

CANADA / JUDGMENT

Neigum v. WGP 236 Holdings Ltd.

2020 BCSC 1909

COURT

Supreme Court of British Columbia

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2020 BCSC 1909 Neigum v. WGP 236 Holdings Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Neigum v. WGP 236 Holdings Ltd.,

2020 BCSC 1909

Date: 20201204

Docket: 117310

Registry: Kelowna

Between:

Adam Neigum

Plaintiff

And

WGP 236 Holdings Ltd.

Defendant

Before: The Honourable Madam Justice Forth

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

September 4, 2020

Place and Date of Judgment:

Kelowna, B.C.

December 4, 2020

Table of Contents

Introduction. 3

Background Facts. 7

Parties' Positions. 8

WGP's Position. 8

Plaintiff's Position. 9

Evidentiary Issue. 9

Reliance on the Larsson Affidavit 9

Admissibility of the Lees Report 13

The Admissibility of Expert Opinion Evidence. 13

Stage One: Threshold Requirements. 14

Stage Two: Gatekeeping Function. 15

Position of the Parties. 16

Defendant's Position. 16

Plaintiff's Position. 16

Analysis. 17

Stage 2: Should the Court Exercise its Gatekeeper Function to Exclude the Lees Report 18

Substantive Liability Issues. 19

Applicable Law. 19

Analysis. 22

Liability: Did the Defendants Breach Their Duty Under the Occupiers Liability Act?. 22

Causation. 25

Contributory Negligence. 26

Introduction

- [1] This is an application by the defendant under Rule 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009, for summary dismissal of the plaintiff's claim. The plaintiff seeks judgment on the issue of liability under the Occupiers Liability Act, R.S.B.C. 1996, c. 337 (the "Act"), and the common law of negligence. The application only deals with the issue of liability and contributory negligence. The issue of damages will have to be determined if there is any liability. A five-day trial has been set for May 2021. Both sides have issued jury notices but, in accordance with COVID-19 Notice # 41, July 20, 2020, this will be a judge alone trial if it proceeds at the scheduled time.
- [2] The action arises out of a trip and fall on May 10, 2017 in the parking lot on property located in Kelowna. The plaintiff, Adam Neigum, tripped on a parking lot median after exiting a parked vehicle. He stepped on the portion of the median covered by rocks.
- [3] The defendant, WGP-236 Holdings Ltd. ("WGP") is the owner of the parking lot, and responsible for its operation and maintenance. The claim is brought in negligence and under the Act against WGP for failing to keep the parking lot and in particular the median reasonably safe and for failing to adequately warn users of the parking lot of the trip hazard posed by the surface of the median.
- [4] The parties agree that the issue of WGP's liability can appropriately be determined by way of a summary trial. The defendant submits that if a finding of liability is made, the issues of causation and contributory negligence should be determined separately. The defendant argues that if the Court finds the defendant breached its duty, the plaintiff must still establish that the breach of duty caused his fall. The defendant relies on the ambulance report and clinical records attached to the affidavit of Diane Larsson, made and filed August 27, 2020 (the "Larsson Affidavit"), to argue that the plaintiff used the words "misstepped" and the phrase "just clumsy". As such, the issue of causation is unclear and ought not to be determined at this summary trial. The defendant further submits that the issue of contributory negligence on the part of the plaintiff has not been addressed by either party.
- [5] In *Prevost v. Vetter*, 2002 BCCA 202, a social host liability case, the Court of Appeal set aside the order of the summary trial judge and sent the matter back to trial on the basis that it was not suitable for summary trial under the previous R. 18A. The summary trial had dealt with whether the social hosts owed the plaintiff a duty of care, and whether they had breached that duty of care. The Court of Appeal held at para. 8 that it was not possible "for the summary trial judge to determine the existence of a duty of care, the appropriate standard of care, or a breach of the standard of care without also determining facts that the plaintiff

must establish in order to succeed on the issue of causation." Additionally, the court noted that if the subsequent trial judge came to contrary findings on important questions of fact, then the duty, standard, and breach may have to be reconsidered.

- [6] Madam Justice Fleming came to a similar conclusion in *O'Neill v. Doe*, 2016 BCSC 2056, a case where the plaintiff slipped outside a restaurant and brought a claim against the restaurant and the City of Vancouver. The restaurant applied for summary trial, asking the Court to sever the issue of its liability from the issue of damages and the City of Vancouver's liability. The restaurant alleged it was not an occupier, and any injury suffered by the plaintiff was due to his own negligence or the City of Vancouver's negligence. In refusing the application for summary trial, Fleming J. found that the restaurant's possible liability was too intertwined with causation and the contributory negligence of both plaintiff and the other defendant, as well as damages, to be heard by way of summary trial, at para. 49:
- [49] I accept the arguments of the plaintiff and the City, and conclude that the issues of liability for the defendants' contributory negligence and legal causation significantly overlap. It is clear to me that much, if not most, of the same evidence will have to be considered in deciding those issues, giving rise to an inefficient use of judicial resources. Perhaps more concerning is that the remaining parties and the court would be exposed to the other risks that come with duplicative proceedings. In my view, there is a very real prospect of inconsistent findings of fact being made by the judge hearing the summary trial and the trial judge, as well as the risk of creating unnecessary complexity. At the very least, some of the findings of fact that would have to be made by the summary trial judge risk burdening or embarrassing the trial judge.
- [7] The factors to consider in deciding whether a matter is appropriate for summary trial were canvassed in *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83. The Court of Appeal endorsed the analytical framework used in *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485, and *Coast Foundation v. Currie*, 2003 BCSC 1781, for determining whether to allow a summary trial under R. 9-7, though cautioned that they should not be used as a checklist. The court also questioned whether the test under R. 9-7 should be the same as that for severing an issue under R. 12-5, and concluded that individual issues should only be isolated if there is good reason for doing so:
- [33] The case law under Rule 9-7 and its predecessor, Rule 18A, makes it clear that, absent good reason, courts should not isolate individual issues in a proceeding and decide them separately from the rest of the litigation. If that is all that is meant by the use of the phrase "extraordinary, exceptional or compelling reasons", then it is not objectionable, though I am not convinced that the phrase itself provides much in the way of guidance.
- [34] In terms of what constitutes a good reason to decide an individual issue separately in a summary trial, it seems to me that the analytical approach represented by Currie and by Greater Vancouver Water District is more helpful in setting out the considerations that apply.

