

Slip and Falls and Municipal Liability

by Sophia M. Stadnyk, Senior Associate Counsel

The joke in my Canadian hometown was that there were really only two seasons: winter and construction. For municipal lawyers, the calendar can similarly be divided into winter slip and fall claims, and construction slip and falls. Two recent British Columba decisions look at the appropriate standard to be applied in addressing construction-related slip and fall claims.

In the first, *Plakholm v. Victoria* (*City*), 2009 BCCA 466 (B.C.C.A. Oct. 29, 2009), the plaintiff, 57-year-old Mrs. Plakholm, had stepped off a bus and jaywalked across the street. Unfortunately, she fell and hurt her shoulder because, she claimed, the pavement was uneven. She testified that the lighting in the area had been sufficient for her to see where she was going, but she tripped on an uneven area. Some weeks earlier, the City of Victoria had carried out repairs which involved excavating, then backfilling and re-paving, that street, with some "settling" of the new asphalt. A friend of Plakholm's said there was over a two-inch height differential in places, but also admitted she didn't know where, exactly, the fall occurred. A city official who examined the site reported back that "there was no height differential that came even close to the 40 mm standard for repair set out in the city's policies," and estimated that the differential was, at most, 15 mm (just over half an inch). The 40 mm standard was set out in a repair policy that stated, "[r]oad failures/potholes of less than 40mm will be repaired at the discretion of the Manager or Assistant Supervisor." Plakholm sued the City pursuant to the *Occupiers Liability Act*, claiming that she had been an invitee of the City when the accident occurred. In a summary trial proceeding, the trial judge, in reasons reported at 2008 BCSC 1048, found that the City was entirely liable. Plakholm had been a licensee of the City, and the duty owed by the City to pedestrians was to avoid foreseeable risks of harm from unusual danger of which the City knew or ought to have known. The City knew the pavement would settle and "a height differential between old and new pavement would inevitably result," yet had done nothing to warn pedestrians that the surface had been repaired and a height differential was to be expected.

The City appealed, arguing, among other things, that the trial judge had applied a higher and incorrect standard of care; that he failed to apply the policy defence available to municipalities; and had misapprehended the evidence about the height differential. The B.C. Court of Appeal allowed the appeal, clarifying the correct approach. By virtue of s. 8(2)(b), the Act did not apply to municipalities vis-à-vis users of its streets. Instead, the trial judge was required to carry out an analysis of whether the policy relied on by the City was indeed a policy and, if so, whether it was made as a bona fide exercise of discretion. If the policy met these criteria, the next step was to assess it in light of all the surrounding circumstances, including budgetary restraints and the availability of qualified personnel and equipment. "Only once this analysis had been done would it be appropriate to move to the question of whether in fact the City had carried out its policy in a reasonable manner." In the absence of the necessary factual findings about the policy, the court remanded the case for re-trial.

A few days later, another slip and fall case, *Beadle v. Nanaimo* (*City of*), 2009 BCSC 1506 (B.C.S.C. Nov. 04, 2009) referred to *Plakholm* and implemented the approach endorsed by the appellate court. Beverly Ann Beadle fell on a sidewalk in Nanaimo. More than a year earlier, a contractor for the City had installed a fibre-optic conduit that required digging a trench in the concrete sidewalk. The sidewalk had been subsequently been repaved, but the paved trench across the sidewalk had settled, leaving a vertical differential of 14 millimetres (about half an inch, or, as the court put it based on photos, "about one-half the height of a Loonie"). Beadle fell at midday and said she didn't notice the filled trench or that the asphalt fill was lower in elevation than the concrete. The City had adopted a policy on sidewalk inspection and repair that required sidewalks to be inspected on a semi-annual basis (including checks for those that had a greater than 25 millimetre difference in elevation) or after an accident. After Beadle reported her fall, the City inspected the sidewalk the same day and repaired it four days later. Nonetheless, it took the position that, because the difference in elevation was below its policy threshold of repair, no liability could attach; further, it argued that it had fulfilled its duty of care by exercising reasonable care in the selection and supervision of the contractor. The parties agreed that liability could be determined on a summary application.

