
CANADA / JUDGMENT

Fraser v. Vancouver (City)

2016 BCSC 1074

COURT

Supreme Court of British Columbia

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2016 BCSC 1074 Fraser v. Vancouver (City)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fraser v. Vancouver (City),

2016 BCSC 1074

Date: 20160613

Docket: S138613

Registry: Vancouver

Between:

Ranald Craig Fraser

Plaintiff

And

City of Vancouver and ABC Company Ltd.

Defendants

Before: The Honourable Madam Justice Fleming

Reasons for Judgment

Counsel for the Plaintiff:

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City of Vancouver:

F. LeTourneux

Counsel for the Defendant,

ABC Company Ltd.:

No Appearance

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 10-12, 2016

Place and Date of Judgment:

Vancouver, B.C.

June 13, 2016

Introduction

- [1] The plaintiff, Ranald Fraser, brings this action in negligence seeking damages in relation to a fall he says occurred on May 26, 2013, while he was walking with his mountain bike in the 1600 block of West 4th Avenue in the City of Vancouver. At the time the City was engaged in a construction project involving the roadway, the curbs and the outer sections of the sidewalks in the same location. Mr. Fraser says his bicycle dropped from the main sidewalk into the construction area next to the road because there was no safety equipment in place to warn of any risk or to prevent access to the area.
- [2] Mr. Fraser injured his right thumb, which required two minor surgical procedures, the first to repair a torn ligament and the second to remove a pin. He seeks non-pecuniary and special damages.
- [3] The City denies liability first on the basis the plaintiff has not established how the injury occurred. If the court accepts his evidence regarding the circumstances of the accident, the City takes the position it was not negligent. In other words, leaving the main sidewalk without safety equipment along the edge adjacent to the construction area was not a breach of its duty of care. In the alternative, the City argues Mr. Fraser was contributorily negligent.
- [4] There is a direct conflict in the evidence of Mr. Fraser and the City about the presence of safety equipment on the west end of the north side of the 1600 block on May 26, 2013. Mr. Fraser relies in part upon photographs he said he took shortly after the fall to depict the accident scene and the absence of the safety equipment, as well as other photographs he said he took the following day, showing delineators in place. Marijan Mudrovic testified for the City. He was the foreman for the concrete construction crew working on the City's project in that location before and after the day of the accident. His evidence was that the

various photographs do not accurately reflect the state of the construction site on May 26 and 27, 2013, and therefore could not have been taken on those dates.

- [5] Although the City does not dispute Mr. Fraser suffered an injury to his right thumb, it urges the court to reject his description of the accident based on several problems with his testimony and in light of Mr. Mudrovic's evidence. The City also relies upon the expert evidence of Dr. Matthew Yanko, a human factors scientist. He analyzed the visibility of the construction area next to the sidewalk where Mr. Fraser says he fell, based on the circumstances he alleges. Dr. Yanko concluded the construction area and the equipment within it were likely "sufficiently" visible to the plaintiff.
- [6] I share many of the City's concerns regarding Mr. Fraser's evidence. In contrast I found Mr. Mudrovic provided credible testimony regarding the construction that occurred and the use of delineators in the accident location before and after May 26, 2013. His evidence about those events casts serious doubt on the accuracy of Mr. Fraser's account of the accident. Ultimately I have concluded Mr. Fraser has not proven the accident occurred as he alleged on a balance of probabilities. In coming to this conclusion I also rely to some extent on Dr. Yanko's expert opinion regarding the visibility of the construction area.

