SCC File No. 39108

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

CITY OF NELSON

APPELLANT
(RESPONDENT)

AND

TARYN JOY MARCHI

RESPONDENT
(APPELLANT)

FACTUM OF THE RESPONDENT

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. On January 6, 2015, the respondent Taryn Marchi, a 28-year-old registered nurse, suffered serious neuromuscular and vascular injuries to her right leg when she fell on a snowbank that had been created by employees of the appellant City of Nelson ("City") when plowing snow on a downtown road some 30 hours earlier.

2. Ms. Marchi had parked in an angled metered parking stall on Baker Street, the main commercial street in Nelson. After getting out of her car, she found her access to the sidewalk blocked by a snowbank (often referred to as a "windrow").

3. The City's Public Works supervisor, Karen MacDonald, admitted the windrow was a hazard. The City created the windrow when clearing the snow from the parking stalls so that the stalls could be used. In doing so, the City invited the public to park in those metered spots. The snowbank obscured the curb. No safe access to the sidewalk for pedestrians exiting their parked cars was provided.

4. As Ms. Marchi stepped on the snowbank her right foot sank through the snow onto something (likely the obscured curb) that kept her forefoot up, while her heel sunk down. This threw her off balance. The heavy deep snow immobilized her lower leg in a type of "snowcast" while her body fell, causing serious injuries to her knee and lower leg.

5. There were many reasonable options available to the City which would have not created the hazard, or which would have resulted in the hazard being mitigated.

6. Ms. Marchi sued the City for the negligence of its employees in creating and not taking reasonable steps to address the hazard.

7. The City had a formal written policy setting out priorities for plowing, clearing and removing snow from the entire city. The City said that the decisions reflected in that policy were *bona fide* "policy decisions" and as a result it was immune from liability in tort.

8. The respondent's position is that the City's employees made a number of decisions that fell below the expected standard of care of a municipality and that are not required by the terms of the

written policy. In Ms. Marchi's view, those decisions were nothing more than operational decisions made during the implementation of the policy and as such were not immune from tort liability. Any one of the following operational decisions fell below the standard of care expected of a reasonable municipality:

> a) pushing snow from the road and the parking stalls up and over the curb, a process referred to as "windrowing the curb", inviting vehicles to park, but blocking any access to the sidewalk down the entire block;
>
> b) leaving the metered stalls in the 300 block open for parking on January 6, 2015, when they knew the windrow was a hazard, and there was no safe way to access the sidewalk;
>
> c) not clearing the windrow in the 300 block of Baker Street by pushing the snow to be stored in one or two parking stalls;
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> d) hauling away the snowbank blocking access to the sidewalk in the 400 and 500 blocks of Baker Street on the morning of January 6, 2015 instead of clearing the snow by pushing into one or two parking stalls per block, until it could later be hauled away, a much less time-consuming practice, and one done by neighbouring municipalities, and which would have provided ample time to address the windrow in the 300 block;
>
> e) not operating a 24-hour shift for clearing of snow downtown, while informing the public in the City's bulletin that there would be a shift for that purpose during the 2015 snow season, and that parking downtown would be closed overnight to allow for snow clearing, thereby not adhering to the standard they had set and which the public expected;
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> f) the lead hand of the afternoon shift on January 5, 2015 not continuing snow clearing into the night up until 4:00 a.m., an option available to him;
>
> g) the public works supervisor not requiring the afternoon shift to keep working into the night to clear the remaining snowbanks blocking pedestrian access to the sidewalk on Baker Street;
>
> h) not shoveling access points to the sidewalk in front of the angled parking spots on the 300 block.

9. In 2019, this Court in *Kosoian v. Société de transport de Montréal* provided a list of examples of operational decisions that included "the carrying out of public works".[1] The respondent submits that the City's creation of the snowbank hazard and its failure to mitigate the risk while inviting the public towards this hazard, were part of the carrying out of public works and as such are subject to the ordinary laws of negligence.

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[1] *Kosoian v. Société de transport de Montréal*, 2019 SCC 59 ("*Kosoian*") at para. 108.

10. The parties' differing positions on this issue required the trial judge to grapple with the distinction between policy and operational decisions as explained in a series of cases from this Court commencing with *Just v. British Columbia*.[2]

11. Unfortunately, the trial judge did not do so. Instead, he issued reasons for judgment that largely copied the written submissions filed by the City at trial, which submissions amounted to mere assertions that certain actions undertaken by the City were the result of "policy decisions". He did not explain why the actions of the City of which the respondent complained were not operational. In fact, as explained below, it is not clear that the trial judge even decided that the impugned actions of the City were policy decisions within the meaning of *Just*, as his reasons indicate he may only have been summarizing the City's arguments.

12. A trial judge has a duty to apply the law and explain the reasons for his or her decision on the significant points of a case. The trial judge failed to do so, and the Court of Appeal was therefore correct to find that "it was an error on the part of the trial judge to accept the City's submission that all its snow removal decisions were policy decisions without engaging in the analysis called for by *Just*."[3]

13. The Court of Appeal also found that the trial judge had erred in his approach to the issues of standard of care and legal causation.

14. The Court of Appeal was correct on both fronts.

15. With respect to standard of care, the trial judge never properly addressed the reasonableness of the decision to create the hazard and leave it in place for 30 hours. He was given the necessary tools by the parties, as both the appellant and respondent called evidence pertaining to the practice of other municipalities. Instead, the trial judge rested his analysis on the fact that the City had followed its policy. This of course is not the question at the standard of care stage.

16. With respect to legal causation, the trial judge said that the plaintiff was aware of the risks posed by the snowbank and was the "author of her own misfortune".[4] For this reason, the trial judge said, "legal causation" was not established. The respondent submits that this was an error of

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[2] [1989] 2 S.C.R. 1228 ("*Just*").
[3] Court of Appeal Reasons, para. 20, Appellant's Record ("AR"), Vol. I, p. 28.
[4] Trial Reasons, para. 45, AR, Vol. I, p. 20.

law. Legal causation is synonymous with remoteness of damage. That inquiry asks whether the particular injuries suffered by a plaintiff were reasonably foreseeable as a result of the defendant's negligence. In this case, there could be no dispute about that: the respondent suffered physical injuries resulting from crossing a physical barrier to the sidewalk that the City admitted was a hazard.

17. It follows this case has nothing to do with legal causation and the trial judge was wrong to dismiss the action on this basis. Nor can it be said that the respondent assumed the risk of crossing the snowbank. The allegation that there has been a voluntary assumption of risk raises the defence of *volenti non fit injuria* which was neither pled nor argued at trial and whose stringent requirements could never be satisfied on the facts of this case. The trial judge's decision on the assumption of risk is an end run around the requirements of the *volenti* defence.

18. The Court of Appeal's remedy in this case was to order a new trial. On this appeal, the appellant appears to be of the view that this Court can decide all three issues: policy/operational, standard of care and legal causation. The respondent agrees and submits that all three issues should be resolved in her favour with the result that the new trial will be limited to the issue of contributory negligence. Alternatively, the new trial should proceed on the issues that this Court considers ought to be decided by a trial court.

B. Background Facts

19. It began snowing in Nelson on the night of January 4, 2015. It stopped snowing by mid-morning on January 5, 2015.[5]

20. In the early evening of Tuesday, January 6, 2015, the respondent decided to drive downtown to pick up dinner for her and her husband. She parked in an angled metered parking spot on the north side of the 300 block of Baker Street. She needed to access the sidewalk to walk to the restaurant for takeaway.[6]

21. Baker Street is the main commercial street downtown in the City of Nelson.[7]

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[5] Transcript, AR, Part V, p. 28, ll. 7 to 29.
[6] Agreed Statement of Facts, para. 2, AR, Vol. I, p. 51.
[7] Agreed Statement of Facts, para. 3, AR, Vol. I, p. 51.

22. When Taryn Marchi got out of her car, she attempted to access the sidewalk in the normal conventional manner of walking to the front of the angled parking spot. There, she faced a large snowbank blocking access to the sidewalk. It ran the entire length of the 300 block. No openings were shovelled into the snowbank to provide safe access to the sidewalk. The size and breadth of the snowbank surprised her. It was too large to step over; to get to the sidewalk she needed to step onto it. She considered walking behind several vehicles parked in the angled spots to the crosswalk, but rejected this as too dangerous as traffic was heavy, and it was dark. Karen MacDonald, the City's Public Works supervisor, agreed that walking along the road to access the sidewalk was not a safe option.[8]

23. The City has a policy that pertains to snow clearing and snow removal entitled "Street and Sidewalks Snow Clearing and Removal" ("the Policy").[9] Ms. MacDonald testified the purpose of the Policy is to provide a guide for the implementation of winter operations by the City.[10]

24. The City was under budget for snow removal for 2010, 2012, 2013, 2014, 2015 and 2017. The trial judge, in his reasons for judgment, stated in error that they were over budget.[11]

25. On January 4, 2015, the City plowed Baker Street. They did not simply push the snow into a few of the angled parking spots which would block those parking spots, but ensure there were no large windrows blocking access to the sidewalk down the whole block. This is the practice followed by the nearby municipality of Rossland. Instead, the City's employees pushed the snow to the front of the parking spot straddling the curb and creating a large snowbank. The curb could not be seen. The purpose of creating the windrow at the curb is to allow vehicles to park. The parking spots are metered.[12]

26. The 300 block of Baker Street where the incident occurred is in the "downtown core" as the term is used in the Policy.[13]

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[8] Transcript, AR, Part V, p. 14, ll. 28 to p. 15, l. 11, p. 76, ll. 22-47.
[9] Agreed Statement of Facts, AR, Vol. I, p. 56.
[10] Transcript, AR, Part V, p. 52, ll. 34 to 44.
[11] Trial Reasons, para. 10, AR, Vol. I, p. 7; Agreed Statement of Facts, paras. 21-22, AR, Vol. I, p. 53; Transcript, AR, Part V, p. 88, l. 28 – p. 89 l. 15.
[12] Agreed Statement of Facts, para. 12, AR, Vol. I, p. 52; Transcript, AR, Part 5, p. 77, l. 11 – 19, p. 78, ll. 5-7.
[13] Transcript, AR, Part V, p. 80, ll. 17 – 25, p. 92 ll. 41 to p. 93 l. 11.