- [8] The court added at para. 36 of Ferrer that "one of the most important considerations in determining whether a single issue should be separated out and determined in a summary trial is the question of whether it is intertwined with other issues."
- [9] I note that in *Hickey v. The Roman Catholic Archdiocese of Vancouver*, 2017 BCSC 1176, a slip and fall case, Justice Bowden (as he then was) held it was appropriate to sever liability from quantum. He went on to address causation in his analysis of the defendant's liability, as the same findings of fact were relevant to the standard of care, the alleged breach of that standard of care, and the cause of the plaintiff's fall, which he ultimately found was not due to the defendant's actions.
- [10] After hearing the submissions, I conclude that this case is appropriate for hearing by way of a summary trial and that issues relating to causation and contributory negligence should also be resolved at the same time. In my opinion, I can find the facts necessary to determine these issues and it would not be unjust to do so. The defendant's suggestion would require a further hearing on causation, followed by hearings on contributory negligence and then damages. I am of the view that issues relating to the breach of duty, causation, and contributory negligence require me to make findings on the plaintiff's actions, and what caused his fall. I see no benefit in severing off the issues of causation and contributory negligence. I agree with the plaintiff's submissions that bifurcating the standard of care and causation would result in litigating in slices, which should be avoided. As noted in *Currie* at para. 18, "Piecemeal decision-making is rarely an efficient manner in which to resolve a dispute. It raises the possibility of multiple appeals on individual issues, and this will generally impede rather than hasten the orderly determination of the action."
- [11] The issues of breach of duty, causation, and contributory negligence are all inexorably intertwined and should be heard at the same time. The issue of damages is a distinct matter not intertwined with the liability of the defendant and the contributory negligence of the plaintiff.
- [12] There were two evidentiary issues that arose:
- a. The plaintiff objects to the defendant relying on the Larsson Affidavit on the basis that the defence was "splitting its case"; and
 - b. The defendant objects to the admissibility of an expert report of Erik Lees, registered landscape architect, dated August 24, 2020 in which this expert was asked to provide a standard of care report with respect to the parking lot median (the "Lees Report").
- [13] I will first set out the background facts and then deal with each of these evidentiary objections.

Background Facts

- [14] On May 10, 2017 the plaintiff was in a vehicle, a Chrysler Town and Country minivan, driven by his wife, Marjorie Neigum. They arrived at the parking lot of a property located at 1525 Dilworth Drive, Kelowna (the "Parking Lot") at approximately 4 p.m. The weather was good and it was not raining. The couple planned to attend Rusty's Sports Lounge ("Rusty's") to have some food. Upon arrival, Ms. Neigum pulled into the only available parking stall, which was a stall adjacent to a V-shaped parking median. This particular parking stall was directly in front of Rusty's. They had used the Parking Lot on numerous prior occasions but had not parked in this particular stall. The minivan almost ran the entire length of the median.
- [15] Ms. Neigum parked the vehicle and her husband was in the front passenger seat. Mr. Neigum opened the vehicle's door and got out. The passenger side of the vehicle was adjacent to the median.
- [16] The parking lot median has two surfaces. The surface at the top of the V-shape was filled with rocks. Approximately a little more than halfway along the median, from what I can discern from the photographs, the surface is concrete. The median is surrounded on the two sides of the V with a curb which was painted yellow. At the bottom of the V, a portion of the concrete surface is also painted yellow.
- [17] Returning to Mr. Neigum's evidence, he stepped onto the yellow curb and then onto the rocks. He was aware he was stepping on medium-sized rocks. As soon as he stepped on the rocks he realized they were unstable. He turned to close the vehicle's door. He took two steps, his right foot got caught in the rocks, he stumbled forward and then fell. He landed on his right elbow and broke it. He recalls that the median was not level, but was sloped away from Rusty's.
- [18] Mr. Neigum was not able to walk between the median and the vehicle due to his size and the location of the vehicle in the parking stall.
- [19] The property manager, Shirley Mehus, has been employed for 25 years in managing the Parking Lot. In those 25 years she has never seen anyone walking on the parking medians and never received a complaint about them. She agreed that the parking median was not intended for pedestrian passage. There were no warning signs advising customers not to walk on the rocks or to exercise caution.
- [20] Ms. Mehus measured the width of the parking stall and confirmed that it met the width requirements of the City of Kelowna Consolidated Zoning Bylaw No. 8000 (the "Zoning Bylaw").
- [21] The median had a large bush in it until an irrigation line was cut during some construction work. At some point in time the bush died. After the bush died, WGP spread the existing rocks to cover where the bush was located.

