# How to Overcome the Black Ice Defence

By Bottom Line Research

## Introduction

Many motor vehicle accidents resulting in personal injuries that occur in wintery conditions are met with the "black ice defence" – the argument that the road conditions were so bad that the accident occurred without the fault of the defendant driver and hence it is argued that no liability for the accident in negligence should ensue. There is Alberta case law supporting the viability of the black ice defence. Countervailing case law refutes the black ice defence, however, and finds the defendant driver in wintery conditions nonetheless liable in negligence. This article will first canvass some cases in which the black ice defence is given effect to, and then canvass the case law in which the defence has been overcome and negligence found. It will conclude with some suggestions as to how to argue to overcome a black ice defence.

## The Black Ice Defence

Black ice is a term used to describe a transparent coating of ice which, by its nature, is nearly unobservable. An early Alberta case in which the black ice defence was successful is ***Barriault v Scherger***, 1998 ABQB 281, [1998] AJ No 382. Here the defendant driver was absolved of liability due to slippery road conditions. The defendant driver lost control and fish-tailed into the plaintiff's lane, where the plaintiff was unable to avoid hitting her. The Court found that there was evidence that the defendant lost control on a patch of black ice, which two other vehicles ahead of her had also fish-tailed on. Further, road conditions were not otherwise snowy or apparently treacherous, making the patch of ice unforeseeable. The defendant was also required to brake at the location of the patch of ice in order to go around two other stopped vehicles on the side of the road. Those factors, taken together, persuaded the Court that negligence could not be attributed to the defendant:

> 8 I find that the plaintiff has failed to establish that the collision between her vehicle and the defendant's vehicle was occasioned by the negligence of the defendant. The evidence of defendant, and which I accept, is that she, and the drivers of two westbound vehicles ahead of her in the north lane of Memorial Drive, **encountered a stretch of black ice occasioning each vehicle, on the application of their brakes, to fishtail to the left,** and in the defendant's case, suddenly placing her vehicle in front of the plaintiff's vehicle and with the plaintiff having no opportunity to avoid the collision. The braking by the three north lane westbound vehicles was made necessary by the fact that a stalled van and parked pickup truck were blocking the north lane of Memorial Drive to

> the west. Following the collision the defendant walked ahead to these vehicles and estimated they were 10 to 12 car lengths west of where the defendant's vehicle came to rest. There was no reconstruction evidence at the trial and I do not know the distance between the point of impact and where the defendant's vehicle came to rest but, clearly, the two westbound vehicles ahead of the defendant, and the defendant herself, **had to take braking or other evasive action in order to avoid crashing into the stalled van and/or the pickup truck immediately behind it**.
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> 9 I fully recognize that the plaintiff was innocently and properly proceeding in her own lane and that she had no opportunity to avoid running into the back end of the defendant's vehicle. On first consideration, one would feel assured that the plaintiff in this situation was entitled to free and unfettered passage along the highway. But what did the defendant do or not do in the circumstances that constitutes negligence on her part? **There was really nothing that she could do differently and, regrettably, her vehicle fishtailed to the left into the path of the plaintiff's car**. [Emphasis added]

In ***Sharma v Smook***, [1996] AJ No 866, 191 AR 152 the Court was also prepared to accept that the patch of ice that caused the defendant to skid out of control and hit the plaintiff's vehicle was unforeseeable. Referring to earlier case law, the Court emphasized that foreseeability of a hazard is a key consideration in determining whether negligence should be attributed to a defendant who loses control of his vehicle, and that courts should consider whether the defendant had no reason to expect that he would encounter a slippery condition:

> 26 […] As noted above, I am of the opinion that the arguments of the plaintiff that the defendant was negligent are not valid. The explanation of the defendant that he skidded on ice and was thereafter unable to regain control of his vehicle is accepted.
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> 27 In *Hearn*, Esson, J.A. distinguished the circumstances of the collision then before the Court from the circumstances of the collision in *Hackman v. Vecchio*, (1969) 4 D.L.R. (3d) 444 (B.C.C.A.). He noted that in *Hackman* the trial judge in instructing the jury should have concluded that it was impossible on the evidence to conclude that **the defendant driver could have been taken by surprise by the slippery condition of the road. In short, the respondent had not provided any explanation of how his car may have skidded without negligence on his part**. Esson, J.A. then went on to say that the crucial difference between the *Hackman* case and *Hearn* was the finding that **the defendant had no reason to expect that he would encounter a slippery condition**. He thus discharged the burden placed on him by the other circumstances of the

collision. The same finding would, in my view, apply in the case at bar. . . . [Emphasis added]

Overcoming the Black Ice Defence

Section 185 of the *Traffic Safety Act*, RSA 2000, c T-6 provides a reverse onus on a driver who is in breach of the Act to show that loss or damage claimed by a plaintiff did not result from that breach:

185 If

(a) a person sustains loss or damage arising out of the operation of a motor vehicle on a highway, and

(b) that motor vehicle is operated by a person who is in contravention of or fails to comply with this Act,

the onus of proof in any civil proceeding that the loss or damage did not arise by reason of that contravention or failure to comply is on the owner or driver of the motor vehicle.

Section 15 of the *Use of Highway and Rules of the Road Regulation*, Alta Reg 304/2002 sets out rules governing traffic lanes, and creates an obligation for drivers not to cross into another lane when it cannot be done safely, and not without first signalling intention to other drivers:

15(1) When operating a vehicle on a highway, . . .

(2) Before driving a vehicle from one traffic lane into another or from a curb lane or a parking lane into a traffic lane, a person driving a vehicle shall

(a) signal that person's intention to do so in a manner as provided for in Division 3, and

(b) give the signal in sufficient time to provide a reasonable warning to other persons of that person's intentions.

[…]

(4) Notwithstanding anything in this section, when the movement cannot be made in safety, a person driving a vehicle shall not do the following:

(a) drive the vehicle from one traffic lane to another;

[…]

(6) A person driving a vehicle shall not drive the vehicle in such a manner so that the vehicle occupies space in 2 traffic lanes

(a) except during the act of passing another vehicle or changing lanes, or

(b) unless road conditions make the use of a single traffic lane impractical.

Case law indicates that the s. 185 reverse onus applies in conjunction with a common law rule providing for a presumption of negligence in cases where a driver has breached a duty of care to other drivers. The rule is typically traced back to ***Gauthier Co v Canada***, [1945] SCR 143, [1945] 2 DLR 48, which dealt with an accident that occurred after a driver lost control in snowy conditions and crossed the centre line into the path of an oncoming ambulance. The Court made a finding of negligence against the driver who lost control. In reaching that conclusion, the Court established the principle that a driver who has breached a duty to other drivers, or at the time of the accident is "in a position where it had no right to be" is *prima facie* negligent, and bears an "onus of explanation":

> The driver of a vehicle meeting another vehicle on a highway is entitled to rely on the performance by the approaching vehicle of the duty cast upon it by the statute referred to, and is in his turn bound by a similar duty. **A breach of this duty occasioning damage will establish a *prima facie* case of negligence on the part of the driver of the offending vehicle, casting upon the latter the onus of explanation**. […] I am of opinion that the principle of the cases just referred to applies in the present instance, the carrier being, in the words of Lord Greene in *Laurie v. Raglan* Building Co. Ltd. [[1941] 3 All E.R. 332, [1942] 1 K.B. 152], "**in a position where it has [had] no right to be" at the time it met the appellant's ambulance. This fact resulting in the damage to the appellant's vehicle, amounts *prima facie* to negligence on the part of the operator of the carrier**. [At pp. 4-5 (QL), emphasis added]

The Court also noted that skidding as a result of poor road conditions does not by itself establish a lack of negligence:

> […] it was established that the presence of the carrier on the south side of the road at the time of the collision was due to a skid, the rear end of the carrier going around to the driver's left, taking the whole vehicle across the road so that, at the time it was run into by the ambulance on its left side, it was across the south half of the highway. **Skidding of a vehicle on a highway by itself is a**

> **"neutral fact", equally consistent with negligence or no negligence.** […] Accordingly, for the respondent in the circumstances of this case to go no farther than to show that the accident was occasioned by the skidding of the carrier, **was not to show "a way in which the accident may have occurred without negligence",** in the language of Lord Dunedin in Ballard's case [(1923) 60 Sc. L.R. 441, at 449]. [At p. 5, emphasis added]

In ***Brown Estate v Britsky***, 2011 ABCA 274, 513 AR 340, the Court of Appeal affirmed the overlapping application of the evidentiary onus established by the common law, and the reverse onus set out by s. 185 of the Act. That case dealt with a head-on collision where both drivers appeared to have been over the centre line:

> 9 The trial judge found that both vehicles were straddling the center line. She found that this **raised a presumption of negligence on the part of both drivers, and that if neither driver could rebut the presumption then they would both be found culpable**. It is permissible for a trial judge to draw an inference of negligence from a finding that the driver was over the center line: […]. At common law that was merely an evidentiary inference, and it did not reverse the burden of proof*: Gauthier Co. v. Canada*, [1945] SCR 143 at pp. 150-51; *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 SCR 424 at paras. 23-25. **However, s. 185 of the *Traffic Safety Act*, RSA 2000, c. T-6 now applies** […]
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> Since s. 12 of the *Use of Highway and Rules of the Road Regulation*, AR 304/2002 requires a driver to stay to the right of the center line, **both drivers here were subject to the burden of showing that the accident did not result from their contravention of the Act**. [Emphasis added]

The principles from ***Gauthier*** were applied and elaborated on in ***McDonald v Nguyen***, [1991], 3 Alta LR (3d) 27, 138 AR 81, a case dealing with an accident between oncoming drivers in poor weather conditions. In that case, the Court dismissed an argument that the road conditions, rather than negligence, were to blame for the defendant driver losing control of his vehicle, since no evidence had been provided to establish that there was a spot of ice on the road at the location where the driver lost control:

> 25 A breach of the duty to remain on the appropriate side of the highway, occasioning damage, serves to establish a *prima facie* case of negligence against a defendant driver. It then casts the onus upon this defendant to "show a way in which the accident may have occurred without negligence." In every other

way, the burden of proof remains with the plaintiff. I adopt this view as being current law.

26 A review of the cases ably put by both counsel for the defendant and counsel for the plaintiffs revealed that such "a way" is not easily or commonly shown. Further, in Gauthier, it was held that the mere fact of skidding is, by itself, a "neutral act," and such behaviours are equally consistent with negligence or no negligence.

[…]

30 In *Gauthier*, as in the case at bar, **no evidence was led to definitively establish that a spot of ice on the road existed at the spot where control was lost. Nor is there any evidence that any witness located a spot of ice there after the collision**. . . . [Emphasis added]

The Court identified the burden resting on the defendant as a burden to produce an explanation “equally consistent with negligence and with no negligence” in order to shift the onus of proof back to the plaintiff. The fact that road conditions were generally poor, not only at the site of the accident, but everywhere, was held to prevent the defendant from invoking an argument that the accident was caused by unforeseen conditions:

43 When the above cases are applied to the testimony as heard from the examination for discovery read-ins and from the trial, the following can be discerned: Upon the principles in *Gauthier*, the nature of the onus which rests upon the defendant is stated as in *Hutson*, supra, where his Lordship at p. 738 said: "Broadly speaking, in such cases, **where the defendant produces an explanation equally consistent with negligence and with no negligence, the burden of establishing negligence still remains with the plaintiff**."

