

Risk Management and Liability for Trails

**TRAIL
MONITOR**

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Canada's Legal System and Trails

Canada's legal system is founded upon *common law* and *statute*. Based on previous judgments as opposed to a definitive code, cases judged under common law are, in principle, to be judged fairly and account for the current norms and values of society, customs and legal procedure. Common law can be overridden by legislation (statutes) established and passed through the political process.

While common law is embraced across Canada, provinces and territories [excepting Quebec] have established legislation that will alternatively influence common law within their jurisdiction. This makes it difficult to provide a generic overview of liability that applies to every province/territory. Trail groups need to learn what relevant liability common laws *are* in their province. This document is intended to provide an overview of common law as it applies to occupiers of trails (trail groups) and explore ways that different jurisdictions can modify common law through legislation.

This document was not intended to be the definitive work on trail liability but rather to help educate trail builders, managers and users with respect to some of the legal aspects of building, managing and using trails. The legislation is constantly evolving in this area, so seek out expertise for quality, specific advice.

This information was compiled and accurate as of June 2004

Standard of Care on Trails

Trail developers/managers owe a duty to all users to ensure they are reasonably safe while on the premises. The *reasonable standard of care* is a familiar concept from the general law of negligence. Reasonableness is determined by:

1. Common sense
2. Published standards
3. Unpublished standards
4. Case law

These duties apply to:

- condition of the premises
- activities on the premises
- conduct of third parties on premises

Risk Management and Liability

Trail operators and trail program facilitators owe a duty of care to the people they attract to their trail/programs. Operators/programmers need to gain a good working knowledge of the legal aspects that impact their trail. A risk management process is the best way to ensure meeting the duty of care and then lessen the chances of litigation and insurance claims in case of an accident.

The process of developing a risk management plan for a trail should include the following steps:

1. Identify the risks to users that are inherent to the trail or trail experience. Consult experts such as experienced trails developers, parks and recreation developers, environmental planners, other trail groups, and trail user groups.

Assess such components as:

- uneven tread
- intrusions to corridor
- cliffs
- wilderness
- low headway
- shared use
- rivers

2. Establish and implement mechanisms to limit the negative effects of these risks:

- Build trail to standards that ensure safety of users
- Establish user guidelines
- Patrol regularly to assess and manage trail
- Post and maintain ample well-placed cautionary and directional signage

3. Develop and implement a crisis management plan that considers:

- Insurance coverage
- Rescue/evacuation tactics, resources and plans
- A reporting mechanism for documentation

Consult experts such as search and rescue teams, wilderness first aid providers (e.g. Red Cross, ski patrol), outdoor leadership program instructors and long standing organized trail operators.

Risk Management Mechanisms

Preventative efforts are more effective than reactive efforts to liability. A prevention plan will not always eliminate or protect against liability, but it may reduce the potential for accidents. The following are some common approaches:

- Identify the trail users, and construct the trail to suit their abilities and their activities.
- Determine if children unaccompanied by an adult may be using the trail. If so, special care should be taken to reduce the risk for children (e.g., very young children cannot read signs).
- Avoid positioning trails in high-risk areas (e.g. steep inclines, cliff edges).
- Use barriers and signage at potentially dangerous areas to protect users.
- For unusual or dangerous situations that cannot be avoided or eliminated on your trail, provide adequate notice. Give the user advance notice to prepare or react for the situation with a specific and clearly written (or graphic) message (e.g. a “Danger” sign is too general).
- Indicate which activities are prohibited and permitted on the trail. Announced prohibited activities suggests to users the trail may not be safe for those particular uses.
- Mark the trail boundaries to prevent users from wandering into unknown territory.
- Where appropriate, signs may mark times of permitted use and indicate the trail may not be safe during closed times.
- For a shared-use (multiple use) trail, consult representatives from all potential trail user groups about their needs and trail specifications. Consult an expert to modify these specifications for shared-use purposes. The user groups should agree on these specifications and help determine parameters of trail use (e.g. speed limits, etiquette). These user guidelines should be communicated so all the potential trail users know what to expect and how to behave.
- Develop a trail patrol system using trained volunteers and enforcement agencies to enforce rules and regulations.
- Follow an inspection and maintenance schedule for the trail.
- Obtain legal advice in preparing land use agreements.

Important Definitions

Plaintiff - The person who initiates a case to court (a lawsuit).

