IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lennox v. New Westminster (City),* 2012 BCSC 410

Date: 20120321
Docket: S065390
Registry: Vancouver

Between:

Eileen Lennox

Plaintiff

And

The City of New Westminster

Defendant

Before: The Honourable Mr. Justice Fitch

Reasons for Judgment

Counsel for the Plaintiff:	S.E. Gibson
Counsel for the Defendant:	C.L. Forth
Place and Date of Trial:	Vancouver, B.C. December 13, 14, 2011 and January 12, 2012
Place and Date of Judgment:	Vancouver, B.C. March 21, 2012

A. Introduction

[1] On May 30, 2006 at about 1:30 p.m. the plaintiff, Eileen Lennox, tripped over an elevation difference between sidewalk panels in front of 451 Fader Street in the City of New Westminster. Ms. Lennox fractured and dislocated her left shoulder, extensively bruised her left hip and suffered facial injuries in the ensuing fall. She was 69 years of age at the time of the trip and fall. Unfortunately, she died on November 16, 2011 after a brief battle with an aggressive form of cancer.

[2] The narrow issue in this case is whether the City of New Westminster was negligent in not repairing the sidewalk in front of 451 Fader Street before the plaintiff's fall in accordance with its unwritten or "customer service" policy. Under this unwritten policy the City would make repairs in response to specific complaints about sidewalk faults, even when the faults complained about were insufficient in size to trigger repair by the City under its written Policy Guideline on the Inspection and Maintenance of City Sidewalks (the "Sidewalk Policy").

[3] Among the questions to be decided in this action is whether a specific complaint was made to the City about the sidewalk fault in front of 451 Fader Street before the plaintiff's fall such as to trigger application of the unwritten policy. The evidence of Thomas Bolderson and Barry Stephenson, both of whom lived on the 400 block of Fader Street, regarding complaints they made to the City in 2005 before the plaintiff's fall, is particularly germane to the resolution of this question. If a specific complaint was made to the City in 2005 about a sidewalk fault at the location of the trip and fall, it remains to be determined whether the City, in all the circumstances of this case, is liable in negligence for not effecting repairs in front of 451 Fader Street before the fall occurred.

[4] At the end of the day, both parties were content that this litigation be resolved by way of Summary Trial pursuant to Rule 9-7. I, too, am satisfied that the record before me, as it was developed on this application, permits the making of necessary factual findings and the just determination of the issues that arise in this case.

B. Detailed Overview

[5] At the time of the fall, the plaintiff was wearing closed, flat heeled shoes and her prescription eyewear. She was walking north on the west side of Fader Street after attending an appointment at the Royal Columbian Hospital in New Westminster. Her car was parked at the curb on Fader Street near the location of the trip. As Ms. Lennox approached the front of 451 Fader, her right foot caught on the height differential between two adjacent concrete sidewalk panels. She fell on her left side causing the injuries described above. A large tree located on the boulevard between the sidewalk and curb shaded the area of the sidewalk where the trip occurred.

[6] The City of New Westminster has approximately 400 kilometers of sidewalks. Most of the streets in the City are lined with trees.

[7] Prior to the development of its written Sidewalk Policy, the City had an unwritten policy of repairing sidewalks in response to public complaints but did not conduct any scheduled sidewalk inspections.

[8] On January 6, 1997, City council formally approved the written Sidewalk Policy. The stated purpose of the policy is to provide the Engineering Operations Department with an assessment of the condition of the sidewalks within the City in order to identify and repair any defects or hazards on the sidewalks and to establish repair priorities. Pursuant to this written policy, all sidewalks are designated as Zone A or Zone B, based on the volume and type of pedestrian traffic in that location. Sidewalks adjacent to higher traffic commercial, school and hospital vicinities are designated Zone A sidewalks and are inspected annually. Zone B sidewalks are generally found in residential and industrial areas and are inspected once every three years. The sidewalk upon which the plaintiff fell is a Zone B sidewalk. As such, the City's Sidewalk Policy requires that it be inspected once every three years.

[9] All sidewalk defects or hazards identified on inspection are classified on a two level rating scale. A vertical differential between adjacent sidewalk panels that is between 10 and 25 mm. in height is classified as a Level 1 fault or defect. Level 2

defects are those that exceed 25 mm. in height. Ten millimetres was chosen as the starting point for recording defects because there is a normal variance in sidewalk construction of up to 10 mm. Height differentials between sidewalk panels up to 10 mm. are, as a result, not considered defects under the written policy. Level 1 defects are classified as “serviceable" under the Sidewalk Policy. The term "serviceable" was meant to reflect the City's determination that a sidewalk with a Level 1 defect can be used safely by a pedestrian with reasonable care and attention. Level 2 defects are classified as “requiring immediate repair/not serviceable”. Level 2 defects identified during a scheduled sidewalk inspection are marked for public notice, usually by spray painting the defect with brightly coloured paint, and scheduled for immediate repair. Level 1 defects are documented, reviewed on the next scheduled inspection and placed on the list for repair as resources allow.

