Memo To: Doble & Doble LLP, Daniel Diamond
File: TEST
Research ID: #400017942244d0
Jurisdiction: Ontario, Canada
Date: June 16, 2020
Regarding: City of Toronto liability at retail frontage

Issue

In the City of Toronto, how much distance from the frontage of a retail plaza abutting a city sidewalk is considered to be City property for the purposes of winter maintenance and municipal liability?

Facts

The Plaintiff exited a bakery that had frontage abutting a City of Toronto sidewalk within 4-6 feet. She slipped and fell on ice within 1 or 2 steps of exiting the store, but before reaching the actual sidewalk. It is unclear whether maintenance of the area in question would fall onto the city or onto the retail landlord or tenant.

Conclusion

There is no uniform rule of law that defines where the municipal road allowance ends and private property begins. The boundary line between municipal and private property in a given case is defined by property records and expert surveyors. See, for example, *Mark v. Bhangari*, where expert surveyor evidence confirmed that the municipal road allowance extended past the sidewalk to a patch of grass between the sidewalk and the defendant's home, even though by all appearances the grass appeared to be part of private property.

Chapter 743-41(B) of the *Toronto Municipal Code* provides that occupiers of buildings used for commercial purposes must keep the land between the building and the public sidewalk in a reasonable state of repair, if it is used by the public as a sidewalk or walkway. However, this by-law alone does not create a common law duty of care to third parties on the part of the adjacent occupier to maintain an area within the municipal road allowance (*Janssen v. William and Markle Jewellers Ltd.*; *Bongiardina v. Vaughan (City)*).

There is no common law duty of care on the owner of a property adjacent to municipal property to clear snow and ice from the municipal property. However, there are two exceptions to this general principle. First, a property owner may be deemed in law to be an occupier of adjacent public property if the owner assumes control of that property. The second exception to the general principle that a property owner is responsible only for his or her property is that the duty of care on the owner extends to ensuring that conditions or activities on his or her property do not flow off the property and cause injury to persons nearby. (*MacKay v. Starbucks Corporation*; *Bongiardina v. Vaughan (City)*; *Bogoroch v. Toronto (City)*)

In *Mark v. Bhangari*, the plaintiff was riding his bike on a municipal sidewalk and then moved off the sidewalk onto a strip of grass that ran between the sidewalk and the defendants' house to pass a pedestrian. While on the grass, he struck a metal stump in the lawn which caused him to fall off his bike and sustain an injury to his wrist. The defendants denied that they was the occupiers of the patch of grass or that they were responsible for the area where the plaintiff fell. A survey of the area confirmed that the stump was on property owned by the City of Toronto. Justice Wilson found that the defendants did not have the requisite control over the area to render them occupiers, even though they maintained the grass and had mistakenly assumed throughout the period of their ownership that the area was part of their property.

Law

There is no uniform rule of law that defines where the municipal road allowance ends and private property begins. The boundary line between municipal and private property in a given case is defined by property records and expert surveyors. See, for example, *Mark v. Bhangari*, 2010 ONSC 4011 (CanLII), where the municipal road allowance extended past the sidewalk to a patch

of grass between the sidewalk and the defendant's home, even though by all appearances the grass appeared to be part of private property.

Chapter 743-41(B) of the *Toronto Municipal Code* provides that occupiers of buildings used for commercial purposes must keep the land between the building and the public sidewalk in a reasonable state of repair, if it is a travelled area:

> § 743-41. Clearing sidewalks and walkways.
>
> ...
>
> B. Every owner or occupier of land upon which there is located a building that is used, or intended to be used, for institutional or commercial purposes shall keep in a state of good repair any portion of the land lying between the building and the street line that is used by the public as a sidewalk or walkway.
>
> C. Where the owner or occupier of land fails to undertake the work required by this section, the General Manager may undertake it and clear, restore or repair any sidewalk or walkway and recover the costs from the owner or occupier pursuant to Article VIII.

