NO. A822 7
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	)
FREDERICK GERAK, JR.	) REASONS FOR JUDGMENT
PLAINTIFF	)
AND:	) OF THE HONOURABLE
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AND THE HONOURABLE THE MINISTER OF THE DEPARTMENT OF LANDS, PARKS AND HOUSING	) MR. JUSTICE LYSYK
DEFENDANTS	)

J. N. Laxton, Esq. and B. Tufts, Esq. - Counsel for the plaintiff

W. A. Pearce, Esq. and T. Leaden, Esq. - Counsel for the defendants

Dates and Place of Trial - September 19, 20, 21, 22, 23, October 3, 1983 Vancouver, B.C.

- October 5 and 6, 1983 New Westminster, B.C.

Mr. Gerak brings this action under the Occupiers Liability Act for injuries sustained in a diving accident in Cultus Lake, located in a provincial park for which the defendants carry responsibility. Only liability is in issue at this

stage, assessment of damages having been reserved by agreement of counsel for future determination. The extent of Mr. Gerak's injuries are not germane to the questions presently before me, therefore, and I simply note in passing that as a consequence of the mishap he is now a paraplegic confined to a wheelchair.

The first question for determination is whether the defendants, hereafter referred to as "the Crown", breached a duty owed to Mr. Gerak to take care that in all the circumstances he would be reasonably safe in using the premises. The Crown concedes that it is an "occupier" of the "premises" as those terms are defined in s.1 of the Occupiers Liability Act, and the duty of care owed by an occupier is laid down by s.3 of that Act in the following terms:

> 3. (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and his property, on the premises, and property on the premises of a person, whether or not that person himself enters on the premises, will be reasonably safe in using the premises.
>
> (2) The duty of care referred to in subsection (1) applies in relation to the
> (a) condition of the premises;
> (b) activities on the premises; or
> (c) conduct of third parties on the premises.
>
> (3) Notwithstanding subsection (1), an occupier has no duty of care to a person in respect of risks willingly accepted by that person as his own risks.

> (4) Nothing in this section relieves an occupier of premises of a duty to exercise, in a particular case, a higher standard of care which, in that case, is incumbent on him by virtue of an enactment or rule of law imposing special standards of care on particular classes of person.

Section 8 provides that the Crown and its agencies are bound by the Act.

If it is concluded that the Crown was in breach of its duty and is consequently liable to the plaintiff, it becomes necessary to address the issue of the plaintiff's contributory negligence. It is conceded that Mr. Gerak was in part responsible for his own misfortune. Accordingly, the second stage of the inquiry involves apportionment of liability in accordance with the provisions of the Negligence Act.

The accident occurred on July 26th, 1981 and on this hot, mid-summer Sunday attendance in the park was at a near record. Mr. Gerak's party arrived in the late afternoon and made its way to a beach area on Cultus Lake known as Entrance Bay No. 2. A wharf there extends out into the lake and this structure, like the beach and water around it, was very crowded. Gerak, who was already wearing a swimsuit, stopped at the water's edge by the wharf to remove his footwear. Then, followed by two members of his group, Messrs. Robin Pallos and Ray Hurley, he jogged

onto and along the wharf, threading his way through the people there. He had traversed about four-fifths of the length of this wharf when he launched on his dive into the water on the right side. He struck his head on the lake bottom, then surfaced floating face down. Pallos, Hurley and a Mr. Dennis Lee, who had been sitting on the wharf, jumped into the water and carried him to shore. Each of the persons just mentioned testified at the trial as did Ms. Sita Houwelling, a friend of Mr. Lee who had been sitting beside him on the wharf.

The wharf is about 125 feet long. Attached to it by a gangway is a float, a little more than 30 feet in length, extending out into the lake. At intervals along the wharf there are three pairs of ladders attached to its sides, with the third pair (that is, the pair furthest from the beach) being about 100 feet from the landward end of the wharf. Gerak's own recollection is that he dove from a point very close to the third ladder on the right side, being about 25 feet short of the gangway leading to the float. The testimony of eye witnesses on this subject differed to some extent, but not greatly, with the locations marked by them on a sketch indicating points of take-off within some 10 feet in either direction. It is unnecessary to fix exactly the point at which Gerak left the wharf or where he entered the water. The lake bottom along this section of the wharf

falls away very gently, so that water depth between the most widely separated points identified by the witnesses would not have differed by more than a few inches. There was a good deal of evidence concerning water depth and water level in relation to the wharf on the date of the accident, and again some variance in the testimony. The gist of the evidence is that the distance from the deck of the wharf to the surface of the water was between two and three feet and that the water at the point Gerak entered it was about three feet deep, give or take a few inches. Greater precision is unnecessary for it is abundantly clear, and conceded on all hands, that the water there was too shallow for safe diving.