Plaintiff's Evidence

- [7] Mr. Fraser is the sales manager and an owner-operator of Kits Inflatable Boats, located at 1655 West 4th Avenue, where he has worked since 1980. The business used to be situated on Granville Island until it moved to the current location about twenty years ago. Prior to the accident, Mr. Fraser said he was aware the City was doing roadwork in the area, but not sidewalk construction. Kits Boats is just north and west of the accident site. The front entrance is clearly visible from the site, separated by a crosswalk located at the end of an exit ramp from the Granville Street Bridge and a short stretch of sidewalk. Mr. Fraser could not recall, however, ever walking along the portion of sidewalk where he said he fell, stating he always parks at the back of the store and when he leaves by the front door he turns right to visit a coffee shop in the next block west. Inexplicably, he also denied that the crosswalk that begins outside the front door of the business leads directly to the sidewalk where the accident happened.
- [8] May 26, 2013, was a Sunday. Mr. Fraser was not working that day. He lives in West Vancouver. He said he decided to drive to the store with his mountain bike and ride from there. He testified that at around 3:00 p.m. he rode his bike from the store to Granville Island through the back lanes, where he estimates he spent three to four hours looking in shops and enjoying a tapas meal. He said he then rode up through the "back trails" and merged onto the road that travels from Granville Island underneath the Granville Street Bridge up to 4th Avenue. In cross-examination he was queried about the existence of any such trails. At that point, Mr. Fraser testified he rode his bike on the grass east of Granville Island. He says he began to walk his bike when he reached the road because he did not have a bike helmet. He did not want to ride on a busy roadway without it and thought it might be illegal to ride on

the sidewalk. His plan was to make his way to Kits Point.

- [9] Once he reached 4th Avenue, Mr. Fraser headed west along the sidewalk located on the north side of the street. Although he is right handed, he said he pushed his bike on his left hand side. Mr. Fraser crossed the intersection at Fir Street. He said he noticed signs of construction in the curb area up ahead, including some orange cones. In cross-examination he acknowledged he had no difficulty pushing his bike in a straight line along the stretch of sidewalk prior to the intersection, through the intersection, along the east portion of the sidewalk in the 1600 block of West 4th, and across the driveway to a veterinarian hospital located about midblock. Mr. Mudrovcic and Dr. Yanko's evidence establishes the width of the intact sidewalk at that location was and is 1.9 metres, or 6 feet 3 inches, and the length of the portion west of the driveway to the utility pole toward the end of the block is 23 metres.
- [10] After crossing the driveway, the plaintiff walked more than half way along the length of the remaining sidewalk before his bike went over the southern edge, or to the left, into the construction area. The plaintiff described landing on his right thumb, which took all of his weight, in an effort to avoid falling onto the pedals. He said he was surprised, got up and looked around, observing there were no cones or warning signs along the stretch of the sidewalk west of the driveway. He thought it was a strange way to leave a construction site, given the "big" drop-off between the concrete sidewalk and the gravel in the construction area. Mr. Mudrovcic's evidence was the depth of the drop between the side walk and the gravel surface in the construction area was approximately four inches, which I accept. Apart from stating he was looking directly into the sun before he fell, the plaintiff gave no other evidence about the circumstances of the accident itself. In cross-examination he indicated he was not wearing sunglasses because he only wears them when he is driving.
- [11] Mr. Fraser testified that after falling he decided to end his outing and put his bike in the back of the truck parked at his business. His thumb was very sore. He described no other injuries, such as abrasions. He says he walked back to the location of the accident and took a number of photographs with his iPhone because he thought the sidewalk had been left in an unsafe condition and he might need to protect himself. During cross-examination the plaintiff indicated he may have taken the photographs later in the week, but to the best of his knowledge they were taken on the Sunday. He then stated he has dyslexia and sometimes mixes things up. Ultimately he disagreed the photographs were taken on another date. Mr. Fraser said he took additional photographs the next day, Monday, May 27, 2013.
- [12] His photographs for both days are in evidence. They do not show when they were taken. Mr. Fraser said he downloaded the pictures from his phone to his computer at home before having them printed. When it was suggested in cross-examination that he could have printed the photographs showing the date and time, he indicated his computer hard drive has since crashed and been repaired--he has three computers at home, and there are always problems with them.

