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Billings v. Mississauga (City)

DOUGLAS BILLINGS (Plaintiff) and CORPORATION OF THE CITY OF MISSISSAUGA (Defendant)

Ontario Superior Court of Justice

Herold J.

Heard: May 13-14, 17-20, 2010
Judgment: May 31, 2010
Docket: Brampton 03-BN-6318

Counsel: Paul J. Cahill for Plaintiff
Scott E. Hamilton for Defendant

Subject: Public; Property; Torts; Civil Practice and Procedure

Municipal law --- Municipal liability — Negligence — Property maintenance — Miscellaneous

Sidewalks — Plaintiff pedestrian slipped and fell on city sidewalk about 50 hours after unusual ice storm — Storm occurred on Thursday, Friday and Saturday — Pedestrian suffered serious injuries as result of fall — Pedestrian brought action in negligence against city — Action dismissed — City was not grossly negligent — City had winter maintenance snow and ice removal policy in place — Policy required sidewalk to be cleared within 36 hours of end of winter storm — Policy was not unreasonable although it involved use of employees who had right to refuse voluntary overtime and did not include stable of subcontractors — There was evidence as to why sidewalk maintenance was incomplete 50 hours after storm ceased — City first addressed dangerous conditions on city roads when storm began — Because of unusual nature of ice storm, it took city employees substantially longer than usual to clear sidewalk — City's response in circumstances was reasonable.

Torts --- Negligence — Duty and standard of care — Gross negligence

Sidewalks — Plaintiff pedestrian slipped and fell on city sidewalk about 50 hours after unusual ice storm — Storm occurred on Thursday, Friday and Saturday — Pedestrian suffered serious injuries as result of fall — Pedestrian brought action in negligence against city — Action dismissed — City was not grossly negligent — City had winter maintenance snow and ice removal policy in place — Policy required sidewalk to be cleared within 36 hours of end of winter storm — Policy was not unreasonable although it involved use of employees who had right to refuse voluntary overtime and did not include stable of subcontractors — There was evidence as to why sidewalk maintenance was incomplete 50 hours after storm ceased — City first addressed dangerous conditions on city roads when storm began — Because of unusual nature of ice storm, it took city employees substantially longer than usual to clear sidewalk — City's response in circumstances was reasonable.

Torts --- Negligence — Causation — General principles

Plaintiff pedestrian slipped and fell on city sidewalk about 50 hours after unusual ice storm — Pedestrian suffered serious injuries to his shoulder and back pain as result of fall — Lower back pain, caused by his subluxed coccyx or tailbone, became major source of concern two years after injury — During surgery to repair subluxed coccyx, pedestrian sustained injury to musculature in area of his rectum, leading to rectal incontinence — Pedestrian brought action in negligence against city — Action

dismissed — Although city was not grossly negligent, causation was proven — There was no evidence as to what would have caused subluxed coccyx other than slip and fall — There was no evidence pedestrian took part in activities likely to cause such injury.

Torts --- Negligence — Contributory negligence — Proof of contributory negligence — Plaintiff's knowledge of danger — Dangerous premises or equipment

Plaintiff pedestrian slipped and fell on city sidewalk about 50 hours after unusual ice storm — Pedestrian suffered serious injuries as result of fall — Pedestrian brought action in negligence against city — Action dismissed — Pedestrian was credible and reliable witness — Pedestrian's criminal record incurred 25 years ago was taken into account but did not destroy his credibility — Pedestrian was wearing appropriate and well-maintained footwear — Pedestrian knew sidewalk had not been maintained — Pedestrian chose to walk on sidewalk rather than road — Pedestrian chose to walk to convenience store to purchase ticket for lottery which was not going to be held for another two days — Pedestrian's conduct was not reasonable — Had city been found grossly negligent, pedestrian's award would have been reduced by 25 percent because of his contributory negligence.

Remedies --- Damages — Damages in tort — Personal injury — Principles relating to awards of general damages — Negligence — Miscellaneous

Plaintiff pedestrian slipped and fell on city sidewalk about 50 hours after unusual ice storm — Pedestrian suffered serious injuries to his shoulder and back pain as result of fall — Pedestrian brought action in negligence against city — Action dismissed — Damages were assessed although city was not found to have been grossly negligent — Pedestrian's shoulder had been major source of concern originally — Lower back pain, caused by his subluxed coccyx or tailbone, became major source of concern two years after injury — During surgery to repair subluxed coccyx, pedestrian sustained injury to musculature in area of his rectum, which was relatively common event, leading to rectal incontinence — Pedestrian's general damages were assessed at $85,000.

Remedies --- Damages — Damages in tort — Personal injury — Special damages (pre-trial pecuniary loss) — Past loss of income — Employment income

Plaintiff pedestrian slipped and fell on city sidewalk about 50 hours after unusual ice storm — Pedestrian suffered serious injuries to his shoulder and back pain as result of fall — Pedestrian had surgery which alleviated tailbone pain but resulted in rectal incontinence — Pedestrian brought action in negligence against city — Action dismissed — Damages were assessed although city was not found to have been grossly negligent — Pedestrian took 21 unpaid sick days and 11 months because of back pain, to search for surgeon, and to recover from surgery — Pedestrian's loss of wages totalled $48,537.49 — Only half of time pedestrian spent searching for surgeon and recovering from surgery was appropriately placed on city — Pedestrian's past wage loss was assessed at $25,000.

