

Failure to Prove a Hazard Results in Summary Dismissal

Biegel v Trotter and Mortan Limited, 2022 ABKB 808

If a plaintiff can't say how they were injured, what caused their injury, if they were injured by a specific hazard, and if they can't say the hazard was caused by the defendants, then the analysis stops there. The courts will say the plaintiff has not met their burden, there is no need to examine the defendants' records, and the case will be dismissed.

In August 2014, the Plaintiff was injured when she was launched over the handlebars of the bicycle she was riding. She was knocked unconscious and suffered a significant brain injury as a result. She could not remember how the accident occurred and there were no witnesses.

Bluebird Contracting Services Ltd. was retained by the Town of Banff to excavate and install a new sewer line and resurface the road on Cave Ave (the “construction”). The Plaintiff alleged the accident occurred as a result of “huge divots” and “a lot of unsafe gravel.” She claimed this was due to construction which had been taken place adjacent to the pathway where she was riding her bicycle.

The Plaintiff attempted to draw the Court’s attention to the absence of warning signs near the construction. However, the Court found this was not applicable to the Plaintiff as she walked on the same pathway to work every day and described the construction as “rather obvious.” The Court stated those signs might be appropriate for someone coming across the scene for the first time that may be unaware of the construction, but this was not the case with respect to the Plaintiff.

The Court found the Plaintiff was unable to identify specifically what she hit that resulted in her launching over her handlebars, and as such could not attribute fault to a Defendant: “Without knowing what hazard Ms. Biegel hit on the pathway, it is not possible to reach a probable conclusion as to fault.”¹ She was only able to draw a conclusion based on her injury, not on her observations as to what happened.

The Court relied on two British Columbia decisions, *Newsham v Canwest Trade Shows Inc.*, 2012 BCSC 289, and *Thomas v Roman Catholic Archbishop of Vancouver*, 2016 BCSC 1466. These cases provided that a Court must not speculate on what caused a fall or a slip and if the Plaintiff is unable to establish the existence of a hazard that caused a fall then the claim must be dismissed.

In addition, the Court relied on the Alberta decision, *Deuling v Shell Canada*, 2022 ABQB 125. In this decision the Plaintiff appealed a summary dismissal and submitted new evidence on appeal that there may have been oil on the ground where he slipped. This was inconsistent with his prior evidence. The Court still found the Plaintiff needed to (and did not) establish the presence of a hazard.

Ultimately, the Plaintiff was unable to prove her case and the Court found this to be an unexplainable accident. The claim was dismissed.

¹ Para 23.