
CANADA / JUDGMENT

Marchi v. Nelson (City of)

2019 BCSC 308

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2019 BCSC 308 Marchi v. Nelson (City of)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Marchi v. Nelson (City of),

2019 BCSC 308

Date: 20190308

Docket: S12245

Registry: Rossland

Between:

Taryn Joy Marchi

Plaintiff

And

City of Nelson

Defendant

Before: The Honourable Mr. Justice McEwan

Reasons for Judgment

Counsel for Plaintiff:

D. Daroux

J. Murphy, Q.C.

Counsel for Defendant:

D. Romanick

S. Morishita

Place and Date of Trial:

Rossland, B.C.

October 2-5, 2018

Place and Date of Judgment:

Rossland, B.C.

March 8, 2019

I

- [1] This action relates to an accident that occurred on January 6, 2015. The plaintiff was injured when she attempted to walk over a snowbank located in the 300 block of Baker Street, Nelson, B.C.
- [2] The only issue to be determined is liability. The parties have agreed on damages. The position of the City of Nelson (the "City") is that it did not owe the plaintiff a duty of care in the circumstances. This is because the decision respecting plowing and removal of snow and snowbanks on Baker Street were bona fide policy decisions and as such the City owed no duty of care.
- [3] Governments do not owe a duty of care in tort if it can be established that their actions are bona fide. In *Binette v. Salmon Arm (City)*, 2017 BCSC 302 (aff'd 2018 BCCA 150) Mr. Justice Weatherill set out the law respecting this issue:
- [10] The law is clear that a public authority can be liable in tort for some but not all of its actions. The Supreme Court of Canada in *Just v. British Columbia*, [1989] 2 S.C.R. 1228 drew a distinction between the policy decisions of a public authority and its operational decisions, leaving public authorities liable for the latter but not the former.
- [11] In practice, it can be difficult to identify whether a decision is a policy or an operational decision. The Supreme Court in *Just* provides some guidance on how to determine what type a decision is. It stated at 1245:

In determining what constitutes [a] policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. ... [Emphasis added.]

[12] Further guidance on identifying the type of decision was provided in *Brown v. British Columbia* (Minister of Transportation and Highways), [1994] 1 S.C.R. 420 at 441:

True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.

The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

[Emphasis added.]

[13] If a decision is identified as a policy decision, the public authority is excluded from liability for negligence (and other torts), unless it was made in bad faith or was so irrational as not to be a proper exercise of discretion: *Brown* at 442.

[14] But if a decision is identified as an operational decision, the public authority may be liable in negligence (and other torts), provided the plaintiff can prove all the elements of the tort.

[4] The starting point is the City's "Streets and Sidewalks Snow Clearing and Removal" policy. This policy has been in effect since July 1, 2000. The introductory paragraph states:

Snow removal, sanding, and plowing of City streets shall be carried out on a priority schedule to best serve the public and accommodate emergency equipment within budget guidelines.

The policy then sets out the procedure for plowing, sanding, and clearing. Those priorities are as follows:

1st Emergency routes and the downtown core;

2nd The transit routes;

3rd Plowing hills (up/down);

4th Cross streets; and

5th Dead end streets.

[5] The policy sets out the specific guidelines respecting snow removal from the downtown area. It states:

DOWNTOWN

Snow plowing in the downtown area will be undertaken during the early morning hours; and

Removal of snow from the downtown areas may be carried out in conjunction with any of the above priorities and as warranted by build up levels.

A map was attached showing that snow plowing would take place in accordance with its terms. In addition to the written policy there are unwritten policies and policy decisions respecting snow removal. The relevant ones are:

- a) When the City experiences a snow event, it follows the street plowing, sanding, and clearing priorities first, as set out in the written policy.
 - b) In addition to the street plowing, sanding, and clearing priorities, the City also has employees out plowing, sanding and removing snow from the designated sidewalk route, as outlined in the route map appended to the written policy. These are collector sidewalks that bring people through town so that you can walk from one end of town to the other. The City also clears sidewalks in front of City Hall, and other City owned properties.
 - c) City crews address the various stairs located in the City, with the focus first being on the downtown core. They will also address crosswalks, sidewalk letdowns, key bus stops and handicapped parking stalls.
 - d) When removing snow from the downtown core, crews first push snow into piles in the parking spots and then haul it out of downtown.
 - e) Snow removal (i.e. the removal of snowbanks) in the downtown core starts at the 400 block of Baker Street, where the main bus stop is located, and proceeds towards Hendryx Street (eastwards), following the bus route.
 - f) The focus on snow removal/hauling in the downtown core is on Baker Street; however, when the downtown core starts to get busy with vehicle traffic and pedestrians (typically around 11:00 a.m.), to ensure safety, the City workers will move to removing/hauling snow from other areas, such as the civic centre, the clinic, the fire hall, the police station, and around schools, and return to Baker Street as soon as possible.
 - g) The City does not remove/haul snow from the downtown core overnight due to noise complaints received in the past, as well as the cost of overtime.
 - h) Inspections are undertaken by Ms. MacDonald, who completes road patrol throughout the day to ensure the streets are safe, and crews are working in a timely and efficient manner. Once Ms. MacDonald leaves for the day, the lead hand will take over the task of road patrol.
- [6] The events of early January 2015 were:
- a) The City experienced a heavy snowfall event from January 4-6, 2015.

- b) On January 4, 2015 the high temperature for the day was -3.0 and the low was -5.1. The total precipitation was 12.7 mm, and the total snow on the ground was 4 cm.
- c) On January 5, 2015 the high temperature for the day was -0.4 and the low was -3.0. The total precipitation was 21.9 mm, and the total snow on the ground was 28 cm.
- d) On January 6, 2015 the high temperature for the day was 1.8 and the low was -1.3. The total precipitation was 1.8 mm, and the snow on the ground was 36 cm.
- e) The evidence of the plaintiff and her husband Chris Blair is that it started to snow on the evening of January 4, 2015. The plaintiff recalls waking up to a large snowfall on the morning of January 5, 2015.
- f) Both the plaintiff and Mr. Blair were off work on January 5, 2015. Mr. Blair believes that it stopped snowing in their area of Nelson mid-morning on January 5, 2015. He recalls shoveling his driveway later that evening.
- g) Mr. Blair believes that the City plowed his street on January 5, 2015.
- h) On January 6, 2015, Mr. Blair was on his last day off. He shoveled his driveway again, as he believes the City plowed his street again, scraping down to the pavement. That clearing created a windrow in front of their driveway.
- i) In January 2015, the City had in place three regular eight-hour shifts for the plowing, sanding, clearing, and removal of snow: a 4:00 a.m. shift, a 7:00 a.m. shift, and a 3:00 a.m. shift. Many of the employees on these shifts worked overtime on January 5 and 6 in order to respond to the snow event.
- j) The City's records indicate that it started plowing and sanding on the early morning of January 5, 2015. The City had six staff plowing and sanding roads, two staff on sidewalk plows, seven employees shoveling stairs, and one on the skid steer.
- k) The evidence of Ms. MacDonald was that on January 5, 2015, the afternoon shift that began working at 3:00 pm worked until 1:30 a.m. on January 6, 2015. The next shift started two and a half hours later, at 4:00 a.m. on January 6, 2015.
- l) On January 6, 2015, the seven employees on the 7:00 a.m. shift were brought in two hours early to start removing/hauling snow from the downtown core.
- m) By 5:00 p.m. on January 6, 2015, the date of the incident, the snowbanks from the 400 and 500 block of Baker Street would have been removed.

