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2018 ABCA 125
Alberta Court of Appeal

Stefanyk v. Sobeys Capital Incorporated

2018 CarswellAlta 587, 2018 ABCA 125, [2018] 5 W.W.R. 654, [2018] A.W.L.D. 1972, [2018] A.W.L.D. 2016, [2018] A.W.L.D. 2051, 291 A.C.W.S. (3d) 447, 67 Alta. L.R. (6th) 215

Karren Edith Stefanyk and Her Majesty the Queen in Right of Alberta (Respondents / Plaintiffs) and First Capital (Eastview) Corporation (Respondent / Defendant) and Kyle Stevens and Chris Martin (Not a Party to the Appeal / Defendants) and Sobeys Capital Incorporated (Appellant / Defendant)

Frans Slatter, Barbara Lea Veldhuis, Frederica Schutz JJ.A.

Heard: March 13, 2018
Judgment: March 29, 2018
Docket: Calgary Appeal 1701-0229-AC

Proceedings: reversing *Stefanyk v. Stevens* (2017), 2017 ABQB 402, 2017 CarswellAlta 1130, 63 Alta. L.R. (6th) 326, J.W. Hopkins J. (Alta. Q.B.)

Counsel: W.N. Moody, for Respondent, First Capital (Eastview) Corporation
N. Peermohamed, for Appellant

Subject: Civil Practice and Procedure; Torts

Related Abridgment Classifications

Civil practice and procedure
XVIII Summary judgment
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XVI.8.c Particular situations
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Headnote

Torts --- Negligence — Occupiers' liability — Particular situations — Stores

Plaintiff was injured when she tripped and fell as she approached grocery store and was allegedly startled by large dog, which was tied to bicycle rack on sidewalk outside store and lunged at her — Plaintiff brought action for damages against store and its landlord, claiming that dog was hidden behind landlord's garbage bins — Store's motion for summary dismissal of action against it was granted on basis that it was not "occupier" of sidewalk under Occupiers' Liability Act and did not owe plaintiff common law duty of care with respect to sidewalk — Plaintiff's appeal was allowed on basis that summary determination of claim was not appropriate — Appeal by store allowed — Mere existence of duty does not mean that occupier becomes insurer for everything that happens on premises — It was appropriate to determine whether store, if not "occupier" of sidewalk, owed plaintiff common law duty of care on summary basis, without resort

to full trial — If store was not "occupier" of sidewalk, it probably owed common law duty of care to invited customers — Given relationship between plaintiff and store, and having regard to plaintiff's expectations and property interests involved, it was appropriate to recognize common law duty of care — Store had no prior notice of danger created by garbage bins, bicycle rack, or dogs — There was nothing on record to demonstrate that store was negligent.

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue

Plaintiff was injured when she tripped and fell as she approached grocery store and was allegedly startled by large dog, which was tied to bicycle rack on sidewalk outside store and lunged at her — Plaintiff brought action for damages against store and its landlord — Store's motion for summary dismissal of action against it was granted on basis that it was not "occupier" of sidewalk under Occupiers' Liability Act and did not owe plaintiff common law duty of care with respect to sidewalk — Plaintiff's appeal was allowed on basis that summary determination of claim was not appropriate because there were triable issues — Appeal by store allowed — Reasons under appeal did not correctly state test for summary dismissal, and did not consider whether store was negligent — Issue was not whether store's position was "unassailable," such that it was so compelling that likelihood of success at trial was very high, but whether record was sufficient to decide if store was liable for plaintiff's injuries — There were no material facts in dispute and no overwhelming issues of credibility, and court was able to apply law to facts — Fair and just determination of whether store owed plaintiff duty of care was possible on summary basis, without resort to full trial — Summary judgment was proportionate, more expeditious, and less expensive means to achieve just result — Action against store dismissed.

Judges and courts --- Stare decisis — Obiter dicta — General principles

Obiter dicta in concurring and dissenting reasons do not reflect law, and should not be followed to extent that they are inconsistent with binding authority.

