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(Winnipeg Centre)

**COURT OF QUEEN'S BENCH OF MANITOBA**

**B E T W E E N:**

COLLEEN FRANCES FRAME,	)	<u>EDWARD TAWKIN</u>
	)	for the plaintiff
plaintiff,	)	
	)	
- and -	)	
	)	
THE FORT GARRY HOTEL and	)	<u>MICHAEL G. FINLAYSON</u> and
3031632 MANITOBA INC.,	)	<u>DARCIE YALE</u> ✓
	)	for the defendants
defendants.	)	
	)	
	)	JUDGMENT DELIVERED:
	)	MARCH 7, 2002

**HAMILTON, J.**

[1] On August 26, 1998 the plaintiff checked into the Hotel Fort Garry. She was in Winnipeg on business. When getting ready for work the next morning, the plaintiff fell in the bathroom of her hotel room. This is an occupier's liability case. There is no issue that the defendant 3031632 Manitoba Inc., the owner of the hotel, is an occupier under *The Occupiers' Liability Act*, R.S.M. 1987, c. O8. There is no issue that the plaintiff's fall caused her injuries (a fractured wrist being the most serious) and that she suffered damage as a result. The only issue before me is whether the defendant breached the duty of care it owed to the plaintiff.

[2] ***Tronrud v. French***, [1989] M.J. No. 639, a decision of the Manitoba Court of Appeal, explains the duty of an occupier: it is not a duty to ensure the safety of persons, but rather it is a duty to exercise reasonable care to see that persons entering on the premises are reasonably safe. The Court of Appeal noted an exception to this duty: "... if the steps required to be taken to avoid any possibility of accident are so disproportionate to the degree of danger that it would not be reasonable to take those steps, then failure to do so would not result in a breach of the duty owed". In the 1990 decision, ***Hoeberg v. Memrad Holdings Ltd.***, [1990] M.J. No. 578, Morse J. defined the duty of an occupier as one of "reasonable, not extraordinary care"; he noted "the occupier is not an insurer".

[3] The plaintiff argues that she fell because the ceramic tile floor in the bathroom was slippery from one or all of the following causes:

- (i) the ventilation in the bathroom was inadequate causing moisture to condense on the tile floor;
- (ii) the ceramic tiles are not slip-resistant and, therefore, are not appropriate for use on hotel bathroom floors;
- (iii) the defendant used a cleaner on the tile floor that left a slippery residue when mixed with water.

[4] The plaintiff called two expert witnesses to give evidence on these points: Mr. John Brighty and Mr. John Burgoyne. Their expertise was acknowledged by the defendant. Mr. Brighty is a senior mechanical engineer with Wardrop

Engineering Ltd. He was qualified as an expert in the area of heating, ventilation, and air conditioning systems and was called to give evidence about the ventilation system in the bathroom in which the plaintiff fell. Mr. Burgoyne has worked in the ceramic tile industry since 1969 and currently is the Winnipeg branch manager for Olympia Tile International Inc. Over the years, he has made recommendations to architects who were preparing specifications for construction projects about what product to use to address safety issues. For example, he would consider what ceramic tiles are non-slip in nature and match the product to the intended use.

[5] Before I comment further on this expert evidence, I will now describe the hotel ventilation system, the bathroom in question, and the plaintiff's activities that morning. The hotel ventilation system and the bathroom are the same today as on August 27, 1998.

[6] The ventilation system in the hotel is a 24 hour continuous system, whereby the air in the hallways flow into the hotel rooms under the room doors, through bathroom door ventilation grills into the bathroom, and then to the ceiling grill in the bathroom.

[7] The bathroom walls and floor are white ceramic tile. In 1988, a previous owner installed the tiles. This is the case for 242 other bathrooms in the hotel as well. The shower is located in the bathtub. A mirror is over the sink and vanity. There is a shower curtain and two bathmats in the bathroom; one mat by the bathtub and one placed at the sink and vanity. On the windowsill of the small

bathroom window is a typed notice that asks guests not to leave the window open to prevent unwanted insects. There is a wall heater but no bathroom ventilation fan. The bathroom door has a wood louvered ventilation grill and the bathroom ceiling has a ventilation grill.

