

CANADA / JUDGMENT

Voje v. Teck Developments Ltd.

2022 BCSC 503

COURT

Supreme Court of British Columbia

DECIDED

29 March 2022

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2022 BCSC 503 Voje v. Teck Developments Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Voje v. Teck Developments Ltd.,

2022 BCSC 503

Date: 20220329

Docket: S210800

Registry: New Westminster

Between:

Micheal Allen Voje

Plaintiff

And

Teck Developments Ltd. and Pet Valu Canada Inc., doing business as Tisol Pet Nutrition & Supply Stores

Defendants

And

Teck Developments Ltd. and Pet Valu Canada Inc., doing business as Tisol Pet Nutrition & Supply Stores

Third Parties

Before: The Honourable Justice MacNaughton

Reasons for Judgment

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Place and Date of Trial:

Port Coquitlam, B.C.

August 23-27, October 27, and

December 2, 2021

Place and Date of Judgment:

New Westminster, B.C.

March 29, 2022

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Introduction

- [1] On January 27, 2018, Micheal Voje tripped and fell outside a pet food store operated by Pet Valu Canada Inc., doing business as Tisol Pet Nutrition and Supply Stores (the "Fall", "Tisol", and the "Store"). The Store is located in leased premises at Unit 103-20645 Langley Bypass, Langley, BC.
- [2] The Store, and the surrounding premises, are owned by Teck Developments Ltd. ("Teck" and the "Premises").
- [3] Mr. Voje tripped in an area where the cement sidewalk along the front of the Store and the asphalt parking stall/loading bay area meet. The asphalt in the parking lot mounds or ramps up in the loading bay area so that it is flush with the curb and the sidewalk at the loading bay door.
- [4] When facing the Store, the area of the Fall was to the right, or south of, the Store's loading bay door. In that area, the asphalt gradually slopes down in relation to the sidewalk (the "Fall Area").
- [5] As a result of the Fall, Mr. Voje suffered serious injuries to his right shoulder and arm. The parties have resolved the quantum of damages resulting from Mr. Voje's injuries, leaving liability to be determined.
- [6] In their pleadings, both Tisol and Teck have denied liability and deny that they are the occupiers of the Fall Area. They have filed third-party claims against each other.

The Issues

- [7] The pleadings raise the following issues for decision:
 - a) Are either or both Tisol and Teck an "occupier" of the Fall Area pursuant to the Occupiers Liability Act, R.S.B.C. 1996, c. 337 [OLA]?
 - b) Has Mr. Voje established that the Fall Area was unreasonably hazardous, or is he the author of his own misfortune?
 - c) Has Mr. Voje established that any acts or omissions on the part of Tisol and/or Teck fell below the statutory standard of care pursuant to the OLA or the common law standard of care in negligence?
 - d) If Mr. Voje has established a breach of the statutory or common law duty of care on the part of Tisol and/or Teck, has he established causation?
 - e) If both Tisol and Teck are liable, how should that liability be apportioned between them, including the contributory fault of Mr. Voje, if any?
 - f) Is Tisol liable to indemnify Teck under the terms of the lease entered into between them?

The Witnesses

Mr. Voje's Witnesses

- [8] On behalf of Mr. Voje, I heard evidence from: Mr. Voje; his friend Billy Scott; Trevor Dinn, a Mechanical Engineer, who reconstructs motor vehicle or trip and fall accidents, and who photographed and measured the loading bay area and the Fall Area on behalf of Forensic Dynamics; and an expert, Sharlene Wauters, a mechanical engineer with a Bachelor's Degree in Engineering who also works with Forensic Dynamics. Ms. Wauters provided a report dated March 30, 2021.
- [9] After a voir dire, I limited the scope of Ms. Wauters' expert evidence. She was qualified as an expert in accident reconstruction, the mechanism of trip and falls, and human factors. She was permitted to give geometric evidence about the condition of the loading bay door, the mechanism of trip and falls, and human responses to visual cues. She was able to refer to WorkSafe BC guidelines and reports of the National Research Council of Canada. She was not permitted to opine or comment on building codes or design, the condition of the Fall Area, and whether it was a hazard according to the building code. She was not qualified to critique Teddy Lai's expert report prepared on behalf of Teck (referred to below). Ms. Wauters' report was redacted accordingly.
- [10] Ms. Wauters did not visit the Store or observe the Fall Area. As the basis for her report, Ms. Wauters relied on photographs and measurements taken by her colleague, Mr. Dinn.

Teck's Witnesses

- [11] On behalf of Teck, I heard evidence from its president, George Tecklenborg. For 20 years prior to becoming president, Mr. Tecklenborg was Teck's property manager. I also heard evidence from Kathy Derksen, who has financial responsibility at Teck and who, from time to time, deals with tenant complaints. Teck also called Mr. Lai, an architect, who was qualified as an expert on building code compliance and safety aspects for stairs and ramps, and other ergonomic aspects of building code and design requirements.

Tisol's Witnesses

- [12] On behalf of Tisol, I heard evidence from Shawna Polywkan, the Store manager on the date of the Fall, and from Albert Chang, a full-time employee of Tisol who was working at the Store on the day of the Fall.

Credibility

- [13] This case does not involve any significant credibility issues. Although there were minor discrepancies between Mr. Voje's and Mr. Scott's evidence, about who arrived at the Store first on the morning of the Fall and the weather, nothing significant turns on those discrepancies, and I conclude that they are easily explained by the passage of time, fading memories, and the relative significance of the events to the two men.

- [14] The fact that Mr. Voje believed that no one saw him fall, and Mr. Scott testified that he saw Mr. Voje do so, is also not significant as both described that Mr. Voje was walking back to the Store from the van, looking forward, and he might not have been aware that Mr. Scott was following him. Mr. Scott has no incentive to say he observed the Fall when he did not. If the two men had coordinated their evidence for trial, I would have expected both to say that Mr. Scott observed the Fall.
- [15] All of the parties know what happened and the mechanics of the Fall. There is some uncertainty about the exact location of the Fall, but that is not surprising.
- [16] The parties entered into a Statement of Agreed Facts filed as Ex. 1, and I will integrate those facts into these reasons.

The Background

The Premises

- [17] Mr. Tecklenborg testified that Teck owns the Premises, and Tisol, in one incarnation or another, has been a tenant since the Premises were completed in 2007. Teck has three tenants on the Premises and does not have an office on site.
- [18] Tisol operated a pet store on the Premises. The Premises have a raised concrete sidewalk at the entrances to the Store, and there is an asphalt parking lot adjacent to the sidewalk. There are two entrances into the Store, the front entrance and a loading bay entrance.
- [19] At Tisol's loading bay entrance, the asphalt paving in the parking lot is raised or mounded up, to bring a section of it flush with the sidewalk, to facilitate loading and unloading.

