

# **Nizamis v Wilderness Escape Outdoor Adventures Pty Ltd [2006] SAIRC 69 (29 September 2006)**

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**MAGISTRATES COURT OF SOUTH AUSTRALIA**

**(INDUSTRIAL OFFENCES JURISDICTION)**

NIZAMIS, Maria

v

WILDERNESS ESCAPE OUTDOOR ADVENTURES PTY LTD

**JURISDICTION:** Prosecution

**FILE NO/S:** 506 of 2006

**HEARING DATES:** 15 August 2006

**JUDGMENT OF:** Industrial Magistrate SM Lieschke

**DELIVERED ON:** 29 September 2006

**CATCHWORDS:**

*Prosecution - Guilty plea - Sentence - Failure to take reasonable care to avoid adversely affecting the safety of participant in climbing activity - Student injured after falling from height when safety rope failed - Rope had been incorrectly tied by student's teacher - Defendant permitted unqualified and untrained person to supervise tie-in of student - Defendant failed to follow its risk management plan by not observing participant and correcting defective tie-ins - No system for checking tie-ins - Failure to ensure proper use of equipment - Compound fractures to ankle and both wrists - Potential risk of fatality - Compensation to be further considered - Held: Conviction and fine of \$36,000 - s 22(2) [Occupational Health Safety and Welfare Act 1986](#) - [Criminal Law \(Sentencing\) Act 1988](#).*

**REPRESENTATION:**

Counsel:

Complainant: Ms S. Connell

Defendant: Mr D. Crocker

Solicitors:

Complainant: Crown Solicitor's Office

Defendant: Lynch & Meyer

## **Introduction**

1 While on a school camp on 1 April 2004 12 year old Alexander Kedzior participated in a potentially dangerous climbing activity, conducted under the control and supervision of Wilderness Escape Outdoor Adventures Pty Ltd.

2 Alexander's safety while climbing was to have been ensured by a belayer controlling a rope attached to a harness. Unknown to Alexander and the school teacher who tied the rope, it was not attached correctly. While Alexander was descending from a height of 7 metres, the rope failed, he fell to the ground, and suffered injury. No-one from Wilderness had checked the rope was correctly tied before Alexander started climbing. It had no practice of checking all such tie-ins. Wilderness was alleged to have failed to take reasonable care to avoid adversely affecting Alexander's safety.

## **The offence**

3 This allegation formed the basis of a charge of breaching [s 22\(2\)](#) of the [Occupational Health Safety and Welfare Act 1986](#). Wilderness pleaded guilty.

Wilderness' offending comprised of:-

- \* Permitting one of Alexander's teachers, who it knew was not appropriately trained or qualified, to conduct the tie-in,
- \* Failing to adhere to or enforce its written risk management plan, which required it to observe all participants during the activity and to identify and rectify poor tie-ins, and
- \* Failing to ensure the climbing equipment was properly used.

It is now to be sentenced.

## **Permitting inappropriate supervision**

4 Alexander was one of 40 students from Mercedes College participating in various aspects of Wilderness' high ropes course. This was one of six different school camps, involving a total of 250 students, Wilderness was conducting on the day of the incident. Wilderness had between 50 and 60 employees.

5 Alexander was in a group of eight students. There were five groups, but only four Wilderness instructors. A teacher was required to supervise Alexander's group. Wilderness' camp leader Ryan Tripney was to supervise another group, 12 to 15 metres away.

6 At some stage before Mr Tripney left the teacher alone to supervise Alexander's group on 1 April, he ascertained that the teacher had some limited experience on a high ropes course many years ago. **He was told that the teacher had only used carabiners, rather than tying in the ropes. The teacher did not claim to be qualified as a climbing or ropes instructor.**

7 On the previous day all the students and the teacher had participated in a wall climbing exercise. As part of that exercise each participant was given a briefing about how to correctly put on the harness, how to wear helmets correctly, how the belaying system worked, and how to tie themselves to their harness with a "double figure-of-eight" knot and a carabiner. **Even though students were taught how to tie-in, they were not expected to do this for climbing, and were not expected to check the instructor's or supervisor's tie-in.**

8 At the start of the exercise on 1 April Mr Tripney demonstrated to the teacher how to tie-in and belay a student. Mr Tripney did the first tie-in and watched the teacher belay the student up a tree, across a pole and down another tree. Mr Tripney tied in a second student and again explained the process to the teacher as he did so. Mr Tripney then left Alexander's group to attend to his own group. The teacher belayed the second student successfully.

9 The teacher was required to do the tie-in for the third student on his own. The teacher was unsure so asked a student to call back Mr Tripney to check the tie-in. Mr Tripney responded and noticed the teacher had tied the knot incorrectly. He corrected the error. Before Mr Tripney returned to his own group he told the teacher to call him back if he did not feel competent. Mr Tripney did not check that the teacher could demonstrate competence in correctly tying the knot and attaching the carabiner.

