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BRIEFING NOTE

Standard of care in occupiers' liability and negligence cases: the duty to protect others from objectively unreasonable risks of harm

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I. Introduction

In a recently released decision, *Agar v. Weber*, 2014 BCCA 297, the B.C. Court of Appeal revisited the legal test for the standard of care under the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337 [*OLA*] and at common law for negligence claims. The Court held that a party will be found to have breached the standard of care only if his or her conduct, in all the circumstances, created an unreasonable risk of harm. That is, liability will not attach to all conduct giving rise to risk.

Therefore, on a broader level, this case is a reminder that just because there is an injury, it does not necessarily follow that there is liability. Plaintiffs must always establish that a defendant's conduct created an unreasonable risk of harm in all the circumstances. Failing to do so will be fatal to their claims.

Whether you are sued as an occupier under the *OLA* or for negligence at common law, the principles set out in this case will assist in defending against a personal injury claim.

II. Background

In this case, the plaintiff/respondent sought damages arising from a serious injury he sustained to his right wrist when he was cleaning crabs using a homemade crab shelling device made by the defendant/appellant.

The parties were neighbours. As a neighbourly gesture, the defendant invited the plaintiff to help himself to the next batch of crabs that were caught in a trap the defendant had tied off the dock of his waterfront property. The defendant pointed out the homemade crab-cleaning device that he had affixed to the dock. The defendant understood that the plaintiff had experience cleaning crabs and had used that particular device before, so the parties did not discuss how to use the device.

The device had two rounded edges for cleaning crabs: an underside edge and an upper edge. During fabrication of the device, the defendant checked the sharpness of both edges and found they were not sharp. Also, no one cut themselves on the device prior to the plaintiff.

Despite this, the plaintiff injured himself while attempting to clean a crab using the device. The plaintiff was pushing the crab against the upper edge when he lost his balance and lurched forward and cut his wrist on the device's underside edge.

The plaintiff succeeded at trial. The judge held that given the device's underside edge was "sharp" and could not be plainly seen by someone using the device, the device constituted an "unusual danger" requiring the defendant to warn the plaintiff of the danger before he used it. Since the defendant did not warn the plaintiff, the trial judge found him negligent.

III. On Appeal – Back to Basics

While the appellants split their appeal into three arguments, the Court was of the view that the appeal boiled down to one central issue to be decided: did the defendant breach the standard of care because the device, particularly the underside edge, posed an objectively unreasonable risk of harm to the plaintiff in all the circumstances?

The Court began its discussion by setting out the standard of care both under the *OLA* and at common law. In reviewing the wording of s. 3 of the *OLA* and the legal authorities applying the common law standard of care, it held that the standard of care for both is the same – it is to protect others from an objectively unreasonable risk of harm.

In setting out the parameters of what constitutes an "objectively unreasonable risk of harm", the Court referred to *Lawrence v. Prince Rupert (City)*, 2005 BCCA 567. In that case, the plaintiff tripped over a hydro pole left on the sidewalk by B.C. Hydro employees. It was not disputed in that case that the area of unobstructed sidewalk between the pole and the curb was almost three metres. In *obiter* (because the court was not asked to address whether B.C. Hydro was negligent), Finch C.J. held that the pole posed such a minimal risk lying on the sidewalk in broad daylight as to not be unreasonable.

The Court in *Agar*, at paras. 54-57, adopted Finch C.J.'s summarization of the standard of care analysis. The key principles are as follows:

1. A party breaches the standard of care and is negligent if his or her conduct, in all the circumstances, creates an unreasonable risk of harm. Put another way, negligence is the failure to take that care which would have been reasonable in the circumstances.
2. The standard of care in any case is commensurate with the degree of risk created. The greater the risk of harm, the greater the care required to guard against its realization.
3. Whether a risk is reasonable or unreasonable in all the circumstances is a question of fact. The same conduct may present a different degree of risk in different circumstances.
4. In order to determine whether particular conduct amounted to an objectively unreasonable risk of harm in all the circumstances, courts will assess several factors:
    a. whether there was a recognizable risk of injury;
    b. the gravity of the risk;
    c. the ease or difficulty with which the risk could be avoided; and
    d. the burden or cost of eliminating the risk.

Thus, not all conduct giving rise to risk, and not every act involving danger to someone, will attract liability. The risk might be acceptable in all the circumstances.

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Turning to the case before it, the Court held that the underside edge, in all the circumstances, did not pose an objectively unreasonable risk of harm because: (i) the defendant did not intend to create a sharp edge for the device; (ii) the defendant tested the underside edge to ensure it was not sharp; (iii) the plaintiff was experienced in cleaning crabs; and (iv) the plaintiff used the upper edge and hurt himself only after losing his balance and falling against the underside edge. The Court concluded that this was nothing more than a "most unfortunate accident".

IV. Liability Does Not Necessarily Follow Injury – Plaintiffs Must Always Establish a Breach of the Standard of Care

In adopting Finch C.J.'s *obiter* statements in *Lawrence*, the Court of Appeal reminds litigants and trial judges alike that liability does not necessarily follow injury. As in this case, sometimes unfortunate accidents do happen.

From a defendant's perspective, then, this case is useful because it states in no uncertain terms that the plaintiff always has the burden of establishing that the defendant's conduct created not just any risk of harm, but an unreasonable risk of harm in all the circumstances. Failing to establish this element negates a finding of liability on the defendant's part.

Neither under the *OLA* nor at common law are parties required to insure others for any and all adverse outcomes that may arise from their conduct. As stated by a learned author quoted with approval by Finch C.J. in *Lawrence*, if every act involving danger to someone entailed liability, many worthwhile activities of our society would be too costly to conduct. Accordingly, even though tort law seeks to compensate injured parties, the law will intervene only when the plaintiff's injuries are caused by another party's failure to take reasonable care in all the circumstances.

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