

Injurious falls on Stairways: A Major Public Health Problem
Deserving a New Approach by Lawyers

“Stairs are manufactured artifacts like cars, soap, toys, and medicines. None of these can be utilized without some risk. Those that are poorly designed or manufactured may be so inherently dangerous that the risk of using them is unacceptably high.”¹

Data from the National Trauma Registry, managed by the Canadian Institute for Health Information, illustrates that for the fiscal year 2008-2009, a total of 8,637 Canadians fell on or from stairs and were seriously injured to the extent that hospitalization was required. 3,950 of those falls (more than 45%) were sustained in Ontario.

This is a startling number of injuries suffered by men and women in environments which we would generally consider safe – the public areas, commercial sites, buildings and homes in which we spend the better part of our days, and would suggest that stairway safety is a serious problem.

Although there are no statistics that speak specifically to falls in public areas and commercial sites, I suspect that many occurrences in public and commercial sites go unreported. We are frequently retained by those who have suffered injuries as

¹ Templar J., “The Staircase: Studies of Hazards, Falls, and Safer Design,” (Cambridge: The MIT Press, 1992) at pp. 3.

a result of falls on City sidewalks, restaurants, commercial shopping centers and sports arenas, to name a few.

As noted on the *CMHC* website, stairway falls can be attributed to three main factors:

1. health factors: such as poor eyesight, frailty, drowsiness or loss of balance;
2. behavioral factors: such as lack of concentration, carrying something while using the stairs, inappropriate footwear and unfamiliarity with the stairs;
3. environmental factors: which include poor design, improper construction and maintenance, non existent dysfunctional handrails, poor lighting and other visual features such as tread surfaces, problems with the run and rise of the stairway, poor differentiation between steps which can cause visual mistakes.

Health and behavioral factors, in many circumstances, may well speak to issues of contributory negligence on the part of the person using the stairs, but in my experience the environmental factors play an equal, if not greater, role and represent the major contributing factor to missteps resulting in personal injuries.

There are numerous factors related to the construction, composition and maintenance of a stairway that can cause or contribute to injurious falls. These factors include narrow treads, dimensional irregularity, inadequate illumination, risers that are too high or low, a step or stair in an unexpected place, no handrails,

a nosing strip that projects above the tread, slippery tread material, distracting views, and confusing patterns on a tread.²

The health, behavioral and environmental factors at play in each case will influence our judgment as to whether we recommend to a potential client that he/she proceed with the claim.

In the exercise of our judgment, we will take a detailed history from the injured person, concentrating primarily on the behavioral and health factors that may be relevant. We may learn, in a general way, something about the environmental factors that are important, for example, no handrail or poor lighting. The more subtle environmental factors will become known, once we have in hand the opinion of an expert who can assist us, and ultimately the court, in understanding how poor design, improper construction or faulty maintenance may have contributed to the injuries.

Once the contributory factors have been analyzed and understood, it is then necessary to consider the applicable law. I discuss below the statutory framework and present approach of Ontario Courts toward stairway cases, which you may find helpful as you consider whether or not to proceed with the case beyond the initial interview, or perhaps after a preliminary investigation. What follows is also a discussion of issues and strategies that plaintiff's counsel can consider when

² *Ibid.* at pp. 15.

contemplating the steps that need to be taken to mount a persuasive and successful action against occupiers and municipalities on behalf of their injured clients as a result of a stairway fall.

Statutory Framework

Ontario's *Building Code Act, 1992* establishes the regulatory framework for the construction, renovation, and change of use of buildings, including stairways. The Ontario Building Code (Ontario Regulation 350/06) ("OBC") is a regulation made under the *Building Code Act, 1992*. The OBC largely mirrors the *National Building Code of Canada*³ (the "Code"). The *OBC* sets out the minimum standards which must be met for the construction of a stairway. These standards include reference to the height, width, number of risers, height between landings, uniformity of risers, run of treads, depth of treads, edges of treads, and the turn of any winders on a stairway.

Enforcement of the *Act* and the OBC is delegated to local authorities. Municipalities, under the *Act*, are empowered to enact by-laws with respect to inspection and enforcing the standards. Municipalities have some discretion in whether to inspect in certain situations, and how to go about enforcing standards, and punishing violations. Nevertheless, such policy decisions as to whether to inspect or how to inspect must be made in good faith and in a manner that is

³ National Research Council of Canada, "National Building Code of Canada," (Ottawa: N.R.C.C, 2005).

consistent with the aims of the Act. Such decisions can only be immune from civil action when they concur with the purpose of the Act, namely, to protect the safety of the public. After all, the legislative framework is designed to make certain that uniform standards of safety are enforced by municipalities. Once a decision is made to inspect, the municipality owes a duty to take reasonable care in conducting that inspection.

