreme so far as deciding the facts in this case are concerned. Your duty is to go through and sift all of the testimony which has been offered on both sides carefully and conscientiously until you have decided all factual issues to your satisfaction. Then when you have decided what the factual situation is your duty is to apply to that factual situation the rules and principles of law upon which you are instructed

Charge of the Court

by the Court and then to base your verdict accordingly.

Now, as you have conceived from what the Court has stated to you already and through the arguments of counsel, and through the testimony as presented to you, the claim of the plaintiffs against the defendant is based upon the allegation that the defendant was negligent. Now, what is negligence? Negligence is the violation of some duty which one person owes to another or the failure to observe some duty which one person owes to another. You must keep in mind that negligence is never presumed, therefore, because this infant plaintiff was injured while diving in the pool of the defendant, that fact cannot lead you to conclude that he was injured through the defendant's negligence, because the plaintiff has the burden of proof.

The plaintiff is required to satisfy you by the preponderance of the credible evidence that the defendant was negligent and that defendant's negligence was the proximate cause of the happening of this accident. Now, when the Court states to you that the plaintiffs are required to satisfy you by the preponderance of the evidence, the Court does not want you to infer that that means that the plaintiffs are required to bring into Court a greater number of witnesses than the defendant. That is not the rule. You could, if you wanted to decide with great accuracy this question of the preponderance of the proof, take an imaginary scale and place on one side of that scale all the testimony which has been offered on the part of the plaintiffs, and then on the other side place the testimony offered on behalf of the defendant. If the plaintiff's testimony in your judgment outweighs the testimony offered on behalf of the defendant then

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the plaintiffs have proven their case by the preponderance of the proof. If, on the other hand, the defendant's testimony outweighs the plaintiff's testimony, or even balances it, then under those circumstances the plaintiffs have not sustained the burden of proof and it would be necessary for you
10 under the law to find in favor of the defendant, a verdict of no cause of action.

Proximate cause is the moving efficient cause of the accident without which the accident would not have happened, and you will keep in mind that the plaintiff has the burden not only of satisfying you that the defendant was negligent, but also that the negligence of the defendant was the proximate cause of the accident in which Harold Ross was injured.

It is the general rule that the operator of a swimming pool is required to use reasonable care in the
20 operation of a pool. Reasonable care is that degree of care which a reasonably prudent person would use under the particular circumstances.

The defendant was required in the operation of its swimming pool to maintain the standard of safety for its patrons which is ordinarily exercised by others in the swimming pool trade or profession. What standard of safety for patrons was the accepted standard in the swimming pool trade will
30 have to be decided and determined by you members of the Jury from the testimony on that particular point which has been offered by both sides of this case.

If you find by the greater weight of the credible evidence that the defendant was negligent in that it failed to observe the ordinary standard of safety of the swimming pool trade, and you conclude that such failure on the part of the defendant was the proximate cause of the plaintiff's accident, then you
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will return a verdict in favor of the plaintiffs, unless you otherwise conclude that the infant plaintiff, Harold Ross, was guilty of contributory negligence or guilty of assuming the risk involved in making his dive.

The defendant has produced a number of witnesses whom the Court has ruled are competent to testify as expert witnesses, who have testified that there is no standard or rule in the swimming pool trade which requires an operator to maintain a sequestered diving area or to employ what might be termed a swimming pool traffic operator. If the testimony of these defendant expert witnesses leads you to conclude that there was no failure of reasonable care on the part of the defendant, then you must find in favor of defendant, a verdict of no cause of action.

Furthermore, if, after a review of all the testimony, you are not convinced by the greater weight of the credible evidence that the defendant had failed to use reasonable care as far as the infant plaintiff Harold Ross is concerned, you must find a verdict of no cause of action in favor of the defendant.

Now, the defendant has interposed certain defenses. I might state to you generally that they are about four in number. First of all the defendant denies the material allegations of the complaint which the plaintiffs have filed against it. Then the defendant denies that it was guilty of any negligence in connection with the injuries sustained by Harold Ross. Of course if you so found then you would have to bring in a verdict of no cause of action. Now, the third defense is that even if you found negligence to exist upon the part of the defendant that you still could not return a verdict against the

defendant because the infant plaintiff, Harold Ross, himself was guilty of contributory negligence.

Contributory negligence in this case would be some act or failure to act on the part of Harold Ross which act or failure constituted negligence and but for which negligence upon his part there would have been no accident. It is the law of our State, members of the Jury, that if a plaintiff by the slightest degree of negligence on his part contributes to the happening of an accident that contributory negligence on his part bars his right to a recovery regardless of whether his negligence was greater or lesser than the negligence of the defendant. In other words, members of the Jury, whether we like the law or not, it is the law of the State of New Jersey that if the Jury concludes that a plaintiff has been guilty of contributory negligence that bars his right to any recovery regardless of the fact that they might feel that upon weighing the degrees of negligence that the defendant was guilty of a greater degree of negligence than the plaintiff had been.

The defendant here has urged, properly, the defense of assumption of risk. Generally speaking assumption of risk can be said to be a rule of law that a person assumes such risks incident to his conduct as are open and obvious and those risks which ordinary care would disclose. Perhaps it would be well for the Court to read to you a little bit more fully on that, and I shall read to you what our highest Court says about assumption of risk in a case which was decided in 1941. The Court held that an individual assumes all the ordinary risks of his voluntary acts or the environment in which he voluntarily places himself, on the theory that he has the intelligence of the ordinary prudent individual who is aware of the ordinary risks of his voluntary acts

and the risks of the particular environment in which he voluntarily entered.

Now, if you are satisfied by the greater weight of the credible evidence that the plaintiff Harold Ross assumed the risk involved in executing his dive as he did under the conditions which prevailed on the afternoon of July 30th, 1940, then that would bar the right of all the plaintiffs to recover against the defendant regardless of whether you found that the defendant was guilty of negligence or not. 10

The defense of contributory negligence and the defense of assumption of risk are both affirmative defenses and it is incumbent upon the defendant to establish contributory negligence or assumption of risk to your satisfaction by the preponderance or the greater weight of the credible evidence.

The Court has heretofore stated to you that the infant plaintiff, Harold Ross, was approximately eleven and a half years of age at the time of the happening of the accident. You must take into consideration his age, because it is the law that the degree of care required of a child such as was the plaintiff Harold Ross should not be measured by the standard of care applied to an adult. A child is only required to use that degree of care usually exercised by children of similar age, judgment and experience. So the infant plaintiff was only required to use that degree of care for his own safety which a child of eleven and a half years of age might be expected to use. 20 30

The Court has commented upon the facts in this case, and the Court has sometimes found that it has unwittingly mis-stated the testimony. Therefore, members of the Jury, the Court desires to impress upon you that if you differ from the Court's recollection of the testimony it is your own recollection and 40

not the Court's recollection of the evidence which controls.

Now, in the event that you decide that the plaintiffs are entitled to a verdict you would have to bring in a verdict in favor of Harold Ross against the defendant, and then another verdict in favor of Harold's mother and his step-father, Mr. and Mrs. Casper. If Harold receives a verdict from you he would be entitled to receive at your hands against the defendant such a sum of money damages as you feel would reasonably and properly compensate him for the injuries which were the proximate result of the accident in which he was involved at the West End swimming pool on July 30, 1940. He would be entitled to be compensated for the pain and suffering accompanying those injuries. He has offered several pictures here in evidence which were taken of him while he was in the hospital and those pictures will lead you quite accurately, I think, in determining the seriousness and the extent of the injuries undergone as a result of his experience.

Those pictures, members of the Jury, must not actuate you to such sympathy that you will lose sight of the fact that you can only properly find a verdict in his favor if you conclude that he was injured through the negligence of the defendants. In other words, you are to base your findings in this case upon your concept of justice and you are not to be swayed in your determination by sympathy or prejudice or passion of any kind.

Now then, so far as the young man is concerned, one of his doctors I believe testified that in his opinion Harold has a permanent disability of about five percent. He apparently has made a very good recovery and he can swim and dive and indulge in the other activities which boys of his age would be

Charge of the Court

expected to indulge in, but despite that fact, the doctor says that in his considered opinion this young man as a result of the accident in which he was involved will for the rest of his days have a five percent disability.

Now, so far as his parents are concerned, if you find in favor of the plaintiffs you will give to them such a sum of money damages as you find will reasonably and properly compensate them and reimburse them for the out-of-pocket expenses. I presume that counsel has outlined to you accurately just what those out-of-pocket expenses consist of. It was not proper, under our law, for the Court to permit those bills to be marked in evidence, but nevertheless I am quite sure that the total amount that they come to has been reiterated sufficiently to impress that upon your recollection. I hope so, because I am frank to state that I don't have the figures available myself, and as I say, I am quite sure, nevertheless, that Mr. LaBrecque, particularly in his summation, impressed you with what this accident has resulted in in out-of-pocket expenses to Mr. and Mrs. Casper. Now, they are entitled to be reimbursed not only for what they have paid, and in that connection you will remember that Mr. Carton never once disputed the reasonableness of the charges of the different bills, so that you have no issue so far as those bills are concerned, they are all conceded by the defendant to be reasonable and proper charges, and the plaintiffs Mr. and Mrs. Casper are entitled to be reimbursed whether they have paid the bill in full or whether they have only made a payment on account.

Now, in addition to their out-of-pocket expenses they would be entitled to be compensated, if you found that the plaintiff Harold Ross was so disabled

as a result of his accident that they would suffer any loss of his services. You see, members of the Jury, under our law parents are entitled to the services and the earnings of a child until the child becomes twenty-one; but I must state to you in all frankness that I think it would be very far fetched
10 to find that the earning ability of a boy who can dive and swim and indulge in the athletic activities that Harold admittedly can indulge in at the present time,—I think it would be very far fetched to say that his earning capacity between the time of the accident and the day that he will reach the age of twenty-one had been interfered with or impeded by this particular accident.

Now I am going to permit the case to go into your hands. I am sure that you are going to decide it
20 calmly and dispassionately and conscientiously, I am sure that you are going to remember that it is your duty as the Jury in this case to consider and to determine accurately where justice exists between the parties to this litigation and then to base your verdict upon your concept of justice.

The Clerk of the Court will be authorized to take your verdict in the absence of the Court.

(After side-bar conference between the Court and
30 counsel for both sides.)

THE COURT: Members of the Jury, the Court does not desire to have you, by any stretch of the imagination, misconceive anything that the Court has stated to you. Now, in fairness to the defendant I did state to you that Mr. Carton made no dispute about the reasonableness of the charges of the hospital bills and medical expenses and the out-of-pocket expenses which Mr. and Mrs. Casper in-
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Charge of the Court

curred by reason of Harold's injuries, but of course I think I have made it sufficiently clear to you that the defendant, through Mr. Carton, strenuously disputes the fact that there is any liability whatsoever extending from the defendant to the plaintiffs and it is the contention, of course, of the defendant that after a review of all of the evidence in this case that you must necessarily find that the defendant is not liable and that therefore you must bring in a verdict of no cause of action in favor of the defendant. 10

(The Jury retired.)

MR. LA BRECQUE: I respectfully except to your Honor's failure to charge number six of the plaintiff's requests to charge, as follows:

"6. If the defendants, or either of them, through their negligence, brought about a situation in which a collision between the plaintiff, Harold Ross, and a third party, was imminent, they are liable for all injuries sustained by the plaintiff, which naturally and proximately resulted from such negligent act, regardless of whether such injuries were brought about by such collision, or by the plaintiff's attempt to avoid it. 152 Atl. 471." 20

I also respectfully except to the Court's failure to qualify the charge on contributory negligence and assumption of risk as set forth, that the Jury should consider the age and experience of the child in determining that question. 30

10

REPORTER'S CERTIFICATE.

I, Lillian B. Levington, assistant to the Official Court Reporter of the New Jersey Supreme Court, Monmouth County, hereby certify that the within and foregoing is a true and correct transcript of the testimony and proceedings and the Oral Charge of the Court in the trial of this case, and that I made
20 the same from my original shorthand notes, taken at the time of such trial.

This the 29th day of January, 1946.

LILLIAN B. LEVINGTON,

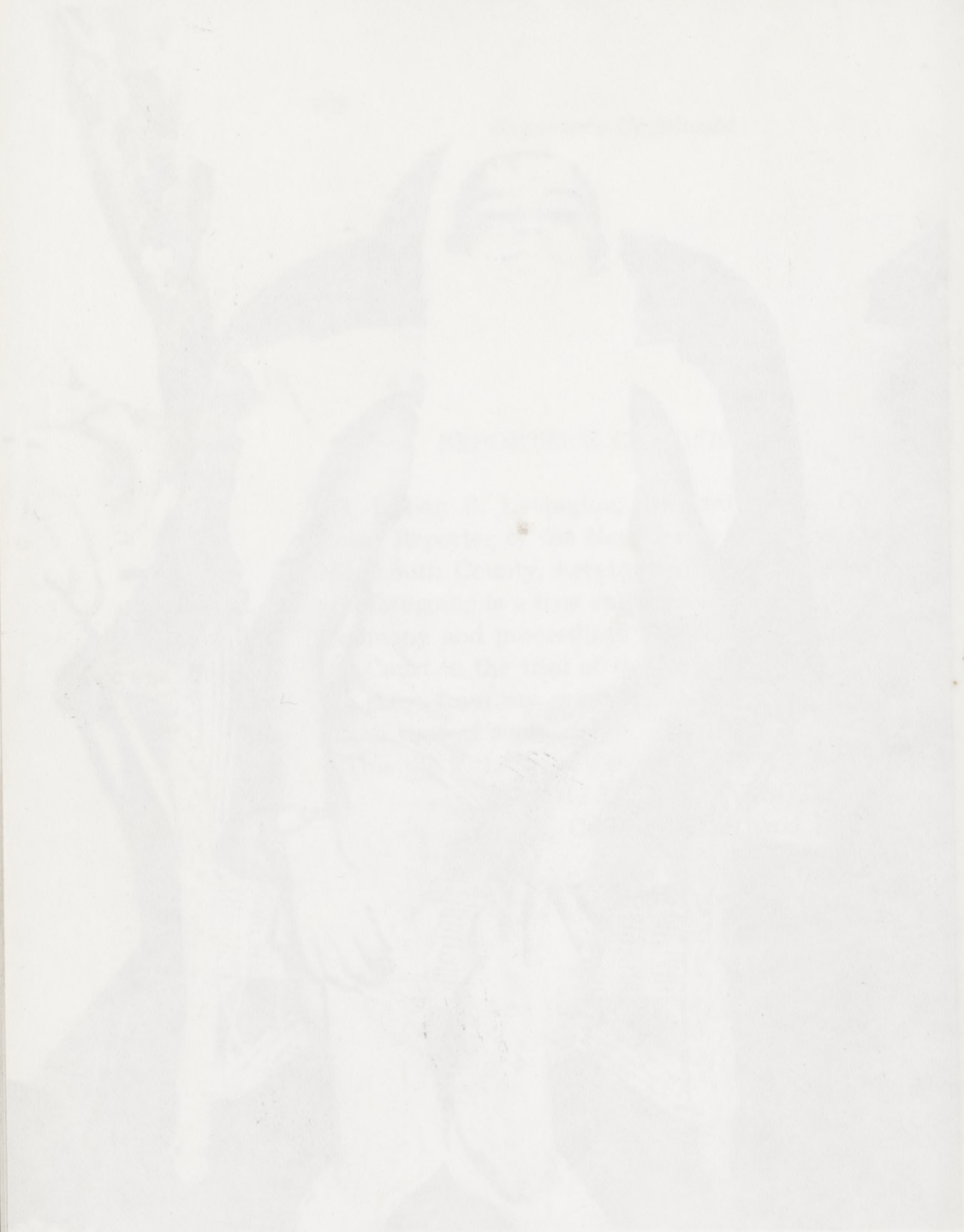
Certified Shorthand Reporter.

