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Nabeel Peermohamed is in his fifth year of practice with Brownlee LLP and was recently named as one of the Lawyers to Watch in Alberta by Lexpert. He focuses on insurance defence litigation. Nabeel is also a member of the first national Board of Directors for the Canadian Bar Association serving a two-year term. In that capacity of community service, Nabeel works with a team to improve the profession and the association. Nabeel also sits on the national CBA Finance Committee and the Enterprise Risk Sub-Committee. Nabeel recently had the honour and privilege of attending the annual CBA/Supreme Court of Canada dinner with all nine justices of the Supreme Court.

Nabeel recently completed the Harvard Law School Program on Negotiation, taught by the world's leading negotiators, some of whom had worked on ending Apartheid in South Africa. In his professional capacity, Nabeel has achieved several recent successes at the Alberta Court of Appeal and Court of Queen's Bench. His decisions have been reported in numerous journals and articles. Most recently, Nabeel was successful at the Alberta Court of Appeal in *Stefanyk v Sobeys et al*, 2018 ABCA 125. That case involved a plaintiff who was injured from falling backwards after being startled by a leashed dog on a sidewalk. Nabeel was successful in restoring the original decision of a master dismissing the claim that had been overturned by a justice which was overturned again by the Alberta Court of Appeal. The decision from the Court of Appeal has redefined the test for summary judgment and the duty of care for occupiers in Alberta. Nabeel was also successful in *Reichert et al v Home Depot et al*, 2017 ABQB 184, where the Alberta Court of Queen's Bench outlined the standard of care for an occupier in a slip and fall case, further clarifying the law on occupiers' liability and the fact that an accident can happen on premises without the occupier being liable if they implement and adhere to a reasonable system of maintenance and inspection.

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ALBERTA COURT OF APPEAL CONFIRMS BURDEN OF PROOF FOR SUMMARY JUDGMENT & TEST FOR OCCUPIERS' LIABILITY

By Nabeel Peermohamed, *Brownlee LLP*

In *Stefanyk v Sobeys*, 2018 ABCA 125, the Alberta Court of Appeal recently confirmed the standard of proof for summary judgment applications as the civil standard. In other words, summary judgment will be granted if one party can establish on a balance of probabilities that they have proven their case. Previously applied standards like "unassailable" and "very high likelihood of success" are not recognized standards of proof. In addition, the Alberta Court of Appeal clarified the test for occupiers' liability. If an incident occurs on premises for which a defendant owes a duty of care under the *Occupiers' Liability Act*, that defendant's duty of care is defined exclusively by the *Occupiers' Liability Act*. There is no residual "common law duty of care". However, if an incident occurs on adjacent lands for which the defendant is not an occupier, an analysis under the common law rules is necessary before imposing a common law duty of care on that defendant. No analysis is done under the *Occupiers' Liability A*ct. Once a duty of care has been established, it is still necessary to determine whether the defendant was negligent. It is not sufficient to stop the analysis after establishing a duty of care.

In *Stefanyk*, the plaintiff alleged she was injured from falling off a sidewalk into a parking lot after being startled by a dog leashed to a bike rack hidden from view by garbage bins. Sobeys operated a grocery store adjacent to the sidewalk. The area leased to Sobeys by the landlord did not include the sidewalk or the parking lot. The bins and the bike rack were placed on the sidewalk by the landlord. The plaintiff sued Sobeys, the landlord, the dog owner and the dog walker.

Sobeys initially applied for summary dismissal. Master Prowse granted the application and dismissed the action against Sobeys. The landlord appealed the decision to a justice in chambers. The learned justice allowed the appeal, found that summary dismissal was not appropriate in this case, and indicated there were triable issues regarding whether Sobeys was an occupier and whether Sobeys owed a common law duty of care. The learned justice did not perform an analysis of whether Sobeys was negligent. Sobeys appealed that decision.

The Alberta Court of Appeal allowed Sobeys' appeal, restored Master Prowse's decision, and confirmed the action against Sobeys was dismissed. In addition, the Court corrected several misconceptions of the law.

First, the Court confirmed that there is only one civil standard of proof. That is, a party must establish on a balance of probabilities that they have proven their case. The Court established that is the standard to be applied when ruling on a summary judgment application. That is the standard to be used when assessing whether a claim has "merit". The Court was explicit when it said standards such as "unassailable" and "very high likelihood" are not recognized standards of proof.

Second, the Court has confirmed the test for summary judgment as follows:

"Is the record such that it is fair and just to decide summarily if the moving party has proven the case on a balance of probabilities?"

Third, the Court clarified that a defendant's duty of care in an occupiers' liability action can only stem from a statutory duty of care under the *Occupiers' Liability Act* or a common law duty of care, not both. If there is a statutory duty of care, there is no residual "common law duty of care". The Court said that if a defendant is an occupier of premises, liability is solely determined under the *Occupiers' Liability Act*. If a defendant is not an occupier of premises, then it is necessary to apply the common law rules to determine if there is a common law duty of care that extends to areas of which it is not an occupier.

