ALEXANDER HOLBURN

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In This Issue:

1. *Chang v. Forest Ridge Landscaping Inc.*, 2022 ONSC 668

In December 2016, Kathryn Chang slipped and fell on a sidewalk in the Town of Aurora. In 2018, she retained counsel and commenced a claim against the Town and Brookfield Residential Properties Ltd., the builder of the housing development where the accident took place.

In the fall of 2019, the plaintiff was informed by the Town that it had hired the defendant, Forest Ridge Landscaping Inc., to clear the subject sidewalk of snow and ice. The plaintiff filed the subject action against Forest Ridge in December 2019, almost 3 years post-loss. Forest Ridge moved to dismiss the claim further to a motion for summary judgment, on the basis that the action was limitation barred. The plaintiff argued, in her defence, that her ability to sue Forest Ridge was dependent on when she "discovered" their involvement.

The ability of the plaintiff to sue Forest Ridge hinged on when she first discovered that she had a claim against them, within the meaning of s. 5 of the *Limitations Act, 2002*. The Court stated "as in many winter slip and fall accident cases, one of the key underlying questions … is when a reasonable person in (the plaintiff's) position would have discovered that Aurora had hired a private winter maintenance contractor to clear its sidewalks".

In order for Forest Ridge to succeed on the motion, the Court affirmed that it must show that the plaintiff's claim was "discovered" within the meaning of s. 5(1) of the *Limitations Act, 2002* more than two years before she commenced her action on December 20, 2019.

The Court noted that the plaintiff, by way of her counsel, had sent notice letters to the Town and Brookfield in the summer of 2018. While the letter to the Town did not inquire about any possible other defendants, the letter to Brookfield requested that plaintiff counsel be advised of any knowledge of other parties who may have been responsible for the subject sidewalk. No information was forthcoming. The plaintiff's claim against the Town and Brookfield was filed on October 31, 2018. Both defendants served Notices of Intent to Defend in January 2019, but did not serve their Statements of Defence until May 2019. Neither pleading made any mention of Forest Ridge. On October 31, 2019, a few days prior to examinations, counsel for the Town advised plaintiff counsel that the Town's defence was to be taken over by counsel appointed by the insurer for the Town's contractor, Forest Ridge (*although it is noted that this did not occur). This was the plaintiff's first notice of the involvement of Forest Ridge. Further to this discovery, a second separate Statement of Claim was issued on December 20, 2019, naming Forest Ridge as a defendant.

The Court, in considering the issue of the limitation, noted that if the plaintiff's action was to proceed to trial, she will have to prove that she did not acquire actual knowledge of Forest Ridge's potential role in her loss any time prior to December 20, 2017. If she was able to meet that burden, the issue would then become whether a reasonable person with the plaintiff's "abilities and in her circumstances ought to have acquired this knowledge before December 20, 2017".

In determining the issue of the limitation period on a summary judgment motion, the Court stated that if Forest Ridge's evidence did not satisfy the Court that the limitations issue can be fairly determined without a trial, then the motion must fail. Forest Ridge could, however, still succeed on its motion if it could demonstrate that the issue of when the plaintiff "ought reasonably to have known about her claim" is one that did not require a trial.

In its analysis, the Court stated that the *Limitations Act, 2002* tries to strike a balance between the competing interests of plaintiffs and defendants. While it puts the onus on plaintiffs to act reasonably in the circumstances that are known to them, it does not go further than that. Moreover, it does not impose an accelerated timeline on plaintiffs who only discover their claim some time after they were first injured. A plaintiff who discovers that they have a claim against a winter maintenance contractor has two years from the date of discovery, under s.5, to commence their claim. The existence of an obligation on behalf of a defendant to make inquiries about the possible existence of a contractor in any given case, and the question of what a plaintiff must to do discharge their duty to act reasonably, will turn on the particular facts of each case, and the timing and nature of the specific inquiries a plaintiff must make will also depend on the circumstances.

