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## OFF THE BEATEN PATH: OCCUPIERS AND TRAIL LIABILITY IN ONTARIO

By. Eitan Kadouri and Garrett Harper

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Throughout Ontario and indeed Canada, community organizations and outdoor associations have been increasingly advocating for the development of interconnected recreational trail networks for use by the public. The development of these trails, such as the Trans Canada Trail and the provincial Trillium Trail Network comprising thousands of kilometres of recreational trails through Ontario and Canada respectively, offer a fantastic opportunity for the public to explore and enjoy the beauty of Canada.

With an estimated 64,000 kilometres of trails in Ontario and approximately 525,000 annual users of snowmobile and all-terrain vehicle trails and an additional 800,000 users annually of hiking trails, the importance of these vast networks cannot be understated.<sup>1</sup> Trails are also important financially, with estimates that Ontario's trail network contributes approximately \$2 billion per year to the provincial economy.<sup>2</sup>

Notwithstanding the hugely beneficial impact these trail networks offer both financially and culturally in Ontario, the proliferation of vast trail networks throughout the province has created very real concerns for owners and occupiers of large tracts of land. In creating many of these trail networks, groups have placed their reliance on the generosity of these occupiers to allow members of the public to access their land. In addition, landowners whose land abuts these trails naturally have some "spillover" of users from the established trails onto their land.

Furthermore, municipalities are continuously expanding their recreational path networks all across Canada which is attracting a growing volume of users.

These concerns are only magnified when one considers the nature of the activities that are performed on these trails, such as snowmobiling and off-roading, and the very real risk of harm befalling those who participate in these activities.

The purpose of this paper is to provide the state of the law as it currently exists and recommend ways in which large landowners can reduce their exposure for harm suffered by users of recreational trails. It will highlight the legal relationship that exists between occupiers and users of land pursuant to the *Occupiers' Liability Act* ("OLA").<sup>3</sup> This paper will first define the duties of landowners to individuals who are taking part in recreational activities on their premises. In doing so, this paper will analyze the impact of whether these individuals are invited upon the land or if they have simply trespassed onto the land to take part in recreational activities. Furthermore, this paper will discuss the corresponding standard of care that accompanies the relationship that is created between occupier and user. Strategies will be

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<sup>1</sup> Ministry of Health Promotion, *Active2010 Ontario Trails Strategy*, online: Ministry of Health Promotion <[http://www.mtc.gov.on.ca/en/sport/recreation/A2010\\_TrailStrategy.pdf](http://www.mtc.gov.on.ca/en/sport/recreation/A2010_TrailStrategy.pdf)>.

<sup>2</sup> *Ibid.*

<sup>3</sup> R.S.O. 1990, c. O.2 [OLA].

provided that can be employed by occupiers to assist in mitigating liability in the event that users of these trails suffer some injury or harm.

#### **A. Who owes a duty and what is the duty?**

In order to determine who owes a duty, it is helpful to refer to the terms and provisions of the *OLA*. The *OLA* states that an occupier is a person who:

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.<sup>4</sup>

From this basic definition, it would appear that the party who owes the duty is the party who is responsible for maintaining the land, which is the owner of the property where the trail is found. Therefore, this duty could theoretically extend to a party who may not even be aware that their land is being used as a recreational trail.

In addition, a party that is not an occupier of land, such as snowmobile clubs and other outdoor clubs, may still be targeted in litigation under the *OLA*. However, these parties will likely only face liability in the context of the *OLA* if they themselves are found to satisfy the definition of an “occupier” of the land pursuant to the *OLA* where a plaintiff suffers some harm.<sup>5</sup> The basis for this relates back to the simple definition of an occupier under the *OLA*.

As many snowmobile clubs and outdoor organizations typically do not hold land themselves but merely advocate for a specific sport or activity, these parties usually do not satisfy the definition of an occupier. Therefore, in the context of injuries to members of these clubs during participation in the activities, it is unlikely that liability under the *OLA* will be found against these parties barring the plaintiff being able to demonstrate that these groups satisfy the definition of an occupier. However, snowmobile clubs may be unable to escape liability under the general principles of negligence in the event that members of these clubs suffer injuries. Should these groups find themselves facing potential litigation, it is imperative that they demonstrate they are not the occupier of the land where the injury occurred despite the fact that they may promote the activity or sport that precipitated the plaintiff’s damages.

