Claim Case Studies & Legislation
The Case of the Missing Hole

What is a hole? What is a depression? Is it reasonable to have such a depression in light of all the circumstances of a particular situation?

The following case was tried by the Queen's Bench of New Brunswick. The case involved a zoo patron who fell and twisted her ankle after feeding deer in a petting area of the zoo. The central question is if the municipal zoo had taken all available steps and precautions to warn of such hazardous conditions as allegedly were found in the petting zoo area. By presenting this transcript, we hope to show how a judge seeks to match previous cases to the one at hand and what factors, such as regularly documented inspections, benefit a municipality during a trial.

The Allegations

The plaintiff fell in what she described as a "hidden hole" while visiting the municipality's zoo in 1999. Her right foot slipped into a depression in an area where wood chips cover the ground. In the process, she badly twisted her ankle and required medical treatment followed by a period of rehabilitation.

She alleges negligence against the municipality for:

1. Failing to maintain the terrain and grounds of the zoo in proper condition to prevent such accidents;
2. Failing in its duty to take reasonable precautions with respect to the plaintiff by posting notices and warnings so that such accidents could be avoided; and
3. Failing to have in place a maintenance program to avoid such accidents.

The defendant denies liability and stated that the plaintiffs injuries were caused or contributed to by her own negligence, which they described as follows:

1. Failing to keep a proper lookout
2. Failing to wear appropriate footwear
3. Failing to exercise proper care for her own safety
4. Deliberately leaving the walkway, when the plaintiff knew or ought to have known that she would encounter an uneven walking surface
5. Such other negligence as may be found.

The defendant, by way of alternative, pleads and relies on the provisions of the *Contributory Negligence Act* SNB, Chap C-19.

The Setting

On July 18, 1999, the plaintiff, her partner, their three-year-old son and two friends, were visiting the petting area of the municipal zoo at around 2:00 p.m. Each had paid $6.00 to enter this area where visitors are allowed to pet and feed the deer that roam freely. In the enclosed area, visitors walk on a path of hard packed, very fine gravel bordered by 6" x 6" beams.

Beyond the beams, the ground is slightly elevated and is composed of bark mulch, which varies between being 2" and $5^{1/2}$" deep. Below the mulch is hard compacted gravel. Food pellets are available for twenty-five cents from nearby feed dispensers. The deer love the mulch, which they sometimes eat, but often times they use it to lie down since it is softer than the hard ground. This can leave a slight depression, which the staff, during their morning and afternoon inspections, rake over and smooth out.

There is a short fence on the mulch area beyond which visitors are not allowed. The deer retreat there when they want to get away from visitors. It was at this fence that the plaintiff and her party were located immediately prior to the fall. In her testimony, the plaintiff related that they fed the deer at the fence for about 20 to 30 minutes, and then headed back towards the main hard gravel path.

She took 7 or 8 steps and there her foot slipped into a depression in the mulch, and she fell down on her right side, with both feet in the "hole". She immediately felt the pain in her ankle, and thought she had broken her foot. Her friends rushed to the main gate to report the incident and get some help. She eventually got up and made her way to the beams that border the path, and sat down to wait for help. Soon after, staff arrived with a wheelchair and took her to the reception office where ice packs were put on her foot. As she was being wheeled away, she saw zoo staff arrive with an ATV and attached trailer that contained garden tools. She saw an employee rake over the depression and smooth it over.

The plaintiff testified that she did not see the hole and said that the hole was covered over with mulch. She also confirmed that her partner and her friend both had passed over the same area and they did not fall. On cross-examination, she indicated that the surface was softer than the surface of the entry path, and that she was not looking down when approaching the depression. She described the depression as being about 20 inches wide and 12 inches deep. She reiterated that the hole was covered over with mulch.

Her partner testified that he didn't notice the depression, even though he and his son walked right over it or next to it 2 or 3 times when they went to the dispensers to get food pellets for the deer. He said he never saw the hole. He thought the surface was softer than the hard gravel surface of the path, but in some areas the mulch was packed down and almost as hard as the path. He related that he had no apprehensions over his safety when walking on this mulch, and that the depression was "observable". He also stated that he works at a sawmill where he is constantly judging sizes, and that the "hole" was 12 inches in diameter and 8 inches deep, and that it consisted of mulch.

