Citation: LAWRENCE v CITY OF PRINCE RUPERT AND BRITISH COLUMBIA HYDRO
2003 BCSC 465

Date: 20030327
Docket: SC3629
Registry: Prince Rupert

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Katherine Margaret Lawrence

PLAINTIFF

AND:

**The City of Prince Rupert and
British Columbia Hydro and Power Authority**

DEFENDANTS

AND:

British Columbia Hydro and Power Authority

THIRD PARTY

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HALFYARD

Counsel for the Plaintiff	M. Griffith-Zahner
Counsel for the Defendant City of Prince Rupert	D. Hwang
Counsel for the Defendant British Columbia Hydro and Power Authority	D. Warner
Date and Place of Hearing:	March 14, 2003 Prince Rupert, BC

[1] In this action for damages for personal injury, all three parties have made applications for summary judgment pursuant to Rule 18A. The plaintiff seeks judgment on the issue of liability only. The defendants The City of Prince Rupert ("the City") and British Columbia Hydro and Power Authority ("BC Hydro") separately seek judgment dismissing the action.

[2] All parties agree that the issue of liability is suitable for disposition by way of summary trial. Because there are no (or no significant) conflicts in the evidence, and because liability is contested, I accept that the issues of liability and damages should be severed, and that the case meets the procedural requirements of Rule 18A(11)(a) and is appropriate for summary trial.

[3] The case for the plaintiff is that on April 1, 2000, in Prince Rupert, she was walking along a downtown sidewalk owned by the City, when she tripped on a log left on the sidewalk by a BC Hydro crew, and fell down and was seriously injured. Mr. Griffith-Zahner alleges that BC Hydro was negligent in placing the pole on the sidewalk, and leaving it there without installing any protective barricade or warning signs around it.

[4] The plaintiff alleges that the City was negligent, and in breach of its obligation under the ***Occupiers Liability Act***, in failing to detect the presence of the pole on the sidewalk, and in failing to either remove it or put a barricade around it. There was also an assertion of negligence in failing to properly supervise BC Hydro's pole replacement project in Prince Rupert.

[5] The essential facts relating to the accident are not in dispute, and I would summarize them as follows. The plaintiff is a schoolteacher who was 46 years of age at the time of the accident. She lived in an apartment at 100 – 2nd Avenue West in downtown Prince Rupert. On the afternoon of Saturday, April 1, 2000, at shortly after 3:30 p.m., she left her apartment intending to walk to the Rupert Cleaners at 340 McBride Street, which was just a few blocks from her residence. It was drizzling or raining slightly, the sky was cloudy and grey, and the streets and sidewalk were wet. The plaintiff wore good footwear, and was not impaired in her ability to walk or see.

[6] Just before the accident, the plaintiff was walking south on McBride Street, on the sidewalk on the west side of the street. She crossed 3rd Avenue and stepped up on to the curb on the south side of the intersection, and

continued walking on the sidewalk towards Rupert Cleaners, which was then only a few hundred feet ahead. There was a guardrail at her right-hand side, because there was a drop in elevation of almost 2 feet, from the right side of the sidewalk, down to a flat unpaved parking lot area. The sidewalk was about 3.5 metres wide, including the space taken up by the guardrail, and it inclined uphill (but not steeply) from the intersection of 3rd Avenue to Rupert Cleaners. The plaintiff held on to the guardrail with her right hand, as she walked.

[7] There was a pole lying on the sidewalk ahead of the plaintiff. It was lying close to the bottom of the guardrail, and parallel with the guardrail. The pole was about 12" to 15" in diameter, it was straight, and was about 45 feet long. The end of the pole nearest to the plaintiff was about 12.3 metres from the point where the plaintiff stepped up on to the curb after crossing 3rd Avenue West. The pole was not flagged or marked in any way, and there was no warning sign or barricade.

