

How much risk are you willing to tolerate?

Affiliates need to be aware of liabilities associated with running courses



Suzanne Gaida, Aquatic Facility Manager of Cochrane's Big Hill Leisure Pool, trains to become a Lifesaving AED Instructor at the Second Annual Lifesaving Society Leadership Institute in Calgary on June 15, 2006. Leadership Volunteers and Affiliate Members need to be aware of their respective responsibilities when they conduct a course.

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The purpose of the following article is to report on a recent discussion of the Board of Directors ("Board") of the Lifesaving Society Alberta and Northwest Territories ("Lifesaving Society"). The issues raised in this article should be considered for information purposes only, are meant strictly to serve as questions that affiliates of the Lifesaving Society should consider when assessing their total risk management strategy, and in no way should be considered to be legal advice.

CONDUCTING A LIFESAVING SOCIETY LEADERSHIP COURSE

Each course endorsed by the Lifesaving Society must be provided through affiliation with the Lifesaving Society. The affiliation may belong to the host facility, instructor, or examiner. While often it is the host facility which maintains the affiliation, there may be a separation of this function, for example where a private individual holds a teaching affiliation and offers private courses at a hotel or backyard pool, conducts recertification exams, teaches or examines first aid courses or runs AED clinics that are not tied to any particular aquatic facility. In each of these scenarios, where the affiliate is separate from the host facility, there is potential legal exposure to the affiliate where a lawsuit is filed against an affiliate independently from a host facility, instructor, or examiner. A prudent affiliate may choose to carry insurance adequate to reimburse an injured claimant for any claims that may be filed against the affiliate or those working or volunteering under the umbrella of the affiliate. While there do not appear to be any reported cases in Alberta nor the Northwest Territories outlining how a Court would apportion responsibility against any of a facility, instructor, examiner, or affiliate if negligence were proven, each player in the equation should examine and manage the risks.

In a typical employment relationship, an instructor provides in a commercial context, and the instructor would ordinarily be covered by the employer's commercial general liability insurance policy for acts or omissions occurring during the course of employment. However, this is less clear in the context of a private swimming instructor conducting a "private swimming lesson" at

a facility outside of the programmed swimming lesson time, or in the context of a swimming instructor voluntarily offering “tips” to close friends or relatives in a non-commercial context. When a private affiliate is acting outside of an employment relationship, the individual affiliate must be prepared to manage the risks of any potential legal suits.

FACTORS TO CONSIDER IN ESTABLISHING DEGREES OF RESPONSIBILITY

There are several elements a Court would examine in apportioning relative degrees of responsibility of a host aquatic facility, examiner, private instructor or affiliate, as to who ultimately would bear the consequences of an act of negligence. Some of the questions to be examined include the issue of whether private instructors or affiliates pay a licence fee or a commission back to a host organization for the exclusivity of being a private instructor or an affiliate. For example, affiliates of the Lifesaving Society are required to pay an annual fee to the Lifesaving Society for the privilege of being able to submit test sheets to certify the candidates they instruct or examine. A Court would also examine the qualifications, certifications and competencies of an individual instructor or affiliate. The onus is on the affiliate to ensure that the examiners/instructors who certify candidates maintain current awards recognized by the Lifesaving Society. Another factor to consider is the standard operating practice of the host facility; specifically whether or not the private instructor or affiliate is allowed access to the facility free of charge, and whether they receive exclusive use of the space in the facility during the time that they are conducting the private program. A Court would consider whether the individual affiliate is entitled to use any of the facility equipment, or whether the affiliate is required to acquire its own equipment for use while conducting a course at a public aquatic facility. The degree of responsibility of the private instructor/examiner or affiliate is also relevant, specifically whether he or she is provided with any supervision by a lifeguard during the time that the instructor affiliate is performing his or her duties. Lastly, one of the most important issues to consider would be whether or not an aquatic facility has a written contract with the private instructor/examiner or affiliate, which allocates the risk of any loss between the parties. If an affiliate or a private instructor/examiner were to sign a binding contract with a host facility stating that throughout the duration of a course conducted at the host facility, the affiliate or instructor/examiner could benefit from the commercial general insurance policy of the host facility, there would be little need for the affiliate or instructor/examiner to maintain its own insurance policy. However, in the absence

of such a clear-cut contract, affiliates and instructors/examiners need to carefully consider other methods of minimizing the risk of a negligence claim brought against them. One tool to mitigate this risk is to maintain and procure an adequate insurance policy on the affiliation.

RISK MANAGEMENT STRATEGIES

One potential risk could arise in a situation where there was an incident during the conduct of a course scheduled by an affiliate at a host facility. Does the affiliate hosting the course have any liability to the victim for any loss? Certainly in the absence of any written contract between a host-facility and host-affiliate (assuming that they are not the same entity), it would be for the victim of any loss to prove negligence on the part of the affiliate or the host facility, and damages would be awarded accordingly. In the absence of a judicial precedent outlining how a Court may allocate risks, the risk management policies of the affiliates, instructors and examiners must be carefully reviewed.

In the absence of any clear-cut answers to the questions outlined above, the issue of whether a private affiliate should maintain its own insurance prior to engaging employees or volunteers to run courses or examinations at public or private aquatic facilities remains largely unresolved. However, in order to mitigate its risks, an affiliate should consider as part of its business strategy, whether to allocate funds to maintaining commercial general liability insurance on the affiliation. While the Lifesaving Society is not in a position to be able to advise its affiliates one way or another, the Lifesaving Society does encourage its affiliates to properly examine and implement a risk management strategy appropriate for the risk tolerance level of the affiliate.

As each individual case varies, this article should not be construed to be legal advice, nor should the facts of any scenarios discussed in this article be considered to be applicable to any particular affiliate. If any affiliate has any questions with respect to their risk management strategy, they are encouraged to consult their legal counsel. The purpose of the above is to furnish lifeguards, instructors, affiliates and pool operators with some general information which might bear some relevance to an aquatic programming facility. This is not to be construed to be legal advice or opinion, but rather to report on the recent discussion at the Board level.