

Court File No.

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND AND
LABRADOR)**

BETWEEN:

ANNE E. WILLIAMS

**Applicant
(Appellant)**

- and -

THOMAS DEVELOPMENT (1989) CORPORATION

**First Respondent
(First Respondent)**

- and -

MODERN PAVING LIMITED

**Second Respondent
(Second Respondent)**

**MEMORANDUM OF ARGUMENT
(ANNE E. WILLIAMS APPLICANT)
(Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*)**

PART I – CONCISE STATEMENT OF FACTS

Introduction

1. At dusk on September 8, 1993, Dr. Anne Williams, a young cardiologist, finished a golf game on a public course, cleaned her clubs and shoes, and prepared to drive home. The golf course was situated on a high hill in the City of St. John's. The parking lot was on the crest of the hill. The golf course had opened to the public in July. By September, the parking lot was still unlit, causing the dark landforms and curved roadway pavement strip extending into the unpaved lot to blend together. Dr. Williams was the last golfer to leave the lot. She made a u-turn and used the pavement edge curvature illuminated by her headlights as a cue to turn onto the roadway. In so doing, she plunged into an unmarked ditch. The impact caused her to "hit her head smashing the front window."

This was recorded by a security guard who witnessed the accident. Dr. Williams presented to Emergency the next day for medical assessment of complaints of “neck pain radiating into her back”. During the next 2½ years, her condition deteriorated to the point of loss of control over bodily functions. She was diagnosed with thoracic spinal chord injury and medivaced to Toronto for definitive surgery.

**Security Guard Report, quoted in Reasons for Judgment of Court of Appeal, para. 109,
Tab 3D
Emergency Record, 09/09/93, Tab 5A**

2. The learned trial judge pronounced that “the whole issue in this case is the depth of the ditch”. This issue determined both negligence and causation of spinal injury. After meticulous sifting of voluminous evidence, and careful findings of credibility, the trial judge found in a 131 page decision that Dr. Williams drove into an unmarked and unlit ditch *at least* 4-4½ feet deep, located at the intersection of the access road with the golf club parking lot. (Two photographs of the remediated scene give an idea of the physical layout, attached at Tab 5B). The trial judge found that the road was not “within an acceptable construction standard.” The road contractor who worked on the road and ditch in July and laid the pavement in September, had failed to warn of danger or to take precautions when it laid a pavement extension into the gravel lot in early September. The trial judge found the road contractor breached its duty to warn or take precautions. He assessed damages at \$4.7 million.
3. The Court of Appeal reversed. After a selective consideration of portions of the voluminous evidence weighed by the trial judge, it did not disturb the finding that the ditch was dangerous or that Dr. Williams had been seriously injured, yet ruled that the premises were reasonably safe. It ruled that the contractor owed no duty of care to Dr. Williams, although this issue was not raised by Notice of Appeal or in argument. It dismissed the case.
4. The stamp of this case is that, as a result of a hearing before the Court of Appeal which was neither full nor fair, Dr. Williams is left with the outcome that she suffered a severe spinal injury in a deep and dangerous ditch for which no one is responsible.

Reasons of the Trial Judge

5. The ditch accident happened at dusk on September 8, 1993, as the plaintiff was leaving a golf course parking lot (11). The whole area around the parking lot was dark (262). The access road had been paved six days before, and the pavement flared out slightly and terminated a number of feet into the gravel lot. There was no lighting, no barricades, and no channelization of egress from the lot. **(All number citations in brackets are to numbered paragraphs in the Reasons for Judgment of the Trial Judge, Tab 3A.)**
6. The plaintiff attended the Grace Hospital Emergency the day after the accident with neck pain to mid back (185). The plaintiff's symptoms became more severe over time and eventually she was admitted emergently to hospital in April 1996 (221). Her physicians performed medical imaging high enough up the spine to find an apparent old thoracic (mid-back) fracture, disc protrusions and spinal chord compression. She was medivaced to Toronto for definitive surgery.
7. In Toronto, the plaintiff was diagnosed with a rare (20) multi-level thoracic disc protrusions with radiculopathy (nerve root irritation) and myelopathy (spinal chord irritation) straddling a healed compression fracture. This diagnosis was made 2½ years after the plaintiff drove into the ditch at the golf course on September 8, 1993 (1, 4). She was aged 37 at the date of the accident.
8. Eyewitness estimates of the depth of the ditch at point of impact ranged from 2 feet to 6 feet (86, 150). The defendants claimed that the plaintiff drove into a shallow depression and suffered at worst, a mild whiplash (14).
9. An insurance adjuster took photographs of the accident scene, but the date of the photographs was disputed (10). Experts from the disciplines of landscape architecture, accident reconstruction, geotechnical engineering, orthopaedic surgery, neurology, and neurosurgery gave evidence bearing on the configuration of any ditch which may have existed, and whether the plaintiff's entry into and passage through it, caused her thoracic spinal trauma.

