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HAPPY TRAILS: STRATEGIES FOR REDUCING A RECREATIONAL TRAIL OCCUPIER'S EXPOSURE TO LIABILITY

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INTRODUCTION

According to the Ontario Trails Council, Ontario has over 64,000 km of trails, including footpaths, bicycle routes, forestry and waterways.[1] From Algonquin Park and the Almaguin Highlands, to municipal parks and even privately owned lands, Ontario has a breadth of natural beauty to discover. For public bodies, inviting the public to access these areas means tourism and a healthier economy. For private enterprise, inviting the public to access these areas can be a particularly lucrative opportunity.

There is a potentially high risk that comes with owning and maintaining recreational property. Ontario's *Occupiers' Liability Act* requires that trail managers take a certain level of care in warning and protecting the public.[2] Clients are often shocked to hear that they even owe a duty to those who are trespassing!

This paper will focus on what trail managers should be aware of in order to minimize this risk. It will begin with an overview of the *Occupiers' Liability Act*, as well as certain corollary statutes, and what they require of trail managers. Once we have discussed what the law requires, we will discuss several strategies for ensuring trail managers live up to the law's expectations.

OCCUPIERS' LIABILITY – THE RATIONALE

The term "occupiers' liability" refers to the fact that those who are in care and control of property must ensure that those on the property are safe. At common law, the Courts distinguished between those who were explicitly invited onto the land, those who were implicitly invited (such as delivery people), and those who were *not* invited (i.e. trespassers).

These distinctions, while simple on their face, became unwieldy for the courts to apply. To simplify this area, the Davis Government introduced the first version of the *Occupiers' Liability Act* in 1980, which has since been amended several times.

[1] http://www.mtc.gov.on.ca/en/sport/recreation/A2010_TrailStrategy.pdf
[2] R.S.O. 1990, c. O.2 [*OLA*].

WHAT IS AN OCCUPIER?

The term "occupiers' liability" is just that – it is the liability that attaches to occupiers. The first step is to therefore define what an occupier is. Occupiers include any person or corporation that:

1. Is in physical possession of the premises;
2. Has responsibility for and control over the condition of the premises;
3. Has responsibility for and control over the activities carried on the premises; or
4. Has control over persons allowed to enter the premises.[3]

Once you are deemed to be an occupier, the *OLA* requires a certain level of care be taken to protect those on the property. This is referred to as the "standard of care" which must be met.

The Standards of Care

Section 3 of the *OLA* states that:

> 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 [their] property . . . are reasonably safe while on the premises.[4]

This applies to both the condition of the premises itself, as well as the activities being performed on the premises. This is the standard of care that an occupier must meet in ordinary circumstances.

However, the *OLA* recognizes four exceptions to this ordinary standard, pursuant to section 4(2) and (3):

1. Entry is prohibited under the *Trespass to Property Act*;
2. The occupier has posted no notice and has not permitted entry; or
3. Entry is for a *recreational purpose* and: (i) *no fee is paid* for the entry or activity (other than payment received from a government or non-profit recreation club), and (ii) the occupier does not provide the person's accommodation; and
4. The person who on the premises is there for the purpose of committing a criminal act.[5]

If one of the above circumstances applies, and the premises are of a specified class, the *OLA* deems the person to have willingly accepted the risk of coming on to the property, and only requires that the occupier not deliberately create danger, or act with "reckless disregard":

[3] *OLA*, *supra* note 2, s. 1.
[4] *OLA*, *supra* note 2, s. 3.
[5] *OLA*, *supra* note 2, s. 4(2) and (3).

> 4(1) . . . the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property.[6]

The importance of the above for trail managers is that where an occupier provides access to property *for recreational uses and no fee is charged for entry or activity*, the occupier is given significant leeway with respect to the care owed to people on the property. Therefore, it is important to assess the advantages and disadvantages of charging a fee for such access.

WHAT DOES IT MEAN TO ACT WITH "RECKLESS DISREGARD"?

