

**CAUTION: THIS POOL IS UNSUPERVISED!**

**Resort Liability of Unsupervised Facilities**

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**I. INTRODUCTION**

Swimming pools and gym facilities are a very attractive feature of recreational resorts and hotels. The ‘resort gym’ may be appealing to those seeking to maintain a fitness regimen while travelling and vacationing, particularly to those patrons who might be drawn to recreational resorts and are keen on maintaining an active lifestyle. In the context of ski resorts, specifically, a quick dip in the pool or a lengthy soak in a warm spa are often welcome après-ski. However, the unique nature of recreational resorts raises a number of inherent liability risks for recreational resort owners.

Most often, a resort’s recreational facilities are unsupervised and patrons are left to use gym equipment, pools and spas, at their own discretion and risk. Certainly one can imagine the injuries and claims that might result, and indeed, have resulted, from this lack of supervision. The inherent risks of swimming activities, in particular, cannot be underestimated. In Canada, there are thousands of pool-related injuries each year. Children are particularly at risk for injury as drowning is among the top five leading causes of death for children aged 5 to 14 in high-income countries.<sup>1</sup>

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<sup>1</sup>Alexandra Sifferlin, “Children Under Age 4 Are at Highest Risk for Drowning”, 17 May 2012, available at: <<http://healthland.time.com/2012/05/17/children-under-age-4-are-at-highest-risk-for-drowning/#ixzz2LRvbBAoR>>.

This paper will provide a comprehensive overview of the liability risks attached to unsupervised resort facilities including pools, spas and gyms, focusing on both Canadian and American jurisprudence. The paper examines the duty and standard of care owed by a recreational resort occupier, as set out the *Occupier's Liability Act*, as well as the Ontario standards regarding pool safety. The applicability of summary judgment motions in instances where safety regulations have been complied with is explored, as well as other applicable defences available to resort occupiers. Finally, a number of risk management strategies are discussed in order to provide protection for resort owners against potential claims arising from the risks inherent in unsupervised resort facilities.

## II. The Duty of Care owed by Resorts

The *Occupier's Liability Act*<sup>2</sup> establishes the standard of care applicable to occupiers in section 3(1) of the *Act*:

### **Occupier's duty**

3. (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case *is reasonable* to see that persons entering on the premises, and the property brought on the premises by those persons *are reasonably safe while on the premises*.

In the context of recreational resorts and hotels, resort owners are considered 'occupiers' who owe a duty to resort patrons. Section 3 of the *Act* lays out the duty of an occupier to take reasonable care in all circumstances to ensure that visitors will be reasonably safe while on the premises. This duty extends not only to the condition of the premises but also to activities that patrons will participate in while on the premises.<sup>3</sup>

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<sup>2</sup> *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 [the "Act"].

<sup>3</sup> The Law of Torts in Canada, G.H.L. Fridman: 2010 Thomson Reuters Canada Limited.

When a claim arises from a patron's injury or death at an unsupervised resort facility, the key to assessing liability is this: "Did the resort act reasonably?" Section 3(1) of the *Act* requires an occupier to observe a standard of care that is reasonable having regard to the circumstances. Liability will be determined based on what dangers the occupier ought to have foreseen as being likely to occur. The standard of care is one of reasonableness, rather than what is required to make the premises perfectly safe. In determining whether or not an occupier has observed the duty of care imposed by the *Act*, the onus of proof is on the plaintiff to prove the occupier's negligence under the *Act*.<sup>4</sup>

### **III. Unsupervised Pool Areas**

There are a myriad of different incidents that could occur in unsupervised areas of resorts that may give rise to claims against occupiers. The presence of young children can also present unique difficulties for occupiers. Children are unlikely to read and pay attention to signage or waivers and occupiers must take this into consideration when considering what precautions to take. A further consideration in the hotel and resort pool context, is guests' consumption of alcohol. Occupiers should be aware of the additional risks and injuries which can occur if a guest is over served and subsequently injures him or herself. Recently, there have been several highly-publicized accidents in resort and hotel pools.

