IN THE SUPREME COURT OF BRITISH COLUMBIA

No. 1733/89 — January 21, 1992

Vernon Registry — Vernon, B.C.

BETWEEN:)	
CHARLOTTE JACKSON)	
PLAINTIFF)	REASONS FOR JUDGMENT
AND:)	OF
THE CORPORATION OF THE)	THE HONOURABLE
CITY OF VERNON)	MR. JUSTICE ARKEL
DEFENDANT)	
AND:)	
JACOB TOEWS)	
THIRD PARTY)	

D. LEWTHWAITE, Esq. Appearing for the Third Party

No other appearances

THE COURT: (Oral) The plaintiff sufferred injuries on May the 9th, 1989 when she tripped and fell on the City of Vernon's concrete sidewalk in front of

Mr. Toews' residence at 3601-31st Street. By consent a judgment was granted against the city awarding the plaintiff costs in the amount of $18,460 inclusive of all costs. It was admitted that the cause of the plaintiff's fall was the defective condition of the city sidewalk, and the plaintiff's failure to keep a proper look out. The fault for the accident was divided equally between the city and the plaintiff, Mrs. Jackson.

Mr. Toews was the owner and occupier of the land and premises at the municiple address of 3601-31st Street in Vernon on the date of the accident. The remaining issue for the court to determine is the city's claim that the roots from a tree growing on Mr. Toews' property created the defect in the city sidewalk that caused the plaintiff's injury. The exact location of the accident was admitted to have occurred upon the sidewalk in front of Mr. Toews' house. The defect in the concrete sidewalk was caused when a slab of the sidewalk was raised or heaved above the adjoining slab of concrete, causing a distortion or lip of approximately one and a half to three quarters of a inch. It was this defect or lip that caused the plaintiff, Mrs. Jackson, to trip and fall.

Mr. Gary Holt, the director of operations and the department head in charge of roads and sidewalks for

the City of Vernon, was notified in June of '89 of the accident, and he viewed the scene and the sidewalk was repaired by the city with a cover of asphault skin patching at three different areas on the sidewalk in front of or near Mr. Toews' property. The asphault patch or patches that covered the uneven level in the concrete was still in place without any change or raise in elevation until November of 1991 when it was removed and the concrete slab was lifted to disclose two tree roots that apparently had raised up into the two inches of gravel immediately beneath the concrete slab. It was Mr. Holt's opinion that the tree root or roots had caused the concrete to heave or lift. Mr. Holt, however, also conceded in cross-examination that there may have been other causes for the distortion, which could include underground water damage from a water main or sewage leak or also from frost heaves or from automobiles travelling on or over the sidewalk.

The city sidewalk in front of Mr. Toews' house was typical of sidewalks throughout Vernon and as Mr. Holt stated, no repairs would have been made to this sidewalk unless the condition had been observed by city crews or had been brought to their attention as it was because of this accident. The city sidewalks are designed in sections with expansion

joints and the separations and changes in elevation between the slabs in front of Mr. Toews' house was not unusual as had been observed throughout the city.

Mr. Holt also stated that the sidewalks were not designed to withstand the weight of automobiles, except at the cross-overs, and he also indicated that a two hour parking limit had been imposed in the Toews' area sometime after June of 1989 because of the all day parking problems that had occurred in that residential area. Mr. Toews had never been contacted by the city to notify him of this complaint by the plaintiff, nor had he been contacted by the city about any sidewalk problems, and they had never requested Mr. Toews to correct any problems relating to his trees or the tree roots.

Mr. Toews is now 78 years of age, he's lived at 3601-31st Street for 28 years, and he never had any tree root problems in his yard or elsewhere, and he had never received any complaints about the tree roots from anyone. Mr. Toews estimated that the three maple trees in his yard were approximately one hundred years old. He indicated that until the two hour parking limit signs were installed by the city after this accident in May of '89 that there had been problems with automobiles parking and driving on the sidewalk in front of his house. Mr. Toews also

indicated that the sidewalk along his street was not unusual; it was uneven and there were cracks in it. The same city sidewalk had been there for the 28 years that he had lived in that house. Mr. Toews also stated that the sidewalk on his property leading from the city sidewalk up to his house had been cracked and was uneven, but that was due to a break in the city water main that had caused the sidewalks to settle approximately 20 years ago and was not due in any way to the tree roots.

Based upon the evidence as presented it is not possible to determine whether the defect in the city sidewalk was caused by the tree roots as suggested by the city, or whether it was caused by automobiles travelling over the sidewalk, or whether it was caused by water damage or in some other way. Therefore, I have concluded that on a balance of probabilities that Mr. Toews is not liable either in nuisance or in negligence, for any injuries that were suffered by the plaintiff, Mrs. Jackson. Even if the tree roots from the Toews' property had caused the uneven city sidewalks, he would not be liable in any event for the plaintiff's damages. A person may be liable in nuisance for damage caused by his tree roots encroaching upon another's lands, however, there is not an absolute liability, and he cannot be held liable without knowledge or means of knowledge

and to have had an opportunity to correct its effects.

The leading case on nuisance of this nature is still Sedleigh-Denfield v. O'Callaghan, 1940 A.C. 880, where at page 904 Lord Wright stated as follows:

> "Though the rule has not been laid down by this House, it has I think been rightly established in the Court of Appeal that an occupier is not prima facie responsible for a nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it, and obviate its mischievous effects. The liability for a nuisance is not, at least in modern law, a strict or absolute liability. If the defendant by himself or those for whom he is responsible has created what constitutes a nuisance and if it causes damage, the difficulty now being considered does not arise. But he may have taken over the nuisance, ready made as it were, when he acquired the property or the nuisance may be due to a latent defect or to the act of a trespasser, or

stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it."

The city's claim, therefore, against the third party, Mr. Toews, is dismissed with costs on scale three.

(CONCLUDED)

I hereby certify the foregoing to be a true and accurate transcript of the proceedings transcribed to the best of my skill and ability.

Jeannette van Eldik
Official Reporter