

Court of Queen's Bench of Alberta

Citation: *Gotlib v. Calgary (City)*, 2009 ABQB 174

Date: 20090318
Docket: 0401 10524
Registry: Calgary

2009 ABQB 174 (CanLII)

Between:

Dora Abramovna Gotlib and Vladilen Iakovlevitch Gotlib

Plaintiffs

- and -

The City of Calgary, Lloyd Ackerman, Tina Cross and Stephen Morrison

Defendants

**Reasons for Judgment
of the
Honourable Madam Justice J. Strekaf**

[1] This case arises out of an unfortunate incident that occurred on January 12, 2004. Dora Gotlib was seriously injured when she fell forward and hit her head while riding on a City of Calgary transit bus. The issue at this trial concerns liability only. Mrs. Gotlib's position is that she fell forward when the bus stopped or slowed abruptly as a result of the negligence of the bus driver, Lloyd Ackerman, and that he, and the City of Calgary, who is responsible for his actions as the owner of the bus and Mr. Ackerman's employer, are liable. Mr. Ackerman and the City maintain that Mrs. Gotlib's fall was caused by her own fault or negligence.

[2] Mrs. Gotlib testified that at the time of the incident, she was an active 80 year old woman who had used public transit regularly all her life, both since moving to Calgary in 1995 and in Russia where she had previously resided. She indicated that she had no walking or mobility problems prior to the accident and walked daily. On January 12, 2004, she was going to her doctor's office, located in Mayfair Place on Elbow Drive SW, to pick up a prescription for her

husband. She took the C-Train from her home to Heritage station and transferred to the No. 3 bus, which proceeded to travel north down Elbow Drive, with the intention of getting off the bus at the stop located just north of 68th Avenue. It was a lovely warm dry day with no ice or snow on the roads or sidewalks.

[3] She stated that there were not many people on the bus when she boarded. She sat in the first compartment on the bus. She was familiar with the route having used it for the past 10 years and knew her stop was approaching and that she would have to get off the bus. She rang the bell and lifted herself up in her seat and braced herself by hanging on with both hands to the straps hanging down from the handrails at the top of the bus. She was facing the front of the bus. She could not recall how long she was standing but stated that it was "for some time" when she experienced an abrupt and violent jerk and fell flat. She said that she could not hold on because the jerk was "abrupt, sudden and unexpected". The bus was in motion but she could not say how fast the bus was going at the time of the incident or whether it was slowing down. She indicated that she does not remember how much time passed from when she stood up until she fell down, and that while it was not much time, it was longer than a few seconds.

[4] As a result of the fall, Mrs. Gotlib broke both of her wrists and fractured her neck at the C3, C4, C5 and C6 vertebrae and was rendered at quadriplegic who has been confined to a wheelchair. She was hospitalized for several months and then had to move into a nursing home from the home where she had previously resided with her husband.

[5] On cross-examination she explained that when the bus jerked she fell forward towards the front of the bus. She acknowledged that she could have remained seated until the bus stopped and does not know why she stood up. She denied having any problems with dizziness prior to the accident and did not recall attending at the Rockyview Hospital in March of 2000 for dizziness and shortness of breath. She recalled seeing a cardiologist, Dr. Filipchuk, but did not believe that he prescribed any medication for her.

[6] The Defendants' counsel cross-examined Mrs. Gotlib on a number of inconsistencies between her evidence at trial and her evidence at her examination for discovery in January 2005. At trial she stated that she had moved to Canada in 1994, whereas she had indicated at discovery that she had moved to Canada in 1995. At trial she could not recall if she was sitting in the most forward seat of the bus whereas she had recalled that was the case at discovery. At trial she recalled ringing the bell whereas at discovery she indicated that was something she did automatically all the time and could not confirm for sure that she had done so on January 12, 2004. At discovery she indicated that the bus was approximately 10 metres from the stop when the incident occurred whereas at trial she indicated that the bus was close to the stop but she was not sure how many metres. At trial she said that when she stood up the bus was travelling at the same pace as before whereas at discovery she stated that the bus was already slowing down. At trial she stated that she was unsure if she was anticipating exiting the bus from the front or middle door because there was nobody in front of her and if she saw somebody getting onto the bus she would have turned and gone out the back door. At discovery she said that she was planning to exit the bus using the middle exit door. At trial, she could not recall what happened

to her glasses whereas at discovery she said they were still intact. At discovery she had stated that she felt an electric shock sensation after the fall, whereas at trial she described feeling paralysed and did not recall the electric shock sensation. Despite these inconsistencies on various details surrounding the incident, I found Mrs. Gotlib to be a credible witness regarding the circumstances that led to her fall.