[8] The plaintiff saw the log ahead of her when she was a few steps away from it. She let go of the guardrail and moved to her left, intending to go around the end of the pole, and to walk alongside the pole between it and an

oblong area near the centre of the sidewalk which was irregular and somewhat depressed on the surface. As she passed the end of the pole, she misjudged its exact location on the ground, and hit the toe of her right boot on the end of the pole, which caused her to trip and fall. She suffered serious injuries to her right arm and left knee.

[9] The plaintiff was familiar with the sidewalk in the area where she fell, but she had not seen the pole there, before.

[10] A BC Hydro crew had been replacing power poles in the downtown area, and had left the pole where it was, after being called away to deal with an emergency. The date when they put the pole there is uncertain, but I infer from the evidence that it had been there for between one and six days. If the pole had been there for more than six days, the evidence makes it probable that the plaintiff would have passed by it and seen it, the previous Sunday.

[11] Leaving the pole where the crew left it was contrary to BC Hydro's own policy for temporary storage of poles at worksites. BC Hydro did not request permission from the

City to leave the pole on the sidewalk, and did not notify the City that it had been left there.

[12] The City has the power and the duty to maintain sidewalks in the City of Prince Rupert. The City did not know that Hydro had left the pole lying on the sidewalk on McBride Street, before the plaintiff' accident occurred. The City had decided, due to budget limitations, that it would not set up any system for inspecting or maintaining its sidewalks. Inspection would only be done, if a complaint was received from a member of the public, or if a city employee happened to notice an apparent problem. Although the duration of this alleged policy was not clearly stated, I infer that it had existed for a considerable period of time. No complaint had been received about the Hydro pole in question.

[13] The City did not receive notification of the plaintiff's accident, until about mid-April. Before that, at some time in the first week of April, the City became aware of the Hydro pole lying on the sidewalk on McBride Street. The City met with BC Hydro on April 6, 2000, and expressed concerns that the pole might be rolled on to the sidewalk or roadway by vandals, and it was agreed that

Hydro would secure the pole to the guardrail, and that was done.

[14] I find the facts which I have summarized, to be true on the balance of probabilities.

[15] Counsel for BC Hydro submits firstly that it did not breach any duty of care owed to users of the sidewalk, because the log did not create a risk or hazard to pedestrians. Mr. Warner pointed out that the pole was plainly visible, and it was out of the way, leaving ample room for pedestrians to walk safely past it. In the alternative, counsel argues that the plaintiff has failed to establish any causal connection in law, between the acts and omissions of BC Hydro, and her trip and fall accident. It is argued that the plaintiff's own negligence was the sole cause of her unfortunate accident.

[16] For the City, Ms. Hwang submits firstly that the City should be exempt from a duty of care to users of its sidewalks, because it made a bona fide policy decision not to systematically inspect the sidewalks. In the alternative, she submits that the pole did not constitute a hazard, and if it did, the City could not reasonably have foreseen that BC Hydro would leave a pole on the sidewalk.

Finally, she argues that the plaintiff's case must fail on the issue of causation because the plaintiff was the author of her own misfortune.

[17] In order to succeed in establishing liability in an action alleging negligence, the plaintiff must prove that the defendant owed a duty to the plaintiff to take reasonable care for the safety of the plaintiff, that the defendant breached that duty of care, and that the plaintiff was injured as a result of the defendant's breach of duty. See ***Magda v. The Queen*** [1964] S.C.R. 72 at 77-78; ***Wickham v. Wrangler Inn*** [1997] B.C.J. No. 671 (B.C.C.A.) at paragraphs 4 and 6.

[18] In my opinion, BC Hydro owed a duty to persons using the sidewalk in question, to take reasonable care not to obstruct the sidewalk in such a way as to create a risk that a pedestrian would be injured. I find that, in putting the pole where they did and leaving it there, BC Hydro did create such a risk. BC Hydro had itself foreseen the safety risk of leaving poles adjacent to roadways, and had published its own policy on the subject. Their rules were aimed at avoiding such storage of poles, and in the alternative, at preventing or minimizing the risk caused by poles that had to be left near roads.

