Citation: Kennedy et al. v. City of Coquitlam et al.
2002 BCSC 1057

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Docket: S042229
Registry: New Westminster

2002 BCSC 1057 (CanLII)

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LISA RAE KENNEDY, AN INFANT,
BY HER GUARDIAN AD LITEM, WANDA KENNEDY

PLAINTIFF

AND:

CITY OF COQUITLAM, TARA AILEEN FENIMORE
AND JOHN EDWARD FENIMORE

DEFENDANTS

REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE JOYCE

Counsel for the plaintiff — Jonathan Taylor

Counsel for the defendant City of Coquitlam — Jeremy M. Poole

Counsel for the defendants Tara Aileen Fenimore and John Fenimore — William R. Chalcraft

Date and Place of Hearing/Trial: June 12, 2002
New Westminster, BC

INTRODUCTION

[1] On the evening of February 25, 1997 Lisa Kennedy, Tara Fenimore and a number of other young persons attended a weekly meeting of local teenagers at the City of Coquitlam's recreation facility. Tara had driven her father's car to the meeting. After the meeting, Lisa was injured when she ran after Tara's car in the parking lot. She fell beside the car and one of its wheels ran over her foot.

[2] Lisa says that in running after the car she was playing a "game" that a number of the teenagers often played with Tara after the meetings. The plaintiff accepts that she was negligent in engaging in this activity but submits Tara was at fault by participating in the game and encouraging Lisa to run after the car. The plaintiff submits the City was at fault in failing to take adequate steps to ensure that young people, including Lisa, did not engage in the dangerous game in its parking lot.

2002 BCSC 1057 (CanLII)

[3] Tara Fenimore denies she participated in a chase game the evening Lisa was injured. She says Lisa suddenly ran up to the car, jumped onto the side of it, then fell.

[4] The City says it took all reasonable steps to prevent the teenagers from engaging in the car chase game.

[5] The defendants submit the plaintiff's injury was caused solely by her own negligence.

[6] Even though this case involves a conflict in the evidence, counsel for all parties submit that the court can make the necessary findings of fact and urge the court to resolve the issue of liability pursuant to Rule 18A. They agree that damages will be assessed at a later time if the plaintiff is successful on this application.

BACKGROUND FACTS

[7] Lisa Kennedy was 13 years old at the time of the incident. She was a member of the Town Centre Teen Committee ("TCTC"), an organization of teenagers from Coquitlam who organize events for local teenagers. The TCTC met weekly in the City's recreation facility.

[8] Tara Fenimore was also a member of the TCTC and an acquaintance of the plaintiff. She was 16 years old at the time of the accident.

[9] On a number of occasions prior to February 25, 1997 Lisa, Tara and others participated in a "game" in the parking lot following the TCTC meeting. Tara would drive her car, at a slow speed, while other teenagers ran after it. The first person to catch up to the car would be allowed a ride.

[10] In early January 1997 Mr. Darren Miller, a recreation leader employed by the City, learned that a number of teenagers had been engaging in the car chase game. He spoke to a number of them and told them not to engage in inappropriate conduct in the parking lot. Lisa does not recall whether she was one of the persons to whom Mr. Miller spoke on that occasion.

[11] A few weeks later Mr. Miller learned that teenagers were "fooling around" in the parking lot. On February 11, 1997, following the meeting of the TCTC, Mr. Miller told all of the members of the TCTC who were present, including Lisa and Tara, that they were not to participate in any "horseplay" or inappropriate conduct in or around Ms. Fenimore's car.

[12] Lisa deposed that, despite the warning, she and others engaged in the chase game the following week. There is no evidence Mr. Miller, or anyone from the City, was aware of the activity on February 18th.

LIABILITY OF TARA FENIMORE

[13] In my view, the liability of Tara Fenimore depends on whether the plaintiff has proved either of two facts: (a) that Tara participated in the chase game on February 25, 1997 or otherwise encouraged Lisa to run after her car, or (b) that Tara had a reasonable opportunity to stop her car when Lisa ran beside it but failed to do so.

[14] Tara's evidence was that she did not participate in the game and had no opportunity to stop the car before the accident occurred. The evidence of Lisa and her sister, Crystal, is to the contrary. Considering the inconsistencies between Lisa's evidence and that of Crystal and the discrepancies between their affidavit evidence and that given in cross-examination, I prefer Tara's evidence and conclude the plaintiff has not established either of the two factual bases that would support a finding of liability against Tara Fenimore.

[15] Tara's evidence was that after the meeting she remained in the lobby area of the recreation centre for about fifteen minutes, talking to other teenagers. She then left the building to go to her car. As Tara left the building Crystal and another teenager, Dan Kilby, accompanied her. She offered them a ride home.

[16] Tara deposed she had started towards home when the subject of how Lisa was getting home came up. Crystal told Tara her parents were going to pick up Lisa. Tara decided she did not want to give Crystal a ride home if Crystal could get a ride with her parents. She decided to return to the recreation centre to sort out how Crystal and Lisa were going to get home.

