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CANADA / JUDGMENT

## Lowe v. Sidney (Town of)

2020 BCSC 335

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COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 335 Lowe v. Sidney (Town of)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lowe v. Sidney (Town of),

2020 BCSC 335

Date: 20200309

Docket: S182580

Registry: Victoria

Between:

Cindy Lowe

Plaintiff

And:

Town of Sidney

Defendant

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:

C. Gordon

C.S. Lott

Counsel for the Defendant:

A. Bookman

A.E. Olson

Place and Date of Hearing:

Victoria, B.C.

February 14, 2020

Place and Date of Judgment:

Victoria, B.C.

March 9, 2020

## Introduction

- [1] This action arises out of injuries the plaintiff claims she sustained on December 20, 2017 after slipping on a small patch of black ice and falling while walking in a public parking lot operated by the defendant (the "Lot").
- [2] The defendant seeks an order dismissing the action by way of a summary trial application pursuant to Rule 9-7 of the Supreme Court Civil Rules. It does so on the basis that it has no liability in law for the plaintiff's injuries.
- [3] The plaintiff concedes that the issue of liability is suitable for resolution by way of summary trial.

## The Defendant's Policy Regarding Ice and Snow Removal

- [4] At all material times, the defendant had a responsive policy in place with respect to snow and ice removal (the "Policy"). It was and is comprised of written policies, unwritten policies, and policy decisions. Responses under the Policy are triggered by complaints from the public, weather reports, observations of staff, and notifications from the Royal Canadian Mounted Police ("RCMP").
- [5] The Policy includes the following general statement:  
  
1(5) The annual budget review and approval, and other expenditure approvals, will determine and reflect Council's judgment of the appropriate level of resources to be provided for each service. Council does not intend by its allocation of resources and provision of service, nor by the passage of related bylaws, to create a civil obligation to provide services to individuals to any given standard, but in all cases only to pursue the general interest of the town.
- [6] The Policy provides the following specific statement regarding snow and ice removal:  
  
11(1) That the Town of Sidney will take action on complaints or advice that a sidewalk has not been cleared of snow and/or ice.

- [7] The Policy includes a Risk Management Plan that provides for sanding, salting, and/or snow ploughing based on weather reports or notifications from the RCMP, with a response time of within 30 to 60 minutes depending on whether the notification occurs during regular working hours or after hours, on weekends or during statutory holidays.
- [8] Proactive salting/sanding (when no ice is observed) requires budgetary and staffing considerations and is done based upon decisions of management and typically occurs only if there is an extreme weather event.
- [9] Responses triggered during normal business hours result in priority areas being inspected in their entirety and, if ice is observed while sanding the priority areas, all areas that the defendant is responsible for are sanded in order of priority.
- [10] Notifications received outside normal business hours trigger an on-call employee to attend and inspect the identified area(s). Once called in, the employee(s) is paid for a minimum of two hours and priority areas are typically inspected and sanded during that time frame. If ice is observed, a full crew is called out to sand the streets on a priority basis.
- [11] Priority areas are those identified by a notification or complaint, as well as wooden boardwalks, ramps, areas of steep inclines, bus routes, emergency routes including parking lots and parking lot entrances to emergency services, the downtown area of the defendant, and major collector roads. Non-priority areas include side-streets and intersections outside of the bus and emergency routes, as well as the defendant's six non-emergency service parking lots. The Lot is one of these six parking lots. The defendant considers its parking lots to be low priority areas for snow and ice control. They are not inspected unless there is a particular complaint or there is an extreme weather event requiring snow and ice clearing procedures throughout the defendant municipality's geographical area.

## The Incident

### Defendant's Activities on December 20, 2017

- [12] December 20, 2017 was a relatively cool morning in Sidney, B.C., with temperatures of approximately -2 to -3 degrees Celsius. There had been rain and snow overnight.
- [13] The RCMP contacted the defendant at 2:41 a.m. by way of a text message to the Roads Foreman, Adriano Sumberac, stating that "roads are getting icy". This notification triggered the defendant's Policy.
- [14] In accordance with the Policy, Mr. Sumberac contacted the defendant's Underground Crew Chief, Mike Kimber. The two men drove from their respective homes to the defendant's Public Works Yard, both arriving by approximately 3:15 a.m. Neither observed any ice on the roads during his drive. Mr. Kimber confirmed the location of the ice with the RCMP officer who had issued the notification. It was on Wain Road in the neighbouring municipality of North Saanich.

