

## **Slips, Trips and Falls: Avoiding the Pitfalls of Occupiers' Liability Claims - Key Components and interpretation of the *Occupiers' Liability Act*:**

**By: Ryan A. Murray and Bianca Thomas (student-at-law), Oatley, Vigmond LLP,  
OBA - The Fundamentals of Personal Injury Practice (YLD) - April 9, 2014**

Prior to 1980 Ontario had a common law regime that governed claims relating to occupiers' liability. On September 9, 1980, the *Occupiers' Liability Act*, R.S.O 1990 c 0.2 ("the Act") replaced the common law with a statutory system that now controls all Ontario occupiers' liability claims. This paper will outline the key components of the Act and the various types of claims grounded in occupiers' liability. It will also provide you with tips and tools to assist you in bringing an occupiers' liability case. The Act regulates several key areas with respect to occupiers' liability: amongst other provisions, it defines who can be considered an occupier, it codifies the duty of care owed to visitors, and it provides exceptions where risks are willingly assumed. The statute has been interpreted and refined by the courts of Ontario over the past 34 years.

### Where does the Act apply?

The Act applies on any premises. Section 1 of the *Occupiers' Liability Act* defines premises to mean lands and structures, or either of them, and includes, (a) water, (b) ships and vessels, (c) trailers and portable structures designed or used for

residence, business or shelter, (d) trains, railway cars, vehicles and aircraft, except while in operation.<sup>1</sup>

### Who does the Act apply to?

The Act applies to any occupier. An occupier is defined as someone with either physical possession of premises, or responsibility for and control over the condition of the premises or the activities carried on there or control over the persons allowed to enter the premises.<sup>2</sup>

A dispute over who is an occupier frequently arises in the context of landlords and tenants, who are usually both sued together. Where there is a landlord and a tenant, the landlord still has a duty of care towards visitors if the landlord is responsible for the maintenance or repair of the premises:

Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show towards any person or the property brought on the premises by those persons, the same duty of care in respect of dangers arising from any failure on the landlord's part in carrying out the landlord's responsibility as is required by this Act to be shown by an occupier of the premises.<sup>3</sup>

In determining which party is an occupier owing a duty of care in a particular case, courts tend to scrutinize the lease between the landlord and the tenant and have recently begun to consider the conduct of the parties over the years with

---

<sup>1</sup> *Occupiers' Liability Act*, R.S.O. 1990 c. O.2, section 1

<sup>2</sup> *Ibid*, section 1

<sup>3</sup> *Ibid*, section 8(1)

respect to the maintenance of the property.<sup>4</sup> In *Cress v. Beauregard Enterprises Ltd.*, [2000] O.J. No. 205 (S.C.J.) the plaintiff sustained serious injuries after slipping on an icy parking lot while walking to a restaurant. The plaintiff brought an action against both the lessee and the owner of the restaurant. On a motion for summary judgment brought by the defendant lessee, the defendant lessee argued that it was not an occupier. In holding that the lessee/tenant was not an occupier, the court scrutinized the lease and held that the lease did not cover the parking lot area, and did not give any rights of possession or control of the lot to the tenant.<sup>5</sup>

While the lease is a helpful factor in understanding whether or not a party is an occupier, it is not determinative. The Court of Appeal, in *Musselman v 875667 Ontario Inc.*, 2012 ONCA 41 (C.A.) considered not only the lease, but the conduct of the parties over the years. In *Musselman*, the Court of Appeal considered whether a landlord was an occupier and owed the plaintiff a duty under section 3(1) of the Act. The plaintiff in *Musselman* slipped and fell on the stairs in a restaurant leading to the basement, and as a result was rendered a quadriplegic. At trial, the tenant proprietor and the City of Toronto were found jointly and severally liable for the plaintiff's injuries. The landlord owner of the premises was not found liable to the plaintiff.<sup>6</sup>

---

<sup>4</sup> *Musselman v 875667 Ontario Inc*, 2012 ONCA 41 (C.A.).

