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INSURE UPDATES

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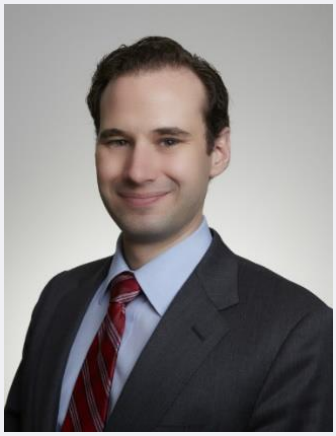

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Sudden and Unexpected: A road map to defending "*failure to prevent assault*" cases

By *Matthew Miller*, DWF Toronto, Email: mmiller@dolden.com

When can a sport governing body be held liable for an injury sustained by a player who was criminally assaulted during a game? Further, when is a summary judgment motion appropriate in these type of cases to dispose of claims that are allegedly without merit? The Ontario Superior Court of Justice discussed both issues in the recent decision of *Da Silva v. Gomes,* 2017 ONSC 5841 (Ont. SCJ). The decision is a useful precedent to use in a variety of personal injury lawsuits.

The plaintiff and defendant Gomes (the "assailant") were both 16-year-old players in a recreational soccer league governed by the defendant. The young men were participating in a game when the assailant punched the plaintiff following a scrum. The plaintiff sustained injury and commenced a lawsuit. The assailant was criminally convicted.

The plaintiff not only sued the assailant but also named five additional defendants, including the coach of the assailant's team, the assailant's team itself and two governing bodies of the sport in Ontario. All defendants except the assailant brought summary judgment motions.

The court found that the material facts were not in dispute. Specifically, the court found that the "*the assault was unprovoked and was an impulsive act and not pre-meditated*".

Sudden and Unexpected Event

The court was persuaded by two decisions the defendants relied on regarding the test for, "*forseeability of harm*". Both decisions involved

school boards successfully dismissing actions brought by students injured in schoolyard fights. In both *Lee (Litigation Guardian of) v. Toronto District School Board,* 2013 ONSC 3085 and *Patrick v. St. Clair Catholic District School Board*, 2013 ONSC 4025, the court found that there was nothing a teacher or playground supervisor could have done to prevent fights between adolescent children.

The following passage from *Lee* was cited with approval in the *Gomes* decision:

> *I am not satisfied on the balance of probabilities that school staff knew or ought to have known on the date of the incident that [the assailant] might behave violently so as to prevent the assault by supervising him differently. The defendants are not liable for failing to supervise [the assailant] more closely.*

In *Gomes*, as in *Lee*, the court found that the assailant did not have a prior history of violence such that the league should have prevented him from playing, or that there was any history between the plaintiff and the assailant such that the coach should have supervised or coached the assailant differently. The court concluded that the assault was, "*a sudden and unexpected event that could not have been anticipated by the defendants*" and no one was responsible for the assault except the assailant. The action was dismissed against the moving party defendants, with costs.

Take Away

A targeted defence theory of the case was clearly followed in *Gomes*. The moving defendants secured several important admissions at discovery and as such, there were few facts in dispute. This worked in the defendants' favour as the plaintiff could not argue a trial was necessary based on disputed facts.

The court mentioned that the plaintiffs failed to lead evidence which might have assisted their case. For example, the plaintiffs failed to lead evidence regarding the allegedly negligent protocols for training the coaches. The court concluded the plaintiffs had no evidence to support many of the allegations in the statement of claim.

The defence "*theme*" in these cases should be, "*what could my clients possibly have done to prevent the assault?*" The *Gomes* decision is another useful precedent to put before the motion court or trial judge. Occupiers as diverse as municipalities, sports teams and nightclubs

should rely on these principles and strongly maintain their defences in cases involving, "*sudden and unexpected*" assaults.

Municipality's Duty in Freeze-Thaw Cycles

By *Morgan Martin*, DWF Toronto, Email: mmartin@dolden.com and *Suneal Khemraj*, DWF Toronto, Email: skhemraj@dolden.com

Municipalities have a duty to maintain sidewalks in a reasonable state of repair. They are only liable for personal injury caused by snow or ice on a sidewalk in cases of gross negligence.

On October 25, 2017, the Ontario Superior Court of Justice released its reasons in *Costerus v. Kitchener (City)*, 2017 ONSC 6030 where it considered the implications of an overnight freeze-thaw cycle on a municipality's duty to maintain its sidewalks. In *Costerus*, the plaintiff commenced an action against the City of Kitchener ("City") arising from a slip and fall on an icy sidewalk at approximately 7:45 a.m. on January 26, 2010. The sidewalk was located beside a transit bus stop with heavy pedestrian traffic. The only issues for the court were whether the City was grossly negligent in failing to meet its obligations to maintain the sidewalk and whether the plaintiff was contributorily negligent in causing her own injuries.

