SUPREME COURT OF NOVA SCOTIA
Citation: Crook v. LaFarge Canada Inc., 2009 NSSC 357

Date: 20091110
Docket: Hfx. No. 249935
Registry: Halifax

Between:

Matthew Crook

Plaintiff

-and-

LaFarge Canada Inc.

Defendant

-and-

Darrell Jollimore and **Adam Turner**

Third Parties

Decision

Judge:	The Honourable Justice Robert W. Wright
Heard:	November 5, 2009 in Chambers at Halifax, Nova Scotia
Oral Decision:	November 10, 2009
Written Decision:	November 30, 2009
Counsel:	Counsel for the Plaintiff - Janus Siebrits Counsel for the Defendant - Murray Ritch, Q.C. Counsel for the Third Party (Adam Turner) - David Green Darrell Jollimore - self-represented third party (not attending)

Wright J. (Orally)

[1] This is a summary judgment motion on the evidence by the defendant LaFarge Canada Inc. under Civil Procedure Rule 13.04, supported by the third party Adam Turner. The other third party, Darrell Jollimore, is unrepresented and did not participate.

[2] This action is brought under the **Occupiers' Liability Act** 1996, c. 27 (the "**Act**") for the recovery of damages for personal injuries sustained by the plaintiff on April 18, 2004. The accident occurred when the plaintiff fell off a borrowed motocross bike while attempting a jump on a makeshift track located on vacant lands owned by LaFarge in Hammonds Plains. The plaintiff sustained serious injuries from this fall, including a broken back.

[3] Extensive discovery examinations have been held in this proceeding from which counsel for the defendant LaFarge and third party Turner have extracted an extensive list of material facts that are not in dispute. These are summarized in the briefs submitted by counsel for LaFarge as follows:

(a) LaFarge owns (and is the occupier of) the subject property upon which it once operated an asphalt plant. In 1995 the plant was decommissioned and all structures and improvements removed, leaving the property unused.

(b) LaFarge employees have since visited the property three or four times per year to observe its general condition.

(c) LaFarge put up No Trespassing signs on the property for several years which

were occasionally removed illegally so that no one can say whether any such signs were visible on the date of the accident.

(d) LaFarge consented in the spring of 2003 to Mr. Jollimore and Mr. Fraser using their motocross bikes on the property on the condition that they help keep the property clean.

(e) LaFarge never gave permission to anyone else to use the property nor did they authorize either Mr. Jollimore or Mr. Fraser to allow others onto the property.

(f) LaFarge had no role in the construction or the maintenance of the makeshift motocross track, nor did any LaFarge employee monitor the use of the track.

(g) There was no vehicular access to the makeshift motocross track, the road having been gated off.

(h) Mr. Crook did not seek LaFarge's permission to enter the property prior to doing so on April 18, 2004. He admitted on discovery that he had entered the property by walking around the locked gate.

(i) Mr. Crook observed other people using the motocross track on the LaFarge property for only 15 minutes prior to using the track himself.

(j) Mr. Crook had experience using dirt bikes in the past and had fallen off such bikes on multiple occasions in the past injuring himself, including a fractured foot.

(k) Mr. Crook borrowed a motocross bike from another rider, namely, the third party Turner which was lent to the plaintiff on the understanding that he would drive the bike only on the access road and not on the track itself.

(l) Mr. Crook borrowed a helmet from Mr. Turner but did not borrow any other protective equipment to use while riding the bike.

(m) After borrowing the bike, Mr. Crook drove directly from the parking lot area to the motocross track.

(n) Mr. Crook did not ask anyone for instruction on how to operate the bike or how to properly use the track.

(o) Mr. Crook did not expect any guidance or "spotting" from anybody as he used the motocross track.

(p) Mr. Crook fell off the motocross bike on the second jump on the track.

(q) Mr. Crook admits that the sole cause of his fall was the fact that he accelerated his bike too hard going over the jump.

(r) Mr. Crook admits that LaFarge played no role in his decision to borrow a motocross bike to use on the track, the speed in which he traversed the course or his acceleration on the second jump; and to forego wearing proper safety equipment. He acknowledges those decisions were his responsibility.

[4] It is on the basis of these undisputed facts that the defendant LaFarge, supported by the third party Turner, has brought this summary judgment motion on the evidence.

[5] The test to be applied on a summary judgment motion on the evidence by a defendant under the new Civil Procedure Rules was recently addressed by Justice McDougall in *Vaughn v. Hayden et al.* 2009 NSSC 235 where he said (at para.7):

> The new rule governing summary judgment motions tracks the existing jurisprudence. It does not alter the applicable test in any appreciable way. In **Selig v. Cooks Oil Company Limited**, [2005] N.S.J. No. 69 at para. 10, the Nova Scotia Court of Appeal framed the two-part test under the old Rule 13.01 as follows:
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> > ....First the applicant, must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success.

