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LANDOWNERS OR LIFEGUARDS? DEGEL v. MAJESTIC MOBILE MANOR, INC. AND LIABILITY FOR VISITORS' INJURIES FROM NATURAL BODIES OF WATER

Joseph Z. Lell

Abstract: Under an exception to the attractive nuisance doctrine, landowners typically owe no duty to warn and protect trespassing children from the dangers inherent in ponds, streams, and other natural bodies of water located on the owners' property. In *Degel v. Majestic Mobile Manor, Inc.*, however, the Washington Supreme Court declined to extend this premises liability exception to situations where the injured visitor is an invitee of the landowner. This Note examines the natural bodies of water exception and argues that *Degel's* refusal to apply it in the invitee context ultimately conflicts with the court's earlier policy statement favoring access to the state's waterways. The Note concludes by proposing an analytical framework that would ensure the continued recreational, visual, and environmental benefits derived from unfenced bodies of water located on business property, while simultaneously maintaining a duty of affirmative care upon landowners to protect invitees from water hazards only under carefully limited circumstances.

The numerous ponds, lakes, rivers, creeks, and miles of shoreline in this state comprise one of its most cherished amenities, and to require that they be drained, filled, or surrounded by impregnable fences (which appear to be the only means of making them child proof) in order to escape liability for the occasional drowning which occurs, would not only impose an unreasonable burden on the owner but would also run counter to the public policy of this state.

Ochampaugh v. City of Seattle¹

Throughout its judicial history, Washington has consistently shielded its landowners from liability whenever visitors have sustained injuries from natural bodies of water on the owners' premises.² In *Degel v.*

1. 91 Wash. 2d 514, 523, 588 P.2d 1351, 1356 (1979).

2. Prior to 1996, no reported Washington decision had imposed liability upon a landowner for personal injuries caused by the dangers inherent in a natural body of water, regardless of the injured party's status or age. Brief of Respondent at 5, *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash. 2d 43, 914 P.2d 728 (1996) (No. 62312-1). Washington courts have, however, occasionally permitted landowner liability for artificial water bodies or man-made conditions associated with the water. *See, e.g., Kilmier v. Bean*, 48 Wash. 2d 848, 296 P.2d 992 (1956) (refusing to preclude liability for drowning death of minor licensee who fell into concealed underwater excavation); *Grove v. D'Allessandro*, 39 Wash. 2d 421, 235 P.2d 826 (1951) (imposing liability upon beach resort operator for injuries suffered by invitee who dived from 20-foot slide tower into shallow water); *Corum v.*

Majestic Mobile Manor, Inc.,³ however, the Washington Supreme Court sharply limited this policy by refusing to exempt natural bodies of water from the general rule requiring landowners to exercise reasonable care for the safety of their business invitees.

Degel involved a three-year-old invitee who nearly drowned after falling into a swift-flowing creek located on the premises of the mobile home park where his parents resided as tenants.⁴ The child's father brought suit against the landlord, alleging that the mobile home park was negligent, inter alia, for maintaining such a dangerous condition on its property without adequate safeguards.⁵ Reversing the district court's grant of summary judgment for the mobile home park owner and remanding the case for trial, the *Degel* majority held that a landowner's duty of reasonable care to protect invitees is not excused merely because the injurious condition is a natural body of water.⁶

Degel's significance is twofold. First, the ruling continues the Washington judiciary's recent trend of permitting landowner liability when visitors suffer injuries from natural conditions on the owner's property.⁷ Second, although the decision in *Degel* is consistent with the majority view nationally, it nevertheless ultimately contradicts the court's previously enunciated statement of public policy condemning the fencing or destruction of the state's waterways.⁸ As such, *Degel* underscores the necessity of creating a new analytical framework that would more effectively and fairly balance the competing public policies implicated in the case.

Part I of this Note provides a general overview of premises liability law in Washington and examines a landowner's respective duty to protect trespassers, licensees, and invitees from natural hazards on the

Blomquist, 116 Wash. 196, 198 P. 727 (1921) (permitting liability against artificial swimming pool operator for drowning death of child).

3. 129 Wash. 2d 43, 914 P.2d 728 (1996).

4. *Id.* at 45-46, 914 P.2d at 729.

5. *Id.* at 47, 914 P.2d at 730.

6. *Id.* at 45-46, 914 P.2d at 729.

7. *See, e.g., Tincani v. Inland Empire Zoological Soc'y*, 124 Wash. 2d 121, 135, 875 P.2d 621, 629 (1994) (stating that natural conditions do not necessarily constitute open and apparent dangers as matter of law); *Geise v. Lee*, 84 Wash. 2d 866, 529 P.2d 1054 (1975) (abandoning traditional "Massachusetts rule" by imposing duty upon landlords to remove natural accumulations of ice and snow from common areas of rental premises).

8. *See supra* note 1 and accompanying text.

land. Part II describes the so-called “natural bodies of water doctrine,”⁹ which insulates landowners from liability when trespassing children are injured by natural waterways on the owner’s property. Part III discusses the facts, arguments, disposition, and reasoning of *Degel*. Part IV argues that *Degel* will effectively result in a significant restriction of access to streams, ponds, lakes, and rivers located on business property throughout the state. Finally, Part V suggests a model rule that would better incorporate the public policy favoring such access.

I. WASHINGTON PREMISES LIABILITY LAW WITH RESPECT TO DANGEROUS CONDITIONS ON PROPERTY

Washington’s traditional common law approach classifies visitors entering a landowner’s property as either invitees, licensees, or trespassers.¹⁰ An entrant’s status under this tripartite system generally determines the scope of a landowner’s or occupier’s duty of warning and protection.¹¹

A. Invitees, Licensees, and Trespassers

The most protected entrants are invitees, defined under Washington law as persons “whose visit involves actual or potential pecuniary benefit to the occupier, or . . . who [have] responded to a public invitation which expressly or impliedly represents that reasonable care has been taken for persons so entering.”¹² A landowner’s duty to safeguard and warn invitees of dangerous conditions on the property is governed by the tests established in Restatement (Second) of Torts sections 343 and 343A.

9. *Degel*, 129 Wash. 2d at 51, 914 P.2d at 732. The Washington Supreme Court has never explicitly recognized the existence of a “natural bodies of water doctrine” as such, and it employed the term in *Degel* only in response to the defendant’s brief.

10. *Tincani*, 124 Wash. 2d at 128, 875 P.2d at 624. Washington’s recreational use statute has implicitly created an additional class of entrant referred to as a “recreational user.” See Wash. Rev. Code § 4.24.210 (1996); see also *Van Dinter v. City of Kennewick*, 64 Wash. App. 930, 827 P.2d 329 (1988), *aff’d*, 121 Wash. 2d 38, 846 P.2d 522 (1993).

11. *Tincani*, 124 Wash. 2d at 128, 875 P.2d at 624. The Washington Supreme Court has occasionally expressed an apparent willingness to abandon its entrant classification system in favor of a single standard of reasonable care under all circumstances. See *Martha V. Trump*, Comment, *Landowner or Occupier Duty of Care*, 16 Gonz. L. Rev. 479, 490–91 (1981) (discussing *Sherman v. City of Seattle*, 57 Wash. 2d 233, 356 P.2d 316 (1960), and *Potts v. Amis*, 62 Wash. 2d 777, 384 P.2d 825 (1963)); see also *Tincani*, 124 Wash. 2d at 142, 875 P.2d at 632. Thus far, however, the court has ultimately chosen to retain the traditional model. See, e.g., *id.* at 129, 875 P.2d at 625.

12. Recent Developments, *Land Occupier Liability in Washington*, 43 Wash. L. Rev. 867, 875 (1968) (citing *Ward v. Thompson*, 57 Wash. 2d 655, 659–60, 359 P.2d 143, 145 (1961)).

Under Section 343, a landowner is liable for failing to exercise reasonable care to protect invitees when the owner should reasonably have known of the dangerous condition and the risk it posed, and of the invitees' probable failure to either recognize the danger or to protect themselves from it.¹³ Significantly, even as to known dangers of an "open and obvious" nature, a landowner owes a duty of affirmative care to invitees under section 343A if the owner "should anticipate the harm despite such knowledge or obviousness."¹⁴

Washington law defines licensees as visitors who are "privileged to enter or remain on land only by virtue of the possessor's consent."¹⁵ Included under this entrant category are social guests invited onto the property without mutuality of economic benefit.¹⁶ Typically, landowners are obligated merely to avoid willfully or wantonly injuring their licensees.¹⁷ With respect to dangerous conditions on the premises, a landowner incurs liability for failing to warn or protect licensees only if (1) the owner should know that the condition poses an unreasonable risk of harm and that the licensee will fail to recognize the danger; and (2) the licensee does not in fact have reason to know of the risk involved.¹⁸ Under this standard, owners owe no duty to warn licensees of "open and apparent" natural dangers.¹⁹

Trespassers, the least protected entrants under Washington law, are those who enter property "without invitation or permission, express or implied, but [enter], rather, for [their] own purposes or convenience, and not in the performance of a duty to the owner or one in possession of the premises."²⁰ Landowners ordinarily owe no duty to trespassers except to refrain from causing willful or wanton injury to them,²¹ and are generally

13. *Tincani*, 124 Wash. 2d at 138, 875 P.2d at 630 (citing Restatement (Second) of Torts § 343 (1965)).

14. *Id.* at 139, 875 P.2d at 631 (quoting Restatement (Second) of Torts § 343A(1)).

15. *Id.* at 133, 875 P.2d at 627 (citing Restatement (Second) of Torts § 330).

16. *Kalinski v. Young Women's Christian Ass'n*, 17 Wash. 2d 380, 389-90, 135 P.2d 852, 857 (1943).

17. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash. 2d 43, 49, 914 P.2d 728, 731 (1996).

18. Restatement (Second) of Torts § 342; *see also Memel v. Reimer*, 85 Wash. 2d 685, 538 P.2d 517 (1975).

19. *Tincani*, 124 Wash. 2d at 135, 875 P.2d at 629. Whether such a hazard is "open and apparent," however, turns on the factual question of whether the licensee knew or had reason to know of the full extent of the risk. *Id.*

20. *Schock v. Ringling Bros. and Barnum & Bailey Combined Shows*, 5 Wash. 2d 599, 605, 105 P.2d 838, 842 (1940), *overruled on other grounds by Potts v. Amis*, 62 Wash. 2d 777, 384 P.2d 825 (1963), and *Laudermilk v. Carpenter*, 78 Wash. 2d 92, 457 P.2d 1004 (1969).

