

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Dykstra v. The Board of School Trustees of School District No. 42 (Maple Ridge-Pitt Meadows) et al,***
2005 BCSC 1205

Date: 20050822
Docket: S015852
Registry: Vancouver

Between:

Laura Dykstra

Plaintiff

And

The Board of School Trustees of School District No. 42 (Maple Ridge-Pitt Meadows) and The Corporation of the District of Maple Ridge

Defendants

Before: The Honourable Madam Justice Humphries

Reasons for Judgment

Counsel for the plaintiff

M.G. Schulz &
N. Benedet

Counsel for the defendant the Corporation of the District of Maple Ridge

J. M. Poole
Kevin McLaren

Date and Place of Trial:

May 9 - 13; 16 – 20;
June 28, 2005

Vancouver, B.C.

[1] On April 24, 2001, Ms. Dykstra, while attending a baseball game at Thomas Haney Park in Maple Ridge, fell and broke her left ankle. She is suing the District of Maple Ridge, admittedly the occupier of the park, in negligence, nuisance and breach of duty. The action against the defendant school board has been dismissed by consent.

Evidence called by the plaintiff

[2] According to Ms. Dykstra's evidence at trial, she was seated on the bleachers watching her son Matthew, then age 12, who was the umpire for a girls softball game at diamond #3. The bleachers are situated behind a chain link fence roughly between home plate and the dugout closest to first base, at the bottom of a slope. The ground between the bottom of the slope and the fence is flat, and the bleachers are situated on the flat ground.

[3] Ms. Dykstra said she dropped her son off at the game, went to park the car, and took her time getting back to the game. She was wearing running shoes. She sat on the bleachers, but decided she could get a better view behind home plate, so got off the bleachers, walked three or four steps, stepped in a drainage ditch, heard a crack, and immediately fell over. In cross examination, she agreed that she did not know at the time what she stepped into, and did not see a trench before or after her fall. She described where she had fallen to her father, and he later told her there was a drainage ditch there.

[4] After she fell, she could not get up. An ambulance was called and bystanders covered her with jackets. She was taken to the hospital emergency ward in

great pain, was eventually seen by a nurse and a doctor, and surgery was performed. She spent some days in the hospital, and returned home.

[5] While Ms. Dykstra was still in the hospital, her parents arrived in Maple Ridge from their home in Peachland. Her father went out to the sports field with her son. Mr. Dykstra testified that he was horrified to find a sharp hidden trench on the flat ground near the bleachers, and he became convinced that this trench caused his daughter's fall. He described this trench as four inches wide, three to four inches deep, or perhaps six inches deep, with gravel on the bottom, but hidden by the grass. He described it as a "nasty ditch," "a leg breaker", and said the possibility for an accident was "horrendous." He took a few pictures of the area, including the flat area at the bottom of the bleachers which shows a swale at the bottom of the slope, but he did not take any that show the characteristics of the trench he described. He said in cross examination that he could not photograph it although it was unclear why. He said he put his foot in the trench and it fit.

[6] The son, Matthew, now 16 years old, testified that he did not see his mother fall. He had seen her on the bleachers, then looked over and she wasn't there. He saw her laying on the ground a couple of feet away from the bleachers. He called "time" and asked her from behind the fence if she was alright. She said she would be fine so he continued the game until it was too dark to play anymore. He noticed the ambulance take his mother to the hospital, and when the game was over he went there himself with a neighbour.

[7] In cross examination, he said the grass was not wet and he did not remember if people put out coats for his mother. He said that when he saw his mother on the ground her leg was positioned so it was on the trench about four to five feet away from the bleachers.

[8] A few days later Matthew had a game at the same field, and was accompanied by his grandfather. He testified he showed his grandfather where his mother had fallen, and his grandfather took pictures.

[9] Ms. DeMarco, a biomechanical engineer, was employed by McInnis Engineering, the firm hired by the plaintiff to provide an opinion on the risk of injury from forces and loads applied to the body. Ms. DeMarco went to the Thomas Haney fields to take pictures on May 1, 2003, and again on January 25, 2005.

[10] In the first set of pictures, Ms. DeMarco took approximately 30 pictures of a drain about 10 meters away from the bleachers, and took many pictures of the swales draining into that drain. She testified she was looking for whatever might be a problem, but did not take many pictures of the area near the bleachers. She did see some uneven ground near the bleachers but she did not see a trench such as the one described by Mr. Dykstra.

[11] On the second occasion on January 25, 2005, Ms. DeMarco took photographs of the area four to five steps away from the bleachers, although she said Ms. Dykstra had told her she took ten to twelve steps before she fell. A distance of ten to twelve steps would have had Ms. Dykstra walking up the hill near

the bleachers, however, and Ms. DeMarco understood Ms. Dykstra had fallen before she got to the hill.

