1 Introduction

2 The Law of Occupiers' Liability

The law of occupiers' liability in Canada is one of the most dynamic and rapidly evolving branches in the field of negligence law. Legal practitioners, legislators, tort scholars, and the judiciary are frequently called upon to shape and define the obligations of occupiers to persons on their premises. Innovation and advancements in development and design have transformed the ways that premises are used and the resources available to help occupiers enhance their ability to safeguard against foreseeable risk. The myriad ways in which people interact with their surroundings, coupled with the commensurate risks attached to them, have challenged courts to untie the tangled complexities of what constitutes reasonable care on the part of occupiers and their guests.

This book is intended to provide legal practitioners with a comprehensive understanding of the law of occupiers' liability; its origins and analysis; and the provisions of the occupiers' liability statutes in Ontario, British Columbia, and Alberta. Tracing the historical evolution of the common law and the negligence principles upon which occupiers' liability law is founded reveals the legislative intent that drove the statutory enactment of provincial occupiers' liability legislation and that now informs the modern judicial interpretation of the legislation in each of those jurisdictions.

The duty owed by owners of premises to persons entering onto them is steeped in longstanding common law maxims and was succinctly articulated by the English Court of Common Pleas in the benchmark decision *Indermaur v Dames*.[1] That decision recognized the bifurcated duty of care owed to persons who enter onto premises on business common to them and the occupier (later known in the case law as invitees) and those who foreseeably enter onto premises for no benefit of the landowner but with their bare permission (later known as licensees).[2] The case law that emerged in the ensuing years referenced this general statement of the law as the Rule in *Indermaur v Dames*, expressed by Willes J as follows:

> [T]hat he (that is the invitee), using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know.[3]

The passage of time saw the social trend away from the ideology that the rights of landowners were sacrosanct to all others, and courts began to recognize the cruel and harsh effect of what had essentially become an all or nothing application of the rule. In an effort to overcome this, courts carved out exceptions in favour of a more expansive interpretation of the duty of care. For example, the duty owed to licensees was enlarged, invoking the principles of foreseeability and common humanity, well known

1 (1866) LR 1 CP 274, aff'd (1867) LR 2 CP 311 (Ex Ct).

2 FW Bissett, "The Rule in Indermaur v. Dames and Some of Its Extensions" (1946) 24:3 Canadian Bar Review 178, online: <https://canlii.ca/t/t4zp>.

3 *Ibid* at 179.

at common law, to create an affirmative duty to warn against known dangers and not to wilfully lay a trap.[4] The concept gained considerable judicial traction,[5] shifting the needle to more closely resemble the duty to an invitee. Indeed, the years that followed saw the categories of invitee and licensee make way to include an expression of the *de minimus* duty not to wilfully injure the trespasser[6] and to recognize the higher common law duties owed to contractual entrants.[7]

Despite this well-intentioned effort by the courts, there was still significant inconsistency in the jurisprudence as judges struggled to manage what some considered an approach tantamount to judicial overreach. The vagaries of this approach were expressed by the Alberta Court of Appeal in *McAllister v Calgary (City)*:[8]

> The common law had idiosyncratic rules governing the duty that an occupier owed to persons who were injured on the premises … . The mere "ownership" of land generally did not attract liability for injuries that occurred on the land, because the "occupier" was seen as being in control of any risks. The highest duty was owed to those who had a contractual right to be on the land. A lower duty was owed to "licensees" who were there for their own purposes, unless they were "invitees" who were there for some purpose that was also of benefit to the occupier. Some of the common law duties could be discharged merely by warning of any known dangers. Virtually no common law duty whatsoever was owed to "trespassers."[9]

The frustration of both litigants and courts at this time was palpable. The disparities in the case law created tremendous uncertainty for plaintiffs bringing their claims and for occupiers defending them. Much of the effort concerning the subjective assessment of the facts of each case centred on the intentions of the parties toward each other and the purpose of their presence.[10] Exceptions emerged in the consideration of the duty owed to different types of trespassers. For example, for the child trespasser,[11] the court imputed a duty where there existed a substantial probability that a trespasser would come onto lands and the general duty to treat the trespasser with common humanity.[12]

4 *Fairman v Perpetual Investment Building Society*, 1923 AC 74.

