ALEXANDER HOLBURN

ISSUE 4 | OCTOBER – DECEMBER 2023
E-NEWSLETTER

SUBSCRIBE TO RECEIVE FUTURE UPDATES HERE.

In This Issue:

1. *Cooper v. Beaudoin*, 2023 ONSC 6543

The plaintiff, Paula Cooper (the "Plaintiff") was visiting with her sister, Elizabeth Cooper ("Elizabeth"), and her brother-in-law, Daniel Beaudoin (the "Defendant") in September 2017. While staying at their home (the "Bungalow"), she tripped over her sister's sandals (which had been left on the bungalow's back stoop), resulting in a broken ankle. As a result of her injuries, the Plaintiff sued the Defendant alleging that he did not take reasonable care in the circumstances to ensure that she was safe on the property. Of note, she did not sue her sister, who was a joint owner of the bungalow.

The action proceeded on the issue of liability. Much of the evidence submitted to the court proceeded on the basis of an Agreed Statement of Facts.

The backyard of the bungalow was accessed via a back door. The back door opened inward, into a narrow landing internal to the home. External to the back door was a stoop, which was located four-to-five inches below the threshold for the back door. The stoop was a few feet across and was slightly wider than the back door. Atop the stoop was a mat. Below the stoop were two steps that led down to a patio stone walkway which lead to a garage and to a deck.

In the summer, it was the practice of both Elizabeth and the Defendant to leave their shoes on the stoop.

For the purpose of determining liability, the parties conceded that the Defendant was an "occupier" as per section 1 of the *Occupiers' Liability Act* (the "*Act*"), while further agreeing that he owed the Plaintiff a duty of care under section 3(1) of the *Act*. There was no agreement, however, on (1) whether the Defendant met the standard of care; (2) if he did not, whether the Defendant caused the Plaintiff's injury; and (3) whether the Plaintiff was contributorily negligent.

Turning to the standard of care, the court reminded us that while section 3(1) of the *Act* "imposes on occupiers an affirmative duty to make premises reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm", the duty is not absolute. The responsibility of an occupier is only to take "such care as in all the circumstances of the case is reasonable". Further, the general rule in assessing the standard of care in negligence is that of a "reasonable person in similar circumstances" and what is "reasonable" is dependent on the facts of each case.

In its analysis, the court considered and accepted the following relevant facts:

1. The Plaintiff was a regular visitor to the bungalow and was familiar with it;

2. The Plaintiff was not aware, prior to the accident, that it was her sister's practice to leave her sandals on the stoop;

3. On the date of loss the Plaintiff was the first to enter into the house and at the time there were no shoes on the stoop;

4. Approximately 10 minutes after being in the house Elizabeth entered, leaving her shoes on the stoop; and

5. When the Plaintiff eventually exited the home she did not recall looking down at the top of the stoop before stepping down and falling.

Of note, there was no evidence before the court directly addressing the likelihood of tripping over the sandals as a known or foreseeable harm, or of the gravity of that harm. Common sense was therefore applied. The court opined that while tripping over sandals left on a back stoop was reasonably foreseeable, the likelihood of harm was low. The court further opined that the injury sustained – a broken ankle – was a "relatively modest injury".

The court found that leaving one's sandals on the back stoop is a "reasonable practice". Although there was risk in doing so, there was nothing "unusual or inherently dangerous" about the practice. Moreover, "the existence of some risk is an ordinary part of life".

The Plaintiff contended that the Defendant failed to meet the standard of care in that he did not (a) request that Elizabeth not leave her sandals on the stoop; (b) failed to warn the Plaintiff to watch out for the sandals; (c) failed to install a shoe rack on the stoop; and (d) did not widen the stoop or leave room for shoes to be placed somewhere else.

In considering the duty on the Defendant to request that his wife not leave her sandals on the stoop, the court found that Elizabeth, being a fully independent and capable adult, did not require supervision or prompting from her husband. Moreover, a reasonable person – an ordinarily prudent person – would not tell their spouse where to put their sandals in their own home. To do so would "put a strain on spousal relations".

Further, the Defendant was not required to warn the Plaintiff to watch out for the sandals. Firstly, he was not aware that Elizabeth had placed them on the stoop prior to the fall; and secondly – with the likelihood of injury being low and the gravity of harm being modest - the court found that only the "most anxious person" would warn visitors to be on guard that their spouse might leave sandals on a stoop. An occupier does not need to warn a visitor about this possibility.

