CURIE

Strategic Defences for Loss of Balance Cases

**By Owen Smith*

What's inside

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Those of you who still use the term "slip and fall" should forget it. "Slip and fall" is a plaintiff's term! Think about it: the plaintiff "fell" because somebody evil put something in his or her path to cause the fall.

I have often asked juries and people who attend seminars what their first reaction is to falling. Usually, it is embarrassment, and a hope that nobody saw how clumsy they were. This universal reaction is overridden only by a desire to sue – a desire fostered by plaintiff's counsel.

Most people fall because they don't look where they are going, are clumsy and lose their balance-it's their own fault. Hence the preferable term "loss of balance." Get used to it. It is permeating the industry, and should be used by all!

If we start with the premise that there is usually some responsibility on the plaintiff's part for his or her own loss of balance, why do we, as an industry, pay out claims that have no merit? The usual answer is, "The courts always side with the plaintiff." That is true enough; what is important is to figure out why.

I would contend that it is because we have simply not paid enough attention to how we deal with these claims, while organizations like the Ontario Trial Lawyers' Association have turned prosecuting them into a science. We need to step back and analyze how to investigate and defend, and that is what this article is all about. We have to go beyond merely saying, "Prove that we did something wrong" and listening to engineers talk about hypothetical standards.

What follows is an anthology of defences that can be used to defeat claims, using teams of experts and processes that make risk management protocols "trial ready." I will set out four basic defences, in ascending order of effectiveness, and two counterattack procedures that can be helpful. I believe they are all useful-they have certainly worked in a case I will describe.

Defence No. 1: Prove We Did Something Wrong

This is the lowest form of defence on the totem pole, and unfortunately it is relied upon too heavily in dealing with these claims. OTLA and plaintiff lawyers in general have targeted "slip and fall" cases as low risk, simply because they are confident that this is the only defence they will have to face.

Essentially, this approach says to the plaintiff, "You have the onus of proof. Go ahead and prove we did something wrong." It is based largely upon the belief that the defendant did

not do anything wrong, and relies more upon lawyer's rhetoric than any scientific or legal principles. It does not take into account the shifting standards of care based on "reasonableness" that courts customarily use to determine the outcome-which usually occurs when the court seizes upon something that the defendant "should have done" and sets up that "should have" as the acceptable standard, with predictable results.

Investigation is usually routine, going into what we call the "what happened" mode, finding out what went on and then trying to rely on logic to indicate that there should be no fault. If this sounds somewhat futile, it is, but nevertheless it often occurs, and it results in a lot of settlements that should not have been made and payouts that are excessive.

Defence No. 2: We Can Prove We Did Nothing Wrong
This is a better defence, in that it is more proactive and takes the offensive.

Essentially, the investigation goes carefully into the activities of the defendant and argues that there was absolutely nothing wrong with what was done or not done. There is obviously more investigation, and care is taken to make sure that the witnesses support the contention that the defendant was blameless.
This approach relies heavily upon the plaintiff's being able to call evidence to show that it did nothing wrong, but it still leaves the standard of care somewhat upon the air, and relies upon the court to agree with the "reasonableness" of the approach. Also, courts commonly scrutinize what the defendant puts forward as "reasonable steps," and are prone to striking down the defence if there is something lacking, in the subjective opinion of the triers of fact. As well, the approach is usually incident-specific, and does not take risk management efforts into account.

Defence No. 3: We Can Prove We Did Everything Right
This defence is called "due diligence," and is customarily used in quasi-criminal proceedings, such as environmental degradation charges or health and safety offences. The stakes in these quasi-criminal cases are high, as fines often run into six figures and more, and the offences impose "absolute liability," which means there will be a finding of guilt even if the infringement was unintentional. Due diligence, however, constitutes an absolute defence against such charges, and amounts to a powerful weapon in the defence arsenal. Proof of due diligence calls for an acquittal even though there is absolute liability. Pretty good stuff!

After years of defending general liability cases, I am amazed that this defence is not used by the insurance industry more extensively. Essentially, it requires proof that the defendant has a reasonable system in place to prevent and control the risk giving rise to the claim. Given that this defence can defeat any claims stemming from incidents where the system fails to manage the risk as intended, it is a powerful defence!

In many cases, in fact, defendants have gone to court and proven due diligence successfully, although they have not referred to by that name, and the defences are usually incident-specific. So if it can work, why don't we use it more? There are a number of answers.

