IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Etson v. Loblaw Companies Limited (Real Canadian Superstore),* 2010 BCSC 1865

Date: 20101230
Docket: 45185
Registry: Vernon

Between:

Juanita Etson

Plaintiff

And

Loblaw Companies Limited doing business as Real Canadian Superstore

Defendant

Before: The Honourable Madam Justice Fisher

Reasons for Judgment

Counsel for the plaintiff:	J. Cotter Agent for M.J. Yawney
Counsel for the defendant:	I.C. Hallam
Place and Date of Trial:	Kelowna, B.C. November 17 and 18, 2010
Place and Date of Judgment:	Vernon, B.C. December 30, 2010

[1] On November 28, 2008, the plaintiff, then 76 years old, tripped over the corner of a wooden pallet in the defendant's Superstore, fell down, and broke her hip. She had surgery to pin her hip together but within nine months the hardware failed and she had to have two further operations: one to remove the hardware and another to replace her entire hip. Fortunately, the last surgery was successful and the plaintiff is finally on the road to recovery.

[2] The plaintiff brings this action under the *Occupiers Liability Act,* R.S.B.C. 1996, c. 337, and in negligence. She says that the defendant created a hazard by placing a defective pallet containing misplaced store stock in the middle of a shopping aisle and thus failed to take reasonable precautions to protect her against the risk of harm. The defendant admits that it was at all times an occupier of the premises but disputes liability. Damages are also in issue.

Liability

Legal principles

[3] The *Occupiers Liability Act*, in s. 3, provides that an occupier owes a duty to take reasonable care to see that a person on the premises will be reasonably safe in using the premises. This duty applies in relation to the condition of the premises, activities on the premises, or conduct of third parties on the premises.

[4] A commercial occupier is required to protect its customers from reasonably foreseeable hazards. The standard of care is one of reasonableness, not perfection. An occupier is not an insurer against every eventuality that may occur on the premises and the duty of care does not extend so far as to require a defendant to remove every possibility of danger: see *Foley v. Imperial Oil Ltd.*, 2010 BCSC 797 at paras. 54-55; *Lavalee v. Bristol Management*, 2005 BCSC 1666 at paras. 28-29; *Grochowich v. Okanagan University College*, 2004 BCCA 325 at paras 18-19.

[5] The plaintiff's claim is also based in negligence. This was succinctly defined in this passage from *Ryan v. Victoria (City),* [1999] 1 S.C.R. 201 at para. 28:

> Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[6] In determining what is a reasonable or unreasonable risk of harm, it is important to consider that the care required is commensurate with the degree of risk. The greater the risk of harm, the greater will be the care required to protect against that risk; on the other hand, where the risk is very small it may be acceptable: *Lawrence v. Prince Rupert (City) and B.C. Hydro & Power Authority,* 2005 BCCA 567 at paras. 21-22.

[7] The fact of injury does not create a presumption of negligence. The burden is on the plaintiff to establish on a balance of probabilities that the injury resulted from a breach of the defendant's duty of care: see *Lavalee* at para. 30 and *Mainardi v. Shannon*, 2005 BCSC 644 at para. 21.

[8] In addition, the plaintiff has a duty to take reasonable care by keeping a reasonable lookout for her own safety. A failure to observe something that is there to be seen may amount to contributory negligence, although a plaintiff is not required to keep her eyes focussed on the ground: see *Wittal v. Mandarin Investments Ltd.*, [1991] B.C.J. No. 2466 (S.C.), and *Tabinski v. Kelowna (City)*, [1992] B.C.J. No. 2508 (S.C.).

Issues

[9] It is not is dispute that the defendant owed a duty of care to Ms. Etson or that her injuries were caused by tripping on the pallet in the defendant's Superstore. Precisely how Ms. Etson tripped is in dispute. Ms. Etson says that she tripped over a split board at the corner of the pallet. The defendant challenges this, saying that the evidence does not establish that the split board caused or contributed to her fall.

[10] On behalf of the defendant, Mr. Hallam characterized the threshold question as whether it is a breach of the duty of care for the defendant to have used a pallet with a split board. I consider this approach too narrow. Although Ms. Etson firmly believed that she caught her foot on the split board, this court is not fettered by the plaintiff's theory of the case. In my view, the main issue is whether the defendant breached its duty of care by creating a hazard when it placed this pallet at this location in the store in a manner and condition that was not reasonably safe.

[11] If the defendant breached its duty, there is an issue as to whether the breach of duty was the cause of the plaintiff's fall.

[12] The parties referred me to many cases involving occupier's liability, some with facts somewhat analogous to this case. I have found many of these cases to be helpful but of course each case turns on the application of these principles to its own facts. I will refer to some of these cases in my analysis of the evidence and the application of the principles.

The evidence

[13] On November 28, 2008, Juanita Etson was shopping with her daughter June in the defendant's Abbotsford Real Canadian Superstore. Ms. Etson did not know her way around the Superstore, so she was following her daughter. She was walking down what is called a "flex-aisle", where there was a deli display on one side and several pallets of product stacked in the middle. The flex-aisle was 10.5 feet wide and the pallets, placed in about the centre of it, were four feet square. The flex-aisle in which Ms. Etson was walking was a little less than 3.5 feet wide between the deli display and the pallets.

