



ONTARIO OCCUPIERS' UPDATE

Q3 | JULY - SEPTEMBER 2025



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In This Issue:

1. **No Liability Found Against City and Contractor For Motor Vehicle Accident That Occurred In A Construction Zone**

Valerio et al v. City of London et al, 2025 ONSC 4332 (CanLII)2

2. **Application Of Pure Salt To An Icy Walkway In -10C Temperature Deemed Negligent By Court In Slip And Fall Action**

Merkley v. St. Lawrence College of Applied Arts and Technology et al, 2025 ONSC 4368 (CanLII)..... 5

3. **Plaintiff Permitted To Amend Statement of Claim 1 ½ Months Prior To Trial To Allege Defendant Is An “Occupier” Under the Occupiers’ Liability Act**

Hudson v. Drain, 2025 ONSC 4499 (CanLII)8

4. **Defendants Found Not Liable For Plaintiff’s Fall From Deer Blind Situated On A Rural Property**

Hudson v. Drain, 2025 ONSC 5396 (CanLII).....10

1. *Valerio et al v. City of London et al, 2025 ONSC 4332 (CanLII)*

On August 7, 2013, the plaintiff, Joseph Valerio ("Valerio") was driving his 15 year old minivan in London, Ontario, through an intersection that was in the process of being repaved. His mother, Santa Valerio ("Santa"), was a passenger in the vehicle. The conditions on the day of loss were clear. There was no precipitation.

While proceeding through the intersection allegedly between 40-50 kilometres per hour, Valerio will say that he heard a "big bang". The undercarriage of his van hit the rim of a water valve, causing the vehicle airbags to deploy. The force of the airbag displaced Valerio's hand from the steering wheel. Despite this, he was able to drive slowly through the intersection and pull his vehicle over to the right side of the road. Valerio claims that, as a result of the incident, he and Santa were injured. In addition to the claims advanced by Valerio and Santa, claims were advanced pursuant to the provisions of the *Family Law Act* (collectively the "Plaintiffs").

The road was under construction when the loss occurred. The construction was being performed by the defendant Hoclim (Canada) Inc., operating as Dufferin Construction Company ("Dufferin Construction"). Dufferin Construction had milled down the roadway, exposing two water valves. Each water valve had been ramped with asphalt and marked with fluorescent orange paint.

At trial, in chief, Valerio gave evidence that he was aware of the construction in the area. He advised that as he approached the intersection he observed an elevated object that was orange, and that he drove his vehicle in such a way to "straddle" the object. However, on cross-examination, he admitted that he had not seen the valve and that he only saw the orange markings post-accident. Valerio did recall seeing striped "tiger barrels" indicating that construction was ongoing, but he denied seeing any construction pilons, barricades, or signs.

Post-accident, Valerio took photos of the intersection. The Court, upon reviewing the photos, noted that the water valves were marked and the markings were visible. Moreover, there was additional evidence from Dufferin Construction's Foreman's Daily Work Record to indicate that the water valves were protected through ramps, paint, and signage.

The Plaintiffs alleged that Dufferin Construction was negligent in its maintenance of the roadway pursuant to common law principles, but notably not pursuant to the duties imposed upon it under section 3 of the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2. (the "*OLA*"). The Plaintiffs also alleged that the City of London (the "City") breached its statutory duty to keep the road in a state of repair under section 44 of the *Municipal Act, 2001*, S.O. 2001, c. 25 (the "*Municipal Act*").

Framework To Assess The Liability Of Dufferin Construction

The Court noted that while the Plaintiffs chose to advance their case against Dufferin Construction based on common law negligence, there is jurisprudence to suggest that the liability of a road

contractor is more appropriately determined under the *OLA* (*Miles v. Corporation of the County of Elgin et al.*, 2020 ONSC 6014). Despite this, the Court noted that its analysis of the standard of care remained the same under both frameworks - as the statutory standard of care under s. 3 of the *OLA* is effectively the same as the standard of care under common law negligence principles.

