Case Name:

St. Louis-Lalonde v. Carleton Condominium Corp. No. 12

Between
Suzanne St. Louis-Lalonde, Louise Lalonde and John McCormick, plaintiffs, and
Carleton Condominium Corporation No. 12 and CNIM Canada Inc., defendants

[2005] O.J. No. 2721
Court File No. 02-CV-021885

Ontario Superior Court of Justice
P.F. Lalonde J.

Heard: May 9, 2005.
Judgment: June 27, 2005.
(82 paras.)

Counsel:

Martin Forget, for the Plaintiffs.

Colin Dubeau, for the Defendant, Carleton Condominium Corporation No. 12.

Julie Parent, for the Defendant, CNIM Canada Inc.

REASONS FOR JUDGMENT

¶ 1 **P.F. LALONDE J.**:— Suzanne St. Louis-Lalonde ("Mrs. Lalonde") brought forward a claim against the defendant for injuries suffered when she used the elevator in her high-rise apartment building to access her unit.

The Facts

¶ 2 Mrs. Lalonde was the owner of a condominium on the 18th floor at 158A McArthur Avenue, Ottawa, Ontario, (Tower "A"). On May 4, 2001, Mrs. Lalonde fractured her tibia and fibula on the left leg, as she entered the elevator, with her Invacare Lynx LX-3 3 Wheel Scooter ("scooter"). Mrs. Lalonde testified that, when she entered the elevator, the door of the elevator hit her scooter on the right side, causing her left leg to fall to the floor of the elevator and to break in two places.

The Injuries

¶ 3 The parties have reached an agreement on the quantum of damages and interest that would be acceptable for compensation to Mrs. Lalonde, in the event that she is successful in her action. As a result, no medical evidence was presented and no evidence, concerning the pain and suffering Mrs. Lalonde sustained in her accident, was presented to the Court.

The Issues

¶ 4 Was there a breach of duty of care on the part of Carleton Condominium Corporation No. 12 ("CCC No. 12"), in not looking after Mrs. Lalonde's safety, required by the Occupiers' Liability Act, R.S.O. 1990, c. O.2, s. 2 and s. 3? Should the maintenance firm, CNIM Canada Inc. ("CNIM"), be declared solely responsible for the negligence that caused Mrs. Lalonde's injuries? Should the damages be apportioned between the defendants, CCC No. 12 and CNIM?

The Facts

The evidence of John McCormick

¶ 5 Mr. McCormick is a retired public servant. He is married to Louise Lalonde, daughter of Suzanne St. Louis-Lalonde, the plaintiff. He explained that his mother-in-law has suffered from multiple sclerosis for years and needs a variety of mobility-assisted devices to get around. He stated that Mrs. Lalonde used her scooter to access Para Transpo vehicles and at La Pieta, a long-term care facility, where she did volunteer work. Mrs. Lalonde's current scooter is the fifth scooter she has owned, as scooters are replaced every five years. He claimed that Mrs. Lalonde had a good ability in handling her scooter and that she was a confident operator. He added that Ms. Lalonde had used her scooter in high-rise apartments and shopping centre elevators, in the past.

¶ 6 At his first visit to Tower "A", Mr. McCormick recalled that he had remarked that the elevators were inconsistent in their operations. For instance, upon entering the elevator, he was struck by the elevator door. If he tried to hold the elevator door open for persons coming in, the elevator door beam would not detect his hand and he had to apply force to the door to prevent the door from closing. He claimed that the unfriendly operation of the door happened at least eighteen times during the two months Mrs. Lalonde had resided in the building, prior to the accident.

¶ 7 Fed up with the manner in which the elevators operated in Tower "A", Mr. McCormick decided to attend the Annual General Meeting of the condominium owners of the building in April 2001. He stated that he spoke at the meeting to complain that the elevator doors closed too quickly, too aggressively and that, once the elevator doors were in a closing mode, they would not stop, even if obstructed. He recalled that Mr. H.W. Jamieson, the building manager ("Mr. Jamieson"), had answered that he would check the elevator doors. Mr. McCormick said he had felt, at the time, that Mr. Jamieson had not accepted his word, and the elevator door problem had been ignored.

¶ 8 Exhibit 6 was filed during trial. It consists of a letter written by Mr. McCormick to Mr. Jamieson on June 8, 2001, advising the condominium corporation, for the first time, that Mrs. Lalonde had an accident using the elevators on May 4, 2001. Mr. McCormick described the accident in the following manner: "Upon her return from this particular outing, as she was about to enter the elevator, the door closed upon her machine, with sufficient force to jam her foot between the door and her machine, causing her to break both her tibia and fibula."

¶ 9 Mr. McCormick recalled that he did not get a response to his letter. He stated that Mrs. Lalonde moved out of Tower "A" during the month of February 2004.

The evidence of Suzanne Lalonde

¶ 10 Mrs. Lalonde stated that she was 71 years of age when the accident occurred on May 4, 2001, at Tower "A", where she had moved, one month prior to the accident. She was accompanied, on that day, by Huguette Paradis, a friend that she had met while doing community work at the long-term care facilities of La Pieta. Mrs. Lalonde stated that she had been out with her scooter to shop at a shopping centre located next door to Tower "A". She added that she suffers from multiple sclerosis. She uses a wheeled walker inside of her apartment, and uses a scooter for longer trips when she leaves her unit. She stated that, on arriving at Tower "A", from the shopping centre, she noticed that the doors of the elevator were in the process of opening. Entering the elevator, she noticed that there was a man standing in the elevator, holding a painting and waiting for the elevator doors to shut. She also stated that the door of the elevator closed rapidly, hitting her scooter on the right side, causing her left leg to fall off the scooter to the floor of the elevator. Mrs. Lalonde remained in the elevator until it reached the 18th floor, where her unit was located. She also stated that she could not put any weight on her leg and that she had to slide off her scooter onto a living room couch. She called 911 and was taken to the hospital.