[…]

51 From all the evidence before me, I am satisfied that **the existence of ice and/or snow causing slippery conditions both for some distance before and at or near the place of the accident was a foreseeable condition**. Whether the defendant accelerated that day to climb the grade or slowed - as he states was his usual practice when it is snowing - will likely remain unknown. **The fact remains that he had reasonable foreseeability that the snow and potentially icy conditions that loomed on the highway for some miles before the accident site caused conditions where harm would have been reasonably foreseeable unless reasonable precautions were taken**, even to the point of slowing to a snail's pace or stopping altogether. [Emphasis added]

The requirement for a defendant to provide specific evidence explaining how a loss of control occurred was noted in ***El Dali v Panjalingam***, 2013 ONCA 24, 113 OR (3d) 721; leave to appeal refused [2013] SCCA No 108. In that case, the Ontario Court of Appeal set aside a jury verdict absolving the defendant of liability for an accident that occurred after he lost control of his vehicle in poor conditions. The Court observed that there was no evidence whatsoever related to the defendant's driving, or any circumstances to overcome the presumption of negligence. In particular, the Court noted that the simple fact that driving conditions were not good was not enough to support a finding of no negligence:

> 22 **We have no explanation for Panjalingam's driving**. We have no evidence about why he crossed the centre line and struck El Deli's car when it was parked on the side of the road; **no evidence about Panjalingam's driving before he lost control of his car; no evidence about what caused him to lose control of his car**; no evidence about what rate of speed he was driving; and no evidence about whether he took any steps to avoid the accident, and if so what they were. **Absent any explanation, the jury's verdict that no negligence on the part of Panjalingam contributed to or caused the accident was unreasonable**. That it was unreasonable is supported by defence counsel's closing submission in which she asked the jury to find Panjalingam only 50 per cent at fault. Although not binding on the jury, defence counsel's assessment of the record strongly suggests that the jury's verdict was unreasonable.
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> […]
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> 25 **The poor driving conditions do not support the jury's verdict. The mere slippery or icy condition of a road does not permit a trier of fact to infer that an accident was unavoidable and not caused by a driver's negligence**. […] [Emphasis added]

The nature of the evidence that a Court will be looking for to determine whether a defendant's driving might have been negligent was commented on in ***DeBartok v Ontario (Minister of Transportation and Communications)***, [1997] OJ No 5000, 45 OTC 6. In that case, the defendant attempted to invoke evidence of another driver's inability to control her vehicle as evidence that the driving conditions, and not negligence, were to blame for the accident. That other driver was not involved in the accident at issue, but had separately spun out and had her own accident. The Court did not accept the argument that she had spun out simply because she was passing over a slippery spot on the road, without any negligence on her part:

> 33 Having regard to the expert testimony that was given before me, I have some considerable difficulty in accepting that Ms. Rendle simply lost control of

her motor vehicle because it was passing over ice. The expert testimony before me made it clear that **the best course of conduct any driver could do in passing over ice was nothing at all.** It was the expert opinion before me that a motor vehicle passing over black ice that did nothing at all would simply pass over the ice uninterrupted in its travel. **If, however, the driver of the motor vehicle was to do anything that would change the state of the operation of the motor vehicle, then it would become raw chance as to whether or not they lost control.** By changing the state of the operation of the motor vehicle, that would involve decelaration, acceleration, braking or turning. The simple act of removing the driver's foot from the gas pedal would be sufficient to change the state of the operation of the motor vehicle.

