ALEXANDER HOLBURN

ISSUE 3 | JULY - SEPT 2023
E-NEWSLETTER

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1. *Karan v. 2038815 Ontario Business Corp.*, 2023 ONSC 974

In the case of *Karan v. 2038815 Ontario Business Corp.*, 2023 ONSC 974, the court considered the request of the plaintiff, Richard Karan ("Karan") to amend his Statement of Claim to add the Regional Municipality of Peel (the "Municipality") as a defendant to the action. The request came more than two years following a slip and fall incident that occurred on September 28, 2017. The loss was allegedly caused by a collapsed portion of a retaining wall that protruded onto a sidewalk.

Karan provided notice to the Municipality of the loss on October 23, 2017, where after he was advised by counsel for the Municipality that it was not legally responsible for the area where the loss occurred. Karan was advised to commence a claim against the City of Mississauga (the "City"), on the basis that it was the responsible government entity, which he did. After the litigation was commenced, and after the expiry of the two-year limitation period, Karan alleges that he was advised by the City that the Municipality was in fact responsible for the area of loss.

Karan sought an order permitting the claim to be amended to name the Municipality on the basis that the "ordinary" two year limitation prior should be extended as he had provided the Municipality with notice of the claim less than a month after the accident; and that by relying on the information he received from the Municipality, the claim was not discoverable until after the expiration of the limitation period. He further suggested that any potential prejudice was negated by the early notice. The motion was opposed by the Municipality on the basis of the expiration of the limitation period, and on the basis that it was not, in fact, responsible for the area of loss.

In considering the motion, the court applied the two-part test to add a party after the expiry of a limitation period as set out by the Court of Appeal in *Morrison v. Barzo,* 2018 ONCA 979, at para. 31 – 33. In summary fashion, first, a plaintiff must lead evidence showing that they first learned of the matters upon which the claim is based after the limitation period expired and when that occurred (which will overcome the s. 5(2) presumption); and second, a plaintiff must meet the low evidentiary burden of offering a reasonable explanation for the delay, demonstrating that the claim could not have been discovered before the expiry of the limitation period.

Considering the first part of the test, the court noted that the early notice to the Municipality was evidence that Karan was aware of the potential liability of the Municipality within a month of the loss. However, he was "disabused of that notion" by the Municipality, and being so informed, the court found that he was "arguably unaware of (the Municipality's) potential liability to him for about 23 of the 24 months following his accident". Actual discovery, therefore, arose after the expiration of the limitation period. Turning to the second part of the test, the court found that Karan offered a reasonable explanation on proper evidence as to his failure to discover he had a claim against the Municipality. It was not open to the Municipality to argue that reliance on its own representation was a breach of due diligence on Karan's behalf.

Turning to prejudice, the Municipality failed to offer any evidence of how the delay would affect its ability to defend the claim. There was no evidence of any non-compensable prejudice.

The court granted the motion, without prejudice to any limitation defence to be raised by the Municipality.

2. *Barry v. His Majesty the King in Right of Ontario*, 2023 ONSC 4299

On August 3, 2016, the plaintiff, Darlene Barry (the "Plaintiff") was playing with her dog in Rideau River Provincial Park campground, when she allegedly tripped over a hidden retaining wall located along the riverbank. The Plaintiff was in the course of was playing fetch with her dog and had thrown her dog's toy into the river for the dog to retrieve. The dog retrieved the toy, but on exiting the river, dropped it approximately 6-8 inches from the water's edge. The Plaintiff approached the toy to pick it up, when she says that her right foot "hit something solid" propelling her into the river, crushing her right leg. The Plaintiff attributed her fall to a concealed retaining wall lip, which was covered by overgrown grass and other foliage along the water's edge.

Following the loss, the area was inspected by a provincial park warden, who spoke to two apparent witnesses to the loss and the Plaintiff's husband. The warden prepared an occurrence report which identified that the Plaintiff "slipped", and not "tripped". The report was submitted to the Ministry of Labour. A Ministry of Labour employee attended at the park to inspect the area for hazards. No hazard was observed.

The trial proceeded on the issue of liability only. No witnesses to the fall testified at the trial.