A number of years ago, I started entering into dialogues with insured clients who were sued for various liability situations and who had risk management practices in place. Many were sound practices, but they were not put together in such a way that I could use them to support a defence in court. The practices were missing something, and although they might have worked internally, they didn't go far enough to establish due diligence.

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Due diligence requires three main components, the Three P's: a *policy* concerning the risk being scrutinized, a set of *procedures* to manage and control them and *proof* of compliance with the system. If any of these three items are lacking, an adverse verdict will surely follow.

To get around this, a considerable amount of digging must be done to find out if the Three P's are available to put before the courts. This can result in some expense on investigation, but the results are worth it. If due diligence can be established, the "comfort base" of the plaintiff can be removed, because of the prospect of losing, and the case can be either settled for a reasonable amount or contested, if all factors indicate that this should be done.

This defence is best advanced with the help of experts who can deal with the standards set out in the risk management protocol. The result is a lot less paid out in indemnity. Not a bad swap for paying a little more out in adjusting and investigation!

Defence No. 4: We're the Best!
This is known as the "benchmark Defence." It goes beyond due diligence, using experts to say: This defendant uses practices and standards that go far beyond what is generally used in the industry. They are the best and, if you find fault with them, you are condemning the whole industry, and that is unreasonable.

This approach effectively takes due diligence and makes it virtually untouchable from a liability standpoint. If a store uses the best mats in the world, how can a court find fault? If doors or flooring are state of the art, what more would the court have the defendant do? This is powerful stuff-and not too difficult to put together if the defendant has sound practices.

So much for the defences. Let's all start using them! And now let's move on to the really interesting stuff: the counterattacks!

Counterattack No. 1: Cancelling out the Hazard
This is a very powerful process. Here's how it works.

What happens when a charge is laid in that realm? The defence use health and safety experts – highly specialized experts who are equipped to deal with serious issues in the workplace. Who better to bring on board for loss-of-balance cases?

Consider the usual practice in the insurance industry. We use engineers. While engineers are highly useful and very necessary, but they don't go far enough! Of course it is important to know what the friction co efficiency of a kind of flooring, or whether particular premises meet building standards, but this doesn't really touch on the main issue: *are the premises safe?* How many cases have you seen in which one engineer says, for example, that a mat has an unacceptable wrinkle in it, and another says it does not? With respect, that isn't their field.

Look once again at the quasi criminal charges that arise out of health and safety legislation. What happens when a charge is laid in that realm? The defence use *health and safety experts* – highly specialized experts who are equipped to deal with serious issues in the workplace. Who better to bring on board for loss-of-balance cases?

We have put some of these people together in teams with other experts (see Counterattack No. 2) to combine their expertise to attack claims. What the health and safety experts can do is say to the court and the plaintiff, "There is nothing wrong with these premises or this situation. They are safe and they are not a hazard." This not only will take away the plaintiff's "comfort base" but also make a recovery extremely difficult.

Counterattack No. 2: It's the Plaintiff's Own Fault!
This is a fun one! Remember at the beginning of this article, when we considered people's typical reactions to falling?

It's a good idea to actually analyze how and why a fall happens, from a scientific standpoint. As part of a proper loss-of-balance defence process, it is important to put together experts to work with health and safety specialists; they include experts who will analyze the mechanics of the fall, often coming to the conclusion that a plaintiff tripped or lost his or her balance for reasons totally unrelated to the defendant. These people can be teamed up with perception and reaction experts to determine what the plaintiff should have perceived and how he or she should have reacted to the stimulate. The result is usually an inescapable conclusion that the plaintiff was simply not paying enough attention.

Conclusion

To illustrate that the counterattacks work, consider the case of *Desjardins v. Arcadian,* which involved a successful defence by our firm of a loss-of-balance claim against a KFC franchise. The plaintiff had fallen and had blamed her surroundings. By using a team of experts, the defence was able to have the court rule that the premises were not hazardous and that the plaintiff was the author of her own misfortune. This case will soon be reported, and the reasons are available up request.

If this article sounds like a bit of a crusade, it is! I believe it is time for the industry to take stock of the weapons it has at its disposal and to stop the bleeding of indemnity payments, through full investigation and using defences effectively. It not only makes sense, it saves dollars!■

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New Addition to the CURIE Staff

CURIE is pleased to welcome John Breen C.I.P., C.E.T., as the new Manager, Risk Reduction and Loss Control.

