CITATION: Kerr v. Loblaws Inc., 2007 ONCA 371
DATE: 20070516
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COURT OF APPEAL FOR ONTARIO

LASKIN, CRONK and LANG JJ.A.

BETWEEN:

CLARA MARGARET KERR, ANGELA HARPER, CATHIE CAMBDEN

and CAROL JONES

Plaintiffs (Appellants)

and

LOBLAWS INC.

Defendant (Respondent)

Kirk F. Stevens and Darcy Romaine, for the appellants

David H. Lauder and Gillian B. Eckler, for the respondent

Heard: February 1, 2007

On appeal from the judgment of Justice Michael Brown of the Superior Court of Justice, sitting with a jury, dated April 20, 2006.

CRONK J.A.:

I. Introduction

[1] This is an appeal from the jury verdict in a civil negligence action arising from a 'slip and fall' accident in the produce department of a grocery store, during which a store customer, the appellant Clara Margaret Kerr, sustained injuries to her right ankle.

[2] After an eight-day trial, the jury concluded that the owner of the grocery store, the respondent Loblaws Inc., had taken such care as was reasonable under the circumstances to see that Ms. Kerr was reasonably safe while on the store premises. The jury assessed Ms. Kerr's total damages at $58,300. In accordance with the jury verdict, the trial judge dismissed the action.

[3] Ms. Kerr and various family members appeal the jury's verdict on liability. They challenge the trial judge's instructions to the jury on the standard of care applicable in the circumstances and on the issue of causation. They also argue that the jury's verdict was unreasonable.

[4] For the following reasons, I conclude that the trial judge's charge properly identified the issues, the applicable legal principles, and the evidence on the key questions of the standard of care owed by Loblaws and whether that standard was met in the circumstances of this case. I see no merit to the claim that the trial judge misdirected the jury on the issue of causation. Finally, because there was evidence to support the jury's verdict, I cannot say that it was unreasonable. Accordingly, I would dismiss the appeal.

II. Facts

[5] On April 9, 2002, while shopping with a friend, Ms. Kerr slipped and fell on a single grape near a grape display in the produce department of a Zehrs' grocery store owned by Loblaws. Ms. Kerr was eighty years of age. When she fell, she broke her ankle in three places and strained her knee.

[6] As a result, Ms. Kerr underwent surgery on her ankle and was hospitalized for about eight days. Thereafter, she convalesced in a nursing home for six weeks and participated in physiotherapy for two-and-a-half months. Although the outcome of her surgery was positive, Ms. Kerr maintained that the injuries sustained by her in the accident caused a dramatic decline in her mobility and a significant reduction in the quality of her lifestyle.

[7] At the time of the accident, Zehrs' floor care policy manual provided for the use of floor mats in front of grape displays to minimize the potential for accidents. Zehrs' policies also required the use of a "sweep log" to document floor inspections and maintenance in the produce department.

[8] Contrary to the directions contained in Zehrs' manual, floor mats were not in use in front of the Zehrs' grape display on the day in question. In addition, a copy of the manual had not been reviewed by the Zehrs' store manager and no schedule for the conduct of hourly floor inspections was in place at the time of the incident.

[9] However, a sweep log was in use in the Zehrs' produce department. The log entries for the morning of the accident documented floor inspections in the produce department at 8:00 a.m. and 10:00 a.m. – prior to Ms. Kerr's fall – and, again, at 12:10 p.m. – shortly after her fall. The log indicated that loose grapes were picked up from the floor at 8:00 a.m. Other produce, located in an area of the produce section some distance away from where Ms. Kerr fell, was picked up during the inspection at 12:10 p.m.

[10] Notably, on inspection after the accident, no grapes or other produce were discovered on the floor in the area of the grape display.

[11] Following the accident, Ms. Kerr and three of her daughters sued Loblaws in negligence claiming damages for Ms. Kerr's injuries, for expenses associated with her post-accident care, and for the loss of Ms. Kerr's guidance, care and companionship.

[12] Loblaws did not dispute that Ms. Kerr slipped and fell in the produce department of the Zehrs' store. However, it denied liability on the basis that it had taken reasonable steps to see that its customers were reasonably safe on the store premises. Loblaws also maintained that Ms. Kerr's injuries were occasioned by a constellation of pre-existing and deteriorating medical conditions and events unrelated to her fall at the Zehrs' store.

[13] The action was tried before a judge and jury in April 2006. As I have said, the jury concluded that Loblaws was not negligent. Therefore, by judgment dated April 20, 2006, the trial judge dismissed the action, without costs.

