



Occupier's
Liability
and
the
Homeowner

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Agenda

- *Occupiers' Liability Act (OLA)*
 - Who is an Occupier?
 - Standard of Care
 - Defences
- Adjacent Municipal Sidewalks
- Subrogated Actions
- Dog Bites

Duty on an Occupier

- Section 3(1) of the *Occupiers' Liability Act*
 - an occupier must take reasonable care to see that people are reasonably safe while on the premises

What is Expected?

An occupier is not expected to remove every possibility of danger

- Reasonableness, not perfection
- An occupier must make sufficient observations and take action where necessary to prevent unsafe situations from being created or prolonged
- Constant monitoring and instant response are not required

Duty of Care

- Affirmative duty to make their premises “reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm”
 - occupier may prefer to designate certain parts of his/her property “off limits” rather than make it safe
- Occupiers are not insurers for any injury or damage that occurs on premises
- Factors which are relevant in determining what is reasonable care in the circumstances, will be “very specific to each fact situation”
- Duty may include a positive responsibility on the occupier to inspect his or her premises to ensure compliance with s.3(1)
 - see *Sauve v. Provost* (1990), 71 OR (2d) 774 at 779

Who is an Occupier?

Section 1 of *Occupiers' Liability Act*

1.In this Act,

“occupier” includes,

(a) a person who is in physical possession of premises, or

(b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,

despite the fact that there is more than one occupier of the same premises; (“occupant”)

Four Categories of Occupier

1. Those who have **physical possession** of the premises;
2. Those who have **responsibility for and control** over the **condition** of the premises;
3. Those who have **responsibility for and control** over **activities** carried on in the premises; and
4. Those who have **control over persons** allowed to enter the premises.

More Than One Occupier

- *OLA* definition of “occupier” allows for possibility of more than one occupier of premises
- Premises can have control exerted by more than one party
- Case law supports this interpretation of the definition of “occupier”

Residential Tenancies

- Section 8 of *OLA*
- Where residential tenancy in which landlord responsible for maintenance or repair, duty of care owed by landlord to entrants onto property
- Same duty of care owed by landlord as an occupier under *OLA*
- This so even if landlord does not live on the premises

Where Tenant is Responsible For Maintenance and Repairs

- *OLA* appears to leave open the possibility that a landlord will *not* be liable where there is an agreement between the landlord and the tenant that the tenant is responsible for the maintenance and repair of the property
- Turns out, however, that that is not the case

Residential Tenancies Act

- Section 20 of *RTA* states that a landlord is responsible for the maintenance and repair of a residential complex
- This is so despite any agreement or waiver to the contrary
 - Such as a lease agreement stipulating that tenant is responsible for maintenance of premises

Tenant Responsible for Maintenance

- *Taylor v. Allard*, Ontario Court of Appeal



Taylor v. Allard

- Tenants hosted party, which included a bonfire
- Landlord had constructed fire pit, with cinderblocks arranged around pit
- Plaintiff, intoxicated, tripped on cinderblocks, and burned himself
- Lease agreement stated that tenants were responsible for the maintenance and repair of the premises

Taylor v. Allard

- Court of Appeal found that there is statutory duty imposed on landlords of residential properties to maintain and repair premises
- This duty prevails, despite any agreement or waiver to the contrary

Tenant Responsible for Maintenance

- Statutory duty prevails, even where:
 - Landlord is not physically present at premises
 - Tenant is responsible for maintenance and repair of property
 - Landlord has no control over social events, or who is invited to attend
 - But, consider ice on sidewalk, or oil or paint spill inside the residence

Standard of Care

Standard of Care

- Difficult to determine what is exact standard of care
- Based on Court's determination of *what is reasonable in the circumstances*
- Idea of “local practice” (*Waldick v. Malcolm*)

Ice and Snow

- Should be shoveled, and salt or sand applied to walkways
- Should be done reasonably soon after snowy or icy conditions are present
- No requirement that entire property be made safe for pedestrians
- Ice-free premises is not the standard
 - Reasonably safe

