



SMHI LEGAL NOTES

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Are Mom & Dad Responsible?

The law has always recognized that parents have a duty to supervise their children and that they could be held liable to those suffering damage as a result of a parent's failure to properly supervise. Such cases involve proof of negligence on the part of the parents, however, which often meant a risky and expensive lawsuit. In 2000, the government of Ontario passed legislation to make it easier for victims to recover the damages they suffer as a result of children's antics, including property damage and theft, without risking expensive litigation.

The Parental Responsibility Act makes parents potentially financially responsible for damages intentionally caused by their children under 18 years of age up to the maximum jurisdiction of the Small Claims Court (presently \$10,000 but increasing to \$25,000 as of January 1, 2010). Pursuant to section 2, the *Act* allows a victim to bring a claim against the parents through the Small Claims Court. The term parent includes anyone with access rights to the children. Victims can sue:

- for loss of or damage to the property suffered as a result of the activity of the child; and
- for economic loss suffered as a consequence of that loss of or damage to property.

A victim who decides to sue in Small Claims Court has to prove only three things in order to shift the burden of proof onto the parent. He/she must prove the child caused the damage or loss, that the defendants are the parents of the child and the amount of the damage.

Once the burden has been shifted, the defendant parent, in

order not to be liable for the damages, must prove that:

- The loss or damage was not caused intentionally; or that
- They exercised reasonable supervision of the child and made reasonable efforts to prevent the damage.

To assist the courts in determining whether or not a parent has exercised reasonable supervision, the *Act* sets out a list of factors that may be taken into account, including:

- The age of the child
- The prior conduct of the child
- The physical or mental capacity of the child
- Whether the child was under the direct supervision of the parent at the relevant time
- Whether the parent made reasonable arrangements for supervision of the child

The following case applies the *Parental Responsibility Act* and it provides a good overview of how the process works.

The Shannons' home was burglarized by two boys, 14 and 10. The 14-year old had been hired for the summer to watch the 10-year old. During the first seven weeks everything ran smoothly and the boys stayed out of trouble. Toward the end of summer, the 14-year old decided to break into the Shannons' house and he talked his 10-year old charge into helping him. More than \$19,000 worth of property was never recovered. The Shannons sued the children's parents.

Although both boys had had some minor behavioural problems at school, there had been nothing to predict this conduct. They had been taught not to steal. The 14-year old had been left on his own a number of times without incident, and he had babysat the 10-year old on a prior occasion.

The trial judge dismissed the case against the 14-year old's parents. Justice Miller concluded that, based on his age, experience and background prior to the theft, it was reasonable for his parents to assume he could be trusted and that he would behave appropriately.

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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.

Thinking of Starting a Business? - Read This First!

So you want to go into business for yourself and be your own boss? Although this is the big decision, there are still many more decisions to make and things to consider. The following are some common questions about starting a business.

How can I get into business?

There are several options available for those who want to be their own boss, including:

- Starting from scratch
- Buying an existing business
- Buying a franchise

What are the various business structures?

The three most common legal structures that are used to set up a business are a sole proprietorship, a partnership and incorporation.

As its name suggests, a **sole proprietorship** is owned and operated by one person. It is by far the easiest to set up, since there are very few legal formalities. On the down side, you face unlimited liability because you and your business are considered one and the same and all your personal assets are available to your business creditors.

A **partnership** involves two or more people carrying on business together. Although a partnership is fairly easy to form, the partners should consider entering into a formal written agreement. As with the sole proprietorship, partners face unlimited liability, both individually and collectively.

A **corporation**, unlike the other two structures, is a separate legal entity. As a result, one of its biggest advantages is limited liability for the shareholder(s). It is however, more difficult and complex to create a corporation and it is subject to extensive government regulations. It should also be noted that some creditors (e.g. a landlord or a bank) may require the owners or directors of the corporation to personally guarantee the corporate obligations.

Is a written agreement between the owners of a business really necessary?

