SUPREME COURT OF NOVA SCOTIA
Citation: *Flowers v. Allterrain Contracting Inc.*, 2017 NSSC 194

Date: 20170713
Docket: Hfx No. 421015
Registry: Halifax

Between:

Jean Andrea Flowers

Plaintiff

v.

Allterrain Contracting Inc. and OPB Realty Inc.

Defendants

Decision

Judge:	The Honourable Justice Denise M. Boudreau
Heard:	May 31, June 1, 2017, in Halifax, Nova Scotia
Counsel:	Trevor Wadden, for the Plaintiff Michelle Kelly and John Boyle, co-counsel, for the Defendants

By the Court:

Introduction

[1] On February 17, 2010, at approximately 8:00 p.m., the plaintiff visited the Wal-Mart Store on Mumford Road (part of the Halifax Shopping Centre mall) in Halifax. Upon leaving the store, she slipped and injured herself. She requests that I find the defendants liable for that fall.

[2] The defendant OPB Realty (OPB) is the owner of the Halifax Shopping Centre property ("HSC"). The defendant Allterrain Contracting Ltd. (Allterrain) is the company responsible for maintenance of plowing and salting the public areas of that facility. I am advised that, pursuant to contract, Allterrain takes responsibility for responding to slip-and-fall claims such as the plaintiff's.

[3] The parties have reached agreement as to damages, should liability be found.

Evidence

[4] Overnight between February 16 and17, 2010, all parties agree, the Halifax area was hit with a major winter storm. Anecdotally it would appear somewhere between 25 and 30 cm of snow fell. Pursuant to the evidence before me, and in

particular the photograph taken by witness Dennis Rodgers (Joint Exhibit Book, Tab 2), the snow had essentially stopped falling by 9:00 a.m. on February 17.

[5] The plaintiff was 26 years of age on this date. She was attending university. On February 17, 2010 she spent the day at her home. At approximately 7:30 to 8:00 p.m., the plaintiff and her partner Ms. Nielsen decided to attend the Wal-Mart on Mumford Road in order to have a key cut. After having spent approximately 30 minutes in the store, the plaintiff and Ms. Nielsen left the store and were walking through the front entrance walkway, toward their vehicle.

[6] The plaintiff testified that she then slipped and fell on ice. She testified that her fall occurred at the outer edge of the pedestrian walkway (the area between the front doors and the parking lot). More specifically, she fell in an area between two cement posts (that exist to prevent vehicles from driving on to, or past, the pedestrian area). The plaintiff had not yet entered the parking lot, or driving area, of the property.

[7] The plaintiff testified that she fell on her right knee, and also twisted her left ankle. She looked around and saw ice on the walkway; she further testified that she saw no salt spread at all, in that area of the walkway. She and Ms. Nielsen re-entered the Wal-Mart and spoke to the assistant manager, Craig MacIsaac, and

explained the situation. The plaintiff noted that Mr. MacIsaac then went out and took photographs of the area. She then left with the assistance of Ms. Nielson in order to be taken to the hospital.

[8] Other than the plaintiff herself, no one who testified before me has any memory of this actual incident.

[9] Mr. Craig MacIsaac testified, but remembers nothing about the incident. He no longer has any of his own notes about the incident.

[10] I was provided with a computer generated claim form from the Wal-Mart store relating to Ms. Flowers' incident. This was confirmed by Mr. MacIsaac as a typical form that would be filled out as a result of such an incident, although he does not recall it specifically.

[11] Mr. MacIsaac did not input these details into the computer. It would appear based on the form that the information was entered by "Debby Proudfoot, Admin. Mgr." This person did not testify. The form notes that the "Associate first on scene" and the "Associate who took the report" were both Craig MacIsaac.

[12] The following responses come from "populated fields"; that is to say, a drop down box provides suggested answers, and one is chosen:

Walks/lots salted? No
Walks/lots sanded? No
Snow shoveled? Yes

[13] Mr. MacIsaac has no memory as to whether that information was/is accurate; nor does he recall what he told or wrote down for Ms. Proudfoot about the walkways. Having said that, Mr. MacIsaac confirmed that he always made every effort to be accurate in the information he provided to the data input person.

[14] I pause here to note that the plaintiff points to this document as definitive evidence that the walkways were not sanded or salted at the time of the incident. While it may be some evidence of that fact, that evidence is of limited weight given the circumstances I have just described. This document is not conclusive.

