Date: 20010406
Docket No.: CA 164671

NOVA SCOTIA COURT OF APPEAL

[Cite as: Marche v. Empire Co. Ltd., 2001 NSCA 59]

Roscoe, Flinn and Oland, JJ.A.

BETWEEN:

EMPIRE COMPANY LIMITED and SOBEYS INC.

Appellants

- and -

THORA MARCHE

Respondent

REASONS FOR JUDGMENT

Counsel:	David Miller, Nancy I. Murray and Dennise Mack, for the appellants William P. Burchell, for the respondent
Appeal Heard:	February 2, 2001
Judgment Delivered:	April 6, 2001
THE COURT:	Appeal dismissed with costs and disbursements per reasons for judgment of Oland, J.A.; Roscoe and Flinn, JJ.A. concurring.

OLAND, J.A.:

Introduction

[1] In 1995 the respondent, Thora Marche, slipped on a grape in the produce section of a Sobeys store and fell, injuring herself. She claimed in negligence against the appellants, Empire Company Limited and Sobeys Inc., the store's owner and operator. In a decision reported at [2000], 183 N.S.R. (2d) 224, Justice A. David MacAdam of the Nova Scotia Supreme Court found the appellants liable for failing, as an occupier of premises, to take reasonable care to prevent injury to its invitee. The quantum of damages was not in issue, having been agreed to by the parties. The appellants appeal his decision as to liability.

Issues

[2] While the appellants raise several specific grounds of appeal, there are two main issues before us. The first is whether the trial judge erred in law by imposing the wrong standard of care. The second is whether he misapprehended the evidence.

Overview of the Facts and Decision

[3] The trial was heard over two days. The respondent and her husband gave *viva voce* evidence on her behalf. Three long-time employees of Sobeys Inc. testified on behalf of the appellants. John MacMullen was the senior grocery clerk, James Hart was the assistant produce manager, and Michael Hart was a produce clerk the day of the accident. Several exhibits were tendered at trial, including maintenance logs and photographs of where the accident occurred.

[4] The evidence established that the respondent was a regular shopper at this store. On prior occasions she had seen lettuce leaves and other things of this nature on the floor. However, she had not noticed anything on the floor before she slipped and fell in the produce section on June 16, 1995.

[5] Messrs. McMullen, Hart and Hart testified as to the risk of produce falling

from the displays, the procedures and systems the appellants had instituted to prevent, discover and respond to such dangers, and their own actions that morning. The trial judge accepted that the appellants had established a safety committee and required each department to maintain a log recording when items were removed from the floors and when floors were swept or cleaned. There was evidence of a nightly cleaning program. Employees were directed to be constantly watchful for spillage. One employee was required to be out on the floor of the produce section at all times. Mr. McMullen was under instructions to walk the floor and check everything every hour or so.

[6] The evidence at trial regarding the sweeping schedule and the clean-up of spills and messes was not consistent. The judge preferred the evidence of James Hart that there was no sweeping or mopping on a prearranged schedule although the maintenance log called for entries to be made every hour. Rather, the actual practice was to complete the log whenever a spill or mess had been a large one or if the entire floor had been swept.

[7] According to James Hart, it was "an ongoing thing" to ensure that the floors were always clear. In giving evidence as to when entries were made in the log, Michael Hart stated that ". . . there's constantly stuff on the floor" and ". . . we're constantly picking it up", before adjusting his response to "There's not so much stuff on the floor." Mr. McMullen testified that items like grapes and strawberries fell to the floor more regularly than other items, and both James Hart and Michael Hart agreed that grapes were one of the most likely items to land on the floor.

[8] The accident took place around 10:15 a.m. The store had opened at 8:00 a.m. The floor would have been scrubbed the evening before. The maintenance log contained three entries before the respondent's fall, at 8:00 a.m., 8:35 a.m. and 9:45 a.m. Before going on his break around 10:00 a.m., James Hart performed a walk-through inspection of the entire produce department. He saw nothing on the floors.

[9] James Hart had made those morning entries in the log. He recalled where he had swept at 8:00 a.m., but had no independent recollection of his entries that he swept at 8:35 a.m. and swept and mopped at 9:45 a.m. He could not remember whether, at those times, he had cleaned all of the produce section or only a portion, and if so, what portion.

[10] The employees testified that Christmas is the busiest season for selling grapes; June is not a popular season for that fruit. The day of the accident, the area devoted to grapes was only about two feet wide; at Christmas the grape display would be about six feet wide. They also gave evidence as to the precautions taken to prevent grapes from falling. For example, the open table holding grapes had a ridge or lip around it to stop the fruit from spilling onto the floor.

