Court of King's Bench of Alberta

Citation: Biegel v Trotter and Mortan Limited, 2022 ABKB 808

Date: 20221208
Docket: 1601 11156
Registry: Calgary

Between:

Shawna Biegel and His Majesty the King In Right of Alberta

Plaintiffs

- and -

Trotter and Mortan Limited, Bluebird Contracting Services Ltd., Town of Banff, Jane Doe, John Doe and XYZ Company

Defendants

Reasons for Decision
of
Applications Judge J.T. Prowse

---

[1] This Action involves an unexplainable accident.

[2] The Plaintiff Ms. Biegel was injured on August 23, 2014 when she was launched over the handlebars of the bicycle she was riding, knocking herself unconscious and suffering a significant brain injury. She does not remember how the accident occurred and there are no witnesses.

[3] The evidence before the Court is by way of affidavit and transcript. There is, in my view, no realistic prospect that holding a trial would result in any further or better evidence.

[4] For the reasons which follow I summarily dismiss her claim.

Background facts

[5] Ms. Biegel lived on Cave Ave in Banff for a number of years. In the summer of 2014 Cave Ave was under construction. Bluebird Contracting Service Ltd. had been retained by the Town of Banff to excavate, install a new sewer line and resurface the road. The pathway on which Ms. Biegel was riding her bicycle runs adjacent to the road. The fact that construction was ongoing would have been obvious to Ms. Biegel as a resident of Cave Ave.

[6] As she stated on cross-examination:

> Q. Okay. But in any event, before the accident on August 23, 2014, you knew that there was construction going on on Cave Avenue?
>
> A. Yes, it's rather obvious.

[7] I am a bit puzzled on the emphasis made during submissions on the presence or absence of warning signs. Those signs might be appropriate to warn someone coming across the scene for the first time who might be unaware of the construction. This is not the situation with respect to Ms. Biegel. She walked the pathway to work every day while construction was underway.

[8] On the afternoon in question Ms. Biegel crossed Cave Avenue and turned right onto a pedestrian/bicycle pathway which ran parallel to Cave Avenue. She was riding her bicycle to the grocery store to buy a head of lettuce, which she did, and then was returning by bicycle on the same pathway when the accident occurred.

[9] When describing the nature of the pathway, Ms. Biegel said that it was a dirt path, and the dirt was packed.

[10] Ms. Biegel gave some very definitive answers on cross-examination as to how the accident happened, but on viewing her evidence as a whole, it is apparent that these definitive answers are based on her conclusions as to what happened, not her observations as to what happened.

[11] Here are Ms. Biegel's conclusory answers as to the cause of the accident:

> Q. Okay. So you're riding uphill on the path, and then you .. well, sorry you're riding uphill on the path, Then what happened?
>
> A. No, I was riding horizontal on the path.
>
> Q. Okay.
>
> A. And just before the uphill part, there were huge divots and a lot of unsafe gravel, and it was negligent that Bluebird did not take care of this area. It was unmarked, no warning signs, and I did an endo on my mountain bike, which means you – I flipped over on my handlebars, landed on my head, split my helmet. ...

[12] In the following questions and answers, it becomes obvious that Ms. Biegel's testimony on the existence of 'huge divots' and 'a lot of unsafe gravel' is her conclusion based on 'the injury'. In other words, she (likely correctly) infers that, since she went over her handlebars, she must have hit something on the pathway. Here is her testimony:

[13] Q. You hit divots and gravel?

[14] A. Yes.

[15] Q. The front part of your bicycle hit a divot or hit a gravel? Which one?

[16] A. Both.

[17] Q. At any time before your bicycle hitting the divots and gravel, did you see those divots and gravel?

[18] A. No.

[19] Q. How do you know your bicycle hit divots and gravel?

[20] A. Because of the injury. (emphasis added).

[21] Ms. Biegel testified she did not see divots or gravel before the accident, nor did she remember seeing divots or gravel while lying on the ground after the accident.

[22] The exact location of the accident was never established, and so it is not possible to establish whether any divots and gravel were located at that place where the accident occurred.

[23] Without knowing what hazard Ms. Biegel hit on the pathway, it is not possible to reach a probable conclusion as to fault.

[24] Ms. Biegel obtained an expert report. What the expert says, essentially, is that the two ways for a bicycle rider to end up going over the handlebars are (i) vigorously applying the front tire brake (not the rear tire brake) on a surface with lots of friction (such as dry pavement) or (ii) hitting an obstacle or object.

[25] The expert concludes:

> Ms. Biegel's evidence about the bicycle crash dynamics of 'an endo' or end over end collision is consistent with the bicycle front wheel interacting with deep loose gravel, a gravel pile, or a divot on the roadway as she described. Given that this is the only evidence we have, we can confirm that this is a plausible scenario. (emphasis added)

[26] The problem with this conclusion as to what is 'plausible' (as opposed to probable) is that it is based on Ms. Biegel's description of 'deep loose gravel, a gravel pile, or a divot' whereas in fact Ms. Biegel made no such observation. Ms. Biegel simply speculates that these elements must have been present "because of the injury" i.e. because she ended up going over the handlebars and landing on (an injuring) her head.