<sup>5</sup> *Cress v Beauregard Enterprises Ltd.*, 2000 O.J. No 205 (S.C.J.).

<sup>6</sup> *Musselman v 875667 Ontario Inc*, 2010 ONSC 3177 (S.C.J.).

The Court of Appeal upheld the trial level decision based on the terms of a lease which left complete responsibility for repair and maintenance on the tenant and on the conduct of the parties over the years. The Court of Appeal explained:

We would add that the trial judge's finding that the respondent landlord was not an occupier was based on his assessment of the entirety of the circumstances. While the lease figured prominently in that analysis the lease alone much less one clause from the lease was not determinative. The conduct of the parties over the many years in which they were in a landlord tenant relationship was also a significant consideration in determining whether the respondent was an occupier.<sup>7</sup>

#### Independent Contractors

Another key component of the Act is the way that it treats independent contractors. The Act allows an occupier to escape liability as long as the occupier can prove that an independent contractor was hired, that the occupier acted reasonably in entrusting the work to the contractor and had taken such reasonable steps in order to be satisfied that the contractor was competent and that the work had been properly done.<sup>8</sup> In that situation, the plaintiff must add the contractor as a party defendant to the claim. If the plaintiff fails to sue the independent contractor he or she runs the risk of not recovering anything because the occupier is not liable for the actions of the independent contractor.

---

<sup>7</sup> *Musselman v 875667 (ON CA)*, *supra*, at para.9

<sup>8</sup> *Occupiers' Liability Act*, *supra*, section 6(1)

Even if there is an independent contractor, it does not necessarily follow that the court will find an occupier to be totally free from fault. In *Allen v Lawrence Avenue Group Inc.*, 2003 CarswellOnt 1149 (S.C.J.), the plaintiff slipped and fell on ice in the parking lot of a shopping plaza belonging to the defendant occupier. The defendant had hired an independent contractor to plough the snow in the lot. However, the court looked at the contract and found that there was no mention of the contractor being required to salt the lot or remove any ice. As a result, the court held that the defendant occupier retained the “residual responsibility” for the ice that was not apparent, either by notifying the contractor or by salting the area itself.<sup>9</sup>

### **Duty of Care and Standard of Care: Individuals, Commercial Entities and Municipalities:**

#### Individuals:

The Act creates a statutory duty of care, which has been interpreted by the jurisprudence. The relevant sections read as follows:

3(1): An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

3(2): The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.

---

<sup>9</sup> *Allen v Lawrence Avenue Group Inc.*, 2003 CarswellOnt 1149 (S.C.J.).

3(3): The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty. R.S.O. 1990, c. O.2, s. 3<sup>10</sup>

In the seminal case of *Waldick v Malcolm*, [1991] 2 SCR 456 (S.C.C.), the Supreme Court of Canada addressed the interpretation of the nature and extent of the duty of care under the Act. The defendants were found liable at trial for the plaintiff's injuries, which resulted from a fall on the icy parking area of the premises occupied by the defendants. The defendants did not salt or sand the laneway and the plaintiff was aware of the icy conditions, having walked on the laneway when entering the house. The trial judge found that the defendants did not meet the standard of care as they failed to do anything to maintain the laneway. The Ontario Court of Appeal dismissed the appeal, as did the Supreme Court of Canada.<sup>11</sup>

The Supreme Court upheld the Court of Appeal's pronouncement that occupiers have an affirmative duty to make their premises "reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm."<sup>12</sup> Justice Iacobucci, for the Court, held:

That duty is to take reasonable care in the circumstances to make the premises safe. That duty does not change, but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to

---

<sup>10</sup> *Occupiers' Liability Act*, *supra*, at section 3(1) to 3(3)

<sup>11</sup> *Waldick v Malcolm*, [1991] 2 SCR 456 (S.C.C.).

