

CANADA / JUDGMENT

Chavez v. Burnaby (City of)

2004 BCCA 116

COURT

British Columbia Court of Appeal

DECIDED

20 February 2004

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2004 BCCA 116 Chavez v. Burnaby (City of)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Chavez v. Burnaby (City of),

2004 BCCA 116

Date: 20040220

Docket: CA030593

Between:

Delia Chavez

Appellant

(Plaintiff)

And

City of Burnaby

Respondent

(Defendant)

Before:

The Honourable Chief Justice Finch

The Honourable Mr. Justice Hall

The Honourable Mr. Justice Smith

Oral Reasons for Judgment

M. Booker

Counsel for the Appellant

A. Sayn-Wittgenstein

Counsel for the Respondent

Place and Date:

Vancouver, British Columbia

20 February 2004

- [1] FINCH, C.J.B.C.: The plaintiff appeals from the order of the Supreme Court of British Columbia pronounced 24 January 2003 dismissing her action. The order was made on the application of the defendant pursuant to Rule 18A.
- [2] There were two bases for the application. First, the defendant contended that the plaintiff had failed to give written notice in compliance with the provisions of s. 755 of the Municipal Act, R.S.B.C. 1979, c. 290 (the "Municipal Act" or the "Act") (now s. 286 of the Local Government Act, R.S.B.C. 1996, c. 323), in that she did not give notice of her claim within two months from the date of her injury, and failed to provide reasonable excuse. Secondly, Burnaby contended that in any event it was not liable for the loss and injury suffered by the plaintiff.
- [3] The plaintiff's claim arose from an accident on 28 January 1996. She was riding on a toboggan with her four year-old daughter at Robert Burnaby Park. At the bottom of the snow-covered slope, the toboggan collided into a chain link fence surrounding tennis courts. Although it is not entirely clear how the plaintiff's injury was caused, it would appear that her right foot struck one of the vertical metal fence poles of the chain link fence, as a result of which she suffered a transverse fracture to her right ankle. She suffered other injuries as well.
- [4] On the Rule 18A summary trial, the defendant contended that the chain link fence was perfectly visible from the top of the knoll where the plaintiff commenced her toboggan run, that it had no duty to warn of any danger represented by the chain link fence at the bottom, and that it was not negligent in any way.
- [5] The plaintiff appeared in person to oppose the defendant's application. She was assisted by a friend to help her with the English language. Her first language is Spanish.
- [6] The learned summary trial judge granted Burnaby's motion to dismiss the action. He held that there was no reasonable excuse for the plaintiff's failure to give notice within the two month period limited by the statute. He went on to say that in any event, he did not consider this "a case in which the City could be held liable for the injury". He said the defendant had no duty to warn of the obvious and that the plaintiff would not be able to succeed in her action against Burnaby, even if the limitation period did not bar her claim. He dismissed her

action.

- [7] The plaintiff appeals from that order.
- [8] The plaintiff is now a 53 year-old single mother. When this accident occurred in 1996 she was about 45 years of age. Her daughter, riding on the toboggan with her, was 4 years old at the time. The plaintiff emigrated to Canada from Peru in 1985. As I mentioned, her first language is Spanish.
- [9] The judge found that the plaintiff "suffered a broken ankle when the toboggan impacted a fence that surrounds a tennis court at the bottom of the incline". The precise mechanism of her injury is not described in the reasons.
- [10] On this appeal, counsel for the plaintiff says there was evidence to show that the accident and the injuries resulted from the plaintiff's attempts to prevent injuries to herself and her daughter by trying to avoid striking a part of the chain link fence that was in a dangerous state of disrepair. The allegation is that shortly before the accident the plaintiff saw that they were about to collide into an area of the fence where there were exposed nails, rotting wood, detached wires and a hole at the bottom of the fence opening on to the tennis court, some six to eight feet below.
- [11] Counsel says the evidence would show that the disrepair of the fence was not visible from the top of the toboggan hill and was not apparent to the plaintiff until she was almost upon it. Counsel says the evidence will show that her injury was suffered when she put out her right foot in an attempt to prevent a collision between herself or her daughter with that dangerous part of the fence. Counsel submits that although the defendant may not be liable for the positioning of the fence at the bottom of the hill, it could be liable for the injury caused by the plaintiff's attempt to avert the potential harm posed by the fence's dangerous state of disrepair.
- [12] It does not seem to be disputed that the plaintiff suffered a transverse fracture to the right ankle along with other injuries to her right elbow, right leg, chest and back. In addition she alleges that she suffered anxiety and depression. She had surgery on the day after the accident to place two screws in the ankle to repair the fracture. For about the next two months she is said to have been confined to bed while recovering from her injuries.
- [13] After the accident the plaintiff contacted the Provincial Court and advised of her interest in bringing a lawsuit. She also attended a Spanish community centre to obtain legal advice in Spanish from a lawyer. Neither the courthouse staff, nor the community centre lawyer told the plaintiff that she was required to provide written notice of the incident to the City of Burnaby within two months from the date of the accident.
- [14] On 5 May 1996, the plaintiff did write to the defendant to inform it of her accident, her injuries and her concern that the damage to the fence could result in injuries to other users of Robert Burnaby Park. However, the plaintiff's responses to questions posed on examination for discovery show that she at no time knew of the legal requirement to provide

notice to the defendant, or that such notice had to be delivered to the defendant within two months of the incident. The plaintiff wrote to the defendant because she believed the defendant was responsible for her injuries.

