

Justice Trainor

MASS TORTS 2011  
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1. The legislature effectively overruled the holding in O'Hanley v. Ninety-Nine, Inc. by enacting G. L. c. 231, § 85T. The law created a statutory duty of care (as opposed to the common law) to patrons who injure themselves. Under the statute, what conduct is required by the tavern keeper to breach that duty of care? What conduct is required, if that same patron injures an innocent third party, by the tavern keeper to breach that duty of care to the innocent third party?

2. What is the significance of the phrase "Evidence of Obvious Intoxication"?

3. In Commerce v. Ultimate Livery Serv. Inc. the Supreme Judicial court held that a private carrier assumed a duty to the public, notwithstanding the fact that the livery service provided no alcohol to their clients, when an intoxicated client later injured a member of the public.

- What was the theory of liability (social host, restatement of torts, negligence, special relationship, etc.)?
- How was that theory of liability applied to the facts?

4. A. What is the significance of G. L. c. 186, § 19 with regard to a landlord's duty of care owed to his tenant?

B. How would liability be established in light of § 19?

C. What is the significance of G. L. c. 21, § 17 with regard to lawful visitors on certain properties and for certain purposes?

D. What effect if any, does § 17 have on the duty of care owed to trespassers.

E. What is the significance of G. L. c. 231, § 85Q to a land owners' duty of care to a child trespasser.

5. Papadopoulos v. Target Corp. abolished the "Massachusetts Rule" which had distinguished between the natural and unnatural accumulation of snow and ice. The decision however, expressly left open a question which significantly effects a property owner's ability to meet his duty of care. Connecticut answered this question in Kraus v. Newton. What is the question left unanswered in Massachusetts?

6. McGuiggan, Langemann and Ulwick combined to determine the duty owed by a social host to persons traveling on the roadways who are injured by an intoxicated driver who had consumed alcohol at the social host's residence. What must the injured party show (prima facie case) to establish the liability of the social host.

7. In 1865, the case of Sweeny v. Old Colony & Newport Railroad Comp. restated the common law duty of care owed Invitees, Licensees and Trespassers by property owners. A 1973 decision changed the long standing common law. What was the case? What was its holding?

8. What is the duty of care, if any, owed to a trespasser under the modern common law (post 1973) rule? What circumstances or situations does our common law recognize as exceptions to the general rule?



9A. In the traditional approach to slip and falls, there were four (4) methods to establish a store keepers negligence and therefore their liability. What are the four (4) methods? (Remember Oliveri v. MBTA)

B. Sheehan v. Roche Bros. Supermarket modified but did not eliminate the traditional approach. What new approach did Sheehan introduce? How does it operate to change a store keepers duty of care?

C. How would this new approach be applied, for example, to expand the duty of care of a tavern owner?

10. Explain the theory of "Lost chance of survival".

11. Below are the facts from DosSantos v. Coleta, 81 Mass. App. Ct. 1, (2011). The plaintiff (DosSantos) sued the defendant (premises owner) for negligence and failure to warn. Discuss the legal issues involved in these facts and what should the outcome of the action be?

Facts. On August 2, 2005, Dos Santos suffered a catastrophic spinal cord injury when he sustained a burst fracture of his C-5 vertebrae, resulting in permanent paralysis from the upper chest down. The accident occurred in the backyard of the two-family home owned by the defendants.

Sometime prior to June 18, 2005, Jose Coleta set up an inflatable vinyl pool in the backyard of the home. At some point on or about June 18, he also installed a trampoline, which his son had received as a birthday present, next to the pool. The pool was approximately two feet deep, while the trampoline was three feet high. During the summer of 2005, the pool and trampoline were frequently used by the Coleta children and family friends. The plaintiffs and defendants testified that they observed children and adults jumping from the trampoline into the pool on many occasions.

On August 2, 2005, Dos Santos returned home from work and spent time playing with his son on the trampoline while his wife recorded a videotape of them. After a few minutes of jumping on the trampoline, Dos Santos decided to try to "flip over and sit on [his] butt in the water." Footage from the home videotape, which was presented as evidence at trial, shows Dos Santos's attempt to perform a front flip into the pool. His attempt was unsuccessful. Dos Santos struck the bottom of the pool, breaking his neck, resulting in permanent injuries.

While awaiting the arrival of emergency medical services, Dos Santos stated that he "dove into the pool from the trampoline and landed on his head." Dos Santos's wife, Keila, stated that she was "video-taping her husband playing on top of the trampoline when he decided to dive into the pool." Police officers at the scene of the accident took photographs of the trampoline and pool, which showed the pool manufacturer's warning label printed on its side, cautioning against jumping and diving. The warning appeared in six languages, including Portuguese, Dos

Santos's native language. The warning label also included pictographs cautioning against jumping and diving.

Dos Santos was hospitalized for an extended period. He has been hospitalized at various facilities for medical conditions related to his quadriplegia. He had incurred \$728,702 in medical bills. Dos Santos also testified that his medical condition adversely affected all aspects of his life, including his relationships with his wife and child.

12. The following question is based on the facts of Navien v. Russ-Lynn, Inc., 2010 Mass. App. Unpub. LEXIS 1298, Docket No. 09-P-1589 (2010) (unpublished decision).

Victor was killed when his car was struck by a car operated by Miller, a drunk driver. Victor's father, in his capacity as executor of his son's estate, has sued Smitty's Pub, alleging that it served alcoholic beverages to the already intoxicated Miller prior to the accident.

The following undisputed facts have been entered into the record:

On the night in question, Victor was driving home at about 1:00 A.M. after spending an evening at a friend's house. Miller was also driving at this time. One witness saw Miller's car weaving on the road. Another witness saw Miller's car pass her at a high rate of speed, veer across the double yellow line and strike the decedent's vehicle head on.

A few hours after the accident, Miller said to a police officer that he had been "out drinking at Smitty's, and I think at some point I blacked out." An acquaintance of Miller's testified that he had been drinking in the back of Smitty's at the same table as Miller, and that Miller had been "definitely quieter than usual, and a little zonked, but I didn't know he was drunk." Both bartenders testified they could not tell that Miller was intoxicated. Miller's blood alcohol level was tested at about 2:00 A.M., approximately forty-five minutes after the collision; his blood alcohol level was .09, .01 above the legal limit in Massachusetts.

Smitty's Pub has moved for summary judgment, arguing that on the present record, no liability can be established. How should the judge rule, and why?

13. The following question is based on the facts of Juliano v. Simpson, 461 Mass. 527 (2012).

Heather, a minor, invited several friends to a party at her home while her father was away. One of the guests, Gary, consumed alcoholic beverages that he had obtained earlier that evening and brought to Heather's house. Although there were some alcoholic beverages in the house belonging to Frank, Heather's father, Heather neither consumed nor offered them to her guests. Thereafter, Gary left the party with Paula, another guest. Their automobile struck a utility pole, causing injuries to both Gary and Paula.

Paula has sued Heather and her father for negligence. Paula argues that both defendants violated a state criminal statute, G. L. c. 138, § 34, and that therefore tort liability should attach. The statute reads:

"Whoever furnishes any alcoholic beverage or alcohol for a person under 21 years of age shall be punished by a fine of not more than \$2,000 or by imprisonment for not more than one year or both. For the purpose of this section the word 'furnish' shall mean to knowingly or intentionally supply, give, or provide to or allow a person under 21 years of age to possess alcoholic beverages on premises or property owned or controlled by the person charged."

Heather and her father have filed a motion to dismiss Paula's claim. How should the court rule, and why?