ALEXANDER HOLBURN

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E-NEWSLETTER

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In This Issue:

1. *Steele* v. *Bicknese,* 2024 ONSC 6090

The plaintiff, David Steele ("Steele"), claimed that he was injured while working in the defendant Victor Bicknese's ("Bicknese") barn on or about June 14, 2019. Steele, who was 69 at the time, had been employed to pick up eggs deposited by the barn's hens upon the barn floor.

The loss occurred on the wooden floor of the barn, which was constructed with 2" x 4" boards with 1" x 1" boards nailed across them, with a gap between the cross boards. The design allowed excrement and wood shavings to fall through to the concrete floor below. Occasionally, the cross boards would break.

On the date of loss, Steele was aware that were some broken slats in the area of the barn that he was working in. In the course of admittedly rushing to complete his work, he stepped onto an area where slats were broken. He fell forward and struck his head on the floor, causing a gash to his forehead, and an odontoid fracture to the vertebrae of his neck.

The defendant, who was self-represented, addressed the issue of liability while on the stand. Bicknese advised the Court that the subject barn had a 172' by 13' area where there was a wooden slat floor. It was the defendant's practice to repair slats during cleanouts of the barn, which took place between flocks of hens arriving at the barn. Bicknese could, however, also replace broken slats as they were identified. Bicknese admitted to the Court that due to the slats being "dried and old…it was normal for people to break through them", and that when people fell through them they "quite regularly" suffered scrapes. The defendant took the position that it did not occur to him that a serious injury could result due to the broken slats. Of note, Bicknese had been in the process of slowly converting the wooden slat floor, section by section, to a plastic floor. Replacement of the balance of the wood floor would have cost less than $30,000 and could have been completed over the course of two days.

In considering liability, the Court noted that the plaintiff presented as an honest person, as did the defendant. Nonetheless, the defendant need not be deemed to be "a bad person or not a competent farmer" for the provisions of the *Occupiers' Liability Act*, namely section 3(1) to apply.

The Court determined that Bicknese had not taken reasonable care to ensure that the plaintiff was safe while on the premises, for the following reasons:

- At the time of the loss there would have been hundreds, if not thousands, of hens walking about in the barn and it would have been impossible for the plaintiff to observe all broken slats and to avoid stepping on them.

- There was no system in place by which the defendant, or anyone else, inspected the floor to ensure that any broken slats were repaired immediately.

- There was no system in place whereby employees were instructed to immediately notify the defendant of broken slats.

- There was an acceptance that people would regularly break through the slats – which was not considered to be a significant issue.

Bicknese was found 100% liable for Steele's injuries. There was no reduction for contributory negligence on behalf of the plaintiff on the basis that the defendant had a fundamental obligation to provide a safe workplace.

Turning to damages, despite being offered surgery, the plaintiff's odontoid fracture was treated conservatively with a cervical collar which had been worn for 6 months' time.

Post-loss, on December 13, 2022, Steele was involved in a motor vehicle accident (the "MVA"). Following the MVA he had to wear a cervical collar for another three months. As of the time of the trial, Steele reported that his injuries caused by the MVA had resolved and that his condition had returned to the same state that it was prior to the MVA.

The fracture to Steele's neck had not healed as of the time of the trial. Steele alleged he had continued pain – which he described as a "shocking sensation" - that occurred in his neck two to three times a week. He also suffered from headaches and reduced range of motion.

According to an expert called by the plaintiff, Steele's ongoing complaints of pain, headaches, and stiffness were consistent with injuries sustained in the fall. The MVA did not have any significant impact on his condition as of the time of the trial. It was not anticipated that his condition would improve, and Steele would experience ongoing chronic pain into the future. Further, there remained the possibility of a fatal injury if he suffered another blow to the head. The evidence of the expert was accepted by the Court.

Steele was awarded damages by the Court as follows:

- General damages in the amount of $100,000
- Two years of wage loss in the amount of $42,000; and
- $3,123.32 for OHIP's subrogated claim.

2. *Mansori* v. *York Region Standard Condominium Corp. No. 1279* 2024 ONSC 6569

On February 26, 2020, the plaintiff Vida Mansori ("Mansori"), a resident of Iran, slipped and fell in a public washroom at a condominium building – York Regional Standard Condominium Corporation No, 1279 (the "Condominium"). The Condominium was managed by Crossbridge Condominium Services Ltd. ("Crossbridge"), who employed a cleaning company, Ingerv Cleaner Company Ltd. ("Ingerv"). The Condominium received security services from Elite Residential Concierge Services Inc. ("Elite").

The claim against Ingerv was resolved prior to trial and a Pierringer agreement had been reached between the plaintiff and Elite. The only claims asserted by the plaintiff that proceeded to trial were those against the Condominium.

