
CANADA / JUDGMENT

Herron v. Value Industries Ltd.

2019 BCSC 878

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 878 Herron v. Value Industries Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Herron v. Value Industries Ltd.,

2019 BCSC 878

Date: 20190603

Docket: S189605

Registry: New Westminster

Between:

Carol Herron

Plaintiff

And

Value Industries Ltd.

Defendant

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Plaintiff:

C. Carta

Counsel for the Defendant:

T. Teja

Place and Date of Hearing:

New Westminster, BC

May 15, 2019

Place and Date of Ruling given to Parties with Reasons to Follow:

New Westminster, BC.

May 29, 2019

Place and Date of Judgment:

New Westminster, B.C.

June 3, 2019

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Introduction

- [1] This is a summary trial application. The underlying action arises from injuries sustained by the plaintiff Ms. Herron when she tripped over a curb and fell in the parking lot of a strip mall operated and maintained by the defendant Value Industries. Ms. Herron filed a notice of civil claim alleging that Value Industries Ltd. ("Value Industries") is liable for failing to take proper steps to maintain the parking lot and to make the curb safe.
- [2] In this application, Value Industries seeks dismissal of Ms. Herron's claim. Value Industries accepts that it had a duty under the Occupiers Liability Act, R.S.B.C. 1996, c. 337 to take reasonable measures to make the parking lot safe, but argues that there was no breach of that duty in this case. Ms. Herron says the Court cannot grant judgment against her, because on the affidavits placed before the Court in this application, the Court is unable to make the necessary factual findings to rule in the defendant's favour. Ms. Herron goes further, asserting that the Court is in a position to make the necessary factual findings to rule in her favour. She says Value Industries failed to take reasonable steps to make the parking lot, and in particular the curb on which she tripped, safe for use by pedestrians.
- [3] I gave judgment in this matter on 29 May 2019, with reasons to follow. These are the reasons.

Facts

- [4] The incident in question took place on 8 October 2015, outside a Save On Foods store located in a strip mall on King George Boulevard in Surrey. It was about 8:00 a.m.
- [5] Ms. Herron drove into the parking lot and parked parallel to the curb. She approached the sidewalk intending to collect some newspapers from a row of newspaper boxes lined up on the exterior wall of the Save On Foods. She knew she had parked next to the curb, but thought she had positioned her car so that she could walk up the wheelchair ramp. As she stepped toward the sidewalk, she tripped on the curb and fell, suffering the injuries that give rise to her claim.
- [6] Ms. Herron says she did not see the curb. It is argued that if the curb had been painted yellow, as it had been in previous years, she would have noticed it and would not have fallen.
- [7] The curb in question separates the driving surface of the parking lot from the sidewalk in front of the Save On Foods. In prior years, the curb was painted yellow. It was repainted annually from 2009 to 2014 inclusive. The paint would evidently flake off over time and had to be repainted every year.
- [8] In 2015, Ms. McCabe, a Value Industries property manager, made a decision not to repaint the curb. Instead, Ms. McCabe arranged for the paint on this particular curb to be removed by sandblasting. This was evidently done as an aesthetic measure, because the paint kept chipping off and Ms. McCabe saw no point in having it repainted each year.
- [9] The evidence indicates that the cost of repainting various surfaces in the parking lot was roughly \$5,000 per year. That cost would not have materially increased if a decision had been made to repaint the curb in question in this case.

Analysis

Suitability for Summary Trial

- [10] The first issue to be dealt with is whether this matter is suitable for summary trial. Judgment may be granted on a summary trial application unless the court is unable to find the facts necessary to determine the case, or it would be otherwise unjust to decide the matter by way of a summary trial: under Rule 9-15(1)(a) of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [11] A court will generally not be able to make the necessary facts on a summary trial application where there is a dispute over the primary facts, or head on conflict in the evidence on a decisive point, of a sort that cannot be resolved without making findings of credibility or preferring one affidavit over another: *Jutt v. Doehring* (1993), 82 B.C.L.R. (2d) 223 (C.A.) at para. 13. This is not such a case. There is no real dispute between the parties with respect to the primary facts. It is quite clear what happened. Ms. Herron tripped over the curb, and Value Industries does not dispute her account of the circumstances.

- [12] Nor is this a case where it would be unjust to decide the matter by way of a summary trial based on the factors discussed in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) at para. 48. This is not a particularly complex case, legally or factually. The central issue is whether the defendant breached a duty of care owed to the plaintiff under the Occupier's Liability Act. A trial is scheduled to begin several months hence, and both parties recognize that the trial can be avoided if the Court is able to determine the issue of liability in this summary trial.