[17] Tara deposed that she drove towards the recreation centre intending to stop at the entrance so that Crystal could phone her parents and determine if they were intending to pick up Crystal and Lisa. She deposed there was a group of young people on the sidewalk near the recreation centre. Tara's evidence was that Lisa suddenly ran from the group towards her car from the left and jumped onto the side of the car, holding on to the driver's window. Tara stated she had no warning Lisa was going to jump onto the car. She said that when Lisa jumped onto the car she took her foot off the gas pedal but did not have time to brake before Lisa fell.

[18] In her affidavit in support of her application for judgment Lisa deposed she recognized Tara's driving on February 25, 1997 to be an invitation to the car chase game. She deposed that she ran beside the car for 25-30 seconds in plain view of Tara. She further deposed that to conclude the game she placed her hands on the driver's window to claim her seat in the car. Lisa deposed Tara did not stop, she slipped and the wheel of the car ran over her foot.

[19] At her examination for discovery Lisa testified Crystal told her that she, Crystal, was going to get a ride home with Lisa but that Lisa would have to phone their parents for a ride home. Lisa testified she did not see Tara leave in her car. The first time she noticed the car it had passed her and was moving towards the recreation centre. She chased after it. She did not recall anyone hanging out of the windows of the car taunting her. She admitted no one encouraged her to run after the car

2002 BCSC 1057 (CanLII)

that evening. Lisa testified that when she got to the car she jumped onto the side of the vehicle and held on by placing her hands on the window and her foot on a spot at the bottom of the car near the door. She said that she held onto the car for perhaps a second and a half before falling off. Lisa further testified that while she was holding onto the car it seemed to slow a little. She also testified she had never jumped onto the car on other occasions when she played the game and had not seen anyone else jump onto the car.

[20] Crystal swore an affidavit in support of her sister's claim. She deposed that the car chase game started because Lisa was too slow getting into Tara's car. She then deposed that while they were driving away from the recreation centre she, Dan Kilby and Tara decided to return to the parking lot in order to engage the younger teenagers in the car chase game. She deposed that Lisa caught up with the car and ran along side it for 5 to 10 seconds. She deposed that Tara sped up and then slowed again whereupon Lisa moved closer to the car and put her hands on the driver's open window sill. She deposed Tara did not stop the car, Lisa slipped and fell.

[21] When Crystal was cross-examined on her affidavit she testified that Tara had agreed to give herself and Lisa a ride home. However, when she got into Tara's car Lisa was still in the recreation centre. She testified they decided to drive off and pretend that Lisa was not going to have a ride. When the car departed Lisa was not in the area. Crystal testified that Tara circled the parking lot a few times with teenagers, including Lisa, chasing the car. She said that she and others were encouraging Lisa to chase the car. Crystal testified Lisa ran beside the car with her hands on the window. She said Tara then sped up and Lisa fell.

[22] The main inconsistency that emerges from the plaintiff's evidence concerns the manner in which she chased the car. It goes to the heart of her case. In her examination for discovery conducted June 28, 1999, Lisa testified she ran next to Tara's car for a very short period of time, jumped onto the car and then fell off. In her affidavit sworn May 17, 2002, Lisa deposed she ran alongside the car for 25 – 30 seconds before placing her hands on the car. She does not say anything about jumping on the car. The version given earlier at the examination for discovery tends to corroborate Tara's evidence.

[23] Crystal's evidence about how the game started is not internally consistent. On the one hand she deposed that the games started because Lisa was slow getting into the vehicle. On the other hand she testified that Lisa was not even outside when Tara and she left in the car.

[24] Lisa's evidence and that of her sister differs in a number of respects. Crystal testified that Tara had agreed to give her and Lisa a ride home, whereas Lisa testified Crystal told her she would have to phone her parents for a ride home. Crystal testified she and others encouraged Lisa to chase the car, but Lisa said no one encouraged her to chase the car that evening. Crystal's evidence was that Tara drove around the parking lot a number of times while Lisa and other teenagers chased the car, while Lisa's evidence was that she saw the car, ran after it, caught up, slipped and fell.

2002 BCSC 1057 (CanLII)

[25] I conclude that when Lisa saw Tara's car returning to the recreation centre she decided that she was going to chase after it as she had on other occasions. However, I find that Tara was not intending to engage in the game. She was returning to the recreation centre for another purpose. I am not satisfied Tara did anything to lead Lisa to believe that she ought to engage in the game. I am satisfied Lisa suddenly ran from her position of safety near the building towards Tara's car, jumped onto the side of it, and then fell off before Tara had an opportunity to bring the car to a stop.

[26] Although regrettable, I conclude that Lisa's injuries resulted from her own actions and not through any negligent acts of the defendant Tara Fenimore.

