WHEN TIGERS ATTACK

Submitted by:

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Bengal Tigers are ferocious carnivores. They typically weigh 250 kilograms and stretch (from head to tail) to about 3 metres in length. In the wild, they hunt medium and large sized animals such as wild boar, deer and water buffalo, generally overpowering their prey by either severing the spinal cord or applying a suffocation bite.

On a warm spring day in April 1996, our client, Jennifer Cowles, was in the passenger seat of a Honda Prelude, which her boyfriend David Balac was driving at a leisurely pace through the African Lion Safari (ALS), just outside of Hamilton.

Suddenly and without any warning, Paca, a female Bengal Tiger, attacked the small car. Paca was soon joined by two more tigers which, between them, severely mauled Jennifer and David.

******INSERT PHOTO OF PACA**

In the fall of 2004, Madam Justice MacFarland (as she then was) presided over a trial that dealt with the issues of duty of care, occupiers liability and strict liability.

Justice MacFarland found that, in the violence of Paca's initial attack on the car, David Balac's arm (or some other part of his body) came into contact with the power window switches causing the unintentional lowering of both the passenger and driver's windows, allowing the tigers into the car. She found ALS liable in both strict liability and in negligence for the horrendous injuries suffered by the plaintiffs.

Madam Justice MacFarland's decision[1] was appealed unsuccessfully to the Ontario Court of Appeal.[2] In March 2007 the Supreme Court of Canada denied ALS' application for leave to appeal.

Although the media focussed on the profession of our client and the horrific circumstances of the attack, the case raised a number of interesting and important legal issues.

1. Claims Founded in Negligence

The design of the African Lion Safari park made ALS a neighbour to persons who visited the park so the principles set out in *Donahue v. Stevenson* applied. ALS was under a duty to take reasonable care to avoid acts or omissions which it could reasonably foresee would be likely to injure its visitors.[3]

The duty of care which applies to the owner or keeper of wild animals was found to be commensurate with the very high risk inherent in that activity; the more dangerous the animal, the higher the duty of care.[4]

In the Cowles case, not only was the risk of the type of accident which happened predictable on ordinary principles of foreseeability but, in fact, two such incidents had occurred in the three years prior to the Balac/Cowles attack. ALS therefore must be said to have contemplated and foreseen the further occurrence of such an incident. Alternatively, the occurrence of those prior incidents shifted the onus of proof onto ALS to show that there was no reason to anticipate the occurrence of a subsequent similar incident.[5]

At trial the plaintiffs argued that even if the trial judge accepted the ALS position that Jennifer's window was open at the commencement of the attack, there was still ample evidence to support a finding of negligence on the part of ALS.

A prudent man will guard against the possible negligence of others when experience shows such negligence to be common.[6]

At ALS it was well known to all staff and management that visitors opened their windows in the carnivore sections on a daily basis and that doing so was common practice, notwithstanding the presence of signs and warnings not to do so. In fact, photographs were admitted at trial showing visitors with their windows open in the tiger compound.

In cases involving highway authorities, it has long been an accepted principle that the authority must provide not merely for model drivers, but for the normal variety of drivers to be found on their highways, including those who make mistakes and are guilty of errors of one kind or another.[7]

It is an established principle in Canada that damages are recoverable if, despite intervening negligence of a third party, the tortfeasor should have seen that negligence and guarded against it.[8]

The Ontario Court of Appeal has clearly stated that even foolhardy conduct, such as a pedestrian's attempt to cross a heavily travelled highway, must be anticipated and guarded against if the previously observed conduct of the pedestrian has created a "distinct possibility" of his making that foolhardy attempt.[9]

In the Cowles case, we argued that ALS was negligent in failing to adequately separate the tigers from the visitors' cars and by failing to adequately train staff in the monitoring of animals and visitors about how to respond to emergency situations.

Gellie v. Naylor[10] stands for the proposition that the greater the risk, the more tentative must be the assumption that others will conduct themselves with reasonable care. In the Cowles case the consequences of a visitor lowering his or her window in the tiger section were well known to ALS as carrying a very high risk of serious injury or death. Accordingly, there was a very high duty on ALS to take every reasonable measure to guard against that risk – particularly when the measures that were available were simple, inexpensive and well within the power of ALS to implement without any difficulty or substantial interference with its operations.

