IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***French v. Fort St. John Curling Club,*** 2003 BCSC 932

Date: 20030613
Docket: 995666
Registry: Victoria

Between:

Robert John French
and Heather French

Plaintiffs

And:

The City of Fort St. John
and Fort St. John Curling Club

Defendants

And:

The City of Fort St. John

Third Party

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

Counsel for the Plaintiffs:	B.J. Flewelling
Counsel for the Defendants:	M.N. Fus
Date and Place of Trial:	April 22-25, 2003 Fort St. John, B.C.

[1] John French slipped and fell in the parking lot outside the Fort St. John Curling Club (the “club”) on February 25, 1997 injuring his right knee. He was 15 years old at the time and had been to the club on a school outing to learn to curl as part of the physical education program.

[2] He commenced an action against both defendants; however, he settled with the City of Fort St. John and proceeded to trial only against the club.

[3] In this action he is seeking damages resulting from the fall. Both liability and quantum are in issue. As part of the settlement agreement, the plaintiff will not seek recovery against the club for any damages attributable to the city. As a result liability has to be determined with respect to both defendants.

[4] By consent Heather French is no longer a plaintiff as Mr. French is now 21 years old.

[5] The issues are to be determined are:

- Is the club liable as an occupier under the ***Occupiers Liability Act***, R.S.B.C. 1996, c. 337;
- Is the city liable as an occupier;
- Is the plaintiff contributorily negligent;

- Damages, including special damages, past wage loss, loss of future earning capacity and loss of opportunity.
- Are the plaintiff's ongoing complaints a result of other incidents, either prior to or subsequent to the fall, or his own failure to mitigate.

LIABILITY

[6] The club entered into a lease with the city for the property on which the club's building is located on August 1, 1979. The lease describes the lands and premises as Lot 1 Plan 25780 and includes the parking lot.

[7] Mr. Holland, the manager of the club, testified that, although the city cleaned the parking lots on occasion, the club had arrangements in place with an individual, Keith Turner, to clear the lot in exchange for free curling.

[8] The duty of an occupier is set out in s. 3 of the ***Occupiers Liability Act***. An occupier is under a duty to take steps to keep their sidewalks and parking lots reasonably safe for persons using them. This does not mean that the lot and sidewalks have to be completely clear of snow but rather that the defendant has a system in place to remove snow and ice

which is reasonable in light of all the surrounding circumstances including budget, availability of personnel, equipment, geographic location and prevailing weather conditions. ***Neilson v. Bear and Majestic Management (1981) Ltd.*** (5 January 1999), Prince George Registry 01996 (B.C.S.C.), ***Just v. R. in Right of British Columbia*** (1989), 41 B.C.L.R. (2d) 351 (S.C.C.) and ***Perrett v. The City of Port Moody*** (19 March 1998), New Westminster S0331 (B.C.S.C.).

[9] The evidence is that the weather on the day of the accident was unseasonably warm and there had been considerable snow melt. A freeze/thaw cycle had been occurring for a couple of days prior to the accident and as a result there was a large puddle surrounding the bus which Mr. French had to walk through in order to get on the bus. He could not see the surface of the parking lot under the puddle but says it felt very icy.

[10] Mr. Life, the friend who was right behind him, testified that when Mr. French fell his feet went right out from under him and he fell backwards. Mr. Life commented on how slippery the lot was.

[11] The manager of the club, Mr. Holland also testified that he noticed that “it was definitely a slippery day” when he went out to investigate the accident.

[12] Mr. Leggett, a forensic engineer, specializing in accident reconstruction, commented in his report that the freeze/thaw cycle of weather reported for the two days leading up to the fall would result in the accumulated snow melting during the day and then refreezing at night. He opined that "The wetter the surface, the lower the coefficient of friction. In essence, the ice becomes lubricated with water to the point where it provides very low traction capabilities."

[13] In his report he states that in order to minimize the effect of the ice one can either apply chemicals to de-ice the area or abrasives to provide traction.

[14] I am satisfied based on the evidence of the slippery state of the parking lot and the description of the fall that Mr. French lost his footing and slipped on ice beneath a large puddle surrounding the school bus.

[15] The evidence is that the club did not use abrasives or salt on the parking lot or the sidewalk in front of the building. Apparently abrasives and salt are problematic for curling clubs as they are easily tracked in and cause damage to the curling ice and the rocks. Mr. Holland testified that "they had experimented with lots of different types of de-icers and abrasives over the years and had decided to use

nitrogen fertilizer for de-icing as it breaks up the ice and then evaporates." His evidence was that the fertiliser was only used on the sidewalks and nothing was applied to the parking lot. The club had no regular system of inspecting the lot or regular schedule to clear the lot. Mr. Holland said he would contact Mr. Turner or after a big dump Mr. Turner would come and clean the lot without being called, or the city would clear the lot. If the lot got soupy and messy Mr. Holland would contact Mr. Turner to clean the lot.

