Date of Release: July 2, 1993

NO. C901196
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: ADA GAW PLAINTIFF AND: PORTE INDUSTRIES LTD., PARAMOUNT INDUSTRIES LTD., PARAMOUNT FURNITURE STORE, JAPONICA LANDSCAPING & NURSERIES LIMITED, THE CORPORATION OF THE TOWNSHIP OF RICHMOND, INTER-CITY CLAIM SERVICE LTD. and NEIL McLEOD DEFENDANTS	**REASONS FOR JUDGMENT** **OF THE HONOURABLE** **MADAM JUSTICE KIRKPATRICK**

Counsel for the plaintiff: Brian Schreiber

Counsel for the defendant
Porte Industries Ltd.: Gillian Dougans

Counsel for the defendant
Japonica Landscaping & Nurseries Limited: Robyn Hamilton

Counsel for The Corporation of the
Township of Richmond: Donald J. Smith

Dates and place of trial: June 21 and 22, 1993
at New Westminster, B.C.

On July 18, 1988, the plaintiff, Ada Gaw, went shopping with her sister-in-law, Ellie Hendriks. They were looking for teak furniture. They knew there was a collection of stores on Minoru

Boulevard in Richmond which sold furniture. They parked their car in a parking lot adjacent to Westway Clothing, thinking that they could leave the car there and travel on foot to look at the other stores in the vicinity. They spent a few minutes in Westway Clothing and then set off to look for furniture in Paramount Furniture Store ("Paramount") which is located to the south of Westway Clothing.

Paramount has a parking lot on the south side of the store. The store faces west onto Minoru Boulevard. The driveway adjacent to Westway is to the north of the property on which the Paramount store is located. There is a grassy expanse stretching from the road curb to the store along the west side of the store. There is no sidewalk or formal pathway over the grassy area leading to the store's entrance on the southeast corner of the store. As Mrs. Gaw stepped from the driveway to the grass, she stepped into a post hole. The hole was about two feet deep and was covered by grass. The hole was situated about four or five feet from the curb and a few inches from the driveway adjacent to Westway. She suffered injuries. Damages are agreed to be $20,000. Liability for the accident is in issue.

Mrs. Gaw testified that on the day of the accident she was wearing comfortable clothing and flat shoes. She wears eyeglasses and says that tends to make her cautious about where she steps.

Both she and Mrs. Hendriks testified that they decided to walk across the grass on what appeared to them to be a worn pathway which leads through a gap in shrubbery that is located between the lawn and the store entrance.

Mrs. Gaw conceded that she was chatting with Mrs. Hendriks when the accident occurred. She recalled that she was walking beside Mrs. Hendriks, who was on the worn pathway. Mrs. Hendriks recalled that Mrs. Gaw walked behind her on the pathway. The grass appeared to be freshly cut. The hole into which Mrs. Gaw fell was obscured by grass growing over it. Mrs. Gaw said that her fall "came as a big surprise."

Mrs. Gaw returned with her husband to the place of the accident on the following day. Her husband took photographs of the hole and the surrounding site. Those photographs and some additional photographs taken about two weeks later were put in evidence at the trial. She testified that she and her husband pulled out the grass covering the hole in order to demonstrate, by the photographs, the size and location of the hole. She agreed that, in hindsight, it might have been better to have photographed the hole with the grass obscuring it.

Under cross-examination, both Mrs. Gaw and Mrs. Hendriks were pressed about the existence of the path across the lawn. Both were

firm that there appeared to be a path. They were also pressed as to why they did not cross Minoru Boulevard to walk on the sidewalk on the opposite side of the road and then cross again when they reached the driveway entrance to Paramount. They both stated that that option seemed neither safe nor convenient having regard to the busy traffic on Minoru Boulevard and the absence of a crosswalk. They were questioned as to why they simply did not walk along the road in front of Paramount until they reached the driveway entrance. To this suggestion, they both replied that they thought that, too, would be unsafe because of the traffic and the cars parked on the roadway.

I found both Mrs. Gaw and Mrs. Hendriks to be entirely honest, forthright, and credible witnesses. I accept without qualification their evidence that there was a pathway across the grass and that the pathway was the safest and most sensible route to take from the northeast corner of the property to the entrance of Paramount.

