

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NANCY VAIL

Plaintiff

- and -

CITY OF YELLOWKNIFE

Defendant

REASONS FOR DECISION
of the
HONOURABLE JUDGE B.E. SCHMALTZ

Heard at: Yellowknife, Northwest Territories

Date of Decision: October 24, 2016

Date of Hearing: September 21, 22, October 7, 2016

Counsel for the Plaintiff: Self-Represented

Counsel for the Defendant: M. Unka-Wool

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A. INTRODUCTION

[1] Nancy Vail has filed a claim against the City of Yellowknife (the City) for \$8,000.00 as compensation for damages she suffered when she fell on Franklin Avenue last November, and broke her wrist. Ms. Vail says the City is responsible for the injury she suffered as it failed to keep the street safe and free of ice. The City accepts that it was responsible for the snow and ice removal from the street where Ms. Vail fell, but says that its policy for snow and ice removal, and its actions on the day in question do not amount to gross negligence, and therefore Ms. Vail's claim should be dismissed.

B. THE CONDITIONS & THE FALL

[2] On November 9, 2015, at approximately 9:00 p.m. Ms. Vail was walking home along Franklin Avenue, from downtown towards Old Town. The area where Ms. Vail fell is a moderate decline, and was referred to in testimony as the Franklin hill. Ms. Vail was being very cautious as she walked along Franklin as it was dark, snowy, and windy, and the sidewalk was icy. At some point Ms. Vail heard a loud noise and turned towards the noise, at this point her feet went out from under her, and she slipped and fell. Ms. Vail testified to being in extreme pain after she fell,

and she started to scream. Ms. Vail believed she was semi-conscious at that point. Someone came over to help, and then ‘a good Samaritan’ drove Ms. Vail to the hospital.

[3] Ms. Vail described the sidewalk on the Franklin hill that night as “really bad”. She noted the condition even as she started down the hill, but had no other way of getting home that night; the buses were not running at 9:00 p.m., she could not afford a cab, and being independent she did not want to call a friend to pick her up. At times she would walk in the snow beside the sidewalk, or on the side of the road, to avoid the ice on the sidewalk. Ms. Vail believed the condition of the sidewalk resulted from “freezing and melting through the day”.

[4] Stephen Fancott was also walking down Franklin Avenue that night, and though he did not see Ms. Vail fall, he was not far behind her when she fell. Mr. Fancott said the condition of the sidewalk that night was treacherous and very slippery. He testified that he had to pay attention to the way he was walking “one hundred percent of the time”. Mr. Fancott described the ice as quite bad and recalled that the day might have been warm and the ice had melted and refrozen. Mr. Fancott stated that the condition of the sidewalk that night was “unique” in that similar conditions may only arise two or three times every winter.

[5] Ms. Vail suffered a compound fracture to her right wrist, she was admitted to the hospital, and her wrist was operated on the following morning. She was discharged from the hospital on November 13; her arm was in a cast for six weeks. Due to her injury and the pain she was in, she could not return to school to continue the program she had been attending. She testified that she usually worked over the Christmas break in order to make money to continue her studies, however she was not able to work during that period due to her injury; she estimated that she would have earned about \$3,500.00 over that period had she been able to work.

[6] At the time she fell, Ms. Vail was 61 years old and had some previous health problems. She had arthritis in her left hip which she took pain killers for. She had to stop taking the pain killers for her hip during the six week period following the operation on her wrist to allow her wrist to heal. Ms. Vail testified that because of the way she fell, “it damaged the right hip” and consequently the surgery on her left hip had to be postponed, and instead her right hip was replaced. When asked if any doctor or medical person had said that the problems she had with her right hip were as a result of the fall, she said “No, I don’t think anybody ever said it is because of the fall.” However Ms. Vail said that she knew that her right hip was damaged because of how she fell:

I just know how I fell. When I fell, I was really worried about my left hip because it had been problematic. And I was really afraid of hurting it. So I turned my whole body around. Like, I knew that what was going --- it’s like you visualize it in slow motion, and I --- and there was that kind of twist where you go down on your arm; you go down on your hip and --- because I knew the left hip was vulnerable.

