IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rennie v. Kanco 535 Niagara Apartments Ltd.*,
2024 BCSC 1820

Date: 20241004
Docket: S184032
Registry: Victoria

Between:

Sarah Ann Rebecca Rennie

Plaintiff

And

Kanco 535 Niagara Apartments Ltd., Zegas Group Ltd., Earthscapes Land Design & Build Inc., and CAPREIT Limited Partnership

Defendants

And

Zegas Group Ltd. and Earthscapes Land Design & Build Inc.

Third Parties

Before: The Honourable Justice Donegan

Reasons for Judgment

Counsel for the Plaintiff:	A.J. Broadley
Counsel for the Defendants:	M. Bujar R. Bacha
Place and Date of Trial:	Victoria, B.C. February 2, 2024
Place and Date of Judgment:	Victoria, B.C. October 4, 2024

Introduction

[1] During the evening of December 10, 2016, the plaintiff was injured when she slipped and fell on the grass lawn in front of her apartment building in Victoria, British Columbia. Ms. Rennie claims that overgrown vegetation impeded the paving stone pathway over which she had been walking, causing her to step onto the wet grass where she immediately lost her footing and fell to the ground.

[2] Ms. Rennie fractured her right ankle as a result of the fall. On September 14, 2018, she commenced this action seeking damages from the defendants. She advances claims in negligence and pursuant to the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337 [*OLA*].

[3] The defendants deny liability. They bring this summary trial application under Rule 9-7 of the *Supreme Court Civil Rules*. B.C. Reg. 168/2009, seeking an order severing the issues of liability and damages and a further order dismissing the plaintiff's claim. The plaintiff consents to bifurcating liability and quantum. She also agrees that liability can, and should be, determined summarily in this application and seeks an order that the defendants be found jointly and severally liable for her fall and resulting damages.

[4] I agree that this matter is suitable for severance and summary determination. The key facts are uncomplicated. There are no issues of credibility. The central legal issues are relatively straightforward. I am satisfied that determining the discrete question of liability separate from quantum will result in significant savings of time and expense for the parties. In terms of suitability, I am satisfied I can find the facts necessary to decide the disputed issues and that it would be just to decide the matter summarily.

[5] For the reasons that follow, I conclude the defendants are not liable. I will begin by finding the general facts. I will make additional findings of fact during my consideration of the issues.

Background Facts

[6] Ms. Rennie is 47 years old. She has lived in an apartment on the fourth floor of a building located at 535 Niagara Street in Victoria, British Columbia (the "Building") since October 2015. In front of the Building is a grass lawn. I will refer to the Building and its surrounding property, including the grass lawn, as the "Premises". The incident giving rise to this action occurred at approximately 9 p.m. on December 10, 2016 (the "Incident").

[7] The Building has four exits and two entrances, all of which were available to the plaintiff for her use at the time of the Incident. They are:

a) The northeast facing main entrance (the "Front Door"). The Front Door provides an entrance and exit to and from the Building for its residents, including the plaintiff. It is illuminated and has a paved walkway in front of it leading to the sidewalk.

b) The southwest facing rear door (the "Rear Door"). The Rear Door provides an entrance and exit to and from the Building for its residents, including the plaintiff. It leads immediately to the paved parking lot behind the Building.

c) The southeast facing side door (the "Side Door"). The Side Door functions as a one-way emergency exit. It leads onto a paved driveway which allows vehicles to move from the street in front of the Building to the parking lot behind it.

d) The northwest facing side door (the "Door"). The Door also functions as a one-way emergency exit. The Door leads onto a paved area which allows one to walk either behind the Building to the parking lot, or in front of the Building along a path made up of rectangular paving stones placed on the grass. The paving stones lead from the side of the Building to the front of the Building and toward the city sidewalk (the "Path"). The paving stones ended prior to the sidewalk, requiring users of the Path to walk a short distance on the grass

to access the sidewalk. The plaintiff used the Door and walked along the Path just before the Incident.

[8] At the time of the Incident, the defendant, Kanco 535 Niagara Apartments Ltd. ("Kanco"), was the registered owner of the Premises. The defendant CAPREIT Limited Partnership ("CAPREIT") owned Kanco and acted as a property manager and landlord for the Premises. Samson Rombough is the director of operations with CAPREIT. He provided an affidavit sworn January 9, 2024, and excerpts from his examination for discovery have also been tendered.

