Released: November 15, 1991

No. 15627

Kamloops Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

1991 CanLII 374 (BC SC)

BETWEEN:	
SONJA VANNAN, an Infant, by her guardian ad litem, PATRICIA VANNAN, and the said guardian ad litem, PATRICIA VANNAN PLAINTIFFS	REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE ROBINSON
AND:	
THE CORPORATION OF THE CITY OF KAMLOOPS DEFENDANT	
AND:	
PATRICIA VANNAN THIRD PARTY	

APPEARANCES:

John M. Drayton, Esq.	- Counsel for the Plaintiff and Third Party
Christine J. Moffat	- Counsel for the Defendant

DATE OF HEARING: October 4, 1991

The infant plaintiff, in this action, was on July 18, 1989 two years old. It is alleged that while playing on a playground apparatus or structure at McDonald Park in the City of Kamloops she fell and hit her head on a concrete foundation located in the ground below the apparatus or structure. She suffered a skull fracture and was taken immediately by her mother to Royal Inland Hospital where x-rays were taken and a C.T. scan done eight days later. In early October, a x-ray examination indicated that skull fracture was still observable. A medical examination done by the Paediatric Neurological Surgery in Vancouver in the British Columbia

Childrens' Hospital on November 2, 1989 determined that the little girl had achieved full recovery and that although there was a small risk of post-traumatic epilepsy it was probably no greater than that of the normal population. There is no risk of brain tumour or some other growth developing as a result of this type of fracture and there is no evidence in the relevant literature to support a definite relationship between a head injury and an underlying brain tumour. The parents incurred some expense as a result of this visit to Vancouver and in addition to a claim for general damages seek compensation for these additional expenses.

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The plaintiff relies upon the ***Occupiers Liability Act*** R.S.B.C. 1979 Chapter 303 and particularizes the defendant's negligence. The statement of claim reads:

> (a) Failing to take any care or any reasonable care to ensure that the plaintiffs would be reasonably safe in using the premises;
>
> (b) Failing to take any care or any reasonable care to prevent injury or damages to the plaintiffs from unusual dangers on the premises of which the defendant knew or ought to have known;
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> (c) Failing to give warning of the unusual dangers on the premises;
>
> (d) Allowing the unusual dangers on the premises to be obscured.
>
> (e) Failing to take adequate measures, whether by way of examination, inspection or test or otherwise, to ensure that the premises were in a reasonably safe condition;
>
> (f) Failing to have material such as sand located beneath the said apparatus instead of concrete;

The substance of the defence by the municipality is that the presence of the concrete foundation, uncovered by sand or other soft material, did not cause or contribute to the plaintiff's injury, that it, the municipality, owed no duty of care to the plaintiff and if such duty existed, there was no breach of same. By way of additional defence, and one on which the municipality relies

strongly, is that its procedures with respect to inspection and maintenance of playgrounds and playground equipment was in place prior to July 18, 1989 and that these procedures were pure policy decisions, thus exempting the defendant municipality from liability.

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Because of the infant plaintiff's age, no contributory negligence can be imputed to her. Accordingly, the mother of the infant is involved, not only in her representative capacity as plaintiff on behalf of the infant, but as a third party against whom the defendant municipality seeks contribution if it is held liable.

The allegation of contributory negligence arises from the fact that the mother of the infant had positioned herself at approximately a mid-point in the park, between the playground apparatus and a wading pool. She did this because of the necessity of watching another child or children for whom she was responsible, in the wading pool. She did not actually see the infant plaintiff fall or strike her head on the concrete base. There is also slight evidence to the effect that the infant plaintiff had some tendency to be accident prone. The mother was approximately fifty feet away from the playground apparatus when the accident took place. No photographic evidence was available or produced at the trial as to the extent of the visibility of the concrete under the centre of the playground apparatus, but the plaintiff's mother testified as to her recollection that it was to some extent or a considerable extent, concealed by grass or a combination of grass and dirt. There was introduced a photograph of an identical piece of equipment in another park in which the circular concrete base is clearly visible. It is to be further noted that the plaintiff's family, including her parents, often had made visits to this park and made use of it.

The authorities cited to me by the plaintiff on the strict issue of whether the defendant is liable, omitting for a moment its defence on the policy aspect, thereby insulating it from liability,

are, though helpful, necessarily different in their fact patterns. In a recent decision ***Stynes*** v. ***The City of Victoria*** 1990 43 B.C.L.R. (2d) 118, the B. C. Court of Appeal upheld the trial judgment against the municipality where it had constructed a six - seven inch curb along the south edge of a paved tennis court. The trial judge held that truncated end area and asphalt curb constituted an unusual danger. The appeal court found that the trial judge's finding of unusual danger was a finding of fact clearly supported by the evidence. I have no difficultly in concurring with that viewpoint, but that is not the situation before me. It is, however, of note that the Chief Justice, in dissent, was of the opinion that the plaintiff having decided to play with the awareness of the curb, thereby accepted the risk so that through a lack of concentration or otherwise a failure to take care might well result, thereby freeing the defendant from liability. In ***Bartlett*** v. ***Waich Apartments Ltd.*** [1974] 704 (2d) 363, the Ontario Court of Appeal reversed the trial judgment involving an injury to an infant plaintiff who fell from a landing situate in or on a complex of three apartment buildings which was unprotected by any fencing or wall from the railing to the surface of the landing. That situation seems to me also to be fundamentally different from the facts before me.

