Municipality Slides Away from Liability... Again

June 13, 2018

In the recent decision of *Martin v. Barrie (City)*, 2018 ONCA 499, the Court of Appeal upheld the trial judge's decision confirming that the standard of care of an occupier pursuant to s. 3 of the Occupiers' Liability Act, 1990 is not one of perfection.

In February 2011, the plaintiff, Ms. Martin, attended the Winterfest and Festival of Ice (the "Festival") hosted annually by the City of Barrie (the "City"). While at the Festival, Ms. Martin and her two children decided to go down a snow slide which was specifically built for the Festival. The slide was designed for guests (children and adults) to go down feet first, on their bottoms. After watching her two children safely navigate the slide, it was Ms. Martin's turn. As she proceeded down the slide, Ms. Martin became worried that she would strike a safety fence located at the base of the slide, and so dug her heels into the slide to slow herself down. In doing so, she struck a hardened piece of ice protruding from the slide, resulting in injury.

At trial, the Court found that Ms. Martin digging her feet into the snow was likely the cause of the small ice chunk being dislodged. Further, the Court indicated that although there was some inherent risk known to the participants using the slide (described as "Canadian an activity as one can imagine"), there was a positive duty on the City to ensure that the operation of the slide was done in a reasonably safe way in the circumstance. Considering the City's evidence with respect to training its employees, as well as the City's maintenance and monitoring procedures, the Court held that the City had met the standard of care of an occupier. For a more detailed analysis of the trial judge's decision, please see the following case alert on our website.

Court of Appeal Decision

Three issues were raised on Appeal: (1) the trial Judge's characterization of the ice chunk as "small"; (2) the inference drawn from hearsay evidence that Ms. Marin heard a City employee say "I have to fill this again" immediately after she was injured; and (3) and the trial Judge's conclusion relating to the standard of care (detailed at para. 52 of the lower Courts decision and reproduced below):

I find that in the circumstances of this case, the standard of care was satisfied. The City of Barrie took adequate and reasonable steps to safeguard the guests using the snow slide at Winterfest. The context is important. The snow slide is a gradually sloped hill on which patrons slide down on their "bottoms." While specific measurements were not

tendered into evidence, the pictures tendered into evidence suggest that the hill is neither steep nor tall. Guests are not using devices such as sleds or toboggans which would ordinarily be used to add speed to the descent. The evidence suggests that guests come [to] a quick stop at the bottom of the slide.

The Court of Appeal quickly dismissed the first two grounds of appeal. With respect to the third ground for appeal, the Appellant argued that the City invited the public to ride the slide and that, in this context, the City failed to provide "a system of regular inspection and maintenance of the run-off area of the busy slide". In rejecting this argument, the Court of Appeal held that "the trial judge made no error of any kind – let alone a palpable and overriding error" with respect to the application of evidence of inspection and maintenance.

Further, the Court of Appeal adopted the trial Judge's comments that although a more rigorous inspection by the City may have revealed the hazard, such a finding would place too high of an onus on the City.

The Court of Appeal further confirmed that the standard of care placed on an occupier under s. 3 the Occupiers' Liability Act, 1990 is one of reasonableness and not one of perfection.

By

Jonathan Thoburn, George R. Wray

Expertise

Appellate Advocacy, Insurance Claim Defence

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749