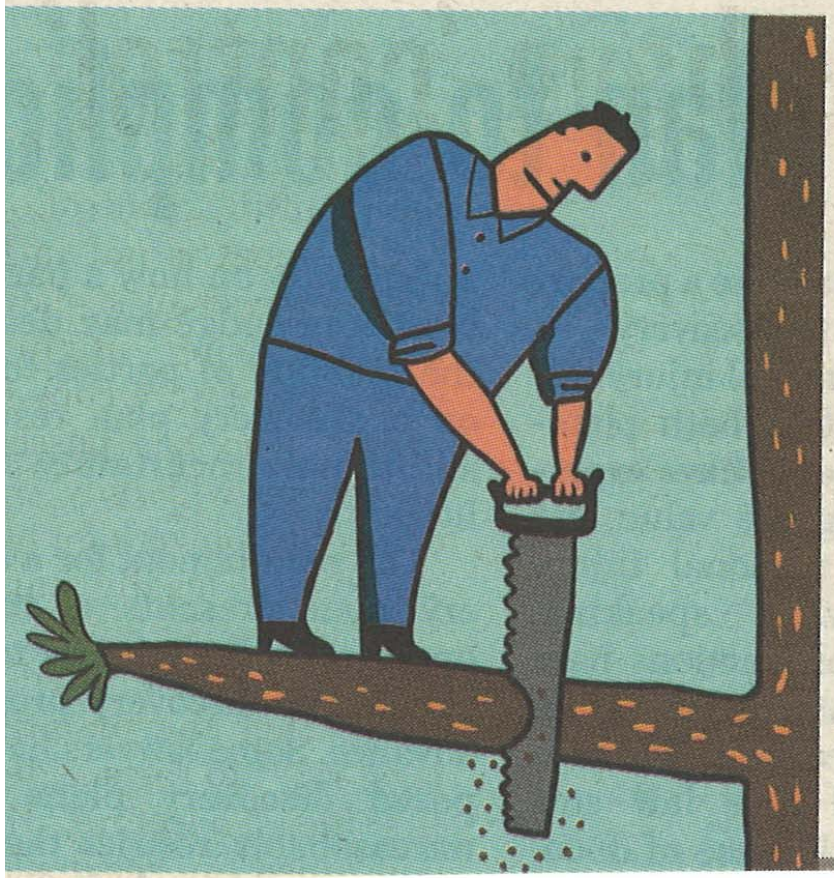
RIMSCANADA™

Proudly Presents…

"*Fairness is what justice really is*"

Justice Potter Stewart

U.S. Supreme Court Justice



Handyman sues after chopping off branch his ladder leaned on

A handyman working at a British hotel sawed off a tree branch while standing on a ladder — with the ladder leaning against the branch being cut.

Peter Aspinall, 63, fell 14 feet after falling from his ladder. A British court fined the hotel $3,100 for failing to perform a risk assessment on the dangers of sawing the branch, according to *Maclean's*.

Aspinall has now launched a civil suit against the hotel. —*Natalie Fraser*

JUANDARIEN / ISTOCKPHOTO.COM

- The case law over the past 20 years have created new liability exposures and current municipal legislation does not provide sufficient or effective liability protection

1/ Exploding Damages

2/ Exposure for psychological injuries

3/ Building inspections and plan approval; building permit approval

4/ Duty of repair respecting streets, roads, public places and public works

5/ Class actions

DAMAGE AWARDS

Walford v. Pioneer Pools (Ontario) 2005

- In 1994, The Walfords installed a 2nd hand Mardi Gras pool (24 feet long & 4 feet deep) in their backyard
- She wanted to buy a slide for the pool and went to Pioneer Pools but was told the cost was over $1,000.
- Purchased the slide from an ad for $225. which had been sitting unused for over 15 years and had been purchased at a garage sale

- Went back to the Pioneer store and dealt with a part-time summer employee and bought mountings for metal legs which support the front portion of the slide
- Never specifically asked whether it would be safe to install or use the slide with a 4 foot deep pool;
- Safety conscious – rule “feet first”

