

CITATION: Gallo v. Bramalea City Centre Equities Inc., 2019 ONSC 1443
COURT FILE NO.: CV-17-569858
DATE: 20190304

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
MOLLY GALLO, a minor by her Litigation) *Rachel Radomski*, for the Plaintiffs
Guardian FRANCESCO GALLO and)
FRANCESCO GALLO)
)
Plaintiffs)
)
- and -)
)
BRAMALEA CITY CENTRE EQUITIES) *Adam Grant*, for the Defendant, Technical
INC., MORGUARD CORPORATION,) Standards and Safety Authority
SCHINDLER ELEVATOR)
CORPORATION, FUJITEC CANADA)
INC. and TECHNICAL STANDARDS) No one appearing for the Defendants,
AND SAFETY AUTHORITY) Bramalea City Centre Equities Inc.,
Defendants) Morguard Corporation and Schindler
) Elevator Corporation
)
)
)
)
)
) **HEARD:** July 19, 2018
)

M. D. FAIETA J.

REASONS FOR DECISION

INTRODUCTION

[1] The Bramalea City Centre (the “Shopping Centre”) is owned by the defendants Bramalea City Centre Equities Inc. and Morguard Corporation (the “Morguard Defendants”). It has several escalators that are subject to the inspection and maintenance requirements adopted by the defendant Technical Standards and Safety Authority (“TSSA”). For a period of five years commencing January 1, 2013, the Morguard Defendants hired the defendant Schindler Elevator Corporation to inspect and maintain its escalators at the Shopping Centre. In its regulatory

capacity the TSSA also periodically inspected these escalators. The action against the defendant Fujitec Canada Inc., the manufacturer of the Escalator, has been discontinued.

[2] On September 3, 2015, the plaintiff, Molly Gallo, her two sibling and her mother visited the Shopping Centre. While on an upwards moving escalator (the “Escalator”), Molly fell backwards to her left side and her left hand became entrapped in the step-to-skirt gap on the escalator. Her left index finger was severed. Molly was rushed to The Hospital for Sick Children. Molly suffered extensive injury to her left hand and her left index finger was amputated.

[3] The plaintiffs allege that Molly’s injuries were caused because the step to skirt gap and step/skirt performance index at the location where Molly’s hand became entrapped exceeded the standard adopted for escalators pursuant to regulations made under the *Technical Standards and Safety Act, 2000*, S.O. 2000, c 16, as amended (the “Act”).

[4] The TSSA brings this motion for summary judgment to dismiss this action on the basis that: (1) the TSSA owed no duty of care to the plaintiffs in respect of the frequency of its inspection but admits that it owed the plaintiffs a duty of care in respect of the performance of its inspection; (2) in any event, it met the requisite standard of care as it properly discharged its inspections of the Escalator (particularly, in respect of its alleged failures to identify defects in the step-to-skirt gap and to shut down the Escalator until an anti-friction coating was applied to the skirt of the Escalator) as well as in deciding how often it would inspect the Escalator; and (3) the Plaintiffs have failed to established that the 6 mm gap existed at the time of this accident or that it caused Molly’s injuries.

[5] For reasons described below, I have dismissed this motion.

BACKGROUND

[6] The plaintiffs allege that Molly’s injuries were the result of the joint and/or several negligence and/or breach of contract and/or breach of the *Occupiers Liability Act* and/or breach of the Act by the defendants and/or their servants, agents and employees. Amongst other things, the plaintiffs allege that the defendants and/or their servants, agents and/ employees:

- (1) Failed to ensure that the clearance gap and/or loaded gap complied with the Act;
- (2) Knew or ought to have known that the clearance gap and/or loaded gap failed to comply with the Act;
- (3) Failed to comply with the Act;
- (4) Knew or ought to have known that the Escalator had not been designed for the safe use of small children, including Molly;
- (5) Knew or ought to have known that the Escalator had not been maintained property and/or was not functioning properly and took no steps to remedy same, when they knew or ought to have

