SUPREME COURT OF NOVA SCOTIA

Citation: *Crowley v. Halifax (Regional Municipality)*, 2022 NSSC 294

Date: 20221017
Docket: *Halifax*, No. 455796
Registry: Halifax

Between:

John Edward Crowley

Plaintiff

v.

Halifax Regional Municipality, a body corporate and Leahey's Landscaping and Contracting Limited, a N.S. Limited Company

Defendants

Judge:	The Honourable Justice Gail L. Gatchalian
Heard:	May 9, 2022, in Halifax, Nova Scotia
Final Written Submissions:	September 9 and September 16, 2022
Counsel:	Lyndsay Jardine and Liam O'Reilly, for the Plaintiff Denise K. Mack and Danette C. Cashman, for the Defendants

The original text of this decision has been corrected according to the erratum dated November 18, 2022.

By the Court:

Introduction

[1] This is a motion for non suit by the Defendants, Halifax Regional Municipality and Leahey's Landscaping and Contracting Limited. The Plaintiff, John Crowley, slipped and fell on a patch of ice on a municipal sidewalk that Leahey's was contracted to maintain. The Defendants concede that they owed a duty of care to Mr. Crowley and that Mr. Crowley sustained an injury as a result of the fall, and the parties have come to an agreement on damages. The outstanding issue is whether the Defendants breached the standard of care. The Defendants rely on Mr. Crowley's concession, during cross-examination, that he walked along approximately ten blocks of sidewalks before he slipped on the patch of ice, and that those ten blocks of sidewalks were in a reasonably good condition. Based on this concession, the Defendants state that there is no evidence upon which a properly instructed jury could find that they breached the standard of care.

[2] The parties do not agree on the standard of care that applies to either Defendant. In this case, Halifax, as an occupier of a "public walkway," is excluded from the operation of the *Occupiers' Liability Act*, S.N.S. 1996, c.27: s.12(2). Thus, the standard of care applicable to Halifax in this case is determined by the

common law. Mr. Crowley says that the standard of care of ordinary negligence, the duty to take reasonable care, applies to Halifax. The Defendants say that Halifax had a common law duty as an occupier, which pre-existed the *Act*, to use reasonable care to prevent injury from an "unusual danger."

[3] The Defendants say that the standard of care applicable to Leahey's is the same as the standard applicable to Halifax. Mr. Crowley says that the statutory standard of care imposed by the *Act* applies to Leahey's.

[4] Once I determine the applicable standard of care, I must decide whether *any* facts have been established by Mr. Crowley from which liability *may* be inferred. I do not decide, at this stage, whether in fact I believe the evidence. I have to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable person. I must conclude whether a reasonable jury *could* find in Mr. Crowley's favour if it believed the evidence given in trial up to this point. I do not decide whether a jury *would* accept the evidence: see the reasons of Fichaud J.A. in *Johannson v. General Motors of Canada Ltd.*, 2012 NSCA 120 at para.27, citing *Herman v. Woodworth*, [1998] N.S.J. No.38 (CA) at para.4, in which Flinn J. adopted these principles from Sopinka's *The Law of Evidence in Civil Cases*.

[5] In assessing whether Mr. Crowley has made out a *prima facie* case, I must assume the evidence to be true and I must assign the most favourable meaning that can reasonably be attributed to evidence capable of giving rise to competing inferences or that can reasonably be attributed to any ambiguous statements made by Mr. Crowley: see *Johannson, supra* at para.29, relying on the reasons of Laskin J.A. in *Prudential Securities Credit Corp, LLC v. Cobrand Foods Ltd.*, [2007] O.J. No.2297 (CA) at para.35.

[6] I am not to determine whether any competing inferences available to the Defendants on the evidence rebut Mr. Crowley's *prima facie* case, if one is made out. Any competing inferences put forward by the Defendants are to be weighed with all of the evidence at the end of trial. See *Prudential, supra* at para.36

[7] In order to determine whether the Defendants' non-suit motion should be allowed or dismissed, I will consider:

1. the applicable standard of care, and
2. whether *any* facts have been established by Mr. Crowley from which it *may* be inferred that the Defendants breached the standard of care.

The Standard of Care

Halifax

[8] For the reasons that follow, I accept the position of Mr. Crowley that Halifax owes a duty to take reasonable care. I rely on the Supreme Court of Canada's decisions in *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Brown v. British Columbia*, [1994] 1 S.C.R. 420; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Lewis v. British Columbia*, [1997] 3 S.C.R. 1145; and *Nelson (City) v. Marchi*, 2021 SCC 41.

[9] The Defendants rely primarily on the decision of Saunders J., as he then was, in *Breau v. Amherst (Town)*, [1996] N.S.J. No. 452, for the proposition that Halifax owes a duty only to take reasonable care to prevent damage from unusual danger. However, in *Breau*, the parties agreed on the applicable standard of care, and it does not appear that they brought the decisions in *Just*, *Brown*, or *Swinamer* to the Court's attention. I am bound by the above-noted line of authorities from the Supreme Court of Canada, which, in my view, definitely establish the framework to apply in determining whether a public authority owes a duty of care in negligence, and if so, the applicable standard of care.

