

A Pot Pouri of Topics


In this issue of the Legal Observer we offer you a variety of legal topics.

The long awaited decision regarding social host liability was handed down in May. We have included a brief synopsis of that decision.

If you have ever wondered about those Privacy Policies that you see at the bottom of everyone’s website, on page 2 we explain what has prompted them.

It looks like summer may indeed be imminent, so we thought it timely to talk about

swimming pools. Specifically we wanted to give you with information about the legal liabilities of pool ownership.

And finally, we conclude our series of profiles of the firm’s lawyers. This time we focus on Jaye Hooper. 

Social Drinks With Your Neighbours - The Sequel

Last month the Ontario Court of Appeal handed down its long-awaited decision in the case of *Childs et. al. v. Desormeaux et. al.* This case raised the issue of whether a person hosting a party in their home should be held responsible for damage caused by a guest’s decision to drink and drive. We first told you about this case in the 2002 fall edition of the *Legal Observer*. Our firm acted for the social hosts through their homeowner’s insurance.

The Facts

On December 31, 1998, Zimmerman and Courier hosted a New Year’s Eve BYOB party at their home. Desormeaux, O’Brien, and Sauve, who arrived together, were three of the more than one dozen guests at the party. O’Brien and Sauve were intoxicated on arrival.

Although Desormeaux had often spent the night at Courier and Zimmerman’s following an evening of drinking, and guests were invited to stay that night, it was not clear that the hosts knew Desormeaux’s plans on this particular evening.

Desormeaux, O’Brien and Sauve, left the party about 1:00 a.m. Shortly thereafter, their vehicle, driven by Desormeaux, was involved in a head on collision with another. There were four passengers in the second vehicle. One of the passengers was killed, one (Childs) was left a paraplegic and the other two were seriously injured. A blood sample, taken from Desormeaux showed a blood alcohol concentration of .18.

Childs sued Desormeaux, as the driver, and Courier and Zimmerman, as the social hosts. She argued that the social hosts owed her a duty of care on the ground that Desormeaux’s ability to operate a motor vehicle was impaired by alcohol, which was consumed at their residence.

The Trial Decision

The trial judge did find a duty of care on the social hosts, Courier and Zimmerman, based on the facts of the case. However, he refused to expand the tort law for policy reasons, believing that such changes should be left to the government. As a

result he dismissed Childs’ claim.

The Court of Appeal Decision

The Court of Appeal agreed with the trial judge that the action should be dismissed but for different reasons.

The Court of Appeal disagreed with the trial judge that a person’s history of drinking (Desormeaux had a drinking problem) should form the basis for imposing a duty on a social host to monitor a guest’s drinking at a party where alcohol is neither provided nor served by the social hosts. In fact, the appellate court saw the BYOB aspect as a distinguishing feature in this case, since the social hosts were not active participants in creating the danger to users of the highway and could not be implicated in the creation of the risk.

The Court also found that the trial judge erred in holding that Courier should have inferred that Desormeaux had had too much to drink on the basis that his passengers had arrived at the party intoxicated.

At the end of the day, this decision does not advance the law in this area, since the Court chose not to discuss whether there is a duty of care and if so what the standard for that duty might be. Rather

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PROTECTING YOUR PRIVACY

The Personal Information Protection and Electronic Documents Act

The protection of privacy is a fundamental value in modern, democratic states. . .

Justice LaForest, Supreme Court of Canada

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403

In this day and age of technology, an organization's ability to collect and retain vast amounts of personal information about you and me seems limitless. Naturally, this leads to concerns about what happens to this data, who sees it and what it is used for. In an effort to address the issues surrounding privacy protection, the Canadian government has enacted the *Personal Information Protection and Electronic Documents Act* (PIPEDA).

Since January 1, 2004 PIPEDA, which initially applied only to federally regulated private sector organizations and to personal health information, applies to all organizations who, in the course of commercial activity, collect, use or disclose an individual's personal information.