[14] June turned left beside a pallet stacked with buckets of dishwasher detergent. Another shopper pushing a cart was coming from the direction June had gone, toward Ms. Etson, who was still in the flex-aisle. Ms. Etson stopped to let the shopper go by and then proceeded to turn left by the corner of the pallet. As she did so, her left foot caught on something, causing her to spin around counter-clockwise and fall on her right side. As she lay on the floor she saw that there was a split

board that had pulled away from the bottom of the pallet. She believed that this split board caught the front inside edge of her left shoe and this is what caused her to fall.

[15] Ms. Etson was in considerable pain. A number of individuals came to help, including her daughter, another customer, several Superstore employees and the store manager. Ms. Etson told the manager that she tripped on the split board and she saw him pull it from the pallet. Someone assisted her into a wheelchair and she was eventually taken by ambulance to the hospital.

[16] There were no witnesses to the incident. There are a number of photographs of the area where Ms. Etson fell and the pallet over which she tripped. The photographs depict the pallet with large buckets of dishwasher detergent stacked in three layers, still covered with plastic wrap. The pallet is supported by what appear to be two-by-four boards, and along the flex-aisle there are two spaces between the bottom of the pallet and the floor near each corner. The bottom edge along the flex-aisle is painted orange. The buckets are not neatly placed on the pallet. They sit several inches away from the edge, particularly at the corner where Ms. Etson was passing. This contrasts with the product on the pallet that sits immediately adjacent to it, where what appear to be yellow plastic boxes are neatly stacked along and close to the edge.

[17] There are two photographs that show the bottom corner of the pallet before the split board was removed. While these photographs are far from ideal, they do depict a board, perhaps several feet long, projecting up to an inch beyond the outside edge of the pallet along the side perpendicular to the flex-aisle.

[18] Ms. Etson was challenged on her belief that her left foot caught on the split board. She agreed that she saw the pallet and that she was able to see over the display of detergent buckets. She agreed that the split in the board did not cause it to project into the flex-aisle. She could not explain how the left inside front of her shoe came into contact with the split board or how she became turned around. She disagreed that her foot got caught in one of the spaces underneath the pallet along

the flex-aisle and she stayed firm in her belief that she caught her left foot on the split board.

[19] The defendant did not call any evidence. Plaintiff's counsel read in admissions from the examination for discovery of a district manager for the defendant. Pallets with product are placed in flex-aisles for the purpose of offering the products for sale to customers shopping in the store. The defendant does not have a written policy regarding the placement or inspection of pallets. District managers provide some direction as to the number of pallets to be placed for merchandizing purposes but the actual placement of pallets is up to the individual store. The condition and displays of pallets may be checked visually only but there is no evidence that any checks were made in respect of the pallet in issue.

The positions of the parties

[20] On behalf of the plaintiff, Mr. Cotter submitted that the court should accept Ms. Etson's evidence that she fell when her left foot caught the split board at the corner of the pallet, but in any event, the pallet was a tripping hazard due to its defective condition and the manner in which it was stocked with product. He says that the defendant breached its duty of care to Ms. Etson by failing to keep its aisles free from an unusual danger. This failure resulted from a culmination of acts and omissions which include (a) reducing visual cues by allowing the pallet to be stocked with product that was not flush to the edge, (b) placing a pallet in the flex-aisle that it knew or ought to have known was damaged, and (c) failing to have a reasonable system of inspection and maintenance of pallets to be used to display product.

[21] Mr. Hallam submitted that the defendant did not breach its duty of care because the pallet was not a foreseeable danger, and in any event, the plaintiff's claim fails on a causation analysis. He says that the evidence does not support Ms. Etson's assertion that the split board caused her fall; rather she simply failed to take enough care to negotiate her way around a large and easily visible sales display. In the alternative, Mr. Hallam submitted that Ms. Etson was contributorily

negligent in failing to keep a reasonable lookout for her own safety and that she bears most of the fault for her injuries.

Findings of fact and analysis

[22] I found Ms. Etson to be a truthful witness. She may have been somewhat prone to reconstructing events in her efforts to remember details but overall I found her evidence to be credible and reliable. It was also consistent with the photographs of the pallet and the area where she fell.

[23] The presence of the pallet was obvious but the location and condition of the bottom corner was not. The way the dishwasher detergent buckets were placed on the pallet gave a somewhat misleading impression, when compared to the pallet beside it, that the bottom edge was farther away from the aisle than it actually was. While the bottom edge was painted orange, this would only be seen by a person standing beside it if that person was focussed on the floor. There was a fairly long board that had splintered away from the pallet base and was protruding into the aisle perpendicular to the flex-aisle. This was difficult to see because the split board and the pallet bottom were the same colour. Unless a person was looking closely at the floor, it would be difficult to appreciate that the bottom corner of pallet protruded several inches further out from where the detergent buckets were stacked.