The Fall and Mr. Voje's Evidence

- [20] On January 27, 2018, Mr. Voje attended the Store, with his fiancée, to volunteer at a pet adoption event hosted by a non-profit dog rescue society. They had picked up the rescue dogs in a rented U-Haul cube van (the "Van"), and were bringing the dogs, and other necessary supplies for the adoption event, to the Store. Mr. Voje said the ground was wet; it had just finished raining.
- [21] When he arrived between approximately 9:30 and 10:00 a.m., Mr. Voje stopped the Van in the middle of the roadway, in the parking lot, outside the front entrance of the Store. The parking lot was not busy. Mr. Voje went into the Store to ask where he should park. In entering, Mr. Voje successfully navigated the sidewalk curb that was raised above the parking lot. A Tisol employee told him to park in the loading bay area and set up through the loading door, inside the Store. Mr. Voje left the Store, crossing over the sidewalk curb and drove the Van to the loading bay door. He reversed the Van in front of the loading bay door, which was to the left of the main entrance to the Store.

- [22] Mr. Voje had been at the Store once before but he entered through the main entrance door not the loading bay door.
- [23] Mr. Voje described that there were two parking stalls in front of the loading bay door, with a white parking line between the two. He straddled the centre parking line. He parked closer to the driver's side of the stall to give himself more room to unload on the passenger side of the Van.
- [24] When he parked, there were no other vehicles in the parking stalls in or near the loading bay door. A Tisol employee opened the loading bay door for him.
- [25] It was not clear on the evidence how far over to one side Mr. Voje had parked. The Van had front driver's and passenger's doors, access doors on the passenger side, behind the passenger seat, and a set of rear doors.
- [26] Mr. Voje agreed in cross-examination that, as he backed into the loading bay door, he saw the adjacent sidewalk, but said he was looking at the passenger's side mirror, not the driver's side.
- [27] Mr. Voje testified that he unloaded equipment, supplies, and dogs from the passenger side and rear doors of the Van and took them into the Store by walking in and out through the loading bay door along the passenger side of the Van. He described his route of travel on the passenger side of the Van as "nice and smooth". He estimated that he took five to ten trips to unload the Van, all of them on the passenger side.
- [28] Once he finished unloading, Mr. Voje walked from the passenger side, around the front of the Van, to the driver's side door to retrieve his phone. He then returned to the Store, walking, for the first time, along the driver's side of the Van. As he walked towards the loading bay door, his left foot hit the curb edge of the sidewalk. He said he felt his toe hit something, and he fell forward, face-first, into the building. He put out his right hand to break his fall, and as he hit the wall, his right arm broke, and he fell to the ground.
- [29] According to the agreed facts, as a result of the Fall, Mr. Voje suffered a right proximal humeral fracture and injured his shoulder.
- [30] Mr. Voje testified that he did not see the curb edge before he fell. He did not notice a sidewalk curb when entering the Store through the loading bay from the passenger side of the Van. He also unloaded from the rear of the Van without difficulty. He only became aware of the sidewalk curb when his left foot hit it. He was looking straight ahead as he walked, and he was not carrying anything, as he had put the phone in his pocket after he retrieved it. He was wearing Nike basketball shoes.
- [31] Mr. Voje was not able to specifically identify where his foot hit the sidewalk curb. Mr. Voje testified that the Fall occurred just outside the loading bay door, to the right of it, between the two "slats" or seams on the concrete sidewalk. On photo 27 of Ex. 4, in Mr. Voje's book of documents, he identified the white painted parking line that he straddled when parking the

Van and described that the Fall occurred near the driver's side white line. On photo 5 of Ex. 5, of Tisol and Teck's joint book of documents, Mr. Voje described catching his foot at the edge of the sidewalk between the two sidewalk seams on either side of the white parking line closest to the loading bay door. Mr. Voje testified that the pylons that appear in photo 5 of Ex. 5 were on the sidewalk on the day of the Fall, but in a different location, further to the right, centred between the parking stall lines on the sidewalk. Copies of these photos are attached as appendices A and B, respectively, to these reasons.

- [32] According to the agreed facts, the sidewalk is constructed of cement. The spacing between the expansion joints or "cuts" in the sidewalk, divided it into 1.2-1.25 m sections. The curb edge of the sidewalk abutted an asphalt parking lot, where white lines delineated spaces perpendicular to the sidewalk. The parking spaces in front of the Tisol main entrance, as well as immediately north and south of the main entrance, had the name "Tisol" painted in yellow on the asphalt. This included the south spot in front of the loading bay door.
- [33] Mr. Voje agreed that there were no shadows or obstructions to his view of the sidewalk area. He testified that he did not believe that anyone saw him fall. He said that he was on the ground, rolling around screaming. His fiancée told him to collect himself, and his friend, Mr. Scott, helped him. As it turned out, Mr. Scott observed the Fall.
- [34] Mr. Voje testified that after the Fall, to collect himself, he went into the Store and sat on a set of stairs at the back. He was still crying and in pain. He told an employee what had happened and asked for, and was given, an icepack for his arm. He stayed on the stairs for about 30 minutes. He drove the Van home, and his father took him to the hospital.
- [35] Neither of the two Tisol employees who testified spoke to Mr. Voje. There was no incident report created in respect of the Fall.
- [36] According to the agreed facts, Mr. Voje worked as a delivery driver. He suffered a left foot toe injury at work on January 24, 2018, which caused him to go off work that day on medical advice. Mr. Voje was still off work as a result of the toe injury on January 27, 2018, the date of the Fall.
- [37] In cross-examination, Mr. Voje acknowledged that the sidewalk was in a good state of repair, clean of debris, and that he did not trip on a cone or pylon. He agreed that when cones are present, they mean that someone should be more careful, although he believed that the cones were to demarcate Tisol's parking stalls. He also agreed that the concrete sidewalk and the asphalt parking lot were constructed of two different materials and were visually different.
- [38] Mr. Voje also acknowledged that he understood that the sidewalk and loading ramp were flush near the loading bay, but there was a curb to the right, in front of the main entrance and that at some point, between the front door of the Store and the loading bay area, the asphalt must have sloped up to meet the sidewalk. He agreed that, if he had been looking down at the sidewalk and curb, he would have seen the raised curb.

