Supreme Court
New South Wales

Medium Neutral Citation	Miller v Lithgow City Council [2014] NSWSC 1579
Hearing Dates	15-19 September 2014; 22-26 September, 2014; 29 September 2014
Decision Date	28/11/2014
Jurisdiction	Common Law
Before	RS Hulme AJ
Decision	(i) A verdict and judgment for the First Defendant against the Plaintiff; (ii) A verdict for the Plaintiff against the Second Defendant for damages to be assessed; (iii) A verdict and judgment for the Cross-Defendant on the First Cross-Claim; (iv) A verdict and judgment for the Cross-Defendant on the Second Cross-Claim; Costs reserved.
Catchwords	Negligence - school and pupil - council pool sporting activity - swimming
Legislation Cited	Civil Liability Act
Category	Principal judgment
Parties	Emilie Kate Miller by her tutor Donna Maree Miller (P) Lithgow City Council (D1) The Uniting Church in Australia Property Trust (NSW) (D2)
Representation	Solicitors: Counsel:
File Number(s)	2010/401465

JUDGMENT

1 **HIS HONOUR:** The plaintiff in these proceedings is a tetraplegic. She acquired that disability on 7 January 2008 when aged 12 and in consequence of diving into the shallow end of a public swimming pool run by the First Defendant, the Lithgow City Council.

2 Prior to that time she was, for someone her age, a very experienced and very competent, swimmer, ranked in the top 20 Australian girls of her age for a number of events. She was a member of the Bathurst Swimming Club from 2003 until 2005. In April 2005 at the invitation of its coach, she became a member of the Kinross Wolaroi School Swimming Club ("KWSC") and in early 2007 was awarded a school bursary and became a member of the Kinross Wolaroi School under the aegis of which the similarly named swimming club existed. The school was conducted by the Second Defendant.

3 The Plaintiff sues both Defendants alleging that her injury was the result of each breaching a duty of care it owed her.

4 At the time of the accident, the Plaintiff was engaged in swimming training for the NSW State Age Swimming Championships scheduled to commence on 12 January. She was under some supervision by a Mr Brodie whose two children were also members of the KWSC, whom the school had also entered to compete in the same titles and who were training at the same time. Mr Brodie was following a program that Mr Critoph, the school's swimming coach, had set. Mr Brodie would reproduce the program on a white board at one end of the pool where it could be read by the swimmers.

5 The Plaintiff had been taken to the Lithgow pool by her grandmother who paid an entrance fee for the Plaintiff's admission. All three children carried out some warm-up exercises on the land and then swam some laps which, for the Plaintiff, totalled 400 or 500 metres. The next item on the program Mr Critoph had laid out and the next embarked upon, was a series of laps wherein contemporaneously the children were expected to dive in, swim 25 metres at a fast pace, finish the 50 metre lap of the pool at a slower pace, leave the pool and then repeat the exercise, commencing at the end where the preceding lap had finished. The program envisaged that the turnaround time for each lap would be 1 minute 30 seconds or thereabouts.

6 The three children each completed one or more laps, the last of which had finished at the shallow end and took their positions for the next lap. Mr Brodie who was on the deck or close to the side of the pool, called out "set" and "go". He was not looking at the children at the time, but shortly afterwards looked in their direction and observed that while his children were swimming, the Plaintiff was at the bottom of the pool. He and one of the pool staff rushed to her and brought her to the surface. The Plaintiff remarked and he observed that she had difficulty with her legs and in due course he, with assistance, moved the Plaintiff onto the pool surround where she was attended to by ambulance personnel and then taken to hospital.

7 In her witness statement the Plaintiff said that Mr Brodie would tell the children their times and might also mention other things about the swimming. In oral evidence she said that on the occasion in question, she "would have been" and "was" instructed to complete a race pace dive, such instructions being given by Mr Brodie following the program set by Mr Critoph. She said that the word "efforts" was written on the white board on which Mr Brodie reproduced Mr Critoph's program, so it could be read by the swimmers. She said that Mr Brodie would also remind her of the times expected but these were in any event written on the white board.

8 Mr Brodie denied that he had ever told the Plaintiff as to the type of dive she should do or, in the week before the accident, the pace at which she should go. He denied ever writing on the white board the word "efforts" or in seeing that word in any program given to him by Mr Critoph. He said that he included on the white board only what Mr Critoph had included in the program he had provided.

9 He denied telling the Plaintiff immediately before the dive in which she was injured, that it was to be "a race pace dive", agreeing however that he had said, "set" and then "go" but not watching the children at the time.

10 Mr Brodie denied ever telling the Plaintiff of swim times expected of her. He did record times but he said that was simply for the purpose of reporting back to Mr Critoph. However, it is appropriate to note that the program Mr Critoph had laid down contained the terms

presumably visible on the white board, "20 x 25 Dive Fast on 1.30 swim through to the other end". It did not contain the term "efforts" or "race pace".

11 The form of dive that the Plaintiff sought to execute was known as a "track-start" dive. Commonly, such a dive is executed from a raised and angled platform or block, the front of which is easily gripped. However the dive can also be performed from a pool deck or surround. Some pools have a coping tile or the like that protrudes from the edge of the deck some 2 or 3 centimetres and which also provides a handhold. Preparation for the dive involves the swimmer placing one foot on the edge of the pool or block, with one or more toes gripping the coping tile or edge of the pool or block and placing the second foot some 500-600mm to the rear. The swimmer leans down and places the hands more or less beside the front foot, gripping if possible. The Plaintiff had been taught by Mr Critoph on how to execute the track-start dive in 2006 and had used it commonly since. She described her technique including that "I try to dive using the maximum effort I can apply".

12 Although her initial training in the track-start dive occurred at the deep end of the school pool using blocks, after a period of practising these dives from that end, she began to perform them at the shallow end. She was never advised of any risks associated with carrying out such a dive at the shallow end, or of incorrectly performing the dive or warned against the risk of her left foot slipping, or her right foot or hands not being able to get the advantage of a good coping edge. The Plaintiff added that she had received no study of pool safety or risk assessment or induction about the risks of a pool and said that if a coach or other person having responsibility for her told her to do something, she did it.

13 After early 2006, the plaintiff always used the track-start dive as her method of commencing races or training swims. During a training session and using this method, she dived in the shallow end of pools multiple times throughout the session. This was a normal part of training and others did the same. Having regard to the extent of her training, she must have used that form of dive on many hundreds but more probably on thousands of occasions.

14 According to evidence from the Plaintiff that I accept, she had dived in the shallow end of a variety of pools since she was aged about 7. She had never previously dived and touched the bottom. She had no problem with a track-start dive before 7 January 2008. Her back foot had never slipped previously as it did on the 7 January 2008.

15 Mr Brodie also said that in the week before the Plaintiff's accident, she had been diving in from the shallow end as were his children. They had done the same previously, both from time to time doing track-start dives.

16 On 7 January the Plaintiff intended to dive from the pool deck into lane 3 of the Lithgow pool. At the same time Mr Brodie's children prepared to dive into lanes 1 and 2. The Plaintiff's description of what occurred was that she took up her track-start dive stance with her fingers gripping the edge tile and the toes of her right foot curled around the tile edge of the pool. She said that it was very difficult to grip the edge of the pool with her fingers and the toes of her right foot, there being nothing to pull on when starting the dive and she had a poor grip of the coping. The Plaintiff described the tiled edge as "poor".

17 In that respect, the Lithgow pool differed from that at the school or the Orange public pool. Those pools had coping tiles that protruded some little distance over the water - perhaps 2 or 3cm - and which provided a good rounded edge for the front foot and fingers by a swimmer carrying out a track-start dive to grip underneath.

18 To that time, the Plaintiff had been accustomed generally to swimming in the Kinross

Wolaroi School pool which had tiles. That pool was about 1.2 metres deep at the shallow end. She would however swim at the Orange public pool between 1 and 3 times a week during summer, if the school pool was being used for another purpose but said that it was not as slippery (as the Lithgow pool). She did not ever recall slipping at that pool and her front foot and finger grip were never compromised there. She was accustomed to diving at the shallow end of both the school and Orange pools multiple times during each training session. According to the Plaintiff, both of these pools were much less slippery than the Lithgow pool. The Plaintiff said that she did not know the depth at the shallow end of the Orange pool.

19 The Plaintiff intended to perform the dive in the course of which she was injured with all of the effort she could as if it was a competitive race. One would infer from [111] in Exhibit A, that that was a habit she had. When Mr Brodie said "go" she pulled hard with her hands and arms and at the same time pushed hard with her left foot. She felt that foot slip badly in a puddle of water it happened to be in, when Mr Brodie said "ready, set, go". Her body twisted, she was going forward and could not stop and was not able to get her arms and hands ahead of her to enter the water first.

20 In her written statement Exhibit A, she said that she had a poor grip on the coping with her toes of her right foot and with her hands. In oral evidence she said that "if you couldn't get a good grip with your right foot or your fingers, you couldn't put a great deal of force into your dive to get horizontal" and repeated that she was not able to exert a great deal of force in her right foot or with her hands.

21 There was no challenge to the Plaintiff's evidence as to these circumstances.

22 There was no clear and direct evidence as to what caused the Plaintiff's back foot to slip. The pool surround sloped away from the pool itself at an angle of about 1 in 55 - described as "slight and not unusual". At the edge of the surround and adjacent to the pool was a row of tiles 200 or 235 mm long and about half or two-thirds that in width. (Different figures in Mr Gibson's report Exhibit 6, which dealt with the situation in 2008 and after changes to the pool, are not easy to reconcile. I do not think it material, but I should add that some of the photographs in Exhibit C showing the side of the pool seem to show 2 rows of tiles). The photographs also indicate that the edge of the tiles appears to be semicircular and the tiles overhang the water to a slight degree, possibly to the extent of the semicircle. The tops of the tiles had ridges and valleys which, in the case of the tiles at the end of the pool, were at right angles to the pool lanes. The evidence did not reveal whether the top of each tile was horizontal or angled slightly as was the balance of the pool surround.

23 The Plaintiff gave evidence also that there was no surface of the tiles overhanging the water. Based on the photographs, I think she was wrong in that regard, a possible explanation for which is her perceived difficulty in gripping the tiles. However any overhang was very small.

24 Although no one placed reliance on the fact, and I do not think it material, I should record that the photographs in Exhibit 3 also show either a gap between the row of tiles and the balance of the pool surround or, as I think more probable, that as a group, the tiles sit slightly proud of the surround. Some of the photographs show that many tiles on the vertical wall at the shallow end of the Lithgow pool were cracked and some of those on the edge of the surround, showed distinct evidence of movement of some tiles relative to others. There are cracks between them and some had at least one edge proud of the general tile level.

25 A question arises as to the slipperiness of the pool surround and a "NO DIVING" decal painted on the pool surround at or close to where the Plaintiff's left foot was likely to have been at the time she commenced her dive.

26 After some confusion, the Plaintiff said that she had not detected slipperiness of the pool concrete deck itself, although it is not clear if she was excluding the effect of pooled water in that evidence.

27 A Ms McFadden, who was employed as a pool attendant and later as a lifeguard at the pool between 2005 and 2010, gave evidence that during the period she was employed by the Council, she did not notice any slipperiness at any portion of the pool surrounds, including the "NO DIVING" signs. It is to be inferred that she very probably spent a considerable amount of time walking around the pool.

28 There was also evidence that ducks tended to congregate on a cover placed on the pool at night and in the vicinity of the pool, leaving their droppings. There was a practice whereby each morning the droppings would be hosed off. Ms McFadden gave possibly inconsistent evidence that sometimes some of the droppings were left and that she made sure that when she was hosing that it was "all gone, especially off the tiles". She agreed also that the droppings were "pretty slippery". Mr Brodie gave evidence, that when the deck area was washed down, large puddles of water would accumulate, but Ms McFadden would not accept this, saying that all the water ran to the drain. There was nothing in the evidence or the demeanour of these witnesses to assist in resolving this difference, although the Plaintiff's evidence, which I accept, of her rear foot being in a pool of water, suggests that drainage from the pool deck was not perfect.

