

CANADA / JUDGMENT

Esau v. Tansley

2020 BCSC 1426

COURT

Supreme Court of British Columbia

DECIDED

25 September 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1426 Esau v. Tansley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Esau v. Tansley,

2020 BCSC 1426

Date: 20200925

Docket: S163347

Registry: Vancouver

Between:

Anne Esau

Plaintiff

And

Richard Lorne Tansley doing business as Dicks Fish & Chips and Nagra Holdings Ltd.

Defendants

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for Plaintiff:

G.K. Randhawa

Counsel for Defendant, Richard Lorne Tansley, doing business as Dicks Fish & Chips:

J. Abrioux

Place and Date of Summary Trial:

Vancouver, B.C.

July 6-9, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 25, 2020

INTRODUCTION

- [1] On July 2, 2014, the plaintiff, Anne Esau, was visiting the Coast Marina in Campbell River, BC (the "Marina"), while she and her husband were waiting to catch a ferry.
- [2] The defendant, Nagra Holdings Ltd. ("Nagra"), was the operator of the Marina. The co-defendant, Richard Tansley, leased a portion of the Marina from Nagra in order to operate his restaurant business, Dicks Fish & Chips ("Dicks").
- [3] While standing on a major walkway of the Marina's dock system, looking at signage on the side of the building where Dicks operated the restaurant, Ms. Esau fell into the gap between the dock/walkway and the float on which the building was located. Because of Ms. Esau's fall into the water, she suffered injuries.
- [4] Dicks brings this application to resolve the action against it by way of a summary trial. Ms. Esau and Nagra have settled the issues in the action as between them. Ms. Esau has discontinued the action against Nagra. Ms. Esau now waives any recovery from Dicks that may be attributable to Dicks and for which Dicks might have claimed indemnity from Nagra.
- [5] Accordingly, the remaining issue is whether Dicks is liable to Ms. Esau for her injuries. Ms. Esau and Dicks have agreed on the amount of her damages, if the Court finds Dicks liable to some degree.

FACTUAL BACKGROUND

- [6] I find the following facts as relevant to a determination of the issues.

The Marina

- [7] Like most, if not all, marinas, the Marina was a series of interconnected floating docks. The intrinsic nature of the Marina is that it surrounded by water, as with all marinas. Here, that is the ocean.

- [8] In September 2010, 0715980 B.C. Ltd. leased the water lot from the Provincial Government for the purpose of operating the Marina. In October 2012, the Government assigned its lease to Nagra who then became the operator of the Marina. Derik Pallan, an employee of Nagra, managed the operations of the Marina. Another Nagra employee, Dave Jones, handled the day-to-day activities of the Marina.
- [9] Mr. Pallan has sworn two affidavits that are in evidence at this trial. In addition, Dicks' counsel cross-examined Mr. Pallan before the Court as part of this trial. Mr. Jones has not provided any evidence at this trial.
- [10] The Marina's layout in accordance with a schematic drawing provided indicates:
- a) There were three access points to the Marina: first, a sea walk over the breakwater; second, a nearby ramp from the parking lot (the "Parking Lot Ramp"); and third, a ramp from the ferry dock (the "Ferry Ramp"), which was the location of the arrival and departure of the ferry which travelled between Campbell River and Quadra Island;
 - b) At the bottom of the access points from the sea walk and the Parking Lot Ramp was a long dock (D) leading to smaller docks (C) for boat moorage;
 - c) Between the bottom of the access points from, on one hand, the sea walk and the Parking Lot Ramp, and on the other, the Ferry Ramp, and running somewhat at an angle parallel to the shore, was a long dock or walkway (the "Central Ramp");
 - d) Along the Central Ramp was a series of floats on the shore side that included three buildings that housed various shops and services at the Marina, including Dicks. There is water on either side of the Central Dock between it and the floats. I accept Mr. Tansley's evidence that the gap is about three feet wide;
 - e) Patrons of the commercial enterprises walk along the Central Dock to access them. They then cross the space between the Central Dock and the floats (i.e. the gap of water) by ramps or walkways attached to the Central Dock leading to the floats. Access to Dicks' premises from the Central Dock was via a ramp, as discussed below (the "Marina Ramp"). Further mooring slips for boats were situated on the other side of the Central Dock; and
 - f) The bottom of the Ferry Ramp was located at the end of the Central Dock. In addition, at that point, the docking system continued about parallel to the shore at almost a right angle and included other major walkways, leading to docks A, B, P and K, also used for boat moorage. In total, the Marina has about 300 berths for moorage.

Dicks' Leased Premises

- [11] Nagra was the operator of the Marina; in addition, Nagra also acted as landlord of the various commercial ventures located in the Marina along the Central Dock on the shore side.

- [12] On March 22, 2013, Nagra entered into a lease agreement titled "Commercial Lease - Canada" with Dicks (the "Dicks Lease") for a three-year term ending February 2016. Unfortunately, the Dicks Lease is not a model drafting exercise for commercial terms such as were intended.
- [13] Under the Dicks Lease, Dicks leased "Premises" defined as 1,256 square feet on the "dock". Despite the Dicks Lease referencing the "Premises" on a floor plan as Schedule A, no plan was attached. Other relevant terms of the Dicks Lease included:
- a) The rented area is "excluding exterior walls. Includes floating dock" (clause 1);
 - b) Dicks was to use the leased space for a restaurant and food and liquor sales and for no other purpose (clause 3);
 - c) Nagra was solely responsible for repairs or improvements to the structure and to the exterior of the building (clause 8);
 - d) Nagra was not responsible for injury to any person in or coming to or from the Premises (clause 11); and
 - e) Dicks was to keep the Premises in a reasonable state of repair and not make improvements or alterations to the Premises without the written consent of Nagra (clause 15).
- [14] An undated addendum to the Dicks Lease also references the responsibilities of Dicks (the "Addendum") with respect to a "floating dock", although the terms "dock" and "float" are also confusingly used. The Addendum provides that: Dicks must moor the floating dock properly; Dicks must contain the floating dock for safety reasons; Dicks must not spill grease on the dock or parking lot; Dicks must get signs and advertising approved by Nagra's manager; Dicks was to properly install netting on the float; and, the walkway from the dock to float must meet safety requirements.
- [15] It is common ground that Dicks' restaurant operations under the Dicks Lease occupied a portion of the ground floor of a two story building on one of the floating docks along the Central Dock (the "Building Float"). In addition, Dicks owned another floating patio area that was used in the restaurant operations (the "Patio Float"). The Patio Float was physically attached to the Building Float by a ramp that allowed access between the them (the "Patio Ramp").
- [16] There is considerable disagreement between the parties as to the interpretation of the Dicks Lease and the Addendum on the zones of responsibility as between Dicks and Nagra with respect to the physical layout of the spaces occupied by Dicks in its restaurant operations. Both Mr. Tansley and Mr. Pallan provided their own views on the interpretation of these documents, which I have largely found to be unhelpful in the interpretation exercise, particularly given their self-interest in the outcome.

