

## RETAIL CASE UPDATE



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### Incident Reports – Are They Privileged?

Many retail stores routinely fill out some type of internal incident report whenever an accident occurs on their premises. Are these privileged in the event that litigation is commenced? Not necessarily. There is no blanket rule of privilege applicable to incident reports. The key factor is the intention of the party creating the report at the time that it was prepared.

Litigation privilege exists when a document is produced at a time when litigation is a reasonable prospect, and the “dominant purpose” of creating the document is for use in litigation. When litigation privilege applies to a document, it does not have to be disclosed to an opposing party.

Western Canadian court decisions are not uniform on whether litigation privilege attaches to incident reports. In several cases, courts have held that incident reports were not privileged because the dominant purpose of preparing the reports was not solely to prepare for litigation. However in a “slip and fall” case out of Alberta, *Stobbe v. Westfair Foods Ltd.*, 1998 ABQB 267, the court held that there was no logic in saying an incident report is not privileged when a business prepares the report only to defend against potential lawsuits.

The recent case of *Smith v. Air Canada*, 2014 BCSC 1648, provides insight into how British Columbia courts will approach this issue. In *Smith*, the plaintiff alleged that a piece of luggage fell on her after being improperly stored in an overhead bin. Shortly after the alleged incident, an Air Canada employee prepared an incident report. During the subsequent lawsuit, the plaintiff sought disclosure of the incident report. Air Canada argued that it was protected by litigation privilege.

The Court found that, because the incident report was completed almost simultaneously with the incident itself, there was not yet any prospect of litigation at the time it was created. The court made this determination even though the employee who completed the incident report was trained by Air Canada to always see litigation as highly probable in the event of any passenger injury. The relatively minor nature of the plaintiff’s injuries also meant that litigation was not immediately a reasonable prospect.

Additionally, the court determined that the incident report was not created with a dominant purpose of assisting in litigation. The court noted that Air Canada has a specific department that deals with

passenger claims before they became litigation, and that the incident report is initially only provided to this department. The incident report is only later forwarded to legal counsel in the event litigation actually arises. Many retailers follow a similar procedure.

The takeaway from *Smith* is that retail stores need to take care when preparing incident reports. While it is worthwhile to have a contemporaneous record of any incident, courts may require disclosure of the incident report in the event of later litigation. It is very important that these reports contain accurate factual information and are properly filled out as they may become an important piece of evidence if a claim is commenced in the future.

We hope you found this update useful.

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