After the accident, Mrs. Gaw and Mrs. Hendriks went into Paramount and advised a salesman that Mrs. Gaw had fallen into the post hole. Encountering apparent indifference to the situation, Mrs. Gaw wrote a letter to Paramount on July 21, 1988. She was advised later by telephone that Paramount did not own the property. Paramount leases the property from Porte Industries Ltd. ("Porte"), the owner. Although it was not entirely clear, it seems that

Mrs. Gaw then embarked on a series of discussions with Porte's insurer. When, in June, 1989, the insurer advised Mrs. Gaw that it would not accept responsibility for the accident, Mrs. Gaw consulted a lawyer. At the suggestion of the lawyer, Mrs. Gaw contacted Mr. Ron Schultz, a solicitor with The Corporation of the Township of Richmond ("Richmond") because Richmond is the owner of the lands on which the hole is located. At Mr. Schultz's suggestion, Mrs. Gaw delivered a written notice to Richmond on June 22, 1989.

This action was not commenced until March, 1990.

The action against the defendants Inter-City Claim Service Ltd. and Neil McLeod was dismissed by consent on March 18, 1991.

I will deal with the liability of each of the defendants in order of appearance in the style of proceeding.

The hole which caused Mrs. Gaw's injuries was situated on lands owned by Richmond. Porte maintained the lands as part of its premises. Japonica was hired to mow the grassed area, part of which included the lands owned by Richmond.

Porte Industries Ltd.

Porte has been the owner of the lands adjacent to the 14 foot wide strip of land owned by Richmond since about the mid-1970's. Porte built the warehouse leased to Paramount in the late 1970's in conjunction with an owner-developer of neighbouring lands on which is situated the Acklands building. The Paramount and Ackland buildings are mirror images of one another.

Under the terms of the lease between Porte and Paramount, Porte is responsible for the maintenance and repair of the building and surrounding lands. Porte's property manager, Mr. Elias, testified that he randomly visits the property not less than every two weeks. He testified that his visits include an inspection of the surrounding landscape. Mr. Elias admitted that Porte is responsible for maintaining the landscaping. Porte hired the defendant, Japonica Landscaping & Nurseries Ltd. ("Japonica") to mow the lawn, edge it, and pick up trash. Japonica performed this work from 1983.

Mr. Elias also admitted that Porte has always maintained the lawn to the curb. He admitted that Porte never expected Richmond to maintain the lawn.

In addition to inspections conducted by Mr. Elias there was another man hired to do odd jobs around the property who was also

in a position to have seen the hole. The principal of Porte, Hershey Porte, also viewed the property from time to time. It was Mr. Elias' evidence that Japonica never reported the existence of the hole, even though Japonica apparently mowed over it every ten days in the growing season. Nor did Mr. Elias, Mr. Porte, or the odd job man see it. Mr. Elias said that if he had seen the hole, or had its existence been reported to him, he would have had it filled immediately.

Mr. Elias' evidence, if wholly believed, would suggest that Porte acted reasonably to detect and repair hazards posed to the public entering onto its lands. However, that evidence must be weighed in relation to other evidence given by Mr. Elias. Two matters to which Mr. Elias testified were, in my view, particularly revealing. Firstly, Mr. Elias testified that he had never, in thirteen years, seen people walk across the lawn to enter the Paramount store by the route taken by Mrs. Gaw. This seems unlikely. Secondly, Mr. Elias testified that the gap in the shrubbery was to afford access to Japonica to bring its lawn mowers onto the grassed area. Yet the photograph showing that gap suggests that it would not accommodate a lawn mower, and certainly not a commercial mower. These are seemingly minor points, but I found them telling in relation to Mr. Elias' credibility. It suggested to me that Mr. Elias was not being forthright in his evidence. It seemed to me that Mr. Elias manufactured evidence in

an effort to bolster the case for Porte. In my view, Mr. Elias' testimony on these points tainted his evidence in respect of his knowledge of the hole or what might at an earlier stage, and prior to the accident, have been regarded as a potentially hazardous depression. I conclude that, either he knew of the potential hazard and did nothing to correct it, or he was not as diligent in his inspections of the property as he would have the Court believe.

The plaintiff pleads the provisions of the ***Occupiers Liability Act***, R.S.B.C., ch. 303. Sections 1(b) and 3(1) provide that:

> "1. In this Act
> "occupier" means a person who
> (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,
>
> * * * *
>
> 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."