However, this by-law alone does not create a common law duty of care to third parties on the part of the adjacent occupier to maintain an area within the municipal road allowance. In *Janssen v. William and Markle Jewellers Ltd.*, 2019 ONSC 425 (CanLII), the plaintiff argued that a retail store with frontage along a municipal sidewalk was an occupier of the sidewalk within the meaning of the *Occupiers' Liability Act* because a municipal by-law required the store to clear ice and snow from the sidewalk. Justice Mitchell of the Ontario Superior Court of Justice rejected this argument, stating:

> [28] The municipal bylaw requiring the defendant to clear ice and snow from the sidewalk adjacent to its store front does not create a common law duty of care owed to the plaintiff. In *Bongiardina v. York (Regional Municipality)* [2000 CarswellOnt 2622 (Ont. C.A.)], a decision of the Ontario Court of Appeal addressing the effect of a municipal by-law on a homeowner's obligation to clear

> ice and snow from municipal sidewalks, it was noted: "the snow and ice accumulating on public sidewalks and the potholes on the street in front of the house are the legal responsibility of the municipality, not the adjacent property owner".

However, a private business or individual can be held to be the occupier of an area within the municipal road allowance in certain circumstances. The Ontario Court of Appeal most recently set out the situations in which an adjacent occupier will be held to be an occupier of a municipal sidewalk in *MacKay v. Starbucks Corporation*, 2017 ONCA 350 (CanLII) ("*MacKay*"). The plaintiff had slipped on an ice-covered municipal sidewalk at the entrance to an outdoor patio in front of a Starbucks. The trial judge held that Starbucks was an occupier of that part of the sidewalk and therefore owed the plaintiff a duty of care. Starbucks appealed the finding that Starbucks was an occupier of the sidewalk. The Court of Appeal set out the test for determining whether an occupier of adjacent premises becomes an occupier of the sidewalk:

> [12] Section 3 of the Act prescribes the duty of care that is owed by an occupier of premises to persons entering onto the premises to see that they are reasonably safe:
>
> 3. (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.
>
> [13] "Occupier" is defined inclusively in s. 1 as follows:
>
> "occupier" includes,
>
> (a) a person who is in physical possession of premises, or
>
> (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,
>
> despite the fact that there is more than one occupier of the same premises.
>
> [14] As the definition makes clear, there can be more than one occupier of the same

premises. This includes municipal sidewalks: *Bongiardina v. York (Regional Municipality)* (2000), 2000 CanLII 5408 (ON CA), 49 O.R. (3d) 641 (C.A.), at para. 20.

[15] Because the municipality owns the sidewalk, it has the primary responsibility for its condition and owes a duty of care to persons who use the sidewalk. The municipality is not, however, liable for personal injuries caused by snow or ice on a sidewalk except in cases of gross negligence: *Municipal Act, S.O. 2001*, c. 25, s. 44(9). This gross negligence standard takes account of the fact that it takes time for the municipality to clear every sidewalk in a city following a snowfall or other inclement weather.

[16] Although occupiers of both residential and commercial properties are often subject to municipal by-laws that obligate them to clear the ice and snow on public sidewalks that surround their property, that obligation is not sufficient to make them occupiers of the sidewalk within the meaning of the Act: *Bongiardina*, at para. 29; *Slumski v. Mutual Life Assurance Co. of Canada*, [1994] O.J. No. 301 (Div. Ct.), at para. 5.

[17] In order to be an occupier of the sidewalk within the meaning of the Act, the occupier of the adjacent premises must have taken steps to come within clause (a) or (b) of the definition, by sharing sufficient possession or control with the municipality. That is what occurred in two often-referred to cases, *Bogoroch v. Toronto (City)*, [1991] O.J. No. 1032 (C.J. (Gen. Div.)) and *Moody v. Toronto (City)* (1996), 1996 CanLII 8229 (ON SC), 31 O.R. (3d) 53 (C.J. (Gen. Div.)).

[18] The facts in *Bogoroch* bear a number of similarities to this case. The plaintiff slipped and fell on an ice patch on the sidewalk in front of the defendant's Kitchen Table store on Spadina Road, and suffered a broken ankle. The City of Toronto had issued a permit to Kitchen Table to use a portion of the sidewalk in front of the store, constituting about 25 percent of the sidewalk, to sell and display its goods. The trial judge first found that Kitchen Table was in physical possession of the portion of the sidewalk covered by the permit. However, that was not where the

plaintiff fell. He fell on the sidewalk in front of the goods on display.

[19] On the issue whether Kitchen Table was an occupier of that area, the trial judge accepted the plaintiff's submission that Kitchen Table intended to and did use the entire sidewalk, not just the portion granted by the permit, to sell and display its goods throughout the year, and that the rest of the sidewalk "became virtually an aisle of the store … from which both the general public and its customers could view and buy its goods." He found that through its policy of aggressive marketing, the defendant used the entire sidewalk to further its commercial objectives, and was therefore an occupier of the entire sidewalk in front of its store, within the meaning of what is now clause (a) of the definition.

