

Swimming Pools Owners or Operators May Owe Duty to Provide Properly Trained Lifeguards

Introduction

1. The Singapore High Court in *BNM v National University of Singapore* [2014] SGHC 5 recently decided that owners or operators of at least standard Olympic sized swimming pools may owe a duty to users of the pool to provide properly trained lifeguards.
2. The Court also stated that changing industry practice may affect what constitutes proper training for lifeguards.
3. An extract of the relevant portion of the Court's analysis on the extent of the duty of care owed by swimming pools owners or operators is set out below in this update for ease of reference.

Facts

4. The deceased drowned while swimming in a swimming pool owned by the National University of Singapore ("NUS"). The two lifeguards on duty were seated together near the turnstile entrance to the pool. They did not spot the deceased's struggles until alerted by the shouts of the deceased's friend. Cardio pulmonary resuscitation was practised on the deceased but to no avail. The lifeguards did not use the available resuscitator machine or an automated external defibrillator ("AED") because they were not trained in their use.
5. The deceased was sent to a hospital eventually and pronounced dead. His wife ("the Plaintiff"), as administratrix of his estate, sued NUS. Hydro Aquatic Swimming School ("Hydro Aquatic") which provided NUS with lifeguard services at the relevant time was added by the Plaintiff as a second defendant. NUS also brought a third party action against Hydro Aquatic. Hydro Aquatic then brought fourth party proceedings against its insurer, Overseas Assurance Corporation Limited.

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Duty of Care owed to the Deceased

6. The Plaintiff's claim was fundamentally based on negligence.
7. The Court applied the legal test in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 to establish a duty of care. The threshold requirement of factual foreseeability, followed by the twin considerations of legal proximity and the presence of any countervailing policy considerations were all met. Both NUS and Hydro Aquatic owed a duty of care to the deceased.

Extent of Duty of Care Owed

8. The Court analyzed the extent of the duty owed by a swimming pool owner or operator. The Court confirmed that it is *not* the law that owners or operators of all swimming pools must provide properly trained lifeguards. The extent of the duty depends on the facts and circumstances of each case.
9. The factors affecting the extent of the duty includes: (1) the size and depth of the pool, (2) whether the pool is private or public, (3) the profile of pool users, and (4) the type of activities being carried out in the pool.
10. On the facts, the NUS pool was standard Olympic sized with depths up to 1.9m. Although the NUS pool is private, the potential users number in the thousands over a year. Therefore, the extent of the duty owed by NUS was the same as the duty owed by those who ran large public swimming pools.
11. An adequate system of safety for such pools would normally include having properly trained lifeguards stationed at appropriate locations around the pool. The lifeguards would be expected to be alert and survey the pool regularly.
12. However, at the time of the incident in 2007, this duty did not extend to providing AEDs and oxygen resuscitators, and lifeguards trained in the use of such equipment. It was *not* (at that time) common or industry practice for pool owners or operators to provide such equipment. Use of AEDs was also

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not included in the training for lifeguards nor required as a qualification. The Court however added that this may no longer be the case today.

13. In this case, the Court held that the lifeguards on duty fell short of the standard of care in the performance of their lifeguarding duties. They did not notice the struggles of the deceased until the shouts of the deceased's friend. This was despite the fact that the deceased was swimming near the surface of the water and easily visible from the lifeguards' high vantage point. The lifeguards also did not patrol the pool.

Duty of Care Owed is Delegable but not Delegated on the Facts

14. NUS tried to argue that its duty to provide properly trained lifeguards was delegable and in fact, delegated to Hydro Aquatic.
15. The Court adopted the test in the UK Supreme Court case of *Woodland v Swimming Teachers Association* [2013] UKSC 66 to ascertain whether a duty is delegable or not. On the facts, the deceased was not a patient or a child or in any way especially vulnerable. Therefore, the NUS's duty of care to provide properly trained lifeguards was a delegable duty.
16. Nevertheless, on the facts, this duty was not in fact delegated to Hydro Aquatics. In their contractual arrangement, NUS retained a very high degree of control over the manner in which Hydro Aquatic was to carry out its work and had a duty to continue to supervise Hydro Aquatic. Hydro Aquatic was therefore not an independent contractor of NUS. On the facts, NUS was contributory negligent and liable for the negligence of the lifeguards.