- known that the failure to do so would result in injury to users of the Escalator, including Molly;
- (6) Created or maintained hazardous conditions with regards to the Escalator and the area where the casualty occurred;
 - (7) Caused and/or permitted the said area to be or become or to remain a danger and a trap to customers of the Shopping Centre and the Escalator including Molly;
 - (8) Knew or ought to have known that the customers of the Shopping Centre would use the Escalator and they failed to take adequate steps to ensure that the Escalator would not cause injury to the customers of the Shopping Centre;
 - (9) Failed to take proper, or any measures by way of testing, examination, supervision, inspection or otherwise to ensure that the Escalator's parts had been installed and maintained properly;
 - (10) Failed to warn users of the Escalator in the Shopping Centre properly or at all of the hazardous conditions that existed with regard to the Escalator which they knew or ought to have known existed, when such warning was necessary and appropriate in the circumstances;
 - (11) Operated or allowed the Escalator at the Shopping Centre to be operated when they knew or ought to have known that the Escalator was not functioning properly;
 - (12) Failed to install any or adequate or appropriately placed devices to permit passengers to safely stop the Escalator in the event of an emergency;
 - (13) Failed to properly maintain and repair the Escalator and, amongst other things, they failed ... to ensure that the clearance gap and/or loaded gap complied with the Act;
 - (14) Failed to establish any or adequate procedures for the inspection and/or maintenance of the Escalator in the Shopping Centre;
 - (15) Failed to have a system in place to receive reports of incidents involving the Escalator in the Shopping Centre, or they failed to ensure compliance with its system, or failed to properly address the information received;
 - (16) Failed to adequately inspect the Escalator for debris and/or moisture and/or obstructions;
 - (17) Failed to take reasonable or any care to ensure that Molly would be reasonably safe while using the Escalator;

TSSA Inspection History of the Escalator

[7] The TSSA relies on the affidavit evidence of Stephen MacDonald, an Inspector with the TSSA.

[8] The role of the TSSA with respect to the inspection and maintenance of elevating devices is limited to reviewing design submissions for new elevating devices, granting licences for elevating devices, investigation of reported incidents, and conducting periodic inspections.

[9] The TSSA's role with respect to inspections is limited to ensuring that elevating devices are compliant with the safety requirements of the Safety Code for Elevators and Escalators (the "Code"), as adopted by the Code Adoption Document, published by the TSSA from time to time. The Code is developed jointly by the Canadian Standards Association ("CSA") and the American Society of Mechanical Engineers ("AMSE") and jointly published as the AMSE A17.1/CSA B44 model code.

[10] Under the Regulation, periodic inspections of elevating devices are to be conducted "at such intervals as may be determined by the director for the purpose of ensuring the safe operation of the device". Using this risk-based approach, in practice, the TSSA determines the frequency of periodic inspections based upon the age and history of a given escalator. The TSSA has given uncertain and conflicting evidence regarding how often it periodically inspected the Escalator:

- MacDonald states that in general, the TSSA conducts inspections of escalators every 2-3 years. On his examination for discovery, MacDonald stated that he did not know the inspection interval for the Escalator; and
- Counsel for the TSSA subsequently advised that the inspection intervals for escalator can be anywhere from 6 months to 5 year and that from 2012 until the accident, the Escalator was on a three-year inspection cycle and that following the accident the inspection interval was reduced to one year however he subsequently advised that the current inspection interval for the Escalator was five years rather than one year.

[11] MacDonald states that the design submission for the Escalator was submitted in March, 2006 and that the initial inspection of the Escalator was completed on August 31 2006. The TSSA inspected the Escalator in 2007, 2008, 2011, 2012, 2012, 2013 and 2014.

[12] A TSSA Escalator Periodic Checklist, dated January 31, 2013, lists the tests and checks to be performed during periodic inspections:

- (1) Item 3 of Pit Inspection includes "the owner shall ensure that a friction reducing agent is applied to skirts without low friction material or without permanently treated material at monthly intervals";
- (2) Item 25 of Runway - "Step-Skirt Performance Index Test" – states that "this test shall be performed if the device had the initial inspection under A17.1/B44-07, after Jan. 1, 2008. ... As of May 1, 2015 SSPI requirements will be enforced for all existing escalators (8.6.8.15.19)"; and
- (3) Item 29 of Runway – "Step to Skirt Clearances" – states that "clearances shall be maintained in compliance with the applicable codes. Alternatively, the clearance on either side of the steps and between the steps and the adjacent skirt guard shall not exceed 4 mm (0.16 in.) and the sum of the clearances on both sides shall not exceed 7 mm (0.28 in.). ... For equipment installed under CSA B44-00 Update 1 and later editions – clearance (loaded gap) shall be not more than 5 mm (0.2 in.) when 110 N (25 lbf) force is laterally applied from the step to the adjacent skirt panel. See 6.1.3.3.5. This can be confirmed during the SSPI test (8.6.8.2.)".

