
CANADA / JUDGMENT

Khoury v. Vancouver (City)

2015 BCSC 805

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2015 BCSC 805 Khoury v. Vancouver (City)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Khoury v. Vancouver (City),

2015 BCSC 805

Date: 20150514

Docket: S123585

Registry: Vancouver

Between:

Samir Khoury

Plaintiff

And

City of Vancouver and

Vancouver Board of Parks and Recreation

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for the Plaintiff:

D.J. Taylor

Counsel for the Defendants:

B.D. Jordan

Place and Date of Trial:

Vancouver, B.C.

December 8 - 12, 2014

January 19, 2015

Place and Date of Judgment:

Vancouver, B.C.

May 14, 2015

- [1] The plaintiff, Mr. Khoury, slipped and fell while visiting VanDusen Botanical Garden (the "Garden") on November 19, 2011. He hurt his shoulder, which he says has interfered with his ability to earn income from his occupation, long haul trucking. He sues the owners and operators of the Garden, the Vancouver Board of Parks and Recreation and the City of Vancouver (collectively, the defendants) in negligence and under the Occupiers Liability Act, R.S.B.C. 1996, c. 337 [OLA]. He says they did not do enough to protect patrons of the Garden from snow and ice hazards.
- [2] The defendants say they met the duty of care required of them and stress the standard cannot be one of perfection. The defendants also say that snow and ice on a path in the Garden during winter months is an inherent risk to which any adult would be aware. In the alternative, if liability is found, the defendants dispute the extent and duration of any injury and the degree to which it prevented Mr. Khoury from earning an income.
- [3] I will address the two main issues, liability and damages, separately.

The Fall at THE GARDEN

- [4] Both Mr. and Mrs. Khoury testified in relation to the facts relevant to establishing liability. Their testimony on important facts was very similar and I found them both to be reliable and credible witnesses.
- [5] Mr. Khoury and his wife live close to the Garden and they visited it frequently. They found it relaxing. They decided to visit it on November 19, 2011, which was a Saturday. It was cold, but sunny. They arrived at the Garden at about 3:30 p.m.
- [6] Mrs. Khoury had two favourite areas in the park that feature maple trees and they decided to visit those areas. Mrs. Khoury tended to walk faster so she was typically two or three metres ahead of Mr. Khoury as they walked through the park. The park was not crowded at that time, although there were some visitors. They visited the maple trees and then walked around a main path working their way back towards the park exit. That main path took them over a wooden bridge (referred to as the zig-zag bridge). As soon as one walks off the zig-zag

bridge, the pathway immediately slopes upwards.

- [7] Both Mr. and Mrs. Khoury testified they saw water and snow on parts of some paths and snow on some surrounding grass. Mr. Khoury testified via an Arabic interpreter. The interpreter informed me that the Arabic word for snow also means ice. For that reason, it is not clear to me whether Mr. Khoury said he saw any ice in the Garden that day. Mrs. Khoury did not mention seeing ice on any pathways. I find on a balance of probabilities that neither noticed ice on the pathways that day.
- [8] Mrs. Khoury walked over the bridge first and warned her husband that it was slippery. He admitted he heard her and took extra care to walk cautiously on the bridge. Unfortunately, Mr. Khoury fell shortly after he stepped off the bridge.
- [9] He fell quickly and was unable to break his fall. His right shoulder hit the ground first. It became dislocated. He could not feel his right arm but had pain in his left arm. He called out for his wife. He was aware that something was wrong because his right arm "was not working". His wife had to assist him using both her arms to help him stand. Mr. Khoury was in a lot of pain and his right arm was "swinging" freely. They walked back towards their car with Mr. Khoury leaning on his wife for support.
- [10] As they were leaving the park, Mrs. Khoury told a security guard that Mr. Khoury had fallen and that the guard was a witness to her husband's condition. The guard was rude and rushed them out of the park because it was closing. Neither of them saw any of the Garden staff in the park during their visit.
- [11] Mrs. Khoury drove her husband to the Richmond Hospital. He was in an unbearable amount of pain. They spent about five hours at the hospital. He was given morphine and his arm was put in a sling after his shoulder was re-set. He was sent home at that time with some medication.

