LEGAL BRIEFS

Volume 18

NEGLIGENCE AND CAUSATION

By David Varty

When thinking about suing a party for negligence, the starting point is a perception that a person did the wrong thing or failed to do the right thing, and that caused harm.

The law goes further in its analysis of the circumstances. There are five elements to be considered. If any one of the five elements is missing, the plaintiff cannot succeed.

1. The first thing that must be shown is that there is a duty of care to the person who was harmed. Every person has an obligation to avoid acts which could be reasonably foreseen to injure or harm other people.

2. The second element that must be proved is that there was a breach of a standard of care. This means determining what a reasonable person would do in the circumstances. It could be a reasonable driver of a car or a reasonable similarly trained professional.

3. The third element to be shown is that the party sustained damages. There is a monetary payment to compensate the injured party. The term used to describe this is damages.

4. The fourth element is fairly straightforward. It is called cause in fact. The question asked is, did the defendant's negligence cause the injury? What happened here? The facts are examined to answer this question. The test that is applied is the "but for" test. Would the injury have occurred without the defendant's negligence? If yes, there would be no liability. On the other hand, if the circumstances were that, but for the defendant's negligence, the injury would not have occurred, then there would be liability.

The English case of ***Barnett vs. Chelsea and Kensington Hospital*** illustrates this issue. Mr. Barnett felt sick after drinking tea. He was suffering from arsenic poisoning. He went to the hospital. The hospital should have treated him. It did not. He was told to go home. He died. There was a finding that the doctor was negligent. He should have examined him. However the court found that Barnett's chances of survival were slim even if he had been given the antidote. There was not enough time for it to have worked. He would have died anyways. There was no liability. Mr. Barnett's death was not caused by the lack of treatment.

5. The fifth and final element is remoteness. Even if there is factual causation, a question remains as to whether there was legal causation. Should the law attribute the damage to the breach of the standard of care? It is possible that there was a chain of consequences from the original breach that was sufficiently complicated that it was not foreseeable that the breach would have caused the particular damage. Damage which is too remote is not recoverable.

The Supreme Court of Canada clarified the law on this point in the case of ***Mustapha v. Culligan of Canada.*** In this case the plaintiff was a regular customer of Culligan's bottled water. One day he saw dead flies in the container of water. He was revolted by this and went on to develop a major depressive disorder. He did not drink the water. The Supreme Court found that Culligan had a duty of care to Mr. Mustapha, that there was a breach of a standard of care, that the plaintiff sustained damages and that the defendant's breach of its duty of care in fact caused Mr. Mustapha's psychiatric injury. The question remained as to whether there was legal causation. Was the harm too unrelated to the wrongful conduct to hold the defendant fairly liable?

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COMMON STRATA PROPERTY ISSUES

By Brent Ellingson

Clients who live in properties that are part of a strata corporation ("strata") frequently encounter issues with their neighbours, their strata council, and the application of strata bylaws. Here are some general tips for addressing the most common issues faced by strata owners and residents:

Strata fines or sues you When strata council concludes that an owner or tenant has breached a Strata bylaw, it may fine the owner to deter the owner or tenant from committing that breach. It may charge the owner for the expense of repairing or replacing damaged property, and otherwise addressing the subject of that breach.

After issuing a fine, Strata must give the owner or tenant at least two weeks' notice of its payment demand and intention to sue if the owner does not pay. If an owner fails to pay in time, Strata Council may start a proceeding in the Civil Resolution Tribunal or Small Claims (Provincial Court) to collect the monies claimed. If the owner challenges the claim, the Strata Corporation will have to prove the bylaw breach.

Water damage to your unit Water damage is a problem many owners must deal with at some point during their tenure in a Strata building. Although a common issue, it can be complex to resolve. It usually requires a review of the strata bylaws, and often requires hiring a professional to assess the cause of the damage and estimate the cost of repairs.

Both owners and strata corporations should both take care when undertaking repairs in a unit, as they should pay for only those repairs for which they are responsible. Strata will need to find authorization in the strata bylaws to proceed with a repair, and owners or tenants who seek to undertake repairs should review the bylaws and get prior written approval of the scope and price of repairs from strata before repairing anything that may be strata's responsibility.

Keeping a pet Strata corporations frequently enact bylaws that limit the number or size of pets that may be kept in a strata unit or that prohibit residents from keeping pets in their units.

