



# Why Sue a Municipality?

- 1) Deep Pockets
- 2) Changing Attitudes



# Due Diligence

- Understand Your Duty of Care
- Know Your Governing Legislation
- Incorporate Accepted Best Practices
- Have a System of Inspection
- Create a Process to Effect Repairs
- Perform Required Maintenance
- Document- Inspections, Repairs, Incidents
- Training Staff/Volunteers



# Claim – Hockey

1988 LaSalle Ontario

- Allegation of hole in ice
- 17 yr old male skated into, catapulted into boards, was rendered quadriplegic

Case went to trial 1993



**Based on Occupiers Liability the Judge indicated ice was too thin and that arena operated without:**

- **specific procedures**
- **documentation**
- **knowledge of proper maintenance**

**Town found liable --- \$8.7 million award**

**Case appealed Feb 1995 and unanimously upheld**



# Importance of Following Guidelines

If there are applicable industry guidelines or standards, the occupier ignores them at its peril. In the above claim, the trial judge found that the arena occupier failed to conform to the recommendations for ice maintenance found in the Ontario Arena Associate guidelines.



# Importance of Following Guidelines

The occupier's failure to carry out flooding and ice depth measurement routines, and to maintain sufficient ice thickness at the location of the hole in accordance with guidelines constituted negligence and a breach of the duty of care under the Occupiers Liability Act.



# Claim - Heavy Use

- Recreational hockey player caught skate in an ice rut and fell. Alleged poor arena maintenance.
- The municipality had a good system of maintenance:
  - Every 50 minutes of regular ice usage was followed by 10 min of resurfacing
  - Special routines were used to maintain the ice if it had been subjected to:
    - Heavy use by high school hockey players
    - Public skaters
    - Power skaters



- Ice had been resurfaced just before the plaintiff's hockey game
- The rut had not been observed by any of the players or Zamboni operator
- The court held that the mere existence of the rut did not in and of itself lead to the conclusion that the defendant had been negligent and found that they had fulfilled their statutory duty of care by implementing a well defined procedure for maintaining the ice surface



# What's Changed



# Damage Escalation



# Escalating Judgements

- Osborn - \$7 M in 1999 for 14 year old who suffered a brain injury and paraplegia
- Sandhu – \$17 M in 2007 for a child suffering a brain injury
- Gordon - \$11.5 M in 2007 for 22 year old who suffered a brain and neck injuries
- Morrison - \$12.6 M in 2007 for young male, paraplegia
- MacNeil vs Bryant - \$18.5 M in 2008 15 yr old female, severe head injury



# Future Care Costs

- Person's future needs that will enhance life
  - Medications
  - Rehabilitation needs
  - 24/7 nursing care
  - Educational/vocational needs
  - Transportation
  - Assistive devices
  - etc.



- Future care costs the largest component of a serious bodily injury claim.
- Providing future care is extremely expensive.
- People with severe brain injuries, spinal cord injuries and multiple orthopaedic injuries are living longer.
- Coupled with rising healthcare costs, the cost of future care has ballooned over the past five years.



# RPN Costs

- In 1999 RPN care from an agency cost \$21 per hour and in the last year we have seen costs of between \$35 and \$45 per hour; and \$54 per hour for specialist for a brain injury



Brain injury cases are the types of cases where future care awards are the most significant. In the past 10 years Frank Cowan Company has seen dramatic increase in the number of brain injury cases reported. The frequency of these cases has more than doubled since 2003.



# Costs Further Impacted By

- Investment Management Fees
- Home Renovation
- Loss of Future Earnings
- Loss of Competitive Advantage
- Loss of Independent Relationship



# Contingency Fees



**Joint and Several Liability (The 1% Rule)** is a common law principal that can be modified by statute. It is a significant concern to all municipalities as they are perceived to be “deep pockets”. As the severity of awards increases so does the exposure to those who have deep pockets.



*A young recently-licensed driver lost control of a vehicle on a gravel road. A passenger sustained a severe brain injury. The liability limits on the vehicle were \$1,000,000. The allegation against the municipality is a failure to grade the road. The damages claimed for the passenger are \$15,000,000. If liability is found on the municipality, any damages awarded in excess of \$1,000,000 will be payable by the municipal insurer.*



# Class Actions

- When a large group of people are collectively harmed they can collectively bring an action before the Court.
- Class actions are an economical way of bringing suit because the expenses are shared among many parties.
- Where the group can't afford the expenses to bring a class action forward, a government fund has been created to assist them.
- Our Courts are more readily willing than before to certify class actions.



