CANADA / JUDGMENT

Saloojee v. Gibsons (Town)

2025 BCCA 49

COURT
British Columbia Court of Appeal

DECIDED
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2025 BCCA 49 Saloojee v. Gibsons (Town)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Saloojee v. Gibsons (Town),

2025 BCCA 49

Date: 20250218

Docket: CA48947

Between:

Mujtaba Saloojee

Appellant

(Plaintiff)

And

Town of Gibsons

Respondent

(Defendant)

Before:

The Honourable Madam Justice Horsman

The Honourable Justice Iyer

The Honourable Justice Edelmann

On appeal from: An order of the Supreme Court of British Columbia,

dated February 22, 2023 (Saloojee v. Gibsons (Town), 2023 BCSC 249,

Vancouver Docket S160872).

Counsel for the Appellant:

D.G. Cowper, K.C.

R.L. Wishart

S. Dhaliwal

Counsel for the Respondent:

N. Krueger

E.A.V. Madhur

Place and Date of Hearing:

Vancouver, British Columbia

November 14, 2024

Place and Date of Judgment:

Vancouver, British Columbia

February 18, 2025

Written Reasons by:

The Honourable Justice Iyer

Concurred in by:

The Honourable Madam Justice Horsman

The Honourable Mr. Justice Edelmann

Summary:

The appellant was seriously injured by a tree in the respondent's park. He sued in negligence under the Occupiers Liability Act and at common law. The trial judge found the statutory scheme made it unnecessary to consider the common law claim. She dismissed the claim on the basis that the respondent had not breached the statutory standard of care. The primary ground advanced on appeal is that the judge erred in treating the requirements contained in the Wildlife Danger Tree Assessor's Course as comprehensive of the standard of care. The appellant also argues the judge made six procedural errors that materially affected the outcome of the trial.

Held: Appeal dismissed. Having submitted that the Wildlife Danger Tree Assessor's Course was comprehensive of the standard of care, and led expert evidence based on that position, it was not open to the appellant to now argue a different standard of care applied. None of the alleged procedural errors would have affected the outcome of the trial.

Reasons for Judgment of the Honourable Justice Iyer:

Overview

[1] This appeal arises out of a tragic accident. In June 2012, when Mr. Saloojee was 17, he and three friends went into the woods in a park to socialize. They threw rocks at dead trees and then pushed them to knock them over. While Mr. Saloojee was pushing one such tree, part of it broke off and struck him in the neck and back, severing his cervical spine. As a result, Mr. Saloojee is a tetraplegic. He has complex medical conditions and a reduced life expectancy.

[2] Mr. Saloojee sued the Town of Gibsons ("Gibsons") and his friends under the Occupiers Liability Act, R.S.B.C. 1996, c. 337 [OLA] and in negligence. He claimed that fault should be apportioned 70% to Gibsons, 25% to him, and 5% to his friends. Both causes of action require a plaintiff to prove that the defendant breached the applicable standard of care, the plaintiff suffered injury and that the injury was caused by the defendant's breach of the standard of care.

[3] The trial judge dismissed the claim against Gibsons. She found that the statutory duty of care set out in s. 3(1) of the OLA required Gibsons to take the care that is reasonable in the circumstances to ensure that a person using the park will be reasonably safe in doing so. More specifically, the judge found that the standard of care with which Gibsons was required to comply was the standard for identifying and managing potentially dangerous trees contained in the Wildlife Danger Tree Assessor's Course. I will refer to this as the "WDTAC Standard".

[4] The trial judge found Gibsons had not breached that standard of care. Although she acknowledged that it was not necessary to do so, the judge also commented on factual causation, stating that it was very unlikely that posting any signs or barriers would have deterred Mr. Saloojee from engaging in the conduct that led to the accident.

[5] As Mr. Saloojee's counsel had not made submissions about the other defendants, the trial judge dismissed the action against Gibsons without making orders respecting the other defendants.