[8] On the morning of August 27, 1998, the plaintiff arose at about 6:00 a.m. and followed her usual morning routine. She showered, stepped out of the tub onto the bathmat and dried herself, stepped onto the mat at the sink and vanity, and then washed her face, dried her hair, brushed her teeth and did her makeup. When she turned to leave the bathroom and stepped from the mat onto the ceramic tile she fell on what the plaintiff described as a damp and slippery floor. She was barefoot.

[9] In her evidence the plaintiff provided this further detail:

- the bathroom door was never closed when she was showering. She guessed it was open 1½ to 2 feet; at her examination for discovery she described the door as half-open;
- the bathroom was a cool temperature and she did not turn on the heater;
- before she showered, she placed the shower curtain inside the bathtub and placed the bathmat on the floor by the tub;
- she let the water run just to get to a warm temperature and then showered for three to five minutes;

- she did not open the window because of the written notice on the windowsill;
- she did not notice if the mirror had fogged while she was at the bathroom sink.

[10] The plaintiff guessed that she was in the bathroom about 10-15 minutes based on her usual routine. She denied that she spilled any water on the floor or that there could have been a spray from the shower because she had placed the shower curtain inside the tub.

[11] Mr. Brighty visited the hotel room on August 17, 2001 at approximately 8:00 a.m. While there he observed the heating, ventilation, and air conditioning systems in the room and performed a simple test to observe how effective the airflow through the ventilation grills was at keeping the water vapour from the shower from condensing on the floor. I quote from his three page report dated August 24, 2001:

- The shower was turned on for ten minutes. The shower water temperature was adjusted to warm to the touch.
- The bathroom window was closed.
- The bathroom door was closed.
- The guest room door was closed.
- The guest room window was closed.
- The bedroom heating and air conditioning unit was left operating as it was when the guest room was entered.

After the 10 minute duration, the bathroom door was opened and the bathroom was entered. The bathroom was found to be very foggy, ... Water vapour was observed from the ceiling to the floor. The floor felt damp to the touch. The bathroom door was left open and the water vapour dissipated into the bedroom in about two to three minutes. The mirror was still fogged up ten minutes after the shower was turned off.

[12] In his explanation about how and why water vapour condenses, Mr. Brighty noted that water vapour typically accumulates at the ceiling first "... and works its way down to the floor". He also noted that condensation depends on many uncontrollable variables, including the room temperature and relative humidity. In cross-examination he agreed that a shorter shower (5 minutes instead of 10 minutes) and greater airflow would result in less condensation. He concluded in his report by stating that "... water vapour could have condensed on the bathroom floor". Although he did not relate a specific date to this concluding opinion in the report or in his evidence, I have assumed the opinion relates to the date of the plaintiff's fall, August 27, 1998.

[13] Mr. Burgoyne also visited the hotel room on August 17, 2001 and prepared his one page report the same day. He reported that the ceramic tile in the bathroom is "White 200 x 200 mm Glazed Monocottura tile, having a slight matte finish face". By "slight matte finish" he meant "not glass-like". He noted that "this product was more predominant in the 80's and was considered more suitable for residential installation" and that "there is very little of this size and type in the market today". With respect to the slip-resistant factor I quote his conclusions:

... This tile is not considered slip-resistant and is not a recommended product for wet areas.

... A more suitable product for wet or potentially wet areas would be one with a slip-resistant Finish or one with a textured face, and preferably unglazed.

Mr. Burgoyne equated a wet area to be anywhere water is expected, such as a pool area, a landing from outside, and a bathroom. To be slip-resistant, a finish is unglazed or, if glazed, processed through a silicone sanding process. Mr. Burgoyne testified that he would not put this type of ceramic tile in a hotel washroom because it is not an anti-slip product.

[14] Mr. Burgoyne also conducted a test. He applied water to the floor and wiped it across the face of the tile. He wrote in his report:

... The tile definitely had slippery feel to the touch. Also noticeable was the beading of water on the surface, as water would bead on a freshly waxed vehicle. This would indicate that a solution of some sort had dried on the surface and once emulsified, became slippery. One might surmise that the solution could be a floor finish, sealer, or cleaning solution, used in the daily maintenance of the floor.