- [17] I conclude that the only reasonable interpretation of the Addendum is that it applies to the Patio Float and Patio Ramp, not the Building Float or the Marina Ramp. This is consistent with my view that the overall intention under the Dicks Lease and Addendum was to assign responsibility for the exterior of the Building Float and Marina Ramp to Nagra and responsibility for the Patio Float and Patio Ramp to Dicks.
- [18] A person travelling along the Central Dock from the Ferry Ramp, such as Ms. Esau, would travel a good portion of the entire Building Float in which Dicks and another business (Discovery Launch) operated. Along that stretch, the gap between the Central Dock and the Building Float is plainly visible. About midway along the Building Float, a person would come to the portion of the Building Float that included the restaurant. The Marina Ramp is located at the far end, on the left side of the Building Float. The Marina Ramp is a large metal ramp 3-4 feet in length and six feet wide that led directly to Dicks and a window that allowed Dicks' patrons to order their meal. Patrons accessed Dicks' restaurant on the Building Float to the left of the order window that also allowed access to the Patio Ramp and then the Patio Float. A wooden railing ran along the outside of the Building Float on that side as people passed that way.
- [19] To the immediate right of the order window is a signboard with Dicks' menu items (the "Menu Sign"). The Menu Sign is about eight feet long and four feet high. Ice cream flavours are listed in the top right of the Menu Sign. A table was located almost below the right side of the Menu Sign that was a sitting area for Dicks' staff.
- [20] A person standing on the Central Dock looking across the gap to the Menu Sign would be some feet away from the Marina Ramp directly to the left. That person would have a direct sightline to the ice cream flavours, although they could also walk over the Marina Ramp onto the Building Float to view them. Such a person would also plainly see the gap (approximately three feet wide) between the Central Dock and the Building Float and particularly, a lack of any railing along the Central Dock from the Marina Ramp to the left and continuing to the far corner of the Building Float.
- [21] The Dicks Lease and the Addendum did not provide that Dicks was leasing any part of the Central Dock. I accept Mr. Tansley's evidence that Dicks never monitored, inspected or maintained the condition of the Central Dock at any time. I also accept Mr. Tansley's evidence that responsibility to maintain the Marina Ramp was that of Nagra and that responsibility to maintain the Patio Ramp was that of Dicks, consistent with Mr. Tansley's evidence as to who paid to replace those Ramps after storm damage in 2012/2013.

The Accident

- [22] Ms. Esau and her husband, Allan Esau, are retirees living in Delta, BC.

- [23] They had both been to the Marina a number of times before July 2014. During those times, Ms. Esau said she had walked around the Marina and was generally familiar with it. Both stated that they had no recollection of visiting the portion of the Marina where Dicks is located before July 2, 2014.
- [24] July 2, 2014 was a nice, sunny summer day.
- [25] Sometime in the early afternoon, the Esaus missed their ferry from Campbell River to Quadra Island where they planned to vacation. They decided to enter the Marina from the Ferry Ramp that was next to the ferry operations.
- [26] Both assert that there were no "warning signs" at or near the Ferry Ramp concerning the Marina although it is unclear what "dangers" they now argue should have been noted on any such signs. Other signage at the Parking Lot Ramp did include "Use Marina at Own Risk"; however, there is no evidence that such a sign was located on or near the Ferry Ramp.
- [27] Ms. Esau was wearing good gripping footwear. The Central Dock was dry. After walking down the Ferry Ramp, the Esaus turned and walked along the Central Dock toward Dicks, where they understood ice cream was sold.
- [28] After arriving in front of Dicks and before the Marina Ramp, the Esaus stopped on the Central Dock. They were standing side-by-side. They were both engaged in looking at the Menu Sign and specifically, the listed ice cream flavours.
- [29] The next thing that Ms. Esau remembers is that she was in the water (the "Accident").
- [30] Rosemarie Fowlow, Dicks' restaurant manager who was present at the time of the accident, stated that Mr. Esau told her that he had warned his wife to be careful as she had undergone eye surgery and had poor vision. Ms. Fowlow also says that Mr. Esau reported to her that his wife had moved closer to read the Menu Sign and fell in the water.
- [31] Ms. Esau confirms that she did have cataract surgery for her right eye in May 2014, just months before the Accident. However, she denies any problems with her vision that day. She was also wearing her glasses at the time of the Accident. Mr. Esau denies having told anyone that his wife had vision problems that day.
- [32] I accept and find as a fact that Ms. Esau had good working vision on the day of the Accident.
- [33] After the Accident, Nagra paid to install a large wooden handrail on the right side of the Marina Ramp and along the Building Float on the left side of the Marina Ramp. At the same time, Nagra also paid to replace the wooden railing on the Building Float to the left of the Marina Ramp.

