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## **No diving? The diving board is disappearing from backyard pools. A court case that has baffled the industry for years may provide answers**

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Picture a backyard swimming pool in 1974. Kids splash and play, fighting over multicolored rafts. Sunlight dapples the water. In the deep end, a diving board is being used by a slew of teenagers, and the rhythmic, springy sound of their feet bouncing on the fiberglass board blends in with the radio playing nearby.

Now picture the same pool 20 years later. Everything is identical except for one important detail: The diving board is gone. In its place, there might be a vanishing edge, a waterfeature or nothing--just the empty side of the pool.

According to some sources, sales of new diving boards in America appear to have dropped by approximately 25 percent in the past five years alone. The causes for this are complex and interrelated. However, one factor is holding center stage in the diving board controversy, much the way the middle of a bicycle wheel holds the spokes. His name is Shawn Meneely.

In 1993, Meneely, who was then 14, became paralyzed from the neck down after performing a "suicide dive" off a board into a neighbor's backyard pool. Remember suicide dives? They involved catapulting yourself headfirst off the board, with as much force as possible, and not raising your arms for protection.

After the accident, the Meneely family sued the pool builder, the diving-board manufacturer and the National Spa & Pool Institute, or NSPI, the trade association for the pool industry. Their victory in court, and the accompanying fallout, profoundly changed the way diving boards are viewed by both industry members and consumers. Some say the change is for the better. Others believe that diving boards have unjustly been made scapegoats.

### Heads up

Diving-board accidents first got the industry's attention in the early 1970s, when a Virginia jury held a pool builder liable for damages in a lawsuit involving a young teenager. The case, *Schutz v. Blue Dolphin*, also resulted in a \$1 million judgment against a diving-board manufacturer. A third defendant, NSPI, settled for \$450,000.

Leif Zars, chairman of the Standards and Codes Committee for NSPI's Technical Council in 1974, says the case received a lot of media coverage, and other attorneys were considering filing similar lawsuits. The sudden attention encouraged NSPI to look more closely at whether or not diving boards were safe to pair with typical backyard pools, he says.

NSPI hired Richard Stone, a researcher at Arthur D. Little Co., to examine the issue. Stone produced about a dozen studies for the industry. His first report identified certain types of people as more vulnerable to diving-board injuries. These "high-risk" divers were profiled as tall, athletic, relatively heavy, young males.

The first study gave us a lot of information: It told us where the accidents were happening and to whom, but it didn't solve any problems, Zars says. "We needed to know more."

The second report was published in 1980. In that document, Stone concluded that diving accidents were mainly caused by the behavior of individual divers who were unaware of the possible risks. He went on to recommend that the industry "teach and warn the public that diving without proper caution and training, whether it be in pools or in the natural environment, involves risk of injury to the cervical spine."

NSPI acted to correct the problem by implementing a nationwide "Steer Up" educational campaign on how to dive correctly. Steering up means the diver keeps his or her back arched, arms extended and head and hands up when entering the water. The industry still advocates

the "steer up" message as the primary deterrent against diving-board injuries.

But NSPI's solutions to Stone's concerns were a source of controversy. The whole idea of a Steer Up campaign begged the question of just how much risk is placed on the average swimmer by a diving board in a backyard pool. Critics of the backyard diving board said the steer up method asked too much of too many people.

Whereas divers at competition pools were supervised, backyard pools were unregulated and posed a higher threat, they argued.

"The problem with diving is that diving boards ... have been too accessible to people who have not given a lot of thought to the place they are diving into," says Art Mittelstaedt, chairman of the National Aquatic Council.

"When diving off the board, the body goes about 17 feet a second, give or take," he says. "That is a very quick period of time for a diver to realize the pool might not be adequate for his dive and to recover. So he is in the air, going through the water as he thinks about what he should have or shouldn't have done."

Still, NSPI's message was strong enough for quite awhile. The association was sued several times over the years for its technical support of the diving board industry, but always settled out of court for relatively low amounts. That is, until 1993, when the Meneely case came along.

