

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Lovely v. Kamloops (City)***,
2009 BCSC 1359

Date: 20091005
Docket: 39674
Registry: Kamloops

Between:

Roderick Lovely and Catherine Lovely

Plaintiffs

And:

**City of Kamloops and S.S.G. Holdings Ltd.
and Stantec Consulting Ltd.**

Defendants

And:

**S.S.G. Holdings Ltd.
and Stantec Consulting Ltd.**

Third Parties

Before: The Honourable Mr. Justice Masuhara

Reasons for Judgment

Counsel for the Plaintiffs:

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Date and Place of Trial/Hearing:

February 16 -20, 23-27, 2009
March 2-3, 2009
Kamloops, B.C.

Written Submissions:

March 5-6, 2009

Place and Date of Judgment:

Kamloops, B.C.
October 5, 2009

INTRODUCTION

[1] On October 13, 2006, the plaintiff, Mr. Lovely, age 53, drove to the Mission Flats Transfer Station in Kamloops, B.C. (the “Transfer Station”) to dispose of some household refuse, including two light wooden frames. In the course of throwing one of the frames into a waste bin, he lost his balance and fell some 2.55 metres (8 feet 4 inches) to the ground. He sustained bilateral compound fractures of his tibia and fibula. It was necessary to amputate his right leg below the knee. He also, as a result of the fall, suffers impairment of his left leg, among other injuries.

[2] Mr. Lovely seeks a finding of liability against the City of Kamloops (“the City”) as the owner/operator of the Transfer Station, Stantec Consulting Ltd. (“Stantec”) as engineers involved in the design of the Transfer Station. His claim also sought the same of SSG Holdings Ltd. (“SSG”) as the operator of the Transfer Station; however, during the course of the trial and after the plaintiff had closed his case, I was advised that the plaintiff and SSG had reached settlement.

[3] Quantum of damages was not an issue for the trial nor was the “in trust” claim by Mrs. Lovely.

[4] The plaintiff’s claim as against the City is based upon the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337 (the “Act”) and negligence. As against Stantec, the plaintiff advised that its claim is based only upon negligence.

[5] In final argument, plaintiff’s counsel withdrew its claim in negligence against the City regarding its decision to move to a solid waste transfer station disposal mode from the “City dump” mode.

[6] The City, in its pleadings, seeks indemnity and contribution from SSG and Stantec for any damages that may be found against the City. In its final submissions, the City made no real argument regarding its entitlement to indemnity or contribution from SSG and submitted that it did not believe there was any evidence to support its claim against SSG for indemnity and contribution, though it maintained that it was open for the court to find negligence on the part of SSG.

[7] Additional submissions were requested and received from the parties on Stantec's potential liability under s. 5 of the *Act*.

[8] The plaintiff conceded that Stantec was not an occupier as defined under the *Act*. However, the City asserted that Stantec was an occupier under the *Act*.

ISSUES

[9] The issues to be determined are:

- Is the City liable to Mr. Lovely under s. 3 of the *Act* for failing to exercise reasonable care in the design of the Transfer Station? A key focus of the plaintiff's case was the failure to install fall protection in and around the unloading platforms of the Transfer Station. Fall protection was described as something secure and solid such as a railing to prevent people from falling over the sides or ends of the unloading platform.
- Was there contributory negligence on the part of Mr. Lovely with respect to his injuries?
- Is Stantec liable as an independent contractor under the *Act*?
- Is Stantec liable in negligence for its role in the design of the Transfer Station?
- Is SSG liable to Mr. Lovely as the operator of the Transfer Station?
- If fault is shared, what is the apportionment?

WITNESSES

[10] The witnesses called in the plaintiff's case were:

- Mr. Lovely, the plaintiff.
- Mr. Dinn, a professional engineer with a forensic engineering firm. Mr. Dinn took various measurements and photographs of the Transfer

Station. He also prepared a scale diagram of the site where Mr. Lovely fell and constructed a wood model of a partial section of the concrete pad surface and the debris plate to show the slope of the debris plate at 29% and 33% at two locations on the plate.

- Mr. Brugger, a professional engineer with the consulting firm Exponent, who prepared an expert report on the design of the transfer station.
- Mr. Bonnell, a paramedic who attended to Mr. Lovely on the day of the fall and transported him to hospital.
- Mr. Ansley, a customer who was also seriously injured at the Transfer Station on March 25, 2007. He suffered three fractures at different locations on his spine.

[11] The witnesses called in the City 's case were:

- Mr. Kloster, the supervisor in charge of solid waste for the City. Mr. Kloster was the primary City employee tasked to gather information, liaise with Stantec, and recommend a design for the Transfer Station.
- Mr. Duckworth, director of public works for the City and senior manager responsible for the Transfer Station project.
- Mr. Cain, crew leader for solid waste collection and route coordinator for the City, now retired. Mr. Cain assisted Mr. Kloster in the preparation of design recommendations for the Transfer Station.
- Dr. Cameron, Ph.D., professional engineer, former professor of environmental engineering at the University of British Columbia and now consultant, who has designed and reviewed transfer stations, and prepared an expert report on the design of the Transfer Station.

[12] The witness called in SSG's case was:

- Mr. Roy, the SSG attendant on duty at the unloading platform on the day and at the time of Mr. Lovely's fall.

[13] The witnesses called in Stantec's case were:

- Mr. Christie, an engineering technologist with Stantec resident in Kamloops. He was the City's main contact with Stantec, including the Transfer Station project. He had been employed for some 25 years with Stantec.
- Mr. Anderson, professional engineer with Stantec, who practises in the area of structural engineering. He approved and sealed the design drawings for the unloading platform.

FACTS

[14] Mr. Lovely is now 55 years old. He has been married for 22 years and has a Grade 12 education. Mr. Lovely is a large man. He is 6 feet 7 inches tall and at the time of his fall, he weighed 340 pounds. His shoe size is 14. He was powerfully built and agreed that he was fairly strong. At trial, Mr. Lovely was in a motorized wheelchair. I found Mr. Lovely to be pleasant and balanced in his testimony. Mr. Lovely was supported by his wife, who sat beside him for the entirety of the trial.

[15] At the time of the fall, he had been employed by Wal-Mart for 12 years as a janitor. He had also worked in the shipping/receiving and loading dock area of the company. Prior to Wal-Mart, he worked for CN Rail in an industrial setting.

The Mission Flats Transfer Station

[16] The City operates two landfills, Missions Flats and Barnhartvale. Prior to December 2005, users would simply "dump" their refuse from their vehicles directly onto the ground in designated areas.

[17] The Transfer Station was brought into use in December 2005. It is open year round for commercial and residential customers. Customers are required to deposit their waste directly into a designated bin. Other than a user being an adult, there are no restrictions on who can dispose of waste at the Transfer Station in terms of physical ability.

[18] Since its opening, the Transfer Station has been used approximately 128,000 times.

[19] In general, a transfer station is a site where residential and commercial users take their refuse and dispose of refuse into large steel bins. Once full, the bins are transported by truck to the landfill area where the refuse is dumped and then covered by the landfill operator.

[20] The disposal area for customers at the Transfer Station is a large raised gravel area with eight adjacent brushed concrete unloading platforms or bays that run in an east to west orientation. Each unloading platform accommodates two vehicles from which refuse can be deposited into a bin placed adjacent to and below the unloading platform. In total, there are 16 parking spaces.

[21] A retaining wall constructed of large interlocking concrete blocks holds up on its north side the raised parking area upon which the unloading platforms sit. It is configured in a zigzag pattern to accommodate the steel bins that line up against the south side of the wall opposite the unloading bays. The zigzag pattern allows trucks to back in to remove the bins from the open side. Each unloading bay is served by one large steel bin that sits approximately 0.18 metres (7 inches) below the level of the unloading platform. Users are guided into the unloading bay by an attendant. The user then unloads refuse while on the unloading platforms and deposits it into the bin located below the bay. The height from the ground to the top of the unloading platform is 2.55 metres (8 feet 4 inches).

[22] The edge of each unloading platform from which users will throw their refuse into the bin below is approximately 7.5 metres (24 feet 7 inches). This platform is

raised from the ground approximately, 0.18 metres (7 inches), extends back from the edge 1.7 metres (6 feet 6 inches) and acts a wheel stop for vehicles. The unloading bay is not designed to accommodate users disposing their refuse directly from the back of their vehicle into the bins.

[23] The bin is approximately 6 metres (19 feet 8¼ inches) in length on the side parallel to the unloading platform edge and is approximately 2.8 metres (9 feet 2¼ inches) in width. The edge of the retaining wall that lines up with the east side of a bin is approximately 2.9 metres (9 feet 6¼ inches). The west side of a bin is open to allow for trucks to remove the bin.

[24] There is a gap of approximately 0.4 metres (1 foot) between the platform edge and opposite wall of the bin. Spanning this gap is a debris plate composed of three equal sections that are approximately 2 metres long (6 feet 6¾ inches) made of checkered steel plate and are hinged to the wall and run just short of the length of the bin. The plate is slightly over 0.6 metres (23 inches) in width. The plate slopes downward at a grade of approximately 29% to 33% to the top edge of the steel bin overhanging it slightly. Each section of the debris plate has a slightly different angle which creates some unevenness between the plate sections. When the bins are not in use, the debris plates are tilted up vertically.

[25] At the time of Mr. Lovely's fall, guardrails ran north/south between the unloading platforms. There is a gap of about 0.8 metres (2 feet 6 inches) between the west side of the debris plate and the north/south guardrail on the west side of the unloading platform. The drop to the ground is, as mentioned earlier, 2.55 metres (8 feet 4 inches). At the time of Mr. Lovely's fall, there were no guardrails running east/west in this gap nor was there on the opposite side of the bin where the gap is 0.3 metres between the eastern edge of the platform and western edge of the debris plate. Instead, traffic cones were to be placed in these two gaps as a warning. At the time of the fall, it is not clear if the cones were in place. Photographs taken on the day of Mr. Lovely's fall shortly after the fall show cones in the area but not in front of the gap. Immediately after Mr. Lovely's fall, the City ordered the installation of

guardrails running east/west in these two gaps for all of the unloading platforms. The total cost was \$4,540.82.