[6] The primary issue at the hearing of the appeal was whether the trial judge erred in her identification of the applicable standard of care. Mr. Saloojee argued that the trial judge's analysis of the standard of care was incomplete because she only considered whether Gibsons had complied with the WDTAC Standard and, having found that it did, concluded that there was no breach of s. 3(1) of OLA. Mr. Saloojee argued that the judge was required to

go on to ask whether, independent of the WDTAC Standard, s. 3(1) of OLA required Gibsons to do more than it did to protect against the risk that materialized in this case.

[7] In his factum, Mr. Saloojee also raised as a ground of appeal the judge's alleged error in failing to determine the liability of the defendants Matthew Kelly and Riley MacKenzie. In oral submissions, counsel for Mr. Saloojee acknowledged that the entered order under appeal only addresses the liability of Gibsons. In light of the limited scope of the order under appeal, Mr. Saloojee abandoned this ground.

Trial Judgment (2023 BCSC 249)

[8] The trial was lengthy: it took over 60 days, spread over 13 months.

[9] There was no real dispute over the facts relating to the accident. It occurred in a forested area off the maintained trails in White Tower Park. Mr. Saloojee and his friends wanted to enter the area so they could drink alcohol without being observed. The group threw rocks at dead trees to knock off branches or bring down the tree. They began pushing on dead trees to knock them over. Mr. Saloojee was pushing on one such tree when the accident occurred.

[10] Mr. Saloojee framed his claims against Gibsons under the OLA and the common law of negligence. The judge held that it would be wrong, as well as unnecessary, to decide Mr. Saloojee's negligence claim because the OLA establishes a complete code for the duty of care owed by an occupier.

[11] Gibsons relied on the core policy immunity defence, which shields core policy decisions made by a public authority (as distinguished from operational or implementation decisions) from liability in order to maintain the separation of powers between the executive, legislative, and judicial branches of government.

[12] Gibsons submitted that its bylaw and two policies that were in issue in this case were protected by core policy immunity. Bylaw No. 1012 permitted the Director of Parks to post signs in public places for the "safe and efficient use of that public place." Gibsons' Tree Removal Policy prohibited the removal of trees in parks unless deemed by the Director of Parks to be an immediate hazard to workers or park users. An unwritten policy on inspection and maintenance (referred to as the "Unwritten Policy") applied to Gibsons' naturally forested parks, including White Tower Park. The Unwritten Policy required Gibsons' Parks Labourer to inspect maintained trails in such parks on a monthly basis. Those inspections included looking for signs of failure in trees that could pose a risk to persons using the maintained trails. Importantly, the Unwritten Policy directed the Parks Labourer not to go off those trails and inspect trees in forested areas.

[13] The judge held that Gibsons could not invoke the core policy immunity defence in this case because Mr. Saloojee was not challenging Gibsons' policies, he was challenging operational decisions made under them:

[190] However, Mr. Saloojee's actual challenge is not to the policy of inspecting only the Maintained Trails in White Tower Park, in other words, the Unwritten Policy. Rather the decisions about which he complains are the decisions not to restrict access to areas of White Tower Park, and not to erect warning signs advising park visitors and users of the dangers of playing off the Maintained Trails and of falling branches in those areas. Mr. Saloojee says that these are the decisions at issue. Mr. Saloojee says further that, because these decisions are not core policy decisions, Gibsons' core policy defence must fail.

[Emphasis in original.]

[14] The judge also rejected Gibsons' submission that the lower standard of care in s. 3(3) of the OLA applies in this case, finding that the applicable standard is set out in s. 3(1). She concluded:

[221] Accordingly, I find that the standard of care that applies to Gibsons is stated in s. 3(1) of the Occupiers Liability Act. Gibsons owed a duty to Mr. Saloojee to take that care that in all of the circumstances was reasonable to see that Mr. Saloojee would be reasonably safe in using White Tower Park on June 2, 2012.

