NOVA SCOTIA COURT OF APPEAL
Citation: ***Shane v. 3104854 Nova Scotia Ltd.***, 2013 NSCA 84

Date: 20130711
Docket: CA 408560
Registry: Halifax

Between:

Shirley Anne Shane

Appellant

v.

3104854 Nova Scotia Limited

Respondent

Judges:	MacDonald, C.J.N.S.; Saunders and Beveridge, JJ.A.
Appeal Heard:	May 30, 2013, in Halifax, Nova Scotia
Held:	Appeal is dismissed with all-inclusive costs of $2,000 payable to the Respondent.
Counsel:	Michael Dull and Loreatha Boehner, for the appellant Joshua Martin and Tara Miller, for the respondent

Reasons for judgment:

[1] The appellant, Ms. Shirley Anne Shane, slipped on ice while walking on the sidewalk along Hollis Street in Halifax. She theorized that water from a melting snowbank in an adjacent parking lot migrated onto the sidewalk and froze. She sued the respondent parking lot owner in negligence. The trial judge rejected her theory and dismissed the claim. She now appeals to this Court. For the reasons that follow, I would dismiss the appeal.

BACKGROUND

[2] The fall occurred on January 7, 2008. Five days earlier, on January 2nd, Halifax had received a significant snowfall. The respondent's lot was plowed the same day, with the snow being piled towards the rear of the lot (which runs at an incline from Hollis Street).

[3] There had been no precipitation to speak of from January 2nd to the 6th and temperatures remained below freezing. However, between the afternoon of January 6th and early morning of January 7th, temperatures began to fluctuate above and below the freezing mark. This effect caused ice to accumulate in the parking lot, prompting the respondent to salt it on the morning of the 7th . The respondent did not treat the sidewalk where Ms. Shane subsequently fell. That sidewalk was maintained by the City when necessary.

[4] Justice Arthur J. LeBlanc of the Supreme Court of Nova Scotia heard the matter (2012 NSSC 327).

[5] At the end of Ms. Shane's evidence, the respondent advanced a non suit motion, asserting that Ms. Shane failed to produce the evidentiary foundation to support her theory (that the ice formation was the product of run-off from the respondent's lot). It argued (Appeal Book, Tab 12, pp. 176-77):

> The Defendant's position on this is very simple, Your Lordship, that it's not enough to provide weak evidence and then ask the Court to draw inferences from that evidence. There's a lot of speculation, there's a lot of assumption in terms of what caused the ice the Plaintiff says she fell on on the sidewalk, where that came from, and it's the Defendant's position that there's been no solid or cogent evidence led by the Plaintiff that allows the Court to be able to draw inferences such that the Plaintiff would have the Court draw.
>
> The basic position is that the factual underpinning to support those inferences is not in place in this case. The Plaintiff is guessing at what caused

> the ice to form, that was her evidence yesterday, and we would suggest that she is now asking the Court to continue on with her in terms of guessing what caused that ice, and that is not sufficient evidence to warrant the continuation of the Plaintiff's claim at this stage.

[6] The judge rejected this motion, finding *some* evidence that *could* support this theory (Appeal Book, Tab 12, p. 202):

> As I mentioned at the outset, this is not a finding on a balance of probabilities as to the credibility and believability of witnesses, and it is not a finding on the respective theories advanced by counsel on behalf of both parties.
>
> My finding is limited to the facts, that there is *some* evidence upon which a reasonably instructed jury *could* make a finding that the icy sidewalk in question was caused by melting snow or ice on the Defendant's property migrating on the sidewalk and refreezing in that location.
>
> [Emphasis added]

[7] This prompted the respondent to call evidence. Specifically, its witnesses explained the maintenance program and the fact that no one in the past (particularly in the days leading up to the fall) had reported seeing water migrating from the lot as theorized. Nor did the respondent's representatives ever observe or receive a complaint about ice build-up in that area of the sidewalk.

