

ERIC WILLIAMS

There are many ways of describing founding partner Eric Williams - ranging from his propensity to make up amusing names for people to his energy. All would agree that he is a fun loving, caring person who has a sharp legal mind and a quick wit.

In twenty-six years of practice, Eric has carried out over 140 civil trials, both jury and non-jury, and has appeared in numerous complex motions and appeals before appellate courts. His practice has included appearances at all levels of trial courts including the Federal Court. In addition, he has carried out numerous arbitrations, both as counsel and arbitrator before private and statutorily created tribunals. As a consequence, over 65 of his cases have been reported decisions.

Eric's opinion is often sought in complex liability litigation and matters where intricate or novel legal points are involved. He enjoys this challenge and can often be heard to inspire others to challenge themselves to come up with creative legal arguments.

Outside the practice of law Eric is a longtime skier and tennis player. In the winter he can usually be found at Tremblant on weekends enjoying the fruits of his labours. His two children, Andrea and Neil, both were involved in competitive skiing when they were younger. Now that they are finished that aspect of their lives, Eric has more time for himself and his own areas of competition.

Eric's areas of practice include:

- bodily injury,
- fire loss,
- errors & omissions claims and
- commercial litigation.

If you are in need of his services or those of any of our litigators, don't hesitate to contact the office at 237-0520. Eric can be reached directly by e-mail at williams@williamsmcenery.com

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at our
new cyberspace location!

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We Have A New Look!

Welcome to our new look firm. In order to reflect the changes, which have taken place at the firm, we have renamed both the firm and the newsletter.

William M. Davis Q.C. left the firm as of January 1, 2002. We wish Bill the best of luck in the future. As a result of Bill's departure, the firm is now called **Williams McEnery**. Along with this name change, we have a stylish new "WM" logo as well as letterhead.

Secondly you will notice that this production has a fresh, modern look. Although the style is new, we will maintain the same informative content.

In this issue of the *Legal Observer* you will find articles on slip and fall accidents (its that time of year again!) and a discussion of recent developments in employment law matters. We also present the first in a series of lawyer profiles, beginning with Eric Williams.

Please let us know if there is a particular topic that you would like to see in future newsletters. Contact Paul Muirhead at muirhead@williamsmcenery.com

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It's that time of year again!

The winter season is upon us and that means snow, ice, slippery conditions - and falls! If you are the victim of a fall, and more than just your pride is injured, you would be wise to promptly seek legal advice. Timing is particularly critical if the fall occurred on a municipal sidewalk or roadway, since the *Municipal Act* requires that the municipality be notified of any claim within 7 days of the fall.

However, just because a person falls, as a result of icy conditions, does not automatically mean that there will be legal liability. As we explained in *Negligence, Cause & Effect (Fall 2001)*, to be entitled to damages a claimant must establish three things.



1. The wrongdoer owed the claimant a duty of care.
2. In carrying out that duty, the wrongdoer failed to exercise such care and skills as might be expected in the circumstances.
3. The breach by the wrongdoer was in fact the cause of the damages.

If any one of these elements is missing, the claim will fail, regardless of the extent of the damages suffered. With respect to slip and fall cases, it is condition number 2 that is generally the most troublesome one for complainants to establish. Perhaps the best way to illustrate these principles is by way of an actual case.

Although the following case is from Quebec, which is governed by the Civil Code of Quebec, the principles of law in this area (slip and fall) are the same as in Ontario and the other common law provinces. We have chosen this case due to the clear, concise reasons provided by the trial judge.

Fleury v. Saint-Hyacinthe (Ville), [2001] J.Q. No. 4657

Fleury slipped on an icy part of the sidewalk as she was attempting to cross the street. She blamed her fall on the snow and ice that had accumulated on the sidewalk following several days of inclement weather. On the day before Fleury's fall, the city had spread salt and sand on two occasions over a six hour period. The day in question had been sunny, however there had been a light snow fall during the early evening. On that particular day, the city had spread salt and sand during the afternoon and the early evening. As a result of the fall, Fleury injured her leg and ankle. She sued the city.

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*The articles in the Legal Observer are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.



“You Are Fired!!” - Redux¹

Many people are surprised to learn that generally speaking, an employer does not have to have a specific reason to dismiss an employee. However, with that right, goes the obligation to provide an employee with reasonable notice or payment in lieu, before terminating the employment. Failure to give reasonable notice, means the employee has been wrongfully dismissed.

Reasonable Notice

Reasonable notice can vary greatly from one situation to another. A number of factors will be considered to determine the proper amount of notice required in a particular case. The following are the most common considerations.

- The type of employment;
- The length of service;
- The age of the employee;
- The availability of similar employment, having regard to the experience, training and qualifications of the employee; and
- The manner in which the dismissal was handled.

In the case of a **fixed term employment contract**, the situation is quite different. According to the Supreme Court of Canada, “*An employee whose contract is not renewed at the conclusion of a fixed term is not dismissed or terminated; rather her employment simply ceases in accordance with the terms of the contract.*”

In the case of an **independent contractor**, the situation would be similar. In other words, the parties would look to their contract in order to determine how termination of the relationship is to be handled.

Over the last few months there have been some interesting decisions with respect to this area of the law. We have chosen two cases that we believe will be of interest to both employers and employees.

The *Ceccol Case* involves an employment relationship governed by a series of one year contracts and whether this translated to an indefinite-term of employment. The *Aqwa Case* explores the issue of whether an independent contractor is entitled to reasonable notice if the employer terminates the agreement.

