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THE WILD GAME OF OCCUPIERS LIABILITY

Occupiers, Cyclists, and One-Eyed Jacks

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Introduction

I believe I can say without hesitation that most cyclists who ride the North Shore Mountains would like to see the current freedom to wander persist indefinitely. Indeed, the simple mention of litigation, lawyers and liability is not only perceived as buzz crushing, but entirely inappropriate, and downright hostile in some circles. The magic of the North Shore trails is that they are free – unencumbered by rigid rules, regulations, contracts or commerce. After all, the last thing any cyclist wants to do at the start of a ride, at the point when he or she is brimming with energy and enthusiasm for what lies ahead, is sign a full release encompassing every conceivable catastrophe, including death, in favour of the landowner and the landowner's heirs, successors etc.

As a general sentiment, the freedom to roam is desirable. Arguably our law should espouse that sentiment as a reflection of a healthy, spirited society, in which recreation is valued.

Legislative Change

Clearly, this was the policy behind the *Occupiers Liability Amendment Act*, in 1998, which limited the duty of care owed by landowners to the uninvited public, including cyclists, using their land. Landowners could allow free access to cyclists, secure in the knowledge that the new statute would protect them against claims in negligence brought by cyclists injured on their lands.

Certainly, the creation of the Trans Canada Trail and negotiations with private landowners about public access to private lands must have been in the minds of the drafters of the amendments. This was a wrinkle occupying Trail system organizers in BC for some time. But statutes, such as the *Occupiers Liability Amendment Act,* are simply an articulation of society's rules, not society's principles, and accordingly they

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are seldom, if ever, broad enough to encompass all conceivable situations. Therefore, cases involving claims by injured parties against occupiers almost always involve a consideration of common law principles – in the perilous world of occupiers liability, the common law is a mess.

The Common Law Approach

Despite the development of the law of negligence, Canadian courts have generally attempted to preserve the traditional immunity of landowners. This has led to an immense and confusing dichotomy which in turn led legislatures to try to better define the various rights and obligations, not always successfully.

An occupier at law is the person who has immediate supervision and control over the premises. It is not necessary to own the land in order to be an occupier. At common law and under the *Occupiers Liability Act* an occupier is the person in possession or control of this premises.

We start with the 3 basic common law categories of entrants to land:

(a) trespassers

(b) licensees

(c) invitees

Trespassers enter premises (not only land but buildings, boats, trains, and other movable structures) without the permission of the occupier. Occupiers have historically only been found liable to trespassers if they intentionally injured them or were in reckless disregard (intentional disregard) of their presence. However, the courts have struggled with the different varieties of entrants within the general rubric of trespassers. For example, is a child who wanders onto land treated the same as a burglar if the child falls into a river. A number of factors, collectively referred to as the common humanity test, were developed to allow courts to avoid the injustice associated with rigid definitions. They were:

(a) the gravity and likelihood of probably injury

(b) the character of the intrusion

(c) the nature of the place where the trespass occurs

(d) the knowledge which the Defendant has or ought to have the likelihood of the trespasser being present.

The second category is the licensee. Basically a visitor, there with permission and no business purpose. A

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classic example is the social quest. An occupier's duty to the licensee was traditionally to prevent damage from concealed dangers or traps of which the occupier has actual knowledge, with actual knowledge being imputed if the occupier had reason to know of its existence. It's important to note for our purposes that a voluntary assumption of risk by the licensee is not a full defence, ie, it doesn't get the occupier off the hook completely. The occupier could always get off the hook by warning the licensee of the danger, but only if the licencee had an opportunity to act on the warning.

The final category is the invitee, or business guest – the classic example being a customer of a store. The only difference between the duty owed to a licensee and that owed to an invitee seems to be that the occupier owes a duty of reasonable diligence to ascertain the existence of an unusual danger, whereas the occupier is only liable to a licensee if he or she has knowledge of the danger.

In addition to the three categories of entrants, there is the contractual entrant. That is someone who has contracted and paid for the right to enter. In that scenario, the applicable standard was either the standard in the contract or, if it is silent, the standard associated with the sale of goods, ie. are the premises reasonably fit for the purpose intended. That's a different standard than the one which applied in licensee and invitee cases. It is a contractual standard, thus it doesn't matter if the occupier is not personally negligent. The occupier must supervise and control the conduct of persons whose activities on the premises are likely to endanger him. Most organizations falling into this category require execution of a full release of liability as a condition to participate in the adventure activity. The law relating to the enforcement of releases is a whole other subject, but suffice it to say there is significant risk to a Plaintiff attempting to argue a release should not be enforced, particularly if the release is drafted by a sophisticated organization such a Whistler.