10. The date of the adjuster's photos was critical (29). If taken as claimed by the defendants on the 9th of September, the day following the accident, then there was little time for the defendants to alter the ditch. If taken on the 15th, as asserted by the plaintiff, there was ample opportunity to alter the ditch. The court determined that the photographs were not taken on the 9th or 10th as the defendants claimed but later, possibly on the 15th (94).

Photographs of Scene, undated, (photos 2 and 7), Tab 5B

11. The defendants denied altering the ditch, but the trial judge found that the golf course altered the ditch before the photos were taken, using heavy equipment available on site (101, 108, 110, 111). Mr. Cook, president of the golf course, was an "uncomfortable" witness who had failed to disclose, until he gave evidence, two relevant contemporaneous documents authored by a security guard eyewitness (102, 103).
12. The expert evidence of the landscape architect was comprehensive (119) and was the most independent and reliable (124). The evidence of the security guard witness to the accident, one Warren, was also judged independent and reliable (155). After examining the totality of the eyewitness and expert evidence, the trial judge found it could not determine the actual depth of the ditch, but was satisfied that it was *no less* than 4-4½ feet deep:

[154] When one examines the totality of the evidence, many of the witnesses are connected or related to either the Plaintiff or the Defendants in some manner, either through employment or other relationships. There is still the conflicting evidence of Mr. Warren as to what he saw and witnessed. He was the only eyewitness not connected to either party to the action. After reviewing all of the evidence, I am unable to determine the depth of the ditch at the point of entry. However, I am satisfied, after reviewing all of the evidence, that the ditch was no less than four to four and a half feet deep at the time the accident occurred.

[155] When I assess the evidence of Mr. Warren and his perceptions standing at the bottom of the ditch, I am satisfied he could not be standing in a two-foot ditch to give evidence as to what he witnessed.... He was the only independent witness in the trial relating to the depth of the ditch. I have accepted his perception of the depth of the ditch and concluded the ditch had to be no less than four to four and a half feet in depth on the night of the accident.

[159] The whole issue in this case is the depth of the ditch where the vehicle went over and hit bottom. It has not been established to my satisfaction by the Defence evidence that the ditch where the vehicle entered it was less than four to four and a half feet deep. [Emphasis added]

13. As to the need for precautions, the trial judge found:

[257] ...There was no way to determine where the edge of the parking lot and the ditch going east/west on the west parking lot started or ended.

[258] The result is that anyone up there on a wet or drizzly evening or any evening had no lighting so as to see the layout of the landscape. Yet, Thomas Development Corporation were well aware that patrons were playing well into the twilight hours...

[262] The evidence is clear that the whole area around the parking lot was dark. The soil to the right of Dr. Williams as she left the parking lot was dark earthen soil. There were no markings, signs and barriers on the west parking lot along the ditch side. Had there been some markings or barrier along the west ditch, it could have been something which could have been used as a guide that this is not a place to turn. The lack of lighting, signage or any markings whatsoever created foreseeable risk and an unusual danger to patrons. I have found as a fact that the deepest part of the ditch was the area adjacent to the north/south and east/west intersection of the ditch, which is adjacent to the pavement coming into the parking lot. We are talking about a parking lot high above the City of St. John's in the east end of the City where fog and drizzle is not a rare occurrence in the month of September or October. On the evening in question it was said to be damp and drizzly.

[263] To allow patrons to play so late into the evening where there is no lighting in the parking lot and where there is a ditch, which the court found to be no less than four to four and a half feet deep at the point of entry of the William's vehicle, under all of these circumstances created an unreasonable hazard to the traveling public. Thomas Development Corporation should have foreseen the risk and done something about it.

[276] ...Yet there is certainly a common law duty to make your premises safe and this was not done in this particular case. [Emphasis added]

14. As to the fault of the road contractor, the trial judge found:

[250] The ditching on the site followed the contour of the road going down the hill. Modern Paving did some alterations to the road and ditch, but for the most part they were putting a top of Class "A" on the road and did certain upgrades to the road. Based on the small amount of money involved in the contract, it is obvious that no great amount of material was altered as it relates to the road leading up to the parking lot. Much of the work in the June contract was to bring the road and parking lot up to a public use standard. Yet, Modern Paving, the Second Defendant, returned to the site [on September 2] and paved the portion of the road at the upper parking lot...

