

Stones and Salamanders

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The Ontario Supreme Court of Justice addressed two unusual cases recently – the first involved the rare occasion in which a court grants a non-suit application; the second centred around a "threatened species."

"A Stone on a Public Highway Does Not Disrepair Make"

In 2000, 51-year-old Maria Copeland signed up to take part in a fundraiser sponsored by The Canadian Cancer Society. She paid a $10 fee and filled out a waiver of liability that stated: "I waive and release any and all claims for myself, heirs, executors, and administrators against all sponsors, officials, and organizers of the [event] for injury, illness, or death which may directly or indirectly result from my participation…. I have read and fully understand and agree with the contents of this waiver/release prior to participating…."

The event took place on a 22-kilometre course—a municipal parkway that was temporarily closed to vehicular traffic. About 1,000 joggers, walkers, cyclists and rollerbladers participated. Near the end of the course, Ms. Copeland's rollerblade hit something on the road and she tripped, hurting herself. A police officer found the probable stone she tripped on, about the size of his thumb. It was the only stone on the ground in the vicinity, and neither Ms. Copeland nor another woman rollerblading slightly ahead of her had seen the stone before the fall. Ms. Copeland sued the Society and the City of Hamilton, taking the position that the road ought to have been cleared for the event, and that the stone created an unreasonable risk under the *Occupiers' Liability Act*.

The court disagreed and, at the close of her case, granted the defendants' motion for a non-suit and dismissed the case. The test for a non-suit was whether the evidence was such that no jury acting judicially could find in favour of the plaintiff. "[T]here is no evidence before the court… whereby a legitimate inference could be drawn that the persons entering onto the premises were not reasonably safe or that the highway was in a state of non-repair. The plaintiff was not exposed to an unreasonable risk. The road was not required to be in a perfect state of repair."

The court referred to the following factors: first, the course retained its character as a public highway at all material times. *The Occupiers' Liability Act* did not apply, and the standard of maintenance was established by *The Municipal Act*, being a state of repair that was reasonable in light of all of the circumstances. The road was "very clear" with "no evidence of any debris or hazards." Alternatively, the Society was the "occupier," and did take positive action to take reasonable care under s. 3(1) of the Act to address any safety concerns by way of patrols before and during the event. There was no duty to warn because there were no risks to the knowledge of the defendants for which there should have been a warning. Further, the court was satisfied that Ms. Copeland had read and understood the enforceable waiver of liability, a waiver that was worded broadly enough to cover the conduct of the defendants. The case is *Copeland v. Hamilton (City)*, 2009 CanLII 42450 (Ont. S.C.J. Aug. 13, 2009).

Safeguarding Salamanders

The second case, *Guelph (City) v. Soltys*, 2009 CanLII 42449 (Ont. S.C.J. Aug. 13, 2009), arose out of a proposed development of a corporate-industrial business park by the City and a private entity, and a resulting injunction application. The land contained a creek, and areas of forest and wetlands, and the proposal included a culvert over the creek. In April 2009, a dead hybrid "unisexual" salamander was found within the area and given to a university professor, an expert on the Jefferson Salamander. ("It is likely that most citizens will not have heard of the Jefferson Salamander. As it happens, the Jefferson Salamander is a 'threatened species' within the meaning of the *Endangered Species Act, 2007*.") The City retained a consultant to provide an opinion on the existence of the salamander on the property. The report concluded that it was likely that the habitat of the Jefferson Salamander did not exist within the vicinity where it was proposed the culvert be installed. However, in contrast, the professor opined that additional survey work (which could take up to three years) was needed before this could be determined. The City notified the Province about the report, and the applicable Ministry, the Ministry of Natural Resources, took no formal action to halt construction.

Soltys belonged to a group called Land Is More Important Than Sprawl (LIMITS), which opposed the development. When construction of the culvert began, Soltys and the other defendants entered the property and shut down construction. Some wore bandanas and sunglasses that hid their facial features, and all ignored demands to leave. The City and the developer applied for an injunction to restrain the trespass and interference with the construction. The defendants filed their own application for an injunction, seeking to restrain construction based on the potential impact on the salamander's habitat and citing the "precautionary principle" (where there was a threat of a significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat).

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The court held both sides were entitled to their respective injunctions. The plaintiffs were entitled to an injunction to restrain trespassing and interference with construction: "the defendants have no right to take the law into their own hands." As property owners, the plaintiffs were entitled to assert the ordinary rights of property owners, including the right to prevent people from impeding or obstructing lawful activities on the property. The defendants' right to seek an injunction rested on their obtaining standing as public interest litigants. The court granted them this status, and, after a review of the *Endangered Species Act*, held there was a serious question to be tried as to whether a stop work order should be issued. "If the injunction is not granted, the work is commenced, and habitat is destroyed, the harm will be irreparable." An injunction for a 30-day period was granted, sufficient to give the Minister of Natural Resources time to decide whether to act and issue a stop work order under the legislation. ML

Ordinances

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are working within the geographical boundaries of the City" and had no bearing on what benefits employers offered when their employees operated outside the City limits.[11]

The City plans to appeal, and it remains to be seen whether or not efforts to require employers to provide paid sick leave will remain at the local level or transition to Congress. In May, Representative Rosa DeLauro (D-CT) introduced the Healthy Families Act, H.R. 2460, which would require employers of 15 or more employees to provide at least one hour of paid sick time for every 30 hours worked. As of August 2009, the bill sits with the Committee on Education and Labor.

Notes

1. David Chen, *At Working Families Party Forum Bloomberg Declines to Toe Liberal Line*, N.Y. Times, July 3, 2009, at A25.
2. Metro. Milwaukee Ass'n of Commerce v. City of Milwaukee, No. 08CV018220 (Milwaukee Cty. Cir. Ct. June 12, 2009).
3. Milwaukee, WI., Code of Ordinances § 112 (2008).
4. *Id.* at § 112-5.
5. State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee, 313 N.W.2d 805 (Wis. 1982).
6. *Metro. Milwaukee Ass'n* at 26-27.
7. *Id.* at 28.
8. *Id.* (emphasis added).
9. Dairyland Greyhound Park, Inc. v. Doyle, 719 N.W.2d 408 (2006).
10. *Metro. Milwaukee Ass'n* at 32.
11. *Id.* at 33. ML