[15] The judge's conclusions on these issues are not challenged on appeal.

[16] Having identified the legal standard of care, the trial judge considered the opinion evidence the parties tendered on the standard of care. She accepted expert evidence from both parties' primary experts on this issue, Todd Manning for the plaintiff, and Dean McGeough, for the defendant. She did not rely on the evidence of Norm Oberson, another expert called by the plaintiff, because she found that he was not impartial. The judge noted Mr. Manning's and Mr. McGeough's expertise and experience in the development of the WDTAC Standard.

[17] The experts agreed that the WDTAC Standard establishes the processes and criteria for assessing the risks posed by trees in parks such as White Tower Park. The trial judge found that the WDTAC Standard was the standard of care that applied in this case:

[238] Both Mr. Manning and Mr. McGeough agree that the definitions, criteria, procedures and guidelines provided by the WT Committee, used in the WDTAC and set out in the WDTAC Workbook, describe the standard of care that applies in this case. I accept their evidence and find accordingly.

[18] The trial judge reviewed in detail the process established by the WDTAC Standard for assessing and managing the risks posed by trees in parks, noting Mr. Manning and Mr. McGeough agreed on these matters.

[19] The experts agreed that a danger tree assessment is only required where a tree meets the definition of "dangerous tree". A "dangerous tree" includes trees of all sizes, whether living or dead. However, the trial judge emphasized that a tree cannot be dangerous unless it is associated with a target, as explained in the WDTAC Workbook, at para. 246:

One cannot have a dangerous tree unless there is a target. For purposes of parks and recreation sites, targets are those established trails, camping sites, roads and facilities that are provided to the visiting public to help them safely enjoy the park or recreation site. Workers that are responsible for the upkeep and development of the recreation site are also targets.

[20] The experts also agreed that, where human activity in a forested area is negligible, it is classified as posing a very low risk ("VLR") and the WDTAC Standard does not require a dangerous tree assessment. Where the level of disturbance ("LOD") is greater than VLR, a dangerous tree assessment is required.

[21] The judge summarized the plaintiff's position as follows:

[317] Ms. Wishart says that Gibsons failed to ensure that Mr. Saloojee was reasonably safe while he was in White Tower Park on June 2, 2012, and therefore failed to meet the standard of care. She submits the evidence shows that, as of June 2012, Gibsons encouraged members of the public to use White Tower Park without posted restrictions. In her submission, it was reasonably foreseeable that a failure on the part of Gibsons to limit access to areas of White Tower Park, and to warn park users about the dangers of going or playing off the Maintained Trails, may result in injury. Ms. Wishart says that, if children are known to play in a park with dead trees (and there were dead trees in the forest in White Tower Park), then it is reasonably foreseeable that a child may be hurt by a dead tree. In Ms. Wishart's submission, to meet the standard of care, Gibsons was obliged at the very least to: limit access to areas of White Tower Park; or warn visitors to White Tower Park that not all trails were constructed and inspected, warn about the hazards presented by dead trees in the forest, including the potential for and danger of falling branches, and warn of the risks associated with playing off the Maintained Trails; or, ideally, both limit access and warn visitors.

[22] The judge explained that the disagreement between the two experts was confined to how the WDTAC Standard applies in the present case, and that the plaintiff urged the judge to prefer the evidence of Mr. Manning over that of Mr. McGeough:

[323] In Ms. Wishart's submission, the Manning Report, and Mr. Manning's evidence generally, describe the applicable standard of care in relation to danger tree management in White Tower Park in June 2012.

[324] Ms. Wishart says that the area of disagreement between Mr. Manning and Mr. McGeough is narrow, namely: whether the WDTAC is only applicable to structures provided by the public authority. Thus, Mr. Manning and Mr. McGeough disagree on how the standard of care is to be applied on the facts here. In Ms. Wishart's submission, when comparing the experts' qualification, reports and testimony, and where there is disagreement, the Court should prefer the evidence of Mr. Manning over that of Mr. McGeough. In that light, in Ms. Wishart's submission, I should conclude that Gibsons breached the standard of care in failing either to restrict access to areas of White Tower Park or to post warnings signs, or both.

