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# **LOSS PREVENTION IN THE RETAIL SETTING - OCCUPIERS LIABILITY AND WRONGFUL IMPRISONMENT LAW IN BRITISH COLUMBIA**

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## **I. INTRODUCTION**

Across Canada owners and occupiers of all types of premises are required by various provincial occupiers liability statutes or by common law to ensure that their premises are reasonably safe for all persons. This paper will focus on the duty and standard of care owed by occupiers of commercial retail outlets such as grocery stores, shopping malls, and "do it yourself" outlets in British Columbia. While "slip and fall" claims predominate the retail liability context, a wide variety of claims can also arise from poor building design, or improper merchandise displays.

Fortunately, not all injuries sustained on premises result in successful claims against the occupier. Where the occupier has left a dangerous hazard on the premise which causes an injury (such as an unlit stairwell) the occupier's liability may be easily established. However, as will be shown through a discussion of the applicable case law, many injuries will not attract liability if the occupier can show that a reasonable program of inspection and maintenance was both in place and performed.

This paper will conclude with a brief discussion of the tort of wrongful imprisonment that often arises when store security personnel or employees arrest and detain suspected shoplifters.

## **II. OCCUPIERS LIABILITY**

### **A. OVERVIEW OF LEGISLATION**

The British Columbia *Occupiers Liability Act*, R.S.B.C. 1996, c. 337 (the "Act") defines an "occupier" to include those who have both physical possession of the premises or those who have responsibility for or control over the premises. Accordingly, in certain circumstances there can be more than one occupier as may be the case with a landlord and tenant. The Act also limits the liability of an occupier for the negligence of an independent contractor (for example, a contractor conducting repairs, renovations or responsible for floor maintenance) if the occupier took reasonable care in the selection and supervision of the contractor. In such a case any injury claim would properly be made directly against the contractor.

i. Duty of Care

The Section 3 of the Act provides as follows:

*An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person and his property ... will be reasonably safe in using the premises.*

*(2) the duty of care ... applies in relation to the*

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

Thus the duty of care imposed by Section 3 of the Act provides that an occupier must exercise "reasonable care" to ensure that entrants onto that occupier's premises will be "reasonably safe". That duty of care extends to the condition of the premises, the activities on the premises, and/or the conduct of third parties on the premises.

British Columbia courts have held that the duty of care set out in Section 3 of the Act is a complete code with respect to the liability of an occupier to an entrant and that, therefore, it is not appropriate for a claimant to commence an action against an occupier alleging common law negligence.

The duty of care set out in the Act applies to unusual risks only. Everyday ordinary risks are not contemplated by the Act. Accordingly, preliminary investigations of the loss should determine whether there was any *unusual* danger which may have caused or contributed to the incident. Further, the existence of an unusual danger must be considered in relation to the character of the premises and the purposes for which it was being used at the time of the loss.

ii. Risks Willingly Accepted

Section 3(3) of the Act provides that the duty of care does not apply to a person who suffers loss or damage in respect of "*risks willingly accepted by that person as his own risks*". With respect to this particular exclusion, preliminary investigations should determine all the circumstances which may link the relevant dangers or risks to the knowledge of the claimant. For example, warning signs, waivers in a written contract or ticket, information

supplied to the claimant, physical circumstances plainly visible to the claimant and so forth must be carefully documented in respect to this defence.

The courts have recently added a new wrinkle to the "acceptance of risk" defence. This involves a determination as to whether the claimant also accepted the "legal" risks associated with undertaking a certain course of conduct. The burden on a defendant of establishing that a claimant assumed both the physical *and* legal risks associated with a certain course of conduct is extremely onerous.

### iii. Standard of Care

The standard of care is determined by a court after considering all of the circumstances of the case. Accordingly, different standards of care will be applied to different circumstances and premises.

In fact, the standard of care may change depending upon the time of the year or the location of the premises.

