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LAWYERS

CASUALTY UPDATE: A YEAR IN REVIEW

SPIAO Conference
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Municipal Liability

- ***Campbell v. Bruce (County)* (2016, ONCA)**
- **Facts:**
  - Municipality opened mountain bike adventure park consisting of series of bike trails and skills development area with wooden obstacles where users could learn what to expect on trails.
  - Municipality heavily relied on mountain bike association for best practices and skills management in design of park.
  - For trails and obstacles in park, municipality used difficulty rating system. Municipality automatically increased difficulty rating for each obstacle in trial area by one. Signage cautioned riders to ride within ability and risk, that helmets were mandatory and to yield to other groups. Promotional material included warning that mountain biking was risky and that visitors should ride within own abilities and at own risk.

Municipal Liability

- ***Campbell v. Bruce (County)* (2016, ONCA)**
- **Facts:**
  - Before incident, there was no mechanism to collect and assess ambulance call at park.
  - Plaintiff was active and athletic 43-year-old man with extensive mountain bike trail experience.
  - Plaintiff fell while attempting to cross constructed obstacle in park, suffered broken neck, and was rendered quadriplegic.
  - At trial, municipality was found liable for plaintiff's injury and trial judge found that plaintiff was not contributorily negligent.
  - Municipality appealed

Municipal Liability

- ***Campbell v. Bruce (County)*** **(2016, ONCA)**
- **Decision:** Appeal dismissed.
  - Trial judge properly assessed municipality's conduct in light of duty to take reasonable care as occupier.
  - Plaintiff assumed risk of riding on trails in park, however, trial judge drew distinction between bicycle trails and trails area in park.
  - Trial judge properly delineated meaning of inherent risk, clearly identified problems posed by obstacle upon which plaintiff suffered injury, and was clear and concise as to what municipality could have done differently.

Municipal Liability

- ***Campbell v. Bruce (County)*** **(2016, ONCA)**
- **Decision:** Appeal dismissed.
  - On issue of causation, trial judge clearly found that plaintiff's injury would not have occurred if more detailed signage had been posted and clearly found that plaintiff's decision to attend park was influenced by promotion of park as family venue.
  - Trial judge was entitled to find that, had municipality adequately monitored previous accidents and been aware of number of accidents at park and on that obstacle in particular, actions would have been taken such that plaintiff's injuries would have been prevented
- **Conclusion:** Even in situations where a plaintiff partakes in a potentially dangerous activity, there can still be a finding of liability against a defendant municipality.

Occupier's Liability

- ***Porchak v. Pizza Pizza Limited* (2016, ONSC)**
- **Facts:**
  - Plaintiff tripped over bicycle rack outside defendant's leased premises in strip mall and fractured radial head.
  - Plaintiff brought action for damages, alleging he did not see bicycle rack before falling, failing to plead Occupiers' Liability Act or duty to warn.
  - Defendants brought motion for summary judgment to dismiss claim

Occupier's Liability

- ***Porchak v. Pizza Pizza Limited* (2016, ONSC)**
- **Decision:** Motion granted; claim dismissed.
  - Plaintiff provided no evidence of objectively unreasonable risk of harm. There was no evidence that bike rack posed hidden or unusual danger on sidewalk. The rack was in plain view.
  - Plaintiff knew rack was there as he had passed it frequently in past.
  - There was nothing objectionable about having bike rack in place. There was nothing inherently dangerous in leaving bike rack outside year round.
  - There was no evidence defendant had obligation to inspect.

Occupier's Liability

- ***Porchak v. Pizza Pizza Limited* (2016, ONSC)**
- **Decision:** Motion granted; claim dismissed.
  - There was no evidence of causal link between failure to inspect and plaintiff's injury or that rack was in state of disrepair.
  - There was no evidence of any breach of duty.
  - Plaintiff's reliance on lease agreement between defendant and landlord was misplaced. There was no evidence of breach of lease.
  - Plaintiff was not taking care and did not see rack before he fell although it was in plain view.
- **Conclusion:** Obstructions that are in plain sight do not attract liability.