III. Issues

[14] There are three issues in this appeal:

(1) Did the trial judge err in his charge to the jury on the requisite standard of care?

(2) Did the trial judge err in his charge to the jury on causation?

(3) Is the jury's verdict on liability unreasonable?

IV. Analysis

(1) Instructions on the Standard of Care

[15] The appellants assert that in directing the jury on the standard of care applicable in this case, the trial judge erred by failing to outline the precautions required to guard against the type of accident that occurred here. The appellants say that where existing case law identifies "*indicia* of reasonableness" or "proper conduct" in relation to the standard of care applicable to an occupier of grocery store produce premises, a trial judge's jury instructions regarding that standard must outline those *indicia* in order to

provide the jury with adequate guidance on the nature of the applicable standard. Stated somewhat differently, the appellants contend that Ontario case law establishes a specific standard of care for grocery store produce departments and that the trial judge erred by failing to particularize that standard for the jury. I would reject these submissions for the following reasons.

[16] Ms. Kerr's negligence claim against Loblaws is based on Loblaws' status as an occupier of the Zehrs' store. Section 3(1) of the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 (the "Act") establishes the standard of care owed by occupiers. It reads:

> An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises and the property brought on the premises by those persons are reasonably safe while on the premises.

[17] Section 3(2) of the Act provides:

> The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.

[18] The trial judge quoted these sections of the Act at the outset of his instructions to the jury concerning liability, indicating that the duty established by s. 3(1) applied to Loblaws. He then elaborated as follows:

> Let us break that down. Under the section I have just read to you *the duty of the defendant here was to take such care as was reasonably necessary in all the circumstances to see that persons like the plaintiff would be safe from injury when they came on the premises. To put it another way, the duty cast upon the defendant was to make the premises reasonably safe for the plaintiff*. The defendant is not required to protect the plaintiff against risks or dangers of which it could not reasonably have been aware. Nor is there any obligation on the defendant to guard against any unusual or unreasonable use of the premises by the plaintiff. In essence, members of the jury, *what you have to consider is whether the defendant took reasonable care in the circumstances by notice, by lighting, by guarding, by maintenance or otherwise to make the premises reasonably safe for the plaintiff*. It is a question of fact for you. You must determine what a reasonably prudent occupier of the premises would have done or

> refrained from doing in the circumstances of this case to make the premises safe for the plaintiff. [Emphasis added.]

[19] As stressed by the trial judge, the standard of care imposed on Loblaws in this case is a standard of reasonableness. It requires neither perfection nor unrealistic or impractical precautions against known risks. In my view, the above-quoted instructions by the trial judge properly drew the jury's attention, in clear and precise terms, to Loblaws' obligation to take such care as was reasonable in all the circumstances to make the Zehrs' premises reasonably safe for customers.

[20] Importantly, the trial judge also told the jury that it should assess whether Loblaws took reasonable care in the circumstances by considering the measures employed by it to render the Zehrs' premises reasonably safe for Ms. Kerr, as a store patron, including such matters as notice, lighting, guarding, and maintenance. The effect of this direction was to inform the jury that Loblaws was required by the standard of care set out in s. 3(1) of the Act to take positive steps to render the Zehrs' store premises reasonably safe. It also alerted the jury to its task of determining whether the steps taken by Loblaws were sufficient to discharge the burden placed on it by the Act.

[21] Moreover, the trial judge's instructions on the standard of care implicitly recognized the important distinction between the well-established roles of the trial judge and the jury in a civil negligence action. In *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670 at 694, Major J. of the Supreme Court of Canada – in dissent on other grounds – noted with approval the following passage from Professor Fleming's textbook on *The Law of Torts*, 8th ed. (Sydney: Law Book Company, 1992) at 106:

> It is for the court to determine the existence of a duty relationship and to lay down in general terms the standard of care by which to measure the defendant's conduct; it is for the jury to translate the general into a particular standard suitable for the case in hand and to decide whether that standard has been attained.

[22] Justice Major explained at p. 694:

> The judge, as a matter of law, must determine, in general terms, the obligation imposed upon the defendant. …Having established the standard of care in general terms, it is then a finding of fact to determine, in the context of a particular case, the obligation imposed on the defendant, and to determine whether or not that obligation was met. [Citations omitted.]

See also *Stewart v. Pettie*, [1995] 1 S.C.R. 131 at 144-45; *Nova Mink Ltd. v. Trans-Canada Airlines*, [1951] 2 D.L.R. 241 (N.S.S.C.) at 254.

