CITATION: Miller et al. v. Canadian National Railway et al., 2021 ONSC 4806
COURT FILE NO.: CV-14-043
DATE: 2021/07/07

COURT OF ONTARIO,
SUPERIOR COURT OF JUSTICE

RE: JEFFREY MILLER and LINDA STAPLEY, Plaintiffs

AND:

CANADIAN NATIONAL RAILWAY and THE CORPORATION OF THE CITY OF QUINTE WEST, Defendants

BEFORE: Regional Senior Justice Calum MacLeod

COUNSEL: Jordan M. Cutler, for the defendant, City of Quinte West (Moving Party)

Michael J. Pretsell, for the plaintiffs (Responding Parties)

Amer Pasalic, for defendant Canadian National

HEARD: June 22, 2021 – by videoconference

DECISION AND REASONS

[1] On the evening of July 20, 2012, Jeffrey Miller fell from a height into a rock-strewn creek bed while attempting to take a short cut over a railway trestle near Wooler Road in the City of Quinte West. It is not clear whether he fell from the trestle or from an adjoining concrete retaining wall, but it is apparently a 15-foot drop and he suffered significant injuries. He and his spouse are the plaintiffs in this action.

[2] The plaintiffs have sued both the railway and the municipality. The motion before the court is a summary judgment motion brought by the city asking the court to dismiss the action against the municipality. It is the position of the city that the plaintiff cannot succeed against it. It submits there is no basis for finding that the city breached any duty of care to the plaintiffs or was negligent in any way. The defendant Canadian National Railway "CN" takes no position on the motion. The plaintiff opposes it.

[3] This is an appropriate case for summary judgment. There can be no liability on the part of Quinte West on these facts. If either of the defendants is liable, it can only be CN, which owns the land where the accident is alleged to have occurred. The city had no duty of care with respect to the CN lands and nothing done by the city on adjoining lands created a hazard or materially increased the risk of injury. The action will be dismissed against Quinte West and may continue against CN.

Background

[4] It is easier to understand the facts of this case with the aid of a map and a survey.[1] At the time of the accident, the plaintiff was living on Wooler Road in the City of Quinte West. He and a friend intended to go to a pub which was located at the corner of Front Street and East Davis Street and in order to get there they attempted to take a short cut along a railway siding owned by the defendant CN.

[5] The tracks in question are a dead-end spur line used infrequently by trains. They run on lands owned by CN. The CN lands abut the road allowance for Wooler Road along its southerly portion and continue northwest, where Wooler Road curves to the west. At that point the train tracks form an acute angle with Mayhew Creek and cross the creek on a trestle bridge. The bridge is supported at either end by concrete retaining walls and, as mentioned above, the creek bed is about 15 feet below. The intended short cut was across the trestle and along the tracks to Wall Street or one of the other streets that connect with Front Street.

[6] Apparently, this is a well known and frequently used pedestrian short cut. The trestle begins just about the point where Wooler Road curves to the west and at that point there is a small triangular piece of land which lies between the Wooler Road boulevard and the CN lands. To get to the trestle it is necessary to cross the Wooler Road boulevard and the triangular property. The grass on the triangle is maintained by the city, but the parcel of land is registered to Raymond and Lorna Jensen (who are not parties to the litigation).

[7] According to the evidence, the city cuts the grass on the boulevard, on the Jensen land and may also cut grass on the CN lands right to the edge of the retaining wall. This is done for aesthetic reasons incidental to the maintenance of the boulevard on Wooler Road. The City makes no other use of the Jensen land. The only other unusual facts about the Jensen owned triangle is that no one knows the current whereabouts of the Jensens who purchased the property in 1949, the Jensens do not themselves appear to be making any use of the property and neither the city nor its predecessor have ever issued a tax bill. The plaintiffs argue that as the city is the only entity making any use of the Jensen land, it is responsible for the condition of that land.

