STHI LEGAL NOTES

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Insurance Coverage or Exclusion for a Tenant

A phenomena that is becoming more common in society is two and three generations living under the same roof. This can lead to some unforeseen legal issues. One such issue, involving insurance coverage, was raised in a recent case.

The Facts
Elizabeth was the insured homeowner. With the exception of a 10 month period, her adult daughter, Betty, had always lived with her. Betty and her mother shared the daily tasks of living in the house, including household chores, grocery shopping and sharing meals. They also shared household expenses, although Elizabeth contributed more toward those expenses and assumed responsibility for utilities and property taxes. Betty paid her mother rent in the amount of $200 a month, an amount that was eventually increased to $400 a month.

On March 31, 2014, Betty was standing on the front porch of the house while waiting for a taxi. As the taxi was arriving, Betty leaned on the railing to take a broom from her mother who was standing below. She fell from the porch and the railing came down with her. Betty sustained injuries and sued various people, including her mother.

The Insurance Policy
Elizabeth had a homeowner's insurance policy. Among other things, the policy covered all sums which Elizabeth might become legally liable to pay as damages because of unintentional bodily injury or property damage arising out of her personal actions anywhere in the world as well as her ownership, use or occupancy of her home. However, the policy did not cover claims made against her arising from bodily injury to her or any person residing in her household. The one exception was if that person was a residence employee.

The insurance policy defined a residence employee as "a person employed by the homeowner to perform duties in connection with the maintenance or use of the premises, including persons who perform household or domestic services or duties of a similar nature for the homeowner."

The Position of the Parties
The insurance company argued that coverage for Betty's accident was excluded since she was a person residing in Elizabeth's household at the time of the loss.

Elizabeth took the position that Betty was either a "residence employee" or a "tenant", and therefore was not excluded from policy coverage.

Interpreting Insurance Policies
When it comes to interpreting insurance policies, the Courts have developed various general principles, including:

- that coverage provisions should be construed broadly and exclusion clauses narrowly;
- that ambiguities will be construed against the insurer since insurance contracts are essentially adhesionary, i.e. take it or leave it contracts; and
- the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.

Analysis of the Facts
The Court dismissed the argument that Betty was a residence employee. The evidence showed that Elizabeth never had a specific list of duties for Betty nor did she supervise her in any tasks and she was not paid for the work she did at the house. Elizabeth never provided Betty with a T4 and she did not make any government remittances on her behalf. The bottom line was that there was no employer employee relationship between mother and daughter and therefore Betty was not a residence employee.

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On the other hand, the evidence indicated that Betty was a tenant of her mother's. There was no exclusion in the insurance policy with regard to bodily injury occasioned by a tenant at the residence. In fact, the Court found "that it had to have been in the reasonable contemplation of the parties that the owner may have rented a room to a tenant for remuneration, and that the owner may call upon that policy if a tenant were injured on the property…"

Since the term "tenant" was not defined in the insurance policy, the Court had to decide what constituted a tenant. They concluded that a tenancy is characterized by two components:

1. the tenant occupies the property in question, and
2. the tenant is permitted to do so by the landlord in exchange for some form of consideration.

Betty met the first criteria since she was residing at the premises when the accident occurred. She also met the second criteria since she and Elizabeth had formed "a mutually beneficial agreement whereby Betty was permitted to reside, and did reside, in her mother's home in exchange for rent."

Betty was found to be a tenant and as a tenant she was covered by her mother's homeowner insurance policy. The Court ordered that Betty be allowed to continue with her legal action and that the insurance company had a duty to defend and indemnify, if required, Elizabeth pursuant to the policy of insurance.

Did you know…

Most homeowners look after the property in front of their house that they own as well as the six feet or so adjacent to the road that belongs to the municipality. But did you know that in most municipalities, including Toronto, that you are legally obligated to look after the city property.

