COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Robinson v. 1390709 Alberta Ltd.,*
2017 BCCA 175

Date: 20170503
Docket: CA44020

Between:

Cathrine Robinson

Respondent
(Plaintiff)

And

1390709 Alberta Ltd. doing business as The Chopped Leaf

Appellant
(Defendant)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia, dated September 30, 2016 (*Robinson v. 1390709 Alberta Ltd.*, 2016 BCSC 2459, Victoria Registry Docket S144101).

Counsel for the Appellant:	J.J.L. Brun
Counsel for the Respondent:	G.D. Williams M.A. Melnyk
Place and Date of Hearing:	Vancouver, British Columbia April 7, 2017
Place and Date of Judgment:	Vancouver, British Columbia May 3, 2017

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Willcock

Summary:

Plaintiff claimed she slipped and fell in defendant's restaurant because of unknown substance on ground. Defendant found 100 per cent liable under Occupiers Liability Act*. Defendant appealed on grounds that judge erred by speculating about what had caused plaintiff to fall, by misinterpreting* Sinow v. Maple Ridge Square Shopping Centre Ltd.*, and by making findings of credibility and fact that could not be supported.*

Held: appeal dismissed. Judge did not speculate about what had caused plaintiff to fall or misinterpret Sinow*. In passage challenged by defendant, judge was referring not to plaintiff's burden to prove causation, but to proof of foreseeable risk. Judge did not err in interpreting* Sinow*. Judge's findings of credibility and fact were well supported by the evidence.*

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This is a 'slip and fall' case brought under the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337 (the "*OLA*"). In the court below, Mr. Justice Gaul gave oral reasons for finding the defendant wholly liable for Ms. Robinson's fall in a restaurant called "The Chopped Leaf", operated by the defendant. At the end of the appeal hearing, we told counsel that the appeal was dismissed for reasons to follow. Since the case turned almost entirely on the facts found by the (summary) trial judge and is unlikely to be of interest to anyone other than the parties, I do not intend to rehearse the facts in these reasons except to the extent necessary to explain our conclusions.

[2] Ms. Robinson and a friend, Ms. Horgan, dined at The Chopped Leaf restaurant in Kelowna on the evening of November 30, 2012. At the material time, the defendant had one employee on duty who may or may not have been Mr. Hamm. (A female employee had also been present when the plaintiff and her friend entered, but she disappeared and was not seen again.) Ms. Robinson deposed that as she and Ms. Horgan were leaving after their meal:

> As I neared the door, I put my left foot down and felt it slip forward suddenly. I definitely felt something slimy and thicker than liquid under my foot, and felt it slide as my left foot slid forward. I could not lift my left foot because it was already too far in front when I started to react to the slip. I tried to correct my balance by shifting my weight forward but my left foot was out in front of me and I fell heavily onto my back and left side. [At para. 21.]

She continued:

> Immediately after I landed on the floor Ms. Horgan asked me if I was alright and I recall saying I was not and that I had hurt myself. Ms. Horgan could not help me off the floor because she was late in her pregnancy.
>
> The employee behind the counter asked if I was alright and I replied that I hurt myself. He appeared to acknowledge my complaint but continued his work behind the counter. [Neither] he, nor any other employee came to help me off the floor. I laid on the floor for about a minute before getting up slowly. I was embarrassed by the fall, and angry that the employee did not show any concern or try to help, so I wanted to leave the store. [At paras. 24–5.]

[3] Ms. Robinson's evidence was largely corroborated by Ms. Horgan's evidence, which included the following:

> I cannot recall the direction she fell, however, I recall after she landed she remained on the ground. For part of the time she was on the ground, she was sitting on her buttocks. She immediately complained of pain in her knee. She was in obvious pain …
>
> …
>
> Only the male employee was behind the counter when the slip-and-fall incident occurred. He asked if Ms. Robinson was okay. She replied that she had fallen and she was hurt. He replied "Oh," and continued with his work behind the counter. [Neither] he, nor any other employee came to offer assistance, first aid, or [to] help her get up.
>
> After she fell, we did not attempt to identify what substance Ms. Robinson slipped on. Ms. Robinson appeared to be in a lot of pain and we were focused on her welfare rather than the floor. I was pregnant at the time and was not able to help her up, or properly examine the floor. [At paras. 13, 15–6.]

[4] For his part, Mr. Hamm did not testify that he had been on duty on the night of November 30, 2012, but he had been employed at The Chopped Leaf between August and December 2012. He recalled that one evening, he saw two women heading towards the front door and seeing one of them fall. His affidavit continued:

> It appeared to me that she fell to her knees. She was helped back up by the other woman.
>
> After the woman fell, I asked her if she was okay. I do not remember my exact words and I do not remember exactly what the woman said to me in response. I do not believe that she told me she was injured or needed assistance. Either she or the other woman said something to the effect of "Ya, I think we're good to go." They both then quickly exited the restaurant. I do not recall seeing the woman who fell limp out of the restaurant.