Reasonable Time

- *Dogan v. Pakulski*



Dogan v. Pakulski

- Tenant lived in basement of house, and landlords lived upstairs
- Tenant slipped and fell on icy walkway on property
- Ice had been building up for **four** days prior to accident
- Court found that icy conditions were not so recent that it was unreasonable to expect action on the part of the landlords

Handrails

- No cases where homeowner found to have breached duty merely because of failure to have handrails in place
- But, presence of handrails is considered in assessment of inherent dangerousness of a walkway
- Plaintiff's failure to use handrails can impact contributory negligence

Sloping Walkways

- *Jacques v. Anderson*



Jacques v. Anderson

- Occupier was elderly woman who had sloped pedestrian ramp leading up to entrance to home
- At its worst, the ramp had a slope of 19%
- Plaintiff fell while descending ramp, which was unsalted
- It had rained that day, and then freezing conditions had settled in

Jacques v. Anderson

- Court found that the walkway constituted an “unusual” and “unsafe condition” for pedestrians
- Defendant negligent in not salting or sanding ramp

Non-Compliance with Building Code

- Failure to comply with building code, safety code, or industry standards will not, by itself, lead to liability against an occupier
- Building code will inform the Court of standard expectations of design and implementation

Salisbury v. London (City)

- Occupier library had interior ramp
- Lighting above ramp was below Building Code standards
- Plaintiff tripped over large dog standing on ramp, and alleged that she was unable to see it due to poor lighting
- Despite being below standards, Court found that there was sufficient lighting on ramp

Standard of Care and Juries

- *Kerr v. Loblaws*
 - In instructing a jury, judge should not articulate the governing standard of care based on prior case law
 - Should instead instruct jury to decide whether steps taken by defendant were reasonable in the circumstances
 - Jurors may balk at plaintiff counsel's suggestion of strict duties on occupiers

Contributory Negligence

- Common in slip-and-fall cases
- Advance knowledge of icy or dangerous conditions can lead to contributory negligence finding
- Same factors which make it reasonable that occupier clear snow or salt, make it reasonable that plaintiff would have known of dangerous conditions

Litwinenko v. Beaver Lumber

- Plaintiff tripped on bump or lip on ramp while leaving Beaver Lumber store
- Familiar with ramp – visited store twice a week

Litwinenko v. Beaver Lumber

- Court found that store failed in its duty to see that people on premises were reasonably safe
- “...the danger existed. But the danger was obvious. The plaintiff knew the danger existed. The danger was one that a person, taking reasonable care of her own safety, would easily have avoided
- Plaintiff found 50% liable for her injuries; Divisional Court reduced this to 15%
- Be aware of local practice

Defences

- Hiring independent contractor
- Risk willingly assumed by plaintiff

Independent Contractor

- Complete defence under *OLA*
- Where damage to person or property caused by negligence of independent contractor employed by occupier
- Occupier acted reasonably in trusting contractor to do proper work

Independent Contractor

- Hiring snow removal company
- If, icy conditions present, and snow removal company ought to have salted, but did not, occupier can avoid liability

Risks Willingly Assumed

- Section 4(1) of *OLA*
- Duty of care required of occupiers under *OLA* does *not* apply where plaintiff willingly assumed risk
- Occupier still owes lesser duty to not create danger with deliberate intent of doing harm, or reckless disregard

Risks Willingly Assumed

- *Waldick v. Malcolm*
- Entrant on property must:
 - Be aware of knowledge of the risk; and
 - Consent to the legal risk
 - “Waiver of legal rights that may arise from the harm or loss that is being risked”

Waiver of Legal Rights

- Will be found by the Courts only in rare circumstances:
- *Waldick v. Malcolm*:
 - “Common sense dictates that only rarely will a plaintiff genuinely consent to accept the risk of the defendant’s negligence”
 - “Rare may be the case where a visitor who enters on premises will fully know of and accept the risks resulting from the occupier’s non-compliance with the statute”
- *Dogan v. Pakulski*:
 - “That section has been narrowly interpreted to apply to situations only if the plaintiff has assumed both the physical and legal risks caused by a defendant’s negligence”