[8] At the end of trial, the judge dismissed the claim because, in his view, Ms. Shane had failed to prove her migration theory:

> ¶19 I make the following findings of fact:
>
> (1) Ms. Shane slipped and fell on January 7, 2008, on a sidewalk on Hollis Street in Halifax;
>
> (2) There was no evidence of water running from the parking lot onto the sidewalk in the days immediately prior to January 7, 2008;
>
> (3) Ms. Shane's slip and fall on January 7, 2008, was caused by slipping on jagged and rough ice on the sidewalk adjacent to the entrance to the defendant's parking lot.
>
> (4) Ms. Shane did not see any ice on the sidewalk where she fell;
>
> (5) On January 7, 2008, the portion of the sidewalk immediately to the south of the entrance to the parking lot was clear of snow and ice, and the portion immediately to the north had a covering of black ice;

> (6) On January 7, 2008, the defendant's employee, following regular procedure, applied salt to the parking lot;
>
> (7) The salting procedure included the entire parking lot but not the portion of the sidewalk adjacent to the entrance, where the plaintiff fell;
>
> (8) The defendant had stopped salting the sidewalk where the plaintiff fell after Halifax Regional Municipality assumed responsibility for the maintenance and cleaning of the sidewalk, including snow and ice removal and salting, pursuant to By-law S-300 in 2006;
>
> (9) There was a snowfall on January 2, 2008, and the parking lot was plowed and salted that day;
>
> (10) There was no snowfall on January 3, 4, 5, 6 or 7, 2008;
>
> (11) The parking lot was at a higher elevation than the adjacent sidewalk.
>
> . . .
>
> ¶26 I cannot conclude that the defendant allowed anything to escape from its property so as to cause the plaintiff to slip and fall. Moreover, while the plaintiff slipped and fell on ice on the sidewalk, it does not automatically follow that the defendant was negligent in cleaning the parking lot. I conclude that the evidence advanced by the defendant displaces any inference of negligence that would arise from the fact of the plaintiff's accident.

[9] Ms. Shane asserts that the judge erred in reaching this conclusion.

ISSUES

[10] In her notice of appeal, Ms. Shane identifies the following grounds:

> (1) After finding as fact the existence of a hazard, the Trial Judge erred in law by failing to examine alternative theories of causation, and any direct or circumstantial evidence (or lack thereof) supportive of each, to determine the probable cause of the hazard;
>
> (2) After having inferred from the circumstantial evidence, on a motion for non-suit, that the Appellant had established on the balance of probabilities, on a prima facie basis, that the hazard responsible for the Appellant's damages flowed from the Respondent's property, and absent any evidence negating this inference being presented by the Respondent, the Trial Judge erred in law in finding that the circumstantial evidence did not allow the inference that the hazard flowed from the Respondent's property;
>
> (3) After having inferred from the circumstantial evidence, on a motion for non-suit, that the Appellant had established on the balance of probabilities, on a

> prima facie basis, that the hazard flowed from the Respondent's property, and absent any evidence negating this inference being presented by the Respondent, and after finding as fact that the Respondent's maintenance operations did not address that hazard, the Trial Judge erred in law in not finding that the Respondent had breached its duty of care;
>
> (4) The Trial Judge erred in law by concluding that evidence advanced by the Respondent concerning its parking lot maintenance activities negated an inference that the hazard flowed from the Respondent's property onto the abutting sidewalk.

[11] In her factum she recasts the issues by asserting that the judge erred in:

(1) – Failing to examine or weigh alternative theories of causation

(2) – Failing to appreciate the effect of the dismissal of the non suit motion

(3) – Failing to find that the Respondent breached its duty of care

[12] I will now address each of these three issues in order.