To establish that Dufferin Construction was negligent, the Plaintiffs had to show that:

1. It owed a duty of care to the Plaintiffs to avoid the kind of loss alleged;
2. It had breached the applicable standard of care;
3. The Plaintiffs sustained damage; and
4. Such damage was caused, in fact and in law, by Dufferin Construction's breach.

Framework To Assess The Liability Of The City

The liability of the City was to be assessed pursuant to section 44 of the *Municipal Act*, which imposed a duty on the City - and created a statutory cause of action - to keep the roadway "in a state of repair that is reasonable in the circumstances". Available to the City were various statutory defences included in section 44(3) of the *Municipal Act*.

Failure To Establish A Breach Of The Applicable Standard of Care

At trial, the Plaintiffs did not lead any evidence to prove that the defendants breached the applicable standard of care. Instead, the Plaintiffs asserted that the Court should infer, based on circumstantial evidence, that the water valve was unreasonably high. The Court disagreed. Expert evidence on the standard of care for road maintenance and the reasonably safe height of a water valve was vital to the Plaintiffs proving their case.

While there are two exceptions to the rule that expert evidence needs to be lead on issues that are outside the evidence and knowledge of a judge or jury - namely (a) where the issues at hand are non-technical and within the knowledge and experience of the ordinary person; and (b) where the impugned conduct of a defendant is so egregious that it is obvious that their conduct had fallen below the standard of care – neither exception applied in the case at hand.

In failing to call expert evidence, the Plaintiffs had not established that either Dufferin Construction or the City had breached the applicable standard of care.

The Plaintiffs' action was dismissed and judgment was granted in favour of the defendants.

In The Alternative

If in fact expert evidence was not required, the Court found that the defendants were not negligent.

Based on the evidence before it, the Court found that the water valve was at a safe height (between 2-3 inches above the road surface) and was sufficiently marked with fluorescent orange

paint making it plainly visible to an ordinary driver exercising reasonable care. This was based on both a lack of evidence from the Plaintiffs regarding its height, and the observations and evidence provided by Dufferin Construction.

Additionally, the Court found that there was sufficient evidence to reasonably infer that the accident could have been caused by the state of Valerio's vehicle (noting that it was not persuaded that the vehicle was sufficiently well maintained), and its speed.

Damages

In spite of its finding that neither defendant was negligent, the Court completed its analysis by considering damages.

Valerio alleged that he sustained an injury to his cervical spine, left shoulder, chest, left wrist, knee, and Temporomandibular joint. He alleged that he developed chronic pain. In considering his damages, the Court noted that it did not find Valerio credible or reliable, noting that it believed that he had "grossly exaggerated or misrepresented" his symptoms, notably in the course of an expert physiatry assessment (thus rendering its findings unreliable). While evidence was also attempted to be lead via Valerio's treating physicians, the Plaintiffs had not complied with Rule 53.03, and thus, his treating physician's evidence on causation were not admissible. Ultimately, Valerio's general damages were assessed at \$60,000.

Santa, who was 93 at the time of the trial, and suffering from dementia, did not testify at trial. Evidence regarding her injuries was tendered via medical records. It was suggested that, as a result of the accident, Santa suffered from hearing loss; and injuries to her left wrist, right hand, right arm, bilateral shoulders, and neck. The Court accepted, on the basis of treating physician clinical notes and records, that Santa suffered mild soft-tissue injuries in the accident. However, there was insufficient evidence to support a finding of causation between the accident and her alleged hearing loss. Santa's general damages were assessed at \$5,000.

Considering the Family Law Act claim asserted by Valerio's wife for loss of care, guidance, and companionship (mainly based on a decline in activity together and assistance with household tasks), the Court assessed a \$5,000 award.

2. *Merkley v. St. Lawrence College of Applied Arts and Technology et al*, 2025 ONSC 4368 (CanLII)

On January 3, 2019, Avery Merkley (the “Plaintiff”), then 19 years old, was the course of traversing a walkway located on a property owned by St. Lawrence College of Applied Arts and Technology (the “College”) when he fell on ice. As a result, he sustained an unspecified “significant fracture”.

