STHI LEGAL NOTES

STEINBERG TITLE HOPE & ISRAEL LLP

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Cohabiting Under Two Roofs

There is no end to the many jokes about divorce and alimony. However, it is a serious subject particularly, if one of the spouses has given up a career or job to devote himself or herself to the family.

While often referred to as alimony, in Ontario money paid by one spouse to the other following a break up is properly called spousal support. In Ontario, there are two laws that provide for spousal support: the *Divorce Act* for couple who were legally married and the *Family Law Act* for couples who were living common law.

The Case

At the time that Lisa and Michael began dating, Lisa was a 38-year old divorced mother of two children, ages 11 and 8. She was working for her brother earning $60,000 a year. Michael was 46 years old and extremely well off financially, working as the chairman of his family's companies.

Almost as soon as they began dating, Michael asked Lisa to quit her job to allow more time for him. Early on he began paying her living expenses, something that continued throughout their relationship. He gave her a credit card and he paid off the second mortgage on her house. They travelled extensively.

Over the years, they exchanged rings and love letters. Every year they celebrated the anniversary of the day they met. They held themselves out as a couple to family and friends.

Lisa and Michael, along with her children, spent every summer together at Michael's cottage. They also lived together when they were in Florida at Michael's family condo. Lisa spent most nights at Michael's when her children were with their father.

In this issue

When Michael was admitted to the hospital due to health issues, Lisa slept at the hospital. She kept track of and took him to all his medical appointments.

Lisa and Michael did keep their respective homes, primarily because Lisa wanted the stability for her young children and because it was near their school.

After more than 14 years together, Michael and Lisa went their separate ways. Following the break up, Lisa began to teach yoga, earning approximately $24,000 a year, a substantial downgrade in her lifestyle. As a result, she filed an application seeking spousal support.

The Law

In defining what a spouse is the *Family Law Act* includes both legally married couples and common law couples. However, to qualify for support as a common law spouse, the parties must have cohabited continuously for a period of not less than three years, or be in a relationship of "some permanence", if they are the parents of a child. The Act defines "cohabit" as living together in a conjugal relationship, whether within or outside marriage.

To determine if there is a conjugal relationship, the courts will consider such factors as shared shelter, sexual and personal behaviour, services, social activities, economic support, children and the societal perception of the couple. Although there must be some element of living together, separate residences do not prevent a finding of cohabitation. Rather, what must be considered is the reason for maintaining separate residences.

The Case

Michael and Lisa had never legally married and despite the length of their relationship and the many factors that pointed toward a committed relationship, as mentioned above, they had not cohabitated – or had they? Lisa argued that essentially she and Michael had been "married" and therefore she was entitled to spousal support. Michael, who was not inclined to pay support, argued that Lisa had been nothing more than his girlfriend and travelling companion.

The Decision

After considering all the evidence, the trial judge concluded

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Beat the Clock: the Importance of Limitation Periods

There are a few legal topics that are so important that we like to raise them in our newsletter on a regular basis as a helpful reminder to our clients. One such issue is limitation periods.

As a general rule, the law requires legal cases to be commenced within a set period of time known as the limitation period. In Ontario, the *Limitations Act* creates a standard limitation period of two years, such that you must file a statement of claim within two years of discovering that you have suffered damage, whether contractual or negligence.

5 (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to above.

If a person starts a claim outside this two-year period, they must provide a very strong explanation as to why the claim could not have been discovered sooner.

What follows are four brief synopses of cases that raised the issue of whether the plaintiffs' legal actions could go ahead or whether they were filed outside the limitation period. All of these cases ended up being appealed. See if you can figure out what the final decision was in each case. The answers are on page 4.

Case #1 – Septic System Run Amok

In 2010, P, the homeowner, hired V to install a new septic system. A smell began to emanate from the system the following year and by the spring of 2013, the smell had grown worse and sewage had begun to seep from the system. V reassured P that he could fix the problem and did in fact make several attempts to do so. However, by the spring of 2014 V had given up. In 2015, the health unit, who had approved the installation in 2010, condemned the septic system and ordered the owners to replace it.

In August 2015, P sued V in Small Claims Court and added the health unit as a defendant in January 2016.

The judge concluded that any reasonable person, given how serious the situation was, would have realized that they had recourse to the courts by the spring of 2013. Since P did not start his claim until more than two years and three months later in the spring of 2015, the action was dismissed.

This case made its way to the Ontario Court of Appeal. What do you think the appellate court decided?