That said, the evidence which the trial judge accepted was that the tigers themselves caused the windows to open. When Paca repeatedly struck the car in her attack, she caused David Balac to stall the car. In those chaotic moments, it was found to be most likely that he touched the automatic window button, opening the window slightly and giving the tiger a chance to press down and open it fully.

The simple and inexpensive placement of a two or three strand electric fence between the tigers and the visitor's cars would, in the opinion of Robert Lawrence (the plaintiffs' expert), have prevented the attack on the vehicle with minimal impact on any visitor's "safari experience". Justice MacFarland found that the training of staff to maintain a view of the tigers at all times and to maintain surveillance of visitor vehicles would have enabled them to intervene immediately in an emergency and would likely have curtailed the attack on Cowles and Balac.

2. Occupiers Liability

> "Tigers are attracted to motor vehicles. They will lurk around them, jump on them and habitually bite vehicle tires. Given the well-known propensities of tigers as extremely quick, vindictive and unpredictable, they are in a class of dangerous animals all of their own. The exposure of the public is fraught with danger." (from the report of Robert Lawrence, plaintiff's expert witness, as quoted by Justice MacFarland).

The goals of the *Occupiers' Liability Act* are to promote and in fact require, in appropriate circumstances, positive action on the part of occupiers to make their premises reasonably safe.[11]

Section 3(1) of the *Occupiers' Liability Act* frames a general duty of care for the occupier of property to take reasonable care in the circumstances to make the premises safe. The Supreme Court of Canada in *Waldick v. Malcolm* considered that duty in the following words:

> ...the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation – thus the proviso "such care as in all circumstances of the case is reasonable".[12]

In the *Waldick* case, the defendants argued that it was not a local rural custom to salt and sand driveways. The Court specifically found that a general local custom of not salting or sanding driveways did not excuse the defendant for failing to do so if it was reasonable in the circumstances to have put down salt or sand.[13]

In our case, the fact that ALS could point to several safari parks in other parts of the world which displayed tigers in generally the same manner as ALS, did not excuse inadequacies in that form of display if found to exist "in all the circumstances". In the words of Mr. Justice Iacobucci:

> In short, no amount of general community compliance will render negligent conduct "reasonable ... in all the circumstances".[14]

Section 4(1) of the Act provides an exception to the duty of care provided in s.3(1), in respect of risks willingly assumed.

Exceptions to the duty of care created by s.3(1) of the Act are very narrow and the circumstances to warrant the application of s.4(1) will be few and far between. In Justice Iacobucci's words:

> In my view the legislature's intention in enacting s.4(1) of the Act was to carve out a very narrow exception to the class of visitors to whom the occupier's statutory duty of care is owed. This exception shares the same logical basis as the premise that underlies volenti, i.e. that no wrong is done to one who consents. By agreeing to assume the risk the plaintiff absolves the defendant of all responsibility for it": per Wilson, J. in Crocker, supra at p. 1201. Rare may be the case where a visitor who enters on premises will fully know of and accept the risks resulting from the occupier's non-compliance with the statute.[15]

In the Cowles case, ALS posted a sign and printed a brochure with a very broad statement purporting to transfer "risk" of entrance to the park to visitors. Justice MacFarland found that those statements had not been brought to Jennifer and David's attention and, in any event, did not

support the conclusion that the plaintiffs "genuinely consented to accept the risk of the defendant's negligence".

In *Crocker v. Sundance*, the Supreme Court of Canada found that even a signed waiver form purporting to transfer the legal risk of participating in the snow tubing contest was insufficient to support the contention that Crocker had voluntarily assumed the legal risk of his conduct.[16]

In reviewing the circumstances of each particular case, the Courts will consider the nature of the activity being carried out on the property. In *Kennedy v. Waterloo County Board of Education* the Ontario Court of Appeal adopted the words of Lord Denning in *Pannett v. McGuinness & Co. Ltd.* [1972] 3 W.L.R. 387 with approval:

> The long and short of it is that you have to take into account all of the circumstances of the case and see then whether the occupier ought to have done more than he did. (1) You must apply your common sense. You must take into account the gravity and likelihood of the probable injury. Ultra hazardous activities require a man to be ultra-cautious in carrying them out. The more dangerous the activity, the more he should take steps to see that no one is injured by it.[17]

ALS was the only facility in Canada which displayed large African and Asian cats in a drive through display.[18]

The activity being carried out on ALS property fell into the category of "hazardous" or "ultra-hazardous" requiring that ALS be "ultra-cautious" in carrying out that activity.

