IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20110224
Docket: 39746
Registry: Vernon

Between:

Graham Roy Kinnear

Plaintiff

And:

**Canadian Recreation Excellence (Vernon) Corporation,
Regional District of North Okanagan, City of Vernon,
Greater Vernon Services Commission,
John Doe #1, John Doe #2 and John Doe #3**

Defendants

Before: The Honourable Madam Justice Beames

Oral Reasons for Judgment

Counsel for the Plaintiff:	R. Moffat
Counsel for the Defendant Canadian Recreation Excellence (Vernon) Corporation:	J. MacMaster J. Fearon (articled student)
Counsel for the Defendant Regional District of North Okanagan:	J. W. Locke D. Hori
Place and Date of Trial:	Kelowna, B.C. January 17-21, January 24-27, 2011
Place and Date of Judgment:	Vernon, B.C. February 24, 2011

Introduction

[1] **THE COURT:** On September 15, 2006, the plaintiff fell and injured himself while on property owned by the defendant Regional District North Okanagan ("NORD"), and managed and operated by the defendant Canadian Recreation Excellence (Vernon) Corporation ("RecEx").

[2] The plaintiff claims his fall was caused by the negligence of the defendants or breaches by them of their duties pursuant to the *Occupiers Liability Act*. Both liability and quantum are in issue.

Background

[3] The plaintiff is 62 years old. At the time of his fall he was 58 years old. He has worked in the insurance industry since he was 18, primarily as an adjuster and an investigator. He is a long-time resident of the Okanagan Valley, and in 2006 he lived and had lived for some number of years in Vernon.

[4] The property where the plaintiff fell is referred to as the Multiplex. It is located in Vernon. The Multiplex is a multi-use community-owned facility. It has been and continues to be the site of concerts and other cultural events. It is also used for sporting events, including hockey. It serves as the home arena for the Vernon Vipers hockey team, which team plays in the British Columbia Hockey League.

[5] The Multiplex is owned by NORD. RecEx, pursuant to a contract between it and NORD, operated and managed the Multiplex in 2006. The property is on the north side of 43rd Avenue. To the west is the Vernon racetrack. To the east is 34th Street, and on the east side of 34th Street is a convenience store called Red Top Grocery and a mall which is anchored by a Safeway store.

[6] The Multiplex property is made up of a building, parking lots, and some green space. The entrance into the parking lots is from 43rd Avenue. There is a small parking lot on the east side of the property between the building and 34th Street, ("the east parking lot"), and a larger parking lot behind or north of the Multiplex building itself. There are, in total, approximately 650 parking spots. The building has

seating for over 3,000 people, plus standing room. When the Multiplex was designed, it was planned and understood that some of the users of the facility would park off site.

[7] On the eastern edge of the property abutting 34th Street is what the parties referred to as the boulder zone. When the Multiplex was constructed, some blasting was required. The by-product, large rocks with flat edges, was used to create a wall along the eastern edge of the property, which served as a set back from a creek located towards the north end of the property, and also to retain soil as the wall neared the south or 43rd Avenue end of the property.

[8] At the rear or north end of the property and towards the middle of the property on the east edge, the boulder wall is high and steep, as there is a significant height differential between the Multiplex property and 34th Street. Moving southward towards 43rd Avenue the wall becomes lower, as the height differential decreases. Closest to 43rd Avenue, the boulder zone is relatively flat with some sections where a person can step on dirt between the boulders. The width of the southerly part of the boulder zone near 43rd Avenue is still significant enough that it requires approximately three or four steps to cross it.

[9] Along 43rd Avenue, there is a wide sidewalk for pedestrians and street lights illuminate the area. The municipal sidewalk curves at the driveway into the parking lots and continues with crosswalks and pedestrian walkways all the way to the entrance of the Multiplex. There are no sidewalks or street lights along 34th Street, which looks more like an alley than a normal municipal roadway as it runs between the back of the mall and the Multiplex property. The Multiplex has lights on the outside of the building, as well as two one-thousand-watt, high-pressure sodium lights or lamps on tall poles in the east parking lot and several more lights in the north parking lot.

The Events of September 15, 2006

[10] On September 15, 2006, the Vernon Vipers had their season home opener game. The plaintiff decided to attend the game. He stopped by the Multiplex that

afternoon to buy a ticket. Shortly before game time, which he believes was 7:15, the plaintiff drove to the Multiplex. He had been to the Multiplex many times before. He approached the property from the west driving on 43rd Avenue, looking for parking at the racetrack. Seeing none, he continued eastbound, passing by the driveway to the Multiplex parking lots, as he preferred not to park there, even if spots were available. This was as a result of the delays associated with leaving the Multiplex parking lots after games, because of the single entrance/exit onto 43rd Avenue. Seeing no spots on 34th Street, the plaintiff continued to the mall and parked to the south of Safeway.