[16] The evidence is that the lot had been ploughed the night before the accident, however, no abrasives or de-icers were used on the lot. Mrs. Richter, the acting president, testified that the club had control over the parking lot and she was aware that the rink employees did not use salt, sand or gravel in the parking lot. However, she assumed if there was ice in the parking lot the rink manager would arrange to have it removed.

[17] Mr. Titley, an employee of the club, testified that he did not know where the fertilizer was and never used it to de-ice the sidewalks or parking lot. He never used salt because it tracks in and is hard to clean up. Rather he used an ice chipper to remove the ice, but only on the sidewalks, not the parking lot. He thought the city was responsible to

chip ice in the parking lot to make it safe for the school children, however there is no evidence that city would have been aware that the club had scheduled high school students to attend that day or evidence of any agreement with the city to be responsible for ice removal in the lot.

[18] The club argued that anyone who lives in Fort St. John is aware that snow and ice are present in parking lots in the winter and represent hazards which must be dealt with on a daily basis. Mr. French had entered the building from the parking lot only an hour or two before the accident and would have been well aware of the condition of the lot. However, there is no evidence that the bus picked the students up at the same point it dropped them off or that Mr. French had walked across the parking lot when he arrived.

[19] Defence counsel referred to a number of cases involving slip and falls where the defendant was found to have a reasonable system in place to remove snow and ice, however, the systems all involved the use of either salt or sand. I agree with Mr. Justice Parrett's comment in ***Neilson v. Bear*** that given the freeze/thaw condition the defendant had a duty to make certain the parking lot was either de-iced with nitrogen fertilizer or sanded; especially when the club knew high school students were attending the club. The club made a

decision not to use salt and sand because of the potential damage to its ice surface and rocks.

[20] There was no reason advanced as to why the club did not use the fertilizer which it received for free. The fertilizer could have been spread either by Mr. Titley who was at the club every day or the students who were employed to assist around the club. The club did not present any evidence that lots in the area were not salted and sanded during the winter to make them safer for use. Neither did it present evidence that the cost of taking steps to either salt or de-ice the lot was prohibitive.

[21] Mr. Leggett states in his report that the use of sand and gravel dramatically increase the ability of pedestrians to walk in when it is placed on the ice, even if water is present. All of the cases referred to by defence counsel included salt and sanding as part of the system of snow and ice removal.

[22] Knowing the lot was slippery and knowing a bus load of adolescents was coming, the club chose to do nothing to improve traction or melt the ice. The bus was parked in line with front door and it would have taken very little effort and cost to put down some fertilizer or sand where the students were walking. In the circumstances, the club has not

satisfied the onus on it to establish that it had a reasonable program of snow and ice removal in place.

[23] The club argues that the city was also an occupier and should bear a portion of the liability. The evidence is that the city would plough the parking lot when it ploughed the other civic lots adjacent to the club. Mr. Holland's evidence is that the city would not advise the club of when it was going to plough or ask permission. Both he and Mr. Locher, the city manager, agreed that the snow clearing was on an informal basis. Mr. Locher provided direction to his staff to push the snow from the kids' arena to store it beside the tennis courts. During that process the curling rink parking lot would be cleared.

[24] In ***Gardner v. Unimet Investments Ltd. and DPE Electronics Canada Ltd.*** (22 March 1996), Vancouver CA019986 (B.C.C.A), the plaintiff argued that DPE was an occupier because it regularly cleaned the sidewalk. The Court of Appeal agreed with the trial judge who had found that even if DPE unilaterally assumed the responsibility of cleaning the sidewalk it did not have control over the area and was not an occupier.

[25] In this case, the lease specifically grants control of the parking lot area to the club. The fact that the city

ploughs the lot from time to time does not give it control. The club is responsible for maintaining the leasehold.

[26] In both ***Hodgson v. Christensen,*** [1989] B.C.J. No. 322 (S.C.) and ***Goldmanis v. Mador,*** [1991] B.C.J. No. 3049 (S.C.) the landlord was found not to be an occupier under s. 3 as there was insufficient control over the premises.

[27] If the landlord is responsible for maintenance then s. 6 of the ***Occupiers Liability Act*** imposes a duty on the landlord towards people using the property. Under the lease the city is not responsible for maintenance, rather maintenance is the responsibility of the club. Accordingly, s. 6 has no application. As a result, I find that the city is not liable to Mr. French.

