1. INTRODUCTION

The two biggest questions for which we, as civil defence lawyers, are engaged are: “what is the liability?” and “what are the damages?” Every litigation is structured around these two questions. There are strategic assessments of them, separate spreadsheets to assess their intertwining influence, and budgets to assess the costs of answering these two questions at court. Experts are retained to explore them and the entire litigation process is an extension of the investigation into them. From defence, to examinations, to pre-trial, to trial, these questions form the conversation of a standard litigation.

However, what if those did not need to be the only questions in the handling of a civil suit? What if the first and greater question was: “Whose risk is it anyway?” What if liability for the plaintiff’s cause of action could be made irrelevant? How would that streamline and improve upon the direction of litigation? How can we change the conversation to make that the question?

To change the conversation, we must first understand the conversation. What this paper attempts to do is introduce the topic of risk transfer, and to encourage its pursuit from the site level forward—starting with the managers and security who will determine the answers and outcome. If these are possibilities based on the facts of your incident, they are avenues to which you and your legal team can direct the conversation.

Given the right tools and approach, you and your counsel can identify these avenues early, and can change the question from liability and damages to “Whose Risk is it Anyway”?

What is a Risk Transfer?

A risk transfer is the transfer of defence costs, indemnity or responsibility from one party to another in a civil case. It applies generally to all types of civil losses: slip and falls, property losses, motor vehicle accidents. It is fact-specific and so relies upon the ability of site management, security, adjuster and lawyer to work together quickly and efficiently at the earliest stage of a suit to understand and to characterize the facts of the case properly.

It results in another defendant or party accepting the risk onto themselves. This can be through an assumption of defence, an agreement to indemnify and hold harmless, an agreement to release the site, or a complete walkaway.

This results in costs savings for the corporation’s insurer and the site, as most payouts or defence costs are transferred in full or in part. It also results in a narrowing of the issues, the elimination of unnecessary parties, a dismissal of the action at a preliminary stage and a closed file for the company and its insurer. As such, the ability to execute such risk transfers can eliminate unnecessary costs and exposure well before trial, before mediation, and often even before a statement of defence is needed.
Jurisdictional transfers are the number one way a site can assist in a civil action to ensure a positive outcome without a settlement. The result is an Order in favour of the site, and a closed file. Both are ideal outcomes that significantly limit exposure and legal costs.

2. REVIEW OF JURISDICTIONAL TRANSFERS

What are They?

These cases are ones in which the site does not have a duty of care to the plaintiff for the case alleged. The resolution of such an issue involves the site being released from the action. Ideally, it should not require examinations or any further involvement of the site’s management or staff. It should result in a dismissal Order in favour of the site.

A simple example is a plaintiff who slips and falls on a sidewalk. Most of the claims involving jurisdictional transfer appear to follow this fact scenario, though other situations involving property losses, fire losses, or other variations on personal injury cases can fit this model.

In the most common example, the plaintiff blames your site management and owner, the adjacent property owner, your site’s contractor or any other role ever connected to the location in issue. The notice letter from the lawyer comes across your desk wishing to hold your site responsible for some alleged injury.

What do you do?

Jurisdictional Elements Needed and Reasons

For a jurisdictional transfer of risk, there need to be:

- Two or more defendants;
- A clear known area of the injury;
- Documentation of the cause of issue;
- A contract, lease or property survey that clearly defines the responsibility between defendants.

What is not needed is a statement of claim, a certificate of insurance, a coverage analysis or often a contractual relationship between the two defendants. Those are valuable inquiries, but for another theory, not jurisdictional transfers.

Documentation of the cause is often the most difficult element to prove. As we move into a digital age, with greater surveillance, more mobile phones, body cameras, and GPS tracking, one benefit for the insurance defence industry is a better ability to recreate that point in time when the accident fell.

