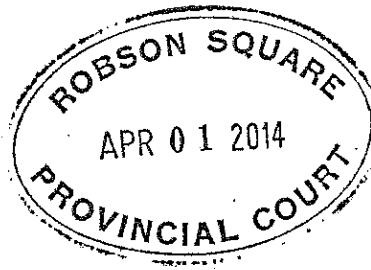


Citation: ☼



Date: ☼

File No: 12-40687
Registry: Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
(Small Claims)

BETWEEN:

CATHERINE CASTER

CLAIMANT

AND:

CINEPLEX ENTERTAINMENT CORPORATION

DEFENDANT

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE W.F.W. YEE**

Appearing in person:

C. Caster

Counsel for the Defendant:

D. Frenette

Place of Hearing:

Vancouver, B.C.

Date of Hearing:

June 28, 2013

Date of Judgment:

April 1, 2014

[1] Ms. Catherine Caster, (the "Plaintiff") went to the Silvercity Metropolis Cineplex Odeon (the "Defendant") located at 4700 Kingsway, Burnaby for a movie on June 15, 2012. She bought a bag of popcorn from the concession counter which she alleged to contain an extraordinary amount of popcorn kernels near the top of the bag buried under the top layer of popcorn. The Plaintiff stated that even though she told the woman who was serving her the popcorn to take the popcorn from the top, the woman insisted on shovelling the popcorn from the bottom on top. She claimed that her front tooth was broken as a result of having bitten into a kernel when she was in the theatre. Following that she went to see a dentist below the theatre for an emergency examination, diagnosis and an X- ray of the tooth. She claims that the Defendant was negligent and/or in breach of the duty of care for having served her with the bag of popcorn containing kernels. The Plaintiff seeks \$5,000 for a dental implant, \$100 for emergency dental examination she paid, \$500 to extract the rest of her tooth and \$5,000 for pain and suffering.

[2] The Defendant argues that causation is an issue. Furthermore, Defence maintains that there was no negligence and/or breach of any duty owed to the Plaintiff.

THE EVIDENCE

Testimony of the Plaintiff

[3] The Plaintiff testified that she asked the person who served her the popcorn in the theatre to "take most of it from the top to make sure there weren't many popcorn kernels in it" but that she was served "this bag just chockfull of them, top to bottom, it shouldn't even have been served to the public, it wasn't quality popcorn at all". She

went on to say "it was all over the top as well, and it was dark in the movie theatre, and I didn't have time to check it over, and I took some popcorn and bit into it and broke my front tooth off, and then I waked out of the theatre, and the crown was broken on my tooth, and I showed it to the manager".

[4] After getting a refund for her ticket, the Plaintiff swore that she then went to her regular dentist, Dr. A. Brar, in the Metroplex Dental Centre which was located right below the theatre for "an x-ray and to see what the damage was right away to see if it could be glued back on or fixed". She stated that Dr. Brar told her the cost to fix the damage would be seven to eight thousand dollars and that she was referred to see a Dr. Ajar.

[5] The Plaintiff recalled having attended to Dr. Ajar's office on July 23, 2012 and that an estimate of \$5,236 was provided to her. She also stated that Dr. Ajar told her that she would have to get someone more specialized to fix the damage to her tooth. She swore that she went to see "a more specialized implant doctor in Ontario" who told her that it would cost \$7,500 to do the implant in four stages. She submitted into evidence an x-ray of her tooth taken on May 19, 2012 of how the tooth looked before the injury.

[6] Under cross-examination, the Plaintiff acknowledged that she had a crown placed on the tooth two years prior to the incident on June 15, 2012. She admitted that she always had the concern that popcorn kernels could damage the crown on the tooth. She recalled that she ordered popcorn and a medium drink from the concession stand in the theatre.

