IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Knodell v. The Corporation of the City of New Westminster, et al***
2005 BCSC 1316

Date: 20050922
Docket: S74422
Registry: New Westminster

Between:

Cindy Christine Knodell

Plaintiff

And

The Corporation of the City of New Westminster, John Doe and Jane Doe

Defendants

Before: The Honourable Mr. Justice Joyce

Reasons for Judgment

Counsel for the plaintiff	N.A. Mulholland
Counsel for the defendant, City of New Westminster	J.M. Poole
Date and Place of Trial/Hearing:	August 10, 2005 New Westminster, B.C.

Introduction

[1] On the morning of March 20, 2002 the plaintiff fell and injured herself while walking on a sidewalk owned and maintained by the City of New Westminster (the "City") on which a patch of ice had developed. She claims damages against the City, alleging that it was negligent and breached its duty at common law and under the ***Occupiers Liability Act***, RSBC 1996, ch. 337 in failing adequately to maintain the sidewalk in a safe condition. The defendant applies under Rule 18A for a dismissal of the plaintiff's claim. The parties are in agreement that the issues can be determined on affidavit evidence.

Facts

[2] Sometime between 7:30 a.m. and 8:00 a.m. on March 20, 2002 the plaintiff was taking her usual route from her home in the Quay area of New Westminster to the New Westminster SkyTrain station. Her route took her onto the sidewalk on the McInnis Overpass (the "Overpass") which bridges the train tracks that run along the riverbank in the Quay area.

[3] The weather had been unusually cold during the several days before March 20th. There was fresh snow on the sidewalk. The plaintiff was wearing running shoes with a "waffle" type tread that she had found to be effective for traction in snow on previous occasions. The plaintiff walked slowly to the crest of the Overpass where it levels out before descending again. At about the point where the Overpass levels out the SkyTrain guideway and tracks pass overtop.

[4] As the plaintiff was walking up the Overpass she met a neighbour, Ms. Sullivan, who was coming from the other direction. Ms. Sullivan warned her that there was a treacherous patch of very slippery ice on the sidewalk near the area where the sky train guideway passes over top the Overpass and cautioned her to be careful.

[5] As the plaintiff reached the top of the Overpass she saw the patch of ice. When the plaintiff reached the patch of ice, she steadied herself by holding on with both hands to the top of the concrete wall on right side as she inched her way forward. As she began to descend the Overpass the height of the wall increased to the point where she could no longer hold on with her left hand. As she let go with her left hand and took another step she slipped and fell.

[6] The plaintiff dragged herself to a point where she could stand and then slowly made her way home where she telephoned her husband, who took her to the hospital. She was diagnosed with a fracture of the radius and ulna of the left wrist. A cast was applied, but a few days later the cast had to be removed, the wrist re-set and another cast applied. In addition to her broken wrist, the plaintiff suffered adhesive capsulitus in her left shoulder, a bruised coccyx and lower back pain.

[7] It is conceded that the City is an Occupier within the meaning of the ***Occupiers Liability Act*** and admits that maintenance of the sidewalk on the Overpass is its responsibility. The City imposes on itself the same obligation for performing winter maintenance on sidewalks that it imposes on adjacent land owners to sidewalk areas. The standard, imposed by City bylaw, is that adjacent

land owners must clear a sidewalk of snow and ice by 10:00 a.m. on the day following the accumulation of such snow or ice.

[8] The City workers who are assigned the task of performing sidewalk maintenance in the winter begin their shifts at 7:30 in the morning. Accordingly, they had not yet begun to perform their maintenance duties on the sidewalk on the morning of March 20, 2002, before the plaintiff fell. The sidewalk at the Overpass had been cleared of ice and snow on the days prior to March 20th so the ice and snow that was on that sidewalk at the time the plaintiff fell had accumulated since the sidewalk had been cleared the previous day. When the City worker arrived at the sidewalk at about 7:45 a.m., after the plaintiff had fallen, he saw a sheet of ice on the sidewalk that appeared to have formed from water that had fallen from melting snow on the SkyTrain guideway and froze on the sidewalk.

