



SMHI LEGAL NOTES

STEINBERG MORTON HOPE & ISRAEL LLP

BARRISTERS & SOLICITORS · TRADEMARK AGENTS

Volume 4

Winter 2006

Occupier's Liability

A customer slips and falls at the grocery store. A child falls off the monkey bars at a city park. A teenager is injured during gym class.

The legal issue in each of these instances is the liability of the occupier for their visitor's injuries. In Ontario, an occupier's obligations are set out in the *Occupiers' Liability Act*. Essentially, the law imposes on an occupier of premises a legal duty to those coming onto its premises to take reasonable care for their safety.

Although the focus of this article is on the duty of commercial establishments, it is important to note that occupiers' liability legislation applies equally to homeowners.

Who is an occupier?

An occupier is a person

- Who is in physical possession of premises.
- Who has responsibility for and control over the condition of the premises or the activities taking place.
- Who has control over the persons entering the premises.

What is the occupier's responsibility?

An occupier owes a duty of care, as in all the circumstances of the case is reasonable, to see that visitors entering on the premises are reasonably safe while on the premises. This duty applies to risks caused by the condition of the premises as well as by the activities carried on.

When is an occupier not responsible?

An occupier may not be responsible for damages suffered by persons on the premises if the occupier has restricted, modified or excluded its duty. However, the occupier is under an obligation to bring any restriction, modification or exclusion to the attention of visitors.

In addition, an occupier will not be responsible in respect of risks willingly assumed by visitors to the premises.

What recourse is available against an occupier?

A person who is injured while on another's property may be entitled to recover monetary damages if it can be established that the occupier was liable for the damages that were sustained by the injured person. In making this determination, a court will take a number of factors into account, including:

- The inherent or unusual danger at the premises.
- The reasonable likelihood of a particular incident occurring.
- The sufficiency of the occupier's program of care and maintenance.
- The visitor's willingness to assume a foreseeable risk.
- The age and status of the visitor.
- The nature and extent of any warnings or waivers of liability on the part of the occupier.
- The sufficiency of the connection between the accident and the alleged breach by the occupier.

The following court cases help illustrate the obligations of an occupier.

The School Gym

Premises - School Gymnasium

Occupier - School Board

Visitor - Student

Facts - The 16-year-old student suffered a dislocated elbow when he hit the hardwood floor after the protective mats sepa-

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rated during a wrestling match. The mats separating during wrestling exercises was not uncommon. The only precaution taken against separation was a standing instruction to the non-participating students to sit around the perimeter of the mats with their feet pressed against the edges of the outside mats.

Result - The student successfully sued the school board.

Reasons - The judge concluded that the school board had failed to discharge the burden of proving that it had adopted the best safety precautions reasonably possible for the protection of students taking part in physical education courses. He found that the so-called perimeter system was a dangerous one when the wrestling reached the competitive stage, particularly since the separation of mats was foreseeable.

The Tennis Court

Premises - Tennis Court (owned by the local paper mill but leased to the municipality)

Occupier - Municipality

Visitor - Competitive Tennis Player

Facts - The 33-year-old tennis player suffered torn ligaments in his knee when, during a competitive tennis match, his toe got lodged in a crack on the court. The tennis player played on these particular courts regularly and was aware of the state of disrepair. The municipality inspected the courts each spring and was aware of the numerous cracks. However, the municipality did not want to resurface the court before obtaining a Wintario grant.

Result - The tennis player's lawsuit was dismissed.

Reasons - The tennis courts were dangerous premises keeping in mind the purpose for which they were constructed. The municipality had an obligation to provide facilities that could be used safely and it was insufficient for the municipality to simply make an on-site inspection in the spring. **However**, the tennis player was aware of the dangers and notwithstanding that knowledge he chose to play thus voluntarily incurring the risk.

The Playground

Premises - Municipal Playground

Occupier - Municipality

Visitor - Child

Facts - The two-year old child suffered a skull fracture when she fell from the playground structure. She hit her head on the concrete foundation used to anchor the structure. The municipality maintained a regular system of inspection and repair of equipment and parks.