Defendant - The person, company or organization who defends a legal action taken by a plaintiff and against whom the court has been asked to order damages or specific corrective action to redress some type of unlawful or improper action alleged by the plaintiff.

Negligence - Failure to use a reasonable amount of care when such failure results in injury or damage to another.

Common Law - The law of a country or province based on custom, usage, and the decisions and opinions of law courts. Also referred to as “unwritten law.”

Statute - A law passed by a legislative body and set forth in a formal document.

Negligence

A trail occupier may be found negligent if there is unintentional neglect or failure to act with reasonable care under the circumstances.

In a negligence case, the plaintiff will need to prove all of the following in order to receive compensation in the form of cash or other award:

- 1) That a duty of care was owed to the plaintiff by defendant. A duty of care exists where it is, or should be, reasonably foreseeable to the defendant that his/her actions may harm plaintiff.
2. That there was a breach of *reasonable standard of care* by the defendant. The *reasonable standard of care* is the minimum degree of care that would be exercised by any competent person undertaking the particular task under all of the same circumstances. To determine reasonableness, the courts will use common sense, published and unpublished standards, and case law.
- 3) There was actual harm or loss realized.
- 4) The harm or loss was a direct result of the breach of reasonable standard of care.

Children and Negligence

Children are owed a higher standard of care. This is known as the *prudent parent test*, which requires examining issues about children’s safety in a way that would reflect the behaviour of an average prudent parent.



Consider the following perspectives to test the standard of care required for children:

1. What activities, conditions and exposure would an average parent/guardian deem acceptable for their child??
2. Is the well being of young participants/users respected to the degree that an average parent/guardian would follow.

Provided the child is informed of or able to understand the risks, the scope and responsibility inherent in the activity, he/she may be treated as an adult therefore the *prudent parent test* would not apply.

Who is Negligent?

Liability for negligence may be shared by or apportioned to more than one defendant. Following are definitions of the different types of liability possible:

1. **Personal Liability**
An individual can only be found personally liable if he/she has done something, or failed to do something, that a reasonable person would not have done or have done.
2. **Corporate Liability**
Governments, organizations and companies that have legal existence can be negligent in their actions or policies, and consequently, can be sued as a whole.
3. **Vicarious Liability**
Any organization, government, company may be attached to the negligence of anyone acting within his or her authority as a paid or unpaid agent of that organization. The actions of the agent are the actions of the organization as long as the acts are within the scope of their authority. This authority is gained through both policies/guidelines as well as implicitly (i.e. if the organization knows the person acted inappropriately and did not reprimand her/him.)

What Limits Liability

A trail owner/manager is required by law to take all necessary precautions to ensure that the required standard of care is upheld. There are several factors that may result in an owner/manager not be held entirely liable for an injury to someone on their property:

Contributory Negligence

The plaintiff (the person suing) or another party may have helped cause the harm or loss suffered. The plaintiff should take certain responsibility for their own well-being and not simply rely on safety measures in place. Signage can warn users of their responsibility.

Voluntary Assumption of Risk

The defendant may not be held liable for harm or loss suffered through an activity where risk is inherent. All recreational activities involve a degree of risk. Post signage to make the risks known. This limitation on liability will not be valid if the risk that the plaintiff was exposed to is not inherent in the activity. This method of limiting liability is not viewed favourably by the courts possibly due to ability to read and understand signage while on the trail.

Exclusion of Liability (Waivers)

A notice of stipulation (e.g. on a sign) and a waiver - a contract signed by participants - relinquishes responsibility for harm or loss from those people or organizations named in the notice or waiver.

The Value of a Waiver

The value of waivers has long been a source of debate. Some say waivers are virtually useless while others hold they are invaluable. Waivers are not necessarily a practical way to limit liability with respect to a trail. For example, it is logistically difficult to connect with all trail users to sign waivers.