Now that we have established who owes the duty, what will now proceed to outline what the nature of the duty is. The *OLA* states that the occupier’s duty is to take “such care as in all the circumstances...to see that persons entering on the premises or the property brought on the premises by the persons are reasonably safe while on the premises.”<sup>6</sup> Furthermore, this duty of care applies whether the danger is caused by the condition of the premises or by activities performed on the premises.<sup>7</sup>

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<sup>4</sup> *Ibid* at s. 1(1).

<sup>5</sup> This principle was enunciated in the decision of *Lemieux v. Porcupine Snowmobile Club of Timmins Inc.* [1999] O.J. No. 1779 (Ont. C.A).

<sup>6</sup> *OLA*, *supra* note 3 at s. 3(1).

<sup>7</sup> *Ibid* at s. 3(2).

## B. What is the standard of care?

The requisite standard of care, pursuant to sections 3 or 4 of the *OLA*, is dependent on whether or not individuals on the property have the occupier's permission to be there. While a duty is arguably formed between an occupier and all persons on the premises, the standard of care that the occupier is required to meet is markedly different depending on whether section 3 or 4 of the *OLA* applies. Therefore, in determining the standard of care that the occupier is required to meet, counsel should first investigate whether the occupier permitted individuals to enter upon their premises.

### Permission

The concept of permission is important in the determination of the requisite standard of care. The early decision of the House of Lords in *Edwards v. Railway Executive*<sup>8</sup> provides guidance on the ways in which an individual can be granted permission to be on an occupier's premises. In *Edwards*, it was stated that "...to find a licence there must be evidence either of express permission or that the landowner has so conducted himself that he cannot be heard to say that he did not give [permission]."<sup>9</sup>

### *Express Permission*

To put it plainly, express permission is where the person entering the property has received actual permission from the occupier of the land whereas implied permission arises when the occupier conducts themselves in a way as to not prohibit individuals from knowingly entering upon the premises.

### *Implicit Permission*

If an occupier is aware that people are entering onto their property without their express permission to do so, yet the occupier fails to take action to prevent this entry from continuing, the occupier risks the court finding that they granted their "implicit permission" for this activity to take place on their land. As a result, the occupier may have unknowingly placed on itself a duty of care to persons entering onto their property. This has potentially negative consequences should one of these people encounter some harm while on the occupier's premises.

In the Supreme Court of Canada's decision of *Veinot v. Kerr-Addison Mines Ltd.*,<sup>10</sup> the court was tasked with determining whether or not the private landowner was liable for a plaintiff's injuries sustained while the plaintiff was travelling on a snowmobile at night on the defendant's private road. At trial, evidence was provided that the defendant's road had been well travelled by snowmobile traffic to the point that the snow had been ploughed down. In fact, the road was so well travelled that the plaintiff thought he was on an established snowmobile trail.<sup>11</sup> On this basis, it was concluded that the plaintiff believed he had permission from the occupier to travel on this trail. For this reason, the court held that the occupier of the land had implicitly allowed snowmobilers to use their private trail and had not made any objections at the time the activity took place.

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<sup>8</sup> [1952] A.C. 737.

<sup>9</sup> *Ibid* at p 747.

<sup>10</sup> 1974 CarswellOnt 243, [1975] 2 S.C.R. 311 (S.C.C.).

<sup>11</sup> *Ibid* at para 6.

This case illustrates the importance that, if an occupier is opposed to an activity from taking place, the occupier needs to make this clear. It is clear that, had the occupier had his way in *Veinot*, it is unlikely that they would have permitted anyone from snowmobiling on their property. However, their failure to safeguard their premises or make riders aware that they were trespassing on the property was a major reason in the court's determination of liability. The techniques by which an occupier can make riders aware that they are trespassing on the property are set out below in the "Mitigation Strategies" portion of the paper.

As demonstrated in *Veinot*, occupiers could be found liable for injuries that befall individuals who trespass on their property. This ruling is of particular concern to occupiers of large tracts of land, such as farmers and municipalities, where it is very hard to safeguard and prevent individuals from entering upon the premises. If individuals are entering the premises without the occupier's permission to engage in recreational activities, what impact does this have on the standard of care that is required for the occupier?

