

**FEB 10** 2017 TRAUMATIC BRAIN INJURY CONFERENCE

McLeish Orlando was proud to be the platinum sponsor of Toronto Rehab Institute's 2016 Traumatic Brain Injury Conference. The conference was hosted by the University Health Network, and featured several notable speakers who are experts in the field of brain injury. McLeish Orlando partners, Patrick Brown and Kate Mazzucco, presented on the topic of Personal Injury Lawfirms: Not All Are Created Equal.

**FEB 23** BIAPH 12th ANNUAL BOWL-A-THON

The BIAPH Bowl-a-thon was a fun community event that brought people together to raise funds for BIAPH support programs and their clients. McLeish Orlando was thrilled to sponsor two lanes for this event.

**FEB 24** OSGOODE PROFESSIONAL DEVELOPMENT: ACCIDENT BENEFITS 2017: WHAT'S NEW, WHAT'S IMPORTANT?

This program focused on the overview of the recent trends and practical solutions in the Accident Benefits field. McLeish Orlando partner, Alison Burrison presented about the recent changes to the SABS.

**MAR 1** BLOOD DRIVE

McLeish Orlando employees headed over to the Canadian Blood Services to give the gift of life. As a company, we try to donate as often as permitted. Blood donations are always needed, and crucial to helping others who have been injured or hurt.

**MAR 3-5** TORONTO INTERNATIONAL BICYCLE SHOW

Patrick Brown, partner at McLeish Orlando is also the founder of Bike Law Canada. Bike Law ambassadors were at the show to educate cyclists on Vulnerable Road User Laws and promoting our advocacy on behalf of cyclists and other vulnerable road users. The Toronto International Bike Show is one of the world's largest bike consumer shows and is a great event for cycling enthusiasts.

**MAR 8** OBA SESSION: DISCOVERY AND BEYOND – WINNING STRATEGIES FOR THE YOUNG LAWYER

McLeish Orlando associate, Selina Andrello, chaired her first OBA session through the Young Lawyers Division. The session's focus was on discoveries - a great topic for new and soon-to-be lawyers. McLeish Orlando partner, Josh Nisker, also presented at this seminar.

**MAR 25-26** SPRING MOTORCYCLE SHOW

McLeish Orlando attended this year's Spring Motorcycle Show. With riding season right around the corner, we wanted to make sure riders were educated on the changes to the SABS that took place last June. We had a great time connecting with the motorcycle community.

**MAR 30-31** THE OATLEY MCLEISH GUIDE TO MOTOR VEHICLE LITIGATION 2017

Motor vehicle litigation has become one of the high-profile areas of the law; prominent stories and cases continue to resonate with the public. This program, co-chaired by John McLeish and Roger Oatley, is geared towards keeping lawyers up-to-date on all the latest developments in this complex field.

For more information on upcoming events please visit: [www.mcleishorlando.com](http://www.mcleishorlando.com)



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# THE fine PRINT

SPRING 2017

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## Resort Waivers: Does A Plaintiff Waive His Or Her Rights Entirely?

In a recent decision, *David Schnarr v. Blue Mountain Resorts Ltd.*, Justice Tzimas held that the defendant ski resort's waiver was invalid as it relates to the procedural and substantial rights protected by the Consumers Protection Act (CPA). The decision is significant as it is the first decision where the Court commented on the interplay between the CPA and the Occupiers' Liability Act (OLA) in relation to waivers of liability where the defendant acts both as an occupier and a supplier.

