

COPY

CANADA

PROVINCE OF BRITISH COLUMBIA

IN THE SUPREME COURT OF BRITISH COLUMBIA

(BEFORE THE HONOURABLE MR. JUSTICE ARKELL)

Vernon Registry
No. 5927/91

May 11, 1995
Vernon, B.C.

BETWEEN:

CLINT HALVORSON

PLAINTIFF

AND:

CITY OF REVELSTOKE

DEFENDANT

PROCEEDINGS AT

TRIAL

APPEARANCES:

K.R. CROSBY, ESQ.,

APPEARED FOR THE PLAINTIFF

MS. C. MOFFAT,

APPEARED FOR THE DEFENDANT

1 THE COURT: The Plaintiff in this action, Mr. Halvorson,
2 obviously suffered a fracture and dislocation of
3 his right ankle when he slipped while playing
4 tennis on the public tennis courts owned, operated
5 and maintained by the Defendant corporation, the
6 City of Revelstoke. Liability is now the sole
7 issue to be determined by the court. The quantum
8 of damages has very appropriately been settled by
9 counsel.

10 The injury suffered by Mr. Halvorson occurred
11 on September the 4th, 1991. His claim is pursuant
12 to the Occupiers Liability Act. It is admitted
13 that the City is the occupier of the tennis courts
14 and the City have also conceded that they did owe a
15 duty of care to persons using their tennis courts.
16 However, it is the Defendant City's position that
17 it did not breach the duty of care that it owed to
18 the Plaintiff.

19 The City's tennis courts were in existence for
20 approximately 12 years prior to 1991. These courts
21 are normally open to the public from 6:00 a.m. to
22 10:00 p.m., and from May until October. The City
23 has no record of any injuries occurring upon their
24 tennis courts during that period of time, and this
25 was the only reported incident.

26 The courts are surfaced with asphalt and a
27 special acrylic paint that was designed for tennis

DECISION

1 courts. This special acrylic surface was installed
2 in 1987, and it is now scheduled for replacement in
3 1995. The City followed a regular maintenance
4 program in the spring. The City's Parks crew spent
5 approximately five hours pressure washing the
6 surface with a fire hose. The fire hose was one
7 and a half inches in diameter and had a 90 psi
8 (pounds per square inch) pressure. A City employee
9 who had worked in washing the surface of the courts
10 testified that because of the pressure in the hose
11 it required two people to hold the nozzle and the
12 hose. Several times throughout the year the City
13 crew would also wash the courts with this fire hose
14 and would take approximately an hour to an hour and
15 a half to clean the courts with this water.

16 The courts were checked daily from Monday to
17 Friday, and once a week the facility supervisor for
18 the City would check the courts to ensure they were
19 in good condition. The facility supervisor
20 testified that he had never found slime on the
21 courts and they were not found to be slippery.

22 The tennis courtyard was surrounded by trees.
23 It was fenced with a high link fence and contained
24 two tennis courts. The entrance was on the south
25 side into the courtyard. The two courts ran north
26 and south. The westerly court had no net
27 installed.

DECISION

1 On September the 4th Mr. Halvorson and his
2 tennis partner Mark Olson arrived at the courts to
3 play tennis sometime between 12:00 noon and
4 1:00 p.m. The tennis courts had, in fact, been
5 power washed by the City crew on September the 4th,
6 that same date, between 8:00 a.m. and 9:00 a.m.
7 The net from the west court had been removed for
8 repairs.

9 Mr. Halvorson and Mr. Olson proceeded to the
10 east court, since there was no net on the west
11 court. Mr. Halvorson went to the north side of the
12 net because of water puddles or bird baths, as they
13 have sometimes been described, that were on the
14 south side of the net. Mr. Olson, by default,
15 played on the south side, which he said was wet,
16 approximately a quarter to one-third of the court.

17 The work superintendent for the City,
18 Mr. Fifield, stated when he arrived on that date he
19 did not see this amount of water on the court, but
20 he did see water on the north side by the net,
21 which was approximately one foot in diameter.
22 Mr. Fifield was on the court on September the 4th
23 at approximately 1:00 p.m., shortly after the
24 accident, when he was replacing the net on the west
25 court. He observed Mr. Halvorson laying on the
26 court with his broken ankle waiting for the
27 ambulance at that time.

DECISION

1 Mr. Halvorson and Mr. Olson were rallying when
2 Mr. Halvorson slipped and broke his ankle.

3 Mr. Halvorson was wearing court tennis shoes that
4 he had purchased approximately six months before
5 the accident. He had worn these shoes for playing
6 baseball, but he described the shoes as being in
7 good to excellent condition.