Case #2 – Back Treatment, Back Surgery

M was a patient of chiropractor B. In June of 2011, he suffered an injury that ultimately necessitated surgery. Two years later in June 2013, he made a claim for negligence against B. B then sued E, a massage therapist, and CM, the family doctor, arguing that it was they who were negligent with respect to the subsequent treatment of M. Examinations for discovery were conducted in May and June 2015. In May 2016, M sought to add E, CM and S as defendants to the main claim. M indicated that it was not until certain information came out during discovery that he realized there had been negligence on the part of these three individuals as well as the chiropractor.

The court refused to extend M's claim to include E, CM and S on the ground that M should have realized that he had claims against these people at about the same time as B. Based on this conclusion, M was way past the limitation period.

This case made its way to the Ontario Court of Appeal. What do you think the appellate court decided?

Case #3 – Too Hot! Too Cold!

In 2006, Z, the homeowner, hired W to install an HVAC. Problems with the system began almost immediately. W claimed that the problems were the result of improper maintenance, but he would fix it if Z was prepared to enter into a maintenance contract. Z agreed and he signed the contract in 2007. Two years later, not only were the problems not solved but they were getting worse. In 2009, Z refused to renew the contract. In November 2010, Z contacted the manufacturer of the HVAC system. He was told that the manufacturer had informed W that the system had not been properly installed, though W had not shared that information with Z.

Z commenced a legal action against W in February 2012. The initial court determined that Z did not sue within the limitation period and dismissed the claim. The judge had concluded that Z knew long before speaking to the manufacturer that there were problems with the system and even if he did not know precisely what was causing them, he knew enough to know that legal action was a remedy available to

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him. Further, while Z may have relied on W's expertise during the two-year maintenance contract that reliance came to an end when the contract was not renewed. He also found that W's failure to share the manufacturer's information with Z did not stop the limitation period from running.

Z appealed the dismissal of his claim to the Ontario Court of Appeal. What do you think the appellate court decided?

Case #5 - Back pain Is Not the Only Pain

The insured employee was a residential support worker who began to experience serious back problems in May 2012, which led to her receipt of long term disability benefits. That same year, the insurance company made changes to how it defined certain health issues.

In February 2013, the insured employee received a letter from the insurance company informing her that due to these changes, her LTD benefits would be ending as of March 2013.

As was her right, the insured employee appealed the decision in April 2013. At that time she provided additional medical information. In October 2014, the insurance company sent her another letter stating that its decision would stand. Unfortunately, the insured employee did not receive the letter. When she contacted the insurance company in the spring of 2015 for an update she was told about the 2014 letter and it was resent to her.

The insured employee sued the insurance company in June 2016. The insurance company filed a motion to have the case dismissed on the ground that the insured employee's case was filed out of time. The judge did not agree and allowed her legal action to proceed. The insurance company appealed. What do you think the appellate court decided?

The Takeaways

One takeaway from this exercise, aside from helping you to better understand limitation periods, is the knowledge that this can be a complicated area of the law with various twists and turns. As seen in Case #4 – Too Hot! Too Cold!, even appeal court judges don't always agree on the outcome.

The second takeaway is the importance of seeking legal advice sooner rather than later, because if a limitation period is missed, even by one day, any recourse for a wronged party is probably permanently lost.

If you have suffered some sort of damage, whether it be a contract issue, an injury or negligence, our lawyers would be happy to discuss your situation with you.

The New Frontier: Cyber Libel

A few short years ago, nobody had any idea what social media was. But today there is a plethora of Internet arenas that allow everyone their own platform.

KJ, a self-styled journalist, runs a number of websites that produce ultra-right and often extremely hateful commentary. One of his main targets are Muslims.

MF is a Canadian-Muslim businessman who owns a string of restaurants. He employs more than 2,000 people. He actively works with refugees and on interfaith engagement. He has been recognized for his efforts by both Parliament and the Senate.

In 2017, MF hosted a Liberal fundraiser that the prime minister attended. KJ stood outside the restaurant and attempted to disrupt the event. He then published a series of eight videos of the event which included numerous false, malicious and vile accusations about MF and his business. One of the videos ended up costing MF a $2 million plus franchise deal in the United Arab Emirates. At one point KJ followed MF to a mall and began making accusations against him in front of his three children.

MF sought to fight back and successfully sued KJ.