[23] In this case, s. 3(1) of the Act established the particular standard of care to which Loblaws was bound. The trial judge specifically referenced and explained that standard in his charge. It remained for the jury, as the trier of fact, to evaluate the precautionary measures taken by Loblaws and to decide whether Loblaws had attained that standard.

[24] To accept the appellants' contention that trial judges are obliged in occupier liability cases tried by judge and jury to articulate the governing standard of care according to prior judicial decisions about conduct found to have satisfied, or to have fallen short of, the applicable standard would be to ignore the reality that the application of the standard of care in such cases is a fact-specific exercise that varies from case to case. This important principle was emphasized by the Supreme Court of Canada in *Waldick v. Malcolm*, [1991] 2 S.C.R. 456 at 472:

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

See also *Galaske*, *supra*, *per* McLachlin J. (as she then was) at 698-99; *Winters v. Loblaws Supermarkets Ltd. (c.o.b. Real Canadian Superstore*), [2005] O.J. No. 3406 (S.C.J.) at para. 19; *Garofalo v. Canada Safety Ltd.*, [1998] O.J. No. 302 (Gen. Div.) at para. 22.

[25] The appellants, however, rely on the decision of the Nova Scotia Court of Appeal in *Marche v. Empire Co. and Sobeys Inc.* (2001), 193 N.S.R. (2d) 132, among other cases, to argue that Canadian common law consistently points to "*indicia* of reasonableness" applicable to grocery store operators and that it was incumbent on the trial judge to refer to these *indicia* in his charge.

[26] I disagree. I note first that *Marche* was a judge alone trial. Thus, it did not concern the adequacy of a jury charge in a case of this kind.

[27] Perhaps more importantly, the court in *Marche* expressly recognized that, in a given case, existing case law concerning preventative measures and responsive safety actions by occupiers, while useful, is ultimately not controlling of whether a particular occupier met the standard of care. The court commented at paras. 30 and 31:

> Case law provides valuable assistance to a judge in determining whether the standard of care has been met. However, as is apparent from the jurisprudence, what is required to meet the reasonableness standard will vary from case to case. What meets the reasonableness standard in one situation may fall short in another.
>
> The appellants urge that the facts of this case are close to, if not virtually identical with, those in cases it relied upon where the standard of care was found to have been met. There may be strong correlations with the facts in other cases, but not surprisingly, there are often noteworthy differences.

[28] I agree. The applicable standard of care in this case is one of reasonableness in the circumstances. As observed by Lax J. of the Superior Court of Justice in *Chan v. Erin Mills Town Centre Corp.*, [2005] O.J. No. 5027 at para. 42, "as circumstances vary from case to case, so do the requirements of meeting the statutory standard [under s. 3(1) of the Act]". It follows that I do not regard it as an error for a trial judge not to specify in his or her jury charge those factors accepted or rejected in other cases as being sufficient to meet the reasonableness standard established by s. 3(1) of the Act.

[29] To the contrary, in my view, once a trial judge in an occupier liability case of this kind has properly identified and explained the relevant standard of care to the jury, as this trial judge did, it is unnecessary to embellish that standard by providing specific examples of how the standard was applied in other cases. The issue of how the standard is met or breached in a given case is for the jury to determine, based on all the circumstances of the case.

[30] It is also noteworthy that, in the case at bar, the appellants' trial counsel appears to have endorsed the trial judge's proposed instructions regarding the standard of care.

[31] In pre-charge discussions, with a copy of the trial judge's draft charge in hand, trial counsel for the appellants requested the trial judge to include in his charge reference to the decisions of other courts regarding the standard of care applicable to grocery store owners in 'slip and fall' cases, like this one. Thereafter, the following exchange took place:

> The Court: Well, we're talking about two things, aren't we, Mr. Romaine? We're talking about what I instruct them on the law.
>
> Mr. Romaine: Yes.
>
> The Court: If there are facts that you want me …

> Mr. Romaine: Yeah.
>
> The Court: …to put to the jury in their assessment of all of the circumstances, you can detail those in your summary and I would be happy to do that tomorrow, but *what is it about this in terms of how I explain the law to them?*
>
> Mr. Romaine: *How you've explained the law is satisfactory. It does cover the [bases or basics]. It does speak to it.* [Emphasis added.]

