

Citation: ☼



Date: ☼

File No: 1525032

Registry: North Vancouver

**IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
SMALL CLAIMS COURT**

BETWEEN:

NAZNIN HALANI

CLAIMANT

AND:

DISTRICT OF NORTH VANCOUVER

DEFENDANT

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE J. MILNE**

Counsel for the Claimant:

E. Hong

Counsel for the Defendant:

S. Boyce

Place of Hearing:

North Vancouver, B.C.

Date of Hearing:

August 3, 2017

Date of Judgment:

March 14, 2018

INTRODUCTION

[1] The claimant sues the Defendant for pecuniary and non-pecuniary damages she suffered on October 31, 2013 while in an intermediate adult swim class at the William Griffith Recreation Centre pool. Liability is the only issue. It is acknowledged a duty of care was owed by the Defendant's instructor to the Claimant as a student in the swim class. It is also acknowledged the Defendant is vicariously liable for the acts of the instructor.

[2] The Claimant, while performing the back stroke swam into the end of the pool and struck her head. She submits the instructor was negligent in failing to instruct her on the use of the overhead flags as a safety device to warn her of the impending end of the pool or in not stopping her from doing so.

[3] The Defendant denies liability submitting there was no breach of the standard of care by the instructor and further that swimming is inherently risky and there was no exposure to any risk beyond the inherent risk which was accepted by the Claimant. The Defendant submits she failed to take to reasonable care of her own interests and it was that failure alone which caused her injury.

THE FACTS

[4] The Claimant was aged 56 at the time. She came to Canada from Uganda at age 14. In 2009 she was in a motor vehicle accident and suffered some injury. She was regularly going to the gym and pool approximately once per week. At the pool she would practice floating and the breast stroke in the shallow end. She also engaged in aerobic classes twice weekly and walked regularly. She used the William Griffith

Recreation Centre and prior to that the Harry Jerome Rec Centre. Her evidence was she had only been to the William Griffith pool a handful of times prior to the incident.

[5] She had taken swimming lessons in 1984 and 1991. She signed up for intermediate level swim lessons on line to help her recover and to get fit. She had never been in deep water and felt anxious about it and always used floatation and stuck to the edge of the pool to be able to hold the edge if required. She wanted to challenge her fear of deep water. Her evidence was she had never been instructed on the use of the overhead flags as she had always been in the shallow end and that she had never asked about the flags. She had seen people throwing balls over them but no one ever told her why they were there or how to use them.

[6] She was wearing a swim cap and took off her glasses and used swim goggles to protect her eyes from the chlorine in the pool. While she needs glasses to see distance she has no hearing problems.

[7] Her evidence was she was waiting for the instructor with 2 other students. The instructor "Rod" arrived, talked with the 2 others and then came to her. Her evidence was that she told him of her fear of deep water, that she had taken lessons before, and that she can't see well without her glasses. He asked her about her level of competency, viewed her strokes in the shallow end and asked her to get a float belt and flippers on.

[8] Her evidence was that she felt he was impatient with her and her previous instructors had been female. She worried he was annoyed with her. She opined he was not used to taking this class and he was substituting for another instructor.

[9] She did a front crawl 2-3 times to the deep end and back. During this time she reiterated her worry of deep water and he reassured her.

[10] During her front crawl laps she looked up to see the end of the pool. She was always the last in the order of the students going out. They did a kicking drill and then a back float. The instructor held her and told her to straighten her body in the deep end to assess her form.

[11] She performed one length of back of stroke to the end of the pool and did the front crawl back. On the second length the 2 other students were at the wall and she heard them talking so she stopped a few feet before the wall. Her evidence was Rod shouted at her to keep going which she did. She believes the instructor was next to her in the water.

[12] On her last trip down the pool the instructor told her to keep her arms beside her. Rod's evidence was doing that increases buoyancy and her arms are only introduced in the advanced class. Her evidence was she wanted to put her arms out but didn't for fear he'd yell at her again.