29 I have referred to the presence of a "NO DIVING" decal painted on the pool surround at or close to where the Plaintiff's left foot was likely to have been at the time she commenced her dive. One issue that arose was whether that decal and others had recently been painted at the time of the Plaintiff's accident. Photographs show two such signs at the shallow end of the pool and at least two down one of the sides. Ms McFadden said there were about three such signs painted along each side.

30 Ms McFadden said that the signs were repainted at the commencement of each swim season, although she had no specific recollection of painting at the commencement of the 2007-2008 season. Taken to photographs, she accepted that the signs were probably not repainted for that season. "Repainting" when it occurred, included scattering sand over the paint while still wet.

31 Mr Brodie described the condition of the signs as "poor" and said they appeared to be quite old, "an historical remnant". He was certain that they were not freshly repainted at the beginning of every summer.

32 A Mrs Kerrison, who was a swimming coach at the pool for a number of years, said that she had noticed one, not obvious, "NO DIVING" sign at the shallow end of the pool and one around the side. She could not recall a sign being in a non-deteriorated condition at the beginning of each season.

33 The Plaintiff had trained at the Lithgow pool on a few occasions prior to her accident, including during the Easter and Christmas 2007 school breaks when in large part, she probably trained with Mr Brodie. However the number of times would seem to have been few. She also had swum at the Lithgow pool on a few occasions during the weeks leading up to her accident. The Plaintiff said that during these earlier visits to the Lithgow pool, she

had not noticed any "NO DIVING" signs.

34 The Plaintiff said that she was never told not to do a track-start dive at the Lithgow pool, or to be careful because the surround, or that the signs could be slippery. She was never told to ensure that her foot was not on the "NO DIVING" sign.

35 In evidence is a report from a Dr Gibson, a biomechanical engineer who, in addition to expressing some conclusions of his own, recounted some findings or measurements taken, it would appear on 19 June 2008, by a Mr Beckett who had measured the coefficient of friction on parts of the decal near to, or on which the Plaintiff slipped, the deck nearby, on parts of another decal at the side of the pool and one area of deck adjacent to the second decal. As measured, the coefficients of friction of those surfaces when wet were:-

Worn sign red Too worn to test

Worn sign white 0.64

Worn sign black 0.5

Pool deck nearby 0.55, 0.67 (One test each side of sign)

Unworn sign red 0.47

Unworn sign white 0.49

Unworn sign black 0.43

Pool deck nearby 0.68

36 Dr Gibson observed that the tests of the relatively unworn sign were done to demonstrate the smoothing effect of a painted surface and the measurements of that sign were a "worst case", by which I understand him to mean, the most slippery of the areas tested, and they significantly reduced the surface's ability to resist slip when wet. Dr Gibson also reported that the recommended resistance for wet pool surrounds and communal shower rooms, was a wet dynamic coefficient of friction of 0.47 - 0.59. It is to be inferred from Mr Gibson's report and confirmed in the first document in Exhibit C, that the higher the reading, the less slippery a surface is.

37 Photographs included in Figure 7 to Dr Gibson's report, depicts the "NO DIVING" sign adjacent to lane 3 as taken on 15 February 2008. The photograph indicates that a deal of the red paint has been almost completely worn off and a very substantial deterioration of the white paint. The similarity of the 0.64 measurement of that white paint and the figures of 0.67 and 0.68 suggests that the white paint in that sign had been so worn that, at the time of the above measurements, it had almost no impact on the slipperiness of the pool deck in the area so painted. The appearance of the white paint in the photograph is consistent with such a conclusion.

38 The 0.5 reading falls within the recommended resistance for pool surrounds but the disparity between that figure and the 0.64 and more particularly the 0.67 and 0.68 figures, suggests a difference in slip resistance that might well be significant. However, the fact that the testing occurred some 5 months after the Plaintiff's accident, makes it difficult to infer too much from that reading. It is however a reasonable inference that the readings would have been taken in the absence of any observable duck droppings.

39 Given that the 0.5 reading falls within the recommended level of slip resistance, leads me to the view that of itself, it does not demonstrate negligence on the part of the Council and its similarity with the 0.55 reading nearby, combined with the absence of any other relevant evidence relating to it, leads me to the view that it cannot be regarded as a concealed trap.

40 An associated issue is where the Plaintiff's feet were in relation to the worn sign. Mr Brodie said that her back foot would have been on or close to sign. Dr Gibson provided a photograph on which was depicted the worn sign, a black lane marking on the floor of the pool for the lane in which the Plaintiff dived, a notional prolongation of that lane marking and its centreline. The photograph showed that the sign measured 835mm long and 545mm wide. The background colour which covered about 80% of the sign was white. There was a red hollow circle with one red and one black line through and a black "NO DIVING" instruction apparently endorsed on the white background. On page 11 of Mr Gibson's report, the lane marking was indicated to have been 202mm wide, the worn sign extended from 65mm from the left edge of the lane marking prolongation to well beyond the right edge of that lane marking prolongation. By far the largest portion - I estimate approximately 80-90% - of that part of the sign as is within the prolongation of the lane marking is white. The edge of the sign in closest proximity to the edge of the pool was 450mm from it.

41 This latter measurement, when taken together with the estimates of the distance the Plaintiff's rear foot would have been from the edge of the pool, indicates that her rear foot was at least close beside the sign. However the measurements do make it doubtful if her foot, i.e. her left foot, was on the sign or certainly on other than the white part.

42 Another matter that must be mentioned is the depth of the pool. This varied from about 1.1 metres at the end where the Plaintiff's accident happened to, according to Mr Beckett, 1.8m. Clearly apparent in the side walls of the pool adjacent to the shallow end were signs "1.1m". Along the sides of the pool were skimmer or scum ledges positioned 1.08 metres from the bottom of the pool at the shallow end. That latter figure would seem to have been the depth of water into which the Plaintiff dived.

43 On the day Mr Beckett visited the pool, the water depth at the shallow end was 1.03 metres and there was approximately 300mm of freeboard to the pool copings.

Lithgow Pool Usage

44 There was a deal of evidence as to the usage of the Lithgow pool. During summer it was generally available for public use. There were commonly two staff manning the pool with a third in the kiosk at some hours. The idea was that there would always be someone wandering about the pool deck.

45 The Lithgow Swimming Club, of which Mr Brodie had been president from about 2003 to 2006, had an arrangement with the Lithgow Council whereby it regularly had the use of three lanes of the pool, four afternoons a week for coaching and training. During these times the Club employed coaches, one for each of the lanes. The coaching included teaching children to dive and when they became experienced, they were allowed to dive in the shallow end. The training included track-start dives but Mrs Kerrison, a member of the Club and who had coached there for some time, said that although track-start dives were taught, she had never seen a track-start dive from the shallow end at Lithgow pool. The Club held competitive races on Friday nights when the children in relays would be diving in from both ends of the pool.

46 One issue that arose was, whether the First Defendant or its employees running the pool, should have permitted the Plaintiff, or indeed anyone, to have dived into the shallow end of the pool. There were, as has been said, "NO DIVING" signs there.

47 Ms McFadden said that one of the pool rules that she was told to enforce was no diving at the shallow end. She said that many people didn't take notice of the signs and if she saw

anyone diving, she would remonstrate with them and say that the water was too shallow. Ms McFadden also said that she suggested to the manager of the pool, a Mr Dart, that if he improved the "NO DIVING" signs, there might be less of a problem with people diving into the shallow end. Mr Dart said he would look into it, but she could not remember anything happening.

48 On the other hand, Ms McFadden said that she would not have challenged the Plaintiff, because she thought it was OK for her to dive in as part of her training.

49 Ms McFadden agreed that the prohibition on diving into water less than 1.8 metres deep was in accordance with some Local Government directive and a directive of the Council. She acknowledged having done an Occupational Health and Safety Course and having heard of a Local Government document called Practice Note No. 15, Water Safety and to which I refer below. She realised that it was most important that the Council adopt a risk management approach to water safety.

50 She understood that the Practice Note No. 15 required the Council to ensure that personnel providing instruction in specific aquatic activities should hold an appropriate qualification. She never asked Mr Brodie whether he had a coaching qualification. She understood an induction for anyone undertaking a competitive dive start was a necessary requirement, but the Council had never told her to approach anyone to see that that had occurred.

51 She was never asked to display a sign in the form of Exhibit J. . Exhibit J was a sign from elsewhere and was in terms:-

> "**WARNING**
>
> DIVE ENTRIES
> PERMITTED BY
> TRAINED SWIMMERS
> UNDER COACHES
> SUPERVISION ONLY"

52 On the other hand, there was a deal of evidence that diving at the shallow end of the Lithgow pool, quite apart from when it occurred in competitions, was common. Mr Brodie said that on numerous occasions he saw diving or jumping, some persons doing this repeatedly, and never saw pool officials remonstrate with the person so acting. On one occasion he spoke to Peter Dart, the manager of the pool, about persons diving into the lanes the Club was using for training but Mr Dart did nothing.

53 Mrs Brodie said that she had attended the pool regularly and commonly saw people entering the water there by diving at the shallow end. People also jumped in. Mrs Brodie said that while she had seen officials speak to persons who had been "bombing" or shouting, playing with a ball or poorly behaved, she had never seen any pool official intervene and direct people not to dive. It is perhaps relevant in assessing the quality of Mrs Brodie's observations, to record that she had never realised that there were "NO DIVING" signs at the shallow end of the pool.

54 Mrs Kerrison said that until recently, people would regularly dive into the shallow end and she never saw a lifeguard intervene. There have been changes since the Plaintiff's accident.

55 There was nothing in the demeanour of these four witnesses who gave evidence of the extent to which the public generally dived or jumped into the shallow end of the Lithgow pool. There is nothing in the inherent probabilities to make one account more probable than another and in the end I have concluded that I should accept the preponderance of evidence, which was to the effect that there was a significant amount of such jumping and relatively little effort on the part of pool officials to stop it. How relevant this is to my ultimate conclusions is another matter.

56 Mrs Kerrison who said that she had obtained a green coaching licence, agreed that in the course leading to that licence, there would have been discussion of implementing basic risk management and injury prevention strategy.

Second Defendant

57 Given the way the case was presented against the Second Defendant, it is necessary to trace at some length aspects of the Plaintiff's swimming career, particularly in connection with the KWSC.

58 The Plaintiff's training was intense. Prior to attending Kinross school, she trained three to four afternoons a week, her mother driving her to and from Bathurst to Orange on each of these days. After she commenced at Kinross school, her grandparents who lived in Bathurst, built a house in Orange and the Plaintiff then lived there mid-week with her mother or grandmother and trained five days a week and on most of these days, twice. Training occurred during both winter and summer. The Plaintiff would spend the weekend in Bathurst and on Monday mornings Mr Brodie, who lived in Lithgow, would pick the Plaintiff up on his way through Bathurst so the Plaintiff and Mr Brodie's son Tom, could start training with the KWSC at 6am.

59 The school prided itself on its sport. Mr Kennelly, who had been the principal of the Kinross Wolaroi school since 2007, gave evidence that one of the reasons for setting up the swimming club was to facilitate the school obtaining a profile at state and national levels. He agreed that, to a limited degree, the school enjoyed benefits from the publicity that the Plaintiff received for herself and the school and agreed with a cross-examiner that "in the end result the entry into the championships was a joint venture by (the Plaintiff), the coach, the club and the school". He acknowledged that the entry into the January 2008 state championships of the Plaintiff, Tom Brodie and about six other members of the club who had qualified, had been made by the school's swimming club and KWSC had paid the entry fees. The Plaintiff was expecting to compete in up to 11 events.

