NOVA SCOTIA COURT OF APPEAL
Citation: ***Miller v. Royal Bank of Canada***, 2008 NSCA 118

Date: 20081216
Docket: CA 293629
Registry: Halifax

Between:

Brenda Miller

Appellant

v.

Royal Bank of Canada

Respondent

Judge(s):	Roscoe & Saunders, JJ.A. and Murphy, J. (ad hoc)
Appeal Heard:	December 4, 2008, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Roscoe, J.A. and Murphy, J. (ad hoc) concurring
Counsel:	Hugh R. McLeod, for the appellant Harvey M. McPhee, for the respondent

Reasons for judgment:

[1] The appellant was injured when she fell in the lobby of the Royal Bank in Sydney Mines, Nova Scotia on October 3, 2002. Her claim for damages was dismissed after a six day trial before Nova Scotia Supreme Court Justice Arthur J. LeBlanc. In a decision now reported at **2008 NSSC 32**, LeBlanc, J. held that the appellant had failed to establish liability on the part of the respondent. Having regard to the circumstances as found to exist on the day of the mishap, the trial judge determined that the respondent had not breached its duty to take reasonable care to make its premises reasonably safe for persons entering the bank. After dismissing the appellant's claim, the trial judge went on to provisionally decide the issues of causation, mitigation, damages, and pre-judgment interest.

[2] The appellant has appealed the decision and order confirming it, alleging various legal errors by the trial judge, both in dismissing the appellant's claim for compensation, and in his treatment of certain evidence. The appellant has abandoned her appeal of the costs order imposed against her following trial.

[3] After considering the record and counsels' submissions I have concluded that the appeal ought to be dismissed for the reasons that follow.

[4] I need not particularize the circumstances surrounding Ms. Miller's fall, or the injuries and treatment that resulted. Those are all described in considerable detail in the trial judge's reported decision. Suffice it to say the appellant alleged that she "did the splits" when she slipped and fell in the bank's lobby because puddles of water made the tiles dangerously slippery. The respondent, however, argued that the appellant, who was wearing slip-on beach sandals on a rainy day, may have fallen because she tripped or stubbed her toe as a result of rushing.

[5] I would reduce the long list of alleged errors contained in the appellant's notice of appeal, and the restated issues in her factum, to four arguments, those being that the trial judge erred:

(i) in failing to make a positive finding of liability against the Royal Bank of Canada, notwithstanding the judge's "clear findings of fact constituting negligence";

(ii) in his interpretation and application of the **Occupier's Liability Act**, S.N.S. 1996, c. 27 and binding judicial authority;

(iii) in excluding the opinion evidence of Mr. Glen Burton; and

(iv) in treating the fact that there had been no history of complaints of slip and fall accidents on this floor as determinative on the issue of liability.

[6] Before addressing each of these arguments it is important to recall this court's limited jurisdiction on appeal. Whether the members of this panel might have decided the case differently had they heard it in first instance, is not the test. Neither does an appeal provide an opportunity for a second trial. Great deference is paid to a trial judge's findings of fact, or inferences drawn from those facts. Such conclusions are immutable unless it can be shown that they are the result of palpable and overriding error. Assessing testimony, evaluating the evidence, making factual findings, and drawing inferences are all functions well within the jurisdiction of the trial judge who enjoys a significant advantage in seeing and hearing the witnesses first hand. Not every misapprehension of the evidence or every error of fact by the trial judge will justify appellate intervention. The error must not only be plainly seen, but be overriding and determinative. See for example **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235; **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010; and **2703203 Manitoba Inc. V. Parks** (2007), 253 N.S.R. (2d) 85 (C.A.). I will now address the appellant's four principal arguments.

[7] In her factum the appellant characterizes some of the findings of fact made by the trial judge as "findings of fact constituting negligence" which must, she argues, lead to a positive finding of liability against the bank.

[8] The trial judge made several findings of fact with respect to the bank's premises on the day of the mishap. These are set out at ¶ 111 of his decision. At no point in the trial judge's discussion with respect to liability does he find that the actions of the bank "constitute negligence". On the contrary, he refers to and then properly applies the law as set out in the **Occupiers Liability Act (OLA)**, to the circumstances as he found them to exist on the day of the mishap. The application of the correct standard when judging an occupiers' conduct is a question of law.

Whether, in the particular circumstances, the occupier met that standard, is a question of fact. See **Ingles v. Tutkaluk Construction Ltd.**, [2000] 1 S.C.R. 298; and **Marche v. Empire Co.**, (2001) 193 N.S.R. (2d) 132 (C.A.).

[9] The mere finding of an act or omission does not constitute negligence. Whether an action or an omission constitutes negligence will necessarily depend on all of the circumstances. I have already observed that the trial judge did not err in his interpretation or application of the proper standard of care. The judge's findings and inferences were – in the circumstances as found – not enough to persuade him that the respondent bank had failed to meet the requisite standard of care. Such a determination is a question of fact. I do not see any palpable and overriding error in his factual findings, or inferences drawn from those facts. On the record before us there is no basis to intervene. Accordingly there is no merit to the appellant's first submission.

