COURT OF APPEAL FOR ONTARIO

CITATION: Nolet v. Fischer, 2020 ONCA 155
DATE: 20200227
DOCKET: C65939

Feldman, Fairburn and Jamal JJ.A.

BETWEEN

David Nolet

Plaintiff (Appellant)

and

Caroline Fischer

Defendant (Respondent)

Joel P. McCoy, for the appellant

Chad Leddy, for the respondent

Heard: October 25, 2019

On appeal from the order of Justice Francine Van Melle of the Superior Court of Justice, dated September 28, 2018.

Feldman J.A.:

Introduction

[1] The appellant was moving out of the respondent's home after their relationship ended, tripped on the sidewalk while carrying his freezer out of the house and injured his left ankle. He sued for damages under the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2. The respondent moved successfully for summary judgment dismissing his claim.

[2] The motion judge gave two bases for dismissing the action. The first was that the respondent as owner and occupier of her premises did not owe the appellant a duty of care under the *Occupiers' Liability Act* because he was also an occupier of the premises. The second was that if the respondent did owe him a duty of care, the appellant did not prove a breach of duty, because he did not prove there was any unevenness on the sidewalk that constituted a hazard, and if there was, he was aware of it.

[3] I would defer to the factual findings of the motion judge on the second ground and dismiss the appeal on that basis.

[4] However, in dealing with the first issue, the motion judge erred in law in her interpretation of the *Occupiers' Liability Act* by finding that under the Act, one occupier cannot owe a duty of care to another occupier. I would set aside that erroneous interpretation.

Background facts and findings of the motion judge

[5] The parties began dating in 2008. The appellant moved into the respondent's house in 2010. In 2012, he moved to a separate room in the basement as their relationship had ended. He moved out later in April 2012. While he lived at the respondent's house, the appellant contributed approximately $500 per month towards expenses. On the day of the move, the appellant and his friend

were carrying a small freezer when he tripped on the sidewalk and fell, causing injury including to his left ankle.

[6] The appellant claimed he fell on a “trip ledge” between two concrete slabs that was about one to two inches high. The height of the trip ledge and whether it constituted a hazard were issues in dispute between the parties.

[7] The respondent had two main defences to the action. The first was that under the *Occupiers’ Liability Act*, one occupier of premises owes no duty to another occupier of the same premises. The motion judge spent a considerable portion of the reasons making factual findings on the issue whether the appellant was also an occupier of the premises and concluded that he was.

[8] The parties were unable to refer the motion judge to any case where one occupier had sued another for this type of accident. The motion judge accepted the respondent’s argument that the reason there was no case law was because there is no cause of action. The motion judge accepted that “the legislation was never intended to permit co-occupants to sue each other under the *Occupiers’ Liability Act*. It stands to reason that a co-occupant is not an entrant on the premises as envisioned by this legislation.”

[9] The respondent’s second main defence was that if she owed a duty of care, the appellant had not proved any breach of duty. On that issue, the motion judge

found that the appellant had not proved the existence of the hazard as he had alleged.

[10] The appellant said the ledge was one to two inches high but there was no independent corroboration of that measurement. The respondent admitted there may have been a ¾ inch trip ledge on the right side of the sidewalk, but the appellant's evidence was that he tripped in the middle or on the left side, injuring his left ankle. The photographs in evidence appeared to show that the height difference on the left side and in the middle was "far less" than on the right side. The motion judge concluded that: "in any event, there is no reliable evidence on this point." The motion judge also noted that the appellant admitted that he had seen the unevenness before the move-out date and that he was therefore aware of a possible hazard. She concluded: "[t]hus it was not the "concealed danger" to which he referred in para. 5 of the Statement of Claim."

Issue 1: Did the motion judge err in her interpretation of the *Occupiers' Liability Act*?

[11] The first issue raised on appeal is whether the motion judge erred in law by finding that under the Act, one occupier of premises is precluded from suing another occupier of the same premises, or that an occupier cannot be a person "entering on the premises" to whom the other occupier owes a duty of care. As indicated, the motion judge spent a considerable portion of her reasons determining whether the appellant was also an occupier of the respondent's

premises, and after finding that he was, concluded that no duty of care was owed to him because of his status as an occupier. In my view, that finding constitutes an error of law. The Act does not preclude one occupier from suing another occupier or negate the duty of care owed by an occupier to another occupier when that occupier enters on the premises.