Table of Authorities

Cases considered:

Abbey Lane Homes v. Cheema (2015), 2015 ABCA 173, 2015 CarswellAlta 913 (Alta. C.A.) — referred to

Amack v. Yu (2015), 2015 ABCA 147, 2015 CarswellAlta 715, 24 Alta. L.R. (6th) 44, (sub nom. *Amack v. Wishewan*) 602 A.R. 62, (sub nom. *Amack v. Wishewan*) 647 W.A.C. 62 (Alta. C.A.) — referred to

Beier v. Proper Cat Construction Ltd. (2013), 2013 ABQB 351, 2013 CarswellAlta 1141, 35 R.P.R. (5th) 105, 564 A.R. 357 (Alta. Q.B.) — considered

Bogoroch v. Toronto (City) (1991), 1991 CarswellOnt 1554 (Ont. Gen. Div.) — referred to

Bongiardina v. York (Regional Municipality) (2000), 2000 CarswellOnt 2622, 49 O.R. (3d) 641, 189 D.L.R. (4th) 658, 13 M.P.L.R. (3d) 167, (sub nom. *Bongiardina v. Vaughan (City)*) 135 O.A.C. 154 (Ont. C.A.) — referred to

C. (R.) v. McDougall (2008), 2008 SCC 53, 2008 CarswellBC 2041, 2008 CarswellBC 2042, 83 B.C.L.R. (4th) 1, [2008] 11 W.W.R. 414, 60 C.C.L.T. (3d) 1, 61 C.P.C. (6th) 1, (sub nom. *H. (F.) v. McDougall*) 297 D.L.R. (4th) 193, 61 C.R. (6th) 1, (sub nom. *F.H. v. McDougall*) 380 N.R. 82, (sub nom. *F.H. v. McDougall*) 260 B.C.A.C. 74, (sub nom. *F.H. v. McDougall*) 439 W.A.C. 74, (sub nom. *F.H. v. McDougall*) [2008] 3 S.C.R. 41 (S.C.C.) — followed

Can v. Calgary Police Service (2014), 2014 ABCA 322, 2014 CarswellAlta 1836, 315 C.C.C. (3d) 337, [2015] 2 W.W.R. 695, (sub nom. *Can v. Calgary Chief of Police*) 584 A.R. 147, (sub nom. *Can v. Calgary Chief of Police*) 623 W.A.C. 147, 3 Alta. L.R. (6th) 49 (Alta. C.A.) — considered

Canada (Attorney General) v. Lameman (2008), 2008 SCC 14, 2008 CarswellAlta 398, 2008 CarswellAlta 399, 86 Alta. L.R. (4th) 1, [2008] 5 W.W.R. 195, (sub nom. *Lameman v. Canada (Attorney General)*) 372 N.R. 239, 68 R.P.R. (4th) 59, 292 D.L.R. (4th) 49, [2008] 2 C.N.L.R. 295, (sub nom. *Lameman v. Canada (Attorney General)*) 429 A.R. 26, (sub nom. *Lameman v. Canada (Attorney General)*) 421 W.A.C. 26, [2008] 1 S.C.R. 372 (S.C.C.) — considered

Cooper v. Hobart (2001), 2001 SCC 79, 2001 CarswellBC 2502, 2001 CarswellBC 2503, [2002] 1 W.W.R. 221, 206 D.L.R. (4th) 193, 96 B.C.L.R. (3d) 36, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.)*) 277 N.R. 113, 8 C.C.L.T. (3d) 26, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.)*) 160 B.C.A.C. 268, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.)*) 261 W.A.C. 268, [2001] 3 S.C.R. 537, [2001] B.C.T.C. 215, 2001 CSC 79 (S.C.C.) — referred to

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — followed

Kluane v. Chasse (2003), 2003 ABCA 30, 2003 CarswellAlta 118, 35 M.P.L.R. (3d) 86, 320 A.R. 376, 288 W.A.C. 376 (Alta. C.A.) — referred to

McDonald v. Brookfield Asset Management Inc. (2016), 2016 ABCA 375, 2016 CarswellAlta 2308 (Alta. C.A.) — considered

Moody v. Toronto (City) (1996), 31 O.R. (3d) 53, 15 O.T.C. 122, 1996 CarswellOnt 4047 (Ont. Gen. Div.) — referred to