Where a winter maintenance contractor seeks summary judgment on the basis that a reasonable person in the plaintiff's position should have known of their existence earlier than they actually did, a contractor is required to support their contention with evidence. In the case at hand, the Court found that Forest Ridge had not presented any evidence that would permit the Court to conclude that a reasonable person in the plaintiff's position ought to have suspected that the Town may have contracted out sidewalk winter maintenance to a private business. Even in the event that the Court had found that the plaintiff should have inquired about the existence of possible private contractors, it remained the burden of Forest Ridge to show that a reasonable person in the plaintiff's position would have made that inquiry before December 20, 2017. Lack of diligence by the plaintiff or her lawyer within the two-year window that preceded the commencement of her action was not "a separate basis for determining whether a limitation period has expired".

Forest Ridge further argued that it would have been reasonable for the plaintiff, prior to retaining counsel in 2018, to have learned about the existence of Forest Ridge within the first year following the loss. In considering this contention, the Court stated that it was not satisfied that it was reasonable to expect an unrepresented plaintiff to make an inquiry of the Town's legal department on their own, and that Forest Ridge had presented no evidence to support the inference that an unrepresented plaintiff in the plaintiff's position ought to have made such an inquiry.

On the basis that Forest Ridge had not met its threshold burden of showing that the objective discoverability of the plaintiff's claim against it did not require a trial, its motion for summary judgment was dismissed without prejudice to its ability to advance a limitations defence at trial.

2. *Musa v. Carleton Condominium Corporation No. 255 et al.*, 2022 ONSC 1030

On December 5, 2016, the plaintiff, Wael Musa, fell on a slippery area in a roadway outside of his condominium. The fall resulted in a fractured ankle. The parties had agreed on damages. The trial proceeded on the issue of liability, only.

The plaintiff brought his action against the condominium corporation, and their snow removal contactor, Exact Post Ottawa Inc. The fall occurred in the midst of the season's first snowstorm, on a plowed laneway area. The plaintiff was walking upon the plowed lane, located upon the roadway, in order to walk to his car which was parked in a nearby parking area. There were no sidewalks in the area. At the time that the fall took place, snow plowing operations were being carried out. The plaintiff lost his footing while on the plowed laneway. The plaintiff contended that, although the area was plowed, it had not been salted.

The fall was witnessed by Exact Post's snowplow operator, who was in the process of clearing the snow and creating a plowed laneway to allow for pedestrian egress. The operator advised that the snow was heavy, wet snow, that was "very slippery". With respect to salt application, Exact Post advised the Court that it was their practice to apply salt after plowing had been completed. The condominium corporation, who had retained the defendant contractor, provided it with the discretion to spread salt when required, and it was admitted by Exact Post that they used their judgment in doing so. The position of both defendants was that snow and ice removal responsibilities where entirely delegated to the contractor.

The central issue before the Court was whether Exact Post had applied road salt to the driveway and parking areas of the condominium in a sufficiently timely way to avoid, or mitigate, the formation of icy conditions that would place residents at risk of slipping and falling. It was accepted by the Court that Exact Post had monitored the weather and was aware of the approaching storm. Ice formation, given the conditions, was reasonably foreseeable, as was the need for the timely application of road salt. At the time that the plaintiff's fall had occurred, snow had been falling for 5 ½ hours, and Exact Post had been on site for 2 hours' time. The area had not been salted prior to the fall. Exact Post's salt truck arrived at the property post-fall, and salting was completed in 10 minutes' time. The salt application occurred approximately 7 hours after the snowstorm began, prompting the Court to consider whether the delays in applying road salt were consistent with a reasonable standard of care required of a commercial snow removal contractor in the circumstances.

Evidence led by Exact Post revealed that it was responsible for providing winter maintenance services to 14 properties. While Exact Post had multiple snowplow operators, it had only one pick-up truck that performed salt application on all 14 properties. None of the plow operators were equipped to carry and apply salt. Exact Post's salt application operator had no formal training and was not familiar with any industry "best practices". While Exact Post did agree that it was important to apply road salt as soon as possible after plowing; it disagreed with

the suggestion that salt could have been applied at the subject property sooner than it had been, due to the continued heavy snow fall and blowing snow.

