

IN THE CORONERS COURT)
AT CANBERRA IN THE)
AUSTRALIAN CAPITAL TERRITORY) **CD 313 of 2004**

**INQUEST INTO THE DEATH OF
DANIEL WEISSEGGER**

**REASONS FOR FINDINGS AND RECOMMENDATIONS
PUBLISHED ON THE 16th DAY OF MAY, 2011**

The former Chief Coroner, Mr R.J. Cahill, commenced the inquest into the death of Daniel Weissegger (“Daniel”) prior to his retirement due to ill health. At the time of his retirement, Mr Cahill had completed the public hearing conducted as part of the inquest, and had given those represented an oral indication as to what his formal findings would be. He also indicated that he would be making some recommendations. However, at the time of his retirement, he had not made the required formal findings, nor made the foreshadowed recommendations.

After having read the transcript of the public hearing, the exhibits tendered and the submissions of Counsel Assisting, Counsel appearing for Mr Achim Weissiegger, Daniel’s father, and Counsel appearing for the Australian Capital Territory, I was satisfied that sufficient information was available to me to finalise the inquest, without any further inquiries being conducted. Accordingly, on 31 January 2011, I issued the necessary formal findings. Given the long passage of time since Daniel’s death, and the fact that the ACT Government had taken action to address the issues surrounding building and design standards, and compliance with them, in relation to backyard swimming pools, which arose during the hearing, I considered that it was no longer necessary to make recommendations in relation to the safety aspects of backyard pools. In this regard, I attach two media releases issued by the Chief Minister, Mr John Stanhope, and the Minister for Planning, Mr Andrew Barr.

Since the issue of the formal findings, Daniel’s father has asked for reasons supporting the findings and that the recommendations, to which the former Chief Coroner had alluded at the conclusion of the public hearing, be published. In light of his request, I now publish the reasons and recommendations.

THE RELEVANT LEGISLATIVE PROVISIONS

The inquest into Daniel’s death was conducted pursuant to the s.13 (1)(b) of the *Coroners Act 1997* (“the Act”) which provides that a coroner must hold an inquest into the manner and cause of death of a person who is found drowned.

Sub-section 52(1) of the Act requires a coroner holding such inquest to make findings, if possible, as to:

- the identity of the deceased; and
- when and where the death happened; and
- the manner and cause of death.

Sub-section 52(4) of the Act provides as follows:

“(4) A coroner may comment on any matter connected with the death, fire or disaster including public health or safety or the administration of justice.”

Allied to this provision is s.57(3) of the Act, which permits a coroner to make recommendations to the Attorney-General on any matter connected with an inquest, including matters relating to public health or safety or the administration of justice. Recommendations will be forwarded to the Attorney-General with respect to Daniel’s death.

Section 58 of the Act governs the processes that must be followed where the coroner has reasonable grounds for believing that a person has committed an indictable offence. I was satisfied that, in relation to Daniel’s death, there was no basis for me to act under s.58.

FACTUAL FINDINGS

On 25 December 2004, Daniel fell into a backyard pool (an above ground pool), situated at his father’s place of residence, and drowned. It appears he obtained access to the pool area through a sliding door from the “toy room” in the house. This door had direct access to the pool area.

On 25 December 2004, Daniel’s father and siblings were in the vicinity of the house, together with extended family, celebrating Christmas. It appears that Daniel had been left alone in the “toy room” playing with his toys. He was discovered floating face down in the pool some 15 to 20 minutes later.

The door from the “toy room” opened onto an area giving direct access to the pool. The door was a sliding door which was also fitted with a separate sliding mesh screen door. Neither the sliding door nor the sliding screen door had self-closing mechanisms as required by *Australian Standard 1926.1 - 1993 Swimming Pool Safety, Part 1: Fencing for swimming pools* (“AS 1926.1 - 1993”), which was then the applicable standard. It was known that Daniel could open the glass sliding door although it was not known if he could open the screen door as well.

The doors had been installed in 2001 after the owners had commissioned a carpenter to do some renovations. The doors replaced windows and provided direct access to the pool area.

Police interviewed Mr Achim Weissegger, Daniel’s father, about the incident. He stated that during the morning of the 25th December his children attended at his

house. Also in attendance were several members of his family, including his mother and sister. All enjoyed a family Christmas day.

Young Daniel had received a red bucket for Christmas and, at one stage during the morning, had filled it with water from the swimming pool. The pool gate was then locked and everyone returned inside. Mr Weissegger was of the view that no one else had gone through the pool gate after that time.