<sup>12</sup> *Waldick v Malcolm*, 35 O.A.C. 389, (C.A.), at para. 19.

each fact situation – thus the proviso, “such care as *in all circumstances of the case* is reasonable.”<sup>13</sup>

Some circumstances that could be considered by a court, and were considered in *Waldick*, include: whether the premises is rural or urban, local custom regarding upkeep of property, weather, time of year, size of parking area, cost of preventative measures, quality of footwear, and the length of the pathway.<sup>14</sup>

*Waldick* is crucial for two reasons: first, it confirms that occupiers have an affirmative duty to take reasonable steps; second, it confirms that occupier’s liability cases are truly fact specific and each one depends on the nature of the circumstances of the case. Occupiers are duty-bound to take such care as in all of the circumstances of the case is reasonable. In each case, the trier of fact must determine what standard of care is reasonable and whether that standard of care has been met.<sup>15</sup>

Occupiers may also have a positive responsibility to inspect the premises, pursuant to the decision of *Sauve v Provost*, [1990] 71 O.R. (2d) 774 (ON Sup. Ct.), in which the trial judge held that the duty of care may involve a positive responsibility to inspect the premises. The defendants were found liable for the plaintiff’s injuries after she fell at the defendants’ premises. Section 3(1) of the Act imposed on the defendants a

---

<sup>13</sup> *Waldick v Malcolm*, (S.C.C.), *supra*, at para. 33

<sup>14</sup> *Ibid*, at para. 32

<sup>15</sup> *Waldick v Malcolm*, (S.C.C.), *supra*, at para. 19

duty to take reasonable care to see that the premises were safe. After knowing that there were prior problems with their porch, the defendants should have inspected the entire porch to ascertain the condition of the railing and then made periodic inspections thereafter. The defendants failed to discharge their statutory duty. The plaintiff had no knowledge of the dangerous condition of the porch and could not have appreciated that a danger existed.<sup>16</sup>

### Assumption of Risk

It should be emphasized that the duty of care outlined in section 3 is not absolute. Section 4(1) of the Act provides that a modified duty will apply to “risks willingly assumed.” In the situation of a modified duty, the occupier has the duty to not create a danger with the deliberate intent of doing harm and not act with reckless disregard. There has been some debate regarding the application of the modified duty.<sup>17</sup> Two arguments have been advanced as to the meaning of the phrase “risks willingly assumed.” The first argument was that mere knowledge of the risk was sufficient to trigger the modified duty. The second argument was that the exception in section 4(1) was meant to embody the *volenti non fit injuria* doctrine, which requires the individual to voluntarily assume the risk of injury. The Supreme Court of Canada in *Waldick v Malcolm* addressed the issue, and held that the modified duty was meant to apply in situations where the guest had voluntarily assumed the risk of injury.<sup>18</sup>

---

<sup>16</sup> *Sauve v Provost*, [1990] 71 O.R. (2d) 774 (On. Sup. Ct.).

<sup>17</sup> *Occupiers' Liability Act*, *supra*, section 4(1)

<sup>18</sup> *Waldick v Malcolm*, (S.C.C.), *supra*, at paras. 42-48



In *Karn v Sturgeon*, [2008] 90 C.C.L.T. (3d) 103, (S.C.J.) the deceased guest was a diabetic teenager who went to a party at the defendant's house. The deceased drank beer at the party and seemed hung-over the next day. The defendant offered the deceased food, which was refused. The defendant did not call for medical attention, and the deceased died overnight from cardiac arrest due to diabetic coma and ketosis. The deceased had a history of not always monitoring and treating his diabetes. The deceased's family sued the defendant. The trial judge dismissed the action, holding that the defendant was not liable under the *Occupiers' Liability Act* since a duty of care was not owed to the deceased. Moreover, even if a duty of care was owed, then it was modified by section 4 of the Act since the deceased willingly assumed the risk by consuming alcohol voluntarily. The defendant did not do anything with deliberate intent to harm or reckless disregard of the deceased's presence. The judge held that it was unreasonable to expect the defendant to have prevented the deceased from drinking alcohol.<sup>19</sup>