The plaintiff led expert evidence which included opinion based on best practice guidelines that were well established in the winter road maintenance industry. It was the opinion of the plaintiff expert that there were two options available to the defendant contractor to appropriately manage the conditions. The area could have been pre-salted, or the defendant could have spread salt concurrently with or immediately after plowing.

Ultimately, the court found that Exact Post had failed in its duty under the *Occupiers' Liability Act* to take reasonable care to see that residents walking on the condominium roadway were reasonably safe. The failure arose from the breach of a duty to carry out snow and ice control responsibilities to the standards required of a commercial winter maintenance contractor, in the circumstances. The conditions required that salt be applied to the paved areas in a more timely and appropriate manner. As pre-salting had not taken place, there was a duty to see that salt was either applied concurrently with, or very promptly after plowing in order to avoid the skiff of snow remaining on the pavement from bonding onto the pavement in the form of ice. The delay was an inherent problem in Exact Post's system, which involved one operator, who was responsible for 14 properties, personally handling salt application from his vehicle once he arrived on site. A failure to delegate salt application to plow operators was noted to be problematic, resulting in the contractor's ability to apply salt, being stretched too thin.

Of note, the Court was also asked to consider contributory negligence on the plaintiff's behalf on the basis of the defendants' contention that the plaintiff appeared to be wearing street shoes (an allegation made on the basis of an observation made by Exact Post's employee who was at the property but was 30 feet away from the plaintiff at the time), and on the basis that the plaintiff was not taking any particular precautions in light of the slippery conditions. The Court had heard evidence from the plaintiff that he had been wearing rubber soled winter boots, which had been corroborated by the evidence of the plaintiff's employer. With respect to the evidence before the Court on the plaintiff's footwear, the Court preferred the evidence of the plaintiff. In considering the allegation that the plaintiff did not take proper care given the conditions, the Court found that the defendants had failed to lead evidence to prove any contributory negligence on the plaintiff's behalf.

Liability was found to fall to Exact Post.

3. *Chambers v. Remnant Tabernacle*, 2022 ONSC 1482

In *Chambers v. Remnant Tabernacle*, 2022 ONSC 1482, the defendant Remnant Tabernacle, a Church, brought a summary judgment motion requesting that the Court dismiss the plaintiff's personal injury action that arose further to a slip and fall on Church property.

The fall occurred in the morning of February 9, 2019, in the parking lot and pathway owned by the Church. At the time of the fall, the parking lot was ice-covered, due to a recent ice storm. The plaintiff had attended at the Church to take part in a service.

The plaintiff and a few other parishioners, after taking note of the icy conditions upon arrival, began to salt the parking lot. The plaintiff also elected to park her car across the entrance to the parking lot in order to prevent other parishioners from entering into the parking lot, due to the conditions. When the pastor arrived, it was requested that the plaintiff vehicle be moved. In response, the plaintiff ventured back across the parking lot and removed her car. In the course of returning back to the other parishioners to continue to assist with salting the parking lot, she slipped on the ice, and fractured her ankle.

The parties agreed that the property was "treacherously dangerous" at the time of the fall due to ice. It was further agreed that, due to extreme seasonal conditions at the time, the Church had run out of salt and had only been able to acquire 3 bags of salt the day prior to the loss (*it would normally take 8 bags to treat the entire surface). While there was a dispute as to when the icy conditions had arisen, the Church acknowledged that it had knowledge of the conditions by the morning of February 9, 2019, and prior to the plaintiff's fall occurring.

The Church's defence rested on its contention that it had a reasonable system for winter maintenance, which included icy conditions, and took steps to make the property reasonably safe for its visitors on the morning of February 9, 2019. The Church further relied on s. 4(1) of the *Occupiers' Liability Act* and stated that it was known to the plaintiff when she ventured across the parking lot that she was taking a risk that she would fall and injure herself. Therefore, the Church argued that the plaintiff willingly took the risk and that pursuant to s. 4(1) the Church is absolved of liability in any event.

