Records and Reasonable Care refute Responsibility
Court rules against slip and fall victim

By Andrea M. Thielk, BA, LLB, JD, ACCI

We have all heard the axiom that the three most important things affecting real estate are *location, location, location.* Perhaps it could be said that the three most important steps in liability risk management are *document, document, document*. The recent Newfoundland case of *Murphy v. Interprovincial Shopping Centres Limited et al.* confirms the importance of this practice and establishes that reasonable measures to remove snow and ice are sufficient practices in commercial operations despite unfortunate injuries to persons due to a slip and fall accident. Since the concepts of invitee and licensee as they relate to liability have been reformulated, liability can be defined in its simplest form as the duty of an occupier to provide "reasonable safety" for all who lawfully enter a premises.

On March 19th of 2000, Plaintiff James Murphy, along with his wife, left their home in the evening and drove to a weekly dart league. When they left the establishment, which was located in Fall River Plaza in St. John's Newfoundland, Mr. Murphy fell on ice while walking across the parking lot of the plaza. There had been a severe blizzard in the area the previous day which had ended around noon on the 19th but was followed by freezing rain on the night Murphy fell.

The Defendant, Interprovincial Shopping Centres Limited, contracted Jack Hill & Son Ltd. to provide snow clearing and ice control services at the plaza. They were named as a third party to the lawsuit. The snow removal company maintained records which verified that substantial efforts were made to remove the snow and ice.

In her decision, Justice Maureen Dunn said:

"In these circumstances it is clear the defendant had a duty to the plaintiff. The question is whether the defendant had in place a maintenance regime pertaining to ice and snow clearing amounting to a standard of reasonable care to ensure the plaintiff's safety while on its premises and prevent injury to him…

Individuals who set out in adverse weather assume the attendant risks and must take care for their own safety and well-being…

To hold the defendant, and through it ultimately the third party, responsible for complete coverage of the Fall River parking lot on the days in question would be to hold both to a standard of perfection which, in Newfoundland and Labrador, will never be achieved. It takes time to bring a parking lot, roadways, private residences and other properties back to a normal and perfectly safe condition subsequent to a snow and ice storm. This is an

impossible standard for individuals and corporations to meet when they reside in a province faced with periodic crisis weather conditions."

Her Honour went on to dismiss Murphy's claim and awarded costs to the Defendant and Third Party.

When determining whether the occupier has provided reasonable preventative action, the onus will be on the occupier to provide evidence of prudent maintenance and care. In *Murphy*, the logs provided by the snow removal company gave evidence to the fact that the plaza provided for the reasonable safety of its customers. The decision in *Murphy* confirmed that an occupier does not have to guarantee that the person coming onto the property will be perfectly safe.

Knowing that documentation is paramount raises the question, *what are the implications of this duty to document especially as it relates to the special circumstances of the Condominium Corporation in its role as occupier of the common elements.* The duty of the Condominium to provide reasonable safety is clear. Documentation helps substantiate that this duty has been fulfilled.

Documentation should be done contemporaneously, such that any incidents which may be a liability issue are recorded as soon as possible. It should be done when recollections are fresh and when conditions relating to the incident can be noted. For instance, was it raining, windy or snowing? Was there a sudden storm? What were the general circumstances? Could they have been predicted and reasonably addressed? A comprehensive report should include as much detail as possible.

Inspection reports are a vital part of the Condominium records. A thorough record should be kept of maintenance and safety procedures. A regular schedule for such things as testing smoke and fire alarms, cleaning dryer vents, testing elevators and checking balconies should be maintained and the results recorded as they are completed. Action should be taken if new equipment or repairs are needed. Invoices of purchases and repair work should be kept as part of the permanent record.

Log books maintained by on-site property managers provide excellent documentation. The Board of Directors should be aware of these logs and keep up-to-date on the information provided. They should put maintenance schedules into place and follow-up on reported problems. Book and record keeping should be organized and readily available. Self-managed Condominiums should follow the same procedures and they should be especially mindful to ensure that records are passed on to succeeding Boards. The Risk Management Protocol suggested by the Canadian Condominium Institute is an excellent precedent to follow.

This Risk Management Protocol provides condominiums with the instruction and tools they need to mitigate the risks faced across the full scope of their operations. The Protocol materials – assembled into a Kit to match the operations of a given

condominium – are available for purchase by any one individual condominium corporation. Protocol Kits are tailored to meet the needs of all condominiums, whether large or small; residential or shared facilities; and self-managed or professionally-managed. The Protocol can assist the condominium with limiting the kinds of law suits like in the *Murphy* case.

Despite documenting, the Condominium Board should be vigilant and proceed with caution at all times. Will there still be occasions when something unforeseeable will be deemed to be negligence? The "should have known" element to risk management can be the most troublesome. While the duty of care is limited to a standard of reasonable safety, the courts have determined that owners and property managers must take an **active** role in ensuring the safety of all who enter the premises. In fact, in *Mortimer v. Cameron* the duty is described as **proactive**. Mortimer sued the owner of an apartment building as a result of an alcohol-fuelled, playful shoving match turned tragedy when Mortimer fell into a wall that gave way. The Judge stated an occupier cannot "do nothing" in the face of a known risk.

In Condominium life, this is complicated by the dual occupier situation and the delineation of who is responsible for liability, the unit owner or the Condominium Corporation (the community of owners). This is especially true in exclusive use common areas. The Condominium may find itself liable as well as individual unit owners in some situations. A Risk Management Protocol which includes meticulous documentation should bring "peace of mind" to Condominium Directors in their duty to provide reasonable safety and avoid liability.

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