IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ross v. Vernon (City),*
2009 BCSC 1378

Date: 20091008
Docket: 42681
Registry: Vernon

Between:

Joyce Ross

Plaintiff

And

The City of Vernon also known as
The Corporation of the City of Vernon
and Blue Ridge Landscaping & Maintenance Ltd.

Defendants

And

Blue Ridge Landscaping & Maintenance Ltd.

Third Party

And:

The City of Vernon, also known as
The Corporation of the City of Vernon

Third Party

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Plaintiff:	J.D. Cotter
Counsel for the City of Vernon:	L.E.W. Nilsson
Counsel for Blue Ridge Landscaping:	C.R. Thomson
Place and Date of Trial/Hearing:	Kelowna, B.C. September 24 & 25, 2009
Place and Date of Judgment:	Vernon, B.C. October 8, 2009

Introduction

[1] On August 10, 2006, the plaintiff slipped, fell and was injured on a walkway in a municipal park. She asserts that the municipality and its maintenance contractor are liable for failing to keep the walkway safe for public use. The plaintiff relies on the *Occupier's Liability Act*, R.S.B.C. 1996, c. 337.

[2] The defendants both assert that the park was reasonably inspected and maintained. They say that the plaintiff was the author of her own misfortune by not keeping a proper lookout for her own safety.

[3] As between themselves, the defendants allege that if there is liability to the plaintiff, it lies with each other. The city asserts a separate claim against the contractor for indemnity for its cost of defending the claim, and bases that claim on a specific term of the contract between them.

The Facts

[4] The park in issue is called Polson Park. It is in downtown Vernon. It is one of, if not the, largest parks in Vernon. The park contains, among other things, a playground, a skateboard bowl, grass, gardens and a fountain in a large pool of water. The pool of water is commonly known as either the "lagoon" or the "duck pond". A walkway encircles the pond. The walkway crosses the pond's northern end by a bridge. On the pond's eastern shore, where the incident at issue here took place, the walkway comprises bricks set between two curbs that are flush with the ground. There, the walkway parallels a grassed strip at the water's edge. Wild ducks and geese inhabit the pond and its shores. The pond has been a feature of Vernon's parkland for at least several decades.

[5] Some years ago, the city of Vernon decided to not employ people or purchase the equipment necessary to maintain the 60 or 70 parks within its boundary. The city decided instead to tender a contract for maintenance of its parkland. The city followed an open and diligent tender process. Blue Ridge submitted a bid in response to the tender. The city assessed Blue Ridge's capacity to perform the work and its reputation for reliability. Eventually, the city accepted

Blue Ridge's bid, and the two parties made a contract. That contract comprised a relatively short document together with the tender itself. The contract began in 2005 and ran through 2006 and 2007.

[6] Among other obligations, the contract required Blue Ridge to remove debris, including animal manure, from the park's grounds on a daily basis. Pursuant to the contract, the city stipulated that the brick walkway around the duck pond should be washed with hose water on Tuesdays, Thursdays and Saturdays. The purpose of washing the walkway was to remove loose debris and bird excrement from the brick surface.

[7] The city supervised Blue Ridge's performance of the contract. Three city employees regularly attended the park. They were the city's head gardener, Mr. Taylor; its parks superintendent, Mr. Haverty; and its manager of public works, Mr. Rice. Each of these individuals were empowered to report any deficiencies in Blue Ridge's operations at the park. Blue Ridge itself employed a foreman, Mr. Sorenson, to oversee the park. The park maintenance contract stipulated that Blue Ridge have a person on the park grounds eight hours per day, seven days per week, between April 1st and October 31st. Blue Ridge hired Mr. Carboni to work at the park between 7:30 a.m. and 4 p.m. on weekdays, and another person to work the same hours on weekends.