One of the friends who was on this outing testified that she also walked over the mulch to get to the deer, and then back again to get food from the dispensers. She thought the mulch surface was a little softer. She did not see the "hole" because "it was covered with mulch".

For the defense, the Head Zookeeper who is in charge of the animals, testified that he has the responsibility of maintaining the entire area, including the safety of the animals and the protection of the public. He confirmed he has held this position for the past 13 years. The zoo had a written policy (since 1989) stipulating that there are morning and afternoon inspections during which the employees ensure that the area is safe for visitors, that the animals are content, that depressions or indentations where the deer lie are raked over and leveled off, and that the feeding machines are replenished. If there is, what he described as, deer "accidents", they are picked up.

In describing the surface material, he explained that under the mulch there is a further 2" of"tailings", which he described as having a "grass texture", and then there is hard packed gravel, very much like what is found on the pathway. The mulch has a soft texture to it, which means that strollers and wheelchairs are not able to easily navigate on it. He related that the mulch is esthetically pleasing, and is good for the deer and easily available. However, it is not as solid as the hard gravel on the pathway. Occasionally, the deer scratch and dig in the mulch to make a comfortable indentation to lie down or sleep in. In the morning, during inspections, the Head Zookeeper checks the mulch and walks on it and levels out any indentations that are found. The same thing is done during afternoon inspections.

On average, he says the mulch is 4" thick, which is slightly below the level of the 6" x 6" border, which he says is really only $5^{1/2}$" inches.

On the day of the accident, he was called on his radio to attend at the scene with his equipment. He arrived just as his supervisor was also arriving. He testified that he could see a gradual sloping depression where the plaintiff fell. His supervisor directed him to level it off. In his opinion, there was no question that the indentation had been formed by a deer, who had laid there sometime before.

He ended his testimony by stating that since the zoo was opened in 1990, well over one million people have passed through the gates. Children have fallen on the hard packed pathways and scraped their hands and knees but this is the first time in his 13 years that he had seen or heard of anyone hurting themselves on the mulch.

The foreman of the zoo testified that he started with the zoo in 1989 as an animal keeper, and worked his way up to his present position. He became foreman in 1997. His duties are to oversee the daily operations of the zoo, and to make sure that the public is "happy".

On the day in question, he remembers arriving at the scene and seeing the plaintiff sitting on the 6" x 6" beam, and she was obviously in pain. She told him she fell in the "hole" and hurt her ankle. She pointed out the "hole" to him and although he could see the depression, he described it as "nothing major".

After he wheeled the plaintiff to the reception area, and put ice packs on her ankle, he returned to the scene and told the Head Zookeeper to "fix it". This was done with a leaf rake. At this time, it seemed to him the "hole" was a sloping depression, which he described as a 2" slope.

Findings:
Counsel for the plaintiff alleged that the zoo staff failed to properly maintain the area or take precautions to alert the public to the possibilities of slipping and falling on the mulch. He further submitted that the signs should alert visitors to the possibility of slipping on the mulch.

However, the preceding judge held the view that the indentation in the mulch was plainly visible. It was a sloping depression approximately 6 to 8 inches deep and one foot in diameter. The plaintiff and other people in her party had walked over it, or near it, several times when they initially went to pet the deer, and when some members went to get food pellets at the dispenser. The two witnesses, who testified on the plaintiffs behalf, walked over that same area and did not notice the depression prior to the fall.

When she turned back to return to the pathway, the plaintiff was accompanied by the other members of her party. No one blocked her view of the terrain. She simply did not look down to check the ground over which she was walking. She was aware that it was soft and irregular, and should have known that her sandals (with 2" heels) did not provide a steady footing. Taking all of this into consideration, the judge indicated that he was not able to accept Counsel's argument that the plaintiffs fall resulted from stepping into a "hidden trap" nor was he satisfied that she was oblivious to the perils of soft and uneven ground.

The plaintiff had the onus of proving that the zoo staff was negligent. People who are aware or should be aware of common and ordinary perils have an obligation to take reasonable care in assuring their security. (*Papadopoulos* v. *TDL* [1997] NBR (2d) (Supp.) No 114)

As to the defendant's responsibility, *Lanteigne* v. *NB Liquor* [2002] NBR (2d) (Supp) stipulated that occupants who accommodate members of the public must be able to show that reasonable measures have been taken to insure the security of those who use their premises. This includes putting in place a reliable and adequate system of inspection in accordance with the circumstances.