### Uninvited Recreational Usage

In order to address the concern of uninvited recreational usage, section 4 of the *OLA* states that all individuals who enter onto a specific premises shall be deemed to have willingly assumed all risks.<sup>12</sup> In return, the occupier has a duty to ensure that they do 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.<sup>13</sup>

Further guidance is offered by section 20 of the *Off-Road Vehicles Act*<sup>14</sup> that states that every person who enters an occupier's premises on an off-road vehicle shall be deemed to have willingly assumed all risks in certain circumstances.

#### *What is "Reckless Disregard"?*

The meaning of "reckless disregard" in the *OLA* has been considered numerous times by the judiciary both in Canada and abroad. Definitions of reckless disregard appear to focus in on some deliberate, malicious act performed by the occupier that results in a plaintiff suffering injury. This act has to constitute one that is void of "ordinary humanity".<sup>15</sup>

Occupiers are deemed to have met the standard of care in any situation except for wilful or malicious damage to a trespasser.<sup>16</sup> In essence, as long as farmers or occupiers of large tracts of land are not in the practice of "booby-trapping" their property in order to fend off intruders, they likely would not found to be acting with reckless disregard should an injury befall a recreational user while the user is on the occupier's premises.

There are two major impacts that section 4 of the *OLA* has on the recreational landscape for Ontario's trail network. First and foremost, it greatly reduces the risk that an occupier will be found liable for damages sustained on the premises. The secondary impact is that it allows

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<sup>12</sup> *OLA*, *supra* note 1 at s. 4(4).

<sup>13</sup> *Ibid* at s. 4(1).

<sup>14</sup> R.S.O. 1990, c. O.4.

<sup>15</sup> *Grand Trunk Railway of Canada v. Barnett* [1911] A.C. 361 (P.C.).

<sup>16</sup> *Cormack et al. v. Township of Mara et al.* [1989] O.J. No. 647 (Ont. S.C.J.) [*Cormack*].

recreational users a wider area in which they can enjoy their endeavours due to the fact that occupiers are not held to an impossible standard.

The decision of *Babineau v. Babineau*<sup>17</sup> provided early insight into how the Court determines 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. This was not the first time the plaintiff had been on the occupier's premises for snowmobiling and, beyond this, it was determined at trial that the plaintiff possessed a moderate level of skill with respect to snowmobiling.

While snowmobiling, the plaintiff suffered damages after he drove into barbed wire fence that had been erected the previous spring. As a result, the plaintiff brought an action against the occupier. Although this case was decided based on reference to the *Motorized Snow Vehicles Act* (which preceded the *OLA*) the language of this legislation as it then was is similar to that seen in the present day *OLA*.<sup>18</sup> It was 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 failed to meet the required standard of care.

In *Whaley v. Hood*,<sup>19</sup> the defendant occupier was the owner of a large portion of land that abutted the Welland Canal. The plaintiff was a passenger on an ATV that was travelling along the canal. While travelling along the canal, the driver of the ATV failed to spot an embankment leading to the canal and plunged down it. As a result, the plaintiff passenger was thrown from the vehicle.

In determining the requisite standard of care, the Court determined that the land, although built beside a developed waterway, was rural in nature. It was also determined that the plaintiffs had entered the premises for a recreational purpose. For these reasons, the occupier was held to the less onerous standard prescribed by section 4 of the *OLA*. Despite attempts by the plaintiff to assert that the occupier failed to adequately light the land and that the occupier constructed a road that was outside the norm for rural roads, it was determined that the occupier had not acted with reckless disregard toward the plaintiff. Accordingly, the plaintiff's claim was dismissed.

In their decision of *Schneider v. St. Clair Region Conservation Authority*, the Ontario Court of Appeal was tasked with determining whether another large landowner, a municipality, had acted with reckless disregard.<sup>20</sup> 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.

In determining whether or not the occupiers were to be held to the less onerous standards imposed by section 4 of the *OLA*, the court determined that the occupiers had knowledge that individuals used the frozen lake for the purposes of cross-country skiing. Although the lake was not a part of the recognized trail system of the park, the failure of the occupiers to restrict parties from utilizing the frozen lake meant the occupier had implicitly provided their permission for

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<sup>17</sup> (1981) 32 O.R. (2d) 545, 122 D.L.R. (3d) 508 (Ont. S.C.J.).