To act with reckless disregard is to act maliciously, in a way that could be said to be void of "ordinary humanity".[7] This means that if the occupier can show that section 4 of the *OLA* applies, then it greatly reduces the risk that the occupier will be found liable for damages sustained on their premises.

Babineau v. Babineau[8] provided an early glimpse into how a Court would determine whether an occupier breached their required standard of care in the context of recreational activities. In *Babineau*, the plaintiff was an invited guest on the occupier's premises and was enjoying a day of snowmobiling.

While snowmobiling, the plaintiff suffered damages after he drove into a barbed wire fence that had been erected the previous spring. As a result, the plaintiff brought an action against the occupier.[9] At trial, Justice Grange of the Ontario High Court of Justice determined that the plaintiff possessed a moderate level of skill with respect to snowmobiling. It was also determined that by not warning the plaintiff of the existence of the barbed wire fence or taking some other measure to protect the plaintiff, the occupier had acted with reckless disregard.[10]

In contrast, in *Whaley v. Hood*[11] the Ontario Court of Justice, General Division determined that the occupier had not acted with reckless disregard toward the plaintiff. In *Whaley*, the defendant occupier was the owner of a large portion of land that abutted the Welland Canal. The plaintiff, a passenger on an ATV that was traveling along the canal, was thrown from the vehicle when the driver of the ATV failed to spot an embankment leading to the canal and plunged down it.

The Court, in determining the requisite standard of care, determined that the land (although built beside a developed waterway) was rural in nature. More importantly, it was determined that the

[6] *OLA*, *supra* note 2, s. 4(1).
[7] *British Railways Board v. Herrington*, [1972] A.C. 877 (HL) cited by *Anderson v. Whitepass Transportation Ltd.*, [1994] Y.J. No. 9 (YTCA).
[8] (1981) 32 O.R. (2d) 545, 122 DLR (3d) 508 (Ont. H. Ct. J.) [*Babineau*].
[9] Although this case was decided based on reference to the *Motorized Snow Vehicles Act* ("*MSVA*") (which preceded the *OLA*) the language of the *MSVA* as it then was is similar to that seen in the present day *OLA*.
[10] The standard of care at play was that under section 19 of the *Motorized Snow Vehicles Act, 1974*, c. 113, which was essentially similar to the "reckless disregard" standard in the *OLA*.
[11] [1998] O.J. No. 1785 (Ont. C.J.[General Division]).

plaintiffs had entered the premises for a recreational purpose. For these reasons, the occupier was held to the standard prescribed by section 4 of the *OLA*. The claim was dismissed despite the plaintiff asserting that the occupier failed to adequately light the land and that the occupier constructed a road that was outside the norm for rural roads.

Further, in *Cormack et al. v. Township of Mara et al.*[12] the plaintiff was injured while snowmobiling on a former railway right-of-way that had been transferred partially to the Township and partially to a private party. While traveling along this path, the plaintiff came upon a drainage ditch that normally had a makeshift bridge to permit passage. However, this bridge had been removed by the Township during maintenance on the drainage ditch. The plaintiff decided to launch their snowmobile over the gap to try and clear the gap but upon landing, the plaintiff was thrown from his machine. The plaintiff argued that he would have never suffered his injuries had the Township not removed the makeshift bridge.

The Court of Appeal for Ontario ruled that there was no evidence to suggest that the municipality had or should have had knowledge that individuals were using the former right-of-way as a snowmobile trail.[13] This was crucial in the Court's opinion – had the municipality known that people were using the trail, it may have been found to act with reckless disregard:

> "In my view, the legislature intended under the present s. 4 of the Occupiers' Liability Act, that there continue to be liability only for the intentional acts or omissions of occupiers made in reckless disregard of the safety of snowmobilers on their premises".[14]

More recently, in *Schneider v. St. Clair Region Conservation Authority,*[15] the Ontario Court of Appeal was tasked with determining whether another large landowner, a municipality, had acted with reckless disregard. The plaintiff was cross-country skiing on a frozen lake in a conservation park that was owned by the St. Clair Conservation Authority but managed by the Township of Middlesex Centre. The plaintiff left the marked trail and subsequently collided with a partially concealed and unmarked cement abutment that had been placed around the frozen lake, causing the plaintiff to fall and suffer injury.