The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances. (Section 3 PIPEDA)

As an individual whose personal information is being collected this law gives you the right to:

- know what information is being collected,
- know what the information will be used for,
- consent to the collection of such information, and
- ensure the information is accurate.

As an organization that collects personal information as part of its commercial activities, this law establishes rules and guidelines for how information can be collected, used and stored.

The legislation sets out for the private sector a framework for the collection, use, retention, and disclosure of personal information¹. Personal information is defined as information about an identifiable individual and includes such things as race, ethnicity, colour, age, marital status, religion, education, medical history, financial history, and personal opinions linked to an individual. It does not include but does not include the name, title or

business address or telephone number of an employee of an organization.

The framework set out in PIPEDA is based on the following ten principles.

Accountability - Organizations are required to designate an individual(s) who will be accountable for the organization's compliance with these principles.

Identifying Purposes - The organization must identify the purpose(s) for which personal information is collected.

Consent - The knowledge and consent of an individual are required for the collection, use, or disclosure of personal information. The only exception is where it would be inappropriate to get consent, for instance security reasons.

Limiting Collection - The collection of personal information is limited to that which is necessary for the purposes identified by the organization.

Accuracy - Personal information must be as accurate, complete, and up-to-date as is necessary for the purposes for which it is to be used.

Safeguards - Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.

Openness - An organization shall make readily available to individuals specific information about its policies and practices relating to the management of personal information.

Individual Access - Upon request, an individual must be informed of the existence, use, and disclosure of his or her personal information and shall be given access to that information. In addition, an individual can challenge the accuracy and completeness of the information and have it amended as appropriate.

Challenging Compliance - Individuals are entitled to address a challenge concerning compliance to the designated individual(s) accountable for the organization's compliance.

If your organization is involved in any sort of commercial activity, including such things as fundraising, and you collect information about individuals, be they clients, customers, or donors, PIPEDA applies to you. If you have not already done so, it is important that you assess your organization's current situation,

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Have Fun But Stay Safe -

The Obligations of Pool Owners

Summer is just around the corner and that means lazy days beside the backyard pool. While a pool can bring a welcome reprieve from the summer heat, pool ownership also carries with it certain legal obligations and responsibilities.

Occupiers' Liability Act

The obligations of a pool owner vis-a-vis those entering onto their property is governed by the *Occupiers' Liability Act* (See Fall 2002 issue of the *Legal Observer* for more information about this Act). The Act provides that:

An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

An occupier includes, not only the owner of the pool (or the property), but also those who are in physical possession of the premises or who have responsibility for and control over the condition of the premises or over those using the premises. As a result there is a wide array of people who may be subject to the duties imposed by the *Occupiers' Liability Act*. In the context of residential property, an occupier could include someone who is renting a home, which is equipped with a swimming pool. It could also include the caregiver, who is left in charge of your children and your home (and by extension the pool) while you are away.

Essentially the law requires that you take reasonable responses to reasonable risks, i.e. risks that are foreseeable. For instance ensuring that your pool is fenced in, that the fence and pool are in good condition and that younger children are not left unattended while in your pool.

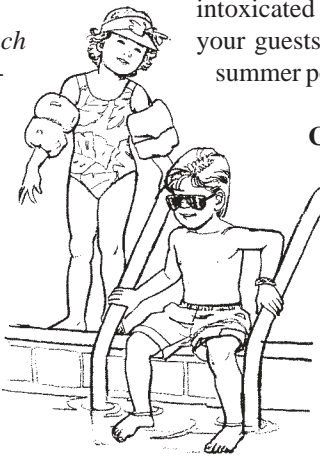
Alcohol and Pools

While much of the responsibility falls on the shoulders of the pool owner, the law does expect a guest to take reasonable care for his or her own safety. In addition, an occupier's duty is lifted in respect of risks willingly assumed by visitors to the premises.