[20] *Moody* also involved a slip and fall on a sidewalk. The accident occurred outside the Rogers Centre (then called the Skydome) at 10:15 p.m. when the plaintiff was leaving a Blue Jays game. The plaintiff fell on part of the road allowance for Blue Jays Way owned by the City of Toronto. The plaintiff tripped over the raised edge of a concrete slab. The plaintiff did not see the protruding concrete edge because he was walking in a large crowd at the time and had to keep his head up.

[21] The plaintiff sued both the City and the Skydome. The Skydome moved for summary judgment on the basis that it was not an occupier within the meaning of the Act. The motion judge dismissed the motion. He found that the evidence could support a finding of control by the Skydome over the patrons using the walkway, and thus could support a finding that the Skydome was an occupier of the premises within the meaning of clause (b) of the definition.

[22] The evidence showed that: i) the walkway was used almost exclusively by Skydome patrons; ii) a significant number of Skydome patrons had no alternative but to use the walkway; and iii) the number of patrons using the sidewalk before and after each game created a crush of activity that made it impossible for a patron to watch for hazards on the walkway.

The Court affirmed the trial judge's decision and dismissed the appeal.

The Court also addressed the argument that an adjacent occupier owes a common law duty of care to maintain the sidewalk even if not an occupier of municipal property, explaining the common law duties as follows:

> [43] However, where a person is found not to be an occupier of the sidewalk adjacent to the person's premises, were there other common law duties of care owed by an adjacent property owner to persons on the adjacent sidewalk that existed before the enactment of the Act, and if so, have those duties of care been abolished?
>
> [44] It appears to me that the question has already been answered, at least in part, by this court in *Bongiardina*. There the court identified three possible duties that an owner of premises adjacent to a municipal sidewalk could owe to someone injured on that sidewalk. The first was a common law duty of care. The court said that there is no common law duty on an owner or occupier of premises to keep the adjacent sidewalk clear of ice and snow. Second was the statutory duty: there will be a statutory duty of care if the adjacent property owner or tenant is an occupier of the sidewalk within the meaning of the Act. The third duty the court identified was the common law duty that could be owed by an owner or tenant of adjacent premises to ensure that conditions or activities on his or her property do not flow off it and cause injury to persons, i.e. a cause of action in nuisance or negligence in failing to prevent a nuisance.
>
> [45] Whether there may be any other common law duties on adjacent landowners who are not occupiers, such as a duty to warn in appropriate circumstances, will have to be determined on a case-by-case basis. As Lewis N. Klar explains in *Tort Law*, 5th ed. (Toronto: Carswell, 2012) at p. 627, fn. 118: "even though the defendant might not have been an occupier of the property in question, the defendant still owes a common law duty of care with respect to unreasonable risks created with regard to that property" citing, as an example, *Lytle v. Toronto (City)* (2004), 2 M.P.L.R. (4th) 58 (S.C.), aff'd (2006) 28 M.P.L.R. (4th) 162 (C.A.).

In *Bongiardina v. Vaughan (City)*, 2000 CanLII 5408 (ON CA) ("*Bongiardina*"), the Ontario Court of Appeal explained the "three possible duties" referred to in *MacKay* as, first, the default conclusion that adjacent property owners owe no duty to clear snow and ice from municipal sidewalks, with two exceptions:

> [19] The question then becomes: is there a common law duty on the owner of the property to clear snow and ice from public sidewalks adjacent to the property? In my view, the answer to this question must be "No". Although the "neighbour" principle from *Donoghue v. Stevenson*, [1932] A.C. 562, 101 L.J.P.C. 119 (H.L.), has been expanded in recent years to cover a myriad of new relationships, it would stretch it too far if it was applied in the circumstances of this case. A homeowner has a duty to ensure that his or her own property is maintained in a reasonable condition so that persons entering the property are not injured. If the homeowner complies with this duty, he or she should be free from liability for injuries arising from failure to maintain municipally owned streets and sidewalks. The snow and ice accumulating on public sidewalks and the potholes on the street in front of the house are the legal responsibility of the municipality, not the adjacent property owner.
>
> [20] There are two exceptions to this general principle. First, a property owner may be deemed in law to be an occupier of adjacent public property if the owner assumes control of that property. Thus, in *Bogoroch v. Toronto (City)*, [1991] O.J. No. 1032 (Gen. Div.), the court held that a store owner who used the adjacent sidewalk to display its wares on a continuing basis was an occupier of the sidewalk and subject to the duties imposed by the *Occupiers' Liability Act*. Similarly, in *Moody v. Toronto (City)* (1996), 1996 CanLII 8229 (ON SC), 31 O.R. (3d) 53 (Gen. Div.), the court held, on a motion for summary judgment, that the owners of the Skydome in Toronto might be an occupier of the public walkways adjacent to the stadium because of the "special circumstances" relating to those walkways, including the almost exclusive use of the walkway by Skydome patrons and the lack of alternatives to the walkways.
>
> [21] The second exception to the general principle that a property owner is

