ALEXANDER HOLBURN

ISSUE 1 | JANUARY – MARCH 2024
E-NEWSLETTER

SUBSCRIBE TO RECEIVE FUTURE UPDATES HERE.

In This Issue:

1. Lyng v. Ontario Place Corporation, 2024 ONCA 23

The appellant, Ontario Place Corporation ("Ontario Place"), appealed the underlying decision of the trial judge to award the respondent, Patrick Lyng ("Lyng") damages for injuries sustained in a July 2016 fall on Ontario Place grounds.

Lyng, then 21 years old, attended at a concert at Ontario Place. Following the concert, he exited the concert stands with a friend and the pair made their way towards a bridge to take them to a nearby Go Station. Finding that the bridge was closed for the Molson Indy, Lyng and his friend decided to traverse down a wet grassy hill located beside the bridge. Lyng, who was wearing flip flops at the time and had consumed alcohol, jumped down the hill and suffered injuries to the ligaments in his knee that required surgical intervention. Lyng was found 25% liable for his injuries. Ontario Place was found 75% liable (under section 3 of the *Occupiers' Liability Act* (the "*Act*")) for failing to take reasonable efforts to prevent Lyng from accessing the hill. Lyng was awarded $50,000 in general damages, $25,367.21 for past income loss, and $100,000 for loss of competitive advantage, against which a 25% reduction was applied for contribution.

The appellant raised multiple grounds of appeal, including that the trial judge:

1. Erred by considering a theory of liability outside of the pleadings and presentation of the case;
2. Erred in his causation analysis;
3. Erred in finding that Ontario Place breached its duty under section 3 of the *Act* on the basis that wet grass is not an unusual danger;
4. Erred in failing to find that the respondent was the author of his own misfortune; and
5. Erred by awarding damages for loss of competitive advantage.

1. Consideration of a Theory of Liability Outside of the Pleadings

The trial judge accepted that the subject hill was slippery and wet following a day of downpour. However, he rejected the respondent's evidence that his injuries were caused by him "slipping" down the hill, in favour of concluding that Lyng jumped down the bottom portion of the hill and landed awkwardly on his straight leg.

Ontario Place argued that, given this finding, the trial judge should have dismissed the action as this theory of liability was not contained in the pleadings – wherein it was alleged that Lyng slipped and fell on wet grass. Ontario Place argued that this theory of liability emerged for the first time in reasons of judgment and was not tested as part of the adversarial process, which deprived it of an opportunity to make submissions on the theory and to address it in the evidence.

This ground of appeal was rejected by the court, which found that the theory was in fact raised in the pleadings, addressed in written and oral arguments at trial, and was canvassed during the cross-examination of the respondent.

2., 3., 4. Causation Analysis and Analysis Under Sections 3 and 4 of the *Act*

Commencing with causation, Ontario Place submitted that the trial judge erred by failing to properly apply the "but for" test, which requires a substantial connection between Lyng's injuries and Ontario Place's conduct. Ontario Place claims that it cannot be liable as Lyng's injuries were due to other

factors unconnected to what it did or did not do. Namely, Ontario Place argued that Lyng's jump, which immediately preceded the fall, represented a break in the chain of causation and that it was therefore not open to the trial judge to find it liable. It further submitted that, even if one were to accept that it breached its obligation to protect patrons from the danger of wet grass, that failure did not cause Lyng's injuries. Lyng did not slip and fall on wet grass, rather, he made the unnecessary decision to jump, which led to him landing awkwardly and sustaining injury.

The court deemed this ask to be a request of the court to reweigh the trial evidence and arrive at a different conclusion than the trial judge, which was not the function of an appellate court. Ontario Place had not identified any error that would warrant appellate intervention. The issue of causation is a factual finding that should not be interfered with in the absence of palpable and overriding error.