- n) In addition to the regular employees working on January 5 and 6, 2015, Ms. MacDonald called in four casual workers on both of those days. Ms. MacDonald did not call additional employees from their regular days off to see if they were willing to do an overtime shift because there would not have been enough equipment available for them to use. Further, she did not think they would agree to come in because they would be tasked with shoveling stairs and hydrants.
- o) The downtown core was completely hauled of snow, including windrows by January 9, 2015.
- [7] The policy decisions made by the City were bona fide, according to the City. The decisions could not be characterized as made in bad faith or so irrational as not to be a proper exercise of discretion. These decisions were governed by factors including budgetary social and economic factors, which included the availability of manpower and equipment.
- [8] Ms. MacDonald, the Works Superintendent said the City had to implement within the budget. The City used more than 20% of the budget allocated for snow removal for the year of the snow fall in January.
- [9] With respect to the budget Ms. MacDonald said she could not use up the entire budget responding to the first snow event of the year because she simply did not have the resources available to do so and because it is impossible to predict how many snow events will occur over the course of a year, it being only the first week of January.
- [10] This is not to say that the City does not exceed its budget. It exceeded its budget in the years from 2011-2017, and was ahead of budget for 2018.
- [11] The decision to haul snow out of the downtown core after plowing of the roads is governed by service and economic factors. If the City did not plow the roads outside the downtown core prior to moving the snowbanks from the downtown core the citizens of Nelson would be unable to travel downtown to work or shop.
- [12] The City has allocated a number of employees to work pursuant to the policy. Even if the City had an overnight shift it would still have three shifts. Clearing downtown takes three loaders, a blade and a snow blower. Even if the City called in additional workers there was no equipment for them to use. They would have been put to work clearing ice from the steps.
- [13] The City followed its policy:
 - a) Following the snow event that began on January 4, 2015, City crews began plowing and sanding the City streets in accordance with the procedure outlined in the policy;
 - b) City crews did not undertake removal of snow from the downtown core until City streets were plowed pursuant to the priority schedule to best serve the public and accommodate emergency equipment;

- c) The City undertook the removal of snow from the downtown core as soon as equipment was available and no longer in use for street plowing and clearing;
 - d) Snow removal from all of the downtown areas was completed by January 9, 2015.
- [14] The City's actions were the result of policy decisions. The City made policy decisions about the sequence in which it clears snow from its roadways. They are dictated by the availability of manpower, and resources.
- [15] The City followed its policy decisions. The City could not remove the windrows from downtown without creating a dangerous situation on the tops of the steep and snowy streets in Nelson in the winter as it would mean diverting equipment from plowing and clearing in favour of removing snow from downtown.
- [16] According to the City, it owed no duty of care in the circumstances.

II

- [17] If the City does not have a policy defence it owes a duty of care and the standard tort analysis applies.
- [18] It is not clear whether the Occupiers Liability Act applies. It makes no practical difference as the standard of care analysis is the same under the Occupiers Liability Act, RSBC 1996, c. 337 and the Common Law. In *Agar v. Weber*, 2014 BCCA 297 at para. 30. Madam Justice Smith summarizes the legal principals as follows:
- [26] In British Columbia, the governing test for occupiers liability is s. 3 of the OLA. It provides:
- (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person on the premises will be reasonably safe in using the premises.
 - (2) The duty of care referred to I subsection (1) applies in relation to the
 - (a) condition of the premises,
 - (b) activities on the premises, or
 - (c) conduct of third parties on the premises.
- [27] The definition of "occupier" under the OLA includes a person who "is in physical possession of premises"; the definition of "premises" includes "land and structures or either of them".
- [28] In short, Mr. Weber's duty of care under the OLA was to take care that in all of the circumstances of the case Dr. Agar would be reasonably safe when he used the device.
- [29] In negligence, the common law requires a plaintiff to establish:

1. a duty of care to conform to a certain standard of care for the protection of others against unreasonable risks. The duty does not extend to the removal of every possible danger, rather the test is one of reasonableness: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 28;
2. a breach of that duty by some act or omission by the defendant; and
3. the breach of duty is the proximate cause of a plaintiff's injury, meaning there must be a nexus between the injury sustained by the plaintiff and the defendant's negligent act or omission: see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27; *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 54.

[30] The standard of care under the OLA and at common law for negligence is the same: it is to protect others from an objectively unreasonable risk of harm. Whether a risk is reasonable or unreasonable is a question of fact.

[31] Under the statutory test for occupiers liability, the Court in *Waldick v. Malcolm*, [1991] 2 S.C.R. 456 described the standard of care at 472:

the statutory duty on occupiers is framed quite generally, as indeed it must be. That duty is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation -- thus the proviso "such care as in all the circumstances of the case is reasonable". [Emphasis added.]