It is necessary for the site to be able to secure such materials at first instance. This allows us objective evidence contemporaneous with the incident of where the incident occurred and the nature of the fault.
Some common examples of such documentary materials and their uses include:

- Photographs of the scene: show the nature of the fault including scale;
- Video of incident: can demonstrate the mechanics of the injury or the nature of the damage;
- Mobile images/video: has the advantage of time stamping of the file to show time and can be used by security to capture plaintiff’s orientation;
- GPS tracking, if used by sophisticated site, can pinpoint time and location of inspection, monitoring or attendance of security;
- Retained products: if it is a product defect/Sale of Goods case, the product itself is often important to retain. Occasionally ice melter/rock salt may even need to be retained from the scene to show conditions.
- Incident reports: demonstrate the details of the scene, reported cause of fault, and timing issues.
- Security Notes: often serve as source documentation from which the incident reports can later be generated, important to show time.
- Investigator images: though not contemporaneous, the images of an investigator can be more detailed with measurements of fault and/or comments on conditions.
- Additional material then includes:
  - Property survey: useful in most slip and fall cases for examinations but before that, for the determination of jurisdiction for loss
  - Contract: if a business premises, a copy of the lease agreement with the tenant assists in defining boundaries and responsibilities.

What the defence lawyer then needs to do then is to establish with plaintiff’s counsel an admission as to location and nature of fault. This can be done through Demands for Particulars (Rule 25.10) before a statement of defence is needed. Alternatively, it can be secured through Requests to Admit (Rule 51) after pleadings are exchanged.

There always remain the arguments that the fall never happened, or not because of the issue complained, or that the issue was not a breach of the standard of care. Again, all these questions are liability questions, not jurisdiction. To answer these liability questions is a lengthy process. These answers also will not secure a risk transfer.

It is changing the conversation to ask the question “whose risk is it anyway?” that is central to a jurisdictional transfer.
3. CASES CONCERNING JURISDICTION

In reviewing some select cases on this topic, the review will focus on:

A. The history of the jurisdictional argument;
B. How jurisdictional arguments succeed;
C. How jurisdictional arguments fail;
D. The importance of documentation for a successful jurisdictional argument; and
E. A recent jurisdictional success with lessons learned.

A. The Historical Case:


Facts:

This case involved a fall on an icy sidewalk that was opposite a driveway occupied and used jointly by the defendants. The plaintiffs contended that owing to the manner of the construction of the driveway, it acted as a channel to conduct water from the premises of the defendants to the sidewalk where, in certain conditions of weather, it froze. It was the ice, originating from this cause, which caused the plaintiff to slip and fall.

Conduct of Case:

At trial, the plaintiff was successful. The doctrine of *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330 was found to apply and to create a strict liability situation for water flowing off the defendants’ property.

Ratio:

The Court of Appeal did not basis their decision on *Rylands v. Fletcher* but on their decision in *Meredith v. Peer* 39 O.L.R. 271 (1917) which held:

> The owner or occupant of a building, the roof of which is so constructed that from natural causes the snow or ice which falls or collects upon it will naturally and probably slid from the roof, is bound, apart from any obligation imposed upon him by a municipal by-law, to take all reasonable means to prevent the snow or ice from falling upon the adjoining property or on an adjoining highway and causing damage to person or property there; and that is the extent of the obligation which the law imposes upon him.

The Court of Appeal accepted that there was “abundant evidence that water did come down that driveway, as found by the trial Judge, and that it was at least a contributing factor in the formation of the ice complained of.”
This created a nuisance that the defendants were therefore liable for not removing.

The issue on jurisdiction was causation. Once causation was established by the “ample evidence” accepted by the Court, the defendants were doomed.

To refute such a position, the defendants would have needed to challenge that they had any causal role in the creation of ice, either through means taken to prevent it or addressing causes that could wholly explain it.

Instead, defence counsel back in 1933 tried to use the “it’s their fault too” argument, suggesting they were one of many contributors to the ice on which the plaintiff fell. Just as that would not work between two toddlers blaming each other, it did not here either. The Court was not moved by the absence of other tortfeasors not having been sued, and was all too happy to attribute fault to the tortfeasors who had been sued already.

