In the Provincial Court of Alberta

Citation: Ellis v Lethbridge (City), 2019 ABPC 276

Date: 20191106
Docket: P1802600192
Registry: Lethbridge

Between:

Leanne Wehlage Ellis

Plaintiff

- and -

City of Lethbridge

Defendant

Judgment of the Honourable Judge J.N. LeGrandeur

Nature of the Proceedings

[1] The Plaintiff claims damages for personal injury arising as consequence of her stepping into a sprinkler hole and spraining and breaking her foot while attending the Beer Gardens at the Dragon Boat Festival being held at Henderson Lake Park, in the City of Lethbridge and which incident occurred on the 24th day of June, 2017.

[2] The Defendant denies that it was negligent or in breach of any duty of care, statutory or otherwise, that may have been owed to the Plaintiff and further pleads s7 of the *Occupiers' Liability Act*, RSA 2000, c O-4 (hereinafter referred to as *OLA*), asserting that the Plaintiff willingly accepted the risk of accident at the time. The Plaintiff further pleads s530 of the *Municipal Government Act*, RSA 2000, c M-26, which bars any finding of liability against the

Defendant based upon the Defendant's system of maintenance and/or inspection of the subject area. The Plaintiff further pleads that the provisions of the *Contributory Negligence Act*, RSA 2000, c C-27.

[3] In the event that liability is imposed upon the City, the parties have agreed as to damages payable.

Issue

[4] Generally stated, the question is whether the City is liable in negligence or otherwise for the injury sustained by the Plaintiff, and if so, whether the Defendant is exempted from any such finding of liability pursuant to the provisions of s530 of the *Municipal Government Act* or otherwise.

Facts

[5] The Plaintiff and her husband were participants in the Dragon Boat races being held in conjunction with the Dragon Boat Festival on Henderson Lake on June 24th, 2017. They had finished their last race and attended the beer garden for some refreshment. Mr. Ellis had purchased a drink for he and his wife and they had taken up occupation of a table in the beer garden area. The Plaintiff had one sip of her canned Caesar drink and then left the table and proceeded a short distance within the beer gardens to a pizza kiosk where she purchased a pop and two pieces of pizza. Upon leaving the kiosk, holding the pop and a plate with two pieces of pizza on it, within a few steps stepped in a sprinkler hole (Exhibit 2(a) and (b)), caught her foot under the edge of the sprinkler head, twisting it as she fell, and broke a bone as well as suffered a significant sprain. She managed to get up with the help of another individual and limped her way back to her table with her husband. From there, she and her husband attended the Chinook Hospital Emergency Room where an x-ray was taken. The next day, after the x-ray had been read by a radiologist, she was advised that a bone had been broken.

[6] She was required to wear an air cast full time for six weeks and thereafter when she was outside, for another two weeks. With physiotherapy she was able to get back more or less to normalcy by November of 2017.

[7] She did not see the sprinkler hole because it was covered by grass that had been bent down over the opening. She indicated based upon her observations after extracting her foot from the hole, that the top of the sprinkler head was approximately two to three inches below the highest edge of the hole. The hole in which the sprinkler head was located was about twice the diameter of the sprinkler head itself. Photographs 2(a) and (b) illustrate the subject sprinkler head and hole the day after the incident. The Plaintiff asserts that these photographs illustrate the hole and sprinkler as it appeared to her immediately after the accident.

Henderson Lake Park and Beer Gardens

[8] This accident occurred in Henderson Lake Park during the annual Dragon Boat Festival. Henderson Lake Park is a feature (specialty-use) park; it is a high level park that deals with events throughout the period May through September with consequent high traffic volumes. During these months Henderson Park has its own crew designated to deal with irrigating the park. The crew would be tasked with checking sprinkler heads and the irrigation system and

repairing any problems discovered. Specifically they are directed by the Level of Service Standards Document 2015 (Exhibit #6), as shown on page 2.26 thereof, to raise sprinkler heads and plumbing valve boxes as part of their regular season maintenance. At present Henderson Park has 1,800 to 2,000 sprinkler heads, and Kevin Jensen, the parks operation manager for the City of Lethbridge, and Ron Preddy, the Coordinator for the City of Lethbridge Irrigation Department, asserted that there are too many sprinkler heads to check individually on a regular basis. Crews are instructed, according to Mr. Preddy, to look for hazards during the ordinary course of their activities; they are responsible for repairing sprinkler heads and exercise their own discretion as to when a repair is necessary.