[11] He then walked from his car, up a set of stairs, to the convenience store parking lot. From that parking lot, he cut across 34th Street and then headed west or northwest through the boulder zone, as he had done on approximately six previous occasions. He then cut across the east parking lot and entered the building.

[12] The plaintiff testified that he took that route because it was the most direct route. It "never crossed [his] mind" to use the sidewalk on 43rd Avenue to access the Multiplex. He says he had no difficulty crossing the boulder zone on his way to the Multiplex. He estimated that he took about three steps up to the top of the boulder zone at the point where he crossed through it.

[13] After the second period of the hockey game ended, the plaintiff decided to go to the Safeway store to buy something to eat. He intended to return for the third period. He estimates that he cut through the parking lot on approximately a 45-degree angle and entered the boulder zone at a point north of where he had crossed on his way to the game. Again, it never crossed his mind to use the sidewalks. It was dark by then, but with the artificial light in the area, and particularly the light in the parking lot near the north end of the east lot, the plaintiff says he could see landscaping features and the tops of the rocks forming the boulder zone.

[14] He entered into the boulder zone and started to cross it. In direct examination, he said he had taken one or two steps and then put his foot out to take his next step

and ended up on the ground, and specifically on the grass at the base of the boulder zone.

[15] In cross-examination, he agreed that his evidence at examinations for discovery, to the effect that he took at least three steps before falling, was true. As the plaintiff landed on the grass without hitting any rocks on his way down, I conclude that he must have taken at least three steps through the boulder zone before he fell.

[16] The height of the boulder zone where the plaintiff crossed was such that even after taking that many steps, the plaintiff estimates that he fell three and a half to four feet onto the grass. The plaintiff's evidence is that after he fell and was lying on the ground on the east edge of the boulder zone, he noticed the light on the east edge of the east parking lot turn on. As he called for help and then waited for the ambulance, he saw the light go on and off several times. Although I have some issues and some reservations with respect to portions of the plaintiff's evidence, I accept that he did see the light in the parking lot go on and off several times.

[17] The plaintiff was taken to the Vernon Jubilee Hospital by ambulance. He was found to have suffered a fracture to his calcaneus or heel bone. He had surgery to repair the fracture, which involved the use of a plate and screws.

The Plaintiff's Position

[18] With regard to liability, the plaintiff pleaded, and led evidence in support of, several theories of negligence, including that the defendants were negligent and in breach of their duties as occupiers in failing to properly maintain and repair the light at the east edge of the east parking lot, in failing to provide a safe path for patrons of the Multiplex through the boulder zone, and in failing to warn patrons of the hazards of the boulder zone.

[19] In argument, plaintiff's counsel focused mainly on the allegation that the overhead light failed, causing the plaintiff's fall, but also maintained that by constructing the boulder zone and putting the light on the east edge of the east

parking lot, so that it shone at least in part on the boulder zone, the defendants created an obstacle course that essentially lured pedestrians, such as the plaintiff, to use it.

[20] With regard to quantum, the plaintiff says he has suffered a significant physical injury which has and will indefinitely continue to cause him significant pain and serious limitations on his ability to work or engage in recreational pursuits. As well, he says that the accident has caused him significant emotional or psychological consequences, including depression, loss of self-esteem, and loss of confidence. He suggests a range of non-pecuniary damages of 80,000 to $125,000. He also seeks damages for economic loss, both to the date of trial and into the future, with respect to what the plaintiff's counsel referred to as his loss of business capacity. Finally, he seeks an award for special damages of $3,305.87.

The Defendants' Position

[21] The defendants say that they were not negligent and that they fully discharged their obligations under the *Occupiers Liability Act*. NORD says that if there was any breach of the duties imposed by the *Occupiers Liability Act* with regard to maintenance of the Multiplex, only RecEx should be found liable, as NORD reasonably selected and reasonably supervised RecEx as its independent contractor to operate and maintain the Multiplex.

[22] With regard to damages, the defendants say the non-pecuniary damages should be in the range of $75,000 to $85,000. They submit that the plaintiff has proved no economic loss, past or future, arising from his injuries. If any award is made, they say it should be minimal, in the maximum amount of $20,000. They take no issue with the amount of special damages claimed.

Discussion

Liability

[23] Section 3 of the *Occupiers Liability Act* provides:

> **3** (1) 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...will be reasonably safe in using the premises.
>
> ...
>
> (3) Despite subsection (1), an occupier has no duty of care to a person in respect of risks willingly assumed by that person other than a duty not to
>
> (a) create a danger with intent to do harm to the person..., or
>
> (b) act with reckless disregard to the safety of the person...