Remedies --- Damages — Damages in tort — Personal injury — Prospective pecuniary loss — Miscellaneous

Loss of competitive advantage.

Remedies --- Damages — Damages in tort — Personal injury — Special damages (pre-trial pecuniary loss) — Expenditures — Housekeeping expenses.

Remedies --- Damages — Damages in tort — Personal injury — Special damages (pre-trial pecuniary loss) — Miscellaneous.

Cases considered by Herold J.:

Crinson v. Toronto (City) *(2010), 100 O.R. (3d) 366, 257 O.A.C. 359, 316 D.L.R. (4th) 145, 2010 CarswellOnt 299, 2010 ONCA 44, 64 M.P.L.R. (4th) 159* *(Ont. C.A.) — referred to*

McNulty v. Brampton (City) *(2004), [2004] O.T.C. 682, 2004 CarswellOnt 3190* *(Ont. S.C.J.)*

— followed

Occhino v. Winnipeg (City) (1988), 53 Man. R. (2d) 257, 51 D.L.R. (4th) 546, 1988 CarswellMan 300 (Man. C.A.) — considered

Sutherland v. North York (City) (1997), 35 O.R. (3d) 189, 102 O.A.C. 367, 1997 CarswellOnt 2993, 41 M.P.L.R. (2d) 260 (Ont. C.A.) — considered

Statutes considered:

Municipal Act, 2001, S.O. 2001, c. 25
s. 44(9) — considered

ACTION in negligence by pedestrian against city for damages arising from slip and fall.

Herold J.:

1 In early April 2003, southern Ontario was hit with a vicious late winter storm. On Monday, April 7, 2003, the plaintiff, Douglas Billings, decided to walk to the local convenience store in the Lakeshore area of southern Mississauga to purchase a lottery ticket for a draw which was to be held the following Wednesday. He knew that the sidewalks had not yet been maintained and that proceeding would be somewhat treacherous and he attempted to adjust his pace and manner of walking accordingly. Mr. Billings made it safely to the convenience store but suffered a devastating fall on the return journey back to his mother's apartment.

2 Within the appropriate time, Mr. Billings gave written notice of his claim to the City of Mississauga and has commenced an action for damages based in negligence. The City contested both liability and damages and a trial ensued. The following are the issues to be determined:

(1) Was the defendant grossly negligent in formulating its winter snow removal policy and/or in implementing its policy on the occasion in question?

(2) If the defendant was grossly negligent, was the plaintiff contributorily negligent?

(3) What injuries did the plaintiff sustain as a result of his fall?

(4) What are the plaintiff's general and other damages arising out of those injuries?

Liability

3 Quite understandably, counsel are in complete agreement with respect to the appropriate legal principles including the applicability of s. 44.(9) of the Municipal Act, 2001 and the long line of cases going back into the early 20th Century up to and including leading cases in our Court of Appeal such as Sutherland v. North York (City), [1997] O.J. No. 3511 (Ont. C.A.), and Crinson v. Toronto (City), [2010] O.J. No. 216 (Ont. C.A.), released earlier this year.

4 Section 44.(9) of the Municipal Act,, tells us that "Except in case of gross negligence, a municipality is not liable for a personal injury caused by snow or ice on a sidewalk."

5 In Sutherland, Justice Rosenberg observed that the term "gross negligence" "has defied precise definition", but he goes on to provide some assistance including the quotation of a passage from Occhino v. Winnipeg (City) (1988), 53 Man. R. (2d) 257 (Man. C.A.) at p. 263.

6 Thirteen years later, Justices. Goudge and LaForme in Crinson went back into the late 19th Century and came up with a similar result - see paragraphs 45, 46, 47 and 48. At the end of the day, I accept as did the learned justices in Crinson the observation of Justice O'Connor in McNulty v. Brampton (City), [2004] O.J. No. 3240 (Ont. S.C.J.), where he said at para. 28:

> *...to a great extent, the determination of gross negligence depends on the facts of each case. It depends on the application of a less than precise definition of gross negligence, interpreted through the prism of common sense.*

7 A careful review of all the authorities provided to me makes the point very clearly that attempting to define gross negligence is neither helpful or necessary; whether or not a defendant is gross negligent is a question which must be decided based on the particular facts of each case, considered in context. The authorities make it clear, and counsel agree, that in order for one to find that a defendant municipality acted reasonably, and therefore not negligently, a two-part test must be considered:

> *(1) Was the municipality's general policy with respect to ice and snow removal a reasonable one?*
>
> *(2) Was the defendant municipality's response on the occasion in question (that is to say, the implementation of its policy) reasonable?*

