See para. 23

Case Name:

Van Staveren v. Coachlite Roller Gardens Inc.

Between
Gregory Van Staveren, Plaintiff (Respondent), and
Coachlite Roller Gardens Inc., Defendant (Appellant)

[2014] O.J. No. 2675

2014 ONSC 2494

241 A.C.W.S. (3d) 242

323 O.A.C. 1

2014 CarswellOnt 7465

Divisional Court File No. DC-13-00519-00

Ontario Superior Court of Justice
Divisional Court - Oshawa, Ontario

G. Czutrin S.F.J.S.C., F.P. Kiteley and K.W. Whitaker JJ.

Heard: March 3, 2014.
Judgment: June 3, 2014.

(27 paras.)

Counsel:

Andrew M. Elrick, for the Plaintiff (Respondent).

David W. Powrie, for the Defendant (Appellant).

REASONS FOR DECISION

The judgment of the Court was delivered by

1 THE COURT:-- This is an appeal by the defendant from the trial judgment of McKelvey J. dated December 3, 2012[1] on the issues of causation, contributory negligence and quantification of damages. For reasons which follow, the appeal is dismissed.

Decision of the Trial Judge

2 During March break in 2010, the plaintiff along with his wife and children and friends went to a roller skating rink in Oshawa. The defendant was an experienced roller skater although he had not skated recently. While showing his daughter's friend how to skate backwards, the plaintiff fell and injured his left elbow.

3 The roller rink was owned and operated by the defendant Coachlite Roller Gardens Inc., the shares of which were owned by Heino Themann and his wife Yvonne Keoghan. The defendant conceded that the flat roof would leak. Rather than get the roof fixed, the owners would place orange pylons and small signs over or near the pools of water to alert skaters to the hazard. Occasionally, these signs would be knocked away by skaters. The Trial Judge made a finding that the defendant was in breach of its obligations under s. 3(1) of the *Occupiers Liability Act* in that it failed to take reasonable care to ensure skaters could roller skate safely.

4 The Trial Judge then considered the evidence as to whether that breach of duty caused the plaintiff's fall. The evidence of causation was as follows. The plaintiff said he did not know what caused the fall but he maintained that the fall was caused as a result of water on the floor, as well as his hitting one of the small orange pylons. He said it happened very quickly and he went flying. The Trial Judge found that the plaintiff was generally a very reliable witness although on the mechanics of the fall, he preferred the evidence of the plaintiff's wife.

5 The plaintiff's wife gave evidence about the white pails on the rink and where they were situated and she described the water pooling on the floor and that some of the water pools were outside the area marked by the pylons. She observed the fall and said that after her husband started to skate backwards, she saw his right foot hit a pylon. She said he stopped and fell backwards. When she went to help him up, there was water in the vicinity and the pylon had been moved from its location close to the bucket. The Trial Judge found her evidence as to the conditions at the rink and the cause of the fall to be reliable and credible.

6 Diane Passey was with the plaintiff's group. She did not observe the fall but she saw water on the floor which she described as being 4 to 5 feet long and 2 to 3 feet wide and a depth of one-half to one inch. Because her evidence was not consistent with the evidence of any other witness, the trial judge concluded that there was good reason to question the reliability of her evidence.

7 Neither Heino Themann nor his wife Yvonne Keoghan saw the fall. They gave evidence about the leaking roof and what steps they took in response including setting out pylons to alert skaters.

8 Mr. Themann and Ms. Keoghan had attended for examination for discovery on April 19, 2011. Ms. Keoghan did not give evidence but observed the questioning which included evidence about the frequency of water dripping from the ceiling onto the floor of the rink. In the seven years since he had operated the rink, he estimated it had happened more than 25 times. In a letter dated June 13, 2012, defence counsel wrote a letter clarifying some of the answers given by Mr. Themann and, in respect of the frequency, he corrected his answer to indicate that there were leaks in respect of the entire building, sometimes in the office area and other places but with respect to leaks on the floor of the rink, it would have been "far fewer" than 25 times. The Trial Judge assessed the credibility of their evidence, including a consideration of the change in that evidence. The Trial Judge concluded that there were serious credibility issues about his evidence and that Ms. Keoghan's evidence should be viewed with caution.

9 The defence called Cynthia Collins who was a regular customer. In her evidence she said that there was no water on the floor or in the buckets. She said she had a very detailed recollection of observing the fall. However, in a letter dated June 2012, defence counsel advised that Ms. Collins did not specifically recall witnessing the fall. The Trial Judge found her explanation as to the inconsistency not to be credible. He placed no weight on her evidence.

10 The defence called Mike Christopher who also gave a detailed recollection of the accident. However, in view of the circumstances under which he gave evidence and inconsistency with other evidence, the Trial Judge rejected that evidence.

11 The Trial Judge held that there was a general problem with water dripping on the floor; that there was a problem with pylons being kicked or moved after being placed around a water bucket or leak; and that the steps taken by the defendant to deal with these problems were inadequate and the result was a hazardous situation. He concluded that the defendant's breach of its obligations under s. 3(1) of the *Occupier's Liability Act* was the cause of the fall.