[26] A chain hung across the front of each unloading platform from the northern most post of the north/south running guardrails on the east side of the platform and the southern most part on the west side. The posts to which the chain was attached was approximately 0.2 metres (8 inches) north of the unloading platform edge. The chains were attached at a height of 42 inches on each post and spanned the length of the unloading platform. The chain sagged in the middle section to approximately 12 inches. The chain was originally contemplated to be hung up when the bins were not in use. However, just prior to the Transfer Station opening it was decided by the City that the chain was to be left up when the unloading platform was in use. However, after a few weeks from the opening, the use of the chain reverted back to the original intent and was not up when Mr. Lovely attended on the day of his fall. The reason the chains were no longer placed up was because it was determined the chains constituted a safety risk as an injury report had been made by an attendant of a customer being hit in the leg by drywall that was reflected back at the user from the chain that it had struck. The City's policy for the use of the chain continued to vary.

[27] There are three large signs at the Transfer Station that state in large bold letters:

Site Safety Rules

Smoking is prohibited

Children and pets must remain in vehicle at all times

Scavenging is prohibited

Commercial haulers must comply with Worker's Compensation Board requirements at all times. Including, but not limited to, the use of WCB approved safety protective footwear and high visibility apparel (safety vest)

Turn off engine and apply emergency brake while unloading

[28] Below the above bulleted words in small font and lighter italic print are the words:

The operators are not responsible for the custody of vehicles or property nor for damage thereto, while upon these premiums, whether caused by negligence or otherwise however all persons using, or otherwise upon these premises, assume all risk of loss or injury to person or property whether caused by negligence of the operator or otherwise howsoever.

[29] One sign is located on the approach to the property. The second is located at the “drop and shop” area of the site, where members of the public stop prior to proceeding to the weigh scale in order to unload recyclable materials. The third is located at the northern side of the parking area some distance from the natural and worn path that vehicles had taken to the unloading area.

[30] There are also a smaller signs at each unloading bay that depicts a pickup truck with a person falling backwards off the back of the pickup towards the drop off. The sign states: “INSECURE FOOTING USE CAUTION WHEN UNLOADING”.

The Fall

[31] Mr. Lovely had visited the Transfer Station only on one previous occasion. It was without incident. For Mr. Lovely, Mission Flats was the closer of the two landfills operated by Kamloops.

[32] On the day in question, Mr. Lovely drove to the Transfer Station with his mother in his Ford F-150 pickup truck. It had a canopy. He was wearing a short sleeve buttoned shirt, denim short pants that were above his knees, laced shoes with a treated rubber sole and glasses with a slight tint to them. The refuse he wished to dispose of included two light rectangular wooden frames approximately 6.5 feet by 3.5 feet made of 1 inch x 3 inch pieces of wood. Each frame had a middle cross piece.

[33] Mr. Lovely first entered the property and drove through to the “drop and shop” area, where he was met by an attendant who asked if they had any recyclable materials. He was then directed to proceed southward to the weigh scale where his vehicle was weighed. After attending the weigh scale he was directed to drive east, then to turn north up to the elevated area and head west to the unloading platforms.

He followed the worn path marked by an orange saw horse and cones that marked the pathway to the unloading area.

[34] As he entered the unloading area, he was directed by the attendant, Mr. Roy, to back into parking stall #14, which is the westerly parking stall for that unloading platform. Mr. Roy guided Mr. Lovely into position by giving him three or four instructions in the backing in process.

[35] Mr. Lovely got out of his truck, went around to its rear and stood on the concrete unloading platform. Leaving the tailgate up, he opened the canopy door above it and took hold of the light wood frame with his right hand towards the back of the frame and his left hand towards the end closest to him. He took a few steps back south westerly holding the frame to clear it from the canopy. One end of the frame was pressed against his belly. He then turned clockwise and took three or four steps at normal walking speed in a south easterly direction, and “hoofed” the frame, which I understood as a pushing action outward towards the bin. At the end of this motion, his left foot remained on the concrete platform and but his right foot came down on the debris plate, approximately midway along the length of the western section of the debris plate. The uneven level of the debris plate caused him to lose his balance. In the course of attempting to regain his balance, Mr. Lovely stepped further towards the western edge of the bin close to the platform edge. He looked for something to grab onto, but nothing was available. While teetering, he said he recalled thinking for a brief moment that he should try to land on his right foot, as he had an artificial knee joint on his left side. He fell over the western side of the bin, landed on his legs and fell over face down on the gravel surface beside the steel bin close to the retaining wall. The impact smashed his glasses. He was able at some point to turn slightly onto his side.

[36] Mr. Roy, who was relatively close to Mr. Lovely at the time of the fall, was involved with directing another user into the next parking stall to the east. He saw Mr. Lovely moments before he lost his balance and said everything looked normal regarding Mr. Lovely’s actions, then some moments later saw him teetering on the

western edge of the bin and saw him fall over the side. At some point, Mr. Roy went to the platform edge and looked down and saw that Mr. Lovely was injured. He rushed to Mr. Lovely's side, called for help on his radio, and stayed with Mr. Lovely until the paramedics arrived.

[37] When Mr. Bonnell, the paramedic, arrived on scene he asked Mr. Lovely what happened. Mr. Lovely replied that he had lost his balance and fell. He was transported to hospital, having sustained compound fractures of his legs severe enough that bone fragments were found on the ground where he had fallen.

[38] There is nothing to suggest that Mr. Lovely's account of the moments surrounding his fall is inaccurate and I accept it. Mr. Roy's testimony supports much of Mr. Lovely's account, though he did not see the plaintiff at the point he lost his balance. Specifically, given the description of his size, actions, his movements on the platform and the bin edge, and the location of where he landed, I find that Mr. Lovely lost his balance due to the sloping and uneven nature of the debris plate and caused him to move to the western edge of the bin. Further, had there been a guardrail either above the front edge of the unloading platform or running east/west on the west side of the retaining wall where there was a gap, as described earlier, he would have been able to steady his balance and avoided falling.

Other Accidents at the Mission Flats Transfer Station

[39] Approximately six months after Mr. Lovely's fall, Mr. Ansley was seriously injured at the Transfer Station. Mr. Ansley testified that on March 25, 2007, he went to the Transfer Station in his pickup truck to dispose of some refuse. He parked at the bay that the attendant indicated to him. He had visited the site six or more times previously and was familiar with the layout.

[40] While he was pulling a plywood box filled with shingles from the back of his truck, the side of the box which he was pulling separated from the rest of the box. He lost his balance and "back pedalled" into the bin. He fell to the bottom of the bin and

hit his head against the back wall of the bin. Mr. Ansley fractured his spine in three places as a result of the fall.

Transfer Station Design

[41] Much of the testimony at trial concerned the process in the design of the Transfer Station and the rationale for the design that was ultimately settled upon. I will consider this background before analyzing the issues regarding liability.

[42] The idea of evolving to a transfer station mode of disposal at Mission Flats was conceived in about 1999. Approval to proceed with the design and construction of the Transfer Station was granted by City Council in 2003. Planning for design and construction of the transfer station began in late 2003.

[43] The City management team tasked to design and construct the Transfer Station (in order of management hierarchy) was comprised of Mr. Duckworth, Mr. McNealy, a professional engineer and Manager of Streets, Mr. Kloster, and Mr. Cain.

[44] Mr. Kloster had primary responsibility for gathering information, liaising with Stantec, and making recommendations to his superiors and coordinating the finalization of a design for the Transfer Station.

[45] Mr. Kloster had no previous knowledge of or experience with the design or operation of transfer stations, including safety aspects for such facilities. Prior to the project he was a supervisor responsible for the City's sign shop, residential and commercial garbage collection crews and administrator of landfill contracts.

[46] To get a sense of what transfer stations looked like and how they operated, Mr. Kloster was instructed by his superiors to tour various transfer stations in British Columbia and to discuss design and operational matters with the local personnel.

[47] The sites visited were those serving Armstrong, Penticton, Port Coquitlam, Mission and Kelowna.

[48] Mr. Kloster also discussed operating issues with SSG, who operated various transfer stations and landfills in the province.

[49] Mr. Kloster also engaged Stantec, a national consulting engineering firm, to provide engineering advice on the design and construction of the Transfer Station. There was no tendering process for the project. The selection of Stantec was by phone call made by Mr. Kloster to Mr. Christie, the local Stantec contact, offering them the project if they wanted it. The project was offered on the basis of Stantec's pre-existing relationship as the City's primary contractor for engineering projects. Mr. Christie accepted the project on behalf of Stantec. The arrangement was that Stantec would bill the City at the rate it usually charged for services provided. No contractual document was drawn up defining the scope of work however, it is apparent that the engagement was to provide advice and to provide a design for the overall Transfer Station site.

[50] Though the firm's Alberta office had designed a transfer station in Red Deer, Alberta, neither Mr. Christie nor Mr. Anderson had any prior experience in the design or construction of a transfer station.

[51] Mr. Christie held no formal designation but was called an engineering technologist at Stantec given his twenty-five years of employment with the firm. Mr. Anderson was the professional engineer who would approve the structural design and drawings for the unloading platform.