On the issue of the position of Ontario Place that wet grass does not constitute an unusual danger which it had to guard against as an occupier, the Court of Appeal found that the trial judge did not in fact find that Ontario Place had an obligation to prevent patrons from entering onto all patches of wet grass everywhere on the premises. The trial judge did find that by blocking the bridge and making no reasonable effort to prevent patrons (some of whom may have been drinking) from traversing a wet and hazardous hill, it failed in its duty under section 3 of the *Act*. The breaches under section 3 related to (a) the failure to erect barriers to prevent entry to the hill; and (b) a failure to warn patrons to avoid the hill.

Finally, the Court of Appeal rejected the appellant's argument that the trial judge erred in not finding that Lyng was the author of his own misfortune. The trial judge found both that Ontario Place and Lyng were negligent for the loss and there was nothing inconsistent with those two findings. The court reminds us that "but for" causation only requires that a defendant's conduct be a necessary cause of an injury, but not the sole cause. The standard for appellate interference with a trial judge's apportionment of liability is an exacting one. There was no demonstrable error in the trial judge's appreciation of the facts or law that would meet this high threshold.

5. Losses for Competitive Advantage

A plaintiff is entitled to damages for loss of competitive advantage if they can prove a substantial risk of loss of income in the future. Ontario Place submitted that the award in this case was based on "mere speculation" and that there was no basis of the trial judge to find any impact on Lyng's ability to earn future income. The standard for appellate interference with a damages award is an onerous one based on either (a) an error of principle or law; (b) misapprehension of the evidence; (c) an error in finding there to be evidence on which to base a conclusion; (d) a failure to consider relevant factors or consideration of irrelevant factors; and/or (e) a palpably incorrect or wholly erroneous assessment of damages.

Reviewing the evidence at hand, the trial judge had heard from Lyng's expert, an orthopaedic surgeon, who opined that recent literature indicated that a reconstructed ACL typically lasts 10-15 years before fraying or breaking; that there was a real possibility that future surgery may be required; and that surgical recovery time may impact one's ability to earn income or return to physically demanding work. While the trial judge was dealing with probabilities and not certainties, this did not render his conclusion as being speculative. While there was not an inevitable result, there was risk of future complications, which provided a sufficient evidentiary basis for the trial judge's conclusion.

The appeal was dismissed.

2. *Aube v. Manitoulin Health Centre*, 2024 ONSC 67

The plaintiff, Tammy Aube (the "Plaintiff"), was a former nurse who had been off of work since 2012 to care for her terminally ill husband. On December 6, 2017, while the Plaintiff's husband was receiving in-patient care at Manitoulin Health Centre, the Plaintiff tripped and fell. She claimed that the injuries sustained in the trip and fall prevented her from fulfilling her husband's wish that he be able to die at home, because she could no longer provide him with care. The Plaintiff sought damages allegedly sustained for psychological trauma due to her perceived failure to fulfill her husband's last wish.

The Plaintiff tripped while in the hospital doorway, awaiting the arrival of her son. She stepped backwards in reaction to a blast of cold air, and one of her heels caught in a broken or cracked tile, while the other slid on a mat covering the entrance tiles. The Plaintiff fell to the ground on her buttocks and struck her elbows and the back of her head on the floor. The defendant Manitoulin Health Centre ("Manitoulin") admitted liability for negligence in the trip and fall.

The day after the fall, the Plaintiff reported the fall to an employee of Manitoulin, Michelle Noble ("Noble"). It was noted that while the Plaintiff denied any injury, Noble marked a box on the Incident Report indicating that "minor injuries" were sustained but provided no additional details. Of note, Noble had been a co-worker and friend of the Plaintiff since the late 1980s. At trial, Noble advised the court that the Plaintiff told her that she wanted to complete the Incident Report to prevent injury to others, and that she should have marked the "no harm" box.

At trial, the Plaintiff insisted that she suffered pain from the fall but she did not seek any medical treatment. Her pain resolved "within three weeks". It was noted that various treating physician records following the loss made no mention of the trip and fall.

