

CITATION: Frank v. Central Elgin (Municipality), 2010 ONCA 574
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COURT OF APPEAL FOR ONTARIO

Laskin, Feldman and Gillese JJ.A.

BETWEEN

Natalie Frank, by her litigation guardian, Christine Harris, Renee Martin, Rolston Holmes, Christine Harris and Simone Frank, by her litigation guardian, Christine Harris

Plaintiffs (Appellants/Respondents by way of cross-appeal)

and

The Corporation of the Municipality of Central Elgin, and The Corporation of The County of Elgin

Defendants (Respondent/Appellant by way of cross-appeal)

Vicki J. Edgar and Lucy Lee for the appellants/respondents by way of cross-appeal

Terry R. Shillington and Jonathan de Vries, for the respondent/appellant by way of cross-appeal

Heard: January 15, 2010

On appeal and cross-appeal from the judgment of Justice Peter B. Hockin of the Superior Court of Justice, dated January 19, 2009, with reasons reported at 55 M.P.L.R. (4th) 149.

Laskin J.A.:

I. OVERVIEW

(1) Introduction

[1] On a December morning in 2001, Natalie Frank was driving to work in the southbound lane of Highbury Avenue in the Municipality of Central Elgin. She hit an icy patch on the road, lost control of her car and collided with an oncoming truck. Sadly, she suffered a serious head injury.

[2] Ms. Frank sued Central Elgin for negligence for failing to maintain Highbury Avenue in a reasonable state of repair. After a four-day trial Hockin J. dismissed the action. He found that Central Elgin had adequately salted Highbury Avenue shortly before the accident occurred, but that light blowing snow had delayed the salt's effectiveness. He concluded that Central Elgin had met the applicable standard of care because it had done all that could reasonably be required of it.

[3] On appeal, Ms. Frank's overall position is that the trial judge erred in finding that Central Elgin had met the standard of care. In support of that position, she makes two main submissions on her appeal. First, she submits that the trial judge erred in holding that the southbound lane of Highbury Avenue was adequately salted. Second, she submits that the road conditions on the southbound lane of Highbury Avenue the morning of the accident were highly dangerous, and required Central Elgin to do more than it did.

[4] For the reasons that follow, I would dismiss the appeal. The trial judge's findings of fact and his conclusion that Central Elgin met the standard of care required of it are well supported in the record. Appellate intervention is not justified.

[5] Before dealing with Ms. Frank's two submissions, I will discuss the duty of care and standard of care imposed on a municipality, the steps Central Elgin took to meet the standard of care, and the trial judge's findings.

(2) The statutory duty and standard of care imposed on a municipality

[6] In 2001, Central Elgin's duty of repair and the standard of care required of it were codified in s. 284(1) of the *Municipal Act*, R.S.O. 1990, c. M. 45, since repealed:

284(1) The council of the corporation that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in light of all the circumstances, including the character and location of the highway or bridge.

(1.1) In case of default, the corporation, subject to the *Negligence Act*, is liable for all damages any person sustains because of the default.

...

(1.3) The corporation is not liable under subsection (1) or (1.1) for failing to keep a highway or bridge in a reasonable state of repair if it took reasonable steps to prevent the default from arising.

(a) Duty of care

[7] Judicial interpretation of s. 284 and similar statutory provisions has held that the act does not impose on a municipality a duty to repair every adverse road condition. In the winter, for example, a municipality's failure to salt or sand its roads does not automatically expose it to civil liability. The driving public cannot expect municipalities to keep the roads free and clear of snow and ice at all times during the winter. Courts have recognized that although motorists ought to be kept reasonably safe during winter driving conditions, municipalities ought not to be turned into insurers of the safety of the driving public by imposing overly onerous maintenance obligations. See *Brown v. British Columbia*, [1994] 1 S.C.R. 420 at 439.

[8] What winter conditions do impose a duty of repair on municipalities? In *R. v. Côté*, [1976] 1 S.C.R. 595 at 603, the Supreme Court of Canada confined a provincial or municipal authority's duty or repair narrowly to road conditions that created "a highly dangerous situation at a certain location in the highway, which otherwise, to persons using the same, was quite passable and usable for traffic."

