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Paul E.F. Martin, Partner
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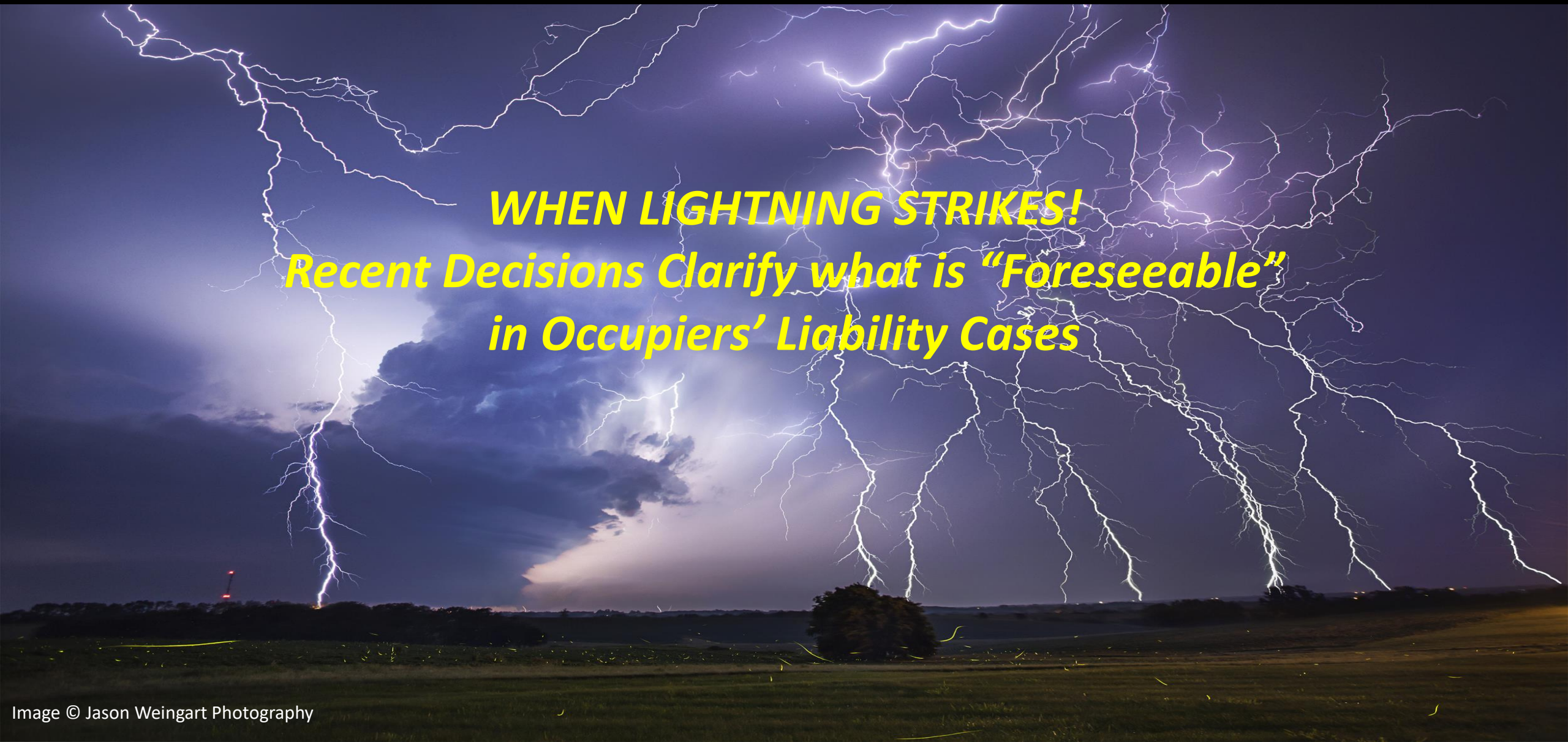

WHEN LIGHTNING STRIKES!
Recent Decisions Clarify what is "Foreseeable" in Occupiers' Liability Cases

If You Only Remember One Thing….