Mr. Scott's Evidence

- [39] Mr. Scott has known Mr. Voje since 2017; their spouses were friends. Mr. Scott and his wife both volunteered at the Tisol adoption event on the day of the Fall. They arrived at Tisol at about 8:30 a.m. No one was parked outside the Store. Mr. Scott parked in the first spot to the left of the loading bay door. They went into the Store, through the front entrance, and introduced themselves. They waited for Mr. Voje and his fiancée to arrive.
- [40] Mr. Scott saw Mr. Voje park in front of the loading bay, "kind of over one line", and he helped Mr. Voje unload the Van. He said that some of the equipment, supplies, and dogs were unloaded from the passenger side door and some from the rear doors. He testified that he and Mr. Voje were talking at the rear of the Van, and Mr. Voje went to the Van to get something he needed. He followed Mr. Voje as their conversation continued. After retrieving what he needed, Mr. Voje walked in front of Mr. Scott, back towards the Store, on the driver's side of the Van. Mr. Voje was looking forward, and was approximately three feet in front of Mr. Scott, when he fell.
- [41] Mr. Scott saw Mr. Voje's left leg hit something, and his shoulder hit the wall. Mr. Scott described him falling "like a football tackle" into the concrete wall. He said that Mr. Voje "went down instantly". In cross-examination, Mr. Scott agreed that he was not looking at Mr. Voje's feet when he tripped.
- [42] Mr. Scott said that he helped Mr. Voje off the ground and he could see that one of Mr. Voje's arms was longer than the other. He helped Mr. Voje into the Store where Mr. Voje sat on the stairs behind the volunteer table.
- [43] Mr. Scott testified that in the Fall Area, the concrete "wasn't even" and it was "really hard to see, like you really had to look at it to see that it wasn't level". He said that they had never really gone that way (meaning along the driver's side of the Van) and would not have seen it before. He said the height differential was "hard to see". Mr. Scott described the Fall Area, in relation to Appendix B (photo 5 of Ex. 5) as somewhere between the seam line that lines up with the right side of the loading bay door and the white parking line closest to the loading bay door.
- [44] In cross-examination, Mr. Scott said that he had not seen Mr. Voje limping before the Fall.

Mr. Dinn's Evidence

- [45] Mr. Dinn attended at the Premises on February 8, 2021, to measure and photograph the loading bay and the Fall Area.
- [46] Mr. Dinn began his measurements at the south edge of the loading bay door. He measured the sidewalk seams in front of the loading bay door, from south to north and noted the seams in the sidewalk and where the flush section of the loading bay ramp started and ended. The width of the loading bay door is 364 cm. The flush section in front of the loading bay door, which Mr. Dinn explained was where the asphalt and the sidewalk were the same

height (or with a height differential of less than 5 mm), is 260 cm wide and was offset to the loading bay door 20 cm north. A height differential of above 5 mm would not make the surface flush.

- [47] On cross-examination, Mr. Dinn agreed that, from the photographs, the flush section was not completely flush and that there are sections that appeared to have a height differential of more or less than 5 mm.
- [48] On the south side of the loading bay door, the flush section started 74 cm north of the sidewalk seam that is depicted in the photographs and ended 30 cm before the north end of the loading bay door.
- [49] Mr. Dinn measured each individual section of the sidewalk as 125 cm from seam to seam. Mr. Dinn used the seam on the south side of the loading bay door as his zero-reference line from which the remaining measurements were taken. The zero-reference line follows the edge of the loading bay door directly to the edge of the parking lot. The elevation gap where the zero-reference line meets the asphalt was 1 cm. The elevation gap between the sidewalk and the asphalt at 30 cm south of the zero-reference line was 2.4 cm; at 60 cm the elevation gap was 4.5 cm; and at 90 cm the elevation gap was 7 cm. The down slope on each side of the flush section of the loading bay mounded or ramped area is 5 percent.

Teck's Evidence

Mr. Tecklenborg

- [50] Mr. Tecklenborg testified that Teck is a property holding company that owns and leases industrial and commercial premises. Mr. Tecklenborg oversees Teck's operations including its business administration, drafting and overseeing lease negotiations, managing its tenants, and conducting inspections of its premises.
- [51] When the Premises were built in 2007, the specifications were approved by the City of Langley. The original plans did not include the loading bay at the Store, but, when construction completed, the loading bay was approved by the City.
- [52] On the date of the Fall, Teck had leased the Property to Tisol for the Store (the "Lease"). Mr. Tecklenborg was involved in negotiating and drafting the Lease, which had existed since September 2007. Teck does not have an office on the Property.
- [53] Approximately every two weeks, Mr. Tecklenborg physically inspects and monitors the common areas of the Premises, looking for damage, debris, or anything requiring correction. In accordance with the terms of its leases, Teck also relies on its tenants to notify it of any damage or hazards. Clause 6.2(d) of the Lease provides:
- [Tisol] will notify [Teck] immediately on [Tisol] becoming aware of any defect in the Premises or of any other condition which may cause damage to the Premises or the Building.

- [54] During the term of the Lease, Tisol contacted Teck, commonly by email, when issues around the parking lot required attention. Mr. Tecklenborg said that, when he received such emails, he usually dealt with them within one or two business days.

Ms. Derksen

- [55] Ms. Derksen has worked for Teck since 1994 as a comptroller/bookkeeper. While she has financial responsibilities, she also interacts with tenants. Tenants contact her about any issues arising in their units. On receipt of a call, Ms. Derksen arranges for someone to deal with the problem. Ms. Derksen testified that Teck hires a sweeping company to clean the parking lot on a monthly basis. Teck also hires a landscaping maintenance contractor. Teck contractors or employees attend the Premises, from time to time, to clean or paint the buildings.
- [56] Mr. Tecklenborg and Ms. Derksen were aware that Tisol had issues with a neighbouring tenant's customers parking in front of the Store. In April 2015, a Tisol employee contacted Ms. Derksen to see if Teck would tow vehicles. Teck did not retain a towing company.
- [57] Ms. Derksen identified an email dated April 22, 2015, between her and Brenda Kozub of Tisol regarding the issue of parking spaces. Ms. Derksen explained that Ms. Kozub had previously contacted her about seeing if Teck would tow vehicles. Teck declined to put a towing company in place, and this email was in further follow-up to this conversation.
- [58] Sometime in about 2015/2016, without Teck's permission, Tisol painted "Tisol" on the asphalt in the parking stalls outside the Store, affixed signs to the outside of the building, and put pylons out on the sidewalk. Ms. Derksen testified that no one at Tisol spoke to her about the steps it was taking. Mr. Tecklenborg testified that he was not asked to approve Tisol's steps and Teck did not pay the associated costs. However, he did not take issue with what Tisol did.
- [59] Both Mr. Tecklenborg and Ms. Derksen testified that Teck did not receive any complaints from any tenants, or hear of concerns, about the parking lot/loading bay area or the Fall Area being hazardous.