The question of a standard of care only arises after the claimant has established a causal link between the injury or loss and the condition of the premises or the activities or persons on those premises. Once this causal link has been established, the onus then shifts to the occupier of the premises to show that the requisite standard of care was met. In this regard, it is important to note that the standard of care is not that of perfection. The occupier is only required to take "reasonable care" to ensure that entrants will be "reasonably safe". The courts have clearly stated that an occupier is *not* an insurer of his or her premises.

As would be expected, the vast majority of cases under the Act, involve the condition of the premises, either an alleged defect in the premises or a foreign substance on the premises.

In cases involving alleged defects in the premises, the evidence generally focuses on whether there was compliance with local building codes. It must be noted that while non-compliance with a provision of an applicable building code may be evidence of negligence under the Act, an occupier's failure to comply with such a provision does not, on its own, establish negligence under the Act. In this regard, preliminary investigations should confirm the age of the subject building and/or the date of substantial renovations to the building so that the applicable building codes may be referenced when determining whether there was compliance at the time of construction, renovation or repair.

With cases involving alleged defects on the premises, it is very important to document the alleged defects. Photographs, diagrams, maps, and building plans are all extremely helpful in identifying the precise nature of the alleged defect. Once the precise nature of the defect is known and the applicable building codes are identified, a determination can be made as to whether the occupier met the appropriate standard of care.

An occupier can only be liable under the Act for unusual dangers which were known to the occupier or should have become known in the course of a "reasonable" inspection. An occupier is only required to undertake "reasonable inspections" of his or her premises at "reasonable" intervals. An occupier is not required to minutely inspect every part of his or her premises. Accordingly, in a case where a claimant was injured falling from an outside staircase which had broken as a result of dry rot under the painted surfaces, the home owner was held not to be liable to the claimant as the court was of the view that the subject defect could only have been discovered by a detailed inspection and the Act did not require such an inspection. It should be remembered, however, that the determination of what constitutes a "reasonable inspection" will depend greatly upon the type of activities ordinarily undertaken on the premises.

In cases involving "foreign substances" on the premises (which substances may include everything from water spills or squashed vegetables on the floor, to snow and ice on a parking lot or driveway) the standard of care is determined on the same basis as above. The claimant must first establish a causal link between the injury or loss and the foreign substance. Once this causal link is established, the onus shifts to the occupier to show that he or she employed a "reasonable" system of inspection and maintenance. The system of inspection and maintenance need only be "reasonable", it does not have to be perfect. A typical example of a system which has been held by the courts to be adequate is that employed by most grocery stores. Store employees are required to inspect store aisles at regular intervals (every 30 to 60 minutes) and to record such inspections in a log book. Any spillages or other risks observed during those inspections are expected to be attended to immediately and should be noted in the log.

Preliminary investigations should confirm precisely what sort of system of inspection and maintenance was in place at the premises at the time of the incident. Every effort should be made to obtain copies of any written policies and procedures, log books, daily memoranda, and so forth which would evidence such procedures. Witness statements should also be obtained in order to determine whether the system of maintenance and inspection was, in fact, followed.

In certain circumstances, a court may be inclined to lessen the standard of care owed by the occupier to a particular type of claimant. This may arise in cases where the claimant had a particular profession or occupation which, by its very nature, exposed the claimant

to unusual risks. For instance, property inspectors, roofing contractors, construction workers, painters, carpenters or other tradesmen may be expected to exercise a higher degree of caution than would be expected of an ordinary entrant to the property.

#### iv. Contributory Negligence

The British Columbia *Negligence Act*, R.S.B.C. 1996, c. 333 applies to occupiers liability cases. Accordingly, the defendant occupier is entitled to allege and prove contributory negligence on the part of the claimant. A defence of contributory negligence is very different from a defence under Section 3(3) of the Act (*i.e.* that the claimant undertook risks which he or she willingly accepted as his or her own risks). The latter defence is a complete defence to any claim under the Act. A defence of contributory negligence, however, seeks to establish that the claimant was partially or wholly responsible for his or her own injuries by showing that the claimant failed to take any or any reasonable steps to ensure his or her own safety. While an occupier may be unable to establish that a claimant assumed all material risks as his or her own, that occupier may nevertheless be able to establish a substantial degree of contributory negligence on the part of the claimant.

