File: 4957
Registry: Rossland

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

SMALL CLAIMS DIVISION

BETWEEN:

CLARE CAMERON

CLAIMANT

AND:

THE CORPORATION OF THE CITY OF TRAIL

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE JUDGE FABBRO

Counsel for the Claimant:	D. Brent Adair
Counsel for the Defendant:	Donald J. Paolini
Dates and Place of Hearing:	July 15, 1998 and November 30, 1998 At Rossland, BC

THE CLAIM

This is a claim for general and special damages suffered by the claimant as a result of a fall by the claimant on a sidewalk owned by and under the control of the defendant. The claimant pleads the provisions of the *Occupier's Liability Act*.

THE CIRCUMSTANCES UNDERLYING THE CLAIM

The claimant contends that the defendant allowed the sidewalk to deteriorate such that it posed a hazard to the claimant causing her to fall and suffer injuries.

The defendant says that the inspection policy and program in respect to sidewalks was at all relevant times properly in place and properly implemented by its employees.

The claimant contends that the staff of the defendant put into place the wrong inspection policy and failed to properly implement the correct policy and maintain this sidewalk. It is contended that a 1 inch minimum standard was used rather than a 1 inch maximum standard and that the inspection should have been done semi-annually rather than annually.

The sole issue is liability and whether the defendant is exempt from liability. It is conceded by the defendant that if liability is found against it that damages should be assessed in the amount of $ 10,000.00 in favour of the claimant.

The defendant has not plead the *Negligence Act*.

The claimant, an elderly person, fell as she was walking on the sidewalk on Geopel Street in the City of Trail near to her home. She testified that her foot got caught in a strip between two concrete slabs on the sidewalk causing her to fall and suffer injuries. She testified that she was momentarily distracted by a passing motor vehicle. She called for help but none came and she got up and got herself home which was around and down the block from where she fell.

The inspection policy of the defendant was created from a Risk Management Study conducted on behalf of the City of Trail. The Study recommended that the defendants institute a system of formal sidewalk inspection and develop a program to eliminate trip hazards. On the 15th of December, 1986 a standing committee recommended that Council approve an inspection program and that the City Manager be instructed to establish a sidewalk inspection program and that the 1 inch standard be employed as the maximum variance allowed. The Recommendations made reference to both a semi-annual and annual inspection.

On December17, 1986 after Council approved the recommendations of the standing committee, a memo was sent to the General Forman to implement the above mentioned recommendations. Based on the testimony of Mr.Forbes, Mr.Abenante and Mr. Mason the policy adopted or put in place was the more specific recommendation

requiring annual inspections. I find that the inspection policy required annual inspections.

Mr. Abenante, the Public Works Manager, who inspected the scene of the incident on the day of the fall, on September 25, 1997, received in November of that year a memorandum from Mr.Prolux, the Engineering Technician, a statement of the defendants policy in respect to sidewalk inspections, which included an inspection sheet completed in June of that year and a comment that the lip in question, according to recent measurements, would not have been identified by the defendant's inspection policy.

According to the minutes of the Committee and the memorandum from the Deputy City Clerk the policy was described as a 1 inch standard as the maximum variance. According to the testimony of Mr.Abenante, the memorandum of the Engineering Technician and the testimony of Mr. Mason, the employee of the defendant carrying out the inspections, the policy was referred to as a 1 inch minimum variance.

CLAIMANT'S SUBMISSIONS

1. It is submitted that the measurements of Mr. Abenante of the depression between the concrete slabs should not be preferred to the claimant's observation as she was leaving the scene whereby she concluded that the depth of the depression was an inch or more. It was further submitted that Mr. Newman's opinion of the depressions along the sidewalk extrapolated after the sidewalk was repaired did not account for the effects of frost over the winter, the impact on the level of the

sidewalk after it was jack hammered when repairs were done, and the measurements should be considered based on Mr. Newman's own margin of error and the opinion should be of little evidentiary weight.

2. While the defendant's policy was a 1 inch standard of maximum variance, the employees of the City including Mr. Abenante were implementing a 1 inch standard of minimum variance, a less onerous policy, which only addressed tripping hazards of 1 inch or more and the staff never addressed problems of less than 1 inch under the policy they assumed was in place. Under the defendant's policy of 1 inch maximum, the staff was left a discretion that they never turned their mind to and failed to address. Accordingly the implementation of the defendant's policy was voided and the staff were negligent in the implementation of the defendant's policy of sidewalk inspection and repair. That the implementation of the policy by the staff amounted to no implementation and that it is submitted cannot be construed to be a reasonable implementation of the defendant's policy.

