



STHI LEGAL NOTES

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Preparing for Sunny Days

The nicer weather will soon be here, at least we can hope. With the warmer days, many will be entertaining more. In fact, one of the nicest things about the nice weather are the pool parties, the outdoor BBQs and drinks with friends on a summer evening. However, when you invite people onto your property you need to remember that you have certain obligations. While we have written about these topics in past issues, we thought a brief summary would be helpful so that you can enjoy your best summer ever.

Occupier's Liability

As a home owner or tenant, you are considered an occupier of your premises. As an occupier you have a legal duty, pursuant to the *Occupier's Liability Act*, to those coming onto your property. The general rule is that you must take reasonable care to ensure the safety of your visitors. If you fail to take reasonable steps to keep your guests and visitors safe, you may be liable for any injuries that they might sustain while on your property.

Things such as rakes or hoses left lying on the ground, holes in your lawn, broken concrete on the walkway or driveway are all potential hazards that could lead to a visitor being seriously injured. As the occupier, an act or a failure on your part to act which leads to a visitor being injured could lead to you being sued.

In order to avoid such risks, a careful and reasonable homeowner or tenant is expected to fix, clean, or warn visitors of potential dangers.

What follows are a few areas that require particular vigilance as an occupier.

Trampolines

Trampolines have become very popular with homeowners. Unfortunately, the number of trampoline related injuries that lead to an emergency room visit are in the thousands each year.

As a homeowner with a trampoline, you are subject to the *Occupier's Liability Act*. While your kids may enjoy bouncing on the trampoline, it is considered a potential hazard and therefore you must take necessary precautions.

In order to protect yourself and to keep your children and the neighbour children safe there must be proper supervision when they are using the trampoline. In addition, you should set rules such as only allowing one person at a time on the trampoline, not allowing somersaults and not allowing children under six years of age, for instance, onto the trampoline. You must also ensure that all framing, springs, and hooks are covered with shock absorbing pads and that the trampoline is on level ground. You should also talk to your insurance company before you buy a trampoline.

For more information about how to keep your children safe, visit canadasafetycouncil.org and download their tip sheet for trampolines.

Pools

While there is nothing more satisfying than a dip in the pool during the hot summer weather, pools can be dangerous if not used properly. Probably the biggest danger is diving into a pool, especially one that is only four or five feet deep. In addition, as a homeowner you also need to make certain that chairs and pool toys are tripping hazards.

As with trampolines, you need to have some strict rules for those using your pool, especially for teens and kids. These rules should include no diving, no pushing people into the pool and that there always be adult supervision. As the owner you must also make certain that you check the fence and gate to make sure that they are in proper working order.

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The articles in STHI 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.

What Do Condo Owners Actually Own?

You may have heard the story last month about the member of Canada's military who sought to show his patriotism by installing a Canadian flag on the outside of his townhouse condo. Several months after affixing the flag and pole to his unit, the Major was told by the condo board that he was not allowed to attach anything to the front of his house. The ensuing flap, pun intended, resulted in a lesson for all condo owners.

So what exactly does a condo owner own?

When you decide to buy a condominium, what you are buying is a private dwelling referred to as a "unit", which is registered in your name. In addition, you will also own an interest in the common elements and assets of the building and community. When you buy a freehold home, it is important to know what you are buying. This can generally be ascertained with an up-to-date survey. When you purchase a condominium it is at least as important to have a clear understanding of the unit's boundaries before you purchase.


Condo developers have the right to determine what part of the property will constitute the units and what parts will be considered common elements, whether for the exclusive use of the owner or for use by all. In addition, the developer can decide who will be responsible for maintenance and repair of these common elements.

In some instances, you will own the land your home is on as well as the exterior walls and roof of your condo. But in most cases, you own only the inside of your unit. Things

such as the exterior walls are more likely to be considered part of the common elements and thus under the direction of the condo board. Obvious common elements include lobbies, hallways, elevators, recreational facilities, walkways, gardens and other amenities, areas that all condo owners will have access to. Common elements may also include structural elements and mechanical and electrical services.

