

---

CANADA / JUDGMENT

## Sullivan v. Victoria (City)

2010 BCSC 218

---

COURT

Supreme Court of British Columbia

DECIDED

19 February 2010

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

---

2010 BCSC 218 Sullivan v. Victoria (City)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sullivan v. Victoria (City),

2010 BCSC 218

Date: 20100219

Docket: 09-3711

Registry: Victoria

Between:

Kathleen M. Sullivan

Plaintiff

And:

City of Victoria

Defendant

Before: The Honourable Mr. Justice Macaulay

Reasons for Judgment

Kathleen M. Sullivan:

In Person

Counsel for the Defendant:

E. Stoker

Place and Date of Trial:

Victoria, B.C.

February 8-9, 2010

Place and Date of Judgment:

Victoria, B.C.

## February 19, 2010

- [1] On July 7, 2009, the plaintiff, Ms. Sullivan, who is a slight elderly woman, tripped on the exposed edge of a section of sidewalk in James Bay, Victoria, and fell. She suffered minor injuries from which she recovered within a week or so. Ms. Sullivan claims damages for pain and suffering against the defendant, City of Victoria (the "City").
- [2] Ms. Sullivan is self-represented. Her pleadings do not set out the usual allegations of negligence, namely, that the City owed her, as a pedestrian on a city sidewalk, a duty of care that it breached by failing to adequately maintain the sidewalk. A generous reading of the statement of claim would permit such amendments as an alternative to striking out the claim in its entirety.
- [3] The City did not apply to strike out the claim. Instead, the City responds in its statement of defence, for the most part, as though Ms. Sullivan properly alleged negligence. I will summarize the more important defence pleadings below.
- [4] Apart from denying that Ms. Sullivan fell or sustained any injury or damage, the City pleads that it created a sidewalk inspection and maintenance policy in good faith and that its policy decision is not reviewable by the court. Alternatively, the City says that the policy was reasonable in the circumstances. The City further says that it did not owe Ms. Sullivan a duty of care because all of the decisions leading up to the accident were policy rather than operational decisions. In the further alternative, the City says that it met the applicable standard of care by taking reasonable care in carrying out its sidewalk inspection.
- [5] I have no difficulty concluding on the uncontradicted evidence that Ms. Sullivan fell, as she described, and was injured. According to Ms. Sullivan, just before her accident, at about 7:15 a.m., she was walking on a sidewalk on Superior Street in James Bay. She was familiar with the route as she lived nearby and walked it daily.
- [6] Ms. Sullivan tripped and fell when the tip of her right shoe hit a partially elevated panel of the concrete sidewalk. She did not notice the elevation before tripping nor had she noticed it on any of her earlier journeys.

- [7] Ms. Sullivan's foot hit the concrete with sufficient force to knock her shoe off and she fell against a small, ivy-covered brick wall running parallel along the property immediately adjacent to the inside edge of the sidewalk. A passerby assisted Ms. Sullivan and another called for an ambulance.
- [8] Ms. Sullivan went to hospital where she received first aid treatment and was released later the same morning. Her injuries included a cut above the right eye. The eye later turned black. Ms. Sullivan also sustained cuts and abrasions to her right arm, hand and fingers. In addition, she bruised her right knee and hip area and had a headache. Fortunately, none of these injuries were long term. Ms. Sullivan testified that the injuries slowed her down for a few days but that she was back to normal within a week.
- [9] Immediately after release from hospital, Ms. Sullivan went to the City and reported the accident. Later that day, she returned to the accident site and observed that, in the meantime, the elevated portion of sidewalk had been ground down. She took photos of the sidewalk and surrounding area but, in the circumstances, the photos do not illustrate the vertical height of the displacement. It is likely that a City work crew attended the site and ground down the sidewalk immediately after Ms. Sullivan reported the accident. Unfortunately, there was no evidence as to the specific height of the elevation before it was ground down.
- [10] Mr. Lai, an assistant director employed by the City, is responsible for planning, traffic engineering, street design and project management. He is not involved in sidewalk repair projects except in relation to budgeting questions. The City has budgeted about \$50,000 per year for sidewalk repairs for many years.
- [11] In 2004, the City created its current Sidewalk Policy for the inspection of, among other things, sidewalks. The policy delegates to the water meter reader the following responsibility:

Inspect all Sidewalks to ensure that panels are not cracked or raised, thus creating a displacement in elevation exceeding 35 mm. If the displacement equals or exceeds 35 mm then this information shall be recorded and listed in the Sidewalk Repair Report History.

The policy goes on to provide that the Supervisor and staff of the Concrete Section of the Streets Division must annually inspect all sidewalks not covered by inspections of the water meter reader. If they find elevations exceeding 35 mm they must record and list them in the same manner as the water meter reader.

- [12] The policy ends with the following:

All displacements in elevation that equal or exceed 35 mm shall be repaired as soon as staff and equipment are readily available. Displacements less than 35 mm may be repaired at the discretion of the Supervisor of the Concrete Section, as budget resources allow.

