



*Past 20589
(watermeter)*

**NO. 20589
VICTORIA REGISTRY**

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

BETWEEN:)	
)	
LIANNE MORDECAI)	
)	BEFORE THE HONOURABLE
CLAIMANT)	
)	JUDGE B. L. DOLLIS
AND:)	
)	
THE CORPORATION OF THE)	
DISTRICT OF OAK BAY)	
)	
DEFENDANT)	
)	

Monte W. Prior, appearing on behalf of the Claimant

Mary Ann E. MacKenzie, appearing on behalf of the Defendant

Date of Hearing: February 28, 1996

REASONS FOR JUDGMENT

This is a claim for personal injury. The facts are relatively simple. The Claimant, Lianne Mordecai, is now 25 and is a 4th year student in the Education Faculty at the University of Victoria. On February 18, 1995, shortly before 5 p.m., she fell in a hole while running across

Oak Bay Avenue in the District of Oak Bay. She was running from the Oak Bay Bakery to a car parked nearby. It was dark and raining. She was in a hurry and did not go to the nearest crosswalk. She fell in a hole and one foot seemed to be stuck in it. Her leg was in the hole up to her knee. She had immediate pain as her leg struck metal. She had pain up to her hip joint, down the muscles of her leg, and to some degree in her knee. The skin on the lower leg was abraded. She attended a physician immediately at the Oak Bay Medical Clinic. At that time, the wound was cleaned and she was given Tylenol 3 for pain. She was told to keep the leg raised as much as possible. She had further medical attention in a few days, and an x-ray. Although she testified there was a slight hairline fracture, this was not supported by the medical evidence.

She missed 2 or 3 weeks of classes, not including spring break. She said she could not be on her feet for any length of time without pain and could not drive or take the bus to school. In addition, she had two part-time jobs, one as a research assistant at the University of Victoria and one as a sales clerk at Benetton. On her calculation she missed 55.5 hours at Benetton, and 28.5 hours at the University. It was some 8 to 10 weeks before she could walk without pain. She still experiences throbbing in the wound area if she walks extensively; this occurs every couple of months. As a result of this injury, she has a scar on the lower leg, which was visible on photographs taken in December 1995. She testified that the scar has not changed since December. Ms. Mordecai had been physically active, attending the Y 2 or 3 times a week, and jogging 1 or 2 times a week. She did not return to the Y until approximately May or June of 1995, and did not start running again until August.

I was impressed by Ms. Mordecai as a witness. She did not seem to me to exaggerate her difficulties or to take unreasonable steps to deal with them.

The District of Oak Bay (Oak Bay) denies any duty of care to Ms. Mordecai, or any negligence, and relies on Barratt v Corporation of the District of North Vancouver (1980) 27 B.C.L.R. 182 (S.C.C.) and Brown v British Columbia (Minister of Transportation & Highways) (1994) 89 B. C.L.R. (2d) (S.C.C.).

On the evidence, Oak Bay had established an inspection system for roads. There is no full time inspector of roads. This decision is based on the budget for the department, and on the size of the municipality. Oak Bay keeps a record of the date problems are reported, and the action taken. The inspection system involves water meter readers, who report faults which they observe while reading water meters, either by noting them on a Radix computer system, or by telephoning for more urgent matters. The Radix computer system does not include a code for a broken lid or other problem with a valve box. The meter readers do not physically inspect the valve box and do not open it, but report problems which they happen to view as they walk by. Meters are read every two months. Other employees are directed to advise of problems they see. In addition Oak Bay relies on reports from citizens. Mr. Barrett is the operations manager for Oak Bay. When a problem is discovered, he investigates and directs the necessary work. If there is an immediate safety risk, he leaves a light or cone, or spray paints as necessary. There is an

annual inspection of valves - the last inspection date of this particular valve box is not clear to me. The plaintiff does not suggest that the annual inspection was overlooked.

On the evidence, the hole in which Ms. Mordecai fell was created when a valve box lost its lid. A valve box contains a valve to shut off water. The lid was approximately 8 inches square and had broken off at the hinge. This was an older style lid which was made of cast iron and was in one piece. The metal outer rim of the valve box was still present. This left a hole approximately one foot deep. This came to the attention of the municipality when the valve box with lid missing was reported by an employee on February 21, 1995. Mr. Barrett directed the employee to leave a traffic cone on it. It was repaired the next day, by jack hammering away the asphalt around the old grate, lifting out the old box, inserting the new box, and then applying new asphalt. It was not possible simply to replace the lid on the valve box. The hinge piece was there and was broken off. The newer style lid has a rectangular cover with an inner circular lid. Mr. Barrett describes the newer style lid as much easier to open than the older style. There is no suggestion that use of the older style valve box constituted negligence.

On the evidence, the municipality had no record of any previous problem with this particular valve box, and had no record of the plaintiff or any other person reporting a hole in this location on February 18, 1995. There was no record of any inspection by a water meter reader in that area between January 5, 1995 and February 18, 1995. Mr. Barrett agreed that a meter reader would not likely see a problem with a hinge on a valve box. He said this was the

first lid on a valve box which had been replaced in some time. There is no evidence from which I can conclude when or how the valve box lid was damaged or went missing.

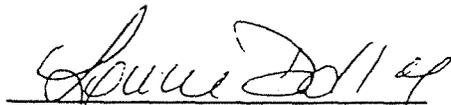
On Mr. Barrett's evidence, the distance from the valve box to the nearest sidewalk was 11 feet, and the distance from the valve box to the nearest crosswalk was 30 feet.

The claimant says she is not alleging a bad system of inspection, but rather a problem in the manner in which the inspection system is executed. The claimant says that a meter reader walking by on the sidewalk cannot see any problem with the valve box.

Oak Bay says that there is no duty to inspect. Having undertaken a system of inspection, the municipality cannot be faulted unless it is negligent in the program of inspection that it undertakes. Based on the cases cited above, I am satisfied that Oak Bay's position is the correct one in law. The municipality has no statutory duty to inspect. If a policy of inspection is undertaken, the municipality cannot be faulted because of the particular policy chosen. I cannot find, on a balance of probabilities, that Oak Bay was negligent in the policy of inspection which it maintained, that is, relying on reports by water meter readers, by employees, and by members of the public. I cannot find, on a balance of probabilities, that Oak Bay implemented its policy of inspection in a negligent manner. I am satisfied that the hole in question was repaired reasonably once it came to the Oak Bay's attention. Having reached this decision, it is not necessary for me to consider contributory negligence or quantum.

Based on the decisions cited above, the claimant's case must be dismissed. Although the Defendant's brief of law includes a claim for costs pursuant to Rule 20(5), this issue was not argued before me. I am not satisfied that it is appropriate for me to award those costs in this case, and that application is denied. I make no award of costs.

Dated this 26th day of March, 1996, at the City of Prince George, Province of British Columbia.


B. L. Dollis, P.C.J.