
CANADA / JUDGMENT

Simmons v. Yeager Properties Inc

2013 BCSC 889

COURT

Supreme Court of British Columbia

DECIDED

22 May 2013

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2013 BCSC 889 Simmons v. Yeager Properties Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Simmons v. Yeager Properties Inc.,

2013 BCSC 889

Date: 20130522

Docket: S64245

Registry: Nanaimo

Between:

Theresa Simmons

Plaintiff

And

Yeager Properties Inc. and

Your Local Bakery Cafe Ltd. carrying on business as

Utopia European Bakery Cafe

Defendants

Before: The Honourable Madam Justice Fisher

Reasons for Judgment

Counsel for the plaintiff:

J.J. Murphy

Counsel for the defendants:

K.M. Low

Place and Date of Trial:

Nanaimo, B.C.

May 8, 2012

Place and Date of Judgment:

Nanaimo, B.C.

May 22, 2013

- [1] On December 6, 2010, the plaintiff, Theresa Simmons, tripped and fell in front of a bakery owned and operated by the defendants and was injured. She brings this action under the Occupiers Liability Act, RSBC 1996, c. 337, and in negligence. She says that the defendants created a hazard by constructing a patio adjacent to the front entrance of the bakery with a two to four inch drop that was not properly marked and thus failed to take reasonable precautions to protect her against the risk of harm.
- [2] In this summary trial under Rule 9-7, the defendants seek a dismissal of the action against them. They acknowledge that they were at all times an occupier of the premises but say that they took reasonable care to ensure the premises were reasonably safe. The plaintiff seeks a dismissal of the defendants' application and judgment in her favour, with damages to be assessed.
- [3] The plaintiff made a preliminary objection that this matter was not suitable for summary trial due to a material conflict in the evidence. That conflict was in relation to whether the principal of the defendants had any prior knowledge of other people tripping on the step. I determined that this was a conflict that could not be resolved on affidavit evidence, as it involved issues of credibility arising from alleged prior inconsistent statements. The question was whether liability could be determined without resolving the conflict. The defendants considered this and decided to proceed with both applications on the basis of an admission that they had this prior knowledge. Given this admission, there was no longer any basis for the plaintiff's objection and I determined that it was appropriate to proceed by way of summary trial.

Legal principles

- [4] The Occupiers Liability Act, in s. 3, provides that an occupier owes a duty to take reasonable care to see that a person on the premises will be reasonably safe in using the premises. This duty applies in relation to the condition of the premises, activities on the premises, or the conduct of third parties on the premises.

- [5] A commercial occupier is required to protect customers from reasonably foreseeable hazards. The standard of care is one of reasonableness, not perfection. An occupier is not an insurer against every eventuality that may occur on the premises and the duty of care does not extend so far as to require a defendant to remove every possibility of danger: *Milina v Bartsch* (1985), 49 BCLR (2d) 33 (SC) aff'd (1987), 49 BCLR (2d) 99 (CA); *Ball v GAP (Canada) Ltd.*, 2001 BCSC 1106.
- [6] The fact of injury does not create a presumption of negligence. The burden is on the plaintiff to establish on a balance of probabilities that the injury resulted from a breach of the defendant's duty of care. The plaintiff must establish some act or failure to act on the part of the defendant that caused the injury. This burden remains the same in an application under Rule 9-7: *Charlie v Canada Safeway Limited*, 2010 BCSC 618; *Bauman v Stein* (1991), 78 DLR (4th) 118 (BCCA).
- [7] The plaintiff's claim is also based in negligence. Negligent conduct was succinctly defined in this passage from *Ryan v. Victoria (City)*, [1999] 1 SCR 201 at para. 28:

Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

- [8] In addition, the plaintiff has a duty to take reasonable care by keeping a reasonable lookout for her own safety. A failure to observe something that is there to be seen may amount to contributory negligence: see *Gervais v Do*, 2000 BCSC 1271.