It was alleged by the Plaintiff that the Crown failed to discharge its duty as occupier of the park on the basis that it (1) allowed a tripping hazard to be concealed by overgrown grass, (2) failed to have a proper inspection system, and (3) failed to provide warning of the hazard. In response, the Crown argued that (1) the action was statute barred due to failure to provide notice within 10 days as required by s. 7(3) of the *Proceedings Against the Crown Act* ("PACA") (*notice was provided January 25, 2017); (2) that the Plaintiff failed to prove on a balance of probabilities that she tripped on the retaining wall as alleged; and (3) the Plaintiff had not proven that the Crown, as the occupier of the Park, acted unreasonably.

At trial, two preliminary issues were raised. The first concerned the admissibility of a videotaped examination in chief of the Plaintiff's husband, who passed away prior to trial. Portions were allowed. The second issue concerned the admissibility of photographs taken of the scene 6 ½ years post-loss. They were not admitted on the basis that they were not relevant.

In considering HMK's position that the claim was statute barred for failure to provide written notice within 10 days of the loss, the Plaintiff advised the court that she relied on her complaint to the park and resultant occurrence report as sufficient notice under PACA. In response, the Crown presented evidence that the park's complaint and occurrence report was used as a "catchall for everything that happens in the park", including a natural event. The Crown submitted that, in order to satisfy the PACA notice requirements, the notice must (1) contain sufficient particulars to allow the Crown to identify the source of the potential problem so that it can investigate; and (2) the notice must include an element of "complaint", i.e. it must inform the Crown that the complaint could reasonably be anticipated to result in litigation. The court found that the Plaintiff had not provided notice to the Crown in that the occurrence report did not include an element of "complaint", and it did not provide sufficient particulars in that the incident was described as a "slip" and not a "trip". The claim was, therefore, statute barred.

For the sake of completeness, the court continued on to address the failure of the Plaintiff to prove, on a balance of probabilities, that she tripped on a retaining wall. The court found that the evidence supported a finding that the Plaintiff slipped and fell while standing *on* the retaining wall, rather than tripping *over* it. The court did not find the Plaintiff's description of the mechanics of her fall credible. Her evidence of how she landed in the water – chest-first, on her arms – was contradicted by her evidence on discovery – that she fell on her tailbone. Moreover, photographs taken just 11 days post-loss by the Plaintiff's husband documented a clearly visible retaining wall. The court also found the evidence of the park warden - who testified that the Plaintiff advised him that she slipped and fell when reaching for her dog's toy - to be preferable over that of the Plaintiff.

Finally, the court considered hospital ER records, made contemporaneous to the time of the loss, that documented that the Plaintiff "fell off a ledge for 3 feet into the water and twisted [her right] leg"; along with triage records that stated that the Plaintiff "was on a stone wall throwing ball for dog – fell into shallow water". While limited weight was placed on the records, the records were admissible as business records, and the statements recorded in them were admissions against interest. The Plaintiff, when confronted with the records, suggested that the statements could not be conclusively attributed to her, and were wrong. No evidence was led, however, to suggest that the Plaintiff had been accompanied by anyone else who could have made the statements contained therein.

The Plaintiff had not proven that she tripped on a retaining wall, nor did she prove that the Crown, as occupier, failed to take reasonable care. Reasonableness was to be determined on the facts of each case; and includes an analysis of foreseeability, the gravity of possible harm, the burden of the cost of preventative measures, industry practice, custom, and applicable regulatory standards (*Fernandez* v. *Toronto (City)*, 2021 ONSC 5106). The court accepted the Crown's evidence that it had a reasonable maintenance system, and that grass in the area was mowed weekly and groomed with weed whippers. There was no evidence of complaints or other slip and fall incidents either before or after the incident, and no evidence of any hazard – unusual or hidden - in the area in which the incident occurred. The retaining wall was large and visible and the water's edge was obvious. The Crown had no duty to warn of an "obvious and self-evident risk".

The Plaintiff was the author of her own misfortune.

