IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Beadle v. Nanaimo (City of),*
2009 BCSC 1506

Date: 20091104
Docket: S47963
Registry: Nanaimo

Between:

Beverly Ann Beadle

Plaintiff

And

City of Nanaimo

Defendant

Before: The Honourable Mr. Justice Shabbits

Reasons for Judgment

Counsel for the Plaintiff:	W.A. Scott
Counsel for Defendant:	J.A. Small
Place and Date of Hearing:	Nanaimo, B.C. October 28, 2009
Place and Date of Judgment:	Nanaimo, B.C. November 4, 2009

[1] On July 6, 2006, Beverly Ann Beadle fell on a sidewalk on Prideaux Street in Nanaimo. With this proceeding Ms. Beadle seeks compensation for injuries.

[2] The City of Nanaimo applies to have her claim dismissed against it pursuant to Rule 18A, the Rule of Court relating to summary trial.

[3] Ms. Beadle asks that the court make a finding pursuant to Rule 18A that the defendant is liable for her injuries and resulting damages, subject to contributory negligence, if any.

[4] Both parties agree that liability in this proceeding should be determined on this application pursuant to Rule 18A of the Rules of Court.

[5] In February 2005, the defendant had a contractor, Knappett Industries Ltd., carry out infrastructure upgrading to premises located on the westerly side of 303 Prideaux Street. Part of the project involved the installation of a fibre-optic conduit that required the digging of a trench in the concrete sidewalk. After this work was done, the contractor paved the sidewalk. That work was completed by July 19, 2005.

[6] The paved trench across the sidewalk settled after the contractor had paved it and before the plaintiff fell. The plaintiff tripped on the vertical face of a difference in elevation between the paved trench and the concrete sidewalk. The difference in elevation was about 14 millimetres or about one half of an inch. The difference in elevation is illustrated with photographs taken by the plaintiff's husband within a day or so of the fall and with other photographs taken by an employee of the defendant the day after the fall. One of the photographs taken by the plaintiff's husband shows the vertical difference in elevation was about one-half the height of a Loonie. The difference in elevation was a minor defect in the sidewalk.

[7] After the plaintiff was injured the defendant replaced the paving that had been installed over the trench in the area of the sidewalk with concrete so that the sidewalk was similar to its condition before the infrastructure upgrading project began.

[8] Ms. Beadle fell on a sunny summer day during her lunch break. She was wearing her eye glasses at the time of the fall, and her eyesight is excellent with her glasses on. She was in good health. Ms. Beadle says that she did not notice the filled trench, nor that the asphalt fill was lower in elevation than the concrete.

[9] At the time of the incident, the defendant corporation had a formal policy on sidewalk inspection and repair. It was City of Nanaimo Public Works Policy Re:

Sidewalk Inspection and Maintenance Bylaw Number 97-02. The bylaw requires the Roads Division of the Department of Public Works of the City of Nanaimo to provide an assessment of the condition of the sidewalks within the City in order to identify and repair sidewalk defects.

[10] The bylaw provides that the policy is that sidewalks be inspected on a semi-annual basis, that defects be entered into a registry, and that the inspection include checking for sections of sidewalk cracked or separated with a greater than 25 millimetre difference in elevation.

[11] Mr. Brian Denby, Manager of the Roads and Traffic Services Department of the defendant says in his affidavit No. 1 that the defendant's policy relative to sidewalk repair is dictated by the City's budgetary and manpower constraints. He said that the sidewalks are inspected semi-annually for defects and that complaints of defects are also received from the public. He says that when a notice of defect is made, either because of the inspection or because of complaint, the matter is directed to the public works department. Repairs are carried out in accordance with the priority reading based on the severity of the defect. Mr. Denby says that if personal injury is sustained as a result of a sidewalk defect, it is scheduled for repair as quickly as possible regardless of its priority rating.

[12] The day after the plaintiff fell, her husband reported her injury to the City's Public Works Yard. The defendant inspected the sidewalk the same day and completed the repair of the defect by July 10, 2006.

[13] The defendant submits that because the difference in elevation at issue was below its threshold to repair that no liability can attach to it.

