Defence of Slip, Trip and Fall Liability Claims 101

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Defence of Slip, Trip and Fall Liability Claims 101

The legal framework amongst the Atlantic Canadian provinces with respect to the ubiquitous slip, trip and fall claim differs. However, defending a slip, trip and fall claim regardless of jurisdiction is substantially the same.

Background

Canadian jurisdictions take three (3) different approaches to the question of the standard of care expected of homeowners or property owners when considering a slip, trip and fall action. These approaches are:

- 1. occupiers' liability legislation;
- 2. the common law of occupiers' liability; or
- 3. general principles of negligence.1
- Occupiers' liability legislation governs Nova Scotia and Prince Edward Island. The legislation sets
 out the standard of care required by property owners towards those who come onto their property.
 The statutes impose an affirmative duty upon occupiers to take <u>reasonable care</u> for the safety of
 people on the premises.
- In contrast, Newfoundland and Labrador determine liability for a slip or trip and fall on the common law of occupiers' liability, but it applies it in a manner virtually indistinguishable from ordinary negligence.² An occupier is required to take such care as in all the circumstances is reasonable to see that the visitor will be <u>reasonably safe</u> in using the premises.³
- In New Brunswick, the Law Reform Act, SNB 1993, c. L-12, s. 2(1) abolished the law of occupiers' liability. New Brunswick is therefore the only province that applies general principles of negligence. The test is whether the defendant kept the condition reasonably fit for its purpose, i.e. the defendant is required at law to provide <u>reasonably safe</u> premises for the purposes contemplated.⁴

Despite the different legal approaches for slip and falls amongst the provinces, there are some consistent legal principles that emerge.

A frequently relied on decision from the Newfoundland Court of Appeal, Gallant v Roman Catholic Episcopal, 2001 NFCA 22 ["Gallant"] provides a succinct summary of these legal principles. In Gallant,

⁴ McAllister (Litigation Guardian of) v Wal-Mart Canada Inc, [2000] NBJ No 300, 228 NBR (2d) 230 (CA) at 22.



¹ Hatty v Reid, 2005 NBCA 5

² Gallant v Roman Catholic Episcopal Corp., for Labrador/Diocese of Labrador City-Schefferville (2001), 200 Nfld. & PEIR 105 (CA) at 27

³ Supra at 27

the court looked at a situation where a woman fell on ice while approaching the door to a Roman Catholic Church. The Court stated the following:

As already noted, in the common law jurisdictions in Canada, a generally consistent approach to occupiers' liability has emerged, one which is compatible with **Stacey**. The following is not an attempt to create an exhaustive list but a collection of principles, which emerge from the cases under the current, generally accepted view of occupiers' liability and which are relevant to the law in this province, post Stacey:

- 1. There is a positive obligation upon occupiers to ensure that those who come onto their properties are reasonably safe;
- The onus is on the plaintiff to prove on a balance of probabilities that the defendant failed to meet the standard of reasonable care-the fact of the injury in and of itself does not create a presumption of negligence- the plaintiff must point to some act or failure to act on the part of the defendant which resulted in the injury;
- 3. When faced with a prima facie case of negligence, the occupier can generally discharge the evidential burden by establishing they have a regular regime of inspection, maintenance and monitoring sufficient to achieve a reasonable balance between what is practical in the circumstances and what proportional to reasonably perceived potential risk to those on the property; and,
- 4. The occupier is not a guarantor or insurer of the safety of the persons coming on their premises. ⁵

Defending a Slip or Trip and Fall Claim

While each case will have unique considerations, the below items offer some key points with respect to defending a slip or trip and fall claim.

- In Atlantic Canada, the jurisprudence and Occupiers' Liability legislation have abolished the classification of the claimant as an "invitee", "licensee", or "trespasser". Such classifications are no longer relevant.
- The common law question of whether the defendant's actions or omissions gave rise to an "unusual danger" is also no longer relevant.