[273] The fact that the contractors were on the site and were upgrading the road in the first instance, the [*sic*] had to be aware of the deep ditch at the intersection of the east/west ditch and the north/south ditch. It was at this intersection where the slope and the depth of the ditch was the greatest. I refer to the evidence of Mr. Hann on that particular point as it relates to the slope of the ditch and road, which evidence I accept.

[274] ...Modern Paving Limited concerned itself more with the roadway, the surface and the grading more so than the ditching. When they returned in September of 1993, it was the grading of the lot and the paving of the road which was their consideration. Yet, they were the engineers on site and should have at the very least warned Thomas Development Corporation of the open ditch in the area adjacent to the top of the parking lot, adjacent to the entrance and exit.

[275] ...Mr. Williams and Mr. Bennett say there was no need to notify Thomas Development Corporation because it was within an acceptable construction standard. I find this not to be the case upon review of all of the evidence.

[277] Modern Paving, by extending the paved portion into the parking lot and flaring the left side coming up the road, may have been using standards acceptable by contactors. It directed traffic, however, coming up the road into the middle of the lot, yet traffic leaving in the evening was not contemplated by the contractors. This strip of pavement, with a slight curvature and with no markings or warnings that a deep ditch was adjacent to it, was a combination of factors which directly contributed to the accident. If Modern Paving Limited had somehow outlined by markings in yellow or white paint the edge of the driving surface, it may have prevented the accident. As such, the extension into the lot, with the curvature unmarked, was a contributing factor to this accident and I so find. Modern Paving Limited should have discussed the issue of lighting with Thomas Development Corporation of the parking lot, knowing there was open ditching around the perimeter of the parking lot. [Emphasis added]

15. In a 131 page decision, of which the first 106 pages were primarily focused on liability, the court considered a great deal of expert and lay evidence and found as a fact that the ditch accident caused or certainly contributed to the plaintiff's thoracic spine injuries (240, 247).
16. The golf club was found 50% at fault, and the road contractor 30% at fault (284). Without benefit of full argument, the judge ruled that liability was several and not joint.
17. The trial judge found the plaintiff to be 20% contributorily negligent based on her lack of explanation of why she turned when she did (283, 284). Damages were assessed at \$4,688,100 plus pre-judgment interest, and were reduced accordingly.

Reasons of the Court of Appeal

18. The Court of Appeal made a statement of the standard of palpable and overriding error for review of findings of fact (9-13). **(All citations in brackets are to numbered paragraphs in the Reasons for Judgment of the Court of Appeal, Tab 3D.)**

19. The Court of Appeal held that the trial judge did not expressly consider the questions of whether the road contractor owed a duty to the plaintiff, and what the standard of care might be (28). Without benefit of pleading, the Court of Appeal arbitrarily decided that the plaintiff was not in a “direct legal relationship” with the contractor .

20. The Court of Appeal cited *Childs v. Desormeaux*, [2006] 1 S.C.R. 643 as determinative of the duty issue against the paver. *Childs* summarized situations in which a positive duty to act may arise. Two themes were identified at para. 38 of *Childs*, quoted by the Court of Appeal at para. 32:

[32] Running through all of these situations is the defendant’s material implication in the creation of risk or his or her control of a risk to which others have been invited....

21. The Court of Appeal concluded:

[33] Extending these principles by analogy in the context of occupier’s liability leads to the conclusion that a party aware of a risk or danger, but having no control over the property in question and not responsible for creating the risk or danger, will not owe a duty of care to a third party who is injured.

[34] In this case, Modern Paving had no control over the property.

22. The contractor had not created a risk or danger “due to the depth of the ditch”: paras. 41; 47.

23. As to painting the edge of the pavement, this was not part of the contract between the contractor and the owner (49), and the pavement “did not create a danger”: para. 50. In the result:

[51] ...Given that there was no direct legal relationship between Dr. Williams and Modern Paving, Dr. Williams had the onus of establishing that Modern Paving was in control of the risk or was responsible for creation of the risk. For the reasons discussed above, Dr. Williams failed to discharge this onus. It follows that Modern Paving did not owe a duty of care to Dr. Williams and cannot be held liable in negligence.

24. The Court of Appeal turned to the issue of whether the golf course breached the standard of care. They said the trial judge had misstated the test by referring to “unusual danger”:

[54] In the case on appeal, the trial judge erred in stating the test for evaluating the liability of an occupier of premises... The test he used was “taking

reasonable care to avoid foreseeable risk of harm from any unusual danger”. The correct test, “to take such care as in all the circumstances is reasonable to see that the visitor will be reasonably safe”, focuses on the reasonable person.

25. At para. 57, the Court of Appeal added:

[T]he trial judge’s decision must be reversed even applying a standard of review of palpable and overriding error.