[9] At the time of the Incident, CAPREIT employed site managers and site administrators for all of its buildings, including the Building. Each site manager was typically responsible for eight properties. They were responsible for day-to-day operations, including ensuring that the apartments were rented, the vacant suites cleaned, rent collected and the like. Each site administrator was responsible for visiting each building daily during the week. They were responsible for such things as posting memos, meeting vendors and inspecting the particular building. The two – site managers and site administrators – spoke to each other daily. Buildings were inspected on a weekly basis, over the course of the week. In the case of the Building, weekly inspections took approximately 10-20 minutes, given its small size.

[10] Site administrators used checklists for noting deficiencies at all Kanco or CAPREIT properties. If tenants had any issues with the maintenance of the Building, including landscaping and outside pathways, they could call CAPREIT's rental office, from which the site administrator and site manager also worked.

[11] CAPREIT retained the services of the defendant, Zegas Group Ltd. ("Zegas"), to provide maintenance services, including landscaping, at a number of its properties, including the Premises. Zegas subcontracted the landscaping services to the defendant, Earthscapes Land Design & Build Inc. ("Earthscapes"). Earthscapes' subcontract with Zegas included a scope of work containing a provision identical to one found in Zegas' contract with CAPREIT, that regular garden maintenance was to include "[t]rimming and/or hand pruning of plant material to control encroachment

and maintain desired appearance". Rodney Grebenar is a manager at Earthscapes. He provided an affidavit sworn January 9, 2024, and excerpts from his examination for discovery have also been tendered.

[12] Zegas had two dedicated maintenance employees for each building where it worked. Zegas communicated with Kanco and CAPREIT daily to identify any issues of concern or note at a property it was working at for them.

[13] Earthscapes' employees, including Mr. Grebenar, attended at the Premises weekly to provide lawn and shrubbery maintenance services. These services included mowing the grass, weeding, adding soil, adding bark mulch, adding flowers, keeping pathways clear, and pruning back shrubbery and trees, including those in the area of the Incident and the shrubbery the plaintiff claims was obstructing her path. Mr. Grebenar previously cut back the shrubbery in question. He never noticed a safety issue in the area of the Incident and was not aware of anyone falling as a result of the pathway or vegetation overhanging it prior to the Incident.

[14] CAPREIT's employees, who also attended the Premises weekly to examine the conditions, contacted Earthscapes (either directly or through Zegas) if any services were required.

[15] At the time of the Incident, the plaintiff was working as a restaurant server. She began work on December 10, 2016, at 6:30 a.m. and finished her shift between 2:00 and 3:00 p.m.. After work, she had lunch and a "couple" of alcoholic beverages at the restaurant with a friend. She and her friend then went back to the plaintiff's apartment in the Building where they continued to socialize. The plaintiff had a "couple" more alcoholic beverages during this time. Her friend left about 8:00 p.m. The Incident occurred about 60 minutes later. During the six or seven hours that elapsed from the end of her work shift and the Incident, the plaintiff estimates she consumed seven or eight alcoholic drinks.

[16] After her friend left, the plaintiff made dinner. While it was cooling, she decided to take her dog, Flynn, outside for a short walk, something she commonly did at night. The time was approximately 9 p.m.

[17] The plaintiff lived on the fourth floor of the Building. She had been living there for just over a year at the time of the Incident. During that time, she developed a routine. When entering the Building, she typically used the main entrance, through the Front Door, and an elevator provided access from the main entrance to the fourth floor. She had never experienced any issues navigating the paved walkway to the Front Door in the past. When leaving the Building, the plaintiff typically used the Door, as it was the nearest exit to her apartment. She did not use a vehicle at the time, so she did not need to go to the parking lot behind the Building for this purpose. She routinely used the Door to exit the Building in the mornings to go to work, at other times to run errands, and in the few days before the Incident, to take Flynn outside for walks.

[18] The plaintiff acquired Flynn three days prior to the Incident. He weighed roughly 80 to 90 pounds, and the plaintiff found him to be well-trained and obedient. During those three days, the plaintiff took Flynn out of the Building three times a day on average, and used the Door to do so. She used the Path where the Incident occurred many times in the past. She used it at least twice on the day of the Incident before the Incident occurred.