Tisol's Evidence

Ms. Polywkan

- [60] Ms. Polywkan has been employed by Tisol since 2016. She was the Manager on the day of the Fall and opened the Store at 8 a.m.
- [61] Ms. Polywkan testified that Tisol had painted "Tisol" on parking lot stalls, and presumably posted the parking signs on the wall, before she started working for it. Tisol employees also placed cones out in front of the designated parking spots in the mornings and would bring them in at the end of their shift unless it was raining. The purpose for marking the parking spots was because customers from other stores would park in front of the Store.

- [62] If a Tisol employee saw someone who was not a Tisol customer park in a Tisol parking spot, they would ask them to move their vehicle. On occasion, Tisol also recorded licence plate numbers and went to the other tenants and asked them to page their customers to have them move their vehicles.
- [63] On the day of the Fall, Ms. Polywkan recalled that the Van was the first vehicle to arrive for the adoption event. The event was the only one that was hosted inside through the loading bay door. Others had occurred through the main entrance to the Store. She did not remember whether she, or another employee, directed Mr. Voje to park in the loading bay area but agreed that a Tisol employee would have told him to do so. She did not recall whether she opened the loading bay door. She did tell Mr. Voje that the volunteers could set up in the interior of the Store, adjacent to the loading bay.
- [64] Ms. Polywkan confirmed that Tisol's loading bay doors are not normally used by the public or customers. The loading bay area is typically used for deliveries. Tisol would receive one to two deliveries a day (Monday to Friday). Delivery drivers would unload products onto a pallet jack or trolley and use the raised parking lot ramp to bring products into the Store. Unlike raised loading bays, at major distribution centres, Tisol employees are not required to supervise delivery drivers as they unload at the loading bay. To her knowledge, no delivery driver ever tripped or raised a concern about the Fall Area.
- [65] Tisol employees also used the loading bay area, and the flush section of the parking lot, to take garbage out of the Store after every shift. Employees would report to their manager if they saw something dangerous or hazardous. Ms. Polywkan testified that Tisol employees, who used the loading bay and the Fall Area daily, did not raise any issues or concerns.
- [66] If a slip or a trip occurs in the Store, regardless of whether there is a fall, employees are trained to report it to Ms. Polywkan, and an incident report is generated. Once generated, incident reports are delivered to the district manager, the vice-president, and the regional manager, and then forwarded to a risk management team.
- [67] With respect to an injury or accident in the common areas of the Premises, like the parking lot or sidewalks, the incident report would go to Tisol's risk management team and be forwarded to the facilities department. The issue would then be brought to Teck's attention. Issues with respect to upkeep of the Premises are uploaded to a third-party online reporting system and then brought to Teck's attention.
- [68] Since 2015, Ms. Polywkan testified that Tisol had generated three incident reports. The first involved a suspected break-in, the second involved a customer slipping and falling in the Store, and the third involved a customer who was pulled off her feet by her leashed dog as she was entering the Store.
- [69] Ms. Polywkan confirmed her understanding that Tisol's responsibility for maintenance of the Premises' common areas is restricted to shovelling the sidewalk, and sweeping and collecting rubbish on it.

- [70] Ms. Polywkan testified that she was not told that Mr. Voje had been injured and she did not give him an icepack. She learned of the Fall when she was advised of it by Tisol's risk management team, about a year later. No incident report was generated as a result of the Fall.
- [71] Ms. Polywkan testified that the other employee who was working on the morning of the Fall was Belle Pennell. She did not testify as she was no longer employed by Tisol and left under difficult circumstances. Ms. Polywkan did not know if it was Ms. Pennell who brought Mr. Voje the icepack. It may have been her. In any event, Ms. Pennell did not generate an incident report.

Mr. Chang

- [72] Mr. Chang has been employed at the Store since May 2016. He testified that he was trained to report incidents by filling out an incident report when there is an injury at the Store, or if someone reports that they tripped, or were bitten by a dog. If he has any doubt about whether an incident report should be filled out, he asks his manager. He has done so on two occasions.
- [73] Mr. Chang started at 11:45 a.m. on the date of the Fall, but he did not learn of it until a few years afterwards. He was not asked for an icepack.
- [74] Mr. Chang testified that he takes out the garbage during each shift, or at the end of the shift. He enters and exits through the loading bay door. He has never tripped.

The Expert Evidence

Ms. Wauters

- [75] In her report, Ms. Wauters explained the measurements taken by Mr. Dinn in the Fall Area. As demonstrated in Mr. Dinn's photographs, the height differential between the asphalt parking lot and the concrete curb varied between 1-7 cm over the 1.25 m section of the sidewalk that Mr. Voje and Mr. Scott described as the Fall Area. As I have said, there is no certainty as to where the Fall occurred.
- [76] Relying on a WorkSafe BC Guideline published in 2021, and an article from the National Research Council's ("NRC") bulletin for best practices for concrete sidewalk construction, Ms. Wauters testified that a height differential of between 1-2.5 cm constitutes a tripping hazard. In cross-examination, Ms. Wauters agreed that the WorkSafeBC Guideline was not available on the date of the Fall. She also agreed that while her report says that the NRC article indicates that 2.0-2.5 cm is considered a serious tripping hazard, the article does not use the word "serious" to describe the tripping hazard. Her interpretation of the NRC article is that a height differential of below 2 cm would not be a tripping hazard.

- [77] In her report, Ms. Wauters also commented that there was no visual cue denoting a transition from the flush section of the asphalt ramp to the gradually increasing vertical discontinuity. However, on cross-examination, she agreed that the concrete sidewalk adjacent to the asphalt ramp and parking lot provided a visual contrast in colour and definition between the two surfaces.
- [78] Her report does not opine that the tripping hazard in the Fall Area was unreasonable or an unusual danger.
- [79] Ms. Wauters outlined on cross-examination that the height differentials she set out in her report were not producing a range of possible tripping hazards and she was not providing a maximum height for a potential tripping hazard.
- [80] I did not find Mr. Wauters' addendum report helpful. It reiterated her earlier report and, to the extent it provided Google street view photographs showing alternative approaches for level entry buildings with loading bay doors and main entrances in close proximity to each other, I was unable to determine if there were visual height discontinuities from the photographs. Ms. Wauters did not attend the sites and was unable to provide any other insight.

