

Personal Injury

Decision settles law on duty of care for snow, ice removal on municipal sidewalks, lawyers say

By **Ian Burns**

(March 8, 2021, 9:31 AM EST) -- Legal observers are saying the door has been shut across Canada on a residential homeowner's common law liability for snow and ice removal on a municipal sidewalk after the B.C.'s highest court ruled two property owners did not owe a duty of care to a man who slipped and fell outside their home.

The case in *Der v. Zhao* 2021 BCCA 82 concerns Kwok Der, who was seriously injured when he slipped and fell on black ice in a sidewalk adjacent to a property owned by Ang Zhao and Qianqiu Huang. He argued before the Court of Appeal there was a common law duty of a homeowner to clear snow and ice from the sidewalk.

In *Bongiardina v. York (Regional Municipality)* [2000] O.J. No. 2751, the Ontario Court of Appeal held no such duty of care existed for municipal sidewalks. But Justice Bruce Butler, who authored the unanimous decision, noted the B.C. Court of Appeal specifically had never dealt with the issue and no court in Canada had done a proper analysis of whether a duty exists under the *Anns/Cooper* test, as outlined in the *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) and *Cooper v. Hobart* 2001 SCC 79 decisions.

As part of the *Anns/Cooper* analysis, a plaintiff has to show proximity, or a close and direct relationship with the defendant. Justice Butler wrote the risk of harm in the case was foreseeable but Der was unable to establish a sufficient relationship of proximity with Zhao and Huang "and it would not be just or fair to impose a duty of care in these circumstances."

"I would conclude that residential property owners do not owe a general duty of care ... with respect to the removal of snow and ice from sidewalks adjacent to their property," he wrote in his Feb. 25 decision.



Alex Eged, Richards Buell Sutton LLP

Alex Eged of Richards Buell Sutton LLP, who represented Zhao and Huang, said the decision now closes the door across Canada on a residential homeowner's common law liability for snow and ice removal on a municipal sidewalk. But he said the court's focus on the word "owner" could open the door for claims that plaintiffs owe a duty of care.

"But I think that gap is really thin," he said. "Given that the court undertook the *Anns/Cooper* test on this issue, I believe the law is now settled on an owner's duty."

University of Victoria law professor Elizabeth Adjin-Tettey said in its decision the Court of Appeal pointed to a long list of cases that have determined homeowners are not liable for injuries arising from slippery sidewalks adjacent to their properties.

"But the court takes the opportunity to say that they don't believe any of the previous courts had done the full duty of care analysis, and therefore they would take the opportunity to go through that analysis," she said. "The court recognized from the beginning the door was shut, so this decision is securing that locked door, so to speak."

Eged said the decision also adds to the jurisprudence as to when courts should undertake an *Anns/Cooper* analysis.

"This says appellate courts should do the analysis if it hasn't been done at a court of appeal level," he said. "*Bongiardina* came out in 2000 so it didn't employ *Anns/Cooper* — so that is why [Justice Butler] said there is nothing at the appellate level, so he went on and did it."

Counsel for Der did not respond to a request for an interview.

If you have any information, story ideas or news tips for The Lawyer's Daily please contact Ian Burns at Ian.Burns@lexisnexis.ca or call 905-415-5906.

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