21. *Winter v. Mackner*, 68 Wash. 2d 943, 945, 416 P.2d 453, 454 (1966).

not obligated to warn of or rectify dangerous conditions on the property for the trespassers' benefit.²² Trespassers therefore enter at their own peril,²³ and, absent special circumstances, are typically unable to recover for injuries sustained while on a landowner's premises.²⁴

B. Washington's Attractive Nuisance Doctrine

The attractive nuisance doctrine represents a judicially-created exception to the general absence of duty owed to trespassers. Under this well-established rule, a landowner incurs liability for injuries to trespassing children caused by dangerous conditions on the owner's property when: (1) the condition is so dangerous that injury to children is probable; (2) the condition is alluring to young children; (3) the children attracted are incapable, due to their youth, of comprehending the danger involved; (4) the condition is left unguarded and exposed at a place where children could reasonably be expected to visit; and (5) the owner could reasonably have either rendered the condition harmless or prevented access to it without obstructing any reasonable purpose for which it was intended.²⁵

The strong public policy favoring the protection of children,²⁶ coupled with the recognition that children often are unable to protect themselves from the hazards they encounter, form the rationale for this exception.²⁷ Machinery, playground equipment, firearms, partially-concealed fires, abandoned vehicles, electrical wires, and construction materials are among the numerous dangers for which Washington courts have invoked

22. *Bolden v. Independent Order of Odd Fellows*, 133 Wash. 293, 297-98, 233 P. 273, 275 (1925).

23. *Winter*, 68 Wash. 2d at 945, 416 P.2d at 454.

24. One exception to the general absence of duty owed to trespassers is the "tender years" doctrine formulated in *Sherman v. Seattle*, 57 Wash. 2d 233, 356 P.2d 316 (1960), and *Helland v. Arland*, 14 Wash. 2d 32, 126 P.2d 594 (1942). Under this theory, landowners owe a duty of reasonable care to ensure that their activities avoid injuring very young children of whose presence the owners are cognizant, irrespective of the children's entrant status. *Tincani*, 124 Wash. 2d at 130, 875 P.2d at 626. The "tender years" doctrine is distinguished from the attractive nuisance doctrine in that it focuses on the landowners' activities rather than specific dangerous conditions on the premises. See *infra* Part I.B.

25. *Ochampaugh v. City of Seattle*, 91 Wash. 2d 514, 518, 588 P.2d 1351, 1354 (1979) (citing *Schock*, 5 Wash. 2d at 616, 105 P.2d at 846).

26. *Id.* at 518, 588 P.2d at 1353; Leon Green, *Landowners' Responsibility to Children*, 27 Tex. L. Rev. 1, 12-13 (1948); William L. Prosser, *Trespassing Children*, 47 Cal. L. Rev. 427, 429 (1959).

27. Prosser, *supra* note 26, at 461.

the attractive nuisance doctrine to impose liability upon landowners.²⁸ Washington follows the majority position and limits the application of the doctrine to children of “tender years.”²⁹

The corresponding Restatement rule, cited favorably by Washington courts, grants a more expansive reach to the doctrine by omitting the requirement that the dangerous condition be alluring to children.³⁰ Unlike Washington’s rule, however, the Restatement specifically limits its application to artificial conditions.³¹

II. THE “NATURAL BODIES OF WATER DOCTRINE”: THE ATTRACTIVE NUISANCE DOCTRINE’S EXCEPTION FOR NATURAL BODIES OF WATER

A. *Overview of the Natural Bodies of Water Exception*

One prominent exception to the attractive nuisance doctrine is the general rule absolving landowners from any duty to protect trespassing children from the dangers associated with natural bodies of water. Although courts have frequently acknowledged the inherently attractive

28. See, e.g., *Mathis v. Swanson*, 68 Wash. 2d 424, 413 P.2d 662 (1966) (I-beam); *Brannon v. Harmon*, 56 Wash. 2d 826, 355 P.2d 792 (1960) (partially-hidden fire); *Talkirgton v. Washington Water Power Co.*, 96 Wash. 386, 165 P. 87 (1917) (electrical wire); *Ilwaco Ry. & Navigation Co. v. Hedrick*, 1 Wash. 446, 25 P. 335 (1890) (railway turntable); *Preston by Preston v. Pierce County*, 48 Wash. App. 887, 741 P.2d 71 (1987) (merry-go-round), *overruled on other grounds by Van Dinter v. City of Kennewick*, 64 Wash. App. 930, 827 P.2d 329 (1988); *Guard v. Town of Friday Harbor*, 22 Wash. App. 758, 592 P.2d 652 (1979) (loaded firearm left in unlocked automobile); *Gabel v. Koba*, 1 Wash. App. 684, 463 P.2d 237 (1969) (abandoned truck).

29. Assessing whether a trespassing child satisfies the “tender years” criteria appears to involve a three-part analysis that examines the child’s age, his or her mental capacity, and the nature of the dangerous instrumentality or condition on the owner’s property. See, e.g., *Hanson v. Freigang*, 55 Wash. 2d 70, 74, 345 P.2d 1109, 1111 (1959) (“A child of tender years is one who, because of insufficient age, knowledge, experience, intelligence, judgment and discretion, is incapable of deliberating and acting upon his own experience and judgment.”); see also *Mathis*, 68 Wash. 2d at 427, 413 P.2d at 663–64 (permitting jury question as to whether 13-year-old was incapable, because of his youth, of recognizing danger presented by I-beam); *Hanson*, 55 Wash. 2d at 74, 345 P.2d at 1111 (holding that, absent allegation of mental deficiency, 15-year-old child fails to satisfy “tender years” criteria); *McDermott v. Kaczmarek*, 2 Wash. App. 643, 654–55, 469 P.2d 191, 198–99 (1970) (holding attractive nuisance doctrine inapplicable where seven-year-old child should have realized danger of falling from cliff in abandoned quarry).

30. See *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash. 2d 43, 51–52, 914 P.2d 732–33 (1996) (citing Restatement (Second) of Torts § 339 (1965)); *Ochampaugh*, 91 Wash. 2d at 519, 588 P.2d at 1354 (same).

31. Restatement (Second) of Torts § 339.

and alluring nature of streams, ponds, lakes, and rivers,³² they have generally shown great reluctance to impose liability upon landowners for failing to warn or protect trespassing children from the danger posed by such water bodies.³³

Numerous legal and policy considerations underlie this judicial hesitance.³⁴ Some courts stress the natural origin of the water to justify their refusal to impose a duty of care upon the landowner.³⁵ Others focus on the open and obvious nature of the water's danger, reasoning that children too young to appreciate the hazards posed by natural bodies of water will be protected by their parents.³⁶ Other jurisdictions base their reluctance on the relative improbability of injury in light of the extensive recreational use made of such waterways.³⁷ Still others emphasize the impracticability of truly "childproofing" the waterfront, stressing that any utility derived from a pond or stream would be destroyed by imposing an implicit duty upon the landowner to either fill or fence it.³⁸

The natural bodies of water exception has been extended in most jurisdictions to encompass artificial bodies of water possessing natural characteristics. Landowners have thus enjoyed immunity for injuries caused to trespassing children by artificially-formed ponds, lakes, canals, drainage ditches, reservoirs, and other man-made conditions located on their property.³⁹ Public policy concerns have formed much of the impetus

32. See, e.g., *Sullivan v. Huidekoper*, 27 App. D.C. 154, 164 (D.C. Cir. 1906) ("[Y]ou might as well try to damn the Nile . . . as to keep boys away from ponds, pools, and other bodies of water."); *Fitch v. Selwyn Village*, 68 S.E.2d 255, 257 (N.C. 1951); *Ochampaugh*, 91 Wash. 2d at 526, 588 P.2d at 1358; *Barnhart v. Chicago, Minneapolis & St. Paul Ry. Co.*, 89 Wash. 304, 306–07, 154 P. 441, 442 (1916).

33. See Prosser, *supra* note 26, at 456.

34. See generally Heywood H. Davis, Note, *Negligence—Condition and Use of Land—Care as to Children Trespassers*, 5 U. Kan. L. Rev. 123, 124 (1956); Pat H. Scanlon, Comment, *Torts—Attractive Nuisance Doctrine—Liability for Drowning of Trespassing Child*, 29 Miss. L.J. 355, 357 (1958).

35. See, e.g., *Cobb v. Lowe Mfg. Co.*, 150 So. 687, 688 (Ala. 1933).

36. See, e.g., *Salladay v. Old Dominion Copper Mining & Smelting Co.*, 100 P. 441, 443 (Ariz. 1909).

37. See, e.g., *Sullivan*, 27 App. D.C. at 160.

38. See, e.g., *Emond v. Kimberly-Clark Co.*, 149 N.W. 760, 761 (Wis. 1914).

39. See, e.g., *Bailey v. City of Mobile*, 296 So.2d 149, 152 (Ala. 1974) (drainage ditch); *Hanners v. City of Ashland*, 331 S.W.2d 729, 730 (Ky. 1959) (reservoir); *Loveland v. Orem City Corp.*, 746 P.2d 763, 772 (Utah 1987) (canal). Courts are divided, however, as to whether attractive nuisance liability may be imposed for artificial swimming pools. Compare *Mozier v. Parsons*, 887 P.2d 692, 698 (Kan. 1995) (refusing to apply attractive nuisance doctrine), with *Reynolds v. Willson*, 331 P.2d 48, 52 (Cal. 1958) (applying Restatement of Torts § 339 to swimming pool), and *King v. Lennen*, 348 P.2d 98, 101 (Cal. 1959) (permitting recovery where infant trespasser was too young to appreciate dangers presented by pool).

for expanding the exception; the arid southwestern states' refusal to extend attractive nuisance liability to canals, for example, stems from judicial recognition of that region's crucial need for irrigation water.⁴⁰

Typically, the presence of additional dangerous features exacerbating the risk of injury from water bodies fails to alter the general rule of nonliability, provided that such conditions are common to watercourses in nature. Thus, neither the steepness⁴¹ nor slickness⁴² of a waterway's bank,⁴³ the force of its current,⁴⁴ or the opaqueness of its waters⁴⁵ usually suffices to impose a duty of care upon the landowner to safeguard trespassing children. Attractive nuisance liability is also usually precluded where the water's surface is covered by a layer of ice and snow, provided that the danger remains open and obvious.⁴⁶

Notwithstanding the general judicial consensus, courts have occasionally held the attractive nuisance doctrine applicable to bodies of water when additional circumstances or justifications compel such a result. Attractive nuisance liability for water bodies has thus periodically been imposed due to the presence of a hidden or unusual danger connected with the waterway,⁴⁷ its proximity to a populated area,⁴⁸ the fact that the water body was artificially formed,⁴⁹ the existence of some extraneous attraction or bait enticing to children,⁵⁰ the landowner's actual

40. See, e.g., *Salladay*, 100 P. at 442; *Trujillo v. Brighten-North Point Irrigation Co.*, 746 P.2d 780, 782 (Utah 1987); *Loveland*, 746 P.2d at 772-73.