- Mrs. Walford was talking to a neighbor and Correna went down slide head-first and chin hit bottom of pool and she was rendered quadriplegic
- Trial: Case dismissed

- **Appeal**: Pioneer Pools was negligent when it failed to warn Mrs. Walford who inquired about the suitability of the slide for a 4 foot deep swimming pool that there was a serious risk of catastrophic injury due to the pool's shallow depth, if a person were to descend he slide other than by sitting upright and entering the water feet first

- The fact that she asked if it was okay to install a slide with a 4 foot deep pool was enough to find liability
- Damages $5 million
- Contributory negligence 20%
- Insurance limits: Inadequate

PSYCHOLOGICAL INJURIES

Mustapha v. Culligan
2008 S.C.C.

- While replacing an empty bottle of water provided by Culligan for a water dispenser, the Mustaphas saw a dead fly in the unopened replacement bottle
- Male Plaintiff becomes upset that he and his family had been consuming tainted water and suffers a major depressive disorder

- Mrs. Mustapha suffers emotional distress but neither suffered physical injury
- S.C.C. - To recover for psychological injury it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely accept
- Personal injury damages include psychological injury but not all psychological upset constitutes personal injury damages

- The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. To qualify as personal injury damages, mental distress must be a recognizable psychiatric illness.

Healey v. Lakeridge Health Corp. 2011 O.C.A.

- 2003-2004 – 2 patients at Lakeridge were diagnosed with TB
- Lakeridge as required under the Health Protection and Promotion Act, notified Durham Public Health which in turn notified 4,402 persons that they should be tested for TB as a result of exposure when visiting Lakeridge's emergency room and oncology unit

- Claim for mental, anxiety, suffering and distress but falling short of a recognizable psychiatric illness
- No active case for TB was diagnosed as a result of the Lakeridge incidents
- Psychiatrist deposed that in his opinion it was reasonable to expect that 30% to 40% would experience psychological injury or illness and an additional 30% to 40% would suffer from a recognized psychiatric illness

- Court held that the harm sustained by the unaffected class fell *“short of demonstrating that they suffered harm of sufficient gravity and duration to qualify for compensation”*
- Threshold for recovery was not met

Frazer and Smith v. Haukioja S.C.J. 2008

- Plaintiff sustained fracture injuries to both lower limbs and compression fractures to his spine following a motorcycle accident
- Doctor failed to diagnose and/or treat fracture but orthopedic outcome was not adversely affected

- Failure to diagnose brought physical pain which was a major contributor to anxiety, depression and emotional state
- General Damages: $150,000
- Past income lost: $283,000
- Future income lost: $1.3 million

MUNICIPAL ROADS AND DUTY TO REPAIR

Section 44 Municipal Act 2001 (in force January 1, 2003) and Duty to Repair

- 44(1) State of repair that is reasonable in light of the circumstances including the character and location of the highway or bridge
- 44(3) No liability if it did not know and could not reasonably have been expected to know about the state of repair of the hwy. or bridge

- 44(3b) No liability if it took reasonable steps to prevent the default from arising

- 44(3c) No liability if minimum standards established and those standards have been met

- 44(1.5) Authorizes the establishment of regulation of
  (a) minimum standards of repair for hwys. and roads;
  (b) classes of hwys. and roads
- Question of fact in each case whether a condition of non-repair exists and if so, whether the highway authorities response is reasonable, timely and reasonably executed

O.R. 239/02 Minimum Maintenance Standards for Municipal Highways

- Came into force November 1, 2002
- Clear statement of intention to substantially limit municipal liability if it can demonstrate compliance with minimum standards
- Require accurate and contemporaneous records of maintenance activities

- Classification of Highways
- Routine Patrolling Frequency
- Snow Accumulation – depth and time depending on class
- Icy roadways – class of highways and time
- Do not apply to provincial highways

Thornhill v. Regional Municipality of York (2007), Howden J

- Dec. 25/00 – Snowstorm across southern Ontario with snow falling continuously with varying degrees of intensity over the Sutton area
- Collision on Green Lane in Newmarket – Class 1 – 4 lane hwy.

