CITATION: Musa v. Carleton Condominium Corporation No. 255 et al., 2022 ONSC 1030
COURT FILE NO.: 18-75765
DATE: 20220214

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Wael Musa, Plaintiff

AND

Carleton Condominium Corporation No. 255 and 6669981 Canada Inc., c.o.b. as Exact Post Ottawa Inc., Defendants

BEFORE: The Honourable Justice C.T. Hackland

COUNSEL: Brenda Hollingsworth, for the Plaintiff

Douglas Treilhard and Brenden Carruthers, for the Defendants

HEARD: Ottawa (by videoconference) on October 18, 20, 21, 22, 25, 26 and 27, 2021

REASONS FOR DECISION

HACKLAND J.

Introduction

[1] This is a personal injury action brought by the plaintiff arising from a slip and fall accident which occurred on December 5, 2016 at about 9:30 in the morning. The plaintiff fell on a slippery area in a roadway outside of his condominium as he was walking to his parked car on his way to work. He suffered an ankle fracture and the parties have agreed on the quantum of his damages. This trial proceeded on the issue of liability.

[2] The plaintiff's action is framed in negligence against the Condominium Corporation and against its snow removal contractor Exact Post Ottawa Inc. ("the contractor" or "Exact Post"). Exact Post accepts that the condominium's obligations with respect to winter maintenance of the property was wholly delegated to it and for the purposes of this action Exact Post is deemed to be an occupier of the condominium property under the *Occupiers Liability Act*, R.S.O. 1990, c. O.2.

[3] The plaintiff's fall occurred in the midst of the season's first snowstorm and the issues are essentially whether the contractor discharged its duty of care to the plaintiff in its snow clearing

and salting on the property on the date of the accident. The focus of the evidence was on the contractor's approach to salting the area in question in the weather conditions pertaining at the time.

[4] The plaintiff alleges the contractor's delay in spreading road salt was unreasonable in the circumstances, thereby allowing dangerous icy conditions to form and placing residents of the condominium at risk. The plaintiff's position is supported by an expert witness whose testimony is discussed below. The contractor's position is that the application of road salt was reasonably timely in the challenging circumstances that existed on the morning in question and his salting application was not the cause of the plaintiff's fall and injury.

The accident

[5] The plaintiff, age 46, resided with his spouse and children and his parents-in-law in a 46-unit garden home condominium known as 'the Huntview'. The condominium units were situated roughly in a rectangular formation, surrounding and facing inward to a roadway and parking area. Each unit had its own driveway but there was also an area for visitors and excess parking and it was in one of the excess parking spaces where the plaintiff parked his car.

[6] At about 9:30 a.m. on December 5, 2016 in what was the season's first snowstorm, the plaintiff left his unit and stepped onto a plowed lane on the roadway in order to walk to his car in the nearby parking area. He observed a snow removal vehicle, a front-end loader with a plow attached. As he walked along the plowed laneway, he lost his footing and fell heavily onto his back. The following appears in the admissions filed by counsel (ex.2), admissions 5, 9 and 13-16:

> Musa slipped while he was walking from his home to his vehicle. His parking spot was in the parking lot of the condo complex. He was walking on the only plowed surface between his home and his parked vehicle. There were no sidewalks on Winbro Private between his home and the condo parking lot. At the time of his fall, the roadway where he was walking had been plowed. At the time of his fall, no grit, salt or sand had been applied to the roadway where he was walking.

[7] While in some pain, the plaintiff did manage to get up from his fall and walk to his vehicle and he drove to work. Upon arrival at work, he had difficulty removing his boot and he and his employer observed that he was injured. He then went to the hospital.

[8] The snow plow operator witnessed the plaintiff's fall from inside the cab of his vehicle, from a distance of about 30 feet. The operator, Mr. Newman, testified that he was in the process of clearing the snow buildup by creating a plowed laneway along the roadway in front of the garden home units, to allow people to drive their vehicles out of their driveways or to walk to the extra parking area to access their vehicles. He explained that he was dealing with heavy wet snow and that it was very slippery. He acknowledged warning another resident not to walk her dog along the laneway as it was "very slippery". This conversation took place shortly after he witnessed the plaintiff's fall and it was confirmed by the other resident.