41. See, e.g., *Luallen v. Woodstock Iron & Steel Corp.*, 184 So. 182, 183 (Ala. 1938).

42. See, e.g., *Cox v. Alabama Water Co.*, 112 So. 352, 356 (Ala. 1927).

43. *But see*, e.g., *Wheeler v. St. Helens*, 58 P.2d 501, 506 (Or. 1936) (considering precipitous nature of banks in deciding to impose liability when such steepness effectively prevented children from escaping).

44. See, e.g., *McCabe v. American Woolen Co.*, 124 F. 283, 284 (C.C. Mass. 1903).

45. See, e.g., *King v. Simons Brick Co.*, 126 P.2d 627, 629 (Cal. Ct. App. 1942).

46. See, e.g., *Wood v. Consumers Co.*, 79 N.E.2d 826, 827 (Ill. App. Ct. 1948); *Waters v. United States Fidelity & Guar. Co.*, 369 N.W.2d 755, 759 (Wis. Ct. App. 1985).

47. See, e.g., *Cooper v. City of Reading*, 140 A.2d 792, 798 (Pa. 1958) (permitting liability for deep hole in seemingly shallow, muddy pool).

48. See, e.g., *Barlow v. Gurney*, 29 S.E.2d 681, 682 (N.C. 1944) (imposing duty of care upon pond owner when pond was located near village and presence of children was known and inevitable).

49. See, e.g., *Sanchez v. East Contra Costa Irrigation Co.*, 271 P. 1060, 1061 (Cal. 1928) (refusing to absolve from liability owner of irrigation ditch with syphon mechanism since owner had chosen to maintain dangerous artificial hazard).

50. See, e.g., *Smith v. Evans*, 284 P.2d 1065, 1067 (Kan. 1955) (holding presence of diving board sufficient to transform artificial pond into attractive nuisance).

knowledge of children present,⁵¹ or the ease of rendering the particular watercourse less harmful through adequate precautions.⁵² The Restatement likewise permits recovery when the landowner should have reasonably anticipated the presence of infants too immature to appreciate the dangers posed by the water.⁵³

B. The Natural Bodies of Water Exception in Washington

1. Historical Development

The “natural bodies of water doctrine” was first recognized by the Washington Supreme Court as an exception to the general rule of attractive nuisance liability in *Barnhart v. Chicago, Minneapolis & St. Paul Railway Co.*⁵⁴ Holding the doctrine inapplicable to the dangers posed by an artificial pond in which a trespassing eight-year-old boy drowned after falling from a makeshift raft, the court emphasized the significant recreational enjoyment afforded by such waters relative to the small number of drownings.⁵⁵ The *Barnhart* court acknowledged the enticing nature of the pond, the fact that children were known to play along its shores, and the many deaths resulting from such unfenced bodies of water.⁵⁶ Nevertheless, the court reasoned that such concerns were outweighed by the open and apparent nature of the water’s danger, the impracticability of effectively preventing child access, and the “oppressive burden” upon landowners that would result from imposing a duty of care under the circumstances.⁵⁷ The *Barnhart* rule was subsequently reaffirmed in *Smith v. McGoldrick Lumber Co.*,⁵⁸ where the court refused to apply the attractive nuisance doctrine to a naturally-

51. See, e.g., *Altenbach v. Lehigh Valley Ry. Co.*, 37 A.2d 429, 430 (Pa. 1944) (permitting liability for reservoir located adjacent to street and sidewalk in populated area where children resided and were known to play).

52. See, e.g., *Larson v. Equity Coop. Elevator Co.*, 21 N.W.2d 253, 254–56 (Wis. 1946) (recognizing propriety of imposing liability under Restatement § 339 where, inter alia, landowner could easily have provided safeguards without interfering with water body’s function).

53. Restatement (Second) of Torts § 339 cmt. j, illus. 7 (1965).

54. 89 Wash. 304, 154 P. 441 (1916).

55. *Id.* at 307, 154 P. at 442.

56. *Id.* at 305–07, 154 P. at 442–43.

57. *Id.* at 308, 154 P. at 443.

58. 124 Wash. 363, 214 P. 819 (1923).

formed millpond despite the "extraordinary hazard of entrapment"⁵⁹ posed by a carpet of logs floating on the pond.⁶⁰

The Washington court further developed the liability exception for waterways in *Meyer v. General Electric Co.*,⁶¹ where an unattended trespassing infant drowned in a commercially-operated ditch. Holding as a matter of law that an artificial body of water with natural characteristics does not constitute an attractive nuisance, the court stressed that parents, not landowners, bear the ultimate responsibility for protecting children too young to recognize the inherent dangers of such obvious hazards.⁶²

Paralleling the national majority view, however, Washington courts have refused to exempt watercourses from attractive nuisance liability when deceptive and unappreciable dangers are present.⁶³ Thus, in *Bjork v. City of Tacoma*⁶⁴ the court permitted recovery for a trespassing infant who drowned after being sucked into an uncovered opening in an otherwise enclosed flume.⁶⁵ *Bjork* distinguished the covered flume from waterways with natural characteristics by noting the improbability of rescue or escape once a child has fallen into the former.⁶⁶ Absent a hidden danger associated with the water, however, the risk of entrapment alone apparently remains insufficient to trigger attractive nuisance liability.⁶⁷

2. Modern Statement of the Rule

*Ochampaugh v. City of Seattle*⁶⁸ represents the Washington Supreme Court's most recent and thorough explanation of the attractive nuisance doctrine's exception for natural bodies of water. Despite the presence of several exacerbating factors, the *Ochampaugh* court refused to apply the

59. *Ochampaugh v. City of Seattle*, 91 Wash. 2d 514, 521, 588 P.2d 1351, 1355 (1979) (discussing *Smith*).

60. *Smith*, 124 Wash. at 365, 214 P. at 820.

61. 46 Wash. 2d 251, 280 P.2d 257 (1955).

62. *Id.* at 253-54, 280 P.2d at 258-59.

63. *Id.* at 253, 280 P.2d at 258.

64. 76 Wash. 225, 135 P. 1005 (1913).

65. A flume is defined as "an inclined channel for conveying water." *Webster's Ninth New Collegiate Dictionary* 476 (1989). The court described the flume in *Bjork* as "an inclosed [sic] box" used to carry water to the local reservoir. *Bjork*, 76 Wash. at 231, 135 P. at 1003.

66. *Bjork*, 76 Wash. at 231, 135 P. at 1008. The flume's danger was also exacerbated by its proximity to a popular child play area.

67. See *supra* notes 58-60 and accompanying text.

68. 91 Wash. 2d 514, 588 P.2d 1351 (1979).

doctrine to an artificially-formed pond in which two boys, ages six and eight, drowned. The pond's proximity to a nearby housing development, its known popularity as a recreational destination for local children, and the enticing presence of floating log rafts upon its surface failed to sway the court's judgment. Likewise, the increased risk of injury presented by such natural features as the pond's murky waters, concealed depth, sudden drop-off, and boggy shores was held an insufficient justification for imposing a duty of care upon the landowner, as the court considered such features common to waterways everywhere.⁶⁹

While reaffirming the traditional policy reasons developed in *Barnhart*, *Smith*, and *Meyer*, the *Ochampaugh* court further expanded the rationale for exempting natural bodies of water from the attractive nuisance doctrine by injecting several additional considerations into its analysis. Following *Ochampaugh*, the justifications underlying Washington's "natural bodies of water doctrine" can be conceptually separated into six primary categories.

a. *Lack of Foreseeable Harm*

The first and most important reason for the watercourse exception to liability under Washington's attractive nuisance doctrine is the improbability that visitors will sustain injuries from ponds, lakes, and streams.⁷⁰ *Ochampaugh* repeatedly emphasized that the incidence of "occasional" drownings remains rare relative to the extensive recreational enjoyment afforded by natural bodies of water.⁷¹ Thus, as a matter of law, the court has held that the foreseeability of harm from natural watercourses is insufficient to warrant imposing a duty of affirmative care upon the landowner.⁷²

b. *Obviousness of Water's Inherent Danger*

The *Ochampaugh* court also reiterated the general judicial consensus regarding the open and obvious nature of water's inherent danger as a further reason for insulating landowners from liability.⁷³ Because the hazards posed by streams and ponds are "apparent" and "easily

69. *Id.* at 524, 588 P.2d at 1357.

70. *Id.* at 522-27, 588 P.2d at 1356-58.

71. *Id.*

72. *Id.* at 527, 588 P.2d at 1358.

