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9406

UPDATE ON \$5 MILLION MORTIMER CASE

*Reprinted from June 1994
COWAN NEWS*

***People need to understand
that a building permit is not a
lifetime warranty.***

In Cowan News, July 1993, we provided an update on the Mortimer case which was a \$5 million award to Stephen Mortimer, 80% of which was held to be the liability of the City of London relating to building inspection and enforcement of the building code. We informed you that the judgment was being appealed to the Court of Appeal.


In February 1994 the Ontario Court of Appeal ruled on the case and changed the finding of liability of the City of London to 40% and that of the building owner to 60%.

This is still not satisfactory when you consider the impact this decision has on the provision of building inspection services by municipalities. The insurers are therefore seeking leave to appeal to the Supreme Court of Canada on the grounds that it is a matter of public importance.

To refresh your memory, the liability of the city rested upon a defect in that the framing of the enclosed staircase was lacking one 44 inch long 2" x 4" stud. The enclosure of the staircase had been achieved by nailing sheets of plywood to a stud frame and the studs, or lack of them, remained clearly visible because there was no interior finish. If this was a danger as is alleged, it was clearly visible to the various owners and occupants of the building, who had control of the building for a period of at least 15 years since the work had been carried out.

If the decision stands that the municipality is liable to any degree for such defects, it would mean that all municipalities would remain at risk indefinitely of being held liable for such defects even where they are obvious to the owners of buildings and even though the municipality has a responsibility to inspect a building only at the time a permit is issued. Contrary to this, owners have an ongoing common law duty to inspect and maintain their building.

Mortimer and his friend, John Cameron, who were adult males aged 27 and 30 years respectively, engaged in rough horseplay at the top of a set of stairs. That the court found no liability on either Mortimer or the other man is an important aspect of this case. It shows how the courts can shift the burden of individual responsibility onto the municipality with the deep pocket. If, for example, Mortimer and Cameron were each judged to be only 15% responsible, this would affect the apportionment of liability by over \$1 million. It is also worth considering that the judgments of both the trial court and the appeal court seem to be tailored to get at the deep pocket of the city and to a lesser degree, the assets of the building owner.

This case involves tremendous implications to the provision of municipal building inspection services and we will keep you advised of future developments. 

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