[10] Sidewalk inspections are carried out by City employees who are trained to visually check for trip hazards, including height differences between sidewalk panels. Where a crack, separation or differential is identified, the defect is measured at its widest, highest or deepest point using a specially designed tool to the end of determining whether it is a Level 1 or Level 2 fault. An inspection form is filled out recording the date of the inspection, the street name and the address that is closest to the sidewalk defect identified. The inspector indicates on the form whether the defect is a Level 1 or Level 2 fault.

[11] Additionally, the inspector is required to rate the overall condition of the sidewalk on each block on a scale of 1 to 10, with 1 being a sidewalk that is new or in excellent condition with a projected lifespan of 50 or more years, and 10 being an extensively patched sidewalk which should be replaced within a year. Among the factors an inspector will consider in assigning a 1 to 10 rating to the overall condition of the sidewalk on a block are: the age of the sidewalk as evidenced by cracks and uneven panels, the presence of trees nearby and the existence of or potential for sidewalk damage related to root growth, the volume of pedestrian traffic on the block being rated, and whether the area is scheduled for future development.

[12] Sidewalk inspection forms are collected at the end of each day by the Streets Supervisor who notes the location of Level 2 faults and makes arrangements for a City work crew to attend at that location as soon as possible to repair it. All Level 2 faults identified during a sidewalk inspection are repaired. If a crew is at a particular location repairing a Level 2 fault and there is a Level 1 fault in an adjacent sidewalk panel, they will often undertake repairs to the Level I fault at the same time because it is cost effective to do so. Repairing a height differential between sidewalk panels can involve grinding the higher panel down or levelling the difference by filling it in with asphalt. The inspection form contains columns for recording of the type of repair undertaken and the date upon which those repairs were completed.

[13] The sidewalk upon which the plaintiff fell was inspected on February 3, 2005, about 16 months prior to her fall. The Fader Street Inspection Form indicates that 3 Level 1 faults were identified on the west side of the 400 block of Fader Street including a Level 1 fault in front of 451 Fader. Five Level 1 faults were identified on the east side of the 400 block of Fader, including one in front of 450 Fader and one in front of 452 Fader. As no Level 2 faults were identified on the block, no immediate repairs were required to be undertaken pursuant to the written Sidewalk Policy.

[14] Thomas Bolderson resides at 450 Fader. He has lived on the street since 1929. Barry Stephenson resides at 448 Fader. He has lived there for about 50 years. As noted above, Mr. Bolderson and Mr. Stephenson both provided evidence on this summary trial relating to complaints each of them made to the City in 2005 about the negative impact the roots of cherry trees planted along the boulevard on Fader Street were having on the condition of the sidewalks on their block.

[15] The east and west sides of the 400 block of Fader Street were both assigned an overall rating of 4 out of 10 during the February, 2005 inspection. The predicted lifespan of a sidewalk in that condition is 20 to 30 years. On the next regularly scheduled inspection in the spring of 2008, the condition of the sidewalk in the 400 block of Fader Street was rated as 5 out of 10 with a predicted lifespan of 15 to 20 years.

[16] Between January 1, 2005 and December 31, 2006, 531 Level 1 faults were identified through sidewalks inspections conducted by City staff.

[17] It is common ground that between the February 3, 2005 sidewalk inspection and June 8, 2006, when the City first received notice of the plaintiff's fall, no sidewalk repairs were undertaken in front of 451 Fader Street.

[18] The plaintiff does not, at this stage of the proceeding, take issue with the appropriateness of the City's written Sidewalk Policy or its operational implementation. I have, nevertheless, set out the terms of the written Sidewalk Policy in some detail as it provides important context in assessing the plaintiff's claim that the City was negligent in failing to implement its unwritten policy that citizen complaints about specific Level 1 sidewalk faults be addressed through timely repair.

[19] The written Sidewalk Policy provides that if any defects or hazards on sidewalks are reported outside of a regularly scheduled inspection, either by a member of the public or an employee of the City, the reported defect or hazard shall be inspected as soon as possible and repaired in accordance with the above classifications. The language of the written Sidewalk Policy suggests that repairs would only be effected in response to a citizen complaint if, upon inspection, the defect motivating the complaint was determined to be a Level 2 fault.

[20] Despite the language of the written Sidewalk Policy, the evidence the City put before me on this summary trial establishes the existence of an unwritten policy whereby the City undertakes the repair of specific Level 1 sidewalk defects about which public complaint is made. Greig Dodgshon, the City of New Westminster's Streets Supervisor, explained this unwritten policy in an affidavit sworn November 13, 2009 and filed for use on this summary trial:

> In addition to performing repairs of all Level 2 faults following the Sidewalk Inspection, all sidewalk faults for which the City receives a complaint, regardless of Level and including Level 1 faults, are re-inspected and repaired using funds from the Operating Budget. This is done in order to provide a basic level of customer service to the taxpayers of the City, to promote citizens calling in because they know something will be done, and to

> ensure that **the particular fault complained of** does not result in future problems [emphasis added].