ANALYSIS

Failing to examine or weigh alternative theories of causation

[13] Here Ms. Shane essentially says that because the judge dismissed the non suit motion, she had successfully established her theory and it, therefore, fell to the respondent to establish a reasonable alternate theory. This, she says, the respondent failed to do. She asserts in her factum:

> 45. The Learned Trial Judge found that the above evidence could lead to the "finding that the icy sidewalk in question was caused by melting snow or ice on the Defendant's property migrating on the sidewalk and refreezing in that location."
>
> **Appeal Book**, Tab 12, page 202
>
> 46. The Learned Trial Judge correctly found that the Appellant's burden could be met through reasonable inferences based on the circumstantial evidence. *He found that the evidence reasonably supported the Appellant's theory of causation*; that the migration from the Respondent's property had caused the hazard.
>
> **Appeal Book**, Tab 12, page 202
>
> 47. This accepted reasonable inference of causation "may be refuted by the defence if it chooses to do so". Where an inference of causation is established

> (as it was found here by the Learned Trial Judge), it "must be negated by a reasonable explanation if the defendant is to be found not liable."
>
> ***Nutall***, supra
>
> ***Holmes***, supra
>
> 48. While none of the Respondent's witnesses offered any possible cause for the existence of the hazard, even if they had, "the mere possibility of another explanation for [the hazard is] insufficient." Theories of causation must be supported by evidence, circumstantial or otherwise.
>
> ***Richards***, supra
>
> 49. On a *prima facie* basis, the Appellant had proved causation. In such cases, the Respondent must establish, from the evidence, other causes as being equally likely, or more likely. "[I]n the absence of evidence to the contrary adduced by the defendant" the Appellant's theory must be accepted as being the most probable. It is the only cause which has been accepted to be reasonably supportive.
>
> ***Snell***, supra, at para. 33
>
> 50. The Learned Trial Judge erred in law when he rejected the only theory of causation supported by the evidence. It was an error to find the only cause of the hazard reasonably supported by the evidence to be not the most likely cause.
>
> [Emphasis added]

[14] Respectfully, and as I will discuss in more detail when analysing the next issue, this submission rests upon a misguided premise. By dismissing the non suit motion, the judge did not find "that the evidence reasonably supported the appellant's theory of causation". Far from it. Instead he simply concluded that there was "*some* evidence upon which a . . . jury *could*" accept that theory. That did not switch the onus to the respondent to come up with a counter theory. This submission, therefore, misses the mark entirely.

[15] In any event, the respondent chose to call evidence, not necessarily to promote an alternate theory, but to successfully attack Ms. Shane's theory.

[16] I would therefore dismiss this ground of appeal.

Failing to appreciate the effect of the dismissal of the non suit motion

[17] As I have detailed above, ironically it is not the judge but the appellant who has failed to appreciate the effect of the non suit ruling. For example, in her factum she asserts:

51. Rather than advancing its own theory of causation, the Respondent chose to criticize the Appellant's theory. After the close of the Appellant's case, the Respondent brought a motion for non-suit. The non-suit motion was based on the assertion that the circumstantial evidence, and the inferences which could reasonably be drawn from it, did not support the Appellant's theory of causation.

52. *The Learned Trial Judge disagreed. He held that the Appellant's theory of causation was substantiated by the evidence*.

Appeal Book, Tab 12, page 202

53. Where a plaintiff has established a *prima facie* case supportive of her theory of causation, a defendant is required to present evidence supportive of alternative theories "or necessarily the plaintiff will succeed". This principle confirmed by the Supreme Court of Canada:

> [Circumstantial evidence] is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a prima facie case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.
>
> [emphasis added]
>
> ***Fontaine v. British Columbia (Official Administrator)***, 1997 CarswellBC 2930, at para. 27
>
> ***Johansson v. General Motors of Canada Ltd.***, 2012 CarswellNS 891, at para. 64

54. This Honourable Court made similar comments in Herman v. Woodworth, where Flinn J.A. adopted the following from Sopinka's *The Law of Evidence in Civil Cases*:

> ... If such a motion is launched, it is the judge's function to determine whether any facts have been established by the plaintiff from which liability, if it is in issue, may be inferred. It is the jury's duty to say whether, from those facts when submitted to it, liability ought to be inferred. The judge, in performing his function, does not decide whether in fact he believes the evidence. He has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man. He must conclude whether a reasonable jury could find in the plaintiff's favour if it believed the evidence given in trial up to that point.
>
> ***Herman v. Woodworth***, 1998 CarswellNS 35 (C.A.), at para. 4

55. Recently, in *Poulain v. Iannetti*, this Honourable Court reviewed the principles applicable to a non-suit motion. Where a trial judge determines that the plaintiff has established a *prima facie* case, he or she should, at the end of trial, "determine whether the competing inferences available to the defendant on the evidence rebut the plaintiff's *prima facie* case."

Poulain v. Iannetti, 2013 NSCA 10 (Canlii), at para. 17

56. Where the plaintiff's evidence is "left uncontradicted" at the close of the defendant's case, "necessarily the plaintiff will succeed."

Fontaine, supra

Herman, supra

57. This makes logical sense: it is the responsibility of a trial judge to weigh the evidence presented by both parties. Where one party presents evidence supportive of a cause, and the other party presents no evidence of any other cause, the only cause supported by the evidence must be deemed to be the most probable.

58. The Learned Trial Judge ultimately rejected the Appellant's theory of causation as being the most probable because, "[a]ny inference of negligence that could be drawn from the plaintiff's evidence would be (like that in *Fontaine*) a modest one (*Fontaine* at para. 33)."

Appeal Book, Tab 9, at page 50

59. The Learned Trial Judge failed to appreciate a crucial difference in *Fontaine*: in that case "the defence had succeeded in producing alternative explanations of how the accident may have occurred".

Fontaine, supra, at para. 33

60. It cannot be said that the Respondent succeeded in producing alternative explanations for the hazard. Unlike the defendant in *Fontaine*, the Respondent advanced no evidence of any possible cause. The Respondents' witnesses explicitly acknowledged having no "circumstantial or direct evidence to explain why this particular section…had pooled ice on the day of January 7th, 2008".

Appeal Book, Tab 12, pages 242 and 290

61. The Appellant proved a *prima facie* case of causation against the Respondent. As confirmed by the Supreme Court of Canada, "[o]nce the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed." No evidence negating the Respondent's *prima facie* case was presented.

Fontaine, supra, at para. 27

[Emphasis added]

[18] Again this submission is based upon a misguided premise. The dismissal of the non suit motion, did not at all mean that the appellant's "theory of causation was substantiated by the evidence". In fact, this Court, on numerous occasions, has confirmed the limited parameters of non suit rulings. For example, in **Johansson v. General Motors of Canada Ltd.**, 2012 NSCA 120, Fichaud J.A. provided this helpful analysis:

¶27 In *Herman v. Woodworth*, Justice Flinn (para. 4), more expansively, adopted the following from Sopinka's *The Law of Evidence in Civil Cases*:

> ... If such a motion is launched, it is the judge's function to determine whether any facts have been established by the plaintiff from which liability, if it is in issue, may be inferred. It is the jury's duty to say whether, from those facts when submitted to it, liability ought to be inferred. The judge, in performing his function, does not decide whether in fact he believes the evidence. He has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man. He must conclude whether a reasonable jury could find in the plaintiff's favour if it believed the evidence given in trial up to that point. The judge does not decide whether the jury will accept the evidence, but whether the inference that the plaintiff seeks in his favour could be drawn from the evidence adduced, if the jury chose to accept it. [Justice Flinn's emphasis]

¶28 The seminal statement of the demarcation between the functions of judge and jury is Lord Cairns' passage in *Metropolitan Railway Co. v. Jackson* (1877), 3 App. Cas. 193 (H.L.), at p. 197:

> The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. [Lord Cairns' emphasis]

The Supreme Court of Canada repeatedly has adopted Lord Cairns' statement: *The King v. Morabito*, [1949] S.C.R. 172, at p. 174; *Mezzo v. The Queen*, [1986] 1 S.C.R. 802, at para. 54, per McIntyre, J. for the majority; *R. v. Arcuri*, [2001] 2 S.C.R. 828, at para. 24, per McLachlin, C.J.C. for the Court.