Municipal Liability

- ***Raubvogel v. Vaughan (City)* (2016, ONSC)**
- **Facts:**
  - Plaintiffs husband and wife were awoken by sound of water gushing down driveway into basement of their home.
  - The subject water main had the highest number of breaks in the City of Vaughan. There were 10 water main breaks in 2004, 13 breaks in 2006, 16 breaks in 2010. By 2011, before replacement, there were 18 recorded breaks.
  - There were water mains that had less breaks than King High Drive that were replaced before the King High Drive water main.
  - Plaintiffs commenced two actions against the City of Vaughan to recover resulting damages to home, personal property and vehicles from breakage of water main in front of entrance to driveway.

Municipal Liability

- ***Raubvogel v. Vaughan (City)* (2016, ONSC)**
- **Decision:** Action allowed.
  - 1) The City owed a duty of care to the plaintiffs;
  - 2) That duty of care was not negated in law by provisions of the *Municipal Act* or the common law as its acts or failure to act were operational, not policy, decisions; and
  - 3) The City was not negligent in its installation of the King High water main, or in its repair of the water main breaks in 2007 and 2010, but was negligent in its failure to replace it before 2010 given the high number of breaks it had experienced, and the guideline it had established regarding when replacement should be done.
- **Conclusion:** A municipality's duty to maintain water mains extends to keeping regular established schedules for replacing parts.

Municipal Liability

- ***Martin v. Barrie (City)* (2016, ONSC)**
- **Facts:**
  - Action arose out of incident that occurred at winter festival.
  - Plaintiff, AM, injured tailbone while sliding down snow slide that had been constructed for purpose of festival at park.
  - Defendant municipality owned and operated park and acknowledged that they were occupiers of premise within meaning of s. 3(1) of Occupiers' Liability Act.
  - AM brought action alleging that defendants city and park breached standard of care set out in s. 3(1) and that she suffered injuries as result of that breach.

Municipal Liability

- ***Martin v. Barrie (City)* (2016, ONSC)**
- **Decision: Action dismissed.**
  - Regrettably, AM hit small chunk or piece of ice that was buried in snow at base of slide in landing area.
  - That was not hazard that city should have been reasonably required to address in order to meet standard of care.
  - While more rigorous inspection process and perhaps use of rake to comb landing area might have uncovered hazard, this placed too high onus on city.
  - In view of activity in question and in view of circumstances, city should not be held liable for unfortunate injury.
- **Conclusion:** Standard was not one of perfection, rather it was reasonableness.

Municipal Liability

- ***Lloyd v. Bush* (2017, ONCA)**
- **Facts:**
  - Municipal defendant county L was owner of County Road #9 (”CR9”) and municipal defendant town N was responsible for its winter maintenance.
  - Plaintiffs were driving on CR9, when they entered “S-curve” portion of CR9 and their vehicle collided with propane truck.
  - Plaintiff driver sustained serious injuries.
  - During first trial, plaintiffs settled their claim with certain defendants, including driver of propane truck.
  - New trial was ordered of plaintiffs’ claim against municipal defendants, including damages.

Municipal Liability

- ***Lloyd v. Bush* (2017, ONCA)**
- **Facts:**
  - The action was allowed in part.
  - Trial judge found that, at time of accident, S-curve was snow covered and slippery and that line markings on CR9 were not visible
  - Trial judge found that N failed to show that it undertook reasonable efforts to address condition of non-repair and that plowing activity that was carried out was inadequate for that location.
  - Trial judge determined that circumstances were ideal for application of straight salt to road rather than sand/salt mixture to “hot spot,” such as S-curve.
  - Trial judge found condition of non-repair of CR9 caused or contributed to plaintiff’s injuries and damages. L and N appealed

Municipal Liability

- ***Lloyd v. Bush* (2017, ONCA)**
- **Decision: Appeal allowed in part.**
  - Municipality will only be liable for failing to salt and clear road of snow where it had actual or constructive knowledge that road conditions create unreasonable risk of harm to users of highway, and where municipality unreasonably neglected that risk.
  - Trial judge's finding that S-curve was in state of non-repair must be set aside. Although trial judge made other findings that provided some support for his conclusion, record did not show that had he properly assessed nature of road and surrounding circumstances, he would necessarily have reached same conclusion.