60 Mr Kennelly accepted that for someone like the Plaintiff to do her best, it was imperative that she train over the weeks before the State Championships. He agreed that students were encouraged to continue their fitness and training programs during holiday periods and that in the case of some students, coaches provided written programs for the students to follow in those periods. Mr Critoph, who was the school's only swimming coach, was one of the coaches who provided such programs.

61 It was customary for the school to close its pool between about 20 December and 4 January. During the 2006-2007 Christmas holidays, training for members of the KWSC had continued for all except about ten days. The school pool was not open during the Easter 2007 holidays, but Mr Critoph provided at least a dry land program and attended each of Bathurst pool and Lithgow pool on one occasion to train the Plaintiff. He was at the Lithgow pool for a full training session - approximately 1½ hours. Otherwise, the Plaintiff trained under the supervision of Mr Brodie at the Lithgow pool during that Easter break. She did

well in the April 2007 championships that followed, winning her first national medal.

62 Although the school term ended in early December, swimming training with Mr Critoph continued up to about 20 December 2007. During this period the Plaintiff was training both morning and night. At some time during that month she participated in the Queensland State Age Championships at which Mr Critoph was also present.

63 Mr Kennelly agreed also that the terms of Mr Critoph's employment included, ensuring the effective planning and implementation of training programs. He was expected to involve himself in the development of elite swimmers to county, state and national levels. Mr Kennelly said that he would expect Mr Critoph, once the Plaintiff had been accepted for the State Championships, to have prepared a program extending up to those championships.

64 Mr Critoph had been appointed to the position of coach in September 2000. Although he trained a number of persons, it is clear, as Mr Kennelly acknowledged, that he was dedicated to furthering the Plaintiff's success. Mr Critoph was almost invariably present when the Plaintiff was training. He attended all the carnivals in which she participated. Apparently concerned that the Plaintiff might have time away from training, he arranged for her to have the help of other coaches when her family went away to Maroochydore in January 2006 and on another occasion to Dubbo. If he was not available during holiday times, he prepared programs in water or dry land for her and it was common for him to contact the Plaintiff on school holidays when he was on leave and ask her about her training.

65 In some respects Mr Critoph may have been too enthusiastic. His employment contract with the school provided that 6 weeks' annual leave was allowed but stipulated "it should mostly be taken during the less busy periods of the year". However he had a reputation for not taking leave and on more than one occasion, including Easter 2007 when he was forced to take leave rather than continue training, he complained about the fact, remarking that his job was to make the swimmers perform. The school expected him to provide the best program he could, but by making him take leave, it was not allowing him to do his job.

66 For the post 20 December 2007 period, Mr Critoph provided Mr Brodie with both a dry land (a copy of which may also have been given to the Plaintiff) and a swimming program. Mr Brodie identified these as appearing at Exhibit C pages 338 and 340. The latter included the passage, "Training recommences at KWS on Monday 7th Jan at 6.00am".

67 With a view to participation in such training, arrangements were made for the Brodie children to stay with the Miller family and for Mrs Miller to take them and the Plaintiff to the Kinross Wolaroi pool for training. However, just before Christmas 2007, Mr Critoph informed the Plaintiff and other members of the KWSC swimming squad, that the school bursar was making him take holidays and that there would be no training by him until school returned. In informing the Plaintiff's mother of this, Mr Critoph expressed anger at the bursar's decision. Mr Critoph asked that the Plaintiff go to train at Lithgow and said that he would see them at the State Age Championships.

68 When it became apparent that Mr Critoph was obliged to take holidays and would not be training the Plaintiff in January, he provided Mr Brodie with a further program to be implemented in the week commencing 7 January and which Mr Brodie identified that at page 335 of Exhibit C.

69 Some years earlier in about 2005, Mr Brodie had had a conversation with Mr Critoph in the course of which the latter said that it was important that parents be committed to the swimming training and that the children continue to swim during holiday breaks and asked

if Mr Brodie was willing to assist. Mr Brodie said yes. Mr Critoph stipulated that he wanted the children's times recorded and wanted feedback on their physical performance, their attitude and times. The practice which continued until January 2008, including the Christmas holidays of 2005/6 and 2006/7, was that Mr Critoph would furnish, personally or by email, Mr Brodie with one or two training programs, commonly what was referred to as a "dry land" program and one covering swimming. Mr Brodie would implement the program at the Lithgow pool.

70 In the period between 20 December and 7 January, Mr Brodie, his children and the Plaintiff attended the Lithgow pool where the children trained. The Plaintiff said that in the week before 7 January, she trained once a day although she was not sure if it was every day. Mr Brodie said that during the week immediately prior to 7 January 2008, he spoke to Mr Critoph several times and during that week reported that the training sessions had gone well, that the children had performed all sets and told Mr Critoph of their times.

71 As I have said, the Plaintiff was at the school in consequence of being awarded a bursary. By its terms, continuation of the financial assistance provided by the bursary was contingent upon, inter alia, "Emilie's continued participation and involvement in the co-curricular life of the school to the Principal's satisfaction." The Plaintiff also gave evidence to the effect that at the beginning of 2006, the principal of the school had said to her words to the effect:-

> You are expected to participate fully in the swimming opportunities that this school provides for you. It is a condition of your bursary that you show full commitment to the swimming program.

72 Originally the Plaintiff attributed these remarks to Mr Kennelly but after he denied this conversation, the Plaintiff gave evidence that it might not have been him. Certainly she would seem to have been in error in relation to the date. Having regard to the time of award of the bursary - about July 2006 - and the Plaintiff's commencement at the school, any such conversation is likely to have occurred early in 2007.

73 The Plaintiff's mother gave evidence of Mr Critoph making somewhat similar statements.

74 Mr Kennelly was asked about the expectation of the school concerning students in receipt of a bursary. He said that all students were required to be part of a co-curricular program, but there were no requirements in terms of level of performance.

75 On this topic also there was nothing to choose between the credibility of the witnesses. It strikes me however, that it was more likely that the continuation of a bursary was to be dependent upon effort and commitment, rather than performance. In short, I prefer the version given by the Plaintiff and Mr Kennelly to that given by Mrs Miller. That is not to say that the latter did not accurately recount what she was told by Mr Critoph.

76 Also raised as an issue was the School's responsibility for activities pursued by its pupils during holiday periods. Taking the view that risk assessments of public facilities such as council or government operated swimming pools or sporting fields, were the responsibility of those bodies, Mr Kennelly said that in 2007 the school did not undertake such assessments of such facilities. It does so now, when such facilities are being used in an organised activity by the school, albeit not in the case of whatever facilities students might be using in school holidays. Mr Kennelly opined that attempting to do so would be an impossible task. Given that in 2007 the school had some 900 students, about 40% of whom were boarders and who came from throughout the State and beyond, I have no difficulty in agreeing with the latter proposition.

77 I should record that in so concluding, I am not unconscious of evidence on the topic from Mr Sweetenham to which I refer below. I clearly reject his view.

78 It was also submitted that the school had an obligation, including a contractual obligation, to train the Plaintiff during the relevant period, even though it was the holiday season and if Mr Critoph was not available, to provide another coach. Reliance was placed upon the benefits the school saw as to be derived from the Plaintiff's success. The submission is easily dealt with. I see no basis, either in documents, spoken words or conduct, for the obligation suggested.

79 Mr Kennelly was also directed to certain provisions of the Education Act imposing obligations on schools and asked a number of questions concerning the school's policies for risk management for off-site activities. Save and except for recounting his evidence that the school had no policy in respect of what he referred to as informal activities - as he characterised those in which the Plaintiff was engaged - I do not think it necessary that I detail his evidence on these topics. He accepted, or I think more accurately was prepared to assume, that it was easy to check if a person had a licence to coach.

80 Attention was also directed to s 47 of the *Education Act* which requires schools to provide a safe and supportive environment and to a Registered and Accredited Individual Non-Government Schools New South Wales Manual that apparently requires a registered school to have in place policies and procedures for, inter alia, risk management for students undertaking on site and off site activities. Such policies are required to be disclosed in a school's annual report. Mr Kennelly seemed to accept that the school's 2007 annual report contains nothing that deals with guidelines for the risk management of off site activities.

81 I rather doubt that the off site activities referred to in these publications include whatever sport practice a pupil may engage in during holidays, even if the school encouraged such practice, provided a program that could be usefully followed and nominated someone who might supervise. Although there are undoubtedly shades of grey, parents, rather than a school, have primary responsibility for students away from the school or formal school organised activities and it cannot sensibly be thought that the publications referred to were intended to interfere with the relativities of their several responsibilities.

Mr Brodie

82 A number of questions arose in respect of Mr Brodie - whether he was or acted as a coach, whether his presence at the Lithgow pool on 7 January was as a supervisor and whether in light of Mr Brodie's qualifications or lack of them, the First Defendant should have allowed the Plaintiff to dive where she did.

83 Mr Brodie had been the president of the Lithgow Swimming Club from about 2003 to 2006. His two children swam with that club until both joined the KWSC. Mr Brodie acknowledged that, in his capacity as president, he went to the Lithgow pool up to four times per week for an hour and a half or more at a time.

84 Mr Brodie said that his offer of services during January 2008, was to enable or assist the Plaintiff to train, but maintained that this offer was of a willingness to assist her training and not as a coach. He agreed with the proposition that in offering his services for the Plaintiff to join him at the Lithgow pool, "those were the services of someone who was proposing to train Miss Miller" although later he emphasised he had offered to "assist" her training and was doing so as a parent to assist Mr Critoph.

85 Mr Brodie gave evidence to the effect that no one had ever suggested to him that he should:-

(a) Speak with anyone at the Lithgow pool and get approval for the Plaintiff to dive in the shallow end;

(b) do any induction of Emilie, i.e. familiarise her with any possible dangers associated with the quality of the surface and the depth of the water etcetera at the shallow end of the pool;

(c) direct the Plaintiff's attention to the shallowness of the pool and the free board above from the surface of the pool to the deck;

(d) check as to whether the depth of the pool varied or was liable to vary from day to day;

(e) do some sort of the risk assessment, e.g. assess himself, the quality of the deck from which Emilie was to do this track-start dive; or

(f) do that coupled with the depth of the water and the amount of free board etc?

86 Mr Brodie said he knew nothing about risk assessments and had no training in relation to the desirability or the need to induct an athlete such as the Plaintiff. In his written statement he said that he had been aware of the "NO DIVING" signs at the Lithgow pool ever since he commenced going to the pool, but given their state and that no one enforced the prohibition, he thought the signs were just an historical feature. He did not inspect the shallow end of the pool on 7 January 2008. He said that if a sign such as Exhibit J had been displayed, he would have stopped immediately because he is not a coach.

87 Mr Critoph may have been under the impression that Mr Brodie had a coaching licence. A letter he wrote on 18 February 2008 contained in Exhibit C so suggests, although other evidence in the case makes it doubtful if the source of information referred to in that letter so indicates.

88 In fact, according to Mr Brodie, he did not and had never had such a licence. He said that he had undertaken the first theoretical component of a green (basic) licence course in 2005 or 2006 but had not taken the matter further. He said that at about that time, he had told Mr Critoph that he had done the theory component of, or part of, the green licence course.

89 There was also an issue whether, whatever qualification Mr Brodie had, he did in fact perform the role of a coach. He said strongly that he was not a coach - that he never performed the activities of a coach and never interfered with the coaching activities of those who were the club's coaches. He denied giving advice to swimmers including the Plaintiff. He denied doing stroke correction. He denied that he would even have told his children and the Plaintiff that they had not warmed up properly. He agreed that from time to time he walked along the side of the pool encouraging children swimming.

90 Mrs Brodie also said that her husband had never been or acted as a coach at the Lithgow Swimming Club. She said that she had been present at the side of the Lithgow pool with her husband when their children and the Plaintiff were swimming laps. She denied hearing him give instructions or advice to the Plaintiff. She denied seeing him speak to the Lithgow Swimming Club children about the quality of their swimming. She denied hearing her husband give their own children advice about their swimming style when he had taken them to training sessions.