27. There were no checklists, records or any documents at all to indicate which windrows on Baker Street had been cleared and which had not.[14]

28. Ms. MacDonald testified that nowhere in the Policy does it say that trucks can plow snow to create a snowbank over the curb and onto the sidewalk (as was done in this case).[15]

29. Ms. MacDonald considered the windrows a hazard to people who park on the street and had to walk over or through the snowbank to get to the safety of the sidewalk. The bigger the snowbank the bigger the hazard.[16]

30. Ms. MacDonald did not have her workers shovel access points to the sidewalk for drivers exiting their vehicles from the angled metered parking spots.[17]

31. The parties called evidence as to the practices in other similar municipalities. The City of Nelson called two witnesses and Ms. Marchi called one. The trial judge erroneously said that all three witnesses were called by Ms. Marchi.[18]

32. The nearby City of Rossland does not create windrows along the curb. Instead, the snow from the road is pushed into a windrow at the back of the angled parking stalls (toward the road) such that if the snow build up is high, the parking spot cannot be used, until the snow is cleared.[19] This method is used in the City of Rossland "so that there isn't the accumulation of snow left for the pedestrians to enter onto the sidewalk."[20]

33. The City of Castlegar typically clears the windrows from the curb within 8 hours of when the snowfall stops. If it stopped snowing by 11:00 a.m. they would have the curbs cleared that night and the snow left in piles in closed parking spaces.[21] The City of Castlegar moves quickly to clear the windrows from the curbs because they recognize that people may have difficulty getting over a large windrow.[22]

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[14] Transcript, AR, Part V, p. 80, ll. 17 – 25, p. 92, ll. 41 to p. 93, l. 11.
[15] Transcript, AR, Part V, p. 74, ll. 13 – 46.
[16] Transcript, AR, Part V, p. 75, ll. 42 - 47, p. 76, ll. 1 - 11, p. 81. ll. 18 – 27.
[17] Transcript, AR, Part V, p. 105, ll. 5 – 46, p.131, ll. 43-45.
[18] Trial Reasons, para. 35, AR, Vol. I, p. 13.
[19] Transcript, AR, Part V, p. 42, ll. 35 to 38; p. 45, ll. 39 to 45.
[20] Transcript, AR, Part V, p. 39, ll. 29 to 47, p. 40, ll. 1 to 9.
[21] Transcript, AR, Part V, p. 131, ll. 1 to 13, p. 135, l. 39 to p. 136, l. 3.
[22] Transcript, AR, Part V, p. 134, ll. 17 to 29.

34. The City of Castlegar removes the hazard by reducing the size of the windrows by back blading the snow off the curb and piling it into one or two parking stalls on a block until it can later be hauled away.[23]

35. The City of Castlegar continues to operate an overnight shift from 11:00 p.m. to 7:00 a.m. and removes snow downtown at that time despite noise complaints because "basically it's the only time we can haul the snow in the downtown core" and there are no parked vehicles. They have had noise complaints but rather than cancel night shifts they reduced the volume of the back-up beepers.[24]

36. The City of Penticton also clears windrows from curbs into one or two parking stalls per block and only on rare occasions hauls the snow away.[25]

37. The appellant City had previously cleared snow from windrows into one or two parking stalls until time permitted subsequent removal but did not do so on January 6, 2015, the date of the accident.[26]

38. In response to paragraph 10 of the appellant's factum, wherein the City contends it hauled away the snow in accordance with the priorities under the Policy, there is a difference between clearing snow from an area and hauling it away. The City had to only clear the windrow by pushing the snow into one or two parking stalls, or shovel access points into it. They could haul away the snow at any time. The safety of the public required only that safe access be provided to the sidewalk, not that the snow be physically hauled away with dump trucks.[27]

39. The Public Works employees decided to completely haul away the snow from the windrows on the other blocks of Baker Street but leave the windrow on the 300 block untouched. Ms. MacDonald had no memory of the snow event in question but indicated that Baker Street gets busy at 11:00 am thus speculating as to the reason they did not also haul away the snow from the 300 block Baker Street.[28]

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[23] Transcript, AR, Part V, p. 134, l. 29 to p. 135, l. 2.
[24] Transcript, AR, Part V, p. 130, ll. 17 to 42; p. 133, ll. 22 to 37; p. 135, ll. 3 to 22; p. 137, ll. 5 to 10.
[25] Transcript, AR, Part V, p. 115, l. 46 to p. 116, l. 11.
[26] Transcript, AR, Part V, p. 84, ll. 14 to 27.
[27] Transcript, AR, Part V, p. 79, ll. 41 to 45.
[28] Transcript, AR, Part V, p. 57, ll. 16-24; p. 92 ll. 9-30.

40. Paragraph 11 and footnote 13 of the appellant's factum refer to Karen MacDonald's testimony in chief that it was not feasible to pile snow into parking spots because of drainage and sight lines. Ms. MacDonald in cross-examination testified sight lines are only a problem if the parking stall used for snow storage is on the corner; if the snow is stored in any of the other parking stalls there is no problem with sightlines. Further, she testified drainage was only an issue if the snow was piled on top of storm catch basins, and there are only three in the block. In fact, the City had piled snow into parking spots before. The afternoon shift would do this task. The snow had stopped mid-morning on January 5th, a day and a half before Ms. Marchi parked her car.[29]

41. In paragraph 63 of the appellant's factum it is asserted that the alleged failure to extend the hours of snow clearance was a fact the Court of Appeal "appeared to find on its own accord". This is not correct. In dealing with snow events the City can keep the 3:00 p.m. afternoon shift working beyond their shift, even until the 4:00 a.m. shift begins. Ms. MacDonald testified that she could have, but did not, ask the afternoon shift of January 5, 2015 to stay on to clear snow on Baker Street.[30]

42. The lead hand of the afternoon shift can also make the decision to stay later to clear snow. If either Ms. MacDonald or the lead hand had made that decision, the snow could have been cleaned up with no people or cars around. It is the afternoon shift that will clear the snowbank by moving the snow into piles in one or two parking spots. Ms. MacDonald when asked why the afternoon shift did not work through the night, speculated the "lead hand must have deemed that it was --- the streets were safe." It is true that some individuals did work overtime on January 5th but the City had more hours of snow clearance available. The lead hand and Ms. MacDonald chose not to use those extra hours to mitigate the admitted hazard the City created for pedestrians in the 300 block of the City's main commercial street.[31]

43. The City states at paragraph 64 of its factum that "There was no evidence at trial that the City had failed to call upon any workers available to it on either January 5 or 6, 2015." It repeats this at paragraph 99. The Agreed Statement of Facts are to the contrary. They state:

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[29] Transcript, AR, Part V, p. 99, ll. 20 to p. 100 l. 8; p. 77, ll. 25 to p. 78. l. 3; p. 86. ll. 22 to 36, p. 28, ll. 26 to 29.
[30] Transcript, AR, Part V, p. 59, ll. 14 to 24; p. 87 ll. 34 – 40; p. 105 l. 47 to p. 106, l. 12, p. 106, ll. 35 – 47 to p. 107, l. 3.
[31] Transcript, AR, Vol. V, p. 86. ll. 22 to 27; p. 60, ll. 1 to 9.

> 25. On January 5th or 6th, the Defendant's public works supervisor Karen MacDonald had the ability to call in two employees who were on days off into work to assist with snow clearing and removal in the City of Nelson.
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> 26. The Defendant's public works supervisor Karen MacDonald did not call in on January 5th or 6th the two employees who were on days off to assist with snow clearing and removal in the City of Nelson.[32]

44. Karen MacDonald testified that she did not call in those workers because there was not enough equipment, and they would have known they would have been shovelling and "they probably wouldn't have answered the phone anyway." The only equipment needed to mitigate the hazard of the large snowbank were shovels to create access points for pedestrians who were invited to park in the metered stalls.[33]

45. The City published a document entitled: "2014-2015 Winter Snow Program Public Information" which stated: "Public Works Snow Crews will be scheduled for 24-hour service, weekdays during the snow season" and provided there was to be "No Parking on Baker Street from 2:00 AM to 7:00 AM Sunday to Wednesday. Signs are posted and restrictions will be enforced". January 6, 2015 was a Tuesday.[34]

46. The City did not schedule 24-hour service and did not operate an overnight shift for snow removal on the nights of January 4 or 5, 2015, and in fact had discontinued operating an overnight shift for snow removal in 2010 or 2011. The public was informed otherwise.[35]

PART II – QUESTIONS IN ISSUE

47. It is submitted that this appeal raises the following issues

i. Are the trial judge's reasons insufficient?

ii. What is the standard of review for a finding that a decision is policy or operational?

iii. Should the duty of care owed to Ms. Marchi by the City be negated because the City's

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[32] Agreed Statement of Facts, paras. 25-26, AR, Vol. I, p. 53.
[33] Transcript, AR, Part V, p. 59. Ll. 37 – 46, p. 87, ll. 30 – 34.
[34] Agreed Statement of Facts, para. 18, AR, Vol. I, p. 31, para 18; Public Information Winter Snow Program 2014-2015 Snow Season, AR, Vol. I, p. 146.
[35] Agreed Statement of Facts, paras, 23-24, AR, Vol. I, p. 53; Transcript, AR, Part V, p. 94, ll. 3 to 17, p. 96, ll. 20 to 24, p. 87, ll. 10 to 23.

employees made decisions that are properly characterized as "core policy"?

iv. Did the City's employees breach the standard of care expected of a reasonable municipality?

v. Should the action be dismissed because the test for legal causation was not met?

PART III – STATEMENT OF ARGUMENT

A. Insufficiency of Reasons

48. Trial judges are under a duty to render adequate reasons. In *F.H. v. McDougall*, this Court summarized the reasons why this duty exists: "(1) To justify and explain the result; (2) To tell the losing party why he or she lost; (3) To provide for informed consideration of the grounds of appeal; and (4) To satisfy the public that justice has been done."[36]

49. In *R. v. R.E.M.* the Court provided guidance as to how an appellate court is to determine whether trial reasons are sufficient:

> The appellate court, proceeding with deference, must ask itself whether the reasons, considered with the evidentiary record, the submissions of counsel and the live issues at the trial, reveals the basis for the verdict reached. It must look at the reasons in their entire context. It must ask itself whether, viewed thus, the trial judge appears to have seized the substance of the critical issues on the trial. If the evidence is contradictory or confusing, the appellate court should ask whether the trial judge appears to have recognized and dealt with the contradictions. If there is a difficult or novel question of law, it should ask itself if the trial judge has recognized and dealt with that issue.[37] [Emphasis added.]