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EXHIBIT P-2 (p.309)









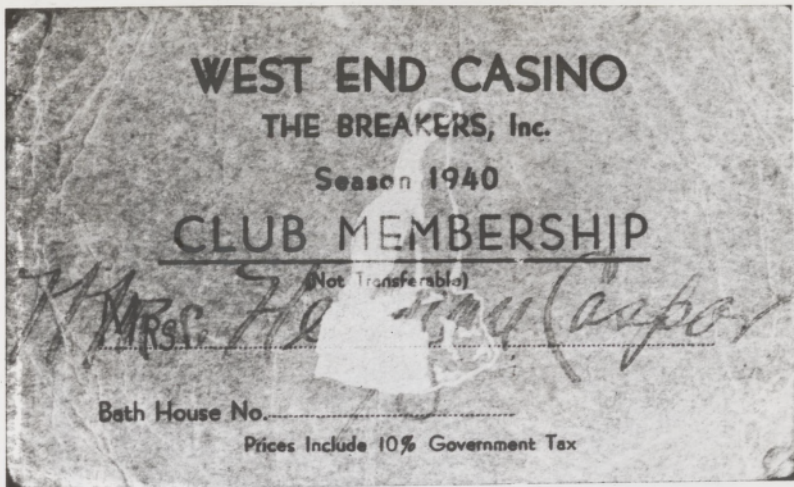


EXHIBIT P-18 (p. 312)

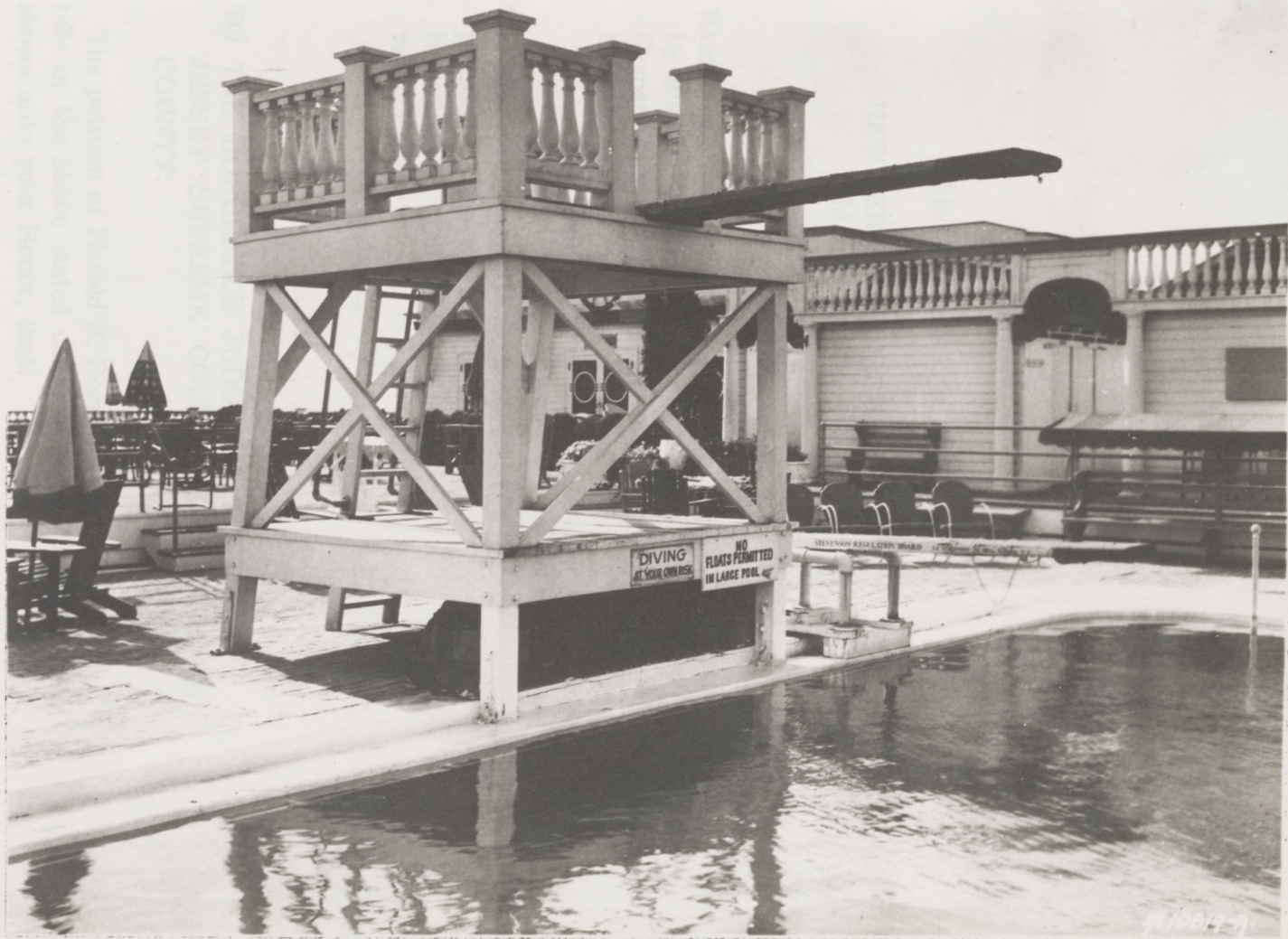


EXHIBIT P-19 (p. 312)

EXHIBIT 2-12 (p. 3-1)

EXHIBIT 2-12 (p. 3-1)

EXHIBIT D-1 (p. 313)



Petition

PETITION.

(Filed January 19th, 1946.)

NEW JERSEY SUPREME COURT.
MONMOUTH COUNTY.

10

HAROLD E. ROSS, a Minor,
by His Next Friend, Ann
Casper, ANN CASPER and
HERMAN CASPER,

Plaintiffs,

vs.

THE BREAKERS, INC., a Cor-
poration of the State of
New Jersey, and HOR-
TENSE LEVY,
Defendants.Action at Law.
Petition.

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TO THE HONORABLE JUDGE OF THE NEW
JERSEY SUPREME COURT, MONMOUTH
COUNTY: 30

The petition of Harold E. Ross, one of the plain-
tiffs in the above stated cause of action, humbly
shows unto your Honor, that:

1. He is an infant under the age of twenty-one
years.

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2. He is advised that he has a good and just cause of action against the said The Breakers, Inc., a corporation of the State of New Jersey, and Hortense Levy, for injuries suffered at the hands of the said The Breakers, Inc., a corporation of the State of New Jersey, and Hortense Levy and through their wrongdoing.

3. Your petitioner has lately commenced an action against the said The Breakers, Inc., a corporation of the State of New Jersey, and Hortense Levy in the above stated court for the same.

Your petitioner therefore humbly prays your Honor to admit him to prosecute the said action by Ann Casper of Long Branch, County of Monmouth and State of New Jersey as your petitioner's next friend.

And your petitioner will ever pray, &c.

HAROLD E. ROSS,
Petitioner.

30 I hereby consent and agree that the aforementioned Harold E. Ross shall be at liberty to prosecute this action by me as his next friend, according to the prayer of the foregoing petition.

ANN CASPER.

State of New Jersey }
County of Monmouth } ss.

10

THEODORE J. LA BRECQUE, being duly sworn according to law upon his oath deposes and says:

That he was present and saw Harold E. Ross, the plaintiff named in the foregoing stated cause of action, sign the foregoing petition and he also was present and saw Ann Casper, the person mentioned in the foregoing petition, sign the consent there-
under written and that they all signed on the 17th
day of January, 1946.

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THEODORE J. LA BRECQUE.

Subscribed and sworn to before me this 18th day of January, 1946.

30

40

ORDER.

(Filed January 19th, 1946.)

10

NEW JERSEY SUPREME COURT.
MONMOUTH COUNTY.

20

HAROLD E. ROSS, a Minor,
by His Next Friend, Ann
Casper, ANN CASPER and
HERMAN CASPER,

Plaintiffs,

vs.

THE BREAKERS, INC., a Cor-
poration of the State of
New Jersey, and HOR-
TENSE LEVY,
Defendants.Action at Law.
Order.

30

It appearing upon reading the petition of Harold E. Ross and the consent of Ann Casper, thereunder written, and the affidavit of Theodore J. LaBrecque thereto attached, that the said Harold E. Ross has a good cause of action against the said The Breakers, Inc., a corporation of the State of New Jersey, and Hortense Levy, and is an infant under the age of twenty-one years;

It is ORDERED that Ann Casper be admitted to prosecute the said cause of action for the said Harold E. Ross in the above stated court, against the

40)

said The Breakers, Inc., a corporation of the State of New Jersey, and Hortense Levy, as next friend of Harold E. Ross.

ROBERT V. KINKEAD.

Dated: Jan. 18th, 1946.

On motion of

10

PARSONS, LA BRECQUE & BORDEN,
Attorneys of Plaintiffs.

Let the above rule be entered in the minutes.

COPY OF JUDGMENT FORM.

NEW JERSEY SUPREME COURT.
MONMOUTH COUNTY.

20

HAROLD E. ROSS, a Minor,
by His Next Friend, Ann
Casper, ANN CASPER and
HERMAN CASPER,
Plaintiffs,
vs.

30

THE BREAKERS, INC., a Cor-
poration of the State of
New Jersey,
Defendant.

The above case was tried before Honorable Robert V. Kinkead and a jury at the Monmouth Circuit on

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Wednesday, January 9th and Thursday, January 10th, 1946.

10 The trial court granted a non suit in favor of the defendant, Eliza Hoeven and the President and Directors of the Manhattan Company, a body corporate of the State of New York, Executrix and Executors, under and by virtue of the Last Will and Testament of Tillie Levy, Deceased.

20 The jury rendered a general verdict in favor of the plaintiff, Harold E. Ross, a minor, by his next friend, Ann Casper, and against the defendant, The Breakers, Inc., a corporation of the State of New Jersey, in the sum of One Thousand Five Hundred Dollars (\$1,500.00), and a general verdict in favor of the plaintiffs, Ann Casper and Herman Casper, and against the defendant, The Breakers, Inc., a corporation of the State of New Jersey, in the sum of Three Thousand Eight Hundred Dollars (\$3,800.00).

30 Whereupon it is adjudged that the plaintiff, Harold E. Ross, a minor, by his next friend, Ann Casper do recover of the defendant, The Breakers, Inc., a corporation of the State of New Jersey, the sum of one thousand five hundred dollars damages, and that the plaintiffs, Ann Casper and Herman Casper do recover of the defendant, The Breakers, Inc., a corporation of the State of New Jersey, the sum of three thousand eight hundred dollars damages, together with their costs, which have been taxed at the sum of eighty dollars and thirty-four cents making in the whole the sum of five thousand three hundred eighty dollars and thirty-four cents.

Damages	\$1500.00	H.E.R. etc.
	3800.00	A.C. & H.C.

\$5300.00

Costs	80.34
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\$5380.34

Judgment entered and signed January 19, 1946.

THOMAS J. BROGAN,

Chief Justice.

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NOTICE OF APPEAL AND GROUNDS OF
APPEAL.

(Filed April 9th, 1946.)

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

20

HAROLD E. ROSS, a Minor,
by His Next Friend, Ann
Casper, ANN CASPER and
HERMAN CASPER,

Plaintiffs,

vs.

THE BREAKERS, INC., a Cor-
poration of the State of
New Jersey, and HOR-
TENSE LEVY,

Defendants.

Notice of Appeal
and Grounds of
Appeal.

30

TO: PARSONS, LA BRECQUE & BORDEN, ESQS.,
and IRA J. KATCHEN, ESQ., Attorneys for
Plaintiffs, Harold E. Ross, a minor, by his next
friend, Ann Casper, Ann Casper and Herman
Casper.

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SIRS:

PLEASE TAKE NOTICE, that the defendant, The Breakers, Inc., a corporation of the State of New Jersey, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

10

1. Because the trial court refused to grant a motion for a non-suit against the plaintiffs and in favor of the defendant when thereunto moved by counsel for the defendant.

2. Because the trial court refused to direct a verdict of no cause of action against the plaintiffs and in favor of the defendant when thereunto moved by counsel for the defendant.

20

Yours, &c.,
DURAND, IVINS & CARTON,
Attorneys for Defendant-Appellant,
The Breakers, Inc.

Service of the above Notice and Grounds of Appeal is hereby acknowledged this 4th day of April, 1946.

PARSONS, LA BRECQUE & BORDEN,
and

30

IRA J. KATCHEN,
Attorneys of Respondents, Harold E. Ross, a minor, by his next friend, Ann Casper, Ann Casper and Herman Casper.

