1995 **S. H. No. 122825**

IN THE SUPREME COURT OF NOVA SCOTIA

Cite as: Kelly v. Loblaws Inc., 1999 NSSC 98

BETWEEN:

VERNA KELLY

PLAINTIFF

- and -

LOBLAWS INC.

DEFENDANT

D E C I S I O N

HEARD BEFORE:	**The Honourable Justice Walter R. E. Goodfellow in the Supreme Court of Nova Scotia at Halifax, N. S. on May 11, 12, 1999**
RELEASE OF WRITTEN DECISION:	**May 25, 1999**
COUNSEL:	**Jeffrey S. Moors, Solicitor for the Plaintiff** **Stephen J. Kingston and Jay Cassidy (Law Student) - Solicitors for the Defendant**

GOODFELLOW, J.

1. BACKGROUND

Verna Kelly, born August 28th, 1951, presently employed through Kelly Services with Pratt-Whitney at the Halifax Airport Industrial Park visited her doctor's office on August 29th, 1995 and around 7:00 P.M. went to the Lower Sackville Superstore, owned and operated by Loblaws Inc. where she intended to pick up only a few items. She entered and grabbed a basket instead of a cart and says she browsed for ten or fifteen minutes in the produce section before proceeding to the dairy section where she says upon reaching for milk, she slipped with her left leg going underneath her, her left elbow ending up in the basket and her right leg out in front of her.

Upon getting up, she says she saw a patch of milk approximately six inches by eight inches, the volume of which she estimates to be approximately one litre and although there were three men nearby, one of whom approached her, she felt too embarrassed, left immediately but apparently returned a minute and a half or so later to pick up her milk.

Ms. Kelly locates the spill at 2-3 feet from the shelves containing milk cartons.

After paying for her purchases, she went to the courtesy desk and reported what she says transpired.

Mrs. Kelly was adamant one of the three gentlemen was a Scotsburn Dairy representative identified by such on his uniform. In any event, none of the three gentlemen gave evidence. At the conclusion of a discovery of Scotsburn Co-Operative Services Limited and Farmer's Dairy, the action against Scotsburn Co-Operative Services Limited was discontinued.

A representative of Farmer's Dairy gave evidence that on the 29th of August in the early evening he was in the dairy area stocking shelves and keeping an eye on a milk spill in the corner area, located inches from the shelves where milk bags, etcetera, are located, an area some considerable distance from the area in which Ms. Kelly alleges she had her slip and fall.

Ms. Kelly was rear-ended in a motor vehicle accident on April 23, 1998 and in this action seeks damages primarily for aggravation of pre-existing conditions and a low back pain she attributes to the slip and fall which she acknowledges dissipated prior to the rear-ending accident in 1998.

2. ONUS

The onus is upon Verna Kelly to establish on a balance of probabilities a breach by Loblaws of the duty to her as a contractual invitee in its premises. The evidentiary standard is proof on a balance of probabilities.

The onus on Loblaws Inc. is a relatively heavy onus. It must take all reasonable steps to ensure patrons of its premises can enter and use its premises for the purposes of the normal business to be conducted, without having to be concerned for their general safety. Loblaws have the duty to ensure all reasonable steps are in place, to avoid and where possible eliminate all dangers that might reasonably be expected from the carrying on of the business; and whenever such danger occurs, to eliminate such danger by the taking of all reasonable steps directed by the circumstances.

Beaudry v. Fort Cumberland Hotel Ltd. (1972), 3 N.S.R. (2d):

> 1. In the case at bar, the learned trial Judge accepted and applied, correctly in my opinion, the line of cases which include **MacLenan v. Segar** and **Zervobeakos v. Zervobeakos**. He indicated that these cases were

> authority for the rule "that the occupier of premises owed a duty arising by implication of a contract between the occupier and the person injured which, in effect, created a limited liability for the safety of the person injured, so far as reasonable care and skill on the part of the occupier or his servant could have warranted or ensured the safety. . .this liability is greater than the liability in the case of the invitor and invitee".

MacKinnon, C.J.N.S., went on to state that the trial justice was correct in applying this rule, and in any event, the same conclusion would be reached if the rule in **Indermaur v. Dames** (1867), 2 C.P. 311. The facts of the situation was that the hotel initially had steps, the height of which were uniform at 6 inches, and on the occasion that Ms. Beaudry fell on the front steps of the hotel, the second step was 9 inches, and the hotel owner knew about the defective steps, creating a hazard which caused her fall and injuries.

It seems to me that Ms. Kelly was using the Superstore in the manner which its owner and operator, Loblaws, intended, namely, to enter and purchase products available for consideration.

