Citation: *O'Neill* v. *City of Whitehorse*, 2006 YKSM 1 Date: 20060525
Docket: 05–S0015
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before: His Honour Judge Lilles

William O'Neill
Plaintiff

v.

City of Whitehorse
Defendant

Appearances:
Peter Morawsky — Counsel for the Plaintiff
Jane Reed — Agent for the Defendant

REASONS FOR JUDGMENT

Facts

[1] The circumstances giving rise to this claim are not complicated. The plaintiff is a 21-year-old man with no physical disabilities. On February 14, 2005, around seven o'clock in the morning, the plaintiff boarded a Whitehorse city bus to go to work at Pizza Hut where he was in an employment-targeted vocational skills program offered by Challenge Community Vocational Alternatives. He was carrying a small handbag in his right hand and a coffee in his left hand. He walked to the back of the bus to sit in his regular seat and the bus began moving forward. He placed his handbag on the seat and was about to sit down when the bus unexpectantly braked. He was thrown forward at least a distance of four seats, and as he fell to the floor, his right knee struck a metal seat frame. He got up and sat down. Although his leg was in pain, he did not think anything of it because he wanted to get to work. On route, he changed his mind. I infer that his knee was still hurting, because he got off the bus at the Wal-Mart store to show the injury to his father. His father was sufficiently concerned that he took his son to Whitehorse General Hospital Emergency Department. The hospital record indicates that he was seen at approximately

9:10 a.m. that morning. Mr. O'Neill stated that his knee swelled to the size of a football, although he did not say whether it was that size prior to attending the hospital.

[2] He was told by the doctor at the hospital to go home, apply ice and keep the leg elevated. He was given a prescription for Tylenol #3 to address the pain and was also told to take Ibuprofen as an anti-inflammatory. He stated that he followed these directions.

[3] The injury did not recover quickly. On February 16, 2005 he saw his family physician, Dr. Rizk. The medical report included observations of swelling, tender ligaments and decreased range of movement. The doctor was sufficiently concerned to order x-rays, but no bone or cartilage damage was observed.

[4] The plaintiff saw his doctor again on February 22, 2005. At this time, he was feeling much better. The swelling had receded but there was still some tenderness. Continued use of Tylenol #3 and Ibuprofen was prescribed.

[5] On June 14, 2005 he reported to his doctor that there was on and off swelling (probably dependent on his activity level) and that he encountered some pain or discomfort walking. His doctor was concerned enough to order a CT scan.

[6] The plaintiff was seen by his doctor again on June 30, 2005. The CT scan was clear, with no bone, joint or soft tissue abnormality. No swelling or redness was observed. There was a good range of movement in the knee.

[7] On July 12, 2005, his doctor reported that everything was normal, except some tenderness with palpitation. The plaintiff reported using a tensor bandage at work.

[8] The plaintiff received a doctor's note from the hospital on February 14, 2005 and from his own doctor on February 16, 2005, excusing him from work. In total, he missed seven days of work. At that time he was working a 35-hour week, receiving $7.50 per hour.

[9] The driver of the bus, Mr. Kim Collins, filed an Occurrence Report on the day of the incident. He stated:

> Picked up passengers, proceeded onward, noticed another patron running for bus, slowed to stop bus and as I came to a stop, heard passenger fall. I asked him if he was alright and he said he was.

[10] In his evidence, Mr. Collins expanded on the information contained in the report. He stated that when he picked up the plaintiff, he observed him start towards the back of the bus and so he started moving towards his next stop. After moving about 50 feet, he saw a woman who had missed the bus, running, probably yelling for the bus to stop. He said he "slowed the bus as carefully as I could, to a stop to pick her up". He also stated that he believes the plaintiff fell before the bus came to a complete stop. "It was probably at the initial braking that he fell over." He said he stopped the bus over a distance of eight to ten feet.

[11] Mr. Collins did not see the plaintiff fall, but estimates that he fell "half-way back or further". By the time he stopped the bus, the plaintiff had gotten up and was already seated. He says he asked the plaintiff if he was alright (considering the distance, he must have yelled at the plaintiff) and the plaintiff said that he was.

The Law

[12] I am grateful to the parties for providing me with a number of relevant cases prior to the hearing.

[13] The decision in *Whey* v. *Halifax (Regional Municipality)*, 2005 NSSC 348 sets out the law of negligence quite clearly (at paragraph 3):

> Negligence is conduct that falls below the standard required by society. The law of negligence has many purposes and is forever changing to meet new circumstances. To establish a cause of action in negligence, several elements must be present.
>
> …
>
> (i) the claimant must suffer damage;
>
> (ii) the damage must be caused by the defendant's conduct;

(iii) the defendant's conduct must be negligence, that is, in breach of the standard of care established by law;

(iv) there must be a duty recognized by law to avoid the damage;

(v) the defendant's conduct must be a proximate cause of the loss, that is, not too remote;

(vi) the plaintiff's conduct should not be such as to bar recovery, such as by contributory negligence or voluntary assumption of the risk.