5 *Robert Addie & Sons (Colleries) v Dumbreck*, 1929 AC 358. See also *Baker v Borough of Bethnal Green* [1945] 1 All ER 135 at 14.

6 *Grand Trunk Railway Company of Canada v Barnett*, 1911 AC 361; *Bondy v Sandiuieh By Co* (1911), 24 Oat LR, 409.

7 *Brown v B and F Theatres Ltd*, 1947 CanLII 8 (SCC).

8 2019 ABCA 214.

9 *Ibid* at para 28.

10 *Addie v Dumbreck*, [1929] AC 358.

11 *British Railways Board v Herrington*, [1972] AC 877 [*Herrington*].

12 *Veinot v Kerr-Addison Mines Ltd*, 1974 CanLII 20 at 332 (SCC).

By the mid-20th century, courts throughout the commonwealth had grown tired of struggling with the discordant law regarding occupiers' liability. The result was conflicting interpretations and inconsistent applications of the duty of care as courts attempted to achieve a balance between the rights of property owners and the overarching public interest in encouraging the use of their lands and the safety of people on them. These confusing decisions undermined the very tenet of *stare decisis*. And while this categorical approach provided a degree of certainty, it was often criticized for its rigidity and its failure to reflect changing social values. The distinctions between categories were often arbitrary and led to inconsistencies and unfair outcomes. The need for reform became increasingly apparent as societal expectations of safety and fairness evolved.

And so, in 1957, England led the legislative effort to bring clarity to the law, enacting *The Occupiers' Liability Act 1957*.[13] **[AU: changed OLA 1957 format to match ch 2, note 23. Okay?]** The statute imposed a common duty of care owed by occupiers to ensure that visitors (excluding trespassers) would be reasonably safe while on their premises. The duty encompassed the common law duty to take reasonable steps to prevent foreseeable risks to visitors from dangers of which the occupier knew or reasonably ought to have known. This principle-based approach emphasized the balance the courts had hoped to achieve between the traditional common law duties and the evolving social interactions between persons and premises.[14]

Canadian courts had suffered much of the same frustration as British courts, and the enactment of this new legislation spurred similar tort reform in Canada, resulting in the passage of the occupiers' liability legislation of Ontario, British Columbia, and Alberta. These statutes are strikingly similar in their intent to provide a common duty of care, although subtly nuanced in their differences. Each adopted certain duties existing at common law, in essence creating a "complete code" that exceeded the scope of their British predecessor.

Alberta was the first of the three provinces to enact legislation in 1973, with British Columbia following shortly thereafter in 1974, and Ontario following several years later in 1980.[15] Each of the statutes dispensed with the differing duties owed to invitees and licensees and created a common duty of care owed to them without distinction. At the same time, the statutes explicitly preserved and entrenched common law duties such as the restricted duty owed to trespassers, including provisions regarding when and for

13 (UK), 1957, 5 & 6 Eliz 2, c 31.

14 *Herrington*, *supra* note 11.

15 *The Occupiers' Liability Act*, SA 1973, c 79; *Occupiers' Liability Act*, SBC 1974, c 60; **[AU: Addition of "SBC" okay here?]** *Occupiers' Liability Act*, RSO 1980, c 322.

what types of premises persons are deemed to have willingly accepted all risks;[16] the *de minimus* duty not to cause wilful harm or act with reckless disregard for the visitor's safety;[17] concurrent statutory duties that may impose a competing duty of care, including on landlords;[18] and the higher duty owed to a contractual entrant.[19]

The intent to create a common duty of care was well stated by the Ontario Court of Appeal in *Waldick v Malcolm*,[20] which confirmed that occupiers have an affirmative duty to make their premises reasonably safe for persons entering onto them and to take reasonable care to protect such persons from foreseeable harm. Balanced against that was the clear statement that the duty is not an absolute one and that occupiers are not to be considered insurers of their premises. Occupiers' obligations are confined to taking reasonable care to ensure that their premises are reasonably safe for both the purposes for which they are intended and the activities carried out on them.