[…]

37 Under the circumstances, I am of the view that the evidence of Ms. Rendle is not of any particular use to me in attempting to sort out the issues of liability among the parties in this action. In my view, her evidence is very suspect as to its value, not only as to when her accident took place but, in particular, the manner in which she described her accident happening. **I say this with particular regard to the expert evidence that was before me which would challenge her view that she had done nothing at all to alter the state of operation of her motor vehicle but simply lost control while passing over ice**. [Emphasis added]

In ***Holizki Estate v Alberta (Public Trustee)***, 2008 ABQB 716, 462 AR 85, the defendant driver was found liable for a single vehicle accident in which his passengers were injured after he lost control of the vehicle on slippery roads. The Court rejected a no-negligence defence that was based on the poor driving conditions, finding that the driver was tired and perhaps mildly intoxicated, but in addition had fair warning of the road conditions and failed to adapt his driving. The Court also pointed out that young or inexperienced drivers do not benefit from a reduced standard of care:

143 The standard of care owed by Andrew Fisher is to act as a reasonable driver. **The standard of care expected of a new or young driver is the same: the law does not reduce what is expected of any driver to ensure a minimum standard of behaviour owed to others on the road**.

[…]

154 Andrew Fisher **did not meet the standard of care of a reasonable and prudent driver**. Mr. Fisher was in all likelihood fatigued and while his blood alcohol level was below the legal limit, it is some evidence of impairment. **He crossed the centre line for no known or defensive reason and went across a**

> **double yellow line, he was speeding, hit into the guardrail, and lost control of the car. Mr. Fisher created a dangerous situation on a high speed roadway**. [Emphasis added]

In ***Fuller v Schaff***, 2009 YKSC 23, 83 MVR (5th) 188, the fact that the defendant driver was well aware of the road conditions, and of the lack of visibility resulting from driving through a snow cloud produced by oncoming vehicles, prevented him from relying on either of those factors as a defence to liability. In that case, the defendant had already driven through two snow clouds earlier in his journey. He passed through a third one as he rounded a curve, and then crossed into the oncoming lane and collided with the plaintiff's vehicle. The Court held that he was negligent in failing to take the precautions that he should have know were necessary, in light of the conditions:

> 8 There is no question that Mr. Schaff owed Mr. Fuller a duty of care in these circumstances. […]
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> 9 Mr. Schaff also had a statutory duty of care not to cross over the centre line of the highway, pursuant to s. 144(1) of the *Motor Vehicles Act*, R.S.Y. 2002, c. 153.
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> […]
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> 12 If Mr. Schaff produces an explanation for the collision equally consistent with negligence as with no negligence, then the burden of proving negligence remains with the plaintiff on the balance of probabilities. On the other hand, **if his explanation fails in that regard, then the fact that he crossed the centre line is conclusive proof of his negligence**. In the words of *Doucet* above, **he would be "presumptively at fault"**.
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> […]
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> 16 […] **Mr. Schaff was fully aware that the highway was largely snow-covered and snow-packed as he approached the accident scene. He had also experienced icy patches on the highway en route. More importantly, he had encountered two separate snow clouds** before the accident, while passing oncoming semi-trailers. He was surprised by the fact that the snow clouds impaired his visibility to such an extent that, on the second occasion, he had to slow his vehicle almost to a stop. He was therefore familiar with what to expect in a snow cloud prior to encountering the snowplow. [Emphasis added]

Conclusion

It seems then that a black ice defence may be overcome by arguing:

- the evidentiary presumption of negligence at common law where a driver has breached a duty of care to other drivers;
- the reverse onus created under s. 185 of the *Traffic Safety Act* if a defendant driver is in breach of the Act;
- the defendant bears the onus to show a way in which the accident may have occurred without negligence, or an explanation for the collision that is equally consistent with negligence as with no negligence, in order to shift the onus of proof back to the plaintiff;
- the defendant is required to provide evidence of factors such as his/her speed, general driving conduct prior to and at the time of the accident, the topography of the alleged black ice and the reason why they lost control;
- if the conditions at the location of the accident were not different from the conditions on the roads generally at the time, the defendant cannot claim that he/she had no warning of slippery conditions or the need to take extra care – that is, the black ice was forseeable; and
- if other drivers were able to navigate that section of road without problems that will be persuasive.

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