

## A PRACTITIONER'S PERSPECTIVE ON SLIP AND FALL CASES

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### LIABILITY TO THE PLAINTIFF

Although the plaintiff's claim in a slip and fall case is in tort, any determination of the plaintiff's rights starts with a consideration of his or her rights under the *Occupier's Liability Act*.<sup>1</sup>

In accordance with section 3 of the Act an "occupier" owes a duty to show reasonable care while an individual is on their "premises". The two key words are "premises" and "occupier".

The first question one asks in any slip and fall case is, "Where did the fall take place or on whose 'premises' did it take place?" "Premises" are broadly defined in the Act as including land, structures, water or any combination thereof. In practical terms, did the fall happen inside or outside, and if outside, on a sidewalk, parking lot, driveway or roadway?

Once the first question is answered and you have determined where the fall took place, the second question that is asked is, "Who or what was an 'occupier' of those premises"?

An "occupier" is defined in the Act as including a person in physical possession of premises, or a person who has responsibility for and control over the condition of premises or activities carried on there, or a person who has control over persons allowed to enter premises.

The definition contemplates three disjunctive criteria by which one can judge whether or not someone occupies premises. It also specifies that there can be more than one occupier of the same premises.

In some cases the determination of who is an occupier requires an examination of the agreements between the landlord, tenant and maintenance company.

The relationship between landlord and tenant is generally governed by lease. The first thing to consider in looking at the lease is what area the landlord is actually leasing to the tenant or alternatively what constitutes the "demised premises" as these premises are defined on the lease.

In most cases the "demised premises" stop at the walls of the room and/or rooms and/or

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<sup>1</sup> R.S.O. 1980, c. 322.

buildings that the tenant actually occupies. Anything exterior to that, such as sidewalks, driveways and parking lots, is generally defined as a common area.

In most typical leases the tenant is responsible for maintaining those areas within the demised premises. The landlord has responsibility and control over the condition of the common areas. Further, in most leases it is specified that a tenant cannot restrict access to a common area.

In short, by virtue of most *leases* a tenant occupies the area within the demised premises while a landlord occupies all common areas.

However, by definition there can be more than one occupier of the same area. As such, a tenant may in fact also be found to be an occupier of a common area. Although a landlord may be obliged to maintain a sidewalk area pursuant to terms of the lease, a tenant may decide for his or her own reasons that he or she is going to do certain repairs and/or maintenance. Further, even though theoretically a common area is for the mutual use of multiple tenants, in fact, given its proximity to one tenant, that tenant may in fact be exercising almost exclusive control over the area. Such gratuitous work on the part of the tenant or, alternatively, exclusive control by default may on the facts be enough to make such a tenant an occupier of these premises.

At the same time a landlord may contract its maintenance responsibility out to a maintenance company. Depending on its terms, that contract may give the maintenance company exclusive responsibility over the condition of certain premises. In these circumstances the maintenance company may be said to be an occupier of these premises.

As such, one can see that, depending upon the facts of any given case, either a landlord or a tenant or a maintenance company or any combination thereof could be found to be an occupier of any given premises and owe a plaintiff the duty contemplated by section 3 of the Act.

At the same time, although the determination of the plaintiff's rights starts with the *Occupier's Liability Act*, such a consideration does not end there. Even if the plaintiff is not owed a duty under the *Occupier's Liability Act*, he or she may be owed one at common law. Section 2 of the Act specifies that the common law duty of care is superseded with respect to the care that "the occupier of premises" at common law is required to demonstrate. The Act has no application where the potential defendant is not an occupier as that term is defined in the Act. In "non-occupier" situations the common law still applies.<sup>2</sup>

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<sup>2</sup> Not only has the *Occupier's Liability Act* codified the duty only where a defendant is found to be an "occupier", it has codified only the duty. It has not codified the common law defences. See *Waldick v. Malcolm* (1989), 70 O.R. (2d) 717 (C.A.), aff'd [1991] 2 S.C.R. 456.

An exhaustive review of the common law applicable to slip and fall accidents is beyond the limited scope of this article. However, it is clear from the analysis of the Supreme Court of Canada in *Crocker v. Sundance Northwest Resorts Ltd.*<sup>3</sup> that one has to consider the relationship between the plaintiff and potential defendant to see whether or not there is a close enough nexus to impose a positive duty of care. Although all aspects of the relationship would be considered, in a slip and fall case the most important, in my view, is the proximity of the area of the fall to premises that are actually occupied by the defendant. For example, falling 10 feet from one's doorstep. A court will draw a line somewhere.

Presuming that a duty is owed either under the *Occupier's Liability Act* or at common law, is there a breach of duty? Again, each case will turn on its facts. In *Waldick v. Malcolm*<sup>4</sup> the Supreme Court of Canada indicated that although the section 3 duty did not change, "the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation."

It is further now clear that the duty is in fact a positive duty. An occupier cannot passively rely upon lack of knowledge of the premises' condition. An occupier has an affirmative duty to inspect and take whatever reasonable steps are necessary.<sup>5</sup>

## LIABILITY BETWEEN DEFENDANTS

Neither landlord nor tenant can resist liability to an injured party on the basis that they contracted out of it. By virtue of section 5 of the *Occupier's Liability Act* the duty of an occupier cannot be restricted by the provisions of a contract to which the person to whom the duty is owed is not a party. However, this section has no application with respect to the ultimate determination of liability amongst multiple defendants. This will be the subject matter of cross-claims, the result of which will almost always be determined on the basis of contract.

## LANDLORD AND TENANT

No lease is exactly the same as another. However, there are some general provisions which should be looked for.