[10] The foundation of the modern law of negligence is the neighbour principle established in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), under which "parties owe a duty of care to those whom they ought reasonably to have in contemplation as being as risk when they act": *Nelson, supra* at para.15, citing

Rankin (Rankin's Garage & Sale) v. J.J., 2018 SCC 19 at para.16. The neighbour principle applies to both private and public defendants, subject to any contrary statutory provision or common law principle: *Nelson, supra* at para.15, citing *Cooper v. Hobart*, 2001 SCC 79 at para.22.

[11] In Canada, what is called the "*Anns/Cooper* test" provides the framework to determine when a duty a care arises under negligence law, including allegations of negligence against public authorities: *Nelson, supra* at para.16; *Just, supra* at p.1235. The framework applies differently depending on whether the plaintiff's claim falls within or is analogous to an established duty of care or whether the claim is novel: *Nelson, supra* at para.16. In novel duty of care cases, there is a two-stage *Anns/Cooper* framework that applies. Under the first stage, the court asks whether a *prima facie* duty of care exists between the parties, which is determined by asking whether the harm was a reasonably foreseeable consequence of the defendant's conduct and whether the parties are in such a close and direct relationship that the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. Second, if a *prima facie* duty of care exists, the court asks whether there are residual policy concerns outside the parties' relationship that should negate the *prima facie* duty of care. See *Nelson, supra* at paras.17 and 18.

[12] When the duty of care issue is not novel, there is usually no need to conduct the full two-stage *Anns/Cooper* framework: *Nelson, supra* at para.19. Over the years, courts have developed a body of negligence law recognizing categories of cases in which a duty of care has already been established: *Nelson, supra* at para.19. In such cases, the requisite close and direct relationship between the parties has been established, and the first stage of the *Anns/Cooper* framework will be complete, as long as the risk of injury was reasonably foreseeable: *Nelson, supra* at para.19. The second stage of the test will rarely be necessary because residual policy concerns will have already been taken into account when the duty was first recognized: *Nelson, supra* at para.19.

[13] In *Just, supra*, the Supreme Court of Canada established that public authorities owe road users a duty to keep roads reasonably safe, but recognized that the duty was subject to a public authority's immunity for true policy decisions: *Nelson, supra* at para.23, citing *Just, supra* at pp.1236 and 1240-1244. See also *Brown, supra,* at p. 439 and *Swinamer, supra* at pp. 457-459. As the Court noted in *Nelson,* lower courts have applied *Just* where a pedestrian alleges that they suffered personal injury because a public authority failed to maintain a public road, sidewalk, or path in a reasonably safe condition: *Nelson, supra* at para.28,

citing, among others, the decision of Beveridge J., as he then was, in *Bowden v. Withrow's Pharmacy Halifax (1999) Ltd.*, 2008 NSSC 252.

[14] Where the *Just* category applies, there is therefore no need to repeat the full two-stage analysis. However, it is open to a public authority to raise core policy immunity. The onus is always on the public authority to establish that it is immune from public liability because a core policy decision is at issue. See *Nelson, supra* at paras.33-35.

[15] In this case, the Defendants have admitted that they owed a duty of care to Mr. Crowley. They have not asserted core policy immunity. The next question, then, is the applicable standard of care.

[16] As confirmed by the Court in *Nelson,* the regular principles of negligence law apply in determining whether a public authority breached the duty of care: *Nelson, supra* at para.86. The standard of care is that expected of an ordinary, reasonable and prudent person in the same circumstances, i.e. reasonableness: *Nelson, supra* at paras.90-91; *Just, supra* at pp.1236-1237; *Brown, supra* at pp.437-439; *Swinamer, supra* at pp.457-459; *Lewis, supra* at paras.16-19 and 24; and *Bowden, supra* at paras.126-128. The reasonableness standard applies "regardless of whether the defendant is a government or a private actor": *Nelson,*

supra at para.92, citing *Just, supra* at p.1243. As stated by the Court in *Nelson*, "[i]t is important that the standard of care analysis not be used as another opportunity to immunize governments from liability, especially when a determination has already been made that the impugned government conduct was not core policy": *Nelson, supra* at para.92.

Leahey's

[17] The Defendants take the position that the standard of care applicable to Leahey's is the same as that applicable to Halifax, which I have found is a duty to take reasonable care. Mr. Crowley states that the *Act* dictates the standard of care for Leahey's, which is "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": s.4(1). For the purposes of this non-suit motion, my conclusion is the same whether Leahey's owes a general duty to take reasonable care or whether the statutory standard of care applies.

Conclusion re: Standard of Care

[18] At trial, the onus is therefore on Mr. Crowley to prove on a balance of probabilities that the Defendants failed to meet a standard of reasonable care. The

fact that he was injured because he fell on the ice is not enough to create a presumption of negligence. He must point to some act or failure on the part of the Defendants that resulted in his injury. See *Theriault v. Avery's Farm Markets Limited*, 2022 NSCA 36 at paras.63-67 and *Gallant v. Roman Catholic Episcopal Corp. for Labrador*, 2001 NFCA 22 at para.27. In assessing whether the Defendants took reasonable care in the circumstances, the facts to be considered by the trial judge will be specific to the particular fact situation: see *Theriault, supra* at para.64.

