COURT OF APPEAL FOR ONTARIO

CITATION: Musa v. Carleton Condominium Corporation No. 255, 2023 ONCA 605
DATE: 20230915
DOCKET: C70424

Roberts, Miller and Coroza JJ.A.

BETWEEN

Wael Musa

Plaintiff (Respondent)

and

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

Defendants (Appellants)

David Zarek and Matthew Owen, for the appellants

Brenda Hollingsworth and Gillian Mactaggart, for the respondent

Heard: May 4, 2023

On appeal from the judgment of Justice Charles T. Hackland of the Superior Court of Justice, dated February 14, 2022, with reasons reported at 2022 ONSC 1030.

Coroza J.A.:

I. OVERVIEW

[1] During a snowstorm in Ottawa on December 5, 2016, the respondent, Wael Musa, slipped and fractured his ankle on a slippery roadway outside his condominium while walking to his car. The condominium was owned and operated

by Carleton Condominium Corporation No. 255 (“Carleton”). At the time the respondent slipped, the roadway was plowed, but not salted. For four years, the condominium had contracted out its winter maintenance to a snow removal contractor, Exact Post Ottawa Inc. (“Exact Post” or “the appellant”). Carleton and Exact Post operated under an Agreement for Winter Maintenance Services, the operative version of which was executed on October 17, 2016 (the “winter maintenance contract”). Exact Post did not apply salt to the roadway until approximately 1.5 hours after the respondent’s fall.

[2] The respondent sued Carleton and Exact Post. The parties agreed on damages, and a trial proceeded on the issue of liability. Exact Post also accepted that Carleton’s obligations with respect to winter maintenance of the condominium property were wholly delegated to it. For the purposes of this action, Exact Post was deemed to be an occupier of the condominium property under the *Occupiers’ Liability Act*, R.S.O. 1990, c. O.2 (the “*OLA*”).

[3] The trial focused on a very specific issue: whether the timing of Exact Post’s application of road salt was consistent with the reasonableness standard of care required of a commercial snow removal contractor in the circumstances.

[4] The trial judge held that in the circumstances of this case, since Exact Post had decided not to pre-salt the roadway in advance of the storm, it was required to apply road salt concurrently with or very promptly after plowing the snow, to prevent the formation of ice. The trial judge concluded that the delay in applying

road salt was due to an inherent problem in Exact Post's system for applying salt to client properties. Accordingly, the trial judge found Exact Post negligent in its failure to apply road salt in an appropriate and timely manner. This negligence caused a dangerous icy surface to form on the roadway that had been plowed for use by the residents, creating an unreasonable risk of injury by slipping and falling.

[5] Exact Post now seeks to challenge the trial judge's determinations on the standard of care and causation. During oral argument, the appellant narrowed the focus of the appeal to the issue of the standard of care. The crux of its position is that the trial judge misapprehended the expert evidence at trial and held it to an unreasonable standard of care.

[6] At the conclusion of the appellant's oral submissions, the appeal was dismissed with reasons to follow. These are those reasons.

[7] In sum, the appellant's submissions invite this court to interfere with the trial judge's findings of mixed fact and law. The trial judge found that given the weather conditions on the morning of December 5, 2016, Exact Post was reasonably required to apply road salt to the plowed areas in a timely and appropriate manner; however, it failed to do so. The roadway was not salted until 7 hours after the snowstorm began, and 1.5 hours after the respondent's slip and fall.

[8] For the reasons that I shall explain, there is no basis to interfere with the trial judge's findings that Exact Post's failure to salt the roadway in a timely manner

was negligent, and that this omission caused a dangerous icy surface to form on the roadway which caused the respondent's slip and fall.

II. FACTS

(1) Exact Post's winter maintenance practice

[9] The appellant's winter maintenance practice was to have an operator plow the snow first. Then, Ross Mitchell, Exact Post's owner, would personally spread road salt at all 14 of his client properties, spread out across Ottawa, using his pickup truck. The plow operators were not equipped to carry and apply salt. Mr. Mitchell lived approximately 30 minutes from Ottawa. On occasion, he had asked his plow operators to apply salt with a shovel in particularly icy spots.