Result - The mother's lawsuit, on behalf of the child, was dismissed.

Reasons - The municipality's inspection program with respect to parks and playgrounds was entirely reasonable. The exist-

ence of the concrete foundation was not hazardous in the circumstances or any more hazardous than the structure itself.

Water Park

Premises - Privately-Run Water Park

Occupier - Popkum Water Slides Ltd.

Visitor - Customer

Facts - The 52-year-old customer injured herself when she slipped on the wet walkway, separating two wading pools. Although the surface of the walkway was generally wet, ground walnut shell grit was sprinkled on the painted surface. This was a commonly used method of making what would otherwise be a slippery surface into a slip-resistant surface.

Result - The customer's lawsuit was dismissed.

Reasons - The water park had taken sufficient steps to make the premises reasonably safe for pool users.

Although an injury does not necessarily entail liability, if you have been injured while on another's premises, it is important to promptly seek legal advice to determine whether there may be liability. In addition, depending on where the injury occurs, the limitation period for commencing legal action may be very short. ☞

Managing Your Risks

If you are an occupier, particularly of a commercial establishment, there are certain steps you can take in order to minimize your potential liability should a visitor to your premises be injured.

- Develop plans to deal with all foreseeable situations that could be dangerous or could lead to liability.
- Put up easy-to-read, visible signage informing visitors of any potential risks.
- Use waivers and informed consent forms.
- Put into place proper inspection, maintenance and repair procedures. Keep records of all inspections, maintenance and repairs.
- Never admit fault or liability should an injury occur.

If you require information with respect to your potential liability or require assistance to draft a proper waiver and/or consent form, please contact our office. One of our lawyers would be happy to speak with you. ☞

Financial Disclosure in the Context of Family Law

Are you thinking of getting married? Or moving in together? Are you in the midst of a separation? Or a divorce? If you answered yes to any of these questions then you may have come across the concept of financial disclosure. Whether you are negotiating a marriage contract or a separation agreement, financial disclosure is crucial.

Parties are free to create agreements to suit their specific circumstances and the courts will generally uphold them. To ensure that the agreement is respected by the courts however, financial disclosure is a must. While the extent of the financial disclosure may vary, depending on the type of agreement, it will usually include providing the other party information about your assets, debts and liabilities.

Separation & Divorce

Financial disclosure is particularly important when dealing with the breakdown of a marriage, since most parties will enter into a separation agreement. One of the main issues likely to be dealt with in the separation agreement is the division of property. Although the courts will uphold a separation agreement, there will be instances where they may choose to exercise their discretion and set the agreement aside, particularly if one party has failed to disclose to the other significant assets, debts or other liabilities.

If the spouses are unable to resolve their property issues, then one or both can make an application to the court to have the issues determined. If litigation ensues, the law is very specific about the type of disclosure that must be made. Each party must provide a financial statement that includes information regarding:

- Property, debts and other liabilities
 - as of the date of the marriage
 - as of the valuation date¹
 - as of the date of the financial statement.
- The deductions that the party claims under the definition of net family property².
- The exclusions that the party claims under the definition of net family property.
- All property that the party disposed of during the two years immediately preceding the making of the statement, or during the marriage, whichever period is shorter.

Child Support and Spousal Support

Financial disclosure is also required where there has been a request for child support and/or spousal support. The type of

financial disclosure necessary in these instances includes information about the parties' income and expenses. In addition, parties are required to provide proof of their income including copies of their last three income tax returns and notices of assessment.

Marriage Contracts & Cohabitation Agreements

Under Ontario's *Family Law Act*, couples who move in together can decide to enter into a cohabitation agreement or, if they are marrying, they can enter into a marriage contract. The main purpose of these agreements is to set up the rules that will govern in the event that the relationship ends, in particular with respect to financial matters.

Although there are specific requirements for financial disclosure with respect to divorce and child support, the only legislative requirement when negotiating marriage contracts and cohabitation agreements is that significant assets, and significant debts or other liabilities, existing when the domestic contract was made, be disclosed. Over the last few years, however, some courts have indicated that the extent of the financial disclosure required for these agreements may in fact be as great as for separation agreements.