[8] The plaintiff himself has no memory of the accident. According to the affidavit of his common law spouse, Linda Stapley, the plaintiff and a friend had been drinking alcohol at the plaintiff's residence on the north side of Wooler Road and had decided to go into town to the Black Bear Pub. On the advice of Ms. Stapley, they took the short cut across the train trestle.

[9] The plaintiff fell from the trestle or into the gap between the retaining wall and the trestle. The "location of the accident" Ms. Stapley marked on a photograph appears to be in the middle of the creek bed below the middle of the trestle. Presumably that is where the plaintiff was found after he was injured. There are no further facts in the affidavit evidence.

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[1] See Schedules A & B attached.

Analysis

[10] This motion was argued primarily on the basis of whether or not the city was an occupier of the Jensen land (the triangle) and whether on that basis or otherwise, the city owed a duty of care to the plaintiff. Success against the municipality would depend on showing either a dangerous condition on city occupied land or a duty upon the city to prevent pedestrians from accessing the railway lands.

[11] The *Occupiers' Liability Act* governs the obligations of occupiers to users of land in Ontario. It "applies in place of the rules of the common law that determine the care that the occupier of premises at common law is required to show" and determines the liability of an occupier "in respect of dangers to persons entering on the premises or the property brought on the premises by those persons".[2] Importantly, the act permits for the possibility of multiple occupiers and includes any person who has "responsibility for and control over" the condition of premises, activities carried on there or who may enter the premises.

[12] In this case, city workers cut the grass on the Jensen property and perhaps on the CN property in the process of cutting the grass on the boulevard of Wooler Road. The city argues that simply cutting the grass for aesthetic purposes is not an assumption of responsibility over the land or the condition of the land and does not give the city the right to control access to those lands. The courts have held that simple use of property is not enough to satisfy the definition of occupier.[3] The operative requirement is the exercise of control over the lands and premises and the consequent assumption of responsibility for the condition of the premises.

[13] In the case of *MacKay v. Starbucks,* Starbucks was found to be an occupier of the sidewalk adjacent to its store, but in that case there was compelling evidence that Starbucks had created an entrance to its premises at that location, had effectively invited customers to cross the sidewalk at that location and had assumed the responsibility to sand and salt the sidewalk for its own commercial purposes. As summarized by the trial judge, "by building its fence and patio in the manner that it did, by making a path over the sidewalk leading directly to its side door, by monitoring the condition of the pathway, by clearing, salting and sanding it to be sure it was safe for its customers, and by directing the ingress and egress of its customers in the manner that it did, Starbucks assumed sufficient control over the sidewalk and the persons it allowed to enter its premises using the sidewalk, to come within the definition of Occupier".[4]

[14] Importantly, in the *Starbucks* decision, what was in issue was whether the store had assumed a duty of care over the condition of the sidewalk patrons were using to access the patio and the store. The hazard existed on the sidewalk. Here, the plaintiff's allegation is more complicated. There is no danger on the lands which the city is said to be occupying. The danger exists on the CN lands. It is one thing to argue that a business has assumed a duty of care over adjoining land used to access the business and is responsible for the condition of the sidewalk. It

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[2] *Occupiers' Liability Act.,* RSO 1990, c. O.2 as amended to June 11, 2021.
[3] See the summary in *R. v. Gillespie,* 2013 ONCA 40 cited by the moving party.
[4] See *MacKay v. Starbucks Corp.,* 2017 ONCA 350 @ para. 8

is quite another to argue that in cutting the grass on the Jensen property, the city has assumed a duty to individuals injured on the CN lands.

[15] For purposes of this motion, I am prepared to assume that the action of cutting the grass on the Jensen land could make the city an occupier of those premises for certain purposes. In any event, even if the city is not an occupier, if the act of cutting the grass created a danger or caused an injury to the plaintiff, the city could be liable on ordinary principles of negligence. To state the obvious, if someone was injured by a lawnmower or a piece of equipment left on the land by city workers, liability would not hinge on the status of the city as an occupier.

[16] There is no evidence to support any such suggestion here. No one was injured by an object or by any kind of inherent or concealed danger located on the road allowance or the private lands.