In addition, each provincial statute defined who was to be considered an occupier and charged with the duty of care and who was to be considered a person, or visitor, on the premises to whom the duty of care was owed. In this respect, the statutes define the term "occupier" analogously to its settled common law definition: a person in physical possession of premises, or a person who has responsibility for and care over the condition of premises, the activities carried out thereon, or control over persons allowed to enter the premises.[21] The term "visitor" refers to the common class formerly distinguished as either invitees or licensees.[22]

While evidence of physical possession of a premises is a factor to be considered, this factor was augmented by the additional requirement of care and control over the premises, its condition, and the activities carried out thereon—a principle that had long found favour at common law. The combined effect of possession and control served to acknowledge the reality that it is not necessary to own a premises to be deemed its occupier[23] and, conversely, that it is possible to own a property and not

16 *Occupiers' Liability Act*, RSA 2000, c O-4, s 6(1) [Alberta *Occupiers' Liability Act*]; *Occupiers Liability Act*, RSBC 1996, c 337, s 3(3) [BC *Occupiers Liability Act*]; *Occupiers' Liability Act*, RSO 1980, c 322, s 4.

17 *Occupiers' Liability Act*, RSO 1990, c O.2, s 4 [Ontario *Occupiers' Liability Act*]; BC *Occupiers Liability Act*, s 3(2)(b); Alberta *Occupiers' Liability Act*, s 12(2).

18 Ontario *Occupiers' Liability Act*, s 8; BC *Occupiers Liability Act*, s 6(1).

19 Ontario *Occupiers' Liability Act*, s 9; BC *Occupiers Liability Act*, s 9; Alberta *Occupiers' Liability Act*, s 14(4).

20 1991 CanLII 8347 at para 20 (ONCA).

21 Ontario *Occupiers' Liability Act*, s 1; BC *Occupiers Liability Act*, s 1; Alberta *Occupiers' Liability Act*, s 1.

22 *Preston v Canadian Legion of the British Empire Service League, Kingsway Branch No 175*, 1981 ABCA 105 at para 12.

23 *Haliburton (County) v Gillespie*, 2013 ONCA 40 at para 23.

necessarily be an occupier of it.[24] This broad casting of the net obviated much of the uncertainty that had existed prior to the statutory enactments and left the courts more freedom to navigate these waters in their subjective analysis of all of the circumstances of the case. The result was greater consistency in judicial precedents and better clarity for litigants bringing and defending these claims.

The crafting of the provincial statutes was so skilfully accomplished that their earliest incarnations exceeded their British predecessor and were far more effective in creating the common code that had been so sorely lacking. Beyond this more cogent approach to the law, the statutes afforded an opportunity for a far more fluid and inclusive approach to resolving complex issues, such as the duties owed by multiple occupiers of the same premises, who may owe a duty of care to their visitors and to each other.[25] Similarly, the ability to delegate the statutory duty of care was explicitly qualified by prerequisites for the occupier to establish reasonable delegation,[26] including the continuing obligation to monitor the person to whom the duty was delegated to ensure that the work was being competently and reasonably performed. The net effect was legislation adept at evolving to serve the needs of a changing society.

There is little doubt that the wording of the statutes requires a subjective analysis of what constitutes reasonable care in all of the circumstances of the case. The flexibility in this approach has been remarkably successful in freeing the law from its previously rigid constraints at common law and ensuring the eventual goal of fairness to both the occupier and their visitor that had previously frustrated courts.

The broad framing of the occupiers' duty of care and its attachment to both the condition of the premises and the activities carried out thereon allows the duty to encompass a wide array of scenarios that may pose a foreseeable risk to a varied category of entrants. As such, the discussion of what may be reasonable in all of the circumstances of the case turns on the nature and character of the premises and its suitability for its intended purpose. In addition, the potential use by a vulnerable category of entrants, such as children or persons who have disabilities or are elderly, informs the scope of the duty of care owed to them.

Just as visitors come in many forms with many varying needs and vulnerabilities, so too are premises inherently unique. Beyond the mere contemplation of premises as a physical construct situated on lands, consideration must be given to both their nature and the activities carried out upon them as well as the intentions of the parties toward them. This is essential to determining both the application and the scope of the duty of care. For example, the duty of care generally applies equally to

24 *Musselman v 875667 Ontario Inc (Cities Bistro)*, 2012 ONCA 41.