[24] If an occupier discharges its duty of care pursuant to the *Occupiers Liability Act*, there is no independent duty of care or possible finding of liability on general principles of negligence: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at paras. 79 and 84. The standard of care that an occupier must meet is one of reasonableness, not perfection. A plaintiff "must" be able to point to some act or some failure to act on the part of the occupier which caused the injury complained of before liability can be established: *Cahoon v. Wendy's Restaurant of Canada Inc.*, 2000 BCSC 629 at para. 26; *Bauman v. Stein* (1991), 78 D.L.R. (4th) 118 (B.C.C.A.).

[25] I will deal first with the issue of lighting. The plaintiff, as I said earlier, says that the east parking lot light nearest the boulder zone was malfunctioning on the night of September 15, 2006. He says that as he lay at the bottom of the east side of the boulder zone, the light was going on and off. He asks this court to find that that was the cause of his fall.

[26] I accept that the defendants owed a duty of care to the patrons of the Multiplex to ensure that the Multiplex premises were reasonably safe. That included, I find, providing appropriate illumination for patrons using the parking lots and sidewalks and walkways on the property.

[27] The plaintiff's expert on lighting standards, Tyler Underwood, testified that the parking lot illumination is required in part to allow patrons to define the limits of the parking lots, that is to see curbing and the like, and that the lighting at the Multiplex did so. He also addressed the industry standards with regard to parking lots, and he

gave the opinion that the lighting in the east parking lot area did meet industry standards.

[28] In terms of areas outside of the parking lot and designated pedestrian walkways, an occupier may have an obligation to maintain or make reasonably safe established, albeit informal, pathways which the occupier knows exist. (See for example *Whitney v. University College of the Cariboo*, 2004 BCSC 1110.)

[29] In this case, there is evidence that people or patrons did climb through the boulder zone, both to access the Multiplex and to leave the Multiplex. It happened both in the daylight and at night, according to the evidence I have heard and the video evidence played in court and filed as an exhibit. However, it is clear from that same body of evidence, and even from the plaintiff's own evidence and the evidence of his witness, Cassandra Cook, that there was no one path people took across the boulder zone. Some people climb the wall at its steepest and highest point. Some cross the boulder zone at the most southerly point, at which point it is relatively low and flat. As the plaintiff himself described, patrons chose their own routes through the boulder zone in a "helter-skelter" fashion. It is impossible on the evidence to find that an informal path through the boulder zone had been established for people to access and leave the Multiplex property.

[30] Further, there is no evidence that it was known to the defendants that a specific path had developed through the boulder zone. It follows that there could not have been a duty on the defendants to install and maintain lighting in the area of the boulder zone.

[31] The plaintiff says that the light on the east edge of the parking lot illuminated the boulder zone in the area of the light and effectively enticed patrons to cross the boulder zone in that area. In those circumstances, the plaintiff says, a duty arose to ensure that the light functioned properly. I cannot accept that submission, particularly in view of the fact that the plaintiff himself attempted to cross the boulder zone a significant distance from the light standard. Even if I accepted the submission, the plaintiff would still have to establish that the light at the east edge of

the parking lot failed as a breach of the defendants' duty, and that the failure of the light caused the plaintiff to fall.

[32] The evidence satisfies me on a balance of probability that the light in question did turn on and off, at least after the plaintiff fell. It was turning on and off when the videographer attended and filmed the boulder zone on October 13th, 2006. The evidence of the plaintiff's expert and of other witnesses who gave evidence about electrical matters is that the type of lamp used can, before failure, enter a cycle of turning on and off. However, I cannot find that the defendants had notice of the cycling on and off of the lamp before the plaintiff fell. The only evidence to suggest they did was the evidence of Mr. Steele, the former manager of the Multiplex, who, on examination for discovery, without reference to any documents, said they knew of the light going on and off, but who, on a review of the documents at trial, resiled from that evidence.

[33] The former facilities manager with NORD made observations on September 6th, 2006, of burned out lights in the back or north parking lot, and that same night he observed the lights in the east parking lot to be working. He took prompt and reasonable steps, I find, to ensure that the parking lot lights that had failed were replaced.

[34] On September 20th, 2006, Mr. Holbrooke, an electrician with a third-party electrical company, attended with instructions to replace the burned out or failing lamps. He testified, and I accept, that at that time he checked all of the parking lot lights and that the lights in the east parking lot were both working.

[35] The whole of the evidence satisfies me that the defendants had a reasonable system in place for identifying lights that needed replacing, and that they took reasonable steps to ensure that the premises, from a lighting perspective, were reasonably safe for patrons.

