SUPREME COURT OF NOVA SCOTIA

Citation: *Jansen v. J.M. Reynolds Pharmacy Limited*, 2026 NSSC 79

Date: 20260312
Docket: Bwt No. 513561
Registry: Bridgewater

Between:

Mavie Marie Jansen

Plaintiff

v.

J.M. Reynolds Pharmacy Limited

Defendant

Judge: The Honourable Justice Michelle Kelly

Heard: January 28, 29, 30 and February 3, 2026, in Bridgewater, Nova Scotia

Counsel: Taylan Caliskan and Brandon Walzak, for the Plaintiff
Sarah-Jo Briand and Sarah M. Flanagan, for the Defendant

By the Court:

[1] J.M. Reynolds Pharmacy Limited operates a Pharmasave Pharmacy in Liverpool, Nova Scotia ("Reynolds Pharmacy"). Reynolds Pharmacy is owned by Mark Reynolds and Janice Reynolds, though Janice Reynolds retired from the operations side of Reynolds Pharmacy in or around 2019.

[2] Reynolds Pharmacy is run out of a building located at 255 Main Street, Liverpool, Nova Scotia. The building is also owned by Mark Reynolds and Janice Reynolds. In front of the building there are three planter beds. One bed is to the left of the entrance to Reynolds Pharmacy (when one is looking face on to the building.) Two others are located to the right of the entrance to Reynolds Pharmacy, with one being immediately to the right of the entrance doors to Reynolds Pharmacy.

[3] The Plaintiff, Mavie Marie Jansen, is a customer of Reynolds Pharmacy and has been a customer since in or around 2019. On May 23, 2021, she was going to Reynolds Pharmacy with her partner, John Crocker, to pick up a prescription.

[4] Some time after commencing this litigation, Mavie Marie Jansen married John Crocker and changed her name to Mavie Marie Crocker. Therefore, on a go forward in this decision, the Court will refer to the Plaintiff as **Ms. Crocker**.

[5] On May 23, 2021, Mr. Crocker parked in behind the Reynolds Pharmacy building. He and Ms. Crocker then proceeded to walk along the drive thru area immediately adjacent to the building, and round the corner onto the municipal sidewalk to enter Reynolds Pharmacy. Ms. Crocker alleges that in rounding the corner and walking towards the entrance to Reynolds Pharmacy, her right foot caught along the side of the planter bed immediately adjacent to the entrance of Reynolds Pharmacy, causing her to fall and break her hip.

[6] As a result, Ms. Crocker sued Reynolds Pharmacy for its alleged negligence in not maintaining a sufficiently safe premises, pursuant to the duties imposed on it as an occupier under the *Occupiers' Liability Act*, R.S.N.S. 1996, c. 27 ("*OLA*").

[7] I heard the trial in relation to liability only.

Evidence at Trial

[8] Ms. Crocker called 7 witnesses at trial: herself; her husband, John Crocker; her nephew, Troy Whynot; an expert witness, Nathan MacLeod; the two owners of Reynolds Pharmacy, Janice Reynolds and Mark Reynolds; and Stewart Newson who was an insurance adjuster who investigated the claim on behalf of the Defendant.

[9] The Defendant did not call evidence, nor did it enter any evidence, other than the agreed to Joint Exhibit Book.

Evidence of Mavie Marie (Jensen) Crocker

[10] Ms. Crocker gave evidence at the trial. At the time of the fall, she was 68 years old.

[11] Ms. Crocker was asked to describe the front of the Reynolds Pharmacy and she noted there were three separate flower beds. One was under the Pharmasave sign and she noted "I knew it was a bed because it had a barrier up in it and the flowers were gorgeous and it had it all the way around. That's how come I knew that one was a flower bed and it had beautiful flowers."

[12] There were varying terms used throughout the trial to describe the flower beds and specifically the area in which Ms. Crocker fell. For ease of reference, I will refer to the area in which Ms. Crocker fell as the "planter bed" on a go forward and the other two flower beds as "flower beds."

[13] In relation to the flower bed that Ms. Crocker noted as being the first you would encounter when walking from the parking areas to the Reynolds Pharmacy

she indicated “That one was very nice too but it wasn’t as pretty…and colourful but it had a border around it so….me around the corner I could see it.”

[14] And finally, in relation to the middle bed (the planter bed) where the fall occurred, she indicated “…it was a big tree and a rock and I thought I seen tulips there at one time but I’ve never noticed the dirt for some reason, I don’t know. But there was no border. There was nothing up there, no sign, nothing.”

