

File No: 09-21012
Registry: North Vancouver

In the Provincial Court of British Columbia
(CIVIL DIVISION)

BETWEEN:

MALIHEH KHERADMEH

CLAIMANT

AND:

DISTRICT OF NORTH VANCOUVER

DEFENDANT

**REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE RODGERS**

COPY

Appearing on her own behalf:

Maliheh Kheradmeh

Counsel for the Defendant:

L. Woo

Place of Hearing:

Vancouver, B.C.

Date of Judgment:

March 25, 2010

[1] THE COURT: This claim is brought by Maliheh Kheradmeh against the District of North Vancouver. On the 12th of January, 2009, at approximately 10:00 p.m., Ms. Kheradmeh was driving on Marine Drive in North Vancouver. It was a dark winter night. As she approached Philip Avenue, she felt her vehicle hit something on the roadway. She stopped her vehicle and got out to investigate. She saw there was a pothole in the middle of the road which she struck. She took photographs of the pothole with her camera phone. She estimated the hole to be approximately 36 inches or one metre in diameter. The photograph appears to show that. She estimated that the depth of the hole was between 18 inches or half a metre. I was not able to determine from looking at the photographs whether the hole was of that depth. It is not essential that I determine the exact size of the pothole.

[2] Ms. Kheradmeh drove home and the next day drove her car to work. She noticed that the car was shaking somewhat. When she returned to her car at the end of her work day, she found that the tire was flat. She took the car to a garage. She was advised that the two rims on the passenger side tires of her car were damaged and needed to be repaired. The cost of the repair was \$495. The cost to have the vehicle inspected was \$55. While Ms. Kheradmeh's vehicle was being repaired,

she incurred some travel expenses of \$64.

[3] Ms. Kheradmeh went to the District of North Vancouver. She was told that other people had complained about the pothole at the intersection of Marine Drive and Philip Avenue. She attempted to resolve this claim with the District of North Vancouver, but she was not able to do so.

[4] Ms. Kheradmeh says that the District of North Vancouver failed to meet the duty of care which was expected of the municipality. There are two parts to her claim. She says, firstly, the District of North Vancouver failed to inspect the pothole and to repair it as became necessary from time to time. Secondly, she says that the District of North Vancouver failed to use the right equipment when they were dealing with the pothole.

[5] There were two other photos entered by Ms. Kheradmeh. They show the pothole having been patched by the District of North Vancouver. These photos were taken sometime in July of 2009.

[6] The District of North Vancouver called as a witness Mr. Robert Warwick. He is a sub-foreman in the Streets Department of the District of North Vancouver. He has held that position since 1992. He has been employed by the District for 25

years. In January of 2009, Mr. Warwick's duties included taking inquiries from the public, dispatching work crews to deal with problems, and to inspect the streets from time to time. Mr. Warwick was aware of the claim of Ms. Kheradmeh, and he was familiar with the operations of the District of North Vancouver Streets Department during the week leading up to the 12th of January, 2009. Mr. Warwick relied in part on the records which were kept by the District of North Vancouver. These records were kept in the usual course of business. The records were created from time to time on the dates set out on the records. There is no suggestion that the records relied upon by Mr. Warwick were created after the claim of Ms. Kheradmeh arose.

[7] Mr. Warwick testified that he first became aware of the pothole on January 7th, 2009. At the time he was working extra shifts because there had been heavy snowfall. This heavy snowfall was centred on the upper portions of the municipality. Employees of the Streets Department were working extra shifts in order to deal with the heavy snowfall. The snowfall was not a factor in the pothole creation. As I have said, the snowfall was on the upper elevations of the municipality.

[8] At approximately 2:00 a.m. on the 7th of January, Mr.

Warwick conducted an inspection of the area around Capilano Road and Marine Drive. He saw the pothole in question at the intersection of Marine Drive and Philip Avenue. It was on the northwest corner of that intersection, and it was in the curb lane of Marine Drive. Marine Drive at that location has two eastbound lanes and two westbound lanes of traffic. He described the pothole as being approximately two feet square and approximately two inches deep. He dispatched a crew to fill in the pothole.

[9] The process to fill the pothole is described as being cold patch asphalt. This is the usual substance used to quickly repair potholes. It is easy to transport to the location. It is then shovelled by work crews into the pothole and pressed down. The cold patch asphalt hardens quickly so that traffic can once again begin to travel in the area. It is not a permanent solution.

[10] Mr. Warwick referred to the instructions given to the crew in writing to repair the pothole on the 7th of January. He referred to the reports received from the work crew confirming that the pothole had been patched. On the 8th of January and on the 9th of January, Mr. Warwick instructed crews to patch the pothole. He received reports showing that this had been done.

[11] On the 12th of January, there was a report from the Streets Department crew indicating that the pothole in question had again been patched. Mr. Warwick testified that at approximately 7:00 o'clock in the morning of the 12th of January, the crew would have been onsite patching this pothole.

[12] It was one of the duties of Mr. Warwick to inspect the streets and to ensure that his instructions to the various work crews had been carried out. Mr. Warwick testified that between 10:00 a.m. and 12:00 noon on the 12th of January, Mr. Warwick went to the intersection of Marine Drive and Philip Avenue, he looked at the pothole, he saw that it had been repaired, and he described it as being fully intact. Mr. Warwick saw that there was a traffic cone in place. The traffic cone was located on the curb approximately one to two feet away from the location of the pothole. It was approximately 18 inches in height. Mr. Warwick testified that he had seen this cone every time that he had inspected the pothole in the past few days.