So have they said it’s the fall? No. But I knew what I was protecting when I went down. I didn’t just go down like that. I went and twisted. (Transcript, page 26, ll. 2-16)

[7] Ms. Vail believes that the fall also caused her back pain, though no medical professional has diagnosed that. Ms. Vail admitted that she did “break lower discs” in her back about five years ago, but did not have problems with her back since that healed. The pain she now has in her back started shortly after she fell.

C. THE DUTY ON THE CITY OF YELLOWKNIFE

[8] The City of Yellowknife is responsible for keeping the sidewalks ‘in a state of reasonable repair’ and that includes in a state which allows pedestrians to safely use the sidewalks. Section 87 of the *Cities, Towns and Villages Act*¹ states:

¹ S.N.W.T. 2003, c. 22 and amendments thereto

87. A municipal corporation shall keep each highway and other public place that is subject to its direction, control and management, including works in, on or above the highway or public place put there by the municipal corporation, in a state of reasonable repair, having regard to the character of the highway, place or work and the area of the municipality in which it is located.

[9] Section 1 of the *Cities, Towns and Villages Act* adopts the definition of a ‘highway’ set out in the *Motor Vehicles Act*² which includes a sidewalk.

[10] Clearly the sidewalk on the Franklin hill was not safe for Ms. Vail on the evening of November 9, due to the ice; it was not in a state of reasonable repair. But that finding does not resolve this case. Section 133 of the *Cities, Towns and Villages Act* states:

133(1) A municipal corporation is not liable for loss or damage caused by snow, ice or slush on highways in the municipality, unless the municipal corporation is grossly negligent.

D. ANALYSIS

[11] I have to consider the procedures and actions of the City on November 9. Though section 87 of the *Cities, Towns and Villages Act* imposes a duty on the City to keep the sidewalk in a state of reasonable repair, I still have to consider if the City knew, or should have known of the condition of the sidewalk that night? Did the City breach its duty to keep the sidewalk in a state of reasonable repair? And if the City did breach its duty, was it grossly negligent in doing so?

[12] The City called three witnesses on this case: James Mercereau, Superintendent of Roads, Sidewalks and Fleet; Tom Vornbrock, Sidewalk and Roads Maintainer; and James Kirk Boettger, Equipment Operator 1.

² R.S.N.W.T. 1988, c. M-16 and amendments thereto

[13] Mr. Mercereau was called to explain the City's practice with respect to snow removal. Mr. Mercereau testified that the City, in compliance with its bylaw, removes snow and ice from sidewalks that the City is responsible for within 24 hours of "an event", being any accumulation of snow or ice on a sidewalk. Mr. Mercereau also explained that sanding and/or salting of sidewalks is done as required. Whether or not sanding and/or salting is required is determined by the maintenance workers' observations. Individuals can also report to the City any situation that requires attention in three ways: first, by calling an emergency dispatch number; second, the City has a program called 'Click and Fix' which allows citizens to register online and report any situation that requires attention; and third, reports may be made to Municipal Enforcement, or bylaw officers, who will then get in touch with Public Works and report an issue.

[14] Mr. Mercereau testified that reports have been received in the past through the 'Click and Fix' program and the City responds by having the Supervisor of the department go out and check the situation and take whatever action is required. The City responds to 'Click and Fix' reports within 24 hours, though Mr. Mercereau testified that if a report of 'slip and fall' or 'tripping hazard' comes in, they are usually investigated "right away", that being within two or three hours.

[15] Mr. Mercereau also explained how work that the City is responsible for is planned, and how 'planned work' may be adjusted depending on the circumstances. Copies of weekly Road Sidewalks Variance Reports for the period of October 12, 2015 to November 22, 2015 were entered as an Exhibit 1 on the trial.

