IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Corbin v. Halifax Regional Municipality- 2003 NSSC121

Date: 20030606
Docket: S.H. No. 142791
Registry: Halifax

Between:

Donna Lynn Corbin

-and-

Halifax Regional Municipality

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: April 1-3, 2003 in Halifax, Nova Scotia

Written Decision: June 6, 2003

Counsel: Plaintiff's Counsel - Peter Landry and Jessica Lyle

Defendant's Counsel - Murray Ritch, Q.C. and Kelly MacKay

By the Court:
Wright J.

INTRODUCTION:

[1] This is a negligence action in the nature of occupiers' liability in which the plaintiff Donna Lynn Corbin seeks damages for injuries she sustained in a slip and fall accident at the Sackville Sports Stadium on February 2, 1997.

[2] The Sackville Sports Stadium is a community facility offering a variety of health and fitness activities which include two swimming pools, a fitness centre and change rooms. The complex opened in 1990 and the defendant Halifax Regional Municipality acknowledges itself to be the occupier of those premises under the statutory definition of that term in the *Occupiers' Liability Act*, S.N.S. 1996, c. 27.

SUMMARY OF THE FACTS:

[3] The plaintiff's use of the Sports Stadium facilities appears to date back to August of 1996, approximately six months prior to the accident. Over that time span, the plaintiff acknowledges having purchased a series of punch card passes (valid for 10-14 visits per card) which could be used for both aerobics and aquafit classes. The plaintiff used these passes mostly for the aquafit classes offered and was usually accompanied by her sister, Mary Kelly, who likewise enrolled in them.

[4] Before relating the details of the accident itself, it is important to describe the area in which it occurred. The area is generally known as the ladies change room. Within the overall perimeter of the change room, there are adjoining sub-areas for locker rooms, toilet stalls, and a lavatory respectively. The lavatory, where the slip and fall occurred, consists firstly of a row of shower stalls next to the entrance to the

pool. Directly across from the shower stalls is a plain wall, on the other side of which is a row of counter sinks beneath large mirrors. Directly across from the sinks and mirrors, on the far wall, there are five hair dryers mounted in a row. On the other side of the latter wall are the toilet stalls alongside the entrance to the locker area.

[5] The flooring throughout the lavatory area consists of grouted ceramic tiles which appear from the photographic evidence to be approximately 8-10 inches square in dimension. The evidence also establishes that there are five floor drains in all within the overall perimeter of the ladies change room, three of which are located on the floor in the lavatory. Of these, one is located near the entrance to the lavatory area, one is located directly in front of the row of shower stalls, and the third (and the one with which we are directly concerned in this case) is located in front of the row of sinks opposite the wall upon which the hair dryers are mounted. A schematic diagram of the lavatory area, including the subject drain, was entered in evidence as an attachment to the plaintiff's expert report, of which more will be said later. It should be added that no intervening changes have ever taken place in the configuration or construction of the lavatory area, nor in respect of the floor tiles or drains, since the sports stadium was built.

[6] It was in this scenario that the plaintiff and her sister attended an aquafit class in the swimming pool of the Sackville Sports Stadium on the Sunday evening of February 2, 1997. The plaintiff's usual after class routine was to go from the pool first to the locker area to get dry towels and some soap and shampoo. She would then routinely proceed to one of the shower stalls where she would shower, shampoo her hair and wring out her t-shirt. From the shower stall she would routinely return to the

locker area to put her wet things away before returning to the lavatory to use a hair dryer. At that point, she routinely still wore her bathing suit, a dry towel and a pair of sneakers of a style that had been recommended by her class instructor to be worn during the aquafit classes for better stability in the pool.

[7] One of these sneakers was entered in evidence as an exhibit. It can be described as a lightweight low cut sneaker with white canvas uppers and laces spanning four eyelets. The sole consists of a flat but pebbled rubber-like material which is only slightly worn. The plaintiff identified this sneaker as one of those she was wearing at the time of the accident.