We argued that negligence principles of foreseeability apply to the interpretation of the duty under the *Occupiers' Liability Act*. In *Cox v. Marchen*, Justice Robertson found that an injury may be reasonably foreseeable by an occupier despite the fact that the negligent condition has caused no previous harm.[19]

In our case, ALS argued that no previous serious injury had been caused in the previous attacks on visitors' cars by tigers at their park. Leaving aside the issue of the inadequacy of the records available to us to test that proposition, we argued that it was clearly foreseeable to staff and management at ALS that serious injury was possible as a result of their method of display of tigers creating a positive duty under the Act to take steps to prevent that risk to visitors to the park.

An occupier should be alerted by previous similar incidents of harm or potential harm resulting from unsafe conditions on its premises. The Act places a positive duty on the occupier to take steps to respond to knowledge of unsafe conditions.[20] ALS knew of many previous attacks on visitors' vehicles, albeit without any recorded injury (other than the occupants' terror).

One of the circumstances that the Court will consider in determining if an occupier met its duty under s.3(1) of the Act is the relative ease and expense in taking steps to render the property or activity safer. Where corrective action can be taken easily and cheaply to eliminate or reduce the hazard, the Court may find that the occupier was in breach of his duty of care "in the circumstances of the case".[21]

In the Cowles case, ALS admitted that the placement of a two or three strand electric fence between tigers and visitors' cars as well as the building of a double gate system and surveillance

towers would have been modest expenses in relation to the overall operating budget of ALS. Clearly the ease and relative low cost of the steps recommended by Mr. Lawrence could easily have been undertaken by ALS after the first or second incident in which tigers entered visitors' vehicles in 1993 and 1994. Interestingly, in her reasons for judgment Justice MacFarland focussed on the inadequacies in staff training and emergency response rather than on the substandard design of the facility as the major contributing cause of the tiger attack on Jennifer and David.

3. Strict Liability

As the trial judge found:

> In its Safari Mission Statement, African Lion Safari states: "Our manner of exhibiting animals is completely different from the traditional approach; that is, the visitor is caged in a vehicle, and the animals roam in 2 to 20 hectare reserves. This approach stresses activity in captivity."[22]

It was the submission of the plaintiffs at trial that a keeper of dangerous animals such as Bengal Tigers is strictly liable for damage caused by that animal, without regard to issues of fault.

The courts have traditionally distinguished between two classes of dangerous animals: animals like cows, dogs and horses in respect of which the plaintiff must demonstrate that the particular animal was dangerous and that the defendant knew or had reason to know of the danger (subject to special legislation such as Ontario's *Dog Owners Liability Act*[23]) and animals such as bears, tigers and lions which are never regarded as safe and in respect of which liability ought to attach for harm they may do without further proof.

In the Cowles case the concept of strict liability on the facts found by the trial judge was not significantly challenged on appeal. Instead, ALS argued that any assessment should be discounted by the plaintiffs' own contributory negligence or, alternatively, on the basis that that the plaintiffs had voluntarily assumed the risk.

The plaintiffs argued that the Supreme Court of Canada decision in *Boma v. C.I.B.C.*[24] had resolved the question of the availability of the defence of contributory negligence to strict liability torts. The trial judge was of the same view. In paragraph 139 of her decision, she stated:

> It seems to me contradictory to call the defendants strictly liable – i.e. whether negligent or not – and then to consider a plaintiff's contributory negligence.[25]

More significantly, in her reasons for judgment the trial judge found that the evidence taken as a whole did not support a finding of contributory negligence by the plaintiffs.

The Court of Appeal (at page 681) did not feel it necessary to weigh in on this ground of appeal since the trial judge found no contributory negligence.