- [13] Mr. Fraser also relies upon photographs taken by a friend on April 25, 2016, at 6:47 p.m. and 6:49 p.m. at the accident location to depict the effects of the sun on the day of the accident. The plaintiff described his friend's camera as "quite fancy" and denied having any knowledge of how to use it properly. The photographs are date and time stamped. There is one photograph that faces east of the accident site, which Mr. Fraser explained was intended to show how the sun was impacting on those headed west. The drivers of two cars have their visors pulled down. In cross-examination, Mr. Fraser denied there would be any significant change in the location of the sun at that time of day between April 25 and May 26, which I found surprising. He said he was not familiar with the summer solstice.
- [14] The day after the accident, Mr. Fraser called his family doctor's office and attended an appointment. The clinical record of Dr. Wayne Smith dated May 27, 2013, confirms the appointment, indicating a number of issues were discussed, including the plaintiff's complaint he "fell yesterday and jammed [sic] his thumb". Dr. Smith referred him to Dr. Ozberg, a hand surgeon, who diagnosed the plaintiff with a "skier's thumb injury" involving a complete disruption or tear of the ulnar collateral ligament. Dr. Ozberg repaired the plaintiff's injury using local anaesthetic on June 6, 2013. Mr. Fraser described the surgical procedure as extremely painful, part of which involved inserting a pin through the bone or joint in the thumb. The area was then protected with a soft cast. The pin was later removed without anaesthetic and again was very painful.
- [15] According to the plaintiff, Dr. Ozberg did not recommend any further treatment, indicating the thumb should heal on its own. Mr. Fraser sought no medical treatment for his thumb until February 2015, after he became concerned about the lack of improvement in his ongoing symptoms, namely pain with activity and stiffness in his right thumb. On July 6, 2015, he was examined by Dr. Daneshvar, an orthopaedic surgeon, who recommended a CT scan to better assess the "MCP" joint and a dorsal osteophyte. Dr. Daneshvar examined the plaintiff again on February 23, 2016, and found ongoing limited motion in the joints of the thumb.
- [16] In both his reporting letter dated July 6, 2015, and his consultation report dated February 23, 2016, the doctor described the plaintiff as sustaining the ligament injury to his thumb when he fell off his bike. In cross-examination, the plaintiff said Dr. Daneshvar was mistaken. He denied riding his bike at the time of the accident or saying that he did. In closing submissions, the plaintiff suggested the doctor simply copied the error from his letter to his report. I note, however, that the references to the accident are not the same. In his reporting letter, Dr. Daneshvar wrote: "As you know, Mr. Fraser had an injury a couple of years ago when he fell off his bike, landing onto his thumb". His consultation report reads: "He sustained an ulnar collateral ligament injury in May 2013, when he fell off his bike while going on an uneven sidewalk".

- [17] It appears that Mr. Fraser has been involved in two other accidents in the last several years. In 2009 he was involved in a motor vehicle accident. His medical records indicate he has complained of ongoing left leg and knee symptoms as a consequence. In August 2012, he fractured his right ankle while walking. In October 2013 he underwent surgery to have plates or implants removed from his ankle. He was taken to hospital by ambulance, suffering from a severe migraine headache, within a few days of the surgery.
- [18] Mr. Fraser's special damages claim includes a number of prescriptions for pain and other medications obtained in late October and early November 2013. Cross-examination revealed all of those medications related to his ankle surgery or his migraine headache. He also submitted parking receipts for a follow-up appointment at Vancouver General Hospital regarding his ankle injury and attendance at his examination for discovery on a date different from his discovery. In addition, the plaintiff claimed for the cost of a TV rental while in hospital for his ankle or his migraine headache. He did acknowledge uncertainty about the accuracy of one or two of the items he was claiming, in his direct evidence. In cross-examination, when confronted with the fact that several of them were unrelated to the accident, he said his mistakes were innocent.
- [19] The special damages claim also includes the cost of attending the West Vancouver and the Vancouver Aquatic Centres on 11 occasions between November 1 and December 11, 2013. Although the soft cast on his right hand was removed in July 2013 and he started attending the aquatic centres not long after his ankle surgery, Mr. Fraser testified all the visits were solely related to his thumb injury. He stated the hot tub relaxed his hand and at the West Vancouver aquatic centre he also attended the gym to exercise it. Given the timing and the nature of the pain medication he was prescribed for his ankle injury, I found this evidence unconvincing.
- [20] Prior to the accident the plaintiff said he rode his bike three or four times a week for up to three or four hours. In cross-examination, Mr. Fraser was confronted with a clinical record made by Dr. Smith on December 12, 2012, that reads in part, "[n]o mountain biking for three years now as it is always painful". The entry was made in the context of discussing leg, back and knee symptoms. When asked whether he made that statement to the doctor, the plaintiff responded with words to the effect of, "That doesn't mean that is what I do I enjoy riding. I hadn't ridden much". He denied his earlier evidence was inaccurate, however, stating he had been staying off rough trails. I note a clinical entry for January 24, 2013, reads in part, "When he does light work like liftin [sic] boxes or mountain biking he get [sic] pain in the back of his lower thigh and upper calf".
- [21] Mr. Fraser testified that he stopped riding his bike after the accident, stating that within 45 minutes or less his thumb would become sore. Dr. Smith's clinical record for November 8, 2013, includes:
5. Left posterior calf and thigh are numb with aggressive activities such as riding a bike. On going [sic] since the MVA 4.5 years ago.