The plaintiff argues that, by virtue of these sections of the *Act*, and the evidence of Porte that it accepted responsibility for maintaining the lawn to the curb, Porte thereby falls within the

definition of "occupier" under the *Act* and is subject to the duty of care imposed by s. 3(1) of the *Act*.

Porte relies on the decision of Bouck, J. in ***Ellington v. Rodgers***, March 27, 1986, Victoria Registry No. 84/1501 which agreed with the earlier decision of Lamperson, J. in ***Zavaglia v. Maq Holdings Ltd.*** (1983), 50 B.C.L.R. 204, that a landlord is not an occupier of premises under the definition section of the ***Occupiers Liability Act***. That decision rested on the finding that the definition section of the *Act* contemplates an occupier as "someone who has the minute to minute, hour to hour, and day to day control of the premises."

The evidence in this case is clear that the landlord accepted complete responsibility for the portion of the premises where the hole was located. I consider that to be a distinguishing feature which takes this case out of the ambit of ***Ellington***.

In my view, Porte does fall within the definition of an occupier who owed a duty of care to Mrs. Gaw.

Porte also contends that Richmond has the responsibility to maintain the strip of land and can only transfer that responsibility to Porte if it creates a bylaw pursuant to s. 579 of the ***Municipal Act***, R.S.B.C., ch. 209. If that argument fails (and

I will deal with it when I come to Richmond's liability), then Porte says Japonica is liable under s. 5 of the ***Occupiers Liability Act*** and its contract of services to Porte (which I will deal with when I come to Japonica's liability), or, as another alternative, that Porte has acted reasonably in conducting inspections.

On this latter point, Porte relies on the decision of the Court of Appeal in ***Sulmona v. Serraglio***, CA001922, May 16, 1986, where the court approved the statements of the trial judge when he said:

> "Clearly, the test of what is reasonable is an objective one. Was the defendant occupier's conduct in accordance with the generally accepted standard of care? Did he know, or should he have known under the circumstances, the dangerous condition that the flight of steps had fallen into?
>
> ... An occupier of premises is not an insurer, he cannot guard against every eventuality."

It was also argued that Porte had no reason to expect a hole to be there. There was some evidence to suggest that Porte might expect holes to be there because the Ackland premises, which are the mirror image of the Porte premises, have posts sitting in holes in the same position as the holes here in question.

Counsel for Porte argued that the burden cannot be one which requires Porte to perform minute inspections. I agree. But Porte

can be expected to perform inspections which would disclose hazards such as this SQ a two foot deep hole near a pathway on which pedestrian traffic is likely to travel. The photographs tendered in evidence demonstrate that there was a slight depression where the hole was found. I do not accept that the discovery of this hazard would have required a minute inspection. Indeed, I think that a reasonably cursory inspection, by a person alive to hazards on the property, would have uncovered this risk. On a balance of probabilities, I think that such an inspection was not undertaken by Porte and the failure to inspect was not reasonable in all of the circumstances.

Lastly, Porte contends that the plaintiff is the author of her own misfortune for failing to watch where she was walking and for failing to take one of the alternate routes suggested. In my view, the alternate routes posed risks which the plaintiff sensibly avoided. She testified that she is naturally cautious when walking because of her eyeglasses. However, I consider that the route which she and Mrs. Hendriks decided to take required some extra precautions which they obviously failed to undertake. The depression in the grass (which eventually gave way to the hole) was, I have found, reasonably detectable. Had Mrs. Gaw exercised sufficient care, she would no doubt have avoided the hole and the subsequent accident.

Japonica Landscaping & Nurseries Limited

Mr. Elias testified that there was no specific term of Porte's contract with Japonica that Japonica was required to inspect or report hazards to Porte. The contract between Porte and Japonica was merely for the provision of lawn mowing and related services. While there may have been an expectation on Porte's part that Japonica would report hazards, it was clearly not a term of an agreement between the parties. There is no evidence that Japonica created the hole. There is no evidence that Japonica knew about the existence of the hole.