Section 4(2) of the Act applies the lowered standard of care to people who are on the premises either committing a criminal act or who intend to commit a criminal act, as they have been deemed to have willingly assumed all risks.<sup>20</sup>

### Commercial Host Liability

---

<sup>19</sup> *Karn v Sturgeon* [2008] 90 C.C.L.T. (3d) 103, 2008 CarswellOnt 9725

<sup>20</sup> *Occupiers' Liability Act*, *supra*, section 4(2)

Commercial host liability derives in part from the Act and in part from the *Liquor Licence Act*, R.S.O. 1990, c. L. 19. The duty of care under the Act applies equally to commercial establishments, and requires commercial hosts to take reasonable care to ensure that their patrons are safe while at their place of business. The duty of care assigns responsibility to occupiers for activities carried out by their patrons. Businesses are required to monitor the activities of their intoxicated patrons in order to prevent hazardous activity. So in the case of one intoxicated person becoming a danger to himself or other guests at the occupier's establishment, the occupier has a duty to take reasonable care to ensure that the conduct does not lead to harm to patrons.

In *Crocker v Sundance Northwest Resorts Ltd*, [1988] 1 SCR 1186, (S.C.C.) a patron at a ski resort entered a tubing race with a partner in 1980. During the second race, the plaintiff broke his neck, rendering him a quadriplegic. On the day of the accident, before and during the tubing race, the plaintiff had been consuming alcohol. He was visibly drunk when the race began. The supervisor of the race suggested that the plaintiff might want to withdraw from the race, but other than that, no steps were taken by the defendant to prevent the plaintiff from taking part in the race.

The Supreme Court of Canada considered whether liability should be imposed on the defendant for failing to warn the plaintiff of the dangers of the ski hill

and tube racing, and for allowing him to take part in the race while visibly drunk. At trial, the defendants were found liable, due to their failure to warn the plaintiff of the dangers of tube racing, and for their failure, in all the circumstances of the case, to take reasonable steps to protect the plaintiff from putting himself at risk by taking part in the competition.

The Supreme Court reaffirmed the duty of a commercial host to take reasonable care. The ski resort had set up and inherently dangerous competition during which alcohol was served. This created a positive duty on the resort to take all reasonable steps to ensure that no one participate while intoxicated.<sup>21</sup> Liability was apportioned at 75% for the resort, and 25% to the plaintiff. This case illustrates the point that business owners must take care to ensure that if hazardous activities such as tubing take place on their premises, intoxicated patrons should not be allowed to participate.<sup>22</sup>

In *Whitlow v. 572008 Ontario Ltd.*, [1995] O.J. No 77 (Gen. Div), a patron fell over a railing at a bar and died after consuming 10-13 drinks at that bar. Earlier on in the day, he was at another bar, where he consumed eight drinks. The deceased's wife sued both bars. At trial, both bars were found liable for over serving and failing to

---

<sup>21</sup> *Crocker v Sundance Northwest Resorts Ltd* [1988] 1 SCR 1186 (S.C.C.), at para.22

<sup>22</sup> *Ibid*, at para.7 and 39

observe that the patron had become intoxicated. Liability was apportioned as follows: 80% to the patron, 5% to the first bar, and 15% to the second bar.<sup>23</sup>

What is interesting about this case is that the second bar was found liable under the Act since the stairway was a hazard for patrons who had consumed a great deal of alcohol. Even though the stairway was found to be reasonably safe for ordinary individuals, there was an overhanging bulkhead that came down into the headspace of patrons who were trying to go down the stairs. The Court commented that the bar must have acted reasonably in all the circumstances. The modified duty in section 4(1) was found to apply since the patron willingly assumed a risk when he entered the bar to drink:

and he compounded his risk greatly when he drank at levels confirmed by his blood alcohol readings... By drinking to a state of extreme intoxication, Mr. Whitlow has contributed to his own demise, but the duty owed by the tavern must be viewed in the context that, as it sells alcohol to an imbibing patron, that patron's ability to fully know of and accept the risks from the occupiers' non-compliance with the statute is correspondingly diminished.