[23] The judge summarized the defendant's position as follows:

[333] On the other hand, on behalf of Gibsons, Mr. Dowler submits that Gibsons did not breach the standard of care. In Mr. Dowler's submission, the standard followed by Gibsons in June 2012, as described in the Unwritten Policy, was in accordance with the WDTAC, as set out in the WDTAC Workbook and as described by Mr. McGeough and Mr. Manning. In Mr. Dowler's submission, nothing about the area where the accident occurred constituted a target as defined by the WDTAC, and, without a target, no tree in a naturally forested area, whether the tree is dead, dying or alive, is considered dangerous pursuant to the WDTAC. In Mr. Dowler's submission, and based on the opinion evidence of Mr. McGeough, the area where the accident occurred would be properly classified as very low risk, and, based on the WDTAC, not require any investigation or management by Gibsons.

[24] The trial judge concluded that Gibsons' failure to conduct a dangerous tree assessment in the area where the accident occurred was not a breach of the standard of care:

[338] In my opinion, as of June 2012, the applicable standard of care, as described in the WDTAC Workbook and in the light of the opinion evidence given by Mr. Manning and Mr. McGeough, did not require a danger tree assessment in White Tower Park beyond what Gibsons carried out under the Unwritten Policy. On the facts, there was no identifiable "target." Therefore, the plaintiff has failed to show that Gibsons breached the standard of care.

[25] The trial judge rejected the plaintiff's submission that the Unwritten Policy and the Tree Removal Policy were in conflict, finding they complemented one another (at paras. 340-341). Accordingly, the trial judge found that the Director of Parks did not fail to administer the Tree Removal Policy or breach the standard of care by applying the Unwritten Policy (at para. 342).

[26] The trial judge acknowledged the plaintiff's submission that the existence of an informal fort structure meant that the area in which the accident occurred was not VLR but a greater LOD of at least LOD 1, such that Gibsons ought to have conducted a dangerous tree assessment. However, she found Mr. Manning's expert evidence did not support that conclusion:

[345] Rather, Ms. Wishart argues that I should conclude that the Fort Structure is a target, and it shows that people are doing more than just walking through the forest. Someone assembled the structure, and by doing so, increased their exposure time to potential hazards. Moreover, Ms. Wishart argues that the Fort Structure is something in the forest to catch a person's attention, analogous to an interpretive sign. Ms. Wishart argues that it therefore increases the level of disturbance and exposure in the incident area from very low risk to LOD 1 at least. In Ms. Wishart's submission, at LOD 1, the standard of care required an assessment, or, at the very least, that Gibsons either restrict access to the area, or provide a warning, or both.

[346] However, the management of potentially dangerous trees, as described by Mr. Manning in particular in response to Question 11 in his Report, still requires identification of a target. This is a critical point on which Mr. Manning and Mr. McGeough agree. Mr. Manning was not prepared to say in the Manning Report that, in his opinion, the presence of the Fort Structure - some 65 feet away from where Mr. Saloojee was injured - increased the level of disturbance and exposure in the area from very low risk to LOD 1. He was also not prepared to express that opinion at trial. His "new opinion" on cross-examination does not go so far. Moreover, on cross-examination, Mr. Manning expressed the opinion that informal trails within 20 metres of where the accident happened were, for the most part, very low risk and therefore would not require inspection. In Mr. McGeough's opinion, the level of disturbance remained very low risk. Moreover, unlike the benches along the Maintained Trails, the Fort Structure was not something that had been provided by Gibsons to the visiting public to help them safely enjoy the park.

