
EXPECTING THE UNEXPECTED: OCCUPIERS' LIABILITY AND MINOR PLAINTIFFS

By: Jim Tomlinson, Robert McGlashan, Megan Mutcheson, Eric Katzman and Kati Aubin

Exposure for occupiers' liability is not a novel topic of discussion in the world of tort and insurance law. However, the application of occupiers' liability to minor plaintiffs is an area of law that has been evolving in recent years. The most dynamic change has been that Courts are more readily finding that occupiers whose premises are geared towards children should expect minors who enter their property to be, to a certain extent, reckless and unpredictable by virtue of their youth and inexperience, and accordingly, ensure their premises are that much safer.

The Occupiers' Liability Act

Occupiers' liability refers to the duties that occupiers owe to individuals who enter their premises. Ontario's *Occupiers' Liability Act* (the "Act")¹ supersedes the common law by establishing the duty of care in occupiers' liability cases.² The *Act* defines the following terms, for ease of use:

"occupier" means

- a. a person who is in physical possession of premises, or
- b. a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises, despite the fact that there is more than one occupier of the same premises;

"premises" means lands and structures, or either of them, and includes,

- a. water,
- b. ships and vessels,
- c. trailers and portable structures designed or used for residence, business or shelter,
- d. trains, railway cars, vehicles and aircraft, except while in operation.³

The stated purpose of the *Act* is to "promote, and indeed, require where circumstances warrant, positive action on the part of occupiers to make their premises reasonably safe".⁴

¹ RSO 1990, c. O.2.

² *Ibid* at s.2.

³ *Ibid* at s.1.

⁴ *Waldick v Malcolm* [1991] 2 SCR 456 at page 477.

Duty and Standard of Care

The *Act* states that:

“An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.”⁵

Further,

“The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on the premises.”⁶

The Supreme Court of Canada, in *Waldick v. Malcolm*,⁷ stated that the determination of what is reasonable will be specific to each fact scenario.⁸

Minors

Occupiers' liability cases involving young plaintiffs tend to differ from cases involving adults due to the fact that when dealing with young patrons, defendants are expected to anticipate, to a certain degree, the unpredictability of minors.

In *Kennedy v Waterloo County Board of Education*,⁹ the 18 year old male plaintiff, a high school student, was catastrophically injured as he exited the school parking lot on his motorcycle. Driving at a highly accelerated speed, Kennedy lost control of his vehicle, hit a curb, and was projected from the motorcycle. Kennedy's head struck a concrete bollard located on school property on grass near the driveway.¹⁰ The bollard was originally intended to support chains that controlled traffic. The chains were removed when the defendant school board decided that this was a hazard after an accident involving another student, but the bollards remained. The trial judge found that the school board was not fully liable for the accident.¹¹ On appeal, the Court stated that the fact that “the property was a school used by teenage students with limited driving experience ... raised the likelihood that they might be *less cautious and capable than adults*” (emphasis added).¹² As a result, the school board was found to be 25% liable for Kennedy's injuries, the remainder being attributable to the plaintiff's own negligent behaviour.¹³

⁵ *Act*, *supra* note 1 at s.3(1).

⁶ *Ibid* at s.2.

⁷ *Waldick*, *supra* note 4.

⁸ *Ibid* and *Skoog v Canadian Tire* 2013 ONSC 144.

⁹ 45 OR (3d) 1 (ONCA) [*Kennedy*].

¹⁰ *Ibid* at 1.

¹¹ *Ibid* at 2.

¹² *Ibid* at 85.

¹³ *Ibid* at 103.

In the 2008 case of *Mott v Brantford (City)*,¹⁴ the 16 year old plaintiff sustained injuries when he was pushed by one of his friends through the plate glass window of a civic centre located next to the skate park they were visiting. The plaintiff argued that the defendant occupier of the civic centre and skate park was negligent for using plate glass windows at the civic centre. It was alleged by the plaintiff that plate glass windows had a tendency to break into shards. Justice Milanetti did not accept this argument and ultimately held that the defendant was not negligent by installing the glass.