73. *Id.* at 526-27, 588 P.2d at 1358.

avoidable,"⁷⁴ imposing a duty upon the landowner to warn trespassing children would constitute a duplicative and unnecessary safeguard. Similarly, the court found reasonable the assumption that children too young to recognize and appreciate such dangers would be protected by their parents or other caretakers.⁷⁵

c. Cost of Rendering Bodies of Water Safe for Children

An additional factor considered by the court was the disproportionately severe financial burden such a duty of protection would place upon landowners.⁷⁶ Echoing the Restatement's concern regarding the extreme cost of "improving land in a state of nature" for the benefit of trespassers, *Ochampaugh* refused to apply the attractive nuisance doctrine to such imposing natural conditions as bodies of water.⁷⁷

d. Impracticality of Rendering Natural Bodies of Water Innocuous

The *Ochampaugh* court also recognized that watercourses could not be effectively "childproofed" without undertaking the often enormous task of draining, filling, or fencing them.⁷⁸ Mandating such drastic measures, reasoned the court, would not only impose a disproportionate burden upon landowners, but would also effectively impede the practical uses served by natural bodies of water.⁷⁹ The court further noted that eliminating the danger posed by streams and ponds on the landowner's premises would not necessarily result in a commensurate increase in child safety if other bodies of water remained nearby on neighboring property.⁸⁰

e. Loss of Recreational Access and Aesthetic Value

Although the court had previously emphasized the recreational value of natural watercourses to justify exempting them from the attractive

74. *Id.*

75. *Id.*

76. *Id.* at 523, 588 P.2d at 1356.

77. *Id.* at 520, 588 P.2d at 1355 (citing Restatement (Second) of Torts, § 339 cmt. p (1965)).

78. *Id.* at 523, 588 P.2d at 1356.

79. *Id.* at 526, 588 P.2d at 1358.

80. *Id.* at 523, 588 P.2d at 1356.

nuisance doctrine's reach,⁸¹ *Ochampaugh* reinforced this proposition by taking judicial notice of Washington's recreational use statute.⁸² The court interpreted this statute, which immunizes from liability landowners who permit public recreational use to be made of their property without extracting a fee, as expressing legislative intent to increase the amount of land available for public outdoor recreational enjoyment.⁸³ Further noting that the statute had expressly disclaimed any intent to alter existing attractive nuisance law, the court thus assumed the continued viability of the judicially-created exemption for bodies of water.⁸⁴ Likewise, while *Ochampaugh* never explicitly recognized the visual impairment that would necessarily result from the widespread fencing of Washington's water bodies, such aesthetic concerns are implicit in the court's extremely forceful dicta.⁸⁵

f. *Damage to Wildlife and Environmental Values*

Ochampaugh also suggested, for the first time in Washington's attractive nuisance jurisprudence, that a rule of liability implicitly forcing landowners to destroy their natural waterways might result in unacceptable environmental consequences.⁸⁶ Although the court failed to elaborate upon this point, its reasoning is largely self-explanatory: filling or emplacing physical barriers around creeks and ponds would dramatically impair wildlife access and severely hinder the myriad other ecological functions served by natural bodies of water.⁸⁷

III. THE *DEGEL* DECISION

On January 12, 1992, two-year-old Jason Farris sustained severe brain damage after falling from a bicycle into a creek located on the premises of the Majestic Mobile Manor mobile home park where his parents

81. See *Barnhart v. Chicago, Minneapolis & St. Paul Ry. Co.*, 89 Wash. 304, 307, 154 P. 441, 442 (1916).

82. *Ochampaugh*, 91 Wash. 2d at 523, 588 P.2d at 1356 (noting Wash. Rev. Code. §§ 4.24.200-.210).

83. *Id.* (citing John C. Barrett, *Good Sports and Bad Lands: The Application of Washington's Recreational Use Statute Limiting Landowner Liability*, 53 Wash. L. Rev. 1 (1977)).

84. *Id.*

85. See *supra* note 1 and accompanying text.

86. *Ochampaugh*, 91 Wash. 2d at 523, 588 P.2d at 1356.

87. See *infra* note 115.

resided as tenants.⁸⁸ The creek was situated approximately twenty feet from the perimeter road that surrounded the park's mobile units, and was adjacent to a grassy play area commonly frequented by the park's resident children.⁸⁹ A steep, slippery, wooded embankment bordered the creek, and its waters underwent a seasonal transformation from "clear, shallow, [and] slow-moving" during the summer to "deep, swift and murky" in the winter months.⁹⁰ Families with young children were required under the mobile home park's policy to live near the play area, and thus near the creek, separated from families without children.⁹¹

Farris's father subsequently brought suit against the owner of the mobile home park for negligence,⁹² alleging that this combination of factors constituted an unreasonable hazard. Because tenants and their children enjoyed business invitee status when using the common areas of the landlord's rental premises,⁹³ Farris argued that Majestic Mobile Manor owed Jason, as an invitee, a duty of reasonable care to prevent such accidents. In response, the landlord, relying on the natural bodies of water exception and *Ochampaugh's* broad policy favoring water access, argued that it had no duty to protect tenants from the dangers inherent in a natural body of water.⁹⁴ The trial court agreed with the landowner and issued summary judgment against Farris.⁹⁵

On direct review, the Washington Supreme Court framed the dispositive issue of the case as whether "a landowner [is] excused from the duty to exercise reasonable care to protect invitees from potentially dangerous conditions on the land solely because the danger is, in part, due to risks which are inherent in a natural body of water."⁹⁶ In essence,

88. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash. 2d 43, 46-47, 914 P.2d 728, 729-30 (1996).

89. *Id.* at 46, 914 P.2d at 729-30.

90. *Id.*

91. *Id.* at 46, 914 P.2d at 730. The landlord also levied a \$1.00 per day charge for each child. *Id.* at 46, 914 P.2d at 729.

92. The tort of negligence requires the plaintiff to prove four elements: (1) the existence of a duty; (2) breach of that duty; (3) resulting injury; and (4) proximate cause. A legal duty is derived from either statutory provisions or common law principles, and the issue of whether a particular duty exists is a question of law. *Id.* at 48-49, 914 P.2d at 730.

93. *Anderson v. Reeder*, 42 Wash. 2d 45, 48, 253 P.2d 423, 425 (1953). For purposes of summary judgment, the parties agreed—and the court assumed—that Jason Farris was an invitee at the time of his accident. *Degel*, 129 Wash. 2d at 49, 914 P.2d at 731.

94. *Degel*, 129 Wash. 2d at 51, 914 P.2d at 732; Brief of Respondent at 1-5, *Degel* (No. 62312-1).

95. *Degel*, 129 Wash. 2d at 45, 914 P.2d at 729.

96. *Id.* at 48, 914 P.2d at 730.

the question concerned whether or not the attractive nuisance doctrine's exception for water bodies should apply to invitees.

Answering this question in the negative and remanding the case for trial, the court expressly confined the natural bodies of water exception to the attractive nuisance context. Under *Degel*, the traditional justifications for exempting natural bodies of water from attractive nuisance actions are inapplicable where the injured child holds invitee rather than trespasser status.⁹⁷ The court explained that because an invitee's entry is based upon an implied guarantee that the property has been rendered safe, landowners are obligated to undertake the precautions reasonably necessary to ensure the safety of these entrants.⁹⁸ Further, prior case law had enunciated the Restatement section 343A rule in categorical terms,⁹⁹ which by its plain language permitted landowner liability for reasonably anticipated harm to invitees from all open and obvious dangers. This precedent seemingly precluded an exemption for natural watercourses similar to that recognized in the attractive nuisance arena.¹⁰⁰ The *Degel* court thus focused its analysis on the entrant status of the injured party rather than the specific nature of the dangerous condition.

The *Degel* dissent raised two main arguments: first, that the liability exception for natural waterways issued in *Ochampaugh* was applicable regardless of the injured party's common law entrant status, and thus constituted mandatory precedent for the present case absolving Majestic Mobile Manor of any duty to warn or protect its invitees;¹⁰¹ and second, that the public policy favoring access to natural bodies of water required that landowners enjoy immunity from liability for visitors' water-related injuries sustained while on the property.¹⁰² Both arguments are explored further in Part IV.

97. *Id.* at 52–53, 914 P.2d at 733.

98. *Id.* at 53, 914 P.2d at 733 (citing *Jarr v. Seeco Constr. Co.*, 35 Wash. App. 324, 326, 666 P.2d 392, 394 (1983)); *Tincani v. Inland Empire Zoological Soc'y*, 124 Wash. 2d 121, 138–39, 875 P.2d 621, 631 (1994) (“[A]n invitee ‘is . . . entitled to expect that the possessor will exercise reasonable care to make the land safe for his [or her] entry.’”) (quoting Restatement (Second) of Torts § 343 cmt. b (1965)).

99. *Tincani*, 124 Wash. 2d at 139, 875 P.2d at 631.

100. *Degel*, 129 Wash. 2d at 43, 914 P.2d at 731–32.

101. *Id.* at 55–58, 914 P.2d at 734–35 (Durham, C.J., dissenting).

102. *Id.* at 55, 914 P.2d at 734 (Durham, C.J., dissenting).

IV. *DEGEL* FAILS TO STRIKE THE APPROPRIATE BALANCE

Although the *Degel* majority's ruling correctly interpreted existing precedent and is consistent with the view of most other states, the decision nevertheless remains problematic because it imposes upon landowners an implicit duty to either fence or eliminate bodies of water on their premises. Since these drastic remedial measures were previously decried by the *Ochampaugh* court as violative of public policy, *Degel* establishes a precedent that potentially contradicts such policy concerns. As such, the decision underscores the desirability of crafting a new rule of liability that would better reconcile *Ochampaugh's* focus on preserving waterfront access with *Degel's* interest in protecting vulnerable invitee children from harm.

A. *Degel Comports with the National Majority View and Existing Washington Precedent*

Degel is consistent with the view held by the majority of jurisdictions. With few exceptions, national case law and legal commentary have rarely questioned the assumption that landowners owe their invitees a duty of care to safeguard them from nearly all potentially dangerous conditions upon the property, both natural and artificial.¹⁰³

The *Degel* opinion also correctly interpreted existing Washington precedent regarding a landowner's obligation to protect invitees from natural dangers on the premises. Prior case law's recitation of the duty created by Restatement sections 343 and 343A was stated in categorical terms, and thus constituted controlling authority for the *Degel* court.¹⁰⁴ The court was similarly bound by the Mobile Home Landlord-Tenant Act, which imposes upon landlords an obligation to maintain the rental property's common areas in a reasonably safe condition without creating a specific exception for the hazards inherent in natural bodies of water.¹⁰⁵

103. See Joseph A. Page, *The Law of Premises Liability* § 4.5, at 75 (2d ed. 1988); Annotation, *Liability of Landowner for Drowning of Child*, 8 A.L.R.2d 1258, 1261, 1305 (1949). But see *Kinya v. Lifter, Inc.*, 489 So. 2d 92, 94-95 (Fla. Dist. Ct. App. 1986) (holding that landowners have no duty to protect invitees from artificial bodies of water absent conditions constituting trap or hidden danger); *Casper v. Charles F. Smith & Son, Inc.*, 560 A.2d 1130, 1136-37 (Md. 1989) (holding that, absent unusually dangerous features, bodies of water are open and obvious dangers for which landowners owe no duty to warn and protect their invitees).