[52] The engineering plans drawn by Stantec for the Transfer Station included:

- 1) overall site layout
- 2) road layout
- 3) road profile
- 4) traffic flow
- 5) utilities
- 6) drainage

- 7) earthworks
- 8) details of road, area base, culvert profile, final cover, pad layout
- 9) structural – concrete pad detail
- 10) structural – debris plate detail, bin skid plate detail, hinge assembly, loading bay guard, welding detail, guide island detail, base plate detail
- 11) electrical

[53] Mr. Anderson, testified that he believed he had enough experience for the project notwithstanding the fact that he had never designed a transfer station before. His only experience with transfer stations was as a user. He understood his role as designing a series of retaining walls and not a transfer station. He also testified that he considered the unloading bay at the top of the retaining wall, some 2.55 metres from the ground to be a “loading dock” as specified under the *Occupational Health and Safety Regulations*, B.C. Reg. 296/97 pursuant to the *Workers Compensation Act*, R.S.B.C. 1996, c. 492.

[54] Mr. Kloster’s uncontroverted testimony was that Stantec was to introduce safety elements into the Transfer Station design, provide their expertise and opinions on safety, and to act as a sounding board.

[55] Mr. Kloster, Mr. Christie, Mr. Duckworth and Mr. Anderson all testified that the design process involved collaboration between the City and Stantec. The communications regarding design features were largely oral, with few memos documenting the discussions. The City guided these discussions, with Stantec serving mostly as a “sounding board.” According to Mr. Christie, the City would do research and give Stantec its preferences; Stantec would then provide feedback on any problems it saw, as well any applicable code requirements.

[56] At the first meeting between the City and Stantec on this project in December 2003, Mr. Christie presented a series of photos from a power point presentation prepared by Stantec’s Lethbridge, Alberta office, which had designed the Red Deer

transfer station. Mr. Christie, however, did not review any notes that were part of the power point presentation.

[57] Shortly after this presentation, Mr. Christie provided conceptual drawings for the Transfer Station. The drawings showed railings around the entire perimeter of the unloading area, including an overhead rail 2.4 metres over above the platform spanning the entire unloading platform edge facing a user. The design also had the steel bin rising above the unloading platform by 0.30 metres (11 inches).

[58] Mr. Kloster evaluated the different sites he visited and their safety features. He noted safety concerns at different sites, such as the absence of guardrails around unloading platforms, the elevation of the bins above loading platforms as a trip hazard, the absence of wheel stops, the use of yellow paint as compromising adherence to a surface, the absence of debris plates, and the absence of attendants. He also queried the effectiveness of overhead guardrails for fall protection.

[59] Mr. Kloster and Mr. Christie testified that safety features including fall protection were extensively discussed internally during the design process.

[60] Both Mr. Kloster and Mr. Christie stated that a primary consideration was balancing safety with convenience. This latter element included cleanliness. There were concerns that certain of the safety features considered could themselves introduce other risks to users.

[61] When Mr. Kloster reviewed the Red Deer transfer station design, he expressed concerns that there were no guardrails along the lock block wall or on the sides. He also had concerns about the protruding lumps at the top of the lock blocks constituting a trip hazard.

[62] Mr. Kloster testified that the City and Stantec discussed the extent to which fall protection should be put into the design. He stated that the decision to go without fall protection was the “toughest” decision.

[63] The height of the bins above the level of the unloading platform was a feature of the original drawings submitted by Stantec. This feature was approved initially by the City on March 11, 2004, and confirmed in a memo by Mr. Christie dated March 23, 2004.

[64] Subsequent to that date, Mr. Kloster said he thought it was ill-advised to have the bins higher than the unloading platform, because they could serve as a trip hazard. He was also concerned that debris would also not be easily swept into the bins if elevated over the platform edge and that such debris would pose a safety hazard. He also said he feared that customers would brace their feet against protruding bin edges to gain extra leverage while throwing things into the bin. For these reasons, he preferred the idea of recessed bins.

[65] Mr. Christie provided similar reasons to reject bins rising above the platform.

[66] As a result, the City directed Stantec to have the bin tops lower than the unloading platform. The date of the direction or the pros and cons for doing so is not documented.

[67] The City also decided that a key design feature was a wheel stop at some distance from the bin wall, which would provide customers enough room on the platform to unload their refuse and throw their refuse into the bin.

[68] The debris plate was designed to close the gap between the edge of the platform and the lip of the bin below it, allowing refuse on the platform to be swept easily into the bin. Mr. Kloster stated that the project team, in discussing the level of the bin tops relative to the unloading platform, also considered whether the debris plate should be level or at some angle. Mr. Kloster stated that a level debris plate would invite people to step on it so the decision was then to go with a sloping debris plate that angled downward into the bin. That way, he said, the edge of the platform would be visible.

[69] While disagreeing at trial with the idea that the debris plate was designed to be used as a step, Mr. Kloster commented that the debris plate was designed to

accommodate a “half step”, and as such, served as something of a safety feature for a customer to feel the difference in materials, “as opposed to going down into the bin.” Mr. Kloster said he thought that the checker plate would allow someone who stepped on the plate to feel the plate texture and alert the person to the proximity of the edge so he or she could step back onto the concrete platform.

[70] The idea of having the plate made of hard rubber was discussed and rejected because of the concern that if a person were to step on it, the rubber would flex, making it more likely that a person’s foot would go downwards or even fall into the crack.

[71] It was recognized that the inclined debris was a potential hazard and it was decided that the plate would be made of checkered steel of the kind commonly used for metal steps and the flat beds of open trucks to provide skid resistance and allow for the weight of a person.

[72] At some point shortly after Mr. Ansley’s fall, Mr. Kloster noticed a customer standing with both feet on the debris plate. Being sensitive to the recent fall of Mr. Lovely, Mr. Kloster immediately sought out and found some yellow spray paint on the premises and printed the words “NO STEP” on the surface of the debris plate. He then directed SSG to do the same for the other unloading platforms. Later, the City had painted a wide yellow line spanning the entire edge of the platform and had the words “STAY BEHIND LINE” stencilled into the yellow band. Once the paint began to fade, though, Mr. Kloster chose not to repaint, stating that he thought the paint reduced traction and that it would be difficult to stencil over the existing words without blurring them and that he did not want to grind the concrete to repaint the warning. He further questioned the effectiveness of the paint and words. The evidence reveals that customers continued to stand and step on the debris plate even with the warning.

[73] When he was asked if painting the checker plate to indicate that it was not to be stepped on would have helped, Mr. Lovely testified that he did not think it would

have made a difference. He said that once had lost his balance, “only a railing would have stopped me. Once I was going backwards, that was it.”

[74] There were differing views between the individuals involved in the design process as to whether guardrails running across the front of the unloading platform should be installed. Much of the discussion centered on the height of proposed rails and whether they would enhance or decrease safety.

[75] Many of the sites viewed for comparison used high grab bars (at a height of 6 feet 6 inches or higher) to afford fall protection for people standing on the flatbed of a pickup truck and throwing their refuse into the bins.

[76] In the final design the idea of a guardrail running across the front of the unloading platform was rejected.

[77] Mr. Kloster and Mr. Duckworth testified that there was discussion of whether there should be a guardrail across the front of the bin. Since the City wanted the bins to be as “user friendly as possible”, they decided that a guardrail across the front would create problems for users by acting as a barrier preventing them from getting refuse into the bin. It was believed that customers having to lift heavy items over a guardrail mid-rail at median height could result in back or other injuries. Mr. Kloster and Mr. Christie also were concerned as to the potential for items hitting a guardrail and “bouncing back” at the customer. Mr. Anderson said that, “Operationally, a guardrail across the edge would impair the function of the bin.”

[78] Mr. Christie and Mr. Anderson testified that the standard height for a railing to accommodate the standard centre of gravity is 42 inches.

[79] The Red Deer transfer station had a high grab bar above the bin spanning the front of the platform edge. Mr. Christie testified that the City directed that a high grab bar be incorporated into the early design for Mission Flats. However, since the Mission Flats site was designed to have vehicles park some distance from the unloading edge, a high grab bar was eliminated from the final Transfer Station design.

[80] Guardrails running east/west were not installed to provide protection in the gap between the wall and the bins on either the east or west side of the bin as the size of the bin would not be known until the construction had been completed. Upon completion, however, guardrails were not installed when the bins were obtained. Rather, the City directed SSG personnel to place a set of three cones in a line running east/west at the edge of each end of the concrete platforms. Mr. Kloster admitted that the cones and chains could not form a fall protection barrier. With the removal of the guardrails from the design, there were no fall protection features along the edge of the unloading platform.

[81] The intent of a chain hung across the front of the bin was to act in the words of Mr. Kloster as a “soft rail”. His view that if a customer were to get too close to the edge of the unloading platform, they would be able to feel the chain which would then act as a warning. In cross-examination, Mr. Kloster agreed that given the manner in which the chain sagged down at the middle it was a trip hazard.

[82] After Mr. Lovely’s fall, Mr. Kloster advised SSG that the chains were to remain up at all times. However, the chain would be lowered upon a customer’s request. This was the case in March 2007 when Mr. Ansley fell into the bottom of the bin on March 25, 2007. As a result of the fall, the chains were ordered up and locked in place. However, Mr. Roy testified that couches and other large objects were getting tangled in the chains, so after about another month following Mr. Ansley’s fall, the City reversed its policy and told workers at SSG to lower the chains. They have remained down.

Role of SSG

[83] SSG is a contractor for the City that operates the Barnhartvale and Mission Flats landfills.

[84] There is no evidence to suggest that SSG was involved in the City’s design process.

[85] The SSG's operation of the Mission Flats and Barnhartvale landfills is governed by written contract dated September 17, 2002. The contract extends to December 31, 2009. The work to be performed by SSG is to provide services for the daily operation of the landfills and is specified in section 6.6. of the contract, including the following tasks:

- c) directing of traffic to active waste disposal areas and providing, placing and maintaining signs and barricades to control traffic;
- ...
- e) checking and ensuring that Prohibited Wastes and Banned Wastes are not accepted at the Landfill;
- ...
- l) snow removal operations on all Roads and operational areas;
- m) litter control at the Site, at entrance gate; and along the Highway approaching the Site;
- n) provide litter fencing as required for litter control.

