1991 S.H. NO. 78527

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

ELIZABETH RODGERS

PLAINTIFF

- AND -

SEARS CANADA INC.

DEFENDANT

HEARD: before the Honourable Mr. Justice F. B. W. Kelly, Supreme Court of Nova Scotia, Trial Division, Halifax, Nova Scotia, on March 27 and April 23, 1992.

DECISION: APRIL 24, 1992

COUNSEL: Jean McKenna, Esq. for the plaintiff

Cathy Dalziel, Esq. for the defendent

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**BETWEEN:**

**ELIZABETH RODGERS**

**Plaintiff**

**- and -**

**SEARS CANADA INC.**

**Defendants**

**KELLY, J.: (Orally)**

Elizabeth Rodgers claims for injuries sustained when she walked into a chain suspended across a cashier's aisle in a Dartmouth store operated by Sears Canada Inc.

In mid-afternoon on September 2nd, 1989 Mrs. Rodgers entered the Sears store with her son to purchase some items for a mother-in-law suite being built for her in his residence. They intended to purchase a toilet paper holder and a towel rack for her bathroom and three storm doors for the house. Mrs. Rodgers had been a patron of this store for a few years, and she and her son had already selected the items they intended to purchase on this occasion. They entered the store from Portland Street as the items they wanted were located at that end of the store, and after picking up two bathroom items they went to the closest cashier, a "Sales Centre" located in a nearby aisle. This

sales centre is of standard construction for Sears stores across the country, and the Dartmouth store had three of them at the time in question.

The "sales centre" is a separate, near rectangular shaped island in the store aisle, providing four cashier stations. The stations are located near the middle of the rectangle, themselves arranged in a sort of square, each station being a corner of that square.

The design places four entrances, clearly marked, to each of the four stations at each of the four corners of the island; however, there are only two exits, placed at the midpoint on either side of the island. Thus the plan calls for customers to enter at the ends of the island, pay for purchases near the centre, and immediately exit to the aisles of the store.

To reinforce and encourage this plan, Sears erected hip high panelled barriers on either side of the island, approximately two to three feet from the island itself, thereby effectively creating channels for customer passage. The only gaps in the barrier are at the midpoints where customer exit was intended.

When one or more of these four cashier stations was not in operation, a chain was attached from the island to a post on the barrier at each end of the passageway; that is, a chain effectively blocked both entrance to and exit from that particular channel. On each chain was a sign attached to its centre, marked "closed". Thus, if a cashier's station was closed, the employees were to hook up these chains to indicate to patrons that they should use another cashier station.

After Mrs. Rodgers and her son had selected their bathroom items, they proceeded to the closest station to complete their purchase. The storm doors were apparently to be found in another part of the store or to be paid for at another place. As they approached the station in question down the store aisle, they noted a few people doing business at a cashier station at the far end of the sales centre in front of them. They walked past two unopened stations on one side of the sales centre, around its end, and approached the open cashier station which had a few people standing in front of it. In fact, they approached the intended <u>exit</u> for that side of the sales centre.

Both Mrs. Rodgers and her son said they chose to go for service at the exit point because they "assumed" that the few people in front of this counter had themselves entered from the exit point instead of the entrance point.

Regardless, to get to that exitway, Mrs. Rodgers and her son had to pass, and did pass, in front of the clearly marked entrance (a sign that said "enter here") to the channel appropriate for their destined cashier station.

Because Mrs. Rodgers was to pay for the two items, her son handed them over to her to hold while she waited her turn, and he wandered off to look at some nearby merchandise. While she was waiting, however, a cashier called to her from the other cashier station on that side of the sales centre, a station Mrs. Rodgers had previously noted unoccupied and closed. This cashier spoke to her and said, "may I help you over here please", or words to that effect. Mrs. Rodgers said that she looked up and noted that the cashier who had spoken was looking directly at her. Mrs. Rodgers was standing in the store aisle in front of the exit passageway that served as an exit for both cashier stations on this side of the island. She indicated at trial that she was located two or three steps from the counter when she was called. She stated that she walked towards this second cashier station, holding the two unwrapped items in her left arm, searching in her open purse for her charge card. In her words, she was juggling the two items and looking for her card. She stated that she did not notice before this time that the chain was hooked up across the exit end of the channel leading to this second station. Her evidence is that as she approached the station, she struck

the chain across her abdomen and at the top of her left hip. This, she says, pushed her back, but she did not fall or drop her parcels. She submits that this impact caused her significant physical injury. Her evidence was that she walked two or three steps from the point she had been waiting to the point of impact with the chain.