The Garden

- [12] The defendant relies on the testimony of James Warkentin and Shawn Longpre. I found both to be credible and reliable witnesses.
- [13] Mr. Warkentin is a park superintendent and has been working for the Parks Board for about 37 years, 18 years of which have been at the Garden. It was clear from his testimony that he takes great pride in his work and in the Garden itself. Mr. Warkentin supervises about 10 employees which include groundskeepers and gardeners. He is responsible for the general maintenance of the Garden which includes overseeing the condition of the interior paths as they relate to snow and ice treatment.

- [14] Mr. Longpre is the equipment manager at the Garden and he reports to Mr. Warkentin. He is responsible for running all the large equipment which consists of a front-end loader, one tonne truck and mowers. Mr. Longpre is responsible for the maintenance of most of the trails in the Garden. He has 15 years' experience working at parks, including eight at the Garden.
- [15] Mr. Warkentin described the park as 55 acres of rolling terrain with a botanically-based garden. Typically the Garden is open from 9:00 or 10:00 in the morning until dusk during the summer hours and from 10:00 a.m. to 4:00 p.m. during the winter hours but the gardening/facility staff typically work from about 7:00 a.m. to 3:30 p.m. They also do a light display in the Christmas season called Festival of Lights that is very popular. Mr. Warkentin is responsible for planning and erecting the Festival of Lights.
- [16] Visitors walk through the gardens on trails. There are three types of trails in the Garden: asphalt trails that are about 3 metres wide; screenings or gravel trails that are a bit less than 2 metres wide; and tertiary paths that have bark mulch, wood chip or other trail mix material. Mr. Longpre is responsible for the maintenance and upkeep of the first two of those but not the third. He is also responsible for maintenance of the wooden and stone bridges within the Garden and areas covered with pavers (around the visitors' centre).

The Manual

- [17] There are more than 200 parks in Vancouver. The Parks Board publishes a manual entitled "Snow Removal & Ice Control: For Road, Parking Lots and Sidewalks Only" (the "Manual") which is updated annually.
- [18] Mr. Warkentin understood the Manual to set out the hierarchy of priorities for snow and ice treatment. He testified the primary focus for the Garden's snow and ice treatment is the external sidewalks along Oak Street and 37th Avenue, followed by the parking lot and the circular drive in front of the Garden's entrance. The internal paths are of secondary concern. This is consistent with the Manual. The Foreword states:

The Vancouver Park Board Snow and Ice Control Schedule provides for a reasonable level of service on major park access roads, primary parking areas, perimeter and direct internal park pathways in the downtown area and access paths to major facilities. These priority areas are treated as soon as practicable during a snowfall or icy conditions and reasonable efforts are made to ensure that they are kept open during and from the first day of snowfall or icy conditions.

The Vancouver Park Board provides very limited snow clearing on the less frequently used parks including perimeter sidewalks and internal pathways, and parking areas. Those that are scheduled are treated as soon as practicable.

- [19] In summary, the major objectives are:

1. to treat perimeter sidewalks and direct internal park walkways in the downtown area, park access roads, primary parking areas, and access paths to major facilities as soon as practicable following a snowfall. Response to these areas is initiated on a call-out basis or treated first on regular work days;
 2. to treat the more heavily used perimeter sidewalks, direct internal park walkways, and the more frequently used parking areas only under heavier snowfall conditions; and
 3. to provide a limited snow clearing program on less frequently used perimeter sidewalks and direct internal park pathways and parking areas.
- [20] The Manual is organized according to the priorities as listed in the Forward. Section A addresses background issues (purpose, scope, climate, weather reports, authority, communications and revisions to manual), section B deals with organizational matters and section C is entitled "Snow and Ice Control Standard Sites and Routes".
- [21] The introductory comments at C.1 state that snow clearing and ice control identified in sections C.5.1 - C.5.7 "shall be carried out as a first priority as soon as practicable during the first day of snowfall." The response to those areas is to be initiated on a call-out basis if outside regular working hours or attended to first during regular working days.
- [22] Section C.1 also identifies and defines what are primary or secondary roads, sidewalks, parking lots, etc. Section C.1.1(a) states primary roads are "the highest priority and shall be attended on a seven days a week, twenty-four hours a day basis." Primary roads are identified in Stanley Park, Queen Elizabeth Park, Vanier Park Road to Burrard Marina and Jericho Service Yard Road.
- [23] Next in the hierarchy are primary sidewalks and pathways which are defined as "[p]erimeter sidewalks and internal park pathways that provide direct access to major facilities" (section C.1.1(b)). They are to be cleared as soon as practicable during the first day of snowfall. Section C.1.1.(c) deals with primary public parking areas which are those heavily used by the public and they "shall have areas immediately adjacent to the facility they serve treated to 25% capacity as soon as practicable" after snowfall. Any additional areas within these parking lots that need to be cleared to allow for more parking shall be done during regular work hours.
- [24] Section C.1.2 addresses secondary sidewalks, pathways and public parking areas. Perimeter sidewalks and internal park pathways "that provide access to a destination or are more heavily used shall be treated as soon as practicable." Secondary public parking areas are those more heavily used that serve Parks Board facilities and they are to be re-treated as soon as practicable after the initial snowfall but during regular working hours. The area immediately adjacent to the facilities is to be treated to 50% capacity.