Nasser v. Rumford (1977), 5 Alta. L.R. (2d) 84, 7 A.R. 459, 4 C.C.L.T. 49, 1977 CarswellAlta 153, 83 D.L.R. (3d) 208 (Alta. C.A.) — referred to

Waldick v. Malcolm (1989), 63 D.L.R. (4th) 583, 70 O.R. (2d) 717, 35 O.A.C. 389, 2 C.C.L.T. (2d) 22, 1989 CarswellOnt 679 (Ont. C.A.) — referred to

Waldick v. Malcolm (1991), 8 C.C.L.T. (2d) 1, 83 D.L.R. (4th) 114, 47 O.A.C. 241, [1991] 2 S.C.R. 456, (sub nom. *Malcolm v. Waldick*) [1991] R.R.A. 560, 1991 CarswellOnt 766, 3 O.R. (3d) 471 (note), 125 N.R. 372, 1991 CarswellOnt 1020, 3 O.R. (3d) 471 (S.C.C.) — referred to

Whippey v. Jones (2009), [2009] EWCA Civ 452 (Eng. C.A.) — considered

Wilk v. Arbour (2017), 2017 ONCA 21, 2017 CarswellOnt 206, 97 C.P.C. (7th) 61, 407 D.L.R. (4th) 222, 135 O.R. (3d) 708 (Ont. C.A.) — referred to

Windsor v. Canadian Pacific Railway (2014), 2014 ABCA 108, 2014 CarswellAlta 395, [2014] 5 W.W.R. 733, 94 Alta. L.R. (5th) 301, 371 D.L.R. (4th) 339, 56 C.P.C. (7th) 107, (sub nom. *Windsor v. Canadian Pacific Railway Ltd.*) 572 A.R. 317, (sub nom. *Windsor v. Canadian Pacific Railway Ltd.*) 609 W.A.C. 317 (Alta. C.A.) — followed

Wood v. Ward (2009), 2009 ABCA 325, 2009 CarswellAlta 1543, 12 Alta. L.R. (5th) 52, 464 A.R. 383, 467 W.A.C. 383, 312 D.L.R. (4th) 570 (Alta. C.A.) — referred to

776826 Alberta Ltd. v. Ostrowercha (2015), 2015 ABCA 49, 2015 CarswellAlta 155, (sub nom. *Ostrowercha v. 776826 Alberta Ltd.*) 593 A.R. 391, (sub nom. *Ostrowercha v. 776826 Alberta Ltd.*) 637 W.A.C. 391 (Alta. C.A.) — referred to

Statutes considered:

Occupiers' Liability Act, R.S.A. 2000, c. O-4

Generally — referred to

s. 1(a) "common law duty of care" — considered

s. 1(c) "occupier" — considered

s. 1(c) "occupier" (ii) — considered

s. 5 — considered

s. 6 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 7.3 — referred to

R. 7.3(1)(b) — considered

R. 14.18(1)(a)(i) — referred to

R. 14.18(1)(b)(i) — referred to

R. 14.18(1)(b)(iii) — referred to

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Sched. C, Tariff of Costs, item 19 — considered

Words and phrases considered:

dogs

[Per Slatter, Veldhuis, and Schutz JJ.A.:] Dogs are domesticated animals . . . .

APPEAL by defendant from judgment reported at 1742986, allowing plaintiff's appeal from summary dismissal of her negligence action under *Occupiers' Liability Act*.

***Per curiam*:**

1 The plaintiff was injured when she was startled by a dog as she approached the appellant Sobeys Capital's grocery store. The appellant Sobeys appeals the dismissal of its application for summary dismissal of the action against it: *Stefanyk v. Stevens*, 2017 ABQB 402 (Alta. Q.B.).

Facts

2 The appellant Sobeys operates a retail grocery store from premises that it leases from the respondent First Capital (Eastview) Corporation. The grocery store premises are in a shopping mall, which includes a parking lot and sidewalks for access. There is a private sidewalk running along the front of the grocery store, the primary purpose of which is to provide access for Sobeys customers to the store.

3 While the sidewalk is not included as a part of the leased premises, there is a Sobeys awning over a large section of it. The landlord Eastview has placed three garbage receptacles on the sidewalk. The photographs suggest that they are the usual cluster of receptacles for waste, recyclables, and beverage containers. Eastview or Sobeys has placed a bicycle rack next to the three receptacles, underneath the Sobeys awning, while still leaving ample room to walk down the sidewalk.