Fixed Term vs Indefinite Term The Ceccol Case²- The Facts

Ceccol was employed for 16 years as the administrative director of the organization, the parties having entered into a series of 15 annual contracts. Each contract set a term of 12 months and provided that it was subject to renewal if the employee received an acceptable performance review and if the parties could agree on the terms and conditions of renewal. Despite their arrangement, Ceccol and her immediate supervisors had always believed and acted as if she were in fact a full-time permanent employee.

As the latest one year contract was drawing to its conclusion, Ceccol was informed that it would not be renewed, despite having served the organization loyally, professionally and continuously. The organization offered her three months salary if she signed a release. She refused and sued for wrongful dismissal.

The Decision

The trial judge found that Ceccol was not a fixed-term employee as alleged by the organization, but rather that she was an indefinite-term employee. This conclusion was based on a review of the parties’ reasonable expectations, specifically that everyone acted as though Ceccol were a permanent employee. In addition, the judge concluded that the language of the contract was ambiguous and that much of it contemplated automatic renewal.

Finally, the trial judge stated that the interpretation of the contract which would provide a loyal and long-term employee with \$66,700 in termination pay was to be preferred over the interpretation which would provide her with only \$7,700. As a result Ceccol was entitled to 16 months reasonable notice.

The organization appealed but the decision was upheld by the Ontario Court of Appeal.

The Moral

An employer who chooses to hire employees using fixed term employment contracts should exercise caution, particularly if the pattern becomes one of automatic renewals. This situation can become especially troublesome if the employer’s conduct and representations signal an indefinite relationship.

In order to avoid problems, employers must ensure that the language used in such an agreement is clear and unambiguous, setting out the parties’ intentions in a precise manner. The agreement should also specify the period of notice to be given in order to terminate it. It would also be wise to ensure that the agreement is clearly reviewed every year.

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Independent Contractors

The Aqwa Case³- The Facts

Aqwa and Centennial Windows entered into an agreement whereby Centennial agreed to take on Aqwa as an independent sales agent. Aqwa was provided training and written material describing Centennial’s products. All sales had to be approved by Centennial and for all intent and purposes, Aqwa had to sell within the Barrie area. Further he was urged to attend regular sales meetings, although it was not expressly required. With respect to terminating the contract, the only relevant provision indicated that either party could terminate the agreement at any time without notice or penalty.

Aqwa did conduct himself as an independent contractor and his income was totally dependent on his efforts. For tax purposes, he indicated that he was operating his own business and he deducted his related business expenses.

A year and a half after signing the agreement, Centennial abruptly terminated it. The result was that Aqwa was instantly cut-off from the prospect of earning income and any goodwill that he had developed was now useless.

The Decision

The trial judge concluded that what existed in this situation was “*a modern-day emerging relationship which was more closely allied to the employment relationship that it is to the traditional independent contractor relationship.*” The evidence indicated that the substance of the relationship was an employment one.

Further, the judge found that Aqwa had been arbitrarily terminated without just cause. He indicated that while traditionally Aqwa, as an independent contractor, would have no recourse against Centennial, in this instance the termination clause lacked

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Fleury’s action was dismissed and the city was found not to be at fault. The court concluded that the city had acted in a reasonably prudent manner with respect to spreading sand and salt, given the weather conditions. Although it was likely that the spot where Fleury fell had been slippery due to the snow that had fallen earlier in the evening, the city could not be expected to spend 24 hours a day working on the sidewalks, nor could it be expected to remove every trace of snow and ice. The court went on to say that Fleury was herself, under an obliga-

tion to take extra care in walking on a sidewalk she knew to be icy.

In this type of case, the courts will be concerned with the steps that the municipality, the store, the school, the recreational facility or the homeowner took to minimize the icy conditions.

For instance,

- did they have a regular maintenance schedule,
- did they adhere to that schedule,
- did they adjust the schedule for the weather conditions.

any degree of mutuality. By terminating the contract as it did, Centennial suffered no hardship, whereas Aqwa suffered great prejudice. Therefore this was a case where a provision had to be read into the contract, requiring the giving of reasonable notice by either party to terminate the contract and further providing for payment in lieu thereof.

The trial judge awarded Aqwa five times the average monthly commissions and bonus earned by him. This award was lower than it would have been had Aqwa been a true employee. The judge stated that in the circumstances of this case, the awards granted to wrongfully terminated employees would be too high.

The Moral

Whether they are dealing with indefinite term employees, fixed term employees or even independent contractors, employers must conduct themselves in a fair manner when terminating the relationship. Employers would be wise to recall the words of the late Chief Justice Dickson.

Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

If you are an employee and believe that you have been improperly terminated, if you are an employer thinking of terminating an employee or if you have an employment contract to be reviewed, feel free to contact our office for advice.

¹See the 1999 Fall Issue of Legal Notes.

²*Ceccol v. Ontario Gymnastic Federation*, (2001) 55 O.R. (3d) 614 (Ont. C.A.)

³*Aqwa v. Centennial Home Renovations Ltd. (c.o.b. Centennial Windows)*, [2001] O.J. 3699 (Ont. SCJ)

The courts will also consider what the weather and lighting were like on the day in question. The courts will be interested in the conduct of the claimant.

For instance,

- was the claimant familiar with the area where he/she fell,
- was he/she exercising proper care given the conditions and
- was he/she wearing proper footwear.

So tread carefully, tread safely and if disaster should strike, be sure to seek prompt legal advice.

