Case Name:

Renaud v. Windsor (City)

Between
Kimberly Renaud, plaintiff, and
The Corporation of the City of Windsor, defendant

[2004] O.J. No. 2836
Court File No. 00-GD-48686

Ontario Superior Court of Justice
Patterson J.

Heard: June 7, 8, and 9, 2004.
Judgment: June 29, 2004.
(19 paras.)

Counsel:

Jennifer DeThomasis, for the plaintiff.

Tom Serafimovski, for the defendant.

¶ 1 **PATTERSON J.**:— On February 3, 2000 Ms. Renaud slipped and fell on a municipal sidewalk on the main street of the City of Windsor near the intersection of Ouellette Avenue and Maiden Lane. Ms. Renaud was starting a new job the next morning at 7:00 a.m. and had been at her new place of employment the day of the accident. She had walked easterly along Maiden Lane to the intersection of Ouellette Avenue to have dinner and spend the evening at Bistro 507 which was at 507 Ouellette Avenue, a restaurant/drinking establishment at the southwest corner of the intersection of Ouellette Avenue and Maiden Lane.

¶ 2 It had been snowing that day with some drizzle. The temperature was about freezing or slightly above and slightly below and during the time that she was in the Bistro 507, from 5 p.m. until 10 p.m., additional snow fell. Her boyfriend worked at the Bistro and prepared the meal for her. She indicates that she had two beers and I have no reason to believe that she was in any way impaired or that alcohol affected the subsequent slip and fall. She was wearing dress shoes with rubber soles and there is some question as to whether this was appropriate footwear for winter snowy conditions. I am satisfied that she was not in a hurry or had had an argument with her boyfriend. In my opinion she was walking normally and slipped on snow-covered ice and fell. She sustained a fracture dislocation to her left ankle. The doctor on the next date, February 5, performed an open reduction, internal fixation with a plate and several screws. She was in the hospital for about four days. She went home with a cast on her leg and approximately six weeks

later the cast was removed. The doctor recommended that she attend physiotherapy but because of a long waiting list she decided on her own doctor's advice, not the surgeon, to rehabilitate her ankle on her own. In my opinion it would have been preferable if she, in fact, had followed her surgeon's advice and attended physiotherapy. There is a possibility that the fact of her not attending physiotherapy may have had some impact affecting her current situation.

¶ 3 She was off work for approximately three months following the surgery, went back to work as a waitress and a labourer from May to November that same year. She was on social assistance for in excess of one year and worked again as a waitress April to November, 2002. During this time period she was off work for six weeks following surgery in September 2002 to remove hardware to help alleviate her complaints of swelling and pain. She went on social assistance for a further time period and her last work was as a waitress February 2003 to May 2003 working three hours per day for five days a week or approximately 15 hours per week.

¶ 4 She has been unemployed and on social assistance since that time. By her own admission she can waitress at least part-time, five to six hours a day, perhaps three days a week. Dr. Jovanovich is of the opinion that she should have no difficulty returning to her waitress job. She experiences pain which can be managed by Tylenol. She cannot walk for more than 30 minutes at a time and be on her feet for in excess of five to six hours. It is arguable that she is capable of earning at least the amount that she earned on average for the five years previous to the injury without difficulty. She earned an average of $5,000 per year over the previous five years prior to the injury.

THE ISSUE OF LIABILITY

¶ 5 The plaintiff slipped on a municipal sidewalk and pursuant to the Municipal Act, R.S.O. 1990 c. M.45 the municipality has a duty to repair and maintain the sidewalk. By section 284(1) of the Municipal Act (subject to the Negligence Act, R.S.O. 1990 c. N.1) the municipality is liable for all damages sustained by reason of the duty to repair and maintain a municipal sidewalk. It is important to note that by s. 284(4) of the Municipal Act the City is not liable for personal injury caused by snow or ice on a sidewalk unless the City is grossly negligent.

¶ 6 The City of Windsor has a policy of salting and sanding municipal streets having regard to the snow conditions and on the day in question I am satisfied in all likelihood there were two saltings of the intersection of Ouellette Avenue and Maiden Lane including Maiden Lane early in the morning and some time during the late evening.

¶ 7 The City in this commercial area of the downtown has a bylaw requiring commercial businesses to remove snow from the municipal sidewalk abutting their businesses. All parties agree that the bylaw does not relieve the municipality of its obligations under the Municipal Act.