[8] There is nothing in the evidence to suggest that the plaintiff in any way departed from following her usual routine on the evening that the accident took place. I am therefore satisfied that immediately prior to the occurrence of the accident, the plaintiff had showered and shampooed her hair while wearing her bathing suit and sneakers, before stowing some of her wet articles in a locker and returning to the lavatory area to use a hair dryer.

[9] Although there were an estimated dozen or more members attending the aquafit class that evening, the plaintiff and her sister were the only ones present in the area between the sinks and the hair dryers when the incident occurred. The plaintiff was still then wearing her wet bathing suit and wet sneakers along with a dry towel while she dried her hair. What happened next was that she took one or two steps towards the sinks and mirrors on the opposite wall when her feet suddenly went out from under her, causing her to fall backwards and strike her head on the concrete block wall

upon which the hair dryers were mounted. She ended up lying flat on her back on the floor in a dazed state with her feet pointing towards the sinks and mirrors.

[10] The plaintiff's sister immediately came to her aid and helped her to the nearest bench where someone brought her an ice pack. Knowing that she was hurt, however, she asked her sister to help her get dressed and to take her to the Cobequid Multi-Service Centre to be medically examined. The x-rays taken were negative but the plaintiff did sustain a cervical soft tissue injury which has been described by her family physician to be of at least moderate severity with symptomology, including related headaches, that persist to this day.

[11] In her evidence at trial, the plaintiff attributed her fall to what she described as an excessive amount of dirty water that had collected around the floor drain located between the hair dryer wall and the row of sinks and mirrors. By "excessive", the plaintiff explained that she was referring to a huge puddle of water around a floor drain that was perhaps 3-4 feet wide. Once she found herself lying on the floor, she says that she observed the presence of dirt and hair in the water which soaked her towel and which she described as being slimy.

[12] In cross-examination, the plaintiff acknowledged that she was used to seeing water on the floor in the area where she fell, having used the facility many times before, but said that she did not remember seeing such an excessive amount of water present. She acknowledged that prior to the accident, she had never encountered any problems walking on the floor area where she fell, nor had she ever observed the floor area to be in a dirty condition on any prior occasion.

[13] The plaintiff further testified on cross-examination that at the time of the accident, you could actually see the water present on the floor in the area where she fell but that where she was talking to her sister while drying her hair by looking at the mirrors on the opposite wall, she saw it only peripherally and did not observe the amount of water puddled on the floor or its condition. She testified that she did not realize that there was an excessive amount of dirty water on the floor around the drain until she was actually lying in it. She could not say what amount of water was present on the floor in terms of depth.

[14] The plaintiff's sister, Mary Kelly, similarly testified that she had seen the presence of water on the floor in the area of the mishap on previous occasions but not in the amount that was there on the night of the accident. While standing under an adjacent hair dryer alongside the plaintiff, Ms. Kelly noticed what she described as a big puddle of water on the floor around the drain. She did not specifically remember walking through it on the way to the hair dryer but said that she probably did and that it had not caused her any trouble. Ms. Kelly, incidentally, was wearing exactly the same type of footwear as the plaintiff at the time.

[15] Ms. Kelly was not actually looking at her sister when the latter first stepped away from the hair dryer but did see, out of the corner of her eye, her sister's feet come out from under her, causing her to fall backwards hitting her head against the concrete wall. Her description of the incident is very similar to that of the plaintiff, with both witnesses placing emphasis on the greater amount of water which was present around the floor drain compared with the amount of water which they usually expected to see there from their prior visits.

[16] To be weighed against that evidence is the testimony of Christina Merry, called on behalf of the defendant, who has been employed at the Sackville Sports Stadium since it opened in 1990. She is now, and was at the time of the accident, the Aquatic Manager. It was in that capacity, and in the normal course of her duties, that she reviewed a Minor Accident Report Form the morning after the accident occurred which had been prepared by a staff member. The report form simply noted that Donna Corbin had fallen in the ladies change room and bumped her head and back, that ice had been applied and that she was told to go to the Cobequid Multi-Service Centre.