[9] Mr. Newman was one of the contractor's snow plow operators. He was the one who customarily plowed the Huntview condominium, using a front-end loader with a box plow attached to the front of the vehicle. Mr. Newman normally kept the front-end loader parked at his own home, not far away. Mr. Newman was on the condominium property for a period of 2 ½ hours that morning, from 7:30 to 10:00 a.m. During that time, he did not attempt to spread any road salt or grit on the area he was plowing because, he explained, that was not his assigned function and he had no salt spreader on his vehicle. There was a large box containing road salt near where the plaintiff parked his car, from which salt could have been spread with a shovel, but Mr. Newman did not utilize this. He explained the practice used by the contractor was that road salt was applied at a later point (after the plowing), by his boss Mr. Mitchell, the owner of Exact Post. Mr. Mitchell, who had a salt spreader on the back of his 4 x 4 truck, would apply road salt when he was able to get to the property.

Contributory negligence

[10] The defendants alleged contributory negligence against the plaintiff. This was on the basis of Mr. Newman's observation that the plaintiff appeared to be wearing street shoes and also because he was not apparently taking any particular precautions given the slippery conditions.

[11] As to the footwear, I prefer the evidence of the plaintiff that he was wearing rubber soled lace up winter boots and this description of his footwear was corroborated by the testimony of his employer Mr. Atieh who helped the plaintiff remove his boots after the plaintiff arrived at his

workplace. Mr. Newman's observations were from his vantage point through the window of his vehicle at least 30 feet away from the plaintiff and were unreliable.

[12] As to the plaintiff's appreciation of the road conditions, he testified at trial that he realized that it was icy at the time. In cross-examination it was put to him that he had said on discovery that he did not appreciate that it was icy. The plaintiff explained the conflict as a translation error in his discovery evidence. I am left in doubt whether the plaintiff appreciated, in the moments leading up to his fall, that the road conditions were icy. However, the road conditions clearly were very slippery and if the plaintiff failed to take some particular precautions as a result, this was never suggested to him in cross-examination. In short, I find the defendants have not proven any contributory negligence on the part of the plaintiff.

Statutory and contractual obligations

[13] In order to determine the property owner's and contractor's duty of care in this case, it is relevant to consider the surrounding statutory and contractual obligations that bear on the issue of winter property maintenance and in particular, concerning the removal of snow and ice.

[14] It is not contested that the defendant contractor was an "occupier" of the premises where the plaintiff slipped and fell. Occupier within the meaning of sec. 1(b) of the *Occupiers' Liability Act* includes "a person who has responsibility for and control over the condition of premises or the activities there carried on…". The occupier's duty of care is prescribed in sec. 3 of the *Act*, as follows:

> Occupier's duty
>
> 3(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 persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.
>
> Idem
>
> (2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.

[15] Ottawa's Property Maintenance By-law (no.2005-208) provides, under the heading "Snow and Ice":

> "Every owner or occupant of a building shall keep the roofs of the buildings and the surrounding lands free of accumulations of snow or ice that might create an accident hazard."

[16] There is a contract between the condominium corporation and the contractor, which contains a schedule dealing with "Roadways and Parking Areas". Certain relevant provisions include:

> 1. The contractor shall remove snow from all parking lots and roadways after a snowfall of 5 centimeters or more…
>
> 4. After a snowfall of 10 cm. or more, the contractor shall clear and open up all roadways before commencing on parking lots to allow maximum access to and from the project.
>
> 5. No hour restrictions shall be placed on the contractor, but the contractor shall attempt to confine his work to the hours between 6 a.m. and 11 p.m.
>
> 6. The contractor shall remove any ice build up that may occur…
>
> 8. The contractor shall spread sand mixed with calcium chloride on icy surfaces in parking areas, roadways…
>
> 11. the contractor agrees to furnish calcium chloride, salt and sand required by the contractor…
>
> **Priority of Snow Removal** 1. Early morning pass through of roadways to allow traffic out of project. 2. contractor to return and clear out parking spots during the day, (underlining added).