[9] According to Mr. Preddy this is a regular topic of discussion at the crew's morning tailgate meeting and is part of the discussion with the crew's initial training session at the beginning of the irrigation season.

[10] Mr. Preddy advised the court that crews are instructed to look for hazards especially in respect of special or major events such as the Dragon Boat Festival. Sprinkler heads are marked however, such as shown in Exhibits #3 a & b, only in circumstances where heavy equipment may be passing over them. The marking is to prevent that from occurring and the consequent damage that may result.

[11] The sprinkler head involved in this particular instance was not marked and was located within the beer garden of the Dragon Boat Festival. That is a designated area set up in conjunction with the festival where beer, spirits, refreshments as well as food is served. The beer gardens are enclosed by a chain link fence with tented and open seating areas as well as food kiosks. The subject sprinkler head was located only a few feet away from the front of a pizza kiosk, see Exhibit #1. The beer garden area would have been a high traffic area during the course of the festival.

[12] Although there would have been, according to Mr. Preddy a basic check of this area by the management crew, there is no suggestion that all the sprinkler heads in this discrete area of Henderson Park would have been individually checked. Regular checks would not mean checking every sprinkler in this particular area, rather, I gather it would be a general overview of the specific areas to see if anything alerted the crew to a problem. Mr. Preddy acknowledges that the sprinkler could have been missed when they did their regular checking, which, as I said, was not a specific check of every sprinkler head. If a fault was not visible so as to attract their attention or they were not alerted by a factor that would suggest an issue with the sprinkler then it could have been missed.

[13] Although there appears to be a clear recognition that the circumstances of the special event of the Dragon Boat Festival are different than the day to day occupation of Henderson Lake Park by the public, given the high traffic and the discrete area that the high volume of people would occupy during the Dragon Boat Festival; nonetheless, nothing different was done by the irrigation crew with respect to the sprinkler heads in the expected high traffic area of that portion of Henderson Lake Park occupied by the Dragon Boat Festival than the irrigation crew would usually do, that is, generally following the instruction to keep their eyes open for hazards and in their discretion, repair any hazards they may find. Despite the reduced number of sprinkler heads that would be present in the discrete area of the Festival, in particular, the Beer Gardens, no active steps to discover sprinkler head hazards were taken with respect to this special event.

Law and Analysis

[14] Although the Plaintiff did not specifically plead the *OLA*, the Defendant's pleadings do assert that the Defendant City is the owner and responsible for the condition of the premises and the activities conducted on the premises, which in this case is a discrete area of Henderson Lake Park where the Plaintiff was injured as described aforesaid.

[15] The Plaintiff was clearly a visitor within the meaning of the *OLA* and the City accordingly owed the duty of care to the Plaintiff as described in s5 of the *OLA.*

[16] Section 5 and 6 of the *OLA* provide:

> Duty of Care to Visitors
>
> > 5 An occupier of premises owes a duty to every visitor on the occupier's premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there.
> >
> > 6 The common duty of care applies in relation to
> >
> > > (a) the condition of the premises,
> > > (b) activities on the premises, and
> > > (c) the conduct of third parties on the premises.

[17] Counsel for the City concedes that the *OLA* applies to the circumstances of this case and asserts that occupier's liability is governed entirely by the *OLA.* In *Stefanyk v Sobeys Incorporated*, 2018 ABCA 125, the Court stated at para 21;

> [21] The liability of an occupier with respect to the premises of which it is an occupier is exclusively governed by the *OLA*.

[18] The Defendant pleads s7 of the *OLA* asserting that the Plaintiff willingly accepted the risk of injury occurring on the premises and that accordingly the Defendant was under no duty or direct obligation to discharge the common duty of care to a visitor in respect of such risk.

[19] In order to establish such defence the occupier must show that the Plaintiff ;

> (1) was aware of the "virtually certain risk of harm";
>
> (2) assumed both the physical and legal risk of entry,
>
> (see: *Murray v Bitango* (1996), 38 Alta LR (3d) 408 (CA)).