[17] After reviewing this report, Ms. Merry called the plaintiff later that day as a result of which she handwrote the following comment on the bottom of the report:

> Follow- up: I called Donna today to see how she was. She went to Cobequid, had an x-ray. They indicated that she had a mild case of whiplash + a slight concussion. I asked her what happened and she said that when she stepped away from the hairdryer she slipped for no apparent reason. She was wearing sneakers and she said the floor was wet, but no more than usual.

[18] Ms. Merry testified that in so writing down the response of the plaintiff, she was attempting to record verbatim the words used by the plaintiff in that telephone conversation. When the plaintiff was earlier cross-examined on this evidence, her reply was that she didn't believe she told Ms. Merry that, because she felt that there had been more water present on the floor than usual in the area where she fell.

[19] The presence of water on a lavatory floor is inevitable, especially considering the high number of users of the facilities on a regular basis. Accordingly, the Sackville Sports Stadium had in place a cleaning and maintenance program

encompassing this area which was in existence at the time of the accident. Evidence in this respect was given by Betty Lou Killen who is the Executive Director of the Sackville Sports Stadium pursuant to a management agreement between her employer, Lake District Recreation Association, and the defendant Halifax Regional Municipality. Ms. Killen has held that position since July of 1996 and as such, she oversees all management staff. Prior to that, she held the position of Leisure Program Manager by virtue of which she oversaw the aquatic program.

[20] Ms. Killen first explained that back in the 1997 time frame when this accident occurred, there were approximately 11,000 users per week of the Sackville Sports Stadium facilities. Of these, approximately 6,000 persons per week used the aquatic centre of which the gender breakdown was pretty much equal between male and female. Arithmetically, that means that approximately 3,000 aquatic centre users per week frequented the ladies change room although Ms. Killen pointed out that these statistics do not take into account the additional users of the ladies change room by those enrolled in fitness centre and/or group exercise programs.

[21] Ms. Killen went on to say that where the Sackville Sports Stadium is a health and fitness centre, the people who use it have a high expectation of cleanliness. As Executive Director, she therefore considers it important to ensure that the Sackville Sports Stadium facilities are cleaned and maintained as much as possible so that people will feel comfortable in going there. She herself carries out a weekly inspection of the entire building in the company of the Operations Manager to address any areas of concern.

[22] Ms. Killen then went on to explain the maintenance and cleaning program in effect at the Sackville Sports Stadium at the time of the accident in February of 1997. She testified that the maintenance and cleaning program came under the direct responsibility of Mr. Noiles, the Operations Manager. Reporting to him were 12 staff cleaners who were required to follow the program in place for both the day shift and the back shift (9:00 p.m. - 6:00 a.m.). It was during the back shift that the heavier cleaning work was carried out such as cleaning the shower areas with disinfectant sprayers. During the day, the cleaners were provided with a user program schedule which they were expected to work around as much as possible. More specifically, the cleaners were instructed to try to clean the change room areas between user groups attending various fitness programs. Ms. Killen testified that the cleaners probably monitored the change room areas three times a day at a minimum to see that they were clean. She said that she routinely saw the cleaners in there with squeegees, making sure the floors were clean and garbage picked up. She also pointed out that because of the ladies change room cleaning requirements, the Sackville Sports Stadium always had a woman on their cleaning staff.

[23] Also introduced through the evidence of Ms. Killen was a sample form of the Sackville Sports Stadium Daily Work Log in respect of the cleaning operations. Under the various work areas identified, which include the showers and drying area of the ladies locker room, there are block spaces to be checked off for floors, walls, chrome, stalls and drains. The same block spaces appear on each Daily Work Log sheet for both the day shift and the back shift.