As a result of the fall, Mansori – who was 61 at the time, sustained a fracture to her left distal humerus and her left distal radius. The injury required two surgeries. Mansori was left with functional limitations and reduced range of motion. As a further consequence to the fall, Mansori alleged that she suffered from an Adjustment Disorder with Mixed Anxiety and Depressed Mood.

Mansori brought her claim further to section 3 of the *Occupiers' Liability Act*. The defendant relied on section 6 of the *Act* in its defence, which considers liability where an independent contractor has been retained.

On the date of loss there had been 14 cms of snow fall in the location of the Condominium. Ingerv was on site - pursuant to its contractual obligations - from 7:00 am to 3:00 pm, and was on call post 3:00 pm. The washroom, which was accessible to the public, had been checked and cleaned at 9:00 am and 1:00 pm, as per contractual obligations. Between 1:03 pm and 5:19pm - the time when Mansori fell - 26 people had used the washroom prior to the plaintiff. Shortly after 5:00 pm the Condominium security guard entered the washroom and made no observation of a wet floor. The last person that used the washroom prior to the plaintiff did so at 5:16 pm.

Mansori advised the Court that the fall occurred after she took one to two steps into the washroom. Upon entering, she did not observe any liquid upon the floor. Only after she fell did she note that her clothing was wet, causing her to assume that the floor had been wet.

The Court opined, in keeping with the decision of the Supreme Court of Canada in *Waldick* v. *Malcolm* [1991] 2 S.C.R. 456, that the fact that the plaintiff ended up falling and suffering a significant injury to her left arm did not, in and of itself, constitute negligence on the part of the defendants. It would be improper to infer that there was a breach from the standard of care from the fact that there had been unfortunate and/or unexpected results.

In addressing liability, both the plaintiff and defence called experts who spoke to whether the washroom flooring was "slip resistant" and whether the floor tiles met appropriate government standards. The Condominium had been built between 2011 and 2015. The tile had been present since its initial installation. Design of the building was subject to the governing laws and regulations, including the Ontario *Building Code*. Of note, while the plaintiff's expert suggested that the construction required conformity with American National Standards pertaining to coefficient of friction for flooring, the Court pointed out that nowhere in the *Building Code* is there any mention of a requirement for a builder to conform with the American Standard. In fact, the

Building Code did not contain any mention of a minimum coefficient of friction number that a tiled floor must meet. In any event, even where there is adherence to the provisions of the *Building Code*, the owner/builder of such a building will not automatically be absolved of liability under the *Occupiers' Liability Act*.

The Court ultimately did not accept the plaintiff's suggestion that the washroom floors of the Condominium were inherently unsafe, noting that from the time that the Condominium opened to the date of loss, there was no evidence to suggest that there had been any other slips and falls on the tiled floors.

When considering the duty of the Condominium under the *Occupiers' Liability Act*, the Court stated that the duty imposed upon it, as occupier, was not a duty that required an occupier to maintain a constant surveillance or lookout for potential danger. The duty to take reasonable care will be met if an occupier has taken measures that are reasonable in the circumstances. Moreover, the law did not require perfection, but did require an occupier to take reasonable steps to ensure the safety of those entering onto its premises. An occupier is not required to act as an insurer to provide against every eventuality.

In the case at hand, the evidence established that numerous people had used the washroom post 1:00 pm without difficulty or incident, including a security guard at 5:00 pm. The Court accepted that as of the time that the security guard entered the washroom, the floor was dry. If there was wetness on the floor, then the Court opined that the only plausible explanation was that the wetness was either deposited by the last person to use the washroom prior to the plaintiff, or that the wetness was brought into the washroom by Mansori herself. On these facts, the Court found that "what happened to the plaintiff was an unfortunate accident…and this unfortunate outcome does not amount to negligence".

Mansori had not met her onus and the case was dismissed.

Despite the dismissal, the Court offered that had liability been found in the case, Mansori's general damages would have been assessed at $100,000.

3. *Pereira* v. *Yaya Foods Corporation* 2024 ONSC 6585

Jose Pereira (the "Plaintiff") fell from a 12 foot step ladder and was injured while working on the defendant Yaya Foods Corporation's ("Yaya Foods") premises. At the time, he was cutting steel beams from the existing structure.

The work involved the use of a mini excavator with a thumb or claw attachment, that was meant to hold the beam while the Plaintiff cut it. The thumb attachment failed and the beam fell and hit the ladder, causing the Plaintiff to fall. A Ministry of Labour investigation was held, which found that the excavator was not maintained to the manufacturer's standard and that its failure to hold the beam was caused by a leakage of hydraulic oil.