- [22] Mr. Fraser was not cross-examined about the January or the November 2013 entries.
- [23] In addition to being used to impeach credibility, prior inconsistent statements of a party may also be treated as admissions and accepted for the truth of their content. However, as discussed in *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114, there are qualifications that apply to such statements in clinical records, regardless of their use. I recognize, as did the Court in *Payer*, that clinical records are not intended to be a verbatim record of what the plaintiff said.
- [24] What I take from the clinical records reviewed above is the plaintiff's evidence regarding his involvement in cycling both before and after the accident is somewhat inconsistent with his statements to Dr. Smith. Regarding Dr. Daneshvar's two references to the plaintiff falling off his bike, it may well be the doctor was mistaken both times, but given the descriptions themselves, and the various problems with the plaintiff's evidence, there is more than a distinct possibility the doctor was accurately recording what he was told.

Expert Evidence of Dr. Yanko

- [25] As indicated above, Dr. Yanko's report dated March 9, 2016 considered the visibility of what he refers to as the "trench" and the "construction equipment" depicted in Mr. Fraser's photograph of the accident location, which he said he took on May 23, 2013. Dr. Yanko analyzed the typical gaze for a pedestrian and the plaintiff's opportunity to have perceived the trench, including whether sun glare may have prevented or interfered with his perception. The trench is the gravel construction area adjacent to the south side of the sidewalk that ran from the western edge of the driveway to the veterinary hospital to the western end of the 1600 block, a distance of 23 metres. The construction equipment within the trench shown in Mr. Fraser's photograph includes several orange and white barricades and a rolled-up flexible orange fence, as well as another large yellow and orange item. Dr. Yanko examined the accident site well after the construction project was complete. Therefore he did not observe the depth of the trench.
- [26] Dr. Yanko concluded the construction equipment and the trench adjacent to the sidewalk along the western half of the 1600 block of West 4th Avenue shown in the photograph were sufficiently visible to a westbound pedestrian. Sun glare would not likely have impaired the plaintiff's ability to detect either the trench or the construction equipment within the trench.
- [27] Dr. Yanko estimates it would have taken Mr. Fraser at least 8 to 11 seconds to walk from the western edge of the driveway to the veterinary hospital, along the sidewalk to the accident location. Based on the marking Mr. Fraser made on the photograph to show where he fell, Dr. Yanko estimated the distance to be approximately 14 metres from the western edge. Dr. Yanko noted various factors that contributed to a high contrast between the sidewalk, the adjacent grass and the trench area at that point. He also observed the sidewalk continues along a straight trajectory and there were no cues that would have prompted Mr. Fraser to

make a left turn.

- [28] In coming to his conclusions, Dr. Yanko relied in part upon a research study that found pedestrians walking on paved sidewalks spend 65% of the time focusing on areas far ahead of them and 35% on areas immediately in front of them. He states it is likely the plaintiff's gaze was directed towards the general area of the trench as he was walking west along the sidewalk from the 1500 block of West 4th Avenue. Dr. Yanko states that, as the plaintiff approached the accident location, the entire trench and the brightly coloured construction equipment within it would have been within his "useful field of view", or the visual field in which he was likely able to detect tripping hazards or obstacles.
- [29] Although Mr. Fraser testified the sun was directly in his eyes before he fell, Dr. Yanko determined the location of the sun at 6:30 p.m. and 7:00 p.m. on May 26, 2013, was unlikely to have caused "disability glare", noting that the sun set at 9:04 p.m. that day. Disability glare occurs when light scatters within the eye, causing a loss of visual contrast on the retina. For someone of Mr. Fraser's age at the time, 52, Dr. Yanko calculated the threshold for disability glare at about 19 degrees. At 6:30 p.m., if Mr. Fraser was looking straight ahead at the horizon as he walked westbound along West 4th Avenue, the sun would have been 22 degrees above the horizon and 5.5 degrees to his right. Altogether, the sun would have been approximately 23 degrees away from a straight forward gaze. The angle would have been greater whenever he looked at the trench. At 7:00 p.m. the sun would have been 18 degrees above the horizon and 11.5 degrees to the right, placing it 21 degrees away from central vision.