[24] Ms. Killen verified that this Daily Work Log form was in use when she became

Executive Director in July of 1996 and has remained unchanged since. Unfortunately, however, the Daily Log pertaining to the date of the accident, i.e., February 2, 1997, is no longer available. These logs were treated as working documents and were not considered a record keeping item. Accordingly, the Operations Manager, to whom the logs were provided, disposed of them periodically.

[25] Neither was there entered in evidence any written cleaning policies which Ms. Killen believed to have been in place back in 1997. She indicated that she hadn't looked for them because she was not aware they might be necessary, nor was she aware if they still existed since the Sackville Sports Stadium has been contracting out its cleaning and maintenance service requirements since 2000. No further evidence was forthcoming on the cleaning and maintenance programs and policies in effect in 1997 where the Operations Manager, Mr. Noiles, was not available to testify, having been said by Ms. Killen to be otherwise detained in Cuba at the time of the trial.

[26] Ms. Killen also testified that dating back to the time of the accident, the cleaners' carts were also equipped with pylons indicating wet floors. She said these were used by the cleaners during the actual cleaning of the change room floors but that they were not left there permanently because the floor in the change room area is always wet in spots. She added that the cleaners are the ones whose responsibility it was (at the time of accident) to systematically check the premises daily for hazards. She also clarified that on a Sunday (dating back to the 1997 time frame), there was normally one cleaner on duty for the entire day shift from 9:00 a.m. to 9:00 p.m. and a second one added working from 5:00 p.m. to 9:00 p.m. She stated, as indicated on the Daily Work Log, that their responsibilities included the daily cleaning of the floor drains in the lavatory areas.

[27] In concluding her direct evidence, Ms. Killen attested to the fact that there have been no other reported accidents ever having occurred in the lavatory area of the ladies change room, either before or after the plaintiff's fall (any incidence of which she would know from her duties and responsibilities). Ms. Merry likewise testified that she is not aware of any other such incidents.

[28] Based on all the evidence I have heard, I am satisfied that it was the presence of water on the lavatory floor that caused the plaintiff to slip and fall, as a result of which she suffered a personal injury of the nature described.

ISSUES:

[29] The issues now to be decided in this proceeding may be stated as follows:

(1) Was the defendant negligent by failing to take reasonable care to see that persons such as the plaintiff using the facility would be reasonably safe while on the premises?

(2) If so, to what damages is the plaintiff entitled for the injuries and losses she sustained?

[30] The submission of counsel for the plaintiff is that the defendant breached the duty of care it owed to the plaintiff to see that she would be reasonably safe while using its facilities in three primary respects:

(1) It is alleged that the floor tiles installed in the lavatory area when the Sackville Sports Stadium was built were lacking in slip resistant qualities and hence became slippery when wet to an unsafe degree;

(2) It is alleged that the defendant failed to monitor and maintain an adequate system for the draining or removal of water which collected on the floor of the lavatory area;

(3) It is alleged that the defendant failed to place signs or pylons in the lavatory area

to warn users of the facility of the slipperiness of the floor when wet.

LEGAL ANALYSIS AND FINDINGS:

[31] The law of occupiers' liability is now embodied in the *Occupiers' Liability Act*, a statute enacted in this province in 1996. The statutory duty of an occupier is set out in s. 4(1) which reads as follows:

> 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.

[32] In interpreting the identical provision found in the *Occupiers' Liability Act* of Ontario in *Waldick v. Malcolm* (1989) 70 O.R. (2d) 717 (Ont. 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. Occupiers are also not liable in cases where the risk of injury is "willingly assumed" by persons entering the premises or to the extent that such persons are negligent...

[33] This interpretation of the statutory duty requiring an occupier to take such care as is reasonable in the circumstances of the case was affirmed by the Supreme Court of Canada on the further appeal of that case. In a decision reported at [1991] 2 S.C.R. 456, Justice Iacobucci affirmed (at para. 45) that "(t)he goals of the Act are to promote, and indeed, require where circumstances warrant, positive action on the part of occupiers to make their premises reasonably safe". He further described the

statutory duty on occupiers as follows (at para. 33):

> ...After all, the statutory duty on occupiers is framed quite generally, as indeed it must be. That duty is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation–thus the proviso "such care as in all circumstances of the case is reasonable"...