12 On the issue of contributory negligence, the Trial Judge held that skating backwards at the time of the fall, failing to wear protective equipment and failing to observe water in the location of the fall were not relevant. However, he held that there was no excuse for failing to observe the bright coloured pylon and he attributed 25% to contributory negligence.

13 The plaintiff remained at the rink following the fall but after returning home and experiencing pain, he went to hospital. The report of the orthopaedic surgeon which was admitted on consent, confirmed that the plaintiff had suffered an undisplaced intra-articular fracture of the radial head. He was given a plaster cast and he was off work for six weeks. The Trial Judge relied on the medical and other evidence and assessed his general damages at $25,000.

14 The plaintiff was a cook and he was then working full time in a seniors' residence and part time in a local hotel. The Trial Judge assessed his loss of income claim at $4,017.

15 The Trial Judge ordered the defendant to pay general damages of $18,750 and special

damages in the amount of $3,012.75.

Analysis

16 The issues to decide are twofold: first, what is the standard of review, and secondly, does the decision of the trial judge withstand review on the appropriate test?

17 We are satisfied that the findings by the Trial Judge on the issues of credibility and reliability, the impact of rule 31.09(2)(a), causation and calculation of damages, are all questions of mixed fact and law and hence the standard of review is palpable and overriding error. There is no challenge to the finding that the defendant breached its duty of care.

18 The reasons for decision demonstrate that the Trial Judge was alive to the critical issue of causation; that he assessed the credibility and reliability of the evidence of the witnesses; that he was aware that it was conceded by the defendant that on that occasion there was water leaking from the roof and there were buckets and pylons as a result. Assessments of credibility and reliability are uniquely the domain of a trial judge. For each witness the Trial Judge gave reasons for relying on the evidence or declining to rely on it. We are not persuaded that the Trial Judge made any palpable or overriding errors in the assessments he made as to credibility and reliability and in the legal and factual conclusions as to causation.

19 The appellant challenges the assessment of credibility of Mr. Themann and Ms. Keoghan and argues that the Trial Judge erred in failing to properly apply rule 31.09(1) which provides that where a party who has been examined for discovery subsequently discovers that the answer to a question was incorrect, the party is required to forthwith provide the information in writing. Counsel argued that pursuant to rule 31.09, the Trial Judge failed to accept the corrections as evidence, particularly when counsel for the plaintiff did not exercise his right to resume examination for discovery.

20 Rule 31.09(2)(a) provides that the written corrections *may be* treated at a hearing as if it formed part of the original examination of the person examined. We do not agree that rule 31.09 requires a trial judge to accept the corrections as evidence. We are not persuaded that the Trial Judge made an error of law in his treatment of the evidence at examination for discovery and the correction of that evidence over one year after the fact. Counsel for the plaintiff is not required to resume examination for discovery; instead, he relied on the change of evidence in his cross-examination at the trial, as he was permitted to do. We are not persuaded that the Trial Judge made any palpable or overriding error in exercising his discretion to reject the explanation for the change in the evidence relating to the issue of occupier's liability and to consider the rejection of that evidence in assessing the overall credibility and reliability of Mr. Themann's evidence.

21 The appellant also asserts that there was evidence that the Trial Judge misapprehended or failed to consider important evidence. The lengthy and detailed analysis by the Trial Judge, including evidence as to the location in the rink where the water had been observed and where the

plaintiff fell and whether it was in the northeast corner or the northwest corner of the rink, does not demonstrate either a misapprehension of evidence or a failure to consider evidence that was important to the outcome.

22 On the evidence that the Trial Judge accepted and relied upon, there was support for his finding that the fall was caused by the presence of water on the surface and an adjacent pylon.

23 Counsel for the plaintiff at trial did not call as witnesses the daughter of the plaintiff and her friend, the two people who were closest to the plaintiff at the time of the fall. The appellant asserts that the Trial Judge erred in not drawing an adverse inference against the plaintiff by reason of the failure to call those two witnesses on the central issue at the trial. At paragraph 55, the Trial Judge explained why he exercised his discretion to decline to draw such an inference, including the fact that the information from both of the girls would have been available through the discovery process and either party could have called the girls as witnesses at the trial. We are not persuaded that he made a palpable and overriding error in that decision.

24 As for the claim for loss of income, the Trial Judge made calculations based on the evidence of the plaintiff as to his hours of work and hourly rate in each location and he subtracted the employment insurance and disability benefits he had received. It is the case that the claim for loss of wages was not well documented. However, it was a modest claim and the evidence of the plaintiff was accepted. We are not persuaded that the Trial Judge made a palpable and overriding error in the assessment of damages for loss of income.

25 The factum on behalf of the defendant included a challenge to the finding of contributory negligence. However, no oral submissions were made and we need not consider that issue.

26 At the conclusion of submissions, counsel agreed that costs of the appeal should be fixed at $5000 payable by the unsuccessful party.

ORDER TO GO AS FOLLOWS*:*

27 The appeal is dismissed. The appellant shall pay costs to the respondent fixed in the amount of $5000.

G. CZUTRIN S.F.J.S.C.
F.P. KITELEY J.
K.W. WHITAKER J.

1 2012 ONSC 5941.

---- End of Request ----
Email Request: Current Document: 1
Time Of Request: Sunday, June 12, 2016 14:48:38