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SOMEONE SLIPPED…WHO TAKES THE FALL? THE OCCUPIERS' LIABILITY AMENDMENT ACT

The *Occupiers' Liability Act* (Ontario) (the "**OLA**") has recently been amended by the *Occupiers' Liability Amendment Act* (the "**OLAA**"), which came into force on December 8, 2020. The OLAA provides that a person who has slipped on snow or ice must give an "occupier" and any independent snow removal contractor, notice of a possible claim under the OLA (with a few exceptions) within 60 days of the date of personal injury. Prior to the OLAA, an injured party could bring an OLA claim within the usual statutory limitation period of two years. The OLAA brings a sigh of relief to landlords and tenants who may be liable as "occupiers" under the OLA.

Background

Enacted in 1980, the OLA is a statutory framework setting out the obligations and duty of care of an occupier. The OLA imposes a duty to take reasonable care to ensure parties entering an occupier's premises are reasonably safe within those premises.

The term "occupier" is a key component of the OLA. It is defined as: "(a) a person who is in physical possession of premises; or (b) a person who has responsibility for and control over the condition of the 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". There can be several "occupiers" of one premises simultaneously.

This definition can be tricky in a commercial leasing context. Because a commercial lease grants a tenant exclusive possession of its premises, clearly a tenant in possession of a premises is an "occupier" under subsection (a) of the definition.

What about a landlord? The courts have held that mere ownership is not enough to create the status of an occupier. Otherwise, as Justice Reilley quipped in *Musselman v. 875667 Ontario Inc.*, the statute would be entitled "the Landlord's Liability Act".

However, the statute provides that where, pursuant to the lease, the landlord is responsible for the maintenance or repair of the premises, the landlord 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". But the statute also provides that a landlord will be deemed not to have defaulted in this duty except where the default is "such to be actionable at the suit" of the tenant. (In other words, if the landlord has performed its repair and maintenance obligations in accordance with the terms of the lease, then the landlord has shown the requisite duty of care.)

Consequently, a landlord is an "occupier" within the meaning of the OLA if it: (1) has responsibility for and control over the condition of the premises or the activities carried on in them; or (2) is responsible under the lease for the maintenance and repair of the premises and fails to comply with its obligation.

Not surprisingly, the blurred line between these two items has generated litigation over what triggers the landlord's liability under the OLA.

Canadian courts have found that a landlord has the requisite responsibility for, and control over, the condition of a premises or the activities in them when there is a "factual proximity or symbiotic relationship" between the landlord and the tenant. One example is *Prunkl v. Tammy Jean's Diner Ltd.*, in which

the Court dealt with defining the "occupier" of a restaurant located in a hotel. The Court held that both the landlord (the hotel owner) and the tenant (the restauranteur) were "occupiers" because, due to the physical set-up of the hotel and the restaurant, a reasonable person could not distinguish between the hotel and the restaurant operations. As the restaurant was located in the lobby of the hotel, the patron who had been injured in the restaurant was not expected to recognize the tenant as the sole "occupier" of the premises.

On the other hand, the courts have found that a landlord does not have responsibility for and control over the condition of a premises when there is insufficient evidence of proximity, shared enterprise or responsibility. For example, in *Musselman*, the Court held that the landlord was not an occupier because, although the landlord had the right in the lease to inspect the restaurant premises, the landlord had little knowledge or control over the tenant's construction and renovation in the premises that led to a patron falling down a flight of stairs.

The courts have demonstrated that whether a landlord is or is not an occupier will be determined on a case-by-case basis based on the factual matrix.

Interestingly, the courts have not examined how an indemnity provision in a lease might impact an OLA claim against a landlord. Presumably, if a tenant agreed to indemnify a landlord under a lease, the tenant would be responsible for the cost of any damages payable by the landlord under the OLA.

Occupiers' Liability Amendment Act

Until recently, a claimant could bring a claim under the OLA at any time within the statutory limitation period (being two years in most cases). This has caused headaches for landlords and tenants, when claims are brought immediately prior to the expiry of the statutory limitation period, and evidence is stale and difficult to piece together.

The OLAA states that a claimant bringing a claim against an occupier, or an independent contractor employed by the occupier to remove snow or ice from the premises in respect of a personal injury caused by snow or ice, must notify the parties of their claim within *60 days* following the date of the injury. If the claimant fails to provide the notice, then their claim is barred. If the claimant complies with the 60 day notice period, then the usual statutory limitation period applies.

It is notable that the 60-day limitation period does not apply in cases where: (i) the claimant died as a result of the injury; or (ii) a judge finds that there is reasonable excuse for the want or the insufficiency of the notice and that the defendant is not thereby prejudiced in its defence.

Although the OLAA amendments are new and have yet to be adjudicated, they are bound to make it easier for landlord and tenant occupiers to defend themselves in OLA claims. They might even allow the affected parties to obtain more affordable insurance (because their exposure to a future claim is reduced).

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