[15] Similarly, a photograph was attached to the report. Mr. MacIsaac has no memory of taking a photograph. However, one could reasonably assume, based on the fact that it accompanied this report, and the evidence of Ms. Flowers that Mr. MacIsaac took a photograph on the evening in question, that this is the photo he took. Unfortunately, the photograph is completely blurry and indistinct. I cannot tell what it is depicting. It is unhelpful.

[16] Witness Andrew Rodgers explained that he owns Allterrain with his brother Jason. The company is multi-faceted but snow removal/clearing is one aspect of

their business. They have held the contract for HSC for a number of years, and it is their biggest snow removal contract. They employ approximately 20 to 25 people to clear the property at HSC, including a foreman, plow operators, shovellers, and snow blowers.

[17] Mr. Rodgers explained their standard practice at HSC in cases of winter storm: first, all entrances were/are pre-salted (prior to first snowfall), in order to melt the snow as it first fell. Then the snowfall would be managed as it occurred. Various equipment is used, such as skid-steer loaders, Cat loaders, and tandems; along with 20 to 25 labourers. The goal, says Mr. Rodgers, is to continue to clean and salt the pavement until it is black.

[18] Mr. Rodgers explained that some of their equipment is able to get past the posts at Wal-Mart to remove snow, and deposit salt, in this pedestrian area. He also noted a ten foot wide spray of salt on the machines.

[19] Mr. Rodgers believes he would have been plowing at HSC on February 17/18, 2010, but he has no actual memory of that date. He was not advised of the incident with the plaintiff until approximately one month later, by which time it was too late for him to investigate further.

[20] Witness Mike Laffin was Allterrain's foreman at HSC in February 2010. Mr. Laffin remembers nothing of February 16/17, 2010. He provided evidence as to the company's usual practice when a snow storm happened. He described giving assignments to the labourers, getting the machines out, and inspecting walkways and stairs. (Mr. Laffin did not mention "pre-salting".)

[21] Mr. Laffin provided the court with his logs from Allterrain, showing the work performed at the facility on February 16/17, 2010, (Joint Exhibit Book, Tab 4). Log #1 provides:

> Employee: Mike
> Date: Feb 16/10
> 11:00 pm - 6 am
> Salt in: 6750 kg
> Salt Out: 750 kg
> Precip: Snow

[22] Log #1 continues with a number of specific areas of the HSC property noted. All are blank. Above the "Wal-Mart lot & loading zone & S.W.'s" section, is handwritten: "Scrape lot lanes and road ways". Mr. Laffin noted that the "Salt In/Out" amounts are estimates only.

[23] The next document provided shows employees and their assignments. Mr. Laffin testified that he is aware, by the equipment shown, what area of the HSC

that employee was working on. For example, he noted, “Matt R” showing equipment “(930)” and “3:00 am – 6:30 pm”, was a Wal-Mart assignment. Mr. Laffin noted that others on this list would also have been assigned to Wal-Mart, including the walkways.

[24] Log #2 provides:

> Employee: Mike
> Date: Feb 17/10
> 6:30 am - 3:10 pm
> Salt in: 6000
> Salt out: 2200
> Precip: Light snow

[25] Mr. Laffin testified that the combination of Logs #1 and #2 led him to believe that he worked from 11:00 p.m. on February 16, to 6:00 a.m. on February 17; he then took a half hour break, returning at 6:30 a.m. While the log indicates his hours ending at 3:10 p.m., Mr. Laffin believes that he stayed until at least 4:30 p.m. (in order to pay his shovellers).

[26] In log #2, under the section entitled "Wal-Mart lot & loading zone & S.W.'s" is noted:

> Time in: 1200 pm
> Time out: 100 pm
> Salt: 300

Conditions: snow
Actions: scraped and salted service bay parking

[27] Mr. Laffin testified that he believed this work would have included the Wal-Mart walkway area.

[28] Log #3 starts at 10:00 p.m. on February 17, and provided another 1800 kgs of salt, "upper parking deck and S.W.'s". I do not know if this salting involved the Wal-Mart area. In any event, this occurred after the plaintiff's incident. The document does note "Received call from security about front of Wal-Mart. Checked front of Wal-Mart when arriving on site." The document mentions no further action. Mr. Laffin believes that he would have noted any action needed or taken.

[29] Mr. Laffin testified that the salt used for the entire HSC property is stored at the far end of the Wal-Mart parking lot. Therefore, he notes, every time a truck refills with salt to attend to any area of the property, they pass through the Wal-Mart parking lot and specifically the lane directly in front of the store. He testified he believed that every truck would therefore repeatedly salt this area. The range of thrown salt would include the walkway in front of the store. Therefore, it is the belief of Mr. Laffin that this area gets a significant amount of salt, perhaps more

than that of any other area of HSC. He testified that he believed the area would have been salted between two and ten times that day.

