SMHI LEGAL NOTES
STEINBERG MORTON HOPE & ISRAEL LLP
BARRISTERS & SOLICITORS · TRADEMARK AGENTS

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It's That Time of Year Again!

Winter is just around the corner, which means snow, ice, slippery conditions - and falls! If you are the victim of a slip and fall and more than just your pride is injured you may have a case for monetary damages. To be entitled to damages a plaintiff must establish three things.

1. The occupier of the property owed the claimant a duty of care, that is to say it was foreseeable that the claimant, or someone like the claimant, would use the property.
2. In carrying out that duty, the occupier failed to exercise such care and skills as might be expected in the circumstances; and
3. The breach by the occupier was in fact the cause of the plaintiff's damages.

If any one of these elements is missing, the claim will fail, regardless of the extent of the plaintiff's injuries.

Slip and Fall Generally
In slip and fall cases, the courts will be concerned with the steps that the occupier--the store, the school, the recreational facility, the homeowner--took to minimize the icy conditions. For instance:

- did the occupier have a regular maintenance schedule?
- did the occupier adhere to that schedule?
- did the occupier adjust that schedule for the particular weather conditions?

In this issue

*The articles in **SMHI Legal Notes** are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.*

In addition, the court will consider what the weather and lighting were like on the day of the fall as well as the conduct of the plaintiff. With respect to the latter, the court will consider whether

- the plaintiff was familiar with the area where he/she fell;
- he/she was exercising proper care given the conditions; and
- he/she was wearing proper footwear.

The Municipal Situation
While the above factors will be taken into account if the fall occurs on a city sidewalk, there are two significant differences that you should be aware of if you do fall on city property. The first is that a claim for damages is lost unless written notice of the claim and of the injury is served on the municipality within 10 days of the fall. The second difference is that a municipality is not liable for a personal injury caused by snow or ice on a sidewalk, except in the case of gross negligence.

Although each case will depend on its individual fact situation, the following two cases help illustrate the concept of gross negligence.

Fleury's Fall
It was a winter evening when Fleury slipped on an icy part of the city sidewalk. As result of the fall, Fleury injured her leg and ankle. She sued the city, blaming her fall on the snow and ice that had accumulated on the sidewalk following several days of inclement weather. The day before Fleury's fall, the city had spread salt and sand on two occasions over a six hour period. The day of the fall was sunny although there was light snow in the early evening. The city spread salt and sand during the afternoon and the early evening.

Fleury's action was dismissed and the city was found not to be at fault. The court concluded that the city had acted in a reasonably prudent manner with respect to spreading sand and salt, given the weather conditions. Although it was likely that the spot where Fleury fell had been slippery due to the snow that had fallen earlier in the evening, the city could not be expected

see **SLIP** on page **3**

Monitoring E-mail and Internet Activity

The right to privacy and the right to know are not contradictory but complementary; they are companion rather than conflicting freedoms. The right to privacy and the right to know are twin freedoms under a democratic order.

John Turner, former prime minister

E-mail has, at least to some extent, revived the art of correspondence. And it seems that one of the best places to catch up on personal e-mail is at work. The question then, for both employers and employees, is who is allowed to monitor this correspondence.

Ask most employers and they will probably tell you that the computer, e-mail account and access to the Internet are company property and therefore they have every right to keep an eye on what is going on. Employees on the other hand, might be appalled to learn that their private e-mail as well as the files they download from the Internet may be monitored by their employer.

While employees are legitimately concerned about their privacy and the sanctity of their private communications, employers have their own equally legitimate concerns. The employer's concerns may include:

- the amount of personal use being made of their resources, especially during working hours;
- the security of their network, particularly with the proliferation of computer viruses;
- the security of company secrets and confidential information;
- their corporate reputation, since e-mail addresses generally include the company name; and
- their legal liability for the wrongful actions of employees who are using company resources, e.g. claims of harassment.

Although the law is not clear in this area, employers are not completely without direction.

PIPEDA

The Personal Information Protection and Electronic Documents Act (PIPEDA), in force since 2004, applies to all organizations and commercial activities in Canada. While it does not address the issue of monitoring e-mail specifically, it does indicate that employers must let employees know what personal information is being collected as well as the purpose for collecting it. In addition, employers must obtain the employees' prior consent and employees must be able to see the information that has been collected.

The Courts

Over the last number of years, there have been several court cases dealing with the issue of an employer's right to monitor its employees. In one case the employer used a voice recognition biometric system to monitor employees who called in sick and in another the employer used hand recognition to control time card fraud. In both instances the court concluded that the business justification for the employer's actions outweighed the employee's right to privacy.

Although these cases do not deal specifically with monitoring e-mail, if an employer can demonstrate that it has a genuine business concern for monitoring e-mail and internet use, then similar results can probably be expected.

In the absence of any concrete legal guidance it is incumbent upon employers, who wish to monitor their employees' electronic communications, to establish a policy with respect to use of company e-mail and Internet. Such a policy allows all parties to know the "rules" and addresses the employees' expectation of privacy. The following are a few suggestions of what to include in such a policy.

- Who owns the systems and files.
- The purposes for which the company's e-mail and Internet may be used.
- The extent to which these tools may be used for personal reasons, including any specific prohibitions.
- The security procedures which must be followed.
- That access to these tools will be monitored.
- The repercussions for breaching the policy.

Once you have created a policy it is important to make employees aware of it, to get written acknowledgment from employees of it and to enforce it consistently.

If you are an employee and are concerned about the boss seeing your e-mail you should consider sending your personal correspondence from your home computer.

If you require assistance to develop an e-mail/internet policy for your organization please contact our firm.