In coming to this decision, the Court distinguished between the case at bar and *Kennedy*. In *Kennedy*, a previous accident had occurred that caused the school board to specifically consider the safety hazard posed by the bollard. By contrast, in *Mott*, there was no evidence to suggest that the defendant had been “tipped off” that the windows presented a “potential hazard.”¹⁵ There was no evidence adduced at trial to suggest that any prior injuries had occurred which would have caused the defendant to turn its attention to the potential risk posed by the windows. The Court in *Mott* did indicate that if the defendant’s employees had been aware of any previous injuries involving the plate glass windows, or seen the glass break, “they more likely would have been expected to think through the potentially dangerous situation existing in a facility that caters to many active young people.”¹⁶ This is in line with the doctrine of reasonable foreseeability, such that where a risk is not reasonably foreseeable, a defendant will not be held liable for injuries that may result from such a risk.¹⁷

Interestingly, though the plaintiff did not make submissions on the matter, Justice Milanetti did indicate in *Mott* that she would have been receptive to arguments that the risk posed by the windows was foreseeable in any event, given that the civic centre was located directly next to the skate park and the fairly reasonable assumption that teenagers may be engaged in horseplay in the vicinity. The Court’s comments confirm that an occupier will be held liable where injury results from a foreseeable risk, and, further, in locations where children are at play, either on the premises or in the direct vicinity, may require an increased duty for occupiers to foresee risks of injury.

There are two salient points from this line of cases which should be noted by occupiers and their insurers. First, if events provide an occupier with a “tip off”¹⁸ as to risks of harm that may be faced by patrons, and the occupier does nothing to mitigate that risk, the Court will be less sympathetic to an argument that the standard of care has been met. Second, if it is known that premises are commonly frequented by minors, occupiers are expected to anticipate the risks associated with the inherent unpredictability and decreased capability of minors. These two points are interrelated, as occupiers will be expected to learn from the prior unpredictability of minors who enter their premises while foreseeing those accidents that have not yet, but may, occur. This will be of importance at the discovery stage of a proceeding as the defendant will be questioned on what information may have caused them to reasonably foresee a plaintiff’s accident. Defendants who should be the most attuned to such circumstances are school boards

¹⁴ 42 MPLR (4th) 261 [*Mott*].

¹⁵ *Ibid* at 64.

¹⁶ *Ibid*, at 65.

¹⁷ *The Wagon Mound (No 1); Overseas Tankship (UK) Ltd. v Morts Dock & Engineering Co.* [1961] AC 388 (PC).

¹⁸ *Mott*, *supra* note 14 at 64.

and municipalities operating facilities frequented by minors, such as recreation centres and community centres.

School Boards

Some plaintiffs have attempted to draw parallels between the higher standard of occupiers' liability to which school boards are held and the careful or prudent parent standard adopted in negligent supervision cases. While a raised standard of care due to the presence of minors is common to these two grounds of liability, the duties of occupiers are sufficiently different from those of supervisors of minors such that the case law surrounding negligent supervision is not typically useful. This issue was discussed in *Cox v Marchen*.¹⁹ While the Court applied the "prudent parent" standard to an occupiers' liability case involving a school board, it was careful to highlight the difference between occupiers' liability cases and negligent supervision cases. The Court referenced the Supreme Court case of *Myers*, wherein the plaintiff student was severely injured in a gymnastics class due to negligent supervision by the defendant teacher. In *Cox*, the Court differentiated between *Myers* and the case at bar in the following way:

The focus of *Myers*²⁰ was application of an appropriate standard of care for supervised school activities and not for the condition of the premises.²¹

This avenue is therefore not practical for those plaintiffs seeking a finding of liability on the part of the building's occupier as it is easily distinguished from the 'prudent parent' line of cases.

Interestingly, the Court in *Cox* stated that the *Education Act*²² modified a school board occupier's standard of care. Language in the *Education Act* states that a principal must "give assiduous attention to the condition ... of the school buildings and grounds."²³ The Court in *Cox* defined 'assiduous' as "done with constant and careful attention, diligent, persevering."²⁴ Whether this standard is more onerous than that for premises frequented by minors (as established by *Kennedy*) is unclear.

Risks Willingly Assumed

Section 4 of the *Act* serves to lower the standard of care owed with respect to trespassers and individuals who enter certain types of premises. These types of premises are listed in s. 4(4) and include rural premises, closed golf courses, private roads and nature trails.

¹⁹ [2002] OJ No. 3669 (OSCJ) [Cox].

²⁰ *Myers v Peel (County) Board of Education*, 17 C.C.L.T. 269, [1981] 2 S.C.R. 2

²¹ *Cox*, *supra* note 19 at 49.

²² RSO 1990.