[13] After consulting the records of the District of North Vancouver, Mr. Warwick could not say whether there was any inspection of the pothole between 10:00 a.m. on the 12th of January and 10:00 p.m. when the pothole was struck by Ms.

Kheradmeh's vehicle.

[14] Mr. Warwick said that Marine Drive is one of the major arteries in the municipality. If the pothole had been noticed by either the bus transit system or the RCMP, there would have been a report.

[15] In cross-examination Mr. Warwick was asked why he did not use different equipment when dealing with the pothole. He was asked why he had not used something other than an 18-inch traffic cone to indicate to motorists that there might be a problem in the roadway. He said, firstly, there was a space restriction. The distance between the curb and the adjacent building was only 40 inches. A larger cone would have restricted pedestrian access. In particular, Mr. Warwick was concerned about pedestrian access on the sidewalk for persons using wheelchairs or parents pushing children in strollers.

[16] He was asked why a flashing light cone or a reflective cone would not have been used. He said both of those devices would have restricted access to the curb. He was also concerned about a possible traffic hazard if a larger cone had been pushed into the roadway inadvertently. Mr. Warwick was then asked why some sort of signal device was not placed into the pothole. Mr. Warwick explained that if this was done, traffic would be impeded on Marine Drive. He said that when

he inspected the hole, it was patched and level.

[17] In cross-examination, Mr. Warwick was asked why there was no inspection of the pothole during the 12 hours between his physical inspection and the time when the pothole was struck by Ms. Kheradmeh. He said that, firstly, there were other duties for the work crew. In particular, there were issues relating to snow clearance that had to be addressed. He said the work crews were busy dealing with other potholes.

[18] Ms. Kheradmeh says that the inspection undertaken by the municipality was inadequate, and secondly, that the proper equipment was not used to alert motorists to the presence of this traffic hazard created by the pothole. She understands that the municipality need not be held to a standard of perfection. She says that some special equipment was required because of the hazard and that the pothole should have been inspected more regularly.

[19] This type of case has come to the attention of judges on other occasions. In British Columbia, the leading case is *Duddle v. The City of Vernon*. It is a decision of the British Columbia Court of Appeal found in (2004) BCCA 390. The court sets out that when assessing the actions of a government body to determine whether or not there has been negligence, the test is whether or not the steps taken by the municipality

were reasonable in the circumstances. The municipality must not be held to a standard of perfection, rather to a standard of reasonableness.

[20] In the case of *Roy's Midway Transport Ltd. v. New Brunswick*, the plaintiff suffered property damage to his vehicle after running into a pothole. The municipality had noticed the pothole 12 days prior to the incident. The pothole had been repaired and was inspected on several occasions. It was determined that the trial judge's decision regarding the frequency and manner of the inspections were reasonable. It was held that the defendant municipality had met the requisite standard of care. The case of *Roy's Midway Transport Ltd. v. New Brunswick* is found at (1995) CanLII 6564.

[21] In *Margeson v. Halifax* (2009), N.S.S.N. 14, the claimant sustained property damage to his vehicle after running into a pothole. It was proven that the defendant had recently temporarily repaired the road using the cold patch material. The municipality inspected the road repair on the morning of the claimant's accident and noted that a pothole might be forming. The court found that it was unreasonable to expect the defendant to place any sort of warning by the road where a pothole may be forming, as this would place an inordinate

burden on the defendant to place warnings at all questionable road surfaces. The court held that the defendant's inspection and actions were reasonable.

[22] I turn, first of all, to consider the systems in place in the District of North Vancouver during the week of January 2009 with respect to potholes. I find that there was an adequate system in place for the identification of potholes. I find there was a system in place to dispatch work crews to deal with these potholes. I accept the documentary evidence and the testimony of Mr. Warwick concerning the nature and extent of the systems which were in place and the steps taken to repair the pothole. I find that the steps taken by the municipality were reasonable in the circumstances.

[23] I turn now to consider whether or not there should have been a different warning device put in place near the pothole in order to alert drivers. I accept the evidence of Mr. Warwick that there was an 18-inch cone placed on the curb in the proximity of the pothole. I further accept the evidence of Mr. Warwick that when he inspected the pothole 12 hours prior to the accident suffered by Ms. Kheradmeh, there was no indication of a new pothole forming. He noted that the repairs undertaken by municipal work crews that morning had resulted in the pothole being filled, and that the road

surface was level and safe for vehicular traffic. I do not find that there was a duty on the part of the District to put in place any different form of signalling device other than the cone which had been placed there by the work crews.

[24] I turn next to consider whether there was a duty on the part of the municipality to inspect the pothole between approximately 10:00 a.m. in the morning and 10:00 p.m. when the accident occurred. I do not find there was any duty on the municipality to carry out a more frequent inspection. The pothole had been fixed at 10:00 a.m. to a reasonable standard. It had been inspected by Mr. Warwick in a supervisory capacity to ensure that the municipal work crews had carried out their duties in a responsible manner. I find that was all that was necessary.

[25] I certainly have sympathy for Ms. Kheradmeh who suffered over \$600 worth of damage to her vehicle. It is a hazard that we all must risk, but the court's job is to measure the standard of care of the municipality, and I find that the standard of care has been met by the District. I have to dismiss the claim. In the circumstances, there will be no award as to costs. Thank you, Ms. Kheradmeh. Thank you, Ms. Woo.

(REASONS FOR JUDGMENT CONCLUDED)

