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E-NEWSLETTER

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In This Issue:

1. *Kim v. Ottawa (City of)*, 2022 ONSC 4648

The Divisional Court, in the case of *Kim v. Ottawa (City of),* 2022 ONSC 4648, considered an appeal from a Small Claims Court judgment which found the City of Ottawa City liable for $6,569.24 in damages to Kim (who was self-represented), for loss of enjoyment and property damage that occurred at a City pool.

Kim had been a patron of the City's Champagne Pool on March 18 and June 7, 2017. During those attendances, she was confronted by another patron of the pool who was verbally abusive towards her. The patron was cautioned by City staff after the first incident. Following the patron's second verbal outburst directed at Kim, the City barred the patron from returning to the pool. A few days after the second incident, Kim's vehicle was "keyed" while parked in the parking lot used by pool patrons.

The City appealed the decision of the Small Claims deputy judge on multiple grounds, including on the basis that the deputy judge erred in law in her interpretation of the City's standard of care under the *Occupiers' Liability Act,* and failed to give any consideration to the steps taken by the City in her analysis of whether the City met its standard of care. Additional grounds advanced by the City included that the deputy judge erred in law with respect to foreseeability, that she erred in finding liability; and that she erred in her assessment of damages and costs.

The Divisional Court allowed the appeal, and the action was dismissed.

In considering the grounds for appeal under the *Occupiers' Liability Act*, the Divisional Court considered the application of both sections 3 and 9 of the *Act*. The Court reiterated that under section 3, an occupier of a premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises. The duty of care provided for in subsection 3(1) applies whether the danger is caused by the condition of the premises or by an activity carried on the premises. Furthermore, the duty of care provided for in subsection 3(1) applies except in so far as the occupier of premises is free to and does restrict, modify, or exclude the occupier's duty. The duty under section 3(1) applied to the City.

The Divisional Court also considered the application of section 9(1) of the *Occupiers' Liability Act,* which was relied upon by Kim at trial. Section 9(1) provides that nothing in the *Act* "relieves an occupier of premises in any particular case from any higher liability or any duty to show a higher standard of care that in that case is incumbent on the occupier by virtue of any enactment or rule of law imposing special liability or standards of care on particular classes of persons including, but without restricting the generality of the foregoing, the obligations of, (a) innkeepers, subject to the *Innkeepers Act;* (b) common carriers; (c) bailees". The Court found that section 9(1) had no application to the case at hand. The City, as occupier of a fitness facility, was not in a position analogous to that of a landlord, a common carrier, a bailee, or a landlord.

Focusing then on the statutory duty imposed by s. 3(1) of the *Occupiers' Liability Act,* the Court rightly stated that the duty upon the City as occupier was to take reasonable care. The *Act* did not impose a strict liability standard. The duty of the City, therefore, was only to take such care as in all the circumstances of the case was *reasonable*.

The duty of care imports a standard of reasonableness, not perfection, and it does not require unrealistic or impractical precautions against known risks.

The Divisional Court, in considering the judgment of the lower Court, found that the presiding deputy judge misapprehended the standard of reasonable care required under s. 3(1) of the *Act* and erred in law by applying a strict liability standard. The error was apparent in both statements made by the deputy judge in the course of the judgment, and in her failure to conduct any analysis as to whether the steps taken by the City in response to the patron's behaviour were reasonable in the circumstances.

The duty to take reasonable care in the circumstances to make the premises safe requires a trier of fact to consider the factors which are relevant to an assessment of what constitutes reasonable care, and will be specific to each fact situation. In this case, following the first incident, there was evidence before the Court that City staff intervened to assist Kim and admonished the patron. City staff documented the incident, reported it to managerial staff, and advised Kim to make a complaint. City staff also met separately with Kim and the patron, and staff were directed to increase patrols during the times the premises was frequented by Kim and the patron. Additionally, the Court found that the deputy judge also failed to consider the factors which are relevant to an assessment of what constitutes reasonable care in relation to the second incident, which included barring the patron from use of the pool.

On the above basis, the appeal was allowed, and the judgment was set aside.

