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Injured plaintiff was not required to prove precise location of fall

By John Jaffey
Toronto

No longer must an injured plaintiff know "the precise location" of a slip and fall in order to successfully sue under Ontario's *Occupier's Liability Act*.

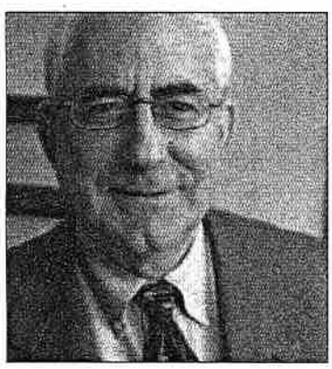
In reversing a 2004 Superior Court decision, which refused to award damages to a woman who suffered injuries in a parking lot, the Ontario Court of Appeal held that Justice Sarah Pepall "erred in her causation analysis by setting too high the onus that the appellant was required to meet."

Justice Stephen Borins wrote, "Nothwithstanding her finding that the parking lot was unsafe, the trial judge dismissed the appellant's claim on the ground that neither she, nor her husband, knew the precise location in the parking lot where she fell or how she fell. In doing so, the trial judge relied on the opinion of Urquhart J. in *Cock v. Windsor* (1944), that in a claim against a municipality for injuries suffered in a fall on a sidewalk, the appellant has the onus of establishing where she fell, that there was a depression at that location and that the depression was the cause of the fall...

"While *Windsor* may have represented the state of the law respecting proof of causation 60 years ago, it has been replaced on this issue by *Snell v. Farrell*, [1990] 2 S.C.R. 311... where it was held that causation need not be determined by scientific precision."

Timothy Bates of Borden Ladner Gervais LLP acted for Kawartha Dairy Limited, in whose parking lot Norma Kamin fell on July 18, 1999.

Bates told *The Lawyers Weekly* the appeal court's decision represents "a fairly significant change in the law." He said, "I've been doing this for 30 years ... Plaintiffs up to now have had to identify with a reasonable degree of accuracy what they fell over. Up until



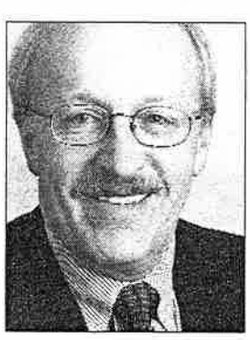
Alfred Kwinter

see PARKING p. 20

Proving fall and injuries based on condition of parking lot

PARKING
–continued from p. 1–

the time I argued it, there was a straightforward test. If property owners were to be held liable, it couldn't be something out in the open. Our court of appeal latched onto *Snell v. Farrell* which we knew about. I tracked it through every single case. It had never been cited as a case where you could make an inference that someone slipped without at least identifying the general area of non-repair. I've never seen a case where someone fell in a parking lot and the court makes a reasonable inference she had to have fallen over some element of non-repair. I think it's an important case." He said his client is considering whether to seek leave to appeal.



Timothy Bates

Alfred Kwinter and Jason Singer of Toronto's Singer Kwinter acted for Kamin and her husband Harold Kamin. Kwinter told *The Lawyers Weekly*, his client broke her hip when she fell, but then suffered heart failure after she was taken to the hospital. She was awarded close to $100,000 for pain and suffering, and did not make a claim for lost earnings.

Jason Singer

Kwinter said, "I told the Court of Appeal, if I have to prove where she fell, I'm outta here. But I can prove on a balance of probabilities that she fell because of the condition of the parking lot."

Justice Borins accepted that level of causation. He wrote, "There was considerable, uncontradicted evidence that the respondent's entire parking lot was in very poor condition. It had last been paved in 1979 and was at the end of, or had exceeded, its lifespan ... The paving was uneven, with many depressions and fissures... From the photographs, the disrepair was so extensive that it is not surprising that the appellant and her husband were unable to point with precision to the location of her fall."

Apart from the parking lot itself, Justice Borins considered the conduct of Mrs. Kamin: "The appellant provided evidence that she was a careful person who was not prone to accidents. She testified that it was a beautiful day, that she was wearing running shoes that fit properly and were laced, and that she had no difficulty walking..."

He concluded, "On the record in this case, the failure of the appellant to recall the precise location of her fall should not have resulted in the trial judge's finding that she had failed in the proof of the cause of her injuries ..."

Justices Janet Simmons and Robert Armstrong agreed.

Reasons: *Kamin v. Kawartha Dairy Ltd.* [2006] O.J. No. 435.