

COURT OF QUEBEC
Small Claims Division

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
Civil Division

No: 500-32-140542-137

DATE: July 16, 2015

PRESIDED BY THE HONOURABLE DAVID L. CAMERON, J.C.Q.

PHYLLIS LEMISH
[...] Côte Saint-Luc (Québec) [...]

Plaintiff

v.

CITY OF CÔTE SAINT-LUC
5801, boul. Cavendish
Côte Saint-Luc (Québec) H4W 3C3

Defendant

JUDGMENT

[1] The Plaintiff, Phyllis Lemish, resides on A Street in Côte Saint-Luc, sues the City of Côte Saint-Luc ("the City"), for \$ 7,000, alleging body injuries and damage to personal property, namely a ring she was wearing at the time and her glasses which were severely scratched.

[2] She alleges that on June 26, 2013, across from [...], she fell on the City sidewalk, injuring her hand, nose, knees and her breast.

[3] She asserts that the fall was caused because of the fault of the City in not maintaining its sidewalk, which was badly worn, cracked, and in the place where she fell, had a hole that her foot became caught in.

[4] She alleges she was not aware of the danger when she crossed the road, turned left onto the sidewalk and proceeded towards her residence.

[5] It was a summer day and there was no rain.

[6] Mrs Lemish was wearing ordinary sneakers. She wasn't carrying anything except her purse over her shoulder. She was walking normally, not running.

[7] The City contests the case, firstly, alleging that the poor condition of the sidewalk was very obvious, and known to Mrs Lemish who resided on the street.

[8] The City also contests the amount claimed as being exaggerated and not proved.

[9] There is evidence in the file that the insurers of the City took up its case; Chantal Picard, FPAA of BFL Canada Risk and Insurance Inc., wrote to the Court on November 19, 2013, attaching the Contestation that they had prepared.

[10] The insurer is, however, not officially a party in the proceedings, having not filed any sort of intervention, nor did the City ask that the insurers be impleaded.

[11] The City was duly summoned to the hearing with the usual notice dated May 11, 2015, but did not attend.

[12] The Court proceeded therefore to hear Mrs Lemish's testimony, and to examine her documents.

[13] The essential issue in the case is whether the very deteriorated and cracked sidewalk was such an obviously poor condition that the City can defend itself by alleging that the Plaintiff fell because of her negligence. Was it the City's fault, or is it simply a case of someone not being careful when walking on an obviously damaged sidewalk.

[14] Not every accident that occurs on a sidewalk is indicative of fault on the part of a city, nor is every crack or blemish on the sidewalk necessarily evidence of fault. Even serious deterioration does not add up to fault if it is quite obvious to the pedestrian, who can avoid it.

[15] The jurisprudence has developed the concept of the trap (*piège*).

[16] This is defined as an inherently dangerous situation where the danger is not apparent but is, to some degree, hidden. There is the connotation of abnormality, of surprise¹.

[17] Our case is not dissimilar to that of *Hélène Couture c. Ville de Montréal*², where Judge Keable remarked on the presence of cracks in which the victim's foot became caught.

¹ *Rubis c. Gray Rocks Inn Ltd*, [1982] 1 R.C.S. 452; *Réjeanne Gagnon c. Ville de Montréal*, (C.A.) 19 novembre 2003, 500-09-012110-029.

[18] In our case, the photos revealed that there is pronounced V shaped crack, like a piece of pie. Just before the tip, there is a hole that is full of foliage, presumably grass or weeds.

[19] The Plaintiff states that her foot got lodged in the hole, and this caused her to trip.

[20] In the Court's view, despite the atrocious condition of the sidewalk, the particular hole where the Plaintiff fell was camouflaged by the growth of grass or weeds, and it would not have been obvious to a pedestrian that this was actually a gaping hole, not just a part of the crack where the soil was sprouting up weeds.

[21] The Court is not suggesting that the City should undertake a campaign of removing grass, clover, and weeds from its city sidewalks, if it can't afford to repair them. Normally the sidewalks are no more nor less dangerous because of unsightly weeds. The City is, nevertheless, responsible if it tolerates a condition that brings about a danger that is not apparent to the normal pedestrian.

[22] The photographs show that there are several yellow dots painted on the sidewalks, which may suggest that the City had decided to repair this particular segment. But this evidence is inconclusive.

[23] Mrs Lemish told the Court that the sidewalks in her neighbourhood are generally in good condition, and she was not aware of the poor quality of this particular segment. She was walking without looking down, which is normal: people keep their eyes looking ahead, not down, when they walk. When she turned from the road onto the sidewalk to continue her passage, she did not notice anything particularly unusual about the place she was walking.

[24] In the Court's view, therefore, this particular condition was unusual and constituted a surprise, which trapped its victim. There was no indication that the cracked sidewalk concealed a hole that a pedestrian's foot could get caught in.

[25] As for the quantum, the most serious injury consisted in a fracture of the "extrémité digitale du 5^e meta", which healed without a cast, with temporally immobilisation.

[26] There was approximately two weeks of pain treated with ordinary pain-killers.

[27] Mrs Lemish also sustained an injury to her nose. There was no permanent scar, and the blemish that is visible in the photo, only lasted a few weeks.

[28] She does suspect that there may be a problem in terms of her breathing, but this has not been adequately proved though medical evidence.

[29] She sustained a bruise to her breast and still has a sore knee, but again, the medical evidence does not establish a serious disability.

[30] She showed the Court an estimate from a jeweller, alleging that the ring she was wearing was chipped. The jeweller estimates a loss of value of \$ 2,800 US, but he states that it is an estimate only.

[31] Mrs Lemish has not proceeded to have the ring repaired.

[32] The Court agrees with the City's position that the amounts claimed are higher than the true loss. In the Court's view, a global amount of \$ 2,000 for minor injuries, pain and suffering, should be sufficient for the personal injuries.

[33] In the absence of more convincing evidence, the Court awards \$ 500 for damages to the ring.

[34] Mrs Lemish also showed the Court the reading glasses that she wore at the time that were very badly scratched when she fell.

[35] This does not represent a true economic loss, because these were very old glasses that, for good ocular health, would have been replaced anyway, and Mrs Lemish wore an older pair pending cataract operations on both eyes which restored perfect vision.

[36] Her outdated damaged glasses are now simply a souvenir of the event and there was no need to replace them and she did not.

FOR THESE REASONS, THE COURT:

CONDEMNS the Defendant to pay the Plaintiff the sum of \$ 2,500, together with interest at the legal rate and the additional indemnity provided for in section 1619 of the *Civil Code of Québec*, calculated from July 3, 2013, as well as costs for the judicial stamp in the amount of \$ 167.

DAVID L. CAMERON, J.C.Q.

Date of hearing: June 22, 2015