- [25] Section C.1.3 deals with tertiary sidewalks and pathways which are identified as "perimeter sidewalks and internal park pathways that are less frequently used but where there are no viable alternative means of access around or through the area" and they are meant to be treated as soon as practicable after the decision being made to embark on this treatment.
- [26] Section C.5.7 applies exclusively to the Garden and it states that "[p]erimeter and building access sidewalks are [a] principal concern then 100% clear parking spaces during initial treatment. Internal pathways are treated secondarily [with] available equipment." The parking lots are identified to include the circular drive through the main parking lot, the main parking lot and internal service roads. Sidewalks are divided into primary (park perimeter and internal pathways near Christmas display) and secondary (internal pathways - remainder).
- [27] The defendants agree the Manual gives no specific guidance nor sets criteria for the actual maintenance of a secondary pathway.

Maintenance

- [28] Mr. Warkentin's evidence is that the Garden always has a lot of rain but the amount of snow differs each winter. For example, as of December 2014, there had already been four or five times where snow and ice treatment actions were needed whereas, during 2013, there was little need due to the mild weather.
- [29] In terms of administrative organization, Mr. Warkentin communicates with a city employee (Ms. Johnson) who acts as a conduit to the building service workers. Those workers do not report to Mr. Warkentin; they report directly to Mr. Warkentin's boss. Mr. Warkentin typically contacts Ms. Johnson in the fall (via phone call, emails and/or personal meetings) and he sets out his expectations with regard to snow and ice treatment for the coming winter, among other things. According to Mr. Warkentin, he provides Ms. Johnson a list of tasks to be done when snow or ice treatment is needed. His understanding is that the list became a document available to building service workers but no such document was put into evidence.
- [30] At the end of each week, Mr. Warkentin would communicate to Ms. Johnson if, based on the weather forecast, he concluded there was a possibility of needing snow or ice treatment for the upcoming weekend. He would typically contact his gardening staff to see who might be available for overtime if it was needed. A building service worker is supposed to be on-site during weekends and Mr. Warkentin understood that person was supposed to report to him in a timely manner (by about 7:30 a.m.) if there is any concern about the weather and conditions at the Garden on the weekend. Regardless of getting a phone call, Mr. Warkentin checks the weather and forecast early in the morning on the weekend.

November 19, 2011

- [31] Mr. Warkentin has some direct recollection of events on November 19, 2011. He did confirm that he always checks a couple of weather forecasts (he accesses more than one weather app) Saturday and Sunday mornings in the winter. However, he was clear that he does not rely on the weather reports; he always wants a "first person" report about the conditions at the Garden. Mr. Warkentin keeps a log at his home for occasions when snow or ice treatment is needed on the weekend. A copy of the page of that log for November 19, 2011 was put into evidence and it showed he recorded a temperature of -3 degrees Celsius and clear skies that morning. The note was made contemporaneous with events.
- [32] The note indicates Mr. Warkentin called Mr. Longpre at about 7:40 a.m. after trying at least three times to reach Mr. Morallis. Because Mr. Warkentin could not reach Mr. Morallis, he had not personal report about conditions at the Garden. He then tried to reach his boss by phone and left a message. He spoke again to Mr. Longpre asking him to go to the Garden for about one hour to salt. He would be in contact again with Mr. Longpre before the job was completed. One reason for that is to check whether Mr. Longpre needed more time to complete the job, for which he would need Mr. Warkentin's approval. Mr. Warkentin also wanted a report back about conditions at the Garden. Mr. Warkentin said there was nothing out of the ordinary in how events unfolded that morning.
- [33] Mr. Longpre confirmed that he invariably follows the same routine when called in on the weekend. He has no specific recollection of what he did on November 19, 2011. But he is confident he would have followed his normal routine. That routine starts with him checking the parking lot, the "C" driveway and the sidewalks along 37th Avenue and Cambie Street before going into the park to check the entrance and exit to and from the visitors' centre. If ice or snow is present, he treats it. His priority then shifts to addressing any snow or ice on all the bridges as well as the sloped areas because they are known to get slippery even if no snow is present or ice has not formed. He testified that he always treats the sloped areas, specifically the area where Mr. Khoury fell, because it was a known slippery spot. His evidence on that point was challenged but he remained resolute.
- [34] The log notes indicate that Mr. Warkentin got a call from Mr. Longpre at about 9:30 a.m. and Mr. Longpre described the conditions and work he had done. The time card entry for November 19, 2011 indicates Mr. Longpre worked for two hours. Both Mr. Longpre and Mr. Warkentin stated phone contact is usually made just before the work is completed, not after.
- [35] Mr. Warkentin described Mr. Longpre as a "solid" employee, someone that knew his job and was experienced; Mr. Warkentin relied on him to undertake the snow and ice treatment properly and had no reason to think it would not be so done. It was clear he had a lot of confidence in Mr. Longpre's capacity to do a good job.