The Plaintiff commenced the action, alleging that Yaya Foods was liable for the loss on the basis that it was an occupier of the premises where the loss occurred. Yaya Foods brought a motion for summary judgment, alleging that there was no basis upon which it could be found liable as an occupier. The motion was granted by the Court.

After considering the applicable test for summary judgment, the Court turned to an analysis of the applicability of section 6 (1) of the *Occupiers' Liability Act*. The Plaintiff alleged that Yaya Foods was responsible for the defective machine left upon its premises, arguing that it was foreseeable that the machine would be used. He argued that it was akin to "leaving a loaded gun" on the premises in that it presented a real risk to those present.

The plaintiff relied on the decision of the Court in *Botosh* v*. Ottawa (City)*, 2013 ONSC 5418, which in part stated:

> "An occupier includes a person who is in physical possession of the premises, or a person who has responsibility for, and control over the condition of the premises or the activities engaged in on the premises, or control over persons allowed to enter the premises, despite the fact that there is more than one occupier of the same premises. Premises mean lands and structures or either of them.
>
> Where damage is caused by an independent contractor, the occupier must take positive steps to ensure that the property is being maintained in a proper manner and that scheduled inspections occur verifying its proper maintenance. In other words, the court will not allow an occupier to avoid its responsibilities under the Act by not paying attention to the maintenance practices of a co-occupier."

The Court interpreted the decision in *Botosh* to apply to the practices of an independent contractor but only as they related to the work that the contractor was expected to do. The Court did not believe that duty extended to ensuring that the tools used by an independent contractor were safe for use. Had the Plaintiff's argument been accepted, it would mean that every occupier would have to inspect the tools of an independent contractor to ensure that they were safe for use on their premises. This was not required by the *Occupiers' Liability Act*.

The equipment failure was the responsibility of the independent contractor and not Yaya Foods and there was no duty on Yaya to ensure that equipment brought onto its premises by the contractor was properly maintained. The motion was granted and costs awarded.

4. *Bainbridge* v. *1392396 Ontario Limited* 2024 ONSC 6990

On February 10, 2016, the plaintiff, Kelly Bainbridge ("Bainbridge") slipped on an accumulation of ice and snow upon the front staircase of her rental unit. The defendants, her landlords, did not defend the matter and were noted in default. The matter proceed to trial on an undefended basis.

In considering liability, the Court noted that pursuant to Rule 19.02 of the *Rules of Civil Procedure*, having not defended a claim, the defendants were deemed to admit the truth of all allegations of fact made in the Statement of Claim. The Court, nonetheless, highlighted that pursuant to the *Occupiers' Liability Act*, an occupier owes a duty of care to ensure that persons entering onto their premises are reasonably safe. A determination of liability will be case specific and factors for a Court to consider in determining whether an occupier fell below the standard of care will include the weather, the time of year, the cost of preventative measures, the nature of the property, and the quality of footwear worn by the visitor.

In the case at hand it was accepted by the Court that the defendants were occupiers within the meaning of the *Act* and that they failed to take reasonable care to ensure that the property was reasonably safe for persons on the property. The Court accepted that the cause of the fall was ice that was obscured by snow, and that the defendants had failed to properly maintain the premises. The Court noted that at the time of the loss Bainbridge was wearing winter boots that had a tread and did not have a heel. As the action was not defended, Bainbridge's pleading that she was being prudent at the time of the loss was deemed admitted. The defendants were 100% liable for the loss.

Turning to damages, the judgment notes that pursuant to Rule 19.06 of the *Rules of Civil Procedure*, a plaintiff is not entitled to judgment on a motion for judgment or at a trial merely because the facts alleged in the statement of claim are deemed admitted, unless the facts entitle the plaintiff to judgment. Bainbridge put before the Court both medical evidence and her testimony, which was accepted as being reliable, credible, and believable.

As a result of the fall, Bainbridge sustained a lateral tibial plateau fracture, which required an open reduction and internal fixation using a metal plate and screws. She was left with a long visible scar running down her leg from the knee. In the years following the loss, Bainbridge advised that she experienced throbbing in her knee, pins and needles in the leg, and difficulty walking and standing for any extended periods of time. In 2019, she underwent a second surgery to remove the plate and screws. The second surgery reduced her pain, but did not improve her difficulty walking. In 2020, an MRI revealed tears in the lateral meniscus, lateral collateral ligament, and the anterior cruciate ligament; along with severe degenerative change and moderate joint effusion with possible loose bodies. As of the time of the trial, Bainbridge reported continued pain and difficulty with range of motion and using stairs. Bainbridge used a cane when her pain reached "extreme" levels. The injury impacted her ability to supervise and engage with her children.

