File No: 09 0649
Registry: Victoria

In the Provincial Court of British Columbia

Civil Division

Between:

Anna Allen

Claimant

And:

The Corporation of the City of Victoria and Her Majesty the Queen in Right of the Province of British Columbia

Defendants

REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE WISHART

COPY

Counsel for the Claimant:	**N. Mason**
Counsel for the Defendant City of Victoria:	**C. Alexander, Articled Student, Agent for L.Woo**
Counsel for the Defendant Her Majesty the Queen:	**C. Drake**
Place of Hearing:	**Victoria, B.C.**
Date of Judgment:	**February 8, 2012**

J.C. WordAssist Ltd. (Victoria)
Suite 101 - 821 Burdett Avenue, Victoria, B.C. V8W 1B3
Phone 250-477-8080

[1] THE COURT: The following are my reasons for judgment after two days of evidence in relation to this matter.

[2] The claimant, Mrs. Allen, claims damages from the defendants in relation to injuries she suffered when she fell in a parkade on January 28th, 2009. The parkade is located in the 700 block of Broughton Street in Victoria, British Columbia, and I will refer to it as "the parkade".

[3] In these reasons I will refer to the claimant as "Mrs. Allen", the City of Victoria as "the City", and Her Majesty the Queen in Right of the Province of British Columbia as "the Province".

[4] The parties filed an agreed statement of facts at the outset of the trial. The Province admits that it was the owner of the parkade at all material times. The City admits that it leased the parkade from the Province and operated it as a public parking facility at all material times. A lease existed between the City and the Province in relation to this parkade and that lease forms part of the agreed statement of facts.

[5] As in all small claims matters, the onus is on the claimant, here Mrs. Allen, to prove her case on a balance of probabilities. She has based her claim in negligence and

pleads the *Occupiers Liability Act*.

[6] In order to succeed, Mrs. Allen must prove that she fell in the parkade, and that her fall was a result of the negligence of either, or both, the City and the Province. She must also prove that she suffered injuries and incurred expenses as a result of this fall for which she is entitled to compensation.

[7] Mrs. Allen testified as to what occurred on January 28th, 2009, and described her resulting injuries and how they impacted her life. She provided evidence of her related expenses.

[8] Dr. Pengilly, her general physician, also testified, and described her general health prior to January 28th, 2009, as well as her injuries after that date. He gave evidence as to the likely cause of health issues after the date of the fall and her prognosis in terms of ongoing difficulties.

[9] The City denies that it is liable on either the basis that there was no negligence at all, or if there was any, it was on the part of the Province, or if the City is at fault, Mrs. Allen was also negligent, and any award should be reduced accordingly.

[10] The City disputes that some of the injuries claimed were

the result of the fall and as well disputes some of the expenses on the same basis.

[11] The City called two witnesses, Victor Van den Booman, Manager of Parking Services, and John Hicks, Supervisor of Building and Event Services. Evidence was also received from Bill Jackson, Supervisor of Facility Maintenance, and his evidence was given by way of affidavit with the consent of all parties.

[12] The Province also denies liability on much the same basis as the City, except it asserts that if there was any negligence, it was on the part of the City.

[13] Three witnesses were called on behalf of the Province: Douglas Shepherd, Director of Portfolio Management at the relevant time; James Thompson, Project Manager for the Parkade Remediation in 2003, 2004; and Ron Spraggett, Facility Manager for the parkade in 2009.

[14] The following issues arise out of this litigation. Firstly, did Mrs. Allen trip and fall in the parkade, and where did that occur? If this is found to have occurred in the parkade, is the area where Mrs. Allen fell a hazard? If it is not a hazard, then there was no negligence, and there can be no liability on the part of either the City or the

Province. Thirdly, if it was a hazard, is the City or the Province responsible, or both? Fourthly, was Mrs. Allen also negligent and partly responsible? Fifth, what injuries were caused by the fall, assuming that liability is found, and what is the extent of those injuries? Sixth, the damages in relation to those injuries. Seven, what expenses are related to her injuries from the fall? Eight, expenses related to the litigation.

