1997 CarswellBC 1475
British Columbia Supreme Court

Reidy v. Kamloops Hotel Ltd.

1997 CarswellBC 1475, 41 B.C.L.R. (3d) 338, 72 A.C.W.S. (3d) 402

Terrence Reidy, Plaintiff and Kamloops Hotel Ltd. d.b.a. Kamloops Inn, Defendant

Lamperson J.

Heard: June 11 and 12, 1997
Judgment: June 24, 1997
Docket: Kamloops 23736

Counsel: *Roy M. Kahle*, for the plaintiff.
James A. Horne, Q.C. for the defendant.

Subject: Torts; Civil Practice and Procedure

Headnote

Negligence --- Occupiers' liability — Particular situations — Ice and snow

Plaintiff slipped and fell on patch of ice and snow when exiting inn while on duty and suffered injuries to left shoulder — Plaintiff brought action for damages for negligence in maintaining access area to premises — Duty imposed on invitor extends not only to invitor's premises but also to areas giving access to premises despite fact that these areas may not be under control of invitor — Context of winter where ice and snow patches common occurrence to be considered — Icy patch outside main exit of beer parlour constituted an unusual danger of which defendants ought to have been aware and to have taken steps to remove — No system in place to inspect sidewalk as evening progressed and unsatisfactory for defendants to rely on complaints of patrons prior to taking action — Plaintiff contributorily negligent as he should have taken more care for his own safety.

Damages --- Damages in tort — Personal injury — Principles relating to awards of general damages — Miscellaneous torts — General

Plaintiff R.C.M.P. officer slipped and fell on patch of ice and snow when exiting defendant's inn while on duty and suffered injuries to left shoulder — Plaintiff brought action for damages — Defendants found liable for accident but plaintiff also found 33 per cent contributorily negligent — Plaintiff concerned that injury might have affected possibility of promotion due to his hesitation to become physically involved in altercations for fear of reinjury — Medical evidence indicated that plaintiff would suffer ongoing problems with shoulder — Injury found to have interfered with plaintiff's leisure activities and could adversely affect career — Non-pecuniary damages assessed at $30,000 and loss of capacity at $15,000.

The plaintiff R.C.M.P. officer was exiting the defendant's tavern after investigating a complaint when he slipped and fell on a patch of ice on the sidewalk. He had noticed the patches of snow and ice on the way in, but in exiting had walked straight ahead and slipped after two strides.

The tavern's employee cleaned the sidewalk each morning, and applied salt and fertilizer to icy areas. The evening bartender also inspected about 5:00 p.m. If patrons reported any further problems, the bartender hired a patron to deal with the problem.

The plaintiff suffered a shoulder injury, which forced him to give up many of his recreational activities and to restrict others, including ski instructing. Since he was on general duties, with the possibility of physical altercations, he was concerned that fear of further injury caused him to not play his full part in physical confrontations, with the possible result that his promotion prospects might suffer or he might be medically discharged.

Held: The action was allowed; the plaintiff was one-third contributorily liable; damages were assessed at $30,000.
The snow and ice at the threshold of the tavern constituted an unusual danger which the defendant as invitor had a duty to remove. The defendant had no reasonable system of doing this, and it was not satisfactory to rely on patrons' complaints.
The plaintiff was contributorily negligent to the extent of one-third. Although he was wearing proper boots, he had noticed the ice on his way in, but was pre-occupied with the complaint he had responded to, and did not take sufficient care in exiting the tavern.
The injury had interfered with his leisure activities, and given that the nature of his employment included physical confrontation, it might affect his employment. Non-pecuniary damages of $30,000 and loss of capacity damages of $15,000 were appropriate. Applying the deduction for contributory negligence, judgment in the sum of $30,000 was given.

Table of Authorities

Cases considered by *Lamperson J.*:

Brown v. British-Israel World Federation (Can.) Inc., [1950] O.R. 809 (Ont. C.A.) — referred to
Campbell v. Royal Bank, [1964] S.C.R. 85, 46 W.W.R. 79, 43 D.L.R. (2d) 341 (S.C.C.) — considered
Fiddes v. Rayner Construction Ltd. (1963), 49 M.P.R. 171, 45 D.L.R. (2d) 367 (N.S. S.C.) — considered
Horton v. London Graving Dock Co., [1951] A.C. 737, [1951] 1 Lloyd's Rep. 389, [1951] 2 All E.R. 1 (U.K. H.L.) — considered
Indermaur v. Dames (1866), [1861-73] All E.R. Rep. 15, Harr. & Ruth. 243, 12 Jur. (N.S.) 432, 14 W.R. 586, L.R. 1 C.P. 274 (Eng. C.P.) — considered
Snitzer v. Becker Milk Co. (1976), 15 O.R. (2d) 345, 75 D.L.R. (3d) 649 (Ont. H.C.) — referred to
Vyas v. Colchester East Hants District School Board (1989), 94 N.S.R. (2d) 350, 247 A.P.R. 350, 65 D.L.R. (4th) 48 (N.S. C.A.) — considered