¶ 11 Mrs. Lalonde testified that she never heard the buzzer on the elevator, when the door had retracted, after hitting her scooter. She also stated that her scooter was not damaged in the process. She testified that she never saw Huguette Paradis, the person accompanying her on the elevator, after the incident, except once, on a visit that Ms. Paradis paid her, while she was still in the hospital. Ms. Paradis disappeared without leaving any forwarding address and, at the time of the trial, remained untraceable. This is why Ms. Paradis did not give any evidence at this trial. Mrs. Lalonde also stated that the man, who was in the elevator, as she entered with her scooter, must have been a visitor, because she never saw this man again, following the accident. On the day of the accident, Mrs. Lalonde stated that she was not in a hurry and that she had not entered the elevator at the last minute, just before the door closed.

¶ 12 During cross-examination, Mrs. Lalonde admitted that she did not take the elevator often, with her scooter. I accept the evidence of Mrs. Lalonde, as establishing the fact that this was the only time that she used the elevator without the help of her daughter or son-in-law, after she had moved to Tower "A". It is to be remembered that Mrs. Lalonde had moved to Tower "A", one month prior to the incident.

Evidence of Edouard Gagnon

¶ 13 Mr. Gagnon testified. He is a former school director and is retired. In the past, he has engaged in a number of renovations, to several units in Tower "A", where Mrs. Lalonde resided. In the past, he has also been a member of the board of administrators that looked after Tower "A". He recalled that, in 1998 or 1999, several residents had complained to the Board of Directors that the speed of the door was incorrect, in that the doors closed too fast. Mr. Gagnon testified that the answers received from the Board of Directors were always the same, namely, that the doors closed at a speed defined by the standards set by the Province of Ontario. Mr. Gagnon also admitted, during cross-examination, that the Board of Directors always deferred their opinion to those of the inspectors, sent by the Province of Ontario, for anything that had to do with the building's elevators.

¶ 14 The first person to testify on behalf of the defendant, CCC No. 12, was Mr. Jamieson, the building manager of this 176-unit, contained in Tower "A", where Mrs. Lalonde resided. He stated that he has managed Tower "A" for the past 27 years, and that his residence has also been located in Tower "A", for a number of years. He testified that it took over a month for the news of the accident of Mrs. Lalonde to be brought to his attention. He also said that the door to the elevator, that had allegedly caused the problems to Mrs. Lalonde, was not readjusted, following the accident. The speed at which the elevator door closes is set by the government inspectors, sent to regulate the elevators. For four years prior to the accident, the defendant, CNIM, was hired by the Board of Directors for the Condominium

Corporation, to maintain its elevators. CNIM replaced the previous company, called "APB", and APB had looked after the building's elevators, since 1987. Mr. Jamieson recalled that, even though the company changed names, the elevator mechanics, servicing the elevators, remained the same persons. He explained that, in May 2001, the elevators in Tower "A" were functioning properly.

¶ 15 Mr. Jamieson further explained that when there is obstruction to the door of the elevator, the door stops its closing action and retracts. The door habitually closes in a sequence of six to ten seconds. When there is an obstruction in the doorway, it retracts, and it then closes with a 20-second delay. Mr. Jamieson stated that the door of this particular elevator, in Tower "A", closes slower than ordinary, because of the building's clientele, which comprises many senior citizens.

¶ 16 During cross-examination, Mr. Jamieson stated that the incident that involved Mrs. Lalonde was not disclosed to the Ministry of Consumer and Business Services. Mr. Jamieson also admitted that CNIM was not told of the incident, and there is no way that CNIM would know about the incident, unless it had been reported by him.

The evidence of Reverend Father Jean-Claude Proulx

¶ 17 Jean-Claude Proulx resides in Tower "A", since 1999. He also uses a motorized scooter. He stated that he had no problems taking the elevators, in Tower "A", with his scooter. He also stated that, if the door is closing before his scooter is fully into the elevator, he would lift his leg, and the beam would be broken and cause the elevator door to retract, allowing sufficient time for his scooter to gain entry to the elevator, without problems.

Evidence of Terrence O'Connell and Kevin O'Connell

¶ 18 Terrence O'Connell ("Terrence") and Kevin O'Connell ("Kevin") both testified on behalf of CNIM. The two brothers have worked as elevator mechanics on the elevators at Tower "A", for several years. Both hold a class 'A' Elevator Mechanics Certificate, Kevin having worked as a mechanic for 25 years, and Terrence for the past 27 years.

¶ 19 Terrence explained that the doors of the elevators close in a delay of six to ten seconds. If there is obstruction that breaks the beam, the door will remain opened for another 20 seconds. There is, at that point, a buzzer sounding, when the door begins to close again. The 20 seconds duration is obligatory, according to a Code defined by Elevating Devices Act, R.S.O. 1990, c. E.8, as amended. Terrence described the inspections that are made to elevators on a monthly basis and also on an annual basis. He described the logbook kept in the machine room at Tower "A" that is signed by the mechanics, after they complete their work on the elevators. The logbook is used by the government inspectors, on their visits to check the elevators in Tower "A". He indicated that, following Mrs. Lalonde's incident in Tower "A", on May 4, 2001, he did his service call on May 15, 2001, as CNIM had been called and told that the doors would not shut at all.

¶ 20 In cross-examination, Terrence advised that he had not worked on car 'A' in Tower "A", prior to May 4, 2001. The speed of the door closure is checked annually and there are no minimum speeds prescribed in the Code. He explained that there are two types of inspections that are done by the mechanics on the elevators, namely: the Technical Standards and Safety Act ("TSSA") J.5 inspection, and a routine maintenance inspection. CNIM is responsible for 15 buildings and 60 elevators. CNIM provides a route sheet to its mechanics and a copy of the route sheet is, by common practice, stored in his vehicle. The J.5 TSSA inspections last one hour per car. He said that he very rarely records the speed of the elevator door closures in the logbook.