3. *Lynch v. Canada (Attorney General)*, 2023 ONSC 4366

The plaintiff, Jerome Lynch ("Lynch"), a designated dangerous offender, commenced a claim against the Attorney General (the "AG") on the basis of various causes of action, including a slip and fall while in custody. The AG brought a motion before the court to strike Lynch's claim on the basis that it failed to establish a reasonable cause of action; that it was devoid of material facts necessary to support the elements of the claim; and that it was frivolous, vexatious, or otherwise an abuse of process of the court.

On a motion under Rule 21 of the *Rules of Civil Procedure* to strike out a pleading on the ground that it discloses no reasonable causes of action, the court is required to read a pleading generously in favour of a plaintiff, with allowances for drafting deficiencies. A claim should only be struck out if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17.

Considering the issue of the slip and fall portion of the action, only, the court opined that in order to advance a claim for personal injuries sustained by a slip and fall, a claim should contain the following:

a. A description of when the slip and fall incident occurred;
b. A description of where the slip and fall incident occurred;
c. What happened;
d. The duty of care that a plaintiff says a defendant owed them;
e. Particulars of the defendant's breach of its duty of care;
f. How and to what extent a plaintiff was injured as a result of the defendant's breach; and
g. The damages suffered.

In the case at hand, Lynch's Statement of Claim did not identify when, where, or under what circumstances the slip and fall occurred. The claim, as it stood, was struck in its entirety with leave to deliver a fresh as amended Statement of Claim.

4. Walpole v. Brush, 2023 ONSC 4869

Chestnut, a dog belonging to the defendants Tammy Brush and Larry Ostertag (the "Defendants") attacked the 6 year old minor plaintiff (the "Minor"), causing injuries to her face. The Minor was visiting the Defendants' rented home. The home was owned by Julian Crisol and Marianette Crisol (the "Landlords"). The Landlords were not present when the dog attacked. As a result of the attack, a claim was commenced on behalf of the Minor, by her litigation guardian, and on the behalf of multiple family members (the "Plaintiffs").

The Landlords brought a summary judgment motion arguing that there was no genuine issue for trial under both the *Dog Owners' Liability Act*, R.S.O. 1990, c. D.16 ("DOLA"), and the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 ("OLA"). They asserted that a landlord could not be held liable for damages resulting from an attack by a tenant's dog while on the rented premises.

In opposing the motion, the Plaintiffs advanced two defences.

First, the Plaintiffs submitted that the Landlords were liable for the Minor's injuries on the basis that the dog was a "hazard" on the property further to the *Residential Tenancies Act* 2006, S.O. 2006, c.17 (the "RTA"). This argument was rejected on the basis that the relied upon provisions under the RTA related to common areas on a premises and not areas within a rental unit.

Secondly - while the Plaintiffs accepted in law that the dog was owned by the property renters, and that the DOLA imposed a strict liability - they asserted that the Landlords breached their common law and statutory duties as occupiers. The Plaintiffs argued that the Landlords did not inspect the property; keep a copy of the lease; ensure that the tenants had tenant insurance as is required by the lease; and took no steps to keep the property safe.

In considering the argument advanced by the Plaintiffs, the court considered the DOLA and its relationship to the OLA. Central to its analysis were the following provisions of the DOLA:

- Section 2 (1) which provides that the owner of a dog is liable for damages resulting from a bite or attack;
- Section 1 which defines an "owner" as including a person who possesses or harbours the dog and, where the owner is a minor, the person responsible for the custody of the minor; and
- Section 3 (1), which provides that where damage is caused by being bitten or attacked by a dog on the premises of the owner, the liability of the owner is determined under the DOLA and not under the OLA.

With reference to prior case law, the court found that where a dog bite occurs on the premises of the owner, the OLA does not apply. Where a dog bite occurs elsewhere, liability may attach to others.

Chestnut was owned by the Defendants. As such, the DOLA applied and the Defendants were responsible for damages. The OLA did not apply in the case at hand. Moreover, even if the failures alleged against the Landlords were made out, (1) they would not establish a duty of care to the Plaintiffs which had been breached; and (2) the failures were not causally connected to the Minor's injuries.

Partial summary judgment was granted on the basis that there was no genuine issue for trial.

