

**Court File No. 32326**

**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 IN REPLY  
(ANNE E. WILLIAMS APPLICANT)  
(Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*)**

---

1. The Court of Appeal transcended all constraints on its capacity to intervene, withheld the fundamental right to a fair hearing, delivered a decision which confounds law and logic (the ditch was dangerous but the premises were safe), and denied justice (*Hill, infra*) by depriving the public of a remedy in tort against the contractors of unsafe works.
2. It must be stated with regret that the conduct of the Court of Appeal is indefensible. It is always a matter of public importance when a court of effective final resort circumvents the rule of law, the more so when the conduct of the court deprives a severely injured plaintiff of her right to “a just and fair outcome” (*Housen*) after a fair trial. The Court of Appeal’s conduct undermines the system of justice and distorts substantive tort law. It merits this Court’s intervention.

3. The Court of Appeal's nod to the principle of not intervening in the trial judge's factual conclusions was lip service. Its violation of this principle may fairly be characterized as an affront to the rule of law. As this Court has pronounced:

I stress that the principle of non-intervention stated in this line of cases is not merely cautionary; it is a rule of law.

***Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, p. 426**

4. The trial judge examined "the totality of the evidence" (para. 154) and stated:

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

**Reasons for Judgment of the Trial Judge, Application for Leave, Tab 3A**

5. In an intervention which transcends mere unwarranted interference, the Court of Appeal treated the trial judge's definition of "the whole issue in this case" and his findings on the issue, as if they did not exist. The Court of Appeal reversed the trial judge's conclusions on liability while leaving his findings on "the whole issue in this case" undisturbed. The result is that the finding stands that the ditch was deep and dangerous, and the finding stands that Dr. Williams was severely injured in the ditch, but the Court of Appeal has ruled that no one is responsible.
6. The issue of no duty of care was never pleaded and never argued at any level of court below. The Court of Appeal decided the issue of contractor duty of care, an issue of huge public importance, without notice or opportunity to be heard. It was a theory never raised by the parties and a battle never joined by them. The Response of Modern Paving points to a casual reference buried in paragraph 337 of the Factum that "Williams had the onus of proving on the balance of probabilities that Modern Paving owed a duty to her": Response, para. 27. This does not constitute a pleading.
7. Considered as a pure issue of law, duty of care might have been raised for the first time on appeal with adequate notice, but no notice was given. Numerous decisions have marked the crucial importance of the fundamental principle of fairness and good order that requires parties to plead, and the Court to grant a hearing, on determinative issues:

[60] It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings.

[62] In addition to fairness concerns which standing alone would warrant appellate intervention, the introduction of a new theory of liability in the reasons for judgment also raises concerns about the reliability of that theory. We rely on the adversarial process to get at the truth.

***Rodaro v. Royal Bank of Canada, 2002 CanLII 41834 (ON C.A.)***

8. The Court of Appeal disregarded the rule of law which requires deference to the trial judge, by ignoring him. This transcends *Housen* and *H.L.*, and the denial of the fundamental right to a fair hearing adds a special dimension of distortive review. This is a Court of Appeal which has exceeded all permissible bounds and must be reigned in.
9. Distortive appellate review breeds bad law. It is a powerful point not contested in the Responses, that the Court of Appeal did not reverse the trial judge on his finding that the plaintiff was severely injured in a deep and dangerous ditch, yet ruled that the premises were reasonably safe. This outcome was not open to a Court of Appeal applying logic and the rule of law.
10. Because the Court of Appeal violated the rule of law confining its competence to intervene, and ignored fundamental principles of procedural fairness, it created other substantive law distortions of great public importance. The trial judge found, and objectively reasonable standards of conduct required, that the contractor should provide a safe road or warn the owner of the danger.
11. The Court of Appeal thought otherwise. Without pleading or argument of the parties, it found that the contractor owed no duty of care to users of the road.
12. This is not a case about contractual entrance (although the doctrine of a high standard of care imposed in favour of contractual entrants has not been visited by this Court in 50 years and continues to be applied in at least four or five Canadian jurisdictions). It is a case about integrating the law of occupiers and contractors liability, into the principled approach to positive duties of care imposed on public undertakings to which the public is invited, which is developed in this Court's jurisprudence as summarized in *Childs*.