[9] For some years after *Côté*, this court held that the narrow test in *Côté* was the sole test for determining when a municipality had a duty to repair winter road conditions. For example, in *Simms v. Metropolitan Toronto (Municipality)* (1978), 28 O.R. (2d) 606, this court rejected the argument that a municipality may have a duty to salt and sand the roads in response to generalized icy conditions. In this court's view that argument stated the

municipality's duty too broadly. Instead, relying on *Coté*, this court confined the municipality's duty to a "high special dangerous situation at a certain location in the highway."

[10] Gradually, however, courts began to recognize that a municipality may also have a duty to repair widespread or general ice and snow conditions within its jurisdiction. The general negligence standard applies. A municipality's duty of repair arises not just in a "highly special dangerous situation at a certain location in the highway" but in any situation where road conditions create an unreasonable risk of harm to users of the highway. The former is simply a subset of the latter. See, for example, *Gould v. County of Perth* (1983), 42 O.R. (2d) 548 (H.C.J.), aff'd (1984), 48 O.R. (2d) 120 (C.A.); *Thornhill (Litigation Guardian of) v. Shadid* (2008), 289 D.L.R. (4th) 396 (Ont. S.C.); *Roberts v. Morana* (1997), 34 O.R. (3d) 647 (Ont. Ct. (Gen. Div.)), aff'd (2000), 49 O.R. (3d) 157 (C.A.).

[11] In some civil actions against a municipality, there is a serious issue whether the road conditions complained of triggered the municipality's duty of repair, that is, whether the road conditions gave rise to an unreasonable risk of harm. That is not the case here. As I will discuss, the trial judge accepted (without deciding) that Central Elgin had a duty the morning of the accident to keep Highbury Avenue in a reasonable state of repair. The only issue at trial was whether it fulfilled its duty, that is, whether it met the standard of care required of it.

(b) Standard of care

[12] Where winter road conditions give rise to an unreasonable risk of harm, a municipality must show that it took reasonable steps to eliminate or reduce the danger within a reasonable time after it became aware of the danger. Consistent with the statute, the standard is reasonableness, not perfection. If a municipality fails to meet this reasonableness standard, then it may be held liable for breach of its duty of repair.

[13] Of course, the reasonableness of a municipality's response to potentially dangerous road conditions must be measured against the nature of the risk. Highly dangerous situations may require the municipality to do more than it would be required to do in other situations giving rise to an unreasonable risk of harm. The reasonableness of Central Elgin's response to the icy conditions on the southbound lane of Highbury Avenue the morning the accident occurred lies at the heart of this appeal.

(3) Weather and road conditions in Central Elgin the morning of the accident (December 21, 2001)

[14] December 21, 2001 was a cold morning in southwestern Ontario, with temperatures about 3 to 4 degrees below zero. It was also windy, and the wind was blowing light snow across the roads. Many of the roads were clear, though wet, but some, including Highbury Avenue, had patches of light snow across both lanes. It was a typical winter day in southern Canada.

(4) The steps taken by Central Elgin

[15] Early in the morning of December 21, 2001, Joe Livingston, Central Elgin's operations superintendent at the time, began to inspect Central Elgin's roads. At about 5:22 a.m. he patrolled Highbury Avenue. He observed that some stretches of Highbury Avenue had light snow in both the northbound and southbound lanes. He recognized that this snow could turn to ice if the morning traffic melted the snow and it later froze. Having recognized this danger, at 5:30 a.m. Mr. Livingston ordered three salt trucks to salt Highbury Avenue and any other roads in the north part of Central Elgin.

[16] Central Elgin's salt trucks had specific routes assigned to them. The route assigned to truck 40 included Highbury Avenue and stipulated that Highbury Avenue was a priority road to be salted first.

[17] Cliff Carrothers, an operator with 16 years' experience, was assigned to truck 40 that morning. He left Central Elgin's operations yard in truck 40 at 6:15 a.m. His truck, like all of Central Elgin's salt trucks, had standard salting equipment used by municipalities across Ontario.