[34] Bearing these principles in mind, I now turn to the three specific allegations of negligence made by the plaintiff as outlined in paragraph 30 of this decision.

Unsafe Floor Tiles:

[35] In support of the allegation that the floor tiles installed in the lavatory area were unsafe to walk on when wet, the plaintiff's counsel relied upon the expert report and opinion evidence of Clifford Tyner, who has practiced in the field of forensic engineering since 1974. Mr. Tyner's principal area of expertise and experience, oft recognized by this court, is in traffic accident reconstruction although he has also been involved in a few cases of fire investigation, industrial accidents and slip and fall accidents. Although this is the first occasion on which he has been asked to testify in court in respect of a slip and fall accident, counsel agreed, and it was accepted by the court, that Mr. Tyner be qualified to give expert opinion evidence on "friction co-efficiency between various materials and its measurement".

[36] Mr. Tyner was first retained on behalf of the plaintiff on May 15, 1997 and was asked to conduct friction tests on the lavatory floor of the Sackville Sports Stadium in the vicinity of the plaintiff's fall. He attended the Sackville Sports Stadium on June 23, 1997 for that purpose, following which he prepared an expert report dated November 28, 1997 which was entered as an exhibit. The report states the method

and results of the friction measurements made and goes on to compare those results with various institutional standards for floor slipperiness as well as to examine alternative floor types.

[37] In conducting this field test, Mr. Tyner measured the dynamic (sliding) friction for both wet and dry conditions in the area where the slip and fall occurred, using one of the sneakers provided to him by the plaintiff. The methodology (known as a drag sled) was as follows:

> 1. The gym shoe was weighed.
> 2. The gym shoe was then loaded with 3050.3 grams (6.71 pounds) of lead.
> 3. Using a calibrated spring scale attached to the lowest or front loop of the lacing of the shoe, the loaded shoe was dragged horizontally across the floor surface while noting the force necessary to keep the shoe moving at a constant speed.
> 4. This measurement was done once for the dry floor and four times over the wetted floor.

[38] What this experiment is designed to do is to measure what is known as the co-efficiency of friction between two surfaces which essentially is the ratio of the horizontal force to the vertical force. Using a known vertical force (i.e., weight) the drag sled methodology determines the horizontal force that produces the ratio where a slip occurs. In other words, in terms of human locomotion, it is the point where a shoe slips on the surface being walked upon. By using this methodology, Mr. Tyner concluded that the dry surface friction test value for the lavatory floor was 0.62 and that its wet surface friction test value was 0.18 - 0.25. This value was one which Mr. Tyner considered to be consistent with a type of tile which would be classified as glazed-non antislip.

[39] To put these results in context, Mr. Tyner then drew a comparison with

standards for flooring prepared by the American Society for Testing and Materials (ASTM), the British Standards Institute (BSI) and the International Standards Organization (ISO). These standards are by no means uniform, ranging from a BSI standard of 0.4 to an ISO standard of 0.4 - 0.75 to meet minimum to satisfactory levels. The ASTM standard for a safe walking surface was 0.5. In comparison, a sliding friction factor of 0.18 - 0.25 was considered to be rated as anything from "poor to unsafe" to "hazardous" to "marginal to dangerous", depending on the literature of the institute.

[40] The ultimate conclusion reached by Mr. Tyner as a result of this testing and comparison of results was that the tile used on the lavatory floor in the ladies change room has a very poor slip resistance when wet and was a poor and unsafe choice for this location. Mr. Tyner went on to express the opinion that there are, and were at the time the facility was built, a number of far better and safer choices of lavatory floor tiles available, the best of which carries a classification of unglazed-antislip tiles with surface relief. In reaching the latter conclusion, Mr. Tyner relied entirely on an article published in 1992 following a study in Italy on the various types of ceramic flooring available and their respective antislip qualities.

