

LEGALLY SPEAKING

heather barnhouse BSc, LLB, MBA
fraser milner casgrain

lifesaving society legal advisor



Heather is a member of FMC's Corporate Commercial group. Heather helps clients organize their business as well as draft and

negotiate contracts pertaining to their area of business. She also advises clients with respect to completing transactions involving their business.

Heather also has experience advising on regulations as well as drafting, reviewing, and negotiating clinical trial agreements and ancillary documents related to clinical research for one of Canada's largest research-intensive universities.

Heather is a member of the Intellectual Property Subsection of the CBA.



FRASER MILNER CASGRAIN LLP

Occupiers' Liability

The case of *McQueen v Her Majesty the Queen in Right of the Province of Alberta and the City of Calgary*, (2001) A.B.Q.B. 220, affirmed 2002 ABCA 31 discusses the full extent of the duty owed to patrons of public swimming facilities by its operators.

Disclaimer: The purpose of this commentary is to furnish lifeguards, instructors, affiliates, and pool operators with some general information which might bear some relevance to an aquatics programming facility. This is not to be construed as legal advice or opinion.

June 25, 1994. Approximately 11 am.
Sikome Lake Provincial Park.

Carrying his two and three year old sons, David McQueen waded 10-15 feet into Sikome Lake towards one of six skimmer platforms around the perimeter of the lake. The skimmers are made of concrete with a side mounted drain inlet near the water surface. McQueen put each child on the edge of the platform and stepped up to the top. He looked out to the expanse of the lake opposite the shore and dove in head first, breaking his neck. He was rendered paraplegic as a result of his injuries.

SIKOME LAKE PROVINCIAL PARK

Sikome Lake is a man-made swimming lake covering 3.88 acres at the south end of Fish Creek Provincial Park near Calgary manned by lifeguards. It has a very shallow gradient with a sand bottom sloping to a maximum depth of approximately 8 feet.

Was the Province of Alberta as owner and occupier of Sikome Lake in breach of any duty owed to McQueen as a visitor to the premises?

At the trial, McQueen testified that he did not intend to dive when he waded out with his boys to the skimmer platform. He further testified that he looked down and could not see the bottom of the lake and thought it was safe, notwithstanding the fact that he had just walked out to the skimmer platform, with the water level no higher than his knees. Prior to his dive, he did not stop to check the water depth; he did not pose for a dive. He was merely on the skimmer platform for a few seconds before he chose to dive into the very shallow water. McQueen testified that he did not see a "No Diving" sign on top of the skimmer at the time of his dive.

McQueen had consumed about 20 ounces of rum and possibly one beer before he went to bed around 4:30 am the previous night. He did not have any more to drink the morning of the incident. A blood sample was taken around noon when he was admitted to the hospital. His blood alcohol level was equivalent to at least 0.148 mg/100 mL.

The plaintiff's expert's opinion was that the injuries to McQueen "were the result in the accumulation of errors and mismanagement by the operators of Sikome Lake". The expert cited inadequacies in lifeguard training and actions, inadequate signage, and errors in platform design and placement as contributing factors to McQueen's injuries.

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The court dismissed the evidence of the plaintiff's expert, ultimately finding that his propositions and findings were not credible. Each of the categories is discussed below.

LIFEGUARD TRAINING. The Court accepted the evidence presented by the lifeguards with respect to their level of training and qualifications. It was held that *the national qualifications maintained by each of the lifeguards and their comprehensive facility-specific inservice training was adequate to ensure the lifeguards were properly qualified to perform their duties.* At the time of the incident with only 15-20 bathers in the lake and three lifeguards on active duty, the lifeguards were properly positioned to observe and respond to aquatic incidents.

SKIMMER DESIGN & PLACEMENT. The plaintiff's expert argued that the skimmer platforms, by their design and placement, constituted an invitation to swimmers to approach, climb up, sit, stand, jump, and dive off, and that the defendant, as occupier of the premises, was negligent in allowing the skimmers to be used in their present design knowing the shallow water depth, when it was known that these would attract people to dive off them.

The defendant argued that rather than the design of the skimmer platform being faulty, it was McQueen's judgment, considerably impaired by alcohol, which resulted in his injuries. His action of diving head first from the skimmer platform was entirely unpredictable and afforded no opportunity for the lifeguards to intervene in a meaningful manner to prevent injury, particularly when he didn't pose for a dive for any length of time prior to executing the dive. *While lifeguards are trained to prevent injuries, they must have an opportunity to do so.* In this case, even McQueen did not know he was going to dive prior to his diving off the skimmer platform. He failed to observe the large sign prohibiting diving which was virtually at his feet. He surely must have known the depth of the water near the skimmer platform as he had just waded out from the shore to a depth of no more than 18-20 inches before he stepped up onto the platform.

While both parties agreed that the presence of skimmer platforms would constitute an attraction to bathers; they could safely jump from the platforms. Jumping and diving are different activities having different risks and different purposes. Expert evidence for the defence testified that jumping from the surface of the top of the skimmer platform was low risk whereas diving was much riskier having potentially catastrophic consequences. Skimmer platforms in and of themselves were not found to be inherently dangerous; rather, *individual activities must be monitored to ensure no unsafe behaviour is demonstrated in individual circumstances.*

INADEQUACY OF SIGNAGE. Although McQueen failed to see the warning signs, a "No Diving" sign stencilling 3.5-4