The essential thrust in the decision of ***Swan*** v. ***C.P.R.*** 1959 W.W.R. 1 centres around the duty or absence thereof of a parent to protect her infant child from the acts of wrongdoers. It was an appeal from a jury decision and involved a moveable ramp and railing running from a gangplank to an overhead walk leaving four triangular spaces through one of which the infant plaintiff fell. The infant was 2-1/2 years old. I do not find the decision of great assistance because of the difficulty in comparison with the premises in question in ***Swan*** and the park premises and playground in this instance.

The well known authority of ***Teno*** v. ***J. B. Jackson Ltd. and Stuart Galloway*** (1978) 2 R.C.S. 287 is helpful relative to the question of the liability of parents where an infant is injured

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by the negligence of others, but the fact situation was substantially different than the fact situation before me.

The decision in ***Oulette*** v. ***Daon Development*** (1988) 8301 - 06160 (unreported) Alberta Queens Bench is of some assistance, particularly as to the issue of contributory negligence on the part of the parent or a person in charge of a young infant. It does not, however, deal with playground equipment.

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Perhaps of most assistance is the decision in ***Stynes,*** because it involves a recreational facility maintained by a defendant municipality, which the public might use and enjoy. The difficulty in applying the principle in ***Stynes,*** to the situation here is that the plaintiff in ***Stynes*** was a full grown adult and here the plaintiff is a two year old infant. Reflection upon that aspect must surely take into account that infants of this age, no matter where they are, but perhaps more emphatically in a playground, are constantly at some risk and in many, many instances, the risks are minimized or avoided because of the close and continuing supervision of a parent or some other adult. Evidence from the defendant indicates that this piece of playground equipment was most probably installed in 1977. Since that time, there have been no other reports of injury to anyone as a result of the use of the equipment. The circle of concrete was not intended to be an "impact surface". It simply was an area of concrete placed for the primary purpose of installing the centre pole of the apparatus.

In a somewhat general way, my overview of infants who make use of parks or playground equipment is that there will be from time to time, without any negligence on the part of the 'occupier' of the premises, injuries to such infants, in most cases of a minimal degree. These injuries will come about as a result simply of the concentration by the infant upon his or her activity or the incapacity due to lack of experience of a young child to recognize the potential danger. An

infant has little regard for his or her surroundings and the potential for injury always exists, by virtue of the acts of other infants or persons, or due to the fact that many of the surfaces, particularly of the equipment or apparatus itself, will be of an unyielding texture as opposed to various soft impact surfaces such as sand, or presumably grass, plastic of some kind, or rubber. Injuries of this kind are almost a fact of life and the younger the infant the greater probability that such infants, during the course of play at a park or playground, will suffer injury unless they are very carefully supervised by the person in charge of such supervision. It cannot be realistically suggested that a two year old should or can be allowed to attend upon a park or playground by himself or herself without that sort of supervision. Further simple logic of this kind suggests that a perfect playground area would have no hard surfaces of any kind, or sharp projections, or moving parts that would possibly cause damage to an infant such as the one in this instance.

Notwithstanding the recent formal recognition of national or international standards for playground equipment and surfaces, suggesting to all owners, occupiers or controllers of playground equipment and playground areas, optimum surfaces for equipment and areas, it must be remembered that the tests to be applied in situations of this kind is one of reasonableness and not one of perfection. The occupier in instances such as these, is not an insurer. The defendant municipality here maintained a regular system of inspection of equipment and parks generally and a repair program, but not directed to improving impact surfaces or reducing the risk of harm or danger to infants not caused by a defect in the equipment, or to make changes pursuant to advancing playground standards. In all the circumstances, I do not think the municipality to have been negligent in not sooner taking the action it did, after the incident, by depositing sand underneath the equipment as the impact surface.

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I am aware that my reasoning may imply an awareness of the extent of the risk and a willing choice to accept physical and legal responsibilities by the plaintiff. That awareness and choice cannot be imputed to the infant plaintiff. But I simply do not conclude that the existence of the concrete circle was hazardous in these particular circumstances or any more hazardous than the apparatus itself. I record my awareness of the Supreme Court of Canada's decision in ***Waldick*** v. ***Malcolm*** in its interpretation of the Ontario ***Occupiers' Liability Act.***

If my logic is faulty and I have misapplied the law thus far, I find, in any event the defendant to be exempt from liability, because its park and playground inspection program is in keeping with a policy decision, not an operational decision.