In addressing the question of whether there was a genuine issue requiring a trial on the issue of the alleged breach of the duty under s. 3(1) of the *Occupiers' Liability Act*, the Church submitted that any assessment of their standard of care can be reached on the basis of common sense. They argued that "this is Canada…and it is not uncommon for pedestrians to know that they have to exercise care in walking on ice covered surfaces". The Church argued that as long as it had a reasonably competent system in place to deal with these types of weather conditions, it had met its obligations under the *Act*.

The Court, in considering the motion, stated that the assessment of whether an occupier met a standard of care is highly fact-driven and the reasonableness of the steps taken (or not) by the occupier to render the premises reasonably safe will be assessed in light of all the circumstances of the case. In considering all of the circumstances of a case, the Court will

take into account relevant factors including the weather, the time of year, the size of the parking area, the cost of preventive measures, the quality of the footwear worn by the visitor, the length of the pathway, and the nature of the property.

In the case at hand, evidence was led that established that the defendant Church relied on a custodian and volunteer parishioners to salt the property on an as needed basis. The Church's winter maintenance program and protocols had not been reduced to writing. Salting was left to the discretion of the custodian, with the only direction provided being that areas were to be "appropriately salted". The volunteer parishioners that assisted with salting were not provided with any training or instruction. Rather, they were expected to pitch in and help, when needed, and to exercise "common sense".

With respect to the Church's salt supply, the Court found that, while there was an admitted shortage of salt supplies in the City, the Church gave no consideration to purchasing or "applying sand, breaking the ice, (or) carving grooves into the ice to assist with traction".

Finally, while there was controversy as to when the ice storm had occurred, it was the evidence of the Church that its custodian attended at the property the evening prior, plowed, and applied salt – although sparingly because he only had three 10 kg bags.

The Court found that the evidence was clear that the Church had actual knowledge of the unsafe condition of the parking lot on the date of loss. Further, it was clear that, if indeed the Church had a system, it was not followed on the date of loss insofar, at least, as there was an insufficient supply of salt. The Church was aware not only that its supplies had been depleted, but it was also aware that its custodian had been unable to secure an adequate supply of salt for the morning of the loss. Despite this, the Church did not appear to have taken any measures to compensate for that inadequacy, except to reply on parishioners to assist in some manner.

The evidentiary record was unclear in some areas, and in conflict in other key areas, such as what the system in place for this type of winter maintenance and severe weather was, what role the parishioners were to play, who was directed to move the plaintiff's vehicle, details of conversations between the Church and its custodian regarding the state of the parking lot, and the precise steps to be taken to render it reasonably safe. The evidence of the plaintiff was noted by the Court to be credible, and it found that it raised a genuine issue requiring a trial to determine whether the Church met its obligations under section 3(1) of the *Occupiers' Liability Act*.

In considering the defendant's argument that, on the basis that the plaintiff willingly assumed the risk before her it was therefore absolved of liability by operation of s. 4(1) of the *Act*, the Court referenced the Supreme Court of Canada decision in *Waldick v. Sundance Northwest Resorts Ltd*., [1988] 1 S.C.R. The Court stated that "rare may be the case where a visitor who enters on premises will fully know of and accept the risks resulting from the occupier's non-compliance with the statute". Ultimately, the Court was not persuaded that the Church's reliance on s. 4(1) of the *Act* and its allegation that the plaintiff willfully assumed the risk that

its alleged negligence could result in harm to her, will absolve it of liability. At minimum, the Court stated, whether this is one of those “rare” cases, there was a genuine issue that requires a trial. The summary judgment motion was, therefore, dismissed.

Of note, in the course of argument, the plaintiff suggested that it would be appropriate for the Court to make a finding of liability in her favour. The Court declined to exercise its discretion to grant partial judgment on liability.