[41] It is on the basis of the foregoing friction test data and its comparison with the literature researched by Mr. Tyner, and the conclusions he draws, that the plaintiff submits that the defendant has breached its affirmative duty of care as an occupier by having unsafe floor tiles in the lavatory area because of their lack of slip resistant qualities when wet. With all due respect to the efforts of Mr. Tyner, I am not

persuaded that the scientific evidence presented has sufficient reliability that such a legal conclusion can be safely reached. There were a number of limitations on this evidence which I will outline as follows:

(a) Mr. Tyner was unable to utilize the same standard testing protocol as he assumes was used by the three named institutes to determine floor friction co-efficients, namely, a so-called James machine. A James machine is an apparatus used in laboratory testing and measures only the static co-efficiency of friction. It does not measure dynamic (sliding) friction and is not intended for use on wet surfaces. Given what he had to work with, Mr. Tyner was only able to conduct a drag sled field test measuring the dynamic (sliding) friction between the plaintiff's shoe and the lavatory floor tile. Although he stated his belief that the comparisons made between the two methodologies were valid, he acknowledged that he did not know the test results that would have been produced had the laboratory testing methodology been used. Mr. Tyner further acknowledged on cross-examination, when asked about the ASTM sliding friction factor of 0.5 as an acceptable standard, that there is ongoing controversy amongst experts about this standard rating and that it is very much in debate. He further acknowledged that there is no CSA standard for co-efficiency of friction for flooring surfaces available in Canada. All of this leaves me with some skepticism about the reliability of the comparisons made, a skepticism that is only heightened by the analysis made by Justice Saunders in *Young v. Hubbards Food Service Limited* [1995] N.S.J. No. 423 where he dealt with similar scientific testing evidence measuring the co-efficient of friction pertaining to a dance floor. Although that case involved different factual circumstances, on the basis of which Justice Saunders ultimately concluded that it would be unsafe to find that the floor played any

part in the plaintiff's injury, the case does illustrate the problems in relying on such evidence to support a finding of negligence.

(b) In conducting his field test aforesaid, Mr. Tyner did not wet the canvas uppers of the gym sneaker. Only the sole of the shoe became wet when dragged over the wet floor. In contrast, at the time of her fall, the plaintiff's sneakers were soaking wet where she had just come from the shower where she used soap and shampoo. Mr. Tyner acknowledged that a soaking wet sneaker could dispel additional water from a walking motion and that if it contained soap or shampoo, there would be added slipperiness to the floor. This is another variable to be considered beyond the pure scientific testing undertaken in the reconstruction of this accident.

(c) In conducting his field test at the Sackville Sports Stadium, Mr. Tyner first wet the floor with a bucket of water which puddled around the drain to a depth of about 1/16 of an inch of standing water before it slowly drained. How that water depth compares with the amount of water that was present around the floor drain at the time of the accident or whether the depth of the water makes a difference in the degree of slipperiness of the floor is unknown. Mr. Tyner did consider, however, that a big factor in the floor condition is the sudden change from walking on a dry area to a wet area, a condition commonly found on the lavatory floor of a widely used sports facility.

(d) Mr. Tyner also acknowledged that the walking movement of the human body from heel to toe is also a factor in the sliding friction between two surfaces. He does not hold himself out to have any expertise or training in the field of kinesthesiology (i.e.,

the science of human motion or biomechanics), but stated that a person is more likely to slip on a wet surface with a longer stride or gait. He acknowledged that the vertical pressure therefore varies during the walking motion. What the effect of that variable was here on the co-efficiency of friction is unknown. All we know from the plaintiff's evidence in the present case is that she took one or two steps on the lavatory floor away from the hair dryer when her feet suddenly went out from under her, causing her to fall. Similarly as in *Young*, this variable combined with others casts doubt on the reliability of the scientific evidence presented to support a finding of negligence.