<sup>18</sup> *Ibid.*

<sup>19</sup> [1998] O.J. No. 1785 (Ont. C.J. [General Division]).

<sup>20</sup> 2007 CarswellOnt 8891 (Ont. C.A.).

parties to freely access the premises.<sup>21</sup> Accordingly, the occupiers were held to the more onerous standard of care imposed by section 3 of the *OLA* as opposed to the “reckless disregard” standard of section 4.

Conversely, in *Cormack et al. v. Township of Mara et al.*<sup>22</sup> 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 travelling 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. In order to cross the gap, the plaintiff launched the snowmobile over the gap but upon landing was thrown from his machine. The plaintiff argued that he would never have suffered his injuries had the Township not removed the makeshift bridge. For this reason, the plaintiff stated that the Township failed to meet the required standard of care.

However in *Cormack*, unlike the situation in *Schneider*, there was no evidence advanced that suggested the municipality had or should have had knowledge that individuals were using the former right-of-way as a snowmobile trail.<sup>23</sup> The court considered the lack of knowledge by the Township to be a key reason as to why the Township should be subject to the less onerous standard prescribed by section 4 of the *OLA*.<sup>24</sup>

In *Kennedy v. London (City of)*<sup>25</sup> the plaintiff was injured when he collided with a post that was placed in a partially concealed portion 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 pursuant to the *OLA*, the Court held that that the plaintiff was neither implicitly nor explicitly invited onto the path. The court further determined that the plaintiff was on the path for a recreational purpose. Furthermore, the path was reasonably marked as a recreational trail. 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*.<sup>26</sup> In determining whether the defendant municipality met the required standard of care, the Court held that the defendant municipality had placed the pole in an “unusual and thus unexpected location” on the pathway and did not provide any warning devices to alert the plaintiff.<sup>27</sup> As a result, the municipality was found liable for the plaintiff’s injuries.

However, in an interesting sidenote, the Court apportioned the majority of the liability in this situation to the plaintiff cyclist due to the fact the cyclist was not paying sufficient attention to the pathway.<sup>28</sup>

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<sup>21</sup> *Ibid* at para 23 to 30.

<sup>22</sup> *Cormack*, *supra* note 16.

<sup>23</sup> *Ibid* at para 33.

<sup>24</sup> In determining whether the conduct of the Township met the “reckless disregard” standard as required by the *OLA*, the court determined that the removal of the railroad ties over the drainage ditch did not satisfy reckless disregard due to the lack of knowledge that the trail was used as a snowmobiling trail. See *ibid* at para 39.

<sup>25</sup> 2009 CarswellOnt 1328 (Ont. S.C.J.).

<sup>26</sup> *Ibid* at para 38.

<sup>27</sup> *Ibid* at para 67.

<sup>28</sup> *Ibid* at para 77.

The findings in *Kennedy* are interesting for two reasons. First, the case speaks to the fact if occupiers permit recreational trails, they should ensure that adequate signage is erected to identify that the trail is meant for a recreational purpose. By doing so, the occupier will likely be held to a lower standard of care. Second, the decision speaks to the fact that although a defendant occupier may fail to meet the standard of care prescribed by section 4 of the *OLA*, the court may still ascribe some liability to the plaintiff for contributory negligence.

Despite the “reckless disregard” standard that is imposed on occupier’s pursuant to section 4 of the *OLA*, there is still a requirement on the occupier to ensure that the property is kept up to an appropriate maintenance standard. This principle was articulated in the decision of *Herbert (Litigation Guardian of) v. Brantford (City)*<sup>29</sup> where it was held that the defendant municipality’s failure to maintain a portion of a recreational path that they knew to be dangerous satisfied a finding of reckless disregard pursuant to section 4 of the *OLA*. Accordingly, a portion of the liability for the plaintiff’s injuries was ascribed to the defendant municipality.

While a duty is arguably owed to all individuals who come upon an occupier’s premises, the standard of care that is owed is markedly different depending on whether or not the individual has received the occupier’s permission to be on the premises. Should individuals be faced with a claim by a plaintiff for injuries that arose while on the occupier’s premises, it is important that the occupier demonstrate (if the facts allow it) that the plaintiff had was taking part in recreational activities and was not invited to do so by the occupier. Should the occupier succeed in satisfying the trier of fact that the plaintiff entered upon the premises to engage in uninvited recreational activities, they would not be found liable barring some evidence that they acted with reckless disregard towards the plaintiff.

