

CANADA / JUDGMENT

Marchi v. Nelson (City of)

2020 BCCA 1

COURT

British Columbia Court of Appeal

DECIDED

2 January 2020

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2020 BCCA 1 Marchi v. Nelson (City of)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Marchi v. Nelson (City of),

2020 BCCA 1

Date: 20200102

Docket: CA45997

Between:

Taryn Joy Marchi

Appellant

(Plaintiff)

And

City of Nelson

Respondent

(Defendant)

Before:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated

March 8, 2019 (Marchi v. Nelson (City of), 2019 BCSC 308,
Rossland Docket S12245).

Counsel for the Appellant:

D. Grunder

D.K. Daroux

Counsel for the Respondent:

D.L. Romanick

G. Allen

Place and Date of Hearing:

Vancouver, British Columbia

November 12, 2019

Place and Date of Judgment:

Vancouver, British Columbia

January 2, 2020

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Hunter

Summary:

The appellant suffered an injury she attributed to inadequate clearing of snow by the respondent municipality. Her action for damages was dismissed. The trial judge accepted the respondent's submission that it owed no duty of care to the appellant because its decisions with respect to snow removal were bona fide policy decisions. He alternatively found that, if the decisions were operational in nature, negligence was not made out under the standard tort analysis, in part because the appellant was the "author of her own misfortune". Held: Appeal allowed. It was an error to accept the respondent's characterization of its impugned conduct without engaging in the analysis called for by *Just v. British Columbia*, [1989] 2 S.C.R. 1228 and to characterize the appellant's conduct as the proximate cause of her injury, contrary to the approach embodied in s. 8 of the Negligence Act, R.S.B.C. 1996, c. 333.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

- [1] The appellant's action against the respondent, the City of Nelson, for damages arising out of a serious injury she sustained when she fell in a snowbank on Baker Street was dismissed for reasons indexed as 2019 BCSC 308.
- [2] She appeals that decision, arguing:
- a) the trial judge made factual errors: holding that all witnesses who testified about the practices and standard of care were called by the appellant, when that was not the case; finding that the practice employed in a comparable community was irrelevant based on a misapprehension of the circumstances in that community; and finding the City had exceeded its snow clearing budget in the three years before the incident when that was not the case;
 - b) the trial judge erred in law by providing functionally insufficient reasons for judgment, substantially reproducing large portions of the respondent's submissions (40 of 46 paragraphs of the judgment reproduce the respondent's written submissions); and misstating and failing to consider the appellant's argument at trial or the jurisprudence referred to by the appellant;
 - c) the trial judge erred in law by failing to distinguish between policy and operational decisions and failing to consider and establish an appropriate standard of care; and
 - d) the trial judge erred in law in finding the plaintiff was the author of her own misfortune and failing to properly address the plaintiff's negligence as contributory rather than a complete defence.
- [3] For reasons set out below, I am of the view the trial judge erred in the manner in which he addressed the City's duty of care, the standard of care and the appellant's own negligence. In my view, it is not necessary to address misapprehensions of the evidence or the purported inadequacy of the reasons for judgment. I would order a new trial.
- [4] The appellant's claim was founded upon an allegation that the City created a hazard when it cleared snow on the downtown streets following a heavy snowfall overnight on January 4-5, 2015. The city work crews plowed the snow on the 300 block of Baker Street early in the morning on January 5. They did so in such a manner as to create snowbanks or windrows at the edge of the street along the sidewalk. At about 5 PM on January 6, the appellant parked in an angled spot on the street and, seeing no other means of getting onto the sidewalk, tried to cross the snowbank. As she did so, her right foot dropped through the snowbank and onto something that bent her forefoot up. The snow locked her leg in place. She fell forward, suffering serious injury to her leg.
- [5] The appellant contended the City should have left openings in the snowbanks to permit safe access from the street onto the sidewalk. She relied upon evidence of the practices in neighbouring municipalities, Castlegar, Rossland and Penticton, to establish there were reasonable and preferable ways to clear the streets so as to ensure safe access onto the sidewalks. Her complaint related not to the City's priorities or budget decisions but, rather,

to the manner in which its work crews dealt with the accumulation of snow, given the available resources.