In New Jersey, a near-drowning occurred in 2009 when a man jumped in the unsupervised hotel pool at a Ramada Inn to save his daughter who was floundering in the deep end. The father could not swim and by the time hotel staff got both him and his daughter out of the pool, he had suffered serious brain damage. His family brought a claim against the hotel,

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<sup>4</sup> *Ibid.* at page 562-564.

stating that the pool lacked necessary safeguards such as visual cues indicating the water's depth and a separation between the shallow and deep ends. In late December 2012, the jury determined at trial, that the hotel was not responsible for the incident, that the pool complied with state laws for pool safety, and that the father and daughter did not satisfy their own duty to act with reasonable care and make reasonable observations.<sup>5</sup> This ruling suggests that if pool safety guidelines are met, the resort (or hotel in this case) is deemed to have acted with reasonable care to the patrons on the property.

In the case of *Hamm Estate v. Wellington Hotels Ltd.*, John Hamm, a 34-year-old father of three drowned in the pool at the International Hotel in Winnipeg. A sign was posted at the pool indicating that no lifeguard was on duty; nevertheless, a trained lifeguard employed by the hotel pulled Hamm out of the water. The lifeguard was not employed as a lifeguard, but rather a general pool maintenance worker. The lifeguard had a variety of responsibilities in and around the pool area and “was not purporting to give full and constant attention to what was happening in the water”.<sup>6</sup> In any event, the judge found that the hotel was not legally obligated to have a lifeguard at the pool and further, the hotel had not led Hamm to believe his activities were monitored by a lifeguard. The plaintiffs also argued that the pool was unsafe due to a lack of visible markers to indicate a difference in depth and due to the murky condition of the water.

Although the judge did find the pool's water quality was in breach of a Manitoba regulation, he ultimately did not find the hotel negligent in Hamm's death because the pool's murkiness *could not be causally linked to the drowning*. This case serves as a reminder that,

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<sup>5</sup> Michael Copley, “Jury: Rochelle Park hotel not responsible in near-drowning in pool”, 20 December 2012, available at: < [http://www.northjersey.com/news/Jury\\_absolves\\_Rochelle\\_Park\\_hotel\\_of\\_responsibility\\_in\\_near-drowning\\_in\\_pool.html](http://www.northjersey.com/news/Jury_absolves_Rochelle_Park_hotel_of_responsibility_in_near-drowning_in_pool.html)>.

<sup>6</sup> *Hamm Estate v. Wellington Hotels Ltd.*, [1990] M.J. No. 247, 65 Man.R. (2d) 133.

even if all provincial safety standards are not met, a plaintiff will not be able to recover damages unless that breach of standards causes the plaintiff's damages.

Under Ontario law, resort operators are subject to certain safety standards that they must comply with to facilitate pool safety. The facility must ensure that a telephone for emergency use is accessible no more than thirty metres from any pool and that there are written emergency and operational procedures and instructions at the pool to be implemented in the event of an emergency.<sup>7</sup> Further, the hotel must post signs on the pool deck that "set out the water depths indicating the deep points, the breaks between gentle and steep bottom slopes and the shallow points and the words DEEP AREA and SHALLOW AREA at appropriate locations".<sup>8</sup> Where the pool has a maximum depth of less than 2.5 metres, there must be a sign that reads "CAUTION — AVOID DEEP DIVES or the words SHALLOW WATER — NO DIVING".<sup>9</sup> However, resort operators do not have an obligation to staff lifeguards at hotel pools as long as "the following notice that is printed in letters at least twenty-five millimeters high is displayed in a conspicuous location within the pool enclosure: CAUTION: THIS POOL IS UNSUPERVISED. BATHERS UNDER TWELVE YEARS OF AGE ARE NOT ALLOWED WITHIN THE POOL ENCLOSURE UNLESS ACCOMPANIED BY A PARENT OR HIS OR HER AGENT WHO IS NOT LESS THAN SIXTEEN YEARS OF AGE."<sup>10</sup> If hotel operators abide by these requirements, it is likely that they will be found to have met the standard of care

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<sup>7</sup> *Health Protection and Promotion Act*, R.R.O. 1990, Regulation 565 Public Pools, s. 16(1)(b) and s. 17(1).

<sup>8</sup> *Ibid.*, s. 19.5.

<sup>9</sup> *Ibid.*, s. 19.6.