It is, as a result, significant, in considering the application of the policy in the present case, that there is no precise evidence of the elevation of the sidewalk displacement.

- [13] Ms. Sullivan did not measure the elevation but agreed that it was less than the width of a ruler marked as an exhibit. Mr. Lai agreed during his evidence that the width of the ruler was one and one-half inches. One and one-half inches is 38 mm although Mr. Lai equated it to 35 mm. Mr. Reynolds, the water meter reader, later measured the width of the ruler using the scale on his handheld computer and concluded that it was about 37 mm.
- [14] Mr. Reynolds' measurement was incorrect. Either Mr. Reynolds' scale is wrong or he misread it in the courtroom. The ruler used for illustrative purposes is much closer to one and one-quarter inches wide, or 33 mm, than one and one-half inches.
- [15] In the result, I conclude that the elevation was certainly less than 37 mm, and probably less than 35 mm, but am unable to conclude how much less. Mr. Lai's evidence and Ms. Sullivan's concession are unreliable in the circumstances because both assumed the ruler was 35 mm wide.
- [16] Although Mr. Reynolds walks the city streets daily in the course of his duties as the water meter reader and covers each area of the City about three times per year, there is no evidence that he observed, recorded or listed any displacement equaling or exceeding 35 mm on the sidewalk in question during the six months before the accident. He testified that he attended the particular area in February and June 2009 in connection with his duties. For the first six months of 2009, the total number of reports for the entire city was 27 but none were for the block in question.
- [17] The City also relies on reports from the public of dangerous areas but there was no evidence of any reports respecting the sidewalk in question.
- [18] I do not accept the absence of a report by Mr. Reynolds as conclusive that the elevation was, in fact, less than 35 mm. He may have failed to observe it if it was present. But there is also no affirmative evidence that the elevation was equal to or greater than 35 mm. Further, even if someone had observed and reported the elevation as equal to or greater than 35 mm, the policy calls for repair "as soon as staff and equipment are readily available."
- [19] Mr. Lai explained the financial considerations that resulted in the choice to use 35 mm as a benchmark for sidewalk repair. Obviously, repairs would cost more if the benchmark was lower. But that is not the only consideration. What are the risk considerations? Unfortunately, Mr. Lai offered no other explanation as to why 35 mm was the benchmark as opposed to some lesser or greater elevation. In particular, he did not explain whether the risk of tripping increases in a meaningful way at 35 mm as opposed to, for example, 30 mm.
- [20] It seems apparent to me that a 30 mm elevation displacement on a city sidewalk also creates a foreseeable risk of the type of fall and injuries that Ms. Sullivan had. Without expert assistance, I am unable to conclude that risk is meaningfully less at 30 mm than at 35 mm.

[21] The gaps in the evidence and the concerns arising from them require a careful consideration of the law as it relates to whether a duty of care existed and any standard of care that the City must meet. It also requires a consideration of who bears the responsibility for the failure to address the gaps.

[22] I start with a review of the law. The Supreme Court of Canada set out the governing principles when considering the liability of government agencies in negligence actions in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, 64 D.L.R. (4th) 689. Those principles are rooted in the test set out in *Anns v. Merton London Borough Council*, [1978] A.C. 728 at 751-52:

First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness 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: [Citation omitted.]

The Supreme Court of Canada approved this two-step approach for determining whether a government agency, like the City, owes a duty of care to a person, such as Ms. Sullivan.

[23] The first step offers little difficulty. There is sufficient proximity between a municipal government and those who walk its streets that the latter reasonably expect the 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 exists in the present circumstances.

[24] The second aspect of the test must also be satisfied before finding that the City owed Ms. Sullivan a duty of care. Here, the City does not rely on any legislative limitation but claims it is exempt from liability based on its Sidewalk Policy.

[25] In my understanding, the creation of a policy does not automatically confer immunity. To the contrary, at 1238-39 of *Just*, the majority stated:

Once a policy to inspect is established then it must be open to a litigant to attack the system as not having been adopted in a bona fide exercise of discretion and to demonstrate that in all the circumstances, including budgetary restraints, it is appropriate for a court to make a finding on the issue.

The majority went on to emphasize that complete Crown immunity should not be restored under the guise of government designating its decisions as policy.

[26] The decision in *Just* at 1240-42 highlights the importance of distinguishing between governmental policy decisions and operational decisions. True policy decisions exempt government from any liability; operational decisions implementing those policies are not immune. Policy-making involves or is dictated by financial, economic, social or political factors or constraints. It is not for the court to second guess such decisions provided they

are properly made. The difference between policy and operation is usually found in the level of government at which the decision-making occurs.

- [27] The making of policy must be a bona fide exercise of discretion. For example, as was pointed out at 1243 of *Just*, a decision not to inspect at all may be an unassailable policy decision if it is "a reasonable exercise of bona fide discretion, based, for example, upon the availability of funds." On the operational side, however, any decision to inspect must result in a scheme that:

is reasonable and has been reasonably carried out in light of all the circumstances, including the availability of funds, to determine whether the government agency has met the requisite standard of care.

