NO. 11425
PENTICTON REGISTRY

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

Small Claims Division

Between:

Margaret McKibbin

Claimant

And:

City of Penticton

Defendant

Reasons for Judgment of The Honourable Judge Sinclair

Dates and Place of Hearing: December 16, 1996
Penticton, British Columbia

Appearances:

Margaret McKibbin, appeared on own behalf

Jeffrey Locke, articled student, appeared as counsel for the City of Penticton

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Nature of Proceeding:

The Claimant sues the Defendant for $10,000.00 damages as a result of injuries sustained by her in a fall on a City sidewalk on the 3rd day of June 1995. The Claimant sustained various injuries, the most serious of which was a fractured arm. The Defendant agrees that the Claimant's damages should be assessed at $10,000.00. The sole issue to be determined is that of liability.

The Issue:

As I have stated above, the issue to be determined is whether the Defendant has any liability to the Claimant. Determination of that issue involves a finding, on the evidence, as to whether the Defendant's method of maintaining and repairing its sidewalks was as a result of a policy decision and, if so, whether implementation of the policy was reasonable in all the circumstances.

The Evidence:

On June 3, 1995, at approximately 10:15 a.m., the Claimant was walking in a southerly direction on the east sidewalk of Main Street between Edna Avenue and Penticton Avenue in Penticton, B.C. This location is relatively close to her home on Edmonton Avenue. She acknowledged that she had traversed that area of sidewalk on many occasions and that she had walked that route several times that week.

On June 3, the Claimant testified that she was wearing her glasses, good walking shoes, and was looking straight ahead as she walked. She tripped on a sidewalk slab which was raised approximately one inch above the slab preceding it. As a result of the trip, the Claimant lost her balance and fell, cutting and scratching her knees, and fracturing her right arm. The weather was clear and the sidewalk was dry.

Both the Claimant and the Defendant concluded that the roots of nearby trees had worked their way under the sidewalk slab in question, causing it to rise. That is

my conclusion as well. The slab had probably been in its upraised position for some time prior to this accident.

Alistair Wardlaw was at all material times the assistant works supervisor for the Defendant. It was his responsibility to look after the City infrastructure, including roads, sidewalks, water and sewer lines. Mr. Wardlaw testified that the City instituted a sidewalk inspection and repair policy in 1994 and that the policy was based on volumes of pedestrian traffic and need, i.e., risk. There are, at all times, one to three persons on the sidewalk crew. Implementation of the inspection and repair policy commenced in the downtown area of Penticton, where pedestrian traffic is heaviest, and then proceeded to the sidewalks along Skaha Lake Road and Main Street between Skaha and Okanagan Lakes, which are second to the downtown core in terms of volumes of pedestrian traffic. Inspection and repairs on the latter sidewalks commenced at Skaha Lake and had moved north to the area of the Peachtree Mall at the time of the Claimant's accident. In other words, the sidewalk crew not yet come to the area of Main Street where the accident occurred.

In addition to the regular activities of the sidewalk crew, the Defendant also relies on all City employees to be on the lookout for, and to report, areas of sidewalk within the City that require repair. Also, individual complaints made by citizens are acted upon as quickly as possible.

The guidelines adhered to by the Defendant are that differences of one inch or more in adjoining sidewalk slabs are to be repaired immediately, and that those

between one half inch and one inch are to be repaired as soon as possible. Offending sidewalk panels are either ground down and paved, so as to make them level, or the offending slab is removed and a new one put in place.

Jack Kler is the Deputy City Treasurer. His duties with the Defendant include insurance matters and risk management. He approved the sidewalk inspection and repair policy and confirmed that priorities, so far as implementation of the policy was concerned, were that high traffic areas would be inspected and repaired first. He confirmed that City Council has a budget for inspection and repair of sidewalks, which Council considers and sets each year. In 1994 and 1995, the sum of $114,000.00 was budgeted for sidewalk inspection and repair. In 1994, $108,000.00 was expended for that purpose and, in 1995, $116,000.00 was expended.

Claimant's Submission:

The Claimant, who represented herself at trial with the assistance of her husband, submits that the Defendant is liable for her damages because it had not inspected and repaired the offending portion of sidewalk and that it was negligent in not doing so.

Defendant's Submission:

The Defendant submits that although it obviously owed a *prima facie* duty of care to the Claimant, there are considerations which negative that duty of care, those considerations being that the Defendant's decision to exercise its power to inspect

and repair the sidewalks, including the system of inspection itself, was a matter of policy or planning and that, absent negligence in the actual operational performance of that plan, the Claimant's claim must fail.

The Law:

In cases involving allegations of negligence against a government or government agency, one must commence by applying the test laid down in *Anns v. Merton London Borough Council* [1978] A.C. 728 at pp 751-752. The test is stated as follows:

> . . . the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, careless on his part may be likely to cause damage to the latter - in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

In this case the Defendant, as I have stated, in summarizing its submission above, acknowledges that it had a *prima facie* duty of care to the Claimant.

