

Municipalities overreact with bans on popular activities

By Judy van Rhijn, AdvocateDaily.com Contributor



Unsubstantiated fear of litigation may be driving municipalities to ban favourite pastimes such as winter sports and riding in horse-drawn carriages, Toronto civil litigator Sarah O'Connor tells AdvocateDaily.com.

"Next it will be snowball fights," says O'Connor, principal of O'Connor Richardson Professional Corporation, which has offices in Toronto and Hamilton. "People are getting very concerned about potential litigation. There is an abundance of caution."

In light of those fears, she says municipalities have moved to ban everything from street hockey to tobogganing to horse-drawn carriages, despite there being minimal litigation surrounding those activities.

"I would understand there being a fear of litigation if it happens constantly, but I don't believe the municipalities are being successfully sued. There are only a few successful reported cases in the last 200 years," O'Connor says.

She refers to a case in which a Superior Court justice dismissed the appeal of an arbitrator's decision finding an Ontario city liable for serious injuries sustained following a tobogganing accident on municipal reservoir property. The arbitrator found that a snow-covered ditch, which the city knew of but did not warn tobogganers about, was a hidden danger. The injured parties were not aware of the existence of a city bylaw prohibiting tobogganing and so were found not to have willingly assumed the risk of injury.

This decision was followed by tobogganing bans in various parts of the province even though another case followed quickly with the opposite outcome. The injured tobogganer, who had lost control of her sled, was found to have willingly assumed the known risk that she could be injured. The municipality's failure to supervise or inspect the hill did not cause her injuries, it was ruled.

In another instance in which an Ontario school board was sued, a teenage girl was sledding in an unfenced area behind a school, but it was ruled that the lack of a fence did not cause the accident.

"The court found no liability in two of the cases, and in the other, it was actually a private arbitration," O'Connor says.

She remains perplexed by the propensity to ban activities outright rather than make accommodations. O'Connor refers to a recent move in Montreal to ban horse-drawn carriages by 2020, following four accidents since 2014 and 14 tickets in 2016 and 2017 for infractions related to horse health and the state of the carriages.

"Fourteen tickets in two years is not that many infractions for horse health and safety or the condition of the carriages," she says. "There are not that many lawsuits about horse-drawn carriages either, so it's not being fueled by litigation. It's fueled by people being overly cautious."

O'Connor acknowledges that while there is no evidence that municipalities are under legal attack, Canadians are becoming more litigious.

"People always go after the parties that have the deepest pockets, like municipalities. It's getting to a point where people don't want to be held accountable for their own actions," she says.

Another pressure point may be public complaints, O'Connor says. Montreal received several hundred citizen complaints about the treatment of the horses in the last few years. In Toronto, there has long been a ban on street hockey, but it was only enforced when people complained.

O'Connor observes that there is often just as much pushback to the bans, with petitions and media attention. "Social media helps people be up-in-arms about anything."

She says that many cities have bylaws that ban tobogganing on city property. O'Connor proposes a middle ground, providing special places for these activities instead of banning them outright. She points to the success of the dirt-bike ramp on the Toronto lakeshore and local skateboard parks.