ALEXANDER HOLBURN

**ISSUE 4 | OCTOBER - DECEMBER 2023**

E-NEWSLETTER


**SUBSCRIBE TO RECEIVE FUTURE UPDATES HERE.**

## In This Issue:

## 1. *Bailey v. The Owners, Strata Plan EPS4454*, 2023 BCSC 1712

### Background

In this case, the Plaintiff slipped and fell in the elevator lobby next to the Defendant Strata Corporation (the "Strata")'s visitor parking. He alleged that the lobby was inadequately lit and littered with loose cardboard or paper.

The Strata denied liability, admitting the elevator lobby lights were out, but asserting that the Plaintiff was speculating that he slipped on cardboard. The Strata further argued it had an adequate program of inspection and maintenance in place.

The Strata brought a summary trial application seeking a dismissal of the Plaintiff's claim. The sole issue for determination was the Strata's liability under the *Occupiers Liability Act* ("*OLA* ").

### Facts

According to the Plaintiff, he arrived at the Strata to meet with a resident, a friend named Mr. Hong. He parked his vehicle in the visitor's parking. When he proceeded into the elevator vestibule, the door closed behind him and he found himself to be in almost complete darkness. He was already "committed" to taking a step, and as he completed his step he felt something give way under his right foot. His right foot slid forward and he fell on his left knee.

The Plaintiff then texted Mr. Hong and his other friend (Mr. Shah, who lived with Mr. Hong), who both came down to assist. One of them mentioned "cardboard" and the Plaintiff heard him push something with his foot – the sound was "distinctively of cardboard" as it slid.

The Plaintiff had no specific memory of what gave out under his foot but knew it was "something" and that his foot slid out forward quickly. The fall was sudden and unexpected and he could not say how much of it was due to the darkness, and how much was because of the cardboard. After having some time to think about it at home, he concluded it made sense that he had slid on cardboard.

The Plaintiff also relied on the affidavit evidence of Mr. Shah. Mr. Shah deposed that earlier in the day he had telephoned the emergency line posted for residents and left a message about the vestibule lights being out. Mr. Shah said that after the fall, he again called the posted emergency line for residents at Strata. When Mr. Shah received no response, he emailed the property manager that evening to report a blackout and that someone had been injured in a fall.

Later that evening, Mr. Shah checked the elevator lobby noting that it was still dark. Mr. Shah says no one responded to him about his reports until the next morning.

The Strata did not dispute that the lights were out but argued that the Plaintiff did not know what he slipped on and the Court could not speculate in that respect. On Examination for Discovery, the Plaintiff agreed that the idea that he slipped on cardboard arose after the fall when Mr. Hong found cardboard on the floor in the lobby.

### Decision

The Court reiterated that the standard of care applicable to the Strata as an occupier was whether its conduct created "an objectively unreasonable risk of harm." The Court further noted that a plaintiff was not required to prove with scientific precision what caused his fall. While the Court may not speculate, it was entitled to draw reasonable inferences that were based on the evidence, about what was more likely than not to have caused the fall.

After considering all of the evidence, the Court found that the fall was caused by the absence of lighting in the elevator lobby and the presence of cardboard or paper on the floor of the elevator lobby. The Plaintiff's failure to identify in the moment that he stepped on cardboard was not fatal. His evidence was that both he and Mr. Shah recall Mr. Hong pointing out that cardboard was on the floor when they came to assist the Plaintiff after the Fall. The Plaintiff was asked if he had rolled over on his ankle and he denied that, stating that he felt "something give way" under his foot as he stepped into the elevator lobby.

Having found that the Plaintiff established a prima facie case of negligence, the burden turned to the Strata to rebut the breach with evidence that it had a reasonable system of cleaning and inspection in place at the time of the accident.

The property manager was responsible for receiving complaints about the Strata. He said he received no complaints regarding power outages prior to the incident. There was a dedicated emergency line relying on a live answering service. The only person who reported the power outage on the day of the fall was Mr. Shah. The day after the fall, the property manager inspected the lobby and replaced a single, burnt-out light bulb.