- [36] Mr. Longpre described his normal routine when dealing with snow or ice on weekdays in the winter and his evidence was consistent with Mr. Warkentin's. If there is snow on the ground when he arrives at work in the morning, Mr. Longpre's priority is to ensure that the parking lot, "C" driveway, the entrance to the visitors' centre and sidewalks along Oak Street and 37th Avenue are clear. He is able to use a front-end loader with a plough on the front to clear the parking lot, "C" driveway and external sidewalks.
- [37] The next priority is the internal trails but most of those areas need manual work to clear snow. All crews working at the Garden pitch in to help with snow removal on a weekday. Small all-terrain vehicles called "gators" bring salt from the storage pile in the parking lot (it has to be loaded by shovel) into the park. While one worker drives on the paved and gravel trails, another worker follows behind distributing the salt on the pathway using a shovel in a fanning motion. The bark mulch pathways are not treated.
- [38] Mr. Longpre also described his regular routine on weekdays when it is cold but no snow has fallen or snow remains on the ground. On those days he first checks the bridges and other areas that are known to be problem areas. That includes the slopes near the zig-zag bridge where Mr. Khoury fell. He checks for icy spots. He breaks up any ice that has not melted and then (whether there was ice or not) he puts down salt or a mixture of salt and gravel. For bridges and sloped areas, they usually use ice melt and sand (not salt) because it is not as harmful to the water and vegetation as salt.
- [39] Staff have a system of placing buckets with secure lids at strategic locations around the park filled with gravel and, at some other places, also ice melt for ease of use. Both Mr. Warkentin and Mr. Longpre confirmed there is always a bucket at the entrance and exit of the zig-zag bridge. There are approximately 20 locations within the park where buckets are placed.
- [40] The Garden does not keep records of accidents or falls, but Mr. Warkentin testified that if someone (a worker or visitor) had been injured by a fall at the Garden, he would have heard about it. He can recall only one such incident ever being reported to him.

Findings of Fact

- [41] In light of all the evidence, I am persuaded of the following on a balance of probabilities:
- a) The Manual represents the Park Board's policy regarding snow and ice treatment for parks, including the Garden.
 - b) Mr. Khoury fell and dislocated his shoulder at the Garden on November 19, 2011, just before the Garden closed for that day.
 - c) Mr. Khoury's fall occurred on what is classified as a "secondary pathway" in the Garden.
 - d) The conditions at the Garden on November 19, 2011 were such that ice could have melted during the day (the defendants admitted this fact).
 - e) The zig-zag bridge deck was slippery because of the weather conditions that day.

- f) Mr. Warkentin called Shawn Longpre on the morning of November 19, 2011 at about 8:00 a.m. and instructed him to treat any snow or ice issues at the Garden.
- g) Mr. Longpre immediately left for the Garden and followed his regular routine for addressing the snow and ice issues at the Garden that morning.
- h) Snow did not blanket the Garden that day. There was some snow on some pathways and grass.
- i) Mr. Longpre placed material from the nearest bucket on the zig-zag bridge and its exit pathway.