Evidence concerning the circumstances of the dive itself adds little that is material. Gerak describes his pace as he moved along the wharf as a "slow jog". Apparently without breaking stride, he launched on his dive from a point close to where Lee and Houwelling sat and Gerak's body, angling away from shore, crossed in front of them. Pallos recalls calling out to Gerak not to dive just as the latter was about to take off. No one else remembers hearing this but, as Pallos himself surmises, the high noise level in the vicinity may account for that.

The core of the Crown's defence is that Gerak ought to have realized it was not safe to dive from the wharf,

although there were no signs or notices of any kind posted on or near the wharf that prohibited diving or jumping from it or warned of hazard in doing so. One sign near the water's edge and a few feet to the right of the wharf reads as follows:

> PARK VISITORS
> CAUTION... LIFEGUARDS ARE NOT IN ATTENDANCE. PLEASE DO NOT LEAVE CHILDREN UNATTENDED.
>
> EXTREME DROP OFF BEYOND CORKS.
>
> PETS ARE NOT PERMITTED IN WATER FRONT AREAS.

Also, stencilled at intervals on the deck of the wharf itself are the words: "NO RUNNING". There are no other signs or notices that relate to activity on or near the wharf; nor are there water depth markings on it, or in the vicinity.

The Crown contends that Gerak ought to have been alerted to the shallowness of the water beside the wharf, and therefore to the hazard, primarily by two circumstances and possibly a third. These are, first, the physical lay out of the beach area, secondly, the behaviour of persons in the water around the wharf and, thirdly, sufficient water clarity to permit observation of the lake bed.

With respect to lay out of the facilities, the sign adjacent to the wharf warns of "extreme drop off beyond corks". This refers to floating cork lines affixed at one end to

points on either side of the gangway that connects the float to the wharf and extending out to either side toward shore where the other ends are anchored to submerged concrete blocks at the water's edge. Some fifty or sixty feet beyond the cork lines is a line of buoys marked with an international symbol prohibiting boats from entry into the area. What Gerak should have recognized, the Crown contends, is that the water between the cork lines and shore was for wading and use by nonswimmers, while the water between the cork lines and the buoys was for swimming. The float, which lay beyond the cork lines, was for diving. Secondly, the Crown submits, if Gerak had looked before he leaped he would surely have observed people standing in the water who served, as it were, as human depth markers. Thirdly, the waters of Cultus Lake are normally clear and, although user activity stirs up sediment from the bottom, it is suggested that the lake bed as far out as the cork lines ought to have been visible to Gerak. The bed of the lake is covered with what is known as "small cobble", typically, rounded rocks, two or three inches in diameter.

With respect to all three of these points made by the Crown, it is important to remember that July 26th, 1981, was one of the busiest days on record for the Cultus Lake Park. Mr. Dennis Eggen, District Manager for the Cultus Lake District in the Ministry of Lands, Parks and

Housing, provided information on this, with figures in support, in his examination for discovery. Eggen described the beach and water off it as "wall to wall people", an expression used by other witnesses as well to describe the situation that Sunday afternoon. The water around the wharf was undoubtedly a hive of aquatic activity. The throngs of people in the water would have tended to distract attention from the floating markers intended to designate distinct areas for nonswimmers, for swimmers and divers, and for boats. In his testimony Mr. Eggen expressed the view that the posting of signs to designate the shallow area or to warn against diving from the wharf would be redundant because anyone coming to the beach from the parking lot could not help but see the cork lines and buoys and draw the conclusion that the former enclosed water that was not deep enough for diving. I am not satisfied that this was so in the conditions of extremely heavy use which prevailed that day. The sheer number of people engaging in various kinds of activities -- swimming, floating on inflatable rafts, and so forth -- may also go some distance towards explaining why Gerak failed to observe persons standing in the area of his dive, from which he would necessarily have realized the shallowness of the water. Certainly, high usage that afternoon accounts for and supports the evidence of several witnesses, including the independent witnesses Lee and Houwelling, that the water was so murky that it was not possible to see the lake bottom from the wharf in the area

of Gerak's dive.

