SUPREME COURT OF NOVA SCOTIA

Citation: *Tyler v. Halifax Convention Centre Corporation*, 2024 NSSC 108

Date: 20240412
Docket: 502595
Registry: Halifax

Between:

Jennifer-Jayne Tyler

Plaintiff

v.

Halifax Convention Centre Corporation, Events East Group, Halifax Regional Municipality, 3280404 Nova Scotia Limited, and Servomation Inc.

Defendants

SUMMARY JUDGMENT DECISION

Judge: The Honourable Justice Scott C. Norton

Heard: April 9, 2024, in Halifax, Nova Scotia

Decision: April 12, 2024

Counsel: Janus Siebrits, for the Plaintiff
Tipper McEwan and Calvin DeWolfe, for the Defendant 3280404 Nova Scotia Limited
Andrew J. Sowerby, for the Defendants Halifax Convention Centre Corporation, Events East Group, and Halifax Regional Municipality

By the Court:

Introduction

[1] This action relates to an incident which is alleged to have occurred on January 23, 2019, during a Bryan Adams concert held at the Scotiabank Centre in Halifax. The Plaintiff, Jennifer-Jayne Tyler, attended the performance with her husband. The Statement of Claim alleges that an unidentified woman, exhibiting signs of extreme intoxication, tripped, fell down the staircase, and landed on Ms. Tyler while she was watching the performance from her assigned seat. Ms. Tyler claims to have been injured in this alleged incident.

[2] Halifax Convention Centre Corporation ("HCCC") and Events East Group ("Events East") manage and operate the Scotiabank Centre in Halifax ("Premises") and Halifax Regional Municipality ("HRM") owns the Premises. 3280404 Nova Scotia Limited, doing business as Shadow Security ("Shadow"), is an independent contractor who was hired by Events East to provide security services at the Premises on the date of the Incident. Servomation Inc. provided concession services to Events East. The action against Servomation Inc. has been discontinued.

[3] The Plaintiff claims that the Defendants are occupiers under the *Occupiers' Liability Act*, SNS 1996, c. 27 (the "*Act*") and breached their statutory duties and/or were negligent by failing to keep the staircase free of tripping hazards, serving the unidentified woman too much alcohol, failing to train their employees to properly manage the incident, and failing to have adequate systems in place to prevent disorderly conduct of patrons.

[4] Shadow Security brings this motion for summary judgment on evidence. It argues that there is no genuine issue of material fact for trial in that the Plaintiff cannot prove that her injuries were in fact caused by any action or omission of Shadow Security. As a result, Shadow Security says the action against it should be dismissed.

[5] The Defendants, HCCC, Events East, and HRM (collectively the "HRM Defendants"), took no position on the Shadow motion but brought a separate motion to sever the trial of the issues of fault and damages. That motion was heard immediately following the summary judgment motion and was dismissed.

Evidence and Objections

[6] The parties proceeded on the basis that the affidavit evidence filed was admissible for both motions before the Court.

[7] On March 22, 2024, the Plaintiff filed a response affidavit from her husband, Geoff Tyler, and a brochure titled: "Plaintiff's Exhibit Book". In written submissions, the Defendants made substantive objections to the content of the Exhibit Book as discussed below. On April 4, 2024, three "days" before the hearing and apparently in response to some of the objections being made, the Plaintiff filed her own affidavit, with attachments. She also filed an affidavit from a paralegal at her lawyer's firm, attaching a copy of an expert report and the expert's *curriculum vitae*.

[8] At the outset of the hearing, all Defendants objected to the late filing of these affidavits. These motions were scheduled for a full day hearing. By *Civil Procedure Rule* 23.11(1) any response affidavit was required to be filed 10 days before the hearing. *Rule* 23.12(1) prescribes that a party may only file an affidavit after a deadline with the permission of a judge. *Rule* 23.12(2) requires the judge to consider the prejudice to the party if the motion proceeds without the affidavit, the prejudice to the other parties by allowing the affidavit to be filed, and the prejudice caused to the public if motions set by appointment are frequently adjourned when it is too late to make the best use of the time on counsel, the judge and court staff.