In the days following the fall, the Plaintiff's husband was transferred to a hospice suite. From December 8 until December 22, the Plaintiff provided her husband care when nursing was not in the room. The Plaintiff's husband left the hospital on December 22 to spend his last Christmas at home. While at home, the Plaintiff provided her husband with care as he did not want to receive care from other family members. In or around December 27th, it was observed that the Plaintiff was having difficulty repositioning her husband, who refused to allow other family members to assist. The family encouraged the Plaintiff to allow her husband to return to the hospital, and the Plaintiff reluctantly agreed. She attributes the need to have him return to the hospital to the physical injuries she suffered in the fall.

The Plaintiff's husband was transported back to Manitoulin on December 27. He was noted by nurses to be unresponsive and not able to be roused to answer questions. He passed away on December 28, with the Plaintiff at his side.

The Plaintiff advised the court that she suffered tremendous guilt because she did not fulfill her husband's wish to die at home. She advised that her feelings of guilt caused her to experience a pounding heart, shortness of breath, nausea, sweats, and crying spells. The symptoms occured at least once per day.

Evidence was put before the court that the Plaintiff's mental health issues had begun after her husband's terminal cancer diagnosis in 2012. Thereafter, she suffered from depression, anxiety, poor sleep, poor concentration, "anticipatory" grief, and psychosocial issues. Due to her condition, she had applied for long term disability benefits and CPP. Following her husband's death, she found herself

alone and was diagnosed with an adjustment disorder. Her anxiety worsened when she lost her sense of purpose.

At trial, the Plaintiff presented the expert opinion of two psychologists, who opined that she presented with PTSD caused by her guilt, along with a generalized anxiety disorder, and a Moderate Major Depressive Disorder. Her prognosis was guarded. Manitoulin relied on the evidence of an expert psychiatrist who opined that the Plaintiff presented with depression and anxiety, but that she had been suffering from significant depression for five years prior to the trip and fall. Her diagnosis was primarily attributed to her husband's illness and death. Her guilt was simply a symptom of her prolonged depression. Her PTSD diagnosis, if any, was attributable to the emotional trauma from seeing her husband pass away; however her presentation was more consistent with a diagnosis of Persistent Complex Bereavement Disorder, or PCBD.

On the facts of the case, the Plaintiff claimed to be suffering from a psychological injury that she related back to the physical injuries that she suffered in the fall at Manitoulin on December 6, 2017. While the law is clear that even undiagnosable psychological injury can ground damages in a negligence claim, it is required that the psychological injury or illness, however described, be caused by a defendant's negligence. Moreover, the mental injury must be "serious and prolonged and rise above the ordinary annoyances, anxieties, and fears that come with living in civil society".

While the court accepted that the Plaintiff's psychological injury was serious, prolonged, and no mere annoyance or simple anxiety, it did not find that the effects were caused by the trip and fall. The court was unable to find, on the balance of probabilities, that the trip and fall probably caused or contributed to the Plaintiff's psychological injury.

On the basis of the evidence before it, including the Plaintiff's initial complaints, reports that her physical pains resolved three weeks post loss, and on the basis that she was able to provide care for her husband post-fall, the court was not persuaded that the Plaintiff suffered any significant physical injuries in the trip and fall. The court was also not persuaded that any physical injuries suffered by the Plaintiff in the trip and fall were a cause of psychological injury following her husband's death. The Plaintiff presented with significant pre-existing depression, anxiety, and guilt; and the court was unable to determine that the Plaintiff's sense of guilt arose from her inability to care for her husband at home as opposed to being a by-product of her long term depression. Accordingly, the Plaintiff failed to establish factual causation.

Despite its finding that factual causation was not established, the court considered legal causation, noting that even if it were persuaded that the Plaintiff suffered from a psychological injury stemming from physical injuries received in the trip and fall, that is not the only hurdle to surmount to establish that the trip and fall caused that injury. The court must also be able to find that such an injury would be reasonably foreseeable to the defendant. In the circumstances of the case, it could not be found that the psychological injury suffered by the Plaintiff would have been reasonably foreseeable to Manitoulin, noting that "such a chain of causation is an extreme and unusual reaction". While it is *possible* to be aware that (a) a fall would cause pain to a caregiver spouse; (b) that the pain would cause them to suffer an inability to care for a dying spouse; (c) that spouse would therefore have to be returned to the hospital instead of dying at home; and (d) that their caregiver would therefore experience severe feelings of guilt that would cause PTSD - it could not be said to be *reasonably foreseeable.*

The Plaintiff's claim was dismissed.

