COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Schan v. City of Whitehorse***
2009 YKCA 4

Date: 20090525
Docket: CA08-YU619

Between:

Barbara Schan

Appellant
(Plaintiff)

And

City of Whitehorse

Respondent
(Defendant)

Before: The Honourable Mr. Justice Donald
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Smith

Oral Reasons for Judgment

James Tucker — Counsel for the Appellant

R. Justin Matthews — Counsel for the Respondent

Place and Date: Whitehorse, Yukon Territory
May 25, 2009

[1] **DONALD J.A.**: The appellant slipped and fell when crossing an icy lane on the west side of 2nd Avenue near Main Street in Whitehorse on 26 February 2000.

[2] An issue arose in the course of the action whether the place of the accident was a sidewalk or a highway within the meaning of the relevant legislation. If it was a highway, then the appellant had to prove gross negligence to recover damages. If it was a sidewalk, the appellant takes the position that legislative amendments deleting "sidewalk" from the provision requiring gross negligence had the effect of reducing her onus to one of ordinary negligence.

[3] Four questions of law were submitted to a judge in chambers:

> a. Is the area where the Plaintiff fell a "highway", a "sidewalk" or both as defined by the *Municipal Act,* R.S.Y. 2002, c. 154, as amended?
>
> b. Is a finding of gross negligence necessary in order for the Plaintiff to succeed in this action?
>
> c. Do ss. 265, 272, 274 and 357 of the *Municipal Act* impose a duty of care upon the municipality to repair or maintain the area where the Plaintiff fell?
>
> d. If a duty is imposed, is it open to the municipality to argue that the decision to remove or not remove snow and ice from the area where the Plaintiff fell was a "policy" decision so as to exempt the municipality from its statutory duty of care?

[4] The judge interpreted the *Municipal Act* as amended and in force at the material time to include the place of the accident within the meaning of "highway", and thus the appellant had to prove gross negligence. The judge's reasons are indexed as 2008 YKSC 59.

[5] The appeal was taken from the answers to questions a. and b. only. We are not concerned with the answers to questions c. and d. I am in substantial agreement with the judge's determination of the subject questions and I would accordingly dismiss the appeal.

[6] Section 357(2) of the *Municipal Act* restricts liability to acts of gross negligence in the circumstances referred to below:

> 357(2) A municipality is only liable for an injury to a person or damage to property caused by snow, ice, slush or water on a highway if the municipality is grossly negligent.

[7] Section 1 of the *Municipal Act* defines highway in this way:

> "highway" includes, subject to the *Highways Act*, any thoroughfare, street, road, trail, lane, alley, square, avenue, parkway, driveway, bridge, viaduct, causeway, and any other place which the public is ordinarily entitled or permitted to use for the passage or parking of vehicles and that is in the boundaries of a municipality;

The term "sidewalk" is not defined.

[8] The judge reasoned as follows:

> [18] The definition of "highway" in the pre-1998 version of the *Municipal Act* included "any other way open to use by the public" rather than "any other place which the public is ordinarily entitled or permitted to use for the passage or parking of vehicles". I am not persuaded that the change to the new wording is pertinent to the matter at hand, as the Plaintiff fell at a location used for the passage of vehicles.
>
> * * *
>
> [20] There is no suggestion in any of the legislation referred to above that such a place loses its character as a "highway" by virtue of its intersection with a crosswalk. The Plaintiff cites *Kingston* v. *Drennan* and other cases. A municipality's common law duty of care for a pedestrian road crossing may well be different from its duty of care for a

> mere roadway. However, in my view, for the purposes of statutory interpretation in this case, a crosswalk over the laneway does not change the nature of the laneway as a place which the public is entitled to use for the passage of vehicles, and such a location falls within the definition of "highways" in the *Municipal Act*. I find that the Plaintiff fell on a "highway".

I think, with respect, that he was right in that interpretation.

[9] On the point taken by the appellant that the legislative history of the *Act* manifests an intention to exclude sidewalks from the gross negligence provision, the judge summarized the argument as follows:

> [22] The Plaintiff submits that she suffered her injury on a sidewalk, not on a highway. The pre-1998 version of the *Municipal Act* explicitly stated that "except in cases of gross negligence, a municipality is not liable for any personal injury caused by ice or snow upon a sidewalk". The Plaintiff contends that the removal of the explicit limitation on the ability to bring an action for damages for personal injury caused by ice or snow upon a sidewalk was an indication that the legislature did not intend for recovery to be limited to cases of gross negligence. The Plaintiff reasons that it is therefore unnecessary for her to establish gross negligence in this case.

[10] The judge held that the effect of the amendment was to widen the ambit of the gross negligence requirement, not to treat sidewalks in a different manner. He wrote:

> [24] The intent of s-s. 357(2) was to require that a claimant establish a higher degree of negligence where an injury was caused by ice on a highway. As I have found that the Plaintiff was on a "highway", despite the roadway's intersection with a crosswalk, s-s. 357(2) applies. There is no indication in the legislation that mere negligence must be established where the injury occurs on that portion of a highway which serves as a crosswalk. Given my findings above as to the statutory definition of the term "highway", the legislative evolution

> relied on by the Plaintiff reflects a broadening of the requirement for gross negligence to include areas of the highway not specifically intended for the use of pedestrians.

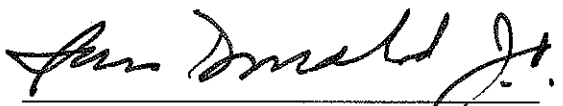
[11] In my opinion, neither the text of the legislation nor the logic of the overall scheme suggests that the legislature intended to lessen the burden on a claimant for a slip and fall on an icy sidewalk, lane or crosswalk. Again, I agree with the reasoning of the chambers judge. The answer to question b. follows inevitably from the determination of question a., that a lane crossing for pedestrians is a highway.

[12] I would dismiss the appeal.

[13] FRANKEL J.A.: I agree.

[14] SMITH J.A.: I agree.

[15] DONALD J.A.: The appeal is dismissed. Thank you, counsel.



The Honourable Mr. Justice Donald