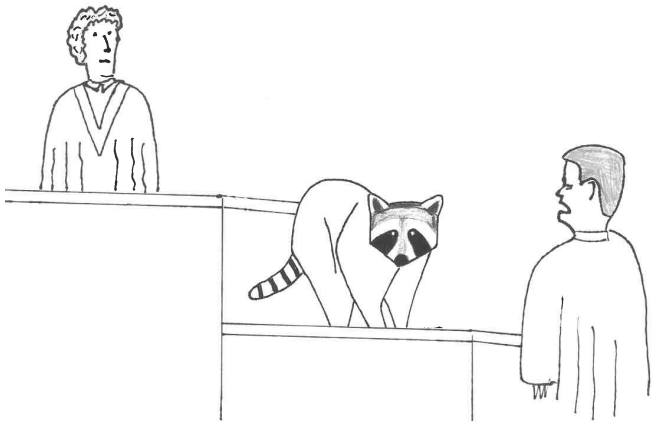
Owners who already had pets in their unit when a restrictive bylaw was passed are typically able to continue to keep pets in their units, as their right to do so is "grandfathered in" under the newly amended bylaws.

When an owner has a documented medical or psychological need for a pet (e.g. visually impaired persons or those benefitting from a companion animal), such an owner may challenge a strata bylaw preventing or restricting pets in units by filing a complaint at the Human Rights Tribunal.

Renting out your unit Although many strata corporations impose rental prohibitions or restrictions, the Strata Property Act sets out certain exceptions that enable owners to rent out their units despite restrictions or prohibitions in the strata's bylaws.

The most common exceptions are when an owner rents out the unit to a close family member (e.g. a child, parent, or spouse of the owner), and when an owner can prove that being prevented from renting out the unit will cause the owner hardship. Sometimes none of the exceptions will apply. However, strata still needs to have a legally enforceable bylaw in order to impose rental prohibitions or restrictions on owners.

A lawyer can help you understand what your rights are, what your bylaws require, and what options you have in dealing with problems that arise when living in a strata property.



You say you were wearing a mask, but how do we know you washed your hands?

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NEGLIGENCE AND CAUSATION

By David Varty

The court looked at issues of probability and the fortitude of the plaintiff. The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals. Unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable. Mr. Mustapha could not show that it was foreseeable that a person of ordinary fortitude would suffer serious injury from seeing the flies in the bottle of water he was about to install. His claim failed.

Each case must be analysed within the five point framework for determining liability. The earlier this is done, the quicker a decision can be reached about whether a law suit is a suitable method of resolving the matter.

COMMON COVID-19 CONCERNS OF FAMILY LAW CLIENTS

By Brent Ellingson

For many Canadians, the COVID-19 pandemic has resulted in financial struggles, including business closures, illness, layoffs, lower incomes, and growing debts. On top of these difficulties, many also have child and spousal support obligations and parenting challenges that they are unsure how to meet.

Here are some answers to common questions from family law clients about the issues that have arisen with the COVID-19 pandemic:

If my income falls due to COVID-19, can I stop paying support, or pay less support?

Payors continue to be required to pay the support amounts set out in any court order or separation agreement governing support. Payors must pay the ordered or agreed amount, unless they reach an agreement with the recipient – including temporary arrangements for the duration of the pandemic – or apply for a court order enabling them to stop paying or pay less.

If a payor unilaterally stops paying support without first reaching an agreement with the recipient, legally the unpaid amounts will be counted as support arrears owing, until such time as the parties reach a new agreement or a court orders a different support amount.

If your income falls to the point that you are unable to make your support payments or pay the same amount of support that you have been paying, we encourage you to do the following:

1. Give the recipient notice that your income has fallen, and that you expect to be able to pay a lesser amount for the foreseeable near future;

2. Disclose any financial records that demonstrate your reduced income, along with a detailed monthly budget that shows your full financial picture, so the recipient has the opportunity to understand your financial situation;

3. Do not breach your agreement or court order until you have resolved the issue by agreement or court order. If the order or agreement has been registered with the Family Maintenance Enforcement Program (FMEP), failure to pay can result in swift and uncomfortable measures, such a freezing of bank accounts, garnishment of wages, and other steps that can bring your life to a halt. Tread carefully and deal with the recipient openly and fairly.

What if my former spouse stops making payments or pays less than our court order/agreement requires? Should I accept lower support payments?

This depends on whether your partner's income has actually fallen to the point of making the mandatory support payments unworkable.

We encourage parties to negotiate with each other and fully disclose financial information to each other to attempt to resolve their problems before resorting to the courts to solve the dispute. Be aware that if you do take your dispute to court, judges will consider the extent to which each party has honestly attempted to solve the problem out of court and to consider the best interests of their children, and may penalize parties who have failed to make their best efforts to do these things.

We encourage recipients and payors alike to keep detailed records of their finances as well, including the amount of payments received, payments made, amounts owing, and amounts of all sources of income.

