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MAY 27 1992

DAWSON CREEK, B.C.

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B.S.
M.S. IN THE SUPREME COURT OF BRITISH COLUMBIA
(Before The Honourable Mr. Justice Preston)

NO. 8250
Dawson Creek Registry
Fort St. John, B.C.
27 April, 1992.

BETWEEN:)
)
BERNARD JOSEPH RYAN)
)
PLAINTIFF)
)
AND:)
)
GOLDE NOOK ENTERPRISES)
LTD. and THE CORPORATION)
OF THE CITY OF DAWSON)
CREEK)
)
DEFENDANTS)

REASONS FOR JUDGMENT
of
PRESTON, J.

L. G. DELLOW, ESQ. for the Plaintiff.
R. J. STRANDBERG, ESQ. for the Defendant, Golde Nook.
MS. JAN LINDSAY for the Defendant, City of Dawson Creek.

THE COURT: (Oral) On January 31, 1991 the plaintiff slipped on an accumulation of ice on a sidewalk outside the premises of the defendant, Golde Nook Enterprises Ltd. ("Golde Nook") and fell, fracturing his right tibia. The sidewalk is owned by the Corporation of the City of Dawson Creek ("Dawson Creek"). The plaintiff was employed as a power saw operator and was unable to return to work for approximately seven months following his injury.

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1 The plaintiff brings this action against both defendants in
2 negligence and under the Occupiers Liability Act, R.S.B.C. 1979.

3 Facts - Liability:

4 Golde Nook operates a jewelry and clothing store on the
5 main corner of Dawson Creek. The sidewalk on which the plain-
6 tiff fell runs east to west along the north side of the
7 premises. Dawson Creek, by bylaw, has placed the responsibility
8 for the maintenance of sidewalks abutting premises on the owners
9 or occupiers of the premises. The relevant portion of the
10 bylaw reads:

11 Bylaw No. 2793

- 12 2(G) Snow Removal Every owner or occupant of real
property within the city shall remove:
- 13 (i) from any and all footpaths and sidewalks on and
14 adjoining his property; and
 - 15 (ii) from any and all roofs or other structures
16 adjacent to or abutting on any highway, footpath
or sidewalk; and
 - 17 (iii) any and all accumulations of snow, ice or
18 rubbish. Such removal shall be completed:
 - 19 (A) Forthwith after receiving a request to do so
20 from an authorized representative of the
City; and
 - 21 (B) Forthwith after the accumulation creates a
hazardous condition to persons using the
22 footpath or sidewalk; and
 - 23 (C) (Whether or not such a request is made) no
24 later than 6:00 o'clock in the afternoon on
the second day following the start of any
such accumulation.

25 At the time that these events occurred the owner of Golde
26 Nook was on holidays and he had delegated responsibility for the
27 maintenance of the sidewalks to Mr. Morris Beaudoin who had

1 performed these duties many times in the past.

2 The sidewalk on which the plaintiff fell is constructed of
3 concrete and is six feet wide. It is bordered on the northerly
4 side by a brick tile extension of the sidewalk. This extension
5 is three feet wide and is bordered by a curb on its north side.
6 Parking meters are located approximately six inches to the north
7 of the concrete sidewalk on the brick tile extension. As a
8 result the usable sidewalk is the six-foot wide concrete portion.

9 Attached to the Golde Nook premises are awnings which extend
10 four feet from the building above the sidewalk. Viewed from the
11 side, these awnings are parallel to the sidewalk at the point of
12 attachment to the building. They remain parallel to the sidewalk
13 for some distance from the building then describe a downward arc
14 to a face that is vertical to the sidewalk. When snow falls it
15 accumulates on the top of the awnings. If the temperature rises
16 above freezing the snow melts and drips onto the sidewalk where
17 it often freezes into what the witnesses referred to as "ice
18 boils". These ice boils are patches of ice which are thicker in
19 the middle directly below where the water drips from the awnings
20 and extend out from there. On the day that the plaintiff fell
21 these ice boils were from six inches to ten inches in diameter.
22 The evidence about the timing of the rise in temperature that day
23 indicates that they formed between three and four P.M.

