"This article written by Lisa Belcourt, a partner at Ferguson Barristers, originally appeared in the April 27, 2012 issue of *The Lawyers Weekly*, published by LexisNexis Canada Inc."

USING THE OHSA IN DISCOVERY

www.fergusonbarristers.ca

Ferguson Barristers LLP Midland Office
531 King Street Midland, ON L4R 3N6
Telephone: (705) 526-1471
Toll-free telephone: 1-800-563-6348
Fax: (705) 526-1067

USING THE OHSA IN DISCOVERY

BY LISA D. BELCOURT

An elderly woman is shopping in a department store when she suddenly stumbles, falls and breaks her leg. Staff and fellow shoppers rush to her aid, medical assistance is summoned and she is taken to hospital by ambulance to be treated for the fracture.

End of story? Far from it. Apart from the woman's own path to recovery, an internal investigation into her fall will ensue and a lawsuit may result. In this case, plaintiff's counsel would inquire about any incident report prepared by the store, photographs taken and witness statements obtained by the store employees and any written reports to the liability insurer. There is also another layer of documentation under the Occupational Health and Safety Act (OHSA) that might come into play.

All deaths and critical injuries at a workplace must be reported to the Ministry of Labour, even when the incident does not involve an employee. In Blue Mountain Resorts Limited v. Ontario (The Ministry of Labour and The Ontario Labour Relations Board), 2011 ONSC 3057, the Divisional Court upheld a decision of the Ontario Labour Relations Board, which found the OHSA, and in particular the requirement to report a death or critical injury, applied to an incident involving a guest of the resort who drowned in a pool.

For the Divisional Court, it appears that the critical factor was that the swimming pool was also a place where resort employees worked – i.e., the hazard affecting the guest could (at least in theory) also affect a worker. In December, the Ontario Court of Appeal granted leave to appeal but it has not yet been heard.

The OHSA provides a somewhat vague definition of "critical injury". Under Regulation 834, an injury is considered "of a serious nature" if it: places life in jeopardy; produces unconsciousness; results in substantial loss of blood; involves the fracture of a leg or arm but not a finger or toe; involves the amputation of a leg, arm, hand or foot but not a finger or toe; consists of burns to a major portion of the body; or causes the loss of sight in an eye.

Under s.51(1), the OHSA requires all deaths or critical injuries to "persons" to be reported to the labour ministry within 48 hours while a verbal report is required immediately. All other injuries involving disability or medical attention must be reported in writing to the employer's health and safety committee or representative within four days.

The injury involving the elderly woman, therefore, should have been reported, both verbally and in writing, to the Ministry of Labour by the store. Arguably, all reports and investigation documents, internal or external, would be producible at the discovery stage.

Employers are required to have a health and safety policy in place that is reviewed annually under s.25(2)(j). In discovery, that policy should be requested and questions relating to compliance should be answered by the defendant.

Section 9 of the OHSA is really the minefield for personal injury lawyers at discovery:

- An employer with 20 or more workers is required to have a joint health and safety committee (JHSC) and a list of its members should be requested at discoveries.
- The JHSC is required to have regular formal meetings; minutes must be taken and maintained and be available to labour ministry inspectors upon request.
- Monthly inspections of the workplace (or portions thereof) must be undertaken by the JHSC in accordance with a schedule.
- The JHSC is required to be advised of and consider any situations that may be a source of danger or hazard to workers.
- Where a death or critical injury occurs at the workplace, at least one member of the JHSC is required to investigate and report to the Ministry of Labour and the JHSC.

In the example of the elderly woman who was injured in the store, I would expect significant documentation to be generated as required by the OHSA immediately following the incident. I would also expect that this incident, which would be characterized as a "critical injury", to be the subject of discussion at the committee level with some consideration of the hazard and its rectification being undertaken. In my opinion, any documents generated should be requested and produced.

Plaintiff lawyers will no doubt face the argument by the defence that such documents are privileged. However, keeping in mind the "dominant purpose" test that is applied to such claims for privilege, the employer (defendant) will have great difficulty in meeting its onus to establish privilege when the requirement to create those documents is legislated.

When preparing for your next examination for discovery in a personal injury matter, consider whether the OHSA might apply to the situation and whether the OHSA obligations imposed on employers should be incorporated into your discovery plan.