To transfer the risk in such a case, more defendants would have to have been added as Third Parties. There was needed more evidence on the true cause, and evidence needed to be led on property distributions to reduce the defendants’ role. None of this appears to have been put forward in this case. As such, the Court found the responding defendants liable, though the fall happened off their property.

Take Away

This case is meaningful for opening the door for jurisdictional arguments in contrast to the then dominating House of Lords decision in *Rylands v. Fletcher*.

*Rylands* imposed strict liability for water off a property, eliminating any question of jurisdiction or causation for that water. If the *Rylands* case were still good law in Ontario, arguably no jurisdictional argument would ever be successful. The Court accepted that proof of causation and jurisdiction were valid arguments. As such, and fortunately, case law has evolved in this area since 1933.

**B. How Jurisdiction Arguments Succeed:**


**Facts:**

The poetic narrative begins to set the case against the defendant municipality:

> On a typical winter morning almost anywhere in Canada, the silence of the pre-dawn hours is often broken by the sound of municipal snowploughs. Canadian taxpayers expect that their municipal governments will move quickly and efficiently to keep the streets clear and safe.

From there it is downhill for the Defendant City of Vaughan.
On January 23, 1997, the plaintiff fell on a sidewalk in front of a municipal residential address in the City of Vaughan. She was injured and brought an action against the City as the owner of the sidewalk. She alleged that the accumulation of snow and ice on the sidewalk constituted a hazard and a nuisance. Negligence and breach of the *Occupier’s Liability Act* 1990 c. O. 2 was alleged.

The City of Vaughan defended the action. In their defence, they took the unusual step of adding in as Third Party Defendants all the owners and occupants of the residential address abutting the area on the sidewalk. They added in these other adjacent owners on the basis of a municipal by-law requiring such owners and occupants to clear snow on sidewalks abutting their properties.

That bylaw read:

> Owners of...occupied...residential buildings...shall clear away snow and ice from the sidewalks on the highways in front of, alongside or at the rear of the land occupied by such buildings...

This by-law was coupled with a penalty at the discretion of the presiding justice.

**Conduct of Case:**

The Third Party adjacent landowners pleaded that they had no jurisdiction for the location in issue. They further pleaded that the City “cannot be relieved from any liability imposed on it by the *Municipal Act*, R.S.O. 1990 c. M. 45”.

The Third Party ratepayers brought a motion for summary judgment to defeat the City’s case against them. Justice Beaulieu granted that judgment at 46 O.R. (3d) 345.

**Ratio:**

The motions judge, Beaulieu J., held:

> ..the Ontario courts have made it quite clear that owners and occupiers of a dwelling adjacent to a municipal sidewalk who are subject to a city by-law, such as By-law No. 300-93, do not owe a duty of care to users of the sidewalk since the remedies for falls on public sidewalks are found in the Municipal Act . . .

Furthermore, it has been decided by the Ontario courts that the *Occupier's Liability Act* . . . does not apply. A by-law requiring owners and occupiers of dwellings to remove snow and ice from public sidewalks adjacent to their properties cannot relieve the municiplality from liability imposed by the Municipal Act.

(Emphasis added)

The motions judge held that there was no duty of care for the adjacent landowners and granted summary judgment.

**Court of Appeal Decision:**
This decision was appealed to the Court of Appeal of Ontario. The Court of Appeal found in favour of the dismissal and clarified the role of a jurisdictional analysis.

The appellant did not contend that the ratepayer’s alleged breach of the snow-clearing by-law, in and of itself, gave rise to tortious liability. Such an argument was foreclosed by the decision of the Supreme Court of Canada in Canada v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205, 143 D.L.R. (3d) 9, where Dickson J. stated, at p. 227:

*The notion of a nominate tort of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that unexcused breach constitutes negligence per se giving rise to absolute liability.*

The City argued that non-compliance with the by-law should still serve as evidence of the breach of a common law duty of care by the adjacent property owner. As a general proposition, there was merit in this submission. In Saskatchewan Wheat Pool, having rejected an independent tort of breach of statute, the court proceeded to link breach of statute and the common law of negligence. Dickson J. said, at p. 225:

*Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence. Negligence and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach. The question then becomes: is there a common law duty on the owner of the property to clear snow and ice from public sidewalks adjacent to the property? In my view, the answer to this question must be "No".*

While the breach was relevant to the question of duty, it did not end the inquiry. The Court of Appeal affirmed that questions of jurisdiction could determine if there is a right of action. Even if there is a statutory breach, where there is no mandatory jurisdiction for the activity alleged, the action could not survive against the defendant. Even a breach of statute cannot create jurisdiction. A lack of jurisdiction was fatal to the case being made.

The Court held that there are two exceptions to this general principle.

1. **Special Circumstances:**
   First, a property owner may be deemed in law to be an occupier of adjacent public property if the owner assumes control of that property. Thus, in Bogoroch v. Toronto (City), [1991] O.J. No. 1032 (Gen. Div.), the court held that a store owner who used the adjacent sidewalk to display its wares on a continuing basis was an occupier of the sidewalk and subject to the duties imposed by the Occupiers' Liability Act.

   Similarly, in Moody v. Toronto (City) (1996), 31 O.R. (3d) 53 (Gen. Div.), the court held, on a motion for summary judgment, that the owners of the Skydome in Toronto might be an occupier of the public walkways adjacent to the stadium because of the "special circumstances" relating to those walkways around games in the Dome. This would include the passage of traffic dictated
by the property owner. Almost exclusive use of the walkway by Skydome patrons and a lack of
alternatives to the walkways would be such “special circumstances”.

2. Flow off property.
The second exception to the general principle that a property owner is responsible only for his or
her property is that the duty of care on the owner extends to ensuring that conditions or activities
on his or her property do not flow off the property and cause injury to persons nearby.

An example of a case in this category would be Brazzoni v. Timmins (City), [1992] O.J. No. 254
(C.A.), where the court held both the City of Timmins and the Toronto-Dominion Bank liable for
injuries suffered by a person who fell on snow and ice on a public sidewalk near the bank.
Referring to the bank's liability, the court said, at p. 2:

. . . the trial judge found that water flowed from the respondent's
property across the sidewalk at the time the plaintiff fell. By
allowing the water from melting snow, on the roof of its building
and from its parking lot, to accumulate on its property and to run
across the sidewalk which was covered with snow and ice, the
respondent, in our opinion, created a dangerous condition that it
knew or ought to have known could cause injury to pedestrians
using the sidewalk. Regardless of whether liability is based on
nuisance or negligence, the respondent, in our opinion, is liable.

Neither of these exceptions applied in the Bongiardina case.

The second exception in Bongiardina is very similar to the much earlier case of Taylor v.
Robertson supra, keeping that 1933 case in the fold.

Since neither of the exceptions applied to Bongiardina, the Court held that the ratepayers did not
have a jurisdiction for the adjacent public sidewalk notwithstanding a by-law setting out a duty
to clear it of ice and snow. The case against the ratepayers was dismissed.

Take Away

The question was whether the City of Vaughan’s by-law altered the common law picture. It did
not. Again referring to Saskatchewan Wheat Pool, Dickson J. stated, at p. 223:

...where there is no duty of care at common law, breach of non-
industrial penal legislation should not affect civil liability unless
the statute provides for it. Neither the Municipal Act nor the City
of Vaughan by-law purports to impose civil liability on the owner
of property adjacent to public sidewalks. Indeed, s. 284 of the
Municipal Act imposes a duty on municipalities to keep highways
(which include sidewalks) in a reasonable state of repair. It is
doubtful that a municipality could circumvent this duty by trying to
impose a replacement duty on its own residents: see Ślumski v.
Absent evidence of a clear duty of care breached by the ratepayers, there was no issue of jurisdiction under the common law. Summary judgment is granted where adjacent owners had no jurisdiction for the sidewalk in issue. The Third Party Claims were dismissed.