The plaintiff relied on the weather reports, which were available to the City in the days leading up to the plaintiff's fall. Such were used by the plaintiff as evidence that the City was, or ought to have been, aware of the potential freeze-thaw cycle overnight on January 25. The plaintiff's evidence was also that no salt or sand was applied nor were any ice removal operations performed on the City's sidewalks between 3 p.m. on January 25 and 7 a.m. on January 26. The City's policy permitted an evening supervisor to call in operators before 7 a.m. if there was more than 8 cm of snow or the downtown area needed to be cleared. However, the City's policy specifically prevented supervisors from calling in operators before 7 a.m. because of a freeze-thaw cycle.

The court accepted the plaintiff's evidence that as a result of the freeze-thaw cycle there was a significant amount of ice on the sidewalks. It was held that the City knew or ought to have known that the overnight freeze-thaw cycle would cause hazardous sidewalk conditions at least equal to 8 cm of snow.

The court found that based on the totality of the evidence, it was likely that the weather leading up to the accident resulted in significant ice forming on sidewalks by the evening of January 25, which remained overnight.

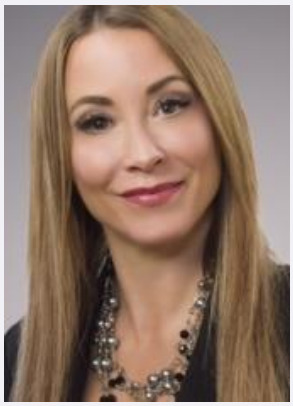
In the circumstances, the City's winter maintenance policy was held to be unreasonable because the hazardous icy conditions could have been addressed before the plaintiff's fall. The court concluded that had the City's supervisors been instructed to inspect the sidewalk for icy conditions and permitted to call in their operators earlier than 7 a.m., they could have removed the hazard. This would have been prudent in high traffic areas including those in the vicinity of a bus stop.

Ultimately, the court held that the City was grossly negligent in its failure to maintain the sidewalk.

Notwithstanding the City's gross negligence, the court concluded that the plaintiff was contributorily negligent and ordered judgment in the plaintiff's favour for 50% of the agreed upon damages. The court reasoned that the plaintiff was contributorily negligent because she chose to wear running shoes at the time of her fall as opposed to her winter boots despite knowing of the icy conditions of the sidewalk. The court also found that in light of the plaintiff's testimony, she had the ability to reasonably avoid the icy sidewalk where she fell by walking around it.

Take Away

This decision affirms a municipality's obligation to take reasonable steps to address hazardous sidewalk conditions caused by overnight freeze-thaw cycles. It reinforces the notion that courts will not differentiate between a municipality's obligation to address hazardous sidewalk conditions caused by a build-up of snow from those caused by the formation of ice. In light of this decision, municipalities ought to revisit their winter maintenance policies to ensure that reasonable efforts are being made to promptly clear any sidewalk hazards caused by overnight ice formation.



Electronic Waiver and Release Leads to Dismissal of Action

By Cecilia Hoover, DWF Calgary, Email: choover@dolden.com and *Jun Kim*, DWF Calgary, Email: jkim@dolden.com

DWF's Calgary office successfully relied upon an electronic waiver and release ("e-Waiver") to summarily dismiss a personal injury action.

Judicial consideration of e-Waivers is significant as businesses are increasingly adopting digital platforms to conduct and operate their businesses. This includes adopting emerging technologies such as wireless methods of payment, cloud-based record keeping, and the execution of electronic contracts or agreements.

In *Quilichini v. Wilson's Greenhouse & Garden Centre Ltd. And Velocity Raceway Ltd*., 2017 SKQB 10 (CanLII), the defendant operated a go-kart racing business. The plaintiff alleged that he sustained bodily injuries when his go-kart malfunctioned and caused him to crash into a concrete barrier.

Prior to participating in the go-kart race, participants proceeded through a kiosk system where they:

- completed an application form by providing their personal information;
- were photographed;
- agreed to the terms of a waiver and release; and
- provided payment.

The kiosk system was designed in such a manner that participants must click "*next*" to proceed from one page to the next and must click "*I Agree*" to the e-Waiver before being permitted to operate a go-kart and race.

The court relied on *The Electronic Information and Documents Act* (Saskatchewan legislation) to uphold the e-Waiver. This statute provides a framework to allow document recognition of electronic documents and to give effect to electronic signatures. *The Electronic Information and Documents Act* and analogous legislation provides legal recognition to electronic documents solely because it is in an electronic form. Here, the fact that the waiver was presented and

executed in an electronic format did not invalidate the effectiveness of the waiver.

Once the Court was satisfied that the plaintiff agreed to the e-Waiver, the balance of the analysis focused on the conventional principles governing the "*form and content*" and "*presentation*" of waivers. The traditional factors that merit consideration include:

- identifying the document as a waiver;
- allowing time to review and consider the waiver;
- identifying the parties protected;
- including a detailed description of the risks associated with the activity;
- highlighting that the agreement waives a participant's right to sue;
- ideally on one piece of paper (or one screen/page); and
- identifies the participant's agreement (witnessed).

The court stated:

> *[The Defendant] took reasonable measures to ensure that its customers received notice of the waiver and release provisions. Their kiosk was designed so as to ensure the waiver and release page was presented to its customers and customers had to indicate acceptance before they could participate*

The summary dismissal of the plaintiff's claim focused on the traditional "*form and content*" and "*presentation*" factors in an electronic context. Therefore, although the waiver was electronic, the form and content of the e-Waiver were clear and it was presented in such a manner that it was clear that the plaintiff agreed to its terms.