8 Mr. Halvorson had played on these tennis
9 courts previously. He described his tennis play as
10 below average, but he was competitive and played to
11 win. He didn't examine the court surface on
12 September the 4th, but he stated that it appeared
13 to be dry, although he noticed the water on the
14 south side of the court and he was concerned about
15 his safety because of the water, but decided to
16 play despite the risk involved.

17 Mr. Halvorson stated that he was near the base
18 line of the court when Mark Olson hit the ball
19 across the net to the corner of the court and as he
20 followed the flight of the ball he planted his
21 right foot but it slipped and then grabbed and his
22 ankle turned over and snapped. After the accident
23 Mr. Halvorson stated that he did not know what
24 caused the slip and fall, however, he did tell
25 other people and the treating physicians that:

- 26 (a) he slipped on the water;
27 (b) he stepped in the puddle; or

1 (c) hit a puddle of water.

2 At his Examination for Discovery on April the
3 23rd, 1992, he stated that neither he nor Mr. Olson
4 knew what he slipped and fell on. Mr. Halvorson
5 did speak to Mark Olson before his Examination for
6 Discovery and he spoke to him after he arrived home
7 from the hospital. At that time Mr. Olson stated
8 that Mr. Halvorson did not know what he had slipped
9 on. Mr. Olson, however, later stated that there
10 was a slippery spot on the court surface. It
11 appeared to be dry on top, but was wet underneath,
12 and this is what Mr. Halvorson had slipped on.

13 It is apparent from the evidence of
14 Mr. Halvorson that he knew that this was an outdoor
15 tennis court, that it was subject to the vagaries
16 of the weather and the deposits that might have
17 been placed there from the wind; being sand, silt,
18 leaves or twigs. There was, in fact, water on the
19 court at the time they were playing and they knew
20 that they had to be careful. There was obviously a
21 safety concern because of a chance of injury, but
22 both Mr. Halvorson and Mr. Olson chose to play
23 tennis that day anyway despite any water that was
24 on the tennis court.

25 Abby Russell, a woman who was called as a
26 witness for the Plaintiff, lived in that general
27 area beside the tennis courts and she testified

DECISION

1 that on that date she heard someone screaming,
2 which was obviously Mr. Halvorson. She ran to the
3 tennis court and she slipped when she entered the
4 tennis courts. She indicated that the courts, in
5 her opinion, were always slippery. This opinion
6 was not supported by any other witness or any other
7 evidence and it is apparent that Miss Russell never
8 filed a complaint of this concern of hers with the
9 City at anytime.

10 The photographs introduced in evidence of
11 these tennis courts, the evidence of the City of
12 Revelstoke employees, the employee from the City of
13 Kamloops and, most importantly, in particular, the
14 evidence of Mr. Gordon Spratt, a professional
15 engineer who has played and still plays competitive
16 tennis three to four times per week and has an
17 extensive experience in the construction, use and
18 maintenance of tennis courts, indicated that the
19 tennis courts in question, as owned by the City,
20 were in good condition and the City maintenance
21 program and operational procedures were, in his
22 opinion, better than average.

23 Where there has been a conflict between the
24 evidence and the opinions of Mr. Macdonald, the
25 expert called by the Plaintiff, and the evidence
26 and opinions of Mr. Spratt, I must say I prefer and
27 have accepted the opinions of Mr. Spratt.

1 I certainly accept Mr. Spratt's opinion that
2 slip-and-fall accidents on tennis courts during wet
3 periods are a fairly common occurrence. Mr. Spratt
4 also stated that water cleaning as used by the City
5 provided good results and that he had found on his
6 examinations no algae, slimes or silts on the
7 courts.

8 It was Mr. Spratt's opinion that ponding of
9 water or bird baths, as they have been described,
10 are conditions that are easily identified by a
11 tennis player. They either wait until the court
12 dries or they remove the water or they play
13 carefully and try to avoid the water or slippery
14 areas, and in that case they elect to assume the
15 risk of any injury. Bird baths, as Mr. Spratt
16 indicated, cannot be entirely avoided in the
17 construction of any tennis court.

18 I am satisfied here that Mr. Halvorson slipped
19 and fell when his footwear slipped and then
20 re-gripped on an adjacent dry area, causing his
21 ankle to over turn, thereby breaking the ankle
22 bone.

23 Section 3(1) of the Occupiers Liability Act,
24 states:

25
26 "An occupier of premises owes a
27 duty to take that care that in all the

1 circumstances of the case is reasonable
2 to see that a person, and his property,
3 on the premises, and property on the
4 premises of the person, whether or not
5 that person himself enters on the
6 premises, will be reasonably safe in
7 using the premises."

8
9 Subsection (2) states:

10
11 "The duty of care referred to in
12 subsection (1) applies in relation to the
13 "(a) condition of the premises;
14 "(b) activities on the premises; or
15 "(c) conduct of third parties on
16 the premises."