⁵ Gallant at 27

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- The standard of care in the Atlantic Provinces is not one of perfection. The standard is one of reasonableness. The trier of fact in every case determines what standard of care is reasonable and whether it has been met.⁶
- In order to satisfy a court that the occupier acted reasonably, a defendant will need to lead evidence that establishes a "system of inspection, maintenance and monitoring".
 - i. It is critical for the owner of a premise to not only have a reasonable and adequate system in place for inspection and maintenance of the premises, but also to maintain a log or record showing that inspections have taken place within the relevant time periods. It is imperative that evidence showing compliance with an inspection procedure on the date in question can be produced.
 - ii. Immediately contact the property owner and advise them to retain all records that relate to inspections, these may include daily logs, hourly logs, checklists or schedules for inspection.
 - iii. Consider whether there are protocols or policies in place for maintenance and monitoring, particularly as it relates to weather events.
 - iv. Advise the property owner to retain maintenance records to assess all work orders. Advise the occupier to retain any system that monitors the premises, including video camera evidence.
 - v. If the slip and fall is in winter, consider whether the occupier had a contract or arrangement with a third party for snow removal and sanding/salting of ice services. Secure any relevant contract.
 - vi. Secure the names and contact details of any employee or relevant person who may have evidence with respect to a system of inspection, maintenance or monitoring and of the alleged fall.
 - vii. Secure weather reports from the day of the alleged fall.
 - viii. Secure photographs of the location of the alleged fall.
- What is reasonable in terms of standard of care will depend on subjective factors and will differ from case to case. However, below offers some examples of factors that a court will weigh in assessing whether the occupier acted reasonably.

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⁶ Miller v Royal Bank, 2008 NSSC 32 and affirmed by the Nova Scotia Court of Appeal, 2008 3NSCA 118

- a. The location of the slip or trip and fall. Courts will likely expect a property owner to keep sidewalks, entranceways and walkways reasonably safer than areas such as parking lots. An occupier still owes a duty of care to ensure a parking lot is reasonably safe, but a court will not hold it to the same standard as a sidewalk or walkway.
- b. The frequency and the method of cleaning (i.e. sweeping/mopping) and inspection. The acceptable frequency of monitoring and inspection will depend on the type of business, the individuals that enter the premise and the prevailing conditions including, and most importantly, the weather. An owner of a commercial property will have to meet a more onerous standard than that applied to a residential property owner. Courts have considered the methods used for snow and/or ice control (i.e. salting/sanding along with shoveling following snowfall and ongoing surveillance if temperatures fluctuate).
- c. The steps a property owner took to warn/notify individuals of a potential danger or hazard (i.e. signage or caution tape).
- d. If a property owner has specific knowledge of ice formation and/or snow accumulation in certain area(s), a court will expect the application of additional due diligence, particularly with respect to surveillance and inspection efforts.

With respect to weather, courts have acknowledged that ice and slippery conditions in the wintertime are to be expected.⁷ That is not to say that a property owner is relieved of a duty to take care of their property. The property owner has a duty to use reasonable care in ensuring that the premises are reasonably safe for its intended use.

Contributory Negligence

If an occupier is liable for a slip or trip and fall, in certain scenarios, it is possible that a portion of liability rests with the plaintiff.

A court will weigh various factors when assessing contributory liability arguments. The below represents a non-exhaustive list of considerations:

- whether the plaintiff knew or ought to have known of the possibility of ice and potential hazards being formed at the location in question, having regard to winter conditions, precipitation and temperatures;
- whether the prevailing circumstances, (such as lighting or the absence of obstructions or other distractions), would have permitted an ordinary person, paying reasonable attention, to notice the presence of the slippery surface/ or potential hazard;

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⁷ Gallant at 36 citing with approval Bogoroch v Toronto (City) et al., [1991] O.J. No. 1032 (G.D.)

- whether the plaintiff failed to keep a proper lookout and exercise proper caution, or had his or her attention focused elsewhere;
- whether the plaintiff was hurrying or otherwise failed to adjust his or her pace and movements to allow for the presence or possibility of slippery surfaces covered with snow or ice or the existence of a potential hazard;
- whether the plaintiff's balance was impaired owing to the ingestion of medications or alcohol; and
- whether the plaintiff's footwear was suitable for walking on snow and ice or for the general prevailing conditions.⁸

Often it is prudent to reevaluate contributory negligence arguments following the Examination for Discovery of the plaintiff.

Summary

Overall, the assessment of liability for a slip or trip and fall case will be very fact specific. The key will be to determine what procedures were in place to guard against slipping or tripping hazards and whether the defendant can produce evidence to establish they had a policy and followed such policy (i.e. they used reasonable care to protect people from slipping and tripping hazards.)

Early retention of defence counsel for a slip, trip and fall claim will ensure evidence is gathered and protected to allow for a strong defence and lead to possible early negotiations.

Atlantic Canada Case Law Update

Please find below a table of the most recent and relevant decisions with respect to slip, trip and fall claims.

Nova Scotia

Citation	Summary
Orlov v Halifax Regional Municipality (Halifax Transit), 2018 NSSC 152	Plaintiff boarded Metro Transit bus on a rainy day. While walking to back of bus, he fell and broke his ankle. He claimed negligence for the bus moving too quickly before he sat down, and for the floor being worn and wet causing him to slip.