At around 11.30 am, Mr Weissegger used a compressor to blow up a large plastic animal pool toy for Daniel, who was playing with this toy in the family room at around 12.10 pm. At this time, Mr Weissegger went outside to the front of the house with his brother-in-law to have a cigarette. Shortly after, his family moved to their vehicles to leave. At this point, an inquiry was made as to Daniel's whereabouts because there were vehicles about to reverse out of the driveway.

Mr Weissegger immediately looked over the fence at the pool and discovered Daniel lying face down in the pool, not moving. He immediately jumped the fence and recovered Daniel from the pool. He commenced cardiopulmonary resuscitation (CPR), and was assisted by his daughter Stephanie. Both have been trained in CPR. An ambulance was called and Daniel was transferred to The Canberra Hospital. Despite resuscitative efforts by the family, ambulance and the hospital, Daniel did not recover and was pronounced dead at 1.00 pm on 25 December 2004.

Dr Lavinia Hallam performed a post mortem examination at the direction of the coroner. She reported that in her opinion Daniel had drowned as a result of immersion in water, and that there were no suspicious circumstances.

ISSUES

An important issue that arose during the public hearing was the question as to how Daniel gained access the swimming pool. Constable Brett Wood, the police officer who investigated the matter on behalf of the coroner, found that the fencing was in good repair and found the gate was a single metal grill gate secured with a "pool lock", located on the top of a metal pole approximately 1640mm from the ground. The lock was in an operable condition. The gate opened outwards from the pool, but there was no spring attached to the gate to ensure it swung shut after opening.

Constable Wood found that the sliding door at the eastern end of the building was lockable, the catch on the exterior screen door was at a height of 1200mm and the door handle on the interior door was at a height of approximately 1000mm. This door leads to a room which appeared to be a play room.

Mr Weissegger stated that access to the pool could be achieved through the sliding door from the toy room and that he was aware that Daniel could reach the locking mechanism on that door. There was a key for this door, but he was unaware of its whereabouts. He stated that the external security door was locked from the inside and was difficult to operate. This door latched automatically when closed and he did not think that Daniel could open this door, as it was a complex task. Both doors slid easily. He could not explain how Daniel was able to access the pool.

Ms Kirsten Beaumont, Mr Weissegger's sister, who gave the blow up pool toy to Daniel, stated that several of the family used the sliding doors from the lounge sitting room onto the patio during the morning. No one indicated that they used the sliding doors from the toy room that morning. Daniel's sister Catherine reported that she had seen the pool toy floating in the pool and that it had been removed and stomped on.

It seems most likely that Daniel accessed the swimming pool area through the spare bedroom's ("the toy room") sliding doors and then entered the pool surrounds. Once he had gained access to the pool surrounds, there was no further barrier to prevent him from entering the pool.

Mr Weissegger had leased the residence from Mr and Mrs Todd since April 2002. In October 2004, he had identified that, amongst other things, the pool did not comply with ACT building regulations with regard to the access doors from the main bedroom and the toy room. This, and other issues, formed the basis of an application he made to the Residential Tenancy Tribunal. In November 2004, the Tribunal ordered that several items be repaired, but nothing was ordered to be done in respect of the sliding doors.

Mr Matthew Todd, one of the owners of the premises, said he had believed that the pool and doors complied with the regulations. He also said that he was not made aware that the sliding doors did not comply with the regulations until Mr Weissegger's letter to him of 30 October 2004.

Mr Peter Robinson was engaged by Mr Todd to perform some building works, which included replacing the existing pool deck, paving areas near the pool and installing sliding doors to the main bedroom and spare room, which lead to the pool area. Mr Robinson's view was that the doors did comply with AS 1926.1 - 1993. He stated that he was aware that plans had been lodged and approved by the ACT Planning and Land Authority ("ACTPLA"), but had not been certified by ACTPLA. Mr Robinson was not a licensed builder but had New Zealand carpentry qualifications which were recognised in Australia.

FORMAL FINDINGS UNDER SECTION 52 OF THE ACT

On 31 January 2011, I made the following formal findings:

1. The deceased was Daniel Weissegger, born on [redacted] 2002.
2. The deceased died on 25 December 2004.
3. The deceased's life was pronounced extinct at 1.30pm on 25 December 2004 at The Canberra Hospital, Garran in the Australian Capital Territory.
4. The deceased died as a result of cardiac and respiratory arrest, consequent upon accidental immersion and drowning in a swimming pool located in the rear yard of the premises at 22 Wheatley Street, Gowrie in the Australian Capital Territory.

