STILLMAN LLP'S

LegalEye

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Presenting Legal News, Views and Updates from
Stillman LLP
Barristers & Solicitors

EDITOR'S NOTE

Should you have any questions, concerns or suggestions for future articles please contact John Hagg by phone at (780) 930-3648 or by email at jhagg@stillmanllp.com

Special Announcement: Grand Opening Party

We are now at our new location:

100 Sterling Business Centre
17420 Stony Plain Road NW
Edmonton, Alberta T5S 1K6

Please join us in celebrating the opening of our new office in the Sterling Business Centre on June 20, 2019 from 4:00 p.m. to 8:00 p.m..

Drop in any time to mix, mingle, and enjoy appetizers and refreshments.

Special Announcement: Mark Stillman Retirement

It is with a mixture of happiness and sorrow that we announce the retirement of Mark Stillman, effective June 30, 2019. We are happy that Mark will be able to spend more time with his wife, children and grandchildren, as first and foremost, Mark is a family man. We are sad that we will no longer be able to turn to our trusted friend and colleague for his leadership and guidance.

In addition to a distinguished legal career, Mark has contributed significant time and effort to giving back to the Edmonton community, including such organizations as the Edmonton Talmud Torah Society, the North East Community Health Centre and the Canadian Cancer Society. He has also served on the Edmonton Jamie Platz Advisory Committee.

Mark created and organized the "Stillman LLP Superbowl" that raised approximately $500,000.00 for various charities, including the North East Community Health Centre, SKILLS Society of Edmonton and Child Care International.

In accordance with the highest standards of our profession, Mark also gave back to the legal community. He was a lecturer for the Law Society of Alberta Bar Admission Course, a Mentor for the Law Society of Alberta Real Estate Western Protocol and a member of both the Law Society of Alberta's Real Estate Practice Advisory Committee and Audit Committee. He also served as the Edmonton District Representative and Treasurer of the Alberta Civil Trial Lawyer's Association.

Mark's retirement will be a loss to our firm, and the City and community which he served and devoted his time and effort to improve. His efforts have had a lasting impact on the quality of life for our fellow Edmontonians, and the legal profession throughout the province.

We wish Mark and his beloved wife, Lorraine, health, happiness and many years surrounded by his children and grandchildren, and thank him for being a role model to all of our lawyers. His standards of professionalism, service to clients and service to our community. We will continue to strive to emulate. All the best!

Directors Liability for Tortious Conduct of the Company: Hall v Stewart, 2019 ABCA 98

By Shannon Kinsella

The corporate vehicle is an amazing thing. Running your business through a corporation has many benefits, including:

- Limited liability for shareholders and directors;
- Flexibility for ownership and profit sharing;
- Ease of raising capital;
- Continuous existence of the corporation that is not tied to the shareholders;
- Transferability to new owners; and
- Potential tax benefits (please contact your accountant for more information).

It is also well known that a corporation is a separate entity. Since the case of *Salomon v. Saloman*, decided in 1897, courts have held that a director cannot be held liable for the acts of the corporation.

However, there are some instances whereby a director may be held liable for the acts of their corporation. Examples include, but are not limited to, fraud, not submitting withholding taxes and unpaid employee wages. What is not clear, is when a director will have personal liability for a corporate tort, for example, where a negligent act causes injury.

A recent Alberta Court of Appeal case, *Hall v Stewart*, 2019 ABCA 98 ("*Hall*") attempts to clarify the law around a director's liability when the corporation causes injury.

In *Hall*, the corporation was hired to construct a staircase in a new home. The temporary staircase installed collapsed, injuring the employees of another sub-contractor. The respondent director supervised and assisted in the installation of the collapsed staircase. The injured employees were covered under the Worker's Compensation Board ("WCB") and the action was started as a subrogated action by WCB.

It is important to note that when an employee is injured on a worksite, WCB takes over to ensure that that employee is adequately covered for their injuries. As they are covered by WCB, an employee cannot sue the company for damages and the company is immune from suit. Other employees are also immune.

The issue in *Hall* was whether a corporate representative (i.e. a director) can be personally liable for tortious conduct while acting as a representative of the corporation. WCB sued the respondent director personally for the injuries to the employees, in an attempt to recoup the amounts paid to those employees.

The WCB statutory no-fault compensation scheme does not apply to directors unless additional coverage is purchased from WCB. If you are a director of a corporation, it is important to determine if this additional coverage is necessary for you. In *Hall*, the defendant director did not have this additional coverage. It is also important to note that general commercial liability insurance can also manage and divert the risk of potential liability.