The Court of Appeal ratio is still good law in Ontario. It draws the line between owner/occupier and others. If it is possible to clearly define the aspects of the case and to tell a clear narrative, there then needs to be special circumstances or deliberate runoff to adjacent property to provide exception. The burden of proof of either exception lies with the plaintiff.

The Court of Appeal agreed that a Rule 20 determination of jurisdiction before examinations was not premature. The motions judge accepted the connection between adjacent owners and the plaintiff’s fall was too tenuous to survive and placed the burden on the Third Party Claim plaintiff to prove the defendant’s duty.

C. How Jurisdictional Arguments Fail:

Pammett v. 1230174 Ontario Inc. 2013 ONSC 2382

Facts:

On January 21, 2009, the Plaintiff slipped and fell at the entrance of a Tim Horton’s Restaurant in the City of Ottawa. She sustained a fracture to her arm and alleged the issue was icy conditions on the curb just in front of the door of the store.

The location is a typical “Timmy’s” at the corner of a plaza parking lot. It was beside a strip mall with offices and other retail establishments. The restaurant was operated by McBride Corp, a franchisee of the Tim Hortons chain. The Defendant 1230174 (“Ashcroft”) was the owner of the land. McBride was the operator of the restaurant and tenant of Ashcroft. Variety was the snow contractor hired by Ashcroft.

The plaintiff did not understand the network of tenancies and contractual arrangements at the time of the fall. The plaintiff notified McBride as the franchisee who notified Ashcroft who notified Variety.

McBride only leased the premises from the exterior walls of the building inwards, as well as a portion of a drive-thru lane adjacent to the building. The leased premises did not include the walkway, which constituted the entrance to the Tim Hortons, where the fall occurred. McBride also did not lease the parking lot area of the commercial center.

By all accounts on the contract, McBride had no jurisdiction for the accident in issue.

Ashcroft engaged the services of a winter maintenance contractor name Variety to maintain the parking lot and walkways, including the location of the fall. Ashcroft owned the walkway that was treated by Variety. On the basis of the Bongiardina doctrine more than ten years prior, McBride would have been correct to move on the question of jurisdiction before discovery and to push a jurisdiction risk transfer to the other parties, if they had been added.

Unfortunately, they took a different approach and one that did not work out well for them.
Conduct of Case:

The statement of claim was issued against only McBride. McBride defended, but did not deny it was an occupier, nor did it name either of the other entities as Third Parties or potential defendants.

Discoveries proceed September 2011, two years post-accident. Only McBride was discovered, as the other entities had not been added or mentioned beyond the adjuster level. No Requests to Admit had been issued and McBride relied on the fact that it was not required by contract, absent any other valid target to the plaintiff.

The discovery was the first time that the plaintiff knew that the walkway was not leased by McBride.

Discoveries proceed of McBride and plaintiff only. The following facts emerged on issue of jurisdiction:

- Customers were required to enter the store though that location;
- There is exclusive use of the walkway by Tim Hortons customers;
- Salt was applied by McBride;
- Shovel and salt were kept on site by McBride;
- McBride’s employees instructed to inspect walkway every 2 hours;
- No denial of responsibility signs were posted; and
- No witness statements were offered by McBride who claimed privilege over them.

McBride, without trying to shift jurisdiction to another entity, brought a summary judgment motion but had gone to examinations by itself as the only defendant first.

Ratio

The motion McBride brought was pursuant to Rule 20.04(2). It needed to prove there was no genuine issue requiring a trial.

McBride’s motion was not successful. There were still issues of whether McBride was an occupier or whether it potentially owed the plaintiff a duty of care, even if it was not an occupier under the lease. McBride, merely by being a franchisee, had not divested itself of responsibility. No Requests to Admit had been filed. No denials were put in place. Given the admissions above, examinations did not help to clarify matters; in fact, they made them far worse for McBride.

The case of Moody v. Toronto (City) (1996) 31 O.R. (3d) 53 was relied upon to speak to the “special circumstances” that McBride had built against itself at examinations. The ratio is the
same of *Bongiardina supra*, though McBride found itself pushed into one of the two exceptions to the general rule that otherwise would have protected it.