Professor Fleming in the Law of Torts (9th Edition) states:

> The hallmark of strict liability is therefore that it is imposed on lawful, not reprehensible activities. The activities that qualify are those entailing extraordinary risks to others, either in the seriousness or frequency of the harm

> threatened. Permission to conduct such an activity is in effect made conditional on its absorbing the costs of the accidents it causes, as an integral part of its overhead.[26]

There is judicial support for Professor Fleming's approach in *Bazley v. Curry*[27] and *Marfani & Co. Ltd. v. West Midland Bank Ltd.*[28]

That said, it is arguable that the defence of voluntary assumption of risk might still be available to defendants. However, as the Supreme Court of Canada in *Crocker v. Sundance*[29] found, that particular defence only applies in situations where the plaintiff assumes both the physical and legal risk involved in the activity. As a consequence, it is a rarely invoked defence. In the *Crocker* case itself, the defendants failed even though the plaintiff who rode the inner tube had signed a release of sorts in favour of the defendant. In the Cowles case, the warnings posted on signs near the entrance to the African Lion Safari park fell well short of the test to establish that the plaintiffs had assumed such risks.

Summary

Notwithstanding the unusual facts and interesting issues of law in the Cowles case, it is ironic that it may be best remembered for Justice Borins' disposition of the question of whether it is proper for defendants' investigatgors to interview plaintiffs who are represented by counsel. In his words:

> In my view, having placed these factors (her injuries) in issue, it would be reasonable for Cowles to assume that ALS would investigate her claim, in the course of which it might hire an investigator to make observations of her activity and, if possible, to converse with her if she agreed to do so.[30]

Plaintiffs and their counsel be warned!

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[1] [2005] O.J. No. 229;
[2] (2006) 83 O.R. (3rd) 660;
[3] *Donahue v. Stevenson* [1932] A.C. 562 (H.L.);
[4] *Maynes v. Galicz* (1975) 62 D.L.R. (3d) 385 (B.C.S.C.);
[5] *The Queen v. Cote* (1975) 51 D.L.R. (3d) 244 (S.C.C.) at p. 7 Q.L.;
Gellie v. Naylor (1986) 55 O.R. (2d) 400 (Ont. C.A.) at p.3 Q.L.;
Gilchrist v. A. & R. Farms Ltd. [1966] S.C.R. 122 at p.5 Q.L.;
[6] *Grant v. Sun Shipping Co. Ltd.* [1948] A.C. 549 (H.L.) at 567;
[7] *Rider v. Rider* [1973] Q.B. 505 at pp. 515–516;
Tonrud v. French (1989) 64 D.L.R. 14th 409 (Man. C.A.) at p.5 Q.L.;
[8] *Martin v. MacNamara Construction Company Limited & Walcheske* [1955] O.R. 523 (Ont. C.A.) at p. 4;
[9] *Gellie v. Naylor* (1986) 55 O.R. (2d) 400 (Ont. C.A.) at p.3 Q.L;
[10] *Gellie v. Naylor*, ibid;
[11] *Waldick v. Malcolm*, [1991] 2 S.C.R. 456 at para. 45;
[12] *Waldick v Malcolm*, supra, at para. 33;
[13] *Waldick v. Malcolm*, supra, at para. 35;
[14] *Waldick v. Malcolm*, supra, at para. 35;
[15] *Waldick v. Malcolm*, supra, at para. 48,
[16] *Crocker v. Sundance Northwest Resorts Ltd.* [1988] 1. S.C.R. 1186 at para. 35;
[17] *Kennedy v. Waterloo Board of Education*, 45 O.R. (3d) 1 (Ont. C.A.) at p. 9 Q.L.;
[18] Plaintiffs' Discovery Read-In Brief, Tab A, Qs. 834-835;

[19] *Cox. v. Marchen* [2002] O.J. No. 3669 (Ont. S.C.) at para. 37;
[20] *Blondeau (Litigation Guardian of) v. Peterborough (City)* (1998) Carswell Ont 3385 (Ont. S.C.) at paras. 59-60;
[21] *McCrindle v. Weston Ltd.* [1985] O.J. No. 667 at para. 15;
[22] Trial Judgment, para. 133;
[23] R.S.O. 1990, Chap. D.16;
[24] *Boma v. C.I.B.C.*, [1996] S.C.J. No. 111;
[25] Trial Judgment, para. 139;
[26] J.G. Fleming, The Law of Torts (9th) (1998) at p. 370;
[27] *Bazley v. Curry* (1999) 174 D.L.R. (4th) 45;
[28] *Marfani & Co. Ltd. v. West Midland Bank Ltd.* [1968] 2 ALL E.R. 573 (C.A.) p. 577;
[29] *Crocker v. Sundance*, supra
[30] *Cowles v. Balac* (2007) 83 O.R.(3d) 660 (C.A.) at p. 713