[10] The appellant's second argument is that the judge erred by misapplying the law with respect to occupiers' liability. Implicit in this submission is the complaint that the judge ignored the binding authority of the Supreme Court of Canada's decision in **Campbell v. Royal Bank**, [1964] S.C.R. 85, and imposed a higher standard of proof upon the appellant. With respect, I cannot accept the appellant's submissions on this issue. It is clear Justice LeBlanc recognized that liability in this case was to be determined in accordance with the provisions of the **OLA**.

[11] The trial judge recited those provisions in ¶ 112 of his decision. In the next paragraph he properly instructed himself that the ". . . effect of the *Occupiers' Liability Act* is to replace the common-law duty of an occupier with the standard set out in the statute." He referred to the appellant's reliance upon **Campbell**, supra, a case that arose more than thirty years before the **OLA** was enacted on December 20, 1996. He properly instructed himself that "(d)ecisions pre-dating the *Occupiers' Liability Act* must be referred to with caution" (at ¶ 115). The judge then correctly described the requisite duty as being an obligation

> . . . "to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises." The standard is one of reasonableness, rather than "unusual danger", as described in Campbell, ...

[12] I am satisfied that the trial judge understood and properly applied the law as it related to the duty of care in the case before him. He did not impose any "higher standard on the Appellant to establish liability than in the past." It should also be emphasized that the circumstances in **Campbell** were much different than those found to exist by Justice LeBlanc in this case.

[13] In **Campbell** a bank customer slipped and fell on a floor made slippery by ice and snow that had been tracked inside. The Supreme Court (in a split decision 3:2) allowed the appeal and restored the trial judge's decision in which he had awarded damages to the plaintiff after finding liability against the bank. The Court referred to the clear findings of the trial judge in that case. There, the source of the water on the floor was explained by the trial judge. He said:

> There is no doubt that the numerous persons who entered the bank's lobby that day carried in a certain amount of snow on their boots . . .

The trial judge in **Campbell** made other strong findings as to the cause of the accident:

> I think there can be no doubt that water on the floor of the bank lobby caused this woman to fall and I find this as a fact. It was, in my opinion, more than mere moisture or dampness; it may have been less than actual puddles; but certainly there was at least a dangerous glaze or film of water underfoot near the tellers' wickets. It may be that the recent oiling contributed to the slipperiness caused by the water, but whether that is so does not, as I have previously said, need to be determined. The place was too slippery for safety.

[14] The strong findings of fact by the trial judge in **Campbell**, must be distinguished from Justice LeBlanc's conclusions in this case. Although LeBlanc, J. was satisfied that the appellant's injuries resulted from her fall at the bank (¶ 127) he did not make any finding as to what caused her to fall or that the floor was dangerous or slippery.

[15] Justice LeBlanc held:

> [118] It has been established that moisture existed on the tile floor where the plaintiff fell. It was apparently in the form of wet footprints. There were no puddles of water. The weather was misty, and it appears that there had been some rain, but it was not raining when the plaintiff entered the bank. In the

> circumstances, I am not satisfied that the defendant's liability should extend to a slip on a wet footprint. It is acknowledged that the defendant had no system or policy respecting floor cleanup. Rather, the employees monitored the floors on an *ad hoc* basis, and mopped or cleaned as needed. While ideally the defendant might have had such a policy in place, it appears that both Ms. Hudson and Ms. Hardy had observed some moisture on the floor of the foyer that morning, but did not believe it was significant enough to mop up.
>
> [119] I do not believe the defendant can be required to observe a standard of perfection, or to act as an insurer, in keeping its foyer floor dry . . .

[16] At trial contrasting theories were put forward as to what caused the appellant to fall. She claimed that she slipped on water on the floor of the bank's premises which the bank negligently failed to observe or neglected to clean up. This she said made the premises dangerous for the bank's customers and was the effective cause of her injuries and damages. On the other hand, the respondent bank argued that it had taken all reasonable steps to make its premises reasonably safe for conditions which prevailed on the day in question, and that the appellant's choice of footwear and hurrying at the time was the more likely cause of her fall.

[17] At the end of the day, after listening to all of the witnesses and viewing the videotape showing the appellant inside the bank at the time of this mishap, the trial judge was unable to say what *caused* her to fall. He did not make any factual finding that the bank's premises were not safe. He was unable to conclude that the appellant fell because the floor was slippery with water. All he was prepared to say was that:

> 7. There were footprints of water on the tiles in the foyer. There were no puddles, paper or other debris on the floor. The quantity of water that was on the floor has not been established beyond the presence of wet foot prints.
>
> . . .
>
> 11. The mechanics of the fall, and whether the plaintiff fell in a "splits"-type motion, are not established on a balance of probabilities.

