



SMHI LEGAL NOTES

STEINBERG MORTON HOPE & ISRAEL LLP

BARRISTERS & SOLICITORS • TRADEMARK AGENTS

Volume 36

Winter 2014

Beginning a New Year

"One resolution I have made, and try always to keep, is this: to rise above the little things."

John Burroughs

To kick off this new year, we have decided to revisit three topics that we have written about previously. It is not because we are feeling nostalgic; rather we believe that the

information is important and that it bears repeating. They are powers of attorney, what to know about slip-falls and a reminder for those travelling to another country.

Although we are a few weeks into 2014, it is still not too late to wish you a happy and healthy new year. 📁

Do Canadian Courts Have Jurisdiction?

As the snow and ice continue to pile up this winter, many of us have thoughts of a sunny warm vacation abroad! The many inexpensive, all-inclusive deals make those thoughts that much more enticing.

However, before you buy, you need to remember that you are going to another country and that the Canadian laws and courts do not necessarily have jurisdiction should something go wrong. The case of *Haufler v. Hotel Riu Palace Cabo San Lucas* is a stark reminder of this reality.

The Facts

In the spring of 2006, Angela, her mother and their friends purchased an all-inclusive package from Belair Travel of Toronto that included accommodations at the Hotel Riu in Mexico. While in Mexico, they decided to go on an ATV excursion operated by Rancho Tours, which had a booth in the lobby of the hotel. Unfortunately, Angela was seriously injured during the excursion. It was that accident that led to this lawsuit in Ontario.

Angela and her family sued both Rancho Tours and Hotel Riu. Rancho Tours had gone bankrupt so failed to respond to the claim. Hotel Riu (the Mexican hotel) brought a motion to stay the claim. It argued that the Ontario court had no jurisdiction over it since it is not a resident of Ontario.

The Test

To determine whether a Canadian court has the jurisdiction to hear a case involving a foreign defendant, the Supreme Court of Canada has set out the following two-step test.

Step 1

The plaintiff must establish that a “presumptive connecting factor” ties the litigation to the jurisdiction.

In the case of a claim for negligence, such as this case, the high court identified four presumptive connecting factors to be considered. They are:

- a) the defendant is domiciled or resident in the province;
- b) the defendant carries on business in the province;
- c) the tort was committed in the province; and
- d) a contract connected with the dispute was made in the province.

Step 2

If the plaintiff succeeds in establishing the existence of a presumptive connecting factor exists, the onus then shifts to the defendant to rebut that presumption. To do this, the defend-

In this issue

Powers of Attorney - Just the Facts p. 3
 7 Things to Know p. 3
 Tread Carefully p. 4

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.

see JURISDICTION on page 2

JURISDICTION continued from page 1

ant must demonstrate that, on the facts of the specific case, the connection is insufficient to establish a real and substantial connection to the jurisdiction. Specifically, the defendant must “establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.”

More Facts

From the get go, the plaintiffs and the Mexican hotel agreed that factors A, C and D did not apply in the particular instance.

The plaintiff did take the position that factor B applied arguing that the Mexican hotel carried on business in Ontario. Based on this, the plaintiff argued that the Ontario court did have jurisdiction in this litigation.

The following is the relevant background as to how the all-inclusive package that Angela, her mother and friends bought came about.

- Hotel Riu is a trademark owned by a Spanish company headquartered in Palma de Mallorca, Spain.
- MX RIUSA II, S.A. de C.V. owns the Mexican hotel that is at the centre of the lawsuit. It operates under the Hotel Riu trademark and is located in Cabo San Lucas Mexico.
- During 2005 and 2006 the Mexican hotel sold blocks of its rooms to Visantilla S.A., a Spanish company, who in turn sold some of these rooms to Thomas Cook Canada Ltd., a travel wholesaler. That contract was concluded in Mexico.
- Thomas Cook, operating as Sunquest Holidays, then created all-inclusive packages that included the rooms located in the Mexican hotel.
- These all-inclusives were then sold to the public through travel agencies, including Belair Travel, where Angela’s friend bought the all-inclusive package.