[20] In the case at bar there is no evidence that the Plaintiff was aware of the risk presented by the sprinkler head or any other risk associated with the premises and there was no evidence upon which to infer that the Plaintiff expressly or impliedly waived her right of action for any injury she might sustain on the subject premises. The Plaintiff was not aware of any physical risks or hazards and did not waive any right under the *OLA* to claim compensation from the occupier for any failure of the occupier to take such reasonable care in all the circumstances of the case to see that the Plaintiff visitor would be reasonably safe in using the premises for the purposes for which the Plaintiff was permitted to be there.

[21] Neither was the activity undertaken on the premises by the Plaintiff in the circumstances inherently risky in the sense of the injury sustained and how it was sustained so as to exempt the occupier from liability. (see discussion: *Crocker v Sundance Northwest Resorts*, [1988] 1 SCR 1186).

Duty of Care

[22] The *OLA* imposes a particular statutory duty upon the occupier. This common duty of care creates an affirmative duty as described by Moore JA in *Preston v Canadian Legion*, 1981 ABCA 105 at para 12;

> In my respectful opinion the effect of the Act is two-fold. Firstly, it does away with the difference between invitees and licensees and puts both invitees and licensees into the common defined class of visitor. That in itself is a very helpful improvement in the law. Secondly, and more importantly, the statute now imposes an affirmative duty upon occupiers to take reasonable care for the safety of people who are permitted on the premises. This change is most marked because it does away with the old common law position that an occupier was only liable for unusual dangers of which he was aware or ought to have been aware. Under the old law the occupier could escape liability by giving notice. Now, the occupier has to make the premises reasonably safe. That does not absolve the visitor of his duty to take reasonable care but does place an affirmative duty on each and every occupier to make the premises reasonably safe. This is in accordance with the decision of the court in *Nassert v. Rumford et al*, (1978), 7 A.R. 459; 5 Alta. L.R. (2d) 84. Further, it is in accord with the reasoning of McKenzie J., in *Woelbern v. Liberty Leasing of Canada No. 3 Ltd. et al.* (1978), 8 B.C.L.R. 352. Insofar as other cases, particularly in British Columbia, have retained the unusual danger test, I am of the view that they certainly have no application to a proper interpretation of s. 5 of the *Occupiers' Liability Act of Alberta.*
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> (See also: Waldick v Malcolm, [1991] 2 SCR 456)

[23] This does not mean that in all cases there is a duty on an occupier to take proactive steps to address a situational danger. The question is one of fact, the finding of which is dictated by whether the "circumstances warrant" positive action on the part of occupier to make the premises reasonably safe. (*Malcolm* at p 128)

[24] In this case the City, through its workers and supervisors, knew that sprinkler heads in Henderson Lake Park, and indeed elsewhere in the city, could in the course of their operation over time sink below the level of the walking surface and become a hazard. The circumstance of a sprinkler head being below the walking surface of the subject premises within a hole the diameter of which was greater than the diameter of the sprinkler head itself, such that an individual who unwittingly stepped in the same, could sustain injury was a known risk. In this case such a sprinkler head hole existed and was partially hidden by grass that had grown and laid to some extent over the sprinkler head and the hole surrounding it.

[25] The City recognized that given the volume of traffic in the discrete area allocated to the Dragon Boat Festival for its use, and also the even more discrete area allocated for the Beer Garden (Special City Permit Exhibit #9), that the risk of a sprinkler hazard causing injury was

higher than in normal circumstances where there was less confined pedestrian activity. Consequently the observing of hazards in this distinct area was specifically discussed amongst the irrigation and maintenance crew. The problem was, however, that they talked about it but did nothing more to make the premises reasonably safe than they did in circumstances where there was less expected traffic. There was no individual inspection of sprinkler heads in the area, but only a general "keep your eyes open" approach, which is that which was followed in the ordinary circumstances.