¶ 21 Kevin indicated that he had done some maintenance on the elevators on May 25, 2001, and it had nothing to do with the doors closing too quickly. His call was nothing out of the ordinary and he stated that he could not remember the elevator doors, in Tower "A", closing too fast and, if that had been a problem, it would have been shown on the timesheet, kept by CNIM.

The evidence of Gordon Phillips

¶ 22 Mr. Phillips is the branch manager for CNIM and has been in elevator maintenance since 1996. He had worked for the APB Company since 1994 and, in June 2000, became its branch manager. He is involved in administration, putting out invoices and looking after staff, together with some maintenance sales. He is also in charge of client concerns, and service calls are logged in, by him, when technicians are sent out to jobs. CNIM has 25 to 30 mechanics in the Ottawa area. He described the inspection log, filed as Exhibit 4, Tab 5, and stated that such logs are used for TSSA inspections and that the documents are kept in the machine room, on location. He stated that he did not have any timesheet that would show he was called, by CCC No. 12, concerning doors closing too quickly. He also confirmed that CNIM was not contacted, after Mrs. Lalonde suffered her unfortunate accident, on May 4, 2001. When the technicians want to get paid for a service call, they have to send in a timesheet. No timesheets were sent at the time of the incident involving Mrs. Lalonde. Mr. Phillips stated that he found out about Mrs. Lalonde's incident, one month later, and he was told by a third party.

¶ 23 During cross-examination, Mr. Phillips indicated that there was no need to call the Ministry, as there was nothing wrong with the equipment before and after the incident involving Mrs. Lalonde. He also maintained that an elevator mechanic would not do anything requested by the owner of the building that would be contrary to the specifications of the elevator code.

Evidence of Hector Mariuz

¶ 24 Mr. Mariuz is also a class 'A' elevator mechanic, and he worked on both elevators in Tower "A", in May 2001. On May 30 and 31, 2001, he did safety tests and the annual maintenance on the elevators. The elevator motor had also seized and he took the motor out, and he explained that that work did not involve the closing of the doors. He also indicated that he had never been called concerning door closings at Tower "A".

The Law

¶ 25 I adopt the law cited by counsel for CNIM. At common law, the owner or occupier of property owes a duty of care to those who enter onto a property and must try to ensure that those entering on to the property will not suffer injury. Since September 8, 1980, this common law duty has been incorporated in the Occupiers' Liability Act, R.S.O. 1990, c. 0.2, s. 2 ("the Act").

¶ 26 Section 3 of the Act, defines the duty of care owed by an occupier to those who enter upon the property:

> 3.(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

¶ 27 Section 3 of the Act establishes a duty of care only, and not a presumption of negligence. Thus, if a person is injured on the premises, a plaintiff must still be able to pinpoint some act or failure to act

on the part of the occupier, which caused the injury complained of, before liability can be established. Madam Justice E.M. Macdonald, in her decision, in Whitlow v. 572008 Ontario Ltd. (c.o.b. Cross-Eyed Bear Tavern), [1995] O.J. No. 77 (Gen. Div.) at paras. 32-33 and 34, explained what a plaintiff has to accomplish to have success:

> para 32 The starting principle is that The Cross-Eyed Bear must be held to a reasonable standard. A reasonable standard is not perfection. See the unreported decision of J. Holland J. in Petrovic v. Chedoke-McMaster Hospital, [1988] O.J. No. 419.
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> para 33 Secondly, s. 3 of the Act does not create a presumption of negligence against the occupier of the premises whenever a person is injured on the premises. See Bauman v. Stein (1991), 78 D.L.R. (4th) 118 at 127 (B.C.C.A.). A plaintiff must still be able to point to some act, or some failure to act, on the part of the occupier which caused the injury complained of, before liability can be established. This fundamental principle is sometimes overlooked by plaintiffs who presume that, when an accident occurs on an occupier's premises, there is a presumption of negligence against the occupier of the premises. In this case, I was concerned that the plaintiffs' case was premised on such a presumption.
>
> para 34 In attempting to determine how the accident occurred, I am limited by the absence of any expert evidence which would assist the court in reconstruction of the events of the accident, having regard to Mr. Whitlow's height, the location where he was found and the position of his body after the fall.

¶ 28 Macdonald J. also pointed out that the plaintiff must establish, on a balance of probabilities, the accessory link of causation between the alleged breach of the standard of care and the alleged injuries, at paragraph 17 of the Whitlow decision:

> para 17 In McGrath v. The Toronto Transportation Commission, [1946] O.J. No. 310, [1946] O.W.N. 931, the Court of Appeal dealt with the danger of a trier of fact resorting to speculation or conjecture. The comments at p. 932 are relevant:
>
> > It is elementary law that the negligence of a defendant will not make him liable in an action for injuries sustained by a plaintiff, unless there is a direct connection found, with evidence to sustain it, between the injuries suffered and the negligence which has been found. It is not sufficient for the plaintiff to prove merely the accident and the negligent act on the part of the defendant. He must further prove clearly that the accident was due to the negligent act with which such defendant is charged, and the connection between the alleged negligence and the injury suffered must be made out by evidence and not left to the conjecture or speculation of the jury ...