In this case, the zoo staff carried out two inspections a day, and submitted the records into court to show that the inspections were carried out on the day of the accident.

In a case similar to this one (*Thompson* v. *Quispamsis* [1997] NBR (2d) (Supp.) No 120), the plaintiff was playing softball on a playing field owned by the defendant municipality. She caught her foot in a "hole" and broke her ankle. She claimed negligence on the part of the municipality for its alleged failure to inspect the field. Justice McLellan found that regular inspections of the playing field were carried out, and this field in particular had been inspected before the game. At paragraph 16, he said:

> However, a hole in a ball field concealed by grass is not necessarily enough to support a finding of liability. An Ontario judge who dismissed an Ontario action by a soccer player who fell in a hole concealed by grass, said:
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> > "The municipality is not an insurer and considering all the circumstances where I think the inspection procedures were adequate and reasonable" *Longo* v. *Thorold* (City), [1998], OJ No 819.

Paraphrasing the case of *Brown* v. *British Columbia* [1994] 1 SCR 420, Justice McLellan went on to describe that the duty of a municipality to carry out inspections was subject to reasonable limitations. At paragraph 25:

> That the duty to maintain would extend to the prevention of injury to users of the [ball field by the presence of holes]. However, the Department is only responsible for taking reasonable steps to prevent injury. [Holes and depressions are] a natural hazard of [ball fields]. [They] can form quickly and unexpectedly, [especially in the batter's box]. Although it is an expected hazard it is one that can never be completely prevented. Any attempt to do so would be prohibitively expensive. It can be expected that a Department of [Recreation] will develop policies to cope with the hazards of [holes in ball fields].

The same can be said of deer that choose to lie down in the mulch and make small depressions. Although regular inspections are carried out, it is unreasonable to expect zoo staff to follow each deer around with a leaf rake in order to smooth out the depressions they make.

See also *St. Anne* v. *Hamilton* [2001] OJ 1807 (Ont Sup Ct) where another softball player slipped on goose excrement and hurt himself. The Court stated at paragraph 20:

> The evidence before me indicates that none of the players on the field had any difficulty with their footing in the outfield and that none of them considered the conditions to be hazardous, and that no player other

than the plaintiff, purported to slip on goose excrement and inure themselves. It would also appear that no one complained about conditions being unsafe for the playing of slow pitch on that particular diamond.

In *Martin* v. *Powell River*, [2002] BCSC 24 (SC), the plaintiff twisted and broke her ankle while training on a softball field when her foot struck a hole of 2 to 3 inches deep, which was not apparent. The Court found that the "hole" was really only uneven terrain, and that regular inspections had not determined that particular spot as being hazardous. The Court rejected the claim and concluded, at paragraph 45:

> Considering all of the evidence before me, I cannot conclude that the District failed to take such care as was reasonable in all of the circumstance to see that persons using the Gordon Park for a baseball practice were reasonably safe. It was a multi-purpose field between sports seasons. There had been weekly inspections by the Parks Manager, the last being three days previously. The grass had been cut five days before. All staff inspected the field for holes and other hazards whenever they worked one or inspected it. The grass cutter noticed nothing to cause concern. There had been other maintenance work done on the field recently.
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> The field was known to have depressions and an uneven surface. The depression identified by Ms. Junek and Ms. Kinley was slight and not out of the ordinary for this field. The field was considered safe by everyone and did not pose an obvious hazard or unusual risk. There had been no injuries reported as a result of the condition of the field. The maintenance schedule was reasonable given the time of year and changing use of the field. There is no evidence that the schedule was not carried out. The District was not an insurer of safety against all risks. Reasonable steps were taken to keep the Gordon Park field safe for baseball.

The judge concluded by stating he would adopt the same reasoning in this case. The depression left by the deer did not pose an unusual risk to visitors in the petting zoo. It is not to be expected that surfaces in such an area would not necessarily always be even, and indeed might be expected to be uneven. The mulch, being soft, would alert the average visitor to take extra precaution to ensure a solid footing. That, in addition to the regular inspections that were carried out, convinces this Court that the defendant was not negligent in this case.

The plaintiffs claim is dismissed, but in the circumstances, without costs.

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