Lessons Learned from Recent Cases The Importance of Your Contracts with Service Providers

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We recently completed an occupier's liability lawsuit for a hospital that involved the contract between the hospital and its parking contractor. This case demonstrates the importance of having clear contracts that document the respective responsibilities of the institution and its service provider.

Facts and Allegations

This case involved a visitor who was leaving the hospital parking lot. Her driver side window was broken, so to access the ticket machine, she opened the car door. She had not placed her car in "park" and her foot slid off the brake as she reached out the door. The car lurched forwards, jumped the curb and became wedged beside a steel bollard in the exit lane. A lawsuit was started against the hospital and the parking contractor.

The hospital legitimately argued that this could not have been anticipated and really was the driver's fault for not placing her car in "park."

In the lawsuit, the plaintiff's counsel argued that the design of the parking lot exit was faulty and created a situation of risk. Prior to this incident, the hospital together with its parking contractor had undertaken some renovations to reconfigure the exit lane when new equipment was added. The family obtained an expert who suggested that the new design was inappropriate and that proper building permits had not been obtained.

The Contract

The hospital in this case was protected by a strong contract with its parking contractor. A key provision provided that:

"Any and all equipment and services provided by [CONTRACTOR] under this Agreement will be provided in accordance with any and all applicable Federal, Provincial and Municipal legislation, regulatory processes, codes and accepted standards for the manufacturing and sale of said equipment and services".

There was also an indemnity clause in favour of the hospital:

"[CONTRACTOR] will indemnify, defend, and hold harmless [HOSPITAL], its officers, employees and agents from any and all claims, demands, actions, losses and expense (including, but not limited to interest, penalties and reasonable legal fees) arising out of bodily injury, property damage or any other damages caused by any equipment or service included in the Agreement unless such is caused by the wilful negligence of [HOSPITAL], its employees or agents."

The contract had an insurance clause that required the contractor to have insurance, but it did not require the contractor to add the hospital as an additional insured for purposes of the contract services.

During the discovery process, there was a dispute between the hospital and the parking contractor as to who had authorized and designed the specific parking lot renovations. Unfortunately, there was very little documentation about the actual renovation — except for an invoice from the contractor for the work. The hospital maintenance director testified that this was discussed with the parking manager and that he had relied on the parking contractor on the new design. The parking contractor, however, testified that the design was the idea of the maintenance director and they simply constructed to those specifications. None of these discussions were documented and there were no formal design drawings.

Lessons Learned

In our experience, claims for personal injury in parking lots are common. Many institutions contract out the responsibility for parking lot management to parking companies and those companies become parties in any claims. We have also seen parking equipment change frequently in recent years, resulting in renovations to existing parking lots to accommodate new equipment and new ways to pay for parking.

We encourage our clients to regularly review their external service contracts and confirm that they contain proper provisions to protect the institution. Where significant work is undertaken with a contractor, there needs to be good documentation of the responsibilities and obligations between the institution and the contractor arising from the project.

This case highlights the importance of clear language in the contracts with external contractors, and in particular:

(1) the language defining who is responsible for what duties;
(2) providing indemnity to the institution for any claims caused by the contractor's services; and
(3) insurance clauses.

In this situation, the contract terms quoted above were very helpful in arguing that any responsibility for faulty renovations rested with the parking contractor.

The contract also required the contractor to have adequate insurance. Insurance clauses are essential to help avoid situations where the contractor is out-of-business by

the time of the lawsuit and had no insurance. In these cases the institution can be held responsible for the entire claim where the contractor is not defending their own conduct. An extra provision requiring the contractor to add the hospital as an additional insured to their insurance policy would have been beneficial and is generally worth including.

Notwithstanding the good contract, a challenge for the hospital was the lack of documentation about who was responsible for what in this specific renovation project. This allowed the contractor to shift some responsibility back to the hospital, because of the uncertainty as to who was responsible for the exit design.

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