5. *Derro v. Blechta*, 2023 ONSC 4939

On February 18, 2019, the plaintiff James Derro ("Derro") fell on the driveway belonging to his neighbours George and Huguette Blechta (the "Blechtas"). The driveway was a common driveway that started at the road entrance and then split in two, heading to their respective homes. The non-shared portion was approximately two hundred feet long.

Typically, George Blechta performed normal winter maintenance to his driveway, which included snow blowing and shoveling, as well as the application of traction materials.

The day prior to the loss, rain and snow caused four to six-inch ruts to form in the Blechtas' driveway. The Blechtas asked Derro to use a steel plow on his truck to scrape the ice, so that sand could be applied. The court noted that Derro had, on prior occasions, performed snow plowing – but not scraping – for the Blechtas. After scraping the driveway, Derro exited his truck and walked around to the front of his plow to speak with his neighbour. After conversing, and in the course of returning to his truck, he fell, allegedly sustaining injury.

The Blechtas denied liability for Derro's loss and brought a motion for summary judgment to dismiss the claim. Derro opposed the motion on the basis that there were credibility issues involving the Blechtas that required an in-person hearing. Derro submitted that there was disputed evidence pertaining (1) to where George Blechta was standing while Derro scraped the ice; (2) whether George Blechta's son was present; and (3) whether it was George Blechta that requested that Derro speak to him when he was done scraping the driveway.

The court found that the alleged "disputed" evidence was of "no moment in (the) determination of whether the Blechtas met their obligations" under the *Occupiers' Liability Act*.

The Blechtas were found to have acted reasonably in the maintenance of their driveway, in the circumstances. They were not liable for any injury caused to Derro.

George Blechta had determined that he could not safely undertake his usual maintenance until the ice ruts had been addressed and had, accordingly, asked Derro to scrape the ice so that sand could be applied. Derro was aware that ice ruts were present and he knew that the Blechtas could not carry out their maintenance, including the application of a traction agent, until he was done scraping the driveway. The court noted that, in cross-examination, Derro confirmed that he was not certain he had scraped all the ice from the driveway and acknowledged that it was possible that there was still ice on the ground. Derro had no duty to leave his truck. He knowingly assumed the risks associated with exiting his truck and walking on the driveway in the conditions prior to the Blechtas continuing with the driveway maintenance.

The court determined that there was no genuine issue for trial, and summary judgement was granted.

6. *Crete et al v. Ottawa Community Housing Corp et al*, 2023 ONSC 5141

The plaintiff, Daniel Crete (the "Plaintiff"), allegedly sustained injury in March 2017 when he slipped and fell on ice located on the front step of a row house that he and his mother leased from Ottawa Community Housing Corporation ("OCHC"). The Plaintiff, and his mother Marguerite ("Margeurite") sued OCHC on the basis that it was OCHC's responsibility to perform winter maintenance upon the property, which included the front step; and on the basis that ice accumulated in the area due to water overflowing from an eavestrough.

OCHC countersued Marguerite on the basis that as an occupier of the property, and a signatory to the lease, she was responsible for clearing ice from the front step.

Both Marguerite and the OCHC brought a motion for summary judgment. Marguerite sought a dismissal of OCHC's counterclaim. OCHC sought an order (1) requiring Marguerite to pay contribution or indemnity to OCHC for any amount it is ordered to pay the plaintiffs; (2) a dismissal of the plaintiffs' action; (3) a declaration that the plaintiffs were responsible for winter maintenance in the area; and (4) a declaration that the plaintiffs were occupiers of the property under the *Occupiers' Liability Act,* R.S.O. 1990, c. O.2 ("OLA").

Prior to engaging in an analysis of the facts, the court noted that partial summary judgment is a rare procedure, reserved only for an issue(s) that may be readily bifurcated from those in the main action, and that may be dealt with expeditiously and in a cost effective manner (*Butera* v. *Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, at para. 34). Partial summary judgment should be granted only in the clearest of cases and only if doing so does not give rise to any of the associated risks of delay, expense, inefficiency, and inconsistent findings (*Truscott* v. *Co-Operators General Insurance Company*, 2023 ONCA 267, 482 D.L.R. (4th) 113, at para. 54).