[7] When the Plaintiff was asked whether there is a difference between asking for popcorn from the top of the pile and popcorn free completely from unpopped kernels, the answer was a "no". However, when it was pointed out to her that she never requested from the server in the concession stand for a bag completely free from popcorn kernels as reflected in the evidence she gave under examination in chief and in her pleadings, she insisted that she did ask the server for a bag free of popcorn kernels and that her tooth was vulnerable to damage.

[8] When Counsel for the Defendant suggested that even if the Plaintiff did make such requests, she would not have received any agreement from the server, she replied that the server actually said "Yes, I'll get you a good quality bag". (Transcript dated June 28, 2013 page 27 line 45) When pointed out to her that since her evidence under examination in chief was that the server had told her that "this is how the manger tells us to shovel the popcorn from the bottom with the kernels" when she told the server for the popcorn to be taken from the top, it would not make sense that the server would be saying something contradictory at the same time, the Plaintiff simply said that it was not contradictory.

[9] The Plaintiff testified that she "didn't see exactly what was going in the bag" and yet she insisted that she did see the server "shovel from the bottom of the pile". Given the answer, Counsel for the Defendant queried that she "must have known that there were unpopped kernels in that bag of popcorn", she then said "No, I didn't, I wasn't watching the whole time...". (Transcript dated June 28, 2013, page 29 line 45)

Q. Did you take the bag to the manager and show them?

(Transcript dated June 28, 2013, page 35 lines 21 - 34)

A. No, I left it in the back of the theatre and I told them...

Q. Ma'am, I put it to you that there was no way to fully remove all hard pieces that could potentially cause damage to your teeth from the bag of popcorn? Do you agree? There was no way for the staff member to do that?

A. Well of course not, but there shouldn't have been that much.

[10] When asked if the large amount of unpopped kernels found in the bag of popcorn she was served with was an honest mistake or whether that was done maliciously, the Plaintiff said "it probably was malicious" or that "they probably just enjoy doing a bad job, they don't care".

[11] The Plaintiff agreed that none of the documents she introduced in court disclosed that the injury to her tooth was caused by a popcorn kernel.

Testimony of Dr. Amir Ajar

[12] Dr. Ajar testified that he is a dentist and that he saw the Plaintiff on July 23, 2012 at the Lonsdale Dental Centre. He did not recall whether the Plaintiff was referred to him by Dr. A. Brar. By looking at the x-ray of the Plaintiff's position 1-2 tooth, Dr. Ajar stated that any kind of trauma can cause a tooth that's been endodontically treated to break. He explained that the estimate provided to the Plaintiff was to provide a rough idea as to what it would cost to do an implant and that it was not an agreement between them. He recalled having referred the Plaintiff to see a periodontist for her soft-tissue problem.

[13] When asked about the estimate of \$7,500 from Toronto with the consultation date of August 20, 2012, Dr. Ajar stated that he was in no position to comment on the estimate, especially since the estimate is not even from a dentist in B.C. He swore that the Plaintiff went to see him and that he gave her an opinion and that he did not do a full examination on her teeth.

[14] Under cross-examination, Dr. Ajar stated that he cannot tell by looking at a panoramic whether a popcorn kernel caused the injury to the tooth. After looking at the x-ray of the Plaintiff's tooth, Dr. Ajar deposed that he can see the tooth had been root canal treated and that it had a post core crown. His opinion was that would mean that the tooth was structurally weaker and that such things as a popcorn kernel, a nut or a shell could theoretically cause the tooth to break.

[15] Dr. Ajar stated that the estimate he provided to the Plaintiff was a rough breakdown of what it would cost his office to do an implant in her mouth in that area but he was not in a position to tell what the cause of the Plaintiff's injury was. He further stated that an implant was not the only option that the Plaintiff could pursue and that there are other less expensive options which may work for the Plaintiff.

Testimony of Spencer Cadlick

[16] Mr. Cadlick testified that he has worked for the Metropolis Cineplex for seven years as a part time assistant manager in charge of the day-to-day operations which included overseeing and supervising staff in the preparation and service of food in the theatre.