The College had employed the services of the defendant David Brown Construction Ltd. (the “Contractor”) to provide winter snow and ice removal at the College.

Damages had been agreed upon between the parties. The trial proceeded on the issue of liability only. The parties agreed that the *Occupiers’ Liability Act*, R.S.O. 1990, C.O.2 (the “OLA”) applied both to the College and Contractor.

Conditions On The Date Of Loss

It was the evidence of the Plaintiff that in the days leading up to the loss there had been significant snowfall. In the hours prior to the loss, the temperature ranged from -12C to -10C at the time of the fall.

The Plaintiff had been transported to the College, to attend a medical appointment, in a vehicle operated by his mother (and in which his mother’s partner was a passenger). It was noted that the road conditions encountered during the drive to the College were “quite bad”. The building that housed the medical office that the Plaintiff intended to attend at was located adjacent to an asphalt parking area, which lead to the concrete walkway where the loss occurred. The parking lot surface had a slight snow covering which did not cause the Plaintiff any difficulty.

When the Plaintiff reached the walkway, he noted that it looked “wet”. He observed scattered bits of salt on the walkway. He formed the impression that it was safe to proceed. However, once he stepped onto the walkway, his right foot slipped out from under him and he fell to the ground. His torso landed to the right of the walkway and his right leg landed under him.

The walkway was observed by the Plaintiff’s mother and his mother’s partner following the loss. Both described the walkway as being covered with a thick layer of black ice. While there were bits and pieces of rock salt scattered on the walkway, they had not melted the ice.

The College’s Winter Maintenance Contract

As per the College’s contract with the Contractor, the Contractor was required to clear snow and manage winter ice conditions for parking lots and walkways when more than 5cm of snow fell. To facilitate the carrying out of the work, the Contractor monitored the weather conditions and dispatched appropriate personnel and equipment to carry out the maintenance. All areas were to be cleared by 7am.

While the contract specified that walkways were to be treated with “ice melt”, evidence before the Court established that the College permitted the Contractor to treat walkways with salt only.

The Contractor was required to keep records detailing its maintenance activities.

The Decision To Permit The Application of Salt Only Instead Of Ice Melt

An employee with the College’s Facility Management Services, Jeremy Ruutel (“Ruutel”) testified that while its contract with the Contractor required that “snow melt” and not salt be used on walkways, the College had agreed to allow the Contractor to salt the walkways. Ruutel advised that, in his opinion, the application of salt rendered a satisfactory result and was effective on walkways in the winter. He did not, however, have any training in the science of salt application and could provide no information on why the College’s former requirement that ice melt be applied to walkways had been abandoned in favour of the application of salt only. Notably, a sand salt mixture was applied to parking lot surfaces.

When an employee of the Contractor was asked about the decision to switch from applying ice melt on walkways to salt, he advised that the practice had been previously abandoned in order to avoid sand and grit being tracked into the College’s buildings.

Maintenance Of The Area Prior To The Loss

Walkways on campus were treated by the Contractor using a Kubota tractor equipped with a snowblower on the front and a salt dropper on the back. It was the evidence of the Contractor’s employee, that the subject walkway would have been treated with salt approximately four hours prior to the Plaintiff’s fall. No sand had been applied to the walkway.

The Contractor kept no records. There was, therefore, an absence of any available record that detailed when the walkway had been treated with salt, or the quantity of salt applied.

Best Practices

The Court was assisted by the evidence of two expert engineers in its assessment of the applicable standard of care and industry best practices applicable to the action.

The Court concluded that the key standard of care issue in the case was whether the surface of the walkway where the Plaintiff fell had been properly treated by the Contractor for ice build-up in view of existing and forecast weather conditions. Notably, the Contractor was required to adhere to certain standards or accepted practices, such as those guidelines published by the Transportation Association of Canada (TAC guidelines) and those of the Canadian Parking Association.