[16] In cross examination Mr. Mercereau testified that he was confident that the City had the resources and manpower available to "keep on top of the situation", and monitor and maintain sidewalks in the City sufficiently. Mr. Mercereau

testified that if the employee who is responsible for clearing snow on the Franklin hill notices that the sidewalk needs additional work, that employee will let the maintainer (another employee) know that further work, i.e. sand and/or salt, is needed on the sidewalk. Mr. Mercereau was asked what he would suggest a person do if he or she is walking down the Franklin hill in the evening and notices that it has started to freeze, to which he responded that the person should put a call in to the emergency response call line. Mr. Mercereau further elaborated that two employees are on call “24/7” all winter long to deal with emergency situations.

[17] Tom Vornbrock testified that his duties as a Sidewalk and Roads Maintainer with the City include installing signs, picking up road debris, clearing snow, and salting and sanding sidewalks. He salts and/or sands sidewalks either when he is requested to do so, or when during the course of his duties, he sees that it needs to be done. Part of his routine includes driving around and looking to see if areas need sand and/or salt. Mr. Vornbrock’s timesheets from October 20, 2015 to November 17, 2015 were entered as part of Exhibit 2 on the trial. Mr. Vornbrock’s timesheets indicated, among other work he did, what areas he sanded or salted any particular day, but do not indicate that he salted and/or sanded the Franklin hill on any of the days during that time period.

[18] Kirk Boettger is an Equipment Operator 1 with the City, and during the winter he is responsible for clearing City sidewalks of snow and ice. He described the equipment he uses to clear sidewalks; he testified that he drives around his route before starting his shift to determine whether to use a broom attachment or a blade attachment on the skid-steer loader used to clear the sidewalks. After Mr. Boettger has cleared the snow and ice from City sidewalks, if he sees that the sidewalks require further attention, then he will call Tom Vornbrock to come with the sanding truck to sand and salt the sidewalks.

[19] Mr. Boettger keeps track of the sidewalks that he clears and his timesheets from October 20, 2015 to November 17, 2015 were also entered as part of Exhibit 2 on the trial. Franklin hill was on Mr. Boettger's route, and his timesheet indicates that he cleared the sidewalks on both sides of Franklin hill on November 9, and though he does not specifically remember November 9, he knows that he would have cleared Franklin hill around 2:30 as he always follows the same route when clearing the sidewalks.

[20] Mr. Boettger's timesheets show that he cleared snow and ice on City sidewalks on Saturday, November 7, 2015. Mr. Boettger does not usually work Saturdays, but will work weekends when necessary in order to have the snow removed from City sidewalks within 24 hours. Though Mr. Boettger has been required to work weekends, he has never been called out in the evening to clear sidewalks.

[21] Mr. Boettger agreed in cross examination that he does not get out and physically walk the sidewalks, but determines whether or not a sidewalk requires further attention by a visual inspection of the sidewalk as he clears it.

[22] Both Ms. Vail and Mr. Fancott described the Franklin hill as being icy and very difficult to walk on that night, to the point of being treacherous. Both describe the weather as being thawing and freezing that day, resulting in icy conditions on the sidewalk on Franklin Avenue where Ms. Vail fell. I accept their evidence that walking conditions on the Franklin hill were dangerous that evening.

[23] I also accept that the City had a procedure in place to remove ice and snow from the sidewalk on the Franklin hill, and I accept that the sidewalk had been cleared of snow and ice between two and three that afternoon.

[24] No evidence was called that anyone at the City had been made aware of the dangerous conditions that had developed on the Franklin hill that evening, so I do not find that the City knew of a dangerous situation and ignored it.