Mr. Lai

- [81] Mr. Lai is a licensed architect and was qualified as an expert in building code compliance and safety aspects for stairs, ramps, and other ergonomic aspects of building code and building design requirements. He attended at the Premises on January 11, 2020, to complete an inspection and take measurements and photographs. He prepared a report dated March 24, 2020, and responded to Ms. Wauters' report in a report dated May 19, 2021.
- [82] In his March 24, 2020 report, Mr. Lai opined that:
- there was no visual defect in the curb or parking lot in the Fall Area. There was no building code requirement to have any special treatment such as colour contrast or distinctive pattern in the Fall Area;
 - the design and construction of the curb and parking lot area where the Fall occurred were appropriate with respect to the applicable bylaws and building codes;
 - the height difference between the parking lot and the sidewalk was considered acceptable by the building code and not prohibited. The tapered height differential is a condition found on permitted curb ramps; and
 - curb ramps do not require any visual marking at tapered curb conditions at the sides of curb ramps.

[83] Mr. Lai opined that single curb steps at raised sidewalks are common in parking areas adjoining buildings and functionally provide the protection of a raised walking surface separated from draining water or snow. He also said that similar step conditions occur at curb ramps in barrier-free transitions between street or parking areas and raised sidewalks.

The Parties' Positions

Mr. Voje's Position

[84] Mr. Voje submits that Teck and/or Tisol were occupiers of the Fall Area under the OLA, and as occupiers, owed him a duty of care. In particular, he submits that Teck and/or Tisol were in physical possession of the Fall Area and had responsibility for, and control over, the condition of the Fall Area, the activities conducted at the Fall Area, and the persons allowed to enter/use the Fall Area.

[85] In addition to its liability as an occupier, Mr. Voje submits that Teck owed him a duty of care pursuant to s. 6 of the OLA, as a landlord responsible for the maintenance or repair of the Fall Area.

[86] Mr. Voje submits that Teck and/or Tisol breached their duty to him by failing to ensure that he was reasonably safe and by failing to take reasonable care in the circumstances. He says that the Fall Area posed an objectively unreasonable risk of harm.

[87] Alternatively, Mr. Voje submits that if Teck and/or Tisol were not "occupiers" pursuant to the OLA, they owed him a duty of care at common law.

Teck's Position as It Relates to Mr. Voje

[88] Teck's position is that it is not an occupier under the OLA and only owed Mr. Voje a duty pursuant to s. 6 of the OLA.

[89] Teck submits that it did not breach the standard of care owed to Mr. Voje either as an occupier or a landlord under the OLA, or in negligence, because the Fall Area did not pose an objective and unreasonable risk or hazard and it acted reasonably within the scope of its responsibilities and duty as a landlord in relation to the repair and maintenance of the Fall Area.

[90] Further, Teck submits that Mr. Voje has failed to prove that any risk or hazard caused the Fall.

[91] Finally, Teck submits that fault for the Fall, and any subsequent harm suffered by Mr. Voje, lies entirely with him. Alternatively, Teck submits that Mr. Voje should bear the majority of fault for the Fall.

Teck's Position as it Relates to Tisol

- [92] Teck submits that Tisol was an occupier of the Fall Area as defined in the OLA and, to the extent that Teck is found to have been at fault, claims contribution and indemnity from Tisol pursuant to s. 4 of the Negligence Act, R.S.B.C. 1996, c. 333.
- [93] Teck also submits that pursuant to the Lease, Teck is not liable to Tisol for any loss or injury suffered by Mr. Voje. Further, pursuant to the Lease terms, Tisol is required to hold harmless and indemnify Teck for all losses, costs, and claims arising out of Mr. Voje's action.

Tisol's Position as it Relates to Mr. Voje

- [94] Tisol submits that it is not an occupier of the Fall Area as defined in the OLA because it had no real control over the condition of the Fall Area. Even if Tisol is found to be an occupier, it submits that, under the Lease, the clear delegation of responsibility over the Fall Area rests with Teck and Tisol should not be held liable for any alleged failings in relation to the design of the loading bay, the mounded ramp, or the Fall Area.
- [95] Tisol submits that the Fall Area did not constitute an unreasonable hazard and that the curb where Mr. Voje tripped should have been noticed by a pedestrian paying a modicum of attention to their surroundings. Mr. Voje is the author of his own misfortune.

Tisol's Position as it Relates to Teck

- [96] Tisol submits that Teck's claim for contractual indemnity against Tisol cannot succeed. A contractual provision that purports to relieve a contracting party of its own negligence must do so in the clearest of terms. The Lease is not clear and any doubt about that issue must be resolved *contra proferentem* against Teck.

The Legal Framework under the OLA

- [97] Section 1 of the OLA defines an "occupier" 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 this Act, there may be more than one occupier of the same premises.

- [98] Section 3 of the OLA sets out an occupier's duty of care as follows:

- (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

(2) The duty of care referred to in subsection (1) applies in relation to the

(1) condition of the premises,

(2) activities on the premises, or

(3) conduct of third parties on the premises.

[99] Section 6 of the OLA sets out a landlord's responsibility and duty if the premises are used under a tenancy and if the landlord has responsibility for the maintenance or repair of the premises:

6 (1) 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.

The Negligence Legal Framework

[100] As explained in *Agar v. Weber*, 2014 BCCA 297 at para. 29, to establish negligence under the common law, a plaintiff is required to establish:

1. a duty of care to conform to a certain standard of care for the protection of others against unreasonable risks. The duty does not extend to the removal of every possible danger, rather the test is one of reasonableness: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 28;
2. a breach of that duty by some act or omission by the defendant; and
3. the breach of duty is the proximate cause of a plaintiff's injury, meaning there must be a nexus between the injury sustained by the plaintiff and the defendant's negligent act or omission: see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27; *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 54.

[Emphasis in original.]

[101] Whether under the OLA or in common law negligence, the standard of care is the same - to protect others from objectively unreasonable risks of harm. Whether a risk is reasonable or unreasonable is a question of fact to be decided in each case. A number of cases have explained that the standard is not perfection. An occupier is not an insurer against every eventuality that may occur on a premise, and the duty of care does not require a defendant to remove every possibility of danger. See, for example, *Fulber v. Browns Social House Ltd.*, 2013 BCSC 1760 at para. 28; *Lavalee v. Bristol Management*, 2005 BCSC 1666 at para. 29; *Gervais v. Do, et al*, 2000 BCSC 1271 at para. 26.

[102] The fact of an injury does not create a presumption of negligence, and a plaintiff has a duty to keep a proper lookout for their own safety and to be aware of their surroundings. If the accident could have been avoided by a modicum of awareness on the plaintiff's part, a defendant will not have breached its duty of reasonable care: *Esau v. Tansley*, 2020 BCSC 1426 at para. 109. Further, a failure to observe something that is there to be seen may amount to contributory negligence: *Dufault v. Kathed Holdings Ltd. et al*, 2007 BCSC 186 at para. 31; *Gervais* at para. 27.