25 *Nolet v Fischer*, 2020 ONCA 155 at paras 24, 25.

26 Ontario *Occupiers' Liability Act*, s 6(1); BC *Occupiers Liability Act*, s 5; Alberta *Occupiers' Liability Act*, s 11.

a residential, public, commercial, or municipal premises, although the scope of the duty owed in each case may vary dramatically.

Each of the occupiers' liability acts of Ontario, British Columbia, and Alberta defines the categories of premises to which the duty applies as well as those to which it does not apply. While generally similar, the statutes are not identical and require careful review. A detailed discussion of this issue is provided in Chapter 5.

Section 1 of the Ontario *Occupiers' Liability Act* defines premises as:

> 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.

Section 1 of the British Columbia *Occupiers Liability Act* defines premises as:

> (a) land and structures or either of them, excepting portable structures and equipment other than those described in paragraph (c),
> (b) ships and vessels,
> (c) trailers and portable structures designed or used for a residence, business or shelter, and
> (d) railway locomotives, railway cars, vehicles and aircraft while not in operation.

Section 1 of Alberta's *Occupiers' Liability Act* defines premises as:

> (i) staging, scaffolding and similar structures erected on land whether affixed to the land or not,
> (ii) poles, standards, pylons and wires used for the purpose of transmission of electric power or communications or transportation of passengers, whether or not they are used in conjunction with the supporting land,
> (iii) railway locomotives and railway cars,
> (iv) ships, and
> (v) trailers used for, or designed for use as, residences, shelters or offices.

However, the Alberta statute expressly excludes:

> aircraft, motor vehicles or other vehicles or vessels except those mentioned in subclauses (iii) and (iv) or any portable derrick or other equipment or movable things except those mentioned in subclauses (i) and (v).

The premises excluded from the common duty of care or to which a greater or lesser duty applies are provided for in the statutes' trespass and permitted recreational activity provisions. The premises to which the duty does not attach generally include rural premises used for agricultural purposes, forested or wilderness premises

or vacant or undeveloped premises; golf courses (when not open); private or resource roads; recreational trails; and utility corridors.[27]

Despite the clear guidance provided by the statutes, many practitioners conflate the application of the duty of care with the analysis of its scope, suggesting that a lesser duty is owed in certain circumstances or that a common custom of not taking affirmative steps to prevent a foreseeable risk may negate the duty of care. That position is erroneous at law. The test for liability necessarily turns on the issue of foreseeability and what a reasonable occupier knew or reasonably ought to have known in the circumstances, so there are many issues that will inform the subjective analysis of the scope of the duty of care. The suggestion that a rural premises should somehow be exempt from the duty of care or subject to a lesser duty defeats the very purpose of the statute.[28] It is important to recognize that, while the duty of care remains fixed, the scope of the duty of care ought to be determined on a subjective analysis of what is reasonable in all of the circumstances of the case.

Most cases brought under the occupiers' liability legislation arise from injuries or damage to property caused by hazardous conditions on premises and typically include slips and falls caused by wet floors, icy walkways and parking lots, uneven or poorly maintained surfaces and structures, defective design or construction of steps and handrails, and deficient lighting. Another significant and often overlooked cause of claims against occupiers arises not from the condition of the premises per se but from its suitability for the activities carried on there. In permitting particular activities on their premises, occupiers have an affirmative duty to ensure that they are not only generally safe, but reasonably safe for the purposes for which they are intended.[29] For example, if someone's entrance onto a premises results from a contract of admission, the duty owed is that due to a contractual entrant.

Regardless of the cause of the injury or damages, recovery in tort is dependent on the plaintiff establishing injury and loss resulting from an act of misfeasance or nonfeasance on the part of the defendant tortfeasor.[30] As expressed by the Supreme Court of Canada in *Crocker v Sundance Northwest Resorts Ltd*,[31] "[t]he common law has generally distinguished between negligent conduct (misfeasance) and failure to take positive steps to protect others from harm (nonfeasance)."[32] The key distinction is whether the work was done deficiently or simply not done at all.