10 Mr Crocker, counsel for Wilderness, submitted that Mr Tripney made an error in placing reliance upon a teacher who had "demonstrated some level of experience and competence in the locking off process". I partially agree, in that the instructor had wrongly placed reliance upon the teacher. **However I do not agree that the teacher had demonstrated any experience or competence in the tie-in process. The teacher had not been observed to correctly tie-in on even one occasion before he was expected to do this unsupervised and unchecked. Placing responsibility on the teacher to identify when he needed help is a hopelessly flawed procedure.**

11 Mr Crocker tendered a statement from Scott Polley a lecturer in outdoor education at the University of South Australia. Mr Polley sets out his belief that it is appropriate to allow a mature and responsible adult to belay a group in circumstances where that adult has been trained and has demonstrated competency in the correct technique.

12 In my view this statement does not assist Wilderness because that standard of care is still inadequate, as can be seen by comparing that proposed method from the method that is now used by the defendant for belaying. In any event Wilderness' system and practice on the day did not require the supervising teacher to demonstrate his competency before he was required to tie-in students unchecked.

### **Failing to observe participants**

13 The teacher then tied in Alexander in accordance with what the teacher thought was the correct method. He did not feel the need to call Mr Tripney back to check. As it turned out the rope had been tied incorrectly and the carabiner had been wrongly attached to the rope instead of to the harness.

14 I was shown photographs of a correct "double figure-of-eight" knot and a photograph of a reproduction of the knot that was believed to have been tied. **To my untrained eye it is not obvious that the teacher's knot was wrong. The correct knot is not one that people ordinarily encounter.**

15 Wilderness had a written risk management plan for its high ropes course. It properly identified a number of hazards including participants falling from dangerous heights, rated as a medium risk and with consequences rated as major to fatal. The plan included a requirement that its instructors observe participants during the activity and rectify any poor tie-ins.

16 **By failing to observe participants the instructors were not in a position to identify and then rectify incorrect tie-ins.**

17 **Whilst Wilderness was entitled to allocate one trained instructor for two groups of students, it still had an obligation to check this fundamental aspect of each climber's safety. That obligation could not reasonably have been delegated to a person who did not have the appropriate training or qualifications, and who had not even demonstrated competency in correctly tying students.**

18 **Whilst Wilderness had a written risk management plan there is no evidence of that system in operation, being adhered to or enforced.** Failure to check Alexander's tie-in was not an isolated lapse or breakdown of an established safe system of work.

### **Failure to ensure proper operation of climbing equipment**

19 All of the above circumstances contributed to a serious failure to ensure that the high ropes course climbing equipment was properly operated. **Having good quality equipment, that is regularly inspected and renewed is worth little if it is not used correctly. The same applies to Wilderness having well trained and qualified staff. Their expertise is of little value if not properly utilised.**

### **Wilderness' response to the incident**

20 I accept that Wilderness responded to the incident by reviewing and changing its system of work. A memo to all staff was issued on 16 April notifying employees of the incident and of a number of important changes. The memo states that the company had both teachers and instructors belaying as they had a large number of students and a small amount of time available. After then observing that Alexander was doing well and that his parents "aren't causing a fuss" the following changes were notified:-

"-- When you teach the participants to tie the climber in, teach them to clip the carabiner into the harness first (we always use carabiners and Figure 8 knots at the climber's end now), and then tie in. Clip in 1<sup>st</sup>. Tie in 2<sup>nd</sup>. Make sure you enforce this during belay school practice. If participants tie in this way, there is no way they can clip the carabiner into the rope and not the harness.

\* Each group must be checked by an instructor every time they send a participant up an element. So this means that if they're ready to go but there isn't an instructor with them, they must wait until they can get an instructor to come over and check them.

\* There need to be at least two instructors available to check people or respond to problems at all times. This means that they can't be belaying or involved in a belay team, up a tree, at the toilet, etc.

\* The most likely incident to occur is around belaying, so make sure you position yourself in a way that you can best observe the belay teams."

21 Further changes were made and are set out in the Statement of Andrew Govan, the principal of Wilderness. These additional changes include reinforcing that instructors are not to become part of the belaying team and that schools must provide an appropriate number of adults for youth groups. An inspection of the attachment of the safety rope is done by the whole belaying team who are to spread the two systems apart on the harness to ensure that they are not joined to each other. That is in addition to the instructor checking the system. Working zones have been created so that both belaying teams are now working in closer proximity to the instructor who still supervises both teams. Minimum time frames for use of the high ropes course have been extended to ensure that no section is rushed. These are all reasonably practicable measures that could have been identified with minimal effort before the injury occurred.