[347] Therefore, on the basis of the opinion evidence, there is very little disagreement. Mr. Manning, even in his "new opinion," was not prepared to say the presence of the Fort Structure changed the level of disturbance and exposure in the incident area from very low risk to LOD 1. The opinion evidence overall does not support the conclusion that the presence of the Fort Structure changed the level of disturbance to LOD 1, from very low risk. At very low risk, the standard of care did not require a danger tree assessment, nor did it require warnings or restrictions on access to areas of the forest. In any event, and assuming the Fort Structure could be considered a target, the distance of about 65 feet between the "incident stump" and the Fort Structure meant that the incident stump was not close enough to a target to have been identified as a possible dangerous tree.

[Italic emphasis in original; underline emphasis added.]

[27] The trial judge noted Mr. Manning, did not opine, based on the facts provided to him by the plaintiff, that the level of activity in the area of the accident justified classifying it as anything other than VLR:

[356] In any event, there is little in the evidence to persuade me that either the area around the Fort Structure or around where Mr. Saloojee was injured was being used on anything more than a random basis as a gathering place or a place for socializing. Mr. Manning never suggested that, as a result of Mr. Saloojee and the other three young men going off a Maintained Trail into the forest to drink, that activity rendered the area LOD 1 and requiring inspection. The plaintiff has failed to prove one of the important assumptions that Mr. Manning was asked to make, namely: "The area of the Incident has a high occupancy rate and a high duration of exposure" (para. 76). Despite being provided with such an assumption - highly favourable to the plaintiff's case - Mr. Manning was not prepared to express the opinion in the Manning Report that the level of exposure and duration in this area was no longer very low risk, but LOD 1.

[28] The trial judge also rejected the plaintiff's argument that the presence of White Tower Park within Gibsons' town limits obliged it to carry out a dangerous tree assessment, and his argument that White Tower Park was a "playground" and required a dangerous tree assessment for that reason.

[29] Accordingly, the judge found that Gibsons' failure to carry out a dangerous tree assessment did not breach the WDTAC Standard:

[362] I find that the standard of care did not require that Gibsons carry out a danger tree assessment in White Tower Park beyond what was being done based on the Unwritten Policy. No target or targets were identifiable in the area where the accident occurred. Based on the standard described by the WDTAC and in the WDTAC Workbook, Gibsons was entitled to treat the bare-topped trails in the Incident Site and around the Fort Structure as very low risk because of the absence of any identifiable target or targets. As such, Gibsons was not required to carry out any assessment of trees in this area.

[30] The judge considered this conclusion dispositive of the question of whether Gibsons had complied with its obligations under s. 3(1) of the OLA:

[363] I find further that, since no danger tree assessment was required, the standard of care did not require that Gibsons either restrict access to areas of White Tower Park or post warning signs.

[364] Accordingly, I conclude that on June 2, 2012, Gibsons had satisfied its duty to take that care that, in all the circumstances, was reasonable to see that Mr. Saloojee would be reasonably safe in using White Tower Park.

[31] Although her conclusion on the standard of care made a causation analysis unnecessary, the judge commented that, even if Gibsons had breached the standard of care, it would have been very difficult for Mr. Saloojee to have established factual or "but for" causation:

[371] From my perspective, the major difficulty for the plaintiff in the causation analysis is that the details of what Gibsons ought to have done to restrict access to the area of White Tower Park where the accident occurred, or the actual content of a hazard warning, were never well developed, either in the pleadings, in the evidence or in closing submissions.

[372] In my view, it is very hard to avoid the conclusion that no warning signs or barriers would have deterred Mr. Saloojee from pushing on the dead tree on June 2, 2012.

[32] The judge dismissed Mr. Saloojee's claim against Gibsons.

Issues on Appeal and Standard of Review

[33] The appellant raises three issues on appeal:

a) the trial judge erred in failing to apply the test under the OLA in analyzing the standard of care;

b) the trial judge erred in her approach to causation;

c) the trial judge made six errors of civil procedure that materially affected the outcome of the trial.

