COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pavlovic v. Just George Cleaning and Maintenance Inc.,* 2023 BCCA 219

Date: 20230511
Docket: CA48488

Between:

Magdalena Pavlovic

Appellant
(Plaintiff)

And

Just George Cleaning and Maintenance Inc.

Respondent
(Defendant)

Before: The Honourable Madam Justice Fenlon
The Honourable Justice Griffin
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated August 11, 2022 (*Pavlovic v. The Owners, Strata Plan LMS 2211*, 2022 BCSC 1368, Vancouver Docket S175817).

Oral Reasons for Judgment

Counsel for the Appellant:	B.T. Lepin
Counsel for the Respondent:	M.C. Jain C. Fox, Articled Student
Place and Date of Hearing:	Vancouver, British Columbia May 11, 2023
Place and Date of Judgment:	Vancouver, British Columbia May 11, 2023

Summary:

The appellant was injured when she slipped on a city sidewalk adjacent to a property owned by a strata corporation. The respondent provided maintenance and caretaking services to the strata pursuant to an oral contract. Under this contract, the respondent was required to discharge the strata's obligation under a city bylaw, requiring snow and ice to be removed from city sidewalks adjacent to privately owned property by 10:00 a.m. every day. The chambers judge dismissed the appellant's claim on the basis that the respondent did not owe a duty of care. On appeal, the appellant alleges that the judge erred in her proximity analysis.

Held: Appeal dismissed. The judge did not err in finding that there was no analogous precedent that definitively found the existence of a duty of care owed by a contractor hired by a private owner to a member of the public using the city-owned sidewalk. The judge did not err in finding that this Court's decision in Der v. Zhao is determinative on the question of proximity, given that the sidewalk is owned and controlled by the city, the appellant was a passerby on the sidewalk and not invited to enter the property, and the Bylaw only requires the snow and ice to be cleared every morning, not throughout the day. In addition, the judge did not err in conflating duty of care with standard of care in her Anns/Cooper analysis.

GRAUER J.A:

1. INTRODUCTION

[1] Between 6:30 and 7:00 p.m. on December 20, 2016, the appellant was walking home from work when she slipped and fell on a City of Vancouver sidewalk adjacent to premises owned by a strata corporation. She fractured her wrist.

[2] The appellant claimed that she had slipped because of "ice and/or snow that had accumulated on the sidewalk" and sued for damages. She advanced claims in negligence and occupiers liability against the strata, the strata's management company, the City, and the respondent, Just George Cleaning and Maintenance Inc. ("Just George"). Just George provided maintenance and caretaking services to the strata.

[3] The appellant subsequently discontinued her action against all defendants except Just George, and abandoned her occupiers liability claim against that defendant. This left solely her claim in negligence against Just George.

[4] In these circumstances, Just George applied for an order severing liability from damages, and for judgment by way of summary trial limited to the question of whether it owed the appellant a duty of care.

[5] In reasons indexed at 2022 BCSC 1368, Madam Justice Tucker allowed Just George's application and dismissed the action, applying an *Anns/Cooper* duty of care analysis to conclude that there was insufficient proximity between the appellant and Just George to make it just and fair to impose a duty of care. In coming to that conclusion, the judge found at paras 51 and 55 that Just George provided maintenance services to the strata pursuant to an oral contract, and that, as a duty incidental to Just George's central contractual obligation to maintain the strata premises, Just George was required to discharge the strata's obligation under the City's *Street and Traffic By-Law No. 2849*:

> The owner or occupier of any parcel of real property shall, not later than 10:00 a.m. every day, remove snow and ice from any sidewalk adjacent to such parcel for a distance that coincides with the parcel's property line and for the full width of the sidewalk.

[6] The judge relied heavily on this Court's decision in *Der v Zhao*, 2021 BCCA 82 in carrying out an *Anns/Cooper* analysis. She noted at para 28 that the following two propositions were not in dispute:

a) the strata, as the owner of the residential property adjacent to the sidewalk, does not owe a duty of care to sidewalk users to remove snow and ice from the sidewalk (citing *Der*); and

b) the City, as the owner and person with control, has a duty to maintain the sidewalk: *Scheck v Parkdale Place Housing Society*, 2018 BCSC 938; *Sullivan v Victoria (City),* 2010 BCSC 218 at para. 23; *Brown v British Columbia (Minister of Transportation and Highways),* [1994] 1 S.C.R. 420, 1994 CanLII 121 (SCC) at para. 35.