[10] Mr. Mitchell testified that he did not have 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.

[11] Fred Newman was the operator in charge of clearing snow in the condominium when the respondent slipped.

(2) The slip and fall

[12] Ottawa's first snowstorm of the year began to set in around 4:00 a.m. on December 5, 2016.

[13] Mr. Newman arrived at the condo at 7:30 a.m. and spent approximately 2.5 hours on site. He cleared the snow, as part of his "opening up" or early morning

pass through function, using a backhoe, which had a plow attachment but no room for a salt spreader. At 8:34 a.m., Mr. Newman phoned Mr. Mitchell to notify him that he had almost finished plowing.

[14] When Mr. Newman finished, he did not apply road salt on the roadway, although a box of salt was available that could have been applied with a shovel, because he believed that was not part of his job responsibilities.

[15] At about 9:30 a.m., the respondent stepped out of his residence onto a laneway that Mr. Newman had cleared. There were no sidewalks between the respondent's residence and the condominium parking lot where he had parked his car. He lost his footing, slipped, and landed on his back. The respondent managed to get up, reach his car, and drive himself to work before realizing the extent of his injuries.

[16] Mr. Newman witnessed the fall and afterwards warned another resident of the "very slippery" conditions. He was instructed to leave at 10:00 a.m. by Mr. Mitchell, who arrived at 10:05 a.m. with a load of salt and a salt spreader on the back of his vehicle. Mr. Mitchell remained onsite for approximately an hour doing additional plowing. He applied road salt in the last 10 minutes and left at 11:00 a.m. He explained that it took about 10 minutes to apply salt to the driveway and parking area of the condominium, and his practice was to do so after the snow clearing was completed.

[17] The parties agreed at trial that the appellant was an "occupier" of the condominium premises where the plaintiff slipped and fell. Subsection 3(1) of the *OLA* prescribes the occupier's "duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises … are reasonably safe while on the premises." This duty applies "whether the danger is caused by the condition of the premises or by an activity carried on on the premises": s. 3(2). The appellant also had a common law duty to take reasonable care in carrying out its winter maintenance activity.

[18] At the time of the incident, Ottawa's Property Maintenance (By-law No. 2005-208) provided, under the heading "Snow and Ice": "[e]very 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."

[19] As noted above, a winter maintenance contract existed between the appellant and Carleton. It is not contested that Carleton wholly delegated its snow removal service to Exact Post through this contract. The relevant portions stated:

> ROADWAYS AND PARKING AREAS
>
> 1. The Contractor shall remove snow from all parking lots and roadways after a snowfall of 5 centimetres or more, when drifting occurs causing snow banks, or when called by the Manager.
>
> 2. The cleaning of parking lots and roadways (including the shared access road) will commence during the end of the snowfall or immediately following.

> 3. Roadways, parking lots, entrances, and sidewalks shall be cleared within eight (8) hours or as soon as possible after the storm and all snow will be removed from the development.
>
> 4. After a snowfall of 10 centimetres 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 over the term of this contract. The Corporation and the manager shall determine whether the ice buildup is sufficient to require removal.
>
> …
>
> 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.

III. DECISION BELOW

[20] The focus of the trial was whether the appellant discharged its duty of care to the respondent in its snow clearing and salting on the condominium property on the date of the accident. The parties agreed that salting was required. However, the respondent alleged that the appellant's delay in spreading road salt was unreasonable, because it allowed dangerous icy conditions to form, thereby placing residents at risk. The appellant's position was that the application of road salt was reasonably timely in the challenging circumstances that existed that morning, and that at any rate any delay did not cause the respondent's fall in fact.

[21] The trial judge concluded that at the time of the injury, the appellant had failed in its common law and statutory duty under the *OLA* to take reasonable care to ensure that residents walking on the condominium's roadway were reasonably safe. He found that the delayed application of road salt fell below the standard of care required of a commercial winter maintenance contractor in the circumstances.