[32] Similarly, in *Ryan v. Victoria (City)*, the Court described the standard of care for negligence as follows:

[28] Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of the harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards. [Emphasis added.]

[33] Therefore, the central issue to be decided in this case was whether the Webers breached the standard of care because the device, and in particular the outboard edge with the bevelled underside, posed an objectively unreasonable risk of harm to Dr. Agar.

[19] The duty does not extend to the removal of every possible danger; the test is one of reasonableness: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201.

- [20] An occupier is not an insurer against every eventuality that may occur on a premises. The standard of care is of reasonableness not perfection. The test is not whether anything could have been done to prevent the injury, using 20/20 hindsight but whether the steps taken by the occupier were reasonable in all the circumstances.
- [21] While the snowbank presented a potential risk of harm it did not do so in circumstances that constitute an objectively unreasonable risk of harm. If that is not so, the City submits that it took reasonable steps to protect users of the sidewalk on Baker Street from risk.
- [22] The January 5 snowfall was heavy. The City has 122 kms of roads to plow, sand and clear and has 21-22 kms of sidewalks and 73 sets of staircases. The City removes snow from these locations within the downtown core and in accordance with a long established policy.
- [23] The City completes all of these tasks within the context of budgetary restraints, equipment availability, regulatory requirements and other factors such as concerns and complaints of citizens and businesses.
- [24] After the January 5, 2015 snowfall the City began removing snow from the downtown core in the early morning of Thursday, January 6 and finished it by Friday, January 9, four days after the snowfall ended.
- [25] The City's approach is reasonable for the following reasons:
- a) If the City started removing windrows that are created by snow plows before the snow stopped falling, it would have to duplicate the work again after the snow stopped falling;
 - b) It would be problematic to remove windrows from the downtown core while downtown streets are being plowed;
 - c) Some of the equipment used to plow and clear streets is used to remove/haul snow from the downtown core (e.g. loaders);
 - d) Most of the City employees/positions that plow, sand and clear streets are the employees/positions that complete snow removal/hauling from the downtown core. Thus, if the City was to start snow removal/hauling from the downtown core prior to the completion of road plowing, sanding, and clearing priorities, the City would need to hire additional workers;
 - e) Further, it is not a matter of simply adding an extra shift. If an extra shift is added, either additional workers would need to be hired, or the number of people working in the other shifts would have to be reduced.
- [26] Another option would be to prioritize the snow removal/hauling from the downtown core over the clearing/removal of snow from sidewalks and staircases. The City submits that this would be unreasonable for the following reasons:
- a) The potential gravity of harm posed by delaying the clearing of sidewalks and staircases is much greater; and

- b) It would hinder the ability of pedestrians to move safely in the City.
- [27] Here, the City experienced a heavy snowfall which started in the evening of Sunday, January 4, 2015. The City commenced plowing, sanding and clearing of the roadways early on January 5, 2015. By 5:00 pm Tuesday, January 6, 2015, 18 hours after the snowfall stopped, the City commenced the removal of windrows and the hauling of snow from the downtown core. The City submits that in all the circumstances its response was reasonable.
- [28] To be liable the City's breach of care must be the cause of the incident giving rise to the plaintiff's injuries. In *Borgford v. Boizard*, 2016 BCCA 317, Mr. Justice Savage summarized the law on causation.
- [54] Causation is a two-step consideration. First, the plaintiff must establish the damage was caused in fact by the conduct of the defendant: *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 54. The test for factual causation was restated by the Supreme Court in *Ediger*:
- [28] This Court recently summarized the legal test for causation in *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181. Causation is assessed using the "but for" test (*Clements*, at paras. 8 and 13; *Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22). That is, the plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred (*Clements*, at para. 8). "Inherent in the phrase 'but for' is the requirement that the defendant's negligence was necessary to bring about the injury -- in other words that the injury would not have occurred without the defendant's negligence" (para. 8 (emphasis deleted)).
- [55] Scientific proof of causation is not required; common sense inferences from the facts may suffice: *Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32 at paras. 38, 46. However, inferences must be based on proven facts and cannot be simply guesswork or conjecture: *Kerr (Litigation Guardian of) v. Creighton*, 2008 BCCA 75 at paras. 58-62; *Haase v. Pedro* (1970), 21 B.C.L.R. (2d) 273 (C.A.) at 279-80, 305.
- [56] Second, the plaintiff must establish causation in law. This has been described as proving the defendant was a proximate cause of the loss, the damage was not too remote from the factual cause, or the damage suffered was reasonably foreseeable: *Hussack* at para. 54. Overall the inquiry asks whether the harm is too unrelated to the wrongful conduct to hold the defendant fairly liable: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paras. 11 and 12.
- [57] It is not necessary for the plaintiff to show the precise injury or the full extent of the injury was reasonably foreseeable, only that the type or kind of injury was reasonably foreseeable: *Hussack*, at para. 71.

