ALEXANDER HOLBURN

ISSUE 1 | JANUARY - MARCH 2024
E-NEWSLETTER

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In This Issue:

1. *Harrison v Fraser Health Authority, 2024 BCSC 71*

Background

In this case, the Plaintiff slipped and fell on snow or ice after getting out of her car in a parking lot on the Chilliwack General Hospital campus. She claimed the Defendant health authority and the Defendant snow-clearing contractor were negligent for failing to de-ice the parking lot.

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

Facts

On February 13, 2019, the Plaintiff drove to the hospital campus. It was disputed whether it was still snowing at that time. The Plaintiff said there was snow on the ground, but the sky was clear as it had stopped snowing by morning. The Defendants said it was snowing throughout that day.

There was no weather station in Chilliwack and therefore no historical weather data. The data from the two next closest stations alternately showed snow falling in Abbotsford and no snowfall in Agassiz, but temperatures below zero. The Court found the most that could be taken from this was that there was snowfall "in the region but not all over the region."

There was no evidence regarding the precise size of the hospital campus, but it appeared to take up at least two city blocks. The Plaintiff parked in Lot 10. She got out of her car and walked around the back intending to help her friend's son exit the rear, passenger-side door. The Plaintiff said there was enough snow on the ground that it reached her ankle when she stepped down; the Court inferred this to mean that there was at least two or so inches on the ground, assuming the Plaintiff's recollection was accurate.

As the Plaintiff walked past the rear of the car, she slipped on some snow or ice and fell, landing with all her weight on her left ankle.

The Defendants tendered evidence from the Defendant snow-clearing contractor demonstrating "substantial and active" snow-clearing and snow management activity on the hospital campus on the day of the Plaintiff's fall. However, the Defendant snow-clearing contractor did not provide information specific to each lot, and therefore there was no record specifically identifying if, when, or how frequently Lot 10 was cleared.

Decision

The Court provided that the duty imposed by the *Occupiers Liability Act* ("*OLA*") was to protect others from an objectively unreasonable risk of harm. As per *Perrett v. Port Moody*, 1998 CanLII 3837 (B.C.S.C), the failure of a defendant to keep a parking lot completely clear of snow did not necessarily mean that its system of winter maintenance was unreasonable. That would depend on factors that included budgetary restraints, the availability of qualified personnel and equipment, geographical location, time of year and prevailing weather conditions.

The Court had to therefore determine whether the winter maintenance system that the Defendant health authority had in place was reasonable and whether that maintenance system was followed on day of the Plaintiff's fall.

The Plaintiff argued the snow removal program was unreasonable as Lot 10 was given no priority status. The Court did not make a conclusive finding in this regard, stating that the program appeared reasonable, but acknowledging the Plaintiff could be correct that this was properly a triable issue. The Court noted that the snow removal contractor's evidence was that notwithstanding a lack of priority status for Lot 10, it was "always" cleared by 8 a.m. This meant it should have been cleared four hours before the Plaintiff's fall.

However, the Court found that there was a conflict in the evidence as to whether Lot 10 was, in fact, cleared by 8 a.m. The Plaintiff's evidence was that the snow reached her ankle, meaning there was at least two inches or so. The Plaintiff testified on examination for discovery that it had not been snowing that morning and had not snowed since late the previous evening. If that was correct, it could only mean that Lot 10 had not been plowed at all on February 13, 2019, at least not before her fall. That would in turn mean the snow clearing program was not implemented in the manner expected from the snow removal contractor's usual practice.

On the other hand, the Court noted that notwithstanding the existence of snow on the ground in Lot 10, it was possible that Lot 10 had been plowed by 8 a.m. and then additional snow accumulated after. If correct, this could be persuasive in defeating liability, given an occupier could not be expected to keep an area completely clear of snow during a snowfall event. Further, people going out in a snowstorm must expect some risk.

However, the snow removal contractor's evidence was not that Lot 10 was cleared by 8 a.m., but rather that it would have been cleared by then based on the contractor's usual practice. Furthermore, if Lot 10 had not been plowed, this could bring into question whether its lack of priority was the reason.

Ultimately, the Court provided that the Defendants had led persuasive evidence of a reasonable snow-removal program and that a substantial crew was active on the hospital campus throughout the day of the fall. However, the Court concluded that it was not able to make the necessary findings of fact to decide the case on a summary basis. This was largely because of an unresolvable conflict in the evidence regarding what, if any, snow clearing was done on Lot 10 that day. Regardless of the reasonableness of the program, this conflict was fatal to a summary trial determination.

Conclusion

The Defendants' application seeking a summary dismissal of the Plaintiff's claim was dismissed. The Plaintiff was awarded costs of the application in the cause.