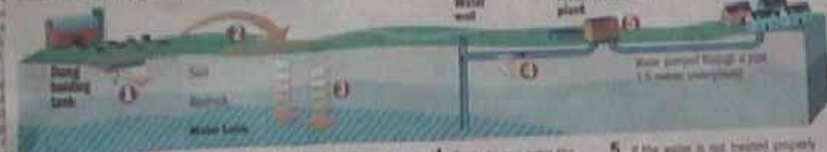
# Grief, sorrow and anger as Walkerton asks: Why?

A tangle of regulations, city may have broken the law

By Ken Gougeon  
and Christina Borek  
Special to the Star

## How E. coli gets into the water

In some countries, E. coli bacteria is nearly always present in the soil. All mammals have E. coli in their intestines. Cows and pigs sometimes carry a virulent strain of the bacteria such as E. coli 157.



1. E. coli can get into the soil through a leak in the liquid dung holding tank.
2. Liquid or dried dung is also spread directly over the fields as fertilizer.
3. Heavy rains carry the bacteria down to the water table from which well water is drawn.
4. Bacteria can enter the water system through a crack in the pipe between the well and the treatment plant.
5. If the water is not treated properly with chlorine, E. coli will continue through the system and into the town water supply.

Every three hours since 11:30 a.m. today at St. Michael's Hospital in Walkerton, Ont., another victim of the E. coli outbreak is being treated. The patient, a 72-year-old man, was admitted to the hospital on Thursday, showing similar symptoms but carrying a new, less dangerous form of the bacteria.

## NIGHTMARE IN WALKERTON

# W...n lawyer launches lawsuit

Class-action motion on behalf town's people

Byron Bay... This would not say how... has been affected by the outbreak.



## **\$20 Million Class Action Filed Against Ontario Tattoo Parlour**

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Moonshin Tattoo in Mississauga, Canada, is facing a potential class action alleging the shop used inadequately sterilized needles during the previous 4-year period. It is estimated that as many as 3,000 people may have unknowingly been exposed to disease as a result.

The suit , seeking \$20 million in damages, also names Charles A. Mason, Evelyne Smith, Peel Region Public Health Department (Peel Public Health) and The Regional Municipality of Peel as defendants.

The allegations are that while the health authorities are legally required to inspect the tattoo shop on an annual basis at a minimum, there were no health inspections between 2005 when the parlour opened and 2009, putting thousands of people at risk.

### **Moonshin Tattoo Parlour Class Action Legal Help**

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If you or a loved one has suffered illness in this case, please click the link below and your complaint will be sent to a lawyer who may evaluate your claim at no cost or obligation.



# Climate Change

## 2005

- 175 mm rain — Toronto & York Region

## 2008

- St. John River flooded
- PEI — ice-storm

## 2009

- OPP shutdown exit ramps on QEW due to flooding in Hamilton
- August — 11 tornados spotted in one day, damage in Vaughn & Durham