[42] Beyond the foregoing opinion evidence, Mr. Tyner acknowledged that he was asked by plaintiff's counsel to do some research into alternative flooring materials available with different slip resistant qualities. Mr. Tyner did so whereby he added section 3.3 to his expert report expressing the opinion that at the time the facility was built, other safer flooring materials were available that could have been used in this area. These included unglazed non-slip tiles, glazed antislip tiles, unglazed antislip tiles with rough texture, or unglazed antislip tiles with surface relief. Relying entirely on an article written in 1992 following a study conducted in Italy, Mr. Tyner concluded that the lavatory floor tiles used here, which likely are classified as glazed non-antislip, were a bad and unsafe choice for this location and that there were a number of far better and safer choices available at the time.

[43] Apart from the fact that this opinion is based entirely on the article aforesaid, in my view it falls outside the specific area of expertise for which Mr. Tyner was accepted as being qualified to give expert evidence. Indeed, during the qualifications

inquiry, he said only that he was “fairly up to date” on the subject of flooring materials. I accordingly disregard this specific aspect of his expert report where it reaches outside the field of “friction co-efficiency between various materials and its measurement” earlier referred to.

[44] In any event, one cannot lose sight of the reality that during approximately 13 years of operation, which translates into well over a million users of the aquatic centre alone by females, and hence a similar volume of use of the ladies change room, there have been no other reported slip and fall accidents in the lavatory area. Given that track record, and the limitations of the expert opinion evidence above identified that cast doubt on the validity of the results expressed, I am unable to conclude that the lavatory floor tiles are unsafe for ordinary use such as to constitute negligence on the part of the defendant. I might add that even if the lavatory floor tiles did have a slip co-efficient that was less than the institutional standards referred to by Mr. Tyner, there is no evidence that the defendant should reasonably have been aware of that, in light of its then seven year accident free track record.

Adequacy of Cleaning and Maintenance System:

[45] In order for the plaintiff to succeed on this ground of negligence relied upon, the court must necessarily find:

(a) that there was an excessive buildup of water around the subject drain over and above that usually found which created a heightened danger of falling;

(b) that it was the excessive amount of water over and above that usually found around the subject drain that caused the plaintiff to fall; and

(c) that the cleaning and monitoring system for the floor drains in the lavatory area

was inadequate or not adhered to by the cleaning staff on the day of the accident.

[46] There is no doubt but that the presence of water on the lavatory floor of the Sackville Sports Stadium, generated by the many users of that facility, was a usual occurrence and the plaintiff so acknowledges. The main thrust of the plaintiff's allegations is that there was an excessive buildup of water around the subject floor drain that caused her to fall and which would not have been there had an adequate cleaning and monitoring system been implemented.

[47] First of all, I am not satisfied on a balance of probabilities that there was an excessive buildup of water around the floor drain that created a heightened danger of falling. I accept the evidence of Ms. Merry, who I found to be a credible witness, that she attempted to record as closely as she could the words used by the plaintiff in her telephone follow up call on February 3, 1997 (recited at para.17 of this decision). This handwritten note was made by Ms. Merry almost contemporaneously with the event when memories were fresh and the parties were not in a litigation mode. I accept it as a reliable account of the conversation which then took place.

[48] Beyond that, in her evidence at trial, the plaintiff said that she didn't notice the excessive amount of water on the floor until she was actually lying in it while in a dazed state. In any event, the water displacement from her lying prone on the floor with her sister kneeling beside her would inevitably have spread the water over a larger area which she estimated to be approximately three to four feet wide. This

suggests that the puddle was of a smaller diameter before she fell.

[49] We know from Mr. Tyner's evidence that the lavatory floor sloped gradually to the subject drain and with the facility users coming and going, dripping wet from either the pool or the showers, some collection of water around the floor drain is to be expected. It is reasonable to conclude that the plaintiff, with the floor drain in her general path between the hair dryer and the mirrors, could just as easily have fallen regardless of whether the water collecting around the drain was greater than usual or not.