YES! While things may seem bright and rosy at the start of a new venture, it is surprising how quickly they can turn sour. Both shareholder (i.e. corporate) and partnership agreements can address a wide variety of issues and can save a lot of heartache down the road.

What should you consider when signing a commercial lease?

Commercial leases can be quite lengthy and complex. They contain a myriad of clauses covering everything from rent to

renewal options. The following are a few key areas you should be aware of.

- Have all the landlord's promises that were made during negotiations been included in the written lease?
- Are you really getting the amount of space promised?
- What rent is payable, including extras? When and where is it payable?
- Has the landlord given you a true option to renew the lease?

Should you hire a lawyer to help?

When getting your new venture off the ground do not overlook the importance of hiring a lawyer. An experienced business lawyer will prove invaluable counsel not only at the start, but throughout the life of your business. He or she can provide assistance with:

- The purchase of an existing business
- The purchase of a franchise
- The incorporation of a new or existing business
- Drafting partnership or shareholder agreements
- The negotiation of leases
- Drafting employment contracts
- Ongoing employment issues
- Contract disputes
- Collection problems
- Shareholder or partnership disputes
- Governmental authorities and licencing bodies

There is lots to think about and do in order to start your own business. With sound advice, including the advice of a lawyer, you will be on the right path. ☞

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The trial judge also dismissed the case against the 10-year old's parents. He concluded that they had acted reasonably in deciding to delegate their supervisory responsibilities to the 14-year old while they were at work. The factors taken into account by the judge included: the babysitter's age, that their child was relatively well-behaved, the lack of previous incidents and the structure that the parents had imposed on the two children.

Although the Shannons were unsuccessful in their suit against the parents, they did get judgment against the two boys. ☞

Damages: A Brief Overview

Lawyers have their own jargon. And in lawyerspeak damages are what a plaintiff is awarded in a lawsuit.

Wrongs that are compensated

The purpose of a damage award is to attempt to put the wronged party into the position he or she would have been in, but for the wrong done by the defendant. Damages may be awarded for wrongs committed both in contract and in tort.

For breach of contract, a court may order a monetary award to compensate for such things as non-performance, non-delivery of goods, delivery of defective goods, wrongful dismissal or loss of goods.

- An employee with 18 years on the job is wrongfully dismissed. The employee is awarded 18 months salary in lieu of notice.
- A supplier delivers defective cable to the buyer. The buyer is entitled to the cost of installing replacement cable as well as the resulting loss of profits.

Damages may also be awarded to compensate for tortious acts such as defamation, professional negligence, product liability, trespass to land or personal injury. The court must attempt to quantify how the actions of the defendant have affected the life of the plaintiff by putting a dollar figure on the effect.

- An employee is wrongfully accused of theft and is fired. The employee is awarded \$5,000 for mental distress.
- The plaintiff's land is flooded as a result of the defendant's conduct. The plaintiff is awarded damages equivalent to the resulting diminution in the land's value.

Other types of damages

In addition to damages designed to compensate for loss a court may award aggravated damages and/or punitive damages.

Aggravated Damages - Aggravated damages compensate for one's injured dignity and pride and are usually awarded in cases where the damages suffered by the plaintiff have been aggravated by the way the wrong was committed.

Exemplary or Punitive Damages - These damages are intended to punish the defendant. They will be awarded when the defendant has behaved with arrogance, high handedness and with callous disregard for the plaintiff and his rights

Liquidated Damages - The parties to a contract may decide to pre-estimate damages for a specific breach of contract, which are referred to as liquidated damages and for an actual calculation of substitute loss.

Nominal Damages - Nominal damages are awarded in cases where the plaintiff's legal rights have been technically breached

but where he or she has not sustained any actual damage. The award is generally a token amount.

Personal injury claims

Personal injury claims are a breed unto themselves. As such, the Supreme Court of Canada has defined specific categories that are to be considered in personal injury actions.

