Canada

PROVINCE OF BRITISH COLUMBIA

In the Supreme Court of British Columbia

(BEFORE THE HONOURABLE MR. JUSTICE BOYLE)

NO: 20139
KAMLOOPS REGISTRY

28 OCTOBER, 1994
KAMLOOPS, B.C.

TERESA ANDERSON

VS

CITY OF KAMLOOPS & others

DECISION

COLUMBIA REPORTING SERVICES
203-239 VICTORIA ST. KAMLOOPS, B.C. V2C 2A1
(604)828-1441

THE COURT (Oral). The Plaintiff was leaving the purlieu of the civic coliseum in Kamloops February the 10th, 1993 when she fell on steps which led from a surrounding plaza onto the street level. She suffered a painful and disabling broken bone in her right wrist, which the physician described as a Colles' Fracture.

She sues under Section 3 of the Occupier's Liability Act, R.S.B.C. 1979, Chapter 303, which will be referred to herein as the Act:

"Occupiers' duty of care

3. (1) An occupier of premises owes a duty to take that care that in all the circmstances of the case is reasonable to see that a person, and his property, on the premises, and property on the premises of a person, whether or not that person himself enters on the premises, will be reasonabley 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.

(3) Nothwithstanding subsection (1), an occupier has no duty of care to a person

(a) in respect of risks willingly accepted by that person as his own risks, or

(b) who enters premises that the occupier uses primarily for agricultural purposes and who would be a trespasser under the Trespass Act,

other than a duty not to

(c) create a danger with intent to do harm to the person or damage to his property, or

(d) act with reckless disregard to the safety of the person or the integrity of his property.

(4) Nothing in this section relieves an occupier of premises of a duty to exercise, in a particular case, a higher standard of care which, in that case, is incumbent on him by virtue of an enactment or rule of law imposing special standards of care on particular classes of person."

The Act establishes in somewhat ambiguous terms the duty of care and the standard of care in situations of this kind. It was not disputed Section 3 applies in this action.

It is not disputed the stairs at issue are municipal property. The stairs are in two flights, separated by a landing. It is on the second flight down that the Plaintiff fell after three or four steps. The Plaintiff's evidence calls for the court to infer from the circumstances that the fall on the probabilities resulted from a slip on ice which should have been removed or prevented from occurring by the Defendant.

In answer, the Defendant claims the injury resulted from negligence on the Plaintiff's part; alternatively, that the Plaintiff voluntarily accepted the risk; again alternatively, that if the Defendant owed a duty, that duty was not breached because there was an established and reasonable policy of maintenance inspection and care for the area at issue with which the Defendant at all material times was in compliance. The Defendant argued that, in any event, the evidence did not show there was ice on the stairs.

The Defendant cited Just v the Queen in Right of British Columbia (1989) 41, B.C.L.R. (2d) 350, which explains the application of governmental policy to a claim of tortious conduct in a case of this kind, and which directs the policy must be distinguished from acts carried out or omitted in implemenation or failure to implement that policy.

There are third party proceedings. By agreement they were severed pending the outcome of this hearing. The third party is the promoter of the evening event attended by the Plaintiff. The promoter had contracted the use of the coliseum.

The Plaintiff and her husband, the Andersons, and another young couple, the Smiths, entered the coliseum by its main entrance and left by a different route. Three of them testified they experienced no slipperiness on the plaza which surrounded the coliseum on the way in. The fourth, Mr. Smith, testified he was kicking up slush.

All four arrived in one car, the two women got out near the main entrance to the coliseum. The two men went on to find a parking place. After parking they rejoined their wives, having followed a route from their parked car which approximated in part the route they all later took on departure. The two men had climbed over a high snowbank on the way to join their wives. That may have accounted at least in part for Mr. Smith's subsequent observation of slush.

It had snowed earlier on the day of the concert. That snow had been cleared off by City workers. It was wet and easy to clear. The City sub-foreman personally shoveled off the steps. No snow fell subsequently at any material time. The work was

completed by eleven a.m. and no further check of the area was made that day. The Defendant's evidence was that it had been thoroughly cleared, and, because of the weather conditions which were above freezing, it was not considered necessary to have a later look at the surface. The Defendant's evidence was that usually after morning removal of snow there would be a later routine check, but on this occasion there was no reason to do so.