LIABILITY OF CITY OF COQUITLAM

[27] The plaintiff submits that at common law and under the *Occupiers Liability Act* the City had a duty to use reasonable care to ensure the safety of the teenagers, including Lisa Kennedy, while on its property. The plaintiff submits the City had a duty to supervise and control the activities that occurred in its parking lot and failed to take reasonable steps to meet the standard of care required of it.

[28] In January 1997 Mr. Miller learned of the potentially dangerous game that the teenagers were playing in the parking lot after their meeting. He gave an informal warning to some of them. He subsequently learned that the teenagers were continuing to engage in the activity and gave a formal warning to all teenagers who attended the meeting on February 11, 1997. Lisa was present and heard the warning. She described it as "strict and specific". Mr. Miller was serious in his demeanour when he gave the warning and made it clear that the game was dangerous and was not to continue. The issue is whether that was sufficient or whether the City ought to have taken further precautions.

[29] Counsel for the plaintiff submits that the City knew its earlier warning had not been heeded and that, consequently, it ought to have done more to ensure the teenagers did not continue the dangerous activity. He suggests the City could have required Mr. Miller to supervise the teens in the parking lot until they departed. He suggests Mr. Miller could have involved the parents, insisting that they attend promptly to pick up their children after the meetings. Plaintiff's counsel submits the City's failure to take some precautionary measure amounts to negligence and breach its statutory duty.

[30] The City submits the plaintiff voluntarily engaged in an activity that she knew was dangerous and expressly prohibited by the City. It says it was the plaintiff's action, not any failure on its part, which caused her injury. It submits the *Occupiers Liability Act* imposes a duty to warn of hazards and takes steps to ensure that persons using the premises are reasonably safe. But, it argues, the statute does not impose a duty on an occupier to protect people who deliberately and knowingly engage in dangerous conduct that is expressly prohibited by the occupier.

[31] The City says that whatever duty it owed to the plaintiff was discharged by the explicit warning given by Mr. Miller. I agree.

2002 BCSC 1057 (CanLII)

[32] Counsel for the City refers to the decision in ***Lust (Public Trustee of) v. Kamloops Exhibition Assn.*** [1996] B.C.J. No. 1351 (S.C.), aff'd [1998] B.C.J. No. 2356 (C.A.). In ***Lust*** an 11 year old boy was injured when he fell through the roof of a tent structure that was located on the fairground of the Kamloops Exhibition Association. The plaintiff and his friend had climbed onto the roof and it gave way under their weight. At the time of the incident the plaintiff was under the care and supervision of his friend's father, Mr. Ritson-Bennett. Earlier in the evening a horse trainer had seen the boys on the roof and shouted at them to get down, which they did. When Mr. Ritson-Bennett learned the boys had climbed onto the roof of the tent he told them not to do so again because it was dangerous. Later that evening, after Mr. Ritson-Bennett had put the boys to bed, they got up and climbed onto the roof.

[33] The action against the exhibition association and Mr. Ritson-Bennett was dismissed. In concluding that Mr. Ritson-Bennett had not breached his duty of care Lamperson J. said at para. 32:

> Lenny was 11 years old and almost old enough to babysit. I find on the evidence that he was a fairly normal boy for his age and he must have understood quite clearly that he was not to go on to the roof of the beer garden. The boys had been chased away from that area by Mr. Barnes. Later when they were observed on the roof they were shouted at and told to get down by Mr. Stockwell as well as by Mr. Ritson-Bennett. I accept Mr. Ritson-Bennett's and Darcy's evidence that the boys were later told that they were not to go on the roof because it was dangerous. He put the boys to bed and there was no reason to think that they would get up, sneak out, and climb on to the roof of the beer garden. It is clear that Lenny and Darcy both were defying adults who had repeatedly warned them. It is suggested that Mr. Ritson-Bennett should have told the boys why it was dangerous to go on to the roof and that he was careless in this regard. In my view his failure to do so in these circumstances does not amount to negligence.

[34] In my opinion the City should not be held responsible for the results of the dangerous activity voluntarily engaged in by Lisa contrary to the clear and express warning and prohibition given by Mr. Miller two weeks before just as Mr. Ritson-Bennett was not liable for the injuries suffered by his 11 year old charge when he chose to defy the instructions given to him. The plaintiff was a normal 13 year old who knew she should not engage in this kind of activity because it was potentially dangerous. There is no evidence the City had any knowledge the teenagers were continuing to engage in the game after February 11th. In my view it was reasonable to assume that the teenagers had heeded the stern warning. I conclude the City did not breach any duty, either at common law or under the statute, by not placing a supervisor at the parking lot or taking the other steps suggested by plaintiff's counsel.

[35] It is unfortunate that the plaintiff was injured but there are times when persons must accept responsibility for their own actions and cannot look to others for recompense. This is such a case in my respectful view.

DISPOSTION

2002 BCSC 1057 (CanLII)

[36] The action is dismissed as against all defendants.

"B.M. Joyce, J."
The Honourable Mr. Justice B.M. Joyce

2002 BCSC 1057 (CanLII)