SMHI LEGAL NOTES
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Do Grandparents have a right to access?

As the ultimate goal of access is the continuation of a relationship which is of significance and support to the child, access must be crafted to preserve and promote that which is healthy and helpful in that relationship so that it may survive to achieve its purpose.

Madam Justice L'Heureux-Dubé
Young v. Young, [1993] 4 S.C.R. 3

When we talk about access, which includes the right to visit and to be visited by a child, we usually think in terms of the rights of a non-custodial parent. However, as more and more families are affected by divorce, members of the extended family may see their relationship with nieces, nephews, cousins and grandchildren begin to slip away.

Grandparents in particular may be affected, especially if their child is not the custodial parent. In addition, there are cases where parents and grandparents simply do not see eye-to-eye and the former will cut off or substantially reduce the grandparents' access.

In the province of Ontario there are two specific pieces of legislation that govern the issue of access. The first is the *Divorce Act*, which applies only to children of a marriage. The Act states that a court may make an order for custody or access on application of either of the spouses, or by any other person. A grandparent would fall into this latter category, however he or she must seek the court's permission to bring such an application.

The other relevant piece of legislation is the *Children's Law Reform Act*. According to this law, a parent of a child or any other person may apply to a court for an order respecting custody of or access to the child. While access is, generally speaking, a given in the case of the parent who does not have custody, there is no presumptive right to access for others, including grandparents. Rather the relationship between a grandparent and grandchild is expected to be maintained through their own child. In fact the onus is on the grandparent(s), who is applying for access, to prove that an on-going relationship is in the best interest of the child. This was precisely the situation in the Ontario Court of Appeal case of *Chapman* v. *Chapman*.

In the Chapman case the paternal grandmother was seeking increased access to her two grandchildren. The grandmother could be rather strong willed and the relationship between she and the children's mother had always been a difficult one. Over the years, the frequency of the grandmother's visits with her only grandchildren had decreased to only a few times a year. In addition, the relationship between the grandmother and her grandchildren was not a very positive one.

Believing that it was in the best interests of the children generally to have access to members of their extended family, the grandmother applied for monthly access and weekly telephone access. Although the parents did not oppose access, they felt that as the parents, they should determine when and how access should take place. The grandmother's application was successful and the trial judge ordered access for at least 44 hours per year to be made up of at least six visits. The parents appealed the decision.

The Ontario Court of Appeal agreed with the parents that it was generally up to parents to decide if and when certain people should have access to their children. The Court concluded that so long as there is no evidence that the parents are behaving in a way which demonstrates an inability to act in accordance with the best interests of their children, their wishes should be respected. In dismissing the grandmother's application for access, Madam Justice Abella stated: "Although it may appear to be insensitive to the grandmother's needs for the parents to resist her efforts to decide how access is to be exer-

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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.*

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cised, this case is not about the needs - or even the wishes - of Esther Chapman. It is about the needs and best interests of the children. The issue must be looked at from their, not the grandmother's perspective."

In another case, decided this past spring, the grandparents were granted access one afternoon every other week to their grandchildren. Unlike the Chapman case, the paternal grandparents in *Boyle* v. *Gayle* had a very close relationship with their grandchildren.

In opposing the application, the mother argued that the grandparents would attempt to control her through the access. However, the judge found that the mother was not acting in the best interests of the children. Rather she was acting in a way that suited her schedule and her desire to control access. The court also noted that there were strong emotional ties between the children and their grandparents and that the grandparents ability to care for the children was not at issue.

These are just two of a number of cases that has been decided in recent years involving grandparents seeking access. When making a decision about access, or any other matter involving children, the sole consideration of the courts is what is in the best interests of the child. There are a number of factors that will be taken into account in determining what those best interests are, including:

- The objections/wishes of the custodial parent, particularly if there is no obvious benefit to the child from ongoing contact with the grandparent.
- Whether or not there is an established, ongoing and positive relationship between grandparent and grandchild.
- Whether the grandparent has or will act in such a way as to undermine the parent(s) or the child's relationship with the parent(s).
- Whether continued contact poses a risk to the child or the stability of the child's home life; the severity of the conflict between the child's parents in the case of separation.
- Whether the grandparent has something special to offer the child, particularly from a family or cultural point of view.
- Whether the child will experience a sense of abandonment if the grandparent is shut out of the child's life.

