

IN THE SUPREME COURT OF BRITISH COLUMBIA

New Westminster, B.C.
28 October 1993

8	BETWEEN:)	
9	JACQUELINE PEARSON)	REASONS FOR JUDGMENT
10	Plaintiff)	
11	AND:)	OF THE HONOURABLE
12	CORPORATION OF THE DISTRICT)	
13	OF MAPLE RIDGE and JOHN DOE)	MR. JUSTICE LANDER
14	Defendants)	

APPEARANCES:

T.E. WATKINS, ESQ. Appearing for the Plaintiff

S.F. LEE, ESQ. &
S. MAH, Articling Student Appearing for the Defendants

THE COURT (Oral): This is an action brought by Jacqueline Pearson. Mrs. Pearson on April the 12th, 1991 had left her home and gone to a bingo complex in the Municipality of Maple Ridge. I believe the complex is on 224th. Either she went with Mrs. -- I cannot think of her name. Her friend, Mrs. --

MR. LEE: Bendickson.

THE COURT: Bendickson who is aged 74. Seventy-five, actually. This happened in '91. She would have been some three

1 years younger at the time. They both became friends,
2 I gather, playing bingo, and after bingo closed at
3 approximately 4:00 p.m. on that date, they were
4 proceeding home and they came out of the bingo complex
5 onto 224th and then up to 119th. They proceeded down
6 119th on the south side of that street. Both the
7 plaintiff, Mrs. Pearson, and Mrs. Bendickson described
8 how they proceeded on that sidewalk. They walked arm
9 in arm. Mrs. Pearson, as I understand from Mrs.
10 Bendickson's evidence, assisting her by holding her
11 arm. As they approached an area across from Hair 2001
12 on 119th Avenue, the area is revealed in Exhibit 1 -
13 it is on the sidewalk adjacent to the United Buy &
14 Sell store - both Ms. Bendickson and Mrs. Pearson saw
15 traffic cones or, as Mrs. Bendickson described them as
16 pylons. There could have been eight. There could
17 have been more. I find as a fact that there were at
18 least eight. I find further as a fact that they were
19 not all standing upright. One of the witnesses
20 described it as strewn, I believe, or words to that
21 effect. They were not aligned in any way and,
22 phrasing the evidence of the plaintiff's witnesses,
23 they appeared to be thrown to the side of the
24 sidewalk, onto the side of the sidewalk closest to the
25 parking-lot and the building situate in Exhibit 1. As
26 the plaintiff and Mrs. Bendickson proceeded down
27 119th, these pylons, I will call them traffic cones,

1 because I find as a fact they are, became apparent to
2 both of them. It was then that the plaintiff, Mrs.
3 Pearson, went ahead of Mrs. Bendickson and proceeded
4 to the right-hand side of these cones. In other
5 words, they continued their journey in single file.
6 It was then that the plaintiff fell. As a result of
7 that fall, the plaintiff suffered a comminuted
8 fracture of her right patella.

9 Dealing specifically with my notes of the
10 evidence of Mrs. Bendickson, she testified that Mrs.
11 Pearson never had any difficulty in walking and that
12 she assisted Mrs. Bendickson sometimes. Then they
13 describe how they left the bingo parlour and they were
14 proceeding down 119th. She described that as their
15 usual route but then she said on this date the road
16 was being paved. That is important. She said, "My
17 recollection is that there were two workmen" that she
18 had seen. Another fact that I find is that while the
19 street 119th was barricaded or there was no traffic on
20 the street, I can only conclude, and the evidence is
21 rather slim in this aspect, but I am concluding from
22 the evidence I have heard, no matter how slight, that
23 the vehicle traffic on that street was not permitted
24 that day. However, importantly, the stores were open
25 on 119th. Therefore, pedestrian traffic was being
26 permitted on both sides of 119th. That is confirmed
27 by Miss Young who was in Hair 2001, and while Miss

1 Young, who testified, did not actually see what caused
2 the fall, she did see Mrs. Pearson on the sidewalk
3 after the fall. There were no signs, warnings or
4 anything that would warn a pedestrian about any
5 difficulties, problems or dangers that might be
6 present on the sidewalk. I find that as a fact.