¶ 29 In Britt v. Zagjo Holdings Ltd., [1996] O.J. No. 1014, Mr. Justice Killeen addressed the standard of care in cases involving persons injured on commercial properties. His decision dealt with a plaintiff who slipped and fell, as a result of the poor maintenance of the parking lot, at one of the defendant's buildings. He stated at paragraph 14:

> para 14 In cases involving commercial properties of this kind, the question of liability

> inevitably turns on what kind of system the owner had put in place to meet the statutory duty to keep the premises reasonably safe. It is important to emphasize, as all the decided cases emphasize, that the owner is not the guarantor or insurer of the visitor's safety, and hence, does not have to set up a full-proof standard, nor does the owner's system have to be a model of perfection. The standard is reasonableness in all the circumstances.

¶ 30 Even though the above standard of care was defined in a slip and fall case, I find it applies equally to circumstances involving elevators and lifting devices. The Newfoundland Court of Appeal in Empire Co. v. Sheppard, [2001] N.J. No. 35, summarized, at paragraph 24, the law that applied to the maintenance of an escalator that I find is akin to the maintenance of an elevator, as follows:

> From the foregoing authorities I would conclude that the liability of an occupier for escalator caused injury to a visitor, who has neither assumed the risk of nor contributed to the injury, is to be determined by applying the following principles:
>
> 1. In seeking to hold an occupier liable for injury or damage, the burden lies with the injured visitor to prove, on a balance of probabilities, that the occupier failed to perform the actions necessary to discharge the duty of care determined to be reasonable, in all of the circumstances, to see that the visitor would be reasonably safe while using the escalator, and by reason of that failure the injury occurred [authorities omitted.]
>
> 2. The duty imposed on occupiers, who have control of escalators, requires a standard of the highest practical degree of care, but that does not imply an obligation to guarantee safety or to meet a standard such that no one can ever be injured [authorities omitted.]

¶ 31 I also agree with counsel for CNIM that, in situations involving elevators and other heavily regulated machinery, the determination of a "reasonable system of maintenance and inspection" must be made, as mandated by the governing legislation. Prior to June 27, 2001, such requirements were found in the Elevating Devices Act, R.S.O. 1990, c. E.8, and the Regulations thereunder and, more recently, in the Technical Standards and Safety Act 2000, S.O. 2000, c. 16, that subsumed the Elevating Devices Act.

¶ 32 I adopt the following statements, made by counsel for CNIM, on the law that governs this case, and the case law, she cites, to support her submissions.

The Elevating Devices Act

¶ 33 As with most regulatory legislation, the Elevating Devices Act established a system of licensing and certification. The Act created a system of design review and approval, similar to that provided under building code legislation. Reporting requirements were created to allow for government oversight into elevator maintenance and safety. However, most importantly for the present case, the Act also provided for the adoption of specific standards with respect to the design, testing, and maintenance of elevators in order to ensure uniform safety standards across the province.

¶ 34 The Elevating Devices Act did not specify precise safety standards that had to be met. Instead, those questions were left to individuals with expertise in the field. The General Regulation, enacted

under the Elevating Devices Act, specifically adopts the relevant safety code published by the Canadian Standards Association ("CSA").

> 38. (1) Every elevator, dumbwaiter, escalator, moving walk and freight platform lift shall meet the requirements of National Standard of Canada CAN3-B44-M85: Safety Code for elevators.

General Regulation, R.R.O. 1990, Reg. 316, s.38(1).

¶ 35 The CSA B44 Safety Code for Elevators ("the B44 Code") (also known as the National Standard of Canada CAN B44: Safety Code for Elevators) is one of the many safety standards, prepared by the CSA. The standard is designed to reflect a consensus of the safety standards that are adopted by many of the experts in the field. (CSA B44-94 Safety Code for Elevators, Preface, at xiii)

¶ 36 The B44 Code has been relied upon by the courts, as establishing the requisite standard of care, required in cases involving elevators and other lifting devices. (Bouffard v. Canada (Attorney General), [1998] O.J. No. 1018 (S.C.J.))

¶ 37 As with all other CSA standards, the B44 Code is updated periodically to keep up with changes in developing technology and studies, with respect to safety. While the CSA would determine when it was appropriate to update the requirements of the B44 Code, such updates were not automatically adopted under the General Regulation. Instead, updates to the B44 Code had to be approved by the Ministry of Consumer and Commercial Relations. However, as of May 5, 1997, the authority to approve such updates to the B44 Code, among other things, was delegated to the Technical Standards and Safety Authority ("TSSA"). (Safety and Consumer Statutes Administration Act, 1996, S.O. 1996, c. 19. Administrative Agreement, January 13, 1997)

¶ 38 On May 4, 2001, the applicable version of the B44 Code that dictated the equipment and maintenance standards was the 1994 edition (CSA B44-M94), as amended by Supplement No. 1 (CSA B44S1-97) and Supplement No. 2 (CSA B44S2-98). Although the CSA adopted an updated version of the B44 Code on April 1, 2001 (CSA B44-00), the updated standard was not adopted by the TSSA until October 1, 2001 (effective March 23, 2002). (CSA B44-M94: Safety Code for Elevators; CSA B44S1-97; CSA B44S2-98; TSSA Director's Order 161/01; TSSA Director's Ruling 141/98; TSSA Director's Ruling 129/97; and TSSA Director's Ruling 115/94)

CSA B44-M94 Safety Code for Elevators

¶ 39 The B44 Code specifically provides power doors to be installed in elevators. However, it provides strict limitations on the force with which the power doors can close (10 J with a re-opening device, otherwise 3.5 J). Furthermore, the B44 Code states that the closing mechanism for the doors must be designed so that the closing of the doors is stopped with the application of a specified amount of force to the door (135 N). (CSA B44-M94, as amended, Parts 2.13.4.1, and 2.13.4.2)

¶ 40 The B44 Code also allows power doors to be equipped with a "re-opening device" that will cause the doors to re-open, if an obstruction is detected that would block the closing of the doors. (CSA B44-M94, as amended, Parts 2.13.4.2 and 2.13.5.1)