[24] Ms. Etson was sure that she caught her left foot on the split board. She was not sure how this occurred or how she got turned around. She thought the board caught the front inside sole of her left shoe. She was wearing athletic shoes which, she said, “might not be sensitive to everything they touch” and admitted that she would not necessarily have felt her shoe touch the edge. She was cross-examined at some length about how she fell but she steadfastly maintained her position.

[25] Given how quickly the incident occurred, it is not surprising that Ms. Etson could not remember details about the manner of her fall. It is not possible to determine precisely what part of her shoe made contact with the pallet. However, in my view, it is not necessary to make a finding of such precision in order to determine if the pallet constituted an unreasonable risk of harm in the circumstances.

[26] I do not disagree with Mr. Hallam that Ms. Etson's evidence makes little sense if she caught the inside of her left foot before she began her left turn, since the split board was not projected into the flex-aisle. However, Ms. Etson testified that she had begun to make her left turn when something caught her foot. In my view, it is entirely likely, and I so find, that Ms. Etson's left foot caught the corner edge of the pallet at the point where the split board was protruding while she was turning the corner from the flex-aisle.

1. Duty of care

[27] As I have found, while the presence of the pallet was obvious, the outer edge of the bottom corner was not obvious to a customer who was passing beside it. This was a consequence of two factors. The first was the split, protruding board that was not easily visible, and the second was the manner in which the detergent buckets were stacked on the pallet. In these circumstances, it would be difficult to appreciate that the bottom corner of the pallet protruded several inches further out from where the detergent buckets were stacked. Given this, it was reasonably foreseeable that a customer might anticipate that there was more room to turn the corner than there actually was.

[28] This case is somewhat similar to *Castillo v. Westfair Foods Ltd*. (1999), 88 A.C.W.S. (3d) 1176 (B.C.S.C.). There, the plaintiff tripped over a display platform that was stocked with product only at either end. The space between the products displayed on the platform gave the impression that there was a passageway when there was not. Although it had a stainless steel edge with yellow price tags that delineated it from the floor, the platform was the same colour as the floor. The plaintiff was not looking where she was going because her attention had been diverted to another product that was on display in the next aisle.

[29] The issue in *Castillo* was whether the defendant created a danger by locating this type of platform in a place where it encouraged customers to look up at other product displays. The court held that it had:

> [44] Westfair's display platform was not reasonably safe given the nature of its business. It was reasonably foreseeable that customers might anticipate a passageway existed between two aisles in the place where the platform was left empty, given the platform was the same colour and configuration as the floor. It was also reasonably foreseeable that customers would be looking up at the products displayed to catch their attention. Depending on a customer's distance from the platform and whether her attention was diverted to the products on the shelves, a customer might not see the metal edging with the yellow price tags around the platform. In these circumstances, it would be reasonably foreseeable that the platform would present a danger to a customer.

[30] Ms. Etson testified that she was doing what she normally does at a grocery store: looking around at products and looking at the floor maybe three feet ahead. While Ms. Etson was not distracted by a particular display, as in *Castillo*, the evidence is clear that the defendant places products for display on pallets so that customers will see the products and consider buying them. In my view, it was reasonably foreseeable that Ms. Etson would be looking at products displayed to catch her attention and not looking down at her feet.

[31] In these circumstances, given the nature of the defendant's business, it is my view that the pallet was not reasonably safe and it was reasonably foreseeable that its condition with the protruding board and the manner in which it was stocked would present a danger to a customer.

[32] The circumstances here are distinguishable from those in *Young v. Westfair Foods Ltd*., 2001 BCPC 28, where the plaintiff fell onto a cart that was clearly visible in the middle of an aisle; from *Lawrence*, where the plaintiff tripped over a power pole that was clearly visible on a sidewalk; and from *Hunning v. Huang*, [1984] B.C.J. No. 2087 (S.C.), where the plaintiff fell into a well-lit stairwell. In all of these cases there was nothing in the placement or condition of the objects that was not obvious to any person watching where he or she was going.

[33] This case can also be distinguished from *Mynott v. F. W. Woolworth*, [1992] B.C.J. No. 405 (S.C.). There, the plaintiff testified that she tripped over a display platform that projected about four feet into an aisle. However, the judge did not accept her evidence and found that the platform did not project into the aisle but

rather formed part of the intersection between two aisles, was part of the defendant's display, and was not unusual. Most importantly, the judge did not find anything in the nature of a trap which would serve to mislead the plaintiff in any way and he concluded that the accident could have been avoided "by a modicum of awareness on the part of the plaintiff".

[34] In this case, Ms. Etson's accident could have been avoided if the defendant had removed the split board and stacked the detergent buckets in a more uniform fashion along the edge and corner of the pallet.

[35] Moreover, the damaged condition of the pallet and the rather haphazard display of product could easily have been prevented had there been a simple visual inspection when the pallet was installed. There is no evidence that there was any visual inspection of this pallet by any of the defendant's staff. In my view, had someone looked at this pallet, it would have been fairly obvious, and thus reasonably foreseeable, that a pallet in the condition of this one could have constituted a tripping hazard to customers. The ease or difficulty and the expense with which an unusual danger could have been remedied is a factor to consider in assessing whether a defendant has fulfilled its duty of care under s. 3 of the *Occupier's Liability Act*: see *MacLeod v. Young*, [1997] B.C.J. No. 2108 at para. 8 (S.C.).

