

After crossing the main street in this community, she "stepped up" and over a curb unto an interlocking brick sidewalk and walked along the adjoining wall of the business premises known as Henry Armstrong's Instant Printing. These premises formed part of a commercial strip mall known as the Selkirk Town Plaza, owned by the defendant Komco Ltd.

As she rounded the corner of this building to turn into this strip mall, she tripped and fell on the sidewalk immediately in front of the business premises of Henry Armstrong's Instant Printing. As confirmed by many of the photographs which comprised Exhibit No. 1, the sidewalk in front of these premises was elevated some 3½ inches at the point where it adjoined the municipal interlocking brick sidewalk. This latter municipal interlocking brick sidewalk was of two distinctly different colors and, in addition to its appearance, differed both in construction and height from the elevated strip mall sidewalk.

According to the plaintiff, she "didn't know or expect a sidewalk to be there". She fell sideways, landing on her shoulder and side with her head striking the sidewalk.

Although she did not lose consciousness, the wing of her eyeglasses caused a laceration just above her eyebrow. These eyeglasses were subsequently replaced at a cost of \$160.05.

After two strangers assisted her to stand up, she was driven to the office of her family physician. Aside from being badly shaken up, the plaintiff testified that she had no immediate aches or pains except where the wing of her eyeglasses had cut her eyebrow.

Concerning his examination of the plaintiff on this date, her family physician, Dr. Habtu Demsas, stated in his report dated April 18, 1995 (tab 1 of Exhibit No. 3):

"... [S]he had about 1 centimeter [sic] long right periorbital superficial laceration. Right periorbital swelling and ecchymosis [sic] (bruising). There was no bony step deformity. Pupils were equal, reactive to light. Fundi were normal. There was no focal neurological deficit. She also had ecchymosis [sic] (bruising) of the volar aspect of right wrist. The wrist range of motion was good. Diagnosis of contusion of head and right wrist, superficial laceration of right periorbital area was sustained.

She was advised to use ice on head and right wrist, tensor on right wrist. She was also advised to be seen again, if any further problem arises. Following the visit of April 15/94, Mrs. Brezina was seen by myself on Oct. 21/94 for a problem unrelated to the accident (fall) of April 15, 94. She was seen again on March 08/95. This time patient was complaining of pain all over her body

especially on right buttock, shoulders and left knee. She was also complaining of chest heaviness and headachis [sic]."

In response to questions posed on direct examination, the plaintiff testified that prior to this accident "my health was good ... no pain ... no problems". However, in the autumn months, "I started to feel pain throughout my whole body." She testified that the symptoms she subsequently experienced, (and which continue to persist), were directly attributable to the fall. They included headaches, stiffness and soreness of both knees, the right ankle and right shoulder, difficulties with movement, shoulder joint pain and loss of hair.

In addition to being examined by her family physician, the plaintiff was examined by Dr. I.I. Mayba, an orthopaedic surgeon and specialist with the Manitoba Clinic, and received chiropractic treatments at the Kildonan Chiropractic Centre.

Since October 1, 1983, occupiers' liability cases in this province are subject to, and governed by, the provisions of The Occupiers' Liability Act, C.C.S.M., c. O8: See Sandberg v. Steer Holdings Ltd. (1987), 45 Man.R. (2d) 264 (Q.B.).

Section 3(1) of this legislation reads:

"Occupiers' duty

3(1) An occupier of premises owes a duty to persons entering on the premises and to any person, whether on or off the premises, whose property is on the premises, to take such care as, in all circumstances of the case, is reasonable to see that the person or property, as the case may be, will be reasonably safe while on the premises."

(underlining mine)

Upon a review of "all circumstances of the case", I have not been persuaded that the defendant Komco Ltd. breached the statutory duty it owed to the plaintiff.