Parties' Positions

WGP's Position

- [22] WGP submits the action should be dismissed.
- [23] It acknowledges it is an occupier and owed a duty of care to users of the Parking Lot. It says that the plaintiff chose to step on the rocks when he had alternatives available to him.
- [24] It points out that the design of the parking stall conformed to the Zoning Bylaw. It further disputes that the rocks in the median posed any "objectively unreasonable risk of harm". It relies on the long history of safe prior use in support.
- [25] WGP points out that the rocks were visible and there was no need to warn of any danger.
- [26] In essence, WGP claims that the plaintiff is the author of his own misfortune. After stepping on the rocks and appreciating that they felt unstable and loose to him, he remained on the rocks and attempted to close the vehicle's door.
- [27] If a finding of liability is made, the defendant submits that the Court should apportion a high degree of contributory negligence to the plaintiff.

Plaintiff's Position

- [28] The plaintiff seeks judgment on liability with a finding of no contributory negligence on his part.
- [29] The plaintiff says that WGP failed to keep the Parking Lot reasonably safe. It ought to have known about the passage of pedestrians over the Parking Lot medians and it failed to warn customers of a trip hazard that it either knew or ought to have known existed.
- [30] The plaintiff says that when the bush was located in the median it presented a warning to pedestrians and a barrier from walking on the rocks. After the bush died, it was negligent of the defendant to simply cover the area of the bush with loose rocks on an uncompact planting bed.
- [31] He argues that the fact that the rocks were loose and unstable was not readily apparent. From a distance, the rocks appear to be a level and even walking surface. As such, there was an obligation on WGP to post a warning sign advising customers not to walk on the rocks or to exercise caution.

Evidentiary Issue

- [32] I will now turn to address the two evidentiary issues that arose.

Reliance on the Larsson Affidavit

- [33] The Larsson Affidavit was filed after the receipt of the plaintiff's application response, dated August 25, 2020. Attached to the Larsson Affidavit is the defendant's notice to admit #1, dated March 4, 2020, and the plaintiff's reply dated March 26, 2020. Attached to the defendant's notice to admit are the following documents:

- a. BC Ambulance Service Patient Care Report dated May 10, 2017;
- b. Emergency Assessment & Treatment dated May 10, 2017; and
- c. Progress Notes dated May 11, 2017.

(collectively, the "Records")

- [34] The defendant wants to use the Records to support that the plaintiff admitted that he misstepped and was "just clumsy". The defendant argues these admissions indicate that the issue of causation is unclear. The defendant explained it was only going to rely on the records in response to the plaintiff's application, and the Records were not relevant on the issue of WGP's liability. For that reason, the defendant did not introduce the records at the first instance.
- [35] The plaintiff says that the issue of causation was always in play and the defendant ought to have included the Records as part of their initial application materials. The plaintiff further submits that, if admissible, the statements in the Records are not admissible for the truth that the plaintiff said those things.
- [36] I have no difficulty in admitting the Larsson Affidavit. However, I do not see the plaintiff's statements in the Records as particularly relevant to the issues of causation and contributory negligence.
- [37] If the plaintiff told the ambulance attendants that he "misstepped" or told a nurse that he was "just clumsy", his statements do not detract from his detailed sworn evidence of how his fall took place. He may have felt clumsy because he was not able to save himself from falling after his right foot was caught in the rocks. He may have described the incident to the ambulance attendants as a "misstep" and a fall forward. The other possibility is that these descriptions are what the ambulance attendants used to describe their understanding of what happened. The ambulance attendants are not investigating the precise mechanism of injury when filling out the history of the chief complaint and completing the patient care report.
- [38] I note the case law on the use of clinical records in attempting to impeach the plaintiff. In *Carvalho v. Angotti*, 2007 BCSC 1760, the Court noted:
- [15] The attack on the plaintiff's credibility is based, in part, on various contradictions and inconsistencies within her evidence at trial and between that evidence and her discovery evidence, documents she prepared for other purposes, or statements recorded in clinical records. It is a rare case of this kind where such inconsistencies cannot be found. By the time a personal injury case gets to trial, the plaintiff typically will have provided information to a number of people - including doctors, adjusters and disability insurers - on a number of occasions over a period of years. This provides fertile ground for cross-examination precisely because very few people will have perfect and identical recollection on each of those occasions.