[36] In all of these circumstances, I have concluded that the defendant breached its duty under s. 3 of the *Occupiers Liability Act* to take reasonable care to see that the plaintiff would be reasonably safe in using its premises on November 28, 2008.

2. Causation

[37] Causation is established where the plaintiff proves on a balance of probabilities that the defendant caused or contributed to the injury. The general test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-14; see also *Resurfice Corp. v. Hanke*, 2007 SCC 7.

[38] It is important to note that it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. Provided a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury: *Athey* at para. 17.

[39] Mr. Hallam argued that Ms. Etson could not establish that but for the split board she would not have tripped. In her examination for discovery, Ms. Etson was asked if the fall would not have occurred if the board had not been loose. While she conceded that she still might have tripped on the corner of the pallet, she also said that it was almost impossible to answer such a question and she really did not know.

[40] In my view, this question asked for Ms. Etson to speculate, and she quite rightly, and honestly, said that it was impossible to answer. This evidence does not detract from Ms. Etson's evidence about how she fell and it does not detract from the evidence that the defendant's breach of duty caused or contributed to her injury.

[41] This case is substantially different from *Lansdowne v. United Church of Canada et al.*, 2000 BCSC 1604. There, the plaintiff attributed her fall on some stairs to loose threads on the carpet of the bottom step. However, she did not know on which step she tripped or where on the stairs she started to fall. The court found that she was able only to advance a theory of how she fell and it would have to speculate in order to find that the fall was caused by the loose threads on the bottom step or some other defect in the carpet. It is also different from *Van Slee v. Canada Safeway Limited*, 2008 BCSC 107, where the plaintiff also advanced only a theory that she "must have" slipped on water that had accumulated on the floor of the defendant's store but was unable to say that there was in fact any water or other hazard present when she slipped.

[42] Here, the plaintiff knew that she tripped at the corner of the pallet. More importantly, given my finding that Ms. Etson's left foot caught the corner edge of the pallet at the point where the split board was protruding, I conclude that she has met the burden of proving that the defendant's breach of its duty of care caused her injuries.

3. Contributory negligence

[43] In addition to the defendant's failure to remove the loose board and stack the detergent buckets in a more uniform fashion, this accident could have been avoided if Ms. Etson had paid more attention to where she was walking. Although she is not required to focus her attention at all times to the floor, she is required to be aware of her surroundings: see *Mynott* at para. 14 and *Castillo* at paras. 47, 50. Ms. Etson said that she was looking at the floor about three feet ahead. Had she looked down at her feet, even momentarily, before she began to turn the corner, she would have seen that she was too close to the corner of the pallet. Accordingly, I find that she did not take reasonable care for her own safety.

[44] The *Negligence Act*, R.S.B.C. 1996, c. 333, requires me to apportion the degree to which each party was at fault. In the circumstances of this case, I find the degree of fault to be equal and I apportion liability 50/50 between the plaintiff and the defendant.

Damages

[45] Ms. Etson's primary claim is for non-pecuniary damages. She also claims special damages, some of which are not in issue, cost of future care and an in trust claim for assistance provided to her by her sister and a friend.

Non-pecuniary damages

[46] The essential principle in assessing non-pecuniary damages is to restore the plaintiff, as far as money can do so, to the position she would have been in before the accident. These damages are specific to the circumstances of each case and each plaintiff.

[47] There are a number of factors that courts consider in assessing non-pecuniary damages. These include the age of the plaintiff, the nature of the injury, the severity and duration of pain, disability, emotional suffering, impairment of family or social relationships, impairment of physical abilities, and the loss of a lifestyle. A

plaintiff is not to be penalized if he or she is stoic in her response to the injury and the pain: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

The evidence

[48] Ms. Etson is a widow who lives alone in Sicamous, B.C. She is now 78 years old and retired. She had three children. Her daughter, June, unfortunately passed away after this incident, in April 2009. She has one sister, Virginia Rogers, who also lives in Sicamous, with her husband.

[49] Ms. Etson testified that before her fall, she was in good health and lived an active, independent lifestyle. She was able to do everything around her home, including gardening and shovelling snow. She worked until several years ago, doing drafting for a company that sells mobile homes. She did a lot of work finishing her own mobile home. She is also an artist and was very involved in art, painting groups and community activities. She had an active social life.

[50] In September 2008, Ms. Etson had knee replacement surgery. She said that she recovered well within eight weeks. While she favoured her knee to some extent, by late November, she was able to walk without assistance.

[51] Ms. Etson was in Abbotsford visiting her daughter, June, in November 2008. June had been in hospital and not expected to live. Miraculously, June recovered temporarily and was able to be released from hospital on November 26. On the day of the fall, Ms. Etson and June were shopping for something special for dinner.