[15] With respect to that last issue, it was indicated from the parties that we would wait until I had rendered my decision before I heard further submissions with respect to any expenses related to the litigation.

[16] So the first issue is whether or not Mrs. Allen has proven that she, in fact, tripped and fell in the parkade.

[17] Having heard the evidence of Mrs. Allen, I have no doubt that she tripped and fell in the parkade as she described, and I have no doubt that it occurred in the area where Mrs. Allen described.

[18] This area can be described as a transition area between the top of a vehicle ramp and a level parking area between P3D and P2D. Mrs. Allen had parked her car on level P2D. The area where she parked her car was level, meaning that it was

not sloped.

[19] In returning to her car, Mrs. Allen took the elevator to P3D and walked up the vehicle ramp to P2D. The area where the ramp meets the level parking surface at P2D is at a right angle. It used to have a 90 degree edge. At some point that edge was filled in to smooth out the transition from where the ramp joins the level parking surface.

[20] This filled in transition area does not gradually blend into the ramp slope; rather, there is a lip that extends down the ramp along the wall and also out toward the area where cars travel. This transition area and lip is shown in the photos entered as Exhibit 10.

[21] At the relevant time the colour of this transition area that was filled in and the surrounding pavement was the same, with nothing to highlight the lip.

[22] Having found that Mrs. Allen tripped in this area of the parkade, the next issue is whether or not that area constitutes a hazard.

[23] Not every change in elevation in an area where people walk will constitute a hazard for which another party can be held liable. Whether or not something is a hazard is another way of asking whether appropriate care was taken in all of the

circumstances to see that a person will be reasonably safe in using the premises. This is also the way in which negligence is defined under the *Occupiers Liability Act* in s. 3.

[24] If I find that appropriate care was taken to see that users of the parkade would be reasonably safe, then the area where Mrs. Allen fell was not a hazard, and there was no negligence on the part of either defendant and her claim must be dismissed. If I find that appropriate care was not taken to ensure that the users of the parkade would be reasonably safe in relation to the area where Mrs. Allen fell, then it does constitute a hazard and one or more of the defendants was negligent.

[25] The fact that Mrs. Allen tripped and fell in this particular area of the parkade does not mean that it is automatically a hazard or that there was any negligence. The standard is one of reasonableness in that reasonable care is required to be taken to ensure that a user of the parkade is reasonably safe.

[26] The question of reasonableness is an objective one and will vary with the facts of each case. What is clear from the case law is that a standard of perfection is not imposed on those falling under the purview of the *Occupiers Liability Act*. The standard is therefore one of reasonableness, not

perfection. I rely on the following cases in support of that proposition: *Kayser* at paragraphs 13 and 19; *Delgado* at paragraph 20; *Coleman* at paragraph 13; *Fingerhut* at paragraph 10; and *Trinetti* at paragraph 12.

[27] A defendant in an action for negligence under the *Occupiers Liability Act* is not required to remove every possibility of danger. The responsibility is only to take that care as in all the circumstances of the case is reasonable.

[28] I have reviewed all of the cases provided by counsel on this issue, and the following factors in similar cases have been considered in determining whether or not something is a hazard; that is, was there a breach of a duty to use reasonable care in ensuring users of a premises are reasonably safe.

[29] Past history of any similar incidents may be considered. This is not determinative one way or the other. If the answer is yes, one needs to look at the specifics of that incident. If the answer is no, it does not mean that other people did not trip as it is possible that those incidents just were not reported. That proposition is referred in *Coleman* at paragraph 17 and *Snitzer* at paragraph 33.

[30] The court should consider the size of the potential hazard. Slight changes in grades have been found not to be a hazard and to be expected in many areas used by the public. I reference *Delgado* at paragraph 29 for that proposition.

