

# Legal News for Local Governments

*Guild, Yule and Company,  
Barristers and Solicitors*

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Inside this issue:

- Thirty Year Limitation Period Upheld; and
- Municipality Wins Appeal in Public Facilities Liability Case

*This Newsletter is published by Guild Yule as a service to our clients and the broader local government sector. Complimentary e-mail subscriptions are available by contacting Sheryl Wagner ([sl\\_wagner@guildyule.com](mailto:sl_wagner@guildyule.com)) or Lamour Krebs ([ll\\_krebs@guildyule.com](mailto:ll_krebs@guildyule.com))*

## Thirty Year Limitation Period Upheld

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The British Columbia *Limitation Act* contains limitation periods of 2 years and 6 years for property damage, depending on the circumstances of the case. Both of these limitation periods can be extended if a Plaintiff can show that he or she did not reasonably discover the property damage within the limitation period. This discoverability rule has the effect of allowing a Plaintiff to maintain an action well beyond the limitation periods set out in the *Limitation Act*. The *Limitation Act* has an “ultimate” limitation period of 30 years, which cannot be extended by the discoverability rule.

The recent decision of the BC Court of Appeal in *410727 B.C. Ltd. v. City of Richmond, Dayhu Investments, et al* (2004) BCCA 379, deals with the

ultimate limitation period of thirty years. In this case, the Plaintiffs’ apartment building was substantially destroyed by fire on January 25, 2002. Richmond had issued a building permit in relation to the building on October 10, 1967. The building was constructed between October, 1967 and July, 1968. The fire was started by the use of a acetylene torch by the Defendant, Richard Rice, while he was conducting plumbing repairs to some of the water pipes located in the building.

The Plaintiffs claimed against Richmond, alleging that it had negligently issued a building permit when the plans and specifications submitted for the permit were “manifestly inadequate”, and that Richmond had conducted negligent building inspections, which

allowed the building to be constructed with deficiencies that created a fire hazard.

Richmond brought an application to have the action dismissed against it, claiming that the Plaintiffs' cause of action was barred by section 8(1)(c) of the *Limitation Act*, which imposes an "ultimate" limitation period of 30 years from when the right to sue arose, and does so notwithstanding the non-discoverability of the Plaintiff's loss or damage or the Plaintiff's state of knowledge.

The Plaintiffs conceded that they had a cause of action for "pure economic loss" in 1968. The Plaintiffs argued that their claim was for damage to their property caused by the fire, which did not occur until January 25, 2002. The Plaintiffs argued that they sued within two years of that date, and therefore were within the two year limitation period specified by sub-section 3(2)(a) of the *Limitation Act*, which provides that an action for damages for injury to person or property has a limitation period of two years.

The judge accepted the Plaintiffs' argument holding that their cause of action for damage to property first arose in 2002. Therefore, Richmond's application to dismiss the plaintiffs' claim was dismissed. Richmond appealed.

The Court of Appeal held that the only connection that Richmond had with the fire and resulting damage was its alleged negligence in the construction and inspection of the building in 1967 and 1968. Richmond was not alleged to have introduced the external force that caused the fire. The court held that whether or not the Plaintiffs'

property was injured, there was only one alleged breach of duty that occurred on the part of Richmond, and this breach of duty occurred in 1967 and 1968 and gave rise to the cause of action.

The Court of Appeal held that if the fire were regarded as giving rise to a new cause of action, the intent of Section 8 of the *Limitation Act* would be frustrated because new claims could be brought against builders, contractors, architects and local governments indefinitely after completion of construction whenever a fire, a flood, or other external event took place, and could also arise repeatedly. The Court of Appeal held that the cause of action arose against Richmond in 1968, and therefore the Plaintiff's action was barred, at the latest, in 1998. The appeal was allowed and the action was dismissed against Richmond.

This decision is important in that it has now set a precedent that can be used to bar claims against local governments in relation to negligent building inspections or plan checks that occurred over 30 years ago. The fact that the plaintiff did not discover the damage, or that damage did not occur until a later date, is irrelevant to the application of section 8(2) of the *Limitation Act*.

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## Municipality Wins Appeal in Public Facilities Liability Case

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On July 14, 2004, the British Columbia Court of Appeal handed down an unanimous decision dismissing the Plaintiff's claim in *Duddle v. Vernon (City), North Okanagan Regional District, District of Coldstream et al* (2004) BCCA 390, a public facilities liability case, and further delineating the standard of care to be applied in such cases.

