

COURT OF APPEAL

ORAL REASONS FOR JUDGMENT

BEFORE:

THE HONOURABLE MR. JUSTICE SEATON
THE HONOURABLE MR. JUSTICE WOOD
THE HONOURABLE MADAM JUSTICE ROWLES

Victoria, B.C.
November 12, 1993

BETWEEN:

ELIZABETH MARY PASTUCK

APPELLANT

AND:

THE VILLAGE OF LAKE COWICHAN

RESPONDENT

T. Taylor
and N Sutherland

counsel for the respondent

G.E. McDannold
and K Stuart

counsel for the appellant

1 **ROWLES J.A.:** This is an appeal from the judgment of
Mr. Justice Murphy dated December 4, 1991, dismissing the
plaintiff's claim for damages against the Village of Lake Cowichan

("the Village") for injuries sustained on February 23, 1990, when near the southwest corner of North Shore Road and Park Road in the Village, the plaintiff slipped and fell, causing permanent injury to her ankle.

2 The claim was brought under the ***Occupiers Liability Act*** R.S.B.C. 1979 c.303 (the "Act") or, alternatively, in common law negligence. The plaintiff appeals the judgment on the grounds that the trial judge erred in concluding that the provisions of the Act did not apply and in concluding that negligence on the part of the Village had not been established. The arguments put forward were largely concerned with the trial judge's determination of the facts.

3 At about 6:45 a.m. on February 23, 1990, the plaintiff left her home on North Shore Road to help her son in delivering newspapers. It had snowed several days before, and the Village had ploughed the roads and sidewalks in the vicinity of the plaintiff's home. After delivering one paper the plaintiff walked south across North Shore Road in order to get to Park Road, where she intended to deliver another paper, but she slipped and fell before reaching her destination.

4 North Shore Road runs east and west. Park Road runs into North Shore Road at an angle from the southwest. Park Road is

slightly lower than North Shore Road so there is a slight decline from North Shore Road to Park Road. There is a concrete sidewalk which runs along the northwest side of Park Road. The plaintiff's home is on the north side of North Shore Road, directly opposite the end of the sidewalk on Park Road.

5 In 1988 the provincial government gave North Shore Road to the Village, which agreed to take it over on condition that the provincial government pave an additional ten feet on the south side of North Shore Road. At that time the paved portion of the roadway on the north side was ten feet in width. The provincial government paved a further ten feet to the south and extended the paving around the corner into Park Road. Prior to that work being done the entire area on the south side of North Shore Road consisted of gravel, which extended around the corner until it met the asphalt on Park Road.

6 When the paving on the south side was completed the concrete sidewalk on Park Road abutted the asphalt. There were no curbs, which meant that a pedestrian would have to step up or down when approaching or leaving the sidewalk. The Village removed a five foot chunk or slab from the end of the sidewalk and filled in the area with gravel thereby eliminating the "step".

7 A sidewalk on the south side of North Shore Road was created by painting a solid white line on the asphalt surface of the roadway.

8 In 1961 the Village had passed a by-law, which was still in effect at the time of the plaintiff's fall, that required every owner or occupier within its limits to remove snow and ice from any sidewalk or footpath fronting that person's property. Later, the Village began to have snow ploughed from the sidewalks because there were a number of vacant lots where there was no owner or occupier to remove the snow. In addition to ploughing, the Village also salted and sanded the sidewalks, but only in the downtown or core area.

9 The population of the Village was about 2200.

10 Following the snowfall on February 20, 1990, the Village ploughed all of the roadways and sidewalks and did so in accord with a pre-existing map or plan. The main roads, and those side roads which approached main roads on a slope were salted and sanded. The sidewalks were cleared and, in addition, salt was placed on the sidewalks in the main commercial centre of the Village. The areas outside the main commercial area were not salted or sanded. The area of North Shore Road and Park Road is

not within the commercial area so neither the sidewalks nor the roadways were salted.

11 In the course of his reasons the trial judge stated that "the slope in the area of Park Road and North Shore Road is of such small magnitude that it would not have caught the attention of the Village authorities."

12 The method of street ploughing employed by the Village at the corner of North Shore Road and Park Road was such that there would be some snow in front of the southwest end of the sidewalk on North Shore Road and none adjacent to the commencement of the sidewalk on Park Road. As a result it would not be possible for anyone crossing North Shore Road from in front of the plaintiff's house to the sidewalk on Park Road to walk in a straight line across the roadway without going over a mound of snow. It would be possible, however, to walk around the end of the windrow in order to get to the sidewalk on Park Road.

13 Following the snowfall, temperatures rose during the day and some snow melted. Water from the melting snow along the south side of North Shore Road ran down around the corner onto Park Road and, as well, into a ditch running along the outside of the sidewalk on Park Road. As the temperatures dropped below freezing

at night the running water gradually stopped and created black ice on the roadway.