91 Mrs Kerrison, a member of the Lithgow Swimming Club and who had coached there it would appear for a number of years, also said that Mr Brodie never acted as coach or meddled with the coaches.

92 Ms McFadden gave contrary evidence. She said that she had seen Mr Brodie at the pool three or four times a week for some years after 2003 or 2004 but perhaps less frequently thereafter. Over the years she had seen him on irregular occasions walking up and down as if he had a designated lane for the night, training children including his own. There were other coaches there and she thought he was coaching or helping to coach. For example, he was doing arm actions.

93 I am not disposed to accept Mr and Mrs Brodie's evidence that he was as "hands off" as he asserted. His obvious interest in his children, the Plaintiff and the activity makes it inherently improbable that he could have been as restrained as he said. On the other hand, the Plaintiff and Mr Brodie's own children would seem to have had so much coaching and training and, at least in the case of the Plaintiff, been so keen, that I suspect there were few occasions when they did anything that called for any intervention by Mr Brodie.

94 There was nothing in Mr or Mrs Brodie's demeanour to cause me to disbelieve them and nothing in the vast bulk of their evidence that inspired such a conclusion. However, forced to choose between the Plaintiff's and Mr Brodie's account of what occurred prior to her final dive, I am disposed to accept what the Plaintiff said. All three witnesses appeared to me to be honest but the Plaintiff was the more impressive.

Common practice

95 In judging the reasonableness of the Defendants' actions, it is pertinent to bear in mind other evidence that was given. There was a wealth of uncontradicted evidence showing that swimming carnivals were a common feature of activity among school children in the towns already mentioned and in other towns in the New South Wales central west and that those carnivals commonly included relay races where children dived into the shallow ends of pools (except at Cowra which seems to have been regarded as too shallow). In 2008-2010 the Brodie children continued to swim in district events and diving continued in both shallow and deep ends of the pool.

Documentary Standards

96 Included in the evidence were numerous advisory publications and ones which recounted standards promulgated or adopted by a variety of bodies concerned with swimming. Most of these were contained in Exhibit C, a lever-arch file containing some 400 odd pages. Much of the contents consisted of statements of such generality or of a "motherhood" nature that they added nothing to the case. Some contain statements expressed in absolute terms, without qualifications appropriate to the wide variety of circumstances likely to be encountered in the real world. Some were repetitive of others and a number had no possible causal relevance to the circumstances of the Plaintiff's injury. However, a few should be referred to.

97 Practice Note 15 was prepared by the Department of Local Government to assist Councils in exercising their water safety functions. It advocated that Councils adopt a risk management or other systemic and comprehensive approach to water safety. That document and a number of others, included recommendations or other observations about signage. However, for reasons indicated below, I am of the view that any deficiencies in signage were in no way causative of the Plaintiff's injuries.

98 SU 22 published on 14 November 2005 by the Royal Lifesaving Society "to provide guidance on safer water entry (Competitive Dive Starts) for competitors during competition and training for competition" contained in clause 5.3 guidelines for Water Depths for starts for competition swimming and training (for trained competitors). It provided, inter alia, that in water depths less than 900mm dive starts should not be permitted and in water depths 900mm to 1000mm they could be permitted in certain defined circumstances. Paragraph 5.3 (c) provided:

> In water depths greater than 1000mm and less than 1200mm:
>
> ¿ competitive dive starts may be permitted from concourse level to a maximum height above water of 400mm;
>
> ¿ if concourse height is greater than 400mm above the surface of the water, starts should be commenced in the water.

99 Other passages in paragraph 5.1 and 5.4 to which attention was directed seem to me to have no causal connection with the Plaintiff's accident and need not be referred to.

100 SU 22 provides an interesting contrast with SU 21, directed to the Supervision of Diving for Recreational Swimming. It provides that in the situations to which it is directed diving should not be permitted into a water depth of less than 1.8 metres.

101 Exhibit C also included a memorandum from the Royal Life Saving Society addressed to all New South Wales aquatic facilities. It was dated 14th December 2007 and was directed to "From 2008 ... (obtaining) from aquatic facilities a recommendation on whether dive entries are permissible for planned swimming events." There was no evidence whether the document was received by or came to the attention of either of the Defendants prior to the Plaintiff's accident and given the date on it, I am not prepared to assume that it did. The document does however contain some statements that may be relevant. It said that SU 22 was produced "as a result of a number of head and spinal injuries that had occurred during scheduled activities such as swimming carnivals and recreational swimming." (page 167) It described as a possible hazard (page 179), "Risk of steep dive into shallow end of pool causing possible head/neck injury". It provided (pages 180, 182) as a guide to water depths acceptable for diving, a table similar to that referred to in [98] above.

102 Most of this group of documents (and similar ones circa page 312 seem to have been co-produced or at least endorsed by the NSW Department of Education and Training. Because it was referred to in Mr Speechley's evidence it is appropriate to quote from the Guidelines at p 318:-

> SHALLOW WATER DIVING INDUCTION PROGRAM:
>
> AIM: To provide students participating in a swimming carnival with information relevant to the performance of a shallow water dive.
>
> DURATION: 10-15 minute presentation and discussion Competitors who receive regular coaching or participate in squad training may be exempt from this program on production of relevant certificates, letters or testimonials from their swimming coach or instructor.
>
> Resources supporting the implementation of the Shallow Water Diving Induction program is available online at: www.royalnsw.com.au.

103 Another publication in Exhibit C was one entitled "Austswim" - Teaching Swimming and Water Safety the Australian Way. This document records that it was first published in 2002 and reprinted in 2003, 2005, 2006 and 2007. Professor Blitvich described the publication as the text for the AUSTSWIM Teacher of Swimming and Water Safety qualification, adding that that qualification is the industry standard qualification for swim teaching. Austswim is the Australian Coach Council for the Teaching of Swimming and Water Safety.

104 The document drew attention to the risk of becoming quadriplegic as a result of diving into shallow water, advocated that in the process of diving hands be held together and the head locked between the arms and the divers should aim for a good horizontal velocity and a long flight. Under the heading "Teaching Safer Diving Skills" the document contains some instructive passages. They include:-

> A spinal injury can occur when a diver slips on the pool decking, does not have sufficient horizontal velocity and consequently performs a deep dive with a very steep entry angle. To prevent this occurrence, teachers should insist that learners curl their toes over the lip of the pool when performing a dive entry. This enables the swimmer to prevent the steep dive that follows slipping as, even if the decking is wet, it is still possible to push backwards against the edge of the pool, hence providing horizontal force for flight. Toes should curl over the pool edge for every dive entry.
>
> ...
>
> It is relevant to note that the velocity achieved during virtually all dive entries is sufficient to dislocate or crush the vertebrae of the neck. Hence, the upmost caution must be exercised for every head-first entry in an effort to prevent serious and permanent injury, which can result from just one poorly executed dive.

105 Exhibit C contained also a number of publications of the New South Wales Department of School Education (pages 250-194) remarking on the duty of care owed by schools to students at school, school organised or endorsed, or conducted under the auspices of the school. It is not obvious the extent to which these remarks applied to the Second Defendant.

106 The "Safe Diving Depth Policy" promulgated by Swimming New South Wales, Exhibit 4, included a clause to similar effect as that quoted in [98] above. Mr Sweetenham, one of the expert witnesses called, said that the Swimming Queensland and Swimming Australia guidelines were the same.

107 Reference was also made to guidelines or rules made by FINA, the governing body for world swimming. The rules themselves were not in evidence but some were the subject of oral evidence and Mr Speechley gave evidence that the FINA and Swimming Australia positions were exactly the same. Appendix B to his report provides further evidence that at the time of the Plaintiff's injury, a depth of water acceptable to the swimming and lifesaving bodies for competitive dives from a pool deck no higher than that at the Lithgow pool was 1 metre. That Appendix also supports Professor Blitvich's statement that FINA have changed the minimum depth to 1.35 metres. However that depth and Professor Blitvich's reference to 1.2 metres minimum, may well relate to platform dives.

108 I accept the evidence of Professor Blitvich, Mr Sweetenham and Mr Speechley to which I have referred in this section of the judgment.

Expert witnesses

109 There was also a vast amount of evidence from expert witnesses and in some respects the experts were unanimous in their views. However, not all views expressed in joint reports were adhered to and in any event, despite that unanimity and the expertise of the

witnesses, as a tribunal of fact charged with making judgments as to what was reasonable, I am unable to accept a deal of what was said. An example of this is, the emphasis which was placed on the necessity to have had a trained coach present on the occasion when the plaintiff was injured. While I accept that if one of the witnesses who were called was that trained coach, the plaintiff would not or might not have been permitted to dive as and where she did, the evidence clearly does not persuade me that all or indeed most coaches or careful coaches would have made any difference.

110 In that connection, I have in mind that Mr Critoph had visited the Lithgow pool and knew that the Plaintiff and Mr Brodie's sons would be training there. I am influenced also by the evidence that diving into the shallow ends of pools is a common feature of swimming carnivals that seem to be reasonably common and at with which it can be inferred, trained coaches are involved. And though the evidence did not establish that track-start dives were in common use by such participants, it is also a reasonable inference that few swimmers in such carnivals had the Plaintiff's experience.

111 A further and extreme example of evidence I reject is provided by Mr Sweetenham's view that, "all swimming should be under the guidance of a qualified coach", that he would "never allow a parent to supervise" swimming and "there is an obligation on every parent to pay for a professional swimming coach to supervise a child undertaking laps in a council run pool." His reason was that the coach "would have experience and knowledge at a level which would allow them to make decisions based on experience and knowledge to modify the training session." Earlier he had recognised that in addition to qualifications, experience was necessary.

112 Mr Sweetenham's approach just stated is so far away from how society operates and, given that coaches would presumably have to be organised and paid, even assuming that enough of them existed or could be trained, how it could operate without limiting swimming to an extreme degree, that I regard such views as unreasonable. Although Mr Sweetenham might not have had them in mind, one might ask what should happen in respect of the use of all backyard pools.

113 The principal swimming experts were Professor Blitvich and Mr Sweetenham called on behalf of the Plaintiff and Mr Speechley called on behalf of the School. Each provided a report and there were also a joint report by Mr Sweetenham and Mr Speechley following on a conclaves involving these persons (Exhibit 5) and later a joint report of these two and a Mr Tullberg who had been engaged by the First Defendant (Exhibit AA). There was also a joint report by Professor Blitvich and Dr Tom Gibson (Exhibit V).

114 A further report by GAB Robins that seems to be a firm of Insurance Assessors is one to which I do not think it necessary to specifically refer.