[22] In reaching that conclusion, the trial judge accepted the respondent's expert evidence – which was supported by industry best practices guidelines – that what likely occurred here was the creation of slippery film on a freshly plowed road. When Mr. Newman cleared a pathway using his heavy box plow, the plow compacted the remaining snow on the pavement, which very quickly froze or had already frozen. This compacted snow was very slippery to pedestrians like the respondent.

[23] According to the evidence of the respondent's expert, the slippery hazard could have been avoided by either pre-salting the driveway or applying the road salt concurrently with or immediately after plowing. As Mr. Mitchell decided not to pre-salt the roadway, he was required to apply the salt concurrently with or very promptly after plowing the snow to prevent ice from forming on the pavement. Instead, Exact Post delayed in applying road salt. This delay was due to a systemic problem inherent in the appellant's winter maintenance system, which involved Mr. Mitchell personally handling the salt application in 14 properties spread around the city. Put simply, he was overstretched. His failure to delegate salting to his plow

operators was problematic as timely application of road salt became a “hit and miss.” Therefore, the failure to apply salt in a timely and appropriate manner was negligent. The trial judge also found that the dangerous road condition was the proximate cause of the plaintiff’s injury.

IV. GROUNDS OF APPEAL

[24] In its factum, the appellant alleges various errors in the trial judge’s determination of the standard of care and causation.[1] During oral argument, the appellant focused on the issue of the standard of care. In advancing its argument, the appellant makes three submissions:

a) The trial judge misapplied the reasonableness standard of care by finding that the appellant should have arrived at the premises at 6 a.m.;

b) The trial judge misapprehended the evidence that suggested that the appropriate standard of care was to apply salt after plowing the entire condominium property. Mr. Mitchell’s decision to wait for Mr. Newman to complete plowing before applying salt thus met the standard of care; and

[1] On the issue of standard of care, the appellant further claims in its factum that the trial judge erred by (i) not citing enough law; and (ii) failing to apply a lower standard of care required of a smaller winter maintenance company. On the issue of causation, the appellant alleges (i) there was a lack of evidence to conclude that the lack of salt was the proximate cause of the slippery condition on the roadway; and (ii) the trial judge erred by not considering alternative explanations. These arguments were not pressed in oral argument. Having reviewed these arguments, I am not persuaded that the trial judge committed any of these errors.

c) The trial judge failed to look at the spectrum of characteristics set out in *Waldick v. Malcolm*, [1991] 2 S.C.R. 456, in his standard of care analysis. Had he considered these factors, he would have found Exact Post's conduct to be reasonable.

V. ANALYSIS

(1) Standard of review

[25] The appellate standard of review from *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, applies in this case. Questions of law are reviewable on a standard of correctness. In the absence of extricable legal errors, questions of fact and mixed fact and law are reviewable on the palpable and overriding error standard. In the negligence context, the determination of the duty of care is a question of law, and the application of the standard of care and the determination of the issue of causation are questions of mixed fact and law: *Walters v. Ontario*, 2017 ONCA 53, 136 O.R. (3d) 53, at para. 31.

(a) The trial judge did not misapply the reasonableness standard of care

[26] As noted above, the appellant's contract with the condominium stated that it "shall attempt to confine its work to the hours between 6 a.m. and 11 p.m." The appellant argues that the trial judge held it to a standard of perfection by requiring it to attend the premises at 6:00 a.m. to do a pass through, and to salt the area to open an access way for residents to walk to their cars. According to Exact Post,

this set the wrong standard of care because the practical effect of such a holding would be to require Exact Post, after every overnight snowfall, to attend every parking lot and every townhouse by 6:00 a.m. when alerted to a forecast of snow. This situation would be "commercially impossible" and require constant surveillance or an instant response.

[27] I see no merit in this submission. The trial judge properly identified and applied the correct reasonableness standard of care.

[28] Respectfully, I do not read the trial judge as holding Exact Post to a standard of perfection or requiring it to attend the premises at 6:00 a.m. The trial judge's reference to that time was in his summary of the evidence of the respondent's expert. For convenience, I reproduce this portion of the trial judge's judgment below:

> [The expert witness] 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).