[19] In my view, a reasonable person in the position of BC Hydro would have known that placing and leaving the pole on the sidewalk as it was, and without any protective barricade, would create a risk that pedestrians might trip over it and be injured.

[20] I find that the pole should have been placed on the other side of the guardrail, in the parking lot, and that BC Hydro could reasonably have done that (even if it required the permission of the parking lot owner). I also find that, having left the pole on the sidewalk, Hydro should have put some sort of railing or barricade around the pole, to keep pedestrians away from it, and that this could reasonably have been done. It is my opinion that, in failing to do either of those things, BC Hydro breached its duty of care to users of the sidewalk. The safety risk would obviously be much greater for persons using the sidewalk at night.

[21] As I have mentioned, counsel for both defendants submit that the plaintiff's case fails on the essential issue of causation. Counsel say that, assuming the existence of negligence on the part of BC Hydro, the plaintiff has failed to prove that BC Hydro's negligence caused or contributed to the plaintiff's injuries. It is

argued that the plaintiff's failure to avoid the pole was the sole cause of the accident, and that this failure was due entirely to her own negligence.

[22] Counsel relied heavily on the following facts:

(a) It was daylight.

(b) The plaintiff saw the pole before reaching the near-end of it.

(c) The plaintiff had an unimpeded opportunity to avoid the pole.

(d) The plaintiff had plenty of room on the sidewalk, to walk around the end of the pole, and alongside it, notwithstanding that there was some irregularity in the surface of the sidewalk, near the centre.

[23] It is argued that, when the plaintiff tripped over the end of the pole in these circumstances, it could not be said that BC Hydro's negligence had any causal connection in law or in fact, with the accident. Rather, it was the plaintiff alone who was at fault for her injuries.

[24] I am satisfied that there was adequate room for the plaintiff to step around the end of the pole and walk alongside it for its length, without having to walk on the irregular area near the centre of the sidewalk. The other facts relied on by defence counsel were clearly proven.

[25] The plaintiff gave a partial explanation for her failure to avoid the end of the log in paragraph 11 of her affidavit sworn February 22, 2003, which says this:

> "Because of the low lighting, weather conditions, and the colour of the log against the surrounding area, the pole blended into the colour of the wet asphalt, sidewalk, and the roadway."

[26] Although I accept that the pole may have "blended into" the sidewalk to some limited extent, I cannot accept that condition as being the cause of the plaintiff tripping over the end of it. She saw the pole before reaching it, and in my opinion, the photographs entered in evidence contradict the idea that the colour of the pole caused the plaintiff to lose sight of it or misjudge its location.

[27] I find that the plaintiff could reasonably have avoided tripping over the end of the pole, had she been keeping a proper lookout, and that her failure to do so was negligence which caused or contributed to her injuries.

Again, the essential question is whether the plaintiff's negligence was the sole cause of her injuries, as contended by the defendants.

[28] Numerous cases were cited by plaintiff's counsel in support of the position that the defendants had breached a duty of care owed to the plaintiff at common law and under the ***Occupiers Liability Act***, but no authorities on causation were referred to. Defence counsel referred me to the case of ***Wickham***, supra, but that case says only that causation is an essential element of a cause of action in negligence or under the ***Occupiers Liability Act***, and upholds a trial judge's finding that the defendant's failure to paint a speed bump was not the cause of the plaintiff tripping over it. Accordingly, I have reviewed additional authorities in an attempt to find guidance on this somewhat confusing issue.

