

LEGAL PRECEDENTS

Director of Public Prosecutions (DPP) v. De Kort Enterprises Pty Ltd. (o/a Swim and Survival Academy, Ballarat, Victoria, Australia) November 14, 2023

Issue

Is it reasonably practical for (De Kort Enterprises Pty Ltd.) to have reduced the risk of injury by ensuring all students were instructed to not dive into water that was less than 1.5 m deep, especially students who appeared, “taller and/or heavier than average for their age”?

Relevant Facts

On November 1, 2016, Amelia (Milly) Yeoman was catastrophically injured when she dove into a swimming pool where the water was approximately 1.3 m deep. At the time, Ms. Yeoman was a 12-year-old, grade 6 student who was participating in swimming lessons with a number of other school students at the “Swim and Survival Academy” located in Ballarat, Victoria. The swimming lesson program had been organized by her school, Ballarat North Primary School, and was being conducted by a member of the academy's staff. The lesson took place in the learner pool, one of three pools in the academy complex. The depth of water in this pool varied between 1.2 m and 1.4 m deep at the north end of the pool. During the swimming lesson, Ms. Yeoman was directed to dive into the north end of the learner pool, where upon doing so, hit her head on the tiled floor of the pool, suffering a spinal injury and rendering her quadriplegic for life. At the time of the incident, the court documents reported that Ms. Yeoman was, “23 cm taller and 46 kg heavier than an average girl of her age.” The incident was captured on video surveillance.

Following the incident, De Kort Enterprises Pty Ltd., the company operating Swim and Survival Academy, was charged pursuant to s. 23(1) of the *Occupational Health and Safety Act, 2004*. The Act imposes a statutory obligation on an employer to ensure that so far as is reasonably practical, that persons other than employees are not exposed to risks to their health or safety arising from the conduct of the undertaking or business of the employer.

The Department of Education and Training (DET) was also charged. However, these charges were later dismissed.

Decision

On February 26, 2019, De Kort Enterprises Pty Ltd. pled guilty to one count of breaching the *Occupational Health and Safety Act, 2004* in the Ballarat County Court of Victoria for failing to ensure that persons other than employees were not exposed to risks. The maximum penalty for this offence equates to approximately \$1.4 million (AUD).

At the sentencing hearing on March 14, 2019, His Honour Judge Lacava accepted into evidence victim impact statements on the immense impact of the offence on the Yeoman family's everyday lives. He also accepted that De Kort pleaded guilty to the charge, and that it did so at the earliest opportunity.

Judge Lacava found that this incident was, “a serious example of a serious offence, in which general deterrence and denunciation for the offence demanded a significant fine.” On the charge of failing to ensure that persons other than employees were not exposed to risks, De Kort was convicted and sentenced to pay a fine of \$150,000 (AUD).

Reasoning

The court heard various recognized bodies associated with the establishment of guidelines pertaining to prudent water depths for teaching diving skills. These guidelines recommend a minimum depth of 1.5 metres with a prudent water depth of 2 metres for standing dives from the pool deck. The learner pool was 1.3 metres deep therefore below the minimum recommended depth for diving and well below a prudent depth of 2 metres.

Video evidence presented by the prosecution showed the activities leading up to the incident, with the victim swimming in the north end of the learner pool, getting out of the pool and lining up behind several other students, who each in turn dove into the water before Ms. Yeoman. The tragic incident, where the victim dove and went straight down hitting her head on the floor of the learner pool was also captured.

In relation to the offence, section 23(1) of the *Occupational Health and Safety Act 2004* required De Kort, as the operator of the academy, so far as was reasonably practical, to ensure that the victim was not exposed to risks to her health or safety arising from participating in swimming and diving instruction at the academy. This required an assessment of the depth of the water at the north end of the learner pool, especially to determine whether the water was of adequate depth and to have regard to the physical attributes of each student engaging in swimming and diving lessons.

It was evident that there had been no assessment of the risk to the victim from diving at the north end of the learner pool, with video showing that the victim was much taller and heavier than an average girl of her age. If a proper assessment had been conducted, De Kort should have ensured that the victim not be permitted to dive at the north end of the learner pool where the average depth of water was below 1.5 metres.