[29] After summarizing the expert's evidence, the trial judge went on to find that in this case, because of the weather conditions on the morning of December 5, 2016, the appellant 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" (emphasis added). The trial judge did not find that the appellant should have arrived at 6:00 a.m. Instead, I read the trial judge as holding that in the specific circumstances of this case, including that the snowstorm began at 4:00 a.m., it was reasonable to expect the appellant to have started earlier than it did in order to complete plowing and salting the driveways before the morning rush hour, given that the appellant decided to not pre-salt the area.

[30] Overall, I am not satisfied that the trial judge misapplied the appropriate standard of care. The trial judge correctly framed the issue as whether Exact Post applied the road salt to the roadway of the 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." The trial judge focused on the lag between the clearing of snow by Mr. Newman and the subsequent application of the road salt by Mr. Mitchell. Put another way, the trial judge's focus in his reasons was not about what time Exact Post should have arrived at the condominium – it was about the timing of the application of the road salt after plowing was completed. The trial judge found that salt was applied about 3.5 hours after Mr. Newman had arrived, and 1.5 hours after the respondent's fall. It was clearly open to him to find that this was neither timely nor appropriate.

(b) The trial judge did not misapprehend the evidence

[31] The appellant alleges that the trial judge erred by misapprehending the evidence of the respondent's expert witness and improperly failing to consider the evidence of its contractual obligations. The appellant claims that the evidence supports its argument that a contractor must finish plowing the entire property before applying salt, and this was exactly what the appellant did.

[32] I do not accept that the trial judge misapprehended the expert evidence. The expert witness expressly provided evidence that in the absence of pre-salting, the road salt must be spread concurrently with or immediately after plowing to prevent the ice/pavement bond from setting in. The appellant's failure to do either created an icy road condition, which posed a danger to the respondent and other residents. In his report, the expert concluded, "[n]ot applying salt/grit immediately after the initial snow removal activities may have aggravated the slippery conditions."

[33] Further, when the respondent cross-examined the appellant's expert about the meaning of "immediately", the following exchange occurred:

> Q: … The – you don't provide any – any opinion on precisely how quickly immediately is, right?
>
> A. No, it doesn't, but immediately in general means in conjunction, or next to each other.
>
> Q. That – that's not at the same time. It's one after the other?

> A. Yes. So, you have to remove the snow first, to apply the salt. Yes, that's correct.
>
> Q. So, immediately means, as soon as reasonably possible after ploughing the snow?
>
> A. That's the standard meaning of immediately, is as soon as you finish the snow [*sic*], you apply the salt. That's – yes. [Emphasis added.]

[34] I do not read the expert's evidence as suggesting that the entire condominium had to be plowed before salt could be applied. It was open to the trial judge to find that the standard of care would have required the appellant to salt the parking area concurrently with or immediately after plowing.

[35] I am also not persuaded by the appellant's argument that plowing the entire condominium had to be completed first because if Exact Post applied salt while it was still snowing, it would have to reapply salt each time it re-plowed. The respondent's expert clearly testified that pre-salting before even starting to plow was a viable option, albeit not a mandatory one. On this record, having opted not to pre-salt the area, the appellant then failed to salt the area concurrently with or immediately after plowing. This failure allowed the compacted remaining snow on the pavement to quickly freeze and therefore become very slippery to pedestrians.

[36] At the time of the accident, the snow had been falling for 5.5 hours. Ice formation was readily foreseeable, as was the need for the timely application of road salt. In the circumstances of this case as found by the trial judge, it was unreasonable to wait for 7 hours after the snowstorm began, over 2 hours after Mr.

Newman had completed plowing,[2] and 1.5 hours after the respondent slipped before applying road salt. Even if I were to accept the argument that one must plow the entire property first – which I do not – there was still a 2-hour gap between the completion of plowing and salt application. The trial judge was entitled to find that this delay fell below the acceptable standard of care expected of a commercial winter maintenance contractor in the circumstances of the case before him. As the trial judge identified, the appellant's breach of the standard of care stemmed from its inherently problematic system of relying on a single individual to handle salt application at 14 properties spread over a large geographic area, without any system to determine the order of salt application.