The Court determined that the occupiers had knowledge that individuals used the frozen lake for the purpose of cross-country skiing. Although the lake was not part of the recognized trail system of the park, the failure of the occupiers to restrict parties from utilizing the frozen lake meant the occupiers had implicitly provided their permission for parties to freely access the premises. The Court ultimately concluded that the occupiers were held to the ordinary standard of care imposed by section 3 of the *OLA*, as opposed to the "reckless disregard" standard of section 4.

[12] *Cormack et al. v. Township of Mara et al.* [1989] O.J. No. 647 (Ont. C.A.) [*Cormack*].
[13] *Ibid* at para. 3.
[14] *Ibid* at para. 27.
[15] 2007 CarswellOnt 8891 (Ont. C.A.).

In *Kennedy v. London (City of),*[16] the Ontario Superior Court of Justice held that the defendant municipality was found liable for the plaintiff's injuries as they placed a post in an "unusual and … unexpected location" on a pathway and did not provide any warning devices to alert the plaintiff.[17]

The plaintiff was injured when he collided with a post that was placed in a partially concealed potion of a recreational trail. The plaintiff came upon the post and, believing there was enough space for him to squeeze by, proceeded to continue along the path. However, in doing so, the plaintiff's handlebars came into contact with the pole causing the plaintiff to lose control of his bike, resulting in the plaintiff's injuries.

In determining the defendant municipality's standard of care, the Court noted that the path was reasonably marked as a recreational trail. It also held that the plaintiff was neither implicitly nor explicitly invited onto the path and that the plaintiff was on the path for a recreational purpose. As a result, the Court determined that the defendant municipality was to be held to the standard of care prescribed by section 4 of the *OLA*.[18] Nonetheless, the defendant municipality was found liable even under the reckless disregard standard in section 4 of the *OLA* for not placing the post in an appropriate location or providing warning devices to alert the plaintiff.

MIXED-USE TRAILS

When individuals are invited onto property for a recreational purpose, and a fee is not paid to enter, then an occupier must not act with reckless disregard to the safety of those on the property. However, what if the property is part recreational, part non-recreational?

In *Diner v. Toronto*[19] the plaintiffs brought an action against the defendant municipality as a result of a trip and fall accident. While walking on a portion of the Eastern Ravine and Beaches Discovery Walk operated by the municipality, the plaintiff tripped due to a deep indentation or pothole on the path. The specific portion of this Discovery Walk was referred to as the Garden Path.

On a motion for summary judgement, the Ontario Superior Court of Justice held there was a triable issue as to whether section 3 or section 4 of the *OLA* would apply. If the path was used exclusively for recreational purposes, then section 4 of the *OLA* would be applicable. However, as the Court pointed out, a trail can have more than one use. If there is a non-recreational use at play, then the party must meet the ordinary standard of care in section 3.[20]

[16] 2009 CarswellOnt 1328 (Ont. S.C.J.).
[17] *Ibid* at para. 67.
[18] *Ibid* at para. 38.
[19] 2007 CarswellOnt 6365, 162 A.C.W.S. (3d) 162 [*Diner*].
[20] *Ibid* at para. 13 citing *Moloney v. Parry Sound (Town)* (2000), 184 D.L.R. (4th) 121 (Ont. C.A.).

A RECREATIONAL TRAIL SHOULD BE "REASONABLY MARKED"

It will be a rare situation where an occupier of any public premises "creates a danger with the deliberate intent of doing harm or damage" as stated in section 4 of the *OLA*. Rather, in the case of a recreational trail or private road, as mentioned above, the test for liability is whether the occupier acted with "reckless disregard".

The requirement that the recreational trail be "reasonably marked by notice as such"[21] is an extremely important threshold requirement. Based on the legislation, it is not enough that both the occupier and users may understand that the trail is for a "recreational" purpose. Users must be *reasonably notified* that they are on a recreational trail. A prudent occupier will ensure the placement of appropriate signage at designated entrance points, as well as at reasonable intervals along the trail itself. Otherwise, the occupier runs the risk of being subject to the ordinary standard under section 3 of the *OLA*.