<sup>10</sup> *Ibid.*, s. 17(19)(a). Note: s. 17(19)(a) applies to pools that have a water surface area of ninety-three square metres or less. Under s. 17(19)(b), if a hotel pool has a water surface of greater than ninety-three square metres, it must limit the number of bathers to ten in order to exempt itself from lifeguard requirements and the following sign must be posted: "CAUTION: THIS POOL IS UNSUPERVISED. BATHERS UNDER TWELVE YEARS OF AGE ARE NOT ALLOWED WITHIN THE POOL ENCLOSURE UNLESS ACCOMPANIED BY A PARENT OR HIS OR HER AGENT WHO IS NOT LESS THAN SIXTEEN YEARS OF AGE. THE TOTAL NUMBER OF BATHERS ON THE DECK AND IN THE POOL SHALL NOT EXCEED TEN."

set out in the provincial regulations. However, it is important to note that complying with provincial safety standards does not ensure that an occupier will not be liable. Whether an occupier will be found to have met their standard of care is always a factual analysis, and will depend upon the specific circumstances of the accident or injury. The fact that an occupier has met the standard of care set out in the provincial regulations will certainly aid an occupier in mounting their defence.

There could conceivably be other claims in and around pools that hotel operators should be aware of including product liability issues. Faulty products at a pool may include a drain cover with a protrusion, a pool cover with sharp edges, a gas heater that explodes or a sump pump that short-circuits. While injuries arising from faulty pool products will normally give rise to claims against the manufacturers, it is important that hotel operators do as much as possible to guard against such accidents. This is important because a plaintiff will likely name the resort or hotel in addition to the manufacturer.

Hotel operators should also ensure that proper maintenance practices are utilized in and around the pool to avoid, for instance, a slip and fall on a slick pool deck. As previously stated, the Act requires hotel operators to keep their premises in a reasonably safe condition. If a plaintiff can prove that she was injured because a pool area was not properly maintained, the hotel operator may be liable in negligence. Situations where liability may arise due to poor maintenance include a slippery area around the pool, broken life-saving equipment, a loose ladder, a faulty pool cover or contamination in a chemically-treated pool.

## VI. Summary Judgment

In 2011, a case came before the US District Court for the District of Hawaii where a mother suffered irreparable brain damage as a result of a near-drowning in the unsupervised pool of the Royal Lahaina Resort. Though there was a sign at the pool that read “WARNING NO LIFEGUARD ON DUTY”, the plaintiffs alleged that the “text of the [aforesaid] sign failed to adequately warn... of the hazard, risk and foreseeable harm as could result from the failure of defendants... to provide a lifeguard at the pool”.<sup>11</sup> The defendant resort brought a summary judgment motion to dismiss the plaintiffs’ claim. However, the court acknowledged that a hotel has a special relationship with its guests and must protect them from an unreasonable risk of physical harm. Ultimately, the court dismissed the summary judgment motion, finding that whether the lack of lifeguards at the pool constituted an unreasonable risk was a question of fact for the jury.

In Ontario, one might hypothesize that a defendant resort in a pool safety-personal injury suit would have a different result. *The Health Protection and Promotion Act* is very clear with respect to what signage a resort is required to display in a pool area. It would appear that if those requirements were met, a summary judgment motion would be tailor-made for a pool safety claim.

## V. Unsupervised Gym and Fitness Facilities

Hotel gyms represent another unsupervised area where hotel operators may be vulnerable under the *Occupiers’ Liability Act*. Liability risks in hotel gyms can include faulty equipment, lack of proper posted signage, slip and falls, unqualified staff and poor layout. Hotel gyms must

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<sup>11</sup> *Yi v. Pleasant Travel Service Inc.*, Civil No. 10-00318 LEK-RLP at page 3.

also be cognizant of young children playing in the facilities and using the equipment. Additional precautions may be necessary in order to ensure children's safety.

In *Sores v Premier Fitness Clubs*, the plaintiff was injured when a dumbbell fell on her right forearm. The plaintiff was a member of the defendant Premier fitness Clubs and was quite physically active at the time of the injury.<sup>12</sup> The plaintiff gave evidence that there was a shortage of dumbbells on a regular basis. She stated that there was another room that had additional dumbbells that were available to participants of a class. Once that class was over, there was a mad dash to retrieve the extra dumbbells. The weights were located on a rack, with each dumbbell on top of the other. Both parties agreed that there were no written or oral instructions as to how to retrieve the dumbbells.<sup>13</sup>

The court examined the case law relating to occupiers' liability and stated that there were four fundamental principles that a court should consider when deciding on the duty of care owed by an occupier:

- (1) Occupiers have an affirmative duty to make their premises reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm;
- (2) It is not necessary that occupiers become insurers and, therefore, liable for any damages suffered by persons entering their premises;
- (3) Although the statutory duty on occupiers does not change from case to case, the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation; and
- (4) The duty may include a positive responsibility on the occupier to inspect his or her premises to ensure that section 3(1) of the *Act* is satisfied.<sup>14</sup>

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<sup>12</sup> *Sores v Premier Fitness Clubs*, [2011] O.J. No. 1662 ["*Sores*"].

