ALEXANDER HOLBURN

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E-NEWSLETTER

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In This Issue:

1. *Power v. Mac's Convenience Stores Inc. et al, 2023 ONSC 1688*

This action arises out of a March 4, 2019, slip and fall at a Mac's Convenience store located within a gas station. By way of a Statement of Claim issued on March 8, 2021, the plaintiff alleged that he exited through the main door of the store, slipped on ice immediately outside the front door, and fell to the ground sustaining injury.

The defendant, On-Site Maintenance & Repairs Inc. ("On-Site") is a winter maintenance contractor. While operating under a waiver of defence, the following course of events took place:

- On March 25, 2021, On-Site wrote to plaintiff counsel inquiring about the location of the loss and advised that it was not responsible for maintaining the elevated concrete area immediately outside the door of the convenience store.

- Receiving no reply from plaintiff counsel, on April 1, 2021, On-Site provided plaintiff counsel with a copy of its snow removal contract with Mac's Convenience which provided that it was responsible for maintaining "city sidewalks only". It again requested confirmation of the area of loss.

- On May 5, 2021, plaintiff counsel advised that the plaintiff had fallen on the sidewalk area immediately outside of the Mac's Convenience door.

- Following this confirmation, on September 8, 2021, counsel for Mac's Convenience confirmed in writing that the area of the loss was the responsibility of Mac's Convenience.

- On September 23, 2021, On-Site requested a photo with the location of the loss circled, which it advised would be used in a Request to Admit.

- On December 10, 2021, On-Site advised that should the matter proceed through the discovery process, counsel should not expect that On-Site would agree to a without-costs dismissal of the claim.

- On-Site served a Request to Admit on plaintiff counsel on February 6, 2022, which included the photograph where upon the plaintiff had indicated the area of the loss. On-Site requested an admission that the fall occurred on the raised concrete walkway. Plaintiff counsel did not respond to the Request to Admit.

- On March 7, 2022, On-Site served a second Request to Admit which, in part, sought an admission from Mac's Convenience that it was the occupier of and had jurisdiction over the area of loss. Jurisdiction was admitted by Mac's Convenience on March 22, 2022.

- On the basis of the foregoing efforts, On-Site requested that the claim be dismissed against On-Site by no later than April 8, 2022. There was no response to the offer, which prompted On-Site to serve a Statement of Defence on April 10, 2022.

- A Notice of Motion was served on April 13, 2022, with a supporting Affidavit. The motion record was served on April 14, 2022.

- On April 22, 2022, plaintiff counsel served an offer to settle the claim against On-Site on a without costs basis. In response, On-Site offered settlement of the claim against it in exchange for payment of its disbursements, which was to remain open until May 13, 2022. The offer was not accepted.

By the time that On-Site's motion came before the court, the only issue was whether On-Site was entitled to costs of the action, who was entitled to costs of the motion, and the quantum of costs.

On-Site took the position that the determination of who had responsibility for the area of loss was a simple matter that could have been accomplished in the two years prior to issuing the claim. On-Site had made persistent efforts to determine whether it was exposed to liability from the outset and argued that the plaintiff had failed to act reasonably in response to information available to him and to settlement offers advanced by On-Site. They further submitted that, despite their efforts, a motion was required to bring the action against On-Site to a conclusion.

On-Site's request for costs was resisted by the plaintiff on the basis that (a) he undertook a common practice to sue all parties that might be responsible for the loss and could not release On-Site until it was certain that the co-defendant, Mac's Convenience, had jurisdiction over the area of loss; (b) he did not become aware that On-Site was not responsible for the area of loss until delivery of the Statement of Defence of Mac's Convenience; and (c) On-Site had acted unreasonably in bringing the motion and not extending an offer to resolve the action on a without costs basis. The plaintiff submitted that he was due costs from On-Site.

In determining the issue of costs, the court highlighted that there is a costs risk to suing parties who do not have liability for a loss. While it was the case that, when the claim was issued, it was not frivolous or vexatious, the court noted that it would have very soon become evident that there was likely no merit to the claim against On-Site. The plaintiff had not taken reasonable steps to investigate or confirm this. Instead, the plaintiff sought to move the action forward, eventually seeking to schedule discoveries shortly before On-Site served its statement of defence and its motion.

