



Recent Alberta Court of Appeal Decision Confuses our Understanding of an Occupier's Duty of Care

By Lisa A. Redmond and J. Faye Armfield

Chomicki Baril Mah LLP

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Chomicki Baril Mah LLP
1201 TD Tower, 10088 - 102 Avenue NW
Edmonton, Alberta
T5J 4K2
<http://www.cbmlp.com/>

Lisa A. Redmond
Tel: (780) 702-2301
redmond@cbmlp.com

J. Faye Armfield
Tel: (780) 441-2083
farmfield@cbmlp.com

www.rmc-agr.com

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Historical Development of Occupiers' Liability in Canada

Long before the modern principles of negligence were developed, the common law held owners of land, buildings or other structures, liable for personal injuries or damage to the property of certain types of visitors. The issues of when and who could be held liable became very complex and confusing, leading to uncertainty as to the precise scope of common law principles. Dissatisfaction with the ill-defined state of the law led to the enactment of legislation setting out the obligations of occupier's towards their visitors. This legislation was meant to resolve the problems that emerged from the common law's treatment of occupier's liability and hopefully clarify what duties were owed, who they were owed to, and under what circumstances these duties could be breached.

In Alberta, the *Occupier's Liability Act*, R.S.A. 2000, c. O-4 (the "Act") provides that an occupier owes a duty of care to visitors as set out in Section 5:

An occupier of premises owes a duty to every visitor on the occupier's premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there.

An occupier is a person who is in "physical possession" of premises, or who has "responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises" (section 1(c)).

A "visitor" means (i) an entrant as of right (ii) a person who is lawfully present on premises by virtue of an express or implied term of a contract, (iii) any other person whose presence on premises is lawful, or (iv) a person whose presence on premises becomes unlawful after the person's entry on those premises and who is taking reasonable steps to leave those premises (section 1(e)).

As you can see, the Act frames the occupiers' duties quite generally, thus courts have examined the scope of this legislated duty on numerous occasions. Accordingly, the courts have determined that:

- (i) the Act creates a new standard of care (*Preston v. Canadian Legion, Kingsway Branch No. 175* (1981), 123 D.L.R. (3d) 645 (Alta. C.A.) ;
- (ii) the standard of care is one of reasonableness, and not perfection (*Kopen v. 61345 Manitoba Ltd.* (1992), 79 Man. R. (2d) 250 (Q.B. affirmed (1993) 83 Man. R. (2d) 239 (C.A); and
- (iii) the statutory duty is not one of insurance (*De Meyer v. National Trust Co.* (1995), 104 Man. R. (2d) 170 (Q.B.)).

The Supreme Court of Canada has stated that the duty of an occupier is to take reasonable care in the circumstances and the factors which are relevant to an assessment of what constitutes reasonable care will be specific to each fact situation (*Waldick v. Malcom*, [1991] 2 S.C.R. 456 at para. 33). In other words, whether or not the occupier met the legislated duty will be determined on a case by case basis and will depend very heavily on the specific facts of that matter.

Recent Trends in Alberta Case Law

In past cases, it has been suggested that because the statute imposes a duty on occupiers to ensure that their premises is reasonably safe, occupiers must take positive steps to fulfill this duty. For example, the Court of Appeal in *Preston, supra*, spoke of an occupier's "affirmative duty" which some have interpreted to mean that failing to do anything positive to remedy a potential danger automatically means that the occupier has breached their statutory duty (see also *Waldick v. Malcom* (1987), 61 O.R. (2d) 624 (H.C.)). Others saw this interpretation as incorrect and thought that the duty imposed by legislation is to ensure that the premises are reasonably safe for persons and property. It may well be that the premises is already safe without any positive action being required. (see L.N. Klar, *Tort Law*, 4th ed. (Toronto: Thomson Carswell, 2009). Further, if positive action was required in every case, it would mean that the *Act* imposed a duty akin to an absolute standard, which is impossibly high to meet. It would also effectively reverse the burden of proof, forcing the Defendant to demonstrate that the premises were reasonably safe, whereas in fact the burden rightly rests on the Plaintiff to prove that the premises were not reasonably safe.

A recent Court of Appeal decision, *Wood v. Ward*, 2009 ABCA 325, clarified that an occupier's duty is not one of absolute liability but, rather, requires a reasonable standard under the legislation. *Wood* established that an occupier has a duty under the *Act* to make their premises reasonably safe but this duty does not necessarily require affirmative action. All that is required is such care as in all of the circumstances of the case is reasonable. Specifically "doing nothing" can discharge the duty if the premises is already reasonably safe. It "does not follow that the occupier is automatically liable for any injury suffered as a result of a foreseeable risk". Moreover, the occupier does not have a duty to take every conceivable precaution. Rather, it is still necessary to show that the occupier was negligent in order to impose liability. In other words, the Plaintiff has the onus of proving that there was a duty and that the occupier breached that duty. Even if the occupier could reasonably foresee the risk and was negligent, the visitor still has a duty to have regard for their safety.