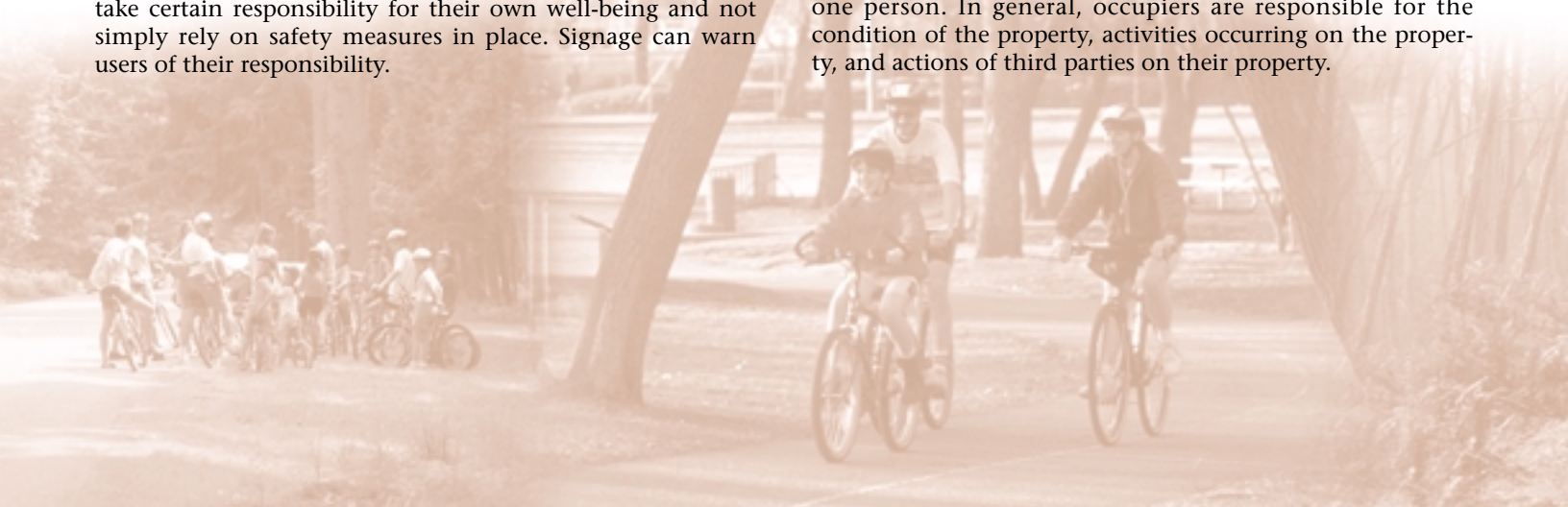
The key to the value of a waiver appears to lie in what it says and on how it is presented or issued to participants. To be most effective, a waiver should:

1. Clearly state the risks inherent in the activity (signs are sometimes considered waivers).
2. Relate specifically to the actions that may cause loss/harm.
3. Clearly state that the waiver exempts the participant from liability claims resulting from his/her own negligence.
4. Be signed by the participant or be clearly brought to the attention of the person affected.

Occupier's Liability in General

Occupier's Liability arises when a hazardous aspect of the property (natural or man-made) causes damage or an injury. The scope of *Occupier's Liability* has grown in Common Law to include cases where injury or harm is caused by hazardous activities done on the property and the actions of third parties.

By definition, the occupier of a property is the person, or organization, who is in control of and responsible for the condition of that property through inspection, maintenance and repair. It is not necessarily the owner, nor is it limited to one person. In general, occupiers are responsible for the condition of the property, activities occurring on the property, and actions of third parties on their property.



The occupier is required to provide a different standard of care depending upon the status of the visitor who is on their land. The grid outlines the various standards, as defined by Common Law cases:

IF THE VISITOR IS A:

Trespasser
on the property without express or implied permission

Licensee
on the property with permission of, but of no benefit, to the occupier

Invitee
on the property with permission of and benefit to the occupier

Contractual Entrant
having paid to be on the property

THE OCCUPIER MUST:

not act in reckless disregard for the safety of the visitor or intentionally cause the visitor harm.

take reasonable measures to protect the visitor from hidden or unusual dangers which the occupier knows about.

take reasonable measures to protect the visitor from hidden and unusual dangers which the occupier knows about or ought to know about.

take every reasonable measure to protect the visitor from any foreseeable danger (other acts may override common law).

One of the complex aspects of determining the status of visitors is that they can change their status during a visit. For example, if a Licensee, Invitee or Contractual Entrant is breaking the law or doing something against the rules, then the duty of care is reverted to that afforded a Trespasser. On the other hand, someone who enters a property without permission might meet the landowner, and be given permission to remain. Their status was Trespasser up to the point they received permission, and Licensee after that point.

Determining the exact status of a visitor has often become the focus of court actions resulting from accidents.