In any event, as in the Beaudry case, it matters not in my final determination which rule is to be applied, the invitee rule as pronounced by the Supreme Court of Canada in **Campbell v. Royal Bank of Canada** (1964), 43 D.L.R. (2d) 341, where the relationship of Ms. Campbell as a customer of the bank was not disputed to be that of an invitor and invitee. Spence, J., referred to duty created at page 347:

> "The occupier's liability to an invitee was stated by Willes, J., in **Indermaur v. Dames** (1866), L.R. 1 C.P. 274 at p. 288, as follows:
>
> And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his

> part use reasonable care to prevent damage from unusual danger, which he knows or ought to know.
>
> That outline of liability has been accepted universally since the day it was pronounced. Therefore, the first and the most important inquiry before a Court considering such claim is whether, under the circumstances existing at the time and place of the accident, there was present an "unusual danger". "Unusual danger" has been defined in the judgment given in the House of Lords in **London Graving Dock Co. v. Horton**, [1951] A.C. 737, by Lord Porter at p. 745, as follows:
>
> I think "unusual" is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand, though what is usual will, of course, vary with the reason for which the invitee enters the premises."

Spence, J., went on to say:

> "It is perhaps a test of some value to determine whether a condition is one of unusual danger to investigate the ease by which the occupier might avoid it."

In **Smith v. Provincial Motors Limited** (1962) 32 D.L.R. (2d) 405, Ilsley, C.J.T.D., after considering **Indomaur v. Dames**, held that a four part test was useful in considering cases involving invitees.

I must consider the following questions:

1. Was there an unusual danger?
2. If so, was one which the Defendant knew or ought to know?
3. If so, did the Defendant use reasonable care to prevent damage to the Plaintiff from the unusual danger?

4. Did the Plaintiff use reasonable care on his own part for his own safety? (p. 412)"

MacLellan, J., had occasion recently to apply the 4-step test in **MacLean v. Empire Theatres Limited** (1998), 171 N.S.R. (2d) 110 where Ms. MacLean alleged she received injuries in a fall at the Defendant's drive-in. MacLellan, J., determined her fall was not in the manner Ms. MacLean described. Justice MacLellan concluded there was no unusual danger present and **Empire** took all reasonable steps to ensure that the canteen entrance was reasonably safe.

Irrespective of which test you apply, I am inclined to the view expressed in **Beaudry v. Fort Cumberland Hotel Ltd.** owners and operators of retail outlets are not guarantors or insurers of the safety of all patrons in all circumstances.

If I were to apply the test referred to by Ilsley, C.J.T.D., I would have concluded that there was an unusual danger, if there was a milk spill in the traffic area as alleged by Ms. Kelly, then such would constitute an unusual danger, particularly as it would tend to blend in with the colour of the floor in the public traffic area. As to the second question, I would have answered it in the affirmative. The evidence of the Farmer's Dairy representative is that milk spills are of some frequency and he estimated several during the rather limited time frame over the past year. He was only present in the Superstore for periods of a short time and if his evidence as to the volume of spills is reflected throughout the rest of the business hours, then such occurred with a frequency that the Defendant knew of them and indeed the Defendant had a "system" to address milk or other spills.

I would have answered the third question in the negative. The Farmer's representative indicated if there was a spill in front of his company's milk, he would take some responsibility for it, but in front of somebody else's milk or other display, he would go into the lunchroom and pass on that information. The courtesy desk when informed

would normally make an announcement over the P.A. system for someone to attend and remove the unusual danger. No system was in place to check and see if in fact the P.A. announcement was carried out, at least in any type of timely fashion. The duty is not one that required the Defendant to have someone standing on guard at various places throughout the store, but it is a duty that requires a system of some degree of regular checking and observation due to the frequency of occurrence. The system should also provide for a confirmation that once discovered, the unusual danger is removed in a timely fashion. The system in place in this store left a great deal to be desired.

I would answer question 4 in the affirmative. I do not accept that because a person acknowledges there was a spill that could be seen constitutes relief of the duty on the store owner and operator, nor, in the circumstances, where a person comes upon a spill not obviously apparent and only determines the presence of the unusual danger after the event, i.e. slip and fall. In the absence of running, carrying a volume that interferes with vision or some such conduct that might amount to contributory negligence, there would no relief for the store owner and operator.

3. EVIDENCE - DETERMINATION

The evidence in support of Ms. Kelly's claim is her own evidence and she states that she had this accident at a location well within the customer traffic area in front of the cartons of milk in the dairy section. She estimated the position on photographic exhibits and indicated it was some two or three feet out from the milk carton display and some distance from the milk spill observed by the Farmer's Dairy representative.

