IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Burton* v. *Westfair Foods Ltd. dba The Real Canadian Superstore, 2003 YKSC 24*

Date: 20030523
Docket No.: 99-A0234
Registry: Whitehorse

Between:

Susan Burton

Plaintiff

And:

Westfair Foods Ltd. dba The Great Canadian Superstore

Defendant

Appearances:
Daniel S. Shier — Counsel for the Plaintiff
Keith D. Parkkari — Counsel for the Defendant

Before: Mr. Justice R. Goodwin

REASONS FOR JUDGMENT

[1] On December 21, 1997, the plaintiff, who was then 34 years old, attended the defendant's store in Whitehorse, called "The Real Canadian Superstore", operated by Westfair Foods Ltd. It was the Sunday before Christmas, one of the busiest days of the year.

[2] Sometime before 4:00 p.m. on that day, the plaintiff slipped and fell in the entrance way inside the store as she was coming to join her husband and children, who had gone ahead.

[3] Evidence reveals that she fell due to ice build-up inside the store's entrance way. She was wearing appropriate and quite new winter boots. The plaintiff testified that the ice was packed at that spot and was the same colour as the tile floor.

[4] Ms. Rogers, an independent and reliable witness who entered the store a few minutes after the plaintiff slipped, lost her balance but did not fall. Ms. Rogers confirms the condition of the floor: "Slush, snow, ice … whatever it was, it moved under my feet."

[5] Ms. Carmel Barron, a host at the entrance, was taping customers' bags closed as they entered, to avoid shoplifting. She commented to some that it was slippery at the entrance, but only after they were past the entrance way and in the store. There was no forewarning of the floor's condition.

[6] In the host log book, Ms. Barron entered this note:

> 4:00 icy floor 5 customers fell down
> one talked to Store Manager
> about floor. She hurt her knees.
> People do not expect to fall on
> icy floor when entering a store.
> 4:16 Manager put map [*sic*] in doorway

[7] The plaintiff says she saw some people fall or lose their footing while she waited for her husband to come and assist her. The manager was called by the host and arrived.

[8] Only after the incident involving the plaintiff did the manager place a mat in that entrance way and only then did some employees come and chip away the ice.

[9] The plaintiff testified at length. Her answers were clear and complete. She responded directly and took time to explain events with sufficient detail.

[10] She described her pain and suffering and losses calmly, without exaggeration and, more important, made the distinction between the pain, inconveniences and annoyances related to her left knee and her pain and suffering from unrelated serious migraines. She described these without complaining.

[11] The plaintiff is a most credible witness.

[12] Counsel agree that the applicable test was expressed by the Newfoundland Court of Appeal, in *Stacey* and *Gallant*, in these words:

> An occupier's duty of care to a visitor to his or her premises is to take such care as in all the circumstances is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he or she is invited or permitted by the occupier to be there or is permitted by law to be there.

It is applicable in the Yukon Territory as Hon. Mr. Justice Hudson, Senior Judge of this court, alluded to in *Mineault* v. *Takhini Hot Springs Ltd.,* 2002 YKSC 48.

[13] Counsel for the defendant referred to *Atkins* v. *Jim Pattison Industries Ltd. (c.o.b. Save-On-Foods and Drugs)*, [1998] B.C.J. No. 3050 (C.A.), adding that this court should consider the evidence indicating that the defendant had refuted the negligence claim by the evidence showing it had put into operation a reasonable scheme, which was being followed at the time of the incident.

[14] While there was some evidence of a plan or a system in place, other evidence did indicate it was not operational enough on that very busy day. The incident was avoidable, had proper care and action been taken on December 21, 1997.

[15] The evidence shows the defendant failed to take reasonable care to ensure the safety of its customers by allowing the ice to build up and create such a hazard.

[16] The defendant was negligent and did not succeed in pleading that the plaintiff failed to heed her own safety, or that she was not doing all that was possible to alleviate her pain and suffering, including seeking proper additional medical advice.

[17] As the plaintiff slipped and fell, she struck her right hip and felt her left knee "snap."

[18] She was brought to the Whitehorse General Hospital, where she was diagnosed as having a "strained knee" with a possible strain of the medial collateral ligament.

[19] On February 12, 1998, suspecting a torn medial meniscus, an arthroscopy was scheduled and performed on March 13, 1998. Dr. Storey noted a mobile meniscus, which he probed back into place.

[20] The clinical notes on file and the plaintiff's evidence reveal further medical attention was needed and confirms the persistence of the pain and inconvenience to the plaintiff.

[21] The plaintiff attended many sessions of physiotherapy and was discharged by the therapist, Ms. Johnson, recognized as an expert, with the explanation that she could do nothing more. At trial, she commented very favourably on the plaintiff's efforts in continuing the prescribed exercises and her regular walking. She talked about patella femoral syndrome.

[22] The plaintiff had had some prior problems with her left knee. She had an arthrogram in December 1980, followed by an arthroscopy in February 1981. In January 1984, she had an operation: a vastus medialus advancement.

[23] The evidence reveals that she had had no problem until her slip and fall on December 21, 1997, nearly 14 years later.

[24] The plaintiff's recreational and domestic activities have been restricted due to the pain and has modified some of her activities at work. She feels pain in her knee when she sits or stands for any length of time. At night, she is awakened by sharp pain after she shifts her knee from one position to another.

[25] In order to set the quantum, one must consider that a prior condition existed, since the plaintiff was operated on when she was a teenager. However, she was not affected, nor inconvenienced, for some 14 years and led a full, active life: walking, biking, caring for her two children and working full-time, mostly as a clerk in a bank.

[26] At age 34, with two young children, her life changed because of the injury to her left knee.

[27] Assessing reasonable damages implies taking into consideration many factors, such as the plaintiff's age, now 39 years old, and the dramatic reduction of her sporting activities.

[28] The passing of time and the expert physiotherapist evidence of Ms. Johnson show that even taking proper care of herself and exercising, the plaintiff's condition has not gone away and is not expected to disappear, even with keeping up her exercises.

[29] Counsel for the plaintiff has submitted jurisprudence setting the range for general damages between $24,000 and $35,000.

[30] Counsel for the defendant suggests a range of $11,000 to $18,000, since there was no loss of employment and that the swelling to the knee was of short duration and

that the pain is more of a nuisance and is very irregular. Finally, he invokes the failure of the plaintiff to mitigate by other medical means.

[31] The court indicates that these arguments were addressed earlier in the analysis of the evidence, and I take them into due consideration in assessing a quantum.

[32] The court finds in favour of the plaintiff and awards general damages of $20,000 and special damages of $3,284.60 as per the Yukon Health account.

[33] Pre-judgment interest is granted pursuant to the *Judicature Act*, RSY 1986, c. 96, as amended.

[34] Costs are awarded to the plaintiff as per Scale 3.

_____

GOODWIN J.