[15] Ms. Crocker then proceeded to describe the particulars of her fall. She indicated she was attending the Reynolds Pharmacy to pick up her medications. She was wearing sandals with velcro straps and she parked in the back of the Reynolds Pharmacy building and then walked toward the Reynolds Pharmacy through the drive thru roadway area. She indicated “… I went ahead, my left foot was on the pavement okay or sidewalk I should say and then my right foot went over when I hit the gravel, well I don’t know what it is called, the gravel patch or the patch on the there, and I rolled and that’s what I can remember.”

[16] She was asked specifics on where her feet were located, and she indicated “my left foot was on the sidewalk.” She further indicated she did not remember specifics, but that Mr. Crocker was walking behind her and he could provide further

particulars. She simply indicated remembering "my foot rolling into that area…" And then specifically she was asked and answered:

> **Q:** Do you recall where your right foot was?
>
> **A:** My right foot, when I fell, was on the patch. I twisted my ankle, it was on the patch.
>
> …
>
> **A:** I observed when my foot rolled that it felt a little bit higher up there and that is why I lost control.
>
> **Q:** What was higher up?
>
> **A:** Where the sidewalk and the patch was, when I went over, because I was on my side and I felt something you know and I couldn't figure out why I went. I don't know.

[17] On cross-examination, she did admit that she knew this area was a garden and there was enough space to walk into the Reynolds Pharmacy without having to step into this garden area. She also admitted that on the day of the fall she was looking

straight ahead, not down and not at the planter bed, but there was nothing preventing her from looking down.

[18] There was one discrepancy in Ms. Crocker's evidence as it related to her evidence at trial and her evidence on discovery. This was whether she was laughing and conversing with Mr. Crocker at the time of her fall. At trial she indicated her discovery evidence was not fully correct as she could not have been talking with Mr. Crocker as he was not directly behind her. However, the key aspect of her evidence was that she was not looking down at the time of her fall and that evidence did not differ between discovery and trial. In terms of the evidence Ms. Crocker gave in relation to the route she took to Reynolds Pharmacy and what she recalled from the fall, I found her evidence credible.

Evidence of John Crocker

[19] Mr. Crocker testified that he drove Ms. Crocker to the Reynolds Pharmacy on May 23, 2021, and parked at the rear of the building. He testified that he was a few feet behind his wife when they turned onto the public sidewalk area in front of Reynolds Pharmacy.

[20] Mr. Crocker indicated that while Ms. Crocker was a few feet in front of him, as they turned on the public sidewalk, he witnessed her right foot step down – "half

her right foot was on the sidewalk and half was in dead air" causing her to roll over to the right. Mr. Crocker further marked the location of where Ms. Crocker stepped with her right foot when the fall occurred on a photograph taken by the Defendant. That mark notes Ms. Crocker stepped just inside the corner of the planter bed, and on the lip of the sidewalk and planter bed, as she rounded the corner to enter Reynolds Pharmacy.

[21] On cross-examination, Mr. Crocker was pressed on whether he was looking at Ms. Crocker's feet and he indicated that because he wears bifocals, he has a tendency to look down. He further confirmed he was looking at Ms. Crocker's feet at the time of the fall.

[22] Mr. Crocker also adopted a statement he wrote on the date of the fall as part of his evidence. That statement stated:

> "walking from the parking lot to front of doors we rounded the corner of the pharmacy the sidewalk is higher than the ground Mavie's right foot was half on and half off the sidewalk Mavie fell…"

Evidence of Nathan MacLeod

[23] Nathan MacLeod was qualified as an expert in the field of landscape architecture, capable of giving opinion evidence on the standards of planning, design, and maintenance of landscaped environments. His report was entered as evidence and his overall conclusion was "it is my opinion that the location of the fall

was not designed or maintained in accordance with industry best practices." He further specified:

> The design of the site resulted in a situation where people cut the corner to shorten the path to the entrance. In turn, this resulted in people stepping in the planting bed and compacting the soil/planting media. This resulted in excessive vertical change in level between the sidewalk and the planting bed. Maintenance of the planting bed, including raking or topping-up mulch, would have resolved this change in level.

[24] Mr. MacLeod was challenged extensively in cross-examination about what "industry standards" he used when coming to his opinion. He explained that in coming to his opinion he referred to the *Nova Scotia Building Code Regulations*, the CSA Standard for Accessible Design for Built Environment and the Canadian Landscape Standard. He further confirmed that a landscaper is not legally required to follow these standards but that these are used to establish the industry's best practices. He also acknowledged that he cited 2023 and 2024 codes and guidelines but in cross-examination expressed that to his knowledge nothing he refers to had changed from 2021 to 2024.