[8] Mr. Carboni was on duty at the park on the day when the plaintiff had her slip and fall. That day was August 10, 2006. It was a Thursday. Mr. Carboni started his day by opening the traffic gates at the park's entrances. He then checked the washrooms and the park's other facilities for damage or vandalism. He used a rake to remove debris from the sand at the playground. He testified that, as per his usual routine and as required by the city, he used water from a pressure nozzle on a hose to wash the brick walkway around the duck pond. He testified that he also used a squeegee to remove any stubborn bits off the brick.

[9] There was only one area of the walkway that Mr. Carboni did not wash that day. That area lay at the perimeter of a clump of trees and shrubs lying between the

pond and the walkway and located near the south end of the pond. He did not wash there because that area was already under water. Water had gathered there from a leak in an underground irrigation pipe. Mr. Carboni washed the walkway up to the northern and southern points where water had pooled on the walk.

[10] Mr. Carboni finished washing the walkway sometime around 10:30 or 10:45 a.m. Roughly half an hour later, the plaintiff began to walk along the walkway toward the spot where she would have her fall.

[11] The plaintiff was then 58 years old. She was in good health. She did not suffer from any condition that impaired her ability to ambulate safely and independently. The plaintiff arrived at the park with four of her grandchildren sometime between 11 and 11:30 a.m. She spent a little bit of time with them at the playground, and then she and her granddaughter Sara set out to walk around the duck pond. They crossed the bridge at the northern end of the pond and headed south. The plaintiff was not concentrating on watching each step she took. She assumed that the walkway was level and safe to use, so she did not stare at her feet as she moved along. When she first noticed the pooled water on the path, the plaintiff was some distance north of it. She perceived it to be wet and possibly dangerous. She was, at that point, not yet actually in the area that was wet. She called out a warning to her granddaughter who was ahead of her. The warning was something to the effect of “be careful, this is unsafe”. Just as those words left her mouth, the plaintiff lost her balance and fell to the ground.

[12] The plaintiff did not describe how she fell. She did not say whether it was her right or her left foot that went out from under her, or whether one or both of her knees had buckled. Neither did the plaintiff describe what parts of her hit the ground. The parties agreed ahead of the trial that, as a result of the fall, the plaintiff suffered a broken right kneecap. I infer from that evidence that, in the course of her fall, the plaintiff somehow suffered a blow to her right knee.

[13] The plaintiff found that she could not get up from the ground. She called her husband to come and get her. He arrived at the scene about 15 minutes later. The

plaintiff and her husband testified that there was bird excrement on the sidewalk in the area where the plaintiff fell. No one looked at the bottom of the plaintiff's shoes, so no one could testify whether her shoe had come in contact with that excrement. The plaintiff testified that bird droppings had transferred from the ground onto her leg and the shorts that she was wearing.

[14] Four days later, the plaintiff's husband attended the park and took two photographs of the area. He concentrated on capturing the standing water near the bushes beside the pond. The area where the plaintiff fell is dry and lies in the middle ground of one of those photographs. That picture does not show the area in question in any meaningful detail.

[15] All of the witnesses who testified about ducks and geese in the park acknowledged that they are wild animals and that where and when they chose to relieve themselves can neither be predicted nor controlled.

[16] The parties agreed that, if the plaintiff's action succeeded, her injuries merited a global award of $45,000.

The Plaintiff's Position

[17] The plaintiff says that if the walkway beside the pond had been washed that day, then there would not have been bird droppings on it when she came along. She urges the court to conclude that Mr. Carboni must, therefore, be either lying or mistaken in his evidence. If the walkway was not washed then, according to the plaintiff, the defendants did not take reasonable steps to ensure that the walk was clear of slippery material such as bird droppings.

[18] As against the city in particular, the plaintiff argues that it had a duty to post signs warning folks of the risk of bird droppings on the walkway, or that it ought to have placed barricades to prevent people from using soiled paths.

