



RISK 101

In this Issue:

- ❖ Team Leader's Message
- ❖ Occupier's Liability
- ❖ Inspection and Repair Policies and a School District's Liability for Slip and Fall Claims
- ❖ Websites of Interest
- ❖ About Our Organization
- ❖ Our Team of Professionals

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A Risk Management Newsletter For The University, College & Institute Protection Program's Members

Team Leader's Message

Welcome to the 2011 Spring Edition of Risk 101.

We would like to take this opportunity to ask for feedback regarding our web site. Should you require some help on the site, please feel free to contact any of our team and we will be pleased to take your call.

We hope you enjoy this publication and find it both useful and informative. Please feel free to contact us at protection.program@bcucipp.org with any suggestions for future topics.

Andrew Green, Director

Occupiers' Liability

Each year UCIPP receives a number of reports of potential "Occupiers Liability" claims. This article provides a brief refresher on the statutory obligations that the *Occupiers Liability Act* [RSBC 1996] CHAPTER 337 (the "Act") creates for occupiers, and the steps that can be taken to mitigate the risk of these types of claims arising.

What does the *Occupiers Liability Act* say?

Section 3 (1) of the *Act* stipulates:

"An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises."

This duty of care applies in relation to: "the condition of the premises, the activities on the premises, and the conduct of third parties on the premises."¹ This duty of care extends to all people who enter the premises, including trespassers. In the case of trespassers, however, where they have the intention to perform a criminal act the duty owed is significantly limited.²

1. *Occupiers Liability Act*, section 3(2) Section 3(3) and 3(3.1) of the *Occupiers Liability Act* state: Despite subsection (1), an occupier has no duty of care to a person in respect of risks willingly assumed by that person other than a duty not to (a) create a danger with intent to do harm to the person or damage to the person's property, or (b) act with reckless disregard to the safety of the person or the integrity of the person's property.

2. (3.1) A person who is trespassing on premises while committing, or with the intention of committing, a criminal act is deemed to have willingly assumed all risks and the occupier of those premises is subject only to the duty of care set out in subsection (3).

Continued on page 2

Occupiers' Liability

Continued from page 1

The Standard of Care: What is "Reasonable"?

The courts in British Columbia have consistently confirmed that the standard of care required is one of reasonableness, not one of perfection. Furthermore, there is no obligation for an occupier to warn of the ordinary risks of everyday life.

What constitutes reasonableness is assessed considering the specific circumstances of each case. Rightly, there are varying expectations for meeting the test in different circumstances and on different types of premises. For example, on an icy day, expectations with regard to timely sanding and de-icing would be much higher for the main entranceway of a building when compared to a small footpath over the premises' fields. Expectations for snow removal would also be very different in a town where snow was an uncommon occurrence, when compared to a community where snowy winters were commonplace. Factors that may be considered when determining whether the requisite standard of care was met may include:

- The size of the premises
- Who uses the premises and for what purposes
- Volume and frequency of traffic on the premises
- Whether structures on the premises met current safety standards
- Whether relevant aspects of a building met applicable building codes
- Whether there was a known hazard
- If there was a known hazard, whether there were warning signs posted
- Foreseeability of the hazard

- Whether conduct of occupier was within acceptable industry standards
- Whether a similar accident had occurred previously on the premises
- Length of time that a hazard was known to exist
- Ease with which a hazard could have been prevented

Be aware that with new developments in safety practices and with a greater awareness of risks within our society, what is accepted as "reasonable" may change over time.

What can a breach of the standard of care look like?

An occupier can breach their duty by:

- Failing to keep pathways, parking lots and fields in reasonable condition
- Failing to have appropriate lighting on the premises
- Failing to put out caution signs when washing floors
- Neglecting to clean up spills on a hallway floor in a timely fashion
- Allowing unsafe activities to take place during an on-site event
- Failing to remove out of control guests from the premises
- Unreasonable or nonexistent maintenance and inspection policies

What steps can be taken to help manage the risk of Occupiers Liability claims?

Developing a risk management plan which addresses the three areas where the duty of care is owed (condition of the premises, activities conducted on the premises and the conduct of third parties on the premises) provides the best

Continued on page 3

Occupiers' Liability

Continued from page 2

opportunity to mitigate the risk of injuries occurring on the premises and will also assist in the defense of the occupier when claims are pursued.