SPELLING

L I G H T N I N G

L I G H T E N I N G

Noun - *"A drop in the level of the uterus during the last weeks of pregnancy as the head of the fetus engages in the pelvis."*

If You Only Remember Two Things….

Electrocution

"Electro" & "Execution"
Technically, Implies Death

Electrical Shock

Implies Survival

If You (Miraculously) Remember Three Things….

It is the electrical CURRENT that will injury you, NOT the VOLTAGE

4,000+ Volts!

Why All This Talk About Electricity?

ONLEY v. TOWN OF WHITBY, 2020 ONSC 20
Justice E.J. Koke (Parry Sound)

- 18 year old Zoe Onley experienced electrical shock while rising to her feet at the end of half-time recess during a night game on August 15, 2012
- Zoe did not scream in pain but said something to the effect of "*Damn – I think I've just been shocked!*" to her friends and coach, a number of whom touched the area without injury
- Zoe ran onto the field to start the second half but collapsed (of mental shock?) after a few seconds/minutes

Onley v. Whitby - Facts

ONLEY v. TOWN OF WHITBY, 2020 ONSC 20
Justice E.J. Koke (Parry Sound)

- Engineering experts agreed the shock was caused by electrical current that was “leaking” out of a nearby soccer lighting standard that, importantly, was otherwise functioning normally (in that it turned on & off when switched)

- The pole was further agreed to have been damaged by a lightning strike that had severed its neutral bonding wire as well as the insulation off one of the “live” phase wires such that the pole was able to light the field but had lost its ability to detect stray current

- No damage to the pole or its lights was evident from visual inspection. The compromised wires were only identified after the hand-hole cover was removed post-accident to expose the internal wiring

- Date of the lightning strike was in dispute between the parties but, in any event, last visual inspection by Electrical Safety Authority was about a month pre-accident with no relevant deficiencies

Onley v. Whitby - Facts

ONLEY v. TOWN OF WHITBY, 2020 ONSC 20
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- Zoe's primary complaint was of ongoing and severe PTSD (with onset only documented in the medical file 1.5 years post-accident when away from home for first time living at university), loss of a lucrative (Ontario) athletic scholarship, income/future care losses, and FLA claims. Also some argument about physical pain and alleged "burn marks" on toes.

- As with all trials, there were subsidiary skirmishes:

    - Hearsay that "everybody" knew of the "buzzy field" for months but the Town did nothing to repair it;
    - The home soccer team had purposely chosen a soccer bench away from the subject light pole;
    - Attempts to knock defence experts "out of the box" based on technicalities or allegations of plagiarism;
    - Whether any medical professional ever examined Zoe's allegedly burnt feet through paramedics, ER at the hospital, and physiatrist who ran neurological tests for her complaints of lower extremity foot pain.

ONLEY – Primary Issue was Foreseeability

We are all well familiar with the standard of care outlined by the *Occupiers' Liability Act*:

3(1) – An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

HARDLY HELPFUL!

ELEMENTS OF TORT OF NEGLIGENCE

In its most general sense, negligence includes a consideration of:

1. Does the Defendant owe a duty of care to the Plaintiff?
2. Did the Defendant breach the standard of care?
3. Did the Plaintiff suffer an injury?
4. Did the Defendant's conduct cause the injury?

Mustapha v. Culligan of Canada Ltd., 2008 SCC 27

In *Onley*, the Town, as an "occupier" under the *OLA*, unquestionably owed a "duty of care". Question was whether Zoe's personal injury resulted from a "foreseeable" harm that the Town ought to have reasonably prevented?