Of interest, on the issue of foreseeability of intentional acts by third parties, the Court opined that foreseeability of the possibility of resultant harm is inadequate to establish a duty of care. The finding of the deputy judge that the patron displayed an escalating pattern of intimidation was not supported on the evidence, and she erred in law in her approach to foreseeability by failing to consider whether there was a "clear basis" in the evidence to find that the patron's outbursts towards Kim were a probable outcome of the City's acts or omissions.

On the issue of causation, the Court relied on the general test for causation – the "but for" test – and agreed with the City that there was no evidentiary basis upon which the deputy judge could find on a balance of probabilities that the patron would have conducted themselves differently but for the City's conduct. Moreover, the identity of the individual that damaged Kim's car was never identified, thus precluding the possibility of a causal link. The deputy judge made both palpable and overriding errors with respect to causation.

As the Divisional Court found multiple basis on which to permit the appeal, it did not address the City's submissions on damages and costs.

2. *Voisin v. County of Oxford,* 2022 ONSC 4912

On August 7, 2016, the plaintiff, Cara Voisin, was involved in a trip and fall accident in Otterville, Ontario. The incident occurred at night while Voisin was crossing Main Street, which was in the midst of a construction project. At the time the loss occurred, the top 50 mm layer of asphalt had been removed from Main Street by a milling machine. Voisin broke her arm when she tripped and fell forward on the 50 mm height differential between Main Street and an intersecting side street.

Voisin resided on the north side of Main Street. She had been notified by letter in June 2016 that Main Street was going to be resurfaced during the summer. During the evening of August 7, 2016, Voisin walked across Main Street to meet a friend. Voisin regularly engaged in this routine, as many as several days per week. Voisin's friend lived on the south side of Main Street, requiring Voisin to cross the milled surface in order to reach his home.

The pair went on a walk which traversed the length of Main Street and other streets that ran parallel to it. Between 10:00 pm and 12:00 am, the pair found themselves in the vicinity of Main Street and Pine Street, which formed a "T" intersection. While engaged in conversation, they crossed the milled surface of the road (which Voisin professed to have no recollection of) and headed toward the south-east corner of the intersection. Voisin was not watching where she was going, nor where her feet were stepping as she crossed. As Voisin reached the south-east corner of the intersection, she caught her toe on the lip of Pine Street, which was higher than the elevation of Main Street, causing her to fall forward. At trial, she advised the Court that she did not see the lip as she approached, nor did she see any warning signs. The intersection was lit by one streetlight only, on the north-west corner.

The next day, Voisin returned to the intersection to take photographs of the loss location. The photographs showed that the edge of the lip that she tripped on was marked with orange paint hash marks, spaced out from one side of Pine St. to the other, and a "bump" sign was placed at the south-west corner of the intersection. Although Voisin advised that she saw neither, there was no evidence before the Court to suggest that they were not present the night prior.

The parties reached an agreement on damages in the amount of $75,000 inclusive of damages, prejudgment interest and OHIP's subrogated claim. The only issue before the court was liability, with the Court left to consider whether the defendants, the Corporation of the County of Oxford ("Oxford"), and Permanent Paving Ltd. ("Permanent Paving") had a duty to "ramp" the lip at the site of the fall, which would have smoothed out the transition from the milled surface of Main Street to the paved surface of Pine Street.

Both parties relied on expert evidence at trial. There was disagreement between the plaintiff and defence experts on whether the fall took place at an appropriate crossing location; whether the height differential between the two streets exceeded prevailing standards resulting in a hazard and a state of non-repair; whether the orange hash marks and signage provided sufficient warning of the height differential; and whether the area was appropriately illuminated.

The defence also relied of the evidence of the President of Permanent Paving, who testified that, in his experience, ramping was not required and was not industry practice. He advised the Court that adding a 2 to 3 m asphalt ramp to either side of the road would amount to temporarily repaving about 40% of the whole surface of the road that had just been milled.

In assessing liability, the Court considered s. 44 of the *Municipal Act, 2001,* S.O. 2001 c. 25 to determine the potential negligence of Oxford; and the *Occupier's Liability Act,* R.S.O. 1990, c. 0.2 to determine the potential negligence of Permanent, as occupier of the area.