7 Just to go back to the manner in which those
8 traffic cones were on the sidewalk, I refer to Mrs.
9 Bendickson's evidence as I took it in my notes. She
10 was asked in direct examination about the items on the
11 sidewalk. She said there were traffic cones. They
12 were thrown haphazardly, not all standing upright.
13 There were more than three or four. She said, "I
14 didn't count them", and she said, "I don't remember
15 any other things on the sidewalk at that time". She
16 said the cones were in the path of the pedestrians and
17 because of the cones, Mrs. Bendickson said, "We
18 couldn't walk abreast", and as they changed their
19 positions on the sidewalk, and I paraphrase Mrs.
20 Bendickson's evidence at this point in time, she said,
21 all of a sudden the plaintiff, Mrs. Pearson said, "oh"
22 and down she went. And importantly, Mrs. Bendickson
23 says, "Mrs. Pearson was walking ahead of me and one of
24 the pylons I could remember was going back and forth."
25 Now, I am obliged to deal with credibility. I found
26 Mrs. Bendickson to be completely credible and I accept
27 her evidence on this point.

1 Now, as to Mrs. Pearson's evidence, she described
2 that she and Mrs. Bendickson were proceeding down
3 119th. She described the footwear she had on that
4 day, loafers, not very much of a heel. They were
5 comfortable and she walked in them often. It was a
6 beautiful day, she said, and they stayed until closing
7 of the bingo which was around four o'clock, and as
8 they exited onto 224th and then turned onto 119th, she
9 said, "I noticed they were doing road work. There
10 were no vehicles travelling on 119th." She did say,
11 "I saw a couple of workmen". She said the sidewalks
12 were not blocked off by any barricades or anything of
13 that nature, and I paraphrase her evidence somewhat in
14 that respect. She said there, we are in agreement
15 with Mrs. Bendickson, she said there were no signs of
16 warning. She said, when looking at Exhibit 1, the
17 photograph, and she referred to the "oh", as circle
18 mark by Miss Young, the first witness, on Exhibit 1
19 where the accident occurred. She said the cones were
20 sprawled covering one half of the sidewalk at this
21 point. She said, "I don't know how many there were,
22 seven or eight maybe. They were just thrown. Not all
23 standing upright." Then she described going in single
24 file. She also said that the cones were towards the
25 building side. She was asked in direct examination by
26 Mr. Watkins about the board referred to by Miss Young,
27 but she said she did not remember that board. She

1 said that when it became necessary, and I paraphrase
2 now, for them to separate, she said, "I went first. I
3 felt something on my foot. I went flying towards the
4 parking-lot. I can't really say what caused me to
5 fall. I was walking carefully. My attention was not
6 distracted by anything. I was looking ahead. I
7 remember going forward on my hands, then putting my
8 hands out and then I hit my knee." Then she described
9 the shock that she suffered as a result of this fall
10 which she did not remember. That is not important at
11 this juncture in my reasons.

12 Now, Mr. Lee cross-examined Mrs. Pearson
13 concerning her evidence on her examination for
14 discovery. I do not propose to read through the
15 discovery evidence. There are, I concede, or agree
16 with Mr. Lee - concede is the wrong word for a judge
17 to use - there are discrepancies in her evidence but I
18 find that they are not great and they do not damage
19 Mrs. Pearson's credibility. I found her to be
20 credible.

21 I have considered the evidence of Miss Young when
22 she described what I would call debris on the
23 sidewalk. Neither Mrs. Bendickson or Mrs. Pearson
24 would say that, but I find as a fact there were the
25 cones there. Miss Young remembered one cone, not many
26 more, but I think that is understandable in the
27 circumstances. She arrived after the fall. She was

1 concerned about Mrs. Pearson and her condition,
2 welfare and so on being a life-guard, well trained.
3 She was not concerned with the surrounding situation.
4 She was concerned about the health and welfare of Mrs.
5 Pearson, and I can understand why she does not
6 remember everything that was on the street at that
7 time, but she does remember one cone, at least.