Consider the following strategies as part of your risk management program:

- Develop and implement inspection and maintenance policies
- Develop and implement regular cleaning and maintenance policies
- Include in policies the requirement to document inspections and maintenance
- Document inspections, maintenance, and cleaning activities, and ensure these documents are kept
- Keep up to date on safety developments and practices
- Train employees to report promptly any defects or hazards
- When hazards are discovered, address them immediately by posting signs/notices warning of the risks and/or erecting barriers to prevent access
- Ensure any renovations and expansions adhere to all applicable building code standards
- Ensure that any lease agreements explicitly state the responsibilities of each party
- Develop a policy for contracting for services which is aimed at identifying qualified and competent contractors and includes indemnity and insurance requirements in contracts
- Establish and advertise codes of conduct for staff/students/guests
- Develop strong relationships with similar organizations of similar size so that you can share loss experiences and stay current on best practices
- When accidents/losses do occur, review your policies and procedures and adjust them to mitigate the risks of recurrence

It is strongly recommended that universities, colleges and institutions regularly review their practices and policies in light of their obligations under the *Occupiers Liability Act*. Ensuring strong risk management plans are in place and following these plans will assist in preventing losses from occurring and minimize the likelihood of a finding of liability in the event that claims are pursued. ◀



Note: This article was written for the K-12 education setting but is equally applicable to the post-secondary setting.

Inspection and Repair Policies and a School District's Liability for Slip and Fall Claims

Article by James P. Carwana, Coutts Pulver LLP

School Districts have many walkways over their properties. These walkways may become uneven for a variety of reasons and slip and fall injuries may result. The inspection and repair policies of the School District can have a bearing on the question of the School District's liability for such slip and fall injuries. This was illustrated by a recent case from British Columbia involving a municipality.

Background

In *Beadle v. City of Nanaimo* [2009] BCSC 1506, a claim for injuries resulting from a slip and fall accident was made against a municipality. The plaintiff tripped on the vertical face of a difference in the elevation of a municipal sidewalk. The difference in elevation was approximately ½ inch or approximately 14 millimeters. The plaintiff's evidence was that she had not noticed the difference in elevation. After the accident, the plaintiff's husband reported the matter to the City's Public Works Yard, and the municipality inspected and made repairs.

The municipality had a by-law regarding sidewalk inspection and repair which included "checking for sections of sidewalk cracked or separated with a greater than 25 millimetre difference in elevation" (at paragraph 10). The municipality led evidence of its policy relating to sidewalk repairs. The policy was said to be "dictated by the City's

budgetary and manpower constraints" (at paragraph 11). The evidence of the Manager of the Roads and Traffic Services Department for the City was as follows:

"...He said that the sidewalks are inspected semi-annually for defects and that complaints of defects are also received from the public. He says that when a notice of defect is made, either because of the inspection or because of complaint, the matter is directed to the public works department. Repairs are carried out in accordance with the priority reading based on the severity of the defect. Mr. Denby [the Manager] says that if personal injury is sustained as a result of a sidewalk defect, it is scheduled for repair as quickly as possible regardless of its priority rating" (at paragraph 11).

The municipality's position was that it was not liable because "the difference in elevation at issue was below its threshold to repair" (at paragraph 13).

Decision

The Court referenced a number of cases relating to the liability of a government agency. It was noted that exemption from liability may arise from public policy decisions. A Supreme Court of Canada case was quoted as



Continued on page 5

Inspection and Repair Policies and a School District's Liability for Slip and Fall Claims

Continued from page 4

to what are considered policy decisions:



“True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.” (at paragraph 15)

The Court further reviewed a number of similar cases where plaintiffs had tripped over uneven sidewalks. These cases noted the cost factors which had been considered by municipalities in setting the threshold for repairs and in attempting “to balance financial considerations against the need to repair the physical infrastructure of the City” (at paragraph 18). The requirement was not to maintain sidewalks at a perfect level. Legal authority was quoted as follows:

“Such displacements of sidewalks are common and the real issue in this case is to what extent they must be tolerated as a part of urban life as a matter of policy, by which a municipality sets the parameters of their state of repair and thus excludes itself from liability to those who might injure themselves using them” (at paragraph 18).

In this regard, the case law indicates

that “it does not follow because an accident happens that a sidewalk is necessarily in a state of non-repair” (at paragraph 18).

With respect to the municipality’s policy in the *Beadle* case, the Court stated:

“I am satisfied that the defendant’s Sidewalk Inspection and Maintenance system as set out in its Bylaw No. 97-02 was a matter of policy driven by budgetary and manpower constraints. The decision of the defendant to effect repairs of sidewalks only where there is an elevation difference of greater than 25 millimetres or following an incident resulting in personal injury is a policy decision relating to budgetary and manpower constraints.