The Strata submitted that since it had new, modern lighting in the elevator lobby and a plan for cleaning and maintenance, that was sufficient to rebut the alleged breach of the standard of care.

The Court agreed that an elevator lobby was not an inherently hazardous area and did not require frequent inspections throughout the day. However, Mr. Shah had left a complaint message on the emergency line before the incident. There was no evidence to explain what happened to Mr. Shah's messages. On that basis, the Court found that the Strata's scheme for handling emergency calls was not followed on the day of the fall and therefore the Strata was found liable.

Nevertheless, the Court assessed 50% contributory liability against the Plaintiff on the basis that he proceeded into the elevator vestibule when he should have seen through the vestibule window that the lights were out.

**Conclusion**

In summary, the Strata's application seeking a summary dismissal of the Plaintiff's claim was dismissed. Instead, the Plaintiff's claim was allowed, with liability being apportioned 50/50 between the Plaintiff and the defendant Strata.

## 2. *Tahouney v. J.C.B. Holdings Ltd.*, 2023 BCSC 1801

### Background

This was another summary trial dismissal application, in this case, brought by the Defendant's grocery store (the "Store"). The Plaintiff had commenced the underlying action after allegedly tripping and falling on a bunched-up mat while shopping in the produce section of the Store.

### Facts

On Examination for Discovery, the Plaintiff testified that she slipped and fell while getting grapes in the produce section. She did not see what she had tripped on, but after the fall while on the ground she "looked around and … saw crinklings in the carpet" and that the carpet was "all bunched up." In an affidavit relied on during the summary trial hearing, the Plaintiff also stated "the sensation I felt right before my fall also felt like my foot getting caught in a rolled-up or bunched-up rug or mat."

The Store relied on affidavit evidence from the current Store manager, Mr. Banys. Mr. Banys deposed that the Plaintiff purchased groceries in the Store at 3:44 p.m. While there was no formal safety training program, new employees were paired with more senior employees during their training period. Employees were expected to perform regular floor checks of their respective departments and supervisors were expected to perform regular floor checks of the entire floor. The shifts included a walk-through of the floor area, the purpose of which was ensuring cleanliness and safety for customers and staff, after which staff would punch into the floor log to document that their area was clean and in order. The floor check included "looking at the carpets or mats to make sure there was nothing there that could pose a hazard or danger to customers."

There was no formal policy in place with respect to the frequency of these checks, but they were expected to be done "regularly." A floor log of these checks was maintained. On the day of the Plaintiff's fall, the log showed that the floor of the produce department was checked twice prior to 3:44 p.m.; and the floor of the entire store, including the produce department, was checked by the supervisor on duty that day six times prior to 3:44 p.m., with the last check occurring at 2:41 p.m.

### Decision

The Court provided that the duty imposed by the *Occupiers Liability Act* ("*OLA* ") was to take reasonable care in the circumstances to make the premises safe. That duty did not require ensuring absolute safety (*Fulber v. Browns Social House Ltd.* , 2013 BCSC 1760 at para. 28).

In order to be successful in establishing their claim, "a plaintiff must prove: first, what condition or hazard caused her slip and fall; and, second, that the condition or hazard existed due to a breach of duty by the defendant" (*Van Slee v. Canada Safeway Limited* , 2008 BCSC 107, at para. 31).

Finally, an occupier can rebut a *prima facie* case of negligence with evidence that, at the time of the accident, the occupier had a reasonable system of cleaning and inspection in place that was being followed (*Druet v. Sandman Hotels, Inns & Suites Limited,* 2011 BCSC 232 at para. 40).

The Court proceeded to consider the two-step process to assess if this matter could be determined by summary trial. The first step was to determine whether there should be severance of the issues and the second, to determine whether a summary trial was appropriate.

