

MUNICIPAL OCCUPIERS' LIABILITY

Presented by:

Daina Young

R | M | R | F

Reynolds Mirth Richards & Farmer LLP

BARRISTERS | SOLICITORS

Municipal Occupiers' Liability

- When will a municipality be an “occupier” of “premises”?
- What premises and situations are exempted from the application of the Act?
- What duty does an occupier owe to visitors, trespassers, child trespassers, and recreational users on its premises?

Municipal Occupiers' Liability

- What, if any, protection does the *Municipal Government Act* offer to municipalities?
- How can an occupier limit or restrict its duty?

Who is an Occupier?

Occupiers' Liability Act, section 1(c):

- “occupier” means:
 - (i) a person who is in physical possession of premises; or

Who is an Occupier?

- (ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises;

for the purposes of this Act, there may be more than one occupier of the same premises.

Who is an Occupier?

Examples of premises “occupied” by municipalities:

- Baseball diamonds, swimming pools, hockey arenas and other recreational facilities;
- Outdoor pedestrian shopping centers;
- Public plazas;
- Power substations and transformers; and
- Etc.

Continued

Who is an Occupier?

McNulty v. Edmonton (City) (2001 Alberta Court of Queen's Bench)

- Defendant municipality was the registered owner of the land and a permanent building located on the land.
- A community league used the building as its main premises.

Who is an Occupier?

- The parties entered into a licence agreement granting the community league non-exclusive use of the building, designated as a community hall. The community league was responsible for the development and maintenance of the hall although development plans were subject to approval by the municipality.
- Was the municipality an “occupier” of the premises?

What are Premises?

Occupiers' Liability Act, section 1(d):

“premises” includes:

- (i) staging, scaffolding and similar structures erected on land whether affixed to the land or not;

What are Premises?

- (ii) poles, standards, pylons and wires used for the purpose of transmission of electric power or communications or transportation of passengers, whether or not they are used in conjunction with the supporting land;
- (iii) railway locomotives and railway cars,
- (iv) ships; and
- (v) trailers used for, or designed for use as, residences, shelters or offices.

Continued

What are Premises?

But does not include aircraft, motor vehicles or other vehicles or vessels except those mentioned in sub-clauses (iii) and (iv) or any portable derrick or other equipment or movable things except those mentioned in sub-clauses (i) and (v);

Exemptions From the Act

Highways and Public Streets

Occupiers' Liability Act, Section 4:

- (1) This *Act* does not apply to highways, other than leased road allowances,
 - (a) where a Minister of the Crown in the right of Alberta has the administration of, or the management, direction and control of, the highway;

Continued

Exemptions From the Act

- (b) where the Crown in the right of Canada has the administration and control of the highway;
or
- (c) where a municipal corporation or Metis settlement has the management, direction and control of the highway.

(2) This *Act* does not apply to private streets as defined in section 78 of the *Law of Property Act*.

Exemptions from the Act

Employees and Independent Contractors

Occupiers' Liability Act, Section 3:

- This *Act* does not apply to or affect the liability of an employer in respect of the employer's duties to employees.

Exemptions from the Act

Occupiers' Liability Act, Section 11:

- (1) An occupier is not liable under this *Act* when the damage is due to the negligence of an independent contractor engaged by the occupier if:
 - (a) the occupier exercised reasonable care in the selection and supervision of the independent contractor; and

Exemptions from the Act

- (b) it was reasonable in all the circumstances that the work that the independent contractor was engaged to do should have been undertaken.
- (2) Subsection (1) does not operate to abrogate or restrict the liability of an occupier for the negligence of the occupier's independent contractor imposed by any other Act.

Exemptions from the Act

Independent Contractors

Popjes v. Otis Canada Inc. (1995 Alberta Court of Queen's Bench)

- The following requirements must be met in order to absolve an occupier of liability on the basis of section 11:

Continued

Exemptions from the Act

- (a) It was reasonable to have the work done by an independent contractor instead of being done in house;
- (b) The occupier exercised reasonable care in the selection of the independent contractor; and
- (c) The occupier exercised reasonable care in the supervision of the independent contractor.

Content and Scope of Duty Regarding Personal Property

Occupiers' Liability Act, section 14:

- (1) Subject to subsections (2) to (4), the liability of an occupier under this *Act* to a visitor or trespasser extends to destruction or loss of, or damage to, property brought on to the occupier's premises by the visitor or trespasser, as the case may be, whether or not it is owned by the visitor or trespasser or by any other person.

Continued

Content and Scope of Duty Regarding Personal Property

- (2) An occupier is not liable under this *Act* in respect of a loss of or damage to property of any person resulting by reason of the act of a third party.