As for Rancho Tours, it was a business independent of the Mexican hotel that was permitted to operate a booth in the Mexican hotel’s lobby. The Mexican hotel received no compensation from Rancho Tours.

In support of their position that the Mexican hotel carried on business in Ontario, the plaintiffs pointed to the following:

- The extensive advertising by Sunquest Vacations conducted in Ontario relative to the Mexican hotel.
- The occasional presence of a business development manager responsible for the marketing of the worldwide chain of Hotel Riu.
- The activities of Thomas Cook in Ontario as agent for the Mexican hotel.
- A website that allows Ontarians to book all-inclusive packages at the Mexican hotel.

The Decision

The Mexican hotel’s motion was successful and Angela’s action was not allowed to proceed in Ontario.

The judge concluded that none of the four items advanced by the plaintiffs supported the proposition that the Mexican hotel carried on business in Ontario.


Aside from the fact that the presence of advertising alone is insufficient to constitute carrying on business in Ontario, the relevant advertising was in fact carried out by Thomas Cook and Sunquest Vacations. The Mexican hotel had nothing to do with this advertising and was not consulted about it.

The business development manager worked for the Spanish company that owned the Hotel Riu trademark, not the Mexican hotel. Further, she was only in Ontario a few days each year.

There was no agency agreement between Thomas Cook and the Mexican hotel since the hotel had sold the relevant block of rooms to Visantilla S.A. outright, who then sold them to Thomas Cook.

The Mexican hotel did not have a website in 2006 when the holiday was booked. But in any event, citing the Supreme Court of Canada, the judge found that a website relating to the Mexican hotel and accessible in Ontario would not have sufficed to establish that the hotel carried on business in Ontario.

The Bottom Line

If you are travelling outside of Canada and you get hurt, or a contract that you have entered into is not respected, it can be very difficult to sue here in Canada. In all likelihood, you would have to sue in the country where the wrong occurred and would be subject to that country’s particular judicial system. So while we wish you a good holiday, just be aware. 

To view past newsletters and to learn more about our lawyers visit us at
www.smhilaw.com

Powers of Attorney - Just the Facts

Despite the importance of having powers of attorney, the vast majority of Canadian adults still do not have either a power of attorney for property or a power of attorney for personal care. Based on a survey conducted by LawPro in the spring of 2012, 71% of Canadians had neither.

As long as this statistic remains alarmingly high, we will continue to write about this very important topic.

What is a power of attorney?

A power of attorney is a document that appoints a person of your choosing to act and make decisions on your behalf if you are unable to. The person you appoint is called an attorney (sometimes referred to as the substitute decision maker).

What type of decisions can an attorney make?

The type of power of attorney will dictate the decisions the attorney can make.

Power of attorney for property

A power of attorney for property allows you to name someone to deal with your property and finances. For instance, you can give someone temporary authorization as a matter of convenience. If you winter down south, your attorney can pay your bills while you are away. If your power of attorney for property is a continuing power of attorney for property (they generally are), then your attorney can also act on your behalf in the case of your mental incapacity.

Power of attorney for personal care

A power of attorney for personal care permits you to name someone to make decisions about your personal and health care in the event that you are not able to. The decisions to be made may range from what you should eat, to where you should live, to whether you should see a doctor.

Can my spouse or one of my adult children not simply make decisions on my behalf?

Even though your family members may be able to make some financial or health care decisions, there are too many instances where they will not be allowed to act without having a power

of attorney. For instance, a government agency such as Canada Revenue Services will not speak to you about someone else's income tax, including your spouse's, without a written directive. Before you have major surgery, the hospital will probably want to know who has the legal **written** authority to make decisions on your behalf.

If the need arises and there is no power of attorney in place, your family may be forced to go to court to have someone

appointed. This will lead to delays, financial expense and possibly conflict within your family.

What is a treatment directive?

In your power of attorney for personal care, you can include various instructions for your attorney, including the type of medical treatment you do and do not want, particularly at the end of your life. This is called a treatment directive (formerly referred to as a living will.)

