CIRCU lawR
A regular publication for legal news and reviews

City of Revelstoke v. Gelowitz 2023 BCCA 139: A Cautionary Tale for Local Governments on the Duty to Warn Public Facility Users of Hazards

The British Columbia Court of Appeal has affirmed the lower court decision in which the City of Revelstoke (the "**City**") was held liable for injuries sustained by the plaintiff after the plaintiff dove into a lake and into shallow water. The injuries rendered the plaintiff a quadriplegic. Although the plaintiff made his dive from private lands owned by a third party those lands were accessed by the plaintiff as part of a swim that began from the Williamson Lake Park and Campground, a pay-for-use park owned by the City. The plaintiff had been camping on the City-owned lands with friends and family and had entered the lake without seeing the "no diving" signs that had been posted elsewhere. The decision is notable because the City was held liable for not warning of the danger of diving from lands that were not owned by the City. This liability arose because the City invited members of the public into its lakefront park, had been made aware of the dangers posed to individuals diving into the lake area, and was aware that park users were routinely accessing other lands surrounding the lake where this danger was present. The City was found to have failed to warn the plaintiff of the danger of diving into the lake by failing to have adequate warning signs placed in the vicinity of the lake warning of the dangers posed by diving into the water.

Lower Court Decision

At trial on the issue of liability, Madam Justice Horsman held that the City owed the plaintiff a prima facie duty of care as an invitee to the park owned and controlled by the City, which gave rise to a duty to warn invitees of the risks of diving that were associated with the use of the park facilities (including rafts, the lake foreshore and other areas of the lake). Madam Justice Horsman referred to previous diving accident cases that identified a duty of care:

> "*Owners of waterfront facilities owe a duty of care to warn invitees of dangers associated with the use of their facilities, including the risks associated with diving into the water.*"

The diving accident cases involved dives that originated from public facilities. The City argued at trial that because the dive occurred on lands owned by a third party, the City did not owe the plaintiff a duty of care. The City also suggested that to decide otherwise would

create an inconsistent result. The City was alleged to be liable under common law, even though the private landowner was exempt from liability because sections 3.2 and 3.3 of the *Occupiers Liability Act*, RSBC 1996 c. 337 deem a person to have assumed all risks in entering certain rural premises for recreational purposes.

Madam Justice Horsman nevertheless held that there was a relationship of proximity that imposed a positive duty on the City to warn of risks known to the City arising from the use of its facilities. The duty of care owed by the City to park users was therefore distinguishable from the statutory duty owed by occupiers to persons on their property set out under the *Occupiers Liability Act* given that the duty owed by the City gave rise to a duty to warn invitees into the park of the hazards and risks of undertaking activities both on the City's lands and lands owned by third parties. The failure to warn the plaintiff of the risk of diving into the lake from any location, regardless of whether the lands where the dove occurred were owned by the City, was a breach of that duty.

Madam Justice Horsman further held that in the event she was wrong in concluding that this case was analogous to other diving cases, the requirements of foreseeability and proximity under the *Anns/Cooper* test would give rise to a novel duty of care in these circumstances. At the first stage of the analysis, it was held that the risk of injury to park users from diving into the lake from areas located outside of the park was reasonably foreseeable to the City. In reaching this conclusion, Madam Justice Horsman relied on evidence that the City was advised through a 2011 risk control survey of the park of the liability risks associated with the use of the lake. The City was cautioned that injuries may occur to divers or swimmers as a result of diving off structures or from unforeseen obstacles in the water and responded by placing no diving signs on their docks and rafts in addition to those along the park's foreshore.

Madam Justice Horsman found that the City failed to meet the standard of care by not placing warning signs at locations along the lakefront where swimmers might reasonably be expected to enter the lake and by failing to maintain the warning sign on the raft.

Court of Appeal Decision

With respect to the issue of duty of care, the City appealed the BC Supreme Court's decision on two grounds:

1) that the trial judge erred in finding that the asserted duty of care fell within an existing category of a recognized duty; and

2) in concluding that a novel duty of care was established by the *Anns/Cooper* test.

On the first ground, the Court of Appeal for British Columbia agreed that the location of the dive was relevant to the duty of care and concluded that this case was not analogous to the other diving cases that Madam Justice Horsman had relied upon to find the existence of a *prima facie* duty of care. Those other diving cases were all claims made against the owner or controller of the land on which the dive took place. The Court of Appeal concluded that the trial judge erred in relying on the characterization of the relationship between the plaintiff and the City as being that of an owner of a waterfront facility to a user of that facility and did not take into account how the relationship between the plaintiff and City changed when the plaintiff swam away from the City's facilities.

On the second ground, the Court of Appeal assessed whether a novel duty of care arose in this case and engaged in their own *Anns/Cooper* analysis.

