IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20060208
Docket: 04-3032
Registry: Victoria

Between:

Jacques Peraya

Plaintiff

And:

The Corporation Of The District Of Oak Bay
And Casey Ryder Formerly Known As Casey Dennis

Defendants

Before: The Honourable Madam Justice Sinclair Prowse

Oral Reasons for Judgment

In Chambers - by Teleconference

February 8, 2006

Counsel for Plaintiff: W. Southward
D. Thompson, Articled Student

Counsel for Defendants: M. Mackenzie

Place of Hearing: Victoria, B.C.

[1] **THE COURT:** The Plaintiff fell and injured himself while attempting to mount a piece of equipment in a fitness facility owned and operated by the Corporate Defendant, The Corporation of the District of Oak Bay. (Hereinafter this Defendant will be referred to as "Oak Bay".) The Personal Defendant, Casey Ryder, also known as Casey Dennis, had been using this piece of equipment immediately before the Plaintiff injured himself on it. In this action the Plaintiff claims damages arising from his injuries, contending that they (that is, his injuries) arose as a result of the negligence of both the Corporate and the Personal Defendants.

[2] In this Rule 18A application, Oak Bay seeks an order dismissing the claims against it. The Personal Defendant, Mr. Ryder, did not join Oak Bay in this application but he did provide them with an affidavit. The Plaintiff opposed this application and sought an order that the matter be referred to the trial list.

[3] With respect to the appropriateness of the Rule 18A application, upon reviewing the materials and considering the submissions of counsel, I am satisfied that it is appropriate to decide this matter under this Rule. Few, if any, of the material facts were disputed. Moreover, I am satisfied that I am able to find on the whole of the evidence the facts necessary to find the issues of fact and law and that it would not be unjust to decide this matter on this type of application.

[4] As far as the circumstances are concerned, as has already been touched upon, this incident took place in a fitness centre owned and operated by Oak Bay. Specifically, it took place as the Plaintiff was endeavouring to mount a treadmill. The

treadmills in this facility were lined up in a well-lit area, side by side, facing a glass wall which overlooked the pool area.

[5] To operate the treadmill, the user mounts it when it is turned off. There is a panel on the front of the treadmill. This panel is visible both when the user is standing beside the treadmill as well as when the user has mounted it.

[6] Written on this front panel is the following caution to the user, "Before starting the treadmill - straddle the treadmill". That is, the user is cautioned before starting the treadmill (before the tread starts moving) to place his or her feet on either side of the apparatus (that is on the non-moveable parts). When straddling the treadmill, the user then pushes various buttons to set the speed and grade at which he or she wants the treadmill to move.

[7] Once the treadmill is turned on, not only does the tread begin to move, but the dials on the front panel light up, providing the user with all kinds of information as to his or her progress throughout their workout, including such details as the distance they have walked, the time, the grade, and the speed. In addition to the panel lighting up when the treadmill is turned on, the tread itself makes a noise as it moves. The front panel remains lit (providing the workout information) and the noise of the tread continues until the treadmill is turned off.

[8] There is no dispute that the Personal Defendant, Mr. Ryder, had been using the treadmill on which the Plaintiff was injured seconds before the Plaintiff attempted to mount it. In fact, the evidence showed that Mr. Ryder did not consider that he had

finished using this treadmill when the incident occurred. That is, the evidence proved that he had only left it momentarily and intended to remount it and continue on with his workout. Mr. Ryder had been using the machine and was partway through his workout when he decided that he needed a drink of water. Rather than stop the machine and interrupt his workout, he dismounted it, leaving it running, intending to return momentarily to continue with the workout. Within seconds of his leaving the machine, the Plaintiff attempted to mount the treadmill, lost his balance, and was injured.

[9] These claims are founded in negligence. Although non-specifically set out in the statement of claim, Oak Bay inferred (correctly in my view) that the Plaintiff was claiming a breach of its duty of care under the ***Occupiers Liability Act,*** R.S.B.C. 1996, c.337, as well as an alternative claim of breach of its common law duty of care.

[10] Pursuant to the ***Occupiers Liability Act***, Oak Bay has a duty to ensure that its premises are reasonably safe for its customers, namely for people such as the Plaintiff. That duty of care does not impose a standard of perfection on Oak Bay but rather a duty of reasonableness. The test is an objective one. It is whether a reasonable person, upon being advised of all of the circumstances, would consider Oak Bay's premises to be reasonably safe for the people that were invited to use them.

[11] The duty of care on Oak Bay under the common law is similar - namely, whether the conduct of Oak Bay caused an unreasonable risk of harm to the people such as the Plaintiff that it has invited to use its premises. Again, the test is one of reasonableness, not perfection. Oak Bay must take reasonable care to prevent damage from an unusual danger which it knows or ought to know.