In ***Lysack*** v. ***Burrard Motor Inn Ltd. and the City of Vancouver***, (unreported) October 26, 1989 Vancouver Registry A872743, Davies J. found for the city of Vancouver on the basis that its program of inspection of sidewalks was a policy decision. Davies J. also found against the plaintiff with respect to Burrard Motor Inn Ltd., but on appeal that defendant was found liable. With respect to the city of Vancouver, Davies J. reasoned as follows:

> "The plaintiff contends that the City had a policy to repair trips and that having made that policy it has a duty to effect repairs within a reasonable time. ***[Malat v. Bjornson*** (1980), 23 B.C.L.R. 235 at 242.] Mr. Tom Timm, Assistant City Engineer, explained that the City has a budget for repair and maintenance of sidewalks which consists of a four part programme. One of the four programmes for sidewalk maintenance is sidewalk fillets. He confirmed that the City is committed to repair all trip No. 3's, whether discovered by inspection or reported, no matter whether the budget figure is exceeded. However, included in the budget item sidewalk fillets is an amount for repairing trip No. 2's at the same time as repairing No. 3's.
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> In my view the ***Malat*** case cited by counsel for the plaintiff is clearly distinguishable from this case. In the ***Malat*** case the Department of Highways had knowledge of the risk of the eighteen inch barrier and instructions had been given to instal a thirty inch barrier which would have averted the accident. Further, these instructions were not acted

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upon within a reasonable time. In other words, there was a decision made to correct the eighteen inch barrier whereas in this case the repair of No. 2 trips was incidental to the repair of No. 3 trips.

Before the City can be held negligent in a claim of this kind, it must be determined whether the conduct complained of is in the "operational" category or in the "policy" category, in which case it is not reviewable by the courts. In ***Just v. R. in Right of British Columbia*** (1985), 64 B.C.L.R. 349, McLachlin J., after extensively reviewing the authorities on such claims, explained the difference between the two terms at p. 352 of the decision. She stated as follows:

> "In general, policy refers to a decision of a public body at the planning level involving the allocation of scarce resources or balancing such factors as efficiency and thrift: ***Nielson v. Kamloops,*** 31 B.C.L.R. 311 at 317-18, [1982] 1 W.W.R. 461, 19 C.C.L.T. 146, 16 M.P.L.R. 221, 129 D.L.R. (3d) 111 (C.A.), per Lambert J.A., affirmed [1984] 2 S.C.R. 2, [1984] 5 W.W.R. 1, 29 C.C.L.T. 97, 26 M.P.L.R. 81, 11 Admin. L.R. 1, 8 C.L.R. 1, 10 D.L.R. (4th) 641, 54 N.R. 1. The operational function of government, by contrast, involves the use of governmental powers for the purpose of implementing, giving effect to or enforcing compliance with the general or specific goals of a policy decision. "

The City's policy for the repair of trips was clear from the evidence. I am unable to find that its policy to repair some No. 2 trips at the same time as repairing No. 3 trips is unreasonable. The City's policy with respect to the repair of No. 2 trips was made because there were not sufficient funds to repair them as well as No. 3 trips. In other words, there was no policy directed at the repair of No. 2 trips.

The plaintiff argued that because this trip was located in the downtown core there was a higher risk and therefore a higher duty on the City. I am unable to agree. The question to be determined is whether the City's policy for inspection and repair is reasonable and whether its policy was properly followed. I am satisfied in both respects. "

On appeal to the Supreme Court of Canada with respect to the ***Just*** decision, where a new trial was ordered, Cory J. referred first to ***Sutherland Shire Council*** v. ***Heyman*** (1985) 60 A.L.R. 1, 59 A.L.J.R.. 564, reciting the words of Mason J. as to guidelines for differentiating between "policy" and "operational" decisions.

