Case Name:

Quibell v. 1096555 Ontario Inc. (c.o.b. Bingo Bingo)

Between
William Quibell, plaintiff, and
1096555 Ontario Inc., carrying on business as Bingo Bingo,
defendant

[2003] O.J. No. 4673

Court File No. 2258/00

Ontario Superior Court of Justice
Lindsay, Ontario

McLean J.

Oral judgment: October 28, 2003.

(33 paras.)

Torts -- Occupiers' liability or negligence for dangerous premises -- Negligence of occupier -- Duty of care -- Sidewalks, walkways, ramps, etc. -- Snow and ice.

Action by Quibell against 1096555 Ontario for damages for injuries sustained in a slip and fall. 1096555 operated a bingo hall. Quibell attended at its premises one evening. He left the premises during the intermission. He noticed there was ice on the exit ramp. He rushed to return to the building, slipped on an icy area and injured his shoulder. 1099655 had a system in place to inspect and shovel snow and to deal with ice as was necessary to protect the premises.

HELD: Action dismissed. 1096555 had in place a reasonable system to prevent slips and falls. The system was acceptable even though it was not put into writing. 1096555 satisfied its duty of care. A perfect system was not required to avoid liability under the Occupiers' Liability Act.

Statutes, Regulations and Rules Cited:

Occupiers' Liability Act, s. 3, 3(1).

Counsel:

John R. McCarthy, for the plaintiff.

Martin P. Forget, for the defendant.

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1 **McLEAN J.** (orally):-- These are brief reasons for Judgment in the case of Mr. William Quibell against the numbered Ontario company carrying on business as Bingo Bingo.

2 On the 17th of November in 1998 Mr. Quibell attended the establishment known as Bingo Bingo in the Town of Lindsay. It was what is known in the area as a bingo hall. It ran three sessions a day; one starting at 12:45, ending at 3:10 in the afternoon with an intermission at 2:00 p.m. The next session was at 6:45 ending at 9:45 with an intermission at 8:30. The last one was at 10:15 p.m. ending at 12:45 a.m. with an intermission at 11:30.

3 Mr. Quibell went with his wife to the 10:15 session. At the intermission he left the bingo hall to walk his dog, his chihuahua, which he had left in his motor vehicle, which was parked in the parking lot. Apparently there had been snow the day before and some snow flurries at least during the day of the 17th. Mr. Quibell stated in his evidence that the grass in the area was covered with snow, however, you could see the blades of grass extending through it.

4 He stated that leaving the bingo hall he noticed some blotches of ice on a ramp that went downwards into the parking lot. He had to take a diagonal line across this and then into the parking lot to the car. He stated he did not walk his dog in the parking lot, however, it seems likely that he didn't do this because the dog wanted a clear path. He did not want to go into the snow because as Mr. Quibell said, that he, the dog, doesn't like snowy conditions.

5 The ramp is shown in his exhibit 4D, and that is the area that extends from the front doors under the canopy noting "Bingo Bingo." He took the dog for a walk and then returned to his motor vehicle, put the dog in the vehicle and continued back into the bingo hall. He admitted that he was in some hurry because the doors were locked at the intermission and it was necessary for him to get into the bingo hall because apparently the super jackpot game occurred after the intermission.

6 On his way into the bingo hall, for whatever reason, he slipped on an area that may have contained ice, and fell injuring his shoulder. The court notes at this point that it is agreed by counsel that it is not necessary for the court to assess damages and therefore no evidence nor no determination will be made by this court as to damages.

7 The main issue is whether the plaintiff has proved that the fall was a result of the breach of duty contained in s. 3 of the Ontario Occupiers' Liability Act, which I quote 3(1).

> "An occupier of premises owes a duty to take such care as in all 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."

8 The plaintiff's counsel has provided the court with an excellent, succinct version of the case law under this from which the court will quote briefly.

> "The factors that are used in assessing reasonable care in the circumstances basically depend on the time of the year, the prevailing weather conditions, the type

> of premises, the type of pedestrian traffic, the location of the pedestrian walk-ways, the cost of care and the knowledge of hazard."

9 Basically, the time of year issue is whether ice and snow are common at this time of year. The case that he cites is Gardiner v. Thunder Bay Regional Hospital, [1999] O.J. No. 833 (Ont. Gen. Div.). That is that an owner must, and I quote from the synopsis.