The Defendants' Common Position

[19] The city and Blue Ridge both assert that they instituted a reasonable system of inspection and maintenance of the park and its walkway. They say that the walk

was washed within an hour of the plaintiff's fall and that it would be unreasonable for them to be held to a higher standard of care than that. The defendants rely on numerous decisions of the courts of this province which establish that the occupier of property is not an insurer of his visitor's wellbeing, but rather that the occupier is obliged to take reasonable steps in the circumstances to provide his visitor a safe environment. They say that the walkway wash routine that was in place on August 20, 2006, constituted a reasonable effort to keep the walkway safe and that, having carried out that routine, the defendants cannot be held liable for the plaintiff's injury.

[20] In the alternative, the defendants argue that the plaintiff was the author of her own misfortune by failing to watch where she was walking.

The City's Position about Warning

[21] The city argues that it is not obliged to warn park users against obvious hazards. It says that the duck pond has that name for a reason, and that it would be obvious to any sentient being who passed by that wild birds frequented the area. The city says that no normal person needs to be warned that wild birds may leave droppings anywhere and that those droppings are slippery if stepped on.

Discussion

[22] After her fall, the plaintiff found that her leg and shorts were smeared with bird droppings. The only mechanism by which droppings could have been transferred onto her leg and clothing was by contact with the ground in the area where she fell. The only sensible inference that one can draw from that is that there were bird droppings on the path where she fell. I accept the plaintiff's evidence that her fall was sudden and unexpected. The plaintiff did not look for droppings on the bottoms of her shoes, but that does not mean that there were no droppings there. In my view, it is more likely than not that the plaintiff lost her balance as a result of stepping on some bird droppings.

[23] There are two fatal flaws in the plaintiff's argument that the walkway had not been cleaned that morning. The first flaw is that Mr. Carboni was a reliable witness.

He was not caught out on inconsistencies in his testimony. His evidence was cogent, consistent and credible. I accept Mr. Carboni's evidence without hesitation. I find that sometime shortly before 11 a.m., Mr. Carboni used water and a squeegee to wash the brick walkway in the area where the plaintiff fell. I find that he did a thorough job.

[24] The second flaw in the plaintiff's position is the indisputable fact that ducks and geese empty their bowels wherever and whenever they see fit. While I accept the plaintiff's evidence that there were bird droppings on the walkway when she fell, that fact does not make it more probable than not that Mr. Carboni failed to wash the sidewalk. All it would take for droppings to appear on the sidewalk would be for one or more birds to wander by after Mr. Carboni had finished his work.

[25] No party suggested that Blue Ridge or the city had a legal duty to follow each of the park's birds with a little scoop and a baggie in hand so as to catch every dropping as it hit the pathway. It would be absurd to suggest that their duty of care went so far as that. The law agrees – the courts in this province had repeatedly stated that all that is required of the defendants in this situation is to take reasonable, not perfect, care in all the circumstances so as to allow the plaintiff to be safe when using the park. See, for example: *Carlson v. Canada Safeway Ltd.* (1983), 47 B.C.L.R. 252 (C.A.), *Leweke v. Saanich School District No. 63* (2005), 46 B.C.L.R. (4th) 257 (C.A.), and *Duddle v. Vernon (City)* (2004), 35 B.C.L.R. (4th) 24 (C.A.).

[26] The city likewise was under no duty to warn the plaintiff that the path might, from time to time, be slippery due to the presence of duck droppings. As McEachern C.J. said in *Malcolm* v. *British Columbia Transit* (1988), 32 B.C.L.R. (2d) 317:

> In my respectful view, it is not negligence or a breach of any duty not to warn an adult person, not suffering under any disability, of the ordinary risks arising out of the exigencies of everyday life…

[27] The slippery nature of droppings left by wild birds in a public park such as Vernon's Polson Park come within that same category of ordinary risk about which every adult and non-disabled person must be taken to be aware.