III

- [29] The plaintiff's closing argument is that she was 28 years old and had lived in Nelson for about 6 years. Around 5:00 pm on January 6 she set off from her Nelson home to go to a Subway outlet in the 300 block of Baker Street. She parked in an angled spot on the north side of the street. She considered walking to the corner but rejected the idea as dangerous, as she was wearing dark clothes, and the traffic was heavy.
- [30] She decided to cross the snowbank onto the sidewalk and moved to a place close to the edge of the snowbank and then began to take a step with her right foot. As she shifted her weight onto that foot it dropped through the snowbank and onto something that bent her forefoot up. She describes the snow as locking her leg in place while she fell forward and felt her knee go "pop". She began to cry out for help.
- [31] There were no witnesses to her fall but people came to help her. Her husband was called and he arrived at the scene just before the ambulance. He stepped in the snowbank and assumed it was safe to walk on it: he also dropped through the snow almost up to his knee.
- [32] The plaintiff was taken to Nelson hospital and transferred later to Kelowna hospital.
- [33] Mr. Blair returned to the scene later at night to get his wife's vehicle. He noticed a hole in the snowbank about the size of his wife's calf and found that the curb was directly below the hole. He corrected his wife every time after the event when she talked about falling into a pothole.
- [34] The City started plowing the streets before the snow stopped. The 300 block of Baker Street was plowed Monday, January 5, though there is no record of when it was completed. The 300 block of Baker Street runs approximately east/west and it has angled parking on the north side and parallel parking on the south side. Snow removal continued during and immediately after the snow storm and the City had crews who cleared all the snow from the handicapped parking spaces and crosswalks in the downtown area to ensure the safety of the people using them. This is in line with the 2014-2015 Winter's Snow Program - Public Information which states "our overall goal is to keep Nelson safe for all the travelling public" and "we try not to place snow on any side walks or private driveways."

IV

- [35] The plaintiff called three people in similar positions to Ms. MacDonalds. They were from Castlegar, Rossland and Penticton. Each explained the way snow was removed in their municipalities. The difference in snow loads in each case per year make comparisons difficult. The main street in Rossland is also a provincial highway and has been modified so that it is quite different from Nelsons. Rossland also gets more snow than Nelson. The most significant difference is that in Rossland they permit snow to pile up in parking spaces where it can be removed later. This did not occur to Ms. MacDonald who said that the way the snow was removed in Nelson was the way it has always been done. I have reviewed the

principles of Policy and those set out in Occupiers Liability Act.

[36] The City followed its policy. The policy was to clear snow in accordance with long established practices. The attempt to compare the practices in Nelson with those of other places was not very useful. Each of the municipalities faced difficult conditions. Nothing in the evidence showed that the policy of the City was unreasonable or the result of a manifest lack of appreciation for the risks involved. The policy is rational. It is very difficult to fault the City on a policy basis.

[37] That said, it is the duty of the City of take reasonable care in the circumstances to make the premises safe *Waldick v. Malcolm*, [1991] 2 S.C.R. 456:

the statutory duty on occupiers is framed quite generally, as indeed it must be. That duty is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation - thus the proviso "such care as in all the circumstances of the case is reasonable". [Emphasis added.]