> responsible only for his or her property is that the duty of care on the owner extends to ensuring that conditions or activities on his or her property do not flow off the property and cause injury to persons nearby. An example of a case in this category would be *Brazzoni v. Timmins (City)*, [1992] O.J. No. 254 (C.A.), where the court held both the City of Timmins and the Toronto-Dominion Bank liable for injuries suffered by a person who fell on snow and ice on a public sidewalk near the bank. Referring to the bank's liability, the court said, at p. 2:
>
> . . . the trial judge found that water flowed from the respondent's property across the sidewalk at the time the plaintiff fell. By allowing the water from melting snow, on the roof of its building and from its parking lot, to accumulate on its property and to run across the sidewalk which was covered with snow and ice, the respondent, in our opinion, created a dangerous condition that it knew or ought to have known could cause injury to pedestrians using the sidewalk. Regardless of whether liability is based on nuisance or negligence, the respondent, in our opinion, is liable.
>
> See also *Taylor v. Robinson*, 1933 CanLII 138 (ON CA), [1933] O.R. 535, [1933] 3 D.L.R. 73 (C.A.).

In *Campana v The City of Mississauga*, 2016 ONSC 3421 (CanLII), the plaintiff fell in a hole on a grassy boulevard, injuring her leg. She sued both the municipality and the adjacent condominium corporation. Both defendants brought summary judgment motions seeking dismissal of the action against them. The condo corporation argued that the fall occurred on the municipal road allowance and that there was no evidence that the condo was an occupier of the premises. The municipality did not dispute that the hole was within the municipal road allowance, but disputed that it was in a state of disrepair. Justice Fragomeni refused to dismiss the claim against either defendant and in doing so, applied *Bongiardina* even though the fall did not occur on a sidewalk and framed the issue as whether the condo corporation could be held liable for incidents occurring on municipal property, generally:

> [24] The Court of Appeal in *Bongiardina* carved out two exceptions to the rule that adjacent property owners cannot be held liable for incidents occurring on municipal property. The two exceptions are illustrated in *Bogoroch v. Toronto (City)*, [1991]

O.J. No. 1032 (Ont. Gen. Div.), and *Brazzoni v. Timmins (City)*, [1992] O.J. No. 254 (Ont. C.A.).

In *Mark v. Bhangari*, 2010 ONSC 4011 (CanLII), the plaintiff was riding his bike on a municipal sidewalk and then moved off the sidewalk onto a strip of grass that ran between the sidewalk and the defendants' house to pass a pedestrian. While on the grass, he struck a metal stump in the lawn which caused him to fall off his bike and sustain an injury to his wrist. The defendants denied that they was the occupiers of the patch of grass or that they were responsible for the area where the plaintiff fell. A survey of the area confirmed that the stump was on property owned by the City of Toronto. Justice Wilson found that the defendants did not have the requisite control over the area to render them occupiers, even though they maintained the grass and had mistakenly assumed throughout the period of their ownership that the area was part of their property:

> [14] The case law in Ontario is clear that adjacent property owners will not be held liable for accidents which occur on municipal property unless they fall under one of the two exceptions that have been identified by the courts: if the owner had control over the property at the time of the incident (the "*Bogoroch*" exception); or if the owner of the property permitted a condition on his or her property to flow onto the land owned by the municipality and in so doing, created a danger (the "*Brazzoni*" exception): *Bongiardina v. York Regional Municipality*, 2000 CanLII 5408 (ON CA), [2000] O.J. No. 2751 (C.A.).
>
> [15] There are numerous cases in which the court undertakes an analysis to decide if a particular case falls under one of the exceptions. The solicitor for the Plaintiff argues that this case is similar to the *Bogoroch* exception as there was no delineation which would be obvious to the public between the Defendants' property and that belonging to the City. The grassy area where the Plaintiff fell looked as if it belonged to the Defendants and certainly, Bhangari had complete and exclusive use of that area and treated it as an extension of his home. I do not accept this proposition.
>
> [16] In imposing liability in *Bogoroch*, *supra*, the Court considered the fact that the

store had secured a permit from the City which conferred upon it the right to use part of the sidewalk as an extension of its store. Because the store was in control of the sidewalk where the pedestrian fell, the Court found that the store was an occupier of that part of the sidewalk and could be found liable under the *Occupier's Liability Act* although the place where the Plaintiff fell was owned by the City.