[12] Ms. DeMarco was accompanied by a woman wearing running shoes, and several pictures were taken of this woman's foot in various positions on the ground near the bleachers. There were no pictures of a trench, and Ms. DeMarco testified that there was no distinctive trench in the area, although there was some uneven ground. She said there was no dramatic change in the area between her visits in 2003 and 2005.

[13] Mr. Chimich, the biomechanical engineer who produced a report for the plaintiff, offered his opinion on how various types of movements of the ankle would produce the pattern of injuries suffered by Ms. Dykstra - that is three fractures to the ankle (a tri-malleolar fracture). It was his opinion that a misstep on uneven ground would be more likely to cause this type of injury than a slip and fall. However, Mr. Chimich was not aware of the ambulance crew report, which was tendered as evidence as part of the defendant's case and will be discussed later. Neither did he consider that Ms. Dykstra might have slipped walking up or down a slippery grass slope. He agreed that the injury could have been caused by a slip down the hill as described in the ambulance crew report, or by a slip while walking up the slope.

[14] Following the accident, Ms. Dykstra's parents spent several months with her, helping her cope with daily living. Her cast came off in the fall, and she began to improve, but was still in considerable pain and a further operation was required the next April to remove a pin in her ankle. She again improved, but has never been

able to return to her previous occupation as a nurse's aid, which she enjoyed. She now works in the records department in the same hospital.

[15] Ms. Dykstra said at trial that she had intended at the time of the accident to retrain as a licensed practical nurse and had taken some courses, but on discovery she had testified she did not have such an intention. She admitted that her discovery evidence was true and also agreed that she had obtained very low grades on the courses she had taken.

[16] Ms. Dykstra described a physically active life before the accident, and testified she participated in many sports activities with her son. Her son, now 16, did not support this testimony, and seemed surprised by the suggestion that his mother had ever been physically active. Nevertheless, it is clear Ms. Dykstra has suffered a marked diminution in her quality of life and ability to perform physical tasks as a result of the difficult and prolonged recovery period following the accident. Despite the unfortunate turn her life has taken, Ms. Dykstra seems to be a pleasant and positive person, determined to make the best of things.

Evidence called by the defendant District of Maple Ridge

[17] The defendant alleges that the accident did not happen as Ms. Dykstra recounts it. It is their contention that Ms. Dykstra slipped and fell down the wet and grassy slope, injuring her ankle, and they are not liable.

[18] Roger Coe, a witness for the defendant, testified that he attended the park on the afternoon of the incident. He was taking his young daughter to play baseball. There are several ball diamonds in the park, and as he walked behind home plate on

diamond #3 he was looking at the other diamonds to see if he could see the colours of his daughter's team. He testified the grass was wet and the ground was muddy in places.

[19] Mr. Coe noticed a woman approaching him walking on the grass along the top of the slope near the far end of the bleachers. He glanced away to the ball diamonds, glanced back and saw her several steps closer. He glanced away to the other diamonds and when he looked forward again, the woman was at the bottom of the slope on the ground, sitting with her hands behind her, one leg forward, and one leg bent under her, like a figure "4". Mr. Coe noted his daughter's coach, Brad, come and speak to the woman, but he himself continued to the dug-out. By the time the ambulance came, he was in the dug-out helping coach the game. He did not speak to Ms. Dykstra.

[20] Under cross-examination, Mr. Coe said he was sure the woman walking along the top of the slope was the one whom he subsequently saw had fallen because he remarked to himself when he first saw her that she was somewhat overweight, and he saw that that was the same person who had fallen down. He said by the time he closed the distance to where she was in the ditch, she was about 10 feet from where he had last seen her. When asked if it was possible that it was a different person, he said it was possible but only if somebody had "poofed" someone else into her place.

[21] Brad Perrie, one of the coaches, testified that he was present at diamond #3 when the plaintiff fell but he did not see her fall. He noticed the young umpire was

distracted, and upon going to see what was wrong, saw the plaintiff on the ground. She was at the base of the slope on her back, with her head pointed up the grade. He ran around the fence and asked her what had happened. She told him she had slipped and fallen. Her left lower leg was underneath her right left, and she said she was in pain.

[22] Mr. Perrie is trained in First Aid, but the plaintiff would not let him touch her, so he ensured an ambulance was called, got some coats to cover her and waited with her until the ambulance came. He told the drivers that she had slipped and fallen, and left her to the care of the attendants. He spoke to the plaintiff's son who said he wanted to finish the game.

