



Heather Barnhouse BSc, LLB, MBA
Fraser Milner Casgrain

Lifesaving Society Legal Advisor

Heather is a member of FMC's Corporate Commercial group. Heather helps clients organize their business as well as draft and negotiate contracts pertaining to their area of business. She also advises clients with respect to completing transactions involving their business.

Heather also has experience advising on regulations as well as drafting, reviewing, and negotiating clinical trial agreements and ancillary documents related to clinical research for one of Canada's largest research-intensive universities.

Heather is a member of the Intellectual Property Subsection of the CBA.



FRASER MILNER CASGRAIN LLP

Kids will be Kids; is that bruise just a bruise?

The Role of Pool Operators in reporting incidents of suspected abuse of children & you.

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 aquatic programming facility. This is not to be construed as legal advice or opinion.

Pool owners, operators and staff, as occupiers of premises have a duty to keep patrons visiting their facilities reasonably free from harm, to the extent reasonably possible. This duty is codified provincially in the Occupier's Liability Act, which requires that occupiers take reasonable steps to prevent foreseeable harm in and around aquatic facilities. However, a duty also exists to prevent harm to children and youth in an arena that extends beyond the water.

One of the areas in which it is very difficult to protect children against harm is the area in which the public and government have the least control. It is difficult to prevent a child from being harmed in his or her own home, or by a family member, as the home and family is a place of privacy. However, the government has imposed a duty to report incidents of abuse against children. The issue becomes particularly relevant in an aquatic environment, where bathing attire provides a view of a child that may otherwise be covered by clothing.

The Law

In Alberta the Child, Youth and Family Enhancement Act (the "Act"), is concerned with the promotion and protection of the best interests and well-being of children. In the Northwest Territories, equivalent legislation exists under the Child and Family Services Act.

Section 4(1) of the Alberta Act sets forth the following duty on the public: "Any person who has reasonable and probable grounds to believe that a child is in need of intervention shall forthwith report the matter . . ." In the Act a "child" is defined as a minor, someone under the age of 18. To ensure the public treat this responsibility seriously, there are sanctions

in the Act which impose penalties for failure to report, ranging from monetary fines to imprisonment.

However, the Act recognizes the sensitivity in reporting these matters, and therefore offers protection to people who do report, holding people immune from lawsuits for reporting, unless the "reporting is done maliciously or without reasonable and probable grounds for the belief". Therefore, if it is determined that a report was made with no reasonable or probable grounds, the reporter may be liable for the harm caused by his or her actions.

The question remains under what circumstances a report should be made. There are two principles that need to be addressed in answering this question: 1) When is a "child in need of intervention?", 2) What are "reasonable and probable grounds?" Each will be addressed below.

When is a "Child In Need Of Intervention"?

A child is in need of intervention if there are reasonable and probable grounds to believe that the survival, security or development of the child is endangered because the child: (a) has been abandoned or lost; (b) has no living guardian; (c) is neglected by his or her guardian; (d) has been or there is substantial risk that the child will be physically injured or sexually abused by the guardian; or (e) has been emotionally injured or subjected to cruel and unusual punishment by the guardian. The child is also in need of intervention if the guardian of the child is unable or unwilling to protect the child from emotional injury, physical injury, sexual abuse, or cruel and unusual punishment.

The Act defines when a child is "neglected" or "emotionally injured". Summarized briefly, a child is "neglected" if the guardian is unable or unwilling (a) to obtain medical treatment for the child; (b) to provide the child with

adequate care or supervision; or (c) to provide the necessities of life such as food, water, shelter, etc. A child is “emotionally injured” if, among other things, there is an impairment to the child’s mental or emotional functioning or development as a result of rejection, exposure to domestic violence or severe domestic disharmony, inappropriate criticism, threats, humiliation, accusations, chronic drug or alcohol abuse by the guardian or someone in the same residence.

What are “Reasonable and Probable Grounds”?

