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Indexed as: Baker v. Flett
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(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA
(GENERAL DIVISION)

B E T W E E N:

DONNA BAKER, plaintiff,	)	Appearances:
	)	Grant M. Driedger
- and -	)	for the plaintiff
	)	
	)	Michael G. Finlayson
BARRY FLETT carrying on business under the firm name and style of SKROUNGERS SALVAGE, SURPLUS & THRIFT, defendant.	)	for the defendant
	)	
	)	JUDGMENT DELIVERED ORALLY:
	)	June 10, 2010

GREENBERG J.

[1] The plaintiff, Donna Baker, sues the defendant, Barry Flett, for damages that she suffered when she fell off a loading dock on the defendant's premises and fractured her leg. While liability is in issue, damages have been agreed upon between the parties.

BACKGROUND

[2] At the time of the incident, Mr. Flett owned a business, Skroungers Salvage, Surplus & Thrift, which sold antique and recycled items. Ms Baker had been at Skroungers on several occasions prior to her fall to purchase recycled

items which she used in art projects. On those previous occasions, Mr. Flett or one of his staff assisted Ms Baker in carrying the purchased items out to the loading dock and in loading them into her car.

[3] On July 21, 2006, Ms Baker went to Skroungers to exchange items that she had previously purchased. She arrived at Skroungers late in the afternoon and parked her car next to the loading dock. She entered the store through the front door and spoke to Mr. Flett. She had decided to take, in exchange for what she was returning, a box of telephone covers and three metal stands. She took the box of telephone covers to her car through the front door. She then returned to get the three metal stands.

[4] Although the metal stands were not heavy, they were large and cumbersome so Ms Baker thought it would be awkward to get them out of the store through the front door. Ms Baker testified that when she asked Mr. Flett if she could take her stands, he pointed to the gate that led to the loading area and told her she could take the items herself. There is no suggestion that he said this in a rude manner. Rather, it appeared to be an indication that she did not have to wait for staff assistance.

[5] Ms Baker proceeded to get the stands and take them to the loading dock. The dock was 4'1" above the ground outside where her car was parked. Ms Baker said that she squatted down with the intention of propping the stands on the ground against the side of the building. She succeeded in doing that with two of the three stands which were each six feet in length. Ms Baker testified that because the third stand was only four feet in length, she was not able to

prop it on the ground from the level of the loading dock. So she stepped with one foot onto a rubber bumper that was affixed to the outside of the building a few inches below the surface of the loading dock. It is obvious from the photographs of the building that the purpose of the bumper is to prevent trucks that are backing into the loading dock from hitting the concrete wall of the building. There are two of these bumpers, one on either side of the opening to the dock. It is clear from their appearance that the bumpers are not meant to be stepped on. Ms Baker said that when she put her weight on the bumper her foot went through it and she fell to the ground causing her injury.

[6] In his examination for discovery, the relevant portions of which were read into evidence, the defendant stated that he had a policy that customers who used the loading dock would get assistance from either him or one of his staff. The defendant acknowledged that the reason for this policy was so that nobody would injure themselves. There is a sign inside the store, on or near the gate that leads to the loading dock area, which says "employees only".

[7] While Ms Baker testified that she fell because her foot went through the bumper when she stepped on it, she admitted that she told two of the defendant's employees, who came to her assistance after she fell, that she had jumped off the loading dock. At her examination for discovery, she said that she had not jumped from the dock but that she told the staff that she jumped because she "was not feeling literary at the moment". At trial, she provided a different explanation for the comment. She said that she told the staff that she had jumped because the last thing that had gone through her mind before she

fell was that she wished she was tall enough to jump off the dock. Ms Baker is 5'1". As I said, the loading dock is 4'1" high. Ms Baker felt that she was too short to negotiate the jump although she had seen the defendant and his staff members do it.