¶ 41 However, where the sensors, that trigger the re-opening device, can be affected by the presence of smoke or hot gases, the B44 Code stipulates a strict 20-second time limit on the amount of time that the elevator doors can stay open. The B44 Code provides that after 20 seconds have passed, then the

elevator doors must close, albeit, at a reduced speed and with reduced power (3.5 J). (CSA B44-M94, as amended, Part 2.13.5.2)

¶ 42 In addition to the above specifications, the B44 Code also specifies the maintenance that is required to be performed on elevators. With respect to the elevator doors, the doors must be maintained on a monthly basis. Maintenance includes:

> (a) inspections, examinations, and tests of all parts and functions in order to ensure, to a reasonable degree, that the doors are in safe operating condition;
>
> (b) cleaning, lubricating, and adjusting of components, and repairing/replacing any worn or defective components, to prevent the doors from becoming unsafe for operation; and,
>
> (c) repairing or replacing damaged or broken parts affecting the safe operation.

CSA B44-M94, as amended, Part 12.2.1 and Appendix J.

¶ 43 The B44 Code also calls for monthly maintenance on door re-opening devices, and annual testing of the closing of the car doors. (CSA B44-M94, as amended, Part J2.5)

Heavy onus on the plaintiff to refute a government standard

¶ 44 Where governing legislation stipulates a specific standard of care to be followed, and the defendant complies with that government standard, the plaintiff bears a "heavy onus" to prove negligence by the defendant, notwithstanding such compliance.

> Accepting that the standard is one of reasonable care, that standard was met by adopting and following industry or government imposed standards. It seems clear that compliance with such standards could not foreclose, in certain circumstances, findings of negligence. At the same time, the Courts have held that there is a heavy onus on a plaintiff or claimant to show that in following the standards set by government regulation or an industry standard, the third parties were nevertheless negligent.
>
> Piche v. Lecours Lumber Co., [1993] O.J. No. 1686 (S.C.J.) at para. 463.

¶ 45 This principle was cited with approval with respect to elevators in the decision of Bouffard v. Canada (Attorney General), supra, at paragraph 21. In Bouffard, the elevator in question had two sets of doors, one in the front and one in the rear. The plaintiff was leaning on the rear set of doors when they opened, causing the plaintiff to fall. There was no signage or other marker to indicate the presence of rear doors, and the internal panelling within the elevator car masked the presence. The defendant argued that the elevator was completely compliant with the applicable B44 Code. The trial judge approved of the reasoning in Piche, supra, but concluded and distinguished the case on the basis that the B44 Code did not address the issue of signage with respect to hidden doors. Had the matter been provided for, in the B44 Code, compliance with the B44 Code would have constituted a complete defence.

"Reasonable System" in Operation

¶ 46 Where the defendant has put a "reasonable system" in place, the Court must also consider whether the "reasonable system" was being followed at the material time. This will usually be inferred, unless there is some evidence to the contrary.

> The plaintiff cannot prove on a balance of probabilities that the defendant was negligent in this case by merely stating [that] there was no direct evidence that the usual routine was being followed on the day in question. The plaintiff, upon whom the burden of proof lies, tendered no evidence suggesting that this usual routine was not followed on that day. [...]
>
> [...]
>
> In this case there was evidence of a regular routine, and in the absence of any evidence, direct or circumstantial, that it was not followed on the day in question, it was entirely reasonable for the trial judge to infer that the usual routine was followed.
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> Empire Co. v. Sheppard, supra.

Plaintiff's submissions

¶ 47 The plaintiff submitted that Mr. Jamieson did not take Mr. McCormick's complaints seriously concerning the elevator door that closed too quickly and that required too much force if a person attempted to have the door retract by hand. Edouard Gagnon had brought a complaint to the Board of Directors in 1998/1999. Mr. Gagnon was a frequent user of the elevators, because he had renovated many units in Tower "A", in the past. His evidence was uncontradicted. He testified that the elevator door operated in an unpredicted fashion, meaning closing too fast. Mr. Gagnon's evidence corroborated Mr. McCormick's evidence on the inappropriate elevator door closing. Counsel for the plaintiff argued that Father Proulx did not comment on the operation of the elevators.

¶ 48 Counsel for the plaintiff put forth two theories. The first theory is that Mrs. Lalonde entered the elevator during the 20 seconds the elevator door is kept open by the person (an unidentified stranger), already in the elevator, who had likely pushed the button to keep the door open. Once that button was released, the closing of the door was engaged and caused the door to hit the scooter, resulting in Mrs. Lalonde suffering some injuries. Counsel for the plaintiff relied on the evidence of Terrence O'Connell, who stated that the door should have stopped, once the elevator's electric beam detected an obstruction.

¶ 49 The second theory, advanced by counsel for the plaintiff, consisted of Mrs. Lalonde arriving at the elevator door, as the door had started to close. Mrs. Lalonde took a chance to enter the elevator with her scooter and she did not have enough time to fully enter the elevator. He maintained that, at trial, witnesses gave contradictory evidence. Terrence O'Connell stated that a buzzer should have sounded and the elevator door would have proceeded to close at one third of its normal speed. Mrs. Lalonde, on the other hand, stated that the door closed rapidly. Since a person was also present in the elevator, the entry by that person, ahead of Mrs. Lalonde, would not have exhausted the 20-second door cycle (the time the door remains open, prior to closing).

¶ 50 While counsel for the plaintiff submitted he preferred the first theory, he maintained that, under both theories, the door malfunctioned.

¶ 51 Counsel for the plaintiff pointed out that many repairs were done on the elevator, both before and after the incident. Moreover, the evidence at trial revealed that the elevator was an old elevator. The replacement of rollers on the doors and the replacement of a motor on that elevator, inside of one month

following the accident, points to an owner, who is derelict in assuring the safety of members of the public.

