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CONTRIBUTORY NEGLIGENCE IN A SPORT AND RECREATION CONTEXT

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INTRODUCTION

Sport and recreational activities invite a certain type of participant. Typically, these participants are committed to the activity they are taking part in and, in most cases, have a drive to be the best at that activity. Furthermore, the more experience a participant has with a particular sport, the more "natural" the activity may feel to the participant and, therefore, less thought may go into the execution of the activity. However, what if during the course of taking part in an activity, the participant suffers an injury? Due to personal pride, the participant will be less likely to look at themselves as the cause of their own injury and will instead look to some third party. In an effort to be compensated for their damages, the participant will then bring an action, alleging that the failure of a third party was the sole cause of their injuries.

This "third party" could be various entities. It could be a municipality who operates a public pool or a gymnasium. It could be a commercial business, such as workout facility and fitness clubs. It could even be a residential home owner who invites friends and family over for a backyard summer get together or a pool party. Any one of these parties could be a potential target in the event that a participant in a sport or recreational activity suffers an injury while taking part in an activity

The focus of this paper is not what the duty is of the individual who is responsible for the alleged injury. The focus of this paper is contributory negligence. This paper will present strategies that can be employed by defendants in shifting the cause of the plaintiff's injuries back onto the plaintiff themselves.

Through an extensive review of case law through the lens of municipalities, commercial businesses and private homeowners, developments in the law of contributory negligence as they relate to sport and recreational activities will be discussed and assessed. In doing so, potential arguments that can be raised by defendants in the proceedings will be identified and their uses (or lack thereof) discussed in light of the factual circumstances of each case. Upon reviewing this paper, the hope is that claims professionals will be more apt to respond effectively to claims brought by plaintiffs for injuries resulting from sport and recreational activities.

MUNICIPALITIES

Municipalities are responsible for a wide array of recreational and activity facilities that are widely used by the public. Examples of these facilities include public pools, skate parks, beaches and playgrounds. While some of these facilities are subject to supervision, such as lifeguards at public pools, other types of municipal facilities, such as skate parks and playgrounds, rely on the user to exercise their best judgment. As an example, assume that a

teenager goes to their local skate park and attempts a difficult trick that they do not possess the skill set for. While attempting the trick, something goes wrong and the teenager suffers an injury. The question then arises, who is liable for this injury? Is it the municipality for not properly supervising and, to an extent, "policing" what the users of the skate park can and cannot do? Or is it the responsibility of the user themselves to know what their limits are and take the appropriate measures to avoid risk?

In the decision of *Crane v. Surrey (City)*[1] the plaintiff was riding his BMX bicycle at the Surrey Skateboard Park in Surrey, British Columbia. While riding his bicycle, the plaintiff alleged that he rode over a spot of paint that had been recently applied by the municipality to cover up graffiti that had been applied to the park. As a result, the plaintiff fell off his bicycle and suffered various injuries including a concussion, a fractured right scapula, a fractured right clavicle, and sprains to his right hip, lower back and groin. The plaintiff alleged that the defendant municipality had a duty to warn users of the skate park of the recently applied paint and the fact that it could be a hazard to users. The defendant municipality stated that the paint in question had dried by the time the fall occurred or, in the alternative, that the paint had been applied by a third party who the municipality had not authorized to do so. The municipality also raised an interesting policy defence, which was essentially that to hold the municipality liable for the plaintiff's injuries would mean that it would be imposing a continuous duty on all municipalities to continuously supervise the skate park. This would result in the skate park no longer being financially feasible and, presumably, would lead to its closure.

