IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Bowden v. Withrow's Pharmacy Halifax (1999) Ltd., 2008 NSSC 252

Date: 20080828
Docket: SH 213649
Registry: Halifax

Between:

Winnifred Bowden

Plaintiff

and

Withrow's Pharmacy Halifax (1999) Limited, E. Mantley Maintenance Services and Halifax Regional Municipality

Defendants

Judge: The Honourable Justice Duncan R. Beveridge

Heard: April 9, 2008, in Halifax, Nova Scotia

Counsel: Robert B. Carter, for the plaintiff
Kevin Quigley, for Withrow's Pharmacy
E. Roxanne MacLaurin, for HRM

By the Court:

INTRODUCTION

[1] Winnifred Bowden lives in Halifax. She says that on February 19, 2003 she was walking on Gottingen Street. As she stepped from the sidewalk onto the roadway of Cornwallis Street, she slipped on an accumulation of snow, slush and water, fell and was injured.

[2] Ms. Bowden initially sued the Halifax Regional Municipality alleging negligence. Her claim was amended to add David Chaisson and E. Mantley Maintenance Services as additional defendants. The plaintiff claimed that Mr. Chaisson was the owner of the Pharmasave Pharmacy located at 2151 Gottingen Street and that he was responsible for the maintenance of the sidewalks in the area where she says she slipped. E. Mantley Maintenance Services had been contracted by David Chaisson to maintain the sidewalks.

[3] E. Mantley Maintenance Services opted not to defend the claim and default judgment was granted in favour of the plaintiff on June 5, 2006.

[4] David Chaisson denied any responsibility and filed a cross-claim against E. Mantley Maintenance Services for any amounts that he may be found liable and sought a declaration of indemnity. David Chaisson also made a cross-claim against HRM for the same relief.

[5] HRM also denied any responsibility. It cross-claimed against David Chaisson and E. Mantley Services suggesting that if the plaintiff suffered any injury or loss as alleged, then those defendants were responsible by virtue of the *Municipal Government Act* S.N.S. 1998, c.18 and Halifax Regional Municipality Bylaw Number S-300. It sought full indemnification from the defendants Chaisson and E. Mantley Maintenance Services.

[6] The defendants David Chaisson and HRM each launched interlocutory applications, returnable March 26, 2008. Each defendant sought summary judgment pursuant to C.P.R. 13 with respect to the claim by the plaintiff against each and their respective cross-claims.

[7] The parties agreed to adjourn the dual applications for summary judgment to permit a further amendment to the pleadings, replacing the defendant David Chaisson with Withrow's Pharmacy Halifax (1999) Limited (WPL). The Originating Notice and Statement of Claim were duly amended and filed April 9, 2008. The defences, cross-claims and defences to the cross-claims were also filed on April 9, 2008. By consent, the application documents that had already been filed were amended to reflect the substitution of WPL for David Chaisson.

TEST FOR SUMMARY JUDGMENT

[8] Despite the number of times that the test has been articulated and applied, it is sometimes easy to lose sight of the correct approach and role of a judge hearing a summary judgment application.

[9] Citizens in a free and democratic society have the right to pursue redress for wrongs they allege were committed against them. Procedural fairness in pursuing redress is fundamental, including the right to a trial before an independent and impartial tribunal. Nonetheless the right to a full trial is not absolute. The courts have long recognized that proceedings may be halted prior to trial by an application to strike out a claim as disclosing no reasonable cause of action or defence, or for summary judgment on the ground there is no arguable issue to be tried with respect to a claim or a defence. Even during a trial claims that are doomed can be halted at the end of the plaintiff's case by way of a motion by the defence for non-suit.

[10] On an application to strike no evidence is admissible. The test is, assuming that the facts as stated in the Statement of Claim can be proved, is it plain and obvious that the Statement of Claim discloses no reasonable cause of action. The pleadings will be read generously in the light most favourable to the plaintiff. The claim will only be struck if the outcome of the case is plain and obvious. (See *Sherman v. Giles*, [1994] N.S.J. No. 572 (C.A.); *Fraser v. Westminer Canada Ltd.*, [1996] N.S.J. No. 540 (C.A.); *Hunt v. Carey Canada Inc.*, [1990] S.C.J. No. 93 (para. 32). Questions of law can be determined where the law is clear and no additional evidence is required to resolve the issues (Nova Scotia) *Labour Relations Board v. Future Inns Canada Ltd.*, [1999] N.S.J. No. 258.

[11] At the other end of the spectrum is the motion for non-suit at the end of the plaintiff's case at trial. The test is the same whether the case is civil or criminal,

judge alone or with a jury.[1] In Williston and Rolls, *The Conduct of an Action* (Toronto: Butterworths, 1982) the authors write at p.47-48:

> In every jury case, the legal question to be determined is whether any facts have been established by the plaintiff from which liability, if it is an issue, may be inferred, but it still remains for the jury to say whether, from those facts, liability ought to be inferred. If that standard has been met, the case must go to the jury. In ruling on the defendant's motion, the judge is deciding a question of law and his decision is therefore subject to review on appeal.
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> In a non-jury case, the evidentiary standard is the same, but since the judge is the trier of both fact and law, the submission may be framed somewhat differently. The defendant may submit that, accepting the plaintiff's evidence at its face value, no case has been established in law or that the evidence led for the plaintiff is so unsatisfactory or unbelievable that the court should find that the burden of proof has not been discharged.

[12] In Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (2 ed.) (Toronto: Butterworths, 1999) this principle is expressed as follows:

> §5.3 An important part of the division of responsibilities between judge and jury is the assessment of the sufficiency of the evidence adduced by a party. If a plaintiff fails to lead any material evidence, the plaintiff may be faced with a defendant's non-suit motion at the close of his or her case. If such a motion is launched, it is the trial 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. In comparison, it is the trier of fact's duty to say at the end of the case whether liability ought to be inferred. In *Metropolitan Railway Co. v. Jackson,* Lord Cairns said:
>
> > 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

[1] *R. v. Morabito,* [1949] S.C.R. 172

> maintained, and should be maintained distinct. [emphasis in original]

The Supreme Court of Canada adopted this passage as a correct statement of the law governing civil and criminal proceedings alike.

> §5.4 The trial judge, in performing this function, does not decide whether he or she believes the evidence. Rather, the judge decides whether there is any evidence, if left uncontradicted, to satisfy a reasonable person. The judge must conclude whether a reasonable trier of fact could find in the plaintiff's favour if it believed the evidence given in the trial up to that point. The judge does not decide whether the trier of fact should accept the evidence, but whether the inference that the plaintiff seeks in his or her favour could be drawn from the evidence adduced, if the trier of fact chose to accept it.

[13] Between these two procedural tools is the application for summary judgment. Civil Procedure Rule 13 provides as follows:

> 13.01 After the close of pleadings, any party may apply to the court for judgment on the ground that:
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> (a) there is no arguable issue to be tried with respect to the claim or any part thereof;
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> (b) there is no arguable issue to be tried with respect to the defence or any part thereof; or
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> (c) the only arguable issue to be tried is as to the amount of any damages claimed.

[14] The test to be applied in a summary judgment application has been articulated in numerous decisions of the Nova Scotia Court of Appeal. It was again set forth in *Huntley (Litigation Guardian of) v. Larkin*, [2007] N.S.J. No. 274, 256 N.S.R. (2d) 20 by Roscoe J.A. as follows:

[30] The applicable test is well established and has been most recently reiterated by this court in *Milbury v. Nova Scotia (Attorney General),* 2007 NSCA 52:

> Test for Summary Judgment:
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> [17] In *Orlandello v. AGNS*, 2005 NSCA 98, Justice Fichaud explained the two stage test on a summary judgment application:
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> > [12] Rule 13.01 permits a defendant to apply for summary judgment on the ground that the claim raises no arguable issue. Rule 17.04(2)(a) allows a third party to invoke Rule 13.01 to challenge a plaintiffs claim. In *Eikelenboom*, after reviewing the authorities, this court stated the test:
> >
> > > [25] Applying these authorities to the circumstances of this case, it is apparent that in order to show that summary judgment was available to it, [the defendant] had to demonstrate that there was no arguable issue of material fact requiring trial, whereupon [the plaintiffs] were then required to establish their claim as being one with a real chance of success.
> >
> > See also: *United Gulf Developments Ltd. v. Iskandar*, 2004 NSCA 35, at 9; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at 15; *Guarantee Co. of North America v. Gordon Capital Corp*., [1999] 3 S.C.R. 423 at 27.
>
> [18] As stated in *Selig v. Cooks Oil Company Ltd*., 2005 NSCA 36, there are two distinct parts of the test and they should be dealt with sequentially:
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> > [10] ... First the applicant, must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success.

> [19] If the applicant does not establish that there is no genuine issue of fact, it is not necessary to go to the second step. There is no onus on the responding party if the applicant does not succeed on the first prong of the test. If there are genuine issues of fact, the application should be dismissed. (emphasis added)

[15] The test in Nova Scotia is the same one employed on summary judgment applications in Ontario. Roscoe J.A. in *United Gulf Developments Ltd. v. Iskandar et al.*, [2004] N.S.J. No. 66 (2004), 222 N.S.R. (2d) 137 commented as follows:

> [6] Jurisprudence under the former Rule established that summary judgment may be granted where the plaintiff can prove his claim clearly, and if the defendant is unable to set up a bona fide defence, or raise an issue against the claim which ought to be tried. (*Bank of Nova Scotia and Simpson (Robert) Eastern Ltd. v. Dombrowski* (1977), 23 N.S.R. (2d) 532 ; 32 A.P.R. 532 (C.A.) at 537; *Oceanus Marine Inc. v. Saunders* (1996), 153 N.S.R.(2d) 267; 450 A.P.R. 267 (C.A.), at para. 15.) The "no arguable issue" standard has been incorporated into the new Rule.
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> [7] Since the new Rule has been in effect, two applications by defendants for summary judgment in the Supreme Court of Nova Scotia, have concluded with reported decisions which discuss the appropriate test: *Binder v. The Royal Bank of Canada et al.*, [2003] N.S.J. No. 304; 216 N.S.R. (2d) 363; 680 A.P.R. 363; 2003 NSSC 174 (under appeal) and *Eikelenboom v. Holstein Association of Canada,* [2003] N.S.R. (2d) Uned. 124; [2003] N.S.J. No. 479; 2003 NSSC 241. It appears that the same test was applied in those two cases as that used in the decision under appeal. In the *Binder* case Justice Moir traced the history of the Rule, compared the new Rule to that in other jurisdictions and at ¶ 7 set out the appropriate test on an application for summary judgment:
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> > [7] Now any party may apply for summary judgment. And, the express standard picks up something of the approach adopted by the courts under the old rule. Now, the application is made on the ground that "there is no arguable issue to be tried with respect to the claim": 13.01(a) or "there is no arguable issue to be tried with respect to the defence": 13.01(b). In my opinion, no substantive distinction can be made between "no genuine issue for trial" and "no arguable issue to be tried". Thus, the approach adopted by the Supreme Court of Canada in *Hercules* and in *Guarantee Company*

> *of North America* applies to summary judgment applications before this Court. The applicant must meet a threshold. Generally, that threshold is met when the case is such that the Court should properly inquire into the presence or absence of a genuine issue (*Hercules*, para. 5 and 15), which I would equate with a reasonably arguable issue. Specifically, the threshold is met in cases where "there is no genuine issue of material fact requiring trial" (*Guarantee Company of North America*, para. 27, emphasis added). Once the threshold is met, the respondent is required to show a real chance of success in its claim or defence. This is not much different from the approach we are used to and, like it, this approach places incentive on both parties to produce evidence justifying their positions.