Non-absorbent tiles such as this, require only warm to hot water for cleaning, and if heavy grime exists a neutral or non-alkaline detergent may be used. A soap type detergent is not recommended as this type becomes extremely slippery once emulsified.

Mr. Burgoyne explained in his evidence that a neutral or non-alkaline solution would have a pH level of 7½. The greater the pH level the more alkaline the solution and the more slippery. In his opinion, a solution with a pH greater than 11 is quite likely the incorrect solution. In cross-examination Mr. Burgoyne acknowledged that his expertise did not include sanitation issues but he was aware that cleaning with water alone would not kill bacteria.

[15] James Watson has been the controller for the hotel since February 1995. In addition to being responsible for the accounting office, he is the Director of Human Resources. From his evidence we know that the bathrooms in occupied

hotel rooms were cleaned daily in August 1998 (as they are now) with a disinfectant/detergent solution with the trade name "Omega". This solution is mixed from a concentrate and as noted on the label, it is intended for institutional use such as in hospitals, nursing homes, and educational and recreational facilities. Mr. Watson described that the first goal when cleaning the hotel room bathrooms is to disinfect them, and the second goal is to clean them. He explained the cleaning policy as follows: if a guestroom is occupied the bathroom is cleaned daily with the Omega solution. It is applied with a bristled sponge to clean the grout and a larger brush is used to scrub the floor. Towels are used to dry the floor. Mr. Watson did not have personal knowledge about the properties of the Omega solution. He was not aware that it has a pH of 11.2 nor was he aware of any recommended cleaning procedure for ceramic tiles.

[16] On August 27, 1998 he met with the plaintiff in her hotel room after she returned from the hospital. At that time, he inspected the bathroom and completed a "Hotel Incident Report". I accept Mr. Watson's evidence that there had been no complaints from other guests about leaks or guests slipping in that bathroom. A month or so after the plaintiff's fall, Mr. Watson and the chief engineer inspected the bathroom and did not find any plumbing problems. And Mr. Watson is not aware of any other slip and falls or complaints concerning any other bathrooms in the hotel.

[17] Just before the trial, Mr. Watson did his own test in the bathroom. He closed the shower curtain, left the bathroom door half open, and let the shower



run for five minutes. When the shower was turned off he observed condensation only around the bathtub.

[18] I do accept the plaintiff's evidence that when she touched the floor after her fall, the floor felt damp to her touch. From that I conclude there was moisture or water on the floor. The plaintiff was a credible witness who gave her evidence in a straightforward manner, without exaggeration. She was not challenged in any meaningful way on cross-examination. She did deny that she spilled any water on the floor and that there could have been some spray from the shower because she placed the shower curtain inside the tub. But common sense tells me there could still be spray from the shower depending on the placement of the shower curtain. And common sense tells me that water can spill or be splashed onto a bathroom floor from any number of bathroom activities. Water or moisture on the floor in a bathroom is foreseeable.

[19] I agree with the plaintiff that her bathroom activities that morning were not unusual or out of the ordinary for a hotel guest. However, I disagree with the plaintiff that the fact that the floor felt damp, coupled with the results of Mr. Brighty's test, is evidence that condensation from her shower reached the tile floor and caused it to be moist to the touch. It is common knowledge that condensation can occur in bathrooms during showers and that many factors contribute to this. Mr. Brighty's evidence confirms this. And both his test and Mr. Burgoyne's test show this. But neither of these tests replicates what the plaintiff did that morning: a shower of some 3-5 minutes with the bathroom

door half-open. The closest test to this scenario is Mr. Watson's test in which he observed condensation only around the bathtub after the shower was turned off. In addition, I have concluded that the mirror in the bathroom was not fogged because the plaintiff was able to do her hair and makeup. Relying on Mr. Watson's evidence that condensation starts at the ceiling, and because of my finding that the mirror was not fogged, I conclude the condensation had not reached the mirror and, therefore, it had not reached the floor. There is no evidence that the ventilation in the bathroom was inadequate nor is there any evidence that condensation occurred in the bathroom to the extent that the floor was moist from condensation.