[50] Moreover, even if more water than usual was allowed to collect around the floor drain, the law does not require perfection of an occupier nor, as observed by Blair J.A. in *Waldick*, are occupiers to be treated as 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 and that standard is met when an adequate system for the prompt discovery and removal of unusual and hazardous objects or materials is put in place (see, for example, *Armsworthy-Wilson v. Sears Canada Inc.* (1991) 100 N.S.R. (2d) 17).

[51] Considering the circumstances here where the presence of water is usually found in the location where the fall occurred, which makes it unique from many other occupiers' liability cases, I am satisfied that the cleaning and maintenance system above described was sufficiently adequate to discharge the defendant's duty to take such care as in all the circumstances of the case was reasonable. The cleaners, both

on the day shift and the back shift, were required to sign off on the daily work log sheets that they had cleaned the showers and drying area, including the drains, in the ladies change room. Beyond that, the cleaners had instructions to systematically check the premises daily for hazards. It may not have been a perfect system, but I find that it was adequate in the circumstances to meet the requisite duty of care.

[52] Where I am unable to make any of the findings necessary in order for the plaintiff to succeed on this second ground of negligence argued, it must be dismissed as well. I might add that the case before me is not of a circumstantial evidence nature from which the court ought to draw an inference of negligence to be rebutted by the defendant. The decision of the Nova Scotia Court of Appeal in *Dauphinee v. Canada Life Assurance Company et al.* (1987) 78 N.S.R. (2d) 326, on which counsel for the plaintiff relied, is to be distinguished in this regard and, in any event, is to be read in light of the more recent decision of the Supreme Court of Canada in *Fontaine v. Loewen Estate* (1998) 156 D.L.R. (4th) 577. I need not review that case in any detail for purposes of this decision other than to reiterate that where there is direct evidence available as to how an accident occurred, the case must be decided on that evidence alone. Such is the nature of the evidence in the case at bar.

Absence of Warning Signage:

[53] The defendant acknowledges that its cleaners were not required to place signs or pylons in the lavatory area to warn users of the facility of the slipperiness of the floor when wet, except when they were actually cleaning the floors themselves. However, I am not satisfied that the absence of such signs was a causal factor in the

plaintiff's slip and fall. I hold the same view as that expressed by the court in *Langille v. Kootenay Boundary (Regional District)* [1988] B.C.J. No. 858 that the posting of such notices in the shower area of a swimming pool complex might be considered a prudent measure but not a necessary one, bearing in mind it is common knowledge that wet floors in a lavatory area are likely to be slippery.

[54] In the present case, the plaintiff acknowledged in her testimony that she was used to seeing water on the floor in the area where she fell and knew it was wet on the night she fell. I am not satisfied that she would have done anything differently in her movements had such warning signs or pylons been ever present. She knew that water was present on the lavatory floor and she must be taken to have known, as a matter of common knowledge without the need for warning signs, that tile floors are likely to be slippery when wet.

[55] Where I have concluded that the absence of such warning signs was not a causal factor in the happening of this accident, no finding of negligence on the part of the defendant can be made in this respect.

CONCLUSION:

[56] As in any negligence case, the plaintiff bears the burden of proving on a balance of probabilities that some act or omission of negligence has been committed on the part of the defendant that caused the plaintiff's injury. In this an occupier's liability case, the plaintiff more specifically must prove on a balance of probabilities that the

defendant has breached its duty to take reasonable care in the circumstances to make the premises safe. For all of the foregoing reasons, I find that the plaintiff Donna Lynn Corbin is unable to succeed on any of the three grounds of negligence argued before me. This action is therefore dismissed.

[57] The defendant will accordingly be entitled to recover costs of the action and if the parties are unable to agree on costs, I will hear further submissions from them. To assist counsel in this regard, however, having regard to the nature of the damages claimed and the medical evidence presented, I would suggest that the amount involved for purposes of Tariff A under **Civil Procedure Rule** 63 be placed at $45,000.

J.