115 Associate Professor Jennifer Blitvich is extremely well qualified in the field of diving and diving accidents. Her report of 19 July 2013 included the following:-

> 5.8 Gehlsen & Wingfield (first published in 1998 in the Journal of Swimming Research, and republished in full, in 2000, in Swimming in Australia) who concluded that "... *the results of this study indicate that any diver using a racing technique has the potential to strike the bottom of the pool with sufficient force to cause catastrophic cervical spine injury. ... Based on depth values alone, the recommended depth of racing diving pool should be greater than 1.4 m for experienced divers."* (p 83, 2000)
>
> 5.24 As mentioned in my earlier report, the track-start, in which one foot is placed back, places the swimmer at risk of spinal injury if the rear foot slips during the diving action. In this situation,

> the opportunity to provide a horizontal component to the dive is decreased by about half as only one leg, rather than both, provides horizontal propulsion. Flight time is decreased, and the time available to take the hands and arms from the deck to the dive entry position, stretched out in front of the body, is thus decreased. With insufficient time to assume the correct position of the hands and arms, the head is left unprotected. The capacity to "steer up" is also significantly diminished.
>
> 5.33 As a former on-deck coach (Australian Swimming accredited) with many years of experience, I coached in a pool with a deep (2m) and shallow (1.2m) end. My practice was to **never** permit dive entries at the shallow end (1.2m), for any swimmer of any age. Similarly, I instructed University students (Exercise Science and Education students) in aquatics, in the same pool. Again, dive entries at the shallow end were always prohibited. Our policy was "Feet first only, at the shallow end".
>
> 5.38 It was clear that since the late 1990s, concern had grown and publications, etc, had increased in relation to the risks of diving into shallow water. The use of competitive dive starts, including track-starts, were of increasing concern and greater attention was being paid to ensuring adequate risk management at aquatic venues.
>
> 5.39 Such developments called for the performance of a risk assessment. In addition, the December 2007 publication called for a risk assessment.
>
> I have read the report of Mr Sweetenham.
>
> I have read the Amended Statement of Claim. I note the Statement of Claim at [11(j)(ii)-(viii)] summaries features of the subject pool and most are referred to by Mr Sweetenham.
>
> 5.40 In my view, a reasonably competent person charged with the duty to perform an inspection and risk assessment of the pool ought to have identified a sufficient number of the factors outlined above to cause that person to not permit or lift the council's prohibition on a dive entry, in particular a competitive dive entry, and in particular a track-start dive entry, into the shallow end of the pool.
>
> 5.41 Further, I am of the view that an induction of the Plaintiff ought to have been required by the First Defendant and such an induction would have revealed a sufficient number of the factors outlined in Mr Sweetenham's report and in the Amended Statement of Claim at [11(k)(ii)-(vi)] as to cause the First Defendant to not permit or life the First Defendant's prohibition on the dive entry or competitive dive entry or track-start dive entry into the shallow end of the pool.

116 Professor Blitvich was asked what the factors were to which she had regard in expressing the view set forth in paragraph 5.41. She provided a partial answer but then drifted off, and was allowed to drift off without a comprehensive answer to the question.

117 She did however refer to the coping. She said that Mr Sweetenham's report described the fact that the coping was such that it was not possible for the Plaintiff to grasp the edge of the pool and provide force that would come from pushing and then swinging her arms forward into the dive position. She contrasted this with a starting block where there is a platform with nothing underneath it, which allows a swimmer to grab whereas the coping as described, did not allow the same development of force.

118 Professor Blitvich also observed that the fact that the Plaintiff could not put her toes over and grab, would be very likely to decrease the force she could provide with her forward foot and the combination of this and the loss of force from her back foot would decrease the horizontal velocity in the dive and it was likely that the Plaintiff's hand would have hit the water on the way through and be unable to both protect her head and allow her to commence the upward component of the underwater pathway after entry. She reiterated

her understanding that because of the coping, the Plaintiff had been unable to obtain grab with her forward foot.

119 The professor demonstrated what she meant by saying that that coping did not allow grabbing in a fashion she demonstrated by half clenching her hand. She acknowledged that the Lithgow pool coping permitted a diver to wrap their toes around the edge of the tile "to some degree".

120 Professor Blitvich also expressed the view that, vis-à-vis the Plaintiff, the Lithgow pool was a new venue and its depth should have been drawn to Plaintiff's attention. She said that a difference of 12cm (1.2 metres to 1.08 metres) is a significant difference for some one used to diving into a 1.2 metre pool and that a 12 year old might not have appreciated the difference, even though the Plaintiff had climbed out of the pool at the shallow end at the conclusion of her preceding lap. Professor Blitvich also took the view that the Plaintiff could not be regarded as an "experienced swimmer".

121 Professor Blitvich also said that a "NO DIVING" sign operated to warn swimmers and coaches of an increased risk and care was required in those circumstances where, despite the sign, diving was permitted.

122 She said also, that given that there was a greater depth of water at the other end of the pool where the same skill could be performed in a safer environment, a prudent coach should not have permitted diving at the shallow end.

Mr Sweetenham

123 Mr Sweetenham was another witness who is also extremely well qualified to express views on the safety aspects of the activity in which the Plaintiff was engaged. It was not challenged that he had been at the pinnacle of Australian swimming since 1981 or before and among the top 3 or 4 world experts in track and field starts. He was made a member of the Order of Australia in 1989 for his service to the sport of swimming. Even though he has been involved in training elite swimmers, he has coached swimmers at all sorts of different levels. At one time he was a co-owner of 17 "Learn to Swim" swimming schools.

124 He made many criticisms of the circumstances in which the Plaintiff met her accident. He said, in his report, Exhibit Z:-

> ...
>
> 7.2.1 the pool deck was not suitable for a track-start dive (a grab start is preferable for a flat deck dive but there was no effective grab point with the coping tiles at the Lithgow facility);
>
> 7.2.2 the depth of the dive in distance from the deck to the pool bottom was not suitable or appropriate for a track-start;
>
> 7.2.3 the depth of water was not suitable or appropriate for a track-start;
>
> 7.2.4 the uneven surface of the deck at the edge of the pool;
>
> 7.2.5 the lower level of lateral balance with a track-start dive compared to a grab start resulting in the increased risk of a compromised dive using a track-start if the back foot slipped when executing the dive;
>
> 7.2.9 the failure to require in water starts; and
>
> 7.2.10 the failure to ascertain and consider the prevailing conditions and determine what is safe

> practice taking into account the risk of injury.
>
> 7.3 In addition, the Lithgow pool facility was not appropriate for practising either the track-start or the grab start in terms of transference of skills to the competitive facility that Emilie was preparing to compete in at Sydney.
>
> 7.4 In my opinion it was foreseeable that there was a risk of injury which was a not insignificant risk for the reasons summarised at paragraph 7.2.
>
> 7.5 The risk of injury could have been easily avoided by requiring Emilie to carry out the training programme "in water" and not by diving from the shallow end of the pool.
>
> ...

125 Mr Sweetenham expanded on the view expressed in paragraph 7.3 saying, that diving from the deck did not relate to the skills that would be required in the State Competition (where diving would be from blocks) and was of no benefit to the Plaintiff's training. Report 4.4. He accepted however that the Plaintiff's participation in some training program on 7 January would have been expected.

126 I confess I was not impressed with many of Mr Sweetenham's criticisms that seem to me to reflect a counsel of perfection, perhaps contributed to by his experience with the cream of the swimming world, rather than the real world or alternatively, relate to matters that were not shown to have any causative connection with the plaintiff's accident.

127 Mr Sweetenham's criticisms of the relative unevenness of the pool deck - a criticism that concentrated on the tiling - provide an example of this. Each tile was wide/long enough to accommodate a sw..immer's foot. Providing a foot was placed in the middle of a tile and the tile was fixed - and there was no evidence that any were loose - it is utterly irrelevant whether there is a gap between that tile and the next or that the next tile, or one some distance away, might not be at the same level.

128 Nor am I disposed to accept Mr Sweetenham's criticisms concerning or based on the absence of a qualified coach on 7 January 2008. I have already made some remarks concerning Mr Sweetenham's views concerning coaches and need not repeat these. However, it should also be borne in mind that what was planned for the Plaintiff to do that day was not being coached, but training involving repetition of what she had done many times before. There is nothing to suggest that on the day of the Plaintiff's accident she needed any coaching as distinct from fitness training or maintenance. There is nothing in the evidence that persuades me that Mr Brodie was not adequately equipped to supervise the planned activity. Nor does the evidence persuade me that every, or indeed every careful coach would have made a decision based on the condition of the pool or otherwise to depart from Mr Critoph's training program which is consistent with diving at the shallow end or would have referred the conditions (including no diving) back to Mr Critoph as the coach of origin. Of course there are likely to be some coaches who would have shared Professor Blitvich's and Mr Sweetenham's views.

129 Again, I am influenced by the evidence as to the frequency of diving into the shallow ends of pools in swimming carnivals and at with which it can be inferred trained coaches are involved.

130 Nor do I accept Mr Sweetenham's evidence that because of Australian Swimming Coaches Association rules, the First Defendant was wrong not to insist on qualified supervision of the Plaintiff.

131 Mr Sweetenham said that even the deep end of a pool is a dangerous area to dive from but safer than the shallow end and the risks of a track-start dive in the deep end acceptable. He was firmly of the view that diving into the shallow end of pools (or probably more accurately into water of a depth commonly encountered at the shallow end of pools) should almost never be permitted. He said that Councils should never allow diving from the shallow end. He would prohibit diving into 1.2 metres of water and at the Learn to Swim Schools with which he was associated, no diving at the shallow end was allowed.

132 He remarked that most responsible Councils do not allow diving at the shallow end and that he could provide (the names of) programs all around Australia that share his view. Given the evidence in the case as to the extent of diving at the shallow ends of pools, and my impression that a number of his views were extreme, I am not persuaded by what Mr Sweetenham said in this connection.

133 Nor am I persuaded by his view that 2 weeks would not be enough to acclimatise an athlete with the conditions of a particular shallow pool.

134 Mr Sweetenham acknowledged that relay races for children involving diving into the shallow ends of pools happen regularly but did not agree that this should occur, saying that his job as a coach was to provide a duty of care and err on the side of safety. He knows that it occurs and although he accepted that elite swimmers could probably dive into 1 metre of water with experience, he personally would not allow even these swimmers to do so.

135 He referred also to what he said was a "golden rule". It was that athletes should not dive into a pool where the depth of water was the lesser of 1.5 metres or their height. Although not all of his evidence on the topic was entirely clear, I think that the better view of his opinion is that the rule applied both in training and generally. He said that he had seen international publications that talked about it being inadvisable to dive into water less than 1.5 metres deep. However he seemed to accept that the golden rule could be broken, this depending on "the capacity of the athlete, the conditions in which they're diving from and correct safe practice (by the athlete) over a period of time".

136 Mr Sweetenham accepted that the FINA guidelines stated that a minimum depth of 1 metre of water was required except where starting blocks were being used and did not prohibit diving from the deck of a pool into water of that depth and contained no stipulation concerning a handhold or about the condition of a pool. He said that those rules were set for competent swimmers who were mature and predicated on assumptions that a swimmer was being supervised and that the pool had a suitable edge with a lip. At one stage he seemed also to say that one of the assumptions was that "the deck of the pool (was) a slope deck with grip".

137 It does not seem to me that there is any basis for concluding that those standards involved any such assumptions. The standards were concerned solely with the depth of water and with the height of the platform dived from in competitive dive starts, that is all they purported to deal with, and neither expressly or impliedly did they have anything to say about attributes of the pool generally.

138 In response to the proposition that the FINA, Swimming Australia, and Swimming Queensland documents did not differentiate between different types of dives, Mr Sweetenham said, "They haven't updated on track-start." He accepted that the guidelines of Swimming Australia and Swimming Queensland permitted diving into I metre of water provided the platform dived from was not more than 400 metres above the water surface.

139 Mr Sweetenham accepted that the various guidelines did not require a risk assessment of the pool but took the view that there should have been one before the Plaintiff was permitted to dive. He said that any such assessment would have precluded diving in the shallow end.

140 He also did not accept that the Plaintiff was mature within his reference of those for whom the FINA guidelines were set. He did accept that if a swimmer had performed 1,000 safe dives the swimmer was probably safe to dive in the same conditions but he would not agree that a swimmer could be regarded as experienced merely because they could replicate consistent performance. He accepted that in the application of the FINA guidelines the capability of the athlete had to be taken into account.

141 Mr Sweetenham also took the view that schools should conduct prior risk assessment of pools their students are likely to swim in during holiday periods. Such assessment could be done via actual inspection, Skype, or by means of an Ipad or by talking to a manager of such pools. If their concerns remained, a video could be obtained etc. In Mr Sweetenham's view, a written record should be obtained in the event that a pool had lifted a "no diving" ban.

142 Mr Sweetenham did provide support to Professor Blitvich's views contained in paragraph 5.24 of her report and referred above. He said that there is difficulty with the track-start dive under any conditions. A slipping back, or indeed any, foot would cause a person diving to lose control and balance and compromise the dive.