24 The plaintiff was walking along the sidewalk between three and
25 four P.M. when he slipped and fell. An employee of Golde Nook,
26 Ms. Alexandria Keech, whose evidence I accept regarding the
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1 condition of the sidewalk, said that she came out of the store
2 shortly after the accident and observed the travelled portion
3 of the sidewalk to be clear except for the ice boils which were
4 approximately eight to ten inches in diameter and approximately
5 one and one-half inches high in the centre. She put salt on the
6 ice boils from a stock of salt that was maintained in the store
7 for that purpose. That portion of the sidewalk is not visible
8 from inside the store. There are a number of display cases
9 facing the street along that side of the store. There are no
10 windows.

11 Mr. Beaudoin testified that he had cleaned the sidewalks
12 adjacent to the Golde Nook premises at 6:30 that morning before
13 they had been walked on. Approximately four inches of snow fell
14 that morning. It was still snowing when Mr. Beaudoin cleaned
15 the sidewalk at 6:30 A.M. He returned later in the day -- he
16 recalls that to be 1:00 P.M.--and removed the remainder of the
17 snow and sprinkled salt on the sidewalk. The temperature was
18 still below freezing at that time. There was no ice on the
19 sidewalk. He did not clean the snow from the tops of the
20 awnings. He was aware, and had known for some years, that ice
21 formed under the awnings if snow on the tops of the awnings
22 melted.

23 The plaintiff had lived in Dawson Creek for several years
24 before these events. He was aware of the icy conditions that
25 prevail on the streets for much of the winter. There is no
26 explanation for his fall other than the presence of the ice
27

1 boils on the sidewalk and his failure to observe them. He was
2 wearing appropriate footwear.

3 The Liability of the Defendant Golde Nook

4 The defendants take the position that the steps taken by
5 Mr. Beaudoin were reasonable in the circumstances and suffi-
6 cient to discharge the duty owed to persons using the sidewalk.
7 I am unable to agree with that submission. The phenomenon that
8 created the icy conditions was known to the defendant Golde
9 Nook. The weather forecast in a newspaper available locally
10 the previous day had predicted above freezing temperatures for
11 January 31, 1990. The sidewalk is a busy one. This increases
12 the foreseeability that a hazard, such as ice, will result in
13 the kind of accident that occurred here. Removing the
14 accumulation of snow from the tops of the awnings would have
15 prevented the formation of the ice.

16 "Occupier" is defined in the Occupiers Liability Act as
17 follows:

18 "Occupier" means a person who

19 (A) is in physical possession of the premises; or

20 (B) has responsibility for, and control over, the
21 condition of the premises, the activities conducted
22 on those premises and the persons allowed to enter
those premises,

23 and for this Act, there may be more than one occupier of
24 the same premises;

25 Golde Nook does not fall within either of the definitions. It
26 is not an occupier of the premises on which the plaintiff fell.

27 Golde Nook is, however, liable to the plaintiff in

1 negligence. The plaintiff's fall was a direct and foreseeable
2 result of the failure of Golde Nook to prevent the formation of
3 ice on the sidewalk. The system employed by Golde Nook to
4 prevent the formation of ice omitted the removal of snow from
5 the awnings to prevent the formation of the ice boils. It
6 cannot be said to have taken the steps reasonably necessary to
7 prevent injury to persons in the position of the plaintiff.

8 The Liability of the Defendant Dawson Creek

9 Dawson Creek concedes that it is an occupier of the side-
10 walk and owes a duty of care to the plaintiff. It submits,
11 however, that it has, as a matter of policy, placed the
12 responsibility for the maintenance of the sidewalk in question
13 on Golde Nook through its bylaw and that that is sufficient to
14 satisfy its duty to the plaintiff and, as a matter of law,
15 precludes recovery against it by the plaintiff.

16 At the time of the plaintiff's fall Dawson Creek did not,
17 and had not for many years, had any system for inspection of
18 sidewalks to monitor compliance with its sidewalk maintenance
19 bylaw. It responded only to complaints. It had never had a
20 complaint about the sidewalks adjacent to the Golde Nook premises
21 in the eight years during which the current bylaw inspector
22 has held that position.

23 I am satisfied that the steps taken by Dawson Creek were
24 reasonable and discharged its duty under the Occupiers Liability
25 Act. I am satisfied further that the plaintiff is precluded,
26 as a matter of law, from recovering against Dawson Creek in view
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1 of its policy decision, which was reasonable in the circum-
2 stances, to delegate responsibility to property owners and
3 occupiers and not to maintain an inspection programme.