> "Mason, J. speaking for himself and one other member of the Australian High Court in ***Sutherland Shire Council v. Heyman*** (1985), A.L.R. 1, 59 A.L.J.R. 564, set out what I find to be most helpful guidelines. He wrote [at pp. 34-35]:

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> ***Anns*** decided that a duty of care cannot arise in relation to acts and omissions which reflect the policy-making and discretionary elements involved in the exercise of statutory discretions. It has been said that it is for the authority to strike that balance between the claims of efficiency and thrift to which du Parcq L. J. referred in ***Kent v East Suffolk Rivers Catchment Board*** [1940] 1 KB 319 at 338 and that it is not for the court to substitute its decision for the authority's decision on those matters when they were committed by the legislature to the authority for decision (***Dorset Yacht Co. v. Home Office,*** [1970] AC 1004 at 1031, 1067-8; ***Anns***, at p 754; ***Barratt v. District of North Vancouver*** (1980), 114 D.L.R. (3d) 577). Although these injunctions have compelling force in their application to policy making decisions, their cogency is less obvious when applied to other discretionary matters. ***The standard of negligence applied by the courts in determining whether a duty of care has been breached cannot be applied to a policy decision, but it can be applied to operational decisions.*** Accordingly, it is possible that a duty of care may exist in relation to discretionary considerations which stand outside the policy category in the division between policy factors on the one hand and operational factors on the other. This classification has evolved in the judicial interpretation of the "discretionary function" exception in the United States Federal Tort Claims Act - see ***Dalehite v. United States*** (1953) 346 US 15:...***United States v. Varig Airlines, supra***. The object of the Federal Tort Claims Act in displacing government immunity and subjecting the United States Government to liability in tort in the same manner and to the same extent as a private individual under like circumstances subject to the "discretionary function" exception, is similar to that of s.64 of the **Judiciary Act**, 1903 (Cth).
>
> The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that a ***public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints.*** Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. ***But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.*** [emphasis added]

The duty of care should apply to a public authority unless there is a valid basis for its exclusion. A true policy decision undertaken by a government agency constitutes such a valid basis for exclusion. What constitutes a policy decision may vary infinitely and may be made at different levels, although usually at a high level.

The decision in ***Anns v. Merton London Borough Council*** **and** ***Kamloops v. Nielsen*** indicate that a government agency in reaching a decision pertaining to inspection must act in a reasonable manner which constitutes a bona fide exercise of discretion. To do so they must specifically consider whether to inspect and, if so, the system of inspection must be a reasonable one in all the circumstances.

For example, at a high level there may be a policy decision made concerning the inspection of lighthouses. If the policy decision is made that there is such a pressing need to maintain air safety by the construction of additional airport facilities with the result that no funds can be made available for lighthouse inspection, then this would constitute a bona fide exercise of discretion that would be unassailable. Should then a lighthouse beacon be extinguished as a result of the lack

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> of inspection and a shipwreck ensue, no liability can be placed upon the government agency. The result would be the same if a policy decision were made to increase the funds for job retraining and reduce the funds for lighthouse inspection so that a beacon could only be inspected every second year and as a result the light was extinguished. Once again, this would constitute a bona fide exercise in discretion. Thus a decision either not to inspect at all or to reduce the number of inspections may be an unassailable policy decision. This is so provided it constitutes a reasonable exercise of bona fide discretion based, for example, upon the availability of funds.
>
> On the other hand, if a decision is made to inspect lighthouse facilities, the system of inspections must be reasonable and they must be made properly: see ***Indian Towing Co. v. U.S.,*** 350 U.S. 61. 100 L. Ed. 48, 76 S. Ct. 122 (1955). Thus, once the policy decision to inspect has been made, the court may review the scheme of inspection to ensure it is reasonable and has been reasonably carried out in light of all the circumstances, including the availability of funds, to determine whether the government agency has met the requisite standard of care.
>
> At a lower level, government aircraft inspectors checking on the quality of manufactured aircraft parts at a factory may make a policy decision to make a spot check of manufactured items throughout the day as opposed to checking every item manufactured in the course of one hour of the day. Such a choice as to how the inspection was to be undertaken could well be necessitated by the lack of both trained personnel and funds to provide such inspection personnel. In those circumstances the policy decision that a spot check inspection would be made could not be attacked: see ***U.S. v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines),*** 467 U.S. 797, 81 L. Ed. 2d 660, 104 S. Ct. 2755 (1984).
>
> 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. "

I am satisfied that the inspection program with respect to parks and playgrounds carried out by the City of Kamloops in this instance was eminently reasonable. Assuming that the concrete circle, installed as a foundation platform for the playground equipment is potentially hazardous, I find the city has demonstrated that, balanced against the kind and quantity of the risk involved, the system of inspection was reasonable in light of all the circumstances including budgetary limits and the personnel and equipment available to it and that it met the standards of duty of care imposed upon it. Though the budgetary allotment for parks was modest, it cannot be realistically suggested that its

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allocation of the funds to the various parks was unreasonable or discriminatory. It was made in a bona fide exercise of discretion.

In the result, the action is dismissed. Had I found for the plaintiff, I would have awarded by way of general damages sum of $2,000.00 and would have allowed the expenses of the parents in travelling to Vancouver to obtain advice at the Childrens' Hospital there.
Costs to the defendant if demanded but as to scale the parties are at liberty to apply.

Judgment accordingly.

ROBINSON, J.

Kamloops, B. C.
November 15, 1991

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