8 The City of Mississauga had a winter maintenance snow and ice removal policy in place. It is found at Tab 3 of Exhibit #3 in the form of a brochure which the City makes available to all residents entitled "Snow Business MissIssauga's Winter Maintenance Program". The policy states that:

> *The City's winter maintenance fleet of more than 200 snow plows, salt and sand spreaders operates according to a designated network of streets called the "PRIORITY ROUTE SYSTEM." Major roads and collector routes are cleared first to ensure that emergency service vehicles like fire trucks, ambulances and you, can safely travel to hospitals, schools and get to public transportation systems and work during or immediately after a snowfall.*
>
> *All other city roads are cleared, and/or a sand/salt mixture is applied within 24 hours of a snowfall. Heavy snowfalls or successive storms can sometimes extend this period to 48 hours or more depending on the severity of the snowfall.*

9 The policy goes on to explain maintenance procedures involving priority roads, secondary roads, bus stops, major intersections, school crossings, dead ends, bends and cul-de-sacs. It then goes on to provide:

> *SIDEWALKS located on arterial, residential and industrial collector roads, Mississauga Transit routes and on roadways having school frontages are...*
>
> - *Either blanket sanded or spot sanded as conditions warrant when snowfalls are less than 8 cm (3")*
> - *Plowed and blanket sanded when snowfall exceeds 8 cm (3")*
> - *Cleared within 36 hours of the end of a winter storm*

10 The plaintiff argues that the policy itself is either unreasonable, or subject to misInterpretation or both. In particular, the plaintiff argues that the policy appears to suggest that winter maintenance programs will not even begin until the storm has ended. I do not read the policy that way. I agree that some of the target times refer to the end of the storm as the time when the clock starts to run, but I do not understand the policy to be suggesting that work does not begin until that time. Moreover, the viva voce evidence generally and with respect to the response to this storm, in particular, would lead to no such conclusion. I do agree with the plaintiff that if the policy was that no maintenance whatsoever was to commence until the storm ends that would be unreasonable, but that it is neither the policy nor, as I understand it, the way it is understood by the maintenance staff.

11 A couple of issues which arose out of the evidence and which counsel for the plaintiff argues, with some merit, might apply both to the first and also the second branch of the test, namely the

policy and implementation of same, dealt with reliance on a volunteer labour force and the absence of subcontractors for sidewalks. Although these issues are not set out in the policy document, I agree that it is quite apparent from the totality of the evidence that the policy of the defendant is to rely on volunteer labour force on holidays and weekends, and rely only on city employees for sidewalk maintenance, unlike the situation for the roads which are sometimes covered by outside subcontractors. By volunteer labour force, I am not referring to work being done gratuitously; rather it is done by employees who cannot be compelled to work at those times.

12 The factual underpinning with respect to these two matters is found for the most part in the evidence James Kettle, the area supervisor for the southern district of the City of Mississauga where the incident in question took place. In order to appreciate the evidence, and also the context which may or may not inform a decision with respect to reasonableness, one must understand that the city forces who were used in the winter maintenance program are members of a labour union. Part of the negotiated agreement provides (wisely, in my respectful view, not disputed by anyone) that employees performing work of this nature are entitled to work for no longer than sixteen (16) hours at a stretch to be followed by a minimum of eight (8) hours rest. Another provision in the agreement entitles unionized employees to arbitrarily accept or reject offered overtime and they cannot be compelled to work after hours, on weekends nor on holidays. Whether or not that is reasonable is not something I am prepared to decide in the absence of a complete record of the negotiations leading up to this concession on behalf of the employer, but I am not prepared in the context of the evidence at this trial to find that the City's reliance on unionized employees, who have this right of refusal, was unreasonable.

13 The City does have and did utilize a fleet of outside subcontractors to do snowplowing and snow removal on city roads. Indeed, one can almost take judicial notice of the fact that there is an abundant supply of labourers with suitable vehicles not employed by cities, who are ready, willing and able to do snow maintenance work on city roads on short notice - that is a very common occurrence in virtually all municipalities. The City does not, however, have a supply of outside subcontractors ready, willing and able to do sidewalk maintenance work. There is no evidence whatsoever before me with respect to the availability, if any, of outside labourers with equipment of this sort available to respond to the call and indeed, I am not aware of any.

14 To the extent that the City policy involves the use of employees who have the right to refuse voluntary overtime and does not include a stable of subcontractors ready, willing and able to do sidewalk maintenance work, I do not find the policy the least bit unreasonable.