[31] Something does not have to be concealed in order to constitute a hazard, and I reference *Snitzer* at paragraph 31.

[32] It is not necessary that the danger to be guarded against be an unusual one in order for it to constitute a hazard. The reference, *Trinetti* at paragraph 11. From that same paragraph, the court should consider that risks that are part of everyday life, including stairs and sidewalks, should not require special measures.

[33] With respect to variations in surface heights, users, particularly in public places, should not expect a complete matching of surfaces, and that principle is set out in *Gervais* at paragraph 34.

[34] The court should also consider the familiarity of the area by the particular user, whether or not there were any warning signs, and the ability to see the area. That last factor is in terms of not only ambient lighting but also whether or not the area of concern is different in colour from the surrounding area. That consideration is referenced both

in *Coleman* and in *Fingerhut* at paragraph 13.

[35] The court should also consider whether or not the area was previously marked to indicate a potential hazard. That is referenced in *Coleman* at paragraph 17.

[36] The court should consider whether the accident could have been avoided by a modicum of awareness on behalf of the plaintiff, as set out in *Delgado* at paragraph 25 and *Coleman* at paragraphs 13 and 14. However, this must be balanced with the consideration that an individual is not required, or expected, to walk with their eyes glued to the ground, as set out in *Coleman* at paragraph 18 and *Snitzer* at paragraph 36.

[37] Keeping those factors in mind, and after considering all of the evidence, I make the following finding of facts with respect to whether or not this area of the parkade was a hazard, and these factors are in no particular order. Much of the evidence was not controversial.

[38] Firstly, Mrs. Allen did not normally park in this parkade when she went downtown, but she had parked there before. Mrs. Allen was wearing shoes that she always wears, and they have a small heel. She had them fitted with an anti-skid sole.

[39] I accept Mrs. Allen's evidence that she was walking cautiously as she always does. Mrs. Allen was wearing her

prescription glasses although she had not had her eyes checked for a few years.

[40] The transition area was the same colour as the rest of the surrounding pavement. This was not disputed.

[41] There was nothing to outline the transition area. Again, this was not disputed. There were no signs warning of the transition area, also not disputed.

[42] Pedestrians were expected to walk on the ramp to get between level P3 and P2D, and to walk in the area where Mrs. Allen fell. Taking the elevator to P3 and walking the way that Mrs. Allen did is the most direct way to return to her vehicle where it was parked on P2D.

[43] There are no signs or markings on the pavement to show where pedestrians should walk. While there is lighting in the area, there is no lighting directly onto the transition area, and I accept the evidence of Mrs. Allen that the parkade is somewhat dimly lit. The transition area is roughly four feet long and about eight to 12 inches wide.

[44] As Mrs. Allen approached up the ramp along the wall, she would have encountered its width. The height of this transition fill area where it meets the wall is three and a half inches, and it tapers out to the edges, but ends in a lip

as opposed to a gradual blending in with the ramp grade.

[45] Mrs. Allen was aware that there would be an elevation change going from the ramp to P2D. There were no cracks, holes or loose pavement in the area where Mrs. Allen fell. There have not been any other reported incidents in this area, since it was modified in 2003 or 2004. Prior to that there was one report of a person tripping when the transition included a 90 degree edge, and that occurred in 1999.

[46] There are approximately 500 to 1200 users of the parkade per day. It was expected that users would include the elderly, and no staff person, with either the City or the Province, ever reported any problem or concern with this transition area since 2003 or 2004.

[47] In analyzing the above factors, and considering the case law that was provided to me, and the principles enunciated in that case law, I find that this transition area did constitute a hazard.

[48] I base this finding on the fact that this area was not expected, it was not a slight difference in surfaces, and there was nothing to delineate the lip of the transition area from the surrounding pavement.