²³ *Education Act*, R.S.O. 1990. Chap. E.2, Part VI ss. 170-173, s. 265 (1 (j)).

²⁴ *Cox*, *supra* note 19 at 26.

The purpose of this section is to “encourage occupiers to make their lands available to the public for recreational use”.²⁵

Section 4(1) of the *Act* establishes a lower standard of care to which occupiers are held provided that those who enter their premises willingly assume the risks associated with attendance. However, the standard is not so low that an occupier may intentionally do harm to a person or a person’s property and may act with reckless disregard of a person who enters onto their premises.

Sections 4(2) and 4(3) outline the circumstances in which risks may be deemed to have been “willingly assumed,” entitling an occupier to provide that willing occupant with a lower standard of care. These sections deal with those patrons entering premises for criminal purposes,²⁶ those trespassing or to engage in permitted recreational activity.²⁷ Specifically, permitted recreational activity occurs when there is no fee being charged by the occupier for entrance and the entrant is “not being provided with living accommodation by the occupier.”²⁸

Section 4(1) sets out a dual standard of care that is owed by an occupier where risks are willingly assumed. The first stage states that an occupier ought not “create a danger with the deliberate intent of doing harm to the person or his or her property.” This stage is largely self-explanatory. The Ontario Superior Court in *Dhaliwal v. Premier Fitness Club Inc*²⁹ cited the leading Supreme Court case on the matter, *Waldick v. Malcolm*,³⁰ and held that “the Act imposes an affirmative duty on occupiers to make their premises reasonably safe for persons entering them by taking reasonable care to protect them from foreseeable harm. This duty is not absolute.”³¹ A plaintiff must thus establish that an occupier intended to harm them in order for this standard to be breached.

The second stage requires an occupier to not “act with reckless disregard of the presence of the person.” The case law on this stage is especially helpful in interpreting its meaning. In *Schneider v St. Clair Region Conservation Authority*,³² the Ontario Court of Appeal restated the law as established in *Cormack v Mara (Township)*.³³ *Cormack* defined “reckless disregard of the presence of a person” to mean:

“doing or omitting to do something which he or she should recognize as **likely to cause damage or injury** to [the person] present on his or her premises, not caring whether such damage or injury results”³⁴ (emphasis added).

²⁵ McGlashan, Robert C. “The Modified Duty of Care for Ski Resorts and Recreational Landowners: A Case Note on *Schneider v. St. Clair*” 2011.

²⁶ *Supra* note 1, at s. 4(2)

²⁷ *Ibid* at s. 4(3)

²⁸ *Ibid* at s. 4(3)(c)

²⁹ [2012] ONSC 4711

³⁰ [1991] 2 SCR 456

³¹ *Supra* note 28, at 22.

³² (2009), 97 OR (3d) 81 [*Schneider*].

³³ (1989) 68 OR (2d) 716 (CA).

³⁴ *Ibid* at 42.

In *Schneider*, it was held that the defendant had not exhibited a reckless disregard for patrons on their premises when they failed to render their property safe for off-trail skiing in the winter. The Court held that the defendant did not have specific knowledge that a “concrete wall, depending on the snow conditions, would be hidden from view of cross-country skiers and thus pose a risk of injury to a skier choosing to leave the trail. The concrete wall had been in place for more than a decade, apparently without incident or suggestion that, in winter, it constituted a hazard or trap to users of the Park . . . In order to constitute recklessness, the court must find that the occupier knew or should have known that injury was likely.”³⁵

Conversely, in the 2009 case of *Kennedy v London (City)*,³⁶ the Ontario Superior Court of Justice held that the unusual placement of a bollard on a recreational path constituted a reckless disregard for the safety of a person. While there was nothing wrong with the presence or rigidity of the bollard or the path itself, the lack of signage around the bollard and the knowledge that a cyclist would injure themselves if contact was made with the bollard constituted a breach of the defendant’s standard of care. It is clear that where a defendant cannot reasonably foresee a risk of injury, they will not be held liable for reckless disregard where an injury may result from such a risk.

In the 2012 case of *Herbert (Litigation Guardian of) v Brantford (City)*,³⁷ it was held that the defendant had a reckless disregard of the presence of a person when they failed to clear an area around a trail that was strewn with stones, boulders, and concrete laced with steel rods.³⁸ Due to the particularly dangerous properties of the section of trail upon which the plaintiff fell, including a sharp angle of decline, the Court held that a failure to keep clear trail shoulders constituted a reckless disregard.³⁹ It should be noted that in both *Kennedy v London* and *Herbert*, the plaintiffs were held to have been 60% liable for their own injuries.