[9] In oral submissions the Defendants acknowledged that there was no particular prejudice to them and advised that they were not seeking an adjournment in the event the affidavit was permitted.

[10] Having considered the balance of prejudices and, subject to any objections as to admissibility of the contents, I permitted the late filing of the affidavits. The time lines set out in the *Rules* are for the benefit of the parties and the administration of justice and further the object of the *Rules* to provide a just, speedy, and inexpensive determination of every proceeding. Counsel well know the filing restrictions. The Court should not and will not permit and thereby promote a casual approach to filing deadlines. Accordingly, I awarded costs of $250, payable to Shadow, forthwith and in any event of the cause.

[11] The Defendants objected to certain contents of the "Exhibit Book" as well as the late-filed affidavits. At the hearing I heard submissions and made the following rulings with these reasons to follow:

a. An expert report of Gil Fried was not admitted.

b. It was included in the "Exhibit Book" and attached to the late-filed affidavit of the paralegal. First, there is no such thing as an "Exhibit Book" contemplated by the *Rules* on a motion. The manner of providing evidence on a motion is prescribed by *Rule* 23.08. Absent agreement by all parties to place documents before the court in a common book of exhibits, as being agreed facts, this is not permissible evidence.

c. The affidavit of the paralegal did not conform to *Rule* 39. The paralegal cannot prove the expert report. Mr. Fried was not called as a witness and did not attest to the contents of the report in an affidavit. The report is hearsay.

d. The report was also not admissible as it does not speak to the issue before the court: causation. Rather, it speaks to the standard of care. It was therefore not relevant or necessary for the Court, both requirements of the common law admissibility test set out by the Supreme Court of Canada in *White Burgess v. Abbott,* 2015 SCC 23.

e. Excerpts of discovery examinations that are not compliant with the requirements for admissibility in the *Rules* were not admitted.

f. Specifically, the discovery testimony of non-party witnesses, Elias Moscovitch and Crystal Williams, are not admissible because *Rule* 18.20 only permits the use of discovery transcripts of witnesses which are either not adverse, not an individual party, or not a designated manager when "it is necessary to provide the evidence through the discovery transcript", for example if the witness cannot testify, is too ill or infirm to attend court, or the court cannot compel the witness to attend the hearing. No evidence was tendered to support such a finding.

g. The Plaintiff sought to introduce a document titled "Scotiabank Centre Concession Services Partner Agreement in the "Exhibit Book". As stated above, absent consent by all parties, this is not permissible evidence and was not admitted.

h. In the late-filed affidavit of the Plaintiff, para. 21, speaks to and attaches, as Exhibit "A", the unsworn statement of the Plaintiff to an insurance adjuster. Similarly, in para. 24, the Plaintiff identifies, and attaches as Exhibit "C", unsworn correspondence she sent to her lawyer. Both are hearsay prior consistent statements introduced for the truth of their contents. They are inadmissible. Both paragraphs and attached exhibits were struck.

Legal Framework for Summary Judgment

[12] Summary judgment on the evidence in an action is governed by *Civil Procedure Rule* 13.04. Summary judgment must be granted when a judge is satisfied that: (1) there is no genuine issue of material fact for trial of the claim or defence; and (2) the claim or defence requires determination only of a question of law and a judge exercises the discretion provided in *Rule* 13.04 to answer the question. The relevant Rule provides:

> **13.04 Summary judgment on evidence in an action**
>
> (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.

[13] The test on a motion for summary judgment on the evidence was articulated by Justice Fichaud in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, at para. 34. At para. 34, Justice Fichaud laid out the sequential questions which form the basis of the test:

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

b. If the answer to above is No, then: does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?

c. If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success?

d. If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law?

e. If the motion for summary judgment is dismissed, should the action be converted to an application, and if not, what directions should govern the conduct of the action?

[14] As set out in para. 36 of *Shannex*, both parties must put their best foot forward on a motion for summary judgment.

