
CANADA / JUDGMENT

Paquette v. School District No. 36

2014 BCSC 205

COURT

Supreme Court of British Columbia

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2014 BCSC 205 Paquette v. School District No. 36 (Surrey)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Paquette v. School District No. 36 (Surrey),

2014 BCSC 205

Date: 20140124

Docket: S124827

Registry: New Westminster

Between:

Owen Paquette, by his Litigation Guardian,

Nancy Paquette, and the said Nancy Paquette

Plaintiffs

And

The Board of School Trustees,

School District No. 36 (Surrey)

Defendant

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

Counsel for the Plaintiff:

J. Moulton

Counsel for the Defendant:

J.A. Dowler

Place and Date of Trial:

Vancouver, B.C.

January 20-23, 2014

Place and Date of Judgment:

Vancouver, B.C.

January 24, 2014

I. Introduction

- [1] The issue in this case is whether the defendant Board of School Trustees is liable to the plaintiff, Owen Paquette, for injuries he suffered when he fell off the roof of Peace Arch Elementary school on March 4, 2008. The plaintiff alleges the defendant was negligent and breached its duties under the Occupiers Liability Act, R.S.B.C. 1996, c. 337 [OLA]. The plaintiff acknowledges partial liability but submits the defendant should be found between 60-75% liable for his injuries.
- [2] The defendant denies liability and says the plaintiff is wholly responsible for the injuries he suffered.

II. Disposition

- [3] For the following reasons, I find the defendant has not satisfied its duties under the OLA and is 75% liable for the plaintiff's injuries.

III. Facts

A. Climbing onto and being on the school roof

- [4] Owen Paquette was a student in grade seven at Peace Arch Elementary school and was 12 years old in March 2008. He was the tallest student in his grade, measuring between 5'8" and 5'10". After school on March 4, 2008, Owen and his friend Jordan Dyck went to Jordan's house to drop off their things. They returned to school to play basketball, something they often did. After playing a bit of basketball, they ran into Dean Coleridge, a student in grade six. They had a brief discussion and then Jordan and Owen decided they would go onto the school roof by climbing a cherry tree located close to the school. Owen testified that Dean told them about using the cherry tree as an access point to the roof, and that he had discussed this with Dean on at least one prior occasion. Dean could not recall those conversations. They climbed the tree after school had ended for the day and when there was no supervision of the playground or outer areas of the school.

- [5] Jordan climbed up first and Owen followed. Owen had never been on the roof of the school before. Owen testified that he decided to climb onto the roof because he thought it would be fun. He and Jordan had no specific plans about what to do once on the roof; nor did they have a plan for getting off the roof. Owen admitted that he knew he should not go on the roof and that he understood that he would get into trouble and get punished if he was caught.
- [6] The cherry tree they climbed is on the south west side of a part of the school referred to as "pod" 300. A pod is a standalone building close to other parts of the school. Peace Arch Elementary school is comprised of four pods and all but pod 100 are connected to each other by covered walkways that function like an outdoor hallway. Pods 200, 300 and 400 roughly form a "U" shape such that there is a courtyard in the middle.
- [7] The cherry tree is almost the same height as the roof of pod 300. There is about 12 inches between the roof and the edge of the branch nearest it. The top branches have an umbrella shape, meaning smaller branches droop down a bit. Based on one photograph in evidence that looks up at the branches from near the main trunk, there is at least one branch that is thicker and more sturdy than the others around it. The end of that particular branch is approximately 12 inches from the roof and the branch is about 12 inches long. There is a joint between that branch and the trunk (or possibly another branch; it is not clear from the photograph). This joint is a bit thicker than the branch itself and is about two feet from the edge of the roof.
- [8] The parties differ on whether it was easy or difficult for Owen to scale the tree and get onto the roof. The defendant says the evidence establishes that the tree was shaking as he climbed it, and he had a "fair jump" from the branch to the roof and that he landed on the roof on his tummy and then had to shimmy to pull himself fully onto the roof. None of these facts are inconsistent with it being easy for Owen to have climbed the tree and got on the roof. He testified that in his mind there was "zero chance" the tree would break as he climbed it. Remembering that Owen was at least 5'8" tall and, by all accounts, a typical 12 year old boy who had previously climbed trees, I accept his evidence that he climbed the tree easily and with little effort.
- [9] Once on the roof the boys eventually traversed eastwards, first along the top of the covered hallway which connects pod 300 to pod 200 and then along the hallway that connects pod 200 to pod 400. When they decided to get down from the roof, they chose to go to the southeast corner of pod 400. Along the south side on the ground at that corner of the building there is a gated, locked wire fence which encages a cement stairway. The stairway is eight or nine feet deep and leads down to a door that gives access to a crawl space underneath pod 400 that is not currently being used by the school. The top of the wire fence is about seven feet from below the roof. The roof is approximately 12 feet high; thus, the wire fence must be approximately five feet high. The wire fence enclosing the stairwell juts out from the roof line by about 13 inches. The top of the wire cage thus offers a ledge about half way between the roof and the ground.