[13] She swam down the length of the pool on her back and hit her head at the end. Her evidence is she did not hear him shouting from the pool deck or see him waving his arms above her as she went by him. Her evidence was she expected him to tell her or alert her to stop. Her evidence was he did not do so in the other laps which she had done on her front or the 2 prior laps done on her back.

[14] After hitting the end she was dizzy for a minute, asked by the instructor if she was okay, and he tested her vision. She then continued swimming back to the shallow end and got out and the instructor told her to get some ice which she did and put it on her head in the change room. She then went to the hot tub and he came and asked her again if she was okay. The supervisor Mr. Clark also came over.

[15] She made later enquiries and on November 5, 2013 spoke to Mr. Clark the supervisor by telephone. Mr. Clark noted she asked for insurance forms for her injury and told him the instructor intentionally and knowingly made her swim into the wall to injure her and that he was negligent in not telling her of the location of the wall. At trial the Claimant resiled from that position and said that she was very angry at the time, English is her second language, and that she had made the wrong use of words.

[16] The Claimant made several remarks in her evidence that she felt bullied, intimidated, and scolded by the instructor. This evidence was in direct contradiction to the evidence of Mr. Clark the supervisor of the instructor who described Rod as being one of their better instructors who was subsequently promoted to supervisor. The Claimant said that she was obviously relying on him to tell her before she reached the end of the pool. She also testified one of the other women in the class said she was sorry and that she should have stopped her.

[17] Her assertion of aggressive behavior by the instructor was never put to the instructor in cross examination and is not supported by any other evidence.

[18] The instructor, Rod, gave evidence and outlined his experience and qualifications as a Life Guard Instructor I. He was a Certified Water Safety Instructor from 2010 and

recertified in 2012. Exhibit 2 sets out in detail his certifications and qualifications as an instructor. I have no difficulty in accepting he is qualified and properly trained to teach an intermediate adult swim class. His knowledge of the procedures, skill levels required and necessary progressions was amply established in the evidence.

[19] His evidence was he arrived as a substitute instructor for the 1st class of this series of lessons. He did an assessment in the shallow end to ensure safety and comfort of each of the students. His evidence is the complainant was late, not him. As described by her they all did front and side glides together. His evidence was she was not very talkative and a little nervous or timid in the water but was completing the task adequately. He did not recall conversations with her where she mentioned any fears or limitations. His evidence was he was in and out of the water with the students.

[20] While he had no specific memory of telling the students to slow while approaching the end he usually does tell them to slow when they see the flags overhead or in the advanced class, to put out their arms. For most classes he points out the flags. He does so in beginning classes but he could not recall if he did so with this intermediate class. The flags are 5 meters from the end and strung across the pool hanging on poles at the side of the pool. He can touch them by standing on the pool deck and reaching over his head.

[21] The instructor testified he was standing on the pool deck by the pole that holds the flags when she swam past him. He leaned over her and shouted at her and waved his arms as she swam by on her back to warn her of the pool's end. His evidence was he could not block her as he was too high on the pool deck and he could not jump in for

fear of landing on top of her. In spite of his shouting and waving a warning she continued without stopping and struck the end of the pool.

[22] The Health and Safety Incident Report he completed shortly after the accident indicates he explained to her after the incident how to use the flags in the future. He agreed the flags were used for no other purpose than safety and mostly for people swimming on their back.

[23] He described the main risk of swimming in the pool was of drowning but did agree there are other risks or hazards one of which was hitting the edge of the pool and to minimize that risk flags were used.

[24] Mr. Clark, the Rec Centre's supervisor, was a life guard at the time and on duty. He explained the flags were a visual cue to slow down. The end of the pool is 5 meters from the flags. The flags were obvious and in view at all times.

[25] He noticed Rod teaching in the shallow end as he scanned the pool. His attention was drawn to the deep end when Rod was waving his arms and calling out to the Claimant. He heard the calling out from the opposite side of the pool. His evidence was the pool was not busy. He observed her hit the end of the pool. He classified her speed as slow. Rod had described it as moderate.

