

RACING DIVE BREAKS NECK OF FEARFUL NOVICE SWIMMER

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In the case of *Kahn v. East Side Union High School District*, (31 Cal. 4th 990; 75 P.3d 30; 4 Cal. Rptr. 3d 103 (2003), plaintiff Olivia Kahn was a 14-year-old novice member of defendant's Mt. Pleasant High School women's junior varsity swim team. On October 13, 1994, Kahn was participating in a competitive swim meet when she broke her neck while attempting a practice dive from a starting block into the three-and-one-half-foot-deep racing pool located at the school.

In her complaint, Kahn alleged that her coach had "negligently directed her to dive off a starting block during competition, without giving her adequate training or supervision" resulting in her injury.

The defendant school district denied any liability claiming "plaintiff assumed the risks inherent in the sport of competitive swimming when she voluntarily joined the swim team and dove into the pool on the day she was injured."

Prior to joining the team, Kahn did not have prior experience as a competitive swimmer, but she was a competent swimmer and had executed dives into deep water on a recreational basis. Kahn had a deep-seated fear that she would suffer a traumatic head injury from diving into shallow water, and had informed the school district's two coaches of her concerns when she joined the team in September. Kahn alleged that her coaches had assured her that she would not be required to dive at meets. Rather, she would be the team member who started from inside the pool. At two or three meets that preceded the competition at which Kahn was injured, head coach Andrew McKay had directed Kahn to swim the first leg of the relay race. This allowed Kahn to start in the water rather than dive from the starting block on the pool deck.

However, on the date of the accident, Kahn claimed McKay informed her, minutes before the meet was to begin, that he would not permit her to start her relay from inside the pool. Kahn said she panicked and begged McKay to reconsider, given her fear of diving into the shallow pool and her inability to perform a racing dive. Kahn said McKay refused her request. As a result, Kahn decided to practice her racing dive from the starting block into shallow water without any supervision by the coaches. Kahn said she could still see coach McKay in her peripheral vision. According to Kahn, the coaches had not directed her to refrain from practicing unless they were present. On her third practice dive, Kahn broke her neck.

DIVING DANGERS

In support of her negligence claims against the school district and her coach, Kahn offered testimony from an expert witness with extensive experience as an aquatics instructor and swim coach. In the opinion of Kahn's expert, "diving into three and a half

feet of water from the deck of a pool or from a starting block is extremely dangerous, and is ultra-hazardous if done by a swimmer without adequate training.”

In addition, Kahn offered the Red Cross safety training manual for swim coaches as evidence of the applicable legal standard of care under these circumstances. In pertinent part, the Red Cross manual contained the following recommendations:

Even an experienced diver can be seriously injured by diving improperly ... or diving from starting blocks without proper training and supervision... Coaches should require persons learning the racing dive to perform adequate shallow dives from the deck into the deep pool on a consistent basis, then require students to perform a shallow dive from a starting block into the deep pool. .. Then, when the swimmer's skill level has been consistently established from the starting block in deep water and the swimmer is able to maintain his or her racing start depth at two to two and a half feet, the swimmer may proceed to the shallow end. The coach then takes the swimmer through the same steps, beginning with shallow dives from the deck and then moving up to the block.

Coach McKay claimed that he followed these recommendations. Moreover, McKay testified that he had instructed team members that they should be under a coach's direct supervision when they practiced diving either from the deck or the starting block. Prior to the accident, McKay recalled that he and the other coach on the team, as well as other team members, had provided Kahn with instruction and training in performing the racing dive during swim team practices. According to McKay, based on his observation of Kahn, “her technique in the diving pool had improved to the point that she could dive off the deck into the racing pool.”

The trial court granted summary judgment in favor of defendants. In so doing, the trial court found defendants could not be liable under the doctrine of primary assumption of risk, unless they had elevated the risks inherent in competitive swimming or had behaved recklessly. Kahn appealed.

The appeals court agreed with the trial court that the doctrine of primary assumption of risk barred plaintiff's claim and affirmed the summary judgment in favor of defendants. (Under the doctrine of primary assumption of risk, a participant assumes the inherent and unavoidable risks associated with a given activity.) In the opinion of the appeals court, “shallow-water diving is a fundamental part of competitive swimming and that such diving presents a danger that is an inherent risk of the sport.” Kahn's petition to review this determination was granted by the state supreme court.

EVIDENCE OF RECKLESSNESS?