Liability

- [13] The second issue is whether Value Industries is liable for the injuries sustained by Ms. Herron when she tripped over the curb. On this issue it is common ground that Value Industries, as the occupier of the property, owed a duty of care to Ms. Herron under s. 3(1) of the Occupiers Liability Act. Value Industries had a "positive duty" to take all reasonable steps necessary to make the parking lot safe for those who use it: *Bains v. Hill* (1992), 68 B.C.L.R. (2d) 193 (C.A.) at para. 13.
- [14] The real controversy in this case has to do with whether Value Industries breached its duty to take all reasonable steps necessary to make the parking lot safe, by failing to address or remediate any risk associated with the curb where Ms. Herron fell. Under the Occupiers Liability Act, Value Industries had a duty to take "reasonable care in the circumstances". The duty itself "does not change", but "the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation": *Waldick v. Malcolm*, [1991] 2 S.C.R. 456 at p. 472; see also *Wilde v. Cambie Malone Corp.*, 2008 BCSC 704 at para. 36 [Wilde].
- [15] Although the Act places a positive duty on the occupier, there is no presumption that the occupier breached that duty. The onus is on Ms. Herron, as the plaintiff, to show that Value Industries failed to take all reasonable steps required in the circumstances. The fact that Ms. Herron was injured is not enough, of itself, to meet that burden: *Wilde* at para. 39; *Kayser v. Park Royal Shopping Centre Ltd.* (1995), 16 B.C.L.R. (3d) 330 (C.A.) at para. 13; *Bauman v. Stein* (1991), 78 D.L.R. (4th) 118 (B.C.C.A.) at p. 127.
- [16] Value Industries cites *Gervais v. Do*, 2000 BCSC 1271 [Gervais] for two propositions. The first is that applying paint to a curb will not necessarily assist in indicating a height differential: *Gervais* at para. 32. The second is that it is simply not reasonable to expect complete matching of surfaces when walking in outdoor areas like parking lots, and transition areas from parking lots, to walkways, into buildings: *Gervais* at para. 34.
- [17] In response, counsel for Ms. Herron submits that one cannot make any categorical statements of law about whether a curb in a parking lot is or is not safe, or about whether the duty to make a curb safe includes a duty to paint it. It is always a question of what is reasonably required in the circumstances to make the area in question reasonably safe.

- [18] Counsel for Ms. Herron says that there were a number of features of this particular curb that called for some reasonable steps to bring it to the attention of pedestrians. In particular:
- a) Counsel cites the fact that the curb was previously painted bright yellow. Assuming it was painted yellow for a reason, counsel says this fact alone should have put Ms. McCabe on notice that the curb could be a tripping hazard. Instead of simply re-painting the curb at no extra cost to Value Industries, Ms. McCabe made a decision in 2015 to have the paint removed entirely.
 - b) Counsel also points to photographs indicating that there was no clear color contrast between the grey concrete roadway and the grey concrete curb. This makes the case at bar distinguishable from Gervais, in which there was a clear color contrast between the road surface and the curb: Gervais at para. 31.
 - c) Counsel further points to the fact that the curb in question separates the road from a sidewalk that is, at 8:00 a.m. in the morning, under the shade of the Save On Foods building, making the whole area dark and lacking in light contrast.
 - d) Counsel points to the fact that the curb in question drops away at a certain point to make way for a wheelchair ramp leading from the parking lot surface onto the sidewalk. Thus, there is a portion of the curb that slopes up from street grade to full curb height, without any yellow paint to draw the change in height to the attention of pedestrians.
- [19] Counsel for Ms. Herron relies on *Furlan v. The Owners, Strata Plan BCS3202*, 2016 BCSC 213. [Furlan] In that case, the plaintiff was injured when he flipped his bike over a "roll over curb". The curb ran directly across a sidewalk that was commonly used by cyclists. The curb was unpainted and at times shaded by other aspects of the landscape. Madam Justice Loo found that the defendant was liable in failing to recognize and remediate the risk the curb posed to cyclists. The defendant knew or ought to have known the curb needed to be more visible to cyclists, and should have painted it yellow to remediate the risk.
- [20] In *Furlan*, Loo J. cited *Agar v. Weber*, 2014 BCCA 297 [Agar] as a "leading case" on the standard of care required under s. 3(1) of the Occupiers Liability Act. The Court in *Agar* stated that an occupier is required to take reasonable measures to address and protect against "objectively unreasonable risk of harm", and went on to explain that whether a particular risk is reasonable or unreasonable is a question of fact: *Agar* at para. 30.
- [21] Having examined the photographs of the curb in question and considered the specific points advanced by Ms. Herron, I see nothing to suggest that the curb was unsafe in the sense of posing an appreciable risk or tripping hazard. The curb appears to be solid and structurally sound. It is not cracked, broken, or misaligned in any way. It is not exceptionally high or low. It is not obscured by any shrubbery or other landscaping feature. The parking lot in front of the curb is level, and the curb is not at the top or bottom of any unusually steep slope. In my view, this curb is a routine feature of the urban landscape where it is situated.