[19] That night, the plaintiff decided to take Flynn for a walk while her dinner cooled. In doing so, she made some choices. Her first choice was what to wear. She knew it had been raining before she left the Building but did not know for how long. She also knew it had also been snowing a few hours earlier and that, although the snow had not remained on the ground, conditions were slushy. In other words, she knew it was wet and slippery outside. She also knew it was dark outside. Armed with this knowledge, Ms. Rennie decided to wear her winter coat and a pair of flip flop sandals, the type one wears to the beach.

[20] The plaintiff's next choice involved how to exit the Building. There was no issue with her bringing Flynn inside the Building's elevator and out the Front Door, but she chose to use the Door, and ultimately the Path, because she found it was the quickest route for her to take Flynn outside to urinate and it gave him "an extra run". By choosing to exit the Building through the Door, the plaintiff was required to walk down flights of stairs to access it, which she did. She then went through the Door and walked down a few steps onto a concrete landing. Flynn was on a leash, which she held in her hand. It was dark and raining outside, as she had expected.

[21] The plaintiff now had a choice about where to take Flynn. Having taken the Path many times in the past, including the same day as the Incident, she knew that the paving stones did not extend all the way to the city sidewalk and that she would have to walk a short distance on the worn path to the sidewalk across the grass. She also knew about the existence of the shrubbery surrounding the Path, and that she may have to step off the paving stones in the location she ultimately fell.

[22] Having chosen to access the exterior of the Building by using the Door, once she was through the Door and outside, the plaintiff had two options. She could turn left and walk down a set of stairs to make her way to the parking lot, or she could turn right and take the Path across the front lawn. The Path and areas adjacent to it were well lit, so she preferred to take that route.

[23] The plaintiff proceeded to walk down the Path along the paving stones. Flynn was walking beside her, on her right-hand side. His leash was slack, and he was not pulling her. As she rounded a corner, she encountered shrubbery from a bush beside the Path that was encroaching on the Path. There are no photographs of how the bush or shrubbery appeared at the time, but the plaintiff estimated that it was grown about two feet further than how it appears in photographs taken some months after the Incident, that its foliage "feathered sort of over the brick" and that it was about waist-height.

[24] Now the plaintiff made another choice. She felt the shrubbery overhang impeded her forward progress on the paving stones, so she chose to step to the

right of the stones and onto the adjacent grass with her right foot. The topography had a gentle downward slope at this location. Her foot slipped on the wet grass and exposed dirt in that area, and she fell forward. She felt her right ankle “crack” as she fell to the ground. She was unable to walk, so sat on the ground until she was assisted back to her apartment by a passerby.

[25] The plaintiff is not aware of any witnesses to the Incident. She did not obtain the name or contact information of the passerby that assisted her.

[26] The plaintiff was paying attention to where she was walking before the Incident and the lighting in the area was good. She was not tired or rushed. While she had several alcoholic drinks that day, this was not unusual for her and she did not feel drunk, intoxicated or unsteady on her feet. She lost the sandals she had been wearing as they were left outside when she was carried to her apartment by the passerby. They were new, and the tread was not worn.

[27] The plaintiff routinely wore flip flop sandals when exiting the Building using the Door and walking on the Path. She had not experienced any issues when navigating the Path, including past the shrubbery and when stepping off the stones and onto the grass in her flip-flops before, including when she had previously been intoxicated, in the rain, and with snow on the ground. When asked if she had ever found the Path and the grass by the stones to be slippery when they were wet, the plaintiff never found the Path unsafe. Specifically, she testified:

> I never felt unsafe going out there, like, I’ve never felt – like, I’ve never slipped before. I never had an “oh” moment, I shouldn’t come this way, so no, I guess.

[28] Kanco and CAPREIT later removed the stepping stones from the Path, at a cost of $500. They did so because the Path served no purpose and removing it was a better way to keep people using the exits toward the parking lot and front of the Building.