Plaintiff's counsel framed this case as an occupiers liability claim. The plaintiff alleged that the municipality had breached the duty of care to the plaintiff as an occupier of the skate park. In determining whether or not a breach of the duty had occurred, the court first examined the steps taken by the defendant in advising users of the risk of using the facility in question. At trial, it was determined that the municipality had placed a sign at the entrance of the skate park that indicated the following:

i. The skate park was not supervised and it was to be used at the user's own risk;
ii. The skate park closed at a specified time;
iii. The skate park was not to be used when the surface was wet; and,
iv. Safety equipment (such as helmets and padding) was recommended while using the skate park.[2]

The court also had an opportunity to review the evidence advanced by the independent witnesses in this matter. In hearing this evidence, it was determined that a truck from a graffiti removal company was seen in the parking lot at the skate park and that workers were observed applying paint via paint rollers at an earlier point on the date of loss.[3] However, the third party witnesses did not observe paint being applied to the area where the plaintiff ultimately suffered his injuries.[4]

The court noted that, if in fact that the plaintiff's fall was caused by wet paint, the party who applied the wet paint was accepted to be unknown to the municipality. In weighing the evidence before the court, it was determined that, had the municipality performed any painting work, this

[1] 2008 BCSC 274 (B.C. S.C.).
[2] *Ibid* at para 10.
[3] *Ibid* at para 26.
[4] *Ibid* at para 30.

work would have been completed in the early morning hours prior to any users of the facility arriving. Due to the fact that this was not the case, the trial judge determined it was more likely than not that the painting was not performed by a party that was authorized to do so by the municipality. On this basis, the plaintiff's claim was dismissed as against the municipality.

However, before the claim was dismissed, the court examined the plaintiff's own subjective knowledge of the skate park as well as the plaintiff's skill level in determining a fair apportionment of liability. The evidence advanced at trial revealed that the plaintiff had knowledge that the skate park had recently been painted due to the fact that the plaintiff had witnessed wet tire tracks. Therefore, knowing that the skate park had recently been painted and knowing this would have created a precarious situation, the plaintiff should have exercised additional caution on the date in question. However, in this matter, the plaintiff was the exact opposite of "cautious". In determining the cause of the accident in *Crane*, the court noted that the plaintiff was "…engaged in an aggressive activity that required speed, technical skill, physical exertion, and involved risk of falling and injury, even under good conditions."[5] The court further indicated that the plaintiff was "…an experienced longtime BMX rider and would have understood the importance of inspecting the riding surface of the route intended prior to attempting maneuvers requiring high speed and tight turn."[6]

After assessing the conduct of the plaintiff, the court held in *obiter* that, had liability been apportioned in this matter, the plaintiff would have been found to be 50% responsible for his alleged damages.[7]

In the decision of *Kester v. Hamilton (City)*[8] the plaintiff dove into a pool off of a diving board when he made contact with a submerged safety wall that had been built across the pool resulting in serious injury. As a result, the plaintiff brought an action against the defendant municipality for the negligent construction of the pool. He alleged that the submerged wall constituted a "hidden danger". In weighing the evidence before the court in *Kester*, the plaintiff was revealed to be an experienced swimmer who had ample prior knowledge that a safety wall existed in the pool below the surface. Furthermore, the court determined that the pool in question was of "modern design" and had been supervised during construction by a competent engineer. While the court stated that the defendant indeed had a duty to the plaintiff to "prevent injuries from an unusual danger", they determined that the plaintiff's prior knowledge of the submerged wall precluded the plaintiff from recovery for his damages. As the court put it, the plaintiff's actions prior to his injury constituted an "entire absence on his part of the use of reasonable care"[9] and that the plaintiff was the "sole author of his injuries."[10]

In the case of *Warren v. Camrose (City)*[11] the plaintiff was a 16 year old male who, while attempting "shallow dives" in a municipally owned pool, struck a cable attached to a floating lane marker. As a result of striking the cable, the plaintiff's motion was deflected downwards where he struck the bottom of the pool and injured his spine, suffering paralysis as a result. At trial, the trial judge determined that the defendant municipality was 40% liable for the plaintiff's

[5] *Ibid* at para 76.
[6] *Ibid* at para 85.
[7] *Ibid* at para 89.
[8] [1937] 2 D.L.R. 330 (Ont. C.A.).
[9] *Ibid* at para 44.
[10] *Ibid*.
[11] [1989] 3 W.W.R. 172 (Alta. C.A.).

injuries while the plaintiff was 60% liable.[12] In doing so, the trial judge determined that the defendant municipality had (i) failed to warn users of the danger of diving into the shallow area of the pool and failed to take measures to reduce this risk; and, (ii) had placed a lane marker approximately 7 feet from the edge of the pool and within the area where a diver would likely enter the pool.[13] The defendant municipality appealed the decision of the trial judge.

