IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20091002
Docket: S103222
Registry: New Westminster

Between:

Shelagh Westfield

Plaintiff

And:

City of Burnaby

Defendant

Before: The Honourable Mr. Justice Willcock

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:	Brock Edwards
Counsel for Defendant:	David J. Bell D. Mark Gyton
Date and Place of Hearing:	October 2, 2009 New Westminster, B.C.

INTRODUCTION

[1] This is an application pursuant to Rule 18A at a summary trial to dismiss an action in negligence arising out of a fall that occurred on May 6, 2006, in a pedestrian crosswalk at the intersection of Canada Way and 12th Avenue in Burnaby.

[2] The plaintiff, Shelagh Westfield, is a 45-year-old education assistant. She says that while she was crossing the street in the morning on her way to a school on 12th Avenue, west of the accident scene, she slipped and fell on a crack in the pavement. She suffered a lateral malleolar fracture of her left ankle. There is some evidence that as a result of that injury, she has suffered a reflex sympathetic dystrophy. She claims to have suffered significant functional limitations and to have suffered significant financial loss.

[3] Ms. Westfield sues the City of Burnaby in negligence alleging that Burnaby breached a duty of care it owed to her as an occupier of the property upon which the accident occurred, it failed to use reasonable efforts to ensure that the crosswalk was safe for users, it failed to warn users of the crosswalk of the existence of the crack and it failed to render the crosswalk safe to use.

[4] The City of Burnaby in its defence says the crosswalk at the location of the fall is reasonably safe. It says by virtue of s. 8 of the *Occupier's Liability Act*, it does not owe a statutory duty of care to the plaintiff as an occupier. It further says it made a policy decision to limit the measures it takes to inspect roads, on the operational level, there was no error or omission on its part as it was not aware of the alleged trip hazard before the plaintiff's injury and cannot be said to have been negligent for failing to repair it or for failing to warn users of the crosswalk of its presence.

[5] The plaintiff says that this case is not suitable for resolution pursuant to Rule 18A.

BACKGROUND

[6] Mrs. Westfield deposes to the fact that on May 6, 2006, at approximately 8:30 a.m., she was walking west at a crosswalk on the south side of the intersection of Canada Way and 12th Avenue when she "slipped and fell on a crack in the pavement". She does not say where the crack was located within the crosswalk. She does not say what caused her to fall, that she tripped or that the crack caused her to fall.

[7] Upon learning of her fall, the City of Burnaby sent a work crew to the site of the accident on June 23, 2006. Photographs were taken at the scene before and after the work crew repaired what appears to be an area where the road has subsided adjacent to what is described as an old utility cut in the road. A utility cut is a cut made in the asphalt surface to access buried utility lines.

[8] There is no evidence the utility cut was made by the City of Burnaby as opposed to Hydro or gas companies. The cut itself does not appear to have subsided, but rather the road immediately adjacent to the cut.

[9] Ms. Westfield has obtained and filed a report from an engineer, Michael Araszewski, who has examined the accident scene and reviewed photographs. Mr. Araszewski does not express an opinion on the cause of the depression in the road surface or its age. He does not express an opinion on the depth of the depression or the height of the edge of the depression. He says only that the depression appears to have a distinct edge, that the edge might not have been seen by Ms. Westfield before her fall and it might have caused her to fall.

[10] While there is only limited circumstantial evidence that Ms. Westfield fell on the defect seen and repaired by the work crew, I will assume for the purposes of this application that Ms. Westfield may be able to prove at trial that her fall was caused by the defect in the road surface seen by the work crew and discussed in his report by Mr. Araszewski.

[11] There is no evidence the City created the hazard or the defect came into existence as a result of a negligent act or omission on the part of the City. The City says it was unaware of the defect prior to the accident. There is no evidence to the contrary in the material before me.

[12] On the evidence, the plaintiff is unable to establish that the City was negligent in failing to repair or failing to warn of the existence of a hazard. The plaintiff must establish a case based upon the inspection practices of the City.