THE CAUSE OF ACTION

[8] Counsel for the plaintiff advanced the plaintiff's claim as one based both on ***The Occupiers' Liability Act***, C.C.S.M. c. O8, and on common law principles of negligence. However, the statement of claim makes no mention of a claim in negligence. Nor does the evidence disclose a basis for a duty to the plaintiff on the part of the defendant other than as an occupier of land and, as an occupier of land, the only duty on the defendant is that provided by ***The Occupiers' Liability Act*** (see s. 2). In any event, the standard of care expected of an occupier under the legislation is similar to a negligence standard. Section 3(1) of the Act states:

> 3(1) An occupier of premises owes a duty to persons entering on the premises and to any person, whether on or off the premises, whose property is on the premises, to take such care as, in all circumstances of the case, is reasonable to see that the person or property, as the case may be, will be reasonably safe while on the premises.

[9] In **Tort Law** (4th ed., 2008), at p. 607, Professor Klar explains the statutory duty of care:

> Despite the inelegant wording, the statutory duty of care is akin to the ordinary common law duty of care, as developed in the negligence action. The duty is based on an objective test of reasonable care, which includes factors such as reasonable foreseeability, reasonable risk, and so on.
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> [footnotes omitted]

ANALYSIS

[10] The plaintiff argues that the defendant failed in his duty under the legislation because he allowed her to enter the loading dock area without a staff member. The plaintiff argues that the defendant breached his own policy of not allowing customers in that area and that this policy established a standard of care by which he should have been bound. The plaintiff also argues that the defendant failed in his duty to make the premises safe by not providing steps or a ramp from which to descend from the loading dock.

[11] There is an inherent danger in a loading dock in that it is elevated from the ground and it is foreseeable that a person could fall off it. Because of that, it was reasonable for the defendant to restrict access to the area especially by patrons who have entered through the front door and may not be aware of the drop from the loading dock if they approached it from inside the building. Therefore, the gate which closed off the area and the sign which said "employees only" was prudent. However, I do not agree that, in order to make the area safe, the defendant must provide stairs or a ramp to allow patrons to exit the building from that area. Patrons can be expected to use the normal street exit. While steps at the loading dock may have provided a convenience for customers, they would not affect the safety of the dock area because the addition of steps would not do away with the drop that is necessary in the design of the loading dock to make it functional.

[12] I point out that there was no suggestion in this case of any unusual dangers in the loading dock area. There was no evidence of any obstructions or

obstacles in the area when Ms Baker fell, nor was there evidence of anything else that would cause someone to slip such as a wet floor from rain. The incident occurred in summer and in broad daylight.

[13] The only issue in this case is whether Mr. Flett breached his duty to Ms Baker when he allowed her to access the loading dock area on her own. The wording of s. 3(1) of the Act makes it clear that in determining whether Mr. Flett breached his duty one must consider all of the circumstances of the case. As explained in ***Waldick v. Malcolm***, [1991] 2 S.C.R. 456:

> 33 ... [T]he statutory duty on occupiers is framed quite generally, as indeed it must be. That duty is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation -- thus the proviso "such care as in all circumstances of the case is reasonable". ...

[14] While it may have been negligent for Mr. Flett to allow a first-time customer to wander into the loading dock area, Ms Baker was not new to the store. She had been in his store several times before and on those occasions she had been in the loading dock area. In fact, Ms Baker appeared to be very familiar with Mr. Flett's business. She knew the staff by name. She testified that she had spent some time with Mr. Flett and the staff talking about the business because she was interested in recycling materials. She also knew about the problems that Mr. Flett was having with the City over a by-law or permit issue. So when Mr. Flett pointed to the loading dock area and told Ms Baker that she could take her items herself, he was speaking to someone he knew was familiar with the premises.

[15] Moreover, the items that Ms Baker was loading into her car on this occasion were not heavy. While she described them as cumbersome because of their size, she said they were delicate. There is no indication that she could not carry them on her own. She acknowledged that she could have asked a staff member for help carrying the items, but did not.

[16] As I said, Ms Baker was familiar with the loading dock area. Before entering the store, she had parked her car behind the loading dock to facilitate transferring to her car the items that she purchased. Ms Baker acknowledged that she could have placed the metal stands on the loading dock and then walked back through the store to the outside in order to retrieve the items from the dock when she was standing at ground level. This is what she had done on the other occasions when she had been at Skroungers. She made the decision not to follow this routine on July 21, 2006.