[15] Recently, the Nova Scotia Court of Appeal provided additional instruction on the approach to be made in answering the Shannex questions. In *Arguson Projects Inc. v. Gil-Son Construction Limited*, 2023 NSCA 72, Justice Bourgeois, for the Court, stated, beginning at para. 33:

[33] In *Shannex*, Justice Fichaud set out five sequential questions to be asked when summary judgment is sought pursuant to the then recently amended Rule 13.04 (paras. [34] through [42])[2]:

…

[34] A motion judge who fails to ask the questions in the above order, or combines one or more of them, risks falling into error.

[35] The first question's focus is solely whether there is a dispute of material fact. A material fact can be one that stands on its own (*i.e.*, whether an email was sent and received) or it can be mixed with a question of law (*i.e.*, an email was sent, but does it constitute a "decision" pursuant to the notice provisions of the contract?). At the first stage, a motion judge looks only at whether the material fact – was an email sent and received – is in dispute. It is irrelevant at this stage whether there is a question of law mixed with the material fact (*i.e.*, the application of the contractual provisions in determining the legal significance of the email) – that consideration belongs in the second step.

[36] In *Shannex*, Justice Fichaud noted " a 'material fact' is one that would affect the result. A dispute about an incidental fact – *i.e.*, one that would not affect the outcome – will not derail a summary judgment motion" (para. [34]). And further:

> The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes.

[37] Identifying a material fact is anchored in what has been alleged in the pleadings. To identify a material fact, it is helpful to ask what needs to be proven to answer the allegations pled by a party. If a fact is necessary to prove the allegation, then it is material.

[38] To determine whether there is a dispute of material fact, *Rule* 13.04(4) makes clear that it is the <u>evidence</u> presented on the motion that must be considered. As noted recently by Justice Farrar in *Risley*, bald assertions in a responding affidavit, without more in terms of an evidentiary foundation, will not give rise to a dispute of material fact. It is critical to emphasize that a dispute of material fact <u>cannot</u> arise from the submissions of counsel, or a judge's speculation about legal issues not raised by the pleadings or what evidence could possibly be called at the time of trial.

[39] The second question requires a court to determine whether a question of law arises from the pleadings. If there is no dispute of material fact and no question of law, either pure or mixed with fact, then summary judgment must follow. For the purposes of this appeal, the interpretation of a contract is a question of law. As

referenced above, the application of contractual provisions to the factual context, is a question of law mixed with fact.

[40] If there are no disputed material facts, but there is a question of law, the motion judge must proceed to the third question – does the challenged pleading have a "real chance of success"? In *Shannex*, Justice Fichaud wrote:

> Nothing in the amended Rule 13.04 changes *Burton's* test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.
>
> It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

[41] In *Burton*, Justice Saunders explained how to ascertain if there is a "real chance of success":

> [42]. . .Instead, the judge's task is to decide whether the responding party has demonstrated on the evidence (from whatever source) whether its claim (or defence) has a real chance of success. This assessment, in the second stage, will necessarily involve a consideration of the relative merits of both parties' positions. For how else can the prospects for success of the respondent's position be gauged other than by examining it along with the strengths of the opposite party's position? It cannot be conducted as if it were some kind of pristine, sterile evaluation in an artificial lab with one side's merits isolated from the others. Rather, the judge is required to take a careful look at the whole of the evidence and answer the question: **has the responding party shown, on the undisputed facts, that its claim or defence has a real chance of success?**
>
> [43] In the context of summary judgment motions the words "real chance" do not mean proof to a civil standard. That is the burden to be met when the case is ultimately tried on its merits. If that were to be the approach on a summary judgment motion, one would never need a trial.
>
> [44] The phrase "real chance" should be given its ordinary meaning – that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. **In other words, it is a prospect that is rooted in the evidence, and not based on hunch, hope or speculation**. A claim or a defence with a "real chance of success" is the kind of prospect that if the judge were to ask himself/herself the question:
>
> *Is there a reasonable prospect for success on the undisputed facts?*
>
> the answer would be yes.
>
> (Emphasis added)

> [42] From the above, it is clear that the second and third questions are anchored in the evidence presented on the motion. As reiterated in *Shannex*, it is expected that each party "put its best foot forward":
>
> > [36] "**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": Rules 13.04(4) and (5); *Burton*, para. 87.

