

*obstruction on sidewalk*  
Date: 19970411  
Docket: C960121  
Registry: Vancouver

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Oral Reasons for Judgment  
Mr. Justice Melvin  
Pronounced in Chambers  
April 11, 1997

BETWEEN:

**LUKE AAS**

**PLAINTIFF**

AND:

**THE CORPORATION OF THE CITY OF NEW WESTMINSTER  
and KHALSA DIWAN SOCIETY - NEW WESTMINSTER,  
SANSCO MANAGEMENT LTD., SANSCO MANAGEMENT (1988) LTD.,  
JOHN DOE #1 and JOHN DOE #2**

**DEFENDANTS**

AND:

**KHALSA DIWAN SOCIETY - NEW WESTMINSTER,  
SANSCO MANAGEMENT LTD., SANSCO MANAGEMENT (1988) LTD.,  
JOHN DOE #1 and JOHN DOE #2**

**THIRD PARTIES**

Counsel for the Plaintiff:

Anthony Wooster

Counsel for the Defendant:

David T. McKnight

Counsel for Khalsa Diwan Society:

Leanne Wood

Counsel for Sansco Management Ltd. and  
Sansco Management (1988) Ltd.:

John A. Campbell

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[1] **THE COURT:** The plaintiff was injured as a result of the operation of his bicycle on a sidewalk on Wood Street. He was heading northbound, according to the material that has been brought to the attention of the court, and he was operating his bicycle, it would appear, in a usual fashion, on the sidewalk which was owned and occupied by the City of New Westminster.

[2] The issue is of course not only the fact that he was injured, but the issue as it relates to the duty of care, if any, owed by any of the defendants, and whether or not those defendants were in breach of the duty of care owed to the plaintiff.

[3] In so far as the circumstances surrounding the accident are concerned, it would appear that while operating his bicycle, he struck a metal object which was located off the travelled portion of the concrete sidewalk. It was perhaps a foot from the edge of the concrete sidewalk, according to one of the witnesses, depending on one's view of the photographs of the location of this metal object perhaps somewhat closer.

[4] In any event in the process of riding his bicycle along the concrete sidewalk, the plaintiff in the pedalling motion, as I understand the evidence, struck the metal object and was injured in the area of his foot. The injury was of some significance. He has claimed against the City of New Westminster, as the owner and occupier of the land in which the

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sidewalk was located, and he has claimed against the Khalsa Diwan Society - New Westminster, on the basis that they are owners of property which was adjacent to the City owned property, and there is a claim against the two corporate defendants, Sansco, on the basis that there may be some evidence that they left, in the course of some earlier construction, the object in the area on the grass on what I will call the "boulevard".

[5] Insofar as the two corporate defendants are concerned, I will not deal with their position, as there is no formal application before the court on behalf of either the plaintiff or for that matter on behalf of those two corporate defendants, under 18A or any other rule, to seek relief. I may in the course of (inaudible)... touch on their position briefly, but I think under the circumstances it would be inappropriate for me to make any ruling.

[6] Insofar as the Corporation of the City of New Westminster is concerned, I have no hesitation in concluding that they were occupier within the meaning of the *Occupiers Liability Act*. The issue is not whether or not they owe a duty of care. They do in fact owe a duty of care to users of their property, including their sidewalks. The question arises as to whether or not they have a policy in place which is economically driven which would be a justified policy concerning the inspection of the City owned properties, which may on the basis of the

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authorities touched on by counsel exempt them otherwise from (inaudible)... liability. Their policy is set forth in Mr. Day's affidavit, the engineering technologist for the City of New Westminster, and reading in part from that affidavit at paragraph 6:

The City of New Westminster undertakes the inspection and maintenance of designated areas with respect to removal of ice and snow. In 1995 the policy of New Westminster with respect to the removal of rubbish and foreign objects from boulevards or sidewalks owned by the City was as follows:

- (a) Sidewalks and boulevards adjacent to private property were not cleared by City crews;

[The sidewalks and boulevards here I think one could conclude were adjacent to private property.]

- (b) Sidewalks and boulevards adjacent to City owned property were cleared by City crews; and
- (c) City crews did not inspect sidewalks and boulevards in residentially zoned areas. If the City received a complaint regarding the maintenance or inspection of a sidewalk or boulevard, City employees were instructed to inspect the subject area and take appropriate steps to either advise the adjacent owner/occupier of his or her duties under the bylaw, or to take remedial steps to clear the sidewalks.

