

*sidewalk differential*

**COPY**

Date: 20040211  
Docket: 28974  
Registry: Vernon

**IN THE PROVINCIAL COURT OF BRITISH COLUMBIA**  
**(SMALL CLAIMS COURT)**

Oral Reasons for Judgment  
The Honourable Judge R. R. Smith  
February 11, 2004

BETWEEN:

**MARJORIE MARTIN**

CLAIMANT

AND:

**THE CORPORATION OF THE CITY OF VERNON**

DEFENDANT

Appearing on her own behalf: M. Martin  
Counsel for the Defendant: J. H. Grover  
Place and Date of Hearing: Vernon, B.C.  
February 11, 2004

[1] **THE COURT:** Ma'am, in this matter the law is, of course, that if the city acted negligently, that you could be successful in this application. There has been a lot of cases where people have sued cities -- like I mean many, many cases where they have sued cities, and the judges in those cases have set down a specific area of law when people are suing

cities for these types of things. They say that the city should have good policies in place to avoid having faulty sidewalks.

[2] I heard a case not too different from this one, in Kelowna, just this last year, where they had a brick on their sea wall walk there, and it had collapsed in and someone had fallen and hurt themselves, and all the case law that I heard then, of course, is the same case law that would be applicable here in your case. If the city is negligent in having a good inspection program and then someone gets injured, the city can be liable. But what the city is not, is they are not the insurer against all injuries, okay. It is not enough just to say that you tripped on that sidewalk and had injury, because clearly you did trip on that sidewalk and you did have injuries, but that is not the test to be applied here.

[3] The test is, was the city then negligent in how they dealt with this? Well, they had a policy in this particular case -- two policies, in particular. They had a policy that, one, they would have an annual inspection each spring and, two, between those annual inspections if they had any citizens' complaints that they would immediately go and investigate. Those were their two policies.

[4] In this particular case, they did have this annual inspection policy in place, but I am not sure a whole lot turns on it, because they say that even after doing their annual inspection that the separation, the lip, as it were, that you tripped on, was sufficiently small that they would not have repaired, in any event; that they have a formula that they have worked out through their policies, after speaking with engineers, and their policy is that if it is less than one centimetre of being unlevel, that that is a Level I default, and if it is between one and three centimetres, it is a Level II, and if it is greater than three centimetres, it is a Level III default, and they say that they do not actually get around to repairing until they hit the Level III, greater than three centimetres.

[5] You say that you think it was roughly a half an inch separation in elevation. A half an inch, when converted to centimetres -- I hope I get this one right. I was told 1.25 and I was trusting what I was being told with the conversion, but roughly 1.25 centimetres was the equivalent of a half an inch. So, even on your theory of the case, what they would have had here is a Level II separation that would not have been repaired until it would have become more significant and became a Level III separation.

[6] Now, the evidence of the city person, that went and inspected it after you fell, he says that the separation was not the 1.25 centimetres at the deepest point, but only .5 of a centimetre. So, there is a real big difference in the evidence on that one point. Out of everything I heard, that is really the only thing that I heard where you can not really reconcile the two. Someone is right and someone is wrong with that, but the two can not be reconciled. But on the city's version, if it was truly only a half a centimetre, this would have been, at best, a Level I default in the sidewalk. So, on their version, a Level I; on your version, a Level II; on their policy, after having got directions from their engineers on what should or should not happen for safety reasons, that it would need to be a Level III, which would have roughly been one inch -- a little over one inch before they would have done anything about it.

[7] I see that -- well, let me just back up here. When I looked at the photographs, I thought one that was very helpful was -- well, they are all helpful and I looked at all of them, but I thought that page 49 at Tab 10 was helpful, because it kind of gave me a bigger perspective of what was going on, because I could see what you were talking about, how if you would have kept going you could have hit the bus. I can see

the bus right there and I can see where you are saying that the street going one direction is not totally level with the street going the other way. Well, that happens. I guess in San Francisco they would really have a problem; you know, not everywhere in the world is it flat, so that, in and of itself, is not a problem. Here, there obviously is a bit of a lip. Whether it is a half a centimetre lip or 1.25 centimetres of a lip, I can't be clear. But what is clear on everybody's evidence is that it is well under three centimetres.

