
Occupiers' Liability: "Activities Carried Out Upon Premises"

by Jennifer E. DeThomasis

Subsection 3(1) of the *Occupiers' Liability Act* (the "Act") imposes an **affirmative duty** on occupiers to take reasonable care for the safety of persons entering on their premises. When dealing with the Act, we typically deal with deficiencies in the *condition* of an occupier's premises, such as snow and ice accumulation, broken, sub-code, or slippery steps, or holes in the ground. There are, however, legitimate Occupier Liability claims where an occupier's premises are not in and of themselves deficient or dangerous, and where in fact the premises have little to do with the instrumentality causing harm. Liability in such cases arises as a result of *activities* carried out on the premises which are by their nature dangerous or, by reason of the circumstances existing at the time, have become dangerous.

Subsection 3(2) of the Act provides that the duty of care imposed by subsection 3(1) applies "**whether the danger is caused by the condition of premises or by an activity carried out on the premises**". This paper will focus on the duty or care in relation to activities carried out on premises, and will provide case examples and practical considerations required for such cases.

Examples of Activity-Related Cases

Some examples of activity-related cases include:

- (a) **Skating** – The Courts have considered cases involving both roller skating and ice skating. I recently achieved a favourable settlement for a client who was injured in a roller skating accident. Our client paid admission to roller skate at a public rink. After roller skating for approximately 10 minutes, she noticed the rink becoming increasingly crowded. She also noticed numerous young skaters disobeying the rink rules and skating in all directions. The rink staff failed to enforce the rules of the rink and continued to allow the skaters to skate in all directions. As a result, the client was knocked over by a young skater and fractured her wrist.
- (b) **Diving** – In the unreported decision in *Stringer v. Ashley*, January 27, 1994 (Ont. Gen. Div.), the Court awarded \$2 million to a plaintiff who injured himself diving from the defendant's roof into a 3-foot deep swimming pool.¹ The Court held that diving was a danger caused by an activity carried out on the premises within the meaning of subsection 3(2) of the Act. The defendant, as the occupier of the premises, should have warned the plaintiff to stop, told the plaintiff to leave, stopped the party or called for help.
- (c) **Festivals** – In *Oppedisano v. Agustino*, [1997] O.J. No. 790 (Gen. Div.), the defendant social club organized a festival, which included a clay piñata game for the children. Flying clay fragments from the piñata injured the minor plaintiff. In holding the social club liable for the plaintiff's injuries, the Court held that the defendant should have inspected, monitored and evaluated the activities that it organized. Reasonable steps should have been taken to prevent the injury. The Court concluded that it was not reasonable for the club to use clay piñatas as opposed to piñatas made of paper or some other material. The Court found that "none of the directors considered the potential ramifications of using clay pots or considered how the game could be played less dangerously."
- (d) **Babysitting** – Our firm is currently involved in a case where a 17-year-old teenager was babysitting our client's two year old son. The teenager's mother was also home at the time. The teenager failed to adequately supervise the two-year-old boy who, as a result, wandered into the back yard of the teenager's home, fell into the swimming pool and drowned. In establishing liability, the level of supervision provided to the two-year-old child and the teenager will be addressed to establish that the supervision was inadequate and/or unreasonable in the circumstances.

- (e) **Activities at School/Extracurricular Lessons** – We have two cases that we recently commenced involving children who were injured while taking gymnastic lessons. In one, the child was an avid gymnast who had Olympic dreams. Unfortunately for both of the children, their instructor/coach did not properly supervise or spot them. As a result, the children fell and suffered fractures to their legs and arms. Similar to the babysitting example above, the level of supervision of the minor plaintiffs will be key in establishing liability. In another case, we represented a young client who was injured by a fellow student on school grounds. The students’ teacher failed to adequately supervise them. As a result, and as children often do, the students began to horseplay. One of the students struck our client in the eye with a metal edge ruler. Due to the clear lack of supervision of the students, we were able to negotiate a favourable settlement for our client.
- (f) **Firearms** – Several years ago, we settled a case involving a young man who was helping the defendant get rid of rats in his barn. Our client was asked to “shoo” the rats from the upper level to the lower level where the defendant intended to kill them with a rifle. Although I am sure you can see where this is going, our unsuspecting and surprisingly sober client did not. The defendant ended up shooting through the floor of the barn, and shooting our client in the head in the process, causing serious head injuries.