As per the industry standards, if rock salt is used to prevent or mitigate ice formation, it must be applied properly and only when temperatures are appropriate as salt is only effective within a certain temperature range. The Court accepted the evidence of the Plaintiff’s expert that pure salt is “ineffective at -10C or colder”, and is not recommended for use at colder temperatures. As

per the evidence before the Court, from 2:00 am until 8:00 am on the date of loss the air temperature was -12 C, then from about 9:00 am to 10:00 am it was -11 C. From 10 am to 11:00 am (approximate time of the fall), it was -10 C. The use of salt to prevent ice formation at the prevailing temperatures was ineffective.

The Court further accepted the evidence of the Plaintiff's expert that applying sand – with the appropriate amount of salt in the mix - when the surface temperatures were below -10C during the early morning of the incident day, would have improved traction on the walkway.

Findings

Both the College and the Contractor owed a duty of care to the Plaintiff as prescribed by section 3 of the *OLA*.

Neither the College nor the Contractor had a satisfactory system in place for ice prevention on its walkways. The Court found that the defendants, for reasons of their own, departed from a thorough ice management plan in their service contract, in favour of a practice of applying pure road salt to their sidewalks in very cold temperatures and when precipitation at freezing temperatures was forecast in weather reports. Pure salt was used on the walkways irrespective of how cold it was or was forecast to be, even on very cold days when salt was chemically ineffective. The salt treatment on College walkways never included ice melt or a mixture of sand to promote traction, which was especially important when salt was not working effectively due to significantly cold temperatures. The application of salt on the walkway in the hours leading to the loss was ineffective.

Turning to causation, the Court found that the question of causation had been satisfied by the Plaintiff on the balance of probabilities. Had the defendants used an ice mitigation technique in the circumstances of this case, the walkway would have been significantly less slippery and the Plaintiff would not have fallen.

Both the College and Contractor breached their obligations under section 3 of the *OLA*.

No finding of contributory negligence was made on behalf of the Plaintiff.

3. *Hudson v. Drain*, 2025 ONSC 4499 (CanLII)

In this action, the Court considered a motion made by the plaintiffs to amend their Statement of Claim to specifically allege that the defendant Todd Drain ("Todd") was an "occupier" within the definition as stated in the *Occupiers' Liability Act*, R.S.O. 1990 c. O.2. (the "*OLA*"). Of note, the trial of the action was set to proceed within one and a half months of the motion date.

On November 4, 2016, the plaintiff, John Hudson ("Hudson"), had been hunting with Todd on a property owned by the defendants Wayne and Heather Drain (the "Drain Defendants"). Todd, the Drain Defendants' son, owned a property adjacent to the Drain Defendants' property. While hunting, Hudson alleges that Todd directed him to occupy a deer blind located on the Drain Defendants' property. Hudson fell out of the deer blind and sustained injury. Todd allegedly maintained the deer blind and baited the trails on both his and his parents' property, which together comprised over 260 acres of land.

Hudson issued a Statement of Claim on August 1, 2018, naming both Todd and the Drain Defendants. The Statement of Claim did not explicitly allege that Todd was an occupier of the lands owned by the Drain Defendants, rather, it only made allegations against Todd grounded in negligence. The Plaintiffs submit that since the filing of the Statement of Claim, they came to receive information that caused them to form the opinion that Todd may meet the legal definition of an "occupier" under the *OLA*. Todd opposed the relief on the basis that any claim under the *OLA* is statute barred by the operation of the *Limitations Act*, S.O. 2002, c. 24 (the "*Limitations Act*"), and on the basis that the amendments would constitute brand new facts and a brand new cause of action.

Following preliminary consideration of a responding motion by Todd to strike certain paragraphs of the affidavit material filed in support of the plaintiffs' motion, the Court considered whether or not the proposed amendments rely on facts which had been substantially pleaded in the initial Statement of Claim. The Court considered both Rule 26.01 of the *Rules of Civil Procedure* and the provisions of the *Limitations Act*.