ISSUES

- [34] I will address the issues as follows:

- a) Did Dicks owe Ms. Esau a duty of care?
- b) If so, did Dicks breach that duty of care?
- c) Were Ms. Esau's injuries caused by any breach of duty of care?
- d) Was Ms. Esau contributorily negligent?

DISCUSSION

Did Dicks owe Ms. Esau a duty of care?

[35] Ms. Esau's claim against Dicks is premised on Dicks being an "occupier" of the Premises, such that a statutory duty arose under the Occupiers Liability Act, R.S.B.C. 1996, c. 337 (the "Act"). Ms. Esau alleges that Dicks breached that statutory duty of care under s. 3 of the Act, causing her injuries.

[36] The duty of care of an occupier under s. 3 of the Act is as follows:

- (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, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.
- (2) The duty of care referred to in subsection (1) applies in relation to the
 - (a) condition of the premises,
 - (b) activities on the premises, or
 - (c) conduct of third parties on 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 damage to the person's property, or
 - (b) act with reckless disregard to the safety of the person or the integrity of the person's property. . . .

[37] Dicks denies being an "occupier", within the meaning of the Act, of the site of the Accident, namely the Central Dock.

[38] The definition of "occupier" is found in s. 1 of the Act:

"occupier" means a person who

- (a) is in physical possession of premises, or
- (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,

and for this Act, there may be more than one occupier of the same premises;

[39] The definition of "premises" in s. 1 of the Act include "land and structures".

[40] The issue is whether the Central Dock (i.e. the "premises" where the Accident occurred) was occupied by Dicks.

[41] I conclude that the Central Dock was not "occupied" by Dicks based on the following evidence, which I accept:

- a) The Dicks Lease did not provide for any occupation by Dicks of any portion of the Central Dock, as acknowledged by Mr. Pallan in his evidence;
- b) There is a conflict between Mr. Tansley, Ms. Fowlow and Mr. Pallan concerning Dicks' activities on the Central Dock. I reject Mr. Pallan's evidence as vague and unreliable in the circumstances. To the extent that it conflicts with that of Mr. Tansley and Ms. Fowlow, I accept the latter's evidence. The Esaus provide no evidence of any activity by Dicks on the Central Dock and photographs taken by Mr. Esau just after the Accident do not show any such activity by Dicks. I accept the evidence of Ms. Fowlow and Mr. Tansley and find that Nagra did not permit Dicks to place any business materials, such as signage, or set up tables on the Central Dock for its operations;
- c) Under the Dicks Lease and the Addendum, Dicks did not have responsibility for, and control over, the condition of the Central Dock, the activities conducted on the Central Dock, and the persons allowed to enter the Marina and the Central Dock. I accept Mr. Pallan's evidence where he acknowledged that Nagra was solely responsible for safety inspections, repairs and maintenance to the Central Dock. He also confirmed that Dicks had no obligation to inspect, clean or maintain the Central Dock; and
- d) The fact that Dicks contributed to common area expenses as part of the lease arrangements does not support that Dicks was responsible for the repair and maintenance of the Central Dock and activities on it. Rather, that fact supports that it was Nagra who used those monies for that purpose as the landlord.

[42] There is no evidence to support that Dicks was in "physical possession" of the Central Dock, within the definition of an occupier, section (a), in the Act.

[43] In addition, there is no evidence to support that Dicks had responsibility and control over the condition of the Central Dock and activities on it within the meaning of occupier, section (b), in the Act. The Esaus suggest that they saw a Dick's sandwich board near the Ferry Ramp advertising food that enticed them to go to Dicks along the Central Dock. Assuming that such a sandwich board was there on the date of the Accident, I cannot conceive that this amounted to Dicks being in occupation of the Central Dock within the meaning of the Act.

- [44] The Central Dock was used by the general public. I reject Ms. Esau's argument that the entire Central Dock, or even the portion of the Central Dock in front of the Building Float, was used almost exclusively by patrons of Dick's. Foot traffic along the entire length of the Central Dock would include patrons of the businesses along the Central Dock and no doubt many others, including those who were accessing the hundreds of boat moorages from either end of the Central Dock.
- [45] Further, section (b) of the occupier definition requires that the occupier exercise responsibility and control over persons allowed to enter the premises. Ms. Esau has failed to satisfy this last requirement. Mr. Pallan's evidence clearly supports that Dicks did not exercise any responsibility or control over the persons allowed to enter the Central Dock.
- [46] There is a conflict in the evidence as to whether the Dicks Lease included the Marina Ramp. In addition, there is a conflict as between Mr. Tansley and Mr. Pallan's evidence as to who paid for repairs to the Marina Ramp and other wooden railings to the left of the Marina Ramp near the entrance to Dicks. Again, I conclude that Mr. Tansley's evidence is to be preferred and that the condition of the Marina Ramp was the responsibility of Nagra. Mr. Pallan seems to have only vague recollections of the matter, having left the day-to-day management of the Marina to Mr. Jones.
- [47] In any event, a determination of responsibility with respect to the Marina Ramp - and whether Dicks was an occupier of the Marina Ramp - is irrelevant. Ms. Esau did not fall from the Marina Ramp. There is no evidence to suggest that the condition of the Marina Ramp caused or contributed to Ms. Esau's fall. There is no evidence that any railing on the Marina Ramp, as was installed by Nagra after the Accident, would have prevented the Accident.
- [48] Ms. Esau made similar arguments concerning the Patio Float, although again, I fail to see how that is relevant given that Ms. Esau's Accident had nothing to do with the Patio Float and the Patio Ramp. The same can be said for the condition of the Building Float that Dicks occupied that was across from the Central Dock area where Ms. Esau fell. There were no railings on the side of the Building Float at that point. Having said that, I will address later in these reasons the matter of Dicks' Menu Sign on the wall of the Building Float, upon which Ms. Esau places some emphasis.
- [49] The parties refer to authorities to support the proposition that in "special circumstances", a court may find that a party is an occupier of an area which it does not lease, own, or carry on any business: *Moody v. Toronto (City)*, [1996] O.J. No. 3418 (O.C.J. - Gen. Div.). There, a patron attending the Toronto Skydome tripped and fell on a walkway not owned or leased by the defendant stadium. At paras. 7-8, the court found that "special circumstances" existed that supported that the stadium had sufficient control over patrons entering the walkway to be classified as an occupier of the walkway.