Landowner Liability

Landowners and adjacent landowners are concerned whether the trail will bring increased liability exposure to them. Naturally, landowners need to proceed cautiously when conducting activities (e.g. maintenance activities) in the trail area that could negatively affect the trail or trail user. Implement appropriate signage or other notification.

When a trail user exits the trail into adjacent property, the duty of care owed to this user depends upon their visitor status and the classification of land around the trail. As this is very much a provincial issue, it is vital that trail groups apprise themselves of relevant provincial legislation. In

provinces with *Occupier's Liability* legislation, landowners and adjacent landowners might have modified liability depending upon the land classification (e.g. agriculture, forestry, signed recreational trail).

Important Note: Occupier's Liability legislation is easily confused with Occupier Liability duty of care, but should not be. Occupier's Liability legislation is specifically designed to vary, or redefine, the Occupier Liability duty of care in specifically defined land classifications from what had evolved through Common Law court cases.

In order to secure permission from landowners to cross their land with a trail, it is prudent to have a written agreement that clarifies responsibility and appropriate uses both on and around the trail. It may also be necessary to reduce the liability of the landowner in certain circumstances by having the trail group agree to accept some of the responsibility through their insurance coverage. Each landowner may want a slightly different agreement and the duration of the agreement may vary.

Include a term in the trail agreement stating that you will purchase and maintain a policy of insurance that includes the landowner as a named insurer. Insurance does not eliminate liability, but it does shift the financial responsibility (if the policyholder is found liable/negligent) to the insurance company.

Legislation Modifying Liability

Community based volunteer associations construct many trails. To limit the liability of these well-meaning volunteers, some governments have passed legislation that can reduce their liability in a number of ways.

1. Occupier's Liability Act
Nova Scotia, British Columbia, Ontario, Prince Edward Island, Manitoba, Alberta
2. Trails Act
Nova Scotia, Prince Edward Island, Alberta*, Manitoba*
(* = in development)
3. Parks Act/Crowns Land Act
New Brunswick, Nova Scotia, Newfoundland, Saskatchewan
4. Volunteer Protection Act
Nova Scotia

Note: The laws in Quebec are significantly different from the other provinces, and require separate examination.

As legislation is continuously created and/or modified, users of this document should refer to their provincial/territorial Department of Justice to determine existing legislation that may impact trail use and trail management in their province.





Insurance

No matter how effective the risk management program, incidents will happen and lawsuits may result. Insurance should be a key component of any trail operations plan, and there are an endless variety of policies that can be obtained. Each group will have different insurance requirements, often depending upon uses permitted and ownership of the land. Some of these might be:

Commercial General Liability policies are designed to protect against claims from visitors for injuries arising on the trail.

Director's and Officer's Liability insurance, is important to help cover inappropriate behavior or decisions made by the volunteers managing the project.

Important structures, such as bridges, may be able to be insured.

Groups should have insurance to cover volunteers while they are working on the trail.

It may not be necessary to investigate with a local agent for appropriate insurance coverage. Insurance programs specifically directed to trail groups, especially those permitting shared uses, may be available through provincial and territorial trail associations or the Trans Canada Trail Councils in each province.

Coverage under an insurance policy should include coverage for your legal costs. However, even successfully defended claims are not always awarded total legal costs.