Although there is still no definitive test to determine when liability will be attributed to a director, *Hall* outlines various factors to be considered at paragraph 18. At paragraph 22 the factors that were relevant in this case are discussed. Those factors included:

1. The work that caused the injury was clearly done on behalf of the corporation;

2. The work was in the best interests of the corporation;

3. The work did not reflect any personal interest of the defendant;

4. The work was not independent of the business of the corporation; and

5. The nature of the damage was personal injury.

The deciding factor in *Hall* was the fifth aforementioned factor. There is a duty of care to avoid injuring co-worker's and employees. When installing a staircase, there is a clear duty of care to those that are going to be using the staircase not to negligently build a faulty staircase. In this case, the director was not able to avoid personal liability for the negligent act, even though that act was undertaken on behalf of the corporation.

Hall has ultimately expanded the instances where a director may be held liable for the acts of their corporation. Insurance policies should be reviewed by a qualified insurer to make sure that appropriate coverage is in place to protect directors. A corporation still offers great protection to shareholders and directors, however, it is important to seek legal advice when incorporating or becoming a director, or if a corporation or their directors are sued. Any of the lawyers at Stillman LLP would be happy to assist in this regard.

Editor's Note

Stillman LLP is pleased to welcome to the firm Jessica Maginnis and Evelyn Tinka. Jessica and Evelyn will be working in the firm in Administrator support, with Jessica having a focus in the real estate department, and Evelyn having a focus in the corporate department.

Mandatory Dispute Resolution Before Entry for Trial

By John Hagg

On February 12, 2013, Alberta Court of Queen's Bench Chief Justice Wittman and Associate Chief Justice Rooke, signed a Notice to the Profession #2013-01 suspending the enforcement of Rules 8.4(3)(a) and 8.5(1)(a) of the Alberta Rules of Court. These Rules require parties to take part in some form of Alternative Dispute Resolution ("ADR") before going to trial. Common ADR options include, mediations, arbitrations, and Judicial Dispute Resolutions ("JDR"). The initial suspension came about because of a shortfall on Court resources, of which JDR's can be a heavy burden. However, in the last six years since NP#2013-01, the Court has seen an increase in trial wait times where litigants can see themselves waiting in excess of eighteen months for a five day trial, and close to thirty months for trials of seven days or longer.

In an effort to promote resolution and to reduce lead times in short and long civil trials in Calgary and Edmonton, the Court of Queen's Bench a pilot project has been in effect since January 1, 2019, reinstituting ADR requirements prior to trial, for all non-family law matters.

There are mixed reviews of reinstituting the ADR requirement various sources. On one side, the ADR North and South Sections of the Canadian Bar Association (CBA) are in strong support as many of their members typically have interest-based negotiations, mediation, and arbitration services as a key component to their practice. They are likely the strongest voice is support of reinstatement of the ADR requirements, because of a strong belief which is shared by much of the Alberta Bar that ADR can and often does lead to quicker and cheaper resolution of disputes, with the added bonus of saving valuable court resources.

One key factor of the ADR Sections of the CBA's support of reinstitution of ADR requirements, is that if parties 'with means' take advantage of options such as independent mediation or arbitration services, availability of JDR hearings provided by the Court will be freed up. This would, in theory, increase access to justice for parties 'without means', and decrease the burden on the Courts for both JDR and trial dates, provided that a good number of disputes are settled.

However, on the other side, unfortunately ADR does not always work, and its appropriateness relies as much on the willingness of the parties to listen and compromise than as it does on a party's resources. In some instances it may prove to be the case that adding this one additional mandatory step could prove to be one obstacle too many when it comes to reaching a fair determination of a litigation dispute.

Only time will tell what effect reinstitution of enforcement of ADR requirements under the Alberta Rules of Court will have. For more information on this change and potential impact in may have on your ongoing or potential litigation, please contact your lawyer at Stillman LLP to discuss.

Illness and Disability in the Workplace: Hoekstra v. Rehability Occupational Therapy Inc., 2019 ONSC 562

By Chris Younker

What happens to an employee's employment contract when he or she suffers an illness or disability that precludes them from continuing to work? This question was recently considered by Justice Mitchell at the Ontario Superior Court in *Hoekstra v. Rehability Occupational Therapy Inc.* ("Hoekstra").

In Hoekstra the employee (plaintiff) was 51 years of age. He suffered from severe esophageal and stomach conditions. The plaintiff had been employed by the defendant as a Medical Social Worker commencing September 7, 2005 pursuant to a written contract of employment.

Due to the plaintiff's medical condition, he commenced short term medical leave of absence in December 2008. The plaintiff returned to work in September 2009 and worked until May 2012. The plaintiff returned to work in September 2012; however, on October 15, 2012 the Plaintiff again took medical leave of absence intending to return to work on December 3, 2012, which date was later extended to March 5, 2013.