According to the Toronto Municipal Code, a homeowner is obliged to cut the grass and keep the area in front of their property free of litter, leaves and lawn trimmings. Failure to do so could result in a $200 fine and any costs incurred by the City to perform any required maintenance.

You should also know that you are equally responsible for ensuring that all ice and snow is cleared on sidewalks that run along your property within 12 hours of the end of a snow fall. If you do not, you could be looking at a fine of $125. And when shovelling your driveway, it is against the law to shovel the snow onto the road and could result in a fine up to $5,000.

Workplace Harassment

One of the most significant issues facing employers these days is ensuring that their workplace is free of bullying and harassment.

In 2017, the Ontario Superior Court of Justice recognized a new independent tort of harassment. The case involved a member of the RCMP, Merrifield, who claimed that his superiors harassed and bullied him because he chose to run in the federal election. The trial judge found that the plaintiff had suffered harassment by his superiors and awarded him damages.

The decision was appealed and earlier this year the Ontario Court of Appeal overturned the decision. Specifically, the appellate court concluded that the current legal "authority does not support the existence of a tort of harassment". In addition, no evidence had been presented to the court showing that any jurisdiction had recognized the tort of harassment. Further, they refused to establish a new tort believing instead that this was best left to the legislature.

However, the Court did find that Merrifield could have sought damages under the tort of intentional infliction of mental suffering. The test for determining the existence of this tort requires a plaintiff to establish that the conduct he or she was subjected to was:

- flagrant and outrageous,
- calculated to produce harm, and
- results in visible and provable illness.

As it turns out, in this specific instance, the facts did not support that Merrifield's superiors had intended to cause him harm and his case was dismissed.

While the Court refused to find that there is an independent tort of harassment and that the threshold for establishing the tort of intentional infliction of mental suffering is quite high, employers should nevertheless remain vigilant. Employers must make sure that their employees understand and adhere to workplace violence and harassment policies. When faced with a complaint it is very important that any investigation by the Employer be conducted in a fair and impartial manner.

If you would like to review your policies to ensure they meet current legal requirements please contact our firm.

When is an Arbitration Clause Invalid?

Modern society has seen many twists on old ideas, including such things as Uber, Airbnb and Skip the Dishes. At first glance, they all seem like a great way for an individual to pick up a bit of extra cash or a way to become your own boss. But as with any legal contract it is important to understand what you are getting yourself into.

The Facts
Heller began driving for Uber in 2016. It was quite simple. All he had to do was download the Uber App, create an account and then agree to the 15-page service agreement by clicking "YES, I AGREE". On average, Heller earned between $400 and $600 per week.

In 2018, Heller sought to commence a class action against Uber for violating Ontario's *Employment Standards Act* (ESA), including minimum wage, overtime and vacation pay. Heller argued that he and other drivers were employees of Uber and therefore protected by the ESA. Uber on the other hand, argued that it does not employ drivers, but rather provides a platform that connects drivers to potential customers.

The case barely got off the ground because the initial court dismissed the suit on the basis that Heller's contract with Uber required that any dispute with the company be dealt with through private arbitration. It should be noted that the arbitration had to take place in Amsterdam, subject to the laws of the Netherlands, and the person had to pay an up-front filing fee of $14,500 US.

Heller appealed the dismissal to the Ontario Court of Appeal.

The Appeal
The appellate court began by considering Ontario's *Arbitration Act*. The Act states that any court proceeding filed by a party to an arbitration agreement cannot proceed through the court unless one of five exceptions applies, including that the arbitration agreement itself is invalid.

The Court was presented two possible reasons for invalidity. The first was that the arbitration clause amounted to an illegal contracting out of the ESA and the second was that the clause was unconscionable and therefore invalid.

Contracting Out of the ESA
Although a legal determination as to the status of Heller and the others is not made in this case, for the purposes of deciding jurisdiction, the Court assumed that they were employees pursuant to the ESA.