2. *Evans v. Berry*, 2024 BCCA 103

** NOTE: the trial decision, which is the subject of this appeal, was reviewed in our 2023 Q1/2 BC Occupiers Liability Update. Please contact the writer for a copy of that Update.*

Background

The Plaintiff/Appellant suffered injuries when she was bitten by a dog owned by the Defendants/Respondents while attending a dinner party.

The Trial Judge dismissed the claim on the basis that the dog's actions on the night the Plaintiff was injured were out of character, unexpected, and "contrary to his usual habits." Applying an objective test of foreseeability, the harm caused was not within the range of likely consequences. Therefore, the claim was not made out pursuant to either the doctrine of *scienter*, negligence, or the *Occupiers Liability Act* (the "*OLA*").

The Plaintiff appealed.

The Court of Appeal Decision

The Court of Appeal reviewed the underlying facts. The Defendant owners had observed some behavioral issues with the subject dog, "Bones." Bones had a history of nipping at ankles and legs, and of being aggressive towards other dogs. Bones had also bitten the father of one of the Defendants on the arm, drawing blood. However, the Defendants believed this to have been a food motivated incident and further sought out appropriate training and veterinarian advice.

The Court of Appeal summarized the two issues on appeal generally to be whether the judge erred (1) in applying the law of *scienter*; and (2) in determining whether the Defendants met the standard of care.

(1) Scienter

The Court of Appeal rejected the proposition that the doctrine of *scienter* is governed by the principle "every dog is entitled to one bite." While this may be a useful adage, it did not form part of the *scienter* doctrine.

Additionally, the Trial Judge found that it was simply not clear that the prior biting incident was an act of aggression by Bones, and therefore it did not establish that Bones was a source of danger or that he had manifested a propensity to bite or cause harm. Such findings of fact are entitled to considerable deference, such that an appellate court will only intervene when it is demonstrated that the judge below made a palpable and overriding error.

The Plaintiff argued that the Trial Judge's decision was inconsistent with prior *scienter* cases, in that it may be the only authority in which there is clear evidence of a previous dog bite yet the owner is not found liable in *scienter* for a subsequent bite. However the Court of Appeal rejected that argument, holding that the *scienter* analysis is "intensely fact based and context-dependent." The Court of Appeal further provided that the Trial Judge made a number of findings of fact leading to her conclusion that the Plaintiff had not met the test for *scienter*, and those findings were entitled to deference.

In particular the Court of Appeal disagreed that the distinction between nipping and actual biting

was "meaningless." The Court of Appeal further noted that the Plaintiff herself testified that she did not feel threatened by Bones, nor did she have any worry or concern that Bones would bite her.

(2) Standard of Care

The arguments advanced on the issue of negligence and standard of care largely duplicated those made in relation to *scienter*. The Plaintiff did advance one additional argument to support her negligence claim, submitting that the Trial Judge erred in failing to consider whether the Defendants owed a duty to warn guests that Bones had recently bitten one of the Defendants' father.

The Court of Appeal disagreed, providing that a duty to warn would only arise if it were established that Bones had a propensity to bite people and cause harm, and that the Defendants knew of that propensity, such that the type of harm suffered by Ms. Evans was reasonably foreseeable. In the circumstances such propensity was not established, nor was knowledge of the same, and therefore no duty to warn arose.

While the Court of Appeal did not specifically address liability under the *OLA*, the Trial Judge had noted that the test for liability pursuant to the *OLA* and the common law of negligence were the same. Accordingly, it follows that the Court of Appeal's analysis regarding the standard of care in negligence equally applies to the standard of care applicable under the *OLA*.

Conclusion

The appeal was dismissed.

Q1 Occupiers' Risk Management Tip

Following on our Q4 tip on the importance of creating inspection and maintenance checklists, it is also important that an occupier develop and utilize an Incident Report form. Key to a successful defence is documenting and preserving as much information about the loss and the injuries allegedly sustained by a claimant contemporaneous to the time of the loss.

An Incident Report form should include, at a minimum:

1. The date and time of the incident;
2. The date and time the incident was reported;
3. The weather conditions;
4. The specific location of the loss, including whether it occurred indoors or outdoors;
5. The name of the individual completing the form along with their title and contact information;
6. The names and contact information of any witnesses;
7. The name and contact information of the injured party;
8. A description of the incident by the person completing the form;
9. A description of the incident from any witnesses to the loss,
10. A description of the incident from the injured party,
11. A description of any injuries alleged by the injured party and assistance provided;
12. A checkbox that indicates whether an ambulance was called and/or attended at the scene;
13. A description of the condition of the area where the loss allegedly occurred;
14. A description of any corrective action taken, if any;
15. A checkbox that indicates whether photos of the loss area were taken;
16. A checkbox that indicates whether the loss was captured by CCTV footage and whether said CCTV footage was preserved; and
17. The signature of the individual completing the report.

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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.

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