John has twenty six years of loss control training and field engineering experience with CGI/IAO. He has taught a variety of loss control courses including Liability Loss Prevention, Special Hazards and Processes, Fire Protection and Basic Hazards.

In his field engineering capacity he has conducted physical inspections on all classes of buildings and sprinkler systems. In this new position he will be responsible for the development, implementation and enhancement of CURIE's risk reduction and loss control activities for our members and to assist member institutions to reduce property and liability losses.

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?? Questions & Answers ??

Q.

a) Can you advise if this piece of equipment (a loaned piece of equipment) is covered under our insurance policy? The value of this piece of equipment is $20,000.
b) Also do our existing policies also cover the item while it is being shipped from the company (in another province) to our campus?
c) Additionally I assume that if a liability incident was to incur while the equipment was being used on campus, that this would also be covered under existing policies.

A.

a) If you are responsible for insuring it, it is covered by CURIE under your property policy. You should add a sentence into the agreement that states the University would be responsible for insuring the equipment. This would be subject to your deductible of course.
b) Yes, the insuring agreement under section 4.1 states "the property of the Insured and of others which the Insured has agreed to insure or for which the insured has assumed responsibility or in which the insured has any insurable interest including all transit exposures and loading, unloading and temporary storage."
c) And yes if somebody was using the equipment and causes a loss for which the university has a claim made against you, the liability policy would respond.

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CURIE UPDATE

CLAIMS HIGHLIGHTS

The CURIE II liability program incurred an unfavourable judgement from the Supreme Court of Canada. The Supreme Court reinstated an earlier Appeal Court decision with a damage award of $840,000 plus interest and costs. There are still 11 open CURIE II files.

The CURIE III claims run-off continued in a favourable trend.

The milder winter across the country resulted in fewer liability claims reported for CURIE IV during the quarter. The elevated property loss frequency trend continued, but with reduced severity compared to the last two years.

Statement of Income and Expenses
For the three months ended March 31, 2006

	2006	2005
Written Premium	$ 19,754,189	$ 16,033,660
EarnedPremium	4,935,647	4,004,953
Less Reinsurance Costs	412,309	745,055
Net Earned Premium	4,523,338	3,259,898
Net Incurred Claims	3,576,859	4,472,125
Net Loss Ratio	*79.08%*	*137.19%*
Underwriting Profit (Loss) Before Operating Expenses	**946,479**	**(1,212,227)**
Operating Expenses	595,360	764,151
Net Operating Expense Ratio	*13.16%*	*23.44%*
Combined Ratio	*92.24%*	*160.63%*
Underwriting Profit (Loss)	**351,119**	**(1,976,378)**
Income from Investment	496,456	382,903
Other Income	1,500	1,500
NET PROFIT (LOSS)	**$ 849,075**	**$ (1,591,975)**

Employee or Contractor

**by Keith R. Gibson, CRM*

Individuals who are hired by local government under a "contract of service" and who qualify as an "employee", may be defined as an insured employee of local government and entitled to insurance protection, as defined by the Municipal Insurance Association of British Columbia Reciprocal Agreement. A self-employed individual hired under a "contract for service" is defined as an independent contractor. An independent contractor is not an insured employee and is not entitled to MIA insurance protection.

A contract alone may not determine an employee - employer relationship and therefore a further analysis may be required, including:

- Common law tests;
- Part-time and casual workers;
- Placement agency workers; and
- Revenue Canada Regulations.

The following four common law tests, based on judicial precedents, are commonly used to determine whether a relationship between an organization and an individual is that of

**Keith Gibson, Risk Manager of Municipal Insurance Association of British Columbia* Reprinted from the April/May 2006 Tidbit Exchange.

"employee – employer". It is important to note that one test alone is insufficient and is not recommended to conclusively determine whether or not a relationship exists.

In addition to the contract the following common law test must be considered:

- Control test;
- Integration or organization test;
- Economic reality test; and
- Specific result test.

The specific result test examines the difference between an employee and someone who is self-employed.

The control test is based on whether or not the employer is in a position to order not only what work is to be done, but also how the work is to be done. The control factor is who holds the ultimate authority or control over the worker. If the employer has the authority to order and direct the worker, the worker may be considered an employee.

The degree of control will vary according to the contracted service and qualifications of the worker. Even if the employee is not directly controlled or works without direct supervision, the dependent factor would be based on if the organization has the ability to exercise control of the service.