[14] There was no issue between the parties with respect to the plaintiff having incurred an injury that resulted from the defendant's actions. There was disagreement as to whether the defendant's actions constituted negligence.

[15] The *Whey* v*. Halifax* (supra) decision also addressed, in general terms, the standard of care established by law (at paragraph 6).

> The standard is an objective standard, that is, the test of what the fictional reasonable person would say. Conduct is negligent if it creates an unreasonable risk of harm. This involves a balancing of the danger created by the conduct with the utility of the conduct. This risk assessment balances the (i) likelihood and (ii) severity of potential harm against the (iii) object of the activity and the (iv) cost or burden to eliminate the risk.

[16] The court goes on to note that the foregoing factors in risk assessment are not an exact science, but "rather it is an individualized evaluation utilizing a common sense approach".

[17] In the case of public carriers, namely, where a passenger pays a fare or fee to be transported, in this case by a bus, the law imposes a significant evidentiary burden on the defendant carrier. The duty on a public carrier is set out in the often quoted passage from *Day* v. *Toronto Transportation Commission*, [1940] S.C.R. 433, per Davies J. at page 439:

> The duty of the respondent to the appellant, its passenger, was to carry her safely as far as reasonable care and forethought could attain that end.

[18] And Hudson J. at page 441:

> Although the carrier of passengers is not an insurer, yet if an accident occurs and the passenger is injured, there is a heavy burden on the defendant carrier to establish that he had used all due, proper and reasonable care and skill to avoid or prevent injury to the passenger. The care required is of a very high degree.

[19] The same standard was articulated by McLachlin J. (as she then was) in *Planidin* v*. Dykes et al*, [1984] BCJ No. 907:

> These, and other cases, establish that once an accident occurs and a passenger is injured, a *prima facie* case in negligence is raised and the onus shifts to the public carrier to establish that the passenger's injuries were occasioned without negligence on the company's part.

[20] On the other hand, everyone who travels on a bus should be aware that it does not provide the smoothest ride possible. It will often lurch as the gears change. In emergency situations, it may stop with suddenness which can affect the unwary or careless passenger.

[21] In this case, the standard of care imposed on the bus driver is the conduct or behaviour that would be expected of the reasonably prudent bus driver in the circumstances: *Wang* v*. Horrod,* [1998] B.C.J. No. 1288 (B.C.C.A.) at paragraph 29.

[22] It is now reasonably well established that the fact a bus is put into motion before all passengers are seated is not in itself a breach of the required standard of care, unless it is apparent to the driver that the passenger is disabled, elderly, or heavily burdened: *Brinacomb* v*. British Columbia Transit*, 2000 BCSC 331 at paragraph 42.

[23] In the case at bar, the question arises whether the bus driver breached his standard of care by suddenly applying the brakes to stop for a passenger whom he noticed was late and was running after the bus without first checking to see if his passenger was seated.

[24] Unlike *Rehemtulla* v*. British Columbia Transit,* [1995] B.C.J. No. 3043, the sudden stopping of the bus in this case, while it was still accelerating, was not a normal and expected movement of the bus.

[25] The bus driver noticed the passenger running after the bus after the bus traveled approximately 50 feet. I infer that the bus was still accelerating at this point. He stopped the bus over a distance of approximately ten feet, which suggests that he applied the brake reasonably vigorously. It is reasonable to expect that a standing passenger would brace himself against the force of acceleration pushing him towards the back of the bus. Suddenly applying the brakes in these circumstances would result in a change of momentum that would thrust the passenger forward, with a force greater than if the bus was traveling at a steady speed.

[26] The plaintiff ended upon the floor of the bus more than four rows of seats ahead of where he was standing. I infer that the brakes were applied suddenly and with some force. The bus clearly did not come to a stop gradually. The short stopping distance and the forward momentum of the plaintiff are consistent with the driver reacting quickly and perhaps instinctively when he saw the passenger running behind and for the bus.

[27] There was no emergency or urgency that required the bus driver to stop suddenly. Indeed, he could have continued to the next bus stop some 200 metres away and waited for the passenger at that location. He could have brought the bus to a stop much more slowly.