The court opined that the issue of determining whether the plaintiffs or the OCHC had responsibility for clearing ice from the front step could be easily severed from the balance of the case, as it would not open the door to inconsistent findings at trial and would likely simplify the litigation and reduce its overall costs. The relief requested by OCHC, on the other hand, was not easily severed from the remaining issues of the case. The only issue, therefore, to be decided by the court was whether Marguerite or the OCHC was responsible for removing ice from the step where the fall occurred.

Marguerite admitted that she was an occupier of her leased property under the OLA but argued that OCHC was responsible for winter maintenance. The governing lease, executed in 1988, provided that the landlord was not responsible for snow removal from driveways and that tenants were responsible for snow removal from the front and back doors of the rented premises to the main walkway. Marguerite conceded this but argued that the provision in the lease was inconsistent with the *Residential Tenancies Act*, 2006, S.O. 2006, c.17 ("RTA"), and was therefore void. Marguerite's argument was based on the following:

- Under Section 20(1) of the RTA, a landlord is responsible for providing and maintaining a residential complex "in a good state of repair and fit for habitation and for complying with health, safety, housing, and maintenance standards", which she argued included winter maintenance.

- Section 4(1) of the RTA provided that a provision in a tenancy agreement that is inconsistent with the RTA or its regulations is void, and therefore the provision in the lease was void on the basis that Section 20(1) of the RTA required a landlord be responsible for winter maintenance.

- The court's decision in *Montgomery* v. *Van*, 2009 ONCA 808, 256 O.A.C. 202 ("*Montgomery*"), in which the Court of Appeal held that, under s. 20 of the RTA, landlords are responsible for

winter maintenance at residential complexes, and that while tenants may assume this responsibility, they may only do so by way of a contract that is severable from the lease.

The OCHC relied on the terms in the lease, and on the basis that for the 28 years prior to the Plaintiff's fall, Marguerite in fact cleared ice and snow from the subject step, and the OCHC had not. Moreover, OCHC took the position that, as the landlord, it was responsible for removing unsafe snow and ice accumulations from "common areas" in the residential complex, which was restricted to areas that could be used by all tenants. The plaintiffs, as tenants, were responsible for clearing snow from the portions of the leased property over which they had exclusive use. Finally, it submitted that the lease did not contravene the RTA, and that it would be cost prohibitive for community housing complexes to be responsible for snow and ice removal in all exclusive use areas.

Turning first to the analysis of the lease terms, the court was satisfied that the area identified in the lease from which the plaintiffs were required to remove snow included the front step. Although the finding did not turn on it, the court did note that the parties had always acted in a manner that was consistent with the interpretation of the snow removal obligations in the lease.

The court then considered whether the lease term, which required a tenant to remove snow from "the front and back doors of the Rented Premises to the main walkways", violated the landlord's obligation under s. 20(1) of the RTA. In doing so, it considered the ruling of the Court of Appeal in *Montgomery,* that to be effective, a clause that provides that a tenant is responsible for snow removal services must constitute a contractual obligation severable from the tenancy agreement.

The OCHC submitted that the lease provision described an area over which the plaintiffs had exclusive use. It was not considered an exterior common area. It further took the position that its obligation as a landlord to remove unsafe accumulations of snow and ice was restricted to "exterior common areas" as per s. 26(1) of *Maintenance Standards,* O. Reg. 517/06, formerly s. 26(1) of O. Reg. 198/98. Therefore, the obligation to remove ice and snow had no application to the plaintiffs' front step.

The court reviewed photographs of front step area, which led to a short pathway in front of the plaintiffs' home and found that it was evident that the area served no purpose in common with other tenants of the complex. It was also evident that the plaintiffs treated the area in front of the rowhouse as though they owned it.

On the basis of the submissions and the evidence before it, the court was satisfied that the plaintiffs had exclusive use of the area, and that it was not a "common area". The OCHC's obligation to remove unsafe accumulations of ice and snow from "exterior common areas" under s. 26(1) of the Maintenance Standards regulation had no application to the front step. The provision in the lease requiring the plaintiffs to remove snow from the front door to the main walkways was not, therefore, inconsistent with s. 26(1) of the regulation. Moreover, *Montgomery* was distinguishable, as it dealt with a landlord's responsibility for ensuring that accumulations of ice and snow were removed from external commons areas.