Statutes considered

Occupiers Liability Act, R.S.B.C. 1979, c. 303
Generally — referred to

ACTION for damages arising from negligence.

***Lamperson J.*:**

1 The plaintiff, a 17 year member of the Royal Canadian Mounted Police, slipped and fell on a patch of ice and snow when leaving the Kamloops Inn after dealing with a complaint which he had received. He sustained a rotator cuff tear to his left shoulder, which still causes him problems, even after three surgical interventions. Liability and quantum are in issue.

2 This case is somewhat unusual in that the accident occurred on the public sidewalk in front of the defendant's public house. The accident occurred at 6:30 p.m. on January 23, 1996, which was a typical Kamloops winter day. The temperature was between -11 to -13.6 degrees centigrade. The Kamloops Inn is located on Victoria Street, which is the main business street in downtown Kamloops.

3 When responding to the complaint, the plaintiff parked his car west of the entrance to the public house and walked diagonally to the front entrance. While doing so he noted patches of hard packed snow and ice on the sidewalk. Upon leaving, he walked straight out onto the sidewalk, as opposed to leaving diagonally, took two strides, slipped on a patch of ice and fell. He put out his arm to break the fall and went down onto his knee and immediately felt pain in his left shoulder.

4 The defendants did not know of the plaintiff's accident until served with the writ for this action. Hence, they cannot comment on the precise situation which existed that evening, but can only provide evidence on the safeguards which were in place.

5 Every morning an employee of the defendant arrives at 5:00 a.m. Amongst other jobs, he cleans the sidewalk if it has snowed, and applies salt and fertilizer to icy sections if necessary. At approximately 4:00 p.m., the evening bartender upon coming to work inspects the parking lot and sidewalk and, if necessary, applies more salt or fertilizer or alternatively has one of the patrons do so. If patrons report problems, the bartender pays one of the patrons to deal with the problem.

6 Because the accident occurred on a public sidewalk and not on the defendant's premises, the plaintiff's claim is under the common law and not the *Occupiers Liability Act*, R.S.B.C. 1979, c.303 (now R.S.B.C. 1996 c.337).

7 It has been held in *Snitzer v. Becker Milk Co.* (1976), 15 O.R. (2d) 345 (Ont. H.C.), and *Brown v. British-Israel World Federation (Can.) Inc.*, [1950] O.R. 809 (Ont. C.A.), that the duty imposed on an invitor extends to the areas giving access to the invitor's premises, even though that access is not under the control of the invitor. The following well known statement by Willes J. in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274 (Eng. C.P.) at p.288, sets out the test:

> And, with respect to such visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know.

In *Vyas v. Colchester East Hants District School Board* (1989), 65 D.L.R. (4th) 48 (N.S. C.A.), the Nova Scotia Court of Appeal approved the following principles articulated in *Fiddes v. Rayner Construction Ltd.* (1963), 45 D.L.R. (2d) 367 (N.S. S.C.) at p. 373:

> (1) Was there an unusual danger? (2) If so, was it one which the defendant knew or ought to know? (3) If so, did the defendant use reasonable care to prevent damage to the plaintiff from the unusual danger? and (4) Did the plaintiff use reasonable care on his own part for his own safety?

8 In *Horton v. London Graving Dock Co.*, [1951] A.C. 737 (U.K. H.L.) at p.745, Lord Porter said:

> I think "unusual" is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand ...

9 Although the breach of a by-law does not create a cause of action, it is indicative of the standard of care that can be expected. Section 1100 of the City of Kamloops By-Law 24-23 provides:

> Every owner or occupier of real property, excluding single family dwellings, shall remove any accumulation of snow or ice upon any sidewalk abutting the land or premises so owned or occupied, not later than 10:00 hours of any day except Sunday.

10 Although there is some evidence that there was a very light snowfall in the hours preceding the accident, there is no indication that it played a part in the accident.