COMMENTS

It is no part of a coroner's function to determine the civil or criminal liability of any person in relation to a death that is the subject of an inquest. However, I offer the following comments in relation to matters that I consider relate to public safety.

It was either Mr Todd, or his builder, Mr Robinson, who made the development application for the renovations. However, neither had arranged to have the renovations inspected and certified, once the work had been completed.

Counsel Assisting correctly submitted that neither the pool fencing, nor the doors to the pool area, complied with the requirements under AS 1926 -1993, the applicable standard.

Constable Wood found that the fencing around the pool was in good repair and found the gate was a single metal grill gate secured with a "pool lock", located on the top of a metal pole approximately 1640mm from the ground. The lock was in an operable condition. The gate opened outwards from the pool but there was no spring attached to the gate to ensure it swung shut after opening.

Constable Wood concluded that factors which may have contributed to Daniel's death were as follows:

- inadequate supervision of the deceased;
- improper safety requirements relating to the fencing of the pool contrary to s. 24 of the *Building Act 2004*, the *Building Code of Australia* and AS 1926.1 - 1993;
- improper safety requirements relating to the windows of the bedrooms on the northern side of the residence, which did not comply with sub-clauses 2.13(a)(i) and (ii) of AS 1926.1 - 1993: and
- improper safety requirements relating to the sliding doors from the bedrooms on the northern side of the residence accessing the pool area, contrary to the ACTPLA requirements and sub-clauses 2.14(a),(b), (c) and (g) of AS 1926.1 - 1993.

I agree with his conclusions.

Mr Weissegger sought to blame Mr Todd, as landlord, for not having the renovations connected to the pool approved and certified. Whilst I appreciate that Mr Weissegger was helpless in regard to the approval and certification of the work, normally, the responsibility for the safety and care of a child, particularly one as young as Daniel, is that of a parent. It is evident that Mr Weissegger was aware that Daniel could open the sliding doors. In view of that, extra care was needed, particularly by maintaining close and continuous watch over Daniel.

As Counsel Assisting submitted, the lesson one learns from tragedies such as these is that parents and carers cannot be too careful when small children have potential access to swimming pools, no matter what the circumstances. Again, as

submitted by Counsel Assisting, responsibility of a parent or carer to supervise children is not delegable.

Having known that the sliding doors could be opened by Daniel, I am inclined to believe Mr Weissegger could have taken extra care to block or lock the doors. That care should have been more intense when there was a celebration at the home which was likely to cause more distractions than usual for those present.

Having a set of keys for the sliding doors made or a new lock installed were options open to Mr Weissegger. He claimed that he was ordered by the Residential Tenancy Tribunal not to undertake any repairs or alterations at the property, as all work should be done by a person arranged by Mr Todd. If that was the case, Mr Weissegger should have been more vigilant to take measures to prevent his son's access to the pool, unaccompanied by a person with swimming ability.

My comments are not intended to attribute blame to Mr Weissegger. They apply to any parent or carer who has a care of a child of a tender age in a place where there is access to a backyard swimming pool. In this regard, I note that it is always easy to be wise in hindsight and one can only feel the deepest sympathy for Mr Weissegger. Young children are often filled with a strong desire to explore their surroundings, particularly water, and can place themselves in dangerous situations very quickly if not kept under constant observation and, unfortunately, even the most vigilant of parents can be distracted for a few fatal moments.

No doubt, Mr Todd and Mr Robinson were also responsible for the risky situation the renovations posed to a family with children in the house. In particular, Mr Todd, as owner, would have been well advised to install measures at his house for the safety of his tenants and their children, with a view also to ensuring that he was not exposed to any legal liability for incidents that might happen otherwise.

RECOMMENDATIONS

I am of the view that Daniel's tragic drowning could have been avoided if the relevant building and pool fencing regulations had been complied with and a much more vigilant degree of parental supervision had been exercised with respect to a child of two and a half years, who was known was to be unable to swim.

My strong warning to parents or adults at a home with a swimming pool is that nothing can completely substitute for vigilant and continuous parental supervision of children who cannot swim. Even if home pool safety measures are in place, there is always a risk of a young child gaining access to a swimming pool as a result of the fascination that so many children hold for water and, as so many similar cases have shown before, the speed with which such children can sometimes gain such access.