[52] The fall was very painful. Ms. Etson was taken by ambulance and admitted to hospital immediately. According to Dr. Paul Moreau, an orthopaedic surgeon, she was diagnosed with a right subcapital hip fracture. On November 30, 2008, she underwent closed reduction internal fixation surgery, where screws were inserted to repair the fracture. She stayed in hospital for five days after that. She was discharged with instructions to “protective weight bear 50 per cent maximum on the right side”. Ms. Etson said that the trip home to Sicamous was not easy for her.

She had to arrange to obtain a walker because it was too difficult to use crutches right away.

[53] Ms. Etson testified about how she coped at home. She had difficulty getting up from the sofa and she had to use a walker to get around her house. She could not get into her bathtub for about a month. She was very limited in what she could do. Friends and family prepared meals for her. She had her groceries delivered. Her sister took her to her doctor's appointments in Vernon. She was not able to drive until March. She needed to use crutches to get to and from her car. She took some physiotherapy and slowly improved.

[54] In August 2009, Ms. Etson began experiencing more pain, which kept increasing. According to Dr. Moreau, it was suspected that there may have been some collapse of the femoral head. By November her pain had increased significantly and it was felt that she was developing avascular necrosis and collapse of the femoral head. She had to use a wheelchair to get around. In January 2010 she underwent surgery to remove the plate and screws. Unfortunately, her pain did not subside. Her mobility deteriorated. She had difficulty sleeping. In April 2010, she underwent a right total hip replacement. She described her sense of relief when, after this operation, she realized that she could finally move without pain.

[55] Since then, Ms. Etson has recovered reasonably well. She said that it took her about two months to be able to walk without assistance. She uses a cane if she walks more than two to three blocks and she has a bit of a limp. She is still limited in what she can do but she is able to drive and do most things around her home. She hopes to be able to do some gardening and yard work in the spring but does not feel she is able to do this now. She has not, however, resumed her former lifestyle. She has not returned to her painting or community and social activities. She testified that she has not had the enthusiasm or inspiration. She said that she was feeling very "down" and felt that the accident took away two years of her life.

[56] Dr. Moreau examined Ms. Etson on September 27, 2010. He described her symptoms at that time as follows:

> Overall, she is doing well 6 months post total hip replacement. She still feels generally weak, but her energy is slowly improving. She gets occasional electric type of shocks along the incision area. She is now able to lie on the affected side. She can climb up and down stairs without great difficulty. She takes 2 extra strength Tylenols at night and this helps her sleep. She also takes Celebrex on a regular basis, this is also for her other generalized joint discomfort. She has no significant pain with walking.

[57] Dr. Moreau also stated that Ms. Etson would have some residual symptoms from the hip replacement for about three months. He did not feel that she will require any further treatment or specific rehabilitation. In his opinion, it is very unlikely that she will have any further problems or disabilities because of the hip injury. He stated:

> The 20 year survival for total hip replacements is now over 90 percent. Rare complications such as peri-prosthetic fracture or dislocation would be related to a new injury. Secondary infections of a total joint replacement are possible, but the incidence is less than 1 percent.

The positions of the parties

[58] Mr. Cotter submitted that $60,000 to $100,000 is an appropriate range of non-pecuniary damages and suggested that an award of $90,000 would be fair in this case. Mr. Hallam submitted that the appropriate range is $65,000 to $70,000.

[59] Determining non-pecuniary damages involves an assessment of the plaintiff's original position, which includes pre-existing conditions: see *Athey*. The defendant did not take the position, nor is there evidence, that Ms. Etson's prior knee replacement should taken into account in assessing her damages.

Findings of fact and analysis

[60] Ms. Etson's testimony about her previous level of activity and her condition after the accident was entirely credible. It was consistent with the evidence of her sister, Virginia Rogers, and her friend, Esther Erikson, and it was also consistent with the medical report of Dr. Moreau.

[61] Ms. Etson was quite reserved in her descriptions of the pain she experienced as a result of her injuries but there is no question that she suffered a tremendous

amount of pain. The initial injury was obviously very painful and it took Ms. Etson about four months to begin to resume her mobility sufficiently to be able to drive and do things for herself. She suffered a debilitating set-back in August 2009 when the hardware failed and the femoral head in her hip collapsed. Her mobility deteriorated and she was again unable to do things for herself. She suffered tremendous and increasing physical pain for about eight months. She underwent two additional surgeries. The first, in January 2010, did not alleviate her pain or improve her mobility. She did not experience any relief from the pain until April 2010 when she had the total hip replacement surgery.

[62] Ms. Etson had been a very independent and active woman. She was involved in painting and the arts and was very active in a local painting club and other community events. After the accident, she was unable to continue any of this involvement and she had considerable difficulty maintaining her independence. She had to rely on her sister and Ms. Erikson to help her with meals and other things. She developed ways to get around her house and she managed as best as she could. However, it is apparent that the severe limitations on her ability to participate in activities outside her home for close to a year and a half left her feeling very isolated. Moreover, the accident occurred at a very difficult time in Ms. Etson's life, when her daughter was in the later stages of a terminal illness. While she said little about this, it was clear to me that her injuries made it practically impossible for her to visit her daughter before her death in April 2009. Since the hip replacement surgery in April 2010, Ms. Etson's condition has improved significantly but she has not yet found the spirit to return to her pre-accident activities and she is still not socially active. I am satisfied that the injury is a factor here, but I also find that some of this lack of spirit is attributed to other factors, such as the death of her daughter.

