IN THE SUPREME COURT OF BRITISH COLUMBIA

(BEFORE THE HONOURABLE MR. JUSTICE BERGER)

Fort St. John Registry
No. C124/81

Fort St. John, B.C.

November 4, 1982

BETWEEN:

RITA ST. LOUIS

Plaintiff

AND:

HUDSON'S BAY COMPANY
DEVELOPMENTS LIMITED

Defendant

APPEARANCES:

A. DALEY, ESQ. for the Plaintiff
P. BYL, ESQ. for the Defendant

REASONS FOR JUDGMENT (ORAL)

THE COURT: Judgment. I say at the outset that much reliance was placed by the plaintiff on the Woelbern case, a judgment of Mr. Justice McKenzie. Mr. Byl sought to distinguish it on a number of grounds. As a matter of law the most cogent of these was derived from the judgment of Mr. Justice Angers in Morais versus Pepper's Drug Store. Mr. Byl said that the Woelbern case was not really a parking-lot case, so to speak, but was, rather, a case which should be treated in the same way as those where plaintiffs had been injured on slippery

sidewalks at the main entrance to retail establishments.

In the Morais case, Mr. Justice Angers said, "it seems to me that the courts have imposed a greater duty on defendants with respect to areas reserved for walking, and generally through which access is gained to the buildings, and a lesser duty with respect to areas reserved for parking and driving of vehicles. On the part of the plaintiff it is reasonable to expect a greater degree of safety and walking and access areas. Further, the duty of the defendant is reasonably and easily discharged in these walking areas, while with respect to larger areas, such as parking lots, it would be, in the words of Mr. Justice Shard, unreasonable to require the same degree of safety". Mr. Byl argued that the evidence in the Woelbern case was that the area where the plaintiff had slipped was well travelled and used by all of those entering the defendant's establishment by the main entrance. Thus, he argued, the distinction outlined by Mr. Justice Angers in Morais is applicable in the case at bar. I will return to that distinction later.

Let me deal now with the facts of this case, for inevitably every case depends on its own facts. In the nature of things, Mrs. St. Louis was the only person who could describe to the court what happened to her. I found Mrs. St. Louis to be a most careful and reliable witness. I was struck by the fact that she was ready -- usually witnesses are not -- to acknowledge without qualification matters of fact that seemed adverse to her interest. She said, and her account of what

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occurred is one that I accept, that she went to the Hudson's Bay Company to shop. She parked her car. She said that the lot is on a slope, and she parked so as to avoid the slope where it is greatest. She was wearing winter boots. She said the lot was icy, but that the ice was sticky. She was able to navigate, so to speak, into the store. She entered the store approximately eleven a.m. She did some shopping, went out of the store, and returned to the store. This exit from and re-entry to the store was through the main entrance at the front of the store. She said the conditions at the front of the store were good, that the front sidewalk was bare of ice and snow. When she left the store, through the back entrance, in order to reach her car, there was fresh snow on the ground. She said she was aware that fresh snow on ice can be treacherous, so she walked slowly, planting her feet carefully. She said that she was looking at the ground as she proceeded. Then she slipped. She said, "both of my feet went up and I was flat on my back". She said, "I was looking at the ground until I was suddenly looking at the sky". She says she got up, and, "I thought, how strange it was that the pattern of my whole body could be observed in the snow". Indeed, she said that her wrist had hit a rut, breaking her wrist, and dislodging the keys that she was carrying in her hand.

She said that she started back to the Bay to tell them that they should sand the lot; then she realized that she was injured, so she got into her car and drove to the hospital. She said that as she left the parking lot she saw someone else

who was slipping and sliding. This was Doreen Clark. Mrs. St. Louis rolled down her window and said to her, "Be careful I've just broken my arm". She waited for Doreen Clark to leave by the entrance and exit for automobiles, and then she drove off to the hospital.

Mr. McLeod of the weather office confirms that snow fell at the time that Mrs. St. Louis was in the store. I think on the balance of probabilities it is fair to assume that one centimeter had fallen by the time Mrs. St. Louis came out of the store into the parking lot and fell. There can be no doubt that the surface, when Mrs. St. Louis came out of the store, was a hazardous surface. I think her evidence on that question is unimpeachable. It is supported by the evidence of her son, Ray St. Louis, a reliable witness. It was challenged by Mr. Ross, the manager of the store, but his evidence was subject to infirmities to which I shall come.