[16] The record created on many of those earlier occasions may consist of answers a plaintiff gave to questioners who were primarily interested in only part of what the plaintiff had to say. For example, a doctor treating a plaintiff for a specific injury may seek only very general information about aspects of the plaintiff's medical history unrelated to the injury that doctor is treating. The information recorded may only be a brief summary or paraphrase of what the plaintiff said. The plaintiff will usually have no specific recollection of what he or she said on that occasion, but, when confronted with the record on cross-examination, will usually agree with the suggestion: "That is what you told Dr. X, isn't it?" The danger of giving too much weight to such inconsistencies was noted by Parrett J. in *Burke-Pietramala v. Samad*, 2004 BCSC 470, at paragraph 104:

I make two observations at the outset about Dr. Keyes' criticism for the variations he finds exist in the versions of symptoms given to various doctors. First of all, the reports are those of a layperson going through a traumatic and difficult time and one for which she is seeing little, if any, hope for improvement. Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different perceptions of what is important. As Dr. Samad made very clear his chart and records were a long way from being a verbatim record, indeed, some of his entries from a full appointment and an examination consisted of three or four phrases. I find little surprising in the variations of the plaintiff's history in this case, particularly given the human tendency to reconsider, review and summarize history in light of new information.

[Emphasis in original.]

[39] In *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114, the Court explained the potential difficulties that can arise from statements in clinical records:

[29] Portions of clinical records that report statements made by the plaintiff, including the plaintiff's description of symptoms, are therefore evidence of the fact the plaintiff made the recorded statements on those occasions. Where the recorded statements are inconsistent with the plaintiff's evidence at trial, they may be used in cross-examination to impeach the plaintiff's credibility.

[30] Unlike prior inconsistent statements of an ordinary witness, which may only be 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, there are important qualifications that apply to such statements in clinical records, whichever purpose they are being used for.

[31] In *Diack v. Bardsley* (1983), 46 B.C.L.R. 240, 25 C.C.L.T. 159 (S.C.) [cited to B.C.L.R.], aff'd (1984), 31 C.C.L.T. 308 (C.A.), McEachern C.J.S.C., as he then was, referred to differences between the evidence of a party at trial and what was said by that party on examination for discovery, at 247:

... I wish to say that I place absolutely no reliance upon the minor variations between the defendant's discovery and his evidence. Lawyers tend to pounce upon these semantical differences but their usefulness is limited because witnesses seldom speak with much precision at discovery, and they are understandably surprised when they find lawyers placing so much stress on precise words spoken on previous occasions.

[32] That observation applies with even greater force to statements in clinical records, which are usually not, and are not intended to be, a verbatim record of everything that was said. They are usually a brief summary or paraphrase, reflecting the information that the doctor considered most pertinent to the medical advice or treatment being sought on that day. There is no record of the questions that elicited the recorded statements.

[33] When statements of a party are relied on for the truth of their content, the authors of Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3d ed. (Markham, ON: LexisNexis Canada, 2009) point out at paragraph 6.398 that one rationale for the admissibility of such statements is that "it is always open to the party to take the witness box and testify either that he or she never made that admission or to qualify it in some other way." The authors also emphasize at paragraph 6.413, that the whole of a statement must be put into evidence:

Thus, if an admission contains statements both adverse and favourable to a party and if an opponent tenders it, he or she may thereby be adducing evidence both helpful and damaging to his or her cause.

[34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.

[35] Further difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time.

[40] I adopt these concerns and accept the sworn evidence of the plaintiff on how the fall happened.

Admissibility of the Lees Report

The Admissibility of Expert Opinion Evidence

[41] Expert opinion evidence is an exception to a qualification of the general rule that all relevant evidence is admissible. The qualification is the exclusionary rule with respect to opinion evidence: witnesses are to testify as to the facts that they perceived, not as to the inferences

(or opinions) that they drew from them: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 14 [*White Burgess*]. Opinion evidence is generally inadmissible as it is the role of the trier of fact, not the witness, to draw inferences and form conclusions. This is based on the idea that ready-made inferences are not helpful to the trier of fact and may even be misleading: *White Burgess* at para. 14.

- [42] The exception to this exclusionary rule comes into play only when, due to the nature of the facts, the trier of fact is unable to form his or her own conclusions without the help of an expert: *R. v. K.(A.)* (1999), 45 O.R. (3d) 641 (C.A.) at paras. 71-72, appeal quashed, [2000] 1 S.C.R. v (note) (S.C.C.). Necessity is, therefore, a key concern when determining the admissibility of expert evidence.
- [43] In recent years, courts have become increasingly concerned with the reliability of expert opinion evidence. This concern grounds the analytical framework for determining the admissibility of expert opinion evidence set out by the Supreme Court of Canada in *White Burgess*, in which Justice Cromwell, writing for the majority, noted the "unmistakable overall trend of the jurisprudence, to tighten the admissibility requirements and to enhance the judge's gatekeeping role": at para. 20.
- [44] Before assessing the evidence against the two-stage *White Burgess* framework, the judge must determine the nature and scope of the proposed expert opinion and carefully delineate the boundaries of the proposed opinion: *R. v. Bingley*, 2017 SCC 12 at para. 17. If admitted, the court has an ongoing duty to ensure that the evidence remains within its proper scope: *Bingley* at para. 29.
- [45] Once the scope of the evidence is delineated, the two-stage *White Burgess* framework requires the court to consider (1) whether the opinion evidence meets the threshold requirements or preconditions of admissibility, and (2) whether the trial judge, in exercising his or her gatekeeper function, ought to admit the evidence.
- [46] The burden rests on the proffering party to establish admissibility in respect of all aspects of the test: *White Burgess* at para. 48; *R. v. Abbey*, 2009 ONCA 624 at para. 71. Admissibility is case-specific and cannot be determined by precedent: *K.(A.)* at para. 76; *R. v. J.-L.J.*, 2000 SCC 51 at para. 45.