The court deemed the issue faced by plaintiff counsel to be "a simple one" – notably, did the fall occur on the sidewalk or beyond the sidewalk, and who was responsible for maintenance of the sidewalk. The plaintiff was aware of where he fell. By September 8, 2021, he knew that Mac's Convenience agreed it had jurisdiction over the area of the fall. The plaintiff refused to formally admit where the accident took place and refused to respond to a simple Request to Admit. The plaintiff pressed on with his claim against On-Site when he was aware of the risk of doing so. On-Site had adverted to the risk of costs and steps it could take if there was no resolution.

In determining costs, the court advised that encouragement of settlement and discouragement of needless expense are both factors which may be considered in the exercise of discretion to award costs. Early discussions to narrow issues and liability of any parties are to be expected and should be encouraged. It was not appropriate for a plaintiff to assume that a defendant must agree to a without costs dismissal of claims against them no matter the complexity of the issue, the circumstances at play, or the stage of the action. While it may be appropriate for a plaintiff to commence a claim against a defendant they are not yet certain will be liable at the time of pleading, parties should pursue reasonable steps and information to determine liability at the earliest opportunity, particularly where a defendant is willing to participate in such discussions.

On-Site was entitled to its costs of the action and the motion. Costs of $3,700 inclusive of disbursements and HST were awarded for the action, along with costs of $3,625 inclusive of disbursements and HST on the motion.

2. *Lue v. Loblaws Supermarkets Limited, 2023 ONSC 3101*

In the case of *Lue v Loblaws Supermarkets Limited*, 2023 ONSC 3101, the court considered a motion by the plaintiffs to amend the Statement of Claim to add two proposed defendants, United Cleaning Services Limited ("United Cleaning") and Orb Services.

The plaintiffs' claims arose from alleged damages resulting from a slip and fall that occurred on April 22, 2017, on premises occupied by the defendants, Loblaws Supermarkets Ltd and Loblaws Inc. c.o.b as Real Canadian Superstore ("Loblaws"). It was alleged that United Cleaning and Orb Services provided cleaning services to Loblaws at the subject premises.

Loblaws did not oppose the motion. United Cleaning opposed the motion on the basis that the limitation period for the plaintiffs' claims against it has expired. Orb Services agreed not to oppose the motion on the plaintiffs' agreement that any order granting leave to amend was without prejudice to Orb Services' ability to plead a limitation defence.

Central to the court's consideration of the motion were Rules 26.01 and 5.04(2) of the *Rules of Civil Procedure*, and sections 4, 5(1) and 21(1) of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

The court cited the test in the Court of Appeal case of *Morrison v. Barzo*, 2018 ONCA 979 as authority for the two-stage approach to be applied on a motion to add a party to a proceeding after the apparent expiry of a limitation period. With the evidentiary burden on a plaintiff, first, a plaintiff must overcome the presumption in s. 5(2) of the *Limitations Act, 2002* that they knew of the matters referred to in s. 5(1)(a) of the *Limitations Act, 2002* on the day the act or omission on which the claim is based took place. This burden is addressed by leading evidence as to the date the claim was actually discovered. Second, a plaintiff must offer a "reasonable explanation on proper evidence" as to why a claim could not have been discovered through the exercise of reasonable diligence. The evidentiary threshold is low, and a plaintiff's explanation should be given a "generous reading" and be considered in the context of the claim.

On a motion to amend to add a party, the parties' rights in relation to the limitation period crystalize on the date the motion is served, as per the decision in *Computer Enhancement Corporation v. J.C. Options et al.*, 2013 ONSC 4548. In the case at hand, the plaintiffs served their motion on the existing and proposed defendants on October 31, 2022. Accordingly, in satisfying their onus on the test as described in *Morrison*, the plaintiffs were required to demonstrate that the claims against the proposed defendants were not actually discovered, nor reasonably discoverable, before October 31, 2020.