[26] The City did not take steps commensurate with the circumstances so as to make this discrete area, in particular the sprinkler head locations in the area, reasonably safe for individuals visiting the area. This area was a discreet sprinkler area with a limited number of sprinklers and easily inspected on an individual basis. Checking each sprinkler head located in this area would not have required more staff, and although it may have taken a greater amount of time than their normal inspection, that cost could have been passed on to the Dragon Boat Festival organizers as part of the service package. It would not have been necessary to immediately repair each and every sprinkler head found to be a hazard as long as they were marked so as to bring their presence to the attention of the visitors.

[27] In all the circumstances the City failed to take reasonable steps to make the premises reasonably safe for the individuals using the same.

Contributory Negligence

[28] An occupier's duty to take reasonable care does not absolve a visitor to premises from taking reasonable care for their own safety.

[29] The case law supports the position that a visitor using reasonable care for his own safety is entitled to expect the occupier to use reasonable care in making the premises safe for the visitor.

[30] One of the circumstances to be considered in determining whether the occupier took reasonable care in all circumstances is whether the visitor took reasonable care for his own safety. The occupier can assume that the visitor will exercise reasonable care for his own safety in light of his own knowledge. That is a factor for consideration in determining whether in the circumstances the occupier has taken care to see that the visitor is reasonably safe, (*Epp v Ridgetop Builders Ltd*, [1978] AJ No 702 SCCTDJ)). A person who with full knowledge of risk, i.e. seeing the hole and choosing to step over it rather than around it is a factor for consideration as to whether the occupier fulfilled its duty of care under the *OLA* (See: *Charko v Wm Holt Tree Farms Ltd*, (1991) ABCA 82).

[31] In this case the hole was partially or totally hidden, there was no reason for the Plaintiff to expect such a hazard given the location and circumstance and nothing the Plaintiff did or did not do would suggest that the Plaintiff was not exercising ordinary diligence in the circumstance. The occupier in this case could reasonably foresee a risk to a visitor exercising ordinary diligence and therefore is in breach of its duty as described aforesaid. (See: *Lorenz v Ed-Mon* Developments Ltd, 1991 ABCA 82).

Policy Exemption with Respect to Duty of Care

[32] Defence counsel asserts that the City is exempt from liability under the OLA by reason of the fact that the nature of the inspection and maintenance of the irrigation sprinkler system and sprinkler heads at Henderson Lake Park as described by the evidence of Mr. Preddy and Mr. Jensen is based upon a policy decision of the City, and the City is exempt from any liability arising from such inspection and/or maintenance policy.

[33] The law in that regard is described in the case *Just v British Columbia*, [1989] 2 SCR 1228, (*Just*) and is summarized in paragraphs 27-29 thereof;

> 27 Let us assume a case where a duty of care is clearly owed by a governmental agency to an individual that is not exempted either by a statutory provision or because it was a true policy decision. In those circumstances the duty of care owed by the government agency would be the same as that owed by one person to another. Nevertheless the standard of care imposed upon the Crown may not be the same as that owed by an individual. An individual is expected to maintain his or her sidewalk or driveway reasonably, while a government agency such as the respondent may be responsible for the maintenance of hundreds of miles of highway. The frequency and the nature of inspection required of the individual may well be different from that required of the Crown. In each case the frequency and method must be reasonable in light of all the surrounding circumstances. The governmental agency should be entitled to demonstrate that, balanced against the nature and quantity of the risk involved, its system of inspection was reasonable in light of all the circumstances including budgetary limits and the personnel and equipment available to it and that it had met the standard duty of care imposed upon it.
>
> 28 It may be convenience 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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> 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 statute or police 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.

[34] Defence counsel argues that the inspection and maintenance policy was dictated by financial and economic factors that is that there are too many sprinkler heads in the City of Lethbridge (20,000), and more specifically, in Henderson Lake Park (2,000), to inspect regularly on an individual basis, given that the City does not have the staff to do so. The policy is essentially framed by the irrigation crew supervisor and the Parks Operation Manager, and provides that the irrigation crew is to have their eyes open for maintenance issues and effect such maintenance as they in their discretion deem warranted when such form of inspection discovers a maintenance issue.

[35] Such a policy exemption would apply to the traditional tort law duty of care that generally applies to a governmental agency as it does to any individual. In such a case the governmental agency is exempt from imposition of the duty of care in situations which arise from a pure policy decision, (*Just* at para 28).