[34] For reasons I will explain, I consider it unnecessary to address the second ground of appeal, pertaining to the trial judge's causation analysis.

[35] In Borgfjord v. Boizard, 2016 BCCA 317, this Court identified the standard of review that applies to the determination of the applicable standard of care:

[20] The definition of the standard of care in a given set of circumstances is a mixed question of law and fact. Where an error can be attributed to the application of an incorrect standard, failure to consider a required element of a legal test, or an error in principle, the error is one of law and subject to a standard of correctness.

[36] The standard for review for rulings related to conduct of a trial is highly deferential. Appellate intervention is justified only if the judge made an error of law or principle, or failed to consider relevant factors: 311165 BC Ltd. v. Derewenko, 2019 BCCA 217 at para. 15. A judge's ruling on the admissibility of evidence is reversible only if the court has misdirected itself, come to a decision that is so clearly wrong it amounts to an injustice, or where the judge gave no or insufficient weight to relevant considerations: Tan v. Tan, 2024 BCCA 113 at para. 26.

Discussion

Did the trial judge err in her analysis of standard of care?

[37] The appellant's primary argument is that the trial judge's analysis of the applicable standard of care was incomplete because she treated the WDTAC Standard as comprehensive of the standard s. 3(1) of OLA required Gibsons to meet in the circumstances of this case. The appellant says, having found the WDTAC Standard did not require Gibsons to conduct a dangerous tree assessment, the trial judge erred in treating that conclusion as dispositive of the question of whether Gibsons ought to have put up warning signs or restricted access to the area in which the accident occurred. He submits s. 3(1) of the OLA required the judge to ask whether, in fulfilling its statutory duty "to take that care that in all the circumstances of the case is reasonable to see that a person on the premises will be reasonably safe in using the premises", Gibsons ought to have implemented measures beyond what the WDTAC Standard required.

[38] I would not accede to this argument. From the outset, the trial judge understood that Mr. Saloojee was challenging Gibsons' decisions "not to restrict access to areas of White Tower Park, and not to erect warning signs advising park visitors and users of the dangers of playing off the Maintained Trails and of falling branches in those areas" (at para. 190).

[39] At trial, Mr. Saloojee framed his case on the basis of the WDTAC Standard and what measures that standard required Gibsons to take to mitigate the risks posed by trees in White Tower Park. The trial judge understood that the experts agreed that this was the applicable standard of care and that the disagreement between them was confined to what the WDTAC Standard required in this case.

[40] Trial counsel for Mr. Saloojee consistently referred to the WDTAC Standard as the applicable standard of care. For example, in the context of discussing the relationship between the Unwritten Policy and the WDTAC Standard, counsel stated:

CNSL R. WISHART: Immediate hazard is defined in the bylaw -- in the policy. Sorry, immediate hazard is not defined in the policy. [The Director of Parks] testified that immediate hazard was -- what that meant flowed from the WDTAC. The WDTAC, the plaintiff submits, is the standard of care that is to be applied in White Tower Park. Failing to apply the policy goes hand in hand with the failure -- with the breach of the standard of care in that [the Director of the Park] was not applying the WDTAC to White Tower Park, which we -- we submit would be a breach of the standard of care.

[Emphasis added.]

[41] When asked what the standard of care is in relation to the plaintiff's negligence claim, counsel responded:

THE COURT: -- all right, what is -- what does the plaintiff have to say about what the standard is that Gibsons should have met. And that's assuming that there's a duty.

CNSL R. WISHART: Right.

THE COURT: So I'm -- you know, I'm looking for this.

CNSL R. WISHART: Yes. And we say the standard is the WDTAC. And we say there's no contention between the experts that the standard is the WDTAC. That is not a contentious issue between McGeough and Manning. That the White Tower Park Labourer 1 and 2 -- Mike Soper, Jackson Wright -- and Wendy Gilbertson were all certified with the WDTAC. ...

[Emphasis added.]