[9] The City employs a tow truck driver who patrols City streets at night. This employee is charged with the responsibility of reviewing conditions on the road surfaces, but does not have any responsibilities with respect to inspecting sidewalks. Due to budgetary constraints, the City does not employ any workers to maintain sidewalk areas outside of normal daytime working hours. The only exception to this is if a specific complaint is made about an area or a specific observation is made of an area that is hazardous. In such a case workers may be called in to address it. No such specific complaint was made during the night of March 19 – 20, 2002.

[10] The specific written procedure that is in place for sanding the McInnis Overpass after regular working hours reads in part as follows:

> ***Objective:*** To provide a reasonable skid free driving surface during adverse weather conditions.
>
> ***Intent:*** To establish a procedure for sanding of the McInnis Overpass during snowfall or below freezing temperatures.
>
> *Guidelines:*
>
> 1. During freezing temperatures and/or snowfall, the night shift tow operator shall inspect the McInnis Overpass on a regular basis during his/her shift.
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> 2. This inspection should take place between 4:00 a.m. and 6:00 a.m. but can vary depending on priorities.

[11] The tow truck driver who was employed the night of March 19 – 20, 2002 inspected the road surface of the Overpass at least once during his shift between the hours of 4:00 a.m. and 6:00 a.m. His practice was to stop near the top of the Overpass, get out of the tow truck and test the road surface by walking on it to see if it was slippery. The place where he stopped was 50 – 60 metres from the area where the SkyTrain tracks cross over the Overpass. From that distance he could not see the conditions in the area of the sidewalk where the plaintiff fell.

Issues:

[12] The defendant states the issues as follows:

(a) Was the City's decision with respect to winter sidewalk maintenance a policy decision which is immune from review by a court?

(b) If so, was the City in any way negligent in the implementation of the procedures called for by its policy?

(c) If the policy defence does not apply, were the City's actions reasonable so as to meet any duty of care imposed by common law or under the ***Occupiers Liability Act****?*

[13] If the City is liable, the following additional issues arise:

(d) Was the plaintiff contributorily negligent and, if so, to what degree?

(e) What is the quantum of the plaintiff's loss and damages?

Analysis

(a) The Policy Defence

[14] Counsel for the City submits that governmental authorities, including municipalities, are entitled to make policy decisions based upon budgetary factors and that such policy decisions are not reviewable by the courts as long as the policy itself is rational and made *bona fide* (***Just v. British Columbia*** (1989), 64 D.L.R. (4th) 689 (S.C.C.), [1989] 2 S.C.R. 1228 [***Just***] ; ***Brown v. British Columbia*** (1994), 89 B.C.L.R. (2d) 1 (S.C.C.), [1994] 1 S.C.R. 420 [***Brown***], and ***Gobin (Guardian of) v. British Columbia*** (2002), 214 D.L.R. (4th) 328, 2002 BCCA 373 [***Gobin***]). Counsel submits that the City's policy with respect to sidewalk inspection and maintenance is just such a policy and that the City is immune from liability as long as it was not negligent in carrying out the policy.

[15] ***Just*** and ***Brown*** deal with the dichotomy between true policy decisions, which are immune from review on traditional negligence principles, and operational decisions, which are not. It is a distinction that is often not easy to make.

[16] In ***Just***, the plaintiff was injured and his daughter killed when a large rock fell from the slope above the highway and crashed into their car. The province had the statutory power but not a statutory duty to maintain highways. In the exercise of its power it put in place a policy for periodic inspection and remedial work upon rock slopes. The plaintiff sued the province, alleging negligence. At trial and in the Court of Appeal, it was held that the number and quality of inspections and the frequency of scaling and other remedial measures were policy decisions that were immune from review by the court. In the Supreme Court of Canada, Cory J., for the majority, disagreed and held that the decisions came within the realm of operational decisions for which the province could be liable in negligence.

[17] At p. 708-709, Cory J. summarized the law this way:

> It may be convenient at this stage to summarize what I consider to be the principles applicable and the manner of proceeding in cases of this kind. As a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual. In determining whether a duty of care exists, the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty. In the case of a government agency, exemption from this imposition of duty may occur as a result of an explicit statutory exemption. Alternatively, the exemption may arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions.
>
> In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a

> high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. Further, it must be recalled that a policy decision is open to challenge on the basis that it is not made in the bona fide exercise of discretion. If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered.
>
> The manner and quality of an inspection system is clearly part of the operational aspect of a governmental activity and falls to be assessed in the consideration of the standard of care issue. At this stage, the requisite standard of care to be applied to the particular operation must be assessed in light of all the surrounding circumstances including, for example, budgetary restraints and the availability of qualified personnel and equipment.