143 He criticised the edging of the Lithgow pool because it was not such as to permit a diver to curl fingers or get their toes under a lip of the coping and grip and apply drive. Although conceding that the type of edge on the Lithgow pool was common, and agreeing that public pools do not normally have a 2cm overhang, speaking in the context of a track-start dive he said that the edge tile should have protruded 2-3 cm further over the water. He went on to say that there should have been no track-start dives from this pool deck although in expressing that view, he seems to have been influenced both by the lack of grip and unevenness in the tiles, an unevenness, the significance of which I have rejected. He said that a grippable coping tile also assists a swimmer to achieve and maintain balance.

144 He said that the function of the front leg was to give accelerated forward movement into the water.

Mr Speechley

145 Mr Speechley is also very well qualified. He is the Australian General Manager of the Australian Swimming Coaches and Teachers Association which trains some 5000 coaches and teachers annually. He has numerous swimming teaching qualifications himself and has been teaching swimming since 1973. He has authored numerous publications dealing with swimming coaching. According to Mr Sweetenham, Mr Speechley had a deal of responsibility for putting out the Swimming Australia Rules.

146 In his report, he expressed the view that the training program the Plaintiff was using was appropriate, the regulations of FINA and those of the National and State Swimming Associations were not breached, the water depth and the height of the pool surround above the water surface appear not to have been contributing factors. He went on to conclude that it was indeterminable whether the "NO DIVING" sign, the manner in which the Plaintiff executed the dive and the lack of a sloping dive surface, lack of grips or uneven tiles contributed to the Plaintiff's foot slippage.

147 In the body of his report, he expanded upon the third of these conclusions by saying that he understood that the manner in which the Plaintiff struck the water resulted in a hyperflexion injury to her neck. However, this possibility may be put to one side in light of the acceptance by all parties during the second day of the hearing before me, that the Plaintiff did strike the bottom of the pool.

148 Mr Speechley also remarked that FINA, Swimming Australia, ASCTA and RLSSA specify minimum depths for competition pools, quoting the FINA rule:

> A minimum depth of 1.35 metres, extending from 1.0 metre to at least 6.0 metres from the end wall is required for pools with starting blocks. A minimum depth of 1.0 metre is required elsewhere.

149 ASCTA is the Australian Swimming Coaches and Teachers Association. The RLSSA would seem to be the Royal Life Saving Society Australia. Mr Speechley's reference to 1.35 metres may also have been a reference to the new FINA standard.

150 Mr Speechley also observed that the less experienced swimmer, the deeper the depth of water required, due to a chance of an entry being performed at a steeper than usual entry angle and when a swimmer has demonstrated consistency and control of their diving technique, then they may move to diving in shallower water within the rules of Swimming Australia. Those rules flowed onto State Swimming Associations and affiliated clubs and form the basis of risk assessment for swimming squad training activities.

151 In his report, Mr Speechley also observed:-

> Mr Critoph's actions in providing training programs to a parent, in this case Mr Brodie, so that Emilie Miller and others could maintain their training regime is prudent practice. This is not uncommon in swimming coaching. Mr Critoph's actions to arrange a parent to supervise his swimmers and oversee the delivery of a training program is not unreasonable as experienced swimmers are capable of reading a training program and understanding what is required.

152 In examination in chief, he said initially that he adhered to his opinion as expressed in the joint report to which he and Mr Sweetenham were parties, but went on to agree that in the next report he had qualified some of those earlier answers.

153 Taken to the issue of the importance of having a qualified coach present, he remarked:-

> It is relatively standard practice that coaches give programs to children to swim during vacation when they are away from that coach. They're sometimes done under the supervision of a parent. Sometimes children swim by themselves. Ideally, the preference is that they be swimming with another qualified coach.

154 He also opined that, given Mr Brodie had completed the first stage of a Green Licence course, completion of the course would have no difference relevant to this case.

155 In evidence in chief, Mr Speechley was taken to the answer he and Mr Tullberg had given to the question "Is it common for divers aged 12, when training for meets such as the championships, to dive into the shallow end of the pool?"; viz, "... it is common, but it is not entirely appropriate." Asked what he meant by the second part of this answer, he replied:-

> There is a continuum between not knowing the skill and knowing the skill. When a child first starts learning the skill they should be taught in water that is as deep as they are high. As they continue to acquire the skill and the skill becomes better and the skill becomes refined and they can perform the dive repeatedly with a degree of accuracy then we start to move towards shallower water.

156 He also expressed the view that the facility where children would be swimming during holidays rather than the school, would normally carry out a risk assessment. His evidence made it clear also that he would regard the Plaintiff as experienced and it was "not that important" that the Plaintiff's training on 7 January be with a coach rather than a supervisor. He observed, "the coach should have done all the hard yards in the previous 3 to 4 months."

157 Other significant evidence from Mr Speechley included the following:-

> He had no issue with a swimmer who usually used track-start dives performing track-start dives in the shallow or deep end during a training program.
>
> The standard practice in most Council pools is to signage the facility for the general public.
>
> The execution of a track-start dive at the shallow end in the case of the Plaintiff was not inherently unsafe or inappropriate even without supervision. Even with a coach supervising, if something goes wrong, a coach can't intervene while a child is in mid-air.
>
> His answer to question 1 on page 2 of Exhibit AA (i.e. "is it common for divers aged 12 ... to dive into the shallow end of the pool?" was because the question was based on age, not ability.
>
> A prudent coach wouldn't determine there is any difference between the shallow end and the deep end (of the Lithgow pool) for a competitive swimmer.
>
> Taken to a statement in the "Australian Swimming Coaches and Teachers Association Diving Advisory" to the effect that "in all cases, teachers and coaches should supervise all diving activities by pupils and athletes and exercise prudent risk management strategies", he said that was the ideal and the emphasis on the word in the document was "should" not "must". He added that the document was actually written by him.
>
> Taken to the "Shallow Water Diving Induction Program" on page 318 of Exhibit C, being part of the "Aquatic Guidelines" produced by the Royal Life Saving Association and Department of Education, quoted above, and asked what the passage suggested to him, he said that all he could refer to was standard industry practice, not called an "induction" but it necessitated that when one went to a pool, one did a number of things to see what it was like.

158 There was no clear reference in Mr Spechley's report to the absence of a protruding coping edge. He did say (in paragraph 5): "That it was indeterminable whether ... the lack of a sloping dive surface, lack of grips or uneven tiles contributed to the foot slippage" but in light of the footnote to paragraph 26 and Mr Speechley's recognition in [40] that it was the Plaintiff's back foot that slipped, I am not persuaded that the reference to "lack of grips" was intended to refer to the edge of the pool deck. Clearly the reference to tiles relates to that area but in cross-examination Mr Speechley made it clear that the deficiencies he saw in the tiles were gaps between them, indicating possible looseness.

159 Nor was any reference made during Mr Speechley's oral evidence to the absence of a protruding coping edge.

160 Exhibit V, the joint report of Professor Blitvich and Dr Gibson, contained the following questions and answers, although as indicated there were some topics as to which Dr Gibson thought outside his field of expertise:-

> **Plaintiff Questions**
>
> 3. Was the risk of spinal injury with diving well known in the swimming community as at 7

January 2008?

A Associate Professor Jennifer Blitvich believes that this risk was well known.

4. Was there a risk of spinal injury to the Plaintiff if she attempted to dive into the shallow end of the pool. Would your response be different if the plaintiff used a track-start?

A We agree that there was a risk of spinal injury to the Plaintiff when she attempted to dive into the shallow end of the pool.

Associate Professor Jennifer Blitvich believes that the risk would be elevated with the track-start, because in this start only one foot has the protective measure of toes over the edge of the coping which acts to prevent the foot from slipping. Risk of injury is increased with slipping because less horizontal force can be developed resulting in less flight and increased angle of entry. These factors increase the likelihood of contacting the bottom of the pool.

Dr Tom Gibson believes this area is outside of his area of expertise.

5. If yes to 4, what were the risk factors?

A Associate Professor Jennifer Blitvich: See 4 above re the risk of slipping. The risk of slipping is elevated with a wet deck. The injury risk is also elevated if the arms are not extended beyond the head (with the hands locked and the head locked into position) as the head would not be protected from impact. With slipping and decreased flight, hands can hit the water during their movement forward, meaning that they do not reach the normal position in front of the body, to provide protection to the head. Reaction time and flight time are insufficient to enable this protective action. Failure to acquire the protective position of extended arms and locked hands and head also impacts on the underwater pathway. Without the hands and arms in this position, "steering up" capacity is highly limited. Having the hands and arms in the correct position is vitally important in initiating the upward trajectory of the underwater pathway (ie bringing the swimmer back towards the surface).

Dr Tom Gibson believes this area is outside of his area of expertise.

6. If yes to 4, what steps, if any, having regard to the state of knowledge in the swimming community as at 7 January 2013, ought to have been taken to minimise or avoid the risk of injury?

A Associate Professor Jennifer Blitvich: The state of knowledge within the swimming community was extensive - as per my report. Risk management procedures were well known and ought to have been implemented.

Dr Tom Gibson believes this area is outside of his area of expertise.

7. If yes to 4, what risk assessment, if any, was required before permitting diving into the shallow end of the pool and including using a track-start?

A Associate Professor Jennifer Blitvich: The state of knowledge within the swimming community was extensive - as per my report. Risk assessment was required before permitting diving into the shallow end, as per my report.

Dr Tom Gibson believes this area is outside of his area of expertise.

8. Was it appropriate to lift the "no diving" prohibition?

A Associate Professor Jennifer Blivich: As per my report, I believe it was inappropriate to lift the

"no diving" prohibition.

Dr Tom Gibson believes this area is outside of his area of expertise.

DLA Piper Questions (the Solicitors then for the First Defendant)

2. Is it likely the dive performed by the Plaintiff had a shorter horizontal flight distance than could ordinarily be expected?

A Yes - we agree the dive performed by the Plaintiff had a shorter horizontal flight distance than could ordinarily be expected.

3. Is it likely that in the course of the dive the Plaintiff entered the water at a steeper angle than would ordinarily be expected?

A Yes - we agree: in the course of the dive the Plaintiff entered the water at a steeper angle than would ordinarily be expected.

4. Would the Plaintiff have suffered the injury she did, had she performed the dive in the manner ordinarily expected?

A No - we agree that had the Plaintiff performed the dive in the manner ordinarily expected the injury would not have occurred. Something went wrong in the execution of the dive.

161 The report of Messrs Sweetenham and Speechley, Exhibit 5, and which was the result of a meeting on 29 July 2013, included questions that corresponded with the Second Defendant's questions in Exhibit AA. I found the answers, most of which were qualified or involved assumptions that do not accord with the evidence, of limited use. However answers included the following:-

6.4 The common practice of providing training programs to intermediate and experienced swimmers whilst holidaying is accepted, it has led to no significant problems prior to the incident with Emilie Miller to our professional knowledge.

7.1 In competition and training with the appropriate facility, it is completely acceptable and extremely common to undertake dive starts.

RLSSA, ASCTA, SAL, FINA all have a similar set of guidelines concerning height of concourse, water depth and type of start permissible.

162 The later report of Messrs Sweetenham, Speechley and Tullberg dated 22 September 2014, Exhibit AA included the following:-

Plaintiff's Questions

1. (Question ruled inadmissible)

A The deep end ought to have been used for diving. A proper assessment should have identified risks associated with the concourse and coping of the pool, including the pool deck maintenance and pool depth.

2. On the assumption that the conduct of Mr Brodie is not treated as the conduct of Mr Critoph, did the conduct of Mr Critoph accord with the prudent and reasonable conduct of a reasonable school coach? If not, in what respects?

A No, because Mr Brodie was not a qualified coach. In addition to conducting an appropriate risk assessment, a qualified coach would have adapted the training programme to suit the facility where the training was undertaken.

First Defendant's Questions

1. Is it common for divers aged 12, when training for meets such as the championships to dive into the shallow end of the pool?