[28] I find that about half an hour before the plaintiff came along, Mr. Carboni washed the area of the walkway where the plaintiff had her fall. I can make no conclusion other than that washing the walkway half an hour before the plaintiff fell satisfied the defendants' duty of care to the plaintiff. I find that the plaintiff was simply unlucky – she stepped on some bird droppings and she slipped. No one can be held legally liable for her misfortune.

[29] The plaintiff's claims against the defendants must be dismissed. The defendants are entitled to their costs on Scale B.

Third Party Notices

[30] Neither the city nor Blue Ridge did or failed to do anything vis-à-vis park maintenance that led to the other being liable to the plaintiff. It follows that their third party notices having to do with claims of negligence and failure to perform a duty of care to the plaintiff are dismissed. The costs of those proceedings offset each other, leaving nothing to be recovered in damages or costs by either defendant against the other.

[31] The city's third party notice seeking indemnity for its costs of defending the plaintiff's action is based upon this provision of its contract with Blue Ridge:

> The Contractor shall save and hold harmless The City of Vernon, The District of Coldstream, The Regional District of North Okanagan, its officers, agents, servants and employees, from and against any and all suits or claims alleging damage or injury (including death) to any person or property that may occur or that may be alleged to have occurred, in the course of the performance of this Contract, whether such claim shall be made by an employee of the Contractor, or by a third person and whether or not it shall be claimed that the alleged damage or injury (including death) was caused through a wilful or negligent act or omission of the Contractor, its officers, servants, agents or employees, or a wilful or negligent act or omission of any of its sub-contractors or any of their officers, servants, agents or employees, and at its own expense, the Contractor shall defend any and all such actions and pay all legal charges, costs and other expenses arising therefrom.

[32] Blue Ridge asserted that the question of whether it should indemnify the city for the cost of defending the plaintiff's action is the subject matter of a proceeding that is underway between its insurer and the city's insurer. Blue Ridge maintained

that that proceeding is the proper venue to determine whether Blue Ridge must indemnify the city for its legal costs.

[33] In my view, Blue Ridge's argument is a red herring. The city's third party notice seeking indemnity for its defense costs arises directly out of the terms of the contract to which Blue Ridge agreed. There is nothing in the provision noted above that requires Blue Ridge to pay the cost of defense out of insurance money. While it is true that the contract goes on to require Blue Ridge to acquire a liability insurance policy and to make the city a named insured under the policy, that insurance provision stands quite apart from the indemnity clause. It seems obvious to me that if, for example, Blue Ridge had failed to obtain third party insurance, the city would nevertheless have been entitled to require Blue Ridge to defend and indemnify the city out of Blue Ridge's own pocket.

[34] I find that the plaintiff's claims against Blue Ridge and the City had primarily to do with alleged deficiencies in Blue Ridge's performance of the maintenance contract. There were peripheral claims, not seriously pursued, that the city failed to, for example, post signs warning park users about bird droppings on the pathway. No time at trial was taken up with those peripheral claims. I find that at least 90 per cent of the city's cost of defense was taken up by dealing with the plaintiff's complaints about Blue Ridge's performance of the maintenance contract. I heard no evidence to suggest that Blue Ridge should be relieved of the obligation to indemnify the city as it agreed to do in the contract. I find, therefore, that the city is entitled to a declaration that Blue Ridge is liable to indemnify it for 90 per cent of its costs of defending the plaintiff's action.

[35] Of course, this judgment is limited to the cost of counsel retained, instructed and actually paid by the city. Legal and other fees paid by the city's insurer are not recoverable under my ruling and would properly be the subject of the separate petition proceeding between the defendants' insurers.

[36] In addition, the city is entitled to its costs on Scale B of its third party notice seeking the declaration if entitlement to indemnity. To prevent double recovery, any

costs that the city may collect from the plaintiff will count as a credit against Blue Ridge's obligation to indemnify the city.

"P.J. Rogers, J."
The Honourable Mr. Justice Rogers