There was an agreement between counsel for the plaintiffs and United Cleaning that the plaintiffs first acquired actual knowledge of the claim against United Cleaning on October 15, 2021, during the examination for discovery of a representative of Loblaws. The only issue in dispute on the motion was therefore whether the plaintiffs had met their onus on the second part of the *Morrison* test by demonstrating that the claims were not reasonably discoverable before that date.

Based on the evidence before the court, it was accepted that prior to the examination the plaintiffs had believed that Loblaws was solely responsible for floor maintenance and that no independent contractor had been engaged. It was noted, in support of this contention that:

a) The subject incident report prepared by Loblaw's insurance adjuster on April 22, 2017, and provided to the plaintiffs in 2019, made no mention of any floor cleaning contractors; and

b) Loblaw's Statement of Defence, and Amended Statement of Defence, made no mention of a floor cleaning contractor.

The court accepted that it was reasonable for the plaintiffs not to conduct due diligence into the possible involvement of any independent floor cleaning or maintenance contractor as they had no reason to believe that such contractor existed, and there had been no "trigger" that would have reasonably caused the plaintiffs to make such enquiries.

In response, United Cleaning submitted that the act of a plaintiff retaining a personal injury lawyer created a basis for a plaintiff's knowledge of the likely involvement of a cleaning contractor and gave rise to an obligation to undertake further enquiries. This submission, which amounted to an argument for a "free-standing obligation on plaintiffs in slip and fall cases to automatically conduct due diligence into the existence of independent contractor defendants regardless of any specific reason to believe that such a contractor exists", was noted by the court to have been rejected in the case of *Madrid v. Ivanhoe Cambridge Inc.*, 2010 ONSC 2235.

The plaintiffs were found by the court to satisfy their onus under the two-part test and were permitted to add United Cleaning as a defendant to the action.

3. *Moffitt v. TD Canada Trust*, 2023 ONCA 349

In *Moffitt v. TD Canada Trust*, 2023 ONCA 349 (CanLII), the Court of Appeal upheld Justice LeMay's 2021 decision in *Moffitt v. TD Canada Trust*, 2021 ONSC 6133.

The underlying claim involved a May 28, 2013, assault and robbery of the plaintiff, Bruce Moffitt, in a TD Bank ATM vestibule located at 673 Warden Avenue in Toronto. The assault resulted in the plaintiff suffering serious injuries. The defendant that committed the assault, Ferdinand Panagan ("Panagan"), was charged with attempted murder, for which he was acquitted. In addition to naming Panagan and his friend who attended with him at the ATM, Jason Green, as defendants to the action, the plaintiff also named as a defendant to the action TD Canada Trust ("TD") on the basis that it owed him a duty of care pursuant to the *Occupiers' Liability Act*, R.S.O. 1990 c. O.2.

TD denied that it owed the plaintiff a duty of care and brought a summary judgment motion before the lower court. The plaintiff disputed that the matter was appropriate for summary judgment on the basis that a full trial before a jury was required.

Expert evidence was tendered by both the plaintiffs and TD on the summary judgment motion in the areas of environmental criminology, security, public safety, risk measurement and emergency management, and occupiers' liability. It is noted that various challenges were mounted by TD with respect to the admissibility of the plaintiffs' expert reports, which are considered in depth in the lower court's decision.

In addition to the admissibility of various expert reports, the court considered whether the claim was one that was appropriate for summary judgment. It accepted that it was.

Specific to the *Occupiers' Liability Act,* the court examined the standard of care applicable to TD in the circumstances; and whether any breach of TD's standard of care as an occupier caused or contributed to the plaintiff's injuries.

On the issue of standard of care, the court accepted that TD owed the plaintiff a duty of care further to section 3 (1) of the *Occupiers' Liability Act*, as he was a person entering upon its premises. The duty, expressed in general terms in the *Act*, required a fact specific determination that included all the circumstances of the case. The question of whether TD had taken reasonable steps to ensure the plaintiff's safety was to be measured against the objective standard of a reasonable person.