Her son was facing away at the time of impact and did not see her come into contact with the chain. He stated that he was alerted by the sound of metal on metal, turned towards his mother and saw her against the chain. On cross-examination he said that his mother was moving back from the chain, which was not moving at the time, and she told him subsequently that she had struck the chain and hurt herself. She states that she also mentioned to the cashier that she had hurt herself. Mrs. Rodgers complained of pain and nausea but completed her purchase at that cashier station. She and her son then went toward the exit to leave. They then decided to return to go to the Home Improvement area of the store, where the storm doors were located. On arrival Mrs. Rodgers felt weaker and a store employee apparently got a chair for her to sit in. At this stage she became involved in a conversation with two store employees concerning the incident and how she was feeling. Mr. Rodgers did not participate in this discussion as he was completing the purchase of the storm windows, using his mother's Sears credit card.

Evidence was given to the court by Michelle Dunnage, a Sears employee who was involved in store security at the time. She stated that she was paged to the Home Improvement Department of the store because of a report of an accident which had occurred. She went to the area and met Mrs. Rodgers and a store clerk. They were located at the Home Improvement Department, across the aisle from, but within sight of, the sales centre where the incident occurred. The store clerk who was also present has since left Sears, and apparently her current location is unknown.

Ms. Dunnage was advised that Mrs. Rodgers had struck a chain at the nearby sales centre. After discussing the incident, Mrs. Rodgers explained that the chain had not been taken down and that she had struck it. Ms. Dunnage and the clerk walked to the area of the corner of the service centre that Mrs. Rodgers had indicated by explanation and by hand signal to be the locus of the accident. This corner was on the side of the sales centre opposite to where Mrs. Rodgers and her son had advised the court where the incident occurred. As well, this point was not an exit area, but an area designated by signs as an entrance. As the chain was down at this particular location, Ms. Dunnage was confused as she understood Mrs. Rodgers had told her that the chain had been in place when the incident occurred. She stated that Mrs. Rodgers must have noted her confusion as she got out of the

chair and walked part way to the area where Ms. Dunnage was located, pointed to the same chain at the entrance being inspected by Ms. Dunnage, and said that the chain had been up at the time of the incident. The group then went back to the Home Improvement area where Ms. Dunnage said that Mrs. Rodgers talked to her about her injury and about her other ailments. Ms. Dunnage asked her if she wanted to go to a hospital and Mrs. Rodgers indicated that she did not wish to do so. She then recommended that Mrs. Rodgers at least see a doctor and offered to drive her home. Mrs. Rodgers said that her son would take her home and pointed to him standing some distance away. Ms. Dunnage said that she then walked Mrs. Rodgers to where her son was located, and that Mrs. Rodgers smiled and waved to her as she and her son left the store. Mrs. Rodgers does not recall the incident where Ms. Dunnage walked to the service centre, nor does she recall herself returning in the manner described, nor referring to another cashier station as the locus of the incident. Ms. Dunnage then wrote a standard report of the incident, indicating that Mrs. Rodgers "reported walking into a closed chain".

**LIABILITY**

Sears admits that it was the occupier of the premises and that Mrs. Rodgers was an invitee to the store. In **Vyas v. Board of Education of Colchester-East Hants District** (1989), 94 N.S.R. (2d) 350 (S.C.,A.D) at p. 352 the

court quoted with approval the statement of Willes, J. in **Indermaur v. Dames** (1866), L.R. 1 C.P. 274 at p. 288:

> **And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know.**

Chipman, J.A. in **Vyas, supra,** at p. 352 also went on to apply the four-point test applied by Ilsley, C.J. in **Fiddes v. Rayner Construction Ltd.** (1963), 45 D.L.R. (2d) 367 (N.S.S.C.) at p. 373 and earlier set out by Ilsley, C.J. in **Smith v. Provincial Motors** (1962), 32 D.L.R. (2d) 405 (N.S.S.C.) at p. 412, to wit:

> **(1) Was there an unusual danger? (2) If so, was it one which the defendant knew or ought to know? (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?**

Lord Porter in **London Grading Dock Co. Ltd. v. Horton,** [1951] A.C. 737 at p. 745 discussed the meaning of the term "unusual":

> **I think 'unusual' is used in an objective sense and means such danger as is not**

> **usually found in carrying out the task of fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises...**

In **Vyas, supra,** at p. 353, Chipman, J. discussed the knowledge of the plaintiff regarding the existence of the dangerous condition as a factor in determining whether a danger was 'unusual' at p. 353:

> **In my view the question whether the danger was unusual must not be tested just by the knowledge of the appellant that the parking lot was not salted or sanded, but whether such condition was one that a person such as he would have been entitled to expect. This reasonable expectation on the part of the class of invitee must, in all cases, be the major factor in determining whether or not the danger is unusual. The ease with which the hazardous condition may be eliminated goes into this equation. See** Campbell v. Royal Bank of Canada, **[(1963), 43 D.L.R. (2d) 341 (S.C.C.) at p. 351]**

This classification of 'unusual' has been followed in a number of occupier liability cases, which aid in understanding the phrase 'unusual danger' in the store environment. In **O'Brien v. Dominion Stores Ltd.** (1986), 75 N.B.R. (2d) 395 (Q.B.T.D.), the plaintiff sustained head injuries when he struck a metal post located in an aisle while shopping in the defendant's store. While observing signs indicating the price of produce, he walked a few strides and hit his head against the

metal post. It was his first visit to the store. At p. 398 Creaghan, J. concluded as follows:

> **In my opinion, the posts or the post in question did not create an unusual danger sufficient to evoke a duty upon the defendant to take steps to prevent injury to a customer. Even if I found otherwise, it is obvious that the plaintiff was the author of his own misfortune. He simply walked ahead without taking any precaution to ascertain where he was going.**

In **Desjardins v. Kent's Supermarket Ltd.** (1977), 17 N.B.R. (2d) 219 (Q.B.), the plaintiff customer fell over a box of produce that was in the store aisle. The plaintiff had been a long-standing customer, familiar with the shelving procedures in the store, and had spent the previous 10 or 15 minutes observing the shelving of goods from these boxes of produce to the shelves. The plaintiff in that situation then proceeded down the aisle and tripped over the boxes causing injury. The court held in those circumstances that the boxes in the aisle were not unusual dangers. In **Mitchell v. Green's Superette Ltd.** (1980), 24 Nfld. & P.E.I.R. 217 (Nfld. Dist. Ct.) an elderly plaintiff was injured after falling over a book of carpet samples in the defendant's store. The court held that the placing of four rather large carpet sample books alongside of an aisle was not an unreasonable danger, did not create an unreasonable risk as they were plainly visible, and did not create an apparent obstruction.

Here, the invitee Mrs. Rodgers entered the premises as a customer. It would be expected that she, and in fact most customers, would use one of the service centres if they made a purchase. The use of marked off passageways is not an unusual sight in the modern store, nor is it unusual to have such a passageway temporarily closed off by a chain and a sign if it is not in use. They are all "usually found in carrying out the task of fulfilling the function which the invitee has in hand"-- here, the purchase of selected goods. From the evidence presented, and the photograph and mock-up provided to the court, I find that there is nothing unusual about the passageway and chain arrangement that Sears had in place. Although there is some uncertainty on the subject, I am not satisfied that the "closed" sign was absent on the chain in question. Only Mrs. Rodgers stated that it was missing, and she indicates that she made this observation at the moment of impact when she acknowledges that she was in a state of nausea and some dizziness. No other person, including her son, noted that the sign was missing.

Mrs. Rodgers had shopped at the Sears store with some frequency in the past, and was aware that chains were used across the cashier's station aisles at both ends when they were not in use. She was aware that the aisles had an intended entranceway, and that she was approaching for service at an exit way. She stated she had sometimes approached

cashier stations in the past by using an exit way. At other times she had entered at the correct entrance opening. She further stated that she had made purchases at a cashier station in the past when the chain was up at the exit point. She explained that she did this by walking to the cashier station and not bothering to go further. In other words, she acknowledged she could have been serviced at a cashier station when the chain was up without having to walk into the chained off area at all.