[21] A similar explanation of the unwritten policy was provided by City employee Stephen Day, who was instrumental in the development of the written Sidewalk Policy. In an affidavit sworn November 16, 2009, Mr. Day explained the unwritten sidewalk repair policy of the City in language virtually identical to that used by Mr Dodgshon:

> In addition to the sidewalk defects that are discovered and recorded during the Sidewalk Inspection pursuant to the Sidewalk Policy, any complaints of sidewalk defects received by the City are inspected by a member of the Streets Branch of the Engineering Operations Department as soon as possible, are marked for public notice by spray painting them with a brightly [sic] colour, and scheduled for immediate repair, regardless of the differential.

[22] This affidavit evidence was given before the City learned that complaints about the condition of the sidewalks on Fader Street had been made by Mr. Bolderson and Mr. Stephenson in 2005, prior to the plaintiff's fall. In subsequent affidavits tended on behalf of the City, it would appear that efforts were made to re-characterize the unwritten policy in such a way as to suggest that only complaints about defects found to constitute Level 2 faults would be repaired. I note that no explanation was given for these two different versions of what the unwritten policy of the City requires. Fortunately, counsel for the City quite properly conceded that if a specific complaint was made about a sidewalk defect at the location of the plaintiff's fall, the City, acting pursuant to its unwritten policy, would have repaired that defect even if it was only a Level I fault. In light of this concession, it is unnecessary for me to say more about this issue.

[23] Counsel for the plaintiff also contends that City officials, after learning that complaint had been made by residents of Fader Street in 2005 about the state of repair of the sidewalks on the 400 block, sought to re-characterize the unwritten policy by emphasizing, for the first time, that in order to trigger its application the complaint had to relate to a specific area on the sidewalk, such as in front of a particular address. I do not accept the contention of the plaintiff's counsel on this point. As I read the evidence tendered on behalf of the City, the point has

consistently been made, both before and after it learned of the complaints, that repairs pursuant to the unwritten sidewalk policy are undertaken only when a "particular" fault is identified at a specific location. It only stands to reason that the City, having already conducted its regularly scheduled inspection and repair of Level 2 faults, would require that complaints about particular sidewalk defects be specific enough to enable a further targeted inspection and repair.

[24] As noted above, the City learned of the plaintiff's fall on or about June 8, 2006. Consistent with his normal practice, the Streets Supervisor, Mr. Dodgshon, attended at the scene of the fall and measured the differential between the sidewalk panels in front of 451 Fader Street. The fault at its highest point measured between 23 and 24 mm. Such a defect is classified as a Level 1 fault under the written Sidewalk Policy. The plaintiff does not take issue in this proceeding with the City's evidence that the differential that caused the fall was a Level 1 fault. As is its practice, the City repaired the Level 1 fault in front of 451 Fader after the plaintiff's fall.

C. History of the Proceeding

[25] The Writ and Statement of Claim were filed on August 22, 2006.

[26] On November 13, 2009, the City applied under old Rule 18A for dismissal of the plaintiff's trip and fall action by way of summary trial. The key factual issue for determination at that time was whether the sidewalk defect in front of 451 Fader Street was a Level 1 or Level 2 defect. In light of the conflicting body of affidavit evidence on this issue, Dickson J. concluded that the Rule 18A application should be dismissed because the matter was not suitable for determination by way of summary trial.

[27] As noted above, the contentious factual issue before Dickson J. is not before me. Counsel for the plaintiff expressly abandoned that part of the action which rested on an alleged breach of the City's written Sidewalk Policy and, specifically, on the contention that a Level 2 sidewalk fault existed in front of 451 Fader Street when the trip and fall occurred. The plaintiff now rests her negligence claim solely on the

failure of the City to repair the sidewalk defect in front of 451 Fader Street, as required by its unwritten policy, after receiving complaints from Fader Street residents about the condition of the sidewalk in areas along that block. As the existence of these complaints was not known at the time of summary trial application before Dickson J., issues relating to compliance by the City with its unwritten "customer service" policy were not argued at that time. I make these observations to highlight that the issue before me (and the suitability of this action for determination by way of summary trial) is very different from the issue that was before Dickson J. in 2009.

[28] Following dismissal of the summary trial application, the action proceeded to a six day jury trial in April, 2010. Very shortly before the trial commenced, counsel for the plaintiff learned of the pre-trip and fall complaints made to the City by Mr. Bolderson and Mr. Stephenson. Both were called at trial to demonstrate the City's failure to comply with its unwritten sidewalk repair policy when complaints are received from members of the public.

[29] The jury found the City not liable and the plaintiff's action was dismissed.