[6] In the case at bar, the initial burden is therefore on the defendant LaFarge to establish that there are no genuine issues of material fact to be determined at trial. If the defendant can discharge that onus, the burden then shifts to the plaintiff to

demonstrate that his claim has a real chance of success or at least partial success; that is to say, that there is a genuine issue that should be left to a trial judge to decide upon a full hearing of the evidence.

[7] The position of the defendant LaFarge (supported by Turner) is that it has met the initial burden of establishing that there are no genuine issues of material fact remaining to be determined at trial and that the plaintiff, based on the facts that are not in dispute, cannot meet the burden of establishing that his claim has a real chance of success. They maintain that the plaintiff voluntarily assumed the risk of driving an unfamiliar bike on an unfamiliar course, without permission and without adequate safety equipment, well-knowing the dangers associated with such activity from past experiences. They say that there was no act or omission on the part of LaFarge that could possibly constitute negligence and that the plaintiff was the author of his own misfortune.

[8] The position of the plaintiff is that there are genuine issues of fact to be determined at trial and that in any event, the plaintiff has met the burden of showing that the claim has a real chance of success, or at least partial success, under the law of occupiers' liability.

[9] Before engaging in the first part of the analysis, it is necessary to set out the relevant statutory provisions of the **Act** that prescribe the duties of an occupier of premises. They are found within ss. 4, 5, and 6 which read in part as follows:

4 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises.

(2) The duty created by subsection (1) applies in respect of

(a) the condition of the premises;

(b) activities on the premises; and

(c) the conduct of third parties on the premises.

(3) Without restricting the generality of subsection (1), in determining whether the duty of care created by subsection (1) has been discharged, consideration shall be given to

(a) the knowledge that the occupier has or ought to have of the likelihood of persons or property being on the premises;

(b) the circumstances of the entry into the premises;

(c) the age of the person entering the premises;

(d) the ability of the person entering the premises to appreciate the danger;

(e) the effort made by the occupier to give warning of the danger concerned or to discourage persons from incurring the risk; and

(f) whether the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection.

5 (1) The duty of care created by subsection 4(1) does not apply in respect of risks willingly assumed by the person who enters on the premises but, in that case, the occupier owes a duty to the person not to create a danger with the deliberate intent of doing harm or damage to the person or property of that person and not to act with reckless disregard of the presence of the person or property of that person.

6 (1) This Section applies to ....

(b) vacant or undeveloped rural land;

(2) Subject to subsection (3), a person who enters premises described in subsection (1) is deemed to have willingly assumed all the risks and the duty created by subsection 5(1) applies.

[10] Having read the various discovery transcripts filed with this motion, the only material fact remaining in dispute that is discernable to the court is whether the defendant's lands are "undeveloped rural land" within the meaning of s. 6(1)(b) of the **Act** (which may be said to be a mixed question of law and fact in the circumstances).

[11] The significance of that finding is that it will determine the duty of care applicable in this case. More specifically, it will determine whether the less onerous duty of care embodied in s. 5(1) applies (pertaining to willing assumption of risk situations) instead of the more general duty of care embodied in s. 4(1).

[12] The plaintiff argues that the LaFarge lands should not be classified as "vacant or undeveloped rural land" within the meaning of s. 6(1)(b). The plaintiff says that this is a genuine issue of fact to be determined at trial, which in turn will determine the applicable statutory duty of care.

[13] A similar issue arose before the Ontario Superior Court of Justice in *Leone v. University of Toronto Outing Club et al.* [2006] O.J. No. 4131. In that case, the subject lands consisting of 4900 acres were owned and occupied by the Crown which permitted members of the public to use its many trails for various recreational purposes during the summer under its Free Use Policy of the Ministry of Natural Resources. The plaintiff, while mountain biking on one of the trails, fell and was injured when his bicycle hit a grass covered hole.

[14] One of the several issues raised on a summary judgment motion by the Crown was whether the subject lands constituted rural premises that were “vacant or undeveloped premises” within the meaning of the counter-part legislation in Ontario, whereby the plaintiff would be deemed to have willing assumed all risks associated with entry thereon. The Court, after reviewing the evidence, held that there was a triable issue on whether the premises in question were, *inter alia*, “undeveloped”, upon which the applicable duty of care would be predicated.

[15] The plaintiff Crook relies on this case in making a similar triable issue argument here. The evidence before the Court establishes that the subject lands were once used by LaFarge for purposes of an asphalt plant. In 1995, however, it was decommissioned and all building structures and land improvements were removed, leaving behind only some concrete footings and some piles of material used for making asphalt. Some of these leftover materials were later used by Messrs. Jollimore and Fraser in creating a makeshift practice course featuring a number of jumps for motocross bikes and other off-road vehicles.