[49] The fact that there were no other reports of any problems

in the preceding years does not affect my finding. There may have been incidents that were not reported, or there may not have been any.

[50] Either way, I find that reasonable care was not taken to ensure that users of the parkade were reasonably safe by failing to properly warn of this unexpected change in the pavement. I do not find that Mrs. Allen could have avoided tripping if she exercised a modicum of awareness on her part, as I find that she was exercising caution. Nor do I find that this is the type of uneven surfaces one ought to expect in a parking lot, or as would be the case when transitioning to or from sidewalk.

[51] I found the language in the case of *Kwasnie v. Penthouse Towers Ltd.* at paragraphs 15 and 16 to be most relevant. Reading from paragraph 15:

> To construct an obstacle such as the abutment in the direct path that one might take approaching a stairway would be to create a hazard at any time, but to have such an obstacle unmarked, unguarded and unlit in the dark would be a direct invitation for accidents. A person unfamiliar with the existence of the abutment could readily trip over it when exercising every reasonable caution.

[52] And further in paragraph 16:

> The owners of the building must have anticipated

> that as tenants came and went, and as visitors lawfully entered on the premises, the parking floors would be used frequently by many for the first time, . . . [who] would be unfamiliar with dangers that might exist. With the volume of traffic to be expected it would be reasonable to expect every reasonable precaution and warning against obstacles and hazards not readily distinguishable.

[53] The key in relation to this case is that this would not be an expected change in grade and I find that it is difficult to distinguish from the surrounding area. While perhaps not as great in height as the hazard in that case, or as dark an area as in that case, it remains it is unexpected and difficult to perceive.

[54] Having found that Mrs. Allen was walking in a cautious manner, I find no contributory negligence on her part.

[55] Having found that this transition area constitutes a hazard, I have necessarily found that there has been negligence, and that reasonable care was not taken to ensure that users of the parkade were reasonably safe in using the premises. The next issue is who was responsible, being the City, Province or both.

[56] In their submissions, the two defendants argued that if I found that the area in question constituted a hazard, that the other defendant was liable.

[57] Under the *Occupiers Liability Act* I have no hesitation in finding that the City falls within the definition of occupier. That section provides the definition as follows:

> 'occupier' means a person who
>
> (a) is in physical possession of premises, or
>
> (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,
>
> and, for [the purposes of] this Act, there may be more than one occupier of the same premises;

[58] Counsel for the City argued that the Province is also liable by it also being an occupier under s. 1 of the Act, or is brought within the scope of the Act under s. 6.

[59] I find that the Province is not an occupier under the definition in s. 1, as the Province did not have control over the persons allowed to enter the parkade. The stipulation in the lease between the City and the Province that the premises could only be used as a parkade, and some restrictions as to when that use could occur, is not enough to bring the Province within this definition.

[60] I then turn to s. 6 of the *Occupiers Liability Act*.

> If premises are occupied or used under a tenancy under which a landlord is responsible for the maintenance or repair of the premises, it is the

> duty of the landlord to show toward any person who, or whose property, may be on the premises the same care in respect of risks arising from failure on the landlord's part in carrying out the landlord's responsibility, as is required by this Act to be shown by an occupier of premises toward persons entering on or using the premises.

[61] Section 6 at paragraph (3):

> (3) For the purposes of this section
>
> (a) a landlord is not in default of the landlord's duty under subsection (1) unless the default would be actionable at the suit of the occupier,

[62] And:

> (b) nothing relieves a landlord of a duty the landlord may have apart from this section, and
>
> (c) obligations imposed by an enactment in respect of a tenancy are deemed to be imposed by the tenancy.

[63] If the Province falls under this section then it has the same duty of care as an occupier.

[64] Much of the submissions from the defendants centred around the responsibilities of the parties as it relates to the parkade. Section 6 contains the phrase "maintenance and repair of premises", and this phrase must be considered in conjunction with the responsibilities of the parties as set out in the lease agreement, and in particular clause 5(c) of the lease agreement.