[63] Clearly, Ms. Etson's injuries have had a profound effect of her life. She has recovered reasonably well since April 2010 but she still has residual problems. She is limited in how far she can walk, she still uses a cane when walking for more than two or three blocks and she has a bit of a limp. She is able to live independently now but she is still not able to do heavier physical activities such as gardening or snow

removal. I do not accept Dr. Moreau's comment that "there would have been some residual symptoms during her recovery from the hip replacement of about 3 months". This statement is not consistent with his own observations of her condition on September 27, 2010, and is not consistent with Ms. Etson's evidence, which I do accept. Her residual symptoms have lasted longer than that and while her prognosis is not entirely clear, it is likely that she will be able to resume most, if not all, of her pre-accident activities by the spring.

[64] I do accept Dr. Moreau's opinion that Ms. Etson will not require any further treatment or specific rehabilitation and that it is very unlikely that she will have any further problems or disabilities because of the hip injury.

[65] With respect to the quantum of non-pecuniary damages, I have reviewed these cases cited by counsel:

> *Fost v. Badcock et al.*, 2005 NLTD 213
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> *Simon v. The Owners, Strata Plan KAS2093 and others*, 2007 BCSC 1592
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> *Irvine v. Cara Operations Limited Enterprises*, 2002 BCSC 1581
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> *Campbell v. Little*, [1993] B.C.J. No. 282 (S.C.)
>
> *Anderson v. Hicks Enterprises Ltd.*, [1991] B.C.J. No. 3059 (S.C.)
>
> *Broccoli v. Harris*, [1991] B.C.J. No. 2725 (S.C.)

[66] Many of these cases were helpful but of course each is specific to the effect of the injuries on the particular plaintiff. Several of them involved plaintiffs over 70 years old. Mr. Hallam did not, however, take the position that Ms. Etson would not have enjoyed her pre-accident activity level for a long future period of time given her age. This factor served to reduce an award for non-pecuniary damages in *Irvine*, where the plaintiff was 86 years old. There is no evidence in this case that Ms. Etson would not have continued to enjoy her active and independent life style for many years to come. In my view, this is a case where Ms. Etson's injuries could be viewed as more profound due to her age. In *Pingitore v. Luk,* [1994] B.C.J.

No. 1866 (S.C.), the court noted (at para. 36) that "[i]njury to older people is, from at least one vantage, more profound than injury to the younger" and referred to these comments in a decision of the Court of Appeal of England, in *Frank v. Cox* (1967), 111 S.J. 670:

> I take the view myself that when one has a person in advancing years, in some respects an impairment of movement may perhaps be more serious that it is with a younger person. It is true, as Mr. Chedlow has stressed, that he has not got as many years before him through which he has to live with this discomfort, pain and impairment of movement. But it is important to bear in mind that as one advances in life one's pleasures and activities particularly do become more limited, and any substantial impairment in the limited amount of activity and movement which a person can undertake, in my view, becomes all the more serious on that account.

[67] I found the decision in *Simon* quite helpful, although the effects of the injuries were more significant than in this case. There, the plaintiff was 66 years old when she fractured her left hip and heel from a fall down some stairs and was 74 at the time of trial. Her hip was surgically repaired but she was left with a permanently shorter left leg, resulting in a gait imbalance and permanent instability. The gait imbalance contributed to osteoarthritis in her lower back, progressive partial impairment in mobility and chronic insomnia. The court found that the injuries were devastating to the plaintiff, who had previously lived an active and independent life, and awarded her $100,000 for non-pecuniary damages. I am advised that the present value of this award is $105,000.

[68] *Irvine* was also a helpful comparison, although the plaintiff was older. The court awarded $60,000 for non-pecuniary damages for injuries that included a fractured right hip, wrist and shoulder. The plaintiff underwent three surgeries for the fractures and was bedridden for about 10 days. She recovered from the hip injury but continued to have limitations from the wrist and shoulder injuries. I consider this award (with a present value of $73,000) to be on the low end given the court's conclusion that the plaintiff, at her age, would not have enjoyed her pre-accident activity level for a long term future period.

[69] I also consider the awards given in *Anderson* and *Broccoli*, $30,000 and $40,000 respectively, to be low. Both involved plaintiffs in their 70's with fractured hips. They are dated (1991) and while the present value of these awards increases the amounts to $48,000 and $64,000, it appears that each judge considered the advanced age of the plaintiff to be an important factor. In *Anderson*, the court's award of $30,000 was based on the same amount awarded in a 1983 case, taking into account "the more advanced age of the present plaintiff against the amount by which the dollar has been devalued by inflation". In *Broccoli*, where the injuries were more comparable to this case, the court relied only on "cases dealing with elderly people who suffered hip injuries" without providing any analysis of those cases.