The Store submitted that this matter was suitable for severance and summary trial. It argued that the Plaintiff had adduced no evidence to substantiate her claim that the fall was caused by any breach of duty by the Store. Furthermore, the Store submitted that it met its burden to show it had a reasonable

system in place to prevent a hazard from arising.

The Plaintiff submitted in response that she was not relying on speculation, but rather on a specific hazard. Further, the Store's reasonable system defense rested largely on hearsay and both elements could only be properly assessed at a full trial of the matter.

The Court sided with the Plaintiff, finding that it could not make the findings of fact required to determine liability on the record before it. In particular, the Plaintiff's claim rested essentially on her own description of what she felt as she was falling. The Store argued that the fold in the mat was merely an inference made by the Plaintiff *after* her fall, based on her subsequent observation that the mat was "all bunched up." The Store further argued that the fold was just as or more likely to have been *caused by* , as opposed to being the *cause of* , the fall.

The Court held that it simply could not reach such a conclusion on the application. The Plaintiff was not cross-examined on her affidavit, which provided new evidence not provided at Discovery. The Court noted that the Plaintiff could have been asked about this evidence on Discovery, had it been provided then. The Store's theory that the Plaintiff's recently attested memory was nothing more than an inaccurate reconstruction of events had not yet been put squarely to the Plaintiff. Her evidence in that regard needed to be tested through cross-examination, with the associated credibility findings made, all of which could only occur in the context of a full trial.

The Court made a similar finding in relation to the Store's reasonable system of inspection. The Court held it could not decide questions regarding the existence and sufficiency of such a system, given the dispute between the parties as to what the records in evidence before the Court actually showed and the issue of hearsay.

**Conclusion**

The summary trial application was dismissed (i.e. the matter was remitted to a full trial). Of note, in anticipation of success, the Plaintiff had sought special costs. Special costs are awarded to punish "reprehensible conduct" by an unsuccessful party. It is unclear what conduct the Plaintiff was arguing was "reprehensible" in the context of what was presented as a fairly typical summary trial application in an *OLA* claim.

Nevertheless, the Court declined to award costs to the Plaintiff, electing instead to award costs "in the cause." This meant that the party that was successful at the pending full trial would be entitled to the costs of the summary trial application as well.

## 3. *Hagley v. A & W Food Services of Canada Inc.* , 2023 BCCRT 899

### Background

In this Civil Resolution Tribunal decision, the Claimant claimed he tripped and fell on a step at the Respondents' property.

The Respondent A&W said it was not responsible as it neither owned nor operated the subject property. Rather the property was owned and operated by its franchisee, the Respondent Western Restaurant Franchises Inc. ("Western"). The CRT agreed and dismissed the claim against A&W.

Western agreed the Claimant fell on Western's property but said there was insufficient evidence to prove the severity of the Claimant's injuries.

### Civil Resolution Tribunal ("CRT") Jurisdiction

This claim was brought pursuant to the Civil Resolution Tribunal Act. The CRT has jurisdiction over small claims worth $5,000 or less. The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT most often determines cases based solely on documentary evidence and submission, as it did in this case.

### Facts

The Claimant said he tripped while visiting Western's restaurant. There was a step in the asphalt leading to the door, that was the same colour as the ground. Additionally, the sun was in his eyes so he did not see the step which caused him to trip.

Western, which was represented by employees in this proceeding, did not provide substantive submissions on whether the step was a hazard. However, it was undisputed that following the fall Western painted the step a different colour. The CRT noted that while remedial measures taken after an incident are not necessarily determinative that they were taken to comply with a duty of care, they are a factor to consider (*Cahoon v. Wendy's Restaurant* , 2000 BCSC 629 at para. 21).

### Decision

The CRT decided that Western was in breach of its obligations under the *Occupiers Liability Act* by failing to provide a warning about the step. The uniform colour of the ground and step would make it hard for customers to distinguish the step. As a public restaurant, Western knew, or ought to have known, that a rise in the asphalt with no differentiation in colour could create a hazard. The CRT found that the Claimant tripped on the step due to its hazardous nature.