- [22] I find Furlan to be distinguishable from the case at bar. The "roll-over curb" in Furlan ran directly across a sidewalk commonly used by cyclists. The trial judge was satisfied that the curb posed a hazard to cyclists, and the defendant had done nothing to remediate the risk. By contrast, in the case at bar the curb ran along the edge of the sidewalk. Any prudent pedestrian would reasonably expect there to be a change in elevation between the surface of the parking lot and the sidewalk. The curb in the case at bar did not pose any foreseeable risk or hazard, and as such Value Industries had no duty to remediate by painting or re-painting it with yellow paint every year.
- [23] I do not find it to be factually or legally significant that the curb was previously painted yellow. Whatever the reason the curb was initially painted yellow, I would consider it to be a superfluous measure that was not necessary to address any appreciable risk, since there is nothing about the curb or the area where it is situated that would cause a reasonable person to foresee any risk of injury.
- [24] The fact that the curb happened to be in an area that falls under the shade of the Save On Foods building at a particular time of day does not mean the curb was unsafe or posed any appreciable risk or tripping hazard. There are many parts of an urban landscape that may be in shade for various parts of the day. This does not mean every such area must be painted bright yellow. This is not a case dealing with adequacy of night-time lighting in a parking lot.
- [25] In my view, none of the features cited by plaintiff's counsel, either individually or collectively, are such as to make the curb where Ms. Herron fell a tripping hazard. I find the reasoning in *Delgado v. Wong*, 2004 BCSC 1199 [Delgado] to be helpful. In that case, the defendant was found not liable for the plaintiff's injuries in a trip and fall accident because there was nothing particularly hazardous or dangerous about the stairs where the plaintiff fell. Gerow J. noted that stairs are commonplace, and the fact that the plaintiff fell on them did not make them dangerous. The stairs in question were in good repair, and there was nothing about them that presented an unusual risk or "trap": Delgado at para. 24-26. The case at bar is factually similar. There was nothing unusual about the curb that made it dangerous or unsafe.
- [26] The fact is that Ms. Herron knew there was a curb in the area where she chose to step from the parking lot onto the sidewalk. I find both Gervais and Delgado to be factually similar to the case at bar in this regard. In Gervais, Madam Justice Holmes, as she then was, found at para. 36 that the plaintiff's accident was "due to his own lack of lookout and care for his own safety". In Delgado, Madam Justice Gerow reasoned at para. 25 that "the accident could have been avoided by a modicum of awareness on the part of the plaintiff". Similarly, in the case at bar the cause of Ms. Herron's accident was her own lack of attention.
- [27] Ms. Herron avers in her affidavit that she does not have a "specific memory of studying the ground" as she walked toward the newspaper box, but that she is generally a prudent person when she walks. Whatever her usual practice, I infer from the evidence presented before me that on this particular occasion she was not prudent enough. It is clear that she did not see

the curb. I am not satisfied that this was due to any hazard or failure to properly mark the curb with yellow paint. Ms. Herron knew this particular parking lot and knew there was a curb between the lot and the sidewalk. She "thought [she] was heading toward the ramp built into the curb". Ms. Herron tried to anticipate the position and angle of the curb, but she was evidently wrong, causing her to trip.

[28] To be clear, I am not relying on either Gervais or Delgado for any kind of proposition of law as to whether parking lot curbs or stairways are or are not safe. However, I find Gervais and Delgado to be factually similar to the case at bar in two respects. First, as in Gervais and Delgado, in this case there was nothing unusual or hazardous about the urban landscape where the accident occurred. Accordingly it could not be said that Value Industries breached its duty of care to take reasonable steps to keep the premises safe. Second, as in Gervais and Delgado, this is a case where the accident was attributable to the plaintiff's own inattentiveness.

[29] In the result, Ms. Herron's fall was unfortunate but not attributable to any breach by Value Industries of its obligation under the Occupier's Liability Act to take reasonable steps to make the parking lot safe. I would therefore dismiss Ms. Herron's action against Value Industries.

"Riley J."

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