[17] He deposed that he was working at the theatre on June 15, 2012 when the Plaintiff approached him near the middle of the show and asked for a refund on her ticket. He recalled the reason provided by the Plaintiff for wanting a refund was that she had cracked her tooth and that she wanted to go see her dentist. Even though the request was outside of the normal refund policy, he authorized the refund be granted. (Transcript dated June 28, 2013 page 66 lines 29 - 36)

Q. Did she say how the tooth was cracked?

A. She did not, no.

Q. Did she show you the tooth?

A. I believe she attempted to; however, I did not see it.

[18] He stated that the Plaintiff did not identify the staff member who served her the popcorn nor did the Plaintiff mentioned that she had requested form the staff member at the concession a bag of popcorn from unpopped popcorn kernels. (Transcript dated June 28, 2013 page 67 lines 24 - 26)

"Q. Did the claimant, during the conversation, show you the bag of popcorn or show you anything?

A. She gave me no specifics."

[19] After the Plaintiff had been given the refund and left the theatre, Mr. Cadlick recalled having approached the concession bar to ask about the Plaintiff's visit to the theatre that day to see if there was anything out of the ordinary as he had multiple interactions with the Plaintiff in the past and learned that none of the staff recall any interaction with her that day.

[20] He stated that the staff members have been trained to accommodate special requests from the guests as much as possible but if there was a request for a bag of popcorn free from unpopped kernels which is something they would not be able to accomplish, they would apologize to the guests for not being able to comply.

[21] Mr. Cadlick deposed that the poppers are cleaned every night by the staff members which then would be inspected by the manager on duty afterwards to ensure that they are kept in working order and clean. The protocol also includes the completion of the concession safety review checklist for temperatures as well as machinery to be done twice daily with one for the morning and the other for the evening. He was able to say by looking at the daily closing checklist for June 15, 2012 that there were no problems with the poppers or popcorn products for that day.

[22] Under cross-examination by the Plaintiff, Mr. Cadlick was asked whether he remembered her showing him the tooth and telling him she'd been injured and he replied: (Transcript dated June 28, 2013, page 72 lines 18 - 20)

"I remember you telling me that you were injured, I remember you attempting to show me the tooth, but, in all honesty, I do -- I did not see it..."

[23] When he was asked whether anyone ever complained about unreasonable amounts of popcorn kernels in a bag of popcorns in the seven years of his employment, he replied: (Transcript dated June 28, 2013 page 74 lines 7 - 13)

"It's happened once or twice, yes, usually it occurs and happens right at our concession. You can feel a noticeable weight difference, and even I, myself, have caught it and then remade the popcorn, but as far as after

the film, someone coming up to me and telling me that there is too much seed in the popcorn, no.”

Testimony of Dexter Tan

[24] Mr. Tan testified that he has been the senior operations manager at SilverCity Metropolis for six years. He stated that he had received training in how to operate poppers and how to prepare and serve popcorn and that throughout the course of his career he had prepared and served popcorn in the theatre for thousands and thousands of times. He said that he had never been asked by guests of the theatre to provide a bag of popcorn completely free from unpopped kernels which in his opinion is impossible.

[25] He recalled to be working on June 15, 2012 from 5:00 p.m. until closing when he was helping at the line-up at the box office when the Plaintiff approached him and told him that her dentist won't be able to put her crown back on. He said that he proceeded to ask her more questions and was then told that the Plaintiff requested for a bag of popcorn with no seeds from a cast member. When he asked the Plaintiff as to the name of the cast member, the Plaintiff could not give him a name.

[26] He learned from the Plaintiff that Mr. Cadlick helped her out with the refund in the afternoon. He recalled that the Plaintiff did not show him her tooth nor did she describe the staff member who served her with the popcorn.

[27] He swore that he then completed the incident loss report which has been submitted into evidence.

[28] Under cross-examination by the Plaintiff, Mr. Tan deposed that he had not received any complaints from other guests that there was unreasonable amounts of popcorn kernels in their popcorn before.

