

INSIGHT

J. Murray Davison, Q.C.

Current Position: Senior Partner
Paterson MacDougall LLP.

Legal Specialty: Municipal liability

Legal Experience:

1969 – 1996: Bassel Sullivan Holland and Lawson / Bassel Sullivan Leake and Davison – associate lawyer / partner

1996 – Present: Paterson MacDougall – senior partner

Education:

- B.A. and B.Ph., University of Ottawa (1964)
- LL.B., University of Toronto (1967)
- Admitted to bar 1969

Author:

- Co-author of "The Law of Municipal Liability in Canada"
- Contributing editor to Butterworths Municipal Liability Risk Management Newsletter

Born: Ottawa

Home: Toronto

Family: married to Margot; 5 children (only one of whom is a lawyer); 5 grandchildren

Hobbies and Interests:

commercial pilot, ski pro
(life member Canadian Ski Instructors Alliance),
golf, and hiding out on a little island in Lake Muskoka.



INTERACTION WITH MURRAY DAVISON

Murray Davison has been practising law for almost 40 years and is an acknowledged expert in municipal liability cases.

We talked to him in his office in Toronto about his career, his work with OGRA, and how municipal liability law can affect municipalities today.

How did you get interested in the law?

I kissed the Blarney Stone when I was 11, which may be part of it. I always enjoyed discussing and debating things. In fact, my wife Margot in desperation gave me a T-shirt that says: "Help. I'm talking and I can't shut up."

I graduated from St Michael's College in 1961 along with such luminaries as Dave Keon and Gerry Cheevers (it was good to see the Leafs win the Stanley Cup three times with my friends on the team) but I wasn't sure what I wanted to do so I went back to Ottawa to get a broad undergraduate education.

I was leaning toward the idea of becoming a commercial pilot. I had my license but as they say about flying: "it's hours of boredom interspersed with blinding flashes of terror." I decided I didn't want to spoil my enjoyment of what has become a lifelong interest by making it a job.

It was trailing after Gordon Henderson, a family friend and one of the pre-eminent lawyers of the time, as a summer



Murray fishing off the Florida Keys

student at Gowlings that really helped make up my mind. I decided to become a lawyer, did my law degree at the University of Toronto and was called to the bar in 1969.

Your specialty is municipal liability law. How did you end up in this field?

After I was called to the bar I joined the law firm of Bassel Sullivan.

John Bassel was a friend of Frank Cowan who was the president of the Frank Cowan Company and they had a joint interest in The Guarantee Company of North America, which was at the time the largest municipal insurer in the province, so I cut my teeth on municipal cases.

Then in 1969 you left Bassel Sullivan and joined Paterson MacDougall. Why the switch?

By 1969, most of the firm's founders had either retired, gone to the bench or passed away and I was the senior litigation partner. I wanted to be a lawyer not an administrator so I wound up the firm and with my team of lawyers joined Paterson MacDougall, which provided an easy going platform where we could do what we are good at and have more fun.

What makes municipal liability cases " more fun"?

There is always plenty of legal activity and local government has always been the most vital of all the political levels. That's where you see the political machine running and I found the field fascinating.

People see municipalities as targets because of their deep pockets. They say you can't fight city hall but you can and the biggest area of exposure is road liability.

When I started there was hardly anyone else in the field and we acted for municipalities from one end of the province to the other.

How many municipalities do you currently represent?

We represent 20 to 25 municipalities at any given time these days, mostly around the Greater Toronto Area. Some years we will close up to 200 files. Other years, three or four major cases will eat up the entire calendar.

I miss the good old days when the cases were smaller and we had portfolios across the province. My pilot license came in handy. I could fly up to Sudbury one day and then turn around and be in Ottawa the next.

Cases today are bigger, more intense, and require much more preparation. There are days when you keep going for 12 to 14 hours straight and by the time it is over, win lose or draw, you need a break.

What are some of your more memorable cases?

There have been thousands of cases over the years but probably my most memorable was the McErlean case in 1987.

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A 14-year old boy named Michael McErlean collided with a friend while racing on his motorized trail bike in an abandoned gravel pit. Michael suffered a catastrophic brain injury. Even though the city of Brampton hadn't as yet assumed responsibility for the property, it had legal title to the property under a subdivision agreement and so Michael's family sued the city for personal injuries. The trial judge ruled that the city was 75 percent at fault and awarded Michael over \$7 million. This was the largest personal injury award in Canadian history

and it set the insurance world on its ear, even making the cover of Time magazine.

Gordon Henderson, my mentor from Gowlings, helped me argue the appeal. The Court of Appeal overturned the judgement, finding that the two boys were equally liable and absolving the city of responsibility. The Supreme Court of Canada refused the plaintiffs leave to appeal and the case thus became the biggest Canadian victory in history.

Are there any other cases that stand out?

I have been fortunate to be involved in other major cases as well.


I acted for Shell Canada in the Mississauga train derailment incident in 1979. There was some litigation involved but the case morphed into a much broader inquiry into rail safety – and that sort of thing is so huge and so intense that it grinds your practice to a halt. I also represented municipalities involved in the Hagersville tire fire in 1990, which kept us occupied for quite some time.

