Date of Release: April 8, 1993

No. C902101
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
SHEILA PERRET	**REASONS FOR JUDGMENT**
PLAINTIFF	**OF THE HONOURABLE**
AND:	
THE CORPORATION OF THE DISTRICT OF WEST VANCOUVER	**MADAM JUSTICE KOENIGSBERG**
DEFENDANT	

Dates and Place of Hearing:	March 11 & 12, 1993 Vancouver, B.C.
Kyong-Ae Kim:	Counsel for the Plaintiff
H.E. Williamson:	Counsel for the Defendant

This action is for damages for personal injuries resulting from a fall into a hole in asphalt pavement which pavement is located in the District of West Vancouver.

The defendant's position is that it has either no liability or only partial liability. Further its position is that if it has any liability all the damages claimed by the plaintiff do not flow from the accident. I set out below the three specific positions taken by the defendant.

l. The plaintiff is either wholly or partially responsible for her own misfortune because the hole was patent and she was familiar with the asphalt in question. She therefore did not take sufficient care for her own safety.

2. The plaintiff's injuries are in part due to a pre-existing condition and not solely attributable to the fall.

3. With respect to damages representing lost wages the defense says that the plaintiff could have claimed UIC benefits instead of using accumulated sick leave and therefore an amount should be deducted from her wage loss equal to the UIC benefits she could have claimed. The quantum is agreed.

The Facts - LIABILITY

The plaintiff is a single mother employed as an office administrator by the Simon Fraser Student Association. On Hallowe'en night l989, the plaintiff was visiting friends in West Vancouver with her then 5-year old daughter. Hallowe'en festivities were on the agenda, including visiting friends at 2695 Marine Drive, trick or treating in that neighbourhood, and later in the evening fireworks at the Marine Drive home.

The plaintiff had visited in the area and specifically at 2695 Marine Drive on average, every 6 weeks, for a number of years.

The Marine Drive house is on the S.E. corner of Marine and 27th Street. The asphalt path with the hole where the

plaintiff fell is located parallel to Marine Drive and runs part way across the front lawn of the lot beginning at the corner of Marine and 27th and ending short of the driveway which runs north-south on the eastern side of the lot. The hole is at the eastern end of the path and is the only hole of any size or for that matter is the only blemish on the asphalt which could be described as a hole. The hole measured approximately 12" in circumference and though it had gradations of depth it measured 10 centimeters in depth at the point where the plaintiff fell.

The house has 5 possible approaches. Two in the back, one on the side, and two in the front. The asphalt path is along one of these front approaches. The plaintiff acknowledged that she visited the home frequently over the years and used all of the approaches at different times depending on such considerations as whether she was driving or taking the bus. She acknowledged she had used the path approach many times. She testified that when she took the asphalt path she would usually walk part way along the front and then cut across the lawn on a diagonal to the driveway.

The asphalt path is a leftover from a bus stop which in l989 was no longer in use. Nothing of the bus stop remained except the path. West Vancouver usually removes such paths but had not yet removed this one.

Around eight o'clock in the evening, the plaintiff was carrying her daughter, walking toward her friend's house at 2695 Marine Drive. Her daughter was sleepy after trick or treating. As the plaintiff approached the corner of 27th and Marine she glanced at her options for approach to the house. She had on 1" pumps. She could walk along the curb, along the grass, or along the asphalt path. It was dark but clear. The grass was dewy from earlier rain. The plaintiff decided that the asphalt path was the safest. Exhibit 3 is a photograph of the view the plaintiff would have had of the three options on that night, however the photo was taken by the plaintiff during the daytime. In the photograph the hole in the asphalt is apparent but its size and depth are obscure. The asphalt is dark and relatively flat and looks safe to walk upon. In the dark it is likely that the hole would not be apparent until one was upon it. It is clearly a trap in the dark. The street lighting did not illuminate it according to the plaintiff. No evidence was called to suggest otherwise. There is no street light near that part of the asphalt.

The plaintiff walked along the path, her heel caught on the lip of the hole and she lost her balance. She heard a ripping sound in her ankle as she veered to the right. She wrenched her body to the left to prevent falling on top of her daughter and heard a similar sound. She fell landing on her left hip, her daughter on top of her.