The plaintiff was unable to return to work on March 5, 2013 due to continuing health complications; however, he always intended to return to work once he was medically cleared to do so. While on medical leave, the plaintiff received group benefits. He maintained regular contact with the defendant and continued to attend the defendant's social events.

On October 19, 2016, the defendant attended at his physician's office for an assessment at which point the physician formed the opinion that the defendant was not returning to work at any point in the future due to his medical concerns.

On January 18, 2017 the defendant advised all of its employees, including the plaintiff, that it would be changing health care providers effective March 1, 2017. The defendant further advised the plaintiff that he would not be eligible for benefits with the new health care provider.

On February 8, 2017 the plaintiff enquired of the defendant as to the basis no longer being eligible to receive group benefits directly as an employee of the defendant and indicated he had a desire and an intention to return to work. In response, the defendant advised that it took the position that the contract of employment had been frustrated and no amount was therefore payable to the plaintiff.

The following day, the plaintiff emailed the defendant and, accepting that his employment was at an end due to his ongoing medical issues he requested payment of his termination entitlements.

As the defendant/employer took the position that the contract had been frustrated due to the plaintiff's medical issues it refused to pay the plaintiff the entitlements he usually would have been used to including the statutory minimum for pay in lieu of notice under Ontario's *Employment Standards Act* (which is similar in nature to Alberta's *Employment Standards Code*).

Failing agreement between the parties, the plaintiff sued his former employer for damages. The issues for determination by Justice Mitchell were as follows:

a) Was the contract for employment frustrated so as to entitle the plaintiff to the benefits provided under the ESA?; and
b) Does the conduct of the defendant in its dealing with the plaintiff attract an award of aggravated or punitive damages?

Justice Mitchell concluded that the contract had been frustrated as of October 19, 2016 when the plaintiff's physician performed an assessment on the plaintiff and formed the definitive view that the plaintiff would not be returning to work due to his medical condition. In short, contract employment is frustrated when "there's no reasonable likelihood of the

employee being able to return to work within a reasonable time".

Simply because the plaintiff has been on prolonged medical leave does not, in itself, amount to frustration of the employment contract. Here, there was evidence that the plaintiff's medical condition had morphed from being temporary to being a permanent condition rendering him incapable of employment duties.

As the plaintiff had been employed for a period of 5 years he was awarded severance pay pursuant to the provisions of the *Employment Standards Act*.

The second portion of the plaintiff's claim sought an award of punitive damages form the defendants that claimed malicious and outrageous acts was dismissed. The plaintiff relied upon an earlier decision in *Morrison v. Ergo Industrial Seating Systems Inc.* wherein the court held that intentionally withholding payment of an employee's minimum entitlements under the *Employment Standards Act*, particularly when it is obvious that such monies would be owing to that employee and that employee is vulnerable, are grounds for an award of punitive damages. However, in Hoekstra's case, Justice Mitchell determined that there was no malicious conduct by the defendant employer, especially as the defendant had continued to allow the plaintiff to claim the employer's disability insurance until the employer switched insurance providers for reasons that had nothing to do with the plaintiff himself.

Although this decision was made by a Justice of the Ontario Superior Court and is not binding upon judges in Alberta, it is still influential upon Alberta courts and it is noteworthy for several reasons. First, it emphasizes the importance for seeking professional assistance of both lawyers and medical professionals before acting to terminate an employment agreement, (whether or not you're the employer or the employee).

In cases such as these it would take both lawyers and medical experts working together to determine the most appropriate date for finding that an employment contract was frustrated. Often this would be neither the employee's last date of employment or their death, but rather some point in between where it becomes unlikely that the employee will ever be able to return to work. Secondly, the matter does serve as a reminder to employers that they need to treat employees suffering from an illness or disability with extra care and caution as the failure to do so could potentially leave them vulnerable to a claim for punitive damages.

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Stillman LLP is a general law firm formed in 1993 with emphasis on Civil Litigation, Corporate and Commercial matters, Real Estate, and Wills and Estates and Family Law. The firm represents clients throughout Alberta, and has also represented clients from British Columbia, Saskatchewan, Manitoba, Yukon, Northwest Territories, Ontario, Quebec and various jurisdictions in France, Ireland the United States.

The firm has a well established network of agents in Canada, including Vancouver, Vancouver Island, Calgary, Regina, Saskatoon, Winnipeg, Toronto and Montreal. Stillman LLP also has established affiliations with various law firms throughout the United States and Great Britain.

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