11 In deciding whether the defendants are liable, this accident must be considered in the context that during the Kamloops winter, snowy and icy patches on sidewalks and driveways are a common occurrence. It seems to me, however, that an icy patch right outside the main exit of a beer parlour is an unusual danger which the defendants should have been aware of and taken steps to remove. Spence J. of the Supreme Court of Canada in *Campbell v. Royal Bank* (1963) 43 D.L.R. (2d) 341 (S.C.C.), at 351made the following observation:

> It is perhaps a test of some value to determine whether a condition is one of unusual danger to investigate the ease by which the occupier might avoid it ... If the danger could have been prevented by these economical and easy precautions, then surely a member of the public frequenting such a busy place as this bank would have been entitled to expect such precautions or others equally effective and their absence would tend to make the danger an "unusual" one.

12 It seems to me that the same considerations apply here. Although the janitor cleaned the sidewalk in the morning and although the bartender checked it in the afternoon, there was no system by which the sidewalk was inspected by a responsible person as the evening progressed. I do not consider it satisfactory for the defendant to wait until one of its patrons complains about some dangerous condition. My finding would probably be different if the accident had occurred in any other place other than almost at the threshold of the doorway used by people as they leave. It seems to me that it would have been easy to remove that patch of ice or to ensure that it was not slippery. I have therefore decided that the defendants are liable for the accident.

13 The next question is whether the plaintiff was contributorily negligent. He was at the time wearing proper boots with a 'Vibram' sole. Unfortunately, when leaving the defendant's premises, his mind was on the complaint which he had just dealt with. Given that he was aware of the conditions which existed that day, I find that he should have taken more care for his own safety. Accordingly I find him 33 $^{1}/_{3}$ percent contributorily negligent.

14 The plaintiff suffered no wage loss as a result of the accident and it was agreed that the special damages are $40. Thus the only question on quantum pertains to general damages and loss of capacity.

15 Simply stated, the plaintiff, as a result of the accident, had to have shoulder surgery on April 23, 1996 during which certain tendons were shortened. On May 11th, while still recovering from the surgery and while his arm was in a sling, he stood on a plastic pail in order to reach for something on a shelf. The pail gave way and as a result he damaged the surgical repairs which had been made. Consequently, further surgery was done on June 18, 1996. The plaintiff underwent a further operation on March 27, 1997 during which some inflammatory changes to the joint and the subacromial space of the rotator cuff were debrided. There was also evidence of some damage to a nerve which appears to be regenerating.

16 Prior to the accident the plaintiff was physically very active. He coached and played baseball, fly fished, and was a ski instructor. He can no longer engage in many of these activities and even though he skiis, he cannot ski at the level at which he did before and he does not instruct. Because he is on general duties, he is concerned, since the shoulder injury affects his work in the sense that he must be very leery of any physical altercation. As a result he feels that there are times when he does not play his full part when he and other police officers are faced with a possible physical confrontation. He is also concerned that this might affect the possibility of promotion and that it could also conceivably lead to a medical discharge.

17 It is difficult to assess the extent to which these concerns are justified. It must, however, be kept in mind that the plaintiff is a general duty police officer who, by virtue of his work, is bound to be involved in physical confrontations. That fact must be looked at in the light of Dr. Sundby's report of April 29, 1997. He is the plaintiff's orthopedic surgeon. He concluded the following:

> Mr. Reidy can expect some ongoing problems with this shoulder. It think a lot of rehabilitation is going to be required to bring his shoulder into it's optimal functional range. His pain pattern is atypical for axillary nerve involvement although this cannot be ruled out. His pain pattern is most compatible with rotator cuff tendonitis and subacromial bursitis. He did have a post-operative synovitis within the joint which was debrided by Dr. Day. His intra and extra-articular debridement procedures have improved his range of motion and I think continued improvement will be seen. Further surgery may be required to further decompress his subacromial space. We will also have to keep a close eye on the function and integrity of his rotator cuff musculature.

18 It is really quite impossible to say what impact the shoulder injury will have on the plaintiff's future career. Certainly it has interfered with many of his leisure activities and it may or may not have an adverse effect in his career as a police officer. After weighing these various factors, I have decided to assess his non-pecuniary damages at $30,000 and his loss of capacity at $15,000 for a total of $45,000. Applying the plaintiff's one-third contributory negligence, it follows that he is to have judgment in the sum of $30,000 together with court costs.

Action allowed.

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