**Weather needs to determine your  
Inspection & Maintenance Schedule.**



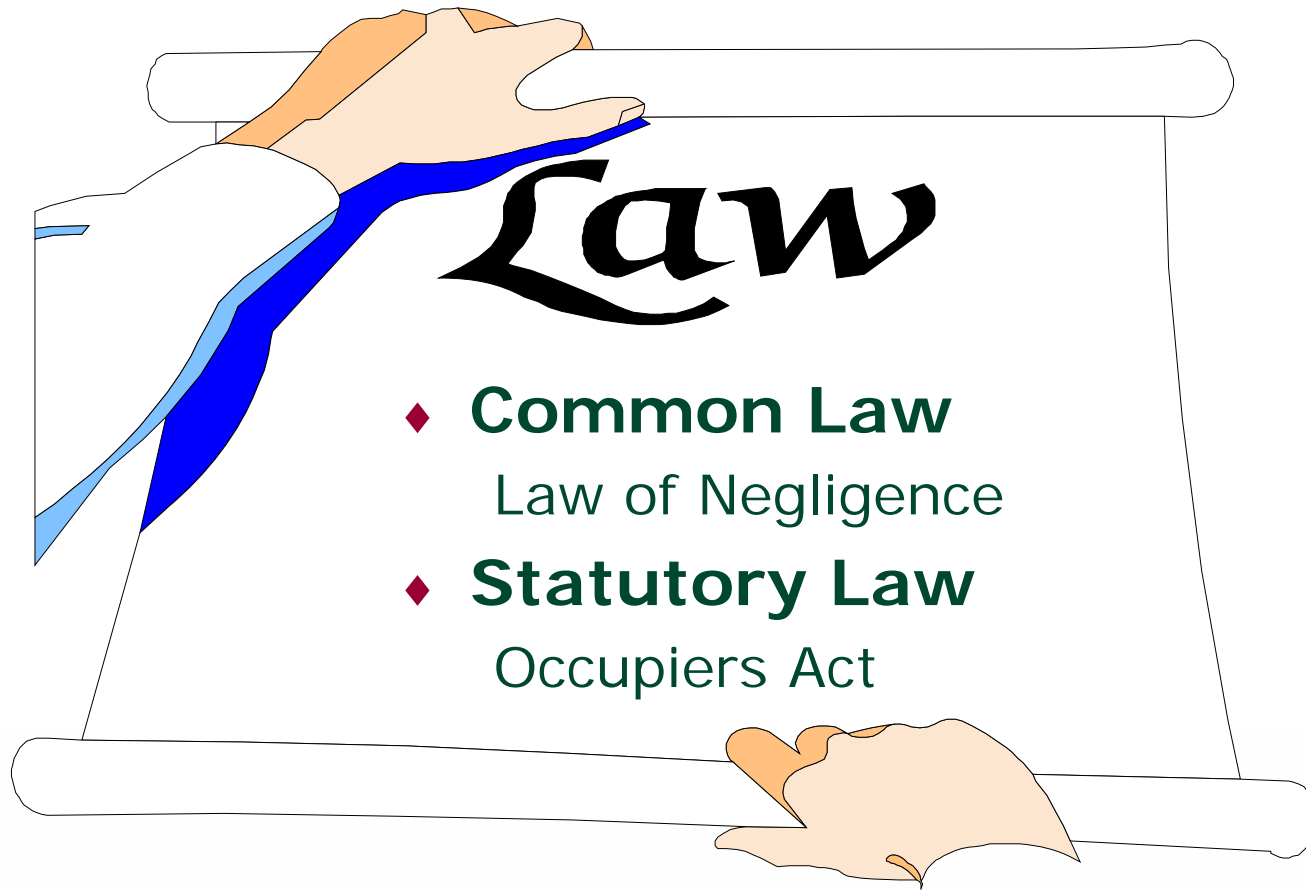
All municipalities are and will be affected by extreme weather events. Weather events will challenge municipal infrastructure – sewer network, roads, buildings, sidewalks and flood control systems.

Even though millions of dollars have been spent on flood prevention efforts, flooding events are still common and costs continue to escalate.

With the effects of heavy rainfall, snowfall and wind events, Frank Cowan Company is experiencing a higher frequency of property losses.



# Duty of Care



# Ontario Occupiers' Liability Act



**3. (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises**



# Occupiers' Liability Act

Subsection 4. (3) and (4) go on to provide that persons entering on “recreational trails” for recreational purposes and without paying a fee, are deemed to have willingly assumed all risks and are subject only to the reduced duty set in subsection 4 (1).



“but in that case the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and not to act with reckless disregard of the presence of the person or his or her property.”



# Occupier

## Definition

Anyone who has control of the premises and the power to admit or exclude others.

Extends to:

- Condition of premises
- Conduct of entrants
- Activities permitted on the premises

Note: A higher duty of care is owed to children



# Law Of Negligence

**Negligence is the failure to do what a reasonably prudent person would do**

**OR**

**Doing that what a reasonably prudent person would not do in a like situation.**

High Risk



Low Risk



# Law of Negligence

- ⌘ **Duty of Care**
- ⌘ **Duty Breached**
- ⌘ **Damages**
- ⌘ **Forseeability**
- ⌘ **Contributory Negligence**



# Joint & Several Liability

A Defendant who is held just **1%** liable for a Plaintiff's injuries or damages may also have to **pay the share of any other** defendant who cannot afford to pay.