50. In this case, the critical question on duty of care was whether the decisions made by the City's employees were properly characterized as policy or operational.

51. The City's position was that the decisions were taken pursuant to the formal written Policy and also to certain "unwritten policies" and that they were all properly characterized as "policy decisions" that were immune from liability in tort. For example, the City argued that in not hauling the snow from the downtown core until all City streets were cleared it was acting in accordance

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[36] *F.H. v. McDougall*, [2008] 3 S.C.R. 41, 2008 SCC 53 at para. 78
[37] *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 ("*R.E.M.*") at para. 55.

with the Policy.[38]

52. In her written submissions, Ms. Marchi's position was that "All of the decisions and actions taken by the City of Nelson which both created the hazard and then allowed the hazard to continue were operational decisions and actions, and thus a policy immunity defence must fail."[39] She listed six such examples in her written submissions.[40]

53. As this Court has stated, "courts have found it notoriously difficult to decide whether a particular government decision falls on the policy or operational side of the line."[41] The question before the trial judge qualified as a "difficult" one that the trial judge was bound to address fully, as noted in *R.E.M.*

54. The trial judge failed to do so. Instead, his reasons largely just replicate the closing written submissions of the City without explaining why the decisions of which Ms. Marchi complained were not operational within the meaning of the jurisprudence.

55. An example of this is found at paragraph 5(a)-(h) of the trial reasons where the judge lists certain "unwritten policies and policy decisions". This list, and the statement that that they constitute "unwritten policies and policy decisions", is taken verbatim from paragraph 20 of the City's written submissions. One of the items on the list is this: "When removing snow from the downtown core, crews first push snow into piles in the parking spots and then haul it out of downtown."[42]

56. There are many problems with merely replicating the City's submission without analysis. First, the agreed statement of facts identified the formal written Policy as "The policy that pertained to snow clearing and removal to be followed by the City of Nelson at the time of the incident".[43] It follows that the alleged "unwritten policies" cannot be relied upon as additional policy decisions that are immune from tort liability. Second, the Policy says nothing about windrows or when to

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[38] Closing Submissions of the Defendant City of Nelson, para. 5, A.R. Vol. III, p. 99, copied at para. 13 of the Trial Reasons.
[39] Closing Submissions of the Plaintiff Taryn Marchi, para. 12, AR, Vol. III, p. 84.
[40] Closing Submissions of the Plaintiff Taryn Marchi, para. 11, AR, Vol. III, pp. 82-84.
[41] *R. v. Imperial Tobacco*, 2011 SCC 42, [2011] 3 S.C.R. 45 ("*Imperial Tobacco*") at para. 78.
[42] Closing Submissions of the Defendant City of Nelson, para. 20, AR, Vol. III, p. 95, copied at para. 5(d) of the Trial Reasons.
[43] Agreed Statement of Facts, para. 6, AR Vol. I, p. 51.

push snow into parking stalls to be stored until it can later be hauled away. Third, there is no analysis as to why this decision was not an operational decision.

57. In replicating the City's written submissions without applying the principles in *Just*, and ignoring Ms. Marchi's written submissions on why the conduct complained of was operational, it cannot be said that the trial judge, in the words of the Court in *R.E.M.*, "seized the substance of the critical issues on the trial." His reasons are therefore insufficient within the meaning of this Court's jurisprudence: they do not justify and explain the result; they do not tell Ms. Marchi why she lost; they do not provide for informed appellate review, and they do not permit the public to be satisfied that justice was done.

58. The trial reasons are deficient in another respect too. The first part of the judgment (paras. 1-16) addresses the immunity issue. At times it is clear the trial judge is only describing the City's position while other times it is not clear whether he is rendering his decision or summarizing a submission. For example, the trial judge says this (at para. 7):

> The policy decisions made by the City were *bona fide*, according to the City. The decisions could not be characterized as made in bad faith or so irrational as not to be a proper exercise of discretion. These decisions were governed by factors including budgetary social and economic factors, which included the availability of manpower and equipment.

59. The first sentence is clearly a statement of the City's position. But the second and third may or may not be. They are not qualified by a similar reference as being the City's position, yet they may well be a summary of position as they are a reproduction of the City's written submissions.[44] The trial judge goes on to describe certain actions of the City as policy decisions which might be thought to constitute his independent reasoning on this point but at the very end of this part of the judgment he states: "According to the City, it owed no duty of care in the circumstances."[45]

60. While this Court has held that extensive copying of a party's written submissions is not an error law *per se*, it has also said that such a practice should be discouraged because it calls into question whether the judge exercised independent decision-making on the issues before him or

[44] Closing Submissions of the Defendant City of Nelson, paras. 36 and 37, AR, Vol. III, p. 97.
[45] Trial Reasons, para. 16, AR, Vol. I, p. 8.

her.[46] In this case it is not clear that the trial judge ever decided the policy/operational question.

61. The Court of Appeal considered it unnecessary to address whether the reasons were insufficient under *R.E.M.* because of errors it found in the trial judge's approach to the policy/operational distinction, standard of care, and legal causation which required his order to be set aside, and a new trial ordered.[47] Standard of care and legal causation are dealt with later in this factum. It is convenient here to address the error the Court of Appeal found with the trial judge's approach to the policy/operational issue.

62. The Court of Appeal noted that the distinction between policy and operational decisions is "subtle" and requires analysis in accordance with Supreme Court of Canada jurisprudence. The trial judge never performed that analysis and never explained why decisions said to be operational by Ms. Marchi were not operational under this Court's jurisprudence. In failing to perform that analysis, the trial judge erred.[48]

63. It is submitted that the Court of Appeal was correct. If it is an error of law to apply the wrong legal test,[49] it is surely an error not to engage with the governing legal test. This error is similar to the error noted above, namely a failure to provide sufficient reasons and the outcome is the same: the decision cannot stand.

B. Standard of Review

64. The appellant states that the standard of review for a finding that a governmental decision is policy or operational is not clear in Canadian law and urges this Court to decide the question.

65. The respondent's position is that this question does not arise on this appeal. The Court of Appeal intervened because the trial judge had failed to apply the analysis called for under this Court's jurisprudence. The Court of Appeal left for the new trial the decision on whether the conduct upon which Ms. Marchi relied was operational within the meaning of the applicable authorities.

66. To the extent that this Court wishes to address this issue, the respondent's submission is

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[46] *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at paras. 36, 50.
[47] Court of Appeal Reasons, para. 3, AR, Vol. I, p. 23.
[48] Court of Appeal Reasons, paras. 13-20, AR, Vol. I, pp. 26-28.
[49] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 39.

that the decision as to whether conduct is an operational decision or a policy decision is a question of law that is reviewable on a correctness standard.

67. This Court has repeatedly stated that whether a duty of care is owed is a question of law.[50] The policy/operational question arises at stage two of the duty of care analysis. It follows that the proper characterization of the conduct in question is a legal question. It is a threshold question that must be addressed before causation and standard of care can be considered.

68. The appellant acknowledges that the weight of authority is in favour of correctness as the standard of review but submits it should be palpable and overriding error because deference is owed "to the findings of fact which inform the policy/operational analysis."[51] It may be necessary to make findings of fact in the course of that analysis, but the ultimate question is whether government, despite owing a *prima facie* duty of care to a plaintiff, is immune from liability in negligence because its decisions are properly characterized as "pure policy" and not "operational". That is a legal question that the appellate court is in as good a position to answer as the trial court. The appellate court should be satisfied that the trial court has correctly determined whether immunity is to be conferred on the government.

C. Policy/Operational Decisions

(i) <u>Introduction</u>

69. As noted, the Court of Appeal did not decide whether the conduct complained of in this case was properly characterized as operational decisions or as policy decisions. Instead, it ordered a new trial. The decision to order a new trial was presumably made because the Court of Appeal had also found error in the trial judge's approach to standard of care. As standard of care is more concerned with factual matters, the Court decided to leave all issues for the trier of fact.

70. However, on the record in this case, an appellate court is in as good a position as a trial judge to decide the policy/operational question. In the respondent's submission, the conduct complained of was clearly operational in nature. It concerned practical matters of implementation

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[50] *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670, at p. 690; *J.J. Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19, [2018] 1 S.C.R. 587 at para. 34; *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 at para. 24.

[51] Appellant's Factum, para. 89.

of the formal written Policy.

71. On this appeal the City refers to a body of academic criticism of the policy/operational distinction as the basis for determining whether governmental actors should be immune from liability in tort. This raises the possibility that the Court may wish to refine the law to address some of the concerns that have been expressed in the literature. In the respondent's submission, this would only be necessary if the existing law did not consider the actions complained of in this case as operational. Why? Because if the decisions taken by the City are regarded as policy there can be little left in the way of operational for which a government is accountable. This would run afoul of the admonishment in *Just* that "complete Crown immunity should not be restored by having every government decision designated as one of 'policy'."[52] *Just* articulated a test that was meant to prevent this.

72. At the same time, the Court will want to ensure that the law does not require courts to pass judgment on core policy judgments made by government in the public interest. As this Court explained in *Imperial Tobacco*, weighing "social, economic, and political considerations to arrive at course or principle of action is the proper role of government, not the courts."[53]

73. In evaluating whether *Just* and its progeny strike the right balance it must also be remembered that since *Just* was decided the *Anns/Cooper* approach to duty of care has become firmly established in Canadian law. In cases where a full *Anns/Cooper* analysis is required to establish a novel duty of care, many cases against the government will flounder at stage one or stage two for reasons other than the fact that the government decision was not operational.[54]

74. The way forward then is to commit to *Just* and to ensure that only <u>core</u> policy decisions are immunized from tort liability, not decisions that implement policy or that can be characterized as having elements of both policy and operations.

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[52] *Just* at p. 1239.
[53] *Imperial Tobacco* at para. 87.
[54] See Osborne, Philip H., *The Law of Torts*, 6th ed. (Toronto: Irwin Law, 2020) ("Osborne") at 231 (describing *Cooper v. Hobart* as introducing "additional layers of analysis which have had the effect of significantly slowing the growth and development of governmental liability").

(ii) <u>Summary of the Law</u>

75. The policy/operational question arises as part of the inquiry into whether the governmental entity owes a duty of care to the plaintiff.