[86] There is nothing in the contract that obliges SSG to assist members of the public in discarding their refuse.

[87] In terms of the authority of the City with respect to the contract it states:

Notwithstanding the Contractor's responsibilities, the City shall maintain overall authority for management and control of the Site. Nothing in this Contract grants the Contractor any interest in the Site, and the City may, at its discretion, retain others to carry out work on and around the Site.

[88] Mr. Kloster reviewed SSG's progress claims each month and monitored work and progress. Mr. Kloster's evidence was that at all relevant times SSG had met its obligations under the contract with the City and that Mr. Kloster was satisfied with SSG's work.

Expert Evidence

[89] The plaintiff and defendant City each tendered an expert report.

[90] The plaintiff's was authored by Mr. Brugger. He has expertise in all aspects of solid waste transfer stations including design, permitting, construction, construction defects and failure of such facilities.

[91] At page 6 of his report under the heading "Engineering Requirements – With Regard to Transfer Station Safety and Public Expectations" he wrote:

Good design requires that a public facility should not present a hazard to anyone reasonably expecting to use it for its intended use, in a responsible manner.

[92] His report contained the following opinions:

1. The City of Kamloops Transfer Station lacked necessary railings or other safety features to protect the public. This condition presented an unnecessary slip, trip, and fall hazard, because there was nothing to help users arrest a fall, or to grab to restore their balance. Although a chain was stretched across the inactive unloading area, it was removed when users were allowed to unload.
2. The design of the City of Kamloops Transfer Station lacked substantial vehicle barriers to prevent vehicles from backing into the garbage bins, and it lacked railings and sufficient cables to prevent users from falling into the garbage bins or to the ground below (as did Mr. Lovely). The sidewalks presented a slip, trip, and fall hazard, and no measures were present to maintain safe surfaces during rain and inclement weather. Moreover, the 29% grade of the bridge plate provided another unnecessary slip and fall risk.
3. The City of Kamloops Transfer Station also lacked warning signs to alert users to the absence of railings, the slip, trip, and fall hazard presented by the sidewalks, and the drop of more than 2.5 m to the garbage bin or the ground below.
4. The cost of correcting the deficiencies noted above (specifically, applying slip-resistant coatings, installing railings/cables the full length of the unloading area, reducing the angle of the steel plate, installing wheel barriers, and providing better warning signs) is most likely relatively low. Non-slip coatings can be applied to the sidewalk and the plate that spans the gap between the garbage bin and the unloading area; side rails can be added under these plates to reduce the angle of the plates from the current 29% grade to a flatter, safer angle; railings can be installed at the ends of the unloading area (railings have already [subsequent to the accident] been installed at the ends of the garbage bins); and padded cables can be installed across the unloading area that would allow waste to be dumped over, through, or under, without the risk of a user falling into the garbage bins. Furthermore, these safety devices are in common use at solid waste transfer stations where the public dumps their waste directly into garbage bins. The cost to correct these items is estimated to be less than CAN \$3,500 for each

garbage bin. However, greatly improved fall protection could be provided by simply adding one or two more chains across the unloading area and leaving the chains in place during use. The cost of this interim measure is probably in the range of CAN \$200 to CAN \$400 per bin.

[93] Referenced in Mr. Brugger's report is the Ministry of the Environment for British Columbia publication, *Guidelines for Establishing Transfer Stations for Municipal Solid Waste*. The document states that the "Branch intends that the document be used to assist regional districts, municipalities and their consultants in the establishment of transfer station facilities during the implementation of solid waste plans." Under the heading of Safety Features in section 3.11 it states:

Most transfer stations involve the dropping or pushing of waste down into a bin or trailer. It is important that safety features such as guard rails be incorporated to prevent people from falling into a bin, and stop logs or bars to prevent vehicle accidents.

[94] In a supplementary report Mr. Brugger assessed the effect of setting the bins at different heights relative to the unloading platform and the bin at the time of the fall. The first, where the debris plate was level; the second, where the bin was at the height originally proposed by Stantec (approximately 0.3 m or 1 foot) above the unloading platform; and the third, where the top of the bin was set at 1 metre above the unloading platform. He opined that all three options provided an advantage over the condition at the site at the time of the fall in terms of user safety. He opined that the costs related to these three options were not significant in terms of the total cost of construction and operation of the Transfer Station.

[95] The City tendered the report of Dr. Cameron. He reviewed and compared safety aspects of the Transfer Station with eight other major transfer stations in British Columbia. These stations were: Vancouver, Capital Regional District, Port Alberni, Kelowna, Prince George, Maple Ridge, Mission, and Salmon Arm. He also seems to have relied in part on other transfer stations were that very old. Unlike the Transfer Station, Dr. Cameron is a proponent of a design that have pickups back up to the edge of an unloading platform to allow refuse to be deposited directly from vehicle to bin. I note that his comparator group did not include the Armstrong transfer station which he designed. His report, which was strikingly similar to the

report that he prepared in *Thiessen v. Columbia Shuswap (Regional District)*, 2002 BSCS 1516, affirmed in *Thiessen v. Columbia Shuswap (Regional District)*, 2003 BCCA 532, contains the following summary of his conclusions and opinion:

1.1 Conclusions

The Kamloops transfer station has a number of safety features. The safety features at other transfer stations reviewed range from none of the Kamloops features to methods similar to all of the Kamloops features. Some of the other stations included safety factors other than or different from those used at Kamloops. The convenience of use at the different stations is variable.

There are a significant number of possible combinations of types and sizes of vehicles and weather conditions, and the size, strength, flexibility and idiosyncrasies of individuals who might use a given transfer station. In addition, there are considerations relating to how convenient it will be for these individuals to use the station. Designing a safe and convenient transfer station that will prevent all accidents from happening is unlikely to occur. This is borne out by the different approaches that have been taken in the design of transfer facilities.

Without using extreme and probably costly measures, it is extremely unlikely that a transfer station can be designed to provide 100% safety combined with reasonable convenience for the user.

1.2 Opinion

It is my professional opinion that there are no uniform standards accepted within the industry for the design of transfer station public safety features.

Considering the nine major transfer stations in the Province of British Columbia that I have included, it is my professional opinion that, on balance, the Kamloops transfer station provides safety and convenience features that are at least equal to the other eight.

[96] In a reply to Mr. Brugger's supplementary report, Dr. Cameron agreed that the cost differences in the three alternatives assessed by Mr. Brugger were not significant.

[97] In cross-examination, Dr. Cameron agreed that all of his transfer station designs feature grab bars at 6 feet 6 inches running across the front of the bin. The grab bar is a safety device to protect people from falling into the bin. He also stated that his designs have the bin tops raised above the level of the unloading platform.

[98] He agreed that there is a serious risk of injury or death for users of the Transfer Station.

[99] He agreed that because of that known risk and if there is a step that can be taken to protect against it that is economical, it is a step that should be taken.

[100] He agreed that in the context of the Transfer Station design concern over a customer straining their back from lifting an item over a rail should be secondary to protecting the public against serious injury and death from a fall.

[101] Dr. Cameron agreed that the 2.55 metre (8 feet 4 inches) drop was dangerous and that the slope of the debris plate could throw a person stepping onto it off balance.

[102] Dr. Cameron agreed proper engineering of a transfer station should take into consideration that there was a drop of 8 feet 4 inches.

[103] Dr. Cameron observed an attendant standing on top of the debris plate at the Transfer Station. He agreed that a customer seeing this might think that they could do the same and walk on it. He agreed that it was obvious that with the chain down given the set up of the unloading platform that someone would stand on the debris plate.

[104] He agreed that the design of the unloading platform would be safer had guardrails been installed in the gap of the western side of the platform.

[105] He agreed that the way that the chain hung across the unloading platform was a trip hazard, was not fall protection, but “basically a warning”.

[106] He also agreed that the yellow warning line with the words “Stay Behind Line” is a warning from an engineering perspective.

[107] He stated that the sign depicting a person falling off the back of a pickup might lead customers to believe that the primary risk they faced was a fall from the back of a truck and that as long as they unloaded from the platform, they need not be overly concerned.

[108] He also stated in his report that from a review of the major transfer stations he could see a consensus in the designers of transfer stations for the installation of guardrails or grab bars around bins.

[109] Given this testimony at trial and reviewing the various transfer stations referred to in his report, his opinion that the Transfer Station provides safety and convenience features that are at least equal to the eight other major transfer stations in British Columbia he reviewed is not of assistance as his assessment did not specifically address the critical safety issue of protecting against falls from an unloading platform. Dr. Cameron's assessment included other aspects not related to fall protection features such as: fire extinguishers, traffic cones, pins securing container lids, overhead lights, directional signs for traffic, and tools. Further, Dr. Cameron conceded that the Prince George transfer station was safer than the Transfer Station. My view is that the majority of his comparator group was safer than the Transfer Station because of the presence of guardrails, grab bars, and raised platform edges. I note particularly, that at the Mission and Maple Ridge transfer stations, where a bin is below the unloading platform, there are guardrails on all exposed sides to protect against a person falling over the side.

[110] What I take from Dr. Cameron's testimony is that it is evident to him that there is a consensus in transfer station designs to install fall protection features across the front of the unloading platforms as well as at the end of bins.

[111] Also, I note that he acknowledged that had he been told by the City that the debris plate was meant to be stepped on by at least one half-step by some users and that some might lose their balance by doing so, that he would have addressed in his report the need for some form of railing as fall protection. Given his testimony regarding the fall protection features in his own designs, I find that it would be hard not to think he would have opined that some form of guardrail or grab bar would have been prudent given the "chute" at the platform edge, particularly, in light of his testimony that it was obvious that with the chain down that someone would step on the debris plate.

