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OCCUPIERS' LIABILITY UPDATE: OWNER V. INDEPENDENT CONTRACTOR

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Occupiers' Liability Update - Owner v. Independent Contractor

by Jay A. Stolberg

This paper examines some of the duties owed by owners and independent contractors generally and the sources of their exposure. It also examines the court's recent approach to indemnity and insurance clauses which have tended to favour the contractors.

The Legislation

Both an owner and an independent contractor are considered to be "occupiers" under the *Occupiers' Liability Act* ("OLA"). In this regard, section 1 of the *OLA* provides:

"occupier" includes,

(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; ("occupant")

The *OLA* imposes the following duty on an "occupier":

Occupier's duty

3 (1) 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.

Idem

(2) 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.

The leading case with respect to the general duty owed by an occupier is the Supreme Court of Canada's decision in *Waldick v. Malcolm* [1997] 3 S.C.R. 701 (S.C.C.). The Supreme Court in that case made the following comments:

"All courts have agreed that the section imposes on occupiers an affirmative duty to make their premises reasonably safe to protect others from foreseeable harm ... The duty is not absolute and occupiers are not insurers liable for any damages suffered by persons entering their premises. Their responsibility is only to take "such care as in all the circumstances of the case is reasonable."

The Court stressed that the determination whether an occupier had discharged its duty to undertake reasonable care was fact-specific:

... the statutory duty on occupiers is framed quite generally, as indeed it must be. That duty is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation -- thus the proviso "such care as *in all the circumstances of the case* is reasonable".

Subsequent cases have defined the obligation to require a system in place to ensure the safety of persons on the premises and efforts to ensure that the system functions properly: *Gardiner v. Thunder Bay Regional Hospital* (1999) CarswellOnt 802 (Gen. Div.).

The Owner's Reliance on an Independent Contractor

Section 6(1) of the *OLA* provides as follows:

Liability where independent contractor

6(1) Where damage to any person or his or her property is caused by the negligence of an independent contractor employed by the occupier, the occupier is not on that account liable if in all the circumstances the occupier had acted reasonably in entrusting the work to the independent contractor, if the occupier had taken such steps, if any, as the occupier reasonably ought in order to be satisfied that the contractor was competent and that the work had been properly done, and if it was reasonable that the work performed by the independent contractor should have been undertaken.

The owner can therefore avoid liability under the *OLA* in cases where it hires an independent if:

- (a) the owner **acted reasonably** in entrusting the work to the independent contractor; and
- (b) the owner **took steps** to reasonably satisfy itself that:
 - (i) the contractor was **competent**; and
 - (ii) the work had been **properly done**

Simply delegating the work to an independent contractor is not sufficient to avoid liability.

There are cases in which the maintenance system and reliance on the contractor was found to be reasonable and which operated to absolve the owner of liability where there was a defect. This was the result in *Gardiner v. Thunder Bay Regional Hospital* [1999] O.J. No. 833 (Ont. Gen. Div.), where the court made the following comments.

On its face, I cannot find fault with the system that was put in place. Hiring a professional snow removal company to maintain a parking lot in winter in Northern Ontario is a responsible action. And this, coupled with a contract which allows the contractor, in the first instance, to determine without restriction when conditions require either snow removal or attending to slippery conditions with sand (salt and sand) is a very solid approach to safety. Furthermore, the Defendant's employees are required to inspect the lot daily, one looking to the parking areas, the other looking to the helipad which sits on one side of the parking lot.

There are other cases, however, where the maintenance system was found to be sub-standard for the circumstances and owners have not be able to avail themselves of the protection of section 6 of the *OLA*. In *Britt v. Zagjo Holdings Ltd.* (1996) CarswellOnt 1186 (Gen. Div.), the plaintiff slipped and fell on ice in a parking lot. The maintenance system involved the use of two independent contractors. The court found that the system was disorganized and lacked communication between the contractors. The court also found that the owner had failed to ensure that the contractors had properly maintained the parking lot. The owner was found liable (the contractors had not been sued).

In *Allen v. Lawrence Avenue Group Ltd.* (2003) CarswellOnt 1149 (S.C.J.), the court found that the maintenance contract did not extend to the peril that caused the plaintiff's injuries and the owner was found solely liable. In that case, the plaintiff slipped on ice at the foot of a stairway. The maintenance contract was silent with respect to salting and the contractor was not required to attend at the plaza in the absence of a snowfall and there were no general inspection requirements. The court held that the owner had retained responsibility for the icy conditions and that it either should have contacted the contractor to salt or done so itself.