76. In *Anns v. Merton London Borough Council*, the House of Lords introduced a two-stage inquiry for establishing a duty of care.[55] At the first stage the question is whether "there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his party may be likely to cause damage to the latter—in which case a prima facie duty of care arises."[56] The second stage of the *Anns* test requires the following question to be answered: are there policy considerations that ought to negate the prima facie duty of care?

77. This Court adopted the two-stage inquiry in *Kamloops v. Nielsen*[57] and then reformulated the test in *Cooper v. Hobart*.[58] *Cooper* made it clear that foreseeability of injury alone was not enough to establish a duty of care. Rather proximity was a separate requirement that must be met at the first stage of the test. However, if the courts had previously recognized the duty of care asserted, a *prima facie* duty of care will be recognized without engaging in a full analysis.[59]

78. In *Anns* the action was brought against a local authority for the negligent performance of a building inspection during the building process. Lord Wilberforce expressed the view that while the first stage of the test was met he did not think this could be the sole consideration. That is because the local authority "is a public body, discharging functions under statute" and as such "its powers and duties are definable in terms of public law."[60] To address this concern, he introduced the policy versus operational distinction into the law. As Professor Osborne explains:

> Lord Wilberforce suggested that a distinction must be drawn between administrative functions that are essentially policy or planning in nature, which would not normally be subject to a duty of care, and operational matters that normally would be subject to a duty

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[55] [1978] A.C. 728, [1977] 2 All E.R. 118, [1977] UKHL 4 ("*Anns*").
[56] *Anns* at p. 4.
[57] [1984] 2 S.C.R. 2 ("*Kamloops*").
[58] 2001 SCC 79 ("*Cooper*").
[59] *Cooper* at para. 36.
[60] *Anns* at p. 5

of care.[61]

79. The complaint in *Anns* was that the foundations of the building were defective and the building inspector had been negligent in failing to ascertain this. The statute provided a discretion as to whether to conduct building inspections. Lord Wilberforce said that once the decision was made to do the inspections they had to be conducted with reasonable care. He described the building inspector's functions as "heavily operational".[62]

80. In *Just*, this Court applied *Anns* and provided guidance as to what constitutes policy and operational decisions. The question in that case was whether the Province of British Columbia was liable in tort for negligently failing to properly maintain a highway running from Vancouver to Whistler Mountain. The plaintiff and his daughter were in a car that was stopped in a line of traffic near a rocky slope next to the highway when a large boulder came crashing down on their car, seriously injuring the plaintiff and killing his daughter. The Province had set up a system for inspection of, and remedial work upon, the rock slopes. The trial judge found that this system, and its implementation, was a policy matter that could not give rise to liability. This Court reversed that decision.

81. Cory J., with whom seven judges concurred, conducted the analysis that had been prescribed in *Anns* and adopted by this Court in *Kamloops.*[63] He first considered whether a *prima facie* duty of care was owed by the Province to the users of the highway. He answered that question in the affirmative.[64]

82. Justice Cory then considered whether there was anything in the applicable legislation that exempted the Province from liability. He found there was not. He then turned to determine whether the system of inspections was a policy decision of a government agency and thus exempt from liability. In answering that question, Cory J. found "helpful guidelines" in the decision of Mason J. of the High Court of Australia in *Sutherland Shire Council v. Heyman*:[65]

The distinction between policy and operational factors is not easy to formulate, but the

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[61] Osborne at 228.
[62] *Anns* at p. 6.
[63] *Kamloops* at 10-11.
[64] *Just* at 1236.
[65] (1985), 60 A.L.R. 1, [1985] HCA 41.

> dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.[66] [Emphasis added by Cory J.]

83. Later in his judgment Justice Cory applied these considerations and found that the conduct of which the plaintiff complained was operational and not policy in nature:

> Turning to the case at bar it is now appropriate to apply the principles set forth by Mason J. in *Sutherland Shire Council v. Heyman*, *supra*, to determine whether the decision or decisions of the government agency were policy decisions exempting the province from liability. Here what was challenged was the manner in which the inspections were carried out, their frequency or infrequency and how and when trees above the rock cut should have been inspected, and the manner in which the cutting and scaling operations should have been carried out. In short, the public authority had settled on a plan which called upon it to inspect all slopes visually and then conduct further inspections of those slopes where the taking of additional safety measures was warranted. Those matters are all part and parcel of what Mason J. described as "the product of administrative direction, expert or professional opinion, technical standards or general standards of care". They were not decisions that could be designated as policy decisions. Rather they were manifestations of the implementation of the policy decision to inspect and were operational in nature. As such, they were subject to review by the Court to determine whether the respondent had been negligent or had satisfied the appropriate standard of care.[67] [Emphasis added.]

84. Thus, the decision to inspect was a policy decision while the manner in which the Province's employees carried out the inspection was an implementation of that policy. This did not mean that the Province was liable in negligence. It still had to be found in breach of the standard of care.[68]

85. This Court applied *Just* in two subsequent cases, *Brown v. British Columbia (Minister of Transportation and Highways)* and *Swinamer v. Nova Scotia (Attorney General)*.[69]

86. In *Brown* the plaintiff was injured when his car skidded off a highway due to black ice.

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[66] *Just* at 1242.
[67] *Just* at 1245-46.
[68] *Just* at 1245.
[69] [1994] 1 S.C.R. 420 ("*Brown*") and [1994] 1 S.C.R. 445 ("*Swinamer*").

The plaintiff's complaint was that there should have been an employee on duty to do the necessary sanding of the road. However, this did not happen because the Province was using the summer schedule (the accident was in the month of November) which on the evidence was a result of significant negotiations between the government and the union. On these facts this Court found the decision to use the summer schedule to be a policy decision.[70]

87. However, there were also operational aspects for which the government was not immune and which had to be measured against the applicable standard of care. These operational aspects pertained to the manner in which the sanding was carried out. In this regard, the Court considered two elements of the sanding to be operational: the amount of time it took for the Highways Department to respond to the request for sanding, and the inability to reach the employee on call. The first was not found to be negligent. The second was found to be negligent but "did not affect the result in this case." That is, causation was not established.[71]

88. In *Swinamer*, the plaintiff was injured when a tree fell on his truck on a highway maintained by the Nova Scotia government. Its employees had conducted a survey in the region of trees that posed a hazard. A number of trees had been marked for removal but not the one that fell on the plaintiff's truck. The trial judge found the Province liable for the manner in which it carried out the survey, including its failure to consult experts and adequately train its staff. This Court found that there was no general policy in place to inspect trees. Rather, the government had decided just to conduct a general survey to identify obviously dead and dying trees and to remove those trees as funding became available. This was a decision based on budgetary considerations and thus immune from liability.[72]

89. Like in *Brown*, however, the Court found that there were operational aspects involved in the implementation of the policy. The operational aspects were the manner in which the survey of trees was carried out. Here the Court found there was no breach of the standard of care "in the manner or method of conducting the survey".[73] The Court added that where a tree does pose a visible danger the failure to remove it might "constitute negligence attributable to the department."

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[70] *Brown* at 441-42.
[71] *Brown* at 443-44.
[72] *Swinamer* at 464-66.
[73] *Swinamer* at 466.

This did not apply to the tree in this case, which was "in apparent good health".[74]

90. This Court reaffirmed the distinction between policy and operational in *Lewis (Guardian ad litem of) v. British Columbia*.[75] In that case, the Crown had retained an independent contractor to do scaling work on a rock face bordering a highway in British Columbia. The independent contractor did the work negligently and the issue was whether the Crown was liable along with the independent contractor for the work performed. This Court answered the question in the affirmative. In the course of giving reasons, the Court stated that the Crown's exercise of its statutory discretion to maintain the highway gave rise to a duty on the Minister to use due care at the "operational level" in performing this stabilization work.[76]

91. Looking at the above jurisprudence we see an unbroken line of authority from this Court that while policy decisions are immune from tort liability, the operational aspects of their implementation are not. Once the government decides to intervene, its employees must carry out their mandate with due care.

92. The Court returned to the issue in *Imperial Tobacco*. In that case, a number of tobacco companies brought third party proceedings against Her Majesty the Queen in Right of Canada. It was alleged that if the tobacco companies are liable for damages caused by smoking they are entitled to compensation from Canada, which was involved in the development of tobacco strains used by the industry and made representations to the industry about the health attributes of those strains. This Court agreed with Canada that "the alleged representations were policy decisions of the government" and thus immune from liability.[77]

93. The Court acknowledged that there are difficulties with the policy/operational test. First, it can be "notoriously difficult to decide whether a particular government decision falls on the policy or operational side of the line."[78] Second, it assumes "a stark dichotomy between two water-tight compartments" while "decisions in real life may not fall neatly into one category or the other."[79]

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[74] *Swinamer* at 467.
[75] [1997] 3 S.C.R. 1145 ("*Lewis*").
[76] *Lewis* at para. 15.
[77] *Imperial Tobacco* at para. 61.
[78] *Imperial Tobacco* at para. 78
[79] *Imperial Tobacco* at para. 86.

94. Despite these criticisms, the Court reaffirmed the test. It also provided further guidance gleaned from the United States Supreme Court decision in *United States v. Gaubert*:[80]

> While the main focus on the *Gaubert* approach is on the nature of the decision, the role of the person who makes the decision may be of assistance. Did the decision maker have the responsibility of looking at social, economic or political factors and formulating a "course" or "principle" of action with respect to a particular problem facing the government? Without suggesting that the question can be resolved simply by reference to the rank of the actor, there is something to Scalia J,'s observation in *Gaubert* that employees working at the operational level are not usually involved in making policy choices.[81]

95. The Court found the decision to assist smokers switch to low-tar cigarettes "was adopted at the highest level in the Canadian government, and involved social and economic considerations."[82] Therefore, the decision was one of core policy. Unlike in *Just*, *Brown* and *Swinamer*, there was nothing about the implementation of the policy at the operational level that could render the government potentially liable in tort.