Pursuant to the requirements of the *Municipal Act, 2001, t*he Court engaged in an analysis of whether the road was in a "reasonable state of repair. The analysis turned on whether there was a requirement

to ramp the road's edges. The Court first reviewed the contract between Oxford and Permanent and found that the contractual terms required Permanent to ramp all "on-road edges", which, in its analysis, included the intersection of Main Street and Pine Street. The contract also required that on-road edges be marked with "bump" signs, and that both the ramping and signage be maintained until final asphalt was placed. As Permanent had not placed temporary ramping in the area of loss, the terms of the contract had been breached. This breach, however, did not necessarily mean that the applicable standard of care was breached. While contract specifications were one factor to be considered by the Court, they were not determinative.

In assessing whether the road was in a state of disrepair, the Court had to consider all surrounding circumstances, which included the use of the road; and the impact of an un-ramped edge on the risk of harm to users, namely pedestrians. The analysis included the degree and manner in which pedestrians could reasonably be expected to use the road at the location of the trip and fall. In Otterville there were no controlled crossings for pedestrians (the closest being 2.6 kilometres away), and therefore pedestrians were required to make uncontrolled crossings. Thus, it was necessary to look for locations where pedestrians would be brought to the edge of the road for that purpose. The Court found that it was reasonably foreseeable that pedestrians would cross in the area of the loss, and that Oxford would need to take this into account in meeting its duty to keep the roadway in a reasonable state of repair.

Given the reasonable expectation of pedestrian traffic at this location, the Court then turned its analysis to whether the lip at the south-east corner of Pine Street presented a hazard that needed to be protected against. While stating that the provisions of the MMS - as they related to the maintenance of walking surfaces constructed for pedestrian usage - do not apply to a road surface, the Court did consider that under the MMS a surface discontinuity in a sidewalk which exceeds 2 cm, is considered to be a deficiency in need of remedial action. While the standards had no direct application in this case, the Court nonetheless relied on them to support the conclusion that a surface discontinuity that is 5 cm in height, fully 2 ½ times the height that the MMS has deemed to require remediation of a sidewalk, constituted a hazard for pedestrians when found on a foreseeable pedestrian path.

In considering the adequacy of street lighting at the intersection, while the Court found that the intersection was poorly lit, the lip at the site of the fall would still be visible to an approaching pedestrian.

Given the totality of the evidence, the Court found that Oxford, on a balance of probabilities, failed to keep the road at the loss location in a reasonable state of repair.

The Court also considered the liability of Permanent for the loss under the *Occupiers' Liability Act*. The Court found that Permanent owed a duty to Voisin to take reasonable care to see that she, and other pedestrians, were reasonably safe. By intentionally creating a 50 mm lip of pavement as a result of its construction activities, and then failing to protect and eliminate that trip hazard by means of a ramp of some kind, Permanent breached that duty of care.

The steps that Permanent did take, by posting a bump sign and painting hash marks on the edge, were insufficient and failed to meet the standard of reasonableness. The negligence of Permanent caused the accident.

As the Court had been advised by counsel that the Defendants had, prior to the trial, jointly agreed that if either party was found to be liable, both defendants would be jointly and severally liable in the same amount, it did not apportion liability as between them.

Prior to considering the contribution of Voisin, the Court considered the issue of causation. It relied on the evidence of Voisin that while she did not see the lip prior to tripping on it, she did see it subsequently. It also accepted the evidence of her friend, who testified that he was walking behind

Voisin at the time and witnessed Voisin catch her toe on the lip and trip forward. The state of non-repair at the location was the lack of a ramp along the lip. Had a ramp been in place, it would have completely eliminated the lip, and would have removed the pavement edge over which Voisin tripped. But for the lack of a ramp, the Court found that the trip and fall would not have occurred. Causation was therefore proven.