Question 1 – Is there a genuine issue of material fact?

[16] In this case the Plaintiff claims against Shadow in negligence. The tort of negligence requires a plaintiff to prove: 1) the existence of a duty of care; 2) a breach of the standard of care; 3) damage; and 4) that the damage was caused, in law and fact, by the defendant's breach. *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27, at para. 3.

[17] Shadow submits that there is no genuine issue of material fact regarding causation.

[18] Shadow's motion is based only on the Plaintiff's admissions regarding the cause of the unidentified woman's fall. The Plaintiff's evidence, or lack of evidence, is not disputed.

[19] The Plaintiff alleges that the unidentified woman who fell on her was severely intoxicated, Amended Statement of Claim, para. 11:

> The Plaintiff states that she was seated in her assigned seating and viewing the on-stage entertainment when suddenly, an unidentified woman who was exhibiting signs of severe intoxication, tripped and fell down the staircase and landed on the Plaintiff. … The Plaintiff then witnessed the unidentified woman purchase additional alcohol and stumble around the area.

[20] To succeed in her claim against Shadow, the Plaintiff must show that the unknown woman consumed alcohol to excess, that this excessive consumption of alcohol caused the Plaintiff to fall, and but for some act or omission on the part of Shadow, the unidentified woman would not have fallen on the Plaintiff.

[21] It is helpful to analyze the Plaintiff's allegations one at time:

a. The unidentified woman showed signs of severe intoxication before the fall.

[22] There is no evidence that the unidentified woman exhibited signs of severe intoxication before the fall. In fact, there is no evidence that the unidentified woman consumed alcohol at any time.

[23] The Plaintiff swore in her answers to interrogatories that she did not see the unidentified woman consume alcohol before the fall:

> 9. Question: Did you see the 'unidentified woman' at the Scotiabank Centre on the evening in question at any point prior to the incident described at paragraph 11 of the Amended Statement of Claim?
>
> Answer: No.
>
> 10. Question: Did you personally observe the 'unidentified woman' consume alcohol at any time prior to the incident described at paragraph 11 of the Amended Statement of Claim?
>
> Answer: No.

[24] The Plaintiff swore in her answers to interrogatories that she did not see the unidentified woman show signs of severe intoxication before the fall:

> 12. e. did you personally observe the 'unidentified woman' exhibit signs of severe intoxication prior to the incident described at paragraph 11 of the Amended Statement of Claim?
>
> Answer: No.

[25] On discovery the Plaintiff testified that (pp. 115-116):

> Q. Before this woman landed on you, had you seen her before?
>
> A. Not that I recall.
>
> Q. So you don't remember seeing this woman going up the aisle.
>
> A. Not that I recall.
>
> Q. And obviously, as you said a couple times, you didn't see her coming down the aisle before she hit you.
>
> A. No, I was not aware of her coming down.
>
> Q. At any point before she fell, did you see this woman with alcohol in her hands?
>
> A. I don't recall seeing her prior to the incident.

> Q. So that would be a "no." You don't remember ever seeing this woman before she fell with alcohol.
>
> A. No.

[26] The Plaintiff did not see the unidentified woman exhibit signs of intoxication before the fall. In fact, the Plaintiff did not see how the unidentified woman was behaving at all (Discovery, pp. 135 and 33):

> Q. Fair enough. Okay. And I'm looking at question 12(e), which is:
>
> > "Did you personally observe the unidentified woman exhibit signs of severe intoxication prior to the incident?"
>
> Your answer is "no" because you didn't see the woman at all before the incident.
>
> A. Correct.
>
> Q. Okay. So, you didn't see her exhibit signs of severe intoxication or any intoxication or see how she was behaving at all before she fell on you.
>
> A. Correct.
>
> [p.33]:
>
> Q. And you're also unable to say, ma'am, I understand, what substances, if any, that the lady consumed before her fall?
>
> A. Correct.
>
> Q. Or where or when she might have consumed any intoxicants?
>
> A. Correct.

