

TREES & THE LAW

BY JULIAN DUNSTER



Tree roots and sidewalks

Policy and inspection are critical

Tree roots in urban areas often cause structural damage to adjacent roads and sidewalks. Heaving of sidewalk slabs is not unusual and many cities have a policy in place to inspect and correct these problems as they are identified. These policies are generally designed to provide the responsible department with a current assessment of sidewalk conditions, so that defects and likely tripping hazards can be identified and repaired in a timely manner.

The re-inspection interval is established in the policy, along with the minimum vertical difference that will trigger the need for repairs. There may be several levels of heaving identified, in order to classify the problems into those most in need of attention and those that need to be monitored but are presently not deemed to be too serious.

By extension, and court decisions have reinforced this approach, not every elevation difference along a sidewalk will automatically be classified as a tripping hazard. In other words, a "Standard of Perfection," where there were never any variations in the sidewalk surface, is unlikely to be met or to be required. Cities or municipalities are not insurers for members of the public using the sidewalks (Bracken v. City of Vancouver et al, 2006 BCSC 136. Assman v. Etobicoke, 1997 OSCJ).

As long as the sidewalk inspection policy is reasonable and has been reasonably implemented, unfortunate accidents resulting from tripping will not automatically result in successful claims of negligence (Hugh v. Vancouver (City) 1981 BCSC; Lennox v. New Westminster (City) 2102 BCSC 410; Pamaran v. The Corporation of the City of Victoria, 1996 BCSC; Tambaou v. City of Vancouver 2001 BCSC).

There are cases where the standard of care was found

to be lacking, and liability has ensued. For example Kirwan v. London (City), 2011 ONSC deals with a sidewalk in an unacceptable state of repair (though not caused by tree roots).

There is an expectation that the users of sidewalks will do so exercising some degree of due care and attention; that is they should be watching where they walk or run to some degree. If it can be proven that the user was not paying attention some degree of contributory negligence may apply (Furlong v. Cambridge (City), 2009 ONSC).

These cases suggest the following cautions for cities and municipalities responsible for sidewalk maintenance. A well written policy is essential. It should consider including:

- the types and scale of sidewalk elevation changes and a classification of them
- the manner in which sidewalks will be inspected and by whom
- the procedure used to respond to citizen complaints about sidewalks problems
- the frequency of inspections, perhaps based on level of use
- the actions necessary to correct problems once they have been identified
- the time frame in which problems will be corrected.

Julian Dunster is not a lawyer and the above should not be construed as legal advice. If you have an issue requiring legal advice please consult a lawyer. Additional case law can be found in the book Arboriculture and the Law in Canada. Copies are available from Julian Dunster. jd@dunster.ca www.dunster.ca Julian Dunster also maintains an extensive data base of Canadian case law involving trees. Please contact him for more information.

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