The evidence of the Farmer's Dairy representative is that his routine, mandated by his employer, was to attend Sobeys in Lower Sackville from 5:00 P.M. to 5:45 P.M.,

the Atlantic Superstore from 5:45 P.M. to 7:30 P.M., then Sobeys to 8:15 P.M., returning to complete his shift at 9:00 in the Superstore.

Ms. Kelly, after her slip and fall shopped for a very short period, returned for her milk and then may have browsed for another ten minutes or so and after paying for her purchases, attended at the courtesy desk to report the incident.

Ms. Kelly spoke to Jennifer Harding who filled out the Customer Accident Report form. Ms. Harding did not mark down the time of Ms. Kelly reporting and subsequently, around 7:41 P.M., attended in the dairy department area and spoke to Scotsburn men which resulted in the notation on the Accident Report:

> "Scotsburn men➞talked to, didn't see anything Tony Giles 7:41?"

The last number is not clearly decipherable on the form.

The Accident Report was filled in in the presence of Ms. Kelly and contained the notation:-

> "Milk was spilled on floor in the Dairy Department when she slipped on milk - did not fall but back was stiff afterwards."

Ms. Harding outlined the procedure which was that on receiving such a incident report, she would announce over the P.A. system the need for a clean-up and rely upon someone in the store employee complement to attend to it. Ms. Harding does not recall specifically making such an announcement August 29th, 1994. She does, however, state very strongly that Ms. Kelly told her there was a Farmer's employee in the area where she allegedly slipped. Ms. Harding acknowledges that she is not a hundred per cent positive Ms. Kelly said Farmer's but she is ninety per cent sure and when she did

go back to the dairy department, she went looking for the Farmer's representative and met Tony Giles, the Scotsburn representative.

There was no other dairy person in the department at that time, 7:41 P.M., and the Farmer's representative indicated he would have left the area at approximately 7:30 P.M. to return to the Sobeys store. Ms. Harding estimated the time of the accident by going backwards and her notation of 7:00 P.M. is merely an estimate which she acknowledges could be out fifteen to twenty minutes. She looked in the dairy area when she attended and saw no milk on the floor.

The Farmer's representative acknowledged that the Superstore had a rear loading system for the cardboard cartons of milk and that there were occasions when a carton would fall out of the front but on the occasions it occurred, none of them split. He indicated that if he saw spilled milk and it was Farmer's, he would clean it up while he was there and if it was another brand, he would simply notify the store. He identified the storage area in behind the dairy department and the door he would exit to bring his company's products which would take him through the traffic area where Ms. Kelly says there was spilt milk which caused her to slip and fall.

The Farmer's representative would wear blue navy work pants and either a sweater or short sleeve golf shirt, the latter being orange and white. He could not remember what he was wearing on August 29th, 1994 but said that it was possibly a sweater, even though it was August, because the fridge was a cold environment and most of the sweaters would have Farmer's on the back and some of the golf shirts had an 'F' on the chest. His recollection of the evening is substantially based on his normal routine other than he recalls seeing a milk spill right in the corner of the dairy department where the two walls converge and that its source appeared to be a leaking bag of milk leaning just outside the case producing a large spill a matter of inches from the case itself. This area is approximately fifteen feet away from the position where Ms. Kelly says she slipped in a puddle of milk.

The Farmer's representative indicates that he reported the spill in the corner and although he does not remember who cleaned it up, he says it was cleaned up. The practice he followed when he observed a spill was to go into the lunchroom and advise whatever Superstore employee that might be there in attendance. The spill itself was about two feet by two feet and he noticed it when he was stocking yogurt and believes this was around 7:00 P.M. He told three or four customers to watch out for the spill before it was cleaned up and specifically recalls a lady going within one or two feet of the milk looking down at it and walking towards him and stating to him, "you better get it cleaned up, I almost slipped on it". He indicates she was thirty-five to forty-five, between 5'5" and 5'6", and that she was a bit rude. He cannot identify her, nor can he remember whether she had a cart or not. It is interesting that he had a cart on wheels and had traveled from the back storage area through to the yogurt area during the course of his stocking shelves but the exact number of trips is not in evidence. The significance being it would require him to traverse the precise area where Ms. Kelly says she had her slip and fall and at no time did he see any other spilt milk other than that in the corner. He acknowledges that Tony Giles was not there while he was on duty and like all of the witnesses, there is some difficulty with specifics because of the passage of time since this event.

Ms. Harding is adamant that Ms. Kelly told her she did not fall and yet on one occasion under oath Ms. Kelly did state she had fallen and the description she gave at trial was of a fall with her left leg under her, her knee on the floor, her left elbow in the basket and right leg forward. Ms. Kelly now agrees that she must have provided the terminology "did not fall" to Ms. Harding.