The Evidence of Marijan Mudrovic

- [30] Mr. Mudrovic testified on behalf of the City. He has been employed by the City for 20 years and has spent the last 10 years working as a foreman of a concrete construction crew. He was the supervisor of Crew 51, assigned to excavate the curbs and outer sidewalks and then construct new curbs and gutters on West 4th Avenue in May 2013. He did not learn of the plaintiff's claim until fairly recently.
- [31] Along with his testimony, the City relied upon a number of business records kept by Mr. Mudrovic and others regarding the project, including daily crew reports from May 21 to May 27, 2013, that he completed and daily crew reports for two road construction crews on May 24 and May 27, 2013.
- [32] On May 21, 2013, Crew 51 started work on the north side of the 1600 block of West 4th Avenue, having completed the 1700 block. Mr. Mudrovic explained the construction project followed the City's excavation and replacement of water and sewer pipes that caused some damage to the road, curbs and the outer sidewalk, an area he referred to as the "utility strip" because it houses utility wires and poles. At the west end of the 1600 block the utility pole was used by Coast Mountain Bus Company, and the plan was to remove and replacing the trolley wires, the pole and its base. Mr. Mudrovic referred to the remaining main area of

sidewalk, adjacent to the utility strip, as the "main walk", which in the 1600 block of West 4th Avenue has a width of 1.9 metres or 6 feet 3 inches. He testified the water crew had damaged the utility strip and the curb in the 1600 block west of the driveway to the veterinary hospital but not the main walk. According to Mr. Mudrovic they had left the area safe for pedestrians and cars by placing gravel in the utility strip area and placing temporary asphalt on the road.

- [33] He gave evidence that on May 21, 2013, his crew placed delineators along the main walk of the sidewalk of the 1600 block, west of the driveway, and they remained there until some point on May 27, 2013. That day Crew 51 cut the road on the north side of the 1600 block and prepared for the excavation of the curbs and gutters.
- [34] Mr. Mudrovic is in charge of leaving his crew's construction site in a safe condition at the end of each day. The second page of every crew report has a series of boxes for each work location that can be ticked to specify what safety equipment was left in place "when departing location". His crew report for May 21, 2013, shows a tick mark for delineators at that location. The same is true for the crew reports he completed on May 22 and May 23, 2013.
- [35] On May 24, 2013, his crew report shows no tick marks at all for work locations one and three in the 1600 block of West 4th. Mr. Mudrovic testified he simply forgot to complete that part of the form, but he was certain the delineators remained in place over the weekend. There was no reason to move them from where they had been since May 21, 2013. The box for delineators is ticked for location two on the same crew report which was apparently not observed by either counsel or Mr. Mudrovic while he was giving evidence. He specified Crew 51 was working at the west and east ends of the block that day, pouring concrete into the curb and gutter forms at the west end, meaning west of the driveway to the parking lot, and cutting the road and preparing for excavation of a bus "pad" at the east end. The notations written on the crew report under location two indicates it was situated in the east end of the block. In cross-examination, Mr. Mudrovic resisted the suggestion he could not possibly have a specific recollection of how the construction site was left, given the passage of time and the number of projects he must have completed in the last three years. It is clear, however, he was relying on his long-standing practice as well as the absence of any reason to remove them from where they had been placed initially, when he politely but firmly maintained his evidence that the delineators remained in place along the western edge of the sidewalk, on the western half of the block.
- [36] Mr. Mudrovic was also challenged about the work he said was done by Crew 51 on Friday May 24, 2013, in the 1600 block. In direct examination he testified about the sequence of the events that occurs whenever curbs and gutters are excavated and constructed on a site. The crew first cuts the road to allow room for placement of the large forms used to create new curbs and gutters; the area is then excavated; forms are brought in and put in place; and concrete is poured into the forms. Although it solidifies in four to five hours, it is "green" at that point and can be easily damaged, so the forms must remain in place for at least one day

(although part of the form is removed to allow for finishing work while it remains green). Once the concrete is cured, the forms are removed, and then the paving crew restores the road.