Stage One: Threshold Requirements

- [47] In order to pass the "threshold requirement" stage, the proffering party must demonstrate the existence of the following preconditions (often referred to as the "Mohan factors", referring to *R. v. Mohan*, [1994] 2 S.C.R. 9):
- a) The evidence must be logically relevant to a material issue;
 - b) The evidence must be necessary to assist the trier of fact;
 - c) The evidence must not be subject to any other exclusionary rule;

- d) The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is impartial, independent, and unbiased; and
- e) Where opinions are based on novel or contested science, or science used for a novel purpose, the underlying science must be reliable for that purpose.

See White Burgess at para. 23.

[48] In order for evidence to be relevant, the evidence must "tend to 'increase or diminish the probability of the existence of a fact in issue'": R. v. Arp, [1998] 3 S.C.R. 339 at 360.

[49] Evidence that is merely "helpful" to the trier of fact does not meet the standard of necessity: Mohan at 23. Necessity is met when the expert evidence:

- a) provides information which is likely to be outside the experience and knowledge of the trier of fact;
- b) enables the trier of fact to appreciate the matters in issue due to their technical nature; or
- c) where the subject-matter of the inquiry is such that ordinary people are unlikely to form a correct judgment about it if unassisted by persons with special knowledge (in other words, it is an area that is not understood by the average person).

Mohan at 23-24.

Stage Two: Gatekeeping Function

[50] A trial judge in a gatekeeper role must determine whether the benefits of admitting the evidence outweigh its potential risks: White Burgess at para. 24. The gatekeeper stage of the analysis is essentially an application of the general exclusionary rule requiring that the probative value of the evidence outweigh its potential for prejudice: Bingley at para. 16.

[51] Necessity, reliability, and absence of bias are all relevant to assessing the potential risks of admitting the evidence. Prejudice or costs from admitting the evidence can include the risk of expert opinion usurping the role of the trial judge, delay, and confusion: J.-L.J. at para. 47; Abbey at para. 71.

Position of the Parties

Defendant's Position

[52] The defendant says that the Lees Report offends the principles of admissibility for expert evidence in the following ways:

- a. It lacks necessity in that it comments on matters that would be entirely within the capability of a judge or jury to understand without the need for the assistance of an expert;
- b. It addresses irrelevant facts and matters outside the scope of the plaintiff's pleaded claim;

- c. It offers opinion outside the scope of Mr. Lees' expertise; and
- d. It offers opinion without any factual support.

[53] The defendant submits that once the inadmissible portions of the Lees Report are struck, what remains offers so little value to the Court that it should be ruled inadmissible in its entirety.

Plaintiff's Position

[54] The plaintiff submits that in *Wickham v. Cineplex Inc.*, 2014 BCSC 850, a case addressing median islands in parking lots, Justice Sigurdson noted at para. 33 that there was "no evidence of the standard of care for the design or maintenance of medians at mall parking lots". Counsel was of the view that Sigurdson J. was suggesting that opinion evidence might have been helpful.

[55] The plaintiff submits that all the defendant's objections should go to the weight of the Lees Report and not its admissibility. He advises that Mr. Lees was offered up for cross-examination on his report and the defendant's counsel elected not to proceed with it.

[56] The plaintiff submits that since Mr. Lees is a qualified landscape architect, he is qualified to comment on the surfacing on a traffic island and its appropriateness as a walking surface, and his opinion assists the Court on whether the rock fill was appropriate.

Analysis

[57] I first address whether the Lees Report is an expert opinion. Mr. Lees was asked to provide his opinion on three matters:

1. "as to whether the surface of the island (loose rocks overlaid on top of a former planting bed) was appropriate for the island at issue, assuming the owner of the premises ought to have expected that some [of] its clients would be forced to walk on the island";
2. "regarding any industry standards that may apply"; and
3. "the type of island surfacing that would be appropriate."

[58] I agree that certain aspects of the Lees Report do not engage the expertise of Mr. Lees as a registered landscape architect. In order for the evidence to be necessary, it must provide information likely to be outside my experience and knowledge; enable me to appreciate the matters in issue due to their technical nature; or assist me in understanding an area that would not otherwise be understood by the average person or that I would be unlikely to form a correct judgment on unassisted.

[59] The following statements in the Lees Report do not engage the expertise of the author and are not matters outside the experience and knowledge of a judge or jury:

- a. "The rock materials are too coarse for safe navigation in street shoes";

- b. "The parking bays are so narrow that it would be impossible to avoid stepping in to the traffic island";
- c. "the surfacing should be at least as dependable as the walking surfaces elsewhere on the property";
- d. "consistent and uniform surface treatment is expected in areas to be traversed by pedestrians in public and semi-public spaces";
- e. "Even a small change in surface type or height can cause a trip and/or fall hazard"; and
- f. "Shrubs with soft bark mulch would have signaled to visitors that the shrub bed was not intended as a transit zone".