**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

HAROLD E. ROSS, a minor, by his next friend, Ann
Casper, ANN CASPER and HERMAN CASPER,
Plaintiffs-Respondents,

vs.

THE BREAKERS, INC., a corporation of the State of
New Jersey,
Defendant-Appellant.

ACTION AT LAW.

ON APPEAL FROM NEW JERSEY SUPREME COURT.

BRIEF OF DEFENDANT-APPELLANT.

STATEMENT OF QUESTION INVOLVED.

This is an appeal from the refusal by the trial court to grant defendant's motion for a non-suit and directed verdict.

The case is one of novel impression. It arises out of a suit by the infant plaintiff, Harold E. Ross,

at the time nearly twelve years of age, for injuries sustained when he dove backwards off a high spring board in a swimming pool known as the West End Casino and operated by the defendant. Under the spring board in question was a sign reading "Dive at your own Risk." The suit originally included other defendants who were eliminated by non-suit. The jury rendered a verdict in favor of the infant plaintiff and his parents for injuries sustained and expenses thereunder.

On July 30th, 1940, the infant, an experienced swimmer and diver, climbed up to a spring board ten feet off the water, walked to the end of the board, turned with his back to the swimming pool, and executed a back jack-knife dive, and alleged he struck the foot of a swimmer in the pool with his neck as he entered the water. He sustained injuries therefrom, the subject matter of the suit. The pool in question known as the West End Casino, at West End, New Jersey, was one of two parallel pools, one hundred feet long and thirty feet wide.

The complaint charges the defendant, the operator of the pool, with negligence in failing to supervise the diving from the board; in failing to have a lifeguard or attendant to warn the divers or swimmers; and in failing to have the area under and about the diving board roped off so that swimmers could not enter said area.

The defendant moved for a non-suit on the following four grounds:

(1) There was no evidence that the injury sustained by the infant plaintiff was the natural and proximate result of any negligence of the defendant;

(2) That the plaintiff assumed the risk;

(3) That the plaintiff was guilty of contributory negligence; and

(4) That there is no requirement in law for the defendant to protect a patron from an obvious risk that was incidental to the use of the place of amusement in question.

The trial court denied this motion.

A similar motion on the same grounds for a directed verdict was made by the defendant. This also was denied.

It is from this action of the trial court that this appeal is taken.

FACTS.

The plaintiff was injured in a swimming pool operated by the defendant in the mid-afternoon of July 30th, 1940. At the time of the accident the plaintiff was eleven years and eight and one-half months of age, starting his twelfth year on November 14th previous to the accident (S. C., page 34). His mother and step-father, the co-plaintiffs, operators of rooming houses, had been given a season club membership in the exclusive West End Casino pool by the defendants (S. C., Exhibits P-18 and P-19, page 312). They paid nothing in cash for these memberships but obtained them because they gave reduced rates in their boarding house to the

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members of Tommy Tucker's Orchestra who boarded there and who played at the pool (S. C., page 182, lines 19-28, and page 183).

The infant plaintiff was an experienced swimmer and diver. In the year of the accident he had been using the pool practically every day; thirty or forty times that season prior to the accident. He was familiar with the pool and the spring boards and had been diving in there on each of these thirty or forty occasions previous to the accident, and had used the high spring board a great deal. Directly under the spring board in question which was ten feet above the water, was a sign which read "Diving at your own Risk" (S. C., photograph, Exhibit D-1, page 313). He had never had any difficulty prior to the day of the accident (S. C., page 55; page 56, lines 1-10). This was conceded by the infant in his own testimony as the above references will show. His mother also verified the fact that the boy was an excellent swimmer and did diving (S. C., page 150, lines 27-30). His mother also verified the fact that the infant had used the pool every day of the 1940 Season prior to the accident, except when it rained (S. C., page 152, lines 7-10).

On the afternoon in question, with a normal crowd in attendance (S. C., page 225, lines 3-6), the plaintiff, who had been diving, went out on the spring board ten feet above the water, saw no one in the water underneath him, turned his back to the pool and did a back jack-knife dive into the pool. His testimony in this connection is quoted below:

"Q. Now, when it came your turn to dive, Harold, will you tell the Court and Jury please what you did?

"A. Well, I went out on the board and I got

on the board and there was nobody there, so I turned around —

“Q. Where did you see there was nobody?

“A. There was nobody around where I was going to dive.

“THE COURT: You mean in the pool?”

(S. C., page 42, lines 30-40.)

“THE WITNESS: Yes, sir.

“Q. When you got out to the end of the diving board did you look, I mean?

“A. Yes.

“Q. Was there anyone in the vicinity there that you saw?

“A. No.

“Q. What kind of a dive were you going to do this time?

“A. I was going to do a back-jack.

“Q. Will you tell the Court please just what that is, I don't remember, it is a long time since I did one.

“THE COURT: Suppose you stand up, son, on the edge of the stand and just show the Jury the posture you have to take to do a back-jack.

“A. (The witness stood up and indicated.) You get on the board like this, turn backwards, and then you dive forward.

“Q. In other words, you walk up to the end of the diving board, then you turn your back —

“A. That's it.

“Q. —and you —

“A. Kick your feet back.

“Q. —would bring yourself near the edge of the board, walk a way, then dive forward, is

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that it? So that it will appear in the record too, is that generally the way you do it?

"A. Yes.

"Q. Had you ever done that dive before?

"A. Yes, sir.

"Q. Did you ever have any trouble doing it before?"

(S. C., page 43, lines 1-40.)

"A. No.

"Q. Now in this case you came out to the end of the diving board, you say you looked and you saw nothing there, then you turned your back. Did you make any other observations?

"A. Yes.

"Q. Well, just tell us briefly what you did.

"A. I looked over my shoulder before I went down.

"Q. Was there anyone there yet?

"A. No.

"Q. So then what did you do?

"A. So then I dove."

(S. C., page 44, lines 1-15.)

The plaintiff continued in his testimony to state that while he was in the air going towards the water he noticed two boys swimming underneath him and saw he was going to hit them and tried to twist out of their way; that his jaw came in contact with one of their feet (S. C., page 45, lines 13-18).

The two boys in question who were swimming in the vicinity where the plaintiff landed were named David Breitkopf and Robert Link. Link was killed in Service in the Army and was unavailable. Young

Breitkopf, son of a Newark attorney, Michael Breitkopf, in Service in the United States Navy, testified by deposition (S. C., page 167, lines 28-32). These were the only boys or patrons swimming in the vicinity (S. C., page 168, lines 17-23). Breitkopf testified that the plaintiff landed close to him but did not strike him, nor his companion Link (S. C., page 168, lines 23-28). He further testified that both he and Link were questioned at the pool immediately after the accident and both stated at that time that the plaintiff had not struck either one of them (S. C., page 168, page 169, and page 170, lines 1-2).

A disinterested witness, Reverend Henry J. Murphy, of Jersey City, was at the pool with a group of about thirty-five boys of his graduating class. Father Murphy's attention was attracted to the plaintiff as he was about to dive because he went to the end of the board and then back a few times, attracting considerable attention, and finally dove. The boy's actions on the board and his jumping attracted the attention of the priest (S. C., page 234, lines 23-39; page 235, lines 20-22).

Arthur F. Healey of Jersey City had accompanied Father Murphy to the pool, and the boy's actions on the board were such as to attract the attention of Mr. Healey, who stated that the boy did not look down to see if there was anyone below before he dove (S. C., page 240, lines 1-10).

One, Albert Neuschaefter, an experienced swimmer, teacher and coach, was in charge of swimming at the pool at the time of the accident (S. C., page 219, lines 12-14; page 283, lines 6-10). In addition to Mr. Neuschaefter there were six locker boys at the pool of an average age of seventeen and eight-

een years; all capable swimmers who were located on either side of the pool (S. C., page 283, lines 10-26).

Neuschaefter, the swimming instructor, had spoken to the plaintiff and other boys about taking unnecessary chances prior to the accident (S. C., page 219, lines 33-39). At the time of the accident Neuschaefter was in the adjoining pool located about ten feet from the pool in which the plaintiff was injured (S. C., page 220 and page 221).

There was no lifeguard on the spring board directing traffic or advising the divers when they could dive. The pool was not roped off under the diving board so as to prevent swimmers from swimming in that area. The protection afforded patrons of the pool was that given by the six locker boys and the swimming instructor.

The plaintiff produced as an expert one James H. Riley, a swimming coach at Rutgers University, who at the time was engaged as swimming instructor in a rival pool, the Colony Surf Club (S. C., page 101, lines 8-9), located a few hundred yards away from the West End Casino pool. Riley testified that the standard and generally accepted practice with reference to the operation of such a swimming pool required corks or buoys segregating the area where those diving entered the pool, or a lifeguard to regulate the traffic on the diving board (S. C., page 74, lines 35-38; page 75, lines 17-29). Mr. Riley's testimony was quite rambling, but there is no question but that the substance of his testimony was to the effect that the standard of safety required the pool either to have a sequestered diving area where swimmers would not be permitted to enter and which would be marked off by either

buoys or ropes, or to have a lifeguard whose duty it would be to regulate traffic on the diving board (S. C., page 297, lines 22-30).

On cross-examination Riley was interrogated as to his knowledge of swimming pools, particularly in Monmouth County, and admitted that in the ten pools he was familiar with in Monmouth County, none had buoys or markers sequestering the area under the diving board (S. C., page 81, lines 7-10). He did contend that the pool at the Spring Lake Casino had guards at the spring board regulating diving (S. C., page 82, lines 10-17). He further stated that the Spring Lake pool was well managed (S. C., page 83, lines 12-16). He further testified that lifeguards were used at the Allenhurst pool to regulate traffic (S. C., page 83, lines 36-40), and further that the Monmouth Beach pool in 1940 had in effect the so-called standards of safety that he testified to, as did the Avon pool (S. C., page 87). He stated on cross-examination that there were at least thirty pools in operation along the Jersey Shore in 1940 but could not testify as to these others having his so-called standards of operation other than the four named.

The defendant in a sharp attack on the alleged standard of operation of swimming pools, as testified to by the plaintiff's expert, produced the manager of the Allenhurst pool, Bloomfield Hulick, whom Riley said had his standard. He testified that he had been the manager of the Allenhurst pool for five years and that neither his pool, the Allenhurst pool, nor the Deal pool nor Spring Lake pool with which he was familiar, had ever had any such so-called accepted standard of operation (S. C., page 227, lines 1-7; page 228, lines 20-30).

Robert M. Holmes, the Mayor of Avon, and familiar with the operation of the Avon swimming pool since 1930, contradicted Riley and stated that Riley's so-called standard of operation was not in effect at that pool (S. C., page 280, lines 38-40; page 281, lines 1-5).

The defendant further produced Lansdell Anderson, a professional photographer for magazines, who, in 1940, at the time of the accident was a sport's photographer for the Newark Evening News, and had previously been the Interscholastic fancy diving champion and a member of the Princeton Varsity swimming team (S. C., page 264), had formerly taught swimming at the Avon pool, besides being a lifeguard at numerous other places. He was familiar with the operation of swimming pools, both as a participant in swimming and diving, a coach, and a sport's photographer. He stated definitely that the two so-called requirements of Riley, that is, a sequestered area of the pool marked off by ropes or buoys, or a lifeguard directing traffic, were not standard practice. This same witness testified he was familiar with the Spring Lake pool, the Monmouth Beach pool, and the Allenhurst pool, and that none of these pools followed the standards testified to by the plaintiff's expert (S. C., page 269, lines 31-40; page 270, lines 1-5; page 271).

The defendant called Orlo Jenkinson, proprietor of Jenkinson's pool at Point Pleasant, who was familiar with the operation of swimming pools in Monmouth and Ocean Counties since 1928. Mr. Jenkinson testified that the plaintiff's expert's standard of operation was not correct and that the pools in Monmouth and Ocean Counties did not employ these standards (S. C., page 275).

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The defendant further produced as an additional expert, Maxwell Vogt, swimming coach at the Newark Athletic Club, Chairman of the New Jersey Association of the A. A. U., and also a member of the National A. A. U. Swimming Committee, the operator of many swimming pools in North Jersey, and who testified that he was familiar with a hundred swimming pools in the New Jersey and Metropolitan area and was familiar with the standard of care recognized in the swimming trade. He denied that the standard of care testified to by the plaintiff's expert, requiring the pool to be roped off or someone in attendance directing the diving and swimming, was standard practice. He further testified it would be serious to place ropes or buoys in the vicinity of the diving board because of the possibility of someone diving on the rope or buoy (S. C., page 214, lines 11-28).

The last expert called by the defendant was Joseph H. Palmer, the manager for twenty-four years of the Olympic Park Swimming Pool in Irvington; a pool two hundred feet wide, four hundred feet long, having a water capacity of four million gallons (S. C., page 245). This is the largest pool of its kind in the United States (S. C., page 245, line 39; page 246, lines 1-10). The pool managed by Mr. Palmer has bathed in one day as many as 9,953 people, and contains seven spring boards ranging in height from three feet to eleven feet (S. C., page 246). This witness was also familiar with the operation of other swimming pools and testified, after qualifying as an expert, that there is no such standard as testified to previously by the plaintiff's expert (S. C., page 257, line 1).

At the termination of the plaintiff's case the de-

fendant moved for a non-suit on four grounds, namely:

(1) There is no evidence that the injury sustained by this boy was the natural and proximate result of any negligence on behalf of the defendant (S. C., page 200, lines 1-10). The court ruled on this ground for a non-suit that the evidence of the plaintiff's expert on the standard of care required, led to the conclusion that it was requisite on the part of the defendant to do one of two things testified to by the plaintiff's expert, that is, to either segregate that part of the pool from the swimmers where the diving took place, or in the absence of buoys or ropes to have a lifeguard present to direct traffic (S. C., page 202, lines 22-38).

Defendant moved further for a non-suit on the ground that the plaintiff assumed the risk. The court held that this was a factual question and must be decided by the jury (S. C., page 203, lines 19-40).

Defendant moved as an additional or third ground for its non-suit, the ground of contributory negligence as a matter of law. The trial court held this also was a jury question (S. C., page 204, lines 34-40; page 205, lines 1-15).