[42] In closing submissions, Mr. Saloojee argued for a more expansive reading of the WDTAC Standard than that provided by the defendant's expert, Mr. McGeough. For example, he argued that the WDTAC Standard did not apply only to public facilities, such as the maintained trails, but extended to informal structures, such as the fort structure. He submitted that the level of the activity in the area warranted an LOD 1 classification, which would have required Gibsons to conduct a dangerous tree assessment. Throughout, he relied on Mr. Manning's report as setting out the applicable standard of care.

[43] The trial judge addressed all of these arguments. She accepted and relied on Mr. Manning's evidence. However, she did not interpret his evidence in the way Mr. Saloojee did. Specifically, the trial judge found that Mr. Manning did not interpret the WDTAC Standard as indicating that the area in which the accident occurred merited an LOD 1 classification, and she found that he did not identify the accident site as a target.

[44] The judge comprehensively and conclusively addressed the evidence and submissions made to her. Mr. Saloojee did not argue at trial that the OLA required a different or additional assessment than that mandated by the WDTAC Standard. He did not lead evidence of what that assessment would entail.

[45] On appeal, Mr. Saloojee argues for the first time that the OLA required Gibsons to do something more than comply with the WDTAC Standard, saying that the trial judge's analysis of this issue was incomplete. In my view, this is a new issue not raised at trial.

[46] A party requires leave to raise a new issue on appeal. This Court exercises its discretion to grant leave sparingly. A new issue will only be permitted in exceptional cases "where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so": Quan v. Cusson, 2009 SCC 62, at para. 37, quoting from Wasauksing First Nation v. Wasausink Lands Inc. 2004, 184 O.A.C. 84 at para. 102. Leave will generally be denied if raising the issue will require new evidence to be led: Athey v. Leonati, [1996] 3 S.C.R. 458 at para. 51.

[47] The evidence and submissions during this lengthy trial were based on Mr. Saloojee's position that the WDTAC Standard was exhaustive of the standard of care required by s. 3(1) of the OLA. The trial judge's conclusions on standard of care were based on the case presented to her. A new trial with new evidence would be required to address Mr. Saloojee's submission on appeal that the standard of care required more of Gibsons than compliance with the WDTAC Standard. In these circumstances, I am of the view that it would not be in the interests of justice to permit Mr. Saloojee to advance this argument. I would dismiss this ground of appeal.

[48] The appellant also argues that the judge confused "danger tree assessment" with "danger tree management", and failed to appreciate that Mr. Manning opined that danger tree management can include posting warning signs, removing structures that pose hazards, and restricting access to hazardous areas.

[49] The standard of review on these issues is deferential. The appellant must show palpable and overriding error, and the reviewing court may not reweigh the evidence: Housen v. Nikolaisen, 2002 SCC 33 at paras. 22-26.

[50] The trial judge addressed this evidence and gave reasons, grounded in Mr. Manning's evidence, for concluding that the standard of care did not require Gibsons to take such measures in this case. Counsel at trial argued the applicable standard for danger tree management was the WDTAC Standard. The trial judge concluded the area remained VLR on

the evidence before her. Accordingly, the WDTAC Standard did not require posting of signs, removing structures that pose hazards, or restricting access to those areas. In my view, her reasons do not demonstrate palpable and overriding error.

[51] The appellant also submits that the trial judge erred in law in her causation analysis. In light of my conclusion that the judge did not err in her analysis of standard of care, it is unnecessary to address this argument.

Did the trial judge make material procedural errors?

[52] The appellant's factum identifies six errors that he describes as "errors of law related to civil procedure". In my view, taken individually or collectively, none provide a basis for allowing the appeal.

[53] First, the appellant says the trial judge erred in law by not admitting into evidence the expert report of Wayne Wright, a former mayor of New Westminster, without first permitting him to testify about his qualifications.