Content and Scope of Duty to Visitors

Occupiers' Liability Act, Section 1(e)

- Visitors include:
 - entrants as of right (a person “empowered or permitted by law to enter premises without the permission of the occupier of those premises”);
 - persons who are contractually entitled (expressly or impliedly) to be present on the premises;

Content and Scope of Duty to Visitors

- persons whose presence on the premises is otherwise lawful, and;
 - persons whose presence on the premises becomes unlawful after their entry onto the premises, and who are taking reasonable steps to leave those premises.
- Generally, if a person is not a trespasser they are a visitor.

Content and Scope of Duty to Visitors

Occupiers Liability Act, Section 5:

- Occupiers of premises owe “a duty to every visitor on the occupier’s premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there”.

Content and Scope of Duty to Visitors

Occupiers' Liability Act, Section 6:

- The common duty of care applies in relation to:
 - (a) the condition of the premises;
 - (b) activities on the premises; and
 - (c) the conduct of third parties on the premises.

Content and Scope of Duty to Visitors

***Mann (Next friend of) v. Calgary (City)* (1995) Alberta Court of Queen's Bench**

- “In deciding whether an occupier has been negligent, the Court must determine whether the occupier could reasonably foresee a risk to visitors who exercise ordinary diligence. ... If the answer is yes, the occupier is liable even if the Plaintiff failed to exercise ordinary diligence.”

Content and Scope of Duty to Visitors

***Hussain v. Edmonton (City)* (2004 Alberta Court of Queen's Bench)**

- The Plaintiff, a paying customer at the Defendant municipality's recreation centre, was injured when the cable on a piece of exercise equipment he was using snapped and caused the apparatus to hit him on the head, causing various injuries.

Content and Scope of Duty to Visitors

- The Defendant purchased the equipment, which was formerly “demo” equipment and had been used in the supplier’s show room, with “no assessment ... of any engineering specifications provided by [the supplier] relating to the fitness equipment ... there was no manual provided by [the supplier] that contained any specifications”: para. 22.

Content and Scope of Duty to Visitors

- The Court found that: the inspection and maintenance system in place could not have detected the defect that caused the accident; the ultimate cause of the accident was that the cable on the machine was loaded beyond its ultimate tensile strength.

Content and Scope of Duty to Visitors

- The supplier, while liable for the defective equipment, was bankrupt. The issue before the Court was whether the Defendant city fulfilled its duty of care to the Plaintiff.

Content and Scope of Duty

Systems of Inspection and Maintenance

Municipal Government Act, Section 530

(1) A municipality is not liable for damage caused by:

- (a) a system of inspection, or the manner in which inspections are to be performed, or the frequency, infrequency or absence of inspections; and

Continued

Content and Scope of Duty

- (b) system of maintenance, or the manner in which maintenance is to be performed, or the frequency, infrequency or absence of maintenance.

Content and Scope of Duty to Recreational Users

Occupier's Liability Act, Section 6.1:

- (1) The liability of an occupier to a person who uses the premises described in subsection (2) or a portion of them for a recreational purpose shall be determined as if the person was a trespasser unless the occupier:

Content and Scope of Duty to Recreational Users

- (a) receives payment for the entry or activity of the person, other than a benefit or payment received from a government or government agency or non-profit recreation club or association; or
- (b) is providing the person with living accommodation on the premises.

Content and Scope of Duty to Recreational Users

Occupier's Liability Act, Section 6.1:

- (2) Subsection (1) applies to the following:
 - (a) rural premises that are:
 - (i) used for agricultural purposes including land under cultivation;
 - (ii) vacant or undeveloped premises, and
 - (iii) forested or wilderness premises.
 - (b) golf courses when not open for playing;

Continued

Content and Scope of Duty To Recreational Users

- (c) utility rights-of-way excluding structures located on them; and
- (d) recreational trails reasonably marked as such.

Content and Scope of Duty to Trespassers

Occupiers' Liability Act, Section 12:

- (1) Subject to subsection (2) and to section 13, an occupier does not owe a duty of care to a trespasser on the occupier's premises.
- (2) An occupier is liable to a trespasser for damages for death of or injury to the trespasser that results from the occupier's wilful or reckless conduct.

Content and Scope of Duty to Child Trespassers

Occupiers' Liability Act, Section 13:

- (1) When an occupier knows or has reason to know:
- a. that a child trespasser is on the occupier's premises; and
 - b. that the condition of, or activities on, the premises create a danger of death or serious bodily harm to that child.

Continued

Content and Scope of Duty to Child Trespassers

- The occupier owes a duty to that child to take such care as in all the circumstances of the case is reasonable to see that the child will be reasonably safe from that danger.

Content and Scope of Duty to Child Trespassers

Occupiers' Liability Act, Section 13:

- (2) In determining whether the duty of care under subsection (1) has been discharged, consideration shall be given to:
- (a) the age of the child;
 - (b) the ability of the child to appreciate the danger; and

Continued

Content and Scope of Duty to Child Trespassers

- (c) the burden on the occupier of eliminating the danger or protecting the child from the danger as compared to the risk of the danger to the child.