[13] Barry Davis, currently the deputy director of engineering employed by the City of Burnaby, deposes in his affidavit, at paras. 4-14, as follows:

> Funding for the maintenance of crosswalk surfaces throughout Burnaby, including Canada Way, comes from the engineering department's pavement maintenance budget which is devoted to funding repairs and repaving sections of roads, including crosswalks throughout Burnaby.
>
> There are approximately 730 kilometres of roads and 217 kilometres of lanes throughout Burnaby.
>
> The allocation of funding for repaving particular sections of roads and crosswalks is determined by the use of a pavement management system, the pavement system. The pavement system uses information collected by a vehicle equipped with sensors which record the general condition of sections of roadway over which the vehicle is driven in order to provide data which can then be used to recommend resurfacing of different roads and sections of roads throughout Burnaby based on a cost-benefit approach.
>
> The pavement management system is not intended to and does not identify specific road surface irregularities. It rather provides a general picture of the condition of a particular section of road.
>
> Burnaby relies upon reports and complaints provided by Burnaby employees and members of the public to address specific hazards in roadways and crosswalks, such as potholes, utility cuts and other road surface irregularities. To this end, Burnaby has developed and maintained a 24 hour telephone service and associated computer system, the Hansen system, to record customer service calls and track responses to problems brought to Burnaby's attention by its employees and by members of the public.
>
> Burnaby has used the Hansen system to record customer service calls since March of 2004.
>
> In addition to road surface problems, the Hansen system is also used to record and respond to environmental, speed, lighting and signal, sewer and water problems.
>
> The Hansen system is funded through Burnaby's engineering department budget.

> Apart from the pavement and Hansen systems, no additional roads or crosswalk inspection programs are funded by Burnaby due to funding limitations.
>
> Attached to this affidavit and marked as Exhibit A is a true copy of Burnaby's engineering and public works budget for the fiscal year ending December 31, 2005, which indicates that Burnaby's road pavement maintenance city projects budget for 2005 was $585,000.
>
> Of the $585,000 allocated to road pavement maintenance city projects, in 2005, $565,995 was spent during the 2005 fiscal year.

[14] Lorne Graham, a superintendent employed by the City of Burnaby roads and drainage division has deposes in his affidavit, at paras. 9-13, as follows:

> Attached to this affidavit and marked as Exhibit A is a true copy of a printout of the Hansen system records relating to all service calls relating to the roads department from January through May of 2006 which confirms that 712 service requests were received by the service centre from Burnaby's operation centre or through complaints made directly to city hall, all of which are recorded on the Hansen system.
>
> Attached to the affidavit and marked as Exhibit B is a true copy of a printout from the Hansen system records relating to all service requests for roads work relating to Canada Way indicating that there were 96 service requests for Canada Way during the period April 1, 2004, through May 30, 2006.
>
> I have reviewed the addresses of the 96 requests noted above and determined that two of these requests were for the area near the intersection of 12th Avenue and Canada Way. Attached to this affidavit and marked as Exhibit C is a true copy of two service requests for the area near Canada Way and 12th Avenue during the period April 1, 2004, through May 30, 2006.
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> Attached to this affidavit and marked as Exhibit D are true copies of the service requests relating to roads department requests for 12th Avenue during the period of March 5, 2004, through May 30, 2006.
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> I have reviewed the service requests attached to my affidavit and the 96 requests relating to Canada Way noted above and confirmed that none of these service requests related to the condition of the surface of the crosswalk at 12th Avenue and Canada Way.

[15] The only service request from a location close to the accident is a document headed "Service Request Detail," which is a record of a call received on January 19, 2005. The primary caller on that Service Request is an individual described as Charmaine Bayntun, the principal of a school on 12th Avenue. That school, on the evidence, is located about a city block west of the accident scene.

[16] The Service Request Detail notes a complaint that on a lane along the side of the school, there are potholes and asphalt has heaved up.

[17] There is also before me an affidavit from Marco Damita, a foreman with the City Traffic Signs Division. Mr. Damita deposes that his records indicate that the crosswalk in question was last painted in August 2005, about nine months before the accident. He expects that had there been a defect in the crosswalk on that date, it would have been noted and reported. That evidence, while not strong evidence, is not challenged.

APPLICABLE LAW

(a) Suitability of the Case for Determination Pursuant to Rule 18A.

[18] The test for granting a summary trial is set out in Rule 18A(11). The Court may grant judgment in favour of any party, either on an issue or generally, unless the Court is unable on the whole of the evidence to find the facts necessary to decide issues of fact or law.

[19] Even if there is sufficient evidence to decide the necessary factual and legal issues, the Court may nevertheless decline to give judgment if it would be unjust to decide the issues on the application. A judge is not obliged to remit a matter to the trial list if there are conflicting affidavits.

[20] Factors the Court should consider in determining whether a summary trial is suitable include the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[21] In describing this test, I have been referred to and rely upon the leading case in this area, the Court of Appeal's decision in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (B.C.C.A.), at pp. 214-215.

(b) Occupier's Liability.

[22] Burnaby says it does not owe the statutory duty of an occupier to users of the road. Section 8 of the *Occupier's Liability Act* reads as follows:

> (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); or
>
> (B) a public road.

