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McAllister v Calgary (City); a heightened duty of care in the age of surveillance?

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Introduction

Are municipalities (and other occupiers) exposed to liability for failing to detect and respond to intentional damage caused by third parties on their premises? While an occupier may not be held liable *per se* for damage caused by third parties, a recent Alberta Court of Appeal decision, *McAllister v Calgary (City)*, 2019 ABCA 214 [*McAllister*], suggests that at least municipalities can be liable if they fail to detect and respond in a timely manner, to acts of third parties on their premises. This was the first time that a municipality has been found liable for damages caused by an assault by a third party in an open-air public space,[2] and there is some concern that the judgment will be relied on as imposing a new "duty to detect and respond" on municipalities.

(Image taken from "Google streetview", looking North)

In the early morning hours of January 1, 2007, Kyle McAllister was assaulted while using the above-pictured pedestrian overpass near the Canyon Meadows light rail "C-Train" station in Calgary (the "City"). The attack lasted nearly 20 minutes and Mr. McAllister suffered serious injuries as a result. The attack took place at the western end of the overpass, near the stairs leading to the entrance to the station. The trial judge found the City liable as occupier of the overpass (as part of the "transit environment") for the incremental damages to the plaintiff after the first few minutes of the assault as a result of failing to detect and respond to the incident in a timely way.[3] The City appealed that finding, however the Alberta Court of Appeal ("ABCA") agreed the duty of care on the City included the reasonable detection and response to assaults and other events.[4] Despite noting that "*Holding one defendant responsible for the intentional torts of another is still exceptional*"[5], it upheld the lower courts finding on liability, albeit with a slight variation to the standard of care to allow a longer time frame within which the assault ought to have been detected and addressed.

The relevant timeline in the litigation is as follows:

- Trial (liability only): September, 2017
- Trial Judgment: June 2018

[2] See para 2 of the City's Application for Leave to Appeal to the SCC
[3] ***McAllister v Calgary (City),*** 2018 ABQB 480, 73 Alta LR (6th) 310.
[4] ***McAllister v Calgary (City),*** 2019 ABCA 214
[5] Para 79

- Appeal hearing: May 3, 2019
- Appeal Judgment: May 30, 2019
- Application for leave to appeal (SCC) filed: August, 2019

This note considers the constituent elements of the occupier's duty of care over public spaces as found by the ABCA and the potential implications of this decision on occupiers of such spaces. While the ABCA decision is not binding on British Columbia Courts, the British Columbia and Alberta Occupier's Liability statutes impose materially identical duties and standards of care.[6]

Background facts

The pedestrian overpass is open 24 hours a day and has no restrictions on access to the public. It provides access to the train station from a "park & ride" parkade, passing over a major highway (McLeod Trail) and train tracks as it does so. It also connects the two neighbourhoods on either side of McLeod Trail - indeed, the only pedestrian crossings of McLeod Trail are similar overpasses connected to the adjacent C-Train stations to the north & south. The overpass is approximately 100 metres long.

The Calgary C-Train network is owned and operated by the City. It is equipped with video surveillance, consisting of 337 cameras. On the morning of the assault, the surveillance system was monitored by two employees who were tasked with observing the footage which rotated across 42 display monitors. Each monitor cycled images from the different cameras every 3-4 seconds. Of those cameras, 25 were near the Canyon Meadows train station; 12 were in the parkade and 13 were in the station; directed at the platform, station exits, and the overpass. The assault was captured by (only) one of the station platform cameras. It is not clear from the judgment if there were any other cameras that captured images from the overpass, however the assault took place "*near the stairs leading to the entrance of the LRT station*."[7] The ABCA found that the scene of the assault would have been displayed approximately 5 times each minute on one of the 42 screens (for 3-4 seconds, as above). The employees did not notice the incident while it was happening.

In addition to the camera surveillance system, the City has 46 transit protective officers. Between 10:00pm on New Year's Eve and 12:45am on New Year's Day, 12 officers were responsible for patrolling the entire C-Train system. On New Year's Eve, Calgary Transit had a "no fare" policy in place, in order to discourage partygoers from drinking and driving. As noted by the ABCA, the trial judge found that, as a result, the system and the overpass were busier than normal at the time of the assault. However, after 12:45am, and despite trains still running, there were only 2 officers left on duty.

Canyon Meadows is one of 28 platforms on the Red Line portion of the C-Train system, which comprises 45 stations in total.

Also mentioned in the trial judgment, was the fact that the City had enacted Bylaws over the transit system prohibiting a number of activities including disorderly behaviour and fighting, and empowering the protective officers to enforce those bylaws. In addition, the trial judgment records problems with the lighting and quality of images that were captured by the cameras, and that in

[6] Occupiers Liability Act [RSBC 1996] Ch. 337, s.3 and Occupiers' Liability Act, RSA 2000 c. O-4., s.5
[7] Trial judgment para 30.1

2009, the City conducted a safety audit (as a result of another, later incident) where lighting & cameras were upgraded.