[29] None of the defendants were aware of any complaints or concerns about any of the features of the Path (the stepping stones, the worn path on the grass leading

to the sidewalk and/or the shrubbery adjacent to it) constituting a hazard before the Incident. None of the defendants were aware of any falls on the Path in the two years before the Incident. Mr. Grebenar, who attended the Premises weekly for Earthscapes, had not seen the shrubbery grow outwards to the extent that it interfered with one's ability to walk on the stepping stones of the Path.

Legal Principles

[30] The plaintiff asserts claims in negligence and pursuant to the *OLA*.

[31] Section 3 of the *OLA* sets out the duty of care owed by occupiers to users of their premises:

> **Occupiers' duty of care**
>
> **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 the person's property, on the premises, and property on the premises of a person, whether or not that person personally 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.

[32] "Premises" is broadly defined in s. 1 as including land and/or structures, as well as ships, vessels, certain portable structures, and various transportation vehicles so long as they are not in operation. There is no issue that the Building and Premises meets this definition.

[33] Under s. 1, the *OLA* defines "occupier" as a person who "(a) is in physical possession of premises, or (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises". There may be more than one occupier under the *OLA*. None of the defendants deny they were "occupiers" of the Premises at the time of the Incident, and thus they owe users of the Premises a duty of care to ensure they are safe from an unreasonable risk of harm.

[34] The *OLA* does not, however, create a presumption of negligence whenever an injury occurs. Nor does the *OLA* require an occupier to "warn or protect against 'the ordinary risks arising out of the exigencies of everyday life'": *Choromanski v. Malaspina University College*, 2002 BCSC 771 at para. 42, citing *Malcolm v. British Columbia Transit*, 32 B.C.L.R. (2d) 317.

[35] It is the plaintiff's burden to prove, on a balance of probabilities, that the defendants breached their duty, and that this breach resulted in the injury or loss at issue: *Foley v. Imperial Oil Limited*, 2011 BCCA 262 at para. 30, citing *Kayser v. Park Royal Shopping Centre Limited*, 16 B.C.L.R. (3d) 220 (C.A.) at para. 13.

[36] The standard of care under the *OLA* is one of reasonableness, not perfection. In *Agar v. Weber*, 2014 BCCA 297 at para. 30, the Court held that the standard of care under the *OLA* is the same as at common law for negligence: "to protect others from an objectively unreasonable risk of harm. Whether a risk is reasonable or unreasonable is a question of fact." The Supreme Court of Canada similarly described the statutory test for the standard of care for occupier's liability as a "duty … to take reasonable care in the circumstances to make the premises safe": *Waldick v. Malcolm*, [1991] 2 S.C.R. 456 at 472.

[37] Where there is evidence of a *prima facie* breach of the *OLA*, an occupier may refute the breach by leading evidence that it had put into place a reasonable system of inspection and maintenance that was being followed at the time of the accident: *Anderson v. Hicks Enterprises Ltd.*, [1991] B.C.J. No. 3059.

[38] As for the test of negligence at common law, the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3 outlined the requirements a plaintiff must fulfill to succeed in an action for negligence:

1. that the defendant owed them a duty of care;

2. that the defendant's behaviour breached the standard of care;

3. that the plaintiff sustained damage; and

4. that the damage was caused, in fact and in law, by the defendant's breach.

[39] The first requirement concerns the relationship between the parties and whether it "is so close that the one may reasonably be said to owe the other a duty to take care not to injure the other": *Mustapha* at para. 4. These relationships may already be established by operation of statute, such as s. 3 of the *OLA*.

[40] As previously discussed, whether the defendant breached the standard of care is the same at common law as it is under the *OLA*. To reiterate, this second requirement under the negligence framework asks, based on the facts, whether the defendant failed "to protect others from an objectively unreasonable risk of harm": *Agar* at para. 30. In *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, the Court described the test for the standard of care in negligence claims as follows:

> [28] Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.
>
> [29] Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. See *R. in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. See, e.g., *Stewart v. Pettie*, [1995] 1 S.C.R. 131, at para. 36, and *Saskatchewan Wheat Pool*, at p. 225. By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability. See Linden, *supra*, at p. 219. Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

[41] On the third requirement, damage may be physical or mental. Mental injuries "must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely … accept": *Mustapha* at para. 9.