At the first stage of the analysis, it was held that the risk of injury from diving into the lake from the known rocky outcroppings on the eastern shore where the accident occurred was reasonably foreseeable to the City because the risk control survey warned of the risks of underwater hazards being present in the lake. Further, a sufficient relationship of proximity between the City and the plaintiff was established by the City's invitation to access the lake from the park and it was known that the area on the eastern part of the lake where the accident occurred was frequently accessed by park users. Additionally, there was no delineation of land ownership or designated swimming area, and by maintaining the raft, the City facilitated access to the eastern shore. The Court of Appeal concluded that it would be reasonably foreseeable to the City that failing to warn park users of the risks associated with diving into the lake in the area around the eastern shore not owned or controlled by the City could cause harm to those invited to access the lake from the park. Additionally, factors including the distance between the shorelines, the City maintaining the raft and the City's awareness that park users were accessing the eastern shore from City owned property were viewed by the court as establishing the necessary proximity between the City and the plaintiff to establish a novel duty of care. Therefore, the first stage of the *Anns/Cooper* analysis was satisfied.

At the second stage of the analysis, the Court of Appeal disagreed with the arguments raised by the City and Attorney General, who made submissions to the Court of Appeal as an intervenor in the case, that the trial decision articulated the duty of care too broadly to be sustainable. The Court of Appeal found that the duty of care had been described narrowly enough by confining the liability of the City to the immediate area from the lake that was accessed from the park and which the City was aware that park invitees were accessing. The court reasoned that:

> *"This case does not establish a precedent that would ground liability on owners of waterfront properties for injuries suffered by invitees at locations that are remote from the location of known risks associated with the use of the waterfront on the owner's own property."*

As the Court of Appeal had found that a novel duty of care could be established under the Anns/Cooper framework and the trial judge had not made an error in finding factual or legal causation, the City's appeal was dismissed.

As demonstrated by this case, the duty of care of a local government that owns or operates public facilities is broader than the statutory duty for occupiers of land. A local government is not only responsible for ensuring there are no risks on its property or that users voluntarily assume such risks, but must also warn users of dangers on nearby lands and bodies of water where it could be reasonably foreseen that persons will also access as part of their use of the public facility.

Takeaways for Local Governments

The Court of Appeal recognized a novel duty of care, a duty to warn the plaintiff, as a park user, of the known risks associated with the use of waterfront park facilities which included a duty to warn of the risks of diving in the area extending from the park to the locations in close proximity to the park which were known by the City to be accessed by park users.

This case will serve as a cautionary tale for local governments of the risks that may arise not only from inviting the public onto their lands and premises but which may further arise where the local government is aware of risks in the vicinity of their property and facilities and its is reasonably foreseeable that the public may access these neighboring lands from the municipal

property. As demonstrated by this case, waterfront facilities are of particular concern for a local government because the boundaries between the City's property and neighboring properties, especially along the foreshore, may be difficult to demarcate and the public are likely to frequently attend for recreation at these locations. The Court of Appeal emphasized that going forward the City need only put up "no diving" signs in the park that all users could see and that would warn of the underwater hazards in the lake.

In other circumstances, such as with a sports field, parks or recreation centers the local government can more feasibly demarcate the boundaries of its property through fencing and signage. Nonetheless, in situations where the boundary is not clear and invitees are accessing lands in the vicinity to the local government's property in conjunction with their use of the local government's facility, a similar duty of care related to risks on those other lands is likely owed by the local government.

April, 2023

David Giroday and Kai Hsieh

DAVID GIRODAY
604.358.7443
DAVID@CIVICLEGAL.CA

David is an associate lawyer of the firm. His practice is focused on municipal, land development and construction matters. Prior to working at Civic Legal LLP, David worked as a litigator and represented insurance corporations, local governments, construction managers and local and national companies in a variety of legal actions and disputes. David has developed a unique perspective on risk management, negotiation, and strategy from his litigation experience, which he draws on to advise his clients on a variety of legal and regulatory issues. In his solicitors practice David routinely advises clients on local government issues, procurement processes and land use planning and development regulatory matters. He has further drafted construction contracts and municipal service agreements on varied construction projects and contractual matters.

KAI HSIEH
604.358.7014
KAI@CIVICLEGAL.CA

Kai is an associate lawyer of the firm and maintains a general municipal law practice with a focus on real estate development.

Kai obtained his Juris Doctor from the Peter A. Allard School of Law at The University of British Columbia and was called to the Bar of British Columbia in May 2022. His law school experience included competing in the 2021 Adam F. Fanaki Competition Law Moot, where he and his moot partner were awarded Best Factum - Appellant, as well as volunteering with Pro Bono Students Canada, for which Kai was co-recipient of the 2021 Honourable Donna J. Martinson Access to Justice Award. Prior to law school, Kai obtained his Bachelor of Applied Science in Mechanical Engineering with Distinction from The University of British Columbia. Thereafter, he spent over three years designing and implementing process improvements for glass fabrication with a focus on laminated glass.

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

710 - 900 West Hastings Street, Vancouver, BC V6C 1E5
604.639.3639 | www.civiclegal.ca | @CivicLegal