LEGALLY SPEAKING

A Swimming Facility's Duty of Care and the Personal Responsibility of Patrons

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On August 1, 2004, during the designated family swim time at a public pool in British Columbia, a female diver ("the Plaintiff") stepped off the 5 meter platform into the dive tank. Before the Plaintiff had cleared the area, a young male, approximately 12 years old, stepped off the 5 meter platform and collided with her. As a result of this collision, the Plaintiff suffered an injury to her left arm. It was no issue that the boy was negligent in stepping off the platform, but the Plaintiff also alleged that the facility's negligence had contributed to the accident.

The Occupier's Liability Act (the "Act") states that the occupier of a premises owes a duty to take that care which, considering all of the circumstances of the case, is reasonable to see that a person on the premises will be reasonably safe in using the premises. This duty of care applies in relation to the condition of the premises, activities on the premises, and the conduct of third parties on the premises. The Plaintiff alleged that the facility did not meet this standard of care.

In support of her position, the Plaintiff pointed to the history of similar events in the dive tank at that facility. Between December 1994 and December 2004 there were thirteen similar incidents concerning the 5 meter platform, and another 31 incidents involving divers using the other diving surfaces in the dive tank. None of the incidents had been particularly serious; they generally only resulted in bruises or some minor discomfort. Nonetheless, the Plaintiff argued that these previous similar incidents had established a foreseeable risk of harm which the facility had done nothing to prevent. Specifically, the Plaintiff felt there should have been a lifeguard designated solely to supervising the 5 meter platform at all times that the platform was open to the public.

The dive tank in the aquatic facility contained 7 total launching devices, ranging from 1 meter to 7.5 meters above the water. There was one tower which contained access to all jumping areas but the lowest, and entry to each platform or board was regulated with a steel gate. Signs were posted at both entries to the tower, which among other things, cautioned divers to: "Ensure water area below is clear before leaving boards and towers"; and "Exit area immediately after entering the water." Additionally, there were also signs posted on the platforms, which read, in part: "Exit Under Platform Immediately After Diving!" Among other things, the diving platform rules stated to "Walk up to end of platform and look below to ensure area is clear before jumping or diving"; and "Upon entering the water please swim directly back to wall beneath, and exit pool."

At the time of the incident, there were nine qualified lifeguards on duty at the time of the incident, although no one was exclusively designated to watch the 5m platform.

Analysis

To help determine whether the facility had fulfilled its duty under the Act, the Court received evidence on the "custom and practice in the industry". It firstly reviewed the legislative standards in force, from the Swimming Pool, Spray Pool and Wading Pool Regulations, B.C. Reg. 298/72, O.C. 419/2003, which are adopted under the Health Act. The material regulations of which are as follows: "Diving boards and platforms more than 10 feet above the water level shall have the access designed so that it may be controlled"; "Every swimming pool manager shall ensure that at least one lifeguard is on duty at pool side for each 100 persons or portion thereof within the pool area"; and "The use of diving boards and platforms shall be restricted in the interest of safety at the discretion of the swimming pool manager."

The Court also heard the testimony of the Executive Director of the Lifesaving Society of British Columbia and Yukon Territory (the "ED") as to the "custom" of swimming pool operations in British Columbia. The ED testified that, in his experience, "the rules applied to a 5 meter platform are clearly set out in conspicuous signage" but that "a lifeguard is not specifically assigned to monitor the use of the 5 meter platform" and that "it is the responsibility of the next user to visually ensure that the previous user has left the landing area prior to entry". The Court accepted this testimony, as well as the legislative standards outlined above, as an accurate reflection of the custom and practice in the industry. There is no doubt that the policy of the facility lived up to the standards set by this custom and practice.

The Court ultimately ruled in the facility's favour. It found that the policies employed, which easily met the common customs and practices in the area, were sufficient, and it accepted the facility's contention that a requirement to change the lifeguard supervision procedures based on the previous incidents would be unreasonable. The frequency of the incidents, and more importantly the severity of the injuries sustained, did not justify a change to the facility's policies.

The Court warned that the word "prevent" must be used cautiously. There is no legislatively imposed duty on occupiers to "prevent" injury. An occupier must take such care as is reasonable, and to see that a person using the premises is reasonably safe. Facility operators can look to the standard set by the customs and practices of the industry to gain an understanding of what measures will be considered 'reasonable'.

The other significant aspect of this case the Court's finding that the facility was entitled to assume that patrons, including 12 year old boys, will exercise reasonable care for their own safety and the safety of others. This concept can be an important, and comforting, one for facility operators and lifeguards to understand. Just as the patrons of a swimming facility can rely an occupier to act reasonably, the occupier can in turn rely on the good sense of its patrons, though it must of course still augment this reliance with cautionary signage and lifeguard oversight throughout the complex.

Editors Note: The purpose of this article is to furnish lifeguards, instructors and pool operators with some general information on the law which might bear some relevance to aquatics programming and facilities. This is not to be construed as legal advice or opinion, but rather to show trends and principles of the law as they might affect aquatic personnel, through the use of recent cases decided throughout Canada.