

The Immediate Pool Area and allowable pool activities:

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
CIV 2003-404-7266

Judgment: 1 October 2004 at 9.30 am (Extract)

RESERVED JUDGMENT OF RANDERSON J

[30] An associated issue is whether the immediate pool area may be used, for example, for recreational or entertainment purposes in conjunction with the use of the pool, even if activities of that kind are capable of occurring independently of the use of the pool. It was submitted for the Councils that such activities could not take place within the immediate pool area unless they occurred exclusively in conjunction with the use of the pool. It followed, the Councils submitted, that activities capable of taking place independently of the use of the pool must take place in areas outside the fenced immediate pool area.



[31] I cannot accept the submission made by the Councils in this respect. It is not supported by the definition of immediate pool area nor any other provision in the Act. The definition of "immediate pool area" is explicit in using the expression "**so much of the surrounding area as is used for activities or purposes carried on in conjunction with the use of the pool**" (emphasis added).

[32] **There is no qualification of the expression "is used"** as the Council's contended. So long as it can be demonstrated as a matter of fact that the area surrounding the pool is used for the relevant activity or purpose from time to time and that such activity or purpose is carried on in conjunction with the use of the pool, it does not matter that the activity might also be capable of being carried on independently of the use of the pool **So, for example, if the pool owner is able to demonstrate that barbecues or entertaining take place in the area surrounding the pool from time to time in conjunction with the use of the pool as described, then the area so used may be included within the immediate pool area.**

[33] In modern society, barbecues and entertainment frequently occur in the vicinity of a pool and in conjunction with the use of it for swimming and similar activities. **There is a sufficiently close nexus between the two to fulfil the statutory definition and I do not view the inclusion of such activities as compromising the safety of children.** Provided there is a complying fence, young children should not be able to enter the area except in the presence of an adult or adults.

[34] Although the extent of the immediate pool area is determined in the first place by its use in terms of the definition, the size of the area is not governed solely by that factor. Some weight must be given to Parliament's use of the expression "immediate". It must be assumed that the legislature intended that the immediate pool area to be fenced would be relatively confined and that, for example, a fence around the perimeter of the property would not comply with the Act. **It is not possible to define with precision the width (say in metres) of the immediate pool area. The width will depend upon the circumstances of each case.** The further away one moves from the edge of the pool, the less likely it will be that an associated activity or purpose can properly be said to be carried on "in conjunction with" the use of the pool and the less likely it is that the activity will be in sufficient proximity to the pool to be properly regarded as within the "immediate" pool area.