15 It is the second branch of the test, namely the implementation of the policy, which requires a more careful consideration of the facts. Counsel for the plaintiff quite properly and fairly points out, and counsel for the defence does not dispute this, that Mr. Billings' slip and fall took place approximately fifty (50) hours after the storm had ceased, at least fourteen (14) hours after the thirty-six (36) hour window provided for in the City's policy. Counsel for the plaintiff also took the position, with which I disagree, that Crinson stands for the proposition that existence of a slippery sidewalk thirty-four (34) hours after the City became aware of a dangerous sidewalk condition is proof in and of itself of gross negligence. All Crinson stands for is the proposition that in the case before the court involving John Derek Crinson's fall on February 4, 2004, the thirty-four (34) hours of elapsed time was grossly negligent. It is important to note, unlike the case at bar, that the Court of Appeal also noted in paragraph 53 that "The City offered no explanation for why the sidewalks were not addressed on the morning of February 3, 2004 when the City first became concerned about the weather, although the roads received significant attention." In the case at bar, there is an abundance of reliable and convincing evidence as to why sidewalk maintenance did not commence, in earnest, until it did, and why it was still incomplete fifty (50) hours after the storm ceased. Finally, it should be noted that the policy in Crinson - responding to complaints - was almost no policy.

16 In order to assess the City's response in April of 2003, I have been very much assisted by the evidence of two witnesses, one truly independent and the other independent to the extent that he is an expert witness but less so to the extent that he has been retained by the defendant.

17 Tomislav Stefanak was most interesting. He is a photographer and cinematographer with a

Bachelor of Arts degree, including a minor in Natural Science (Weather and Climate), from York University. His hobby is storm watching. He produced a series of photographs and a video showing the effects of the storm in South Woodbridge, North Etobicoke and mid-Toronto during a great portion of the relevant period. He was not qualified to give opinion evidence and no opinion was necessary - as usual the photographs and the video speak for themselves. They are exhibits. The storm, and the most unusual efforts required to deal with its aftermath are set out therein. It was almost, but not quite, impossible to remove the freezing rain, snow pellets and accumulated frozen mixture from the surfaces to which they had adhered.

18 Dr. Michael Morassutti is a meteorologist and a forensic/consulting climatologist. His company, Climet Systems, was retained by the defence to give an opinion with respect to the reconstruction of freezing precipitation conditions in relation to a slip and fall incident at Mississauga, Ontario, on April 7, 2003. In conducting his analysis, he obtained weather information from four weather stations within relatively close proximity to the scene of the fall, namely, Pearson Airport, North York, City of Toronto and Georgetown. He concluded, and no one disputed, that the results from Pearson Airport were most helpful, being very similar to those which would have been experienced at the scene of the fall approximately ten (10) kilometers to the southeast of the airport.

19 Dr. Morassutti described the combination of freezing rain and ice pellets which fell generally between the morning of April 3rd and the afternoon of April 5th. He referred to a series of graphs which are found in his report which has been marked as Exhibit A. Because Dr. Morassutti gave viva voce evidence at trial, his report is not a trial exhibit but counsel agreed that reference could be made and it has been to the graphs contained therein, which were the subject matter of much comment by him. A particularly interesting graph, figure 7, shows the duration and type of precipitation (ice pellets, freezing rain/drizzle, and snow) which fell between approximately 4:00 a.m. on April 3rd, until 12:00 noon on April 5th, with some snow thereafter late on April 5th and on the afternoon of April 7th. He told us that this was not a regular snowfall. It was rather, bearing in mind the time of year, a combination of ice, freezing rain, ice pellets and snow which he described as relatively dense. He said that at the end of the storm the precipitation would have been at a depth of approximately 10 centimeters, the equivalent of 40 millimetres of water, far thicker and heavier than usual. He explained that because of the way in which the precipitation fell a compressed sheet of ice was going to be created with a dense layer due to gravity settlement.

20 Dr. Morassutti was asked whether or not the storm which took place in early April 2003 was normal or an historical anomaly. In order to respond, he did a comparison going back fifty years at Pearson Airport from 1953 to 2003, and set out his findings in a chart found at page 11 of Exhibit A. Between April 3 and April 5, 2003, there were 15.2 hours of freezing rain as opposed to the average per year of 16.4 hours. During the same period there were 8.5 hours of freezing drizzle as compared to the average per year of 14.8 hours, and even more astonishingly ice pellets of 25.7 hours as opposed to the average per year of 15.4 hours. He described how the ice storm of April 3 to April 5, 2003, was such a singular atmospheric occurrence that it was runner-up on the list of Environment Canada's top ten weather stories of 2003, and he described other ways in which it had received significant attention. He concluded, not surprisingly, that the storm was unique and can be classified as an extraordinary atmospheric event.

21 It is not disputed that the storm had been forecast and that the City was aware that it was coming. It is also not disputed that the City's maintenance program remains in effect as long as it is required but that it is, generally speaking, expected to be most in demand between mid-November and mid-March. Finally, it is not disputed that many city employees who have been involved in the winter maintenance program begin to take holidays in early April or lieu time which they have accumulated.

22 Once the storm began, the City commenced its response. It did so first by addressing the dangerous conditions on city roads. When asked about the City's priorizing of roads over sidewalks, Mr. Kettle gave what can only be described as the obvious answer - dangerous conditions on roadways where heavy vehicles are travelling at great speeds are a far greater threat to the public safety than dangerous conditions on sidewalks where people are walking. It simply makes common

sense that roadways would be addressed first.