[17] In any event, even if it could be said that Mr. Flett breached his duty by allowing Ms Baker to approach the loading dock on her own, she was not injured because of an inherent danger in the dock. According to her evidence, she fell because she made the decision to step down onto the bumper that was meant to buffer a truck's contact with the exterior wall of the building. This action was the result of a deliberate decision on her part. In fact, she testified that, while there were two bumpers below the dock, she chose to step on one bumper over the other because one looked rotten and the other looked like it had substance to it.

[18] I should say that I have some doubt as to whether it was the step onto the bumper that actually caused the fall. As I said earlier, Ms Baker acknowledged that she told the Skroungers' staff who came to her rescue that she had jumped off the dock. It is curious that she would say this if it was not true. And her explanation, which was that she said she had jumped off the dock because she had been thinking that she wished she could have done so, simply makes no sense. But I need not decide whether her fall was a result of jumping off the dock or a result of stepping onto something that was clearly not meant to support her weight. In either case, her injuries were caused by her own deliberate act and not by the defendant's failure to take reasonable care to make his premises safe. Mr. Flett could not have foreseen that if he allowed Ms Baker to access the loading dock, she would have negotiated a descent in either of these manners.

[19] In ***Lorenz v. Winnipeg (City)*** (1994), 88 Man.R. (2d) 193, [1993] M.J. No. 521 (C.A.)(QL), the plaintiff had injured herself in similar circumstances to the case at bar. Ms Lorenz had been walking on a walkway on top of a dyke that was built and maintained by the City. She broke bones in her foot when she attempted to reach the trail by the river below by lowering herself over the edge of the dyke. Her foot slipped when she stepped onto something called a "waler", an eight inch horizontal wooden beam on the side of the dyke.

[20] Ms Lorenz sued the City claiming that it was negligent for failing to install a guardrail along the dyke, for failing to build stairs down to the river and for failing to erect warning signs. She based her action on occupiers' liability and

negligence. In deciding that there was no liability on the part of the City, the Manitoba Court of Appeal found that it was unnecessary to decide which cause of action applied because, in either case, the alleged breach of duty must be considered in the context of foreseeability and causation. The Court held that, if there was negligence on the part of the City, it was not the cause of the plaintiff's injury. Kroft J.A. said:

> 19 One might well speculate about circumstances in which a walker, a jogger, or a cyclist while using the walkway (either prudently or carelessly) falls off and is injured. In those cases there would be an intended or contemplated user incurring damages by reason of an occurrence which was foreseeable. In such circumstances there might well be liability upon the city, but this is not that kind of case.
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> 20 Here we must ask whether when Mrs. Lorenz intentionally left the walkway, climbed over the piling and stepped onto the waler for the purpose of lowering herself to the riverbank, she continued to be a person in regard to whom the law recognized that there was some duty on the part of the city, and whether the breach of any such duty was an effective cause of the damages she incurred.

[21] Kroft J.A. concluded that the plaintiff's injuries were attributable to her own intentional act.

[22] I come to the same conclusion in the case at bar. Ms Baker was familiar with the loading dock. There was no reason why she could not leave the items on the dock and walk around to ground level to retrieve them as she had done on other occasions. She knew that was an option but she made a conscious decision to navigate the area in a manner that could not have been foreseen by the defendant.

[23] Section 3(3) of ***The Occupiers' Liability Act*** provides that an occupier owes no duty of care to a person with respect to any risks willingly assumed by

that person. Whether she jumped off the dock or stepped onto the bumper, Ms Baker willingly assumed the risk associated with that action.

[24] In ***Felix v. Park Royal Shopping Centre Holdings Ltd.***, [1999] B.C.J. No. 1826 (S.C.)(QL), the plaintiff was injured when she fell from the second level of a golf driving range. She fell when she bent over to retrieve a "missed hit" ball that had landed in a screen that extended from the edge of the driving platform. The court dismissed the plaintiff's action, finding that she knew the risk of going over the edge of the platform and willingly assumed it. Melvin J. said:

> 29 In the case at bar, I think it should be noted that the premises were not inherently dangerous, and the risk of falling off the edge was obvious, and it is obvious according to the plaintiff in her own evidence. The nature of the activity precluded any vertical barrier at the edge of the structure. The plaintiff was aware of the edge. She knew of the danger of falling, saw the screen, was aware of its nature and appreciated the hazard. At her discovery, as she stated, "I would never ever think of going beyond the platform"; and she stated at trial, "I knew all I needed to know."
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> . . .
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> 35 ... There was nothing done by the defendants that disguised the danger in any way, shape or form. It was her decision and her decision alone, and it was with such knowledge that she willingly accepted the risk and caused the damages to herself.