Take Away

An e-Waiver can be as effective as traditional written waivers. The form and content of the waiver and the manner in which it is presented remain important factors. An e-Waiver should be carefully implemented to ensure the traditional requirements are met. Practical tips include:

- consulting with legislation concerning electronic records and signatures;

- ensuring an e-Waiver is witnessed – i.e. taking a picture of the person;
- allowing the reader sufficient time to review and consider the e-Waiver – i.e. allow the reader to view the e-Waiver online or send it to the reader via e-mail;
- present the e-Waiver before payment is processed and received;
- highlight the significance of the waiver – i.e. waiving the right to sue;
- e-Waivers may be creatively presented to ensure they are accessible – i.e. different sizes of text, verbally read etc.; and
- ensure that a paper backup is available in case there are IT issues.

A Waiver and Release, Each and Every Time?

By *Catherine Whitehead*, DWF Vancouver, Email: cwhitehead@dolden.com

Is a waiver and release required each and every time a party participates in an event, or can a defendant rely on a previously signed waiver and release?

The above question was addressed in *Cooper v. Blackwell,* 2017 BCSC 1991, where a widow brought an action after her husband was accidentally shot and killed during a hunting excursion. The British Columbia Supreme Court considered whether a Liability Release Agreement (the "Release") could be interpreted as extending beyond a single hunting excursion to encompass a subsequent hunt that the defendants argued was a continuation of the first hunt.

At the time of the fatal accident on May 26, 2014, the deceased was participating in a guided grizzly bear hunt provided by the defendants. He was an experienced hunter and a repeat customer of the defendants, having previously taken part in two successful guided moose hunts in 2009 and 2012, and an unsuccessful guided grizzly bear hunt in 2013. Prior to each of these hunts, the deceased had signed the Release. However, he did not sign the Release in advance of the May 2014 hunt because the defendant owners and operators of

the hunting outfit considered it to be a "*continuation*" of the unsuccessful 2013 bear hunt. Since the deceased was a good customer, he was offered (and accepted) the chance at the end of the 2013 hunt to return on a future date, at no charge, so that he could try again. There were no further charges for room and board for the May 2014 hunt, but the deceased did have to pay for a new hunting license.

The defendants argued that although a new Release was not obtained from the deceased before the 2014 hunt, the terms of the Release that he signed in 2013 should nonetheless be taken as existing between him and the defendants during the 2014 hunt for the following reasons:

- the 2014 hunt was a "*continuation*" of the 2013 hunt, as the overall objective (i.e., to "*bag a grizzly*") remained the same and the deceased was simply "*picking up where he left off*";
- merely because an arbitrary length of time had passed, it would be artificial to treat an excursion with the same overarching goal of bagging a grizzly as a separate and distinct contract that required another waiver to be executed; and
- in any event, the deceased was sufficiently familiar with the conditions imposed by the Release that such conditions should be imposed on the 2014 hunt based on his prior "*course of dealing*" with the defendants.

The plaintiff in turn sought to circumvent the Release, arguing:

- each of the guided hunts embarked upon by the deceased constituted discrete, date-specific contracts, and any release document related to an expedition operated only in respect of that particular expedition;
- the Release must be interpreted to cover only what was specifically in the contemplation of the parties at the time the Release was executed;
- because the 2013 hunt did not guarantee a kill and did not require a further excursion at a later date should the hunt be unsuccessful, the deceased would not have expected or contemplated a further excursion in spring 2014 to which the Release would also apply;
- any ambiguity in the interpretation or application of the Release should be determined *contra proferentem* against the defendants and in favour of the plaintiff; and

- the "*course of dealing*" principles have never been applied in the context of a release of liability in favour of one party whose negligent conduct has caused loss to another.

The court ultimately decided in favor of the plaintiff, concluding that at the time the Release was executed by the deceased, there was only one "*guided excursion*" that was contemplated and intended by both parties: the grizzly hunt set for September 1–10, 2013. The grizzly hunt in May 2014 was a wholly separate and distinct excursion, which the court concluded was made more clear by the fact that it took place during a different hunting season.

The court was also not persuaded by the defendants' argument that parties who have a history of dealing on the basis of certain written terms should be bound by such terms in any transaction where the documentation may not have been perfected. The court expressed doubt that three separate transactions in four years qualified as a "*course of dealing*", and further emphasized that releases and exclusion clauses will be rigorously scrutinized by a court before being enforced.

Take Away

The Court did not unequivocally reject the idea that a "*course of dealing*" could potentially be applied in the context of releasing liability for a negligently-caused injury, but made it clear that this case would not be the first to do so. It may still be arguable in certain recreational contexts, such as on ski slopes, where the courts have, on many occasions, upheld releases/waivers.

Cooper v. Blackwell makes clear that temporally separate excursions will require a waiver every time a participant undertakes an activity, irrespective of whether the parties might consider it to be a "*continuation*" or "*extension*" of an earlier activity.

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