[8] In the case under appeal, Justice Moir employed the same test stating it in the following terms:

> Starting with *Carl B. Potter Limited,* Nova Scotia developed an approach to plaintiff's summary judgment applications by which the plaintiff was required to clearly prove the claim. Then the defendant was called upon to demonstrate a point reasonably to be presented in defence.
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> In my opinion, it is not possible to appropriately mirror this approach in situations where the defendant applies for summary judgment. Rather, the approach suggested by the Supreme Court of Canada in the decisions of *Guarantee Company of North America* at para. 27, and *Hercules Management* at para. 15 are of guidance at least in defendants' applications in this province.
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> The Court will consider summary judgment only where the moving party establishes that, "there is no genuine issue of material fact requiring trial," and that that threshold having been met by the applicant, the respondent fails to, "establish his claim as being one with a real chance of success."

[9] I agree with Justice Moir that it is not possible to mirror the usual test for a plaintiff on a summary judgment application where a defendant brings the motion. I agree as well, that there is no appreciable difference between the standard of no genuine issue, and no arguable issue. I concur with the Chambers judge that the appropriate test where a defendant brings an application for summary judgment in Nova Scotia is the test as set out in *Guarantee Co. of North America v. Gordon Capital Corp*., [1999] 3 S.C.R. 423; 247 N.R. 97; 126 O.A.C. 1:

> [27] The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc*. (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules*, supra, at para. 15).

[16] Saunders J.A. in *Eikelenboom v. Holstein Assn. of Canada* (2004), 226 N.S.R. (2d) 235, 2004 NSCA 103 described the appropriate approach as follows:

> [20] The approach that ought to be taken on an application for summary judgment was explained by the Supreme Court of Canada in two recent judgments, *Hercules Management Ltd. Et al. v. Ernst & Young et al.*, [1997] 2 S.C.R. 165; 211 N.R. 352; 115 Man.R (2d) 241; 139 W.A.C. 241 and *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; 247 N.R. 97; 126 O.A.C. 1.
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> [21] In *Hercules* the plaintiffs were shareholders who held shares in an investment company. The defendants were auditors who performed annual audits on the company and provided audit reports to the shareholders. In 1984 the company went into receivership. The shareholders sued the auditors alleging that the audit reports for 1980, 1981 and 1982 had been negligently prepared and that the shareholders had suffered financial losses because of their reliance on those reports. The auditors brought a motion for summary judgment to dismiss the shareholders' claims. The auditors argued that there was no contract between the parties, that the auditors did not owe the individual shareholders a duty of care, and that the claims asserted could only be brought by the company and not the shareholders. The auditors' application for summary judgment was granted. The shareholders' appeal to the Manitoba Court of Appeal was dismissed. Their further appeal to the Supreme Court of Canada was also dismissed. As a first preliminary matter the Court described the approach that ought to be taken in disposing of motions for summary judgment under the prevailing rules of procedure in Manitoba. LaForest, J., writing for a unanimous seven member court, said at ¶15:

... The first concerns the procedure to be followed in a motion for summary judgment brought under Rule 20.03(1) of the Manitoba *Court of Queen's Bench Rules*. That rule provides as follows:

> 20.03(1) Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

I would agree with both the Court of Appeal and the motions judge in their endorsement of the procedure set out in *Fidkalo [v. Levin* (1992), 76 Man.R. (2d) 267], at p. 267, namely:

> The question to be decided on a rule 20 motion is whether there is a genuine issue for trial. Although a defendant who seeks dismissal of an action has an initial burden of showing that the case is one in which the existence of a genuine issue is a proper question for consideration, it is the plaintiff who must then, according to the rule, establish his claim as being one with a real chance of success.

In the instant case, then, the appellants (who were the plaintiffs-respondents on the motion) bore the burden of establishing that their claim had "a real chance of success". They bear the same burden in this Court.

[22] *Hercules* arose in Manitoba and dealt with that province's summary judgment rule. This court has recently held that there is no appreciable difference between the standard of "no arguable issue" (used in this province) and "no genuine issue" (found in the Ontario and Manitoba rules), *United Gulf Developments Ltd. v. Iskandar et al*, [2004] N.S.J. No. 66; 222 N.S.R. (2d) 137; 701 A.P.R. 137 (C.A.).

[23] In *Gordon*, supra, an investment dealer entered into a fidelity insurance contract with its insurer, which covered dishonest and fraudulent acts committed by the dealer's employees. The dishonest borrowings of an employee led to a loss to the dealer of approximately $90,000.00. The dealer submitted a proof of loss to the insurer. The insurer repudiated the insurance contract, stating that the dealer had made

a material misrepresentation in its application. The dealer denied the validity of the rescission, and sued the insurer. The insurer brought a successful motion for summary judgment dismissing the action. The motions judge held that the action was not brought within 24 months of the discovery of the loss as required by the contract. The judge held that even if the rescission was wrongful, it did not prevent the insurer from relying upon the limitation provisions in the contract. The investment dealer's appeal to the Ontario Court of Appeal was successful, the court finding that where an insurer repudiates a contract, the insured is excused from affirmative future obligations within the contract, including limitation periods. The insurer then appealed to the Supreme Court of Canada.

[24] At ¶ 28, the Court expressed its concurrence with the motions court judge's finding that "the only disputes were on the application of the law." Notwithstanding the complexity of factual and legal issues surrounding the claim, and that the application of the law to the circumstances of the case was strongly contested, the Court held that it was an appropriate case for summary judgment. Iacobucci and Bastarache, JJ., writing for a unanimous five member Court, described the test and shifting burdens of persuasion that arise in an application for summary judgment at ¶ 27:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at para. 15; *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (Ont. C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success." *Hercules*, supra, at para. 15.

In allowing the appeal, setting aside the judgment of the Ontario Court of Appeal and restoring the decision of the motions court judge granting summary judgment in favour of the fidelity insurer, the Court stated:

> [28] The limitation period defence raises mixed questions of fact and law. O'Brien, J., found that the only disputes were on the application of the law. We find no reason to disturb this finding.
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> ...
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> [35] We agree that there is no legal issue to be resolved at trial. The application of the law as stated to the facts is exactly what is contemplated by the summary judgment proceeding.
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> ...
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> [36] We would therefore conclude that the motions judge committed no error in determining that this was a proper case for summary judgment. *Gordon* has not met the evidentiary burden to show there is a genuine issue for trial.

[17] Two of the decisions referred to, with apparent approval, by the Supreme Court of Canada in *Guarantee Company of North America v. Gordon Capital Corp.* were *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257, [1998] O.J. No. 3240 (C.A.) and *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), [1991] O.J. No. 1478.

[18] In *Dawson v. Rexcraft Storage,* Borins J.A. stressed the need to be mindful of the appropriate rule of a judge hearing a motion for summary judgment:

> [18] The caselaw and the experience of this court suggest that motions judges frequently encounter difficulty in the analytical exercise of determining whether the record demonstrates that there is no *genuine* issue in respect to a *material* fact which requires resolution by a trial judge or jury. In this regard, it is helpful to emphasize that the dispute must centre on a material fact, and that it

must be genuine: *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545, 83 D.L.R. (4th) 734 (C.A.); *Rogers Cable T.V. Ltd.*, *supra*; *Royal Bank of Canada v. Feldman* (1995), 23 O.R (3d) 798 (Gen. Div.), appeal quashed (1995), 27 O.R. (3d) 322 (C.A.); *Blackburn v. Lapkin* (1996), 28 O.R. (3d) 292, 134 D.L.R. (4th) 747 (Gen. Div.). In my view, the difficulty encountered by motions judges arises not so much because of any real problem in appreciating that the inquiry must focus on a genuine issue of material fact, but because of uncertainty concerning the role of a motions judge and that of a trial judge. Not infrequently, it is apparent from their reasons for judgment that some motions judges have come to regard a motion for summary judgment as an adequate substitute for a trial. In my view, this is incorrect and does not reflect the true purpose of Rule 20. This confusion of roles usually arises in the more difficult cases in which the parties have presented conflicting evidence relevant to a material fact. Each of the four cases cited above illustrates the more difficult type of motion, in which it is tempting for a motions judge to exceed his or her proper role.

[19] In *Aguonie*, this court discussed the role of a motions judge in determining whether a genuine issue exists with respect to a material fact. It is helpful to repeat what the court said at pp. 235-36:

> [32]...In ruling on a motion for summary judgment, the court will never assess credibility, weigh the evidence, or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact.
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> ...
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> [35] In reviewing the evolution of Rule 20, Doherty J. [in *Masciangelo v. Spensieri* (1990), 1 C.P.C. (3d) 124 (Ont. H.C.J.)] made this significant observation at p. 129: "The case law which has developed under Rule 20 promotes an expansive use of the rule as a means of avoiding expensive litigation where it is possible to safely predict the result without a trial." Morden A.C.J.O. made a similar observation in the passage which I have quoted from his reasons in *Ungerman*, *supra*: "It must be clear that a trial is unnecessary." As I read these observations, it must be clear to the motions judge, where the motion is brought by the defendant, as in this appeal, that it is proper to deprive the plaintiffs of their right to a trial. Summary judgment, valuable as it is for striking through sham claims and

> defences which stand in the way to a direct approach to the truth of a case, was not intended to, nor can it, deprive a litigant of his or her right to a trial unless there is a clear demonstration that no genuine issue exists, material to the claim or defence, which is within the traditional province of a trial judge to resolve.
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> [20] To what the court said in *Aguonie*, I would add this. Underlying Rule 20 is the premise that little purpose is achieved by having an unnecessary trial. Rule 20 is the mechanism adopted by the Rules of Civil Procedure for deciding cases where it has been demonstrated clearly that a trial is unnecessary and would serve no purpose. I recognize, however, that deciding when a trial is unnecessary and would serve no purpose is no mean task. However, in my respectful view, in determining this issue it is necessary that motions judges not lose sight of their narrow role, not assume the role of a trial judge, and, before granting summary judgment, be satisfied that it is clear that a trial is unnecessary. This is not to say that the court is not to consider the evidence which constitutes the record. Indeed, to do so is central to determining the existence of a genuine issue in respect to material facts.

[19] With these principles in mind I now turn to the respective applications by the defendants WPL and HRM.

APPLICATIONS BY WPL

[20] The applications for summary judgment by both WPL and HRM were heard together on April 9, 2008. The plaintiff, WPL and HRM tendered a number of affidavits. For the most part the affidavits were used as a vehicle to identify and provide to the Court relevant excerpts from examinations for discovery of the plaintiff, the plaintiff's son, Paul Bowden, and officials from HRM who were involved in the clearance of snow and ice in the municipality. Some business records were identified and included. In addition, photographs were introduced

that were taken by David Chaisson and by Paul Bowden very shortly after the time that Mrs. Bowden says she slipped.

