Citation: Hindley v. Waterfront Properties Corp. et al 2002 BCSC 885

Date: 20020610

Docket: 000140

Registry: Victoria

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MURRAY HINDLEY and JOAN HINDLEY

PLAINTIFFS

AND:

WATERFRONT PROPERTIES CORP. AND, PACIFIC CANADIAN INVESTMENTS CORP.

DEFENDANTS

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE GROBERMAN

Counsel for the Plaintiffs: Edward St.J. Pollard

Counsel for the Defendant: Nigel P. Kent

Date and Place of Hearing/Trial: April 26, 2002 Victoria, BC

[1] On August 1, 1999, while on vacation in the Parksville area, the Plaintiffs and two of their sons set off for a day of recreational cycling. They intended to cycle along the Top Bridge Trail, but did not make it there. On the way, Mr. Hindley was severely injured when he was thrown from his bike after hitting an obscured ditch on the Defendants' property.

[2] As a result of the cycling accident, Mr. Hindley is an incomplete quadriplegic. He sues the Defendants, alleging that they failed to meet the duty of care imposed on them pursuant to the ***Occupiers Liability Act***, R.S.B.C. 1996, c.337.

[3] The Defendants apply under Rule 18A for a dismissal of the action. They say that they were not "occupiers" of the property. They also say that, under provisions of the ***Occupiers Liability Act*** that apply to rural premises, the occupiers of the premises owed only a limited duty of care to recreational users of the land. They say that they have met that duty of care.

[4] The Plaintiffs resist the application. They say that it would be inappropriate to decide this case on a Rule 18A application. They agree with the Defendants, however, that the Court has sufficient evidence on this application to determine whether the land in question is "rural premises".

THE DEFENDANTS' LAND

[5] The Defendants' land is a 145 acre parcel located near Parksville. It is vacant and largely undeveloped. Most of it is heavily treed. The north-east portion of the parcel was used sometime prior to 1991 for a sand and gravel operation, and there remains evidence of gravel pits in that area. As well, there are gravel trails through parts of the property, presumably used at one time as hauling routes to take sand and gravel off the property.

[6] The land is within the boundaries of the City of Parksville, but, except for an industrial

park to the east of the property, the surrounding land is of a rural character.

[7] The Top Bridge Trail traverses the parcel. It is a multi-use recreational trail connecting Rathtrevor Beach Provincial Park to the Top Bridge Municipal Park, a Mountain Bike Park maintained by the City of Parksville. The Defendants have consented to allow the public to use the trail without charge.

[8] The Top Bridge Trail can be accessed from public lands from Highway 19A by going down Northwest Bay Road and Tuan Road. It is common, however, for cyclists to take a shorter route down Greig Road, which ceases to be a public road at the Defendants' property. There is a gate at that point. There are also a number of signs (including a "No Trespassing Sign"), though there is some dispute as to whether or not the signs were present at the time of the accident.

[9] After Greig Road becomes a trail on the Defendants' property, it splits into two forks. Down one fork there is a mound of dirt across most of the trail. On the other side of the mound, and obscured by it, is a one metre ditch or depression. Mr. Hindley was thrown from his bicycle when it hit the ditch after coming over the mound of soil.

ARE THE DEFENDANTS OCCUPIERS?

[10] The parcel of land in question is owned by Waterfront Properties as a bare trustee for Pacific Canadian Investments. The land is being held by the Defendants for future development; they have not developed it in any way since related companies acquired it in 1991.

[11] In 1992, Pacific Canadian Investments hired Ron Grasser, who lives near the parcel, to "perform caretaking duties" on it. He is paid $100.00 per month to "oversee the property and monitor it against any unauthorized use."

[12] The ***Occupiers Liability Act*** provides that

> "occupier" means a person who
>
> (a) is in physical possession of premises, or
>
> (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises.

[13] The Defendants argue that the parcel is vacant, and that no one can be said to be "in physical possession of premises." They further argue that, as they have left Mr. Grasser in control of the premises, they do not meet the definition of "occupier".

[14] The Defendants place heavy reliance on ***Konkin v. Bartel***, [1988] B.C.J. No. 1716 (S.C.). In that case, owners of a farm had gone to Germany on holiday, and left their son in possession of the property. The Plaintiff, who was bitten by a dog while on the property, sued both the owners and their son, alleging that all three were occupiers. Rowles J. (as she then was), dismissed the claim against the owners, finding that they were not occupiers of the property at the material time.

[15] In my view, ***Konkin*** is distinguishable from the present case. In ***Konkin***, the owners gave up control of the premises in favour of their son while they were on holidays. He was left in charge of the property, occupying it on his own behalf while they were away. In the present case, Mr. Grasser is not in a position analogous to the owners' son in ***Konkin***. While he controls the property to some extent, he does so not on his own behalf, but on behalf of the Defendants. The Defendants, continue to have full responsibility for and control over the premises. They are occupiers of the premises under the ***Act***.