The Alberta Court of Appeal found that the plaintiff had knowledge that a "shallow dive" was the only dive that was permitted given the depth of the pool. It was accepted that while the municipality permitted users of the pool to perform shallow dives, the plaintiff had taken part in extensive swimming lessons wherein one of the first skills learned was the proper execution of the shallow dive. Also, the Court of Appeal found that the plaintiff subjectively believed that he possessed the ability to execute a proper shallow dive to enter the pool.[14]

The plaintiff in *Warren* was found to be a frequent visitor to the subject pool.[15] At trial, it was held that the plaintiff should have seen the lane marker which he collided with during the performance of his dive, commenting that an individual about to dive, "…should look for swimmers or other obstacles in the water, none of which would have been so large or so brightly coloured and noticeable as this lane marker."[16] In addition, the plaintiff's knowledge of the existence of the lane marker was strengthened by the fact that the plaintiff was a semi-regular attendee at the subject pool. Therefore, he presumably possessed a level of familiarity that would have alerted him to fact that these lane markers were omnipresent at the subject pool. After hearing evidence of the plaintiff's skill level in executing shallow dives as well as the plaintiff's familiarity with the pool, the Court of Appeal held that the defendant municipality did not breach its duty of care owed to the plaintiff. Accordingly, the appeal was allowed and the plaintiff's claim against the defendant municipality was dismissed.

However, under what conditions will a court determine that a plaintiff is likely not contributorily negligent for injuries they have sustained? In the case of *Roscoe v. Halifax (Regional Municipality)*[17] the plaintiff was at a gym in a community centre owned by the defendant municipality for a game of badminton. During the game, the plaintiff stepped on a piece of exposed duct tape causing her foot to stop suddenly which resulted in the plaintiff suffering a torn meniscus in her knee.

At trial, it was determined that the municipality was responsible for maintaining the gym facility which included ensuring that the gym was clean at all times. It was also determined at trial that prior to the plaintiff entering the gym the municipality took no steps to inspect the gym to ensure that it was clean. Furthermore, duct tape on the ground was not held to be a hazard that a user of the gym would be reasonably expected to detect prior to using the facility. The plaintiff was not expected to conduct an inspection of the gymnasium. As tape was not a hazard in the reasonable contemplation of a gym user, the plaintiff here was not found to be contributorily negligent.

[12] *Ibid* at para 5.
[13] *Ibid* at paras 6 and 7.
[14] *Ibid* at para 4.
[15] In fact, the plaintiff had attended at the subject pool at least 50 times prior to the visit wherein the damages were sustained. However, it was determined that the position of the lane marker in the pool had been changed from where it was usually placed to a spot much closer to the edge of the pool. See *ibid*.
[16] *Ibid* at para 20.
[17] 2011 NSSC 485 (N.S. S.C.).

In summary, in determining whether a plaintiff was contributorily negligent for their damages, court will assess several factors. These factors include the level of familiarity the plaintiff has with the facilities that are in use as well as the plaintiff's own subjective skill level with the activity that was being conducted or performed at the time the damage occurred. If the damage was in part caused by the plaintiff's perceived skill level (or lack thereof) or the plaintiff's dismissal of a known hazard (or plain and clear hazard), then the plaintiff will be found to bear a larger burden of the negligence for their injuries. However, if the injury was caused by something in the sole discretion of the municipality, such as the condition of the facilities where the damage occurred or the failure to identify a hazard, then the defendant municipality will bear a larger burden of the negligence.