- [50] In *Appleyard v. Essex Terminal Railway*, [1997] O.J. No. 3226 (O.C.J. - Gen. Div.) at para. 18, the court rejected that special circumstances existed to impose a duty of care on an employer with respect to a public sidewalk used by its employees to access a parking lot set aside for employee use.
- [51] See also *Davies v. Clarington (Municipality)*, [2006] O.J. No. 1307 (Ont. S.C.J.) which followed *Appleyard* in finding that the defendant was not an occupier; in that case, the defendant did not exercise control over persons using the railway corridor. Leaving aside the facts considered in *Davies* and *Appleyard*, care must be taken in considering the Ontario authorities, as the definition of "occupier" in its legislation is materially different from the definition found in the Act.
- [52] Finally, this Court rejected the *Moody* approach in *Scheck v. Parkdale Place Housing Society*, 2018 BCSC 938. Justice Johnston rejected that the defendant seniors' housing facility was an occupier of the adjacent sidewalk where the plaintiff fell. At para. 43, the Court found that the defendant did not control use of the sidewalk.
- [53] I am not convinced that any "special circumstances" arise here that would justify the approach taken in *Moody*. As in *Appleyard*, *Davies* and *Scheck*, the Central Dock was a public walkway, used by the general public and all users of the Marina. Dicks did not exercise any control over who could access the Central Dock. Any user of the Central Dock with normal eyesight and comprehension could plainly see and understand the inherent nature of the Marina and that it was necessary to look where one was stepping - including on the Central Dock - so as not to step off and into the water.
- [54] Ms. Esau also argues that Dicks owed her a common law duty of care. As before, no mention of such a duty is to be found in her pleading. On that basis alone, this argument can be disregarded. In any event, I will address that argument briefly.
- [55] Dicks does not dispute that a duty of care arose with respect to Ms. Esau to make its Premises safe if she had attended on the Premises. In accordance with the Dicks Lease, that included the portion of the Building Float occupied by Dicks, the Patio Float, the Patio Ramp and, leaving aside my finding above, arguably, the Marina Ramp. However, again, Ms. Esau was not present in any of those locations.
- [56] Ms. Esau argues that the common law duty owed to her by Dicks was to:
- ... ensure that the Central Dock area immediately adjacent to the Menu Board where prospective customers would stop to read the Menu Board was a safe location from which to view the Menu Board.
- [57] I cannot conceive that any common law duty of care arose with respect to Ms. Esau's activities on property owned and/or controlled by other persons, such as Nagra, should she decide to view the Menu Sign from that location. Ms. Esau does not cite any case authority in support of such an argument.

[58] I reject that Dicks owed Ms. Esau any duty of care - statutory or otherwise - with respect to her activities on the Central Dock. The fact of the matter is that Ms. Esau was not standing on any portion of the Marina that Dicks physically occupied as part of its restaurant operations or any portion over which Dicks exercised responsibility or control. If any duty was owed to Ms. Esau in this respect, it was owed by Nagra, not Dicks.

Did Dicks breach a duty of care?

[59] I agree that, even if Dicks was an "occupier" as defined by s. 1 of the Act, Ms. Esau has failed to establish that Dicks breached the requisite standard of care.

[60] In *Lovely v. Kamloops (City)*, 2009 BCSC 1359, Justice Masuhara discussed the standard imposed by the Act:

[113] The Act imposes a duty on an occupier of premises to take reasonable care in all the circumstances to ensure that a person using the property will be reasonably safe: *Weiss v. Greater Vancouver Y.M.C.A.* (1979), 11 B.C.L.R. 112 (C.A.). The general standard is an objective one, of reasonableness, not perfection. The legislation does not make the occupier of premises an insurer against every possible harm: *Carlson v. Canada Safeway Ltd.* (1983), 47 B.C.L.R. 252 (C.A.); *Sulmona v. Serraglio*, [1986] B.C.J. No. 413 (C.A.); *Mason v. Reid*, [1999] B.C.J. No. 1328 (S.C.). The occupier is responsible to take reasonable precautions to protect against risks which the occupier knows or ought to know are present in the premises: *Evans v. Jim Pattison Industries Ltd.*, [2000] B.C.J. No. 1171 (S.C.). Although the term "foreseeability" does not appear in the legislation, the requirement of reasonable foreseeability is inherent in the common law duty of care embodied in the Act: *Rendall v. Ewert* (1989), 38 B.C.L.R. (2d) 1 (C.A.). The reasonableness standard was explained in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 aff'd 49 B.C.L.R. (2d) 99 (C.A.) by McLachlin J. (as she then was) at p. 58:

. . . [T]he duty owed by an occupier of premises to take reasonable care to see that persons using the premises will be reasonably safe. The Acts do not impose a duty to take reasonable care to insure that persons using the premises will be "absolutely safe". As stated in *Hagerman v. Niagara Falls* (1980), 29 O.R. (2d) 609...per Labrosse J. at p. 613, the occupier does not owe a duty to provide safety in all circumstances, but rather a duty to use reasonable care to prevent injury or damage from danger which is known or which ought to be known.

[114] The test is not "whether anything could have been done to prevent the injury using 20/20 hindsight, but rather whether the steps taken by the occupier were reasonable in all the circumstances": *Duddle v. Vernon (City)*, 2004 BCCA 390 at para. 16.