[42] The fourth and final requirement focuses on whether the defendant's breach of the standard of care caused the plaintiff's injury in fact and in law. Not only does the plaintiff need to factually connect the breach to their injury, but they must also show that the injury was a reasonably foreseeable consequence of the defendant's negligence: *Mustapha* at paras. 11–12.

[43] A plaintiff, having established the requisite elements for negligence, may nevertheless be found to have been contributorily negligent, as a plaintiff is "required to take reasonable care for [their] own safety": *Doucette v. McDaniel*, 2014 BCSC 42 at para. 22. The burden of proof lies with the defendant to establish contributory negligence: *Doucette* at para. 22.

Issues

[44] I turn now to the issues to be determined:

1. Has the plaintiff established that the Path, encroached upon by overhanging shrubbery, constituted an objectively unreasonable risk of harm to its users?

2. If so, has the plaintiff established that the defendants breached their duty of care by failing to keep the Path free from encroachment?

3. If so, did the defendants' breach of their duty of care cause the Incident?

4. If the plaintiff has established fault against any of the defendants, to what degree, if any, have the defendants established the plaintiff was contributorily negligent?

[45] In my view, this case is decided on the first question.

1. Has the plaintiff established that the Path, encroached upon by overhanging shrubbery, constituted an objectively unreasonable risk of harm to its users?

[46] The plaintiff submits that she has established that the Path, obstructed by the overhanging shrubbery as it was, presented an objectively unreasonable risk of harm to those that used it. She argues that users of the Premises were invited to walk along the Path by virtue of the stepping stones placed along it. Yet, the Path was also obstructed by overgrown vegetation, which forced its users to detour off the stones every time they used it and onto the grass in the area of the encroachment. She argues that the defendants knew users of the Premises walked along the Path. They inspected it every week. The portion of the Path with the encroaching vegetation showed wear in the grass beside the stepping stones, evidencing that users had been stepping off the stones to avoid the vegetation.

[47] The plaintiff also highlights other circumstances that not only invited users to walk along the Path, but effectively forced those residents exiting the Building from the Door to use it if they wanted to access the street. She says that because the Door locked from the inside, once outside users like herself were outside the Door, they had no choice but to go forward. Once outside the Door, her options were to proceed left towards a poorly lit stairwell that led to the parking lot behind the Building, or to proceed right along the Path to access the street. In other words, she says that the defendants created a situation where residents of the Building who used the Door, which was the closest exit to her apartment, and who intended to leave the Premises, had no good option but to carry on down the Path once they had left the Door. Well lit and initially appearing reasonably safe, she was faced with a hazard – overgrown vegetation – which forced her to leave the stepping stones and step onto the potentially wet and slippery grass.

[48] The plaintiff submits that the hazard constituted by the overgrown vegetation on the Path was present every time she used the Path after inclement weather, and it was merely fortuitous that a slip and fall did not occur earlier. In all these circumstances, she says she has established that the risk of harm created by the

overgrown Path was objectively unreasonable, giving rise to a breach of the duty of care by all defendants in this case.

[49] The defendants disagree. They submit the plaintiff has failed to establish that there was an objectively unreasonable risk of harm from any and all of the conditions of the Path giving rise to a breach of the duty of care in this case. I agree with their position. The evidence is insufficient to establish that the Path as a whole, or any of its individual components – the paving stones, the wet grass and/or the overhanging shrubbery – constituted an objectively unreasonable risk of harm in the circumstances.

[50] There is limited evidence about the paving stones that comprised much of the Path before the court. The photographs are of poor quality. Other than the basic information these photographs provide, there is no evidence that would allow me to determine the size of the paving stones, the distances between them, or their dimensions. I can see from the photographs that the paving stones are rectangular in shape and there is a small space between each of them. The spacing appears uniform. While determining their precise material is impossible on the evidence (the plaintiff says different things on this topic – stone, concrete, brick), from the photographs I can comfortably find that they appear even and in good shape.

[51] There is no evidence to suggest that the paving stones used in the Path were inappropriate, unsafe, unsuitable, or even out of the ordinary for the application for which they were used. I am satisfied the paving stones and their placement did not pose an objectively unreasonable risk of harm for users of the Path.