A We are unable to agree upon an answer to this question. In answering this question we assume that the 'shallow end' is at a depth of 1 metre or more.

Mr Sweetenham is of the view that it is not common for swimmers in the development years with limited experience to dive in shallow water without coaching supervision.

Mr Tullberg and Mr Speechley are of the view that it is common, but it not entirely appropriate.

We are all of the view that if such an occurrence was observed by any of us, we would speak immediately to the coach.

2. Is it common to include diving from both ends of a pool, under supervision, when training?

A We are of the view that it is common, but only after a risk assessment has been undertaken and provided the coach remains present throughout the entire training period.

3. In your opinion, what are the prerequisites for permitting shallow end entry into a pool?

A The prerequisites include the matters set out in the Royal Lifesaving "Guidelines for safe pool operation" (14 November 2005) SU 22.5 and or the ASCTA and FINA guidelines related to diving.

We are agreed that the "diver" must be experienced. Mr Sweetenham is of the view that a child is not adequately "experienced" in shallow end diving to perform track-start entries into the pool at the shallow end. Mr Tullberg and Mr Speechley are of the view that "experience" is determined by consistent performance by the individual.

In addition, we are agreed that the coach should obtain written permission from the pool authority permitting diving from the shallow end and in addition to inducting the divers in accordance with the guidelines, should remain present during the diving.

4. In what circumstances do you consider shallow end diving is appropriate as part of a training programme?

A Shallow end diving as part of a training programme should be determined by reference to the height of the diver to a maximum depth/height of 1.5 metres.

5. In what situations would you permit shallow end diving in circumstances where the coach who devised the training programme is not present at a supervised training session?

A Based on the knowledge and experience of 2008, only if the programme is supervised by a qualified coach and the appropriate and current risk assessments have been undertaken by that coach.

6. We refer you to the Plaintiff's training programme (Exhibit C page 335), in your opinion was the programme appropriate as part of the Plaintiff's training for the championships?

A First paragraph of answer rejected.

Mr Sweetenham adds the additional comment: The programme should have been modified once an appropriate risk assessment was undertaken so that track-starts from the shallow end were not included. There was not a qualified coach in attendance and the deck was not safe for track-starts in shallow water.

7. In providing a training programme to a 12 year old school child, would a coach who was not going to be present at the sessions comprising the programme:

(i) ascertain the pool or pools at which the child was proposing to train;

(ii) make an inquiry to ascertain the nature and depth of those pools;

(iii) inspect those pools;

(iv) inquire as to the identity and qualifications of those supervising the training sessions;

(v) satisfy him or herself as to the ability of the child to execute a safe dive from the shallow end of the pool or pools before including diving from the shallow end of the pool;

(vi) satisfy him or herself as to the suitability of the pool or pools for diving from the shallow end.

A If a coach is unable to provide the training then he or she must ensure that the substitute coach is a qualified coach.

Second Defendant's Questions

4. Assuming that the coach was aware of a swimmer's invariable use of track-start dive starts, was it appropriate in those circumstances to include repeat laps with dive starts in a training programme to be implemented at public swimming facilities under the supervision only of a parent or other adult carer?

A No, because the supervision contemplated does not include supervision by a qualified coach.

6. What precautions could a school swimming coach reasonably be expected to take against (foreseeable and not insignificant) risks of harm having regard to:

6.2 The probability of harm occurring.

6.3 The likely seriousness of the harm.

6.4 The cost and other burden of taking precautions against the risk; and

6.5 The utility of the vacation period training programmes?

A Given the associated risks (viz associated with diving in shallow water, hypoxic blackout, medical conditions of the swimmer and impact from other swimmers/public) ... a school swimming coach should ensure that the person supervising the training is a qualified coach as should the swim pool management.

7. Are there standards for allowing swimmers the age, experience and calibre of the plaintiff competing or training at swimming facilities to undertake:-

7.1 Dive starts generally?

7.2 Track-start dives in particular?

A There is a general standard for "dive" starts, but there is no specific standard for "track-start dives".

8. If the answer to question 7 is "yes", what are those standards?

A Royal Lifesaving "Guidelines for a Safe Pool Operation" (14 November 2005) SU 22.5 has a guideline for 'dive' starts only.

FINA Facility Rules - Fina Rules 2.3.

ASCTA guidelines.

Mr Sweetenham adds the following comment: "Swimmers of the plaintiff's standard

(capability/capacity) should dive into the water at least as deep as their height."

9. As at January 2008, did Lithgow War Memorial Pool meet those safety standards?

A The depth of the water complied with the diving standards. Mr Sweetenham adds the following matters:

However, the coping at the shallow end did not have an effective grab point for the swimmer as per the requirements of the safety standards. The deck appeared poorly maintained and appeared to slope away from the pool, which is different from the requirements of the standards. The depth of the water was less than the plaintiff's height. Lifting the "no diving" ban without conducting a risk assessment is contrary to acceptable safe practice. There was no sign indicating that the ban had been lifted. The sign should have stated "Warning. Dive entries permitted by trained swimmers under coach's supervision only." There should be written approval from the pool facility indicating the ban had been lifted.

10. Had an inspection or risk assessment of the Lithgow War Memorial Pool been carried out in January 2008 with a view to determining its safety for training, including dive starts:

10.1 What would such an inspection have involved?

10.2 What potential risks, if any, would such an inspection or assessment have identified?

10.3 Would such an inspection or assessment have identified the depth of water at the shallow end as a potential risk to the safety of swimmers training?

10.4 Would such an inspection have identified slip resistance on the pool concourse adjacent to the shallow end of the pool as a potential risk to the safety of swimmers training?

A 10.1 We are agreed that inspections should occur on a regular and ongoing basis by lifeguards at the pool. We are agreed that an inspection on each coaching visit by a qualified coach prior to the use of the facility should occur. This would involve a review of the facility to determine its compliance with SU 22.5 of the guidelines, including the water depth at both ends. In addition, a proper assessment would include a review of the surrounds of the pool, the coping edge of the pool used in a grab or track-start dive, the signage at the pool and an ongoing review during the activity. This may have concluded that the practice of track-starts should not have been included in this situation.

10.2 The potential risks include slipping on the concourse, or the pool surrounds, and risks associated with diving, especially track-start diving, because of the diver's diminished capacity to maintain their balance through use of the coping.

10.3 Yes.

10.4 Yes.

163 I have not thought it necessary to set out verbatim, questions and answers 1 to 3 of the Second Defendant's questions. All the answers included statements to the effect that there had to be a qualified coach. The earlier answers to the same questions contained in Exhibit 5 contained no such stipulation.

164 I confess I formed the view that these joint reports added little but confusion to the case. Although there was some degree of unanimity, the ambit of the issues dealt with, the extent of Mr Sweetenham's disagreement and comments were calculated to add complexity. The matter was made no easier by some difficulty on the part of the witnesses in understanding the questions.

Conclusions

165 What conclusions should flow from all this?

166 Firstly, I should record that subject to remarks already made, all witnesses struck me as honest and doing their best to tell the truth.

167 Secondly, it seems clear that the immediate cause of the Plaintiff's dive not proceeding normally was that her rear foot slipped.

168 As a matter of simple physics, it is to be inferred that that slippage reduced or eliminated any horizontal velocity that the Plaintiff would otherwise have acquired by use of the rear foot. The criticism of Professor Blitvich and Mr Sweetenham of the coping would suggest that it was likely not to provide as good a toe or foothold as is desirable to assist in forward propulsion. The Plaintiff's evidence of a poor grip and comparing the coping at Lithgow pool with that at the school pool, confirms that view. Her striking of the bottom of the pool suggests that a factor in her doing so, was the lack of sufficient velocity in the direction of the length of the pool.

169 Thirdly, there is nothing to suggest that that slipping was due to any fault in the general pool surround or the "NO DIVING" sign near the beginning of lane 3 or water on that surround or sign. Matters I have referred to from Dr Gibson's report, argue against the surround or sign being in any way that could be criticised, a contributing factor. That evidence is far more compelling than the answers to question 10 of the Second Defendant's questions in Exhibit AA.

170 While I do not exclude the possibility that from time to time some duck droppings may have been missed in the course of hosing them off, the probabilities favour them not having been there on 7 January and in the area where the Plaintiff placed her back foot. *A fortiori* is this so, given that the Plaintiff seems not to have noticed any.

171 And even if one accepts an argument adduced on behalf of the Plaintiff, that because her foot slipped (for the first time), therefore the deck must have been slippery, there was no evidence that the fact should have been known to the First Defendant.

172 Given the extent of the Plaintiff's swimming prior to 7 January, I do not accept Mr Sweetenham's description, and Professor Blitvich's similar views, of the Plaintiff as inexperienced. Given her experience, including her use of the Lithgow pool in the preceding week and earlier, and laps swum on 7 January 2008, I am not persuaded that any failure to "induct" the Plaintiff into the Lithgow pool was in any way causative of her accident. I see no basis also for concluding that the 12cm difference in depth between the Lithgow pool and the school pool of which Professor Blitvich spoke, was causative or contributed to the Plaintiff's injury.

173 Given the extent of diving into shallow ends of pools generally and the standards prescribed by the various swimming and life-saving organisations, I am not persuaded that there was anything necessarily unreasonable in Mr Critoph incorporating, expressly or impliedly, in a training program for the Plaintiff diving at the shallow end. Nor was there anything unreasonable in the First Defendant permitting such diving in circumstances of training. The remarks in this paragraph are subject to what I say hereafter concerning track-start dives.

174 I accept Mr Speechleys' evidence to the effect that such "no diving" prohibitions are directed to the general public (in its general use of the pool) - a view I would probably have

arrived at without his evidence. I am not persuaded that the absence of further or better signage in that regard contributed to the Plaintiff's accident. In so concluding, I do not ignore Mr Brodie's evidence, that if there had been a sign in the terms of Exhibit J, he would not have permitted the Plaintiff to dive because he was not a coach.

175 I do not doubt the honesty of his answer but, given the obvious enthusiasm of the Plaintiff and himself for her training, I am not persuaded that her diving from the shallow end would not have occurred. The Plaintiff was a trained swimmer and though he was not a qualified coach, he was supervising. I suspect he would have adopted a pragmatic approach himself or made successful representations to those running the pool to permit the Plaintiff's training to occur in accordance with Mr Critoph's program. After all, diving at the shallow end of the school pool was something that the Plaintiff and Mr Brodie's sons commonly did under Mr Critoph's eye and I have no doubt that Mr Brodie would have known this. He was aware that diving at the shallow end was a common feature of swimming carnivals. Certainly I am not persuaded that something along the lines I have referred to would not have occurred.

176 It was submitted that, because the First Defendant had established "NO DIVING" signs, it knew diving from the shallow end was unsafe and having called no evidence to justify a departure from what was its overriding policy, should have prevented diving. The argument draws more from the presence of the "NO DIVING" sign than is justified. No one can doubt that diving into the shallow end of the pool had risks but it is also clear that expert bodies have not regarded such risks as too great to permit diving in all circumstances. In these circumstances, I see no basis for inferring from the "NO DIVING" signs more than that the Council regarded unsupervised diving as something to be discouraged. Nor does the evidence of Ms McFadden lead to any more extensive inference.

177 I am also unpersuaded that the suggested absence of documentation of the exception from "no diving" that was permitted to those engaged in training contributed to the Plaintiff's accident. Given that diving in the shallow end as an incident to training had been going on for years, I see no basis for concluding that a risk assessment (of some reasonable type, and perhaps years ago) had not been carried out by the First Defendant.