[18] Mr. Carrothers' truck was calibrated to drop salt at the rate of 130 kilograms per kilometre of highway. This rate was the standard rate used by municipalities in Ontario in winter. Once dropped on the road, the salt forms a brine solution, which lowers the freezing point of ice that it comes into contact with. In winter storm conditions, the

practice was to drop salt at the rate of 160 kilograms per kilometre. But there was no winter storm in Central Elgin that morning.

[19] Mr. Carrothers drove immediately to Highbury Avenue. He testified that he applied salt to the northbound lane of Highbury Avenue, turned around at the northern boundary of Central Elgin's jurisdiction, then salted the southbound lane. To ensure that salt was evenly distributed on the road Mr. Carrothers drove the truck at 50 kilometres per hour.

[20] Mr. Carrothers testified that he completed salting the northbound and southbound lanes of Highbury Avenue between 6:30 and 7:00 a.m. He then went to salt other roads on his route. He testified that as he was salting the southbound lane of Highbury Avenue, he noticed snow drifting onto the road. Because of this observation, Mr. Carrothers said that after completing his route he had intended to return to Highbury Avenue to check on the condition of the road. Before finishing his route, however, he was told that an accident had occurred on Highbury Avenue.

(5) The accident

[21] The accident occurred about 7:50 a.m. Ms. Frank was driving in the southbound lane of Highbury Avenue. It was rush hour and the traffic was heavy. She was driving at or below the speed limit. When her car hit the icy patch, she veered into the northbound

lane, resulting in the collision. Central Elgin did not allege that she was driving negligently.

(6) The trial and the findings of the trial judge

[22] Ms. Frank's principal argument at trial was that Mr. Carrothers did not salt the southbound lane of Highbury Avenue. She pointed out that when the accident occurred, the northbound lane of Highbury Avenue was clear but the southbound lane was slushy with icy patches. Alternatively, Ms. Frank argued that the southbound lane had been inadequately salted. She therefore submitted that Central Elgin had not taken reasonable steps to keep the southbound lane of Highbury Avenue in a reasonable state of repair the morning of December 21, 2001.

[23] As I have said, the trial judge accepted, without deciding, that Central Elgin had a duty of repair. In effect, he accepted that the road conditions on Highbury Avenue and on other streets in the north part of the municipality the morning of the accident created an unreasonable risk of harm, requiring Central Elgin to take remedial action. He analyzed the case by assuming, as Ms. Frank had contended, that Central Elgin had an obligation to salt Highbury Avenue. He, therefore, had only to decide the factual questions whether Central Elgin had salted the southbound lane of Highbury Avenue, and if so whether the salting was "timely and reasonably executed." He set out his task at para. 28 of his reasons:

I am not required in this case to decide whether, in law, there was an obligation on Central Elgin to salt Highbury Avenue. In the weather conditions which were present the morning of December 21, 2001, Central Elgin's patrol man called for a salt truck. This was a matter of good practice for the municipality; it was obliged to do so under its road standards by-law and the Ontario Good Roads Association standard; and it was the reasonable thing to do for a high volume road which connected London and St. Thomas when there was a foreseeable risk of ice. The only issue for me is an issue of fact: was the southbound lane of Highbury Avenue salted, and if it was, whether the salting was timely and reasonably executed.

[24] After reviewing the evidence the trial judge concluded that Central Elgin was not negligent, that the steps it had taken were reasonable and executed properly – in short, Central Elgin had done “all that should reasonably be required of it” (para. 33). In reaching this conclusion, the trial judge made three important findings of fact, each of which was well supported in the record, and grounded in the trial judge's credibility findings.

[25] First, he found that Mr. Carrothers had salted both the northbound and the southbound lane of Highbury Avenue. This finding was fully justified. Mr. Carrothers testified that he salted both lanes. On cross-examination, Ms. Frank's counsel did not put to him that he did not salt the southbound lane or that he salted the southbound lane improperly. Indeed, he was not cross-examined on the route that he took or on his application of salt. Mr. Carrothers' evidence stood unchallenged because Ms. Frank called no contradictory testimony. (Jeff Udall, Ms. Frank's expert, initially gave the opinion that the southbound lane of Highbury Avenue was not salted. His opinion was

entirely undermined by his misunderstanding of how salt trucks operated and his mistaken assumption that little or no wind was blowing at the time of the accident).