[25] I found Mr. MacLeod's report lacking in detail as to what exactly the industry best practices are in relation to the design of a planter bed. However, in answering the question(s) "Was the location of the fall maintained in accordance with industry best practices? If not, how should it have been maintained to be consistent with best practices," Mr. MacLeod did express the details of what the Canadian Landscape

Standard outlined in terms of how one can maintain a planter bed (or planting bed as he expressed) and specifically that one should ensure such a planter bed is periodically raked and topped-up with mulch or planting material to resolve vertical changes in height.

[26] Mr. MacLeod was also cross-examined on the photos he relied on to assess the vertical changes in height. He described the measurements that he took in April of 2025, and he further confirmed that he reviewed the photo taken on the day of the fall and photos taken in November of 2021. In all instances, he observed (either on site or in the photos provided) a difference in height of around one inch between the sidewalk and the planter bed.

[27] Mr. MacLeod further confirmed on cross-examination that the conditions from google earth photos, the photos he was provided and his observations on site all seemed to show conditions that were all very similar with visible height differences throughout the planter bed, which is what allowed him to be relatively confident in his opinion.

[28] I found Mr. MacLeod's report useful in outlining what the industry best practice should be in relation to maintaining a planter bed, especially one in a highly

traversed commercial area. However, I did not find his report helpful in assessing the design of the planter bed.

Evidence of Janice Reynolds

[29] Ms. Reynolds was called by the Plaintiff and gave evidence at the trial, despite the fact that she retired from the operational side of Reynolds Pharmacy in 2019. She indicated she remains a shareholder and director of the company and as such, the Plaintiff called her as a witness but requested and was granted permission to cross-examine Ms. Reynolds pursuant to *Rule* 54.06(1).

[30] Ms. Reynolds gave forthright evidence. She was specific in that the original design of the planter bed had wooden boards around it, just as the two flower beds did. However, the boards around the planter bed were removed years later when teenagers who would congregate and stand on the boards, broke them down to the point that they needed to be removed. This occurred prior to 2019. She did describe that the wooden border extended fully around the planter bed and the boards were somewhat elevated from the sidewalk with the dirt then being inside that wooden border area.

[31] Since 2019, Ms. Reynolds has little to do with the operations of Reynolds Pharmacy. She was not engaged in making decisions involving landscaping by

2021. She did confirm that since 1986, Cosby's Garden Centre handled all the landscaping needs for Reynolds Pharmacy.

Evidence of Mark Reynolds

[32] The other owner of Reynolds Pharmacy and the person in control of the day-to-day operations, Mark Reynolds, gave evidence at trial. He was called by the Plaintiff and counsel requested and was granted permission to cross-examine Mr. Reynolds pursuant to *Rule* 54.06(1), given he is an officer and director of the named Defendant.

[33] Overall, I found Mr. Reynolds' evidence was at times hard to follow and lacked credibility. He was often evasive and refused to answer some basic questions posed by Plaintiff's counsel. However, when his own counsel questioned him, he did explain that he has had health issues that appear to have affected his memory. No medical evidence was led to establish any medical deficiency, however.

[34] In *Blenus v. Fraser*, 2021 NSSC 79, (affirmed on appeal, 2022 NSCA 73 and leave to appeal to SCC dismissed) Justice Warner helpfully outlined the difference between credibility and reliability of witnesses:

> [88] …The distinction between credibility and reliability was explained by Watt J.A., for the court, in *R. v. H.C.* (2009), 2009 ONCA 56 (CanLII), 241 C.C.C. (3d) 45, [2009] O.J. No. 214 (Ont. C.A.):

> 41 Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately
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> i. observe;
>
> ii. recall; and
>
> iii. recount
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> events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence...
>
> A classic statement of the principles of reliability and credibility appears in *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152, where O'Halloran, J.A. said, for the majority of the British Columbia Court of Appeal:
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> 9 ... [T]he validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted or the circumstance that the Judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time...
>
> 10 If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility... A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

[35] In reviewing this law and assessing the evidence of Mr. Reynolds, I have come to the conclusion that Mr. Reynolds was not a credible witness. He was not

forthright in his answers. More importantly, he could not accurately observe, recall and recount crucial details to the Court which leads me to find the majority of his evidence unreliable.

[36] I will provide some specific and relevant examples.

[37] In the Joint Exhibit Book there is a statement that Mr. Reynolds made after hearing of Ms. Crocker's fall. In this statement he writes:

> A gentlemen entered the store representing Mavie Jansen. He was told that she had fallen in front of the entry doors because of slipping on gravel. There is a 12' spruce tree separating the drive-thru lane from the two entry doors, and they are planted in soil covered with gravel. It is very difficult to step under the tree onto the gravel because the spruce tree is pretty solid and has sharp needles.

[38] However, Mr. Reynolds also took various photographs that were contained in the Joint Exhibit Book, along with this statement. The pictures show the area in question and the front of Reynolds Pharmacy. There is no gravel under the spruce tree or anywhere in the planter bed.