- [15] At approximately 3:30 a.m., Mr. Kimber travelled to Wain Road and salted the identified area. He then spent the next approximately 1.5 hours driving his salt truck throughout the defendant's environs. He did not see any ice on any of the roads. The intermittent salting he performed was done as a precautionary measure.
- [16] During the course of his travels, Mr. Kimber drove past the Lot but did not drive into the Lot to inspect it.
- [17] At 7:30 a.m., the defendant's public works employees began their normal shifts. Upon their arrival, Mr. Kimber instructed four of them to inspect and distribute salt to priority areas throughout the defendant's municipality, including elevated areas, wooden areas, a boardwalk and the adjacent parking stalls, a Boat Launch, a washroom ramp, the sidewalks around the entire block of the Town Hall, the RCMP building, and the walkways and ramps located on these properties. No ice was observed at any of those locations.

### The Plaintiff's Slip and Fall Incident

- [18] The plaintiff is a licenced practical nurse. At approximately 8:45 a.m. on December 20, 2017, she parked her car in the Lot, which is located at the corner of Bevan Avenue and Third Street. She was familiar with the Lot as she had parked there a few times previously. She was wearing rain boots that had a tread which was somewhat worn. She got out of her car and walked across the Lot to attend a massage therapy appointment at a clinic adjacent to the Lot. The pavement surface of the Lot appeared to her to be "clear and dry". She does not recall noticing any ice or snow on its surface.
- [19] At approximately 10 a.m., after her appointment, the plaintiff left the clinic and walked across the Lot to return to her car, taking roughly the same path she had taken an hour earlier to go to her appointment. She did not notice anything on the surface of the Lot that appeared slippery. She admitted during her examination for discovery that she was both aware and mindful of the risk of encountering black ice due to the winter conditions at the time.
- [20] As the plaintiff approached a low point in the Lot near a drain, she suddenly slipped and fell.
- [21] As she was getting up from her fall, she noticed a patch of black ice where her feet had been. The patch of ice was small. During her examination for discovery on December 4, 2018, the plaintiff guessed that the patch of ice was approximately 6 to 8 inches across. In her affidavit sworn on January 24, 2020, she deposed that she is not good at estimating size and revised her estimate of the size of the patch of ice to being "a little larger than a big dinner plate", closer to 12 to 14 inches. She also deposed that she has no doubt that she slipped on it and did not trip or stumble.
- [22] As a result of her fall, the plaintiff injured her shoulder, including a partial rotator cuff tear, hurt her lower back, and broke her wrist. Her wrist injury required surgery that was performed eight days later.

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The Law**Policy Decision vs. Operational Decision**

- [23] Public authorities do not owe a duty of care in tort if it is established that their actions were based upon a policy decision, unless the decision was made in bad faith or was so irrational as not to be a proper exercise of discretion. However, public authorities can be liable for operational decisions provided the plaintiff proves the required elements of liability: *Just v. British Columbia*, [1989] 2 S.C.R. 1228 at 1245; *Binette v. Salmon Arm (City)*, 2017 BCSC 302, aff'd 2018 BCCA 150, at paras. 10-14; *Marchi v. Nelson (City of)*, 2020 BCCA 1 at paras. 14-16.
- [24] As a general rule, decisions concerning budgetary allotments for departments are classified as policy decisions, because they are an attempt by the public authority to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertaking and of their actual performance. True policy decisions will usually be dictated by financial, economic, social, and political factors or constraints: *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420 at 441; *Binette* at para. 12.
- [25] Operational decisions are those concerning the implementation and performance of the formulated policies and are usually made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness: *Brown*, at p. 441; *Binette* at para. 12.

**Occupiers Liability Act**

- [26] If a claim against a public authority arises from an operational decision, the standard tort analysis applies. The duty of care applicable in this case is found in s. 3(1) of the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337, namely:

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.

- [27] Liability is found if the plaintiff proves that the defendant's conduct fell below the standard of care expected in the circumstances: *Binette* at para. 17.
- [28] The standard of care is one of reasonableness, not perfection: *Duddle v. Vernon (City)*, 2004 BCCA 390 at para. 22. Therefore, the question is whether the defendant took reasonable steps to ensure that the plaintiff was reasonably safe: *Binette* at para. 17.

**Analysis**

Did the Defendant owe a Duty of Care to the Plaintiff?

Was the Policy bona fide?