[26] Moreover, Michael Hare, the only other witness who testified about the salting of the southbound lane of Highbury Avenue, corroborated the evidence of Mr. Carrothers. Mr. Hare was Central Elgin's operations superintendent at the time of trial. He arrived at the scene of the accident shortly after 8:00 a.m. He said that he looked at the southbound lane. He testified that he "felt that the road had been salted." He also testified that by the time he left the accident scene the southbound lane of Highbury Avenue was clear of ice: it was "pretty well bare."

[27] The trial judge's finding that the southbound lane of Highbury Avenue was salted effectively disposed of Ms. Frank's main argument.

[28] The trial judge's second finding disposed of Ms. Frank's alternative argument, that the southbound lane of Highbury Avenue was inadequately salted. The trial judge found that "the concentration of salt was the correct concentration." This finding, too, was fully justified on the record before the trial judge.

[29] Mr. Carrothers testified that he applied salt at the rate of 130 kilograms per kilometre and that he drove at 50 kilometres per hour so that the salt would be distributed evenly. The rate at which Mr. Carrothers deposited the salt on Highbury Avenue followed the standard practice in Central Elgin and other municipalities across Ontario

for these road conditions. This rate also complied with the standard mandated by the Ontario Good Roads Association and Central Elgin's own winter maintenance by-law. No evidence was led at trial to suggest that this standard was itself negligent.

[30] Mr. Carrothers' testimony that he salted Highbury Avenue at the standard rate followed across Ontario is supported by Central Elgin's salting records for the day. According to those records, truck 40, which Mr. Carrothers drove, had 23,800 pounds of salt when he started out and 7,800 pounds left when he completed his route. Therefore, he applied 16,000 pounds of salt. The evidence disclosed that his route was between 40 and 42.5 kilometres. A salt deposit of 130 kilogram per kilometre would yield a total deposit for the route of between 5,200 and 5,525 kilograms of salt, or between 11,440 and 12,155 pounds of salt (1 kilogram = 2.2 pounds). Mr. Carrothers, then, applied more salt than the standard rate required him to. Indeed, Mr. Hare testified that he would have expected Mr. Carrothers to have used only half his load – between 12,000 and 13,000 pounds of salt. He used much more than that.

[31] Third, the trial judge found that the salt "was applied in time to work but its effectiveness was diminished greatly by the deposit of snow over the brine solution from the drifting condition which existed at the time" (para. 32). This finding explained the evidence that the northbound lane of Highbury Avenue was clear, while the southbound lane had icy patches.

[32] This finding drew support from the two experts called at trial, Jeff Udall for Ms. Frank and Brian Malone for Central Elgin. Mr. Malone explained that usually a brine solution created by salt deposited on the road will have its full effect within 30 minutes. However, even a light amount of drifting or blowing snow can produce a layer of snow or ice over the brine solution and delay the breaking up of the ice. Mr. Udall essentially agreed with Mr. Malone's explanation.

[33] Mr. Malone's explanation was supported by the eye witness evidence of Mr. Hare, who, as I said earlier, testified that by the time he left the scene of the accident the southbound lane of Highbury Avenue was pretty well bare. Indeed, the evidence at trial was that not all of the southbound lane of Highbury Avenue was a sheet of ice when the accident occurred. Some parts of it were clear. In other parts, the salt was taking a little longer to work because of the light blowing snow.

[34] The accident apparently occurred at one of those spots on the road where the light blowing snow created icy patches and delayed the salt's effectiveness. However, on the basis of these three findings, the trial judge concluded that Central Elgin was not negligent.

II. ISSUES

(1) Did the trial judge err in holding that the southbound lane of Highbury Avenue was adequately salted?

