Dennis Macura vs. 4050177 Canada Inc. (Time Supper Club)

COUR DU QUÉBEC
(CHAMBRE CIVILE)

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

NO: 500-22-117598-055
DATE: 20 avril 2007
DATE D'AUDITION: 28 mars 2007

EN PRÉSENCE DE:
DIANE QUENNEVILLE, J.C.Q.

Dennis Macura
Plaintiff
v.
4050177 Canada inc., duly constituted legal person under the Canadian Business Corporations Act (R.S. 1985 c. 44) and doing business under the name Time Supper Club
Defendant

Quenneville J.C.Q. :–

1 The Plaintiff, Dennis Macura, lacerated his right great toe while partying with some friends at the bar owned and operated by the Defendant, 4050177 Canada Inc., known as Time Supper Club (*"Time"*).

2 Macura argues that his bodily injuries are a result of the fault and negligence of Time's employees.

3 Time contests the action on the grounds that its employees committed no fault, that they acted with the care required under the circumstances and lastly, that the damages result from Makura's own fault and negligence.

THE FACTS

4 On December 31, 2002, Macura and his friends decide to celebrate the New Year at Time.

5 The group arrives at Time at approximately 11:30 p.m. and is seated in the upstairs balcony.

6 At approximately 1:30 a.m., Macura and his friend Nikola Mrksic ("*Mrksic"*) decide to go down on the lower level where the dance floor is located. As they near the bottom of the stairs, they see two employees of Time lighting sparkles placed in an ice bucket.

7 One employee is holding a tray containing champagne glasses. While in the process of lighting the sparkles, one of the champagne glasses falls to the floor and breaks.

8 Macura is following Mrksic down the stairs. As the latter is the first in line, he sees the broken glass, while Macura only hears it break.

9 They stroll around the premises. Mrksic stays downstairs for approximately ten minutes. Macura stays behind for approximately ten more minutes.

10 After some twenty minutes, Macura decides to go back upstairs. When arriving close to the stairs, Macura steps on a piece of glass.

11 He returns to his seat on the upper floor, and attempts to remove his shoe, which he has difficulty doing as a shard of glass has perforated the sole and is embedded in his right great toe. When he finally succeeds in removing his shoe, he sees that his sock is covered in blood.

12 As Macura is bleeding profusely, he is taken to the Royal Victoria Hospital where he arrives at approximately 3:00 a.m., as appears from Macura's medical record, Exhibit *P-2*. As noted in the record, Macura has a foot laceration of his right great toe.

13 Macura is referred to the Montreal General Hospital for treatment, where he arrives in the Emergency at 9:30 a.m. He is examined, an x-ray is done, he is treated, prescribed antibiotics and is discharged at 3:12 p.m., as appears from the medical record, Exhibit *P-3* and *P-6* en liasse.

14 When Macura returnes home, he consults his family doctor, Floricante B. Cabilan, who recommends he stay at home until he is fit to work. Macura was only able to return at work on January 14, 2003. Doctor Cabilan also referred Macura to Doctor Stewart Heddle, a plastic surgeon.

15 Dr. Heddle recommends that Macura undergo surgery which is performed on February 5, 2003, to repair the flexor tendon of the right great toe and insert a K-wire, as appears from the operative report, Exhibit *P-4*.

16 As of March 11, 2003, Macura started physiotherapy. Macura was absent from work from February 4, 2003 until April 22, 2003, as appears from the claim filed with Great West, his employer's group insurer, Exhibit *P-12* and *P-13*.

17 On April 14, 2003, a demand letter was sent to Time, Exhibit *P-7*.

ANALYSIS AND DISCUSSION

1. The liability

18 Jean-Louis Beaudoin, at paragraph 170 of his treaty[1], analyses the fault in these terms:

Chercher la faute revient donc à comparer la conduite de l'agent à celle d'une personne normalement prudente et diligente, douée d'une intelligence et d'un jugement ordinaires, et à se demander si elle aurait pu prévoir ou éviter l'événement qui a causé le dommage. Cette prévisibilité du préjudice n'a cependant pas à être absolue, mais relative ou raisonnable. Il ne s'agit pas d'obliger l'individu à prévoir tous les types d'accidents possibles, mais seulement ceux qui, dans les circonstances, sont raisonnablement probables. La notion de «bon père de famille», d'«honnête citoyen», de «personne prudente et diligente», varie selon des impératifs de temps et de lieu.

19 Both Macura and Time rely on the Supreme Court case of *T. Eaton Co. Of Canada* vs *Moore*[2] who concludes that sometimes accidents occur and they do not entail liability. What the law requires of an owner of a public establishment is that he acts with reasonable care. The Court agrees with these comments. It is however a question of fact to determine if the conduct of the owner of the establishment was prudent.