The development application relating to the renovation of the property, including the installation of sliding doors leading from two bedrooms to the pool area, was made to ACTPLA in 2001 by the owners, Mr and Mrs Todd. However, the alterations were not certified as required by law. It appears that Mr Weissegger had brought to the attention of the landlord's agent around October 2004, that the pool did not seem to comply with the ACT building requirements with regard to the access

doors from the main bedroom and the toy room. Counsel for the Australian Capital Territory submitted that approval of a plan by ACTPLA under the *Land (Planning and Environment) Act 1991*, as it stood at the time of the approval, had nothing to do with safety considerations. He said that “[t]he criteria here is like heritage requirements, the necessity to remove trees from property and overall compliance with the Territory Plan”.

He submitted that the safety issues were governed by the *Building Act 1972*, “which is an entirely separate process”. What Counsel for the Territory submitted was consistent with the statement given by Mr David Kyburz of ACTPLA. It is the approval process under the *Building Act 1972* that imposes the requirement to comply with the *Building Code of Australia* and the applicable Australian Standards.

The plan for the renovations, including the swimming pool area and fence, at the residence were appropriately approved. However, it is unfortunate that, because no application for certification was made under the *Building Act 1972*, there was no process to monitor whether the completion of the renovations under the approved plan complied with the AS 1926.1- 1993, which was current at the time. The current version of the Australian Standards relating to safety barriers for swimming pools is AS 1926.1-2007.

I observe that under the current legislation (i.e. *Planning and Development Act 2007* and *Planning and Development Regulation 2008*), exempted backyard swimming pools and fences do not require a development approval to be obtained but still require such structures to be certified under the *Building Act 2004*.

Pursuant to s.57(3) of the Act, I propose to make the following recommendations to the Attorney-General:

1. A review of all relevant legislation be carried out to ensure it provides that all requirements for fitness, occupancy and use of any a building work, in particular, in relation to back yard swimming pools, and the fencing of, and access to, those pools, are complied with and that people not be allowed to occupy premises with pools that do not comply with the relevant requirements.
2. Where the construction of a backyard swimming pool or pool fencing requires a development approval (I note that the relevant current legislation is the *Planning and Development Act 2007* and the *Planning and Development Regulation 2008*), there should be an active and close link between the processes of development approval and certification of the work under the relevant building legislation (I note that the relevant current legislation is the *Building Act 2004* and the *Building (General) Regulation 2008*) so that there is a requirement for some authority to ensure that, after development approval is given, a certifier under the *Building Act 2004* is engaged before the work commences and that certification takes place once the work has been completed and before occupation is permitted.

3. There should be clear advice given to applicants for approval for the construction of a home swimming pool, or for the carrying out of renovations affecting pool surrounds and access to pool areas, about the requirement for compliance with AS 1926.1 – 2007 and about the pool safety information available on the website of Royal Life Saving Society Australia (RLSSA).
4. There should be a legislative requirement that a lessor of a residence with a swimming pool, or their leasing agent, ensure that the swimming pool has been certified, under the *Building Act 2004*, as complying with AS 1926.1 – 2007 before the premises are let and provide information to a prospective tenant as to such compliance. In this regard, I note that a prospective tenant of residential premises does not have the same capacity and entitlements as does a prospective purchaser to carry out enquiries and searches in relation to building's compliance with the relevant building laws.

These recommended regulatory measures would not substitute for the parental, or adult, obligation to constantly supervise a child where there is a home swimming pool. The best of safety measures may sometimes not work, for example, the latch on a pool gate may become defective. The only certain method of keeping young children safe around water is constant vigilance.

I note there is on from the Royal Life Saving Society Australia's (RLSSA) website : <http://www.royallifesaving.com.au/www/html/7-royal-life-saving-website-home-page.asp> – useful information that everyone who has a backyard swimming pool should be familiar with. Particularly useful are the fact sheets on RLSSA's web page: www.keepwatch.com.au.

RLSSA advises “all parents and carers that supervision is the key to preventing toddler drowning deaths, but a fence with a self closing gate is essential in providing an extra line of protection. With toddlers' curious nature and fast feet, in no time at all they can be in the water”.¹ It also advises that “[a] significant percentage of toddler pool drowning deaths do not occur in their own backyard, but in relatives, friends and neighbours pools”.

It is not enough to have a safe gate to a backyard pool or safe sliding doors which lead to access a pool. They have to be checked often, whether or not children are at home. RLSSA notes that:

“Many people leave their pool gates propped open, or have gates that close but do not lock. A child does not need a great deal of strength to push open an unlocked gate. The gate to the pool must be both self closing and self latching.”

I take this opportunity to repeat the following recommendation of RLSSA:

¹ RLSSA, Fact Sheet No. 2, Fencing.

“Royal Life Saving recommends you conduct a thorough check of your fence every year before summer (and a quick check at least once a month) to ensure that it is not climbable, is in good repair, the gate when opened fully closes by itself and locks, there are no loose palings or support members, and there are no gaps under or through the fence.”