4 The headlease between Sobeys and Eastview defines that portion of the sidewalk at issue in these proceedings as a "common area" of the shopping centre. However, Sobeys reserved the exclusive right to use the main entryway to the Sobeys store for promotional, marketing, sales and charitable purposes. Although there is no direct evidence concerning the activities conducted by Sobeys in this area at the time of the incident, there is evidence that Sobeys utilized "the whole front of the store" for merchandising racks and promotional signs. Since this area was used almost exclusively by Sobeys customers, it was the general practice of Sobeys to deal with complaints concerning other sidewalk users, such as panhandlers. Sobeys would also collect grocery carts left by its customers on the sidewalk or in the parking lot.

5 Under the headlease, Eastview was to provide, maintain, operate and manage the common areas, including maintaining free, easy and open access between common areas and leased premises, and keeping common areas clean and clear of debris. Although Eastview is responsible for maintaining and preserving free access between such areas, there is no express provision in the lease requiring Eastview to remove obstacles or hazards that do not impede access. Sobeys, on the other hand, is prohibited from permitting anything of a "dangerous, inflammable or explosive nature" to be brought upon the leased premises except in accordance with "safe and proper procedures" and applicable laws. The headlease contains cross-indemnity clauses that provide that each party will indemnify the other for damage caused by its fault.

6 From time to time Sobeys customers would tie their dogs to the bicycle rack while shopping. The evidence of Sobeys is that it had no prior knowledge or complaint of any aggressive or dangerous dogs on the premises before the incident. However, a Sobeys representative admitted in questioning that he had observed dogs tied up in front of the store prior to the incident, in areas that included the sidewalks and parking areas.

7 On the day of the incident, the defendant Martin had tied a dog owned by the defendant Stevens to the bicycle rack, while the former went shopping. The plaintiff Stefanyk alleges that she was startled by a large dog which lunged at her from behind the cluster of garbage bins that were located on the sidewalk, causing her to step back and trip over the edge

of the sidewalk. She says that she did not see the dog because its presence was obscured by the garbage receptacles on the sidewalk. She suffered injuries to her head, back and wrists, and sued Stevens, Martin, Sobeys, and the landlord Eastview.

The Decisions Below

8 Sobeys brought an application for summary dismissal of the action against it. It argued that it was not an "occupier" of the sidewalk under the *Occupiers' Liability Act*, RSA 2000, c. O-4:

> 1 In this *Act* . . .
>
> (c) "occupier" means
>
> (i) a person who is in physical possession of premises, or
>
> (ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,
>
> and for the purposes of this *Act*, there may be more than one occupier of the same premises;
>
> Sobeys also argued that it owed no other duty of care, and that in any event it had not been negligent in any respect. Eastview opposed the application for summary dismissal, although the plaintiff did not participate in the proceedings.

9 A Master in Chambers granted the application and dismissed the action against Sobeys. After considering the terms of the lease, and the types of activities that Sobeys might conduct on the sidewalk from time to time, he concluded that: "The evidence does not support the conclusion that Sobeys was an occupier of the sidewalk at the time of this incident". Secondly, the Master concluded that Sobeys did not owe a common law duty of care with respect to the sidewalk " . . . simply because customers needed to use the sidewalk for ingress to and egress from the Sobeys store". Thirdly, the Master concluded that even if Sobeys did owe a duty of care, there was no " . . . basis in the evidence that would lead to the conclusion that Sobeys was negligent".

10 Eastview appealed the dismissal to a Justice in Chambers. The appeal was allowed on the basis that summary dismissal was not appropriate, because there was a triable issue as to a) whether Sobeys was or was not an "occupier", and b) whether Sobeys owed a common law duty of care. The chambers judge did not deal with the third argument, namely that even if a duty of care was owed, Sobeys had not been negligent. Sobeys appealed that decision to this Court.

Summary Judgment

11 A threshold issue is whether this case is suitable for summary dismissal, a form of summary disposition under R. 7.3. It would be unfortunate if our civil procedure was unable to resolve a simple dispute like this, where the facts are not seriously in dispute, without a full trial.