[30] The plaintiff appealed alleging misdirection in the question the trial judge submitted for the jury's consideration. The Court of Appeal allowed the appeal and ordered a new trial on grounds that the question asked of the jury may have erroneously caused them to conclude that the plaintiff had to establish negligence on the part of the City in carrying out their operational responsibilities under both, as opposed to either of the written and unwritten policies: 2011 BCCA 182.

[31] The City's subsequent application for leave to appeal to the Supreme Court of Canada was dismissed: [2011] S.C.C.A. No. 257.

[32] This matter came before me on the plaintiff's application under Rule 9-7 for an order that the City was negligent in carrying out its operational responsibilities under the unwritten sidewalk policy. In the course of this summary trial application, it was disclosed that if the plaintiff was unsuccessful in fixing the City with liability for

negligence in failing to carry out its unwritten sidewalk policy, her counsel would seek to proceed with a full trial on the question of whether the City was negligent in carrying out its operational responsibilities in accordance with the written Sidewalk Policy. I expressed a disinclination to approach the litigation in slices and suggested that the proper and most cost-effective course would be to have both issues determined at the same time and by way of a full trial. At this point, counsel for the plaintiff determined to abandon the action insofar as it encompassed an allegation that the City was negligent in carrying out its operational responsibilities pursuant to the written Sidewalk Policy. As noted above, both parties agree that the sole question before me - whether the City was negligent in carrying out its operational responsibilities under the unwritten sidewalk policy - could fairly and properly be determined by way of summary trial procedure.

D. The Evidence Regarding Compliance by the City with its Unwritten Sidewalk Policy

[33] To establish that the City was negligent in failing to carry out its operational responsibilities under the unwritten sidewalk policy, the plaintiff adduced the evidence given by Mr. Bolderson and Mr. Stephenson on the first trial as well as affidavits both of them swore after the Court of Appeal's judgment ordering a new trial. Both counsel agreed that in order to do justice in the case, the Court should permit cross-examination of Mr. Bolderson on the question of whether a specific complaint was made by him to the City before the plaintiff's fall about state of repair of the sidewalk in front of 451 Fader Street. Cross examination of Mr. Bolderson took place before me on January 12, 2012. On the same day, I heard *viva voce* evidence from the City's Streets Supervisor, Greig Dodgshon, on the substance, scope and operational implementation of the unwritten sidewalk policy and how complaints are managed as between the Parks Department and the Street Branch of the City.

[34] What follows is a summary of the evidence relevant to one of the questions I must decide - whether a specific complaint was made to the City about the sidewalk fault in front of 451 Fader before the plaintiff's trip and fall.

(a) Thomas Bolderson

[35] Mr. Bolderson testified on the first trial that he lived at 450 Fader Street, “right across the street” from 451 Fader. Flowering cherry trees grow on the grass boulevard on the east and west sides of Fader Street in the 400 block. Mr. Bolderson testified that one of these trees is directly in front of his property and another is in front of 451 Fader. He testified that in 2005 he contacted the City about five times to complain that the sidewalk was being heaved up by root growth of the cherry trees. He reported his concerns about the sidewalk because he had seen people tripping and feared that “somebody's going to get hurt sooner or later ...” He was eventually referred to the Parks Board who sent one of their employees out to investigate his complaint. Mr. Bolderson told the Parks Board employee that there were other areas along the same block where the sidewalk was similarly affected by root growth where the cherry trees were planted. The Parks Board employee said that someone from the City would be out to look at the problem but Mr. Bolderson testified that he did not see anyone for quite some time. He testified that the City eventually attempted to repair the sidewalk fault in front of his house - first by using asphalt and then, a couple of years later, by grinding down the uneven panels. City records reflect that the grinding occurred on May 27, 2008, following a regularly scheduled sidewalk inspection conducted earlier that year which then identified a Level 2 fault in front of Mr. Bolderson’s home. In cross-examination, Mr. Bolderson agreed that he never specifically complained to the City about the sidewalk in front of 451 Fader Street. Further, he acknowledged that he does not walk on the other side of Fader very often.

[36] In his subsequent affidavit sworn May 6, 2011, Mr. Bolderson deposed that he pointed out to the Parks Board employee other areas on the block, “including directly across the street” that he was concerned about because of the obvious impact tree root growth was having on the condition of the sidewalks.

[37] Evidence was adduced on the summary trial before me which establishes that Mr. Bolderson does not live directly across the street from 451 Fader Street. Rather, he lives directly across the street from 449 Fader. A large cherry tree is planted on

the boulevard in front of 449 Fader almost directly across from the one that grows on the boulevard in front of Mr. Bolderson's property. Another cherry tree is located in front of 451 Fader. As will become apparent, however, in light of the *viva voce* evidence given by Mr. Bolderson before me on this summary trial, set out below, the evidence as to what residential address was directly across the street from Mr. Bolderson's house takes on less significance.