ANALYSIS

- [42] This claim is brought pursuant to the OLA and negligence. The Court of Appeal has found that the OLA is "a complete code regarding the duty of an occupier of land" and there is no need to refer to earlier common law cases about occupiers' duties: *Foley v. Imperial Oil Ltd.*, 2011 BCCA 262 at para. 29. The general principles of the OLA are not in dispute and are conveniently summarized in *Wickham v. Cineplex Inc.*, 2014 BCSC 850 at paras. 29 - 31 and *Kerr v. Global Investments House Inc.*, 2014 BCSC 1544 at paras. 26 - 29. Occupiers have a duty to take reasonable care in the circumstances to make premises safe. What is reasonable depends on the nature and use of the premises. The standard is reasonableness and occupiers are not expected to achieve perfection, nor are they meant to act as insurers to those who get injured on their premises.
- [43] The OLA does not "create a presumption of negligence" or, to put it another way, "the fact that the plaintiff fell does not, on its own, establish that the occupier failed to take reasonable care to ensure that the plaintiff was reasonably safe": *Kerr* at para. 26. Evidence of prior safety and continued safe use is relevant but not determinative to whether the area was reasonably safe at the time of the fall. Finally, even if the plaintiff can prove a breach of the standard of care, the plaintiff must still prove that the breach caused the fall.
- [44] The plaintiff referred to case law that discusses the significance of policy decisions to the liability of governmental actors: *Brown v. British Columbia (Ministry of Transportation and Highways)*, [1994] 1 S.C.R. 420; *Just v. British Columbia*, [1989] 2 S.C.R. 1228. Fortunately, the issue of whether "policy" immunity can be invoked in this case does not arise because the defendants agree they owed Mr. Khoury a duty of care. They also concede liability may flow from the negligent implementation of a policy. Because the defendants are not attempting to shield themselves from liability on the basis of a policy defence, my analysis will be undertaken under the OLA. The parties did not take the position that a separate analysis of liability would need to be engaged for negligence (apart from the policy/operational issue).

- [45] Under either negligence or the OLA, the central issue is whether Mr. Warkentin and Mr. Longpre took reasonable steps on the day in question to ensure Mr. Khoury was reasonably safe when visiting the Garden. For the reasons that follow, I find they did and, therefore, the duty of care was not breached.
- [46] A significant factor in this case is the nature of the premises where Mr. Khoury fell. The Garden is not a typical park. Rather, it is intended to provide a botanical and non-urban experience in the heart of the city. Not all trails are paved. The land is not necessarily level. But for special events (such as the Festival of Lights), the Garden generally closes when it gets dark outside. Some of the trails have rough surfaces similar to bark mulch.
- [47] Visitors choose to attend the Garden. Mr. and Mrs. Khoury were familiar with the Garden having visited it many times before. They were clearly aware of its characteristics. They were aware of the weather conditions and what impact that might have on the Garden. Specifically, I find they realized the bridge may be slippery on November 29, 2011, and Mrs. Khoury, in fact, called out to Mr. Khoury to be cautious.
- [48] Mr. Warkentin was clear the degree of snow and ice the Garden experiences differs every winter. Moreover, "[i]ce is a natural hazard of Canadian winters" and "[i]t can form quickly and unexpectedly": Brown at 439. In my view, the conditions at the Garden were not out of the ordinary for a cold but sunny winter's day. Mr. and Mrs. Khoury have both lived in Vancouver for some time, and I find they were familiar with the phenomenon that snow or ice that melts during the day may produce ice or a slippery surface when the sun goes down and the temperature drops. I do not have enough information to make a finding whether there was ice on the bridge or bridge exit at the time Mr. Khoury fell. In my view, that is not necessary to determine liability. Whether the standard of care was met is determined not by whether ice existed but by what the Garden's response was to possible snow and ice.
- [49] In all these circumstances, I find the Garden's response to possible ice and snow conditions to be reasonable. While somewhat informal, the system in place was effective. Mr. Warkentin can remember only one fall at the Garden, but that was in a different location where there is a dip in the asphalt walkway where ice could form. He thinks it was an employee, not a visitor, that fell. I am persuaded that if there had been other falls involving injury near or at the zig-zag bridge, Mr. Warkentin would have been advised. The fact there has only been one incident during the time he has worked at the Garden has some bearing on both the effectiveness of the Garden's method of addressing snow and ice and the level of safety at the area just past the zig-zag bridge.
- [50] The plaintiff argues the Garden's system of inspection and maintenance for snow and ice was inadequate because it was not in writing (relying on *Tom v. Burnaby*, [1999] B.C.J. No. 109 (S.C.)) and because, on the weekends, it was done on an ad hoc basis. The defendants' policy with regard to snow and ice treatment is contained in the Manual. Instructions or descriptions of specific tasks to achieve the Manual's goals are not written down. Despite Mr. Warkentin's testimony that he believed his outline of expected tasks was documented for

building safety workers, I find on a balance of probabilities that it was not written down.

