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LEGAL PRECEDENTS

Unger v. Ottawa (City)

(1988) 68 O.R. (2d) 263 (Ont. High Court)

Issue

Did the City of Ottawa and Susan Pelletier, the site supervisor, breach their duty of care to the plaintiff, Steven Unger, pursuant to s. 3(1) of the *Occupiers' Liability Act*?

Relevant facts

The plaintiff Steven Unger was 16 years 11 months old at the time of the accident. He dove into shallow water from a lifeguard chair at Britannia Beach. Unger was 5 feet 10 inches tall and weighed 175 lb. He was a good swimmer and could dive. As a result of the dive, Unger fractured his C5 vertebra and became quadriplegic.

On June 8, 1984, Unger and his grade 11 classmates finished their last examination and attended a beer party from 11:00 a.m. to 6:00 p.m. The group was estimated to be between 15 and 20 people. Four of them testified that they consumed somewhere from four to ten beers at the party and assumed Unger drank about the same quantity. The group decided to go to Britannia Beach and arrived around 6:30 or 7:00 p.m. Unger recalled bringing a case of 24 beer to be shared with three of his classmates.

The City of Ottawa operated Britannia Beach. Susan Pelletier was the site supervisor. The beach leading into the water extends quite a distance and is in a gentle slope. The lifeguard chair had four legs in the water at a distance of two to three feet from the shoreline. The platform was four feet and the seat was five feet from the ground respectively. The water in front of the chair was ankle deep – between six inches and one foot

Unger's classmate, James Taylor, was the first to sit on the lifeguard chair. Taylor took a dive and hit the bottom and concluded that it was not safe to dive. At the point where he dove in, the water was up to his knees. Taylor was soon joined on the chair by Kevin Chadwick, another of Unger's classmates. Unger later joined them and sat in the middle. At one point, Unger jumped feet first into the water. Eventually, he climbed back on the chair and was going to dive. Both Taylor and Chadwick grabbed Unger on each side and one of them or both said, "Don't dive. It's stupid." Unger sat down, but immediately leaped to dive head-first into the water. He hit the water at about eight or 10 feet ahead of the chair and into two to three feet of water. He remained with his face down, arms extended and had to be helped.

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According to Pelletier, there was a notice stating "Beach Unsupervised. Swim at own Risk" on the lifeguard chair and another more detailed notice on the building close to the beach. Both the city and Pelletier had no knowledge of similar incidents.

Decision

The court found that the plaintiff failed to establish on a balance of probabilities that the defendants were in breach of their duty to take care as occupiers under s. 3(1) of the *Act.*

Reasoning

The court accepted the statement in *McErlean v. Sarel* about the inapplicability of the doctrine of allurement in the case of teenagers when determining the duty of care of the occupier under the *Occupiers' Liability Act* (see below). The court found that Unger already knew the water was too shallow; he was told that it would be too stupid to dive and refused to follow the advice from his classmate(s). It concluded that it was not foreseeable that a 16-year-old student would make such a dangerous dive into such obviously shallow water.

Quote

"That doctrine [of allurement] applies where an occupier has reason, because of the nature of the property or some artificial attraction thereon, to anticipate the presence of children (usually trespassing children) whose vulnerability, immaturity and want of judgment are such that they will not likely discover or appreciate the risks of injury which they may encounter. The doctrine cannot be invoked in the case of teenagers, who are required to conform to the reasonable person standard or who, in any event, know and understand the condition of the property, for the purpose of imposing a greater duty on an occupier than the duty owed to others similarly obliged to operate their vehicles in conformity with the ordinary standards of reasonable care."

McErlean v. Sarel (1987) 61 O.R. (2d) 396, at p.421

Lessons learned

The plaintiff was the author of his own misfortune: The court focused on the actions of the plaintiff, rather than those of the defendant. It ruled that the accident was the result of the negligence of the plaintiff only. The court stated, "If one does not dive into unknown waters, *a fortiori**, one does not dive into known shallow waters." The court also said, "I might add, in our case, diving into known shallow water was also foolhardy."

Age does matter: The court made a clear distinction between very young children and teenagers in defining the duty of care of occupiers. While children, because of their physical and intellectual shortcomings cannot be judged by adult standards, teenagers are required to conform to the reasonable person standard.

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* *a fortiori*: with a yet stronger reason (than a conclusion already accepted); more conclusively [Latin] – The Canadian Oxford Dictionary