Scope of the Duty

Similar to cases involving the condition of premises, the duty imposed by the *Act* where activities are concerned is an **affirmative duty**. Occupiers are required to take affirmative measures to reasonably control dangerous or potentially dangerous activities on their premises. The burden of proof in an Occupier Liability action rests with the defendant to establish that it discharged its duty, specifically that it took reasonable care in the circumstances to ensure persons entering on its premises were reasonably safe.

However, the duty imposed on an occupier is limited to taking reasonable action in the circumstances. The factors a court will consider in assessing the reasonable care requirement are specific to each case. In *Kennedy v. Waterloo County Board of Education*, [1999] O.J. No. 2273 (C.A.), leave to appeal dismissed, [1999] S.C.C.A. No. 399, the Ontario Court of Appeal quoted the following:

“The long and short of it is that you have to take

into account all the circumstances of the case and see then whether the occupier ought to have done more than he did. (1) You must apply your common sense. You must take into account the gravity and likelihood of probable injury. Ultra-hazardous activities require a man to be ultra-cautious in carrying them out. The more dangerous the activity, the more he should take steps to see that no one is injured by it.” [Emphasis added]²

In a nut shell, occupiers must take affirmative steps to reasonably control dangerous activities. The more dangerous the activity, the more the occupier must do to control it. However, plaintiffs must also take reasonable care for their own safety. In activity-related cases, the defence of *volenti* is often raised. Section 4(1) of the *Act* provides that the duty of care does **not** apply in respect of risks willingly assumed. Although the defence of *volenti* is unlikely to be a complete defence and is more likely to factor into issues of contributory negligence, the defence has been applied in numerous sporting cases. In *Nairne v. Wagon Wheel Ranch*, [1995] O.J. No. 1234, McIsaac J. reviewed the leading case law in this area before dismissing the plaintiff’s claim arising out of a serious injury she sustained after having been thrown from a horse on a trail ride. The Court stated:

In Waldick v. Malcolm (1989) 70 O.R. (2d) 717 (Ont. C.A.), Blair J.A. agreed at p. 730 with Professor Di Castri’s comment in Occupiers’ Liability (Burroughs and Company, 1980) at p. 229 wherein the author limited the scope of the defence in the following terms:

“It may be assumed that the words “willingly accepted” will not be given a liberal interpretation. I regard it as wrong in principle to dissolve a duty of care that arose on the facts of a case merely because the person to whom the duty is owed knows that he may be exposing himself to some danger, and especially as when there is applicable apportionment legislation. [per Laskin C.J.C. in Mitchell v. C.N.R. (1974) 46 D.L.R. (3d) 363 at p. 380]. It would seem that the defence will be difficult to sustain in view of the high standard of evidence required. Likely cases are those involving participants in sports, games and spectators.” [Emphasis added]

In our roller skating case described above, *volenti* as it related to contributory negligence was a significant issue. The defence argued that our client observed the rink

becoming overcrowded and did not attempt to leave the rink until over 30 minutes elapsed (when she was eventually injured). Our client was not wearing protective gear (i.e. wrist guards or knee pads) and was stationary on the busy rink in a precarious position (half bent over trying to help her son up), which increased the risk of accident. Had we not been able to settle this case, our client faced a significant risk of being found contributorily negligent at trial.

In researching similar fact cases involving both roller and ice skating, I found that many of the cases were reduced by 50% on account of contributory negligence. For example, in *Leslie v. Mississauga (City)*, [2003] O.J. No. 1188, Cameron J. considered a similar roller skating case:

“Skating in a group with mixed skill levels is inherently hazardous. Beginners will probably skate slowly with the support of a parent or lose balance and fall without warning. Those skating near them must give them an unusually wide berth, be prepared to stop suddenly or take other evasive action, or accept the risk of falling with or because of them. Some people may lack consideration for others they cannot see, causing a lighter or smaller person to fall.

...