The plaintiff testified that she had never noticed the hole in the asphalt before she fell in it. She did not deny that she might have walked by it or been near it on previous occasions but she was clear that it was not something of which she had taken note. She had never consciously walked around it or over it. There was no evidence to contradict the witness nor was any circumstance presented to make the plaintiff's evidence unlikely. She was a straight forward witness who in all respects gave credible evidence.

The Law on Liability

Several cases were cited to me in which persons were held contributorily negligent for falls in public places. But in all cases the plaintiff had some degree of knowledge of the danger by direct observation of the hazard. In particular, the defense relied upon ***Stynes v. Victoria (City)*** (1990), 43 B.C.L.R. (2d) 118 (C.A.).

In that case the plaintiff tripped over a curb at the back of a tennis court while playing tennis. The following constituted the "knowledge" sufficient to cause the Court to accept a 40% apportionment of contributory negligence. At p. 135 Gibbs, J.A. wrote:

> As to knowledge, it goes no further than Mr. Stynes' statement that "in a general sense" he was aware of the existence of the curb, but that "it was always behind my back". He had

> occasion to step over it sometimes to retrieve a ball which was out of play but he had never had to contend with it when trying to return a ball still in play...

Even some knowledge does not necessarily result in contributory negligence. Particularly when the knowledge is inferential, that is, the danger is apparent and it would be expected that a reasonable person might make the necessary connections to note the danger.

For this proposition I rely on the case of ***Leischner v. West Kootenay Power & Light Co.***, [1986] 24 D.L.R. (4th) 641 (B.C.C.A.) at p. 651:

> The duty of a plaintiff, in the circumstances here, was to become aware of dangers which would be present to the mind of a reasonable person acting prudently to avoid injury. While, as the learned trial judge found, "the poles, wires and guys were there to be seen" there was nothing which would have alerted the mind of a reasonable person to their presenting a potential risk of danger vis-à-vis the beaching of the boat and the lowering of the mast. "Awareness" as an isolated fact is of no consequence. Before the plaintiff can be held to be at fault, there must be "awareness" of a danger which ought reasonably to have been perceived.

And at pp. 652-3:

> Prior knowledge of danger does not inevitably led to a finding of contributory negligence: see ***Logan v. Township of Asphodel***, [1938] 3 D.L.R. 748*n*, [1938] O.W.N. 215 at p. 218, as follows:

> "Mere forgetfulness or want of attention or failure to look for some source of danger that is not present in the mind of the person injured, does not necessarily defeat his right to recover even though he had prior knowledge of the danger: Keech v. Smith's Fall (1907), 15 O.L.R. 300."

See also ***Keech v. Town of Smith's Falls*** (1907), 15 O.L.R. 300 at p. 301, as follows:

> "***Gordon v. City of Belleville*** (1887), 15 O.R. 26, and ***Copeland v. Village of Blenheim*** (1885), 9 O.R. 19, shew that mere forgetfulness, or want of attention, or failure to look for some source of danger that is not present to the mind of the person injured, does not necessarily defeat his right to recover."

There is a distinction between want of attention and negligence: see judgment of Lord Wright in ***Caswell v. Powell Duffryn Associated Collieries Ltd.***, [1940] A.C. 152 at pp. 175-6:

> "Negligence is the breach of that duty to take care, which the law requires, either in regard to another person or his property, or where contributory negligence is in question, of the man's own person or property. The degree of want to care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury or the Court in lieu of a jury. It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time. It may vary even in the case of the same man. Thus a surgeon doing an emergency operation on a cottage table with the light of a candle might not properly be held guilty of negligence in respect of an act or omission which would be negligence if he were performing the same operation with all the advantages of the serene atmosphere of his operating theatre; the same holds

> good of the workman. It must be a question of degree. *The jury have to draw the line where mere thoughtlessness or inadvertence or forgetfulness ceases and where negligence begins.*"
>
> (Emphasis added.)
>
> On the facts of this case, having regard to the above analysis of the facts, it is not possible to hold that the plaintiff was in any way at fault. Assuming for the purposes of argument that there was inadvertence or forgetfulness on the part of the plaintiff, that does not constitute negligence in the legal sense. The inadvertence (and we do not think there was inadvertence) was a momentary lapse, namely, a spontaneous reflex-like reaction to an order given by Schenk.
>
> Lastly, it must be emphasized that the onus was on the defendant to prove contributory negligence on a balance of probabilities. It cannot be said, in the circumstances of this case, that this onus has been met.