Deceased's Death was not Caused by Negligence

17. Although there was negligence on the part of the lifeguards, both NUS and Hydro Aquatic were found not liable for the deceased's death. The Court found that the cause of the death was a pre-existing medical condition. The deceased had a badly diseased heart and suffered cardiac arrhythmia which incapacitated him while he was swimming.

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18. No intervention would have been likely to save the deceased, even one with AED applied. Therefore, the deceased's death was not caused by the negligence of NUS, Hydro Aquatic and their lifeguards.

Extract of Court's Analysis on Extent of Duty of Care Owed

33 I have described the NUS swimming pool in some detail above. It is clear that it was large and deep enough in parts such that a swimmer getting into difficulties would find it hard to reach the safety of the poolside and therefore risk serious injury or even death by drowning. Swimmers can get into difficulty for a variety of reasons: sudden muscle cramps; accidental ingestion of large amounts of water; collisions with other swimmers or the pool wall; diving mishaps; or falls into the pool. Because they are immersed in water, the danger of drowning or serious injury arising from near fatal submersions is obvious. Pool operators therefore have a duty to take reasonable care and responsibility for the safety of all who use their pools.

34 That said, I do not think that owners or operators of all the different kinds of swimming pools should be bound by the same scope and extent of duty of care to the users of such pools. Swimming pools come in all shapes and sizes and are built for different purposes. They may be deep or shallow or more commonly, with deep and shallow parts. They may be private pools in bungalows, small blocks of flats or large condominiums to which the public has no ready access or right of use, or they may be public swimming pools to which any member of the public can gain access upon payment of a modest fee. They may also be restricted swimming pools, as was the case here, available only to a class of persons who are members of a club or organisation. Must owners of all such swimming pools provide properly qualified lifeguards? This cannot be the rule for it would inflict an unduly onerous burden on some owners which is not proportionate to the expected benefits of the rule. Having said that, the kind of users of the pool may give rise to very different considerations, eg, where children have ready access and are known to frequently use the swimming pool. However these considerations may have to be balanced by a duty of supervision by parents or adults who can swim, especially in

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swimming pools within private condominiums. A duty of care may also be imposed on those carrying on an organised activity in a swimming pool, for example, a group of school children being given swimming lessons as part of the school's extracurricular programme. All facts and circumstances must be taken into account in deciding the issue of legal proximity and the scope of the duty of care that is owed.

35 Owners or operators of large or Olympic-sized swimming pools such as those commonly in use in public swimming complexes should, in my judgment, be under a duty to provide an adequate system of safety for their users as these pools are in effect open for public use. Those who use these pools will range from the very young to the very old and will necessarily differ in their ability to swim. Some may be so exuberant as to engage in dangerous horse-play. No owner or operator is entitled to assume that every user is physically fit and a competent swimmer who can cope with unexpected exigencies. Even the fittest swimmer is not immune to mishaps.

36 Although the NUS swimming pool is a private swimming pool open only for members of the university and their guests to swim in, the potential users number in the thousands over a year. Therefore, I do not think that NUS should be treated differently from those who run large public swimming pools in this respect. Having invited use of this facility, NUS was thereby duty-bound to take steps to militate against the obvious risks of harm arising from the use of this facility in the manner in which it was intended to be used.

37 Consequently, an adequate system of safety for such pools would, absent any special circumstances, normally include having properly trained lifeguards stationed at appropriate locations around the pool. The lifeguards would be expected to survey the pool regularly, to remain alert to and be trained to spot cases of swimmers in difficulty or drowning or near-drowning and to intervene promptly with the proper techniques. They should also notice and stop over-exuberant behaviour or horseplay amongst children or young adults that may endanger themselves or other swimmers. These lifeguards should also be, as the first responders to any pool emergency, trained in the basic resuscitation techniques which

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would be critical in such rescues. As a matter of public policy, I can see no reason why it would not be fair, just and reasonable to impose liability on a pool owner or operator who negligently fails to implement such reasonable measures; neither would it be unduly onerous or a disproportionate measure in terms of cost or practicality in implementation.