

OCCUPIERS' LIABILITY – A SUCCESSFUL DEFENCE

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By *Richard Horak*

In the recent decision of *Kerr et al v. Loblaw's Inc.*, (2007) O.N.C.A. 371, the Court of Appeal dismissed the Plaintiffs' appeal from a jury verdict, wherein the jury found that the Defendant had taken such care as was reasonable under the circumstances and had met its duty under the *Occupiers' Liability Act*. Given this conclusion the trial judge dismissed the action. In dismissing the Plaintiff's appeal the court made some interesting comments regarding the duty to be applied to occupiers and also commented on the respective roles of the judge and jury in such cases.

Facts

The Plaintiff, who was 80 years of age, fell and broke her ankle while shopping in the produce department at a store owned by the Defendant. It was acknowledged that the Plaintiff slipped and fell on a single grape near a grape display.

At the time of the accident the Defendant's policy manual provided for the use of floor mats in front of grape displays and also required the use of a sweep

log. However, contrary to the manual, floor mats were not in use on the day in question. While no schedule for hourly floor inspections was in place, a sweep log was in use, which documented inspections at 2 hour intervals. The log indicated that loose grapes were picked up from the floor at 8:00 a.m., but no mention was made of findings made at 10:00 a.m. (the last inspection prior to the Plaintiff's fall). At 12:10 p.m. (shortly after the accident) the log indicated that other produce was picked up in a different area of the produce section, some distance away from where the accident occurred.

On inspection following the accident, no grapes or other produce was discovered on the floor in the area of the grape display.

While the Defendant did not dispute that the Plaintiff fell in the produce department, it denied liability on the basis that it had taken reasonable steps to see that its customers were reasonably safe on the store premises. The Defendant maintained that the Plaintiff's injuries were caused by pre-existing

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Noteworthy

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medical conditions and events unrelated to the fall.

On appeal, the court considered whether the trial judge erred in his charge, either with respect to the requisite standard of care or the causation issue. The court also considered whether the jury's verdict on liability was unreasonable.

The Plaintiff argued that the trial judge had failed to outline the precautions required to guard against the type of accident that occurred and suggested that reference should have been made to existing case law, which outlined indicia of reasonableness. The court rejected this submission and approved the charge given by the trial judge, which imposed on the Defendant a standard of reasonableness. This required "neither perfection nor unrealistic or impractical precautions against known risks".

The court noted that the trial judge's instructions implicitly recognized the important distinction between the well established roles of the trial judge and the jury. While it was the job of the judge to determine the existence of the duty relationship and to lay down in general terms the standard of care by which the Defendant's conduct should be measured, it was for the jury to determine whether that standard had been met.

The court indicated as follows:

"The applicable standard of care in this case is one of reasonableness in the circumstances".

Having properly identified and explained the relevant standard of care, it was unnecessary for the judge to provide specific examples of how the standard was applied in other cases.

The court also noted that counsel at trial had not objected to the jury charge. While this was not dispositive, it would "tell strongly" against a request for a new trial based on flaws in the jury charge.

The court also noted that the trial judge had identified for the jury the evidence relied upon by the Plaintiff which was said to breach the standard of care. In these circumstances the court concluded that the jury could not have been in any doubt as to the standard of care to be applied.

The Defendant is not an insurer and is not held to a standard of perfection, nor is it required to take unreasonable or unrealistic steps in an effort to maintain the safety of persons on the premises.

On the issue of the instructions relating to causation, the court noted that while it was conceded that the Plaintiff slipped on a single grape, there was

some dispute as to the Plaintiff's exact position in relation to the grape display when she fell. The Defendant relied on the Plaintiff's evidence as to her position to argue that the presence of a floor mat would not have prevented or minimized the potential for an accident. The Plaintiff argued that a determination as to the Plaintiff's precise position at the time of the accident was unnecessary to a finding of liability and relied on the recent Court of Appeal decision in *Kamin v. Kawartha Dairy Ltd.* (2006) 79 O.R. (3d) 284.

The court rejected this submission, noting that this portion of the charge consisted of only five sentences in a charge that was 55 pages in length and accordingly the remarks could not be considered significant.

Lastly, the court considered the reasonableness of the verdict. In the court's view this was an uncomplicated personal injury case and the evidence at trial was straight-forward. There was an evidentiary base on which the jury's verdict on liability could be supported and accordingly the court was not prepared to intervene and conclude that the jury's verdict was either plainly unreasonable or unjust.