December 2012 Periodic Inspection and Five Follow Up Inspections

[13] MacDonald conducted a periodic inspection of the Escalator on December 24, 2012. His inspection report identified a number of deficiencies with the Escalator. His report required the Morguard Defendants to comply with 19 specific orders, including performing various repairs, by February 10, 2013.

[14] A follow up inspection occurred on February 13, 2013. MacDonald found that the majority of the deficiencies had been corrected. However, he also noted some further deficiencies, including a worn anti-friction skirt, be performed by March 13, 2013 and others by May 13, 2013. His report states “A Follow Up Inspection has been performed with the above directions issued for compliance. Non-compliance with all issued directions will result in a forced shutdown at the next Follow Up Inspection”.

[15] A second follow up inspection occurred on March 27, 2013. MacDonald noted that the work required to be performed by March 13, 2013 had not been performed. His report once again states: “A Follow Up Inspection has been performed with 2 of the above directions issued for compliance remaining overdue. Non compliance with all issued directions by the compliance dates will result in a forced shutdown at the next Follow Up Inspection”.

[16] A third follow up inspection occurred on April 26, 2013. MacDonald noted that the work that he had required to be performed by March 13, 2013 had not been performed. He ordered that such work be performed by May 13, 2013. His report once again states: “Failure to comply with inspection orders by the required date shall result in this device being removed from service”.

[17] A fourth follow up inspection occurred on July 3, 2013. MacDonald found that the work that he had required to be performed by March 13, 2013 had still not been performed. He ordered that such work be performed by August 4, 2013. Once again, his report states “Follow Up Inspection has been performed with 2 of the above directions issued for compliance remaining overdue. Non-compliance with all issued directions by the compliance dates will result in a forced shutdown at the next Follow Up Inspection”.

[18] A fifth follow up inspection occurred on August 6, 2013. MacDonald found that the deficiencies, including the worn anti-friction skirt surface, had been resolved.

March 2014 Periodic Inspection and Three Follow Up Inspections

[19] MacDonald conducted a periodic inspection of the Escalator on March 19, 2014. His inspection report identified a number of deficiencies with the Escalator, including a worn anti-friction skirt. His report required the Morguard Defendants to comply with six specific orders, including performing various repairs, some by April 19, 2014 and others by June 18, 2014.

[20] A follow up inspection occurred on June 11, 2014. MacDonald found that all but one of the deficiencies had been corrected. He required the deficiency to be corrected by July 13, 2014.

His report states “Failure to comply with inspection orders by the required date may result in this device being removed from service”.

[21] A second follow up inspection occurred on September 24, 2014. MacDonald noted that the work required to be performed by July 13, 2014 had not been performed. He ordered that such work be performed by October 2, 2014. His report states in capital letters: A FOLLOW UP INSPECTION HAS BEEN PERFORMED WITH THE BELOW DIRECTION REMAINING OUTSTANDING. CONTINUED NON-COMPLIANCE WITH THE ISSUED DIRECTION BY THE COMPLIANCE DATE WILL RESULT IN A FORCED SHUTDOWN OF THIS DEVICE ON THE NEXT FOLLOW UP INSPECTION.

[22] A third follow up inspection occurred on October 14, 2014. MacDonald noted that the required work, including the work required to address the worn anti-friction skirt, had been performed. This was the TSSA’s last inspection of the Escalator prior to Molly being injured while on the Escalator. MacDonald states that there were no issues found with the Escalator that required any action and was unaware of any issue with the Escalator that may have ultimately caused Molly’s injuries.

September, 2015 Inspections

[23] The TSSA conducted two inspections shortly following this accident.

[24] On September 3, 2015, TSSA Inspector Craig Parks (“Parks”) ordered that: (1) the Escalator be removed form service until a TSSA had given consent; (2) a step/skirt index test be performed and witnessed by a TSSA Inspector before the Escalator is returned to service.