[21] HRM provided a separate Book of Documents which included an unsigned and undated statement attributed to one Michael Stephen Conway, and business records from Environment Canada. HRM also referred to and quoted from examinations for discovery.

[22] The parties agreed there would be no cross-examination on the affidavits. There was no objection with respect to the unverified excerpts from discovery included in HRM's brief nor to the documents assembled in its book of authorities. Understandably, none of the parties placed any weight on the unsigned and undated statement purportedly given by Mr. Conway.

[23] From the materials filed by the parties the factual background to this litigation is relatively straightforward. There was a weather event which commenced on the morning of February 18, 2003. Environment Canada records document that 6.4 centimetres of snow fell on February 18, 2003. From these records the parties would be able to establish that snow commenced falling at approximately 9:00 a.m. on February 18 and changed to snow showers and then simply cloudy by 4:00 p.m. Snow showers commenced again at 8:00 p.m. on February 18. At sometime between midnight and 1:00 a.m. February 19, 2003 the snow showers ceased.

[24] Environment Canada records also demonstrate that Thursday February 19, 2003 was a cloudy day with no snow falling (Environment Canada lists the snowfall as “TR” or trace).

[25] Ms. Bowden is 75 years of age. At approximately 3:50 p.m. on February 19, 2003 she stepped from the sidewalk at the northeast corner of Cornwallis and Gottingen Streets. As she stepped onto the roadway to enter the marked crosswalk to cross Cornwallis Street in a southerly direction she encountered an accumulation of snow, slush and water. She says she slipped on ice, hidden by the accumulation of snow, slush and water, fell forward and sustained injury to one of her knees.

[26] It is not contested that HRM owns the sidewalk and the streets. The *Municipal Government Act* S.N.S. 1998 c.18 is clear. Sections 307 and 308 provide as follows:

> 307 In this Part, "street" means a public street, highway, road, lane, sidewalk, thoroughfare, bridge, square and the curbs, gutters, culverts and retaining walls in connection therewith, but does not include bridges vested in the Halifax-Dartmouth Bridge Commission and streets vested in Her Majesty in right of the Province. 1998, c. 18, s. 307; 2000, c. 9, s. 49.
>
> Streets vested in municipality
>
> 308 (1) All streets in a municipality are vested absolutely in the municipality.
>
> (2) In so far as is consistent with their use by the public, a council has full control over the streets in the municipality.

> (3) No road, or allowance for a road, becomes a street until the council formally accepts the road or allowance, or the road or allowance is vested in the municipality according to law.
>
> (4) Possession, occupation, use or obstruction of a street, or a part of a street, does not give and never has given any estate, right or title to the street. 1998, c. 18, s. 308.

[27] In the winter of 2003/2004 many sidewalks located in peninsula of Halifax were not cleared by HRM personnel. Bylaw S-300 required the "owner" to remove all snow and ice from any sidewalk which abuts any side of his or her property. The bylaw defines owner as including a tenant.

[28] The property abutting the sidewalk at the intersection of Cornwallis and Gottingen Streets, was 2151 Gottingen Street. This property was owned by John Dundar and Elmer McIvor. WPL was a tenant of the building. WPL arranged with the defendant E. Mantley Maintenance Services for snow and ice removal. The invoice from Mantley Maintenance Services shows a claim for shovelling and salting on both February 18 and 19, 2003.

[29] The President and sole director of WPL is David Chaisson. As noted earlier, he took photographs shortly after the time that Ms. Bowden says she slipped. His affidavit says that these photographs are, to the best of his recollection, a true representation of the condition of the sidewalk and crosswalk adjacent to 2151 Gottingen Street at about the time of the plaintiff's fall. No one has challenged this evidence. In fact, the evidence of the plaintiff's son, Paul Bowden, corroborates

Mr. Chaisson's evidence about the condition of the sidewalk. An excerpt of the discovery examination of Mr. Bowden was tendered and photographs, taken by an unknown author, show the same area. Mr. Bowden says this is approximately what the sidewalk looked like in the area where his mother fell.

[30] In paragraph 6 of the plaintiff's amended statement of claim dated April 9, 2008 the plaintiff alleges that she was walking in a careful and prudent manner at or near 2151 Gottingen Street and in entering, or attempting to enter Cornwallis Street in the crosswalk, "she slipped and fell due to the dangerous icy and slippery conditions of the crosswalk". The plaintiff was discovered on April 16, 2007. She testified as follows:

552. Q. Okay. So, your first step was off the sidewalk?

A. Yeah.

553. Q. And then your second step was another step off the sidewalk, was it?

A. Yeah.

554. Q. Yes, Okay. And so that when you fell were both of your feet off of the sidewalk?

A. No, both feet was in the water.

555. Q. Okay. And was that off of the sidewalk?

A. Yeah, that little curve there.

556. Q. Okay. It was off of the sidewalk?

A. Yes.

557. Q. Both of your feet were off the sidewalk when you first fell?

A. Yeah.

558. Q. Yes?

A. Yeah.

559. Q. So, both of your feet were on the travelled portion of the roadway when you fell?

A. Yes.

560. Q. Are you certain of that?

A. When I fell, I was coming down and I put my foot –two feet down, and there's where I landed.

561. Q. Okay. And what I'm wondering about is --you took your first step off of the curb onto the roadway, correct?

A. Yes. Yeah.

562. Q. And then your second step you moved farther away from the curb, did you?

A. Yes. Yeah.

563. Q. So that when you fell, both your feet –when you first fell, both of your feet were off of the sidewalk?

A. Sidewalk, on that little curve.

564. Q. Okay. And when you're saying "the little curve", what do you mean?

A. There was a little curve, so I – the water was there, so then I was going to go across the street that way.

565. Q. And that's going down Gottingen to the left, correct?

A. Yes.

566. Q. But what I'm interested in knowing – and I think you've answered it – is that both of your feet were off of the sidewalk when you first fell.

A. Yes.

[31] The plaintiff was shown the photographs taken by David Chaisson. She was asked to mark on a photograph where her right foot was when it first began to slip. She marked on what was Exhibit 1 at the discovery, and which was reproduced as Exhibit 7 to David Chaisson's affidavit. This plainly puts the plaintiff off the sidewalk when she first began to slip.

[32] Jeffrey Rogers was, at the time of his discovery, the Regional Coordinator for Bylaw Services for HRM. He testified that he believed it was the responsibility of HRM to clear and remove ice and snow from city streets and that property owners had the obligation to clear the sidewalks abutting their property. He explained the separation of the sidewalk from the roadway by examining photographs of the area when it was bare of snow and ice. In his view the concrete portion is considered the sidewalk and the paved portion the roadway.

[33] Bylaw Number S-300 sets out the obligation of the "owner" of properties in the municipality. The requirement on owners is set out as follows:

> 4 (1) Owner, except where snow removal service is provided by the Municipality, shall remove all snow and ice,
>
> (a) from any sidewalk which abuts any side of their property; provided , however, that where a property containing a detached one-family dwelling unit, a duplex dwelling or a semidetached dwelling unit as defined in the Land Use Bylaws has frontage on a street at both the front and rear of the property, the owner shall not be required to remove the snow and ice from a sidewalk which is part of the street at the rear of the property, where the street at the front of the property is defined as the street on which the property has its civic address, and
>
> (b) from any pathway leading from a sidewalk abutting their property to the roadway, and
>
> (c) between any sidewalk abutting their property and a crosswalk

> for a minimum width of three feet or the full width of the paved sidewalk, whichever is less, within twelve hours after the end of any snowfall or, where the snow stops falling during the night, six hours after daylight, and without restricting the generality of the foregoing, owners shall render the sidewalk completely free of snow and ice to bare pavement within said times.
>
> (2) No person shall deposit snow or ice on the travelled way of any street.

[34] The bylaw sets out a number of relevant definitions. These include:

> Definitions
>
> 3 In this By-law:
>
> ...
>
> (e) “crosswalk” means that portion of a roadway ordinarily included within the prolongation or connection of curblines or the edge of a roadway and property lines at intersections or any portion of a roadway clearly indicated for pedestrian crossings by lines or other markings on the road surface;
>
> ...
>
> (n) “roadway” means that portion of a street between the curb lines or the travelled portion of a street designed for vehicular travel;
>
> (o) "sidewalk" means that portion of a street between the curb line and adjacent property line or any part of a street especially set aside for pedestrian travel and separated from the roadway;

[35] During his discovery examination Mr. Rogers also reviewed photographs of the area which the plaintiff says the slip and fall occurred. He testified that based

on the photographs it appeared to him that WPL had complied with Bylaw S-300 in clearing the sidewalk and providing access to the crosswalk.

[36] In order to satisfy the criteria to obtain summary judgment, WPL needs to demonstrate that there is no arguable issue of material fact requiring trial. If it does not meet this first threshold requirement there is no burden on the respondents. If WPL does satisfy the first threshold requirement the plaintiff, and HRM must establish their respective claims as being ones with a real chance of success.

[37] The plaintiff argues that there are a number of significant factual and legal issues that need to be resolved. She contends that the specific area where the sidewalk meets the crosswalk was covered with slush and water and it is unknown whether the plaintiff slipped on the crosswalk, the sidewalk or both. She says it was the failure of either or both WPL and HRM to completely and properly clear snow and slush from the entrance onto the crosswalk that permitted the accumulation of water and created a very dangerous and slippery surface in the area. The plaintiff further submits that WPL breached Bylaw S-300. While acknowledging that breach of a bylaw alone does not create civil liability, she argues that it may result in liability on the basis that non-compliance with a bylaw may serve as evidence of the breach of a common law duty of care.

Is There an Arguable Issue of Material Fact Requiring Trial?

[38] In order to answer this question it is important to keep in mind that it is not just any dispute about factual matters that will preclude the Court from moving on to the second aspect of determining a summary judgment application. In *Irving Ungerman Ltd. v. Galanis*, *supra* Morgan, A.C.J.O. explained (p.549):

> The expression "genuine issue" was borrowed from the third sentence in Rule 56(c) in the Federal Rules of Civil Procedure in the United States which were adopted in 1938. It reads:
>
> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> Our rule does not contain, after "genuine issue", the additional words "as to any material fact". **Such a requirement is implicit. If a fact is not material to an action, in the sense that the result of the proceeding does not turn on its existence or non-existence, then it cannot relate to a "genuine issue for trial"**. (See Wright, Miller and Kane, *Federal Practice and Procedure*, 2nd ed. (1983), vol. 10A, pp. 93-95.) **Similar reasoning applies to the absence from our rule of the words "and the moving party is entitled to a judgment as a matter of law". This is implicit.** **[**emphasis added]

[39] Counsel for the plaintiff acknowledges that analysis of the legal issues is necessary for a determination whether there exists a genuine or arguable issue of material fact.

[40] As noted above the plaintiff says there is a real issue as to where the slip and fall occurred - the sidewalk or in the crosswalk. The only evidence on this issue tendered on this application is the discovery evidence of the plaintiff herself. The plaintiff was of course at liberty to tender affidavit evidence demonstrating the

existence or availability of other evidence bearing on this issue. No such evidence was tendered.

