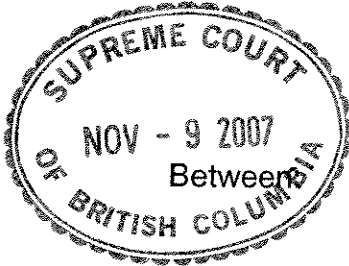


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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Carlton v. Invermere (District)***,
2007 BCSC 1634

Date: 20071109
Docket: 3018
Registry: Golden



Nigel Patrick Carlton

Plaintiff

And

District of Invermere

Defendant

Before: The Honourable Mr. Justice Melnick

Reasons for Judgment

Counsel for plaintiff

B. McKenzie

Counsel for defendant

D.N. Kawano

Date and Place of Trial:

October 30 and 31, 2007
Golden, B.C.

[1] The plaintiff, Nigel Patrick Carlton ("Mr. Carlton"), claims against the defendant, District of Invermere ("Invermere"), in negligence or for the breach of a duty of care he claims Invermere owed to him under the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337 ("the Act") arising from his having tripped and fallen over an asphalt berm along the edge of one of Invermere's streets. The trial was with respect to liability only.

I. BACKGROUND

[2] On May 17, 2003, Mr. Carlton, a resident of Calgary, was attending a meeting of the homeowners of the residential complex in which he has a residence at or near Invermere. Returning from the meeting, he was a passenger in the front of a Dodge Caravan motor vehicle driven by his sister, Penny Dutton ("Ms. Dutton"). Mr. Carlton, who was apparently familiar with Invermere, asked his sister to park on the side of 7th Avenue so that he could cross the street to purchase an item from a shop located on the other side of the street. Seventh Avenue (the main street in Invermere) runs generally in a north/south direction.

[3] Ms. Dutton pulled her vehicle to the right in an area on 7th Avenue to the south of 4th Street at which intersection there is a marked crosswalk and traffic lights. She pulled her vehicle off the travel portion of the road by crossing a marked white fog line. She then drove two of the four wheels of the vehicle over a low asphalt berm of a material similar in composition and colour to the asphalt paved road surface. The two wheels on the left-hand side of her vehicle apparently remained to the left of the berm.

[4] Mr. Carlton alighted from the passenger side of the van, quickly walked to the back of the vehicle and, after checking for oncoming traffic, began to walk onto 7th Avenue, intending to cross the street at a point other than a marked intersection (in other words, jaywalk). Unfortunately, he tripped over the low berm, which, at that point, protruded from the gravel located on its right-hand side by approximately two to four inches. Prior to commencing the act of crossing the street, Mr. Carlton had not looked down at the road surface, concentrating instead on the oncoming traffic. He notes that he was in a hurry to make his purchase, return home, and install the item.

[5] As a consequence of the fall, Mr. Carlton suffered certain injuries.

[6] Mr. Brian Nickurak ("Mr. Nickurak"), the Director of Municipal Works for Invermere, gave evidence. He did not work for Invermere at the time of the

accident, having joined them in January 2004. However, Mr. Nickurak says that Invermere has no written policy or procedure for inspecting this type of berm. He also notes that the area where Ms. Dutton chose to park her vehicle (whether at the specific direction of Mr. Carlton or as a consequence of her own choice was not certain from the evidence) was designated as neither a sidewalk nor a parking area by Invermere. The berm, he says, was constructed to channel storm runoff water to a catch basin to the south.

[7] Mr. Nickurak also says that Invermere had no specific policy directed to the inspection and maintenance of this particular type of area on the side of a road but that, ordinarily, municipal employees would take note of it when driving by and

checking for any hazards that might be present. Apparently, no reports of any such hazards had been received. He agrees that while at one point there had been a sign further north on 7th Avenue toward the end of the berm indicating that no parking was allowed to the north of that sign, the sign was apparently no longer present.

[8] Mr. Carlton gave evidence that he does not remember feeling any "bump" or reaction when the two tires of his sister's vehicle drove over the berm. He also,

apparently, did not see that the berm was exposed along much of its length on the shoulder side as well as the street side. I add that, to the right of that shoulder area of mixed gravel and natural sandy soil there is a grass-covered bank that rises steeply four to six feet at the top of which is a gravel path having an appearance of

being used by pedestrians.

[9] The shoulder area to the right of the berm is a long lens-shaped area varying

from one-half to three-quarter metre up to about 1.5 metres in width. Photographs of the area were presented in evidence by both sides, which demonstrated an area that was, at most, barely wide enough for a passenger vehicle to park to the right of the berm. The soil in the area bears evidence of tire marks indicating that any number of vehicles had parked in that area from time to time. Some photographs show as

many as four vehicles parked in the area where Mr. Carlton said he had tripped.