[52] The ground on either side of the paving stones, and between where the paving stones ended and the sidewalk, consists of grass. However, many areas of this grass are what I would characterize as “patchy” – areas of grass intermingled with areas of mixed grass and exposed dirt. These patchy areas existed on either side of the paving stones all along the Path, in the part of the Path from where the paving stones ended to the sidewalk, and other areas of the lawn as well.

[53] The plaintiff knew that these grassy areas could get very wet and muddy. She expected, from her prior use of the Path, that she would have to walk on these wet and slushy grassy and patchy areas, in flip flop sandals, at some point during her walk with Flynn. There is nothing in the evidence to suggest that the area where the plaintiff stepped that night was different than any other area on the lawn. This was Victoria, in the winter. It had been raining and snowing that day, and it was raining at the time of the Incident. The plaintiff expected to step on the wet, slippery and muddy lawn. There was no unexpected or unknown substance on the ground where she stepped. Unlike the situation in *Ramos v. South Coast British Columbia Transportation Authority*, 2023 BCSC 966, a case relied upon by the plaintiff, there was no obscured or hidden defect or condition on the Path, or on the ground where she stepped. In all these circumstances, I find that the ground where the plaintiff stepped did not constitute an objectively unreasonable risk of harm.

[54] I turn now to the overhanging shrubbery. The plaintiff asks me to find the encroaching shrubbery created an unseen hazard because it forced users like the plaintiff to step from the paving stones onto potentially wet grass every time they used the Path after inclement weather. The evidence, considered as a whole, does not support such a finding.

[55] I will first determine the nature and extent of the encroachment alleged by the plaintiff. Determining these facts with any precision has been very difficult on the evidence that has been tendered. Unlike in some of the authorities relied upon by the plaintiff, she has tendered no photographs of how the encroaching shrubbery appeared at the time of the Incident. She has tendered no drawings, measurements, or opinion evidence that might assist in interpreting the evidence that has been tendered.

[56] I have been provided with a collection of photographs of the Path and surrounding area that were taken more than two months after the Incident. The quality of the photographs is quite poor, and they were taken after the shrubbery in issue was trimmed back. Other than the state of shrubbery at issue, I am satisfied

from the plaintiff's evidence that the photographs show the Path in a condition similar to how it was that night – trimmed, neat, and tidy.

[57] Without photographs showing how the shrubbery appeared at the time of the Incident, evidence about the nature and extent of the encroachment comes from two main sources – the plaintiff and Mr. Grebenar.

[58] The plaintiff's evidence in this regard is quite general. She refers to the vegetation variously as a bush, a tree, a shrub, or a "weeping willow". I have referred to it as "shrubbery" for ease of reference. She describes the encroachment of this shrubbery as follows: the overgrowth from it was "out and over" the Path; it "blocked" her path; it was about waist height (she is about five feet, three inches tall); it was "maybe two feet" wider than it appears in the photograph; and that it came out to right over the shoe depicted in photograph 7. Leaving aside the difficulty I have seeing the shoe in the photograph, the absence of any measurements or something that could provide me with a scale of reference, makes assessing and determining the implications of these descriptors on the degree of encroachment on the Path quite difficult.

[59] Mr. Grebenar's evidence provides some assistance. He was on the Premises weekly and had not seen the shrubbery along the Path grow outwards to the extent that it interfered with one's ability to walk on the stepping stones of the Path. This suggests that he had seen some shrubbery along the Path grow outward and over the Path, but not to the degree or extent that it completely blocked the Path and required a user to step off the stones in order to continue moving forward.

[60] Adding to the challenge is the minimal evidence that has been tendered about the type of shrubbery and its foliage. I can see what the trimmed back shrubbery looks like from the photographs, but its specific type and growth is not identified in the evidence (other than Mr. Grebenar's educated guess that it is a "weeping blue cedar" of some kind). As well, other than the plaintiff's description of "feathered" over the paving stones and Mr. Grebenar's evidence that it "grows down" rather than up, there is no meaningful evidence about the nature of the foliage associated to this

shrubbery. From the photographs, which show the shrubbery cut back months later, it is not at all clear the degree to which any overhanging foliage from it would have been an impediment to a user of the Path interacting with it.