The Contractor's Liability

The maintenance contract will be the primary source of the contractor's obligations. Its failure to fulfill its contractual obligations will give rise to exposure for liability.

However, the contract may not be the only source of liability for the contractor. The contractor may have undertaken additional maintenance activities which may give rise to exposure outside the four corners of the contract. This was the result in *Fragomeni v. Ontario Corp.* 1080486 (2006) CarswellOnt 2442 (S.C.J.). In that case, the plaintiff slipped and fell on ice after exiting a

funeral home. The maintenance contract required the contractor to perform ploughing operations after two inches of snow accumulation and to “salt on call.” The contractor testified that he always waited for a call prior to salting. There was other evidence before the court, however, which indicated that the contractor, as a matter of practice, routinely salted on his own initiative. The contractor was found to have assumed an obligation to salt when reasonably required and failed to properly do so prior to the incident.

The owner would also salt the premises on a regular basis and the court found there was no clear direction as to who would salt on a particular day. The maintenance system was found to be unreasonable and the contractor and owner were held to be jointly and severally liable. Liability was apportioned 50% each.

This case highlights the importance of examining the pattern maintenance in place and not focusing strictly on the contract and maintenance logs in the few days prior to the incident.

Indemnity Clauses

Indemnity clauses vary from contract-to-contract and their specific wording must be closely examined. What is reasonably clear is that the indemnity will not be held to cover the owner’s independent negligence, unless there is clear express wording to this effect in the indemnity. In this regard, the Supreme Court of Canada in *Fenn v. Peterborough (City)*, [1981] 2 S.C.R. 613 (S.C.C.) stated the following:

... if one is to be protected against or indemnified for one’s own negligence, there would have to be an indemnity clause spelling out this obligation on the other party in the clearest terms.”

Potvin v. Canadian Museum of Nature (2003) CarswellOnt 1932 (S.C.J.) is an example of a case where an indemnity clause was interpreted narrowly. In that case, the Canadian Museum of Nature rented a portion of its facility to Royal LePage for a dinner and dance event. The plaintiff attended the event and fell down marble stairs at the Museum’s main entrance as she was leaving. She sued the Museum only.

The Rental Agreement between the Museum and Royal contained the following indemnity clause:

The Renter shall indemnify and save harmless the Museum from and against any and all claims, damages, suits, and actions whatsoever, including any claims for any personal injury (including death resulting therefrom) or any loss of or damages to property which **arise out of or in connection with the entry onto and use of the Museum's facilities** on the date(s) specified in this agreement or which arise out of said event ... [Emphasis added]

The court first noted the absence of any clear language in the indemnity encompassing the owner's own negligence. It then went on to examine whether the words "arise out of or in connection with the entry onto and use of the Museum's facilities" were broad enough to trigger the indemnity. The court concluded that for the indemnity to apply, the renter's activities must be the "proximate" or immediate cause of the plaintiff's injury, rather than simply having been the event which brought the plaintiff to the Museum. The court commented as follows:

... Unless an agreement clearly expresses an intent to transfer all of the occupier's negligence liability to a renter, the indemnity will apply only to negligence with a causal connection to the renter's use and activity.

Here, while the injury followed the entry and attendance of one of Royal's invited guests on the Museum's premises, that temporal connection alone is insufficient connection to say that it *arises out of or in connection with the entry onto and use of the Museum's facilities.*"

In other words, Royal was not responsible for the condition of the stairway and its activities on the premises did not cause the injury to the plaintiff.

Insurance Clauses

Maintenance contract also typically include a requirement that the contractor take out a CGL policy with fixed policy limits and name the owner as an additional named insured with respect to the contractor's operations. There are a number of recent decisions in which owners have attempted to rely on insurance clauses to argue either: (1) the clause evidences an intention that the contractor assumed all risks relating to winter maintenance, including the owner's negligence; or (2) the owner's inclusion as an additional named insured includes coverage for claims relating to the owner's own negligence. These arguments have recently been unsuccessful.

In *Tinkess v. N.M. Davis Corp.* (2007) CarswellOnt 1627 (S.C.J.) the plaintiff claimed she slipped on snow and ice on a walkway leading to a parking lot. The maintenance contract

required the contractor to clear the walkway when requested to do so by the owner and within two hours of the request. The policy contained the following indemnity and insurance clauses:

7. Indemnity/Hold Harmless Agreement. Parkway shall not be liable for any injury or damage to any person or property whatsoever by reason of, or in any manner arising out of, any of [Contractor's] acts or failures to act under or pursuant to the Agreement. [Contractor] shall indemnify, defend, with counsel acceptable to [Owner] and hold harmless [Owner] and its affiliates from and against any and all claims...arising from the acts or failure to act of [Contractor]...in connection with the matters governed by this Agreement...