One of the things to look for in a lease is whether or not the tenant is obliged by the terms

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<sup>3</sup> [1988] 1 S.C.R. 1186, 51 D.L.R. (4<sup>th</sup>) 321. For a more extensive discussion of the duties owed at common law see *Snitzer v. Becker Milk Co.* (1976), 15 O.R. (2d) 345 (H.C.).

<sup>4</sup> Above, note 2. Besides local custom and the nature of the premises, the Court noted that the trial and appellate judges had considered the following: the weather, the season, the size of the parking area, the cost of remedial measures, footwear, and the fact that the premises were both residential and rural.

<sup>5</sup> See *Waldick v. Malcolm* and *Sauve v. Provost* (1990), 71 O.R. (2d) 774 (H.C.).

of the lease not only to insure the property which is the subject of the lease but to insure further in both the name of the tenant and landlord. If such a clause is present and such insurance has been taken out, that puts an end to any potential claim over a tenant may have against a landlord, regardless of the circumstances of the fall or the other terms of the lease.

Presuming that there is not such an insurance clause, the next thing to consider is the description of the tenant's demised premises in the lease. If there is a site plan, look at it. It is important to determine whether or not the fall took place in this tenant's premises, another tenant's premises, or a common area.

Having determined whose premises the fall occurred in, one should then consider who is responsible for maintenance and/or repair of these premises pursuant to the terms of the lease. As indicated previously, in most leases the tenant's responsibility stops at the demised premises while the landlord is responsible for the common areas.

Having determined both the premises and the responsibility therefor, are there any "hold harmless" clauses which would be applicable? Most leases have at least one. In some cases there are multiple clauses which seemingly contradict each other. Whether acting for either landlord or tenant I would caution taking much solace in a hold harmless clause. Inevitably they are contradictory and narrowly interpreted. Further, they are inapplicable to acts of negligence unless explicitly stated so in the clause.<sup>6</sup>

## LANDLORD AND MAINTENANCE COMPANY

If one is fortunate this relationship is governed by contract. However, these contracts tend to be as brief as the lease contracts are long. At the same time there are some general questions one should ask when examining these contracts.

The first thing to consider is what area is covered by the contract. Quite simply, are the "premises" where the fall took place an area which the maintenance company is obliged to clean and/or repair pursuant to the terms of the contract? At the same time, even if the premises are not an area covered by the contract, consider what happens in practice. Although a maintenance company may not be obliged to clean sidewalks pursuant to the terms of the contract, they may have taken on a positive duty with respect to these sidewalks by cleaning them over a period of time.

Once it has been determined that the maintenance company is obliged to clean certain areas, the second thing to consider is the breadth of their duty. What exactly is the maintenance company obliged to do? Do they plow snow or apply salt/sand or both? Do they attend daily, weekly, or only when weather conditions demand, i.e, when snow

<sup>6</sup> *Toronto (City) v. Lambert* (1916), 54 S.C.R. 200.

reaches a certain depth? Does the company attend of its own discretion, or upon being called by the landlord, or pursuant to some combination thereof?

The same considerations would apply to a verbal agreement between a landlord and maintenance company.

In determining cross-claims as between a landlord and maintenance company one must not lose sight of the effect of section 6 of the *Occupier's Liability Act*. Where negligence on the part of an independent contractor employed by an occupier is established, the occupier is not liable for that negligence. The occupier's liability is limited to reasonably selecting a competent contractor.

### CONTRIBUTORY NEGLIGENCE

Contributory negligence is a defence. As such, the onus is on the defence to prove contributory negligence on the part of the injured party.

Not unlike proving liability as against a defendant, each case turns on its own specific facts. Just because someone has fallen where others have not does not necessarily mean that that person has acted unreasonably. At the same time, what may constitute unreasonable behaviour on the part of one person may not on the part of another.<sup>7</sup>

An occupier can also put forward the defence contemplated by section 4 of the *Occupier's Liability Act*. By virtue of this section the duty of care set out in the Act does not apply with respect to risks "willingly assumed" by an individual.

If it was not clear before, it was made clear by the Supreme Court of Canada in the *Waldick* case that section 4 was intended to embody the common law doctrine of volenti. As such, in order for a person to willingly assume a risk as contemplated in section 4, such a person must more than know of the risk. Knowing the risk, such a person must assume both the physical and legal risk involved in his or her own actions.

In my view such an assumption by a plaintiff would be tantamount to consenting to the risk of a defendant being negligent. It will be the rare case in which section 4 affords a

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<sup>7</sup> In *Snitzer*, above, note 3, Mr. Justice Lerner discussed the concept of contributory negligence and stated at 355:

"The plaintiff was entitled to expect that the sidewalk was in good condition from which he could assume that a joining slabs of concrete were reasonably level. Pedestrians are not expected nor required to walk with their eyes focused downward immediately in front of their feet to make sure that slabs of the sidewalk are reasonably level."

defendant a defence.<sup>8</sup>

## CONCLUSION

As I indicated from the outset, slip and fall cases are inherently driven by their facts. As such, no article can hope to replace knowledge and consideration of the facts of the fall and the contracts governing the various parties. What I hope to have accomplished in this article is to have set out some general guidelines by which these relationships can be judged.

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<sup>8</sup> An extensive discussion of the volenti principle is beyond the limited scope of this article. However in *Dube v. Labar*, [1986] 1 S.C.R. 649 at 658, 27 D.L.R. (4<sup>th</sup>) 653, Estey J. held that it would only arise “where the circumstances are such that it is clear that the plaintiff, knowing of the virtual certain risk of harm, in essence bargained away his right to sue for injuries incurred as a result of any negligence on the defendant’s part.” Such a defence is further discussed by Wilson J. in *Crocker*, above, note 3, where she noted both its exceptional nature and the fact that it would be narrowly applied.