12 An action may be summarily dismissed where "there is no merit to a claim or part of it": R. 7.3(1)(b). Summary judgment is an appropriate procedure where there is no genuine issue requiring a trial. There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (a) allows the judge to make the necessary findings of fact, (b) allows the judge to apply the law to the facts, and (c) is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) at para. 49, [2014] 1 S.C.R. 87 (S.C.C.); *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.) at para. 13, (2014), 94 Alta. L.R. (5th) 301, 572 A.R. 317 (Alta. C.A.). Parties to a summary disposition application are expected to put their "best foot forward", meaning that gaps in the record do not necessarily prevent summary disposition: *Canada (Attorney General) v. Lameman*, 2008 SCC 14 (S.C.C.) at para. 11, [2008] 1 S.C.R. 372 (S.C.C.).

13 In this case the reasons under appeal stated the test for summary judgment as being whether the moving party's position was "unassailable", and stated it would be unassailable if it is so compelling that the "likelihood of success [at trial] is very high": reasons at para. 9. This statement of the law was extracted from the concurring reasons in *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.) at para. 20, (2014), 584 A.R. 147 (Alta. C.A.), which extracted that test from the earlier reasons of the author in *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.) at para. 61, (2013), 564 A.R. 357 (Alta. Q.B.). The *obiter dicta* in *Can* do not accurately state the law. Under the rules of *stare decisis*, decisions of the Court of Appeal reflect the law of the province. The binding *ratio decidendi* of a Court of Appeal decision, however, is to be found in the majority reasons. *Obiter dicta* in concurring and dissenting reasons do not reflect the law, and they should not be followed to the extent that they are inconsistent with binding authority.

14 First of all, it is now established that there is only one civil standard of proof, and it is proof on a balance of probabilities. The rule was definitively stated in *C. (R.) v. McDougall*, 2008 SCC 53 (S.C.C.) at para. 40, [2008] 3 S.C.R. 41 (S.C.C.): " . . . I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities". That is the standard the summary judgment rule engages when it talks about "merit": proof on a balance of probabilities. "Unassailable" and "very high likelihood" are not recognized standards of proof.

15 Secondly, the test for summary judgment is stated in the binding cases like *Hryniak v Mauldin* and *Windsor v Canadian Pacific Railway*. Summary judgment is one *procedure* for deciding whether the moving party has proven its case on a balance of probabilities. Summary judgment is the appropriate procedure where the record is such that a fair and just disposition can be made on it: *776826 Alberta Ltd. v. Ostrowercha*, 2015 ABCA 49 (Alta. C.A.) at paras. 9-10, (2015), 593 A.R. 391 (Alta. C.A.). In other words, is the record such that it is fair and just to decide summarily if the moving party has proven the case on a balance of probabilities? That generally comes down to deciding if there is any material issue of fact on which a trial is justified, or whether the chambers judge can make any required fact findings from the summary dismissal record in a fair and just manner. A trial may be the preferred and proportional procedure where there is a reasonable expectation that a better evidentiary record will be created by a trial, for example because there are disputed issues of material fact, or issues of credibility, that cannot fairly be resolved summarily.

16 It follows that a plaintiff cannot resist summary dismissal merely by raising a "doubt", although the plaintiff is not required at that stage to prove its case on a balance of probabilities: *McDonald v. Brookfield Asset Management Inc.*, 2016 ABCA 375 (Alta. C.A.) at para. 13. The plaintiff can obviously resist summary dismissal by showing that the applicant has not, at that stage, proved its defence on a balance of probabilities. Summary dismissal can also be resisted when the record or the issues mean that summary dismissal is not a fair and just procedure for both parties: *Abbey Lane Homes v. Cheema*, 2015 ABCA 173 (Alta. C.A.) at para. 22. A dispute about material facts that cannot be resolved on the existing record, or that fairly and reasonably call for a trial, will be sufficient: *Ostrowercha* at para. 11.