The photographs also demonstrate that the surface of the ground to the right of the berm is very uneven, containing, in places, stones and gravel of varying sizes.

II. DISCUSSION

[10] The thrust of Mr. Carlton's complaints are that Invermere was negligent, or created a hazard, by installing this approximately four inch high berm of asphalt along the side of 7th Avenue without either ensuring that the side away from the street was filled level with gravel up to the top of the berm, or that it was painted a bright colour to distinguish it from the colour of the road, or both. Inherent in his argument is the suggestion that Invermere created a situation of danger where persons commonly park their vehicles, which is an activity that was not prohibited by Invermere.

[11] In *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 28, 168 D.L.R. (4th) 513, negligent conduct was defined as follows:

Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury.

[12] Did the construction of the berm by Invermere without either painting it a bright colour to delineate it more fully from the colour of the asphalt road surface or in not backfilling the shoulder area with gravel to the top of the berm, create an objectively unreasonable risk of harm? In the circumstances of this case, I think not. Invermere never intended for pedestrian or vehicular traffic to use the area. The long narrow lens-shaped area of relatively flat but uneven ground to the right-hand side of the berm before the grassy bank was never intended to be either a sidewalk

for pedestrian use (a gravel path is available at the top of the bank) or for parking by vehicles. Persons obviously use it for parking from time to time as, on the day in question, did Ms. Dutton. It is an area, however, that is patently obvious to me to be rough, uneven, and not to be used as a parking area. It strikes me that anyone with his eyes open could see that as he approached the area in a vehicle. It also seems highly unlikely to me that anyone driving the wheels of a vehicle over that berm would not feel a bump or movement of the vehicle. In my view, any reasonable person paying a modicum of attention to what was going on around him would notice the berm.

[13] Given the nature of the location of the shoulder of the road, in my view there was no obligation whatsoever on Invermere to create conditions that would be the equivalent of a gravel sidewalk. It was clearly not an area where pedestrians were expected to be. It was also clearly not an area where vehicles were expected to park. The fact that there may have been a sign at the time to the north of the area where Ms. Dutton parked, indicating that one could not park to the north of that sign, does not mean that, as a corollary, permission was somehow given to park to the south of the sign, particularly where common sense should have demonstrated that it was not a proper parking area. That Ms. Dutton chose to park in that area was either because Mr. Carlton directed her to do so (in which case his complaint is with himself) or because Ms. Dutton chose to park there (in which case, arguably, his complaint is with her).

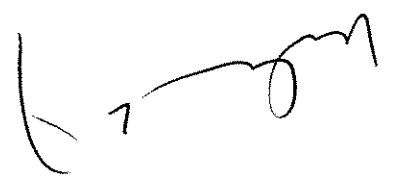
[14] This is not a case where Invermere created a clearly dangerous situation by installing a berm that was largely exposed on both sides. Persons such as Ms.

Dutton and Mr. Carlton, who choose to park in a place like that, do so at their own risk. The municipality is not an insurer against any form of mishap that can occur within its boundaries. Persons must take a measure of responsibility for their own safety including, as Mr. Carlton did not, watching where they are walking when they are clearly in an area where there is uneven ground. I appreciate that Mr. Carlton tripped on the berm rather than on the ground but, in my view, the berm was there to be seen (and when driven over, to be felt) and should not have been a surprise to anyone in a vehicle that was parked there if that person paid a minimum amount of attention to his own safety and well-being.

[15] Further, as will be clear from what I have said above, it is my conclusion that Invermere, although an occupier within the meaning of the **Act**, was not in breach of its duty to keep the road and gravel shoulder safe for the use of pedestrians or motorists. Undoubtedly, the creation of the berm created the potential for someone to trip over it, just as the construction of any curb and sidewalk along the side of a street creates the potential for someone to trip over it. The circumstances of this case are not at all like those in *Henhawk v. Brantford (City)*, [2005] O.J. No. 5140 (Ont. S.C.J.), where the curbs in question were located in a municipal three level parking garage. The case at bar involves an area along the side of a municipal street to which neither pedestrians nor vehicles were by any reasonable inference invited by Invermere.

III. CONCLUSION

[16] I find that Mr. Carlton is solely negligent for the injuries he sustained as a consequence of tripping over the berm along the side of 7th Avenue in Invermere. Further, Invermere was not in breach of any duty to him as an occupier. Mr. Carlton's claim is dismissed. Invermere is entitled to its costs on Scale B.

A handwritten signature in black ink, appearing to be 'L. O. M.', is written over the text of the judgment.