Put simply, the appellant had failed to prove her case.

[18] As Iacobucci, J. observed in writing for the Court in **Waldick v. Malcolm**, [1991] 2 S.C.R. 456 at ¶ 33:

> . . . the statutory duty on occupiers is framed quite generally, as indeed it must be. That duty is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation—thus the proviso "such care as in all circumstances of the case is reasonable". [Emphasis in original]

[19] I agree with counsel for the respondent that the trial judge in this case conducted the appropriate analysis and carefully reviewed all of the circumstances. After doing so he was not persuaded that the appellant had successfully proven what caused her to fall, or that in any event the bank ought to be held liable for failing to ensure that a wet foot print was not left on the floor of the foyer that morning.

[20] I cannot say that the trial judge's conclusions resulted from reversible error. On this record I see no basis for disturbing his finding that the bank discharged its obligation as an occupier of the premises.

[21] The appellant's third argument is that the judge erred in excluding certain opinion evidence offered by Mr. Glen Burton. At trial the appellant sought to have Mr. Burton qualified as an expert in the field of ceramic tiles, their placement and maintenance and their relative slipperiness under different conditions. Mr. Burton is a carpenter by trade. He operates a retail business as an installer of wall and floor tiles. The respondent bank challenged Mr. Burton's qualifications as an expert, as well as his ability to provide objective or independent evidence on a number of grounds including the fact that he had a somewhat adversarial history with the Royal Bank. The respondent argued that Mr. Burton's report did not disclose the essential facts or grounds for his opinion. Neither had he carried out any objective testing of either the floor tiles used by the Royal Bank or those which he opined were less slippery.

[22] LeBlanc, J. did not allow Mr. Burton to be qualified as an expert. In his decision on the *voir dire* dealing with Mr. Burton's qualifications, LeBlanc, J. said:

> . . . I have concluded that Mr. Burton cannot be qualified as an expert. Consequently his report will not be admitted into evidence. . . . Mr. Burton is not entitled and will not be allowed to testify or offer an opinion as to the degree of

> coefficiency of friction in relation tiles, including those placed at the Royal Bank of Canada were as slippery as if they were on a skating rink. . . .

[22] Nevertheless, the trial judge did not exclude Mr. Burton's evidence in its entirety. He said:

> . . . [B]ased on the decision of the Supreme Court of Canada in **R. v. Graat** and the Nova Scotia Court of Appeal decision in **R. v. Ross**, I find that Mr. Burton is entitled to testify as a witness who has considerable and significant experience in the purchasing, selling, installing and cleaning of tiles, including floor tiles, in residential and commercial establishments; and to offer a lay opinion that the tiles of different configurations and finish may cause slipperiness in the tiles. Mr. Burton can also testify that tiles covered with water or other matters may be more slippery.

[22] Applying the principles in **R. v. Mohan**, [1994] 2 S.C.R. 9 and the requirements of **Civil Procedure Rule** 31, I see no error in the trial judge's handling of this issue. Neither am I persuaded that the judge misunderstood or ignored Mr. Burton's evidence. On the contrary, after considering the evidence concerning the choice of floor tiles offered by both Mr. Burton and the expert called by the bank, the judge was not persuaded that the tile was unsafe, as there was no comprehensible standard offered by which the relative slipperiness could be determined. For all of these reasons I would find that LeBlanc, J. did not err in refusing to qualify Mr. Burton as an expert witness, and further that he appropriately weighed all of the evidence, including the opinion Mr. Burton was permitted to give as a lay witness.

[23] The appellant's final argument is that the trial judge erred by treating the fact that there had been no history of complaints of slip and fall accidents on this floor as "pivotal" or determinative on the issue of liability. I would reject this argument summarily. In his decision Justice LeBlanc states:

> [120] I am likewise not convinced on the evidence that the choice of floor tile for the foyer amounts to a failure to meet the standard of care. <u>In this respect, I have considered that there is no history of complaints of slip-and-fall accidents on this floor, although this is not determinative</u>. Mr. Burton's evidence suggests that the tile may have been more slippery than others that were available. I am not satisfied that this establishes that the tile was actually unsafe. To suggest that the

> bank could only meet its duty under the *Act* by installing the least slippery tile available also seems to demand a standard of virtual perfection. As with Dr. Smith's evidence regarding the plaintiff's footwear, there is no comprehensible standard offered by which the relative slipperiness can be judged. (Underlining mine)

[24] The respondent's accident free record was a relevant factor for the trial judge to consider. LeBlanc, J. was entitled to take it into account in his assessment of all of the circumstances surrounding this mishap. He was careful to say that this particular feature was not, in and of itself, dispositive on the issue of liability. There is no merit to the appellant's complaint.

[25] For all of these reasons I would dismiss the appeal with costs to the respondent in the amount of $5,000.00, plus disbursements as taxed or agreed.

Saunders, J.A.

Concurred in:

Roscoe, J.A.

Murphy, J.