

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Dunn v. Tidan Hospitality*, 2017 NSSM 84

SCC SN No. 456989

BETWEEN:

ANN ELIZABETH DUNN

CLAIMANT

and

TIDAN HOSPITALITY/REAL ESTATE GROUP

DEFENDANT

REASONS FOR DECISION

Editorial Note: The electronic version of this judgment has been edited for grammar, punctuation and like errors, and addresses and phone numbers have been removed.

BEFORE: A. Robert Sampson, Q.C., Adjudicator

DATE OF HEARING: Hearing held at Sydney, Nova Scotia on January 18, 2017

DECISION RENDERED: January 31, 2017

APPEARANCES:

For the Claimant: Self-Represented

For the Defendant: Michael Gillis Keating, Property Manager/Keltic Plaza

BY THE COURT:

1. An incident occurred on the early afternoon of September 9, 2016 at the Keltic Drive Shopping Centre, where it is often referred to as “the Sydney River Walmart”, situate at 45 Keltic Drive, Sydney, Nova Scotia. There are two principal entrances to this shopping centre, one leading from Kings Road northwesterly and the second one leading from Keltic Drive southwesterly. The Claimant was driving a 2014 Mitsubishi/Lancer. Upon entering the

shopping centre parking lot from Keltic Drive she continued proceeding southerly on a main thruway heading towards the Walmart Department Store building. She turned left, stopped in front of the main entrance to Walmart to drop off a passenger and continued southeasterly to the end of the Walmart Store where the thruway opens up somewhat to a series of smaller boutique stores situate off to her right-hand side. As with most large shopping centre parking lots, there are a number of two-way laneways throughout the parking area designed to accommodate the movement of traffic and orderly parking.

2. The Claimant's evidence is that after passing the Walmart building she proceeded to turn left down one of the identified laneways and states, without notice, upon entering the lane she struck something on her front end and immediately stopped her vehicle. She then discovered that she had struck a stop sign which had been mounted on a cement block situate, by her evidence, more to the center of the laneway and not on the side of the laneway or roadway which she believes should normally be the case.

3. The Claimant alleges that the placing of the stop sign and moreso, the location in which it existed, presented an "unusual danger" and further, she alleges it had not been sufficiently marked for a person to see when travelling in the direction in which she was traveling. She alleges, therefore, that the Defendant breached the onerous duty of care owed towards those persons invited onto the property to travel the parking ways to patronize stores at the shopping centre.

4. Two estimates were submitted to the court as evidence to the damage caused to her vehicle and in her submission to the court the Claimant claimed \$958.90 together with court costs of \$99.70.

5. The Claimant presented a detailed written submission to the court setting forth the facts noted above together with additional information through her testimony which she believed was relevant to her claim. Included was a series of seven (7) photographs (Exhibit 4) taken by her. Each photograph was described by the Claimant. They represented samples of the configuration of various areas of the larger parking lot, including similar stop signs mounted on concrete blocks, and a picture of the damage to the passenger front underside of her vehicle.

6. The Defendant was represented by Mr. Michael Keating. Mr. Keating manages and operates the property where the accident occurred. The property has for years been referred to as "Keltic Plaza" and the court takes note of the fact that the parking area is just as often referred to as the "Sydney River Walmart". The plaza itself not only encompasses the Walmart Department Store but also a Sobeys grocery store, an NSLC store, bank (CIBC), several fast food operations, a series of boutique stores connected on one end of the Walmart building and finally a larger building situate on the southeastern side, formerly a grocery store and now "Don Cherry's Restaurant and Bar".

7. The Defendant filed a written defence/counterclaim submitting that the accident was a direct result of the driver's inattention or error and that the Defendant should bear no responsibility for the damages incurred. There was nothing in this statement or evidence presented that established any form of counterclaim. The written Defence, also re-confirmed by Mr. Keating's additional testimony under oath, confirmed that he personally has acted as the property manager for the past three (3) years. He indicated that prior to that he worked in a similar capacity as a property manager in Halifax (NS) and managed a large residential complex, together with approximately eight commercial tenants, including the required parking areas.