The last ground urged by the defendant for a non-suit was that there was nothing to go to the jury in the evidence because of the fact that there was no requirement in law for the proprietor of an amusement park or place of amusement such as the defendant operated to protect patrons from obvious risks incidental thereto, and that the plaintiff in diving off the spring board took an obvious risk incidental to the use of the spring board. The trial court conceded that the defendant's argument

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in this case was a correct expression of the law, but that it was a factual question for the jury to determine whether or not it was such an obvious risk (S. C., page 205, lines 17-40; page 206, lines 1-8).

Exceptions were taken to the denial by the trial court of the respective motions on each of the four grounds.

A directed verdict of no cause for action at the termination of the case was moved by the defendant on the same grounds and for the same reasons enumerated as in the motion for a non-suit. The court denied this motion and allowed the exception (S. C., page 295, lines 16-23).

ARGUMENT.

Point One.

The Trial Court erred in failing to non-suit or direct a verdict for the defendant on the ground that there was no evidence that the injury sustained by the plaintiff was the natural and proximate result of any negligence on behalf of the defendant.

The law is well established that the burden rests upon the plaintiff to prove the causal connection between the negligence and the accident, and the mere fact that one followed the other is not sufficient. See *Meyer v. Lembeck & Betz Brewing Co.*, 93 N. J. L. 7, page 10.

The mere happening of an accident is not sufficient but must be followed by proof. Negligence is a fact which must be proved; it will not be presumed. See *McCombe v. Public Service Railway Co.*, 95 N. J. L. 187; *Donus v. Public Service Railway Co.*, 102 N. J. L. 644.

It will have to be conceded that the only evidence under which the trial court submitted this case to the jury was the testimony of the plaintiffs' expert, Riley. His testimony in substance was that the required standard of safety in the operation of such a pool required one of two things: either (1) to segregate that part of the pool from swimmers where the diving took place by means of ropes or buoys, or some other object to sequester the particular diving area; or (2) in the absence thereof to provide a lifeguard to direct traffic and regulate the diving. The specific references to the plaintiff's testimony in this regard have been previously referred to under Facts and it is not necessary to repeat them here.

We do not believe that the law in New Jersey has gone so far that the testimony of one alleged expert, with no corroboration, and which testimony was clearly shown to be false, could in itself establish a jury question. This alleged expert of the plaintiffs relies upon certain specifically named swimming pools in and about the Jersey Shore as one of the basis for his so-called accepted standards of operation. In direct contradiction the defendant produced either the managers of those specific swimming pools or persons familiar with the operation of those specific pools, all of whom emphatically denied that any such standards existed. Other experts produced by the defendant likewise testified that no such standards existed.

This court in the case of *Young v. Ross*, 127 N. J. L. 211, at page 213, stated "Even expert testimony should not be permitted to transform an absurdity into a fact question for the jury." In the *Young* case this court did not decide the appeal specifically on this point, but we believe had it been necessary to so do, this court would have found the same result it eventually reached on another ground.

We continue the words of Justice Case, speaking for this Court, in the *Young* case:

"The testimony of the witness is unimpressive. We have doubt as to whether there is proof beyond the measure of a scintilla to take the case to the jury on the questions of negligence and cause of the fall, and a determination thereon is rendered unnecessary by our disposition of the second point."

We believe that the experience of the members of this court in their observation of swimming pools will definitely show that the alleged standards testified to by the plaintiffs' expert are false. When the plaintiffs' expert can only name four or five pools out of the thirty he admits to exist in Monmouth County to have his so-called standards in effect, it seems that this in itself is an admission by him that what he has testified to is not the accepted standard but rather what he thinks the accepted standard should be. His testimony is, in our respectful opinion, completely vitiated by the fact that those familiar with the specific pools that he referred to, and where he said his so-called standards were in effect, testified to the contrary.

We respectfully submit, therefore, that the testimony of the plaintiffs' expert was made up out

of whole cloth; that the standard of care he said existed in pools along the Jersey Shore was known unequivocally not to exist; and therefore any stated opinion by him, which was shown to be based upon improper and incorrect statements, should not be sufficient to take a case to a jury.

Points Two and Three.

The Trial Court erred in refusing to non-suit or direct a verdict for the defendant on the grounds that the plaintiff assumed the risk and that the plaintiff was guilty of contributory negligence.

In discussing these grounds for the defendant's motions we are aware that the plaintiff was not quite twelve years of age. However, he was an experienced swimmer and familiar with the particular pool and diving board in question. His testimony in this regard is enlightening:

"Q. Could you swim in 1940, did you know how to swim?

"A. Yes.

* * * * *

"Q. Could you dive?

"A. Yes.

"Q. Do you know the different kind of dives?

"A. Some of them.

"Q. Are you familiar with the West End Casino, did you used to go there in 1940?

"A. Yes."

(S. C., page 35, lines 17-28.)

"Q. Now, directing your attention to the day that this accident happened how many times

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had you been in the pool that year before that day?

"A. Practically every day.

"Q. In other words you had been there from —what time did you come, some time in June?

"A. Yes.

"Q. From some time in June and all through the month of July?

"A. Yes.

"Q. So you had been there perhaps, thirty, forty times, is that correct?

"A. Yes.

"Q. And you were of course familiar with the pool and the spring boards?

"A. Yes.

"Q. And you knew where the spring boards were located?

"A. Yes.

"Q. You had been diving in there every other day that you went in there?

"A. Yes.

"Q. In fact you used to be around the high springboard and diving quite a lot, did you not?

"A. Yes.

"Q. You never had any difficulty on any other occasion up until this day, did you?

"A. No.

"Q. And you knew, did you not, that there was no separate part of the pool roped off for divers?

"A. Yes.

"Q. You knew that?

"A. Yes.

"Q. You knew that a person swimming in the pool could start at one end and swim to the

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other end or any other part or any other place that he chose?

"A. Yes.

"Q. You also knew that people swimming in there had to keep out of the way of the people coming off from the board, didn't you?

"A. Yes.

"Q. You knew also, did you not, that it was the duty of those diving to look underneath to make sure there was a clear space before you dove?

"A. Yes.

"Q. You knew, did you not, that if someone dove off the springboard that you were on, ten feet off the water, and collided with somebody in the water that they were likely to get injured, did you not?"

* * * * *

"A. Yes."

(S. C., page 55, lines 17-40; page 56, lines 1-40; page 57, line 23.)

"THE COURT: For two years? Was that the first time you did any diving?

"A. No, I dove for about two years before then.

"Q. Had you been diving in that same pool before, in other years?

"A. No.

"Q. H'm?

"A. No.

"Q. Other pools?

"A. Yes.

"Q. Somewhat similar to this one?

"A. Yes.

"Q. So you knew generally the practice in diving?

"A. Yes.

"Q. You had been diving then for a couple of years before this accident?

"A. Yes."

(S. C., page 58, lines 13-30.)

The above quoted testimony shows very clearly that this plaintiff was not only experienced in swimming and diving, well acquainted with the pool and diving board in question, but also that he knew that no portion of the pool was segregated, and swimmers could use the entire pool, and that if someone dove off this ten foot spring board there was a likelihood of a collision unless the person dove at the appropriate time.

The infant plaintiff was well aware that there was no attendant regulating the diving, and he also knew that it was necessary for him in diving to see that he had clear water in front of him.

"Q. And you knew also, Harold, did you not, that there wasn't any guard or attendant that stood out there like a traffic cop, or somebody that signalled when you could come off the diving board and when you could swim. You knew there was nobody there regulating the diving or swimming, did you not?

"A. Yes.

"Q. You knew that it was a pool where those that wanted to dive dove and those that wanted to swim swam, did you not?

"A. Yes.

"Q. And you knew also that in view of the fact that there wasn't any guard or attendant or anybody else there saying when you could dive that it was necessary for you or anybody

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else in diving into the pool to see that you have a clear path in front of you?

"A. Yes.

"Q. Now, how long had you been diving at the time this accident took place?

"A. All day long."

(S. C., page 57, lines 24-40; page 58, lines 1-

9.)

On the platform holding the diving board was a sign "Diving at your own risk" (S. C., page 313, Exhibit D-1; page 292, lines 9-14).

In *Young vs. Ross*, supra, the present Chief Justice speaking for this court stated very clearly the doctrine on assumption of risk. His words were as follows:

"This court has repeatedly held that an individual assumes all the ordinary risks of his voluntary acts or the environment in which he voluntarily places himself on the theory that he has the intelligence of the ordinary prudent individual who is aware of the ordinary risks of his voluntary acts and the risks of the particular environment in which he voluntarily entered.' *Garton v. Public Service Electric and Gas Co.*, 117 Id. 520, 523. Patrons of a place of amusement assume the risk of the dangers normally attendant thereon, *Thurber v. Skouras Theatres Corp.*, 112 Id. 385, and, further, the risks ensuing from conditions of which they know, *Falk v. Stanley Fabian Corp.*, 115 Id. 141, or, as was suggested in *Castino v. Di Menzo*, 124 Id. 398, of which in the particular circumstances they are charged with knowledge, and which inhere therein. One who takes

part in a sport 'accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball.' *Gardner v. G. Howard Mitchell, Inc.*, 107 Id. 311. One may not engage in a game and then be heard to complain of such characteristic incidents as give it the desired zest."

This court in that case, which also involved an infant, held that the plaintiff assumed the risk, and reversed the court below. It is a coincidence that the same attorneys and the same trial judge were involved in the *Young* case.

The maxim of "Volenti non fit injuria" was discussed by this court as late as February, 1945, where, in this court, speaking through Mr. Justice Perskie, cites with approval the *Young* case, *supra*, and the principles therein stated. See *Offringa v. Westwood*, 132 N. J. L. 493.

We do not believe it can be forcibly argued on behalf of the plaintiff that by reason of his age he is exempt from the rules of law pertaining to assumption of risk and contributory negligence. Our courts have passed upon this frequently in the past. See *Vorrath v. Burke*, 63 N. J. L. 188, involving assumption of risk of a twelve year old girl; *North Hudson County Railway Company v. Flanagan*, 57 N. J. L. 696, involving a nine year old boy; *Brady v. Consolidated Traction Company*, 63 N. J. L. 25, a nine and a half year old boy; *Sheets v. Connolly Railway Co.*, 54 N. J. L. 518, involving a ten year old girl; *Verdon v. Crescent Automobile Company*, 80 N. J. L. 199, involving a seven year old boy.

We, therefore, have a young plaintiff who had been experienced for at least two years in diving; had used this same swimming pool and springboard on thirty or forty previous occasions—in fact, daily for the summer season of 1940 up until the date of this accident on July 30th, 1940; was entirely familiar with the manner of the operation of the pool; knew there was no sequestered area for divers; knew there was no lifeguard in attendance directing the opportune or appropriate time to dive; knew that it was necessary for the person making a dive to select the appropriate time in which to do so, and also knew the possibility of injury from a collision with a swimmer. Knowing all of these things, which he conceded and which are not disputed, how can it be said that there is a disputed question of fact warranting the submission of the case to a jury?

We submit that the actions of this boy, coupled with his experience and knowledge, bring the case exactly within the rule laid down by this court in the case of *Young v. Ross*, supra, and that his actions in diving off the board in view of all of the attendant circumstances clearly placed him in the category of one who assumed the risks of his voluntary acts.

The Supreme Court in the case of *Spitzkopf v. Mitchell*, 114 N. J. L. 160, considered a somewhat analogous case wherein the plaintiff was injured by an unknown person diving off a high springboard. In that case the trial court in awarding a non-suit said that he could not conceive of any possible precaution that the defendant below could have taken whereby he could properly control the actions of any one after he got on the spring board. The Su-

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preme Court in referring to the above holding by the trial court stated "We think that this was a correct disposition of the matter."

In the *Spitzkopf* case, *supra*, a non-suit was sustained denying recovery to the plaintiff who was a swimmer and who was struck by a person diving off a springboard. As noted above the court was of the opinion that there was nothing that the proprietor of the pool could do to control the actions of a diver once he was on the springboard. It seems to us that if the person in the water who was struck by a diver is denied recovery against the proprietor of a pool that it is an *a fortiori* conclusion that the proprietor of the pool could not be held responsible for the overt acts of the diver, who, by his own overt acts brings about his own injuries.

This court has held many times in discussing automobile intersection cases, that it is not only incumbent upon the driver of the car to look, but to look effectively. If the driver makes an observation which should disclose a known danger and by his ineffective observation fails to see it, he is in a position no better than if he had made no observation at all and is guilty of contributory negligence.

In the instant case the plaintiff stood on a springboard ten feet above the pool. Certainly he, more than anyone else, had a better view of the pool and was in a better position to determine when it was safe to dive, than anyone standing alongside of the board or in any other position in the pool, lifeguard or otherwise. The plaintiff testified that he looked and saw nothing. His testimony follows:

"Q. Now in this case you came out to the end of the diving board, you say you looked

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and you saw nothing there, then you turned your back. Did you make any other observations?

"A. Yes.

"Q. Well, just tell us briefly what you did.

"A. I looked over my shoulder before I went down.

"Q. Was there anyone there yet?

"A. No.

"Q. So then what did you do?

"A. So then I dove."

(S. C., page 44, lines 2-15.)

We, therefore, submit that the plaintiff voluntarily engaging in the sport of diving, knowing the possible dangers incident thereto and knowing the rules in regard to his proper conduct in engaging in a sport, must be held as a matter of law to have assumed the risk of any injury which he sustained, and that there was no issue upon this point for the jury to decide.

We further submit that the plaintiff by walking out upon the diving board, being in a preferential position to observe the safety of his actions, and in failing to make proper observation, of which there is no question he did, is guilty of contributory negligence as a matter of law. The injuries which he sustained were brought about solely by his own overt act. He and no one else had control and direction over his movements. He was not in a position where he could have been controlled in his movements had there been an obligation upon the proprietor so to do. The injuries which he sustained were brought about by his own voluntary acts.

We respectfully submit that upon the point of contributory negligence there was no issue for the jury.

Point Four.

The Trial Court erred in failing to non-suit or direct a verdict for the defendant on the ground that there was nothing to submit to the jury because there was no requirement in law for the defendant herein to protect a patron from an obvious risk that was incidental thereto.