I would apportion liability for Mr. Leslie’s injuries equally between Mr. Leslie and Mr. Kovacs as contemplated by s. 4 of the Negligence Act.”

In *Carson v. Thunder Bay* (1952), 52 O.R. (2d) 173, the plaintiff was a spectator at a hockey game who was injured by the blade of a hockey stick when one player checked another player into the boards. The blade penetrated the screen between the players and spectators. The trial judge found that the screen between the players and spectators was insufficient, but divided liability equally between the plaintiff and defendant.

“The Plaintiff on the other hand, could equally have observed the size of the mesh. He failed to take steps to preserve himself from injury. He knew the game, knew about flying hockey sticks and equipment and crashing bodies. He was therefore guilty of the same negligence as the defendant and was equally at fault. I assess his contribution at 50%.”

While contributory negligence tends to depend on the judge or jury trying your case, plaintiffs involved in activities that are clearly dangerous and who do not wear protective gear or take any precautions for their own safety are at risk of being found contributorily negligent.

Practical Considerations for Activity-Related Cases

In working up activity-related cases, the following (although not an exhaustive list) should be taken into consideration:

- ◆ The degree of experience the plaintiff had with the particular activity;
- ◆ The knowledge (imputed or actual) of both the plaintiff and defendant of the danger the activity posed;
- ◆ The existing safety standards, rules, regulations or guidelines for the activity;
- ◆ Common practices in respect of the activity;
- ◆ If the activity is a sporting event, whether the plaintiff was wearing proper equipment or gear;
- ◆ The number of people involved in the activity;
- ◆ The degree of supervision provided by the defendant, particularly in cases involving children or large groups of people;
- ◆ Whether the plaintiff or defendant, or both, stood to benefit (i.e. derive profit) from the activity; and
- ◆ Whether there existed other less dangerous way to conduct the activity.

In activity-related cases, a lot will turn on the safety standards in place for the activity in question. In our roller skating case, we examined the R.S.A. Roller Skating Rink Safety Standards. These standards set out the degree of supervision required by the rink staff as well as the rules of the rink (i.e. ensuring skaters always skate in one direction, blowing whistles when a skater falls, having one floor guard per 200 skaters, etc.). Through the use of these rules, we were able to effectively argue that the defendant faced a significant liability risk due to its failure to enforce the rules.

In many cases, an aggressive focus on the procurement of the defendant’s documentation which details its maintenance and staffing will also prove helpful. In a recent case of ours in which our client fell and was injured while playing hockey at a local ice arena, the first set of the defendant’s ice rink maintenance logs curiously did not contain any information regarding the ice surface condition. This was particularly noteworthy given the extensive

comments on the balance of the month's rink condition logs. It was only after pointing this curiosity out to defence counsel and obtaining a second set of the logs, which turned out to contain extensive inculpatory and colourful comments, that our settlement negotiations began to move in a far more "positive" manner.

Conclusion

Activity-related occupier cases can be somewhat unique from non-activity related cases, since in the former, we are generally not dealing with deficient "premises" but rather with deficient "conduct" in or about those premises. In order to ensure the best possible result it is imperative that we focus on the occupier's duty to take *affirmative* measures to control dangerous activities on their premises. While activity-related cases often face significant hurdles involving contributory negligence, plaintiffs should not be held responsible for an occupier's complete disregard of its obligations under the *Act*. The focus must be directed towards the duty of the occupier and the measures that the occupier took or failed to take to control the dangerous activity.

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Notes

¹ S.E. Firestone, B.L. Gluckstein & L. Samis, et al., eds., *Personal Injury Practice Manual* (Markham: Lexis Nexis Canada Inc., 2004), para 7.28.

² This quote originated from Lord Denning in *Pannett v. McGuinness & Co. Ltd.*, [1972] 3 W.L.R. 387. The Ontario Court of Appeal in *Kennedy v. Waterloo County Board of Education*, [1999] O.J. No. 2273 (C.A.) quoted the Supreme Court of Canada decision of Dickson J. in *Veinot v. Kerr-Addison Mines Ltd.*, [1975] 2 S.C.R. 311 in which Dickson J. quoted Lord Denning.