Foreseeability cannot just be an abstract concept

- Analogous to Courts struggling with a definition of pornography. As Justice Stewart Potter of the US Supreme Court wrote in the 1964 case of *Jacobellis v. Ohio*:

  > *"I shall not today attempt to define the kind of material I understand to be embraced within that shorthand description [pornography], and perhaps I could never succeed in intelligibly doing so. But I know it when I see it."*

- Same dilemma applies to foreseeability. We "all know it when we see it" but courts struggled to define it in a manner that was useful towards real-life cases

- It is imperative that we can define what is "foreseeable" as it influences the dangers that occupiers ought to "reasonably" prevent. Too often, courts simply ask "was the injury preventable?" (≈strict liability)

- Consider:
  1. Divots in a soccer field
  2. Goose excrement on a baseball diamond
  3. Goose falling onto a person
  4. Untended bollard/gate
  5. Donation bins as threatening to human life
  6. Peculiar allergic reactions to food, clothing, cosmetics
  7. Assault at a gym facility
  8. Pedestrians being "knocked down" at "dog parks"

Ryan v. City of Victoria, [1999] 1 S.C.R. 201

Ryan injured when he was catapulted from his motorcycle while attempting to cross railway tracks that ran down the centre of a street in downtown Victoria. Front tire got caught in a “flangeway gap”.

Ryan v. City of Victoria, [1999] 1 S.C.R. 201

- At para. 21 (citing an earlier case from Nova Scotia):

It is the function of the Judge [trier of law] to determine whether there is any duty of care imposed by the law upon the Defendant and if so, to define the measure of its proper performance; it is for the jury [trier of fact] to determine…whether the Defendant has failed in their legal duty.

The common law yields the conclusion that there is such a duty only where the circumstances of time, place and person would create in the mind of a reasonable person in those circumstances such a probability of harm resulting to other persons as to require them to take care to avert that probable result. This element of reasonable prevision of expected harm soon came to be associated with the fictional Reasonable Man [Person] whose apprehensions of harm became the touchstone of the existence of duty, in the same way as their conduct in the fact of such apprehended harm became the standard of conformity to that duty…

HELPFUL BUT STILL ABSTRACT!

Ryan v. City of Victoria, [1999] 1 S.C.R. 201

Of more practical assistance, at para. 28:

Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

Judge Learned Hand's Rule:	% Chance (risk) of harm	x	Expected damage from that harm	>	Cost of prevention	=	**Foreseeable**
				<		=	**Unforeseeable**

Ryan v. City of Victoria, [1999] 1 S.C.R. 201

- Trial Judge held the Railways and the City joint and severally liable in negligence, the former for maintaining dangerously wide flangeways and the latter for failing to warn of the hazard.

- The BC Court of Appeal found the Railways and City liable only for duty to warn.

- The City's negligence was not appealed to the Supreme Court – only that of the Railways. At para. 58:

The Railways were negligent with respect to the width of the flangeways…They owed a duty of care to [the plaintiff] with respect to flangeways…and that duty required them to exercise reasonable care in the circumstances. Their compliance with regulatory standards did not replace or exhaust that obligation…In particular, they should have taken steps to minimize the risk to two-wheeled vehicles by building the flangeways at the minimum allowable width or by installing flange fillers.

Mustapha v. Culligan, [2008] 2 S.C.R. 114

- "Fly in the bottle" case where Mustapha had severe psychological distress from drinking water with a dead fly in it.
- Trial judge awarded liability, which was overturned by Court of Appeal on basis that the injury was not reasonably foreseeable and hence did not give rise to a cause of action.
- Short decision by Supreme Court of only 20 paragraphs, upholding Court of Appeal denial of damages. At para 13, provides some guidance on what is foreseeable when determining liability:

> *Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is probable or merely possible. In my view, these terms are misleading. Any harm which has actually occurred is "possible"; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirements was described in the Wagon Mound (No. 2) as a "real risk", i.e., "one which would occur to the mind of a reasonable person in the position of the defendant and which they would not brush aside as far-fetched."*