It has been said that the *Code* and the provincial adaptations of the *Code*, including the OBC, have some of the lowest requirements for stairway safety amongst all English language speaking countries.⁴ It has further been suggested that Canada's comparatively low standard for step geometry requirements on stairways has led to the risk of injurious falls in Canadian homes and commercial entities rising to a rate of up to four times higher than the risk of injurious falls in the United States.⁵ In most cases, home and business owners are unaware of the danger their stairways present, relying largely on the OBC standards that their stairways were constructed under and enforced through inspections by municipal building departments. Unfortunately, the low standards of the *Code*, the OBC, the lack of comprehensive inspections by municipalities and occupiers, and improper maintenance, have contributed to an elevated level of injurious falls on stairways in Ontario.

⁴ Pauls, Jake (Certified Professional Ergonomist), Personal Interview. June 18, 2010.

⁵ *ibid.*

Liability for stairway falls also engages the *Occupiers' Liability Act*. It is well known to lawyers that The *Occupiers' Liability Act* states:

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.

(2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on the premises.

It has been clear since the decision of the Supreme Court of Canada in *Waldick v. Malcolm*⁶ that s. 3(1) of the *Occupiers' Liability Act* places an affirmative duty on occupiers to take reasonable care for the safety of those whom they permit on their premises. As Justice Iacobucci stated: "The statutory duty on occupiers is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation."⁷ Occupiers' of stairways, despite the precise and specific requirements imposed by the OBC and by-laws, are no different than occupiers of other premises and the principles enunciated in *Waldick* apply to them.

⁶ [1991] 2. S.C.R. 456.

⁷ *Ibid.* at para. 124.

Accordingly, while the OBC establishes minimum standards, it is important to keep in mind that Ontario Courts will look beyond mere compliance with the OBC in determining whether liability ought to be imposed on a municipality and/or occupier.

Indeed, the Ontario Superior Court, in the 2010 case of *Musselman v. 875667 Ontario Inc.*⁸, in determining whether a stairway was safe, made the following comments:

The mere fact that a staircase may be compliant with a building code, a building by-law or evidence as to industry standards, does not determine the question as to whether the staircase was unsafe. That is a determination for the court on all the evidence. Building codes, building by-laws and evidence as to industry standards may all inform the court however, in coming to this determination. Building codes and building by-laws are there for a reason; to ensure that a particular structure will be safe for use. What is safe and what is reasonable may well depend on the circumstances. The “staircases” on a naval ship (sometimes referred to as “ladders”) given space restrictions, would not comply with a building by-law that relates to a public building or even a private residence. That is understood. 859 Queen Street West however, was not a naval ship; it was a restaurant open to the public, to be used within reason, by all members of the public. It would be expected that a patron of the restaurant might want to use the washrooms on the basement level. It was therefore incumbent upon an occupier of the premises and anyone else responsible for construction or approval of the staircase to ensure that it was safe for reasonable use by members of the public. In this case, I conclude without reservation that the staircase that existed at 859 Queen Street West, on the February 10, 2004, was not a safe staircase. Indeed I am disposed to concur with Mr. Blaney’s opinion expressed during his testimony the “merely by visual inspection the stairs were unsafe”.

⁸ [2010] O.J. No. 2325 at para. 46.

In the case of *Clarke v. Boulevard Club*,⁹ a 1994 decision from the Ontario Court of Justice, a patron of the Club was injured when she fell down the stairs because she was not able to properly grasp a hand railing. The staircase railing, built in 1967, did not meet the design standard found in the 1986 and 1993 versions of the *OBC*. Justice Wilkins, in assessing a possible breach of the *OBC*, stated: “Whether or not the railing in question complied with any building code requirements in 1967 or whether or not the railing was in breach of the actual building code for 1986 and 1993 are, in my view, not significant having regard to my finding that the design was unsafe for one of the specific purposes for which the railing was intended.”¹⁰ Here, the court’s approach with respect to safety trumped any breach of the building code. An unsafe stairway which causes or contributes to the plaintiff’s damages is likely to result in liability being imposed on the owner. It is important to note that despite the fact that there were thousands of users of the stairway at this busy athletic club, the first such accident involving the stairway and railing in question led to a finding of full liability against the club owner. Therefore, in *Clarke*, despite the fact that the injurious fall was unprecedented, the court found the owner and occupier of the premises had a duty to conduct reasonable and periodic inspections which would have revealed that the stairway, in all of the circumstances, was not safe.

