THE LAWRENCES® LETTER

News and information for clients and friends of Lawrence, Lawrence, Stevenson LLP

WINTER 2012

Injuries in the Workplace:
When Does Liability Begin—and End?

Anthony E. Bak

A recent Ontario court decision about liability for accidental death on premises makes it clear how different the outcome can be for different parties in a case—and how important it is to anticipate and prevent potential legal problems before they arise, if possible.

In 2009, a 14-year-old girl was crushed to death when a wall in a public park washroom operated by the City of Guelph collapsed on her. Charges were brought under the *Occupational Health and Safety Act* (OHSA) against the architect and engineer who designed the wall and the municipality that owns and operates the facility.

The wall was built in 2004. The limitation period under the OHSA is generally one year. As the designers, the architect and engineer argued that the statute of limitations on their work ran out one year after installation of the wall. The Crown argued that the limitation period should start when users of the facility are endangered. The court agreed with the architect and engineer, finding that the limitation period for the charges against them had expired.

However, the case is ongoing against the municipality, since as owner and operator, it was charged with improper maintenance—an ongoing responsibility. The court distinguished between the continuing ill effect of an improper act and the improper act itself.

The case is still before the court; appeals of preliminary rulings and decisions may yet occur. Irrespective of the limitations period set out under the OHSA, different and lengthier limitations periods may exist under tort law for those injured, or families of the deceased. Architects and engineers may also be subject to professional disciplinary proceedings, which could proceed under a different limitation period and include the potential for licence revocation or suspension.

The OHSA deals with highly technical offences within a very complicated legal framework. For example, if a defendant is charged with not having complied with a specific section of the Act from April 1 to April 30 of any given year, each day constitutes a separate offence, which can theoretically trigger 30 separate fines upon conviction. Businesses are strongly advised to review their operations to see where they might be liable and seek legal advice on how to comply with the law.

The penalties upon conviction under the OHSA can be enormous. Maximum fines for individuals can be $25,000 per offence, while for corporations, the maximum fine can be $500,000 per offence. Quite often, the Ministry of Labour may lay charges against both the corporation and its directors. All employers should be well-informed and have legal representation when attending in court if charged under the Act.

Lawrences' Litigation Group has extensive experience in helping businesses prepare for litigation, as both plaintiff and defendant. We can also help you anticipate the problems that can lead to litigation and prevent them wherever possible.

Tony Bak heads Lawrences' Litigation Group. He practises civil litigation, with extensive experience at all levels of Court, including the Ontario Court of Appeal. He can be reached at (905) 452-6875 or aebak@lawrences.com.

In this issue:

Occupational Health and Safety Act

Do the New OHSA Poster Requirements Apply to Your Workplace?

Damien M. E. Buntsma

Jagdeep and Mahesh Gupta run a family business employing 11 people, all of whom speak English as a second language. They received notification from the Ontario Ministry of Labour about the new requirement to post workplace health and safety information prominently on their premises. Jagdeep believes the requirement applies only to larger workplaces, but Mahesh says it applies to "provincially regulated workplaces" and they must post it in both English and the first language for most of their employees, which is Hindi. Neither of them knows whether their business is provincially regulated and they are unsure how to find out.

Since October 1, 2012, Ministry of Labour inspectors have been auditing workplaces for compliance.

Many smaller employers are unsure about whether they are provincially or federally regulated. In very simplified terms, employers are *federally* regulated if they operate within these sectors: air and water transport, federal crown corporations, energy, mining, banking, federal public service, pipelines, bridges and tunnels, feed, flour and seed mills, postal contractors, broadcasting, grain elevators, rail transport, communications, longshoring and interprovincial road transport. Employers are *provincially* regulated if they operate outside these sectors.

As of October 1, 2012, all provincially regulated Ontario employers are required to post a new workplace poster, "Health & Safety at Work – Prevention Starts Here", in a conspicuous location within their workplaces, together with the *Occupational Health and Safety Act* (the "OHSA") and any explanatory materials prepared by the Ministry. The poster size must be at least 8.5 x 11 inches, in English and the predominant language within the workplace. Copies are available at www.labour.gov.on.ca.

The poster was created on the recommendation of the Minister of Labour's Expert Advisory Panel, which has been studying ways to help prevent workplace injuries, illnesses, and fatalities.

Since October 1, 2012, Ministry of Labour inspectors have been auditing workplaces for compliance. Failure to display the poster can result in compliance orders from the Ministry and/or fines for repeated contraventions of the OHSA or ignored orders. Fines for offences under the OHSA can be up to $25,000 for individuals and up to $500,000 for corporations. For most employers, the most practical risk of non-compliance is increased scrutiny from the Ministry in relation to other statutory obligations.

Other Statutory Obligations

Some other requirements for provincially regulated employers include:

Other OHSA posting requirements

- All provincially regulated employers must post full copies of the OHSA in the workplace.
- Employers with five or more workers must develop and post policies in relation to: occupational health and safety policy, workplace harassment, and workplace violence.
- Employers with 20 or more workers must post information about the established Joint Health and Safety Committee.
- ***Employment Standards Act*** Employers must display the "What You Should Know About the Ontario Standards Act" poster.
- ***Workplace Safety and Insurance Act*** Employers must display the "In Case of Injury at Work" poster (also known as the "1,2,3,4" poster).
- ***Smoke-Free Ontario Act*** Employers must post "No Smoking" signs at all entrances and exits.