I suggest that anyone who has a swimming pool at home, or wants to construct one, should read the information available on the RLSSA website and its fact sheets.

I thank the Counsel Assisting, Ms Margaret Hunter, for the work she did in relation to this inquest. It was of great assistance to the court, as was the assistance of the other Counsel who appeared.

Finally, I express my personal sympathy to the parents and siblings of Daniel for the untimely and tragic loss of their loved son and brother.

P.G Dingwall
Coroner

Section: Jon Stanhope, MLA | Media Releases

Time to stop the child drowning 'epidemic'

Released 13/11/2009

Chief Minister Jon Stanhope wants Canberrans to help stop child drownings - a tragedy labelled by life saving experts as "Australia's hidden epidemic".

In his new role as a Keep Watch Ambassador with the Royal Life Saving Society Australia, Mr Stanhope is driving child swimming safety into the backyard, urging thousands of Canberran home owners to check the efficiency of their pool safety fence.

"Everyone with a backyard pool should get in and check their fence and the surrounding environment to make sure it is safe for children."

Mr Stanhope said the initiative from Royal Life Saving Society ACT to offer a free, home pool safety checklist should make it easier for pool owners to do a regular self-check.

"As any parent or grandparent will tell you, it is almost impossible to watch small children at every moment; so effective home pool fences are critical to make sure children don't enter the water unsupervised," Mr Stanhope said.

Mr Stanhope said since July 2002 there have been seven children under the age of five years drown in the ACT.

"This represents 58% of the total drowning deaths for this period. The most common location where children under the age of five drowned was backyard pools which accounted for 42%."

"And that is where you can take action to save a life."

Royal Life Saving ACT CEO, Sean Hodges, said: "An increasing number of children are drowning by getting through, under or over existing pool gates and fencing that their parents believed was secure or where the gate had been propped open.

"We are asking every pool owner to get out into their back yard and make sure it is safe and secure. Pool fencing legislation has now been in place for 10 to 15 years and many fences and gates have badly deteriorated.

"Recent local government surveys have shown that up to 85% of home pools do not comply with the safety standards. That's a frightening statistic.

"By using our practical, easy-to-read checklist home pool owners will be able to check, fix and maintain their home pool environment," Mr Hodges said.

The home pool safety checklist guides pool owners on the key risk areas that children could use to access the backyard pool and is available free of charge at <http://www.homepoolsafety.com.au/>

Section: Andrew Barr, MLA | Media Releases

Stronger pool fence law to help protect ACT kids

Released 26/12/2009

204/09

The ACT Government will introduce new laws for pool fences to help prevent Canberra kids from drowning in back yard swimming pools. Minister for Planning Andrew Barr said he will introduce the new law to the Legislative Assembly as soon as possible next year.

“There’s nothing more important than keeping kids safe. Unfortunately backyard pools pose a real threat, especially to little kids,” Mr Barr said. “The ACT currently has the lowest rate of drowning in the country. We want to keep it that way.

“More young kids drown in swimming pools than in rivers, creeks, bath tubs and dams combined. The ACT Government has been working with other States and Territories to improve pool fencing standards and we fully support changes to the National Building Code which will help keep kids safer. We will make it law that backyard pool owners in the ACT must comply with the new standards.”

Since 1970, all in-ground back yard pools in the ACT have had to have a barrier that prevents young children from gaining unsupervised access to the pool area. Currently, a house or other building can form part of this barrier, including an external door of a house. In 2010, the National Building Code of Australia will be updated so that direct access to a pool from the rear door or window of a house will no longer be sufficient.

From 1 May 2010, all new outdoor back yard pools will need to be surrounded by a pool fence or other appropriate barrier. This can still include a wall of a building as long as it has no doors, or windows that children can use to get into the pool area.

Home pools built indoors after 1 May 2010 will need to comply with a new standard that ensures the default for a door that is unlocked is outwards and away from the pool.

Mr Barr said that while ACT Labor’s strengthened measures will help prevent death or disability, parents and carers must remain vigilant and watch young children at all times when around water.

“While fencing is important, nothing beats keeping an eye on kids around water, making sure they know how to swim and be water safe,” he said. “It’s also important that people know what to do, in the event of a drowning.”

Through the Royal Life Saving Society the ACT Government delivers the *Keep Watch* program. The program highlights four simple strategies to help prevent children from drowning. These are:

- ensure children are supervised
- provide barriers to water locations
- familiarise children with water safety and
- learn resuscitation.