The claim against the Defendants in this case arose out of a diving accident by the 19 year old Plaintiff, Duddle, off of a lake pier maintained by a standing committee with representation from the three defendant municipal districts/cities. The Plaintiff was rendered a quadriplegic.

The pier in question is an "h" shape, and is surrounded by water of varying depths, ranging from 9½ feet, to the shallowest area of 4 feet 10 inches. On the date of the accident, the Plaintiff dove into the lake from the pier into the shallowest area.

The Defendants had placed a number of signs in the area identifying that diving is prohibited and warning that the water around the pier is shallow. The signs posted were located at each of the entry points to the beach area, two signs were posted on the archway entrance to the pier, a number of signs were painted on the surface of the pier itself, and 12 signs were attached to the side of the pier.

City personnel patrolled the beach for the purpose of enforcing certain rules, such as the prohibition against alcohol consumption, but the security staff

did not patrol the pier to enforce the 'no diving' rule.

The evidence of the Plaintiff was that he was familiar with the area, as he had been swimming there since he was a young child, and that he was aware of and understood the rule prohibiting diving, was aware of the signs and that the water was shallow.

### The Trial Decision

The trial judge found the Defendant municipalities liable and apportioned their liability at 25%.

While the trial judge held that signs posted at the pier exceeded British Columbia safety standards and that a decision by the municipal council to dispense of lifeguards at the beach for budgetary reasons was a *bona fide* policy decision, she found the Defendant municipalities liable and apportioned their liability at 25%.

The primary reason the trial judge found the municipalities liable was that they did not do all that could have done to prevent this accident in all of the circumstances. In her view, the Defendants ought to have taken further steps, including the posting of signs to indicate the actual water depth around the pier, and having the security personnel take steps to enforce the "no diving" rule.

On the issue of causation, despite a finding that the Plaintiff had knowledge of all facts necessary to

assess the risk, the trial judge held that the Defendants' breach was causative of the Plaintiff's injuries, stating that "there were conflicting signals as to the risk," which were the fault of the municipality.

### **The Appeal**

The B.C. Court of Appeal unanimously held that the trial judge erred in:

1. holding the Defendants to a standard of care higher than that of a reasonable standard; and
2. finding a causal link between the defendants' breach of duty and the plaintiff's injury.

The Court of Appeal found that the trial judge erred in holding the Defendants to a standard of perfection when she held that they were required to "do all [they] could have done" to prevent this type of accident.

Further, the Court of Appeal held that the trial judge did not properly consider the issue of causation. The Court of Appeal stated that the trial judge had applied a lower standard than the proper standard, which is the 'balance of probabilities'.

The Court of Appeal considered the trial judge's findings that the Plaintiff had knowledge of the diving prohibition, knew the water was shallow, and knew the consequences of injury when one dives into shallow water, and held:

[27] " ... The appellants cannot be held liable for failing to warn [the Plaintiff] of dangers of which he was already aware. Thus, the conclusion that the

failures to mark water depths on the pier and to orally reinforce the diving prohibition caused or contributed to Mr. Duddle's injury was clearly wrong.

The Court of Appeal also distinguished its own decision of *Gerak v. British Columbia (Minister of the Department of Lands, Parks and Housing)*. *Gerak* was a diving case where the Plaintiff dove into the lake from a public wharf that ran approximately 100 feet into the lake. The Plaintiff had never been to the park before, no signs had been posted warning of the shallow water, and one could not see the bottom of the lake from the end of the wharf due to the murky water. In *Gerak*, the trial judge held that the wharf constituted an "invitation to dive," and this was affirmed on appeal.

In distinguishing *Gerak*, the Court of Appeal in *Duddle* stated:

[30] By way of contrast, Mr. Duddle did not testify that he assumed it was safe for him to dive. Moreover, there was no evidence to support any inference that the pier constituted an invitation to dive or any assumption on his part that it was safe to do so. As I have said, the trial judge found that he knew of the prohibition and the reason for it and was well aware of the danger when he decided to dive from the pier.

As a consequence, the Court of Appeal held that the sole cause of the Plaintiff's injuries was the Plaintiff's own failure to take reasonable care for his own safety. Accordingly, the appeal was allowed and the action was dismissed.

**Comments**

The *Duddle* case is useful in that it provides an example of a situation where an occupier of a public facility met the reasonable standard test. The crucial issue in this case appears to be the plaintiff's knowledge of all information necessary to assess the risk. Therefore, municipalities should ensure that users of a public facility are aware of all material facts they need to assess the risk of using the facility. This can be accomplished through methods such as warning signs, waivers, and releases that would alert and remind users of dangers.

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