[36] What a policy decision is may vary infinitely and may be made at different levels of the governmental agency. In reaching a decision as to inspection the governmental agency must act in a manner which constitutes a *bona fide* exercise of discretion. To be *bona fide*, the government agency must specifically consider whether to inspect and if so, the system must be a reasonable one in all the circumstances, (*Just* para 21).

[37] As explained in *Just* at para 22, the decision to not inspect at all or to reduce the number of inspections may be unassailable as a policy decision if it constitutes a reasonable exercise of *bona fide* discretion based upon, for example, the availability of funds. In the case at bar it is argued that the inspection policy as described in the evidence is based upon economics and the limited availability of staff such that individual inspections of individual sprinkler heads is not feasible on a regular basis.

[38] The policy calls for inspection; the question turns to the manner and quality of the inspection system established and its implementation and the determination of whether the governmental agency had been negligent in the implementation of the policy decision to inspect and therefore were operational in nature, which would be subject to court review to determine whether the City had been negligent or satisfied the appropriate standard of care.

[39] With these principles in mind it is my view that the policy/operational analysis is not applicable to this case. That analysis applies only to common law tort duty; it is not part of the analysis in dealing with the statutory duty such as provided in the *OLA* as described aforesaid. The *OLA* provides for specific affirmative statutory duty and I see no place for the application of the policy/operational analysis in determining liability under the *OLA*.

[40] There does not appear to be any consensus in the law on this point amongst the various provinces, however I find the position of the Ontario Court of Appeal in the case *Kennedy v Waterloo County Board of Education*, [1999] OJ No 2273, 45 OR (3d) 1, leave to appeal to SCC refused, [1999] SCCA No 399 *(Kennedy*) to be persuasive. In that case a trial judge was found to have erred in applying the policy operational analysis when the *Ontario Occupiers' Liability Act* provided the statutory duty as well as the standard of care, and provided for civil liability in

breach of that duty. No policy decision could be made that would allow it to avoid compliance with this statutory obligation. The section in the *Ontario Occupiers' Liability Act* imposing the duty and standard of care in that case is slightly different than the *OLA* wording, but in essence the duty imposed is the same. The *Kennedy* court, at paragraphs 26, 28, 29, 30 and 3, states:

> 26 In my view, therefore, there is nothing in the majority decisions which derogates from Sopinka J.'s statement in his opening sentence in *Just*, that that case did not involve a statutory duty but only a statutory power. Therefore, the policy/operational dichotomy and the exempting effect of a policy decision, are not applicable where a duty of care is imposed by statute rather than arising at common law.
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> ...
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> 28 The *Occupiers' Liability Act* is the second type of statute which imposes a duty. It provides for civil liability for its breach. Section 2 of the *Occupiers' Liability Act* states that the Act replaces the common law obligations of an occupier of premises to persons who enter on the premises and the liability in respect of those obligations. Section 3(1) prescribes the statutory duty:
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> > An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.
>
> 29 There is no issue in this case that the statute is binding on the respondent. The statute places a positive duty on all occupiers of premises as set out in s. 3(1) and provides civil liability for breach of that duty. Therefore, the only issue can be whether the respondent breached the duty of care it owed to the appellant under s. 3(1).
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> 30 Section 3(1) not only imposes a duty of care, it also prescribes the standard of care. In deciding whether the respondent breached the prescribed standard, the court is to consider "all the circumstances of the case." In the case of a government authority such circumstances could include its financial resources, as with a policy decision. It is also to apply a standard of reasonableness both as to the degree of care to be taken and the degree of safety to be provided. However, it was not open to the Board for financial or other reasons, to make a "policy decision" to absolve itself from or reduce its statutory obligation.
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> 31 In this case, therefore, the trial judge erred in applying the policy/operational analysis where the *Occupiers' Liability Act* prescribes the statutory duty and the standard of care and provides civil liability for breach of that duty. The Board could not make a policy decision which would either oblige or allow it to avoid compliance with its statutory obligation. Therefore, if the decision not to remove the bollards when the chains were removed was a breach of the statutory duty on the Board pursuant to its obligations under the *Occupiers' Liability Act*, it is no defence to say that the Board made a policy decision to exempt itself from that duty.