3. *Marderosian* v. *City of Niagara Falls, 2024 ONSC 1043*

The plaintiff, Frances Marderosian ("Marderosian"), slipped and fell on December 13, 2017, on a City of Niagara Falls sidewalk. The defendant Corporation of the City of Niagara Falls (the "City") acknowledged that it had responsibility for the maintenance of the sidewalk.

The City moved for summary judgment on three basis: (1) that Marderosian fell on private property; (2) the claim was statute barred pursuant to section 44(8) of the *Municipal Act*, 2001, S.O. 2001, s.25 (the "*Municipal Act*"), which provides that there can be no action against the City for a failure to maintain an untraveled portion of a highway; and (3) the claim was statute barred for failure to provide notice within 10 days of the accident as required by section 44(1) of the *Municipal Act*. Marderosian opposed the motion on the basis that there were genuine issues requiring a trial, that credibility determinations needed to be made, and that she had a reasonable excuse for failing to give notice within the requisite 10 day period.

The Location Of The Fall

Marderosian fell while out walking her dog, in or around 5624 Drummond Road. She testified that she was able to initially traverse the area, via the sidewalk, without incident. On her second pass through the area, while heading home, she encountered five people, apparently awaiting the arrival of a bus, that were blocking the sidewalk. It was her evidence that the individuals did not heed her request to move, and so she stepped off the sidewalk and onto the snow covered front lawn of the property that abutted the sidewalk. She crossed behind a tree, and in doing so tripped over a tree root and fell, injuring herself. The fall occurred approximately three feet from the sidewalk.

The City acknowledged that the back of the tree behind which the plaintiff fell was 2.1 metres from the sidewalk, and that the tree itself was located on City property. Although the City asserted that the fall occurred on private property, in the alternative, it submitted that even if the fall occurred on the road allowance, it did so on an "untraveled portion of the highway", and therefore it was protected from the claim by virtue of s. 44(8) of the *Municipal Act*. In reply, Marderosian took the position that the location of the fall did not matter, but what did was that she was "forced" off the sidewalk because the City had failed to clear snow and ice, in breach of its duties under the *Municipal Act*.

No Issues Of Credibility Requiring A Trial

There was conflicting evidence provided on the state of the sidewalk at the time of the loss. At her examination for discovery, Marderosian advised that she could not recall whether the sidewalk had been cleared of snow. In a later affidavit sworn in support of the motion, Marderosian advised that there was snow on the "margin" of the sidewalk that was deeper than the snow on the neighbouring property, and that it was not safe to walk on. The City disagreed that the variation in the evidence gave rise to a triable issue of credibility. Rather, it urged the court to base its factual findings on the plaintiff's discovery evidence.

In determining whether this was a case that can be decided on a motion for summary judgment or whether there is a triable issue, including one of credibility that is more appropriately resolved at a trial, the court noted that the plaintiff's evidence was the only first-hand evidence concerning the state of the sidewalk on the day she fell. The court concluded that it was the plaintiff's clear and straightforward evidence that she chose to leave the sidewalk due to people standing upon it. In

reaching that conclusion, the court exercised the powers available to it under r. 20.04 (2.1) to weigh, evaluate credibility, and/or draw reasonable inferences from the plaintiff's evidence, after concluding that it was not in the interest of justice for such powers to be exercised only at a trial.

The City's Liability

Finding that a summary judgment motion was appropriate in the circumstances, the court turned to consider the defences raised by the City under sections 44(8) and 44(1) of the *Municipal Act*.

Notice

It was not disputed that Marderosian failed to provide the City with notice of the claim within 10 days of the loss. Notice was first provided 70 days post-loss. The plaintiff relied on the "exception" set out in section 44(12), notably that she had a "reasonable excuse" for her failure.