[23] Aggie Pringle, the ambulance attendant, testified by video from Prince Rupert. She does not have a clear recollection of the incident, but does recall arriving at the park and finding the plaintiff sitting on the ground, saying her ankle hurt her, she thought she had broken it. On the ambulance crew report, which she had with her and which she filled in as she went, Ms. Pringle wrote: "Slipped down 3-4' embankment and jammed ankle at bottom (grass) felt and heard pop". She said that was a quote from the patient. Ms. Pringle applied a splint and the crew took her to Ridge Meadows hospital.

[24] Ms. Pringle recalls having a conversation with a nurse at Ridge Meadows but does not recall the conversation itself.

[25] Eva Teubert, a Registered Nurse, was working in the emergency ward at Ridge Meadows Hospital on the afternoon the plaintiff was brought in. She does not recall treating Ms. Dykstra, but testified regarding the notes on the back of the triage form which she identified as hers. A patient would be assessed at the triage counter and then assigned to a bed, where she would be seen by Ms. Teubert.

[26] Ms. Teubert wrote "slipped down small embankment, ankle 'popped'". She said she would use quotation marks to indicate that that was how it was described to her. She could have obtained the information from the triage nurse, the ambulance crew, or the patient. Regardless of whether she spoke to the ambulance crew, she would still speak to the patient if the patient could talk.

[27] Dr. Hargreaves saw Ms. Dykstra at Ridge Meadows that afternoon. She was in marked distress and was receiving morphine. His notes say "walking on grass and slipped down an embankment." He agreed that some of the words are similar to the nursing notes, but those notes do not contain a reference to walking on grass so he assumes he got that information from the patient.

[28] During cross-examination, Ms. Dykstra would not admit to having spoken to any of the health professionals, although she could not explain where the personal information recorded by Ms. Pringle would have come from. She suggested that her son Matthew might have been the source of the information, but he testified he was watching from behind the fence as the paramedics took care of his mother, and agreed that he never came around the fence. On discovery, Ms. Dykstra agreed that she could not recall what she told the ambulance attendant or the nurse.

[29] Dr. Younger, an orthopaedic surgeon and director of the foot clinic at St. Paul's hospital, testified that a significant amount of force is required to break three bones high up on the ankle and displace them. To displace the bones, the person has to tear the whole ankle joint and ligaments. Although he could not exclude a twisting injury, he said the majority of fractures of the type Ms. Dykstra experienced require a reasonable rate of speed combined with an impact and were consistent with slipping down an embankment and coming to a sudden stop.

[30] Mr. Gaudioso has worked for the District of Maple Ridge for 25 years. He was and is the foreman in charge of sports fields, including those at Thomas Haney Park. When the fields were built, the plans had called for a certain drainage system. "As built" drawings were never provided, but he was aware that all the drains noted on the original plans were not installed.

[31] There were swales running into a catch basin behind diamond #3, including a swale which ran along the bottom of the slope behind the backstop at diamond #3.

[32] Mr. Gaudioso had noted problems with surface water drainage ponding behind the backstop at diamond #3 at the bottom of the slope, and in the winter of 2000, he had the manpower to deal with it.

[33] He had his crew use a "ditch witch" to dig a line, 12-14 inches deep and 4 inches wide, at the bottom of the swale. They put in 1-2 inches of pea gravel at the bottom, installed a 3-inch perforated PVC pipe, tied it into the existing catch basin,

which required knocking a hole in the catch basin, and topped up the drain with pea gravel.

[34] They tamped it with their feet and levelled off the area with rakes. They did not change the contour of the land. He did not cover the drain with sand because he was trying to intercept surface water, and sand would defeat the purpose. The drain worked, and the area behind the back stop drained effectively.

[35] Mr. Gaudioso testified he went back half a dozen times in 2000 to walk the line. There was no settling of the pea gravel except right at the catch basin itself, and that had to be refilled and repaired.

[36] Mr. Rodenbush, an employee of the defendant and one of Mr. Gaudioso's crew, testified he did the bleacher inspections every month from 2000 until part way through 2003 when he became the mower operator. He walked the swale in question many times, noted the pea gravel in it, and found it to be firm. He recalled noting a hole once on the other side of the bleachers, which was promptly filled in. The area around the drainage grate at the catch basin would wash out from time to time after heavy rain, and would have to be repaired.

[37] Considerable time was spent at trial on the issue of whether Mr. Gaudioso was telling the truth about the method used to fill the depressions at the catch basin, or whether remedial work had been undertaken around the swale in the five months prior to trial, which is, of course, four years after the incident. Ms. DeMarco was sent

out again during the trial to take another set of pictures aimed at showing that Mr. Gaudioso had not told the truth when he said no such work had been done.