The Original Legislation

Following the enactment of the BC Legislation in 1974, the Courts moved away from the invitee/licensee distinction, in favour of a general statutory duty of care which incorporated common law principles of negligence. Unlike the Alberta Legislation, the Act established a general duty of care in relation to all entrants to the premises, including trespassers. The Act provided that an occupier has no duty of care to an entrant in respect of "risks willingly accepted by that person as his own risks". The Act is silent as to the effect of the warning. That would obviously be a factor in assessing the evidence as to voluntary acceptance of risks. It would also be a factor in assessing whether the occupier acted reasonably.

The Provincial Crown is bound by the Act, but public highways, public and private roads, and certain other roads occupied by the Crown are exempted. The Cypress Trails are on Provincial Park land and West

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Vancouver District lands. The Fromme Trails are on North Vancouver District land. The Seymour Trails are on a mix of North Vancouver District land, GVRD land and Provincial Park land. All these entities would be bound by the Act, and likely protected by the amendments.

The Effect of the Amendments

Now that I have given you that overview, I think it's important you know that under the amendments to the Act, and the one case in BC which has considered the amendments, cyclists who ride the North Shore Trails will likely be treated by the law as trespassers. Here is how it works:

Section 3 of the amended *Occupiers Liability Act* provides that a person who enters vacant or undeveloped rural premises or recreational trails for recreational purposes is deemed to have willingly accepted all risks. In these circumstances, the occupier's duty is limited to not:

(i) create a danger with intent to do harm to the person or damage to the person's property, or

(ii) act with reckless disregard to the safety of the person or the integrity of the person's property

Sound familiar? That's the common law duty of care to trespassers ie. there is no liability for negligent conduct. There is only liability for intentional conduct (recklessness at law is a form of intent) and there's no liability for someone else's negligence. An example would be a contractor hired by the occupier whose negligence causes an injury.

The First Post Amendment Case

Many of you will be familiar with a sad case out of Parksville stemming from a serious accident on rural land in 1999. Mr. and Mrs. Hindley set off on a ride with their two sons along the Top Bridge Trail. That trail cut across a vacant and largely undeveloped parcel of land owned by Waterfront Properties Corporation and Pacific Canadian Investments. It was within the boundaries of Parksville and the Defendants allowed cyclists to use the trail without charge. Mr. Hindley rode into a completely obscured ditch and as a result was an incomplete quadriplegic.

Suddenly, these legal concepts become much less conceptual to the accident victim, who is searching to replace income, to recover attendant care costs, to renovate his home to accommodate his limitations, to pay for transportation, to protect his young family against an enormous personal and financial disaster. Mr. Hindley brought his case against the corporate landowners, which in the first instance argued unsuccessfully that they were not occupiers. Ultimately, the Defendants' applied to dismiss the case summarily, on the basis that their land fit the definition of "rural premises" and they effectively owed no duty of care in

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negligence. Because of the magnitude of the claim for damages, the case was deemed inappropriate for a summary trial, and so not decided. But in his consideration of the facts, Mr. Justice Groberman of the BC Supreme Court determined that the land in question was indeed rural and discussed the purpose of the Amendments to the Act. He said that a land use analysis should be applied to the question of whether the premise is "rural" under the Act, rather than examining what use the land has been put to in the past or what use it could be put to in the future. He didn't think the fact that the land was within municipal boundaries was at all important to its classification under the Act.

With respect to the purpose of the Amendments, he said "they were to encourage the opening up of rural lands to recreational use. Areas outside cities, particularly those where parcels of land are large and roads are some distance apart, appear to have been the main target of the legislation." He concluded that the area where the cyclist was injured "is of the very nature that the legislation appears to be aimed at."

His Lordship refused to confine his comments to the land in issue. He stated that land on the periphery of urban areas, such as the farmlands of Saanich, and Delta, and the mountains of North Vancouver would come within the term "rural premises" under the Occupiers Liability Act. Because the comment was incidental to and not part of his decision, it would be considered obiter dictum, as such it isn't binding on any future judge who might consider the issue. But it certainly might influence a future judge, particularly because it is such a specific comment.