The evidence

- [9] Wendy Laughlin is an owner-operator of the defendant Your Local Bakery Cafe Ltd., which owns and operates the Utopia European Bakery, located in Chemainus, BC. The bakery was built by the defendants in 2007. All construction complied with the applicable building codes at the time.
- [10] There is a concrete landing in front of entrance to the bakery and an outdoor wooden patio deck adjacent to the entrance (I will refer to this as the patio deck). The front of the bakery faces west. There are front stairs and a wheelchair ramp leading to the entrance, all made of concrete. There are also back stairs leading up to the patio deck from the north side of the bakery. The back stairs are also made of concrete but they have a wood surface with non-slip mats nailed to the top of each stair.
- [11] The front concrete landing is level. The patio deck is elevated from the landing by two to four inches by a step along the entire edge (I will refer to this as the patio step).

- [12] At the time of this incident, the edges of the front and back stairs and the patio step were painted white. These had been painted in 2007 and were still visible at the time of this incident in 2010. There were also two warning signs with red and black lettering posted in and around the area of the front entrance stating "Watch Your Step Please". One of the signs was posted from the inside window beside the front door and the other was on the edge of an outdoor post, about three feet from the ground, facing the bakery. The words "Watch" and "Step" on the sign located on the outdoor post were quite faded and difficult to see. There was one patio table and two chairs on the patio deck.
- [13] On December 6, 2010, the plaintiff tripped and fell near the front entrance of the bakery. She had entered the premises by way of the back stairs to the patio deck. She did not see the warning signs as she crossed the patio deck and did not notice the patio step. She deposed that a three to four inch drop between the patio deck and the concrete landing caused her to trip. She also deposed that the white paint on the edge of the patio step did not alert her to the hazard and she had no reason to believe that the surface would not be level to the front entrance.
- [14] The defendants read in portions of the plaintiff's examination for discovery, where she had difficulty remembering details about how she entered the premises or where she was looking at the time. More particularly, she did not recall going up any stairs or walking over the patio deck, nor did she recall where she was looking. She said she was following another lady and concentrating on the bakery doors. Because of her lack of recall, the plaintiff attended at the bakery in August 2012, retraced her steps, and provided a statement and further photographs that clarified how she entered from the back stairs and walked through the patio deck towards the entrance. In this statement she said that she did not realize what caused her to fall until she was on the ground, where she saw for the first time "a ledge" showing the difference between the patio deck and the concrete landing.
- [15] The plaintiff deposed that within seconds of her fall, a woman who was working at the bakery opened the entrance door and stated that she knew something like this was going to happen. Ms. Laughlin deposed that she went outside and found a woman sitting on the concrete landing in front of the entrance; she denied conveying that message. There is no evidence that the defendants knew of any prior falls but, despite Ms. Laughlin's evidence, they have admitted knowledge that others had tripped.
- [16] Ms. Laughlin made and posted the warning signs. She did not consider placing a sign facing the patio at or near eye level and she did not consider a sign that more specifically warned of the step. The outdoor sign needed to be replaced every six to eight months due to fading. She did not have a record of when she replaced the signs. However, she deposed that she was at the bakery almost every day and was aware of the condition of the painted stairs and the warning signs, and she would prepare a new sign when needed due to general wear and tear. She did not consider that the painted edges of the stairs and the patio step required a new coat of paint at the time of this incident.

- [17] After this incident, the defendants re-painted the edges of the patio step, and all other steps, with yellow paint. They also replaced the warning signs with yellow paper and black letters, and added an additional warning sign at about eye level facing the patio deck.