[41] Counsel for HRM, in her written submissions, made the assertion that the plaintiff's son, Paul Bowden "testified that he did not see his mother fall, but heard her cry out". Initially, he claimed that the "X" drawn in the photograph at Tab 1 (Exhibit 7 in Mr. Quigley's affidavit) as the location where his mother had slipped. This puts Mrs. Bowden off the sidewalk and into the street. Subsequently, HRM says he put an "X" on a different photograph to show the area where he first saw his mother after she fell. A copy of the photograph containing Paul Bowden's "X" is located at Tab 2 of HRM's Book of Documents. This would put Mrs. Bowden on the sidewalk. I find it difficult to conclude that this demonstrates the existence of an arguable issue of material fact.

[42] First of all, in my opinion in light of the available evidence, a finding by a trier of fact that the slip occurred on the sidewalk would be unreasonable. No claim is made by the plaintiff that WPL would have any liability if the slip occurred off the sidewalk. If advanced, such a claim is untenable. Even if a trier of fact could find that the slip occurred on the sidewalk, WPL cannot, in these circumstances, be found liable for such an occurrence. The basis for this conclusion is as follows.

[43] The plaintiff's claim against WPL is based on an assertion of liability in negligence and under the *Occupiers' Liability Act*. In my opinion, the law could

not be clearer that, absent special circumstances, the owner or occupier of premises abutting a sidewalk owes no duty of care to pedestrians either at common law or pursuant to statute.

[44] The *Occupiers' Liability Act* S.N.S. 1996, c.27 stipulates that its provisions replace the common law rules for the purposes of determining the duty of care that an occupier of premises owes persons entering with respect to damage to them or their property. The duty of an occupier is defined as follows:

> 4 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises.
>
> (2) The duty created by subsection (1) applies in respect of
>
> (a) the condition of the premises;
>
> (b) activities on the premises; and
>
> (c) the conduct of third parties on the premises.

[45] Section 2 of the *Act* is the definition section. It defines occupier and premises as follows:

> 2 In this Act,
>
> (a) "occupier" means an occupier at common law and includes

> (i) a person who is in physical possession of premises, or
>
> (ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on the premises or the persons allowed to enter the premises,
>
> and, for the purpose of this Act, there may be more than one occupier of the same premises;
>
> (b) "premises" includes
>
> (i) land and structures, or either of them, except portable structures and equipment,
>
> (ii) water,
>
> (iii) ships and vessels,
>
> (iv) notwithstanding subclause (i), trailers and portable structures designed or used for a residence, business or shelter,
>
> (v) railway cars, vehicles and aircraft, except while in operation. 1996, c. 27, s. 2.

[46] In my opinion WPL is not an occupier at common law[2]. Furthermore WPL was not in physical possession of the sidewalk or crosswalk. While it may be argued that WPL had some responsibilities, and control over the condition of the sidewalk, it did not have any responsibility for, nor control over activities

[2] See *Di Castri, Occupiers' Liability* (Calgary: Burroughs, 1981)

conducted on the premises, the activities conducted thereon, nor the persons allowed to enter.

[47] There did not appear to be any decisions in Nova Scotia that have considered this issue. However, there are no shortage of cases from other jurisdictions in Canada that have. The case law is unanimous in concluding that the occupier of adjacent premises is neither an occupier at common law nor under similarly worded statutes with respect to occupiers' liability (*Shwemer v. Odeon Morton Theatres* (1995), 33 Man.R. (2d) 109, [1985] M.J. No. 315 (Q.B.); *Turner v. Windsor* (1994), 46 O.R. (2d) 174, 9 D.L.R. 4th 123; *Slumski v. Mutual Life Assurance*, [1994] O.J. 301 (Div. Ct.); *Chong v. Flynn* (1990), 233 A.R. 120, [1998] A.J. No. 1094 (Q.B.); *Gardner v. Unimet Investmests Ltd.* (1995), 4 B.C.L.R. (3rd) 376, [1995] B.C.J. No. 79, aff. (1996), 19 B.C.L.R. (3rd) 196 (C.A.), [1996] B.C.J. No. 886; *Koch v. Slavelake Jewellers Ltd.* (2001), 290 A.R. 329 (Q.B.); *Rolland v. Limb* (1992), CarswellOnt. 2950 (Gen. Div.*); Graham v. 7 Eleven Canada Inc.* [2003] O.J. No. 544 (Ont. Sup. Ct.); *Peterson v. Windsor (City*) (2006), 27 M.P.L.R. (4th) 129. With the exception of *Shwemer*, all of the claims against abutting occupiers were dismissed in applications for summary judgment.

[48] In *Bongiardina v. York (Regional Municipality)* (2000), 49 O.R. (3d) 641, 2000 O.J. No. 2751 (C.A.) the plaintiff claimed he slipped and fell on an icy and snow covered sidewalk. He sued the Municipality. The City then commenced a third party action against the owners and occupants of the residential properties

abutting the sidewalk where the plaintiff says he fell. The third parties brought a motion for summary judgment to dismiss the third party claim. The motion was granted. The Municipality appealed. In dismissing the appeal, the Court of Appeal held there was no common law duty on the owner of a property to clear snow and ice from public sidewalks adjacent to the property and an alleged breach of the municipal snow clearing bylaw by the property owners did not give rise to any basis for liability. MacPherson J.A. delivered the judgment of the court. He wrote:

> [19] The question then becomes: is there a common law duty on the owner of the property to clear snow and ice from public sidewalks adjacent to the property? In my view, the answer to this question must be "No". Although the "neighbour" principle from *Donoghue v. Stevenson*, [1932] A.C. 562, 101 L.J.P.C. 119 (H.L.), has been expanded in recent years to cover a myriad of new relationships, it would stretch it too far if it was applied in the circumstances of this case. A homeowner has a duty to ensure that his or her own property is maintained in a reasonable condition so that persons entering the property are not injured. If the homeowner complies with this duty, he or she should be free from liability for injuries arising from failure to maintain municipally owned streets and sidewalks. The snow and ice accumulating on public sidewalks and the potholes on the street in front of the house are the legal responsibility of the municipality, not the adjacent property owner.

[49] I am certainly cognizant that the law in Ontario with respect to the responsibility and liability of the provincial government and municipalities is statutorily different than in Nova Scotia. Nonetheless, the conclusion by MacPherson J.A. with respect to the common law liability of an abutting landowner is undoubtedly correct.

[50] The same conclusion was expressed by Ilsley J., as he then was, in *Commerford et al. v. Board of School Commissioners of Halifax et al.*, [1950] 2

D.L.R. 207, [1950] N.S.J. No. 13. The plaintiff slipped on a sidewalk and sustained injuries. Ilsley J. held that a violation of the city ordinance that imposed an obligation on abutting landowners to remove snow and apply ashes, sand, or salt on ice did not make an abutting landowner liable in damages to any person injured because of such a breach. He went on to write at p. 218:

> Then Mr. Cowan argued that neglect of the statutory duty in this case constituted negligence for which the plaintiff might recover on the principles developed in and since the ease of *M'Alister (Donaghue) v. Stevenson*, [1932] A.C. 562, that the duty to take care is much wider than it was thought to be prior to 1932, that in this case the abutting owner or occupier could have reasonably foreseen that any omission to perform the duty created by the Ordinance would be likely to injure pedestrians using the sidewalk fronting on the premises, that these pedestrians are "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question" and that therefore an action for damages for negligence lies--and on a basis, as I understand the contention --separate or different from the line of cases to which I have referred. It seems to me that the fallacy in this contention lies in the fact that the whole inquiry is directed to the question as to whether the Charter and the Ordinance do create or impose a duty by the abutting owner and occupier to the pedestrian, one for which the owner or occupier is answerable in damages to the pedestrian. If it was not the intention of the legislation to create such duty to the pedestrian, then the principles of *M'Alister v. Stevenson* and subsequent cases based on it have no application. I cannot think that modern developments in the law of negligence have overthrown the carefully developed jurisprudence on recovery for breaches of statutory duty. And the fact that the duty of abutting owners and occupiers to remove snow and put sand on ice in streets is completely non-existent at common law, confirm me in the view that liability for damages for breach of a purely statutory obligation should not be found to exist except on well-established grounds.

[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.

[53] Neither of these exceptions apply here. I am satisfied that there is no genuine or arguable issue to be tried. The burden is then on the plaintiff to demonstrate that her claim has a real chance of success. For reasons set out above, in my opinion it does not. The defendant WPL is entitled, as a matter of law to a dismissal of the plaintiff's claim against it.

[54] I have not overlooked the plaintiff's argument that the evidence establishes that WPL or its employees or agents took specific steps to clear the sidewalk, which steps left a pile of snow or slush in the crosswalk entrance resulting in a blockage of water drainage and thereby created a dangerous situation for pedestrians. The fact that this allegation was not pleaded is not fatal as the plaintiff could seek leave to amend its pleadings. What is fatal to the position of the plaintiff is that there is absolutely not a scintilla of evidence that the steps taken by WPL, its employees or agents left a pile of snow or slush in the crosswalk entrance.

WPL's Application to Dismiss HRM's Third Party Cross-Claim

[55] The same general principles apply to a consideration of a motion for summary judgment of a cross-claim. The burden is therefore on the applicant WPL to demonstrate there is no arguable or genuine issue to be tried. If WPL satisfies this burden it will then be up to the defendant HRM to demonstrate that its cross-claim has a real chance of success.

[56] Caution was expressed by Roscoe J.A. in *Cooks Oil Company Ltd. v. Parkhill Construction*, [2005] N.S.J. No. 69 in considering an application for summary judgment of a third party claim, that is for indemnity by a defendant over against another party. In such an application the defendant, should not have to demonstrate that the plaintiff has a good cause of action. The focus should be

whether the third party has demonstrated that there is no genuine issue of fact as alleged in the third party claim.

[57] The only factual allegations made in the cross-claim by HRM against WPL is that WPL was responsible for the sidewalk area when the alleged incident occurred. In particular it is said that WPL was, by virtue of Bylaw S-300, responsible for the removal of snow and ice from the sidewalk which abuts their property. This is restated by the suggestion that liability would lie with WPL as a result of its failure to properly clean and maintain the sidewalk and to warn of potential dangers.

[58] Based on the materials submitted by the parties there is no genuine or arguable issue of fact. The evidence is clear that the plaintiff did not slip on the sidewalk but was on the roadway when she says she slipped. HRM does not allege that WPL would have any liability with respect to what may or may not have happened on the roadway or in the crosswalk.

[59] Furthermore the evidence is overwhelming that WPL did fulfil their obligations under Bylaw S-300 for the removal of snow and ice from the sidewalk abutting its property. HRM's own witnesses confirmed that WPL met its obligations under Bylaw S-300, both in clearing the sidewalk and in providing access to the crosswalk.

[60] The burden is then on HRM to satisfy me that its cross-claim has a real chance of success. In my opinion "real" connotes a potential for establishing liability that is neither fanciful nor farfetched. It must be one that is reasonably grounded in legal principle. For the reasons outlined above WPL owed no duty at common law or by statute, absent special circumstances to pedestrians.