Can Negligence be Inferred?

[19] At the first day of trial on May 9, 2022, Mr. Crowley testified and tendered two exhibits: a Joint Exhibit Book and the shoes that he was wearing on the night of his fall. The parties agreed that the documents in the Joint Exhibit Book were admitted for the truth of their contents without need for further proof. After his testimony, the Plaintiff closed his case and the Defendants made the motion for non suit.

[20] Mr. Crowley testified that he slipped, fell and was injured because of a large patch of ice on a sidewalk on Agricola Street and that he did not notice any salt on the sidewalk where he fell. Mr. Crowley draws the inference from this evidence

that Leahey's did not apply salt to the area of the sidewalk where he fell. This is a meaning that can reasonably be attributed to his evidence.

[21] Mr. Crowley also relies on the following evidence:

(a) photographs at Tab 6 of the Joint Exhibit Book, which show that the particular area of sidewalk on which he slipped and fell was bordered on both sides by accumulated snow; and

(b) Environment Canada temperature records for March 7 and 8, 2016, Tabs 10 and 11 of the Joint Exhibit Book, which show that there was a freeze/thaw cycle on March 7 and 8, 2016.

[22] Mr. Crowley relies on these documents to draw the inference that the accumulated snow bordering both sides of the sidewalk where he fell melted on that part of the sidewalk during above-zero temperatures during the day, resulting in the run-off of water onto the sidewalk, which then froze when the temperature dropped later in the day, resulting in the large patch of ice on which he fell. This is a meaning that can reasonably be attributed to the evidence in the Joint Exhibit Book.

[23] The parties agree that the terms of the contract between Halifax and Leahey's may inform the standard of care. Mr. Crowley relies on the following terms of the contract, found in the Joint Exhibit Book (Tab 7). The contract states, with respect to the area in question, that "[a]djoining residential or commercial property, athletic facilities, parking lots, fencing, underground infrastructure warning signs, buildings etc. … may require caution/attention during the course of works" (p.45). The contract required Leahey's to (a) keep sidewalks to "full width bare surface" during freeze/thaw cycles with required "daily inspections" (p.41), (b) monitor and correct for freeze/thaw hazards as conditions warrant (p.43), and (c) apply salt when weather conditions dictate in order to provide a walking surface as bare as possible (p.43).

[24] Mr. Crowley says that, in the circumstances of this case, during the freeze/thaw cycle on March 7 and 8, 2016, where the area of sidewalk in question was bordered on both sides by accumulated snow, Leahey's had a duty to apply salt to areas of sidewalk such as this to prevent the presence of ice.

[25] Mr. Crowley relies on the three Leahey's Snow Removal Log/Time Sheets for March 8, 2016 in the Joint Exhibit Book (Tab 4) to infer that Leahey's did not apply salt. It appears, from those three time sheets, that:

- an employee inspected and salted from 6:40 a.m. to 4:15 p.m.,
- the owner of Leahey's salted sidewalks and parking lots from 8:00 a.m. to 4:00 p.m., and
- an employee patrolled and salted from 7:00 p.m. to 7:00 a.m..

[26] The three time sheets do not describe the specific location of the activities. Mr. Crowley relies on the lack of detail in the records of Leahey's activities on March 8, 2016 to draw the inference that Leahey's failed to apply salt to the area of sidewalk in question and to ensure that it was bare, and that this failure created the conditions that caused him to slip, fall and injure himself. This is a meaning that can reasonably be attributed to the evidence, along with Mr. Crowley's evidence that, when he fell, he did not notice any salt on the ground.

[27] As pointed out by the Defendants, Mr. Crowley conceded in cross-examination that the ten blocks of sidewalks that he walked on before slipping on a patch of ice were in reasonably good condition. The Defendants want me to conclude that Mr. Crowley has therefore conceded that they took reasonable care to ensure that the sidewalks in question were reasonably safe, and therefore that they met the standard of care. However, the most favourable inference attributable to Mr. Crowley's evidence is that, while the ten blocks of sidewalk on which he walked before he fell were in reasonably good condition, the area where he fell as a result of a large patch of ice was not reasonably safe.

Conclusion

[28] Assuming, as required, that the evidence of Mr. Crowley is true, and that the information in the documents in the Joint Exhibit Book is true, and assigning the most favourable meaning to that evidence capable of giving rise to competing inferences and to any ambiguous statements made by Mr. Crowley, I am satisfied that Mr. Crowley presented *some* evidence on which a properly instructed jury *could* infer that the Defendants breached the standard of care and were therefore negligent.

[29] I dismiss the Defendants' non suit motion.

[30] If the parties cannot agree on the costs of this motion, I will receive written submissions from Mr. Crowley within two weeks of this decision, and from the Defendants within one month of this decision.

Gatchalian, J.

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ERRATUM

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Details:	**November 18, 2022** Addition of Liam O'Reilly as co-counsel for the Plaintiff, November 15, 2022