Examples of Occupier's Liability in the Recreation Setting

- a. In *Piercey v. Lunenburg County*, a School Board engaged the services of an individual to run a wilderness outing for grade nine students. The program included rock climbing, canoeing and initiative games. The individual so employed had considerable expertise in rock climbing, and some expertise in canoeing, camping and initiative games. However the individual was not at all current with the literature that recommended particular safety measures with respect to a particular initiative game. The leader then delegated supervision of the activity to an individual with no formal training with respect to initiative games and no understanding of proper safety measures (in this case, spotting the activity). A jury found the School Board liable to the Plaintiff who was seriously injured in the course of the activity.
- b. In *Tomszyk v. British Columbia (Ministry of Environment, Lands and Parks)*, a decision of the B.C. Supreme Court in 1998, the plaintiff brought an action for personal injury damages arising from a fall. She had fallen over a rock on a provincial campsite breaking her wrist. The rock was embedded in the ground, standing about 50 cms above the surface. It had been placed in that position to prevent vehicles from hitting the camp table. The plaintiff fell after she put her flashlight out and walked towards the table. The Court dismissed her action. The presence of the rock was not unusual and it was readily visible. The Court also noted there were no other cases of other injuries from similar rocks on campsites. The Court found the plaintiff could have avoided the rock if she kept her flashlight on. The B.C. Occupier's Liability did not impose an obligation to provide a campsite free from all danger and the defendant was found not to have breached its duty under the Act.
- c. In *Woods v. Ontario (Ministry of Natural Resources)*, the Ontario Supreme Court found the defendant to be 25% liable in an action for personal injury. The 20-year-old plaintiff dove from a supporting wall on the shore of Lake Huron into three-foot deep water and suffered a serious spinal injury. The City maintained the supporting wall, as well as the stairway to the beach insuring public access to the lake. There was no supervision at the site and there were no warning signs on the supporting wall. There are many of these walls along the lakeshore, but only one beach was supervised by the City. At that particular location, there were signs warning the public to keep off the wall. The plaintiff was found to be 75% contributory negligent. The Court ruled that an occupier is required to protect against dangers that are so probable that they should normally be foreseen. The City was aware swimmers used these walls at this public beach and it had made the beach accessible. The negligent act was failure to post warning signs of the danger of diving into shallow water. The Court found that a warning sign would have deterred the plaintiff from diving.
- d. The decision of the Newfoundland Court of Appeal in *Stacey v. Anglican Church of Canada*, shows the tendency of the Court to move away from the rigid category of trespasser, licensee, invitee and contractual entry. In this case, the plaintiff was in the defendant's cemetery property. As she proceeded from one section to another, she came to an area where there previously were steps leading to a lower level then were replaced with sod. A sign had been placed stating, "Please Do Not Walk on the Sod." The plaintiff, rather than retreat to another route, walked along the sloping embankment. She fell and

broke her ankle. Although the Trial Court found that she had been an invitee, and the grassy slope was an unusual danger, the Court of Appeal reversed this decision. The Court addressed the confusion and injustice arising from the rigid rules and formal categories of Occupier's Liability and moved away from the traditional approach finding the different duties owed to the four classifications of visitors should be fused in one test for liability. They ruled that an occupier's duty to a lawful visitor is to take such care as is reasonable to see that the visitor is reasonably safe in using the premises for the lawfully intended purpose. The Court found that in that case, the plaintiff walked in an area that was not intended for passage. The defendant had provided sufficient safe pathways for the purpose, and therefore had taken reasonable care.

- e. In *Ackerman v. Wascana Centre Authority*, a decision of the Saskatchewan Supreme Court in 1998, the plaintiff was on a school outing at the defendant's marina for her first canoeing experience. As she was carrying a canoe with a partner, her leg slipped through a gap between sections of a floating dock injuring her leg and knee. She successfully brought an action against the marina. The Court considered the plaintiff to be a licensee and the defendant was therefore liable as it was found that the dock contained a concealed or unusual danger. The Court found that the existence of the gap to an uninitiated student did constitute an unusual danger. The defendant had not posted any warning signs, and thus failed to take reasonable care to prevent injury. However, the Court also found that the plaintiff knew the wharf was unsteady and she was carrying a canoe in such a way that her view was impeded. The Court found that she also failed to take care for her own safety and liability was apportioned equally between the parties.

About Go for Green . . .

Go for Green, the Active Living and Environment Program, has been working since 1992 in close partnership with health, environment, transportation and community organizations, corporations, and all levels of government in Canada. Go for Green focuses on:

- Creating healthy, safe and accessible environments.
- Providing opportunities for Canadians to experience, value and learn to protect the environment while being active outdoors.
- Finding active transportation alternatives to counter the growing reliance on the automobile.

Go for Green encourages trail development and maintenance. The organization administers TrailsCanada (www.trailsCanada.com), a sustainable web based resource centre for trail developers and users. TrailsCanada was launched in June 2000 to assist Canada's trail communities by:

- Supporting community-based trail initiatives.
- Sharing valuable trail resources among trail developers.
- Informing Canadians about accessing trail opportunities in their community.
- Promoting Canada's outdoor trail adventures to an international audience.

"Risk Management and Liability for Trails" is the third in a series of fact sheets about trail development in Canada, designed to assist trail builders. The trail monitors are available online at www.trailsCanada.com. Other trail monitors include:

- The Economic Benefits of Trails
- The Social, Health and Heritage Benefits of Trails.
- Risk Management and Liability for Trails
- Trails and the Environment

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