[16] Counsel for the plaintiff refers to the Concise Oxford English Dictionary definition of the word “developed” as meaning to “convert (land) to a new purpose, especially by constructing buildings”, and argues that the lands here were converted to a new purpose, namely, the use of a track for riders of motocross bikes and other off-road vehicles with the knowledge and acquiescence of LaFarge.

[17] The culmination of this argument is that it is the s.4(1) duty of care that

applies, which requires an occupier to take reasonable care to see that persons entering on the premises are reasonably safe. Stretching into the second stage of the two-part test, the plaintiff argues that LaFarge breached its duty of care, given the knowledge it had, by failing to take reasonable steps to prevent non-authorized persons from using the track, or by otherwise failing to make sufficient effort to give warning of the danger concerned or to discourage persons from incurring the risk (tracking the language of s.4(3)(e) of the **Act**). Indeed, the plaintiff makes reference to all of the factors listed in s.4(3) except subparagraph (c), which are to be considered in determining whether the duty of care under s. 4(1) has been discharged.

[18] Having considered the plaintiff's submissions, I conclude on the first stage of the analysis that as in *Leone*, there is a triable issue on whether or not the lands of LaFarge are "undeveloped rural land" within the meaning of s. 6(1)(b). As far as counsel have been able to determine, that section of our **Act** has never been judicially interpreted before; nor had Ontario's similar legislation been judicially interpreted before the *Leone* case.

[19] This is new ground for judicial interpretation of the **Act** and I am persuaded that it constitutes a genuine issue which is better left to the trial judge to decide after hearing all of the evidence. The finding on that issue will then determine the applicable duty of care under the **Act**.

[20] That conclusion alone at the first stage of the analysis is sufficient for the disposition of this motion in favour of the plaintiff. I would go on to say, however, that if the plaintiff is ultimately successful in his argument that the applicable duty of care is that set out in s.4(1) of the **Act**, the duty to warn on the part of LaFarge constitutes a further arguable issue for trial.

[21] The duty to warn (or supervise) begs the question of what LaFarge knew about the use being made of its property by members of the public (aside from Messrs. Jollimore and Fraser) albeit without LaFarge's permission, and any associated dangers from such use that created a risk of harm. That evidence will bear upon the duty to warn.

[22] I have reviewed the discovery evidence of Gary Rudolph, General Manager of LaFarge, with this focus. I would add that there is presently no discovery evidence before me from Mr. Saab, a LaFarge superintendent reporting to Mr. Rudolph, who was responsible for the quarterly inspection of this property and any required maintenance.

[23] I have noted the following passages from the transcript of Mr. Rudolph's discovery evidence (some of which I have paraphrased):

<u>At page 15</u>

> I would say I was aware of it through general conversation that there was a track set up.

<u>At page 23</u>

> Not surprised there were so many individuals using the track... when somebody comes across something, then usually youth may congregate to that area. Fair to say that indirectly you realize that there was probably more than two bikes out there...

At page 38

> Mr. Rudolph acknowledged he was actually aware that more than one or two individuals were using the site before May 10, 2004, but had no idea how many individuals were using it.

At page 40

> In an earlier statement, Mr. Rudolph said he was aware that Jollimore and his friend had done some track building on the property...but couldn't put a particular timeline on that.

At page 59

> When asked if LaFarge made any efforts to give warning of the potential danger of using motocross bikes on the site, Mr. Rudolph answered "nothing particular to that" (only that LaFarge had placed a locked gate on the access road to the site and posted a No Trespassing sign which often went missing and had to be replaced).

At page 60

> Mr. Rudolph acknowledged that he knew people were back there using motocross bikes and ATVs on the Hammonds Plains property for years.

[24] The crux of the plaintiff's argument on this issue is that a difficult motocross track was built on this property which was inherently dangerous to use and that the track was being used by various members of the public with the knowledge and

acquiescence of LaFarge, and without LaFarge taking any precautions by placing proper signage or otherwise.

[25] The plaintiff has been forthright that he bears some responsibility for the accident. Indeed, he may well ultimately be found to have been entirely responsible for the accident. However, on this a summary judgment motion, it is not for the Court to decide whether or not the plaintiff is likely or unlikely to succeed, even in part. The plaintiff need only show under the second branch of the test that there is a genuine or arguable issue for trial that represents a chance of at least partial success.

[26] Whether there was a duty to warn against the use of the track on the part of LaFarge on the facts of this case represents, in my view, an arguable issue for trial.

[27] For all of the foregoing reasons, the summary judgment motion by the defendant LaFarge is dismissed. Costs of the motion are hereby fixed at $1,000 and shall be costs in the cause, pending the final outcome.

J.