AMBULANCE CHASING? BY LUKE ZACHARIAS

Personal injury law is often jokingly referred to as "ambulance chasing". This is a perception that is rooted significantly in the American image of the personal injury lawyer. However, there is some cross-over to Canada.

The ultimate question that arises in any personal injury case relates specifically to whether retaining a lawyer is of value to an injured person, even after having paid the lawyer's fee.

Insurance companies are rightfully focused on their bottom line. The goal of most insurance companies is to pay out as little as possible so that they show profitable returns for the shareholders of the company. With respect to ICBC, it is slightly different as it is a statutorily mandated corporation; however ICBC's goal is not substantially different from that of any other insurance company. The focus on the bottom line by an insurance company can lead to individuals being treated unfairly. Ultimately, this is where a good personal injury lawyer is valuable for an individual.

My goal as a personal injury lawyer is to ensure you are treated fairly by insurance companies and to the degree that this may be viewed as "ambulance chasing", I accept that. I have dealt with hundreds of personal injury claims. That experience has given me substantial knowledge of the value of various injury claims. I will ensure that your claim is properly developed through the necessary medical evidence by obtaining appropriate medical reports from doctors who will provide support for your claim. I have substantial experience in negotiating with insurance companies and will use this experience for your benefit.

Further, although going to Court is not always in a person's best interests, sometimes in order to ensure that you receive a fair result to your personal injury claim, it is necessary. At Baker Newby LLP, our personal injury lawyers are also experienced trial lawyers, not afraid to go the distance if that is what is in the best interests of our clients.

If you have been injured in a motor vehicle accident or slip-and-fall, contact Baker Newby LLP for a free initial consultation. We will make every effort to ensure that you are treated fairly by the insurance company you are dealing with and will fight for your rights.

RECENT BLOGS

DAMAGES NOT REDUCED BASED ON A LACK OF DOCTOR VISITS

Posted by Luke Zacharias and Troy Estensen

The British Columbia Supreme Court recently held that the number of visits to a doctor's office does not determine the value of the Plaintiff's personal injury claim. In *Tarzwell v. Ewashina,* the Plaintiff was injured in a motor vehicle collision in 2007 and suffered soft tissue injuries to the lower back and trapezius muscle. After she was injured...

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IMPORTANCE OF PROPERLY DRAFTED FAMILY LAW DOCUMENTS

Posted by Cristen Gleeson and Ryan Dueckman

Bill 16 has recently been introduced into the Provincial Legislature which proposes the introduction of the new *Family Law Act.* One of the dominant features of the new bill is how it changes the "best interests of the child" test in parenting decisions from the paramount consideration to the only consideration. The new *Family Law*...

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SEASONS GREETINGS FROM THE LAWYERS AND STAFF AT BAKER NEWBY LLP, AND WISHING EACH OF YOU A HAPPY AND PROSPEROUS NEW YEAR!

KUDOS

LARRY STINSON

To Larry Stinson, who has been elected Chair of the Board of Governors of the University of the Fraser Valley. The management, administration and control of the property, revenue, business and affairs of the University are vested in the Board.

DAVID RENWICK

To David Renwick, who has been appointed to the British Columbia Review Board. The BC Review Board has ongoing jurisdiction to hold hearings to make and review orders where individuals charged with criminal offenses have been given verdicts of not criminally responsible on account of mental disorder or unfit to stand trial on account of mental disorder.

TODD HARVEY

To Todd Harvey, who has been appointed Chair of the Chilliwack Foundation and elected as a Director of the Rotary Club of Chilliwack. The Chilliwack Foundation provides a means for making donations and bequests for charitable, educational and cultural purposes within the Chilliwack. The Rotary Club of Chilliwack, chartered in 1934, is the largest club in Chilliwack with 190 members.

LUKE ZACHARIAS

To Luke Zacharias, who has been appointed Vice President of Chilliwack Community Services. Chilliwack Community Services is an independent local charity that provides opportunities for people to make positive change in their lives through a variety of community, family, and youth programs.