Risk Assumed in Homeowners' Context

- *Robson v. Spencer*



Robson v. Spencer

- Accident took place in northern B.C.
- Plaintiff approached entrance to occupier's house, not via the walkway, but cut across the lawn
- Slipped and fell on icy grass
- Walkway was cleared of snow, and salted

Robson v. Spencer

- Court found that plaintiff had willingly assumed the risk, within the meaning of the B.C. *OLA* (similar language to Ontario *OLA*)
- Plaintiff knew risk of traversing compacted snow
- Court stressed that plaintiff was local to northern B.C., and would have been familiar with winter conditions in area
- Overlooked assumption of legal risk
 - Probably better looked at as reasonable care in all the circumstances

Risk Deemed Willingly Assumed

- Section 4(3) of *OLA*
 - Where person enters onto certain types of land for the purpose of recreational activity; and
 - Where **no fee** is paid for the activity
- In these circumstances, a plaintiff is **deemed** to have willingly assumed the risk of injury

Risk Deemed Willingly Assumed

- Types of land where risk is deemed willingly assumed, when engaged in recreational activity:
 - Farmland
 - Undeveloped rural land
 - Private roads reasonably marked as such
 - Recreational trails

Recreational Trails

- Included in *OLA* to encourage occupiers to make their lands available to the public for recreational use

Schneider v. St. Clair Regional Conservation Authority



Schneider v. St. Clair Regional Conservation Authority

- Plaintiff cross-country skiing on occupier's rural land, upon which he had built trails
- Plaintiff intentionally went off the trail, and was injured when ran into a stone wall concealed under snow

Schneider v. St. Clair Regional Conservation Authority

- Court found that occupier should be held to lower standard of care, because area was a recreational trail
- Further, occupier did not know or ought to know that skiers would leave the trail and ski down unmarked portion of property
- Court stressed legislature's intent to encourage occupiers to open up their lands to the public

Recreational Trails

- *Discussion Paper on Occupiers' Liability and Trespass to Property*, Ministry of the Attorney General:
 - Urban residents have flocked to countryside for recreational activities
 - Farmers have become fearful of being sued by people who might be injured while using their land
 - Economic impact of snowmobiling and like in the northwest
 - No fee: lower standard; off trail: little, if any, responsibility

Responsibility for Adjacent Sidewalks

No Liability Generally

- Occupier of a property is generally not liable for injuries that take place on adjacent municipal sidewalks
- Even where:
 - Municipal by-law requires individual owners to clear snow and ice from sidewalks; and
 - Homeowner makes it her/his business to inspect sidewalk, and takes steps to remedy snow and ice on sidewalk

Adjacent Municipal Sidewalks

- *Coulson v. Hamilton (City)*



Adjacent Municipal Sidewalks

- *Coulson v. Hamilton (City)*
- Fact that owner had maintained the adjacent municipal sidewalk did not make him an occupier of the sidewalk

Exceptions

- Two exceptions (“special circumstances” to rule that occupier is not liable for accidents on adjacent sidewalk):
 - Where owner has assumed sufficient control over sidewalk, and where sidewalk is used almost exclusively for visitors of owner; or
 - Where owner permits a condition to flow from property onto sidewalk (nuisance)

Exception 1: sufficient control and exclusive use by visitors

- *Bogoroch v. Toronto (City)*
- Owner had obtained permit from City which gave his store right to physical possession over a part of the sidewalk
- Permit allowed owner to sell and display its goods on the sidewalk

Exception 1: sufficient control and exclusive use by visitors

- *Moody v. Toronto (City)*



Toronto Skydome, "Rogers Centre"

Moody v. Toronto (City)

- Owner of Skydome found to be occupier of walkway adjacent to stadium
- Walkway used almost exclusively by Skydome customers
- When used, it was used in such numbers that it was impossible for a patrol to watch for hazards as they used the walkway

Homeowner Context

- Laneways
- Pathways
- Right of ways
- Adjacent public lands

Exception 2: allowing condition to flow onto adjacent land

- Occupier in this circumstance may be liable to a plaintiff in nuisance or negligence
- For liability in nuisance, no negligence on the part of the occupier is required
 - Strict liability
- Case law evolving: so far always involves negligence principles

Exception 2: allowing condition to flow onto adjacent land

- Nuisance: *Brazzoni v. Timmins* (C.A.)