[60] I further agree with the submission of the defendant, that the potential for someone to trip over some remaining stubble in the median has no relevance to the issues in this action. The plaintiff made no reference to the "stubble remnants of shrubs" and did not trip over those remnants. This action relates to the existence of the rocks on the median. As such, Mr. Lees' comments on whether the stubble remains present a potential trip hazard are of no relevance.

[61] The comment made by Mr. Lees on the purpose of the landscaped island is not grounded in any of the factual assumptions provided. There is no evidence of the purpose of the median at the time of its construction.

[62] For these reasons, I find that the Lees Report does not pass the threshold criteria for admissibility. For the sake of completeness, I will go on to consider the second stage of the White Burgess framework.

Stage 2: Should the Court Exercise its Gatekeeper Function to Exclude the Lees Report

[63] Assuming I am wrong about the relevance and necessity of the Lees Report, I have significant concerns about its reliability and its probative value compared to its prejudicial effect.

[64] I agree with the defendant that there are significant problems with the factual assumptions underlying the report. The Lees Report has a title "Facts and Assumptions yet to be completed" and then provides some of the facts Mr. Lees apparently relied upon. He briefly comments on a site visit he conducted on October 4, 2018, and what he found underneath the rock surfacing material. He references the City of Kelowna Development Standards and the Zoning Bylaw and refers to clause 8.1.6 of the Zoning Bylaw, which says that "Landscaped Islands are required at the end of each parking aisle." The opinion does not go on to suggest that the construction of this Parking Lot and the design of the various parking mediums was in violation of the zoning or design standards applicable when the Parking Lot was constructed.

[65] It may be that an opinion from a qualified expert that a particular parking lot or median does not meet the design requirements would be an appropriate expert opinion to tender. However, this report does not seek to provide such an opinion. I see little probative value in the Lees Report.

[66] For the above reasons, I find that the Lees Report is inadmissible as evidence on this summary trial.

Substantive Liability Issues

Applicable Law

[67] The statutory duty imposed on occupiers is set out in s. 3 of the Act:

3 (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.

[68] The defendant's written submissions provide a helpful summary of the applicable principles, which the plaintiff for the most part also adopts, and I quote with only some minor changes to the citations:

- a. The standard of care under the [Act] and at common law for negligence is the same: it is to protect others from an objectively unreasonable risk of harm. Whether a risk is reasonable or unreasonable is a question of fact: *Agar v. Webber*, 2014 BCCA 297 at para. 30, leave to appeal ref'd (2015), [2014] S.C.C.A. No. 423.
- b. It is not negligence or a breach of any duty not to warn an adult person, not suffering under any disability, of the ordinary risks arising out of the exigencies of everyday life: *Malcolm v. BC Transit* (1988), 32 B.C.L.R. (2d) 317 (C.A.) at 318-319.

- c. While not determinative, prior safe use has been found to be a relevant factor in determining whether premises are reasonably safe: *Cahoon v. Wendy's Restaurant of Canada Inc.*, 2000 BCSC 629 at para. 16.
 - d. The plaintiff has a duty to keep a proper lookout for his own safety and to be aware of his surroundings: *Gervais v. Do, et al*, 2000 BCSC 1271 at para. 27.
 - e. 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: *Fulber v. Browns Social House Ltd.*, 2013 BCSC 1760 at para. 28.
 - f. 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: *Fulber* at para. 28.
 - g. 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: *Fulber* at para. 28.
 - h. An occupier is not expected to be an insurer against all risks: *Lamont v. Westfair Properties (Pacific) Ltd.*, 2000 BCSC 406 at para. 20, cited with approval in *Foley v. Imperial Oil Ltd.*, 2011 BCCA 262 at para. 28.
 - i. Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. ... Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 29.
- [69] The defendant relies on the case of *Oser v. Nelson (City of)*, 45 M.P.L.R. (2d) 231 (B.C.S.C.), where the plaintiff fell in an alley. The plaintiff described the alley's surface as "crumbly", with "a lot of gravel and bumps", and "the pavement was uneven, very uneven" (para. 10). The Court concluded that:
- [13] In any event, it is obvious from the evidence that while the surface of the alley was less than ideal, it did not constitute an unusual or latent "trap". The defendant was not in a better position to appreciate the danger than the plaintiff, and was therefore not realistically in a position to warn the defendant. The evidence is that the risk posed by the condition of the alley was slight, and that, in any event, the plaintiff had assessed that danger and proceeded in spite of it.
- [70] The defendant relies on the statement at para. 34 of *Gervais*, that "[o]ne cannot expect complete matching of surfaces when walking in outdoor areas like parking lots, and transition areas from parking surfaces to walkways to building entries."

