Case Name:

Herbert (Litigation guardian of) v. Brantford (City)

Between
Clara Herbert, infant under the age of 18 years, by her Litigation Guardian, Everill Muir, the said Everill Muir, Gary Muir, Kiri Lyn Muir, Kevin Muir and Kelly Baird, Respondents/Plaintiffs, and
The City of Brantford, Appellant/Defendant

[2012] O.J. No. 592

2012 ONCA 98

93 M.P.L.R. (4th) 178

212 A.C.W.S. (3d) 1082

2012 CarswellOnt 1288

Docket: C52254

Ontario Court of Appeal
Toronto, Ontario

K.M. Weiler, R.P. Armstrong and P.S. Rouleau JJ.A.

Heard: January 13, 2012.
Oral judgment: January 13, 2012.
Released: February 13, 2012.

(10 paras.)

Tort law -- Occupiers' liability -- Duty of occupier -- Appeal by city from finding of partial liability and costs award allowed in part -- Cyclist suffered catastrophic injury when he fell on rock strewn trail after swerving to avoid collision with others -- Trial judge found city 40 per cent liable for failure to properly inspect and maintain trail -- Trial judge carefully reviewed evidence, which was sufficient to make finding that city failed to meet standard of s. 4 of Occupier's Liability Act -- Trial judge did not conflate ss. 3(1) and 4 of Act -- Evidence did not support exceptional order of

compound interest on expert fees.

Tort law -- Practice and procedure -- Costs -- Appeal by city from finding of partial liability and costs award allowed in part -- Cyclist suffered catastrophic injury when he fell on rock strewn trail after swerving to avoid collision with others -- Trial judge found city 40 per cent liable for failure to properly inspect and maintain trail -- Trial judge carefully reviewed evidence, which was sufficient to make finding that city failed to meet standard of s. 4 of Occupier's Liability Act -- Trial judge did not conflate ss. 3(1) and 4 of Act -- Evidence did not support exceptional order of compound interest on expert fees.

Statutes, Regulations and Rules Cited:

Occupier's Liability Act, s. 3(1), s. 4

Appeal From:

On appeal from the judgment of Justice Alan C.R. Whitten of the Superior Court of Justice, dated May 7, 2010.

Counsel:

Deborah Berlach, for the appellant.

Robert J. Hooper and Sumitra Lagoo, for the respondents.

ENDORSEMENT

The following judgment was delivered by

1 THE COURT (orally):-- Gary Muir was a retired high school teacher and an experienced cyclist. On September 23, 2003, he set out on his bicycle for a ride on a public trail in the City of Brantford. The City owned and operated the trail. Mr. Muir was very familiar with the trail and had cycled on it many times including the week before September 23rd. He was aware of the risks and dangers of using the trail and, in particular, the hazardous nature of the location where his accident happened.

2 On the day in question, Mr. Muir cycled down a hill towards a bridge over the Grand River. He noticed ahead of him two people who were also on bicycles, although when he testified, his recollection was that they were pedestrians. One of the two people appeared to be in his lane. In order to avoid a collision, he veered to the right and lost control of his bicycle. He fell from his

bicycle into an area of the trail, which was strewn with stones and a large rock. He struck his head and suffered a catastrophic injury - making him a quadriplegic.

3 In this action against the City of Brantford, the trial judge found that the City was 40 per cent responsible for the accident because of the City's failure to carry out proper inspection and maintenance of the trail. The trial judge found that in the particular area where Mr. Muir lost control, there was sprawling of the pavement with a pile of rocks or a large jagged rock within a few feet of the pavement. The trial judge concluded that the sprawling of the pavement had been there for some time and the City's failure to attend to this situation amounted to a total disregard of Mr. Muir's safety.

4 Mr. Muir was found to be 60 per cent responsible for his accident in that he failed to keep a proper look-out, failed to yell at the persons ahead of him and because he was driving at an excessive rate of speed.

5 Counsel for the City argues that the trial judge failed to properly apply s. 4 of the *Occupiers Liability Act* which provides in these circumstances that the City must not act with reckless disregard of Mr. Muir. Counsel submitted that the trial judge, in fact, applied the standard in s. 3(1) of the Act, *i.e.*, to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises ... are reasonably safe while on the premises.

6 We disagree. The trial judge carefully reviewed the evidence in detail and concluded that the City had failed to meet the standard in s. 4 of the Act. We are not persuaded that he conflated s. 4 and s. 3(1) of the Act. In our view, the evidence at trial was sufficient to enable the trial judge to make the finding he did.

7 The appellant seeks leave to appeal the costs award. The trial judge granted interest on some of the experts' fees of between one and two per cent compounded monthly. It is the compounding of the interest that is the sole issue in respect of the costs appeal.

8 The trial judge appears to have decided this matter on the basis that it raises an access to justice issue for Mr. Muir and his family. The trial judge acknowledged that there was a dearth of evidence as to the actual financial circumstances of Mr. Muir and his family. Despite this, he went on to find that it would have been difficult, if not impossible, for him and his family to carry the cost of the approximately $42,000 in expert fees. In the circumstances of this case, we do not agree that the evidence relied upon by the trial judge supports this exceptional order. In our view, the trial judge's reference to the statutory accident benefits regime is of no help in this argument.

9 In the result, the appeal as to the merits is dismissed. Leave to appeal the costs is granted and the appeal in respect of the compounding of the interest is allowed.

Costs

10 The respondents are entitled to their costs of the appeal on the merits. However, such award should be reduced to take into account that the appellant succeeded on the costs appeal. In the result, the respondents are awarded their costs fixed in the amount of $15,000 inclusive of disbursements and applicable taxes.

K.M. WEILER J.A.
R.P. ARMSTRONG J.A.
P.S. ROULEAU J.A.

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