[28] The club also argues that Mr. French caused his own misfortune by failing to take care when crossing the lot. The evidence is that Mr. French came out of the building running to catch up to his friend, Mr. Life. He passed him and then, he says, slowed to a fast walk. The puddle was obvious, however, there was no other way to get into the bus except walking through it. He was wearing running shoes, which Mr. Leggett opines provides the same traction as winter boots on ice.

[29] Mr. Life's evidence was that he thought Mr. French's pace was a little quicker than he would go in the circumstances. He described it as a bit rash but qualified that comment by saying Mr. French's pace was a reasonable compromise between speed and stability. There is no evidence that he or anyone else told Mr. French to watch out or slow down

[30] The cases referred to in which the plaintiff has been found contributorily negligent are cases where the plaintiff was either told or knew not to proceed or they had an alternate route in order to avoid obvious danger. ***Stankovic v. Wong*** (20 November 1996), New Westminster S018315 (B.C.S.C.), ***Scurfield v. Cariboo Helicopter Skiing Ltd.,*** [1993] 3 W.W.R. 418 (B.C.C.A.) and ***Lawrence v. The City of Prince Rupert and B.C. Hydro and Power Authority,*** 2003 BCSC 485 (S.C.).

[31] Although there was no obvious danger as the puddle covered the ice and no alternate route, there is evidence that Mr. French's pace was too fast for the conditions. Accordingly, some apportionment of liability is appropriate. Even taking into account his age and the fact he was on a school outing where high spirits are normal he was not as attentive as he should have been. However, I am of the view

that the major fault lies with the club which failed to take steps to salt and sand the lot. Fault is apportioned 80% to the club and 20% to Mr. French.

DAMAGES

[32] Mr. French suffered a serious injury to his right knee. He suffered a full thickness articular fracture of the cartilage of the femur, a grade IV fracture to the patella, a tibial facture and a crush fracture of lateral meniscus. He has had two surgeries to date. He has a degenerative condition which is progressive. It is probable that he will require more surgeries, including a total knee replacement, in the future. The evidence is that he is not a good candidate for surgery as a result of his size. It is recommended that total knee replacement be delayed as long as possible, hopefully until he is in his 60s.

[33] He was bedridden for two to three months and on crutches for some time after the accident. The injury has left him with ongoing pain.

[34] He is restricted in the types of activities he can do. He can not go for long walks, hiking, camping or fishing. He can not stand for long periods of time and has difficulty going up and down stairs. He is not able to participate fully

in extracurricular activities or have a full social life at university because of his physical limitations. He is unable to perform manual labour jobs which involve lifting, carrying or any other activity which uses the knee.

[35] He attempts to exercise however his knee prevents from doing any strenuous cardiovascular exercise. As a result he has had difficult controlling his weight. He has had two incidents of instability when his knee has given out and may have more in the future. If the instability problem continues there is a possibility he may require surgery.

[36] He was only 15 at the time he was injured but was a large boy at 6’2” and has grown significantly since then. He is now 6’6” and weighs 300 lbs.

[37] Defence counsel argues that any damages should be reduced because Mr. French has failed to follow his doctors’ recommendations that he lose weight and exercise more. She argues that he should have gone to the pool right after the accident. As well, he has said no to all the surgical suggestions.

[38] The doctors have all said that Mr. French is a poor candidate for surgery. He cannot, therefore, be faulted for

declining further surgeries. I did not understand any of the doctors to recommend surgery except as a last resort.

[39] The evidence is that Mr. French was very diligent at the beginning with his physiotherapy. As time went on and he saw no further improvement, he was unwilling to exercise as much with the pain he was experiencing. However he continues to exercise within his pain tolerance.

[40] Both Mr. French and his mother testified regarding his attempts to lose weight, watch his diet and exercise. He has followed doctors' recommendations. As Dr. Ellis said, Mr. French is in a catch 22 situation, his bulk makes it difficult to exercise and he needs to exercise in order to lose weight.

[41] The two principles that are equally important are that the plaintiff must act reasonably to minimize his loss and the defendant takes his victim as he finds him. ***Humphrey v. Rancier Estate,*** [1985] B.C.J. No. 835 (S.C.). I find in the circumstances, given Mr. French's age and size at the time of the accident and his honest attempts to exercise and lose weight, he cannot be said to have acted unreasonably or failed to mitigate his damages.

[42] The injury occurred when Mr. French was very young. He will suffer pain and restrictions throughout his life. The injury has affected his self esteem as a teenager and young adult. Having considered the significance of the injury, his age, the ongoing pain and impact his life and the cases presented by counsel for similar injuries I assess his non-pecuniary damages at $100,000.