[25] Should the City have known that even after clearing the Franklin hill sidewalk of snow and ice in the afternoon that icy conditions would develop that evening? The evidence was not that the sidewalk on Franklin hill was routinely icy and dangerous, and in fact Mr. Fancott's evidence was to the contrary in that conditions as they were that night only occur about once or twice a year. The reason for the icy conditions on the evening of November 9 is not clear. In reviewing the historical weather data for Yellowknife on Environment Canada's website, the temperature at 3:00 pm on November 9, 2015 was -2 Celsius, and at 9:00 pm was -0.2 Celsius, and at 10:00 pm was -0.7 Celsius, so perhaps 'freezing and melting' did occur that day which *may* explain why the sidewalk was clear between 2:00 and 3:00 p.m., yet icy at 9:00 p.m. But on all the evidence, I do not find that the City should have known that the sidewalks on Franklin would become icy and should have continued to check or monitor the sidewalks into the evening.

[26] The City had a system or procedure for clearing the City sidewalks of snow and ice, and thereby keeping the sidewalks in a state of reasonable repair and safe for pedestrians. Obviously, that system failed Ms. Vail on November 9 last year. But can I go so far as to say because the sidewalk was not safe on November 9, that the City was thereby grossly negligent?

D.2 Gross Negligence

[27] Gross negligence is very great negligence³. This is not a definition of gross negligence, but was an effort by the Supreme Court of Canada to give "some meaning to this expression of the legislative will" in requiring a finding of gross

³ *Kingston (City) v. Drennan* (1897), 27 S.C.R. 46

negligence. The Supreme Court spoke further of what may constitute ‘gross negligence’ in a later case⁴:

The term “gross negligence” in this statute is not susceptible of definition. No *a priori* standard can be set up for determining when negligence should be deemed “very great negligence” – a paraphrase suggested in *Drennan v. City of Kingston*, which for lack of anything better has been generally accepted. The circumstances giving rise to the duty to remove a dangerous condition, including the notice, actual or imputable, of its existence, and the extent of the risk which it creates – the character and the duration of the neglect to fulfill that duty, including the comparative ease or difficulty of discharging it – these elements must vary in infinite degree; and they seem important, if not vital, factors in determining whether the fault (if any) attributable to the municipal corporation is so much more than merely ordinary neglect that it should be held to be very great, or gross, negligence. It is a practical impossibility that all the relevant circumstances affecting the character or degree of the negligence involved should be the same in any two cases that may arise. (citation omitted)

[28] Numerous cases discuss the concept of gross negligence. The statement in *McNulty v. Brampton (City)*⁵ is helpful:

[T]o a great extent, the determination of gross negligence depends on the facts of each case. It depends on the application of a less than precise definition of gross negligence, interpreted through the prism of common sense.

[29] In *Crinson v. City of Toronto*⁶, the Court held that gross negligence on the part of the municipality may be established if a municipality permitted a slippery, icy sidewalk in a busy area of the city to *remain* unprotected or *ignored it altogether* and someone was injured due to the condition of the sidewalk. A city must take reasonable steps to keep sidewalks free of dangerous conditions. I agree

⁴ *Holland v. Toronto (City)*, [1927] S.C.R. 242 at para. 12

⁵ [2004] O.J. No. 3240, at para. 28 (Tab 10 of Defendant’s Book of Authorities)

⁶ 2010 ONCA 44 at para 54 (Tab 7 of Defendant’s Book of Authorities)

that allowing dangerous conditions to remain, or ignoring them completely when the City has a duty to keep sidewalks safe, would constitute gross negligence.

