Personal Injury

Ontario Court of Appeal shuts many out | Michael Lesage

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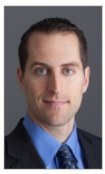

Michael Lesage

Access to justice is increasingly an issue in Ontario. Over tea and crumpets, posh debating societies (i.e., the law society), have determined it to be serious enough to warrant discussions and committees.

Meanwhile, judges have spoken out, warning that justice is increasingly available only to the rich and writing that our "fossilized Jurassic Park' of a legal system is at risk of becoming an "irrelevant museum piece," as held by Justice David Brown in *Bank of Montreal v. Faibish* [2014] O.J. No. 1639.

The Supreme Court of Canada has even noted that "a culture shift is required to create an environment promoting timely and affordable access to the civil justice system," according to Justice Andromache Karakatsanis in *Hryniak v. Mauldin* [2014] 1 S.C.R. 87.

The recent Ontario Court of Appeal decision in regard to *Drummond v. Cadillac Fairview Corp.* [2018] O.J. No. 4017 illustrates that this message hasn't gotten through to the lower courts.

In many respects, *Drummond* was a run of the mill slip and fall case. It arose after Stephen Drummond slipped on a skateboard in the aisle at the Fairview Mall food court and suffered injuries to his left knee and lower back. The skateboard belonged to a 12-year-old boy, who was alleged to be have been shuffling it between his feet and otherwise admitted that it had gotten out from under his chair.

There was some additional evidence that the boy had been seen playing with his skateboard in the food court earlier and had even struck one of the cleaners with it.

After discoveries, Cadillac Fairview moved for summary judgment, asserting that its security measures had been reasonable in the circumstances and that no problems with the boy had been noted.

Drummond resisted and filed an affidavit that prior to his incident, his daughter had seen the boy playing with his skateboard. Additionally, Drummond's fiancée reported that one member of the cleaning staff had seen the boy playing with the skateboard with his feet in the area, while a second had been hit by a skateboard roughly one hour prior in the same area.

Against this backdrop, Justice Paul Perell ruled that the mall's security had been ineffective, in that they had not noticed the boy enter the mall with a skateboard, had not noticed him playing with it in the food court, had not noticed that he had failed to secure it and had not made inquiries of others (such as the cleaners) as to potential problems.

As such, Justice Perell granted summary judgment in favour of Drummond but regrettably failed to address the mall's defence of contributory negligence. Cadillac Fairview appealed.

The appellate court turned out to be very favourably disposed towards Cadillac Fairview. Not only did it reverse the grant of summary judgment in favour of Drummond (or limit its holding to procedural grounds), but it excluded the bulk of his evidence as hearsay (without giving real consideration to the admissions by the cleaners, mind you, arguably the mall's agents), granted summary judgment in favour of Cadillac Fairview and awarded the hapless multinational $30,000 in costs for its troubles.

This decision is troubling both for its reasoning and for its implications to the administration of justice.

Looking first to its reasoning, the appellate court essentially narrowed the applicability of Rule 20.02 (which permits affidavit evidence on summary judgment motions to be based upon information and belief), holding that where the hearsay evidence is on a fundamental aspect of a motion, "it is unlikely that the motion judge will decide the motion favourable to the party adducing hearsay evidence," quoting Justice Mark Edwards in *Mitusev v. General Motors Corp.* [2014] O.J. No. 4365.

As Drummond's affidavit did not offer any explanation as to why his daughter and fiancée could not provide their own affidavits, same were excluded as inadmissible. The court was also critical of the failure to produce affidavits from the two unnamed cleaners.

Conversely, the Court of Appeal did not address proportionality or offer any guidance as to how much time and money should be invested in pursuit of such a claim.

As our courts tend to forget, the standard in civil cases is the balance of probabilities, the rough equivalent of earning a D on a test. Moreover, the provision of legal services is subject to economic reality, namely, that parties (or their counsel) can only afford to invest so much time and money in a given case.

From the description given (no mention was made of surgery) this would appear to be a case of modest value, perhaps $100,000 at best, assuming chronic pain. If we assume a fee of 30 per cent (along with the potential for an outright loss, which happened in this case), as well as expenses related to filing and serving the claim, conducting discoveries and obtaining transcripts, retaining one or more expert witnesses and summonsing Drummond's doctors to court at trial, it becomes difficult to understand who will provide representation to the next Drummond or someone with even more limited injuries.

As is increasingly the case, it appears that the courthouse doors are closed to an ever increasing number of Ontario residents.

Michael Lesage is a trial lawyer and the founder of Michael's Law Firm, a litigation boutique that specializes in complex cases involving professional negligence, business litigation, insurance coverage disputes and cases of serious injury. When not representing clients, he can often be found playing competitive sports. You can e-mail him at michael@michaelsfirm.ca.

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