Porte also argues that Japonica falls within the meaning of s. 5 of the ***Occupiers Liability Act***. Section 5 provides:

> "**5.** (1) Notwithstanding section 3(1), where damage is caused by the negligence of an independent contractor engaged by the occupier, the occupier is not on that account liable under this Act, if, in all the circumstances,
>
> (a) the occupier exercised reasonable care in the selection and supervision of the independent contractor; and
>
> (b) it was reasonable that the work that the independent contractor was engaged to do should have been undertaken.
>
> (2) Subsection (1) shall not be construed as restricting or excluding the liability of an occupier for the negligence of his independent contractor imposed by any other Act.
>
> (3) Where there is damage under the circumstances set out in subsection (1), and

> there is more than one occupier of the premises, each occupier is entitled to rely on subsection (1)."

In my view, Japonica falls within the meaning of independent contractor. However, I find nothing in the conduct of Japonica which amounts to negligence.

In the absence of a positive requirement on Japonica to inspect and report hazards to Porte, and in the absence of overt negligence on the part of Japonica, I do not find any ground on which to hold Japonica liable for the plaintiff's injuries.

The Corporation of the Township of Richmond

Richmond asserts that this action is statute barred. Section 755 of the ***Municipal Act*** provides:

> "**754.** All actions against a municipality for the unlawful doing of anything purporting to have been done by the municipality under the powers conferred by an Act of the Legislature, and which might have been lawfully done by the municipality if acting in the manner prescribed by law, shall be commenced within 6 months after the cause of action shall have first arisen, or within a further period designated by the council in a particular case, but not afterwards."

The accident occurred on July 13, 1988. The first notice of this accident was received by Richmond when Mrs. Gaw discussed it with Mr. Schultz on June 21, 1992.

Under cross-examination by counsel for Richmond, Mrs. Gaw admitted that she owns a home in Surrey and is aware that Surrey is the owner of the boulevard lands in front of her home. Formal notice was provided to Richmond by letter dated June 22, 1989, 11 months after the accident. Section 755 of the *Act* provides:

> "**755.** The municipality is in no case liable for damages unless notice in writing, setting forth the time, place and manner in which the damage has been sustained, is delivered to the clerk within 2 months from the date on which the damage was sustained. In case of the death of a person injured the failure to give notice required by this section is not a bar to the maintenance of the action. Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes there was reasonable excuse and that the defendant has not been prejudiced by it in its defence."

The action was not commenced until March, 1990, 8 months after the notice was delivered.

The question then arises as to whether the plaintiff has provided evidence of reasonable excuse in failing to provide notice as required under s. 755.

The purpose of s. 755 was considered by Southin J.A. in ***Teller v. Sunshine Coast Regional District*** (1990), 43 B.C.L.R. (2d) 376 at p. 383:

> "What then is the purpose of the section? Clearly one of the purposes of the section is to enable a municipality to investigate a claim fully. But that purpose is addressed by the second branch of the concluding sentence. The only other purpose I can think of was to protect municipalities against stale claims in order to enable them to estimate their future liabilities and make budgetary provision for them. But I know of no authority for that surmise. It really is difficult to make much sense out of the words 'reasonable excuse' in the context."

The only inference I am able to draw from the evidence tendered in regards to "reasonable excuse" is that Mrs. Gaw did not know that Richmond was the owner of the lands until she consulted a lawyer in June, 1989. However, she also testified that she was aware that the boulevard in front of her home is owned by the Municipality of Surrey. The obvious inference to be drawn from that evidence is that Mrs. Gaw ought to have suspected that the same might be true of boulevards in Richmond and investigated that suspicion. In these circumstances, I cannot find any evidence that there was reasonable excuse in failing to give notice within the time limited by the statute.

Richmond does not argue that it has been prejudiced in its defence by the failure to provide notice. It merely relies on the wording of the *Act* and the absence of evidence of reasonable excuse. I am compelled to agree that the action cannot be maintained by reason of these sections.

Notwithstanding this finding, I consider it appropriate to deal with the defences raised by Porte in respect of Richmond's alleged duty to inspect and repair.

Porte argues that the only way in which Richmond can "transfer" to Porte the responsibility for maintaining this strip of land is by creating a by-law to that effect pursuant to s. 579 of the ***Municipal Act***. Section 579 provides:

> "**579.**
> (1) The council may by bylaw regulate the
> (a) construction and maintenance of boulevards by or on behalf of the owners of land fronting on them;
>
> (2) The council may by bylaw
> (a) require the owner or occupier of real property to remove snow, ice or rubbish from sidewalks and foot paths bordering his real property or from the roof or other part of a structure adjacent to a highway;...."

