Date: 19980908
Docket: C973273
Registry: VANCOUVER

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DOREEN EINARSON, formerly known as DOREEN ROSE

PLAINTIFF

AND:

CITY OF RICHMOND

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE T.M. McEWAN

Counsel for the Plaintiff:	A. TED EWACHNIUK
Counsel for the Defendant:	JAMES D. COTTER
Place and Date of Hearing:	VANCOUVER, B.C. AUGUST 28, 1998

[1] On January 13, 1997, Doreen Einarson, a 63 year old woman, was walking on a sidewalk on 7th Avenue in Steveston, when she tripped and suffered injuries to her arm and shoulder. She had stumbled on an uneven joint between two of the concrete slabs in the sidewalk. The evidence is that the difference in elevation between the slabs was about half an inch. The accident occurred at about 5:30 p.m. The weather was not a factor.

[2] Ms. Einarson's cause of action against the City of Richmond is outlined in her Statement of Claim in the following terms:

> The accident of the 13th day of January, 1997, was caused as a result of the negligence and/or nuisance of the Defendant, CITY OF RICHMOND, particulars of which are as follows:-
>
> (a) in leaving the said sidewalk/roadway area in a state of disrepair;
> (b) in failing to post any kind of warning signs of the danger and hazard that existed;
> (c) in failing to take any or any adequate or timely measures to improve and repair the said sidewalk/roadway area so as to make it reasonably safe for persons using that area when it knew or ought to have known that it was in a dangerous or hazardous condition;
> (d) in allowing the Plaintiff to proceed in an area which she was proceeding in when the Defendant knew or ought to have known that a hazard existed;
> (e) in knowing or ought to have known that a hazard in the nature of an uneven and/or protruding and/or hidden layer of sidewalk/roadway existed and continued to exist;

(f) in not making arrangements to warn persons and, in particular, the Plaintiff of the existence of a hazard when the Defendant knew or ought to have known that a hazard existed;
(g) in not blocking off the said area and stopping persons and, in particular, the Plaintiff from using that area when the Defendant knew or ought to have known that a hazard existed;
(h) in failing to make arrangements to have the said area a safe pathway for persons and, in particular, the Plaintiff;
(i) in creating a dangerous situation that invited passersby to use the said sidewalk/roadway, such as the Plaintiff did herein, when it knew or ought to have known that a dangerous situation existed;
(j) in creating a dangerous situation which served as a trap to the Plaintiff;
(k) in permitting a situation that could best be described as a trap;
(l) and such further and other particulars of negligence and/or nuisance as Counsel may advise.

[3] The City responds to this by pleading that Ms. Einarson failed to take reasonable care for her own safety. It also pleads that the City had, at the time of the accident, a "reasonable policy of sidewalk repair" which was carried out "properly and without negligence".

[4] In submission, counsel for Ms. Einarson argued that this court should not lightly interfere with her right to be tried by a jury by determining the matter on a summary basis. He also argued that she should be allowed to try the issue as to whether, in fact, the gap in the sidewalk in this case was a "hazard" or a "trap", and to explore whether the so-called

"policy" defence is really so driven by economic considerations, that it does not reflect a proper consideration of what is reasonable relative to foreseeable risks of harm. Counsel spoke of a field called "safety engineering" in reference to the latter argument, although he had not developed such evidence, and was not seeking an opportunity, by way of adjournment, to do so.

[5] Under the principles set down by the Chief Justice in ***Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*** (1989), 36 B.C.L.R. (2d) 202 at pp. 214-15, a chambers judge is obliged to rule if he or she can find the facts as a judge would at trial, unless to do so would be unjust. Rule 18A(16) makes it clear that the filing of a jury notice does not constitute an impediment to a hearing under this rule.

[6] On the facts, there is no dispute as to what occurred. Ms. Einarson's argument proceeds on the basis that the discrepancy in the sidewalk elevations was a hazard or a trap, not so much in the sense that it was hidden, but apparently because it was so small a difference as to be imperceptible to a person exercising ordinary care. Counsel argued from the photographs in evidence that a nearby street light, casting directly down on the crack, would have allowed for very little shadow, increasing Ms. Einarson's difficulty in perceiving the danger.

[7] It is undisputed that the City has had a policy since 1975 of investigating every complaint by the public or city employees respecting sidewalks within 48 hours of notice. If sidewalk panels are "out" three-quarters of an inch or more, the City classifies them as hazardous. The City will not otherwise repair small discrepancies unless it is convenient to do so.

[8] The evidence is that there had been no complaints to the City about the particular sidewalk in question. Ms. Einarson had personally been over that area of sidewalk perhaps ten times and had never noticed any unevenness or experienced any difficulty. Even following an inspection after the incident, the City did not repair the discrepancy, because it did not consider the gap to be a hazard.

[9] The evidence of the Manager of Trades for the City was that studies respecting a scheduled inspection programme proved it to be prohibitively expensive. He deposed that, for that reason, a policy decision was made to leave the existing system of "on demand" inspection in place.

[10] The duty of a city respecting its sidewalks is briefly stated in ***Stojadinov v. Hamilton (City)*** (1988), 41 M.P.L.R. 185 (Ont.H.C.) at p. 191,per MacFarland, J.:

> The duty of the municipality is to keep the sidewalks in repair, which is to say, in such a condition that a person using ordinary care for his or her own safety can pass along it in safety. In my view it would be requiring the impossible or a municipality to require that it maintain all its sidewalks at a perfect level. As has been said in these cases over the years, it does not follow because an accident happens that a sidewalk is necessarily in a state of non-repair.

[11] It is not necessarily unreasonable for a city to have a policy that it will not provide scheduled inspections of sidewalks, if a *bona fide* policy decision has been made that certain hazards fall below a threshold established for budgetary or manpower considerations. Unless it can be shown that the threshold is irresponsibly high or arbitrary, the mere fact that there are no inspections will not lead to an inference of negligence [***Oser v. Nelson (City)*** Dec. 3, 1997, No. 4375 Nelson Registry].

[12] The issue amounts to whether the three-quarter inch threshold was reasonable. No evidence has been led to suggest that a half to three-quarter inch gap or discrepancy is so obviously hazardous that the standard adopted by the City was unreasonable. As I have said, the subtlety of the crack seemed to be part of Ms. Einarson's complaint. In ***Pamaran v. Victoria (City)*** (1996), 32 M.P.L.R. (2d) 243 (B.C.S.C.), this court had occasion to consider a municipal policy involving a 35 mm or 1 and 1/4 inch threshold. The court held that the adoption of this policy was a consequence of a *bona fide* attempt to balance

financial considerations against the need to repair the physical infrastructure of the City. In dismissing the plaintiff's action, Taylor, J. noted at p. 249, that:

> Such displacements of sidewalks are common and the real issue in this case is to what extent they must be tolerated as a part of urban life as a matter of policy, by which a municipality sets the parameters of their state of repair and thus excludes itself from liability to those who might injure themselves using them.

[13] Here, weighing the plaintiff's case and that of the defendant, I am unable to find that the plaintiff has carried the burden of demonstrating negligence or nuisance on the part of the City. It has not been shown that the discrepancy in the sidewalk was a hazard to any person using an ordinary degree of care in the circumstances, or that the City was in a better position than the plaintiff to assess the risk. Moreover, it has not been shown that even if it were, the policy threshold set by the City was unreasonable or arbitrary such that it would not stand in the way of the plaintiff's recovery in any event.

[14] Accordingly, this action is dismissed with costs.

"Mr. Justice T.M. McEwan"