178 Nor do I see that the absence of a risk assessment by the First Defendant at a time proximate to the Plaintiff's injury was a contributing factor to it. While there was a deal of emphasis placed during the hearing on the absence of a risk assessment (and induction of the Plaintiff), no attention was directed to who would have carried out such an assessment or induction. Given the extent of diving into the shallow ends of pools, including the Lithgow pool, and Mr Critoph's obvious satisfaction with that pool, there is no basis for concluding that, as a matter of probability, the person(s) tasked with the risk assessment or induction would not have permitted the implementation of Mr Critoph's program at the Lithgow pool. As may be inferred from my summary of his evidence, Mr Speechley would have.

179 In this connection, it is appropriate to refer to Mr Speechley's remarks when taken to the "Shallow Water Diving Induction Program". His approach seems eminently reasonable.

180 Next, I see no basis for criticising the absence of a coach rather than Mr Brodie. In that connection I thought that Mr Speechley's oral evidence was far more sensible and realistic than many of the answers in the joint reports although, even then, I do not entirely accept what he said. He said that it was "not that important" that the Plaintiff's training be with a coach rather than a supervisor. Given the Plaintiff's skill and coaching that had occurred prior to 7 January 2008 and the purposes of the training on that day and the fact that I am not persuaded a coach was likely to, as distinct from might have, prevented the diving at

the shallow end that occurred, I would place no importance on the mere presence of a coach rather than Mr Brodie. Furthermore any coach may have been well away from the shallow end of the pool as the Plaintiff dived and as Mr Speechley also said, a coach can't intervene while a child is in mid-air.

181 I acknowledge that in expressing the views I have, I have departed from a deal of expert evidence. I am conscious that judges should not do so without good reason. However, I believe what I have said, just now and earlier, provides that good reason.

182 There is no direct evidence of what occurred immediately after the Plaintiff's back foot slipped. However, the circumstances of her accident would suggest that her front foot also did not provide her with a great deal of horizontal velocity - a view that finds a deal of support in the criticisms of Professor Blitvich and Mr Sweetenham of the pool coping. Indeed the Plaintiff's accident bears a striking similarity to that foreshadowed in the passage I have quoted from "Austswim" - Teaching Swimming and Water Safety the Australian Way" and which bears repetition, viz.-

> A spinal injury can occur when a diver slips on the pool decking, does not have sufficient horizontal velocity and consequently performs a deep dive with a very steep entry angle. To prevent this occurrence, teachers should insist that learners curl their toes over the lip of the pool when performing a dive entry. This enables the swimmer to prevent the steep dive that follows slipping as, even if the decking is wet, it is still possible to push backwards against the edge of the pool, hence providing horizontal force for flight. Toes should curl over the pool edge for every dive entry.

183 Given these risks, it seems to me that it was unreasonable for the school, by Mr Critoph to encourage the plaintiff who, as Mr Critoph must have known, was accustomed to use the track-start dive, to dive into the shallow end of a pool with the lack of gripping facilities of the Lithgow pool and of which Mr Critoph, who had been there, was aware or, as an incident of encouraging the Plaintiff to go there, should have been aware. It is also to be inferred that this absence of gripping facilities and the shallow depth both contributed to the accident. Had Mr Critoph specified that diving was to occur at the deep end only, consistently with the Plaintiff's evidence that she did what she was told, I accept that that is what would have occurred.

184 In so concluding, I prefer the evidence of Professor Blitvich and Mr Sweetenham over that of Mr Speechley as to the acceptability of diving into the shallow end of the Lithgow pool. Nor do I ignore the various standards that permit diving into water at least 1 metre deep. However, as Mr Sweetenham said, those standards seem not to have caught up (though the increase in depth now advocated by FINA may now indicate the contrary) and as I have pointed out, they are concerned with only a limited field, not all aspects of competitive diving. The evidence in this case indicated that a track-start dive was attendant with more risks than a grab-start or one where both of a swimmer's feet were placed at or partly over the edge of a pool and it seems to me that a professional swimming coach was under an obligation to take account of those additional risks and not simply follow (limited) standards, particularly given the magnitude of the potential consequences. *A fortiori* this is so, given that the Second Defendant was a school and the Plaintiff its pupil.

185 In this connection I take the view that, if engaged in teaching the track-start dive, Mr Critoph should have been aware of the risks highlighted in what Professor Blitvich said without challenge was the "industry standard qualification" for swim teaching and published 5 or 6 years before the Plaintiff's accident. I would expect him to have had some awareness also of the sorts of matters referred to in paragraphs 5.24 and 5.38 of Professor Blitvich's report, quoted above. Given the school and Orange pools had protruding coping

tiles that could be gripped, I would infer that as a professional coach, Mr Critoph knew or should have known of their function and benefits and conversely of the disadvantages of a pool without them.

186 In summary, the school was negligent and that negligence caused the Plaintiff's injuries. I make it clear that in so concluding I have taken into account the stipulations in the *Civil Liability Act*, particularly s 5D.

187 It was suggested that the injury to the Plaintiff occurred in circumstances where Divisions 4 or 5 of Part 1A of that Act precluded the Plaintiff from succeeding in these proceedings. I am satisfied that it did not. In the first place, while I am prepared to accept that, even to a child of the Plaintiff's age, but with her experience, striking the bottom of the pool was an obvious risk, I am satisfied that the risks attendant on her executing a normal training dive or attempting to execute a track-start dive from the shallow end of the Lithgow pool were not.

188 In any event, the primary basis upon which I regard the Second Defendant as liable is not because of a failure to warn, but because it actively encouraged the Plaintiff to do what she was doing at the time of her injury.

189 I would however also hold the Second Defendant liable because of a failure to warn the Plaintiff of the risks attendant upon what she was doing and in that connection I am satisfied that the risk to the Plaintiff was foreseeable, the risk was not insignificant and in the circumstances, a reasonable person in Mr Critoph's position would have given a warning of the nature of that referred to below. I can accept that even though the plaintiff was younger than 12 when she arrived at KWSC, her training and experience would have been expected by most people, including coaches, to make her safe in the ordinary incidents of swimming training. However, once the Plaintiff was being taught the more dangerous track-start dive, it should have been drilled into her that it was essential such dangers be minimised by, for example, aborting a dive that had gone wrong and perhaps "belly-flopping" into a pool. Providing such warnings were sufficiently strong and repeated, and accompanied by appropriate warnings as to the horrendous consequences liable to flow from a mis-dive, logic suggests that the Plaintiff would have aborted the dive. She was, after all, only engaged in training.

190 In so concluding, I do not ignore the statement at paragraph 168 of Exhibit A in which the Plaintiff said that after she felt her left foot slip badly, she "was going forward and could not stop" or Mr Sweetenham's evidence that once the back foot slips "you have nothing to regain control of the start" or "grip to regain the control of any forward motion". Given the position of balance that a swimmer ready for a track-start dive has before commencing a dive, I have no difficulty in accepting that once force is applied to the back foot, some forward motion is inevitable. However, given the purpose the front foot is intended to serve, and the position and flexibility of a body, I do not accept that a slip by the back foot means that a swimmer has no influence whatsoever thereafter.

191 In this connection I should record that I accept the Plaintiff's evidence that she had received no study of pool safety or risk assessment or induction about the risks of a pool.

192 But there is another matter affecting the liability of the First Defendant to which it is necessary to refer. It was submitted that the case pleaded against the Second Defendant was formulated so as to be dependent on a failure to undertake a proper inspection or risk assessment and a conclusion that, had such an inspection or assessment been carried out, the Second Defendant would, or ought to have, become aware that the Lithgow pool was

not suitable and no case independent of such matters (or a failure to warn) had been made. The point fairly arises on the somewhat peculiar formulation of the pleadings. However, as a matter of logic, it seems to me to follow that Mr Critoph's instructions to Mr Brodie and to the Plaintiff as to training at the Lithgow pool in accordance with the program he set, carries with it a failure to carry out a proper risk assessment.

193 I turn to the position of the First Defendant. Given the standards for competitive and training dives put out by the various swimming organisations and the frequency of the practice of dives into the shallow ends of pools, I see no basis for concluding that that First Defendant should have precluded all dives into the shallow end of the Lithgow pool or was negligent not to do so. Nor, given Mr Brodie's extensive experience at the Lithgow pool, do I regard the First Defendant as negligent in permitting diving when he, rather than some qualified coach, was apparently supervising.

194 It seems to me that the First Defendant's liability depends on whether it should have been aware of the risks attendant upon a track-start dive or such a dive in the absent of appropriate coping tiles or the like. In that connection, it is proper to recognise the different positions it and Mr Critoph or the school occupied.

195 There is no evidence the First Defendant subscribed to the publications which Professor Blitvich spoke about or indeed to most of those that were in evidence. I see no basis for concluding that it should have done so. Certainly, it received Practice Note 15 and very probably there would have come a time when it was in possession of the 14 December 2007 Memorandum from the Royal Life Saving Society. However, I see no basis for concluding that prior to 7 January 2008, the First Defendant should have become aware of any significant increase in danger associated with track-start dives or of the importance of a readily grippable coping or any other basis for drawing a distinction between track-start and other dives.

196 In short, I see no breach of duty or negligence by the First Defendant.

197 There were also Cross-claims by each Defendant against the other for contribution. The result of these follows the result of the Plaintiff's claims.

198 In the result, there should be:-

(1) A verdict and judgment for the First Defendant against the Plaintiff;

(2) A verdict for the Plaintiff against the Second Defendant for damages to be assessed;

(3) A verdict and judgment for the Cross-Defendant on the First Cross-Claim;

(4) A verdict and judgment for the Cross-Defendant on the Second Cross-Claim.

199 There have been interlocutory proceedings. Costs were not the subject of debate and subject to anything the parties may say at the time of delivery of these reasons, I order that costs be reserved.

****

Last updated 28 November 2014

NEWS

Orange school found negligent over accident that disabled a star swimmer

By Melanie Pearce and Chloe Hart

Updated Sat 6 Dec 2014, 10:55am

The Uniting Church body that runs a private school in Orange has been found to be negligent over a swimming accident at Lithgow pool that left a promising swimmer disabled.

In 2008, then 12 year old Emilie Miller, who was on a swimming scholarship at the Kinross Wolaroi School in Orange was training at Lithgow pool, preparing to represent the school in the NSW State Age Swimming championships.

The accident occurred during the January holidays using a training schedule provided by the school.

Ms Miller dived into the shallow end using a track start dive and her foot slipped on or near a NO DIVING sign painted on the pool.

She hit the bottom of the pool, causing her to become a quadriplegic.

Her family sued the Uniting Church in Australia Property Trust and Lithgow City Council alleging her injury was the result of each breaching a duty of care to her.

Supreme Court Judge, Robert Hulme, has found Kinross's operator negligent for actively encouraging Emilie to do what she was doing at the time of her injury and for failing to warn her of the risks.

He found no breach of duty or negligence by Lithgow City Council.

Judge Hulme found negligence by the school caused the Olympic hopeful's injuries.

In 2008 she was ranked in the top 20 Australian girl swimmers for her age.

Justice Hulme found no breach of duty of care by Lithgow City Council and that it was not in the same position as the school to be aware of the risks associated with track start dives.

He said there was nothing to suggest the accident was due to any fault in the general pool surround or the No Diving sign.

Kinross Wolaroi says it cannot comment on the negligent findings, and the school is exploring whether to appeal the decision.

Principal, Brian Kenelly says the school is considering taking further legal action against the findings.

"At the moment we are looking at the findings and investigating the possibility of an appeal," he said.

"I understand we have 28 days to lodge an appeal if that process goes through, so I'm not at liberty to discuss the findings of the case should that appeal process go through."

Mr Kenelly says the school has done everything in its power to support Emilie and her family.

He says Kinross has always cooperated with the legal proceedings and they are extremely proud of her achievements after the accident.

"The school has great sympathy for Emilie and her family," he said.

"Emilie after the accident returned to the school and completed her schooling through to year 12 and was an outstanding student.

"We've since followed her progress through as she studies teaching at university."

Topics: swimming, courts-and-trials, schools, education, secondary-schools, orange-2800, lithgow-2790

First posted Thu 4 Dec 2014, 8:58am