[41] The contrary view is expressed in the British Columbia case of *Fox v Vancouver (City)*, 2003 BCSC 1492. However, in my view, that court misunderstood the *Kennedy* decision as one where the court concluded that the Board involved had made a policy decision to absolve itself from or reduce its statutory obligation which was not a true policy decision and that financial resources and constraints and social and economic factors did not support such a policy decision.

[42] That aspect of the *Kennedy* decision was pure *obiter* and the *Kennedy* court only entered into that discussion after it had already concluded that the statutory duty under the *OLA* was not affected by the policy operational/analysis applicable to common law torts. The decision as to whether it was a true policy decision (*Kennedy* at para 32) in essence says that "if" the issue of policy/operation analysis was relevant, it was not a true policy in any event. That, however, is not the ratio of the *Kennedy* decision as the *Fox* court suggests.

[43] In the Alberta case, *Shanks v Calgary (City)*, 2003 ABQB 56, Justice Lomas mentions the *Kennedy* decision noting that unlike the *Kennedy* decision, in the *Shanks* case there was a statutory exemption under s530 of the *Municipal Government Act*. Such was not the case in *Kennedy*, and *Kennedy* speaks only to the inapplicability of the common law policy operation exemption, not the statutory exemption.

[44] It is my conclusion that the common law policy operation exemption does not in the present circumstances apply in the face of the affirmative statutory duty imposed upon the City by the *OLA*.

Section 530 – *Municipal Government Act* Exemption

[45] Section 530 of the *Municipal Government Act* provides:

> A municipality is not liable for damages caused by:
>
> (a) a system of inspection, or the manner in which inspections are to be performed, the frequency, infrequency or absence of inspections, and
> (b) a system of maintenance or the manner in which maintenance is to be performed, or the frequency, infrequency or absence of maintenance.

[46] What is the impact of this legislation on the liability of a municipal body? Is s530 simply a restatement in statutory form of the *Just* case as stated in paragraph 18 of that decision:

> 18 The need for distinguishing between a governmental policy decision and its operational implementation is thus clear. True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions may well be subject to claims in tort...

[47] It is clear that a governmental agency exemption from implementation of a duty may occur as a result of an explicit statutory exemption, or alternatively a governmental agency may be exempt from a duty of care in situations which arise from its pure policy decisions.

[48] In this latter circumstance, if the decision involved is a manifestation of the implementation of policy to inspect and was operational in nature, then circumstances could be reviewed by the court to determine whether the governmental body had been negligent or had

satisfied the appropriate standard of care. If the matter is one of operation, the governmental agency would not be immune from liability in negligence.

[49] The policy/operational exemption provides protection to governmental agencies against unlimited tort liability, but leaves open the issue of imposition of liability when the issue is not one of the establishment of the policy but the implementation of the policy.

[50] Section 530 provides a statutory exemption against any liability for damages arising in the context set out in s530.

[51] The text of the section appears to exempt government agencies from any liability for damages with respect to inspection or maintenance, whether the damages were caused by a system of inspection or maintenance or the manner in which the inspection was performed, its frequency, infrequency, or even absence.

[52] Section 530 does not just restate the policy/operational analysis principle set out in *Just*, it establishes exemption for any damages including damages arising from what might otherwise be considered negligence in the implementation of policy, which might be a basis of liability and damages in the common law sphere.

[53] In this case the matter for consideration is a matter of inspection and maintenance, that is, the failure to adequately inspect and maintain in the circumstances present which I have found to be a breach of the *OLA* in the circumstances, to make the premises reasonably safe for the visitors to the subject premises.

[54] In my view, s530 does not require any policy/operational analysis. *Prima facie* it exempts the governmental agency from liability for damages whether they arise from policy or any operational decision relating to inspection and/or maintenance.

Interaction Between s530 *Municipal Government Act* and the *Occupiers' Liability Act*

[55] As I have noted aforesaid, the purpose of s530 of the *Municipal Government Act* appears to be to exempt municipal government agencies from any tortious liability related to inspection and maintenance policy or any implementation, non-implementation or the manner of implementation of such policy. Its effect is to remove all liability under the common law of policy/operational analysis as described in the *Just* case insofar as it relates to inspection and maintenance policy and implementation.