- [71] The defendant further relies on Malcolm to support that there is no duty to warn of something that should be equally obvious to the plaintiff. The plaintiff in Malcolm, a bus passenger, volunteered to leave the bus as it was struggling up a steep slope. As she walked up the slope she slipped and fell on wet grass. The Court of Appeal affirmed the trial judge's finding and held that the risk of falling on a steep and grassy slope when wet is a risk arising from the "exigencies of everyday life" and there is no duty to warn an adult person of such a risk.
- [72] Both counsel agree that the Wickham case is, on its face, most similar to these circumstances. It involved a pedestrian crossing a median in a parking lot and then falling while walking on stones. The defendant points to para. 58 of that decision:
- [58] In the case at bar, the defendant knew that drivers crossed the median to exit and enter the area where they parked their vehicles. The defendant owed a duty to take reasonable care to make it reasonably safe for pedestrians to cross that median. They fulfilled that duty through the gravel path that was properly maintained and provided a means of access for the plaintiff to and from her car. Knowing parkers used the path across the median, was there a lack of reasonable care to have the median in part covered in uneven stones? While the defendant could have chosen another type of surface, given that parkers might choose to walk there, the standard is not one of perfection. I find that the plaintiff has not demonstrated a lack of reasonable care on the part of the defendant.
- [73] The plaintiff took the position that both Oser and Malcolm have no relevance to the case at bar. Oser involved a claim against a municipality, where there is a different standard of care. The plaintiff submits it has no relevance to an occupier liability case involving commercial premises.
- [74] The plaintiff distinguishes Wickham on the basis that the defendants in that case had provided an alternative safe route and the plaintiff chose to veer off the safe path and to walk over the uneven stones.

Analysis

- [75] The defendant admits that it was an occupier of the Parking Lot.
- [76] The issues are:
- Whether the defendant, as occupier of commercial premises, breached its duty to take reasonable care to see that the plaintiff would be reasonably safe in using the premises; and if so,
 - Whether the slip and fall is the cause of the plaintiff's injuries; and
 - Whether there was contributory negligence on the part of the plaintiff.

Liability: Did the Defendants Breach Their Duty Under the Occupiers Liability Act?

- [77] I have concluded that the plaintiff has established a breach of the requisite standard of care. The duty of care is that set out in the Act, a duty to see that the premises are reasonably safe. I will first address the condition of the parking median. This case involves a parking lot median which by its very location, immediately adjacent to the parking stall, would frequently require individuals to step on it. It should have been obvious to the defendant that when a vehicle is parked in the stall it is highly likely that a passenger exiting the vehicle may have to step on the median in order to exit and close the vehicle's door. It may be that if the vehicle is pulled over, hugging the left side of the parking stall, an exiting passenger could squeeze along the vehicle and the edge of the median but even that manoeuvre could place a user at risk for losing his balance.
- [78] I agree that the median was not designed as a pedestrian walkway but clearly would be used as a stepping out point when exiting a vehicle.
- [79] The fact that the defendant was not aware of any previous slips and falls is a factor to consider, but, in my view, not determinative: *Foley* at para. 7. It appears that at least for some period of time this median had a large bush on it which would have acted as a deterrent for pedestrians from using the rock filled portion of the median. The photographs establish that, in the past, a large bush was in an area where it would have made it difficult for a passenger to open a vehicle door and exit onto the median.
- [80] I note in this case the defendant was not aware of this plaintiff's fall. In my view this type of fall in a Parking Lot that services a range of different establishments differs from a fall that takes place within the confines of a business. If an individual falls, for example in a store, it would be anticipated that records would be kept of a fall. A fall in a parking lot may well occur without the user having any knowledge of where they would report such a fall. Accordingly, I am not in a position to conclude that there has been safe prior use.
- [81] The evidence supports that after the bush died, the defendant simply spread out the rocks on the median to cover the area where the bush had been growing. In doing so the defendant ought to have known that individuals would likely step on those rocks in an effort to exit from the passenger side of a vehicle, if a vehicle was parked with the front end first into the stall.
- [82] The rocks do not appear to be unstable or dangerous to users of the Parking Lot just from looking at them. In my view there was nothing to suggest to the plaintiff that, once he realized he was going to have to step on the rocks, that he should not do so. It is not the case that he should have initially asked his wife to pull the vehicle out of the parking stall so that he could exit the vehicle without stepping on the rocks. I will be commenting later on how the safety of his actions changed after he stepped on the rocks and appreciated they were unstable.

- [83] The defendant ought to have known that users of the parking lot would step on the rocks while exiting their vehicles. With that knowledge the defendant owed a duty to ensure that it exercised reasonable care in ensuring that the median was reasonably safe for this purpose. It was not. Although the rocks appeared to be stable, when stepped on they were not affixed in any manner but created a hazard for individuals by their instability, increasing the risk of a fall.
- [84] Allowing unstable rocks to be used in a median which is likely going to be used as a "stepping stone" for users to exit their vehicles is not reasonable.
- [85] I observe that half of the median was covered with concrete. It provided a safe landing spot for an individual stepping out of their vehicle. The problem is that the concrete only extended half way up the median. When looking at the photos attached to Ms. Neigum's affidavit, it is clear that a passenger sitting in the back seat of the vehicle would have exited by stepping on the concrete portion of the median. If the concrete portion extended along the entire distance of the median the plaintiff would not have had to step on the unstable rocks.
- [86] It is the location of this parking stall with the median that creates the dangerous situation that this plaintiff faced when he was exiting the vehicle.
- [87] In my view this case differs from the Wickham case in that the plaintiff in Wickham had a choice to walk on the gravel walkway or to veer off and walk across rocks, which the trial judge referred to as "large uneven stones" at para. 45.
- [88] I would see an analogy to the Wickham case if a parking lot user who had parked in a different parking stall had decided to cross the median on his way back to his vehicle. If the user chose to walk on the rocks, versus the flat concrete on the median, then I accept that individual would have made a choice to walk on an area that was clearly more unstable. This is not the scenario that faced this plaintiff. His wife had pulled into a parking stall and parked. Once parked, the plaintiff opened his door and stepped out. In order to exit the vehicle he had to move away from the door of the vehicle so he could close it. In order to close the vehicle door he had to step on the rocks. All of these actions would not have been surprising to the defendant but expected. I do not view this as an unconventional means of egressing a vehicle. It would be the normal and standard way of getting out of a vehicle parked in this particular parking stall.
- [89] The defendant could have addressed the dangers of the rocks by replacing the rocks with concrete to create a safe area for individuals exiting their vehicles, by replanting shrubbery to indicate this was a plant bed and not for traversing, or by placing some type of warning sign that the rocks were unstable and should not be walked on. The defendant took none of these steps.