Testimony of Kenterra Kang

[29] Mr. Kang testified that he was hired as a food service manager for Cineplex Entertainment fifteen years ago and then promoted as the regional merchandiser for the 22 theatres in B.C. for the past six years. He stated that it is not possible to provide a bag of popcorn free from kernels.

[30] When asked how would one go about removing all the unpopped popcorn kernels from a bag of popcorn, Mr. Kang replied: (Transcript dated June 28, 2013 page 85 lines 23 - 30)

“You know the -- for popcorn to pop, it needs to have 14 percent moisture in it, and not all the seed actually has that moisture. So it doesn't pop. So the only way you can guarantee that there's no seed is that you actually probably need to lay it flat and pick it one by one to make sure that all the seed exploded the way that it should have, right.”

[31] Mr. Kang went on to explain that every popper has a grate in the bottom to allow the seeds that fail to pop to fall through and be removed. However, since unpopped kernels could fall on top of the popped kernels, they would not fall through to the bottom. While the staff always try to get as much out as they can, there is no guarantee that all of the unpopped kernels could be taken out.

[32] He stated that it would be in the company's interest to pop every kernel as the popped kernels would fill up more which also mean less products are being used. He

said that is the reason that they purchase the Weaver corn over another brand as they found the Weaver brand corns to have a higher popped rate. By looking at the concession sales record for June 15, 2012, Mr. Kang was able to tell that between 500 and 600 bags of popcorns were sold in that theatre. Other than the complaint in question, Mr. Kang testified that there were no other reported complaints received of excess amount of kernels on that day.

ANALYSIS

[33] The Plaintiff's claim for compensation is that one of her front tooth got broken by an unpopped kernel when she bit on the popcorns which she purchased from the concession stand in the Defendant's theatre on June 15, 2012. As the Claimant, the Plaintiff bears the burden to prove on a balance of probabilities that her tooth was broken by an unpopped kernel in the bag of popcorns which allegedly was negligently prepared or that the contract she had with the Defendant was for a bag of popcorn completely free of kernels and that the bag of popcorn provided contained unpopped kernels.

[34] A close examination of the Plaintiff's evidence reveals the following problems.

1. Her testimony with respect to how she was served with the bag of popcorn is inconsistent. She stated in examination in chief that the server told her that the company policy was to shovel the popcorn from the bottom when she requested the server for the popcorn to be taken from the top. However, under cross-examination, the Plaintiff swore that after she made the request to the server, the server actually told her that she will be getting a "good quality bag". Her evidence about where the unpopped kernels were found is also not clear. Her statement of claim was that the kernels were "near the top of the bag buried under the top layer of popcorn" but her evidence at trial was that the bag she was served with contain "chockfull" of kernels from "top to bottom".

2. It is noted from the evidence that the Plaintiff appeared to be uncertain as to whether she was taking the position that she saw or was aware that the bag of popcorn she was served with contain unpopped kernels. On the one hand she has stated that she saw the bag of popcorn she was served with had "chockfull" of kernels "from top to bottom". On the other hand, she insisted under cross-examination that she "didn't see exactly what was going in the bag" or that she "wasn't watching the whole time".

However, considering her response of "Well of course not, but there shouldn't have been that much," to Defence Counsel's suggestion that there was no way for the Defendant's employees to fully remove all hard pieces that could potentially cause damage to her teeth from the bag of popcorn, it can be concluded that she was aware that a bag of popcorn may contain kernels.

3. It is noted that the Plaintiff gave no reason whatsoever for her comment that even if the bag of popcorn she was served with did contain unreasonable amount of unpopped kernels, it was "malicious" or that the staff of the Defendant "enjoy doing a bad job" or that "they don't care".