In this case the plaintiff gave credible evidence that she had never noticed the hole before. Her many visits placing her in the vicinity of the hole do not of themselves force an inference that she must have noticed such a big hole, if it was there to be seen. Unless a hole of this type is brought to one's attention by something traumatic such as falling in it, seeing someone else fall in it, or nearly falling in it, it is not unusual that it would not be noted and retained in memory, even if it had been seen before.

Thus, I find that here the onus on the defendant to prove contributory negligence has not been discharged and the District of

West Vancouver is solely responsible for the injuries suffered by the plaintiff's fall.

The Facts - INJURIES

The plaintiff went to the hospital that night, had x-rays and was put on crutches and prescribed Tylenol 3 for pain. She was diagnosed with a ligamentous sprain to her ankle. She was on crutches for two months. The plaintiff's left hip gave her the most difficulty while on crutches. When no longer on crutches, her hip problem abated. With great difficulty she could perform her previous activities until February 1990. The plaintiff returned to work approximately two weeks after the accident, however she was only able to perform on a part-time basis. After 4 weeks of frustration at being unable to perform adequately while in pain and on crutches, she took a leave beginning mid-December.

The plaintiff did not work from mid-December 1989 until February 6, l990. She used her accumulated sick leave to cover wages for this period.

After December 23, l989 the plaintiff was able to get around without crutches. She slowly began resuming her household duties with which she had help until February. Ms. Perret, before the accident, walked her daughter to child care about 6 blocks from her home. She typically picked her up as well. She was unable to resume this activity until around February.

The area of physical fitness, and physical recreational activities were and are the greatest loss to the plaintiff. The

plaintiff, before the accident ran regularly, did aerobics classes, skiied, cycled and walked. Notably, she did most of these things with her daughter. They participated in numerous activities together on the weekends, skating, skiing, walking the seawall at Stanley Park as well as West Vancouver. They walked or cycled everywhere they could. This was an important part of the plaintiff's life, not only for her own physical well-being but also for her family life. Until May of l990 most of these activities were severely curtailed; some remain curtailed to this date, 3½ years later. The plaintiff is still not able to run, ski or skate.

The medical evidence indicates the plaintiff suffered a severe sprain to her left ankle. Her left hip seems to have ongoing intermittent joint pain. Pain complaints for both of these areas are regularly reported to the plaintiff's doctors and tender areas are noted. The prognosis is positive in all reports; there is expected to be no permanent disability. Several health professionals and doctors note that the plaintiff has problems of a bio-mechanical nature such as flattened feet, one leg shorter than the other and hypermobility and hyperinversion of the ankle joint. These are noted as underlying the injuries complained of here. They may account for why the plaintiff has had such a slow recovery.

I should note that the plaintiff struck me as a person motivated to improve her condition and resume as full a physical

life as she possibly can. The defense suggested that her ongoing problems, since February, l990 are caused by conditions other than the fall. The evidence for this is marshalled by picking out particular statements or lack of complaint at different times throughout her medical history, in particular with reference to the records of her family physician over the relevant 3½-year period. I find that while there are sometimes puzzling statements, such as, "fully recovered in May" in Dr. Emmot's records, taken together and read with the specialist's medical/legal reports they do not bear out that the plaintiff has had either any serious continuing problems from before the accident nor that any other condition has caused her problems. With reference to the latter suggestion, none of the three doctors who saw her to examine her for litigation purposes suggested any other cause for her problems other than the fall, although her history and bio-mechanical problems are noted. Because of the defendant's position, I set out below the parts of the medical evidence which I think is most relevant to the issue of causation.

The Medical Evidence

The filed medical reports are unanimous on the following major points in issue. The plaintiff suffered a ligamentous sprain to her right ankle. She is still symptomatic after 3½ years. There is no likelihood of permanent disability. Although there was no disagreement among the medical reports, each added something helpful for determining the issue.

