

Claim Case Studies & Legislation

Wessell v. Kinsmen Club of Sault Ste. Marie Ontario Inc.

Facts

A 15-year old boy and his friend went swimming at an outdoor recreation area owned, occupied and maintained by the defendant Organization. There was a very popular beach and a large natural water swimming spot. While the boy was attempting to swim ashore from an unanchored raft, he nearly drowned. He died of his injuries four days later. The boy's parents and two sisters brought a claim against the Organization for damages.

Issue

What duty of care does an occupier of lands in Ontario owe to a person who enters the premises by the permission of the occupier?

Background

The defendant was a non-profit organization. They made their swimming facilities available to the public at no charge. The Organization had a Parks Committee that was responsible for the operation of the park. The park was open from 10:00am to 10:00pm. There was a sign at the entrance of the park setting out the rules and code of behaviour for those using the park. Rule 5 stated that in unsupervised swimming areas you swam at your own risk. There were two teenage girls with life-saving qualifications hired by the organization as lifeguards. They were responsible for water safety in the park.

The swimming area had a raft. The purpose of the raft was to provide swimmers with a diving platform. It was constructed out of plywood and 45-gallon drums. The raft was originally anchored in deep water by a rope tied to a submerged pipe. On the July 1st weekend the raft became detached and floated free.

The chairman of the Parks Committee noticed that it had detached and decided that it should be pulled up onto the beach. Teenage swimmers continued to take the raft out into the water. He instructed the lifeguards to arrange for it to be permanently anchored by chains. At this time the

lifeguards also expressed their concern regarding the safety of the raft.

On the day of the accident the lifeguard on duty noticed that the raft had been taken out into the water again by swimmers. She pulled it back on shore. Later in the day she allowed it to be taken out again as long as there was no horse play and that the swimmers brought it back to shore when they were done. At 8:00pm the raft was onshore. Her shift was over and her responsibility for supervising the beach area ended.

After she left, several teenagers took the raft out again. Shortly thereafter, the 15-year old boy and his 17-year old friend swam out to the raft. The raft was approximately 20 to 30 feet from shore. Horse play on the raft caused it to drift further from shore. The boy and his friend were not engaging in the horse play and decided to swim back to shore. The 17-year old made it back but noticed the 15-year old boy's head pop up and down in the water almost 20 feet out.

Although immediate action was taken, by the time the boy was found and artificial respiration was applied, he was unable to survive the effects of the incident.

Findings of the Court

1. First it had to be determined whether the raft constituted an 'unusual danger'.

In deciding if something constitutes an unusual danger, you have to look at not only the object itself, but also the circumstances surrounding it at the time and place of the incident. The judge believed that a raft used by teenage swimmers, even if it is anchored and they are supervised, could be considered dangerous. He went on to state that "...to permit a raft to be unanchored and to float free in a large swimming area, as here, at the time of the accident its use completely uncontrolled and unsupervised, must surely constitute an unusual danger..."

2. It then had to be determined if the Organization had knowledge of the danger or ought to have had knowledge of the danger.

In this case, the Organization's chairman of their Parks Committee had actual knowledge of the danger. The lifeguards felt that the raft could be dangerous and had expressed it to him. He also admitted being concerned about the raft and the possible dangers. The judge stated that the Organization was "thus aware, not only that the raft was unsafe, but that it was being taken out into the lake immediately after the lifeguards went off duty, and allowed to drift free, its use by teenage swimmers uncontrolled and unsupervised".

The judge believed that a few simple precautions could have prevented the accident. He stated: "the raft could have been securely attached to the shore so that it could not have been taken out into the swimming area at all until the proper anchoring arrangements were organized. The lifeguards' hours of duty could have been extended or unsupervised swimming could have been prohibited altogether and the gates of the park closed at 8:00pm when the lifeguards went off duty...the Kinsmen Club, however, took no precautions at all".

Defence: *Volenti non fit injuria*

The defence of 'volenti non fit injuria', or 'to a willing person, injury is not done' generally means that a plaintiff cannot sue a defendant where the plaintiff has consented to or willingly accepted the risk of harm. The court considers if the plaintiff gave real consent to the assumption of the risk without compensation, and whether that consent really absolved the defendant from their duty of care. The judge found that on the facts of this case, the young boy could not be said to have given his real consent to the assumption of the risk.

Contributory Negligence of a Child

In determining whether a child was contributorily negligent, it must first be decided whether the child was capable of having responsibility for his or her own safety in respect of the risk of injury to which he or she was exposed to by the defendant. If they are found to be capable, then it must be

decided whether there was negligence on the part of the child and the degree of that negligence. This is no easy task. In the oft-quoted case of *Winnipeg Elec. Ry. v. Wald* (1909), 41 S.C.R., the judge states: "though the law fixes an age limit for responsibility in some cases, none for the application of the doctrine of contributory negligence has yet been so definitely fixed as to furnish a uniform rule of law to guide in all possible emergencies that might arise in the conduct of children". The test of capability is a subjective one. The total child must be assessed and compared to a reasonable child of the same age.

In this case, the judge found that the boy was capable of being found negligent. He then had to consider if he was, in fact, negligent and if so, to what degree. He was a 15-year old boy with limited swimming experience. It was his first time swimming at the park that summer. A boy of his age would be embarrassed and hesitant to express concern or ask for help in swimming back to shore. The judge found that the boy's failure to perceive, for whatever reason, the distance the raft had drifted from shore and his awareness of the limitations of his swimming ability warranted a finding of 25% fault on his part.

The judge relied on the Supreme Court of Canada's finding in *Grieco v. L'Externat Classique Ste. Croix* (1962) where they found that a 15-year old boy's actions of jumping out of a boat, when expressly forbidden to do so, and subsequently drowning warranted his being found 50% at fault when he barely knew how to swim and knew, or ought to have known, the danger of jumping into deep water.

Court's Ruling

The defendant organization was found 75% responsible and the boy 25% responsible. Damages, after making the required apportionment, were \$4,350.75 to the boy's father; \$2,400 to the boy's mother; \$6,000 to the boy's one sister; and \$1,200 to the other plus costs and prejudgment interest.

Lessons Learned

When dangers or hazards are noticed, immediate steps should be taken to eliminate or reduce the risk of harm. These factors will be considered if someone is injured and a claim is brought against your organization.