J.J. v. Rankin's Garage, [2018] 1 S.C.R. 587

- J and friend C, who were 15/16 y.o. at the time, were at the house of C's mother drinking alcohol and smoking marijuana (aka. ganja/herb/Mary Jane/grass/skunk/weed/dope/420/etc.)
- Around midnight, they left the house to walk around town, with the intention of stealing valuable from unlocked cars.
- Eventually made their way to a commercial garage located near a main intersection. The property was not secured and the boys walked around looking for unlocked cars. C found an unlocked car with its keys in the ashtray.
- Though C did not have a driver's license and had never driven a car before, C decided to steal the car so that he could go pick up another friend in a nearby town. J was passenger.
- The car crashed and J suffered a catastrophic brain injury.
- Question on liability at para. 15: Was the risk of personal injury reasonably foreseeable to Rankin's Garage when leaving parked cars on its lot unlocked overnight? (Remember – this is an occupiers' liability case)

Rankin's Garage – A Critical Distinction

- Para. 22:

Foreseeability operates as the "fundamental moral glue of tort", shaping the legal obligations we owe to one another, and defining the boundaries of our individual liability.

- Para. 24:

When determining whether reasonable foreseeability is established, the proper question to ask is whether the plaintiff has "offered facts to persuade the court that the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged."

Rankin's Garage – Important Considerations

It was found to be a fact that:

1. Rankin knew that he had an obligation to secure vehicles on his property

2. Rankin was a (for-profit) commercial establishment, not just an individual homeowner

3. Police gave evidence that vehicle theft was a "common occurrence" in the area that residents were publicly warned about

Rankin's Garage – Analysis

Para. 33:

All the evidence respecting the practices of Rankin's Garage or the history of theft in the area, such as it was, concerns the risk of theft. The evidence did not suggest that a vehicle, if stolen, would be operated in an unsafe manner. This evidence did not address the risk of a theft by a minor, or risk of theft leading to an accident causing personal injury. Indeed, the jury noted it found liability based on the foreseeability of theft.

Rankin's Garage – Analysis

Para. 34:

I accept that the evidence could establish, as the jury found, that the defendant ought to have known of the risk of theft. However, it does not automatically flow from the evidence of the risk of theft in general that a garage owner should have considered the risk of personal injury. I do not accept that anyone that leaves a vehicle unlocked with the keys in it should always reasonably anticipate that someone could be injured if the vehicle were stolen. This would extend tort liability too far. Physical injury is only foreseeable when there is something in the facts to suggest that there is not only a risk of theft, but that the stolen vehicle might be operated in a dangerous manner.

Rankin's Garage – Differentiating Cases

SCC in *Rankin* then differentiates 3 trial court decisions where subsequent injury to a third party was found to be foreseeable

- All of those trial decisions involved "innocent" plaintiffs
- Distinctions: 1. Foreseeable that thief would return to steal more vehicles, 2. Fleeing police caused the erratic driving, not driving in and of itself
- Para. 40: "In each of these cases, there was something in the factual matrix that could connect the theft and subsequent unsafe driving of the stolen car and thus make personal injury foreseeable."

Rankin's Garage – Conclusion

Para. 41:

I agree with the weight of the case law that the risk of theft does not automatically include the risk of injury from the subsequent operation of the stolen vehicle. It is a step removed. To find a duty, there must be some circumstance or evidence to suggest that a person in the position of the defendant ought to have reasonably foreseen the risk of injury – that the stolen vehicle could be operated unsafely. That evidence need not be related to the characteristics of the particular thief who stole the vehicle or the way in which the injury occurred, but the court must determine whether the reasonable foreseeability of the risk of injury was established on the evidence before it. [underline original]

Rankin's Garage – Conclusion

Para. 46. (as in *Mustapha*):

The fact that something is <u>possible</u> does not mean that it is reasonably foreseeable. Obviously, any harm that has occurred was by definition possible. Thus, for harm to be reasonably foreseeable, a higher threshold than mere possibility must be met. Some evidentiary basis is required before a court can conclude that the risk of theft includes the risk of theft by <u>minors</u>. [underline original]

Para. 48: *"Unlike an ice cream truck, vehicles are not designed to attract children."*

Rankin's Garage – Analogy to Alcohol

Para. 58: *OTLA intervened in the appeal, arguing that "Since these businesses benefit from the sale or storage of dangerous goods [vehicles], they have an implied responsibility to the public to reduce the risks associated with the goods…a car garage is analogous to a commercial vendor of alcohol.*

Para. 59:

In my view, this analogy is misguided…While a garage benefits financially from servicing cars, they have no commercial relationship with, and do not profit from or encourage the persons who might steal cars.