The B.C. Supreme Court dismissed the plaintiff's claim. Following *Plakholm*, it held that the case fell outside the *Occupiers Liability Act*. Second, it found that the City's decision to repair sidewalks only if there was a more than 25 millimetre elevation difference (or following an incident resulting in personal injury) was a policy decision relating to budgetary and manpower

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Times, http://legaltimes.typepad.com/blt/2009/08/first-local-government-seeks-voting-rights-bailout-bailout-post-supreme-court-ruling.html.
25. Others echoed the prediction that the number of bailout suits would increase at the local government level. "By widening the escape hatch for localities in its extraordinary ruling, the Supreme Court may have launched a town-by-town movement that may release localities that have chafed for years under the law's strict rules; every time a covered jurisdiction wanted to move a polling place from one school to another, it needed Justice Department approval. Now, if they can show they've been adhering to the law for 10 years, they're home free." Tony Mauro, *Can the Voting Rights Act Survive Another Challenge?* National Law Journal, June 29, 2009, accessible at http://www.nlj.com.
26. 129 S. Ct. at 2512.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 2512-13.
31. *Id.* at 2512.
32. *Id.*
33. *Id.* at 2511, citing H.R.Rep. No. 109-478, p. 12 (2006).
34. *Id.*
35. *Id.* at 2512.
36. *Id.* at 2511.
37. *Id.*
38. David S. Broder, *For Obama, Court Cases that Matter*, Washington Post, July 02, 2009, at http://www.washingtonpost.com/wp-dyn/content/article/2009/07/01/AR2009070103024_pf.html.
39. 129 S. Ct. 2658 (2009).
40. Ricci v. DeStefano, 554 F. Supp.2d 142 (D. Conn. 2006).
41. 530 F.3d 87 (2d Cir. 2008).
42. 129 S.Ct. at 2664-65.
43. *Id.* at 2681.
44. *Id.* at 2664-65.
45. David S. Broder, *supra* note 38. ML

Federal

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viewpoint of states and localities. The brief will argue that there is no clear statement in SORNA that Congress intended such a broad preemption of state sex offender law and administration, that SORNA imposes expensive unfunded mandates on states and localities, and that SORNA violates important federalism principles.

Notes

1. Carr v. United States, 551 F.3d 578 (7th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3610 (U.S. Sept. 30, 2009) (No. 08-1301).
2. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 249-109, 120 Stat. 590 (2006).
3. This includes, but not limited to, national databases, law enforcement, all jurisdictions where the sex offender resides or is an employee/student, any school in each area where the sex offender resides, social service entities, and any volunteer organizations in which contact with minors may occur.
4. Justice Policy Institute, *What will It Cost States to Comply with the Sex Offender Registration and Notification Act*, at http://www.justicepolicy.org/images/upload/08-08_FAC_SORNACosts_JJ.pdf. *See also*, Virginia Department of Planning and Budget, 2008 Fiscal Impact Statement, (Richmond, VA: Department of Planning and Budget, 2008).
5. Office of the Attorney General, *Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8891 (Feb. 28, 2007).
6. The final guidelines were released in June 2008. Office of the Attorney General, *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38030 (July 2, 2008).
7. U.S. v. Juvenile Male, 581 F.3d 977 (9th Cir. 2009).
8. *Id.* at 979.
9. U.S. v. Cain, 583 F.3d 408 (6th Cir. 2009); U.S. v. Hatcher, 560 F.3d 222 (4th Cir. 2009).
10. Edward Byrne Memorial Justice Assistant Grant Program, 42 U.S.C. § 3750 (2006). ML

Supreme Court

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absent "unusual circumstances," a sale of real property was an effective way for a public body to end its inappropriate endorsement of religion. What made it more interesting was that, according to one source, "the preserve [was] riddled with private inholdings," being an estimated 1,000 private landowners with 1,800 plots of land.

The Supreme Court agreed to hear the appeal and, apart from the issue of standing, must decide when a message ceases to be a government message, and whether the Ninth Circuit erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands. During the October 07 oral argument, the issue of whether the cross was an impermissible display on government land was not before the Court. Instead, the Court focused on the legal issues associated with the injunctions before dealing with the merits, with Chief Justice Roberts asking one of the most relevant questions: "I'm just kind of curious, why is this cross put up – you know, in the middle of nowhere?"(The answer was that the man who originally put up the cross was apparently a miner and homesteader when the land was owned by the Bureau of Land Management). Counsel for Frank Buono, the individual challenging the government action, maintained that the "totality of the circumstances," including "the government's asserted purpose to make sure that the cross remains up, the government's favoritism of the same parties," and its retention of the reversionary interest, added up to a continuing government endorsement of religion and an Establishment Clause violation.

The Court's decision is pending. ML

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constraints, and represented a bona fide exercise of discretion. That policy did not differentiate between sidewalks and sidewalks that had been repaired, and there was no reason to hold the City to a different standard of inspection and maintenance for just the sites that had been worked on and restored by a contractor. Even if the policy did not apply, there was no evidence that the City had been negligent. Although there was a "small difference in elevation" that may have been a "minimal hazard," "[a] municipality cannot provide a perfectly smooth surface on its sidewalks. Such a standard would be inordi-

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nately expensive, if not impossible to achieve. Other than the plaintiff's own unfortunate experience, there is no evidence that what she tripped over was so obviously hazardous that the [City], had it even been aware of the elevation difference, was required to repair" it.