In considering the request, the Court noted that it makes no comment on whether Todd meets the definition of "occupier" under the *OLA*, noting that the motion did not require the Court to come to such a conclusion. The question on the motion was simply whether the proposed amendment seeks to rely on facts which have been substantially pleaded in the initial Statement of Claim. If so, a new cause of action is not asserted. If not, a new cause of action is asserted – one that is statute barred.

In the view of the Court, the original Statement of Claim contained all the pleaded facts necessary to come to the legal conclusion that Todd may be liable in negligence for breach of a duty of care, or liable for breaching his duty of care as an "occupier" in the *OLA*. The material facts pleaded against Todd were essentially the same allegations made against the Drain Defendants who are alleged to be "occupiers". The allegation that Todd was an "occupier" was not a new

cause of action but rather a legal conclusion that flowed directly from the facts and allegations as originally pleaded. Additionally, the Plaintiffs had plead a general reliance on the provisions of the *OLA* in the original Statement of Claim.

While Todd contended that there was no prior allegation in the Statement of Claim that he had any “control” of persons upon the property, the Court stated that the original allegations that Todd instructed Hudson to enter the deer blind and that he failed to properly oversee and ensure the safety of persons using it, suggested an element of control over persons allowed to enter and use the premises. Moreover, given that Todd plead in his Statement of Defence that he denied that he was an occupier of owner of the premises, it appeared to the Court that he had anticipated such an argument and conveyed his position.

The Court emphasized that Rule 26.01 allows amendments unless they cause prejudice that cannot be compensated by costs or an adjournment. Todd’s ability to file an amended Statement of Defence and argue against the “occupier” designation mitigated any potential prejudice. While the amendment would provide the potential for further discovery, the Court noted that it was still possible for the trial to proceed as scheduled “if things move along efficiently”.

The Plaintiff’s motion was granted and the amendments were permitted.

4. *Hudson v. Drain*, 2025 ONSC 5396 (CanLII)

The plaintiff John Hudson (“Hudson”) sustained injury when he fell out of a deer blind while hunting on a property owned by the defendants Wayne and Heather Drain (the “Drains”). The trial of the action proceeded before a jury. Following the hearing of the evidence and the closing of the defendants’ cases, an issue arose regarding the questions to be put to the jury.

Underlying Facts

On November 4, 2016, Hudson was invited by his son-in-law, the defendant Todd Drain (“Todd”) to go hunting and to stay over at a hunting cabin that Todd was building on his property. Hudson attended at the property. He had lunch on the date of loss at Todd’s cabin, and set out on his own to go out hunting post-lunch. Todd remained at the cabin.

Hudson, who was an experienced hunter, went hunting on Todd’s parents property - the Drains’ property, which was adjacent to Todd’s property. Situated upon the Drains’ property was a deer blind. Todd had placed apples near the blind to attract deer. He also maintained trail cameras about the properties to monitor animal activity. The deer blind was located in a spruce tree, approximately 12-15 feet off of the ground. Hudson climbed a ladder attached to the spruce tree to enter the blind with his gear. After sitting in the blind for approximately 1 ½ hours, his legs became stiff. Hudson stood up to stretch his legs and somehow fell out of the blind. While uncertain as to how he fell, Hudson believed that he slid out feet first due to the floor of the blind being wet. Hudson was seriously injured.

The Pleadings

A Statement of Claim was filed on August 1, 2018, that set out separate allegations against the Drains – which were founded in the *Occupiers’ Liability Act*, R.S.O. 1990 c. O.2. (the “OLA”); and against Todd – which were founded in negligence. On July 30, 2025, the plaintiff was permitted to amend the Statement of Claim to expressly allege that Todd was an occupier for the purposes of the OLA, and to strike out allegations that the blind had been constructed by Todd (*noting that it had been constructed by an unknown person at an unknown time).

In response, Todd amended his Statement of Defence to specify that the property was a “rural property” and that the parties had gathered there for “the recreational purpose of deer hunting”. In addition, he plead that, while he denied that he was an occupier of the premises, in the alternative, he did take such care as in all the circumstances of the case was reasonable to see that persons entering onto the premises, including Hudson, were reasonably safe while on the premises.