[38] Mr. Bolderson testified before me that he called the City about five times over a five week period in 2005. He reiterated that he phoned the City about the state of repair of the sidewalk outside his residence but also told them that there were other places along the block where the cherry trees were causing the sidewalk panels to heave. When the Parks Board employee attended at Mr. Bolderson's residence in response to his complaint, the two of them went outside to look at the sidewalk in front of his residence. While they were out there, Mr. Bolderson pointed from his side of the street to cherry trees at four different locations on Fader Street - two across the road, one next door to him and one down the street. He did so in order to direct the attention of the Parks Board employee to the locations at which similar sidewalk problems were occurring, or had the potential to occur, as a consequence of tree root growth. On the evidence before me, it is clear that when Mr. Bolderson pointed to the two locations across the street, he was pointing to the cherry trees located in front of 449 and 451 Fader Street.

[39] It is also clear that Mr. Bolderson, in identifying these four locations, was not suggesting that there were sidewalk faults at each of these locations. Rather, he was pointing out both existing sidewalk faults and areas where the potential for future sidewalk damage was apparent because tree roots were coming up through the ground. For example, he acknowledged that when the Parks Board employee attended in response to his complaint in 2005, there was no sidewalk fault in front of 449 Fader. He identified this location as a potential problem area given his view that the cherry tree roots would, over time, inevitably heave the sidewalk panels at that location too.

[40] Mr. Bolderson also confirmed in cross-examination before me that the City eventually responded to his complaint sometime in 2006 by putting asphalt between the sidewalk panels in front of his house to reduce the size of the lip. There are no records before me documenting Mr. Bolderson's complaint, the completion of the repair or whether this repair was undertaken before or after the plaintiff's fall on May 30, 2006. I would note, however, that the only inference to be drawn from the fact that repairs were undertaken is that the Parks Board communicated Mr. Bolderson's concern about the sidewalk in front of his house to the City's Street Branch.

(b) Barry Stephenson

[41] Mr. Stephenson resides at 448 Fader Street, across the street from and two houses north of 451 Fader. He testified on the first trial that cherry trees were planted on both sides of the block about 20 years ago. There are seven cherry trees on each side of the 400 block. About five years after they were planted, problems began to develop as tree branches were growing over power and telephone lines. He then noticed that the sidewalks began lifting as a consequence of root growth and that this was occurring on both sides of the street.

[42] Mr. Stephenson contacted the City in 2005 and complained about the fact that cherry tree branches in front of his house were interfering with his power, telephone and cable lines. The head arborist of the City attended in response to his complaint. As they were talking, Mr. Stephenson also mentioned that tree roots had lifted up his driveway, the sidewalk in front of Mr. Bolderson's house and that root growth was affecting the sidewalk along the whole block. Mr. Stephenson wanted the trees cut down and suggested this to the arborist. The arborist advised him that the City would not be doing so. The arborist also told Mr. Stephenson that someone would come out to inspect the sidewalks. Mr. Stephenson acknowledged that he did not specifically complain to the arborist about a sidewalk defect in front of 451 Fader Street. In cross-examination, Mr. Stephenson acknowledged that he has seen City employees blacktopping and grinding sidewalk panels along Fader Street.

[43] The City's Parks Department records reflect that a complaint was received from Mr. Stephenson on March 8, 2005 (about 15 months before the plaintiff's fall) which was recorded in these terms: "multiple trees along the blvd need to be cut back as they are touching or pulling on the power lines connected to his home. The roots are also lifting the sidewalks & his driveway & he's not happy."

[44] It is apparent that the City promptly responded to Mr. Stephenson's primary complaint by pruning away the cherry tree branches from the service lines on his property. There is no written record confirming that Mr. Stephenson's remarks about the condition of the sidewalks on the block were communicated from the Parks Board to the Street Branch and no evidence before me that the Street Branch conducted an inspection or any sidewalk repairs in response to Mr. Stephenson's call.

[45] Mr. Stephenson testified before the jury that prior to May, 2006 the sidewalks on the west side of Fader were dangerous because they were lifting and that some of them were "like a skateboard park". He testified that he expressed these concerns to the arborist. He further testified that in one area there was a 3 inch differential between sidewalk panels and in another area an 8 to 10 inch slope. While I have no doubt that Mr. Stephenson was genuinely concerned about the impact the cherry tree roots were having on the condition of the sidewalk on his block, I would note that there was no evidence before me of the existence of any trip approaching 3 inches on the Fader Street block. Further, Mr. Stephenson's evidence on this point is inconsistent with the Sidewalk Inspection Form and with the photographs before me depicting the state of the sidewalk in front of 451 Fader shortly after Ms. Lennox's fall.

(c) Greig Dodgshon

[46] Mr. Dodgshon, the City's Street Branch supervisor and the person responsible for responding to public complaints about sidewalk defects, also gave *viva voce* evidence before me on this summary trial.