[7] At para 29 of her reasons, the judge set out the framework for the *Anns/Cooper* analysis as described by this Court in *Der*:

> [47] The steps required for an *Anns/Cooper* analysis were summarized by Justice Garson in *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at para. 50:
>
> > 1) Does a sufficiently analogous precedent exist that definitively found the existence or non-existence of a duty of care in these circumstances;
> >
> > If not;
> >
> > 2) Was the harm suffered by the plaintiff reasonably foreseeable;
> >
> > If yes;
> >
> > 3) Was there a relationship of sufficient proximity between the plaintiff and the defendant such that it would be just to impose a duty of care in these circumstances;
> >
> > If yes, a *prima facie* duty arises;
> >
> > 4) Are there any residual policy reasons for negating the *prima facie* duty of care established in question/step 3, aside from any policy considerations that arise naturally out of a consideration of proximity.
> >
> > If not, then a novel duty of care is found to exist.

[8] In considering the first step, the judge concluded at para 41 that the case law cited by the appellant established that in some circumstances it is possible that a maintenance contractor owes a duty of care to users of the property it was engaged to maintain, but that the case law did not establish that a maintenance contractor owes such a duty of care in general.

[9] The judge then turned to consider the terms of the contract between Just George and the strata, as discussed above. She next considered the second step in the *Anns/Cooper* analysis, which is whether the harm suffered by the plaintiff was a reasonably foreseeable consequence of the alleged breach of duty. At para 60, she concluded it was.

[10] This led to the third step, which is the question on this appeal: was there a relationship of sufficient proximity between the appellant and Just George? Again, after an extensive review of the case law, the judge noted that the proximity factors and circumstances in this case mirrored those considered by this Court in *Der*. She concluded at para 75 that there was no basis on which to find sufficient proximity

between the appellant and Just George to make it just and fair to impose a duty of care.

2. ISSUES

[11] The appellant submits that the judge erred in her analysis in five ways:

1. at the initial stage of the Anns/Cooper analysis, in failing to recognize that a duty of care has clearly been established by existing case law;

2. in finding it unnecessary in the circumstances "to consider whether there is precedent for a duty of care framed by reference to contractual terms" (quoting from the reasons at para. 48);

3. in characterizing the proximity issue as whether the respondent had failed to abate a hazard, rather than whether the respondent's contractual duties brought it into a relationship of proximity with the appellant;

4. in the blanket application of the proximity considerations that attach to a private homeowner's would-be duty of care as reviewed in *Der*, rather than that of a professional contractor; and

5. in incorrectly conflating duty and standard of care.

[12] The parties accept, as do I, that the question of whether a duty of care arises is a question of law, to be reviewed on a standard of correctness: see *Der* at para 23.

3. DISCUSSION

[13] Although the appellant has framed five separate issues, they all revolve around the contractual relationship between Just George and the strata. In this regard, it is important to note that the appellant does not dispute the judge's interpretation of the contract. Rather, the appellant challenges the judge's analysis of

the *legal effect* of her interpretation as it impacts the question of whether there is sufficient proximity to establish a duty of care.

[14] I can see no error in the judge's analysis of precedent, and I agree with her that the cases submitted by the appellant do not establish an analogous category of proximity (see *168872 Ontario Inc v Maple Leaf Foods*, 2020 SCC 35 at para 64).

[15] The appellant points, for instance, to *Reichert v Home Depot Canada Inc*., 2017 ABQB 184, *Shweihat v Greti Development Co. Limited*, 2015 ONSC 5186, and *Murkute v Owners Condominium Plan 8210034*, 2006 ABCA 315, as examples of cases that demonstrate an established duty of care owed by a contractor to third parties where the contractor's duties included clearing snow and ice.

[16] The circumstances in *Reichert* were, as the judge noted, quite different. The injury took place on property owned and occupied by Home Depot, with whom the maintenance company contracted. It would be as if the appellant here had fallen on strata property, rather than on a city sidewalk. The same distinction applies to *Shweihat,* where the accident happened on the strata's parking lot, and *Murkute*, where the area in question comprised the common areas of the strata, not municipal property.

[17] *Chouhan v Canada Safeway Ltd.*, 2012 ABQB 7, upon which the appellant also relies, is similarly distinguishable. There, the contractor in question was actually in the process of clearing ice on Safeway's sidewalk area at the time the plaintiff slipped and fell. The obligations of the contractor were framed by Safeway's own snow removal policies, not the City's.