In coming to this decision, the trial judge found that KJ's statements met the three elements of the tort of defamation:

(1) by being posted online on a variety of social media platforms and websites they were published to at least one person;

(2) MF and his business were the clear targets of KJ's hateful expressions which expressly identify MF and his business by name and KJ posted images of both; and

(3) the remarks associated MF and his business with terrorists and criminals which would tend to lower their reputation in the eyes of a reasonable person.

The tort of defamation is one of reverse onus whereby it is not for the plaintiffs to prove the impugned statements are false, but rather for the defendants to prove their truth. KJ essentially put forward no evidence, instead relying on his freedom of expression rights as outlined in section 2 of the Charter of Rights and Freedoms.

The judge found that that the defences of justification, fair comment or related to the public interest were not present. Further, although the Charter does protect free speech,there is a line whereby the speech becomes true hate speech and therefore not worthy of protection, as in this case. KJ was ordered to pay general damages, aggravated damages and punitive damages in the amount of $2.5 million, the highest ever Canadian damages award for cyber libel.

Beat the Clock - Answers

Case #1 – Septic System Run Amok
Although the Divisional Court agreed with the Small Claims Court judge, the Ontario Court of Appeal had a very different view of things. They concluded that it was reasonable for P to accept V's assurances that he could fix the problem. P was entitled to rely on V's expertise and superior knowledge. Based on this, P could not have known until the spring of 2014, once V had given up his repair efforts, that litigation was the appropriate course of action. As a result, P was well within the 2-year time frame when he filed his claim.

Case #2 – Back Treatment, Back Surgery
The Court of Appeal disagreed with the lower court. It was clear from the evidence that M could not have reasonably discovered the claims against these three proposed defendants prior to the discovery phase of the proceedings. While the clock began to run against B in 2011, it did not start to run against E, CM and S until May and June 2015, the date of the examinations for discovery. Unlike B, who was alleged to have actually caused the injury to M, the core of the claim against these three was that, after the original injury but prior to the surgery, they had contributed to or exacerbated M's injuries in their approach to treating him.

Case #3 – Too Hot! Too Cold!
Two of the three appellate judges agreed with the lower court. Specifically, they agreed that Z did not have to know the precise cause of the problems to commence a legal action. What Z did know long before February 2010 was that the HVAC system was not working properly and that W was responsible for the problems.

The third judge did not agree with this reasoning. She concluded that time did not begin to run until November 2010 since it was not until then that Z discovered that the system had been improperly installed. In addition, she found it relevant that W had concealed from Z that this had been the manufacturer's conclusion.

Case #4 – Back Pain Is Not the Only Pain
The Divisional Court upheld the lower court's decision on the grounds that the insured employee, until she received the 2015 letter, genuinely believed that the insurance company's decision was still under consideration. It was not until she received the 2015 letter that she could have known that she would have to look to the court system for a remedy.

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that Lisa and Michael were spouses for the purpose of the *Family Law Act,* stating that, "The dynamic of their relationship was such that all of the elements were present to some degree or another, but when viewed all together, lead to the conclusion that they were spouses." Those elements included their committed relationship, their financial arrangements, the acceptance of Lisa by Michael's family, the social perception and the fact that they did live together when they travelled, to the cottage, to the condo in Florida and the many times that Lisa stayed at Michael's when she did not have her kids.

Once the trial judge concluded that the parties had cohabited and therefore were indeed spouses, she went on to find that Lisa was entitled to support based on the fact that she had suffered an economic loss as a result of the role she played in the relationship. She also found that Michael had the means to pay support and Lisa had need when measured against her standard of living during the relationship.

Unless the marriage or common law relationship was fairly short, the question of spousal support is more than likely to come up. Our family law lawyers would be pleased to assist you.

Steinberg Title Hope & Israel LLP

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

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

LAWYERS

Irwin Steinberg
isteinberg@sthilaw.com

Jack W. Hope
jhope@sthilaw.com

David M. Israel
disrael@sthilaw.com

M. Michael Title
mtitle@sthilaw.com

Derrick M. Fulton
dfulton@sthilaw.com

David A. Brooker
dbrooker@sthilaw.com

Eli Leibowitz
eleibowitz@sthilaw.com

Marvin Barkin
mbarkin@sthilaw.com

Shelley Brian Brown
sbrown@sthilaw.com

Patricia Virc
pvirc@sthilaw.com

Taras Kulish
tkulish@sthilaw.com

Daria Krysik
dkrysik@sthilaw.com

Eli B. Hoffman
ehoffman@sthilaw.com

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