[56] The *OLA* is specific legislation directed at a specific aspect of tortious liability and which defines the duty and standard of care and prescribes civil liability for breach of that duty.

[57] As noted aforesaid, a governmental agency is not exempt from liability under the *OLA* by application of the common law policy operational analysis (*Kennedy, supra*). Such a common law exception cannot offset a duty of care imposed specifically by a statute such as the case under the *OLA*.

Conflict

[58] The s530 exemption appears to be in conflict with the duty imposed on occupiers, of which the City is one, by s5 of the *OLA*. The application of both statutes to the fact situation before this Court would lead to different results; that is liability under the *OLA* if it were to prevail, or exemption under the *Municipal Government Act* if it were to prevail. There is a

legitimate conflict present having regard to the fact situation before this Court (*Platana (Litigation Guardian of) v Saskatoon (City*), [2006] SJ No 46 at para 89 (CA)). Both provisions continue to complement each other outside of the inspection maintenance context, that is liability under the *OLA* is not exempted otherwise with respect to the actions of a municipal government agency.

[59] There is no specific legislative expression that serves to solve this conflict such as if s530 provided that it applies, "despite any other provision of law" or a specific provision that sets out that "where conflict arises the *OLA* takes precedence over s530 of the *Municipal Government Act*".

[60] The Court is accordingly left to try and determine which provision will prevail. In *Lèvis (Ville)* C Côtè, [2007] SCJ No 14 , Bastarasch J wrote at para 58,

> When a conflict does exist and it cannot be resolved by adopting a interpretation which would remove the inconsistency, the question that must be answered is which provision should prevail. The objective is to determine the legislature's intent. Where there is no express indication of which law should prevail, two presumptions had developed in the jurisprudence to aid in this task. These are that the more recent law prevails over the earlier law and that the special law prevails over the general.... Both are only indicies of legislative intent and may be rebutted if other considerations show different legislative intent ...

[61] In my view, these two presumptions would point to s530 prevailing over the *OLA* duty. At the time s530 became law in 1994, the *OLA* had been in place for many years. The legislature is deemed to be all knowing and is presumed to know that the duty imposed by the *OLA* applied to governmental agencies including municipal bodies yet no attempt was made to exempt the *OLA* from the application of s530.

[62] Section 530 is very specific legislation that deals with exempting the municipal body from liability for damages only with respect to inspection or maintenance. It does not exempt any municipal agency from all liability under the *OLA* only for breach of duty thereunder relating to inspection and maintenance. Arguably, the special that is s530 prevails over the general, that is the *OLA*.

[63] If the *OLA* legislation were to prevail over s530 the purpose of that section, that being to exempt the municipal agency from any tortious liability arising from inspection or maintenance as articulated in s530, would be undermined; the dominant purpose would be overridden by the lesser.

[64] Accordingly I conclude that s530 of the *Municipal Government Act* exempts the City of Lethbridge from liability under the *OLA* for any breach of affirmative duty of care that arises in conjunction with inspection or maintenance as is the circumstance in this case.

Conclusion

[65] But for the provisions of s530 of the *Municipal Government Act*, I would have concluded that the City would be liable to the Plaintiff for damages arising from breach of their duty under the *OLA* as I have described aforesaid, however s530 of the *Municipal Government Act*, I am satisfied prevails over the provisions of the *OLA* with respect to issues of inspection or

maintenance, and exempts the City from liability for damages arising therefrom, and accordingly, the Plaintiff's claim must be dismissed.

Costs

[66] If the City of Lethbridge seeks costs and the Plaintiff opposes the same or the amount of costs sought by the City, either party may speak to the Clerk of the Court and arrange for a hearing before me to speak to the matter of costs.

Heard on the 5th day of March, 2019
Dated at the City of Lethbridge , Alberta this 6th day of November, 2019.

J.N. LeGrandeur
A Judge of the Provincial Court of Alberta

Appearances:

R. Dodic
for the Plaintiffs

D. Wilson
for the Defendant