[15] In its written submission, the defendant admitted that it was not in fact prejudiced by the plaintiff's 40 day delay in providing written notice of her injuries.

[16] The material part of s. 755 of the Municipal Act provides:

755. The municipality is in no case liable for damages unless notice in writing, setting forth the time, place and manner in which the damage has been sustained, is delivered to the clerk within 2 months from the date on which the damage was sustained. ... Failure to give the notice or its insufficiency is not a bar to the maintenance of the action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes there was reasonable excuse and that the defendant has not been prejudiced by it in its defence.

[17] In brief oral reasons, the learned summary trial judge held that there was no reasonable excuse for the plaintiff's failure to give written notice within two months of the accident. He said that ignorance of the law could not be raised as a reasonable excuse.

[18] It is not disputed that under s. 755 of the Act, the Court of Appeal can exercise an independent judgment on whether reasonable excuse has been made out. It is not necessary to show that the court appealed from made a palpable or overriding error. The language of the provision allows this Court to "look at the matter untrammelled by the opinion of the court below": see *Teller v. Sunshine Coast (Regional District)* (1990), 43 B.C.L.R. (2d) 376 at 382 (C.A.) [Teller].

[19] In *Teller*, supra at 388, Madam Justice Southin for the Court held that all circumstances were to be considered in deciding whether there was a reasonable excuse:

In the end, the question is simply what do the words at issue mean in the context. In my opinion, ignorance of the law is a factor to be taken into account. So for that matter is knowledge of the law. But all matters put forward as constituting either singly or together a reasonable excuse must be considered.

[20] I have been persuaded that, considering all matters together, the plaintiff has shown a reasonable excuse for the late notice of her claim. She was not aware of the time limitation on notice stipulated by the legislation. She made two attempts to obtain legal advice concerning her situation, one from the Provincial Court, and one from the Spanish Community Centre, neither of which resulted in her being advised of the time limitation on the notice requirement. She suffered a significant injury and for some time after the accident was occupied with her physical recovery. In addition, she suffered depression, and of course she had to care for her young daughter. She also does not speak English as her first language.

- [21] In my view, these circumstances do provide a reasonable excuse for the plaintiff's failure to give notice within the two month time limitation under s. 755.
- [22] As mentioned, the notice she did give was only 40 days late, and the defendant concedes that it suffered no prejudice as a result.
- [23] I am therefore of the view that the s. 755 notice requirement is not a bar to the maintenance of this action.
- [24] The second ground on which the learned summary trial judge dismissed this claim was his opinion that the defendant could not be held liable for the plaintiff's injury. He held that the fence with which the plaintiff collided was clearly visible from the top of the slope, and that the defendant was under no duty to warn of the obvious. In effect, he concluded that the plaintiff was the author of her own misfortune for failure to keep a proper lookout.
- [25] It is unfortunate that the plaintiff was unrepresented by counsel on this summary trial under Rule 18A. The plaintiff, as a lay person with a limited command of the English language assisted only by her friend, was at a serious disadvantage in opposing the motion to dismiss. Perhaps more importantly, she did not raise a question as to whether this case was suitable for final disposition on affidavit evidence under Rule 18A. Nor was that matter addressed directly by the learned summary trial judge, or by counsel for the defence.
- [26] On the judge's view of the evidence, this was an open and shut case with no prospect of success. With respect, as the matter has been presented to us by counsel for the plaintiff on this appeal, the matter is not so clear cut. A theory of liability has been put forward, which appears to have some foundation in the evidence. It is that the plaintiff's ankle injury was caused by her attempt to avoid collision either by herself or her daughter with a part of the chain link fence that was in a state of dangerous disrepair, a hazard which only became visible to her shortly before impact.
- [27] The defendant suggests that the plaintiff's theory of liability based on the fence's state of disrepair is an argument that has emerged only on appeal. Even if not adequately articulated prior to appeal, it appears that the plaintiff has always believed that the condition of the fence was relevant to her claim. The statement of claim is cast broadly enough to encompass such a theory of liability. The plaintiff's responses to questions on examination for discovery and in her affidavit filed on the Rule 18A application both make reference to the disrepair of the fence in explaining how she suffered her injury.
- [28] The defendant's liability on this theory of the claim is by no means clear. There are questions of credibility and reliability to be considered. Unfortunately, it does not appear that this theory of liability was explained, adequately or at all, to the learned summary trial judge, and he does not address it in his oral reasons.
- [29] In my respectful view, if this explanation of the plaintiff's claim had been put before the judge, it would have been apparent that this case was not suitable for final disposition under Rule 18A. The fact that the fence was visible, but not seen by the plaintiff, from the top of the

slope may be an important fact in resolving the liability issue. However, that fact alone is not necessarily dispositive of the claim. There appear to be other factual issues, which could not have been adequately resolved on the affidavit evidence. The fact that the plaintiff was self-represented, and had less than complete command of the English language, are also important considerations making this case unsuitable for decision on a summary trial under Rule 18A.

[30] I would allow the appeal, set aside the order dismissing the action, and remit the case to the trial court. I would direct that the parties bear their own costs of this appeal.

[31] HALL, J.A.: I agree.

[32] SMITH, J.A.: I agree.

[33] FINCH, C.J.B.C.: So ordered.

"The Honourable Chief Justice Finch"

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