LAW

[112] The *Occupiers Liability Act* provides:

1 In this Act:

“**occupier**” means a person who

- (a) is in physical possession of premises, or
- (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,

and, for this Act, there may be more than one occupier of the same premises;

“**premises**” includes

- (a) land and structures or either of them, excepting portable structures and equipment other than those described in paragraph (c),
- (b) ships and vessels,
- (c) trailers and portable structures designed or used for a residence, business or shelter, and
- (d) railway locomotives, railway cars, vehicles and aircraft while not in operation;

...

3 (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

(2) The duty of care referred to in subsection (1) applies in relation to the

- (a) condition of the premises,
- (b) activities on the premises, or
- (c) conduct of third parties on the premises.

(3) Despite subsection (1), an occupier has no duty of care to a person in respect of risks willingly assumed by that person other than a duty not to

- (a) create a danger with intent to do harm to the person or damage to the person's property, or
- (b) act with reckless disregard to the safety of the person or the integrity of the person's property.

...

5 (1) Despite section 3(1), if damage is caused by the negligence of an independent contractor engaged by the occupier, the occupier is not on that account liable under this Act if, in all the circumstances,

- (a) the occupier exercised reasonable care in the selection and supervision of the independent contractor, and
 - (b) it was reasonable that the work that the independent contractor was engaged to do should have been undertaken.
- (2) Subsection (1) must not be construed as restricting or excluding the liability, imposed by any other Act, of an occupier for the negligence of the occupier's independent contractor.
 - (3) If there is damage under the circumstances set out in subsection (1), and there is more than one occupier of the premises, each occupier is entitled to rely on subsection (1).

[113] The *Act* imposes a duty on an occupier of premises to take reasonable care in all the circumstances to ensure that a person using the property will be reasonably safe: *Weiss v. Greater Vancouver Y.M.C.A.* (1979), 11 B.C.L.R. 112 (C.A.). The general standard is an objective one, of reasonableness, not perfection. The legislation does not make the occupier of premises an insurer against every possible harm: *Carlson v. Canada Safeway Ltd.* (1983), 47 B.C.L.R. 252 (C.A.); *Sulmona v. Serraglio*, [1986] B.C.J. No. 413 (C.A.); *Mason v. Reid*, [1999] B.C.J. No. 1328 (S.C.). The occupier is responsible to take reasonable precautions to protect against risks which the occupier knows or ought to know are present in the premises: *Evans v. Jim Pattison Industries Ltd.*, [2000] B.C.J. No. 1171 (S.C.). Although the term "foreseeability" does not appear in the legislation, the requirement of reasonable foreseeability is inherent in the common law duty of care embodied in the *Act*: *Rendall v. Ewert* (1989), 38 B.C.L.R. (2d) 1 (C.A.). The reasonableness standard was explained in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 aff'd 49 B.C.L.R. (2d) 99 (C.A.) by McLachlin J. (as she then was) at p. 58:

...[T]he duty owed by an occupier of premises to take reasonable care to see that persons using the premises will be reasonably safe. The Acts do not impose a duty to take reasonable care to insure that persons using the premises will be "absolutely safe". As stated in *Hagerman v. Niagara Falls* (1980), 29 O.R. (2d) 609...per Labrosse J. at p. 613, the occupier does not owe a duty to provide safety in all circumstances, but rather a duty to use reasonable care to prevent injury or damage from danger which is known or which ought to be known.

[114] The test is not "whether anything could have been done to prevent the injury using 20/20 hindsight, but rather whether the steps taken by the occupier were

reasonable in all the circumstances”: *Duddle v. Vernon (City)*, 2004 BCCA 390 at para. 16.

[115] In *Arkesteyn v. Burgess*, [1989] B.C.J. No. 264 (S.C.) the court identified four factors that may be considered in deciding whether an occupier has fulfilled his or her duty under the legislation. These were: whether there was an unusual danger (this was said to be the first and most important factor); whether there were posted warning signs; the ease or difficulty and the expense with which the unusual danger could have been remedied; and the prior record of safe usage of the premises.

[116] As noted in *Murphy v. St. John*, 2001 NFCA 23, at para. 26, “Occupiers liability cases often reduce to an examination of the system put in place by the occupier and whether there has been compliance with the system..... [as] in *Bogoroch v. Toronto (City) et al.*, [1991] O.J. 1032 (G.D.)” That is not as applicable in the present case, where the issue is more the design than operation. For that reason, some of the cases cited by counsel, such as *Grochowich v. Okanagan University College*, 2004 BCCA 325, [2004] B.C.J. No. 1156, *Duddle v. City of Vernon*, 2004 BCCA 390, and *Jalbert v. Saanich*, 2007 BCSC 676, are of limited utility on the facts of this case.

[117] *Niblock v. Pacific National Exhibition* (1981), 30 B.C.L.R. 20 (S.C.) is one of few cases in which design of a facility and not maintenance of the premises is at issue, although the issue is not explicitly framed this way in the case. In *Niblock*, the plaintiff, who had had a considerable amount of alcohol to drink, was injured when he tripped over a thigh-high guardrail going down a set of stairs. The Court concluded that the railing acted as a trap, with the potential to cause someone to somersault over it, and thus constituted a foreseeable risk. Despite the plaintiff’s possible inebriation at the time, the defendant was found 75% liable for his injuries.

[118] In *Coleman v. Yen Hoy Enterprises Ltd.*, 2000 BCSC 276, where a woman tripped on a step, injuring herself, the Court found at para. 18 that while the plaintiff was required to be aware of her surroundings, she had no duty to walk with her eyes glued to the ground.

[119] The plaintiff relies on these authorities to show that, even in circumstances where an injured party may not have been completely vigilant in guarding against harm, a defendant who fails to take appropriate action regarding a foreseeable risk may be found liable.

[120] The defendant points to cases in which the plaintiff was found not to have taken the care expected of a reasonable person facing ordinary and obvious risks, among them *Barreda v. The Butchart Gardens Ltd.*, 2002 BCSC 508; *Felix v. Park Royal Shopping Centre* [1999] B.C.J. No. 1826 (S.C.); *Malcolm v. British Columbia Transit* (1988), 32 B.C.L.R. (2d) 317 (C.A.); and *Jalbert*, in which the Court noted at para. 53 that an occupier is under no duty to prevent injury, but rather to take reasonable care to ensure that premises are reasonably safe. In all these cases, the plaintiffs were familiar with the premises on which the accidents occurred and had used them numerous times before without incident.

[121] In *Thiessen*, Hunter J. found at paras. 24-25 that admitting in its totality a report submitted by Dr. Cameron, who provided similar evidence in this case, would have usurped the function of the Court in determining the standard of care and liability in the case. He limited the use of the report to providing information about the layout and design of other transfer stations.

[122] Mr. Justice Hunter did, however, make use of expert reports submitted by both the plaintiff and the defendant to make the following findings common to both submissions, at para. 35:

- (a) There are no industry standards for the design of transfer stations and safety features which may be utilized.
- (b) The design of transfer stations involves the balancing of a number of factors which include function, safety, convenience and cost.
- (c) Most, if not all, safety features suggested create other hazards and risks.
- (d) In transfer station design it is appropriate to consider a variety of hazards and dangers which may arise for the user which include not only the risk of falling into a transfer bin, but also the risk of physical injury while unloading refuse into the bin.

(e) Suggested options as safety features such as moveable guardrails, offset curbs and covered transfer bins themselves raise potential risks.

[123] Hunter J. dismissed the plaintiff's action. He found that the plaintiff's injuries were entirely the result of his conduct.

[124] In terms of reference to statutory or policy guidelines, the defendant submits that there is no evidence that the *Guidelines for Establishing Transfer Stations for Municipal Solid Waste*: UMA Engineering Inc. (for the Ministry of the Environment); were available when the Transfer Station was being designed. However, Dr. Cameron in his written response to Mr. Brugger's report comments at some length on the Guidelines and does not state that they were not available during the time the design process was underway. Rather, his testimony seemed to indicate that they were available at the time and that a person having knowledge of transfer station design would have been aware of the Guidelines. In any event, I recognize that the Guidelines, as sensible as they are, are simply guidelines.

ANALYSIS

[125] The City concedes that it was an occupier under s. 3 of the *Occupiers Liability Act*, and that as such owed a duty of reasonable care to users of the Transfer Station. However, it submits that it met that duty because it took reasonable steps in all the circumstances to see that Mr. Lovely was safe in his use of the Transfer Station. Applying the factors set out in *Arkesteyn*, the City submits that the inherent nature of the risk at the Transfer Station informs the standard of care to the extent of perils which might reasonably be expected on the premises. The City concedes there are inherent dangers faced by users of the Transfer Station, but argues that such dangers are not unusual. It also notes the large signs at the entrance to the site, the "drop and shop" location, and at the northern end of the parking area, which state that the user is doing so at their own risk and the pictograph at each unloading platform indicates danger and submits that these signs limit its liability. It further submits that rectifying the danger is more complex than a simple analysis of a particular approach or feature. While it concedes that guardrails, grab bars or

markings on concrete are not expensive, it argues that functionality and safety must be considered in the assessment. In terms of a prior record of safe usage, it submits up to the plaintiff's fall, there had only been one prior incident to the City's knowledge.

[126] In addition to the factors set out in *Arkesteyn*, the City submits that it met the standard of care by virtue of the process it followed in deciding the features for the Transfer Station, including its own investigation and the hiring of Stantec.

[127] The plaintiff does not pursue a finding of liability against SSG and submits that SSG is not an occupier under the *Act*. Further, the City submits that there is no evidence supporting a finding of negligence against SSG. While I am not persuaded that SSG is not an occupier, given my conclusion in this case, further commentary is not required.

[128] Stantec is not an occupier as defined under s. 3 of the *Act*. However, it concedes that it owed a duty of care to both the plaintiff and the City.