- [28] Assuming that a duty of care is owed, the standard of care that government owes differs from what an individual would owe. The frequency and nature of governmental inspection "must be reasonable in light of all the surrounding circumstances." (at 1244). The nature of risk involved, budgetary limits and the availability of personnel are relevant factors in determining whether a government body has met the standard of care.
- [29] In *Just*, the province conducted visual inspections of slopes and rock faces adjacent to the highway to assess stability. The plaintiff was injured and his daughter was killed when falling rock hit their vehicle while they were travelling on the highway. Ultimately, the Supreme Court of Canada determined that the frequency and other specifics of the inspection system "were manifestations of the implementation of the policy decision to inspect and were operational in nature." (at 1246). As such, the court was required to review the inspection scheme to determine whether the province was negligent.
- [30] Pausing here, and without regard to other recent decisions, my reading of *Just* suggests that the City, having decided to inspect its sidewalks and effect repairs in some instances, is not entitled to succeed on the second aspect of the *Anns* test. As in *Just*, the City appears to owe a duty of care and the focus should turn to whether the City met the standard of care. This involves considering the reasonableness of its inspection system in all the circumstances, including budgetary and personnel constraints.
- [31] *Plakholm v. Victoria (City)*, 2009 BCCA 466, a recent decision of the Court of Appeal, is significant because it considers a policy very similar to the City's Sidewalk Policy. The plaintiff fell when she tripped over uneven pavement while crossing a Victoria street that was in a state of disrepair. The applicable policy provided a benchmark of 40 mm below which repair was at the discretion of the manager or assistant supervisor.
- [32] As in the present case, the City contended that its policy was bona fide and immunized the City from liability. Finding that the trial judge did not engage in the *Just* analysis that I have set out above, the Court of Appeal ordered a re-trial for that purpose.

- [33] Another decision of significance is *Pamaran v. Victoria (City)* (1996), 32 M.P.L.R. (2d) 243 (S.C.). In that case, the court considered the Sidewalk Policy with particular emphasis on how it deals with elevation differences of less than 35 mm. On the evidence, the site where the plaintiff fell had an elevation difference of about 25 mm. The judge concluded that the Sidewalk Policy in its entirety was a bona fide policy entitling the City to immunity and dismissed the plaintiff's claim accordingly. He went on to find that the City had, in any event, carried out its inspection program in a reasonable manner.
- [34] I observe that in *Plakholm*, the Court of Appeal quoted extensively from the judgment in *Pamaran* in its discussion of the need for a similar analysis. While the Court of Appeal did not expressly approve the result in *Plakholm*, it appears to have accepted that the analysis and decision were correct.
- [35] I also observe that other judges of this court have followed *Pamaran*. See *Beadle v. Nanaimo (City)*, 2009 BCSC 1506 at paras. 16-17; and *Einarson v. Richmond (City)* (1998), 47 M.P.L.R. (2d) 70 at para. 12.
- [36] The principles of judicial comity require me to follow and apply *Pamaran* even though I would conclude, if permitted to consider the matter afresh, that the City owed a duty of care to Ms. Sullivan and that the Sidewalk Policy did not entirely immunize the City from her claim.
- [37] It is necessary, in the circumstances, that I also set out my further conclusions respecting the evidence, the burden of proof and whether the City met the applicable standard of care.
- [38] The City demonstrated the existence of an inspection policy. It is up to the plaintiff to establish that the policy is unreasonable, having regard to the factors set out earlier. For example, the plaintiff could have led expert evidence to challenge the 35 mm benchmark but did not do so. It is obvious that the City took safety considerations into account but, absent expert evidence, I am unable to say that the 35 mm benchmark is so far off the mark as to render its inclusion unreasonable.
- [39] Ms. Sullivan also bears the burden of establishing that the City failed to meet the standard of care. She did not establish that the City could reasonably afford a better inspection system or that the inspector failed to carry it out. At most, she established that the inspector might have failed to observe an elevation change that exceeded 35 mm and, as a result, failed to record and report it. It is likely that the elevation change was less than 35 mm. In that case, the policy imposed no obligation on the inspector to record and report it. Even if reported, the policy imposed no obligation on the City to immediately repair the displacement. Ms. Sullivan has not demonstrated that the City failed to follow its own policy or that the operation of the policy is so unreasonable in all the circumstances that the City cannot rely on it.

[40] It follows that I must dismiss Ms. Sullivan's claim. If she had established liability, a fit award for pain and suffering would have been \$1,500. Although Ms. Sullivan would have preferred me to order damages in an amount to punish the City, I would have declined to do so. Her claim is only for compensatory damages and punishment is not an appropriate factor in determining such an award.

[41] Ms. Sullivan's claim is dismissed with costs on Scale A to the City.

"M.D. Macaulay, J."

The Honourable Mr. Justice Macaulay

---

### Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE      <https://www.bccourts.ca/jdb-txt/SC/10/02/2010BCSC0218.htm>

CASE PAGE              <https://chat.esheria.ai/case-law/canada/sullivan-v-victoria-city-2010>

Prepared on 29 October 2026 · Esheria