- [37] Referring to his various crew reports, Mr. Mudrovcic gave evidence that after the road was cut on May 21, 2013, the next day, his crew excavated, graded and compacted the area up to edge of the main walk. On May 23, 2013, Crew 51 put steel and wood forms in place. Mr. Mudrovcic was not shaken in cross-examination when it was suggested the curbs and gutters were actually completed on Friday, May 24, 2013. He maintained the concrete was poured into the forms located west of the driveway that day and the forms remained in place until Monday morning--May 27, 2013. Although his crew report for May 24, 2013, is consistent with his evidence, there is no reference to removing the forms in his crew report for May 27, 2013. Mr. Mudrovcic explained the task is so minor, he did not make a note of it. Indeed, the descriptions of the work done in all of the crew reports are very summary. He indicated it would take about an hour for a few members of his crew to remove the forms. The focus of the work that day was on excavating, grading and compacting the bus slab--the area of the road where the bus stops at the east end of the block, which is made of concrete, not asphalt, because of the loads involved.
- [38] Mr. Mudrovcic testified Crew 30 was one of the paving crews restoring the road alongside his curb and gutter crew. Their crew report for May 24, 2013, indicates they were idle that day, consistent with his evidence that the curb and gutter forms were in place, preventing any paving from occurring. The crew report for Crew 81, another paving crew that worked together with Crew 30, although not that day, indicates they used a "con saw" and "flagger" on West 4th Avenue from Pine to Fir (the 1600 block), but did no paving. Mr. Mudrovcic explained a con saw is a large machine used to cut the road in damaged areas to allow for excavation.
- [39] Mr. Mudrovcic was also cross-examined about a document entitled "City Engineering Services - Record of Cuts and/or Damaged Surfaces", numbered 211417 (the "Cut Sheet"). The Cut Sheet relates to the curb and gutter work being done by Crew 51 in the 1600 block of West 4th. Mr. Mudrovcic signed the form and entered May 24, 2013, as the "date completed". He denied the date indicated his crew had actually removed the forms by then rather than on the May 27, 2013, explaining the concrete work for the curbs and gutters in that block was otherwise complete and the cut sheet was used to bill another department, in this case water works, for the cost of the repairing that concrete asset (based on a unit price and the units completed) in that particular block. He specified May 24, 2013 as the "date completed" because by the end of that day the curb and gutter had been replaced and the only remaining task, removing the forms, was an insignificant amount of work. Mr. Mudrovcic explained he received several cut sheets for each concrete asset in that particular block including the bus slab located at the east end of the block and the utility strip which was replaced later.

- [40] Mr. Mudrovic denied the photographs the plaintiff said were from May 23, 2013, could have been taken that day. He pointed out that in the first of those photographs the new curb and gutters are completed both east and west of the driveway to the veterinary hospital, which occurred three or more days later. The second shows the inside lane of the north side of the 1600 block at the west end of the block restored and the curb and gutters completed. Mr. Mudrovic reiterated the curb and gutters were encased in forms on May 26, 2013, and that portion of the road was paved on May 27, 2013. With respect to the photograph marked by the plaintiff to indicate where his bike fell off the sidewalk edge, which shows the absence of delineators along that edge, Mr. Mudrovic made the same comments. When asked to explain why there were no delineators in place, he testified that while working on the bus slab at the east end of the block on May 27, 2013, the paving crew used his delineators on the roadside at the west end. Mr. Mudrovic acknowledged he did not observe them moving the delineators from the edge of the sidewalk but he emphasized only his crew and the paving crew were present that day, and there is simply no other explanation. The photograph itself shows a multitude of delineators on the north side of the road at the west end of the block.
- [41] Mr. Mudrovic also disputed the accuracy of the date for the photographs Mr. Fraser said he took on Monday, May 27, 2013, noting they show the road completely restored--re-paved from one side of the street to the other, with the center and lane lines painted. There is also a new utility pole standing on a new base next to the old one, surrounded by a much larger hole than is shown in the earlier pictures.
- [42] Even without Mr. Mudrovic's evidence, it is plain the changes between the first and second sets of photographs could not have occurred in one day.