Was the City an occupier of the overpass?

On appeal, the City argued that it was not an occupier as it was not in physical possession of the premises, because the overpass is open to the public 24 hours a day, there are no City staff present the majority of the time, and the City does not "control" who makes use of it. While the court disagreed and held that the City was an occupier, the nature and function of the premises is relevant to the standard of care:

> *The open and accessible nature of the overpass most likely has little effect on the scope of the City's duty to maintain the physical integrity and safety of the structure itself. ... It does, however, have a significant impact on the City's duty of care with respect to the "activities" and "conduct of third parties" on the overpass. The duty of care is narrower, and the standard of care lower, that it might be on other City premises. The City does not have a duty in tort to respond to every assault that happens in an open public space controlled by the City.*[8]

The standard of care

It seems clear from the judgment that had this just been a pedestrian overpass across a roadway, the standard of care would be much lower. The ABCA noted that the overpass is similar to other open public places, such as bicycle trails and walking paths. Like the overpass, they are made available for the convenience and enjoyment of the public. As above, the City undoubtedly must have regard to the overall safety of these places, but there was no reasonable expectation that it will be responsible for crimes that are committed there. However, it went on to hold that:

> "*The C-Train station itself is of a different character. ... the City encourages use of the system, including by an implicit representation that the system is reasonably safe. ... The City has a significantly greater degree of control and management over the C-Train station than other open public places. The City's duty of care with respect to the C-Train station is therefore higher than its duty with respect to other public spaces like parks and the pedestrian overpass*. [9]

Two points emerge. First, that the use of the word "overpass" when considering the judgment appears to be a misnomer; the court did not view the area where the assault occurred as a pedestrian overpass per se, but part of the transit system. Second, that the above duty of care would likely apply to virtually any transit hub.

The duty to deter and prevent crime

This engages the obligation of one person to prevent damage caused by the intentional torts of a third party.[10] In general, the common law does not impose liability for pure omissions. The two

[8] Para 26
[9] Para 38-39
[10] Para 42

exceptions to this rule are (a) where the defendant is in a position of control over a third party, and should have foreseen the likelihood of the third party causing damage to somebody in close proximity if the defendant failed to take reasonable care to exercise that control (an example being vicarious liability), and (b) where the defendant assumes a positive responsibility to safeguard the plaintiff.

The court characterized the issue as being whether the occupier failed to meet the standard of care on it to mitigate the foreseeable risk created by potential torts of the third party. It noted that the leading Canadian cases on this topic are ***Fullowka v. Pinkerton's of Canada Ltd.***,[11] and the earlier decision in ***Childs v. Desormeaux***.[12] While outside of the scope of this case note, the material distinction between those two cases is that ***Childs*** involved an unintentional tort by the third party (negligent driving), whereas ***Fullowka*** involved an intentional tort (assault). The Court held "*These decisions confirm that the duty to prevent damage from the torts of third parties could extend to both, but the standard of care will vary*."[13]

Here the court found the City did not breach its duty to prevent the assault given the opportunistic & unprovoked nature of it; "*The reasonable steps open to the City to stop an assailant like A.B., who was motivated to make an unprovoked intentional assault on the respondent, were very limited*."[14] However, this leaves some uncertainty as to what might reasonably be required under this duty to take positive action to prevent the commission of an in intentional tort. It could, for example, demand an increased security presence at transit hubs after sporting events involving violence (such as Hockey or Mixed Martial Arts). The trial judgment notes that Calgary did not have a written "Special Events Policy" dealing with events of increased ridership, but did informally deploy a greater number of transit protective officers during Stampede, after hockey games and the like to deal with crowd control and intoxication.[15]

Second, prior caselaw considering a duty to prevent crime has focussed on police forces rather than municipalities, and as such this appears to represent an extension of the duty.

Third, in terms of infrastructure, the trial Judge appeared to place great reliance on the CPTED concepts ("Crime Prevention Through Environmental Design"), in finding the Canyon Meadows C-Train station required sufficient lighting, video surveillance, and staffing levels "*to deter and prevent crime, or allow its detection and an appropriate and timely response thereto*".[16] Apart from conflating the overpass with the train station (and a duty to prevent with a duty to detect – one of the criticisms of the judgement made by the ABCA), this formulation has implications for any entity designing and maintaining a space open to the public – particularly as to lighting design and maintenance programs, and especially transit hubs and similar designed gathering spaces.