[7] Mrs. Gotlib's son and the paramedic who attended at the accident also testified.

[8] The Defendants called three witnesses in addition to Mr. Ackerman: Ms. Gulick, who was a passenger on the bus, Mr. Webster, who was the Operations Supervisor for Calgary Transit who dealt with the incident, and Mr. Geals, who was the Coordinator of Operations for Calgary Transit.

[9] Mr. Ackerman testified that he had worked as a bus driver for the City of Calgary for 29 years. He described the driving standard that bus operators were expected to meet, stating that safety was number one and that drivers were to drive as smooth as possible and to provide good service. He noted that a driver needs to be aware if people are standing because they could fall and be pushed forward if the bus was braking. He indicated that when driving he has a regular scanning procedure which includes checking his inside mirrors.

[10] He stated that his experience from driving route No. 3 was that there was plenty of time allotted on the schedule to drive between the designated time points at Heritage Drive and at 50th Avenue on that route. As a result, he was driving well below the speed limit. He recalls that there were six to seven people on the bus as he approached 68th Avenue and that Mrs. Gotlib was sitting in the jump seat, which is the first seat on the right hand side of the bus. He first noticed the light at the 68th Avenue intersection after the crosswalk at 70th Avenue, at which time it was green. He was going about 40 kilometres an hour. As he approached 69th Avenue, he noticed that the light was a stale green, that is, the "don't walk" sign was flashing. He had his foot over the brake and as he got to 69th Avenue, the light changed from green to yellow and he started to apply the brake and the bus began slowing down quickly. He then started to apply more pressure on the brake because the light was turning red. He heard the bell go off, and one or two seconds later he, heard a loud thump on the floor. The light turned red before he heard the thump. He then put his foot right to the brake to stop the bus because he saw the Mrs. Gotlib falling. He put the maxi brake on and called in a code yellow and advised that a lady had fallen on his bus and hurt her head. She was face down, not moving and barely breathing. He moved her head so she could breathe. It was not possible to move her as she was taking up the space between the wheel well and the driver's compartment. EMS arrived and took Mrs. Gotlib off the bus. Mr. Ackerman asked if there were any witnesses on the bus that saw what happened and Ms. Gulick was the only passenger who came forward. The other passengers stayed on the bus until the next route No. 3 bus came up behind them and they then got onto that bus, except for Ms. Gulick who stayed with Mrs. Gotlib.

[11] He said that he heard the bell just after 69th Avenue as he was starting braking, and that it was not until he started to go more into the braking that he heard the thump. He said that as

soon as the bell was pulled that he checked and did not see anyone standing. He does not remember how fast the bus was going when Mrs. Gotlib fell.

[12] Mr. Ackerman indicated that he is vaguely familiar with the Bus Operator's Rules and Procedures Manual which provide guidelines to drivers. He does not carry it with him. He is familiar with courtesy cards which are designed to be provided to passengers who witness an unusual occurrence on a bus, however he stated that drivers are not required to carry them and he does not use them. His understanding is that he is to try and acquire the names of witnesses to an incident on a bus by asking, but that is as far as one can go.

[13] On cross-examination Mr. Ackerman acknowledged that passengers standing on a bus are very vulnerable to sudden movements by the bus, and that if the brakes are applied with a jerk that it is possible that passengers who are standing will fall. He further acknowledged that if the brakes are applied then the law of motion will cause people to fall forward, that there are no signs on the bus requiring or advising passengers to remain seated while the bus comes to a stop, that seniors and people who are unsteady on their feet use buses, and that a driver can never be sure when some passengers might stand up. He clarified that he first noticed the light being green at 68th Avenue after the pedestrian crosswalk located at 72nd or 73rd Avenue and that it turned yellow around 69th Avenue at the south end of the intersection. The light turned red somewhere in the middle of the block. At this point in time he pressed the brake harder, which is when Mrs. Gotlib fell. He then applied the full brake to stop the bus, which took about 10 - 15 feet. He acknowledged that he did not have any courtesy cards with him and therefore did not hand any out.