[61] However, HRM says it relies on the provisions of the *Municipal Government Act*, S.N.S. 1998, c.18, in particular s.516 which provides as follows:

> 516 Where a municipality or village is found liable for damages as a result of the unsafe condition of a street or sidewalk, or of a nuisance or encumbrance on it, the municipality or village has a right of indemnity for all such damages, and for costs and expenses incurred in connection therewith, against any person whose act or omission caused the street or sidewalk to be unsafe or caused the nuisance or encumbrance.

[62] I am satisfied that there is no arguable or genuine issue of fact that WPL did, or omitted to do anything that caused any street or sidewalk to be unsafe. The unsafe condition alleged by the plaintiff was the crosswalk. She has identified the crosswalk to be plainly in the roadway. Even if the plaintiff's claim could be amended, and there was actually some evidence that the sidewalk was unsafe, such a condition was not caused by an act or omission by WPL. If there was an unsafe condition of the sidewalk, it was created by the weather conditions and not by an act or omission of WPL. HRM has not established its cross-claim as having a real chance of success. The application for summary judgment by WPL with respect to the cross-claim by HRM is allowed.

HRM'S APPLICATIONS FOR SUMMARY JUDGMENT

Legal Context

[63] As noted early, in order to determine if there is an arguable issue to be tried and if not, does the plaintiff have a reasonable chance of success, the legal requirements that a plaintiff must establish (or a defendant in the case of an affirmative defence) provide the necessary parameters to determine these issues.

[64] In her pleadings and submissions the plaintiff asserts that HRM owned and was responsible for the maintenance of the sidewalks and crosswalks at the intersection of Gottingen and Cornwallis Streets. She says that her injuries were caused by the negligence and breach of the duty owed to her by the defendant HRM. She sets out a number of particulars of the alleged negligence.

[65] The plaintiff also pled that HRM was liable as it was in breach of a statutory duty, in particular s.344 of the *Municipal Government Act*, and its statutory duty under the *Occupiers' Liability Act*. These contentions can be dealt with first. Both contentions are, in my opinion, entirely without merit.

[66] Section 344 of the *Municipal Government Act* provides that:

> Every property in a municipality shall be maintained so as not to be dangerous or unsightly. 1998, c.18, s.344.

[67] Although "property" is not specifically defined in the *Act* it is obvious it does not apply to municipal sidewalks and streets. In the sections that immediately follow s.344 the power is given to a municipality to order the owner, where a property is dangerous or unsightly, to remedy the condition by removal, demolition or repair. This section creates no duty on the municipality with respect to streets and sidewalks.

[68] Although a municipality may well be an occupier for many purposes, and absent a specific legislative provision could also be considered an occupier under the typical wording in occupiers' liability legislation[3], there is such a specific provision in the Nova Scotia *Occupiers' Liability Act.* Section 12 expressly provides that the *Occupiers' Liability Act* does not apply to a municipality as the occupier of a highway, public walkway or public sidewalk.

[69] With respect to the common law allegations of negligence, the plaintiff relies on a host of decisions from Ontario where liability was imposed on municipalities for a failure to properly deal with snow and ice on sidewalks, roadways and crosswalks. These case authorities are of limited assistance as in Ontario there has been a statutory obligation on municipalities to keep roads, streets and highways in repair. The Ontario legislation specifically provided that the municipality would

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[3] In British Columbia municipalities do owe duties under the *Occupiers' Liability Act* with respect to sidewalks. See *Pearson v. Mapleridge, (District),* [1994] B.C.J. No. 2751 (C.A.)

be civilly responsible, sometimes with the caveat that civil responsibility would only attach if there was gross negligence.

[70] David G. Boghosian & J. Murray Davison, in *The Law of Municipal Liability in Canada*, (Toronto: Butterworths,1999) noted that caution must be exercised in considering case law from other jurisdictions. They wrote:

> §3.6 A duty to maintain highways and a cause of action for its breach are legislated by statute in Alberta, Manitoba, Ontario, Saskatchewan and Yukon. A private law duty of care, based upon principles of negligence, as discussed in detail in Chapter 2, applies in the other jurisdictions, whose legislation is either discretionary or silent.
>
> §3.7 There are a number of significant distinctions, from the standpoint of the liability of local road authorities, between jurisdictions having a statutory duty of repair (all of which also import a statutory right of action) and jurisdictions in which the duty merely exists at common law. Those distinctions concern liability for nonfeasance, onus of proof and availability of the policy decision immunity.

[71] Over 100 years ago it was authoritatively established that in Nova Scotia public authorities charged with a duty of keeping public roads and bridges in repair were not liable to a person who has suffered injury from any failure to do so. Lord Hobhouse of the Judicial Committee of the Privy Council in the *Municipality of Pictou v. Geldart*, [1893] A.C. 524 held at p.527:

> By the common law of England, which is also that of Nova Scotia, public bodies charged with the duty of keeping public roads and bridges in repair, and liable to an indictment for a breach of this duty, were nevertheless not liable to an action for damages at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair.

[72] This principle has long been upheld (see *Coleman v. The City of Halifax*, [1915] N.S.J. No. 10 N.S.S.C. (*en banc); Pelham v. Halifax (City)* (1972), 7 N.S.R. (2d) 300, [1972] N.S.J. No.3). However liability would attach where a municipality undertook repairs but did so negligently. In *Halifax (City) v. Tobin*, (1914), 50 S.C.R. 404 the corporation of Halifax was laying a concrete sidewalk on Granville Street. In doing so it lowered the grade and cut away the asphalt sidewalk on Salter Street. The part that was cut away was filled in with earth and ashes. This was washed out in a rainfall and the plaintiff was injured when she stepped into the hole. The City was found liable at trial, which was upheld on appeal. The City appealed further to the Supreme Court of Canada. The appeal was dismissed. Fitzpatrick C.J. held:

> This appeal should be dismissed with costs. The accident was due entirely to the faulty construction of the connection between the concrete sidewalk on Granville Street with the asphalt sidewalk on Salter Street. It is a case of failure on the part of the municipality to take due care in the exercise of its powers.
>
> The appellant urges that there is no misfeasance, and that for non-feasance there is no statutory liability. I express no opinion as to whether or not under the statute there is a liability for non-feasance.
>
> In my judgment this is not a naked question of law, but one of mixed fact and law. I am quite satisfied that the accident was directly attributable, as found below, to the fact that the municipality having undertaken to make repairs to sidewalk left it in an unsafe condition and that for the consequences to the plaintiff the municipality is liable.

[73] In *The City of Sydney v. Slaney* (1919), 59 S.C.R. 232 the Court recognized that natural accumulations of snow and ice may amount to non or disrepair. In that

case snow had been permitted to accumulate on the sidewalk. Slush formed when mild weather arrived which was then converted into ice as a result of a night frost. The sidewalk then became dangerous for pedestrians. The trial judge found that the City was aware of the condition and the likelihood of the lowering of the temperature that created the icy conditions. The Supreme Court of Canada upheld the liability of the City of Sydney for this non repair. However, s.249 of the *Sydney Corporation Act* specifically imposed on the City an obligation to keep in repair all streets in the City.

[74] The defendant HRM points out that the *Municipal Government Act* does not impose any statutory obligation on the municipality to clean, clear or otherwise keep its sidewalks or streets in repair. The legislation is permissive. It provides as follows:

> 312 (1) A council may design, lay out, open, expand, construct, maintain, improve, alter, repair, light, water, clean, and clear streets in the municipality.
>
> ...
>
> (3) The council may expend funds for the purpose of clearing snow and ice from the streets, sidewalks and public places in all, or part, of the municipality. 1998, c. 18, s. 312.

[75] Absent a statutory obligation, what duty then is there on the defendant HRM to anyone that is injured either by a complete failure to exercise its powers or a lack of reasonable care in how it exercised them.

[76] This question is far from straightforward. There are a number of Supreme Court of Canada decisions that bear on this issue. All of them arise from claims against government authorities in British Columbia and in Nova Scotia, two jurisdictions that do not have a specific statutory duty to repair streets and highways. In chronological order they are as follows.

[77] In *Barratt v. North Vancouver (District)*, [1980] 2 S.C.R. 418 the plaintiff appellant was injured when he was thrown from his bicycle when its front wheel dropped into an unmarked, rain filled pothole on a heavily travelled street in North Vancouver. The street at the time of the accident was in a poor state of repair. The Municipality's maintenance coordinator knew that the whole of the street was badly in need of resurfacing. He testified that potholes were forming all the time along that street. He acknowledged that a pothole filled with water could be very dangerous and that if it had been known that there was such a pothole a warning sign would have been erected.

[78] North Vancouver had a well organized system of road inspection. Two highway inspectors were employed. It was their duty to travel all roads in their assigned districts once in each two-week period. If they found damage they could either report it or in the case of a pothole fix it themselves. One week prior to the accident the street was inspected. The plaintiff did not suggest that the inspection was made improperly or negligently. The trial judge found that the pothole which caused the appellant's accident was the product of the ordinary wear and tear of

traffic and it did not come into being because of any negligence on the part of North Vancouver. The trial judge accepted that the Municipality of North Vancouver had the power to maintain and repair highways but was under no statutory duty to do so. He found the Municipality liable on the basis that it knew of the danger inherent in the street and should have taken steps to ensure that drivers and cyclists using that street were not injured because of the potholes that were forming. He concluded the Municipality did not discharge that duty by the inspection system that they had implemented. The Court of Appeal disagreed and dismissed the action.

[79] On further appeal to the Supreme Court of Canada the appeal was dismissed. Martland J. delivered the judgment for the court. He agreed with the analysis by the British Columbia Court of Appeal that, relying on principles from the House of Lords in *Anns v. London Borough Merton*, [1977] 2 All E.R. 492, the frequency of inspections was a matter of policy and could attract no liability. He wrote:

> ...His criticism of the conduct of the Municipality is therefore as to frequency of inspection. In essence, he is finding that the Municipality should have instituted a system of continuous inspection to ensure that no possible damage could occur and hold that, in the absence of such a system, if damage occurs, the Municipality must be held liable.
>
> In my opinion, no such duty existed. The Municipality, a public authority, exercised its power to maintain Marine Drive. It was under no statutory duty to do so. Its method of exercising its power was a matter of policy to be determined by the Municipality itself. If, in the implementation of its policy its servants acted negligently, causing damage, liability could arise, but the Municipality cannot be held to be negligent because it formulated one policy of operation rather than another.

...

> My conclusion is that the trial judge sought to impose upon the Municipality too heavy a duty, that the determination of the method by which the Municipality decided to exercise its power to maintain the highway, including its inspection system, was a matter of policy or planning, and that, absent negligence in the actual operational performance of that plan, the appellant's claim fails.
>
> p.427-28

[80] In *Just v. British Columbia*, [1989] 2 S.C.R. 1228 the appellant and his daughter were on their way to Whistler to ski. Heavy snow forced the traffic to stop. While stopped, a boulder, which had worked loose from the wooded slopes above the highway, crushed his car, killing his daughter and causing him very serious injuries. He sued the province alleging it had negligently failed to maintain the highway. The Department of Highways had set up a system for inspection and remedial work on rock slopes, particularly that stretch of highway where the accident occurred. The trial judge found that the number and quality of inspections and the frequency of scaling and other remedial measures were matters of planning and policy. The action against the province was dismissed. This conclusion was upheld by the British Columbia Court of Appeal.