As a lifeguard, is it reasonable to suspect that a girl or boy is emotionally injured if a parent yells at her or him constantly? Do instructors have a duty to report every time children in their classes have a bruise? Is that reasonable?

Unfortunately, the Act does not provide much assistance in determining what are “reasonable and probable grounds”. While there is no case law specifically relating to an aquatic environment, case law however does make it clear that “reasonable and probable grounds” go far beyond a mere suspicion. In *Bella v. Young*, 2006 SCC 3, a university student submitted a case study of women sexually abusing children. The professor speculated that the study might really have been a personal confession of the student, and, without any further inquiry or reason, made a report to Child Protection Services. The Supreme Court of Canada determined that the professor acted on conjecture and speculation, which fell short of being reasonable. The Supreme Court reported that “while legislative and judicial policy mandates the quick reporting of information of suspected child abuse, it does not do so to the exclusion of the consideration of the legitimate interests of the person named in the report”. Consequently, this professor was held liable for the damage caused to the student’s reputation.

In another case, Ontario (Police Complaints Commissioner) v. Dunlop (1995), 26 O.R. (3d) 582, an investigation took place inquiring into an alleged sexual assault by a religious leader. While the case settled out of court, a police officer who was not involved in the investigation was still concerned for the safety of other children, so he reported the religious leader pursuant to

the child protection legislation in Ontario. The Court stated that he did have an obligation to make such a report, as he had reasonable and probable grounds to believe a child may have suffered sexual abuse.

It should be added that sometimes, such as in the case of the police officer discussed above, reasonable grounds will arise out of confidential information. The Act acknowledges this sensitivity, by stating that an individual still has a duty to report, “notwithstanding that the information on which the belief is founded is confidential and its disclosure is prohibited under any other Act”. Therefore, if someone makes a report based on information that is otherwise confidential, as long as the grounds are reasonable and probable, the individual will not be held liable for breach of confidential information.

Commentary

This legislative duty is imposed upon all members of the public, not just those in aquatic facilities. However, as members of the aquatic community, pool operators, instructors and lifeguards are often in a position where they are closely watching children as they interact with their parents and guardians. They watch how parents treat their kids, listen to how they speak with them, and hear the children discuss their home lives with their peers. They see children close up, and by virtue of typical swimming

attire can observe indicia of physical injuries that most others cannot. These factors enable those in the aquatic industry to witness things that will give them reasonable and probable grounds to believe that a child is in need of intervention. However, this position should not be abused, and instructors and lifeguards must recognize that most often children acquire bruises and scrapes in the ordinary course of their daily lives, by virtue of being children and therefore having poorer coordination than adults. Therefore, only where these indicia are out of proportion to a child’s age and developmental stage, or where there are other reasonable and probable grounds should pool operators, instructors or lifeguards act. As with all things in an aquatic environment, instructors and lifeguards should use their best judgment, to determine what are reasonable and probable grounds. Discuss discretely with other staff members with respect to specific concerns. In the event that it is still unclear, legal counsel should be consulted.

For more information on reporting a belief that a child is in need of intervention, in Alberta contact the Child and Family Services Authorities at <http://www.child.gov.ab.ca>, and in the Northwest Territories contact the Department of Health and Social Services at <http://www.hlthss.gov.nt.ca/>.

Lifesaving Society Influences School Safety Guidelines
Another partnership success story

Congratulations to The Alberta Centre for Injury Control & Research (ACICR) who has recently published their revised Safety Guidelines for Physical Activity in Alberta Schools. Throughout the revision process, the Lifesaving Society is proud to have provided input with our standard setting expertise. These safety guidelines provide teachers and school boards with safe practices related to physical education, the daily physical activity initiative, intramural activities and recess or lunch breaks. The goal of these safety guidelines is to influence choices made by teaching staff and influence the policies made by school authorities in order to minimize the inherent risk associated with the physical activity.

website search-word: SCHOOL SAFETY GUIDELINES
Take a look at the Society’s recommendations and find a link to these guidelines.