At the very least, assets, particularly major assets, should not be concealed. Financial facts that may influence the other person's decision about entering into the agreement should be disclosed. While it remains unclear whether you must provide formal valuations of your property, a general worth of the various assets is not a bad idea. And do not be afraid to ask for particulars of the other person's affairs, including the value and location of his or her assets.

It is a good idea to get legal advice if you are thinking of entering into any of the arrangements discussed in this article. Our lawyers would be happy to assist you. 

¹Valuation date means the earliest of the date the spouses separate and there is no reasonable prospect that they will resume cohabitation, the date a divorce is granted, the date the marriage is declared a nullity, the date one of the spouses commences an improvident depletion application or the date before the date on which one of the spouses dies leaving the other spouse surviving.

²Net family property is basically your net worth at the date of separation (calculated by valuing all property held at that date less debts) less your net worth at the date of marriage. There are, however, some very significant exceptions and exemptions to this calculation, which should be discussed with a family lawyer.

Put it in Writing:

The Importance of Shareholder Agreements

While we all hope that the internal workings of our business will run smoothly, that is not always the case. It is essential, therefore, to put into writing an agreement that will govern the relationship between the shareholders. While things may seem all bright and rosy at the start of a new venture, it is surprising how quickly they can turn sour.

A shareholder's agreement covers a wide variety of issues. It helps you focus on how the day to day operations will be run as well as on solutions to problems that may arise. This checklist can help you think about what should be included in your shareholder's agreement.

- How will the business be controlled and managed?
- How many directors will there be and how will they be elected?
- How will vacancies on the board of directors be filled?
- Will the directors be compensated and how?
- Who will the officers be and how will they be appointed? Will they be compensated and how?
- What compensation should the shareholders who are also employees receive?
- How will security be issued, redeemed and repurchased?
- Can the corporation incur debt notwithstanding the objections of some of the shareholders?
- When will dividends be declared?
- How will business decisions, during the ordinary course of business, be made? What about business decisions outside the ordinary course of business?
- How will shareholder deadlocks be resolved?
- How will you ensure the business's future requirements for capital are met?
- How will capital be raised?
- If capital is to be raised through shareholder contributions, how much will each contribute?
- What happens if one of the shareholders does not contribute?
- What will be the corporation's fiscal year?
- Who will the accountants/auditors be?
- Who will have cheque signing authority?
- Will there be an absolute prohibition on share transfers outside the original group?
- How can shares be transferred to people outside the original shareholders group?
- When will a mandatory transfer of shares, within the shareholder group, take place?
- How will an optional transfer of shares, within the shareholder group, take place?
- How will the relationship be terminated? What sort of divorce provisions will be included?
- What should be included in the non-competition clause in the event one or more of the shareholders leaves the business?
- Should the shareholders be required to enter a marriage contract whereby the non-shareholder spouse would agree not to satisfy an equalization of net family property from the corporation and/or keep all business information confidential?

If you would like further information about this or any other business matter, please contact our firm. 

Steinberg Morton Hope & Israel LLP

5255 Yonge Street - Suite 1100
Toronto, Ontario M2N 6P4

T: 416 225-2777 F: 416 225-7112
www.smhilaw.com

LAWYERS

Irwin Steinberg

isteinberg@smhilaw.com

James C. Morton

jmorton@smhilaw.com

Jack W. Hope

jhope@smhilaw.com

David M. Israel

disrael@smhilaw.com

Michael E. Cass

mcass@smhilaw.com

M. Michael Title

mtitle@smhilaw.com

Shelley Brian Brown

sbrown@smhilaw.com

Taras Kulish

tkulish@smhilaw.com

Antonin I. Pribetic

apribetic@smhilaw.com

David A. Brooker

dbrooker@smhilaw.com

Corey D. Steinberg

csteinberg@smhilaw.com

Olga Kanevsky

okanevsky@smhilaw.com

Victor A. Nikitine

vnikitine@smhilaw.com

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