[81] The majority judgment of the Supreme Court of Canada was written by Cory, J. While he left open the potential for a litigant to have the courts review a policy decision, the scope to do so would be narrow. It would have to amount to a non-bona fide exercise of discretion. However, once having made a policy decision a court may review how those policies are implemented. He wrote:

> [18] The need for distinguishing between a governmental policy decision and its operational implementation is thus clear. True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions may well be subject to claims in tort. What guidelines are there to assist courts in differentiating between policy and operation?

[82] Cory J. went on to provide the following examples:

> [21] The decisions in *Anns v. Merton London Borough Council* and *City of Kamloops v. Nielsen,* supra, indicate that a government agency in reaching a decision pertaining to inspection must act in a reasonable manner which constitutes a bona fide exercise of discretion. To do so they must specifically consider whether to inspect and if so, the system of inspection must be a reasonable one in all the circumstances.
>
> [22] For example, at a high level there may be a policy decision made concerning the inspection of lighthouses. If the policy decision is made that there is such a pressing need to maintain air safety by the construction of additional airport facilities with the result that no funds can be made available for lighthouse inspection, then this would constitute a bona fide exercise of discretion that would be unassailable. Should then a lighthouse beacon be extinguished as a result of the lack of inspection and a shipwreck ensue no liability can be placed upon the government agency. The result would be the same if a policy decision were made to increase the funds for job retraining and reduce the funds for lighthouse inspection so that a beacon could only be inspected every second year and as a result the light was extinguished. Once again this would constitute the bona fide exercise of discretion. Thus a decision either not to inspect at all or to reduce the number of inspections may be an unassailable policy decision. This is so provided it constitutes a reasonable exercise of bona fide discretion based, for example, upon the availability of funds.
>
> [23] On the other hand, if a decision is made to inspect lighthouse facilities the system of inspections must be reasonable and they must be made properly. See *Indian Towing Co.*, 350 U.S. 61 (1955). Thus once the policy decision to inspect has been made, the Court may review the scheme of inspection to ensure it is reasonable and has been reasonably carried out in light of all the circumstances,

> including the availability of funds, to determine whether the government agency has met the requisite standard of care.

[83] Applying these principles, Cory J. considered that the Department of Highways had settled on a plan which called upon it to inspect all slopes visually and then do further inspections of those slopes and take additional safety measures where warranted. He considered that these were not decisions that could be designated as policy but rather were manifestations of the implementation of the policy decision to inspect, and were operational in nature. As such they were subject to review by the court to determine whether the Department of Highways had been negligent in order to satisfy the appropriate standard of care. Since no findings of fact were made at trial on the issues germane to the standard of care, a new trial was ordered as the appellant was entitled to findings of fact on those questions.[4]

[84] The Supreme Court of Canada released reasons for judgment simultaneously in the companion cases of *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420 and *Swinamer v. N.S. (Attorney General)*, [1994] 1 S.C.R. 445. In *Brown v. British Columbia* the appellant Brown left home at approximately 8:30 to drive to Campbell River. At approximately 9:15 a.m. he hit a stretch of black ice of several hundred feet and left the highway. Unbeknownst to the appellant there had been three accidents that same morning, all within the stretch of seven kilometres due to the presence of black ice. The RCMP

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[4] A new trial was held and the Department of Highways found to be negligent by failing to meet the standard of care in the way it inspected and maintained the slope. *Just v. British Columbia* (1991), 60 B.C.L. R. (2d) 209, [1991] B.C.J. No. 3328 (B.C.S.C.)

had called three times, commencing at 7:25 a.m. for sanding trucks to be sent. The Department of Highways was still on its summer schedule. It was not due to switch to its winter schedule until the week after the accident.

[85] At trial two allegations of negligence were made against the Crown. The first was that it was negligent in failing to respond in a timely fashion to the reports of icy conditions and to remedy them. The second was that the Crown was negligent in failing to maintain the road so that ice would not form on it. The trial judge found that the local highway office did not know about the need for sanding until 8:30 a.m. He concluded that once the department was aware of the need for sanding, it acted with dispatch to fulfill their obligations. He determined there was no negligence by the Department of Highways in failing to respond in a timely fashion. The trial judge also found the Crown could not be held liable in negligence with respect to failing to maintain the road so that ice would not form on the basis that these were policy matters which excluded any duty of care.[5] The Court of Appeal declined to intervene.

[86] Cory J. confirmed the conclusion, by the Court in *Just* that, despite the permissive language in the *Highway Act*, a duty of care was owed by the province to those who use its highways which extended to reasonable maintenance. Cory J. held that the duty to maintain included an obligation to prevent injury to users of the roads due to icy conditions. He wrote:

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[5] Cory J. observed there did not appear to be any evidence that either the state of the road or its design led to the formation of black ice

[33] That duty to maintain would extend to the prevention of injury to users of the road by icy conditions. However the Department is only responsible for taking reasonable steps to prevent injury. Ice is a natural hazard of Canadian winters. It can form quickly and unexpectedly. Although it is an expected hazard it is one that can never be completely prevented. Any attempt to do so would be prohibitively expensive. It can be expected that a Department of Highways will develop policies to cope with the hazards of ice. Before applying the principles set out in *Just* to determine what may be the policy pertaining to ice and what may be the operational aspects of that policy it should be determined whether, as the respondent contends, there are any statutory provisions that would exempt the Department from the imposition of a duty of care in the repair and maintenance of highways.

C. Statutory Exemptions

[34] Once again it is clear that there is no statutory exemption from tortious liability provided by the *Highway Act*, R.S.B.C. 1979, c. 167. The respondent argued that s. 8 of the *Occupiers Liability Act*, R.S.B.C. 1979, c. 303, and s. 3(2)(f) of the *Crown Proceeding Act*, R.S.B.C. 1979, c. 86, provided the requisite statutory exemptions. Further the Crown submitted that it is under no obligation to repair the highway. It contends that Crown liability can only arise from acts of misfeasance and not of nonfeasance.

[35] I cannot accept these submissions. I will deal first with the suggestion that there is no obligation to repair highways and that liability cannot arise from a failure to act but only from an act negligently performed. It seems to me that any distinction between negligence founded on misfeasance or nonfeasance will often be unnecessary or inappropriate. More importantly, as long ago as 1885, this Court in *Town of Portland v. Griffiths* (1885), 11 S.C.R. 333 held that a statute which placed public streets and highways under the control of a municipality imposed upon that municipality the duty of keeping them in repair. It follows that once the duty to repair or to maintain is assumed by a government then it must fulfil that obligation in a manner that is not negligent. That is the duty that rests upon the respondent in this case.

[87] Cory J. found that the decision of the department to maintain a summer schedule was a policy decision and as such it could not be reviewed on a private

law standard of reasonableness. It would therefore only be open to attack if it was not bona fide or was so irrational that it could not constitute a proper exercise of discretion.

[88] However, Cory J. affirmed the ability and obligation of the court to determine whether or not the manner in which the sanding was carried out under the summer schedule was negligent. If it was, the Department of Highways could be found liable. Cory J. noted that the onus was on the appellant to establish, on a balance of probabilities that a Department of Highways negligence was responsible for the unexplained delay in responding to the request for sanding. Despite undoubted negligence by the department in failing to have the home telephone numbers of its employees on file, the claim still failed because even if the home telephone number was available, the sand truck driver could not have been on the road in time to have prevented the accident.

[89] In *Swinamer v. Nova Scotia, supra* the appellant was seriously injured when a tree fell across his truck while travelling on a highway in Nova Scotia in the fall of 1983. The tree was located on private party, approximately three feet from the edge of the highway right-of-way. As part of its ordinary maintenance activities, the provincial Department of Transportation removed fallen trees and branches from the roads as well as any trees which were regarded as dangerous.

[90] There was no general policy to inspect trees, but a few months prior to the accident the Department had conducted a survey of trees in the region following a

complaint about dead trees posing a hazzard. The survey was carried out by a foreman, who had some knowledge, but no specific training in the area. The tree that fell on the plaintiff had been in full foliage and appeared to be in good health in the summer. The sudden and unexpected collapse of the tree was caused by a severe fungus. A lay person looking at the tree could not determine if it suffered from this disease. An expert might suspect its presence. Further tests would be required to determine if it existed.

[91] The trial judge found that the department was negligent in the manner it had conducted its survey of the trees, concluding that the department should have consulted experts and adequately trained the foreman so he might recognize a tree suffering from a severe fungus infection and taken the appropriate steps.

[92] The Nova Scotia Court of Appeal concluded that the Province was under no statutory duty to repair, as opposed to the situation in Ontario. The court summarized its reasons as follows:

> [34] In summary I have reached the following conclusions:
>
> (1) there is no statutory duty requiring the Minister to maintain provincial highways;
>
> (2) there is no liability imposed on an abutting owner for a nuisance on an adjoining property;
>
> (3) there is no statutory power to enter onto lands abutting the highway to inspect or remove trees;

> (4) any duty at common law to repair highways does not extend to adjoining lands;
>
> (5) even assuming a duty to remove dangerous trees from lands abutting a highway, there was no evidence that the tree in question constituted a danger prior to the accident;
>
> (6) the finding by the trial judge that there was a policy to inspect and remove diseased trees from adjoining lands which was the key to his decision, was not supported by the evidence.
>
> [35] As the evidence did not support such a conclusion with respect the decision cannot stand. (1992), 108 N.S.R. (2d) 254 at p.265

[93] Cory J., writing on behalf of the majority of the court, disagreed with the first four conclusions of the Court of Appeal. He set out ss. 4 and 5 of the *Public Highways Act*, R.S.N.S. 1989 c.371. They are:

> Management and control of highways
>
> 4 The Minister has the supervision, management and control of the highways and of all matters relating thereto. R.S., c. 371, s. 4.
>
> Construction or maintenance by Minister
>
> 5 The Minister may construct or maintain any highway, or may on behalf of Her Majesty in right of the Province enter into contracts or agreements for such construction or maintenance, but nothing in this Act compels or obliges the Minister to construct or maintain any highway or to expend money on any highway. R.S., c. 371, s. 5.

[94] Despite the permissive nature of these legislative provisions, Cory J. concluded that the province did have a duty to maintain which would extend to reasonable maintenance and that the appellant, as a user of the highway, was in sufficient proximity to the Department to fall within the scope of that duty of care. It would be a reasonably foreseeable risk that harm might befall users of the highway if it were not reasonably maintained. With respect to the argument that there was a statutory exemption from liability for maintenance, Cory J. wrote:

> [25] The respondent, like the Court of Appeal, relies on the same s. 5 of the Public Highways Act as the basis for exempting the Department from liability for maintenance, more specifically on the following words:
>
> . . . but nothing in this Act compels or obliges the Minister to construct or maintain any highway or to expend money on any highway.
>
> [26] It is true that there is no similar provision in the British Columbia highways legislation considered in *Just*. However, in my view, the wording of the section is not explicit enough to constitute a statutory exemption from the duty of care, so as to exempt the respondent from liability in tort. I would agree that the presence of a discretion such as that provided in s. 5 might in some circumstances support an argument that there is no statutory duty to maintain. However in my view, the absence of a provision providing a specific statutory obligation to maintain is not sufficient to exempt the Crown from the general common law duty of care owed to users of the highway. The duty to maintain arises out of the relationship that exists between the Department of Transportation and the users of the highways. If the Department is to be exempted from liability for negligent conduct in the course of its duty to maintain the highway, the wording of the statutory exemption should be clear and precise. Section 5 does not, in my view, exempt the Department of Transportation from liability arising from negligent conduct in highway maintenance.