[65] Clause 5 starts with "the tenant covenants with the landlord", and (c) is as follows: [as read in]

> To repair and maintain the parkade save and except only for reasonable wear and tear, structural repair, damage caused by the misuse or negligence of the landlord, its servants and agents, damage by fire, lightening and tempest or other casualty against which the landlord is insured.

[66] Counsel on behalf of the City argue that the transition area in question is structural in nature and is therefore the responsibility of the Province.

[67] The evidence was undisputed that this transition area was constructed by the Province as part of the parkade surface remediation in 2003 or 2004. The City says that its responsibilities, as set out in the lease, and in practice, include maintaining the lighting, cleaning the elevators and washrooms daily, removing waste at regular intervals and repairing and maintaining the parkade except for reasonable wear and tear and structural repair.

[68] It was the evidence of the witnesses Mr. Van den Boomen, Mr. Hicks, Mr. Jackson, that City staff were completing the required janitorial and maintenance duties as required under the lease.

[69] Counsel on behalf of the Province argue that the

transitional area in the parkade in question is not a structural repair, and therefore not the responsibility of the Province under the lease and therefore the Province is not brought within s. 6 of the *Occupiers Liability Act*.

[70] Ms. Drake referred me to a number of cases in which the phrase "structural repair" has been considered. She quite correctly pointed out that there is no juridical definition of what constitutes a structural repair, but submitted that it must be one that affects the structural integrity of the premises. She submitted that as the transitional area does not affect the structural integrity of the premises, it is not a structural repair.

[71] In my view I do not need to determine whether it has to involve the structural integrity of the premises to constitute a structural repair under the lease. This, to me, seems to be complicating the issue. The fact that the Province was responsible for constructing this transitional in 2003 or 2004 creates a duty of care owed to users of the parkade and brings the Province within the scope of s. 6 of the *Occupiers Liability Act*.

[72] The fact that the Province, in fact, constructed that area made it a structural repair. The fact that the Province hired professional engineers and had building permits from the

City does not change this fact. The Province was ultimately responsible for constructing this area of the parkade, and had a duty to ensure that it was done in a manner that provided for the reasonable safety of users of the parkade.

[73] Having found the Province liable under the *Occupiers Liability Act* I now turn to the issue of any liability on behalf of the City.

[74] The City was the user of the parkade and employees and contractors were there on a daily basis. The City ought to have realized that this area was a potential hazard, and either taken steps to bring it to the attention of users, or to the attention of the Province for it to deal with.

[75] I therefore find the Province in constructing this transitional area in this manner to be 80 percent liable and the City to be 20 percent liable for failing to bring the hazard to the attention of users or the Province.

[76] Turning next to the issue of damages. Mrs. Allen testified as to her injuries. Her general physician, Dr. Pengilly also testified about her health pre and post-fall and her prognosis.

[77] As stated earlier, Mrs. Allen is required to prove on a balance of probabilities that her injuries were the result of

her fall at the parkade on January 28th, 2009. The injuries complained of are as follow: wound to her face, mainly her upper lip; cardiac dysrhythmia, a transient episode of palpitations; sore neck; cut and bruising to the left knee; and, pain in the left thumb.

[78] I find that Mrs. Allen has proven that the injuries to her face, knee, and left thumb, and soreness to her neck were the result of her fall in the parkade.

[79] Although I have some concerns that the episode of cardiac dysrhythmia that she experienced two weeks after the fall is related, as she had a similar episode a few months prior to this, the evidence of Dr. Pengilly is that this was probably as a result of the trauma from January 28th, 2009.

[80] On the basis of his evidence, I find that she has proven, on a balance of probabilities, that that episode of cardiac dysrhythmia was a result of the fall. In any event, this was not an ongoing health concern and resolved with medication.