- [90] The Parking Lot clearly services a number of businesses, including Rusty's. The defendant could expect that a range of clientele would attend the various establishments. There would be individuals of varying ages, health conditions, mobility issues, and some who may well have ingested alcohol. The Parking Lot would be used by customers in all types of weather and light conditions.
- [91] In all of these circumstances, I conclude that the defendant did not take reasonable care to ensure that the plaintiff would be reasonably safe in using the Parking Lot.

Causation

- [92] The defendant argues that the proximate cause of the plaintiff's fall was his own failure to use reasonable care in walking on the rocks, resulting in his "misstep" or being clumsy.
- [93] The test of causation is the "but for" test as referenced in *Clements v. Clements*, 2012 SCC 32:
- [8] The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury -- in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.
- [Emphasis in original.]
- [94] The description provided by the plaintiff in his sworn evidence sets out the mechanism of how the unstable rocks resulted in his fall. As he explained in his discovery evidence, he fell as a result of his foot being "caught in the rocks" or "stuck in the rocks". As a result, he stumbled forward and fell.
- [95] There is a clear nexus between the unstable rocks and the plaintiff's fall which resulted in injuries. The existence of the unstable rocks in an area that the defendant could have reasonably anticipated that users of the particular parking stall would access as a means of egress from their vehicles provides the necessary connection.
- [96] The defendant's negligent actions, in leaving the unstable rocks and failing to warn, resulted in the plaintiff using the rocks, catching his foot in the rocks, and caused his fall along with serious injuries.
- [97] I have no difficulty in finding that the proximate cause of his injury was the condition of the median for which the defendant was responsible.

Contributory Negligence

[98] The plaintiff argues that he bears no responsibility for his fall. The defendant contends that the plaintiff failed to take reasonable care for his own safety and suggests that the plaintiff be held 85 percent at fault.

[99] As I indicated at the beginning of these reasons, I am convinced that I have the necessary facts to decide this issue.

[100] To resolve this issue, I must consider whether the plaintiff failed to take reasonable care for his own safety and whether his failure was one of the causes of the fall: *Bradley v. Bath*, 2010 BCCA 10 at paras. 25-27.

[101] The onus is on the defendant to establish contributory negligence: *Dennis v. Gairdner*, 2002 BCSC 1289 at para. 56. A description of what the defendant must prove is set out in *Shaw v. Storey* (1991), 53 B.C.L.R. (2d) 257 (C.A.) at 265:

What must be proved by a defendant setting up a plea of contributory negligence, apart from any duty of care that may be owed by the plaintiff to the defendant, is that the plaintiff "did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury."

[102] I am convinced that the plaintiff bears some responsibility for this fall.

[103] The steps taken by the plaintiff in parking in the parking stall and exiting his vehicle were reasonable. I also accept that it was reasonable for the plaintiff to step out on the curb and then onto the rocks. There was no objective reason for him to suspect that stepping on the rocks was dangerous. The plaintiff was not aware of the unstable nature of the rocks, in essence a hidden or unexpected danger.

[104] The plaintiff's evidence is that he first stepped onto the curb, which was an even and stable surface. When he stepped onto the rocks he immediately appreciated that the rocks were unstable. At that moment the plaintiff should have taken some additional steps to ensure his own safety. He should not have taken another step to turn and close the vehicle door. He should have returned to a place of safety, by stepping back onto the curb and back into the vehicle.

[105] He would have had the vehicle's door to hold onto in order to safely enter the vehicle.

[106] If the plaintiff was not able to use the curb and the road surface between the median and the vehicle to leave the parking stall, then he ought to have returned to the vehicle and asked his wife to back up a couple of feet so that he could access the concrete portion of the median.

[107] He did not do this. He chose to continue to try and manoeuvre on the rocks so that he could close the vehicle's door.

- [108] The plaintiff is the best judge of his ability to balance on unstable rocks. In my view, his decision was negligent, and as a result he is partially responsible for his fall.
- [109] I disagree with the defendant that the plaintiff should be held 85 percent at fault. The appropriate fault apportionment is 50 percent to each party.
- [110] If the parties cannot otherwise agree on the issue of costs they can make written submissions. I will leave it for the parties to agree on a timeline for the exchange of the written submissions. The only requirement is that the written submissions be sent to the registry within 60 days of the release of these reasons.

"Forth J."

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