[14] In *Just v. British Columbia* (1989), 2 S.C.R. 1228, Cory J. writes this for the majority of the court at paragraphs 28 and 29:

> [28] 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 [page 1245] duty of care in situations which arise from its pure policy decisions.
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> [29] 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 statue 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.

[15] In *Brown v. British Columbia (Minister of Transportation and Highways)* (1994), 1 S.C.R. 420, Cory J. says this at paragraphs 38 and 39.

> [38] In distinguishing what is policy and what is operations, it may be helpful to review some of the relevant factors that should be considered in making that determination. These factors can be derived from the following decisions of this Court: *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *Barratt v. District of North Vancouver*, [1980] 2 S.C.R. 418; and *Just, supra*; and can be summarized as follows:
>
> > True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.
> >
> > The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the

> performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

[39] In my view, the decision of the Department to maintain a summer schedule, with all that it entailed, was a policy decision. Whether the winter or summer schedule was to be followed involved a consideration of matters of finance and personnel. Clearly the decision required the Department to discuss and negotiate the dates for the commencement of the summer and winter schedules with its unions. This was a policy decision involving classic policy considerations of financial resources, personnel and, as well, significant negotiations with government unions. It was truly a governmental decision involving social, political and economic factors.

[16] In *Pamaran v. Victoria (City)* (1996), B.C.J. No. 912, Taylor J. dismissed an action in which the plaintiff tripped over an uneven portion of the sidewalk. The City of Victoria had a policy of repairing differences in sidewalk elevation in excess of 35 millimetres. Taylor J. said this at paragraphs 33 and 34:

> [33] The evidence here clearly shows that for the City of Victoria to repair 25 mm differences rather than 35 mm differences it would be faced with a 25% increase in costs. Likewise, in each of the budget proposals for 1991, 1992 and 1993 that went before City Council, consideration was given to the effects of reducing budget item 521 and those are set out Exhibit 2, Tab 9 as follows:
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> > Consequence of eliminating this package: Risk of damage claims dangerous unsightly side-walks, driveway filletts, increased risk of flooding and are potentially hazard to cyclists, redundant driveways reduce current parking space, hazardous driveways left unrepaired increase city liability for injuries.
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> [34] Nothing in the evidence before me suggests that the 35 mm policy or the budget approval of item 521 was not made in good faith by those who advised the City Council and the City Council itself. From the evidence before me, I conclude the adoption of these policies was a consequence of a bona fide attempt to balance the financial considerations against the need for repairs of the defendant's physical infrastructure.

[17] *Pamaran* was cited with approval in *Plakholm v. Victoria (City),* 2009 BCCA 466

(C.A.).

[18] In *Einarson v. Richmond (City)* (1998), B.C.J. No. 2103, McEwan J.dismissed an action in which a plaintiff fell on an uneven joint between two concrete slabs in the sidewalk. The difference in elevation between the slabs was about one-half inch. The policy of the City of Richmond was to repair differences in elevation of more than three-quarters of an inch. In dismissing the action McEwan J. said this at paragraphs 10, 11, 12 and 13:

> [10] The duty of a city respecting its sidewalks is briefly stated in *Stojadinov v. Hamilton (City)* (1998), 41 M.P.L.R. 185 (Ont. H.C.) at p. 191, per MacFarland, J.:
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> > The duty of the municipality is to keep the sidewalks in repair, which is to say, in such a condition that a person using ordinary care for his or her own safety can pass along it in safety. In my view it would be requiring the impossible or a municipality to require that it maintain all its sidewalks at a perfect level. As has been said in these cases over the years, it does not follow because an accident happens that a sidewalk is necessarily in a state of non-repair.
>
> [11] It is not necessarily unreasonable for a city to have a policy that it will not provide scheduled inspections of sidewalks, if a bona fide policy decision has been made that certain hazards fall below a threshold established for budgetary or manpower considerations. Unless it can be shown that the threshold is irresponsibly high or arbitrary, the mere fact that there are no inspections will not lead to an inference of negligence [*Oser v. Nelson (City),* [1997] B.C.J. No. 2809, Dec. 3, 1997, No. 4375 Nelson Registry].
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> [12] The issue amounts to whether the three-quarter inch threshold was reasonable. No evidence has been led to suggest that a half to three-quarter inch gap or discrepancy is so obviously hazardous that the standard adopted by the City was unreasonable. As I have said, the subtlety of the crack seemed to be part of Ms. Einarson's complaint. In *Pamaran v. Victoria (City)* (1996), 32 M.P.L.R. (2d) 243 (B.C.S.C.), this court had occasion to consider a municipal policy involving a 35 mm or 1 and 1/4 inch threshold. The court held that the adoption of this policy was a consequence of a bona fide attempt to balance financial considerations against the need to repair the physical infrastructure of the City. In dismissing the plaintiff's action, Taylor, J. Noted at p. 249, that:

> Such displacements of sidewalks are common and the real issue in this case is to what extent they must be tolerated as a part of urban life as a matter of policy, by which a municipality sets the parameters of their state of repair and thus excludes itself from liability to those who might injure themselves using them.

[13] Here, weighing the plaintiff's case and that of the defendant, I am unable to find that the plaintiff has carried the burden of demonstrating negligence or nuisance on the part of the City. It has not been shown that the discrepancy in the sidewalk was a hazard to any person using an ordinary degree of care in the circumstances, or that the City was in a better position than the plaintiff to assess the risk. Moreover, it has not been shown that even if it were, the policy threshold set by the City was unreasonable or arbitrary such that it would not stand in the way of the plaintiff's recovery in any event.

[19] In *Plakholm,* Newbury J. says this for the Court at paragraph 20:

> . . . the trial judge was required to carry out an analysis of whether the "policy" relied on by the City was indeed a policy and if so, whether it was made in a *bona fide* exercise of the discretion of the City. If the policy met these criteria, the court would then be required to assess it in light of all the "surrounding circumstances including ... budgetary restraints and the availability of qualified personnel and equipment." (*Just, supra*, at 1245.) Only once this analysis had been done would it be appropriate to move to the question of whether in fact the City had carried out its policy in a reasonable manner.

[20] I am satisfied that the defendant's Sidewalk Inspection and Maintenance system as set out in its Bylaw No. 97-02 was a matter of policy driven by budgetary and manpower constraints. The decision of the defendant to effect repairs of sidewalks only where there is an elevation difference of greater than 25 millimetres or following an incident resulting in personal injury is a policy decision relating to budgetary and manpower constraints.

[21] I am satisfied that the policy was adopted by the defendant in the bona fide exercise of discretion. The policy exempted the defendant from liability to the defendant arising from the 14 mm difference in elevation, subject only to the plaintiff's submission that the policy was not carried out in a reasonable manner.

[22] The plaintiff agrees that the defendant's policy in respect of the repair of sidewalk defects is a policy decision relating to budgetary and manpower constraints, and that the policy was adopted by the defendant in the bona fide exercise of discretion. But the plaintiff says that in the circumstances of this case the defendant did not apply its policy reasonably, and that a traditional torts analysis renders the defendant liable to the plaintiff in negligence.

[23] The defendant had contracted with an independent contractor to install the fibre-optic conduit by trenching the portion of the sidewalk where the plaintiff fell. The contractor was contractually obligated to repair sidewalk defects for the period of one year following completion of the contract. The plaintiff submits that because the cost of the repair fell to the contractor, budgetary issues are not of relevance or concern.

[24] The defendant in fact submitted that because the contractor was responsible for repair of any defects associated with its work for the one-year guarantee period, which had not expired at the time of the incident, that the defendant is exempt from liability pursuant to s. 5(1) of the *Occupier's Liability Act.*

[25] S. 5(1) reads as follows:

> 5 (1) Despite section 3 (1), if damage is caused by the negligence of an independent contractor engaged by the occupier, the occupier is not on that account liable under this Act if, in all the circumstances,
>
> (a) the occupier exercised reasonable care in the selection and supervision of the independent contractor, and
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> (b) it was reasonable that the work that the independent contractor was engaged to do should have been undertaken.

[26] The defendant says that it fulfilled its duty of care by exercising reasonable care in the selection and supervision of the contractor.

[27] I am of the view that the defendant's alternative submission does not excuse it from liability for two reasons.