[17] It is abundantly clear that the accident did not occur on the road allowance or on the Jensen land. Although CN has not admitted that the accident occurred on its lands and denies liability in its statement of defence, the location of the accident described by the plaintiffs is not located on the city property or on the private property which the city is said to be occupying. In that regard, the evidence of the surveyor commissioned by the city is persuasive and conclusive. The accident could not have occurred on the boulevard of Wooler Road nor on the triangle of land owned by the Jensens. If the accident occurred as alleged by the plaintiffs, it was the result of a fall into the creek bed on the CN lands. The location of the trestle and the retaining wall abutting the creek and forming an angle with the trestle is entirely on the CN lands. The small section of the retaining wall located on the Jensen land played no role in the accident.

[18] In fact, the plaintiffs do not assert that there was a danger on city occupied lands other than the danger of allowing access to the CN lands. The plaintiffs seek to find a duty of care arising from the fact that members of the public were using those lands to access the CN lands where the danger was located. The plaintiffs argue that because city workers frequented the area, the city ought to have known that pedestrians were using the train trestle and should have taken steps to prevent access because of the danger that someone might fall from it. They argue that knowledge that pedestrians were using the tracks combined with knowledge of the risk and effective control of the adjoining land gave rise to a duty to protect individuals such as the plaintiff by preventing access or warning of the risk.

[19] Counsel for the plaintiff was not able to cite any case in which a landowner or occupier had been found to have a duty to fence its own lands to prevent access to adjoining land where a hazard was located. The duty of an occupier under the act is to “take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises”. The statutory duty does not extend to ensuring the users of the premises are safe when they are on other property which the defendant is not occupying.

[20] There is no evidence that maintenance done on the city lands or the Jensen land rendered the CN lands more dangerous. No evidence, for example, that anything was done that would have made the retaining wall or the edge of the trestle or the location of the creek less visible. Nothing was done to make the surface more slippery or the creek bed more dangerous.

[21] The plaintiff's alternative argument is that by cutting the grass and maintaining the area, the city, in effect, created an attractive nuisance by making the tracks and the trestle more accessible. Even if the city had no duty to prevent access to the CN lands, it should not be facilitating the use of the short cut by making it easier to access. Other than regularly cutting the grass, however, there is no suggestion that the city took any active steps to promote the use of the shortcut. But even if by cutting the grass, the city could assume a duty not to facilitate access to the railway lands, this theory is completely unsupported by any evidence. There is no doubt that the city kept the grass cut and the area tidy, but there is no evidence that the plaintiff or anyone else was induced to take the short cut by this fact. Nor is there any evidence that the plaintiff would not have done so had the area been more overgrown.

[22] This is not a case like *Burns v. Canadian National Railway* referred to by the plaintiff.[5] In that case the late City of Nepean had constructed an underpass and installed fencing. Some of the fencing was inadequate for its purpose and in addition the City had made openings in the fence to specifically permit access to a buffer zone along the railway tracks for recreational purposes. That was the CN main line on a very busy route. A young child was struck by a train. In that case Nepean had clearly assumed a duty of care and the evidence indicated that the City's negligence had materially contributed to the risk. The trial was a trial of a crossclaim between Nepean and CN. The city was found to be 25 percent at fault and CN 75 percent.

[23] It is should be noted that at common law, a municipality could be liable for assuming responsibility for work and carrying it out negligently (malfeasance) but not for failing to act where there was no duty to do so (nonfeasance).[6] Absent a statutory basis for imposing such a duty, it would require significant evidence of fault and a powerful policy argument to impose liability on the city for failing to protect citizens from danger created or permitted by CN.

[24] In certain circumstances the imposition of a new duty of care might be a genuine issue requiring a trial. Where the consequences of inaction are dire and there is no effective remedy, new duties of care can be developed by the common law applying the "Anns/Kamloops" test.[7] The plaintiff did not argue the motion on that basis but in any event the evidence in this case would not provide a basis for such a dramatic expansion of municipal liability. Nor is it necessary. CN acknowledges it is the owner of the land on which the tracks run and of the train trestle which spans the creek. In this case, CN does not allege any contributory fault on the part of the city. There are no crossclaims. CN asserts that fault lies with the plaintiff, with Ms. Stapley and perhaps with the bar if the plaintiff was returning from the pub. It does not assert that the city shares any fault.