17 Therefore, in this appeal the issue is not whether the appellant's position is "unassailable". The first question is whether the record is sufficient to decide if the appellant is liable for the plaintiff's injuries. There are no material facts in dispute, no overwhelming issues of credibility, and the court is able to apply the law to the facts. It is unlikely that the cost and expense of a trial is justified because of an expectation of a significantly better record. In this case summary judgment is a proportionate, more expeditious and less expensive means to achieve a just result, and therefore it is an appropriate procedure. The ultimate issue is whether the appellant has proven on a balance of probabilities that it is not liable for the plaintiff's injuries.

Duty of Care

18 The first issue is whether the facts on the record disclose a duty of care, either under the *Occupiers' Liability Act*, or at common law. In the context of this summary dismissal application, is the record such that the court can fairly and justly determine if a duty of care is owed?

19 The common law had idiosyncratic rules governing the duty that an occupier owed to persons who were injured on the premises: G.H.L. Fridman, *The Law of Torts in Canada* (3d ed) (Toronto: Carswell, 2010), at pp. 544-5. Generally speaking, the mere "ownership" of land did not attract liability for injuries that occurred on the land, because the "occupier" was seen as being in control of any risks. The highest duty was owed to those who had a contractual right to be on the land. A lower duty was owed to "licensees" who were there for their own purposes, unless they were "invitees" who were there for some purpose that was also of benefit to the occupier. Some of the common law duties could be discharged merely by warning of any known dangers. Virtually no common law duty whatsoever was owed to "trespassers".

20 The purpose of the *Occupiers' Liability Act* was to rationalize the law by replacing the old categories of "licensees" and "invitees" with a new category of "visitors" to whom the occupier owed a general duty to take reasonable care:

> 5 An occupier of premises owes a duty to every visitor on the occupier's premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there.
>
> 6 The common duty of care applies in relation to
>
> (a) the condition of the premises,
>
> (b) activities on the premises, and
>
> (c) the conduct of third parties on the premises.
>
> What the *Act* defines in s. 1(a) as the "common law duty of care" is not really the occupier's common law duty of care at all, but rather the "statutory duty of care" created by the *Act* itself. What the statute effectively does is to create a statutory duty of care to all "visitors", and apply the common law standard of care in negligence to occupiers.

21 The liability of an occupier, with respect to the premises of which it is an occupier, is exclusively governed by the *Occupiers' Liability Act*. That statute was only enacted because there was no appropriate common law duty of care. Thus, if Sobeys is an occupier of the private sidewalk where the plaintiff was injured, its liability must be determined under the statute; there is no residual "common law duty of care". However, if Sobeys is not an occupier of the sidewalk, it would be necessary to apply the common law rules to determine if there is a *common law* duty on Sobeys that extends to the areas of which it is not an occupier.

22 The *Act* specifically contemplates that there can be more than one occupier of any premises. Thus, it is possible that both Sobeys and Eastview were "occupiers" of the sidewalk at the time of the incident. If that was the case, it would not necessarily follow that the duty owed by each of them was equal, or that the standard of care they would be required to meet would be the same. Both the duty and the standard of care would vary depending on the circumstances, including the degree of control exercised, the number of other occupiers, the nature of the risk that materialized, and many other factors. Further, the mere existence of a duty does not mean that the occupier becomes an insurer for everything that happens on the premises: *Wood v. Ward*, 2009 ABCA 325 (Alta. C.A.) at paras. 7, 13-4, (2009), 12 Alta. L.R. (5th) 52 (Alta. C.A.); *Waldick v. Malcolm* (1989), 70 O.R. (2d) 717 (Ont. C.A.) at p. 723 affirmed [1991] 2 S.C.R. 456 (S.C.C.).

23 The recognition of multiple occupiers means that an occupier need not have "minute-to-minute, hour-to-hour control" of the premises as suggested by some of the cases. It is unlikely that each of several occupiers would have such complete control. Rather, the degree to which each occupier controls the premises will impact the scope of the duty of care and the content of the standard of care. A more important consideration is the extent of the control of any particular occupier at the time at which an incident occurred, and the nature of the risk that emerged.