Most agree that grandparents play an important and unique role in the lives of children. Although access can be gained through the courts, in Ontario a grandparent has no special legal right to see their grandchildren. While some provinces have passed laws granting specific status to grandparents in access cases, to date Ontario has not seen fit to do so.

When the Boss is a Bully

When you think of bullying the picture that probably pops up is a big mean kid pushing all the other kids around. But if you think this kind of intimidation happens only in the school yard you would be wrong. In recent years, bullying has been making its presence felt in the workplace. When the bullying becomes serious enough it may lead an employee to quit a job and sue the employer for constructive dismissal.

Constructive Dismissal

As we explained in the winter issue of *SMHI Legal Notes*, constructive dismissal traditionally occurs when the employer unilaterally alters an essential term of the employment contract, whether written or implied. In such cases, the employee may treat the employment as terminated. These changes generally include a reduction in salary and/or responsibilities or a change in work conditions.

In 1998, the courts expanded the definition of constructive dismissal. They concluded that an employee did not have to point to a particular fundamental term having been breached if the employee's situation established that the employer had renounced the entire relationship without cause. The leading case in Ontario is *Shah* v. *Xerox Canada Ltd.*

The Facts

Shah worked for Xerox for more than 12 years. During that time he had only positive performance reviews. In addition, he received regular pay raises and bonuses. Based on his technical credentials and his initiative, Shah was recommended for a new technical support analyst position. A few months after accepting the position, Shah's group was moved to Harvey's division. Confusion soon developed about the division of labour and about whom Shah was to report to. Shah was also criticized by Harvey for spending too much time away from the home office despite Harvey being responsible for Shah's involvement in an exchange program.

Four months passed with no further criticism. However, at Shah's next performance review Harvey raised several concerns, which Shah addressed. The review was followed up with a warning letter which suggested that Shah's position was in jeopardy. Harvey became more authoritarian, impatient and intolerant with Shah.

About this same time, Shah's wife suffered her fifth miscarriage and Shah himself became ill. At no time did Harvey inquire about Shah's personal situation, and he turned down Shah's request for a six-week unpaid leave of absence.

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Two months after the first letter, Harvey sent Shah a second unexplained warning letter. Shah was then put on one month's probation. Believing that his days at Xerox were numbered, Shah tendered his resignation.

Resignation or Constructive Dismissal

Shah subsequently sued for damages claiming that his work situation had become unbearable and that he had been left with no choice but to resign.

A careful review of the evidence convinced the court that Shah's position as a member of Harvey's group had indeed become intolerable and that he had been constructively dismissed without cause. The court found that the situation was primarily the result of Harvey's inefficient and unreasonable conduct.

Although a finding of constructive dismissal generally requires a change of a fundamental term of the employment contract, the judge in the Shah case indicated that such a finding is not necessary. Instead, the test to be met is whether the conduct of the manager/employer is such that a reasonable person in the circumstances should not be expected to persevere in the employment.

Xerox unsuccessfully appealed.

In upholding the lower court's decision, including the broader definition of constructive dismissal, the Ontario Court of Appeal stated, "In some cases, however, the employer's conduct amounts not just to a change in a specific term of the employment contract but to repudiation of the entire employment relationship."

Saunders v. Chateau Des Charmes Wines

Saunders v. *Chateau Des Charmes Wines* is another case where the employee was found to have been constructively dismissed based on how he was treated by his supervisor. Saunders began his career as a sales manager before being promoted to director of marketing. The relationship between he and his boss was positive and productive during the first nine years.

Although there were several unpleasant exchanges between Saunders and his supervisor during the final year, it was the treatment during the last two weeks that "was of sufficient severity and effect to amount to a repudiation of the employment relationship." Saunders' supervisor had begun to display an unrelenting and escalating anger. His behaviour was hostile, aggressive, rude, demeaning and intimidating.