Analysis

- [43] In assessing credibility, I am guided by *Faryna v. Chorney*, [1952] 2 D.L.R. 354, and the factors summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398, *aff'd* 2012 BCCA 296. Those factors include the ability of the witness to resist the influence of interest to modify his or her recollection; whether the witness's evidence harmonizes with independent evidence that has been accepted; whether the witness changes his or her evidence during direct and cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in recalling events; whether the witness's evidence seems unreasonable, impossible or unlikely; and the witness's demeanour. Fundamentally, the question is whether the evidence of the witness is consistent with the probabilities affecting the case as a whole. I am also aware that I may accept all, some or none of the evidence of a witness and that truthfulness and reliability are not necessarily the same. An honest witness can be mistaken (*Xu v. Hu*, 2015 BCSC 1400 at para. 26).
- [44] As I have already pointed out, there are several problems with the plaintiff's evidence, each of which on its own might be understandable but considered together undermine his credibility. I also agree with the defendant's submission that at times it was as if the plaintiff was answering questions in a way that he thought would be helpful to his case rather than

speaking candidly, for instance, denying any knowledge of the sidewalk construction that had been occurring in the same block as his business for several days prior to the accident, or ever having previously walked on the sidewalk where the accident occurred. I was less than convinced by the plaintiff's account of the bike ride prior to the accident when considered in the context of some of his other evidence. For example, although he testified to riding three or four times a week up to three or four hours at a time, his ride that day would have been very short, given how close his business is located to Granville Island and the time frames he provided, as well as the activities he engaged in--looking in various shops and eating a meal. Mr. Fraser did not indicate what he did with his bike while shopping or eating. At the same time he did say he was without his bike helmet, viewed it as unsafe to ride on a busy road without it, and was concerned that riding on a sidewalk was illegal. In those circumstances, one might expect Mr. Fraser would have decided to walk to Granville Island rather than ride and walk with his bike.

- [45] Again viewed contextually, the most concerning aspect of his evidence was his very limited account of the accident itself. While I accept his submission that describing the minutiae of an incident that occurs in a matter of seconds can indicate contrivance, the absence of any evidence about many important aspects of the circumstances--for example, what he observed as he was proceeding across the driveway located midblock and westbound, how he was pushing or walking with his bike and how and where he and the bike landed--is troubling.
- [46] Accordingly, I am left in doubt by Mr. Fraser's evidence, about what actually happened to cause the injury to his right thumb.
- [47] My concern about the paucity of his evidence regarding the accident is not alleviated by the expert opinion of Dr. Yanko, who concluded the trench (the gravel construction area) and the (brightly coloured) equipment within it were likely sufficiently visible to a westbound pedestrian. Contrary to the plaintiff's claim he was facing directly into the sun and therefore his perception of the trench was obscured when the accident occurred, Dr. Yanko also concluded the location of the sun at that time was unlikely to have impaired his ability to see either the trench or the equipment within it. I accept Dr. Yanko's evidence. When combined with the plaintiff's testimony, it seems unlikely that after walking without any difficulty along a straight stretch of sidewalk that was 6 feet 3 inches wide, the plaintiff would have veered left into the construction area, which contained brightly coloured safety equipment that was there to be seen.
- [48] Finally, the testimony of Mr. Mudrovcic, which I largely accept, entirely undermines Mr. Fraser's account of the accident, along with his claim that his photographs depict the circumstances at the time of the accident and the next day.
- [49] Although the plaintiff suggests important aspects of Mr. Mudrovcic's evidence were unreliable because they involved the reconstruction of events influenced by his own interest, I found Mr. Mudrovcic to be a very credible witness. He testified in a straight

forward, careful manner. Apart from failing to acknowledge he could not recall specific events that occurred during the construction project, he provided a consistent, logical, plausible account of the sequence and timing of the work done by his crew and others. His explanations for what appeared to be discrepancies between the City's documents and his evidence were also entirely reasonable. For these same reasons, although the absence of delineators depicted in some of Mr. Fraser's photographs suggests Mr. Mudrovic failed to ensure they were placed at the edge of the sidewalk at the end of the work day on May 24, 2013, I have no difficulty accepting they remained in place from May 21, 2013, onward, and he simply forgot to mark the box on the crew report for that day. I accept Mr. Fraser's photographs could not have been taken that day, given the state of the construction it shows.

[50] I am therefore unable to accept Mr. Fraser's evidence about when, where and how the accident occurred.

Conclusion

[51] Because Mr. Fraser has failed to establish the accident occurred as he alleged on a balance of probabilities, his claim is dismissed.

Costs

The City will have its costs.

"Fleming J."

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