(a) On a proper interpretation of the *Occupiers' Liability Act*, one occupier can owe a duty to another occupier

[12] The Ontario *Occupiers' Liability Act* was passed in 1980 in order to replace the common law rules that governed an occupier's liability and duty of care owed to persons who enter the occupier's premises. The Act followed from the recommendation contained in the Ontario Law Reform Commission's 1972 *Report on Occupiers' Liability* to abolish the common law distinction between the duties owed to the common law classes of entrants: invitees, licensees, trespassers and contractual entrants, and to create one duty of care owed to all entrants, subject to specifically articulated exceptions and limitations.

[13] Section 2 of the Act provides that subject to specifically identified exceptions in s. 9 where a higher duty is owed, the Act applies "in place of the rules of the common law". Section 2 provides:

> Subject to section 9, this Act applies in place of the rules of the common law that determine the care that the occupier of premises at common law is required to show for the purpose of determining the occupier's liability in law in respect of dangers to persons entering on the

> premises or the property brought on the premises by those persons.

[14] This court has made it clear in recent cases that the wording of the Act establishes that it is intended to be exclusive and comprehensive, effectively constituting a complete code with respect to the liability of occupiers: see *MacKay v. Starbucks Corp.*, 2017 ONCA 350, 413 D.L.R. (4th) 220, at paras. 45-46; *Schnarr v. Blue Mountain Resorts Limited*, 2018 ONCA 313, 140 O.R. (3d) 241, at paras. 25-26, 59-60, leave to appeal refused, [2018] S.C.C.A. No. 187.

[15] As a result, one must look to the Act to determine any occupier's liability issue.

[16] The Act defines an occupier very broadly in s. 1 and provides that there can be more than one occupier of the same premises:

> "occupier" includes,
>
> (a) a person who is in physical possession of premises; or
>
> (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,
>
> despite the fact that there is more than one occupier of the same premises. ("occupant")

[17] Subsections 3(1) and (3) state:

> (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 persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

…

> (3) The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty.

[18] Section 3 of the Act describes the duty of care that is owed by an occupier to "persons entering on the premises". While "occupier" and "premises" are defined terms in the Act, "persons entering on the premises" is not defined in the Act. However, there is nothing in the Act to suggest that such persons cannot also be occupiers.

[19] First, we know from s. 2 that the Act replaces the common law duties that were owed to the previously defined classes of entrants: licensees, invitees, trespassers, and contractual entrants. Therefore, "persons entering on the premises" includes everyone who fit into the former categories. To the extent that those categories could possibly have excluded anyone, there is no exclusion that arises from the words or phrase "persons entering on the premises".

[20] The respondent argued that at common law, one occupier could not sue another, and that the Act did not change that rule. However, the respondent could provide no authority for the proposition that there was any such prohibition at common law, nor have I found any authority that supports the respondent's argument.

[21] Second, the temporal scope of the duty of care that extends over the time "while on the premises" also indicates that the duty is owed to other occupiers. The

duty extends to property brought onto the premises by those persons, and it extends throughout the time period “while on the premises”. Therefore, after a person enters on the premises, for however long that person or their property remains on the premises, the occupier owes the person the prescribed duty of care. The duty is therefore owed to a person who remains on the premises including a person who lives there.

[22] Third, the Act contains a number of exclusions from the duty of care. The statutory interpretation principle “*expressio unius*” or “implied exclusion” applies here; if the legislature had also intended to exclude other occupiers from “persons entering on the premises”, it would have done so along with the other exclusions: Ruth Sullivan, *Sullivan on the Construction of Statutes,* 6th ed. (Markham: LexisNexis, 2014), at p. 248. As a complete code, the Act contains all restrictions, limitations and exceptions to when the occupier’s duty of care arises.

[23] One exception is in s. 3(3) where the occupier can “restrict, modify or exclude” the duty. Then, under s. 4, the duty does not apply to risks that are “willingly assumed” by the person who enters on the premises, subject to the qualifier, that even then, the occupier still owes a duty not to create a danger with the deliberate intent to harm or to act with reckless disregard of the person or the person’s property. Subsections 4(2), (3) and (4) address criminal entrants, as well as trespassers and people using other people’s property as unpaid recreational space, and provide that in certain situations these entrants will be deemed to have

willingly assumed all risks for the purpose of subsection (1). Finally, s. 9 is not an exclusion per se, but maintains previously imposed higher obligations for innkeepers, common carriers and bailees, and preserves the obligations of employers to employees.