With respect to her ankle injury, it was noted by Dr. Reebye, a specialist in physical medicine and rehabilitation, that:

> It must be pointed out that although she did not sustain bony injury, ligamentous injury in the region of the ankle can be very painful and disabling for long periods.

A further relevant note was made by Dr. MacNeil, an orthopaedic surgeon retained by the defense to do an independent medical examination. He stated at p. 6 in his report dated March 2, 1993:

> There is just slight decreased passive anterior posterior glide of the right ankle when compared with the left. This test is primarily for ankle joint stability and indicates that the ankle in fact is stable but one wonders if the loss of mobility in the right ankle is due to some fibrosis or capsular contracture, following healing from an ankle strain.

And finally, Dr. Kokan in his report of February 15, 1993 said at p. 4:

> I believe this lady has vulnerable ankles and feet due to pre-existing flattening of the longitudinal arches and hypermobility and hyper-inversion of the ankle joints. In that accident she probably sustained a twisting injury to her right ankle and foot which caused damage to the soft tissues mainly ligamentous and capsular tissue of the ankle and foot...

None of the medical experts suggested that the plaintiff's pre-existing conditions of any type were responsible for the symptoms she now experiences. Her vulnerability in the

ankle area may have meant she suffered a greater injury when she fell, but that is simply a matter of the "thin-skulled" plaintiff.

The left hip is less straightforward. Clearly the plaintiff injured her hip, at least slightly, in the fall. The most severe symptoms emerged when she was on crutches and then eased up considerably when she went off them. Her remaining symptoms are: a clunking sound when she rises from a sitting position and her hip is sometimes painful, especially at night, when it might occasionally wake her. None of the medical specialists relate the continuing symptoms to either the accident or anything else. There is really no evidence that the plaintiff's continuing problems with her hip are related to the fall. There are other possible causes - her bio-mechanical makeup or her previous injuries as a teenager. However, there was no evidence to favour one explanation over another. The symptoms are minor, perhaps disquieting and annoying, but they have no relevance to any restriction in activity. Clearly the plaintiff's hip problems are minor in relation to her ankle.

In the final analysis, I find the plaintiff sustained a severe injury to her right ankle consequent to her fall. I find she sustained a minor injury to her left hip. None of her ongoing problems with her ankle are the result of any pre-existing condition. Most likely her ongoing problems with her hip are not related to the fall.

Damages - QUANTUM

The plaintiff was severely disabled by the fall for two months. She began a gradual recovery which reached a plateau of substantial recovery by May of 1990, or 7 to 8 months after the accident. While the plaintiff has a good prognosis of no permanent disability,3½ years after the accident, she suffers some restriction of activities, which are important to her.

In these circumstances, having reviewed several cases with which I was supplied to help me with a range of awards appropriate to the circumstances, I award general damages of $18,000.

I can see no useful purpose in reviewing each of the cases provided, as each is substantially different from the facts here in one particular or another. I have increased the award considerably, however, on the basis of my assessment that the greatest damage this plaintiff has suffered is the restriction in activities which were so important to her in relation to her physical well-being and her relationship with her daughter.

The final issue to be dealt with is the amount to which the plaintiff is entitled for wage loss. Her claim is for $4,167.45 which is the value of her accumulated sick leave which she used to cover the period she didn't work from mid-December to February 6.

The defense argues that an amount equivalent to the UIC benefit to which the plaintiff was entitled while taking leave should be deducted from her wage loss.

The plaintiff was a member of CUPE and subject to a collective agreement. The defendant says that under the plaintiff's collective agreement Article 27: 2(a), (b) and (c) the plaintiff, after using 10 days of such leave was required to apply for UIC benefits. The employer was then liable only to pay the difference between the benefits and her normal wage rate.

Since, in this case, the plaintiff had sufficient accumulated sick leave to cover the time missed, she used that and did not apply for UIC. It was established that under the terms of her employment, sick leave not taken in one year can be accumulated and used in another year.

