Date: 19980819
Docket: C955262
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TINA ANNETTE ROBINSON and REBECCA MICHELLE an infant, by her guardian ad litem, Kevin Demings

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, O'BRIEN ROAD & BRIDGE MAINTENANCE LTD. and THE CITY OF PRINCE RUPERT

DEFENDANTS

AND:

TINA ANNETTE ROBINSON

THIRD PARTY

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BLAIR

(IN CHAMBERS)

Counsel for the Plaintiff and Third Party, Tina Annette Robinson:	Robert P. Campbell
Counsel for Infant Plaintiff:	Jerome A. Williams
Counsel for the Defendant Her Majesty the Queen:	Leanne D. Johnston
Counsel for the Defendant O'Brien Road & Bridge Maintenance Ltd.:	Michael D. Adlem
Counsel for the Defendant City of Prince Rupert:	James D. Cotter

[1] The plaintiffs, Tina Annette Robinson and her infant daughter, Rebecca Michelle Demings, seek damages from the defendants for injuries suffered when they fell on May 2, 1995, as they crossed 2nd Avenue at 6th Street in the City of Prince Rupert.

[2] The accident occurred as Ms Robinson pushed a stroller containing her daughter from the sidewalk onto the crosswalk at the intersection. Ms Robinson deposed the stroller halted abruptly when its front wheels caught on an asphalt lip where the asphalt road surface met the cement curb and gutter. Ms Robinson fell over the stroller and both she and her daughter suffered injuries. The plaintiffs allege that the defendants breached the duties imposed by the ***Occupiers Liability Act***, R.S.B.C. 1996, c. 337 ("the Act") and were negligent in failing to remove a hazard posed by the sidewalk, failing to warn that

the sidewalk was dangerous, failing to construct a ramp or let-down from the sidewalk to the road, and knowingly leaving in place for several years a dangerous asphalt lip and a high curb which together created a hazard leading to the plaintiffs' fall and their resulting injuries.

[3] The defendants each seek orders pursuant to Rules 18A and 57 of the ***Rules of Court*** dismissing the plaintiffs' action and for costs. This application concerns only the issue of liability. The defendants, the City of Prince Rupert ("the City") and Her Majesty the Queen in Right of the Province of B.C. ("the Province") shared responsibility for construction of 2nd Avenue road, sidewalk, curbs and gutter in 1980. The City continues to maintain the sidewalk and the Province accepts responsibility for maintaining the road, curbs and gutters along 2nd Avenue which is designated an arterial highway. The defendant, O'Brien Road & Bridge Maintenance Ltd. ("O'Brien"), contracted with the Province to maintain the road, curbs and gutters on 2nd Avenue.

[4] I will dispose of the claim against O'Brien at this point. Counsel advised that O'Brien was named a defendant in anticipation that the Province might allege that O'Brien had breached the maintenance standards. However the Province has made no such allegations and I dismiss the action against O'Brien.

[5] Ms Robinson deposed that she approached the intersection intending to cross 2nd Avenue with her daughter. At the corner, she was aware that there was a let-down on to 6th Street crosswalk, but declined to use it as she feared it would place her into the traffic on 6th Street as she manoeuvred the stroller around and onto the crosswalk across 2nd Avenue. Ms Robinson lowered the stroller down the curb from the sidewalk directly onto the crosswalk to cross 2nd Avenue, placing the stroller's front wheels down first, rather than the back wheels. Ms Robinson deposed that an asphalt lip where the gutter met the road stopped the stroller, causing the plaintiffs to fall. At the time of the accident Ms Robinson's attention was directed towards the walk signal on 2nd Avenue and she was concerned with getting across the intersection before the signal changed. Ms Robinson was not looking at the road or the curb as the stroller descended to the crosswalk.

[6] The Act states:

> 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.

Section 8 provides that the Act does not apply to the Province or a municipality as the occupier of a public road:

> 8 (2) . . . this Act does not apply to the government or to the Crown in Right of Canada or to a municipality if the government, the Crown in right of Canada or the municipality is the occupier of
>
> (a) a public highway,
> (b) a public road . . .

However, in ***Lysack v. Burrard Motor Inn Ltd.*** (1991), 58 B.C.L.R. (2d) 33 at p. 40, the B.C. Court of Appeal confirmed that a municipality is bound by s. 3 as occupier of a sidewalk.