[61] Similarly, on the requisite standard of care under the Act, this Court stated in *Fulber v. Browns Social House Ltd.*, 2013 BCSC 1760:

- [28] A useful summary of the law is set out in *Wilde v. The Cambie Malone Corporation*, 2008 BCSC 704. I accept Ms. McCullagh's summary of that, and I am just going to read her summary of some of the principles stated in the *Wilde* case:
- (a) The goals of the Occupiers Liability Act are to promote positive action on the part of occupiers to make their premises reasonably safe.
 - (b) The duty imposed by the Act is to take reasonable care in the circumstances to make the premises safe. The duty does not require occupiers to ensure that persons using the premises will be absolutely safe.
 - (c) The care that must be taken by an occupier differs according to the nature and use of the premises.
 - (d) The onus is on the plaintiff to prove on a balance of probabilities that the defendant breached this duty of care. The fact of injury does not create a presumption of negligence. The plaintiff must be able to point to some act or failure on the part of the defendant which resulted in the injury.
 - (e) This duty of care does not extend so far as to require the defendant to remove every possibility of danger. The test is one of reasonableness, not perfection.
- [62] A relevant factor, although not determinative, relates to the use of the premises prior to the accident and, specifically, whether there was "prior safe use": *Lovely* at para. 115 and *Coleman v. Yen Hoi Enterprises Ltd.*, 2000 BCSC 276 at para. 8.
- [63] Prior to the Accident, Dicks has been operating the restaurant on the Building Float with the same configuration for some 12 years, since 2002. Both Mr. Tansley and Mr. Pallan say that there were no similar accidents at the Marina, including where people fell into the water. Both Mr. Tansley and Ms. Fowlow say that no one, including any patron, or anyone from Nagra, ever expressed any concerns about safety on the Central Dock, including the area just in front of Dicks.
- [64] In their evidence, and in argument, the Esaus express concern regarding the lack of signage to warn them of the "dangers" faced by patrons visiting the Marina.
- [65] However, as Dicks' counsel notes, there are numerous BC case authorities to the effect that failure to provide warning signage is not a breach of any duty to warn an adult person, not suffering under any disability, of the ordinary risks arising out of the exigencies of common everyday risks: *Malcolm v. B.C. Transit*, [1988] B.C.J. No. 1945, 32 B.C.L.R. (2d) 317, at para. 10; *Choromanski v. Malaspina University College*, 2002 BCSC 771 at para. 42; *Ross v. Vernon (City)*, 2009 BCSC 1378, at para. 26; and, *Deroche v. Best Western Coquitlam Inn*, [1999] B.C.J. No. 331 (S.C.) at para. 21.

- [66] The evidence amply supports that the configuration of the Marina, and specifically in the area where Ms. Esau fell into the water, was completely ordinary. Open water on either side of the docking system is what any ordinary person expects in any marina. Certainly, anyone visiting a marina, such as Ms. Esau, would plainly see that fact.
- [67] The Esaus now suggest that there should have been guardrails along the Central Dock to protect anyone from falling into the water. With respect, it is common sense that guardrails are generally antithetical to how marinas operate, as noted by Mr. Pallan. Marinas of this type are usually not equipped with guardrails since watercraft regularly move along the docking systems. The fact is that anyone visiting the Marina, such as the Esaus, would have also clearly observed that fact, particularly as they walked along the Central Dock.
- [68] Ms. Esau refers to various authorities where the court has considered the matter of guardrails. I agree with Dicks' counsel that they are distinguishable and of no assistance to Ms. Esau.
- [69] In *Lovely*, the Court found that the occupier of the premises (i.e. a transfer station) had breached the duty of care in the design of the transfer station where a customer had fallen. That finding was based on many factors, including a lack of guardrails that would have allowed the customer to steady himself and not fall (para. 38).
- [70] In *Doucette v. McDaniel*, 2014 BCSC 42, the plaintiff fell down a stairwell in a residential home. At paras. 26-27, the court found that a variety of factors were present that supported that the stairwell was a reasonable risk of harm and that it was not safe. One of those factors was the lack of guardrails to prevent someone falling into the stairwell.
- [71] *Doucette* is plainly distinguishable from the facts here. The gap between the Central Dock and the Building Float was plainly visible at all times and would have been visible to the Esaus as they approached the area of the Central Dock across from Dicks. The Central Dock was not manifestly unsafe if a person, acting reasonably, kept their wits about them to ensure they were walking where they should, particularly given the apparent nature of the Marina in that it was surrounded by water.
- [72] This is also not a case such as was addressed in *Foley v. Imperial Oil Limited*, 2011 BCCA 262. In *Foley*, at paras. 32-33, the court discusses determining the standard of care for an "unusual danger". That phrase refers to a "hidden or unexpected danger that an occupier of land knows of or ought to know of". In this case, I do not find that there was any "unusual danger" as being hidden or unexpected. The presence of water on both sides of the Central Dock was there for all to see, including Ms. Esau as she walked along the Central Dock.
- [73] The Esaus appear to have been adults of ordinary intelligence, who would have understood that there was a risk of falling into the water off any part of the docking system, including the Central Dock, if a person was not paying attention.