[35] On appeal, Ms. Frank conceded that the trial judge had correctly stated the duty and standard of care imposed on Central Elgin. She submitted, however, that he had applied the standard of care incorrectly. She argued that the trial judge's finding that the southbound lane of Highbury Avenue was adequately salted the morning of the accident was an unreasonable one.

[36] Ms. Frank's argument runs up against the trial judge's key findings of fact, which I discussed above: Mr. Carrothers salted the southbound lane of Highbury Avenue and applied the correct amount of salt. These findings were made on largely uncontradicted evidence, and on the trial judge's assessment of the credibility of the witnesses. There is no basis in the record to revisit these findings on appeal and therefore, in my judgment, no basis to set aside the trial judge's decision on the basis that his holding was unreasonable.

(2) Did the trial judge err in finding that Central Elgin met the standard of care because he failed to characterize the road conditions on Highbury Avenue as highly dangerous?

[37] The trial judge found that Central Elgin had met its duty of repair: it had done all the morning of the accident that could reasonably be required of it. That finding is entitled to deference from this court. Nonetheless, Ms. Frank submits the trial judge

erred in making this finding because he failed to appreciate that the road conditions in the southbound lane of Highbury Avenue that morning created – in the words of *Coté* – “a highly special dangerous situation.” Had the trial judge characterized the road conditions in that way, Ms. Frank asserts, he would have been bound to find that Central Elgin had not met the standard of care required of it.

[38] In three relatively recent decisions – two of which Ms. Frank referred to – this court held that a municipal or provincial authority had a duty of repair and then imposed liability for failing to meet the standard of care, that is, failing to take reasonable steps to address a “highly special dangerous situation at a certain location” it knew or ought to have known required special attention: see *Montani v. Matthews* (1996), 29 O.R. (3d) 257, leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 395; *Bisoukis v. Brampton (City)* (1999), 46 O.R. (3d) 417, leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 52; *MacMillan v. Ontario (Minister of Transportation and Communications)* (2001), 24 M.V.R. (4th) 15, leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 348.

[39] The trial judge did not characterize the road conditions on Highbury Avenue that morning as giving rise to a “highly special dangerous situation.” And Central Elgin disputes this characterization, maintaining that the road conditions were simply typical of a winter day in southern Ontario.

[40] I do not think it is necessary to decide whether the conditions at least in the southbound lane of Highbury Avenue should have been characterized as giving rise to a

highly special dangerous situation. Even if they should have been so characterized, the trial judge's finding that Central Elgin did all that could reasonably be required of it is well supported in the record. I would defer to this finding.

[41] Deference to the trial judge's finding is justified both because of the steps Central Elgin did take that morning to keep the road conditions on Highbury Avenue in a reasonable state of repair, and because of the contrast between what Central Elgin did and the municipal or provincial authority did (or did not do) in *Coté* and the three cases from this court.

[42] I begin with the steps Central Elgin did take the morning the accident occurred.

The critical steps that justify deference to the trial judge's finding are the following:

- Central Elgin's operations superintendent patrolled and inspected the roads very early in the morning on December 21, 2001;
- He recognized the potential for icy conditions and called out the salt trucks promptly;
- He ordered that Highbury Avenue be salted first because it was a high priority road;
- Mr. Carrothers, the operator assigned to salt Highbury Avenue, salted it first before salting any other roads on his route;
- By 7:00 a.m. he had salted both the northbound and southbound lanes of Highbury Avenue;

- He applied the salt at a rate used by every municipality in Ontario and mandated by the Ontario Good Roads Association;
- He planned to come back to Highbury Avenue to check on its condition after he had salted the other roads on his route.

[43] Unfortunately, the accident intervened because the light blowing snow delayed the salt's effectiveness. A municipality, however, cannot be expected to deal with every contingency. The steps that I have outlined support the trial's judge's finding that Central Elgin met the reasonableness standard of care. Moreover, the contrast between what it did and what was not done in the four cases where the provincial or municipal authority was found liable further support the trial judge's finding.