The language of this court in *Schlenger v. Weinberg*, 107 N. J. L. 130, starting at the bottom of page 132, is of particular significance. The court there states:

"The question of the ordinary care required of the defendants must, to some extent, be predicated upon the knowledge of the ordinary person. Was it obligatory upon Weinberg to specifically caution the plaintiff that the links were there for the very purpose that players might drive golf balls over them, and that if a person through a player's carelessness or otherwise should be hit by a ball the contact might cause injury? If that be so, it seems equally logical that in inviting a guest to observe a tennis game one must warn that a ball may, by inadvertence, be driven over the side lines and, by striking a sensitive organ, as the eye, do physical injury, or that at a baseball game a host should warn his guest to be on guard against a long ball driven by an unusually vigorous player; and that failure to give such warning would leave one liable for subsequent injuries of that character. The mind readily multiplies such instances. Potential mishaps are incidents to almost every occasion."

In paraphrasing the language of the court in the *Schlenger* case, *supra*, was it necessary for the defendant-proprietor of the pool to warn the plaintiff that other persons might be in the water and that he must watch out for them in diving? Was it necessary for the defendant in the use of ordinary care to warn the plaintiff that if he was inadvertent he might cause injury to himself and others? The obvious answer is that there was no such duty, and even if it be assumed that there was such a duty, the performance of that duty by the defendant would have been ineffectual because the plaintiff by his own testimony admitted that he knew what was required of him in the exercise of care, and notwithstanding this, he brought about his own injuries.

It may be argued that the claim of the plaintiff is that it is not only the duty of the defendant-proprietor to warn of possible dangers, but that it was also the duty of the defendant-proprietor to regulate the conduct of those using the pool. In answer to this it is submitted that there is no decision in the State of New Jersey imposing any such extraordinary standard of care upon a proprietor of a place of amusement, such as a pool, or other place of amusement where sports are undertaken. The only decisions in the State of New Jersey placing responsibility to supervise the conduct of those participating in a sport are instances where the proprietor, through actual or constructive notice, has knowledge that at or about the time of injury some persons engaging in the sport are doing so in an unorthodox or improper manner. No such evidence existed in this case, nor was any evidence presented showing similar actions any time

Brief of Defendant-Appellant

previous. In the absence of such notice to the proprietor there is no obligation to guard and regulate every move of those participating in the sport.

CONCLUSION.

For the reasons herein indicated, it is respectfully submitted that the trial court erred in refusing to grant the defendant's motion for a non-suit and a directed verdict.

Respectfully submitted,

DURAND, IVINS & CARTON,

Attorneys for Defendant-Appellant.

J. VICTOR CARTON and

ROBERT V. CARTON,

Of Counsel.

Argued orally by

ROBERT V. CARTON.

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Respectfully submitted,

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Attorneys for Defendant

and

J. VICTOR CARTON and

ROBERT V. CARTON

Of Counsel

Respectfully submitted by

ROBERT V. CARTON

New Jersey Court of Errors and Appeals

MAY TERM — 1946

HAROLD E. ROSS, a minor, by his
next friend, Ann Casper, ANN
CASPER and HERMAN CASPER,
Plaintiffs-Respondents,

vs.

THE BREAKERS, INC., a corpora-
tion of the State of New Jersey,
Defendant-Appellant.

Action at Law

On Appeal From
New Jersey
Supreme Court,
Monmouth
Circuit

Sat Below:
Hon. Robert
V. Kinkead,
S.C.C.

BRIEF OF PLAINTIFFS-RESPONDENTS

Introduction

The defendant appeals from a verdict entered at the Monmouth Circuit in favor of the plaintiffs, in the total sum of Five Thousand Three Hundred Dollars (\$5,300.00), for personal injuries sustained by the infant plaintiff, Harold E. Ross.

The action arose out of a bathing accident, which occurred at the bathing pool conducted by the defendant corporation at West End, Long Branch, New Jersey.

The infant plaintiff, Harold E. Ross, was eleven years of age at the time of the occurrence complained of. He was the son of the plaintiff, Ann Casper. His father was deceased, and Mrs. Casper had remarried.

The defendant corporation operated a swimming pool and casino at West End, New Jersey, known as the West End Casino. Mr. and Mrs. Casper held a family membership at the Casino, under which they, and the members of their family, were entitled to use the pool and other facilities.

On July 30, 1940, plaintiff, Harold E. Ross, met with an accident while diving into the pool. His dive was made from a springboard, which was furnished by the defendant. The defendant had failed to furnish a competent lifeguard to assist its patrons and supervise the use of the diving board and the pool in the vicinity of the board, notwithstanding testimony that this was standard practice, and that such practice had been adhered to by the defendant during the previous year.

In executing his dive, the infant plaintiff, as he dove into the water, came in contact with the foot of a swimmer. The resulting blow was of such severity as to cause partial unconsciousness and a dislocation of the cervical vertebrae. Plaintiff was confined to the hospital for a long period of time, and his recovery from his injuries was both slow and painful.

The complaint charged the defendant with negligence in failing to have qualified lifeguards in attendance at the pool, in failing to supervise the diving from the board, in failing to supervise the diving area in the pool, and in failing to separate the swimming area from the diving area. At the trial, evidence was produced that it was standard practice in the operation of such pools throughout the United States either to separate the bathing area from the diving area or to provide protection for the bathers and divers

in the form of a qualified lifeguard or attendant to supervise the diving area. The witness who so testified stated that he, himself, had been in charge of the defendant's pool during the preceding year, and that such standard practice had been followed at that time. This was not denied by the defendant's witnesses. He further testified that the practice was well recognized and was taught by the Red Cross in college courses, where personnel was trained for service in such swimming pools. One of the defendant's employees, who was an expert and who was in charge of the operation of the pool at the time of the accident, failed to deny the existence of this practice, when called by the defendant as a witness.

During the course of the trial, the defendant moved for a nonsuit, and later for the direction of a verdict, on the grounds that:

- (1) There was no evidence that the infant plaintiff's injuries were the proximate result of the defendant's negligence.
- (2) That the infant plaintiff assumed the risk.
- (3) That the infant plaintiff was guilty of contributory negligence.
- (4) That, as a matter of law, defendant was not required to furnish protection to the plaintiff, under the circumstances.

The trial court denied these motions, holding that the evidence offered in behalf of the plaintiff disclosed that there was a standard of care in the profession of managing and operating swimming pools, that it was for the jury to determine whether such standard of care existed,

and if so, whether the failure to adhere to it constituted negligence which was the proximate cause of the plaintiff's injuries. He further held that the questions of contributory negligence and assumption of risk were questions of fact for the jury. The defendant's appeal is from this ruling.

Facts

In reviewing the testimony, no attempt will be made to review portions of the testimony covered in the defendant-appellant's brief or portions thereof not directly bearing upon the grounds of appeal.

Plaintiff, Harold E. Ross, testified that he was eleven years old on July 30, 1940 (S. C. p. 34, line 28). He went to the pool with his uncle and his sister (S. C. p. 35, line 25). His family had a bath house at the pool (S. C. p. 36, line 10). It was a season bath house, and he had the key (S. C. p. 36, line 15). Mrs. Prendergast was in charge of the defendant's place (S. C. p. 36, line 30). It was an open-air swimming pool (S. C. p. 37, line 15). There were diving boards at the pool (S. C. p. 37, line 30). The day of the accident was Kiddies' Day (S. C. p. 38, line 32). There were a lot of children around 11 or 12 years of age there (S. C. p. 39, line 23). He had used the pool and the board before (S. C. p. 39, line 28). Most of the children were swimming and diving (S. C. p. 40, line 3). There was no lifeguard at the pool (S. C. p. 40, line 10). There was no one regulating the pool (S. C. p. 40, line 15). There were no barriers or markers to keep swimmers away from the diving area (S. C. p. 40, line 20). There was no one on duty to warn swimmers away from the diving area (S. C. p.

40, line 33). There was no one in charge of the diving board (S. C. p. 41, line 3). There was no lifeguard on duty at the pool at all (S. C. p. 41, line 10). Swimming was permitted anywhere in the pool (S. C. p. 41, line 11). Diving was permitted any time (S. C. p. 41, line 17). At the time of the accident, there were a lot of children diving from the board (S. C. p. 41, line 35). They were diving one at a time (S. C. p. 42, line 3). After the diver ahead of him dove off, he came up the ladder to make his dive (S. C. p. 42, line 12). When he got out on the board to dive, he noticed that there was no one around at the place where he was going to dive (S. C. p. 42, line 38). He looked when he got to the diving board (S. C. p. 43, line 5). There was no one in the vicinity (S. C. p. 43, line 8). The dive which he was going to make was known as a back-jack (S. C. p. 43, line 15). Just before diving, he looked over his shoulder again (S. C. p. 44, line 11). There was still no one in the vicinity (S. C. p. 44, line 13). He then dove (S. C. p. 44, line 16). As he went down, he saw two boys racing underneath him (S. C. p. 44, line 19). They were swimming hard, had their heads under water, and were going pretty fast (S. C. p. 4, line 35). He tried to avoid them by twisting out of the way, but didn't do it (S. C. p. 45, lines 5-15). He struck one of the boys on the foot (S. C. p. 45, line 18). He sustained shock and was in a daze (S. C. p. 45, line 30). He was dizzy and paralyzed so that he could move only his legs (S. C. p. 45, line 35). He could not move either arm (S. C. p. 46, line 5). He was taken out of the water unable to move his arms or shoulders, neck or head (S. C. p. 46, line 25).

On cross examination, he stated that he knew how to do the dive (S. C. p. 58, line 33). The back-jack dive would land him almost directly beneath the board (S. C. p. 59, line 35). The boy with whom he came in contact was swimming from the other end of the pool towards the diving board (easterly) (S. C. p. 60, lines 15-25). In executing his dive, he entered the water almost directly underneath the outward end of the diving board (S. C. p. 61, line 17). When he dove off, he did not know that there was any likelihood that he would collide with anyone (S. C. p. 63, line 23). In diving, he would wait until the persons swimming in the immediate vicinity had gone, so that he would not hit anyone (S. C. p. 61, line 30). He wouldn't dive if he was going to hit someone (S. C. p. 63, line 33). He looked for swimmers (S. C. p. 63, line 40). He looked first, turned around, and then looked over his shoulder and saw that there was no one there before diving (S. C. p. 64, lines 5-25). There were a lot of people in the middle of the pool, but they were far from where he was going to land (S. C. p. 65, line 26). When he looked around from the top of the board, there was no one there (S. C. p. 67, line 20). When he broke out of the dive, he was coming straight. Then he noticed the two boys racing each other (S. C. p. 67, line 16). He wouldn't have dove if he had seen them (S. C. p. 69, line 8). He did not see the boys before diving (S. C. p. 69, line 10).

James H. Riley resided at New Brunswick, New Jersey. He was Associate Professor of Physical Education at Rutgers University. He had been in the swimming business for a total of thirty-nine years (S. C. p. 70, lines 26-40). He swam for the New York Athletic Club for eight

years and was the national champion surf record swimmer (S. C. p. 71, line 3). He swam on the American Olympic Team in 1912 (S. C. p. 71, line 6). He was in charge of swimming at the West End Casino for many years, also at the Colony Surf Club and at many camps (S. C. p. 71, line 10). He was President of the College Swimming Association, and was President of the Eastern Swimming Association for five years (S. C. p. 71, line 15). He helped to organize the Swimming Forum, which is nation-wide and which recently met at Fort Lauderdale, Florida, and was on the Action Committee of that forum (S. C. p. 71, line 18). When he was in charge of the West End Casino, his duties included the engaging of lifeguards, seeing that their duties were carried out properly, and seeing that they were properly trained (S. C. p. 71, line 23). He later performed similar duties at the Colony Surf Club (S. C. p. 71, line 27). When he left the West End Casino, he recommended to the proprietors a man who had been trained by him, a Mr. Neuschaefer (S. C. p. 71, line 30). Mr. Riley testified that he was familiar with the standard practice in the operation of swimming pools (S. C. p. 72, line 26). He was familiar with the standard practice regarding the precautions to be taken in connection with pools of the type of the West End Casino, in which swimming and diving were permitted (S. C. p. 72, lines 35-40). The standard practice required that the pool be covered properly by competent lifeguards and that the divers be protected (S. C. p. 73, line 22). The lifeguard was charged with the duty of protecting the public in the pool. If they have a high board and a low board, he directs the traffic. He prevents collisions by be-

ing present on the spot and timing the take-off of the diver so that there is not complication there when he hits the water (S. C. p. 74, lines 15-24). The guard is supposed to cover the hazards of both swimming and diving and regulate traffic under the board (S. C. p. 74, lines 33-40). In the event that swimming and diving are permitted in the same pool and there is no lifeguard, the standard practice requires corks, buoys, or markers around the area where there is a hazard of contact between divers and swimmers (S. C. p. 75, lines 5-25). The purpose is to have a restricted area where swimmers cannot enter and where divers can dive without hazard (S. C. p. 75, line 39 to p. 76, line 5). Where there is no such restricted area, standard practice requires the lifeguard (S. C. p. 76, line 6).

On cross examination, he stated that he was familiar with the practice which existed generally throughout the country during the year 1940 (S. C. p. 78, line 20). The standard practice of having a lifeguard on duty at the pool was followed at the West End Casino prior to 1940 (S. C. p. 87, line 7). It was taught in the Teachers Training Course of the American Red Cross (S. C. p. 87, line 9). The Red Cross course goes into the matter quite deeply and intensively as to the protective measures for pools (S. C. p. 91, line 17). The Red Cross course is given in nearly every university and that information is taught to the men who pass the course and later take guard positions or teaching positions (S. C. p. 91, lines 25-30). Olympic Park, Colony Surf Club and a pool at New Brunswick had buoys or markers regulating the area where diving was permitted (S. C. p. 79, lines 20-30). The standards prescribed and taught in these courses are

the same standards testified to by the witness (S. C. p. 92, line 10). His testimony was based upon the teachings of these courses, and upon talks and observations of other swimming pools (S. C. p. 91, lines 5-15). The precautions mentioned by him were taught in the Red Cross course as being standard accepted practice (S. C. p. 95, line 27). The lifeguard should be a competent life saver, who has passed the Red Cross test and has been qualified and certified (S. C. p. 97, line 26). He observed these standards in practice in various pools (S. C. p. 101, line 5 to p. 103, line 33).