Withdrawal Of The Amendment To The Statement Of Claim

On the first day of trial, plaintiff counsel advised that Hudson wanted to withdraw the amendment to the Statement of Claim, as he was no longer alleging that Todd was an “occupier” of the

premises. Hudson only wished to maintain his claims in negligence. Hudson also reaffirmed that he was not alleging that Todd had constructed the deer blind. Todd's lawyer took the position that, with Hudson's acknowledgment that Todd did not construct the blind, and with the withdrawal of the allegation that he was an "occupier", there was no basis to find Todd liable for the loss as there was no longer any basis on which to allege that Todd owed Hudson a duty of care.

Hudson was permitted by the Court to withdraw the amendments. As to the effect of the withdrawal of the amendment, and whether Todd owed any duty of care to Hudson, the Court advised that it would wait until all of the evidence was in, and would hear argument and decide what, if anything, remained for the jury to decide.

Questions To Be Put To The Jury

Following the close of the defendants' cases, the Court heard submissions regarding the questions to be put to the jury. The issue revolved around the question of whether Todd owed Hudson a duty of care. The parties agreed that whether Todd owed Hudson a duty of care is a question of law for the court to determine before the matter went to the jury.

Hudson argued that Todd owed him a duty of care because Todd was the "organizer" of the hunt. As the organizer of the hunt, Todd exercised control over it. Todd could invite guests and grant them permission to go on his parents' property. Todd also had control over the activity as illustrated by the fact that he left apples near the deer blind to attract deer and maintained trail cameras to monitor animal activity around the property. This relationship imposed a duty on Todd to take positive action to protect Hudson from harm. Second, Hudson alleged that Todd had a duty of care based on the allegation that Todd went to the deer blind a couple of weeks before the hunt and removed a green artificial turf carpet (the "Carpet") from the floor of the deer blind. This act of removing the Carpet caused the floor of the deer blind to be wet and slippery, creating a hazard. Removing the Carpet was an act of misfeasance.

Todd argued that, even assuming Hudson's allegations to be true (they were disputed at trial), Hudson had simply described the relationship defined as "occupier" in the *OLA*. Having disavowed any reliance on the *OLA*, the Hudson could not rely on the same relationship to found an argument in common law negligence, because, by its express terms, the *OLA* applies in place of the common law.

Consideration of the *OLA*

In order to understand Todd's position, the Court reviewed the provisions of the *OLA*, namely sections 1 through 4. Section 4(1), notably, provides for a lesser duty of care in the specific circumstances and types of premises set out in subs. 4(3) and (4). As per those sections, where a person enters a rural premises used for agricultural purposes, including woodlots and forested premises, and the entry is for recreational purposes and no fee is paid, the person is deemed to have willingly assumed all risks, and the occupier's legal duty is "to not create a danger with the

deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property”.

The Court highlighted that the Court of Appeal has described the duty of care established by s. 4(1) as a “lesser duty of care” than the duty of care established by s. 3(1). Where s. 4(1) applies, it does in fact dislodge the duty of care imposed by s. 3(1) and imposes on an occupier a lesser duty than the duty imposed in s. 3(1). Moreover, the Court highlighted that the legislative policy for including s. 4 in the *OLA* is “to encourage private landowners to voluntarily make their property available for recreational activities by limiting their liability”.

Application Of The *OLA* To The Present Case

The Drains’ property qualified as a rural property under section 4 of the *OLA*. Hence, the Drains owed Hudson the lesser duty of care. There was no allegation put forth by Hudson that the Drains had created a danger with deliberate intent – notably, they gave evidence that they were not aware that the deer blind was located on their property. The question to be put to the jury with regards to the Drains was whether they acted with “reckless disregard” of the presence of Hudson.