⁹ [1994] O.J. No. 2207.

¹⁰ *Ibid.* at para. 30.

It should also be noted, as the Ontario Superior Court of Justice discussed in the 2008 decision in *Kehoe v. Ameli*,¹¹ under s.6 of the *OLA*, an occupier may escape a finding of liability arising from the negligence of an independent contractor if the occupier acted reasonably in entrusting the work to the contractor and if the occupier has taken reasonable steps to determine that the contractor was competent and that his work was properly done.¹² Plaintiff's counsel should keep in mind section 6 of the *OLA* to ensure that all of the proper parties, such as a negligent contractor, are named within the limitation period and are before the court.

The Code and By-laws: Starting points for stairway cases

Despite the words of caution, the OBC and the municipalities' building by-laws enacted under it, are an important starting point to help you determine whether a stairway is unsafe. Indeed, the OBC and building by-laws will be of assistance to the court in its overall determination of whether a stairway was properly constructed, inspected and was reasonably safe. In respect of identifying non-compliance with the Code and by-laws, the assistance of professional engineers and other experts is crucial. It is important to familiarize yourself with the facts of your case as they interact with the OBC and applicable by-laws, to identify municipal breaches of the applicable regulatory standard of care such as lax inspection, building permits that should not have been issued, failure to order

¹¹ [2008] O.J. No. 2103.

¹² *Ibid.* at para. 3.

repairs, and occupier breaches such as failure to comply with municipal repair orders, and OBC specifications.

Municipal duties of inspection, approval and enforcement

Justice Bastarache, in the case of *Ingles v. Tutkaluk Construction Limited*¹³ stated the following with respect to the duty owed by municipalities with respect to inspection of buildings:

The measure of what constitutes a reasonable inspection will vary depending upon the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost that would be incurred to prevent the injury; for example, a more thorough inspection may be required once an inspector is put on notice of the possibility that a construction project may be defective. In addition, a municipal inspector may be required to exercise greater care when the work being inspected is integral to the structure of the house and could result in serious harm if it is defective. While in some circumstances a more thorough inspection will be required to meet the standard of care, municipalities will not be held to a standard where they are required to act as insurers for the renovation work. The city was not required to discover every latent defect in the renovations at the appellant's home. It was, however, required to conduct a reasonable inspection in light of all of the circumstances

In *Mortimer v. Cameron*¹⁴, where plans for a building were submitted to the City prior to construction of the stairway, it was determined by Justice McDermid that the City owed a duty of care to the plaintiffs to inspect the stairway and the railings and walls that surrounded it. The court added, with respect to the duty owed: "This was a duty to exercise reasonable care, both in inspecting the plans

¹³ (2000) 1 S.C.R. 298 at para. 40.

which were submitted for the proposed enclosure of the exterior stairway from which the plaintiff fell, and in inspecting the construction authorized by the building permit.”¹⁵

In order to appreciate the interplay between municipal by-laws enacted pursuant to the Code and municipal negligence, an examination of the court’s methodology in *Mortimer* is helpful. In *Mortimer*, a London City by-law required that the application for a building permit be accompanied by drawings and specifications. The builder, however, did not submit any drawings or specifications. The City of London proceeded to issue a building permit that did not have the appropriate information regarding building code compliance. The Court determined that the City negligently failed to detect obvious deficiencies in the stairway’s construction and the construction of the surrounding walls around it; deficiencies that fell below the standards set by the *OBC*. The Court further determined that this negligence was the cause or contributing factor to the plaintiff’s injuries and determined that the City of London was 80% liable for the plaintiff’s injuries. While the apportionment of liability against the City of London was reduced to 40% by the Court of Appeal, the principles iterated in the trial Court’s decision are nevertheless instructive and worth reviewing by counsel faced with stairway cases.

¹⁴ [1992] O.J. No. 764.

¹⁵ *ibid.* at para. 13.

