SMHI LEGAL NOTES
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The Value of Housekeeping

Vacuums don't clean houses. People clean houses.
Marie Barone
Everybody Loves Raymond

Truer words were never spoken. So how do you compensate someone when her or his ability to keep house has been impaired by injuries sustained in an accident. This dilemma was recently addressed by the Ontario Court of Appeal.

The Accident
Claudia McIntyre was a passenger in a vehicle driven by her future husband when they collided with Shaun Docherty's vehicle. The accident left Claudia with chronic pain, fibromyalgia, depression and anxiety. As a result of these health issues her ability to carry out various tasks, including housekeeping, was affected. According to her family and friends, Claudia was a neat freak who prided herself on her ability to provide a nice home for her family.

Shaun Docherty admitted he was at fault in the accident and therefore the only issue at trial was the amount of Claudia's damages.

Damages
The key purpose of a monetary award of damages is to, as much as possible, put the plaintiff in the position she or he would have been in but for the injury. Assessing damages in a personal injury case can be complex, particularly since there are a number of different categories of damages that must be considered.

"Damages are initially categorized as either special or general. Special damages generally compensate a plaintiff for pre-trial pecuniary out-of-pocket or 'positive' losses. In contrast, general damages compensate for 'negative' losses, which can include both pecuniary and non-pecuniary losses."

"Pecuniary damages are generally assessed on the basis of calculable losses for items such as the plaintiff's prospective loss of earnings and profits and costs of future care, as well as other expenses. In contrast, non-pecuniary damages cannot be arithmetically calculated because they compensate the plaintiff for intangible losses arising from physical and psychological pain and suffering as well as from any loss of amenities or expectations of life."

With regard to the loss of housekeeping, traditionally compensation has been hit or miss and has largely focused on the cost of replacing the services.

Loss of Housekeeping
Claudia, whose housekeeping duties included cooking, vacuuming, dishwashing, cleaning, laundry, bed-making and gardening, testified that, if she paced herself carefully, with pain, she could undertake most of these responsibilities. For the balance, she relied on family and friends.

At trial, Claudia was awarded approximately $60,000 to compensate for the difficulties she suffered pre-trial in respect of loss of housekeeping as well as any future lost housekeeping capacity.

In dismissing the appellants' appeal, the Court of Appeal recognized that an injured party, whose ability to attend to housekeeping has been affected, may experience a loss of self-worth resulting from the inability to contribute personally to the well-being of the household. As this loss is an intangible one, a non-pecuniary award, in addition to the pecuniary award, may

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At Your Own Risk

In past editions of *SMHI Legal Notes* (Winter 2006, Summer 2007) we have considered the topic of an occupier's liability to visitors to their premises. A recent case decided by the Ontario Court of Appeal provides another important and timely lesson with respect to this area of the law.

The Facts
Jo-Anne, her husband and their three sons were out for an afternoon of cross-country skiing in a park located just north-west of London and operated by the Township. Although the Township encouraged residents to use the park throughout the year, it only maintained the park from May to October. During the winter months the park was used by cross-country skiers, though trails were neither maintained nor groomed.

On this particular afternoon, Jo-Anne and her family came to a berm. Leaving the marked trail, Jo-Anne suggested they all wait while she skied down the berm to the ice surface to ensure it was safe. As she reached the bottom of the berm, but before she could stop, her ski hit a concrete wall that was hidden under the snow. The concrete wall had been in place for more than a decade without incident and there was no evidence that in winter it constituted a hazard or trap to users of the Park.

She sustained a compound fracture of three bones in her right ankle. She was off work for almost nine months. She sued the Township.

The Occupier's Liability Act
Pursuant to Ontario's *Occupier's Liability Act*, the Township was an occupier since it permitted the public to enter its premises, in this case the park.

The law goes on to set out two different levels of responsibility in such situations. In the first case, an occupier owes a duty and standard of care, reasonable in all the circumstances of the case 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. For instance, this duty of care would apply to a store owner or to the operator of an arena or public swimming pool.

In the second case, there is a lesser duty and standard of care because persons entering onto the premises, including some recreational trails, are deemed to have willingly assumed any risks. Nevertheless, the occupier does owe a duty not to create a danger with the deliberate intent of doing harm or damage to those entering onto the premises or their property and to not act with reckless disregard of the presence of persons on their property. This lesser duty of care was intended by the legislature to encourage occupiers to promote the use of recreational trails on their land by members of the public.

The Decision
The main issue in Jo-Anne's case was to determine the duty of care owed by the Township to users of its park. The court concluded that Jo-Anne had willingly assumed the risk of using the park and therefore the lesser duty of care was in play. The court went on to say that this type of situation was precisely why a lesser duty of care had been put in place.

The court also concluded that the presence of the wall did not provide a sufficient basis for a finding that the Township acted "with reckless disregard" to the presence of users of the park. There was no evidence that the Township knew or ought to have known that cross-country skiers were likely to collide with the partially snow covered wall in a manner such that a serious injury could or was likely to result.

The Morale of the Story
When using public recreational facilities, particular when there is no charge and no specific maintenance by the owner, you should remember that you will in all likelihood be deemed to be doing so at your own risk. Therefore, take care and be cautious about wandering out of bounds.

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be necessary to adequately compensate the injured party.