In fact, Mrs. Rodgers stated on direct examination that she did not have to go into the passageway to make her purchase. When asked on cross-examination why she did, she responded, "I don't really know". When asked again why she walked into the corridor or passageway she responded, "I didn't pay attention to where I was going. I was going to go to the cash register. I walked toward the cash register". She also indicated that she believed she had to turn to her right, into the area barred by the chain to get to the cash register.

I therefore find in these circumstances and on the basis of the evidence before the court, that the chain barrier across the passageway did not constitute an "unusual danger".

In the event that I am wrong in finding that an

"unusual danger" did not exist, I will explore the other aspects of the test referred to above. Was the danger one which the Sears store knew existed? If in fact it was an unusual danger, then the only answer can be "yes" as Sears had then, and continues to have, a number of these service stations in its stores across the nation.

Continuing with the test of Ilsley, C.J.N.S. in **Smith v. Provincial Motors Ltd., supra**, it would appear that Sears had used reasonable care to prevent damage to the plaintiff from such an unusual danger. One could perhaps contemplate the use of more warning signs about the existence of chains, but in these circumstances I find that reasonable steps were taken.

Finally, as I have noted above, Mrs. Rodgers knew of the existence of the chains and passageways from her past experience in the store. She was aware of where the chain was located, and further, she was aware it would be in place as a barrier if the cashier station was closed. Her evidence was that she believed it was closed while she waited to be served at the other cashier station. In the circumstances, I find that she could have and should have watched where she was walking for the few steps to the cashier's counter. Simply put, if she had used reasonable care, she would have seen the chain. Her evidence was that she was distracted by her search

in her purse at the time she was approaching the station. This is, in my opinion, only additional evidence to support my finding that she did not use reasonable care on her own part for her own safety.

In DiCastri's, **Occupier's Liability** (Calgary, Burroughs: 1981) at p. 66-67, the author proposes that the occupier's duty in certain situations goes beyond the traditional occupier's liability categories:

> **The source of an invitee's injury may be the condition of the premises or the active negligence of the invitor in carrying on there an activity which results in a new hazard for the invitee. In the latter case, the ordinary law of negligence is said to apply, and it is open to a court to treat as irrelevant the established categories and to give effect to the proposition that the invitor and, for that matter, any other person, is under an overriding obligation not to injure by negligent acts his invitee, whose presence may reasonably be anticipated. 'In regard to current operations, the duty of the occupier -- or of the person conducting the operations -- is simply to use reasonable care in all the circumstances. This duty is owed alike to all persons lawfully on the premises who may be affected by his activities: and it is the same whether the person injured is an invitee or a licensee, a volunteer or a guest.' That duty is generally viewed as an 'activity duty' in contradistinction to an 'occupancy duty'; the latter affecting the occupier's responsibility in respect to the condition of the land. But perhaps the true distinction is to be found in separating negligent omissions from negligent commissions.**

> **The proposition is supportable on the ground that it circumscribes the operation of the category-oriented rules of occupiers' liability and recognizes that society now demands that the occupation of premises be a ground of liability and not a ground of exemption from liability. 'If there is no other relevant relationship [than occupier and licensee], there is no further or other duty of care. But there is no exemption from any other duty of care which may arise from other elements in the situation creating an additional relationship between the two persons concerned.'**
>
> **Where positive operations and the static condition of the premises so combine as to create an unreasonable risk of harm to the entrant, the standard of care is that of ordinary negligence law.** [footnotes omitted]

Here, what constituted a normal passageway and chain system could constitute a danger if the occupier or its employees caused injury to an invitee, or in fact any category of person, by a negligent act. For example, for an employee to invite Mrs. Rodgers to walk into a passageway in circumstances where Mrs. Rodgers would unlikely notice the chain, could, in some circumstances, constitute a negligent act. This, in effect, is what counsel for the plaintiff invited me to consider in these circumstances. I find, however, that the evidence simply does not support the plaintiff's proposition that she was required to enter the passageway blocked by the chain to be serviced by the cashier who dealt with her purchases. Her own evidence and the

photograph make it clear that she could have been serviced without crossing the chain barrier into the passageway. In this situation, it was simply not foreseeable to the occupier that the accident would occur in the manner that Mrs. Rodgers claimed it did.