[18] In ***Brown***, the plaintiff was injured when his car skidded off an icy road that was maintained by the province. The plaintiff alleged the province was negligent in two respects: first in failing to respond in a timely fashion to reports of icy conditions and second in failing to maintain the road so that ice would not occur. In connection with the second ground the allegation was that the Department of Highways was negligent in having in place at the particular time a summer schedule which provided less frequent inspection of the roads than during the winter schedule. With regard to the first ground, the trial judge found that the evidence did not support a finding of negligence. As to the second ground, the trial judge held that the policy that the province had adopted with respect to the inspection and sanding of roads was a matter of true policy which excluded any duty of care. The Court of Appeal dismissed an appeal as did the Supreme Court of Canada. Cory J., speaking for the majority, concluded that the case should be decided by application of the principles

set out in ***Just***. He held that there was a *prima facie* duty of care on the province to maintain the roads and that there was no statutory exemption from tortious liability. However, he held that the decision of the Department of Highways to maintain a summer schedule in effect, with all that it entailed, was a policy decision involving considerations of financial resources, personnel and negotiations with government unions which provided immunity from tortious liability.

[19] The difficult nature of determining which decisions fall under the category of "true policy" and which fall under the category of "operational decisions" is apparent from the decision in ***Gobin***. That case, like ***Just***, involved a situation where a rock fell from a bluff above a highway. In ***Gobin*** the rock was small but it crashed through the windshield of a pick-up truck travelling on the highway, striking and seriously injuring an 8-year old passenger. The trial judge held that the decision of the Ministry of Transportation and Highways to postpone implementing a recommendation to mesh the relevant area until the fall rainy season was operational rather than a policy decision.

[20] In the Court of Appeal, Braidwood J.A. set out the legal principles at paras. 11 – 13:

> [11] It is clear that a true policy decision may shield the government from liability. In the decision of ***Just v. R. in Right of British Columbia*** (1989), 64 D.L.R. (4th) 689 at p. 705, the following appears:
>
> > . . . 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.

> [12] At the same time, however, "complete Crown immunity should not be restored by having every government decision designated as one of policy" (**Just**, *supra*, at p. 704). Courts must weigh the particular circumstances of any given case in order to distinguish between policy and operation.
>
> [13] The analysis does not end here, however. Even where contested decisions are clearly ones of policy, the operational implementation of a policy decision may still leave government susceptible to a tort claim, as the matter essentially "reverts" to an operational one. Courts may therefore be required to assess whether policy matters under review are manifestations of the operational implementation of a policy choice. Where, ultimately, the contested decision is operational, the standard tort analysis applies, and the requisite standard of care is one of reasonableness. Where, in comparison, the decision at issue is one of policy, liability may be imposed only for decisions that are made in bad faith or that are so irrational or unreasonable that they cannot be said to constitute a proper exercise of discretion: ***Kamloops (City of) v. Nielsen***, [1984] 2 S.C.R. 2.

[21] Braidwood J.A. held that the decisions under consideration involved matters of expenditure and allocations of funds, scheduling and prioritizing all directed towards balancing social, economic and political needs of British Columbians and were true policy decisions where the applicable test was the bona fides of the decisions, not their reasonableness. He concluded at para. 57 that even if the decisions were “manifestations, operational in nature, of the implementation of the policy decision to inspect”, as in ***Just***, they were reasonable when “assessed in light of the relevant context, including the budgetary constraints and the availability of qualified personnel and equipment”.

[22] I note, also, the remarks of Southin J.A. in ***Gobin*** wherein she decries the lack of clear legislation with respect to the liability of the Crown in the matter of

highways, which would “avoid the policy/operations dichotomy which, in these highway cases, leads to a substantial expenditure of judicial ink.”

[23] ***Just***, ***Brown*** and ***Gobin*** all involved claims in negligence where there was no statutory duty imposed upon the governmental authority. In such cases it is necessary to determine whether the policy defence applies and, in so doing, it is necessary to consider whether the decision under attack comes within a matter of true policy or whether it is operational in nature. If it is a matter of policy then, unless that policy is not bona fide or is so irrational or so unreasonable as to not constitute a proper exercise of discretion, the City cannot be liable in negligence.