If you do have strong feelings about your medical treatment in the event that you are unable to speak, you should prepare a power of attorney for personal care that includes a treatment directive. Remember that your instructions must be clear. For instance, saying that you "do not want to be kept alive on life support" is too vague since this statement does not differentiate between life support and the prolongation of dying. With the advances in medicine and technology, it is important that you talk to your doctor so that he or she can explain various medical scenarios and treatments. Finally, your attorney should not be left in doubt as to your wishes, since it is your wishes, not those of your attorney, that

should be carried out.

Despite the potential consequences, people continue to neglect this important aspect of planning their finances and health care. Please make time during this new year to prepare powers of attorney as well as a will. If you already have these documents, be sure to review them to ensure that they still reflect your particular circumstances. Our firm works in the area of estate planning and would be pleased to assist you. ☞

7 Things to Know

- Both your attorneys for property and for personal care are legally obligated to attempt to make decisions you would make and in your best interests.
- So long as you are mentally capable, your attorney for personal care has no authority.
- As soon as your continuing power of attorney for property has been signed, your attorney does have the power to deal with your property and finances.
- A properly drafted and signed continuing power of attorney for property is your attorney's definitive authority to deal with all of your finances and property.
- Both your attorneys for property and for personal care cease to have any power following your death.
- The executor of your will has no authority until your death.
- A living will is not the same thing as a power of attorney for personal care.

Tread Carefully!

This winter has been particularly harsh in the GTA. One of the most frustrating and dangerous things has been the amount of ice on our roads, sidewalks, driveways and walkways. All this ice inevitably leads to falls.

Municipal Property

If you slip and fall on property belonging to a municipality, the most important thing to know is that you must **notify the municipality in writing, within 10 days of the fall**. Your letter must be served upon or sent by registered mail to the clerk of the municipality.

Once you have made the notification you will have two years from the date of your fall to decide whether to commence litigation. Therefore, if you think that your injuries may linger beyond a few days, you are best to err on the side of caution and notify the municipality.

The other important thing to know about a slip and fall on municipal property due to snow or ice is that the standard that the municipality is held to is lower than if the fall occurred on private property. For instance, if the fall occurs on a city sidewalk, then a lawsuit would be successful only if the municipality had been grossly negligent in its maintenance of the sidewalk.

Private Property


The standard to which private property owners, including homeowners, shopping malls, funeral homes and professional offices, are held in cases of snow

and ice is much higher. In these instances, a plaintiff need only show that the owner was guilty of negligence, as opposed to gross negligence, though it is important to note that this is still not a standard of perfection.

An occupier of premises, which includes the owner, has a legal duty to those coming onto its premises, specifically to take reasonable care for their safety. When it comes to snow and ice the following are the type of factors that a court would take into account in assessing whether the owner is liable for the fall as well as any resulting injuries.


- The weather on the day of the fall.
- The weather on the days leading up to fall.
- The type of winter maintenance undertaken by the owner.
- When the most recent maintenance had occurred.
- The presence of any signs warning of snow and ice.
- The lighting.
- The type of footwear worn by the plaintiff.

If you are seriously injured in a fall, it is important to seek immediate legal advice to know whether you have any recourse.

We have lawyers who work in personal injury litigation and who would be pleased to provide you with advice. 

LEGAL TIP

If you are the victim of a fall, be sure to pull out that smart phone and take a few pictures so that you have a record of what the area looked like at the time of the fall.

If all you suffer is a few bumps and a bruised ego then you were just being diligent. But if your injuries prove to be more serious, those photos may turn out to be the best evidence available if you are trying to recover damages. 

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

Patricia Virc
pvirc@smhilaw.com

Derrick M. Fulton
dfulton@smhilaw.com

Taras Kulish
tkulish@smhilaw.com

David A. Brooker
dbrooker@smhilaw.com

Daria Krysik
kdrysik@smhilaw.com

PRACTICE AREAS

Corporate & Commercial
Commercial & Civil Litigation
Residential Real Estate
Commercial Real Estate
Condominium Law
Matrimonial & Family Law
Employment Law
Wills, Trusts & Estates
Personal Injury Law
Construction Law
Criminal Law
Trademark Law
Health Discipline Law
Administrative Law