

Indexed as:
Robinson v. Sarnia (City)

Between
Nora Robinson, plaintiff (respondent), and
The Corporation of the City of Sarnia, defendant (appellant)

[2000] O.J. No. 3529

50 O.R. (3d) 680

49 C.P.C. (4th) 153

7 M.V.R. (4th) 108

100 A.C.W.S. (3d) 1076

Court File No. 1044

Also repored at:

Ontario Superior Court of Justice
Divisional Court

Kent, Cunningham and McKinnon JJ.

Heard: May 15, 2000.
Judgment: September 20, 2000.

(29 paras.)

On appeal from Desotti J.

Counsel:

Carl E. Fleck, Q.C., for the plaintiff (respondent).
Douglas A. Wallace, for the defendant (appellant).

The judgment of the Court was delivered by

1 McKINNON J.:-- This appeal involves a determination as to whether the provisions of section 266 of the

Ontario Insurance Act bar recovery for action framed in contract.

The Facts

2 On January 25, 1993, the Respondent, Nora Robinson, then aged 80, sustained injuries after slipping and falling on an icy sidewalk after disembarking from a transit bus owned and operated by the Appellant, The Corporation of the City of Sarnia. On the day in question, the weather was clear and cold. There was ice everywhere, including all of the city sidewalks. When arriving at her bus stop, the bus driver warned the Respondent of the icy conditions and offered to assist her. In evidence, the bus driver stated:

"When she got up and she got to the front, I asked her if she would like me to take her bags for her. And she said "No, I can do it". I said "Well when you get off hang on to the pole because it is really icy."

3 The Respondent was carrying her purse and two plastic grocery bags, one in each hand. She did not use the pole.

4 After disembarking from the bus, she slipped and fell on ice accumulated beneath snow on the sidewalk. After her fall she stated "My legs. My damn arthritic legs. My knees." She then informed the bus driver that the fall was not the driver's fault.

5 In his reasons for judgment, the learned trial judge found that:

"The conduct of the bus driver was exemplary. She not only warned the plaintiff of the dangerous situation but offered to carry her bags from the bus. This proper and appropriate gesture was not accepted by the plaintiff. Moreover, her own previous knowledge of the poor conditions should have caused her to accept such assistance."

6 As a result of the fall, the Respondent suffered a displaced fracture of the left distal fibula.

The Findings of the Trial Judge

7 Desotti J. found that had the Respondent sued the Appellant for a slip and fall on a poorly maintained city sidewalk or curb, the claim would have been statute barred pursuant to the provisions of the Ontario Municipal Act. He found that her action in negligence under the Ontario Highway Traffic Act was statute barred because the claim was issued one day after the limitation period lapsed. He found that the Respondent did not fall into one of the exceptions prescribed by s. 266 of the Insurance Act because the Respondent had not sustained:

"Permanent serious impairment of an important bodily function caused by continuing injuries which is physical in nature."

He fixed damages in the amount of \$24,000 with the Respondent's contributory negligence fixed at 50 percent thus resulting in an award of damages of \$12,000.

8 In referring to the contributory negligence, Desotti J., apart from commenting on the "exemplary conduct" of the bus driver stated:

"She not only warned the Plaintiff of the dangerous situation but offered to carry her bags from the bus. This proper and appropriate gesture was not accepted by the Plaintiff. Moreover, her own previous knowledge of the poor conditions should have caused her to accept such assistance. The Plaintiff's failure of accepting this aid, plus her knowledge of the dangerous conditions plus the warning by the bus driver significantly contributed to the resulting fall and injury."

9 However, because the Plaintiff's claim had been pleaded in both negligence and implied breach of contract, the trial judge relied upon the decision in *Hydro-Electric Power Commission of Ontario v. Bruell*

Float Services Ltd. (1974), 3 O.R. (2d) 108 (O.C.A.), per Estey J.A. (as he then was):

"It would take the clearest possible language on the part of the legislature to impose by a statute of this nature a limitation provision affecting action in contract only by reason of the circumstance that a vehicle might be somehow involved in the performance of that contract."

10 Desotti J. stated:

"In my view, the simplest interpretation of section 266 would not invite the imposition of this limitation in these circumstances where a public carrier is sued for a breach of an implied duty of care. This case is virtually identical to *Bleau v. Nepean (City)* [1983] O.J. No. 315 where the action was dismissed against the transit authority but liability against the city was affirmed. In the case before me, the Defendant Corporation of the Sarnia is both the operator of the transit system as well as responsible for the conditions at the bus stops."

11 The trial judge quoted the following passage from *Bleau* (supra):

"... in the present case a condition very dangerous for pedestrians existed on the roadway immediately in front of the bus shelter and in the location from which the Plaintiff attempted to board a bus. This condition could have been remedied with ease by the application of salt or sand and I find that the failure of the Corporation of the City of Nepean to apply either of these substances, or to take other action to put the roadway in a safe condition for the pedestrians who were known to the City to make use of that roadway and who were in fact compelled to do so if they wished to use the bus system, was the sole cause of the accident and is responsible for the consequences."