If Todd were an “occupier” under the *OLA*, s. 4 would also apply to him, and he would be subject to the lesser duty of care in s. 4(1). Moreover, if Todd was an occupier and s. 4(1) applied, Hudson would have been “deemed to have willingly assumed all risks”. If Todd was not an occupier under the *OLA*, then Todd had the burden of proving that Hudson willingly assumed all risks. It is for this reason that Hudson withdrew the allegation that Todd was an “occupier”, and sought to base his case exclusively on Todd’s common law duty to take reasonable care. The Court noted that the fundamental flaw in Hudson’s position, however, was s. 2 of the *OLA*, which provides that the *OLA* “applies in place of the rules of the common law”. If Todd was an “occupier” within the meaning of s. 1(b) of the *OLA*, then the common law duty did not apply.

The Court agreed with the submission of Todd – namely that once Hudson withdrew his allegation that Todd was an “occupier” within the meaning of s. 1(b), he could no longer claim that Todd owed a common law duty of care by virtue of Todd’s “responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises”. Hudson could not evade the *OLA* by withdrawing the allegation that Todd was an “occupier” - but still assert that Todd owed a common law duty of care by virtue of Todd’s alleged responsibility over the conditions of the premises or activities carried on or his alleged control over the persons allowed to enter the premises. The result of Hudson’s withdrawal, combined with Todd’s consistent position that he was not an occupier, signified to the Court that both parties agreed that Todd was not an “occupier”. With this agreement, Todd could not be found to owe a duty of care to Hudson.

In response to the suggestion that Todd could not be found to owe a duty of care to Hudson given that he was not an “occupier”, Hudson made two submissions to the Court – both of which were rejected. First, Hudson argued that the principle that the *OLA* applies in place of the common

law, is only with respect to “occupiers” as defined in s. 1(a) of the *OLA*, and not occupiers as defined in s. 1(b). Hudson alleged that where it is argued that an individual is a s. 1(b) occupier, they have the choice to proceed under either the common law or the *OLA*. This argument was found to be without textual foundation and contrary to the principles of statutory interpretation. Secondly, Hudson argued that s. 9(1) of the *OLA*, which provides an exception to s. 2 of the *OLA* applied. The Court rejected this argument on the basis that it would nullify s. 4(1) of the *OLA*, and more importantly, on the basis that s. 9(1) only applied to “occupiers” under the *OLA*. Because Hudson had withdrawn his amendments and the allegation that Todd was an occupier, s. 9(1) of the *OLA* had no application to the case.

Findings

On the basis of the foregoing, the Court found that:

1. To the extent that Hudson’s claim is based on the allegation that Todd owned a common law duty of care by virtue of his alleged responsibility over the conditions of the premises or activities carried on or his alleged control over the persons allowed to enter the premises, Hudson’s withdrawal of the allegation that Todd was an “occupier” under the *OLA* meant that these questions could not be put to the jury. This eliminated all allegations relating to nonfeasance, since allegations of nonfeasance are based on Todd being under a duty of care as an “occupier” as defined by s. 1(b) of the *OLA*.
2. On the issue of misfeasance which was rooted in the allegation that Todd removed the Carpet from the floor of the deer blind that resulted in the floor of the blind being wet and slippery and causing Hudson’s fall - since there was no longer any allegation that Todd was an “occupier”, Todd’s liability for allegedly damaging the deer blind would be based on the common law. It would then be open to the jury to decide whether Todd’s action in removing the Carpet fell below the conduct of a reasonably prudent or reasonably careful person, and whether the removal of the Carpet caused Hudson to fall or slip from the deer stand. Accordingly, the jury could be asked questions relating to potential negligence for allegedly removing the Carpet.
3. While the evidence was contentious regarding whether Todd had removed the Carpet from the deer blind, there were sufficient facts before the jury to permit questions about the Carpet to be put to it.

Findings of the Jury

Ultimately, questions were put to the jury concerning misfeasance and the Carpet, including whether, on the balance of probabilities, the Carpet was on the floor of the deer blind on the date of loss. In answering the questions, the jury found that the Carpet was present. Given that answer, it was not necessary for them to consider any of the other questions, and the action against Todd was dismissed.

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