4. *Psaila v. Kapsalis*, 2022 ONCA 37

In *Psaila v. Kapsalis*, 2022 ONCA 37, the Court of Appeal affirmed the lower court's decision to dismiss the plaintiff's claim, further to a summary judgment motion, for failure to provide timely notice as required under s. 42(6) of the *City of Toronto Act*, 2006, S.O. 2006, c. 11, Sched. A, with no reasonable excuse.

The plaintiff had been involved in a motor vehicle accident on March 28, 2015, in the City of Toronto. By August 2015, the plaintiff was in receipt of the complete police file relating to the accident, which included statements from the defendants. Examinations for discovery took place in January and February 2017. In February 2018, the defendants served an expert accident reconstruction report placing blame on the plaintiff for the accident. The plaintiff retained an expert engineer to respond to the plaintiff report in March 2018, who shortly thereafter, advised plaintiff counsel to put the City on notice of a potential negligence claim due to road design issues. Notice was provided to the City on April 2, 2018. The City was added to the action, as a defendant, by an order dated March 29, 2019. They City filed a motion for summary judgment, on the basis that the statutory notice under section 42(6) of the *City of Toronto Act* was not satisfied. The Court ultimately found that the plaintiff did not meet the first part of the two-part conjunctive test set out in s. 42(8) of the *Act*, which requires that, where there is a failure to give notice, a reasonable excuse for the want of the notice be established in order to not bar the action. There was no genuine issue requiring a trial. The plaintiff's action against the City was dismissed.

The appeal was brought on the basis that the motions judge made palpable and overriding errors in findings of fact and misapprehended an expert report. The Court of Appeal resisted these arguments.

In rendering its decision, the Court pointed out that the plaintiff, in the underlying motion, was given the "benefit of a broad and liberal interpretation of reasonable excuse", when finding that the plaintiff, and his litigation guardian, were in possession of sufficient facts to warrant hiring an expert; and that they knew of the location of the accident, of the City's responsibility for designing and maintaining the location, and that the defendants were blaming him for failing to avoid the collision. This information should have led the plaintiff to put the City on notice, or at the very least, put the City on notice 10 days post receiving their expert report.

The appeal was dismissed.

5. *Graham v. Toronto (City)*, 2022 ONCA 149

In *Graham v. Toronto (City)*, 2022 ONCA 149, the City of Toronto appealed the decision of the lower court to dismiss their summary judgment motion which sought to dismiss the plaintiff's claim on the basis that the plaintiff failed to provide notice of her trip on a pothole within 10 days of the incident, contrary to s. 42(6) of the *City of Toronto Act*, 2006, S.O. 2006, c. 11, Sched. A. Notice of the claim was provided to the City just short of three months post-fall.

As discussed in the lower Court decision (2021 ONSC 2278), the plaintiff's excuse for not providing notice as required by the *Act*, was due to her not knowing about the notice requirement. Moreover, although she may have been told by her doctor that her injury was serious and that she should sue and/or put the City on notice, her doctor also advised her that the injuries would heal with physiotherapy. The plaintiff only realized several months after the fall that her injuries were not resolving. Furthermore, the Court noted that the delay in providing notice was not lengthy. The lower Court also considered the issue of prejudice and found that the City was not prejudiced in its defence. The City appealed on the basis of unfair process, and on the basis that the motion judge erred in not finding that the action was statute barred.

The Court of Appeal reiterated that, "to determine whether a plaintiff has demonstrated a reasonable excuse, a court must ascertain whether, in all of the circumstances of the case, if it was reasonable for the plaintiff not to give notice until she did". On the issue of prejudice, it was noted that the City's position solely rested on the fact that it did not take measurements of the hole before it was repaired. However, the plaintiff had taken clear photos of the pothole within the 10-day period; her husband had inspected the pothole on the date of loss and could estimate its depth; and the City took pictures of the pothole 17 days later in relation to another unrelated fall. Moreover, the City did not adduce any evidence to explain why measurements were not taken at the time that photos were taken, and the plaintiff had an expert opine on the pothole dimensions based on the photos yet the City did not cross-examine the expert. The Court of Appeal agreed that, in the circumstances, there was no prejudice to the City.

The appeal was dismissed.

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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.

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