[39] Mr. Reynolds was also adamant in his evidence that the branches of the spruce tree hung over the municipal sidewalk, preventing anyone from walking on the lip of the sidewalk and planter bed. Again, Mr. Reynolds' own photos do not support his evidence.

[40] Mr. Reynolds took one photo that he confirmed was his attempt to measure the dirt level of the planter bed. He was using a ruler but had a great deal of difficulty explaining the area where he took the photo. However, and perhaps more importantly, the photo clearly depicts a ruler stuck in a weed and standing beside the concrete edge of the sidewalk. It appears the ruler is showing that the height differential from the top of the concrete of the sidewalk and the top of the dirt level is approximately one inch. However, Mr. Reynolds repeatedly suggested the measurement depicted an eighth of an inch. He reiterated this frequently over the course of his evidence. In reviewing the photo closely, it is inaccurate to suggest the measurement shows an eighth of an inch as it appears to be a height differential of approximately one inch.

[41] I will note that Mr. Reynolds did agree that there was a drop from the sidewalk to the dirt in the planter bed and he believed that drop was level throughout the area of the planter bed, he simply continued to rely on his photo of the ruler to suggest the drop was only an eighth of an inch.

[42] Mr. Reynolds was also asked about the design of this planter bed and whether there was ever a wooden border around this planter bed, like the wooden borders that are around the other two flower beds. He indicated he had no recollection of there ever being a wooden border around the planter bed even when told that his ex-

wife, Janice Reynolds, testified on discovery that there were wooden boards around that planter bed until people broke them and they were removed and never replaced. I prefer the evidence of Janice Reynolds who provided detailed evidence on the fact that the original design had wooden boards around the two flower beds and the planter bed and that the boards were removed from the planter bed years later when teenagers who would congregate and stand on the boards, broke them down to the point that they needed to be removed.

[43] Mr. Reynolds was also specific in his evidence that he was the person primarily responsible for giving any direction on landscaping – both from a design and maintenance perspective. He further gave evidence that he gave no specific instruction to Cosby's Garden Centre, who were hired to tend to the flower beds and planter bed; however, he knew they were doing a good job, and he trusted them to do the work. He wanted the soil level of the planter bed to be lower than the sidewalk, but he did not specify anything further to Cosby's. He also could provide zero details on what Cosby's did or did not do with the planter bed. His evidence was he gave Cosby's "free reign" on anything to do with landscaping and the planter bed. He had no other people, including employees, inspecting or addressing the planter bed. And he introduced no evidence as to what, if anything, Cosby's did. There were no logs, no invoices, no work orders – either from Cosby's or from

Reynolds Pharmacy. He simply confirmed that Cosby's was in charge and he trusted them.

[44] Finally, Mr. Reynolds was asked about CCTV footage from the day of the fall. He confirmed he has CCTV cameras and he has no reason to believe they were not working in May of 2021, but he simply never reviewed the footage from any of the cameras to see if there was a video of the fall.

Evidentiary Issue – Subsequent Remedial Measures and Photographs

[45] The final issue that needs to be addressed in outlining the facts of this case are the various objections the Defendant made in relation to exhibits and commentary on evidence that post-dated the Plaintiff's fall. Specifically, the following was objected to based on relevance but admitted with a further assessment of reliability and weight to be undertaken:

1. A photograph taken by Troy Whynot who gave evidence to authenticate the photo and confirmed it was taken "within about a week" of the Plaintiff's fall. The area depicted is the planter bed.
2. Various photographs taken by an adjuster for the Defendant's insurer in November of 2021.

3. Various photographs taken on December 1, 2021.

4. Two photographs taken by the Defendant in approximately February of 2022.

[46] As noted above, I ruled these photographs to all be admissible given they showed the area of Ms. Crocker's fall. The photos that were taken prior to December 1, 2021, all showed a similar area and there did not appear to be any changes to the area in question. The photos from December 2021 and February 2022, showed changes to the planter bed.

[47] The Defendant could not recall why the changes were made or by whom specifically. He could recall very little about the changes, in fact.

[48] With respect to the photographs in issue, I am giving weight to the photo taken by Mr. Whynot within a week or so of Ms. Crocker's fall. I am giving it no more weight than the photos taken by Mr. Reynolds on the day of the fall and will simply note that the photo taken by Mr. Whynot looks virtually the same as the photo taken by Mr. Reynolds on May 23, 2021 – specifically the small stick is in the exact same location in the planter bed. I find the photo is a reliable depiction of the area of Ms. Crocker's fall.