Mrs. Ruth Breilkopf testified that she was the wife of Michael Breilkopf, a member of the bar of this state, and also had a family membership at the West End Casino (S. C. p. 135, lines 5-20). On the day of the accident, there was a very large crowd (S. C. p. 135, line 30). There were a lot of children (S. C. p. 135, lines 34-38). There was no lifeguard in attendance on that day (S. C. p. 136, line 18). There was no one regulating diving or directing swimming (S. C. p. 136, lines 22-40).

On cross examination, she stated that she had seen Mr. Neuschaefer giving lessons (S. C. p. 139, line 15). She did not think the locker boys had anything to do with the pool. She never saw them doing anything at the place (S. C. p. 139, lines 32-40). She did not see Mr. Neuschaefer at the pool on the day of the accident (S. C. p. 138, line 4).

The deposition of David J. Breilkopf, taken on the application of the defendant, but also offered by the plaintiff, was as follows: He had been swimming at the pool with Robert Link, who had subsequently died (S. C. p. 167, lines 26-32).

They were swimming towards the deep end of the pool (easterly) (S. C. p. 167, line 38). He never saw the infant plaintiff come off the springboard at all (S. C. p. 168, line 7). The first he noticed was the plaintiff going by him in the water (S. C. p. 168, line 13). As near as he could recall, plaintiff did not hit him (S. C. p. 168, line 27).

On cross examination, he stated that the pool was very crowded (S. C. p. 172, line 3). There was some kind of a Children's Day going on (S. C. p. 172, line 8). He didn't see the plaintiff dive into the water (S. C. p. 174, line 12). He never saw the plaintiff until plaintiff was in the water (S. C. p. 174, line 16). Plaintiff entered the water very close to him (S. C. p. 174, line 24). He didn't see any lifeguard in charge of the pool that day (S. C. p. 176, line 18). No lifeguard came up to help them immediately after the accident (S. C. p. 176, line 24). There was no separation of the diving area from the swimming area (S. C. p. 176, line 30). We were allowed to swim anywhere and to dive any time (S. C. p. 176, line 35). He did not notice any lifeguard, and there were no barriers or floats separating the diving area (S. C. p. 177, lines 5-10). There were no notices posted limiting the diving or swimming areas (S. C. p. 177, line 14). He and Link were the only ones in the vicinity of the place where the plaintiff landed (S. C. p. 180, line 18). He felt the plaintiff enter the water rather than saw him do so (S. C. p. 180, line 30). There were extra children in the pool on the day of the accident (S. C. p. 181, line 15).

Eldon C. Presley was Police Recorder of the City of Long Branch (S. C. p. 191, line 3). He was at the pool with Father Conally, the Curate

of the Star of the Sea Church in Long Branch (S. C. p. 191, line 28). He was sitting on the side of the pool, facing the north, with the diving board just ahead of him (S. C. p. 191, line 25). The plaintiff was about halfway from the board when he observed him and also noticed a swimmer (S. C. p. 192, line 25). Plaintiff attempted to avoid striking the swimmer (S. C. p. 192, line 34). He thought that the plaintiff had missed the swimmer (S. C. p. 193, line 7). The swimmer's feet were nearest to the plaintiff (S. C. p. 193, line 15). There was no lifeguard there (S. C. p. 194, line 14). There was no separation of divers and swimmers (S. C. p. 194, line 19). There were children using the pool and using the diving board at the time (S. C. p. 195, lines 5-10).

On cross examination, he testified that he always thought that Mr. Neuschaefer was an instructor (S. C. p. 195, line 35). He never saw the locker boys in the pool (S. C. p. 194, line 22). Mr. Neuschaefer usually gave his instructions in a pool, other than the one where the accident occurred (S. C. p. 197, line 37 to p. 198, line 10). There was no one regulating the swimming or diving at the time of the accident (S. C. p. 198, line 3).

Al Neuschaefer, called by the defendant, testified that he resided at Trenton, and that he was teacher in charge of swimming at Trenton High School (S. C. p. 218, line 15). He related his qualifications, which were extensive and included time spent at the West End Casino, the Spring Lake Tennis and Bath Club, the Colony Surf Club and the Trenton Municipal Pool (S. C. p. 218, line 24 to p. 219, line 5). In 1940, he was stationed at the West End Casino (S. C. p. 219, line 14). At the time of the occurrence

of the accident, he was in the training pool nearby (S. C. p. 22, line 8). He was not watching the swimmers or divers (S. C. p. 222, line 13). There was no lifeguard at the pool (S. C. p. 222, line 16).

He was qualified as a person competent on pools and had a teacher's certificate from the Red Cross (S. C. p. 222, line 28). There were two lifeguards stationed on the beach. On rainy days or when the beach was closed, these lifeguards would be detailed to the pool (S. C. p. 224, lines 18-20). On the day of the accident, the lifeguards were not detailed to the pool (S. C. p. 224, line 23). There was quite a crowd in the pool (S. C. p. 224, line 24).

In the defendant-appellant's brief, the statement is made that prior to the accident, Mr. Neuschaefer, the swimming instructor, had spoken to the plaintiff and other boys about taking unnecessary chances, quoting State of Case, page 219, lines 233-239. Reference to the page quoted reveals testimony that some time previous to the day of the accident, Mr. Neuschaefer spoke to the plaintiff and a good many other boys about taking unnecessary chances. This testimony did not refer to a time "prior to the accident" but rather to a time "previous to the day that the accident occurred." The testimony is devoid of any insinuation that it had anything to do with the accident in question. The testimony was not followed up by the defendant and could shed no light on the event leading up to the plaintiff's injuries.

Father Henry J. Murphy and Arthur Francis Healy were called by the defendant. They testified in substance that they were at the pool and saw the infant plaintiff go to the end of the

diving board and go back two or three times before actually making his dive (S. C. p. 234, line 25; S. C. p. 241, line 17). Father Murphy was not sure that the plaintiff struck anybody (S. C. p. 238, line 10). On cross examination he stated:

“Q. And this young boy that you say you recognized, who was the one that you saw dive from the board, you say that he went to the end of the board a couple of times? A. That’s right.

Q. And then went back? A. That’s correct.

Q. Did you look down in the water to see if there was anyone in the water that deterred him from jumping? A. There were some people swimming at that time” (S. C. p. 237, lines 7-18).

The witness, Healy, in contradiction of the other witnesses, described two or three swimmers swimming in opposite directions *across* the pool near the diving board (S. C. p. 243, line 38; S. C. p. 244, line 5, and S. C. p. 242, lines 8-18).

The defendants called a number of witnesses in an effort to meet the factual situation presented by the testimony of Mr. Riley. Among the witnesses produced were Bloomfield Hulick, Maxwell Vogt, Joseph H. Palmer, Lansdell Anderson, Orlo Jenkinson, and Robert M. Holmes. With the exception of one, these witnesses all testified that they were familiar with the operation of swimming pools. The witness, Robert M. Holmes, stated that his pool employed no life-guard at all (S. C. p. 280, line 38 to p. 281, line 5). In referring to Mr. Holmes’ testimony, counsel for the defendant said, “I might state also that I am not calling this witness as an expert

or qualifying him on the standards'' (S. C. p. 280, line 34). Mr. Hulick testified that he had been engaged as manager of the Allenhurst pool. He managed no other pools, nor had he ever been connected with any other pool in an executive capacity. He had had no experience in training lifeguards or assigning them to their duties (S. C. p. 229, lines 5-20). He further stated that he had a swimming instructor who was charged with the duty of looking after the lifeguard conditions at the pool (S. C. p. 231, lines 25-30). He had someone supervising the pool generally (S. C. p. 231, line 33 to p. 232, line 13).

Maxwell Vogt denied that there was any standard of care in the operation of swimming pools (S. C. p. 214, lines 11-27). On cross examination, he admitted a practice of having a lifeguard in attendance at pools (S. C. p. 215, line 20). Standard practice required that there be someone put in charge of the pool, who, as a rule, should be a competent lifeguard (S. C. p. 215, line 30 to p. 216, line 5). Such lifeguards could control swimmers around the diving board (S. C. p. 216, line 37). He further said:

“Q. You do, and watching swimmers so they won't be hurt by divers? A. I don't think that—no matter how many lifeguards you have—I don't think that they can control all the swimmers.

Q. No, but don't you think they can control the swimmers around the diving board? A. I suppose they could.

Q. And the general purpose then of the standard practice of having a lifeguard in charge is safety, is that it, protecting the people that are using the pool? A. To the best of his ability, yes.

Q. That's right, that is the purpose of it. Now, is there any greater danger, in your opinion, when diving and swimming are permitted in the same area? A. Well, there is always a case of danger somewhere'' (S. C. p. 216, line 31 to p. 217, line 12).

The witness, Joseph H. Palmer, denied that there were any standard practices in effect in the swimming pool industry (S. C. p. 258, line 4). He admitted that, at his swimming pool, there were from five to ten lifeguards in attendance at all times (S. C. p. 257, line 36). These lifeguards were in the pool for safety protection and to look after the welfare of patrons (S. C. p. 258, lines 20-28). These lifeguards are stationed so many feet apart and the captain of lifeguards sees that they are in their places (S. C. p. 259, lines 25-30). Every well-run pool has a lifeguard assigned to it (S. C. p. 259, lines 31-35). If one of his lifeguards saw that a collision was liable to take place between a diver and a swimmer, it would be his duty, if he could, to give notice in order to prevent an accident (S. C. p. 261, line 31 to p. 262, line 7). (Note: Mr. Riley had previously testified that at this pool, buoys or markers were used [S. C. p. 79, lines 20-30].)

Lansdell Anderson was a photographer and writer, who had formerly taken part in swimming competition. He had also taught swimming at one time and had been a lifeguard. His only testimony concerning the practices in vogue at the time of the accident was what he had observed in certain pools in connection with his duty as a sports writer and photographer (S. C. p. 268, line 25 to p. 269, line 7).

Orlo Jenkinson was the proprietor of a pool at Point Pleasant (S. C. p. 275, line 4). His pool

has a lifeguard, who is also swimming instructor (S. C. p. 276, line 35).

Eliza Hoeven was the treasurer of the defendant corporation (S. C. p. 282, line 32). She was in charge of the pools (S. C. p. 282, line 35). Mr. Neuschaefer was in charge of the pools for her (S. C. p. 283, line 9, S. C. p. 285, lines 32-40). She stated that there were lifeguards, but that they were assigned to the pools only when they had no duties to perform on the beach. Their duties were to watch the pools and the bathers, and see that they wouldn't be injured (S. C. p. 284, lines 14-35). She gave no testimony either way concerning the standards of safety, and did not deny that the standards, as testified to by Mr. Riley, had been carried out in her pool prior to 1940, when the accident occurred.

Joseph W. Prendergast testified that he was the manager of the defendant's pool in 1940 (S. C. p. 293, line 28). Mr. Neuschaefer was general director to take care of the safety of the pool (S. C. p. 293, line 33). Although the witness stated that he himself could not swim, he contended that the locker boys were all very competent swimmers (S. C. p. 294, lines 5-31).

Based upon these facts, the Trial Judge held that it was for the jury to determine whether there were in effect certain standards of safety, whether they had been violated by the defendant, and whether the violation thereof was the proximate cause of the plaintiff's injuries. In denying motions for a nonsuit and for direction of a verdict, the court further held that the questions of contributory negligence and assumption of risk were for the jury and not the court to determine.

ARGUMENT

POINT I

The Trial Judge properly held that it was for the jury to determine, as a fact, whether the defendant had been guilty of negligence in the operation of its pool and whether such negligence was the proximate cause of the injuries sustained by the infant plaintiff.

The argument under this point will be directed principally to Point I of the appellant's brief.

It is respectfully submitted that the Trial Judge properly held that the evidence presented at the close of the case involved questions of fact which required determination by the jury. The Court was required to assume as true all testimony offered in behalf of the plaintiff, and was required to accord to the plaintiff the benefit of all lawful deductions therefrom. *Israel v. Travelers' Insurance Co.*, 116 N. J. L. 154. *Shields v. Yellow Cab, Inc.*, 113 N. J. L. 479. It could not direct a verdict unless the evidence was so conclusive that reasonable minds could not differ as to the results, and where fair-minded men might honestly differ as to the conclusion to be drawn from such facts, the court was required to deny the motion and submit the determination of these facts to the jury. *Garvey v. Public Service Coordinated Transport*, 115 N. J. L. 280. And even where the facts were uncontradicted, if they were susceptible of different inferences, the question was still one for the jury. *Christine v. Mutual Grocery Co.*, 119 N. J. L. 149. *Bower v. Bower*, 78 N. J. L. 387.

Tested by these rules, it seems clear that the Trial Judge had no other alternative but to submit the issues to the jury. There was ample evidence that the defendant had violated the applicable standards of safety in the operation of its pool, and that failure to adhere to such standards was the proximate cause of the injury.

The defendant was the operator, for profit, of a swimming pool and casino. It invited the public to make use of its facilities. These facilities included pools, beach, refreshment stands and bath houses. The infant plaintiff was an invitee upon the premises. The defendant was under a duty of exercising reasonable care for his safety. For failure to exercise this care, it was liable to respond in damages. *Rom v. Huber*, 93 N. J. L. 360. *Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb. 463, affirmed 50 Neb. 214. *Larkin v. Saltair Beach Co.*, 30 Utah 36, 83 Pacific 686. *McKinney v. Adams*, 68 Fla. 208. *Turlington v. Tampa Electric Co.*, 62 Fla. 398. *Decatur Amusement Park Co. v. Porter*, 137 Ill. Appellate 448. *Esposito v. Saint George Swimming Club*, 143 New York Miscellaneous Reports 15, 255 N. Y. Supplement 794. The duty of the defendant under such circumstances was to make reasonable provision to guard against those accidents which common knowledge and experience teach are likely to occur. *Decatur Amusement Park Co. v. Porter*, *supra*.

The dangers to be guarded against in cases of this type depend upon the facts of each individual case. In the instant case, the defendant operated a swimming pool. This pool was about eighty feet long. In the deep end of the pool, it maintained diving boards. The public, both adult and infant, was invited to make use of the

pool and the diving board. On the day in question, the defendant's pool was being patronized by a large group of children. Such a situation was not unusual there. The children averaged from nine years of age upward. They were permitted to use both the pool and the diving board. There was no lifeguard stationed at the pool, and there was no supervision by a competent lifeguard over either the swimmers or the divers.