The Plaintiff's theory is that during the day the temperature was sufficiently warm to melt snow at the sides of the plaza walkway and stairs, thereby keeping parts of the surface wet from the run-off. He submitted the temperature during the concert fell sufficiently to cause that moisture to freeze or begin to freeze into slush.

No one suggested the morning snow clearance had not been thorough. The plaza has a slight slope to facilitate drainage. The Plaintiff argues that would tend to keep the plaza damp from the run-off from the melting snow.

Civic employees testified regarding a regularly followed program of snow and ice removal and many visual checks for ice in the environs of the coliseum during working hours, which run from eight to four, that's eight a.m. to four p.m, or from seven a.m. to four p.m. when there has been a significant snowfall.

As I understood it, there was a call-out procedure followed when circumstances so required, but that call-out procedure was related almost exclusively to untimely snowfalls, and not with respect to ice. I was satisfied the municipality had adopted in general a reasonable policy and practice for regular working hours of implementation based on that policy, the purpose of which was to keep the area reasonably safe during times of normal use. The program of response to snow and ice put priority on removal within a legitimate budget constraint of the coliseum and municipality.

I should add this case deals only with policy and practice relating to the coliseum, which is a separate civic program to that of street and sidewalk.

The general policy to which I have referred appears to have been implemented on the date in question, but there was one specific negligent failure in the Defendant's duty to the public under that policy and under Section 3 of the Act. To meet that duty the Defendant should have had an established practice of providing for an inspection of the plaza surface when the colisem was in use in the evening after normal working hours when weather conditions raised the possibility of temperatures dropping below freezing when the plaza surface was wet. That observation would apply to after hours inspection in any weather condition that might reasonably be anticipated to create a hazard.

Robert Taylor, the foreman who has overall charge of the snow clearing at the coliseum -- a small part of his responsibility I might add -- testified that very little would be done after hours unless a coliseum staff member called or unless there was snow, in which case a crew would be called out and the area kept open until members of the public had left. In my summary he agreed if there were snow and ice it would not be up to the Defendant's standard and, obviously,

the standard set is a matter of policy. He said a crew would definitely go back during working hours if ice were suspected. The issue he said would be temperature. To carry out such a check after working hours and when the coliseum is in use would not require an expanded budget because the coliseum has a large contingent of volunteers, one or more of whom could be dispatched to inspect the plaza for ice and snow on the stairs before and after public affairs. No such check is -- or was done. The coliseum manager testified he usually sent one of his staff, paid or volunteer, outside during an event to see whether or not there were any problems. But the evidence did not suggest that person's purpose was to check for slippery spots. If one were encountered by chance, it would be reported but the evidence did not stipulate that was the purpose of the cursory reconnoiter.

There is no question the manager had authority to give the necessary direction. The manager did testify he had materials on hand to fight ice and so something could be done if ice were found and reported to him, but no evidence indicated specific instructions from him to check the plaza and stairs for slippery

conditions. The manager testified the plaza generally was not his responsibility but that does not override the general policy regarding snow and ice.

The Plaintiff and her companions arrived for the concert at seven p.m. They came out at about ten-thirty p.m. They testified variously that the temperature on arrival was cool or cold. My conclusion was that it was not freezing. The evidence of the two women was that on leaving they encountered slippery patches on the plaza. Their evidence -- excuse me, there was no evidence anyone slipped, but the evidence for the Plaintiff was of walking carefully. No one testified he or she had observed ice in the plaza or on the stairs where the Plaintiff fell. That is, no one giving evidence for either the Plaintiff or Defendant testified he or she saw ice on the stairs at any material time before or after the Plaintiff fell.

It is not necessary to examine the fall itself, apart from cause. It is not disputed the Plaintiff did fall and it is not disputed a bone in her arm was broken. The only description given of the initiation of the fall was that of Mrs. Smith, the

young woman accompanying the Plaintiff as she headed toward their parked vehicle. She said the Plaintiff's feet went out from under the Plaintiff and the Plaintiff tried to soften her fall with her right arm. In doing so, the Plaintiff's right wrist was broken.

