Citation: Nabholtz v. Kimberley (City of) 2002 BCSC 174

Date: 20020201
Docket: 27784
Registry: Kelowna

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JEAN-MARC NABHOLTZ

PLAINTIFF

AND:

CITY OF KIMBERLEY

DEFENDANT

REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE BROOKE

Counsel for the Plaintiff:	Chris A. Fraser
Counsel for the Defendant:	Donald Paolini
Date and Place of Hearing:	January 23, 2002 Kelowna, B.C.

[1] On March 4, 1995, the plaintiff slipped and fell in an outdoor pedestrian shopping area under the control and responsibility of the defendant. The plaintiff seeks damages for injuries he sustained in the fall and pleads the ***Occupiers Liability Act***, R.S.B.C. 1979, c. 303 and amendments thereto, and negligence. The defendant says that it took reasonable care to ensure that the plaintiff and others would be reasonably safe in using the area and seeks summary trial and dismissal of the plaintiff's claim pursuant to Rule 18(A). The plaintiff submits that the evidence is such to establish the defendant's liability and seeks an order for judgment against the defendant for damages to be assessed.

THE EVIDENCE:

[2] The plaintiff resided in Edmonton, Alberta, in 1995 but had, for several years, visited Kimberley where he owned a ski chalet for winter sports.

[3] The plaintiff and his fiancée were vacationing in Kimberley on March 4th and on that Saturday morning, somewhat before 11:00, they had been shopping in a pedestrian mall known as the "Platzl". Both the plaintiff and his fiancée describe the day as clear and sunny, although it had snowed overnight and the Platzl was covered with untracked, virgin snow. The plaintiff says that the snow was as much as 20 centimetres deep (paragraph 17) and that there had not been any apparent snow clearing or sanding. At paragraph 44 of his affidavit, the plaintiff refers to a climatological report for March 4th and says that, at the time of the accident, there was a fresh blanket of snow several centimetres deep.

[4] The plaintiff describes making his way in a normal, cautious, and reasonable fashion when, suddenly, his feet shot out from under him on an underlying sheet of ice. The plaintiff describes the area where he fell as a designated pathway regularly used by persons making their way to a parking area, which lies behind the Platzl.

[5] The plaintiff's fiancée (now wife) says that the Platzl was blanketed with a layer of virgin snow and that there was no evidence of snow removal or sanding of any kind.

[6] The plaintiff did not report the accident to the defendant until approximately seven weeks after the event. Accordingly, the defendant had no opportunity to physically inspect the sight within a short time after the incident nor have any witnesses to the event, other than the plaintiff's wife, come forward. What the defendant says, however, is that it assumes a limited responsibility for snow removal and sanding of the Platzl within the budgetary and manpower limitations of the Leisure Services department. The Leisure Services manager says that, during weekdays, an employee inspects the Platzl at approximately 7 a.m. and arranges for ploughing, sanding, salting, or snow removal to be done if required. In the event of a significant snowfall during the day, a further inspection may be done in the afternoon. On weekends and as a result of budgetary and manpower constraints, the Platzl is inspected between 11:30 a.m. and 1 p.m. On March 3rd, an employee of the defendant, David Oscarson, deposed that he attended for approximately one hour and sanded the corners, pathways, and bridges in the Platzl area. Another employee of the defendant, Ray Creasy, deposed that he attended at the Platzl shortly after 11:30 a.m. and spent an hour clearing the paths and sanding them. He noticed nothing unusual in the condition of the walkways or the bridges over the swales.

[7] The evidence of the defendant is clear and unequivocal that on March 4, 1995, there were steel bridges with handrails over what was called a swale. The swale is a downward sloping part of the Platzl designed to collect and dispose of water. The plaintiff and his fiancée are equally clear in deposing that they saw no bridges and in fact remarked on their presence the following year.

THE LAW:

[8] The plaintiff's case is founded on section 3 of the ***Occupiers Liability Act*** which provides:

> (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...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...
>
> (3) Notwithstanding subsection (1), an occupier has no duty of care to a person
>
> > (a) in respect of risks willingly accepted by that person as his own risks, or ...
>
> other than a duty not to
>
> > (c) create a danger with intent to do harm to the person...or
> >
> > (d) act with reckless disregard to the safety of the person...

[9] It is common ground that the defendant is an occupier having responsibility for and control over the condition of the premises and that the Platzl falls within the definition of "premises" contained in section 1 of the ***Occupiers Liability Act***.

[10] The plaintiff's case, in essence, is that the fresh snow concealed the ice beneath it, that there was no evidence that the snow had recently been cleared or the surface sanded, and that, in itself, coupled with the slip and fall is proof that the defendant failed in its duty of care to him.

[11] The law is clear that an occupier is not an insurer of the plaintiff's safety. Its duty is to take that care that in all the circumstances of the case is reasonable to see that a person will be reasonably safe in using the premises. The standard of care is reasonableness and not perfection.

DISCUSSION:

[12] In ***Brown v. British Columbia (Minister of Transportation & Highways)*** (1994), 89 B.C.L.R. (2d) 1 (S.C.C.), Mr. Justice Cory says this at page 13:

> Ice is a natural hazard of Canadian winters. It can form quickly and unexpectedly. Although it is an expected hazard it is one that can never be

> completely prevented. Any attempt to do so would be prohibitively expensive.