[11] The trial judge also heard evidence as to whether the grapes were wrapped or bagged in a perforated wrap the day the respondent fell. None of the employee witnesses had any independent recollection. Mr. McMullen could not say for sure. Michael Hart testified that the grapes were probably bagged because it was slow and when it was a slow time, they had time to wrap. He also observed that there still could have been some that weren't in bags because some customers liked to open the bags and take out grapes. James Hart initially could not remember if the grapes were bagged or loose. After examining a photograph taken the day the respondent fell, he could tell the grapes had not been bagged; rather, they were displayed in their box

[12] It was not disputed that no mats were in place on the floor near the grapes on June 16, 1995.

[13] At trial, it was agreed that the respondent's claim was governed by the law on occupier's liability. Nor was there any dispute that, with respect to an invitee, an occupier is only required to exercise reasonable care to prevent injury from unusual danger, of which he knows or ought to know: **Indermaur v. Dames** (1866), L.R. 1 C.P. 274 at 288 which was accepted as the law in this country by the Supreme Court of Canada in **Campbell v. Royal Bank of Canada**, [1964] S.C.R. 85**.**

[14] In **Smith v. Provincial Motors Ltd.** (1962), 32 D.L.R. (2d) 405 (S.C.C.) at p. 412 and in **Fiddes v. Rayner Construction Ltd.** (1963), 45 D.L.R. (2d) 367 (S.C.C.) at p. 373, Chief Justice Ilsley set out a series of questions for determining

whether an occupier had breached its duty of care. Those questions are:

1. Was there an unusual danger?
2. If so, was it one which the defendant knew or ought to have known?
3. If so, did the defendant use reasonable care to prevent damage to the

plaintiff from the unusual danger? and
4. Did the plaintiff use reasonable care on his own part for his own safety?

The trial judge used that series of questions as the framework of his decision and answered each question in turn.

[15] On this appeal, the appellants do not contest the findings by the trial judge on the first, second, and fourth of these questions that there was an unusual danger of which the appellant knew or ought to have known and that the respondent had used reasonable care for her own safety. The judge answered the third question in the negative. That determination, that the appellants had not used reasonable care to prevent damage to the respondent from an unusual danger, is very much in issue on this appeal.

[16] In evaluating the reasonableness of the precautions and systems undertaken by the appellants, the trial judge stated:

> [47] Despite the evidence of James Hart that it was not busy, and there were not many grapes displayed, in the absence of mats, something more than periodic inspections was required. The fact grapes were not in season and traffic in the store was slow, is of little comfort to the plaintiff. The plaintiff fell; produce such as grapes and lettuce leaves regularly, if not constantly, fell on the floor. The grapes were unwrapped, the floor had no mats, no warnings were posted to alert those present to the danger. It could have been some other steps; but it had to be something. What was done, did not, in the circumstances, meet the standard of reasonable care.
>
> ...
>
> [51] Here, ... the steps taken by the occupier were commendable but obviously inadequate. An occupier can respond to a risk to customers by:
>
> 1. Providing warnings as to the risk;
> 2. Eliminating or reducing the risk by the way produce is displayed;
> 3. Establishing systems for locating and removing the dangers as they occur;
> 4. Installing safety measures to deal with accident occurrences.
>
> [52] Here, to a large extent at least, the defendant has restricted itself to the third course of action, ... In many areas of a large grocery store this may be sufficient. However, the evidence discloses a frequency of risks that requires something more than scheduled or unscheduled inspections in produce areas. Mopping or sweeping the floor, even every one and a half hours, together with walk by inspections, may be sufficient where the risks and dangers are not constant. Where they are otherwise, then "reasonable care" requires

> additional steps. (Emphasis added)

[17] He reached the following conclusion on whether the reasonableness standard had been met:

> [55] At issue is whether the systems were sufficient, in view of the known risks and dangers associated with the procedures for the sale of produce in the produce department. Clearly they were not.

and towards the end of his reasons, reiterated:

> [60] ... The systems of the defendant, involving a safety committee, the direction to employees, at all levels, to keep an eye on the floor, the provision of a floor maintenance log to record any activity in respect to the floor and requiring "walk-about inspections" on either a periodic or even a regular basis, are not, in the circumstances, the meeting of the reasonable standard. The circumstances are predominately the recognition of the risk in the produce department of certain fruits and vegetables falling on the floor and the dangers to shoppers slipping while in the produce department. Something more may not be required in other of the defendants' departments, but it certainly is in the produce department, and particularly in the area where loose grapes were stacked. (Emphasis added)