Marderosian advised that she was unaware of the 10 day notice requirement. She also asserted that in the 70 days between the date of the fall and when notice was provided, her focus was on her injuries, and attending at various appointments. It was not until the approximate 63 day mark that she believed that her injuries would not improve and that it was necessary for her to pursue a claim.

The court adopted the approach espoused in *Crinson* v. *Toronto*, 2010 ONCA 44 and *Azzeh* v. *Legendre*, 2017 ONCA 385, notably that a that a lack of awareness of the notice requirement, by itself, does not constitute a reasonable excuse.

The court accepted Marderosian's evidence that she was aware of her injury from the time that she fell, and that while she was seeking and attending at ongoing medical care, this did not constitute a reasonable excuse for not providing the City with notice. The plaintiff was both physically and mentally capable of investigating her legal rights and taking steps to protect them. She failed to prove any reasonable excuse for her failure to provide notice.

Marderosian further submitted that no prejudice was caused to the City by her late notice, arguing that the City did not investigate the claim until 10 days after it received notice, which inferred that the City was not in any hurry to investigate the area. While the court rejected the plaintiff's submission that a negative inference should be drawn against the City, it did note that a court – absent any special weather events – could take judicial notice that winter snow conditions may change over a 10-day period. However, where a significant period of time has elapsed, delay in depriving a defendant of an opportunity to investigate an incident through examining sidewalk conditions, interviewing witnesses, and making inquiries, would result in significant prejudice.

Marderosian further argued that there was an absence of any actual evidence of prejudice suffered by the City. It was accepted by the court, however, that prejudice was presumed and that it was the onus of the plaintiff to disprove or rebut that presumption.

The action was barred by virtue of s. 44 (10) of the *Municipal Act*.

Did the City Owe The Plaintiff A Duty Of Care?

Finally, the court considered whether, in the circumstances, the City owed the plaintiff a duty of care. In doing so, it highlighted the following:

- Under section 44(1) of the *Municipal Act*, the City is not liable for personal injury caused by snow or ice on a sidewalk, expect in cases of gross negligence.
- A change in policy whereby the issue of clearing snow in the vicinity of bus stops was silent, to a revised policy that saw snow removal and salting at "selected bus stops" was not proof that the prior policy was inadequate.
- The presence of snow on the "margins" of a sidewalk did not amount to "gross negligence".
- It was not foreseeable to the City that, having cleared snow from the sidewalk (which was four feet in width) that there would not be sufficient room for a pedestrian to make their way past a group of individuals waiting for a bus, forcing them onto adjacent private property.
- It was a reasonable expectation that a pedestrian, confronted with other sidewalk-users, would approach them and request space to pass.
- There was no obligation, statutory or otherwise, on the City to maintain the road allowance were the plaintiff fell, even where the yard was located over the City right-of-way.

The court ultimately found that the City did not owe Marderosian a duty of care with respect to the property located at 5624 Drummond Road, where the fall occurred. While the City did owe a duty of care in respect of the sidewalk, that duty was met.

The action was barred pursuant to section 44(8) of the *Municipal Act.*

The City's summary judgment motion was granted, and the claim was dismissed in its entirety.

Q1 Occupiers' Risk Management Tip

Proper floor care and maintenance is essential to reducing the risk of slips and falls upon a property. When it comes to floor care, it is important to consider not only the maintenance itself, but also training, and documentation.

In addition to regular inspection and cleaning, a preventative and proactive floor care plan should include investigation into slip resistant products for hard floor surfaces, periodic testing with a slip metre, and ensuring that cleaning product label instructions are followed as directed and in a consistent manner. A maintenance plan should also include general safety measures, including the use of "Wet Floor" signs during times of maintenance.

It is equally important to ensure that all cleaning staff are provided with comprehensive training and education on proper floor care procedures and a consistent level of product usage.

Finally, all floor care - ranging from inspection, maintenance, and testing - should be documented and records should be preserved. Records should include maintenance procedures – including tasks performed, times and dates, a list of floor care products used, and the employee involved.

SHARE THIS NEWSLETTER:

ABOUT THE AUTHOR

JENNIFER HUNEAULT

PARTNER

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

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.

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.