Date: 19971203
Docket: 4379
Registry: Nelson

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DIANE OSER

PLAINTIFF

AND:

THE CORPORATION OF THE CITY OF NELSON

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE T.M. McEWAN

Counsel for the Plaintiff:	Michael J. Yawney
Counsel for the Defendant:	Donald Paolini
Place and Date of Hearing:	Nelson, B.C. November 24, 1997

[1] On May 5, 1994 Diane Oser, a thirty-eight year old piano teacher, was walking on a sidewalk along Hall Street in Nelson, British Columbia. She came across a barricade erected by the City around an area of the sidewalk that was under repair. It was necessary to find a way around this barricade to continue in the direction she was going.

[2] Maps and photographs in evidence show that Ms. Oser had a choice between a short but steep alleyway running perpendicular to her direction of travel, and a longer, more gradual lane that would require her to back-track a little. She chose to take the alley.

[3] Toward the bottom of the section of the alley between the sidewalk and Hall Street the photographs show that what looks like an old oiled surface is broken up into loose gravel.

[4] Ms. Oser came to that part of the alley, and, partly due to the steepness of the slope, tripped on the loose material and injured herself. Weather and visibility were not factors. The accident happened in daylight and the surface was bare and dry.

[5] The sole issue for determination is liability. Counsel have agreed that all the necessary facts have been put before the court in the filed affidavits, so the matter proceeded by way of a Rule 18A Summary trial.

[6] The plaintiff submits that in barricading the sidewalk the defendant should have foreseen that persons would use the steep alley and that injury could result, given its grade and condition. At a minimum, the plaintiff suggests, the defendant should have posted signs warning that the alley was dangerous.

[7] The defendant submits that it was not negligent by ordinary standards or by those applicable under the Occupiers Liability Act, and that, as a public authority, it is exempt from a duty of care in the circumstances, because it had a policy on maintenance and inspection of property and had followed that policy.

[8] The City's evidence is that before May 5, 1994, it had not received any complaints about the condition of the alley. Robert Adams, the Director of Works and Services deposed that this alley is not in a high traffic area and has a low priority for maintenance. He further deposed that before June of 1994 there was no policy for scheduled inspections of roadways and sidewalks in the City due to budget and manpower constraints.

[9] Mr. Adams also deposed that he inspected the site after Ms. Oser's mishap and found there was nothing so unusual or particularly hazardous about the condition of the alley that it would cause him to order repairs.

[10] Ms. Oser's observations at the time included:

157 Q Did you make any observations about the surface of that alleyway?

A I was aware that it was very crumbly, yes.

158 Q When you say "crumbly", what do you mean by that, gravel --

A There was a lot of gravel and bumps.

159 Q Were you concerned at all about the surface of that roadway?

A No.

* * *

169 Q And you weren't trapped in the sense that there were alternate routes to get back to Hall -- to get down on to Hall Street?

A If I had really thought that there was immediate danger, I would have definitely gone back up the hill, but I didn't thin -- I didn't see anything to warrant, you know, making that trip back up the hill.

* * *

172 Q Were you looking down at the roadway?

A Actually, yes, I was.

173 Q And there was no problem? Nothing impeding your vision of the roadway?

A No.

* * *

187 Q You said you slipped on gravel. Did you step in a pothole or anything?

A I remember that the pavement was uneven, very uneven, and I was very aware of that.

188 Q As you were walking down, you were aware that it was uneven?

A Right.

[FROM THE DISCOVERY]

[11] The plaintiff submits that the defendant's "policy" of having no schedule of inspections of sidewalks and roads before June 1994 is "so irrational and unreasonable as to constitute an improper exercise of government discretion", as that test is enunciated in ***Brown v. British Columbia*** (1994) 112 D.L.R. (4th) 1 (S.C.C.) at p. 11, per Mr. Justice Cory. That decision establishes that the person who asserts such an improper exercise of discretion must prove it on a balance of probabilities. Here, the only evidence offered is the fact that there were no scheduled inspections. From this, an inference of irrationality or unreasonableness is invited. But, as submitted by the City, it is not unreasonable not to inspect if a bona fide policy decision has been made that certain hazards fall below a threshold established due to budgetary or manpower considerations. That is the evidence before me.

[12] Without evidence that clearly dangerous situations were being ignored or that the "threshold" was irresponsibly high or arbitrary, no inference of irrationality or unreasonableness is warranted from the mere fact that there were no scheduled inspections. That submission is tantamount to an assertion that

the City is an insurer respecting any mishap within or upon its public places. That is not the defendant's legal burden.

[13] In any event, it is obvious from the evidence that while the surface of the alley was less than ideal, it did not constitute an unusual or latent "trap". The defendant was not in a better position to appreciate the danger than the plaintiff, and was therefore not realistically in a position to warn the defendant. The evidence is that the risk posed by the condition of the alley was slight, and that, in any event, the plaintiff had assessed that danger and proceeded in spite of it. In this respect the comments of the Chief Justice in ***Malcolm v. B.C. Transit*** (1988) 32 B.C.L.R. (2d) 317 at p. 318 are pertinent:

> In my respectful view, it is not negligence or a breach of any duty not to warn an adult person, not suffering under any disability, of the ordinary risks arising out of the exigencies of everyday life. Any such adult person without being warned knows and accepts the risks of falling on a steep, wet, grassy slope or a path and it was not necessary, in my view, to give a warning of such a common everyday risk. Counsel in his able submission before us, himself described such a warning as superfluous.
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> This is quite a different case from *Dixon v. R.*, 12 B.C.L.R. 110, [1979] 4 W.W.R. 289, 99 D.L.R. (3d) 652, affirmed 24 B.C.L.R. 382, [1980] 6 W.W.R. 406 (C.A.), where liability was found against a bus company for negligence when a passenger slipped on an oil slick near the point of disembarkation from the car deck of a B.C. Ferry. Here there was no hidden or unusual danger and the plaintiff was just as aware of this risk as was the driver of the bus.

[14] The plaintiff is in the same position here. I am unable to conclude that she has established that the defendant was negligent. The action is accordingly dismissed.

"T.M. McEwan, J."

T.M. McEWAN