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 FEEDBACK

**War of the Woods – Liability at heart of the issue**

**By Justin Beddall**  
*Jun 02 2005*

Mountain biking is an inherently dangerous sport. But does that make the District of North Vancouver liable if a mountain biker is seriously injured while riding dangerous stunts on their land?

David Hay, a personal injury lawyer who specializes in cyclist injuries, says changes to the Occupiers Liability Amendment Act in 1998 have limited the duty of care owed by landowners to the uninvited public — in this case, mountain bikers using trails built in the District.

Hay, who wrote a paper for last year's North Shore World Mountain Bike Conference entitled *Occupiers Cyclists and One-Eyed Jacks: The Wild Game of Occupiers Liability*, believes the District's concerns over legal liability (see: *Dismantling of the Watchumacalit*) may be overblown, but adds this caveat.

"Clearly the North Shore is a mecca for cyclists and it's probably one of the better places in the world to pursue that activity, and it's gaining a national and international reputation for some of the best cycling terrain around," he said. "There's a lot of rogue builders up there, there's a lot of people taking it upon themselves to create the most monstrous hazard they can build and whenever that occurs within the legal jurisdiction of the District they're going to get concerned.

"From an injury perspective, from a danger perspective, from anything but a legal perspective, they ought to be concerned."

Hay, a veteran lawyer, noted that an orthopedic surgeon who sat on last



Rob Newell

**Personal injury lawyer David Hay specializes in cyclist injuries.**

year's mountain bike conference panel said there's been a spike in the number of serious injuries related to mountain biking. And that's something that should trouble District officials — and not just from a legal point of view. “[The doctor] is seeing a real increase in the number of serious bodily injuries coming from the North Shore mountains,” explained Hay, who noted that cases are underreported “because typically there's no tort fees, or other words, no one to be sued. It never becomes a matter of public record, it seldom makes it to the press.”

Hay noted that the creation of the Trans Canada Trail helped to create new legislation in 1998 that ultimately deflects liability away from municipalities and other owners of rural properties and trails.

“At least at this time, there seems to be sufficient legislative protection against liability and that really was the purpose of the amendments to the Occupiers Liability Amendment Act,” he explained.

“That was a big part of the push and lobby. You know in order for there to be a Trans Canada Trail a lot of private and public land owners had to sign on to this ... they had to basically allow people to cross their land and, of course, their concern was liability. So the legislature addressed that and said if people are pursuing a recreational activity on rural lands that are properly marked as such then they're basically treated as trespassers, not in the sense that they're run off the land with a shotgun but in the sense that if something happens to them they have the same remedy against the landowner as a trespasser does, which really has none.”

Under the new amendment, cyclists who injure themselves while riding on North Shore trails will likely be treated as trespassers, meaning that any person entering a vacant or undeveloped rural premise or recreational trail for recreational purposes is deemed to have willingly accepted the risks. In this case, the District duty is limited to not “create danger with intent to do harm to the person or damage to the person's property; or act with reckless disregard to the safety of the person or the integrity of the person's property.”

Still, that doesn't mean the District is immune from prosecution, Hay said. “You can never completely have a sound night's sleep as someone who is a District or public authority. The simple reason is if you get sued in our free and democratic society you may have a successful defence on the merits and you may get the case dismissed but it still costs you money,” he explained. “It doesn't stop lawsuits from being brought. From just the perspective of getting sued unsuccessfully, the District might be concerned that it's still going to have to defend a lot of these cases, which it could do, and likely have dismissed but it's still a cost. I don't think in my view that would be a huge concern. If someone came into my office and said they were on the North Shore trails and they had gone off a rogue jump and landed improperly and a serious injury resulted I would tell them that the legal battle is probably steeper than any trail they've ever been on in terms of the prospects of success,” he said.

A recent case in Parksville, B.C. caused by a serious biking accident in 1999 was the first lawsuit that tested the 1998 amendments to liability.

The defendants, the municipality of Parksville, ultimately wanted the claim dismissed because their land fit the definition of rural. The judge agreed, and went on to comment that land on the outskirts of urban areas, like the North Shore mountains, fall under the term “rural premises” under the Occupiers Liability Act.

“That case does apply because the judge hearing the case did say the North Shore lands would be caught. It's the only case in B.C. that has considered the application of the amendments to the act to the North Shore mountains, so it's an important case from that perspective. The judge actually said that in his view the North Shore mountains would come within the excluded definition under the act. But that's not binding [because] when he said that it was not integral to his decision.”

But, on the other hand, Hay said the judge's comments could easily influence future decisions.

“It all comes down to the occupier's liability amendment act,” explained Jeff Schaafsma, risk manager for the Corporation of Delta and soon-to-be president of the B.C. Chapter of the Risk and Insurance Managers Society.

“The Occupier’s Liability Act has a reduced duty of care for recreational areas; if you have a nature area, the Occupier’s Liability Act says you’re not liable for anything unless you put something in there that creates a hazard. My own personal opinion is that there will be mountain biking whether or not...there’s too much wilderness to stop it. So you can try and manage or it or wait for something to happen.”

If there is a mountain bike trail on municipal land with unsanctioned trails, the municipality is not necessarily exempt.

“That’s not necessarily true. If they know it is there and they do nothing about it then they may have some liability; I mean that’s why a lot of municipalities and a lot of governments have started working with biking associations to bring in trail management programs.

“I think that’s sort of the wave of the future, to manage the recreation rather than allow it to go unchecked,” he said.

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