20 What is required of anyone who operates an establishment open to the public is, as stated by Fish J., as he then was, t*o act conscientiously and diligently so as to prevent the occurrence, insofar as possible, of reasonably foreseeable and avoidable accidents*.[3] Quoting Taschereau J. in *Ouellet* and *Ouellet*[4] he adds:

> The test as to probability of an accident which the owner of a place must be deemed to anticipate was laid down as follows by Taschereau J., as he then was, in *Ouellet v. Cloutier* [1947] S.C.R. 521 at p. 526:
>
> Il se peut qu'il était possible qu'un accident semblable arrivât. Mais ce n'est pas là le critère qui doive servir à déterminer s'il y a eu oui ou non négligence. La loi n'exige pas qu'un homme prévoit tout ce qui est possible. On doit se prémunir contre un danger à condition que celui-ci soit assez probable, qu'il entre ainsi dans la catégorie des éventualités normalement prévisibles. Exiger davantage et prétendre que l'homme doive prévoir toute possibilité, quelque vague qu'elle puisse être, rendrait impossible toute activité pratique.

21 Benjamin Bitton (“*Bitton”*»), an employee of Time, explained to the Court the measures taken by Time to clean the premises if an accident occurs and the brooms and mops that are available throughout the premises. However, even if he was present at the time of the accident, he has no recollection of the events.

22 In the circumstances of the present matter, the Court has no hesitation in concluding that Time did not act with the care expected from someone operating a public establishment.

23 The testimony of Mrksic shows that ten minutes after the glass had broken, the shards were still at the bottom of the stairs. When Macura decided to go back upstairs, some twenty minutes later, the shards were still there and are cause of the injury. Their testimony has not been contradicted. If Time had taken measures to have the necessary equipment at the disposal of its employees to clean the floor, none of the employees in this particular instance did anything to pick up those shards.

24 In fact, as two employees were present when the champagne glass fell to the floor, it would have been easy for one of them to pick up at least the bigger shards, which would have prevented the accident. Even if small pieces had been left, Macura, who was wearing shoes having soles of approximately half an inch, would not have been hurt. A delay of twenty minutes to clean the floor does not fall within the standard set by the Court of Appeal, namely to act *conscientiously and diligently*.

25 Although Time in its cross examination has tried to demonstrate that Macura is partly responsible for the accident, because he had consumed alcohol and did not take any precautions, it has not convinced the Court. The lighting was dim, it was a crowded area, Macura wore sturdy shoes and he could not expect that big shards of glass would be lying on the floor.

26 Therefore, the Court finds that Time's employees did not act with the reasonable care that is to be expected and finds that Time is the sole person liable for the injuries sustained by Macura.

2. The damages

Loss of earnings

27 Macura claims $13,000. for loss of earnings, which amount he reduced to $12,364., as appears from his employee records, Exhibit *P-10*.

28 Time argues that the amounts Macura received from his employer's group insurance, should be deducted. Article 1608 of the Civil Code of Québec settles the issue. It is well established that double indemnity is allowed unless the third party who has paid the indemnity is subrogated. No evidence was presented to show that subrogation occurred. Therefore the full amount of the loss is awarded.

29 *Medical expenses*

30 Macura claims the sum of $300. for his medical expenses. As appears from Exhibit P-6, invoices totalling only $41.05 were provided. The Court therefore reduces the claim to this amount.

31 *Non pecuniary damages*

32 Macura claims the sum of $43,600. for the partial permanent incapacity, aesthetic prejudice, pain and suffering, shock and nervousness and loss of enjoyment of life.

33 Neither Macura or Time have filed expert reports. They both rely on *Lafond* vs *Provigo Distribution Inc.*[5] , in which the plaintiff suffered a similar injury resulting in a partial permanent incapacity set at 1.5% and was awarded $3,500. Time has tried to distinguish this case by arguing that the plaintiff had undergone three surgeries. However, no further particulars are provided regarding the plaintiff.

34 Macura is in his twenties. Although the incapacity will not result in a loss of future earnings, he works on his feet and is uncomfortable. His hobbies are centered around sporting activities; he was an avid soccer player having played since he was six and since the surgery he has stopped playing competitive sports. As reported by Doctor Heddle in his letters, Exhibit *P-9* en liasse, further surgery will not improve his condition, he has difficulty in flexing or bending his right foot, due to his inability to keep the toe hyperextended, he often trips, finally he experiences episodic cramps along the instep of his right foot. Macura was unable to work for approximately five weeks and had to undergo surgery and physiotherapy.

35 The Court awards an amount of $9,000. for the non pecuniary damages, namely the partial permanent incapacity, the aesthetic prejudice, pain, suffering and loss of enjoyment of life. To this amount must be added the loss of revenues of $12,364. and the medical expenses of $41,05.

FOR THESE REASONS, THE COURT:

GRANTS in part Plaintiff's action;

CONDEMNS Defendant to pay to Plaintiff the sum of $21,405.05, plus the interest at the legal rate and the additional indemnity provided at Article 1619 C.C.Q. as of April 15, 2003.

THE WHOLE with costs.

Quenneville J.C.Q.

***Me Pierre Hugues Fortin* , pour le demandeur**

***Me Amélie Trépanier Fortin*, pour la défenderesse**

1. Jean-Louis BEAUDOIN, *La responsabilité civile*, 2003, Éditions Yvon Blais.

2. [1951] R.C.S. 470, AZ-50293094

3. *Kollias* vs *Manolakas* (C.A.) EYB 1990-91150

4. [1947] S.C.R. 521 at p. 526

5. (C.Q. 2000-03-10), AZ-50070675