27 Ontario *Occupiers' Liability Act*, s 4(4); BC *Occupiers Liability Act*, s 3(3.3); Alberta *Occupiers' Liability Act*, s 6.1(2).

28 *Waldick v Malcolm*, 1987 CanLII 4303 at 636 (ONSC), cited with approval in *Waldick v Malcolm*, 1991 CanLII 71 (SCC).

29 *Gerak v R in Right of BC*, 1984 CanLII 392 at para 112 (BCCA).

30 *Cunningham v Wheeler; Cooper v Miller; Shanks v McNee*, 1994 CanLII 120 (SCC).

31 1988 CanLII 45 (SCC).

32 *Ibid* at para 17.

In cases such as these, it is essential to begin any discussion of liability with the consideration of a fundamental and often misunderstood negligence principle and its effect on the onus of proof. As stated by the Ontario Court of Appeal in *Greer v TP [Township of] Mulmer*[33] in the context of municipal liability:

> The law, as I understand it, is that it is the duty of a municipality to keep its roads, or to use all reasonable efforts to keep its roads, in a reasonable state of repair. When it is shown that a road is not in a reasonable state of repair and that damage has been caused by the want of repair, a ***prima facie*** case is established against the municipality. Confusion has arisen frequently by reason of the fact that the action of the municipality has been called negligent, and people have thought that it was for the plaintiff in such a case to establish negligence. That, as I say, is not what I understand the law to be. When want of repair is shown, a *prima facie* case is made out; it is then for the municipality to show that the want of repair existed notwithstanding all reasonable efforts on the part of the municipality to comply with the law.[34]

This general statement of the law of negligence applies equally to occupiers' liability cases. As in any case framed in negligence, the plaintiff's case is complete on the proof of a dangerous condition which caused their injuries. At that point, a *prima facie* case is made out and the onus shifts to the defendant to rebut this presumption by adducing evidence that it took such steps as were reasonable in all of the circumstances of the case to ensure that persons on the premises and their property were reasonably safe.[35]

Care must be taken not to misapprehend the intention of the law. The plaintiff first bears the onus of proving, on a balance of probabilities, that the unusual danger that caused their injury was caused by an act or failure to act on the part of the occupier.[36] A mere allegation that, because they were injured, the occupier must be negligent is patently insufficient.

It is relatively straightforward to establish cases of nonfeasance, since the facts generally speak for themselves: the evidence shows that the occupier failed to perform their reasonable duties. An affirmative defence is not available to the occupier in such a case, although the defence that it was reasonable not to have undertaken the work is not precluded. Cases of misfeasance are somewhat more complex insofar as the plaintiff must establish the deficiency or insufficiency of the work to rebut the evidence of steps taken by the occupier. Common examples of misfeasance include such

33 [1926] 4 DLR 132, 1926 CanLII 402 (ONCA).

34 *Ibid* at 135 (emphasis added).

35 IM Rogers, *Law of Canadian Municipal Corporations*, 2nd ed (Toronto: The Carswell Company Limited, 1988) vol 2 at 1270-71.

36 *Bauman v Stein*, 1991 CanLII 1140 (BCCA); *Lansdowne v United Church of Canada*, 2000 BCSC 1604 at para 22.

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things as incomplete winter maintenance, incompetent or non-compliant construction and repair, and failure to dry freshly mopped floors or to meet the *de minimus* duty to warn with marking cones or wet floor signs.

Success or failure in prosecuting occupiers' liability cases turns as much on the facts of the case as it does on the creativity, tenacity, and diligence of counsel. Indeed, tort law is one of the most fluid and rapidly evolving areas of legal practice. There is much opportunity within this field to make a positive contribution to the evolving body of law and to zealously advocate for the rights of both plaintiffs and defendants.

At the time of writing this book, our society is undergoing major transformative change on many fronts. The ways in which we communicate and share information across multiple platforms are evolving at a frenetic pace, sweeping many of us up and leaving many more behind. So, too, are the ways we imagine, create, and interact with our work, living, and recreational spaces. The challenge for us, as servants of the law, is to ensure that we honour the legacy of the scholars, advocates, and jurists who came before us while also blazing new trails in the pursuit of justice and fairness.