ROSE SHAWLEE

To Rose Shawlee, who has been elected Vice President of The Chilliwack Academy of Music, elected Director of the United Way of Fraser Valley and elected Director of the Canadian Home Builders Association of the Fraser Valley. The Chilliwack Academy of Music is a nonprofit music school, providing quality musical experiences to the entire community. The United Way of the Fraser Valley provides leadership and stimulates citizen participation in the improvement of social conditions in the Fraser Valley. The mission of the Canadian Home Builders Association of the Fraser Valley is to encourage professionalism and integrity in all aspects of the home building industry.

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BAILIWICK

bail-i-wick (ba'lewik). *n. area of interest, skill, knowledge or expertise*

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Baker Newby LLP is committed to being the leading Fraser Valley law firm, providing a full range of quality, practical and effective legal services. Our team of lawyers and staff will continuously strive to serve with excellence, earning the respect, loyalty and trust of our clients, our community and our peers.

BY JASON FILEK
estate and civil litigation

A WARNING TO SELLERS AND REAL ESTATE AGENTS ABOUT THE USE OF PROPERTY DISCLOSURE FORMS

A relatively recent case, Krawchuk vs Scherbak, from the Ontario Court of Appeal, is generating a lot of attention in Canada's real estate industry. The Court held a real estate agent, her firm, and the seller jointly liable for the seller's negligent misstatement on a property disclosure form formally known as the "Seller Property Information Sheet" (SPIS). Real estate agents and sellers are recognizing that the SPIS is a double-edged sword: the SPIS provides information about a house to a prospective purchaser, but also increases the chance that the seller and the real estate agent may be liable if the information on the SPIS is inaccurate or insufficient.

FACTS:

In the spring of 2004, Timothy and Cherese Scherbak listed their house for sale. On April 18, Zoriana Krawchuk attended an open house for the property, quickly became interested in the property, and walked through the house on her own and with the agent. During her walk-through, Krawchuk noticed several visible defects in the house: these included uneven floors, a foam-filled crack in the northwest corner of the crawl space, and sloped brick work on the exterior of the northwest corner. When asked about the defects, the agent advised Krawchuk about the SPIS and stated that the house had settled in the northwest corner and that there had been no further problems in 17 years.

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CHILD SUPPORT FOR ADULT CHILDREN

SEMANCIK V. SAUNDERS

BY CRISTEN GLEESON
family and civil litigation

We all know that the breakdown of a marriage can be hard on children. This is often hardest when the children are young, but it is important to understand how family law deals with the transitional stage when they go from child to adult as well. This is the age when they buy their first car, or they head off to university. Sometimes at that age our children want to explore away from their homes, and they want to spread their wings and experience the world. What then are the responsibilities of a parent paying child support?

In the Supreme Court case *Semancik v. Saunders*, the daughter of the two litigants, Jillian, was exactly that age. She had attended Langara College and was hoping to get accepted into the nursing program. She had travelled to Cuba and the Dominican Republic in the meantime, and had bought her own car. She also had some significant cosmetic dental work done to correct the fact that she was born without canines, which was paid for by her mother.

Ms. Semancik brought a lawsuit against her ex-husband, Mr. Saunders. Although at the time of the lawsuit Jillian was no longer a "child of the marriage" as defined by law, Ms. Semancik claimed that Mr. Saunders didn't pay the child support he owed before Jillian became an adult. She also claimed that he hadn't done enough to help pay for Jillian's extra expenses since legally becoming an adult including her schooling and her dental work.

Mr. Saunders did not agree. He argued that Jillian's dental expenses were not necessary since they were purely cosmetic in nature. Furthermore, he argued that his daughter had worked throughout the period of time in question and had saved up several thousand dollars whereas he

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A WARNING TO SELLERS AND REAL ESTATE AGENTS ABOUT THE USE OF PROPERTY DISCLOSURE FORMS

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Krawchuk decided to purchase the house. Since the agent was already acting for the sellers, she became a dual agent in the transaction. The purchase price was $110,000.

After the closing, Krawchuk cleaned up small accumulations of sand in the northwest corner wall of the crawlspace. A few days later, more sand had accumulated in the same area. A contractor inspected the house and concluded that the entire north foundation wall and northern section of the east foundation wall were sinking into the ground. The sinking walls were causing substantial damage to the foundation and floor joists in the building.