Lawrences' Employment & Labour Group has extensive experience advising both provincially and federally regulated employers. Call us to find out how we can help you develop comprehensive workplace policies and deliver on-site training for your managers and employees.

Damien Buntsma is an associate in Lawrences' Employment & Labour Law Group. He represents and advises public and private sector employers, unionized and non-unionized, in all areas of labour and employment law. Damien can be reached at 905-452-6876 or dbuntsma@lawrences.com.

Guardianship of Minors:

What is in the Best Interests of the Children?

Michael J. Prsa

Sue and Dave have one child of their marriage, a 10-year-old son named Jack. Dave's aunt died recently, naming Jack as sole beneficiary of a $20,000 insurance policy. Sue and Dave have wills, in which Sue's sister Mary is named as guardian for Jack, should Sue and Dave die before Jack reaches age 18. They want to know if Mary as guardian would have the authority to manage Jack's assets, including the $20,000 insurance policy.

In fact, even Sue and Dave have no legal authority to manage the insurance proceeds. Parents are not the guardians of their children's property. The insurance company must pay the money into court, to be held by the Accountant for the Province of Ontario until Jack reaches age 18.

While parents are not automatically the guardian of a minor child's property, they can be appointed as guardians by court order. The Children's Law Reform Act (CLRA) of Ontario provides for such applications. Sue and Dave would have to submit management and investment plans for Jack's inheritance to the Office of the Children's Lawyer, which is part of the Ministry of the Attorney General. They would likely be required to post a bond as a condition of appointment.

In some cases, parents of young children die without a Will (intestate). In this situation, their minor children's shares of their estate would also be paid into court, just like the insurance policy in the above example.

This is why estate lawyers recommend that in addition to making Wills and naming a guardian for their minor children, parents also have an estate plan with trusts for those children. In this case, the aunt could have set up a trust to hold the funds and appoint a trustee to administer the trust for Jack if she were to die before he reached age 18. A typical trust would hold the child's share of the estate and would direct another adult family member to act as trustee until the child reaches age 18 or older. Trusts can be set up to give the trustee discretion to use the trust capital or income for the child's benefit before the child attains the specified age. Set up properly, trusts protect minor children in the event that their parents die before they reach the age of majority. Advice should be sought from an experienced trusts and estates lawyer for the many planning considerations involved.

Under the Children's Law Reform Act (CLRA), parents have joint custodial rights to their children. Should one parent die, the survivor will have custody of any minor children. In the above example, Mary would not become Jack's guardian during Dave's lifetime. If Dave were to die first and Sue after him, but before Jack reached the age of majority, Mary would become Jack's guardian pursuant to Sue's Will.

Readers may be surprised to find out that the appointment of a guardian in a Will is legally effective for only 90 days after the parent has died. For the guardian named in a Will to continue as guardian for more than 90 days, that person must make a court application under the CLRA and have the appointment confirmed by court order.

The court must consider a wide variety of factors, including the child's wishes and preferences. The court must follow the governing principle: "What is in the best interests of the child?"

While the guardian appointed in the Will would usually be the guardian that the court appoints, this is not always the case. A judge may determine that the parent's choice is not appropriate and that it is not in the best interests of the child to appoint the person named in the Will as permanent guardian.

Lawrences' Wills, Estates, and Trusts Group has extensive experience in setting up trusts and advising families on guardianship. Call us for advice on estate planning: we can help you ensure that your wishes are followed.

Michael Prsa chairs Lawrences' Wills, Estates, and Trusts Group. A member of the Society of Trusts and Estate Practitioners, Mike focuses his practice on estate planning, estate administration and estate litigation. He can be reached at (905) 452-6880 or mjprsa@lawrences.com.

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Brampton Area Community Foundation

Robert J. van Kessel Memorial Fund

Our friend and partner, Robert J. van Kessel, passed away earlier this year after a valiant battle with cancer. In his memory, we have established the Robert J. van Kessel Memorial Fund with the Brampton Area Community Foundation (the "BACF").

Everyone at Lawrences will contribute to the fund through our various activities throughout the year, including our casual-dress Fridays, and other fundraising events we hold. The partners will also be making a contribution each year. The fund will be managed by the BACF and applied towards cancer research and treatment. Our decision to establish the fund is really seeking to celebrate and commemorate Rob's active involvement in the Brampton community. During his many years at Lawrences, Rob took time from his busy law practice to be an active Rotarian, to take part each year in the Ride to Conquer Cancer, and to found Brampton's Rib'n'Roll'.

Rob left us a great legacy, both as a lawyer and as a community participant, and Lawrences is proud to build on this legacy. This year, our partner Heather Picken participated in the Ride to Conquer Cancer in Rob's memory. Going forward, our firm's fundraising activities will now be in support of the fund, including our annual donation in lieu of sending holiday cards.

Those who knew Rob may wish to join us in contributing to the fund. If you wish to do so, please contact the Brampton Area Community Foundation (www.bramptonareacf.ca), Attention: Mr. James Boyd, President and CEO at jboydBACF@aol.com or (905) 796-2926 (phone) or (905) 796-3432 (fax).

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