The reason that an adjacent owner can be liable in “special circumstances” flows from the definition of “occupier”. In *Moody, supra*, the court found that there were special circumstances, which made the adjacent owner a *de facto* occupier. Where a walkway was almost exclusively used by patrons of the owner’s venue and those people had no alternative, the existence of the business necessitated the flow of people to it. **Such facts were capable of expanding the jurisdiction beyond the strict boarder in the lease.**

Given the additional facts admitted to at examinations, it is no surprise that the suit was found to have a genuine issue requiring a trial. McBride was permitted to amend its statement of defence to plead it was not an occupier, given the mandatory provision of Rule 26.01. The motion to strike was dismissed, however. The litigation continued and McBride was left alone to defend and to settle with the plaintiff.

**Take Away**

*Pammett* may be considered an example of what not to do to attempt a jurisdictonal transfer. It supports the general rule that adjacent property owners can be found to occupy space they do not lease if their business creates foot traffic of patrons.

Not all the necessary parties were added, the admissions were made before that occurred and McBride did not press the conversation to be one of jurisdiction. Merely allowing the process to unfold in the normal course and not changing the conversation allowed McBride to remain the only target.

Had Variety and Ashcroft been added by McBride, or the plaintiff, early, McBride would not have had to face the prospect of exclusive jurisdiction alone. Even with McBride failing a summary judgment motion, the plaintiff would have liability potentially across three targets rather than against just McBride. Neither Variety nor Ashcroft was successfully added to this action (due to limitations expiry). McBride ended up settling in whole for an accident outside of their leased premises.

McBride ends up, post-discovery and two motions later, with no other target and sole responsibility to the plaintiff.

*Pammett* is an excellent example of what not to do to effect a jurisdictonal transfer.

**D. The Importance of Documentation:**

*Labancz v. Reeves 2007 Canlii 54277*

**Facts:**

The plaintiff, Maria Labancz, slipped and fell on a patch of ice in a municipal laneway abutting the Reeves’ property. Both Reeves and the City of Toronto were sued in negligence.
The City admitted jurisdiction for the lane. The lane was bordered by a fence on the Reeves’ property. Through that fence there was a downspout that allowed drainage from the Reeves’ property into the laneway. The lane was graded in two directions towards a catch basin. The grading is designed to permit surface water to drain towards the catch basin in the lane.

The plaintiff’s evidence was that she fell on a “large bumpy patch of ice located on the laneway directly adjacent to an eaves trough downspout that was protruding through the wood fence located on the Defendant Reeves’ property.” This downspout was removed after the incident. The plaintiff produced a photograph of it in December, 2004 that showed it pouring water onto the lane making bumpy ice allegedly similar to what was observed February 2004.

The plaintiff had no knowledge of water pouring out of the downspout on the date in issue. The witness/friend of the plaintiff also made no mention of the downspout or the condition of the lane other than that the lane was “covered with ice and fresh snow”.

The police constable who was present before the fall noted ice in the laneway but nothing having to do with the downspout.

The plaintiff’s expert reports were contradictory. The first blamed surface irregularities in the laneway as a cause of improper drainage. The second report stated that ice would not have developed in the absence of surface irregularities, which impeded proper drainage. The third plaintiff report blamed “debris carried in uncontrolled storm water runoff and plan waste” as impeding draining”. This latter issue was laid at the feet of the Reeves’ property.

The defendants had no contradictory evidence that could eliminate the downspout as a cause of the ice. The defendants were silent on the issue of causation, having not invested at the first stage. They sat back and relied on the fact that the plaintiff had the burden to show causation. The contradictions in the plaintiff’s three expert reports and their divergent theories were suggested by the Reeves to be sufficient to exclude jurisdiction.

