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When Will a Landowner or Tenant Have Legal Responsibility for an Accident on Adjacent Lands?

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Liability in a personal injury action involving multiple defendants for a slip and fall accident can be complicated. A key issue is to determine which defendant, or defendants, has the legal responsibility for the area of the plaintiff's fall.

When the accident occurs on lands adjacent to the defendant's, the issue can be further complicated. Historically, there has been some uncertainty regarding the interplay between the common law and the *Occupiers' Liability Act* ("the *OLA*") in this regard.

In *MacKay v. Starbucks Corporation*, 2017 ONCA 350 ("*Starbucks*"), the Court of Appeal looks to settle this debate. The plaintiff slipped and fell on an ice-covered municipal sidewalk at the entrance to a patio in front of a Starbucks location in Toronto. At trial, Starbucks was found liable as an "occupier" of the municipal sidewalk. The Court of Appeal dismissed an appeal by Starbucks.

The Court found that the *OLA* "occupies" the field of liability when dealing with the issue of whether a landlord or tenant can be responsible for incidents on adjacent lands. The Court held that if a defendant is not an "occupier", then there will be no liability in negligence with respect to injuries on adjacent lands, based on proximity principles. In short, a defendant is not liable for incidents on neighbouring lands, under the neighbour principle.

This outcome is said to be as a direct result of section 2 of the *OLA,* which indicates that the *Act* applies in place of the rules of the common law.

Case law thus far has established only one area of potential exposure on non-"occupier" defendants for injuries on adjacent lands. This involves situations where conditions flow off the premises onto adjacent lands and cause injuries to others. Liability will attach in those situations, based on a failure to prevent a nuisance. (See *Bongiardina v. York* , 2000 CanLII 5408 (ON CA)).

Although the door is not entirely closed, it is clear that situations where a defendant who is not an "occupier" will be found liable for incidents on neighbouring lands, are quite limited. As a result, a lot turns on whether a landowner/tenant can be seen to meet the definition of "occupier" under the *OLA*.

In circumstances where the adjacent land is a municipal sidewalk, the stakes are even higher since the municipality, the typical target and obvious "occupier", is only responsible if gross negligence is established in the context of personal injuries caused by snow or ice (see *Municipal Act*, S.O. 2001 c.25 s.44(9)).

Simply clearing ice and snow on an adjacent municipal sidewalk pursuant to municipal by-law, is not enough to create "occupier" status (see *Bongiardina).*

A greater degree of assumed control over adjacent lands is required to affix legal responsibility. Indeed, the nature and extent of the "assumed" control appears the determinative factor.

In *Starbucks,* the requisite degree of control over the adjacent lands (sidewalk) was demonstrated based on the following factors/conduct of the defendant:

building a fence and patio that contained an opening that seamlessly joined the patio and the sidewalk;

- by making a path over the sidewalk leading directly to its door;
- by monitoring the condition of the pathway, and by cleaning, salting and sanding it, to be sure it was safe for its customers; and,
- by directing the travel path of its customers over the adjacent lands as a means of entering and exiting its premises.

Starbucks can now be added to the list of well-known cases, such as *Moody v. Toronto* (City) 1996, 31. O.R. (3d) 53 (Gen. Div) and *Bogoroch v. Toronto* (City) [1991] O.J. No. 1032 (Gen. Div), where adjacent store owners/merchants, were found responsible for falls on adjacent lands, based on the degree of control assumed over the premises, and the people on it.

Take Away from *Starbucks*

The Court of Appeal affirmed that a defendant is not liable for neighbouring lands under the neighbour principle; there is no common law duty of care, based on proximity for incidents on adjacent lands.

In most cases, liability will only attach to an adjacent landowner if the defendant meets the definition of "occupier" under the *OLA.*

Simply clearing ice and snow from adjacent lands or sidewalks will not be sufficient to attract "occupier" status.

“Occupier” status will only be conferred when a defendant exercises sufficient control over the adjacent lands by directing customer traffic through those lands to its premises and/or by monitoring the condition of the premises to ensure the safety of its customers.

As a result, although liability will not attach to a defendant simply by virtue of them being aware of a danger on an adjacent property, liability may well attach where a degree of control over those premises is exercised, particularly for the defendant’s own benefit. Counsel will be well advised to consider the nature and extent of any control over adjacent lands when considering which defendants may have legal responsibility for the area of the plaintiff’s fall.