Content and Scope of Duty to Child Trespassers

Occupiers' Liability Act, Section 13:

- (3) For the purposes of subsection (1), the occupier has reason to know that a child trespasser is on the occupier's premises if the occupier has knowledge of facts from which a reasonable person would infer that a child is present or that the presence of a child is so probable that the occupier should conduct himself or herself on the assumption that a child is present.

Content and Scope of Duty to Child Trespassers

***Houle v. Calgary (City)* (1985 Alberta Court of Queen's Bench)**

- The 8 ½ year old Plaintiff was injured as a result of an electrical shock from a power transformer substation, installed and operated by the Defendant municipality. The Plaintiff's injuries included extensive electrical burns and resulted in the amputation of his left arm.

Content and Scope of Duty to Child Trespassers

- The substation was located in an abandoned supermarket parking lot in a suburban residential area where there were large numbers of children playing. The Defendant knew, or ought to have known, that the parking lot had become a de facto playground. There was evidence that flying balls had fallen within the enclosure, and children had attempted to retrieve them, in the past.

Content and Scope of Duty to Child Trespassers

- The transformer was surrounded by a fence approximately 10 ½ feet high, however, various planks, crossarms, and a metre box, combined to “effectively reduce the height to 6’6” insofar as climbing boys were concerned”. Three signs on the fence warned of “Danger – High Voltage”.

Continued

Content and Scope of Duty to Child Trespassers

- The Plaintiff was playing with his brother in the area when he was able to, with his brother's assistance, climb up and over the fence into the inside of the structure.

Restricting or Limiting the Duty

Risks Willingly Accepted

Occupiers' Liability Act, Section 7:

- An occupier is not under an obligation to discharge the common duty of care to a visitor in respect of risks willingly accepted by the visitor.

Restricting or Limiting the Duty

Risks Willingly Accepted

Block v. Canada Pacific Hotels Corp (2007 Alberta Court of Queen's Bench)

- The Court held that the Plaintiffs in the case, being experienced golfers, had accepted the risks inherent in driving golf carts on a course even though there was no express agreement to that effect.

Continued

Restricting or Limiting the Duty

Risks Willingly Accepted

***Naicken v. Edmonton (City)*, [1997] 197 A.R. 331, 4 W.W.R. 170 (Q.B.)**

- An escalator which the Plaintiff was riding, at the Defendant municipality's LRT station, came to a "sudden" stop. As a result, the plaintiff fell forward and suffered various injuries.

Continued

Restricting or Limiting the Duty

- The escalator stopped relatively abruptly, but the stop was within the parameters set out in the applicable standards and codes and appeared to be “safe and reasonable” in the circumstances. The cause of the sudden stop was indeterminable but there was no suggestion the escalator was defective or not in good working order.

Restricting or Limiting the Duty

Variation of Duty of Care

Occupiers' Liability Act, Section 8:

- (1) The liability of an occupier under this *Act* in respect of a visitor may be extended, restricted, modified or excluded by express agreement or express notice but no restriction, modification or exclusion of that liability is effective unless reasonable steps were taken to bring it to the attention of the visitor.

Continued

Restricting or Limiting the Duty

(2) This section does not apply with respect to a visitor who is an entrant as of right.

Continued

Restricting or Limiting the Duty

Variation of Duty of Care

- “as long as reasonable steps are taken to alert a visitor to the waiver terms, an occupier can rely on the release”: ***Champion v. Ski Marmot Basin*** (2005 Alberta Court of Queen’s Bench), in regards to waiver conditions printed on ski lift tickets, and posted on signs throughout the ski area.

Restricting or Limiting the Duty

- The question, of whether an occupier has taken reasonable steps to bring a notice to the user's attention, will depend on factors such as the sign of its sign, its colour, its visibility in comparison to the surroundings, and its location.

Restricting or Limiting the Duty

Warning

Occupiers' Liability Act, Section 9:

- A warning, without more, shall not be treated as absolving an occupier from discharging the common duty of care to the occupier's visitor unless in all the circumstances the warning is enough to enable the visitor to be reasonably safe.

Concluding Thoughts

- Municipalities may “occupy” a broad range of “premises”, and be subject to fairly onerous duties as a result.
- While there are limited exceptions to the general application of the Act, fulfilling the applicable duty of care is a best practice.
- Occupiers should carefully consider at least the following:
 - the intended and actual use of premises;
 - the ability and entitlements of the public, including children, to access the premises;

Continued

Concluding Thoughts

- potential dangers and risks associated with activities carried out on the premises, the premises themselves, and occupants and users of the premises;
- whether the premises, and the practices employed there, satisfy applicable standards and codes; and
- whether adequate systems are in place with respect to the reporting of accidents, maintenance and inspection, etc.

Continued

Concluding Thoughts

- The Act provides a number of options for municipal occupiers who wish to limit or restrict their obligations.

Thank You

Questions are welcome

Speaker:

Daina Young
dyoung@rmrf.com
780.497.3309