[49] I am giving limited weight to the photos taken by Mr. Newsom in November of 2021. I find the lighting makes it difficult to see the planted bed in question and I find the measurements to not be fully reliable given how they were taken and the time lapse. However, I will give a limited amount of weight to the measurements as they note the height differential for the planter bed is in and around an inch, which is in keeping with the measurement taken by Mr. Reynolds on the day of the fall.

[50] Finally, I am giving some weight to the photos taken on December 1, 2021 and February 2022, specifically as they identify a change to the planter bed and the incorporation of crusher dust or gravel to the area where Ms. Crocker fell. Essentially, these photos depict remedial measures taken to the planter bed after Ms. Crocker's fall.

[51] In *Wolverine Motor Shipyard LLC v. Canadian Naval Memorial Trust*, 2011 NSSC 308, Justice McDougall addressed the current law as it relates to evidence on subsequent remedial measures. At paras 58-60 he stated:

> **Post-Juan Changes to Sackville's Lines.** The plaintiff says the evidence of a subsequent change in Sackville's mooring arrangements supports an inference that those in charge of Sackville agreed that the previous mooring arrangement was inadequate. The plaintiff points to Moir, J.'s comment in *Cheevers v. Halifax Regional Municipality*, 2005 NSSC 153, that evidence "of post-accident measures is now admitted generally to prove negligence and is not restricted to proof of what could have been done in response to foreseeable risk" (para. 63). In *Driscoll v. Crombie Developments Ltd*., 2006 NSSC 79, such evidence was admitted, although Wright, J. held that it "should not be treated as akin to an admission of negligence, nor should an inference of negligence be drawn from the mere fact that post-accident changes were made," but the evidence could go to show the

> steps that could have been taken before the accident to meet the requisite duty of care (paras. 20-21).
>
> The Trust submits that post-hurricane changes to the line arrangements are immaterial to the issue of negligence at the time of the hurricane. As defence counsel says, "once burned, twice shy." The relevant determination is whether the line arrangement was proper at the time of Juan. The defendant notes the following comments of Saunders, J. (as he then was) in dealing with an objection to post-incident evidence in *Horne v. Industrial Estates*, [1997] N.S.J. No. 243, 1997 CarswellNS 266 (S.C.), affirmed at 167 N.S.R. (2d) 363, 1998 CarswellNS 80. Saunders, J. said, at para. 37:
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> > ... Not surprisingly counsel objected to the introduction of such evidence as being irrelevant and inadmissible to the issue of negligence. The objection, as far as it goes, is well taken but it doesn't end the matter. Naturally, evidence of taking steps after a mishap to remedy the situation or improve the condition of the thing thought to have caused the injury, or given rise to the claim, may be objectionable. The reason is that it might encourage a belief, in some, that the injury was caused by the defendant's negligence. Such evidence (and the inferences to which I have referred) are declined for reasons of logic, proof and public policy. First, the assumption is false; injuries may well be caused by inevitable accident or the plaintiff's own contributory negligence. Further, to allow such evidence would discourage owners or occupiers of the things from ever improving the location or objects said to have caused the injury out of fear that the use to which evidence of such remedial acts might be put, would work to their disadvantage.
>
> As the Ontario Court of Appeal noted in *Sandhu (Litigation Gurdian of) v. Wellington Place Apartments,* 2008 ONCA 215, where such evidence is offered, the court must balance its probative value with its prejudicial effect.

[52] The photos show that crusher dust or gravel was added to the planter bed sometime in November 2021. This appears to create a more level area where the planter bed abuts the sidewalk and drive-thru area. As such, the photographs do have probative value.

[53] In terms of prejudicial effect, it is hard to truly ascertain that as Mr. Reynolds was vague and lacked recall when it came to these remedial steps that were taken. He could not explain why he took this step and whether he was advised in anyway

to do so. To a certain extent, what Mr. Reynolds was advised after Ms. Crocker's fall is irrelevant. But what is relevant is that a substance could have been added to level off the planter bed, leaving less of a height differential and so I admit this photographs and find them reliable in establishing that measures could have been easily taken to address the height differential in the planter bed. They are given weight only in relation to that express purpose.

Issues

[54] Having assessed the evidence, it is now for the Court to address the following issues:

1. Has the Plaintiff demonstrated a prima facie case of negligence under the *OLA* pursuant to the applicable standard of care?
2. If the answer to the above question is yes, has the Defendant demonstrated that it had a reasonable regime of inspection and maintenance sufficient to discharge its duty?
3. In the event there is a finding of liability against the Defendant, was the Plaintiff contributorily negligent and if so, to what extent?

Law and Analysis

[55] The *Occupiers Liability Act*, S.N.S. 1996 c. 27 ("*OLA*") outlines the duty of care owed by occupiers to users of their premises:

> 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
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> (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.