23 Many of the city employees who have been checked out on the two types of equipment used to clear sidewalks are also involved in the road maintenance program. More often than not, they are not actually the drivers on the road maintenance program but they act as wingmen, a second person in the truck, to perform necessary safety functions. As such, they are not immediately available for sidewalk work.

24 April 3rd was a Thursday, April 4th a Friday and April 7th a Monday. Except for a very brief bit of sidewalk work on April 4th which is not particularly relevant for our purposes, sidewalk clearing did not begin until Saturday, April 5th. It was the evidence of the city employees, not contradicted, that every possible volunteer employee was contacted and those who agreed to work did so. The plaintiff argued that there was no evidence with respect to the actual lists of the people contacted and their reasons for not working (on holidays, ill, family plans, etc.) but nor is there any suggestion that any such information was sought. I have no reason to doubt the evidence of the city employees that every attempt was made to martial all forces potentially available to assist.

25 The City map is broken into several districts and the fall we are considering took place in the southern district. The southern district contains various routes for road maintenance and sidewalk maintenance and I will refer to ours for convenience as the Lakeshore sidewalk route (it is referred to in the exhibits as 1-SW-02). The routes are all set out on Exhibit 15.

26 Included in the Lakeshore route are the Clarkson GO Station, the Port Credit GO Station and the business districts of Clarkson and Port Credit. Because of the high pedestrian traffic in and around those areas, those areas are given some priority.

27 Mr. Kettle testified that ordinarily the sidewalks are cleared using one of two pieces of equipment, most frequently one known as a "trackless" with a plow affixed to the front of it. The plow is most useful in removing snow, both new and packed. Mr. Kettle testified that in an average snow storm the entire route with which we are concerned could be completed in approximately eleven (11) hours.

28 It was not possible to plow the dense frozen concoction which had adhered to the sidewalks during the storm in question. The only reasonable alternative, according to Mr. Kettle with which I agree, was attempt to do so using a snow blower which would move much more slowly but had the ability to gradually chew up and spit out the frozen concoction. One person was assigned to start the route on Saturday, April 5th and after eleven (11) hours his mandatory rest period had arrived. He had done less than one-third and probably closer to one-quarter of the entire route. The next day, on Sunday, April 6th a man spent sixteen (16) hours on the north side of the route and got to within approximately five (5) hours of completing one-half of the entire route so that by that time approximately three-quarters of the route would have been completed after a total of some twenty-seven (27) hours or more. On the morning of Monday, April 7th the equipment was, as a result of a priorizing decision, sent to deal with the ice and snow build up at and around the heavy traffic area at the Port Credit GO Station, and at approximately 1:00 p.m. on Monday, April 7th, Mr. Billings, on his return from the convenience store, slipped and fell with tragic consequences.

29 Two of the sidewalk clearing staff testified, Al Gerrow and Brian Currie. They told us of the absolutely horrendous conditions with which they were faced and the extent to which their Herculean efforts fell short of their ambitious target of clearing the route. Shear pins were snapping at an alarming rate, the dangerous situation of ice and snow clogging the blower's chute repeated itself constantly, and the extremely difficult conditions required more frequent than usual refueling of the equipment.

30 As Rosenberg, JA observed in Sutherland, "It is unwise for the courts to become involved in rewriting policies on an ad hoc basis and dictating priorities to the City or its employees." I have not the slightest doubt that everything humanly possible had been attempted (other than around the

clock twenty-four hour snow blowing which was neither safe nor available based on the personnel who responded on the weekend) to meet the City's target as set out in its policy, and I have concluded without any hesitation that the City's response in all of the circumstances was completely reasonable. It goes without saying, therefore, that it was neither negligent nor, obviously, grossly negligent.

31 For all of these reasons, the plaintiff's action cannot succeed. I will go on, however, to consider the issues of contributory negligence and damages.

Contributory Negligence

32 In looking at the issues of contributory negligence and damages, it is necessary to first consider the plaintiff's credibility. The defence attacked the plaintiff's credibility on several bases:

(a) His criminal record;

(b) A comment made during his examination for discovery;

(c) Some inconsistencies between his evidence on discovery and at trial.

33 The plaintiff told us about a criminal record which he incurred in his early twenties approximately twenty-five years ago. During a time of financial stress and over a fairly lengthy period of time (approximately two years) he engaged in what sounded like a cheque kiting scheme defrauding his bank out of a total of something in the area of $5,000.00. He was convicted, after pleading guilty, to a charge or charges of fraud. At or about the same time, his licence was under suspension because of some medical investigations involving the possibility of Epilepsy and he was driving with a friend's identification. When stopped by the police, he gave his friend's name and was eventually charged with, pled guilty to and was convicted of obstructing justice. Counsel for the plaintiff argues quite rightly that these crimes of moral turpitude must be considered when assessing the credibility of a witness. I have not ignored them nor Mr. Billings' evidence with respect to the circumstances under which they arose and his subsequent attempts, apparently successful, at rehabilitation.

34 When asked about the high cost of surgery which he had considered but elected not to have while in China, he said that he had tried to "slip it by" his insurance company. This obviously does not bode well for his integrity but when one considers the candor of the response one wonders what it does to his actual credibility as a witness.