13. As to the issue of whether contractors owe a *continuing* duty of care to members of the public after they leave the worksite, the Applicant relies on several decisions of this Court, including *Winnipeg Condominium, infra*. The Respondents argue for a different interpretation of these decisions and say that they do not assist the Applicant. This disagreement between the parties is support for the proposition that the important issue of contractors continuing duty is unresolved and in need of this Court's attention.
14. But when the Respondents say that this Court's decision in *Winnipeg Condominium* is not relevant because it is not a personal injury case, they go too far. It was the threat to personal safety that enabled third party purchasers of the condominiums to recover in tort for the cost of repair.

The negligently supplied structure in this case was not merely shoddy; it was dangerous. In my view, this is important...

***Winnipeg Condominium Corporation No. 36 v. Bird Construction Co., 1995 CanLII 146 (S.C.C.), para. 12 [Application for Leave, Tab 8]***

15. The test of liability in *Winnipeg Condominium* is participation in the construction of the risk: *Winnipeg Condominium, supra*, para. 21. The trial judge found that the contractor performed work not only on the road surface but on the ditching too, and that it failed to warn the owner of the danger. The Court of Appeal ruled that the contractor owed no duty because it did not create or control the danger. (The Court of Appeal omitted to consider the issue of duty to warn.) The Applicant says that *Winnipeg Condominium* is an important source of relevant jurisprudence and that the decision of the Court of Appeal is out of alignment with the test for liability contained in *Winnipeg Condominium*.
16. The Court of Appeal's conduct has resulted in serious distortions of the substantive law of occupiers and contractors liability. The result of these distortions is that the Court of Appeal has found that Dr. Williams suffered a severe spinal injury in a deep and dangerous ditch for which no one is responsible. One only has to view the photographs of the *remediated* ditch at Tab 5B of the Application for Leave to recognize the potential for injury on a twilight evening. These distortions of substantive law subject the public to serious injury without recourse to civil remedy. As this Court warned in *Hill*:

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

***Hill v. Hamilton-Wentworth Regional Police Services Board, 2007 SCC 41, para. 35 [Application for Leave, Tab 11]***

17. The Court of Appeal has done serious damage to the rule of law as to non-intervention, in a manner which by its extremes of distortive review, transcends the circumstances of any reported case brought before this Court for decision in recent times. The plaintiff in this important personal injury case got a fair hearing from the trial judge, and lost the fruits of this through an unfair hearing in the Court of Appeal. In the process, the Court of Appeal distorted the substantive law of occupiers and of contractors liability, so as to do lasting damage to these bodies of law throughout the land, unless arrested by this Court.
18. For ease of reference, the proposed issues as formulated by the Applicant are 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.
19. These are novel issues of serious public importance and warrant the attention of this Court. If issue three as phrased is not a novel issue, then the Court of Appeal's treatment of it (the ditch was dangerous but the premises were safe) confounds logic and creates a novel distortion in the law. It is in the interest of justice that leave be granted.

All of which is respectfully submitted this 3<sup>rd</sup> day of December, 2007.

---

**Chesley F. Crosbie, Q.C.**  
Ches Crosbie Barristers  
Counsel for the Applicant  
169 Water Street, 4<sup>th</sup> Floor  
St. John's, NL A1C 1B1

**PART VI – TABLE OF AUTHORITIES**

<b>Tab</b>		<b>Para(s).</b>
1	<i>Hodgkinson v. Simms</i> , [1994] 3 S.C.R. 377	3
2	<i>Rodaro v. Royal Bank of Canada</i> , 2002 CanLII 41834 (ON C.A.)	7