In this regard, attempts should be made to interview all witnesses, including the claimant, to obtain full particulars of the incident. These particulars should include the claimant's physical condition, whether the claimant wears prescription glasses, what sort of footwear and clothing was worn, and the weather conditions at the time of the incident. Further, an attempt should be made to conceptualize what the "reasonable person" would have done in similar circumstances. Any actual variation from the reasonable person standard may prove that the claimant was contributorily negligent. Of course, the claimant's prior knowledge of the premises (obtained through prior visits or verbal or written information) is also relevant.

Pursuant to the provisions of the British Columbia *Negligence Act*, in circumstances where there is more than one occupier, and any degree of contributory negligence can be established on the part of the claimant (even 1%), the result will be that each of the occupiers will be severally liable to the claimant. Where there is no contributory negligence, multiple occupiers are jointly and severally liable.

## **B. DISCUSSION OF CASE LAW**

In *Lemon v. Canada Safeway Ltd.*, [2001 BCCA 403](#), the plaintiff fell on water that had accumulated near the entrance to the defendant's store. The plaintiff entered the store walking on a mat but had to walk onto an uncarpeted wet area to give way to another customer with a cart. The fall occurred on a very rainy day. At trial the plaintiff argued

that the entire entranceway should have been carpeted and that had it been so, she would not have fallen. In its defence, the store led evidence that on the day in question its employees had carried out manager's instructions to *inspect entrance areas every 15 minutes and mop up any water found in the area*. In dismissing the plaintiff's claim, the trial judge found that given the heavy rainfall, it was not reasonable to expect the defendant to keep the floor at the store entrance completely dry at all times. The court also held that the store was not an insurer and that it could not be held to a standard of perfection.

In *Kayser v. Park Royal Shopping Centre Ltd.* ([1995](#)), [16 B.C.L.R. \(3d\) 330 \(C.A.\)](#), the plaintiff fell while attempting to step over a barrier separating two lines of parked cars in the defendant's parking lot. At trial, there was evidence that the lights in the parking lot just above the plaintiff's car had gone out during the hour or so she was shopping. In its defence, the store led evidence that *its employees were instructed to conduct hourly inspections of the parking lot* to ensure, among other things, that the lights were functioning properly. At the same time, the store was unable to lead *direct* evidence that that routine was being carried out on the day in question. The plaintiff's action was dismissed at trial and the plaintiff appealed. In dismissing the appeal, the court rejected the plaintiff's argument that she had established liability against the defendant merely by stating that there was no direct evidence that the usual routine was followed on the day in question. Instead, the appellate court found that there was *evidence of a regular routine* and that in absence of any evidence, direct or circumstantial, that it was not followed on the day in question, it was entirely reasonable for the trial judge to *infer* that the usual routine had been followed.

In *Moate v. Wal-Mart Canada Inc.*, [2002 BCPC 534](#), the BC Provincial Court considered the retailers duty of care in relation to falling objects. In this decision, the plaintiff was looking at some toys on a shelf when a sign made of sheet metal attached to a display fell onto his head. At trial, the court found that at the time of loss the defendant had an "excellent" safety inspection program that it implemented several times a day. Despite this, the defendant store was held liable for failing to fasten the sign securely in the first place.