...the protruding bulkhead created a danger to drunken patrons and, while Mr. Whitlow cannot be absolved from the consequences of his voluntary act of intoxicating himself to such an extreme level, it remains that The Cross-Eyed Bear cannot be absolved from liability for the danger presented by the bulkhead, particularly to patrons who can reasonably be expected to use the stairs to access toilets on a more frequent basis as more alcohol is consumed.<sup>24</sup>

---

<sup>23</sup> *Whitlow v 572008 Ontario Ltd.*, [1995] OJ No 77 (Gen. Div), at para.91

<sup>24</sup> *Ibid*, at para.31 and 46

This case sends a warning signal to commercial hosts, insofar that while the state of their premises do not pose any danger to a reasonable person, if the premises pose a danger to intoxicated people, the host may still be found liable under the Act.

#### Municipalities- Public Roads, Sidewalks and Building Code Violations:

Municipal liability related to a municipality's status as an occupier is governed either by the Act or the *Municipal Act*, depending on the facts of the case. Where an individual sustains injuries on a public highway or a sidewalk, then the provisions of the *Occupiers' Liability Act* are ignored, and the *Municipal Act* applies.<sup>25</sup>

The first thing to be aware of if an incident occurs on a public road or sidewalk is the notice requirement imposed by section 44(10) of the *Municipal Act*, 2001, SO 2001, c. 25. This section requires an injured individual to provide written notice of the claim within 10 days after the occurrence of the injury to the clerk of the municipality (or where the claim is against multiple municipalities, the clerk of each municipality).<sup>26</sup>

Where an incident occurs on a public highway or bridge, the municipality can be sued for failure to maintain the highway in a state of repair that is reasonable in the circumstances. The circumstances to be considered include the character and

---

<sup>25</sup> *Occupiers' Liability Act*, *supra*, section 10(2)

<sup>26</sup> *Municipal Act*, 2001, SO 2001, c. 25, section 44(10)

location of the highway or bridge.<sup>27</sup> The *Municipal Act* goes on to outline certain defences that a municipality may invoke despite its failure to keep a highway in a reasonable state of repair: first, where a municipality did not know and could not reasonably have been expected to have known about the state of repair; second, it took reasonable steps to prevent the default; or third, at the time the cause of action arose, the minimum standards provided by regulations have been met.<sup>28</sup>

The *Minimum Maintenance Standards of Municipal Highways* O. Reg. 239/02 outlines the areas in which municipalities must maintain a proper state of repair, ranging from monitoring weather, to addressing snow accumulation, the prevention of ice formation, and how to deal with potholes and cracks in the roads.<sup>29</sup>

If, on the other hand, the incident occurred on a sidewalk, the *Municipal Act* provides that the standard of care is gross negligence.<sup>30</sup> Municipalities are not held to a standard of perfection. Where a plaintiff is able to establish on a balance of probabilities that the place where the fall occurred was in a state of non-repair, and that state of non-repair caused the injury, then there is a reverse onus with respect to the burden of proof. In that case, the municipality must show that it had a reasonable

---

<sup>27</sup> *Ibid*, section 44(1)

<sup>28</sup> *Ibid*, section 44(3)

<sup>29</sup> *Minimum Maintenance Standards of Municipal Highways*, O. Reg. 239/02

<sup>30</sup> *Municipal Act*, *supra*, section 44(9)

system in place for inspection and repair, and it was despite this fact that the condition of non-repair existed.<sup>31</sup>

Municipalities can also be sued for building code violations. Under the *Building Code Act* 1992, S.O. 1992, c. 23, municipalities are able to enact by-laws regarding the inspection and enforcement of standards outlined in the Building Code.<sup>32</sup> Municipalities owe a duty to inspect buildings. Justice Bastarache, for the Supreme Court of Canada, in *Ingles v Tutkaluk Construction Limited*, 2000 SCC 12 (S.C.C.), described this duty as follows:

The measure of what constitutes a reasonable inspection will vary depending on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury...For example, a more thorough inspection may be required once an inspector is put on notice of the possibility that a construction project may be defective. In addition, a municipal inspector may be required to exercise greater care when the work being inspected is integral to the structure of the house and could result in serious harm if it is defective. While in some circumstances a more thorough inspection will be required to meet the standard of care, municipalities will not be held to a standard where they are required to act as insurers for the renovation work. The city was not required to discover every latent defect in the renovations at the appellant's home. It was, however, required to conduct a reasonable inspection in light of all of the circumstances...<sup>33</sup>

---

<sup>31</sup> *Bourgoin v Leamington (Municipality)*, [2006] 39 CCLT (3d) 41, (S.C.J.), at para. 31.

<sup>32</sup> *Building Code Act* 1992, S.O. 1992, c. 23, section 3 and 7

<sup>33</sup> *Ingles v Tutkaluk Construction Limited*, 2000 SCC 12 (S.C.C.) at para.40

In *Musselman*, after falling down the stairs at a restaurant and sustaining serious injuries, the plaintiff also sued the City of Toronto for failure to ensure that the stairs were constructed in a manner to provide for the safe use by patrons in the restaurant, in particular the plaintiff. The City of Toronto entered a “Pierringer” agreement with the plaintiff prior to trial, settling the claim against them. Despite this, the court engaged in an analysis of the City’s negligence.

The Court applied a three-pronged analysis for determining liability. First, the court considered whether the staircase, which was alleged to be the cause of the plaintiff’s fall, was in fact unsafe. Then the court considered whether the unsafe staircase contributed to the fall or whether there was another factor that contributed to it as well. Third, the court then determined who bore responsibility and in what proportion for the condition of the staircase.<sup>34</sup>

The Court found that the staircase was not only unsafe, but “grossly noncompliant” with the Ontario Building Code, the 1962 Toronto Building By-Law and the City of Toronto Property Standards By-Law.<sup>35</sup> The plans should never have been approved as they were. Moreover, the several inspections by the building inspector should have revealed the structural deficiencies. In arriving at this conclusion, the court

---

<sup>34</sup> *Musselman v 875667 Ontario Inc*, 2010 ONSC 3177, at para.29

<sup>35</sup> *Ibid*, at para.47



considered expert evidence from a structural engineer who discussed the staircase's compliance with building codes and industry standards. Interestingly, the court also allowed the plaintiff's counsel to produce an exact replica of the staircase as an exhibit. The court apportioned liability as follows: 70% on the defendant owner, and 30% for the City of Toronto.<sup>36</sup>

### **Understanding the Mechanics of a Slip/trip and Fall Incident:**

The first step in an occupiers' liability claim is to properly investigate the claim. One key element involves gaining an understanding of who the proper parties are, namely, who to sue. It is important to identify and include all proper parties early on; otherwise, issues of discoverability may arise later in the proceeding. Plaintiff's counsel should conduct property and corporate searches to determine the correct owner and names of the owner/occupier defendants. Once the appropriate defendants are determined, it is also important to consider whether said occupier may have outsourced some repair or maintenance work to a third party contractor. For example, if one is pursuing an occupiers' liability claim against a shopping plaza, it would be helpful to inquire about whether or not the tenant/owner hired a third party contractor to come in and perform maintenance, such as shoveling snow or salting the parking lot. Where there is a third party contractor, liability may not actually rest with the tenant or owner, but with the contractor themselves, so it may be crucial to find out whether there is a

---

<sup>36</sup> *Ibid*, at paras 38 and 192

third party contractor initially. It may even be useful to assume that there is an independent contractor where a slip and fall case occurs during the winter.