[24] In the present case the claim is founded not only in negligence but also under the ***Occupiers Liability Act***, which imposes a statutory duty of care upon the City. The relevant provisions of the Act are as follows:

> 1. In this Act:
>
> "occupier" means a person who
>
> (a) is in physical possession of premises, or
>
> (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 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,

8. (1) Except as otherwise provided in subsection (2), the Crown and its agencies are bound by this Act.

(2) Despite subsection (1), 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, other than a recreational trail referred to in section 3 (3.3) (c),

(b) a public road,

(c) a road under the *Forest Act*,

(d) a private road as defined in section 2 (1) of the *Motor Vehicle Act*, other than a private road referred to in section 3 (3.3) (b) (iv) of this Act, or

(e) an industrial road as defined in the *Industrial Roads Act.*

[25] I should have thought that where a statutory duty of care exists the policy/operational analysis simply does not arise. The policy defence, if it applies, negates a common law duty of care. That was the view taken by Sopinka J. in his concurring judgment in ***Brown*** at para. 2:

> … if a statutory duty to maintain existed as it does in some provinces, it would be unnecessary to find a private law duty on the basis of the neighbourhood principle in ***Anns v. Merton London Borough Council***, [1978] A.C. 728. Moreover, it is only necessary to consider the policy/operational dichotomy in connection with the search for a private law duty of care.
>
> (emphasis added)

[26] It was also the view taken by Southin J. in her concurring judgment in ***Gobin*** at para. 65, quoted above, and at para. 67 where she said:

> In ***Brown v. British Columbia (Minister of Transportation and Highways),*** [1994] 1 S.C.R. 420, Sopinka J. set out correctly, in my opinion, the law of British Columbia.

[27] This is also the view taken by the Ontario Court of Appeal in ***Kennedy v. Waterloo County Board of Education*** (1999), 175 D.L.R. (4th) 106, 45 O.R. (3d) 1 [***Kennedy***] in which the Court held that "the trial judge erred in applying the policy/operational analysis where the Occupiers' Liability Act prescribes the statutory duty and the standard of care and provides civil liability for breach of that duty".

[28] That is not to say that the existence of a policy would be irrelevant to the determination whether there is a breach of the statutory duty of care. It is clearly relevant. In determining the standard of care under the ***Occupiers Liability Act*** and whether the City has breached the standard of care, it is necessary to consider all relevant circumstances, including budgetary constraints and the availability of personnel and equipment. During such analysis the court would have to consider the reasonableness of the policy as well as whether it was properly carried out.

[29] However, this is not the view taken by my brother Brooke J. in ***Fox v. Vancouver (City)*** 22 B.C.L.R. (4th) 126, 2003 BCSC 1492 [***Fox***]. In that case, Ms. Fox sued the City of Vancouver for damages suffered when she tripped and fell on a sidewalk owned by the City. Her claim was based solely upon the ***Occupiers Liability Act***; she did not advance a common law claim in negligence.

[30] The defendant City argued that it had implemented an inspection system which could not be reviewed on a private law standard of reasonableness, unless it

could be said that the decision was not *bona fide* or was so irrational that it could not constitute a proper exercise of discretion. Alternatively, it argued it took reasonable care to see that the plaintiff and others would be reasonably safe in using the sidewalk and no liability should be found under the ***Occupiers Liability Act***.

[31] The plaintiff argued that the immunity defence depended on the absence of a positive duty, whereas a positive statutory duty existed under s.3 of the Act. The plaintiff's position was summarized by Brooke J. at para. 14:

> What the plaintiff, in essence, is saying is that there is a distinction between a common law claim in negligence in respect of the exercise of statutory powers to maintain and repair streets as against an alleged breach of a statutory duty of care, such as that contained in the Occupiers Liability Act. The plaintiff says that in the first case, the powers are permissive and import a discretion which lends itself to a policy and operational analysis. In the latter case, so says the plaintiff, no such analysis is permitted.