[25] On September 8, 2015, a Schindler technician, Michael DesRoches, spent about five hours inspecting the Escalator. A summary from an interview with DesRosches, produced by Schindler, includes the following statements:

- On September 8, 2015, Mr. DesRoches attended the loss scene with two TSSA representatives, Craig Parks and “Ajay”. They carried out a complete inspection of the escalator, checking all safety switches including skirt indexing. They also checked clearance distance from step to step;
- At one location, the gap between step and skirt was measure at 6 mm. The Code states that the gap should be no more than 5 mm. Mr. DesRoches was asked by the TSSA to adjust and reduce the gap to below 5 mm;
- The gap between steps was found to be within Code at 6 mm or less. Mr. DesRoches could not recall the exact measurements;
- Mr. DesRoches’ understanding was that Molly Gallo’s finger was pinched between the steps – caught between the step and the riser of the leading step;
- Mr. DesRoches believed that the TSSA was supposed to carry out an annual inspection of all escalator devices. According to Mr. DesRoches’ logs, the last TSSA pre-incident inspection was carried out by Steve MacDonald in June 2014. Mr. DesRoches was not sure if skirt indexing

would have been done at that time, as he believed that this did not become a Code requirement until 2015;

- As escalator maintenance contractors, Schindler was required to visually inspect all exterior equipment, such as handrails, sharp edges, broken glass, broken steps, broken comb teeth, etc. on a monthly basis. Various switches were inspected monthly, every 3 months or every 6 months;
- Mr. DesRoches carried out his full annual inspection of this escalator in April 2015, and did monthly inspections thereafter up to the date of loss;
- A change in the gap between step and skirt can be caused by debris such as an article of clothing or footwear, or if someone tries to remove something and pries the skirting. Otherwise the gap would not change over time; and
- The escalator contains a safety mechanism at the top and bottom, wherein a deflection in the skirt is detected, the safety circuit will open and the unit will shut down. If Molly Gallo's finger got caught between the skirt and the step, the safety mechanism would have been triggered when the deflection got near the sensors. There are no similar sensors for deflections between steps, so if her finger got caught between steps nothing would have happened.

[26] On September 9, 2015, Parks issued an Inspection Report which noted that:

Step/skirt index test was performed and passed. ...
TSSA has completed an inspection of this device. All outstanding orders have been resolved. ...

[27] The Inspection Report also indicated that the following step/skirt gap issue had been resolved:

The clearance (loaded gap) shall not exceed 5 mm (0.2 in.) when 110N (25 lbf) force is laterally applied from the step to the adjacent skirt panel (for devices installed under B44-00 Update 1 and later editions).

(Gap at second skirt seam from the bottom on the left hand side between the skirt and the step was measured at 6 mm).

Evaluation of Accident by Neil Bigelow and Edwin Wang

[28] Neil Bigelow and Edwin Wang are professional engineers that were retained by the plaintiffs to evaluate this accident. In coming to the conclusion that Molly's injuries were preventable, their report, dated May 25, 2018, includes the following opinions:

- Molly's left index finger became entrapped between the gap at the escalator step and the left escalator skirt;
- Molly's finger entrapment occurred on a fully formed inclined portion of the escalator at an excessively wide step/skirt gap;
- The gap exceeded AMSE/CSA standards;

- An unloaded step/skirt gap of 6 millimeters was found at the left side of the escalator step surrounding the area of entrapment;
- The exceeded step/skirt gap at the area of entrapment should have been visually identified by Bramalea City Centre staff before the accident;
- Had Bramalea City Centre staff been properly trained they likely would have identified the exceeded step/skirt gap in the area of entrapment;
- The exceeded step/skirt gap at the area of entrapment should have also been identified by Schindler, had they properly inspected the step/skirt gap on a monthly basis, as originally prescribed in the Fujitec monthly inspection tasks;
- The Step/Skirt Performance Index (“SSPI”) was found to be 0.188 on the escalator surrounding the area of entrapment on June 3, 2015. AMSE A17.1/CSA B44 standards require the SSPI not exceed 0.15;
- Schindler failed to take corrective measures to reduce the SSPI, after discovering it exceeded a 0.15 value in June 3, 2015, based on a comparison analysis with the subsequent July 7, 2015 and September 8, 2015 SSPI graphs which showed very similar trend patterns;
- The TSSA should have recognized the subject escalator as being high risk, based on recurring wear of the anti-friction skirt surface in 2011, 2013, and also in 2014 and, further based on a history of Schindler not complying with the TSSA orders to repair the worn anti-friction skirt surface on this escalator in 2013 and 2014;
- The TSSA should have shut down the escalator when their order compliance deadlines were not met, in order to ensure that Schindler and Bramalea City Centre met the required compliance deadlines and to safeguard the public;
- Had the TSSA carried out inspections on a one year interval, as recommended by the ASME A17.1/CSA B44-13, after the March 20, 2014 inspection date, they more likely than not would have discovered the exceeded SSPI index that was found on June 3, 2015;
- The entrapment incident more likely than not would have been prevented had the TSSA discovered the exceeded SSPI index and issued compliance orders to remedy the exceeded SSPI, the high skirt friction and the exceeded step/skirt gap; and
- The escalator had a history of recurring wear of the anti-friction skirt surface yielding a higher skirt friction value that increased the risk for step/skirt entrapment.