[24] Given this explicit list of exclusions to the standard occupier's duty of care, and given the absence of "other occupiers" from this list, I conclude that the legislature did not intend such an exclusion. This analysis is reinforced by the fact that the Act clearly contemplates the possibility of multiple occupiers of the same premises.

[25] To conclude, there is no language or provision of the Act that one occupier does not owe the duty of care to another occupier, or that provides that when an occupier enters on the premises they are not a person "entering on premises" for the purpose of the Act. Nor is there any basis to read any such legal restriction into the Act. While persons may enter onto premises for many different reasons and may leave quickly or stay indefinitely, the Act creates one duty that is owed to all such persons including those who are also other occupiers.

(b) In spite of the existence of the duty, the paucity of cases may have other explanations

[26] As the motion judge noted, the parties could not find any case where one occupier was found liable to another occupier under the Act.

[27] One explanation may be the defence of the willing assumption of risk. Whether it could be argued in any particular case where there is more than one occupier, that a person who is an occupier and who enters on premises has willingly assumed some or all of the safety risks associated with the premises for the reason that the person is also an occupier, would be decided on a case-by-case basis, depending on such factors as the nature of the relationship between the occupiers and the degree of control they each may have over the premises.

[28] Another could be the unavailability of insurance. For example, where one spouse has an accident in the family home, that spouse is unlikely to sue the other unless there is insurance coverage available, and some insurance policies explicitly exclude from coverage claims by a resident family member.

[29] For example, in *Traders General Insurance Company v. Gibson*, 2019 ONCA 985, Ms. Gibson had a homeowner's insurance policy that covered her for amounts she became "legally liable to pay" for unintentional bodily injury arising out of her ownership or occupancy of her home. Ms. Gibson's adult daughter lived with her in the home. The daughter was injured when she fell off the porch and the porch railing came down with her.

[30] The policy contained an exclusion for claims for “bodily injury to you or any person residing in your household other than a residence employee”. The court found that the daughter was in residence but not as an employee and therefore coverage for her injuries was excluded under the policy.

[31] It was clear in that case that the insurance policy would cover claims by a number of potential “occupiers” against the homeowner, including residence employees or any person not in residence but left in physical possession of the premises. In other words, the policy language accepts that one occupier can be legally liable to pay another occupier for unintentional bodily injury arising out of the use or occupation of the premises. It then limits its coverage to indemnify for such liability by the specific wording of the policy.

[32] While there may be explanations such as these for why, in practice, occupiers do not often recover from other occupiers, there exist situations in which it is obvious that this should be possible. For example, because the definition of “occupier” is so broadly framed, some people are occupiers while they are in physical possession of premises who have no control over the premises’ maintenance or repair. Depending on the circumstances, such a person may be, for example, a friend or grandparent visiting overnight. While that friend or grandparent may have a duty to warn others who may enter, such as a delivery person or a repair person, of hazards that they are aware of, there is nothing in the Act that says that the owner of the premises does not owe the occupiers’ duty of

care to the overnight guests, or that they are not persons entering on the premises because they are also occupiers within the definition contained in s. 1.

[33] To conclude, the apparent paucity of case law where one occupier has sued another does not undermine the proper interpretation of the Act which does not preclude such claims on the sole basis that the person to whom the duty is owed is also an occupier of the premises.

[34] As the motion judge erred in law by finding that the respondent did not owe any duty of care to the appellant under the Act, the appeal turns on whether the motion judge erred in finding in the alternative, that there was no breach of duty.

Issue 2: Did the motion judge err in finding there was no breach of the duty of care?

[35] As this was a motion for summary judgment, the motion judge had to be satisfied that she could decide the issues based on the record before her and that there was no genuine issue requiring a trial. The motion judge was satisfied that the record before her was complete. She observed that the facts were largely uncontroverted and it was a case of applying the law to the facts.

[36] The appellant submits that the motion judge failed to consider all the evidence before her and that her reasons for rejecting his claim were inadequate. I would not accept those submissions.