[7] In ***Wray v. MacLeod*** (2 June 1992) Vancouver Registry No. C903337 (Unreported), Provenzano J. at p. 6 referred to the duty of care owed under s. 3 of the Act:

> The duty of care owed by the Defendant under the Act as an occupier is provided in sec. 3. Under that section, the occupier owes a duty that is reasonable and within that obligation must see that a person using his premises is reasonably safe in using his premises. It is clear from the section that the occupier is not an insurer in the sense that the duty is an absolute one and insure the safety of the person on his premises. This interpretation is clearly set out by McLachlin J. (as she then was) in ***Milina v. Bartsch*** (1985) 49 B.C.L.R. (2d) 33 at p. 58:
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> > Under both statutes, the duty owed by an occupier of premises is to take reasonable care to see that persons using the premises will be

> reasonably safe. The Acts do not impose a duty to take reasonable care to insure that persons using the premises will be "absolutely safe". . . . the occupier does not owe a duty to provide safety in all circumstances, but rather a duty to use reasonable care to prevent injury or damage from danger which is known or which ought to be known.

[8] The plaintiffs also allege the defendants have been negligent and, in order to prove negligence, the plaintiffs must show the defendants failed to exercise that standard of care which the defendants, as reasonable persons, should by law have exercised in all the circumstances. Actionable negligence involves a breach of a legal duty of care, in this case, a duty of care towards Ms Robinson and her child and their use of the sidewalk, curb and crosswalk. The plaintiffs contend, as I apprehend their submission, that the defendants knew of the danger posed by the crossing, or that the danger was or should have been reasonably foreseeable, and that the defendants' failure to exercise the requisite care by rectifying the crossing or warning of the danger was likely to cause injury to pedestrians such as Ms Robinson and her child.

[9] I will address first the plaintiffs' allegation that the defendants were negligent or in breach of the Act in not providing a let-down or ramp from the sidewalk to the crosswalk. When the City and the Province constructed the sidewalks, curbs and gutters on 2nd Avenue in 1980, they were precluded from placing a let-down where Ms Robinson fell

because of a lack of support under the sidewalk caused by the intrusion of the foundations from a nearby structure known as the Islander Hall. The foundations remained after the hall burned in 1983, however in 1994, prior to the plaintiffs' accident, the City's capital projects coordinator Bill Horne provided the City with a plan to fill in the site of the hall, and upgrade the adjacent sidewalk along 2nd Avenue including construction of a let-down at the accident site. The City's council considered the plan and, because of the $79,000 cost, did not budget the work until 1996.

[10] There is no evidence that the standard of care imposed upon the City and, in this case, the Province, involved in 1980 the installation of let-downs at every intersection. Nor is there any evidence from which I might conclude that the sidewalk, as constructed and as found in 1995, was in a condition to pose an unusual risk for users such as the plaintiffs. Although let-downs are undoubtedly beneficial for those who have difficulty with curbs, I conclude that the construction of let-downs is a policy decision. The Supreme Court of Canada, in ***Just v. B.C.*** (1989), 41 B.C.L.R. (2d) 350, held that a government body ought not be held liable for its policy decisions, with Cory J. noting at p. 371:

> As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions.

I conclude the Province and the City made a policy decision to construct the sidewalk in 1980 without a let-down at the accident site largely as a result of budget considerations which followed from construction difficulties posed by the intrusive foundation from the nearby Islander Hall. The City's council in 1994 made a further policy decision regarding the let-down which led to its inclusion in the City's 1996 budget and its construction the same year. I conclude that the policy decisions regarding the sidewalk construction does not attract a finding of liability against either the City or the Province.

[11] The plaintiffs allege the defendants were negligent in that the asphalt lip at the point where the road surface joined the gutter was of such a height as to halt Ms Robinson's stroller. However the evidence led by the defendants is that the asphalt lip was neither unacceptable nor hazardous. Terry Carson, an adjuster, in September, 1995, measured the lip as ranging between zero and 1/2 inch (13 mm) in height. Mr. Horne first measured the lip in May, 1995, and found the lip to between 2 to 3 mm in height and in July, 1995, he measured the lip again and found it to be between 3 mm and 15 mm in height, with the latter height found towards the middle of the intersection where pedestrians would not typically walk. Laurie Fulford, the area manager for the Ministry of Transportation and Highways, visited the site in July and October, 1995, and concluded the asphalt lip appeared to be acceptable and in accordance with her Ministry's standards.