Conduct of Action

The Reeves, as adjacent land owners, moved for summary judgment. Reeves moved under Rule 20 and argued there was no genuine issue for trial, as the plaintiffs advanced no evidence that anything from the Reeves’ property caused the ice to form on the lane. They also claimed that there was no evidence of knowledge or deemed knowledge of the hazard in the laneway.

Both the City and the plaintiffs opposed the summary judgment motion.

Ratio

The Court accepted that there were errors in the plaintiff’s expert reports. That there was deterioration of the laneway was directly opposed by other evidence and accepted by the Court as an “error” and “incorrect assumption” in the reports.

However, in failing to provide clear evidence of how the downspout operated, or its history, the defendants could not rebut a genuine issue, or series of issues, requiring a trial.

Questions remained for the court, which included:
whether the downspout was improperly positioned,

what effect that had,

whether water was flowing from the downspout at, or preceding the time of the incident,

whether water in some way contributed to surface irregularities on the pavement,

whether the downspout created irregularities that interfered with the proper drainage in the lane,

whether the position of the downspout caused damage to the curb, which caused soil and debris into the lane.

Take Away

There was clearly a jurisdiction argument to be made along the same lines as *Bongiardina*. However, unlike *Bongiardina*, the defendants did not take the time to challenge or define the facts of the incident, including their very limited role in its creation.

There remained the potential for this to fall within the second exception to the rule in *Bongiardina*: concerning flow of material that the landlords ought to have known about. Nonetheless, better crystallization of the facts contemporaneous with the scene, even with expert reconstruction, could have allowed the jurisdiction argument to succeed. Without such details from the scene, there was no chance.

One of the most important elements for a successful jurisdiction risk transfer is the ability to reconstruct the circumstances, including the cause of the incident. This is where site management and security have far more power than a defence lawyer does. Photographs, keeping of video footage, well-constructed logs, and detailed security reports of the scene can clarify the cause at the time and allow for control of the narrative on jurisdiction.

If a site can prove that it was ice formed from flow from a snow pile, or ice from freezing rain, or ice from an adjacent property, all have possible defences on jurisdiction to transfer to a contractor, a tenant, or an adjacent property owner. Failure to document the cause prevents such a reconstruction. Contemporaneous documentation is key to a jurisdictional motion succeeding.

**E. A Recent Successful Jurisdiction Argument:**


Facts

The plaintiff slipped and fell after a freezing rainstorm. She fell on the paved portion of a boulevard abutting the City sidewalk, which was used for driveway access to the defendant Lyszczyk’s property. Lyszczyk had salted her driveway, but not the boulevard. Lyszczyk believed it was not her responsibility to do so. The City also did not salt or plow the boulevard portion of the driveways.
**Ratio**

On a question of jurisdiction, the boulevard fell to the City to maintain under s. 44(1) of the *Municipal Act, 2001* S.O. 2001 c. 25. It fell to the City to maintain to an appropriate standard. There was no by-law imposing a duty upon Lyszczek to remove snow and ice from the boulevard. This by-law, even if it existed, would not relieve the City from liability imposed on it by the *Municipal Act, 2001*.

Lyszczek was not liable for maintenance of the boulevard as an adjacent property owner under the *Occupier’s Liability Act* R.S.O. 1990 c. O 2 because she did not exercise any control over the boulevard. The City met the minimum requirements contained in the Regulations. As such, there was no breach on their role either.

This matter had proceeded through multiple days of examinations and there are 50 paragraphs in the decision summarizing the evidence of the plaintiff, her common law spouse, the neighbour of the plaintiff, a forensic engineer, the City manager of operations, the defendant Lyszczek, and Lyszczek’s former common law partner.

The Court did not accept, in any event, that the Municipality could divest itself of civil responsibility by imposing a by-law on its ratepayers. Reference was made to *McQueen v. Niagara on the Lake, Luta v. Toronto* (1975) 8 O.R. (2d), *Erskine v. City of Regina* [1973] 2 W.W. R. 751 all of which upheld that proposition.

It was accepted that a failure to exert control over the area was sufficient to have the “occupier” definition of the *Occupier’s Liability Act* not apply to the defendant Lyszczek.