[17] It can be seen from these provisions that the condominium looked to the contractor to manage ice conditions appropriately, with salt when required, and also to do an 'early morning pass through' to allow traffic out of the project. The required pass through would surely include allowing residents to walk to their vehicles in the parking area. The contractor's principal, Mr. Mitchell, testified that he received virtually no direction from condominium management and he therefore exercised his own judgement as to the carrying out of his responsibilities, including about when he needed to attend the property and how to manage snow removal and dealing with ice conditions. The position of both defendants is that these responsibilities were entirely delegated to the defendant contractor.

Timely application of road salt

[18] The central issue in this case is whether the contractor applied the road salt to the driveway and parking areas of this condominium in a sufficiently timely way to avoid or mitigate the formation of icy conditions that would put the residents at risk of injury through slipping and falling. There is no question that the application of road salt was required in this storm and the contractor, and particularly Mr. Mitchell, did apply salt when he visited his client's various properties over the course of the day. Mr. Mitchell, as a commercial snow removal contractor, knew he had to monitor the weather forecasts on government websites so as to plan his timing and his approach to snow removal and ice management challenges in the approaching storm. Mr. Mitchell testified that he did monitor these weather sites and was aware of the expected storm and the mild just below freezing temperatures and the need to apply road salt. I accept his evidence in this regard.

[19] The following admissions are contained in exhibit 2 (admissions 36 – 40):

> The snow event started around 4 am on December 5, 2016. Once ice is formed and bonded to pavement, it is difficult to break. Snow clearing is not effective to prevent slippery conditions without a de-icing treatment such as a salt or grit. Without salt, mechanical snow removal by the backhoe would not break the bond formation of ice to pavement. The contractor was permitted to start work before 7 am when the weather required it. Salt is most effective just below freezing temperatures.

[20] This storm set in about 4:00 a.m. and continued until about 2:00 p.m., dumping some 12 cm of snow in the Ottawa area. The temperatures were mild, just below freezing. Ice formation was readily foreseeable as was the need for the timely application of road salt. As noted, the plow operator, Mr. Newman, arrived at 7:30 a.m. and spent 2 ½ hours on site. It is not entirely clear what he did over that lengthy period of time, but he did not apply road salt, a supply of which was readily available. The plaintiff fell just after 9:30 a.m. in a laneway the plow operator had created as part of his 'opening up' or early morning pass through function.

[21] In summary, at the point the plaintiff fell, the snow had been falling for 5 and 1/2 hours and the contractor (Mr. Newman) had been on site for two hours and he had witnessed the accident and warned another resident of the slippery conditions. Mr. Newman left the area at 10:00 a.m. on

the instructions of Mr. Mitchell, who arrived at 10:05 a.m. in his pick-up truck with a load of salt and a salt spreader on the back of this vehicle. Mr. Mitchell remained on site for an hour and eventually applied road salt in the last 10 minutes before he left at 11:00 a.m. He explained it takes about 10 minutes to apply salt to the driveway and parking area at the condominium and he would do so after the snow clearing was completed.

[22] Accordingly, it can be seen that road salt was applied about 7 hours after the snowstorm began and about 3 ½ hours after the contractor first arrived on site and 1 ½ hours after the plaintiff's fall. The question arises as to whether these delays in applying road salt are consistent with a reasonable standard of care required of a commercial snow removal contractor in the circumstances.

Mr. Mitchell's evidence

[23] Mr. Mitchell testified he is the owner of Exact Post, which is a firm that builds fences and decks in the summer months and does commercial snow clearing in the winter. He has 14 properties with whom he has contracted to do the winter snow clearing and maintenance, the Huntview condominium being one of his clients. His business premises are in Rockland, a small town about 30 minutes east of Ottawa. The client properties that he services are situated around Ottawa, some as far north as the Ottawa river, some as far west as Britannia, and some are in the east end (Orleans) and in the south end. The Huntview property is in the southern part of the city near the airport. Mr. Mitchell has several snow plow operators who, like Mr. Newman, are dispatched to clear snow on particular properties.