The claim was therefore allowed.

## 4. *MacMillan v. The Owners, Strata Plan 1688*, 2023 BCCRT 969

### Background

In this Civil Resolution Tribunal decision, the Claimant owned a strata lot in the Respondent Strata Corporation (the "Strata"). The Claimant's vehicle was vandalized while parked in the common property garage. The Claimant blamed the Strata for negligently failing to ensure the safety of vehicles in the garage.

### Facts

The Strata had a common property garage building divided into sections. The Claimant's section included five stalls. While each stall had its own garage door, there were no internal walls between the stalls. This meant that if one stall door was open, a person could access any of the five stalls in that section. Each stall door could be opened by the owner's opener, but that could also be accessed by a security code. While the Strata was responsible for maintaining the parking garage under its bylaws, it did not have specific bylaws about garage security.

In April 2021, the Claimant's vehicle was vandalized. The Strata was undergoing construction and the Claimant argued that the Strata failed to create a "safety plan" to protect property when workers were using the garage. Without providing evidence (e.g. witness statements, logs, etc.), she asserted that workers left stall doors open for hours at a time, with no one within eyesight to monitor the same.

The Strata said that it had recently changed the garage security code when the construction crew had been reduced to two members. Only those two members and Strata council knew the code. The garage doors were closed at the time of vandalism and there was no sign of forced entry, nor was there any damage to any other vehicles parked in or outside the garage.

### Decision

The CRT re-iterated that to prove negligence, the Claimant must show that the Strata owed her a duty of care, the Strata breached the standard of care, Claimant sustained damage, and the Strata's breach caused the damage (*Mustapha v. Culligan of Canada Ltd.* , 2008 SCC 27 at paragraph 3).

Additionally, while neither party referred to it, the CRT found that the *Occupiers Liability Act* ("*OLA* ") applied to this dispute. Section 3(1) of the *OLA* says that an occupier has a duty to take reasonable care that a person's property on its premises will be "reasonably safe", except where the person willingly assumes a risk to their property. The standard of care under the OLA is the same standard of care at common law for negligence, which is to protect others, or their property, from an objectively unreasonable risk of harm.

Therefore, pursuant to both negligence and the *OLA*, the question was whether the strata breached its duty to take reasonable care in the circumstances to ensure that the Claimant's vehicle was reasonably safe.

However, the CRT concluded that the evidence, including the police report, indicated that no one knew who damaged the Claimant's vehicle or how they were able to access the garage. The CRT found that the Claimant failed to prove that a safety plan would have prevented the damage to her vehicle as there was no evidence that the damage was caused by an unauthorized person gaining access to the garage using the code.

The claim was dismissed.

# Q4 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.

**SHARE THIS NEWSLETTER:**

## ABOUT THE AUTHOR


### PATRICK BRUCE

PARTNER

**EMAIL** pbruce@ahbl.ca
**TEL** 604 484 1779
Vancouver
**V-Card**


Patrick Bruce is a Partner in the firm's Insurance group. His practice is primarily litigation-based with an emphasis on insurance defence, insurance coverage and alternative dispute resolution. Patrick has experience with technically complex, multi-party personal injury, casualty, and liability claims. He has acted for large global insurers and their insureds across a wide range of industries, including complex personal injury claims, subrogated matters, property damage, construction claims, and other matters. In his capacity as counsel, Patrick's approach is to focus on first understanding his client's unique objectives before recommending a course of action to resolve claims efficiently and creatively. He works closely with his clients throughout the process and is committed to providing a high level of service on all matters.

## 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 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.

Alexander Holburn lawyers are repeatedly recognized in *Best Lawyers in Canada*, the *Canadian Legal Lexpert Directory*, *Benchmark Litigation*, and *Who's Who Legal*. In addition to providing outstanding legal services, we aim to be thought leaders who can add insight beyond the individual mandates we receive.