[8] When the city went out and got the engineer to prepare their Sidewalk Inventory program, back in December of 1993, I think they did that in good faith and they were simply relying on what the engineer told them they needed to do in order to keep the street safe.

[9] The case law says that the courts will not review negligence with respect to policy matters, whereas it will with respect to the implementation or operation of that policy. So, I am not going to review whether or not that policy was negligent, this business of not doing any repairs until it reached three centimetres. I assume that the city was simply following in good faith what the engineer told them to do with that. All I am looking at is whether or not they implemented and operated that policy. They had a problem in

not getting their spring inspection, in 2001, and that could have been a big problem for them, if in fact there had been a Level III defect at the time that you tripped. I would have had no trouble in finding them negligent if this was a Level III defect, in circumstances where they had not done their spring inspection the way they were supposed to. They did not do that inspection until after you fell. Then they went and looked.

[10] But at the end of the day, like I say, they are not there to be your insurer. There is only a valid cause here if you can show that they were negligent in how they implemented their Sidewalk Inventory program and spring survey of the sidewalk, and in this particular case it can not be said that they were negligent in any of that. If in fact what the engineer said is wrong -- if the engineers are wrong -- in other words, if the city should be required to go out and fix separations that are less than one centimetre, then they would have been negligent, but that is not what their engineer told them to do and I am not going to go back and say that the engineer had it wrong.

[11] So, in all of those cases, while, you know, I have sympathy for your situation where clearly you fell and you fell on this area where it had separated, so obviously there

is a danger associated with that to some degree. I can tell you this. Notwithstanding what the city is saying, after one person has fallen in an area like that, if they then have another person fall in that very same location, they would not want to be in front of me and say, "Well, oh look, we were just following the policy," because now they do have a heads up that it was a problem in this particular location; not just because of the height of the separation, but I guess all of the factors put together, like you were trying to say, with the difference in elevation, combined with the height in separation, somehow caused the problem there, and it had nothing to do with ice or bad sidewalks. When it happens in the middle of the day, like this, on a clear day, I think they have now been put on notice that that is a problem there and perhaps they should look at correcting that, but I can not say that at the time that this slip and fall happened, that they had done anything contrary to their Sidewalk Inventory program, their policy manual for sidewalk inspection, because in fact, even to this day, it is within the level of where they would not have to fix it, going by that policy.

[12] So, while I have some sympathies for the fact that you did fall and obviously hurt yourself there, I can not find on the balance of probabilities that the city was negligent in

the way that they carried out their inspections on this occasion and, accordingly, I dismiss the case.

[13] **MR. GROVER:** Your Honour, just to alert you, there was a formal offer, but I have been advised by my client to waive any pursued costs against the claimant.

[14] **THE COURT:** So, in those circumstances, I will simply say that everybody will bear their own costs, then, in this matter. I guess -- I hope the representative for the city heard me. Even though you are telling me now that it is within what the engineer told you, you know, once you have someone fall on it, in circumstances where it wasn't like they were not paying attention, but where they just fall in the light of day, I think that you then have to say, even though this one is within what would normally be something we wouldn't need to repair, you have got to look at it --

[15] **MR. GROVER:** Right.

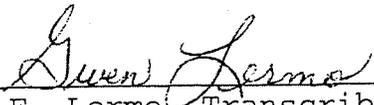
[16] **THE COURT:** -- because you don't want to -- you know, can you imagine coming to court a second time and it's the same location, and trying to say, "Oh, well, it was within our --" you know, because now you have different notice than what you would have had, from what your engineer gave you, for that particular intersection. I am not saying that would apply

clear across all of your intersections everywhere, but for this particular one, for some reason, because of the way it's sloped and everything, I think you would be well advised to see what you could do to level that off better. Thank you.

[17] MR. GROVER: Thank you, Your Honour.

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I hereby certify the foregoing to be a true and accurate transcript of the evidence recorded on a sound recording apparatus, transcribed to the best of my skill and ability.



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G. E. Lermo, Transcriber  
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