[27] We do not know what obstacle Ms. Biegel ran into on the day in question. One can only speculate, as Ms. Biegel has done.

Failure to prove a 'hazard'

[28] In ***Newsham v. Canwest Trade Shows Inc.***, 2012 BCSC 289, 2012 CarswellBC 700, the Court stated, at para 96:

> The simple fact of a plaintiff's slipping or falling does not shift the evidentiary onus onto Canwest. The plaintiff must still show that something the occupier did or neglected to do caused his slip or fall: *Lansdowne v. United Church of Canada*, 2000 BCSC 1604 ... And, as explained by Cohen J. in *Slee v. Canada Safeway Ltd.*, 2008 BCSC 107 ... at para. 31, the Court must not speculate on what caused the fall, or in the case at bar, the slip. Adopting the analysis of Cohen J. in *Slee*,

> the plaintiff must therefore prove the following in the case at bar under the standard of care stage of the negligence analysis:
>
> 1) what hazard or condition caused the slip; and
>
> 2) that the defendant's breach of its duty of care caused the hazard or condition to be present.(emphasis added)

[29] In ***Thomas v. Roman Catholic Archbishop of Vancouver***, 2016 CarswellBC 2244, 2016 BCSC 142016, the Court followed ***Newsham*** and observed, at para's 48 and 49:

> The authorities have consistently held that the court cannot speculate about the cause of an accident. See ...
>
> These cases, and others, similarly make it clear that if the plaintiff cannot establish the existence of a hazard that caused her to fall, the claim must be dismissed. (emphasis added)

[30] To similar effect is the decision of Shelley J. in ***Deuling v Shell Canada***, 2022 ABQB 125, 2022 CarswellAlta 399.

[31] In ***Deuling*** one plaintiff fell in a parking lot after slipping in a puddle. The claim was summarily dismissed but appealed, and the plaintiffs submitted new evidence on appeal. During oral submissions, the plaintiff raised for the first time his concern that there may have been oil on the parking lot ground. His new affidavit also suggested that there had been ice below the surface of the puddle. This assertion was contrary to the evidence which the plaintiff had given during earlier questioning.

[32] Shelley J. ruled as follows at para's 22 to 24:

> I find that the [plaintiffs] have still not established that there was a hazard. There is therefor no obligation on the [defendants] to provide evidence concerning what steps they took to avoid a hazard which has not been established. In that regard, the wording used in para 7(c) of the [plaintiffs'] written argument is telling:
>
> > " . . . the Defendants have not provided any policies, procedures, or logs pertaining to ice maintenance that would go towards establishing liability..."
>
> It is not the duty of the Defendants/Respondents to provide evidence to establish liability. It is the duty of the Plaintiffs/Appellants. The Appellants' focus on the Respondents' policies, procedures and logs might, in these circumstances, be reasonably characterized as a fishing expedition aimed at providing them with the evidence they need to justify a trial. Similarly, one might question why, if this has been Mr. Deuling's concern from the outset, he waited until the hearing of the appeal to suggest that the possible presence of oil on the parking lot might be implicated in his fall.
>
> The Appellants have failed to establish the presence of a hazard and therefore, for the same reasons as were given by the Master, the Master did not err in dismissing the Action. Accordingly, this Appeal must be dismissed. (emphasis added)

[33] Ms. Biegel has been unable to establish the nature of the hazard with which her bicycle collided. I understand and sympathize with her counsel's submission that her lack of memory of the events, caused by the brain injury she suffered, results in her not having that evidence.

[34] On the other hand, how can the defendants defend themselves from allegations of negligence, or make useful submissions on contributory negligence, if the evidence does not show what hazard led to the plaintiff's injuries? Should the defendants have noticed and fixed the hazard? That depends what the hazard was and when it arose. Should the plaintiff have noticed and avoided the hazard? Again, that depends on what the hazard was.

[35] It is clear from the evidence, and there is no reason to suspect more evidence would be available at trial, that there is no proof, but only speculation, as to what the hazard was. Following the case law cited above, due to the hazard which caused the injury being unknown and unknowable, I dismiss the plaintiff's claim.

[36] If counsel cannot agree on a costs outcome to this matter then they may make written submissions in that regard.

Heard on the 30th day of November, 2022.
Dated at the City of Calgary, Alberta this 8th day of December, 2022.

J.T. Prowse
A.J.C.K.B.A.

Appearances:

Steve D. Grover
Grover Law Firm
for the Plaintiff

Nabeel Peermohamed
Brownlee LLP
for the Defendants