[95] Nonetheless the appeal from the dismissal of the action was unsuccessful. Cory J. concluded that there was no negligence demonstrated in the operational

aspect in carrying out its policy decision to survey the trees along the highway. The tree that fell was in full foliage and gave every indication of good health during the summer before the accident.

[96] HRM argues that it was under no statutory obligation to provide winter maintenance in relation to its streets or sidewalks. The *Public Highways Act*, R.S.N.S. 1989, c.371 certainly contemplates that every municipality has some obligation with respect to winter maintenance. Section 33 provides as follows:

> 33 (1) The council of every municipality shall divide the municipality into road sections in the best and most convenient manner so as to ensure effectively the performance of the duties required by Section 34 and shall appoint an overseer for each road section.
>
> Existing road sections
>
> (2) Until such division is made, the road sections or divisions constituted and existing before the twenty-first day of March, 1953, for snow removal purposes shall continue to exist for the purposes of this Section.

[97] The duties defined by s.34 are rather quaint and obviously relate to a much earlier time. They are:

> 34 (1) All physically fit male persons between the ages of sixteen and sixty, residing within every such section or division, are required to work with their shovels on the highways during the winter whenever the highways become impassable from snow, but persons actually in regular attendance at any public school are not, during school hours, required to work under this Section.
>
> Order to attend to shovel

> (2) If a person does not attend for work in accordance with subsection (1), the overseer shall order him to attend for that work either forthwith or at any time or hour of the day that the overseer designates.

[98] The *Public Highways Act* goes on to bestow upon municipalities the power to levy taxes to pay for the expense of snow removal and to keep all such funds in a separate account and to be used only towards the expense of the removal of snow including the purchase of materials, machinery implements and plant required.

[99] The *Municipal Government Act* gives to each municipality full control over all public streets, curbs and sidewalks. The relevant provisions are:

> 307 In this Part, "street" means a public street, highway, road, lane, sidewalk, thoroughfare, bridge, square and the curbs, gutters, culverts and retaining walls in connection therewith, but does not include bridges vested in the Halifax-Dartmouth Bridge Commission and streets vested in Her Majesty in right of the Province. 1998, c. 18, s. 307; 2000, c. 9, s. 49.
>
> Streets vested in municipality
>
> 308 (1) All streets in a municipality are vested absolutely in the municipality.
>
> (2) In so far as is consistent with their use by the public, a council has full control over the streets in the municipality.
>
> (3) No road, or allowance for a road, becomes a street until the council formally accepts the road or allowance, or the road or allowance is vested in the municipality according to law.

> (4) Possession, occupation, use or obstruction of a street, or a part of a street, does not give and never has given any estate, right or title to the street. 1998, c. 18, s. 308.
>
> ...
>
> 312 (1) A council may design, lay out, open, expand, construct, maintain, improve, alter, repair, light, water, clean, and clear streets in the municipality.
>
> ...
>
> (3) The council may expend funds for the purpose of clearing snow and ice from the streets, sidewalks and public places in all, or part, of the municipality. 1998, c. 18, s. 312.

[100] I fail to see any difference between the so-called permissive provisions set out in sections 4 and 5 of the *Public Highways Act* by which the province was found to have a duty to maintain and the provisions of the *Municipal Government Act*. It cannot now be gainsaid that there is not, in the absence of a specific statutory exemption, a common law duty on municipalities to users of their streets and highways.

[101] As I understand the submissions of HRM, it contends that it made policy decisions with respect to the clearance of snow and ice from its streets and roads and that these decisions are not reviewable by the courts unless the policies are not bona fide or are so irrational or unreasonable as to not constitute a proper exercise of discretion.

[102] However, HRM concedes that it may be liable if there is evidence of negligence in carrying out the operational component of one of its policies. It says there is no such evidence.

Factual Context

[103] Much of the factual context has already been set out earlier. In addition HRM tendered a number of affidavits from HRM officials and documents. One of the affidavits sets out the procedure for enforcement of Bylaw S-300. The enforcement of this policy is complaint driven. It is unnecessary to review this evidence.

[104] HRM tendered the affidavit of Gordon Hayward. He is the snow and ice coordinator for HRM. He indicates that HRM's Public Works and Transportation Department is responsible for all aspects of snow and ice control in the municipality. He says this department conducts it snow removal operations in accordance with the snow and ice control service standards. The relevant portions of the standards are as follows:

> It is the intent of this document to identify the Service Standards which will be maintained by HRM. At the same time, it is not the intent to identify how the Snow & Ice Control Program will be managed.
>
> The goal is to set an attainable standard which align the levels of service with the financial constraints of the HRM budget.

OBJECTIVES

The key objectives of the Service Standards are:

- To reduce the hazards of ice and snow conditions to motorists and pedestrians
- To minimize economic losses to the community and industry
- To facilitate the handling of emergencies by fire, hospitals and police officials.

[105] Gottingen and Cornwallis Streets fall within the classification of being a Class 1-first priority. The standards with respect to Class 1 streets provide:

> **Class 1** Surfaces as bare as possible with frequency of coverage during a storm not to exceed 3 hours, with clean-up to be completed 12 hours after the end of the event.
>
> - These roads are priority 1, and shall be salted/plowed to their full width.
> - Parking shoulders where no sidewalks are provided shall be plowed when there is appreciable accumulation of snow after one or more light snow falls.
> - Snow removal will be carried out based on operational requirements for snow storage and visibility concerns at intersections.

[106] In 2003-2004 the senior work supervisor for streets and roads for the Western Region of HRM was Kenneth Wilson. The Western Region includes Gottingen and Cornwallis Street. HRM filed an affidavit from Mr. Wilson. Mr.

Wilson deposes that it started to snow the morning of February 18, 2003. His crews worked in the Western Region removing snow from streets from 8:00 a.m. on February 18 until midnight on February 19. He says "Gottingen and Cornwallis Streets are Class 1 streets and would have been addressed on numerous occasions during this period as required by the Service Standard. Class 1 service areas are to be as bare as possible with frequency of coverage during a storm not to exceed three hours, with clean-up to be completed 12 hours after the end of the event."

[107] Mr. Wilson further deposes that the crosswalk located at the intersection of Cornwallis and Gottingen Street is cleaned at the same time the street is. He reviewed the photographs of the area taken on February 19, 2003 shortly after the plaintiff says she slipped in the crosswalk. It is his view the crosswalk shown in the photographs and Gottingen Street in general are in very good condition and appear to be pavement bare. He acknowledges that the entrance to the crosswalk appears to contain some water and slush. He says that this accumulation happens from time to time as a result of the breakdown of snow banks at intersections.

[108] He notes that snow plowing results in the accumulation of snow banks along both sides of every street within HRM and there is no policy in place that requires HRM to clear the entrances to crosswalks or to remove snowbanks.

[109] He offers the following:

> 10. That snow banks can break down as a result of melting, vehicles cutting the corner, or pedestrian traffic. The only way this could be avoided would be to have an HRM employee on guard at each intersection with salt and a shovel. HRM does not have a Policy that would require this type of service standard, nor would it be feasible, logistically or economically.

[110] The photographs tendered by the parties show a substantial accumulation of snow and slush in the roadway extending well out into the painted crosswalk lines. According to the photographs attached as Exhibit 4 in Mr. Quigley's affidavit the corner of the painted line crosswalk is some two and a half feet from the curb. The snow and slush in the photographs extend beyond that point. The photographs also demonstrate that the crosswalk areas in at least two of the other corners of the intersection do not have a similar accumulation.

[111] With respect to that aspect of the plaintiff's claim that seeks to establish liability on behalf of HRM for injuries alleged to have occurred by slipping on the sidewalk, I am satisfied there is no genuine or arguable issue of material fact to be tried.

[112] Based on the evidence that the parties have adduced, or say is available for a trial, in my opinion, no jury, properly instructed and acting reasonably, could find that the plaintiff slipped on the sidewalk. Even if there was some evidence that the slip occurred on the sidewalk there is still no arguable issue for trial. I acknowledge that the courts in Ontario have not hesitated to fix liability on municipalities for injuries arising from a slip and fall on ice or snow on sidewalks despite the existence of municipal bylaws requiring abutting owners to clear, sand

and salt such sidewalks. This liability is based squarely on the statutory obligation of Ontario municipalities to maintain their streets and sidewalks. No issue of policy/operational negligence arises (see *Restoule v. Strong (Township)* (1999), 123 O.A.C. 346, [1999] O.J. 2979).

[113] In Nova Scotia any duty by a municipality with respect to its streets and sidewalks is based on a common law duty of care (see *Brown v. British Columbia*, *supra* and *Swinimer v. Nova Scotia*, *supra*. HRM, for policy reasons instituted a requirement for abutting landowners to clear and salt or sand sidewalks. On the evidence adduced before me, such policy was a bona fide exercise of its discretion. Furthermore the evidence with respect to inspection and enforcement of that system do not demonstrate any operational negligence with respect to sidewalk maintenance.

[114] The evidence of the plaintiff is that she slipped in the crosswalk portion of the pavement on ice that was obscured by slush and water. HRM says regardless of where the slip occurred it is entitled to summary judgment. I disagree. The burden is on HRM to satisfy me that there is no genuine or arguable issue of material fact to be tried. I agree that there is no evidence that the policy implemented by HRM with respect to the formulation of its policy for dealing with snow and ice as set out in its snow and ice control service standards is anything other than bona fide rational and reasonable exercise of its discretion. However, I am not satisfied that there is no genuine issue that it breached its duty in the operational performance of this policy. A determination of negligence is in

essence a finding of fact, or one of mixed law and fact. The factual dispute is not one of a primary fact such as whether or not a light was red or amber when a car entered an intersection, or as in *Huntley (Litigation Guardian of, v. Larkin, supra* was it the defendant's dog that may have been involved in the events that caused the accident.

[115] The factual dispute is primarily whether or not HRM fell below the requisite standard of care in the implementation of its policy on clearing snow and ice from its streets. Here it is certainly open to a trier of fact, acting reasonably, and properly instructed to find that the pavement area of the crosswalk constituted a dangerous situation. There is no direct evidence as to how this condition came into existence. The most that Mr. Wilson says is that "Gottingen and Cornwallis Streets are Class 1 streets and would have been addressed on numerous occasions during this period as required by the service standard". "Would have been addressed" to me has the same meaning as "should have been addressed". There is in fact no evidence how the HRM crews actually addressed this intersection, beyond the obvious, that the streets appear to be clear of snow except for the northeast corner of Cornwallis Street and Gottingen Street where the snow and slush extend some three feet into the pavement.