Finally, the contributory negligence of Voisin was considered. While Voisin had a duty to take reasonable care for her own safety, the Court was satisfied that she did not. The Court highlighted that Voisin was aware of the surface milling and crossed the road by foot on almost a daily basis. At the time of the loss she was not looking at the road, was not paying attention to the road surface, and was not watching where she was placing her feet. She proceeded while looking forward and engaged in conversation. The Court did not find her evidence that she failed to note the rough condition of the road credible, as she was wearing ballet slippers with a thin sole, and on the basis that she lived along the road and the rough condition could not fail to be noticed. Voisin was not on “a stroll down a sidewalk on a sunny afternoon”, she was traversing a “construction zone that she knew, or ought to have known, she was walking across”. The fact that the fall occurred at night, and in an area where the streetlighting was poor, imposed a duty upon the plaintiff to be “more vigilant than had she been taking a stroll in ideal conditions”.

Voisin was found to be 35% contributorily liable.

3. *Alison Braks v. Dundeal Canada (GP) Inc,* 2022 ONSC 3978

The plaintiff, Alison Braks, commenced an action against the defendants Dundeal Canada (GP) Inc., Dundee Realty Management Corp., and Dundee Realty Management Inc. (the "Defendants") for damages allegedly sustained as a result of the defendants' breach of their duty of care owed to her under the *Occupiers' Liability Act,* R.S.O. 1990, c. O.2. Braks exited an elevator in an office building in Kitchener, Ontario and slipped on a greasy substance situated upon the floor. She allegedly sustained injuries including a concussion, multiple soft tissue injuries, and migraines.

The issues at trial included liability, causation, and damages.

Turning first to liability - on May 25, 2012, Braks took the elevator to the second floor. The elevator, which was exterior to the building, had a glass exterior. When the elevator door opened, it allowed sun to shine into the adjacent hallway. It was noted that the loss occurred on a "bright and sunny day". The floor located outside the elevator was granite.

Braks exited the elevator carrying her lunch. She was wearing 3 1/2" platform shoes with rubber soles. While exiting the elevator, and looking straight ahead, her foot slipped, causing her to fall forward and land on her right side.

Post-fall, Braks touched the floor in front of the elevator with her hand and felt a "greasy substance", which was clear in colour. Braks' husband, who worked in the same building, and who she intended to meet for lunch had the fall not occurred, arrived at the scene shortly thereafter. He photographed the area and advised that he too touched the floor and felt a slippery, oily substance. The photographs were also taken for the purpose of illustrating how shiny the floor was, and to document how light reflected off of the floor surface.

At trial, the Defendants' former building operator advised the Court that post-fall he observed a greasy film on the floor which he determined to be from a substance used to clean the elevators. He opined that the substance came to be on the floor due to "over spraying". It was his evidence that the premises cleaner should have applied the cleaner with a cloth instead of spraying it directly onto the elevator. The substance was translucent, and he agreed that it would have been difficult to see upon the floor.

The Defendants were unable to provide any evidence that regular patrols of the area had been carried out.

The Court considered section 3(1) of the *Occupiers' Liability Act*, in assessing liability of the Defendants, and found that Braks had discharged the onus in proving that on a balance of probabilities the Defendants failed to take such care as is reasonable in the circumstances of the case to ensure that persons entering on, or, brought onto the premises were reasonably safe while on the premises from foreseeable harm. Notably, the presence of the slippery substance on the granite floor was not disputed at the trial, and there was no controversy over the fact that the substance involved in the loss was clear.

The Defendants had not led any evidence at trial that it had reasonable policies or procedures for the inspection and maintenance of the premises, or whether those policies were followed. Moreover, no evidence was led on the best practices that the premises cleaner should have used in both applying the cleaner and addressing any errant residue. The Defendants breached the applicable standard of care imposed upon them under the *Act.*

The Court next considered the contributory negligence of Braks. While citing the authority in *Assmann* v. *Etobicoke,* 1997 CarswellOnt 3680 (S.C.), at paras. 37 and 38, affirmed (2002), 161 O.A.C. 138 (C.A.) that pedestrians are not expected to walk with their eyes focused downward immediately in front of their feet, the Court noted that in the circumstances of this case – which involved a

translucent cleaning product – the plaintiff would not have likely seen the hazard even if her gaze was fixed at her feet. Although it was argued by the Defendants that Braks' footwear may have contributed to the accident, no evidence was led to support this contention. In the circumstances, the Court found that Braks was using reasonable care for her own safety and was not contributorily negligent.

