

Court of Appeal upholds occupier's liability for failing to provide alternate exit route

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On Jan. 12, 2024, the Court of Appeal for Ontario released its decision in *Lyng v Amex Ontario Place Corporation*, [2024 ONCA 23](#), upholding a finding of liability against the defendant occupier in a somewhat novel fact pattern. This decision is an important reminder that unwise conduct by a plaintiff will not necessarily shield an occupier from liability, even if it does give rise to contributory negligence.

Background

The action arose out of a serious knee injury sustained by the plaintiff on July 14, 2016, as he was leaving a concert. The plaintiff, who had consumed alcohol and was wearing flip-flops, initially tried to use a pedestrian bridge to access the nearby transit station, but after finding that the bridge was closed (by Ontario Place staff), he and his friend descended a nearby hill instead. The hill was wet and slippery due to recent rainfall and had no barricades or warning signs.

The trial decision

The trial judge rejected the plaintiff's assertion that he was injured as he slid down the hill, finding instead that the plaintiff had jumped near the bottom of the hill and hurt his knee as he landed in an asphalt parking lot. Nonetheless, the trial judge found Ontario Place to have breached its duty of care under s. 3 of the **Occupiers' Liability Act**, while assigning 25 per cent contributory negligence to the plaintiff. Liability against Ontario Place was grounded in its failure to erect barriers to prevent people from using the hill and by otherwise not informing them that the hill, because it was wet, posed a risk.

In addition to general damages and past loss of income, the trial judge awarded the plaintiff \$100,000 for loss of competitive advantage, on the basis that the plaintiff might require further knee surgery in 10-15 years.

The appellate decision

Ontario Place appealed on various issues, including the trial judge's consideration of a theory of liability not raised in the pleadings, his causation analysis, and his award of damages for loss of competitive advantage.

The Court of Appeal unanimously upheld all aspects of the trial judgment. First, it **rejected the contention that the focus on Ontario Place's decision to close the pedestrian bridge and not direct attendees to an alternate safe exit was "a novel theory of liability" found for the first time in the trial judge's reasons.** Instead, it held that the statement of claim was pleaded sufficiently broadly to encompass this theory of liability, and that in any event, this theory had been explored in cross-examination of the plaintiff and in both sides' closing arguments.

Next, the Court dismissed the argument that Ontario Place's failure to provide an alternate exit route was not the **"but for" cause of the plaintiff's injuries, given the finding that he jumped at the bottom of the hill.** The Court held that it was open to the trial judge to find that the decision to close the bridge and not direct attendees to an alternate exit **set off the chain of events that ended in the plaintiff's injuries, particularly given that it was well-known that many of the attendees had consumed alcohol.** While the plaintiff was partially the author of his own misfortune by choosing to jump at the bottom of the hill, it was appropriate to treat this a source of contributory negligence, since there can be multiple negligent causes of a party's injury.

Finally, the Court emphasized that the standard for appellate interference with a damages award is an onerous one, generally requiring an error of principle or law, or a palpably incorrect or wholly erroneous assessment of damages. While acknowledging that the expert evidence on this point from the plaintiff's orthopedic surgeon was **"superficially inconsistent,"** the Court went on to state that all that was necessary to award damages for loss of competitive advantage was a real chance of future income loss, and that such a finding was available on the evidence before the trial judge.

Commentary

This decision illustrates the liability risk that an occupier of a premises may face when it takes steps to close a pedestrian route but fails to direct pedestrians to an alternative route or fails to warn pedestrians from using an unsafe route. In such a circumstance, particularly when alcohol is consumed at an event, the occupier may not be able to avoid liability simply by pointing to unsafe choices made by the plaintiff.

For more information on defending occupiers' liability claims, please reach out to any of the key contacts listed below.

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