[29] The TSSA states that the step-skirt gap was neither more than 5 mm at the location where Molly’s finger became entrapped nor was such gap present at the time of the TSSA’s last inspection on October 14, 2014.

ISSUES

[30] The TSSA submits that this action against it should be dismissed because:

- It does not owe the plaintiffs a duty of care in respect of the frequency of its inspection of the Escalator (which it characterizes as “inspection intervals”); Alternatively, if it does owe a duty of care in respect of the frequency of its inspections, it discharged such duty of care;
- It discharged its duty of care in respect of the performance of its inspection of the Escalator; and,
- In any event, its act or omissions did not cause the plaintiffs’ losses.

[31] The plaintiffs submit that this is not an appropriate case for summary judgment because the necessary findings of fact related to whether the TSSA met the standard of care in respect of its inspection of the Escalator cannot, given the conflicting evidence, be resolved without the trier of fact seeing and hearing the evidence of the witnesses.

[32] Rule 20.04(2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, states that a court shall grant summary judgment if the court is satisfied that there is “no genuine issue requiring a trial” with respect to a claim or defence.

[33] In *Hryniak v. Mauldin*, 2014 SCC 7 at para. 49, the Supreme Court of Canada stated that:

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[34] A court may weigh the evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence unless it is in the interest of justice for such powers to be exercised only at trial: Rule 20.04(2.1). It will be in the “interests of justice” to use the additional fact-finding powers if their use will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole: *Hryniak*, paras. 45, 52, 58, 59 and 67.

[35] A motion for partial summary judgment runs the risk of duplicative proceedings or inconsistent findings of fact: *Hryniak*, para. 60. They also cause the resolution of the main action to be delayed, can be very expensive and tax judicial resources: *Larizza v. Royal Bank of Canada*, 2018 ONCA 632, paras. 29-33.

[36] Summary judgment “remains the exception, not the rule” and is only appropriate where it leads to “a fair process and just adjudication”: *Mason v. Perras Mongenais*, 2018 ONCA 978 (C.A.), para. 44. Partial summary judgment should only be granted in the clearest of cases where the issue on which summary judgment is sought is clearly severable from the balance of the case *Larizza*, paras. 26-29; *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, para. 34.

[37] This is not a clear case for the grant of partial summary judgment as it would not result in a fair and just determination on its merits. As is evident from the allegations in the Statement of Claim described earlier, the issues in relation to the TSSA are not clearly severable from the

balance of the case against the Morguard Defendants and Schindler which will remain even if partial summary judgment is granted. It also raises the very real risk of inconsistent findings in relation to the adequacy of the frequency of inspections, the performance of the inspections, the action taken following such inspections and the condition of the Escalator prior to this incident, and whether such conditions caused the injuries suffered by Molly. The more sound and efficient approach is to proceed to trial so that the trier has the benefit of the live evidence of the witnesses for all the parties, can better assess the strength of their evidence, and determine the issues with that fuller perspective.

CONCLUSIONS

[38] For the reasons given, I dismiss the motion for summary judgment as it raises genuine issues requiring a trial.

[39] I shall remain seized of this action.

[40] I encourage the parties to come to an agreement on the question of costs for these motions, failing which the plaintiffs shall provide their submissions within two weeks, the TSSA shall provide its submissions within three weeks and the plaintiffs shall provide any reply submissions within four weeks. Each submission shall be a maximum of five pages in addition to an Outline of Costs and any Offers to Settle.

Mr. Justice M. D. Faieta

Released: March 4, 2019

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MOLLY GALLO, a minor by her Litigation Guardian
FRANCESCO GALLO and FRANCESCO GALLO

Plaintiffs

– and –

BRAMALEA CITY CENTRE EQUITIES INC.,
MORGUARD CORPORATION, SCHINDLER
ELEVATOR CORPORATION, FUJITEC CANADA
INC. and TECHNICAL STANDARDS AND SAFETY
AUTHORITY

Defendants

REASONS FOR DECISION

Mr. Justice M. D. Faieta

Released: March 4, 2019