⁸ Miller v Canada (Attorney General), 2015 ONSC 669

	The case was dismissed on the basis that there was no evidence that floor was worn and not shown that it was wet at the time of accident.
Flowers v Allterrain Contracting Inc., 2017 NSSC 194	Plaintiff slipped on ice outside Wal-Mart store, and brought action against the owners of Halifax Shopping Centre property and contracted snow removal company. Major winter storm occurred the night before the fall.
	Defendant contractors provided logs showing work performed, and evidence on standard practice for winter storms. Their labourers were assigned to clear snow and salt that day, but there was little evidence on when, how often, and how much salt was deposited.
	Law does not impose duty of repeated and documented salting and inspection to point of insuring every inch of area is ice-free. They had a system in place that occurred on the day of the incident. Action dismissed.
Shane v 3104854 Nova Scotia Ltd., 2012 NSSC 327	Plaintiff slipped and fell on sidewalk on Hollis Street, claiming she fell on a piece of jagged ice. The sidewalk was adjacent to a parking lot located on defendant's property. Halifax Regional Municipality was responsible for clearing the sidewalk, but the plaintiff submitted that snow and water was escaping the defendant's parking lot, which was elevated slightly from the sidewalk, and running onto sidewalk creating a hazard.
	The fall was not on the defendant's property. Absent special circumstances (there are two from Bowden v Withrow's Pharmacy Halifax, 2008 NSSC 252,), owner of adjacent property does not owe duty of care to pedestrians. One of these circumstances is when activities/conditions on a property escape and cause injuries to others.
	There was not enough evidence to conclude anything escaped from defendant's property to cause slip and fall. Action dismissed.
Shane v. 3104854 Nova Scotia Ltd , 2013 NSCA 84	Shane was appealed to the Nova Scotia Court of Appeal on several grounds. One of the

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	grounds was that the judge erred in failing to find a breach of the duty of care.
	Ground dismissed. The trial judge was unable to find the evidence to support migration of conditions theory. This was a finding of fact.
	Court agreed that judge erred to the extent that they suggested that the City's involvement displaced the duty of care an adjoining landowner can owe a duty to pedestrians. However, this had no effect on the result as neither <i>Bowden</i> circumstance was proven on the evidence. Action dismissed.
Roscoe v Halifax (Regional Municipality), 2011 NSSC 485	Plaintiff was playing badminton and her foot was stopped suddenly by a piece of exposed duct tape on the gym floor. She suffered a torn meniscus.
	Municipality was occupier of gym as they had responsibility and control of it. They did not have reasonable system for maintenance and inspection in place, and there was no evidence any checks were done on day of incident. In fact, nothing was done to check condition of gym since the Municipality took control of it, and thus they failed to meet the standard of care. Action allowed.
Mielke v Harbour Ridge Apartment Suites Ltd, 2011 NSSC 313	Plaintiff was walking up sidewalk of Market street, past a building under construction and owned by the defendants. He sped up to catch up with friends, and stepped on something that caused his foot to roll, which ruptured his Achilles tendon.
	Judge found that defendant was an "occupier" of the sidewalk as there was a <i>Bowden</i> special circumstance—they had the care and control of the sidewalk at the time. They had left a significant amount of construction debris on sidewalk, and it was left open to pedestrians. Allowing debris to accumulate was a breach of the standard of care they owed. There was no evidence that the defendant organized program of regular inspection, cleaning and maintenance for the sidewalk. Action allowed.
Hill v Cobequid Housing Authority, 2010 NSSC 294	Plaintiff slipped and fell in parking lot of an apartment building. It was raining and

snowing, and there was an isolated patch of black ice by his car. It was submitted that the defendant did not have a regular regime of inspection, maintenance and monitoring considering what is a reasonable potential risk to person who lives in and visits a "seniors" complex.

Evidence was adduced on the snow clearing system they had in place. An independent contractor plowed, sanded and salted lot. Absent evidence that that regime did not take place that morning, the judge was satisfied that regime put in place was reasonable in the circumstances. Action dismissed.