24 A common situation arises where the occupier of lands is sued for damage that occurs on adjacent land. Often that adjacent land is used for access to the "occupied lands". The case law presumes that the occupier is only liable for what happens on the occupied lands, subject to certain exceptions: *Kluane v. Chasse*, 2003 ABCA 30, 35 M.P.L.R. (3d) 86

(Alta. C.A.); *Bongiardina v. York (Regional Municipality)* (2000), 49 O.R. (3d) 641 (Ont. C.A.) at paras. 19-21, (2000), 13 M.P.L.R. (3d) 167 (Ont. C.A.). Some cases say that the occupier can become a "deemed occupier" of the adjacent lands if it assumes some control of those lands: *Bogoroch v. Toronto (City)*, [1991] O.J. No. 1032 (Ont. Gen. Div.). Others look for "special circumstances" before imposing a duty of care: *Moody v. Toronto (City)* (1996), 31 O.R. (3d) 53 (Ont. Gen. Div.). An occupier may also be liable for hazards that originate on its land, and migrate onto adjacent premises: *Bongiardina* at para. 21.

25 A more scientific approach is to examine if a common law duty of care arises with respect to the adjacent premises using the common law test, set out in a series of cases including *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.). The analysis turns on whether the relationship between the claimant and the defendant discloses sufficient foreseeability and proximity to establish a *prima facie* duty of care and, if so, whether there are any residual policy considerations which ought to negate or limit that duty of care. Defining the relationship can involve looking at expectations, representations, reliance, and the property or other interests involved. The object is to evaluate the closeness of the relationship between the plaintiff and the defendant to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

26 In this appeal Sobeys operates a grocery store, to which it invites customers. Sobeys is clearly the "occupier" of the grocery store itself, and its liability with respect to the store is exclusively governed by the *Act*. With respect to the private sidewalk where the incident occurred, Sobeys might be an "occupier" of the sidewalk, although Eastview is also likely an occupier. If Sobeys is an occupier of the sidewalk, its liability is, again, exclusively governed by the *Act*. If Sobeys is not an occupier, then it is necessary to examine whether it owed a common law duty of care. Given that the relevant facts are not significantly disputed, it is appropriate to determine the existence of a duty of care on a summary basis, without resort to a full trial.

27 The first question, therefore, is whether Sobeys has established on a balance of probabilities that it was not an "occupier" within the statutory definition:

> 1 (c)(ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,
>
> Sobeys had some, although limited, control over the sidewalk and the condition of the sidewalk. It did, in fact, exercise that control from time to time. It also had some control over the persons using the sidewalk, such as panhandlers. It is reasonable to conclude that it could have prohibited dogs from the sidewalk. The logical access to the Sobeys store is through the parking lot and across the sidewalk where the dog was tied up. It is also reasonable to conclude that Sobeys had some control over potentially dangerous conditions on the sidewalk, such as ice and snow, even if the primary responsibility for them lay with Eastview. Sobeys cannot demonstrate on a balance of probabilities that it is not an "occupier" of the sidewalk.

28 In the alternative that Sobeys was not an "occupier" of the sidewalk, it is probable that it owed a common law duty of care. Sobeys invited customers to its store, and the logical access to the store is through the parking lot and across the private sidewalk where the dog was tied up. This was not a situation where the privately owned sidewalk provided access to other stores, nor a situation where the sidewalk provided an obvious route unrelated to access to the Sobeys store. Given the relationship between the plaintiff and Sobeys, and having regard to the expectations of the plaintiff and the property interests involved, it is appropriate to recognize a common law duty of care in the circumstances. It is not necessary, to resolve this appeal, to precisely define the scope of that duty of care.

Negligence

29 The existence of a duty of care (either as an occupier or at common law) does not make Sobeys liable for everything that happens on the sidewalk, nor does it necessarily engage a general duty to keep the sidewalk safe. It would likely extend to preventing or warning of any obvious dangers that arose. The Master in Chambers held, in the alternative,

that even if Sobeys owed a duty of care the record did not disclose any negligence on its part. The Justice in Chambers did not analyse this aspect of the application for summary dismissal.

30 The Statement of Claim alleges the following particulars of negligence against Sobeys and Eastview:

a. Creating a hazardous area by cluttering the Sobeys Sidewalk with various garbage/recycle bins;

b. Failing to properly inspect the condition of the Sobeys Premises for potential hazards or risks to the public;

c. Failing to take proper action to avoid hazards or risks on the Sobeys Premises;

d. Failing to take reasonable care to ensure that Stefanyk would be reasonably safe in using the Sobeys Premises;

e. Failing to properly regulate the activities conducted on the Sobeys Premises;

f. Failing to take proper and prompt action when advised of the dog on the Sobeys Sidewalk; and

g. Such further and other particulars of negligence as may be proven at the trial of this action.