Rankin's Garage – Analogy to Firearms

Para. 60:

Vehicles are ubiquitous in our society. They are not like loaded guns that are inherently dangerous and therefore must be stored carefully in order to protect the public…While cars can be dangerous in the hands of someone who does not know how to drive, this risk would only realistically exist in certain circumstances.

Result = Liability Denied. While Property Damage/Theft was Foreseeable, Risk of Personal Injury was Not!!

Back to *Onley*

Town's liability argument centred upon:

1. *Rankin* – While thunderstorms and lightning are foreseeable to cause property damage to lighting poles, it was unforeseeable that it would cause personal injury

2. *Ryan* – The cost of preventing Onley's accident would far outweigh the risk of that kind of personal injury, having regard to the damages expected

Onley – Liability Reasons

Paras. 78 – 88: Justice Koke accepted that the "type" of damage (personal injury v. property damage) was a valid distinction per *Rankin.*

Court rejected the following proposals from Plaintiffs:

1. Stray Voltage Detection as with City of Toronto (Streetlight) Handwell Replacement Project
2. Use of pen detectors
3. More frequent inspections
4. Use of Lightning Rods and arrestors on light poles
5. Routinely opening/closing hand-holes (more harm than good)

Onley – Damages

- Damages frequently “sway” courts – see *Rankin*
- Court would have denied athletic scholarship, past and future income losses
- General damages to Zoe: $85,000
- Future Care Costs: $50,000
- FLA claims: $15,000 to each parent
- Agreed out of pocket expenses: $18,195.75
- Town did NOT pursue *Mustapha* defence that PTSD was an unforeseeable consequence of electrical shock

Case Example: *Labanowicz v. Fort Erie (Town)*, 2017 ONSC 630

Labanowicz - Facts

- Bright, sunny day on Monday July 31, 2006 when Plaintiff was cycling with a friend along a recreational trail

- "*Suddenly, the front wheel of [Plaintiff's] bicycle struck the housing or sleeve that usually contains the bollard, which is an approximately four foot tall wood post that is used to control access to the Trail by unauthorized motorized vehicles from the municipal streets that cross the Trail.*" (*i.e,* "empty bollard housing")

- Sustained a severe brain injury – was <u>not</u> wearing a helmet

Labanowicz – Occupiers' Liability Act

Risks Willingly Assumed

4.(1) The duty of care provided for in subsection 3(1) [of reasonable care] does not apply in respect of risks willingly assumed by the person who enters on the premises, but in that case the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property.

Labanowicz – Occupiers' Liability Act

Trespass and permitted recreational activity

4.(3) A person who enters premises described in subsection (4) shall be deemed to have willingly assumed all risks…(c) where entry is for the purpose of a recreational activity [blah blah blah]

(4) The premises referred to [above include]:

(f) Recreational trails reasonably marked by notice as such.

Labanowicz – Other Important Notes

- Municipality extended the Trail based on a commissioned report that recommended:
  - Existing bollards were to be painted with a bright colour such as safety yellow;
  - A dashed line to be painted on the Trail surface at a distance of 40m from the intersecting road's edge;
  - Diamonds were to be painted around existing bollards;
  - Additional reflective bands were to be added to existing bollards
- On Friday prior to the Monday accident, the bollard went missing – maintenance crew conducting inspections discovered and reinstalled it 'shortly' after discovering it in the ditch to the side of its housing.