26. The Court of Appeal purported to review the evidence afresh. This review may be found at paras. 58-102. It concluded that:

[102] In short, there is no basis for determining that Thomas Development failed to take such care as in all the circumstances was reasonable to see that Dr. Williams was reasonably safe in using the golf course parking area.

27. The Court of Appeal decided that it was unnecessary to decide any other issues on appeal, including the joint liability issue, which had been cross-appealed. Costs were awarded to the defendants, and each defendant has applied for costs of the trial and the appeal on a solicitor and client basis.

PART II – CONCISE STATEMENT OF ISSUES

28. The questions in issue in this memorandum may conveniently be considered as follows:

Issue One: Whether the Court of Appeal has seriously eroded basic principles which govern the competence of trial and appellate courts to achieve a just and fair outcome;

Issue Two: Whether a contractor who works on an inherent road hazard has a continuing duty of care to the paying public and joint liability with a concurrently negligent occupier;

Issue Three: Whether an occupier of premises who invites paying customers to an inherent risk which the occupier created, is in breach of the standard of reasonable care when the risk materializes.

PART III – CONCISE STATEMENT OF ARGUMENT

Issue 1: Whether the Court of Appeal has seriously eroded basic principles which govern the competence of trial and appellate courts to achieve a just and fair outcome

29. It is always a matter of public importance when a Court of Appeal liberates itself from fundamental principles which define its capacity to do justice. There are two dimensions to this issue. The Court of Appeal treated the trial judge as if he did not exist, and it denied Dr. Williams a full and fair hearing in the Court of Appeal. When fundamental principles of fairness and justice are flouted, damage to substantive jurisprudence is a sure result.

30. The assigned competence of the trial judge is to assess the totality of the evidence and decide what the case is all about. The trial judge should give sufficient reasons. The trial judge in the present case gave 131 pages of reasons and stated:

[154] When one examines the totality of the evidence ...

[159] The whole issue in the case is the depth of the ditch where the vehicle went over and hit bottom.

31. The decision of the Court of Appeal to reverse the trial judge strikes at a fundamental premise of the system of justice: “that appellate courts are not in a favorable position to assess and determine factual issues” (*Housen*, below, para. 14). This limitation on the presumed competence of appellate courts is the corollary of another fundamental premise:

The presumption underlying the structure of our court system is that a trial judge is competent to decide the case before him or her, and that a just and fair outcome will result from the trial process. [Emphasis added]

***Housen v. Nikolaisen*, 2002 SCC 33, para. 17, Tab 6**

32. This was a case about whether there was a ditch, and has become a case about whether there was a trial judge – a trial judge entitled to the presumption of competence to examine the totality of the evidence, define the whole issue in the case, and arrive at “a just and fair outcome” (*Housen*, *supra*). In the present case, the just and fair outcome

delivered by the trial judge was that the Plaintiff suffered serious spinal injuries in a deep and dangerous ditch as a result of the Defendants' negligence.

33. Astonishingly, the Court of Appeal reversed the trial judge while leaving his findings on "the whole issue in the case" undisturbed. This intervention transcends mere unwarranted interference. By treating the trial judge's definition of the whole issue and his findings as if they did not exist, the Court of Appeal negated the right to "a just and fair outcome" (*Housen*) after a fair trial. By dismissing on an issue not pleaded or argued, namely duty of care, the Court of Appeal negated the right to a full and fair hearing before the Court of Appeal itself.
34. The appeal below should have been "a review for error, and not a review by rehearing." In the end, it was neither. Nor was it a full and fair hearing. It went beyond the issues defined by the parties without grant of opportunity to properly provide the benefit of argument on the crucial issue of duty of care.

H.L. v. Canada (Attorney General), 2005 SCC 25, para. 80, Tab 7

35. The trial judge conducted a lengthy and detailed examination of the whole of the evidence accumulated during a 36 day trial. The Court of Appeal did not. Nor did it purport to identify a *reversible* error capable of vitiating the findings. The panel's review of the evidence was telescoped and highly selective, and did not purport to be a rehearing of the totality of the evidence, and in this sense was *not a reweighing or retrial at all*.
36. Review for error requires a reviewing court to identify the error, which the Court of Appeal did not do:

I need hardly repeat, however, that appellate intervention will only be warranted where the court can explain why or in what respect the impugned finding is unreasonable or unsupported by the evidence. And the reviewing court must of course be persuaded that the impugned factual finding is likely to have affected the result.

H.L., supra, para. 59, Tab 7

37. The Court of Appeal did what the fundamental rules which define its capacity to do justice, say it cannot do. It reversed the trial judge, without engaging his reasoned

synthesis of the whole issue in the case. It did not identify reversible error. It did not attempt to engage the totality of the evidence. The result is a repudiation of the presumption of the competence of trial judges, which will “weaken public confidence in the trial process”: *Housen, supra*, para. 17, Tab 7.

