

## OCCUPIERS' LIABILITY- REC CENTRE ACCIDENT CITY LIABLE

August 2004

*HUSSAIN v. EDMONTON (CITY)*, [2004] A.J. No. 375 (QL),  
2004 ABQB 204

During the summer of 1997, the City of Edmonton purchased a Lat-Pull Down machine from a supplier of fitness equipment for the weight room at its Leisure Centre. The City was the owner and operator of this particular recreation facility and also conceded that it was an occupier of the premises pursuant to the *Occupiers' Liability Act*, R.S.A. 1980, c. O-4. On December 4, 1997, 17-year-old high school student, Adeel Hussain, was injured while using the "next to new" exercise machine, when the cable snapped, hitting his head and causing injuries. Mr. Hussain had paid for a monthly pass to the Leisure Centre and it was common ground that there were no conditions printed on such passes. As a result of this accident, the plaintiff brought an action against the City, and others, in light of the injuries he had sustained.

On March 12, 2004, Madame Justice J.B. Veit ruled that the municipality was liable under occupiers' liability law. During the two-day trial, a materials engineering analyst gave expert testimony establishing that the machine's cable was loaded beyond its ultimate tensile strength, the cable was

not strong enough for the job of pulling up the weight stack, and some of the wires in the cable had been weakened by damage caused by the form of clamping device used to join the cable to the weight stack. Although checklists of inspections completed by the municipality prior to the accident were destroyed in a flood, a lifeguard regularly inspected the weight room equipment for wear or damage and never saw anything in relation to the Lat-Pull Down machine that caused any concern. However, expert evidence established that some of the damage to the wires would not be visible to the naked eye and, further, some of the damage was located where it would not be fully visible.

The defendant municipality denied liability because the incident was not foreseeable. In the alternative, the City argued that, if it was foreseeable, s. 530 of the *Municipal Government Act*, S.A. 1994, c. M-26.1, which provided that a municipality was not liable for damage caused by a system of inspection, the manner of inspections, or absence of inspections, or a system of maintenance, the manner in which the maintenance was performed, or the absence of maintenance would apply and, therefore,

the municipality was not liable. In her analysis, Veit J. referred to the Supreme Court of Canada decision in *Just v. British Columbia*, [1989] S.C.J. No. 121 (QL), [1989] 2 S.C.R. 1228, with respect to the defence arising as a result of the policy-operational distinction. Briefly, the trial judge found that the "...decision of the City to acquire fitness equipment from Scott Strength was, accordingly to a *Just* analysis, an operational decision as opposed to a policy decision" (at para. 25). Justice Veit went on to note that, in purchasing the fitness equipment, the City, "...had an obligation to satisfy itself that equipment that it was purchasing for commercial use in recreational centers was adequate for the job and safe for the users of the equipment" (at para. 25). The trial judge next moved on to a brief review of the decision of the English House of Lords in *Anns v. London Borough of Merton*, [1977] 2 All. E.R. 492, which was subsequently adopted by the Supreme Court of Canada in *Barratt v. North Vancouver*, [1980] 2 S.C.R. 418, as follows (at para. 25):

Pursuant to an *Anns* analysis, the City owed a duty of care to the users of its Rec Centre. On the one hand, it is foreseeable that fitness equipment that is not adequately engineered to handle the job that it is asked to do will fail and will injure the user of the equipment. Such an eventuality is not a 'fantastic possibility'. On the other hand, because the City not only invites individuals to use its recreational facilities, but even charges a fee for such use, there can be no doubt that the required proximity has been established in this case in order to conclude that the City owed a duty of care to Mr. Hussain.

Turning to the City's reliance on s. 530 of the *Municipal Government Act*, the trial judge was keen to observe that in, "...providing municipalities with policy protection from negligence", that provision, "...specifically limited the kinds of negligence from which municipalities were shielded" (at para. 26). After reviewing the relevant case law and noting

that a large number of decisions involved the maintenance of highways, Veit J. went on to conclude that, "...not only is there no statutory protection for the kind of negligence that occurred here, but there is no reason for the courts to provide such protection" (at para. 26). Ultimately, she concluded that, "...there is no policy reason to protect the City from liability in relation to the operation of a purely elective facility", and, therefore, "[u]sual principles of negligence apply" (at paras. 26-27).

In conclusion, the trial judge found that, under an occupiers' liability analysis, the defendant municipality did not provide the plaintiff, a paying visitor to the Centre, with reasonable safety in the use of the premises in question.

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