COMMERCIAL BUSINESSES

It is clear that defendant municipalities will be tagged with a greater apportionment of liability where the cause of the plaintiff's damages can be traced back to a factor that is controlled by the defendant municipality, such as maintenance of the facility. Similarly, municipalities have been shown to deflect liability when they are able to demonstrate that the plaintiff's level of skill or familiarity with the activity or facility should have alerted the plaintiff to an increase in risk. The facilities owned by municipalities are unique in that they tend to be "open access" to members of the public which is in contrast to facilities owned by commercial entities. Commercial entities are able to exercise a greater degree of control over who is able to use their facilities. However, does this greater degree of control invite a heightened standard of care for commercial entities?

In the case of *DeWaard v. Capture the Flag Indoor Ltd.*,[18] the defendant corporation was an owner and operator of a laser tag facility. Inside the facility, there was an elevated island that was open to the floors below. The thought behind this island was that it would add a different element to the activity in that it would allow players to "tag" players on the lower levels. Despite prior warnings from staff of the facility and the existence of the sign on the island, the plaintiff stepped onto the island which caused the particle board to give way. As a result, the plaintiff fell a considerable distance to the main floor of the facility, resulting in the plaintiff suffering a fractured foot.

On a previous occasion, a player that was not the plaintiff had attempted to climb on top of the island and, not knowing it was open to the floor below, fell through. In response, the defendant placed a piece of particle board over the opening and placed a sign on the island telling patrons to remain off the island. Furthermore, before patrons were permitted inside the laser tag facility, they were informed by staff that they were not to climb up onto the walls.

In determining whether or not the defendant had met the requisite standard of care emerging from their duty to the plaintiff, the court determined in *DeWaard* that the hole in the island constituted a "hidden hazard".[19] This fact was made even more evident due to the fact that the facility was not well lit to begin with. The plaintiff alleged that the level of lighting made it impossible to view the signs that had been placed on the island by staff. As a result, the court determined that it was reasonably foreseeable that the hole in the island presented a risk to "individuals playing laser tag who exercised ordinary diligence."[20] However, due to the fact that

[18] 2010 ABQB 571 (Alta. Q.B.) [*DeWaard*].
[19] *Ibid* at para
[20] *Ibid* at para

the plaintiff disobeyed the rules of the facility in that he climbed onto the island,[21] the court was prepared to find the plaintiff 25% contributorily negligent for his damages.[22]

Interestingly, the defendant attempted to advance an argument pursuant to section 7 of Alberta's *Occupiers' Liability Act*[23] that they were not under an obligation to discharge the common duty of care to the plaintiff due to the fact that the plaintiff had willingly accepted the risks upon entering the premises.[24] However, this argument was rejected on the basis that the plaintiff had no knowledge that the island he stepped onto had a partially concealed hole in it. Therefore, the plaintiff could not have been said to voluntarily assume the risk of falling to the floor below if the plaintiff was not aware that such a risk existed.[25] The defendant also attempted to advance an argument that the plaintiff had signed a waiver prior to taking part in the activity. However, the waiver was never entered into evidence by the defendant and therefore, the court could not consider the waiver. While a clear takeaway from this decision is that even where there is a clear act of negligence on the defendant, an argument for contributory negligence may still be accepted by the court and, therefore, should be advanced by an at-fault defendant.

In *Dhaliwal v. Premier Fitness Clubs Inc.*[26] the plaintiff was attending a workout facility that was owned and operated by the defendant corporation. While at the facility, the plaintiff was using a vertical leg press machine. While using this machine in an attempt to lift approximately 365 pounds,[27] the plaintiff's foot slipped off the machine which caused the weight sled to fall and crush the plaintiff's pinky finger on his right hand. As a result of the crush injury, the plaintiff lost the tip of his pinky finger. It was the plaintiff's position in *Dhaliwal* that his injury was caused due to the fact that he had stepped in water at a nearby water fountain. The water caused his footing to become slippery and, during the course of completing his exercise, the wet shoe was the direct cause of him losing his footing on the platform. The plaintiff indicated that he had stepped in water near the water fountain in the past and had always informed management about the water to get them to clean it up. On this occasion, the plaintiff stepped in the water puddle and, while walking to the vertical leg press machine, attempted to get as much of the water off his foot as possible.[28] Prior to getting onto the leg press platform, the plaintiff performed a visual inspection of his shoes and determined that they looked "okay".[29] The plaintiff indicated at trial that he was aware that using the leg press machine with wet shoes was dangerous and that this prior knowledge was the reason he was trying to remove the water from his shoes prior to using the machine.[30]