[13] I find this observation apt in all the circumstances of this case. The presence of snow implies the risk of ice. A blanket of virgin snow must be seen as requiring particular care, mindful of the risk of ice beneath it. A walk in the snow is an activity which assumes some risk of a slip and a lesser risk of a fall. An occupier has a duty not to act with reckless disregard to the safety of a user of the premises. The duty of care at common law is to take reasonable steps to protect the plaintiff against a known or foreseeable risk of harm.

[14] In respect of both the statutory and the common law claim, the defendant says that it does not owe the plaintiff a duty of care with respect to the condition of the Platzl because of its policy with respect to maintenance and inspection. Alternatively, it says that if it did owe a duty of care to the plaintiff then that duty was discharged by a system of inspection and maintenance prescribed by policy. It is submitted that the decisions of the Supreme Court of Canada in ***Brown***, *supra*, and in ***Just v. British Columbia*** (1989), 41 B.C.L.R. (2d) 350 (S.C.C.) stand for the proposition that policy decisions are not reviewable unless those decisions are so irrational as not to be a proper exercise of discretion.

[15] In ***Brown***, *supra*, Mr. Justice Cory states at pages 14-15:

> True policy decisions involve social, political and economical factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.
>
> The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administration direction, expert or professional opinion, technical standards or general standards of reasonableness.
>
> ...
>
> I should not leave this issue without addressing the two bases put forward by the appellant for the interpretation and application of *Just*. First, the appellant contended that policy decisions must be limited to so called threshold decisions, that is to say, broad initial decisions as to whether something will or will not be done. This would be contrary to the principles set out in *Just* referred to earlier. Therefore, this submission cannot be accepted. Policy decisions can be made by persons at all levels of

> authority. In determining whether an impugned decision is one of policy, it is the nature of the decision itself that must be scrutinized, rather than the position of the person who makes it. The appellant next alleges that the system itself was unreasonable. As I have already said, this decision was clearly one of policy. Such a policy decision cannot be reviewed on a private law standard of reasonableness. Since no allegation was made that the decision was not bona fide or was so irrational that it could not constitute a proper exercise of discretion, it cannot be attacked.

[16] The plaintiff says, in answer, that even if the maintenance and inspection practices of the defendant rise to the level of policy, the implementation of that policy may be scrutinized to determine whether it is reasonable. The factors which may be considered in determining reasonableness include:

(1) the likelihood of known or foreseeable harm;

(2) the gravity of that harm; and

(3) the burden of costs to prevent the harm.

[17] The plaintiff relies upon ***Ingles v. Tutkaluk Construction Ltd.***, [2000] 1 S.C.R. 298 (S.C.C.).

[18] I find the following facts:

(1) That at least four centimetres of snow fell during the night of March 3 and 4, 1995 and in the early morning hours.

(2) That it was not snowing at the time of the slip and fall but that the surface of the Platzl was covered with snow and at the time of the accident, there had been little pedestrian traffic.

(3) That the hard surface beneath the snow was slippery, and steel bridges were installed over the swale but not used by the plaintiff.

(4) That the plaintiff slipped and fell within the Platzl before it had been inspected by employees of the defendant and snow cleared and sanding done.

(5) That on the 4th of March the policy of the defendant was to inspect the Platzl on weekdays at approximately 7 a.m. and to take remedial measures where necessary and to inspect the Platzl on weekends after 11:30 and to take remedial measures.

(6) That the defendant did inspect the Platzl on March 4th in accordance with this policy and cleared snow from and sanded pathways.

(7) The plaintiff did not afford the defendant a reasonable opportunity to inspect the Platzl after the accident.

[19] The leisure services department of the defendant was given a budget and responsibility for inspection and maintenance of the Platzl. It identified times of inspection and maintenance that were different for weekdays and weekends and it did so taking into account the allocated budget and manpower. It was not argued that this was not a *bona fide* decision nor that it was so irrational as to constitute an improper exercise of discretion. I am satisfied that the defendant's inspection and snow removal system must be measured in light of all of the surrounding circumstances including budgetary considerations and manpower availability. The burden remains on the plaintiff to prove on the balance of probabilities that the defendant breached the standard of care in all of the surrounding circumstances. The accident and the resulting injury, which doubtless occurred, are unfortunate but I cannot find that the defendant failed to discharge its policy or that the policy was manifestly irrational. Nor approaching the issue from the perspective of ***Ingles***, *supra,* can I find that the implementation of the policy was unreasonable having regard to the foreseeable risk of harm, the gravity of that harm, and the cost of prevention. The Platzl had little use that morning, no complaints had been made to the defendant, bridges were installed over the swale, and the cost of prevention taken to its logical conclusion could reasonably be seen as prohibitive having regard to budgetary and manpower considerations.

[20] In the result, the plaintiff's case is dismissed. The defendant is entitled to its costs at Scale 3 unless there are matters which require further submissions in which event those can be brought before me through the registry in the ordinary way.

"T.R. Brooke, J."
The Honourable Mr. Justice T.R. Brooke