[38] I am unable to say that the pictures show that work had been done in the past five months, whatever relevance that might have for this trial. The area looks the same as it always has, and the grass was growing undisturbed. It does appear that at some point, sand was used around the catch basin, and Mr. Gaudioso said none had been used. However, he said his workmen would do a small repair without consulting him. Mr. Rodenbush, who has done the mowing on the field since 2003, testified he had never seen anyone working in the area this year. He did testify that it looked like there had been sand placed around the drainage grate, and said a crew member might take a shovelful from some other work going on.

Discussion

[39] If the fall had taken place at the drainage grate, the extensive photographic evidence, diagrams and testimony about it might have some relevance. However, the fall took place over by the bleachers, about ten meters from the grate. It is with respect to this area of ground that the defendant's alleged failures of construction, maintenance and inspection are relevant.

[40] The plaintiff's theory of liability rests upon the claim that her injury was caused by a hidden trench on the defendant's property. She faces a number of hurdles in trying to establish, on a balance of probabilities, that this was in fact what happened.

[41] The first hurdle facing the plaintiff is that none of the photographs depict the sharp deep trench described by Mr. Dykstra. Mr. Dykstra's own photographs do not show a trench, in spite of the horror he recounted at seeing such an obvious hazard. The ground near the bleachers is obviously subject to traffic, looks like it retains impressions of foot prints, and is somewhat uneven, but there is no trench on the level ground. There is a swale right at the bottom of the slope. It is this swale that was cut out by Mr. Gaudio's crew and filled with pea gravel. At the point where it goes near and under the back of the bleachers there is no trench. It is difficult to see a depression of any kind.

[42] Ms. DeMarco's evidence does not support the existence of a hazard near the bleachers; the best she could say was the ground was somewhat uneven. Her photographs do not show a trench, and Ms. DeMarco did not describe a depression. On her first visit, she took many pictures of the drainage grate several meters away because it is really the only point of interest in the area. The pictures she took of the ground near the bleachers are unremarkable.

[43] The second and most significant hurdle facing the plaintiff is the evidence of Mr. Coe, Mr. Perrie, and Ms. Pringle. Even assuming that Nurse Teubert's and Dr. Hargreaves' notes were, contrary to their usual practice, simply copied out from the ambulance crew report written by Ms. Pringle, Ms. Pringle's evidence is that she would not simply write down what she assumed happened. She would obtain the information from the patient. It is clear that at least some information on the report had to have come from Ms. Dykstra. It is reasonable to conclude that the

description of the accident, which no one else saw, had to have come from her as well. The description of events Ms. Pringle recorded and testified she obtained from Ms. Dykstra accords with Mr. Coe's evidence and with Ms. Dykstra's position post-fall as noted by Mr. Perrie: Ms. Dykstra slipped down the embankment and jammed her foot at the bottom.

[44] Once this theory of the plaintiff's injury is taken into account, the plaintiff's expert evidence loses much of its force. In fact, upon being presented with the ambulance crew report, and having had other scenarios suggested to him, Mr. Chimich could not say how the event likely occurred.

[45] On a consideration of all of the evidence, there is no support for the theory of the fall as developed by Ms. Dykstra's father and explained to her by him following the accident. Even Ms. Dykstra did not notice a trench before or after her fall, and did not describe her foot being caught in one. All she could say was she fell and could not get up.

[46] I am satisfied that the preponderance of the evidence supports the version put forward by the defendant. I find that Ms. Dykstra slipped on the wet grass and fell down the embankment and broke her ankle when she came to rest at the bottom. This is the only reasonable inference to be drawn from all of the evidence. This inference is consistent with Mr. Coe's evidence, that he saw a woman resembling the plaintiff walking along the top of the slope, glanced away briefly, and then saw her lying at the bottom of the slope. It is also the version recorded by Ms. Pringle, as given to her by Ms. Dykstra herself, and subsequently recorded Ms.

Teubert and Dr. Hargreaves. It is further supported by what Ms. Dykstra told Mr. Perrie - that she had slipped and fallen - and by the position in which Mr. Perrie found her, that is, on her back at the base of the hill, with her head pointed up the grade, her left lower leg bent under her right leg. This latter observation is consistent with Mr. Coe's evidence as to her position. Finally, the defendant's theory is consistent with Dr. Younger's expert medical opinion evidence.

[47] The plaintiff has not discharged the burden of proof. I am persuaded the more likely scenario is that put forward by the defendant. In these circumstances, there is no liability on the defendant either in negligence or in nuisance; nor has any causative breach of duty been established. In the result, the action must be dismissed.

[48] Unless there is some issue respecting costs of which I am unaware, the defendant will have costs at Scale 3, if sought.

"M.A. Humphries J."

The Honourable Madam Justice M.A. Humphries