[30] Having said that, Mr. Laffin can only be sure that he "inspected" the Wal-Mart area between noon and 1:00 p.m. on February 17, as noted in the logs.

Law

[31] The *Occupiers Liability Act* S.N.S. 1996 c. 27 provides us with the duty of care owed by occupiers to users of their premises:

> 4(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises.
>
> (2) The duty created by subsection (1) applies in respect of
>
> (a) the condition of the premises;
>
> (b) activities on the premises; and
>
> (c) the conduct of third parties on the premises.
>
> (3) Without restricting the generality of subsection (1), in determining whether the duty of care created by subsection (1) has been discharged, consideration shall be given to
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> (a) the knowledge that the occupier has or ought to have of the likelihood of persons or property being on the premises;
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> (b) the circumstances of the entry into the premises;
>
> (c) the age of the person entering the premises;
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> (d) the ability of the person entering the premises to appreciate the danger;
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> (e) the effort made by the occupier to give warning of the danger concerned or to discourage persons from incurring the risk; and
>
> (f) whether the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection.

[32] I have also been referred to s. 8 of the *Act*, as the present circumstance involves an independent contractor:

> 8(1) Notwithstanding subsection 4(1), where damages caused to persons or property on premises solely by the negligence of an independent contractor engaged by the occupier of the premises, the occupier is not on that account liable pursuant to this act if, in all the circumstances,
>
> (a) the occupier exercised reasonable care in the selection of the independent contractor; and
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> (b) it was reasonable that the work that the independent contractor was engaged to do should have been done.

[33] In this case, there is no issue as between the two defendants. It is agreed that this circumstance fits within the scenario envisaged by subsection 8 (1).

[34] Many cases have confirmed that the duty imposed by occupiers' liability legislation, is not a standard of perfection. I note *Miller v. Royal Bank* 2008 NSSC 32 (affirmed at 2008 NSCA 118), at para. 113:

> The duty of an occupier was considered in *Corbin v. Halifax (Regional Municipality)* (2003) 214 N.S.R. (2d) 345 (S.C.), where Wright, J. stated, with respect to the duty set out in s. 4(1):
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> > [32] In interpreting the identical provision found in the *Occupiers Liability Act* of Ontario in Waldick et al. v. Malcolm et al (1989) 35 O.A.C. 389; 70 O.R. (2d) 717 (C.A.), Blair, J.A., described the essence of this statutory duty in the following passage (at para. 19):
> >
> > > A similarly worded statement of an occupier's duty occurs in all other Occupiers Liability Acts. All courts have agreed that the section imposes on occupiers an affirmative duty to make the premises reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm. The section assimilates occupiers' liability with the modern law of negligence. The duty is not absolute and occupiers are not insurers liable for any damages suffered by persons entering their premises.

> Their responsibility is only to take "such care as in all the circumstances of the case is reasonable". The trier of fact in every case must determine what standard of care is reasonable and whether it has been met.

[35] In *Gallant v. R.C. Episcopal* 2001 NFCA 22 (Nfld C.A.):

> [27] As already noted, in the common law jurisdictions in Canada a generally consistent approach to occupiers' liability has emerged, one which is compatible with Stacey. The following is not an attempt to create an exhaustive list but a collection of principles which emerge from the cases under the current, generally accepted view of occupiers' liability and which are relevant to the law in this province, post Stacey:
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> 1. There is a positive obligation upon occupiers to ensure that those who come onto their properties are reasonably safe (see: DeMeyer v. National Trust Co. (1995) 104 Man. R. (2d) 170 (Q.B.); Preston v. Canadian Legion, Kingsway Branch No. 175 (1981) 123 D.L.R. (3d) 645 (Alta. C.A.));
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> 2. The onus is upon the plaintiff to prove on a balance of probabilities that the defendant failed to meet the standard of reasonable care - the fact of the injury in and of itself does not create a presumption of negligence - the plaintiff must point to some act or failure to act on the part of the defendant which resulted in her injury (see: Kayser v. Park Royal Shopping Center Ltd. (1995) 16 B.C.L.R. (3d) 330 (C.A.); Empire Ltd. v. Sheppard 2001 NFCA 10);
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> 3. When faced with a prima facie case of negligence, the occupier can generally discharge the evidential burden by establishing he has a regular regime of inspection, maintenance and monitoring sufficient to achieve a reasonable balance between what is practical in the circumstances and what his commensurate with reasonably perceived potential risk to those lawfully on the property. An occupiers' conduct in this regard is to be judged not by the result of his efforts (i.e. whether or not the plaintiff was injured) but by the efforts themselves (see: Empire Stores);
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> 4. The occupier is not a guarantor or insurer of the safety of the persons coming on his premises. (See: Empire Stores; Qually v. Pace Homes Ltd. and Westfair Foods Ltd. (1993) 84 Man. R. (2d) 262 (Q.B.) and also, Stevenson v. City of Winnipeg Housing Co. (1988) 55 Man R. (2d) 137