IS THE PARCEL IN QUESTION "RURAL PREMISES"

[16] With certain exceptions that are not material to this case, ss. 3.2 and 3.3(b)(ii) of the ***Occupiers Liability Act***, provide that a person who enters vacant or undeveloped rural premises for recreational purposes is deemed to have willingly assumed all risks.

[17] Section 3(3) of the ***Act*** sets out the occupier's limited duty of care in such circumstances:

> 3) … [A]n 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.

[18] The Plaintiffs argue that s.3(3) does not apply to this case, because the land in question

is not “rural premises.” In this regard, they point out that the land is within the boundaries of the City of Parksville, that there is a nearby industrial park, and that the land is designated “Comprehensive Development” in the 1994 Official Community Plan Bylaw. It is, however, currently zoned Agricultural, a zoning which “is intended to provide land for “a diversity of rural land uses”.

[19] The diminished duty of care for recreational use of rural premises is a result of a 1998 Amendment to the ***Occupiers Liability Act***. The purpose of the Amendment is clear – it is to encourage landowners in rural areas to allow the public to use their land for recreational purposes. The legislation recognizes that the normal duty of care set out in the ***Occupiers Liability Act*** might be onerous in a rural setting, where owners may have limited practical ability to control access to their land, and where the cost of continuous monitoring of land to ensure that it is reasonably safe for all comers may be high.

[20] In my view, the question of whether premises are “rural premises” under the ***Act*** must be answered primarily by considering the current use of the premises and surrounding land rather than by examining what uses are permitted or may be permitted in the future. Further, I do not believe that the question of whether the premises are within municipal boundaries or not can have any influence on whether or not the land is characterized as “rural premises”.

[21] I agree with the conclusion in ***Whaley v. Hood***, [1998] O.J. No. 1785, that the question of whether premises are rural or not is largely a question of fact. In that case, Simmons J. adopted the definition of “rural” set out in the Concise Oxford Dictionary, Eighth edition: “in, of, or suggesting the country (opp. URBAN); pastoral or agricultural.”

[22] The purpose of the Amendments to the ***Occupiers Liability Act*** in 1998 was to encourage the opening up of rural lands to recreational use. Areas outside cities, particularly those where parcels of land are large and roads are some distance apart, appear to have been the main target of the legislation. The area of the parcel of land in this case is of the very nature that the legislation appears to be aimed at.

[23] I do not suggest that every large tract of land without buildings on it constitutes “rural premises” under the ***Act***. Lands in the middle of a large urban area, such as Victoria’s Beacon Hill Park or Vancouver’s Stanley Park are probably not “rural premises”. While land within the core of an urban area probably cannot come within the meaning of “rural premises”, it seems to me that merely being within municipal boundaries should not disqualify land from being categorized as “rural premises”. I agree with the Defendant that lands on the periphery of urban areas, such as the farmlands of Saanich and Delta and the mountains of North Vancouver would come within the term “rural premises” under the ***Occupiers Liability Act***.

[24] The lands in question in this case are of a rural character. The diminished duty of care under s.3(3) of the ***Occupiers Liability Act*** applies to this case.

IS THIS CASE APPROPRIATELY DECIDED UNDER RULE 18A?

[25] In order to succeed in this case, therefore, the Plaintiffs must demonstrate that the Defendants acted with reckless disregard for cyclists on their property.

[26] Proof of recklessness requires more than a demonstration that the Defendants were careless, or even very careless. It must be demonstrated that they either knew of a serious risk of harm and chose to ignore it, or that they chose to be indifferent to clear risk. There is little, if any, evidence before me that could support an inference of recklessness.

[27] The Plaintiffs, however, say that it would be unfair to decide this matter on a Rule 18A application. They have provided evidence that the Defendants knew of cyclists using the premises, and consented, or at least acquiesced to their presence. They have provided some evidence that at least two other personal injury accidents occurred at the same site in the months preceding Mr. Hindley’s accident. They say that they have had difficulty obtaining affidavit evidence from one of the injured parties. They have also had only a limited opportunity to obtain the evidence of Mr. Grasser, who, as caretaker of the property, is clearly a crucial witness in this matter.

[28] Given the magnitude of Mr. Hindley’s injuries and the difficulties that the Plaintiffs face in presenting evidence of recklessness without the power to compel testimony, I am of the view that it would be unjust to decide this matter on a Rule 18A application. The application is therefore dismissed.

[29] Costs will be in the cause.

“H. Groberman, J.”
The Honourable Mr. Justice H. Groberman