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Trails and Tribulations: Liability Exposure in the Recreational Realm

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Trails and tribulations: liability exposure in the recreational realm

Executive summary

There are many thousands of kilometres of paved and unpaved trails throughout this Province. A significant proportion of these came into existence before there were any published guidelines on recreational trail design, construction and maintenance. These facilities are used by pedestrians, cyclists, rollerbladers and various combinations of such users for recreational purposes – which by their nature often carry with them a certain level of risk.

This presentation provides an overview of the statutory framework for recreational trail liability, the development of this framework in the case law, and risk management strategies for entities having responsibility for such trails.

Recreational trails under the *Occupiers' Liability Act*

The *Occupiers' Liability Act* (the "OLA") defines and limits obligations with respect to the care and control of property.

The general duty of care owed by an occupier of premises to others while they are on the premises is "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" (section 3). However, in recognition of the realities of certain types of premises, the OLA provides that persons "shall be deemed to have willingly assumed all risks" when they enter specific premises. Pursuant to subsection 4(3) of the OLA, this deeming provision applies where a person enters on to property for a recreational activity and:

1. no fee is paid for the entry or activity of the person; and
2. the person is not being provided with living accommodation by the occupier.

Under section 4(4)(f) of the OLA, the types of premises to which the deeming provision applies include “recreational trails reasonably marked by notice as such”.

Where the above conditions are met, the general duty of care set out in section 3 does not apply. Rather, under subsection 4(1), the occupier responsible for the recreational trail owes the following duties:

(a) to not create a danger with the deliberate intent of doing harm or damage; and

(b) to not act with reckless disregard of the person and their property.

Under the OLA, this standard also applies to individuals who are on premises for the purpose of criminal activity [section 4(2)], as well as to rural premises that are vacant, undeveloped, forested or wilderness premises as well as other specifically listed types of property [section 4(4)].

The law of “reckless disregard”

For obvious reasons, it will be a rare situation where an occupier of any public premises “creates a danger with the deliberate intent of doing harm or damage”. Rather, in the case of a recreational trail “reasonably marked by notice as such”, the test for liability is whether the occupier acted with “reckless disregard”.

The requirement that the recreational trail be “reasonably marked by notice as such” is an extremely important threshold requirement. Based on the legislation, it is not enough that both the trail authority and users may understand that the trail is for “recreational” or “multi-use” purposes. Users must be reasonably notified that they are on a recreational trail. A prudent occupier will ensure the placement of appropriate signage at designated entrance points, as well as at reasonable intervals along trail itself. Otherwise, the occupier runs the risk of being subject to the significantly more onerous duty under section 3 of the OLA, above.

Assuming the notice requirement is met, the threshold for establishing liability with respect to a recreational trail is a high one. It was first considered by the Ontario Court of Appeal in the case of *Cormack v. Mara (Township)*, [1989] O.J. No. 648. That case arose out of a snowmobile accident, however, the Court did not confine its analysis of "reckless disregard" to snowmobile situations. The Court unanimously held that section 4 of the OLA provides "an immunity except for wilful or malicious damage" (paragraph 28). Emphasizing the required level of intention to ground a finding of "reckless disregard", the Court went on to explain that this phrase means doing or omitting to do something which should be recognized as likely to cause damage or injury to a user, "not caring whether such damage or injury results" (paragraph 29; emphasis added). Leave to appeal to the Supreme Court of Canada was refused.

In 2009, the Court of Appeal confirmed that the *Cormack* formulation of "reckless disregard" continues to be the law in this Province. In *Schneider v. St. Clair Region Conservation Authority*, 2007 CarswellOnt 8891 (S.C.J.), which arose out of a cross-country skiing accident, the trial judge found that the premises at issue were neither rural premises nor a recreational trail and therefore not subject to the reckless disregard standard. The defendant was instead found to owe a duty to take "reasonable care" for the safety of the plaintiff who struck a concrete wall located beneath the surface of the snow in an area cross-country skiers would not normally visit. On appeal, the trial decision was reversed. In dismissing the plaintiff's action the Court of Appeal made the following findings:

1) The intent of the legislature, by imposing a lesser duty of care on occupiers of recreational trails of all kinds, was to encourage occupiers to make their land available for recreational activities (paragraphs 24, 27, 29 and 34);

2) The combined wording of sections 4(1), 4(3)(c) and 4(4)(f) work together such that a person who enters a recreational trail for the purpose of a recreational activity is deemed to have willingly assumed the risks associated with that activity. In such cases, the duty of the occupier is "to not create a danger with deliberate intent to do harm … and to not act with reckless disregard … of the person" (paragraph 28);

3) The lesser duty of care applies both when a user is on the trail and when they venture off it on to surrounding lands (paragraph 31);

4) The test for "reckless disregard" is the *Cormack* test: "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" (paragraph 42; emphasis added).