No expert evidence has been introduced on the standard of care called for in the circumstances. That, however, does not preclude summary disposition of the claim. The summary dismissal judge can make findings of fact from the evidence on the record: ***Hryniak v Mauldin*** at paras. 49-50. The parties are expected to put their "best foot forward" on summary judgment applications, and in the absence of expert evidence the court is entitled to determine if there is a breach of the standard of care with respect to matters within common experience.

31 It cannot be negligent to have a bicycle rack or garbage bins on the sidewalk, even if they would inevitably obstruct the view of some other parts of the sidewalk. Sobeys would undoubtedly have a duty to warn of or remove unreasonable hazards or risks, but the record discloses that Sobeys had no prior notice of a danger created by the garbage receptacles, the bicycle rack, or dogs. There is no evidence on the record supporting any "failure to inspect". The fact that Sobeys did not have a formal "policy" about dogs is of little significance if its conduct with respect to the incident was reasonable.

32 It was suggested in argument that Sobeys could have prohibited the leaving of unattended dogs on the sidewalk, or could have posted warning signs about the risk. Dogs are domesticated animals, and while some dogs can be unpredictable, on the whole they likely do not present an unreasonable risk. Liability for damage caused by domestic animals is based on foreseeability, which in turn is highly dependent on whether the animal had a history of creating a risk of injury: *Nasser v. Rumford* (1977), 7 A.R. 459 (Alta. C.A.) at paras. 22, 26, (1977), 5 Alta. L.R. (2d) 84 (Alta. C.A.); *Wilk v. Arbour*, 2017 ONCA 21 (Ont. C.A.) at para. 40, (2017), 135 O.R. (3d) 708 (Ont. C.A.); *Whippey v. Jones*, [2009] EWCA Civ 452 (Eng. C.A.) at para. 19. It is not negligent to keep dogs in public, at least when they are restrained or supervised. Further, dog owners can be expected to be responsible about their pets. Sobeys could expect that owners of unpredictable or aggressive dogs would not leave them tied up unattended outside grocery stores. It is clearly foreseeable that there are dogs that are unpredictable, and dog owners that are irresponsible, but that does not mean that a defendant like Sobeys must ban all dogs to avoid being found negligent.

33 The Master correctly determined that there was nothing on the record to demonstrate that Sobeys was negligent. Since Sobeys was not directly responsible for the dog, any negligence would have to arise from its failing to prohibit any dogs from the premises, or for failing to deal with this particular dog. Given that there had never been any prior problem with the dog, and that Sobeys had no notice that this dog was even present, negligence has not been demonstrated.

Conclusion

34 The legal test for summary dismissal, as well as the legal components of the underlying cause of action, are subject to review for correctness. However, the case management judge's assessment of the facts, his application of the law to those facts, and the ultimate determination on whether summary dismissal is appropriate are entitled to deference: *Hryniak*

v Mauldin at paras. 81-4; *Amack v. Yu*, 2015 ABCA 147 (Alta. C.A.) at para. 27, (2015), 2015 ABCA 147, 24 Alta. L.R. (6th) 44 (Alta. C.A.). The reasons under appeal did not correctly state the test for summary dismissal, and did not consider whether Sobeys was negligent. Further, a fair and just determination on the merits was possible on this record, without the necessity of a trial. Appellate intervention is accordingly appropriate. The appeal is allowed, and the action against Sobeys is dismissed.

35 The Appeal Record prepared by the appellant was deficient. It did not contain copies of the last version of the pleadings, nor a copy of the summary judgment application that generated the appeal: R. 14.18(1)(b)(i) and (iii). The reasons of the Master were in the Appeal Record, but were not listed in the Table of Contents: R. 14.18(1)(a)(i). As a result, the appellant is only entitled to one half of the fee for "all other preparation" allowed by item 19 of Schedule C.

Appeal allowed.

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