## Deep Pocket Theory



# What the Courts Consider



- Was the danger foreseeable?
- Did the occupier follow accepted standards of practice?
- Was there a risk appropriate inspection system?
- How long did the hazard exist?
- Could the danger have been avoided/removed?



# Duty Of Care Owed To Users

- Operate your premises with reasonable care for the safety of the user
- Keep your premises in safe repair
- Inspect your premises for hidden hazards
- Remove the hazards or warn of their presence



# Good Rule of Thumb

**Your Premises**

**Your Responsibility**

**Your Rules**



# Liability

- The most serious on going concern for municipalities
- Result from negligent acts - can be the most devastating
- Can be unpredictable in frequency and severity
- Long Tail



# Long Tail Effect

- 1) Notice Given – 2 Year Limitation
- 2) Investigation
- 3) Liability Assessment
- 4) Damage Assessment
- 5) Exchange of Documents
- 6) Examinations for Discovery
- 7) Answering Undertakings



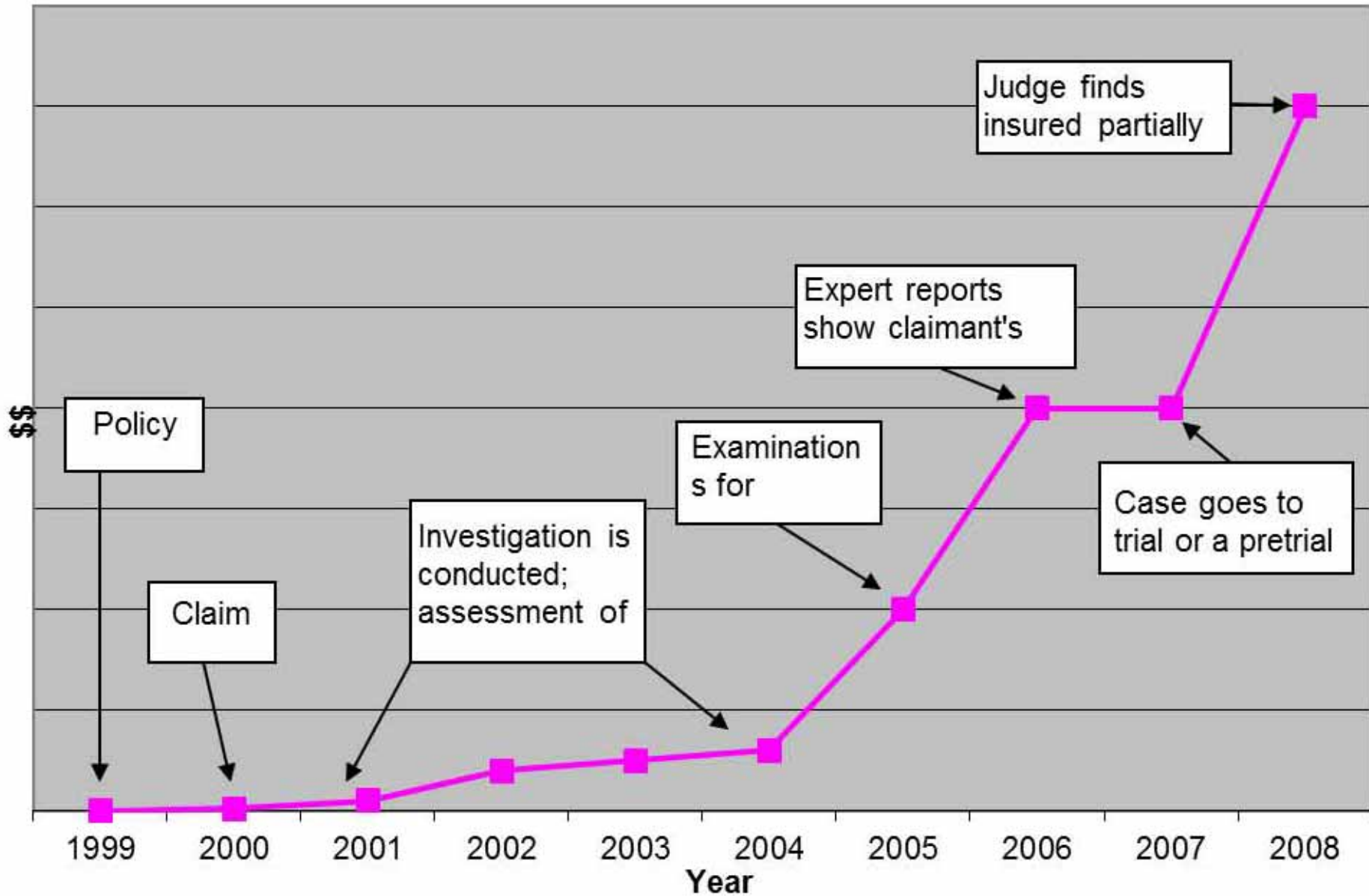
## Continued..