[14] Ms. Gulick was a passenger on the bus that morning. She also boarded the bus at the Heritage station and was seated two to three seats behind Mrs. Gotlib, on the right side of the bus. She testified that Mrs. Gotlib was seated and that the bus had already begun to slow down when Mrs. Gotlib rang the bell and got up right away. She stated that Mrs. Gotlib was holding onto the bar above the wheel well. The bus was going slow as it was approaching the intersection and the next bus stop was just after the intersection. When the light changed, the driver "hit the brakes" and Mrs. Gotlib fell forward and rammed her head into the front of the bus. She said that Mrs. Gotlib slid and went down and that she was wearing "old lady shoes". When shown the brown boots that were marked as an exhibit which Mrs. Gotlib said she was wearing, Ms. Gulick said that those were not what she recalled. She said that Mrs. Gotlib was wearing black shoes with a slippery sole. She described the way the bus stopped as not unusual. She stated that the bus was not going fast but it was still a jerk, the way a bus always stops. Ms. Gulick got out of her seat and went to sit with Mrs. Gotlib and told the driver that she shouldn't be moved. She stayed with Mrs. Gotlib until the paramedics arrived and took over.

[15] On cross-examination she said that Mrs. Gotlib was holding onto the bar with her right hand but acknowledged that she could not recall seeing her left hand and that she was not positive that the shoes marked as an exhibit were not worn by Mrs. Gotlib at the time of the incident. She described the bus's stopping as sudden but normal and that the bus came to a complete stop before the intersection. She acknowledged that she described the driver as having

hit the brakes in a statement she gave to a representative of the city shortly after the accident. She agreed with a statement put to her by Plaintiffs' counsel that it was her observation that it was the motion of the bus that caused Mrs. Gotlib to fall and that she recalled Mrs. Gotlib's feet flying up in the air behind her and that her head went down to the front of the bus. She does not recall the bus driver doing anything to obtain the names of the other passengers on the bus. He asked for her name and address while waiting for the ambulance, after the other passengers had left.

[16] Her evidence about how long Mrs. Gotlib was standing before she fell was contradictory. On direct examination, she stated that the bus had already started slowing down when Mrs. Gotlib rang the bell and on two occasions said that she was standing for a couple of minutes before she fell. She later said that the bus was not quite to the intersection but was getting close and that it was maybe half a bus length away. On cross-examination, she said that Mrs. Gotlib rang the bell and got up after the bus started again from the last stop and that she agreed that Mrs. Gotlib was standing after she rose from her seat all the way from the stop before the stop the bus was coming up to. On redirect, she denied that Mrs. Gotlib was standing all the way from right after the previous stop and said that she stood up maybe a minute before the bus stopped and reconfirmed that the bus was half a bus length from the intersection when Mrs. Gotlib got up.

[17] Mr. Webster, who has been working as an Operations Supervisor with Calgary Transit since 1985, and Mr. Gaels, who has been the Coordinator of Operations for Calgary Transit since 1997, also testified.

Evidentiary Issue

[18] Before addressing the question of liability for the accident, I would first like to deal with an evidentiary issue that arose in the course of the trial. Defendants' counsel sought to introduce three documents, whose admissibility was challenged by Plaintiffs' counsel. After hearing argument, the documents were marked for identification purposes and I reserved my decision on whether they would be admitted as full exhibits at the trial. The first document was from the Plaintiffs' Affidavit of Records, being a letter dated December 1, 2003 from Neil G. Filipchuk (who was identified in the course of the trial as a cardiologist who had seen Mrs. Gotlib) to Dr. P. James Tkalych (who was identified in the trial as the Mrs. Gotlib's family physician) in which he states in part that he had "begun (Dora Gotlib) on ramipril 2.5 qd". Defendants' counsel then introduced evidence from John Gaels, the Coordinator of Operations with Calgary Transit, who testified that he conducted a computer search on the Health Canada website and located a screen which led him to a product monograph for Altace, also described as Ramipril capsules. The printout of the computer screen and the product monograph were the second and third documents in question. The product monograph indicated that the most common adverse reaction in the Altace drug trials were dizziness (3.7%) and in less than 1% of patients, anxiety, amnesia, confusion, disorders or balance and lightheadedness.

[19] Defendants' counsel argued that the documents were relevant as the Defendants had alleged in their Statement of Defence that Mrs. Gotlib's fall was caused in part by her "failing to take adequate or any precautions for her own safety due to the impairment of her faculties by alcohol, drugs, fatigue or any other cause." It was his position that if the Plaintiffs were seeking to argue that an inference could be drawn that Mrs. Gotlib's fall was occasioned by a sudden stop of the bus, these documents raised the possibility that her fall had been caused by the medication and, therefore, an adverse inference should be drawn against the Plaintiffs for failing to call medical evidence to address this possibility.