In the lawsuit, Meneely's attorney, Fred Zeder, was able to convince a jury that the Steer Up educational campaign shouldn't limit NSPI's responsibility for accidents. He argued that the association knew that diving put specific people at higher risk when they received Stone's report in the early 1970s. But rather than release that information, Zeder says, NSPI gave the public a general, blanket warning so that it would limit its liability.

"What [NSPI] did is say that all diving is dangerous unless you steer up," Zeder states. He says that idea was faulty because "they were going to try and teach the entire world proper diving techniques."

Thus, in the end, the Steer Up campaign was used to make the industry look worse in court. Through his questioning and arguments, Zeder made it appear as if the defendant was hiding something--the Stone report.

### Setting the standard

Though the Steer Up campaign came back to hurt the industry's image, it was not the primary reason NSPI lost the Meneely lawsuit.

Many trade groups set voluntary safety standards for their members, and NSPI was no exception. NSPI published highly specific recommendations for the placement of diving boards. The standards covered depth, slope, the size of the diving envelope and myriad other variables. The builder who designed the pool of Meneely's neighbor was not an NSPI member and didn't construct it quite to the standards, but the jury still decided his measurements were close enough. They found the trade association liable for \$6.6 million.

Eventually, NSPI was forced to file Chapter 11 under the Bankruptcy Code. No sooner had that problem been fixed than, buoyed by Meneely, four more lawsuits involving diving-board accidents were filed against NSPI--forcing it to once again go into Chapter 11. Ever since, the industry has seen sales of residential diving boards steadily decline, despite a low number of such accidents.

And though NSPI refused in the beginning of the Meneely case to abandon its standards for diving boards, the association has since removed all recommendations for the product. That protects NSPI from future lawsuits, but doesn't help the image of the diving board or those pool builders who still install and believe in the product.

### Deep impact

NSPI's removal of standards affected many pool builders, but it probably didn't hurt diving-board sales much. However, other aspects of the case did.

In the end, Shawn Meneely won two victories: the first one in court, the second one in the press.

After winning \$6.6 million (more than \$8 million after interest) from NSPI, Meneely's attorneys publicized the dangers of backyard diving boards on numerous television programs, including two investigative pieces for CBS news. One of the evening broadcasts, "60 Minutes II" anchored by Dan Rather, was seen by at least 8 million households and featured two other diving-board accident victims along with Meneely. The show implied that NSPI standards were unsafe, and portrayed Meneely as the one who had finally caught them in wrongdoing.

Days after the "60 Minutes II" episode, NSPI informally surveyed consumers to gauge their reactions. The response was sobering. Viewers said they took away two messages: Diving off a diving board can be dangerous; diving is a risky activity. This stood in sharp contrast to Stone's pre-Meneely findings that most divers were largely unaware of the possibility for injury.

Diving-board manufacturers say their revenues have not been affected by the negative publicity, but other sources tell a different story.

Pre-Meneely, about 50 percent of all in-ground pools had diving boards. But over the past five years, the number of pools being built with diving boards has dropped to the point that presently, including the millions of existing pre-Meneely pools with diving boards, only 38 percent have diving boards, according to P.K. Data, a research firm based in Duluth, Ga.

An insurance headache

Injured teenagers appearing on national TV is bad for business. But there is another, even more powerful, reason that diving-board sales have fallen.

Today, pool builders who install diving boards are rare, says Greg Clauser, an insurance agent specializing in pool construction at Interwest Insurances Services in Sacramento, Calif. He works with more than 200 clients in the pool business, and says that the majority of builders discourage homeowners as much as possible from getting a diving board.

"From their point of view, it increases their liability," he says. "If somebody were ever to dive off that diving board and hurt themselves in any manner, they could always come back to the builder and point fingers."

Zars, the man who hired Stone in the 1970s, still stands behind Stone's findings and believes backyard pools can be used safely for diving. He also believes that diving envelopes should be enlarged if boards are going to be placed on pools.

The owner of Gary's Pools in San Antonio, practices what he preaches: When Zars puts the rare diving board on a backyard pool (the customer has to insist he or she wants one), he installs an extra-long, extra-deep hopper.

"It's like taking a curve on the highway and straightening it out a little so you don't have to steer so hard to get around it," Zars says. "You can't be positive that you'll prevent the errant diver from having difficulty, but you can give them a little bit more room for error."