I am satisfied that the policy was adopted by the defendant in the bona fide exercise of discretion. The policy exempted the defendant from liability to the defendant arising from the 14 mm difference in elevation, subject only to the plaintiff’s submission that the policy was not carried out in a reasonable manner” (at paragraphs 20 and 21).

The Court characterized the plaintiff’s case in *Beadle* as “primarily based on her assertion that since she fell it must have been unreasonable or negligent for the City to have left the edge on which she tripped unrepaired” (at paragraph 33). The Court again quoted the legal authorities to the effect that “it would be requiring the impossible of the municipality to require that it maintain all its sidewalks in

Continued on page 6

Inspection and Repair Policies and a School District's Liability for Slip and Fall Claims

Continued from page 5

perfect level" (at paragraph 36). In concluding that the plaintiff's claim ought to be dismissed, the Court held:

"I am of the view that the principles set out in both of those decisions are of application. A municipality cannot provide a perfectly smooth surface on its sidewalks. Such a standard would be inordinately expensive, if not impossible to achieve. Other than the plaintiff's own unfortunate experience, there is no evidence that what she tripped over was so obviously hazardous that the defendant, had it even been aware of the elevation difference, was required to repair.

I find that the small difference in elevation at issue was a minimal hazard and not a defect that reasonably required repair. I am of the view that the plaintiff fell because she did not use ordinary care for her own safety" (at paragraphs 38 and 39).

It is worth noting as well that evidence of the maintenance programs carried out by school districts has been a factor in dismissing claims in other cases. In *Nyuli v. The Board of School Trustees of School District #22 (Vernon)*, (No. 8700220, Vernon Registry, August 8, 1991), the court held that the maintenance program of the school district was reasonable in deciding the case for the school district. In *Mynott v. The Board of School Trustees of School District No. 43 (Coquitlam) et al.*, 2005 BCCA 204, the finding that the "the school district's system of inspection was adequate and reasonable" (at para 23) was noted in the determination for the school district.

Considerations

School Districts which do not have a policy relating to inspection and maintenance matters may wish to consider implementing such a policy. In formulating such a policy, School Districts may wish to consider obtaining information from their local municipalities concerning the standards for inspection and repair which the municipalities use and the reasons for such standards. Consideration could also be given to the School District's budgetary and manpower constraints. The policy arrived at would then involve an attempt to balance financial considerations against the need to repair the School District's physical infrastructure. As indicated by the legal authorities, having a policy relating to inspection and maintenance can provide an important defence for School Districts facing personal injury claims arising from defects. In addition, the exercise involved in formulating such a policy will assist the School District in ensuring it has dealt with such matters in a rational way in light of the relevant constraints it faces. ◀

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Reproduced with permission of the publisher from *Risk Management in Canadian Education*, Vol. 10 No. 3, February 2010. James P. Carwana is a senior associate counsel with the law firm Coutts Pulver LLP in Vancouver and co-General Editor of *Risk Management in Canadian Education*.

Websites of Interest

Risk Management Conferences:

RIMS 2011 Annual Conference May 1-5, 2011, Vancouver, British Columbia

<http://www.rims.org/annualconference>

2011 Rims Canada Conference September 18-21, Ottawa, Ontario

<http://conference.rimscanada.ca>

Other:

Risk Management Magazine

<http://www.rmmagazine.com/>

Canadian Risk Management (CRM) Program. Simon Fraser University offers evening courses toward CRM designation in downtown Vancouver and downtown Victoria. For more information call them at 778-872-5095, see <http://www.sfu.ca/cstudies/mpprog/rims.htm>. or send an email to mpp-infor@sfu.ca

University of Northern British Columbia offers weekend courses toward the CRM designation in Prince George. For more information call them at 1-866-843-8061, see <http://www.unbc.ca/continuingstudies/certificates/riskmanagement.html> or send an email to cstudies@unbc.ca.



About Our Organization...

We are the Client Services Team for the University, College & Institute Protection Program (UCIPP). UCIPP is a self-insurance program which is funded by the Province of BC. The program is housed within the offices of the Risk Management Branch of the Ministry of Finance which also has responsibility for similar programs such as the Health Care Protection Program, and the Schools Protection Program. As part of the services of our program, we provide risk management and claims & litigation management services to UCIPP member entities including all institutions.

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