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IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Madam Justice Satanove
Pronounced in Chambers
March 9, 1998

BETWEEN:

KARL WIEBE

PLAINTIFF

AND:

CITY OF ABBOTSFORD

DEFENDANT

Counsel for the Plaintiff: S.T. Cope

Counsel for the Defendant: J. Cotter

[1] THE COURT: The defendant applies, by way of summary trial, for the dismissal of the plaintiff's case. Although the plaintiff did not bring its own Rule 18A application for judgment, counsel took no objection to the entire case being tried summarily.

[2] The facts giving rise to the plaintiff's claim are these: in the afternoon of August 14th, 1996, the plaintiff, who is now twenty-six years of age, went with his wife and young

daughter to the fountain in front of the Matsqui Centennial auditorium in Abbotsford, B.C., to go wading in the water. They walked along the eastern walkway which is designated number 6 on the plan attached to Mr. Hudson's affidavit. The plaintiff's daughter went splashing in. The plaintiff and his wife took their shoes off and waded in their shorts. They sat on the bottom step of the circular grandstand which protrudes into the fountain area.

[3] After about twenty minutes, the sun started to go down. The plaintiff's daughter was chilly, so he left his seat to go to the car to fetch her a drink and a towel. The plaintiff took about three or four steps in the water and his left leg went down. His right foot was still on the pebbled surface of the ground, but his left foot was in a hole. His left foot hurt. He looked down and saw his toes were twisted and he had abrasions on the side of his leg.

[4] The next day, the defendant determined that three grates, which usually sat in a recessed lip near the top of the drainage trench were missing, creating a gaping hole of about one and one-half feet in depth.

[5] The plaintiff was diagnosed on August 15th, 1996 with a fractured third toe. He missed three weeks of work and lost one thousand eight hundred and five dollars sixty-five cents in

wages. Approximately two months later, he was able to return to his usual routine, including karate lessons.

[6] The plaintiff pleads that his fall and injuries were caused by the negligence of the defendant, who is responsible for the maintenance of the fountain and its grounds, in that it failed to keep it in reasonably safe condition, failed to warn of a hidden or any danger and ignored a known trap, that is, the missing grates.

[7] The defendant pleads that it was not negligent and that the plaintiff was the author of all or part of his own misfortune. It also pleads that it has fulfilled its obligations under the Occupier's Liability Act.

[8] In my opinion, it is this latter defence which discloses the real issue in this case. The defendant admits that it falls within the definition of occupier under the Occupier's Liability Act, as a person who has responsibility for and control over the premises, the activities conducted on the premises and the persons allowed to enter those premises. However, the defendant denies that it has a duty to persons such as the plaintiff because of the operation of Section 3(3)(a) which states:

> An occupier has no duty of care to a person in respect of risks willingly accepted by that person as the person's own risks.

[9] The defendant relies on three signs posted around the perimeter of the fountain area which say "no wading" and depict a person with water at his feet inside a red circle through which a thick red line is drawn. The plaintiff says he did not see the signs and was not aware they were there and in any event, they never warned of the danger of missing grates or any danger at all.

[10] Counsel for the plaintiff emphasized the inviting nature of the lakeshore type of design of the fountain premises with its steps leading down to the water and benches surrounding the perimeter. The plan shows that no sign appears along path number 6 or at the junction of this path and the fountain premises.

[11] I agree that the set-up of the fountain premises is conducive to wading and is likely a temptation to young and old alike on a hot summer's day. Although the prohibitory signs are clear, they are posted low to the ground and in only three places. I find on a balance of probabilities that the plaintiff likely was not aware of the signs, coming as he did along path number 6. Therefore, he cannot be said to have willingly accepted the risk and the signs on their own do not absolve the defendant from a duty to the plaintiff.

[12] I find that the defendant did have a duty to the plaintiff, and that duty is defined in Sections 3(1) and (2) of the Occupier's Liability Act.

> An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person on the premises, whether or not that person personally enters on the premises will be reasonably safe in using the premises.

[13] It is trite law that the defendant is not in a position of an insurer, and that the duty is not one of strict liability (see ***Milina v. Bartsch*** (1985), 49 B.C.L.R. (2d) 33, at page 58). It is a duty to use reasonable care to prevent injury from dangers which are known or ought to be known, taking into account the nature of the undertaking, its inherent risks, and the appreciation of those risks by the participant.

[14] The onus is on the plaintiff to show that the defendant breached its duty of care. In his submissions, counsel for the plaintiff did not refer to the adequacy or otherwise of the maintenance and inspection system of the defendant. Instead, counsel concentrated on the inadequacy of the signage and the failure to warn.

[15] The evidence regarding the defendant's system of inspection and repair was quite thorough. Michael Springer, an engineer, had been hired as a contractor by the defendant since

April 1993 to look after inspection and maintenance of the fountain in question. His duties included such things as keeping the pumps running, cleaning the strainers, keeping the brominators running, draining, pressure washing and other general maintenance tasks.

[16] He deposed that since February 1996 he inspected the fountain several times per week and part of his check was to determine that the grates were in place. His formal checks were recorded on the same day on special forms, but in addition, he often checked informally throughout the day as he performed his other tasks.

[17] Mr. Springer's records were attached to his affidavit and they disclosed three things worthy of note:

1. His inspection of the grates were often noted.
2. All but one report indicated that the grates were "okay". On July 1, 1996 the record indicated he found one grate misplaced and had to put it back in place.
3. He performed a check on August 13th, 1996, the day before the plaintiff's fall and the grates were okay. Mr. Springer also deposed that he checks to see the no wading signs are in place and if he sees anybody wading, he advises them to get out.

[18] With the wisdom of hindsight, one could say the signs should read, "Danger, no wading, do so at your own risk," and should be posted on every concrete block around the perimeter

or that the inspections should take place every day or twice a day, but that in my opinion would be the counsel of perfection, and as I stated earlier, the law requires reasonableness, not perfection. In my view, the plaintiff has failed to show a breach of the duty of care by the defendant. The defendant has met the allegation with sufficient evidence of reasonable care. The plaintiff's case must be dismissed.

[19] Now, would you like to make submissions as to costs?

[20] MR. COTTER: Costs follow the event?

[21] MR. COPE: That's reasonable, My Lady.

[22] THE COURT: All right. I am concerned about a case of this nature being brought in Supreme Court. It appears from both sides that there was not any expectation that the damages would exceed the amount of the jurisdiction of Small Claims Court.

[23] MR. COPE: What is My Lady suggesting?

[24] THE COURT: Well, it is in my discretion to do something about that in respect to costs, but since that is not being sought by Mr. Cotter, I will not pursue it. I will just simply make the comment that in future, I do not expect to see this type of case at this level of court.

[25] MR. COPE: Your comments are noted.

Madam Justice Satanove