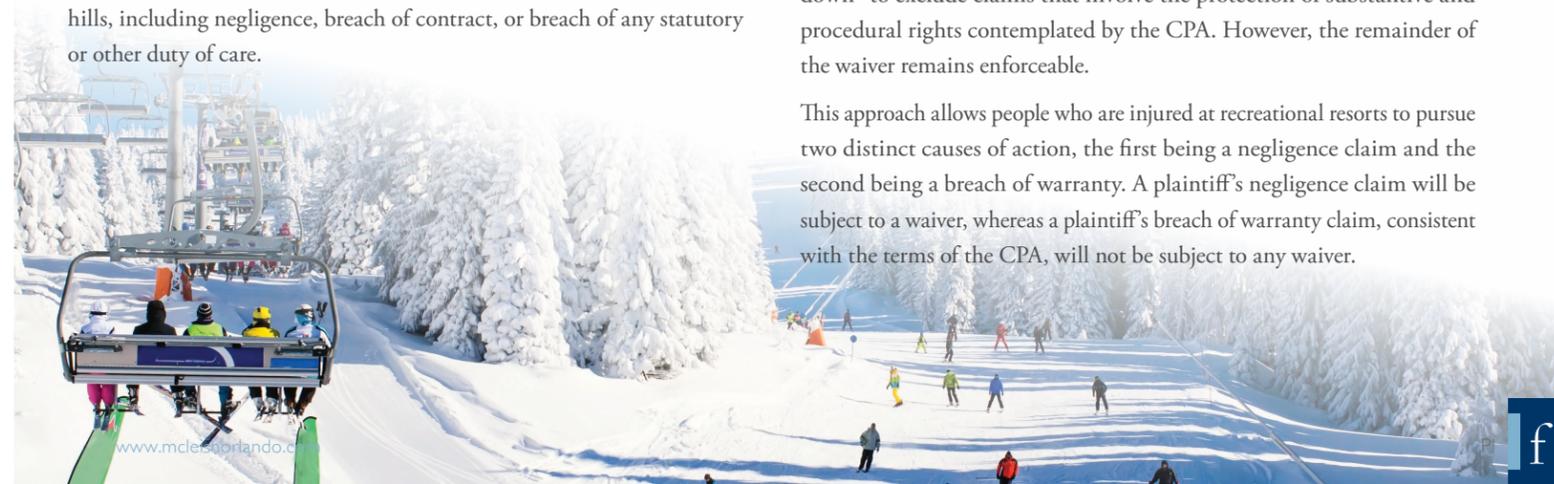
The facts of the case are simple. The defendant, Blue Mountain Resorts is both a supplier and an occupier, and therefore subject to both the CPA and the OLA. The plaintiff, David Schnarr, was a ski pass holder who agreed to the terms of a waiver provided by Blue Mountain Resorts before completing his purchase of a ski pass online. The online waiver specifically barred the plaintiff from pursuing any legal action against Blue Mountain Resorts. Unfortunately, during his stay at the resort, the plaintiff sustained personal injuries while skiing. He subsequently commenced an action against the resort, where he pled breach of warranty pursuant to the terms of the CPA and negligence under the OLA. The plaintiff argued that Blue Mountain Resorts could not rely on a broad and all-encompassing waiver to prevent litigation for all risks associated with the skiing on Blue Mountain's ski hills, including negligence, breach of contract, or breach of any statutory or other duty of care.

According to the CPA, if a consumer signs a waiver of liability with a supplier, that waiver is unenforceable as it relates to substantive and procedural rights that are protected by the CPA. The CPA requires that suppliers provide services of a "reasonably acceptable quality", this is known as the 'deemed warranty rule'. The OLA, however, allows for the waiver of liability in negligence claims against an occupier. Thus, the CPA shields consumers from waivers related to CPA protections, while the OLA allows occupiers to use waivers as a shield against negligence claims. Viewed in isolation, the statutes are not problematic. However, the statutes are in conflict in instances where a consumer interacts with a supplier who is also an occupier (e.g. ski resorts).

In rendering the decision, Justice Tzimas considered the elements of each statute in order to determine whether they could be interpreted in such a way as to be read harmoniously and produce a just and fair result.

Justice Tzimas concluded that Blue Mountain cannot deny liability for any breach of the deemed warranty contemplated by the CPA. In other words, the resort can be liable for failing to provide services in a "reasonably acceptable quality". She concluded that the resort's waiver must be "read down" to exclude claims that involve the protection of substantive and procedural rights contemplated by the CPA. However, the remainder of the waiver remains enforceable.

This approach allows people who are injured at recreational resorts to pursue two distinct causes of action, the first being a negligence claim and the second being a breach of warranty. A plaintiff's negligence claim will be subject to a waiver, whereas a plaintiff's breach of warranty claim, consistent with the terms of the CPA, will not be subject to any waiver.



## Navigating Short Term and Long Term Disability: The Basics

Employers often have group insurance disability plans that provide their employees with replacement income in the event an employee is injured or suffers from an illness that prevents them from returning to their employment. These disability plans offer employees a portion of their income to offset financial hardship they may suffer as a result of being unable to work. The amount and length of coverage differs from one plan to the next.

### Short-Term Disability

Short-term disability benefits typically kick in when an employee has exhausted their sick days and requires financial assistance during their temporary recovery period. Short-term disability benefits are therefore by nature “short-term” benefits and are only available for an abridged amount of time. Most plans provide some form of income replacement (usually a percentage of an employee’s monthly earnings) for a period of 17 to 26 weeks (depending on the employer and the disability plan). Not all employers offer their employees with short-term disability benefits. In those cases, an employee is left to rely solely on sick days and Employment Insurance provided through the government.

### Long-Term Disability

Long-term disability benefits become available once short-term disability or Employment Insurance is no longer available. For example, most long-term disability plans do not start paying long-term disability benefits until 120 days have elapsed from the date at which the employee left his or her employment.