[38] In *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, the Court described the standard of care for negligence as follows:

[28] Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of the harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards. [Emphasis added.]

[39] The situation must be analysed in its terms. Snowbanks, including windrows are an unavoidable feature of winter in most parts of British Columbia. In *Mather v. Westfair Foods Ltd.*, 2004 BCSC 449, the plaintiff was injured in the City of Nelson attempting to walk over a snowbank. Judge Stewart asked himself a series of questions:

21 Is it a case where a reasonable person in the position of the defendant's employees would have concluded that, regardless of what the defendant might wish, the fact of the matter was that the defendant's customers had created a "danger", an inviting pathway over or through the snow bank on Baker, and the time had come to create an entranceway through the snow bank at that location or take steps to stop the defendant's customers from using what had become a recognized and favoured pathway? No. The evidence simply does not admit of any such conclusion. The description in the evidence is of a scene where one or more individuals had walked over the snow bank before the plaintiff made her decision to follow in the available footprints on January 17, 2002. But that is the end of it.

22 Is there evidence in the case at bar of anything peculiar to the nature, shape, consistency, content or appearance of the snow bank on Baker Street that ought to have resulted in action being taken by an employee of the defendant to prevent, eliminate or warn of danger beyond that inherent in walking over a snow bank that exited onto a downhill slope? No. Nothing. And only binding authority from above could result in a ruling by me that an occupier must warn people about the "inherent" danger just noted. And no such binding authority was brought to my attention at this trial.

23 I accept the submission of counsel for the defendant that at this stage of the analysis the case ends. I find that the defendant has affirmatively established on a balance of probabilities that there is no platform for discussing even the possibility of a relevant breach by the defendant of its duty under the Occupiers Liability Act.

[40] Mather is an example of a case that begins and ends at the policy stage of the analysis. It is factually very close to the situation of the plaintiff. It may be distinguished in this one respect that the snowbank was created in the course of the City's dealing with the recent snow fall and the policy applied to it. The plaintiff proposes, on the basis of the experience of Supervisors of other municipalities, that the City change its policy to ensure that another method of snow removal is adopted that would remove the windrows from the roads sooner. The practical impossibility of this, without opening other roads to similar dangers, is obvious. To establish factual causation the plaintiff would have to prove that the requisite standard of care was to have removed the snowbanks on Baker Street to a point between January 5, 2016 and January 6, 2015 which was not possible under any standard of care, short of perfection.

[41] Beyond this, the City would also have to be liable for legal causation. The City's fault must be the proximate (or reasonably foreseeable) cause of the accident. In *Wickham v. Cineplex Inc.*, 2014 BCSC 850, Sigurdson J. found that the plaintiff's failure to use reasonable care was the proximate cause:

56 However, even if an occupier owes a duty of care to keep an unconventional means of access or egress reasonably safe, and has breached its standard of care by not addressing a hazard present in this area, it may not be negligent in the event the danger is apparent and known to the pedestrian. In such a case, any lack of care is not the proximate cause of the plaintiff's injuries.

57 In *Mather v. Westfair Foods Ltd. (c.o.b. Extra Foods)*, 2004 BCSC 449 the plaintiff perceived that her route to the defendant's grocery store was blocked by parked cars. Although there were other entrances, the plaintiff elected to walk over a snow bank and fell, suffering injuries. Her action was dismissed by Stewart J. who said, at para. 22:

Is there evidence in the case at bar of anything peculiar to the nature, shape, consistency, content or appearance of the snow bank on Baker Street that ought to have resulted in action being taken by an employee of the defendant to prevent, eliminate or warn of danger beyond that inherent in walking over a snow bank that exited onto a downhill slope? No. Nothing. And only binding authority from above could result in a ruling by me that an occupier must warn people about the

"inherent" danger just noted. And no such binding authority was brought to my attention at this trial.