[24] Remarkably, he personally does all the road salt applications. He has a pick-up truck with a snow plow on the front and a salt spreader on the back, which allows him to plow and salt at the same time, or to salt right after the plowing has been done. His plow operators are not equipped to carry and apply salt, although on occasion he has contacted them (by cell phone or text message) and asked them to shovel some salt by hand in particular icy spots. He would not admit to having any particular system or protocol to determine the order in which he would visit his client's properties, although when pressed he said he obviously would try and avoid 'zig-zagging" all

across the city. He would get up very early in the morning in Rockland and drive to the city and do the salt applications on his 14 properties over the course of the day.

[25] He describes his work as a "difficult tricky business", particularly when he faces unusual weather challenges. He first learned his business 'on the job' from subcontracting snow removal from experienced operators and then from experience gained in his own business. He has never taken any formal training or on-line courses and has never heard of the organizations mentioned by the plaintiff's expert, nor is he familiar with the suggested 'best practices' put out by these organizations. Mr. Mitchell seemed to the court to be quite dismissive of the concept that there had developed any real science or useful guidelines surrounding the application of road salt as part of the winter road and parking lot maintenance process. He seemed to be of the view that these matters are best addressed by experience, common sense, hard work and rapid on the ground decision making as the weather situation unfolded.

[26] However, Mr. Mitchell agreed in his examination for discovery testimony that it was important to apply road salt as soon as possible after plowing and this was because plowing can compress a thin layer of snow and create a slippery film on the road (see examination for discovery read-ins, questions 224-227). This admission goes directly to the key breach of duty on the contractor's part which the plaintiff's expert relied on, being the failure to quickly apply road salt to slippery recently plowed areas.

[27] Mr. Mitchell rejected the suggestion that pre-salting road surfaces (before expected snow) is a viable approach, except when freezing rain was expected. Furthermore and notwithstanding his admission from his examination for discovery testimony referred to in the previous paragraph and read in by plaintiff's counsel, he rejected the opinion of the plaintiff's expert that it was important to either plow and salt at the same time, or be in a position to apply road salt immediately after plowing, in recognition of the fact that plowing compacts the snow and leaves a potentially slick freezing surface on pavement.

[28] Mr. Mitchell's basic position was that the snow plowing must be completed before applying road salt, otherwise one is likely to be simply plowing away the salt that has already been applied. He stated this was certainly so in a confined area like the Huntview condominium where the plow

operator was required to plow back and forth frequently. He rejected the suggestion that salt should have been applied sooner in this case, because of the continuation of heavy snow fall and blowing snow. He acknowledged the possibility of delays in his arrival at the property but said if that were to occur, his operator, Mr. Newman, could use a shovel to apply some salt from the communal use salt box on the premises. As noted, Mr. Newman did not apply any salt during the 2 ½ hours he was present, not even after witnessing the plaintiff's fall and warning another resident not to walk on the slippery roadway until the area had been salted.

[29] Mr. Mitchell said in his examination in chief that he does not recall the roadways being slippery or icy upon his arrival, although he did not get out of his truck. He testified that if he had formed the impression upon his arrival that the roadways in the condominium were slippery he would have applied salt right away, from the spreader in his truck and then come back later to finish any required plowing. He plowed the parking spaces for about an hour, then applied salt and left the property. He therefore concludes that, having proceeded in that manner, he must have been confident the roads were not slippery. I do not accept this self-serving view of the matter. He had already been told by Mr. Newman by phone that a resident had fallen and that the conditions were very slippery. I am satisfied on a balance of probabilities that by the time Mr. Mitchell arrived on the property, there had developed a thin layer of ice on the areas that had been plowed, due to or exacerbated by a failure to apply road salt.

Plaintiff's expert

[30] The plaintiff called an expert witness, Dewan Karim P.Eng., a civil engineer with many years of experience in traffic engineering and a member of the Institute of Transportation Engineers. He has advised municipal governments and private developers on issues of winter maintenance design, procedures and standards. Winter maintenance and pedestrian safety have been a particular focus of Mr. Karim's professional work and he has testified in various proceedings and taught courses for winter maintenance contractors at several community colleges. The court qualified him to provide his opinions on winter maintenance standards in Ontario and pedestrian safety, including the application of road salt in a winter context.