Early investigation of a plaintiff's claim may prove very helpful, particularly in circumstances where the weather may destroy part of the evidence helpful to your case or where the claim involves an alleged violation of a building code. Plaintiff's counsel should either visit the site of the incident to conduct a survey of the premises and take photographs, or have someone else do so.

Moreover, it is helpful to consider which experts to retain early on. In the situation where a building code violation is alleged, a structural engineer would be helpful, as it was in *Musselman*, in establishing a breach of building code due to the unsafe nature of the staircase. In other cases, an accident reconstructionist would be useful to assess the level of friction between the walking surface and the shoe in question, along with assessing the difference in slip resistance between nearby surfaces. The testimony of these experts at trial is helpful when the court turns to its determination on liability issues.

The burden is on the plaintiff in an occupiers' liability case to establish that a duty of care was owed. Then the plaintiff must show on a balance of probabilities

that the defendant occupier breached their duty of care by failing to take reasonable care in the circumstances.

Plaintiff's counsel must then go on to establish that the breach of the duty of care caused the plaintiff's injuries. Interestingly, causation seems to be the only area not expressly addressed by the Act. The case of *Kamin v Kawartha Dairy*, 79 O.R. (3d) 284 (C.A.) confirmed what the test is for causation in occupiers' liability cases. The plaintiff must show on a balance of probabilities that the fall/injuries were caused by a breach of the duty of care.

In *Kamin v Kawartha Dairy Ltd.*, the plaintiff was injured after falling in the parking lot of the defendant's store. She was unable to identify where or how she fell in the parking lot. The weather was clear and dry. The store's maintenance was inadequate. However, at trial there was insufficient evidence that the fall was caused by any breach of the duty of care because the plaintiff was unable to identify how or why she had fallen down, so the trial judge dismissed the claim. The Ontario Court of Appeal reversed the decision, and held that the causation test used by the judge was too strict. The Court stated that if the trial judge had not erred in her causation analysis by setting too high an onus for the plaintiff to meet, there was ample evidence on which to

find that the injuries were caused, or materially contributed to, by the defendant's negligence.<sup>37</sup>

The Court referred to several cases in which the Supreme Court of Canada held that causation need not be determined by scientific precision. The probable, reasonable cause of the fall was the state of disrepair of the parking lot. The Court was satisfied that the lot was in an uneven and unsafe state, and that there was no other plausible explanation as to why the plaintiff fell.

Considerations for determining when an occupier breaches the duty include common sense, the likelihood of the injury, and the knowledge that the defendant had or ought to have had.<sup>38</sup>

### **Contributory Negligence Issues:**

Section 9(3) of the Act indicates that the *Negligence Act*, R.S.O. 1990, c.N.1, applies to occupiers' liability claims, which allows a defendant to argue that a plaintiff is contributorily negligent.<sup>39</sup> <sup>40</sup> At the trial level of *Waldick v Malcolm*, Justice Austin declined to find contributory negligence on the plaintiff who had previously walked

---

<sup>37</sup> *Kamin v Kawartha Dairy* 207 OAC 199, 79 OR (3d) 284, 2006 CarswellOnt 661, at para.3

<sup>38</sup> *Kennedy v Waterloo (County) Board of Education* 1999 45 OR (3d) 1, leave to the SCC dismissed

<sup>39</sup> *Occupiers' Liability Act*, *supra*, at section 9(3)

<sup>40</sup> *Negligence Act* RSO 1990, c.N.1, section 3

across the icy driveway and knew its condition.<sup>41</sup> Yet, on appeal, Blair J.A. commented that it was quite possible for other judges to reach a different conclusion on the issue of contributory negligence.<sup>42</sup>

In *Litwinenko v. Beaver Lumber Co.*, [2006] O.J. No. 3383 (S.C.J.), the plaintiff was an elderly woman who tripped on a ramp as she left a store. The ramp had a small lip at the bottom which the defendant had attempted to fill with asphalt. As the plaintiff walked down the ramp, she tripped over the lip and fell, causing her to hit her head. She sustained serious injuries to her head, shoulder and ribs. The defendant was found liable, but the plaintiff's damages were reduced by 50% due to contributory negligence as she was seen, to a certain extent, to be "the author of her own misfortune. The reason for this being that the danger was obvious and the plaintiff knew that the danger existed as she had attended the store several times prior to that day. Therefore, she could have easily avoided the danger by taking reasonable care for her own safety."<sup>43</sup>