The plaintiff's position

- [18] The plaintiff says that the two to four inch difference in height between the patio deck and the concrete landing constituted a foreseeable trip hazard and the defendants knew this, as evidenced by their efforts to demarcate the drop with white paint and post warning signs. Mr. Murphy submits that the defendants failed to discharge their duty of care because the painted edge of the patio step was faded, the warning signs were not placed such that a person coming from the plaintiff's direction would see them, and the outdoor warning sign was so faded that the words "Please" and "Step" were virtually illegible. Moreover, the defendants' act of taking more effective measures to warn patrons after this incident is indicative of the insufficiency of the previous marks and signs.
- [19] The plaintiff also says that there is no evidence that she was doing anything other than paying reasonable attention to her surroundings and walking in a reasonably prudent manner at the time she tripped.

The defendants' position

- [20] The defendants say that the cause of the plaintiff's fall is based on speculation and theory and she has not met her burden of proving that something the defendants did or omitted to do caused her to trip and fall. Ms. Low submits that it is more likely that the plaintiff failed to pay any attention to where she was going and tripped over herself.
- [21] Even if the court finds that the plaintiff tripped on the patio step, the defendants say that she has failed to establish that the bakery was not reasonably safe. They submit that they took reasonable steps to ensure the exterior area was reasonably safe by obtaining approval of the construction in accordance with the applicable building code, painting the top and side edges of the patio step as well as the front and back stairs white, installing slip resistant mats on the top of the back stairs, and placing warning signs in contrasting colours. They further submit that the warning signs were not necessary in light of the painted edges of all the stairs as well as the patio step, which was there to be seen.
- [22] The defendants say that their subsequent actions in re-painting the edges with yellow paint and installing new signs are not determinative that such steps were required to make the premises reasonably safe, and given that the plaintiff was not looking where she was going, such actions would have made no difference.

The issues

- [23] In assessing whether the defendants are liable, the issues to be determined are:

1. whether the plaintiff's fall was caused by tripping on the patio step;
2. whether the defendants failed to make the premises outside the bakery entrance reasonably safe for the use of the plaintiff and others; and
3. if the defendants are liable, whether the plaintiff was contributorily negligent.

Analysis and findings

1. Was the plaintiff's fall caused by tripping on the patio step?
 - [24] The plaintiff must show that something the defendants did or did not do caused her to trip and fall and the court must not speculate on what caused the trip in this case: Bauman at 127; Newsham v Canwest Trade Shows Inc., 2012 BCSC 289 at para. 96; Lansdowne v United Church of Canada, 2000 BCSC 1604 at para. 23.
 - [25] The plaintiff's evidence about how she fell was initially quite vague. Until she went back to re-trace her steps, she could not remember how she entered the bakery or if she walked up any stairs at all, and she could not remember walking across the patio deck. She then was able to recall that she followed a lady up the back stairs, turned left and continued to walk toward the front entrance of the bakery. She saw the patio step for the first time when she was on the ground. Before that, she thought the surface she was walking on was level to the front doors. This is the basis for her statement that the difference in levels caused her to fall.
 - [26] There were no witnesses to the actual fall. However, it is quite clear that the plaintiff landed on the concrete landing in front of the entrance doors. Ms. Laughlin found her there immediately after.
 - [27] Given the plaintiff's direction of travel, her belief that the surfaces were level, and the location where she landed, I find it more probable than not that she tripped on the patio step and this is what caused her to fall.
2. Did the defendants fail to make the premises outside the bakery entrance reasonably safe for the use of the plaintiff and others?
 - [28] There is no dispute that the area where the plaintiff fell, including the patio deck, the patio step and the concrete landing, was constructed in accordance with the applicable building code at the time. This is a factor to consider in assessing whether premises are reasonably safe, but it is not determinative. The relevance of legislative standards was discussed in Ryan at para. 29:

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. Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability. 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. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

[citations omitted, emphasis added]