[81] Other than her left wrist, I find that the other injuries resolved within approximately one month. Although Mrs. Allen reported ongoing rough skin on her upper lip, this was something that she had received treatment for prior to her fall, and I therefore find it is not compensable.

[82] Dr. Pengilly testified that Mrs. Allen suffers from arthritis and this contributes to the ongoing pain that she suffers in the area of her left thumb. He opined that without the fall this arthritis likely would have remained asymptomatic.

[83] Mrs. Allen testified that she continues to experience pain in her left thumb area, especially upon use. She has difficulty turning doorknobs and opening jars. She attended a hand therapy clinic for some time which provided her with some relief. She also uses a splint, principally at night.

[84] Based on the evidence of Mrs. Allen and Dr. Pengilly, I find that Mrs. Allen continues to suffer pain in her left thumb/wrist area and that this injury is a result of her fall on January 28th of 2009.

[85] I have reviewed the case law provided by counsel with respect to damages awarded in other cases with similar injuries. The amount of the damages varies with the severity of the injury, the length of time that it lasts, and the effect of the injury on the individual. Some of the cases address the issue of injuries in older persons and the need to balance life expectancy with the fact that any decrease in activity is more serious in the elderly. The range of awards in the cases provided to me is $1500 to $75,000.

[86] In this case I find that although Mrs. Allen saw some improvement in her left thumb/wrist area after attending the hand clinic, that this continues to be a painful injury for her and limits some of her activities. She gave up most of her volunteer activities after the fall and was fearful of going out as much as she did before. She also continues to experience pain in the left thumb and wrist area and has difficulty with household chores.

[87] I accept the evidence of Dr. Pengilly that this is unlikely to change. The fact that this injury is unlikely to resolve distinguishes this case from any of the ones provided by counsel for the defendants. At the same time, this injury is less severe than in some of the cases provided by counsel for Mrs. Allen.

[88] After considering all of the cases and the nature of Mrs. Allen's injuries the damages, what we typically refer to as pain and suffering, I award at $16,000. The Province is liable for 80 percent or 12,800 and the City for 20 percent or 3,200.

[89] Turning next to special damages, special damages refers to those expenses incurred by Mrs. Allen as a result of her injuries. The expenses are set out in Exhibit 11. Some of those expenses were withdrawn by the claimant. That included

prescriptions for the cardiac medication that was not related to the incident that she suffered close in time to her fall.

[90] So with respect to prescriptions, the initial amount claimed was $179.59 and subtracting those three prescriptions, the amount that I am allowing for prescriptions is $97.93.

[91] With respect to the heading of replacement of eyeglasses, there is a claim for an eye exam of $50.00, replacement of frame and lenses for $686.00 and a single lens in the amount of $128.00. Mrs. Allen could not recall what the single lens of $128.00 was actually for, and on that basis I am not allowing that portion of the claim.

[92] The defendant Province disputes the cost of the eye exam in that she had not had one for some time and needed to have one, in any event.

[93] While that may be the case, that expense was directly related to the fact that her glasses were damaged in the fall and that she could not get a new set of glasses without having that examination, and I will therefore allow the $50.00 for that expense.

[94] So subtracting the amount of $128.00 under that heading, the total allowed for replacement of eyeglasses is $736.00.

[95] Under Island Hand Therapy Clinic, Mrs. Allen has claimed the cost for all of the visits, including costs of a splint and parking costs, for a total of $532.75. Both defendants submitted that the hand therapy costs should be reduced, that she had treatment for both hands during at least some of the initial visits.

[96] It is clear from the hand therapist reports that Mrs. Allen did receive some treatment in relation to her right hand, although she did not specifically recall this, but it is also clear that the focus was on the left hand. There is no evidence before me that the costs for any of those visits would have been less had she only attended for one hand as opposed to both. On that basis, I am allowing all of the amounts set out under that heading for a total of $532.75.