[28] I distinguish the case of *Sawatsky* v*. Romanchuk*, [1979] B.C.J. No. 964 (B.C.S.C.). The court stated (at paragraph 4):

> Mrs. Sawatsky was injured because the bus started up as she was moving from one stanchion to another. She had let go of one stanchion before she was able to place her hand on another. The bus had lurched forward; she was thrown into the lap of another passenger. The evidence is that as she extricated herself, the Defendant bus driver, Mr. Romanchuk, braked in order to see what had occurred. The braking of the bus was something that did not fall outside the normal range of movements that passengers ought to expect on the buses. In any event, it seems to me that in this case, as in the Calderwood case, the action of the bus driver, in braking can be said to constitute something that was not unreasonable for him to do in the circumstances in which he found himself.

[29] I note that Mrs. Sawatsky herself had created a situation which caused the bus driver to stop the bus. That bus was not pulling away from a bus stop, a time when the

bus would not normally be expected to stop. In the case at bar, the bus driver should have known that a passenger going to the back of the bus would not yet be seated.

[30] In order to avoid such an accident, the bus driver needed only to check his rearview mirror to ensure all passengers were seated before applying the brakes. This is a reasonable and prudent action to take in such circumstances. He did not do so.

[31] I am unable to make a finding of contributory negligence on the part of the plaintiff. Moreover, there are no signs requiring or advising passengers to always hold on to the stanchions or seats as they walk down the aisle or to take the first available seat.

[32] The Passenger Code of Conduct advising passengers to "Care for yourself at all times" is very general and in my view is insufficient to warn a passenger of the sudden stop in the circumstances of this case. The sign on the outside and back of the bus advising that the bus makes frequent stops is directed to motorists following the bus, not to the passengers themselves.

[33] I find that the plaintiff fell and was injured due to the negligent action of the bus driver, an employee of the City of Whitehorse. I find the City of Whitehorse to be responsible for 100% of the damages incurred by the plaintiff.

Damages

[34] The pecuniary damages specified in the plaintiff's Amended Claim were not disputed by the defendant. I find that they are reasonable.

Lost wages	$ 367.50
Medical expenses (YTG)	$ 678.80

[35] In considering the quantum of non-pecuniary damages, I have considered the following cases:

> *Lopthien* v. *Subasic,* 2004 BCPC 406
>
> The plaintiff incurred some minor injuries including a sore left knee. Her injuries had resolved four months post-accident. Damages were assessed at $4,500.00.

Collyer v*. Leonardon,* [1998] B.C.J. No. 2050 (B.C.S.C.)

The plaintiff injured her knee in a motorcycle accident and missed three days work. Non-pecuniary damages were assessed at $1,000.00.

Nguyen v*. Pleytez-Hernandez,* [1993] B.C.J. No. 1389

Two plaintiffs suffered a number of minor, superficial injuries which were completely resolved within six and eight months and did not interfere with their ability to work. Damages of $4,000.00 and $7,500.00 were awarded.

Plummer v*. J.D. Irving Ltd.,* [2000] N.S.J. No. 165 (N.S.S.C.)

The plaintiff tripped on a "dolly cart" at the defendants' building supply store. He injured his knee and was in considerable pain over the summer after the accident. He was unable to hike or fish or to perform all of the physical labour associated with his business. He was able to resume all his activities less than one year after the accident. The court awarded non-pecuniary damages of $8,500.00

Mazur v*. Moody,* [1987] B.C.J. No. 1027 (B.C.S.C.)

The plaintiff hurt his knee in a "slip and fall" accident that kept him off work for four months. Non-pecuniary damages were assessed at $9,000.00.

Golding v*. Wiebe,* [1990] B.C.J. No. 1231 (B.C.S.C.)

The plaintiff sustained a dislocated left thumb, bruising and swells of the right foot, some tenderness to his shoulders, large bruises on his upper thighs, a two-inch abrasion on his thigh and a tender swollen knee. He was totally disabled and unable to work for three weeks and partially disabled for another three or four weeks. His non-pecuniary loss was assessed at $5,000.00

[36] In the case at bar, the plaintiff sustained an injury to his right knee that kept him off work for seven days. Although he was able to return to work wearing a tensor bandage on his knee, he was unable to participate in his favourite recreational activities, basketball and football, for a period of four months. I assess his non-pecuniary damages at $4,000.00.

[37] The plaintiff will also receive his court costs and pre-judgment and post-judgment interest calculated in accordance with the *Judicature Act*, 2002 R.S.Y. c. 128.

[38] In addition, the plaintiff will be awarded $100.00 for the preparation and filing of pleadings pursuant to s. 57 and $150.00 as counsel fee at trial pursuant to s. 57 and s. 58 of the *Small Claims Court Regulations,* OIC 1995/152.

Lilles, T.C.J.