The integration or organization test examines the work performed. An independent contractor is an accessory to the organization and is not controlled by the organization beyond the scope of the contract for service. The economic reality test examines four situations: control (as defined above), ownership of the tools of work or production, chance of profit and risk of financial loss. In some occupations it may be normal or acceptable for the employee to provide their own tools. In some cases an employee may provide their own tools such as auto repair or construction or the teaching of handicrafts. In these cases it is especially important to look at all of the factors outlined above. For example if the individual has been retained to teach "pottery" and the instructor provides the pottery wheel(s), provides the class with clay directly sold by the instructor at a profit for the instructor's benefit, the instructor could be deemed "self-employed". If the instructor is hired under contract for a specific period of time and is supervised by a member of staff, for a set remuneration and does not offer to sell other products for profit, the instructor may be deemed an employee.

A self-employed individual would normally supply his or her own tools, equipment and/or other supplies, invest money in the business in anticipation of a profit and would be responsible for the risk of a financial failure. For example the services for instructing a scuba diving class, including the use of air tanks and other related equipment. Although the instructor may receive a flat fee or percentage of registration fees, the instructor is responsible for the cost of equipment and the cost of refilling air tanks. If the equipment is damaged and repaired or replaced or if the cost of refilling air tanks increased, these additional costs would be the responsibility of the instructor and not local government.

The specific result test examines the difference between an employee and someone who is self-employed. No employee-employer relationship will exist where an individual is hired under a contract for service to achieve a specific result. For example a local individual is hired on a contract to under take the cleaning of the facility. The contract for service would preclude the individual from the employee-employer relationship.

Local Government employees who are designated as casual, part-time or summer student employees, are included in the definition of an insured local government employee. An employee relationship exists when the individual's services are at the direction of the

employer for a defined period of time. For example an individual is retained either on an hourly wage or a flat fee, to supervise a daycare drop in, Monday to Friday from 9 a.m. to 11:30 a.m. for 14 weeks during the months of June to August. This individual may be a casual or part-time or summer student employee. If the individual is hired on a contract basis the common law tests outlined previously would apply.

Agencies that provide workers do not constitute an employee-employer relationship between local government and the agency employee. In this type of relationship the employee-employer relationship is between the agency employee and the agency they are retained by.

Revenue Canada is also a resource with regulations and standards used to determine employee and employer relationship. These standards resolve taxation issues and may be used in the analysis of an employee-employer relationship. For purposes of determining an insured employee status, local government should consult the above guidelines and if unsure of an employee's status they may consult with their legal counsel and the Municipal Insurance Association of British Columbia.

In summary an individual hired under a contract of service who is directed and who is controlled by local government, is considered an insured employee of local government. Individuals hired under a contract for service, where the individual is exposed to both financial gain and the risk of financial loss, is not a local government employee.■

This article is for general information only and should not be relied upon in the absence of independent legal advice in any given situation.

DATES TO MARK ON YOUR CALENDAR

September 16 & 17, 2006 **CURIE University & College Risk Management Conference**
Calgary Marriott Hotel, Calgary Alberta

CURIE University & College Risk Management Conference *(Sat. 9-4, Sun 9-1)*

CURIE BOARD UPDATE *by Tony Whitworth (CURIE – Chair)*
LEGAL UPDATE *by A. Pettingill & I. Gold of Cassels Brock*
LAB SAFETY *by J. Kaufman*
BUSINESS CONTINUITY PLANNING *by J. Yip Choy of University of Calgary and R. Dunham of Marsh Canada*
FLU PANDEMIC PREPAREDNESS *by J. Yip Choy of University of Calgary and R. Dunham of Marsh Canada*
STUDENT EVENT RISK MANAGEMENT *by I. McGregor of McGregor & Assoc.*
2005 A YEAR WE DON'T WANT TO REPEAT *by S. Roberts of CURIE and G. Gribbon of FM Global*
Member roundtable discussion (bring your questions &/or problems to discuss with your peers)

REGISTRATION FORMS WILL BE SENT OUT IN JULY TO OUR SUBSCRIBERS. IF YOU WOULD LIKE TO ATTEND BUT DO NOT RECEIVE YOUR FORM, IT WILL BE AVAILABLE ON OUR WEBSITE BY MID JULY. IF YOU HAVE ANY QUESTIONS PLEASE CONTACT TERRY PAGE (905-336-3366) OR E-MAIL (tpage@curie.org)