The trial judge stated:

"I adopt and echo those comments in the case before me. In this case the Defendant allowed an elderly lady to be discharged in an area of ice and snow when it knew that the conditions were treacherous and thus it breached an implied term of its contract with the Plaintiff, its passenger."

Analysis

12 At the outset, it should be noted that the Plaintiff's statement of claim in essence complained of the "icy condition of the bus steps". Insofar as the action in contract was concerned, the claim alleged "that it was an implied term of the contract between the Plaintiff and the Defendant that the Defendant would maintain the bus and specifically the steps as to safely facilitate the ascent and egress of the Plaintiff from the said transit bus." There was no evidence that the steps of the bus were icy.

13 In particularizing the implied terms of the contract, the Plaintiff alleged a failure to keep the steps from ice and snow; allowing an elderly lady to be discharged to an area of ice and snow when it knew or ought to have known danger would occur; failing to warn the Plaintiff of the hazards of the steps and the icy condition as she was disembarking from the bus and failing to provide assistance to an elderly woman from disembarking from the bus when it knew or ought to have known the conditions were icy.

14 As far as the allegations in negligence are concerned, they are particularized as failing to take proper precautions in discharging the Plaintiff; allowing the bus to move at a time when the Plaintiff was alighting, thereby creating a situation of danger; failing to properly warn the Plaintiff of a situation of danger; failing to properly warn the Plaintiff of its intention to move the vehicle at the time she was alighting from it; failing to take proper conditions to ensure that the steps and area from which the Plaintiff was alighting was free from ice and snow; and being reckless and negligent in its care and handling of the Plaintiff as an elderly person in discharging her from the bus.

15 In essence, the Plaintiff's claim is grounded in negligence. The allegations of breach of contract sound in negligence.

16 One more observation is apposite to the case at bar. The Bleau case (*supra*), relied upon so heavily by the trial judge, did not involve any issue involving limitation periods. That case simply dealt with the liability of the City of Nepean to maintain the condition of bus stops within its boundaries.

17 In the case at bar, Desotti J. found that had the action been brought pursuant to the Municipal Act for failure to salt and sand at the roadway, the action was statute barred. Further, in finding that the Plaintiff did not meet the threshold imposed by the Insurance Act, the only relief available to the Plaintiff would be an action in contract which was not subject to the threshold nor the limitation period imposed by the Municipal Act.

18 The pleadings in the case at bar have been phrased almost strictly in accordance with the pleadings filed in the case of *Renaud v. OC Transpo et al.*, (1992), 91 D.L.R. (4th) 755, in which the Plaintiff slipped on the step of a bus and was injured. In that case, the Defendant pleaded that the action was barred by s. 180(1) of the Highway Traffic Act, R.S.O. 1980, because it was an action for the recovery of damages "occasioned by a motor vehicle". Chadwick J. held that s. 180(1) did not apply to actions for breach of contract, and the fact that the bus was a motor vehicle was merely incidental to the Plaintiff's claim. While this case appears to be supportive of the Plaintiff's claim in the present case, we observe that Chadwick J. in his reasons did not expound upon his finding, and it would appear that because he found negligence in the circumstances, he may have been inclined to find an implied breach of contract. That said, in the case at bar, there was no negligence, and the slip and fall occurred on the sidewalk, not the steps of the bus.

19 Cases involving the limitation imposed by the Highway Traffic Act are informative to the discussion of the limitations imposed by the Insurance Act. There is a lengthy and sometimes contradictory path arising from those cases, best analyzed by Osborne J. (as he then was) in *Clost v. Colautti Construction Ltd.* (1985), 35 C.C.L.T. 259; 5 C.P.C. (2nd) 11 and 36 M.V.R. 38 (Ont. H.C.J.) and (1985), 52 O.R. (2d) 339. Osborne J. considered certain apparently conflicting decisions of the Supreme Court of Canada in *Heppel v. Stewart* [1968] S.C.R. 707, *F.W. Argue Ltd. et al. v. Howe* [1969] S.C.R., 354, and *Bruell Float Service Ltd. v. Ontario Hydro*, [1976] 1 S.C.R. 9. In *Clost*, Osborne J., correctly in our view, stated:

"... What filters through the Supreme Court of Canada's decisions in *Argue* and *Bruell* is the need to examine the substance of the claim being advanced, as opposed to simply considering what actually caused the damage complained of. Mr. Nelson contends that the obvious basis of the Plaintiff's claim is that the Plaintiff was struck and injured by a car and that the claim advanced against all Defendants, including the applicant toy manufacturer, are in tort. There is no doubt about the factual integrity of that submission. In my view, the intellectual exercise required must focus on the claim being made against the Defendant seeking the protection of the Highway Traffic Act limitation period. What claim is being made against that Defendant? That is a far different exercise than asking the simplistic question, how was this Plaintiff injured? Or, did a motor vehicle occasion the physical injury referred to as the basis for the Plaintiff's damage claims?