> "An owner must have a reasonable system in place to ensure users are reasonably safe from slipping and falling due to weather conditions. Furthermore, the system must be functioning properly."

10 I will deal with that case later on in these reasons.

11 Prevailing weather conditions, and do the changing weather conditions affect the surface of the parking lot and walking areas? The citation for this is Preston v. Canadian Legion Kingsway Branch No. 175 (1981), 123 D.L.R. (3d) 645 (Alta. C.A.). Basically stands for the fact that the owner must inspect and protect visitors from dangerous conditions and dangerous areas by salting and sanding them.

12 The type of premises must be considered, whether it's commercial, public or residential. Similarly, Preston seems to state that the reasonable care for an occupier will vary with the size of the parking lot and the use of it made by visitors; the type of pedestrian traffic, that is, who's expected; are they young and athletic, or senior and disabled; the location of the pedestrian traffic; where are the likely to be; the cost of care, and lastly, the knowledge of the hazard.

13 As stated in argument, the real issue for the court to decide in this matter is whether any system was in place that was reasonable in the circumstances, and was that system properly implemented? A good summary of the law is found in Przelski v. Ontario Casino Corp., [2001] O.J. No. 3012 (Ont. S.C.), a decision of my brother J.W. Quinn, J.

14 And I read from page 7,

> "How have the courts interpreted this duty of care? Four fundamental principals have emerged in the case law: (a) Occupiers have an affirmative duty to make their premises 'reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm.': see Waldick v. Malcolm (1989), 70 O.R. (2d) 717 at 723 (C.A.), affirmed (1991), 83 D.L.R. (4th) 114 (S.C.C.)."

> "(b) It is not necessary that occupiers become insurers and therefore, 'liable for any damages suffered by persons entering their premises': see Waldick v. Malcolm, ibid."

> "(c) Although the statutory duty on occupiers does not change from case to case, 'the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation': see Waldick v. Malcolm, S.C.C. at p. 124."

> "(d) The duty may include a positive responsibility on the occupier to inspect his or her premises and to ensure that s. 3(1) is satisfied: see Sauve v. Provost (1990), 71 O.R. (2d) 774 at 779 (H.C.J.)."

15 More specifically Gardiner v. Thunder Bay Regional Hospital, [1999] O.J. No. 833 (Ont. Gen. Div.) at paragraph 26 states:

> "In a nutshell, then, a combined reading of s. 3 of the Occupiers' Liability Act as interpreted by the cases indicate that what is required by the owner of premises in this situation is to take reasonable care, considering all of the circumstances of the case, to see that persons on the premises are reasonably safe. More specifically, where there is a known danger, in this case ice and snow conditions in a public parking lot in Ontario, and specifically Northern Ontario, in February, then the owner must have a reasonable system in place to ensure users will be reasonably safe from slipping and falling due to weather conditions. Furthermore, the system must be functioning properly. If a plaintiff can establish on the balance of probabilities that such a system is not in place, or is not working properly, then he will succeed, otherwise he must fail."

16 Against this legal background we must consider the evidence in this case. The witnesses are basically Mr. Quibell and his wife. With respect to Mr. Quibell, he testified quite fully and fairly about what had happened to him, though it was interesting when the court considers his evidence, he was not specific on particularly how he fell. He simply stated that he did fall.

17 His wife backed up his situation that he appeared injured when he returned to the bingo hall and his hand swelled up and that it may indeed, in her statement given to the employees of the bingo hall, be necessary to take him to the hospital.

18 The other witnesses, Ms. Angiers, stated that she saw the fall and that she had attempted to help him. However, Mr. Quibell said that did not happen, that there was nobody there and nobody witnessed it. Moreover, with respect to Ms. Angiers' evidence, she was an employee who had been fired from the bingo hall and denied making a statement earlier in this matter. So the court has great difficulty with her evidence.

19 With regard to Ms. West, she fell several times she testified, and that the maintenance of the building was not up to her standard. However, she never reported any of these falls, nor did she make any comment about the condition of the ramp.