[54] Rule 11-6(1)(b) requires an expert to set out their qualifications in their report, and R. 11-6(2) provides that this assertion of qualifications is evidence of them. There is no legal principle requiring a trial judge to hear oral evidence on qualifications before ruling on the admissibility of an expert report. In any event, as the respondent notes, the trial judge's determination on admissibility was not only based on Mr. Wright's qualifications. She found that his opinions were unnecessary because they drew inferences and conclusions the court could draw itself based on the law and the evidence; they set out factual information that could be given by a fact witness; they were irrelevant, as they were based on Mr. Wright's experience as mayor of a different community; and they were in the nature of argument or advocacy. The judge's detailed reasons on the inadmissibility of Mr. Wright's expert evidence contains no reviewable error.

[55] Second, the appellant submits that the judge erred in permitting Mr. McGeough to testify first as a fact witness and then as an expert witness without appropriately confining the scope of his direct evidence, contrary to this Court's decision in Ford v. Lin, 2022 BCCA 179. Ford was decided after the impugned rulings but before the conclusion of the trial. The respondent points out that counsel for the plaintiff did not advise the trial judge of the decision in Ford during closing submissions.

[56] Ford establishes that a party can call a person as an expert witness, and as a fact witness, but must comply with the rules and procedures applicable to each type of evidence. In particular, witness lists must disclose that the witness is giving both types of evidence and, if will-say statements are required, a will-say statement must be provided for the factual evidence it is anticipated the witness will provide: Ford at para. 65. Importantly, an expert witness cannot give "fact" evidence to amplify their expert opinion (at para. 86):

... That an expert is able to give "fact" evidence does not automatically open the door to a party both filing a report and calling the expert. When the "facts" sought to be elicited in the witness box relate to the basis for the opinion, a party must choose how they wish to present both those facts and the opinion. If a party chooses to tender a report, then they cannot call the expert as a "fact" witness unless the "fact" evidence to be elicited is relevant to some matter other than the opinion in the report or falls within Rule 11-7(5)(a)(ii). Put otherwise, a party is not entitled to "double up" on presenting an opinion or the foundation on which it is based.

[57] The appellant says that Mr. McGeough was only identified as an expert witness on the defendant's witness list, not as a fact witness, and no will-say statement was provided for his anticipated "fact" evidence. He says that the judge refused to accede to his objections to Mr. McGeough's testimony based on the absence of a will-say statement. The appellant states that Mr. McGeough was permitted to testify about what he observed during his visit to White Tower Park on March 3, 2019, which underscored or bolstered his opinion, contrary to Ford.

[58] Even accepting that the judge erred in her treatment of Mr. McGeough's evidence, the appellant has not demonstrated that it was material to the outcome of the case. The trial judge found that, in large part, there was no inconsistency between the evidence of Mr. Manning and Mr. McGeough. Further, she accepted the plaintiff's submission that she should prefer the evidence of Mr. Manning, and she concluded that Gibsons had not breached the standard of care based on his evidence, not that of Mr. McGeough. Accordingly, any error by the judge in failing to follow the process set out in Ford is not a basis for allowing the appeal.

[59] The remaining errors alleged by the appellant concern trial management decisions by the judge relating to redactions to an expert report, her refusal to order the respondent to provide a more detailed will-say statement for one of its witnesses, limits she placed on discovery read-in evidence, and her refusal to admit two documents for the truth of the facts recorded on them. Two of these alleged errors (the redaction to the expert report and the discovery read-ins) are relevant only to causation, which is not an issue I consider it necessary to address on this appeal. Furthermore, the appellant has not identified any reversible error by the judge in respect of these decisions, or in respect of the remaining two matters (the scope of the will-say statement and the admission of two documents), nor has he demonstrated that any of the alleged errors are material to the outcome of the case. Therefore, I would not accede to this ground of appeal.

Disposition

[60] I would dismiss the appeal.

"The Honourable Justice Iyer"

I AGREE:

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Justice Edelmann"

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Prepared on 29 October 2026 · Esheria