- Issue not addressed – does the regulation exceed the authority of the Minister of Transportation under the Municipal Act
- Patrolling frequency – 3 times every 7 days – routine patrolling intended to apply to off-winter conditions or non-storm circumstances
- Snow clearance – cleaned and salted 3.5 to 4 hrs. prior to the accident – depth more than 2.5 cm.

- Plaintiffs established state of non-repair and an unreasonable risk of harm and onus of proving that it complied with the MMS fell upon the Municipality
- Failure in MMS to provide a patrol standard appropriate to storm conditions and therefore section 4(1)(a) must be read as providing for the continuous deployment of resources to clear snow during a storm as soon as practicable after becoming aware or after it reasonably should have become aware of snow accumulation exceeding the table depth

- As soon as practicable means as soon as the municipality is able to act using the resources open to it, considering the size of the road system and the respective intensities of use of various roads and hwys. within that system

Deering v. Scugog (2010)

- Coates Road W. in Durham is a low volume, rural paved 2-lane roadway, narrow lane widths, narrow shoulders, speed limit was an unposted 80 KPH
- Limited sight distance at crest of hill, no centre line, no lane marking and no signage

- Horizontal deflection in the alignment of the roadway near the top of the hill;
- Driving at night, never driven the road and driving 90 KPH
- Road design manuals used to establish the standard of care by which the conduct of the municipality will be judged

- Justice Howden held that municipalities have a duty to keep their roads in a reasonable state of repair so as to protect “ordinary drivers” from an unreasonable risk of harm.

- Concept of the ordinary driver described as follows:
- *“The standard of care uses as the measure of reasonable conduct the ordinary reasonable driver and the duty of repair arises whenever an unreasonable risk of harm exists on the roadway for which obvious cues on or near the road are not present and no warning is provided*

- *The ordinary motorist includes those of average range of driving ability – not simply the perfect, the prescient or the especially perceptive driver or one with exceptionally fast reflexes but the ordinary driver who is of average intelligence, pays attention, uses caution when conditions warrant, but is human and sometimes makes mistakes”*

- The conclusion that the reasonable user is not a perfect driver but an ordinary and fallible one was fundamental to the decision. It follows that the municipality has an obligation to make the road safe for ordinary drivers, which may include drivers who may be speeding or less attentive and partially at fault for the accident

CLASS ACTION EXPLOSION

Class Actions

- Increasing pervasive force facing municipalities and corporate Canada prompting observation that Canadian class action legal landscape is beginning to follow the footsteps of U.S.

- Where do we see it:

  1/ Businesses falling within scope of inspection eg. Tattoo parlors, subdivision construction, landfill site;

  2/ Hospitals – testing and sterilization

- Overriding Policy Consideration in Class Actions
  1/ Promoting access to justice
  2/ Achieving behavior modification
  3/ Promoting judicial economy

- **95** new class actions filed across the country last year – **17** new class actions were launched in the 1st 3 months of this year according to CBA's National Class action database – 2005 – **29** Class actions filed

- Plaintiff's class action lawyers are entrepreneurs looking for issues that have class action potential – large number of Plaintiffs accompanied by early acceptance of responsibility by the Defendant

RECOMMENDATIONS

1/ Advocate for change

- Municipalities should only be liable if at fault and then only to the degree to which they are at fault
- The standard of care required of municipalities should reflect, among other things, its financial capacity, its size, the number of municipal employees charged with providing a specific service

- Expand the defence of policy decisions to include decisions which are the result of administrative direction, expert or professional opinion, technical standards or general standards or reasonableness. Include decisions regarding expending monies to repair roads, bridges or to inspect and maintain municipal sewage and water systems

- 2/ Increased Risk Management
- 3/ Document rationale for decisions
- 4/ Appropriate insurance limits

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Thank you for attending the Ottawa Capital Connexions Conference

Ottawa 2011 Capital ConneXions