[27] The Plaintiff also swore (Interrogatory, 12.f.) that she did not know of any other witness who did see the unidentified woman show signs of severe intoxication before the fall.

[28] There is no evidence that the unidentified woman showed signs of intoxication when she entered the Scotiabank Centre (Discovery, p.33):

> Q. And similarly, ma'am, you're unable to say what the lady's demeanour was when she was walking on the concourse?
>
> A. Correct.

[29] None of these facts are in dispute.

2. The unidentified woman fell because she was intoxicated.

[30] The Plaintiff's Statement of Claim alleges that the unidentified woman tripped on the stairs. The Plaintiff does not know why the woman fell (Discovery, p. 33):

> Q. And I take it, ma'am, you're unable to say with any certainty at all of why it is that woman fell that day?
>
> A. I do not know.
>
> Q. That's right. And I guess that follows from not having had any observation of her before the fall.
>
> A. Correct.

[31] It is not in dispute that the Plaintiff does not have any evidence to establish why the unidentified woman fell and injured her. The Plaintiff did not see the unidentified woman at any time before the fall (Interrogatory):

> 12.d. did you personally observe the 'unidentified woman' trip on the staircase?
>
> Answer: No.

(Discovery, p. 111):

> Q. And you didn't see this woman before she struck you.
>
> A. No.

[32] The Plaintiff has no evidence about the condition of the unidentified woman's footwear (Discovery, p. 31):

> Q. Do you recall anything about the footwear that the lady was wearing when she fell on you?
>
> A. I do not.
>
> Q. Do you recall if she was wearing heels or flats, or you're unable to say?
>
> A. I'm unable to say.

[33] The Plaintiff has no evidence about the condition of the stairs at the place and time where the unidentified woman fell (Discovery, p. 32):

> Q. And I take it you didn't turn around at anytime and observe the conditions of the stairs above you?
>
> A. I did not.

> Q. And so you're unable to say whether the stairs were obstructed in any way, whether anything was spilled on them, or whether there was anything protruding into the aisle from the seats above you?
>
> A. I'm not able to say.

[34] The Plaintiff is unable to say where the unidentified woman was affected by any medical conditions that would affect her balance or gait (Discovery, pp. 32-33):

> Q. Okay. And I take it from your answers to My Friend's question on Tuesday, you have no notion of who this lady is who fell?
>
> A. I do not.
>
> Q. And it would follow from that, you're unable to say whether she would have any medical conditions which would affect her balance or her gait as she was going up and down the stairs?
>
> A. Correct.

[35] None of these facts are in dispute

3. The unidentified woman purchased more alcohol and stumbled around.

[36] The Plaintiff's statement of claim alleges that the Plaintiff saw the unidentified woman buy alcohol and "stumble" around the area. Her sworn evidence is that she assumes that the unidentified woman purchased the alcohol because she was holding plastic cups.

[37] The Plaintiff said that the unidentified woman was very unsteady on her feet climbing up the stairs, using her elbow to steady herself against the railing. However, the Plaintiff herself described the stairs as hard to navigate (Discovery, p. 107):

> A. I was very surprised how -- like, it was hard to navigate those stairs because it felt like you were up in the sky. It was very high up.

[38] Mr. Fanning, shift leader at Scotiabank Centre, attested that people who appear to be perfectly sober to have difficulty with the Scotiabank Centre stairs at times, and injure themselves.

[39] None of these facts are in dispute.

[40] On the first question in *Shannex*, I conclude that there is no genuine issue of material fact for trial on whether it was the unidentified woman's excessive

consumption of alcohol that caused her to fall on the Plaintiff. There is no evidence to support this finding.

Question 2: There is a question of law

[41] The Plaintiff's claim then raises a question of law. The legal question is: does the Plaintiff need to lead evidence of factual causation? The answer to the question is "yes".