[56] In its Notice of Defence, the Defendant admitted it was the occupier of the property that contained Reynolds Pharmacy. As occupier, the Defendant owed Ms. Crocker a duty of care when she attended at Reynolds Pharmacy on May 23, 2021. That duty of care was to ensure customers, like Ms. Crocker, were "reasonably safe while on the premises."

[57] The caselaw is clear in that the duty under the *OLA* is not a standard of perfection, but one of reasonableness. LeBlanc, J. in *Miller v. Royal Bank*, 2008 NSSC 32 (N.S.S.C.) (affirmed at 2008 NSCA 118 (N.S.C.A.)), stated at para. 113:

> The duty of an occupier was considered in *Corbin v. Halifax (Regional Municipality)* (2003) (2003 NSSC 121 (CanLII), 214 N.S.R. (2d) 345 (S.C.), where Wright, J. stated, with respect to the duty set out in s. 4(1):
>
> > [32] In interpreting the identical provision found in the *Occupiers Liability Act* of Ontario in *Waldick et al. v. Malcolm et al.* (1989) 1991 CanLII 8347 (ON CA), 35 O.A.C. 389; 70 O.R. (2d) 717 (C.A.), Blair, J.A., described the essence of this statutory duty in the following passage (at para. 19):
> >
> > > A similarly worded statement of an occupier's duty occurs in all other Occupiers Liability Acts. All courts have agreed that the section imposes on occupiers an affirmative duty to make the premises reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm. The section assimilates occupiers' liability with the modern law of negligence. The duty is not absolute and occupiers are not insurers liable for any damages suffered by persons entering their premises. Their responsibility is only to take "such care as in all the circumstances of the case is reasonable". The trier of fact in every case must determine what standard of care is reasonable and whether it has been met.
> >
> > [Emphasis added]

[58] The Nova Scotia Court of Appeal in *Theriault v. Avery's Farm Markets Limited*, (2022) NSCA 36, further outlined the duty of care owed by occupiers and noted the applicable principles for *OLA* cases as follows:

> 62 The legal principles applicable to a claim under the OLA are not controversial. At trial, both parties relied upon this Court's decision in *Miller* [*Miller v. Royal Bank*, 2008 NSCA 118]. They do so again on appeal.
>
> There, this Court upheld the lower court's articulation and application of the legal principles of occupiers' liability drawn from a number of case authorities, including those set out by the Newfoundland Court of Appeal in *Gallant v. Roman Catholic Episcopal Corporation*, (2001) NFCA 22:
>
> - There is a positive obligation upon occupiers to ensure that those who come onto their properties are reasonably safe;

- The onus is on the plaintiff to prove on a balance of probabilities that the defendant failed to meet the standard of reasonable care;
- The fact of an injury in and of itself does not create a presumption of negligence. The plaintiff must point to some act or failure to act on the part of the defendant that resulted in their injury;
- If a plaintiff is able to demonstrate a prima facie case of negligence, the occupier can discharge its evidential burden by showing it has a regular regime of inspection, maintenance and monitoring sufficient to achieve a reasonable balance between what is practical in the circumstances and what is commensurate with reasonably perceived potential risk to those lawfully on the property; and
- An occupier is not a guarantor or insurer of the safety of the persons coming on its premises.

Additionally, I would note:

- In assessing whether an occupier has taken reasonable care in the circumstances to make the premises safe, the factors to be considered by the trial judge will be specific to the particular fact situation (*Waldick v. Malcolm*, 1991 CanLII 71 (SCC), [1991] 2 S.C.R. 456 at para. 33); and
- Demonstrating the existence of an act or omission by an occupier does not give rise to an automatic finding of negligence. Whether an action or omission constitutes negligence giving rise to a statutory breach will depend on all the circumstances (*Miller*, at para. 9).

Issue One – Has the Plaintiff demonstrated a *prima facie* case of negligence

[59] It is for the Plaintiff, on a balance of probabilities, to prove that the Defendant breached the applicable standard of care. In assessing the standard of care, the *OLA* requires the Court to answer the following:

1. Occupier's knowledge of persons being on the premises (s.4(3)(a))

In this case, the Defendant ran a commercial business and knew Reynolds Pharmacy and the front entrance would be used by staff and customers.

2. Circumstances of the entry into the premises (s.4(3)(b))

Ms. Crocker attended at Reynolds Pharmacy frequently. She knew the front entryway well and indicated she was aware of the planter bed, specifically the rock and the tree. She had not previously noticed the dirt or dirt levels in the planter bed.

3. The age of the people entering the premises (s.4(3)(c))

Mr. Reynolds gave evidence that the clientele of Reynolds Pharmacy included various older customers and customers with mobility issues.