38. The issue of the depth and dangerousness of the ditch was the key to determining negligence. If the ditch was deep enough to be a danger to paying guests, then reasonable safety would require precautions to prevent injury.
39. The reason so much of the evidence centered on the depth of the ditch is that the golf course had, as the trial judge found, altered the ditch within days of the accident, but denied doing so. A whole section of the trial judgment, from para. 89 to para. 117, was devoted to this issue. The judge arrived at his determination through an assessment of the credibility of the golf course president (an “uncomfortable” witness: para. 102).
40. A comparison of the testimonial evidence considered by each court on the two most important factual issues, illustrates the truncated and selective nature of the Court of Appeal’s review. In determining the depth and dangerousness of the ditch, the trial judge also considered the evidence of medical experts listed in the second table below, which reflected on the ditch characteristics and forces necessary to produce the specific spinal injury at issue.

Depth and Dangerousness of Ditch

Trial Judge (paras. 50-165)	Court of Appeal (paras. 35-103)
<ul style="list-style-type: none"> • Eyewitness Dr. Williams • Eyewitness Warren • Eyewitness Gover • Eyewitness Cook • Eyewitness Bennett • Eyewitness Bill Williams • Eyewitness Halliday • Eyewitness Bowman • Expert Hann (landscape architecture) • Expert Shirer (accident reconstruction) • Expert Boone (geotechnical investigation) 	<ul style="list-style-type: none"> • Eyewitness Bennett • Eyewitness Bill Williams • Expert Hann (landscape architecture) • Expert Shirer (accident reconstruction)

Causation of Injuries

Trial Judge (paras. 166-247)	Court of Appeal
<ul style="list-style-type: none"> • Lay witness Dr. Williams • Lay witness Connolly • Lay witness Connors • Expert Dr. Fehlings (neurosurgery) • Expert Dr. King (neurology) • Expert Dr. Lloyd (orthopaedic surgery) • Expert Dr. Brown (orthopaedic surgery) • Expert Dr. Goodridge (neurology) 	

41. *Dr. Williams suffered a severe spinal injury in a deep and dangerous ditch for which no one is responsible. Arrived at without a full and fair hearing by the Court of Appeal, this result is the stamp of this case and creates a fundamental injustice which will seep into the jurisprudence if left unchecked.*

42. The Court of Appeal proceeded as if the trial judge did not exist. It was critical of the evidence of landscape architect Fred Hann, who made some initial errors in his assumptions. But the trial judge was well aware of these errors (“obviously the apron was not there, yet there was a flare”: para. 131), and was satisfied they had been corrected during testimony, and preferred the evidence of Mr. Hann nonetheless:

[124] Mr. Hann appeared to me to be an independent minded witness.... His evidence to me appeared to stand up under scrutiny and under cross-examination.

43. Mr. Hann was not the only expert who explained how the pavement curvature would have acted as a lure. Mr. Fariello was the only witness qualified by the trial judge as an expert in human factors. He gave evidence that in the marginal visibility conditions, the human eye behaviorally fixates on a curved path as a guideline, so that the pavement extension functioned as “a magnet drawing the driver along that curvature” into the region of the ditch. Mr. Fariello’s evidence is perfectly compatible with the evidence of Mr. Hann that the pavement curvature acted as a lure.

Evidence of Sal Fariello, Transcript for October 19, 2004, p. 217, Tab 5C

44. The Court of Appeal’s holding at para. 54 that “the trial judge erred in stating the test” for occupiers liability is an exercise in semantics. If he did err, it was not explained how this was likely to have affected the result.

45. *Housen* counseled that “matters of mixed law and fact fall along a spectrum of particularity,” and that “a finding of negligence by the trial judge should be deferred to by appellate courts.” [Emphasis added.]

Housen, supra, at paras. 28, 29, Tab 6

46. The Court of Appeal has seriously eroded the right to a just and fair outcome through a fair trial by a judge whose reasoned findings are entitled to a presumption of competence: *Housen, supra*, para. 17; and in dismissing the case on the issue of duty of care which was neither pleaded nor argued, has seriously eroded the right to a full and fair hearing before the Court of Appeal.
47. The Court of Appeal did not identify “why or in what respect” the trial judge committed a palpable error. It reversed him on his finding of negligence without engaging him on his definition of the whole issue in the case: the depth of the ditch. For the Court of Appeal, the most significant factual findings of the trial judge did not exist. The right to a full and fair hearing on appeal did not exist. Being neither a review for error nor a review by rehearing, this case transcends *Housen* and *H.L.*, attacks the basic principles of appellate review, seriously erodes the right to a just and fair outcome through a fair trial and a fair appeal, and will seep into the jurisprudence to bring about perverse results if left unchecked.