The question then is whether or not the Hudson's Bay Company is liable under Section 3, subsection 1, of the Occupier's Liability Act, RSBC, 1979, Chapter 303. Section 3, subsection 1 reads, "an occupier of premises owes his duty to take that care that in all the circumstances of the case is reasonable to see that a person and his property on the premises and property on the premises of a person, whether or not that person himself enters on the premises, will be reasonably safe in using the premises".

The defence is that reasonable measures had been taken to avoid risks to store patrons using the parking lot. Evidence

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was given about the system for snow removal and sanding established by the Hudson's Bay Company. The contract had been let with London Excavating. It required London Excavating to clear the lot of snow whenever it snowed, and to sand it on those occasions. The evidence is that the lot was cleared of snow on January 9th, and not cleared again until February 10th. The accident in this case occurred on February 7th. Mr. Daley argued that the frequency with which London Excavating responded to weather conditions is open to question. He points out that the weather report shows that something like five centimeters of snow fell on January 6th, yet London Excavating did not remove the snow until three days later, January 9th. This, he said, belies Mr. Ross's contention that, if London Excavating failed on the morning following the snowfall to remove it, he would be on the phone to London Excavating to make sure that they cleaned up the lot at once.

The case turns on weather conditions. There was unseasonably warm weather in January and early February. It did not snow for some weeks prior to February the 7th. That is the reason why there had been no cleaning or sanding of the parking lot between January 9th and February 7th. The argument for the defendant is that since no snow fell there was nothing required to be done. It seems to me this is an unsound proposition. Unseasonably warm weather in a cold climate does not suspend the obligation to keep the parking lot safe. Unseasonably warm weather may bring about conditions such as melting and freezing and re-freezing of water and other

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materials, (e.g., sand) that themselves render the parking lot hazardous, perhaps more hazardous than a mere fall of snow would do.

There is also the fact that this parking lot is sloped. Ray St. Louis said in cross-examination that the Hudson's Bay parking lot stood out among retail parking lots in town because of the slope. The slope not only affects the footing, but also is conducive to changes in conditions on the surface of the lot. Melted water may run into the parking lot. It may collect on the lot. It may carry sand off the lot, or displace it from where it was deposited by those responsible for cleaning and sanding the lot after each snowfall.

Mrs. St. Louis and her son both said that they saw no sand on the parking lot. Mr. Ross said that there was sand on the parking lot. He felt it beneath his feet and he observed it. He said that a large quantity of sand had been brought in by truck in the late fall. It was stored in the southwest corner of the lot. He said that at the end of the winter, at break-up, when the lot was cleared of sand, there was at least a pick-up truck full; so it is argued there must have been sand on the lot. Well, there may have been, but it has been established, on the balance of probabilities, that if there was it was not evenly distributed or distributed in such a way as to avoid the formation of dangerous patches of ice. It may be that the ruts Mrs. St. Louis complained of -- and I accept her evidence that she hurt her wrist on a rut -- were formed by the redistribution of sand during the process of melting and

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re-freezing in the period of three or four weeks that the lot went unattended.

I turn to the dispute about the state of the lot on the day of the accident. I have indicated that I accept the evidence of Mrs. St. Louis and her son on this point. Mr. Ross said that there was sand to be observed. Indeed, he says, there were bare patches of asphalt. I think Mr. Ross was telling the truth as best as he could recollect it. But if there was sand to be observed, and bare patches of asphalt, they were not in the vicinity of where Mrs. St. Louis had her fall. I am satisfied that the condition of the lot was generally icy on February the 7th, that there were substantial patches of ice, and that the fall of snow made these areas hazardous to those negotiating their way through the parking lot.

I also point out that Mr. Ross, in going out to the lot to examine the place where he thought Mrs. St. Louis had slipped, did not observe the area where she had slipped. He went to another area. He pointed this out on the map. It was marked 'S', whereas it was some distance away that Mrs. St. Louis had fallen, that she had marked 'Y'. I hold therefore, on the balance of probabilities, that the lot was in a generally icy condition, that the sand laid down a month before had been tracked away or covered by ice, and that the fall of snow created a hazard to Mrs. St. Louis.