- [10] While the two boys were on the roof, Dean followed their movements from the ground. That is to say, he travelled from near the cherry tree, to the outdoor hallway between pods 200 and 300 and then eastwards and slightly north to the end behind the library.

B. Interaction with Vice Principal Helland

- [11] During this time, Vice Principal Brad Helland was in his office in pod 200 which had a window facing south into the courtyard. He testified that he was startled when he heard running on the roof. He testified he called out from his open window in a loud, firm and directive voice saying: "Hey, get off the roof!", or words to that effect.
- [12] There is a dispute between the parties about the timing of the running in relation to his yell. Owen testified they only started running after they heard Mr. Helland yell whereas Mr. Helland claims it was the sound of running that alerted him to there being someone on the roof.
- [13] Nothing of significance turns on this difference. There is also a possible explanation for the differing accounts. It may have the boys' landing onto the roof which Mr. Helland mistook for the sound of running, a completely understandable mistake. I have inferred this possibility from the testimony of Ms. Paquette who said Mr. Helland told her he heard "thumping" on the roof just before he yelled out his open window. However, I cannot make that finding because it was not put to Mr. Helland. Regardless, it does not matter because nothing significant turns on the timing of the boys' running in relation to Mr. Helland's yell.
- [14] In any event, Mr. Helland was concerned that someone was on the roof who was not authorized to be there. He exited the building and went to the courtyard, trying to see who was on the roof. He could not see anyone so he then proceeded eastward, ending up behind the library. At this point he ran into Dean and asked him, among other things, if Dean knew who was on the roof. Dean said he did not.
- [15] Realizing that Mr. Helland knew someone was on the roof, the boys decided to exit the roof from the southeast corner, where the gated cement stairwell is located. Owen testified that they chose that exit point because it looked to be both the easiest and safest. He said, from his point of view, it was also the only way he could see to get down other than the cherry tree. It was suggested to Owen in cross-examination that the boys were actually looking for the route furthest away from the office in order to reduce the risk of being caught. However, Owen insisted that ease and safety were his primary concerns. This is inconsistent with Owen's evidence given on examination for discovery.
- [16] I find that when exiting the roof, Owen was motivated primarily, if not exclusively, by the desire not to get caught and thus into trouble. The boys had a strong incentive to put as much distance between themselves and Mr. Helland because they knew what they were doing was wrong and would get them into trouble. Owen admitted to running after he heard Mr. Helland's yell. These events must have been unfolding very quickly. In my mind it is probably that 12 year old boys who are up to mischief would want to try and get away with it.

Indeed, there might be something unusual if I was being urged to find the boys were not worried at all about getting caught but that was not Owen's evidence.