Prince Edward Island

Citation	Summary
Mallett v Richard et.ors. (2018), 2018 PESC 50	Plaintiff was injured by a gate when it was struck by a horse during Old Home Week. The Court was left to determine whether Old Home Week and the Civic Centre were occupiers. The Civic Centre admitted it was an occupier for the purposes of the summary judgment motion. Factors were considered in relation to Old Home Week only. It was found that: • During Old Home Week, OHW had use of the entire premises except for Civic Centre administration space, the box office, Islander hockey team locker rooms and Red Shores Race Track and Casino area; • OHW fenced off the perimeter of the premises and charged admission at entry points. The fees were kept by OHW; • The lease agreement provided that the premises were handed over to OHW on August 6, 2012 and returned on August 19, 2012; • OHW provided security and first aid services on the premises; • The General Manager of OHW remained on site for the entire day to be available for whatever may arise; • OHW arranged to have various events and presenters enter upon and use the premises during the course of the exhibition.

In all of the circumstances, it was determined
that OHW met the definition of "occupier". The
Plaintiff's cause of action was dismissed as
Plaintiff's cause of action was dismissed as the defendant OHW and Civic Centre met the
standard of care.

Newfoundland & Labrador

Citation	Summary
Hawkins v Village Mall Shopping Centre (2006) Inc., 2015 NLTD(G) 59	Plaintiff was walking in parking lot of defendant's mall when he slipped and fell and injured his ankle. The temperature was -3.4 to -2.6 degrees Celsius that day with winds up to 80 km/h and snow of 4.2 cm. Plaintiff's action for damages was dismissed. The defendant had an adequate system in place for dealing with snow removal and ice control. More severe freezing conditions than normally controllable were experienced on the day in question. The salting operator maintained constant inspection of surface and repeated salting as necessary. While the results were not effective, they were as practical a response as could be reasonably expected in the conditions. Requiring a walking inspection of the parking lot was impractical and likely not effective.
Smith v 60144 Newfoundland and Labrador Inc., 2017 NLTD(G) 143	Plaintiff slipped and fell on defendant's walkway adjacent to their car dealership. Plaintiff's action was dismissed. Plaintiff failed to establish that he fell on ice or snow. Winter maintenance was a priority for two employees, and evidence established that they attended to those duties on a daily basis, which varied according to current weather conditions. The snow and ice control regime was reasonable (despite the fact that there was no written log with respect to monitoring the walkway) and implemented on the day the plaintiff fell. Action dismissed.

New Brunswick

Citation	Summary
Hickey v New Brunswick Housing Corporation, 2014 NBCA 36	Plaintiff slipped and fell on an outdoor stairway located in front of her apartment building. The Plaintiff alleged that the fall was caused by the failure of NB Housing to effect needed repairs. Spring thaw caused a gap to occur between the top of the staircase and the walkway. A metal plate had been attached to the top of the stairway. The Plaintiff's sandal caught the lip of the metal plate. The Plaintiff was aware of this gap. The issue was whether NB Housing had a reasonable maintenance and inspection system in place. The court held that the system was not adequate for two reasons. The annual inspections were not carried out for the purpose of identifying defects that pose a safety risk. Second, the fact that the tenant was required to report the need for repairs did not substitute the standard of care owed to the occupants. The property owner could not avoid liability by transferring their inspection obligations to their tenants. The issue regarding the Plaintiff's familiarity with the gap went to contributory liability. The Plaintiff was found to be 25% liable for failing to exercise the degree of care required when she was aware of the hazard. Action allowed.
Whelton vs. A&B Deschenes Sales Ltd., 2012 NBQB 294	Plaintiff claimed that she slipped on a patch of black ice on the sidewalk immediately adjacent to the auto service entrance door at the Canadian Tire store. It was a cold day with no precipitation in the hours prior to the accident. The Defendant testified that they did have a system of inspection and maintenance in place for snow and ice. Employees would inspect the area frequently, as did the store manager. The problem was the destruction of the logs and the fact that no employee could specifically recall the efforts exerted on the day in question. As a result, the court held that there no way to ascertain, what, if anything, was done in terms of the maintenance and inspection of the sidewalk outside of the entrance. This case highlights the importance of record keeping and a system of keeping records for at least two years (being the limitation period). Action allowed.

Mckay v Boardwalk Reit Properties Holdings Ltd., 2017 SKQB 298

*this decision cited and relied on *Hickey v New Brunswick Housing* Corporation, 2014 NBCA 36

Plaintiff tripped and fell on the sidewalk outside of his apartment building. The Plaintiff was visually impaired and he had walked on the portion of the sidewalk many times without noticing a crack. His foot stepped into a v shaped crack causing him to fall. The defendant's building manager stated that the sidewalks were visually inspected each day by the landscaper. The court held that the defendant had a reasonable system of maintenance and inspection. The type of damage to the surface of the sidewalk was common in the province and across the country and the obligation on property owners was not to maintain a sidewalk in pristine and completely smooth state. Action dismissed.



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