[97] Under miscellaneous special damages, there is a claim for development of photos relating to her injuries in the amount of $13.30. The amount on the receipt is actually $13.13. So that will be the amount allowed for that expense.

[98] There is also an amount for a thumb splint, separate from the one that was claimed under the hand therapy expenses, and that is in the amount of $43.32 and that expense is also allowed.

[99] There is a gardening maintenance expense of $210.00. Both defendants disputed that this was related to any injuries resulting from the fall, and the evidence of Mrs. Allen was that gardening became difficult for her, mainly as a result of pain in her lower back. The evidence satisfies me that this was a pre-existing injury, as set out in the medical records, and that as that was the main reason for her inability to continue with the gardening, I am not going to allow that expense. So the amount of $210.00 is not allowed.

[100] Mrs. Allen is claiming mileage for attending all of the various appointments in relation to her injuries for a total of 505 kilometres at 30 cents a kilometre, for $151.50.

[101] Counsel for the Province disputed one entry, and that was in relation to attending at Victoria General Hospital, as Mrs. Allen could not recall what that attendance was related to, and on that basis I agree she had not proven that expense is related to her injuries from this fall, and I will deduct the amount of $6.00 from the mileage. Exhibit 11 includes a further parking cost of $1.25, and counsel for Mrs. Allen withdrew that expense during the course of the trial.

[102] So the total damages claimed of $1,995.71, the total that I am allowing, which includes those that have been withdrawn by the claimant and those that I have not allowed,

comes to $1,568.63.

[103] The Province is responsible for 80 percent of those expenses, which totals $1,254.90 and the City is responsible for 20 percent, which totals $313.73.

[104] The total amount of the award, including the damages for pain and suffering, and the special expenses is $17,568.63. Of that, the Province is liable for $14,054.90 and the City $3,513.73.

[105] Having provided those reasons, I will now hear further from counsel with respect to submissions on expenses related to the litigation.

[SUBMISSIONS NOT TRANSCRIBED]

[106] THE COURT: I am going to deal firstly with the expenses of Dr. Pengilly, and in relation to that deal first with the trial fees for that.

[107] I find that all of those fees are reasonable in terms of both that consultation on December the 14th, the half day of testimony and the court preparation fee, so that totals $1,849.00. So these fees are all allowed.

[108] Argument was made by counsel for the City that that amount should be paid by the defendant Province only, as it

was the defendant Province that required, requested that Dr. Pengilly attend for cross-examination. Counsel for the City indicated that the City was prepared to proceed on the basis of the report, or reports, that were filed by Dr. Pengilly.

[109] There is nothing to contradict that and on that basis I am ordering that the Province pay the entirety of that amount, which is $1,849.00.

[110] With respect to the other fees that related to Dr. Pengilly, given the basis upon which the first trial date was adjourned, and that was the late request for Dr. Pengilly to attend for cross-examination, I find that all of the fees in relation to Dr. Pengilly are reasonable, except for the $60.00 fee for the production of documents from records.

[111] As I understand counsel's submission, that related to the two-page handwritten notes of Mrs. Allen, and that fee certainly does not seem reasonable. I accept the submission of counsel for the Province that that should be reduced to the rate for transferring a medical record, plus photocopying the two pages, for a total of $34.15.

[112] So other than that adjustment, the balance of the fees related to Dr. Pengilly are allowed, and that includes the $900.00 for the medical legal report; $110.00 for the

copying of records; $74.70 fee for the phone consultation; and as I said, the $60.00 is now reduced to $34.15; $125.00 for a phone consultation; and $100.00 for an office meeting.

[113] So not including the amount that I have allocated to his attendance at trial, those fees total $1,343.85. That, and the balance of the fees I am going to go through, will be split 80 percent payable by the Province and 20 percent payable by the City.

[114] So dealing with the balance of the non-taxable disbursements, the filing fee of $156.00 is allowed. As is the Care Point Medical Centre fee of $131.50.