In the result, I find the plaintiff has failed to discharge her burden of proof of liability.

In the event that I am wrong on the matter of liability, I will assess damages provisionally.

Mrs. Rodgers alleges that she has suffered ongoing problems and pain in her lower back and hips as a result of the contact with the chain. She indicates that this pain at times interferes with her sleep at night. Her pain is also aggravated by standing and by walking any great distance. Because of her other medical problems, walking is a recommended beneficial exercise for her.

She reported that after she left the store the day of the incident, she had back pain and pain in both hips. She also complained of dizziness and nausea. Later that night she decided to go to the Dartmouth General Hospital where she was treated by a Dr. Hebb. She was x-rayed, and the doctor treating her noted that she had complained of a sore back and

abdomen. The diagnosis was a "lumbar sacral strain - abdominal contusion". She was advised to apply heat and was not medicated, but it was noted that she was already on medication for her other problems.

The x-ray eventually indicated her vertebrae had an osteoporotic appearance and that there were degenerative changes in her lower back area.

In the meantime, the incident was reported by store personnel and an adjuster was assigned to the matter. He contacted Mrs. Rodgers and he forwarded a medical form to her family physician, Dr. Heikamp, and eventually an appointment was made for the completion of this medical form.

Her evidence at trial was that she was suffering from arthritic pain in the right hip, still had some pain in her left hip, and that this pain was greater than it had been previous to the accident. She also indicated that the pain occurred with greater frequency than before.

She was examined by Dr. Heikamp on September 20, 1989 and he noted on his medical report that she had a right hip contusion. At trial he said that the contusion was not visible but that he detected it by palpitation of the hip area. The location he indicated was somewhat different than

Mrs. Rodger's location of the point of impact of the chain. He also noted on the report that she had experienced a "lower back sprain at L5-S1". He noted her progress was good and her injuries would probably be resolved in three to four months, but he further noted that it was too early to tell if it was a permanent disability. Dr. Heikamp advised the court that she had not complained of hip injury before the incident.

He recited her prior problems as sugar diabetes, osteoporosis and degenerative disease of her lower back area. He advised as well that she had previously complained of shoulder and upper back pain. She had been medicated with drugs for pain and muscle relaxants.

Between her visit to Dr. Heikamp to complete the adjuster's form as described above, and a visit 10 months later in July of 1990, Mrs. Rodgers had visited Dr. Heikamp on four or five occasions for other serious unrelated complaints. On these visits Dr. Heikamp did not make note of complaints from her regarding her back or hips. However, when she was examined in July of 1990, she did disclose to him that she had experienced pain in these areas throughout this period. Dr. Heikamp pointed out to the court that, in his experience, she was not a chronic complainer, and that as the other ailments treated during the interim period were more serious and immediate, she may have accepted the back and hip pain as less

serious from a reporting perspective.

Mrs. Rodgers has indicated that her right hip was principally injured in the accident and Dr. Heikamp reports that his early notes indicate the complaint was of the left hip. He acknowledged that the mistake may have been either his or Mrs. Rodgers. He also submitted that both hips could have been injured because of the peculiar nature of the impact.

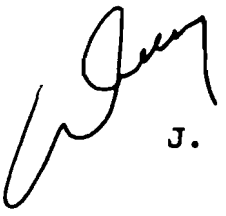
Dr. Heikamp acknowledges the absence of objective evidence of the impact being the cause of the injury in the back or the right hip, but he felt he could conclude from her subjective complaints, and the fact that the incident occurred, that she had suffered a contusion of the upper hip soft tissue area. He defines her problem as a "whiplash sprain phenomenon" which "basically is resolved with some residual, possibly permanent, off-and-on subjective painful periods. We will never objectively come to any conclusion there, neither do I expect any change."

I find that Mrs. Rodgers suffered pain and discomfort as a result of the incident to an extent that she did not suffer beforehand.

The medical evidence here is far from clear. She

had an underlying degenerative condition and other medical problems that are likely causative of a significant portion of her present discomfort. However, the incident brought on, perhaps earlier than she would have otherwise experienced, pain and discomfort from which she continues to suffer. At the same time, her present experience of pain cannot be considered as caused solely by the incident at the Sears store.

After considering the medical evidence and the nature of the injury, I assess her general damages for pain and suffering in the amount of $8,500.



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