96. This Court's most recent foray into the area was in 2019 in *Kosoian*. In that case, a subway authority claimed immunity from liability for the actions of a police officer who had enforced a by-law based on a misunderstanding of its terms. The Court rejected the immunity claim because it found the authority's actions in training the police officer, and the actions of the police officer himself, were operational in nature:

> The application of a by-law falls within the "operational sphere", that is, the practical execution of policy decisions, and is not protected by any form of immunity (see *Laurentide Motels*, at p. 722; *Papachronis*, at para. 23). Baudouin, Deslauriers and Moore provide some relevant examples of operational decisions to which the rules in art. 1457 *C.C.Q.* apply in full:
>
> > [translation] Examples include the carrying out of public works, the provision of information, acts of the police and fire departments, the administrative implementation of statutes, regulations and by-laws, the giving of notice, the conduct of inspections, the enforcement of court decisions, etc. The government has no immunity for such acts and is liable on the private law standard for the commission of a simple fault.[83]

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[80] 499 U.S. 315 (1991).
[81] *Imperial Tobacco* at paras. 87, 89.
[82] *Imperial Tobacco* at para. 95.
[83] *Kosoian* at para. 108 (underlining in original removed).

97. This is entirely consistent with *Just* in denying immunity for operational decisions such as "the carrying out of public works" and the "implementation" of laws and policies.

(iii) <u>Duty of Care Was Not Negated by Any Core Policy Decision</u>

98. It is important to note at the outset that the policy/operational question arises at stage two of the *Anns/Merton* test for determining whether a duty of care is owed.[84]

99. At the first stage, the onus is on the plaintiff to establish a *prima facie* duty of care; at the second stage, "the evidentiary burden of showing countervailing policy considerations shifts to the defendant, following the general rule that the party asserting a point should be required to establish it."[85]

100. This case was argued by the City exclusively at stage two as there was no question that the City owed a *prima facie* duty of care to the respondent. In *Cooper*, this Court set out some of the categories of relationships for which a duty of care has already been established making it unnecessary to conduct a full *Anns/Cooper* analysis. Citing *Just*, this Court stated that "governmental authorities who have undertaken a policy of road maintenance have been held to owe a duty of care to execute the maintenance in a non-negligent manner."[86]

101. The City was therefore correct to argue the case only under stage two where it bears the burden of establishing that its decisions should be immunized from tort liability. This switch in burden makes sense as a plaintiff has limited ability to ascertain: (1) how the decisions came about; (2) who were the employees who made the decision, and (3) what type of documentation was generated or reviewed when making the decisions. Merely to assert that a decision was based on "budgetary considerations" should not suffice to discharge the burden.

102. The second point to note at the outset is that the actions that are said to constitute the policy decisions in this case must be found in the City's formal written Policy. The City argues that "The Policy is supplemented by unwritten policies as found by the trial judge."[87] However, the respondent submits that any such alleged "unwritten policies" are irrelevant to this case.

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[84] *Imperial Tobacco* at para. 62.
[85] *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 ("*Childs*") at para. 13.
[86] *Cooper* at para. 36.
[87] Appellant's Factum, para. 61.

103. First, the trial judge did not "find" that there were "unwritten policies" that constituted "policy decisions" within the meaning of this Court's jurisprudence. He merely copied a submission from the City's closing argument which itself contained no analysis of the question. And as pointed out earlier, it is not even clear that he ever made findings of fact or decided any legal question in this part of his judgment; rather he appears only to have summarized the City's position.

104. Second, the parties filed an Agreed Statement of Facts where they agreed that the City's policy regarding snow clearing and removal is the formal written Policy.[88] The City is not entitled to derogate from that agreement by positing the existence of additional polices.

105. Third, there is no evidence that any of these alleged unwritten policies were based on the sort of considerations that are typically found to underlie a policy decision. Merely affixing the word "policy" to a challenged decision in a negligence action does not magically transform that decision into an immune "policy decision". That is a question of law for the courts.

106. Furthermore, there was no evidence of an unwritten policy to "windrow the curb" and invite the public to park in those stalls, or that the only option to provide access to the sidewalk was to remove the snow into trucks and haul it away. There is no evidence of an unwritten policy that the City will not shovel pathways to provide access to the sidewalk, or clear the windrow by pushing the snow in the windrow into one or two parking stalls. There was no unwritten policy which resulted in the decision being taken on the morning of January 6th to completely clear and haul away all of the snow from the 400 and 500 blocks of Baker Street whilst leaving the windrows against the curb on the 300 block. There was no evidence of an unwritten policy to not have the afternoon shift on January 5th stay late to ensure there was time to clear all of snowbanks/windrows on Baker Street before the street became busy with traffic on the late morning of January 6th. The Public Works Department had the ability to close parking until they could provide safe access to the sidewalk. The Public Works Department chose not to do that. There was no evidence of a policy in support of that choice.

107. The City asserts that despite creating the admitted hazard, and taking no action to remediate the risk to the public, they can walk away from the resulting foreseeable bodily injury because of

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[88] Agreed Statement of Facts, para. 6, AR, Vol. I, p. 51.

the protection of an "unwritten policy". The bald assertion that an action is based on policy whether written or unwritten, should not protect a government which owes a duty of care to the public, especially if its employees created the hazard and then invited the public to face that hazard. Even if a government were to include operational actions in a written policy document, that would not make them true core policy decisions, immune from the law of negligence. The safety of the public from potential bodily injury is too paramount a concern to be so easily shielded from the behaviour-modifying effects of the law of negligence.

108. We turn now to look at the impugned conduct of City. The decisions of which the respondent complains are set out at paragraph 8 above. None of these decisions are commanded by the terms of the Policy. They are decisions made by employees in giving effect to the priorities stipulated in the Policy. In other words, they are decisions taken in the implementation of the Policy which this Court held in *Just*, and then reaffirmed in *Brown*, *Swinamer*, *Lewis* and *Kosoian*, are operational in nature.

109. Take the decision to create the windrow in the first place. The Policy sets out the priorities for "plowing, sanding and clearing" five areas. The first priority is "emergency routes and the downtown core" where Baker Street is located. The Policy also says that "removal of snow from the downtown areas may be carried out in conjunction with any of the above priorities."[89] A decision on whether to create windrows on the curb or instead to push snow into a few parking spots, or to create a windrow but shovel through the windrow an access way to the sidewalk is not a decision that is mandated by the Policy. Rather it is an operational decision as to how to deal with a hazard created by plowing.

110. The City submits that "There is nothing in either the Policy or the unwritten polices as found by the trial judge which suggest that snow windrows on non-emergency routes are to be cleared by piling snow into particular parking spots."[90] The fact that the Policy is silent on that is precisely Ms. Marchi's point. The manner in which plowing and clearing are to occur requires the making of operational decisions in furtherance of the implementation of the Policy.

111. The City then argues it would have been a violation of the priority sequencing under the

[89] The Policy, AR, Vol. I, p 56.
[90] Appellant's Factum, para. 71.

Policy to pile snow into a few parking spots.[91] How could this be so? The downtown core is in the first priority area. While the Policy provides a discretion as to the timing of hauling away snow from the downtown area, which itself could engage operational conduct, Ms. Marchi never argued the City should have removed the snowbank by hauling away the snow. Rather, she identified reasonable alternatives to deal with the hazard the City created. These alternatives engaged operational decision-making on the part of the City's employees.

112. In response to the Court of Appeal's statement that "the decision not to further extend the hours of snow clearing" arguably was an operational decision, the City says "There was no evidence at trial that the City had failed to call upon any workers available to it on either January 5 or 6, 2015." This is incorrect. The Agreed Statement of Facts says:

> On January 5th and 6th 2015, the Defendant's public works supervisor Karen MacDonald had the ability two call in two employees who were on days off into work to assist with snow clearing.

The Agreed Statements of Facts also records that she did not call in the two employees at her disposal.[92]

113. Another allegation of negligence is the failure of City employees to shovel by hand a couple of access points in the windrow. This demonstrates how far removed we are from the kinds of "core policy" decisions spoken about in *Imperial Tobacco*. Whether shovels should be used to create access points is hardly the stuff of immunizing "core policy". On the contrary, it is something to be decided at the operational level and is subject to the ordinary principles of negligence law.

114. It is submitted that the City has not discharged its burden of establishing that the allegations of negligence in this case concern matters of core policy for which the City is immune from liability in tort.

(iv) <u>Additional Factors that Support Respondent</u>

115. Other considerations support Ms. Marchi's position on this appeal.

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[91] Appellant's Factum, para. 72.
[92] Agreed Statement of Facts, paras. 25-26, AR, Vol. I, p. 56.

116. First, it has long been thought that a municipality should not be immune from liability for negligently providing services to the public. In 1911, this Court examined the City of Vancouver's liability for not repairing a sidewalk on which the plaintiff was injured. Justice Davies stated:

> The nature of the duty itself affecting every inhabitant using the streets is one which I cannot imagine the legislature intended should be neglected, with civil immunity from damages, by the corporation and without remedy by one of the public specially damnified.[93]

117. Modern jurists are of the same view. Mr. Justice Linden stated in his article *Tort Liability of Governments for Negligence* that "when a government is implementing policy by supplying services - that is, doing things for its people other than governing - it should be subject to ordinary negligence principles."[94] When deciding whether to create windrows on the 300 block Baker Street, or how to mitigate the hazard of the windrow, or whether to call in additional employees or extend snow clearance hours, the City's employees were not "governing". They were providing services in implementation of a previous governmental decision.

118. Second, as this Court noted in *Just*, the rule is that "the duty of care should apply to a public authority unless there is a valid basis for its exclusion."[95] While the "policy" defence is such a basis it should not be given broad reach. As this Court has stated: "To deny a remedy in tort is, quite literally, to deny justice."[96]

119. Third, the actions and omissions of the City that would have prevented this accident are all "micro" decisions akin to the building inspector in *Anns* who carelessly inspected a property in exercise of a discretionary authority. As Mr. Justice Linden helpfully explained, the activity for which immunity is available "is normally concerned with large issues (macro decisions, if you will), not routine items (micro decisions).[97] Plowing, sanding and clearing is a basic "service" provided by the City to the public. As such, it should be subject to ordinary negligence principles.

120. Fourth, if the City of Nelson had contracted out the service of snow plowing and clearing,

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[93] *City of Vancouver v. McPhalen* (1911), 45 S.C.R 194 at 197.
[94] The Honourable Allen M. Linden, *"Tort Liability of Governments for Negligence"*, (July 1995) 53:4 The Advocate 535 ("Linden") at 539.
[95] *Just* at 1242.
[96] *Hill v. Hamilton-Wentworth Regional Police Services*, [2007] 3 S.C.R. 129 at para. 35.
[97] Linden at 539.

the firm retained would be vicariously liable for the actions of its employees. The result should be no different if the City retains the work for its employees. As Professor Feldthusen forcefully states, "it is wrong for the courts to immunize conduct that would be actionable if committed by a private citizen."[98]

121. Fifth, as explained in *Imperial Tobacco*, "persons working at the operational level are not usually involved in making policy choices." This applies to the employees in this case. The lead hand, the Public Works supervisor Karen MacDonald, and the employees operating the equipment were not individuals who made core policy decisions on behalf of the City of Nelson. Their location at the operational level supports the characterization of their decisions as operational.