4. Considering the fact that the Plaintiff made the effort to deal with the manager in seeking a refund for her admission ticket after she allegedly had bit on an unpopped kernel and broke her tooth, it made no sense for the Plaintiff to leave the bag of popcorn in the back of the theatre. Given the fact that the bag of popcorn would contain her alleged "unreasonable amount of kernels" as well as the alleged culprit to her tooth injury any reasonable person would find it necessary that the bag would be given to the manager as proof of her complaint. Her failure to do so without providing any explanation whatsoever is highly suspicious.

5. It is noted that the Plaintiff is seeking compensation for a dental implant of her problematic tooth which she treated with by way of a crown two years previous. The fact that the Plaintiff produced no invoice to show how much she paid for the original treatment but simply seeks to resort for an implant while according to Dr. Ajar there are other less expensive treatment options, makes her demand totally unjustifiable.

6. Given Dr. Ajar's evidence that the Plaintiff's tooth "was structurally weaker and that such things as a popcorn kernel, a nut or a shell could theoretically cause the tooth to break", the Plaintiff's insistence that her tooth broke when she bit on a kernel in the absence of any corroborative evidence is not persuasive.

[35] Considering the above note problems in the Plaintiff's evidence, I am not convinced that the Plaintiff has made out her case on a balance of probabilities that the crown on her front tooth was broken by an unpopped kernel. Given the opinion of Dr.

Ajar of the Plaintiff's tooth being structurally weaker and the fact that the crown was put in two years earlier, her tooth could have been broken by things other than a kernel.

[36] In looking at the testimonies of the witnesses for the Defence, there is no question that popcorn and drink sales are integral and important part of the Defendant's business and that there is a two-tiered system of maintenance and inspection in place to ensure that the poppers are operated properly and efficiently. The Defendant has a daily inspection regime composed of inspections twice daily by staff members which are signed off by managers. The records of inspections of the poppers submitted into evidence clearly show that the poppers used by the Defendant for the day in question were operating properly. The records of sales of popcorns for the day in question also show that other than the incident with the Plaintiff, there were no other complaints of unusual amount of kernels in any of the popcorns sold.

[37] Considering the evidence of the witnesses for the Defendant and the fact that the poppers are designed with a grate to hold unpopped kernels, I am satisfied that some seeds may not explode and therefore, it would be impossible for the Defendant's employees to serve the popcorns free of any kernels to anyone. Even if the Plaintiff did in fact make such a request as alluded, it would be most unlikely that any of the staff would agree to do so. In any event, based on her own admission in cross-examination, I am not satisfied that the Plaintiff had made such a request. Consequently, there is no agreement between the Plaintiff and the Defendant for the Plaintiff to receive a bag of popcorn completely free of kernels from the Defendant.

[38] Furthermore, I am not satisfied that the Plaintiff had made out a case that the bag of popcorn she purchased contained unreasonable amount of unpopped kernels. Even if I were to find that the Plaintiff's crown was broken by an unpopped kernel, there is no evidence to warrant a finding of negligence on the part of the Defendant. Given the Plaintiff's own admission that that it is impossible for the employees of the Defendant to serve her with a bag of popcorns to be completely free of kernels and given her knowledge that her crown had been put on for two years, any reasonable person under the circumstances, would avoid the using the front tooth to bite on anything hard. Consequently, I would find the Plaintiff to be the author of her misfortune.

[39] Even if I were to hold that the Defendant to be somewhat negligent in having served the Plaintiff with a bag of popcorn which contained more than the normal amount of kernels, I would only order a nominal amount in favour of the Plaintiff in this case for the following reasons:

1. The damage to the Plaintiff's crown was caused by her biting on the kernel with the tooth and not because of the presence of the kernel.
2. There is no evidence presented on the cost of replacing the crown and therefore, there is no basis to apportion liability.

DECISION

[40] Having considered all of the evidence and on the basis of the above analysis, I find the Plaintiff to have failed to make out her case of causation and damages against the Defendant and the claim is dismissed with costs to be decided by the Registrar in accordance with the rules.



W.F.W. Yee
Provincial Court Judge