[28] First, s. 8(2) of the *Occupier's Liability Act* provides that the *Act* does not apply to

a municipality if the municipality is the occupier of a public highway or a public road. *Plakholm* makes it clear that because of that enactment the *Act* does not apply to a claim against a municipality founded on a fall on a public sidewalk.

[29] Second, even if the *Act* was of application, s. 5 would not relieve the defendant of liability. The plaintiff does not seek to recover damages caused by the negligence of the independent contractor. The plaintiff seeks to recover damages from the defendant because she says the defendant was negligent in its inspection and maintenance of the sidewalk. Even if the terms of its contract with its contractor allowed the defendant to recover the cost of repairs from the contractor, the defendant still had a duty to inspect its sidewalk for defects. After the contract was completed, the sidewalk was in the care and control of the defendant municipality. It was not under the care and control of the contractor.

[30] But, I am of the opinion that the plaintiff's claim must nevertheless fail, and for two different reasons.

[31] First, in my opinion, the defendant's policy relating to inspection and maintenance was of application. The plaintiff submits that the defendant had a duty to inspect the site of the repair more often than required by the by-law and that it had a duty to maintain contracted work to a higher and better standard of maintenance than is required by By-law 97-02. I do not accept that submission. In my opinion, the policy relating to inspection and maintenance applied to all of the defendant's sidewalks, repaired or not. The policy does not differentiate between sidewalks not repaired and sidewalks that have been repaired. The defendant could have installed the fibre-optic conduit on its own without employing a contractor. Had it done that, there is no issue but that its inspection and maintenance policy would have applied to the site of the repair. I see no reason to hold the defendant to a different standard of inspection and maintenance to sites repaired by a contractor. I see no reason to find that the independent contractor had agreed to maintain the condition of the sidewalk to a higher or better standard than the standard that the defendant would have employed had the defendant done the work on its own.

[32] Second, even if the by-law does not apply, the plaintiff has not shown that the

defendant was negligent. The plaintiff's claim rests on the premise that it was negligent of the City to allow a 14 mm vertical edge in an elevation difference on a sidewalk to remain unrepaired.

[33] The plaintiff's case is primarily based on her assertion that since she fell it must have been unreasonable or negligent for the City to have left the edge on which she tripped unrepaired.

[34] The only complaint the defendant received about this hazard was that from the plaintiff's husband on July 7, 2006.

[35] In *Pamaran v. Victoria (City)* Taylor J. dismissed an action in which the plaintiff fell on an uneven sidewalk. The sidewalk was in the City of Victoria. It had elevation differences of about 25 mm to 50 mm.

[36] Taylor J. adopted the comments of McFarlane J. of the Ontario High Court in *Stojadinov v. Hamilton* (1998), 41 M.P.L.R. 185, where McFarlane J. writes:

> The duty on the municipality is to keep the sidewalks in repair, which is to say, in such a condition that a person using ordinary care for his or her own safety can pass along it in safety. In my opinion, it would be requiring the impossible of the municipality to require that it maintain all its sidewalks in perfect level. As has been said in these cases over the years, it does not follow because an accident happens that a sidewalk is necessarily in a state of non-repair.

[37] In *Einarson v. Richmond (City)*, McEwan J. says at paragraph 12 that:

> The issue amounts to whether the three-quarter inch threshold was reasonable. No evidence has been led to suggest that a half to three-quarter inch gap or discrepancy is so obviously hazardous that the standard adopted by the city was unreasonable.

[38] I am of the view that the principles set out in both of those decisions are of application. A municipality cannot provide a perfectly smooth surface on its sidewalks. Such a standard would be inordinately expensive, if not impossible to achieve. Other than the plaintiff's own unfortunate experience, there is no evidence that what she tripped over was so obviously hazardous that the defendant, had it even been award of

the elevation difference, was required to repair.

[39] I find that the small difference in elevation at issue was a minimal hazard and not a defect that reasonably required repair. I am of the view that the plaintiff fell because she did not use ordinary care for her own safety.

[40] I am of the opinion that the liability in this proceeding can be determined pursuant to Rule 18A of the Rules of Court, and that the claim must be dismissed.

[41] The defendant is entitled to its costs.

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Mr. Justice S.J. Shabbits