[70] In this case, the injuries had a profound effect on Ms. Etson's life. Her active and independent life style, which was important to her, was seriously compromised for over a year and a half. During that time she experienced significant pain and had to undergo three surgeries. She is now able to resume most of her former activities but she still has some residual effects. Given my findings, I assess non-pecuniary damages at $90,000.

Future care costs

[71] Ms. Etson makes a modest claim in the amount of $15,000 for a future loss of housekeeping capacity. She says that her ability to look after her household has been affected by her injury and will likely continue to do so in the future.

[72] While the legal basis for such a claim is well known (see *McTavish v. MacGillivray*, 2000 BCCA 164), there is little, if any, medical evidence to support this claim. As indicated above, Dr. Moreau saw Ms. Etson on September 27, 2010, four months after the surgery. He reported that she was doing well overall at that time but noted that she was still feeling generally weak and needed to take extra strength Tylenols at night to help her sleep. More importantly, Dr. Moreau was of the opinion, which I have accepted, that Ms. Etson will unlikely have any further problems or disabilities due to her hip injury and that complications or secondary infections are possible but rare.

[73] Mr. Hallam submitted that there is no basis for the court to make any award for this future loss in light of Dr. Moreau's evidence.

[74] I note here that the plaintiff is not required to prove a future or hypothetical event on a balance of probabilities. Rather, she must prove that future event is a real and substantial possibility and not mere speculation: see *Athey* at para. 27.

[75] Dr. Moreau did not specifically address how long it would take Ms. Etson to be back to her normal household activities. As explained above, I have not accepted his evidence that "there would have been some residual symptoms during her recovery from the hip replacement of about 3 months" and I have accepted Ms. Etson's evidence that she is still limited in her ability to do things like yard work and snow removal. She is, however, able to do things around her house and she no longer has joint pain. She is able to drive and do grocery shopping with a cart.

[76] I am not satisfied that Ms. Etson has established the basis for a claim for future loss of housekeeping capacity. While she continues to have some residual symptoms, the limitations on her ability to do housework are no longer significant and there is no evidence to establish a substantial possibility that her residual symptoms will continue indefinitely into the future.

[77] Moreover, there is no evidence from which a monetary award can be based. Ms. Etson did not adduce any evidence about the cost of the housekeeping services claimed.

[78] Mr. Cotter relied on a similar award given in *Paller v. Paller*, 2004 BCSC 977, where the court was satisfied that the plaintiff had a reduced capacity to provide housekeeping services as a result of chronic back pain, but was not satisfied that the loss was to the extent claimed. I did not find that case particularly helpful. There the amount claimed, $120,000, was based on the equivalent of 12 hours a week to a stated age. The court reduced this to $30,000. Clearly, there was evidence before the court that established the basis for the initial claim, including rates for housekeeping services.

[79] In the absence of any evidence about the cost of housekeeping services, Ms. Etson is essentially asking the court to award her a nominal amount to compensate her for unspecified housekeeping assistance for an unspecified period of time in the future. In these circumstances, there is no basis to make such an award.

In trust claim

[80] The plaintiff also makes an in trust claim for the care that was provided to her by her sister and a friend. Mr. Cotter submitted that an award of $10,000 would be appropriate.

[81] The purpose of an in-trust award is to compensate a plaintiff for a diminished ability to carry out household tasks, even where such tasks have been performed gratuitously by one or more family members: see *Kroeker v. Jansen* (1995), 4 B.C.L.R. (3d) 178 (C.A.); *Bradley v. Bath*, 2010 BCCA 10.

[82] Mr. Hallam opposes this claim on the basis that there is no evidence on which to quantify such a claim. While there is ample evidence that Ms. Etson's ability to perform household tasks was severely diminished after her fall and continued to be diminished as she suffered complications from the initial surgery, I agree that this is a deficiency in the plaintiff's evidence.

[83] The factors to be considered in the assessment of in trust claims were summarized in *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180:

> (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
>
> (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship …;
>
> (c) the maximum value of such services is the cost of obtaining the services outside the family;
>
> (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
>
> (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute

> caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
>
> (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[84] The evidence establishes that Ms. Etson received some services from her sister, Virginia Rogers, and her friend, Esther Erikson, which were necessary for her care as a result of her injuries. Ms. Rogers testified that she helped Ms. Etson with driving, grocery shopping and providing meals. Ms. Erikson testified that she stayed with Ms. Etson for about three days when she first came home after the accident and then checked on her daily for a week or two following. She helped her to get up, made her breakfast and often brought meals. She also took Ms. Etson to hospital and doctor appointments on occasion. She said that Ms. Etson paid her once or twice, either by taking her for lunch or paying for gas.

[85] The evidence also establishes that the services provided by Ms. Erikson and at least some of the services provided by Ms. Rogers were over and above what could be expected from Ms. Etson's relationships with these women. The case law does not expressly address in trust claims for services rendered by non-family members, although *Bystedt* certainly implies that a claim may be made for services provided by a friend as opposed to a family member.