<sup>13</sup> *Ibid*, at paras 5-9.

<sup>14</sup> *Ibid*, at para 23.



The court ultimately found that the premises were reasonably safe and that the plaintiff was well aware of the procedure for retrieving the weights. The court stated that the defendants were not insurers and were therefore not responsible for any damages that persons on their premises sustained.

In *Dhaliwal v Premier Fitness Clubs Inc.*, the plaintiff suffered an injury while exercising on a weight machine in one of the defendants' fitness clubs.<sup>15</sup> The plaintiff was using a vertical leg press machine when his right foot slipped off the foot platform that controlled the movement of the weights, causing the weights to fall down and crush the distal phalanx of his pinky finger on his right hand. As a result of this injury, the end portion of the pinky finger on the plaintiff's dominant hand had to be amputated.<sup>16</sup>

The plaintiff claimed that this event was caused by the defendants in that they failed to keep the fitness club premises reasonably safe for its members. Specifically, the plaintiff claimed that his foot slipped off the platform because he had, just moments earlier, stepped in a puddle of water near a water fountain, which had caused the soles of his shoes to become wet and slippery. He had done his best to dry his shoes off by stomping his feet and that he had been successful in sufficiently drying his shoe. As the plaintiff exerted his legs to push up the weight, his right foot slipped off the platform, and his little finger on his right hand was subsequently injured.<sup>17</sup>

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<sup>15</sup> *Dhaliwal v Premier Fitness Clubs Inc.*, [2012] O.J. No. 3841 [*"Dhaliwal"*].

<sup>16</sup> *Ibid*, at para 2.

<sup>17</sup> *Ibid*, at para 3.

The defendants maintained that they did not breach their duty to keep their commercial premises reasonably safe. The defendants argued that they took reasonable steps to ensure that water spills near the water fountain were cleaned up in a timely manner. They had hired a full time cleaning company and this responsibility was supplemented by their own employees when necessary. The defendants stated that this was an unfortunate accident that could not have reasonably been prevented. In the alternative, the defendants submitted that any potential breach of their duty to keep the premises reasonably safe did not cause the plaintiff's accident. The plaintiff, knowing he had stepped in water, did not ensure that his shoes were sufficiently dry to guarantee the safe operation of the machine.<sup>18</sup>

In considering whether the defendants breached section 3(1) of the *Act*, the court looked to the fact that the defendants subcontracted the cleaning of the facility and also had a janitorial closet on the premises. Club employees were instructed to clean any water spills that they personally saw or that were reported to them by a member. Additionally, there was always a perforated mat underneath the water fountain to help absorb any falling water.<sup>19</sup>

The court ultimately concluded that plaintiff had established that the defendants failed in their affirmative duty to make their fitness club premises reasonably safe for its members by taking reasonable care to protect them from foreseeable harm.<sup>20</sup> The court reached this conclusion not because of any deficiency in the maintenance program that the defendants devised for their fitness club, but rather because of the lack of evidence that its maintenance

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<sup>18</sup> *Ibid*, at para 4.

<sup>19</sup> *Ibid*, at paras 28-31.

<sup>20</sup> *Ibid*, at para 37.

program was implemented and in proper and active use. There was no evidence as to the activities of the cleaners who were working on the day of the accident; there was no evidence that there were even cleaners on duty on that day. The court also noted that there was no evidence that anyone had placed a yellow “wet floor” warning sign cautioning members about the potential dangers of a wet floor.<sup>21</sup>

While the court found that the defendants did not meet the standard of care set out in section 3(1) of the *Act*, the court also concluded that the plaintiff was contributorily negligent. The plaintiff admitted that he knew operating the machine could be dangerous if his shoes were wet. Accordingly, the plaintiff subjectively foresaw the risk of danger to himself if he used the machine with a wet shoe. The plaintiff not only foresaw the risk, but he also was negligent in failing to ensure that his shoes were not wet before beginning to use the machine. The court ultimately concluded that the plaintiff was responsible for half of the total damage award.<sup>22</sup>

*Dhaliwal* is important for an occupier because it shows that it is not enough for an occupier to have a reasonable maintenance system in place. An occupier must have evidence that the maintenance system is being followed and implemented. This can easily be accomplished through the use of maintenance logs. While the defendants in this case had contracted with an outside company for maintenance of the facility, and even had their own staff also assisting, this was not sufficient. The court made it clear that there must be evidence that the procedures and system in place are being followed. *Dhaliwal* also indicates that even if a company subcontracts the maintenance of a facility, the company should still ensure that the

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<sup>21</sup> *Ibid*, at para 46.