Issue 2: Whether a contractor who works on an inherent road hazard has a continuing duty of care to the paying public and joint liability with a concurrently negligent occupier

48. Although the issue was neither raised by Notice of Appeal nor argued, the Court of Appeal ruled that road contractors who perform work on an inherently dangerous public road have no duty to warn the occupier contracting the work, and no continuing duty of care to users of the road. This ruling might surprise the contractor’s supervising engineer, who testified that he would be “obligated to at least notify the owner”: Bennett, quoted by Court of Appeal, Judgment, para. 43. It might also surprise counsel for the defendants, who chose not to plead the issue of duty.

49. In the wake of the Court of Appeal decision, contractors may be wondering why they carry liability insurance. The decision has implications across the entire field of contractor liability in which the work performed puts safety and lives at issue.
50. The Court of Appeal appeared to accept that the contractor was aware of the risk or danger: para. 33. Certainly, this was the finding of the trial judge: para. 273. He also found that the roadway and ditch were not “within an acceptable construction standard”: para. 275.
51. The paving carried out on September 2, 1993 was in follow up to a contract performed in June, which the trial judge described as being “to bring the road and parking lot up to a public use standard” (250). In June, “Modern Paving did some alterations to the road and ditch” (250). The Court of Appeal observed that “Mr. Bennett indicated that Modern Paving would have ‘fine tuned’ the ditches” (36) but “did not do any digging that would have increased the depth of the ditch” (37). It increased the height of the road by adding five inches of granular and asphalt (37). Mr. Bennett was a professional engineer, and the Court of Appeal accepted that “this expertise was relevant in overseeing the grading and paving of the road”.
52. The Court of Appeal did not expressly weigh whether the road contractor’s level of involvement amounted to material implication in the creation of the risk, but stated as a conclusion that it was “not responsible for creating the risk” (33), not even “partially responsible” (34). The Court of Appeal did not consider whether the contractor *participated* in the construction of the risk, which is the test in *Winnipeg Condominium, infra*. The Court of Appeal ruled that the contractor was not an “occupier of the golf course” (30), and in the absence of a “direct legal relationship” between Dr. Williams and the contractor, it did not owe a duty of care.
53. The Court of Appeal decided the issue of duty of care without the benefit of pleading or argument. This violation of fundamental rules of procedural fairness resulted in damage to the substantive jurisprudence. The Court of Appeal did not consider the relevance of this Court’s decisions on contractor liability starting with *Winnipeg Condominium*

Corporation No. 36 v. Bird Construction Co., 1995 CanLII 146, and did not consider whether the contractor had participated in the construction of the risk:

[A] person who participates in the construction of a large and permanent structure which, if negligently constructed, has the capacity to cause serious damage to other persons and property in the community, should be held to a reasonable standard of care. [Emphasis added.]

[T]he reasonable likelihood that a defect in a building will cause injury to its inhabitants is also sufficient to ground a contractor's duty in tort to [third parties].

***Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, 1995 CanLII 146 (S.C.C.), paras. 21, 36, Tab 8**

54. This Court has previously identified the elements which create a close and direct relationship and justify imposition of special duties in a road safety situation. These elements are:

[T]he fact that road maintenance is entirely within the power of the Ministry....
[T]his renders the public ... totally vulnerable.... Finally, the fact that safety and lives are at issue is of critical importance.

***Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1173 at para. 53, Tab 9**

55. This Court, in a companion case to *Lewis*, affirmed a road contractor's joint liability with the Crown where a contractor, still in control of the road, failed to warn the public of hazardous road conditions.

***Mochinski v. Trendline Industries Ltd.*, 1997 CanLII 305 (S.C.C.) at para. 10, Tab 10**

56. The Court of Appeal's narrow conception of "direct legal relationship" is also at odds with this Court's most recent explication of the words "close and direct".

This factor is not concerned with how intimate the plaintiff and defendant were or with their physical proximity, so much as with whether the *actions* of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed. A sufficiently close and direct connection ... may also exist where there is no personal relationship between the victim and wrongdoer.

***Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 29, Tab 11**

57. Dr. Williams submits that at the points in time when the contractor performed work on the road, parking lot and adjacent ditches, it was in control of the risk. It certainly

participated in the construction of the risk, as explained in *Winnipeg Condominium, supra*. Whether in occupiers liability, general negligence, or implied contract, a special duty to third parties arose to warn of the risk or take precautions. The contractor's duty of care did not expire when the contractor left. The continuing nature of the duty to warn of inherent danger has been developed in the analogous situation of liability for dangerous products. As stated by this Court in *Childs*:

[I]f the defendant creates a risky situation and invites others into it, failure to act thereafter does not immunize the defendant from the consequences of its acts. These cases are akin to the positive and *continuing* duty ... to warn of inherently dangerous products....