Ms Fulford noted that the Ministry's standards provided that the lip between gutter and road not exceed 6 mm when constructed and traffic use would cause the asphalt lip to increase in height, but the Ministry would not consider that even a 5/8 inch (15 mm) lip, the maximum observed by Mr. Horne at the outer edge of the crosswalk, would require immediate repair. The pictures taken of the scene in 1995 reflect what appears to be a very small asphalt lip. Apart from Ms Robinson's evidence that the asphalt lip halted the stroller occupied by her daughter, there is no evidence to establish that the asphalt lip posed a hazard to pedestrians entering the crosswalk from the sidewalk.

[12] The plaintiffs further allege that the height of the curb presented a danger to pedestrians stepping from the sidewalk down to the crosswalk, relying to some extent on the City's 1992 criteria for public works construction which specified barrier curbs should be of a height of 150 mm (6 inches). Mr. Carson found the curb to be 8.5 inches (216 mm) high and Mr. Horne measured the curb and found it to be between 8 inches (203 mm) and 8.5 inches (216 mm) high. However, the City's specifications produced were applicable some 12 years after construction of the road, curb and sidewalk by the City and the Province. The only evidence as to the curb specifications in 1980 comes from Mr. Horne who deposed that after viewing the accident site in 1995 he considered the sidewalk, curb, gutter

and existing let-down to be within the City's acceptable pedestrian safety limit.

[13] Ms Robinson acknowledged in examination for discovery that she was familiar with the intersection of 2nd Avenue and 6th Street having passed through it with a stroller prior to the accident. At the time of the accident which occurred during daylight hours, Ms Robinson stated she was looking ahead at the walk signal for pedestrians crossing 2nd Avenue, not at the stroller or the curb. Ms Robinson testified that she put the small front wheels of the stroller down first rather than lifting the front wheels up and lowering the stroller down the curb to the road surface on its rear wheels.

[14] In ***Hunning v. Bau-Xi Huang et al*** (17 April 1984) Vancouver Registry No. C827025, a case in which the plaintiff fell down stairs on the defendants' premises, McEachern, C.J. (as he then was) stated at pp. 4 - 5:

> The standard is, as I have stated, reasonableness. This well-lighted area was well-maintained and the plaintiff, although not required to glue her eyes to the ground, was under a duty to be aware of her surroundings. A mere glance would have disclosed the presence of this stairwell which was there and easily to be seen. I do not find anything in the nature of a trap misleading the plaintiff in any way. After all, stairways are commonplace and are part of every day life. To impose liability upon the defendants in these circumstances could only be justified by a standard beyond reasonableness approaching perfection and would constitute not just reasonableness but a guarantee of safety. If the accident could have been avoided by a modicum of awareness on the part of the

> plaintiff, as I believe it could have been, then it cannot be said that the defendant breached its duty of reasonable care.

[15] The statement reflects my conclusions about the instant case. The accident occurred in daylight and the sidewalk and crosswalk were well maintained within the standards established by the defendants. Ms Robinson, although not required to glue her eyes to the ground, had a duty to be aware of her surroundings. Unfortunately, she concentrated her attention upon the walk sign for the intersection rather than on the curb as she put the stroller onto the crosswalk. The curb which she encountered was not a trap such as to require warnings to be posted for the users of sidewalks and crosswalks. Curbs are a common, everyday experience encountered frequently by pedestrians and the curb in question was there to be seen by Ms Robinson. Although the height of the curb in question was higher than the 1992 standard set by the City, Mr. Horne noted that the height was well within the City's standards for pedestrian safety. Nor do I conclude that the asphalt lip, which was less than .25 of an inch, or 6 mm, where the accident occurred, poses a danger requiring rectification, warning or notice by the defendants.

[16] I conclude that the accident could have been avoided by some slight awareness on the part of Ms Robinson. I cannot find that the defendants breached their obligations either in negligence or imposed by the Act. I conclude the plaintiffs

have failed to establish either negligence or a breach of the Act by the City or the Province and dismiss the action against the City, the Province and O'Brien. The defendants will have their costs at scale 3.

"Blair J."

BLAIR J.