[43] Mr. French is currently attending University of Northern British Columbia to become a teacher. As a result of the injury he cannot pursue a career in the trades as his family had hoped. Accordingly, he claims a loss of both past wages and future earnings, for the difference between when he could have entered the labour force and the wages he would have received during the course of his career as a tradesman as opposed to a teacher.

[44] At the time of the accident Mr. French had not developed any firm career plans. His career plans are still not set although he is currently studying to be a teacher. Since the accident he has considered careers in computers and teaching. He enjoys school and reading. He says that but for the accident he would have considered going into a trade as his father is a tradesman with certification (tickets) in three trades.

[45] Mrs. French testified that the family had hoped Mr. French would go into the mill and obtain a ticket as both her husband and father were involved in trades. However, Mr. French is doing well at university and his prospects for the future are bright. I am not satisfied that Mr. French would have pursued a career in the mill as opposed to pursuing a career which would have required university or technical school training such as a teacher.

[46] Dr. Young, an economist, provided a report and testified at trial regarding the appropriate calculation of the loss of future earning capacity and past wage loss. In my view, the underlying assumption of his report, that Mr. French would have pursued a career in the trades and obtained a ticket rather than going to school has not been established by the evidence.

[47] It follows that Mr. French is not entitled to recover the cost of his tuition or living expenses while attending school as special damages.

[48] Mr. French has been working at the mill in the summers during university. There is no evidence of past wage loss.

[49] With respect to loss of future income earning capacity, I accept that Mr. French was delayed slightly in his education as a result of the injury and, therefore, his entry into the labour force. He is limited in the type of work he will be able to do in the future.

[50] I have considered the various factors set out in ***Kmetyko v. Harrison,*** [1998] B.C.J. No. 2918 (S.C.) and ***Brown v. Golaiy***, [1985] B.C.J. No. 31 (S.C.). The evidence establishes that Mr. French has been rendered less capable overall of earning income from all types of employment, is less marketable and less attractive to potential employers because of his injury, has lost the ability to take advantage of all job opportunities and is less valuable to himself as a person capable of earning income.

[51] It is recognized that assessing awards in this area is a matter of prophecy, but the courts have held that “for a young person at the beginning of his adulthood, the general loss of capacity is the paramount consideration.” ***Morris v. Rose Estate*** (1996), 23 B.C.L.R. (3d) 256 at 262 (C.A.). Taking into account the fact Mr. French was only 15 at the time when he was rendered unable to pursue a wide range of job options thus limiting his choices of career and the degenerative nature of his condition, it is my view that an

appropriate award for loss or impairment of future earning capacity and delay in entering the work force is $150,000.

[52] Mr. French is claiming special damages for trips to Dawson Creek for medical treatment of $991.69. As well, he is claiming the amount of $10,000 for the cost of future care including the cost of a brace, its occasional replacement and ongoing physiotherapy. I am awarding those amounts.

[53] Finally, I have considered Mr. French's claim for cost of past and future housekeeping. Mr. French's limitations include cleaning low areas, vacuuming, climbing ladders, working on slopes, mowing the lawn and shovelling snow. In ***McTavish v. MacGillvary,*** [2000] B.C.J. No. 507 (C.A.) the replacement cost approach of assessing the amount for the loss of capacity to do unpaid work was favoured. It matters not whether the plaintiff will actually pay for replacement services.

[54] Dr. Young provided calculations of the value of the loss based upon generalist wages at $12.07 per hour as most of Mr. French's limitations are in the domestic work category. The total loss of ability he calculated was $244,800. however, Mr. French's loss of ability is partial. He submits $75,000. would be an appropriate award under this head. The club argues that historically an award under this head of damages

is a thousand dollars. No evidence was adduced by the club regarding another amount being more appropriate.

[55] In ***McTavish*** the Court of Appeal did not find the trial judge's award of $43,170 for future loss and $20,800 for past loss of future housekeeping capacity excessive. The plaintiff in the case was 47 years old and could no longer perform any household services involving lifting or carrying of even moderately heavy objects or stretching, bending or leaning over. She was therefore quite limited in the domestic chores she could undertake.

[56] The evidence establishes that Mr. French has ongoing limitations that will affect his capability to do household chores as enumerated above. In the circumstances, again taking into account his young age and the degenerative nature of his injury, it is my view an appropriate award for both past and future loss of housekeeping capacity is $50,000.

[57] In summary damages are assessed as follows:

Non-pecuniary	$ 100,000.00
Past loss of income	$ 0.00
Loss or impairment of future earning capacity	$ 150,000.00
Special Damages	$ 991.63
Cost of future care	$ 60,000.00

[58] Subject to submissions to the contrary, costs to each party according to the apportionment of fault at scale 3.

"L.B. Gerow, J."
The Honourable Madam Justice L.B. Gerow