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The Weir-Jones (2019) Summary Judgment Hangover: Two Similar Occupiers' Liability Cases With Different Results


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Background

The lasting effects of the recent Alberta Court of Appeal decision on summary judgment, Weir-Jones [1], are not yet fully realized. However, a recent court decision in which *Weir-Jones* was applied could cause alarm for occupiers interested in summary dismissal.

As a brief refresher, the new 'test' for summary judgment is:

1. Is it possible to fairly resolve the dispute on a summary basis or **do uncertainties in the facts**, the record, or the law reveal a genuine issue for trial?
2. Has the moving party met its burden of proof that there is no merit/defence and that there is no genuine issue requiring a trial?
3. If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate there is a genuine issue requiring a trial.
4. The presiding master/judge **must be left with enough confidence in the record** (facts, evidence, and law) to exercise judicial discretion and summarily resolve the dispute.

The fourth factor allows judicial discretion and may be a cause for concern as exemplified by two cases that involved nearly identical facts with one being decided before *Weir-Jones*, and the other thereafter.

Pre-*Weir-Jones*

In *Harding* (2015)[2], the plaintiff attended a Hudsons bar and was assaulted by an unidentified patron who threw a bottle at his head. The assault was random and unprovoked. Further, the patron was never identified.

As the plaintiff was unable to sue the assailant, he sued Hudsons for negligence and in breach of the *Occupiers' Liability Act*. Hudsons admitted it owed a duty to the plaintiff, but the Court found there was no breach of that duty. There was no evidence that anything done (or not done) by the bar could have prevented, caused or contributed to the assault. The assault was found to be unforeseeable and unpreventable. Further, the level of surveillance was deemed sufficient and did not contribute to the assault. The plaintiff's claim was, therefore, summarily dismissed.

Post-*Weir-Jones*

The facts in *Allnut* (2019)[3] are near identical to the facts in *Harding* (2015). In *Allnut* (2019), the plaintiff was randomly assaulted by an unknown assailant while also attending a Hudsons bar. The assaults were only separated by 16 months and both Hudsons were located in Edmonton.

In *Allnut* (2019), however, the court focused on Hudsons' surveillance system, policy and employee training that was in place to protect customers and identify intoxication (which was only briefly discussed in *Harding* (2015)).

Specifically, Hudsons' security personnel participated in a training program to identify signs of intoxication. Hudsons also participated in the 'Servall system' that allowed scanning of a patron's identification to determine if they had been banned by another establishment in the last 24 hours. Any patrons identified by that system would be denied entry. Washrooms were to be routinely checked by security approximately every 15 minutes. Employees were also provided a handbook entitled 'Front of the House' which included a section entitled 'Detection of Intoxicated Persons'.

Despite finding that the assault was unforeseeable, Hudsons' summary dismissal application was dismissed on the basis that the judge lacked confidence in the evidentiary record. Hudsons established it had a reasonable system and training in place to protect customers but there was no evidence to demonstrate Hudsons abided by their system.

There was no evidence that the Servall system was followed or any screening took place when the assailant entered the premises (no record of scanning the assailant's ID) and no record was kept with respect to washroom inspections. Accordingly, the judge dismissed Hudsons' summary dismissal application for a lack of confidence in the evidentiary record (despite the assault being unforeseeable). That said, the judge described this case as a "close call".

Reasons for Different Outcomes

The fourth factor in *Weir-Jones* appears to have played a significant factor in the *Allnut* (2019) decision. The judge exercised his discretion on the basis that Hudsons did not put forth evidence that it followed its system. The judge was lacking confidence in the evidentiary record. In *Harding* (2015), Hudons' surveillance system and training was only briefly discussed.

One other reason that may explain the different outcomes is the assailant in *Allnut* (2019) was identified, criminally charged and convicted of assault while the assailant in *Harding* (2015) was never identified. The criminal proceedings revealed that he was extremely intoxicated prior to attending Hudsons (he had consumed approximately 30 ounces of alcohol). This was amplified by the fact Hudsons had no record of scanning his ID or evidence that an employee had witnessed the assailant prior to the assault.

Allnut (2019) was not appealed but a few lessons can be learned from the decision. First, parties applying for summary dismissal must ensure there are no discrepancies in the evidentiary record.

The fourth factor from Weir-Jones now applies such that gaps in the evidence may cause the court to lose confidence in the evidentiary record.

Second, parties who bring these applications must remember they are asking a judge to dismiss a plaintiff's claim (which can be for substantial injuries) in its entirety. Given the high ask, these parties must ensure the evidentiary record is sound. Those who oppose the application only need to murky the waters to be successful.

Put in the context of slip and fall cases, defendants should ensure all the facts are established. Incomplete inspection logs (e.g. missing time entries for certain parts of the days) or discrepancies regarding what the plaintiff slipped on (i.e. ice vs snow) should be dealt with prior to bringing the application. If there is any missing evidence or disputed facts, the court may very well conclude there are discrepancies in the evidentiary record that warrant a full trial to resolve.

If you have any questions with respect to this bulletin, please contact Drew Wilson by email at dwilson@brownleelaw.com or by phone at: (403) 260-5317.

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[1]Weir-Jones Technical Services Incorporated v Purolator Courier Ltd, 2019 ABCA 49 [Weir-Jones].
[2] Harding v Hudsons Canadian Hospitality Ltd, 2015 ABQB 38 [Harding (2015)].
[3] Allnut v Hudsons South Common Ltd, 2019 ABQB 143 [Allnut (2019)].