[23] The plaintiff suggests that because the accident occurred in a crosswalk, it should be regarded as having occurred on a sidewalk rather than a road. Section 119 of the *Motor Vehicle Act* finds a "crosswalk" as follows:

> "Crosswalk" means:
>
> (A) a portion of the roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by signs or by lines or other markings on the surface; or
>
> (B) the portion of a highway at an intersection that is included within the connection of the lateral lines of the sidewalks on the opposite sides of the highway.

[24] The legislation clearly considers crosswalks to be portions of the roadway or highway. Section 8 of the *Occupiers Liability Act* applies to a crosswalk and the *Act* has no application to the defendant municipality in relation to a crosswalk on a highway.

[25] As is illustrated by the cases to which I will make reference further in these reasons, that the question is not determinative, as a municipality owes a common law duty as an occupier to users of the highway, including pedestrians on the highway.

(c) Duty of Care

[26] The municipality owes a common law duty of care to users of the roadway, including pedestrians in crosswalks, but the defendant says that duty of care is defined and circumscribed by the case law. The defendant says that the *bona fide*

policy decisions of municipalities are not subject to review by the Courts. Decisions with respect to the allocation of scarce resources by government are not justiciable. Only the operational acts or omissions of municipal agents putting into effect or delivering municipal programs are subject to scrutiny.

[27] In support of this proposition, I have been referred to a number of the leading cases. I would like to briefly review the case law relied upon by the defendant at this point. The defendant relies on *Knodell v. New Westminster (City)*, 2005 BCSC 1316. This is a case of a fall on a city sidewalk. It was conceded in the case that the City was the occupier of the sidewalk. The Court nevertheless dismissed the claim, relying, in part, upon the policy defence.

[28] At paras. 25-26 of the reasons for judgment, Joyce J. noted:

> 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 v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420 at paragraph 2.
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> It was also the view taken by Southin J. In her concurring judgment in *Gobin (Guardian of) v. British Columbia*, [2002] 214 D.L.R. (4th) 328, [2002] BCCA 373, at para. 65.

[29] In paras. 29-30, however, Joyce J. says as follows:

> 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. 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.
>
> 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*.

[30] Mr. Justice Joyce pointed out that Brooke J. then reviewed the authorities and applied the policy immunity defence, and cited with approval the following passage at para. 19:

> 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.

[31] Mr. Justice Joyce held that as the decision in *Fox* is a considered decision in which the relevant case law is reviewed, he was constrained to follow it. In doing so, Joyce J. held that in the case before him, the City adopted a policy for clearing snow and ice on its sidewalks, and that decision was a *bona fide* exercise of discretion based upon budgetary constraints and the availability of workers and equipment. It was neither irrational nor unreasonable and afforded a defence to the Municipality.

[32] The defendant also relies upon *Nabholtz v. Kimberley (City)*, 2002 BCSC 174. That was a case in which the plaintiff fell in an outdoor pedestrian shopping area and sued the City. The policy defence was considered by the Court in that case at paras 14-15, and the case was dismissed for reasons set out very briefly in the following portion at para. 19:

> The accident and the resulting injury, which doubtless occurred, are unfortunate but I cannot find that the defendant failed to discharge its policy or that the policy was manifestly irrational.

[33] The defendant relies, as well, on the case of *Frost v. Whistler (Resort Municipality)*, [2003] BCSC 22. In that case, Bauman J., as he then was, cited a lengthy passage from *Just v. British Columbia*, [1989] 2 S.C.R. 1228, which is a frequently cited passage from that case. I will cite here from paras. 11-12 in the judgment of Bauman J. in the *Frost* case:

> The principal issue between the parties is whether Whistler can make out a policy defence on the basis of the law discussed in, amongst other cases, *Just v. British Columbia* [cite omitted].

In *Just*, Cory J. summarizes his discussion of the principles at play where a governmental agency is sued in tort (at pp. 1244-45):

> 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.
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> 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.
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> 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.

[34] Mr. Justice Bauman concluded his judgment in the *Frost* case at para, 29 by citing from the decision in *Oser v. Nelson (City)*, [1997] 44 M.P.L.R. (2d) 231 (B.C.S.C.), a judgment of McEwan J., upon which the defendant also relies in this case and holds, at para. 32:

> Here, I recognize that Whistler is allocating a limited road inspection/maintenance budget amongst various needs within the

> municipality. It has set up a system of responding to reports of hazards and it has proactively established a shouldering program during the summer months.