In *Crudo v. Westfair Foods Ltd.*, [2005 BCSC 320](#), the plaintiff injured herself when she slipped and fell in the beauty department of the defendant's store. She alleged at trial that she slipped on water. The only evidence linking the plaintiff's fall to water was her own assertion and her husband's evidence that post-fall he observed that the right knee of her pants was soaking wet. Ultimately, the court rejected the plaintiff's evidence respecting the presence of water and concurrently found that the defendant had met the requisite standard of care. In considering the defendant's standard of care, the court



stated:

*“An occupier may be found to have taken reasonable care if it can show it has implemented a regular and reasonable cleaning routine and if it can show the routine was being complied with in the circumstances.”*

In support of its case, the defendant established that it had taken the following steps to ensure the reasonable safety of its customers:

- i. instructing employees that when they see any substance on the floor, 'don't pass it up, pick it up';
- ii. requiring that sweeps be carried out at regular intervals and recorded in department store sweep logs;
- iii. requiring supervisors to review sweep logs weekly and forward the logs to managers weekly to ensure compliance;
- iv. having store managers and assistant managers spend much of their time walking the floors;
- v. placing a large awning over the store's entrance and exit to provide protection from the rain; and
- vi. placing mats at the entrance to the store.

## C. CONCLUSION

The *Occupiers Liability Act* imposes a duty upon retailers to take reasonable care to see that persons on the premises are reasonably safe and the standard of care to which a retailer is held will be determined by the particular circumstances. Factors that will effect the retailers degree of risk include:

- i. the size of the store;
- ii. the nature of the merchandise being sold;
- iii. the volume of traffic in the particular area;
- iv. whether special or unique conditions exist;
- v. whether a system of inspection/maintenance was in place and followed by employees;

- vi. whether inspection/maintenance duties were executed separately from regular duties; and
- vii. whether the inspection system was supervised or logged.

### III. WRONGFUL IMPRISONMENT

#### A. INTRODUCTION

Retailers often retain the services of private security companies to prevent the loss of merchandise through shop lifting. This usually involves the provision of security personnel who roam the premises dressed in plain clothes while keeping an eye out for shoplifters. Theft prevention is also dealt with on a more informal basis where responsibility for the arrest and detention of the shoplifter is delegated to ordinary employees. As will be discussed in more detail below, regardless of who ultimately effects the arrest, it is very important that strict procedures are employed by retailers during all stages of the arrest process in order to avoid liability for actions against them for wrongful arrest and imprisonment.

As the tort of wrongful imprisonment is an intentional one, the complainant must prove "intentional confinement" that occurs "within fixed boundaries." Detention necessarily involves restraint which can take one of two forms:

- 1) restraint by the threat of force to which the complainant submits; or
- 2) restraint by direct force.

Therefore, a person who reasonably thinks that force *may* be used *is imprisoned* if he or she decides to submit in order to avoid the risk of violence. The mere threat of imprisonment is sufficient and once the complainant has proven his or her imprisonment, the onus shifts to the defendant to prove that the imprisonment was justified.

#### B. AUTHORIZATION TO ARREST

The authority for a private citizen to "imprison" another is found in the *Criminal Code of Canada*. A complete defence to the charge of false imprisonment can be found in Section 494 of the *Criminal Code* if the person committing the arrest has actual knowledge that the detainee committed an indictable offence. Furthermore, the common law of most Canadian provinces (excluding British Columbia and Alberta) authorizes detention

where it can be shown that the person committing the arrest merely *believed*, on reasonable and probable grounds, that a criminal offence (i.e. theft) was committed. An objective test will be applied, thus where a retailer cannot clearly show reasonable and probable grounds for the arrest it will likely face civil liability for wrongful or false imprisonment. In British Columbia and Alberta, a retailer is subject to an additional and more onerous burden, in that it must prove that an indictable offence was *actually* committed. Additional limits are imposed by s. 25 of the Criminal Code which requires that the person committing the arrest use only as much force as is reasonably necessary under the circumstances.