The appellate court also noted that, like Claudia, a person who has sustained injuries may be required to work more hours post-accident to accomplish the same amount of pre-accident housekeeping. In such cases, the non-pecuniary award would be further increased to reflect any increased pain and suffering. The award for non-pecuniary damages could also take into account any inefficiency that would lead to a less clean and organized household.

Bottom Line
Housekeeping has a financial value and evidence that the ability to keep one's household has been negatively impacted will be compensated. More significant, though, is the recognition that the loss of self-worth that may accompany the loss of ability to perform a task important to an individual deserves compensation quite apart from the actual economic losses.

Tackling Violence and Harrasment in the Workplace

Beginning in June 2010, there will be new protections put in place to guard against workplace violence and harassment. The Ontario government recently passed legislation that amends the Occupational Health and Safety Act (OHSA) to require employers to institute a number of measures relating to violence and harassment in the workplace.

The primary purpose of the OHSA is to protect workers from hazards in the workplace, including hazards involving workplace violence. Up until now workplace violence and harassment were dealt with under an employer's general duty to take every reasonable precaution in a given situation to protect their workers. However, following a consultation process by the Ministry of Labour it was concluded that this general duty did not go far enough in providing protection, hence these new specific provisions.

New Definitions
Two new definitions have been added to the Act.

Workplace Harassment means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.

Workplace Violence means,
a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,
b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,
c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

Obligations of Employers
The Act also includes a number of items that an employer must implement in the workplace. These include:

- preparing a policy with respect to workplace violence;
- preparing a policy with respect to workplace harassment;
- reviewing these policies as often as is necessary, but at least annually;
- posting the policies in a conspicuous place if there are six or more employees;
- developing and maintaining a program to implement the policies; and
- assessing the risk of workplace violence that may arise from the nature of the workplace and advise, if applicable, the results of the assessment to the health and safety representative or committee.

Other Changes
The amendments to the OHSA also address the issue of domestic violence. Specifically, if an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker.

If a worker believes he or she is at risk of physical injury due to possible workplace violence, the amendments permit that person to refuse work. There will also be a requirement for employers and supervisors to alert certain workers of the risk of workplace violence from persons with a history of violent behaviour.

If you are an employer and you do not currently have a policy in place to address workplace violence and harassment then it is something you need to begin considering immediately. If you want to know more about the impending changes or if you require assistance in drafting appropriate policies please contact our firm. We would be pleased to assist you.

Did You Know?
Approaching a Stopped Emergency Vehicle

The *Highway Traffic Act* requires motorists to slow down and pass with caution when approaching a police, fire or ambulance vehicle stopped with its red lights flashing in the same direction of travel, either in a lane or on the shoulder of the road. If the road has two or more lanes the motorist must move over into another lane, if it can be done safely.

Failure to do so may result in a fine of $400 to $2,000, plus 3 demerit points. A second offence within 5 years may result in a fine of $1,000 to $4,000, possible jail time up to 6 months and possible suspension of driver's licence for up to 2 years.

So remember to slow down when you see flashing lights.

Going Up: the Cost of Spousal Support

"The wife should not have to eradicate her savings to pay for her living expenses." So says Judge Greer, who ruled on the wife's motion for temporary spousal support. The Elgners had been married 33 years when they separated. Theirs was a traditional marriage, wherein the wife stayed home to look after the household and the couple's three children. She and her husband also provided substantial financial support to her sister as well as some support to her father.

During the marriage, the husband was building a successful business with his brother.

Late in the marriage, the business was sold, making the brothers extremely wealthy. At the time of their separation, the Elgners owned a home in Toronto, a summer residence in Muskoka, a residence in Florida, a condo in Whistler and five timeshares, worth together in excess of $8 million.

When the Elgners were unable to settle their financial matters, including the issue of spousal support, the 61-year old wife filed her motion.

Pursuant to the *Divorce Act*, when making a spousal support order, whether final or temporary, the court takes into consideration the condition, means, needs and other circumstances of each spouse, including:

- the length of time the spouses cohabited;
- the functions performed by each spouse during cohabitation; and
- any order, agreement or arrangement relating to support of either spouse.

In addition, the courts must also have recourse to the *Spousal Support Advisory Guidelines* in determining the amount of support.

In our particular case, the court took into account the wife's age as well as the length of and type of marriage (i.e. traditional). Judge Greer also considered the fact that the wife was not employable, noting that she should not have to be in the particular circumstances of this case. The judge also considered the husband's annual income which was $3-million to $4-million.

Despite the husband's position that the wife had already received substantial cash and investments, Judge Greer concluded that, "The wife should not have to eradicate her savings to pay for her living expenses. She sacrificed a career to be a stay-at-home wife and mother for all those years. This is a family with extensive wealth, and both parties should live out their retirement years in a style that can easily be afforded."

The wife was awarded retroactive support in the amount of $140,000 a month and ongoing temporary support in the amount of $110,000 a month. This amount is believed to be the largest spousal support award ever made in Canada.

The lawyer who represented the wife indicated that she believed the size of the award "reflects a growing feeling within the judiciary that spousal support has not kept up with the times." Time will tell.

If you have specific questions about spousal support or another family law issue, please contact one of our family law lawyers who would be pleased to assist you.

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