While Judge Lacava accepted that many thousands of dives had previously been conducted in the learner pool, and that this was the first incident resulting in injury, he detailed that the law does not permit a one size fits all approach. Therefore, the victim, being at the time taller and heavier than an average girl of her age, should not have been instructed to dive into water less than 1.5 m deep, as it would pose a risk to her safety and health. It would have been reasonably practical to simply move the diving part of the lesson to a deeper pool in the complex, which could easily have been done at no cost to De Kort.

Further, while the risks of diving into shallow water are well known, grade 6 school children cannot be expected to fully understand that risk, and so the academy had to take all reasonably practical steps to protect them.

Lessons Learned

Water-related activities represent the number one cause of spinal cord injuries resulting from sports and recreation activities. According to The Consumer Product Safety Commission (CPSC), "one of the major accident patterns associated with swimming pools was striking the bottom or sides of the pool because of insufficient depth for diving or sliding."

While there are clear standards regarding water depths from diving boards and platforms, there are few that suggest minimum standards from diving from the swimming pool deck. To reduce this risk, those choosing to enter the water headfirst should have sufficient water depth below them to ensure they do not hit the bottom of the pool regardless of the effectiveness of the diving entry.

The Lifesaving Society Ontario Branch follows the standards set forth in the Ontario Building Code (O. Reg. 332/12, Section 3.11.4.1) with respect to defining the minimum diving depth from pool deck:

- The depth of water in the area directly below a horizontal semi-circle in front of a *diving board* or *diving platform* having a radius of 3 m measured from any point on the front end of the board or platform shall not be less than 2.75 m, where a board is 600 mm or less in height above the water surface.

This standard is employed in the recreational swim setting. For instructional programs, the Ontario Branch permits an acceptable depth of 2.5 metres. This depth is permitted because bathers are under the direct supervision of an instructor who has provided instruction on safe diving entry.

The International Swimming Federation (FINA, Fédération Internationale de Natation) has also published general requirements for diving pools detailing that the depth of

water shall not be less than 1.8 metres at any point of the pool where diving is permitted.

FINA also stipulates that, in addition to minimum diving depth, other interventions must be implemented by owners/operators to minimize the risk of spinal-cord injury in a supervised public swimming pool.

To reduce the risk of spinal-cord injury, pool owners/operators should consider education and interventions that include:

- Marking pool depths.
- Clearly identifying designated diving areas
- Clearly identifying no-diving areas.
- Placing 'No Diving' signage or ideograms on the deck where diving is not permitted.
- Clearly identifying water depth.
- Providing sufficient lighting that meets or exceeds the Lifesaving Society's Lighting Levels Standard.
- Confirming that there is adequate depth in areas where diving is permitted.
- Staff training on the importance of educating bathers and preventing shallow water diving.
- Bathers learning skills for low-risk dive entries during swimming lessons (lock of hands, lock head, steer up).
- The need for additional water depth when diving from an elevated (above the surface of the water) pool deck.
- Prohibiting diving from starting blocks unless under the direct supervision of a qualified coach or instructor and/or restricting the use of starting blocks to competitive swimmers and swimmer training activities.

Refer to FINA rules for minimum water depths required when using diving boards and diving platforms.

Conclusions

This incident reinforces the severe and life altering consequences of not taking reasonably practical steps to reduce the risks of spinal-cord injury to swimming pool users. Owners and operators of public pools have a legal obligation to ensure that where diving activities are permitted, the depth of water meets or exceeds minimum legal requirements. Operators should also adopt industry best practices and recommendations where possible. Further, staff should be properly trained in the importance of educating bathers on diving technique and preventing shallow water diving.

Civil Claim at the Victoria Supreme Court

In addition to the criminal claim, Ms. Yeoman filed a civil claim in the Supreme Court in 2018, which was settled for approximately \$20 million in 2021 at mediation.

De Kort Enterprises Pty Ltd., the operator of "Swim and Survival Academy," agreed to pay \$10 million, the state of Victoria \$6.67 million and the lesson instructor \$3.33 million, according to court documents. The settlement was reached with a denial of liability from the defendants.

Disclaimer

Please note that the language used in this document is derived from transcripts of the court proceedings of the criminal and civil claims. As such the wording reflects the words of the court and not necessarily those of the Lifesaving Society.

References

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