¶ 52 The claim against CNIM is based on the following facts:

-- Not recommending to the owner to change old equipment.

-- Breach of its obligation under Code B44 to record, in detail, its inspections. This failure lead to a prima facie case of negligence against CNIM, as on May 4, 2001, under the plaintiff's two theories, the elevator door would have malfunctioned.

-- The O'Connell brothers testified that they are obliged to leave the monthly maintenance work unfinished on an elevator, if they receive an emergency call to attend to a faulty elevator, elsewhere in the City, in situations where persons would be trapped in an elevator. Counsel for the plaintiff argued that the mechanics, in such a situation, may or may not get back to the original work site, to finish their monthly inspections. Because the mechanics could only return days later, he concluded that such an interrupted inspection would be in breach of section J2.5 of Code B44. He also criticized the fact that Kevin O'Connell did not write anything down on what maintenance was made on the elevator in question. Kevin O'Connell did not remember any of the procedures he undertook on his monthly inspection and, as a result, the plaintiff is left in the dark on what steps he followed to ensure a proper functioning elevator door.

¶ 53 Counsel for the plaintiff further argued that section 12.2.5 of the B44 Code requires elevators mechanics to record, in detail, their inspections and tests done on elevators. Referring to the logbook, maintained in the machine room of the elevator, he pointed out the lack of details and the lack of dates on which the work was performed. The problems the mechanic encountered are also not enumerated. The time sheets presented in evidence are only used to remunerate the mechanic for his work done.

¶ 54 Referring to the logbook for June 2001, counsel for the plaintiff pointed out that only initials are shown and no time sheet were produced, corresponding to that entry. It is impossible to say what type of inspection was made. Therefore, the time sheet does not meet the requirements of the legislation that defines what information should be contained therein. The logbooks are not reliable, and CNIM cannot maintain that the inspections of that elevator were made, as required by law. As a result, he argued that we do not know if the buzzer had been checked during the month of April 2001, nor the speed the elevator door closed for that matter. He also requested that I draw a negative inference on CNIM's lackadaisical reporting on inspections to that elevator. Because Mrs. Lalonde has made a prima facie case of negligence against CNIM, her counsel submitted CNIM had to respond, with reliable evidence, to avoid responsibility, and it could not do that. CNIM had nothing: no reliable documents and no completed logbooks. The technicians did not know their own routine. He stated that CNIM couldn't prove it did the inspections and the repairs required by the B44 Code.

Defendant's, CCC No. 12, submissions

¶ 55 This defendant submitted that there was no basis for finding liability on CCC No. 12, as the plaintiff had no basis on the facts and on the law to show negligence on its part. She failed to prove her case. CCC No. 12 is not an insurer and its only obligation is to use reasonable care in insuring the safety of the persons using the elevator. According to section 6(1) of the Occupiers' Liability Act, that duty is discharged, by hiring CNIM Canada Inc., an independent contractor, with an expertise, dating back to

the late 1880s. CNIM employed mechanics in this case that had over 20 years experience. They had serviced this elevator since the 1970s, without problems. Counsel for the defendant, CCC No. 12, argued that its client need not go further to discharge its duty. CCC No. 12 is forbidden, by law, to touch or adjust elevators, and CNIM is also mandated, by law, to use a 20-second closing rate for the doors.

¶ 56 CCC No. 12 presented the evidence of its building superintendent, Mr. Jamieson. He has been employed by CCC No. 12, as a superintendent, since 1979; he lives in Tower "A", and uses the elevator in question, several times each day. Mr. Jamieson stated that he often received complaints that the elevator door closed too slowly, as opposed to closing too fast. He recalled that Mr. Jamieson had stated he had not received any other complaints about the elevator. Counsel for CCC No. 12 also recalled the evidence of Father Proulx that indicated the beam of the magic eye worked properly, when he stuck his leg out from his scooter, to have the elevator door retract.

¶ 57 Counsel for CCC No. 12 recalled that the evidence of the mechanics, working for CNIM, was that the elevator was inspected on April 27, 2001. Barely one week prior to the incident involving Mrs. Lalonde, the elevator door mechanism had been inspected and found to have worked properly. Even if the matter of the elevator door had been mentioned at the Annual General Meeting of the condominium owners, held one month prior to Mrs. Lalonde's incident, the elevator was inspected after the date of that meeting. Therefore, there is no causal connection between the incident of May 4, 2001 and Mr. McCormick's inquiries, made at the Annual General Meeting of the owners, held at the beginning of April 2001.

¶ 58 There is no reverse onus in this case, based on a prima facie case of negligence, according to counsel for CCC No. 12. He maintained that counsel for the plaintiff is relying on the doctrine of res ipsa loquitur and that doctrine does not apply.

¶ 59 Turning to the theories of the plaintiff, counsel for CCC No. 12 pointed out that Mrs. Lalonde's memory is not the best it could be. During her evidence, given in chief, she stated that the elevator door was closing when she was approaching it. When Mrs. Lalonde's memory was refreshed, by reading to her what she had said during examinations for discovery, when her memory was better, Mrs. Lalonde had said that the elevator door was open and someone was standing inside the elevator.

¶ 60 Next, Mrs. Lalonde admitted that her scooter did not have a scratch from the thump received from the elevator door. The elevator door never touched Mrs. Lalonde's leg. Mrs. Lalonde's leg fell out of the scooter and was fractured in two places. Counsel for CCC No. 12 argued that I should look at those facts with scepticism. There is no basis, on the evidence, to find that the door was malfunctioning. Mrs. Lalonde did not hear the buzzer, she did not know when the door had opened, and she did not know when the 20 seconds of door opening had begun to tick. It is clear that Mrs. Lalonde did not know how much time she had to enter the elevator.

Submissions of CNIM Canada Inc.