[20] The focus of the analysis is now on the ceramic tiles and the Omega solution. The evidence of Mr. Burgoyne is critical to this. Mr. Burgoyne was a knowledgeable and credible witness. I accept his evidence that he would not recommend the ceramic tiles in question for hotel bathroom installations because they are not slip-resistant. And I accept his opinion that the Omega solution is likely an incorrect solution to use with these ceramic tiles because its alkaline level can result in a slippery surface when mixed with water.

[21] Did the defendant breach its duty to take such care, as in all circumstances of the case, was reasonable to see that the plaintiff was reasonably safe while in the bathroom [see s. 3(1) of *The Occupiers' Liability Act*]? Certainly the risk of injury from a fall is reasonably foreseeable. Is the risk of a hotel guest falling in the hotel bathroom reasonably foreseeable in these

circumstances? In other words, am I satisfied on a balance of probabilities that the plaintiff fell because the ceramic tile was slippery as a result of the defendant's breach of its duty to the plaintiff?

[22] To assist me in answering these questions, counsel referred me to numerous slip and fall cases. I will not comment on them individually. My review of them confirmed that each case, while helpful in illustrating how the principles concerning occupier's liability have been applied, are of minimal value because each case turns on its unique factual circumstances. Having said that, I will comment briefly on one of the cases.

[23] In *Nikkel v. Westfair Foods Ltd. (c.o.b. Extra Foods)*, [2001] M.J. No. 30, a case involving a slip and fall on a tile floor in a store, Schulman J. commented that "... there is no evidence that the tile fell below building standards or regarding the tile in use at the time in other stores". This absence of evidence did not appear to be an important factor for him in concluding that the defendant had not breached its duty. I, too, have no evidence that the ceramic tiles did not comply with building codes nor do I have any evidence as to the use of this tile in other hotel bathrooms. And for me, as well, this absence of evidence was not determinative. Even though I respect Mr. Burgoyne's statement that he would not recommend this tile for use in a hotel bathroom, I also have his evidence that the use of this tile was more predominant in the 1980's (these tiles were installed in 1988) and more suitable for residential installation. On this latter point, it seems to me that a bathroom in a hotel

guestroom is very much like a residential bathroom in its intended use. The defendant's placement of two bathmats in the bathroom is a reasonable safety precaution to address the risk of harm of slipping on these ceramic tile. The plaintiff has not satisfied me on the required balance of probabilities that such risk was reasonably foreseeable and, therefore, the use of these ceramic tiles is not a breach of the defendant's duty of care to the plaintiff.

[24] The use of the Omega solution is more problematic. The defendant argued that the health risk issues addressed by the use of the Omega solution outweighs any risk the use of the Omega solution may result in slippery tiles. That may be so, but I have no evidence that the defendant had considered, let alone was aware of, the risk of leaving a slippery residue by using the Omega solution on ceramic tiles. It was reasonable for the defendant to have known of this risk. If the defendant had directed its mind to this it could have easily foreseen the risk of slippery tiles. And if the defendant had directed its mind to this risk it could have determined if there was an alternate cleaning and disinfecting method that avoids, or at least reduces, this risk. This is not a case where I have evidence that the steps to be taken to avoid any possibility of accident are so "disproportionate to the degree of danger that it would not be reasonable to take those steps" (*Tronrud v. French, supra*).

[25] The plaintiff has satisfied me on the required balance of probabilities:

- that it was reasonably foreseeable that the use of the Omega solution to clean the ceramic tiles would leave a residue that, when combined with water or moisture, would cause the ceramic tiles to be slippery;
- that it was reasonably foreseeable that as a result of such a slippery floor, a person could slip and fall and be injured.

And I am satisfied that, on a balance of probabilities, the plaintiff slipped and fell because the tiles were slippery as a result of the combination of the residue of the Omega solution and water or moisture on the bathroom floor. There is no evidence that the plaintiff contributed in any way to the fall. I find the defendant liable for the plaintiff's injuries.

[26] As noted previously, liability was the only issue before me. Unfortunately, it is not clear from the record or from counsel whether the quantum of damages is an issue. I assume the parties have agreed on damages or will be able to agree on damages in the near future. If I am wrong about that, I would ask that counsel please advise me, so that dates can be arranged for damages to be determined. Judgment cannot be entered unless damages are agreed or determined by me. Costs may be spoken to.

*Bromfield* J.