

SUPREME COURT OF NOVA SCOTIA

Citation: *Riddle v. Colchester (Municipality of the County)*, 2023 NSSC 24

Date: 20230125

Docket: HFX No. 469328

Registry: Halifax

Between:

Mary Riddle

Plaintiff

v.

Municipality of the County of Colchester and
Five Islands Lighthouse Preservation Society

Defendants

DECISION

Judge: The Honourable Justice C. Richard Coughlan

Heard: December 1, 2022 in Halifax, Nova Scotia

Counsel: Jeff T. Mitchell, for the Plaintiff
Peter C. McVey, K.C., for the Defendant, Municipality of the
County of Colchester
Cory J. Withrow, for the Defendant, Five Islands Preservation
Society (watching brief only)

By the Court:

[1] Mary Riddle commenced action against the Municipality of the County of Colchester and the Five Islands Lighthouse Preservation Society for damages arising from a fall she experienced at the Five Islands Lighthouse on July 9, 2017. The Municipality moves for an order for summary judgment on evidence in relation to Ms. Riddle's claim against it. Ms. Riddle opposes the motion.

[2] The background of this motion is as follows:

[3] The Lighthouse in question was built by private citizens during the winter of 1913-1914 at Sand Point, Nova Scotia. For approximately eighty years the Lighthouse was a functioning navigational lighthouse whose operation was overseen by the federal government. The Lighthouse ceased to be an operating navigational lighthouse in approximately 1993.

[4] The Five Islands Lighthouse Preservation Society was incorporated to preserve the Lighthouse after it had ceased operation.

[5] In or about 1996 the Municipality purchased the Lighthouse to assist the Society in achieving its goal of preserving it. In approximately the same year the Lighthouse was moved from its operational location to Sand Point Beach Campground in Five Islands, Colchester County, a private, for-profit campground.

[6] The Municipality and the Society entered into a lease agreement with respect to the Lighthouse dated November 30, 1998. The term of the Lease was for a period of one year from the date of the lease which was to be automatically renewed on a yearly basis unless either party gives notice to terminate within 30 days of the annual expiration of the lease.

[7] In the lease the Society agreed to (1) use the facility as a ecotourism site; (2) be responsible for continuing maintenance, both major and minor associated with the building; (3) to manage the facility in a professional and safe manner with appropriate signage to the satisfaction of the Municipality.

[8] The Municipality agreed to maintain adequate fire and liability insurance on the Lighthouse for the benefit of the parties as their interest may appear.

[9] The lease continues to be in force. There is no evidence the Society has ever provided signage to the Municipality for approval.

[10] The Municipality, Society and Sand Point Beach Campground Limited entered into an agreement dated June 3, 2001 in which the Company agreed the Lighthouse could remain on the Company's land and the public was allowed to visit the Lighthouse, following a route designated by the Company, during all times the Campground was open for business. If the Company terminated the agreement the Society had six months to remove the Lighthouse. The Municipality agreed to maintain a public liability insurance policy in the amount of at least two million dollars to insure the Company against claims made against the Company by persons alleging they have been injured while on the lands for the purpose of visiting the Lighthouse. The Municipality indemnified the Company against any such claims unless caused by the negligence of the Company. The Society agreed to preserve and maintain the Lighthouse in good condition. The Municipality executed the Agreement on the assurance from the Company and Society that when the Lighthouse is open to the public, the Lighthouse is attended to, and that maintaining access to the Lighthouse is not the responsibility of the Municipality.

[11] In 2008, the Lighthouse was moved to its current location at the Five Islands Lighthouse Park on lands owned by the Municipality on Broderick Lane in Five Islands. The Society applied for a building permit. The Municipality approved a building permit for the foundation upon which the Lighthouse was placed. The Municipality built a small wooden deck with seven steps in front of the Lighthouse to allow visitors to enter the Lighthouse, the doorway of the Lighthouse being several feet above the ground. The Municipality landscaped and created a rope railing and garden around the Lighthouse and has continued to landscape and maintain the garden.

[12] Prior to September 9, 2019 the Municipality did not perform any work inside the Lighthouse. The work performed by the Municipality was on maintaining the outside of the Lighthouse and the park. Staff working at the Lighthouse were hired and managed by the Society. The Society oversaw and directed the Lighthouse operation, including hours of operation and terms of admission of the public to the Lighthouse. The Society did not report to the Municipality concerning the operation of the Lighthouse or seek or obtain authorization to conduct any work on the interior of the Lighthouse.