[31] I found Mr. Karim's evidence to be careful, well considered and objective. His opinions are supported by best practices guidelines published by two industry organizations which I refer to below as the "CPA guidelines" (trial exhibit 9) and the "TAC guidelines" (trial exhibit 8). I accept, and as Mr. Karim acknowledged, best practices guidelines are not strict rules or requirements mandated for all snow removal contractors in all situations. They are nonetheless of great assistance to the court in ascertaining the appropriate standard of care to be expected of commercial road and parking lot maintenance contractors in the context of managing winter ice conditions. Certain of these guidelines are directed specifically to the issues which arise in the present case, being the proper application of road salt to prevent ice formation to reduce the risk of slip and fall accidents.

[32] Mr. Karim testified that he based his opinions on best practices guidelines that are well established in the winter road maintenance industry and which are available online. These are:

> 1) Best Management Practices for Salt Use, Technical Bulletin No. 6, Canadian Parking Association, CPA, 2006: Provides best practices for parking lot winter maintenance and snow and equipment storage ('**CPA guidelines**').
>
> 2) Syntheses of Best Practices Road Salt Management, Salt Use on Private Road, Parking Lots and Walkways, Transportation Association of Canada, April 2013: A best practice resource to help site owners, managers, and salt users learn about best salt management practices that can be used in snow and ice control operations so that safety can be maintained and salt use can be reduced ('**TAC guidelines'**)

[33] As noted previously, Mr. Mitchell testified that he had never come across these guidelines, nor heard of these organizations and was confident in his own experience and methods. In terms of scientific issues pertaining to road salt and best practices for applying road salt in winter conditions, I prefer the evidence provided by Mr. Karim.

[34] Mr. Karim's opinion on the adequacy of the contractor's winter maintenance on the date of the accident is summarized in his second report (exhibit 7), as follows:

> Based on the best practices analysis, we can conclude the following:
>
> > • The TAC and CPA guidelines recommend assessing the de-icing treatment based on intensity and type of weather conditions. For a heavy

> snowfall, such as the blowing snow that started around 7:00 a.m. on the incident day, pre-treatment to prevent ice formation or a combination of snow removal and salt application was required to avoid slippery conditions. No such actions were taken by the contractors.
>
> • As ice was formed during the early morning hours, initial salting during snow removal could have reduced the need for extensive salt use to prevent icy conditions. The salt application rate recommended by the CPA guideline was not considered or consulted by the contractors to assess the weather conditions and subsequently apply de-icing treatment per best practices.
>
> • Not applying salt/grit immediately after the initial snow removal activities exacerbated the slippery conditions. The temperature was favourable (-12°C or warmer) to apply a salt/grit mix to melt the thin layer of packed snow/ice to address the hazardous conditions, which was also a requirement of the City's bylaw (City's Property Standards bylaw No. 2005-208) to avoid hazardous conditions during snow events.
>
> • Had the contractor assessed the de-icing application rates, applied salt/grit during snow removal, and started de-icing and snow removal actions in the early morning, a hazardous condition could have been avoided and Mr. Musa could have had a safer walking surface and avoided slipping and falling.

[35] Mr. Karim was of the view that Mr. Mitchell had two ways to appropriately manage the ice situation, and he did neither. He could have "pre-salted" the driveway and parking areas or he could have made sure that the road salt was spread concurrently with or immediately after plowing.

[36] Pre-salting is a proactive approach involving applying the salt before the storm arrives to prevent a bond from forming between the pavement and the snow and ice when the storm starts. It is understood that it is much harder (and takes more time and more salt) to dissolve the ice/pavement bond once it has been allowed to form. Mr. Mitchell said this approach would only be suitable or appropriate if freezing rain was expected. I note parenthetically that pre-salting would likely have assisted in alleviating Mr. Mitchell's major logistical problem which was how to get the salt applied in a sufficiently timely way on his 14 properties in locations in different parts of the city, when he was trying to attend all the locations and doing all the salt applications personally.