[25] While 3(3) of ***The Occupiers' Liability Act*** has been interpreted narrowly, that is to say it does not absolve an occupier of liability merely because a person knows there is a risk to using premises (***Waldick v. Malcolm***, [1991] 2 S.C.R. 456; ***Sandberg v. Steer Holdings Ltd.*** (1987), 45 Man.R. (2d) 264 (Q.B.)), an occupier is not liable when a person takes on a risk not normally associated with the use of the premises, such as jumping off an elevated

landing. The occupier is not liable either because the action was not foreseeable or because one can infer that the person willingly assumed the risk associated with the action.

[26] Ms Baker was not injured as a result of any inherent danger in the loading dock area or as a result of a failure by the defendant to maintain it. The nature of a loading dock will necessarily create some danger if not properly used. The dock may be compared to a flight of stairs. To find Mr. Flett responsible for Ms Baker's injury in this case would be the same as finding an occupier responsible any time someone falls down a flight of stairs. There is an inherent danger in a staircase and one expects that people will use it with an understanding of that danger. If the stairs are properly maintained, then to make the occupier liable simply because someone falls down them is to make the occupier an insurer of the safety of those who use the stairs. ***The Occupiers' Liability Act*** does not create such a duty.

[27] In ***Oser v. Nelson (City)***, [1997] B.C.J. No. 2809 (S.C.)(QL), the court dismissed the plaintiff's action for damages for injuries she suffered when she tripped on a gravel sidewalk. The accident happened in daylight and the surface was dry. The comments of McEwan J. are apt in the case at bar:

> 13 In any event, it is obvious from the evidence that while the surface of the alley was less than ideal, it did not constitute an unusual or latent "trap". The defendant was not in a better position to appreciate the danger than the plaintiff, and was therefore not realistically in a position to warn the defendant. The evidence is that the risk posed by the condition of the alley was slight, and that, in any event, the plaintiff had assessed that danger and proceeded in spite of it. In this respect the comments of the Chief Justice in *Malcolm v. B.C. Transit* (1988) 32 B.C.L.R. (2d) 317 at p. 318 are pertinent:

> In my respectful view, it is not negligence or a breach of any duty not to warn an adult person, not suffering under any disability, of the ordinary risks arising out of the exigencies of everyday life. Any such adult person without being warned knows and accepts the risks of falling on a steep, wet, grassy slope or a path and it was not necessary, in my view, to give a warning of such a common everyday risk. Counsel in his able submission before us, himself described such a warning as superfluous.
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> This is quite a different case from *Dixon v. R.*, 12 B.C.L.R. 110, [1979] 4 W.W.R. 289, 99 D.L.R. (3d) 652, affirmed 24 B.C.L.R. 382, [1980] 6 W.W.R. 406 (C.A.), where liability was found against a bus company for negligence when a passenger slipped on an oil slick near the point of disembarkation from the car deck of a B.C. Ferry. Here there was no hidden or unusual danger and the plaintiff was just as aware of this risk as was the driver of the bus.
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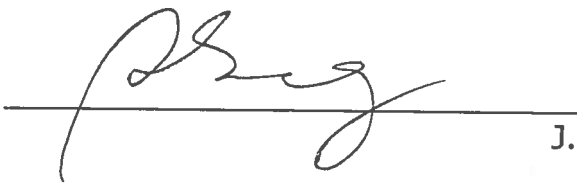
> 14 The plaintiff is in the same position here. I am unable to conclude that she has established that the defendant was negligent. The action is accordingly dismissed.

[28] It was reasonable for Mr. Flett to assume that Ms Baker would use the dock in the manner that she had on other occasions. He did not breach his duty by not accompanying her to the dock. Her fall was a result of her own actions and not the result of a breach of duty on the part of Mr. Flett. As a result, Ms Baker's action is dismissed.



J.