[26] He described Rod as an above average instructor, a great communicator, and easy to get along with.

[27] His evidence was is up to the instructor to provide safety instructions in the pool and that that those instructions followed the nature of the lessons and the level of the

competency of the students. It would be expected that the instructors would advise “back crawlers” of the flags. The Presence of the flags is an industry standard.

DISCUSSIONS AND CASE AUTHORITIES

Duty of Care

[28] As mentioned above I have no difficulty in finding a swim instructor in an intermediate adult swim class owes a duty of care to his students. There is a foreseeability of risk of drowning with novice swimmers and that was acknowledged by the instructor and his supervisor in their evidence. There was clearly a relationship between the instructor and student that was close or proximate enough to give rise to a duty of care.

Standard of Care

[29] Counsel have provided a number of cases on determining the standard of care. They include *Childs et al v. Desormeaux et al*, 2006 SCC 18, [2006] 1 SCR 643; *McCabe v. Westlock Roman Catholic Separate School District 110* 1998 ABQB 809, [1998] A.J. No. 1053, varied by 2001 ABCA 257, [2001] A.J. No. 1278; *Smith v. Horizon Aero Sports Ltd.*, [1981] B.C.J. No. 1861; *Isildar v. Kanata Diving Supplies, a division of Rideau Diving Supplies Ltd.*, [2008] OJ No. 2406 (ON Sup Ct Jus); *Knowles v. Whistler Mountain Ski Corp.*, [1991] BCJ No. 61 (BC SC); *Roumanis v. Mt. Washington Ski Resort Ltd.*, [1995] BCJ No. 844 BCSC; *Rozenhart v. Skier's Sport Shop (Edmonton) Ltd.*, 2002 ABQB 509; *Wormald v. Chiarot*, 2016 BCCA 415. I have reviewed these cases although will not refer to all of them.

[30] The court must view with caution those cases involving the standard of care and injury to children and determining the standard of care relating to adults. In Smith the Court held the standard of care depends on a variety of factors:

...It depends on many factors which include the relationship of the plaintiff to the defendant, the plaintiff's relative inexperience in the area of activity as known to the defendant, the magnitude of risk associated with the activity and the degree of harm which may reasonably be expected to flow from the risk if it materializes [citation omitted]. The circumstances of the relationship and of the occasion may attract the high degree of care expected of a teacher towards a student even where the student is an adult.

[31] The standard is not a standard which can be applied in the same manner and to the same extent in every case. Inherent risks must be considered along with the perils a person engaged in the activity might reasonably expect to encounter. (See Rozenhart)

[32] It is clear to everyone pools have edges and there is an inherent risk of hitting the edge.

[33] The instructor assessed her skill set, he encouraged use of a floatation device for her safety, he spoke to her because she appeared timid, while not recalling if he advised of the flags it would have been his practice to do so and in any event he attempted to get her attention in the only way he could.

[34] Her evidence of relying on him to somehow tell her of the impending edge of the pool is inexplicable given that she had swum to the end immediately before, had heard the other adults students and stopped prior to it. She was clearly able to hear as she

swam, how she failed to hear the shouted warning by the instructor standing immediately over her, waving his arms, is equally inexplicable.

[35] Even if I accept her evidence, it is clear that she was familiar with the pool environment having had lessons, she had practiced in the pool in the past, she done laps to the end immediately preceding the incident, but she gave no apparent thought of looking around. Her evidence of relying on the instructor to tell her when to stop has no reasonable basis for it.

[36] She clearly did not take care of herself and it was her lack of care, where she had accepted a readily ascertainable risk that was the proximate cause of her injury.

CONCLUSION

[37] In all of the circumstances and on all of the evidence I can find no negligence on the part of the defendant and dismiss the claim.



The Honourable Judge J. Milne
Provincial Court of British Columbia