Labanowicz – "Foreseeability"

- Foreseeability only mentioned in passing (around para. 67)
- Could either of *Ryan* or *Rankin's* have been used by the municipality to defend against liability? (Neither decision was cited)
- Before getting to that question, important to note that "reckless disregard" standard does not need to be intentional and is "watered down" by courts, so be careful

Labanowicz – Trial Decision

- Para. 51: "*Put otherwise, [the municipality] did not paint diamonds on the Trail around 3 sets of newly installed bollards, including the sets installed at the [accident] location*."

- Para. 52: "*No explanation was proffered by the Town for not painting diamonds around these bollard locations, in distinction to those painted around 18 of the already existing bollards, notwithstanding the fact that the cost of painting these diamonds would not have been excessive. The explanation I heard…was that while the initial painting was not expensive, the maintenance of these markings into the future might be the problem*."

Labanowicz – Trial Decision

- Para. 53:

"*I would hasten to add that the photos filed as part of Exhibit 1, which show a multitude of other painted Trail markings delineating the bike paths, do not readily support that rationale, if it is one. But [the municipality's] response begs at least one question: why did they paint diamonds around 18 of the existing bollards at 9 intersections and not around the 6 bollards at the 3 new intersections? The same maintenance issue, if there was one, would presumably exist in all 12 locales. The Town offered no evidence to deal with this seeming paradox.*"

Labanowicz – Trial Decision

- Para. 54: "*I did not hear any explanation about why the Town did not entertain the O'Connor Report recommendation to paint the bollards or to add further reflective material to their exterior unless, again, it was concerned about some form of in future maintenance issue.*"

- Para. 58: "*I heard from…the maintenance manager…that padlocks were not used [to secure the bollards from vandalism] as they were difficult to remove in winter – the accident occurred July 31st – and that emergency vehicles would somehow be denied access to the Trail if the bollard were locked in place*."

Labanowicz – Trial Decision

- Paras. 59/60:

"I was not provided with any explanation about why some bollards were locked and others were not. Respectfully, I am persuaded that the Town's system of securing the bollard was haphazard, particularly when it knew that bollards easily go missing and were subject to vandalism."

- Para. 62: "*I agree with counsel for the plaintiff that the existence of an unpainted, unlocked and relatively easily removable bollard which exposes a housing or saddle above grade that has limited, if any, conspicuity amounts to reckless disregard to the safety of persons using the Trail.*"

Labanowicz – Do *Ryan* or *Rankin's* Assist?

- *Rankin's* → Likely does not assist given "type of damage" that is of primary concern is indeed personal injury
- *Ryan* → Without referencing this authority, this Judge seemed especially cognizant of the Learned Hand test in "weighing" cost of prevention against severity of harm
- Did not help the municipality that Plaintiff was severely brain damaged → approx. $1 million in damages (exclusive costs)
- Zero contributory negligence despite failure to wear helmet!!

Moral to the Story

1. Never play soccer
2. Don't "overreach" in litigation, either for plaintiff or defendant
3. Records, records, records – They can always be better
   - Although more comprehensive forms are helpful, staff may resist filling out endless data fields (which can have reverse effect when presented to court)
   - Audits of record keeping should be encouraged from time to time, with clear communication to staff as to why they are important (not just about keeping nice forms but rather a simple lawsuit can cost hundreds of thousands of dollars)
   - Be wary of new technologies (GPS, scanner, paperless failures, etc.)
4. Early on, encourage opposing (and retained counsel) not to go crazy on disbursements
5. Emphasize the occupiers' defence as to burdensome prevention costs and limited budgets (courts particularly have sympathy for non-profit, municipal defendants)
6. Emphasize the scale of operations (*i.e.,* City of Toronto has 7,000 kms of sidewalks; Whitby has 7,300 light poles; 200,000+ water boxes in Durham Region; lightning strike statistics, etc.)

Onley – Appeal?

- There is an appeal from the Plaintiffs, on both liability and damages.