> (Q.B.) in which the court found that there was no duty to completely clear sidewalks of snow in a Winnipeg winter, and that frozen patches were inevitable, notwithstanding that the occupier took reasonable care to make the property reasonably safe.

[36] The reasonableness an of occupier's maintenance system was discussed in *Lanteigne v. New Brunswick Liquor Corp.* [2002] N.B.J. No. 85:

> 96 In cases of this nature, in the event it is determined that a slip and fall accident was precipitated by the condition of the surface upon which it occurred, it is then necessary to determine if the owner or occupier of the premises has met the standards reasonably expected to be in place with respect to the maintenance of the area in question. Ultimately, this determination will involve a review and consideration of the maintenance and inspection system or program in place in order to determine if it is a reasonable one which adequately protects users of the premises from slip and fall accidents.
>
> 97 The owner or occupier must put its best foot forward to demonstrate that it had a reasonable and adequate system or program in place at the time of the slip and fall accident. Ideally this system or program will be reduced to writing and will include a reasonable level of adequate and routine inspections with those inspections being recorded in a log or record in order to show that the system or program was being carried out at the time of the slip and fall accident.

[37] The duty of care owed by occupiers in relation to their premises is, therefore, well set out. An occupier has a duty of reasonableness, not perfection.

[38] Here the plaintiff testified that she fell on ice, on the walkway outside the Wal-Mart store. I have no independent evidence that there was ice in that area. However, I found the plaintiff to be a credible and forthright witness, and I have no reason to doubt that she did, in fact, slip on ice.

[39] Having said that, as the above noted cases show, the question is not whether there was ice in that area. The question is whether the defendant had a reasonable and adequate system in place for keeping that area free of ice.

[40] For example, in the *Miller* case (supra), where the plaintiff had allegedly slipped on a wet footprint in a bank foyer area, the Court noted:

> [118] It has been established that moisture existed on the tile floor where the plaintiff fell. It was apparently in the form of wet footprints. There were no puddles of water. The weather was misty, and it appears that there had been some rain, but it was not raining when the plaintiff entered the bank. In the circumstances, I am not satisfied that the defendant's liability should extend to a slip on a wet footprint. It is acknowledged that the defendant had no system or policy respecting floor cleanup. Rather, the employees monitored the floors on an *ad hoc* basis, and mopped or cleaned as needed. While ideally the defendant might have had such a policy in place, it appears that both Ms. Hudson and Ms. Hardy had observed some moisture on the floor of the foyer that morning, but did not believe it was significant enough to mop up.
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> [119] I do not believe the defendant can be required to observe a standard of perfection, or to act as an insurer, in keeping its foyer floor dry, which, I believe, is what would be required if it were found necessary to monitor an ATM foyer for the presence of wet footprints in order to meet the duty of care under the *Act*.

[41] In relation to the walkway area in front of Wal-Mart, it seems to me that Allterrain's system was also, to some extent, *ad hoc*. There exists precious little evidence of inspection of that specific area. The evidence shows that some of the Allterrain labourers were assigned to clear snow and salt that area, but we do not know when or how often. The evidence establishes that trucks drove by and deposited additional salt, but we do not know when and how much.

[42] This is not ideal. Ideally, the evidence would show incidents of specific, repeated, salting of this particular walkway; and further, specific and repeated inspections of this walkway. But, as I have said, the law does not require perfection. The failure to reach a standard of perfection does not render the system unreasonable.

[43] In other words, I do not interpret the law to impose a duty of repeated and documented salting and inspection, to the point of ensuring that every inch of area is ice-free at any given moment.

[44] Allterrain devotes much time, energy and resources to the job of snow and ice clearing at the Halifax Shopping Centre, including the Wal-Mart section of the property. Allterrain maintains a system of repeated plowing and salting throughout this property, including walkways, in a concerted effort to render the property safe. That system has been described in evidence, and I have described it here. In my view, while it is not perfect, it is a reasonable and adequate system as required by law.

[45] The plaintiff's claim is dismissed. If the parties cannot agree on costs, I would ask that they provide me with written submissions within 30 days of this decision.

Boudreau, J.