- [29] See also *Gagne v Fourneau*, 2005 BCSC 725 at para. 13, where it was held that compliance with a building code in effect from time to time may be comparative evidence in assessing whether premises are reasonably safe. In this case there is no evidence of any subsequent changes to the applicable building code.
- [30] The principle expressed in *Ryan* would also apply in respect of evidence of prior safe use: see *Cahoon v Wendy's Restaurant of Canada Inc.*, 2000 BCSC 629 at para. 16.
- [31] Here, there is no evidence that the defendants were aware that other people had fallen due to the patio step but there is evidence, by admission, that they were aware that others had tripped in that location. This is a factor to consider but it is also not determinative of a lack of reasonable care. I do not find it to be determinative in this case because the defendants took measures to alert customers to the existence of the patio step, measures which may or may not have been motivated by any prior knowledge. The question is whether the measures they took were sufficient to ensure that the premises were reasonably safe.
- [32] The plaintiff equates her situation with that in *Lysack v Burrard Motor Inn Ltd.* (1991), 58 BCLR (2d) 33 (CA). In that case, the Inn was found liable, not under the Occupiers Liability Act but in negligence, for obstructing passage along a sidewalk with large circular planters and diverting pedestrians toward an uneven trip in the pavement. The majority of the Court held that the likelihood of a pedestrian being injured was reasonably foreseeable because the face of the trip was disguised for westbound pedestrians by the joint between two types of concrete.
- [33] I do not see the case at bar as comparable to *Lysack* because the patio step was marked with white paint on the top and side edges such that the step was not disguised for anyone walking toward it, and there were warning signs posted in the area. I find that the outdoor warning sign was visible to someone coming from the plaintiff's direction. The photographs of the area show that the white paint and the outdoor warning sign were visible from all directions, including the direction the plaintiff was walking. I do not agree with the plaintiff that the outdoor warning sign was posted too low to the ground or was directed the wrong way for someone to see it from the patio deck. However, this warning sign was faded such that one could not readily read the words "Watch" and "Step" and I find that the faded words rendered this sign ineffective as a warning. The warning sign posted beside the entrance door, which was not faded, was directed toward people coming from the front entrance although it may have been visible to the plaintiff had she been looking toward the front door.

[34] The defendants say that the warning signs were superfluous as they were not necessary in light of the white paint marking the patio step, which was there to be seen. They rely on these comments in *Malcolm v British Columbia Transit*, 32 BCLR (2d) 317 at 318-319 (CA):

... 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. Any such adult person without being warned knows and accepts the risks of falling on a steep, wet, grassy slope or a path and it was not necessary, in my view, to give a warning of such a common everyday risk.

[35] In *Gagne*, it was held that these comments are applicable in circumstances involving the use of a staircase on the basis that stairs and landings are commonplace and part of everyday life, a point made in *Delgado v Wong*, 2004 BCSC 1199. In *Delgado*, the court noted that the fact that a person falls on stairs does not make them dangerous in and of themselves, unless there was something that presented a trap. In *Trinetti v Hunter*, 2005 BCCA 549 at para. 12, the court considered a step over a door sill from an outside deck to a lower surface was "one of the everyday risks or exigencies that adults know require care in the ordinary course".

[36] I do not find these cases applicable in the circumstances here, as they stand for the proposition that no warning is required for risks associated with activities of everyday life. *Gagne* and *Delgado* both involved stairs within residential premises that were regularly used by the plaintiffs and *Trinetti* involved a step that the plaintiff had already walked over in the opposite direction. In this case we are dealing with one step near the entrance to commercial premises where the defendants took measures to warn customers of its existence. Without any demarcation, the patio step presented a potential hazard. The question is whether the application of white paint constituted a sufficient warning, given the fact that the warning sign that would have been most visible to the plaintiff was ineffective at the relevant time.

[37] In my opinion, the presence of white paint demarcating the patio step was not a sufficient warning, as the patio step was quite different in nature from the both the front and back stairs, and it was also sloping along its edge so that its height varied from two to four inches. In addition, with a patio table and chairs in front of it, the entire painted edge may not have been visible to customers approaching from the back stairs as the plaintiff did. As the defendants must have considered, it was necessary to specifically alert customers to the presence of this step with warning signs. Here, the warning sign that was most visible to the plaintiff was ineffective due to wear and tear.