Conclusion

The decision in *Kerr et al v. Loblaws Inc.* again confirms

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that, if a Defendant is able to present persuasive evidence that it had a reasonable system in place to provide for the reasonable safety of persons on the premises, the Defendant will be found to have met its duty under the *Occupiers' Liability Act*. The Defendant is

not an insurer and is not held to a standard of perfection, nor is it required to take unreasonable or unrealistic steps in an effort to maintain the safety of persons on the premises.

While past decisions are of some persuasive force, each case will be decided on its own

facts. The trier of fact will be obliged to determine "reasonableness in the circumstances", based on the evidence called at trial. This of course makes predictability of the result at trial more difficult and will present challenges for both counsel and clients.

ONTARIO SUPERIOR COURT DECISION RE THE DUTY TO DEFEND CONCURRENT AUTO AND NON-AUTO RELATED CLAIMS

By Michael Teitelbaum

In *Aviva v. Pizza Pizza*, a judgment released on October 29th, 2007, Justice Beth Allen of the Ontario Superior Court of Justice found that Aviva, the CGL carrier, was obliged to defend the insured, Pizza Pizza, in respect of non-automobile-related claims, while ING was obliged to defend the insured in regard to automobile-related claims.

The Plaintiff was injured when a Pizza Pizza delivery driver struck her while she was a pedestrian crossing the street. The Statement of Claim included allegations that Pizza Pizza was negligent as a result of its business practice of speedy deliveries and failure to screen drivers' driving records.

Allen J. stated that "court determinations of whether all claims pleaded are covered by an automobile exclusion and whether there are concurrent non-automobile related claims

being pleaded are fact driven" and "each case must be determined based on its particular facts" (para. 24).

At para. 25, Her Honour finds that the aforesaid claims are independent of the claim involving the use or operation of an automobile and, therefore, fall outside the scope of the automobile exclusion in Aviva's policy.

Justice Allen, in applying *Djepic v. Kuborovic*, 80 O.R. (3d) 21, at para. 30, finds Aviva "did not succeed in demonstrating that all of the possible scenarios pursuant to which injury may have occurred are claims arising from the use of an automobile and that none of those scenarios also involved a concurrent non-automobile related cause" (para. 26).

At one point, Allen J. refers to the *Unger v. Unger* decision being argued by Aviva. *Unger* found that allegations of negligent hiring, supervision and

entrustment of a vehicle were excluded by the CGL automobile exclusion. She does not specifically address *Unger* in her analysis, but presumably was of the view that it was distinguishable due to the above-noted allegations.

Insofar as the automobile-related claims were concerned, ING had agreed to defend the vicarious liability claim, and assume responsibility for seeking a determination that Aviva was obliged to pay all of the defence costs. Pizza Pizza alleged in its Statement of Defence that the driver was not its employee but an independent contractor and, therefore, it could not be liable. It then argued that the driver did not qualify as "any insured" under the wording of the CGL automobile exclusion. The Court did not address whether consideration of a Defence plea was appropriate.

In any event, Her Honour

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found that while the Plaintiff might find it difficult to prove Pizza Pizza's liability in these circumstances, her vicarious liability plea in the Statement of Claim was enough to raise the possibility of Pizza Pizza's liability and, therefore, attract a duty to defend. She also held that ING's Non-Owned Policy was "intended to cover automobile-related injuries

caused by a fast food delivery driver in circumstances where the vehicle driven at the time of the accident was not owned by the fast food enterprise". Accordingly, there was also a defence obligation in respect of the automobile-related claim.

No allocation formula as between the two insurers was considered by the court. It

appears this was because, on the consent of the parties, it was agreed that certain issues, including whether the insured was entitled to appoint counsel of its choice, could be better dealt with once the court reached its decision "owing to the complexities of sorting out the parties' respective costs obligations".

FIRM NEWS

We are very pleased to congratulate Jennifer Malchuk on becoming a partner at the firm. Jennifer will continue her practice out of our Hamilton office, where she specializes in insurance defence litigation.

We are also pleased to welcome Jennifer Huneault as our newest associate in our Toronto office. Jennifer was called to the bar in 2003 and has been practising in the insurance field since then.

On February 21, 2008 Pam Stevens spoke at the Canadian Institute's 6th Annual Forum on Winning Personal Injury Cases on the subject of Videotaping of Defence Medical Examinations.

Jack Fitch will be co-chair of the Canadian Institute's 8th National Summit on Institutional Liability for Sexual Assault, Abuse & Harassment, to be held in Toronto March 31—April 1, 2008.

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