Landowner Liability for Climbing

"If I allow people to climb on my land, am I liable if they hurt themselves?"

Landowners and land managers throughout Ontario frequently ask this question of the Ontario Access Coalition ("OAC"), and for good reason. Landowners, land managers, and all other land "occupiers" who allow people to climb on their land do not want their generosity rewarded with the burden of liability for a climbing accident.

This pamphlet provides a brief overview of the risks to occupiers arising from the use of their land by climbers. Though the pamphlet focuses on climbing, it applies to other recreational activities like hiking, mountain biking, and cross-country skiing.

Disclaimer: The information in this pamphlet is not legal advice. Only your lawyer can provide you with legal advice. The law and legislation cited are subject to change.

The Ontario Access Coalition

The OAC is a volunteer, not-for-profit group that works with the climbing community, landowners, land managers, and conservation authorities to keep climbing areas open in an environmentally responsible manner.

Please visit the OAC's website at www.*ontarioaccesscoalition.com* to learn how the OAC can assist you manage climbing on your land.

What is Climbing?

Climbing is a low impact, year-round, self-powered outdoor activity in which participants ascend steep rocks and ice.

Climbing has a long history in Ontario. Climbers first began ascending the Niagara Escarpment in the early 1900s. In the period following the Second World War, newly arrived European climbers explored the Escarpment's full length. Their climbing access trails are the precursor to what is now the Bruce Trail. Today, there are over 3,000 climbing routes in Ontario and over a dozen climbing gyms in Southern Ontario.

Despite the media's tendency to sensationalize the risks of climbing, it is a very safe activity. Climbers significantly reduce the risk of injury through the use of ropes and other equipment. Climbers are ten times less likely to require rescue than the average recreational user.

What is Liability?

In law, liability is a court's decision that on a balance of probabilities one person is responsible for another's loss. The court enforces this responsibility by ordering the liable party to pay money to the injured party as compensation. The amount of money payable reflects the severity of the injury and the nature of the conduct that caused it.

No one can be legally liable to another person without a decision by a court. This means that being sued is a precondition of liability. Until there is a lawsuit and a decision, there is only the risk of liability.

Here it is helpful to introduce a telling fact: in over a century of North American climbing, there is not one reported judgment in the United States or Canada involving occupiers' liability for climbing. In North America, no climber has ever successfully sued an occupier for a climbing-related injury. The risk of occupiers' liability for climbing-related injuries remains theoretical.

The Risk of Liability

The Ontario *Occupiers' Liability Act* (the "Act") is a statute that defines and limits occupiers' obligations with respect to the people who use their land.[1] The Act applies to any person who has physical possession of land, who is responsible for the condition of land or the activities that take place on it, or has control over persons allowed to enter land. The Act almost always applies to landowners and land managers.

One purpose of the Act is to encourage recreational activities. The Act accomplishes this by shielding occupiers who permit recreational activities on their land from liability. The drafters of the *Act* specifically contemplated climbing as a recreational activity:

> [T]he recreational entrant who is engaged in adventuresome activities such as climbing may be seeking some element of risk. These risks are expected. Wilderness and undeveloped land are such that an occupier cannot reasonably be expected to tend them in order to prevent injury to an entrant.[2]

The Act acknowledges that climbing has inherent risks, and places the burden of these risks entirely on the climber. Section 4 of the Act states that a climber "willingly accepts all risks" of climbing on someone else's land. To have the benefit of this section, an occupier must meet four requirements.

1. The occupier's land must be vacant, undeveloped, forest, or wilderness. Climbers climb on cliffs; cliffs, as a rule, are on this kind of land.

2. The climber's entry on the land must be for recreational climbing. This means that commercial climbing services are beyond the scope of section 4. However, commercial climbing services usually carry their own insurance.

[1] The full text of the Act is available at <http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90o02_e.htm>.

[2] This quotation is from the discussion paper that preceded the enactment of the Act. Ministry of the Attorney General, *Discussion Paper on Occupiers' Liability and Trespass to Property* (Toronto, 1979) at 10.

3. The occupier cannot charge climbers a fee for entry or for climbing. However, section 4 does permit payments and benefits to occupiers from the government and non-profit recreational clubs and associations. If the OAC provides an occupier with signage or some other benefit, the occupier will not lose the protection of section 4.