With liability determined, the Court turned to an assessment of damages.

Braks, who was 35 years old at the time of the fall, testified that due to the fall, she suffered a traumatic brain injury, headaches, migraines, brain fog, blurred vision, nausea, facial pain including eye pain, jaw pain, tinnitus, whiplash, neck pain that radiated into the back, tingling arms, muscle weakness, depression, and anger. Any contributing pre-accident condition was denied.

The focus of the Defendants was upon the head injury that Braks allegedly sustained, and her credibility relating thereto. They noted that an Incident Report completed post-incident included a denial from Braks that she hit her head. During the plaintiff's first attendance for medical treatment post-fall, which took place on the date of loss, she made complaints of left ankle pain, a skinned right elbow and knee, immediate right hip pain, low back pain, and tightness in the base of the neck. She did not mention that she hit her head. It was not until June 20, 2012, that Braks first mentioned to her family doctor that she believed her head may have struck her forearm in the course of the fall. A possible concussion diagnosis was not made until June 27, 2012, with a diagnosis of persistent post-concussion syndrome made on July 12, 2012. CT scans were normal.

The plaintiff expert, Dr. Waseem, made a diagnosis of chronic pain of the cervical spine compounded by central sensitization, a mild traumatic brain injury, and post concussive syndrome including chronic cervicogenic headaches with migraine features. The plaintiff also relied on the expert opinion of Dr. Gawel, neurologist, who was of the opinion that the plaintiff presented with symptoms typical of someone who had suffered a head injury.

The Defendants relied on the opinions of Dr. Selchen, neurologist, and Dr. Kleinman, physiatrist. Dr. Selchen opined that the pattern of the plaintiff's symptomatology – in terms of timing and pattern over time – was not consistent with traumatic injury; but conceded on cross-examination that it was unclear to him whether the plaintiff suffered a mild traumatic brain injury in the fall. Dr. Kleinman testified that any physical injuries sustained by the plaintiff had, in his opinion, resolved, and that she had reached maximum medical improvement.

The Court accepted that Braks sustained a concussion as a result of the fall, and that the balance of her complaints were causally related to the loss.

General damages in the amount of $115,000 were awarded.

In considering her claim for special damages, the Court found that Braks' headaches, migraines, and neck pain were chronic, and impacted her social, recreational, and family life, as well as her employment. The trial took place over nine years post-fall, and Braks continued to make pain complaints. On the evidence before the Court, it was accepted that that her prognosis for recovery was poor. The Court also accepted Braks' evidence that due to her chronic neck pain, headaches, and sleep issues, she was unable to manage her workload (initially as an administrative assistant and subsequently as a financial planner) as she had, or would have been predicted to, pre-loss.

Braks was awarded $173,400.00 in past income loss, and $590,200.00 for loss of earning capacity (reduced by a 15% contingency to $501,500.00). Additionally, she was awarded $10,000.00 for out-of-pocket expenses, $15,000.00 for loss past housekeeping inefficiency, and $9,380.18 for OHIP's subrogated interest.

4. *D'Shay Knights-Wright v. 110 Parkway Forest Drive*, 2022 ONSC 4922 (CanLII)

In *D'Shay Knights-Wright v. 110 Parkway Forest Drive*, 2022 ONSC 4922 (CanLII), the Court was asked to consider a motion, in writing, for court approval of the settlement of the claims of the minor plaintiff, D'Shay Knights-Wright (the "Minor"), pursuant to Rule 7.08 of the Rules of Civil Procedure. In the context of the motion, the Court considered both liability of the defendants 110 Parkway Forest Drive Limited, Timbercreek Properties Services Inc. (operating as Timbercreek Communities), and John Doe Contractors (the "Defendants"), and the proposed contributory liability of the Minor.

On December 26, 2017, the Minor was playing with a friend in a parking garage when he slipped on ice and fractured his left tibia. He was thirteen and in grade seven at the time of the incident.