[20] Defendants' counsel argued that Dr. Filipchuk's letter was admissible on the basis that it was deemed authentic pursuant to Rule 192 and that it qualified as a medical record admissible under the principle enunciated in *Ares v. Venner*, [1970] 1 S.C.R. 608, for the purpose of establishing that Mrs. Gotlib had been prescribed the drug Ramipril and that the latter two documents were admissible as business records under sections 30 and 31.1 of the *Canada Evidence Act*, R.S.C. 1985, c.C.-5, as amended. I am prepared to admit Dr. Filipchuk's letter as a business record for the purpose of establishing that Mrs. Gotlib was prescribed Ramipril, however, I am not prepared to admit the latter two documents as the *Canada Evidence Act* does not apply to this proceeding. Section 2 of the *Canada Evidence Act*, states that "(t)his Part applies to all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction." A civil personal injury trial falls with provincial jurisdiction and is not a matter in respect of which Parliament has jurisdiction: *Christidis v. P.L.L.*, [2000] O.J. No. 554 (Gen.Div.).

[21] However, even if I am wrong and those documents should have been admitted, they would not have affected the result in this case as they would not have given rise to an adverse inference.

Liability

[22] Both parties agree that section 186(1) of the *Traffic Safety Act*, R.S.A. 2000, c. T-6, as amended, applies to this incident. It states:

If a person sustains loss or damage by reason of a motor vehicle being in motion, the onus of proof in any civil proceeding that the loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner or driver of the motor vehicle is on that owner or driver.

[23] The Supreme Court of Canada considered the Nova Scotia equivalent provision in *Feener v. McKenzie*, [1972] S.C.R. 525, in which Justice Ritchie (dissenting on other issues) stated at pp. 537 to 538:

In my opinion the effect of s. 221(1)(b) of the *Motor Vehicle Act* in the trial of an action where damages are claimed for an injury sustained by any person by reason of the presence of a motor vehicle upon a highway, is to create a rebuttable

presumption that such injury arose "entirely or solely" through the negligence or improper conduct of the operator of the motor vehicle. This presumption against the operator remains until the very end of the case, but it is a presumption which can be rebutted either in whole or in part, and if after all the evidence has been heard the jury is satisfied that the operator was only partly to blame, then the fault is to be divided in accordance with the provisions of the *Contributory Negligence Act*. If, on the other hand, the jury is satisfied on the whole of the evidence that there was no fault on the part of the operator which caused the accident, the plaintiff's action must be dismissed. The question of whether, and to what extent, the presumption has been rebutted is one which can only be determined at the conclusion of the case.

[24] This approach has been applied in numerous Alberta decisions, including *C(H) v. Loo*, 2003 ABQB 52, at paras. 62 - 69, *Bouchard Estate v. Chalifoux*, 2004 ABQB 877, 11 M.V.R. (5th) 288 at para. 50 and in *Mose v. Moeck*, 2005 ABQB 485, 21 M.V.R. (5th) 66.

[25] In addition, as the Alberta Court of Appeal recognized in *Nice v. Doe*, 2000 ABCA 221, 266 A.R.118, at paras. 24 - 39, it is well established at common law that in the event of an accident where the defendant is a public carrier the burden shifts to the defendant to show that it exercised all due, proper and reasonable care and skill to avoid or prevent injury to its passengers.

[26] The Defendants have alleged that Mrs. Gotlib's negligence caused or contributed to the accident and her injuries and rely upon the provisions of the *Contributory Negligence Act*, R.S.A. 2000, c. C-27, as amended. Allegations of contributory negligence in respect of bus passengers who have fallen when a bus stopped suddenly have been accepted by some courts and rejected by others, depending upon the circumstances. In *Nice v. Doe*, *supra*, the Alberta Court of Appeal found that Mrs. Nice was equally responsible for her injuries when she was making her way down the aisle after boarding a bus without holding onto any of the railings or stanchions provided. In *Lanteigne v. Autobus Lavoie Ltee* (1984), 55 N.B.R.(2d) 403 (Q.B.) Ms. Lanteigne was found 40% responsible for her injuries when she fell when the bus in which she was travelling braked suddenly while she was standing in the aisle and removing lunch from her luggage without holding onto a fixed object. In *Tugwood v. John Doe*, [1995] B.C.J. No. 2418 the British Columbia Supreme Court rejected the argument that the plaintiff was contributorily negligent for failing to remain in his seat until the bus came to a stop finding that it was a regular practice that was not discouraged by BC transit or their operators for passengers to move towards exits whilst the bus was in motion. In *Kean v. British Columbia Transit*, [1998] B.C.J. No. 2903, Ms. Kean was found not to have been contributorily negligent where she got out of her seat and moved forward in the bus to tell the driver that she wanted to get off where there was no pull cord and she was thrown forward when the bus came to a sudden stop.