¶ 61 Counsel for CNIM placed in doubt Mrs. Lalonde's account on how the accident happened. During trial, Mrs. Lalonde stated that, as she approached the elevator, the door was in process of opening. During her examination for discovery, she had stated the door was open. Counsel for CNIM pointed out that Mrs. Lalonde's fuzzy memory prevented us from finding out who, between herself, the man in the elevator or her companion, Huguette Paradis, had press the button to get the elevator to the floor. Mrs. Lalonde had no memory of the buzzer sounding, but it does not mean that the buzzer did not go off. Counsel for CNIM submitted that the only way the door could have come in contact with Mrs. Lalonde's scooter, was because the 20-second mechanism on the door had ran its course.

¶ 62 Counsel for CNIM also submitted that, the fact that Mrs. Lalonde had to be shown how to enter the elevator, with her scooter, after she became a resident of Tower "A", pointed to a concern on her ability to use the elevator, with a scooter, and her need to be cautious.

¶ 63 Counsel for CNIM submitted that, where an elevator company has complied with the requirements imposed by the applicable B44 Code, in effect, at the material time, the elevator company will be found to have met the requisite standard of care, unless the plaintiff can discharge its heavy onus to demonstrate that the B44 Code is inadequate. Even if the plaintiff is successful in discharging that heavy onus, the plaintiff must still establish a link in causation.

¶ 64 She recalled that Mr. Jamieson, in his evidence, said he had had no need to call CNIM in early May 2001. He had not received complaints about CNIM, and described CNIM as the Cadillac of the city firms doing work on elevators. CNIM would have been called, if a problem had developed between its April 27, 2001 inspection of the elevators and May 4, 2001, when the incident, involving Mrs. Lalonde, occurred. Father Proulx, a resident in Tower "A", had no problems using the elevator with his scooter.

¶ 65 CNIM's three mechanics, who testified, all had class 'A' certificates and experience extending from 25 years to 38 years. The mechanics followed the duties outlined in Appendix J. of the B44 Code. The sensors on the elevator were tested, on a monthly basis, the nudging component of the doors, on a yearly basis, and the housekeeping component of the maintenance was done, but not recorded. That, she claimed, followed the standards in the industry.

¶ 66 CNIM submitted that the evidence of Terrence O'Connell was not challenged, and he testified that the problems with the elevator on the May 15 and August 31, 2001 inspections, were not out of the ordinary, and the problems had nothing to do with the door closing too quickly. The mechanics only initial the log sheet, after the work is completed. If they are called away from the job, their initials are only affixed on the log sheet, after the job is completed. There is no evidence, in this case, of an uncompleted job.

¶ 67 CNIM argued that the log sheet produced and discussed at trial is the sample provided by TSSA, the guiding body for the elevator industry. The log sheet, used in this case, is compliant with the law. Mr. Phillips' evidence was uncontradicted that, in the seven service calls received in year 2001, from Tower "A", none involved an elevator door closing too quickly. Counsel for CNIM submitted that there is no such duty at law to counsel and advise CCC No. 12 on their equipment base. She also submitted that the plaintiff had the opportunity to call the CNIM supervisor, a Mr. Cavanaugh, to ask how a problem of elevator door closing could be repaired, but he did not call the supervisor, or any other qualified mechanic, to give evidence on the inadequacies of CNIM's inspections.

Analysis and Decision

¶ 68 I draw a negative inference on the fact that Mrs. Lalonde's companion, Huguette Paradis, a witness to her accident, was not called to testify at this trial. No evidence was given concerning the attempts the plaintiffs made to find this witness. The only evidence I received was that Huguette Paradis had stated she was going on a trip and disappeared without a trace. No evidence was given that the personnel at the long-term care facility, La Pieta, had been contacted to inquire about Ms. Paradis' whereabouts. That is where Mrs. Lalonde and Ms. Paradis worked as volunteers. I conclude that Ms. Paradis' evidence would not have helped Mrs. Lalonde.

¶ 69 Mrs. Lalonde's evidence was not helpful, due to her age and her illness. As a result of her fuzzy memory, the exact manner of how this accident occurred cannot be determined. The buzzer on the

elevator may have sounded, or it may not have. The door to the elevator may have started to close or it may not have. There is no prima facie case of negligence that can be founded on such evidence. The plaintiff was met with solid defence witnesses. First, Mr. Jamieson, the building superintendent, testified that he has a wealth of experience in supervising high-rise apartment buildings, such as Tower "A" and, in this case, he has also been a resident, in Tower "A", for a number of years. I believe his evidence, he was a cautious witness, thinking before answering questions, and unchallenged in his evidence. I was impressed by his composure and thoughtfulness, while he gave his evidence. Next, the plaintiff had to face three elevator mechanics, who had between 25 years to 38 years experience each, in fixing elevator problems. All of them testified in a calm and reasoned manner, providing solid answers on the opening and closing of the door, and the past maintenance of that elevator. None of the mechanics were found to have breached Code B44 during the times they attended to work on the elevator in question. The procedure of Code B44 is as follows:

> J2.5 Landing and Car Doors
>
> All landing and car door mechanical and electrical components shall be maintained to ensure safe and proper operation according to the following:
>
> (a) Monthly
>
> (i) interlocks, locks, contacts;
>
> (ii) door reopening devices;
>
> (iii) vision panels;
>
> (iv) hoistway access switches;
>
> (v) eccentrics and retainers;
>
> (vi) door gibs;
>
> (vii) pickup rollers;
>
> (viii) clutch retiring cams and assemblies;
>
> (ix) hangers;
>
> (x) interconnecting means;
>
> (xi) closers; and
>
> (xii) sight guards; and
>
> (b) Annually
>
> (i) test power closing force on horizontally sliding doors (maximum 135 N);
>
> (ii) test compliance with restrictions on opening of passenger elevator car doors; and

(iii) test door closing time (see Clause 2.13.4.3 or, where no data plate exists, refer to Appendix H).