¶29 As to other provinces, in *Prudential Securities Credit Corp., LLC v. Cobrand Foods Ltd.*, [2007] O.J. No. 2297 (Q.L.) (C.A.), Justice Laskin for the Court said:

> **35** On a non-suit motion, the trial judge undertakes a limited inquiry. Two relevant principles that guide this inquiry are these. First, if a plaintiff puts forward some evidence on all elements of its claim, the judge must dismiss the motion. Second, in assessing whether a plaintiff has made out a *prima facie* case, the judge must assume the evidence to be true and must assign "the most favourable meaning" to evidence capable of giving rise to competing inferences. This court discussed this latter principle in *Hall et al. v. Pemberton* (1974), 5 O.R. (2d) 438, at 438-9, quoting *Parfitt v. Lawless* (1872), 41 L.J.P. and M. 68 at 71-72:
>
> > I conceive, therefore, that in judging whether there is in any case evidence for a jury the Judge must weigh the evidence given, must assign what he conceives to be the most favourable meaning which can

> reasonably be attributed to any ambiguous statements, and determine on the whole what tendency the evidence has to establish the issue.
>
> ...
>
> From every fact that is proved, legitimate and reasonable inferences may of course be drawn, and all that is fairly deducible from the evidence is as much proved, for the purpose of a *prima facie* case, as if it had been proved directly. I conceive, therefore, that in discussing whether there is in any case evidence to go to the jury, what the Court has to consider is this, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue.
>
> **36** In other words, on a non-suit motion the trial judge should not determine whether the competing inferences available to the defendant on the evidence rebut the plaintiff's *prima facie* case. The trial judge should make that determination at the end of the trial, not on the non-suit motion. See John Sopinka, Sidney N. Lederman and Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths Canada, 1999) at 139.
>
> ¶30 In *Capital Estate Planning Corp. v. Lynch*, [2011] A.J. No. 820, para. 19, the Alberta Court of Appeal described Justice Laskin's statement from Prudential Securities as "[t]he definitive test on a non-suit motion".

[19] **Johansson** was recently reviewed and applied by this Court in **Poulain v. Iannetti**, 2013 NSCA 10, where after referring to **Johansson**, Hamilton J.A. added:

> ¶19 …Assuming as required, that the evidence before the judge is true and assigning "the most favourable meaning" to that evidence capable of giving rise to competing inferences, the record satisfies me that Mr. Poulain presented sufficient evidence that the judge was required to dismiss the non-suit motion.

[20] Several points can be taken from these passages. First, a trial judge hearing a non suit motion merely decides *if* a trier of fact *could* draw a requested inference from the plaintiff's evidence. The trial judge does not weigh the evidence on a non suit motion; that is for the trier of fact at the end of trial. On a non suit motion, the trial judge must assume that the evidence is true and must ascribe the "most favourable meaning to it". Any competing inferences put forward by the defendant are to be weighed with all of the evidence at the end of trial. Finally, the ordinary burdens continue to apply even where a plaintiff survives a non suit motion. That is, once all of the evidence is heard, the trier of fact must decide whether the plaintiff has proven its case on a balance of probabilities and this includes deciding

whether circumstantial evidence is sufficient to draw a requested inference as to causation or liability.

[21] **Johansson** did not change the law on non suit motions. Rather it reiterated what has long existed in Nova Scotia. See, for example, **J. W. Cowie Eng. Ltd. v. Keeping et al.** (1982), 52 N.S.R. (2d) 321 at ¶13 and **Herman v. Woodworth** (1998), 166 N.S.R. (2d) 174 at ¶4.