[129] The City has argued that Stantec may be liable under s. 5 of the *Act*, as an independent contractor, however, I conclude that Stantec is not. Under s. 5, an independent contractor may be held liable for injuries caused as a result of its failure to take reasonable care. Section 5 applies when the independent contractor stands in the place of an occupier, provided that occupier exercised reasonable care in selecting that contractor and that the work for which the contractor was hired was reasonable. Issues may also arise as to how much control or supervision the occupier exercised over the contractor.

[130] Cases under s. 5 typically involve parties that perform routine maintenance on premises. See, for example, *Grochowich and Bludau-Kugler v. Vancouver Community College* (1998), 45 B.C.L.R. (3d) 74.

[131] Stantec did not have this role with respect to the Transfer Station. It did not maintain the Transfer Station, and its employees were not regularly at the site though it was present as observers during the construction of the Transfer Station.

Its services were retained to assist in the design of the Transfer Station. Arguably, SSG more aptly fits the description of an independent contractor as the legislation has been interpreted than Stantec does, there are however, no outstanding allegations that SSG maintained the Transfer Station site in a way that was improper or dangerous.

[132] Accordingly, though I find that Stantec is not liable as an independent contractor under the *Occupiers Liability Act*, its liability under negligence is a live issue and is discussed below.

Did the City exercise reasonable care in all the circumstances to see that a person would be reasonably safe in using the premises?

[133] For the reasons that follow, I conclude that the City did not exercise the required care to see that a person would be reasonably safe in using the premises.

[134] The risk of serious harm to the plaintiff was reasonably foreseeable. This was amply established. The following sets out several of the facts establishing this.

[135] The transfer stations that Mr. Kloster and Cain visited on a familiarization tour had various features that recognized the existence of a fall hazard around the bins and would have been apparent to these men. These features included a sign that stated "Caution: Fall Hazard," bright yellow paint highlighting the edge of the bin wall, a grab bar, guardrails at the end of each side of the bins, and bins that extended above the level of the unloading platform, or in the case of Mission where the top of the bin is below the unloading platform there are guardrails enclosing the entire front and sides of each unloading platform.

[136] It was recognized by the City and Stantec that there existed in the design of the Transfer Station a risk to users of falling from the unloading platform; that the drop of 2.55 metres from the unloading platform to the ground constituted a danger; and that a person falling from that height could sustain serious injury or death.

[137] The debris plate was sloped downward into the bins. The City and Stantec knew that people could be thrown off balance by the debris plate if they stepped on it, and could fall and suffer serious injuries from the fall. Mr. Kloster's immediate actions subsequent to Mr. Lovely's fall of spraying painting in yellow the words "NO STEP" on the debris plate upon seeing a customer standing on the debris plate evidences knowledge of this fall hazard.

[138] Mr. Kloster's testimony that the question of whether to install guardrails was the "toughest of the bunch" clearly evidences foreseeability.

[139] The City's decision prior to the Transfer Station opening in December 2005 to have a chain spanning the front of the unloading platform as a "soft rail" confirms its knowledge of a fall hazard.

[140] I turn now to the City's failure to exercise reasonable care. The reasons for this conclusion are what follow.

[141] The Transfer Station is open to all adult members of the public. There are no minimum physical requirements for users to meet such as sense of balance, weight, height, vision, age, agility, or strength. Customers are required to dispose of their refuse themselves. No assistance is provided by the site operators. No instructions of how to dispose of refuse into the bins were provided. Yet users potentially laden with large heavy items were expected to approach an open platform edge with a debris plate angled downward into bin with a bottom 2.55 metre below.

[142] Mr. Kloster testified that customers were to keep off of the debris plate and to keep their sight on the edge. Despite the obvious, to which Dr. Cameron agreed and which I find, that given the characteristics of the unloading platform that people would step or stand on the debris plate; there were no specific warning signs or markings on the platform drawing attention to the fall hazard at the edge of the unloading platform and to keep off the debris plate. There was only one warning sign at the unloading platform and it only depicted the risk of a person falling off the back of a pickup into the bin. As Dr. Cameron stated the sign could lead a person to

believe that falling off the back of a pickup was the main risk to a user. Given that the unloading platform was designed in way that did not accommodate disposal directly from the back of a pickup into the bins, one is left to question how it is that such a sign would be installed over one that would be against the more significant risk of a fall from the platform edge.

[143] The large signs with the heading Site Safety Rules given their location and their written content can hardly be considered sufficient warning of a serious fall hazard. They are not sufficient to establish that the plaintiff waived his right to seek liability against the City.

[144] Orange/red traffic cones were to be placed on the unloading platform covering the gap between the bin ends and the north/south running guardrails on the east and west sides of the unloading platform. The photographic evidence at trial suggests that the cones were not so placed but were at the sides of the platform at the time of Mr. Lovely's fall.

[145] It is clear from the evidence that a person could lose their balance by stepping on the debris plate and fall and suffer serious injury.

[146] No guardrails were installed fronting the platform edge or the gaps along the sides of the bin to the north/south guardrails.

[147] In my view, the characteristics of the unloading platform were such that there existed an "unusual danger" of the nature set out in *Arkesteyn*.

[148] While Mr. Kloster testified to the considerable thought and discussion devoted to safety around the unloading platform and the process undertaken, there are several aspects, in addition to those already mentioned, that militate against the City's position that safety was afforded the necessary attention and that it adequately addressed safety in the design and operation of the unloading platform. The City's submission that the extensive process it undertook in the design of the Transfer Station demonstrate that it took reasonable care was largely negated by the facts that follow.

[149] I start with the limited experience of the City's project team.

[150] None of the members of the City's project team were experienced in the design or operation of a transfer station. Mr. Kloster had none and did not even know what a transfer station looked like prior to starting the project.

[151] The senior project team member, Mr. Duckworth though a professional engineer, having a large span of responsibility, relied upon his subordinates to attend to the details. His approval of the design amounted to a review of a single drawing of the Transfer Station.

[152] The City knew that the Stantec representatives had no specific expertise in transfer station design.

[153] A photo of the unloading platform taken by Mr. Kloster on the opening day of the Transfer Station shows that a customer was permitted to dispose refuse on a largely ice encrusted platform where ice at the edge of the platform had been chipped away but was still covered with some relatively large patches of ice. It is reasonable to assume that other customers were also permitted to discard their refuse under the same unsafe conditions that day and on other days. Permitting customers to use the unloading platform under such unsafe conditions is entirely inconsistent with the City's stated concern for safety. Compounding this was Mr. Kloster's explanation that the ice had been permitted to build up because salt could not be used to de-ice the platform as the concrete was still in the 28-day curing stage and that salt would damage that process. This preference of curing concrete over public safety raises significant questions as to the reasonable care exercised by the City.

[154] Mr. Kloster's logic, in part, behind why the elevation of the bin over the level of the unloading platform also undermined the City's assertions regarding the level of care it applied. He attempted to explain that a user might put their feet against the raised wall of the bin for leverage to pull items into the bin from the back of their vehicle. The cross-examination of Mr. Kloster on this point demonstrated that his

understanding of leverage was confused. Leverage operates opposite to the manner in which he described the bin wall would act as a lever. Further, Mr. Kloster's view is also at odds with the evidence of its expert Dr. Cameron who testified that all of his designs have the bin wall raised above the unloading platform as a safety feature.

[155] Despite the limited experience of the project team, when faced with the "toughest" question of all, namely, whether to install fall protection, it did not seek to consult the City's Risk Management or Safety departments, which specifically focussed on safety and risk matters or to seek a formal assessment from Stantec or any other resource having some expertise on the topic.

[156] Another instance relates to the actions of the City subsequent to Mr. Ansley's fall. Mr. Kloster, having observed customers standing on a debris plate, immediately personally spray painted in yellow the words "NO STEP" on the plate, and had SSG staff do the same on the rest of the debris plates. Shortly after he had a discussion with the City Manager. Arising from that discussion a professionally painted warning in yellow paint along the entire edge of the unloading platform that stated "Stay Behind Line" was applied. Mr. Kloster did not support this warning and has not attended to repainting this warning even though it has worn down. His reasons were that he had a concern with paint on a lateral surface where people step and toss things into a bin as the paint would reduce the effectiveness of the non-skid properties of the brushed concrete surface of the platform. Further, that it would be difficult to keep the words legible when repainting and thus grinding the paint off before repainting would be required which would compromise the brushed concrete. In addition, Mr. Kloster commented that the warning had limited effectiveness as he continued to see people standing on the debris plate. The logic ignores the fact that users were to stay behind and not step on the yellow line. What is further disturbing is that even with his observation that users have continued to stand on the debris plate, nothing further has been done to warn of a danger or provide for fall protection.

[157] The City's flip flopping regarding the use of the chain adds to the doubt as to the attention applied to safety at the Transfer Station. Initially, the chain was simply to be up when the bins were not in use. However, prior to opening it was decided that it was to act as a "soft rail" and was to be up when the bins were in use.

Mr. Kloster then said the chain was thought to be of "questionable value" because of its sag. As a result of a report that a user had been injured by a piece of drywall that had reflected back at the user after hitting the chain the chain was ordered to be taken down while a bin was in use . The chain was then ordered to be kept up after Mr. Lovely's fall. It was then decided that the chain would be permitted to be taken down upon request. This was the case when Mr. Ansley fell. After Mr. Ansley's fall it was ordered back up and secured into position with a lock. However, shortly thereafter, the chain was again ordered down and has remained down. These continued changes do nothing to support the position of the City.