Standard of Review

[18] The appellants assert that the trial judge erred in law by applying an incorrect standard of care and by concluding that they failed to exercise reasonable care. Whether the judge imposed the correct standard for measuring an occupier's conduct is a question of law. Whether, in the particular circumstances, the occupier met the standard, is a question of fact. In **Ingles v. Tutkaluk Construction Ltd.**, [2000] 1 S.C.R. 298 at § 42, Bastarache, J. noted in the context of negligent inspection of construction by a municipality:

> In examining whether the inspection was reasonable in the circumstances, we must bear in mind that the determination of whether a defendant has met the standard of care required in the circumstances is a question of fact. While it is open to an appeal court to find that a trial judge applied the wrong standard of care, once it is determined that he or she applied the correct standard, an appeal court can reverse a trial judge's findings with respect to whether that

> standard was met by the defendant only if it can be established that he or she made some palpable and overriding error which affected the assessment of the facts; see, for example, Ryan v. Victoria, supra, at para. 57; Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802, at p. 808.

[19] In **Canada (A.G.) v. Dingle et al.** (2000), 181 N.S.R. (2d) 302; 560 A.P.R. 302 (N.S.C.A.), Hallett, J.A. considered the scope of appellate review with respect to findings of fact and findings that involve legal conclusions from those findings. He referred to the Supreme Court of Canada decisions in **Stein**, supra, and in **Toneguzzo-Norvell et al. v. Savein and Burnaby Hospital**, [1994] 1 S.C.R. 114; 162 N.R. 161. At § 48, Hallett, J.A. noted that while a court of appeal is not to interfere with evidentiary conclusions made by a trial judge unless there is palpable and overriding error, a mere error by a trial judge in concluding whether or not a defendant was negligent in the circumstances, which involves considerations of both facts and the application of law to the facts, would warrant appellate court interference.

[20] On this appeal, I must assess whether the trial judge erred in his determination of the standard of care, and, if he did not, whether he made some palpable and overriding error in his assessment of the facts and erred in his conclusion that the appellants had not discharged their obligation as occupier.

Analysis

[21] The first issue is whether the trial judge erred in law by imposing the wrong standard of care. This issue encompasses several of the specific grounds of appeal, namely that:

1. The trial judge mis-directed himself as to the applicable law;
2. The trial judge failed to conclude in law that the appellants had exercised reasonable care and had taken due care in the circumstances;
3. The trial judge erred in concluding as a matter of law that the appellants were required to do more than they had undertaken to establish that they had taken due and reasonable care in the circumstances;
4. The trial judge imposed an unreasonable burden on the appellants as to the requirements of due and reasonable care; and
5. The trial judge erred in concluding that the appellants had failed to take due and reasonable care in the circumstances without providing particulars

of what was required to establish due and reasonable care in the circumstances.

[22] The appellants' submissions on this issue dealing with the standard of care can be summarized as follows: On the facts of this case, they had met their duty of care to ensure that their premises were reasonably safe. The appellants were conscientious and had systems in place to safeguard customers. The respondent slipped on a single grape which had fallen to the floor only a few minutes after the last inspection of the produce section. For the trial judge to find that "something more" was required was an error of law. To require anything more than what was done would be akin to an expectation of perfection rather than reasonableness.

[23] The respondent asserts that the trial judge made no error of law, that he did not apply a standard of perfection, and that there was ample evidence to support his findings of fact that the appellants failed in their particular duty to the respondent.

[24] As established in **Indermaur**, supra, the standard of care is reasonableness. That the standard is not perfection and that unrealistic procedures are not required is settled law. See, for example, **Empire Company Ltd. v. Sheppard** (unreported: Supreme Court of Newfoundland, Court of Appeal, February 8, 2001, Decision No. 2001 NFCA 10), **Beaman v. Canada Safeway Ltd.**, [1993] S.J. No. 617 (Q.B.) at § 17; aff'd [1994] S.J. No. 320 (C.A.), and **Vyas v. Board of Education of Colchester-East Hants District** (1989), 94 N.S.R. (2d) 350; 247 A.P.R. 350 (C.A.). However, an occupier is required to take all reasonable steps to minimize risk of injury to customers by displaying goods in a manner to minimize risk of their falling, taking preventative steps to avoid dangers, and having a system to respond promptly to any dangers that may arise. See **Bennett v. Dominion Stores Ltd.** (1961), 30 D.L.R. (2d) 266 (N.S.S.C.) at p. 271 and **Kelly v. Loblaws Inc.**, [1999] N.S.J. No. 178 (N.S.S.C.) at § 9.