Both cases are available from the B.C. courts' website at http://www.courts.gov.bc.ca. **ML**

Ordinances

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down economy. The court rebuked the County for changing its tone just weeks later and calling an emergency meeting with the unions to discuss a financial picture that was volatile.

This case is now on appeal, with opening briefs submitted by the time this *Municipal Lawyer* issue goes to print. One issue that wasn't discussed at all in the opinion was whether or not a furlough plan constitutes a "law" under the Contracts Clause. In this case, it is arguable that there was no legislative act that impaired the contract, as the furlough plan was implemented by the County Executive. IMLA will be filing an *amicus* brief as well in support of the County, as it feels that the court substituted its opinion for that of duly elected local government officials, particularly in the situation where the court chastised the County for not utilizing its UFB, a fund which most local governments save for one-time disaster situations, not for ongoing expenses like employee salaries.

Notes

1. *Webster's New Collegiate Dictionary* 462 (1979).
2. Cal. Exec. Order No. S-13-09 (July 1, 2009), available at http://gov.ca.gov/executive-order/12634.
3. For a good FAQ document on the interaction between FLSA and furloughs, go to http://www.imla.org/images/stories/pdf/Events/AudioConferences/personnel/FLSA/furloughfaq.pdf.
4. IMLA conducted a teleconference in August 2009 on *Furloughs and Reduction in Force Policies*. Send an email to djanardan@imla.org, reference this article, and I'll send you the presentation slides from the event.
5. Fraternal Order of Police v. Prince George's County, No. AW-08-2455 (D. Md. Aug. 18, 2009).
6. U.S. Const. art. I, § 10, cl. 1.
7. *Id.*
8. U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 25-26 (1977).
9. Baltimore Teachers Union v. Mayor and City Council of Baltimore, 6 F.3d 1012, 1015 (4th Cir. 1993) (emphasis in original).
10. *Id.*
11 U. S. Trust Co. of New York, 431 U.S. at 25.
12. *Fraternal Order of Police*, No. AW-08-2455, quoting *Baltimore Teachers Union*, 6 F.3d at 1018.
13. *U.S. Trust Co. of New York*, 431 U.S. at 25.
14. *Fraternal Order of Police*, No. AW-08-2455 at *30.
15. Baltimore Teachers Union v. Mayor and City Council of Baltimore, 6 F.3d 1012, 1020 (4th Cir. 1993). **ML**

Cases

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imposed were "so onerous as to prevent employees from effectively using the time for personal pursuits." This was a highly fact-specific inquiry, and summary judgement was inappropriate in light of issues of material facts in dispute on whether the restrictions imposed on the plaintiff while monitoring the pager on evenings and weekends had prevented her from effectively using her time for personal matters. The evidence suggested that, even assuming the plaintiff's on-call duties forced her to remain at home, it did not necessarily follow that she was restricted from engaging primarily in personal pursuits during her on-call time. "Merely having to remain at home would not, in and of itself, prevent Plaintiff from engaging in a variety of personal pursuits." Further, other employees had testified that the pager duty was voluntary and that this duty did not confine them to their homes. However, the court agreed that the plaintiff was entitled to overtime compensation at one and a half times her normal hourly rate for the time she actually spent dealing with each after-hours page. *Abdelkhaleq v. Precision Door of Akron*, No. 5:07 CV 3585, 2009 WL 2762356 (N.D. Ohio, Aug. 28, 2009).

Schools

IDEA

T.Y., a child with autism, was placed in a special education class within New York City's public school system. The Individuals with Disabilities Education Improvement Act (IDEA) entitled all children with a disability to access to a free and appropriate public education. At the heart of IDEA is the Individualized Education Program (IEP). This is a plan, resulting from meetings between parents, educators, and representatives of the school district, which not only establishes annual and short-term goals for student performance, but also provides for specially-designed instructions and services for the disabled child. If parents are dissatisfied with an IEP, their complaint will be heard by an impartial hearing officer (IHO), whose decision can subsequently be appealed to a state hearing officer (SHO), whose decision, in turn, can be further appealed to a state or federal court.

T.Y.'s IEP stated that he would receive three 30-minute sessions of individual speech therapy a week, two 30-minute sessions of individualized occupation therapy, and a similar amount of physical therapy. What the IEP did not mention was the specific school where the therapy would take place, except to state that it would be a school that specialized in providing education for children with disabilities. When T.Y.'s parents received notice of the actual school, they did a site visit and found the school to be unsuitable for T.Y. They also rejected another school put forward by the school district. T.Y. was subsequently enrolled in a specialized private school and his parents ultimately brought a lawsuit against the City. The lawsuit contended, among other things, that the IEP materially violated T.Y.'s right to a free and appropriate education because it did not provide adequate speech services, and was procedurally deficient because it did not include a specific school placement.

The U.S. Court of Appeals for the Second Circuit affirmed the lower