8. Insurance. [Contractor] shall at its own cost and expense carry commercial general liability insurance (including insurance against assumed or contractual liability under this Agreement) with a minimum combined single limit of one million dollars...and naming [Owner] and its affiliates as additional insureds...

The owner argued that the combined effect of the two clauses was that the contractor was required to defend and indemnify the owner for all claims, including those relating to the owner's own negligence. In this regard, it argued that the contractor's agreement to obtain insurance coverage operated as an assumption of "all risk of loss or damage that is caused by the peril to be insured against," including losses arising from the owner's own negligence. In its argument, the owner relied on case law in the landlord and tenant context in which the landlord's covenant to insure "against loss by fire" protected the tenant even where its own negligence caused the fire as was the finding in *Smith v. T. Eaton Co.* (1977), 92 D.L.R. (3d) 425 (S.C.C.).

Justice Belobaba examined the wording of the insurance obligation in the maintenance contract:

... In our case, the contractual obligation spelled out in section 8 requires that [Contractor] take out a CGL insurance policy, "including insurance against assumed or contractual liability under this Agreement. In other words, [Contractor] is obligated to take out insurance to cover its exposure as set out in section 7 --- namely, its own acts or failures to act, not [Owner's].

The agreement to insure was held to simply mirror the contractor's indemnity obligation and was not intended to extend any additional coverage to the owner.

In his decision, Justice Belobaba referred to the British Columbia decision in *Kocherkewych v. Greyhound Canada Transportation Corp.* [2006] B.C.J. No. 723 (B.C. S.C.). In that case, the B.C. Supreme Court held that a bus depot's obligation under a contract with a bus company to take out a CGL policy, did not cover the bus company for the negligence of its own employees.

The court found that the contract was clear that the insurance requirement was intended only to underwrite the indemnity assumed by the bus depot and was not meant to provide extended coverage to the bus company.

D’Cruz v. B.P. Landscaping Ltd. (2007) CarswellOnt 4385 (S.C.J.) is another recent case in which an owner unsuccessfully attempted to obtain coverage for the independent negligence claims made against it. In that case, the plaintiff slipped on fell on snow and ice on property owned by the defendant, Peel Housing. Peel had entered into a winter maintenance contract with B.P. Landscaping. The contract contained an insurance provision requiring the contractor to take out a CGL policy “with coverage including the activities and operations conducted by the vendor and those for whom the vendor is responsible for in law.” Peel was to be included under the policy as an additional named insured.

B.P. took out a policy with Citadel. The Certificate of Insurance provided as follows:

The Regional Municipality of Peel and/or Peel Housing Corporation -- O/A Peel Living have been added as additional insured's, **but only with respect to their interest in the operation of the named insured.** [Emphasis added]

The decision does not state the precise allegations in the Statement of Claim, however, it appears there were separate allegations of negligence on the part of Peel and B.P. Peel brought a third party claim against Citadel and moved for summary judgment. It argued that because it was an additional named insured under the policy, Citadel was required to defend it with respect to the negligent winter maintenance claims against B.P. It argued that once this duty is established, Citadel must defend Peel against all of the allegations, including those relating to Peel’s own negligence, with the defence costs left to be sorted out after liability, if any, is established at trial. Peel also suggested that because its interests conflicted with those B.P., it may be entitled to separate counsel.

The court rejected Peel’s arguments. First, it was held that there were “separate and distinct” allegations of negligence against Peel in the Statement of Claim in its capacity as occupier which were unrelated to the allegations against B.P. Second, the court held that the claims relating to B.P.’s alleged negligent maintenance were already being defended by Citadel. The court then went on to state:

I leave for the trial judge to determine if there are any issues outstanding in the Third Party Claim, such as the payment of Peel Housing's costs to defend the main action. That can only be determined after the liability of the various parties has been apportioned, if at all.