C. The fall

- [17] At this point, Jordan hung down from the edge of the roof, presumably placed his feet on the top of the wire fence, and safely jumped to the ground. Unfortunately Owen lost his grip on the roof. He slipped and then fell all the way onto a cement surface at the bottom of the stairwell, a total distance of about 20 or 21 feet. Because the gate was locked and no key could be found in time to open it, firefighters attending the scene had to break open the lock to get access to him. An ambulance was called and he was taken to Peace Arch Hospital where he was treated for his injuries and was admitted for at least two weeks.
- [18] Mr. Helland testified that about the time he was questioning Dean, Jordan appeared. Jordan was white as a ghost and told them Owen had fallen. They went to the stairwell and saw Owen at the bottom in obvious pain and distress. Another teacher was already at the scene and calling 911 on a cell phone. Mr. Helland did not have the key to the gate on his key chain so he ran to the office to look for it, and also to get someone to contact Owen's mother, Nancy Paquette. She was contacted and she then contacted her partner and Owen's stepfather, Tony Delavalle. They both made their way to the hospital to see Owen.
- [19] Mr. Helland filled out an incident report and that evening went to the hospital to check on Owen's condition. He had a conversation with both Ms. Paquette and Mr. Delavalle. All agree that Mr. Helland was apologetic and concerned about Owen's condition. Mr. Helland testified this accident was the worst he has had to deal with in his teaching career.

D. March 26 and 27, 2008

- [20] Ms. Paquette and Mr. Delavalle went to the school on March 26 hoping to run into either the principal or Mr. Helland because their efforts until then to have a meeting about the accident had not been successful. I note that between March 4 and March 26 there were two weeks of Spring Break.
- [21] The evidence regarding what happened on March 26 differs somewhat, but by all accounts Ms. Paquette and Mr. Delavalle ran into Mr. Helland, who showed them both the cherry tree and the cement stairwell where Owen fell. Mr. Helland says that he specifically showed them the "door jam" access point which he only learned about when interviewing Dean the day after the accident.
- [22] Mr. Delavalle testified that Mr. Helland gave them a complete tour of the school and pointed out numerous possible access points to the roof. Mr. Helland denies this and insists he only showed them the tree, stairwell and door jam. As Ms. Paquette's evidence is inconsistent with Mr. Helland's evidence, I prefer Mr. Helland's evidence on this point.

- [23] That being said, it matters little because Mr. Delavalle returned to the school the next day and took photographs depicting a number of points where someone could attempt to climb onto the roof. These photographs were entered into evidence by consent and there was no dispute about what they depicted.

E. Mr. Hurd's evidence

- [24] Mr. Hurd was the principal of Peace Arch Elementary School from 1999 until 2009. He testified about numerous occasions where he believed people had been on the roof, based either on what he saw or what he was told.
- [25] On one occasion, students reported to him that youth were partying on the school roof over the weekend. He also recalls either the former principal or a teacher telling him the school had a problem with kids going on the roof. This explained why when he first arrived at the school as principal, a board was placed perpendicular to the roof at one potential access point, in an attempt to block access to the roof. Mr. Hurd felt that the board was insufficient to prevent access and he got it widened. On another occasion students at the school told him their older brother had been on the roof. He then called and spoke with the boys' mother, telling her that being on the roof was unsafe. He also told the court about occasions when the school would be colder than normal on a Monday morning. Upon inspecting the furnaces, which were located on the roof, maintenance workers told him the gas had been shut off. The only way to shut off the gas was to go up onto the roof.
- [26] Mr. Hurd could not know how the roof was accessed where he was simply told that someone had been on the roof.
- [27] On two occasions Mr. Hurd witnessed people on the roof. In neither case were they students at the school. Mr. Hurd estimated them to be older teenagers. On one of these occasions he saw a youth in a coniferous tree close to the school and another youth on the roof. He told them to get down and the one on the roof jumped back onto the tree and climbed down. After this incident he asked for two trees to be removed, the one he had seen the youths in and another in a different area but that was similarly proximate to the school. In the other incident he witnessed a teenager on the roof who was the older brother of a student at the school. That boy's father was at the school and told him to get down, which he did by jumping directly to the courtyard below.

IV. Issues

- [28] There is one issue in this case: did the defendant discharge its duties under s. 3(1) of the OLA, which states:

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.

[29] To decide that issue I need to answer two questions

1. Was it reasonable in all the circumstances for the defendant to allow the cherry tree to be in close proximity to the school roof, and;
2. Did Mr. Helland's interaction with the boys when they were on the roof contribute to Owen's injuries?