The Court went on to assess the liability against the City based on the Minimum Maintenance Standards. The Court found that the City had no liability under the MMS and dismissed the case against them too. The plaintiff was shut out entirely due to one argument on jurisdiction and one on the standard of care.

**Appellate Decision**

The case was appealed to the Court of Appeal by the plaintiff. The Court of Appeal dismissed the appeal and sustained the dismissal against both ratepayer and City. In 2014 ONCA 291, the unanimous court held there was nothing in a by-law that would make the ratepayer an occupier of the boulevard. There was no specific circumstances on the facts of this case that place the respondent in “control” of the boulevard. As such, there was no separate duty of care of the ratepayer.

**Take Away**

This was a successful and recent example of a successful jurisdictional risk transfer. This complemented the standard of care analysis that vindicated the City. However, it is also a demonstration of the added costs of treating a jurisdictional question like one of liability and not controlling the narrative early.

In this case, there were no Requests to Admit served. The costs of getting to the summary judgment motion were very high. The extra costs resulted in one expert essentially finding that
the boulevard was icy. Examinations only proved the plaintiff fell on the boulevard. On the balance, there were conflicting and overall irrelevant views about the scene that did not affect the jurisdictional determination. None of the other evidence was worth the money spent to obtain it.

On the issue of jurisdiction, the costs thrown away could have been avoided by a Request to Admit. A clear survey of the property would have established the location to be on the boulevard and not on the ratepayer’s property. Without evidence of actual control of that boulevard, the case could have ended against the individual defendant.

The positive takeaway is that the ability to extricate a party on a question of jurisdiction continues to exist. However, it should not be left until trial to raise such an argument. Bondy was a successful demonstration of the principle of jurisdictional risk transfers, leaving the City to argue standard of care. However, such a result should have been possible without the preponderance of evidence utilized in this case.

A Request to Admit on the plaintiff, followed by one on the City would have established the same facts as accepted by the Court of Appeal to not be in dispute. It would be then the position of the ratepayer that there was no evidence of control being tendered and a short affidavit to that effect would have established what took years of litigation to obtain.

On the question of “whose risk is it anyway” Bondy answered that it was solely the plaintiff’s risk. With no recovery against either the ratepayer or the City, the plaintiff was shut out. This is a rare result at trial. As seen by the other cases in this section, the risks are high at trial that alternative questions will be asked by the Court.

If the conversation can be controlled early with careful uses of Requests to Admit, it is possible to transfer risks to other entities. While such questions can also be dealt with at trial, it is far more economical and efficient to attempt to settle such questions before examinations, lest the plaintiff muddy the waters as they did in Pammett supra.

4. CONCLUSION:

In conclusion, jurisdictional analysis involves directing the conversation away from issues of liability and damages and to the question of proper party at risk. To do so:

1. **Start the narrative early.** Explain which route is being taken to plaintiff and where applicable, to the co-defendant/tenant/adjacent owner. If the narrative of “no jurisdiction” is clearly set out, the plaintiff’s own lawyers can be useful to press the co-defendant for needed admissions and to take the focus off your site as a target.

2. **Offer up material early.** The productions concerning role of site, role of others, and site conditions need to get to counsel early to start that discussion. There may be times when adjusters are appointed for the co-defendant and a jurisdictional discussion can be had, and some material exchanged even before a statement of claim.

3. **Gather productions early.** Ensure that depending on the approach, you have the other side’s certificate, our incident report, a property survey, lease agreement, or materials (photographs, video) to document the scene.
4. **Push for a transfer before examinations.** Learn the lesson of *Pamnett* not to allow admissions to muddy the waters with evidence that obscures.

5. **Control the story and help control the outcome.** Do not be afraid to ask, “Whose Risk is it Anyway?” Ask it frequently of your counsel, the adjuster and ensure that story gets heard from the beginning of an incident. Focus the litigation around that issue where possible and not merely allowing the normal course. Controlling the conversation keeps the focus on your sites’ release at the earliest possible stage.