Special Damages - Special damages are pecuniary losses which can be calculated in a relatively objective manner. They include loss of pre-trial earning capacity, cost of pre-trial care as well as other pre-trial expenses, e.g. cost of hiring someone to look after your property.

General Damages - These are non-pecuniary losses, the calculation of which is more art than science. General damages compensate the plaintiff for pain and suffering, for loss of amenities and for loss of expectation of life.

Future Losses - Future losses encompass loss of earning capacity and future care. Loss of earning capacity is equal to an estimate of the plaintiff's probable annual lost earnings multiplied by the number of years during which that loss will extend, adjusted for taxes, interest that will be earned on the money. Cost of future care will be awarded to plaintiffs who are totally or partially disabled.

Less than full damages

Although a plaintiff may have suffered a loss as a result of another's actions, generally speaking, he or she is still under **an obligation to mitigate** the damages. In other words, the injured party must make a reasonable attempt to lessen the damages suffered. If the plaintiff fails to mitigate, that portion of the damages which could reasonably have been avoided will be disallowed.

Another instance where a plaintiff may not be entitled to full compensation is where he or she has been **contributorily negligent** in causing the harm. In these cases, the damage attributable to the plaintiff's actions will not be recoverable.

No damages

There are certain circumstances where a plaintiff's right to recover damages will be barred. These include:

- A signed release
- An accord and satisfaction, i.e., the plaintiff has accepted payment in settlement of the claim
- A contractual release of liability
- A voluntary and express assumption of the resulting risk. ☞

The Responsibilities of Corporate Directors

Before you agree to become a director of a company, you should have an understanding of the legal responsibilities involved with the position.

Management of Company

The obligation of a board of directors, subject to a unanimous shareholders agreement which may give all managerial powers to the shareholders, is to manage the corporation. Although directors are elected by the shareholders, it is not to them, but rather to the corporation that directors owe their duty. This makes sense, since shareholders do not usually undertake the responsibilities nor face the resulting liabilities that are imposed on the directors.

Since directors' responsibilities are of a periodic nature, exercised mostly at board meetings, they oversee the big picture items such as the company's financial objectives and its strategic direction. They also provide guidance to management, who look after the day to day operations of the company.

Directors as Fiduciaries

Directors occupy a fiduciary position in relation to the corporation. As such, they owe a duty of loyalty and good faith to the corporation, not the shareholders. They must act in a way that is both reasonable and prudent and in the best interests of the corporation.

Directors must keep confidential information they learn in their capacity as directors. A director must not profit at the expense of the corporation. Therefore, any interest a director may have in a contract with the company must be disclosed. Such an interest may arise directly. For instance the director may have an asset to sell the corporation. Or the interest may arise in an indirect manner. In this case the director may be a shareholder in a company wanting to sell to the corporation.


Care, Skill and Due Diligence

There are no professional standards for directors as, for example, there are for engineers, lawyers and accountants. However, a director is bound to act as a reasonably prudent person in comparable circumstances would act. Directors must exercise due diligence. This means putting into place systems and processes to avoid liability. For instance, a corporate employer is responsible for remitting to various government offices income tax, Canada Pension Plan and Employment Insurance payroll deductions. Therefore, the directors will ensure that the corporate employer sets up a special trust account for these monies rather than mixing them in with its general funds.

Due diligence also means ensuring that employees are trained to use such systems and processes. In addition, the systems must be regularly monitored and adjusted.

Although honesty and sincerity are important qualities for a director, they are not a substitute for acting reasonably and prudently. Directors are required to ask questions, to learn about the corporation and to follow up on important matters, in addition to attending and being prepared for the regular board meetings.

In certain circumstances, directors may also find themselves personally liable for certain corporate debts, such as the wages and vacation pay of the corporation's employees.

Although you may be honoured that someone thinks enough of you to want you on their board of directors, you should not blindly accept. This position carries with it serious responsibilities that you should thoroughly understand before making your decision. Our firm works in many areas of corporate and commercial law. Our lawyers would be pleased to assist you. 

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