Claim Case Study: Gelowitz v. Revelstoke (City), 2022

Safety audits are a crucial risk management tool that property owners and occupiers should utilize. Having the audit done is only the first step. If the recommendations made are not followed, an owner may still be liable if damages result; as in the following case.

Incident

On July 28, 2015, the Plaintiff, Aaron Gelowitz, suffered catastrophic injuries while camping in a park owned by the City of Revelstoke when he dove into the lake and hit his head on a hard object.

Mr. Gelowitz alleged that, after swimming across the lake, he exited on the opposite shore which was not owned by the City and then dove from a rock. He testified that, visually, the water appeared to be deep enough for a shallow dive. The Plaintiff further stated that prior to his dive, he hadn't seen any warning signs prohibiting diving including on a raft he had stopped at along the way. The Plaintiff had entered the water from a clearing in the foliage he discovered while walking along the road and not at the beach or dock where signage had been installed.

The Park had a beach area that included a dock that was affixed to the shore as well as a raft or swimming platform. Although the Park was operated by a contractor at the time, it was the City's responsibility to post safety signage along the waterfront.

The allegations made in the Claim accused the City of negligence for failing to post warnings to swimmers that diving was not advised due to underwater hazards such as rocks.

The City's position was that it did not owe a duty of care to the Plaintiff to warn him because the land from which he dove was owned by Alpine Village. Additionally, the City felt it had met its standard of care because it had installed "No Diving" and "Swim at Your Own Risk" signage at the waterfront.

Background

The City had obtained a safety audit of the park in September 2011, the purpose of which was to identify liability exposures and to assist the City in risk management to minimize exposures. The audit report recommended painting "No Diving" signs on the dock and the raft because "Injuries may occur to the diver or swimmers as a result of diving off structures. There may be unforeseen obstacles in the water."[1]

The City followed some of the recommendations and installed some signs on the raft and dock which were painted with white paint. Following the initial installation, there was no evidence that the signs had ever been re-painted and they were no longer visible by the time of the accident. The City also installed four burgundy and gold "No Diving" signs along the lakeshore.

To avoid liability, the City was required to "exercise the standard of care expected that would be of an ordinary, reasonable and prudent person in the same circumstances".[2] Relevant factors in this assessment include whether the risk of injury was reasonably foreseeable, the likelihood of damage and the availability and cost of preventative measures.[3]

1 https://www.canlii.org/en/bc/bcsc/doc/2022/2022bcsc46/2022bcsc46.html?autocompleteStr=gelowitz%20v.%20revel&autocompletePos=1
2 (Ryan v. Victoria (City), 1999 CanLII 706 (SCC), [1999] 1 S.C.R. 201, at para. 28)
3 (P. H. Osborne, The Law of Torts (6th ed. 2020), at pp. 29-30; Bolton v. Stone, [1951] A.C. 850 (H.L.))

In measuring what is reasonable, the court may also look to external indicators of reasonable conduct, which may include industry practice as well as more formal statutory or regulatory standards.[4]

Experts for both the Plaintiff and the Defendant agreed that signage is important to ensure the public is safe at municipal waterfronts. They also agreed that signs should be placed to indicate that diving is not permitted where potential hazards may be present and that signs should be legible and conspicuous.

The City was expressly put on notice of such potential hazards in the Lake by the 2011 Risk Control Survey. The risk of catastrophic injury was therefore foreseen, and the cost to the City of mitigating the risk was small. He further opined that the Risk Control Survey put the City on notice about the potential for underwater hazards in the Lake. The City could have responded by conducting a lakebed survey to satisfy itself that there were no such hazards. Then the City may have met its standard of care without placing warning signs. Alternatively, the City could have, and should have, assumed there was a risk and acted accordingly.[5]

Decision

To succeed in proving negligence, the Plaintiff is required to prove that:

(1) the defendant owed the Plaintiff a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the Plaintiff sustained damage; and (4) the damage was caused, in fact and law, by the defendant's breach.[6]

The Judge concluded that the City owed a duty of care to the Plaintiff, the City did not meet the standard of care required of it in the circumstances, and that the Plaintiff's injury was caused by the City's breach of its duty. The Judge concluded that a reasonable and prudent person in the City's position would have placed conspicuous and legible signs at the lakefront and on the dock and raft in order to warn Park users entering the Lake of the risks of diving into the Lake given the potential presence of underwater hazards.

Accordingly, he decided that the City was 65% at fault and the Plaintiff was 35% at fault for the Plaintiff's injuries.

The Judge's reasons, given on January 13, 2022, included that the City:

- retained the responsibility for the placement of aquatic safety signage along the waterfront including "No Diving" signs
- had received specific advice to place warning signs on the raft
- could foresee the risk of catastrophic injury due to the specific advice
- failed to follow the audit by maintaining the sign it initially painted on the raft
- was aware Lake users regularly swam across the Lake to the land owned by Alpine Village on the eastern shore to jump off the rocks and swim to the raft
- would have had to expend minimal amounts of money to erect the signage

The Judge also found that the Plaintiff:

- did not observe any "No Diving" signs at any point before the dive
- did not see any submerged stumps and would not have made the dive if he had seen any
- was not impaired at the time he attempted the dive

Takeaways

Having safety audits completed is a great tool for mitigating risk but it is only the first step in the process. Once a property owner is aware of hazards and has received recommendations to mitigate them, the owner exposes itself to liability if they fail to follow the recommendations or to continue to maintain any risk management steps they have taken.

4 Ryan v. Victoria (City), 1999 CanLII 706 (SCC), [1999] 1 S.C.R. 201 at para. 28 [Ryan]
5 https://www.canlii.org/en/bc/bcsc/doc/2022/2022bcsc46/2022bcsc46.html?autocompleteStr=gelowitz%20v.%20rev&autocompletePos=1&searchUrlHash=AAAAAQAGcmVwb3J0AAAAAAE&offset=1872
6 Deloitte & Touche v. Livent Inc. (Receiver of), 2017 SCC 63 at para. 77

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