In the alternative, Marguerite submitted that even if the lease was found not to be inconsistent with s. 26(1) of the regulation, and the findings in *Montgomery* did not to apply; the lease was nonetheless inconsistent with s. 20(1) of the RTA*,* which provides that landlords are responsible "for providing and maintaining a residential complex, including the rental units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards." The court disagreed with the arguments advanced by Marguerite and found the removal of snow (which includes the removal of ice and slush) from the exclusive use areas of a residential complex falls within the meaning of s. 33 of the RTA, which makes a tenant responsible for the ordinary cleanliness of a rental unit, and not under s. 20(1).

The court ruled that the terms of the lease, which imposed certain snow removal obligations on tenants, were not inconsistent with the provisions of the RTA, and were not void under s. 4(1) of the RTA. Marguerite's motion seeking dismissal of the counterclaim was dismissed, and the court granted a declaration that the plaintiffs, and not the OCHC, were responsible for performing winter maintenance in the area of loss.

7. *Musa v. Carleton Condominium Corporation No. 255*, 2023 ONCA 605

On December 5, 2016, the plaintiff, Wael Musa (the "Plaintiff"), fell on a slippery area on a roadway outside of his condominium. The fall resulted in a fractured ankle. The fall occurred in the midst of the season's first snowstorm. At the time that the fall took place, snow plowing operations were in the course of being carried out. An area of the roadway had been plowed, but not yet salted. The Plaintiff was walking on the plowed roadway towards his car when he lost his footing and fell, resulting in injury. As a result, the Plaintiff brought an action against the condominium corporation, and their snow removal contactor, Exact Post Ottawa Inc. The matter proceeded to trial on the issue of liability only.

At trial, the court found that Exact Post had failed in its duty under the *Occupiers' Liability Act,* R.S.O. 1990, c. O.2 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. 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. The failure to delegate salt application to plow operators resulted in the contractor's ability to apply salt being stretched too thin.

Exact Post appealed the lower court's decision on the basis of its findings on standard of care. The crux of its position is that the trial judge misapprehended the expert evidence at trial and held it to an unreasonable standard of care.

Exact Post requested that the appeals court interfere with the trial judge's findings of mixed fact and law – namely the findings that given the weather conditions on the morning of the loss, Exact Post was reasonably required to apply road salt to the plowed areas in a timely and appropriate manner; however, it failed to do so. The roadway had not been salted until 7 hours after the snowstorm began, and 1.5 hours after the Plaintiff's slip and fall. The Court of Appeal found no basis to interfere with the trial judge's findings.

The court noted that the appellate standard of review on a question of law is a standard of correctness; questions of fact and mixed law are reviewable by palpable and overriding error. The determination of a duty of care is a question of law; and the application of the standard of care and the determination of an issue of causation are questions of mixed law and fact.

On the issue of reasonableness standard of care, Exact Post noted that its contract for the property required it to confine its work to the hours between 6 am and 11 pm. It argued that the trial judge's suggestion that it should have attended at the premises earlier, i.e., by 6:00 am, was akin to holding it to a standard of perfection which was not "commercially possible" as the practical effect would be that it would have to "attend every parking lot and every townhouse by 6:00 am when alerted to a forecast of snow". The Court of Appeal saw no merit in the submission and did not read the trial judge's decision as requiring it to attend at the premises at 6:00 am. The decision was read by the court to indicate that in the specific circumstances it was reasonable to have expected Exact Post to have started earlier than it did in order to complete plowing and salting before the morning rush hour, given that it decided not to pre-salt the area.

The standard of care had been correctly framed – namely, whether Exact Post applied the road salt to the roadway of the condominium in a sufficiently timely way to "avoid or mitigate the formation of icy conditions that would put the residents at risk of injury through slipping and falling." The Court of

Appeal opined that the trial judge's focus in his reasons was not about what time Exact Post should have arrived at the condominium – it was about the timing of the application of the road salt after plowing was completed. The trial judge found that salt was applied approximately 3.5 hours after Exact Post arrived on site, which was 1.5 hours after the Plaintiff's fall. It was clearly within the purview of the trial judge to find that this was neither timely nor appropriate.