- [74] In any event, if, as the Esaus suggest, there should have been guardrails or warning signs or netting along the edge of the Central Dock to address this "danger", that was the responsibility of Nagra, not Dicks. As confirmed by Mr. Pallan, Nagra was the person who assumed responsibility for safety issues arising on the Central Dock.
- [75] The gravamen of Ms. Esau's argument is that Dicks' Menu Sign was a distraction such that she simply forgot where she was standing and walked into the water off the Central Dock.
- [76] As discussed above, I am not aware of any case authority that would support that Dicks even owed a duty of care to Ms. Esau in respect of her inattention, whether brief or otherwise, while standing on property which Dicks did not occupy, possess or exercise control.
- [77] Certain cases have held a defendant liable for a hazard on their premises when a plaintiff's attention is distracted to other matters, however these cases are clearly distinguishable from the case at bar.
- [78] In *Coulson v. Canada Safeway Ltd.*, [1988] B.C.J. No. 2067 (C.A.), the issue of distraction of the plaintiff arose although in the context of allegations of contributory negligence. The plaintiff slipped and fell on eggs left on the grocery store floor by another person. This Court found, upheld on appeal, that the defendant store was liable because its system of inspection and maintenance was faulty in that it did not respond to address the hazard within a reasonable period. The plaintiff failed to notice the eggs since her attention was drawn to the defendant's display of goods. This case does not assist Ms. Esau as the "distraction" of the display was not the basis upon which the defendant was found liable.
- [79] In *Davis v. Kin's Farm Market (Lynn Valley) Ltd.*, 2010 BCSC 677, the plaintiff slipped on a grape that had rolled some distance from a fruit stand and into the common hallway of a mall. At the time of the fall, the plaintiff was looking at a Shoppers Drug Mart display further down the hallway such that he did not see the grape. As in *Coulson*, the Court considered the issue of distraction only in the context of contributory negligence (paras. 60-62). The plaintiff did not advance any allegation that Shoppers Drug Mart was liable for the distraction by its display, which would be analogous to what Ms. Esau argues here.
- [80] In both *Coulson* and *Davis*, the plaintiffs were momentarily distracted by signage such that they did not see the eggs and grape, both unexpected hazards. Again, the existence of water in the gap between the Central Dock and the Building Float was anything but an unexpected hazard. From the moment Ms. Esau stepped onto the Central Dock, she would have been or should have been cognizant of the risk.
- [81] I accept that Dicks placed the Menu Sign to entice the public to come to the restaurant and order food and/or drink. Dicks invited the public to come onto the Building Float for that purpose, where it assumed some responsibility for the safety of its patrons as an occupier of that space. However, I find that Dicks could not reasonably have anticipated that Ms. Esau would become distracted as to the risks inherent in the Marina by looking at the Menu Sign, while standing on some other part of the Marina. It is unreasonable to argue that Dicks

should have anticipated that a potential patron would be so focussed on the Menu Sign to the point that she would lose her appreciation of what conditions were immediately before her in the gap between the Central Dock and the Building Float that housed Dicks' operations.

[82] Even if a person should have reasonably anticipated such a possibility, the only party who had the responsibility and authority to take measures to protect Ms. Esau from such inattention - such as guardrails or warning signs along the Central Dock where she fell - was Nagra.

[83] In summary, I find that Dicks did not breach any standard of care owed to Ms. Esau in the circumstances, assuming that even such a duty existed.

Were Ms. Esau's injuries caused by a breach of duty of care?

[84] Dicks also argues that, even if it owed Ms. Esau a duty of care, and even if there was a breach of such duty, Ms. Esau has failed to establish causation with respect to her fall and injuries.

[85] The "but for" causation test requires that the plaintiff show that the defendant's negligence was necessary to bring about the injury. The test is grounded in common sense. A plaintiff need not show with precise accuracy that negligence caused the injury. A court may rely on evidence connecting the breach of duty with the injury suffered to draw a reasonable inference that the breach caused the injury: *Clements v. Clements*, 2012 SCC 32 at paras. 8-10.

[86] In order to succeed, Ms. Esau bears the burden of proving, on a balance of probabilities, that "but for" the negligent conduct of Dicks, her injury would not have occurred: *Letain v. Quatsino Lodge Ltd.*, 2016 BCSC 648 at para. 22. The fact that someone slips and/or falls does not give rise to any presumption of negligence: *Charlie v. Canada Safeway Limited*, 2010 BCSC 618 at para. 21.

[87] Dicks cites various decisions of this Court where the plaintiff had no idea how he or she fell: *Lansdowne v. United Church of Canada*, 2000 BCSC 1604 and *Charlie*. In *Lansdowne*, the plaintiff had suddenly tripped on stairs. She asserted that the condition of the stairs caused her fall. At paras. 22-24, the Court rejected her claim, finding that the supposed cause of the fall was pure speculation and theoretical. In *Charlie*, the Court rejected similar speculation as to the cause of a slip and fall in grocery store as establishing causation: paras. 24-28.

[88] In *Van Slee v. Canada Safeway Ltd.*, 2008 BCSC 107, the plaintiff theorized that she had slipped on water on a grocery store floor, however she was unsure of the actual cause of her fall. The court dismissed the action, stating that the plaintiff's case was no more than a theory without evidence:

[31] The law is clear in this area, the Court must not speculate. The plaintiff must prove: first, what condition or hazard caused her slip and fall; and, second, that the condition or hazard existed due to a breach of duty by the defendant. I find that as the plaintiff cannot prove the former, thus she cannot prove the latter.

[89] See also *Newsham v. Canwest Trade Shows Inc.*, 2012 BCSC 289 at para. 96.

[90] Ms. Esau's pleading, in their various iterations, all allege that she "slipped and fell into the water". There is no evidence that Ms. Esau slipped on anything although she clearly fell into the water.

[91] In June 2017, Dicks' counsel examined Ms. Esau for discovery. Her evidence at that time concerning the cause of the Accident was as follows:

95 Q And you would agree with me that the marina is a network of interconnected floating decks or docks and that you walk from one walkway to another, that they're sort of interconnected?

A That's right.

96 Q And you are aware then that the walkways - the decks that you're walking on are floating on top of the water and the harbour below?

A That's correct.

97 Q I'm going to ask you if you can tell me in your own words as best as you can recall, because I appreciate it's a few years ago, just what led to your fall and if you can just tell me what you were doing, what you remember, if you were walking to your husband.

A Okay. We had missed the Quadra ferry. We walked down to the dock. We were walking along and we saw a sign that said they were selling ice cream. We decided to buy an ice cream cone and we were standing there looking at the board that listed the flavours, and that's as much as I can remember.