[25] I was also referred to the decision in *Russell.*[8] In that case the plaintiff was a teenager who lost his legs while hopping a train in Parry Sound. It is true that the judge in *Russell* distinguished the case from *Burns* in part because the town did not own adjoining lands, but the court in *Russell*

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[5] [1998] O.J. No. 2451 (Quicklaw), 2 MPLR (4th) 114 (Ont. Gen. Div.); aff'd [2000] O.J. No. 2206 (Quicklaw), 133 OAC 392 (Ont. CA)
[6] See *Muirhead v. Nesbitt,* (1985) 49 OR (2d) 513 (CA)
[7] See *Cooper v. Hobart,* 2001 SCC 79, [3001] 3 SCR 537
[8] *Russell v., Canadian National Railway Co.,* [2004] Oj. No.

also rejected the existence of a general duty of care on the Town of Parry Sound to prevent access to the railway tracks which ran through the municipality. The result in *Russell* was the harsh assessment that "municipalities are not guarantors of the safety of its citizens" and "there is no duty on a municipality to protect its citizens from their own negligence". It was not an occupier's liability case. In addition, in both *Burns* and *Russell*, the risks involved were the risks created by moving trains and not merely the passive risk of falling into a hazard that existed on the railway land. The risk of injury from moving trains on a well used railway track might engage a different risk analysis than injury to pedestrians walking on a seldom used railway right of way.

[26] Whether based on occupier's liability or on general principles of negligence, liability of a municipality for injury on railway lands must be premised either on the failure to do something that the municipality had a duty to do or on a negligent act which caused or contributed to the injury. As I mentioned above, there is no evidence for a court to find a causal link between cutting the grass on the boulevard and the plaintiff falling from the railway trestle. There is no negligent act or malfeasance which can be laid at the feet of the municipality. Nor is there the kind of evidence here that would justify imposing a duty of care on the city to prevent or impede pedestrians from accessing the railway land.

[27] Under these circumstances, even if the City of Quinte West is an occupier of the Jensen land it cannot be said to have a duty of care in respect of the adjoining CN property. Nor on these facts is there any genuine case to be made against the city on principles of general negligence. A trial is not necessary to reach this conclusion.

[28] The plaintiff argues that this is a motion for partial summary judgment and for that reason it should not be granted. I do not accept that argument. Judgment in favour of one defendant is not the kind of partial summary judgment discussed in the cases that caution against inappropriate use of Rule 20. [9] In this case, in the absence of any crossclaim, the question of whether the municipality can be liable to the plaintiff is an issue that can readily be separated from the question of CN's liability as an occupier of its own land. The resolution of this question now and the elimination of one of the parties will significantly streamline the trial.

[29] As mentioned, CN is not alleging any fault on the part of the city and there are no crossclaims. There are counterclaims against the plaintiff Stapley and against the bar where the plaintiff may have been drinking. The city also has counterclaims, but presumably those will no longer be necessary if the action is dismissed.

Summary and Conclusion

[30] In conclusion, the claim of the plaintiffs against the defendant City of Quinte West is dismissed.

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[9] See *Butera v. Chown Cairns LLP*, 2017 ONCA 783.

[31] Counsel may arrange to speak to the issue of costs or if they agree it is more efficient, may make submissions in writing on a schedule to be agreed upon or set by my office within the next 30 days.

Mr. Justice C. MacLeod

Date: July 7, 2021

SCHEDULE A – MAP OF AREA IN QUESTION

Produced by the City of Quinte West
GIS Division. Copyright, 2014.
2008 DRAPE Imagery.
Properties are not survey grade.