The Mississauga Hilton suit was another interesting case. When engineers found that a recently built addition to the hotel was in imminent danger of collapse, the hotel sued the city because it had approved the structural plans. The court found that the municipal building department had done the necessary review and was not responsible for the structural integrity of the building.

Another significant case was MacMaster versus York Region (a case that ended up in Reader's Digest). Hugh John MacMaster left a party one night but never arrived home. It was his brother who found him a couple of days later. John's car had gone off the road and down an embankment leaving him severely injured and trapped hanging upside down in the car. MacMaster sued the municipality for his injuries but was unsuccessful. The judge ruled that despite the plaintiff's catastrophic injuries, just because an accident happens on a road it does not mean that the road authority is automatically at fault.

You have had a long-standing association with Ontario Good Roads Association.

OGRA has been a part of my career right from the beginning when as a young lawyer I went with John Bassel and Frank Cowan to its annual conference.



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I have always been impressed with the work that OGRA does and the enormous clout that it has. Politicians pay attention to what it has to say and that makes it a very meaningful association.

You have also done a lot of work with OGRA on minimum maintenance standards.

In 1996, in response to mounting municipal concerns, the provincial government enacted legislation that gave the Minister of Transportation the power to establish minimum standards for the repair and maintenance of bridges and roads. A municipality would no longer be liable for claims arising from the state of repair of the highway or bridge if it met the minimum standards established under the Act.

A committee with broad representation from the municipal, legal and engineering communities (including OGRA) drafted the new minimum maintenance standards and they came into effect in November 2002. I taught OGRA courses on the minimum maintenance standards across the province at that time.

We are now involved in the next phase. MTO has asked OGRA to review the standards, something that according to

the act has to be done every five years, and make recommendations for any changes. I helped Frank Hull, OGRA's technical director, put together a task force and we have been working on that for the last year - another example of how OGRA is in an enviable position to influence some of the decisions that are being made.

Do you have any advice for municipalities based on the minimum maintenance standards?

Particularly with the changes that the task force has recommended to the ministry, the minimum maintenance standards provide an excellent shield against liability claims. In order to get the benefit, you must be able to prove you met the standard and the only way that you can do that is to keep records. There is no point doing the work to meet the standard if you don't do the work to prove that you did it.

But even that will not protect municipalities from liability claims. Are we heading toward a more American style litigious society?

As you can see in the McErlean case and many others, awards are getting bigger and claims are becoming more frequent.

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Murray and his wife, Margot, in Waikiki

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I would suggest that the public's claims awareness is more acute than it was in the past. Forty years ago, if someone tripped and fell they would pick themselves up and say: "I need to be more careful." Now they look around for someone to blame.

We haven't reached U.S. levels yet but Canadian plaintiff lawyers can now act on a contingency basis, which is bound to increase litigation.

U.S. lawyers seem to get away with a lot more histrionics in front of juries. Here the judiciary controls the case more and that is a good thing. It is important, however, to remember that our judges are human too. If you look out into your courtroom and on one side you see a family destroyed because their child is in a wheelchair and on the other side there is an insurance company with a huge policy limit, your job becomes extremely difficult.

As an advocate, does that same sympathy factor ever bother you too?

My job is to put the case before the court as fairly and as forcefully as I can. In our criminal system, whether a defendant is innocent or guilty, he or she has the right to be defended. It is up to the crown to prove its case and the integrity of the system is all-important.

It doesn't apply in quite the same way in civil cases but my job is to be an advocate on behalf of my client, as difficult as that sometimes can be, especially when you have children of your own.

I remember one case where in a matter of seconds the teenaged plaintiff had gone from being the fastest skater in his hockey league to being confined to a wheelchair for the rest of his life. He reminded me of one of my own sons. It was God-awful and it can't help but affect you.

Somewhat surprisingly, the family usually respects the position that you are in. I often talk to the plaintiffs and express my sympathy for their situation. I have experienced very little animosity. They seem to understand that I am doing my job.

What else should municipalities do to protect themselves from liability claims?

Just when you think you have seen everything, someone will come up with a new way to injure themselves and the first place they are going to look for compensation is the entity with deep pockets. Even with the protection of a large insurance policy a finding of liability

will come back to bite you in the form of higher premiums in the future.

Risk management has become the name of the game and that means doing more than just having adequate insurance. It means actively assessing risks and taking whatever steps are needed to rectify problems. When the Mississauga Living Arts Centre was being built, for example, we had a regular risk management tour to see if any problems jumped out at us.

And from a personal viewpoint, after almost 40 years practising law, do you still find it fun?

Yes. I must admit that some mornings trudging up the court house steps I look up and see a contrail at 40,000 feet and wonder if I made the right decision. But as much as I love flying, I believe I made the right choice.

I have been fortunate to have had a lot of great support, especially from my wife and family. My secretary retired a few weeks ago after assisting me for 34 years. My law clerk, Bill Irwin, has been with me for 37 years. People say I must have been a great boss but in truth I am just lucky to have had such great people to work with.

Working in litigation can become an all consuming job and that is not good for anyone – you, your client or your family. I remember telling Bill Irwin years ago that it was his job to make sure that we spend the least amount of time possible in the office. Bill came through and that's what keeps it fun. **M**

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