[103] Mr. Voje has the burden of proving that Tisol and/or Teck are occupiers of the Fall Area. He must show either that Tisol and/or Teck had physical possession of the Fall Area, or responsibility for, and control over, the condition of the Fall Area and the persons allowed to enter the Fall Area. The components of s. 1(b) of the OLA are conjunctive; all of them must be satisfied for Mr. Voje to succeed in establishing that Tisol and/or Teck are occupiers: *Chamberlain v. Jodoin*, 2012 BCCA 108 at para. 30.

Is Tisol an occupier pursuant to the OLA?

Physical Possession under s. 1(a)

[104] Physical possession of a premise typically involves some degree of actual physical presence on and control over the property: *Chamberlain* at para. 21.

[105] I have concluded that Tisol did not have physical possession of the Fall Area. Pursuant to the terms of the Lease, the boundaries of the leased premises are delineated in Schedule D and do not extend to the parking lot or the sidewalk. Although the boundaries of leased premises are not always determinative of whether a tenant has physical possession of premises, the cases where this Court has extended physical possession beyond leased boundaries are distinguishable from the circumstances of this case.

[106] In *Goldmanis v. Mador*, 1991 CanLII 710 at 13-14, [1991] B.C.J. No. 3049 (S.C.), a commercial tenant used an area immediately adjacent to his leased premises as storage for equipment and supplies. The Court held that the tenant was an occupier of that area.

[107] In *Lysack v. Burrard Motor Inn Ltd.*, [1989] B.C.J. No. 1910 (S.C.), the hotel swept and placed planters on the sidewalk adjacent to its premises. The trial judge concluded that this did not amount to the hotel having physical possession of the sidewalk. The Court of Appeal upheld this finding: [1991] B.C.J. No. 2408, 28 A.C.W.S. (3d) 269 (C.A.).

[108] In this case, Tisol did not have a business presence on the sidewalk or in the parking lot. It did not display information or promotional material in either location. In fact, pursuant to the terms of the Lease, Tisol is prohibited from displaying material in common areas. Clause 4(f) provides:

[Tisol] will ensure that all goods and items brought to the Property and handled, stored and processed by [Tisol] in the conduct of its business are stored within the Premises, and [Tisol] will not place or store, or permit the placement or storage of, any goods or items outside the Premises.

[109] Mr. Tecklenborg, Ms. Derksen, and Ms. Polywkan testified that, notwithstanding that Tisol posted "Tisol Parking Only" signs on the walls of the building, painted "Tisol" on the asphalt in the parking stalls, and placed pylons demarking reserved parking, Tisol had no control over who used those parking stalls.

[110] The Lease does not assign specific parking stalls to Tisol, and Tisol was not permitted to tow offending vehicles. Its only remedy was to ask vehicles to move, if the drivers were seen parking and were not shopping at Tisol, or asking neighbouring commercial tenants to ask their customers to move. The authority rested with Teck, and when it was asked whether it would tow vehicles, it refused.

[111] The pylons on the sidewalk did not indicate that Tisol had extended its possession of the Premises onto the common areas. They were placed to deter the customers of other tenants from parking near to the Store. Teck could have demanded that the pylons be removed at any time. Schedule E to the Lease, the Rules and Regulations provides:

2. The sidewalks, driveways and entrances shall not be encumbered or obstructed by tenants or tenants' agents, servants, employees, licensees or invitees, or be used by them for any purpose other than for ingress to and egress from the Premises. [Teck] reserves the right to restrict and regulate the use of the aforementioned public areas of the Building by tenants and tenants' agents, employees, servants, licensees and invitees and by persons making deliveries to tenants. All loading and unloading of merchandise, supplies, materials, garbage, refuse or other chattels shall be made only through or by means of such doorway as [Teck] shall designate in writing from time to time.

[112] For these reasons, I conclude that Tisol did not have physical possession over the sidewalk and parking stalls.

Responsibility for, and Control over, the Condition of Premises, the Activities Conducted on those Premises and the Persons Allowed to Enter those Premises under s. 1(b)

[113] As set out, the requirements in s. 1(b) are conjunctive, and Mr. Voje must satisfy all of the preconditions to establish that Tisol is an occupier under the OLA.

[114] The Lease between Tisol and Teck clearly stipulates that the parking lot, sidewalk, and loading bay are common areas and that it is Teck's responsibility to inspect and maintain them. Tisol's only obligation with respect to those areas is for snow clearing and removal of debris from the sidewalk, but not the parking lot.

[115] Clause 6 of the Lease provides:

Subject to Sections 7 and 9.3 below and reasonable wear and tear and damage not covered by insurance normally maintained by prudent landlords, [Teck] will keep in good repair as would a prudent owner the Building's exterior walls, roof, foundations, and bearing structure and the Common Areas and mechanical, electrical and other base building systems.

[116] "Common Areas" is defined at Clause 1(f) of the Lease to mean:

all areas of the Property so designated by [Teck] from time to time, including corridors, electrical rooms, washrooms, staircases, retaining walls, roofs, exterior areas, facilities, improvements, equipment and installations of the Building and on the Property, pedestrian sidewalks, landscaped and planted areas, general signs, entrances and exits, roads and other means of access to and serving the Building and Property, loading docks and areas, delivery passages, truckways, parking areas, general signs and all other facilities available for the use or benefit of tenants of the Property or their officers, employees, agents, customers, invitees or licensees.

[Emphasis added.]

[117] Mr. Tecklenborg testified that Teck understood that it was responsible for safety matters within the parking lot, including the loading bay and sidewalk. Under the terms of the Lease, Teck collected operating expenses from Tisol for the common areas. Paragraph 1 of the Rules and Regulations at Schedule E of the Lease, sets out that Teck has the right to control and operate the public portions of the building, the public facilities, and the facilities furnished for the common use of tenants, in a manner it deems best for the benefit of tenants generally.

[118] In *Goldmanis*, the tenant was found to be in control of the area outside the leased premises. The Court had "no doubt" that the tenant had the authority to require that, if someone left a truck, tools, or debris blocking the office door, that it be moved or removed: at 14.

[119] In this case, Tisol could not restrict access to the Fall Area. It could not tow vehicles. Ms. Derksen testified that she had been contacted by Tisol to ask for Teck to remove materials from the common areas and Teck looked after it.