With respect to the short period of bullying, the court specifically stated that, "It matters not that it was over a period of only about two weeks."

Advice for Employers and Employees

So where does this leave employers and employees? Are employers entitled to be critical of the unsatisfactory work of its employees? Are they entitled to take measures to remedy the situation? And what about employees who take everything personally? Will every harsh word support a case for constructive dismissal?

In order to protect itself against a claim for constructive dismissal, an employer must ensure that its employees are treated with civility, decency, respect and dignity. Employers should guard against the following types of behaviours and actions.

- Making rude, degrading or offensive remarks.
- Discrediting an employee by spreading rumours.
- Intimidating an employee.
- Isolating an employee.

Another important note to employers is that it is not up to the vulnerable employee to advise the employer that a particular type of conduct is not acceptable. Rather the employer bears the onus of identifying problems in the workplace and taking appropriate steps. The employer is also obliged to conduct an investigation to determine what has actually happened, as the rights of the alleged harasser must also be protected.

If you are an employee and you are being subjected to a pattern of unacceptable behaviour you would be wise to keep notes of the events and to seek legal advice. It is important that you determine whether you are the target of a bully or you are simply being subjected to strong management or justifiable criticism. If you resign and a court does not agree with your assessment of the situation you will be without a job and your claim for constructive dismissal will be lost.

Whether you are an employer or an employee, if you require more information about employment law generally, and constructive dismissal in particular, please contact our firm.

For additional information

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Who is Responsible for the Fall?

In our fall newsletter we explained the legal ramifications of injuring yourself in a fall on a municipal sidewalk. (*It's that Time of Year Again*) The Ontario Court of Appeal recently decided an appeal involving a very typical slip and fall case. With that fact situation as a backdrop we will explain the law of slip and falls on private property.

The Facts

Mrs. Kerr was grocery shopping at the local Zehrs, which was owned by Loblaws. She was in the produce section when she slipped and fell on a grape. The fall was a nasty one and she required surgery to repair her ankle. She sued Loblaws for damages for her injuries and for the expenses associated with her post-accident care.

Although Loblaws did not dispute that the 80-year old Mrs. Kerr had fallen, it did deny that it was liable for the fall or any ensuing damages.

The Law

In a slip and fall case, the court will consider a number of questions to determine if a defendant is liable for a plaintiff's damages. The first question to be determined is whether the relationship between the parties is such that the defendant even owes a duty of care to the plaintiff. If a duty does arise, the court will then consider the general terms for measuring the standard of care that is required of the defendant. The court will next look at the facts of the particular situation and will decide whether the defendant exercised that standard of care. While the duty to take care does not change from one situation to the next, the factors that determine what is reasonable are situation specific.

In our fact situation, the government, through the *Occupiers' Liability Act*, has created what can be referred to as a "duty relationship" between a store and its customers. The Act goes on to dictate the standard of care that an occupier, in this case Loblaws, owes to people like Mrs. Kerr. That standard is to take positive steps to make its premises reasonably safe for Mrs. Kerr and its other customers. However, the law does not seek perfection of an occupier, nor does it require unrealistic or impractical precautions against known risks.

The following facts were put into evidence to help the jury decide whether Loblaws had exercised reasonable care on the day Mrs. Kerr was in its store.

- Zehrs had a nightly cleaning program, whereby the floors were cleaned every night by an outside company.
- A produce department sweep log was in place at the store to document floor maintenance and inspections.
- It was expected that store employees would ensure that the floors were in "optimal condition" throughout their shift.
- Zehr's had not put down floor mats in front of its grape display, despite this being its policy.
- The floor had been checked on two occasions the morning in question.

The Verdict

Despite the sympathetic nature of Mrs. Kerr's claim, the jury concluded that Loblaws had taken reasonable care to ensure her safety.

This decision truly demonstrates how each case will be decided on its individual fact situation. If you are the victim of a fall and you are injured, it is always best to seek legal advice in a timely fashion. A lawyer can help you decide whether you have a viable claim and if so can file it on time.

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