...

100 Q And so when you were standing there you were standing across from the sign board on the walkway or deck right directly across from Dicks Fish & Chips?

A The dock, then that open slot, and then the board. Yes.

...

107 Q All right. So there is an open slot with water below?

A That's right.

108 And were you aware of that when you were looking at the sign board?

A I don't remember.

109 Q All right. And your evidence is that you saw a sign, they were selling ice cream, you and your husband walked towards the sign board, you were looking at the flavours of the ice cream and that was the last you could remember?

A That's correct.

110 Q Do you have any recollection of how you fell?

A I don't.

[92] Ms. Esau's affidavit evidence similarly confirms that she has no recollection of what caused her to fall. She also now confirms that she has no recollection of being aware of the gap before she fell into the water.

[93] The remainder of Ms. Esau's evidence concerning the reasons for her fall into the water clearly fall into the realm of speculation and newly proposed theory. She now "believes" that she stepped closer to read the Menu Sign and she now recalls struggling to make out the ice cream flavours on offer by Dicks. She proffers this now as the only "reasonable explanation" for her fall. This new evidence is contrary to her complete lack of recollection of having any difficulty reading items on the Menu Sign at the time of her discovery. I do not accept this aspect of Ms. Esau's testimony.

[94] Mr. Esau's evidence is similarly speculative as to cause of his wife's fall into the water. He says that his wife was standing right beside him on the Central Dock while they were reading the Menu Sign; then, he heard a splash, looked, and saw his wife in the water. He did not even see her fall into the water. Therefore, Mr. Esau has no evidence to support why his wife fell into the water.

[95] Clearly recognizing this significant evidentiary gap in proving her case, Ms. Esau obtained an expert report from Dennis Chimich, a biomechanical injury expert, dated May 8, 2020.

[96] Mr. Chimich's opinion is that the mechanism for Ms. Esau's injuries were consistent with a fall into the open gap arising from her slowly stepping forward toward the Menu Sign, as opposed to an ongoing gait. This expert evidence is consonant with the Esaus' evidence that Ms. Esau was standing on the Central Dock just before the fall. However, I agree with Dicks' counsel that Mr. Chimich's opinion does not establish that "but for" any breach of duty of care of Dicks, the fall would not have occurred.

[97] Despite Ms. Esau having absolutely no recollection as to how she ended up in the water, she now states in her affidavit that she would not have fallen if there had been a guardrail or "other protection" along the perimeter of the Central Dock adjacent to the gap.

- [98] This argument does not assist Ms. Esau's case. I agree that, even if Ms. Esau does not have any recollection of how she fell in, it is a reasonable inference that some form of guardrail may have prevented her fall if she stepped forward. I agree that Mr. Chimich does not address this point directly having only discussed the state after the Central Dock restaurant expansion took place. However, even so, only Nagra had the authority and power to place any such guardrails or barriers on the Central Dock. Dicks could not have done that.
- [99] Mr. Chimich's report also refers to an extensive guardrail system around the restaurant, as depicted in photographs taken by Mr. Esau and attached to his affidavit. Mr. Chimich states that such guardrails would have prevented the Accident. However, these guardrails were installed after the Accident and by the new tenant who took over the premises from Dicks and, in fact, extended the restaurant premises onto the Central Dock. The more relevant evidence would have been if Mr. Chimich had commented on the effect of any railings based on the state of play in July 2014, not a new and very different configuration of the restaurant/Central Dock area. Mr. Chimich also refers to netting as possibly preventing the fall, referring not to the state of the Central Dock at the time, but the netting around the Patio Float. Again, assuming that such netting would have prevented Ms. Esau from falling into the open slot, it was Nagra's power and responsibility to install such safety measures, not Dicks.
- [100] The essence of Ms. Esau's claim is that her reading of the Menu Sign was such a distraction that she lost her attention with respect to her surroundings and "forgot" that there was a hazard in front of her that should be avoided. She argues that "but for" the Menu Sign which drew her attention, she would not have fallen. With respect, that is a long bow to draw.
- [101] In my view, Ms. Esau she has not proven that the Menu Sign caused her to become distracted as the reason for her fall into the water. The purpose of the Menu Sign was clearly to entice her to come to the restaurant and order something. It belies common sense to suggest that a business creates a hazard by advertising its wares.
- [102] Further, applying Van Slee, the first question raised is whether Ms. Esau has proved that the condition or hazard caused her fall. She does not allege that the hazard (said by her to be the open slot) caused her fall. She blames the Menu Sign. However, there are any number of reasons why Ms. Esau could have stepped forward into the gap: for example, she could have tripped as she turned to her husband; she could have been distracted by something else; she could have momentarily lost consciousness and slipped down and stepped forward for that reason. Even if the Menu Sign was a "distraction", Ms. Esau has not proven that her fall was caused by it. Ms. Esau's allegation that the location and placement of the Menu Sign affixed to the exterior wall of the Restaurant was the cause of the Accident amounts to no more than mere speculation.

- [103] Even if the Menu Sign was the distraction causing her inattention, I cannot conclude that the placement of the Menu Sign by Dicks (i.e. across from the Central Dock) was a breach of duty by Dicks. Businesses advertise in a variety of ways. Businesses do not typically advertise their wares solely to persons on their premises, since the whole point is also to reach persons who are not on the premises to persuade them to enter.
- [104] The analogy here would be a closing out sale placed in the window of a store on the south side of Robson Street. A passerby on the north side of the street might stop and look - even strain - to read the details of the sign since a good deal appears to be on offer. If that passerby loses her attention and focus as to her surroundings because of the reading of the sign, such that she steps into the busy traffic travelling along Robson Street, would any reasonable person suggest that the store is liable for the person's injuries that result? The answer must be no.
- [105] In summary, there is simply no evidence that any alleged breach of the duty of care on the part of Dicks caused the Accident. Ms. Esau's arguments as to why she fell are merely speculative such that she is unable to prove causation as against Dicks. Further, the simple placement of the Menu Sign was not a breach of duty in relation to Ms. Esau. For that reason alone, Ms. Esau's claim must be dismissed.
- [106] Similarly, her argument that guardrails or warning signs in the Central Dock area would have alerted her to the gap is speculative and with no evidentiary foundation. This is contrary to her own assertion that she was very focussed on the Menu Sign and nothing else. Even accepting Ms. Esau's argument that a railing along the Central Dock or over the slot would have prevented her fall, the uncontested evidence is that Nagra had sole responsibility with respect to the Central Dock and Dicks had none at all. It cannot be said that Dicks breached any standard of care with respect to the Central Dock when it had no obligation to maintain or control the Central Dock, including putting any railings or netting up.