[120] Tisol also could not control persons in the Fall Area. The parking lot and the sidewalk are used by other businesses at the Premises, and customers and others routinely traversed the parking lot and the sidewalk to access other businesses. For example, both Mr. Dinn and Mr. Lai accessed the Fall Area to perform their measurements, without seeking Tisol's permission.

[121] The issue of "control" over an area where an accident had occurred has been discussed in a number of cases, all of which are fact dependent. Nonetheless, the analysis of some of them is helpful to the analysis in this case. In *Scheck v. Parkdale Place Housing Society*, 2018 BCSC 938, a plaintiff who slipped and fell on a municipal sidewalk adjacent to a senior's home sued the home. Despite the home having a by-law obligation to clear snow from the sidewalk, the Court found it was not an occupier:

- [43] There is no evidence that Parkdale asserted any control over the activities conducted on the sidewalk outside its building, or that it purported to control or regulate who might use the sidewalk. Its obligations to clear snow and ice gave it arguable control over at least that aspect of the condition of the sidewalk, but not, say, control over cracks or other defects in the surface of the sidewalk.
- [122] In Esau, the defendant's restaurant was located on a floating dock next to a public marina walkway. While reading the defendant's menu board, the plaintiff stepped off the walkway and fell between it and the restaurant's floating dock. The Court said that the restaurant lease did not provide for occupation of any portion of the dock. Pursuant to its terms, the restaurant did not have responsibility for, and control over, the condition of the dock, the activities conducted on it, or the persons allowed to enter the marina and the central dock. The Court also found that the landlord acknowledged that it was solely responsible for safety inspections, repairs and maintenance of the dock and that the restaurant had no obligations in that regard. The restaurant's contribution to common area expenses under the terms of the lease did not support that the restaurant was responsible for repair and maintenance on the dock: at para. 41.
- [123] In Esau other factors leading to the conclusion that the restaurant did not have control or responsibility for the dock included that the public marina walkway was used by the general public to access other businesses and moorages along its length: at paras. 44-45.
- [124] However, in this case, I find that Tisol had day-to-day control of the loading bay area and the Fall Area. Tisol had painted its business name on the parking stalls adjacent to the Premises and posted signs on the exterior building designating the stalls as Tisol parking only. Tisol also placed cones each day designating its parking stalls. Tisol took efforts to control who parked in the stalls adjacent to the Store. Its employees asked customers of other tenants to move their vehicles and recorded licence plates so that other tenants could page their customers to ask them to move. Tisol employees referred to the stalls as "ours".
- [125] Tisol was responsible for keeping the sidewalk adjacent to the Store free of snow, ice, and debris.
- [126] With respect to the loading bay area, Tisol controlled who had access to the loading bay by using the loading bay ramp. Tisol received daily deliveries through the loading bay, and opened and closed the loading bay for that purpose. In addition, Tisol agreed with the pet adoption society that its volunteers could run the pet adoption event from the Store. It directed Mr. Voje to park next to the loading bay door and opened the door to allow him to unload into the Store.

Is Teck an occupier pursuant to the OLA?

- [127] I accept that Teck was not in physical possession of the loading bay area. Physical possession is not synonymous with ownership. Physical possession typically involves some degree of actual physical presence on and control over the Premises. Occasional attendance every few weeks is not sufficient to amount to "physical possession" within the meaning of s. 1(a) of the OLA.
- [128] As set out, the components of the definition of an "occupier" under s. 1(b) of the OLA are conjunctive. As a result, Mr. Voje must demonstrate that Teck has both responsibility for, and control over, the condition of the Premises. On the uncontroverted facts, and pursuant to the Lease, Teck has responsibility for the Premises, including the loading bay and the Fall Area.
- [129] The real issue is whether Teck had some degree of control over the condition of the Premises and those who use the Premises. Exclusive possession or control is not required: *Chamberlain* at para. 36.
- [130] Under the Lease, it was responsible for maintenance of the sidewalk and the parking lot. It controlled the general public's use of both. Only it had the ability to tow unauthorized vehicles. The design of the mounded or ramped loading bay and the adjacent sidewalk was part of Teck's construction of the Premises. Teck attended the Premises for inspections approximately every two weeks and hired contractors to sweep the parking lot and to maintain the landscaping.
- [131] If Teck had notice that the loading bay area or the Fall Area were hazardous, only it could have hired contractors to change the design.
- [132] While Teck did not have day-to-day control over the activities of individuals who were invited by Tisol to cross the area to access the loading bay and the Store via the loading bay door, I find that it had sufficient control to be an occupier under s. 1(b) of the OLA.
- [133] As is conceded by Teck, it owed Mr. Voje a duty pursuant to s. 6 of the OLA.
- [134] This section of the OLA imposes the same duty, pursuant to s. 3, on a landlord as the occupier, but it does not impose vicarious responsibility for the actions of an occupier in breach of that duty: *Jack v. Tekavec*, 2010 BCSC 1773 at paras. 35-36.
- [135] As a landlord, Teck had a duty to take reasonable care in respect of risks arising from a failure to maintain or repair the Premises, and to ensure that persons using the Premises would be reasonably safe in so doing.

Did Tisol and/or Teck owe Mr. Voje a duty at common law?

- [136] In the circumstances of this case, I accept that both Tisol and Teck owed Mr. Voje a duty at common law.

- [137] Mr. Voje was a volunteer attending a Tisol-sanctioned pet adoption event at the Store. He was told by a Tisol employee to park at the loading bay door. A Tisol employee opened the loading bay door for him. A Tisol employee permitted him and the other volunteers to come and go from the loading bay for the purposes of unloading the dogs and the equipment, and to set up within the Store. As such, they owed Mr. Voje a duty to ensure his safety.
- [138] To access the Store, and to unload for the purposes of the pet adoption event, Mr. Voje was required to use the parking lot and the sidewalk outside the loading bay. The loading bay area, and thus the Fall Area, was designed and built on behalf of Teck. As a permitted user of the Premises, Teck owed Mr. Voje a duty to ensure that the loading bay area and adjacent sidewalk were safe for him to use.
- Has Mr. Voje established that the Fall Area was unreasonably hazardous?
- [139] As I have said, the standard of care to be applied to an occupier or a landlord is that of a reasonable person objectively determined.
- [140] An occupier is not required to absolutely ensure against any misadventure. The statutory or common law duty owed to a user of premises is determined through the lens of reasonableness in the circumstances. The onus is on Mr. Voje to demonstrate, on a balance of probabilities, that the Fall Area was unsafe and that the unsafe condition caused or contributed to his injury.
- [141] From the photographs in evidence, and Mr. Voje's testimony, the surface of the parking lot, the mounded asphalt that ramped up to the loading bay, and the adjacent sidewalk were in good condition. There was no evidence of disrepair. Mr. Voje testified that his path of travel was "nice and smooth" for the purposes of unloading.
- [142] Mr. Tecklenborg testified with respect to his regular inspection of the Premises, and Ms. Polywkan testified about Teck's responsiveness to any issues that Tisol brought to Teck's attention.
- [143] According to Mr. Lai's evidence, which I accept, the Fall Area complied with building, by-law, and applicable safety codes. There were no applicable regulatory requirements for any specific markings on the loading bay or the adjacent sidewalk.
- [144] The WorkSafe BC guideline relied on by Ms. Wauters was not in effect at the relevant time. The NRC document on which she relied appeared to apply to sidewalk cracks, not to parking lots adjoining sidewalks around a building. The tripping hazard referred to in the article did not use the word "serious".
- [145] There was nothing obstructing Mr. Voje's vision as he approached the Fall Area. He agreed that the Fall Area was in good repair and clean of debris. The photographs depict a well-maintained parking lot, sidewalk, and Premises. The parking lot was not busy. There was a distinct change in the nature of the surface of the asphalt parking lot and the concrete