- [29] The defendant submits that it is exempt from owing a duty of care to the plaintiff because its actions were in keeping with the Policy, which was put in place bona fide and in good faith based on, among other things, the availability of manpower, equipment, and budgetary constraints.
- [30] The plaintiff submits that the classification of the Lot as a low priority area was not a bona fide policy because the Lot was along the defendant's priority routes and could easily have been inspected with little to no extra effort.
- [31] I am satisfied on the evidence presented by the defendant that the Policy was dictated by financial, economic, and budgetary constraints. It was a proper exercise of discretion. Included in the Policy was the determination that the defendant's six public parking lots were areas of low priority for snow and ice inspection and control, in the absence of a particular complaint or extreme weather event. This was a resource allocation decision and, thus, an unassailable policy decision.
- [32] I also find the policy decision to be reasonable. It is one thing for priority areas to be inspected and sanded. To require as a matter of policy that those involved in the inspection of priority areas, at the same time, divert their attention to and engage in an inspection of areas considered low priority is illogical and inconsistent with reasonable resource allocation and prudent policy-making. In my view, the Policy was bona fide.

Was the decision not to inspect the Lot that morning operational?

- [33] The plaintiff submits that, regardless whether the Policy was bona fide, the defendant's "decision not to have the Lot inspected and to prioritize other areas for inspection and sanding" [emphasis added] was operational in nature. However, the evidence does not suggest that a "decision" was made. Rather, the defendant simply implemented the Policy and the operational steps it took that morning did not require any discretionary decisions related to the non-priority areas. Therefore, the plaintiff's complaint in this regard relates to the Policy itself, not the manner in which it was carried out.
- [34] The defendant carried out the Policy. It received a notification from the RCMP and responded to it as per the Policy. There was no extreme weather event that morning. Indeed, based upon the evidence, as weather events go, the one in question was, at best, benign. The defendant received no complaints regarding the Lot or any other area which should have prompted it to take action. Therefore, the Policy dictated that the Lot was a low priority and would only be tended to following a specific complaint. The defendant's staff who were responsible for implementing the Policy reasonably determined that full scale inspection and/or sanding of the defendant's facilities was not necessary. The evidence is that none of the defendant's employees who were dispatched to sand or salt the areas that were considered priority areas saw any icy conditions. The plaintiff's own evidence corroborates their observations.

- [35] There is no evidence that the defendant's snow and ice response that morning was unreasonable or demonstrated a lack of appreciation for public risk. Mr. Kimber was working within the Policy when he dispatched his workers to perform salting and sanding to the areas that were done.
- [36] I find that the defendant has a complete defence to this action because the decisions it made during the morning in question regarding ice control were policy decisions, not operational decisions.

### Breach of Duty of Care

- [37] If I am wrong and the decisions made were operational in nature, such that a duty of care was owed by the defendant to the plaintiff, there is no evidence that the duty was breached in this case. There is no evidence of a particular standard of care the defendant was required to meet in the circumstances, other than one of reasonableness. As was stated by the Supreme Court of Canada in *Brown*, at page 439, which specifically dealt with standards of care as they relate to icy conditions:

the [public authority] is only responsible for taking reasonable steps to prevent injury. 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.

- [38] The plaintiff's assertion that the reasonableness standard necessitated the defendant to inspect each of its public parking lots for ice when no ice hazard had been observed by any of its workers, all before 10 a.m., would impose on the defendant an almost impossible burden. There is no evidence that the surface of the Lot presented an unusual risk of harm to the public and should have been inspected that morning. Indeed, the plaintiff's own evidence is to the contrary. She saw nothing on the surface of the pavement that indicated any potential risk.
- [39] In my view, by any measure, the defendant's response on the morning of December 20, 2017 was reasonable and met the standard of care expected of it in the circumstances.

### Causation

- [40] Even assuming that the defendant was in breach of a duty of care to the plaintiff, she, nevertheless, bears the onus of establishing on a balance of probabilities that, but for the defendant's failure to take reasonable care, she would not have suffered her injuries: *Duddle* at para. 23. The Court must not speculate. The plaintiff must prove the existence of the hazard that caused her to slip and that it existed due to a breach of duty on the part of the defendant: *Van Slee v. Canada Safeway Limited*, 2008 BCSC 107 at para. 31.

- [41] First, it is pure speculation to suggest that, on the day in question, an inspection by the defendant of the Lot would have revealed the small patch of black ice the plaintiff claims was present. Indeed, the plaintiff's evidence was that she did not see any ice in the parking lot. Second, the mere fact that an icy surface is salted or sanded does not mean a person will not slip on it. Such accidents are not infrequent. Common sense dictates that much depends on the plaintiff's pace, length of stride, weight, and footwear tread, among other factors. The photographic evidence of the rain boots that plaintiff was wearing suggests that the treads on them were worn.
- [42] The plaintiff has failed to prove that any breach of duty on the part of the defendant was a proximate cause of her injuries.

## Conclusion

- [43] The action is dismissed. The defendant is entitled to costs at Scale B.

"G.C. Weatherill J."

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