[12] For reasons that follow, I am satisfied that the evidence fails to prove that Oak Bay breached either its duty of care under the ***Occupiers Liability Act*** or its common law duty of care. To the contrary, the evidence shows that this incident probably occurred because of the Plaintiff's own failure to take care of himself.

[13] Specifically, given that the lights on the panel of the treadmill were on and working and that the tread on the machine was moving, the fact that the machine was on was there to be seen. Further, given that the movement of the treadmill was audible, the fact that the treadmill was on was there to be heard. Though the Plaintiff attests that he neither noticed the lights nor heard the movement of the treadmill, there is no explanation provided for that failure. The evidence proves that this hazard was there to be seen and to be heard. It was not hidden. The Plaintiff had his own duty to keep a proper lookout for his own safety and to be aware of his surroundings. The evidence shows that he breached that duty.

[14] The Plaintiff contends that Oak Bay was negligent and should have had signs up warning people not to get onto treadmills while they were moving. In my view, such warnings are unnecessary. Aside from the fact that it is not an industry

standard to have such signs posted, this was a danger that was there to be seen and heard. Moreover, the Plaintiff had used the treadmills on earlier occasions, so he knew or should have known the danger of mounting them while they were in operation. In any event, such signs would not have made any difference to the present case because the position of the Plaintiff is that he was unaware that the treadmill was on and moving.

[15] The Plaintiff further argues that Oak Bay should have ensured that everyone used a safety clip when using the treadmill. A safety clip or lanyard is a device that connects the user to the treadmill panel. One end of this lanyard is inserted into the treadmill panel and the other is slipped onto the clothing of the user. If the user loses his or her balance during the workout, that movement will cause the clip to be pulled from the panel which, in turn, will cause the treadmill to stop. The objective of this device is to prevent the user from being injured if they stumble. It is unknown whether there was a safety clip on this treadmill or not. Many of the treadmills have them, but not all of them.

[16] In this case, even if safety clips were mandatory, it would not have prevented this injury. Safety clips do not stop the treadmill unless they are pulled out of the panel on the machine. They are intended only to be pulled out of the machines in an emergency - that is, at the conclusion of a workout the safety clip would not be pulled out of the machine. Rather, the user would simply turn off the machine and then unclip the device from his or her clothing, leaving the safety clip hanging from

the panel so that the next user could clip it onto his or her clothing once they were using the machine.

[17] In this case, if Mr. Ryder had been using a safety clip (and it is uncertain as to whether he was or not) it would not have made any difference in the circumstances. He could still have left the treadmill operating simply by unclipping it from his clothing before dismounting. When he came back to continue his workout, he would simply re-clip it on his clothing. From the Plaintiff's perspective, it would not have made any difference, therefore, as to whether a safety clip was there or not and, in any event, it would have simply been hanging from the panel of the machine. His problem (that is the problem of the Plaintiff) was that he did not notice that the treadmill was on, even though that fact was visible and audible.

[18] Given all of these findings, I am satisfied that the evidence fails to prove that the Plaintiff's injuries arose as a result of the negligence of Oak Bay. For that reason, the claims against Oak Bay are dismissed.

[19] Counsel, that concludes my Reasons on this application unless you have any questions and unless you have any submissions with respect to costs.

(SUBMISSIONS RE COSTS)

[20] THE COURT: As the successful party, Oak Bay will be granted costs to be calculated on Scale 3. However, the Plaintiff will be granted liberty to apply to have

this order set aside, provided that notification of that application is given to Oak Bay within the next 14 day period.

[21] Do you think you could get instructions within the next two weeks?

[22] MR. THOMPSON: I don't think that should be a problem, My Lady, thank you.

[23] THE COURT: All right. You have to notify the other side on or before 14 days from today (which would be I believe February 22 at 4:00 p.m.) that your client is going to make this application. After that just set it down in front of me at any mutually convenient time at 9:00 a.m. We can deal with it by telephone.

[24] MR. THOMPSON: Yes, thank you.

[25] THE COURT: All right, but you have to do that on or before 4:00 p.m. on the 22nd. You don't have to have the application before then, but you have to notify your friend. All right?

[26] MR. THOMPSON: Yes, thank you, I understand.

[27] MS. MACKENZIE: My Lady, would that notification then be in the form of a formal notice of motion on seeking to have an application heard on the costs issue or is it just simply a written letter notifying?

[28] THE COURT: It is just a simple letter.

[29] MS. MACKENZIE: Thank you.

[30] THE COURT: I will really view this more as just a continuation of this particular application, and the rationale behind that is that just helps to keep the costs down.

[31] MS. MACKENZIE: Certainly, My Lady, thank you.

[32] THE COURT: All right. So if there is nothing else, then I will adjourn Court.

The Honourable Madam Justice Sinclair Prowse