Long-term disability benefit plans pay a percentage of an employee’s monthly earnings with a maximum amount payable per month. Often these plans provide coverage for up to two years where the employee

is unable to perform his or her occupation. After that time, benefits are typically only provided if the employee is unable to perform any occupation for which he or she is reasonably suited to do by education, training, or experience.

Becoming eligible for long-term disability benefits after this two year period is therefore quite difficult, as the employee must establish that their disability prevents them from working at the level they once did. Insurance companies will usually require medical reports to demonstrate that there is an inability to resume work.

It is important to note that long-term disability benefits are usually offset by other benefits an individual may receive, such as CPP and WSIB benefits. In some cases, employers have policies that give the long-term disability insurer the power to force the insured to apply for benefits from another source.

### When is it a Good Idea to Hire a Lawyer?

Deciding whether or not to retain a lawyer is often a difficult choice; however, this choice is often the most important decision an injured or ill employee will make. Negotiating directly with insurance companies often leaves an insured at a clear disadvantage. Insurers have years of experience and resources available to them that the insured quite simply does not. It is for this reason that consulting an experienced lawyer is very important. Most personal injury and disability lawyers work on a contingency fee basis, meaning that they collect their legal fees if they are successful in obtaining compensation for their client’s claim. An experienced lawyer will know how to maximize a client’s chances of being successful with his or her disability claim and will also know what steps to take in the event that benefits are denied.

## In Honor of His Wife David Stark is an Advocate for Safer Streets

It was a sunny November day when Erica Stark, a 42-year-old mother of three boys, and wife of David Stark, was taking her car into the dealership to have her winter tires put on. She brought along Zella, a black lab she had been training as a guide dog for the hearing impaired. While she was waiting for her car to be serviced, Erica and Zella went for a walk along Gilder Drive, a quiet residential street. As Erica was approaching the intersection near Midland Avenue and Gilder, the driver of a minivan, Elizabeth Taylor, veered across the roadway, into a TTC bus post, through a traffic control box and collided into Erica, sending her about 20 meters from where she was standing. The result of the collision was fatal. Erica had died at the scene leaving her husband, David, to care for their three young children on his own.

“When our children came home from school I had to tell them that their mother had been killed. I was a wreck,” David said in his victim impact statement read at the sentencing hearing for Taylor. Taylor was found guilty of careless driving under the Highway Traffic Act and was imposed a mere \$1,000.00 fine, six months probation and a one month driving ban. Taylor was not asked to testify, she didn’t even have to give an explanation as to what she was doing behind the wheel that had caused her to veer from the road, onto a sidewalk, and into Erica.

Erica’s death prompted David to do something about the rising number of pedestrian fatalities in Toronto. Erica was the 24th of a total of 31 pedestrians killed in 2014, and that number has been steadily rising year by year – in 2016 Toronto hit an all-time high in over a decade with 43 pedestrian fatalities. In honor of his wife, David has become an advocate for safer streets and has been working with groups to impose better laws that will protect vulnerable road users. David

co-founded Friends and Families for Safe Streets, a group that seeks to end traffic violence through firmer penalties for careless drivers, changing Toronto’s traffic culture and also supporting victims of road violence. Through this organization, David plans to call on the province to make amendments to the current justice system including mandatory attendance at sentencing hearings in order for the Defendant to hear the victim impact statements, as well as required production of cellphone records in careless driving cases. David has appeared in the media many times to share his story. He has also received Metro Morning’s 2016 Torontonion of the Year award for his continuous efforts to protect vulnerable road users.

After successfully representing the Stark family in their civil suit, McLeish Orlando continues to stand behind David and supports his initiatives not only through Friends and Families for Safe Streets but also by working to lobby the government to pass Vulnerable Road User laws so that all road users can be protected from road violence and distracted drivers. We believe it is possible to achieve zero fatalities in Toronto.



## In the Community

### Blood Drive

McLeish Orlando understands how critically important blood donations are, as many of our clients have had to depend on blood donors as a result of their injuries. We are proud to announce that at our last donation day, over 75% of our donors were first time donors – and are already looking forward to our next blood drive. We are always looking for opportunities to give back to our communities and clients, which is why we commit to donating blood as often as we can.



## Lawyer Spotlight: Meet Josh Nisker, Partner at McLeish Orlando

McLeish Orlando LLP is pleased to announce that Josh Nisker has been made a Partner of the firm.

Josh has been an associate with the firm since 2012 and is an invaluable member of our team. Josh obtained his law degree from the University of Western Ontario and then completed his Master of Laws at the University of Cambridge.

Josh’s practice is devoted solely to plaintiffs’ personal injury, wrongful death, and disability benefits claims. He has effectively represented their interests in jury trials, arbitrations, and appeals.

We look forward to Josh’s many years of continued success at McLeish Orlando.