[86] However, the evidence does not establish the cost of obtaining any of these services and there is no basis for this court to assess the "true and reasonable value of the services performed taking into account the time, quality and nature of those services" in order to make a damage award that reflects the wage of a substitute caregiver. Although the plaintiff's claim here is a modest one, in the absence of evidence to properly quantify such a claim, it must be dismissed.

[87] While not raised by the defendant, I note as well that this claim was not specifically pleaded. This issue was discussed by Mackenzie J.A. in *Star v. Ellis*, 2008 BCCA 164 at para. 21:

> One aspect of this claim that is not directly in issue on this appeal, but is of some significance, is the question of the extent to which a claim for past in-trust services ought to be pleaded. The claim is addressed under the heading of special damages which normally requires that the claim be specifically

> pleaded as is the case with out-of-pocket expenses. The trial judge relied on *Frers v. De Moulin* [2002 BCSC 408] for the proposition that an in-trust claim does not have to be specifically pleaded and *Frers* was not challenged by the appellant in this case. Nonetheless, it appears to me that a claim of this nature ought to be pleaded to provide a degree of specificity to the claim. As I have indicated, the pleading point is not specifically put in issue on this appeal, but in my view, good practice suggests that in future cases it ought properly to be pleaded.

[88] In *Bradley*, the Court of Appeal did not resolve this issue because it found that the evidence did not provide a foundation to conclude that the plaintiff's ability to perform household tasks had been diminished. That, of course, is not the case here. While such claims should be specifically pleaded, in the absence of prejudice I would not be inclined to deny Ms. Etson's claim only on this basis.

Special damages

[89] The parties agreed to an amount of $1,623.80 for special damages. The plaintiff claims a further sum of $5,404 to compensate her for the cost of purchasing a recliner chair and the cost of replacing her bathtub with a walk-in tub and shower unit.

[90] The defendant opposes these further claims on the basis that they were not medically justified, as they were made long after the accident.

[91] Ms. Etson testified that she purchased a rocker recliner chair because she was unable to sleep on her back for about a month. She had trouble with the chair she originally purchased. In May 2010, she returned it and purchased a lift chair, which allowed her to rest in a comfortable reclining position. She claims $448, which is the difference in price between the recliner chair and the lift chair. She also claims $4,956 for the cost of a new bath and shower unit, which she had installed in March 2010, before her last surgery. She said that this unit allowed her to get inside with her walker.

[92] In my opinion, these expenses were medically justified. While she ought to have purchased these items sooner, I do not think Ms. Etson should be faulted for her delay in doing so. She clearly had a need for them for some time.

[93] Accordingly, special damages are awarded for a total of $7,027.80, which includes the agreed amount of $1,623.80 and $5,404 for the chair and shower unit.

Health Care Costs Recovery Act

[94] The *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27, came into force April 1, 2009. A person who commences a legal proceeding against a wrongdoer for damages for personal injury is now obligated to include a health care services claim in that proceeding. The plaintiff in this case did not do so. Mr. Cotter did, however, discuss the matter with counsel for the Ministry of Health Services. I was advised that the Ministry intends to pursue recovery of health care costs by way of a separate action if the claim is not resolved in this proceeding.

[95] I considered whether to permit the plaintiff to amend her statement of claim to include a health care costs recovery claim. Mr. Hallam submitted that to do so at this stage could be prejudicial to the defendant because it did not agree with the amount of the Ministry's claim and it was doubtful that these parties were ready to deal with this issue at this trial. Under s. 16, the Minister may issue a certificate setting out the health care services received and the costs of those services. It has been held that s. 16(1) creates a rebuttable presumption: *MacEachern v. Rennie*, 2009 BCSC 652 at para. 27.

[96] The *Health Care Costs Recovery Act* gives the Ministry several ways to recover the costs of health care services. One way is where a plaintiff includes such a claim. Another is by way of a separate action. Under s. 8, the government has the right to commence a legal proceeding in its own name for the recovery of past and future costs of health care services.

[97] If a claim has not been included in a proceeding, the court must, under s. 3(3), permit an amendment of the originating documents up to six months after they were filed in the court. In this case, the statement of claim was filed November 2, 2009, and the application to amend was made over a year later, at the start of trial. In such circumstances, I have the discretion to permit or refuse an amendment.

[98] It was my view that permitting an amendment at this late stage would be prejudicial to the defendant's ability to challenge the amount of the claim and would result in delays, as the trial would likely require more time to complete. Since the Ministry had another option that it intended to pursue if necessary, I denied the application to amend.

Conclusion

[99] The defendant is liable to the plaintiff for breaching its duty of care under s. 3 of the *Occupiers Liability Act.* The plaintiff was contributorily negligent by failing to take reasonable care for her own safety. Fault is assessed equally between the parties.

[100] Non-pecuniary damages are assessed at $90,000 and special damages at $7,027.80.

[101] The plaintiff's claim for future housekeeping services and the in trust claim are dismissed.

[102] There will be judgment for the plaintiff in the amount of $48,513.90, which is 50% of the damages awarded.

[103] The parties will have leave to make submissions on costs if they are unable to agree.

"Fisher J."