V. The Law

[30] There is no dispute about the guiding legal principles, which are helpfully summarized in *Bendzak v. Bohnet*, 2013 BCSC 435 at paras. 41-48. Paraphrasing those passages, the following points are pertinent to this case:

- section 3(1) of the OLA is a comprehensive code and common law negligence cases need not be considered in determining whether the duty of care has been met;
- an occupier is not held to a standard of perfection; an occupier is not an insurer against any possible risk of harm;
- the test is whether the defendant's actions were reasonable in all the circumstances; the test is not whether anything at all could have been done to prevent injury but whether the defendant's actions were reasonable in all the circumstances;
- the general class or nature of the harm suffered in the circumstances must have been reasonably foreseeable, although the exact type of injury suffered need not have been foreseen;

[31] It is also undisputed that decisions made under s. 3(1) of the OLA are fact-intensive and require a contextual analysis. As such, the degree to which a previous case will be helpful depends, perhaps to a greater extent than in some other areas of the law, on the similarity of facts to the case before the court.

VI. Discussion

A. Liability

The Cherry Tree

[32] The defendant contends that it met the duty of care owed under s.3(1) of the OLA and raises a number of arguments in support of this position.

[33] First, the defendant says there was no way for it to anticipate that Owen would use the cherry tree to access the roof because there was no evidence that the cherry tree had actually been used for that purpose in the past. Rather, there was only evidence that it was rumoured that the tree had been used in that way. Second, in its written submission, the defendant says that "it satisfied its standard of care by regular monitoring the conditions at Peace Arch Elementary" and taking reasonable steps to remove ALL access points of which they were aware keep students and others reasonably safe. As such, the defendant says it

could not have reasonably foreseen Owen's injuries and is therefore not liable.

- [34] I am not persuaded by the defendant's submissions on this point. I note first that the defendant's written submissions overstate the evidence somewhat in suggesting monitoring was regular and that all access points of which it was aware were removed.
- [35] First, most of the time the defendant knew people had been on the school roof, the defendant did not know how they got there. The lack of evidence about people having previously used the cherry tree to access the roof is, therefore, unsurprising. On one occasion the defendant did know that someone climbed a tree close to the school to access the roof. As Mr. Hurd rightfully conceded, a tree close to the school will tempt kids to climb it and get onto the roof. I conclude it was foreseeable that trees close to the school might be used to access the roof. It is simple common sense that if a child can get onto a roof, it is reasonably foreseeable that the child might fall off that roof and get badly injured.
- [36] Second, there was no evidence of "regular monitoring" of potential access points to the school roof. If there was at any time either a schedule of routine inspection or an assessment of trees proximate to the school that could potentially provide access to the roof, I would have expected that to be put into evidence as it would have clearly been material to this case.
- [37] Instead, the evidence demonstrates that if the defendant took any action in response to knowing youth had been on the roof, it was only reactive and ad hoc. This was despite the fact that there were numerous possible access points to the roof, as depicted in Mr. Delavalle's photographs.
- [38] Mr. Hurd's evidence establishes that this school had a problem with youth getting onto its roof. The numerous incidents he recalls confirm that this problem was known to the principal, teachers, maintenance workers, students and their families and others. Despite this, there is no evidence that the defendant required anyone to turn their mind to whether any trees were growing too close to the school roof and providing the access that allowed for this problem to persist.
- [39] In making these findings, I am mindful that the defendant is not expected to be perfect and that it would be impossible to completely prevent anyone getting on the school roof other than in an authorized fashion. However, taking into account all the circumstances of this case, it was unreasonable that the defendant allowed the cherry tree to grow so close to the school's roof.
- [40] The defendant also argues it should not be held liable because most, if not all, other instances of people being on the roof occurred on the weekend and probably involved teenagers. The problem with that submission is the issue in this case is not about when the roof was accessed. Rather, the issue is whether the defendant's actions in relation to possible roof access points were reasonable. The school is a permanent structure and its grounds are open to the public. When the roof was accessed is immaterial to the

determination of whether the defendant acted reasonably in allowing the cherry tree to grow so close to the roof.