Several years ago, the Ontario Court of Appeal ruled on a case involving an intoxicated guest, who ended up a quadriplegic after falling head first into his hosts' pool. The guest arrived at his hosts' with a beer in hand and over the course of the afternoon he had three more drinks. Although he had been warned not to dive into the pool, he unexpectedly climbed the safety railing around the pool. He lost his balance and fell in head first.

During the trial and the appeal, the guest argued that the hosts were liable for his accident since it was foreseeable. The guest conceded that it was not obvious that he had been intoxicated and that there had been nothing unsafe about the pool or the railing. Both the trial and appellate courts exonerated the hosts. The Court of Appeal stated that "*the conduct was outside the realm of foreseeable uses in connection with the swimming pool.*"

Despite this decision, there is a trend that is beginning to move towards making social hosts liable for accidents involving their intoxicated guests. Therefore, you would be wise to monitor your guests' consumption of alcoholic beverages during those summer pool parties.



Children and Pools

While adults must assume a certain responsibility for their own actions and safety while enjoying your pool, children, and especially young children, do not necessarily understand, appreciate and avoid danger. And while something may not be considered a danger where adults are concerned, this is not necessarily the case with children. This means that your duty to take precautions when children are using your pool will be higher.

If the neighbourhood kids hang out at your house because you have a pool, it is essential that you set up strict rules. Children should not be allowed into your pool without adult supervision. If you are too busy to act as "lifeguard", insist that their parents accompany them. Although you cannot prevent children from being children, you should insist on minimal horseplay, no running on the deck and no diving where the pool depth is less than six feet deep.

City By-Laws

Most municipalities have a bylaw regulating the enclosure of privately owned pools. These bylaws are put in place primarily to protect young children from accidentally climbing into a pool.

Although each municipality has its own rules, most require that those who wish to install a swimming pool secure a pool enclosure permit. In Ottawa *The Pool Enclosure By-law No. 2001-259*, requires every owner of a privately owned outdoor pool to erect and maintain an enclosure (at least 5' in height) around their pool. For specific information contact your city's bylaw office.

Swimming pools are one of the great pleasures of summer, with a little bit of common sense, you and your guests will have a fun-filled and safe summer. ☞

Jaye Hooper

In the last of our series, we profile the firm's newest lawyer, Jaye Hooper.

A native of Windsor, Jaye attended law school at the University of Windsor, where she had previously earned an Honours degree in International Relations. During her university days she was very active in both academic and university life, including three years working with Community Legal Aid.

After receiving her law degree in 1999, Jaye joined Williams McENERY as an articling student. Following her call to the Bar in 2001, she chose to continue her career with the firm,

Since joining Williams McENERY, Jaye has had the opportunity to appear before various levels of court and administrative tribunals, assuming both lead and assisting roles in trials and appeals. During the last three years, Jaye's practice has focused on the areas of:

personal injury,
insurance litigation,
commercial host liability,
employment law, and
commercial litigation.

She is currently a member of the executive of the Young Lawyers as well as a member of the Civil Bench and Bar Committee.

Now with two children in her life, Jaye can usually be found in various hockey rinks or on the sidelines of soccer fields throughout the Ottawa area. To find some quiet time, she has developed an interest in gardening. However, she will have to keep us posted on whether or not she successfully develops her green thumb. 📁

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that you develop a policy respecting the collection and use of personal information and that your staff be educated about the legislation and your organization's privacy policy.

Canada's Privacy Commissioner is given the mandate to enforce this legislation and to receive and investigate complaints regarding an organization's compliance.

If you would like more information about PIPEDA and how your organization may be affected please contact us. Our lawyers are also available to assist you regarding compliance issues and the drafting and implementation of privacy policies. 📁

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the Court has made more of a moral statement, leaving social hosts in the difficult situation of not knowing what to do and if there is even liability. Therefore, social hosts would be advised to keep this issue on their radar screens when hosting their next party.

We understand that the plaintiff will be seeking leave to appeal the decision to the Supreme Court of Canada. Perhaps the high court will talk more about the duty, if any. 📁



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