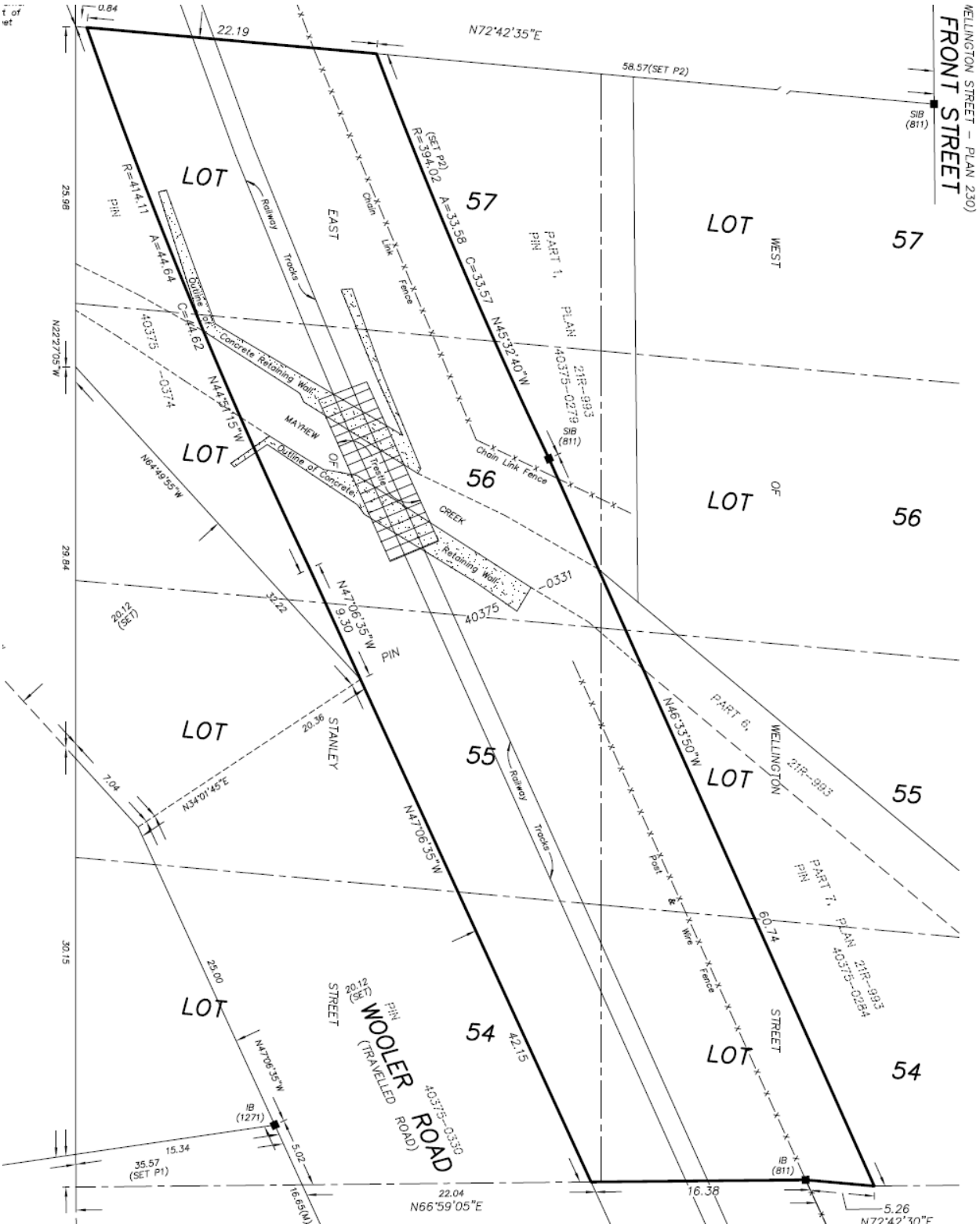
A Natural Attraction

0 12.525 50 75 100 Meters

N W E S

A8

SCHEDULE B – PORTION OF PLAN OF SURVEY



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DECISION AND REASONS

Regional Senior Justice Calum MacLeod

Released: July 7, 2021