8 Therefore, I have concluded or I find as a matter
9 of fact that the cones were there, that they were, I
10 prefer to use the word strewn or thrown onto that side
11 of the sidewalk. I may be going quite far in this
12 finding, but I find as a fact that they were put there
13 or thrown there by workmen who had probably completed
14 some task on that street, and the cones were no longer
15 necessary until they completed the day's work. They
16 threw them onto the sidewalk where they ultimately
17 would come back and retrieve them. Now, I agree that
18 that is going quite far and being quite speculative,
19 but common sense and one's function in society in
20 moving about the outside world leads one to make
21 certain assumptions and I make this assumption.

22 Therefore, I must decide next were these cones
23 the property of the defendant? Perhaps I should say
24 this first: there was no direct evidence, no
25 admission before me that those are, in fact, the
26 traffic cones of the defendant municipal corporation.
27 However, I find as a fact that it was the defendant

1 carrying out the work on its own street. Whether they
2 were actually owned by the defendant municipal
3 corporation or not perhaps is a question that one
4 could pose. That is a better way of putting it. I
5 find as a fact either they are the defendant's or an
6 agent of the defendant, but to make this absolutely
7 clear, I am going to find that those cones were, in
8 fact, the property of the defendant.

9 Now, moving onto the next issue -- oh, I should
10 perhaps decide this also. Having concluded that the
11 cones are the property of the defendant or its agent,
12 I must decide were they properly put there. I find
13 that they were not. It is not, in my opinion, a
14 prudent thing to do to throw cones onto a sidewalk.
15 They could have been properly picked up, placed in a
16 safe location even at the area of which is shown in
17 Exhibit 1. Some unthinking employee of the defendant
18 just obviously threw them up onto the sidewalk, as I
19 have alluded to earlier, and would come back later on
20 and pick them up when the day was complete. So they
21 were put there improperly.

22 Next, having concluded that, I do not think there
23 is any problem relative to the Occupier's Liability
24 Act. My finding immediately is that they did not act
25 in a manner that is required by the Occupier's
26 Liability Act and the section I have not -- in any
27 event, you might be surprised, I have not committed

1 that section to memory.

2 MR. LEE: I believe it's 3.1 -- 3(1).

3 THE COURT: I beg your pardon?

4 MR. LEE: 3(1), I believe.

5 THE COURT: Thank you very much, Mr. Lee.

6 Yes, it is s. 3(1), yes.

7 Having concluded that, I move to the next issue.

8 Having concluded that there was a breach of the
9 Occupier's Liability Act, I move to the conduct of the
10 plaintiff. Mr. Lee said he took the position there is
11 no evidence that the cones were that of the
12 defendant. I found to the contrary. He further said
13 that there was no evidence of negligence. I found to
14 the contrary, that they should not have been strewn,
15 as I say, on a public sidewalk. Sidewalks should be
16 unobstructed. If the municipality wanted to obstruct
17 the sidewalk, they should put the necessary barriers
18 and signing that is necessary so that people will know
19 that it is unsafe to move in that particular area.
20 They did not do that in this instance.

21 That brings me to this point in my judgment and
22 that is what, if any, negligence falls upon the
23 shoulders of the plaintiff? The plaintiff knew the
24 cones were there. It was a clear day, a bright and
25 sunny day. Mr. Lee says there were alternatives open
26 to the plaintiff. She could have walked into the
27 parking-lot or taken another route. Human nature

1 tells me that people do not do that unless the danger
2 is so great, is so apparent it would cause them to
3 take alternatives. Ms. Bendickson said, "We couldn't
4 go onto the street because of the tar, the working
5 done on the street." I find that as a fact.