<sup>22</sup> *Ibid*, at para 70.

independent contractor not only has appropriate procedures in place, but also has evidence that the procedures are being followed. In *Sores*, the defendants were ultimately successful in establishing that they had met their duty under section 3(1) of the *Act*, despite the fact that they had no signage or system for retrieving the dumbbells. In contrasting the two aforementioned cases, it is clear that whether an occupier has met its duty is a largely factual analysis. The analysis will involve what is reasonable in the specific circumstances. In *Sores*, the court found that the defendant had undertaken some effort to ensure the safety of its members and had discharged its duty.

## **VI. Risk Management Strategies**

As evidenced in this paper, there are a multitude of potential claims that can arise from the liability risks attached to unsupervised resort facilities. As occupiers, resorts and hotels must attempt to foresee these potential claims and risks for injury on their premises. In terms of protection for recreational resorts against claims of negligence, the best defence is a sensible program of risk management intended to eliminate or at least mitigate the danger of potential injury. Active risk management steps will demonstrate that a recreational resort occupier has fulfilled the duty to take reasonable care for the safety of its patrons. Certainly resorts must follow legislated safety regulations.

In the context of unsupervised pools, hot tubs, saunas and gym facilities, an obvious risk management tactics for resort owners includes adequate signage warning of a lack of supervision and use of the facility at one's own risk, as well as posted safety rules for use. Signage around pool areas in particular should be large, clearly written, and require adults to accompany children at all times. The importance of maintaining pool facilities (drains, jets, diving boards, etc.), maintaining adequate water depth, installing adequate lighting, etc. have been previously

discussed. In terms of maintenance, resort owners should ensure that all resort staff are properly trained and qualified, particularly resort housekeeping and maintenance staff who should be trained to spot deficiencies and potential risks. A preventative maintenance log can be very helpful in this regard: “If, for some reason, someone still gets injured ... presenting the completed preventative maintenance log can help in proving the facility fulfilled its due diligence in maintaining the equipment.”<sup>23</sup>

In the resort’s gym or fitness centre, signage becomes increasingly important. While it may be reasonable for a gym owner to ensure that all of its members sign a copy of rules and regulations or even a waiver of liability, this is not feasible for resort owners and patrons whose clientele often change daily. As such, resort owners must resort to posting rules and regulations throughout the gym facility, making these signs easily visible in order to fulfill its obligation of informing guests of the rules they must follow to maintain a safe environment.<sup>24</sup>

Another potential issue for resort owners is access to unsupervised recreational facilities by children (who are at an increased risk of injury by virtue of the fact that they cannot fully appreciate the risk of dangers associated with same). As such, resorts might consider making these facilities accessible only with a hotel room key. Children should be entirely banned from participating in certain activities and using certain facilities, such as Jacuzzis and saunas.<sup>25</sup>

While, as an occupier of the premises, a recreational resort must meet a standard of reasonableness in protecting its patrons from harm, this standard is not one of perfection. By the sheer nature of the recreational hotel or resort and the inherent risks attaching to unsupervised

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<sup>23</sup> Kurt A. Broadhag, “10 Top Liability Risks for the Hotel Fitness Center,” 2013, available at: <[http://hotelexecutive.com/business\\_review/2310/10-top-liability-risks-for-the-hotel-fitness-center](http://hotelexecutive.com/business_review/2310/10-top-liability-risks-for-the-hotel-fitness-center)>.

<sup>24</sup> *Ibid.*

<sup>25</sup> O’Fallon and Rutherford, *Hotel Management and Operations* (5<sup>th</sup> ed.) (2011), John Wiley & Sons, Inc: New Jersey, at page 209.

facilities like gyms, pools and spas, it is an unfortunate reality that injuries to patrons will likely occur and claims in negligence will likely result against resort owners, despite the best efforts at risk management. Nonetheless, recent case law provides excellent guidance for mounting a successful defence against such claims.