

Who's Liable Anyway?!


The theme for this issue of the *Legal Observer* is LIABILITY - employer liability, insurer liability, parental liability. . .

Our firm was recently involved in a wrongful dismissal case that focused on an employer's liability for an employee's burnout and how this affected the notice period. In the article, *Was he or wasn't he insured?* we consider an auto insurer's

liability for coverage under a 30-day binder.

Parents have always had a legal responsibility to supervise their children. However, in 2000 legislation was passed, which made it easier for victims to sue the parents whose children had wronged them.

In *Believe it or not* we take a look at the lighter side of liability, specifically the liability of the makers of Pop Tarts and the creators of TV's Survivor.

Finally, we continue our series of profiles of the firm's lawyers. This time we focus on one of our newer members of the firm, Colin Dubeau. 

Workplace Safety and Wrongful Dismissal: A New Chapter

Employers are well-versed in their obligations to provide a safe workplace; however, recent studies on workplace stress and burnout have indicated that workplace injuries may also include psychological problems. The question then is how much can an employer require of its employees? Our firm was involved in a recent case, *Zorn-Smith v. Bank of Montreal* (2003 CarswellOnt 4845), in which that was one of the issues.

The Facts

Suzanne Zorn-Smith started with the Bank of Montreal when she was 15 years old. During the next 21 years, Suzanne rose through the ranks. In 1995, Suzanne

started a family, and over the next four years she had three children. Upon returning from her last maternity leave in 1999, Suzanne was placed in a relatively new position as a Financial Services Manager (FSM). This position not only had new responsibilities but involved considerable training.

Suzanne could not handle the workload. Over the next eight months, she slowly burned out and subsequently went on medical leave for two weeks. Upon returning to the bank, Suzanne asked for a substantial demotion to a teller position. Although the Bank agreed to the demotion, it asked Suzanne to continue in the FSM position until she was replaced. One year later, Suzanne still had not been replaced and sustained a further burnout period.

The trial judge heard evidence that Suzanne would work a full day, go home to feed her children and put them to bed, and then return to the bank to either study for the required courses or to finish her day's work. She sometimes did not get home before midnight or 1:00 a.m. According to her husband, when Suzanne burned out the second time,

her body and mind simply shut down.

After three months off, the Bank felt that Suzanne was sufficiently recovered to return to work. Despite her doctor being against it, the Bank ordered Suzanne back to work. When she refused, the Bank terminated her employment.

The Lawsuit

Suzanne sued for damages for wrongful dismissal, aggravated damages for mental distress and punitive damages.

The Bank argued that it had cause to fire Suzanne. It took the position that the root of Suzanne's stress and burnout was her poor time management skills and family demands. In support of its position, the Bank called two employees, including an FSM, who had worked with Suzanne. That employee testified that although work got hectic, it was manageable.

The Decision

Justice Aitken rejected all of the Bank's defences and found that it had abdicated its responsibility for Suzanne's condition. She found that the Bank's conduct was

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the primary cause of Suzanne's burnout. In a very strongly-worded judgment, Justice Aitken categorized the Bank's actions in regard to Suzanne, as callous. Justice Aitken found that the Bank, among its many failings, had placed excessive demands on Suzanne. In addition, once aware of her inability to handle the workload, the Bank had done little to fix the problem. Instead, the Bank continued to pile on the pressure, taking advantage of Suzanne's old fashioned work ethic and personality that made saying "No" difficult.

Justice Aitken concluded that Suzanne had been wrongfully dismissed and that she should have been given 16 months notice. The judge also awarded her three months of disability benefits and \$15,000 in aggravated damages. The claim for punitive damages was dismissed.

In awarding 16 months notice, Justice Aitken relied on the principles outlined in *Wallace v. United Grain Growers Ltd.* [1997] 3 S.C.R. 701, a Supreme Court of Canada decision, which considered situations where courts could increase the notice period to compensate an employee for an employer's bad faith conduct. In fact, one of the examples of bad faith conduct cited in *Wallace* is when an employer chooses to terminate an employee while the employee is on disability leave.