The defense says that the employer did not have to pay the full wage because the plaintiff was obliged to apply for UIC under the collective agreement, therefore, the payment beyond 10 days was voluntary in the sense that word is used in ***Bloom v. Klein*** (1992), 63 B.C.L.R. (2d) 130 (S.C.). In that case Madam Justice Newbury was dealing with a situation in which an employer paid the full wages of a disabled employee for 10 weeks. It was common

ground that the payment was gratuitous. At p. 140 the learned trial judge stated the following:

> In ***Cunningham v. Wheeler*** Southin J.A. concluded that the ratio of ***Chan*** and "some of the dicta" of ***Boarelli*** had been overruled by ***Ratych*** [i.e., wage loss benefits paid should be deducted.] Is this true with respect to gratuitous payments?
>
> As I read ***Ratych***, this question was left in the discretion of the court, but that discretion is not to be exercised in most cases.

Madam Justice Newbury did not exercise her discretion in that case and held the paid wages must be deducted. However, on p. 139 she excerpted from ***Ratych v. Bloomer***, [1990] 1 S.C.R. 940 the following:

> ...affirmed that the purpose of awarding damages in tort is to put the injured person in the same position as he or she would have been in had the tort not been committed, in so far as money can do so. The plaintiff is to be given damages for the full measure of his loss as best that can be calculated. But he is not entitled to turn an injury into a windfall. In each case, the task of the Court is to determine as nearly as possible the plaintiff's actual loss.

In this case the employee has suffered a loss, her accumulated sick leave has been used and is not replaceable. Whether the employer could have forced the employee to abide by the strict terms of the collective agreement and paid her wages with a set-off of the UIC benefits is irrelevant in my view. In fact, it appears this would have been a more costly course of action for the

employer since the employee would still have her accumulated sick leave.

It seems to me that this situation is analogous to an insurance scheme to which the employee makes contributions. As allowed she banked her sick leave. She used her contributions and has sustained that loss.

In these circumstances, the effect of applying the principles in ***Ratych v. Blooomer*** (supra) or ***Cunningham V. Wheeler*** (1991), 64 B.C.L.R. (2d) 62 (C.A.) is to find that the Plaintiff is entitled to be reimbursed for the value of her accumulated sick leave with no deductions.

In summary, the plaintiff will have total damages of $23,072.45 calculated as follows:

Wage loss	
Sick leave benefits	$4,167.45
Special Damages agreed	905.00
General Damages	l8,000.00
T O T A L	$23,072.45

Court Order Interest

The interest payable on general damages has been considered anew recently by the Court in several cases, notably

Costello v. Blakeson (unreported decision, November 25, 1992, Victoria Registry No. 90 1670) a decision of Spencer, J.; ***Braddick v. Simon*** (unreported decision, Vancouver Registry No. B895472, October 7, 1992), a decision of Paris, J.; and ***Marante v. Neale and Clarke*** (unreported decision, Vancouver Registry No. B863314, January 5, 1993) a decision of Boyd, J.

As a result of legislative amendments repealing ss. 11 to 14 of the Interest Act, R.S.C. 1985 c. 1-15 (see Miscellaneous Statute Law Amendment Act, 1991 R.S.C.) there is no longer a floor on the amount of interest to be awarded under s. 1 of the Court Order Interest Act.

These recent decisions have enunciated the principle that as Boyd, J. stated in ***Marante*** at p. 21:

> ...the court ought to award a rate of interest which reflects a "real rate of interest" - that is an interest rate which does not reflect any inflation factor but at the same time preserves the real value of the money from the date the cause of action arose...

The real rate has been approximated by determining the difference between the average rate used by Registrars and the average rate of inflation throughout the period from when the cause of action arose to the date of judgment. I am prepared to adopt othat methodology and principle.

Counsel for the plaintiff provided me with the calculation of pre-judgment interest. No objection was taken to these figures and thus I am prepared to adopt them. I set them out below.

Average Annual Prime Rate as Set by the Registrar

April 1, 1989 to January 1, 1993 = 136.25 / 13 = **10.48% annual interest rate**

Average Annual Rate of Inflation (based on CPI)

November 1992 (latest figure available)	128.9
October 1989	113.4
Difference	15.5%

15.5 / 3.1 years = **5.0% annual inflation rate**

Difference Between Inflation and Interest Rates

10.48% - 5.0% = **5.48% pre-judgment interest**

In the result there will be 5.48% interest on the general damages from the date of the accident to the date of judgment. Special damages bear interest at the rate set by the Registrar.

Costs follow the event.

Vancouver, B.C. " M.M. Koenigsberg, J. "

April 8, 1993