Was Ms. Esau contributorily negligent?

- [107] In *Hynna v. Peck*, 2009 BCSC 1057, the Court discussed how to approach the matter of apportionment:
- [88] In assessing apportionment, the Court examines the extent of blameworthiness, that is, the degree to which each party is at fault, and not the degree to which each party's fault has caused the loss. Stated another way, the Court does not assess degrees of causation, it assesses degrees of fault . . .
- [108] At para. 89, the Court in *Hynna* refers to *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, 2000 BCCA 505. In *Alberta Wheel Pool*, Finch, J.A. (as he then was), for the majority of the Court of Appeal, explained the principle at follows:

[45] In my view, the test to be applied here is that expressed by Lambert, J.A. in *Cempel*, supra, and the Court's task is to assess the respective blameworthiness of the parties, rather than the extent to which the loss may be said to have been caused by the conduct of each.

[46] Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

[Emphasis added.]

[109] In *Coleman* at para. 18, Justice Burnyeat agreed that while a plaintiff is under no duty to "glue her eyes to the ground", she is still required to be aware of her surroundings. Further, Burnyeat J.'s comments are apposite here and consistent with the court's reference in *Alberta Wheel Pool* to even momentary lapses of care in a person's conduct:

[13] The question which must be first answered is whether the defendants took the care that is required of them under s.3(1) of the *Occupier's Liability Act*. It is clear that the steps taken must not approach "perfection." In this regard, McEachern C.J.S.C. (as he then was) stated in *Hunning v. Huang* [1984] B.C.J. (Q.L.) No. 2087 (B.C.S.C.):

. . . To impose liability upon the defendants in these circumstances could only be justified by a standard beyond reasonableness approaching perfection and would constitute not just reasonableness but a guarantee of safety. If the accident could have been avoided by a modicum of awareness on the part of the plaintiff, as I believe it could have been, then it cannot be said that the defendant breached its duty of reasonable care. at pp.4-5)

[Emphasis added.]

[110] Ms. Esau had a duty to take reasonable care for her own safety by keeping a reasonable lookout at her surroundings. That duty would have been heightened at the Marina as she was well aware before the Accident of its intrinsic nature in that it was surrounded by water and that it was necessary to look where you were stepping. By any measure, common sense dictates that water is an ever-present and completely expected hazard at a marina. It is not a hidden or unexpected danger since a person visiting a marina needs to be cognizant of where they are stepping to avoid stepping into the water. Any adult attending at a marina, such as on the Central Dock area, would reasonably appreciate that there is a risk of falling off and a person ought to have a heightened awareness of such risk.

- [111] Ms. Esau's good vision, confirmed by both her and her husband, would have given her a very good appreciation of that fact on this very nice sunny afternoon. It should have been obvious to Ms. Esau that there was a gap between the Central Dock and the Building Float. It is visibly conspicuous, consisting of a three-foot separation between the floats, and a noticeable colour difference between the edge of the Central Dock and the edge of the Building Float.
- [112] I conclude that Ms. Esau should have fully appreciated that water surrounded the docking systems as she and her husband walked along the Central Dock toward Dicks. That would include the fact of the gap between the Central Dock and the Building Float, as evidenced by the photographs taken just days later where the gap is clearly visible.
- [113] I agree that a "modicum of awareness" on the part of Ms. Esau would have avoided this very unfortunate accident, assuming, as she argues, that she seemingly just forgot about the existence of the gap as she looked at the Menu Sign. Ms. Esau and her husband had clearly stopped on the Central Dock to view the Menu Sign for a reason, rather than continuing to walk over the Marina Ramp and up to the Menu Sign for closer inspection. The fact that they stopped there reasonably infers that they were aware of the barrier between them and the Menu Sign.
- [114] Ms. Esau, not Dicks, must bear the responsibility for any forgetfulness or inattention on her part. Assuming that Ms. Esau was distracted, I agree with Dicks that there is no basis for liability against Mr. Tansley simply because Ms. Esau inexplicably forgot that there was a gap in that location, causing her to step off the Central Dock without looking.
- [115] In support, Dicks refers to *Mann v. Rainsford*, 2010 BCSC 410. The plaintiff tripped on staggered concrete steps in the yard of an open house she was visiting. She simply missed one of these very visible steps because she was distracted looking at the garden just adjacent to the steps. At paras. 59-63, in addition to finding no breach of the standard of care, the Court found that the plaintiff's injuries were caused solely by her own inattention and in not looking where she was walking. The action was dismissed.
- [116] I agree the circumstances and conclusions in *Mann* are persuasive here.
- [117] If the cause of her accident was tripping or some temporary medical event, that is also not of Dicks' making.
- [118] I find that Ms. Esau is solely responsible for her fall and her injuries.

CONCLUSION

- [119] For the reasons discussed above, Ms. Esau's action is dismissed with respect to Dicks. Dicks is entitled to its costs of the action as against Ms. Esau.

"Fitzpatrick J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/14/2020BCSC1426.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/esau-v-tansley-2020>

Prepared on 26 October 2026 · Esheria