However, if the occupying defendant is aware that individuals are entering upon their premises to engage in recreational activities but does not do anything to restrict access, the occupier risks a finding of implicit permission for this behaviour to occur. If permission is found to exist, be it explicit or implicit, the occupier will be required to meet the more onerous standard of care prescribed by section 3 of the *OLA*. Therefore, if occupiers are opposed to individuals using their land for recreational purposes, they should make this abundantly clear through the use of signage or barriers to entry.

As seen from the jurisprudence, a finding of reckless disregard is contingent on many aspects. These factors include erecting appropriate signage and warning signs, properly identifying hazards, the occupier’s subjective knowledge of the premises and the plaintiff’s own experience and skill level with the activity. The next section will discuss these factors in more detail.

### **C. Mitigation Strategies**

How can an occupier reduce the standard of care owed if a duty of care is found to exist and, therefore, reduce the chance that the occupier will be found liable for injuries suffered by an individual while on the occupier’s premises? The jurisprudence has identified several methods that can be utilized by an occupier to alert users of the premises to any potential risk of harm in an effort to reduce their liability for any injuries sustained.

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<sup>29</sup> 2012 ONCA 98 (Ont. C.A.).

The most obvious method in lessening liability to invited or uninvited recreational users is to first argue that the party is not an occupier pursuant to the definition as outlined by the *OLA*. By doing so, the defendant can dispose of the claim in an efficient manner.

However, if the party is found to be an occupier pursuant to the *OLA* there are many strategies that can be employed by the occupier to lessen their liability.

The obvious strategy is to ensure that there is nothing untoward about the premises. This includes placing adequate signage around any potential hazards or hidden dangers. Cordoning off dangerous areas can also reduce the likelihood that injuries will befall individuals who enter onto the premises. Furthermore, in the case of posts or fences, applying bright paint or light reflectors to these objects may be enough to meet the requisite standard of care prescribed by section 4. These simple and inexpensive steps can go a long way in ensuring that large landowners have mitigated their potential legal liability.

Should occupiers become aware that some aspect of their land has come into a state of disrepair such that it presents a danger to individuals who may enter upon the land, it is imperative that remedial action is taken as soon as possible. Any delay may not only mean that the occupier has breached the more onerous standard prescribed by section 3 of the *OLA*, it may also be grounds for a breach of the “reckless disregard” standard as seen in section 4 of the *OLA*. Not only does taking remedial action reduce the likelihood that individuals will come to harm in the first place, it can go a long way in satisfying the occupier satisfying the standard of care.

If an occupier has permitted 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. By drawing the plaintiff’s attention to the existence of these risks, the occupier is able to more effectively shift the responsibility for detecting these dangers onto the plaintiff and thus meet the heightened standard of care for invited individuals pursuant to section 3 of the *OLA*.

In addition to safeguarding the premises itself, occupiers may also be able to look to inherent traits of the plaintiff in lessening their liability for any injuries by arguing some aspect of contributory negligence. Defendant occupiers should always attempt to gather evidence that the plaintiff had some level of experience with the activity they were taking part in at the time they were injured. By doing so, one may be able to argue that the plaintiff should have been aware that some danger could potentially exist.

Not only should defendant occupiers argue that the plaintiff had some inherent skill level, the defendant occupier should also argue (if the facts allow it) that the plaintiff conducted themselves in a manner that was unfit or unsafe given the situation they found themselves in. Defendant occupiers should ensure that they obtain full information about the conditions that existed at the time the damages occurred as well as the nature of the activity that was being performed by the plaintiff. In the context of ATV and snowmobile accidents, counsel should investigate factors such as speed, intoxication and distractions as these factors may be crucial in lessening the occupier’s liability.

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 clearly indicating that the land



is meant for recreational activities. By doing so, an occupier increases the likelihood that their conduct will be held to the less onerous standard imposed by section 4 of the *OLA*.

#### **D. Conclusion**

By employing the strategies previously outlined, occupiers will be better positioned to protect their legal and financial interests during a busy summer season that is right around the corner. Not only will these strategies assist occupiers, they will also ensure that members of the public enjoying the recreational trail network throughout Ontario have a fun, safe and enjoyable experience.