As noted by the state supreme court, “persons generally owe a duty of due care not to cause an unreasonable risk of harm to others.” On the other hand, the court

acknowledged that “some activities and, specifically, many sports are inherently dangerous.” Accordingly, “[i]mposing a duty to mitigate those inherent dangers” in sports could, in the opinion of the court, “alter the nature of the activity or inhibit vigorous participation.” As a result, the court found that “defendants generally do not have a duty to protect the plaintiff from the risks inherent in the sport, or to eliminate risk from the sport.”

[T]he risks associated with *learning* a sport may themselves be inherent risks of the sport, and an instructor or coach generally does not increase the risk of harm inherent in learning the sport simply by urging the student to strive to excel or to reach a new level of competence...
[I]nstruction in a sport frequently entails challenging or "pushing" a student to attempt new or more difficult feats, and liability should not be imposed simply because an instructor asked the student to take action beyond what, with hindsight, is found to have been the student's abilities.

As a result, “[a]bsent evidence of recklessness, or other risk-increasing conduct,” the state supreme court determined that “liability should not be imposed simply because an instructor asked the student to take action beyond what, with hindsight, is found to have been beyond the student's abilities.” To hold otherwise would, in the opinion of the court, “discourage instructors from requiring students to stretch, and thus to learn, and would have a generally deleterious effect on the sport as a whole.” On the other hand, the court recognized that a coach or sport instructor owes a duty to a student not to recklessly increase the risks inherent in the learning process undertaken by the student.

In order to support a cause of action in cases in which it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction, it must be alleged and proved that the instructor acted with intent to cause a student's injury or that the instructor acted recklessly in the sense that the instructor's conduct was "totally outside the range of the ordinary activity" involved in teaching or coaching the sport.

As characterized by the state supreme court, the appeals court had determined that coach McKay had merely challenged Kahn to “go beyond her current level of competence.” As described above, injury associated with challenging instruction is generally an inherent risk in the process of learning a sport. However, in the opinion of the state supreme court, Kahn’s allegations and evidence in this particular instance “went far beyond a claim that the coach made an ordinary error of judgment in determining that she was ready to perform the shallow-water dive.” Specifically, the state supreme court found Kahn had alleged sufficient facts which, if proven at trial, could establish reckless misconduct on the part of the coach which was "totally outside the range of the ordinary activity" involved in teaching or coaching the sport.

In reaching this conclusion, the state supreme court found Kahn had presented sufficient evidence to establish “a settled progression of instruction in the dive is considered

essential to the student's safety." Moreover, the court noted that the risk associated with inadequate instruction was serious, even catastrophic, because "the student may sustain serious head and spinal cord injuries by striking the bottom of the pool." In contrast to the availability of such risk information to coaches, Kahn claimed "she had not received any instruction at all from her coaches or teammates on the performance of the shallow-water dive," despite expressing "a mortal fear of performing the shallow-water dive." Further, Kahn claimed that she was told to dive or not be allowed to compete on the swim team, despite earlier assurances by her coach that she would not be required to do perform a racing dive in a relay race.

In light of such evidence, the state supreme court concluded that a trial was warranted to allow Kahn an opportunity to convince a jury that "the coach's behavior was reckless" under the circumstances of this particular case.

If a jury were to find that defendant coach directed plaintiff (a novice on the swim team) to perform a shallow racing dive in competition without providing any instruction, that he ignored her overwhelming fears and made a last-minute demand that she dive during competition, in breach of a previous promise that she would not be required to dive, we believe the trier of fact properly could determine that such conduct was reckless in that it was totally outside the range of the ordinary activity involved in teaching or coaching the sport of competitive swimming.

The state supreme court, therefore, concluded that the lower courts had erred in granting summary judgment in favor of defendants on the basis of Kahn having necessarily assumed the inherent risk of injury associated with a racing dive into shallow water under the circumstances of this case.

In reaching this conclusion, the state supreme court found further that Kahn had alleged sufficient facts to establish a causal connection between her injury and the lack of adequate training and supervision on the part of the coaches. In so doing, the court noted that "defendants had a duty of supervision that included an obligation to offer plaintiff some protection against her own lack of mature judgment." Specifically, the court found evidence that the coaches "should have foreseen and forestalled" Kahn's "decision to practice shallow-water dives with the help of other students, after the coach unexpectedly told her she was to dive that day."

The state supreme court, therefore, reversed the judgment of the appeals court dismissing Kahn's claims and remanded (i.e., sent back) the case "for further proceedings consistent with this opinion." On remand, Kahn would be given an opportunity to convince a jury that her injury was caused by the reckless misconduct of her coach, rather than an inherent and, thus, assumed risk in competitive swimming.