104. *Tincani*, 124 Wash. 2d at 138-39, 875 P.2d at 630-31.

105. *Degel*, 129 Wash. 2d at 49, 914 P.2d at 731 (citing Wash. Rev. Code § 59.20.130(2)-(4)). Although the majority opinion omits any discussion of the Residential Landlord-Tenant Act, that statute also mandates a similar duty of care as to the common areas of the landlord's rental premises. See Wash. Rev. Code § 59.18.060 (1996).

Thus, both case precedent and statutory authority supported the *Degel* majority's ruling.

Likewise, the *Degel* court was not precedentially bound by *Ochampaugh*'s refusal to permit recovery for the drowning deaths of trespassing children. Viewed from a purely legal perspective, *Ochampaugh* held only that bodies of water fail to constitute "attractive nuisances," and the court's forceful statement of public policy favoring the preservation of access to waterfront areas ultimately remained mere dicta. The *Degel* majority adopted this position, specifically limiting the applicability of *Ochampaugh*'s exemption for natural watercourses to situations where the injured child is a trespasser. Under this interpretation, Jason Farris's invitee status effectively precluded the application of the "natural bodies of water doctrine" in his case, and failed to alter Majestic Mobile Manor's duty of care to render the premises safe for his protection.¹⁰⁶

106. The dissenting opinion in *Degel* argued that *Ochampaugh* had implicitly recognized the applicability of the natural water body exception to child invitees by exempting ponds and streams from attractive nuisance liability. *Degel*, 129 Wash. 2d at 56–57, 914 P.2d at 734–35 (Durham, C.J., dissenting). Drawing upon the traditional "implied invitation" theory of attractive nuisance, a historic legal fiction under which trespassing children meeting the doctrine's criteria were transformed into "invitees" to whom the landowner owed an increased obligation of warning and protection, the dissent posited that the attractive nuisance doctrine elevates the entrant status of trespassing children to that of invitees. *Id.* at 56, 914 P.2d at 734 (Durham, C.J., dissenting); *see also* *United Zinc & Chem. Co. v. Britt*, 258 U.S. 268, 275 (1922) (recognizing "implied invitation" theory). Thus, because *Ochampaugh* and *Barnhart* held that landowners owe no affirmative duty to such fictional "invitees" with respect to water hazards, the dissent argued that this exemption was equally applicable to all "true" invitees. *Degel*, 129 Wash. 2d at 55–61, 914 P.2d at 734–37 (Durham, C.J., dissenting). Read in this way, *Ochampaugh* would have dictated a contrary result in *Degel*.

The *Degel* majority cursorily dismissed this novel interpretation, responding simply that "a child invitee is not the equivalent of the trespasser in an attractive nuisance action but is a guest, specifically invited upon the property of the landowner." *Id.* at 53, 914 P.2d at 733. Although legally correct, the majority's response remains unsatisfactory, as it fails to explain why landowners owe no heightened duty to social guests who are likewise "specifically invited" onto the owner's property. *See supra* notes 16–19 and accompanying text. Nevertheless, the dissent's argument ultimately fails because it rests upon the faulty assumption that landowners owe a duty of care to trespassing children under the attractive nuisance doctrine that is functionally equivalent to the duty owed to invitees.

While superficially identical, a closer examination of these respective duties reveals crucial differences regarding both the scope of the obligation and the circumstances under which it is triggered. Unlike the general, all-encompassing duty of care mandated by the Restatement's invitee provisions, Washington's attractive nuisance doctrine imposes its limited obligation upon landowners only when the doctrine's five elements have been established. *See supra* text accompanying note 25. As a result, while the attractive nuisance doctrine requires landowners to safeguard children only from conditions *likely* to injure them, Restatement § 343A imposes its duty of care whenever landowners should anticipate harm to their invitees, regardless of the probability of such accidents actually occurring. *See supra* text accompanying note 14. Similarly, attractive

B. *Degel Inherently Contradicts Ochampaugh's Policy of Preserving Access to Washington's Waterways*

The key assumption underlying the *Degel* majority's holding was its assertion that "[t]he reasons for exempting the landowner from liability in attractive nuisance cases do not exist where the injured party is an invitee, rather than a trespassing child."¹⁰⁷ From a purely technical perspective, the court's statement is correct: because natural bodies of water do not present a significant probability of injury¹⁰⁸ and cannot usually be rendered harmless without obstructing the practical purposes they serve,¹⁰⁹ they fail to satisfy the first and fifth elements of Washington's attractive nuisance doctrine.¹¹⁰ Viewed in this light, the fact that landowners incur no liability for water bodies under the doctrine could be seen as merely a failure to meet the doctrine's criteria rather than a specific judicially-created exception to the general rule of attractive nuisance.¹¹¹

nuisance liability attaches only when the dangerous condition could have been rendered innocuous in a reasonably practicable and feasible manner without obstructing *any* reasonable purpose for which it was intended; in contrast, a landowner's duty under the Restatement to safeguard the premises for the benefit of invitees is stated in categorical terms and without reference to either practical feasibility or preserving the dangerous condition's useful function. *See supra* text accompanying notes 13–14.

The few jurisdictions to have specifically addressed the issue remain divided. *Compare* *Cotter v. Novak*, 261 P.2d 827, 828 (N.M. 1953) (finding no substantial difference between duty of landowner maintaining attractive nuisance on premises and duty of trailer park operator to child invitees), *with* *Jones v. Billings*, 289 A.2d 39, 42–43 (Me. 1972) (holding that limited duty of care owed under Restatement's attractive nuisance doctrine was not equivalent to landowner's general obligation to "exercise ordinary care to keep the premises safe" for business invitees). Of these two positions, however, the better and most prevalent view holds that the extent of a landowner's duty of reasonable care and the circumstances under which it is triggered remain significantly distinguishable for the respective entrants at issue. *See, e.g., Jones*, 289 A.2d at 42. The court stated:

It is apparent that the Restatement Rule was very carefully stated so as to limit the duty owed by the possessors of property to trespassing children to specific and well defined situations. It was not to be equated with the obligation "to exercise ordinary care to keep the premises reasonably safe" since it applies only to conditions "which involve an unreasonable risk of death or serious bodily harm."

Id. (quoting Restatement (Second) Torts § 343A (1965)).

107. *Degel*, 129 Wash. 2d at 52–53, 914 P.2d at 733.

108. *See supra* text accompanying notes 70–72.

109. *See supra* text accompanying notes 78–79.

110. The first and fifth criteria of liability under Washington's attractive nuisance doctrine are, respectively, the probability of injury resulting from the dangerous condition at issue, and the ability to prevent access to or feasibly render the condition safe without obstructing any reasonable use for which it was intended. *See supra* text accompanying note 25.

111. This explanation is appealing particularly in light of the Washington Supreme Court's oft-stated policy of limiting rather than extending the doctrine's application. *See, e.g., Holland v. Niemi*,

This interpretation, however, ignores the strong public policy justifications supporting the doctrine's exemption for natural bodies of water. Water's unique dangers, physical characteristics, and social benefits conceptually distinguish it from other natural conditions that similarly fail to meet the technical criteria of attractive nuisance liability.¹¹² Further, by incorporating recreational, environmental, and wildlife values into its analytical framework,¹¹³ the *Ochampaugh* court significantly broadened the policy foundation underlying the natural bodies of water exception, and thereby implicitly expanded the exception's logical scope beyond the attractive nuisance sphere.

1. The Policy Justifications Underlying the Natural Bodies of Water Exception are Equally Applicable to the Invitee Context

Much of the judicially-recognized rationale for exempting landowners from liability for harm caused to trespassing children by streams and ponds is logically extendible to situations where the injured party is an invitee. Because the consequences of imposing an implicit duty of care upon landowners to fence or fill their watercourses would occur regardless of the particular class of visitors sought to be protected, *Ochampaugh's* concerns regarding the financial costs to landowners, the loss of recreational access, and the significant environmental damage that would result from such a scenario retain their validity across the entire entrant status spectrum.

a. Recreational and Visual Access, Damage to Ecological and Wildlife Values, and Financial Costs

First, the importance of public recreational access central to the attractive nuisance doctrine's exemption for waterways is conceptually

55 Wash. 2d 85, 89, 345 P.2d 1106, 1109 (1959); *Mail v. M.R. Smith Lumber*, 47 Wash. 2d 447, 449–50, 287 P.2d 877, 878 (1955). From this perspective, the court's refusal to include natural bodies of water within the general umbrella of attractive nuisance liability arguably stems more from the general judicial reluctance to extend the doctrine's reach than from a specific desire to exempt streams, lakes, and ponds.

112. Trees, for example, have traditionally been exempted from the attractive nuisance doctrine despite their often injurious effect on children attracted to them. *See, e.g., Mullins v. Pannell*, 266 So. 2d 862, 864 (Ala. 1972). Unlike injuries from playing near water, however, the danger posed by climbing up trees can effectively be prevented by landowners removing low-hanging limbs. Further, while trees and similar natural objects may serve important ecological and socially valuable purposes, their recreational and environmental value has not enjoyed water's explicit and forceful recognition by the Washington judiciary to justify their exemption from attractive nuisance liability.

113. *Ochampaugh v. City of Seattle*, 91 Wash. 2d 514, 523, 588 P.2d 1351, 1356 (1979).

extendible to the business invitee realm. In the landlord/tenant context, for example, waterfront property and water views are highly desirable and command heightened rental costs. Many of the tenants who choose to pay such increased prices clearly do so for the purpose of enjoying the physical and visual access to the adjacent water body. Because exculpatory agreements absolving landlords from liability for tenant injuries sustained in the common areas of rental premises are unenforceable under Washington law,¹¹⁴ landlords desiring to avoid liability would be forced to impede tenant access to waterfront areas on their property. Imposing upon landlords a duty that would ultimately result in erecting fences around scenic lakes and rivers would significantly impair the aesthetic and recreational benefits currently valued by tenants, adversely affecting not only the landlord's interest, but also that of the invitees. *Ochampaugh's* policy of ensuring public access to water should not only benefit trespassers and landowners who decline to invite visitors onto their property, but should also logically encompass invitees and the landowners who encourage their presence.