The next step in the analysis was laid down by the Supreme Court of Canada in *Just v. The Queen in Right of British Columbia* (1990) 64 D.L.R. (4th) 689 at 702, per Cory, J. for the majority:

> Even with the duty of care established, it is necessary to explore two aspects in order to determine whether liability may be imposed upon the respondent. First, the applicable legislation must be reviewed to see if it imposes any obligation upon the respondent to maintain its highways or alternatively if it provides an exemption from liability for failure to so maintain them. Secondly, it must be determined whether the Province is exempted from liability on the grounds that the system of inspections, including their quantity and quality, constituted a "policy" decision of a government agency and was thus exempt from liability.

The *Municipal Act*, RSBC 1979, c. 290, s. 578, provides for construction and maintenance of sidewalks in these words:

> (2) The Council may
>
> . . .
>
> (b) construct, repair, maintain, improve and care for sidewalks and boulevards on highways, and plant, care for and remove grass, shrubs, trees and other plants on them.

This statutory provision appears to require the Defendant to maintain its sidewalks reasonably.

The next step in the analysis is to determine whether the City is exempted from liability on the grounds that the system of inspection and repair, including the quantity and quality thereof, constituted a "policy" decision and was thus exempt from liability. That is the more difficult issue to resolve. As the Supreme Court of Canada stated in *Just*, *supra*, at 705:

> The need for distinguishing between a governmental policy decision and its operational implementation is thus clear. True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions may well be subject to claims in tort.

And, at pp 709-710:

> . . . decisions reached as to budgetary allotment for departments or government agencies will in the usual course of events be policy decisions that cannot be the basis for imposing liability in tort even though these political policy decisions will have an effect upon the frequency of inspections and the manner in which they may be carried out. All of these factors should be taken into account in determining whether the system was adopted in bona fide exercise of discretion and whether within that system the frequency, quality and manner of inspection were reasonable.

Conclusion:

The manner of inspecting and repairing its sidewalks was a policy decision which was adopted and acted upon by the Defendant. The policy was formulated by the Works Department and approved by the Deputy Treasurer, who is the person, in the City bureaucracy, responsible for insurance matters and risk management. The policy was approved, if not expressly, at least impliedly, by City Council, which each year allocates a budget for inspection and repair of sidewalks. Economic factors obviously play a role in determining the frequency, quality and manner of inspections. The law is clear that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. That is for the Legislature, not for the Courts.

I have concluded further, on the evidence, that the Defendant was not negligent at the operational or implementational level. As was stated by the Supreme Court of Canada in *Just, supra*, at pp 707-708:

> Nevertheless, the standard of care imposed upon the Crown may not be the same as that owed by an individual. An individual is expected to maintain his or her sidewalk or driveway reasonably while a government agency such as the respondent may be responsible to the maintenance of hundreds of miles of highway. The frequency and the nature of inspection required of the individual may well be different from that required of the Crown. In each case the frequency and method must be reasonable in light of all the surrounding circumstances. The governmental agency should be entitled to demonstrate that balanced against the nature and quantity of risk involved, its system of inspection was reasonable in light of all the circumstances including budgetary limits, the personnel and equipment available to it, and that it had met the standard duty of care imposed upon it.

In the case at bar, the evidence established that the Defendant had one to three persons on its sidewalk crew at all times and that, once the sidewalk inspection and repair policy was put into effect, that crew concentrated on inspecting and repairing sidewalks in those areas of the City having the heaviest volume of pedestrian traffic, being, firstly, the downtown core, and secondly, Skaha Lake Road and Main Street between Skaha and Okanagan Lakes. Unfortunately for the Claimant, the inspection and repair crew had not yet reached the area where she was injured. However, that does not assist her. The Defendant's system of inspection, including having a specific sidewalk crew, instructing all employees to be on the lookout for and to report problems with sidewalks, and acting upon citizen's complaints, was reasonable in light of all of the circumstances.

The Claimant, who certainly has the sympathy of the Court, cannot recover damages from the Defendant for two reasons:

1) The manner of inspecting, maintaining and repairing sidewalks formulated and adopted by the Defendant was a policy decision, which operates to negative the duty of care which would otherwise be owed to the Claimant, and to exempt the Defendant from liability.

2) There was no negligence in the actual operational performance of the policy or plan.

In case I am wrong in the above conclusions, I briefly consider the issue of liability on basic tort principles. In other words, if the City's duty of care is not negatived by its policy decision, and if there was negligence in the operational aspect of the policy decision, should the Defendant have been held fully liable for the Claimant's accident and resulting injuries? In light of the evidence that the Claimant traversed the subject sidewalk on a regular basis, and upon my conclusion that the sidewalk slabs were in an uneven position for some time prior to the accident, the Claimant had a responsibility to exercise reasonable care for her own safety and well being. I would find that she contributed to the accident and her injuries by not keeping a proper lookout and would apportion liability equally between her and the Defendant. That finding, of course, is not necessary to the disposition of this case. However, should the matter be reviewed on appeal, I make that finding.

The Result:

In the result, notwithstanding that the Claimant has the sympathy of the Court, her action must be dismissed and I so order.

Dated at the City of Penticton, Province of British Columbia, this 9th day of January, 1997.

G. G. Sinclair
Judge, Provincial Court of
British Columbia