When is an Occupier's Liability Case Ripe for Summary Judgment?

Stephen G. Ross & Andrew Yolles
March 2017

Through Hryniak v. Mauldin, [2014] 1 SCR 87, the Supreme Court of Canada has encouraged litigants and judges to make use of the summary judgment process. Summary judgment is more attractive than ever as an efficient and cost-effective means of adjudicating certain cases. The catch is, it should be the right case, or a summary judgment motion could be a waste of time and money. How do you know if your case is the right case? A court will grant summary judgment when it can confidently make the necessary findings of fact and apply the law to those facts in a manner that is proportionate to the claim and is more expeditious and less expensive than a trial.

Practically speaking, this means that summary judgment will be most appropriate, and most likely to succeed, where the case can be narrowed to a few specific, determinative issues that can be judged on the basis of discrete evidence.

In a claim for personal injury in an occupier's liability context, the issue of damages can be discretionary to fit this mold. Because so much depends on the evidence of the plaintiff as well as his or her likeability and credibility as a witness, the summary judgment process is not particularly well-suited to that determination. However, some liability defenses in an occupier's liability claim are well suited to summary judgments.

In an occupier's liability case, the plaintiff must prove that there was a hazard on the premises that caused his or her accident. The defense best suited to summary judgment is one in which the defendant can demonstrate with evidence that no such hazard was present on the premises. A common example is where the plaintiff fell and claims that there was liquid or debris on the floor. However, the plaintiff does not have sufficient

evidence to prove that a hazard was present, or the defendant has overwhelming evidence to demonstrate that there was no hazard present.

This was the case in Nandlal v. Toronto Transit Commission, 2015 ONCA 166. The Ontario Court of Appeal upheld the summary dismissal of the plaintiff's action. Her claim was that she slipped and fell on stairs in a subway station, and though she saw debris elsewhere in the same subway station and on prior occasions, she did not claim to have seen any at the location of her fall. Further, the defendant led evidence that the stairs were made of non-slip material and were in good condition.

In another case that was appropriate for summary judgment, the plaintiff's accident was caused by a feature of the premises that cannot reasonably be considered to be a hazard. In Jassal v. Hilcox, 2016 ONSC 5523, the plaintiff tripped over a tennis net post on a public tennis court. The court found that summary judgment was appropriate because the feature that caused the plaintiff's accident was not an unreasonable hazard.

Finally, a defendant may also obtain summary judgment on the basis that notwithstanding the presence of a hazard on the premises, the defendant occupier nevertheless met its duty of care. Section 3 of the Occupiers' Liability Act requires the occupier "to take such care as in all the circumstances of the case are reasonable" to ensure that people are reasonably safe while on the premises. The courts have held that this is not strict liability, and that the occupier can avoid liability by demonstrating that it took reasonable care to prevent hazards from occurring on the premises (Waldick v. Malcom, [1991] 2 SCR 456).

On such motions, the defendant would need to provide clear evidence that it took reasonable steps to prevent the plaintiff's accident. This will usually involve evidence including maintenance policies and procedures, as well as evidence that those policies and procedures were followed at the time of the accident.

However, where there is solid evidence of preventative maintenance being conducted in the location of the accident shortly before an accident, summary judgment should be carefully considered. In many cases, the potential advantages of such a motion (successful end to the case) outweigh the disadvantages of bringing one and losing (exposure to costs) or not bringing one at all (a distant and expensive trial or an unhappy compromise).

So summary judgment may save time and expense when you have an occupier's liability case where: the plaintiff has no real evidence of a hazard; you have good evidence of the absence of a hazard; the "hazard" is an innocuous feature of the premises; the hazard was caused entirely by the negligence of a contractor; or you have good evidence that preventative maintenance was conducted in the location of the accident shortly before it occurred. If the case is borderline, unclear on the evidence, or there is contradictory evidence, summary judgment will be more of a long shot.

In any event, in the aftermath of Hryniak, an analysis of whether summary judgment is a useful tool to employ in a given case is a consideration every litigator must undertake.