Second, because the potential environmental and wildlife damage resulting from the destruction of water bodies would occur regardless of the injured visitor's entrant status, *Ochampaugh's* warning in this regard also retains its validity in the invitee context.¹¹⁵ While the environmental value of most property designated for business purposes may arguably be less than that of relatively undeveloped land,¹¹⁶ *Ochampaugh's* consideration of ecological concerns was issued without regard to the type of land involved or the common law status of the entrant.¹¹⁷

Third, *Ochampaugh* acknowledged that a rule of liability that would effectively require landowners to take the precautionary measures necessary to prevent trespassing children from water-related injuries

114. *McCutcheon v. United Homes Corp.*, 79 Wash. 2d 443, 486 P.2d 1093 (1971).

115. *Ochampaugh* specifically addressed only the environmental and wildlife detriment resulting from a landowner's decision to "destroy" his or her ponds and lakes. *Ochampaugh*, 91 Wash. 2d at 523, 588 P.2d at 1356. The import of this warning, however, would also logically extend to situations where bodies of water were surrounded by childproof fences rather than being drained or filled. The emplacement of fences around water bodies, for example, would completely prevent wildlife access to water for any animal unable to climb over the fence. *See, e.g.*, *Kimberly Hills Neighborhood Ass'n v. Dion*, 320 N.W.2d 668, 677 (Mich. Ct. App. 1982) (noting that "fences interfere with the free movement of wildlife in the area").

116. Arguably, however, the fact that a natural body of water is located on business property potentially increases rather than diminishes its ecological value, as it becomes a biologically rich island in the larger sea of surrounding development.

117. *Ochampaugh*, 91 Wash. 2d at 523, 588 P.2d at 1356.

would result in an inordinate financial burden.¹¹⁸ In light of the numerous other policy reasons against fencing or destroying waterways, the large number of businesses in Washington State possessing or abutting natural bodies of water validates the *Degel* dissent's argument that the cost to landowners of effectively protecting their business guests from water hazards would constitute a similarly unreasonable onus.¹¹⁹ Further, although the profit a landowner receives from business invitees would help alleviate this financial burden, extending this rationale to public invitees from whom the owner derives no financial benefit presents obvious logical difficulties.¹²⁰

b. Water Is an Open and Obvious Danger Requiring No Additional Warning

Water has long enjoyed judicial recognition as an "open and obvious danger," the hazards of which are normally apparent to all children old enough to be at large.¹²¹ Along with fire and falling from heights, water

118. *Id.*

119. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash. 2d 43, 58, 914 P.2d 728, 735 (1996) (Durham, C.J., dissenting) ("To expect that landowners can somehow make these waters safe for children at anything less than an extraordinary cost is to misunderstand the magnitude of the burden."). *Degel* held that a landowner's burden to safeguard waterways is not disproportionately heavy as a matter of law, where the landowner profits from the invitee's presence or where it has been encouraged. *Id.* at 53, 914 P.2d at 733. Thus, a possible counter-argument could be that a key element in the *Ochampaugh* court's refusal to saddle landowners with the burden of childproofing bodies of water was that such landowners were "strangers" to the trespassing children. *Ochampaugh*, 91 Wash. 2d at 522, 588 P.2d at 1356. This rationale carries significantly less persuasive value when a business owner actually invites an entrant onto the premises, as the owner loses his or her "stranger" status in such situations. However, landowners are presumably not "strangers" to their invited social guests either, yet are not required to take such drastic precautionary measures for the benefit of these entrants.

120. Public invitees are entrants who have responded to a landowner's express or implied public invitation to visit the owner's property. See *supra* notes 12–14. Landowners who issue such a public invitation for the purpose of outdoor recreation remain insulated from liability by Washington's recreational use statute. See Wash. Rev. Code §§ 4.24.200–210 (1996). However, if the public invitation is made for purposes other than outdoor recreation, landowners presumably remain liable under *Degel* to responding entrants who are injured by natural bodies of water on the premises.

121. See, e.g., *Locke v. Liquid Air Corp.*, 725 F.2d 1331, 1334 (11th Cir. 1984); *Scott v. Future Invs. of Miami, Inc.*, 559 So. 2d 726, 727 (Fl. Dist. Ct. App. 1990); *Saga Bay Property Owners Ass'n v. Askew*, 513 So. 2d 691, 692 (Fl. Dist. Ct. App. 1987); *Cope v. Doe*, 464 N.E.2d 1023, 1026–27 (Ill. 1984); *Yacoub v. Chicago Park Dist.*, 618 N.E.2d 685, 688 (Ill. App. Ct. 1993); *Lerma v. Rockford Blacktop Constr. Co.*, 617 N.E.2d 531, 538 (Ill. App. Ct. 1993); *Stevens v. Riley*, 580 N.E.2d 160, 164–65 (Ill. App. Ct. 1991); *Casper v. Charles F. Smith & Son, Inc.*, 560 A.2d 1130, 1134–35 (Md. 1989); *Waters v. United States Fidelity & Guar. Co.*, 369 N.W.2d 755, 758 (Wis. Ct. App. 1985); see also Restatement (Second) of Torts, § 339 cmt. j (1965).

is one of the first perils recognizable to children.¹²² Because of their unique physical characteristics and inherent dangers,¹²³ bodies of water have thus “historically and consistently been afforded distinctive treatment in the law relating to landowners’ liability.”¹²⁴ *Ochampaugh* echoed this view by insisting that despite water’s dangerous potential, water-related injuries remain insufficiently foreseeable as a matter of law to impose liability upon landowners.¹²⁵

Since water “signal[s] its own lethal danger,”¹²⁶ requiring landowners to warn their invitees of the hazards associated with lakes and streams would constitute a redundant, expensive, and largely ineffective precaution while producing only a minimal net increase in child safety. Older invitees choosing to ignore the perils of streams and lakes would also likely remain undeterred by posted warning signs, and infants too young to appreciate water’s inherent danger would necessarily be incapable of reading or understanding any written warning.¹²⁷ Thus,

122. See, e.g., *Riley v. Brasunas*, 438 S.E.2d 113, 115 (Ga. Ct. App. 1993) (“The dangers associated with . . . water are . . . normally understood by young children absent other factors creating additional risks of harm.”); *Higginbotham v. Winborn*, 218 S.E.2d 917, 921 (Ga. Ct. App. 1975) (“[E]ven young children have a natural fear of water, fire and heights.”); see also *Davis, supra* note 34, at 124 (“[T]he peril inherent in water, is, like fire, obvious to a child, or instinctively known.”).

123. See, e.g., *Lerma*, 617 N.E.2d at 538 (noting that, unlike other dangerous natural conditions, any body of water categorically represents potentially lethal hazard).

124. *Casper*, 560 A.2d at 1134–35.

125. *Ochampaugh v. City of Seattle*, 91 Wash. 2d 514, 527, 588 P.2d 1351, 1358 (1979). Significantly, *Ochampaugh’s* recognition regarding the low probability of harm from water bodies arose in a context where the presence of trespassing children at the pond was both constant and known. *Id.* at 516, 523, 588 P.2d at 1353, 1356. As such, the issue of foreseeability would logically remain the same in situations where invitee children were known to congregate near a particular watercourse, such as the mobile home park in *Degel*.

126. *Casper*, 560 A.2d at 1137.

127. A strong case in point here is *Degel* itself: Jason Farris’s parents were aware of the obvious danger posed by Clark’s Creek, and accordingly prohibited their children from playing near the creek unattended. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash. 2d 43, 47, 914 P.2d 728, 730 (1996). Jason’s tragic accident occurred during a brief but admitted lapse in parental supervision. *Id.* In light of the fact that the creek’s danger was already known to Jason’s parents, and that Jason himself was too young to have appreciated a written warning had one been posted, it is difficult to envision what value if any the presence of additional warning signs would have had in the instant case. Ultimately, the existence of such a warning would merely have had the duplicative effect of informing the Farris family of what they already knew: that a creek was located on the premises, and that it presented a potential risk of injury to their children.

Some commentators have suggested that the large number of drownings infers an inability of children to appreciate the dangers posed by water. See, e.g., *Prosser, supra* note 26, at 458; Note, *Landowner’s Liability for Infant Drowning in Artificial Pond*, 26 Ind. L.J. 266, 271 (1951). However, at least with respect to post-toddler children, the better view is that children recognize water’s danger but willingly choose to disregard it. See *supra* notes 121–22.

unless physical access to the waterfront were prevented by way of a fence, barricade, or omnipresent sentry, the only method of truly safeguarding invitee children would be to ensure the sufficiency of their parental supervision. The Washington Supreme Court's recognition of this principle in the attractive nuisance context¹²⁸ is therefore logically extendible to the invitee realm.

c. Invitees Would Continue to Incur Injuries Despite the Presence of Physical Barriers

Jurisdictions that have considered the issue have almost universally acknowledged that the only truly effective means of "childproofing" bodies of water for the purpose of avoiding liability is to either surround them with fences or to drain and fill them.¹²⁹ As previously explained, however, such measures are economically prohibitive, unduly burdensome, and inherently violative of the public policy favoring recreational, visual, and wildlife access to the state's watercourses.

Significantly, however, even the widespread emplacement of fences would fail to guarantee the safety of invitee children. Courts have repeatedly recognized the impossibility of effectively barricading waterways,¹³⁰ and the massive number of cases involving children who have incurred injury despite the presence of fences or other barricades belies the assertion that physical barriers represent a panacea for the problem of child access to dangerous conditions on the premises.¹³¹

128. See *Meyer v. General Elec. Co.*, 46 Wash. 2d 251, 254, 280 P.2d 257, 259 (1955) (noting that with regard to water, "the presence of danger to an unattended infant is not necessarily a test of anything but the need of parental care").

