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Considerations of Negligence and Contributory Negligence: Did the Trial Judge Get it Wrong?

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Bike parks, skate board parks are all becoming more prevalent today. But what responsibility does a municipality have in bringing the attention of all risks to the users of these parks? Isn't there an inherent risk in using these specialized parks? Should a municipality be responsible for drawing the attention of all of the risks to the users of said parks? The Court of Appeal recently addressed these issues and resoundingly agreed with the trial judge in the 2016 Court of Appeal decision of *Campbell v. The Municipal Corporation of the County of Bruce*. The decision was appealed to determine whether proper consideration of the concept of negligence as defined in the *Occupiers' Liability Act* (hereinafter "OLA") and the issue of contributory negligence, were properly addressed by the trial judge.

The Municipal Corporation of the County of Bruce (hereinafter "the municipality") constructed a mountain bike park for people to ride on various trails and obstacles. Mr. Campbell fell while trying to cross a constructed obstacle near the entrance of the park and fractured his C6 vertebrae and was rendered a quadriplegic.

In designing the park, the municipality relied on the International Mountain Bike Association for best practices and risk management. The park was also promoted as a "family park". The municipality also had a "difficulty rating system" similar to that of a ski hill. In addition, the municipality had signs in place which cautioned riders:

(1) to ride within their ability and at their own risk;

(2) that helmets are mandatory; and

(3) to yield to other groups.

The trial in this action proceeded on liability only. The trial judge found that the municipality had breached its duty under section 3 of the *OLA* in 5 ways:

(1) its failure to post proper warning signs;

(2) its negligent promotion of the Park;

(3) its failure to adequately monitor risks and injuries at the Park;

(4) its failure to provide an "adequate progression of qualifiers"; and

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(5) its failure to make the Trial Area a low-risk training area.

It was also found that Mr. Campbell was not contributorily negligent in deciding to ride on Free Fall.

On appeal, it was argued that an onerous duty of care was imposed on the municipality, that was not in keeping with the OLA and the case law in the 1991 Supreme Court of Canada's decision in *Waldick v. Malcolm*. The Court of Appeal disagreed. It was found that the decision was in keeping with the governing case law which was encapsulated by Long Denning's judgment in *Pannett v. McGuinness & Co. Ltd.*,:

> *The long and short of it is that you have to take into account all the circumstances of the case and see then whether the occupier ought to have done more than he did. (1) You must apply your common sense. You must take into account the gravity and likelihood of the probable injury. Ultra-hazardous activities require a man to be ultra-cautious in carrying them out. The more dangerous the activity, the more he should take steps to see that no one is injured by it.*

It was also questioned whether the trial judge properly applied the test for inherent risk. The municipality argued that the trial judge fell into error by using the respondent's "subjective inability to foresee the actual damages he sustained as somehow delineating the scope of inherent risk." The Court of Appeal agreed with the trial judge who found that the municipality failed to warn users of the dangers of the Free Fall, where the respondent's injury took place, and that an ordinary person would not be able to appreciate and perceive the risk, notwithstanding their skill set.

The municipality also questioned whether the standard of care was properly articulated by the trial judge. The Court of Appeal agreed with the trial judge and stated that the trial judge identified the problems a rider could encounter in dealing with the "Free Fall". It was also questioned why there were no instructional signs regarding "risk of serious injury and the level and type of expertise required to ride this feature without serious injury". Furthermore, the park brochure should have contained more details about the difficulty of the feature and the skill level required for the Free Fall. Apparently, several riders had been injured on the wooden obstacles before the respondent's fall.

On appeal, the municipality challenged the conclusions on causation. However, the Court of Appeal again concurred with the trial judge in that "the respondent's injury would not have occurred if more detailed signage had been posted". Furthermore.

> The trial judge clearly found that the respondent's decision to attend the park was influenced by the promotion of the park as a family venue. Accordingly, it was open to the trial judge to conclude that the respondent's injuries would not have occurred if the park was promoted more accurately

Lastly, in terms of contributory negligence, the Court of Appeal gave deference to the trial judge, because a "decision on contributory negligence is one of mixed fact and law and is entitled to deference, absent a palpable and overriding error".

The Court of Appeal agreed with the reasons of the trial judge:

> In finding that the County breached its duty under s. 3(1) of the OLA, I have already concluded that the risks of Free Fall were a hazard and not readily apparent. As such, [Stephen Campbell] would have lacked foresight of the severe consequences of his behaviour.

Campbell articulates that an occupier is responsible for reasonably informing participants of the risk that they are going to encounter. Given that this particular park feature had previously caused injuries, it was found that the municipality should have properly identified the dangers of the feature and provided more pronounced warnings.

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