In *Musselman*¹⁶, the plaintiff was injured after falling down the basement stairs in the defendant-owner's restaurant. The plaintiff also named the City of Toronto as a defendant for failing to ensure that the stairs were constructed in a manner that would provide for safe use by the patrons in the restaurant, and specifically the plaintiff. The City of Toronto admitted liability and settled before trial, but the judgment did review the City's liability. The court assessed liability at 70 percent for the defendant restaurant owner and at 30 percent for the City of Toronto.

In its assessment of the liability of the defendant restaurant-owner, the court had to determine whether the staircase was unsafe. As in all tort actions, if the staircase was determined to be unsafe, the court then had to assess whether the condition caused or contributed to the plaintiff's fall or whether there were other factors that caused or contributed to her fall.

In assessing the evidence addressing the safety of the staircase, the court considered the opinions of expert witnesses including a structural engineer who analysed the stairway's compliance with building codes, building practices, and standards for the industry.

¹⁶ *Supra*, note 8.

Interestingly, despite the evidence of numerous expert witnesses describing the safety, or lack thereof, of the stairway in question, the court permitted plaintiff's counsel, with the consent of the defence, to reproduce an exact replica of the stairway in question as an exhibit in the courtroom. The replica reproduced the stairs as they were at the time of the accident. The stair structure had been prefabricated and was erected during the luncheon recess during the first day of trial. As a result, it was available for reference by many witnesses and for direct examination by the court. The court recognized that despite the artificial composition of the exhibit, the replica was very helpful. It is recommended that plaintiff's counsel should at least contemplate the possibility, where feasible, of reproducing the stairway in question at trial, given the favourable treatment of such an exhibit by the *Musselman* court.

Demonstrative evidence such as photographs, replicas of the stairway or step in question, diagrams and animations, together with witness descriptions of the condition of the stairs, will be of assistance to the court. It is important to help the trier of fact visualize the factors that may result in the determination that a staircase is unsafe. The use of a replica as in *Musselman* may be extremely helpful to the court, but obviously the cost to produce a replica may not be reasonable in most cases. The point to be made is that most staircase trials have complex technical issues in dispute and the easier these issues can be shown the more persuasive your case.

Often, several factors work in tandem to create a situation of danger: for example, lack of illumination, handrails without adequate clearance from the wall, or excessive height of risers can create an unsafe condition. Accordingly, it is important to emphasize multiple failures and unsafe conditions, which on their own might not lead to a conclusion of negligence but their cumulative effect may lead to such a conclusion. Visual representations can be an important tool in creating such an impression.

It must also be remembered that an unsafe staircase does not equate to strict liability. The unsafe staircase must also be found to have caused or contributed to the plaintiff's fall. You may need to retain an accident reconstructionist on the issue of causation.

The retention of experts such as engineers, architects, ergonomists and accident reconstructionists will assist the plaintiff in meeting the burden of proof with respect to standard of care and causation. In this regard it is absolutely imperative that our experts are aware of the changes in the *Rules of Civil Procedure* that came into effect January 1, 2010. I do not intend to review the new rules since I suspect they are all familiar to you. In my practice, I generally attach a copy of the new rules along with the acknowledgement of duty form in my instructing correspondence, so that the expert is fully aware that his paramount duty is to the court and that he is there for the assistance of the court, rather than an advocate

for one side or the other. Compliance with the rules is now a condition precedent to the admissibility of the expert's opinion.

Conclusion:

To be sure, improvements in stairway safety such as those recommended by our previous speaker Jake Pauls, are deserving of consideration. We should pay close attention to consultants and experts who advocate for all of us with respect to this issue.

As Plaintiffs lawyers representing injured parties, we too can play an important role in bringing about change by advocating for our clients who have suffered serious injury as a result of an unsafe stairway.

As we all know, one of the purposes of tort law is the notion of deterrence. The application of the principles of tort law is a mechanism for discouraging inappropriate behaviour. The principles of tort law encourage more responsible behaviour which in turn will have a positive effect by lessening the risk of injury.

By advocating for our injured Plaintiffs, whether the claim is against a municipality, a transportation authority, a commercial enterprise or private individual, we are in some small way, acting as agents of change. By this I mean that our efforts to secure just and reasonable compensation for our clients often result in additional benefits to society as a whole. These benefits may include

improved design, improved construction and more thorough inspection procedures, which will result in better accident prevention and fewer injuries.