[13] On or about September 9, 2019, the Municipality received a complaint from the Nova Scotia Department of Labour regarding occupational safety of the internal stairs and look-off area of the “lantern room” of the Lighthouse. The Municipality immediately took the following steps:

- (a) Notified the Society in September 2019 that a Department of Labour complaint had been received regarding the Lighthouse.
- (b) Confirmed with representatives of the Society that the Lighthouse had been closed by them for the season by the time the complaint was received .
- (c) Directed representatives of the Society that no one was to use the internal staircase in the Lighthouse which is also referred to as the “ladder”.
- (d) Placed a lock on the internal staircase hatch at the top of the ladder so that the look-off area or lantern room could not be accessed.
- (e) Placed a new lock on the external door of the Lighthouse to secure it against entry.

[14] The Lighthouse has not reopened since September 2019 due to the complaint. The Lighthouse remains padlocked and the door has been screwed shut.

[15] Ms. Riddle alleges she sustained injuries following a fall on the internal staircase of the Lighthouse on July 9, 2017. She was a tourist visiting from Pennsylvania. She fell from the observation deck to the second floor through the opening where the ladder sat.

Issue:

[16] The issue before the Court is whether the defendant Municipality is entitled to summary judgment on Ms. Riddle’s claim against it.

Analysis:

[17] Summary judgment on evidence is governed by *Civil Procedure Rule* 13.04 which provides:

13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:

- (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
 - (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
- (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
- (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
- (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
- (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
- (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
- a) determine a question of law, if there is no genuine issue of material fact for trial;
 - b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[18] The manner in which a judge is to deal with the motion for summary judgment on the evidence was set out in detail by Fichaud, J.A. in giving the Court's judgment in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, where he identified five sequential questions to be answered.

First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?

Second Question: If the answer to #1 is No, then: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?

Third Question: If the answer to #1 and #2 are no and yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment:

Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: Does the challenged pleading have a real chance of success?

Fourth Question: Should the judge exercise the "discretion" to finally determine the issue of law?

Fifth Question: If the motion under Rule 13.04 is dismissed, should the action be converted to an application and, if not, what directions should govern the conduct of the action?

[19] In the same judgment Fichaud J.A. stated at para.. 36 that each party is expected to put its best foot forward:

"Best foot forward": Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success". Rule 13.04(4) and (5); *Burton*, para. 87.

[20] Ms. Riddle sets out three grounds of alleged liability of the Municipality for the damages she claims against it, namely: (a) negligence; (b) liability as an occupier pursuant to the *Occupier's Liability Act*, SNS 1996 c. 27 (OLA); and (c) breach of duty pursuant to the *Municipal Government Act* SNS 1998 c. 18 (MGA).

[21] The first question which is to be addressed is does the challenged pleading disclose a "genuine issue of material fact" either pure or mixed with a question of law.

[22] In dealing with the claim pursuant to the OLA "occupier" is defined in section 2(a):

2 In this Act,

- (a) "occupier" means an occupier at common law and includes
 - (i) a person who is in physical possession of premises, or
 - (ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on the premises or the persons allowed to enter the premises,

and for the purpose of this Act, there may be more than one occupier of the same premises:

[23] Sections 3, 4, and 9 of the OLA provide:

3. This Act applies in place of the rules of common law for the purpose of determining the duty of care that an occupier of premises owes persons entering on the premises in respect of damages to them or their property.

4. (1) An occupier of premises owes a duty 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.

(2) The duty created by subsection (1) applies in respect of

- (a) the condition of the premises;
- (b) activities on the premises; and
- (c) the conduct of third parties on the premises.

(3) Without restricting the generality of subsection (1), in determining whether the duty of care created by subsection (1) has been discharged, consideration shall be given to

- (a) the knowledge that the occupier has or ought to have of the likelihood of persons or property being on the premises;
- (b) the circumstances of the entry into the premises;
- (c) the age of the person entering the premises;
- (d) the ability of the person entering the premises to appreciate the danger;
- (e) the effort made by the occupier to give warning of the danger concerned or to discourage persons from incurring the risk; and
- (f) whether the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection.