The contractor also noted that the household sewage was draining into a small pit beneath the crawlspace before emptying into the municipal sewage system. The pit was poorly constructed and did not have an airtight seal. In response to the serious defects, the city issued a work order requiring Krawchuk to repair the problems in her house.

During the repairs, the house was lifted from its foundation and the ground below the house was excavated and removed. Contractors replaced the cement basement floor and placed the house on its new foundation. As if the original damage was not enough, moving the house caused large cracks in the walls, which were also repaired. Krawchuk sued the sellers, the agent and the agent's employer, Re/Max Sudbury Inc. in an effort to recover her substantial losses.

TRIAL DECISION:

At trial, Krawchuk claimed breach of contract and misrepresentation against the sellers. The information provided on the SPIS, argued Krawchuk, was insufficient and did not refer to the hidden defects (the sinking foundation and sewage system) which rendered the house uninhabitable. Krawchuk further claimed that the sellers had tried to conceal the problems by re-leveling the living and dining room floors in 1995.

Most of Krawchuk's arguments, however, pertained to the SPIS. Although the SPIS was created to increase transparency in the sale and purchase of homes, sellers may face legal consequences if they do not accurately and completely disclose their knowledge of defects. In Krawchuk's case, she argued that the sellers failed to disclose the continuing problems with the foundation of the house. In response to a question on the SPIS, "Are you aware of any structural problems?" the sellers answered: "NW corner settled – to the best of our knowledge the house has settled. No further problems in 17 years."

In June 2009, the trial judge concluded that Krawchuk would not have purchased the house had she known the actual extent of the damage to the foundation. In the result, it was held that the sellers were responsible for negligent misrepresentation.

While the trial judge held the sellers liable for Krawchuk's losses, the judge did not extend any liability to the real estate agent or her firm. Burdened with having to pay all the damages and costs, the sellers appealed the trial judge's decision. Krawchuk also cross-appealed the dismissal of her claim against the real estate agent.

COURT OF APPEAL DECISION:

The Ontario Court of upheld all of the trial judge's findings except for the apportionment of liability. The Court of Appeal concluded that the sellers, the agent and the agent's firm were equally liable to Krawchuk for damages.

The Court examined the real estate agent's duty "to verify information provided by the vendor about the property." On behalf of the Court, Epstein J. wrote that "While the Scherbaks were in the best position to have accurate and complete information about the condition of the property, the agent should have done more to protect both of her clients [the sellers and the buyer]." Epstein J. also commented that routine use of the SPIS form was a ground "ripe for litigation."

LESSONS FROM KRAWCHUK:

Krawchuk is not the first case that involved the legal ramifications of Ontario's SPIS form. Since its introduction in 1993, the SPIS form has led to numerous reported court decisions in Ontario. Property disclosure documents akin to Ontario's SPIS have been the focus of over 150 reported decisions in other provinces and territories. Unlike the other cases, Krawchuk has generated the most attention because of its large damages award and the associated costs of litigation. In effect, Krawchuk has compelled everyone in the real estate industry to reexamine whether property disclosure forms are a useful tool or a potential liability.

The real estate industry in British Columbia uses the Property Disclosure Statement (PDS), which is a document similar to Ontario's SPIS form. Sellers and agents in B.C. real estate transactions should note that the reverberations of Krawchuk are likely to reach courts in B.C. When a PDS has been prepared, sellers and their agents should carefully determine whether the disclosures in the document are clear, comprehensive, and most importantly, accurate. Real estate agents should remind sellers of the important liability issues that may arise if the PDS is inaccurate or incomplete, and should also strongly recommend that purchasers have an independent inspection performed either before making an offer or as a condition of an offer. Notwithstanding the old rule of "buyer beware", after Krawchuk, courts in B.C. may be more amendable to legal claims against not only sellers, but also against real estate agents by purchasers who, after accepting the truthfulness and accuracy of the disclosures in the PDS, are stuck with defective houses and large repair bills. ■

To learn more about Jason Filek, his areas of practice and view other articles written by lawyers at our firm, visit us online at www.bakernewby.com

TODD HARVEY
corporate, commercial, real estate, and estate planning

LEGISLATIVE UPDATES - SIGNIFICANT CHANGES TO POWERS OF ATTORNEY, LIVING WILLS/ADVANCE DIRECTIVES, AND REPRESENTATION AGREEMENTS

Effective September 1, 2011, the B.C. Legislature made a number of significant changes to the laws that govern Powers of Attorney and other incapacity planning documents in British Columbia. These changes were brought into effect by amendments to the *Power of Attorney Act* (the "PoA Act"), the *Health Care (Consent) and Care Facility (Admission) Act* (the "HCC Act"), and the *Representation Agreement Act* (the "RA Act").