In considering the Plaintiff's assertion that the standard of care required the Defendant to install a shoe rack on the stoop, the court did note that after receiving notice of the action, a shoe rack was temporarily installed and then removed. While post-accident remedial measures can be relevant, they are not an admission of liability (*Sandhu v. Wellington Place Apartments*, 2008 ONCA 215, 291 D.L.R. (4th) 220). Nonetheless, the standard of care does not require an occupier to install a shoe rack, as a reasonable person would not have done so.

Finally, in considering whether the Defendant was required, by the standard of care, to widen the stoop or leave room for shoes to be placed elsewhere, the court noted that there was no information before it to suggest that the width of the stoop was deficient or dangerous. A reasonable person would not have widened the stoop simply because it was common for their spouse to leave sandals upon it in the summer.

The Defendant met the standard of care. Moreover, the *Act* did not impose vicarious liability on a co-occupant for the acts and omissions of another co-occupant.

Although the court's finding that the Defendant met the standard of care concluded the matter, it undertook a brief review of the issue of causation. The Plaintiff did not meet the burden of both establishing negligence and establishing that said negligence caused the injury. The Defendant did not cause the Plaintiff's injury. Even if he had asked Elizabeth not to leave her sandals on the stoop, the court opined that it would not have made a difference. In determining this the court cited evidence that, even after the fall, Elizabeth continued to place her sandals on the stoop.

Given the court's conclusion on liability, while it need not consider whether the Plaintiff was contributorily liable, it did opine that it would have found the Plaintiff 25% contributorily negligent on the basis that a reasonably prudent person looks down when stepping down from a higher elevation onto a step.

Judgment was granted in favour of the Defendant.

Q4 Occupiers' Risk Management Tip

Further to our 2023 Q3 tip discussing proactive identification of possible hazards that can contribute to the risk of slips, trips, and falls, consideration should also be given to regularly scheduling the inspection of a premises for the following common issues (*please note that this list is not exhaustive):

Building Code Compliance

- Uneven steps treads, risers, steps, that do not meet local building codes
- Accessibility ramps or curbs that do not meet local building codes
- Stairways without required railings

Flooring

- Entranceway or well-travelled internal pathways without runners or floor mats
- Floor mats that have become trip hazards
- Smooth or worn flooring
- Surfaces and ramps without slip-resistant floor coatings or materials applied
- Inadequately maintained or cared for flooring
- Flooring transition areas
- Scatter/throw rugs
- Cracked and/or broken steps

General Obstructions/Hazards

- Partially blocked aisleways or aisleways with items stacked in them
- Insufficient waste receptacles
- Loose or broken handrails
- Pot holes or uneven external surfaces
- Deficient grading
- Loose gravel or landscape debris
- Sudden drop-offs or changes in elevation
- Protruding objects, including but not limited to, utility boxes, posts, signage stands, and sprinkler heads

Signage

- Confusing or insufficient signage to guide pedestrians
- Poorly maintained signage
- Signage that is in one language versus pictorial signage (see Canadian Standards Association warning sign guidelines)
- Unmarked changes in elevation

Water

- Areas where water pooling is known to occur
- Sources of water leaks or drips that can contribute to areas of ice formation

Importantly, the findings of all regular inspections - including the areas and issues reviewed for - should be documented. This includes not only the presence of hazards, but also the absence of hazards, and any corrective action taken.

SHARE THIS NEWSLETTER:

ABOUT THE AUTHOR

JENNIFER HUNEAULT

PARTNER

EMAIL jhuneault@ahbl.ca
TEL 416 639 9054
Toronto
V-Card

Jennifer is Alexander Holburn's Toronto Practice Leader and is a member of the firm's Insurance Group. She defends matters relating to complex personal injury, occupier's liability, CGL claims, municipal liability, professional negligence, D&O claims, product liability, 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, customer service driven and dedicated to understanding her client's business objectives with an aim to not only deliver high-quality work but also an exceptional client experience. Jennifer has completed a certificate in Risk Management, holding a Canadian Risk Management Designation. As a value-added service to her clients, she can provide advice on risk mitigation, 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.

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.