An expert opinion was obtained by the plaintiff which suggested that she would have some permanent level of impairment and may require further surgery in the form of arthroscopy or knee replacement.

Bainbridge was awarded general damages in the amount of $150,000; $12,000 in future care costs (pain management medication); $635.57 in out-of-pocket expenses; and partial indemnity costs and disbursements.

5. *Schinas* v. *Wal-Mart Canada Corp.* 2024 ONSC 7108

The plaintiff, Daria Schinas (the "Plaintiff") brought a motion before the Court for leave to issue a Fresh as Amended Statement of Claim, which involved the consolidation of two proceedings and the addition of the proposed defendant, Modern Cleaning Concept Inc. ("Modern Cleaning") to the consolidated action. The motion was opposed by Modern Cleaning on the basis that the Plaintiff was attempting to add a party to the action after the expiry of the limitation period.

The Plaintiff had been involved in a slip and fall seven years prior on August 3, 2017. A Statement of Claim was issued on June 10, 2019, naming Wal-Mart Canada Corp. ("Wal-Mart"), and Bequia Properties Inc. as the owner and occupiers of the premises where the loss took place. On July 4, 2019, Wal-Mart's adjuster, on the basis that the loss took place inside the store, advised her that it appeared no other Defendants were necessary to be named to the action. Acting under a waiver, Wal-Mart did not deliver a defence until June 28, 2022. The defence made no reference to a cleaning and maintenance contractor. On November 11, 2022, the Plaintiff delivered a Request to Admit which included a request that Wal-Mart admit it was solely responsible for maintaining the premises. Wal-Mart denied the requested admission. The Plaintiff made three further inquiries of Wal-Mart in 2023 of whether there was a maintenance contractor at the premises, but received no response. A further Request to Admit was served in July 2023 asking further questions about the responsibility for cleaning and maintenance which were denied by Wal-Mart without the provision of any additional information. In the course of examinations for discovery in January 2024, Wal-Mart's representative testified that it was solely responsible for cleaning and maintenance. Following the examination, on March 6, 2024, Wal-Mart advised that contrary to the evidence on examination, Wal-Mart had retained a cleaning company. On July 29, 2024, Wal-Mart advised plaintiff counsel that it would assert that another entity was responsible for the maintenance of its floors. 49 days after receiving this information, the Plaintiff placed Modern Cleaning on notice of its intent to add them as a defendant to the claim.

Modern Cleaning took the position that the Plaintiff had not exercised reasonable diligence in identifying all potential involved parties and that adding it as a defendant to the consolidated action would result in prejudice that could not be compensated for in costs.

In considering the motion, the Court took into account:

- Rule 5.04(2) of the *Rules of Civil Procedure,* which provides that the court may by order add, delete, or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment;

- Rule 26.01 of the *Rules of Civil Procedure*, which provides that on motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment; and

- Section 21 of the *Limitations Act, 2002,* which provides that, where a limitation period in respect of a claim has expired against a person, that person shall not be added as a party to an existing proceeding.

The Court proceeded to consider the motion within the framework set out in the Court of Appeal judgment in *Morrison v. Barzo,* 2018 ONCA 979.

As part of its analysis, the Court accepted that the Plaintiff had not become aware of Modern Cleaning's involvement until March 6, 2024. In considering whether the Plaintiff exercised reasonable diligence, the Court noted that the Plaintiff had relied on the representation made by Wal-Mart that no other defendants were necessary to the action. There was no trigger to alert her to the fact that someone other than Wal-Mart was responsible for the maintenance of the floors. The suggestion by Modern Cleaning that the Plaintiff made no effort prior to the issuance of the claim to learn about the existence of a cleaning contractor was rejected on the basis of the decision in *Madrid* v. *Ivanhoe Cambridge Inc.*, et al., 2010 ONSC 2235 (*at para. 15) which held that a plaintiff is not required to conduct a pre-discovery; and that it was reasonable for it to rely on Wal-Mart's adjuster's representation that no other defendant needed to be added to the claim.

Finally, when considering prejudice, Modern Cleaning advised the Court that (a) it had terminated its franchise with the franchisee responsible for the premises in 2021; (b) the former franchisee was not responding to inquiries; (c) documents that would have been available to it were no longer; and (d) that adding it as a defendant to the action would have the effect of rewarding Wal-Mart for its significant delay in disclosing its involvement.

The Court did not find that Modern Cleaning would suffer non-compensable prejudice if added as a defendant to the action. It was not precluded, however, from arguing that the delay by Wal-Mart and the Plaintiff impacted its ability to defend the action.

The motion was granted.

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Jennifer is the Practice Lead in Alexander Holburn's Toronto Office, 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 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 and 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

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