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TIME FOR OCCUPIERS TO REJOICE

Richards Buell Sutton Insurance Law Newsletter

By: Nicholas Safarik

Relatively recent amendments (*circa* 2000) to occupiers liability legislation across Canada, which were made to encourage the opening of rural lands to recreational use, have received relatively little judicial consideration since their inception. The effect of the amendments was to reduce the duty of care owed by occupiers of agricultural, rural and recreational property to persons using that property. The Ontario Superior Court of Justice case of *Pierce v. City of Hamilton*, 2013 ONSC 6485 adds to the small body of jurisprudence in this area and does so in a manner that occupiers and their insurers will appreciate.

The Facts

The seventeen year old plaintiff was out for a late evening and early morning stroll with a number of his friends in Hamilton's Scenic Drive Park (the "Park"). The Park is four acres large and situated between Scenic Drive and the edge of the Niagara Escarpment within the City of Hamilton (the "City"). The Park is comprised of a parking lot, grassy areas and wooded areas. Criss-crossing the Park are marked trails and unmarked trails. Some of the marked trails were groomed having been built and continuously maintained by the City. Both groomed and marked trails were regularly used for hiking, cycling and walking. They were used primarily for recreation and leisure purposes. The unmarked trails were essentially dirt paths through the wooded areas of the Park, close to the Niagara Escarpment.

It was a very dark night when the plaintiff, without aid of any lighting, commenced his stroll in the parking lot at about 1:45 a.m. and moved along marked and groomed trails to a wooded area. While in the wooded area the plaintiff and his friends departed from a marked trail and walked along a number of unmarked trails during their return to the parking lot. During the return the plaintiff chose to go a different path than his friends and, while walking alone on another unmarked dirt path, he stepped forward thinking he was still on the path. Instead, the plaintiff fell into a 12 to 15 foot deep ravine that was 10 to 15 feet wide at that location. The plaintiff sustained serious injury and commenced proceedings against the City on the basis of a breach of duties pursuant to the *Occupiers' Liability Act*, R.S.O. 1990, c.O2 (the "Act").

The Ruling

The plaintiff alleged that the applicable duty of care owed by the City was to take reasonable care to ensure



he was reasonably safe while in the Park. The City argued that the plaintiff willingly assumed all risks associated with the Park and that the only duties it owed the plaintiff were (a) not to create a danger with the intent to harm him (b) to act with reckless disregard for his safety. In order to bring itself within this reduced duty or standard of care the City was required to show that the Park fit within one of the prescribed types of property attracting such reduction; in this case, either “rural premises” or “recreational trails reasonably marked by notice as such.”

In considering whether the Park could be deemed a “rural premises” the court noted that although the Park was in a quiet, undeveloped area it was still located within a largely urban area within the city limits. Therefore the Park was considered to be a natural environment but not a “rural premises”.

The consideration of property type in respect of “recreational trails reasonably marked by notice as such” proved more difficult. The court undertook an extensive analysis of all the trails in the Park. In doing so it noted that the primary trails, namely the Chedoke Radial Trail and the Scenic Drive Side Trail, were trails of the type described in the legislation. The difficulty in the case was that the plaintiff did not fall on either of these two marked recreational trails. Instead the plaintiff fell on what could be described as a recreational trail but it was not marked as such. The question became whether the duty or standard of care for the City changed from the lower standard required by the Act to the higher, general standard required by the Act when the plaintiff left the Scenic Drive Side Trail.

In determining the question the court made note of the prior decision in *Schneider v. St. Clair Region Conservation Area*, 2009 ONCA 640. That case involved a person leaving a well-marked ski trail to ski down a berm to an ice surface. The court in *Schneider* stated:

“It would make little sense to limit this lesser duty of care to users when they remain on the marked trail, only to impose a greater duty of care when they venture off the trail. As the occupier has no effective way of policing the use of these trails, this would, in effect, impose a duty on the occupier to make the off-trail portions of his or her property safer than the trail itself. This would defeat the purpose of the Act.”

Guided by this decision the court discerned the following principle:

“Where a person enters a property that is generally used for recreational activity and the provisions of [the lesser duty sections] apply; and the property consists in part of a recreational trail reasonably marked as such; and that person leaves the recreational trail but



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remains on the property while continuously engaged in a recreational activity, then the lower standard of care...applies.”

The court went on to hold that the City did not breach the lesser standard of care by failing to conduct inspections of the Park, erecting signs with respect to uneven ground or building barricades or fences around the ravine. Had the City been aware of previous falls into the ravine one or more of these precautions may have been required.

Practical Considerations for Insurers, Brokers and Occupiers

Pierce is a very sensible decision in that it balances the purpose of the rural property provisions of the Act without being hamstrung by its particular language. Insurers and brokers, particularly those involved with municipalities, large agricultural property owners, forestry companies, owners of large tracts of vacant or undeveloped properties and utilities are well advised to work with their insureds in respect of compliance with *Pierce*'s governing principle. This may entail taking steps to ensure that at least the entrance points to such lands consist of marked trails. It would also be prudent to determine if there is any loss history related to the use of their property as such loss history may require precautionary steps such as signage, fencing or inspections in order to comply with the lesser standard of care that might attach to these occupiers.