[36] Further, there is absolutely no evidence before the court, other than an inference drawn by the plaintiff, which the plaintiff also asks me to draw, that the light

on the east edge of the east parking lot went out as the plaintiff traversed the boulder zone. The plaintiff admits that he does not know how he fell. He does not know whether the light in question was on or off as he crossed the parking lot and entered the boulder zone, and he does not know if the state of illumination changed at or around the time he fell. There are numerous possible explanations for the plaintiff's fall, including the most likely one, in my view, namely that the plaintiff simply misjudged the step he was taking, particularly given the size of the boulders, the degree of the slope, and the shadows in the boulder area, even when the parking lot light was on.

[37] I am not satisfied, on a balance of probabilities, that I can draw an inference from the circumstantial evidence that the parking lot light went out as the plaintiff took his step.

[38] Turning to the plaintiff's allegations of negligence or breach of duty with regard to the boulder zone itself, aside from any lighting issues, I have already referred to the evidence that some patrons of the Multiplex entered onto the property and left the property from the east and to the east by crossing at various points the boulder zone. Interestingly, despite hundreds of thousands of patrons having attended the Multiplex since its opening, not one, other than the plaintiff, has ever complained of injury from crossing the boulder zone. In fact, one patron slipped on the grassy slope near 43rd Avenue some years before the plaintiff fell, and NORD actually extended the boulder zone southward to deter patrons from entering the property from the east.

[39] The boulder zone was an obvious and readily-apparent hazard. It is made up of a jumble of large, angular rocks. There is, as I have said, no established pathway through those rocks. There was a readily-available alternative route for patrons; namely, to walk to the corner of 34th Street and 43rd Avenue and then use the designated and well-lit crosswalks, sidewalks, and walkways leading to the Multiplex.

[40] On the evidence of Mr. McNiven, an employee of NORD, the maximum time savings by crossing the boulder zone instead of using the designated pedestrian routes was in the range of 40 seconds, less however long it took a patron to cross the boulder zone itself.

[41] The plaintiff, by his own admission, knowing of the designated pedestrian route, took the shortcut through the boulder zone because it was "in [his] nature". He never considered using the sidewalk. He knew, when he attempted to cross the boulder zone on the night of September 15, 2006, that he would have to step down from the rocks onto the grassy slope below the rocks. He knew that if a person missed a step in the boulder zone, a fall and physical injury could result.

[42] The plaintiff's witness, Ms. Cook, testified that at night she would go to very near the south end of the boulder zone in order to cross it, as it was more treacherous the further north one crossed. The plaintiff was significantly to the north of Ms. Cook's night-time route at the time that he fell.

[43] I am unable to find any breach of the defendants' duties under the *Occupiers Liability Act* with regard to the boulder zone. It was obviously not intended for use by pedestrians. It was a visible hazard. The plaintiff recognized the risk of crossing the boulder zone, knew he had a choice to use the sidewalk instead, and opted to enter the boulder zone where it was relatively high, steep, and hazardous, and he cannot fault the defendants for the choice he made.

[44] I find that the defendants are not liable.

Damages

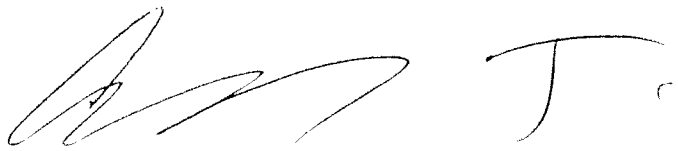
[45] Having heard all of the quantum evidence, I have concluded that I should briefly set out my conclusions with regard to damages. The plaintiff's physical injury was a serious one which has left him with permanent pain and limitations. With regard to his claims of psychological or emotional damages, I prefer the evidence of the defendant's psychiatrist with respect to the significant pre-existing and ongoing issues the plaintiff had and has in terms of their contribution to his psychological

problems since the accident. Taking all of the evidence into account, had I found any liability against the defendants, I would have assessed the plaintiff's non-pecuniary damages to be $100,000.

[46] With regard to past and future economic loss, as the plaintiff's own counsel conceded during closing argument, the evidence at trial "shot the [plaintiff's loss of income claim or economic loss claim, based on a loss of his adjusting business], full of holes". Nonetheless, I accept that the plaintiff's ongoing physical limitations and ongoing pain make him less capable of earning income than he would have been had the injury not occurred. Again, had I found liability against the defendants, I would have assessed the plaintiff's loss in that regard at $20,000.

[47] Had the plaintiff proved liability, I would also have awarded special damages in the amount previously set out.

[48] That concludes my reasons.



Beames J.