- 8) Mediations – some jurisdictions mandatory
- 9) Pre-trial
- 10) Trial
- 11) Appeal

Time-frame – 5 years (minimum)



# Frank Cowan Company - Typical Large Claim Progression



# Costs Incurred

- 1) Adjusters
- 2) Lawyers
- 3) Medical Reports & Assessments
- 4) Experts – Medical & Non-medical
- 5) Surveillance
- 6) Couriers
- 7) OHIP Subrogation (falls)



## Continued..

- 8) Costs to Produce Documents
- 9) Pre- judgement interest
- 10) Post- judgement interest
- 11) HST

Legal costs for trial - \$25K - \$50K/week



# Damage Calculation

• General Damages		\$90,000
• Family Law Claims (husband & 2 children)		\$10,000
<u>Special Damages</u>		
• Loss of Income		\$13,000
• Out of Pocket Expenses		\$1,635
• OHIP		\$4,400
• Prejudgement Interest	General Damages	\$14,180 (4 yrs)
• Prejudgement Interest	Special Damages	\$1,570 (4 yrs)
• Legal Fees		\$16,500
• GST on Legal Fees		\$840
• Less 25% Contributory Negligence		(\$31,353)
<b>Total</b>		<b>\$121,401</b>



# Judgement Costs

- Pain & Suffering
- Loss of Income – Past & Future
- Medical Expenses – Past & Future
- Family Law Claims
- Cost of Care – Past & Future
- Third Party Costs + HST
- Pre & Post Judgement Interest



# What can you do?



# Make Risk Management Part of Your Operational Culture

Operational decisions based on risk assessments can:

- 1) Reduce risk of injury
- 2) Protect your reputation & public image
- 3) Demonstrate a due diligence process



# Risk Management

The process of making and carrying out decisions that will *minimize* the adverse effects of *accidental* losses upon an *organization*.



# Our Goal – Minimize The Risk



# 5 Steps in the Risk Management Process

- 1) **Identify – Brainstorm**
- 2) **Analyze – Frequency & Severity**
- 3) **Control – Reduce/Prevent/Finance**
- 4) **Implement – Action**
- 5) **Monitor – Continuous Process**



# Issue of Ice in Arena Aisle

- Arena had ice that seeped from under boards of rink into aisle
- Arena had a sign posted in lobby warning that moisture and ice could make any part of the arena floor slippery and that patrons were responsible for their own safety
- Courts found arena 100% liable for having garbage can in middle of aisle (hazard) and failing to remove ice – sign deemed too limited (vague)



# What is Risk Management?

- 1) Policies
- 2) Procedures
- 3) Documentation
- 4) Training
- 5) Contracts



# Roads

- When was the last time you reviewed your Road Maintenance Policies & Procedures?
- Have you adopted Minimum Maintenance Standards?
- Are all employees familiar with your road maintenance policies & procedures?
- When was the last time you reviewed your policies & procedures with all staff and third party contractors?



# Sidewalks

- When was the last time you reviewed or upgraded your Policies & Procedures?
- Has the community within your sidewalk routes changed? (i.e. new school built)
- MMS – Section 16, Sidewalk Surface Discontinuities
- Inspecting sidewalks annually



# Playgrounds

- New equipment to meet current CSA standard
  - Installation by licensed technicians
  - Have a lifecycle plan for replacing equipment
  - Post signs advising the appropriate age group for equipment
- Post signs regarding the need for parental supervision
- Create inspection policy for play areas, sports fields, etc.
- Complete immediate repairs of equipment
- Remove and/or warn of all hazards (barricade, fencing)
- Document all repairs and inspections
- Repairs to follow CSA standards
- Train all staff (summer students, part time/casual staff) on policies, procedures, checklists, new equipment, etc



# Contracts

- Do you enter into formalized agreements with third party suppliers and contractors?
- Do your agreements include Hold Harmless/Indemnification Clauses and Insurance Requirements?
- Do you ask for Certificates of Insurance?
- Do you review the Certificates against the contractual requirements?