***Childs v. Desormeaux*, 2006 SCC 18 at para. 35, Tab 12**

58. This Court has never, so far as can be ascertained, considered the important question of the positive and *continuing* duty to warn of inherent danger, in a contractor setting. This is a novel issue.
59. The critical importance of an inherently dangerous condition which placed safety and lives at issue, the superior knowledge of the contractor, the status of the contractor as an occupier while in control of the road, the public expectation of reasonable safety for paying entrants, the participation of the contractor in the construction of the road, and the public nature of the undertaking for which it assumed responsibility, are elements of the situation which combined to impose a duty on the contractor to take action to prevent harm to a vulnerable public. Whether a road contractor's duty is imposed in occupiers liability, general negligence, or contractual warranty, is a question which did not arise in *Winnipeg Condominium, supra*, and which this Court has not addressed in modern times.
60. The doctrine of contractual entrance was argued in detail before the Court of Appeal. The Court did not address this historically important basis for liability. The doctrine is still applied by lower courts. Where an occupier admits a paying visitor, the occupier is expected to identify discoverable defects and to do something about them so as to make the premises reasonably safe for the purposes for which the visitor is allowed onto them. This higher than ordinary standard of care was adopted by this Court in older cases, for example *Brown* below, in which it was held that the fact of payment imposed a "difference in the degree of care called for."

***Brown v. B. & F. Theatres Ltd.*, [1947] S.C.R. 486, para. 11, Tab 13**
***Carriss v. Buxton*, [1958] S.C.R. 441, Tab 14**

61. It is an open question whether the implied warranty of a high standard of safety imposes a tort, or is contractual in nature. If as this Court suggested in *Carriss, supra*, para. 6, it imposes a tort, then the high “degree” of care is more easily imposed on contractors, who work on undertakings to which they know the paying public is invited.
62. The Court of Appeal ruling appears to conflict with this Court’s holding in *Mochinski, supra*, that a road contractor is under a duty to warn of hazardous road conditions. The novel issue is whether the relationship between the contractor and the public is sufficiently close and direct that the duty to warn continues after the contractor ceases work. The reasoning in *Winnipeg Condominium, supra*, is consistent with a *continuing* duty.
63. The ruling also conflicts with the goal of modern occupiers liability law to promote “positive action on the part of occupiers to make their premises reasonably safe”: *Waldick v. Malcolm*, [1991] 2 S.C.R. 456, 472. It conflicts with the principled approach to special duties to act to prevent harm adopted by this Court in *Childs* and *Lewis, supra*. These conflicts deserve the attention of this Court, which visited the modern law of occupiers liability in 1991 but in a rural residential setting.

***Waldick v. Malcolm*, [1991] 2 S.C.R. 456 at p. 472, Tab 15**

64. It is important for the orderly development of contractor liability law and tort law in general, to examine the duty of care which contractors who are engaged by commercial public occupiers may owe to the paying public, to determine whether the duty originates in general negligence, occupiers liability, or implied warranty, and to integrate this analysis with the principled approach set out in *Childs* to positive duties of care to the public imposed on public undertakings. Principle may then be applied to a novel situation: whether a road contractor who has worked on an inherent danger has a *continuing* duty of care to the public.

Issue Three: Whether an occupier of premises who invites paying customers to an inherent risk which the occupier created, is in breach of the standard of reasonable care when the risk materializes

65. As a matter of logic, premises cannot both be reasonably safe, as concluded by the Court of Appeal, and dangerous, as found by the trial judge. It is impossible to reconcile the Court of Appeal's conclusion of no negligence with the undisturbed finding of the trial judge that the ditch was deep and dangerous. The result is that Dr. Williams suffered severe injury in the ditch, but the premises were safe. This confounding precedent makes the finding of negligence in a premises case appear to be a random event and impossible to predict, and seriously weakens the safety-promoting purpose of modern occupiers law. This serious disarray in occupiers law is a matter of public importance and is deserving of the attention of this Court in the circumstances of a public undertaking on which special duties of care are imposed.
66. Whether the doctrine of a higher degree of care owed to contractual visitors maintains an independent existence in the law with a basis in implied warranty, or should be integrated into the modern approach to positive or special duties of care, is timely and important to the ongoing development of this body of law.