[7] In furtherance, Mr. Day at paragraph 9 states:

In addition to advising property owners and occupants of the requirements of the bylaw through publication of the section 506 notice in the local newspapers, [section 506 being the pertinent section of the bylaw under consideration] as part of their regular duties City crews are instructed to note any uncleared sidewalks or boulevards and report those to the

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property maintenance foreman or designated employee. The property maintenance foreman will then deliver a notice to the occupant of the property adjacent to the uncleared sidewalk or boulevard advising the occupant of his or her responsibility under the bylaw.

[8] In addition, the City keeps records of complaints concerning accidents or incidents with reference to items being located on the property such as sidewalk or boulevard. There are no complaints or record of any incident with reference to this particular section of Wood Street in the City of New Westminster, and as Mr. Day testifies in paragraph 12:

Prior to the plaintiff's accident, there are no complaints regarding the existence of rubbish or foreign substances or objects on the sidewalk or boulevard at or near Wood Street in the City of New Westminster. Further, prior to the plaintiff's accident there are no complaints regarding any accidents as a result of any rubbish or foreign objects at or near the sidewalk on Wood Street in the City of New Westminster.

[9] Consequently, based on that approach to its obligations as occupier, using that expression advisedly, the City had nothing that occurred which would cause them to trigger an inspection of the premises to determine whether or not there was rubbish or objects on the sidewalk or boulevard which may have created a hazard, or may have created difficulty for the users on those premises. Consequently, the City did nothing, so far as any inspection of Wood Street was concerned. In addition to what I have read from Mr. Day's affidavit, the City has gone somewhat further with reference to the obligation to maintain clear

sidewalks and has passed the bylaw which is under consideration. The bylaw provides in s. 506:

A person being the owner or occupier of real property shall remove snow, ice, and rubbish from any sidewalk and foot path bordering that person's real property and from the roof and other part of a structure adjacent to or abutting on any portion of the street, not later than 10:00 a.m. of the day after the snow, ice or rubbish was deposited thereon.

[10] So snow, ice and rubbish are to be removed by the owner or occupier of real property which is bordering the sidewalk. The question then of the case at bar is of course "the effectiveness" of that bylaw, insofar as the owner of the property was concerned, the Diwan Society.

[11] Leaving that issue for the moment, it is clear then that the municipality took steps with reference to its own property, had a method of recording complaints, had a method of dealing with complaints and had, as it said in other aspects of Mr. Day's affidavit, a system whereby members of its staff who made observation of incidents or objects on sidewalks or City property could take steps to remove it. Nothing was done further than that in relation to the case at bar.

[12] The question then arises as to whether or not they are exempt from liability as a result of the policy decisions that they made. In that respect, I am not going to refer to a number of the authorities that counsel have, but it is clear from the *Just* decision and the *Brown* decision that the Supreme

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Court of Canada had dealt with these matters. The Supreme Court of Canada has made it clear from *Just*, the need for distinguishing between a governmental policy decision and its operational implementation. True policy decisions, according to Mr. Justice Cory's decision in *Just*, should be exempt from tortious claims, so that governments are not restricted in making decisions based on social, political or economic factors.

[13] There is in the case at bar evidence that there was a budget for of the City of New Westminster for sidewalk matters. My recollection is approximately \$100,000 for this purpose. The council does pass a budget annually. The details of the budget are in the material before the court: the breakdown of the source of funds from residential taxation; industrial taxation; and demonstrated in the material the utilization of those funds for various responsibilities of the corporation.

[14] In my view, they have demonstrated sufficient evidence for this court that what has occurred is a true policy decision in the language of *Just*, and if I may (inaudible)... portion of the language of Chief Justice Esson in that respect, his decision in *Short v. New Westminster Rotary Senior Citizen's Housing Society and City of New Westminster* where he states, with reference to an earlier decision of Mr. Justice Preston, and he adopts Mr. Justice Preston's quote:

I am satisfied that the steps taken by Dawson Creek were reasonable and discharge was speedy under the *Occupiers Liability Act*. I am satisfied further that the plaintiff is precluded, as a matter of law, from recovering against Dawson Creek in view of its policy decision which was reasonable in the circumstances to delegate responsibilities to property owners and occupiers and not to maintain an inspection program.