[11] 2010 SCC 5, [2010] 1 SCR 132
[12] 2006 SCC 18, [2006] 1 SCR 643
[13] Para 50
[14] Para 55
[15] Para 29
[16] Para 11 (quoting paras 38—39 of the trial judgment)

The duty to detect and respond to crime

As regards the duty to detect and respond to crime, again ***Childs*** is of relevance. The court noted that, in occupiers' liability cases: "*Since the duty of reasonable care extends to activities on the premises, one could argue that it includes an obligation to rescue, within reasonable limits. The law, however, is still hesitant to impose a positive duty to intervene on those who observe others committing torts*."[17] Applying ***Childs***, it held that, in the operation of the C-Train, the City fell within the recognized exception to the rule that there is no duty in tort "*to take positive action in the face of risk or danger*", being;

> "*The third situation where a duty of care may include the need to take positive steps concerns defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large: [authorities omitted]. In these cases, the defendants offer a service to the general public that includes attendant responsibilities to act with special care to reduce risk. Where a defendant assumes a public role, or benefits from offering a service to the public at large, special duties arise. The duty of a commercial host who serves alcohol to guests to act to prevent foreseeable harm to third-party users of the highway falls into this category*".[18]

The court held:

> "*In this case, there was a relationship between the City and those proposing to use the C-Train system. That would engage a duty of care, although not one to insure against all assaults or other damage. The special relationship and the duty arose from the City's general invitation to the public to use the C-Train system, and the charging of a fare to do so, combined with express representations made by the City that the system was "reasonably safe*""[19] (going on to quote representations on the City's website).

By their very nature, municipalities assume a public role. The reference to the charging of a fare seems to suggest the C-Train was seen as a commercial enterprise - would the outcome have differed if the cost recovery method was less direct (e.g. through gas or property taxes)? This seems doubtful, given the duty was expressed as being imposed on those "…*who either exercise a public function or engage in a commercial enterprise…*".

While there are many decisions involving the duty to detect and respond to assaults in the commercial host liability sphere, this appears to be the first in respect of municipal responsibility over public places. The court focussed on representations on the City's website, holding "*A user of the system could not reasonably rely on those assurances as guaranteeing safety, but could rely on them as indicating that a system of detection and response was in place*".[20]

[17] Para 59
[18] Para 60 (quoting Childs, para 37)
[19] Para 61
[20] Para 61

Those representations were that:

> "*For the safety and security of Calgary Transit customers, an extensive security network is in place to provide assistance when needed. Your personal safety while using Calgary Transit is of the utmost importance to us and Calgary Transit personnel are ready to respond to all incidents such as medical emergencies, passenger harassment, acts of vandalism, or any other situations or conditions which may be considered unsafe*."

This appears to have elevated the municipality's duty of care over the location where the assault occurred, to a duty to enforce its bylaws. Just what representations, and how far they need to go, in order to give rise to a duty to detect and respond to the deliberate torts of a third party, will presumably depend on all of the circumstances.

Relevance of the location:

Of course, here the assault did not occur on the train platform, but the pedestrian overpass. The trial judge found the latter to be sufficiently connected to the former to engage the duty of care. The only measure of distance is that the assault occurred "near" the top of the platform stairs. We know that it was captured on one camera (although that appears to have been in the background). The appeal judgment is no more helpful in determining that level of connection. On the issue of 'connectedness' all the appeal court said, was that it was a finding of mixed fact and law, which it would not disturb absent palpable and overriding error.

This injects another area of uncertainty. Apart from physical proximity, is evidence of intent relevant? Here, the plaintiff and assailant were on the overpass for the purpose of accessing the train platform, but had not yet got there. What if the assault had occurred in the same location, but the parties involved were only using the pedestrian overpass to access the other side of the highway and not the train platform?

The Judgment seems to stand for the proposition that there will be a duty to detect crime where there is some overt representation as to safety. However the contextual language of "*in all the circumstances of the case is reasonable*" appearing in both the Alberta and British Columbia statutes[21] will continue to inject uncertainty as to the likelihood of liability of occupiers for assaults by third parties on their premises. For example, what of bus interchanges where there is lighting & design to prevent crime – does that bring with it an obligation to also monitor (detect) and respond?

The standard of care (detection and response)

The ABCA next considered the standard of care for detecting the assault. It noted the absence of expert evidence on the appropriate number of cameras for the C-Train network, monitoring employees, and security officers. However, rather than sending the matter back for a new trial to address that issue, and despite describing a requirement for 33 staff monitoring 500 cameras as a "*high standard*",[22] the Court appears to have applied that, to find the standard required detection

[21] S.5 & S.3, respectively
[22] Para 71

within 5 minutes.[23] This is curious, bearing in mind the ABCA's criticism of the trial judge doing the same thing, to come up with a shorter time within which the assault ought to have been detected.

