WINTER WALKERS, BE WARNED: OCCUPIERS BENEFIT FROM CONTRIBUTORY NEGLIGENCE ANALYSIS

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In the recent decision of *Wilson v. 356119 Ontario Ltd. et al.* ("***Wilson***")[1], the Ontario Superior Court of Justice held that the defendant property manager and snow removal contractor did not meet their obligations under Section 3(1) of the *Occupier's Liability Act*, R.S.O. 1990, c. O.2 (the "**Act**") to ensure reasonable safety of the premises by failing to apply salt to the snow and ice covered premises in a timely manner. Importantly, the plaintiff was also found to be 25% contributorily negligent for her injuries resulting from the slip and fall incident on the premises because she failed to take any special precautions despite being "a person living in Canada familiar with Canadian winters".

Background

On January 27, 2016, the plaintiff, Debbie Lee Wilson, slipped and fell in the snow and ice covered parking lot of the Brockville 1000 Island mall ("**the mall**").

The plaintiff claimed against the defendant property manager and snow removal contractor alleging that they were negligent in their duty to ensure reasonable safety of the premises. The relevant issues before the Court were whether the defendants met their positive duty of care under the Act, and whether the plaintiff was contributorily negligent for her injuries.[2]

The Decision

This decision provides a useful, updated analysis into what constitutes a reasonable system in place to ensure safety, whether the winter maintenance system was adequate through a review of the provisions in the winter maintenance contract between the property manager and the contractor, and whether the system was properly functioning on the day in question.

Slip and falls in snowy/icy conditions are highly fact-driven, requiring analysis of relevant factors including the weather, the time of year, the size of the parking area, the cost of preventive measures, the quality of the footwear worn by the visitor, the length of the pathway, and the nature of the property.[3] As such, the following factors regarding the day in question were subsequently examined:

- There was snow on parts of the parking lot at the time of the fall[4];
- There were icy conditions that morning that required the application of salt to prevent ice from adhering to the road surface, provide traction and melt the snow/ice and the snow removal contractor was aware of this[5];
- To the knowledge of the defendants, the mall doors opened at 7 a.m. to allow customers into the mall and people would commence arriving at the mall after that time[6];
- On that day, salting had not been completed until 8:22 a.m., 1 hour and 22 minutes after the front doors opened and approximately 22 minutes after the plaintiff fell[7].

The focus of the Court's analysis was whether the salt application was completed in a proper and timely way on the day of the fall, and whether property management and the snow removal contractor met their obligation under the Act to ensure that the premises were reasonably safe for persons using it.[8] Considering the above-mentioned factors, the Court held that on this occasion the defendants failed to ensure that the parking lot was safe for its customers because

a. The snow removal contractor did not meet the provisions of the contract to complete the snow maintenance by the agreed timeline of 7:00 a.m.[9];
b. An employee of the property manager responsible for inspections of the parking lot did not identify or report any issues that morning[10]; and
c. The senior property manager responsible for overseeing the operations, tenant relations and the day-to-day running of the mall concluded that the contractor had met its obligation under the contract and confirmed that the salt had melted the snow/ice on most of the lot. This was based on their review of a photograph taken by an employee of the contractor showing the mall sidewalk, main access roads and non-access roads of the parking lot that morning.[11]

The Court held that the defendants were negligent in their omission to apply the salt in a timely manner causing a dangerous icy surface to form in the parking lot, which was held to be the proximate cause of the plaintiff's slip and fall and resultant injury.[12] The Court emphasized that had the salting operation been conducted in a more timely and careful manner in the circumstances, the fall and resultant injuries would not have occurred.[13]

The Court concluded that the defendants had in place a reasonable system to provide proper winter maintenance for the parking lot with a regular regime of inspection, maintenance and monitoring; however, the system was not functioning properly on the day in question. Not only did the snow removal contractor fail to apply salt to the snow and ice covered premises in accordance with its contractual obligations, but property management also did not identify any issues in its inspections of the premises and concluded that adequate

snow removal and salting had occurred based on a photograph of the premises that morning. Accordingly, the defendants were found to be jointly and severally liable for negligence.[14]

The Court also found that the plaintiff was contributorily negligent because she was well aware of the conditions outside, and she did not take any special precautions despite her experience with the winter conditions that morning and her observations of the parking lot (i.e. parts covered with snow).[15] It was emphasized that there was a lack of due care on her part because "as a person living in Canada familiar with Canadian winters"[16], the plaintiff would have been aware of the presence of snow and ice on ground, that care is needed when walking outside in the winter especially during or after a storm, and the perils of walking during the winter time.[17] This is even while the Court assessed that she was wearing appropriate clothing and gear for the winter. The Court assessed the plaintiff's liability at 25% and the defendants' liability to be 75%.[18]

Takeaways

- *Wilson* highlights that a reasonable system of maintenance and inspection implemented by occupiers is not enough to satisfy their obligations under the Act if it is not complied with in a timely and careful manner to prevent any unreasonable risk of injury.
- *Wilson* establishes that plaintiffs in slip and fall incidents can be held to be 25% contributorily negligent for their injuries if there is a lack of due care in taking special precautions when walking outside during the winter when there may be presence of ice and snow on the ground.

[1] *Wilson v. 356119 Ontario Ltd. et al.*, 2023 ONSC 600.
[2] *Ibid* at para 3.
[3] *Ibid* at para 25.
[4] *Ibid* at para 69.
[5] *Ibid* at paras 69 and 73.
[6] *Ibid* at paras 69 and 105.
[7] *Ibid* at para 98.
[8] *Ibid* at para 74.
[9] *Ibid* at paras 101 and 103.
[10] *Ibid* at para 83.
[11] *Ibid* at paras 55-56 and 85-87.
[12] *Ibid* at para 109 and 110.
[13] *Ibid* at para 111.
[14] *Ibid* at para 202.
[15] *Ibid* at para 114 and 115.

[16] *Ibid* at para 116.
[17] *Ibid* at para 116.
[18] *Ibid* at para 117.

by Rachel Cooper, Shahnaz Dhanani

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.