[15] In this respect, in my view, I adopt that language and I note Chief Justice Esson then went further in relation to the case I referred to and stated:

The only difference on the facts here is that the City of New Westminster does maintain a limited inspection program with respect to certain areas, but not the area in question here.

And he states:

I am bound by that decision [referring to Mr. Justice Preston] with which in any event I agree.

[16] I adopt that language, applying it to the case at bar, and the language of the Supreme Court of Canada in *Just v. British Columbia*. In my view the policy decision is a true policy decision. It is not an operational implementation. Consequently, the plaintiff's action against New Westminster is dismissed.

[17] With reference to the Diwan Society, the argument is advanced two-part: (1), that the provision of the bylaw may have transferred obligation to Diwan to maintain the sidewalk in question, and (2), there may be an obligation, under s. 508 of the bylaw, to cut grass and weeds on the boulevard abutting

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that owner's property. There is no doubt the property in question was not occupied by Diwan Society. It was not an owner of the property, nor was it an occupier. It does have an obligation according to s. 506 to remove snow, ice and rubbish from sidewalks bordering that person's real property, and I note, in the case at bar, within the definitions of "sidewalk" and the definitions of "boulevard", and the existence of 6 metres of City property between the edge of the concrete sidewalk and the Diwan Society property, that this sidewalk could not under those circumstances be considered to be bordering the Diwan Society's real property.

[18] Number two, that the other obligation concerning cutting grass and weeds, insofar as it may be argued that the grass and weeds might have obstructed the view of a user of the grassy area of the existence of piece of metal or for that matter the plaintiff's inability to see it in operating his bicycle close to the edge of the sidewalk, in my view the effective cause of the contact between the plaintiff and the piece of metal was not and cannot be related to the failure to cut grass and weeds on the boulevard, as one looks at the photographs demonstrating how obvious the item is. I realize there is evidence from witnesses who said that they had not seen it previously. I realize the plaintiff did not see it previously. One witness did, however, in her affidavit depose that she had seen it approximately three or four months prior. Nevertheless, when one looks at the photograph, it is not a hidden hazard in any

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shape or form of that expression. Consequently, in my view, one cannot make a causal link between the failure to cut grass or remove weeds, and the cause of action that is claimed by this particular plaintiff.

[19] In addition, I note in the decision in *Gardener* (B.C.C.A.) 19 B.C.L.R. (3d) that the court adopted a statement by the trial court - the bylaw is applicable to the owner of the property not the property itself. As well, it has been held that the failure to comply with the municipal snow clearing bylaw does not render an owner civilly or liable to third parties. Consequently the failure to comply with s. 506, s. 508 of the bylaw would not render the Diwan Society liable to the plaintiff for the injuries that the plaintiff has sustained.

[20] Mr. Wooster says his client has fallen between two stools, and it may very well be true. There can be no liability on the Diwan Society at common law, by virtue of the fact that they are not owners or occupiers of the piece of property on which the metal was found which caused the injury to the plaintiff. As far as the corporate defendant is concerned, that is the municipal corporation, as I said earlier, the distinguishing feature here is that there was a governmental policy decision, it was a true policy decision based on the economic factors. And I am satisfied, that there is sufficient evidence to demonstrate that the policy decision was based on economic

factors. Consequently, the City of New Westminster is exempt from liability under all the circumstances.

[21] There was not, in this instance, a failure to carry out its policies in an appropriate fashion. They adopted the policy and they acted in accordance with that policy, and the policy had good economic considerations for its existence. Consequently, the action against the Corporation of the City of New Westminster and the Diwan Society is dismissed.

[22] I can say nothing, as I said, about Sansco Management Ltd. or Sansco Management (1988) Ltd., as there is no formal motion before the court. But unless there is some evidence from which a court can conclude that these people left that item there, and as a result of that, in some way, shape or form were negligent and a duty of care arose thereby, in favour of the plaintiff, it seems to me that ultimately the action against Sansco is likely to fail as well.

[23] I think under the circumstances there should only be one set of costs on scale 3 in favour of the two defendants against whom the action was commenced.

"F. A. Melvin, J."  
The Honourable Mr. Justice Melvin