[158] The City's view that the debris plate would only be stepped on minimally by users displayed an unrealistic view of actions of users. Mr. Kloster testified that the plate was built to allow an extra half step by a user before going off the edge. Given the heavy steel plating used and the "checkered" surface and the general layout of the platform and the activities to be carried out by users, the view that customers would only take an "extra half step" on the plate was a highly questionable assumption. The checkered steel plating is often seen by the public in places where people step such as stairs or utility service covers where there is pedestrian and vehicular traffic such as on sidewalks and streets. Given the characteristics of the debris plate, it should have been apparent that, in the absence of any warning or a barrier, users would think they could step or stand on the debris plate. As mentioned earlier, my view was confirmed by Dr. Cameron who agreed that it was obvious that users would step or stand on the debris plate given the setup of the unloading platform. The evidence substantiates that both service staff and customers stood on the debris plate often. Mr. Roy stated that he saw customers stepping on the debris plate regularly and stated that it was acceptable for people to do so. Dr. Cameron acknowledged that to the extent that service staff were seen standing on the debris plate customers would think it was permissible to do so. Dr. Cameron stated in his

report that “it would be possible for a person to stand on the plate.” Mr. Kloster observed customers standing on the debris plate even after a warning had been stencilled onto the unloading platform forward of the edge. Nothing further has been done by the City to address this.

[159] No assessment was conducted by the City on the impact of its decisions on safety either when it elected to not have guardrails or to have the bins lower than the platform or later when it decided to no longer employ the chains which was the only feature on the unloading platform that could be considered fall protection.

[160] The City’s actions to immediately requisition the installation of guardrails to span the gaps on the east and west sides of the bin following Mr. Lovely’s fall, its ongoing changes on the use of the chains, and the painting of warnings on the platform edge and its later decision to not repaint evidences the reactive approach as opposed to proactive nature of the City to safety.

[161] Mr. Kloster conceded that designing fall protection into the Transfer Station could have easily been done. The cost of installing the guardrails in the gap area was \$4,540.82.

[162] I find that the installation of guardrails or grab bars to be an economic and simple measure relative to the capital and operating costs of the Transfer Station.

[163] The City’s argument that it took reasonable care because of its retention of Stantec and its reliance upon its advice does not absolve it of liability. While it is a factor to be considered, the City knew that Stantec had limited experience and expertise in transfer station design. The question of whether to install fall protection for the public is not confined to a technical question requiring in special knowledge but more to do with common sense. Further, the City can be characterized as sophisticated given that it is a civic government with considerable internal resources. In the circumstances, the City cannot find refuge in a reliance argument. Regardless of any argument based on reliance upon a professional, it should have been apparent to the City project members that an unloading platform with a drop in

excess of 2.5 metres (8 feet) and without warning as to the edge or a warning to remain back or any physical barriers to arrest a person's loss of balance, was an unreasonable risk given the acknowledged fall risk and related serious potential consequences.

[164] While balancing convenience with safety is a factor to be taken into account, in this case the argument of the City in this regard is objectively is not sustainable. The concern over injury from lifting items over a railing or from debris "bouncing off" a railing or the lack of ease of disposing of refuse into the bin as a justification for not installing fall protection is not reasonable given the real potential for serious injury or even death to a user falling from the unloading platform. I would add that the installation of railings on the sides of the bin in the gap between the bin ends and the north/south running guardrails does not attract these concerns in any event. Further, I do not accept the specification for guardrails being 42 inches high as the reason for not installing guardrails because of their negative effect on function. There is no reason that such a railing could not be set higher than the 42 inch height to accommodate larger items or some modification such as seen in the photos of the Prince George transfer station.

[165] In terms of the previous safety record at the Transfer Station, I am of the view that it is not assistive to the City's case as the period from the date of opening to the date of the fall was a rather short period; particularly, when one takes into account that it was only six months after Mr. Lovely's fall that Mr. Ansley's fall occurred.

[166] This case is distinguishable from *Thiessen*. In that case, the plaintiff had considerable familiarity with the facility having disposed refuse at the Salmon Arm transfer station on twelve previous occasions. The plaintiff had backed his truck in too close to the bin, about one to one and a half feet, as compared to his usual distance of four to five feet. He realized he had parked too close but continued on. The plaintiff was trying to close the tailgate of his truck in the narrow space he had created between the rear of his truck and the bin which protruded twelve to eighteen inches above the grade of the unloading dock which served as a visual warning of a

drop off to anyone walking forward towards the container. Further, the narrowness of the top edge of the container acted as a deterrent to a person considering standing on it. It was also noted by Hunter J. that the bin was painted a bright blue colour which contrasts with the edge of the loading dock. There was also a horizontal pipe guardrail mounted above the container edge and across the lip of the retaining wall. As well, there was a double bar guardrail at the end of each container. In the process of closing the tailgate the plaintiff lost his balance and tripped on the edge of the bin and fell backwards into it. The court held that the plaintiff's carelessness was the sole cause of his fall.

[167] In the instant case, there is a debris plate, which Mr. Anderson called a "chute" that sloped downward into the bin from the unloading platform, there was no guardrail or grab bar, the bin walls were not raised above the level of the platform, and there was no guardrail at the ends of the bin. There was little difference in colour between the debris plate and the unloading platform. Mr. Lovely's one prior visit to the Transfer Station cannot be said to amount to familiarity with the Transfer Station. There is no issue of Mr. Lovely having parked too close to the bin as his vehicle was positioned in conformance with the explicit instructions of the attendant. I also find that Mr. Lovely was disposing his refuse in an ordinary fashion. Mr. Roy noted nothing unusual in the movements of Mr. Lovely. I do not find that Mr. Lovely's fall onto the ground was solely the result of his inattention as agreed by the defence.

[168] When the unloading platform is viewed as a whole, one finds that the platform is essentially devoid of fall protection features or warnings. To the extent the chain can be characterized as a fall protection device, or as a visual aid to customers in staying back from the unloading platform edge, it had been removed from such use by the time of Mr. Lovely's fall. There were no other visual warnings for customers to stay back from the edge and debris plate save for the sign showing a person falling off the back of a pickup which was more of a warning to take care while on the back of a pickup and indicator that falling off a pickup was the most significant risk on the platform. The absence of any fall protection feature or clear warning in the face of

the recognized fall hazard, leads me to conclude in all of the circumstances that the City did not take reasonable care.

[169] The City is liable for the injuries suffered by Mr. Lovely.

Is Stantec liable in negligence for its design?

[170] Stantec concedes that it owed a duty of care to both the City and to Mr. Lovely. It was hired for its expertise as a consulting engineering firm. The standard of care for professionals is one of reasonableness and ordinary competence, commensurate with the position of the person or entity in question and prevailing internal professional standards. Industry practice and regulatory standards may be considered in making this determination (Campion & Dimmer, *Professional Liability in Canada* (Markham: Thomson Carswell, 2008), at 3-25), but generally, expert evidence is not required. The work of the engineer must be done with the skill, care and diligence which may be reasonably expected of person of ordinary competence, measured by the professional standard of the time.

[171] Within British Columbia there is no standard of design for transfer stations that has been developed and put into any code. However, there is a paramount professional duty to ensure public safety in all designs signed and sealed by a professional engineer. Mr. Anderson acknowledged this duty and agreed he was so bound. He also stated that professional engineers had a duty to remain current on developments in the field of engineering in which they practised.

[172] Stantec submitted that there is no evidence to establish that it did not meet the standard of a reasonable prudent engineer. It argued that the level of expertise of Mr. Brugger and Dr. Cameron as engineers is the not the measure that should be applied as they have devoted their practices to the niche specialty of environmental engineering.

[173] I did not take their evidence as being of a niche nature. These witnesses were not questioned as to whether their evidence could be characterized so narrowly. Their evidence was not deeply technical. There were no formulae or calculations or

complex concepts; rather their evidence related to the application of common engineering principles to transfer stations. I took their evidence as that of a competent engineer generally.

[174] Further, the testimony of Mr. Anderson and Mr. Christie provided sufficient evidence to discern whether the standard of care was met.

[175] For the reasons that follow, I find that Stantec, through their representatives on this project, did not meet the required standard of care.

[176] I start by reiterating that the paramount principle applicable is the duty to ensure public safety.

[177] The limited background of Mr. Anderson and Mr. Christie gives immediate rise for concern. Stantec was retained as engineers to providing engineering expertise in the overall design of a transfer station for the City, including safety insofar as the public's use of the transfer station. As mentioned earlier, neither Mr. Anderson nor Mr. Christie had any expertise or experience in designing transfer stations. Mr. Anderson knew that Mr. Christie did not hold any formal engineering or technology designation. Mr. Anderson agreed that though he was a structural engineer his knowledge of transfer stations was equivalent to that of a lay person. Despite this acknowledged limitation Mr. Anderson was of the view that he had the training, experience and qualifications for the project. Mr. Christie held a similar view as to his ability.

[178] It is trite to say that a key requirement is to understand the scope of the work requested by a client. In this regard, Mr. Anderson did not. The uncontroverted evidence of Mr. Kloster was that the City was seeking the expertise of Stantec for all aspects related to the design of the Transfer Station, including public safety; Mr. Anderson's view of his role in approving the drawings for the unloading platform was to design a retaining wall and not a transfer station. Mr. Anderson did not seek to explore what he was required to do. He did not participate in any of the meetings of the City in the design of the Transfer Station nor did he speak to any of the

members of the City's project team to get a clear picture of the role Stantec was to play. He relied on Mr. Christie who was not a professional engineer and held no formal designation. Mr. Christie's evidence reveals that he understood the role of Stantec was much larger than simply designing a retaining wall and the safety concerns with which the City was concerned. Either he did not communicate this concern adequately to Mr. Anderson or Mr. Anderson did not consider it. It is hard to understand how this limited view of the role arose and reveals that there was a failure within Stantec in understanding adequately their role in the project.

