


LEGALLY SPEAKING



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WHAT POOL OPERATORS SHOULD CONSIDER WHEN HIRING STAFF

Hiring decisions are complex; there are many factors to consider when deciding to hire a complement of staff for a busy facility, such as training, credentials, availability for scheduling, the candidate's personality, the ability to work with your team, and overall skill and knowledge. While the hiring challenges listed above are ubiquitous among all industries, for a pool operator, arguably the overall competence of his or her lifeguards is the single most important consideration. A pool operator must consider the need to be positioned as best as possible in the worst case scenario it may face: a drowning at its facility.

In the unfortunate event of a public drowning, the likeliest cause of action involving a pool operator would be negligence; essentially, the drowning would not have occurred but for the negligence of the lifeguards and therefore the pool operator. It is not hard to imagine the argument would be that the negligence of the pool operator goes to the competence and/or training of its staff. In order to succeed in proving the alleged negligence of a pool operator vis a vis a drowning victim, there are five elements which the plaintiff must prove: (1) the pool operator owed a duty of care to the injured victim; (2) the Canadian standard of care of a pool operator in like circumstances; (3) the pool operator breached the standard of care applicable in the circumstances; (4) the breach of the standard of care directly resulted in a cause and effect relationship in damages to the victim; and (5) the pecuniary and non-pecuniary damages suffered. In a drowning situation, the first element is a given: in Alberta, the Occupiers Liability Act (Alberta) sets forth the legislated duty of care: all pool operators in Alberta owe a duty of care to patrons who frequent the facility.

In the event of a negligence action involving drowning, the second, third and fourth elements would be the source of argument. The standard of care that a lifeguard and/or pool

operator owes to the public is the standard of "reasonableness". While in Alberta there is no codified definition of the proper interpretation of reasonableness, the common law holds that the standard of reasonableness to which a lifeguard and/or pool operator will be judged is measured against other lifeguards and/or pool operators in similar circumstances. In order to be sure that pool operators are acting reasonably when hiring their lifeguards, there are several considerations that should be followed.

First, pool operators should abide by rigorous hiring policies that are in line with industry standards and best practices within the aquatic industry. The Lifesaving Society is the recognized expert with respect to lifeguards, and is the standard setting agency for lifeguards in Canada. The Lifesaving Society's mission and sole business is the prevention of drowning and water-related injury, and it has been serving Canadians since 1896. The National Lifeguard Service award ("NLS") is the legal standard of care recognized by courts in Canada.

From a historical point of view, the NLS award was originally established in Canada by employers in 1964. Following its establishment, many agencies voluntarily retired their existing lifeguarding programs, such as the Lifesaving Society's "Lifeguard Cadet"; the YMCA's "Senior Lifesaver"; and Red Cross' "Leader Patrol", in favour of a single lifeguard standard embodied in the NLS award. The NLS award is the industry-accepted standard and the national standard endorsed by the Canadian Parks and Recreation Association. The award is endorsed and supported by the NLS Advisory Committee, which is comprised of lifeguard employers, facility operators and national agencies; as well as Canadian Parks and Recreation Association, Physical and Health Education Canada, YMCA and the Canadian Armed Forces. The statistics support that the public has been well-served by the adoption of the NLS award in Canada. Public pool drownings in Canada have been virtually eliminated since the adoption of the NLS award as the single lifeguard standard in the mid 1980s. In Ontario, of the 1500 drownings in the past 10 years, only 4 (0.3 per cent) occurred in public swimming pools. In Alberta, the statistics are similar: only 0.09 per cent of the drownings in this province have occurred in public swimming pools.

Today, NLS is recognized as more than a "license" to lifeguard, it is a complete system with a variety of supports at all levels: the NLS award is supported by the Lifesaving Society's national and global network of equipment, drowning and water-related injury research, technical and medical expertise of the International Life Saving Federation and the Commonwealth Royal Life Saving Society. The NLS system is supported by the Lifesaving Society's liability insurance, comprehensive certification database available online to employers and public health inspectors, post-incident counseling, safety standards, and a complete suite of aquatic safety management services including aquatic safety inspections, audits, training and consulting. The rigour and strength of the award is founded on the comprehensive training protocol and depth of knowledge imparted to the candidates who complete the certification. NLS

candidates complete the course once they demonstrate, in addition to the technical first aid and water rescue skills, the ability to make reasoned decisions in a wide and varying range of circumstances appropriate to the specific facility.

Given that in Alberta there is no legislated statement of a minimum competency requirement, when considering the appropriate level of training for its lifeguards, there are several considerations that pool operators should bear in mind, including the following:

1. Minimum age for assumption of lifeguarding responsibilities: Just as pool operators have to set standards and policies for minimum age requirements for children swimming at their facility unsupervised, and the policies are based on children's developmental milestones, judgment, maturity, decision-making ability and physical swimming ability, so too must pool operators consider the minimum age of its lifeguard staff, and set policies designed to ensure that the lifeguards have the judgment, decision-making ability, maturity, leadership and responsiveness necessary to assume the responsibilities of supervising aquatic patrons, appropriately utilizing preventative lifeguarding techniques and rescue responses in all circumstances. The NLS award has a prerequisite age of 16 years of age, designed to ensure that candidates have the ability to develop the judgment throughout the course of completing the award that will allow them to make informed decisions in aquatic environments;

2. Design of lifeguard training program to emphasize situational approach: The essential element of a lifeguard's training in a real emergency is the ability to exercise sound judgment quickly and efficiently. However, of all the skills required to become a competent lifeguard, judgment is the most difficult skill to acquire, and takes the longest time to hone. Thus, a certification program that emphasizes a situational approach and fosters the ability of the lifeguard to think independently, creatively and react based on time-sensitive information is critical to the development of the essential skill of judgment. A course that is designed with enough

time to allow candidates to practice mock emergencies and incidents allows adequate time to develop this skill. A pool operator should thus consider training protocols that devote significant time to exploring the situational realities of lifeguarding and the ability to learn from a group's collective expertise. A pool operator may wish to consider that the underlying certification program it requires of its lifeguards aims at developing the ability to decide, as judgment is singularly the most essential requirement in a real emergency;

3. Emphasis on priorities: The emphasis on preventative lifeguarding first, and rescue response second, in order of priority, is essential to ensuring that injuries and incidents are minimized wherever possible; and

4. The depth of knowledge that candidates receive through the training program: The length of the course is directly proportional to the level of detail that the candidates learn about the specialized techniques, equipment, skills and knowledge that allow lifeguards to be flexible and responsive in their approach on the pool deck.

In those provinces where there is no codified statement of minimum training requirements in order to be recognized as a competent lifeguard, the onus is on pool operators to ensure that they have met due diligence to ensure that they are in the best possible position to defend a potential negligence action based upon whether their staff are competently trained. It is clear that the standard of care to which pool operators and lifeguards will be held in Canadian courts is the standard of reasonableness; what would be expected of a reasonable lifeguard in similar circumstances. The Lifesaving Society supports a single lifeguard standard in Canada, backed by the research, statistics and training of nationally and internationally organizations solely dedicated to drowning prevention. That standard is the one recognized in a court of law: NLS.

Editor's Note: The purpose of the article below is to furnish lifeguards, instructors and pool operators with some general information on the law which might bear some relevance to aquatics programming and facilities. This is not to be construed as legal advice or opinion, but rather to show trends and principles of the law as they might affect aquatic personnel, through the use of recent cases decided throughout Canada.