Vacuum Return Gone Wrong: The Duty of an Occupier

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On March 27, 2018, the Ontario Court of Appeal released a decision in the case of *Tondat* v. *Hudson's Bay Company*, 2018 ONCA 302. The case involved a slip and fall accident at a Hudson's Bay store and provides important lessons for retail stores and other occupiers.

Facts

In December 2012, the plaintiff, a Superintendent of Education with the Toronto District School Board, went to a Hudson's Bay store in Oakville to return a small vacuum cleaner. It had been raining heavily earlier in the morning. The rain had turned into a light drizzle by the time the plaintiff arrived at the store.

The plaintiff, who was wearing leather sandals, approached the doors to the store carrying the vacuum in both hands. A customer opened the door for her. The plaintiff entered the store and stepped onto a black floor mat. She did not see any debris or water on the floor at the time.

The plaintiff slipped and fell as she stepped from the mat onto a tiled floor. She fell on her right knee breaking her knee cap. After falling, she noticed water on the floor.

Damages were agreed to in the amount of $100,000. A trial on liability proceeded.

Applicable Law

Section 3(1) of the *Occupiers' Liability Act* requires an occupier to take reasonable care so that people entering on its premises are reasonably safe. Perfection is not required.

The plaintiff bears the onus, on a balance of probabilities, to prove that the occupier breached its statutory duty of care. A plaintiff must be able to identify some act or failure on the part of the occupier which caused the injury complained of.

A retailer must account for the fact that customers will be of differing ages, strengths, and infirmities.

Trial Decision

The trial judge found the maintenance company hired by Hudson's Bay to be liable.

The Director of Corporate Affairs of the maintenance company was called as a witness. He had no personal knowledge of the condition of the store on the date of the accident.

There was only one cleaner assigned to clean the 118,348 square foot store. This employee performed "light duty" on the date of the accident, but the Director of Corporate Affairs did not have any particulars of the actual work done. He did not know whether the area of the accident had been cleaned. There were no maintenance sheets or inspection forms.

Moreover, the trial judge noted there was no evidence that the cleaner's work "had been supervised on that day to ensure that, given the weather conditions on December 2, 2012, patrons seeking to participate in Christmas shopping would not have to contend with conditions that increased the possibility of a slip and fall".

The trial judge held that there was no system of dealing with water hazards in the area of the accident and that, even if there was such a system, it was not working on the date of the accident.

The defendants called a human factors expert who testified that the floor was not unreasonably dangerous when wet and did not pose a risk of harm to a customer of the store. The expert determined that the coefficient of friction of the floor, or its slip resistance, exceeded the acceptable standard when the floor was dry or wet.

The plaintiff did not call an expert. However, the trial judge rejected the evidence of the defence expert, noting that the expert conducted his tests under ideal or controlled conditions. For example, the expert tested the floor with distilled water instead of rain water.

Further, the expert had no knowledge of the force the plaintiff applied to the floor, the angle at which her foot contacted the floor, the presence or absence of any grease or oil on the floor, and the condition of the sole of the plaintiff's shoe when she fell.

Lastly, the trial judge did not find any contributory negligence on the plaintiff. The plaintiff was wearing leather sandals in December. However, the trial judge stated that the defendants should reasonably have known that customers would be wearing every manner of footwear when they entered the store.

Appeal Decision

The Court of Appeal dismissed the defendants' appeal.

The defendants accepted the trial judge's findings that a wet floor caused the plaintiff's fall and that they lacked an effective inspection or maintenance system. However, the defendants argued that the trial judge failed to require the plaintiff to prove that the wet floor created an unreasonable risk of harm.

The essence of the defendants' argument was that the trial judge erred in the assessment of the expert evidence. The Court of Appeal rejected this argument. The Court agreed with the trial judge that the defence liability expert conducted his tests in a highly controlled way. The Court stated that the trial judge reasonably concluded that the expert had not replicated the conditions typical of the entrance to a busy department store on a rainy day.

The Court held that the trial judge reasonably rejected the defence position of the flooring being suitable. The Court stated there was no merit to the defence argument that the plaintiff was required to call her own expert witness to prove that the floor was inherently slippery or to contradict the evidence on the slip resistance of the flooring.

The Court also agreed that there was no contributory negligence on the plaintiff.

Conclusion

The plaintiff has the onus to prove that some act or failure on the part of the occupier caused an injury.

An occupier has an affirmative duty to take reasonable care to make its premises safe. An assessment of what constitutes reasonable care is specific to each fact situation.

An occupier should have a sufficient number of properly trained and supervised staff to ensure that the premises are inspected and maintained at suitable intervals. The frequency of the inspection and maintenance activities may need to be increased depending on the weather conditions and the number of people at the premises.

Contemporaneous records should be kept on what areas of the premises were inspected and the times of the inspections.

Further, an occupier should take into account that people of various ages, strengths, and infirmities may visit its premises.

In a case involving a slip and fall on a wet floor, if a defendant is going to rely on an expert to show that the flooring surface was safe, the expert should try to replicate the condition of the floor at the time of the accident. The expert should also take into account the mechanics of the plaintiff's fall.

Following an incident, an occupier should make best efforts to conduct immediate investigations, including inspecting the floor surface, taking photographs, interviewing the injured person and any witnesses, interviewing employees on what inspection and maintenance activities were performed, and preserving surveillance footage, if available.