17
18 In the leading decision from the Supreme Court
19 of Canada in Malcolm and Waldick, 1991 83 D.L.R.
20 (4th) 114, at page 128 Mr. Justice Iacobucci stated
21 this:

22
23 "The goals of the Act are to
24 promote, and indeed, require where
25 circumstances warrant, positive action on
26 the part of occupiers to make their
27 premises reasonably safe. The occupier

1 may, however, wish to put part of his
2 property 'off limits' rather than to make
3 it safe, and in certain circumstances
4 that might be considered reasonable.
5 Where no such effort has been made, as in
6 the case at bar, the exceptions to the
7 statutory duty of care will be few and
8 narrow."

9
10 And at page 129 he stated the following:

11
12 "In my view, the legislator's
13 intention in enacting s. 4(1) of the Act
14 was to carve out a very narrow exception
15 to the class of visitors to whom the
16 occupiers statutory duty of care is
17 owed. This exception shares the same
18 logical basis as the premise that
19 underlies volenti, i.e., 'that no wrong
20 is done to one who consents.'"

21
22 Here the Defendant City have indicated that
23 they are not relying upon the defence of volenti.

24 The view as to s. 3(3) of the B.C. statute,
25 which was s. 4(1) of the Ontario statute, was
26 referred to in Bains and Hill, a 1992 decision of
27 the B.C. Court of Appeal in which Mr. Justice

1 Goldie said at page 195:

2
3 "It is accordingly clear the
4 defence afforded the occupier under
5 s. 3(3) requires proof that the plaintiff
6 assume both the physical and legal risk
7 involved."

8
9 In 1990 in Stynes and the Corporation of the
10 City of Victoria, cited in 43 B.C.L.R. (2d) 118, it
11 was a case involving a public tennis course
12 operated by the City of Victoria in which the
13 plaintiff in that case was playing tennis and
14 suffered an injury when he hit the curb that was
15 constructed at the rear of the tennis court.
16 Mr. Chief Justice McEachern dissented in that
17 decision, but in the majority decision of
18 Mr. Justice Gibbs, as concurred in by Mr. Justice
19 Toy at page 131, Mr. Justice Gibbs considered what
20 he said were the duty of care under four heads:

21 "(1) the existence of an unusual danger;

22 "(2) the existence or nonexistence of posted
23 warning signs;

24 "(3) the ease or difficulty with which the
25 unusual danger could have been avoided; and

26 "(4) the record of previous safe usage of the
27 premises."

1 At page 136 in the Stynes decision Mr. Justice
2 Gibbs said this:

3
4 "Having elected to provide tennis
5 playing opportunities for the enjoyment
6 of its citizens, the city had a duty, in
7 my opinion, to take care that the
8 premises were reasonably safe for the
9 normal range of proficiency and
10 concentration or, alternatively, to post
11 readily visible and easily understood
12 warnings of the risk to potential users.
13 It did not do that. It created an
14 obstacle on the playing surface which the
15 trial judge, correctly in my view,
16 identified as an unusual danger. I think
17 it must abide the consequences."

18
19 Here, in this case, there were no signs posted
20 stating words to the effect "Danger when wet", but
21 I am satisfied that any such sign on an outdoor
22 tennis court, a court that is subject to the
23 weather, rain, sand, dust, leaves, twigs,
24 et cetera, would have been superfluous since the
25 conditions were constantly changing and the
26 conditions, especially wet conditions, would be
27 obvious to anyone that walked upon that tennis

1 court.

2 The City maintenance program in clearing the
3 courts, I am satisfied from the evidence that has
4 been presented, was adequate. It was conducted on
5 a regular basis, and in fact they had just cleaned
6 this specific tennis court on that date of
7 September the 4th, 1991. The City did keep records
8 of all complaints and there had been no previous
9 reported accidents.

10 In Stynes there was an obvious existing and
11 unusual danger in the curb that created an apparent
12 hazard to a tennis player. Here, however, there
13 was no obvious existing or unusual danger other
14 than the water that may have been on the court, and
15 that was apparent to everyone, including Mr. Olson
16 and the Plaintiff Mr. Halvorson.

17 Here the City created a tennis facility for
18 recreational activity. They had a regular and
19 adequate maintenance program. The tennis courts, I
20 am satisfied, were in a safe and reasonable
21 condition for their expected use on September the
22 4th of 1991.

23 The City of Revelstoke did not breach its duty
24 of care to the Plaintiff, who was in fact reckless
25 in regard to his own safety. The Plaintiff's claim
26 is therefore dismissed.

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(DECISION CONCLUDED.)

REPORTER'S CERTIFICATE

I hereby certify the foregoing to be a true and accurate transcript of the proceedings contained herein, transcribed to the best of my skill and ability.

Debra K. Maxwell, RPR
DEBRA K. MAXWELL, Registered Professional
Reporter, Official Court Reporter

