A Refresher on the Test for Gross Negligence: Zaravellas V. Armstrong, 2016 ONSC 3616

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In a recent slip and fall decision, *Zaravellas v. Armstrong*, 2016 ONSC 3616, the Court found that the City of Toronto (the "City") sidewalk in question was not in a dangerous condition and that the City was not grossly negligent. Note that this decision also includes reasons for dismissing a separate personal injury action brought by the Plaintiff against the Toronto Transit Commission.

At about 5:30 p.m. on December 23, 2007, the Plaintiff was walking eastbound on the north side of Huntingwood Drive from his home on Blueberry Drive to catch a bus to the Scarborough Town Centre. One week prior, the City had experienced a severe snowstorm. Although the City had worked hard to clear the snow and ice, the Plaintiff testified that the sidewalk on Huntingwood was "very bad" on the date of loss and covered by a one-inch thick layer of ice. Despite the weather conditions, the Plaintiff wore the same rubber-soled shoes that he wore throughout the year. As he was walking eastbound, the Plaintiff allegedly stepped into a hole in the ice, lost his balance and fell. He sustained a right shoulder fracture.

The Trial Judge reviewed the applicable law with respect to the City's obligation to keep the roadways and sidewalks in a reasonable state of repair. He recognized that the clearing of snow and ice in Toronto is a mammoth task and that the City cannot reasonably be expected to clear every inch of road or walkway used by the public. In particular, the Court referred to section 42(5) of the *City of Toronto Act, 2006*, which states that "except in the case of gross negligence, the City is not liable for a personal injury caused by snow or ice on a sidewalk." In determining whether the City was grossly negligent in this case, the Trial Judge cited the two-part test, which has emerged from the case law:

1. Was the municipality's general policy with respect to ice and snow removal a reasonable one?
2. Was the municipality's response on the occasion in question (that is to say, the implementation of its policy) reasonable?

The Court found that the City had in place various mechanisms to observe and deal with the presence of snow and ice on roads and sidewalks at the time of the accident. Such mechanisms included, among other tools, road patrols by field investigators, roadway

ploughing following eight centimetres of snowfall, winter maintenance patrollers on arterials roads on a 24-hour basis and a public call-in complaint system.

The Court also found that the City's response on the occasion in question was reasonable. The City initiated its snow ploughing operations when the heavy snowfall began on December 16, 2007 and continued to clear snow until the weather conditions improved on December 21, 2007. The weather records indicated that the temperature stayed above freezing from December 22, 2007 until shortly after the accident occurred. Although the Plaintiff argued that there was a lack of salting on the date of loss, the Court held that it is not unreasonable for roads and sidewalks to remain unsalted when the overnight temperatures remained above freezing. Accordingly, the Court concluded that the sidewalk in question was not in a dangerous condition on the date of loss and that the City was not grossly negligent in the circumstances, and dismissed the action against the City.

Although not necessary, the Court went on to assess contributory negligence and damages. The Plaintiff was found to be 25% contributorily negligent for wearing shoes that were unfit for icy weather conditions despite knowing that a snowstorm had occurred a week earlier. His right shoulder fracture was assessed at $30,000 but reduced to $22,500 to reflect contributory negligence.

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