The beach areas at Cultus Lake have been unsupervised since 1978 when lifeguard services were discontinued in the provincial park system. From the time when the wharf was installed in 1959 until 1978 there had been lifeguards assigned to the site, and one was normally stationed on a tower resting on a platform which jutted out to the left of the wharf, close to the gangway leading to the float. This lifeguard was expected to supervise the general area, both inside and outside the cork lines, and to control "horseplay" on the wharf itself. The tower was removed from the platform sometime after lifeguard service was discontinued, but the platform itself was still there at the time of the accident. It was finally removed in the summer of 1983, according to the testimony of park officials, because there had been diving from the platform and this was considered hazardous. There was concern, it was said, that a diver might land on a swimmer. Another apparent risk, however, would lie in the possibility of a dive being taken in the wrong direction, or perhaps poorly executed in the right direction. The water landward of the platform, directly opposite the platform and, indeed, for a certain distance beyond the platform, is not deep enough for safe diving. No explanation was offered for failure to remove the platform before 1983.

Another aspect of the fact situation that attracted considerable attention at trial related to beer drinking by Mr. Gerak, with his companions, that day. The accident occurred between 5:00 and 6:00 in the afternoon. Gerak testified that from 11:00 o'clock in the morning to the time of the accident he had consumed six beer, that he had eaten during this period, and that he was sober at the time the group arrived at Cultus Lake. Other members of his party testified concerning the amount of beer they saw him consume, and their figures were more modest than Gerak's own. There was no evidence of impaired behaviour on his part. The only other information bearing on this point took the form of an admission that a Constable Beloy, of the Royal Canadian Mounted Police, who attended at the scene immediately after the accident, detected a "mild odour of alcohol" when his face was very close to Gerak's. The evidence as a whole does not establish that impairment by alcohol was a contributing factor to Gerak's misfortune, and in his concluding submissions counsel for the Crown conceded this.

Two witnesses were called upon to testify as experts on behalf of the plaintiff. Ms. Irene MacDonald, who was formerly an international and Olympic level competitive diver and diving coach, presently operates her own sports consulting firm. Ms. Janice Engemoen has wide experience in aquatics and water safety. For the last decade she has been Director of Water Safety Service for the B.C.-Yukon Division of the

Canadian Red Cross Society and in the course of her work over the years she has visited most public swimming facilities, indoor and outdoor, in British Columbia. Both Ms. MacDonald and Ms. Engemoen considered that a wharf in an area such as this constituted an open invitation for jumping and diving. If a wharf is to be located in such an area intended for both swimmers and nonswimmers, both witnesses felt that safety precautions should include, or feature some combination of, prominent signs warning against diving, supervision by lifeguards, depth markers, and, possibly, some sort of guard railing along the sides of the wharf. None of these were to be found at Cultus Lake.

I am of the view that there is merit in their observations. The wharf in question differs from those found in most other recreational facilities, developed or undeveloped, in one important respect. The wharf here is not used for mooring boats; they are in fact prohibited from approaching the wharf. Its function is to serve primarily as a walkway for swimmers and divers and incidentally as a place from which other persons may observe the swimming and diving. The wharf in question is not strictly comparable to one in a marina or to one which serves a dual function, available for the use of both boaters and swimmers. It is an integral part of what has been developed exclusively as a swimming area, and one which is very heavily used for this purpose. As such, one

might reasonably expect safety precautions to be taken that may not necessarily be called for in the case of a wharf evidently intended to serve as a dock.

Gerak testified that he had never visited this beach before. He was 20 years of age at the time of the accident, and he describes himself as having been an average swimmer and diver. As he came down to the water's edge he noticed the cork lines and the boats beyond it, but he does not recall seeing the line of buoys. He intended to go swimming, and as he dodged in and around people on the wharf he was generally aware of the concentration of people engaging in all sorts of water activities, splashing and generally having fun in the water. He assumed that the further along the wharf he got the deeper the water would be. He testified that as he reached the point where he left the wharf he had the impression that he was in a swimming area, and he thought that in diving out at an angle toward the cork lines he would be safe. He does not recall seeing anyone else diving or jumping in; nor does he recall more than has already been mentioned concerning the activities of others in the vicinity. He does not recall his dive being either particularly steep or shallow, or remarkable in any other respect.

Evidence concerning the extent to which diving or jumping from the wharf occurred was somewhat sketchy. In

general, park officials who testified were aware there had been diving from what was formerly the lifeguard's platform, and this is why it was eventually removed a few months ago; apart from this, however, they did not know of people diving or jumping from the wharf. On the other hand, there was testimony from Ms. Houwelling and Mr. Hurley to the effect that there was diving from the wharf itself, around its end and out toward the lake, and Ms. MacDonald testified that in the course of a visit to the site for purposes of preparing her report she personally observed people jumping off both sides of the wharf.