- [51] In my view, however, Tom can be distinguished because I do not find it was unreasonable that instructions for snow and ice treatment were not written down. In Brown, Mr. Justice Cory says this at 439:

Ice is a natural hazard of Canadian winters. It can form quickly and unexpectedly. Although it is an expected hazard it is one that can never be completely prevented. Any attempt to do so would be prohibitively expensive.

- [52] The Garden's system for addressing snow and ice was tailored to the reality of the unpredictability of ice formation. It is not as if the Garden was oblivious to the dangers of ice formation. It was reactive depending upon the weather, which I find to be reasonable for two reasons. For one thing, the Manual is in writing and it provides the order of priority for addressing snow and ice; that priority was followed in this case. Mr. Warkentin confirmed he was satisfied that Mr. Longpre was familiar with the Manual's priorities because of his experience. He was also satisfied Mr. Longpre knew exactly what to do to treat ice or snow and would do so well whenever called upon. Secondly, there is no special knowledge or skill associated with treating ice and snow on a pathway. Dispersing sand, ice-melt or salt is not a complicated task and the lack of written instructions is no indication of the adequacy of the defendants' response to snow and ice.
- [53] Furthermore, in Tom, the City of Burnaby only addressed problems if a complaint was received about a particular location. In contrast, the Garden's system was not dependent on visitors reporting problems. It was consistent with the priorities identified in the Manual. I am also satisfied that Mr. Warkentin was diligent about addressing possible snow or ice conditions on the weekend, anticipating on Friday what might be needed, but also checking the weather early weekend mornings. Indeed, this case illustrates his diligence. The building maintenance worker did not call him Saturday morning, but he took action anyway.
- [54] The plaintiff also argues it was unreasonable for there to be only one person, working an hour or two, to address ice and snow on a weekend morning. The plaintiff compares that to the evidence that the whole gardening crew would need about two hours to treat the entire park. Mr. Longpre took under two hours to treat the Garden on that particular Saturday morning.
- [55] However, the plaintiff is not comparing identical activities. Mr. Longpre's evidence was that the gardening crew could take up to two hours to clear the entire park if it was blanketed in snow. That was not the situation on November 19, 2011. Mr. Longpre was clear that on days with no snow but when it was sunny and cold, the treatment during weekdays does not differ from the weekend days. On such days, material from strategically located buckets is manually dispersed to address the potential that ice will form at that spot. There are about 20 buckets on the property. More workers are involved on weekdays simply because they are on site, not because the job is too onerous for one person.

- [56] The plaintiff argues there was no evidence there had been ice melt, sand and/or salt spread on the slope just past the zig-zag bridge on the day in question. This is based partly on Mr. and Mrs. Khoury's testimony that they saw nothing. But the plaintiff also argues there was no evidence of what was done with regard to snow or ice treatment because Mr. Longpre has no specific recollection of that day. I rely on *Belknap v. Meakes* (1989), 64 D.L.R. (4th) 452 (B.C.C.A.) to find as a fact Mr. Longpre did follow his normal routine on November 19, 2011, and his normal routine involved always treating the zig-zag bridge and exit/entrance area. His evidence on that point was clear and unshaken.
- [57] The plaintiff introduced into evidence pictures of the spot where Mr. Khoury fell. Having viewed those pictures, and hearing the evidence, it is not clear to me that in the late afternoon on a winter's day any material that had been spread on the pathway would be visible. More importantly, quite understandably, Mr. and Mrs. Khoury were pre-occupied with Mr. Khoury's condition and would not have undertaken a careful examination of the spot on the day in question.
- [58] For all those reasons, I find the defendants did not breach the standard of care and they are not liable to Mr. Khoury for any losses caused by his fall. Because of my conclusions, it is not necessary to address any remaining issues.
- [59] If the parties cannot agree on costs, they can contact the Registry no later than 30 days from the date of this decision either to set down a short appearance before me, or to arrange a schedule for the exchange of written submissions.

"Sharma J."

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