Summary as to Public Importance

67. The result of the Court of Appeal's aggressive intervention commands attention: Dr. Williams suffered a spinal chord injury in a deep and dangerous ditch for which no one is responsible. This case transcends *Housen*. The Court of Appeal decision creates a special dimension of disorder in which an appeal court is at liberty to replace a trial judge's holistic and advantaged view of the evidence, with a partial and disadvantaged one, without identifying a reversible error or attempting a rehearing of the whole of the evidence. It perpetrates a serious erosion of public confidence in the competence of trial judges, a serious erosion of the confidence of trial judges in the integrity of their own process, and a serious erosion of the right to a fair trial with "a just and fair outcome": *Housen*. The Court of Appeal's assault on fundamental principles of appellate review will seep into the jurisprudence and promote perverse results if left unchecked.

68. The grave mischief which may result when a court of appeal overrides fundamental limitations on appellate competence is exemplified in this very case. The Court of Appeal's disregard of what the trial judge defined as "the whole issue in this case" led to the perverse result that premises can be both dangerous and reasonably safe. This confounding precedent causes disarray in the law, renders confident advice to clients impossible, and turns the trial process into a lottery. It deserves the attention of this Court.
69. The grave mischief which may result when a court of appeal overrides the fundamental right to a full and fair hearing and decides a case on the basis of an issue, namely duty of care, which was neither pleaded nor argued, is also exemplified in this very case. The Court of Appeal's disregard of the normal rules of pleading and of the right to be heard on a critical issue, resulted in a decision which has muddled the jurisprudence on duty of care and surprised everyone connected with the case. It leaves contractors wondering why they carry insurance. It turns the appeal process into a lottery. As with other aspects of this case, the Court of Appeal's holding that a contractor's awareness of danger does not create a continuing duty of care to the public, will seep into the jurisprudence and promote perverse results if left unchecked.
70. It is always a matter of public importance when a court of appeal liberates itself from fundamental principles of fairness and justice. Damage to substantive jurisprudence is a sure result.
71. Although the Court of Appeal decided the case against the contractor on the basis of no duty of care, which was neither pleaded nor argued, it overlooked the issue of the high standard of care imposed by the doctrine of contractual entrance, which was extensively argued. This Court has not visited the doctrine of contractual entrance in 50 years. The doctrine is in need of integration with modern trends, particularly the trend to impose positive or special duties to act to prevent harm to the public imposed on those who participate in the construction of public undertakings or assume the role of occupier of them. Whether the doctrine of contractual entrance still has a role in modern law, whether the duty on the road contractor is founded in negligence, occupiers liability, or implied warranty and is a *continuing* one, and whether in these circumstances the

contractor may be jointly liable with the occupier in concurrent tort, are novel issues of serious public importance in need of resolution.

Interest of Justice

72. Dr. Williams pleads the residual category of the interest of justice. This case shakes public confidence and undermines the system of justice. It discourages the trial bench. By threat of punitive costs (para. 113 of the Court of Appeal Judgment, Tab 3D), it may have an intimidating effect on counsel who are bound by ethical precept to fearlessly advocate. It militates against “a just and fair outcome” (*Housen*) premised on the competence of the trial judge to deliver a remedy for serious personal injury suffered through the presence of needless danger. The Court of Appeal’s aggressive disregard of basic principles of assigned competence within the system of justice has deprived Dr. Williams of her right to “a just and fair outcome” (*Housen*) after a fair trial. The Court of Appeal’s decision to reverse on the unpleaded and unargued issue of duty of care, has deprived Dr. Williams of her right to a full and fair hearing before the Court of Appeal, and of her remedy awarded by a trial judge entitled to a presumption of competence not rebutted by the Court of Appeal. As this Court warned in *Hill*:

“To deny a remedy in tort is, quite literally, to deny justice.”

Hill, supra, para. 35, Tab 11

PARTS IV AND V – ORDERS SOUGHT

73. The Applicant requests leave to appeal. If leave is granted, the Applicant requests that she be awarded costs in any event of the cause in accordance with this Court’s usual practice.

All of which is respectfully submitted this

day of October, 2007.

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PART VI – TABLE OF AUTHORITIES

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6	<i>Housen v. Nikolaisen</i> , 2002 SCC 33	31-33, 37, 45-47, 67, 72
7	<i>H.L. v. Canada (Attorney General)</i> , 2005 SCC 25	34, 36, 47
8	<i>Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.</i> , 1995 CanLII 146 (S.C.C.)	52, 53, 57, 59, 62
9	<i>Lewis (Guardian ad litem of) v. British Columbia</i> , [1997] 3 S.C.R. 1173	54, 55, 63
10	<i>Mochinski v. Trendline Industries Ltd.</i> , 1997 CanLII 305 (S.C.C.)	55, 62
11	<i>Hill v. Hamilton-Wentworth Regional Police Services Board</i> , 2007 SCC 41	56, 72
12	<i>Childs v. Desormeaux</i> , 2006 SCC 18	20, 57, 63, 64
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