Applying these principles to the case before them, the Court concluded that while the trial judge's factual findings might constitute a sufficient basis for concluding that a breach of the s. 3(1) duty existed, they did not provide a basis for concluding that the Conservation Authority had acted with "reckless disregard" of the plaintiff. The absence of specific knowledge of a hazard, absence of specific knowledge of skiers in this area and absence of past incidents or injury, precluded a finding that the Conservation Authority knew or ought to have known that cross-county skiers were likely to collide with the snow covered wall in a manner such that serious injury could or was likely to result. As such, there was no basis for a finding that the Authority failed to take any steps to correct the hazard or warn of its presence (paragraphs 43-45).

In summary, both the purpose of section 4 of the OLA, and the clear guidance from the Court of Appeal, dictate that the high threshold of "reckless disregard" should only be found to have been satisfied in situations where there has been an egregious departure from a standard of care expected of a reasonable property owner.

Recreational trail "standards"

There are no "standards" regarding the design, construction or maintenance of recreational trails in this Province. Since the 1980's, and particularly the 1990's, a variety of published materials have appeared suggesting criteria and parameters that should be used for the design and construction of recreational trails. These reference materials include documents published by the American Association of State Highway and Transportation Officials (AASHTO), the Canadian Institute of Planners (CIP), Velo Quebec, and the Ontario Ministry of Transportation.

Proper use of these materials requires a trail authority to answer the threshold question: "Who are my intended users?" The correct answer to this question is important because different types of users result in different suggested design criteria. There is no "one size fits all" for recreational trails. It is also important to understand that, while it makes sense for trail authorities to consult these materials and consider them, failure to follow their suggested guidance is not in and of itself a basis for imposing liability. There may be significant, valid reasons for not following suggested design criteria, including geographic and financial restrictions. Wherever possible, these issues should be properly documented with the rationale for the approach taken being set out in the construction documentation. Proper documenting of these types of decisions will be of great assistance if an incident subsequently occurs in proving that the trail authority did not act with "reckless disregard" when it designed that section of trail.

With respect to the existing trails, the reality is that a significant portion of them were constructed before any of the reference materials were published. While claimants will attempt to engage in a microscopic assessment of trails based on the present day reference materials, which in some cases are very technical, this exercise will bear little or no resemblance to what was reasonably contemplated by anyone when the trail was constructed. The end result of such an approach will almost certainly be a report that is critical of the existing trail because it doesn't meet present day design criteria. That, however, does not mean that the existing trail is unsafe, that it was reckless to build it, or that it was reckless to allow it to continue in its existing form. As the Court of Appeal noted in *Schneider*, analysis of whether reckless disregard has occurred depends on knowledge of a hazard, knowledge of the uses being made of that section of land and whether there have been past incidents or injury. Absent this type of information, it is hard to argue that a section of trail that is operating safely needs to be altered to reflect present day design criteria or the trail authority face liability.

Conclusion

Notwithstanding the OLA and the clear guidance from the Court of Appeal, claims with respect to recreational trails persist.

The reality is that many trails run through natural terrain which can pose various inherent risks. Due to the nature of the activities engaged in on recreational trails and the level of intensity at which some participants will engage in those activities, the risk of serious injury and resulting litigation to offset the significant costs associated with those injuries is high. To the extent that claims are not held to the required standard, the potential for liability exposure is significant. Accordingly, in spite of the limited standard of care expected of occupiers of recreational trails, a prudent occupier will attempt to be vigilant in inspecting and addressing any maintenance issues that arise with respect to signage and the condition of the trail. As in other areas, clear and detailed record keeping with respect to those activities will go a long way towards successfully responding to any claims that do arise.