Now, given these facts, is there liability? Mr. Byl has rightly pointed out that the Hudson's Bay is not required to live up to a standard of perfection, as Mr. Justice Verchere

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said in the Motler case. Questions of cost and feasibility enter the picture. The defendant is obliged to design a system that will forestall risks that are reasonably foreseeable, that is, the system need not be extravagant in terms of its costs, or in terms of any possible risks that might be conceived by the imagination.

It seems to me, however, that the system here suffered from one vital deficiency. It did not take into account any conditions except those caused by snowfall. It was only when snow fell that London Excavating was hired to clean and sand the lot. But other conditions, such as the formation of ice and the peculiar conditions created by the slope, the likelihood that sand would be tracked away or redistributed -- none of these were taken into account in formulating the design of the system established to avoid risks to patrons of the store using the parking lot. No sanding had been done for a month before this accident. Here, in a cold climate, it seems to me that was simply not good enough.

Even accepting the distinction made by Mr. Justice Angers in Morais and Pepper's Drug Store, even accepting that there is not the same duty relying on a retailer with respect to keeping the parking lot safe as the retailer is obliged to live up to in relation to the sidewalk at the main entrance to his establishment, the measures taken here were not reasonable within the meaning of Section 3, subsection 1, of the Occupier's Liability Act.

I turn to the question whether the defence advanced under

Section 3, subsection 3, of the Occupier's Liability Act has been made out. The section reads, "notwithstanding Section 1, an occupier has no duty of care to a person in respect of risks willingly accepted by that person as his own risks". This appears to be the old defence of Volenti. I do not think that it applies here. Mr. Byl cited the old case of Ottawa Electric and Latang, a judgment of the Supreme Court of Canada, handed down in 1924. That case is an application of the old rule in Indermaur and Dames. As the Court of Appeal had pointed out in Weiss and YMCA, a judgment handed down in 1979, we are now liberated from these old rules, when it comes to the question of occupier's liability. The Occupier's Liability Act is a code, and we interpret the provisions of Section 3, free from the old rules that used to have to be applied. In any event the judgment of Mr. Justice McKenzie in the Woelbern case, which unlike the judgment in Sanders and Shauer, judgment of Mr. Justice Verchere handed down in 1964, comes to us subsequent to the enactment of the Occupier's Liability Act, and it settles the question. I adopt what Mr. Justice McKenzie said in the Woelbern case, at pages 356 and 357, with respect to the application of Section 3, subsection 3.

Finally I turn to the question of contributory negligence. Here two matters are raised. It is said that Mrs. St. Louis' shoes had heels that were too high. She had two-inch heels. It is also said that she was not walking in a way that was as careful as it should have been. That is, she had her shopping

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bag and her purse in one hand, and her keys in the other. It is said that she did not have the same balance and control over her movements that she would have had had she chosen some other way of proceeding. Well, these are difficult questions, but I'm bound to address them with the advantage of hindsight.

I am inclined to accept these propositions. That is, it seems to me that in a cold climate when conditions are hazardous, a pair of shoes that were better suited to winter conditions could have been chosen. I think it may be said that the heels -- even acknowledging women's fashions -- were higher than was reasonable in the circumstances. I think also that carrying the keys in one hand when her other hand was occupied with her shopping bag and her purse, meant that she wasn't in a position to use her arms to balance herself to the same extent as she would have been able to do if she had kept her keys in her pocket until she had got to the car, and then gotten them out. She would have had her hand and her arm free to be used to retain her balance.

I hold therefore that the defendant was negligent. I hold that the plaintiff was guilty of contributory negligence. I apportion fault against the defendant 80 per cent, against the plaintiff, 20 per cent. I award the plaintiff the damages agreed, that is, loss of wages in the sum of $10,000, general damages in the sum of $4,000, special damages in the sum of $227.17. She is entitled to pre-judgment interest, at the rates from time to time applying. The damages, interest, and costs will be apportioned according to the apportionment of

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fault that I have made in this case.

I hereby certify the foregoing to be a true and accurate transcript of the proceedings transcribed to the best of my skill and ability.

Danielle Morgan

Danielle Morgan
Official Court Reporter.