That section is obviously permissive and does not, on its face, require Richmond to regulate by by-law. Nor does the section impose a duty on Richmond to so regulate. In my view, Porte's argument on this point must fail. Even if the section could be so construed, s. 754 of the *Act* requires that the plaintiff bring her action (or Porte file its third party notice) within 6 months after the cause of action arose. Even if the time were extended to June,

1989 when the plaintiff discovered that Richmond was the owner of the lands, the action was not brought until 8 months later, in March, 1990 and is therefore statute barred.

Porte further argues that the policy adopted by Richmond in respect of the maintenance of boulevards is "a policy of neglect" which is subject to judicial review.

Mr. Richards gave evidence on behalf of Richmond. He has been employed by Richmond for 35 years. He is currently the Superintendent of Administration. Prior to his employment in this position, he was the Parks Superintendent for 17 years and he occupied this position during the period of time relevant to this action. He testified that, because of very restrictive budget constraints, Richmond adopted a policy of not maintaining municipal lands behind the curb and gutter. It was expected that the adjacent property owner would maintain those lands. If Richmond received a complaint, then the Municipality would inspect and fix the problem, but it would not undertake routine inspections or maintenance. The rationale for the policy is a practical one. Richmond encompasses some 17,000 hectares of land, with 960 kilometres of roadways and 1,920 kilometres of boulevards.

Both Porte and the plaintiff asserted that Richmond has a duty to inspect. The plaintiff relies on the decision of ***Jones v. City***

of Vancouver, [1979] 2 W.W.R. 138 (B.C.S.C.), both for the proposition that the plaintiff was not contributorily negligent for failing to look directly downward at the depressed area and for the proposition that Richmond knew or ought to have known of the hidden danger and cannot escape liability.

However, the decision in ***Jones***, in respect of the issue of inspection, is clearly distinguishable. In ***Jones*** there was a system of inspection by the City. Here, it is clear that there was no system of inspection by Richmond.

However, Porte argues that the absence of a system of inspection does not absolve Richmond if it can be demonstrated that such a decision was unreasonable. Before the merits of this argument may be addressed, it must first be established that Richmond's decision falls within the definition of "operational implementation" as opposed to "policy". The Supreme Court of Canada discussed the need for distinguishing between these functions in ***Just v. R. in Right of British Columbia*** (1989), 41 B.C.L.R. (2d) 350 at p. 368:

> "The need for distinguishing between a governmental policy decision and its operational implementation is thus clear. True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions

> may well be subject to claims in tort. What guidelines are there to assist courts in differentiating between policy and operation?"

The court in ***Just*** considered many of the factors which distinguish policy from operation. Counsel for Porte seized on one factor; that is set out in a statement at p. 369 that a true policy decision "may vary infinitely and may be made at different levels, although usually a high level."

Counsel for Porte argued that Mr. Richards was not at a sufficiently high level of authority to bring the decision (not to inspect) within the definition of policy because Mr. Richards testified that there were four or five layers of authority between him and the council of Richmond.

Counsel for Richmond countered this argument by relying on another passage in ***Just***, at p. 370:

> "Thus a true policy decision may be made at a lower level provided that the government agency establishes that it was a reasonable decision in light of the surrounding circumstances."

In the circumstances of this case, Mr. Richards testified that the decision not to inspect had been in place for all of the 35 years he has worked for Richmond. I did not take from his evidence

that he made the decision. Furthermore, the decision was made because Richmond's choices were limited by finances and manpower.

In my view, the decision not to inspect constitutes a policy decision to which a duty of care does not apply.

In the result, I find that Richmond is in no way liable for the plaintiff's injuries.

In summary, I find that Porte is an occupier within the meaning of the ***Occupiers Liability Act***. I find that Porte failed to take care to see that Mrs. Gaw would be reasonably safe in using the lands over which Porte had assumed responsibility.

I also find that Mrs. Gaw contributed to her injuries in failing to detect the depression which I find both Porte and Mrs. Gaw could have detected if they had exercised due care.

As between the parties, I assess Porte's liability at 75% and the plaintiff's at 25%.

The actions against Japonica and Richmond are dismissed.

The question of costs poses some intricacies in light of my findings as to liability. If the parties are unable to agree on costs, they may speak to it.

New Westminster, B.C.
June 29, 1993.

"P.A. Kirkpatrick, J."