Waterloo (City) v. Economical Mutual Insurance Company (2006) CarswellOnt 8451 (S.C.J.) is another recent decision which highlights the importance of a careful analysis of the wording of the policy documentation when determining the scope of the insurance available to the owner. In that case, the plaintiff was injured at a train crossing while watching the annual K-W Oktoberfest parade. The City had provided a special event permit to K-W Oktoberfest Inc. A condition of the permit required K-W Oktoberfest to obtain a CGL policy with the City listed as an additional named insured. The Additional Insured Endorsement provided as follows:

This insurance applies to those stated on the declarations as 'additional insureds', **but only with respect to liability arising out of the operations of the named insured.** [Emphasis added]

The plaintiff brought an action against the City and the railway company only. The claim alleged negligence in the operation of the railway and the defendants' failure to ensure the safety of the parade-goers. The claim alleged the City permitted K-W Oktoberfest to schedule its parade at the same time as a scheduled train crossing and allowed K-W to run the parade without taking proper steps to protect the patrons. The City relied on these allegations arguing the claim against it was derivative of the negligence of K-W Oktoberfest.

The court concluded as follows:

The key limitation of coverage is contained in the defining words of the endorsement, "but only with respect to liability arising out of the operations of the named insured".

In my view this is a common, clear and unambiguous limitation of coverage. The words "arising out of" have been interpreted in the cases to include such meanings as "originating from", "growing out of", "flowing from", "incident to", or "having connection with".

These words define the pertinent liability for which coverage is provided. The pleadings on their face do not allege facts in support of liability "flowing from" or "incident to" the operations of K-W Oktoberfest Inc. And the plaintiffs have not sued K-W Oktoberfest Inc.

The K-W Oktoberfest parade was merely the site or occasion of the Hepditches unfortunate accident with the train.

In my view there is no duty on the part of the Respondent to defend the claim against the City because the Plaintiffs' Statement of Claim includes no claim payable under the Respondent's obligation to indemnify. No facts have been alleged which if properly construed would support an action which could potentially fall within coverage.

All of the allegations of negligence against the City stand alone and are neither expressly or by necessary inference derivative of or arising out of the operations of K-W Oktoberfest Inc.

The case is useful in highlighting the importance of obtaining a copy of the policy and not just relying on the Certificate of Insurance when examining whether coverage exists for the owner as an additional named insured. The Certificate of Insurance in that case referred to coverage for the City "but only insofar as their legal liability arises vicariously out of the negligent operations of the Named Insured." The relationship between the City and K-W Oktoberfest was such that the City likely could not strictly be "vicariously" liable for K-W's negligence. The Certificate provided, however, that it was for information purposes only and that it was subject to the terms in the policy.

Practical Considerations in the Owner v. Contractor Context

Many plaintiff's counsel are satisfied if they properly name the property owner in the Statement of Claim. Some do not care to go through the additional trouble or expense of naming the contractor and believe they have adequately protected their client's interests by naming the owner only. They believe the property owner is ultimately responsible for maintenance and it can go through the expense of a third party claim if they wish to do so.

In this circumstance, however, what is being overlooked is the risk that at the end of trial, the court might find that the owner acted reasonably in the circumstances and is protected as a result of section 6 of the *OLA*. The evidence may point to the sole negligence of the contractor which was not otherwise reasonably foreseeable or preventable from the owner's perspective. If the contractor was not sued, the plaintiff may be left without any recourse (except perhaps against his or her solicitor).

From the owner's perspective, there are advantages to having the contractor named as a party in the Statement of Claim, as opposed to adding them to proceedings by way of a third party claim. If the owner third parties the contractor and succeeds at trial against the plaintiff, the owner

would be exposed to the contractor's costs of defending the third party claim. If the contractor had been a defendant and both were successful in the action, the owner would not be responsible for the contractor's costs.

In the event a third party claim is necessary, it must be issued within two years after the statement of claim is served. Claims against the insurer for coverage under an additional named insured endorsement, will also be subject to limitation period and possibly notice requirements.

Closing Comments

Because there are no standard contracts, disputes between owners and contractors must be assessed on a case-by-case basis. The following inquires provide some guidance:

- In addition to the contract, has the contractor assumed any obligations outside of the contract? Log records for the weeks or months prior to the date of loss may provide some insight into this issue.
- Does the indemnity expressly include the owner's own negligence?
- Does the indemnity include the contractor's obligation to defend the owner? If not, depending on the wording of the clause, the contractor may have a valid argument that the indemnity is only triggered by an actual finding of negligence, which can only be done after trial.
- What does the policy documentation say with respect to the triggering criteria for the owner's status as an additional named insured?
- Is there any ambiguity in the clauses (i.e. they can be reasonably read more than one way) which might be construed against the drafter of the contract (likely the owner)?