122. Sixth, the employees did not have broad discretion as to how to proceed. Rather, they had a more confined discretion to deal with operational matters. As stated by the authors of *Liability of the Crown*, this is an indicator that the decisions are operational:

> Decisions which involve broad discretion, the allocation of scarce governmental resources, and the weighing of competing social, economic, and political considerations are more likely to be characterized as policy decisions. In contrast, decisions that involve narrow discretion, fixed resources and the execution of settled government policy are more likely to be characterized as operational decisions."[99]

123. This is an apt description of the employees in this case: they had limited discretion and were acting with fixed resources in the implementation of the Policy. Their decisions which have been challenged in this case should be characterized as operational.

D. Standard of Care

(i) <u>Errors in Trial Reasons</u>

124. The City submits that the trial judge found that the City had met the applicable standard of care.[100] Unfortunately, as with the policy/operational question, it is not clear that the trial judge ever decided this issue.

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[98] Feldthusen, Bruce, "Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary, and Unjustified" (2014) Can Bar Rev 211 at 225.
[99] Hogg, Peter W., Patrick J. Monahan, and Wade K. Wright. *Liability of the Crown*, 4th ed. (Toronto: Carswell, 2011) at 227.
[100] Appellant's Factum, para. 101.

125. The City relies heavily on paragraphs 20-27 of the trial reasons. The City says: "Given the importance of these paragraphs from the trial judge's reasons to the issue, they have been reproduced in their entirety."[101] But those paragraphs are mostly copied from the City's closing written submissions at trial[102] and are punctuated with statements by the trial judge that he is describing the City's position.[103] For example, after listing in paragraph 25 a number of reasons why the City's approach "is reasonable" (which is a verbatim copy of paragraph 117 of the closing submissions) he concludes paragraph 27 with the statement that "The City submits that in all the circumstances its response was reasonable" (emphasis added).

126. As with the reasons on policy, the trial judge's reasons are insufficient for appellate review. It is not clear what are findings and what are descriptions of positions.

127. The reasons on standard of care are also flawed because they conflate considerations relevant to the immunity analysis with the standard of care analysis. After finishing the part of the judgment on policy, and moving on to the "standard tort analysis" that would apply "[i]f the City does not have a policy defence",[104] the judge discussed standard of care and the witnesses who had been called from other municipalities to provide evidence relevant to the standard of care. He then made the following statement (at para. 36):

> The City followed its policy. The policy was to clear snow in accordance with long established practices. The attempt to compare the practices in Nelson with those of other places was not very useful. Each of the municipalities faced difficult conditions. Nothing in the evidence showed that the policy of the City was unreasonable or the result of a manifest lack of appreciation of the risks involved. The policy is rational. It is very difficult to fault the City on a policy basis.

128. The Court of Appeal found that this analysis on standard of care "was coloured by the trial judge's view that a policy defence was available to the City and that rationality, rather than reasonableness, was the applicable standard."[105] The Court of Appeal was correct. The standard of care analysis will apply only if there are operational decisions. To conduct the analysis on the

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[101] Appellant's Factum, para. 97.
[102] Paragraphs 20-26 are taken from paragraphs 65, 103-04, 106-09, 110, 116, 117 and 118 of the Closing Submissions of the Defendant City of Nelson, AR, Vol. III, p. 89.
[103] Paragraphs 21, 26 and 27 of the Trial Reasons, AR, Vol. I, pp. 10-11.
[104] Trial Reasons, para. 17, AR, Vol. I, p. 8.
[105] Court of Appeal Reasons, para. 24, AR, Vol. I, p. 29.

assumption that the court is dealing with policy decisions is to embark upon a flawed venture.

129. The City seeks to defend the trial judgment on the ground that the references to policy in the above passage are "unrelated to the trial judge's standard of care analysis".[106] This is clearly wrong. The references are made in the middle of the standard of care analysis after the trial judge has finished the section on policy.

130. It is true that trial judge followed this up by citing this Court's decision in *Ryan v. Victoria (City)* for the proposition that the test is one of reasonableness.[107] But immediately after he relies on the B.C. Supreme Court decision in *Mather v. Westfair Foods Ltd. doing business as Extra Foods*,[108] which concerned a person injured while crossing over a snowbank that was abutting Extra Foods grocery store. An action against the storeowner was brought under the *Occupier's Liability Act*. The court found that there was no breach of the statute and dismissed the action.

131. The trial judge inexplicably said that "*Mather* is an example of a case that begins and ends at the policy stage of the analysis."[109] This was a mistake, as no governmental entity was sued and no policy defence was advanced. The important point is that the judge has once again invoked the policy defence when addressing standard of care.

132. Additionally, the trial judge made numerous errors in his treatment of the evidence adduced by the parties on the standard of care (as reviewed below).

133. For all of these reasons, the decision on standard of care (if there ever was one) cannot stand and a new trial must be ordered unless this Court considers it is in a position to decide the issue. The evidence in this case was not contested thus making it possible for the Court to address this matter.[110]

(ii) <u>Standard of Care Was Breached in this Case</u>

134. In *Ryan* this Court held that "a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances." It further

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[106] Appellant's Factum, para. 106.
[107] *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 ("*Ryan*").
[108] *Mather v. Westfair Foods Ltd. doing business as Extra Foods*, 2004 BCSC 449.
[109] Trial Reasons, para. 40, AR, Vol. I, p. 15.
[110] *Gronnerud (Litigation Guardians of) v. Gronnerud Estate*, 2002 SCC 38 at para. 33.

explained how a court is to make that determination:

> The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.[111]

135. In this case, the City of Nelson provides a service to the public, namely snow plowing and clearing and the sanding of roads. As this Court stated in *Childs*, "The public provider of services undertakes a public service, and must do so in a way that appropriately minimizes associated risks to the public."[112] Moreover, "there is a reasonable expectation on the part of the public that a person providing public services . . . will take reasonable precautions to reduce the risk of the activity, not merely to immediate clients, but to the general public."[113]

136. The City of Nelson failed in its obligation to ensure that members of the public had safe access to the sidewalk once they got out of their vehicles. It created the windrow which it admitted was a hazard. It invited the public to park in the parking stall by clearing the stalls of snow, but left the windrow in place. The City had the time and ability to mitigate the risk in the 1.5 days after it was created. It failed to do so.

137. The trial judge suggested that this argument amounted to a proposal "that the City change its policy to ensure that another method of snow removal is adopted that would remove the windrows from the roads sooner." It described this as demanding a standard "of perfection".[114]

138. The trial judge has misunderstood the respondent's argument and mis-read the Policy. The Policy sets priorities for the plowing, clearing and removal of snow. It says nothing about the creation of windrows or how to mitigate the risks posed by the windrows. The simple, common sense alternatives available to the City would not have required any modification of the Policy. It would not have required a standard of perfection.

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[111] *Ryan* at para. 28.
[112] *Childs* at para. 38.
[113] *Childs* at para. 40. For examples of cases where municipalities have been found negligent for the failure of their employees to address icy and snowy conditions, see *Crinson v. Toronto (City)*, 2010 ONCA 44 and *Cullinane v. City of Prince George*, 2000 BCSC 1089, aff'd 2002 BCCA 523.
[114] Trial Reasons, para. 40, AR, Vol. I, p. 15.

139. Both the appellant and respondent called as witnesses representatives of neighbouring municipalities to provide evidence of their snow clearing and removal practices. The trial judge erred in finding that all three witnesses were called by Ms. Marchi when two of the three were defence witnesses. He also erred in dismissing their evidence as irrelevant without considering it in relation to the standard of care.

140. Evidence of the practices followed by other jurisdictions is pertinent to establishing the appropriate standard of care. In *The Law of Municipal Liability in Canada*, the authors state:

> Evidence of the practice of similarly situated municipalities concerning the activity in issue is relevant in determining the standard of care expected in the circumstances. Proof that a defendant failed to conform with the custom or practice will raise a strong presumption of negligence on his or her part whereas conformance with a custom or practice will usually, although not necessarily, exonerate the defendant.[115]

141. The evidence of the other neighbouring municipalities was that snow was not left in windrows along the curb blocking access to the sidewalk until such time as it is hauled away, but was instead stored in individual parking spots. These other municipalities did not consider it reasonable to leave a snowbank blocking pedestrian access to the sidewalk until they had the ability to haul it away. They either avoided the creation of the windrow in the first place or took the intermediate step of pushing the snow into parking stalls to be stored until it could be hauled away.

142. The City of Rossland avoided the hazard of windrows all together by only having snow plowed to the back of parking spaces, thus blocking them from access when the snow was deep enough to create a hazard, until such time as the windrows could be piled into one or two closed parking spaces where it remained until there was time to remove the piles completely.[116]

143. The trial judge found that the practice of the City of Rossland was irrelevant because the main downtown street is a highway and had been modified and thus is different from the City of Nelson.[117] The evidence from the City of Rossland public works manager, Darrin Albo, was that there are also streets in the downtown core that are not on the highway, have not been modified and which have angled parking. They are therefore akin to Baker Street in Nelson. The evidence

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[115] Boghosian, David. G and Davison, J. Murray, *The Law of Municipal Liability in Canada* (loose-leaf) ("Boghosian") at para. 2.96.
[116] Transcript, AR, Part V, p. 39, ll. 29 to 38; p. 40, ll. 4 to 9; p. 42, ll. 35 to 38; p. 45, ll. 39 to 45.
[117] Trial Reasons, para. 35.

was that the City of Rossland uses the same snow handling procedure on those streets as it does on the highway.[118] The trial judge misconstrued the evidence given by the public works manager for the City of Rossland.

144. The City of Castlegar's manager was called by the City of Nelson. His evidence was that within 8 hours or less of the snow stopping and during the overnight shift, employees would clear the windrows and pile the snow into piles in one or two closed parking spots per block until it could be removed at a later date. They had an overnight shift to deal with the snow in the downtown core and they dealt with any noise complaints by reducing the volume of backup beepers.[119] The trial judge ignored this evidence in considering the standard of care.