[25] In their written and oral submissions, the appellants reviewed in detail several decisions which held that certain precautions and systems had met the reasonableness standard. These included grocery store and supermarket cases such as **Garofalo v. Canada Safeway Ltd.** (1998), 66 O.T.C. 241 (Ont. Gen. Div.) where the plaintiff slipped on a piece of plum; **Evans v. Jim Pattison Industries Ltd.**, [2000] B.C.J. No. 1171 (B.C.S.C.) where the culprit was a strawberry; **Kay v. Sobeys Inc.** (1998), 205 N.B.R. (2d) 74 (N.B.Q.B., T.D.) where a white powder

caused a fall; and **Webb v. Sobeys Inc. et al.** (December 8, 1997), S.P. No. 03487 (N.S.S.C.) where there was liquid detergent on the floor. They pointed out similarities in the precautions taken, the presentation of product, or the systems established to discover and to respond to dangers, with those in this case.

[26] Having reviewed the reasons of the trial judge, I see no merit in the appellants' argument that he mis-directed himself as to the applicable law. The judge clearly recognized that the standard was reasonableness. In § 6 of his decision, he set out the test in **Indermaur**, supra. In the last paragraph, he noted:

> There is no obligation on the occupier to "guarantee" the safety of a person in the position of the plaintiff. There is, however, an obligation to use reasonable care to prevent damages as the result of unusual danger.

[27] Furthermore, I am not persuaded that although he may have correctly stated the reasonableness standard in his decision, the trial judge nevertheless effectively imposed a standard of perfection in concluding that the appellants were liable to the respondent. The appellants submit that he set a standard that transformed them from occupiers to insurers of their premises, as was the situation in **Sheppard**, supra. There, the trial judge did not identify the standard of care and dealt with the question of whether the defendant had used reasonable care to prevent damage to the plaintiff from the unusual danger of a sharp dent below the handrail of an escalator in two sentences in his reasons. He stated that the appellant's employees had used some measure of care in their inspections "but it was obviously not enough" as they had not discovered the dents. The Newfoundland Court of Appeal held that the judge had erred in law. His phrase could only be interpreted as meaning that the trial judge required the appellant to do whatever was necessary to prevent injury to the respondent while she was on the escalator and such a standard effectively made the appellant a guarantor or an insurer.

[28] The trial judge in this case instructed himself as to the proper standard of care. His reasons were not limited to the fact that the respondent fell. The judge dealt with the evidence at trial and weighed the risk of spillage from a grape display against available precautions. There was evidence upon which he could base his findings that grapes were more likely than most other produce to fall on the floor, the cleaning regime was more responsive than scheduled, the grapes were unwrapped, and there were no warning signs. It was acknowledged that floor mats

were not in use the day of the respondent's fall.

[29] The trial judge articulated how, in his view, the appellants' actions were not proportionate to the risk. He concluded that the appellants could reasonably have been expected to take some additional precautions and that their failure to do so meant they fell below the standard of reasonable care.

[30] In order to meet the standard of reasonable care, occupiers must tailor their preventative measures and responsive actions for the safeguarding of their customers to the particular circumstances which could give rise to an unusual danger. For an illustration of this tailoring of response to risk, see the facts in **Evans**, supra where the defendant displayed strawberries sold in flats in a different manner than strawberries sold in bulk. Case law provides valuable assistance to a judge in determining whether the standard of care has been met. However, as is apparent from the jurisprudence, what is required to meet the reasonableness standard will vary from case to case. What meets the reasonableness standard in one situation may fall short in another.

[31] The appellants urge that the facts of this case are close to, if not virtually identical with, those in cases it relied upon where the standard of care was found to have been met. There may be strong correlations with the facts in other cases, but not surprisingly, there are often noteworthy differences. In this case, for example, the trial judge was struck by the similarities with the circumstances in **Garafolo**, supra. However, he also observed that that decision involved consideration of occupiers' liability legislation applicable in Ontario, there were differences in the scheduling and implementation of the sweeping regimen, and the judge in **Garafolo**, which involved a piece of plum, had commented that grapes and strawberries tend to fall more readily than other items. The trial judge here was of the view that the standard of reasonable care in the particular circumstances before him was higher than that apparently accepted in **Garofolo**.

[32] Having examined his reasons and considered the case law presented to us, I am unable to agree that the trial judge in this case effectively required the appellants to do everything that was necessary to prevent injury to the respondent and consequently set the standard of care beyond that of reasonableness to one of perfection.

[33] Nor can I accept the appellants' submission that, having concluded that the

reasonableness standard has not been met, the trial judge erred by not then providing particulars of what was required to establish due and reasonable care in the circumstances. The judge identified several deficiencies. By stating that “something more” was required, he did not foreclose the possibility of other, reasonable actions that could have been taken to meet the appellants’ obligations to their customers. He dealt with the issue that was before him. It is not error for the judge not to have specified exactly what, in his view, would have met the reasonableness standard in this case.