35 The inconsistencies between his evidence on discovery and at trial were so minor as to be of no consequence whatsoever.

36 I also noted, as pointed out by his counsel in submissions, that unlike the majority of personal injury plaintiffs, Mr. Billings was quick to acknowledge improvements in his condition such as, for example, after surgery.

37 I observed Mr. Billings carefully while he was testifying particularly in view of the fact that the issue of his credibility had been highlighted almost at the outset of the trial. I found him to be candid and straightforward, one who seemed to call a spade a spade and one who was, particularly in view of the paucity of documentary evidence to which I will refer shortly, a very impressive historian. On balance, I found Mr. Billings to be both a credible and a reliable witness.

38 A very common consideration in slip and fall incidents and allegations of contributory negligence is not present in the case at bar. Mr. Billings was wearing appropriate and apparently well-maintained footwear. He knew that the storm was a vicious one and he had been outside walking his mother's dog at least once per day throughout the duration of the storm and up to and including the day of his fall. He knew that the sidewalk had not been maintained and that initially people had taken to using the side of the roadway which had been maintained. He also knew that people then began tramping down the accumulated precipitation forming a very uneven and somewhat treacherous

pathway. During all of this, he chose to go out, walk on the pathway rather than the roadway (Lakeshore Road, although a provincial highway, is really a major residential road, with two lanes in each direction and speed limits in the usual residential range) to go to a convenience store some distance away to pick up a ticket for a lottery which was not going to be held for another two days.

39 Mr. Billings conduct in the circumstances was somewhat cavalier and in my view, not reasonable. He took his chances and must suffer the consequence of that decision. Had I found the City to be grossly negligent, I would have reduced the award to which Mr. Billings was entitled by twenty-five (25%) percent to reflect his contributory negligence.

Injuries Sustained

40 Mr. Billings described his feet suddenly going out from under him and his recollection of observing both feet in a V shape in front of him as he hit the uneven icy ground. There is no dispute that he suffered a temporary loss of consciousness, a slight closed head injury, painful soft tissue injuries to his shoulder, a bruised elbow and some back pain of uncertain location. Some considerable period of time after the fall (the exact date is a matter of some debate) a severe low back pain became the most prominent complaint, dealt with initially by some herbal medication from China where Mr. Billings was residing, acupuncture, manipulation and eventually surgery. In 2008, it became apparent that Mr. Billings was suffering from what was sometimes described as a fracture, sometimes as dislocated but what we now know to be a subluxed coccyx or tail bone. Other than the issue of liability, it is this tail bone injury which was the subject matter of most evidence and disagreement between the parties.

41 Immediately upon regaining consciousness at the scene of the fall, Mr. Billings was attended to first by a police officer and then by emergency measures ambulance personnel. The ambulance call report, which was made an exhibit, indicates that the patient was "walking along icy sidewalk when he slipped and fell on ice, landed on his head and back" - "unable to get up". The report went on to indicate "left back pain along with lower right back pain states pain increases on movement, pain also felt in back right side of head". The final assessment by the ambulance crew indicated the primary problem to be "back injury". Mr. Billings was placed on a back board for transportation to the Emergency Department at the Mississauga Hospital. In the Emergency Department records, also made an exhibit, there was reference to a complaint of severe back and left shoulder pain and x-rays and a CT scan were ordered for the head and cervical spine. X-rays were also done of the thoracic spine. The CT scan indicated no abnormalities in either the head or the lower cervical or upper thoracic region, and no evidence of any fracture, with good alignment. The x-rays indicated no bone or joint abnormality in the left shoulder and there is no report of any fractures in the spine area which was x-rayed. Mr. Billings testified and the x-ray and CT scan results would appear to corroborate his testimony that he was told that there were no fractures but that his shoulder should be followed up in the fracture clinic with Doctor Clement. Mr. Billings appeared to have been relieved that there were no problems found in the area of his back pain.

42 Mr. Billings went to see Doctor Clement, an orthopaedic surgeon, a few days later in the fracture clinic when they discussed his shoulder and possible treatment for it but no mention was made by either of them of the problem, if there was one, in his back.

43 A Statement of Claim was issued on June 18, 2003, some six weeks after the fall by prior plaintiff's counsel making reference to injuries to the plaintiff's "left shoulder, head and upper back". No mention was made of the lower back. A defence medical was arranged with Doctor Robert Galway in 2005, and although Doctor Galway was under subpoena by both the plaintiff and the defendant, he did not testify. I am sure we would have heard if Mr. Billings had complained of any lower back pain to Doctor Galway or if Doctor Galway had been asked to evaluate and did evaluate the lower back.