The duty to respond follows the duty to detect. Once the standard of care for detecting an assault is established, the court held that it next needed to establish the standard of care for responding to that assault. Here again, the expert evidence at trial did not address this issue. As noted above, the assault happened early on New Year's Day. Despite the City having attracted increased crowds to use the trains by offering free fare, and evidence that the trains were still operational at the time of the assault[24], only two transit officers were patrolling the entire network after 12:45am. It is also important to note that their jurisdiction was not exclusive and the Calgary Police were available to respond to serious assaults.

As the area in which the assault took place was found to be sufficiently connected to the station, the analysis focussed on the standard of care applicable to the transit station (rather than a pedestrian overpass). The ABCA held:

> "*As the trial judge noted, there were two Protective Services Officers about four to six minutes away, but they were occupied "with dispersing a large group of youths". The standard of care does not require the City to have sufficient staff such that there are officers present on each station, or that there are always unoccupied officers on duty. ... Requiring a five to ten minute response time to any observed incident would be reasonable, having regard to all the circumstances*."[25]

Again, despite having no evidence, the Appeal court seems to have waded in to determine a response time standard.

Finally, applying the standard required for detection and response; the continuance of the assault after 10 minutes amounted to a breach, and it followed that the City was liable for the incremental injuries to the plaintiff after that time.

How may the McAllister decision affect municipalities and like organizations?

Municipalities and organizations responsible for public spaces should be alert to the following 'take-aways' from this decision as they relate to their potential liability for the acts of third parties in those spaces.

a) The nature and function of the premises is an important factor in establishing the duty of care, as well as the standard of care, that an occupier has with respect to detection of, and response to, third party incidents. Open spaces such as sidewalks and parks will attract a lower duty of care as compared to buildings and land in which the occupier conducts its business and deliberately attracts members of the public to use the space. In *McAllister*, the ABCA held there was no reasonable expectation that it the City would be responsible for crimes that are committed in *all* public spaces, however the City was found to have a greater

[23] Para 78
[24] See para 29.5 (trial judgment)
[25] Paras 73-74

degree of control over the Canyon Meadows train station than it did over the overpass, thus the duty of care the City owed with respect to the train station was higher than its duty with respect to the overpass per se.

b) The imposition of a duty to *prevent* crime (or intentional torts), as an occupier appears to be an expansion of the duty of care beyond policing agencies. Despite the language used of there being "*no reasonable expectation*" that the City would be responsible for crimes that are committed in public places generally, it seems that the design of at least transit hubs (and analogous gathering spaces) need to comply with CPTED concepts. At trial, the City had argued that that CPTED was not an accepted Canadian standard, however the court held that is did represent the standard of care, given the City's own use of CPTED in review of transit practices predating Mr. McAllister's assault, and its acceptance of that standard in a later safety audit of the stations.

c) Per statute, an occupier is only required to take such care as is reasonable in the case. This standard of care does not require an occupier to have continuous, real-time monitoring of every aspect of their premises. Just what the standard will require "*in all the circumstances*" of the case, remains uncertain.

d) A court may find that those organizations which assume a public role *or* benefit from offering a service fall within the ***Childs*** duty of care exception to take positive action to respond when users of their premises face a risk or danger. The imposition of the duty on an occupier to detect and respond to crime in publicly accessible places is an expansion of this positive obligation. As per *McAllister*, the duty of care may extend to structures or land also occupied that is near to the subject premises, when the third party incident is sufficiently connected to the use of that premises.

e) One area of overlap between a duty to prevent and a duty to detect and respond to crime, is the use of surveillance cameras. Many are not monitored on a live basis, but set up as a deterrent; the footage available to be reviewed, after an event. How the duty to detect and respond may apply to such spaces remains to be seen.

f) A related issue is the overlap of a duty to detect and respond, with privacy rights of individuals. These obligations seem at odds, such that the imposition of the duty puts occupiers in a 'damned if you don't; damned if you do" position.

g) Finally, legal authority is a factor mentioned in the trial judgement as being relevant to the standard of care, however this is not mentioned in the appeal reasons. The City had enacted bylaws empowering transit officials to deal with disorderly behaviour and the like. Whether the absence of such bylaws (and reliance on a municipal police force in the ordinary course) would take the occupier outside of a duty to detect, remains to be seen.

On our review of *McAllister*, this may be a case confined to its facts; a duty to detect being imposed over a transit system that already had its own protective force and CCTV surveillance system in place, and was governed by user-safety bylaws promulgated by the City. On the other hand, it may well be argued to apply to analogous situations, and as it reflected above, there is enough uncertainty in application of the reasons to make it susceptible to this. Unfortunately, only time will tell.