[32] Brooke J. reviewed the authorities, including ***Just*** and ***Brown***, distinguished ***Kennedy*** and applied the policy immunity defence. At para. 19 he said:

> I find that the defendant city made a bona fide policy decision in the exercise of a discretionary power, and that that decision expressed in the Engineering Technician's Manual is not unreasonable and is a bona fide exercise of discretion based upon social, political and economic factors and not with a view to absolving itself of liability for the harm that the plaintiff sustained when she fell. As such, it is not reviewable by this court other than with respect to its operational aspect. There is no suggestion that the defendant city failed to carry out its responsibilities as set out in the Manual. Accordingly, the plaintiff's claim must be dismissed.

[33] As the decision in ***Fox*** is a considered decision in which the relevant case law was reviewed I feel constrained by ***Re Hansard Spruce Mills Ltd.*** [1954] D.L.R. 590, 13 W.W.R. (N.S.) 285 to follow it.

[34] In my opinion, the policy adopted by the City for the clearing of snow and ice from its sidewalks constitutes a *bona fide* exercise of its discretion based upon budgetary constraints and the availability of workers and equipment. In my view, it is neither irrational, nor so unreasonable as to constitute an improper exercise of discretion. The City imposes on itself the same obligation that it imposes on persons whose property abuts sidewalks. It requires a response to snowfall by 10:00 a.m. of the day following a snowfall or freezing weather. The City does not have crews available to provide sidewalk maintenance outside of the dayshift hours, but does respond on an exceptional basis if a dangerous situation is brought to its attention.

[35] Counsel for the plaintiff says the fact that the City has singled out the Overpass street for special consideration demonstrates that it is aware there are special risks associated with icing on the Overpass. He submits the City ought to have been aware the Overpass was used heavily by pedestrians and that it was more susceptible to icing than other locations. Counsel submits, therefore, that the nature of this location takes it out of the general policy and the failure to give it special consideration is an improper exercise of discretion.

[36] I cannot accept that submission. The evidence does not enable me to find as a fact that the City was aware of any special problems associated with the sidewalk

on the Overpass that would necessitate consideration beyond that given to other sidewalks that the City is liable to maintain.

[37] Even if the policy/operation analysis were not to be applied to the claim founded upon the ***Occupiers Liability Act***, I would conclude, for the reasons set out above, that the policy the City adopted for inspection and ice and snow removal is reasonable in all of the circumstances and meets the reasonable standard of care imposed by the Act. Occupiers are not insurers. They are only required to take such care as is reasonable in all the circumstances to see that a person will be reasonably safe in using the premises. As Cory J. said in ***Brown*** at p.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.

While this observation was made in relation to icy roads, it also applies to the clearing of ice and snow from sidewalks. It would not be reasonable to expect the City to devote the workforce and resources to clear the sidewalks immediately upon snow falling and to ensure that they remained clear as snow fell. The City need not take all measures that may be possible to ensure the safety of those who use its sidewalks. The standard is reasonableness.

[38] I note as well that the policy adopted by the City for clearing sidewalks under its control is the same as that adopted by the municipality in ***Miller v. Kamloops (City)*** 39 M.P.L.R. (3d) 295, 2003 BCSC 908, which Blair J. found to be reasonable.

(b) Was the City negligent in implementing the policy?

[39] In my opinion, there is no evidence that the City was negligent in carrying out its policy or in failing to detect and remedy the danger that presented itself to the plaintiff. The plaintiff accepts that the icy patch developed overnight and was not the result of any failure on the part of the City to clear the sidewalk on the previous days. The tow truck driver who inspected the Overpass road early on the morning of March 20, 2002 was not required to inspect the sidewalk and was not in a position where he could have detected the danger when he was testing the surface of the road. There was nothing about the road surface that could have alerted him to the presence of the ice patch that had formed on the sidewalk.

[40] I am satisfied that if the defendant owed the plaintiff a duty of care, either at common law or under the ***Occupiers Liability Act***, it met a reasonable standard of care, and is therefore not liable for the plaintiff's injuries.

Remaining issues

Given my conclusion that the City is not liable, either in negligence or under the ***Occupiers Liability Act***, I need not address the issues of contributory negligence or quantum and I choose to not do so.

Disposition

[41] The plaintiff's action is dismissed. The City will be entitled to its costs at scale 3.

"B.M. Joyce, J."
The Honourable Mr. Justice B.M. Joyce