44 There can be no doubt that the lower back problem, if there was one, did not surface until at least 2005. It is the plaintiff's evidence that in 2005 as a result of a lengthy transatlantic flight he experienced severe pain in his lower back causing him to seek out treatment in China. There are some records, such as they are, from treating facilities in China which would support Mr. Billings sworn testimony that he received treatment in the form of herbal wraps, manipulation and

acupuncture, but the records are nothing compared to what we are used to in North America. Surprisingly, the evidence would appear to suggest that in China it is the patient and not the doctor who keeps the records - a form of record book kept in a continuous fashion with notations by the treating physicians and the book then being given back to the patient. The book has not been produced and no one has asked why. The reports from the physicians in China are made from memory some years after the event, but they are, in my respectful view, compelling and corroborative of the plaintiff's version of events. I have no doubt that it was in early 2005 and not 2007, as the defence suggests, that the problem of the back reared its ugly head. The defence notes quite forcefully that at no time from the initial contact with the ambulance attendants up to and including whenever treatment was sought in China did the plaintiff ever make reference to his tail bone, his coccyx or his coccygeal region. The defence does not seriously suggest that a teacher of English as a second language would be likely to refer to one's coccyx or coccygeal region but does suggest that the tail bone might have been a descriptor. I disagree. I am quite satisfied that the back or lower back could easily be intended to cover that region.

45 The parties each called a well-qualified and well-respected orthopaedic surgeon to give opinion evidence with respect to the question of the causation of the subluxed coccyx. It is common ground that by some time in 2008, the plaintiff did have a problem with his coccyx, that it was subluxed, and that some treatment would be required to alleviate the pain emanating therefrom. Doctor Martin Roscoe, on behalf of the plaintiff, was quite satisfied that, notwithstanding the evidentiary problems to which I have already referred, the most likely explanation for the subluxed coccyx was the fall on the ice on April 7, 2003. Doctor Geoffrey R. French, called on behalf of the defendant, was equally adamant that it was not the cause.

46 Doctor French's opinion was based on a complete and thorough review of all of the medical records and as well, unlike Doctor Roscoe, a physical examination of Mr. Billings. Without putting too fine a point on it, Doctor French's opinion appeared to be based on the following, among other factors:

> *(a) A fairly prolonged silence with respect to specific reference to the coccygeal area, even by non-technical terminology. Doctor French appears to have been under the impression that the first reference was made some time in 2007, whereas I am completely satisfied that 2005 is a more accurate date.*
>
> *(b) The mechanics of the fall. Doctor French finds it hard to believe that the lower back could hit a hard object more solidly than the head and shoulder when the plaintiff/patient described seeing his feet in front of him in a V configuration as he was falling. Doctor French appears to envisage a situation where the only way the patient could see the feet in front of him was if the feet were higher than horizontal and the head and shoulders lower than horizontal. If this were so, obviously the first point of impact would probably be the head and shoulder area. If, however, the entire plane of the body was rotated clockwise, say 90º degrees, the patient could still see his feet outstretched in front of him with the lower extremities hitting the ground before the head and shoulders. As well, Doctor French appears to have assumed a smooth surface whereas the evidence is quite to the contrary and a hard and rough protuberance could easily have struck the plaintiff's coccyx region, however he fell.*
>
> *(c) Doctor French pointed out that the CT scan or x-ray (I am never sure which is which) which both he and Doctor Roscoe were shown during the course of their examination indicated that the subluxation of the coccyx was toward the rear rather than toward the front. He pointed out, quite appropriately, that if a blow struck the coccyx from the rear one would expect that the shift would be to the front rather than to the rear. There are, however, a couple of problems with this. First of all, although I did understand the evidence to be that the subluxation could not be spontaneous, I did not understand the evidence to suggest that once the subluxation took place the distorted portion would remain in the same place forever thereafter. Secondly, although Doctor French was permitted to remain in the courtroom while Doctor Roscoe first testified, and although Doctor French then saw the x-ray or CT scan during Doctor Roscoe's examination-in-chief and although there was a break between the examination-in-chief and cross-examination it was never put to Doctor Roscoe that the*

eventual location of the distorted portion of the coccyx was inconsistent with his opinion.

47 All of the expert opinion evidence was interesting and helpful, but not dispositive. It does not assist me with a very simple and basic question - if the fall of April 7, 2003, which could easily have caused a subluxed coccyx did not cause it, what did? I appreciate that the plaintiff bears the onus of proof. I note that at no time did anyone suggest either in questions put to Mr. Billings or in any other evidence that Mr. Billings took part in activities likely to cause such an injury. At the end of the day, I am satisfied, on a least the balance of probabilities, that the subluxation of the coccyx leading to severe pain and eventual surgery was a direct result of Mr. Billings' fall in the City of Mississauga on April 7, 2003.

Damages

48 I will look first at general damages. Although it is to his credit, Douglas Billings is not a whiner or a complainer. Indeed, he is the first to admit when any form of treatment has improved his symptomatology. Because he did not make regular trips to the doctor (partially because he was working in China for a considerable period of time between the date of the fall and now) there is very little hard evidence on which to fix the duration of some of his complaints. Generally speaking, it would appear that moderate headaches were no longer a concern after a year and any elbow pain cleared up in even less time. His shoulder has been a source of concern and indeed was the major source of concern originally, and up to the present time, but Mr. Billings indicates for the most part now it is episodic at best and usually only presents a problem when he does prolonged work with his arm upraised, something not often done in his executive position with a law firm in China.