[179] Communicating any key assumptions or conditions for the approval of a design is also fundamental to a professional's duties. In this regard, Mr. Anderson stated that but for his view that the unloading platform was a loading dock as set out in *Occupational Health and Safety Regulations*, which exempts loading docks from the requirement to have guardrails; he would not have approved and released his design drawings without fall protection. He also stated that a key factor in his reaching the conclusion that the design was safe was that he expected that as part of the operation there would be a safety plan in place which he said would typically include safety monitors and safety supervisors to oversee people on the loading dock. However, no such assumption is written on the drawings or in any documentation within Stantec or to the City. Mr. Anderson did not follow up with anyone at the City to verify his assumption. The basis for Mr. Anderson's assumption was simply that he had seen attendants at the Westbank transfer station that he frequented and since the Transfer Station would be busier than that, such attendants would be in place at the Transfer Station. I would note at this point there is no evidence as to what role attendants play at Westbank. Further, there was no exploration of attendants playing a safety role at the Transfer Station by either Mr. Anderson or Mr. Christie with the City. As earlier discussed, the SSG attendants at the Transfer Station are not tasked to oversee the safety of users on the unloading platform, except to the extent that they are required to keep the platforms clean. It is without question that a fundamental condition to the approval of an engineer's drawing must be communicated and this was not done.

[180] Mr. Anderson also stated that as a professional engineer it was part of his duty to make inquiries as how a facility was going to be used. From the above, it is apparent that he did not fulfill that requirement.

[181] In regard to the aforementioned exemption, the relied upon provision states that guardrails are not required on a loading dock “provided that effective measures are taken to ensure that workers are protected from injury.” This condition was not specifically referred to by Mr. Anderson; however, it is apparent that there was no considered examination of “effective measures” against injury in the context of the Transfer Station. Mr. Anderson’s assumption was a broad and undefined reference to a safety plan that could include safety monitors and safety supervisors. His testimony did not demonstrate the effectiveness required under the said regulations.

[182] The application of the said regulations as a justification for the absence of fall protection also reveals a less than adequate application of the duty to ensure public safety. Reliance upon the characterization of the platform as a loading dock is far too simplistic. While there is no definition of a “loading dock” in the regulations, it should have been apparent that the words in the context of the regulations and *Act* imply a commercial facility as opposed to a public facility, given that they relate to workers. There is clearly a difference in the expectations one can have of workers and members of the general public. Beyond the fact that the Transfer Station would have tens of thousands of visits per year from the public, the characteristics of the unloading platform are not typical of a loading dock. It was established that a typical loading dock had a height in the order of four feet. The unloading platform was twice the typical height and had a debris plate angled downward into the bin. The combination of the public nature of the Transfer Station and these characteristics clearly required a fuller consideration by Stantec of the need for fall protection which does not appear to have been conducted. Mr. Christie, Stantec’s key liaison with the City was not aware of the loading dock characterization until a few days before trial.

[183] Stantec's argument that the evidence that Worksafe had inspected the Transfer Station and did not raise any concerns is not determinative of the issues regarding design.

[184] Beyond the exemption, another justification stated by Mr. Anderson for not including fall protection into the design was his view that a guardrail would impair function as it would be more difficult for users to dispose of their refuse. This was predicated on the standard that a guardrail is 42 inches in height. However, if one were to consider that the exemption applied, there would be no requirement to be bound by the 42 inch requirement; rather there could be a single bar set higher and further offset from the platform edge away from the edge to accommodate the concern over larger items not being able to be fit under or having to be lifted over a 42 inch high bar as well as items reflecting back at a user after hitting a railing. In any event, the problems would not apply to guardrails that should have been placed on the platform edge in the gap between the north/south running guard rails and the bin sides. Had Stantec conducted some investigation of other transfer sites in the province they would have seen various methods for installing fall protection at the platform edge.

[185] A factor that led Mr. Anderson to have the opinion that the unloading platform design was safe was his view that because of the inherent risks of the unloading platform that people would tend to stay away from the edge. Thus, fall protection was not needed. I find this conclusion surprising having regard to the features of the unloading platform, including the heavy metal checkered plate debris plate and the activities to be undertaken by users on the platform and the evidence of the other witnesses. It is obvious that people would step or stand on the debris plate. With respect, the view expressed by Mr. Anderson is naive and not reflective of the necessary insight required. In any event, Mr. Anderson admitted in cross-examination that from an engineering perspective steps should be taken to address risk if they can be taken economically. I would note that Mr. Christie conceded that railings around the platform edge fall protection were not "cost prohibitive." He also

stated that given the characteristics around the platform edge caution in design was required.

[186] The view that fall protection was not necessary for the Transfer Station also does not line up with the evidence, including that of Mr. Brugger and Dr. Cameron. Their evidence supported the need for fall protection from a proper engineering perspective, given the characteristics of the unloading platform. Photos of various transfer stations clearly show fall protection features across the fronts and sides of bins is common and can be designed in various ways to accommodate concerns regarding function. I note Dr. Cameron's evidence that there was a consensus in the design of transfer stations that reflected the need for fall protection features.

[187] It is apparent that little investigation into safety features for the Transfer Station was conducted by the Stantec. The extent of the research, beyond obtaining a power point presentation and plans for the Red Deer transfer station, was a Yahoo search on the topic by Mr. Christie. Even after realizing that the question of whether to install fall protection was a tough decision for the City, he made no inquiries within his organization or to other sources (such as the government ministry having jurisdiction over transfer station matters) that could provided further insight into the safety issues.

[188] Similar to my comments with respect to the City, when looking at the unloading platform as a whole, the absence of fall protection features in the design of the Transfer Station cannot stand up to scrutiny given the acknowledged public safety risks.

[189] Given all of the foregoing, the conclusion that I reach is that the Stantec did not meet the required standard of care. As a result, fall protection was not included in the design approved by Stantec and the absence of fall protection led to Mr. Lovely's injuries.

[190] I find that Stantec's negligence caused or contributed to Mr. Lovely's injuries.

Liability of SSG

[191] I do not find SSG liable in negligence or under the *Occupiers Liability Act* with respect to Mr. Lovely's claim. Further, I find that SSG was not negligent in regard to Mr. Lovely's fall. Though SSG was required under contract to report unsafe situations to the City and SSG knew that the public walked on or stood on the debris plate regularly but did not report it, I do not find the necessary proximity for liability to attach relative to the plaintiff, particularly as the requirement as I understand the documents relates entirely related to worker safety.

[192] Insofar as the City's third party claim, the City's evidence is that SSG performed its duties satisfactorily and made no submission against SSG. Accordingly, the third party action is dismissed.

Contributory Negligence

[193] Did Mr. Lovely fail to use the ordinary care to protect himself that an ordinary reasonable person would have used in the circumstances? Did Mr. Lovely willingly accept the risk of falling into or off the bin? If not, then did Mr. Lovely contribute to his own misfortune? If so, how should liability be apportioned?

[194] The defendants argue that Mr. Lovely was either solely responsible for his fall and not the defendants or alternatively, that he bears the majority of fault. It is argued particularly by Stantec that Mr. Lovely's fall was entirely avoidable but for his failure to exercise normal caution one would expect of a reasonable person fully alive to the inherent dangers. Stantec argued that Mr. Lovely could not have chosen a more foolish way of removing the frame from his vehicle. Stantec submitted that no reasonable and prudent person with four or five feet of space to an eight foot edge, removes lengthways from his pickup a light wooden from his pickup a light wooden frame in the manner in which Mr. Lovely chose to discard his refuse on October 13, 2006.

[195] Mr. Roy was the primary witness to Mr. Lovely's actions on the day the accident occurred. He testified that he helped Mr. Lovely to back his vehicle in,

which Mr. Lovely did without incident. When Mr. Lovely attempted to place the wood frame into the bin, Mr. Roy was nearby at an adjacent platform helping another customer and was able to see most of what happened. He said that when Mr. Lovely was at the edge of the platform, his feet were in a “normal” position, and that “everything looked normal.” Other photos taken by Mr. Kloster of another customer throwing debris into the bin in a somewhat similar fashion show that Mr. Lovely was not doing anything out of the ordinary, and that his use of the station was consistent with what other users would do.

[196] Based on the evidence before me, there is no indication that Mr. Lovely was reckless or that he engaged inappropriate behaviour.

[197] However, Mr. Lovely stated at trial that it would be dangerous to get too close to the open bin and that if he stayed back there would be no danger. He was aware that there was no guardrail or chain across the front of the bin, that the debris plate was a different colour and material from the platform and that it was sloped downward into the bin, that he knew to keep watch of where he was in relation to the open bin and to be cautious as to where he stepped. While prior knowledge of danger does not inevitably lead to a finding of contributory negligence and having one’s eyes glued to their feet is not a necessary requirement, in the circumstances of this case, I find that Mr. Lovely bears some responsibility in respect to his fall and injuries. In this regard, I attribute 10% as contributory negligence on his part.

[198] In terms of apportionment between the City and Stantec, fault should be borne 55/35, respectively. The City was fully aware of that a fall hazard existed at transfer stations. Mr. Kloster and Mr. Cain visited several transfer stations that had fall protection features, yet in the final design decided and directed Stantec to not include any fall protection measures. The City knew that the Stantec representatives were not experts in transfer station design. Just prior to opening the City recognized a need to install fall protection and on its own chose to have chains raised at all times as a form of fall protection. But shortly thereafter it chose not to employ the chains when a platform was in use and did not seek to find an alternative fall

protection solution. Stantec was not advised or consulted on these decisions respecting the chain. In addition, the City did not seek to follow up once the dimensions of the bins were known to install the guardrails in the gaps between the north/south rails and bin ends on the platform. As a result of the absence of fall protection, Mr. Lovely fell over the edge of the unloading platform and was seriously injured.

CONCLUSION

[199] I find that the City and Stantec are liable for the injuries suffered by Mr. Lovely.

[200] I find that Mr. Lovely contributorily negligent in the amount of 10%.

[201] I find that apportionment of liability as between the City and Stantec at 55/35, respectively.

[202] I find SSG not liable for the injuries suffered by Mr. Lovely.

[203] The City's claim against SSG is dismissed.

[204] The parties have leave to speak to costs should it be required.

The Honourable Mr. Justice D. M. Masuhara