

Case Name:

D'Amico v. Galati Supermarkets (Finch) Ltd.

Between

**Serafina D'Amico, plaintiff, and
Galati Supermarkets (Finch) Limited, defendants**

[2002] O.J. No. 4465

[2002] O.T.C. 917

118 A.C.W.S. (3d) 472

Court File No. 54714/00

Ontario Superior Court of Justice

Loukidelis J.

Heard: October 31 and November 1, 4, 5, 2002.

Judgment: November 13, 2002.

(25 paras.)

Torts -- Negligence -- Causation -- Causal connection -- Duty of care -- Whether defendant took reasonable care -- Occupiers liability for dangerous premises -- Invitees, liability of particular occupiers (incl. duty and standard of care) -- Retail business.

Action by D'Amico against Galati Supermarkets for damages for personal injuries. D'Amico slipped on a grape on the floor of Galati produce aisle and fell, injuring her back, wrist, and ankle. D'Amico had pre-existing health conditions and depression, which she claimed worsened after the fall. She claimed that a herniated disc was a direct result. There was no medical evidence to connect the disc with the accident. Galati had a plan for regular maintenance and a full-time maintenance person on duty, to sweep, mop, and inspect for spills and debris. He swept the produce aisle four times that day during a five-hour shift, and mopped it twice. There was no evidence of other debris, or poor lighting.

HELD: Action dismissed. Galati's maintenance plan and its implementation fulfilled its duty of care to D'Amico. As there was no breach of the duty of care to D'Amico, her action failed. In the absence

of medical evidence, no causal connection was established between the fall and the disc. For purposes of appeal, non pecuniary damages for the other injuries were assessed at \$10,000.

Statutes, Regulations and Rules Cited:

Occupier's Liability Act.

Counsel:

Antonio Conte, for the plaintiff.

M.P. Forget and Tania Del Belluz, for the defendants.

1 LOUKIDELIS J.:-- The 55 year old plaintiff claims non pecuniary damages for injuries suffered when she slipped and fell in the defendant's premises on September 1, 1999.

2 The plaintiff slipped on a grape or grapes in the defendant's produce section causing her legs to spread apart, lose her balance and fall on her tail bone.

3 The plaintiff contends that the defendant failed to satisfy the positive duty imposed upon it under the Occupier's Liability Act toward those persons who enter its premises.

4 The defendant on the other hand claims that it did meet its obligations under the said Act. It also claims that the injuries now suffered by the plaintiff were for the most part not caused by this fall.

5 A great deal of evidence was heard as to the probable time of the fall in relation to a clean up of that area by the maintenance staff. The time differences, it was suggested also exposed a credibility problem.

6 The full time maintenance employee Mr. Anthony Caruano, I find, swept and mopped the produce section between 5:25 and 5:44 pm., based on his daily log kept that day. His evidence was straightforward, unshaken on cross-examination and not contradicted. Whether a daily log was or was not signed by a manager is in my view of little consequence. In my view, whether the fall occurred before 5:25 or after 5:44 pm., is immaterial.

7 The issue is whether the defendant met its obligation under the Act on that particular day.

8 As was pointed out in *Waldick v. Malcolm*, [1991] 2 S.C.R. 456, a great deal will depend on the circumstances of each case. The owner or occupier must exercise "... such care as in all the circumstances of the case is reasonable".

9 The standard of care it is agreed is one of reasonableness and not perfection.

10 Here Galati had a regular inspection plan in existence. This included a full time maintenance person, Mr. Caruano who made regular inspections throughout the store, the focal point being the produce section.

11 In addition, all the clerks, especially those in the produce section were instructed to be on the lookout for spills or fallen items and to clean same or call maintenance immediately.

- 12 In addition a rug was placed in the produce section to absorb falling moisture or items.
- 13 Mr. Caruano was consistently sweeping and mopping throughout the store and inspecting various aisles for spills or debris that required immediate attention.
- 14 On the day in question during a 5 hour shift Caruano swept the produce aisle 4 times and mopped twice.
- 15 There was no evidence of any other produce or debris about the produce section or poor lighting.
- 16 The defendant had a regular maintenance plan. That plan, as outlined above, I find to have been reasonable in the circumstances. I do not think anything more could have been expected of the defendant.
- 17 I am not satisfied on a balance of probabilities therefore that the defendant breached its duty of care.
- 18 The plaintiff's action must therefore be dismissed.

Damages

- 19 Mrs. D'Amico immediately prior to the fall was a very fragile person having suffered numerous injuries from an industrial accident in 1988, a motor vehicle accident August 22, 1998, plus other falls.
- 20 In addition to her physical injuries she suffered from serious depression since her 1988 accident.
- 21 Prior to the fall she attributed most of her injuries and resulting severe pain to her motor vehicle accident.
- 22 Mrs. D'Amico contends that a herniated disc discovered after the slip and fall was a direct result of same. While some evidence suggests this as a possibility including Dr. Furer's testimony, there is no positive medical evidence from any of the numerous specialists that makes such a connection. Consequently, I am not satisfied on a balance of probabilities that there was a causal connection between the fall and the herniated disc.
- 23 As stated the slip and fall resulted in wrist and ankle injuries as well as worsening her other existing injuries including her long standing depression.
- 24 I would assess her non pecuniary damages at \$10,000.
- 25 If costs are requested, submissions should be forwarded to myself at the Newmarket Court House by December 15th next.

LOUKIDELIS J.

cp/e/nc/qw/qlgkw/qlkjg

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