Brazzoni v. Timmins

- Snow on property of TD Bank
- Snow melted, and flowed off property onto municipal sidewalk, where plaintiff slipped and fell
- No by-law requiring adjacent owners to clear snow and ice from sidewalk

Brazzoni v. Timmins

- Court of Appeal found that store owner was liable to plaintiff in negligence and in nuisance
- Allowing water and melting snow to accumulate on property and run across to municipal sidewalk created a dangerous condition
- Owner knew or ought to have known that this would cause injury

Exception 2: allowing condition to flow onto adjacent land

- Exposure in nuisance and/or negligence against homeowner who does not properly deal with snow accumulation on property
 - Could melt and flow onto municipal sidewalk
 - Or, onto neighbour's property

Government Employees Compensation Act (GECA)



Right of Subrogation

- Employee covered under *GECA* may elect to claim compensation under the *Act*
- In those instances, employer has right of subrogation against tortfeasor

Releases for Subrogated Actions

- Despite fact that an action may be a subrogated action under section 9(3) of the *GECA*, important that in the event of settlement, that a release is signed by the employee herself/himself

Dog Bites



Liability of Owner

- In *Dog Owners' Liability Act (DOLA)*, an owner is liable for her/his dog biting a plaintiff
- “owner” includes anyone who possesses or harbours the dog
 - Has care and control over the dog at the time

Liability for Dog Bites

- Though arguably not relevant, Courts will often take into account whether dog had previously attacked people
- *DOLA* contains sections dealing with pit bulls specifically
 - Safe to assume that Court will deal strongly with biting incidents involving pit bulls

Plaintiff's Negligence

- Strict liability in dog bite cases
- But, *DOLA* allows for apportionment of blame against plaintiff
 - Section 2(1)
- Factors that have been considered:
 - Aggressive body language of plaintiff
 - Whether plaintiff approached dog in an uncomfortable setting for the dog
 - Verbal provocation
 - Other provocation (baby donut bite injury)

Dogs Attacking Dogs

- A plaintiff can recover pecuniary costs where a dog bites the plaintiff's dog
- Also can recover for pain and suffering, and inconvenience for having to care for plaintiff's dog
- Recognition of dog being more than a mere physical possession

Dogs Attacking Dogs

- Duty on dog owners to keep their dogs from biting people, and other dogs
- For homeowners, duty to keep dog confined to premises
- In *Nevelson v. Murgasi*, defendant liable where her dogs escaped her yard via an improperly-secured gate
- Attacked the plaintiff's dog
- Dog attacks dog on leash, resulting in injury to plaintiff

Summary

- Homeowners' Liability
 - As occupier: exposure for injuries and hazards inside and outside the premises
 - As landlord (*Taylor v. Allard*)
 - As tenant
- Deemed Occupier of adjacent land in special circumstances
 - Assumed dominion over adjacent land
 - Flowing hazard to adjacent land

Summary

- Standard of Care
 - Varies with circumstances
 - Building code helps with context, but not determinative
 - Jury not given specific expectations based on case law
 - More general
- Exposure Reduced
 - Contributory negligence
 - S.4(1); *Volenti*
 - Likely where deemed recreational property
 - Policy reasons
 - Strictly applied

Summary

- Homeowners' Exposure as Dog Owners
 - "Owner" broadly defined and applied
 - Strict liability
 - no proof of negligence on owner required
 - Contributory negligence is the key defence to reducing exposure

Summary

- We hope this presentation will assist you in understanding the exposures faced by homeowners and the defences available to them