[27] I find that Mrs. Gotlib rang the bell and had been standing for some period time while the bus was slowing down as it approached the 68th Avenue intersection and that she fell when the bus jerked suddenly when the driver hit the brakes when the light turned red. Mrs. Gotlib was

unable to estimate how long she was standing before she fell. Mrs. Gulick's evidence on this point was inconsistent but supports that Mrs. Gotlib was standing for more than a few seconds before she fell. Mr. Ackerman's evidence was that he was aware that the bell had been rung but was not aware that Mrs. Gotlib was standing and, therefore, he could not have taken into account the fact that an elderly woman was standing when he applied the brakes. He had plenty of notice that the light was going to change and there was no need for him to have "hit the brakes" resulting in a sudden stop that caused Mrs. Gotlib to fall. While the bus was travelling at a slow speed at the time, I accept that it was the action of the bus jerking to a stop that caused Mrs. Gotlib to fall. That is consistent with Mrs. Gotlib's description that the manner in which the bus stopped caused her to fall, with Ms. Gulick's observation that that it was the motion of the bus that caused Mrs. Gotlib to fall and with Mrs. Gulick's description that Mrs. Gotlib's feet flew up in the air behind her and that she fell forward. While Mrs. Gulick described the stop as not being unusual, she acknowledged that it was sudden and used the phrase "hit the brakes" to describe the manner in which the brakes were applied.

[28] While there is a difference in their evidence, both Mrs. Gotlib and Ms. Gulick testified that Mrs. Gotlib was holding onto available supports at the time of the incident. Mrs. Gotlib testified that she was holding onto the safety straps hanging from the roof of the bus with both hands. Ms. Gulick indicated that Mrs. Gotlib was hanging onto the support above the wheel well. However Mrs. Gotlib was hanging on, it was not sufficient to keep her from falling with the bus stopped suddenly. While both Mr. Ackerman and his supervisor acknowledge that passengers often stand and Calgary Transit does not have any signs discouraging them from doing so, passengers who elect to do so expose themselves to greater risk and the possibility of falling should the bus stop suddenly than passengers who remain seated. Mrs. Gotlib was accustomed to travelling on the bus and should have been aware that buses can frequently jolt or stop suddenly. While she was no doubt active for her age, by electing to stand, even though she was holding onto some supports at the time of the incident, she placed herself in a position where she was at risk of falling if the bus stopped suddenly and of experiencing significant injuries if that occurred. There was no necessity for her to stand, and she could have remained in her seat until the bus came to a stop before standing and disembarking. While the bus stopped abruptly, it was not going very fast at the time. I find that while Mrs. Gotlib was holding on at the time, she fell in part because she lacked the strength to support herself through a somewhat abrupt stop on a slow moving bus.

[29] Having regard to the onus on the Defendants in this case, I am satisfied that they have partly rebutted the presumption in section 186 of the *Traffic Safety Act* that Mrs. Gotlib's injuries resulted solely or entirely through the negligence of Mr. Ackerman. I am satisfied that her injuries were caused in part by Mr. Ackerman's negligence in stopping the bus abruptly without due regard to the effect that could have on passengers who were standing or in the process of standing at the time (which is a practice that is not actively discouraged by Calgary Transit) and that her injuries resulted in part from her own actions of standing on a slow moving bus at a time when she had no need to do so and when she was not able to hold on and support herself when the bus stopped suddenly. I apportion liability for the accident equally between Mrs. Gotlib and the Defendants.

[30] I note that success in this case has been divided. Costs may be spoken to within 30 days of the date of this judgment if the parties are unable to agree how they should be addressed.

[31] In conclusion, I would like to thank counsel for their helpful, gracious and professional conduct throughout this matter.

Heard on the 17,18,19,20 and 21st days of November, 2008.

Dated at the City of Calgary, Alberta this 18th day of March, 2009.

J. Strekaf
J.C.Q.B.A.

Appearances:

Timothy J. Boyle
Spier Harben
for the Plaintiffs

Douglas D. Merchant
City of Calgary, Law Department
for the Defendants