The general area of the stairs was scrutinized about two hours later at somewhere between twelve and twelve-thirty a.m. the next day by Larry John Grant, a relative of the Plaintiff. He is an insurance adjuster who was asked, not in that capacity but as a relative, by the Plaintiff's husband to go to the scene and to take some photographs. He did so accompanied by Mr. Smith. Neither Mr. Grant nor Mr. Smith testified to seeing ice on the stairs. Mr. Smith said there was slushy water on the landing but he testified to an absence of slipperiness. Mr. Grant's recollection was that it was mild at the time he took the photographs. He was wearing shoes with a tread similar to that of the Plaintiff. He testified he had no trouble going up or down the stairs, he had no trouble on the stairs seeing where he was going. He agreed one of his concerns was to see how slippery -- to see whether or not it was slippery there and found none, and that's a

bit ungrammatical, but "found none" are his words.

Photographs taken at the time were put into evidence. They show generally a piece of dampness. One shows a faint impression of a footprint. Mr. Grant testified his foot had left the imprint. The Plaintiff argues that impression could not have been made if the "damp" area was only water. He argues there must have been slushy ice present. Whatever it was, Mr. Grant did not find it to be slippery and it goes beyond common observation to interpret the footprint that is faintly seen in the photo. Mr. Grant testified he saw only water at the scene.

The stairs are not broad, they are easily taken in at a glance. Mrs. Smith testified she did not slip but felt the need for caution, thinking there might be ice. Her recollection was that it was cooler when they left the coliseum than upon entering, but agreed the temperature could have been unchanged and she said she didn't feel it was below freezing. Her evidence and that of the Plaintiff was that the Plaintiff descended the stairs holding a hand rail on her left. The Plaintiff had moved to the left because

there was no hand rail on the right. She said it was dark on the stairs but that she could see where she was going. The court took a view -- I found the lighting adequate. In winter there was snow and, with leaves off nearby trees it probably was a bit brighter. Asked whether there was snow or ice on the stairs, the Plaintiff could not recall. She said she first felt the stairs might be slippery when she reached the landing.

A meteorologist identified records which showed temperatures above freezing at the material time, and warming slightly about midnight when they started to drop. The readings were taken at the airport, which is about six miles from the coliseum, although at the same elevation. The meteorologist agreed as did the City's sub-foreman who testified that temperatures could vary from place to place within one general area. Asked on cross-examination whether there might be, for instance, snowfall at the airport but none at the same time in the City, the meteorologist agreed, but that did not suggest to me a colder temperature in the City than at the airport.

The sub-foreman who shoveled the stairs attended the concert. He did not then use the stairs but he is an extremely conscientious employee up at five a.m. to check the weather and he gave no evidence of concern about the conditions of the plaza.

The coliseum manager left the building at about midnight. His exit would take him across what was not disputed to be the area most commonly icy. He testified there was no ice.

Mr. Smith testified the plaza was not as slippery at midnight as it had been earlier. That is out of sync with the reasonable consequences of moisture and of the weatherman's observations.

It is not of overwhelmingly weight, but there were three thousand twenty-five hundred persons at the concert. The evidence was that others were using the stairs at the same time although the crowd had dispersed generally around the plaza, but there were others on the stairs at the same time as the Plaintiff, ahead of her and behind her, and there was no evidence of anyone other than the Plaintiff slipping.

The Plaintiff's Statement of Claim asserts she slipped on ice on the stairs. I have not strictly construed the word "ice". I have taken it to include slush.

I have said at the outset there was, or perhaps not at the outset, somewhere close to the outset, there was negligent failure in implementation of a reasonable policy of snow and ice clearance, but I find that that failure was not proven to be causatively connected to the Plaintiff's fall. I came to that conclusion because I was satisfied on the evidence that, whatever the situation on the plaza, it had not been proven on the probabilities that there was ice or slush on the stairs at the material time. The evidence of Mr. Smith, the only witness who gave evidence anywhere close to positive affirmation of slush on the stairs, is outweighed by the substantial contrary evidence of the weather and surface conditions of other witnesses.

Just briefly put, I found there was a negligent failure in the implementation of the

Defendant's reasonable snow and ice clearing policy at the coliseum, but that failure was not causatively related to the Plaintiff's injury. I concluded that it was not proven that the Plaintiff had slipped on ice or slush, and the claim is dismissed.

(DECISION CONCLUDED).

I hereby certify the foregoing to be a true and accurate transcript of the proceedings transcribed to the best of my skill and ability.

IRIS RICHARDS
Official Court Reporter