49 Between 2005 and the end of 2008, the lower back pain was a source of almost constant concern. It flared up particularly after Mr. Billings was required to sit for long periods in a position with his former employer which he began in 2005. It was also problematic after lengthy travel in an aircraft, something which was not infrequent. Mr. Billings resorted to herbal wraps, manipulation, acupuncture and eventually cortisone injections. He was quick to acknowledge that the cortisone injections worked wonders for a period of time but gradually the impact wore off and it would appear that a resistance was being built up to the treatment as well as some concern about scar tissue. Mr. Billings then began to investigate the possibility of surgical intervention and at some point during that investigation he learned of what was variously described as a fracture or a dislocation know known as a subluxation of the coccyx. Surgery was suggested and he did a very thorough investigation of various surgical options, eventually concluding that one of the most promising was simply out of his price range.

50 Finally, in late 2008 or early 2009, the pain became so severe that he was simply unable to continue with his job with the Chinese law firm and he took an unpaid leave of absence. Mr. Billings' supervising employer, the senior founding partner and managing director of the Windo Law Firm in Shenzhen, China, wrote a report dated August 10, 2009, and a subsequent one dated December 21, 2009, and he testified at this trial by video link with China. Both Mr. Billings and Mr. Chow testified that between 2007 and January 14, 2009, Mr. Billings had twenty-one unpaid sick days associated with his back problem and that from January 14, 2009, until December 14, 2009, Mr. Billings was on an unpaid leave of absence to enable him to have corrective surgery. Mr. Chow confirmed Mr. Billings' evidence that the sole and only reason for this unpaid medical leave of absence was to deal with a back pain which had escalated to the point where Mr. Billings could no longer perform his tasks effectively.

51 Mr. Billings continued his search for a surgeon to do the repair work on his coccyx and eventually located one in China who did so at a price which he could afford. The surgeon's skills have not been brought into question in this lawsuit and the pain was alleviated substantially, variously described as between eighty (80%) and eighty-five (85%) percent by Mr. Billings. Any residual back pain can probably now best be described as episodic but may well continue indefinitely.

52 This, however, is not the end of the unfortunate matter. During the course of the surgery, Mr. Billings sustained an injury to the musculature in the area of his rectum, a relatively common, or at least not uncommon, event in surgery of this sort. Indeed, both Doctor French and Doctor Roscoe

alluded to the fact that the possibility of this type of injury is so common that it is one of the factors that patients take into account in deciding whether or not to have the surgery. In any event, the injury to the musculature has resulted in rectal incontinence which is probably permanent. The incontinence in this case is a source of inconvenience and annoyance as well as potential embarrassment in social situations but it is kept fairly well under control with the use of what were described as "industrial wipes". During the course of the trial, Mr. Billings had to excuse himself on more than one occasion to deal with the situation.

53 Taking all of these factors into account, I have assessed Douglas Billings general damages arising out of this incident at $85,000.00.

54 With respect to past wage loss, counsel agree that for the twenty-one (21) unpaid sick days in 2007 and 2008, and the eleven (11) months in 2009, Mr. Billings' total loss (in Canadian dollars) is $48,537.49. Although no one suggests that Mr. Billings was malingering and although I am sure that he was using his time wisely during the period of absence in 2009, the duration of his absence for the purpose of corrective surgery is something, in my respectful view, which is not properly all laid at the feet of the defendant. I have concluded that perhaps one-half of that time at most would be appropriately spent seeking out and retaining a surgeon and recuperating following the surgery and I have fixed Mr. Billings' loss of wage claim at $25,000.00.

55 Mr. Billings also claims some allowance for a loss of competitive advantage. Mr. Billings appears to be well thought of by his current employer and he clearly appears to have found a job which fits both his personality and his skill sets. There is no reason to believe that if he wants it he cannot keep this position and there is no evidence to suggest that if for any reason the position is no longer available, he could not with the experience he has gained find suitable comparable employment at a similar income. There is simply no evidence before me to support any order, in my respectful view, for loss of competitive advantage.

56 Mr. Billings also claims a housekeeping allowance. He did spend $400.00 on a housekeeper at one point for which he is entitled to reimbursement, but there is no other evidence before me to confirm the details of any such claim and no amount will be allowed.

57 Special damages assuming causation has been proven, which I found it has, have been agreed upon at $3,127.03.

58 Accordingly, and for all of these reasons, the plaintiff's claim against the City of Mississauga is dismissed.

59 Counsel have not, as yet, had an opportunity to make submissions with respect to costs and I invite submissions first from counsel for the defence within fifteen (15) days, a reply from counsel for the plaintiff within fifteen (15) days thereafter, and a brief response, if any, within five (5) days thereafter. Whoever seeks costs shall include a draft Bill of Costs and I wish to be advised of any offers served by either party, whenever they may have been made.

Action dismissed.

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