14 The trial judge found that the plaintiff did not slip and fall on the concrete portion of the Park Road sidewalk, and no issue is taken with that finding. The trial judge said that he was unable "to pinpoint with any degree of accuracy the exact area where the plaintiff fell" except to say that "she had obviously not reached the sidewalk." He went on to say that it was "difficult to say whether she fell in the area from which the end of the sidewalk had been removed." One of the witnesses called by the plaintiff said that after her fall the plaintiff was located in the gravel area between the concrete sidewalk and the asphalt, whereas another of the plaintiff's witnesses said that the plaintiff was lying in an area of very black ice. The trial judge said that if the second witness was correct, that "would indicate to me that she was in the asphalt portion of the roadway, not the gravel portion."

15 The trial judge made these findings regarding the prevailing conditions and the plaintiff's fall:

I find that the plaintiff knew that the streets were icy, whether from snow or black ice is difficult to tell; that she crossed North Shore Road from north to south in line with the end of the sidewalk on Park Road, intending to walk down the sidewalk to deliver the paper. There were two banks of snow in front of her of a height that she was able to step over. She stepped over the first and then over the second. It was this second

manoeuvre that caused her to slip on the icy conditions caused by alternate thawing and freezing, and she fell injuring her ankle. If she had walked around to her left or approached the sidewalk in an area which was free from snow, she would have been in an area of black ice as testified to by Mrs. Duffill, but certainly not any more dangerous than the area in which she crossed North Shore Road, except for the fact that she would have been walking on a slight downward slope. However, the Village is not responsible for the geographic area or the slopes and contours in which the Village is located.

16 Although the trial judge found that the plaintiff was not on the concrete portion of the Park Road sidewalk at the time she slipped and fell, plaintiff's counsel nevertheless contends that the plaintiff was on a "sidewalk" and that, as a consequence, the exemption contained in s. 8(2) of the Act does not apply.

17 Section 8 of the Act provides:

8. (1) Except as otherwise provided in subsection (2), the Crown and its agencies are bound by this Act.
- (2) Notwithstanding subsection (1), this Act does not apply to the Crown in right of the Province or in right of Canada or to a municipality where the Crown or the municipality is the occupier of a public highway or public road or a road under the Forest Act or the Private Roads Act, 1963, or to an industrial road as defined in the Highway (Industrial) Act.

18 In asserting that the plaintiff fell on a "sidewalk", plaintiff's counsel put forward two alternatives: (1) the

plaintiff fell in the gravel area, where a portion of the sidewalk had been removed, or (2) if the plaintiff fell on the asphalt, it must have been within the area of the painted white line marking the sidewalk area on the south side of North Shore Road.

19 As to the first alternative, the trial judge did not find that the plaintiff slipped in the gravel area, and a review of the evidence to which we were referred does not support that submission. Indeed, the plaintiff, when asked to mark on a photograph the place where she had fallen, drew a circle on the asphalt area, not the gravel.

20 Although the trial judge did not make the finding counsel now urges, he did make the following observation:

Even if asphalt had been placed over the area in question, this would still not have prevented snow melting in front of the sidewalk from gathering on the asphalt surface and freezing at night with the drop in temperature. Circumstances involving high temperatures during the day causing the snow to melt and below freezing temperatures at night, causing water to freeze, is something that no governing body can prevent.

There is no evidence of any complaints in the past when similar conditions existed in the area....

21 The second alternative put forward by plaintiff's counsel appears not to have been argued before the trial judge. The

argument made at trial was that the place where the plaintiff had fallen was within a "street crossing" and was therefore not covered by the exemption provision in s. 8(2) of the Act. The trial judge rejected the argument that the Act would apply to a "street crossing" which was part of the asphalt roadway and, as I understand it, no issue is taken by plaintiff's counsel with the trial judge's analysis in that regard.

22 Assuming, without deciding, that the exemption in s. 8(2) of the Act would not apply to an area along the side of the street which has been marked off for the use of pedestrians, the evidence does not support a finding of fact that the plaintiff fell within that area. The trial judge found that the plaintiff walked directly across North Shore Road in line with the sidewalk on Park Road. The area marked off by a white line on the south side of North Shore Road does not extend to the plaintiff's path of travel on the day she fell.

23 On the first ground of appeal I think it unnecessary to go further than to say that the plaintiff has not demonstrated that the trial judge was plainly wrong in his assessment of the evidence, and it is not necessary to determine whether the **Occupiers Liability Act** would apply in the two alternatives plaintiff's counsel urged upon us.

24 I would not accede to the first ground of appeal.

25 The second ground of appeal, as set out in the plaintiff's factum, is that the learned trial judge erred in holding that the respondent was not negligent in light of the budgetary constraints of the respondent.

26 The trial judge concluded that the Village had not breached its common law duty of care to the plaintiff. In reaching that conclusion he applied the analysis in **Just v. R.**, [1989] 2 S.C.R. 1228, 64 D.L.R. (4th) 689, [1990] 1 W.W.R. 385, 41 B.C.L.R. (2d) 350.