[47] In his first affidavit sworn November 13, 2009 and filed for use on the original summary trial application before Dickson J., Mr. Dodgshon deposed that he had "reviewed the City's records and, between February 3, 2005 and June 8, 2006, no complaints were received which would have triggered a re-inspection and repair of the ... sidewalk in the vicinity of 451 Fader Street." It is apparent from this that the Street Branch of the Engineering Operations Department of the City, which is responsible for administration of the written and unwritten sidewalk policy, did not receive from the Parks Department any *written* record of the complaints made by either Mr. Bolderson or Mr. Stephenson about the condition of the sidewalk along the 400 block of Fader Street. As noted above, neither the fact of these complaints nor the existence of documents reflecting the Stephenson complaint were identified until shortly before the start of the jury trial, well after Mr. Dodgshon's original affidavit had been sworn.

[48] In a subsequent affidavit sworn November 29, 2011 and filed for use on this summary trial application, Mr. Dodgshon clarified that, "no complaints were *documented* by the Street Branch which would have triggered a re-inspection and repair the sidewalk in the vicinity of 451 Fader Street" [emphasis added]. Mr. Dodgshon deposes in his second affidavit that when the City receives a more general complaint about the condition of a sidewalk, its practice is to first investigate the condition of the sidewalk as a whole to determine whether it requires replacement. This investigation consists of reviewing the Sidewalk Inspection Form from the last regularly scheduled inspection for that block. If the condition of the sidewalk was described as a level 5 or less on the scale, then the entire sidewalk will not be replaced.

[49] Mr. Dodgshon testified before me that if the public complaint is about trees, including tree roots, the Parks Board responds to that complaint. If the Parks Board identifies a sidewalk problem, the matter is referred to him. He has no recollection of receiving from the Parks Board a referral relating to the complaint made by Mr. Bolderson in 2005.

[50] He confirmed that his customer service policy is to fix Level 1 sidewalk defects about which a specific complaint is made by a member of the public. Repair work undertaken with respect to Level 1 faults is not recorded. I would pause to note that this likely explains why there is no record of the asphalt repair done to the sidewalk panels in front of Mr. Bolderson's house in 2006.

[51] Mr. Dodgshon agreed in cross-examination that if a member of the public identifies three or four trees affecting sidewalk panels on a block, this might be a specific enough complaint to trigger application of the unwritten policy. He also agreed that a tree location can convey more specific information about the location of an alleged sidewalk defect than providing a residential address.

E. The Position of the Parties

[52] The parties appear to be *ad idem* that there is a sufficient proximity between a municipal government and those who walk its streets that the latter reasonably expect sidewalks to be reasonably maintained and the former foresees the risk of harm if it does not do so. Thus, a *prima facie* duty of care arises.

[53] Mr. Gibson, for the plaintiff, takes no issue with City's sidewalk policies *per se*. He accepts that those policies are reasonable and reflect a *bona fide* and unreviewable exercise of the City's discretion: *Just v. British Columbia*, [1989] 2 S.C.R. 1228.

[54] He argues, however, that the City was negligent in its operational implementation of the unwritten sidewalk policy. He argues that the plaintiff was severely injured when she tripped over a sidewalk defect that the City, had it exercised reasonable care in all the circumstances known to it, would have fixed prior to the date of the fall. Counsel contends in this regard that the attention of the City was specifically drawn to sidewalk faults on the 400 block of Fader Street in 2005, before the plaintiff's fall, by both Mr. Bolderson and Mr. Stephenson. He argues that these were not generalized complaints about the state of repair of the sidewalk in the entirety of the 400 block of Fader, but specific complaints directed at the impact a handful of the cherry trees planted on Fader Street were having on the

sidewalk panels. Contextualizing the complaints in this fashion, he argues that the evidence as a whole supports a finding that a specific complaint was made about the sidewalk at the particular location of the trip and fall before May 30, 2006. He argues that the City breached the applicable standard of care when it failed to inspect the sidewalk in response to either of these complaints, and when it failed to take the remedial steps contemplated by its own unwritten sidewalk policy.

[55] Ms. Forth, for the defendant, argues that the plaintiff has not demonstrated an absence of reasonable care on the part of the City in its operational implementation of the unwritten sidewalk policy.

[56] First, she argues that the plaintiff has failed to show that a specific complaint was made about the sidewalk in front of 451 Fader Street before the plaintiff's fall on May 30, 2006.

[57] But in addition, she takes the position that the issue before this Court is not restricted to the narrow question of whether Fader Street residents made a specific complaint about a sidewalk defect in front of 451 Fader before the plaintiff fell. Rather, she submits that all of the surrounding circumstances must be taken into account in determining whether the City has shown reasonable care in implementing the policy: *Just v. British Columbia* at para. 30. She argues that all the circumstances must take account of: the fact that the City had already complied with its written Sidewalk Policy, the nature and purpose of the unwritten "customer service" policy, the generalized nature of the complaints received by Mr. Bolderson and Mr. Stephenson, the timing of those complaints in relation to the last regularly scheduled Sidewalk Inspection and the evidence that the City did, in fact, respond to Mr. Bolderson's complaint about the sidewalk panels in front of his house by first blacktopping the panels in 2006 and then grinding the panels down in 2008 when the initial repair work proved unsatisfactory. Ms. Forth argues that even if the Court were to find a failure by the City to adhere to its unwritten customer service policy of repairing Level 1 defects reported by the public, a negligence finding would not necessarily follow. She submits that the Court should be extremely wary about

increasing the standard of care owed by the City where its unwritten sidewalk policy goes substantially above and beyond what the written policy actually requires. Put differently, counsel for the defendant argues that when a City takes upon itself a level of care or customer service well beyond what would merely be reasonable in the circumstances, failure to discharge that enhanced level of service is not necessarily negligent. To hold to the contrary would be to substitute for the standard of reasonable care a standard of perfection.