The Court found that one of the rights, or employment standards, provided by the ESA to employees is the right to file a complaint with the Ministry of Labour. If the arbitration clause was allowed to stand, it would have the effect of denying Heller his right to turn to the Ministry of Labour. For this reason, the Court concluded that this result amounted to Heller having contracted out of his rights under the ESA. Therefore, the arbitration clause was invalid and Heller could proceed with his court application to certify the class action.

Unconscionability
The Court also considered whether the arbitration clause was unconscionable. The test for determining whether a contractual provision, including an arbitration clause, is unconscionable includes the following four elements:

1. A grossly unfair and improvident transaction;
2. Failure of one of the parties to obtain independent legal advice or other suitable advice;
3. An overwhelming imbalance in bargaining power caused by one of the party's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
4. The other party's knowingly taking advantage of this vulnerability.

The Court found that the arbitration clause met all four elements. In addition to being grossly unfair, it required a driver with a small claim to put up thousands of dollars just to commence the arbitration process, which then would take place in Amsterdam according to Dutch law, something about which drivers are unlikely to have any knowledge.

With respect to the second part of the test, there was no evidence that Heller had any legal advice prior to entering into the services agreement. Further, even if he had, there was no reasonable prospect of negotiating any of the terms.

There was a significant inequality of bargaining power between the parties, which even Uber admitted.

Based on the above, it could be safely concluded that Uber chose this arbitration clause in order to favour itself and thus take advantage of its drivers. There was also a reasonable inference that Uber did so knowingly and intentionally.

Since the clause was unconscionable, it was unenforceable and could not block Heller's access to the courts. As a result, Heller could proceed with the certification of his class action lawsuit.

What's Next?
This fight is far from over since Uber has successfully

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Whose Tree Is It?

I often lay on that bench looking up into the tree, past the trunk and up into the branches. It was particularly fine at night with the stars above the tree.

Georgia O'Keeffe

Trees are beautiful and can give a yard so much character. But if a tree straddles a property line, who does it belong to? And can one neighbour decide to cut it down without the other's consent. This very set of facts came before the Ontario Superior Court of Justice earlier this year.

A 60 year old maple tree was two thirds on the property of A and one third on the property of B. A, who had lived in their home for 18 years, wanted to cut the tree down in order to build an addition. The addition was to go on the north side of the backyard which meant the shared tree would be in the way. The south side of the yard would remain untouched.

Although the City of Toronto gave A permission to take the tree down, B, who had lived there for four years, refused to consent and brought an application to the court to save the tree.

According to the *Forestry Act of Ontario*, "Every tree whose trunk is growing on the boundary between adjoining lands is the common property of the owners of the adjoining lands." This of course meant that even if A needed the tree removed to renovate, B could refuse since they were equal owners of the tree. The exception to this rule is if the tree is a nuisance to A.

Generally speaking the court has found trees to be a nuisance when the root system has caused damage to the neighbour's property or where the tree has physically impeded access to the neighbour's land. Neither of these were issues in the case at hand. The Supreme Court of Canada has stated that for there to be a nuisance, there must be an interference with a property owner's use and enjoyment that is both substantial and unreasonable.

In this case, A had not considered the tree a nuisance until they decided to renovate. Although the municipality agreed to the tree being cut down, they were considering such factors as community planning and construction safety. However, the role of the court is to consider what is reasonable from a competing property rights point of view. This means that A had to demonstrate that the tree had to be chopped down and that there was no reasonable alternative.

The court concluded that the tree was not interfering with A's current enjoyment of the land. Further, the court concluded that A had failed to demonstrate that there was no tree-sensitive renovation, as for instance expanding on the south side rather than the north. The application was dismissed.

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sought leave to appeal this decision to the Supreme Court of Canada. Stay tuned.

Parting Words

At this point, the issue remains one of jurisdiction. The Court has not ruled on whether Heller and the other are in fact employees of Uber. If you decide to work for one of these companies be sure to read the terms and conditions carefully and understand what you are getting into before you click "YES, I AGREE."

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