[32] Counsel for the appellants made no subsequent objection to the trial judge's charge on the standard of care. Nor did he object at any point to the trial judge's review of the evidence or of the positions of the parties on this issue. As this court has said repeatedly, a failure by counsel to object to a jury charge in a civil case, while not dispositive, will tell strongly against an appellant's request for a new trial based on alleged flaws in the jury charge. See *Brochu v. Pond* (2002), 62 O.R. (3d) 722 (C.A.) at para. 66; *Mizzi v. Hopkins* (2003), 64 O.R. (3d) 365 (C.A.) at para. 50; *Pereira v. Hamilton Township Farmers' Mutual Fire Insurance Co.* (2006), 267 D.L.R. (4th) 690 (Ont. C.A.) at para. 77.

[33] In the end, the key question is whether the trial judge's instructions provided the jury with sufficient guidance on the applicable standard of care. In my view, the appellants' attack on these instructions must fail.

[34] Having identified and explained the standard of care applicable in this case, and after directing the jury on the law regarding contributory negligence, the trial judge reviewed the positions of the parties concerning liability, and the evidence relied upon by them in support of their positions, in considerable detail. In so doing, he expressly reminded the jury of the appellants' contention that, in all the circumstances, Loblaws had failed to implement adequate measures to prevent and guard against accidents in the produce department of the Zehrs' store.

[35] In his review, the trial judge identified for the jury the evidence relied upon by the appellants as demonstrating the need for reasonable safety measures by Loblaws and Loblaws' alleged lack of reasonable care regarding the safety of the Zehrs' store premises. This included evidence of the known hazard arising from fallen grapes in a produce department; Zehrs' alleged failure to adhere to the produce department safety measures outlined in its own internal policies; the absence of floor mats in front of Zehrs' grape display; the alleged failure of Zehrs' store personnel to sweep or mop the produce department floor; the absence of any detailed floor maintenance schedule for Zehrs' produce department; the failure of Zehrs' store manager to read Zehrs' floor care policy manual and his alleged failure to instruct store personnel to follow Zehrs' safety policies;

and the failure of produce department staff to inspect the floors and to record such inspections in the sweep log on an hourly basis.

[36] Thus, the trial judge outlined in his charge many of the factors said by the appellants to constitute inadequate or unreasonable conduct by Loblaws. The fact that this outline formed part of the trial judge's summary of the appellants' position on liability, instead of a separate direction on liability, does not change the fact that the identified factors were placed squarely before the jury for its consideration and related specifically to the appellants' theory of the case. I note that this mirrored the approach of the appellants' trial counsel, who reviewed many of the same factors in his closing address to the jury when pressing the appellants' position on liability.

[37] In the result, therefore, this jury cannot have been left in any doubt about the standard of care to be applied and the factors to be considered by it in determining whether Loblaws met that standard.

(2) Instructions on Causation

[38] It was conceded at trial that Ms. Kerr slipped on a single grape in the Zehrs' produce department. However, there was some dispute between the parties about Ms. Kerr's exact position in relation to the grape display when she fell.

[39] Essentially, Loblaws relied on Ms. Kerr's evidence of her position in relation to the grape display at the time of the accident to argue that the presence of a floor mat by the display would not have prevented or minimized the potential for her accident. Rather, given her position – two steps away from her shopping cart and the grape display – Loblaws maintained that the presence or absence of a floor mat in front of the grape display was irrelevant.

[40] The appellants submit that this is a causation defence. They argue that causation was not in issue in this case (save with respect to damages), and that the evidence at trial was insufficient to require a causation instruction. The appellants assert that, having elected nonetheless to instruct the jury on the issue of Ms. Kerr's position at the time of the accident, the trial judge erred by failing to tell the jury that a determination of Ms. Kerr's precise position at the time of her fall was unnecessary to a finding that Loblaws was liable. See for example, *Kamin v. Kawartha Dairy Ltd.* (2006), 79 O.R. (3d) 284 (C.A.).

[41] On the facts of this case, I would reject this argument.

[42] The trial judge's description of Loblaws' theory concerning Ms. Kerr's position at the time of the accident formed only a small part of the jury charge – five sentences in total – during a relatively detailed overview by the trial judge of the theory of the defence and the evidence relied upon by the defence in support of its denial of liability. The

charge itself was fifty-five pages in length. In this context, the trial judge's impugned remarks were insignificant.

[43] Moreover, trial counsel for Loblaws mentioned the same evidence and the same defence contention – that the presence of a floor mat in front of the grape display would have been irrelevant due to Ms. Kerr's position when she fell – in his closing address to the jury. No objection was taken by the appellants to this closing address, or to the inclusion by the trial judge of the impugned statements in his jury charge. This suggests that counsel did not regard the trial judge's comments on this issue as significant or prejudicial. This too militates in favour of the conclusion that the comments in question were of little moment.