[116] The suggestion is made by Mr. Wilson that the water and the slush can come from breakdown of snow banks at intersections. He hypothesizes that snow banks can breakdown as a result of melting, vehicles cutting the corner or pedestrian traffic. The evidence from environment Canada precludes or makes unlikely the

issue of melting. Mr. Wilson, nor anyone else professed to be an expert. Furthermore, the photographs of the area do not display any tire marks into the snow bank supporting such a hypophysis. It would be just as open to a trier of fact to conclude that a snowplow deposited this snow and slush in this area or missed this patch despite many opportunities to clear it as it came from vehicles cutting the corner.

[117] The case of *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 is undoubtedly the leading case in Canada with respect to the advantages that a trier of fact has and the degree to which appellate courts owe deference to findings of fact and to mixed findings of fact and law made by a trial court. Findings of fact made by a trial court, whether they are based on an assessment of credibility of witnesses or inferences are owed the same deference - an appeal court may only interfere unless there is a palpable and overriding error. Iacobucci and Major J J., in delivering the majority judgment wrote:

> ...As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.
>
> [23] We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over

> the weight to be assigned to the underlying facts. As we discuss below, it is our respectful view that our colleague's finding that the trial judge erred by imputing knowledge of the hazard to the municipality in this case is an example of this type of impermissible interference with the factual inference drawn by the trial judge.
>
> at p.253

[118] Coincidentally *Housen v. Nikolaisen* dealt with a finding by the trial judge that not only was the driver negligent in driving too fast and operating his vehicle while impaired, but that the Municipality of Shelbrook was at fault in breaching its duty to keep the road in a reasonable state of repair. The Saskatchewan Court of Appeal overturned the trial judge's finding that the municipality was negligent. The Supreme Court of Canada reversed and reinstated the trial judge's findings that the municipality was negligent.

[119] With respect to the standard of review for questions of mixed fact and law Iacobucci and Major JJ. wrote:

> [26] At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual. Because of this similarity, the two types of questions are sometimes confounded. This confusion was pointed out by A. L. Goodhart in "Appeals on Questions of Fact" (1955), 71 L.Q.R. 402, at p. 405:
>
> > The distinction between [the perception of facts and the evaluation of facts] tends to be obfuscated because we use such a phrase as "the judge found as a fact that the defendant had been negligent," when what we mean to say is that "the judge found as a fact that

> the defendant had done acts A and B, and as a matter of opinion he reached the conclusion that it was not reasonable for the defendant to have acted in that way."
>
> In the case at bar, there are examples of both types of questions. The issue of whether the municipality ought to have known of the hazard in the road involves weighing the underlying facts and making factual findings as to the knowledge of the municipality. It also involves applying a legal standard, which in this case is provided by s. 192(3) of the *Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1, to these factual findings. **Similarly, the finding of negligence involves weighing the underlying facts, making factual conclusions therefrom, and drawing an inference as to whether or not the municipality failed to exercise the legal standard of reasonable care and therefore was negligent.** (Emphasis Added)
>
> ...
>
> [29] When the question of mixed fact and law at issue is a finding of negligence, this Court has held that a finding of negligence by the trial judge should be deferred to by appellate courts. In *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2, at p. 4, Dickson J. (as he then was) set aside the holding of the British Columbia Court of Appeal that the trial judge had erred in his finding of negligence on the basis that "it is wrong for an appellate court to set aside a trial judgment where there is not palpable and overriding error, and the only point at issue is the interpretation of the evidence as a whole" (see also *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, at p. 84).

[120] I have not overlooked that there is some power on a summary judgment application to draw inferences of fact. This is what the motions judge did in *Guarantee Company of North America v. Gordon Capital, supra*, a conclusion that was upheld by the Supreme Court of Canada. In my opinion this power should be limited to drawing inferences where the inference is the only reasonable one to be drawn. In other words, the finding of a different inference or a refusal to draw the requested inference, would constitute clear and palpable error. Generally speaking

a judge hearing a summary judgment application should not weigh the evidence for the purposes of making findings of credibility or drawing contested inferences of fact.

[121] As expressed by Borins J.A. in *Dawson v. Rexcraft Storage:*

> [28] As I read the trilogy of United States Supreme Court decisions referred to in the passage from Justice Wright's opinion quoted in paragraph 23, I am impressed by the functional approach which American courts take in adjudicating motions for summary judgment. In applying a test which focuses on whether the entire record could lead a rational trier of fact to find for the nonmoving party, what the court is saying is that there is no evidence on which the plaintiff's claim, or the defendant's defence, can succeed. In a sense, the courts have come to equate "genuine issue for trial" with "genuine need for trial." However, at the end of the day, it is clear that the courts accord significant deference to the trial process as the final arbiter of the dispute which has brought the parties to litigation. If there is a genuine issue with respect to material facts then, no matter how weak, or how strong, may appear the claim, or the defence, which has been attacked by the moving party, the case must be sent to trial. It is not for the motions judge to resolve the issue.

[122] This passage was specifically approved by Nova Scotia Court of Appeal in *Huntley (Litigation Guardian of) v. Larkin* (2007), 256 N.S.R. (2d) 20, [2007] N.S.J. No. 274.

[123] I have not overlooked the reliance by HRM on a number of decisions of this court that have refused to find liability on municipalities in slip and fall cases brought against municipalities. In particular HRM relies on *O'Keefe v. Glace Bay* (1995), 68 N.S.R. (2d) 351, [1985] N.S.J. No. 525 (N.S.S.C.T.D.); *Block v. Halifax (City)* (1996), 148 N.S.R. (2d) 297, [1996] N.S.J. No. 47 (N.S.S.C.); *Scott v. New*

Glasgow (Town) (2001), 196 N.S.R. (2d) 258, [2001] N.S.J. No. 324 (N.S.S.C.). In all of these the municipal defendant was found not to be liable at the conclusion of a trial. For example *Block v. Halifax (City)* Gruchy J. found that the City was not in anyway negligent either in its policy or in the execution of it.

[124] HRM also relies on the decision of Hood J. in *McGuire v. Digby (Town)*, [2006] N.S.J. No. 473. The claim against the municipality was dismissed on a summary judgment application. The facts are somewhat sparse. Apparently the plaintiff fell on a snow bank. The parties agreed there were no material facts in dispute. It therefore fell on Hood J. to determine whether or not the plaintiff could establish that she had a real chance of success. She described the claim, in essence as that the municipality failed to remove snow banks. The municipality had a similar policy to that in existence in this case. The policy did not address snow banks and did not require removal of them. The purpose and objective of the policy was to clear snow and ice thereby reducing hazards of icy road conditions for motorists and pedestrians. The policy was to plow Class 1 streets full width and as bare as possible did not include clearing snow banks. Hood J. noted that if the plaintiff's case was that she fell in an area that was not plowed properly it would be relevant. However, since it was clear that the plaintiff in *McGuire* had simply fallen on a snow bank, there was no real chance of success at trial.

[125] The evidence available for the plaintiff at trial is that she did not slip and fall in a snow bank but on ice that was concealed by slush and snow on the travelled portion of the pavement. In my opinion it would be open to a trier of fact, acting reasonably and properly instructed, to conclude that HRM did not follow its own

policy in having the roadway salted/plowed to its full width. Indeed the slip and fall appears to have occurred some 16 hours after snow had stopped falling.

[126] There is no shortage of cases where Canadian Municipalities have both been found liable and not liable with respect to claims by pedestrians for slipping on ice or snow with respect to sidewalks or roadways (see for example *Lessard v. Timmons* (City), [2001] O.J. No. 5935 (Ont.S.Ct); *Bleau v. Napean (City),* [1983] O.J. No. 315 (Ont. High Ct.); *Chuhay v. Toronto (City), [2003] O.J. No. 4552; Ondrade v. Toronto (City), [2006] O.J. No. 1769; Beattie v. Town of Bow Island* (1965), 53 W.W.R. 608 *(Alta. S.Ct.)*. Based on these and numerous other cases it is difficult if not impossible to conclude there is any general rule with respect to the circumstances that will or will not attract liability. It can be said with some confidence that members of the public should not be entitled to expect that highways, streets or sidewalks will be completely free and clear of snow and ice at all times during our winters. A standard of perfection would be unreasonable. Municipalities, or other government agencies are entitled to a reasonable time to do what is reasonably necessary.

[127] Ian Rogers in *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 2003) writes:

> §237.41 It is difficult to state any general rule as to when and under what circumstances local authorities may be held responsible for accidents caused by the non-removal of ice and snow from streets and sidewalks, or failure to take other precautions. It is clear that the duty to repair obliges them to use the means at their command to make a highway reasonably safe for travel during winter as

> well as during other seasons.(c), but there is no absolute rule of liability or non-liability(d).

[128] Boghosian and Davison in *The Law of Municipal Liability in Canada*, *supra* refer to the standard of care in ordinary negligence jurisdictions with respect to sidewalks as follows:

> §3.210 The mere presence of ice and snow on the ground is not evidence of negligence. A municipality will be found to have breached its duty only where it has permitted snow and ice to accumulate so as to render the sidewalk dangerous for pedestrians using ordinary care. Put another way, the municipality has a duty to keep the sidewalk in a reasonably safe condition for pedestrian traffic using ordinary care, in light of all of the surrounding circumstances. These circumstances include the time and place of the accident, the weather conditions prevailing at the time, the location of the sidewalk, the knowledge that the municipality had, or ought to have had and the municipality's opportunity to remedy the condition. This necessarily requires an inquiry into the municipality's system of inspection and maintenance.

[129] I see no reason these principles would not apply to situations of a duty of care to pedestrians on city streets.

[130] While I may have some doubt as to the plaintiff's ultimate chances of success, an application for summary judgment is not a trial nor is it a summary trial. Just as the appellant in *Just v. British Columbia* had the right to a trial to determine whether the Department of Highways had met the requisite standard of care, so too should this plaintiff.

[131] I have not overlooked HRM's reliance on the provisions of s.513 of the *Municipal Government Act*. This section provides as follows:

> 513 (1) A municipality or village, and its officers and employees, are not liable for
>
> (a) failure to provide a service or the manner in which a service is provided, unless the municipality or village fails to meet a standard of care to be determined having regard to financial, economic, personnel, social, political and other factors or constraints in the circumstances, including whether the service is a volunteer or partly volunteer service;
>
> (b) failure to maintain a public place, that is subject to the direction, control and management of the municipality or village, in a reasonable state of repair, unless the municipality or village has actual or constructive notice of the state of disrepair and fails to take steps to remedy or otherwise deal with the state of disrepair within a reasonable time;

[132] In my opinion, at least on an application for summary judgment, the provisions of s.513(1)(b) do not assist HRM. It would be open to a trier of fact to conclude that HRM had actual or constructive notice of the ice and snow accumulation on city streets. The evidence is that it did take steps to remedy or otherwise deal with the snow. The issue for the trier of fact is whether or not those steps were carried out to the requisite standard of care, including whether or not it was done within a reasonable time.

CONCLUSION

[133] The application by the defendant WPL for summary judgment with respect to the claim by the plaintiff and the cross-claim by the defendant HRM is granted with costs to be apportioned between these two latter parties.

[134] The application for summary judgment by the defendant HRM with respect to the claim by the plaintiff is dismissed with costs. If the parties are unable to agree on the issue of costs they can contact my assistant to make the necessary arrangements for determination of this issue.

Beveridge J.