4 The plaintiff has established liability in negligence
5 against Golde Nook.

6 He has not established liability against Dawson Creek and
7 the plaintiff's action against that defendant is dismissed.

8 Contributory Negligence:

9 I will now turn to the matter of contributory negligence.
10 Walking on the sidewalks in Dawson Creek in winter conditions
11 demands greater care than that exhibited by the plaintiff.
12 There were no conditions such as a crowded sidewalk necessi-
13 tating unexpected deviations or obstructing his view of the
14 sidewalk. The ice boils were there to be seen. A minimum of
15 care would have prevented the plaintiff's injury. There was
16 an ample expanse of clear sidewalk to allow the plaintiff to
17 walk in perfect safety if he had looked where he was going.
18 I assess his contributory negligence at 50%.

19 Damages:

20 The plaintiff is 37 years of age. He is single. He
21 suffered a minimally displaced spiral fracture of the mid-tibia
22 of his right leg. He was placed in a series of casts. The
23 first cast was a full leg cast. After approximately one month
24 this was replaced. Two further casts were required before the
25 bone had knit properly. He had his last cast removed in late
26 April 1991. He was on crutches for approximately one and one-
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1 half months after that. Considerable muscle wasting took place
2 because of the long period of immobility. He exercised by
3 riding a bicycle and lifting weights with the leg. He returned
4 to work in September but was not fully recovered until approxi-
5 mately mid-October.

6 He experienced considerable pain in the early stages of
7 his recovery. He was on crutches for four and one-half months
8 and required the assistance of a friend to shop and carry out
9 routine tasks around the community. He limped until October,
10 1991.

11 He has had a good recovery from the injury and no future
12 problems are anticipated by his doctor.

13 I assess the plaintiff's non-pecuniary general damages at
14 \$10,000.00.

15 The plaintiff had been employed as a powersaw operator for
16 three weeks. The job that he had been doing had come to an end.
17 He was awaiting recall by his employer if there was any more
18 work. Evidence was introduced that he would have been recalled
19 and would probably have worked intermittently for his employer
20 throughout his period of disability. The job that he was doing
21 required that he work seven days per week, twelve hours per day.
22 On the basis of the evidence before me he could have earned
23 between \$6,000.00 and \$9,000.00 had he continued to pursue
24 employment diligently. His employment history, hwoever, has
25 been sporadic. In view of the contingencies involved, I am
26 satisfied that a proper estimate of the plaintiff's likely
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1 employment income is represented by the bottom of that range
2 and I award him \$6,000.00 as damages for lost employment income
3 during his period of disability.

4 He estimated that he incurred expenses for transportation
5 of \$220.00. I am satisfied that this is a reasonable estimate
6 of those expenses. He is entitled to recover this sum as
7 special damages.

8 Accordingly, I assess the plaintiff's total damages at
9 \$16,220.00. He is entitled to Judgment against Golde Nook for
10 50% of that amount or, \$8,110.00. He is entitled as well to
11 Court Order interest at the rates used by Registrars from time
12 to time.

13 I will hear from counsel on the matter of costs.

14 (SUBMISSIONS BY COUNSEL RE COSTS)

15 THE COURT: I am satisfied that it is appropriate in the circum-
16 stances of the matter that it be brought in Supreme Court rather
17 than Small Claims court even though, on the division of
18 liability, the amount recovered is within the jurisdiction of
19 the Small Claims Court.

20 The plaintiff will recover 50% of his costs from the
21 defendant, Golde Nook. The defendant, Golde Nook, will recover
22 50% of its costs against the plaintiff. The City of Dawson
23 Creek is entitled to its costs from the plaintiff in full. The
24 plaintiff is entitled to recover over from Golde Nook $\frac{1}{2}$ of the
25 costs of the City of Dawson Creek. I am satisfied that in the
26 circumstances the plaintiff could not have sensibly done other
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1 than join both defendants.

2 As far as the date from which Court Order interest should
3 run, the only date that really presents a problem is the
4 date of the special damages, the \$220.00, 110 of which was
5 recovered. The appropriate date to calculate interest for the
6 special damages is 30th of April, 1991. Interest on the
7 general damages shall be calculated from January 31, 1991 and
8 on wage loss in accordance with the provisions of the Court
9 Order Interest Act.

10 Costs shall be on scale 3.