8. Mr. Keating was not present at the time this accident occurred, but confirmed he was familiar with the location on the property and the stop sign that was struck. He confirmed under oath that the stop sign/structure in question had been present in the location as described by the Claimant for at least as long as he had been manager of the plaza. He further confirmed through a series of 4 pictures (exhibit 5) taken a short time after the date of this accident (Sept 26/16 as verified by e-mail shown in Exhibit 2), the location of the stop sign in question as well as the painted markings (white strip) on the pavement area leading to the sign structure itself. He confirmed that all lines on the parking lot are painted annually by the same company that arranges the snow removal contract and that this work is generally carried out through the summer months. Mr. Keating confirmed that to his knowledge there had never been any accidents, claims or complaints in relation to the location or presence of this particular stop sign during his time at the mall.

9. The Defendant confirmed that the height of the stop sign is 5'9" off the ground and the base (as confirmed by the pictures-Exhibit 5) is painted a bright yellow and that there are two noticeable circles painted yellow on both sides of the main stop sign pole and displayed at a 90-degree angle to the face of the stop sign itself.

10. It appeared, through an e-mail exchange between the Claimant and Ian Copnick, General Counsel for the Defendant, that the height of the sign was at issue. Using Exhibit 4 tendered by the Claimant (picture #4), the Claimant confirmed to the court that the height of the stop sign shown in that picture appeared to be the same in height as the stop sign which she struck. In that picture, it appears evident, from the location of the stop sign being adjacent to the rear of a truck, that the height of the sign would have been well within the normal sight vision of a driver in most vehicles.

11. Finally, the evidence of the Defendant confirmed that the weather on September 9, 2016 was clear. In addition to the painted lines on the pavement itself, the stop sign "structure" would have been visible, whether it was the sign itself, the side yellow markers, the yellow base from all angles or a combination thereof.

12. The adjudication of this claim principally deals with issues surrounding the duty of an owner of property to an invited person such as the Claimant. In such situations, the provisions of the *Occupiers' Liability Act* (Nova Scotia), 1996, c.27, provide the framework to determine the duty an occupier (owner) of premises owes to persons entering upon the premises and the

property brought on the premises by that person so as to ensure they are reasonably safe. Given that the legislators have determined the need to codify common law by means of the *Occupiers' Liability Act*, it is worthwhile to set forth the following excerpt which outlines the duty to provide some guidance as to the factors to be considered in assessing whether an occupier has met their duty:

Duties of occupier

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.

13. In a nutshell, the occupier (or owner) must take reasonable care in all the circumstances to ensure that people and their property are safe. However, occupiers are not guarantors of safety by any means.

14. The onus of proof rests with the Claimant to satisfy the court that the owner failed to take reasonable care, given all of the circumstances that existed at the time.

15. Clearly, with larger plazas and shopping areas where it is a necessity to provide parking areas, a host of duties arise. Some examples of this would be the basic layout of the parking area so as to provide a safe means for cars to travel throughout and access parking spaces, providing means of corralling shopping carts so as to minimize or reduce collisions with shopping carts, providing a standard of lighting throughout the parking area to provide guidance and safety in the evening, snow clearing, salting, etc.

16. Keltic Plaza Shopping Centre is similar to many shopping centres. With the increase of fast food restaurants and smaller stand-alone franchise operations, often it is the case that what was once a very large parking area which serviced principally one main anchor store is now surrounded throughout the perimeters of the lot with a host of different stand-alone stores, each one attracting patrons almost exclusively by motor vehicle into the larger parking area for the purposes of travelling in one direction or another to reach a specific business. With that, arguably the further duty that arises with those who own and operate large parking areas is the need to provide some structure for the flow of traffic itself. To provide this structure, I find, will necessitate signage such as speed limits, yield signs and stop signs.

17. In the case of the Keltic Plaza as clearly depicted by the numerous photographs tendered, this particular parking lot has a number of stand-alone business structures around its perimeter. Further it has a number of stop signs throughout as well as different configurations of painted lines for the purposes of directing traffic and/or pedestrian walkways.

18. I find, with the exception of larger parking lot areas that one may find in warmer climate locations which do not have to deal with snow removal, most traditional North

American parking lots situate in areas which have to endure the winter snow do not use fixed forms of curbing to delineate specific parking areas and/or thruways. The accepted means is generally to maintain painted parking lines/spots throughout the larger parking lot which, by default, then creates a variety of thruways used to enter, exit and travel within the parking area. As noted above, in more recent years with the expansion of a variety of businesses around the perimeter of similar type parking areas, undoubtedly owners have determined the need to provide even greater structure to control the flow of traffic, which in turn has given rise to additional traffic signs such as "stop signs".