In *Pierce v. Hamilton (City)*[22], the City of Hamilton was not found liable for damages as a result of the injuries suffered by the plaintiff when he fell in a park in the early hours of the morning. In *Pierce*, at approximately 1:45 a.m., the plaintiff was walking with friends in a wooded area in Scenic Drive Park near the edge of the Niagara Escarpment. While in the woods, the plaintiff chose to leave his friends and venture out on his own. Shortly thereafter, he fell into a deep ravine and suffered significant physical injuries.

The Ontario Superior Court of Justice concluded that there were two marked recreational trails in the vicinity of Scenic Drive Park that were characterized as recreational trails. Additionally, the Court found that both trails were reasonably marked as such as one trail had various signs and fences at the entrances as well as a large identifying sign providing a map and regulations for bikeways, trails and parks.[23] With regards to the second trail, in addition to a sign at the start of the trail, there were blue flashes on light poles/utility poles along the trail which indicated that it formed part of another larger trail.[24]

The Court concluded that given the length of the trails, and the use made of the trails by the public, the aforementioned signs, flashes and maps were "reasonable notice that both of these trails [were] recreational trails."[25] Important to note, the Court also concluded that the defendant municipality did not have to erect signage that gave a general warning to the public regarding the use of the woods. The failure of the City to erect a more general warning sign, such as "Caution. Uneven Ground in the Woods" did not constitute a breach of its duty.[26]

[21] *OLA*, *supra* note 2 at 4(4)(e) and (f).
[22] 2013 ONSC 6485, 2013 CarswellOnt 14282 [*Pierce*].
[23] *Ibid* at para. 27.
[24] *Ibid* at para. 28.
[25] *Ibid* at para. 29.
[26] *Ibid* at para. 46.

A general warning sign of this nature would have been superfluous. For similar reasons, the Court also rejected the plaintiff's submissions that the City ought to have built a barricade or a fence near the drop-off into the ravine. The Court stated that the danger of a sharp drop in elevation in a wooded area that was near the edge of an escarpment should be "obvious to anyone who entered the woods".[27]

As an aside, the Court in *Pierce* referenced the earlier decision of *Schneider*. While in *Schneider* liability was found against the occupier, the Court in *Pierce* articulated the following principle:

> Where a person enters a property that is generally used for recreational activity; and the provisions of s. 4(3) [of the *OLA*] apply; and the property consists in part of a recreational trail reasonably marked as such; and that person leaves the recreational trail but remains on the property while continuously engaged in a recreational activity, then the lower standard of care set out in s. 4(1) of the *OLA* applies.[28]

Even though the plaintiff proceeded to walk off the recreational trail, the fact that he once walked on the path meant that the reckless disregard standard in section 4(1) of the *OLA* applied.

Most recently, in *Cotnam v. National Capital Commission*[29], the plaintiff brought an action for damages suffered while bicycling on property owned and operated by the defendant. The plaintiff alleged that signage on a bike path was improper, thereby constituting danger. As a result, he fell while negotiating a curve on the subject pathway and sustained injuries and damage to his bicycle.

The Divisional Court found that steps were taken by the defendant with respect to the pathway and the fact that there was signage with respect to the curve in question demonstrated that the defendant took steps for the safety of users of the trail. The fact that the City of Ottawa could have improved the signage given the potential hazard that existed did not translate into "reckless disregard" as the City had obviously addressed the possible danger and taken steps to communicate it to users/cyclists.[30]

RISK MANAGEMENT STRATEGIES TO REDUCE EXPOSURE TO LIABILITY

Risk management is a key concept in reducing liability. It involves taking steps to identify potential risks and to evaluate their potential frequency and magnitude of loss. Once risks have been identified and evaluated, they then must be addressed, either through risk avoidance, reduction, retention or transfer.