Another interesting aspect of this case was that Suzanne was awarded damages for wrongful dismissal and three months of disability benefits. Traditionally, receipt of both has been considered double recovery. However, in this case Justice Aitken found that there was no express provision precluding double recovery. She inferred that the parties had agreed that an employee should retain disability benefits in addition to damages for wrongful dismissal where the employee has effectively paid for the benefits in question.

Final Thoughts

Despite concerns that there is now a cause of action for "burn-out", psychological illnesses, such as depression, have long been held to have a disabling effect. In this case, there was an employee who was disabled from her employment and it was this disability, and the termination that resulted, that created the cause of action.

Employers would be wise to recognize that terminating an employee during a period of disability will not be looked upon favourably by the courts; especially when the disability was created by the employment situation itself. In addition, this case makes the point that employers cannot expect an employee to give his or her entire life to the job only to abandon that employee when the expectations become too much. 📁

Was he or wasn't he insured?

The Ontario Superior Court of Justice recently provided an opinion in an auto insurance case that will be of interest to both drivers and insurance people. At issue was whether there was insurance coverage under a 30-day binder, despite the insurer's decision not to accept the car owner's application for insurance.

Chronology of Events

December 18, 1998 - McAlister applies, through one of its agents, to Farmers' Mutual Insurance Company for automobile insurance. He fills out an application, which was attached to the policy and forms part of the contract. The term of the contract is described as one year. He pays two months of premiums. The agent provides him with a Motor Vehicle Liability Insurance Card (the temporary "pink card").

January 6, 1999 - Farmers' notifies its agent that McAlister's application has

not been accepted because of the non-disclosure by him of two driving convictions.

January 19, 1999 - McAlister is involved in a car accident with Buck.

The Parties' Positions

Farmers' paid Bucks claim in the amount of \$77,279 and received an assignment of Buck's rights against McAlister and Halifax, Buck's insurer. Farmers' argued that the section 236 notice provisions of the *Insurance Act* does not apply to 30-day binders. It also argued that since the accident occurred 32 days after McAlister's binder was issued, there was no longer insurance on McAlister's vehicle with its company.

Halifax argued that binders do not simply expire. Rather insurers are required, pursuant to the *Insurance Act*, to give its policy holder 15 days written notice of its intention to terminate an auto policy, or 30 days notice of the insurer's intention not to renew the policy.

The Court's Opinion

- There was a valid contract of insurance between McAlister and Farmers'
- The contract was for one year commencing on December 18, 1998.
- There was insurance coverage on January 19, 1999 on McAlister's vehicle under Farmers' policy.
- This was not a renewal, but instead a situation which called for termination.
- The insurance companies were both innocent victims of McAlister's misrepresentation. However, Halifax had no control over the application process while Farmers' at least had the opportunity to protect itself by terminating the contract. Therefore Farmers' should bear the loss.

The Moral of the Story

- Those seeking insurance should not misrepresent their driving record.

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Parental Responsibility

The law has always recognized that parents have a duty to supervise their children and that they could be held liable to those suffering damage as a result of a parent's failure to properly supervise. However, in 2000, the government of Ontario passed legislation to make it easier for victims to recover the damages they suffer as a result of your children's antics, including property damage and theft.



The Parental Responsibility Act holds parents financially responsible for damages intentionally caused by their minor children. Pursuant to section 2, the Act allows the victim to bring a claim against the parents through Small Claims Court. Victims can sue:

- for loss of or damage to the property suffered as a result of the activity of the child; and
- for economic loss suffered as a consequence of that loss of or damage to property.

A victim¹, who decides to sue in Small Claims Court, has to prove only three things in order to shift the burden of proof onto the parent.

1. The child caused the damage or loss.
2. The defendants are the parents of the child.
3. The amount of the damage.

In order not to be liable for the damages, the defendant parent must prove that:

- The loss or damage was not caused intentionally; or
- They exercised reasonable supervision of the child and made reasonable efforts to prevent the damage from occurring.

To assist the courts in determining whether or not a parent has exercised reasonable supervision, the Act sets out a list of factors that may be taken into account, including:

- the age of the child;
- the prior conduct of the child;
- the physical or mental capacity of the child;
- whether the child was under the direct supervision of the parent at the time when the child was engaged in the activity;

- whether the parent made reasonable arrangements for supervision of the child.