[37] The duty of care owed by an occupier to a person who enters on the premises is “to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises…are reasonably safe while on the premises.” The duty is to take reasonable care – it is not absolute.

[38] The motion judge was not satisfied that the appellant had proved a breach of that duty for the following reasons which I synthesize as follows. 1) Although it is clear from the photos that there is an unevenness or ledge between two of the sidewalk slabs, the appellant did not prove that the height discrepancy created was significant enough to constitute a hazard. He did not provide measurements of the height differential to substantiate his claim that the ledge was 1-2 inches as opposed to ¾ inch. Further, he tripped on the left side of the slab where the ledge was lower than on the right side. 2) The appellant was aware of the unevenness between the concrete slabs so that he was aware of the need to take care to avoid the possibility of tripping there. The motion judge therefore rejected the appellant’s submission that the trip ledge was a concealed danger.

[39] While the motion judge did not state explicitly why the respondent met her duty of care, it is clear from her reasons that she found that the appellant had not proved that the respondent failed to “take such care as in all the circumstances of the case is reasonable” to see that the condition of the sidewalk was reasonably safe. I see no error in that conclusion. It was open to the motion judge to view the photographs in conjunction with the evidence of the witnesses and to make a

finding regarding the safety condition of the sidewalk and that the appellant was aware of that condition.

[40] I also see no error in the motion judge's conclusion that there was no genuine issue for trial. The evidence of how the accident happened was explored under oath with all the witnesses, and photographs from the time of the accident were in the record. The motion judge was in as good a position as a trial judge to look at the photos and assess whether the ledge constituted a safety hazard.

Other issues raised by the appellant

[41] In his factum the appellant raised a number of other issues, some of which are dealt with by the reasons above. I address the three outstanding issues here.

[42] First, the appellant argued that the motion judge erred by ignoring binding precedent that "[w]hile there is no hard and fast rule, it is well established that a trip ledge, and specifically one that is the size of ¾ of an inch to 2 inches, is a hazard". In support of this proposition the appellant cites two cases where a ¾ inch to 1 inch ledge and a 1 to 1.5 inch ledge were each found to breach the occupiers' standard of care: *Ford v. Windsor (City),* 1955 CarswellOnt 492 (C.A.); *Litwinenko v. Beaver Lumber Co.* (2008), 237 O.A.C. 237 (Div. Ct.). Neither of these cases says that a ¾ inch ledge is always a hazard. In fact, *Ford* states "[i]t is a question of fact in each case": at para. 1.

[43] Second, the appellant argued that the motion judge failed to provide sufficient reasons for her findings on credibility. There is no specific finding on credibility. With respect to the motion judge's finding whether or not the ledge was high enough to constitute a hazard, it is clear that she relied on the contemporaneous photos. To the extent that credibility influenced her decision on other issues (such as how the appellant fell), her findings with respect to the existence of a hazard provide a sufficient justification and explanation for disbelieving the appellant.

[44] Third, the appellant argued that the motion judge erred by failing to allow the parties to make submissions on costs and sought leave to appeal the costs award. The motion judge received costs outlines from both parties and ultimately awarded the costs of the entire action to the respondent on a partial indemnity basis in the amount of $30,000. I see no reviewable error with that process.

Conclusions

[45] The motion judge erred in law in her interpretation of the *Occupiers' Liability Act*. The Act does not preclude one occupier from suing another occupier for breach of the statutory duty to take reasonable care for the safety of persons entering on the premises and the property they bring onto the premises.

[46] However, I would dismiss the appeal on the alternative ground articulated by the motion judge, that the respondent did not breach her duty of care.

[47] Counsel agreed at the end of oral argument that if on appeal each party were to be successful on one of the two main issues, then there would be no costs of the appeal.

[48] With respect to the costs of the motion, which were $30,000 to the respondent, the appellant submitted that if he were to be successful on the issue of the interpretation of the *Occupiers' Liability Act*, then the costs below should be reduced by $5000 to $10,000. I consider that a reasonable submission.

[49] In the result, I would order no costs of the appeal, and that the costs below be reduced by $7,500.

Released: "K.F." February 27, 2020

"K. Feldman J.A."
"I agree. Fairburn J.A."
"I agree. M. Jamal J.A."