[22] In short, the question of whether the plaintiff has established its case on the balance of probabilities is a question of fact to be decided by the trier of fact not on a non suit motion, but only at the end of trial, after all of the evidence has been heard. Here, the appellant appears to have erroneously conflated these two distinct functions.

[23] Consider as well the *Civil Procedure Rule* dealing with non suit motions:

> **51.06** (1) At the close of the plaintiff's case and before the defendant elects whether to open the defendant's case and present evidence, the defendant may make a motion for dismissal of the proceeding, or a claim in the proceeding, on the ground that there is *no* evidence on which a properly instructed jury *could* find for the plaintiff.
>
> (2) A defendant who unsuccessfully makes a motion for a non suit must elect whether to open the defendant's case and call evidence when the motion is dismissed.
>
> [Emphasis added.]

[24] Rule 51.06(1) confirms the obvious. To grant a non suit motion the judge would have to have found "*no* evidence upon which a jury *could* find for the plaintiff".

[25] However, Rule 51.06(2) is instructive. It directs the defendant to elect whether or not to call evidence following an unsuccessful non suit motion. Yet, if Ms. Shane's interpretation of a non suit ruling were correct, then there would be no need for this election provision because the unsuccessful defendant would always have to call evidence in order to refute the plaintiff's case.

[26] There is no merit to this aspect of the appeal.

Failing to find that the Respondent breached its duty of care

[27] Here Ms. Shane makes two assertions. First she argues, that because all the evidence pointed to her migration theory, the judge erred by not finding that the

respondent breached its duty of care. Secondly, she suggests that the judge may have found no duty of care because of the City's responsibility to maintain this sidewalk. If so, she says that this would constitute an error in law. As I will now explain, neither assertion would prompt me to interfere with the judge's ruling.

Failing to find a breach

[28] Ms. Shane acknowledges that there are only two circumstances where an adjoining landowner can owe a duty of care to sidewalk pedestrians, as Beveridge J. (as he then was) identified in **Bowden v. Withrow's Pharmacy Halifax (1999) Ltd.**, 2008 NSSC 252:

> ¶51 In *Bongiardina*, MacPherson J.A. noted there were two exceptions to the general principle that the law does not recognize a duty on a property owner. First, an owner may be deemed in law to be an occupier if it assumes control of that property. This was the conclusion in *Bogoroch v. Toronto (City)*, [1991] O.J. No. 1032 (Gen. Div.) where the court held that a store owner who used the adjacent sidewalk to display its wares on a continuing basis was an occupier of the sidewalk and thus subject to the duties imposed by the Occupiers' Liability Act. Similarly, Dambrot J. in *Moody v. Toronto (City)* (1996), 31 O.R. (3rd) 53 dismissed a motion for summary judgment on the basis that the owners of the Skydome in Toronto might be an occupier of the sidewalks adjacent to the stadium because of the special circumstances surrounding those walkways, particularly the almost exclusive use of the walkway by Skydome patrons.
>
> ¶52 The second exception is that an owner owes a duty to ensure that conditions or activities on his or her property do not leave the property and cause injury to others. This was illustrated in *Brazzoni v. Timmons (City)*, [1992] O.J. No. 254 where the court held that the bank was liable allowing water from melting snow on its roof to accumulate, run across the sidewalk and create a dangerous situation that it knew or ought to have known could cause injury to pedestrians using the sidewalk.

[29] Here, there is no suggestion that the respondent ever assumed control over this part of the sidewalk. So Ms. Shane is left to rely only on the second circumstance; namely that the respondent's snow removal system created "a dangerous situation that it knew or ought to have known could cause injury to pedestrians using the sidewalk."