### **Impact of offence on Alexander and his family**

22 Alexander could have easily fallen the full 7 metre height. As it was he had commenced his descent and he fell a slightly lower distance. He landed on a natural earth surface with no additional cushioning. I note that such cushioning could easily have been provided in the fall zone by way of net, sports cushions, bales of straw, mulch or similar.

23 Alexander suffered compound fractures to each wrist and to his left ankle. He spent five days in hospital and has needed extensive medical treatments. He is likely to need further treatment. Alexander lost a considerable amount of school time and could not participate in extra curricular sporting activities. The long term effect of the three joint fractures remains unclear. Alexander's parents incurred medical expenses of about \$4500. Alexander's mother ceased working for two months to look after him during his recovery.

24 Alexander's father comments in a victim impact statement that Alexander should never have been on the apparatus without a qualified instructor and that Wilderness showed little or no concern regarding the accident.

25 Wilderness has made no reparation to Alexander or his family. I am told however that Mr Govan organised for a basket of goods and a card to be sent to Alexander in hospital. He also offered to pay medical expenses which he correctly anticipated would be incurred. He did not follow that up and has made no financial contribution to the family's expenses.

### **Contrition of Wilderness**

26 Whilst Alexander's family discerned little or no concern from the operator of the camp regarding the incident, I am told and accept that Mr Govan has in fact experienced great concern over the incident. It is regrettable however that this was not adequately communicated. This is no doubt because Mr Govan stated that whilst he wanted to express his feelings about the situation he did not know how to. He did telephone Alexander's family to express his regret for the incident and concern for Alexander's wellbeing. Mr Govan's

personal assistant at the time also telephoned the family. Mr Govan offered to meet with Alexander's parents to discuss the incident and to take all of the family on the same course.

27 Mr Crocker submitted that Wilderness was "extremely contrite" and that it sincerely regretted the accident. Mr Crocker then asked the Court to accept that the company had accepted full responsibility for the consequences of its offence.

28 This submission however is not consistent with par 13 of Mr Govan's written statement where he says:-

"Without admitting any legal liability I can say that, as a human being, when I heard about the incident I felt a strong level of personal guilt and depression regarding what occurred."

When this hedging was put to counsel, I was told it was because "there might be subsequent events" in respect of the incident. I infer that is an oblique reference to the possibility of Alexander's family taking some legal action to recover compensation or damages. It is more important for Wilderness to defend its position with respect to potential liability for damages for its actions, than to accept the full measure of legal responsibility for its offending.

Accordingly I do not accept any more than the most minimal form of contrition.

### **Other considerations**

29 I take into account that Wilderness had been operating such activities for about 15 years without serious injury to a participant, and that it has otherwise exhibited a high degree of safety consciousness.

30 In my view this is a very serious breach of Wilderness' obligations. To operate a system of work that omits checking the attachment of the most important safety device of each child participant, is not a reasonable standard of care and is plainly negligent.

31 It is likely that had Wilderness disclosed beforehand to the parents of the students that its instructors would not be checking each of the tie-ins, there would have been widespread concern. It is also likely there would have been few, if any, participants. The defendant took on a high level of responsibility when vouching for the safety of its course, and inviting trusting 12-year-old students to engage in unusual and potentially life threatening physical activities. The defendant's poor system of work badly let down Alexander, his family, the other participants, and the school.

32 I also take account that the potential injuries, as foreseen by the defendant, include a fatality.

### **Compensation**

33 The complainant did not make any submission regarding a potential award of compensation pursuant to [s 53](#) of the [Criminal Law \(Sentencing\) Act 1988](#). I am entitled to make an order for compensation of my own initiative based upon appropriate evidence. In this case it is clear that Alexander and possibly his family would be entitled to an award of compensation given that he has no entitlement to any compensation under the [Workers Rehabilitation and Compensation Act 1986](#). Compensation could potentially be awarded to cover such losses as Alexander's pain and suffering incurred to date and for the future, loss of

amenity both past and future, medical expenses, and his mother's loss of income. Because of an absence of submissions and evidence I propose to hear from both parties, and Alexander's family if necessary, on the question of compensation and I will accordingly adjourn that issue for further consideration.

### **Penalty**

34 I accept that the defendant fully cooperated with the complainant, and entered a guilty plea at the earliest opportunity. I accept that there has been some statement of contrition as described above but only of the most minimal kind and not one consistent with the defendant fully accepting responsibility. For these factors I will afford the defendant a reduction of 10 per cent of the fine I would otherwise have imposed.

35 A conviction will be recorded against the defendant. I impose a fine of \$36,000 after application of the reduction. In addition the following costs, levy and fees are to be paid by the defendant.

Court costs \$104

Victims of Crime Levy \$35

Counsel Fee \$750\*

**TOTAL \$36,889**

\*Payable to the Crown Solicitors Office

36 The total of \$36,889 is to be paid within 28 days.