[35] At para. 34, Bauman J. held:

> As in *Barratt v. North Vancouver (District)* [1980] 2 S.C.R. 418, this particular hazard could only have been discovered if Whistler had adopted a more regular, virtually continuous, system of shoulder inspections. In the exercise of its discretion, for obvious budgetary reasons, it has not and as that is a bona fide exercise of discretion, no liability can attach.

[36] The defendant of course relies upon the *Just* decision and in particular the passage from Mr. Justice Cory's reasons for judgment at para. 22 of that case describing what constitutes a policy decision.

[37] The defendant says that *Brown v. British Columbia (Minister of Transportation and Highways)* [1994] 1 S.C.R. 420 describes accurately, in para. 28, the limited cases in which the Court can hold that the exercise of the discretion on the part of a governmental body is not *bona fide*, where inaction is taken for no reason or for an improper reason.

[38] The defendant relies also on *Oser*. This is a case where the plaintiff tripped and fell in an alley within the Municipality, and the Municipality had established no system of inspection of the alley. In para. 11 in that case, McEwan J. says:

> 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* [cite omitted] 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.
>
> 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.

[39] I should say at this point that that case and the description of a threshold in *Oser* is a passage that is relied upon by the plaintiff and is referred to in the plaintiff's authorities.

[40] Plaintiff's counsel says that the Municipality cannot rely upon a policy defence unless it has considered the threshold level of acceptable risks in describing or creating a policy. The plaintiff further says that the Municipality was called to the 12th Avenue school approximately 16 months before the plaintiff's accident and should have conducted an inspection of the adjacent neighbourhood, an area wide enough to extend to nearby crosswalks whether or not a report was received with respect to the crosswalks.

[41] He says that inspection should have been closer, and by that I take him to mean more meticulous, but at the same time covering a wider area. In support of those claims, the plaintiff relies upon the *Just* case to which reference has been made, and in particular the cases of *Tom v. Burnaby (City)*, [1999] B.C.J. No. 1093 (BCSC) and *Plakholm v. Victoria (City)*, 2009 BCSC 1039.

[42] The plaintiff also relies to a certain extent upon the decision at trial and in the Court of Appeal in *Cullinane v. Prince George (City)*, 2002 BCCA 523.

[43] The *Tom* case is a particularly troubling decision. It is a decision of Quijano J. in chambers, an oral decision in which the Court cites from the *Oser* case, and at paras 13-14 says:

> The plaintiff's position with respect to this defence [the policy defence] is that the defendant had no *bona fide* policy. The plaintiff argues that there was no written policy and the City had no protocol for inspecting sidewalks or for handling complaints or advice received by the City regarding the perceived need for sidewalk repair.
>
> The defendant acknowledged that in 1992, at the time of this incident, there was no written policy relating to inspection or repair of sidewalks. The defendant described its policy in the affidavit of Mr. Lorne Graham,

> superintendent of the Roads and Drainage Division within the City of Burnaby.

[44] The Court then cited from Mr. Graham's affidavit, and went on to hold at para. 19, referring to the cases previously cited in the judgment:

> The plaintiff says that here the defendant had not established a threshold or, if the policy or protocol for determining when and whether to repair sidewalks amounted to a threshold it was so arbitrary, undefined and unstructured as to lead to an inference of negligence.

[45] The Court then cited from the *Oser* case and held at paras. 23-24:

> ... I cannot find any evidence that there was an identifiable threshold established. Here the determination as to whether a hazard existed was necessarily made arbitrarily by those who may have observed a deficiency or hazard in the sidewalks. Putting it another way, if there was a threshold the determination as to whether the threshold had been exceeded, that is whether the sidewalk required or appeared to require repair, was left to be decided by whoever happened to observe it, based on their own criteria and it was therefore arbitrary.
>
> This circumstance leads to an inference of negligence because without a threshold having being established it cannot be said that an employee, having seen the condition of the sidewalk, would necessarily have identified it as a hazard and reported it.

[46] It appears to me on reading the reasons for judgment in *Tom* that Quijano J. was looking at the conduct of the municipal employees in the course of their operational duties. In the course of conducting an inspection, they did not clearly understand what hazards ought to be noted and addressed.

[47] With respect, I believe that this is not what the Court was intending to refer to in *Oser* where it referred to a threshold. In my view, what the Court was referring to in *Oser* was the fact that in determining that a policy decision is *bona fide*, a court can look at whether or not the Municipality is adopting a policy that ignores risks that are so significant that they must be dealt with.

[48] It is clear to me, on reviewing the cases, that there are many cases in which our courts have held that the existence of cracks in streets and sidewalks is not a risk which is so significant that a municipal decision to conduct a limited system of inspection falls below a reasonable threshold.