Finally, while the Court confirmed a duty of care in an occupiers' liability action does not make that occupier an insurer or guarantor, the degree to which each occupier controls the premises will impact the scope of the duty of care and the content of the standard of care. This requires consideration of the extent of control and the nature of the risk. In *Stefanyk*, an incident occurred on a sidewalk adjacent to the Sobeys store not part of the leased premises. Thus, the Alberta Court of Appeal applied the principles in *Cooper v Hobart*, 2001 SCC 79. Specifically, the relationship between the defendant and the plaintiff had to be examined for foreseeability and proximity. Factors like the expectations of the parties, representations made, reliance, property interests, and other interests were to be considered. Finally, there may be residual policy reasons to negate or limit the duty of care.

The Court found that Sobeys was clearly the occupier of its store. The question arose as to whether Sobeys was an occupier of the adjacent sidewalk. The evidence showed that Sobeys exercised some degree of control over that sidewalk by retrieving shopping carts from the sidewalk and addressing customer complaints about panhandlers on the sidewalk. The Court found that Sobeys could not demonstrate on a balance of probabilities that it was not an "occupier" of the sidewalk. Alternatively, given the sidewalk was the only logical access to the store, the Court found that it was appropriate to recognize a common law duty of care that Sobeys owed for the sidewalk. However, the Alberta Court of Appeal said that once a duty of care is found, it is necessary to continue the negligence analysis and determine if there was any breach of the standard of care.

In this case, Sobeys had no prior knowledge of the risk and there was no evidence to suggest Sobeys failed to inspect the sidewalk. Just because Sobeys did not have a specific policy about dogs did not mean they were negligent for banning dogs. Liability for dogs is based on foreseeability which depends on the specific history of the animal. An occupier cannot ban all dogs to avoid being found negligent. The Court said that Master Prowse was correct in finding there was no evidence to show Sobeys was negligent. There were no prior incidents involving a dog and Sobeys did not even know this specific dog was present on the sidewalk before the incident occurred. Thus, no negligence was demonstrated.

In the end, the Alberta Court of Appeal concluded that the reasons provided by the learned justice did not correctly state the test for summary judgment and did not consider whether Sobeys was negligent. This case was appropriate for summary judgment given there were no material facts in issue. A trial was not necessary. Accordingly, the Alberta Court of Appeal dismissed the action against Sobeys.

Stefanyk stands for several propositions. The standard of proof and the test for summary judgment has been confirmed. Specifically, a party will be granted summary judgment if on the record, it is fair and just to decide summarily if the moving party has proven its case on a balance of probabilities. In addition, the Alberta Court of Appeal has bifurcated the source of a duty of care of a defendant. That duty of care will be defined either under the *Occupiers' Liability Act* or the common law rules, not both. Finally, once a duty of care has been established, it is necessary to continue the negligence analysis to determine if there was a breach of the standard of care. Even if a duty of care exists, a party is not negligent if there is no breach of the standard of care.

Stefanyk was decided approximately three years after the decision in *Stout v Track*, 2015 ABCA 10 was released. In *Stout*, the Alberta Court of Appeal upheld the summary dismissal of Mr. Stout's claim by the court below. However, while the Court unanimously agreed the claim should be dismissed, the majority did not agree with the minority's mathematical approach. The minority decision placed upper and lower percentage bounds for a claim's likelihood of success at trial in order to grant summary judgment.

In *Stout*, after Ms. Track ended her relationship with him, Mr. Stout called her over 500 times, sent her over 130 text messages, and left her over 15 voicemails in a three-month period. One night she was awoken by a sound and her security alarm went off. She locked herself in a bedroom and called the police. When she looked out the window, she saw Mr. Stout's vehicle drive away. Ms. Stout told the police she suspected Mr. Stout had tried to enter her house based on the numerous attempts he had made to contact her. Mr. Stout was arrested and released on terms forbidding him to contact Ms. Track, which he subsequently breached by following her. Mr. Stout was arrested again. Mr. Stout commenced an action for malicious prosecution. He alleged Ms. Track made false allegations to the police resulting in his arrest. Ms. Track made an application for summary dismissal of the claim, which the chamber's judge granted.

The Alberta Court of Appeal justice who wrote the minority decision said the Alberta *Rules of Court* allowed summary dismissal of a claim if it has no merit (i.e. if the likelihood the moving side's position will prevail is high). He said this required comparing the relative strengths of each party's position. However, he said the positions need not be so disparate that the plaintiff's prospects of success are close to zero before summary judgment may be granted.

On the other hand, "if the likelihood the moving party will prevail at trial is only fifty-one percent, the moving party will not be granted summary judgment... Other protocols are available...where the outcome is not obvious... summary trial may be the best protocol." While the majority concurred with the minority that the claim should be summarily dismissed, the majority decided not to use the minority's mathematical approach.

Now, after *Stefanyk*, it is clear that even on a summary judgment application, a party need only meet the civil burden of proof (i.e. they must prove their case on a balance of probabilities or 51%).