Exact Post further alleged that the trial judge erred by misapprehending the evidence of the Plaintiff's expert witness and improperly failing to consider the evidence of its contractual obligations. Exact Post claimed that the evidence supported its argument that a contractor must finish plowing the entire property before applying salt, and this was exactly what it had done. This submission was rejected by the Court of Appeal. It found that the Plaintiff's expert witness expressly provided evidence that in the absence of pre-salting, road salt must be spread concurrently with or immediately after plowing to prevent the ice/pavement bond from setting in. Exact Post's failure to do either created an icy road condition, which posed a danger to the Plaintiff.

The suggestion by Exact Post that the entire property had to be plowed prior to salting, while snow continually fell, or else it would be required to re-apply salt each time it re-plowed was also rejected. Having opted not to pre-salt the area, Exact post then failed to salt the area concurrently with or immediately after plowing. This failure allowed the compacted remaining snow on the pavement to quickly freeze and therefore become very slippery to pedestrians. The trial judge was entitled to find that the delay in applying salt fell below the acceptable standard of care expected of a commercial winter maintenance contractor in the circumstances of the case before him.

Additionally, Exact Post argued that the trial judge erred in relying on the industry best practices from the Canadian Parking Association and the Transportation Association of Canada in setting the standard of care, since these guidelines are not mandatory. The Court of Appeal saw no merit in the submission.

Finally, Exact post argued that its decision to not salt the roadway until the entire condominium had been plowed was consistent with its winter maintenance contract. In response, the Court of Appeal noted that it is trite law since *Donoghue v. Stevenson,* [1932] A.C. 562 (H.L.), that "the duty to take reasonable care exists independently of any contractual obligation. In this case, (Exact Post's) liability is grounded in tort and the statutory provisions of the *OLA*. While a contractual provision may inform the assessment of, and in some circumstances modify, the standard of care, it is not determinative".

The Court of Appeal found that the analysis of the trial judge in assessing reasonable care, was consistent with the Supreme Court's decision in *Waldick v. Malcolm,* [1991] 2 S.C.R. 456, and included consideration of the weather, the time of year, the size and nature of the property, the cost of preventive measures, the quality of the footwear worn by the plaintiff, and the length of the pathway.

On the foregoing basis, the appeal was dismissed.

Q3 Occupiers' Risk Management Tip

While the focus of our prior tips has been on creating systems, policies, and procedures to prevent and respond to losses, it is equally important for an organization to proactively identify possible hazards that can contribute to the risk of slips, trips, and falls.

In order to take a proactive approach to the elimination of slip, trip, and fall risks on your property, consideration should be given to:

- Foreign Substance Potential – Are certain areas upon your property likely to be wet or slippery or contain other foreign substances (ex. grease or oil)?
- Human Factors – What is the typical demographic of individuals that are generally upon your property (ex. seniors or children)? What type of footwear is generally worn by people walking through the area?
- Level Changes – Is there any uneven flooring, ramps, or ledges on the property that can pose a slip or trip hazard?
- Obstructions – Are there any obstructions in travelled pathways (ex. extension cords, furniture, displays)?
- Stairs - Do stairways on the property have proper handrails? Are there differences in stairway tread depths and riser heights?
- Surface Conditions – Are there any cluttered walkways with low obstacles or uneven flooring upon the property?
- Surface Changes – Are transitions between different flooring surfaces highlighted?
- Unusual Feature – Are there any atypical features on the property that require extra care or warning, or features that can result in distraction?
- Visibility – Are there adequate light levels to highlight potential slip or trip hazards? Is there any unusual glare or shadowing upon the property?

A proactive approach to identifying, providing warning of, or outright eliminating hazards is an important strategy in reducing claims.

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ABOUT THE AUTHOR

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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, Kelowna and Toronto, Canada. We have operated in British Columbia for 50 years and opened our Ontario office in 2019, followed by our Kelowna office in 2023. 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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