F. Discussion

[58] I propose to start my analysis of the issues in this case by considering, first, whether a specific complaint was made to City officials by the Fader Street residents Bolderson and Stephenson in 2005 about the defect in the sidewalk panel in front of 451 Fader.

[59] To put the complaints lodged by Mr. Bolderson and Mr. Stephenson in context, it must be recalled that the City had completed its regularly scheduled inspection of the sidewalk in the 400 block of Fader Street on February 3, 2005. The City was aware, as a result of this inspection, that a number of Level 1 faults had been identified on the block including two in front of 459 Fader, one in front of 451 Fader, one in front of Mr. Bolderson's house at 450 Fader, and one in front of the house next to Mr. Bolderson at 452 Fader. The City had also conducted an evaluation of the condition of the entirety of the sidewalk on the 400 block of Fader and concluded that the sidewalk was not in need of immediate replacement but had a predicted lifespan of 20 to 30 years.

[60] Mr. Stephenson's call to the City was made on March 8, 2005, scarcely a month after City had discharged its operational responsibilities under the written Sidewalk Policy by inspecting and evaluating for repair purposes the entirety of the 400 block on Fader Street.

[61] I make three observations about Mr. Stephenson's call to the City. First, it is apparent that his primary complaint, and what motivated his call, was that the cherry tree branches were interfering with his power lines. That is, no doubt, why an

arborist from the City responded to his complaint. He testified that he “also mentioned” to the arborist that tree root growth was lifting up his driveway, the sidewalk panels in front of Mr. Bolderson's residence as well as other portions of the sidewalk on the block. These concerns were clearly secondary in nature. The City acted on the primary complaint lodged by pruning the trees away from Mr. Stephenson's power lines. Second, Mr. Stephenson characterized his own complaint about the condition of the sidewalk on Fader Street as a complaint about the “whole block”. Finally, Mr. Stephenson was clear that he never drew the arborist's attention to, or made specific complaint about, a sidewalk defect in front of 451 Fader. In my view, it was not unreasonable for the City to take no further action in response to the “mention” Mr. Stephenson made about the impact tree root growth was having on the sidewalks along the whole block. This is particularly so given that the City had just completed its inspection of this block, knew of the existence and location of Level 1 sidewalk faults on Fader Street, including the one in front of 451 Fader, and knew that the block was clear of Level 2 defects requiring immediate repair.

[62] With respect to Mr. Bolderson, I am satisfied that he drew the attention of the City’s Parks Board representative to particular trees that were causing, or had the potential to cause, the sidewalk panels to heave. Mr. Dodgshon acknowledged that pointing to a particular tree as the location of the problem may, in fact, provide more detailed information about where the defect is than would be conveyed by supplying a residential address.

[63] Having said this, it must be recalled that Mr. Bolderson was doing more than pointing out existing sidewalk defects. By his own evidence, he was also pointing out locations where no sidewalk defects were present but where the potential for a sidewalk defect to arise over time existed by virtue of the fact that a cherry tree was planted in that location. He did not, in speaking with the Parks Board representative, specifically complain about an existing defect in front of 451 Fader Street. Again, it was not, in my view, unreasonable for the City not to embark on a broader investigation of all of the problems and potential problems Mr. Bolderson was

identifying, particularly given that a complete Sidewalk Inspection had been undertaken by the City that same year. Finally, it is noteworthy that the City did intervene to effect repairs to the Level 1 fault in front of Mr. Bolderson's residence in response to his complaint. In doing so, the City was operating in compliance with its unwritten sidewalk policy.

[64] In light of my finding that the City did not receive a sufficiently specific complaint about a particular sidewalk defect in front of 451 Fader before the trip and fall, it cannot be said that they acted unreasonably in failing to effect repairs at that location before May 30, 2006.

[65] While this finding is sufficient to dispose of the litigation, I prefer not to rest my decision solely on this basis.

[66] Even if the unwritten policy was engaged by a specific complaint about a sidewalk defect in front of 451 Fader Street before the plaintiff's fall, I would still find the City not liable for negligence in this case. My reasons for coming to this conclusion are briefly set out below.