[18] Other cases on which the appellant relies include *Mochinski v Trendline Industries Ltd*, [1994] BCJ No. 1220 (SC), and this Court's decision in *Goodwin v Goodwin*, 2007 BCCA 81. In my view, neither is analogous. In *Mochinski*, the Ministry of Transportation and Highways delegated its duty to maintain the highway in question to the defendant contractor. That would be analogous to the City delegating its duty to maintain its sidewalks to Just George. That is not what

happened in this case. In *Goodwin*, the specific danger was reported to the defendant contractor who undertook to abate it. No specific danger is brought to Just George's attention here, nor did it specifically agree to abate a specific danger.

[19] In my view, the judge's conclusion on this first stage of the *Anns/Cooper* analysis was correct.

[20] Given the judge's unchallenged findings concerning Just George's contractual obligation, I agree with her that *Der* is determinative on the question of proximity. *Der* did not involve a contractor like Just George. But the claimant in that case was injured when he slipped and fell on ice on a city sidewalk adjacent to the defendant's property, just like the appellant did here. There, like the strata in this case, the defendant property owner was obliged by a similar city bylaw to remove snow or ice from any adjacent city sidewalk not later than 10 a.m. every day. This Court undertook an *Anns/Cooper* analysis and concluded that while the risk of harm was foreseeable, the circumstances did not establish a relationship of proximity sufficient to give rise to a duty of care on the part of the property owner. Of significant importance were (1) the fact that the sidewalk was owned and controlled by the city, not the property owner; (2) the claimant was, like the appellant in this case, a passerby, not someone invited to enter the property via the sidewalk; and (3) the bylaw obliged the property owner to clear snow and ice every morning, not to keep the sidewalks free, clear, and safe around-the-clock.

[21] The question is whether it makes any difference if that same obligation is delegated by the property owner, here the strata, to a maintenance contractor. Does the contractor's relationship with third parties using the city sidewalk become closer than the strata's?

[22] While the appellant agrees with the judge's observation at para 47 that "[t]he existence (or not) of the duty of care asserted by the plaintiff—one owed by a maintenance contractor to users of the area maintained—depends on contractual obligations undertaken", the appellant maintains that the judge then strayed from the proper analysis by stating:

> [48] It is unnecessary to consider whether there is precedent for a duty of care framed by reference to contractual terms (e.g., where a contractor is expressly obliged to maintain an area fit for a specified use). That is not the plaintiff's position here.

[23] In the appellant's submission, the judge's statement at para 48 is inconsistent with her observations at para 47, and inconsistent with the appellant's arguments below. The appellant submits that whether a duty of care arises out of contractual terms, or whether it may be established by prior case law, are not mutually exclusive questions.

[24] I am not persuaded by this argument.

[25] First, it does not detract from the judge's analysis discussed above that led her to what I consider to be the correct conclusion: the cases relied on by the appellant do not establish an analogous category of proximity.

[26] Second, it does not contradict the judge's clear statement, with which the appellant agrees, that existence of the duty of care in question turns on the contractual obligations undertaken: para 47. That is why the cases relied on by the appellant do not establish an analogous category of proximity. It is also why the appellant cannot succeed in her submission that the judge conflated standard of care with duty of care judge by emphasizing Just George's contractual obligations and how the parties intended these obligations to conform with the Bylaw. The judge properly examined the scope of the obligation, as this Court did in *Der*, not the extent to which the obligation had been fulfilled.

[27] Third, the judge's statement does not, as I read it, mean what the appellant suggests. All the judge said was that analogous precedent would not include cases where there is a specific obligation applying to the circumstances in question. This fits with her unchallenged finding at para 55 that the contract did not oblige Just George to maintain the sidewalk "so as to make it fit for its intended use [or] to maintain it at all times." It is cases framed by contractual terms of that specific nature that the judge was saying need not be considered. I agree. The precedent they establish would not be analogous.

[28] The precedent that is, in my view, analogous, is that established by this Court in *Der*. It is true that, as noted, *Der* did not involve a party performing maintenance under contract. What it did involve was a property owner with the same obligation imposed by the city on the strata in this case, and the relationship between the party with that snow-clearing obligation and the claimant, a passerby who had slipped and fallen on the city sidewalk adjacent to the property. For this reason, I would also reject the appellant's fourth argument, that the judge erroneously applied the proximity analysis from *Der*. The factors I discuss above at para 20 apply equally to this case to demonstrate that a relationship of sufficient proximity did not exist between the appellant and Just George.