However, even that extra precaution may not offer hope for the diving board. Many builders who believe in the product and want to install diving boards are finding that option has been effectively taken from them.

Bob Wason, president of Gym & Swim in Louisville, Ky., says his insurance company dropped him this summer because he installed diving boards.

"[They said] no diving boards of any kind, period," he states, adding that he has been in business for 39 years and has never faced a lawsuit from a diving-board accident. "We weren't encouraging boards before, but now we don't have any choice."

Twenty years ago, Wason was installing 75 to 100 boards annually. Last year, he only sold four. The small amount didn't matter to the insurance company, though.

"[The insurers'] concern is not only are you [installing boards] today, but have you done it in the past five years?" notes Clauser, the agent

broker.

Yet, compared with other causes of death and injury, diving boards are relatively insignificant when the numbers of accidents are examined. They don't even get their own statistical category within national safety organizations. It's only since the Meneely decision was first secured in 1999, that residential diving boards seem to have come under such scrutiny by insurers.

"Six, seven years ago, diving boards weren't really a huge underwriting, red-flag issue," Clauser confirms.

The numbers game

Thus, the fate of the diving board lies largely in the hands of insurance companies, and it doesn't seem fair to the industry. If insurance companies are raising premiums--or dropping builders who install diving boards--it would make sense that the number of diving-board accidents is on the rise. But that doesn't seem to be the case.

The U.S. Consumer Product Safety Commission, the only independent agency to track diving-board injury statistics, reported approximately 11,000 diving accidents in 2001, the most recent year for which statistics are available. However, the CPSC lumps "diving" and "diving-board" accidents together. This means the category includes accidents in lakes, pools and the ocean, as well as instances where someone dove from the side of a pool into shallow water.

The industry, for its part, relies mostly on statistics gathered in a 1983 report by Stone, the researcher recruited in the 1970s to look into diving safety issues. In one of his last reports, Stone said that 75 percent of divers' spinal cord injuries occur in oceans, lakes and rivers, not swimming pools. In addition, he said that of the accidents that do happen in pools, approximately 95 percent occur in the shallow end.

While those numbers may be more exact than the CPSC figures, they are also outdated.

Nevertheless, some insight into the insurance conundrum is possible. A 2003 study conducted by S.R. Smith, a manufacturer of residential diving boards and pool deck accessories based in Canby, Ore., estimates that about 169 spinal cord injuries result annually from people diving into pools.

Only 10.2 percent of those, or about 17 spinal cord injuries per year, occur from someone diving off diving boards, the study states. That number is extremely low when compared with the millions of times per year that people in the United States dive off diving boards.

In trying to assess how many diving-board accidents attract the attention of the insurance companies, Greg Munro, a law professor at the University of Montana and author of a soon-to-be published study called *The Case of the Disappearing Diving Boards: The Role of Insurance in Prohibiting Risk in Our Society*, has researched the number of diving-board accidents hitting the courts.

Going back 50 years, Munro found only 52 appellate cases involving residential and commercial pools. Not all, however, involved victims with Meneely-type injuries. In fact, many accidents were caused by people falling from ladders or jumping off the board and landing on other divers.

"The cases have come up at about the rate of one a year," Munro says. "If there were an onslaught of litigation going on about diving boards, you'd expect to see more than one per year reaching the appellate court level out of all the 50 states."

Today, only the insurance companies know how many diving-board accidents occur in pools each year. And they're not talking.

But while they won't reveal hard numbers, several large insurance companies whose representatives spoke with Pool & Spa News on condition of anonymity, say that diving-board accidents are likely few and far between, as S.R. Smith's study suggests. But diving boards still are perceived as high-risk products.

"There's not going to be a frequency of [accidents]--that's probably an accurate statement," says a representative of one insurance company working in the pool industry. But, she explained, victims of diving-board accidents typically are young and their injuries catastrophic,

meaning expensive medical treatments will be necessary the rest of their lives.

Just one diving-board accident can cost an insurance company millions of dollars--and therefore make the possibility of another accident too risky for comfort.

Picture a backyard pool in 2024. Kids are doing handstands and somersaults into the shimmering, blue water. Is there a diving board nearby? This is where the image becomes too hazy to see for sure.

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