[115] With respect to the Island Hand therapy expenses, one of $80.00, and a second of $100.00, I agree that those amounts should be reduced. There is very little information in the invoice as to what that pertains to, although we know that records were provided, so they were certainly photocopied, and the file transferred to counsel upon their request. So I will allow those amounts again as proposed by counsel for the Province, so the $80 is reduced to $37.50 and the $100.00 is reduced to $32.70.

[116] So the total non-taxable disbursements, which I am allowing comes to $1,701.55 with 80 percent payable by the

Province, which equals $1,361.24 and 20 percent payable by the City, which is $340.31.

[117] Dealing with the taxable disbursements, submissions were made by the two defendants in relation to allowing for expenses such as photocopying and fax charges, couriers in relation to a small claims action.

[118] The only rule that relates to these types of expenses is Rule 22, which just refers to any other reasonable charges or expenses that the judge or registrar considers directly relate to the conduct of the proceedings.

[119] There are some authorities that say that these items should not be recoverable in Small Claims Court, as the idea is to keep the litigation costs down and keep matters simple and straightforward. There is also reference in that same case, the *Nittel* case, that it may depend on the size of litigation.

[120] I would not call this a straightforward small claims matter, personal injury cases rarely are, and there was a significant amount of documents presented to the court during the course of this litigation. In my view, that distinguishes this case from that of the *Nittel* matter, and I will allow the costs for photocopying, except at the reduced rate of 25 cents

per copy as opposed to the 30 cents that was claimed.

[121] The idea of costs in either Supreme Court or Small Claims Court is not to reimburse the claimant for their out of pocket expenses, but for those costs that are reasonable in relation to the conduct of the litigation. So the amount that was claimed for photocopying was $316.80. That is reduced to $264.00 plus the HST.

[122] The next item I will deal with, the fax charges of $36.00. That is set out in the affidavit of Ms. Alexander to relate to $2.00 per outgoing fax. There is no further information as to what was faxed and when, so I do not have sufficient information to determine that those are, in fact, reasonable. I have no idea if these are documents that could have been scanned and emailed or what they were and where they went, so I am not going to allow that cost.

[123] Similarly with the courier, again I do not have sufficient information as to what documents were couriered, where and why, and on that basis I am not satisfied that they were reasonable, and those costs in the amount of $22.50 are not allowed.

[124] Again, the agent fees of $51.00, again I do not have sufficient information to determine what the use was for the

agents, I am assuming it was to file the documents at the courthouse but again, I do not have that information before me. Those fees are not allowed.

[125] With respect to the postage, I agree with the submissions of counsel for the Province that the only documents that required registered mail were the two court documents, and I am going to reduce that amount of $103.88 to one of $20.00.

[126] So the two expenses that I have allowed under taxable disbursements, then, are the photocopies at $264.00 and the postage of $20.00, for a total on the taxable disbursements of $284.00 plus HST, which equals $318.08.

[127] Again, the Province is responsible for 80 percent of that, so before HST, that's $227.20, with HST $254.46. The City is responsible for 20 percent, which before HST $56.80 and after the HST, $63.62.

[128] So the total of those costs, then, for the Province is the $1,849.00 for the fees of Dr. Pengilly which related to the trial, the share of the other non-taxable disbursements of $1,361.24 and the 80 percent share of the taxable disbursements, including HST $254.46, for a total payable by the Province of $3,464.70. With respect to the City, the

amount required to be paid is the 20 percent of the non-taxable, $340.31 and the 20 percent including HST of taxable, $63.62 for a total of $403.93.

[129] So those amounts will be obviously paid in addition to the order that I made this morning. If, after counsel get back to their offices and realize that I have made a mistake in my math, and you all agree on that, you can attend at the Registry and they will adjust the order accordingly, but those are the figures that I came up with, given those deductions.

(REASONS CONCLUDED)