This lowered standard of care has been upheld by the Courts even in instances where the injured parties are minors. In *Burns v Canadian National Railway*,⁴⁰ where a seven-year-old child plaintiff trespassed onto a Canadian Rail train crossing, the Court held that the lowered standard of liability contemplated in s. 4(1) was applicable. Despite the lowered standard, however, the Court still found liability on the part of the defendant occupiers due to their failure to provide proper fencing per the statutory requirements.⁴¹

In *Genua v. North York (City)*,⁴² the Court applied s. 4 of the *Act* to a case involving a defendant municipality and a 4 year-old plaintiff who was injured when he was hit by a cyclist while in a municipal park. The Court enunciated the judicial attitude towards s. 4 modifications, stating that “if the legislature had intended that the benefit of the exemption in s.4 of the

³⁵ *Supra*, note 32 at 33-4.

³⁶ 2009, 58 MPLR (4th) 244 [*Kennedy v London*].

³⁷ 2012 ONCA 98 [*Herbert*].

³⁸ *Ibid* at 2 ; *Herbert v. Brantford (City)*, 2006 CanLII 36621 (ON SC) at 3; and *Herbert v. City of Brantford*, 2010 ONSC 2681 (CanLII).

³⁹ *Herbert v. City of Brantford*, 2010 ONSC 2681 (CanLII) at 162.

⁴⁰ 2000, 133 OAC 392 (CA) [*Burns*].

⁴¹ *Ibid* at 6.

⁴² 2006 CarswellOnt 9505 (OSCJ).

Occupiers' Liability Act was not to accrue to a municipality, it would have said so in explicit language.”⁴³

It is therefore not prudent for counsel acting for minor plaintiffs who fall within the ambit of s. 4(1) of the *Act* to expect the standard of care owed to them will be raised beyond what s. 4(1) provides. Indeed, the Courts have proven they are unwilling to raise the standard of care, even in cases where plaintiffs are young and especially sympathetic.

Avoiding Liability

Meeting the standard:

It is open to defendants to argue that they have met their standard of care under the *Act*. They can do this by demonstrating the ways in which they provided a reasonably safe environment for persons entering their premises. As noted above, the standard of care will vary from circumstance to circumstance. Occupiers would be well prepared to take note of the various standards and how same can be met.

Modify or exclude the duty:

Section 5(3) of the *Act* allows occupiers to restrict, modify, or exclude their duty of care, provided that reasonable steps have been taken to bring the attention of patrons to the restriction and the extent to which the occupier is displacing its duty.⁴⁴ This is often accomplished through proper signage or providing a written notice on a document or ticket. Occupiers should be mindful of the fact that, in order to displace their duty, people who enter their premises must not only be provided with clear notice, but must also have their attention drawn to said notice. In the Ontario Court of Appeal case of *Best v Deal*,⁴⁵ the defendant golf course did not benefit from the exclusion as set by s. 5(3). In that case, the golf course provided a patron with a ticket that had an exclusion of liability printed on its back. The Court held that this failed to attract the plaintiff's attention. Section 5(3) had not been engaged. It should also be noted that signage will afford no protection in circumstances where a minor plaintiff is unable to read or understand same.

Contributory negligence of minors:

When dealing with minors, the Courts interpret the standard of care of occupiers as requiring an occupier to anticipate the reckless behaviour of minors. While the Courts do require occupiers to anticipate minors' recklessness, occupiers are not precluded from raising contributory negligence as a defence if the minor's behaviour contributed to them being involved in an accident.

The degree to which each individual plaintiff has contributed to his or her own injury will vary from case to case. The following cases are useful in surveying the various degrees to which plaintiffs will be found to be contributorily negligent.

⁴³ *Ibid* at 25.

⁴⁴ *Act*, *supra* note 1 at s.5.

⁴⁵ 2008 ONCA 26.