[29] Notwithstanding the appellant's able submissions, I do not accept that Just George's status as a commercial contractor, as opposed to a property owner, is sufficient to distinguish *Der* and create a relationship of proximity. Again, that must depend on the contractual obligation. Where the obligation in relation to an adjacent city sidewalk is the same as that of the property owner, I see no distinction.

[30] The concern raised by the appellant in relation to the judge's discussion about the absence of an overt act of negligence, is, with respect, irrelevant to this analysis. What the judge concentrated on was the nature of the contractual relationship between the strata and Just George. As she observed at para 73, "Notably, nothing in Just George's commercial contractor status here brought Just George into a closer or more direct relationship with Sidewalk users than the Strata was itself". I agree.

[31] Just as the existence of a by-law does not shift the responsibility of the City for clearing its sidewalks to the property owners (*Der* at para 94), similarly the existence of a contract between the property owner and its contractor does not of itself shift the city's liability to the contractor. And that, in my view, is why *Der* is dispositive.

[32] As this Court held in *Der*:

[96] A pedestrian would also be able to see what steps had been taken by residents, businesses and the municipality to clear the sidewalks and streets. It would be apparent to him or her that some property owners do a better job than others of clearing ice and snow. However, the pedestrian would understand that he or she had an obligation to take care for their own safety and well-being in the face of uncertain and frequently changing winter sidewalk conditions.

[97] I make note of these expectations not to be critical of the appellant, but because a pedestrian's responsibility for their own safety in these circumstances is a factor that has influenced courts in declining to find that an adjacent property owner owes a duty of care to the pedestrian. A pedestrian would expect snow and ice to create a hazard and, even where a sidewalk had been cleared, would expect that conditions may have changed making the sidewalk slippery and less safe. These expectations suggest that a pedestrian would not reasonably be able to rely on adjacent property owners or municipalities to keep sidewalks free from hazards caused by changing winter conditions after a snowfall.

[98] As the respondents argue, the nature and size of the class of property owners is also a factor in considering proximity. A pedestrian who goes for a 30-minute walk on a day with freezing temperatures after a snowfall may walk by dozens or hundreds of residential properties. The respondents suggest that this raises an issue akin to that of indeterminate liability, which is properly considered at the last stage of the *Anns/Cooper* analysis. I do not think that it raises an issue of indeterminate liability. Rather, it is a factor to take into account when considering the lack of reliance that a pedestrian could place on property owners, and the relationship between them. Given the nature of the activity and risk I am of the view that it is not reasonable to suggest that the pedestrian can be said to place reliance on each of those property owners. I would contrast that with a situation in which ice forms on the sidewalk on the "threshold of the doorway" or immediately outside of a café or hotel.

[99] From the perspective of property owners, like the respondents, the same factor of changing weather conditions and the difficulty in ameliorating all risks of harm make the imposition of the general duty suggested by the appellant unfair. It is also relevant that the ability of property owners to fulfil the suggested duty of care would vary greatly. Many owners may have difficulty in doing so. The large variation in particular circumstances, including location of the property and nature of the pedestrian traffic, would, if such a duty were found to exist, place markedly different burdens on different property owners.

[100] Further, the analysis of proximity cannot be divorced from the property interests of the municipality and the private owners. As the cases have highlighted, there is no duty at common law on a property owner to maintain the property of a neighbour. It is a greater stretch to recognize a duty to maintain the property of a neighbour for the benefit of strangers who may use that property. This is the context in which courts have rejected the proposition

> that the passage of snow-clearing bylaws by a municipality changes the common law duties or serves to shift or impose civil liability.

[33] In my opinion, the analysis in *Der* applies equally to the issues in the present case, where a contractor agrees with the property owner contractually to take on the owner's duty to comply with the bylaw for snow removal.

[34] I conclude that the judge was correct in finding that no duty of care existed in the circumstances of this case. It is therefore unnecessary to address whether there are residual policy concerns that would negate a finding of a *prima facie* duty of care.

4. DISPOSITION

[35] For these reasons, I would dismiss the appeal.

[36] **FENLON J.A.**: I agree.

[37] **GRIFFIN J.A.**: I agree.

[38] **FENLON J.A.**: The appeal is dismissed.

"The Honourable Mr. Justice Grauer"