The Great Paper Chase

An integral part of our system of litigation is the concept of discovery. Discovery requires that during the litigation process, each party disclose to the other all relevant facts and information, whether helpful or harmful to its own case. By requiring disclosure each party will have a better idea of the case to be met and surprises at trial should be avoided. Discovery also facilitates settlement, pre-trial procedures as well as the trial itself.

This duty to disclose arises both when a lawsuit has been commenced and when a party reasonably anticipates a lawsuit.

With respect to the scope of discovery, the *Rules of Civil Procedure* require that every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed. Even if a party claims that certain documents are privileged, their existence must still be disclosed.

Under the *Rules of Civil Procedure* the term document is broadly defined to include a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account as well as data and information in electronic form.

These last items, data and information in electronic form, have given rise to a whole other dimension of discovery. With the proliferation of electronic communication the amount of information potentially available for discovery has drastically increased. E-mail, Blackberries, PDAs, text messaging and voicemail are all new repositories of information.

Another interesting facet of e-discovery, as it is referred to, is the ability to retrieve documents, including documents that were believed to have been destroyed. While it may be easy to delete a file from your program and even from the recycle bin, the document remains on your hard drive. In fact, it will remain on your hard drive until your computer recycles the space, a process that could take quite some time. And e-mail is virtually impossible to delete since it can exist in several different places long after the sent folder has been emptied.

This explosion of technical gizmos means that companies and organizations cannot wait until they are entangled in litigation to consider their data retention policies. Instead they must begin now to develop appropriate policies. In the words of Justice Cameron of the Ontario Superior Court of Justice,"..... a properly run company should have a documents retention policy requiring retention of files for a reasonable period extending beyond the limitation period for civil cause of action in contract or tort and the limitation period for a reassessment under the Income Tax Act. Failure to do so risks a court making an adverse inference on the absence of evidence."

A key starting point is to educate your employees on the responsible use of company owned computers, e-mail, phones, Blackberries, and other communication devices. A sound document retention policy should

- be simple and clear;
- identify the retention periods set out in the relevant legislation and regulations;
- clearly identify the retention period of documents and their location as well as the categories of documents to be destroyed; and
- identify the employees responsible for implementing the policy.

It is also important to explain that the policy is not to be used to dispose of potentially incriminating evidence, rather it is a necessary tool in order to manage the company's documents. Finally, it is important that the policy be applied consistently.

If you require assistance to develop a document retention policy for your organization please contact our firm.

SLIP continued from page 1

to spend 24 hours a day working on the sidewalk, nor could it be expected to remove every trace of snow and ice. The court went on to say that Fleury was herself under an obligation to take extra care in walking on a sidewalk she knew to be icy.

McNulty's Fall

It was a snowy cold morning when McNulty fell on the sidewalk as she walked to work. She suffered several soft tissue injuries and general bruising. Three days prior to McNulty's fall, the city had experienced a thaw/freeze cycle. The sidewalk had not been plowed, salted or sanded between the time of the thaw/freeze and McNulty's fall. Additionally, according to the city's plow logs, it had not been sanded or salted for possibly two weeks prior.

The court ruled in favour of McNulty. Although the city had a proper winter maintenance program for the sidewalk in question, the city's employees had failed to follow that program. It was this failure that amounted to the gross negligence.

Tread carefully, tread safely and if disaster should strike be sure to seek prompt legal advice. For further information about an occupier's liability generally see *Occupier's Liability, Legal Notes Winter 2006*.

Liability for Environmental Contamination

When purchasing real estate there are a number of items that need to be addressed. One issue that is gaining prominence, particularly in respect of commercial real estate, is the environmental condition of the property being considered for purchase.

If the property under consideration is potentially contaminated there are a number of obvious reasons why the purchaser needs to be aware of this information. This fact may have an effect on the decision to proceed with the purchase as well as the purchase price.

Another reason this information is so important is that in Ontario liability for environmental clean-up is not based on fault. The Ministry of the Environment can direct any number of companies or individuals to take corrective action with respect to particular lands in order to comply with Ontario's environmental laws. The list of those potentially liable for this arduous and costly task include past owners, present owners, occupants and anyone having the charge, management and control of the land.

Obviously environmental due diligence is significant in assessing the purchaser's potential for environmental liability. The process involved is essentially an information gathering exercise and will include:

- Looking at the use of the property both past and present;
- Looking at the use of neighbouring properties both past and present to determine if contamination has or may migrate off site;
- Searching for relevant orders or approvals related to the property;
- Analysing any existing environmental reports for the property; and
- In some cases conducting environmental testing.

While the potential for environmental liability can be onerous, the Ontario government enacted legislation in 2004 to help alleviate some of this burden. *The Brownfields Statute Amendment Act* is specifically designed to encourage the redevelopment of land that had previously been used for commercial or industrial uses and is perceived as contaminated, i.e. brownfields.

The two key amendments are the creation of the Environmental Site Registry (ESR) and the Record of Site Condition form (RSC). The ESR is a registry separate from the province's land registration system. It allows persons to file records of site condition and facilitates the public's access to information contained in those records. The RSC provides an exception to the unlimited liability for environmental clean-up orders. Once an RSC has been filed no order can be made against the current or subsequent owner, occupant or person in charge of the land. To file an RSC the property must have been properly assessed by an environmental professional and shown to meet the soil, sediment and groundwater standards appropriate for the proposed use of the land.

This issue of liability for contaminated property is primarily a commercial real estate issue. However, rural and cottage properties that have a well or septic system are not immune to such problems. Therefore it is important to seek legal advice prior to proceeding with any real estate purchase and preferably before signing the agreement of purchase and sale.

Our firm handles all types of real estate transactions. For further information please contact us.

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