[30] However, this assertion meets a dead end because it takes us right back to the judge's conclusion that Ms. Shane had not established her migration theory. In other words, the judge was asked to infer that the ice was sourced from the respondent's lot. Based on his review of all the evidence, the judge was not prepared to do so. This was his call and one that we must respect short of palpable

and overriding error. See, for example, **Fontaine v. British Columbia (Official Administrator)**, [1998] 1 S.C.R. 424 at page 436.

The City's involvement

[31] In her factum, Ms. Shane explains how the judge may have erred in assessing the respondent's duty of care:

> 70. Although unclear, it is possible that the Learned Trial Judge found the Respondent did not owe a duty of care because "the defendant's staff operated on the understanding that the sidewalk was cleaned by the Municipality". He appears to reason that this understanding made it unforeseeable that its failure to salt hazards abutting its property would cause injury to others.
>
> **Appeal Book**, Tab 9, page 50
>
> 71. The question of foreseeability is only relevant to the existence of a duty of care. In order to establish a *prima facie* duty of care, it must be shown that a relationship existed between the parties such that it was reasonably foreseeable that a careless act or omission could result in injury.
>
> ***Ryan v. Victoria (City)***, [1999] 1 S.C.R. 201, at paras 22-23
>
> 72. Where it is not foreseeable that the failure to address a hazard would likely cause injury, a party owes no duty of care.
>
> 73. The Learned Trial Judge correctly recognized that, absent special circumstances, the owner or occupier of premises abutting a sidewalk does not have a duty of care to pedestrians. He correctly recognized an exception to this: owners owe a duty of care if the hazard comes from its abutting property.
>
> ***Bowden***, supra, at para. 43
>
> ***Bongiardina***, supra, at para 51-52.
>
> 74. If the pool of ice on January 7 came from the Respondent's property, the law is clear: the Respondent owed a duty to address it.
>
> 75. Although vague and unclear, the Learned Trial Judge appears to have found an exception to this. Latent in his reasoning may be that the duty of care applies only to situations where another entity does not occasionally maintain the sidewalk.

[32] For greater context, here is the full passage from the judge's decision (with the impugned passage highlighted):

> ¶25 I am not satisfied that it follows from the dismissal of the nonsuit that the plaintiff must succeed. Any inference of negligence that could be drawn from the plaintiff's evidence would be (like that in *Fontaine*) a modest one (*Fontaine* at para. 33). As Major J. noted, whether an inference of negligence

> can be drawn is highly dependent upon the circumstances of each case" (*Fontaine* at para. 35.) A considerable portion of the defendant's evidence consisted of evidence of the procedures followed by the defendant's staff in monitoring the state of the lot and in clearing and salting it. This was supplemented by evidence, drawn from the defendant's records, of the cleaning activities done on the lot at the relevant time. *There was also evidence that the defendant's staff operated on the understanding that the sidewalk was cleaned by the Municipality*. Further, the evidence did not establish that there was any flow of water from the parking lot onto the sidewalk in the days immediately prior to the plaintiff's accident. I am also not satisfied that the defendant could reasonably foresee that it would be held liable for the condition of the sidewalk, given that this duty belonged to the Municipality.
>
> [Emphasis added.]

[33] Here, I agree with Ms. Shane's legal analysis. As noted above, an adjoining landowner can owe a duty to pedestrians if one of the two **Bowden** circumstances applies. The City's involvement would not necessarily have displaced this and, to the extent that the judge may have suggested otherwise, he would have erred in law.

[34] However, this purported error would, in any event, do nothing to change the outcome of this appeal. I say this because, as noted, neither of the two **Bowden** exceptions applies in this case. In short, regardless of the legal issues at play, Ms. Shane's case was dependent on establishing her migration theory and, according to the judge's unassailable factual conclusion, this she failed to do. We are therefore left with no cause to interfere.

[35] For all these reasons, I would dismiss the appeal with all-inclusive costs of $2,000 payable to the respondent.

MacDonald, C.J.N.S.

Concurred in:

Saunders, J.A.

Beveridge, J.A.