[67] I agree with counsel for the defendant that all of the circumstances must be taken into account in determining whether the City exercised reasonable care in the operational implementation of its sidewalk policy. Demonstrated non-compliance with municipal policy will be a factor and, in some cases, an important one in the determination of a negligence claim. But non-compliance with an inspection policy, like the unwritten sidewalk policy in the case at bar, will not, standing alone, necessarily lead to a negligence finding: see *Stojadinov v. Hamilton (City)* (1998), 41 M.P.L.R. 185 (Ont.H.C.). In my view, regard must be had to the policy itself, its purposes and the mischief it seeks to prevent in order to determine how non-compliance with that policy should be factored into the assessment of whether reasonable care has been exercised.

[68] In case at bar, it is clear that adherence by the City to its written Sidewalk Policy is to the end of ensuring that pedestrians using the sidewalks with ordinary care can do so safely.

[69] The objectives of the unwritten policy may overlap to some extent with the written policy but its animating purposes are quite different and have less to do with the maintenance of safe walkways than with the promotion of good relations between the City and its residents. As Mr. Dodgshon explained, the unwritten policy exists "to provide a basic level of customer service to the taxpayers of the City, to promote citizens calling in because they know something will be done, and to ensure that the particular fault complained of does not result in future problems." To the extent that the City takes upon itself, in its unwritten policy, the task of repairing Level 1 faults about which public complaint is made, it does not do so because those faults are deemed to constitute a present danger to pedestrians using reasonable care and attention. As noted above, Level 1 faults are characterized as "serviceable" under the written policy. As Mr. Day explained, the word "serviceable", was "meant to indicate that a sidewalk with a Level 1 default [sic] could be used safely with due care and attention." Rather, the City undertakes to fix Level 1 defects about which public complaint is made primarily to promote good relations and communication between the citizens of New Westminster and their local government and to ensure that sidewalk imperfections do not become hazards in the future. Given the primary purpose of the unwritten policy, it does not follow that non-compliance with it reflects a departure from the standard of care of that a reasonable municipality would have exercised.

[70] Moreover, I agree with counsel for the defendant that when a municipality takes upon itself a level of service that exceeds what would be reasonable in the circumstances, courts should be exceedingly slow to characterize the failure to discharge that enhanced level of service as negligence. In the case at bar, the unwritten sidewalk policy goes well beyond the requirements of a reasonable sidewalk inspection programme. As a matter of public policy, the law should ecourage steps taken by municipalities to proactively address concerns that may

give rise to public safety issues in the future where those steps go beyond what is merely reasonable in the circumstances.

[71] The plaintiff's negligence claim, grounded in the failure of the City to comply with its unwritten sidewalk policy by investigating and repairing a Level 1 sidewalk fault in front of 451 Fader Street in response to a public complaint, cannot be assessed in isolation. Rather, it must be assessed in light of all of the surrounding circumstances and factual findings I have made, including:

1) The existence of a reasonable written Sidewalk Inspection and Repair Policy with which the City complied before, at the time of, and after the trip and fall;

2) The fact that the City had completed its regularly scheduled inspection of the sidewalk in the 400 block of Fader Street a month before Mr. Stephenson's complaint and in the same year that Mr. Bolderson's complaint was received;

3) The fact that the City was aware, as a consequence of its inspection, of the existence of a number of Level 1 sidewalk defects in the 400 block of Fader Street, including the one in front of 451 Fader that Ms. Lennox ultimately tripped over;

4) The fact that Level 1 sidewalk faults are “serviceable” in the sense that they can be navigated by pedestrians using due care and attention;

5) The evidence that the City responded to Mr. Bolderson's specific complaint about the sidewalk panels in front of his house and effected repairs by filling in the height differential with asphalt;

6) The fact that the plaintiff's negligence claim rests entirely on non-compliance by the City with an unwritten “customer service” policy by which it undertakes a level of responsiveness and service in the inspection and maintenance of municipal sidewalks that goes well beyond what would constitute a reasonable operational programme.

[72] In all of the circumstances, I am unable to find that the plaintiff has carried the burden of demonstrating negligence on the part of the City in failing to repair the Level 1 defect in the sidewalk in front of 451 Fader before Ms. Lennox's trip and fall on May 31, 2006.

[73] Municipalities have a duty to keep the sidewalks in a reasonable state of repair to enable persons using them with ordinary care to do so safely. As has repeatedly been said in trip and fall actions of this kind, the fact that an accident has taken place, even one as regrettable as that experienced by the plaintiff, does not necessarily mean that the sidewalk was in a state of non-repair or that the municipality failed to act reasonably in the implementation of its sidewalk inspection and maintenance policy. In the case at bar, it is not contested that the City of New Westminster had in place a reasonable sidewalk inspection and repair policy that reflects the application of a *bona fide* exercise of discretion. In my view, the City also implemented its inspection and repair policy in a reasonable manner.

[74] For these reasons, I would dismiss the claim.

[75] The defendant is entitled to its costs.

G. Fitch, J.

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G. Fitch, J.