58 In the case at bar, the defendant knew that drivers crossed the median to exit and enter the area where they parked their vehicles. The defendant owed a duty to take reasonable care to make it reasonably safe for pedestrians to cross that median. They fulfilled that duty through the gravel path that was properly maintained and provided a means of access for the plaintiff to and from her car. Knowing parkers used the path across the median, was there a lack of reasonable care to have the median in part covered in uneven stones? While the defendant could have chosen another type of surface, given that parkers might choose to walk there, the standard is not one of perfection. I find that the plaintiff has not demonstrated a lack of reasonable care on the part of the defendant.

59 Moreover, the plaintiff chose to cross the median initially over the stones and returned that way. I think that the risk of walking on uneven, wet stones was clear to the plaintiff.

60 The plaintiff deposed that she did not see the path on the way out of her car because her car door blocked her view of the path. Her evidence was that on the way back she did not see the path because of the lighting. I am not persuaded, regardless of whether she saw the path, that it was reasonable for her to have crossed over the stones, which when wet posed an obvious risk. The plaintiff saw the uneven stones, knew that they were wet and in fact thought that the median with these stones was "a ridiculous design", but she nevertheless took the obvious risk.

61 The plaintiff could have accessed her car by going alongside or along the curb next to her car. I am not persuaded that it was inappropriate for the plaintiff to have tried to access her car in the usual fashion by going along its side either by walking on the ground or on the curb along the median. She did not try but walked across what she knew were the uneven stones on the median.

62 In all of these circumstances, and keeping in mind that the standard is not one of perfection, I find that even though arguably the defendant might have acted differently, it took the care that was reasonable to see that a person using its premises is reasonably safe.

63 I have concluded that in any event any lack of care on the part of the defendant by the manner of design or maintenance of the median with a path and uneven stones was not the proximate cause of the plaintiff's fall. I think that the plaintiff's failure to use reasonable care in light of an obvious risk of walking over wet uneven stones was the proximate cause of her injury.

[42] Chamberlist J. in *Robson v. Spencer*, 2006 BCSC 1240, dealt with a case where a man slipped and fell on compacted snow while traversing the defendant's front lawn. He dismissed the action observing that the plaintiff knew the risk and voluntarily assumed the risk. This is to say that the plaintiff was the author of his own misfortune. He wrote:

15 The plaintiff in this case who was aged 64 at trial and aged 61 at the time of the accident had lived in Quesnel for some 25 years at the time of the accident. He is an adult person familiar with the winter circumstances of Quesnel and the associated risks of visiting his friends' residences during the winter time. The slippery nature of the compacted snow area behind the truck was

clearly visible to the plaintiff who was wearing summer runners. There is no evidence to indicate that the defendant occupier was aware of the footwear being utilized by the plaintiff on December 18th, 2003. In these circumstances the defendant cannot be required to take steps to prevent someone in the position of Mr. Robson from being exposed to an everyday exigency of life in northern British Columbia including failure to warn of compacted snow on a date when it is above freezing as evidenced by the dripping of the gutters close by. What happened here is very similar to what happened in *Malcolm v. British Columbia Transit (B.C.C.A.)*, [1988] B.C.J. No. 1945 (B.C.C.A.) where Chief Justice McEachern at page 2 said:

In my respectful view it is not negligence or a breach of any duty not to warn an adult person, not suffering under any disability, of the ordinary risks arising out of the exigencies of everyday life. Any such adult person without being warned knows and accepts the risks of falling on a steep wet grassy slope or a path and it was not necessary, in my view, to give a warning of such a common everyday risk.

16 The same consideration would, of course, apply to the plaintiff traversing an area of compacted snow that appears slippery and that appears not to be maintained by the property owner for ingress or egress purposes. In *Neilson v. Bear*, [1999] B.C.J. No. 86, Mr. Justice Parrett had occasion to deal with a slip and fall in the early morning hours of December 17th, 1995. At paragraph 30 Mr. Justice Parrett said:

Anyone who lives in Prince George is aware that during the winter snow and ice are often present for much of the winter and represent hazards which must be coped with on a daily basis. In the present case the plaintiff was certainly aware of the hazard snow and ice represented.