[17] In the record before me, there is no evidence that Bhangari was controlling the grassy area where Mark fell. The fact that he mowed the grass because he was of the mistaken belief that the grassy area was his property is of no consequence, in my opinion. He was not free to deal with that area as he wished.

[18] In the case of *Graham v. 7 Eleven Canada Inc.*, [2003] O.J. No. 544, Justice Sachs considered whether the owner of property next to a municipal sidewalk could be found an "occupier" under the Act. She noted that "absent special circumstances, the owner of land adjacent to a municipal sidewalk is not an occupier of the sidewalk for the purposes of the *Occupier's Liability Act*." In rejecting the argument that "special circumstances" existed which ought to impose liability on the property owner, Justice Sachs stated that "the fact that Monk Realty [the owner of the adjacent property] cleared the snow and ice from the sidewalk also does not render them liable at common law." I agree with this analysis and the fact that Bhangari mowed the grassy area where the Plaintiff fell is not evidence to support the proposition that he "controlled" the grassy area, as envisaged in the *Bogoroch* exception. There is no evidence before me that Bhangari had "exclusive" control of the municipal road allowance for many years as submitted by the solicitor for the Plaintiff. Rather, the evidence is that he owned the house next to the grassy area and that he mowed the grass because he believed it was part of his property.

[19] I agree with the submission of counsel for the moving parties that if on the facts of *Graham*, *supra*, where a store owner is not found to be an occupier of the municipal property located right outside its doors which his customers must use to enter and exit the store, then on the facts of the case at hand, Bhangari cannot be found to be an "occupier" of the grassy area owned by the Municipality which can

be used by any member of the public who are not entering or exiting his house.

Justice Wilson also emphasized that the type of municipal property in issue, whether a sidewalk or boulevard, was inconsequential and that the *Bongiardina* anaylsis applies to all types of abutting municipal property:

> [22] Counsel for the Plaintiff argues that there are no cases dealing with the same facts as the case before me as the other cases all deal with falls that occurred on municipally owned sidewalks. Thus, it is submitted, since it has not been decided, it constitutes a novel point of law. I do not agree. The law, in my view, has been settled in Ontario since at least 2000 and probably as early as 1994 [*Slumski v. Mutual Life Assurance Co. of Canada* (1994), O.J. No. 301 (Div.Ct.)] that the owner of property adjacent to a public sidewalk is not an "occupier" of the premises within the meaning of the *Occupier's Liability Act* and is not liable to others who use the area absent "special circumstances". There have been numerous cases which have considered what constitutes special circumstances. Each case must be scrutinized based on its facts. Simply because the case before me involves a fact situation that is arguably different than those that have been considered by the courts up to the present time does not mean that this case involves a novel point of law. The issue that the Court must decide is whether on the facts of a particular case a defendant has control, possession or responsibility over municipal property as articulated in *Bongiardina*, *supra*. The fact of whether the municipal property was a sidewalk, a grassy area, a road, a trail or any other place where a Plaintiff alleges he or she suffered injury is not determinative in the analysis. I note that many of the cases cited to me by counsel were decided on different fact situations, pursuant to a motion for Summary Judgment.

Authorities

Toronto Municipal Code, Chapter 743, Streets and Sidewalks, Use of

Janssen v. William and Markle Jewellers Ltd., 2019 ONSC 425 (CanLII)

MacKay v. Starbucks Corporation, 2017 ONCA 350 (CanLII)

Campana v The City of Mississauga, 2016 ONSC 3421 (CanLII)

Bogoroch v. Toronto (City), 1991 CarswellOnt 1554, [1991] O.J. No. 1032

Moody v. Toronto (City), 1996 CanLII 8229 (ON SC)

Bongiardina v. Vaughan (City), 2000 CanLII 5408 (ON CA)

Mark v. Bhangari, 2010 ONSC 4011 (CanLII)