- [6] The judge described the contest at trial as follows:
- [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 [sic] 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. [Emphasis added].
- [7] The highlighted portion of this quotation is not an accurate description of the law. The trial judge appears to have adopted the submission of the City but abridged it in a manner that omits the crucial reference to the insulation of policy decisions, in particular, from judicial scrutiny. The City had submitted: "Governments (including local governments) do not owe a duty of care in tort if it can be established that the government's actions (or omissions) are a result of bona fide policy decisions" (emphasis added).
- [8] The reasons for judgment are, in my view, marked by a failure to identify the types of governmental decisions that should be insulated from judicial scrutiny.
- [9] The trial judge began by referring to the City's "Streets and Sidewalks Snow Clearing and Removal Policy" which sets out the priorities and the procedure for plowing, sanding and clearing city streets. That policy says nothing about whether windrows should be left along the edge of sidewalks or whether the street clearing crews should create any means of access from the street to the sidewalk in the downtown shopping area.
- [10] The judge noted, in a passage taken verbatim from the respondent's submissions, (submissions at para. 20, reasons for judgment at para. 5):
- [5] 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 [the City's Works Superintendent], 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.
- [11] The judge then paraphrased paras. 36-37 of the respondent's submissions:
- [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.
- [12] Finally, he held, adopting wording in paras. 52, 54 and 55 of the respondent's submissions:
- [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.

[13] The distinction between governmental policy and operational decisions is subtle. In my view it was an error to simply accept the City's submissions that all decisions made with respect to snow removal, whether made by the City Council, the Works Superintendent or the street crews, were policy decisions.

[14] As the Supreme Court of Canada noted in *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (per Cory J., for the majority at 1239):

The functions of government and government agencies have multiplied enormously in this century. Often government agencies were and continue to be the best suited entities and indeed the only organizations which could protect the public in the diverse and difficult situations arising in so many fields. They may encompass such matters as the manufacture and distribution of food and drug products, energy production, environmental protection, transportation and tourism, fire prevention and building developments. The increasing complexities of life involve agencies of government in almost every aspect of daily living. Over the passage of time the increased government activities gave rise to incidents that would have led to tortious liability if they had occurred between private citizens. The early governmental immunity from tortious liability became intolerable. This led to the enactment of legislation which in general imposed liability on the Crown for its acts as though it were a person. However, the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions. On the other hand, complete Crown immunity should not be restored by having every government decision designated as one of "policy". Thus the dilemma giving rise to the continuing judicial struggle to differentiate between "policy" and "operation". Particularly difficult decisions will arise in situations where governmental inspections may be expected.

The dividing line between "policy" and "operation" is difficult to fix, yet it is essential that it be done.

[Emphasis added.]

[15] Cory J., at 1241, drew some assistance from the following passage from the judgment of Mason J. in the High Court of Australia decision, *Sutherland Shire Council v. Heyman* (1985), 60 A.L.R. 1 at 34-35, in identifying the criteria to which reference may be made in drawing the critical distinction:

The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness. [Emphasis added by Cory J.]

[16] Cory J. concluded:

The duty of care should apply to a public authority unless there is a valid basis for its exclusion. A true policy decision undertaken by a government agency constitutes such a valid basis for exclusion. What constitutes a policy decision may vary infinitely and may be made at different levels although usually at a high level.

[17] The appellant relies upon a passage from The Honourable Allen M. Linden, "Tort Liability of Governments for Negligence" (1995) 53:4 The Advocate 539, to the effect that immunity should cover only narrowly defined government activity:

Such activity is normally concerned with large issues (macro decisions, if you will), not routine items (micro decisions).

[18] The appellant submits:

It would be unreasonable to call in particular the decision taken by the lead hand on the evening of January 5, 2015 a policy decision. The evidence of [Ms. McDonald] is that the city can have the evening crew stay until [4 AM] after a snow event. She explained that the decision not to keep the crew that evening to do further snow clearing was made by the lead hand. Clearly, that was a discretionary operational decision and not a policy one.

[19] Further, the appellant argued, relying on the evidence of practices in other municipalities, that there were methods of clearing snow that were simple and inexpensive that might have been adopted in Nelson by administrative direction and that would have satisfied the standard of reasonableness without requiring any change in the City's policies as dictated by financial, economic, social or political factors or constraints.

[20] Certain of the impugned decisions of the street clearing crew may properly have been characterized as operational in nature. Arguably, the decision not to further extend the hours of snow clearing and the decision not to move snow into particular parking spots, leaving access to the sidewalk open in other areas along the street, were operational. In my view, it was an error on the part of the trial judge to accept the City's submission that all its snow removal decisions were policy decisions without engaging in the analysis called for by Just.

[21] After concluding that the City owed no duty of care to the appellant, the trial judge went on to consider whether, if he was wrong, and the City did not have a policy defence, it would be liable if its conduct were subjected to the "standard tort analysis".

[22] That analysis by the judge, in my opinion, is equally flawed. The trial judge erroneously believed the appellant called three witnesses, from the works departments of Castlegar, Rossland and Penticton, who occupied positions similar to the City's Works Superintendent. In fact, two of those witnesses were called by the respondent. The appellant sought, in part through cross-examination, to establish a standard of care in the manner described by David G. Boghosian in *The Law of Municipal Liability in Canada*, at para. 2.96, p. 2.54:

Evidence of the practice of similarly situated municipalities concerning the activity in issue is relevant in determining the standard of care expected in the circumstances. Proof that a defendant failed to conform with the custom or practice will raise a strong presumption of negligence on his or her part whereas conformance with a custom or practice will usually, although not necessarily, exonerate the defendant."