[49] As pointed out by defence counsel, a number of the cases relied upon by the plaintiff in support of her claim are cases where it is clear that the Municipality or government body has established a policy and the complaint made is that in the exercise of that policy in the course of discharging its operational duties, the City failed to discharge the duties which were assumed by the Municipality.

[50] In *Plakholm*, the plaintiff suffered an injury when she stepped into a depression on a city street, but that depression was negligently created by the City, who knew or ought to have known of its existence. It arose out of work done by the City and there was an express finding in the case at para. 37 that, "On the facts, any issue of inspection evaporated when the City detected a defect in Oswego Street and embarked upon work to repair that defect."

[51] In *Jones v. Vancouver (City)*, [1979] 2 W.W.R. 138, the plaintiff fell on a city sidewalk. There was a finding that the City, through a member of its inspection staff, knew or ought to have known that heavy construction trucks were crossing at or near the manhole at the place at which the accident or injury occurred and the City's inspector should have noted cracks in the concrete prior to the plaintiff's accident.

[52] In *Cullinane*, the Court of Appeal, in dismissing the appeal, found that the defendant's argument on appeal was a challenge to the trial judge's finding that no sand or other abrasive material had been applied in the area where the plaintiff fell. In doing so, the Court of Appeal was expressly saying, in my view, that the trial judge had found that there was operational error and that the City had not followed its own policy in the case and no appeal could properly lie from that finding.

[53] In *Skewis v. Kamloops*, [1911] 19 W.L.R. 612, 1 W.W.B. 241, the Court held, as noted in the head note, that this was not a case of nonfeasance but a case of a duty undertaken and not properly performed.

[54] Similarly in *Wintrup v. Surrey (District)*, [1990] B.C.J. No. 609 (B.C.C.A.), as I read that case, it is another instance where there was evidence that the proper performance of the duty assumed by the Municipality on its own policy decision would have revealed the defect and avoided the injury.

ISSUES

[55] The issues in the case are:

(a) whether the case is suitable for determination under Rule 18A; and

(b) is there any case made out for operational negligence.

(a) Suitability

[56] With respect to suitability, in this case there are no conflicting affidavits. In my view, the affidavits together with the undisputed evidence provide sufficient evidence to find the facts necessary to decide the issues of fact and law. As well, I am of the view that determining the issue of liability by way of summary trial results in both the effective use of court time and the efficient resolution of the proceeding.

[57] Accordingly, I have concluded that this matter is suitable for determination by way of summary trial.

(b) Duty of Care.

[58] The plaintiff says that the Municipality has failed to establish that it has described a threshold level of tolerance for risk in adopting the policy that it has adopted. In my view, on the case law, there is no basis upon which I can find that the adoption of the policy described in the evidence by the City of Burnaby was inappropriate or that the policy demonstrated an excessive tolerance of risk.

[59] This is not a case, as noted above, where the defect was reported or observed before the plaintiff's injury, but considered to be too insignificant to require repair. The Municipality does not rely upon the exercise of a discretion on the part of any employee as in its defence in this case.

[60] The plaintiff's complaint that when the Municipality was called to the 12th Avenue school, it should have conducted an inspection of the adjacent neighbourhood amounts to a plea to require the Municipality to adopt a different inspection policy. The location of the 2005 complaint appears to be a full city block

away from the crosswalk. There is no basis upon which a court can or should substitute its own policy of neighbourhood inspection in the place of the City's policy of responding to identified defects and hazards.

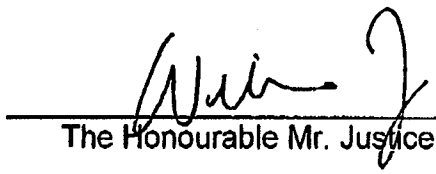
[61] There is a further obstacle to the plaintiff's success in the relation to the 2005 complaint. There is no evidence that the defect upon which the plaintiff might have tripped in May 2006 was there to be seen and repaired in January 2005, 18 months and many winter months previous.

(c) Standard of Care.

[62] I cannot find that the City did not act in good faith in establishing its policy. Further, I cannot find that there was any negligence in determining what streets to repair in accordance with the policy previously described in these reasons for judgment. I cannot find that there was any negligence in responding to a complaint that might have avoided the plaintiff's injury.

[63] For the forgoing reasons, I dismiss the plaintiff's claim, with costs if they are sought.

[64] I will make no order for costs and give the parties leave to address that matter further.



The Honourable Mr. Justice Willcock