[44] In *Coté*, the Ontario Department of Highways was found contributorily negligent because it neither inspected nor patrolled the highway where the accident occurred and let a "treacherous, slippery and dangerous" icy condition continue for several hours. Here, very early in the morning Central Elgin patrolled and inspected Highbury Avenue, by 5:30 a.m. ordered that Highbury Avenue be salted, designated Highbury Avenue a high priority road to be salted first, and had both lanes salted by 7:00 a.m.

[45] In *MacMillan*, this court found the Ministry liable because although it knew or ought to have known about the risk of preferential icing on a bridge, it did nothing. The Ministry did not think it had any duty of repair, and therefore neither inspected nor salted

the bridge. The contrast between what the Ministry did not do in that case and what Central Elgin did do in this case is striking.

[46] In *Montani*, an accident occurred on black ice on a bridge one January morning about 11:30 a.m. The Ministry had salted and sanded the bridge at 8:00 a.m. but did no further salting or sanding after that time. A majority of this court held the Ministry liable for failing to salt or sand in the intervening three and a half hours. Here, Mr. Carrothers salted Highbury Avenue by 7:00 a.m. and planned to check on its condition after salting the other roads on his route. The accident occurred within an hour after he had salted, not over three and a half hours later as occurred in the *Montani* case.

[47] Finally, in *Bisoukis*, the plaintiff, while driving home from work on a well traveled road, lost control of her car on black ice and was injured. The city had last inspected the road two days before the accident and last sanded it the day before the accident. This court found that the city had a duty of repair, which it had breached because it failed to inspect or salt the road the day the accident occurred. Here, of course, Central Elgin inspected Highbury Avenue and then salted it less than an hour before the accident took place.

[48] What separates *Coté*, *MacMillan*, *Montani* and *Bisoukis* from this case is that in all four of those cases, on the day of the accident, the authority either took no remedial action or waited hours before taking remedial action; here, on the day of the accident, Central Elgin took remedial action, and did so promptly.

[49] Still, Ms. Frank maintains that “something more was required.” She asserts that Mr. Carrothers should have done a second salting on Highbury Avenue right away or that Central Elgin should have applied more salt because it knew or ought to have known that salting at the standard rate – 130 kilograms per kilometre – would be ineffective. Respectfully, these assertions are contrary to the evidence led at trial and to the trial judge’s finding of fact that the correct amount of salt was applied.

[50] Mr. Carrothers testified that he had to give the salt he did deposit time to work and that he did not immediately do a second salting on Highbury Avenue because he had other roads to salt lest accidents occur on those roads. And, for the road conditions that existed in Central Elgin that morning, the municipality applied salt at the rate used by every other municipality in Ontario and approved by the Ontario Good Roads Association. The higher rate of 160 kilograms per kilometre was reserved for winter storm conditions, but there was no winter storm in Central Elgin that morning. Ms. Frank did not lead any evidence to challenge these rates or to show that salting at a higher rate that morning would have been more effective.

[51] The salt Mr. Carrothers applied on the southbound lane of Highbury Avenue was working to break up the ice. On Mr. Hare’s evidence, without the light blowing snow, the southbound lane likely would have been clear of ice by 7:30 a.m. As best I can tell from the record, the light blowing snow delayed the salt’s effectiveness by about 45 minutes, perhaps as long as an hour. The accident occurred in that 45 to 60 minute

timeframe. The municipality is not an insurer and it is not held to a standard of perfection. Thus, whether road conditions that morning are characterized as creating an unreasonable risk of harm or a “highly special dangerous situation,” I see no basis to disturb the trial judge’s finding that Central Elgin did all that could reasonably be required of it, and therefore was not negligent. I would dismiss the appeal.

[52] Central Elgin is entitled to its costs of the appeal in the amount agreed to by counsel, \$10,000 plus applicable taxes.

III. THE CROSS-APPEAL

[53] Central Elgin cross-appealed asking this court to vary the judgment at trial by setting aside the finding that Mr. Udall was qualified as an expert to give opinion evidence. In the light of my disposition of the appeal, the cross-appeal is unnecessary. Moreover, an appeal lies from a judgment, not from the reasons. The cross-appeal is dismissed without costs.

RELEASED: SEP - 8 2010

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I agree. K. John J.A.

I agree. RB Sillars JA