¶ 70 As stated in Empire Co. v. Sheppard, supra, if there is evidence of a regular routine and, in the absence of any evidence, direct or circumstantial, that it was not followed on the day in question or, in this case, on the day of the inspection, nearest to the day of the incident, it is reasonable to infer that the usual routine was followed. I find, in this case, that the usual routine was followed during the April 2001 inspection. I also find that the law does not require a constant inspection of elevators, nor does it require a standard of perfection.

¶ 71 The Elevating Devises General Regulation, R.R.O. 1990, Reg. 316, as amended, sections 13 and 15 provides strictly that no work can be undertaken on an elevator, except by a contractor licensed to carry on such work by the Province of Ontario. No fault can be attributed to CCC No. 12, for hiring CNIM, a very competent firm, to handle the maintenance of the elevator in Tower "A".

¶ 72 Concerning the 20 seconds interval the Safety Code for Elevators, section 2.13.5.1.2 provides that power operated elevator doors must contain a re-opening device that will function to stop and re-open an elevator door, so as to permit passenger entry or exit, in the event that the door is obstructed while closing.

¶ 73 Where an elevator door is equipped with a re-opening device, such as a photoelectric sensor, that device must be rendered inoperative after the doors have been held open for a total of 20 seconds. In other words, a photoelectric sensor can only allow an elevator door to remain open for a total of 20 seconds. After those 20 seconds elapses, the door must close. The rationale behind this requirement is to prevent smoke or hot gases from triggering the photoelectric sensor, thus, causing the door to remain open in fire or similar emergency situations.

¶ 74 I conclude, as did Dea J. in Popjes v. Otis Canada Inc., [1995] A.J. No. 589:

> Testing the evidence in this case against the requirements of the rule, I am unable to find, based on either common experience or the evidence before me, that the mere failure of the elevator to level properly may be considered as evidence that the Defendant failed to exercise the highest practical degree of care for the safety of those using the elevator, in the sense that the elevator would always level properly if such care had been exercised by the Defendant or its servants.

¶ 75 Counsel for the defendant, CCC No. 12, dealt with the doctrine of res ipsa loquitur. He cited Phillips v. Ford Motor Company of Canada Ltd., [1971] 2 O.R. 637 (C.A.), for the proposition that the above doctrine is nothing more than an instance of circumstantial evidence. It applies whenever common experience, or the evidence in a case, indicates that the mere happening of an accident may be considered as evidence that reasonable care has not been used. The doctrine of res ipsa loquitur will not apply in cases of an unexplained accident, where the cause of the accident could have resulted from negligence of either the plaintiff, or one, or more, of the defendants.

¶ 76 In this case, I find that Mrs. Lalonde's scooter could have hit the wall at the back of the elevator and caused her injuries. I find that Huguette Paradis' actions remained unaccounted for: was she pressing the open door button and did she let it go too soon? What about Mrs. Lalonde's exit from the elevator? Did she scream on her way up to the 18th floor of the building, due to her suffering a leg broken in two places? Why did the passenger in the elevator not come to Mrs. Lalonde's rescue?

¶ 77 I cannot find liability or causation on the part of CCC No. 12, and I dismiss Mrs. Lalonde's claim against CCC No. 12.

¶ 78 I also agree with counsel for CNIM that Mrs. Lalonde should have retained an elevator expert to prove her case. All I am left with is speculation and conjecture, not a proper basis to establish a prima facie case in negligence, and pin liability on CNIM. Counsel for CNIM submitted that the decision in Crewe v. Royal Bank of Canada, [1986] O.J. No. 1182, did not apply to this case, as it was decided before the Occupiers' Liability Act, supra, came into being. Counsel for the plaintiff dismissed that argument, stating that all new legislation had done was to incorporate the old common law rules. A similar case Marcelino v. Snider Holdings Ltd., [1990] O.J. No. 1083, involved also the operation of an elevator. In the Crewe decision, the plaintiff's foot had remained caught by the door of the elevator and the defendant was found 100% liable. In the Marcelino decision, the plaintiff's hand and wrist were injured while he had, unsuccessfully, attempted to stop the elevator door from closing. Rapson D.C.J. dismissed the action, stating the duty of the landlord and the elevator maintenance company was not breached. The Crewe decision was not mentioned and the case was decided under the 1980 Occupiers' Liability Act. There is no mention of the Elevating Devices Act, or the Canadian Standards Association B44 Safety Code. I find that the Crewe case is distinguishable from this case.

¶ 79 The plaintiff also cited Polny v. Cadillac Fairview Corp., [1993] O.J. No. 2092. In that case, Madam Justice Greer found the elevator manufacturer 100% liable for the plaintiff's injuries (plaintiff injured in a fall on exiting from an elevator). That decision is distinguishable from this case, because the elevator was found to be malfunctioning on the day of the accident. In the decision of Hanna v. M.D. Realty Canada Inc., [1996] B.C.J. No. 1100, a decision cited by the plaintiff, the Court found the elevator company liable, because, Dover, the elevator company, was advised by the building owner that the elevator was malfunctioning and did not react in a timely fashion. That case is different from Mrs. Lalonde's case, for the additional reason that there was a witness to the accident, who had responded to the plaintiff's screams.

¶ 80 In this case, CNIM used the form provided by TSSA for the maintenance of records, and I am satisfied that the plaintiff has not met her burden, under liability or causation. No expert from another elevator company was called to show CNIM could have performed its work in another manner.

¶ 81 The plaintiff's action against CNIM Canada Inc. is dismissed.

¶ 82 If the parties cannot agree on costs, they can file submissions of no more than five typewritten pages, within 21 days of the release of this decision, and the reply within 10 days thereafter.

P.F. LALONDE J.

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