[38] The plaintiff says that the measures taken by the defendants after this incident, which were easily done and inexpensive, show that the previous measures were insufficient to make the premises reasonably safe. As with evidence of prior safe use, evidence of what is done after the fact is also a factor to consider in assessing whether the area at the time of the incident was reasonably safe. After the fact conduct is not an admission of negligence, but it may establish that measures were taken which converted an unsafe area into a reasonably safe one, and it may also establish the ease or difficulty with which a risk may have been avoided:

see Cahoon at para. 21; O'Leary v Rupert, 2010 BCSC 240 at paras. 47-48.

- [39] In re-painting the edges of all stairs and the patio step in yellow paint, and replacing the red, black and white warning signs with yellow and black signs, the defendants enhanced the safety of the premises. However, other than replacing the faded warning sign, I do not consider that these changes show the previous measures to have been insufficient to alert customers to the change in level at the patio step.
- [40] I find that the ineffective warning sign is evidence of a prima facie breach of the Occupiers Liability Act. In these circumstances, the defendants may refute the breach by leading evidence that they had put into place a reasonable system of inspection and maintenance that was being followed at the time of the accident: Newsham at para. 131, citing Atkins v. Jim Pattison Industries Ltd. (1998), 61 BCLR (3d) 183; and Davis v Kin's Farm Market (Lynn Valley), 2010 BCSC 677.
- [41] Ms. Laughlin's evidence was that the outdoor sign needed to be replaced every six to eight months due to fading. She did not have a record of when she replaced the sign but she was at the bakery almost every day and would prepare a new sign when needed. Given how faded the sign was on the date of this incident, I do not consider her inspection and maintenance to be sufficient. It was obvious that the outdoor sign needed to be replaced.
- [42] Accordingly, I find that the plaintiff has proved on a balance of probabilities that by failing to maintain the outdoor warning sign, the defendants failed to take reasonable care to ensure the exterior area leading to the entrance of the bakery was reasonably safe.
3. Was the plaintiff contributorily negligent?
- [43] Although I have found the defendants liable, I have also concluded that the plaintiff was contributorily negligent to a significant extent for failing to keep a reasonable lookout for her own safety.
- [44] In my view, this situation is similar to that in Cahoon, where the plaintiff stepped off a sidewalk into what he thought was a wheelchair ramp but was actually the surface of a parking lot that was adjacent to, but lower than, the ramp. He alleged that the way the area was painted with white lines led him to believe that the area was level with the sidewalk. The court found that with a minimal amount of attention paid, the edge of the sidewalk and the actual edge of the ramp were there to be seen.
- [45] Here, I find that the patio step was there to be seen by the plaintiff had she paid attention to where she was going. It was demarcated by white paint that was generally visible to persons accessing the bakery entrance from the patio deck. The photographs of the area taken shortly after this incident show that the paint was not faded and worn as suggested by Mr. Murphy. It is questionable whether the faded outdoor warning sign was a significant factor in the circumstances since the plaintiff was not looking in that direction and did not see the sign at all.

- [46] If the plaintiff had been watching where she was walking, she would likely have seen that there was a difference in level from where she was to where she was going. I find her expectation that the entire walking surface would be level to be an unreasonable one, as she was not paying attention but was instead focused on the woman in front of her and on the front entrance to the bakery.
- [47] The Negligence Act, RSBC 1996, c. 333, requires me to apportion the degree to which each party was at fault. This was not a case where the defendants failed to take any measures to make the premises reasonably safe but rather where they failed to maintain some of the measures they took. Considering the plaintiff's own lack of care, I find her degree of fault to be significant. I apportion her liability at 75 percent and the defendants' liability at 25 percent.

Conclusion

- [48] The defendants' application to dismiss the plaintiff's claim is dismissed. Judgment is for the plaintiff as to 25 per cent and damages are to be assessed.
- [49] The parties will have leave to make submissions as to costs if they are unable to agree.
- "Fisher J."

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