4. The ability of the person entering the premises to appreciate the danger (s.4(3)(d))

Ms. Crocker indicated she had saw the planter bed on many occasions and knew that it was in front of Reynolds Pharmacy and when you rounded the corner from the Drive-Thru area. She knew the planter bed was there on May 23, 2021, but failed to fully appreciate the end of the sidewalk and the start of the planter bed. In looking down, the edge of

the sidewalk is clearly visible. What may not be fully known is the height differential between the edge of the sidewalk and the bottom of the planter bed.

5. **The effort made by the occupier to give warning of the danger concerned or to discourage persons from incurring the risk (s.4(3)(e))**

   Mr. Reynolds says the spruce tree and rock were placed in the planter bed to prevent people from walking through that area. However, there was nothing placed or painted to warn customers of the edge or lip of the planter bed and the drop off from the sidewalk.

6. **Whether the risk is one which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection (s.4(3)(f))**

   This is the most important question this Court has to answer. Was the Defendant required to protect its customers from the edge of the planter bed? Originally, the Defendant did offer that protection in the form of a wooden border that went all around the planter bed. However, the wooden border was ripped up and nothing was put down to replace it.

> Instead, an unmarked height differential was left to exist between the edge of the sidewalk and the planter bed. Given the type of clientele attending at the pharmacy (i.e. older customers with mobility issues) some protection should have been offered.

[60] Ms. Crocker fell because when she stepped down with her right foot, she caught the edge of the sidewalk and her foot rolled down and over because of the height differential with the planter bed. She described her right foot rolling and her husband gave detailed evidence of her foot being partly on the sidewalk but partly in the air. This is what caused her right foot to roll and her to fall.

[61] The risk was a foreseeable one. Uneven walkways and height differentials can be hazardous. Here the dirt level in the planter bed was enough to create an unsafe condition. It was reasonably foreseeable that this unsafe condition could cause harm to a customer and in the case of Ms. Crocker, this unsafe condition did cause her to fall. As such, the Plaintiff has made out a prima facie case of negligence under the *OLA*.

[62] I will address the Defendant's position that it was not foreseeable this condition could cause harm because it was not foreseeable that individuals would take a short cut and walk in the planter bed. A lot was argued about Ms. Crocker

stepping in the planter bed. It appears the argument was partly founded on the idea that Ms. Crocker purposely chose to take a short cut through the planter bed.

[63] I find as a fact that Ms. Crocker, at no time, attempted to step into the planter bed. She was attempting to walk on the sidewalk and had no intention of stepping into the planter bed. Instead, her right foot rolled into the planter bed when she failed to appreciate the end of the sidewalk and stepped on the edge of the sidewalk and rolled her foot into the planter bed. As such, this case is fully distinguishable from many of the cases cited by the Defendant that relate to a Plaintiff making an active choice to take a short cut off of a well-established path of travel.

Issue Two - Has the Defendant demonstrated a reasonable regime of inspection and maintenance sufficient to discharge their duty?

[64] A prima facie negligence finding then shifts the analysis to the Defendant and its conduct. In this case, the Defendant led no evidence. Mark Reynolds and Janice Reynolds did testify but the most that can be taken from their evidence is that the steps taken by the Defendant to ensure the premises, and specifically that this planter bed, caused no hazards to its customers, were to hire Cosby's Garden Centre to take care of the landscaping needs of Reynolds Pharmacy. Unfortunately, it seems that no specific instructions were given to Cosby's in relation to the planter bed and no evidence was submitted to show that Cosby's did anything at all with the planter

bed. There is certainly no evidence that the planter bed was raked, topped up with mulch or planting material, or assessed or inspected at any point.

[65] I cannot find the Defendant took reasonable care in the circumstances as there is no evidence that the Defendant, or anyone on their behalf, ever looked at this planter bed, inspected it or tended to it in anyway in the months leading up to Ms. Crocker's fall on May 23, 2021. As such, the Defendant has not shown that it had a reasonable regime of inspection and maintenance and it has not discharged its duty.

[66] The Defendant is liable for Ms. Crocker's fall.

Issue Three – Contributory Negligence

[67] The final issue for this Court to deal with is the question of whether Ms. Crocker was contributorily negligent.

[68] The Plaintiff relies on the *Snitzer v. Becker Milk Co. Ltd*, 1976 CanLII 584, wherein a plaintiff tripped on uneven sidewalk slabs. In that case, the Court found:

> 36 … The plaintiff was entitled to expect that the sidewalk was in good condition from which he could assume that adjoining slabs of concrete were reasonably level. Pedestrians are not expected nor required to walk with their eyes focused downward immediately in front of their feet to make certain that the slabs of the sidewalk are reasonably level – particularly a sidewalk in front of a row of adjoining stores in a shopping plaza. There was no evidence that the plaintiff was negligent.