The action was commenced against the Defendants on the basis that they breached their duty imposed by s. 3(1) of the *Occupier's Liability Act,* R.S.O. 1990, c. O.2. The Minor maintained that snow and/or ice had accumulated on the Defendants' premises and presented a danger to all patrons entering and exiting the premises.

There was no evidence before the Court as to any system of maintenance carried out by any of the Defendants, and while counsel suggested that the defence available under s. 4(1) of the *Occupier's Liability Act* may be available to the Defendants, the Court did not agree.

As for the apportionment of any contributory negligence on the part of the Minor, who at the time of the incident was running while wearing running shoes which were well worn with no tread on much of the soles of his shoes, the Court accepted plaintiff counsel's contention that a 20% contribution was reasonable. The Court justified a 20% finding of contribution on the basis as reasonable "given the range is anywhere from 0% to 30%".

Damages, which had been agreed upon in the amount of $110,000.00 (taking into account the Minor's contribution), consisted of $60,000.00 in general damages inclusive of interest, $27,942.20 in special damages – housekeeping/attendant care, $0.00 in loss of competitive advantage, and $1,787.47 for OHIP's subrogated interest, plus costs and disbursements). The settlement amount was accepted as fair and reasonable in the circumstances.

Of note, plaintiff counsel's contingency fee agreement was not approved by the Court and was found not to be enforceable.

Q3 Occupiers' Risk Management Tip

Further to last quarter's tip that any successful defence to an Occupiers' Liability claim arising out of a slip and fall or trip and fall incident begins with the creation of maintenance and inspection policies and procedures, care must also be given to inspection and maintenance checklists.

Records of inspection should thoroughly document all inspections, repairs, and the state of all buildings and premises at the time that they are inspected.

Indoor inspection should focus on keeping floors free of hazards, including deficiencies in the floor surface, and debris; eliminating slip and trip hazards; keeping entrances clean; placing and maintaining mats in high traffic areas where water may accumulate; ensuring carpeting is fastened; and placing wet floor signs where warranted.

Outdoor inspection should focus on checking that entrance and exit surfaces are level; that surfaces are free of cracks, bulges, and depressions; checking for proper pitch for drainage; ensuring that surfaces are not slippery or covered in ice or snow; removing debris and other hazards; and verifying proper and adequate illumination.

For stairways, both indoor and outdoor, inspection and maintenance should include ensuring that steps are uniform in size with maintained edges; that handrails are secure and to code; that landings are level and maintained; that stairs are free of debris; and that lighting is appropriate and adequate for the circumstances.

Inspection forms should, at a minimum, include:

- The date the premises was inspected;
- The premises address or other identification;
- The full name of the individual conducting the inspection;
- The exact locations inspected;
- The time of the inspection;
- The condition of the area inspected;
- The action taken, if any; and
- The initials of the individual conducting the inspection (identifiable and unique) after completing each area of inspection.

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Jennifer is a member of the firm's Insurance Group and is based in Alexander Holburn's Toronto Office. She defends matters relating to complex personal injury, occupier's liability, CGL claims, municipal liability, professional negligence, D&O claims, product liability and recall, property claims, and subrogated claims. Jennifer also handles coverage disputes, and fraudulent claims. She works for insurers, and private clients alike. Jennifer is committed to working with her clients in a collaborative approach to develop a litigation strategy that is mindful of their goals, and needs, as an organization. She is client focused and customer service driven, and is dedicated to understanding her clients' business objectives, in an aim to not only deliver high quality work, but also an exceptional client experience. Jennifer has completed a certificate in Risk Management holds a Canadian Risk Management Designation. As a value-added service to her clients, she can provide advice on risk mitigation and financing, and strategies to reduce claims.

ABOUT ALEXANDER HOLBURN BEAUDIN + LANG LLP

Alexander Holburn is a leading full-service, Canadian law firm with offices in Vancouver, British Columbia and Toronto, Ontario. We have operated in British Columbia for nearly 50 years and opened our Ontario office in 2019. With over 100 lawyers, we provide a full spectrum of litigation, insurance, business, and personal law services for clients based in Canada, the United States, and Europe.

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