3. That the operational implementation of the defendant's policy was never rooted on those economic factors referred to in *Just v. B.C.* (1989) B.C.L.R. (2nd) 350 (S.C.C.) at page 705 "social, political or economic" which where not addressed by Mr. Forbes according to his testimony.

4. That the defendant is liable under the *Occupier's Liability Act* in light of the testimony of Mr. Abenante who believed that depressions of ¾ inch should be repaired and the testimony from Mr.Newman that a ½ inch depression was a tripping hazard and the measurement that he found to have existed in this case of 5/8th to 7/8th of a inch was of concern to him.

DECISION

While the defendant repaired the sidewalk soon after the incident I find, based on the testimony of Mr. Abenante who took measurement the day of the incident and the opinion offered by Mr. Newman completed after the sidewalk was repaired, the height differential between the two slabs of concrete was less than 1 inch. The dip was 5/8 of an inch on the right hand side of the sidewalk and 7/8 of an inch on the left hand side. On the testimony of the claimant she fell approximately one foot from the roadside edge of the sidewalk. The differential was on the evidence higher on the house-side of the sidewalk than on the roadside of the sidewalk.

I prefer the evidence of Mr. Abenante as to the height of the depression, even though the measurements were not recorded or photographs of the scene taken. I accept his evidence that the measurements were taken in the general area described by the claimant as the place where she had fallen. Mr. Abenante's measurements were supported by the opinion of Mr. Newman. In respect to his opinion I do not find that his opinion was affected by the effect of frost, jack-hammering of the side walk when it was repaired. Nor were the measurements affected by the margin of error mentioned by Mr. Newman

in his testimony. The opinion of Mr. Newman has been demonstrated to be sound and valid even though his measurements were made after the sidewalk was repaired and by means of extrapolation.

As a result of those measurements I find that the depression on the sidewalk at the time of the fall of the claimant was less than 1 inch as measured by Mr. Abenante. It was also lower at the end where she fell than at the other side of the sidewalk. On the evidence I also conclude that the height of the depression on the sidewalk was less than 1 inch when it was inspected in June of that year.

Accepting that the defendant is bound by the *Municipal Act* to maintain its sidewalks, the question that must be asked in this case is whether the defendant is exempt from liability as was set out in *Just v. The Queen in Right of British Columbia* (1990) 64 D.L.R. (4th) 689 at 702 when Cory J. for the majority set out the following step in the analysis;

> "whether the province is exempted from liability on the ground that the system of inspections including the their quantity and quality,constituted a "policy" decision of a government agency and was thus exempt from liability."

In *Just*, supra, a clear distinction was made between governmental policy decisions, which are exempt from tortuous claims, and the operational implementation of the policy which may well be subject to claims in tort.

In regard to the quantity and manner of inspections it was held in *Just*, supra, that a decision to not inspect or to reduce the number of inspections may be an unassailable

policy decision, provided it constitutes a reasonable exercise of bona fide discretion based for example, upon the availability of funds.

The court went on to say at page 370:

> "On the other hand, if a decision is made to inspect lighthouse facilities, the system of inspections must be reasonable and the must be made properly: see Indian Towing co. v. U.S. 350 U.S. 61,100 l. ED. 48, 76 s. Ct. 122 (1955). Thus once the policy decision to inspect has been made, the court may review the scheme of inspection to ensure it is reasonable and has been reasonably carried out in light of all the circumstances including the availability of funds, to determine whether the government agency has met the requisite standard of care."

The 1 inch maximum was the governing measurement for sidewalk repair. All depressions of 1 inch or more were repaired as soon as possible according to the witnesses for the defendant. According to Mr. Abenante all other depressions brought to the attention of the defendant such as the sidewalk in this case would be repaired based upon available resources. As there was another project in the area of this sidewalk, it was repaired soon after the incident. This was done as a consequence of the claimant's fall and the repair was done in accordance with the discretion given to the public works manager where differences were less than 1 inch.

The 1 inch maximum also governed how inspections were made. In this case an inspection of the sidewalk was completed in June of 1997, and no depression was noted on the inspection sheet in tab 4 of exhibit 2 in these proceedings. The inspection was completed by Mr. Mason who used a pre-designed measuring stick measuring depressions of 1 inch or more. That measurement was carried out properly.