17 The same comment can be made in this case of the plaintiff, a long time resident of Quesnel, who would have known that compacted snow may eventually form ice. That knowledge coupled with his own observations of the compacted area together with the footwear he was utilizing leads me to conclude that Mr. Robson knew the risks of traversing the compacted snow and voluntarily assumed the risk and as a result is the author of his own misfortune.

18 With respect to causation the evidence is clear that the plaintiff crossed the defendant's lawn in the way that was most convenient to him from his parked truck. Mr. Robson admits that he was about to step upon an area of the defendant's lawn that appeared slippery to him but yet continued. His only explanation for not using the normal access namely the driveway was that it looked damp from which he inferred it was slippery. The driveway was available for his use and short of trying it he had little reason to avoid using it. I am satisfied on the evidence that the driveway was adequately maintained at the time by the defendant to provide the plaintiff with safe access. The plaintiff's decision to cross the lawn where he did and traverse the compacted snow where he did created the risk of injury and therefore his conduct seems to be the proximate cause of the accident. In other words he chose the path that he knew was not maintained for his passage and thus became the author of his own misfortune.

[43] The plaintiff was aware of the risks presented. The plaintiff in this case gave evidence as follows:

- a) She has lived her entire life in the Kootenays;
- b) On the accident date she was familiar with Baker Street and the 300 block of Baker Street;
- c) Snowbanks on the edge of roadways were something she expected;
- d) She wore running shoes because she observed the roads to be clear and not slippery, and because the running shoes had a good tread on them;
- e) She took the first and only parking spot that she could see, having only driven down less than one block of Baker Street;
- f) She chose not to look for another parking spot;
- g) She pulled into the parking spot, exited her vehicle and proceeded towards the sidewalk;
- h) The roadway where she parked was not slippery;
- i) She noticed a large snowbank and a puddle between the snowbank and her vehicle and the parking stall. She is not sure how large or wide the puddle was or how deep it was;
- j) She describes the snowbank as approximately two feet high and approximately two to three feet deep;
- k) She looked up and down the street and as far as she could tell, the snowbank ran the length of the block;
- l) She noticed some footprints in the snowbank and assumed that the snow was packed down and safe for her to step on;
- m) The area was illuminated by streetlights and from the retail businesses. The lighting was good enough for her to see the footprints in the snow and to the end of the block;
- n) She thought it was appropriate to step into the snowbank wearing running shoes because she thought the snow was packed;
- o) She did not look to see whether snowbanks had been removed from other blocks of Baker Street;
- p) She did not get back into her vehicle to find another parking spot because she assumed there wouldn't be another parking spot available;
- q) She considered walking in the roadway to the nearest intersection, but chose not to over concerns about the traffic and parked cars pulling out, among other things;
- r) She was aware that there was a curb beneath the snowbank but could not tell where it was;

- s) She did not do anything to try and figure out where the curb was other than to just step slowly;
- t) She assumed that the snowbank would bear her weight;
- u) She did not test the snow before putting her foot on it, but she stepped slowly;
- v) The only precaution she took just prior to stepping on the snowbank was that she "stepped carefully".

Prior to stepping onto the snowbank the plaintiff appreciated and understood the following risks:

- a) That there was some risk in walking over the snowbank;
- b) That in walking on the snowbank there was a risk that she could slip and fall;
- c) That in walking on the snowbank there was a risk that she could lose traction;
- d) That her foot could go through the snow.

[44] The City summarized the situation as follows:

Despite clearly seeing the snowbank, and wearing inappropriate shoes, and having the time to consider other options, and in fact considering (but ultimately rejecting) other options, and appreciating the various risks of stepping on the snowbank, and not doing anything to test whether the snow was indeed compacted and could bear her weight, the plaintiff took her right foot off the snow patch on which she was standing (in order to avoid the puddle) and stepped into the snowbank, ultimately injuring herself.

[45] I agree with the submissions. The plaintiff assumed the risk of crossing the snowbank and an unfortunate accident followed. She was the author of her own misfortune and I see no way that the City can be blamed for the accident.

[46] The case is dismissed.

"McEwan J."

The Honourable Mr. Justice McEwan

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