20 In our view, this is the exercise to be followed in analyzing whether the limitation period imposed by the Insurance Act would apply. An analysis of the true claim advanced by the Plaintiff must be made. The mere fact that a motor vehicle is involved does not answer that question. There are circumstances where actions in contract quite appropriately would arise from circumstances where the use of the motor vehicle is incidental to the claim. Such cases have involved an action against a repairer of the brakes of a vehicle which resulted in an accident because of ill repair: see *Lebed v. Chrysler Canada Ltd. et al.* (1979), 25 O.R. (2d), 161 (Ont. H.C.J.); a motor vehicle accident which occurred as a result of a faulty tire: see *Byrne v. Goodyear Canada Inc. et al.* (1981), 33 O.R. (2d), 800 (Ont. H.C.J.); an action against a taverner where excessive service of alcohol resulted in an automobile accident: see *Clark v. 449136 Ontario Inc.* (1996), 27 O.R. (3d), 658 (O.C.G.D.) and the unsuccessful appeals in the Court of Appeal for Ontario (1997), 34 O.R. (3d), 742 and Supreme Court of Canada [1997] S.C.C.A. No. 570, an action by a person injured at a motorcycle race after being struck by a motor vehicle which left the track: see *Daviault et al. v. Canadian*

Motorcycle Association et al. (1985), 49 O.R. (2d) 147 (Ont. H.C.J.); an action for damages to a motor vehicle suffered as a result of a cargo trailer overturning due to a malfunction of sway control bars: see Eaz-Lift Spring Corp. (Ontario Ltd.) v. Fitzgerald et al., (1981), 119 D.L.R. (3d) 483 (N.S.S.C.); or where a vehicle belonging to a common carrier drove under a low bridge and machinery being transported was damaged by striking the bridge, the claim by the owner of the machinery was not subject to the provisions of the Highway Traffic Act, because such a case was in essence an action for damages for breach of contract to deliver the equipment at the specified destination: see Hydro-Electric Power Commission of Ontario v. Bruell Float Service Ltd. (1974), 3 O.R. (2d) 108.

21 These examples are certainly not exhaustive of the kinds of actions in contract which may arise independent of the limitation period contemplated in the Highway Traffic Act or the Insurance Act.

22 In Meyer v. Bright [1993] O.J. No. 2446 (O.C.A.), the Ontario Court of Appeal made comments with respect to the purpose and interpretation of s. 266 of the Insurance Act. The court stated at p. 6:

"In our view, the Ontario legislature enacted s. 266 and other related amendments to the Act for the purpose of significantly limiting the right of the victim of a motor vehicle accident to maintain a tort action against the tortfeasor. The scheme of compensation provides for an exchange of rights wherein the accident victim loses the right to sue unless coming within the statutory exemptions, but receives more generous first-party benefits, regardless of fault, from his or her own insurer. The legislation provides for enhanced benefits for income loss and medical and rehabilitation expenses to be paid to the accident victim regardless of fault"

23 Implicitly, it could be argued that the Ontario Court of Appeal regarded s. 266 as applying only to actions in tort and not to actions in contract.

24 S. 266 reads as follows:

"In respect of loss or damage arising directly or indirectly from the use or operation of an automobile and despite any other Act, none of the owner of an automobile, the occupants of an automobile or any person present at the incident are liable in an action in Ontario for loss or damage from bodily injury arising from such use or operation ..."
(emphasis added)

25 A strict reading of s. 266 would appear to foreclose actions in contract. However, we are persuaded that the words of Estey J.A. previously quoted are appropriate to the analysis of s. 266, namely that it would take the clearest possible language on the part of the legislature to foreclose actions in contract only because a vehicle was somehow involved in the performance of the contract.

26 Notwithstanding, we are persuaded that the real claim being made against the Defendant in the case at bar is a claim in negligence and not implied contract. The pleadings as they relate to a breach of implied contract really amount to claims of negligence in disguise. We can find no independent contractual obligation imposed in the circumstances that would impose liability on the Defendant. Indeed, the trial judge in his reasons for judgment in essence found that the Defendant City of Sarnia was negligent in failing to salt or sand the icy conditions at the bus stop. Clearly, that action was barred due to the provisions of the Municipal Act.

27 This court is unanimously of the view that s. 266(1) of the Insurance Act does not foreclose actions in contract where the facts support such an action, namely where the fact of the use of a motor vehicle is merely incidental to the true claim being advanced. However, the facts in this case do not support such an action.

28 The court has been referred to a decision of Poupore J., [1999] O.J. No. 4954, Action No. 2878/97 in the Superior Court at Sudbury, wherein Poupore J. held that s. 266(1) of the Insurance Act foreclosed actions in contract. A reading of the decision convinces us that the line of cases considered by Osborne J. in Clost (supra) did not appear to be cited to him and we are, therefore, not persuaded that the case constitutes

authority that would persuade us otherwise.

29 In the result the appeal is allowed with costs here and below to be assessed.

McKINNON J.

CUNNINGHAM J. -- I agree.

KENT J. -- I agree.

cp/d/qlrme/qlhcs