Occupiers' Liability Act (OLA) and patron – occupier liability

Daniel Cayley, December 2007

a. Overview:

The OLA sets out the duties and responsibilities of "occupiers" towards entrants to premises. For our purposes the "occupier" of a public park, as per the OLA, is the City of Toronto and its employees and the entrants would be park patrons. It sets out the "duty of care" faced by occupiers towards entrants and the circumstances under which this "duty" is limited.

The "duty of care" is defined in S.3(1), in layman's terms, as taking all reasonable (reasonable is not defined) measures to ensure the protection of all persons entering the premises and any property they bring on the premises. It is further stated in S.3(2) that the above duty "applies whether the danger is caused by the condition of the premises or by an activity carried on the premises." The key here is what is "reasonable". The matter of what "reasonable" means is a matter of judicial discretion and will be made clearer in the cases in subsection 2(b) and discussed in terms of public parks in section 2(c).

The two key restrictions to "duty of care" are linked. The first, set out in S.3(3) states that the occupier's duty can be restricted as long as the entrant is informed of the restriction. The second, defined in S.4(1) allows that occupiers are not liable in cases

where risks were "willingly assumed" (known in Canadian law as *Volenti non fit injuria*). Under both these restrictions the occupier is only responsible to not create a danger with the deliberate intent to harm or damage entrants or their property. Both these restriction have been limited by the court in its distinction between the "physical assumption of risk"[1] and "a waiver of any legal claim"[2]. The court has opted for the second definition and therefore a simple recognition of the risks inherent in an activity is not sufficient to limit liability on the part of the occupier. So in essence, for the *Volenti* defence to work the entrant must have signed a waiver. The OLA also states that occupier's duty cannot be restricted by a contract that the entrant is not a party to. The matter of *Volenti* and assumed risk is illustrated in subsection 2(b)(xi).

The OLA states that matters concerning employer-employee rights, duties, and liabilities can not be restricted by the anything therein. Such matters between employers and employees are in fact covered under the OHSA, which will be discussed in section 3.

As set out in S.9(3) of the OLA, all those who are seen to be liable under the conditions of the OLA are punishable under the Negligence Act[3] (NA). In short, the NA states that parties found liable will be forced to pay damages to injured parties. Under the NA, one or more parties may be found liable, including the plaintiff. Cases can be decided by judges or juries and in both cases the ruling party may decide the percentage of damages to be paid by each involved party. Examples of such partial liability rulings are seen in subsection 2(b).

b. Cases:

i) CINDY HENHAWK v. THE CITY OF BRANTFORD[4]
http://www.canlii.org/on/cas/onsc/2005/2005onsc15085.html

Cindy Henhawk tripped over a curb and fell in a parking garage damaging her wrist. The

city was found to be at fault under S.3 of the Act for not taking the proper care and painting the curb yellow. The plaintiff was found partially liable and was awarded two thirds of the damages of $82833.78.

ii) WILLIAM LESLIE v. MISSISSAUGA[5]
http://www.canlii.org/on/cas/onsc/2003/2003onsc11716.html
William Leslie was skating at an ice rink when he struck a rink attendant and fell to the ice sustaining injury. It was found that the fault lay with the rink attendant not the city. It was further determined that Leslie was partially liable and was awarded half the damages which came to $34,664.
The case was later appealed and thrown out on a technicality concerning the judge weighing facts not in evidence in coming to his decision.

iii) MABEL SALISBURY v. LONDON[6]
http://www.canlii.org/on/cas/onsc/2006/2006onsc15860.html
The plaintiff walked up a darkened ramp at a public library and tripped over a dog. She claimed that if it had been bright enough she would not have gone up the ramp but would have taken the stairs. The court ruled that the lighting was sufficient as to not have been an obvious danger and that it was not in fact the libraries responsibility to guard against

any possibility of an accident, but only those that could be reasonably foreseen (not stated in documents but implied). The case was dismissed.

iv) WOODS v. ONTARIO[7]

http://www.canlii.org/on/cas/onca/2003/2003onca10157.html
The plaintiff was seriously injured when he dove off a groyne (a low wall built out into water) into shallow water. It was found that the city of Sarnia was liable to pay 25% of damages (amount not listed) because they had failed to post warning signs about the shallow water, which would be pursuant to S.3 of the Act requiring occupiers to take all reasonable measures to protect persons entering premises.
v) DOYLE v. PETROLIA (city)[8]
http://www.canlii.org/on/cas/onsc/2003/2003onsc11463.html
The plaintiff sat on a bench at a new year's celebration in a public park. The bench tipped over causing personal injuries. The bench had been vandalized and had become unstable. The plaintiff argued that the bench should have been properly fastened with bolts and that security should have been on hand in the park for the party. The judge ruled that the bolts did not apply as a reasonable action of the occupier as they relate to theft deterrence more than safety. However, the judge did rule that given the New Year's party going on in the park, the lack of security was a failure to fulfill S.3 of the Act. The City was found liable and ordered to pay damages of $66,227.00.