What do I do if I'm concerned about letting my child be around my former partner during the pandemic? What if I suspect that my partner is not following Covid-related health guidelines?

Some Canadian courts have recently addressed this issue, and have come down on the side of requiring parties to abide by pre-existing court orders and agreements relating to parenting time. Unilaterally denying your ex-partner and your child parenting time with the other parent based on your own opinions is a violation of your ex-partner's rights. Courts frown on this behavior and may impose sanctions on parents who take such steps.

A recent decision of the Ontario Superior Court of Justice sheds some light on how the courts are dealing with this issue. In the case of ***Ribeiro v. Wright, 2020 ONSC 1829,*** a 9-year-old boy lived primarily with his mother, and spent alternating weekends with his mother. The mother, who was self-isolating at the time of the application, was concerned that the father was not observing COVID-19 health guidelines, such as social distancing, during his parenting time with the boy. As a result of her fears for the health of the child, the mother applied to the court to suspend the father's parenting time.

The court denied the mother's application. The court held that the while many aspects of our lives have been altered or put "on hold" because of the pandemic, it is not in the best interests of children that vital family relationships such as those between parent and child also be disrupted.

The court reminded the parties that children need the guidance and support of both parents in such troubling and disorienting times as these even more than they normally do. In light of this, the court stated that basic presumption will be that parents will comply with existing parenting arrangements and schedules, subject to whatever modifications may be necessary to observe provincial health guidelines.

Parents may have to forego parenting time with a child if they are subject to restrictions such as self-isolation after possible virus exposure or symptom appearance. Also, some parents' lifestyle choices, such as not observing social distancing or hygiene guidelines, may raise concerns about whether a parent is exposing a

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SOLVING YOUR TENANCY ISSUE

By David Varty

For landlord or tenant, the dispute resolution procedure at the Residential Tenancy Branch offers advantages over other court proceedings. While it can be stressful, it can be quick, simple and inexpensive. The hearings are conducted by telephone and are often completed in 40 minutes. In many cases the parties handle the matter without a lawyer.

Problems arise when a case is difficult to prove. The common errors are no receipts for rent payments, no condition inspection report, oral communications between tenant and landlord rather than in writing by email and not using the forms required by the Residential Tenancy Act. Disorganized record keeping is a hindrance to success. Sometimes a problem is the aggressive manner of the other party.

Hearings follow an inquisitorial procedure. This means that the arbitrator asks questions because he or she will have read the submissions before the hearing. This shortens the proceedings considerably. The arbitrator tries to clarify points while at the same time the arbitrator gives the parties an opportunity to tell their sides of the story.

Having well organized submissions is vital. A lengthy, rambling jumble of facts is not persuasive. Well indexed documents are helpful.

There is a wide variety of cases that go to a hearing. There can be noise issues, a tenant's complaint about poor living conditions, the landlord's need for the premises, a tenant's disturbing behaviour, damage to the premises, smoking and rent issues.

One of the unique features of hearings is the option during the hearing for a settlement to be reached. This is very unlike Supreme Court. The arbitrator can ask the parties if there is a halfway point that can be reached with respect to a move out date or a dollar amount. When this occurs, the arbitrator's decision is a summary of the settlement terms. Sometimes a settlement is a best way out when the arbitrator gives an indication of problems in the evidence of one or both of the parties.

When there is no settlement the arbitrator will produce a decision and an order. An order of the Residential Tenancy Branch is as enforceable as a Supreme Court order. It has to go through a couple of steps, however, before it can be presented to a bailiff. It must be entered in Provincial Court and then in Supreme Court. Once that is done for an eviction, a bailiff is authorized to enforce it by attending at the residential premises and removing items inside.

An Application for Dispute Resolution is a serious matter, since claims can be awarded as high as $35,000. It is best to consult a lawyer at the beginning to determine next steps and whether a lawyer's assistance is required in the background or for a greater level of involvement.

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COMMON COVID-19 CONCERNS OF FAMILY LAW CLIENTS

By Brent Ellingson

child to undue risk of infection. However, these matters are appropriately addressed through negotiation and, if necessary, analysis by the court, and not unilateral decision-making. Ultimately, the court told the parents to "renew their efforts to address vitally important health and safety issues for their child in a more conciliatory and productive manner."

Therefore, while parents should continue to observe provincial health guidelines when exercising parenting time with their children, unilaterally preventing the other parent from spending time with a child is not an appropriate response to a parent's concerns. Meanwhile, advocating modified behavior as necessary within the framework of current parenting arrangements is the approach the courts are most likely to endorse.

THIRTY-SEVENTH ANNIVERSARY

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