Less obvious are the common elements that are for the sole use of the condo owner, such as balconies, parking spaces, storage lockers, driveways and lawns. Although for the use of the specific condo owner, these elements are nevertheless considered common elements. This means that the condo board can make rules about their use and appearance. Rules may include the type of vehicles that you can park in your driveway or what décor you can put on your front lawn. They may also include the colour of your curtains and blinds, at least the part facing outwards. The rules can even include which renovations you can undertake inside your unit, whether an engineer will have to be engaged and when the renos can take place.

The bottom line is that before you purchase a condo you need to review and understand the condo's rules, bylaws, declaration and any restrictions on the use of your "property" which are in fact common elements.

As with any real estate purchase, it is important to seek legal advice, even before signing an offer to purchase. Our lawyers would be pleased to assist you. 

Did You Know? A Potpourri of Legal Info

400 Series Highways

If you are travelling on one of the 400 series of highways and an ambulance or other emergency vehicle is coming up behind you with its lights and/or siren on, you should slow down and move to the right lane when it's safe to do so. However, you should not move onto the shoulder since the emergency vehicle may have to use it. If the emergency vehicle is stopped and its lights are flashing you should slow down, move over when safe to do so and pass with caution.

Pulling onto the shoulder is banned on the 400-series of highways, unless it's an emergency. Taking a call or sending a text is not likely to be considered an emergency.

Potholes

Along with warmer temperatures and longer days, spring also brings with it - the pothole! Most potholes are

relatively harmless, but every once in awhile they can do serious damage to your car. If your car is damaged you need to take immediate action. When it's safe to do so you should try and get photos, the dimensions of the pothole as well as the names of any witnesses. Your claim must be submitted within 10 days. If you live in Toronto go to toronto.ca and search for *Pothole Claims*.

Passport Expiry Date

You may not be allowed to board an out-of-country flight even if your passport has not expired. Recently a Toronto woman was prevented from boarding her flight to Portugal to visit her dying mother because her passport would expire within three months of her trip. Different countries have different rules about passport expiration dates. For instance the USA requires only that Canadians have a passport that is valid for their intended period of stay. So before you

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Social Host

Alcohol and summer just seem to go together. But if a guest who has had too much to drink gets behind the wheel, are you responsible? Several years ago, the Supreme Court of Canada ruled on this issue. The Court found that a private social host is not liable for the actions of their guests and that there is no positive legal duty on the host to act. The Court stated, "Suffice it to say that hosting a party where alcohol is served, without more, does not suggest the creation or exacerbation of risk of the level required to impose a duty of care on the host to members of the public who may be affected by a guest's conduct."

Although this is the law as it currently stands, recently there have been a few cases involving social hosts that have attempted to draw a distinction between their facts and those of this particular Supreme Court decision. These cases are trying to make a social host responsible for the conduct of their guests who have maybe had too much to drink.

One case, which involved two friends, Williams and Richards, who had spent the afternoon at Richards' house drinking approximately 15 beers over three hours, made it to the Ontario Court of Appeal. Although Williams drove home that afternoon without incident, he was subsequently involved in an accident when he drove the babysitter home. He was killed and his children were injured.

Initially, the trial judge dismissed the case finding that Richards had no responsibility as a social host. However, the appellate court noted that while the duty of care analysis consisted of three elements, the trial judge had failed to consider them. Those elements are:

1. Was the injury reasonably foreseeable?
2. Is there sufficient proximity such that there is a duty to act?
3. If the answers to these questions are yes, is this duty negated by other, broader policy considerations?

Time will tell whether the duty of a social host will be expanded or not. In the meantime, whether your guests are supplying their own alcohol or you are providing it, you should consider having a plan for making sure they have a safe and enjoyable time. This might include providing alcohol-free drinks, serving food and encouraging the use of designated drivers or taxis.

Dogs


Once the snow melts and the temperature becomes warmer, we humans along with our dogs begin to emerge from our homes. As a dog owner, you should be aware of Ontario's *Dog Owners' Liability Act*. Pursuant to this law, the owner

of a dog is liable for damages resulting from a bite or attack on another person or on another domestic animal. As a dog owner you will be responsible whether the attack or bite occurred on or off your property.