It is now admitted that no steps were taken to segregate the swimmers from the diving area, or vice versa, nor were any facilities or employees provided for the purpose of warning swimmers away from the diving area or of warning divers of the proximity of swimmers (S. C. p. 40, lines 22-40).

The plaintiff charged that this omission was a violation of the standard and accepted practices of safety in the swimming pool industry. In support of its contention, the plaintiff called James H. Riley as an expert.

Professor Riley had made swimming his life's work. He was in charge of swimming at Rutgers University and had been for many years. He had been connected with the industry for thirty-nine years in all. During the course of this time, he had engaged in swimming competition throughout the country. He had operated swimming pools over a long period, extending down to the date of the trial. Among the swimming pools which he had operated were the pools at the West End Casino and the Colony Surf Club. In addition to operating pools himself, he had trained and qualified other men in the operation of pools. One of his trainees was Mr. Neuschaefer, who succeeded him in the operation of the West End Casino Pool, in 1940. Mr. Riley's

testimony was clear and most convincing. He based it upon his experience and observation in operating and observing the operation of pools throughout the country, upon studies and conferences held with other qualified men in the industry, and upon the proper practices as taught in the American Red Cross courses in connection with the operation of swimming pools. The standard practices so taught and adhered to consisted of separating the swimming area from the diving area by ropes, buoys or other devices. Where such separation was not enforced, the standard practice was to have a lifeguard stationed for the purpose of warning swimmers away from the diving area or regulating diving so that it did not take place while swimmers were in the diving area.

Mr. Riley testified that these standards of safety were in effect in 1940 and prior thereto. In the year, 1939, he had been in charge of the West End Casino Pool, and these standards were in effect and adhered to by the defendant at that time. In the year 1940, and thereafter, he was in charge of the Colony Surf Club Pool, where the same standards were in effect. He also named other pools in which the divers were separated from the swimmers or in which lifeguards were used.

The importance of Mr. Riley's testimony is best illustrated by the attention devoted to it in the presentation of the defendant's case, and in the defendant's argument before the trial court. In attempting to counteract or to avoid its effect, the defendant called a number of witnesses. It is significant, however, that none of them possessed the experience and qualifications of Mr. Riley in the swimming industry. Several of them

had had no experience except in the operation of their own swimming pools. Most used life-guards but refused to admit that such guards had anything to do with the question of the safety of divers.

The defendant did have available a witness whose qualifications equalled those of Mr. Riley. This witness was Mr. Neuschaefer. Singularly, however, Mr. Neuschaefer did not deny the existence of the standard practices as testified to by Mr. Riley. He was not even asked that question by the defendant. On cross examination, when the question was asked of him, the defendant objected.

Singularly, also, no one was called by the defendant for the purpose of contradicting Mr. Riley's testimony that the standards of safety, as testified to by him, had been in effect at the defendant's pool in 1939, the year before the accident. There was no testimony from any of the so-called locker boys who were alleged to have been on duty at the pool at the time of the accident, nor was there any attempt to account for their absence.

Singularly, too, no evidence was produced by the defendant to contradict Mr. Riley's testimony that the standard practices of safety, as testified to by him, were taught in the Red Cross courses, which were designed to train men for duty in swimming pools, and in similar capacities.

The omission, by the defendant, of evidence on these points spoke louder than the self-serving testimony of a few operators of pools, who might not have been any more careful than had been the defendant, in the operation of their pools.

These facts were undoubtedly in the mind of the Trial Judge when he denied the defendant's

motion for a nonsuit and for a direction of a verdict. On such a state of facts, it is respectfully submitted that his decision was eminently proper.

In *Martin v. City of Asbury Park*, 114 N. J. L. 364, at page 366, a somewhat similar situation was presented, and this Court held:

“This witness did, however, testify that he was familiar with the standard and generally approved methods of constructions of stairways in bathing establishments, frequented by large numbers of persons at seashore resorts, and that such methods required a non-slip tread or nosing for the purpose of making them non-slip, a condition and method of constructions not found in the stairway in question, which consisted of a one-piece spruce tread with open risers.

“The testimony of this witness is, to us, not impressive, but it existed, and was sufficient to send that issue to the jury for settlement, which was done, under instructions from the Trial Judge, which were not excepted to, and the jury must have found thereon in favor of the respondents, as it could have done upon the proofs.”

In *Hansen v. Brown*, 123 N. J. L. 223, this Court held:

“In the present case there was the testimony of a qualified architect that a change in level at a doorway is not standard practice and where necessary should be accompanied by some appliance to call attention to it. It may be safely said that anyone knows

what a severe jolt may result from an unexpected step down, whereas if it is known beforehand there is none. We think that clearly there was evidence of negligence in failing to see to it that strangers invited to enter the room should have some warning of the change in level; and by the same token, the matter of contributory negligence in failing under the conditions to observe it, would be for the jury."

So, also, in the instant case, the plaintiff's case rested upon expert testimony. That the introduction of such expert testimony as to the standard of care was proper was not denied by the defendant. The Trial Court ruled that Mr. Riley had been qualified, by his study and experience, to give an opinion as to the standard of care applicable. No appeal is taken from this ruling, and it must be assumed that the Trial Court properly so ruled. The defendant admitted that it failed to carry out the precautions required by the standards of safety as testified to by Mr. Riley. This left as the only question open, whether such standards of safety did, in fact, exist. This was purely a question of fact and was for the jury to determine, under all of the evidence.

It was likewise for the jury to determine whether the defendant's omission was the proximate cause of the plaintiff's injury. Mr. Riley testified that the reason for the standard precautions was safety, to eliminate collisions such as the one here involved. These precautions were to prevent contact between the swimmers and divers. They took the form of alternative methods of protection. The jury was entitled to infer from the plaintiff's testimony that the observ-

ance of either of these precautions would have been effective. Plaintiff, himself, had exercised all of the powers of observation which an eleven year old boy could reasonably have been expected to do. Had he been warned, he would not have made his dive. Had the swimmers been warned from the area, either by the use of ropes, or by the lifeguard's whistle, the fair inference was that there would have been no accident. Clearly, the omitted precautions were calculated to avoid just what did occur. It was open to the triers of the facts to find that such omissions were the proximate cause of the collision. Such being the case, the Trial Court was required to deny the defendant's motion to nonsuit and to direct a verdict.

In *Deschamps v. L. Bamberger & Co.*, 128 N. J. L. 527, at page 530, it was held:

"It is also urged that a nonsuit should have been granted because the female plaintiff testified that she was not sure what caused her to fall and that the proofs did not show that the construction was not standard and was the cause of the fall. We think these contentions to be without merit. Whether the female plaintiff knew what caused her fall or not is not important *if there was testimony from which a fair inference might be drawn as to the cause.* We think there was such testimony. As to the method of construction there was testimony that the conditions stated were improper and differed from that usually found in similar large buildings frequented by many people and was dangerous."

In *McKittrick v. Dugan Brothers of N. J., Inc.*, 119 N. J. L. 605, the Supreme Court held:

“While in such an action as this a plaintiff must prove circumstances which render it probable, and not merely possible, that the defendant was at fault, he is not required to exclude beyond doubt the inference that the damage was due to a cause for which the defendant was not responsible. All that is required is that the circumstances should be so strong that a jury might properly, on grounds of probability, rather than of certainty, exclude the inference favorable to the defendant. The test is probability rather than certainty. *Austin v. Pennsylvania Railroad Co.*, 82 N. J. L. 416; *Jackson v. Delaware, Lackawanna and Western Railroad Co.*, 11 Id. 487; *Hercules Powder Co. v. Nieratko*, 113 Id. 195; affirmed 114 Id. 254.”

And further:

“Now it is a well settled rule that in passing upon motions to nonsuit and for the direction of a verdict the court cannot weigh the evidence but must take as true all evidence which supports the view of the party against whom the motions are made and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor. *Andre v. Mertens*, 88 N. J. L. 626.”

And further:

“It is also well settled that before the judge can take away from the jury the question whether or not the defendant was neg-

ligent, and whether or not such negligence was the proximate cause of the injury and determine those questions himself, the inference to be drawn from the pertinent facts in evidence must be such that fair-minded men ought not to differ about them. *Podolsky v. Sautter*, 102 N. J. L. 598. It therefore follows from an application of such rules that the motions in the present case were properly denied."

Clearly, it was open to the jury to infer that the injuries sustained by the infant plaintiff were the result of the failure of the defendant to put into effect the standard precautions required for the safety of patrons while swimming and diving in its pool. Such being the case, the ruling of the Trial Judge was proper.

POINT II

The Trial Court properly held that the questions of contributory negligence and assumption of risk were for the jury's determination.

Under this point will be discussed the defendant's argument under Points II and III of its brief.

At the conclusion of the testimony, it was open to the jury to find that the infant plaintiff was one of a large group of children who were invitees upon the premises, on the day in question; that in approaching the outer end of the diving board, prior to making his dive, he observed that there were no swimmers in the immediate vicin-

ity of the board, and that the nearest swimmers were about in the center of the pool (which was eighty feet long). After he turned, he again made observation and found the water still free of swimmers. He then executed his dive and was injured by coming in contact with one of two swimmers who were racing one another from the direction of the middle of the pool towards the point where he was diving. These swimmers had not been seen by him before. They were moving fast through the water and the one of them, who testified, admitted that he had not observed the infant plaintiff at all. It was open to the jury to find that these two racing swimmers had come from the group which was in the safety of the center of the pool, approximately forty feet away at the time the infant plaintiff made his observation.

When there is added to these facts the fact that the plaintiff was an infant who had not as yet attained his twelfth birthday, plus the fact that there was a large group of children at the Casino, all bent upon enjoying themselves, it is respectfully submitted that the questions of contributory negligence and assumption of risk were for the jury's determination.

The rule is well settled that negligence is never presumed. The burden of proving negligence is upon him who asserts it. *McCombe v. Public Service Railway Co.*, 95 N. J. L. 187. This rule is especially applicable in cases involving children. Our courts have uniformly held that such children are not held to the same degree of care as would an adult be. Thus, in *Nichols v. Grunstein*, 105 N. J. L. 363, this Court held, in an opinion by Mr. Justice Trenchard:

“Between the time in life when a person is incapable of exercising the care and judgment necessary to avoid and avert danger, and the time when such person is in law an adult and responsible as such, there is a transition period during which responsibility depends on matters of fact, and in this transition period such person may or may not be guilty of contributory negligence.

“The degree of care required of a child old enough to be capable of negligence is such as is usually exercised by persons of similar age, judgment and experience. In order to determine whether such a child has been guilty of contributory negligence, it is necessary to take into consideration the age of the child, and its experience and capacity to understand and avoid danger to which it is exposed in the actual circumstances and situation under investigation; and it is usually a question for the jury to determine whether the child has been guilty of contributory negligence.”

In that case, the plaintiff, a child of about seven years of age, ran across the street in front of a truck, after breaking away from her brother. This Court held that the question of the child's contributory negligence under the circumstances was for the jury's determination.

In *Napodensky v. West Jersey and Seashore Railroad Company*, 85 N. J. L. 336, at page 338, this Court, in an opinion by Mr. Justice Min-turn, held:

“Negligence is not an *ex cathedra* pronouncement with which an act may be arbi-

trarily branded in the abstract as the judicial eye may conceive it. It presents a concrete proposition for a jury to solve, where the facts vary, as narrated by opposing witnesses, and from which different minds may conjecture differently."

The decision in the *Napodensky* case referred to the actions of a full-grown man, who was struck by a train at a railroad crossing. He was thoroughly familiar with the crossing, and claimed to have stopped his horse and listened for a train before attempting to cross. In the instant case, the plaintiff was only eleven years of age and subject to such distractions as might arise from the presence of a large crowd of children who were patrons of the defendant's premises on the day in question.

In *Pesin v. Jugovich*, 85 N. J. L. 256, at page 259, this Court held:

"If a person, in doing that which it is his right to do in discharge of his duty, exercises reasonable care and prudence, he is not chargeable with contributory negligence as a matter of law, although the result showed that he imperiled his personal safety in doing as he did. 29 Cyc. 523.

"Reasonable care means, not extraordinary care, but such care as an ordinarily prudent person would exercise under the conditions existing at the time he is called upon to act.

"Where fair-minded men might honestly differ as to whether the conduct of the plaintiff was such as an ordinarily prudent person would have pursued under the conditions existing at the time he was called upon to

act, it cannot be said as a matter of law that he was guilty of contributory negligence.”

Reference to the testimony of the infant plaintiff, himself, discloses nothing which bespeaks negligence as a matter of law. He made his observation before diving and observed no one in the vicinity (S. C. p. 42, line 38; S. C. p. 43, line 8; S. C. p. 44, line 13). In diving, he would wait until anyone in the vicinity of the board had gone (S. C. p. 61, line 30). He wouldn't have made his dive if he was going to hit someone (S. C. p. 63, line 33). He looked for swimmers before making his dive (S. C. p. 63, line 40). The nearest people were in the middle of the pool, far from him (S. C. p. 65, line 26).

There is some corroboration of his testimony in the testimony of Father Murphy, who stated that the plaintiff went to the end of the board twice before making his dive, and that on both of these occasions, there were swimmers in the area. The witness, Breitkopf, whose testimony was taken by deposition by the defendant, testified that he and his companion, Link, were the only two swimmers in the area. They were coming from west to east. Plaintiff was also corroborated in part by the testimony of Recorder Presley. The only evidence in contradiction of this was the testimony of the witness, Healy, who was called by the defendant. He claimed that there were swimmers, who were coming from opposite directions, i. e., north and south. Clearly, the plaintiff was entitled to a determination from the jury as to whether his testimony, partially corroborated by the testimony of Father Murphy, David Breitkopf and Recorder Presley, was correct or whether the testimony of Healy was correct.

Admittedly, plaintiff was not required to defer his dive until all swimmers had left the pool. He was only required to see that the way was clear for a distance within which swimmers, proceeding at a customary and reasonable rate of speed, would not threaten his safety. *Newark Passenger Railway Co. v. Bloch*, 55 N. J. L. 605.