[61] The plaintiff has tendered no evidence from any other users of the Path. Rather, she asks me to infer, from the presence of mixed grass and exposed dirt in the location where she stepped, that the encroachment was so complete that users were forced to step off the Path in that location in response to the overgrown vegetation every time they used it. There are two difficulties in drawing such an inference from this evidence. First, as I have described, the photographs show there are many other similar looking areas throughout the lawn itself, as well along either side of the paving stones throughout the course of the Path. In other words, the degradation of the grass in the area where the plaintiff stepped off the paving stones is not unique to that area of the lawn. Second, the evidence of Mr. Grebenar runs counter to the inference the plaintiff asks me to draw. He was present at the Premises at least weekly and did not recall seeing any shrubbery along the Path extending across it to the point where it precluded a user from continuing on the Path, and thus forcing them to step onto the grass.

[62] Doing the best with the evidence I have been given, I find it is likely that the shrubbery at issue extended somewhat over the paving stones, a few feet off the ground, at the time of the Incident. Given the nature of the foliage and its modest encroachment over the Path, I find it is likely that a user, including the plaintiff, could have easily used their arm to move it aside to continue walking down along the paving stones. I accept that the plaintiff chose to step off the Path because of the overhanging shrubbery, but the evidence does not support a finding that the encroachment by the vegetation was such that she, and all other users of the Path, were forced to do this every time they used it. I find the presence of the shrubbery encroaching on the Path in all of these circumstances did not constitute an objectively unreasonable risk of harm.

[63] While only a factor and not determinative, this finding is also supported by the fact that the plaintiff, and others, routinely used the Path as a passageway, despite the modestly overhanging shrubbery. The plaintiff used it many times, including two times on the day of the Incident. She had previously stepped off the Path and onto the grass at the location of the shrubbery in the same conditions present at the time of the Incident – same footwear, rain, snow, and after consuming intoxicants. In other words, there were no conditions at the time of the Incident that were different than the conditions she routinely experienced on the Path and the grassy area adjacent to it. The fact that the plaintiff and others were routinely using this area and bypassing any foliage supports a finding that it did not present as an objectively unreasonable risk of harm and that persons could use the Path absent concern or need to alter their course of travel because of the overgrown, feathered foliage. If the plaintiff viewed the Path and its surrounding shrubbery as an objectively unreasonable risk of harm, she would not have repeatedly navigated this same area in flip flop sandals, when it was raining, when it was snowing and after she had consumed intoxicants. Indeed, the plaintiff's evidence was clear that in all the times she had previously used the Path, often under the same conditions as at the time of the Incident, she never once found it to be unsafe or had any concerns about it being a hazard.

[64] The defendants' evidence also supports a finding that the shrubbery encroaching on the Path and its surrounding area did not pose an objectively unreasonable risk of harm.

[65] Representatives of the defendants were frequently at the Premises. Neither of them received any complaints reporting concerns about the Path constituting a hazard. They received no reports of any falls in the two years before the Incident. Mr. Grebenar was present at the Premises at least weekly and did not recall seeing any shrubbery along the Path extending across it to the point where it precluded a user from continuing on the Path. As well, there is no evidence from any other users of the Path at that time suggesting that they may have viewed the Path, or any of its features such as any overhanging shrubbery, as a hazard.

[66] Rather, the plaintiff relies upon her interpretation of features of the evidence of Mr. Grebenar and Mr. Rombough to support her position. Specifically, she points to Mr. Grebenar's evidence when he said, "enter at your own risk" when asked about the Path, and to the time Mr. Rombough said, "[i]t does look like something that we should've identified".

[67] I agree with the defendants' position that the plaintiff has inadvertently misstated the evidence of both of these witnesses. Viewed in their proper context, I find these two statements do not support the plaintiff's position.

[68] The question posed to Mr. Grebenar that led him to quip, "enter at your own risk" did not arise in the context of questioning related to maintenance of the Path and its surrounding shrubbery. Rather, it arose in relation to questioning about the scope of Earthscapes' responsibilities, and whether he actually thought of that area as a pathway.