(4) Nothing in this Section relieves an occupier of premises of any duty to exercise, in a particular case, a higher standard of care that, in such case, is required of the occupier by virtue of any law imposing special standards of care on particular classes of premises.

...

9. (1) Where under a lease of premises a landlord is responsible for the maintenance or repair of the premises, the landlord owes the same duty to each person entering on the premises as is owed by the occupier of the premises.

(2) Where premises are sublet, subsection (1) applies to any landlord who is responsible for the maintenance and repair of the premises.

(3) Nothing in this Act relieves a landlord of any duty imposed on landlords by law.

(4) For the purpose of this Section, obligations imposed on a landlord by any law shall be deemed to be imposed under the lease and “lease” includes any statutory lease or any contract or statutory provision conferring the right of occupation of premises on a person who is not the owner thereof and “landlord” shall be construed accordingly.

(5) This Section applies to leases that are made prior to or after the coming into force of this Act.

[24] When the Municipality received the complaint from the Department of Labour in September, 2019, during the currency of the lease between the Municipality and the Society, it did not notify the Society of the complaint and require the Society to remedy the situation. Rather, the actions the Municipality took, set out above, including directing the Society no one was to use the internal staircase in the Lighthouse, placing locks on the internal staircase hatch and the exterior door of the Lighthouse to secure it against entry raises the issue whether the Municipality was an occupier of the Lighthouse. Did the Municipality have responsibility for and control over the condition of the premises or the persons allowed to enter the premises – in this case the Lighthouse?

[25] In its prehearing submission the Municipality stated at para. 88:

However, in the present case, the facts are uncontradicted that the Municipality played no role in the day-to-day operations of the Lighthouse. There is no evidence that it could – or did – exercise any control over how the Society ran the Lighthouse as a tourist attraction. There is no evidence the Municipality had any role in the operation, upkeep, maintenance or condition of the Lighthouse. The Municipality, rather, only maintained the surrounding park. **The Municipality only controlled the Lighthouse during the “off season”**. The Plaintiff fell during the Society’s occupancy.

[Emphasis added]

[26] Considering the particular relationship between the Municipality and the Society, whether the Municipality is an occupier pursuant to the OLA is a genuine issue of material fact for trial.

[27] The Supreme Court of Canada addressed the liability of government for damage caused by their negligence in the same way as private defendants in

Nelson (City) v. Marchi, 2021 SCC 41. In so doing the Court set out principles that affect such a determination which include (a) core policy decisions shielded from negligence liability are “decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith”. (para. 51); (b) activities outside the protected sphere of core policy – that is, activities that open up a public authority to liability for negligence, are operational decisions which implement or carry out a policy (para. 52); (c) the onus is on the public authority to establish a decision was in fact core policy (para. 79); (d) the key focus in classifying a decision must remain the nature of the decision (para. 54); (e) four factors that help in assessing the nature of a government’s decision are: (1) the level and responsibilities of the decision-maker; (2) the process by which the decision was made; (3) the nature and extent of the budgetary considerations; and (4) the extent to which the decision was based on objective criteria (para. 68).

[28] Whether a particular decision is core policy or operational will depend on the facts of the case based on the principles set out above. In giving the Court’s judgment in *Nelson (City) v. Marchi*, Karakatsanis and Martin JJ. in describing an example of an operational decision stated at para. 39:

... At the other end of the spectrum, government employees who drive vehicles or public authorities who occupy buildings clearly owe private law duties of care and must act without negligence (L. N. Klar and C. S. G. Jefferies, *Tort Law* (6th ed. 2017), at p.348). Tort law must ensure that liability is imposed in this latter category of cases without extending too far into the sphere of public policy decisions.

[29] Given the circumstances of this motion set out above, there is a genuine issue of material fact whether the Municipality’s decisions about the maintenance of the Lighthouse were core policy or operational decisions.

[30] In this proceeding I have found there are genuine issues of material fact to be determined.

[31] These issues of material facts are such that the findings of fact which may be made by the trial judge could impact whether any claim exists pursuant to the MGA. I am not prepared to deny Ms. Riddle’s right to pursue her claim against the Municipality.

[32] I dismiss the motion for summary judgment.

[33] If the parties are unable to agree I will hear them on the issue of costs. I will also schedule a hearing pursuant to Civil Procedure Rule 13.08.

Coughlan, J.