[23] The judge considered the evidence that different practices in those similarly situated municipalities avoided the creation of windrows at the edge of downtown sidewalks but gave it little weight. He held:

[35] 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.

[Emphasis added.]

[24] Thus, even the "standard tort analysis" was coloured by the trial judge's view that a policy defence was available to the City and that rationality, rather than reasonableness, was the applicable standard.

[25] Further, in my view, the trial judge was led into error by accepting the City's submission that fault had not been established because the appellant was aware of the risk presented by the snow bank and was the "author of her own misfortune". Substantially adopting portions of paras. 143-4 and 146 of the respondent's submissions, the judge held:

[40] 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 (sic) 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. [Emphasis added.]

[26] The trial judge accepted (at para. 44) what he described as the City's summary of the situation:

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.

- [27] In support of the proposition that the appellant's negligence was the proximate cause of her injury and that afforded the City a defence, the City and the trial judge relied on two trial decisions: *Robson v. Spencer*, 2006 BCSC 1240 and *Wickham v. Cineplex Inc.*, 2014 BCSC 850. The former had not been cited in any other trial decision before it was relied upon by the respondent in this case and adopted as authority for the trial judge's analysis. The proximate cause causation analysis in *Robson* is unnecessary and in my view, for reasons set out below, wrong in principle. The latter judgment, *Wickham*, is not authority for the proposition for which it is cited. The trial judge in that case, Sigurdson J., dismissed the plaintiff's claim because negligence had not been made out. His observation that the plaintiff was entirely responsible for her injury should be seen in light of his conclusion that there was no fault on the defendant's part:
- [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.
- [28] In my view, it was an error on the part of the trial judge to adopt the proximate cause analysis urged upon him by the City, for reasons this Court expressed in *Skinner v. Fu*, 2010 BCCA 321. In that case, in similar circumstances, Garson J.A. held:
- [18] In my view the judge erred in the way he framed the analysis. "Proximate cause" or "effective cause" are sometimes confusing terms.
- [19] The use and misuse of the term "proximate cause" was discussed by Smith J.A. in *Chambers v. Goertz*, 2009 BCCA 358 at para. 29:

"Proximate cause" is a phrase ill-suited to the task of identifying culpable causes in negligence. It implies that the law recognizes only one cause and that this sole cause must be close in time and space to the event. As I have explained, these implications are not correct - every event has multiple historical factual causes. The phrase "proximate cause" is most often used in tort law synonymously with "remoteness", that is, "to inject some degree of restraint on the potential reach of causation": *R. v. Goldhart*, at para. 36. It suggests a limit on the scope of liability. There is also a doctrine of proximate cause in insurance law, where the term has been used to signify the main or dominant or effective cause of a loss, since the insurer has contracted to pay for the loss only if, or unless, it was caused by an event specified in the insurance policy. It must be noted that the term's usefulness in insurance law has also been questioned: see *C.C.R. Fishing Ltd. v. British Reserve Insurance Co.*, [1990] 1 S.C.R. 814 at 823, 69 D.L.R. (4th) 112, [1990] 3 W.W.R. 501; *Derksen v. 539938 Ontario Ltd.*, 2001 SCC 72, [2001] 3 S.C.R. 398 at para. 36, 205 D.L.R. (4th) 1.

[20] The judge's use of the term "proximate cause" in this case, diverted the analysis from the correct approach, the "but for" test. The judge must have employed a last clear chance analysis when he used the term "proximate". That term implies a finding of no liability based on a determination that the appellant could have entirely avoided the accident if only he had been more attentive to the road ahead of him. The judge found that the defendant was negligent. Indeed he could hardly have found otherwise. The respondent did create an unreasonable risk of harm by remaining stationary in the way he did.

[29] It follows that it was not open to the judge to treat his finding that the appellant assumed the risk of crossing the snowbank as dispositive of the question of the respondent's negligence. Such reasoning is clearly precluded by s. 8 of the Negligence Act, R.S.B.C. 1996, c. 333, which reads:

This Act applies to all cases where damage is caused or contributed to by the act of a person even if another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so. [Emphasis added.]

[30] For these reasons, in my view, the trial judge did not appropriately consider and identify the acts or omissions on the part of the City that should have been subject to judicial scrutiny and he did not correctly apply the "standard tort analysis" in relation to any such acts or omissions. I would allow the appeal, set aside the order dismissing the appellant's action and order a new trial.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Fitch"

I agree:

"The Honourable Mr. Justice Hunter"

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Prepared on 26 October 2026 · Esheria