[29] Some years ago, before the amendment to the ***Contributory Negligence Act*** in 1970, the issue would often be framed in terms of whether a clear line could be drawn between the negligence of the plaintiff and the negligence of the defendant, so as to justify the conclusion that the negligence of the defendant had ceased to be an operating factor in the accident. It appears to have been the law

that, if the defendant had negligently created a situation of risk that could cause an accident, and if the plaintiff knew (or ought to have known) of that risk and by the exercise of reasonable care could have avoided the accident but failed to do so, then, in law, the plaintiff's negligence would be the sole cause of the accident. Examples of this reasoning may be found in the cases of: ***McKee v. Malenfant and Beetham*** [1954] S.C.R. 651; ***Bruce v. McIntyre*** [1955] 1 D.L.R. 785 (S.C.C.); and ***Brooks v. Ward*** (1956) 4 D.L.R. 2d 597 (S.C.C.).

[30] The problem with that analysis is of course that it embodies the "last chance" doctrine, which was long ago removed from our law. Section 8 of the ***Negligence Act*** now reads as follows:

> "8 This Act applies to all cases where damage is caused or contributed to by the act of a person even if another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so."

[31] It seems to me that, under the old law, where a plaintiff proved that the defendant's negligence caused or contributed to the accident, the defendant could escape liability by showing that the plaintiff could have avoided the consequences of his negligence by the exercise of

reasonable care. If that was shown, then the defendant's negligence (which had the potential to cause the accident) would "cease to be an operating factor". In other words, even though the plaintiff had made out a prima facie case on the issue of causation, proof that the plaintiff had the "last clear chance", would break the chain of causation, and the plaintiff would be found solely at fault. That is no longer the law, but the repeal of the last chance doctrine does not absolve the plaintiff from establishing that the defendant's negligence was at least part of the cause of the accident.

[32] I have found the case of ***Scurfield v. Cariboo Helicopter Skiing Ltd.*** [1993] 3 W.W.R. 418 (B.C.C.A.); leave to appeal refused [1993] 7 W.W.R. lxviii, to be of considerable assistance. The incident from which the lawsuit arose was described in the opening paragraph of the reasons of Mr. Justice Taylor: "The late Ralph Scurfield died when he skied into an avalanche in progress ahead of him while on a wilderness helicopter skiing expedition in South-Central British Columbia."

[33] The trial judge had found that the guide was negligent in taking the ski party to that particular slope, and that finding was accepted on appeal. The trial judge also found

as a fact that Mr. Scurfield had: "...skied heedlessly into an avalanche in progress in front of him when he could see it and could also hear the other members of the party shouting 'avalanche', and telling him to stop."

[34] The trial judge apportioned fault at 75% to Mr. Scurfield, and 25% to the defendants. On appeal, the defendants argued that the action should have been dismissed on the footing that the negligence of the guide did not cause or contribute to Mr. Scurfield's death. On behalf of the plaintiffs, it was argued that to accede to such an argument would require the application of the defence of "last clear chance", which had been abolished by statute.

[35] I quote from paragraph 8 of the reasons of Mr. Justice Taylor:

> "The question in my view is not whether Mr. Scurfield could with reasonable care have avoided the danger--which, on the judge's view of the matter, he plainly could--but whether the conduct of the defendant guide in taking the party to the particular slope can properly be considered an act of negligence which had a proximate causative connection with the accident, when that accident happened after the hidden hazard to which Mr. Scurfield was thereby exposed had become obvious and readily avoidable."

[36] At paragraph 13, Mr. Justice Taylor states:

> "The final question then, is whether, after the danger ahead was clearly visible to Mr. Scurfield, and he could hear the others shouting to him to stop, the guide's negligence in bringing the party to the slope could still be regarded as one of the proximate causes of the accident which followed."

[37] And finally, at paragraph 15, Taylor, J.A. said in part as follows:

> "...This is not a case of Mr. Scurfield having had a 'last clear chance' to avoid a peril created by the defendants. Insofar as the defendants had a duty to protect Mr. Scurfield from unreasonable risk of unavoidable avalanche, that risk was over once the hazard had become obvious and avoidable. On the findings of the trial judge I conclude that Mr. Scurfield's failure to concern himself with what he could see ahead was the sole act of negligence which constituted in law a proximate cause of his death."