The sidewalks under the defendant's control were inspected annually in accordance with the policy, but were not inspected according to volume of traffic. This sidewalk was not, I find, a sidewalk of heavy traffic in comparison to other sidewalks in the City so it is not a sidewalk where greater inspections should have be made for the policy to be reasonable because of the level of traffic. The policy did not address the age of the population living in this area, but it was not established that the number and manner of inspection should have been different to address the age of the population in this area for the policy or implementation of the policy to be reasonable

While the policy as it was created by council in December of 1986 referred to the variance as a 1 inch maximum, the employees of the defendant who testified referred to the variance as as a 1 inch minimum. I conclude that the policy of the defendant was not negligently implemented as a 1 inch minimum. It was not established that a different or less onerous method of inspection would have been implemented by city employees by applying a 1 inch minimum as opposed to a 1 inch maximum. The 1 inch minimum was implemented as a 1 inch maximum according to the testimony of Mr. Abenante.

Accepting that the employees were given a discretion as to how the inspections were carried out and as to how they would address depressions of less than 1 inch the question is did they fail to turn their mind to this and was their a vacuum of policy in respect to such depressions that left these risk with no policy of inspection. Inspections were to directed to find depressions of 1 inch or more. It was not intended to inspect for depressions of less than 1 inch. That was the policy set for budgetary considerations by

the defendant. I was not intended in policy or for the implementation of policy that there be inspections done at any time for depressions of less than 1 inch. That is clear from the original adoption of the standard variance by the defendant and from the manner in which Mr. Mason did the inspections with his measuring device. Even if the employees were given a discretion in respect to depressions of less than 1 inch such discretion would not enable them to create an inspection standard or threshold different than that set by council.

Repairs in this area were made in accordance with the discretion given to the public works manager. Depressions of 1 inch or more were repaired as soon as possible. Depressions of less than 1 inch were repaired when they came to the attention of the defendant and resources for their repair were available. This depression was less than 1 inch and not detected in the June inspection.

I am satisfied that the employees of the defendant reasonably implemented the policy.

Was the policy in place subject to attach because it failed to address potential risks to sidewalk users from depressions of less than 1 inch? Both Mr. Abenante and Mr. Newman expressed concerns about depressions of less than 1 inch. This is in my view the balancing of policy set by governmental bodies dictated by bugetary considerations and the obligations of such entities to maintain sidewalks and passages to ensure the safety of the users. As there was a policy of a 1 inch standard it could not be reviewed on a private

law standard of reasonableness even though this particular policy decision had an effect upon the frequency of inspections and the manner in which they were carried out. Balanced against the nature and quantity of the testing invoked by the defendant, it has demonstrated its system of inspection was reasonable in light of all the circumstances.

As in *Pamaran vs. Victoria (City)* (April 24, 1996) Victoria Registry 941123 (B.C.S.C.) there is nothing in the evidence to suggest that the policy of 1 inch or the approval of the policy by Council was not made in good faith by those who advised the City and City Council itself. The policy threshold was not shown to be unreasonable or arbitrary (see *Einarson vs. Richmond (City)* (September 8, 1998) Vancouver Registry C973273 (B.C.S.C.).

Furthermore, it matters not what repair standards for sidewalks are followed by other municipalities.

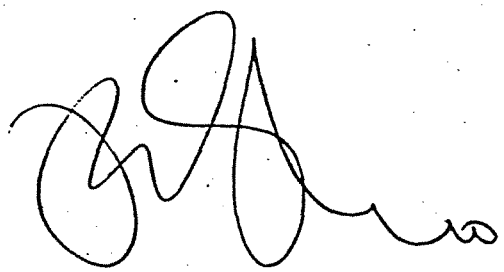
Mr. Forbes was clearly not familiar with the details of the sidewalk inspection policy, and he was not directly involved in budgeting for the sidewalk inspection policy. He was not the City Manager then or now. From his testimony I am able to conclude that the policy was adopted by Council from the Risk Management study and this policy was created on economic and political factors.

I am satisfied that the defendant has demonstrated that the policy was made in the bona fide exercise of its discretion and even if the defendant's policy of repairing

immediately sidewalks in excess of 1 inch is not a policy, but an operational aspect of the defendant's duty to provide safe sidewalks, no negligence has been established in the actual operational performance of policy. Accordingly I need not embark on the issue of basic tort principles governing the defendant.

The defendant is accordingly exempt from liability for the reasons set out above.

The claim of the claimant is accordingly dismissed.



The Honourable Judge Fabbro

Dated this 25th day of February, A.D. 1999