In determining whether TD breached the standard of care applicable to it, the court deliberated whether TD:

(a) breached its duty to properly analyze the risks to its customers at the ATM;

(b) breached its duty to provide proper security at the ATM; and

(c) breached its duty to protect the plaintiff from harm or to warn him of impending harm either immediately before or during the assault.

As part of its analysis, the court considered whether the incident was reasonably foreseeable, along with the crime rate at the branch, the CAP rates (a crime risk score), and the neighbourhood that the branch was located in. The court also considered TD's risk assessment model; and precautions taken by the Bank which included signage advising that the vestibule was monitored by video surveillance, bright lighting in the vestibule, and the placement of mirrors to assist in security issues.

The lower court found that TD had a risk methodology to assess risk, and that there was no basis on which to conclude that the branch was in a high crime location, nor was there any evidence to support regular security concerns at the branch. The plaintiff's assault was deemed to be random, and as such, it was not easily foreseeable or preventable.

The court considered the plaintiff's contention that the Bank breached its standard of care by not posting a security guard in the vestibule but opined that his position was not founded as a security guard was not a reasonable precaution in the circumstances. Similarly, an absence of live monitoring of the CCTV system was not a breach of the Bank's duty as it was not a reasonable precaution for the Bank to take given the relative risk, and on the basis that it would not have made a difference in dealing with a sudden or random act of violence. Finally, the Bank had not breached its duty to warn the plaintiff as there was neither any specific nor general risk that the plaintiff was exposed to by entering the ATM vestibule.

TD was found to not have breached its duty of care, and subsequently, the lower court granted TD's summary judgment motion.

On appeal, the plaintiffs raised three issues: (i) the availability of summary judgment in a civil action in which a party has served a jury notice; (ii) the motion judge's exclusion of expert evidence; and (iii) the fairness of the summary judgment process used in the case.

The Court of Appeal made the following findings:

i. Summary judgment motions in civil jury actions do not require the application of the special test espoused in the decision of *Roy v. Ottawa Capital Area Crime Stoppers*, 2018 ONSC 4207, 142 O.R. (3d) 507. The *Hryniak* test and methodology apply to summary judgment motions brought in civil jury actions. Consequently, the motion judge did not commit legal error by applying the *Hryniak* test.

ii. The motion judge assessed the admissibility of each expert's opinion evidence by applying the two-stage method – the four *Mohan* (*R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9) factors and the discretionary gate-keeping cost/benefit analysis described in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182. The motion judge also gave detailed, structured reasons explaining which portions of the opinion evidence from two of the experts he was admitting and why he was excluding other portions of their evidence. The appellants had not demonstrated any reversible error made in the motion judge's decision, and the motion judge had applied the correct legal principles.

iii. There was no evidence before the court to substantiate a claim that the plaintiffs did not receive a fair hearing.

The appeal was dismissed and the decision of the lower court was affirmed.

Q2 Occupiers' Risk Management Tip

To set yourself up for success in defending an Occupiers' Liability claim, it is crucial that an Incident File is created and maintained.

Contemporaneous to an incident, an Incident File should be immediately created which should include, at a minimum, a copy of:

- All Incident Reports;
- A copy of any statements taken from witnesses to the loss;
- Scene photos;
- A list of any individuals/employees that may have been present on the premises at the time of the loss that may have relevant information to the loss and conditions preceding the loss;
- Inspection records for the relevant period;
- Maintenance records for the relevant period (both internal records and contractor records);
- A copy of any available CCTV footage; and
- A copy of any relevant maintenance contract.

A copy of the Incident File should be provided to your insurance company with your report of the loss.

A copy of the Incident File should also be preserved on site.

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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.

At Alexander Holburn, high-quality work is our baseline. We are dedicated to providing pre-eminent legal services to clients by forming strategic, service-oriented business partnerships. We are also equally committed to delivering exceptional customer service to our clients, which begins with taking the time to get to know our clients' needs, and the environments they work and operate in. We not only want to be your advocate, but we also want to be your trusted advisor.

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