27 Plaintiff's counsel argued before us that the Village had failed to demonstrate that the system it had adopted of removing snow and ice was reasonable in light of its budgetary restraints and, in particular, it was clearly within the budgetary constraints of the Village to remedy the hazardous condition when the plaintiff fell.

28 Plaintiff's counsel pointed to the following evidence in support of his submission:

- a) the Village ultimately spent \$18,153.00 on snow removal in 1990;

- b) the Village could have spent a further \$4,000.00 on snow removal without exceeding the budget;
- c) it would only have cost approximately \$50.00 to take the measures necessary to remedy the hazardous condition at the corner of North Shore Road.

29

The trial judge said this:

The second policy decision was the decision to plough the streets and sidewalks. Funds for this purpose were provided for in the budget. Based on the availability of these funds, the Village carried out ploughing and the salting and sanding in the manner previously described. I do not find that the Village was negligent in the implementation of the program that it adopted. It is not unusual that the downtown area or commercial section or core of a city is completely cleared of snow as in this case, and that outlying areas, as in this case, were not and that no sanding or salting program is carried out in the outlying areas. It is not unusual to find programs of this nature in even the most affluent of towns or cities.

The other facet of the implementation of the program was the manner in which the streets were ploughed.... From the evidence that there was snow in front of the edge of the sidewalk on Park Road, I infer that the plough operated in the manner described by Mr. Miller. As mentioned previously, the effect of that is to leave some snow piled in front of the edge of the sidewalk so that anyone crossing North Shore Road towards the sidewalk as the plaintiff did, would have to step over the pile created by the snowplough. However, entry to the sidewalk could be gained by walking around and walking in at an angle. If the plough lifted its blade prior to reaching the sidewalk and dropped the snow, it would then have to proceed around the turn without picking up snow, which would leave an area of snow on the highway. On the other hand, by proceeding directly across the entrance to the

sidewalk, dropping the snow and making a right angle turn to proceed along Park Road as mentioned, there is snow on the blade to begin with and it gradually piles up and leaves an area for entrance to the sidewalk and also clears all the snow from the highway. I cannot conclude that there is anything negligent in that operation. The Village ploughed the streets in this area and as well cleared the sidewalks. In situations such as this, it is not unusual for pedestrians to have to deviate from the normal paths in crossing the street or to step over piled snow, which is what the plaintiff did in this case.

The ploughing of the highway by the Village causing snow to be piled along the edge of the roadway, combined with alternate freezing at night and thawing during the day causing icy snow on the flat surface of the road or black ice to form in areas where the roadway has been completely cleared, produces hazardous conditions over the width and breadth of the entire roadway. Even a sidewalk which has been cleared of snow, is hazardous during freezing temperatures. The only way the Village could prevent the resultant conditions as described to the highway would be to clear the snow off completely and dispose of it, as it apparently does in the commercial areas. However, the fact that the Village, in this case with a population of approximately 22,000 (sic) and a somewhat limited budget for snow, and considering all of the other budgetary expenses it has to meet, cannot be said to be negligent with respect to its snow removal operations when it confines total removal to the core or downtown centre, or to put it another way, to the more heavily populated or travelled areas.

I have no doubt that the slope of the road downwards from North Shore Road to Park Road, coupled with icy snow and ice, contributed to her fall. However, differing contours in roadways in any city or town are not uncommon. The evidence is that no-one had ever complained to the Village prior to this accident of that area of the roadway being particularly hazardous when it snows followed by a freeze.

As previously mentioned, I cannot conclude from the evidence before me that there was any negligence on

the part of the Village, in ploughing the roads and clearing the sidewalks bearing in mind budgetary restraints in the implementation of the extent of ploughing and salting in the Village on both the streets and the sidewalks, or the method of ploughing followed in that area of the Village where the plaintiff was injured.

30 I would dismiss the second ground of appeal for the same reason as the first. The underpinning for the plaintiff's argument are facts that do not accord with the trial judge's assessment of the evidence. The plaintiff has not demonstrated that the trial judge either overlooked or misapprehended evidence.

31 I would not accede to the second ground of appeal.

32 In result, I would dismiss the appeal.

SEATON J.A.: I agree.

WOOD J.A.: I agree.

SEATON J.A.: The respondent's factum was was not responsive. The form in the Rules specifies:

In the respondent's factum, this Part shall consist of the respondent's position with respect to the appellant's statement of facts together with a concise statement of any other fact that the respondent considers relevant.]

The respondent's factum did not do that. It was therefore not as useful as it should have been. I would not permit any costs of the respondent's factum.

WOOD J.A.: I agree.

SEATON J.A.: The appeal is dismissed. There will be no costs of the respondent's factum.

"The Honourable Mr. Justice Seaton"

"The Honourable Mr. Justice Wood"

"The Honourable Madam Justice Rowles"