[44] Finally, both parties agree that the central liability issues in this case concerned the standard of care to which Loblaws was bound and whether that standard had been breached. This was made clear to the jury in both the jury charge and the closing addresses of counsel. It was also confirmed by the fact that no question regarding causation was posed for determination by the jury.

[45] In these circumstances, I am not persuaded that the jury would have been misled or unfairly influenced by the references made to Ms. Kerr's position at the time of the accident. On this record, there is no basis to conclude that the jury's liability finding was premised on the type of causation considerations now challenged by the appellants. Accordingly, I would reject this ground of appeal.

(3) Reasonableness of the Verdict

[46] The standard of review of a jury verdict in a civil case dictates that a jury verdict is not to be set aside "as against the weight of the evidence" unless it is "so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it": *McCannell v. McLean*, [1937] S.C.R. 341 at 343, quoted with approval in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at 259. See also *Snushall v. Fulsang* (2005), 78 O.R. (3d) 142 (C.A.) at para. 19. I am far from satisfied that this exacting standard for appellate intervention has been met in this case.

[47] This was an uncomplicated personal injury case. As relevant to this appeal, there were two issues on liability: what standard of care applied to Loblaws and did Loblaws' conduct fall below that standard?

[48] In addition, the evidence at trial was straightforward. It included evidence by Todd Young, the Zehrs' store manager, that he addressed floor maintenance and inspection duties with his staff and instructed them to be diligent in completing their duties. He testified that:

(i) Zehrs had a nightly cleaning program, whereby the floors at the store were cleaned every night by an outside company;

(ii) store personnel checked every morning to ensure that the store floors had been cleaned properly the previous night;

(iii) a produce department sweep log was in place at the store to document floor maintenance and inspections;

(iv) produce department employees were obliged to maintain the floors and to document that maintenance; and

(v) it was expected that store employees would ensure that the floors were in "optimal condition" throughout their shift.

[49] Mr. Young also said that, although Zehrs' goal was to document floor inspections in the produce department sweep log on an hourly basis, the times of inspections recorded in the log did not represent the only times that the floors were inspected or cleaned in that section of the store. According to Mr. Young, store employees were instructed:

> If there was anything found out of place or discarded on the floor, to certainly manage that, pick it up, and in the produce department specifically to the best of their ability make a record on their sweep log at least every hour. We didn't write down everything that we picked up through the course of the day, but my expectation was to the best of their ability every hour to make record.

[50] In connection with the use of floor mats in the Zehrs' store, although no mats were in place in front of the grape display prior to the accident, Mr. Young said that mats were utilized in those areas of the produce department where produce 'misting' equipment was employed.

[51] In addition to the evidence of Mr. Young, James Huygen, a Zehrs' produce department clerk who was working at the store on the day of the accident, confirmed in his testimony that Zehrs' employees regularly checked and swept the floors in the produce department, often without making a notation in the sweep log.

[52] As well, Ms. Kerr acknowledged at trial that the floor of the produce department was fairly clean on the morning of the accident.

[53] Given the testimony of these witnesses, there was an evidentiary base to support the jury's verdict on liability. Consequently, I cannot say that the jury's verdict on liability is either plainly unreasonable or unjust.

[54] In particular, there was evidence upon which the jury could rely indicating that Loblaws took reasonable steps to ensure that the floor of the produce department at the Zehrs' store was clean and clear of debris and fallen produce, and that Loblaws had a detailed floor maintenance program in place, consisting of recorded inspections and regular employee checks and cleaning of the produce department floors. There was also evidence that Zehrs' produce department employees actually checked the floors and removed any fallen items on a regular basis. I note, as well, that there is no suggestion here that the problem of accidents from fallen grapes was a recurring issue at this Zehrs' store, or that the employees of this store treated their maintenance and inspection duties as an *ad hoc* or casual requirement.

[55] Finally, the fact that floor mats were not in use in front of the grape display on the day of the accident was one factor, among many, to be considered by the jury in determining whether Loblaws had met the standard of care required in the circumstances. It was open to the jury to determine what weight should attach to this omission.

V. Disposition

[56] For the reasons given, I would dismiss the appeal. Loblaws is entitled to its costs of the appeal, if sought, on the partial indemnity scale, fixed in the amount of $10,000 as agreed by counsel, inclusive of disbursements and GST.

RELEASED:
"MAY 16 2007"
"JL"

"E.A. Cronk J.A."
"I agree John Laskin J.A."
"I agree S.E. Lang J.A."