Thus, the defense of contributory negligence raised by the defendant would no more than present a jury question. *Newark Passenger Railway Co. v. Bloch*, *supra*. *Jackson v. Dreamland Coaster Co.*, 4 N. J. Misc. 924, 135 Atl. 56. *Andre v. Mertens*, 88 N. J. L. 626.

The defendant, in its argument, also urges that the infant plaintiff, in making his dive, assumed the risk of contact with the swimmer and hence cannot recover. This question likewise was for the jury and not the Court.

Our courts have uniformly held that the doctrine of assumption of risk applies only to such dangers as are normally attendant upon the plaintiff's action. *Thurber v. Skouras Theatres Corp.*, 112 N. J. L. 385. Unless there be a realization by the plaintiff of the peril to which he is exposed, the doctrine of assumption of risk does not apply. Whether, in a given case, there was any assumption of risk is a question of fact for the jury's determination. *Castino v. De Menzo*, 124 N. J. L. 398.

In the instant case, the situation presented was certainly not one wherein the infant plaintiff was chargeable, as a matter of law, with assuming the risk of any danger. From his position on the springboard, he observed that there were no bathers nearer to him than the middle of the pool, forty feet away. To him, the area appeared to be clear and the time propitious. His state

of mind in the circumstances is fully illustrated by his testimony. Thus he testified:

“Q. So you knew, did you not, that when you dove off that springboard, there was, unless you were particularly careful, a likelihood that you would collide with somebody, didn't you? A. No.”

And further:

“Q. That is how long it took. Now, when you went out to the end of the board and looked, what was the nearest person to you in the pool? A. I don't know, there were a lot of people in the middle of the pool, but they were far from where I was going to land” (S. C. p. 63, lines 23-27; S. C. p. 65, lines 23-30).

He was certainly not called upon as a matter of law to assume that two swimmers would detach themselves from the group in the middle of the pool and, by racing tactics, place themselves in a position to injure him while he was executing his dive. On the contrary, it was open to the jury to find that any reasonable prudent person, under similar circumstances would have been justified in assuming that the dive could be made in safety.

Some point is made in the appellant's brief that there was a sign bearing the legend, “Dive at your own risk.” The case is devoid of any evidence that this was ever seen by the infant plaintiff or called to his attention. The record discloses that the sign was placed in a position where it would not be seen by divers until they had entered the water.

Under circumstances such as those sub judice, it has been held time and again that the ques-

tions of assumption of risk and contributory negligence are questions of fact for the jury's determination. Upon the facts submitted, there could be no assumption, as a matter of law, of the risk of injury due to the defendant's negligence.

In *Hill v. Merrick*, 147 Ore. 244, 31 Pacific Reporter, 2nd Series, 663, a proprietor of a swimming pool was held liable for injuries sustained by a patron when she was jostled by other children from a diving board, and fell, injuring herself. The Court held that the defendant had failed to use reasonable care in furnishing a reasonably safe condition at the high dive. The Court further held that it was the duty of the defendant to superintend the pool, so as to furnish a reasonably safe condition. The plaintiff did not assume the risk of injury from the failure of the defendant to perform its duty in this regard.

In *Connolly v. Palisades Realty and Amusement Co.*, 11 N. J. Misc. 841, the plaintiff was a patron of the defendant's amusement park and took a ride on a device known as the "Dodge Em". The evidence indicated a practice which consisted of having arrows indicating the direction in which the "Dodge Em" cars were to be operated and signs prohibiting head-on collisions. Plaintiffs claimed that they were struck by another "Dodge Em" car in violation of these precautions, although they had applied to the defendant for protection. The Court held that the matter was one for the jury's determination, and a judgment was entered in favor of the plaintiff. The judgment was affirmed by the Supreme Court, which held:

"In the case of *Gardner v. G. Howard Mitchell, Inc.*, 107 N. J. L. 311; 153 Atl. Rep. 607, it was held that when a person enters into a sport of this sort he takes the chance of injury through its normal operation. *He does not, however, take the chance of conduct endangering the safety of its patrons if such conduct is in violation of the rules governing the sport and within the knowledge and control of those in charge of the amusement.*

"While the proofs showed that the movements of each individual car were controlled by its occupants they also showed that the entire power of the operation of all the cars could be shut off by the attendant in charge. Under the proofs it could be inferred that the plaintiffs were subject to bumping in violation of the rules with the knowledge and without the interference of the attendants, and that finally this resulted in the severe collision which caused the injuries. Such obviously was not a risk assumed by plaintiffs when they entered the car."

The case was subsequently affirmed by this Court in *Connolly v. Palisades Realty and Amusement Co.*, 112 N. J. L. 502.

The case of *Esposito v. Saint George Swimming Club*, 225 N. Y. S. 795, 143 N. Y. Misc. 15 (Municipal Court, N. Y.), is almost on all fours with the case sub judice. There, the plaintiff was swimming in the water in the vicinity of the diving board, after having completed his dive. Before he could emerge from the water, he was struck by another diver. In a subsequent suit for his injuries against the proprietor of the

bathing pool, negligence was charged in the failure of the defendant to take precautions to regulate the use of the diving board. The Court held that it was the duty of the proprietor to take reasonable precautions to avoid contact between the diver and the plaintiff below. The Court further dismissed the contention of the defendant that the plaintiff had assumed the risk of injury, holding that the thrill of a collision between the swimmer and diver was not the appealing motive of the sport, nor could it even be considered part of the sport, nor was it a hazard invited and foreseen, quoting *Tantillo v. Goldstein Bros. Amusement Co.*, 248 N. Y. 290, 162 N. E. 82, and *Reinzi v. Tilyou*, 252 N. Y. 97, 168 N. E. 101.

In *Griffin v. De Geeter*, 132 N. J. L. 381, the plaintiff was a patron of the roller skating rink. In clearing the floor, the skating rink guards herded the skaters through various passage ways to the outer space beyond the skating floor. In so doing, a guard skated rapidly towards the plaintiff with outstretched arms, causing her to turn and lose her balance so that she fell and was injured. The defendant appealed from the Trial Court's refusal to grant motions for a nonsuit and the direction of a verdict. In passing upon the question of assumption of risk, this Court held:

"We think, however, that the proofs in the instant case distinguish it from this line of cases, because the wrongful act complained of was not a danger normally attendant upon the amusement or sport in which the plaintiff was indulging. Nor was the fall due to any defect in the conditions of the premises but was rather caused by the method used

by the employee of the defendant in clearing the floor of the patrons in a manner which, under the proofs, the jury could find was done negligently, in disregard of their safety."

In the somewhat similar case of *Andre v. Mertens*, 88 N. J. L. 626, this Court held that the question of the plaintiff's contributory negligence in descending an unlighted stairway in a theatre was one of fact to be determined by the jury.

Applying the doctrine of the cases above cited, the Trial Court properly held that a factual situation had been presented, which was for the sole determination of the jury. The case was not one in which the thrill of violent contact between the swimmer and diver was a part of the game. It did not involve devices constructed and operated to give the participants the thrill of danger from obstacles or mechanical devices calculated to throw or strike the participants.

A careful examination of the cases cited in the appellant's brief fails to reveal a single case holding that, under the facts sub judice or similar facts, the plaintiff, as a matter of law, was held to have assumed the risk of injury. In *Garton v. Public Service Electric & Gas Co.*, 117 N. J. L. 520, the Court left the question of assumption of risk to the jury in a charge which was found to be proper. In *Thurber v. Skouras Theatres Corp.*, 112 N. J. L. 385, the case was devoid of any standard practices or of any evidence of any conditions which would suggest the existence of danger which the defendant should have guarded against. In *Falk v. Stanley Fabian Corp. of Delaware*, 115 N. J. L. 141, there was no

evidence of any violation of any standard practice regarding the lighting of theatres. On the contrary, the evidence indicated that the state of light in the theatre was no different than usual. The cases of *Gardner v. G. Howard Mitchell, Inc.*, 107 N. J. L. 311, *Offringa v. Westwood*, 132 N. J. L. 493 and *Young v. Ross*, 127 N. J. L. have no application to the present facts. In each of these cases the Court found that the condition complained of was part of the thrill of the game, which the device was calculated to give, and the patron expected to enjoy. Thus in *Gardner v. Mitchell, supra*, the Court held that the essential part of the game was the thrill of bumping and being bumped in the use of the "Dodge Em" device. In *Offringa v. Westwood, supra*, the thrill of the game consisted in coasting around an obstacle which had been left on the highway where coasting was being carried on. In *Young v. Ross, supra*, the thrill of the game consisted in overcoming the various obstacles which were placed in the path of the player of obstacle golf. If the device had been constructed in any other way, the thrill would have been lost.

The case of *Spitzkopf v. Mitchell*, 114 N. J. L. 160 is in no wise helpful to the defendant's present argument. In that case, the question of assumption of risk was not even commented upon by the Supreme Court. There was, in the case, no evidence of any standard practice or safety precaution which the defendant had omitted and hence the Court held that no negligence had been shown. The Court was careful to point out, however, that if the defendant knew or should have known of the danger involved, a duty to provide against it could have arisen, citing *Alcott v. Public Service Corp.*, 78 N. J. L. 482 and

Connolly v. Palisades, &c., Co., 11 N. J. Misc. R. 841, affirmed, 112 N. J. L. 502.

In the instant case therefore, the defenses of contributory negligence and assumption of risk raised, at the most, a factual question to be determined by the jury. The plaintiff's testimony, corroborated by other witnesses, indicated that he took such steps as appeared reasonably necessary to him, a boy of less than 12 years, for his own safety. He testified that he waited until others had left the area before attempting to dive from the board. He made observations and found no swimmers nearer to him than the middle of the pool. Had he known that there was any danger, at the time, he would not have dove into the water.

Plaintiff's testimony was corroborated in a number of important respects by the testimony of other witnesses. Although disputed by the defendant, the decision on these disputed questions of fact was obviously one for the jury, and it was to the jury rather than the Court that the defendant was required to address its argument thereon. The jury found, and properly so, that the defenses of contributory negligence and assumption of risk had not been made out.

and argument, in that case, the question of assumption of risk was not even submitted upon by the Supreme Court. There was in the case no evidence of any standard practice or custom, or of any negligence on the part of the defendant which the defendant had sought to show. The Court held that no negligence had been shown. The Court was careful to point out, however, that if the defendant knew or should have known of the danger involved, in being to provide against it could have arisen, citing *W. C. Colt v. Public Service Corp.*, 78 N. J. L. 482 and

POINT III

Where the defendant violated the standards of care generally accepted in the operation of swimming pools, it was a question of fact for the jury to determine whether such violation constituted negligence.

In Point IV of the appellant's brief the contention is made that there was no requirement in law incumbent upon the defendant to protect the plaintiff as a patron of the defendant's pool.

The only case cited in support of this contention (*Schlenger v. Weinberg*, 107 N. J. L. 130) has no application whatever to the facts in the instant case. It was devoid of any evidence of standards of safety which were in general use, and should have been adhered to by the defendant. To the contrary, in the instant case, there was evidence that the defendant had failed to carry out, at the time of the accident, the standards for safe operation, which were generally accepted and in effect in the swimming pool business. The testimony of Mr. Riley indicated that these standards were followed to prevent just such accidents as the one here under consideration.

In the operation of its swimming pool the defendant was bound to exercise reasonable care. *Lipton v. Dreamland Park*, 121 N. J. L. 554. Failure to adhere to the standard safety precautions generally accepted and enforced in the industry constituted ample evidence to go to the jury as to whether it had performed its duty in this regard.

An illustration of this doctrine is found in *Connolly v. Palisades Realty and Amusement*

Co., 11 N. J. M. 841, subsequently affirmed by this Court in 112 N. J. L. 502. In the *Connolly* case plaintiff was using the same device as was passed upon in this Court in *Gardner v. Mitchell*, 107 N. J. L. 311. However, there was evidence that there were certain safety precautions, consisting of arrows indicating the direction in which the cars should be propelled and signs prohibiting head-on collisions. In view of the failure of the defendant to enforce these precautions, the Court held that there was evidence of the defendant's negligence sufficient to take the case to the jury and that the question of assumption of risk was likewise a jury question.

A somewhat similar situation is illustrated in the operation of baseball parks. Safety precautions in the form of wire netting are in common use in baseball parks and for negligence in the failure to maintain such safety devices, owners of baseball parks are held liable. Thus, in *Edling v. Kansas City Baseball and Exhibition Company*, 181 Mo. App. 327, 168 S. W. 908, the proprietor of a baseball park was held liable where a foul ball passed through a hole which had been worn in the protective netting and struck a patron. The Court said:

“when plaintiff entered the grand stand he was invited to seat himself where he pleased, with the assurance that reasonable care had been observed for his protection. It was the duty of defendant to exercise reasonable care to keep the screen free from defects, and, if it allowed it to become old, rotten, and perforated with holes larger than a ball, the jury were entitled to infer that it did not properly perform that duty, but

was guilty of negligence. In seating himself where he did, plaintiff did not assume the risks resulting from such negligence."

In the swimming pool industry safety precautions in the form testified to by the expert witness had been generally adopted.

The adoption of any one of the protective measures described by this witness would have sufficed to avoid the accident. The warning note of the lifeguard's whistle is a common occurrence in the bathing industry today. Such a warning, in the absence of segregation of the diving area, would have called the attention of both swimmer and diver. Proper supervision of the diving board, or the use of markers to warn swimmers out of the diving area would have avoided such an accident.

The fact that such precautions had been adopted was a clear indication that the proprietors of bathing pools were conscious of the dangers attendant upon their failure to carry out such precautions. Such precautions were not only adopted in the industry, but they had been carried out and adhered to by the defendant, at least during the year prior to the accident. Under such a state of facts it was clearly for the jury to determine whether in the omission of these standard precautions during the year 1940 the defendant had performed its full duty of exercising reasonable care for the safety of its patrons, especially those of the age and intelligence of the infant plaintiff.

CONCLUSION

Inasmuch as (1) there was evidence adduced to indicate that the defendant had omitted to carry out the standard precautions required for the safety of its patrons in the operation of its swimming pool, and (2) inasmuch as the questions of assumption of risk and contributory negligence were questions of fact to be determined by the jury, it is respectfully submitted that the action of the Trial Court in denying the motions for a non-suit and a directed verdict, was proper and that the judgment rendered in favor of the plaintiffs and against the defendant should be affirmed.

Respectfully submitted,

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