129. See, e.g., *Scott v. Future Invs. of Miami, Inc.*, 559 So. 2d 726, 727 (Fla. Dist. Ct. App. 1990); *Saga Bay Property Owners Ass'n v. Askew*, 513 So. 2d 691, 692-93 (Fla. Dist. Ct. App. 1987); *Walters v. Greenglade Villas Homeowners Ass'n*, 399 So. 2d 538, 539 (Fla. Dist. Ct. App. 1981); *Adams v. Brookwood Country Club*, 148 N.E.2d 39, 43 (Ill. App. Ct. 1958); *Ochampaugh*, 91 Wash. 2d at 523, 588 P.2d at 1356; *Emond v. Kimberly-Clark Co.*, 149 N.W. 760, 761 (Wis. 1914).

130. See *Emond*, 149 N.W. at 761 (recognizing that "to construct a boy-proof fence at a reasonable cost would tax the inventive genius of an Edison"); see also *Kelly v. Benas*, 116 S.W. 557, 560 (Mo. 1909) ("Shall [landowners] fence [their waterfronts] against adventurous, trespassing boys? Almost as well suggest 'that [they] build a wall against birds.'"); *Washabaugh v. Northern Va. Constr. Co.*, 48 S.E.2d 276, 278 (Va. 1948) (stating that to prevent adventurous children from gaining access to bodies of water "would take more than a mere warning sign, fence, or any ordinary barricade"); Comment, *Torts—Attractive Nuisance Doctrine—Application to Bodies of Water*, 4 Vand. L. Rev. 198, 200 n.22 (1950) (noting that with regard to bodies of water on owner's property, "a fence is a slight deterrence in keeping an active boy from trespassing").

131. Case law is replete with examples of children passing over, under, and through physical barriers in order to reach prohibited areas. See, e.g., *Smith v. U.S. Steel Corp.*, 351 So. 2d 1369 (Ala. 1977) (thirteen-year-old boys drowned in reservoir after climbing eight-foot cyclone fence topped

Similarly, the existence of additional water bodies or stream segments located on neighboring property minimizes the net increase in child safety resulting from a landowner's decision to fence the waterfront.¹³² The unfortunate but unmistakable lesson to be drawn from these realizations is clear: children determined to visit natural bodies of water will continue to do so despite the emplacement of preventive devices, and thus will inevitably continue to sustain injuries.

The recognition that invitee children (at least those old enough to climb fences) will almost certainly continue to incur harm despite the presence of physical barriers, coupled with the low probability of drowning even when children do gain access to water, casts serious doubt upon the social value of imposing liability on landowners for most water-related injuries. Viewed in light of the foregoing, the problem is that the duty of care established in *Degel*—ostensibly in furtherance of the dual public policies of ensuring a stable business climate and protecting children—will result in few tangible benefits (in terms of lives saved) relative to the significant detriment such a rule would pose to the countervailing public policy of preserving access to water. The minimal increase in child safety resulting from a landowner's decision to fence the waterfront is ultimately outweighed by the corresponding detriment to this public policy concern.

d. Natural Bodies of Water are Distinguishable from Other Natural Dangers and Warrant an Exemption from the General Duty of Care

The Washington judiciary's past willingness to expand a landowner's duty of care to cover other natural conditions has, in part, stemmed from its recognition that setting apart such conditions for selective treatment

with barbed wire); *Phachansiri v. City of Lowell*, 623 N.E.2d 1124 (Mass. App. Ct. 1993) (five-year-old was injured and seven-year-old drowned in swimming pool after digging hole underneath ten-foot chain link fence with two-foot barbed wire top); *Latimer v. City of Clovis*, 495 P.2d 788 (N.M. Ct. App. 1972) (five-year-old was injured in swimming pool after passing through hole in fence).

132. See *Ochampaugh*, 91 Wash. 2d at 523, 588 P.2d at 1356 (noting that even though pond had been filled, danger of drowning had not been significantly alleviated due to presence of other water bodies remaining in immediate vicinity). This observation is not meant to suggest that the standard of care should be reduced to the lowest common denominator, but rather that the *Degel* majority failed to adequately consider *Ochampaugh's* recognition that requiring preventive measures by one landowner does not necessarily result in the desired increase in lives saved. Given the numerous public policy arguments against fencing or filling bodies of water and the fact that the incidence of drowning remains low relative to use, the court should have considered more carefully the extremely limited benefit, previously acknowledged by the court, of imposing such a duty of care.

would be “to create a distinction without a sound difference.”¹³³ While this reasoning is valid as to such easily rectified natural dangers as accumulations of ice and snow, its underlying rationale is inapplicable when considered within the context of natural bodies of water. Water’s recreational, aesthetic, and ecological values effectively distinguish it from other less socially-valuable natural conditions. Further, unlike ice, snow, protruding tree roots, and small holes in the ground, water bodies typically cannot be rendered safe absent inordinate financial expenditure by the landowner.

e. Limiting the Natural Bodies of Water Exception to the Trespasser Arena Will Severely Dilute Its Underlying Policy

Finally, applying disparate standards of care with respect to bodies of water (one for trespassing children and one for business invitees) as established by *Degel* would lead to inconsistent and illogical results that would effectively emasculate *Ochampaugh*’s policy of preserving intact waterways and access to them. A business owner anticipating the presence of trespassing children at a pond located upon the premises would have no duty to prevent access for their benefit, but would nevertheless be forced to barricade or fill the pond in order to prevent injury to his or her invitees. Because most entrants onto business property are presumably invitees rather than trespassers, a public policy exemption absolving landowners from liability for trespassers’ injuries would be rendered effectively meaningless by the simultaneous existence of a duty to take precautionary measures for the benefit of other entrants. The ultimate result would thus be a fenced or destroyed body of water, an eventuality that would contradict the environmental, recreational, and economic policy concerns previously enunciated by *Ochampaugh*.¹³⁴

133. See *Geise v. Lee*, 84 Wash. 2d 866, 869, 529 P.2d 1054, 1056 (1975) (imposing duty upon landlords to remove natural accumulations of ice and snow from common areas of rental premises due in part to absence of sound reason for granting distinctive treatment to ice and snow).

134. The tripartite nature of premises liability law admittedly creates numerous occasions where landowners must take affirmative steps to protect invitees that need not be taken to protect licensees and trespassers. Unlike situations involving other dangerous conditions, however, the court has already acknowledged the strong public policy favoring intact and unfenced waterways. This judicial recognition underscores the unique benefits of water access, and suggests the desirability of establishing a rule of liability in this limited arena which would transcend the boundaries of entrant classification.

2. *The Duty of Care Imposed by Degel Inherently Conflicts with the Public Policy Favoring Unfenced Waterways*

The central issue in *Degel* was whether a landowner's duty of care to invitees should encompass an affirmative obligation to protect them from the dangers presented by natural bodies of water. In determining the existence of a duty, the court was required by previous case law to evaluate the relevant public policy considerations implicated by the case.¹³⁵ Through its mechanical application of the Restatement section 343A standard, the *Degel* majority afforded insufficient weight to the countervailing public policy favoring access to water bodies, and regrettably disregarded the logical consequences of imposing an implicit duty upon landowners to fence or fill their waterways.

While the Washington judiciary's adoption of Restatement section 343A serves the important public policies of ensuring a safe business environment and protecting invitees from injury, strictly applying this rule to natural bodies of water will expose landowners to increased liability for the presence of streams, lakes, and rivers located on their premises. As *Barnhart*, *Ochampaugh*, and the *Degel* dissent noted, the combination of water's alluring nature and inherent danger will inevitably result in occasional water-related injuries. That landowners possessing bodies of water may thus "anticipate" physical harm to their invitees absent an effective means of preventing physical access to the water therefore potentially exposes such owners to vulnerability to section 343A claims.¹³⁶

Although the practical effect of this liability threat may ultimately fail to assume the apocalyptic dimensions envisioned by the *Degel* dissent,¹³⁷ landowners will nevertheless feel the weight of its shadow. Since the question of whether or not a landowner should have anticipated harm under section 343A almost always necessitates a factual determination,¹³⁸

135. See *Bernethy v. Walt Failor's, Inc.*, 97 Wash. 2d 929, 933, 653 P.2d 280, 282 (1982); *Swanson v. McKain*, 59 Wash. App. 303, 307, 796 P.2d 1291, 1293 (1990).

136. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash. 2d 43, 61, 914 P.2d 728, 737 (1996) (Durham, C.J., dissenting); see also *Casper v. Charles F. Smith & Son, Inc.*, 526 A.2d 87, 94 (Md. Ct. Spec. App. 1987) ("All bodies of water deep enough to drown a child and situated within roving distance of children, present a danger from which an injury or death to some child may reasonably be anticipated."), *aff'd*, 560 A.2d 1130 (Md. 1989).

137. *Degel*, 129 Wash. 2d at 55, 914 P.2d at 734 (Durham, C.J., dissenting) (arguing that "the majority creates a universe in which our precious natural resources will be barricaded from public access").

138. See, e.g., *id.* at 54, 914 P.2d at 734 (holding issue of whether Majestic Mobile Manor should have anticipated Jason Farris's injury to be jury question).

owners choosing to leave ponds and streams in their natural state will at a minimum incur increased legal expenses for resulting accidents, regardless of a jury's ultimate disposition regarding liability. Thus, because the only truly effective methods of preventing invitee injury from bodies of water on the premises are to destroy or barricade them from physical access, landowners must choose between exposing themselves to liability and violating the public policy favoring water access issued by *Ochampaugh*.

Therefore, despite the near-consensus of judicial opinion requiring landowners to protect their invitees from all dangerous conditions on the property, numerous policy reasons suggest the desirability of creating a limited exception to this duty of care which would relax the obligation of landowners to warn and protect invitees from the dangers inherent in natural bodies of water.

V. THE INHERENT CONFLICT BETWEEN *DEGEL* AND *OCHAMPAUGH* WARRANTS A SOLUTION THAT SIMULTANEOUSLY PROTECTS VULNERABLE ENTRANTS AND PRESERVES WATER ACCESS

An ideal approach to the problem presented by *Degel* would seek to balance the competing public policies implicated in the case: minimizing injury to vulnerable invitees on one hand, and ensuring the continued recreational, visual, and environmental benefits derived from unbarricaded lakes and rivers on the other. In striking this balance, the recognition that invitee children will continue to sustain water-related injuries despite the presence of physical barriers¹³⁹ suggests the appropriateness of erring, if at all, on the side of preserving water access.