6 In dealing with this issue of Contributory
7 Negligence Act or the Negligence Act, I have
8 considered the age of the plaintiff, who is now 68 and
9 was 65 at the time. Mrs. Bendickson who is now 75 or
10 74 would have been probably 71 at the time,
11 approximately. These are approximate ages. Mrs.
12 Bendickson had difficulty walking. I find as a fact
13 that Mrs. Pearson did not save and except I noticed
14 she was wearing glasses. There was no question about
15 that. I am going to say this candidly. They seem to
16 be rather very corrective but there was no evidence of
17 that. She said that this in no way affected her but I
18 am considering she wears glasses. She said she was
19 looking ahead. However, I have concluded that she is
20 partially responsible for her own misfortune. Once
21 again, common sense dictates that knowing that the
22 cones were there, knowing that she had to move over to
23 the north side of the sidewalk that she should have
24 taken greater care as to where all the cones were
25 related. I can only conclude that when she alleges
26 that she steps on a cone, and the evidence of Mrs.
27 Bendickson is that she stepped on the cone because she

1 saw it waver immediately upon Mrs. Pearson going down,
2 that she should have been more careful as to where she
3 was putting her foot.

4 Now, therefore, I find that Mrs. Pearson is
5 contributorily negligent. Now, Mr. Lee said the split
6 should be 90/10. I disagree with that. I do not find
7 that to be the case. I have concluded that the
8 liability is greater on the municipality because
9 sidewalks should be clear. They should be left
10 clear. And, as I said earlier, if they are going to
11 put, if any municipality or anybody is going to put
12 things on a sidewalk, they should take the necessary
13 precautions that pedestrians have knowledge of it.
14 They have alternative routes to take that are safe.

15 Now, moving to what the split is. I have
16 concluded that the reasonable split is 60 per cent on
17 the municipality, 40 per cent on Mrs. Pearson. I do
18 so because of the facts that I have related earlier.
19 She knew the cones were there. It was a bright day.
20 She should have paid more attention when she made the
21 move.

22 Now, moving to quantum. I made it very clear to
23 Mr. Watkins when he said this is worth \$12,000, it is
24 not. Fortunately for Mrs. Pearson, she has had a good
25 recovery and I rely on Dr. Bhachu's report. He is an
26 orthopaedic surgeon that resides in Maple Ridge and he
27 treated Mrs. Pearson. She was never confined to

1 wheelchair. She has never used crutches. She got
2 around on a cane. She had a Jones bandage put on
3 after Dr. Bhachu began to treat her. The first
4 physician utilized a cast. She had an uneventful
5 recovery from this comminuted fracture of her right
6 patella, and I read from page 3 of the report of Dr.
7 Bhachu.

8
9 "X-rays of her knee at the time revealed the
10 fracture to be healing well without any change in
11 position. She was advised to continue full
weight bearing with a cane.

12 At the time of her last followup on the 3rd of
13 October 1991, she complained of transient pain in
14 that knee. The pain was slight and was brought
15 on with walking. She had no pain whilst climbing
or ascending stairs and she did not complain of
any swelling of the knee. There were no symptoms
of any locking or instability of the knee."

16 She now complains on occasion, four times a month, she
17 may have sharp short-lasting pain in the knee while
18 going upstairs lasting several seconds. Whether that
19 is a direct result of this fall, I do not know. She
20 had a subsequent fall. She said that this pain was
21 suffered before. I accept that Mrs. Pearson is
22 suffering that. I have no problem with the
23 credibility, but it is so minimal that it does not
24 demand a compensatory award for that minor pain that
25 she suffers.

26 Now, the important aspect of the non-pecuniary
27 award here is pain, suffering, lost amenities of

1 life. She has had pain. She has suffered to some
2 degree but there appears to be no loss of enjoyment of
3 life to Mrs. Pearson, and I factor that into my award
4 for her non-pecuniary assessment.

5 Dr. Bhachu in his March 23rd, 1992 discusses the
6 degenerative changes. He says,

7
8 "However, there is a probability that she will
9 develop degenerative changes in the
10 patellofemoral joint of the right knee earlier
11 than her left knee."