- [41] The same reasoning can be applied to the defendant's argument that it was likely only older, non-students who had been on the roof previously. I note the evidence about the age of the people on the roof on weekends was obviously speculative, except for the two instances Mr. Hurd witnessed. It would be imprudent to place significant weight on this point when the evidence is not conclusive. But even if it was proven that all prior incidents involved teenagers, I do not find that that fact would support a conclusion that this accident was not foreseeable. If there are numerous instances of teenagers being on the roof, the elementary school students would know about it. This inference is confirmed by Mr. Hurd's evidence that he received reports from his students about people on the roof during weekends. It is common sense that if students know that older youth have been on the roof, they may be tempted to do the same. More than one witness agreed that tree climbing is a normal part of childhood.
- [42] Mr. Hurd testified he was surprised that was how the boys got on the roof because he thought the tree was flimsy. As noted above, I have found the cherry tree had a study branch close to the roof. More importantly, in my view a reasonable person understands that a child might try climbing any tree close to the roof, flimsy or not. Owen was a 12 year old boy. Children act impulsively, with little forethought about the consequences of their actions and with limited insight. Put more simply, reasonable people foresee that children can and often do stupid things that are dangerous even when they know they shouldn't.
- [43] I am not suggesting that the inherent nature of childhood means an occupier is liable for anything that a child might do. As always, each case must be assessed in context, reviewing all the circumstances.
- [44] Given the circumstances at this particular school, a reasonable person would foresee that the cherry tree (or any other tree in similar proximity to the school roof) might be used by kids to climb onto the roof. As such, the defendant is liable for not taking reasonable actions to prevent children accessing the school roof via the cherry tree.

Mr. Helland's Actions

- [45] I am satisfied the defendant is liable based on the above finding alone. However, the plaintiff also argues that Mr. Helland's conduct contributed to Owen's injuries and Mr. Helland ought to have known that injury could result when he reacted as he did. Although it is unnecessary to do so, I will consider the argument about Mr. Helland's conduct.

[46] The plaintiff argues that by yelling in an angry voice and telling the kids to get off rather than calmly telling them to wait for instructions for a safe exit, Mr. Helland acted unreasonably and contributed to Owen's injuries. I do not agree. Children doing something wrong and at risk of being discovered but not yet caught are likely to flee regardless of what a teacher says. For that reason alone, I do not find that Mr. Helland's conduct contributed to Owen's injuries. Thus the defendant is not liable on this basis.

B. Apportionment

[47] The plaintiff accepts that he must bear some responsibility for his injuries because he climbed the roof knowing he should not. The plaintiff submits the defendant is between 60-75% liable.

[48] The approach to determining apportionment is set out in *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219, 1997 CanLII 2374 (C.A.) at paras. 18-19. Speaking for the majority, Lambert J.A. states:

[18] I believe the trial judge's choice of words and the syntax of the last two sentences indicate that the reason that the plaintiff was required to pay 75% of her own loss was that she was "primarily the author of her own misfortune". I consider that the trial judge reached his conclusion on apportionment by deciding that the apportionment should be based on an assessment of relative degrees of causation as between the plaintiff as an active causative force at the moment of the injury and the defendant as a passive causative force at the moment of the injury.

[19] I think that such an approach to apportionment is wrong in law. The Negligence Act requires that the apportionment must be made on the basis of "the degree to which each person was at fault". It does not say that the apportionment should be on the basis of the degree to which each person's fault caused the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.

[49] The critical factor to consider is "fault" or blameworthiness, rather than assessing the degree to which a plaintiff is the author of his or her own misfortune.

[50] I understand the defendant to argue that because Mr. Helland's conduct did not contribute to Owen's injuries, liability can be avoided. I agree that Mr. Helland's conduct did not contribute to Owen's injuries, however I stated earlier that I find the defendant liable irrespective of Mr. Helland's conduct.

[51] As such, I am assessing the defendant's blameworthiness for failing to take action to prevent children accessing the roof via the cherry tree, or any other tree in similar proximity to the school roof. For the defendant's fault in this regard I find the defendant 75% liable.

"Sharma J."

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