145. The evidence from the appellant was that it was feasible for them to push the snow into piles in one or two parking spaces per block to await being hauled away.[120] There was no evidence that any budgetary or policy constraints prevented them from doing so in January of 2015. Thus, there was no evidence that the City could not meet the standard illustrated by the practices of the other municipalities.

146. It is also relevant to consider the City's own documents as they can be illustrative of the standard of care. The authors of *The Law of Municipal Liability in Canada* state:

> Internal standards and guidelines which do not qualify as policy decisions are considered by the court in assessing the appropriate standard of care, apparently on the basis that they reflect an acknowledgement of the risks involved. Another rationale for considering internal standards in the case of municipalities is that they tend to represent the standards reasonably expected by its own in the conduct of the operation in question.[121]

147. The City's public information document "2014-2015 Winter Snow Program" advised the public that "Public Works Snow Crews will be scheduled for 24-hour service, weekdays during the snow season" and there would be no parking on Baker Street from 2:00 a.m. to 7:00 a.m. from Sunday to Wednesday and that "Commercial parking areas may be restricted for parking as

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[118] Transcript, AR, Part V, p. 41, ll. 3 to 38.
[119] Transcript, AR, Part V, p. 134, l. 29 to p. 135, l. 2; p. 130, ll. 17 to 42; p. 137, ll. 5 to 10; p. 131, ll. 1 to 13; p. 135, l. 39 to p. 136, l. 3; p. 131, ll. 14 to 21; p. 136, l. 4 to 17; p. 133, ll. 22 to 37; p. 135, ll. 3 to 22.
[120] Transcript, AR, Part V, p. 84, ll. 14 to 27.
[121] Boghosian, para 2.95.

necessary for snow removal operations …".[122]

148. This accident occurred on a Tuesday, a weekday. The snow had stopped falling the day before. The public could expect there to be 24-hour service and for there to be snow clearing in on Baker Street from 2:00 a.m. to 7:00 a.m. on the Tuesday, given the public disclosures to that effect. The public, based upon the bulletin and the signs on Baker Street, would reasonably expect that any snowbanks created would be cleared by the City to allow for reasonable access to the sidewalk by 5:00 p.m. on January 6, 2015.

149. The City of Nelson did not meet its own standard, as there were no 24-hour shifts scheduled during that winter season and, in particular, no 24-hour shift scheduled on the night of January 5th.[123]

150. Additionally, the afternoon shift could have worked until 4:00 a.m. Ms. MacDonald did not know why this option was not exercised though she speculated that the lead hand "must have deemed the streets to be safe". If that had been the lead hand's view it would have been negligence as there was an admitted hazard blocking pedestrian access on the 300 block. There were many ways the City could have mitigated the hazard during the daytime hours of January 5th and 6th. Keeping the afternoon shift on until 4:00 a.m. provided additional snow clearance hours, which could have been used to clear the hazard. Had the afternoon shift worked until 4:00 a.m. there would have been additional snow clearance hours to clear the snowbank.[124]

151. Again, there was no evidence of any budgetary constraints on use of 24-hour shifts or extending the existing shifts. On the contrary, the evidence was that the City had enough resources and time to plow the dead-end street at the top of town where Ms. Marchi lived on January 5th, 2015 and then return again on January 6th, 2015 to scrape down the pavement.[125] If that could be done, the City most certainly had the resources to address the hazard it created on Baker Street in the downtown core, an area that was the first priority for plowing and clearing.

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[122] Public Information Winter Snow Program 2014-2015 Snow Season, AR, Vol I, p. 51; Transcript, Part V, p. 66, ll. 32 to 41.
[123] Agreed Statement of Facts, AR, Vol. I, p. 53, paras. 23-24; Transcript, AR, Part V, p. 94, ll. 3 to 17; p. 96, ll. 20 to 24; p. 87, ll.10 to 23.
[124] Transcript, AR, Part V, p. 59, ll. 14 to 24; p. 92, ll. 3 to 30; p. 78, ll. 29 to 37.
[125] Transcript, AR, Part V, p. 11, ll. 7-15, p. 28, ll. 37-41, p. 29, ll. 3-20.

152. The measure of whether it was reasonable for the City to allow a windrow that it created, and which it knew was a hazard, to block pedestrian access to the sidewalk for drivers and passengers invited to park, must be considered with all members of the public in mind, not just the young sure-footed adult. What about young children, the elderly, pregnant women, the disabled, those with parcels, and those who are not nimble? Is it reasonable to expect them to navigate a large snowbank to access the sidewalk, which access is the very purpose of the angled metered parking spots on Baker Street? The respondent submits that the answer is no.

153. The appellant argues it had other areas in the City which required resources to clear snow that were prioritized. When the City has created a hazard and invited the public to that hazard it has a duty to act swiftly to mitigate the hazard. It chose instead to haul away snow with a dump truck from the windrows on the other blocks on Baker Street, a time-consuming process, when instead it should have dismantled the windrows on all of the Baker Street by pushing the snow into parking stalls instead of hauling it away. It could also have called in two workers to shovel access points to allow pedestrians to access the sidewalk safely. Until it mitigated the risk of the hazard, it should have closed parking on that block.

154. Paragraph 15 of the appellant's factum suggests Ms. Marchi should have gone back into her car and found another parking spot. Ms. Marchi took the only parking spot available. Baker street was busy and she considered herself lucky to have found an open parking stall. She did not drive around to find an open parking spot with better access to the sidewalk because she thought that if the downtown core did not have the snowbank cleared, she didn't think anywhere else would.[126]

155. If the City expected people to not park in the stalls on the 300 block it should have closed off parking or created the windrow at the back of the stall, providing a barrier to cars parking in those spots. The City had the option to close parking. The City created the windrow straddling the curb and blocking safe access to the sidewalk to allow people to park in the stalls. This is an invitation to park. To invite the public to park but expect them to find another spot because access to the sidewalk is blocked is nonsensical.

156. The City had 30 hours to mitigate the risk of the hazard it created, but it did

[126] Transcript, AR, Part V, p. 19, ll. 36 to p. 20 l.4.

nothing. Instead, it invited people to park knowing their access to the sidewalk was blocked by the windrow. It is submitted that in all the circumstances of the case the City did not act reasonably and is liable in negligence.

E. Legal Causation

157. The trial judge found that "legal causation" was not met in this case and dismissed the action on that basis. He stated his understanding of this requirement as follows (at para. 41):

> Beyond this, the City would also have to be liable for legal causation. The City's fault must be the proximate (or reasonably foreseeable) cause of the action.

158. In addressing legal causation, the trial judge reviewed two trial decisions from British Columbia. In one the court concluded that the plaintiff's failure to use reasonable care in the face of an obvious risk "was the proximate cause of her injury."[127] In the other, the court found that a plaintiff who fell on compacted snow on the defendant's property had "voluntarily assumed the risk and as a result is the author of his own misfortune."[128]

159. The trial judge then set out in paragraph 43 a list of the "risks" that he said the respondent was aware of. Paragraph 43 is a reproduction of paragraphs 162 and 163 of the City's closing written submissions at trial.[129] At the close of paragraph 43 he says this, which is taken verbatim from the City's closing submissions:

Prior to stepping onto the snow bank the plaintiff appreciated and understood the following risks:

a) That there was some risk in walking over the snowbank;

b) That in walking on the snowbank there was a risk that she could slip and fall;

c) That in walking on the snowbank there was a risk that she could lose traction;

d) That her foot could go through the snow.

160. Borrowing the language from the two B.C. trial decisions, the trial judge concluded that "The plaintiff assumed the risk of crossing the snowbank" and "was the author of her own

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[127] *Wickham v. Cineplex Inc.*, 2014 BCSC 850 at para. 63.
[128] *Robson v. Spencer*, 2006 BCSC 1240 at para. 17.
[129] AR, Vol. III, pp. 119-20.

misfortune."[130]

161. The City's submissions regarding the risks, which were copied in the trial reasons, do not accurately or fully set out the respondent's evidence. While she was aware there was some risk in crossing the snowbank, she explained that she did not slip or lose traction that day nor did she think her foot would go through the snow as she "thought the snow had already been compressed".[131]

162. However, the important point here is that the trial judge erred in treating the alleged assumption of risk as a matter of legal causation. Legal causation is concerned with remoteness of damages and has nothing to do with the voluntary assumption of risk. The latter is relevant to the defence of *volenti non fit injuria* which was neither pled nor argued at trial.

163. The trial judge further erred by treating legal causation as an issue in this case at all. Legal causation addresses the reasonable foreseeability of the actual injury suffered by a plaintiff. It is not concerned with determining whether the plaintiff caused the accident. To find that a plaintiff and not a defendant has caused an accident is another way of saying that factual causation has not been established. It is confusing and wrong to use the concept of legal causation or remoteness of damages to describe such a situation.

164. Finally, the trial judge erred in treating the allegations of lack of due care on the part of the respondent as going to the question of legal causation. Such allegations are relevant to the question of contributory negligence. To exonerate a defendant notwithstanding its negligence caused or contributed to an accident because a plaintiff failed to take due care and attention immediately prior to the accident is a result not permitted by law. It is an application of the "last clear chance" doctrine that has been abolished in British Columbia.

(i) <u>Assumption of Risk</u>

165. In *Dube v. Labar*, this Court described the defence of *volenti non fit injuria* – meaning "to one who is willing no harm is done" – as "drastic" because it denies compensation completely to the plaintiff notwithstanding the defendant's negligence. As a result, "the defence will only be

[130] Trial Reasons, para. 45, AR, Vol. I, p. 20.
[131] Transcript, AR, Part V, p. 22, ll. 13-18; p. 24, l. 42 to p. 25, l. 6.

made out in unusual circumstances."[132]

166. In *Dube* the Court discussed the requirements of the defence as follows (at p. 658):

> . . . *volenti* will arise only where the circumstances are such that it is clear that the plaintiff, knowing of the virtually certain risk of harm, in essence bargained away his or her right to sue for injuries incurred as a result of any negligence on the defendant's part. The acceptance of risk may be express or may arise by necessary implication from the conduct of the parties, but it will arise, in cases such as the present, only where there can truly be said to be an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to.
>
> Common sense dictates that only rarely will a plaintiff genuinely consent to accept the risk of the defendant's negligence.