[37] Relying on this court's decision in *Fordham v. Dutton-Dunwich (Municipality)*, 2014 ONCA 891, 327 O.A.C. 302, the appellant complains that the trial judge erred in relying on the industry best practices from the Canadian Parking Association and the Transportation Association of Canada in setting the standard of care, since these guidelines are not mandatory. I see no merit in this submission.

[38] The respondent's expert's opinion relied on the guidelines and the trial judge was entitled to accept the opinion of the expert. In *Fordham*, this court concluded that the best practices guidelines did not establish a legally enforceable standard of care for civil liability regarding the installation of a traffic sign; however, the

[2] Mr. Newman phoned Mr. Mitchell to notify him that he almost finished plowing at 8:34 a.m. Mr. Mitchell applied salt at 10:50 a.m.

court's conclusion turned on the particular facts of that case. In this case, the trial judge expressly acknowledged that "best practices guidelines are not strict rules or requirements mandated for all snow removal contractors in all situations." This is consistent with this court's treatment in *Fordham* at para. 53 that "the guidelines … are just that, guidelines. They do not establish a legally enforceable standard of care for civil liability."

[39] The trial judge was nevertheless entitled to consider and accept these guidelines. Indeed, he found them to be of "great assistance" and relevance, as they spoke directly to the issues arising in the case before him, being the proper application of road salt to prevent ice formation in a slip and fall context. Those guidelines supported the expert's opinion that Exact Post could have made sure that road salt was spread concurrently with or immediately after plowing.

[40] Finally, the appellant alleges that its decision to not salt the roadway until the entire condominium had been plowed was consistent with its winter maintenance contract with Carleton.

[41] It is trite law since *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), that the duty to take reasonable care exists independently of any contractual obligation. In this case, the appellant's liability is grounded in tort and the statutory provisions of the *OLA*.

[42] While a contractual provision may inform the assessment of, and in some circumstances modify, the standard of care, it is not determinative: see generally

Mabe Canada Inc. v United Floor Ltd., 2017 ONCA 879, 74 C.L.R. (4th) 1, at para. 4. In this case, even if the winter maintenance contract were relevant, its plain language did not preclude the appellant from salting the roads concurrently with or immediately after plowing the snow.

[43] In sum, I am not satisfied that the trial judge committed any palpable and overriding error in his determination and application of the standard of care.

(c) The trial judge properly considered the characteristics set out in *Waldick v. Malcolm*, [1991] 2 S.C.R. 456

[44] Although the trial judge did not explicitly cite to the Supreme Court's decision in *Waldick*, the thrust of his analysis is consistent with the contextual analysis that the court espoused. In *Waldick*, a slip and fall case, the court articulated several factors to consider in assessing reasonable care, including: the weather, the time of year, the size and nature of the property, the cost of preventive measures, the quality of the footwear worn by the plaintiff, and the length of the pathway.

[45] In my view, these factors informed the trial judge's decision. He identified that: the incident took place amidst a snowstorm that set in at 4 a.m. on a residential condominium property, the temperature was just below freezing, and ice formation was readily foreseeable. He considered in some detail the preventative measure of pre-salting the property, and he expressly made a finding on the type and quality of footwear of the respondent's winter boots. Further, the trial judge considered and accepted the expert evidence and industry best

practices guidelines in determining the appropriate standard of care. Contrary to the appellant's submission, the trial judge's analysis was entirely in keeping with *Waldick*.

VI. DISPOSITION

[46] For these reasons, the appeal is dismissed. The respondent is entitled to its costs of the appeal in the agreed amount of $17,500, all-inclusive.

Released: September 15, 2023 "L.B.R."

"S. Coroza J.A."
"I agree. L.B. Roberts J.A."
"I agree. B.W. Miller J.A."