vi) KAMIN v. KAWARTHA DAIRY LIMITED[9]
http://www.canlii.org/on/cas/onsc/2004/2004onsc10663.html
The plaintiff tripped on a crack in the parking lot outside the dairy and was injured. It was determined by the judge that the crack was too small to fall under the "duty of care" set out in S.3 and that the liability for the injury rested with the plaintiff. The case was dismissed.
vii) BECHAALANI v. HOSTAR REALTY LIMITED[10]

http://www.canlii.org/on/cas/onscdc/2004/2004onscdc10381.html
The plaintiff was delivering food to a residence when he slipped on an icy path and was injured. He had been told to use the side door, but the path to this door was not clear so he used main path, which had not been cleared. The plaintiff was awarded damages of $5,122.49.
The case was later appealed on the basis of the request that the plaintiff use the side door and the defendants claim that it was not the responsibility of the defendant to highlight the staircase to the side door under the "reasonable measures" to ensure safety stipulation of S.3. The appeal judge dismissed both claims citing that it was in fact a reasonable and necessary precaution on the part of the occupier to make the staircase more obvious with extra lighting. The appeal was dismissed and the original award stood.

viii) MANNING v. 3980 INVESTMENTS LTD.[11]
http://www.canlii.org/on/cas/onsc/2003/2003onsc10921.html
The plaintiff slipped and fell, sustaining injury, on an icy path to an apartment complex. She was walking on a patio stone walkway when she fell. The plaintiff claimed that the stones were uneven and icy, she later admitted to having noticed the condition of the path and having used it often in the past. In his decision the judge cited S.6 of the Act, which states that it is the landlord's responsibility to ensure that independent contractors (in this case the temporary superintendent) are competent and that their work be properly done. The judge ruled that the defendant (the landlord) was 60% liable for failure to properly instruct and train his temporary superintendent and that the Plaintiff was 40% liable for walking on the path even after she noticed that it looked unsafe. The damages awarded were $21420.45.

ix) FRAGOMENI v. ONTARIO CORPORATION 1080486[12]
http://www.canlii.org/on/cas/onsc/2006/2006onsc10890.html
The plaintiff fell in a funeral home parking lot hitting his head and eventually developed dementia. The defendants admitted their responsibility under S.3 to ensure that measures were taken to "reasonably" ensure the safety of persons entering the premises. However, they also argued that this liability was restricted by their contract with an independent company to maintain the parking lot during winter. The judge ruled that the funeral home and independent were equally liable (50% each). The Funeral home for not ensuring that

the independent contractor was performing his duties and the independent contractor for his failure to perform his duties as contracted. The award, which excluded the claim that the fall had contributed to the injured person's dementia, was $112,316.79. Family members were awarded a further $14,000 for their losses in caring for their father/husband.

x) CHAN v. THE ERIN MILLS TOWN CENTRE CORPORATION[13]
http://www.canlii.org/on/cas/onsc/2005/2005onsc15051.html
The plaintiff, a Chinese citizen visiting Canada, claims that a slip and fall in a Loblaw's contributed to the worsening of his pre-existing polio. The plaintiff claims to have suffered from Post Polio Syndrome after the fall. He slipped and fell in the produce section on the leakage from a watermelon bin. The judge ruled that the removal of fluid from the produce section, known to be the main cause of grocery store accidents, falls under the reasonable "duty of care" set out in S.3. An award was made in the amount of $1,526,808 including $110,000 awarded to his daughter for earnings lost while caring for

her father.

xi) LITWINENKO v. BEAVER LUMBER COMPANY LTD.[14]
http://www.canlii.org/on/cas/onsc/2006/2006onsc15953.html
The plaintiff fell while exiting a ramp leading to the lumber store. The defendant tripped over a small lip of about an inch that remained after a larger lip of three inches had been

addressed with asphalt. The plaintiff admitted to having noticed the half inch gap many times and mentioning it to her friends. The judge ruled that the remedy that the defendant had put in place was not sufficient to meet the "duty of care" stated in S.3. The defence argued that the plaintiff had "willingly assumed risk" (as in S.4) since she knew of the danger. S stated earlier this is known as the *volenti* defence. The judge, however, ruled that it must be proved that the plaintiff had knowledge of virtually certain harm, and in essence waived the right to sue. The judge further stated that this was not met in this case.