

LEGALLY SPEAKING

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Where's the danger?

Communication of hazards is paramount

Disclaimer: The following cases discuss the reasonable standard of care owed by pool operators to their patrons in British Columbia. Comments are also relevant in the other provinces in Canada including Alberta. The purpose of this commentary is to furnish lifeguards, instructors, affiliates, and pool operators with some general information which might bear some relevance to an aquatics programming facility. This is not to be construed as legal advice or opinion.

Dominelli v. Saanich (District) 2005 BCSC 1455, affirmed by 2007 BCCA 38

Commonwealth Place is a recreational complex that includes a teaching pool, dive tank, and competition pool. The teaching pool and dive tank are 25m long, separated by a movable fiberglass bulkhead that is rarely moved. The competition pool is 51m long. It has a 1m bulkhead that can be placed at the end of the pool to make a 50m pool or placed in the middle to create two 25m pools. Lines on the floor of the competition pool start 2m from either edge and run unbroken to within 2m of the other end, with a "T" cross marking the end of the line, as required by the rules of the *Federation Internationale de Natation Amateur* (FINA), the governing body for international aquatic events. The markings *provide the swimmer adequate time to adjust before encountering the wall*. However, due to the fact of the movable bulkhead, at the 25m mark, there was a 1m cross line, but no 2m "break" in the line before the bulkhead when in the 25m position.

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March 25, 2000. Commonwealth Place. The competition pool was set up in 25m format. Ms. Dominelli had recently completed a 25m underwater swim for the first time in the teaching pool and dive tank. With no further investigation, Ms. Dominelli entered the competition pool and attempted the 25m underwater swim. Upon seeing the "cross" on the floor, she attempted to surface, and, in so doing, injured herself on the side of the bulkhead. *It is argued that the design of the bulkhead, the placement of the bulkhead, and the lack of signage pointing out this danger contributed to the incident.*

* * * * *

The judge reviewed the rules of FINA. Due to the configuration of the bulkhead, the required lane markings were not present in the competition pool when it was set up in 25m format. It was a hazardous situation; collision with the wall was a *foreseeable risk*. This danger could have been avoided at minimal cost by the mere placement of a caution sign, advising of the risk. Moreover, prior to this incident, there were at least two other injuries caused by collisions with the bulkhead. Therefore, the District of Saanich *did not take reasonable care to see that Ms. Dominelli would be reasonably safe in using the competition pool*.

However, the judge stated that a contributing factor in this case was the negligence of Ms. Dominelli. She entered a pool that was unfamiliar to her, that was deeper than the others, and most importantly, whose characteristics of the bulkhead were visible from the deck. Despite all of this, she made no attempt to inspect the characteristics of the pool before swimming. In this respect, *she failed to take reasonable care for her own safety in circumstances where she ought to have foreseen danger to herself*. As such, the judge found each party 50% responsible. Nevertheless, it highlights the duty of the occupier to take reasonable steps to prevent injuries.

THE LAW: OCCUPIERS' LIABILITY ACT §3, R.S.B.C. 1996, c. 3379

Each Province in Canada has legislation prescribing the duty owed by occupiers of a premise to visiting patrons. In British Columbia, the *Occupiers' Liability Act* says that *an occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person ... on the premises ... will be reasonably safe in using the premises*. The person who possesses or has control of a building has the legal duty to make that building reasonably safe.

The Act also states that this duty applies to the condition of the premises, but that *there is no duty of care owed in respect of risks willingly assumed by individuals*. Similar legislation exists across Canada, including in Alberta.

Campbell v. Vancouver (City) 2001 BCSC 350

The Lord Byng Pool had markings on the bottom of the pool ending about 6 feet from the wall in a cross line. The pool had a removable ladder that was placed in an edge lane approximately half of the time. This was the slow lane; it was often used for weaker swimmers and patrons with special needs. When placed into the water, the ladder protruded about 6 feet into the pool.

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October 28, 1994. Lord Byng Pool. Mr. Campbell was swimming lengths on his stomach in the slow lane as he had routinely done in the past. When Mr. Campbell was nearly done his customary 20 laps, the lifeguard inserted the ladder in the lane. On his 19th lap, he struck his head on the aluminum ladder.

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The judge found that the lifeguard intended and actually attempted to bring to Mr. Campbell's attention the fact that he was putting in the ladder. The judge also acknowledged that Mr. Campbell was aware that the ladder had been in that position on previous occasions. However, on this specific occasion, the lifeguard did not successfully bring to Mr. Campbell's attention that the stairs were going in; he *incorrectly assumed that Mr. Campbell was aware*. By placing the stairs in the pool, the lifeguard changed the environment, creating a risk to swimmers who were not aware of the stairs' presence in the pool.

Therefore, *by failing to take reasonable steps to warn the swimmer that he was changing the environment, the defendant City of Vancouver was negligent and failed to keep and maintain the premises in a reasonably safe condition.*

Commentary

There are some important similarities and differences to note in these two cases. In Dominelli, a hazard was present and visible before the swimmer entered the pool. The level of risk created by the hazard did not vary. Ms. Dominelli could have easily discovered the hazard by a quick inspection before entering the pool she had never swam in before. In Campbell, the hazard was placed in the water while Mr. Campbell was swimming. He did not know that the hazard was present, as he had not previously encountered it on his first 18 laps. He was, however, aware of the hazard from previous occasions.

While it is impossible to prevent every accident, lifeguards, instructors, and pool operators must take reasonable steps to ensure that patrons visiting the facility are safe. In both of these cases, *reasonable steps were not taken*.

In each instance, it was not necessary to completely eliminate the actual hazard. The bulkhead and the ladder could each be used safely. However, by not informing the swimmers of these hazards - by appropriate signage in the one instance and by ensuring the individual actually was aware of a new hazard in the other - each facility was negligent in its duties. Some hazards may (and will) be present on the premises or be inherent in its design. *The duty of the occupier of the premises is to ensure that all reasonable steps have been taken to ensure that the hazards are brought to the attention of the patrons*. While it is not expected that pool operations will eliminate all hazards, steps must be taken to reduce the risk of injury. The most important one being to communicate to patrons the existence of the hazard.

WHERE'S THE DANGER? Communication of hazards is paramount (Page 2 of 2)



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