In determining the liability of the various parties in *Dhaliwal*, the court noted that it was the responsibility of the defendant's staff to patrol the facility to locate hazardous conditions that required action, such as the existence of spills.[31] The court noted that, on the date of loss, the

[21] *Ibid* at para 26.
[22] *Ibid* at para 73.
[23] *Occupiers' Liability Act*, RSA 2000, c O-4.
[24] *DeWaard, supra* note 18 at para 16. Section 7 of Alberta's iteration of the *Occupiers' Liability Act* is similar to section 4 of the *Occupiers' Liability Act*, RSO 1990, c O.2.
[25] *Ibid* at para 18.
[26] 2012 ONSC 4711 (Ont. S.C.J.).
[27] The plaintiff maintained at trial that the amount of weight being lifted did not contribute to the accident due to the fact that the plaintiff had successfully lifted heavier amounts in previous workouts. See *ibid* at para 15.
[28] *Ibid* at para 12.
[29] *Ibid* at para 13.
[30] *Ibid*.
[31] *Ibid* at para 39.

defendant had made no efforts to ensure that the water fountain area was monitored and was kept clean. While the court accepted the defendant's argument that imposing 24/7 surveillance on the water fountain was unreasonable in the circumstances, the court nonetheless determined that the defendant breached the duty of care owed to the plaintiff. However, the court held that the plaintiff was largely the "author of his own misfortune" in this case due to the fact that he demonstrated prior knowledge that use of a leg press machine with wet shoes posed a risk. Despite this prior knowledge of an increased risk, the plaintiff nonetheless decided to use the machine when he knew or ought to have known that he should not have.[32] Accordingly, the court held that the plaintiff was 50% responsible for his damages.[33]

In *Sores v. Premier Fitness Clubs*[34] the plaintiff was attending a fitness class at the defendant's gym. This fitness class required that participants use dumbbells that were provided by the defendant. According to the plaintiff, there was always a shortage of dumbbells for the class and, as a result, there was usually a "mad dash" to obtain the necessary equipment for the class.[35] While gathering the dumbbells in one hand, the plaintiff dropped a dumbbell which rolled down her right arm resulting in a fracture of the plaintiff's right fifth metacarpal.

It was determined in *Sores* that the plaintiff had been to the defendant's gym on previous occasions and was a frequent attendee of the class where the injury occurred. Accordingly, the plaintiff was well aware about the "process" in obtaining the weights for the class. The plaintiff described the scene on this day in particular as a "frenzy"; a scene that the court determined the plaintiff freely and on her own volition entered into prior to her injury.[36] Accordingly, the court dismissed the plaintiff's claim against the defendant on this basis and held the plaintiff 100% contributorily negligent for her damages.

Commercial entities will be held liable for the plaintiff's injuries in instances where the cause of the damages can be traced back to factors that are in the defendant's control, such as the maintenance of the facility. However, the defendant's duty to maintain the facility does not go so far as to require that the defendant must safeguard against every possible risk to users of the facility. Rather, defendants must only safeguard users from reasonably foreseeable risks. Furthermore, the court is prepared to take into account the financial viability of defendant corporations protecting users of their facilities from harm. Where the plaintiff is shown to be reckless or willfully blind to a hazard or, alternatively, is shown to possess a level of subjective knowledge that performing a certain activity in a certain way will expose the plaintiff to an increased risk, these factors will likely go against the plaintiff in assessing the degree of contributory negligence.