As referenced earlier, the 18-year-old plaintiff in *Kennedy*⁴⁶ drove his motorcycle too quickly and lost control of his own vehicle on school property. The plaintiff struck a bollard on the grass beside the driveway and was catastrophically injured. Due to his reckless driving, the plaintiff was assigned 75% liability for his own injuries. In *Walford (Litigation Guardian of) v Jacuzzi Canada Ltd.*,⁴⁷ the 15-year-old plaintiff disregarded her mother's instructions and went down a waterslide head-first instead of feet-first.⁴⁸ The plaintiff was assigned 20% liability for her own injuries. In *Cox*,⁴⁹ the 16-year-old plaintiff's ankle was injured when a door suddenly opened behind her. The door was sharp at the bottom and severed her Achilles tendon when it opened. The plaintiff was not assigned any liability for her injury.

While the percentages in these cases are disparate, a pattern can be discerned from the factual circumstances surrounding each case. For example, in *Kennedy*, the defendant was invariably going to sustain an injury as a result of his own actions, irrespective of the bollard. This fact likely reduced the apportionment of liability to the school board. In *Walford*, while the plaintiff disobeyed her mother's instructions, she was not provided with an appropriate authoritative warning. Furthermore, the plaintiff was used to using slides in much deeper pools, and in deeper pools, going down a slide head-first is not necessarily dangerous; the plaintiff's actions were only dangerous in a shallow pool.⁵⁰ In *Cox*, the defendant attempted to assign liability to the plaintiff for improperly clearing the path of the door after she used it. Ultimately, it was found that while the plaintiff did make a small contribution to her injuries by not clearing the path, her actions were not unreasonable or negligent and the Court declined to find her contributorily negligent.

Walford further helped to identify two general factors that are important to cases involving minors and their liability for contributing to their own injuries. First, the plaintiff's awareness of the nature or degree of risk is relevant, and the age of the plaintiff will provide some indication of their awareness of the risk. Second, minor plaintiffs are expected to understand that instructions from adults regarding safety are usually for some safety purpose. In this way, disobeying the instructions of an adult may constitute contributory negligence on the part of a minor plaintiff and can lead to a reduction in recoverable damages.

Motions for Summary Judgment

If it can be demonstrated that there is no genuine issue requiring trial, a motion for summary judgment may be granted. The case of *Gemelus v. Ecole Secondaire Catholique Renaissance*⁵¹ demonstrates how a school board can satisfy its standard of care with sufficient certainty to dispose of an action prior to trial. This case involves a plaintiff who tripped and fell while playing basketball in gym class. In granting the motion for summary judgment, Justice Grace of the Ontario Superior Court of Justice held the following:

⁴⁶ *Supra*, note 9.

⁴⁷ 2007 ONCA 729 [*Walford*].

⁴⁸ While this was a negligent misrepresentation case, it is useful to an investigation of contributory negligence on a general level.

⁴⁹ *Cox*, *supra* note 19.

⁵⁰ *Walford*, *supra* note 40 at 64 and 65.

⁵¹ 2010 ONSC 4232.

I agree the School Board has discharged its evidentiary onus. Its material leads to the conclusion that the School Board's statutory responsibility was fulfilled: *St. Louis-Lalonde v. Carleton Condominium Corp. No. 12, supra*. The gymnasium floor was nearly new. It was swept daily. It was more thoroughly cleaned weekly. Mr. Gladu noticed nothing wrong with the floor before, during or after class on the day in question. Ms Gemelus could not remember noticing anything unusual about the floor. She had no explanation for her fall. Nothing about Mr. Gladu's explanation of the drill or the way in which it was conducted causes concern. That shifts an evidentiary burden to Ms Gemelus to establish that her claim has a real chance of success.⁵²

While this is certainly a high threshold to meet, it is not impossible for a defendant school board, through diligent maintenance practices and record-keeping, to obtain summary judgment against a plaintiff.

Conclusion

The jurisprudence concerning occupiers' liability treats minor plaintiffs differently than adults. Since *Kennedy*, Courts have interpreted the standard of care of occupiers of schools and premises catering to minors differently than the standard of care of occupiers of premises catering to adults. This requires occupiers to provide a reasonably safe environment despite the unpredictable behaviour of minor patrons. While predicting the unpredictability of minors is a tall order for occupiers, this is the direction in which Courts are headed.⁵³

While the courts have required occupiers of premises catering to minors to be cognizant of minors' unpredictability, the occupier is not held to a standard of perfection while discharging the duty of care. A defendant occupier can defend against these claims by arguing that their efforts were reasonable under the circumstances. Defendant occupiers may also raise the defence of contributory negligence when minors' behaviour contributed to the accident.

⁵² *Ibid* at note 23 and 24.

⁵³ *Mott, supra* note 14 at 65.