167. To the extent there is any responsibility on the plaintiff, *volenti* is rarely applied and the usual approach is apportionment of liability.[133]

168. As noted, *volenti* was neither pled nor argued in this case. This is not surprising as it could never be made out. It was an error to dismiss the action on the basis that Ms. Marchi "appreciated and understood" the risks of crossing the snowbank. The trial judge has done an end run around the stringent requirements of the *volenti* doctrine.

(ii) <u>Remoteness</u>

169. As this Court explained in *Deloitte & Touche v. Livent Inc. (Receiver of)*, legal causation is synonymous with remoteness of damages and asks if the "actual injury" suffered by the plaintiff was reasonably foreseeable.[134] The concern, as Justice Linden put it, is to ensure that a defendant is not called upon to pay "for some unusual damage."[135]

170. Ms. Marchi suffered personal injuries in an accident that resulted from a hazard of the

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[132] *Dube v. Labar*, [1986] 1 S.C.R. 649 ("*Dube*") at 653, 657, 660.
[133] *Crocker v. Sundance Northwest Resorts Ltd*., [1988] 1 S.C.R. 1186 at 1202. See also *Mitchell v. Canadian National Railway Co.*, [1975] 1 S.C.R. 592 at 617 where Laskin J. (as he then was) said: "I regard it as wrong in principle to dissolve a duty of care that arises on the facts of a case merely because the person to whom the duty is owed knows that he may be exposing himself to some danger, and especially so when there is applicable apportionment legislation."
[134] *Deloitte & Touche v. Livent Inc. (Receiver of)*, [2017] 2 S.C.R. 855 ("*Livent*") at paras. 78-79.
[135] Linden, Allen M., *Canadian Tort Law,* 11th ed. (Toronto: LexisNexis Canada, 2018) at 7.60. See, for example, *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 18 and see *Milliken v. Rowe*, 2012 BCCA 490 at para. 32.

City's making. The trial judge accepted there were risks of such an accident occurring. Indeed, he used the respondent's (alleged) knowledge to hold (wrongly) that she had assumed the risks of crossing the snowbank. There is no remoteness issue in this case.

171. Despite the well-understood meaning of legal causation, the City attempts to support the trial judgment by contending that it was not reasonably foreseeable that an individual living in a city "prone to snow events" would do the things such as cross a snowbank wearing running shoes. There was no evidence that the shoes she was wearing had any impact on the fact that her foot went through the snowbank (she did not slip and fall). The important point, however, is that the City's argument has nothing to do with remoteness of damages. It is an argument that the respondent contributed to her own injuries by failing to take reasonable care when crossing the snowbank. Indeed, the City itself concludes its submission on legal causation by saying that the City should be able to expect that residents "will use reasonable caution in such conditions."[136] The City is making allegations of contributory negligence, not lack of legal causation.

(iii) <u>Last Clear Chance Doctrine</u>

172. The "last clear chance" doctrine operated to absolve a defendant for its negligence where the plaintiff had an opportunity to avoid an accident through the exercise of reasonable care but failed to do so. Section 8 of British Columbia's *Negligence Act*[137] abolished this doctrine. Now, where the defendant and plaintiff are both responsible for an accident, the court must apportion liability between them under s. 4 of the *Negligence Act*.[138]

173. In *Lawrence v. Prince Rupert (City of)*, the British Columbia Supreme Court provided this helpful review of how the last clear chance doctrine used to operate before section 8 was passed:

> [29] Some years ago, before the amendment to the ***Contributory Negligence Act*** in 1970, the issue would often be framed in terms of whether a clear line could be drawn between the negligence of the plaintiff and the negligence of the defendant, so as to justify the conclusion that the negligence of the defendant had ceased to be an operating factor in the accident. It appears to have been the law that, if the defendant had negligently created a situation of risk that could cause an accident, and if the plaintiff knew (or ought to have known) of that risk and by the exercise of reasonable care could have avoided the accident but failed to do so, then, in law, the plaintiff's negligence would be the sole cause of the

[136] Appellant's Factum, para. 127.
[137] *Negligence Act*, R.S.B.C. 1996, c. 333.
[138] *Sweeney v. British Columbia*, 2018 BCSC 1832 at para. 97.

accident. [Citations omitted.]

[30] The problem with that analysis is of course that it embodies the "last chance" doctrine, which was long ago removed from our law. Section 8 of the ***Negligence Act*** now reads as follows:

> "8 This Act applies to all cases where damage is caused or contributed to by the act of a person even if another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so."[139]

174. In the case at bar, there is no doubt that if the City was negligent its negligence caused or contributed to Ms. Marchi's injuries. The only comment made by the trial judge was that for "factual causation" to be established the requite standard of care would have required the removal of the snowbanks which would have meant imposition of a standard of perfection. For the reasons given above, the trial judge erred in his assessment of the standard of care. However, for the purpose of factual causation, there is no question that but for the creation of the hazard Ms. Marchi would not have been injured.[140]

175. The trial judge dismissed the action after finding that Ms. Marchi is solely responsible for her injuries because she was aware of some risk but decided to cross anyway.[141] This is not a result that can be legally justified given the abolishment of the "last clear chance" doctrine. The Court of Appeal was therefore correct to find that "it was not open to the judge to treat his finding that the appellant assumed the risk of crossing the snowbank as dispositive of the question of the [City's] negligence."[142]

(iv) <u>Proximate Cause</u>

176. As noted, "legal causation" is synonymous with "remoteness of damages." It is sometimes

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[139] *Lawrence v. Prince Rupert (City of)*, 2003 BCSC 465; aff'd *Lawrence v. Prince Rupert (City) and B.C. Hydro & Power Authority*, 2005 BCCA 567 (*Lawrence*).

[140] In the City's memorandum of argument in support of its application for leave to appeal, it submitted (at para. 51) that it is not an application of the last clear chance doctrine to find that a plaintiff was the "sole cause of their injury, even if but for defendant's negligent conduct, the injury would not have occurred." This apparently was the trial judge's thinking too but it is wrong. In the scenario the City describes responsibility for the accident must be apportioned. See dissenting reasons of Esson J.A. in *Lawrence* at paras. 71-76 which the respondent submits is a correct application of the law.

[141] Trial Reasons, para. 45 (agreeing with the City's submission reproduced at para. 44 of his reasons), AR, Vol. I, p. 20.

[142] Court of Appeal Reasons, para. 29, AR Vol. I, p. 31.

also referred to as "proximate cause" but that is an "older" use of the phrase.[143] However, "proximate cause" is sometimes used to describe "factual causation".

177. The decision of Finch C.J.B.C. in *Lawrence* (relied upon by the City) is an example of a judge using "proximate cause" to mean factual causation. In that case, the plaintiff had tripped over a power pole that was left by the defendant on a portion of the sidewalk. He said determining whether the defendant's "act of negligence was a proximate cause of damages is not an application of the 'last clear chance' doctrine" but "is rather a factual determination on the issue of causation."[144]

178. Given that proximate cause is used to denote legal causation or remoteness, it is a recipe for confusion to use it to mean factual causation, as the BC Court of Appeal pointed out in *Skinner v. Fu*.[145] It is better simply to ask, in any negligence case, whether "factual causation" has been made out. Here it has been, and there was no issue of "legal causation" presented.

PART IV – COSTS

179. The respondent seeks an order for costs here and in the courts below.

PART V – ORDER SOUGHT

180. The respondent seeks an order dismissing the appeal and remitting the case to the Supreme Court of British Columbia for disposition in accordance with the reasons for judgment of this Court, with costs throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

D. Daroux

Danielle K. Daroux
Michael Sobkin
Counsel for the Respondent, Taryn Joy Marchi

January 25, 2020

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[143] This is the view of A.M. Linden and B. Feldthusen reproduced in *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 181.
[144] *Lawrence* at para. 41. In the respondent's submission the dissenting judgment of Esson J.A. was the correct one. The trial judge having found both parties at fault for the accident, liability should have been apportioned (see para. 83 of Justice Esson's reasons).
[145] *Skinner v. Fu*, 2010 BCCA 321 at paras. 18-20.

PART VI – TABLE OF AUTHORITIES

Jurisprudence	**Para(s)**
1688782 Ontario Inc. v. Maple Leaf Foods Inc., 2020 SCC 35	67
Anns v. Merton London Borough Council, [1978] A.C. 728, [1977] 2 All E.R. 118, [1977] UKHL 4	73, 76, 78-81, 98, 100, 119
Brown v. British Columbia (Minister of Transportation and Highways), [1994] 1 S.C.R. 420	85-87, 89, 95, 108
Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748	63
Childs v. Desormeaux, [2006] 1 S.C.R. 643, 2006 SCC 18	99, 135
*City of Vancouver v. McPhalen (*1911), 45 S.C.R. 194	116
Cojocaru v. British Columbia Women's Hospital and Health Centre, 2013 SCC 30	60
Cooper v. Hobart, 2001 SCC 79	73, 77, 100
Crinson v. Toronto (City), 2010 ONCA 44	135
Crocker v. Sundance Northwest Resorts Ltd., [1988] 1 S.C.R. 1186	167
Cullinane v. City of Prince George, 2000 BCSC 1089	135
Cullinane v. City of Prince George, 2002 BCCA 523	135
Deloitte & Touche v. Livent Inc. (Receiver of), [2017] 2 S.C.R. 855	169
Dube v. Labar, [1986] 1 S.C.R. 649	165-166
F.H. v. McDougall, [2008] 3 S.C.R. 41, 2008 SCC 53	48
Galaske v. O'Donnell, [1994] 1 S.C.R. 670	67
Gronnerud (Litigation Guardians of) v. Gronnerud Estate, 2002 SCC 38	133
Hill v. Hamilton-Wentworth Regional Police Services, [2007] 3 S.C.R. 129	118
J.J. Rankin (Rankin's Garage & Sales) v. J.J., 2018 SCC 19, [2018] 1 S.C.R. 587	67
Just v. British Columbia, [1989] 2 S.C.R. 1228	10-12, 57, 71, 73-74, 80-85, 95, 97, 100, 118
Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2	77, 81
Kosoian v. Société de transport de Montréal, 2019 SCC 59	9, 96, 108
Lawrence v. Prince Rupert (City of), 2003 BCSC 465	173
Lawrence v. Prince Rupert (City) and B.C. Hydro & Power Authority, 2005 BCCA 567	173-174, 177
Lewis (Guardian ad litem of) v. British Columbia, [1997] 3 S.C.R. 1145	90, 108