The following case² was decided pursuant to the *Parental Responsibility Act*. It provides a good overview of how the process works.

The Shannons' home was burglarized by two boys, 14 and 10. The 14-year old had been hired for the summer to watch the 10-year old. During the first seven weeks, everything ran smoothly and the boys stayed out of trouble. Towards the end of summer, the 14-year old decided to break into the Shannons' house and he talked his 10-year old charge into helping him. More than \$19,000 worth of property was never recovered. The Shannons sued the two sets of parents.

Although both boys had had some minor behavioural problems at school, there had been nothing to predict this conduct. The boys had been taught by their parents not to steal. The 14-year old had been left on his own a number of times without incident, and he had babysat the 10-year old on a prior occasion.

The trial judge dismissed the case against the 14-year old's parents. Justice Miller concluded that, based on his age, experience and background prior to the theft, it was reasonable for his parents to assume he could be trusted and that he would behave appropriately.

The trial judge also dismissed the case against the 10-year old's parents, concluding that they had acted reasonably in deciding to delegate their supervisory responsibilities to the 14-year old, while they were at work. The factors taken into account by the judge included, the babysitter's age, that their child was relatively well-behaved, the lack of previous incidents and the structure that the parents had imposed on the two children.


Although the Shannons were unsuccessful in their suit against the parents, they did get judgement against the two children. 

¹According to section 8 of the Act, an insurer who has paid an amount as compensation to a person in connection with the loss or damage is subrogated to the rights of the person under this Act to the extent of the amount.

²*Shannon v. Westmon (Litigation Guardian of)* (2002) 12 C.C.L.T. (3d) 46.

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- When an insurance company has provided insurance coverage, even on a temporary basis, that it later decides to cancel, it should do so in writing in a clear and unambiguous manner and in accordance with the provisions of the *Insurance Act*.

- The provincial government should revisit the *Insurance Act* and the *Compulsory Automobile Insurance Act* as well as contracts of insurance, temporary binders and pink cards to ensure they all mesh with each other. 

Colin Dubeau

Colin Dubeau, who graduated from the University of Windsor's law school, joined the firm following his call to the bar in 1999. Since that time, Colin has become a valuable member of the Williams McEnery team.

Colin practices exclusively in the area of civil litigation with an emphasis on insurance litigation, commercial litigation, employment and administrative law. In particular, he has obtained experience in defending actions commenced against School Boards in a variety of different areas such as slip and fall, assault and battery and defamation.

In addition, to his experience at all levels of Ontario court, Colin also has experience with alternative dispute resolution, mediation and arbitration. He has appeared before a number of administrative tribunals including:

- Canadian International Trade Tribunal,
- National Energy Board,
- Ontario Municipal Board,
- Ontario Rental Housing Tribunal, and
- Committees of Adjustment of various local municipalities.

Colin is a civil litigation instructor in the Law Society of Upper Canada's Bar Admission Course.

In his spare time, Colin enjoys following various sports and is looking forward to the Ottawa Senators' appearance in this year's Stanley Cup finals - maybe?! Colin recently took the matrimonial plunge, and as we went to press he and his lovely new wife, Cynthia were leaving for their honeymoon in sunny WARM Cuba. 📁

Believe it . . . or not!

A New Jersey couple sued Kellogg's and Black and Decker for \$100,000 following a fire that seriously damaged their home - the culprit a Pop Tart!!! It seems that the wife put a Pop Tart into the toaster and then left to take her children to school. Instead of returning home to a nice hot Pop Tart she returned to find her house on fire.



* * * * *

Former "Survivor" Stacey Stillman (Survivor Borneo) is suing the producers of the made for TV reality show. She claims that when her tribe voted her off in episode three, it was only because the producer talked two of her fellow castaways into changing their votes. Stillman alleges that the show wanted to keep 72-year old Rudy Boesch in the cast, fearing criticism if the first three contestants to be removed also were the oldest. She is seeking restitution for lost prize money, lost earning opportunities thereafter, plus \$75,000 representing out-of-pocket expenses and punitive damages. 📁



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