[37] However, Mr. Karim also acknowledged that Mr. Mitchell had another way to meet an appropriate standard for salt application, which was to apply the salt with a salt spreader on the rear of a vehicle as the plowing was done, or at least spread the salt immediately after the snow clearing occurred and before the ice/pavement bond set in. This was not done and the danger thereby created to the plaintiff and other residents should have been obvious to a competent commercial winter snow removal and road maintenance contractor.

[38] I accept Mr. Karim's conclusion that what likely occurred in the present case is that when Mr. Newman cleared a pathway in the snow for residents to use, his heavy box plow compacted the remaining snow on the pavement, which very quickly froze, or had already frozen and was therefore very slippery to pedestrians like the plaintiff. The back and forth actions of the front-end loader further compacted the snow and promoted ice formation. Mr. Newman referred to the fact that his wheels were "spinning" and the snow, he said, was "heavy and wet". He had been operating the heavy vehicle with the box plow mounted in front for at least 2 hours before the plaintiff's fall, with no salt having been applied. Mr. Newman was prudent to have warned another resident not to walk her dog on the pathway he had cleared until the area could be salted. I conclude the risk of slip and fall accidents was readily foreseeable.

[39] Mr. Karim also observed that the weather forecasts should have alerted the defendant contractor to arrive on the property much sooner than 7:30 a.m. Had Mr. Mitchell or his operator Mr. Newman arrived at 6:00 a.m. they could have done their contractually required "early morning pass through" to open an access way for residents to walk to their vehicles or drive out of their driveways to get to work, within an hour or so and they could have salted the area, which is a 10 minute exercise with a salt spreader (according to Mr. Mitchell).

Summary and Disposition

[40] I find that at the time of the plaintiff's slip and fall injury, the defendant contractor had failed in its duty under the *Occupiers Liability Act* to take reasonable care to see that residents walking on the condominium's roadway were reasonably safe. This failure arose from the defendant's breach of his common law duty to carry out his snow and ice control responsibilities to the standards required of a commercial winter maintenance contractor in the circumstances of

this case. In particular, in the weather conditions which existed on the morning of December 5, 2016 this defendant was required, for the safety of the residents of the condominium, to apply road salt to the paved areas his plow operator had cleared of snow in a timely and appropriate manner, and failed to do so.

[41] As noted previously, I agree with the opinion and analysis of the plaintiff's expert Mr. Karim and with the best practices guidelines he relied on. As Mr. Mitchell had decided not to pre-salt the areas in question, he was required to see that road salt was applied concurrently with or very promptly after plowing the snow in order to avoid the skiff of snow remaining on the pavement from bonding onto the pavement in the form of ice. Here, the defendant's employee, Mr. Newman, in clearing an early morning pass through for residents to reach their cars, created an impacted snow surface on the pavement which quickly turned into a very slippery iced surface that constituted a slip and fall hazard for pedestrians such as the plaintiff. The contractor was on the premises for at least two hours before the plaintiff fell, without any salt being applied. Indeed, there was no salt applied to the area until nearly 7 hours after the storm began.

[42] The delay in applying road salt was due to an inherent problem in the contractor's system, which involved Mr. Mitchell personally handling the salt application from his vehicle once he was able to arrive on site. He had to deal with some 14 properties spread around the city, which made a timely application of road salt to be hit and miss, at best. His failure to delegate salting to his plow operators was problematic as was his taking on a large number of client properties resulted in his operation being very overstretched when road salt applications were needed.

[43] I find there was negligence on the part of the defendant contractor in his omission to apply road salt in an appropriate and timely manner which caused a dangerous icy surface to form on the pathway that had been plowed for use by the residents, creating an unreasonable risk of injury by slipping and falling. I find, on the balance of probabilities that this dangerous road condition was the proximate cause of the plaintiff's slip and fall and resultant injury. There will be a finding of liability against the defendants.

[44] If the plaintiff wishes to claim costs, I will require a concise written submission within two weeks of the release of these reasons and the defendants may respond within two weeks of receiving the plaintiff's submission.

Mr. Justice Charles T. Hackland

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REASONS FOR DECISION

Justice Charles T. Hackland

Released: February 14, 2022