In the Hindley case, his Lordship did not consider the two enumerated categories of premises, in addition to rural premises, to which the reduced duty of care applies. Section 3(3.3) (c) of the Act indicates that "recreational trails reasonably marked as recreational trails" would also enjoy the protection of the Act, insofar as the diminished duty of care goes.

This section seems to provide that even an occupier of developed non rural land would be immune, except in cases of intentional or malicious conduct, if the recreational trails were reasonably marked as such. But suppose a group of 8 year old children sets out on a ride – can it be an 8 year old grievously injured as a direct result of the negligence of the occupier would have no case if he/she couldn't show intention, simply on the basis that the trails were reasonably marked as recreational trails – suppose the 8 year old could not read or understand the signs – would there not in that circumstance need to be some resort to the common law, at least for a determination of whether the trail was, in all of the circumstances, "reasonably" marked. After all, what will constitute reasonably marked may vary, depending on the circumstances of each case. The section doesn't seem to connote any kind of requirement to warn of hazards, but simply to indicated the trails are identified as recreational trails, but it has not yet been judicially considered.

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Deemed Assumption of Risk

Assuming the North Shore Mountains fall within an immune category, unless you can demonstrate you were intentionally harmed, a most unlikely thing in my view, you will be completely on your own, and that's fine, as long as you know that, and as long as you expect that before going in. There will be no recovery in negligence, no duty to warn of hazards. There is no general obligation based on foreseeability. If you are seriously injured there is no "system" to look after you or your family beyond the basic healthcare, GF Strong, and an extremely modest indexed CPP benefit.

This is the social choice at the heart of the amendments. In my view, they go far beyond simply returning the balance of power to occupiers in the courtroom; they preclude lawsuits from getting off the ground. Again, whether that's good or bad is beyond the scope of this discussion. The point is, this legislation leaves very little wiggle room in even the most catastrophic cases resulting from obvious negligence. This is certainly the case in Ontario, which has also amended its Act. The Ontario Court of Justice dismissed an action by a catastrophically injured ATV rider, in circumstances where there was clear evidence of negligent road design, on the basis that the accident occurred on rural land, and the Plaintiff had entered those lands for the purpose of a recreational activity – this is the only other post amendment case in Canada. These kinds of decisions are certainly true to the purpose and spirit of the amendments, but other scenarios may not fit so clearly into the scope of the amendments, particularly those, where it would be inappropriate to expect the standard of the perfectly reasonable person. Those cases seem to invite a closer look, especially where it is obvious the occupier's negligence was the sole and direct cause of the loss. That would mean turning for help to the common law which seems contrary to the purpose of the legislation.

Now take the same group of 8 year old kids – they ride the same recreational trail everyday after school. At one point in the trail, they come around a blind corner and immediately onto a bridge which spans a creek. The occupier hires a contractor to effect repairs to the bridge and the contractor removes the first section completely. The lead cyclist plunges into the creek and is catastrophically injured.

On those facts, despite obvious negligence, and an obvious failure to warn, the legislation says no recovery, absent intent to harm or evidence that the occupier simply didn't care if harm occurred. One wonders if Judges might attempt to circumvent the legislation by some device such as reliance on a common humanity test.

Interestingly, the *Occupiers Liability Act* of Alberta specifically states that the liability of an occupier to a person using the premises for a recreational purpose shall be determined "as if the person was a trespasser." It has specific provisions relating to child trespassers which remove the legislative immunity

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and restore the traditional duty to take reasonable care to see that the child is reasonably safe from danger. The Alberta Act seems to import the common humanity test by making the age of the child, the ability of the child to appreciate the danger, and the burden on the occupier of eliminating the danger all relevant to the determination whether the duty has been discharged. The Ontario Act is similar to the BC Act in this regard.

Conclusion

The changes to the Occupiers Liability Act occurred in order to foster the increased use and enjoyment of the great outdoors – those changes represent an attempt to reduce the prospect of litigation against occupiers who let cyclists and other adventure minded individuals enjoy their lands, without charge. As such, the Courts will likely extend to those occupiers the protection offered by the Act whenever possible. But the legislation cannot embrace all circumstances, and inevitably some cases will need to be decided on their own facts. In those instances, the Act will be important but not necessarily determinative of the result, and resort to the always muddled common law of occupier's liability may be necessary.

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