sidewalk. They were different in texture and colour. The asphalt parking lot, including the ramp, are dark grey in colour; the sidewalk is a lighter grey. Accepting Mr. Voje's evidence that it had been raining does not change the visual discontinuity that is evident in the photographs, some of which were taken when the asphalt and the sidewalk were wet or damp.

- [146] Mr. Lai opined that there was no requirement or standard for the curb edge or loading bay ramp to be painted or have any other visual warnings.
- [147] Ms. Polywkan and Mr. Chang testified that there had been no complaints about the loading bay area or the Fall Area. The loading bay had been used daily by delivery drivers without complaint or incident, and staff used the loading bay ramp daily for garbage disposal without incident. While prior safe use is not determinative, it is of some relevance to my analysis. There was no evidence of trip and falls with respect to the Fall Area after Mr. Voje's fall.
- [148] It is common for there to be differences in height between the surface of parking lots and sidewalks. Mr. Voje agreed in cross-examination that he had been to the Store before and was aware that there was a raised curb and sidewalk across the length of the Store frontage. As he was unloading at the loading bay, Mr. Voje was also aware that the loading bay area was raised to be flush with the curb and the sidewalk. He testified that he understood that, at some point between the loading bay and the entrance to the Store, the asphalt or pavement transitioned to become flush with the sidewalk. Common sense suggests that the transition would be near to the loading bay.
- [149] Mr. Voje was not looking down at the time of the Fall. He was looking ahead. He did not say that he was distracted. He was not holding anything in his hands. Knowing that there was a transition between the asphalt parking lot and the sidewalk, and that, at some point, the flush area would come to an end, he should have paid more attention to where he was walking. The fact that he worked as a delivery driver should have heightened his awareness to risks around loading bay doors.
- [150] On the date of the Fall, Mr. Voje was medically advised to be off work due to a toe injury on his left foot. He was receiving Worker's Compensation benefits because he was unable to perform his work duties. It was Mr. Voje's left foot that caught on the curb. He denied that his left foot was causing him difficulty on the day of the Fall, but, contrary to his discovery evidence, he also denied that his foot was bruised. Although I do not find that Mr. Voje's injury caused him to fall, in light of his injury, I would have expected him to be particularly cautious about where he was walking to prevent aggravating his foot injury or causing further injury.
- [151] From the photographs, and the evidence, Mr. Voje had ample opportunity to observe the asphalt parking lot and its relationship to the curb and the adjacent sidewalk. Although Mr. Scott testified that it was difficult to see, Mr. Voje did not give that evidence. I find that in the circumstances, taking reasonable care, Mr. Voje ought reasonably to have observed that

there was a height differential between the asphalt parking lot and the sidewalk. The loading bay area and the Fall Area were reasonably safe and did not pose an unreasonable risk of harm. There was no unusual danger.

- [152] The Fall Area was in a commercial building parking lot near a loading bay door with an adjacent sidewalk. The asphalt parking area sloped upwards in order to meet the height of the curb to facilitate loading in and out of the loading bay door.
- [153] Pedestrians are not entitled to expect perfection in the condition of sidewalks or the complete matching of surfaces when walking in outdoor areas like parking lots, and transition areas, from parking surfaces to walkways to building entries.
- [154] In *Desjardins v. Arcadian Restaurants Ltd.*, [2005] O.J. No. 5613, 2005 CanLII 48315 (S.C.J.), at issue was an asphalt parking lot and a concrete sidewalk around a Kentucky Fried Chicken restaurant. At the curb, there was a minor difference in elevation between the parking lot and sidewalk. The court accepted an expert opinion that slight changes in elevations on sidewalks are not rare. If an elevation change is not exceptional, then it should not be considered a significant tripping hazard and does not warrant any action by an occupier or the property owner.
- [155] The photographs in evidence do not show the presence of any unusual risk or hazard. The gradual mounding or ramping of the parking lot to meet the height of the curb at the loading bay door is not uncommon in parking lots and would not be viewed as an unreasonable risk or hazard.
- [156] In his submissions, Mr. Voje suggested that an unusual danger existed because the flush area was off centre by a few centimetres. There was no evidence that this had any impact on the Fall.
- [157] I conclude that the cause of Mr. Voje's accident was his own lack of reasonable care for his safety, which should have been heightened by his toe injury. After retrieving his phone, he chose to move from the Van to the sidewalk using a different route than he had previously used. Had he returned to the Store along the passenger side of the Van, as he had previously done, the Fall would not have occurred. In taking a different route, he should have exercised more care.
- [158] Mr. Voje was aware that, at some point, the asphalt transitioned from being flush with the sidewalk, as it was outside the loading bay door, to there being a height differential between the two. Common sense and logic suggest that the transition would be to the south and north of the loading bay door.
- [159] I conclude that the Fall Area was reasonably safe for users of the Premises, the loading bay and the Store, and that the defendants are not in breach of any statutory or common law duty owed to Mr. Voje. Thus, even if Tisol was an "occupier" as defined by s. 1 of the OLA, Mr. Voje has failed to establish that it breached the standard of care under s. 3.

[160] Mr. Voje's Fall was an unfortunate accident. His action is dismissed. As a result of my conclusion, it is not necessary for me to consider causation, the apportionment of liability between Tisol and Teck, contributory negligence, or the indemnification issues raised.

Costs

[161] In the absence of facts which might be relevant to costs, and of which I am not aware, the defendants are entitled to their costs of this action on scale B.

"MacNaughton J."

Appendix A

Appendix B

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Prepared on 27 October 2026 · Esheria