Municipal Liability

- ***Lloyd v. Bush* (2017, ONCA)**
- **Decision: Appeal allowed in part.**
  - Trial judge's conclusion as to existence of state of non-repair was premised on faulty assessment of nature and character of roadway in issue and of whether it presented unreasonable risk of harm to reasonable driver in all circumstances.
  - It was difficult to ascertain what standard of non-repair trial judge ultimately applied and thus inappropriate for this court to make findings as to appropriate state of repair for CR9 at time of accident.

Municipal Liability

- ***Lloyd v. Bush* (2017, ONCA)**
- **Decision: Appeal allowed in part.**
  - Whether municipality's actions are reasonable or not depends in part on resources that were available to municipality.
  - Trial judge's failure to admit evidence of financial impact of applying straight salt therefore constituted reversible error, when viewed in combination with his conclusion that applying straight salt to "hot spot" would not have imposed any meaningful financial burden on N.
  - New trial was ordered as to liability, but trial judge's assessment of damages allowed to stand.

Municipal Liability

- ***MacKay v. Starbucks* (2017, ONCA)**
- **Facts:**
  - Plaintiff, MacKay (“M”), had a fall on a municipal ice-covered sidewalk at the entrance to a patio in front of a Starbucks, which was a tenant of a small retail mall.
  - In a ruling before the case went to the jury, the trial judge held that Starbucks was an occupier of that part of the sidewalk and therefore owed M a duty of care. The jury found that Starbucks breached its duty of care as an occupier of the sidewalk.
  - Starbucks appealed the trial judge’s ruling of jurisdiction.

Municipal Liability

- ***MacKay v. Starbucks* (2017, ONCA)**
- **Decision: Appeal dismissed**
  - The appeal was based on two grounds.
  - First, Starbucks argued that the trial judge's finding undermines the principle from *Bongiardina v. York (Regional Municipality)* that sanding and salting a municipal sidewalk does not make an adjacent property owner liable to a person who slips and falls on that sidewalk.
  - The Court of Appeal rejected this argument, stating that the trial judge's finding that Starbucks was an occupier was not based solely on the fact that it took steps to clear ice and snow from the sidewalk. The judge's ruling was based on the "combined effect" of the factual findings and was "in no way inconsistent with *Bongiardina*."

Municipal Liability

- ***MacKay v. Starbucks* (2017, ONCA)**
- **Decision: Appeal dismissed**
  - Starbucks' second ground of appeal was that it did no more than any other storefront owner and suggested that the trial judge's ruling improperly shifts the responsibility for accidents occurring on icy sidewalks from the municipality to storefront owners.
  - The Court of Appeal rejected this argument as well, holding that determining whether a party is an occupier is a very fact-specific determination, to be conducted on a case-by-case basis. Furthermore, where storefront owners are found to be occupiers of a municipal sidewalk, such findings are consistent with the purposes and objectives of the *Act.*

Municipal Liability

- ***MacKay v. Starbucks* (2017, ONCA)**
- **Conclusion:** Overall, the Court of Appeal's decision reinforces the fact specific application of established principles as to when an adjacent property owner or tenant may be found to be an occupier of a municipal sidewalk. As stated by the Court of Appeal, this case, and those which preceded it, do not create a "blanket rule" for the determination of whether an adjacent property owner is an occupier.

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