12 It appears that this degenerative change was going to
13 occur in any event.

14 "With the degenerative changes, she may have
15 difficulty getting up from sitting or squatting
16 positions and climbing stairs or walking up
17 inclines initially. These changes may gradually
18 get worse which will affect her walking and also
19 may spread to the rest of the joint. Depending
20 upon her knee symptoms, she may require further
21 surgery. Surgery would have to depend upon the
22 degree of her knee symptoms and the localization
23 of the knee pain. For instance, if the
24 degenerative changes and the pain are localized
25 to the patellofemoral joint, she may benefit from
26 removal of the kneecap or patellectomy, but if
27 the degenerative changes spread to the rest of
the joint, she may benefit from a total knee
replacement. It may take many years for such
changes to develop however, and there is also a
possibility that she may not require any further
surgery despite degenerative changes in the
knee."

That is the most equivocal report, and then he goes
on,

"Surgery would only be indicated if pain symptoms
are severe. I do not feel that there was any
significant injury sustained to her neck, back or her
right shoulder. As far as the right knee injury,

1 she was completely disabled, ambulating in a
2 wheelchair."

3 I do not know where he got that. She was never in a
4 wheelchair. Oh, he is completely wrong on that, I
5 think, about what she was doing. He is not correct in
6 that.

7
8 "At five weeks, she had regained full range of
9 movement in her knee. At the time of her last
10 followup visit, on the 3rd of October 1991,
11 I felt she had recovered from her injury."

12 I have concluded that there will be some
13 possibility, or that he uses the word probability,
14 probability of degenerative change. At Mrs. Pearson's
15 age, I can only conclude that a trauma such as this
16 will have an adverse effect on that right knee, and I
17 am factoring that into my award that she will have a
18 change, but bearing in mind her age, all those other
19 factors, I am not prepared to conclude that this
20 plaintiff will ultimately need surgery. As I have
21 said, Dr. Bhachu's --

22 MRS. PEARSON: Bhachu.

23 THE COURT: Bhachu, is it?

24 MR. WATKINS: We disagree on the pronunciation. It's either
25 Bhachu or Bhachu.

26 THE COURT: I wish he would come in person so I could ask him.
27 Bhachu has concluded that this is in the cards for
Mrs. Pearson. I do not think it is, and as I

1 interpret his report, I think that he has come to that
2 conclusion and I rely on that.

3 As to the award, the quantum, I rather forcefully
4 told Mr. Watkins in his submission to me that I did
5 not agree this was a \$12,000 award. I have concluded,
6 and I should refer to Mr. Lee's submission to me, he
7 says \$5,000 without the arthritic development, \$7500
8 with. I think it is worth a little more than that. I
9 am making the award. I am setting the non-pecuniary
10 damages at \$9,000. The award to Mrs. Pearson will be
11 \$5,400. She will have her tax costs. Mr. Lee?

12 MR. LEE: If I might, I'm also reluctant to do this, but I feel
13 I must. Rule 57(10) provides where a plaintiff
14 recovered a sum within the jurisdiction of the Small
15 Claims court, they're not entitled to costs other than
16 disbursements, and, of course --

17 THE COURT: No, they're going -- no, no, they are properly
18 brought here. No.

19 MR. LEE: Then I would submit the costs ought to follow the
20 cause and 60/40, the plaintiff.

21 THE COURT: Oh, yes. No problem with that. Negligence Act
22 provides that, but, no, Mr. Watkins was properly
23 here. No, I do not think this is a case for the Small
24 Claims court, no.

25 MR. LEE: I was reluctant but I felt I must.

26 THE COURT: No, no. I think he is properly here. It is just
27 that I do not agree with him, that's all. There we

1 are. Thank you very much, gentlemen.

2 MR. LEE: Thank you, my lord.

3 ***

4

5

6

7

8

9

10

11

12

14

15

16

17

18

19

20

21

22

23

24

25

27