In *Dogan v Pakulski*, [2007] O.J. No. 1903 (S.C.J.), the plaintiff fell on the walkway of the defendant owner's property, in which he was renting a room. Prior to the fall, there had been many days of rain, ice pellets and snow, causing icy conditions at the property. The tenant sued the owners for their failure to clear the walkway. The

---

<sup>41</sup> *Waldick v Malcolm* [1987] 61 OR (2d) 624, 1987 CarswellOnt 1016 (Ont Supreme Court)

<sup>42</sup> *Waldick v Malcolm* (ON CA), *supra*, at para.45

<sup>43</sup> *Litwinenko v. Beaver Lumber Co.*, [2006] O.J. No. 3383 (S.C.J.), at para.24

Court found the owners liable, but also apportioned 40% of the fault to the plaintiff given that he did not take reasonable precautions to protect himself from the negligence of the owners. The court commented that “advance knowledge of icy or dangerous conditions that caused persons to slip and fall have led to findings of contributory negligence.”<sup>44</sup>

There is no set range for contributory negligence – it has been assessed as low as 5%, and as high as 100%. Courts have found plaintiffs contributory negligent for various reasons, including inappropriate footwear, drinking alcohol, and not paying enough attention where the plaintiff knew of a hazardous condition. The case law illustrates that the issue of contributory negligence in the context of occupiers’ liability is truly fact specific. Where a defendant can demonstrate that a plaintiff failed to take reasonable care or precautions to protect himself from the defendant’s negligence, then the court will likely make a finding of some degree of contributory negligence.

### **Preparing for the Discovery of an Occupiers’ Liability Claim:**

While there are certain similarities, preparing for the examination for discovery in an occupiers’ liability claim is somewhat different from other types of claims.

---

<sup>44</sup> *Dogan v Pakulski*, [2007] O.J. No. 1903 (S.C.J.), at para.28

In all claims where there is a corporate defendant, it is fundamental to choose the best representative of the defendant. Ideally, this is the person with the best firsthand knowledge of the maintenance and upkeep of the premises. For example, the store manager, superintendent, contractor in charge of the maintenance work.

Second, request information about prior accidents and injuries that have occurred on the premises. While these questions will likely be refused by defence counsel, there is some authority which supports the admissibility of similar fact evidence to prove allegations of negligence. In *Roycroft v Kyte*, [1999] O.J. No. 296 (Gen. Div.), the court admitted evidence of over thirty previous accidents on a particular section of road as evidence of the road authority's knowledge of a dangerous condition.<sup>45 46</sup>

Third, to avoid the situation in *Kamin v Kawartha Dairy*, establish where exactly it was that the plaintiff fell, so that there is no confusion as to whether the plaintiff fell on the premises or not.

Fourth, questions that discuss the procedures regarding maintenance and inspection, and how diligently those procedures were followed will be important. In the

---

<sup>45</sup> *Roycroft v Kyte*, [1999] O.J. No. 296 (Gen. Div.), at para.52-53

<sup>46</sup> W. Mandel, *Effective Discovery in Occupiers Liability Cases*, OTLA 2013 Fall Conference Materials, at page 12.

case of a building code violation by a municipality, the *Minimum Maintenance Standards of Municipal Highways* will be particularly helpful in guiding plaintiff's counsel's questions for the representative of the defendant municipality.

## **Conclusion**

While every case involving the Act is fact specific, that does not mean that plaintiff's counsel is unable to prepare for and predict the issues that will arise in an action when they are first retained. It is our hope that this article will assist counsel in spotting issues and preparing to litigate in their next case involving occupiers' liability.