[30] With respect to the City's duty to keep sidewalks safe, I agree with the comments of the Court in *Occhino v. Winnipeg (City)*⁷ when speaking of the duty of the city of Winnipeg in circumstances very similar to this case:

The duty to protect the public from the hazard of snow and ice is far from absolute. The city is not an insurer of safety. It must take reasonable steps to keep the sidewalks free of dangerous conditions, but its failure to do so does not necessarily result in liability to everyone who falls and is injured. For liability to ensue, the cause of the injury must be more than a mere breach of duty. The breach must be of such magnitude that it can properly be described as gross negligence. (my emphasis)

[31] In this case, the City of Yellowknife had a procedure to clear the sidewalks of ice and snow, and in fact the Franklin hill had been cleared earlier that day. Mr. Boettger testified that if the sidewalk had needed further attention, i.e. sanding and/or salting, he would have advised Mr. Vornbrock, which he did not. Even on the evidence of Ms. Vail and Mr. Fancott, the weather that day was such that freezing and thawing may have occurred, but the evidence does not establish that Mr. Boettger must have ignored a dangerous condition, as there is no evidence that the sidewalk was icy when he cleared it between 2:00 and 3:00 p.m. that day.

[32] Ms. Vail argued that the City should monitor the condition of the sidewalks and suggested that to do so hourly would be reasonable. Such a policy may make the sidewalks safer, but it would impose a significant financial burden on the City. Unless it could be said that the City's failure to inspect or monitor the sidewalks continuously amounted to gross negligence, the City would not be liable for the loss or damage as section 131(4)(c) of the *Cities, Towns and Villages Act* states:

(4) A municipal corporation is not liable for loss or damage caused by

⁷ 53 Man. R. (2d) 257 at p. 263; see also: *Boyle v. Corporation of Dundas* (1875), 25 U.C.C.P. 420; *Huycke v. The Town of Cobourg*, [1937] O.R. 682 (C.A.)

...

(c) the frequency, infrequency or absence of inspections or maintenance.

[33] I do not find that the City having no procedure to inspect or monitor the City sidewalks to ensure dangerous conditions do not develop amounts to gross negligence. Even though that may result in sidewalks being less dangerous, it could only be done at a cost to the City. A court should not attempt to dictate what reasonable policies, practices, or procedures should be implemented in the absence of gross negligence.

[34] What I have to determine in this case is first, does the City have a duty of care to pedestrians using the sidewalks? It does: the City shall keep the sidewalks in a state of reasonable repair. Second, did the City breach that duty on November 9? It did: On November 9 sometime between 9 and 10 p.m., the sidewalk on Franklin hill was in a dangerous condition to the point of being treacherous to walk on, and due to the condition of the sidewalk, Ms. Vail slipped and fell breaking her wrist. And lastly, was the City grossly negligent in allowing the condition of the sidewalk on the Franklin hill to become dangerous? No. The City has a reasonable snow removal procedure which results in snow and ice being removed from the City sidewalks within 24 hours; if sanding and/or salting is required, that is also done. If dangerous conditions either develop or are observed by citizens, there are three different ways conditions or problems can be reported. The City has 2 employees on call at all times to deal with emergency situations. The City cleared the sidewalk of snow and ice sometime between 2 and 3:00 p.m., Ms. Vail fell on the icy sidewalk approximately 7 hours later between 9 and 10 p.m.; the City had not received any call or report with respect to the condition of the Franklin hill between the time it had been cleared that afternoon and the time that Ms. Vail fell. This is not a situation where the City allowed a dangerous situation

to remain, or ignored its duty to keep the sidewalks in a state of reasonable repair altogether. The City had cleared the sidewalk of snow and ice, and then unfortunately perhaps due to the weather a dangerous situation developed.

E. CONCLUSION

[35] In consideration of all of the evidence in this case, and not having found the City's action or inaction amounting to gross negligence, Ms. Vail's claim is dismissed.

[36] Having found that the City did have a duty of care to Ms. Vail, and that that duty was breached on November 9, 2015, resulting in significant injury to Ms. Vail, though not to the extent that the City's actions amounted to gross negligence, there will be no costs ordered against the Plaintiff.

Dated at Yellowknife, N.W.T.,
October 24, 2015

B.E. Schmaltz
Territorial Court Judge

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