In keeping with the reasoning in *Wood*, the Supreme Court of Canada in *Fallowka v. Royal Oak Ventures Inc.*, [2010] S.C.J. No. 5 expanded on what is required of a Plaintiff in satisfying his onus of proving that the occupier was liable. Not only must the plaintiff prove that there was a duty, but the plaintiff must articulate what that duty entailed. Before there can be a finding of liability, the plaintiff must indicate what was required of the defendant to "properly" satisfy its duty of care.

These two decisions clarified the duty of an occupier and seemed to provide predictability as to what was actually expected of an occupier and also explanation as to what needed to be established by the plaintiff.

However, recently the Alberta Court of Appeal decision in *Christensen v. Calgary (City)*, 2011 ABCA 244, muddied our understanding as to when an occupier will be found liable under the *Act*. In a split decision, the City of Calgary was found liable for the plaintiffs' injuries despite the absence of both evidence outlining the parameters of the duty of care owed and evidence that the failure to meet this duty actually caused the Plaintiff's injuries.

Christensen considered two separate inline skating accidents which occurred on a pathway on public land that was specifically designed in 2001 by the City of Calgary to be used recreationally by the public. The Plaintiff, Gaston, was injured when he dropped to the ground and hit a pole, and the Plaintiff, Christensen, was injured when he was unable to negotiate a curve at the bottom of the hill. The evidence established that the City knew that in-line skaters were using this path and had also expressly approved of this usage.

The trial judge held that, despite the absence of any expert evidence, the pathway was not safe for in-line skaters and that the City should have taken additional steps such as:

- (i) consulting with the in-line skating community before conducting renovations;
- (ii) considering the needs of in-line skaters;
- (iii) formulating their own guidelines for the design of pathways for use by in-line skaters; and
- (iv) posting adequate warnings at the summit of the steep hill.

She concluded that the City's failure under section 5 of the *Act* caused or materially contributed to the Plaintiff's injuries even though there was no evidence showing that had the City acted on her suggestions, the injuries would have been avoided.

The City appealed the decision on the following issues:

- (i) Was there an onus on the plaintiffs to lead evidence of the reasonable standard to be met in the design, construction and maintenance of the pathway?
- (ii) Did the trial judge err in not requiring evidence to establish the causal connection between the City's actions and the Plaintiff's injuries?

The City argued that the Supreme Court of Canada's decision in *Fallowka* required the Plaintiffs to articulate the applicable standard of care, which they did not do. Further, there was no evidence supporting the conclusion that the City's actions or lack of actions resulted in the Plaintiffs' injuries. However, the majority decision of Justice Ronald Verger and Justice Carole Conrad held that *Fallowka* did not apply. They found that it was unnecessary for the trial judge to set out what the City might have done, particularly in light of the City's acknowledgement that to change the hill would have been

prohibitively expensive and the fact that there was no evidence that showed that the City considered other options such as prohibiting in-line skating on the pathway. As for the question of causation, the majority dealt with the entirety of that issue with the single statement that “[t]here is, on this record, ample evidence to establish the requisite causal connection between the City’s deficient conduct and the Respondents’ injuries”. How this causal connection was established, was neither elaborated on nor explained.

In his well thought-out dissent, Justice J.D. Bruce McDonald stated that he would have allowed the appeal and dismissed the claims as against the City. He pointed out that the majority’s decision, in effect, required the defendant to disprove its liability rather than requiring the plaintiffs to establish liability. This is a reverse onus and is contrary to basic principles in negligence law. Further, he noted that the trial judge failed to articulate what the applicable standard of care was in renovating the pathway. Rather, she engaged in what he referred to as ‘speculation’ and “little more than a wish list”. Justice McDonald also found that there was absolutely no evidence that had the City implemented any of the steps in her ‘wish list’ that the injuries would have been prevented. Lastly, he pointed out that for the trial judge to impose a duty on the City to develop its own guidelines for the design, construction and maintenance of in-line skating pathways when the Transportation Association of Canada could not even accomplish this task, suggested an absolute standard of care, which is contrary to the decision of the Supreme Court of Canada in *Fallowka*.

Conclusion

Christensen either represents a change in the direction of occupier’s liability law or an error in law. Neither the majority nor the dissenting opinion considered the decision in *Wood*. Instead, the majority appeared to contradict *Wood*, by arguably requiring the City to engage in positive acts to fulfill their obligations under the *Act* and shifting the burden of proof such that the City was required to establish that they discharged their duty under the *Act*.

As set out by *Wood*, just because there is a foreseeable risk, this does not automatically make the occupier liable. As stated correctly in the dissenting judgment, in “order to succeed, the plaintiffs... would have to prove on a balance of probabilities that a duty was owed to them by the City and having breached the appropriate standard of care, the City’s substandard actions caused the plaintiffs... the damages complained of” (para. 35). To do away with these requirements is akin to imposing a standard of strict liability, or in other words, deem the occupier an insurer of the visitor, which is not the law in Canada.

From looking at these recent Court of Appeal cases, it seems that the law of Occupier’s Liability is still in development. Whether or not an occupier will be found liable for damages to a visitor will depend very heavily on the facts and will not necessarily be easy to predict. As it stands, occupiers have a considerable duty to protect visitors on their property. Exactly how far this duty extends has yet to be clearly defined. It is likely that the Court of Appeal will revisit this area of law in the near future.

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