[69] Similarly, viewed in its proper context, Mr. Rombough's testimony that "[i]t does look like something that we should've identified" does not assist the plaintiff's position. Mr. Rombough did not make this statement in relation to the area where the plaintiff stepped off the Path or in relation to any foliage encroaching on the Path. His statement occurred in the context of a discussion about the paving stones, and then about whether he would notice that the stones looked like they disappeared under the grass. In other words, Mr. Rombough was not being asked about the area the plaintiff claims posed an objectively unreasonable risk of harm when he gave that answer. He was being asked about the area further down the Path – the area where the stones end (and appear to disappear under the grass) and users are required to walk across the lawn to reach the sidewalk. He was referred to photographs during this time of his questioning that did not depict any encroaching shrubbery. Therefore, viewed in its proper context, Mr. Rombough's testimony that "it does look like something that we should've identified" was not given in relation to the area of the Path and the encroachment the plaintiff claims posed an objectively unreasonable risk of harm.

[70] Moreover, I also agree with the defendants that it is unclear from the transcript of Mr. Rombough's evidence whether, how, or even if, this statement relates to a potential hazard or concern of any of the defendants. Although it is clear he was not referring to the area where the plaintiff stepped off the paving stones or any encroaching shrubbery, the absence of any clarifying questions leaves his answer quite ambiguous. I am unclear about what Mr. Rombough is referring to when he said, "it does look like something that we should've identified". Does "it" refer to the paving stones in the area near where they end, the length of grass next to or in between them, or the absence of paving stones in that area? In any event, this ambiguity is immaterial because I am satisfied that Mr. Rombough's evidence was not in reference to the area the plaintiff claims presented an objectively unreasonable risk of harm.

[71] In the end result, I am not satisfied that the Path as a whole, or any of its features – the paving stones, the wet and slippery ground, and the overhanging shrubbery – either individually or collectively posed an objectively unreasonable risk of harm to users of the Path, including the plaintiff.

[72] In the event it could be found there was some risk of harm created by the modestly overhanging shrubbery on this Path, I would consider this an ordinary risk arising out of the exigencies of everyday life. There are a number of facts that support this conclusion.

[73] The area in question was well lit. The plaintiff was very familiar with the Path and had walked it repeatedly, including on the day of the Incident. There was nothing unusual or out of the ordinary about the paving stone pathway from what one would expect to have on a property when embedded within a grass lawn. There was nothing unusual or out of the ordinary about a modestly overgrown shrub over a paving stone pathway from what one would expect to see on any commercial premises in British Columbia.

[74] As well, the plaintiff was aware of the weather conditions and the effect they would have on the ground around the Path. She was aware that it was raining when

she left her home and was aware that it had snowed earlier in the day as well. She knew the grass would be wet, slushy, and slippery. She also knew that the grass was patchy in places, including the area where she stepped off the Path, and that it could be muddy as well. She also knew that if she used the Path, she would have to walk on the grass in these conditions, at least after the paving stones ended, and intended to do so. The plaintiff also knew she had other reasonable options, alternative routes she could have used, that were readily available to her to take Flynn outside, such as using the Front Door, which would have provided her a concrete walkway to use to exit and enter the Building.

[75] I also consider that once the plaintiff chose to take the route she did to exit the Building and then chose to take Flynn along the Path, nothing precluded her from stopping and changing courses when she encountered the foliage from the shrubbery. She could have decided to select another route, or she could have decided to move it aside with her arm and continue walking on the paving stones. In other words, like the route she chose, the plaintiff had reasonable alternatives to stepping onto the ground that she knew was wet and slippery.

[76] To the extent the plaintiff is asserting that the defendants had a duty to warn her about the nature of the Path, the shrubbery and/or the area surrounding it, I am satisfied they had no such obligation here. There was no need to warn the plaintiff that she might have to walk on the grass or that the grass might be slippery in the rain. To the extent it could be found that modestly overgrown shrubbery and wet grass could constitute a risk, I find that it was no more a risk than an exigency of everyday life that people deal with routinely.

[77] In the end result, I find there was no objectively unreasonable risk of harm created by the overhanging shrubbery along the Path and that none of the defendants breached their duty of care to the plaintiff in this case. The plaintiff's claim is dismissed.

[78] If the parties are unable to agree on the issue of costs, they may file written submissions on a timetable of their choosing, but with an outside date no longer than 90 days following the date of this judgment.

"S.A. Donegan J."

DONEGAN J.