19. Turning to the facts of this case and in particular the location of the stop sign that was struck by the Claimant, clearly the presence of a stop sign itself suggests an effort of prudence rather than negligence by an owner attempting to provide assistance and safety to those who are invited into a mall parking area. Because in this instance, the Claimant alleges the stop sign structure was located in somewhat of a different or odd location, "in the middle of the thruway", the issue turns to whether the placement of this structure (stop sign) presented an unusual danger, one which the occupier knew or ought to have known created a risk to a visitor.

20. The Claimant's position is simply that she did not see the structure and she proceeded to make a left turn intending to go down a thruway. She maintains that this structure/stop sign was not located in a "traditional" squared-off corner where one typically experiences stop signs on the main public roadways. She emphasized the fact that she did not see it because of its location, how it was situated and presumably how it was marked.

21. As noted earlier in my comments, an occupier/owner is not expected to guarantee the safety of those persons using its facilities. Clearly, the owner has a duty of care to maintain, in this instance an orderly, structured and safe parking area, to a reasonable and acceptable standard. That duty is well-established under common law as well as the *Occupiers' Liability Act* not unlike the same duty owed by one private citizen to another. That duty extends to protecting persons from unusual danger, the existence of which the occupier knew or ought to have known.

22. The Defendant stated that the structure/stop sign in question had been situate in its present location for at least the past three years during which Mr. Keating was the Manager of the Plaza. He confirmed there were no complaints or incidents associated with this structure. He further confirmed that the reason for the location of the structure was to stop traffic at the end of one of its thruways so as to cause a person to pause before entering into a main thruway. It was acknowledged that this structure/stop sign was not located on the right-hand side of a curbside as traditional stop signs are found on the public roadways but that was because there were no curbs anywhere throughout the larger parking lot. As a result, other stop signs also have been placed in locations not necessarily connected to any curb way but generally in line with designated parking areas.

23. The Defendant further stated as was confirmed by the pictured exhibits, because of the location of this particular stop sign (as opposed to pictures of others stop signs throughout the parking area), additional care was taken to paint what is a noticeably large white line (Exhibit 5) which extends across the width of approximately two laneways where the structure/stop sign is located at the very right edge of such white line, in an effort to provide greater identification of its location. Added to this, the evidence was clear that additional markings were placed on the structure/stop sign together with a highly-visible painted base.

24. Therefore, in my assessment of this particular occupier's liability, having regard to all of the evidence, it is clear that the occupier/owner in fact took greater care to make visible the location of this stop sign as compared to several other stop signs that existed throughout the larger parking lot.

25. It is incumbent upon me to assess the likely knowledge of both the owner and the invitee, both actual and presumed, of existing conditions in a parking area.

26. In deciding whether a danger is an "unusual danger" one needs to apply an objective test measured not only by the knowledge of the invitee but also by what a reasonable observer might be entitled to expect given the conditions that existed at the time. On this point, again Mr. Keating's evidence is telling that at least during the past three years while he was the Manager, he has not received any complaints nor reported incidents regarding the location of this particular structure/stop sign. I find that a reasonable person entering into a busy and large parking lot would reasonably expect there to be a host of unknown or unexpected obstacles, including traffic signs similar to the one that was struck.

27. Clearly, there must be a reasonable expectation on the part of the invitees who come into a shopping mall parking lot that must be also considered in determining whether a particular danger is unusual. Saying there is in fact a danger is not unlike saying that a lamp post or shopping cart corral are dangers, but rather the question that must be decided is whether a danger falls into the category of "unusual".

28. In conclusion, as unfortunate as this accident was, it was nothing more than an unfortunate, regrettable accident. The users of parking lots in Nova Scotia must reasonably expect to encounter what may best be described as "foreign objects". These include everything from unorganized pedestrian traffic to and from the parking area, shopping carts hidden between parking spaces, lighting standards throughout the parking area and, as in this instance, different forms of traffic signs which have been placed to provide some structure to the normal ebb and flow of vehicle traffic in what is otherwise often akin to a big open space.

29. I find that the structure/parking sign that was struck was determined to be a necessity for the occupier in an effort to control traffic patterns. I find that the occupier recognized the somewhat different location in which they had to place this structure and for that reason I am satisfied that they took reasonable and additional steps to highlight both the structure itself and the pavement markings. I am satisfied that the height of the stop sign structure was

sufficient to see from any normal type vehicle similar to the Claimant's vehicle. I am satisfied that the Defendant met their obligations and duty as imposed upon them by the legislation and common law.

30. I find for the Defendant. The claim is dismissed.

A. ROBERT SAMPSON, Q.C.

Adjudicator