The amended PoA Act now sets out a list of requirements that a person must satisfy in order to have the necessary level of capacity to create an EPoA.

To revoke an EPoA, the revocation must be in writing and signed according to the same rules that apply to the initial signing of an EPoA. The person who created the document is also required to send a "notice of revocation" to every Attorney appointed under the EPoA that is being revoked.

FOR MORE INFORMATION ON THESE IMPORTANT STATUTORY AMENDMENTS, PLEASE SEE OUR DETAILED ARTICLE ON THIS TOPIC ON OUR WEBSITE, WWW.BAKERNEWBY.COM.

In addition, an Attorney is not allowed to delegate his or her powers, make gifts or loans or receive compensation unless the EPoA explicitly provides for such matters.

A key change under the amendments to the HCC Act is the formal recognition of a new health care planning document called an "Advance Directive", which is similar to what is commonly known as a "Living Will". Advance Directives essentially provide a record of a person's wishes on the types of health care they wish to receive if they are unable to communicate and have been diagnosed with a terminal illness or condition. Advance Directives are the first such documents to be recognized as binding on medical practitioners in B.C., as Living Wills were not legally binding.

Generally speaking, a Representation Agreement is a document created under the RA Act whereby an adult appoints another adult to make health care decisions on their behalf. A person can still create a Representation Agreement ("RA") under Section 9 of the RA Act appointing a representative to make decisions on their behalf for all major and minor health care matters, including "end-of-life" decision making, however under the amendments, an RA made under Section 9 of the RA Act cannot give the representative the power to deal with any financial matters. Another significant change for RAs under Section 9 of the RA Act is the deletion of certificates that used to have to be signed by the representatives appointed by the RA in order for the RA to be complete.

Under the amended RA Act, it is also possible to create an RA under Section 7 of the RA Act which allows a Representative to deal with routine management of the Adult's financial affairs, as well as with certain routine health care decisions, which are now more limited and specifically do not include end-of-life decisions. While a person must have full capacity when creating a Section 9 RA, a reduced level of capacity is required for the creation of a Section 7 RA, as it gives more limited powers to the Representative. ■

To learn more about Todd Harvey, his areas of practice and view other articles written by lawyers at our firm, visit us online at www.bakernewby.com

CHILD SUPPORT FOR ADULT CHILDREN

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himself had to deal with a collapsing business and substantially reduced yearly income. He argued that his child support obligations were decided by the Court when he was doing well financially and the Court should take the fact that he had fallen onto hard times into account when looking at his missed child support payments.

The Court did agree that Jillian should have paid more for her own expenses considering what she had earned. However, they sided with Ms. Semancik on the rest of the issues.

The Court found that correcting a congenital defect that affected her appearance, while cosmetic in nature, can still be considered necessary. As well, the Court found that although Mr. Saunders was making less than the Court originally estimated, the test for changing what child support is already owed is whether there was a material change in circumstances that rendered that amount "grossly unfair". This is much harder to prove than what is required for a variation in child support amounts, which is simply a "material change in circumstances".

Last but not least, the Court reminded the two parties that although Jillian was now an adult and no longer a "child of the marriage" as defined by law, this could change if Jillian was accepted into medical school. If Jillian was to become a student again, the law would place a unique obligation on separated parents to support her through her schooling. This benefit under the law does not extend to the children of parents who are still together.

Growing children of divorced parents face uncertainties they may not have otherwise faced. The law tries to mitigate this by ensuring support for them through higher education or vocational training. The simple fact is that it is the obligation of every parent, separated or single, to prepare their children for the outside world, and support them through various stages of their young adult life. ■

To learn more about Cristen Gleeson, her areas of practice and view other articles written by lawyers at our firm, visit us online at www.bakernewby.com