Misapprehension of the Evidence

[34] The appellants raise two grounds of appeal relating to the trial judge’s appreciation or interpretation of the evidence, namely that:

1. The trial judge misconstrued the evidence in finding that grapes and lettuce leaves regularly, if not constantly, fell on the floor; and
2. The trial judge failed to consider the evidence of the appellants concerning its policies and procedures in the handling and display of grapes having regard to the various circumstances existing from time to time.

[35] The argument on the first of these grounds is the trial judge’s statement at § 47 of his decision that “. . . produce such as grapes and lettuce leaves regularly, if not constantly, fell on the floor.” The appellants submit that the evidence dealing with the frequency of grapes falling was that of Mr. McMullen to the effect that grapes and strawberries are **more likely** to fall to the floor. Having in mind the testimony of James Hart and Michael Hart recounted in § 7 above as to the frequency of produce falling and that of Mr. McMullen as to the increased propensity of grapes to do so, I do not find that the judge misconstrued the evidence and made such a palpable and overriding error that this court should intervene.

[36] Much of the submission on the second ground on misapprehension of the evidence relates to the use made of mats in the produce section. The appellants submit that the trial judge misconstrued the evidence on the packaging of grapes and the use of mats. In his reasons, the judge stated at § 42:

> Michael Hart said the defendant placed mats when the grapes were not wrapped. It appears that at the busiest period for grapes, such as at Christmas

> and special sales, it was not realistic to wrap and as a result mats were used on the floor. On the other hand, when fewer grapes were displayed, as the demand was reduced, they would be wrapped. The mats were employed to reduce the risk of shoppers slipping and falling while at other times the wrapping was employed to prevent grapes falling on the floor.

[37] Michael Hart's testimony on direct examination was as follows:

> *Q.* *Now, in addition, then – – and you spoke about the busy time at Christmas, for example, when the grapes go very quickly and they don't get bagged.*
> *A.* *Yes.*
> *Q.* *On those occasions, is anything else done in the way of precautions?*
> *A.* *For grapes?*
> *Q.* *Yes.*
> *A.* *Yes, mats are installed.*
> *Q.* *And mats were – – what's the connection between the busy time and the grapes not being bagged, and the mats if any?*
> *A.* *Well, the more people that are around, the more mess they're going to create. So then we can't keep up with people constantly, so we have to have an alternative, so we turn to a mat just to stop them.*
> *Q.* *Was there any mat in place on the day of Mrs. Marche's fall?*
> *A.* *No.*
> *Q.* *Why was that?*
> *A.* *Because it was slow.*
> *Q.* *Excuse me. And was there any connection between the lack of the mat and the grapes being bagged?*
> *A.* *Yes, the – –*
> *Q.* *And what's that connection?*
> *A.* *Well, see, when the grapes are in bags, there's less chance of them falling out on the floor so you don't really need the mat.*

James Hart also testified as to the use of mats and his evidence is set out at § 45 of the decision.

[38] In particular, the appellants submit that the evidence was not that grapes were either wrapped or mats are used in the absence of wrapping; rather, it was that mats are only used during busy seasons when grapes were sold in greater quantity. Careful review of the evidence does indicate that, although Michael Hart's testimony gave a basis for the judge's statement on the use of mats when grapes were not wrapped, that statement was not entirely accurate. If his interpretation of

when the appellants used mats had been more determinative in the judge's decision, I may have been inclined to be more concerned by this finding. However, as is apparent from his reasons, the placing of mats was only one of the precautions he found that the appellants could reasonably have been expected to take.

[39] The appellants also submit that the judge misconstrued the evidence when he concluded that the grapes were not bagged on the day the respondent fell. They say that James Hart was not testifying from his own recollection, but on the basis of his interpretation of a photograph which the appellants say is blurred, and point out that none of the other witnesses or the parties had offered that photograph as proof that the grapes were not bagged. Mr. Hart was the appellants' witness. He did not equivocate or hesitate, once he examined the photograph, in testifying that the grapes were not bagged. There is no merit to this submission.

Disposition

[40] In my view, the trial judge did not err in law; he did not impose a standard of perfection. Further it has not been established that he made some palpable and overriding error which affected his assessment of the facts or that he erred in concluding that the appellants had not met the reasonableness standard. I would

dismiss the appeal and would award the respondent costs of $2,000.00 plus disbursements.

Oland, J.A.

Concurred in:

Roscoe, J.A.

Flinn, J.A.