[69] I agree that pedestrians are not expected or required to walk with their eyes focused downward. But in the present case, Ms. Crocker was walking into a business

that she frequented regularly. She was well aware of the entrance to Reynolds Pharmacy and she was aware of the planter bed immediately adjacent to the entrance way. In this instance, it requires further analysis to determine if a reasonable person would have at least glanced down to ensure she was far enough away from the planter bed and its edge.

[70] In *Etson v. Loblaw Companies Limited*, 2010 BCSC 1865, the Court articulated an individual's need to take care of their own safety as follows:

> 43 In addition to the defendant's failure to remove the loose board and stack the detergent buckets in a more uniform fashion, this accident could have been avoided if Ms. Etson had paid more attention to where she was walking. Although she is not required to focus her attention at all times to the floor, she is required to be aware of her surroundings: see *Mynott* at para. 14 and *Castillo* at paras. 47, 50. Ms. Etson said that she was looking at the floor about three feet ahead. Had she looked down at her feet, even momentarily, before she began to turn the corner, she would have seen that she was too close to the corner of the pallet. Accordingly, I find that she did not take reasonable care for her own safety.

[71] In this case, Ms. Crocker was required to be aware of her surroundings. She testified that she was aware of the planter bed but was not looking down when she rounded the corner and approached the planter bed. Instead, she was looking up, because that area can be busy with cars and pedestrians and there was more than just the planter bed that Ms. Crocker had to be mindful of.

[72] I conclude, based on the circumstances and the evidence presented, that Ms. Crocker should have looked down as she rounded the corner to ensure she was

stepping fully on the sidewalk as opposed to onto the edge or lip. Ms. Crocker knew the area, knew of the planter bed, and had a positive obligation to take steps to guard for her own safety. Therefore, I am satisfied that Ms. Crocker failed to take reasonable care for her own safety when she did not look down, even once, as she rounded the corner around the planter bed.

[73] As noted in many other cases, assessing the degree of contribution is a difficult task. However, the Plaintiff has pointed me to the case of *Voisin v. County of Oxford*, 2022 ONSC 4912. In that case, the Plaintiff tripped on a "lip" that had a height differential from the main road because of ongoing construction work. The court reviewed other cases and concluded as follows:

> 85 While it was a combination of the negligence of the defendants and the plaintiff that caused the accident, I am of the view that the defendants must bear the larger share of liability, since this was a hazard that they intentionally created. However, for reasons already given, the plaintiff herself bears significant responsibility for what happened. Given that she was crossing a known construction zone at night in poor lighting conditions, she should have been keeping a close eye on where she was going.
>
> 86 I assess her contributory negligence at 35%.

[74] Here Ms. Crocker was walking in daylight in an area she had traversed many times. She had not been given a warning of the hazard or potential for hazard, as was the case in *Voisin*. As such, I find Ms. Crocker's contributory negligence is less than Ms. Voisin and assess Ms. Crocker as being 25% contributorily negligent.

Conclusion

[75] Reynolds Pharmacy has a planter bed located adjacent to its entrance. At one time, the planter bed had a wooden border around it, but when that wooden border was damaged from wear and tear, it was never replaced. That left an unmarked lip between the edge of the sidewalk and the planter bed. It also resulted in a drop off of about an inch. Given the clientele of Reynolds Pharmacy are sometimes elderly individuals with mobility needs, this unmarked lip created a hazard.

[76] Although the Defendant representatives gave evidence that they had hired a landscaping company to tend to the planter bed there was no evidence before the Court as to what, if anything, this company had done to inspect the planter bed or maintain the planter bed in the months leading up to the Plaintiff's fall.

[77] On May 23, 2021, the Plaintiff was proceeding into Reynolds Pharmacy when her right foot caught the lip of the sidewalk/planter bed. This caused her right foot to roll down into the planter bed and caused the Plaintiff to fall and break her hip. As such, the Defendant is liable for the Plaintiff's injuries.

[78] However, there is evidence that that Plaintiff was aware of the existence of the planter bed, but not the possible height differential between the sidewalk and the dirt level in the planter bed. However, had the Plaintiff looked down, even once as

she turned the corner into Reynolds Pharmacy, she would have better appreciated the location of this lip. Therefore, I do find the Plaintiff 25% contributorily negligent for failing to properly look out for her safety while walking into Reynolds Pharmacy on May 23, 2021.

[79] I find the Defendant 75% liable for Ms. Crocker's injuries.

Costs

[80] If the parties cannot agree on costs, I will receive costs submissions (maximum of 10 pages) within 30 days of the release of this decision.

Kelly, J.