### C. DISCUSSION OF CASE LAW

In *Kendall v. Gambles Canada Ltd.*, [1981] 4 W.W.R. 718 (Sask. Q.B.) the plaintiffs brought a claim against the defendant's store and its security officers for damages for false imprisonment, assault and malicious prosecution. The plaintiffs were apprehended outside of the store by the head of security for the store who testified that she saw them hide merchandise in their clothes before leaving. The plaintiffs resisted arrest and a scuffle ensued. Despite the fact that no merchandise was found in their possession the plaintiffs were taken by police to the police station where they were charged with creating a disturbance and theft. Ultimately, the charges against them were dropped. As the store could not prove that the plaintiffs committed theft, the court allowed their claim of false imprisonment, however, their malicious prosecution claim was dismissed as they were unable to prove that the security officer corruptly pursued the prosecutions. The two plaintiffs were awarded \$1000 and \$2000 respectively.

In *Chopra v. T. Eaton Co.*, [1999 ABQB 201](#), the 64 year old plaintiff was injured when he was arrested by the security staff employed by the defendant department store. At the time of arrest, the plaintiff was trying to obtain a refund of a credit balance on his account. He was arrested for causing a disturbance and assault. Following the arrest, the plaintiff was held by security for over four hours before the police were called. The plaintiff was ultimately acquitted of all criminal charges. The plaintiff claimed damages for battery, false imprisonment, defamation and malicious prosecution. The plaintiff's claim for false imprisonment was allowed on the basis that the defendant had failed to notify the police as soon as "reasonably practicable". The court also upheld the plaintiff's claim for battery on the finding that the head of the security staff had "grossly overreacted" and used "excessive force" during the arrest process. The plaintiff was awarded \$23,000 for general damages and \$10,000 for punitive damages.

In *P. (M.)(Guardian ad Litem) v. Port of Call Holdings Ltd.*, [2000 BCSC 548](#), the BC Supreme Court considered the tort of wrongful imprisonment on an appeal from a provincial

court decision. In this case, the 13 year old plaintiff was observed by store employees returning a chocolate milk container to a store shelf. As soon as the plaintiff left the area, one of the employees checked the container and noticed that it was open and that some of the contents had been removed. The plaintiff was subsequently detained by store employees due to his "suspicious behaviour". At trial, the Provincial Court judge dismissed the plaintiff's claim and in doing so interpreted s. 494 of the *Criminal Code* to read "Anyone may arrest without warrant a person whom he finds **apparently** committing an indictable offence." On appeal, the Supreme Court rejected that interpretation of s. 494 holding that it was not enough that the arresting individual have reasonable and probable grounds that a crime had been committed, rather it must be shown that a crime was actually committed and that there were reasonable grounds indicating that the particular individual was responsible. Thus the store employee's mere suspicion that the plaintiff had tampered with the milk carton was not enough to justify the arrest. The plaintiff received \$500 in damages.

Accordingly, a private person who arrests an individual must satisfy the court on a balance of probabilities that:

- 1) someone committed an indictable offence; and
- 2) the private person effecting the arrest had reasonable grounds for believing and did believe the person arrested had committed that indictable offence.

#### **D. DAMAGES**

Generally speaking, damage awards for wrongful imprisonment cases are relatively modest, usually falling in the \$500 to \$5000 range. Awards can fall as high as \$20,000 to \$25,000, however, such awards usually involve the use of unreasonable force and significant injuries, as was the case in *Chopra v. T. Eaton Co., supra*.

Wrongful imprisonment claims can attract aggravated or punitive damage awards, in addition to compensatory damages. Typically, aggravated damages are awarded in cases where the court finds that the defendant's conduct was unusually high handed or oppressive, and that such conduct caused the complainant extraordinary humiliation and anxiety. To succeed with an aggravated damages claim, the complainant must prove that the person who committed the arrest was motivated by *actual* malice.

Punitive damages are not compensatory in nature rather they are intended to punish a defendant. Punitive damages are rarely awarded and require a finding of harsh, vindictive, reprehensible or malicious conduct.

## **E. CONCLUSION**

In determining liability for a wrongful imprisonment claim, one must consider whether there is sufficient evidence to prove that an indictable offence was in fact committed and whether, applying an objective test, it was reasonable for the individual committing the arrest to believe that the person detained in fact committed the indictable offence.