[42] Factual causation requires the Plaintiff to prove that a breach of the standard of care by Shadow was a necessary cause of the Plaintiff's injury. In *Clements v. Clements*, 2012 SCC 32, at para. 8, the Court instructed:

> The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

[43] The but for test is applied in a robust, common sense fashion, without the need for scientific precision (*Clements*, para. 9). However, there must be some evidence connecting Shadow's breach of duty to the Plaintiff's injury (Clements, para. 10):

> A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss.

Question 3: The claim has no chance of success

[44] The Plaintiff's case has no chance of success. The Plaintiff bears the burden of proving on the balance of probabilities that intoxication caused the unidentified woman to fall, and that this fall was connected to a breach of Shadow's duty of care. The Plaintiff cannot meet this burden since she has no evidence that the unidentified woman consumed alcohol, showed any signs of intoxication before the fall that should have been detected by Shadow, or of what actually caused the fall.

[45] While the trier of fact may draw inferences, inferences cannot be drawn in the complete absence of evidence, or based on primary facts that are the result of

speculation. This principle was reviewed by the Court of Appeal in *Flynn v. Halifax (Regional Municipality)*, 2005 NSCA 81, citing with approval the following definition of palpable and overriding error from the Court of Appeal for Ontario's decision in *Waxman v. Waxman*:

> Examples of "palpable" factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.

[46] The principle is reflected in this Court's reasoning in *Brothers v. Alexander*, 2023 NSSC 320. The Defendant in an occupier's liability dispute brought a motion for summary judgment. The Plaintiff argued that there was a material fact in dispute relating to the cause of the ice on the sidewalk where she fell. The Court held this could not be inferred without "evidence…sufficient to ground a finding on that point" aside from " 'speculation from the counsel table' requesting that the Court infer a material fact in issue" (para. 21).

[47] *Brothers* stands for the proposition that a party cannot infer a material fact in dispute without evidence to ground a finding on that point.

[48] That principle applies in this case. In *Brothers* the cause of the fall itself was in evidence – the ice caused the fall. There was however, no evidence to prove the source of the ice. In this case, there is no evidence of why the unidentified woman fell.

[49] This Court has granted summary judgment due to a Plaintiff's failure to lead evidence on causation on multiple occasions in the medical malpractice context. In that context expert evidence is required to prove factual causation. See, for example, *Thorburn v. Grimshaw*, 2024 NSSC 15.

[50] A claim in negligence – whether *simpliciter* or under the *Occupier's Liability Act* – cannot succeed without evidence that the injury was caused by a breach of the defendant's duty.

[51] In *Chan v. White*, 2014 NSSC 383, the plaintiff failed to produce evidence linking the plaintiff's death to the medical treatment he received. Summary judgment was granted in favour of the defendant.

[52] Similarly, in *Szubielski v. Price*, 2013 NSCA 151, the plaintiff had no evidence to support one of her claims with respect to use of an improper device in

her medical treatment. The Court of Appeal upheld the trial judge's determination that summary judgment was appropriate because that there was no genuine issue of material fact with respect to causation, which had not been proven.

[53] In this matter, given the lack of evidence about the cause of the unidentified woman's fall, the Plaintiff cannot meet her burden of proving that the fall was caused by an act or omission of Shadow.

[54] It is speculation to conclude that the unidentified woman was intoxicated before the fall, or that she was visibly intoxicated before she took her seat, or that the fall was the result of intoxication and not some other cause. Furthermore, the Plaintiff has no evidence to show that the unidentified woman's demeanour at some unspecified time when she entered the Premises warranted the attention of Shadow. The Plaintiff cannot meet the "but for" test without proving the cause of the fall and that it would not have happened but for act or omission by Shadow.

[55] Without evidence of causation, the Plaintiff's claim has no chance of success. The motion for summary judgment is granted and the claims against Shadow are dismissed with costs.

[56] If the parties are unable to agree on costs, I will receive their written submissions within three weeks of the date of this decision.

[57] Order accordingly.

Norton, J.