A risk management process is the best way to ensure meeting the reckless disregard standard of care outlined in section 4 of the *OLA* and lessening the chances of litigation in case of an

[27] *Ibid* at para. 47.
[28] *Ibid* at para. 34.
[29] 2014 ONSC 3614, 2014 CarswellOnt 10149 [*Cotnam*] (Div. Ct.).
[30] *Ibid* at para. 15 citing *Herbert (Litigation Guardian of) v. Brantford (City)*, 2010 ONSC 2682 (Ont. S.C.J.).

accident. Below is a brief description of how an occupier can develop a risk management plan for a trail. The process should include the following steps (among others).[31]

First, trail operators and trail program facilitators should identify the risks to users that are inherent to the trail or trail experience. Consult experts such as experienced trails developers, parks and recreational developers, environmental planners, other trail groups, and other trail user groups. Components such as uneven tread, intrusions to corridor, cliffs, wilderness, low headway, shared use and rivers should be assessed.

Second, trail operators and trail program facilitators should establish and implement mechanisms to limit the negative effects of the risks listed above. Building trails to standards that ensure safety of its users, establishing user guidelines, patrolling the grounds regularly to assess and manage the trial, as well as posting and maintaining ample well-placed cautionary and directional signage should be employed to limit the negative effects of risk.

In addition to the above, several other practical approaches can be suggested for a landowner who is an occupier:

1. Prohibit certain uses or access to high risk areas, such as trail bike access near steep cliffs.
2. Regularly inspect, address and warn about hazards where people may enter onto the property.
3. Transfer liability, including obtaining insurance, having "hold harmless" agreements, and leasing or contracting out the use and management of public access areas such as trails. [32]

Furthermore, another useful strategy is to transfer the use and management of a trail to an organization – often a property management corporation. Transferring the use and management of a trial makes the organization the primary occupier of the lands and generally makes them primarily responsible for management and any liabilities. Both of these strategies can aid in alleviating liability for an owner of a recreational trail by placing another occupier in the lead position to defend a claim against them. In these circumstances, "hold harmless" agreements (also known as indemnification agreements) are often signed. These agreements do not prevent landowners from being sued but rather provide them with an agreement that someone else will bear the responsibility for paying the costs of any claims or a defence for such claims.

The jurisprudence has also identified several methods that an occupier can utilize to alert users of their premises to any potential risk of harm in an effort to reduce their liability for any injuries

[31] Please see the Trans Canada Trail Ontario website at http://www.tctontario.ca/library/files/Insurance&Trails.pdf for a comprehensive paper on risk management and liability for recreational trails in Ontario.
[32] *See* Ian Attridge, "Trail Liability and Other Reforms in Ontario: A Discussion Paper" (October 2002), online: Ontario Trails <http://www.ontariotrails.on.ca/assets/files/pdf/member-archives/reports/Trails%20Discussion%20Paper.pdf>

sustained. First, the most obvious method is to argue that the party is not an occupier pursuant to the definition outlined in the *OLA*. Second, if the party is found to be an occupier, ensure that there is nothing problematic with the premises. This would include placing adequate signage around any potential hazards or hidden dangers, sectioning off dangerous areas, and applying bright paint or light reflectors to posts and fences. Third, if the premises come into a state of disrepair, take remedial action as soon as possible.

When an occupier permits individuals to enter their premises for recreational activities, the occupier should ensure that these individuals are properly informed about any potential risks or dangers that exist on the premises.

Finally, if an occupier is aware that individuals are utilizing their land for a recreational purpose, it may also be advisable for occupiers to erect signage on their property that clearly indicates that the property is meant for recreational activities. By doing so, an occupier increases the likelihood that their conduct will be held to the reckless disregard standard of care imposed by section 4 of the *OLA*.

CONCLUSION

Preparation, at least in the world of occupiers' liability, is everything. To avoid liability requires proactivity on the part of those who have care and control of property, particularly when individuals of the public are invited to use the property.

The more prudent an occupier can be in minimizing their exposure to risk, the greater chance an occupier has at reducing their exposure to liability for injuries that occur on their premises during recreational activities. Having experienced counsel, such as those here with McCague Borlack LLP, can be crucial to creating a customized a risk management plan to assist in minimizing their clients' exposure.