20 For the defendant, Rhonda Bryant testified. Ms. Bryant did work for the defendant, however, has gone on to be a materials consultant with a high tech firm. She stated that she worked a prior shift and that she shovelled snow and checked about the premises for the condition. She stated it was their practice to inspect and to shovel snow as was necessary to protect the premises. In the court's view Ms. Bryant was straightforward in her evidence, and certainly had no reason to be anything other than forthright.

21 She stated that on many occasions the fact that the premises were cleaned or checked or indeed shovelled, did not show up in the log, which is exhibit 8 to these proceedings. She however, as apparently occurred on this date, did note the condition of the premises, but she stated this did not happen on all occasions. She was forthright in that it was required of her to check and to remedy problems with ice and snow as required.

22 Ms. Petersen, the general manager also testified that it was her practice to check when she went into work and that she indeed had shovelled and salted the premises as is necessary, particularly the rampway in, which is shown in exhibit 4B and the walkway along the side of the building that is shown in exhibit 7. She indeed stated that she had salt on the premises. She also had a shovel and that it was the duty of the session managers to look after the condition of the building.

23 Cathy Burns who was a session manager who continues to be employed by the defendant also testified. She stated that she checked the premises when she arrived on shift and also at the end of the intermission, and that she shovelled and salted as was necessary. That sometimes she put the details of this in the log, but on other times didn't.

24 Much was made by plaintiff's counsel of the fact that she's given prior inconsistent statements, particularly when she states in the log that after she encountered Mr. Quibell coming in that she found that the outside was becoming slippery and that she had not mentioned this on earlier occasions. She also went out after she had talked to Mr. Quibell and threw salt on the ramp. She said in response to cross-examination that she changed her testimony because when she'd given the earlier testimony she was not aware or did not have in her possession exhibit 8, which was found sometime later.

25 When we consider the whole of Ms. Burns' testimony, the court considers notwithstanding those inconsistencies, that her testimony is believable. Under cross-examination she maintained that she did not log the fact that she had maintained or checked the premises. However, the court is satisfied that this is indeed what she did do.

26 With respect to the inconsistencies, she was forthright in giving her reasons why these inconsistencies had crept into her testimony, especially when we consider the fact that the events that she testified about were more than five years after the actual events.

27 The court also considers the photographs, particularly exhibits 7, 4 and 3. These were taken sometime after, and particularly exhibits 4B and 4C, were taken by the plaintiff and were taken at random occasions, and sometime afterwards, and it is clear from exhibits 4B and the upper part of 4C, that the ramp in question was shovelled and salted.

28 There is also the fact that in exhibit 8 there is a note on the 22nd of December '98 indicating that they were out of salt. Ms. Petersen testified that she kept ten or fifteen bags on the premises and it seems only reasonable to infer that if there was a note in the log about getting more salt that there must have been some system in place. There is also evidence from the plaintiff's witnesses that they had indeed seen Ms. Petersen, the manager, shovelling snow.

29 When we consider all of the evidence together, it is the court's view that there was a reasonable system in place to prevent such incidents as occurred in this matter. The court is also satisfied from the witnesses that that system was reasonably in place. It is clear from the evidence that there is no written specifications or directions with regard to the system or the implementation, however, the court is satisfied that notwithstanding that this system has not been reduced to writing, that it was still reasonable given these circumstances.

30 In addition to the facts that the shift manager is required to check and clean up ice and snow as required, there was also a snow removal person, Mr. Wade Reed, who came when there was greater than two inches of snow on the ground, and was also available for them to call to sand the parking

lot if there was a problem of ice build-up, and that indeed, Mr. Reed would remove snow from the parking lot as required.

31 When we consider the matter as a whole therefore, the court is satisfied on the balance of probabilities that there was a reasonable system implemented by the manager of Bingo Bingo and that it was reasonable for the circumstances on these particular facts, and that on the date in question, namely the 17th of November, it was in place and it was being reasonably implemented given these circumstances.

32 Mr. McCarthy has said that the fact that the accident occurred is some proof that it was not a reasonable system or a reasonably implemented system. The court is however of the view that given these facts that it would have had to be a perfect system to alleviate all risk.

33 Certainly a perfect system is not that that is required for s. 3(1) of the Occupiers' Liability Act. Therefore for these reasons, the action will be dismissed. Thank you.

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drs/e/qlaab/qlcem/qljal