

Teacher Found Not Guilty for Student Drowning: What Does This Say About the Burden of Proof in OHS Criminal Cases?

By Ryan J. Conlin and Haadi Malik

Facts

On one unfortunate day in July 2017, a 15-year-old boy drowned while swimming in a lake on a school wilderness canoe trip. The teacher supervising the group of students that was swimming, Mr. Nicholas Mills, was charged with criminal negligence causing death.

When the drowning occurred, there were around eight students swimming in the lake, including a student who was hired to be the lifeguard on the trip (she was a certified lifeguard). When the deceased went missing, Mr. Mills and his spouse Ms. Souza, who was also supervising the trip, were in the water standing near a drop-off into deep water. The student lifeguard was on duty.

The canoe trip itinerary stated that participants were to pass a swim test to participate in the program. It stated that if students did not pass the swim test, they would be provided swim lessons/one-on-one coaching, and be given multiple opportunities to pass the test. Failing this, students would be provided “different outdoor education opportunities” at a later date.

Some students who performed the swim test did so with lifejackets on, which was considered a “fail”. Mr. Mills admitted that he did not intend to provide swim lessons or one-on-one swim coaching to those who failed the swim test by wearing a lifejacket for the test. He also did not intend to exclude such students from the school trip. He said that he believed it was safe to bring the students on the trip if they were able to complete the test with a lifejacket. He admitted that he believed that allowing students to attend the trip when they could not pass a swim test without wearing a lifejacket would not be sanctioned by the TDSB, and that he understood that this was contrary to the guidelines of the Ontario Physical and Health Education Association (“OPHEA”), which apply to TDSB physical education activities and excursions.

On the date of the fatality, the students were informed that they must wear a lifejacket while in the canoe and no one could swim without a lifeguard present. Two days before the drowning, Mr. Mills observed that the deceased student tripped out of a canoe; so, Mr. Mills assessed his swimming ability and determined that this student could keep himself afloat and move 50 meters through the water without a lifejacket. No one saw the deceased enter the deep water. He was last seen in shallow water and was not wearing a lifejacket. Nobody saw him drown.

Criminal Negligence Causing Death

To prove that the accused is guilty of “Criminal Negligence Causing Death”, the Crown must prove, beyond a reasonable doubt, that:

- (1) the accused did something that caused death or failed to do something that he had a legal duty to do, and that failure caused death; and

- (2) the accused’s acts or omissions that caused death showed a wanton and reckless disregard for the lives or safety of other persons, where “wanton and reckless disregard” is measured as being a marked and substantial departure from the conduct of a reasonable person in the same circumstances.

For conduct to rise to the level of criminal negligence, it requires a high degree of moral blameworthiness; i.e., that can justify imposing a criminal conviction and a potential jail sentence.

Finding

To the surprise of many, the trial judge found Mr. Mills not guilty of criminal negligence causing death. The trial judge first concluded that allowing students to swim without lifejackets was not itself conduct that fell below the standard of care. The Court made the following comments:

- Though the OPHEA guidelines prohibited non-swimmers from attending such trips, they did not set the “standard of care”, given that many teachers and administrators viewed them as a framework within which to exercise discretion, with modifications being accepted as reasonable and necessary. For example, TDSB students regularly attended activities where they participated in whitewater rafting, a prohibited activity under the OPHEA guidelines. As well, it was clear that the OPHEA guidelines were not the “industry standard”, given that some school boards and private schools in Ontario did not adopt them;
- Evidence showed that non-swimmers can and do participate in canoe trips safely. For example, commercial enterprises such as Scouts Canada do not conduct swim tests or bring in lifeguards, and careful and prudent parents permit children to enter the water without lifejackets for a variety of swim sites;
- There was a lifeguard present, which factor weighed in favour of reasonableness in this case. The fact that she was 17 years old and there were not two 18-year-old lifeguards as per the OPHEA guidelines was not determinative of the standard of care, because relying on a certified, student lifeguard was reasonable and not only met but exceeded the standards at many swim sites; and
- Mr. Mills had knowledge of the swimming ability of the deceased student two days before the drowning and had observed that he could keep himself afloat and move 50 meters through the water without a lifejacket (the distance of 50 meters is a standard used in swim tests).

The trial judge found that Mr. Mills did fall below the standard of care in that he failed to foresee the risk of a student drowning where (1) the swim site boundaries were unmarked and there were 7-8 students to watch and (2) the swimming ability of the deceased student was known to some extent, but his experience in open water was not well known. The trial judge concluded that a reasonable teacher in the circumstances would have foreseen the risk of a student drowning and taken additional steps to avoid it.

However, the trial judge found that the Crown failed to show that Mr. Mills’ conduct fell below the criminal standard of negligence – that is, wanton and reckless disregard for the lives and safety of others. The trial judge stated that Mr. Mills’ failure to assess the risk was an “error in judgment”

that occurred within the one-hour period, during which time the decision was made to allow swimming, the swim site was chosen, and the students entered the water.

Interestingly, the decision noted that if this had been a case of civil negligence, the test would have been met; however, Mr. Mills' conduct did not rise to the level of moral blameworthiness necessary to find him guilty of criminal negligence causing death.

Takeaways

This case shows that a court will hold the Crown to a very high standard to prove criminal negligence as opposed to proving guilt in a regulatory OHS prosecution. The trial judge made this clear when he stated that Mr. Mills' conduct rose to the civil standard of negligence but not the criminal standard. The Court emphasized that judges guard against criminalizing behaviour which can be characterized as merely careless, even when tragic consequences ensue.

The Court placed great emphasis on the finding that Mr. Mills did not make a series of unreasonable decisions which resulted in the student's tragic death. The breach of the standard of care was isolated to the specific failure to reassess the risk to the student for a very discrete period. One can reasonably assume that he would have been convicted if the Court had found that Mr. Mills' other actions on the day in question had violated the standard of care.

From an OHS perspective, this suggests that a criminal conviction will be more likely where the Crown can show a pattern of behaviour which breaches the standard of care. Obviously, there will be egregious cases where a single breach of the standard of care will justify a criminal conviction. The *Mills* case is a good example of the difference between criminal and civil/regulatory liability. The high burden of proof is likely one of the reasons that there have been few criminal prosecutions in the workplace safety context. Further, the availability of high fines prescribed under regulatory legislation allow courts to impose significant penalties against corporations, directors and supervisors, even without a criminal conviction.

The risk of criminal or regulatory prosecution for businesses in all sectors is a very real one. Employers are reminded to build strong safety protocols and chain-of-responsibility structures for situations where health and safety can be at risk, and to apply them consistently and carefully, keeping detailed written records of all training and safety checks. In addition to their importance in preventing accidents, these steps help organizations to mount a strong due diligence defence in the event of an OHS regulatory or criminal prosecution.

For more information, **please contact:**

Ryan J. Conlin at rconlin@stringerllp.com or 416-862-1687

Haadi Malik at hmalik@stringerllp.com or 416-849-2552

UPDATE is an electronic publication of Stringer LLP
390 Bay Street, Suite 800, Toronto, Ontario M5H 2Y2
T: 416-862-1616 Toll Free: 1-866-821-7306
E: info@stringerllp.com I: www.stringerllp.com

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