[38] I have also reviewed the cases of ***Kautz v. Kopach*** (1993) 84 B.C.L.R. 2d 329 (C.A.) and ***Wickberg v. Patterson*** (1997) 145 D.L.R. 4d 263 (ALTA. C.A.), and have found them to be of some assistance.

[39] I must apply the law to the facts of this particular case. I have found that BC Hydro was negligent in failing to place a barricade around the pole. If that had been done, pedestrians walking close to the guardrail (in either direction) would have been diverted away from the end of the pole, before reaching it. As the plaintiff approached

the pole, she was walking along the sidewalk, keeping a proper lookout, when she was required to change her course by the pole on the sidewalk ahead of her. If a barricade had been placed around the pole, the plaintiff would have been diverted away from the end of the pole, before reaching it, and would not have tripped over it. But she saw the pole, and knew she had to go around the end of it. If a barricade had been present, it would have done no more than to direct the plaintiff to do, what she already knew she must do. She failed to maintain a proper lookout so as to know the location of the end of the pole on the ground, and as a result of that failure she misjudged her step and tripped over the end of the pole.

[40] In my opinion, the failure of BC Hydro to place a barricade around the pole was not an effective cause of the plaintiff's accident. It may be true that, if the pole had not been put there, the accident would never have happened. But in my opinion, that is not sufficient to establish a causal connection. The fact that the plaintiff had an opportunity to avoid the consequences of the defendant's negligence, but failed to do so due to negligence, no longer leads automatically to a dismissal of the plaintiff's claim. But in my view, when the plaintiff saw

the pole ahead of her, and had the opportunity and ability to easily avoid tripping over it, the risk created by BC Hydro lost its potential to cause the plaintiff to trip and fall as she did. It might be otherwise, if the plaintiff had been proceeding along the sidewalk at night, holding on to the guardrail, and then either failed to see the log ahead of her, or failed to see it in time to avoid tripping over it. But that is not what happened here.

[41] I find it unnecessary to determine whether the decision of the City regarding sidewalk inspection was, or was not, a bona fide policy decision. As to the objection by the City to the admissibility of the evidence as to the kind and severity of the injuries sustained by the plaintiff, I think the objection is well taken. Of course, a plaintiff must establish that he or she was injured, as part of the cause of action on liability, but once the fact of injury has been proved, I think the severity of the injuries is not relevant on the issue of liability. I think it is logical to assume that a person could be injured by tripping over the end of a pole that was lying on the sidewalk, and falling down on to the pole and/or the sidewalk. But in my opinion, the determination of

liability requires no further consideration of the plaintiff's injuries, in this case.

[42] The action of the plaintiff is dismissed as against both defendants. I think an amended writ of summons should be prepared and filed, so as to properly make BC Hydro a defendant, but I do not think that, in the circumstances, the plaintiff should be charged any filing fee for doing this. Nor do I think it should be necessary to prepare and file an amended statement of claim, so as to allege a cause of action against BC Hydro, since the allegations of negligence have long been known to BC Hydro. If necessary, counsel may speak to the matter of regularizing the pleadings.

[43] The rule is that costs shall follow the event unless the court otherwise orders. The plaintiff was seriously injured and might suffer some degree of permanent disability. The pole that she tripped over was put on the sidewalk by BC Hydro, and that sidewalk was owned and maintained by the City. It is understandable that she sued the City and BC Hydro, in an attempt to gain compensation for her injuries. I appreciate that the defendants have been put to considerable work and expense in defending against the plaintiff's claim. But I am hopeful that, in

the circumstances of this case, the defendants will give consideration to waiving their claims for costs against the plaintiff.

[44] If the issue of costs cannot be settled, the matter may be set down for hearing by communicating with the trial coordinator.

"D.A. Halfyard, J."
The Honourable Mr. Justice D.A. Halfyard