If the court determines that your dog did attack or bite another, it can order you as the owner to take measures for the more effective control of the dog and/or for purposes of public safety. Those measures could include confining the dog to its owner's property, restraining the dog by means of a leash or a muzzle or posting warning signs. In the worst case scenario, the court can order that the dog be destroyed.

While the person that sustained the bite or attack may be held contributorily negligent, it is important to understand that the dog owner will always be more at fault.

Knowledge is Power

While this article may give the impression that we are trying to rain on your summer parade, that is not our intent. Rather we are simply trying to make you aware of your duties as an occupier homeowner or occupier tenant. As the saying goes "knowledge is power". If you have questions or require assistance with issues of occupier's liability please contact our firm. 

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travel, check with your travel agent or the consulate of the country you intend to travel to for their rules about passports.

License Plate Sticker

In Ontario, your licence plate sticker expires on your birthday. You have up until 11:59 pm on your birthday to renew it.

Unattended Child

Ontario does not have a specific law that dictates when a child can be left alone. However, the *Child and Family Services Act* does state that parents should not leave children under the age of 16 alone without making reasonable arrangements for their care. In essence what this means is that parents need to consider a variety of factors before leaving their children unsupervised. These factors include such as things as the child's age and level of maturity, the length of time the child will be alone, whether there is a neighbour that the child can go to if necessary and if the child knows what to do in an emergency.

The key to deciding when your child can be left alone is to exercise common sense. You know your children and you know what they are able to handle. 

The Costs of a Lawsuit

Before embarking on a lawsuit, an important consideration that potential plaintiffs need to bear in mind is the issue of costs. Regardless of what side you are on, litigation can be an expensive endeavour. However, there is some relief if you are victorious in that Ontario's *Courts of Justice Act* and the *Rules of Civil Procedure* allow the court to award costs to the successful party, and in some cases to the losing party.

The original purpose of a costs award was to compensate a party for the money they had to spend on the litigation. Over time, the law of costs has evolved to include three additional purposes. Cost awards are used to encourage settlement. For instance, in Ontario a costs award may penalize a party who refuses to accept a reasonable offer to settle, whether plaintiff or defendant. Costs awards are also meant to discourage unnecessary steps in proceedings, a flurry of unnecessary motions for example. In addition, the threat of a large costs award is used to prevent frivolous or vexatious litigation.

At the conclusion of litigation, the court will fix a party's costs based on one of three scales: partial indemnity, substantial indemnity or full indemnity.


With respect to partial indemnity, a party can expect to receive approximately 50% of the costs he or she actually incurred. Partial indemnity costs attempt to strike a balance between the theory that one should not have to bear the financial cost of enforcing or defending one's legal rights and the theory that one will not defend or enforce one's legal rights because of the fear of having to bear the legal costs of the other side. Partial indemnity is the cost award that is most often used in Ontario.

Substantial indemnity costs will be used when offers to settle have come in to play as well as certain summary judgement motions. They are also available to a court to punish abhorrent behaviour by a party.

Finally, there is the full indemnity scale, which as its name suggests is meant to provide to the successful party, total compensation of the costs reasonably incurred for the litigation. Full indemnity of costs remains relatively rare and is most likely to be awarded where there was an indemnity agreement between the parties. However, full indemnity has also been awarded to compensate estate trustees and actions involving pension funds.

While the *Rules of Civil Procedure* set out a number of factors for the court to take into consideration in deciding on a costs award, one of the most important aspects is offers to settle. Making an offer, accepting or refusing an offer can all have a significant effect on the amount of costs awarded – even to the successful party. For instance, if the plaintiff offers to settle prior to the trial and it is refused by the defendant but the plaintiff does better than the offer, the plaintiff will likely be awarded a partial indemnity costs award up to the settlement offer, but a substantial indemnity costs award for the period after the settlement offer including the trial.

If, on the other hand, the defendant makes an offer to settle that the plaintiff turns down and it ends up being more than what the plaintiff receives at trial, then the plaintiff will likely receive partial indemnity for the period leading up to the settlement offer, but the defendant would be the recipient of a costs award from the time of the offer through to the trial.

There are many factors to take into account before commencing legal action including potential costs awards. We have lawyers well versed in the area of civil litigation who can help you decide your best course of action. 

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