Both municipalities and commercial entities possess a level of sophistication which allows these groups to monitor their facilities in a more comprehensive manner. However, what about situations faced by private homeowners? Now that we have explored contributory negligence that arises in the use of municipal and commercial sport and recreation facilities, does the landscape change when the factual analysis shifts to the setting of a private residence?

[32] *Ibid* at paras 83 and 84.
[33] *Ibid* at para 88.
[34] 2011 ONSC 2220 (Ont. S.C.J.).
[35] *Ibid* at para 8.
[36] *Ibid* at para 42.

PRIVATE RESIDENCES

With summertime right around the corner, people are eager to open up their homes to friends and family for an evening get together, pool parties and barbeques. One would think that due to the fact owners of private residences are less sophisticated in their supervision of facilities such as backyard pools, owners of these facilities may be ascribed a lower standard of care than that imposed on their commercial or municipal counterparts. However, there is a counterargument to a reduced standard of care on the basis that owners of residential facilities deal with fewer users of their facilities. Therefore, these owners are likely in a better position to monitor and supervise these users to ensure they do not come to harm.

In *Walford (Litigation Guardian of) v. Jacuzzi Canada Ltd.*[37] the homeowners and parents of the minor plaintiff purchased a slide for use in their 4-foot deep above ground pool. The minor plaintiff was injured while sliding headfirst down a slide purchased from the defendant manufacturer. When the plaintiff entered the water she struck her head off the bottom of the pool resulting in a fractured vertebra which rendered her a quadriplegic. As a result, the plaintiff brought an action against several parties, including the manufacturer of the slide, her parents and a pool supply company whose advice had been sought during the installation of the slide.

At trial, it was determined that the minor plaintiff's mother made significant efforts to determine the suitability of the slide for their pool as well as the appropriate way to install the subject slide. Her efforts in this regard included contacting a retailer of pool supplies who was also a named defendant to this action. Furthermore, there was evidence advanced that the plaintiff's parents were "safety-conscious" and had consistently warned pool users, including their children, to not enter the water headfirst. At trial, no liability was attributed to the minor plaintiff's parents. This was due to the fact that they had made ample efforts to educate themselves on the appropriateness of the slide for their pool as well as warning users of the slide to not enter headfirst. This finding was not subject to appeal.

In determining the liability against the remainder of the defendants and the plaintiff, the Court of Appeal held that the defendant retailer was liable for the plaintiff's injuries due to the fact they failed to warn the plaintiff's mother about the dangers of installing the slide in the plaintiff's "style" of pool.[38] Interestingly, the Court of Appeal also held that the minor plaintiff was contributorily negligent in this matter. In doing so, the Court of Appeal held that the plaintiff had received ample warnings from her mother to not enter the water headfirst. However, the minor plaintiff did not heed her mother's warnings and, as a result, displayed a level of "carelessness" which directly led to her injuries.[39] As a result, the Court of Appeal held that the minor plaintiff was responsible for 20 percent of her damages in this matter.[40]

CONCLUSION

The primary goal from the defence perspective is that the plaintiff's claim be dismissed. In cases where this is not possible, one must still address the plaintiff's contributory negligence.

[37] 2007 ONCA 729 (Ont. C.A.).
[38] *Ibid* at paras 61 and 62.
[39] *Ibid* at para 65.
[40] *Ibid*.

There are several factors that should be investigated by the claims professional that may assist in this regard. These factors include the plaintiff's prior knowledge of a hazard and the plaintiff's familiarity with the activity being performed. These arguments should be advanced even if the plaintiff is a minor, with the caveat being that a court will likely be increasingly hesitant to make a finding of contributory negligence as the age of the minor plaintiff decreases.

At the very outset of receiving a file involving an injury sustained during the performance of a sport or recreation activity, claims professionals must be aware of the factors discussed in this paper. In doing so, evidence of these factors should be collected during the initial investigation of the matter. These factors, when supported by the evidence, can be instrumental in obtaining a finding of contributory negligence.

Hopefully, this paper will provide some guidance in successfully defending claims arising in a sport and recreation context.