4. The occupier cannot provide living accommodations to climbers on the occupier's land. Though no court has considered the issue, this almost certainly does not include camping. Occupiers will satisfy this requirement unless they start housing climbers.

Occupiers' Duties

Section 4 makes climbers solely responsible for injuries that are inherent risks of climbing. The Act deems climbers to willingly assume risk of these injuries and shields occupiers from liability for them. However, occupiers lose this protection when they cause or contribute to a climber's injury. Such an injury is not an inherent risk of climbing, and climbers have not willingly accepted risk of it. Accordingly, the Act imposes two duties on occupiers to avoid injuring climbers. Occupiers likely owe these duties even to trespassing climbers.

The first duty is to avoid creating a danger to climbers with the deliberate intent of doing them or their property harm. This duty should not concern occupiers. Essentially, only occupiers that take active measures to hurt climbers will breach this duty, and the risk to them is not only liability but criminal prosecution.

The second duty is to avoid acting with "reckless disregard" for the presence of climbers. According to the Ontario Court of Appeal, this means that an occupier cannot do, or fail to do, what the occupier knows, or should know, is likely to injure climbers.[3] A recent decision of the Ontario Superior Court explains what this means:

> [Reckless disregard is a concept that] includes an objective standard; namely, what he or she (the occupier) should recognize as something likely to cause damage. What is being referenced is something beyond what can be assumed by all of us, as ordinary people know, something unusual, something inherently harmful or dangerous. Whatever this danger it is clearly contextual. It may not be obvious. It may be hidden or concealed. It may contain an element of surprise for the user such that response times are diminished, if not eliminated. It may be that the user cannot extricate himself or herself from the situation. It may be of such a nature that, as some jurists have described, it is a "trap". The failure of the

[3] See *Schneider v. St. Clair Region Conservation Authority* (2009), 97 O.R. (3d) 81 at para. 42.

> occupier to address a known danger of this magnitude would constitute "reckless disregard" [citations omitted].[4]

It is difficult to imagine what an occupier might do to create a danger for climbers that rises to the level of reckless disregard. As the drafters of the Act recognised, risk is an integral part of the climbing experience. For an occupier to act with reckless disregard for a climber, the occupier must create or permit a danger that exceeds the inherent risks of climbing: rough trails, inclement weather, loose rock, and the like. Examples of such an act include the use of a cliff as a firing range (a possibility where the occupier is the military) or the use of a cliff top for a bottle toss competition while climbers are on the cliff face. It bears noting that the OAC has never encountered an occupier acting with reckless disregard for climbers.

Signage

Occupiers have no legal obligation to post warning signs for climbers on their land. However, a properly-worded warning to climbers posted at the bottom or top of a cliff or at other access points may further reduce the risk of liability.

Below is a sample warning sign. The text should be visible from a reasonable distance.

WARNING: CLIMB AT YOUR OWN RISK.

CLIMBING INVOLVES SUBSTANTIAL RISK OF INJURY AND DEATH. YOU ALONE ARE RESPONSIBLE FOR YOUR SAFETY.

Obtain proper training and guidance before climbing. Rock and ice climbing and associated activities are inherently dangerous.

Permission to climb here is conditional on your assumption of all risk of injury to person and property. Climbing risks include, but are not limited to: falling; collision with manmade and natural objects, falling rocks, ice and other debris, failure of equipment or anchors, including bolts; adverse weather; human error; slippery surfaces; negligence of other users.

THE OCCUPIER'S LIABILITY IS EXCLUDED BY THESE TERMS AND CONDITIONS.

The OAC is pleased to provide signs to occupiers that contain a warning and guidelines for low-impact use of land. Please do not hesitate to contact us.

The pamphlet was prepared by the OAC and Dan Zacks of Clyde & Co. Clyde & Co. is an international law firm with many climbers within its ranks. Dan works from the Clyde & Co. Toronto office and has climbed for over 15 years – mainly on the Niagara Escarpment – and assists the outdoor recreational industry with its legal needs. You can reach Dan at Daniel.zacks@clydeco.ca or visit his LinkedIn profile at *linkedin.com/pub/dan-zacks/18/54/298*.

[4] See *Herbert v. Brantford*, 2010 ONSC 2681 at para. 26.