On these facts, the first question for determination is whether the Crown, as occupier of the premises, discharged the duty imposed by s.3(1) of the Occupiers Liability Act "to take that care that in all the circumstances of the case is reasonable to see that a person ... on the premises ... will be reasonably safe in using the premises". This statutorily defined duty supplants the common law, making it unnecessary to deal with the accretion of authority relating to classifications of visitors and corresponding formulations of the appropriate standard of care. The position now was succinctly expressed by Aikins, J.A., delivering the judgment of the Court of Appeal in Weiss v. Y.M.C.A. (1979), 11 B.C.L.R. 112, at p.118:

> In my view, s.3(1) is comprehensive, in the sense that it fully and clearly imposes a duty on an occupier and defines the standard of care necessary to fulfil that duty. Thus, in my judgment, it is unnecessary to an understanding of the standard prescribed by the subsection to refer to any of the specially formulated standards of care laid down in the common law cases. Indeed, to do so is more likely to mislead than assist in understanding what the subsection says. I add only that if the standards are indeed identical then it is unnecessary to go beyond the statutory definition; if they are not, then it will lead only to error to consider any standard other than the one prescribed by the statute.

Foreseeability of risk, as at common law, nonetheless remains an element of central importance: see, e.g., Jacobson v. Kinsmen Club of Nanaimo (1976), 71 D.L.R. (3d) 227 (B.C.S.C.; Toy, J.). The fact that the premises in question have been used for many years without similar incident does not warrant the conclusion that the risk was not foreseeable. In Niblock v. Pacific National Exhibition (1981), 30 B.C.L.R. 20, liability arose from the insufficient height of a guard rail on a flight of stairs despite evidence that no one had fallen over that rail or any rail similar to it at the heavily used public facility in question over the previous twenty years. Macfarlane, J. (as he then was) stated (at p.27):

> I do not think that an occupier can be relieved of responsibility for a failure to keep his premises reasonably safe by saying that he turned a blind eye to the danger because no one had yet been hurt and because no one else had warned him of the danger. If the unsafe condition was there to be seen by someone who was applying his mind to the

> relevant risks, then it was a duty of that occupier to take reasonable steps to remedy the problem. It could have been done easily and economically.

The last sentence of this passage touches on the readiness with which precautionary measures might have been taken. This again echoes a theme struck in the jurisprudence developed at common law. Thus, in Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. Pty., (Wagon Mound No. 2), [1967] 1 A.C. 617, Lord Reid observed (at p.642) that a reasonable man would only neglect a risk of small magnitude if he had some valid reason for doing so, such as where it would involve considerable expense to eliminate the risk. The risk must be weighed against the difficulty of eliminating it. He went on to say this (at p.643):

> If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as farfetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense.

As to the relevance of the ease with which danger can be prevented, see also Campbell v. Royal Bank of Canada, [1964] S.C.R. 85, at pp.96 and 97 (per Spence, J., for the majority). In the present case, the installation of signs warning against diving or of depth markers would have constituted a minimal precautionary measure, involving no significant

expense.

Ms. MacDonald and Ms. Engemoen testified that disregard for personal safety is a well known problem for persons working in the fields of aquatics and water safety, and it is unfortunately the case that members of the public will sometimes dive into water without knowing its depth. This is a problem which can be addressed by various means, such as signs prohibiting diving, depth markers and supervision by trained lifeguards. Here, despite the fact that the wharf was used solely as an adjunct to swimming and diving activities, none of these precautions were taken. Having endeavoured to consider "all the circumstances of the case", as directed by s.3(1), I find that the Crown did not exercise that degree of care that in all the circumstances of the case was reasonable.

As noted at the outset, it was conceded that Gerak was partly at fault, so the remaining question is simply one of apportionment of fault pursuant to s.1 of the Negligence Act. A cardinal rule of water safety is that one ought not to dive into waters of unknown depth. Gerak violated this precept. The character of his negligence scarcely needs further elaboration. He had never been to this site before and yet he failed to take any steps to ascertain the depth of the water before launching into his dive. He operated

on the basis of an assumption which, sadly, was unfounded. In my view, the major responsibility for the accident is his. I apportion fault 65% to him and 35% to the Crown.

Vancouver, B.C.
October 7th, 1983.