¶ 8 There is no dispute that an area of the sidewalk southerly from Maiden Lane to the northerly edge of Bistro 507 was not covered by the municipal bylaw requiring cleaning by any business owner. I am satisfied that the owner of Bistro 507 during that day complied with the bylaw regarding snow removal abutting its premises. At no time ever was the 12' or 15-foot section that I above described looked after by anyone, including the municipality except as

hereinafter mentioned. A city employee testified that perhaps the truck in spreading salt behind it may have caused some salt to spread into the area of the sidewalk where the plaintiff fell.

¶ 9 The City has argued that there was never any complaints registered at any time involving this area of Ouellette Avenue specifically the sidewalks to which the municipality would respond. The City does not look after the sidewalks in the downtown area and only responds in the event of complaints. If the complaint involved a commercial enterprise not cleaning their sidewalks in front of their buildings sanctions would take place. The difficulty with the area of the sidewalk not covered by the bylaw results in what appears to be no policy by the municipality. The policy regarding sidewalks by the municipality is that they apparently clean the curb area of intersections that are wheelchair accessible or in which there is a buildup of snow along the curb in that area. Further, they respond to complaints against commercial property owners and presumably themselves and use bobcats to remove heavy snowfalls.

¶ 10 I am concerned that the municipality has no policy regarding sidewalks in the downtown area save and except as above-mentioned. On the date in question there apparently was patchy ice and the snowfall during the day hid any ice that was there. Ms. Renaud lived within a half a block of the area for approximately a year, knew the area well and, in fact, had walked in the very location where she fell that same evening when she went to the restaurant. Despite that I am satisfied that the municipality was grossly negligent in that it does not have, in my opinion, an adequate policy for snow removal from sidewalks. There was approximately a 12-foot section where the plaintiff fell that the municipality at no time ever concerned itself about sidewalk snow removal except to respond to complaints or in the event of heavy snowfalls that require the use of bobcats. As I have already stated the bylaw does not relieve the municipality from responsibility and I am satisfied that the policy of responding to complaints and the use of bobcats for heavy snow removal is inadequate and therefore the municipality, on the facts of this case, was grossly negligent.

¶ 11 I find that Ms. Renaud is 25% liable because though the ice was covered, the area is a well lit and well traveled area of the main street of Windsor and was an area that she knew well living within a half a block and having walked there previously the same evening. Additional snow fell while she was in the restaurant between 5:00 and 10:00 in the evening and I am satisfied that she did not take appropriate care and that her footwear (being dress shoes with rubber soles) were not adequate or appropriate for the weather conditions.

¶ 12 I am satisfied that Ms. Renaud suffered a serious injury to her ankle and that she will experience into the future some swelling and pain and that there has been some impact on her ability to work.

GENERAL DAMAGES

¶ 13 I assess her general damages at $40,000.

HOUSEKEEPING

¶ 14 In regard to housekeeping there is no suggestion that she cannot do her own housekeeping even though it does take her additional time to complete it. She worked for some time period after the fall and, in my opinion, can continue to work as a waitress with her being capable of being on her feet for up to five or six hours at a time. The range of motion between her left and right ankles are very similar even though there is some small impairment to her left ankle. I am not satisfied this supports a claim for housekeeping.

PAST WAGE LOSS

¶ 15 In regarding to her claim for past wage loss she was off work for approximately a three month period just after the injury when she was in a cast and there was a period of time of approximately six weeks in September of 2002 when she would not be capable of working after the hardware was removed. Her past income experience indicates that she was earning approximately $5,000 per year and I award her 4.5 months or $1,875 for past income lost for the time period she could not work post surgery.

FUTURE WAGE LOSS

¶ 16 It is arguable that there is no claim for future income loss. Despite that I believe it is appropriate that the plaintiff be awarded future income loss less 25% using her previous five-year income average. Using her income of approximately $5,000 per year at a reduction of 25% results in an award of $1,250 per year for 20 years or $25,000. The plaintiff was born November 26, 1969.

¶ 17 I award $3,958.08 for the O.H.I.P. subrogated claim.

¶ 18 Therefore, I award to the plaintiff general damages ($40,000 less 25%) $30,000, past loss income claim $1,875, future loss income claim $25,000 and subrogated O.H.I.P. claim of $3,958.08.

¶ 19 I may be spoken to as a matter of costs.

PATTERSON J.

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