> I did not make notes of the incident or fill out any incident report or forms. I did not report the incident to Taylor [the shift manager] or my employer. This was because I had no indication that the woman who fell was injured. If she told me she was injured or needed help, I would have attended to her and if necessary, called my manager or if appropriate, 911. [At paras. 15–7.]

[5] The trial judge correctly stated the statutory duty of care created by s. 3 of the *OLA* and quoted from *Mainardi v. Shannon* 2005 BCSC 644, in which Preston J. observed that the duty of care does not require an occupier to remove *every* possibility of danger, since the test is reasonableness rather than perfection. Further, he stated, the court is not entitled to resort to "speculation" when determining the cause of the plaintiff's injury. It is for the plaintiff to prove the "nexus" between her fall and the occupier's failure to discharge his or her duty of care. (At para. 21.)

[6] In the case at bar, the plaintiff was unable to say exactly what she had slipped on. The defendant thus argued that it was insufficient for her to say she had slipped on "something" that was slimy and that the court should not speculate about what had caused her fall. On this point, the defendant relied on *Van Slee v. Canada Safeway Ltd.* 2008 BCSC 107, in which the plaintiff had assumed that she slipped on water in a Safeway store on a rainy day. The Court ruled that:

> The law is clear in this area, the Court must not speculate. The plaintiff must prove: first, what condition or hazard caused her slip and fall; and, second, that the condition or hazard existed due to a breach of duty by the defendant. [At para. 31.]

[7] The trial judge in the case at bar distinguished *Van Slee*, however, observing that Ms. Robinson was able to state that the substance on the floor was "noticeably different than water and that it had the distinct consistency of a food item." He did not regard this as "speculation or theorizing" on the plaintiff's part and quoted the following passage from this court's decision in *Sinow v. Maple Ridge Square Shopping Centre Ltd.* [1990] B.C.J. No. 743:

> … It is not a particular type of debris that the occupier must concern himself with, rather it is debris generally which creates a risk of a slip and fall such as happened here that he must concern himself with. The trial judge found as a fact, and this is not challenged by the appellant, that the respondent slipped and fell on a leaf or leaves; or to put it another way she slipped and fell as a result of a form of debris on the floor in the common area that created a risk of harm. [At para. 5.]

Gaul J. also noted that the colour and texture of the floor in the restaurant made it hard to see items that may have been dropped on it, and that from the vantage point of someone working behind the food preparation counter, it would have taken the extra effort of leaning over the counter to examine the entire floor. (At para. 23.)

[8] On appeal, the defendant submits that the judge erred in resorting to speculation and in his interpretation of *Sinow*. I cannot agree. As I read the passage from para. 5 quoted above, the Court was not referring to the plaintiff's burden to prove causation, but to the proof of a foreseeable risk with which an occupier must concern himself. I am not persuaded the judge erred in law in either of the ways asserted by the defendant.

[9] The trial judge found that the plaintiff's evidence was persuasive but that Mr. Hamm's evidence was not. In particular, he noted that Mr. Hamm did not say he remembered the actual incident or even that he was present and at work on the date of her accident. The defendant's timesheets should have been in evidence to confirm who was working on the day in question. The judge found that no restaurant employee had made any satisfactory effort to determine the state of the floor at or after the time of Ms. Robinson's fall. In the circumstances, then, Gaul J. found the plaintiff had established a *prima facie* case that the defendant had breached the duty of care owed to her under the *OLA*.

[10] The balance of the Court's reasons was concerned with whether the defendant had had a reasonable cleaning regime in place (see paras. 27–39), and if so, whether the defendant's cleaning regime was being implemented on the day of the accident (see paras. 40–41.) On the first issue, the trial judge concluded that the restaurant's training program for employees contained "very little if any review of the restaurant's Systems Manual, Employee Handbook or any other policy manual." Instead, employees were given only hands-on training during the course of their work and the training had no "identifiable structure." Thus, the Court concluded:

> In my opinion this was insufficient given the nature of the Chopped Leaf's business and I cannot conclude that the policies and procedures that the defendant asserts it had in place to ensure the restaurant's premises were

> reasonably clean and free from hazard creating debris were sufficient and appropriate for the premises. [At para. 39.]

[11] On the second issue, the Court also found that whatever policies or systems management had thought were in place were not being properly followed or implemented. This led the Court then to the final conclusion that the defendant was liable for Ms. Robinson's accident.

[12] I have dealt with the one question of law raised by the defendant's grounds of appeal; the rest are issues of fact or mixed fact and law which challenge the trial judge's findings of credibility, the inference that it was a food item on the floor that caused the accident, and his finding that the restaurant did not have a reasonable system of inspection and maintenance in place that was being implemented on the date of the incident.

[13] Ms. Brun tried valiantly to persuade us that in fact employees of the restaurant received detailed "hands-on" training in how to clean in the restaurant and that the colour of the floor made it hard to see debris. She also submitted that the judge had erred in failing to consider the size, use and design of the premises in deciding whether a reasonable system of inspection had been in place. We were not persuaded, however, that any palpable and overriding error was shown, and indeed a review of the evidence demonstrates that the judge's factual findings and inferences were well supported by the evidence.

[14] In these circumstances, we dismissed the appeal.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Mr. Justice Willcock"