There are other aspects of the evidence which have assisted me in making an assessment of the weight to be given to the evidence of the various witnesses. In particular, Ms. Kelly described the summer of 1996 when she was making regular two hour drives to Springhill, Nova Scotia as a terrible summer relative to her lower back pain claimed at least to the time of her motor vehicle to be caused by this slip and fall

and yet her family doctor's records do not reasonably reflect that which Ms. Kelly attempted to convey in her description of the summer of 1996 as being a terrible summer as relates to the alleged pain in the lower back.

Ms. Kelly's explanation that she was embarrassed and therefore did not wait at the scene of her slip even though, as she says, a Scotsburn person took a couple of steps towards her which I would infer to help her get up and her departure is explained as being embarrassed. I have no doubt that some people would be embarrassed although no one should be embarrassed by a fall caused by unforeseen danger. Ms. Kelly indicated she returned very very shortly afterwards and my observation and assessment of her is that she is not the type of person that would at all be embarrassed by such an event.

Her evidence in trial insisting that the uniform was one that designated Scotsburn likely described what the Farmer's representative normally wore and I am satisfied that she in fact told Ms. Harding that it was a Farmer's representative. The reason she is likely insisting upon it being Scotsburn is that when the Customer Accident Report form was completed by Ms. Harding, it was mailed out to her and she received it about a week later and it distinctly states witnesses Scotsburn men.

Overall, I find the evidence of Ms. Kelly very unsatisfactory and I conclude, without reservation, that she has failed to meet the onus upon her and her action must be dismissed.

4. DAMAGES

Counsel have asked that I assess damages irrespective of my termination on liability and I have read all of the cases, medical reports and other reports which were tendered into evidence. I commend counsel for tendering the various reports rather

than imposing upon a number of experts whose evidence would not have added anything beyond the reports filed.

Ms. Kelly concedes that what she describes as her lower back pain had in effect dissipated by the time of her car accident April 23rd, 1998. She was rear-ended apparently while traveling at about 90 kilometers per hour and it is quite likely that the person who rear-ended her on the highway will be liable for whatever injuries she received in the motor vehicle accident.

Ms. Kelly has a lengthy history of difficulties and must of her present problems, particularly with her neck and shoulder problems were long outstanding and their history is well documented. She was in fact coming from her doctor's office when she entered the Superstore on August 29th. Ms. Kelly was seen by her family doctor, Doctor James Fitzgerald, and by the specialist, Doctor Tom Loane, physiatrist, and by orthopedic surgeon, Doctor Roy Englund. Ms. Kelly was seeing Doctor Loane for several years in relation to her physical problems and without quoting at great length from the reports, to repeat I have read and reread, I simply refer to Doctor Loane's last report to Ms. Kelly's solicitor, dated March 20th, 1997 where he said:

> "My clinical impression in November (1996) was that her symptoms of lumbar sprain had largely resolved."

Further:

> "On review of Ms. Kelly's course, I do not believe that the fall significantly worsened her neck, shoulder and arm symptoms."

And further:

> "Her lumbar sprain was a new condition related to her falling injury. The signs and symptoms of this have largely

> resolved although she still does complain of some lower back pain with prolonged sitting. However, the demonstrable impairments in terms of range of motion, muscle tenderness and other physical examination findings have resolved."

Doctor Loane found it hard to follow how she had a complaint with respect to her tail bone in the absence of a direct fall onto it. In summing up, he clearly indicated that Ms. Kelly's upper back, neck and shoulder pain is largely pre-existing and in his summary:

> The findings of lower back sprain and largely resolved at the present time and the only residual tender point is in the sacrococcygeal joint."

Doctor Englund saw Ms. Kelly on only one occasion and his report of January 20th, 1998 accepts her complaints which, of course, when it comes to pain are subjective and even he states:

> "The prognosis is actually that of resolution rather than progression and is consistent with the natural history in the great majority of cases."

Overall, I conclude that the totality of the evidence, including Ms. Kelly's own description, fall markedly of the injury and consequences necessary to bring the damage range within **Smith v. Stubbert** (1993), 117 N.S.R. (2d) 119 if, which I find she did not, if Ms. Kelly suffered a low back injury as a result of her alleged slip and fall, the evidence supports at best an award of damages comparable to what was provided in **MacDonald v. MacInnis** (1994), 126 N.S.R. (2d) 54. I would assess general damages for pain and suffering, interference with amenities, etcetera, at $9,000.00.

5. COSTS

Action dismissed. Counsel are entitled to be heard on costs. There are numerous decisions where the “amount involved” has been determined as the amount recovered being the best indication of the risk to the Defendant and subject to representations from counsel, costs would be in accordance with Tariff ‘A’, scale 3, plus disbursements.

J.