The statutory obligation imposed under this legislation does not mandate a standard of perfection on the part of occupiers to insure the safety of persons using their property. As noted by Monnin, J., (as he then was), in Qually v. Pace Homes Ltd. and Westfair Foods Ltd. (1993), 84 Man.R. (2d) 262, at 266 (Q.B.):

"... The standard is reasonableness, not perfection. Krindle, J., dealt with the application of this standard in Kopen v. 61345 Manitoba Ltd. et al. (1992), 79 Man.R. (2d) 250 (Q.B.), at [p. 254] of her reasons:

'I am satisfied that the occupier in this case took such care as, in all circumstances, was reasonable to see that persons would be reasonably safe while on the lot. To demand more is

to demand that occupiers insure the safety of persons using their lot, as opposed merely to taking reasonable steps to see to their safety.' "

According to the plaintiff, April 15, 1994 was "a lovely, spring, warm day". Having visited the business premises of Henry Armstrong's Instant Printing ("once before April, 1993") and having visited the Canadian Imperial Bank of Commerce located on this property ("once a month") as a customer in 1992, the plaintiff was not a stranger to this strip mall. The sidewalk in front of the business premises of Henry Armstrong's Instant Printing (which extended to all adjoining stores in the strip mall) was in good repair (unlike the dangerous condition of the private sidewalk described in Snitzer v. Becker Milk Co. Ltd. et al. (1976), 15 O.R. (2d) 345 (H.C.)) and free of ice and snow. When viewed in relation to the municipal interlocking brick sidewalk, the color, height and construction of the private sidewalk was clearly visible and did not constitute any unusual danger.

This unfortunate accident appears to be directly attributable to the plaintiff's own negligence in failing to heed where she was walking. In response to the question on cross-examination, "And you weren't watching where you were walking?", she replied, "No." Under such circumstances, neither a sign on the wall adjoining the municipal interlocking brick sidewalk alerting pedestrians to the private sidewalk nor a private sidewalk of greater elevation would have prevented this unfortunate accident.

Had liability been established, (a) special damages would have been restricted to the replacement of eyeglasses in the amount of \$160.05 and the account of Dr. Demsas of \$16.17 for his examination of the plaintiff on April 15, 1994, and (b) general damages would have been assessed in the amount of \$1,000.00.

Aside from the testimony of Dr. Douglas Eggertson concerning the likelihood that subsequent headache complaints were post-traumatic, the preponderance of the evidence neither confirms the plaintiff's assertion that she enjoyed good health prior to the subject fall, nor that all her aforesaid symptoms and medical problems were directly attributable to the fall.

Aside from her own testimony that she had no immediate aches or pains from the subject fall (except where the wing of her eyeglasses had cut her eyebrow) and the aforesaid assessment of condition by Dr. Demsas (tab 1 of Exhibit No. 3), various medical documents and reports confirm pre-existing medical problems and conditions.

In his report dated August 28, 1995 (tab 2 of Exhibit No. 3), Dr. Mayba stated, at p. 3:

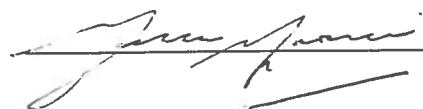
"... I anticipate in the future she will be bothered by all her pre-existing conditions."

Some of these conditions were noted in the report of Dr. Mayba to Dr. Demsas dated October 19, 1993 (tab 8 of Exhibit No. 3). It reads, in part, that the plaintiff "has chronic aches in her back and hips and knees and difficulty in walking", that "the dorsolumbar spine movements are moderately restricted and there is pain across the lumbosacral area", and that "there is 15 degrees scoliosis and marked degenerative changes are present in the lumbosacral spine and multiple lumbar discs".

Other pre-existing medical problems and conditions recorded by Dr. Mayba in his office notes (tab 9 of Exhibit No. 3) included (a) "occipital headaches" as a result of a fall from steps at her home in February, 1973, (b) chronic foot pain since 1971, (c) unstable right knee in 1978, and (d) thinning of her hair in 1990.

In his office notes for 1992, Dr. Demsas recorded a complaint of pain in both shoulders (under date of July 29, 1992) and "½ day episode of dizziness" (under date of November 13, 1992).

In the result, the plaintiff's action is dismissed. Failing agreement, counsel may speak to costs.

 J.