Instead of the blanket exemption for water-related injury liability proposed by the landowner and the dissent in *Degel*, the better-reasoned approach would recognize a carefully-limited exception to the general rule of section 343A for natural bodies of water that would permit the imposition of liability under only a few specific circumstances. Borrowing from the attractive nuisance doctrine's exemption for water, landowners under this suggested rule would retain their original duty to warn and protect invitees from any traps or other unusually dangerous and deceptive conditions not typically associated with natural bodies of

139. See *supra* notes 130–32 (noting likelihood of injury to children despite presence of physical barriers).

water.¹⁴⁰ Further, and most importantly, owners would remain under a duty of reasonable care to safeguard extremely young invitees too immature to appreciate water's inherent danger whenever such infants are likely to be near the water body *unattended* by their parents or other guardians.¹⁴¹

The latter provision would not necessarily impose liability upon landowners for infant drownings, but would rather leave as a jury question whether the owners should have anticipated the presence of unsupervised infants near the waterfront, and if so, whether they failed to implement reasonable safeguards. In such cases, landlords could minimize their potential exposure to liability by taking affirmative steps to distance infant invitees from bodies of water located on the property,¹⁴² by enclosing designated play areas with fences, and by employing other similar measures falling short of destroying or barricading the water body itself. Further, the suggested approach would preclude most retail and business park owners from incurring liability for water-related injuries to their invitees, because such owners could not normally anticipate the entry of infants onto the premises without the supervising presence of their parents. Thus, with careful planning, even business owners with infant invitees could potentially avoid the fear of

140. Given the redundancy, ineffectiveness, and burden of requiring landowners to warn entrants of open and obvious dangers, the suggested approach would not impose such a duty absent the presence of deceptive or unusual features associated with the watercourse. *See supra* notes 126–28 and accompanying text.

141. The Restatement (Second) of Torts § 339 recognizes a similar distinction in the trespasser arena between extremely young infants and older children. The result is a caveat to the usual rule of exempting bodies of water from liability under the attractive nuisance doctrine when the landowner has reason to expect the presence of trespassing children too young to recognize the hazards posed by water. Restatement (Second) of Torts § 339 cmt. j, illus. 7 (1965). Defining the exact age threshold that would trigger a landowner's duty of affirmative care under this suggested approach is beyond the scope of this Note. Presumably, however, the acknowledged capacity of post-toddler children to recognize water's inherent danger, as well as the proven capability of such children to scale physical barriers, suggest that the age limit should be much more restricted than that required to satisfy the "tender years" criteria of the attractive nuisance doctrine. A leading commentator has noted the inability of an "infant of three or four" to appreciate water's risks, implying that an appropriate age limit might be five years. Prosser, *supra* note 26, at 458. Similarly, given the inherent vulnerability of mentally and physically disabled adults, the proposed rule would also encompass such entrants whenever landowners should anticipate their unsupervised presence near the property's waterfront.

142. Of course, merely increasing the probable distance between young infants and bodies of water fails to ultimately guarantee their safety. *See, e.g., Villani v. Wilmington Hous. Auth.*, 106 A.2d 211 (Del. Super. Ct. 1954) (thirty-month-old infant drowned in stream located approximately one-quarter mile away from landlord's property); *Meyer v. General Elec. Co.*, 46 Wash. 2d 251, 280 P.2d 257 (1955) (thirty-month-old infant drowned in drainage ditch after wandering over 2000 feet from his house).

liability and, as a result, would not feel compelled to fence or fill their natural watercourses.

Under this approach, landowners would ordinarily owe no duty to warn or protect invitees old enough to independently recognize the dangers inherent in natural bodies of water. The judicial consensus that the hazards of water should reasonably be understood and appreciated “by any child of an age to be allowed at large”¹⁴³ is logically extendible beyond the attractive nuisance realm and should therefore apply with equal force to invitees and licensees.

The application of this suggested framework to the factual situation involved in *Degel* would have imposed a duty of reasonable care upon Majestic Mobile Manor to distance child tenants such as three-year-old Jason Farris from the dangers presented by Clark’s Creek. Liability on the basis of the creek’s steep banks and forceful current would be precluded since such natural features represent open and obvious dangers and are common to watercourses everywhere.¹⁴⁴ However, the known presence of extremely young child invitees on the premises would suffice to require the landowner to reasonably protect such children, and would mandate affirmative steps to ensure that unsupervised recreational areas be located a safe distance away from the waterfront. Had Majestic Mobile Manor’s housing policy not required families with young children to live closest to the waterfront, and had the play area itself either been fenced or located farther from the creek, the foreseeability of injury would have been minimal and would almost certainly have resulted in a jury verdict of nonliability under the proposed rule.

In addition to the public policy reasons favoring extension of the natural bodies of water exception to the invitee sphere, several factors underscore the logic of such a rule. First, the attractive nuisance doctrine itself is not limited to situations involving trespassing children but applies with equal force to licensee and invitee children.¹⁴⁵ Although the doctrine’s parameters serve as a floor, rather than a ceiling, regarding the duty owed to the latter entrant categories, its extension into the invitee realm provides a conceptual basis for similarly applying the doctrine’s natural bodies of water exception to situations where the injured child is a business visitor.

143. See, e.g., *Ochampaugh v. City of Seattle*, 91 Wash. 2d 514, 520, 588 P.2d 1351, 1355 (1979) (citing Restatement (Second) of Torts § 339 cmt. j).

144. See *supra* notes 41–46 and accompanying text.

145. See, e.g., Restatement (Second) of Torts, § 343B cmts. b, c.

Second, the suggested approach attempts to reconcile the principle that parents ultimately bear the primary responsibility for protecting children from water hazards,¹⁴⁶ with the generally recognized public policy of protecting infants too immature to appreciate such dangers and protect themselves.¹⁴⁷ The resulting duty of care fills the gap between reasonably anticipated parental supervision and unsupervised child recreation by threatening liability against landowners only when they should reasonably foresee the presence of unattended infant invitees near the premises' waterfront.

Third, the proposed rule represents a superior alternative to other jurisdictions' attempts to address the waterfront liability issue. For example, a small minority of cases have apparently attempted to insulate landowners from liability for water-related injuries by entirely eliminating any duty of care to protect entrants regardless of age or common law status, provided that no hidden or unique hazards are present.¹⁴⁸ This approach remains unsatisfactory in light of the oft-cited countervailing public policy favoring the protection of extremely young children too immature to appreciate water's inherent danger. Similarly problematic is the *Dege* defendant's proposed rule,¹⁴⁹ which would retain the general framework of Restatement section 343A but establish a limited exception for conditions, including water bodies, so obviously dangerous that the possessing landowner should not reasonably anticipate injuries to invitees as a matter of law.¹⁵⁰ The underlying rationale of this model remains unrealistic when considered within the context of natural bodies of water; despite the obviousness of water's danger and the fact that it is one of the first perils recognizable to

146. See *supra* notes 61–62 and accompanying text.

147. See, e.g., *supra* note 24 (discussing "tender years" doctrine), and text accompanying note 53 (noting exception to attractive nuisance doctrine's general exception for bodies of water when landowner should anticipate presence of extremely young trespassing infants near waterfront).

148. See, e.g., *Chaconas v. United States*, No. 84-1492, 780 F.2d 1020, 1985 WL 13925, at *1–2 (6th Cir. 1985); *Navarro v. Country Village Homeowners' Ass'n*, 654 So. 2d 167 (Fla. Dist. Ct. App. 1995); *Kinya v. Lifter, Inc.*, 489 So. 2d 92 (Fla. Dist. Ct. App. 1986); *Roberson v. City of Kinston*, 134 S.E.2d 193 (N.C. 1964); *Fitch v. Selwyn Village, Inc.*, 68 S.E.2d 255 (N.C. 1951). A similar blanket exemption for water-related injury has also been legislatively attempted. See, e.g., Note, *Liability Resulting from Artificial Bodies of Water*, 48 Iowa L. Rev. 939, 952–53 (1963) (discussing proposed legislation that would have insulated Iowa landowners from liability for any injury or death caused by bodies of water located on premises).

149. Brief of Respondent at 22, *Dege* (No. 62312-1).

150. See, e.g., *Lawrence v. Hollerich*, 394 N.W.2d 853, 856 (Minn. Ct. App. 1986) (holding that steep hill on landowner's premises presented such obvious danger that owner was not required to warn or protect invitee under § 343A as matter of law).

infants,¹⁵¹ the enormous number of cases involving drowned children negates any assertion that water-related injury to invitees should never be anticipated.¹⁵² The suggested approach openly acknowledges the continued inevitability of harm, but also maintains a duty of protection for the benefit of inherently vulnerable entrants.

VI. CONCLUSION

By imposing a broad categorical duty upon landowners to protect their invitees from the dangers inherent in natural bodies of water, the Washington Supreme Court accorded regrettably insufficient consideration to the strong public policy favoring access to the state's waterways, the previously acknowledged financial burden associated with such an obligation, and the limited beneficial impact of such a rule. In confining the premises liability exemption for natural bodies of water to situations where the injured party is a trespasser, *Degel* significantly weakened *Ochampaugh*'s policy of preserving access to the state's streams, ponds, lakes, and rivers. While *Degel* may result in a marginal increase in child invitee safety, the corresponding potential detriment to the recreational, aesthetic, and environmental benefits conveyed by intact and unfenced bodies of water will almost certainly outweigh any such minimal gains. As such, the court should have preserved access to Washington's "cherished amenities"¹⁵³ by recognizing a carefully limited exception to a landowner's general duty of reasonable care.

151. See *supra* notes 121–22 and accompanying text.

152. See, e.g., Prosser, *supra* note 26, at 458 (noting that "the impressive number of cases of dead children, attesting to their failure in fact to appreciate these risks, is sufficient in itself to cast some doubt upon the validity of the assumption" that water-related child injuries should not be expected); Note, *supra* note 127, at 271 (recognizing drowning as among leading causes of accidental child death).

153. *Ochampaugh v. City of Seattle*, 91 Wash. 2d 514, 523, 588 P.2d 1351, 1356 (1979).