In any trial there are at least two parties

- the **Injured party** (called the Plaintiff)
- the **Defending party** (called the Defendant)

In a Criminal Trial, the case is decided when the evidence shows “beyond a reasonable doubt” if the defendant is at fault.

In a Civil Trial, the case is decided based upon “the balance of probabilities”.

We are discussing Civil Law matters.



First the Plaintiff must prove on a balance of probabilities that the condition of non-repair existed and that the non-repair caused the damages.

Then the Entity must prove on the balance of probabilities that the non-repair did not exist, and that the damage was not caused by the alleged non-repair.

Your documentation will be the factor in tipping the balance.



In the world of litigation:

It's not what you did

It's what you can **PROVE** you did



# Documents

**Your inspection, maintenance documents have to stand on their own.**

**They have to pass the “Test of time”.**

**We may call on them many years later.**



# **Do the Documents Prove that you took action?**

## **Do they show what action you took?**

Plaintiff's lawyers spend a significant amount of time and effort understanding and reconciling documentary evidence.



# Fall From Slide

- 6) The damage and personal injury as hereafter set out was caused by the negligence and/or by the breach of statutory duty of the Defendant, its agents, servants, or employees, for whom in law the Defendant is responsible and/or by their combined negligence and/or breach of statutory duty, the particulars of which are as follows:
- f) it failed to adequately monitor the maintenance or repair of the slide at the park;
  - g) it negligently maintained and repaired the slide at the park;
  - h) it failed to properly inspect the slide at the park to ensure the same was safe;
  - i) it failed to take reasonable steps to remedy an unsafe condition once it became apparent that such a condition existed;
  - k) it allowed the slide at the park to become and remain in a defective and dangerous condition;

There are Lawyers who specialize in championing the case of Plaintiff's in Civil Trials, and they have their own organization.



*Lawyer members must certify that they are licensed to practice law, their primary occupation is the practice of law and no more than 5% of their direct or indirect billings or time is derived from the defence of personal injury actions on behalf of institutional defendants, including insurance companies, Boards of Education and self-insuring corporate defendants; currently and for the full 12 month period immediately preceding this application.*



**MUNICIPAL LIABILITY**  
**PROVING ROADWAY NON REPAIR**

*The Oatley-McLeish Guide to Motor Vehicle Litigation*

*Part One*

*November 10, 2008*



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# How a Plaintiff's Lawyer Looks at Municipal Road Claims



# 3 Quotes from The Guide to Motor Vehicle Litigation

**“A Municipality’s defence lies in its ability to prove that the relevant standards were met. It can only do so by having in its possession accurate and current records of its maintenance activities.”**

**“A Municipality’s failure to properly record important information provides tremendous ammunition at trial and substantially increases the likelihood of a finding of negligence.”**



# 3 Quotes from The Guide to Motor Vehicle Litigation

## Continued...

**“(The) primary focus of the discussion is intended to provide (Plaintiff’s) counsel with a game plan by discussing the practical strategies which should be utilized in undertaking preliminary investigation of the municipality’s records, preparing for discoveries and proving your liability theory at trial.”**



# Documentation

- When was the last time you reviewed, audited or updated your documentation forms and procedures?
- Do your employees realize the significance of good documentation?
- Do you do spot checks of completed employee documentation to review completeness, consistency and adherence to your documenting standards?
- Do all of your employees document their inspections and maintenance?



**Everyone in the department  
must use the same form  
and document in the same  
manner.**

***Consistency is Critical!***



# Incident Reporting

- State the facts
- Only the facts
- Nothing but the facts



# Incident Reporting

## Identify:

- The parties
- The place
- The event
- The response
- The consequences



# Incident Reporting

Who

When

Where

How



# Incident Reporting

**NOT** the Why



# Incident Reporting

In the event of litigation this document MUST be produced and provided to the plaintiff and their legal representative.



# THANK YOU

